

03-1180

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUAN ALECIO SAMAYOA CABRERA, ET AL.

Petitioners,

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

ON PETITION FOR REVIEW OF A FINAL ORDER
OF THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR THE RESPONDENT

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STATEMENT OF JURISDICTION

Petitioners Juan Ailio Samayoa Cabrera ("Lead Petitioner" or "Samayoa") and his spouse, Blanca Margarita Velasquez, seek review of decisions of the Board of Immigration Appeals ("BIA" or "Board") affirming, without opinion, the Immigration Judge's denial of their applications for asylum and withholding of removal. The Board's jurisdiction arose under 8 C.F.R. §§ 3.1(b)(3) and 240.15, which grant the Board appellate jurisdiction over decisions of immigration judges in removal cases.¹

This Court has jurisdiction over the petition for review under section 242(a) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1252(a). Section 242(b)(1) of the INA, 8 U.S.C. § 1252(b)(1), provides that a petition for review must be filed no later than thirty days after the issuance of the Board's final order

¹ On February 28, 2003, in a rule published in the Federal Register, the Department of Justice reorganized Title 8 of the Code of Federal Regulations to reflect the transfer of functions from the Immigration and Naturalization Service to the Department of Homeland Security ("DHS"). 68 Fed. Reg. 10349 (March 5, 2003); see also 68 Fed. Reg. 9824 (Feb. 28, 2003). The Homeland Security Act ("HSA") retains in the Department of Justice, under the direction of the Attorney General, the functions of the Executive Office for Immigration Review ("EOIR"), including the immigration courts and Board of Immigration Appeals. See HSA, 116 Stat. at 2273. The amendments to the regulations in Title 8 reflect the division of jurisdiction over regulations pertaining to DHS and EOIR after the transfer of functions to DHS on March 1, 2003. Thus, the regulations governing the Board's jurisdiction, previously designated at 8 C.F.R. §§ 3.1(b)(3) and 240.15 (2002), are now designated at 8 C.F.R. §§ 1003.1(b)(3) and 1240.15.

of removal. In the instant case, the Board entered its decisions on January 16, 2003. A.R. 2, 3.² Petitioners filed a timely petition for review. Venue properly lies in this Court because this is the judicial circuit in which the hearing in Petitioner's case was completed. See INA § 242(b)(2), 8 U.S.C. § 1252(b)(2).

STATEMENT OF THE ISSUE

Whether substantial evidence supports the Immigration Judge's finding that Petitioners were ineligible for asylum and withholding of removal, when the record does not compel the conclusion that they suffered past persecution on account of a qualifying ground for asylum, and they failed to demonstrate a well-founded fear of persecution if returned to Guatemala.

STATEMENT OF THE CASE

Lead Petitioner Samayoa and his spouse, Blanca Velasquez, are natives and citizens of Guatemala. A.R. 376, 382. On November 29, 2000, Samayoa was served with a Notice To Appear, the Immigration and Naturalization Service's ("INS" or "Service") charging document.³ A.R. The Service charged that

² The abbreviation "A.R." followed by a number refers to a page or pages in the Certified Administrative Record on file with the Court.

³ The Immigration and Naturalization Service (INS) issued the Notices to Appear. A.R. 376-77, 381-82. Effective March 1, 2003, the INS was abolished and its immigration enforcement functions were transferred to the Department of
(continued...)

Samayoa, not a citizen or national of the United States, entered the United States at an unknown point of entry, on an unknown date, without being admitted or paroled by an Immigration Officer. A.R. 376. In the Notice to Appear served upon Ms. Velasquez, the Service charged that she was admitted to the United States at Houston, Texas on or about November 12, 1996, as a visitor authorized to stay only until May 11, 1997, but remained in the U.S. beyond that date, thus remaining in the United States without authorization. A.R. 382.

Petitioners appeared before an Immigration Judge on January 30, 2001 and February 4, 2002. At the first hearing, Petitioners, through counsel, admitted the notices' allegations and conceded removability. A.R. 61. At the second evidentiary hearing, the Immigration Judge issued an oral decision denying Petitioners' application for asylum and withholding of removal, and granting Petitioners' requests for voluntary departure. A.R. 43-55. Petitioners filed a timely notice of appeal with the Board. A.R. 35-36. The results of the Immigration Judge's decision were affirmed on January 16, 2003, by a single Board member, without a separate opinion, pursuant to former 8 C.F.R. § 3.1

³(...continued)
Homeland Security, specifically the Bureau of Immigration and Customs Enforcement. See generally Homeland Security Act of 2002, 6 U.S.C. § 101, 251, 252, Pub. L. 107-296 §§ 101 et seq., 116 Stat. 2135 (Nov. 25, 2002).

(e)(4) (which may now be found at 8 C.F.R. § 1003.1 (e)(4)). A.R. 2, 3.

Petitioners now seek this Court's review.

STATEMENT OF FACTS

A. SAMAYOA'S ASYLUM APPLICATION

On or about December 23, 1993, Samayoa submitted an Application for Asylum (Form I-589).⁴ A.R. 384-91. In his application, Lead Petitioner contended that he sought asylum because guerilla fighters in Guatemala threatened and attempted to kill him based upon an imputed political opinion. A.R. 386.

Samayoa alleged his first direct encounter with the guerillas occurred in 1980. A.R. 385. According to Samayoa, during a routine delivery, he was accosted by the guerillas and bound for two hours. Id. Lead Petitioner alleged the guerillas took gasoline from his vehicle before departing. Id.

Samayoa contended that after this incident, he began to carry a gun for protection. A.R. 385. He alleged that he did not want the military to mistake him for a guerilla, so he registered the weapon with the military. Id. Lead Petitioner asserted that the guerillas discovered he had a gun, and based upon his having a weapon, believed he was affiliated with the army. Id. Samayoa contended that he

⁴ An application for asylum is deemed to include a request for withholding of removal. 8 C.F.R. § 1208.3(b) (2003).

began receiving threatening notes and letters from the guerillas, cautioning him to leave the area or he would be killed. Id.

Samayoa asserted that he subsequently joined the military in 1984, serving as Chief Army Commissioner. A.R. 385. His alleged responsibility was to recruit young men for military service, and later, to provide appointments for the men to report for duty. Id.

Samayoa contended four incidents involving the guerillas transpired during his alleged military service. First, Samayoa claimed that in 1988, the guerillas attempted to frame him for kidnapping. A.R. 390. Second, he alleged that the guerillas planted a bomb underneath his car in 1990, but his wife found the bomb and disabled it. Id. Third, Lead Petitioner contended that in 1991, the guerillas surrounded the area in which he was working. Id. As he attempted to escape, he allegedly set off a land mine which wounded his face and chest, requiring fifteen days of hospitalization. Id. For the final incident Samayoa recounted, he alleged that while driving, in 1992, he encountered another land mine. A.R. 390. He asserted that the guerillas appeared after the land mine exploded and shot at his vehicle, injuring him. Id. Unable to continue driving, Samayoa alleged that his friend drove him to the hospital, where he purportedly fell into a coma for three days. Id. Samayoa contended that he was ultimately moved to a military hospital.

Id. He alleged that was told afterwards that the guerillas had searched for him at the previous hospital, and the guerillas injured a hospital worker attempting to gain information about his whereabouts. Id.

Samayoa asserted that he believed he would be killed if he remained in Guatemala. A.R. 391. He applied for a visa to the United States, which was denied. Id. On approximately July 10, 1992, Samayoa left Guatemala, traveled through Mexico for approximately 2.5 weeks, and entered the United States without being admitted or paroled. A.R. 387.

Samayoa's wife did not apply for asylum separately. Her application is based upon the incidents of persecution allegedly endured by Lead Petitioner. Samayoa's wife entered the United States on November 12, 1996, as a visitor with authorization to stay until May 11, 1997. A.R. 382. She remained in the United States beyond the authorized date without permission. Id.

B. PROCEEDINGS BEFORE THE IMMIGRATION JUDGE

Petitioners obtained counsel and appeared before an Immigration Judge on two occasions (January 30, 2001 and February 4, 2002). At the first hearing, Petitioners, through counsel, admitted to their respective charges and conceded removability. A.R. 61. Petitioners sought relief in the forms of asylum or

withholding of removal. Id. In the alternative, Petitioners sought voluntary departure. Id.

At the second evidentiary hearing, the record reflects only Samayoa's testimony. Samayoa's testimony mirrored the information provided in his asylum application. Samayoa testified that the country was in a state of general unrest, in which guerillas would "kill woman, rape women, . . . [and] kill children" before fleeing. A.R. 78.

Lead Petitioner reiterated the details of his first direct encounter with the guerillas, although he testified that the first encounter occurred in 1982. A.R. 82-85. Samayoa contended that he went to the military for assistance and was named Chief Army Commissioner so that he "would be able to carry a weapon." A.R. 87. Samayoa contended that at that time, citizens began to "take care of [themselves]" by organizing civil patrols. A.R. 87-88.

Samayoa recounted the previous four incidents in which he alleged the guerillas either attacked him or attempted to harm him. A.R. 90, 92, 95-103. Samayoa's testimony was similar to the accounts provided in his asylum application, with two differences. In his asylum application, Lead Petitioner stated that after being attacked in 1991, he was hospitalized for 15 days. A.R. 390. In his testimony, he stated that he was not hospitalized at all. A.R. 94-95. Samayoa

also testified that his wife deactivated a car bomb in 1987, A.R. 90; in his asylum application, he stated the incident occurred in 1990. A.R. 390.

C. THE DECISION OF THE IMMIGRATION JUDGE

After hearing the testimony of Petitioner, Immigration Judge Patricia Sheppard considered all of the evidence and issued a decision orally, which is now transcribed and part of the administrative record, in which she denied Petitioners' applications for relief. Judge Sheppard's decision includes a detailed explanation for the reasons why the applications were denied. A.R. 43-55.

First, the Immigration Judge found that Samayoa had not met his burden of establishing that he was persecuted on account of a protected ground. A.R. 46-51. Immigration Judge Sheppard reviewed each of the incidents proffered by Lead Petitioner and found that Samayoa failed to establish that the encounters were motivated in response to an imputed political opinion, and not attributable to the general unrest in the country. Id.

For example, regarding the incident in 1991 in which Samayoa was injured when he set off a land mine, Immigration Judge Sheppard found that while "respondent believes that he was directly targeted, [] it sounds more as though he may have been in an area controlled by the guerillas and . . . it appears to have been land mines planted in the area." A.R. 46-47. The Immigration Judge noted

that while the planting of land mines is tragic and has contributed to many needless injuries throughout the region, "[i]t is not uncommon for areas, contested areas, especially rural contested areas to be mined and that appears to have been the situation." A.R. 47.

Similarly, in another example, the incident Samayoa alleged occurred in 1992 began when he veered off the road and hit another land mine. A.R. 47. The Immigration Judge found that because there were other targets on the road (a bus and a truck), it was not clear that Samayoa was, in fact, the target. The Immigration Judge found that based on the description given by Lead Petitioner, that the incident appeared "to be an attack on traffic on that road." A.R. 48.

Second, the Immigration Judge held that Petitioners did not establish a well-founded fear of future persecution. A.R. 52. The Immigration Judge noted that the civil war between guerillas and the Guatemalan government has ended. Id. The incidents Petitioners cite occurred over a decade ago. Id. Samayoa's wife has been able to reside in the country peacefully and without incident after Samayoa departed Guatemala. Id. Indeed, Petitioner's wife has indicated "that she has no fear of returning to Guatemala." Id. Accordingly, the Immigration Judge found that neither Samayoa nor his wife had a reasonable fear of future persecution. A.R. 52-53.

D. THE DECISION OF THE BOARD OF IMMIGRATION APPEALS

Petitioner filed a timely Notice of Appeal to the Board of Immigration Appeals. A.R. 35-36 In its decisions, the Board affirmed the decision of the Immigration Judge, without a separate opinion. A.R. 2, 3. The Immigration Judge's decision is therefore the final agency determination. See 8 C.F.R. § 3.1(a)(7) (which may now be found at 8 C.F.R. § 1003.1(a)(7)).

SUMMARY OF ARGUMENT

Substantial evidence supports the Immigration Judge's determination that Samayoa (and therefore, his wife) failed to show past persecution on account of an imputed political opinion. During the period of persecution Petitioners allege, Guatemala was in a state of general unrest in which guerilla fighters attacked civilians. Samayoa has not met his burden in conclusively establishing that the harassment he faced was attributable to an imputed political opinion, as he alleges, and no reasonable factfinder would be compelled to conclude otherwise.

Additionally, substantial evidence also supports the finding that Petitioners failed to demonstrate a well-founded fear of future persecution by the guerilla fighters. Petitioners concede that the Guatemalan government and the guerillas have signed a peace accord in 1996. Petitioners offer no evidence that the guerillas would still be interested in Samayoa (or his spouse) due to a perceived

political opinion. Instead, Petitioners simply offer an unsupported, unsubstantiated claim that they would be in danger if removed to Guatemala. In addition to the insufficiency of Petitioners' evidence, their claim is undercut by the ability of Samayoa's spouse to reside in Guatemala safely after his departure, and her ability to repeatedly return to the country without consequence. On this record, a reasonable factfinder could find that Petitioners' fear of future persecution is not well-founded, and the evidence does not compel the contrary conclusion.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT PETITIONER WAS NOT ELIGIBLE FOR ASYLUM AND WITHHOLDING OF REMOVAL

1. Standard Of Review

The Immigration and Nationality Act, as amended by IIRIRA, provides that a court of appeals shall decide a petition for review of a final order of removal "only on the administrative record on which the order of removal is based," and that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." INA §§ 242(b)(4)(A)-(B), 8 U.S.C. §§ 1252(b)(4)(A)-(B) (2002).

This Court must affirm the Board's finding that Petitioner was not eligible for asylum if substantial evidence supports the finding that Petitioner failed to prove persecution or a well-founded fear of persecution on account of a qualifying ground. See INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (holding that the determination that an alien was not eligible for asylum "must be upheld if 'supported by reasonable, substantial, and probative evidence on the record considered as a whole'" (citation omitted)); Albathani v. INS, 318 F.3d 365, 372, (1st Cir. 2003) (same). In the instant case, the Immigration Judge's decision is the final agency determination. See 8 C.F.R. § 1003.1(e)(4)(B)(ii). Where "the BIA affirmed directly without opinion, [this Court] review[s] the decision of the IJ directly." Kalitani v. Ashcroft, 340 F.3d 1, 4 (1st Cir. 2003) citing Herbert v. Ashcroft, 325 F.3d 68, 71 (1st Cir. 2003).

The substantial evidence test set forth in Elias-Zacarias "means exactly what the Supreme Court said it meant" and is the "definitive statement of 'substantial evidence,'" which subordinate federal courts should regard "as the touchstone for reviewing the Board's factual conclusions in asylum cases." Prasad v. INS, 47 F.3d 336, 339 (9th Cir. 1995). This Court may not reverse the Board's decision merely because it would have decided the case differently. See El Moraghy v. Ashcroft, 331 F.3d 195, 202 (1st Cir. 2003) ("We 'should not supplant the agency's

findings merely by identifying alternative findings that could be supported by substantial evidence."") (quoting Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992)) (emphasis added). Instead, this Court must find that the evidence not only supports a finding of persecution or a well-founded fear of persecution, but compels it. Elias-Zacarias, 502 U.S. at 481 n.1; Keo v. Ashcroft, 341 F.3d 57, 60 (1st Cir. 2003); Khem v. Ashcroft, 342 F.3d 51, 53 (1st Cir. 2003) (" Like a BIA decision, an IJ decision that has been affirmed without opinion may be reversed only if 'the evidence is so compelling that no reasonable fact-finder could fail to reach the contrary conclusion.'") To that end, it has been noted that "[i]t is axiomatic that immigration courts are better suited than a reviewing court to make factual determinations regarding an alien's status. Courts of appeal sit as reviewing bodies to engage in highly deferential review of BIA and IJ determinations." Al Najjar v. Ashcroft, 257 F.3d 1262, 1278 (11th Cir. 2001) (citing INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999)).

2. Statutory Framework And Burden Of Proof

Under Section 208(a) of the INA, 8 U.S.C. § 1158(a), the Attorney General has the discretion to grant asylum to "refugees." INS v. Cardoza-Fonseca, 480 U.S. 421, 428 n.5 (1987). Section 101(a)(42)(A) of the INA defines a "refugee" as a person unable to return to his or her country "because of persecution or a well-

founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . ." 8 U.S.C. § 1101(a)(42)(A).

The disposition of an application for asylum involves a two-step inquiry. First, the applicant must demonstrate that he or she is a refugee within the meaning of Section 101(a)(42)(A) of the INA. Once statutory eligibility has been established, the applicant must show that he "is entitled to asylum as a matter of discretion." Kazlauskas v. INS, 46 F.3d 902, 905 (9th Cir. 1995). The alien bears the burden of proof of establishing that he is a refugee and that he has suffered past persecution or has a well-founded fear of persecution. See 8 C.F.R. § 1208.13(a); Khem v. Ashcroft, 342 F.3d at 53. The alien also "bears the burden to show that alleged persecution took place on account of [a protected ground]." Khalil v. Ashcroft, 337 F.3d 50, 55 (1st Cir. 2003); see also Huaman-Cornelio v. Bd. of Immigration Appeals, 979 F.2d 995, 999-1000 (4th Cir. 1992) (holding that aliens must show that their "fear of persecution stems directly from one of the five categories of persecution listed in the Act").

In order to establish a well-founded fear of future persecution, "a petitioner must satisfy both an objective and subjective test. . . . Under the subjective requirement, a petitioner must prove that his fear is genuine, while the objective component requires showing by "credible, direct and specific evidence" that this

fear is reasonable.'" Khalil, 337 F.3d at 55, quoting Ravindran v. INS, 976 F.2d 754, 758 (1st Cir. 1992).

An application for asylum made in removal proceedings is also considered to be a request for withholding of removal. 8 C.F.R. § 1208.3(b). "Because the standard for withholding of [removal] is more stringent than for asylum, 'a petitioner unable to satisfy the asylum standard fails, *a fortiori*, to satisfy the former.'" Guzman v. INS, 327 F.3d 11, 15 (1st Cir. 2003) quoting Velasquez v. Ashcroft, 316 F.3d 31, n. 2 (1st Cir. 2002).

3. Petitioners Have Failed to Establish Past Persecution or a Reasonable Fear of Future Persecution On Account of a Protected Ground

Substantial evidence supports the Immigration Judge's determination that Samayoa failed to establish past persecution on account of a protected ground. Samayoa "bears the burden of providing 'conclusive evidence' that he was targeted on any of the five grounds." Albathini, 318 F.3d at 373, quoting Velasquez v. Ashcroft, 316 F.3d 31, 34-35 (1st Cir. 2002); see also Aguilar-Solis v. INS, 168 F.3d 565, 569 (1st Cir. 1999) (finding that petitioner failed to carry his burden in proving past persecution because his account lacked the requisite degree of specificity, and because "the vague evidence of alleged persecution that the

petitioner adduced failed to establish a sufficient nexus between the events that he described and any ground enumerated.").

In the instant case, Samayoa contends that he was harassed and threatened by guerilla fighters in his native country of Guatemala. Samayoa concedes that during the time at which the guerillas and the Guatemalan government were in conflict, the region was in a state of general unrest, in which guerillas would "kill woman, rape women, . . . [and] kill children" before fleeing. A.R. 78. For Samayoa and his spouse to prevail, Samayoa must establish more than that he was harassed and threatened by the guerillas during the state of general unrest. See Velasquez v. Ashcroft, 342 F.3d 55, 58 (1st Cir. 2003) ("general harm attributable to the widespread civil strife that plagued Guatemala" does not constitute persecution); Aguilar-Solis, 168 F.3d at 572 ("[d]anger resulting from participation in general civil strife, without more does not constitute persecution"). They must conclusively establish that such persecution was on account of the protected ground Samayoa alleges, an imputed political opinion.

Immigration Judge Sheppard considered each of the incidents proffered by Samayoa and found that Samayoa failed to meet his burden in establishing that such encounters were motivated by a response to his imputed political opinion, and not attributable to the general country conditions. A.R. 47-51. Regarding the

alleged incident in 1982, in which Samayoa was stopped and bound for two hours by the guerillas, A.R. 45-46, Immigration Judge Sheppard found the encounter "appeared to be a random stop, simply stop someone on the road to try and get gas and siphon off gas." A.R. 46. This determination is reasonable in light of the fact that Samayoa had no connection to the military at that time and he does not allege that the guerillas believed that he did.

Next, Samayoa contends that he began receiving threatening notes and letters that he claims were left for him "almost every 8 days or every 15 days." A.R. 90. Yet, despite the purported frequency with which Samayoa claims he was threatened, he does not allege another direct encounter with the guerillas for almost a decade, when he claims he was targeted in 1991. A.R. 92. More importantly, Samayoa cannot conclusively establish that the guerillas were, in fact, responsible for leaving the notes, nor can he establish the motivation of the guerillas, if they were, in fact, responsible. Samayoa (and his spouse) bear the burden of establishing a nexus between the notes and his alleged imputed political opinion. See Albathini, 318 F.3d at 373; Aguilar-Solis, 168 F.3d at 572 (finding that where Guatemalan "petitioner introduced no evidence about the motivation behind [his] attacks, and without some proof that the guerillas were attempting to harm or oppress . . . [based upon] political opinion, the record cannot conceivably

compel a conclusion that enlistment in the CDP [civil defense patrol] subjected its members to politically-inspired persecution."). While it is understandable that direct, incontrovertible proof may be unavailable, Petitioners must still provide more evidence than simple assertions. Here, Samayoa offers nothing more than bald speculation.

In the next direct encounter, in 1991, Samayoa set off a land mine. A.R. 92. The explosion purportedly signaled guerillas who were laying in wait, and allegedly shot at him. Id. The Immigration Judge found that while

[Samayoa] believes that he was directly targeted, [] it sounds more as though he may have been in an area controlled by the guerillas and . . . it appears to have been land mines planted in the area. . . . It is not uncommon for areas, contested areas, especially rural contested areas to be mined and that appears to have been the situation. It doesn't appear to have been any direct targeting of the respondent on that incident.

A.R. 46-47. The Immigration Judge's determination is more reasonable than Samayoa's account, in which Samayoa's theory does not explain why the guerillas would wait almost a decade before directly attacking him if they viewed him as such a threat.⁵

⁵ Respondent notes that Samayoa alleges that the guerillas planted a bomb underneath his car either in 1987, A.R. 90, or 1990. A.R. 390. However, Samayoa has no evidence that the purported bomb was planted by the guerillas, nor does he offer any proof as to their motivation for allegedly doing so.

The next year, in 1992, Samayoa set off another land mine, this time while driving. A.R. 97-98. Samayoa contends that he was directly targeted because the guerillas detonated the land mine as he drove past them. A.R. 97. However, Samayoa admits that "when the land mine exploded . . . a big bus [] was coming in the other direction and I was going very fast and I went way over to the side, to the edge of the highway." A.R. 100. Given that Samayoa veered off towards the side of the road in an unpredictable time, it seems unlikely that the guerillas could have set a land mine in that location, anticipating that Samayoa would drive over it. The Immigration Judge reasonably concluded that "what the respondent has described appears to me to be an attack on traffic on that road." A.R. 48. Immigration Judge Sheppard concluded that:

it appears that a land mine went off about 10 meters away, whether this was intended for anyone or whether it was an accident or explosion is unknown to the Court. It may well have been intentional. It may well have been, if it were aimed at anyone, it may well have been aimed at the bus full of people, as well. They were side by side, just about, separate by 5 seconds when this explosion went off. And it also appears that this simply may have been traffic that had found its way into hostile territory . . .

A.R. 49. Lead Petitioner was also shot after the explosion. A.R. 102. Samayoa concedes that he did not hear the guerillas say anything that would indicate that he was the intended target, or that revealed their motivation for the attack. A.R. 102-

03. He also contends that he was driven away immediately after being shot, A.R. 99, so Samayoa cannot plausibly state that the guerillas did not fire at the other vehicles on the road. The Immigration Judge noted that

there may have been some reason why, either [the guerillas] did not want to be discovered or they simply decided to fire at random at traffic in the road in terms of sort of general terrorism in the, in the area. It's simply unclear to know what the motivations are here.

A.R. 49.

The Immigration Judge also addressed Samayoa's contention that the guerillas attacked a hospital, allegedly searching for him. Immigration Judge Sheppard found that Samayoa was able to stay at the hospital "without difficulty while he was recuperating." A.R. 52. Because Samayoa was relying on second-hand information regarding what happened after he left the hospital, and the Immigration Judge found it was unclear whether the incident was related to Lead Petitioner, Immigration Judge Sheppard held the "rumor" was not "reliable enough to substantiate a nexus." A.R. 52.

Accordingly, the Immigration Judge reasonably concluded that Samayoa failed to meet his burden in conclusively establishing that he was directly targeted by the guerillas because of his political opinion, as opposed to being a random victim of the regional civil unrest. Based on the evidence of record, a reasonable

factfinder could find that Samayoa failed to establish past persecution and would not be compelled to find otherwise.

In order to establish a "well-founded fear" of future persecution, an applicant must establish that he has a subjectively genuine fear of future persecution and that the fear is supported by objective facts showing a reasonable possibility that he will be persecuted in the future. Cardoza-Fonseca, 480 U.S. at 430-31; 8 C.F.R. §§ 1208.13(b)(2)(A) and (B). The Immigration Judge found that Petitioners did not establish the latter, and this finding is amply supported by the record.

Petitioners concede that there is a peace accord between the Guatemalan government and the guerillas. See Petitioner's Brief, p. 36. The Immigration Judge noted that because "the civil [war] has ended," Petitioners no longer have a reasonable fear that the guerillas will persecute Samayoa (or presumably, his spouse) on account of his political opinion. A.R. 52. Petitioners contend that "the evidence of record establishes that, although the leaders of Guatemala's guerilla movement and the military signed peace accords in 1996, hostilities between those loyal to the government and those loyal to the guerillas continue to this day." See Petitioner's Brief, p. 36. However, the "evidence of record" Petitioners claim is nothing more than Samayoa's bald assertion that the fighting continues and that he

would be subject to future persecution. A.R. 126. Outside of his own subjective fear and corresponding unsubstantiated contention, Samayoa offers no evidence establishing that the guerillas have an interest in him at this time based upon his imputed political opinion. Id. Although Samayoa contends that he and his spouse would be in danger if removed to Guatemala, Immigration Judge Sheppard noted,

[Samayoa's] spouse indicated that about a month and a half after the respondent left for the United States, []about 2 to 3 people came to his home and asked one of the sons if the respondent was his father. The wife had instructed the children to say that he was not their father, and the son did that and, thereafter, these men left and . . . the respondent was never inquired after again. That was almost 10 years ago. The wife of the respondent moved to another home. She hired security . . . and they were able to live peacefully in her home with the security. The female respondent has come and gone to [Guatemala] 2 to 3 times, and she indicates that she has no fear of returning to Guatemala. I noted the civil [war] has ended. It has ended some time ago, and . . . [while] there may be difficulty with crime, [] it does not appear that the respondent has a well-founded fear of persecution on account of one or more of the five statutory grounds.

A.R. 52-53. For these reasons, substantial evidence supports the finding that Petitioners failed to show a well-founded fear of future persecution, and the Immigration Judge's determination should be affirmed.

4. Petitioners Failed to Establish Their Eligibility for Withholding of Removal

Because Petitioners failed to establish their eligibility for asylum, they necessarily failed to meet the higher standard of eligibility for withholding of removal. See Alvarez-Flores v. INS, 909 F.2d 1, 4 (1st Cir. 1990) (noting that a petitioner who fails to satisfy the asylum standard automatically fails to satisfy the standard for withholding of removal); Mediouni v. INS, 314 F.3d 24, 27 (1st Cir. 2002) ("Because the standard for withholding of [removal] is more stringent than that for asylum, a petitioner unable to satisfy the asylum standard fails, *a fortiori*, to satisfy the former.") (internal quotations omitted). Accordingly, the Immigration Judge's decision denying Petitioners' applications for withholding of removal should be affirmed.⁶

⁶ Petitioners also seek asylum on humanitarian grounds, contending the persecution Samoya suffered "was so severe as to render his forced return to that country inhumane." See Petitioners' Brief, p. 37-38. As a procedural matter, Respondent notes that Petitioners failed to raise this issue with the BIA and thus review is precluded here. See Ravindran v. INS, 976 F.2d 754, 761 (1st Cir.1992) ("Issues not raised before the Board may not be raised for the first time upon judicial review of the Board's decisions."). Additionally, Petitioners' claim must also fail on its merits as the relief of asylum on humanitarian grounds is reserved for those who have suffered the most "atrocious forms of persecution." Matter of Chen, 20 I&N Dec. 16, 18 (1989). The applicant in Chen, for example, was a Chinese Christian whose father had been systematically tortured for eight years due to his religious beliefs. From age eight, Chen himself was tortured, harassed, and deprived of food and necessary medical attention. Id. at 19-20. The Board (continued...)

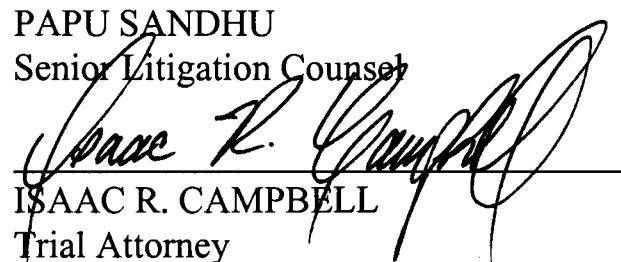
CONCLUSION

For the foregoing reasons, the Court should deny the Petition for review.

Respectfully submitted,

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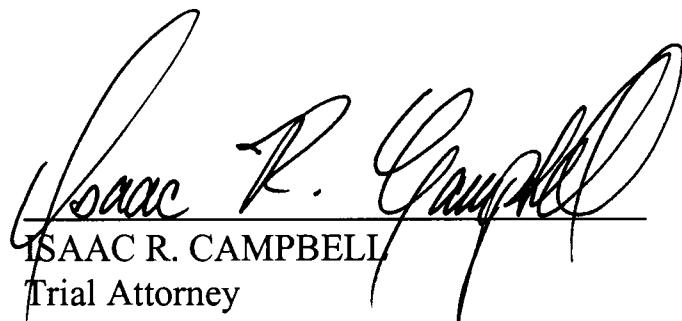

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⁶(...continued)

found that Chen's past persecution was "severe and atrocious" and that Chen suffered from ongoing physical and emotional disabilities stemming from the persecution. *Id.* at 20. In the instant matter, Petitioners' claims of past persecution hardly rise to a sufficient level to justify a discretionary decision to grant asylum on humanitarian grounds.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Federal Rules of Appellate Procedure 32(a)(7) and does not exceed 14,000 words. This brief contains 5787 words and complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i).



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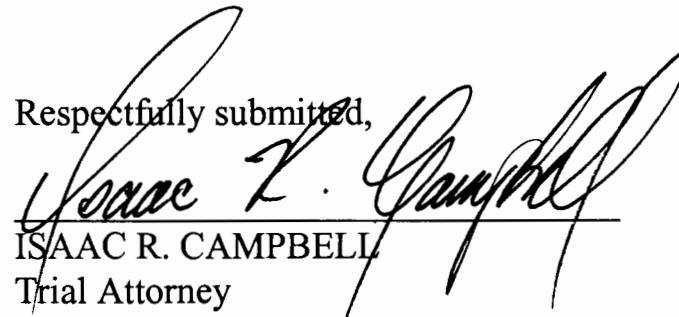
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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 3-1180

Juan Alecio SAMAYOA Cabrera
Blanca Margarita VELASQUEZ
Petitioners

v.

John ASHCROFT, Attorney General of the United States
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Case No. 3-1180

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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3. Did the simple fact that guerilla and military leaders signed peace accords in anti-guerilla civil patrols?
- him because of his status as a military commissioner and a leader of his local
2. Did members of Guatemala's guerilla movement visit that persecution upon and hospitalized for a month, constitute persecution?
- which Mr. Samayoa suffered, one of which left him in a coma for three days
1. Did the approximately 50 death threats, three bombings and two shootings

ISSUES PRESENTED

not control these proceedings.

discretionary relief. The holding of *Koester v. INS*, 101 F.3d 785 (1st Cir. 1996) does this case because it relates to a decision regarding statutory eligibility, not creates an exception for asylum cases. Moreover, those limits are not applicable to INA §242(a)(2)(B) limits judicial review of denials of discretionary relief, but

Appeals.

States Code. That chapter, in turn, refers to the jurisdiction of the U.S. Courts of review of a final order of removal is governed by chapter 158 of title 28 of the United and Nationality Act (the "permanent rules"). That section provides that judicial The First Circuit has jurisdiction pursuant to § 242(a)(1) of the Immigration

STATEMENT OF JURISDICTION

as to dismiss Mrs. Velasquez's interest in this claim.alone throughout the course of this brief. Those references should not be construed is based solely on Mr. Samayoa's experiences in Guatemala, counsel will refer to him Samayoa's application, and is a co-Petitioner in this case. Because the application

Mr. Samayoa's wife, Blanca Margarita Velasquez, is included in Mr.

because of his status as a military commissioner and leader of his local civil patrol, Mr. Samayoa had not been specifically targeted by Guatemala's guerilla forces. The Immigration Judge committed reversible error when she concluded that

SUMMARY OF ARGUMENT

Juan Samayoa appeals from the decisions of the Board of Immigration Appeals to deny him asylum and withholding of removal.

STATEMENT OF THE CASE

5. Did Mr. Samayoa establish eligibility for withholding of removal?persecuted in the future?
4. Was the abuse which Mr. Samayoa suffered over the course of a decade which eviscerated Mr. Samayoa's claim to a well founded fear of persecution?1996 constitute a substantial, durable and effective change in circumstances sufficiently severe and atrocious as to warrant a grant of asylum on humanitarian grounds, without regard for the likelihood that he would be

and that the abuse which he suffered was simply random violence or robbery.

Mr. Samayoa presented clear evidence that he was identified by rebel forces as an enemy of the guerrilla movement, that he was personally and explicitly threatened with death on approximately fifty occasions, and that he was surrounded, bombed and shot at repeatedly by URNG guerrillas who targeted him alone, not once easy targets. He presented evidence that, on the final occasion, when the guerrillas wounded but did not kill him, they came looking for him in the hospital, at a relative's house, and finally at his own house, asking for him by name.

The judge also committed reversible error when she relied on the simple fact that rebel and military leaders had signed peace accords in 1996 to conclude that circumstances in Guatemala had changed so substantially as to exonerate Mr. Samayoa's claim to a well founded fear of persecution. Mr. Samayoa presented evidence that, although the rebels signed the accords, they did not lay down their weapons, and that factions loyal to the guerrillas continued to fight those loyal to the government, as they had for close to four decades.

his identity documents, counsel will use that spelling throughout is the most common, and because it is the spelling which appears on the majority of as "Alecio," "Alicio," "Alesio," and "Alieso." Because "Alecio" is the spelling which ²The Petitioner's middle name is spelled throughout the record of proceedings

the theater for horrific violence. [AR 78].
raping and killing. And the region in which Mr. Samayoa lived - the Quiche - became battling the government for power turned on the civilian population with a vengeance, In the early 1980's, however, Guatemala's civil war escalated; armed insurrections

owned land and a car, and had plenty of money. [AR 78].
buying and selling cattle and wood. He made a good living, had several employees, Mr. Samayoa worked for the state for a while, and then ran his own business
of them remained in Guatemala [AR 76].

children. At the time of his trial, his children ranged in age from 15 to 31; all but one 74]. He married Blanca Margarita Velasquez in 1977, and together they had eight remained for the next ten years, until he fled Guatemala for the United States [AR 73- approximately 1982, when he moved to the nearby Aldea Chimiique, where he Chimiique, in Guatemala's Quiche region [AR 230]. He lived in that town until Juan Alecio² Samayoa was born on April 7th, 1950 in Aldea Chuaxan,

FACTS

³ Through the court-appointed interpreter, Mr. Samayoa used the words "guerrillas" and "terrorists" interchangeably at trial. [See generally AR 73-143, and specifically AR 124]. For the purposes of clarity, counsel will refer to them as "guerrillas" throughout this brief.

protect himself. [AR 86-87].

Samayoa did not want to leave, however, and, so, the colonel offered to make him an assistant military commissioner, a position which would entitle him to carry a gun to what had happened. The colonel told him that he would likely find himself in danger for having talked to the authorities, and told him that he should leave town. Mr. Samayoa went to an army colonel, and told him about despite the warning, Mr. Samayoa went to an army colonel, and told him about living, and that they would murder him in his sleep [AR 82-86].

When they needed assistance and he agreed, afraid that they would kill him if he did otherwise. They left, after warning him that if he mentioned the incident to the military authorities, they would kill him. They told him that they knew where he lived, and that they would murder him in his sleep [AR 82-86].

Mr. Samayoa's problems with the guerrillas began in 1982, when he was stopped by a group of guerrillas while driving in his car. They grabbed him, tied him up, put a gun to his head, and told him that if he moved, they'd kill him. Then they tried to siphon gas out of his car. Mr. Samayoa offered to give them a can of gasoline which he kept in the car, in the hope of appeasing them, and they released him so that he could fetch it. Afterwards, they told him that he should continue to help them when they needed assistance and he agreed, afraid that they would kill him if he did otherwise. They left, after warning him that if he mentioned the incident to the military authorities, they would kill him. They told him that they knew where he lived, and that they would murder him in his sleep [AR 82-86].

sometime on the inside to kill him in jail once he was arrested. Mr. Samayoa suspects and working on a farm. Afterwards, people told him that the idea had been for investigation, but before he was arrested they found the supposed kidnapper living In 1988, he was falsely accused of kidnapping. The authorities began an before it detonated. [AR90, 238].

found a bomb planted under his car outside their house; she was able to deactivate it stated explicitly that he would be killed by the guerrillas. [AR 106]. In 1987, his wife between 1984 and 1991 [AR 104]. The notes were addressed to him by name, and they would kill him. He estimated that he received between 30 and 50 death threats written death threats from the guerrillas, warning him that if he did not leave town, For years after he became a military commissioner, Mr. Samayoa received

he became a full-fledged military commissioner. [AR 122]. give him a .38 pistol with which to protect himself. [AR 80-82]. After a few years, was not a formal member of the military, and was not paid. The army did, however, for military service. In both capacities, he acted as a civilian, and as a volunteer. He protect it from guerrillas [AR 88-89]. As a military commissioner, he recruited men civil patrol, he was in charge of approximately 500 men, who patrolled the village to commissioner, as well as the leader of his neighborhood civil patrol. As leader of the Mr. Samayoa accepted the offer, and became a volunteer assistant military

that it was the guerrillas who had filed the complaint against him [AR 91]. In December of 1991, a bomb was planted on Mr. Samayoa's land. It exploded, wounding him in the face, when he walked across his fields on the way to milk his cows. [AR 92]. Immediately after the explosion, approximately eight men approached and surrounded him, and began shooting at him. [AR 94]. Mr. Samayoa was carrying his pistol, and managed to hold the men at bay by shooting back. He escaped, ran into town, and went to the army headquarters, leaving his son and two other young men waiting in his truck by the side of the road. [AR 92]. He was treated at the regional army headquarters. [AR 94]. Meanwhile, his son and their two companions stayed in the car. After Mr. Samayoa escaped, the guerrillas approached the truck and asked the young men where their quarry's son. The young men replied that they did not know, that they had just seen a man run off. [AR 92]. The guerrillas let them leave on foot, but when Mr. Samayoa came back, he found that they had shot and damaged the car so that it would not start. He returned to town, and came back with several soldiers, who helped him to get the vehicle into town, and to fix it. Then, the soldiers went looking for the guerrillas who had attacked him. The guerrillas were hiding along the road, and bombed the soldiers when they approached, killing seven of them. [AR 93].

in Guatemala during that country's 36 year-long civil war.
 4 The Unidad Revolucionario Nacional Guatemalteco (Guatemalan National Revolutionary Unit) or "URNG" was an umbrella group for various guerrilla factions

The night before, an acquaintance of Mr. Samayoa's had asked him what time
 him. [AR 97, 102].

road, toward him. [AR 101]. The guerrillas began running toward him, shooting at
 green uniforms and carrying M-16's and AK-47's coming out of the hills above the
 of the road, to avoid the explosion. At that moment, he saw 25-30 guerrillas wearing
 passed by. [AR 95-96, 102, 105, 109-110]. Mr. Samayoa swerved over to the far side
 approached from the opposite direction, and passed him, continuing on down the
 40 kilometers from his home. As he was driving up an incline, a bus full of people
 he was driving in his pickup truck with another man on the mountainous road around
 bombed and shot at again by members of the guerrilla forces. [AR 95, 238]. This time,
 Around three months later, in February or March of 1992, Mr. Samayoa was
 altogether [AR 94].

[AR 93-94]. His son told him later that there had been around sixty of them
 them men shooting at him wore URNG armbands⁴ and carried M-16's and AK-47's
 Mr. Samayoa knew that it was the guerrillas who had attacked him because

approximately a month, during which time he underwent surgery and had the bullet unit at the Guatemala City military hospital. [AR 108, 238]. He remained there for Mr. Samayoa remained in a coma for three days; he awoke in the intensive care unit a guard said, when they did not find him, left. [AR 106-107, 238].

told him later that the guerrillas had come into the hospital, asking for him by name, the hospital, looking for him. A woman who was in the Joyabaj hospital at the time hospital in Guatemala City. [AR 108, 238]. The night he left, the guerrillas entered Santa Cruz de Quiche. [AR 238]. From the base, he was airlifted to a military smuggled out later that day, in another truck, which took him to the military base in Joyabaj. [AR 238]. There, he underwent surgery. [AR 238].

continue. His passenger took over the wheel, and drove him to the hospital in nearby back. [AR 238]. He continued driving, but was so badly wounded, he could not Mr. Samayoa, however, was shot. The bullet entered his shoulder from the bus or the pickup truck. [AR 106, 111].

no fighting going on in the region at the time, and the guerrillas did not shoot at either guerrillas were in fixed places, clearly waiting for something. [AR 142]. There was he realized that the man had probably given the information to the guerrillas. The he planned to leave for Joyabaj the next day. Mr. Samayoa told him; in retrospect,

230, 382]. The record does not reflect when or how this happened. Clearly, at some point during the time between his flight from Guatemala and the issuance of the Notice to Appear, Mrs. Velasquez joined her husband in the U.S. [AR 143]. Testimony does not appear as a part of the certified administrative record. [AR 143]. The transcript reflects that Mrs. Velasquez also testified at trial, but her

the visa, however, Mr. Samayoa decided that there was no hope in trying again, even offered to help him to obtain a visa. Since he had already applied and been denied denied him the visa. [AR 116]. Then he went to the military authorities, and they he stayed. He went to the U.S. embassy, and applied for a tourist visa. The embassy still in very poor health, and quite weak, but he was afraid that he would be killed if he stayed. After that, Mr. Samayoa decided that he could not stay in Guatemala. He was asked about him. [AR 115].

his aunt's house, a few blocks away from the house he and his wife were renting, and Soon thereafter, the guerrillas came looking for him again. Uninformed men went to hospital and, for the first time, the military put him on active payroll. [AR 114, 136]. children in the rented house, he continued to be treated as an outpatient at the military When he was released from the hospital, Mr. Samayoa joined his wife and if he returned to Chimalque, the guerrillas would find and kill him. [AR 114].

and rented a house in Guatemala City's Mixco neighborhood. She was afraid that [AR 133]. Two days before he was released, his wife left their house in Chimalque, removed from his shoulder. [AR 113]. Two soldiers guarded him around the clock.

for gunshot wounds in March of 1992 [AR 206-212, 212-223]; sworn statements from Military Medical Center in Guatemala City confirming that he had been treated there his status as a military commissioner [AR 213-221]; medical records from the 230]. With that application, he submitted copies of his military ID cards, as proof of Mr. Samayoa applied for asylum affirmatively on December 27, 1993. [AR

over the past four decades. [AR 131].

over Guatemala, and that they maintained the networks which they had established Samayoa testified that hundreds of thousands of guerrillas remained in operation all those whom it had for so long fought as bitter enemies. [AR 126]. At trial, Mr. Pearce accords, but did not turn over their weapons, and continued to fight and kill those loyal to the government and those loyal to the guerrillas. The guerrillas signed mere end to formal combat did not, however, mark the end of armed conflict between time, Mr. Samayoa was in the United States, pursuing his asylum application. The In 1996, Guatemala's 36-year long civil war finally came to an end. At that 124-125].

month after he left Guatemala, the guerrillas had come looking for him again. [AR 136]. His wife told him in a telephone conversation later on that, approximately a The military continued to pay his wife his salary for several months after he left. [AR with the military's assistance, so he arranged to come to the U.S. illegally. [AR 117].

"During the course of these proceedings, the Immigration and Naturalization Service ceased to exist, and its functions were transferred to various offices of the new Department of Homeland Security.

Appealed, and, on January 16, 2003, the Board of Immigration Appeals summarily affirmed the deportation [AR 52-53]. Mr. Samayoa and Mrs. Velasquez timely formally ended evicted any claim which he might have had to a well founded fear him on account of a protected ground [AR 51], and that the fact that the civil war had established that the abuse which he had suffered in Guatemala had been visited upon

In that decision, Judge Sheppard concluded that Mr. Samayoa had not

and issued her oral decision, on February 4, 2002.

October of 2000. [AR 250]. Immigration Judge Patricia Sheppard heard testimony, Office for nearly seven years, the case was referred to the Immigration Court in After languishing at the Immigration and Naturalization Service's⁶ Asylum act." [AR 204-205].

direct quotes from military spokesperson, who stated that, "the army condemns this and was undergoing treatment at the Military Medical Center. The article included commissioner, and reported that he had been "ambushed," wounded in the right lung, his hospitalization which included a photograph of him, identified him as a military details of his claim [AR 265-274]; and a newspaper article published at the time of three individuals who had known him in Guatemala and who corroborated specific

on inferences or presumptions that are not reasonably grounded in the record, viewed L.Ed.2d 131 (1966), deference is not due where findings and conclusions are based Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-20, 86 S.Ct. 1018, 16 from conflicting evidence, *Martinez v. INS*, 970 F.2d 973, 975 (1st Cir. 1992); Although the Circuit Court defers to reasonable inferences drawn by the Board *de novo* *Fergeriste v. INS*, 138 F.3d 14, 17 (1st Cir. 1998).

Gebremicheal v. INS, 10 F.3d 28, 34 (1st Cir. 1993). Questions of law are reviewed record considered as a whole." Former INA § 106; 8 U.S.C. § 1105a. See also are conclusive if "supported by reasonable, substantial, and probative evidence on the evidence"). Board determinations of statutory eligibility for relief from deportation Cir. 1990) ("we must uphold any finding of fact that is supported by substantial

Hiores v. INS, 909 F.2d 1, 3 (1st Cir. 1990); *Novoa-Umana v. INS*, 896 F.2d 1, 2 (1st [hereinafter "BIA" or "the Board"], under a substantial evidence standard." *Alvarez-*

The Court of Appeals reviews findings of fact and credibility by the BIA

I. STANDARD OF REVIEW

ARGUMENT

affirmed the judge's decision, rendering that decision the final agency determination on the merits. [AR 1-3]. This appeal follows.

The judge did not make an explicit credibility finding, although she did appear to accept the facts which Mr. Samayoa presented at trial as true, and did state that she does not find his testimony to be inconsistent. [AR 45]. Because the judge did not make an explicit credibility determination, this Court must presume Mr. Samayoa to be a credible witness. *Arteaga-Turcios v. INS*, 829 F.2d 720, 723 (9th Cir. 1987).

may have had to a well founded fear of future persecution. [AR 51-53].

guerrilla leaders had signed peace accords in 1996 evinced any claim which he visited upon him on account of his political opinion; and 2) the fact that military and on her conclusions that: 1) any violence which Mr. Samayoa did suffer was not have accepted all of his testimony as true and accurate. Her decision is based solely judge Sheppard did not question Mr. Samayoa's credibility, and appears to un-founded when viewed in light of the evidence presented.

reviews. 8 CFR § 1003.1(e)(4). And, in this case, the judge's decision is entirely immigration judge without analysis, it is the judge's decision which the Court In a case such as this, where the Board summarily affirms the decision of the

1994); *Damazie-Job v. INS*, 787 F.2d 1332, 1337 (9th Cir. 1986). views of the Immigration Judge Cordero-Trejo v. INS, 40 F.3d 482, 487 (1st Cir. 455 (1954); *Gallius v. INS*, 147 F.3d 34, 44 (1st Cir. 1998), or are merely personal 451 (1951); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 49, 74 S.Ct. 323, 98 L.Ed. as a whole, *Universal Camera v. NLRB*, 340 U.S. 474, 491, 71 S.Ct. 456, 95 L.Ed.

⁸ An application for asylum is also considered to be an application for withholding of deportation 8 CFR §1208.3(b).

L.Ed.2d 434 (1987). In fact, that Court specifically held more than fifteen years ago of the evidence standard INS v. Cardoza-Fonseca, 480 U.S 421; 107 S.Ct. 1207; 94 standard of proof considerably lower than a more likely than not or a preponderance The Supreme Court has interpreted the so-called "reasonableness test" to require a A "well-founded" fear is one which is subjectively and objectively reasonable.

political opinion. INA § 208.

account of his race, religion, nationality, membership in a particular social group, or has suffered past persecution, or has a well-founded fear of future persecution, on of discretion. An alien is prima facie eligible for asylum if he can show that he either firstly that he is statutorily eligible and secondly that he warrants relief in the exercise An applicant for asylum and withholding of deportation⁸ must demonstrate

DEPORTATION.

II. THE IMMIGRATION JUDGE ERRED WHEN SHE HELD THAT MR. SAMAYOA IS NOT ELIGIBLE FOR ASYLUM OR WITHOLDING OF

from this reviewing Court.

fact, fly in the face of all of the evidence of record, they are not entitled to deference Because those conclusions are not supported by substantial evidence and, in

Cordero-Trejo 40 F.3d 482; Perez-Alvarez at 23. As such, applicants for asylum in an asylum claim must be evaluated in light of the context in which the claim arises despite the difficulty involved, this Court has unequivocally held that evidence

Boston, MA p29.

Deborah Anker, *Law of Asylum in the United States*, 1999 Refugee Law Centre,

Studies indicate that it has sometimes been difficult for adjudicators to meet the challenge of viewing evidence from a non-native perspective. One report of asylum adjudication in the immigration court notes that immigration judges may in some cases substitute their understanding of reality for that of the asylum applicant, in practice applying a standard of a reasonable person in the circumstances of the immigration judge.

functions or should function.

This is, of course, a difficult determination to make. Because the determination of reasonableness turns on what is reasonable given the particular cultural, social, and political situation of a certain country or group which is by its nature foreign, it is not easy for an immigration judge to suspend his or her own notions of the way the world

Alvarez v. INS, 857 F.2d 23, 24 (1st Cir. 1988); 8 CFR §1208.13(a).

This Court has interpreted Cardoza-Fonseca to mean that a "reasonable" fear means a fear which is reasonable in light of the applicant's particular knowledge, experience and circumstances, not the judge's Cordero-Trejo, 40 F.3d at 491; Perez-

that an applicant may establish eligibility for asylum if he can demonstrate a 10%

chance that he will persecuted in the future Id.

threshold eligibility, he bore an additional burden of establishing that he warranted suffered past persecution on account of his political opinion. Once he established that thus, Mr. Samayoa bore the initial burden of demonstrating that he had

Perez-Alvarez at 24.

As a general rule, in considering claims of persecution, I think it highly advisable to avoid assumptions regarding the way other societies operate. Time and time again this Board has considered appeals in which assumptions of this nature have been proved to be totally wrong...

substitute their own preconceived notions of other societies and cultures for it; should accept an applicant's clear, coherent, and credible testimony, and may not keep with this fundamental tenet, this Court has held that triers of fact

at 5 (BIA 1997); Matter of Mogharabi, 19 I & N Dec. 439 at 4 (BIA 1987).
1396, 1402 (9th Cir. 1987); Gallius, 147 F.3d at 45; Matter of S-M-J, Int. Dec. 3303

extralegal entity associated with "the government"; see also Turcios v. INS, 821 F.2d conclusive evidence of his persecutor's identity where he is targeted by a "shadowy", threatening messages"); Cordero-Trejo at 488 (Petitioner not required to present them to sign their names and reveal their individual identities when they deliver

1990) (Persecutors "have not been given adequate notice that our government expects typically require in other contexts"). 914 F.2d 1375, 1380 (9th Cir. cannot be expected to produce the type of corroborating evidence which courts

has not presented evidence to rebut that presumption, and because Mr. Samayoa Guatemala, 8 CFR 1208.13(b)(1). Because the Department of Homeland Security to a regulatory presumption that he has a well founded fear of future persecution in Upon establishing that he had been persecuted, Mr. Samayoa became entitled

suffered past persecution on account of a protected ground.

military commissioner and leader of his local civil patrol, he established that he had by members of Guatemala's armed insurgent movement because of his position as a When Mr. Samayoa established that he had been threatened, bombed and shot

tactics.

was pursued and shot, there were other people in the areas who would have been easy occasion was anyone else injured, despite the fact that on the two occasions when he written death threats, was bombed three times, and was shot twice. On neither was targeted for attack. Over the course of a decade, he received approximately 50 As a result of that work, he was identified by the guerrillas as an enemy, and

purpose was to detect and report guerrilla activity to the military authorities.

period, he was also the leader of his village's 500-man-strong civil patrol, whose military for ten years, during the height of Guatemala's brutal civil war. During that Mr. Samayoa worked in a civilian capacity as a recruiter for the Guatemalan

relief in the exercise of the judge's discretion.

In *Matter of Acosta*, the BIA defined the term as "either a threat to the life or 232 F.3d 258 (1st Cir. 2000); *Aguiar-Solis v. INS*, 168 F.3d 565 (1st Cir. 1999). discrimination, to that of persecution, is one left to judicial exposition. *Nelson v. INS*, whether an applicant's experience rise above the level of harassment and define the term "persecution." As such, this Court has held that the determination of Neither the Immigration and Nationality Act nor its implementing regulations month, he suffered past persecution.

one of which left him in a coma, near death, and in need of hospitalization for a When Juan Samayoa suffered repeated death threats, bombings, and shootings,

A. MR. SAMAYOA CLEARLY ESTABLISHED THAT HE HAD BEEN PERSECUTED IN THE PAST.

him to a country which holds such horrific memories for him. persecution because the severity of his past persecution makes it inhumane to return humanitarian grounds, even if it finds that he has no well founded fear of future and impeded political opinion. Alternatively, it may grant Mr. Samayoa asylum on still find that he has a well-founded fear of future persecution on account of his actual Should this Court find that Mr. Samayoa was not persecuted in the past, it may asylum.

warrants relief in the exercise of the Court's discretion, he is entitled to a grant of

did constitute persecution. See *Ananeh-Firempong v. INS*, 766 F.2d 621 (1st Cir.) (holding that treatment which is equally or less severe than the repeated death threats, bombings and shooting which left him close to death which Mr. Samayoa suffered, held that law is replete with instances in which federal courts and the BIA have

"rights can constitute acts of persecution...". *Id.* at 28.

The Basic Law Manual also recognizes that, "[s]erious violations of basic human rights deny; constant surveillance or; pressure to become an informer." *Id.* at 31. passport denial; exclusion from institutions of higher learning; enforced social or civil inactivity; virtually all means of earning a livelihood; relegation to sub-standard dwellings; interference with a person's privacy, family, home or correspondence; depriavation of in determining whether a harm rises to the level of persecution include: "arbitrary exclusion from institutions of higher learning; enforced social or civil inactivity; virtually all means of earning a livelihood; relegation to sub-standard dwellings; interference with a person's privacy, family, home or correspondence; depriavation of

According to the INS's Basic Law Manual, elements which may be significant

(BIA 1985); *Matter of Kullie*, 19 I & N Dec. 318, 331 (BIA 1985).

depriavation. *Id.*; see also *Matter of Sanchez and Escobar*, 19 I & N Dec. 276, 284 but, by way of example, mentioned confinement, torture, and significant economic 1987). The Board did not enumerate all activities which may constitute persecution overruled on other grounds by *Matter of Moghartabi*, 19 I & N Dec. 439, 441 (BIA regarded as offensive." *Matter of Acosta*, 19 I & N Dec. 211, 222 (BIA 1985), freedom of, or the infliction of suffering or harm upon, those who differ in a way

commissioner, and to give him a pistol with which to protect himself. [AR 86-87]. Want to do so, the colonel offered instead to make him an assistant military his having reported that he advised Mr. Samayoa to leave town. Because he did not colonel with whom he spoke was sufficiently concerned about the ramifications of authorities, despite the guerrillas' specific order that he not do so. [AR 85-86]. The Mr. Samayoa reported his first encounter with the guerrillas to the military government, pro-military political opinion.

Nor is there any doubt that Mr. Samayoa was identified as an enemy of the guerrilla movement, and targeted for attack specifically because of his pro-

B. MR. SAMAYOA WAS PERSECUTED ON ACCOUNT OF HIS POLITICAL OPINION.

The prolonged, severe abuse which Mr. Samayoa suffered at the hands of armed insurgents clearly constitutes persecution within the meaning of the Act.

v. INS, 79 F.3d 912 (9th Cir. 1996) (death threats).

1232 (9th Cir. 1988) (forced conscription by a revolutionary army); Gomez-Saballo Dec. 3251 (BIA 1995) (detention and imprisonment); Arteaga v. INS, 836 F.2d 1227, (murder, intimidation, kidnapping, and beating of family members); Matter of B, Int. F.3d at 17-18; see also Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985) (seizure of bank accounts, house arrest, and physical beatings); Ferreira, 138

through the mountains, on a route which he believes the guerrillas knew he was to

Three months later, in early 1992, his car was bombed as he was driving

M-16's, surrounded and shot at him [AR 92-94].

after the explosion, guerrillas wearing URNG armbands, and armed with AK-47's and

planted in his field, one of which exploded as he crossed the pasture. Immediately

bomb planted under his car [AR 90, 238]; in December of 1991, landmines were

bombed and shot by members of the guerrilla forces. In 1987, his wife discovered a

And, over the course of the next eight years, Mr. Samayoa was repeatedly

1984 and 1991. [AR 104, 106].

kill him. He estimated at trial that he received between 30 and 50 such letters between

by name, and threatened explicitly that, if he did not leave town, the guerrillas would

Samayoa began to receive written death threats. These letters were addressed to him

Shortly after he was promoted to full military commissioner, in 1984, Mr.

with responsibilities for recruiting young men into the army. [AR 122].

commissioner for several years, he was promoted to a full military commissioner,

activity in the area to the military. [AR 89]. After serving as an assistant military

village's 500-man-strong civil patrol, whose goal was to identify and report guerrilla

and with the anti-guerrilla campaign in his region. He became the leader of his

Thereafter, Mr. Samayoa became more and more involved with the military,

the U.S., guerillas went to his house, and questioned his wife and children about him. He left for aunt's house in Guatemala City, asking about him. [AR 114-115]. After he left for he left for the U.S., several months later. During that period, guerillas went to his the hospital, his wife rented a house in Guatemala City, and he remained there until He never went back to his house in Chimalque; just before he was released from soldiers. [AR 133].

[AR 106-107, 238]. At the hospital in Guatemala City, he was guarded by two armed Joyabaj, guerillas entered the hospital, asking for him by name, and killed a guard. same day to the military hospital in Guatemala City. [AR 238]. Soon after he left taken first to a nearby hospital in Joyabaj, but was smuggled out and transferred that three days, underwent surgery, and was hospitalized for a month. [AR 238]. He was Mr. Samayoa was shot, and wounded so badly that he remained in a coma for

Mr. Samayoa was being attacked. [AR 106, 111].

shot at either a bus full of people or a pickup truck, both of which passed by while caught in crossfire. The guerillas fired only at Mr. Samayoa; they did not fire a single the region at that time, and, so, no reason to believe that Mr. Samayoa was simply [AR 95-102]. There was no fighting going on between the rebels and the military in armed, uniformed guerillas appeared, and ran toward him, firing M-16's and AK-47's. drive that day. The bomb missed his car, but immediately after the explosion, 25-30

persecutor's motivations beyond a reasonable doubt or even by a preponderance of require that an applicant establish either the reasonableness of his fear or his record, and of the controlling law. As noted above, the asylum statute does not

The Judge's reasoning in this regard flies in the face of all of the evidence of

[AR 50].

on account of one or more of the five statutory grounds... moment, do not necessarily mean that the respondent was targeted in an, notes... But all of these things together, even assuming their truth for the military, and the guerrillas may well have come to his home and left comissioner, particularly if he was gathering young men for the other things. He may well have become known as the military he could give them in terms of material things, such as gas and perhaps It appears that the guerrillas were interested in the respondent for what

49]. With regard to the claim as a whole, the Judge concluded that:

to be discovered or they simply decided to fire at random on traffic on the road." [AR Judge concluded that, "There may have been some reason why either they didn't want accident and, if it was indeed intentional, might have been aimed at the bus, the that road." [AR 48-49]. After noting that the landmine explosion might have been that, "what the respondent has described appears to me to be an attack on traffic on of the respondent." [AR 47]. With regard to the 1992 incident, the Judge concluded testimony, but concluded that there "doesn't appear to have been any direct targeting The Immigration Judge did not question the veracity of Mr. Samayoa's

[AR 124-125].

INS, 175 F.3d 732 (9th Cir. 1999).
 Matter of R, 20 I & N Dec. 621 (1992); In re V-T-S; Int. Dec. 3308 (1997); Bojaza v.
 enumerated grounds.” Id.; See also Matter of Fuentes, 19 I & N Dec. 658 (1988);
 demonstrate the reasonableness of a motivation which is related to one of the
 for those actions are possible.” Id. at 7. Rather, “the task of the alien is to
 burden of establishing the exact motivation of a persecutor where different reasons
 In summary, the Board instructed that the alien “does not bear the unreasonable

Id. at 6.

persons who have been punished because of their actual or imputed political views.”
 situations of general civil unrest should not...diminish the protections of asylum for
 1996). The Board went on to instruct that, “the difficulty of determining motive in
 fundamental humanitarian concerns of asylum law.” Interim Decision 3287 at 4 (BIA
 adjudicating that type of case, the BIA noted that, “it is important to keep in mind the
 motives for persecution, only some of which are related to a protected ground. In
 for analyzing cases such as this, where evidence arguably suggests multiple possible
 In Matter of S-P, the Board of Immigration Appeals provided sound instruction

Fonseca, 480 U.S. 421.

This persecutor’s behavior be objectively and subjectively reasonable. Cardozza-
 the evidence; it requires only that he demonstrate that the inferences he draws from

In this case, of course, Mr. Samayoa did provide corroborating evidence of his claims for relief. With his asylum application, he submitted copies of his military ID cards, as proof of his status as a military commissioner [AR 213-221]; medical records from the Military Medical Center in Guatemala City confirming that he had been treated there for gunshot wounds in March of 1992 [AR 206-212, 212-223];

Implicit in all of those cases is a recognition of the longstanding premise that asylum applicants are often incapable of producing concrete, conclusive evidence to support their claims and, for that reason, an applicant's testimony alone may be sufficient to meet his burden of proof. See *Bolanos-Hernandez v. INS*, 767 F.2d 1277 (9th Cir. 1984) (noting that persecutors are not likely to provide their victims with signed affidavits or other evidence of the persecutor's motives); See also, *Intre-S-M-J*, 111 Dec. 3303 (1997) (holding that, when the record contains general country condition information, and when an applicant's claim relies primarily on personal experience not reasonably subject to verification, corroborating documentary evidence of the asylum applicant's particular experience is not required).

The Ninth Circuit Court of Appeals has held unequivocally that "death threats by people on one side of a civil war against a person suspected of being on the other side constitute of persecution on account of political opinion." *Gomez-Saballo*, 79 at 917; *Castellanos-Castillo v. INS*, 191 F.3d 459 (9th Cir. 1999) (unpublished opinion).

he joined them. Rather than joining the guerrillas, Ramos-Calmo fled his home the next activities and, when he denied being a member of the patrol, threatened to kill him unless members of the URNG went to Ramos-Calmo's house, asked him about his patrol petitioner in that case was not a leader of the civil patrol, but just one of many members). Members of the URNG went to Ramos-Calmo's house, asked him about his patrol been, like Mr. Samayoa, a member of his local civil patrol (unlike Mr. Samayoa, the Ninth Circuit Court of Appeals considered the case of a young Guatemalan man who had In *Ramos-Calmo v. INS*, 285 F.3d 868 (9th Cir. 1999) (unpublished opinion), the motivated persecution.

which other Circuit Courts have found that the URNG did engage in politically claim. And his case is significantly more compelling than other similar cases in provide detailed, specific documentary evidence which directly corroborated his Mr. Samayoa's claim is thus crucially different from the norm in that he did

that, "the army condemns this act." [AR 204-205].

Center. The article included direct quotes from military spokesperson, who stated wounded in the right lung, and was undergoing treatment at the Military Medical identified him as a military commissioner, and reported that he had been "ambushed," published at the time of his hospitalization which included a photograph of him, corroborated specific details of his claim [AR 265-274]; and a newspaper article sworn statements from three individuals who had known him in Guatemala and who

(unpublished opinion) the Ninth Circuit addressed the case of a man who was

similarly, in *Castellanos-Castillo v. INS*, 191 F.3d 459 (9th Cir. 1999)

political opinion." *Id.* at 3.

conclude that Ramos suffered past persecution from the URNG on account of his

Id. at 2. And, accordingly, it determined that "a reasonable factfinder would have to

guerrillas.

political opinion - an opinion favoring the government and opposing the
Ramos' willing participation in the Civil Patrol is strong evidence of his

Id. at 2-3, citing *INS v. Elias-Zacarias*, 502 U.S. 472 (1992). The Court concluded that,

Ramos' very participation in the Civil Patrol was an expression of
opposition to the guerrillas, which in turn motivated their seeking him out
and threatening to kill him if he refused to comply with their demands.

guerrillas...

Patrol, an organization among whose duties was to guard against and to kill
that they were not also motivated by Ramos' membership in the Civil
motivated by recruitment does not, without more, compel the conclusion
clearly is recruitment as the *Id.* found. Yet the finding that the guerrillas were
We agree that one motive for the death threat suggested by the record

of the Petitioner's political opinion.

2. It went on, then, to address the central issue: whether the persecution was on account

The Court found that the guerrillas' death threats constituted persecution. *Id.* at

threatened to kill Ramos-Calmo should he return. *Id.* at 1.

returned to his family's house, killed two of their horses, tied up his father, and

day, and eventually made his way to the United States. After his departure, the guerrillas

threatened not just once or twice, but between 30 and 50 times, over the course of ten

profile military commissioner and leader of a 500-man-strong civil patrol. He was

Castellanos or Ramos case. He was not simply a civil patrol member, but was a high-

The facts of Mr. Samayoa's case are much more compelling than those of the

for that reason. *Id.* at 3.

URNG believed Castellanos opposed its goals...” and that it targeted him for persecution

Id. at 3. Accordingly, it found that, “[t]he evidence compels the conclusion that the

guerrillas and the guerrillas’ persecution of Castellanos.
establishes a causal connection between Castellanos’ disagreement with the
abducted him and threatened to kill him and his family. The order of events
the guerrillas even though he was in a position to do so, the guerrillas
want to help the guerrillas... When Castellanos persisted in refusing to help
At that point the guerrillas knew what his political opinion was - he did not
to cooperate and told the guerrillas that he would not support their cause.
However, Castellanos was kidnapped and threatened only after he refused
popularity at his place of work. The guerrillas said as much to Castellanos.
persecution because they wanted to take advantage of his position and
There is little doubt that Castellanos was singled out by the guerrillas for

Id. at 4. And it reasoned that,

Among the major violators [of human rights in Guatemala] are the guerrillas
and their abuses include killings, political kidnappings, and death threats.

that,

refused, he was kidnapped and threatened, and then released. *Id.* at 1. The Court noted

factory, and asked to distribute communist propaganda to his fellow workers. When he

approached by members of the URNG in his capacity as president of a trade union in a

Her conclusion that "the guerrillas were interested in the respondent for what he

fact.

base her decision on unfounded assumptions and conclusions which have no basis in

however, the judge ignored the majority of the evidence of record, choosing instead to

substitute her own, unfounded opinion for his. Perez-Alvarez, 857 F.2d 23. In this case,

Judge was required to consider the reasonableness of that inference, and not to simply

Once Mr. Samayoa presented his inference, and the facts which supported it, the

clearly reasonable; the judge's conclusion to the contrary is clearly erroneous.

he was identified as an enemy of the guerrilla movement and specifically targeted is

to his house, asking for him by name. Given all of this, Mr. Samayoa's conclusion that

After he was shot, guerrillas went to the hospital, his relatives' house and, finally,

well. On no occasion did they fire at anyone else but Mr. Samayoa.

victim who would have been easy targets had the guerrillas chosen to fire on them as

active fighting going on in the area at the time, and there were other people in the

M-16's and AK-47's, who surrounded and shot at him. On both occasions, there was no

was followed by Mr. Samayoa being pursued by tens of uniformed guerrillas, armed with

moment the bomb exploded. On two of those three occasions, the landmine explosion

on his land, and on a section of road which the guerrillas knew he was to travel at the

years. Each attack on him was specifically targeted - bombs were placed under his car,

added).

rather than a political dispute. *Osorio*, 18 F.3d at 1028 (*emphasis* with the former Soviet Union is properly characterized as a literary, would not have been eligible for political asylum because his dispute likened the BIA's view to the opinion that Aleksander Solzhenitsyn At oral argument, counsel for Osorio made this point well when she necessarily imply that there cannot exist other causes of persecution.

the conclusion that a cause of persecution is economic does not

rejected that reasoning, finding that Guatemalan government was essentially an economic one. The Second Circuit flatly established persecution on account of a political opinion because his dispute with the establishment in part, by an actual or implied protected ground." *Borja v. INS*, 175 F.3d 732, 1994). In that case, the Immigration Judge found that the applicant had not The Second Circuit addressed the issue in *Osorio v. INS*, 18 F.3d 1017 (2d Cir.

also Matter of S-P, Interim Decision 3287 (BIA 1996).
736 (9th Cir. 1999) (quoting *In re T-M-B*, Interim Dec. No. 3307 (BIA 1997)); see rather, an applicant can establish eligibility for asylum if this harm was motivated "at least in part, by an actual or implied protected ground." *Borja v. INS*, 175 F.3d 732, need not establish that his persecutors were motivated solely by political ideals; not be fatal to his claim. Circuit Courts across the country have held that an applicant desire to obtain material assistance from Mr. Samayoa, that fact in and of itself would even if this Court were to find that the guerrillas were motivated in part by a

with bullets so that he could not use it to escape.⁹

robbed; he was bombed and shot. His car was not stolen; it was bombed and riddled demands for money or goods; he received death threats. He was not held at gunpoint and take anything from Mr. Samayoa with the exception of his life. He did not receive of his troubles with the rebels began, there is no evidence that the guerrillas wanted to basis in the evidence of record. With the exception of one occasion, in 1981, before any could give them in terms of material things, such as gas, " [AR 50] has absolutely no

Id.

reveals a complete lack of understanding of the political dynamics in Guatemala.”
 opposition activities,” Id. at 1029, and concluded that, “the BIA’s decision thus
 because he and his union posed a political threat to their authority via their organized
 Rather, that court found that, “Guatemalan authorities persecuted Osorio

Once Mr. Samayoa established that he had been persecuted on account of his

**C. ONCE MR. SAMAYOA ESTABLISHED THAT HE HAD BEEN PERSECUTED ON
 ACCOUNT OF HIS PRO-GOVERNMENT, PRO-MILITARY POLITICAL OPINION,
 HE WAS NOT REQUIRED TO PRESENT ADDITIONAL EVIDENCE THAT HE
 WOULD BE PERSECUTED IN THE FUTURE.**

face of all of the evidence of record, it cannot be upheld.
 Because her conclusion is not supported by substantial evidence and, in fact, flies in the
 that Mr. Samayoa was simply the unfortunate victim of random violence or robbery.
 Given all of this, there is simply no basis for the Immigration Judge’s conclusion
 asking for him by name.

armed rebels came to the hospital, his relatives’ house, and finally to his own house,
 which active fighting was going on between guerilla and rebel forces. After he was shot,
 were any persons besides Mr. Samayoa attacked. On no occasion was he in a region in
 occasion other people, who would have made easy targets, were present; on no occasion
 He was tracked down and attacked on his own land and on a mountain road. On each
 Nor is there any evidence that, on any occasion, he was simply caught in crossfire.

1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva,

The Handbook on Procedures and Criteria for Determining Refugee Status Under the

fear, and rebuts the regulatory presumption 8 CFR § 1208.16(b)(1)(i)(A)(2001); See also,

that a fundamental change in circumstances vitiates the reasonableness of the applicant's

at that point, the burden shifts to the Department to produce evidence which establishes

additional evidence to demonstrate a well-founded fear of future persecution. Rather,

Id. at 5. Thus, once an applicant has established past persecution, he need not present

to a regulatory presumption that the applicant has a well-founded fear of persecution."

standing alone, establishes eligibility for asylum: a "finding of past persecution gives rise

I & N Dec. 337(BIA 1996). That case clearly establishes that proof of past persecution,

The Board set forth a detailed explanation of past persecution in Matter of H, 21

16 at 3-4 (BIA 1989); Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988).

§1208.13(b); Matter of H, 21 I & N Dec. 337 (BIA 1996); Matter of Chen, 20 I & N Dec.

persecution are separate and distinct methods of establishing asylum eligibility. 8 CFR

decisions also clearly establish that past persecution and well founded fear of future

well-founded fear of persecution. Federal regulations, Board decisions, and federal court

The asylum statute creates alternative bases for asylum: past persecution and a

future persecution. 8 CFR § 1208.13(b)(II).

political opinion, he became entitled to a presumption that he has a well founded fear of

that he had been persecuted in the past on account of his political opinion. Because the Mr. Samayoa therefore established eligibility for asylum when he demonstrated (of harm.”)

the burden to demonstrate the reasonableness of his fear from any potential new source 1998) (“Once the presumption of well-founded fear has been rebutted, the applicant has constituted legal error warranting reversal); Matter of N-M-A, Int. Dec. 3368 at 5-6 (BIA (The Board’s failure to apply the regulatory presumption of future persecution Matter of H, 21 I & N Dec. 337 at 15 (BIA 1996). See also, *Ernesto*, 13 F.3d at 18-19

An alien who has demonstrated past persecution is not separately required to prove compellng reasons for being persecuted in the country, such that the applicant would not face persecution upon return: by 8 C.F.R. §208.13(b)(1)(ii) to demonstrate compelling reasons for being persecuted in the country where he was persecuted, absent unwillingness to return to his or her country of nationality or last habitual residence in order to be granted asylum. Rather, he or she is considered to have established eligibility for asylum both on account of the past persecution which has been demonstrated and the well-founded fear of future persecution which is presumed.

No may an applicant in a past persecution case be required to prove compelling reasons for his unwillingness to return to the country where he was persecuted, absent showing by the government that durable, effective and substantial changes have occurred in the country, such that the applicant would not face persecution upon return:

Matter of Izatula, 20 I & N Dec. 149, 152-154 (BIA 1990).

demonstration of an effective, substantial and durable change in country conditions); 1979) [hereinafter “UNHCR Handbook” or “Handbook”], note 7, para 135 (requiring a

Castillo v. INS, 121 F.3d 1237, 1240 (9th Cir. 1996); *Osorio v. INS*, 9 F.3d 928, 932-33

Fergeriste, 138 F.3d at 19 (citing former 8 CFR § 208.13(b)(1)(I); See also *Vallencillo-*

Founded fear of persecution.

specific evidence presented by the applicant. Rather, changes in country conditions must be shown to have negated the particular applicant's well-abstract "changed country conditions" do not automatically trump the

Fergeriste case. In that case, this Court held that,

conditions may rebut the regulatory presumption of a well founded fear in the 1998

This Court addressed the issue of when general evidence of changed country

1208.16(b)(1)(i)(A)(2001).

the regulatory presumption that he will suffer persecution in the future. 8 CFR § circumstances which vitiates the reasonableness of the Mr. Samayoa's fear, and rebuts persecution, the government bore the burden to establish a fundamental change in order to overcome the regulatory presumption of a well founded fear of

D. THE DEPARTMENT OF HOMELAND SECURITY HAS NOT PRESENTED EVIDENCE OF CHANGED CIRCUMSTANCES SUFFICIENT TO REBUT THE REGULATORY PRESUMPTION THAT MR. SAMAYOA HAS A WELL FOUNDED FEAR OF FUTURE PERSECUTION IN GUATEMALA TODAY.

additional facts to establish that he has a well-founded fear of future persecution. Department has not presented evidence that circumstances have changed sufficiently to rebut the presumption of eligibility for asylum, he does not bear the burden of presenting

In the *Ferrière* case, this Court noted that the only evidence of record in support of the INS's position were two documents from the U.S. State Department which discussed Haiti's political and social conditions in generalized terms, whereas the applicant had presented a good deal of evidence relating specifically to the persecution of persons to whom he was similarly situated *Id.* Because the Board's decision did not mention any of that evidence in its decision, and because it did not discuss how the applicant's particular situation may be affected by the changed country conditions that it had recognized, this Court found that the Board "ignored Ferrière's individual situation," in violation of the law *Id.* Noting that the violation constituted an error of law, this Court declined to remand the case, and instead reversed the Board's decision, and remanded the case for a decision only on the issue of discretion *Id.* at 21.

In this case, the evidence of record establishes that, although the leaders of Guatemala's guerilla movement and military signed peace accords in 1996, hostilities between those loyal to the government and those loyal to the guerillas continue to this day. [AR 126, 131].

Guatemala's guerilla movement and military signed peace accords in 1996, hostilities between those loyal to the government and those loyal to the guerillas continue to this day. [AR 126, 131].

(9th Cir. 1996); *Li Wu Lin v. INS*, 238 F.3d 239 (3rd Cir. 2000); *Gallina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000) (describing as "woefully inadequate" the Board's reliance on generalized conclusions in the most recent State Department Report to rebut the regulatory presumption).

The Immigration Judge's conclusion that country conditions changed so as to fatally undermine Mr. Samayoa's claim of a well founded fear of persecution is contrary to the evidence of record, and cannot be supported.

E. **EVEN IF MR. SAMAYOA NO LONGER HAS A WELL FOUNDDED FEAR OF PERSECUTION IN GUATEMALA, THE COURT SHOULD GRANT HIM ASYLUM ON HUMANITARIAN GROUNDS BECAUSE THE PERSECUTION WHICH HE SUFFERED WAS SO SEVERE AS TO RENDER IT INHUMANE TO FORCE HIM TO RETURN TO THAT COUNTRY.**

The Board of Immigration Appeals and Circuit Courts across the country have long recognized that, "there may be cases where the favorable exercise of discretion is warranted for humanitarian reasons even if there is little likelihood of future persecution." Matter of Chen, 20 I&N Dec. 16, 18 (BIA 1989); See also Matter of C-Y-Z, Interim Decision 3319 (BIA 1997); Matter of H, Interim Decision 3276 (BIA 1996); Matter of B, Interim Decision 3251 (BIA 1995); Tokarska v. INS, 978 F.2d 1 (1st Cir. 1992); Dobrotar v. INS, 195 F.3d 970 (7th Cir. 1999); Vongsaakdy v. INS, 171 F.3d 1203 (9th Cir. 1999); Rivera-Cruz v. INS, 948 F.2d 962 (5th Cir. 1991).

on humanitarian grounds, regardless of the likelihood of future persecution.

surely constitutes the sort of "atrocious" persecution which warrants a grant of asylum

this aunt's house and, finally, at his own home. Such protracted, traumatic violence

that they had wounded but not killed him, they came looking for him in the hospital, at

in a coma for three days, and hospitalized for a month. And, when the guerrillas realized

and shot at him twice. The last bombing and shooting incident left him close to death,

on his life. Members of the guerrilla forces tried to bomb him three times, and surrounded

Over the course of ten years, he lived with incessant death threats, and repeated attempts

humanitarian grounds, without a showing of a well founded fear of future persecution.

level of severe and atrocious persecution which warrants a grant of asylum on

In this case, the treatment to which Mr. Samayoa was subjected clearly rises to the

Handbook at para. 136.

It is frequently recognized that a person who - or whose family - has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in the view of his past experiences, in the mind of the refugee.

(Geneva, 1979) [hereinafter "the Handbook" or "UNHCR Handbook"]:

Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees principle" in *The Handbook on Procedures and Criteria for Determining Refugee Status*

In the Chen case, the Board cited to what it described as the "general humanitarian

applications for asylum and withholding of removal.
Court REVERSE the decision of the Board of Immigration Appeals, and GRANT this
For all of these reasons, Petitioner Juan Samayoa respectfully requests that this

CONCLUSION

evidence establishes eligibility for withholding of deportation.
particular social group was reasonable, but that it was quite likely to occur. As such, that
Samayoa's fear of persecution on account of his political opinion and membership in a
In this case, the evidence outlined above clearly established not only that Mr.

INS, 138 F.3d 14 (1st Cir. 1998).

presumed to have established eligibility for asylum. 8 CFR § 1208.16(b)(2); Ferguson,
presumed to have established eligibility for withholding of removal, just as he is
§ 243(h). One who has suffered past persecution on account of a protected ground is
nationality, membership in a particular social group or political opinion," Former INA
establish that his "life or freedom would be threatened on account of race, religion,
In order to establish eligibility for withholding of deportation, an applicant must

DEPORTATION.
HAD NOT ESTABLISHED ELIGIBILITY FOR WITHHOLDING OF
THE IMMIGRATION JUDGE ERRED IN CONCLUDING THAT MR. SAMAYOA

(617) 482-4500
 Boston, MA 02110
 10 Wintrop Square, Third Floor
 Kaplan, O'Sullivan & Friedman

Jeremiah Friedman

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45907

Juan Samayoa, Petitioner
 Ilana Greenstein, Attorney for

Ilana Greenstein

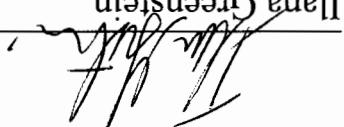
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18126

RESPECTFULLY SUBMITTED this 26 day of September, 2003,

Juan Samayoa, Petitioner
 Harvey Kaplan, Attorney for

Harvey Kaplan

(617) 482-4500
 Boston, MA 02110
 10 Wimthrop Square, Third Floor
 Kaplan, O'Sullivan & Friedman, LLP
 Ilana Greenstein


this 26 day of September, 2003.

Boston, MA 02203
 15 New Sudbury Street
 John F. Kennedy Federal Building, Room 425
 Office of District Counsel
 Department of Homeland Security

and

Washington, D.C. 20044
 1331 Pennsylvania Ave, Room 7025 South
 U.S. Department of Justice, Civil Division
 Office of Immigration Litigation
 Brenda O'Malley, Esq. (2 copies)

I, Ilana Greenstein, certify that a copy of the foregoing PETITIONER'S BRIEF, and all attachments including the Appendices, were sent by regular mail, postage prepaid, to:

CERTIFICATE OF SERVICE

Harvey Kaplan, hereby certify that the enclosed Petitioner's Brief contains less than the maximum 14,000 words permitted for submission to the United States Court of Appeals. That Brief contains 9,678 words.

I, Harvey Kaplan, hereby certify that the enclosed Petitioner's Brief contains less than the maximum 14,000 words permitted for submission to the United States Court of Appeals. That Brief contains 9,678 words.

Ilana Greenstein

Kaplan, O'Sullivan & Friedman, LLP
10 Wimthrop Square, Third Floor
Boston, MA 02110

(617) 482-4500

Date
9/26/2003

CERTIFICATE OF COMPLIANCE

Decision of the Board of Immigration Appeals
Appendix A

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U.S. DEPARTMENT OF JUSTICE
IMMIGRATION COURT
SILVER SPRINGS, WASHINGTON

Hess, Fred
Panel Members:

Enclosure

Jeffrey Frater
Chief Clerk

Jeffrey Frater

Sincerely,

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Date of this notice: 01/16/2003

Rider: 73-617-650
Name: SAMAYOA CABRERA, JUAN ALICIO
AT3-182-454

Kapilan, Harvey
Office of the District Counsel/BO
P.O. Box 8728
Ten Winthrop Square
Boston, MA 02114
3rd Floor
BOSTON, MA 02110-0000

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Board of Immigration Appeals
Office of the Clerk

Executive Office for Immigration Review



U.S. DEPARTMENT OF JUSTICE

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DEPARTMENT OF JUSTICE

FEB 1 2003 PM 12 MFL 30

U.S. IMMIGRATION AND
NATURALIZATION SERVICE
IMMIGRATION COURT
BOSTON, MASSACHUSETTS

FOR THE BOARD

John H.

See section 240B(d) of the Act.

under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act.
\$1,000 and not more than \$5,000, and shall be ineligible for a period of 10 years for any further relief
extensions granted by the district director, the alien shall be subject to a civil penalty of not less than
NOTICE: If the alien fails to depart the United States within the time period specified, or any

the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.
See section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event
the date of this order or any extension beyond that time as may be granted by the district director.
voluntarily departs from the United States, without expense to the Government, within 30 days from
with conditions set forth by the Immigration Judge and the statute, the alien is permitted to

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance
decision below is, therefore, the final agency determination. See 8 C.F.R. § 3.1(e)(4).

ORDER:

ON BEHALF OF RESPONDENT: Kaplan, Harvey

APPEAL

IN REMOVAL PROCEEDINGS

In re: SAMAYOA CABRERA, JUAN ALICIO

File: A73-182-454 - Boston

JAN 16 2003

Date:

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041
Executive Office for Immigration Review

000003

FOR THE BOARD

Donald J. H.

See section 240B(d) of the Act.

under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. \$1,000 and not more than \$5,000, and shall be ineligible for a period of 10 years for any further relief extensions granted by the district director, the alien shall be subject to a civil penalty of not less than

NOTICE: If the alien fails to depart the United States within the time specified, or any

the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order. See section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.2(c), (f). In the event the date of this order or any extension beyond that time as may be granted by the district director.

voluntarily depart from the United States, without expense to the Government, within 30 days from with conditions set forth by the Immigration Judge and the statute, the alien is permitted to

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance

decision below, therefore, the final agency determination. See 8 C.F.R. § 3.1(e)(4).

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The

ORDER:

ON BEHALF OF RESPONDENT: Kaplan, Harvey

APPEAL

IN REMOVAL PROCEEDINGS

In re: VELASQUEZ, BLANCA MARGARITA

File: A73-617-650 - Boston

Date:

Falls Church, Virginia 22041

Executive Office for Immigration Review

U.S. Department of Justice

Decision of the Board of Immigration Appeals

Decision of the Immigration Judge
Appendix B

APPLICATIOnS: Asylum; Withholding of Removal Under Section 241(b)(3) of the Act; Relief Under Article III of the Convention Against Torture; and Voluntary Departure, in the alternative.

CHARGE: Section 212(a)(6)(A)(i) of the Immigration & Nationality Act for the Lead Respondent; and Section 237(a)(1)(B) of the Immigration & Nationality Act for the spouse of the Lead Respondent.

IN REMOVAL PROCEEDINGS
BLANCA MARGARITA VELASQUEZ,)
a/k/a BLANCA MARGARITA,)
VELASQUEZ-RODRIGUEZ)
a/k/a BLANCA MARGARITA)
spouse of the respondent)
a/k/a BLANCA MARGARITA SAMAYOA,)
Nationality Act for the Lead Respondent)
Section 237(a)(1) of the Immigration & Nationality Act for the spouse of the Lead Respondent.)
Responsible.

In the Matter of

File A 73 617 650

AND

IN REMOVAL PROCEEDINGS
JUAN ALICIO SAMAYOA CABREERA,)
Lead Respondent)
Boston, Massachusetts

In the Matter of

Lead File A 73 182 454
February 2, 2002

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Boston, Massachusetts

respondent's pleadings are Exhibit 5-A. In their respective respondents, pleadings are at Exhibit 3, and the female respondents, through counsel, submitted pleadings. The male are removable on different charges, and they are stated above. of these documents, the service contains that the respondents may of these documents, the service contains that the respondents 2000 respectively. See Exhibits 1 and 1-A in their cases. By at Boston, Massachusetts on December 1st 2000 and December 15th service filed their Notices to Appear with the Immigration Court 30th 2000 and December 13th 2000 respectively. The Immigration mailing it by regular mail to them, to each of them on November each of their cases on October 11, 2000. Served it upon them by Immigration Naturalization Service issued a Notice to Appear in Removal proceedings were instituted against them when the respondent natives and citizens of Guatemala. simpler.

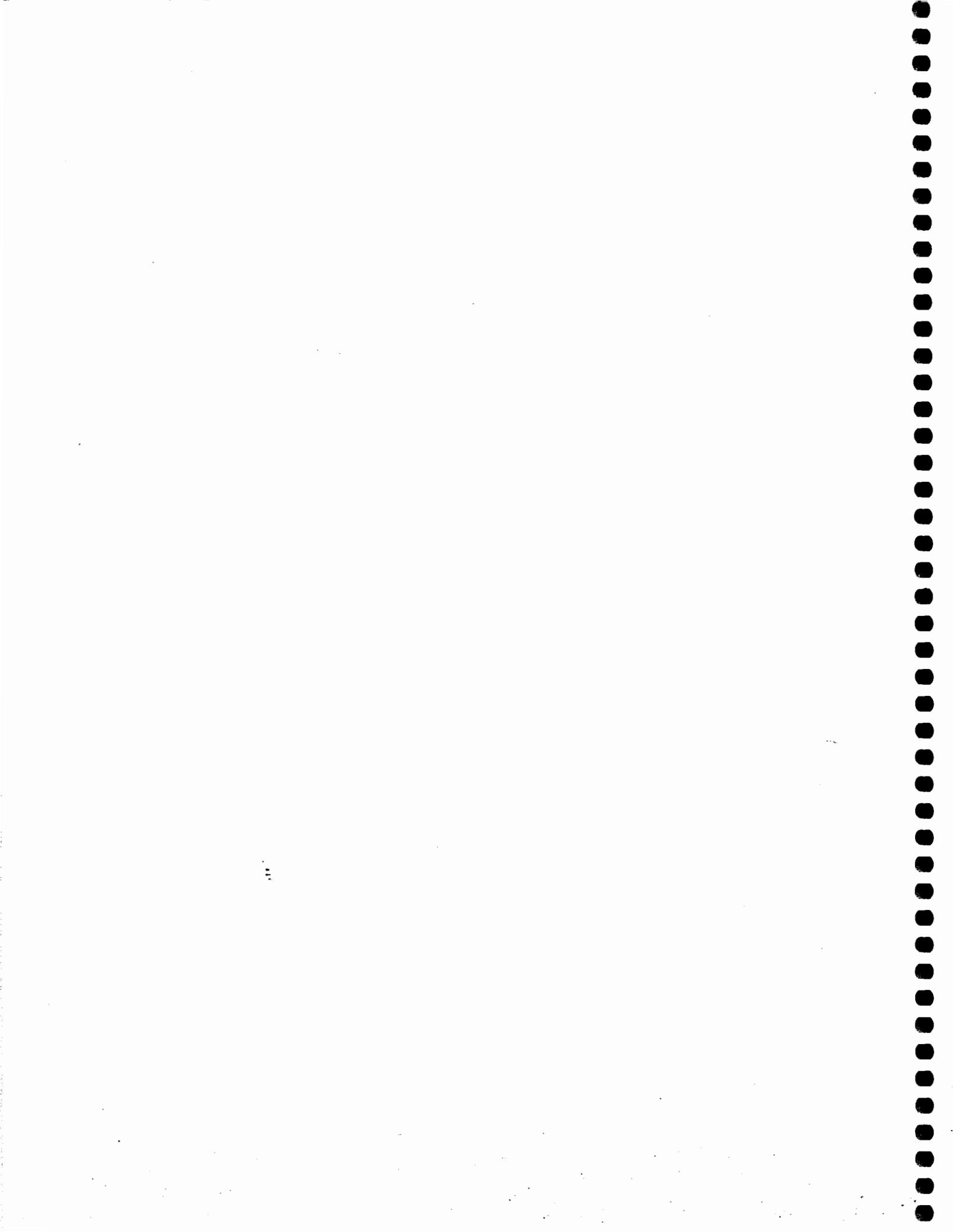
refer to her as the spouse of the respondent to make things respondent there. When I refer to the second respondent, I'll refer to the respondent, and I am referring to the lead is the lead respondent. And in the course of my decision I will the respondents herein a married couple, the male respondent

ORAL DECISION OF THE IMMIGRATION JUDGE

Susan Mills, Esquire
1165 Elmwood Avenue
Providence, RI 02907
JFK Federal Building, Room 425
Assistant District Counsel
Susan Hiller, Esquire
Boston, MA 02203

ON BEHALF OF RESPONDENTS:

30th



that he was not paid for his services at the, after he was in which he went and caught people for army service. He states in which community comissioner. He described this job as a volunteer job guerrillas killed a person in 1984, and, thereafter, he became a various jobs in Guatemala. The respondent claimed that the application for asylum of his father. The respondent held years of age. And, therefore, he is not included in the children. One of the children lives with them, and he is 24-testified that he is married, and that he and his spouse have 8 in Guatemala City in Guatemala, the capital. The respondent immediately before coming to the United States, he lived in Mexico he was born in Aldea Chuxan, Chiquique in Quiche, Guatemala. of the respondent testified briefly. The respondent stated that male respondent testified at length during the hearing. The wife against Torture and Voluntary Departure, in the alternative under 241(b) (3), relief under Article III of the Convention. The respondents are seeking asylum, withholding of removal country for removal purposes.

decided to name a country. The Court has named Guatemala as the their respective notices to appear. Both respondents have evidence that is clear and convincing on each of their charges in the testimony, I find that removability has been sustained by admissions, as well as the evidence in each of their cases and through 4, and concede removability as charged. Based on these pleadings, the respondents admit the factual allegations 1.

injured apparently in consideration of the service that he had given in what appears to be a kind of civil patrol, he was given a rank of second soldier and that was so his wife would receive some money, I guess due to his, because he had been injured. I note, however, that in the documents that the respondent has provided in Exhibit 9 was one document that's curious in right of the status of the military commissioneer. He does have the right to bear arms, although its misspelled, page 23 is the translation Article 38 the military commissioneer's and assistants that wish to exercise their civil, political rights, they have to renounce their charge in the military. It's unclear exactly what civil, political rights would be, but it does seem to indicate that the respondent held some position that was not merely a civilian

wanted for them in terms of "recruiting," but he did not appear to be on a payroll. It does not appear that he was ever issued a military uniform, but he did receive a .38 for protection. Seems to be some hybrid status. As to the assessment to refer, I think to be some hybrid status, and the fact that he was, that he was not paid. I don't find that to be an inconsistency as the Service commissioneer status, and the fact that he was, that he was not found originally, but, again, it seems to be some type of hybrid paid. The respondent has more or less explained his military status, neither wholly military nor wholly civilian but without pay. The respondent had an incident with the guerrillas when they found originally, but, again, it seems to be some type of hybrid paid.

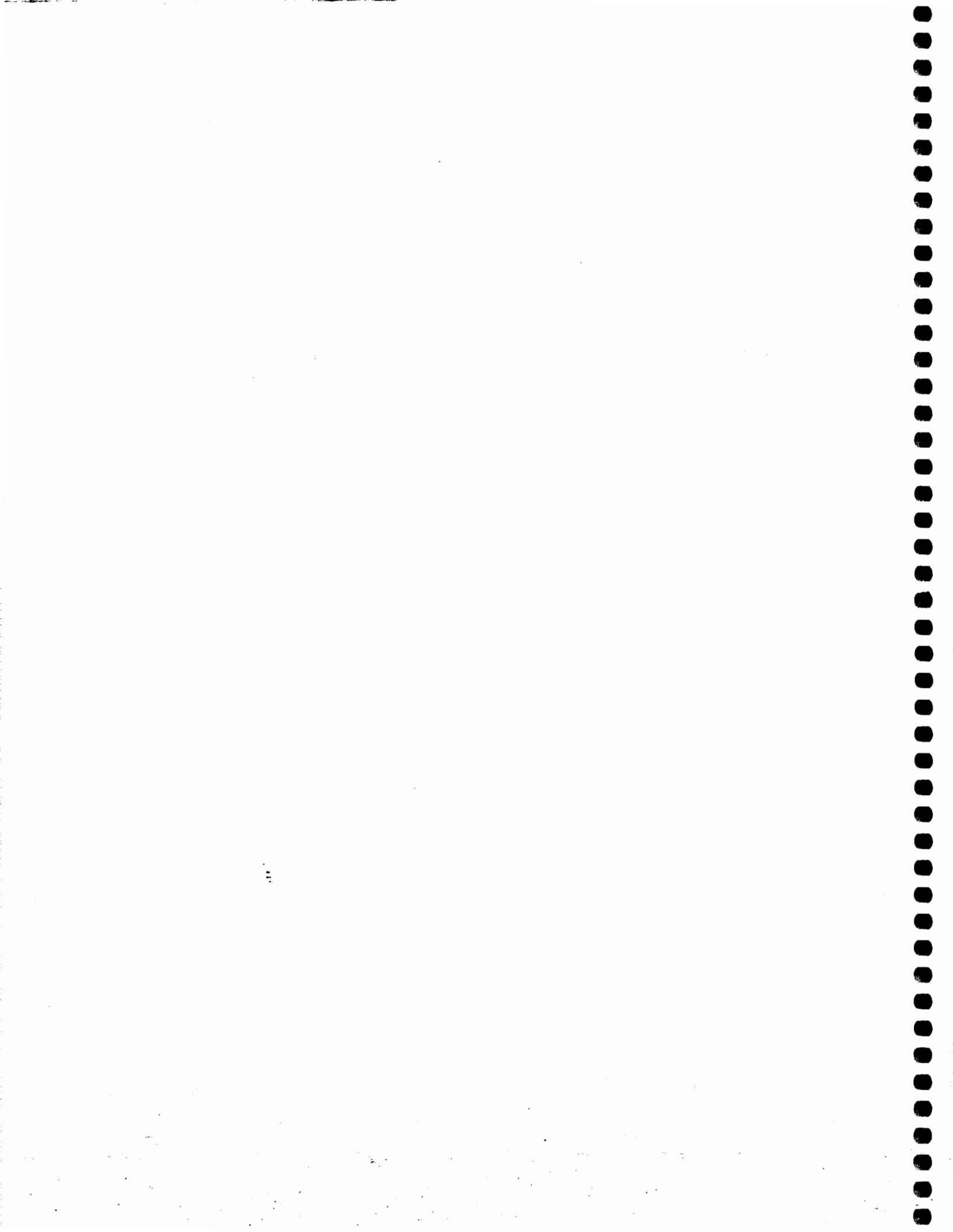
he was directly targeted, but it sounds more as though he may vague on that particular incident. The respondent believes that not permanently injured on that occasion. The facts are a little trouble at that time with a type of injury to his eyes but he was apparently a, some type of land mine went off, and he had some in '82, and then when he was in a field, I believe, working and encountered directly guerrillas, according to his testimony, was harassing him. However, the only time that he guerrillas, harassing him. That he received numerous notes from people whom he believed to be that he received a military commissioneer in '84. Respondent claims appointed him a military commissioneer in '84. Respondent claims respondent apparently went to local military, and then they in the course of his testimony. This occurred in '82. The burn down a town building; although, that was never brought out states that he believes that his gasoline might have been used to help them in the future. In the application, the respondent have it. He stated that they said to him that he also had to that he was working, and that if they wanted the gas, they could him some money for the gas, but he refused the money and stated who the respondent described as the guerrillas actually offered it, and then he was released and they took the gas. The person him that he had some gas in his truck that they had not spotted respondent had a filter. He then told the person who was holding and siphon off gas. They were unable to do it because the random stop, simply stop someone on the road to try to get gas stopped him to try to siphon off his gas. This appeared to be a

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have been in an area controlled by the guerrillas and they may have, it appears to have been land mines planted in the area. The Court describes the planting of land mines and it certainly maimed and injured many, many people throughout the world, particularly children. It is not uncommon for areas, contested areas, especially rural contested areas to be mined and that been any direct targeting of the respondent on that incident. The next incident was in '92 at about 8 a.m. The respondent was going to buy brown sugar from a town and was on his way to Joyabaj. He said it was about 8 in the morning. There was not much traffic, as most people had already passed. It was apparently a, a mountain road or at least a hill, a road on a hill. It sounded more mountainous than what this description was, with people, coming down the mountain around the curve, and when it came round, it swerved somewhat into his lane. He went off the side of the road to avoid a collision, about a yard off of the road. It was a two-lane paved highway, or paved road. The respondent said that just as he went off to side of the road, about 5 seconds after the large bus passed by him, a large explosion occurred about 10 meters away. He stated that he saw the explosion and there was no one on the street or on the road at that time as far as pedestrians. He did say that he saw a number of people in green uniforms. Respondent stated that he

saw people in green, green clothing, and he was, I guess, unable to see them after the blast, which appears to have been a land mine from his description. But he was able to make out about 25 to 30 people in green running in his direction. There seem to be a lot more people further away. The respondent also said that there was a small truck coming down the road after, in the same direction as the bus, and about half a kilometer behind the bus. He gave various, varying testimony about this because he said he had been shot by then so he didn't really see the truck. Although he believes that the truck -- the respondent first had been shot by then so he didn't see the truck.

Although he believes that the truck that he was aware of, possibly aware of another truck coming down the road in the same direction as the bus but stated that he didn't see them, but in the truck, but the people in the truck saw him, and he did indicate that he had been shot in the truck saw him, and he did receive a very serious wound. So he may have had some trouble with his perception at that time. I have the sense from his testimony that he was aware of, possibly aware of another truck coming down the road in the same direction as the bus but stated that he didn't have too much more information about it. The respondent stated that shortly, very shortly after the blast, he didn't have too much more information about it. The respondent's description it sounds as though they would have had a good vantage point as far as the curve in the road, he was ascending and they were above him, and so they would have been able to, would have had a fairly good position in which to fire. The, what the respondent has described appears to me to be an attack on traffic on that road. The respondent believes that he



respondent does, that he was specifically targeted. He states questions around this event, and I cannot assume, as the again, it's unclear exactly, but I believe that there are many slights may have triggered some explosion through some means. It's also unclear whether the respondent's going off of the road off about 10 meters away, and people then began firing on him. happened, and that is that he was driving on a road. A mine went know what the motivations are here. We have facts of what of general terrorism in the, in the area. It's simply unclear to decided to fire at random on traffic in the road in terms of sort why, either they didn't want to be discovered or they simply number of guerrillas there, and there may have been some reason represented the guerrillas. There seems to have been a large description of people in green and his understanding that, that was controlled by guerrillas, according to the respondent, was into hostile territory. It clearly seemed to be an area that appears that this simply may have been traffic that had found its separated by 5 seconds when this explosion went off. And it also of people, as well. They were side by side, just about, were aimed at anyone, it may well have been aimed at the bus full it may well have been intentional. It may well have been, if it whether it was an accident or explosion is unknown to the Court. about 10 meters away, whether this was intended for anyone or evidence of that. The, it appears that a land mine went off was specifically targeted, and I, however, have not found

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It does appear to me from these, from the facts that he was another Land mine blew up. And, again, it's most unfortunate, but that into his being forced to pass in a certain way apparently, the respondent appears to make some patrol in his area, and turns the worked. Again, if there was some type of a patrol going on, armed with automatic weapons that were surrounding the area where he was out working in a field there were a group of guerrillas of a Land mine. The respondent, in his I-589, states that while to milk cows, and, again, it seems to have been another explosion incident that he referred to he says he was, I think, on his way the five statutory grounds at the incident in 1992. The other the respondent was targeted in an, on account of one or more of assuming their truth for the moment, do not necessarily mean that respondent's testimony. But all of those things together, even left notes; although we have no proof of that other than the the military, and guerrillas may well have come to his home and commander, particularly if he was gathering up young men for other things. He may well have become known as the military give them in terms of material things, such as gas and perhaps guerrillas were interested in the respondent for what he could than probable, certainly. At first, it appears that the guerrillas who then lay in wait for him. I find that to be less for the guerrillas. And then gave this information to the morning on his trip, and he believes that this person was a "ear" that he had a friend who asked him when he was leaving in the db

of the five statutory grounds. Furthermore, the respondent, after he was injured, moved to a suburb of Guatemala City where he recuperated. He went to a military hospital. Again that indicates his status may was certainly more than a mere civilian, and because of his

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seriousness of his injuries. The, he was able to live there without difficulty while he was recuperating. He indicated that some people came to the hospital where he had been, and that there was an incident there. Again, as to whether this was related to the respondent or not it is simply a matter of something, but, again, we have only rumor and I don't find that conjecture. There is some indication from someone who told him that's reliable enough to substantiate a nexus. The respondent's spouse indicated that about half after the respondent left for the United States, some, about 2 or 3 people came to the home and asked one of the sons if the respondent was his father. The wife had instructed the children to say that he was not their father, and the son did that and, thereafter, these men left and he was, the respondent was never inquired after again. That was almost 10 years ago. The wife of the respondent moved to another home. She hired security, the respondent moved to another home. She and the 8 children, were able to live peacefully in her home with the security guard, and they were able to live, she and the 8 security about 2 or 3 times, and she indicates that she has no country about 2 or 3 times ago, and the, they maybe ended. It has ended some time ago, and the, they maybe fear of returning to Guatemala. I note that the civil was has fear of returning to Guatemala. I note that the civil was has demobilized combatance and there may be difficulty with crime, but it does not appear that the respondent has a well-founded fear of persecution on account of one or more of the five

S&P

statutorily eligible. I am not pleased that the female On the issue of Voluntary Departure, both appear to be concerning torture herself.

public official. The female respondent has not shown any issue tortured by the government or by through the acquisition of a have not shown, the respondent has not shown that he would be against Torture; however, considering the applications is they the spouse's pleading, they did not actually seek Convention and Stevic, 467 U.S. 407 (1984). In the respondent's pleading and for withholding of removal under 241(b)(3) of the Act. INS v founded fear standard, he cannot meet the more stringent standard because the respondent cannot meet the more generous well-lead cases.

Y-B-; Matter of H-; Matter of S-P-; Matter of S-M-J-; and other Matter of Acosta; Matter of Mogharabi; Matter of Doss; Matter of Cardozza-Fonseca; pertinent First Circuit cases; Board cases; considered lead cases on asylum. INS v Elias Zucharias; INS v asylum. In considering the respondent's asylum claim, I respondeant. I find that the respondent has not met his burden there is a sufficient nexus to show past persecution to this articles. Articles from 1981, and, again, I have not found that submitted, but I note that these were early on, these were 1981 consideration the other materials that the respondent has documents, Exhibits 13, and (indiscernible) and I also into statutorily grounds. The Service has also presented some

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Naturalization Service.

extension as may be granted by the District Director, Immigration this decision to leave on or before April 5, 2002 or any Immigration Naturalization Service within five business days of condition that each post a \$500 departure bond with the Voluntary Departure be, are the same are, hereby granted with the IT IS FURTHER ORDERED that the respondent's application for same are, hereby denied.

under Article III of the Convention Against Torture be, and the asylum; withholding of removal under 241(b)(3) of the Act; relief IT IS HEREBY ORDERED the respondent's applications for

ORDER

is the maximum allowed at the conclusion of the merits hearing. departure bond. I will give them a period of sixty days, which to both respondents on the condition that they post a \$500 her husband here. I shall grant voluntary Departure nonetheless she could use the multiple entries, she stayed permanently with after her visa expired as her terms of the length of time that and that was appropriate period of time and then returned. But appear on the first visit, she only stayed a couple of months, and used it a number of times to come back and forth. It does so she lied. She got the visa, and she came to the United States officer that her husband was here that she wouldn't get the visa. relatives here. She understood that if she told the consult respondent lied to get a visa indicating that she had no

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Immigration Judge
PATRICIA SHEPPARD

Adm in Juzgado

to Appear.

depart this country on or before April 5, 2002 or any extensions as may be granted by the District Director, and/or fail to post a \$500 bond each with the Immigration Naturalization Service, the following order shall enter without further proceedings. The respondents be, and the same are, hereby ordered removed and reported to Guatemala on the charge in their respective Notices of Appearance.

IT IS FURTHER ORDERED that should the respondents fail to

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Juan Ailio SAMAYOA Cabrera, A73 182 454
Blanca Margarita VELASQUEZ, A73 617 650,
Petitioners

v.

IMMIGRATION AND NATURALIZATION SERVICE
Respondent

**PETITION FOR REVIEW OF A FINAL ORDER OF
THE BOARD OF IMMIGRATION APPEALS**

and

MOTION FOR STAY OF DEPORTATION

Petitioner hereby requests that the First Circuit Court of Appeals review a final order of the Board of Immigration Appeals (hereinafter BIA or Board) issued on January 16th, 2003. This Petition for Review has been timely filed within 30 days of the Board's decision.

The BIA decision (attached as Exhibit A) affirmed without opinion the decision of the Immigration Judge (exhibit B), denying the Petitioner's applications for asylum, withholding of removal, and relief under Article III of the United Nations Convention Against Torture, and granting voluntary departure.

JURISDICTION

The First Circuit has jurisdiction pursuant to section 242(a)(1) of the Immigration and Nationality Act (the "permanent rules"). That section provides that judicial review of a

final order of removal is governed by chapter 158 of title 28 of the United States Code. That chapter, in turn, refers to the jurisdiction of the U.S. Courts of Appeals.

The Petitioners are the subjects of a final order of removal issued on January 16th, 2003. They are not subject to the bars to Circuit Court jurisdiction enumerated in section 242 of the INA, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). That section limits judicial review of denials of discretionary relief but creates an exception for asylum cases. INA section 242(a)(2)(B)(ii); 8 U.S.C. section 1252(a)(2)(B)(ii).

Therefore, this Court has jurisdiction under the permanent rules.

MOTION FOR STAY OF DEPORTATION

The Petitioners hereby move this court for a stay of deportation pending adjudication of their Petition for Review. The Petitioners are a husband and wife from Guatemala, a country wracked by violence, where Petitioner Juan Samayoa suffered protracted and severe persecution at the hands of armed rebel factions, on account of his support for, and complicity with, the country's military establishment¹.

Mr. Samayoa began his involvement with the Guatemalan military in the early 1980's, as a civilian recruiter for the government. In that capacity, he was responsible for recruiting soldiers. Although the position was a purely civilian one, Mr. Samayoa was identified as a government sympathizer, and an enemy, by the guerilla forces, and was targeted for attack.

¹ As his spouse, the female Petitioner was included in her husband's asylum application

He was stopped on the road, tied up, and held at gunpoint while rebels syphoned gas from his car; Mr. Samayoa believed that they were planning to use the gas to blow up government buildings. They told him that if he notified the army, they would kill him. Notwithstanding, Mr. Samayoa did relate the incident to a colonel in the army, who became concerned for Mr. Samayoa's life. He warned him to leave the town where he lived, and told him that he would elevate his standing in the government ranks to that of a military commissioner. In that role, he told Mr. Samayoa, he would be permitted to carry a weapon to protect himself.

Soon thereafter, in 1984, Mr. Samayoa began to receive written death threats at his house several times a month. The threats continued over the course of seven years, until approximately 1991. The letters addressed him by name; he estimated that, over the course of those seven years, he received between 30 and 50 of them. And as time went on, the threats escalated into targeted attacks on him and his family.

His wife discovered a bomb under their car. She was able to deactivate it before anyone was harmed. Later, Mr. Samayoa was falsely charged with kidnapping, a charge which he believes was trumped up by guerillas who were trying to get him into trouble.

In 1991, events came to a head. On one occasion, Mr. Samayoa working in a field when a group of guerillas, armed with automatic weapons, surrounded the area where he was working and forced him out of his work area, into an area laced with landmines. One exploded, and he suffered wounds on his chest and face. He was nearly blinded, and spent fifteen days in a military base hospital. On that same day, guerillas attacked the base, killing fifteen people.

Less than a year later, Mr. Samayoa was attacked again while driving on a highway, when a bomb exploded several meters away from him and, immediately after, men dressed in guerilla uniforms began shooting at him. He was wounded, and his car was riddled with bullets. A friend with whom he was driving took him to the closest hospital, where he was operated on and remained in a coma for three days. When he regained consciousness, he wanted to leave the hospital, but couldn't, because guerillas had surrounded the hospital, and were watching for him. Finally, he was smuggled out of the hospital in a truck, and was taken to a military base. From there, he was flown to the main hospital in Guatemala City.

When he was in the capital, a group of armed guerillas entered the hospital which he had just left, looking for him. They knifed a hospital employee, and demanded to know where he was.

Mr. Samayoa was hospitalized for a month, operated on, and emerged, terrified and physically depleted. He went from the hospital to a house which his wife had rented in the San Jose neighborhood of Guatemala City, only to discover that the guerillas had come looking for him at his aunt's house, also in San Jose. Frightened for his life, and still physically unwell, Mr. Samayoa obtained a visa to the United States, and fled.

At trial, he submitted extensive documentation to corroborate the details of his claim, including hospital records and a newspaper article from Prensa Libre, one of Guatemala's leading newspapers, dated March 10th, 1992. That article, entitled "Military Commissioner Ambushed," reported that, "Military Commissioner Juan Alesico Samayoa was ambushed on the 8th of this month at 7:30 on the road which leads from Zacualpa to Joyabaj, Quiche, in another attempt by the delinquent subversives trying to cause unrest in the occupants of that

region." It went on to report that "the army condemns this act, which again makes evident that the insurgency has not even minimal respect for human rights nor for the physical integrity of Guatemalans." It includes a photograph of Mr. Samayoa, apparently unconscious, in a hospital bed (attached at Exhibit C).

Neither the Immigration Judge nor the Board of Immigration Appeals questioned Mr. Samayoa's credibility, and both appear to have accepted the facts which he laid forth in his written application, and at trial, as true.

On information and belief, the Petitioner has had no involvement with the police. By filing the instant petition for review, the Petitioners raise life and death issues concerning Mr. Samayoa's fear of persecution at the hands of armed guerilla factions who have already targeted him for attack and, in fact, nearly succeeded in killing him. A stay of deportation is critical to the Petitioner.

The Immigration Service will not be prejudiced by a stay of deportation. The Petitioners are not detained at government expense. The time spent in resolution of these legal issues will not create any hardship or prejudice to the Immigration Service.

Should the Court decline jurisdiction in this matter, the Petitioner requests that a stay of deportation remain in effect for an additional 30 days pending the filing of a new petition for writ of habeas corpus in the U.S. District Court.

Respectfully submitted,

2/4/2003
Date

Ilana Greenstein
Ilana Greenstein 62449, counsel for Petitioners

H.K.
Harvey Kaplan 18126, counsel for Petitioners

Maureen O'Sullivan
Maureen O'Sullivan 45907

Jeremiah Friedman
Jeremiah Friedman 7981
Kaplan, O'Sullivan & Friedman
10 Winthrop Square, 3rd floor
Boston, MA 02110
(617) 482-4500

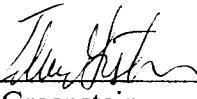
CERTIFICATE OF SERVICE

I, Ilana Greenstein, hereby certify that I have served a copy of the foregoing Petition for Review by sending, postage prepaid this 7th day of February, 2003 to:

Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

and to:

Fred McGrath, District Counsel
Immigration and Naturalization Service
John F. Kennedy Federal Building
Government Center
Boston, MA 02203



Ilana Greenstein

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Juan Alicia SAMAYOA Cabrera, A73 182 454
Blanca Margarita VELASQUEZ, A73 617 650
Petitioners

v.

IMMIGRATION AND NATURALIZATION SERVICE
Respondent

**PETITION FOR REVIEW OF A FINAL ORDER OF
THE BOARD OF IMMIGRATION APPEAL**

and

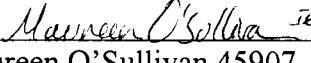
MOTION FOR STAY OF DEPORTATION

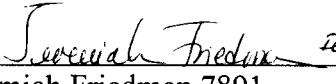
NOTICE OF APPEARANCE

Please note the appearance as counsel for the Petitioner:


Ilana Greenstein 62449


Harvey Kaplan 18126


Maureen O'Sullivan 76
Maureen O'Sullivan 45907


Jeremiah Friedman 7891

Kaplan, O'Sullivan & Friedman, LLP
Ten Winthrop Square, 3rd Floor
Boston, MA 02110
(617) 482-4500

Exhibit A
Decision of the Board of Immigration Appeals



U.S. Department of ~~Office~~

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Kaplan, Harvey
Ten Winthrop Square
3rd Floor
Boston, MA 02110-0000

Office of the District Counsel/BO
P.O. Box 8728
Boston, MA 02114

Name: SAMAYOA CABRERA, JUAN ALICIO
Riders: 73-617-650

A73-182-454

Date of this notice: 01/16/2003

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Jeffrey Fratter
Chief Clerk

Enclosure

Panel Members:
HESS, FRED

**U.S. Department of Justice
Executive Office for Immigration Review**

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A73-182-454 - Boston

Date:

JAN 16 2003

In re: SAMAYOA CABRERA, JUAN ALICIO

IN REMOVAL PROCEEDINGS

APPEAL

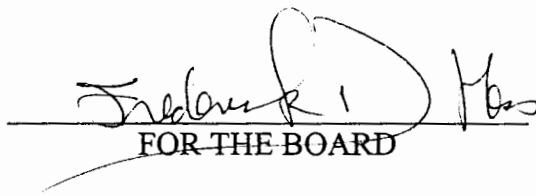
ON BEHALF OF RESPONDENT: Kaplan, Harvey

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than \$1,000 and not more than \$5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.


Harvey S. Kaplan
FOR THE BOARD

**U.S. Department of Justice
Executive Office for Immigration Review**

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A73-617-650 - Boston

Date:

JAN 16 2003

In re: VELASQUEZ, BLANCA MARGARITA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kaplan, Harvey

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than \$1,000 and not more than \$5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.


FOR THE BOARD

Exhibit B
Decision of the Immigration Judge

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Boston, Massachusetts

Lead File A 73 182 454

February 2, 2002

In the Matter of

JUAN ALICIO SAMAYOA CABRERA,) IN REMOVAL PROCEEDINGS
)
)
Lead Respondent)

AND

File A 73 617 650

In the Matter of

BLANCA MARGARITA VELASQUEZ,) IN REMOVAL PROCEEDINGS
)
a/k/a BLANCA MARGARITA)
)
VELASQUEZ-RODRIGUEZ)
)
a/k/a BLANCA MARGARITA SAMAYOA,)
spouse of the respondent)
)
)
Respondent)

CHARGE: Section 212(a)(6)(A)(i) of the Immigration & Nationality Act for the Lead Respondent; and Section 237(a)(1)(B) of the Immigration & Nationality Act for the spouse of the Lead Respondent.

APPLICATIONS: Asylum; Withholding of Removal Under Section 241(b)(3) of the Act; Relief Under Article III of the Convention Against Torture; and Voluntary Departure, in the alternative.

dh

ON BEHALF OF RESPONDENTS:

Susan Mills, Esquire
1165 Elmwood Avenue
Providence, RI 02907

ON BEHALF OF SERVICE:

Susan Hiller, Esquire
Assistant District Counsel
JFK Federal Building, Room 425
15 New Sudberry Street
Boston, MA 02203

ORAL ARGUMENT OF THE IMMIGRATION JUDGE

The respondents herein a married couple, the male respondent is the lead respondent. And in the course of my decision I will refer to the respondent, and I am referring to the lead respondent there. When I refer to the second respondent, I'll refer to her as the spouse of the respondent to make things simpler.

The respondents are natives and citizens of Guatemala. Removal proceedings were instituted against them when the Immigration Naturalization Service issued a Notice to Appear in each of their cases on October 11, 2000. Served it upon them by mailing it by regular mail to them, to each of them on November 30th 2000 and December 13th 2000 respectively. The Immigration Service filed their Notices to Appear with the Immigration Court at Boston, Massachusetts on December 1st 2000 and December 15th 2000 respectively. See Exhibits 1 and 1-A in their cases. By way of these documents, the Service contends that the respondents are removable on different charges, and they are stated above. The respondents, through counsel, submitted pleadings. The male respondent's pleadings are at Exhibit 3, and the female respondent's pleadings are Exhibit 5-A. In their respective

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pleadings, the respondents admit the factual allegations 1 through 4, and concede removability as charged. Based on these admissions, as well as the evidence in each of their cases and the testimony, I find that removability has been sustained by evidence that is clear and convincing on each of their charges in their respective notices to appear. Both respondents have declined to name a country. The Court has named Guatemala as the country for removal purposes.

The respondents are seeking asylum, withholding of removal under 241(b)(3), relief under Article III of the Convention Against Torture and Voluntary Departure, in the alternative. The male respondent testified at length during the hearing. The wife of the respondent testified briefly. The respondent stated that he was born in Aldea Chuaxan, Chinique in Quiche, Guatemala. Immediately before coming to the United States, he lived in Mixco in Guatemala City in Guatemala, the capital. The respondent testified that he is married, and that he and his spouse have 8 children. One of the children lives with them, and he is 24-years of age. And, therefore, he is not included in the application for asylum of his father. The respondent held various jobs in Guatemala. The respondent claimed that the guerillas killed a person in 1984, and, thereafter, he became a military commissioner. He described this job as a volunteer job in which he went and caught people for army service. He states that he was not paid for his services at the, after he was

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injured apparently in consideration of the service that he had given in what appears to be a kind of civil patrol, he was given a rank of second soldier and that was so his wife would receive some money, I guess due to his, because he had been injured. I note, however, that in the documents that the respondent has provided in Exhibit 9 was one document that's curious in light of the status of the military commissioner. He does have the right to bear arms, although its misspelled, page 23 is the translation of the document, but at number, page 25 of Exhibit 9, it says Article 38 the military commissioner's and assistants that wish to exercise their civil, political rights, they have to renounce their charge in the military. It's unclear exactly what civil, political rights would be, but it does seem to indicate that the respondent held some position that was not merely a civilian patrol. He was under the auspices apparently of the military and worked for them in terms of "recruiting," but he did not appear to be on a payroll. It does not appear that he was ever issued a military uniform, but he did receive a .38 for protection. Seems to be some hybrid status. As to the assessment to refer, I think the respondent has more or less explained his military commissioner status, and the fact that he was, that he was not paid. I don't find that to be an inconsistency as the Service found originally, but, again, it seems to be some type of hybrid status, neither wholly military nor wholly civilian but without pay. The respondent had an incident with the guerillas when they

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stopped him to try to siphon off his gas. This appeared to be a random stop, simply stop someone on the road to try to get gas and siphon off gas. They were unable to do it because the respondent had a filter. He then told the person who was holding him that he had some gas in his truck that they had not spotted it, and then he was released and they took the gas. The person who the respondent described as the guerillas actually offered him some money for the gas, but he refused the money and stated that he was working, and that if they wanted the gas, they could have it. He stated that they said to him that he also had to help them in the future. In the application, the respondent states that he believes that his gasoline might have been used to burn down a town building; although, that was never brought out in the course of his testimony. This occurred in '82. The respondent apparently went to local military, and then they appointed him a military commissioner in '84. Respondent claims that he received numerous notes from people whom he believe to be guerillas, harassing him. However, the only time that he encountered directly guerillas, according to his testimony, was in '82, and then when he was in a field, I believe, working and apparently a, some type of land mine went off, and he had some trouble at that time with a type of injury to his eyes but he was not permanently injured on that occasion. The facts are a little vague on that particular incident. The respondent believes that he was directly targeted, but it sounds more as though he may

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have been in an area controlled by the guerillas and they may have, it appears to have been land mines planted in the area. The Court decries the planting of land mines and it certainly maimed and injured many, many people throughout the world, particularly children. It is not uncommon for areas, contested areas, especially rural contested areas to be mined and that appears to have been the situation. It doesn't appear to have been any direct targeting of the respondent on that incident. . The next incident was in '92 at about 8 a.m. The respondent was going to buy brown sugar from a town and was on his way to Joyabaj. He said it was about 8 in the morning. There was not much traffic, as most people had already passed. It was apparently a, a mountain road or at least a hill, a road on a hill. It sounded more mountainous than what his description was, and it was at a curve in the road. There was a large bus, filled with people, coming down the mountain around the curve, and when it came round, it swerved somewhat into his lane. He went off the side of the road to avoid a collision, about a yard off of the road. It was a two-lane paved highway, or paved road. The respondent said that just as he went off to side of the road, about 5 seconds after the large bus passed by him, a large explosion occurred about 10 meters away. He stated that he saw the explosion and there was no one on the street or on the road at that time as far as pedestrians. He did say that he saw a number of people in green uniforms. Respondent stated that he

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saw people in green, green clothing, and he was, I guess, unable to see them after the blast, which appears to have been a land mine from his description. But he was able to make out about 25 to 30 people in green running in his direction. There seem to be a lot more people further away. The respondent also said that there was a small truck coming down the road after, in the same direction as the bus, and about half a kilometer behind the bus. He gave various, varying testimony about this because he said he had been shot by then so he didn't really see the truck. Although he believes that the truck -- the respondent first stated that he didn't see them, but in the truck, but the people in the truck saw him, and he did indicate that he had been shot and did receive a very serious wound. So he may have had some trouble with his perception at that time. I have the sense from his testimony that he was aware of, possibly aware of another truck coming down the road in the same direction as the bus but he didn't have too much more information about it. The respondent stated that shortly, very shortly after the blast, he was fired upon from above by people in green, and from the respondent's description it sounds as though they would have had a good vantage point as far as the curve in the road, he was ascending and they were above him, and so they would have been able to, would have had a fairly good position in which to fire. The, what the respondent has described appears to me to be an attack on traffic on that road. The respondent believes that he

sdh

was specifically targeted, and I, however, have not found evidence of that. The, it appears that a land mine went off about 10 meters away, whether this was intended for anyone or whether it was an accident or explosion is unknown to the Court. It may well have been intentional. It may well have been, if it were aimed at anyone, it may well have been aimed at the bus full of people, as well. They were side by side, just about, separated by 5 seconds when this explosion went off. And it also appears that this simply may have been traffic that had found its way into hostile territory. It clearly seemed to be an area that was controlled by guerillas, according to the respondent's description of people in green and his understanding that, that represented the guerillas. There seems to have been a large number of guerillas there, and there may have been some reason why, either they didn't want to be discovered or they simply decided to fire at random on traffic in the road in terms of sort of general terrorism in the, in the area. It's simply unclear to know what the motivations are here. We have facts of what happened, and that is that he was driving on a road. A mine went off about 10 meters away, and people then began firing on him. It's also unclear whether the respondent's going off of the road slightly may have triggered some explosion through some means. Again, it's unclear exactly, but I believe that there are many questions around this event, and I cannot assume, as the respondent does, that he was specifically targeted. He states

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that he had a friend who asked him when he was leaving in the morning on his trip, and he believes that this person was a "ear" for the guerillas. And then gave this information to the guerillas who then lay in wait for him. I find that to be less than probable, certainly. At first, it appears that the guerillas were interested in the respondent for what he could give them in terms of material things, such as gas and perhaps other things. He may well have become known as the military commissioner, particularly if he was gathering up young men for the military, and guerillas may well have come to his home and left notes; although we have no proof of that other than the respondent's testimony. But all of those things together, even assuming their truth for the moment, do not necessarily mean that the respondent was targeted in an, on account of one or more of the five statutory grounds at the incident in 1992. The other incident that he referred to he says he was, I think, on his way to milk cows, and, again, it seems to have been another explosion of a land mine. The respondent, in his I-589, states that while he was out working in a field there were a group of guerillas armed with automatic weapons that were surrounding the area where he worked. Again, if there was some type of a patrol going on, the respondent appears to make some patrol in his area, and turns that into his being forced to pass in a certain way apparently, another land mine blew up. And, again, its most unfortunate, but it does appear to me from these, from the facts that he was

sdh

specifically targeted; although, it does appear that he had some injury to his face and to his chest, but recovered from them. The respondent also claims that in 1990 the guerillas put a bomb under his car, and left propaganda scattered about, but his wife discovered it in time and was able to safely remove it. I suppose she's either a very brave lady or it was not a very substantial destructive device, but, at any rate, he was spared and they were all spared any injury. It does appear that the incident that the respondent is most concerned about is the one where he received the serious injury to his lung where a bullet went through his body, puncturing his lung and he was very severely injured. The, further concerning the incident in 1992, he indicated that it occurred 10 leagues from his home, and that there are four kilometers in a league, so that the respondent was about 40 kilometers from home. And, again, it makes it somewhat unlikely that the, that these people that had left notes for him, assuming those notes were in fact left, would necessarily be the same people who shot at him on the highway or that they had information that specifically targeted him. I find that the respondent has not shown past persecution on account one or more of the five statutory grounds.

Further, the respondent, after he was injured, moved to a suburb of Guatemala City where he recuperated. He went to a military hospital. Again that indicates his status may was certainly more than a mere civilian, and because of his

sdh

seriousness of his injuries. The, he was able to live there without difficulty while he was recuperating. He indicated that some people came to the hospital where he had been, and that there was an incident there. Again, as to whether this was related to the respondent or not is simply a matter of conjecture. There is some indication from someone who told him something, but, again, we have only rumor and I don't find that it's reliable enough to substantiate a nексис.

The respondent's spouse indicated that about a month and a half after the respondent left for the United States, some, about 2 or 3 people came to the home and asked one of the sons if the respondent was his father. The wife had instructed the children to say that he was not their father, and the son did that and, thereafter, these men left and he was, the respondent was never inquired after again. That was almost 10 years ago. The wife of the respondent moved to another home. She hired security, security guard, and they were able to live, she and the 8 children, were able to live peacefully in her home with the security. The female respondent has come and gone to this country about 2 or 3 times, and she indicates that she has no fear of returning to Guatemala. I note that the civil was has ended. It has ended some time ago, and the, they maybe demobilized combatance and there may be difficulty with crime, but it does not appear that the respondent has a well-founded fear of persecution on account of one or more of the five

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statutory grounds. The Service has also presented some documents, Exhibits 13, and (indiscernible) and I also into consideration the other materials that the respondent has submitted, but I note that these were early on, these were 1981 articles. Articles from 1981, and, again, I have not found that there is a sufficient nexus to show past persecution to this respondent. I find that the respondent has not met his burden for asylum. In considering the respondent's asylum claim, I considered lead cases on asylum. INS v Elias Zacharias; INS v Cardoza-Fonseca; pertinent First Circuit cases; Board cases; Matter of Acosta; Matter of Mogharrabi; Matter of Doss; Matter of Y-B-; Matter of H-; Matter of S-P-; Matter of S-M-J-; and other lead cases.

Because the respondent cannot meet the more generous well-founded fear standard, he cannot meet the more stringent standard for withholding of removal under 241(b)(3) of the Act. INS v Stevic, 467 U.S. 407 (1984). In the respondent's pleading and the spouse's pleading, they did not actually seek Convention Against Torture; however, considering the applications is they have not shown, the respondent has not shown that he would be tortured by the government or by through the acquiesce of a public official. The female respondent has not shown any issue concerning torture herself.

On the issue of Voluntary Departure, both appear to be statutorily eligible. I am not pleased that the female

sdh

respondent lied to get a visa indicating that she had no relatives here. She understood that if she told the Consult Officer that her husband was here that she wouldn't get the visa. So she lied. She got the visa, and she came to the United States and used it a number of times to come back and forth. It does appear on the first visit, she only stayed a couple of months, and that was appropriate period of time and then returned. But after her visa expired as her terms of the length of time that she could use the multiple entries, she stayed permanently with her husband here. I shall grant Voluntary Departure nonetheless to both respondents on the condition that they post a \$500 departure bond. I will give them a period of sixty days, which is the maximum allowed at the conclusion of the merits hearing.

ORDER

IT IS HEREBY ORDERED the respondent's applications for asylum; withholding of removal under 241(b)(3) of the Act; relief under Article III of the Convention Against Torture be, and the same are, hereby denied.

IT IS FURTHER ORDERED that the respondent's application for Voluntary Departure be, are the same are, hereby granted with the condition that each post a \$500 departure bond with the Immigration Naturalization Service within five business days of this decision to leave on or before April 5, 2002 or any extension as may be granted by the District Director, Immigration Naturalization Service.

sdh

IT IS FURTHER ORDERED that should the respondents fail to depart this country on or before April 5, 2002 or any extensions as may be granted by the District Director, and or fail to post a \$500 bond each with the Immigration Naturalization Service, the following order shall enter without further proceedings. The respondents be, and the same are, hereby ordered removed and deported to Guatemala on the charge in their respective Notices to Appear.

PATRICIA SHEPPARD
Immigration Judge

Exhibit C
Copy of Prensa Libre newspaper article

Guatemala March 10, 1992 Prensa Libre, 17

Military Commissioner Ambushed

The Military Commissioner Juan Aleiso Samayoa, was ambushed on the 8th of this month at 7:30 on the road which leads from Zacualpa to Joyabaj, Quiche, in another attempt by the delinquent subversives trying to cause unrest in the occupants of that region, says army public relations. (DIDE)

"Samayoa, who serves with the Guatemalan army, is highly esteemed in his community, and his neighbors have thus repudiated the attempt against his person; he was wounded in the right lung, making it necessary to transfer him to the military medical center in the capital where he will stabilize," added the DIDE

"The army condemns this act, which again makes evident that the insurgency has not even minimal respect for humane rights nor for the physical integrity of Guatemalans.

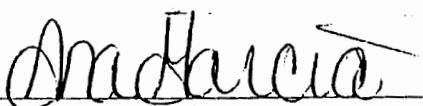
(Photo) Military commissioner, Juan Samayoa, (PL)

CERTIFICATION OF TRANSLATOR'S COMPETENCE

I, Ana Garcia, hereby certify that the above is an accurate translation of the original certification in Spanish and that I am competent in both English and Spanish to render such translation.

Date: 3-23-01
130 Unit St.
Providence, RI 02909

Signature:



Ana Garcia
401-621-8455

Guatemala,
10 de marzo de 1992

PRENSA LIBRE 17

Emboscán a comisionado militar

EL COMISIONADO militar Juan Alesio Samayoa, fue emboscado el pasado 8 de los corrientes, a las 7:30 horas en el camino que conduce de Zacualpa a Joyabaj, Quiché, en un atentado más de los delincuentes subversivos que pretenden intranquilizar a los habitantes de esa región, dice relaciones públicas del ejército (DIDE).

"Samayoa, quien presta sus servicios al ejército de Guatemala, goza de mucha estimación en su comunidad, por lo que los vecinos han repudiado el atentado en contra de su persona; resultó herido en el pulmón derecho, siendo necesario su traslado al centro médico militar en la capital, donde se re establece", agrega el DIDE.

"El ejército condena este hecho, que pone de nuevo en evidencia que no existe el mínimo respeto por los derechos humanos ni por la integridad física de los guatemaltecos, por parte de la insurgencia."



COMISIONADO militar, Juan Alesio Samayoa. (PL)

To be filed by:

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEARANCE FORM

2003 FEB 25 A 10:40

Case No. 3-1180 Samayoa Cabrera v. INS

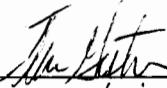
FILED IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIRST CIRCUIT

FAILURE TO FILL OUT COMPLETELY MAY RESULT IN THE REJECTION
OF THIS FORM AND COULD AFFECT THE PROGRESS OF THE APPEAL

THE CLERK WILL ENTER MY APPEARANCE AS COUNSEL ON BEHALF OF:

Juan SAMAYOA and Blanca Margarita VELASQUEZ as the
(Specify name of person or entity represented)

- appellant(s) appellee(s) amicus curiae
 petitioner(s) respondent(s) intervenor(s)
 I do not represent a party to the appeal.



(signature)

(SIGN ONLY IF PARTICIPATING)

Corrections:

Status: a

Ilana Greenstein, Esq.

Kaplan, O'Sullivan & Friedman

Ten Winthrop Square

3rd floor

Boston, MA 02110

Telephone: (617)482-4500

Court Of Appeals Bar Number: 62449

Fax: (617)422-0997

E-Mail: igreenstein @ kof-law.com

Has this case or any related case previously been on appeal?

Yes _____

Court of Appeals No. _____

No ✓

IF YOU WILL NOT BE PARTICIPATING IN THIS CASE, PLEASE CHECK HERE AND RETURN, AND GIVE US THE NAME AND ADDRESS OF ANOTHER ATTORNEY, IF ANY, WHO WILL PROVIDE APPELLATE REPRESENTATION.

NOTE: Must be signed by an Attorney admitted to practice before the United States Court of Appeals for the First Circuit pursuant to Local Rule 46(a)(2). If you are applying for admission, please return this appearance form **with** your application for admission.

If your name has changed since you were admitted to the First Circuit Bar PLEASE show the name under which you were admitted.

COUNSEL MUST COMPLETE & RETURN THIS APPEARANCE FORM
IN ORDER TO FILE PLEADINGS IN THIS COURT

To be filed by:

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEARANCE FORM

203 FED 25 A 10:40

Case No. 3-1180 Samayoa Cabrera v. INS

FILED IN CLERK'S OFFICE
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

**FAILURE TO FILL OUT COMPLETELY MAY RESULT IN THE REJECTION
OF THIS FORM AND COULD AFFECT THE PROGRESS OF THE APPEAL**

THE CLERK WILL ENTER MY APPEARANCE AS COUNSEL ON BEHALF OF:

Juan SAMAYOA and Blanca Margarita VELASQUEZ as the
(Specify name of person or entity represented)

- appellant(s) appellee(s) amicus curiae
 petitioner(s) respondent(s) intervenor(s)
 I do not represent a party to the appeal.

Harvey Kaplan ¹⁶
(signature)

(SIGN ONLY IF PARTICIPATING)

Corrections:

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Has this case or any related case previously been on appeal?

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Court of Appeals No.

No ✓

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To be filed by:

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEARANCE FORM

Case No. 3-1180 Samayoa Cabrera v. INS

2003 FEB 25 A 10:40

FAILURE TO FILL OUT COMPLETELY MAY RESULT IN THE REJECTION
OF THIS FORM AND COULD AFFECT THE PROGRESS OF THE APPEAL
FOR THE FIRST CIRCUIT

THE CLERK WILL ENTER MY APPEARANCE AS COUNSEL ON BEHALF OF:

Juan SAMAYOA ; Blanca Margarita VELASQUEZ as the
(Specify name of person or entity represented)

- appellant(s) appellee(s) amicus curiae
 petitioner(s) respondent(s) intervenor(s)
 I do not represent a party to the appeal.

Maureen O'Sullivan
(signature)

(SIGN ONLY IF PARTICIPATING)

Corrections:

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Yes _____

Court of Appeals No. _____

No ✓

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COUNSEL MUST COMPLETE & RETURN THIS APPEARANCE FORM
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To be filed by:

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEARANCE FORM

Case No. 3-1180 Samayoa Cabrera v. INS 25 A.D. 40

FILED
FAILURE TO FILL OUT COMPLETELY MAY RESULT IN THE REJECTION
OF THIS FORM AND COULD AFFECT THE PROGRESS OF THE APPEAL
OF THE FIRST CIRCUIT

THE CLERK WILL ENTER MY APPEARANCE AS COUNSEL ON BEHALF OF:

Juan SAMAYOA and Blanca Margarita VELASQUEZ as the
(Specify name of person or entity represented)

- appellant(s) appellee(s) amicus curiae
 petitioner(s) respondent(s) intervenor(s)
 I do not represent a party to the appeal.

Jeremiah Friedman ¹⁶
(signature)

(SIGN ONLY IF PARTICIPATING)

Corrections:

Status: a

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E-Mail: jfriedman@kof-law.com

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Court of Appeals No.

No ✓

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COUNSEL MUST COMPLETE & RETURN THIS APPEARANCE FORM
IN ORDER TO FILE PLEADINGS IN THIS COURT

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
(617) 748-9057

APPEARANCE

No. 03-1180

JUAN ALICIO SAMAYOA CABRERA, ET AL.,

Petitioner

v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE US

Respondent

The Clerk will enter my appearance as Counsel for the

JOHN ASHCROFT, ATTORNEY GENERAL OF THE US

Name:

Brenda M O'Malley
Brenda M. O'Malley, Attorney

Address: Office of Immigration Litigation
Department of Justice, Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

Telephone: (202) 616-2872

Please inform this court if this case or any other related cases have previously been on appeal.

Yes _____ U.S. Court of Appeals Docket No. _____

No _____

--> This should be signed by a member of this court. (The appearance of a member of the bar of any court designated in F.R.A.P. Rule 46(a) will be entered subject to subsequent admission to practice in this court.) The firm name may be added.

COUNSEL SHOULD COMPLETE AND RETURN THIS APPEARANCE FORM FORTHWITH SO AS TO ENABLE THE CLERK TO GIVE NOTICE.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
(617) 748-9057

APPEARANCE

No. 03-1180

JUAN ALICIO SAMAYOA CABRERA, ET AL.,

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v.

JOHN ASHCROFT, ATTORNEY GENERAL OF THE US

Respondent

The Clerk will enter my appearance as Counsel for the

JOHN ASHCROFT, ATTORNEY GENERAL OF THE US



Name:

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Address: Office of Immigration Litigation
Department of Justice, Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

Telephone: (202) 305-3619

Please inform this court if this case or any other related cases have previously been on appeal.

Yes _____ U.S. Court of Appeals Docket No. _____

No _____

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COUNSEL SHOULD COMPLETE AND RETURN THIS APPEARANCE FORM FORTHWITH SO AS TO ENABLE THE CLERK TO GIVE NOTICE.

No. 03-1180

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

**JUAN ALICIO SAMAYOA CABRERA,
BLANCA MARGARITA VELASQUEZ,**

Petitioners,

v.

**JOHN D. ASHCROFT,¹
Attorney General of the United States,**

Respondent.

**RESPONDENT'S OPPOSITION TO PETITIONERS'
MOTION FOR A STAY OF REMOVAL**

Respondent, Attorney General John Ashcroft, through undersigned counsel, respectfully opposes Petitioners' motion for a stay of removal. Petitioners present neither evidence nor argument in support of their request that shows clearly and convincingly that they qualify for a stay of removal.

¹ Pursuant to section 242(b)(3)(A) of the Immigration and Nationality Act ("INA"), the proper respondent in a petition for review of an order of removal is the Attorney General, not the Immigration and Naturalization Service as set forth in Petitioners' petition for review and motion for a stay. See INA § 242(b)(3)(A), 8 U.S.C. § 1252(b)(3)(A).

ARGUMENT

Section 242(f)(2) of the INA, 8 U.S.C. § 1252(f)(2), governs the granting of a stay in cases such as this one, where the alien was placed in removal proceedings on or after April 1, 1997:

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

INA § 242(f), 8 U.S.C.A. § 1252(f).

Petitioners are natives and citizens of Guatemala. Petitioner Cabrera was charged with being removable pursuant to INA section 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled, and Petitioner Velasquez was charged with being removable pursuant to INA section 237(a)(1)(B), 8 U.S.C. § 1227(a)(6)(A)(i), as an alien present in the United States in violation of law. Exhibit A at 1-2. During their removal hearing, Petitioners admitted that they were removable as charged. Id. at 3. After hearing the evidence, the immigration judge found Petitioners ineligible for asylum, withholding of deportation, and relief under the Convention Against Torture, but granted their request for voluntary departure relief. Id. at 13. On January 16, 2003, the Board of Immigration Appeals affirmed, without opinion, the immigration judge's decision. Exhibit B.

In their motion for a stay of removal, Petitioners have not attempted to demonstrate why their removal is prohibited as a matter of law. Instead, they list the evidence they presented below in an attempt to show that they should have been granted asylum. Thus, Petitioners have failed to meet their burden under section 242(f)(2) of the INA, 8 U.S.C. § 1252(f)(2), which requires a showing that removal is prohibited as a matter of law.

Assuming for the sake of argument that INA § 242(f)(2) did not apply to Petitioners' case, their request for a stay would fail even under the old law. Prior to the enactment of INA § 242(f)(2), an alien seeking a stay of deportation had to establish: (1) a likelihood of success on the merits; (2) irreparable injury; (3) balance of hardships in the movant's favor; and (4) that the stay of deportation would serve the public interest. See Cintron-Garcia v. Romero-Barcelo, 671 F.2d 1, 4 n.2 (1st Cir. 1982). Petitioners have not shown that it is likely they will succeed on the merits of their petition. In order to obtain reversal of the Board's asylum decision, Petitioners must show that the evidence they presented was so compelling that no reasonable factfinder could fail to find past persecution or a well-founded fear of future persecution. INS v. Elias-Zacarias, 502 U.S. 478, 483-84 (1992). Petitioners' evidence was not so compelling. See Petitioner's Petition for Review and Motion for Stay at 2-4.

Petitioners have not – and indeed, cannot – show by clear and convincing evidence that the execution of the Board's order of removal is prohibited as a matter of law. Accordingly, the Court should therefore deny the motion for a stay of removal.

CONCLUSION

For the foregoing reasons, the motion for a stay of removal should be denied.

Respectfully submitted,

ROBERT D. McCALLUM, JR.
Assistant Attorney General
Civil Division

DOUGLAS E. GINSBURG
Senior Litigation Counsel
Office of Immigration Litigation

Brenda M. O'Malley
BRENDA M. O'MALLEY
Attorney
Office of Immigration Litigation
Civil Division
Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 616-2872

Date: February 27, 2003

Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on February 27, 2003, one copy of the Respondent's Opposition to Petitioners' Motion For A Stay Of Removal was served on Petitioner, by having the copy placed in the Department of Justice mailroom in sufficient time for over-night mailing, first-class, postage prepaid, addressed to Petitioner's counsel of record:

Ilana Greenstein, Esq.
Kaplan, O'Sullivan & Friedman
Ten Winthrop Square
Third Floor
Boston, MA 02110

Brenda M. O'Malley
BRENDA M. O'MALLEY
Attorney
Office of Immigration Litigation
Civil Division
Department of Justice

EXHIBIT A

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Boston, Massachusetts

Lead File A 73 182 454

February 2, 2002

In the Matter of

JUAN ALICIO SAMAYOA CABRERA,) IN REMOVAL PROCEEDINGS
)
 Lead Respondent)

AND

File A 73 617 650

In the Matter of

BLANCA MARGARITA VELASQUEZ,) IN REMOVAL PROCEEDINGS
)
 a/k/a BLANCA MARGARITA)
 VELASQUEZ-RODRIGUEZ)
)
 a/k/a BLANCA MARGARITA SAMAYOA,)
 spouse of the respondent)
)
 Respondent)

CHARGE: Section 212(a)(6)(A)(i) of the Immigration &
 Nationality Act for the Lead Respondent; and
 Section 237(a)(1)(B) of the Immigration &
 Nationality Act for the spouse of the Lead
 Respondent.

APPLICATIONS: Asylum; Withholding of Removal Under Section
 241(b)(3) of the Act; Relief Under Article III of
 the Convention Against Torture; and Voluntary
 Departure, in the alternative.

dh

ON BEHALF OF RESPONDENTS:

Susan Mills, Esquire
1165 Elmwood Avenue
Providence, RI 02907

ON BEHALF OF SERVICE:

Susan Hiller, Esquire
Assistant District Counsel
JFK Federal Building, Room 425
15 New Sudberry Street
Boston, MA 02203

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents herein a married couple, the male respondent is the lead respondent. And in the course of my decision I will refer to the respondent, and I am referring to the lead respondent there. When I refer to the second respondent, I'll refer to her as the spouse of the respondent to make things simpler.

The respondents are natives and citizens of Guatemala. Removal proceedings were instituted against them when the Immigration Naturalization Service issued a Notice to Appear in each of their cases on October 11, 2000. Served it upon them by mailing it by regular mail to them, to each of them on November 30th 2000 and December 13th 2000 respectively. The Immigration Service filed their Notices to Appear with the Immigration Court at Boston, Massachusetts on December 1st 2000 and December 15th 2000 respectively. See Exhibits 1 and 1-A in their cases. By way of these documents, the Service contends that the respondents are removable on different charges, and they are stated above. The respondents, through counsel, submitted pleadings. The male respondent's pleadings are at Exhibit 3, and the female respondent's pleadings are Exhibit 5-A. In their respective

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pleadings, the respondents admit the factual allegations 1 through 4, and concede removability as charged. Based on these admissions, as well as the evidence in each of their cases and the testimony, I find that removability has been sustained by evidence that is clear and convincing on each of their charges in their respective notices to appear. Both respondents have declined to name a country. The Court has named Guatemala as the country for removal purposes.

The respondents are seeking asylum, withholding of removal under 241(b)(3), relief under Article III of the Convention Against Torture and Voluntary Departure, in the alternative. The male respondent testified at length during the hearing. The wife of the respondent testified briefly. The respondent stated that he was born in Aldea Chuaxan, Chinique in Quiche, Guatemala. Immediately before coming to the United States, he lived in Mixco in Guatemala City in Guatemala, the capital. The respondent testified that he is married, and that he and his spouse have 8 children. One of the children lives with them, and he is 24-years of age. And, therefore, he is not included in the application for asylum of his father. The respondent held various jobs in Guatemala. The respondent claimed that the guerillas killed a person in 1984, and, thereafter, he became a military commissioner. He described this job as a volunteer job in which he went and caught people for army service. He states that he was not paid for his services at the, after he was

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injured apparently in consideration of the service that he had given in what appears to be a kind of civil patrol, he was given a rank of second soldier and that was so his wife would receive some money, I guess due to his, because he had been injured. I note, however, that in the documents that the respondent has provided in Exhibit 9 was one document that's curious in light of the status of the military commissioner. He does have the right to bear arms, although its misspelled, page 23 is the translation of the document, but at number, page 25 of Exhibit 9, it says Article 38 the military commissioner's and assistants that wish to exercise their civil, political rights, they have to renounce their charge in the military. It's unclear exactly what civil, political rights would be, but it does seem to indicate that the respondent held some position that was not merely a civilian patrol. He was under the auspices apparently of the military and worked for them in terms of "recruiting," but he did not appear to be on a payroll. It does not appear that he was ever issued a military uniform, but he did receive a .38 for protection. Seems to be some hybrid status. As to the assessment to refer, I think the respondent has more or less explained his military commissioner status, and the fact that he was, that he was not paid. I don't find that to be an inconsistency as the Service found originally, but, again, it seems to be some type of hybrid status, neither wholly military nor wholly civilian but without pay. The respondent had an incident with the guerillas when they

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stopped him to try to siphon off his gas. This appeared to be a random stop, simply stop someone on the road to try to get gas and siphon off gas. They were unable to do it because the respondent had a filter. He then told the person who was holding him that he had some gas in his truck that they had not spotted it, and then he was released and they took the gas. The person who the respondent described as the guerillas actually offered him some money for the gas, but he refused the money and stated that he was working, and that if they wanted the gas, they could have it. He stated that they said to him that he also had to help them in the future. In the application, the respondent states that he believes that his gasoline might have been used to burn down a town building; although, that was never brought out in the course of his testimony. This occurred in '82. The respondent apparently went to local military, and then they appointed him a military commissioner in '84. Respondent claims that he received numerous notes from people whom he believe to be guerillas, harassing him. However, the only time that he encountered directly guerillas, according to his testimony, was in '82, and then when he was in a field, I believe, working and apparently a, some type of land mine went off, and he had some trouble at that time with a type of injury to his eyes but he was not permanently injured on that occasion. The facts are a little vague on that particular incident. The respondent believes that he was directly targeted, but it sounds more as though he may

sdh

have been in an area controlled by the guerillas and they may have, it appears to have been land mines planted in the area. The Court decries the planting of land mines and it certainly maimed and injured many, many people throughout the world, particularly children. It is not uncommon for areas, contested areas, especially rural contested areas to be mined and that appears to have been the situation. It doesn't appear to have been any direct targeting of the respondent on that incident. . The next incident was in '92 at about 8 a.m. The respondent was going to buy brown sugar from a town and was on his way to Joyabaj. He said it was about 8 in the morning. There was not much traffic, as most people had already passed. It was apparently a, a mountain road or at least a hill, a road on a hill. It sounded more mountainous than what his description was, and it was at a curve in the road. There was a large bus, filled with people, coming down the mountain around the curve, and when it came round, it swerved somewhat into his lane. He went off the side of the road to avoid a collision, about a yard off of the road. It was a two-lane paved highway, or paved road. The respondent said that just as he went off to side of the road, about 5 seconds after the large bus passed by him, a large explosion occurred about 10 meters away. He stated that he saw the explosion and there was no one on the street or on the road at that time as far as pedestrians. He did say that he saw a number of people in green uniforms. Respondent stated that he

sdh

saw people in green, green clothing, and he was, I guess, unable to see them after the blast, which appears to have been a land mine from his description. But he was able to make out about 25 to 30 people in green running in his direction. There seem to be a lot more people further away. The respondent also said that there was a small truck coming down the road after, in the same direction as the bus, and about half a kilometer behind the bus. He gave various, varying testimony about this because he said he had been shot by then so he didn't really see the truck.

Although he believes that the truck -- the respondent first stated that he didn't see them, but in the truck, but the people in the truck saw him, and he did indicate that he had been shot and did receive a very serious wound. So he may have had some trouble with his perception at that time. I have the sense from his testimony that he was aware of, possibly aware of another truck coming down the road in the same direction as the bus but he didn't have too much more information about it. The respondent stated that shortly, very shortly after the blast, he was fired upon from above by people in green, and from the respondent's description it sounds as though they would have had a good vantage point as far as the curve in the road, he was ascending and they were above him, and so they would have been able to, would have had a fairly good position in which to fire. The, what the respondent has described appears to me to be an attack on traffic on that road. The respondent believes that he

sdh

was specifically targeted, and I, however, have not found evidence of that. The, it appears that a land mine went off about 10 meters away, whether this was intended for anyone or whether it was an accident or explosion is unknown to the Court. It may well have been intentional. It may well have been, if it were aimed at anyone, it may well have been aimed at the bus full of people, as well. They were side by side, just about, separated by 5 seconds when this explosion went off. And it also appears that this simply may have been traffic that had found its way into hostile territory. It clearly seemed to be an area that was controlled by guerillas, according to the respondent's description of people in green and his understanding that, that represented the guerillas. There seems to have been a large number of guerillas there, and there may have been some reason why, either they didn't want to be discovered or they simply decided to fire at random on traffic in the road in terms of sort of general terrorism in the, in the area. It's simply unclear to know what the motivations are here. We have facts of what happened, and that is that he was driving on a road. A mine went off about 10 meters away, and people then began firing on him. It's also unclear whether the respondent's going off of the road slightly may have triggered some explosion through some means. Again, it's unclear exactly, but I believe that there are many questions around this event, and I cannot assume, as the respondent does, that he was specifically targeted. He states

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that he had a friend who asked him when he was leaving in the morning on his trip, and he believes that this person was a "ear" for the guerillas. And then gave this information to the guerillas who then lay in wait for him. I find that to be less than probable, certainly. At first, it appears that the guerillas were interested in the respondent for what he could give them in terms of material things, such as gas and perhaps other things. He may well have become known as the military commissioner, particularly if he was gathering up young men for the military, and guerillas may well have come to his home and left notes; although we have no proof of that other than the respondent's testimony. But all of those things together, even assuming their truth for the moment, do not necessarily mean that the respondent was targeted in an, on account of one or more of the five statutory grounds at the incident in 1992. The other incident that he referred to he says he was, I think, on his way to milk cows, and, again, it seems to have been another explosion of a land mine. The respondent, in his I-589, states that while he was out working in a field there were a group of guerillas armed with automatic weapons that were surrounding the area where he worked. Again, if there was some type of a patrol going on, the respondent appears to make some patrol in his area, and turns that into his being forced to pass in a certain way apparently, another land mine blew up. And, again, its most unfortunate, but it does appear to me from these, from the facts that he was

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specifically targeted; although, it does appear that he had some injury to his face and to his chest, but recovered from them. The respondent also claims that in 1990 the guerillas put a bomb under his car, and left propaganda scattered about, but his wife discovered it in time and was able to safely remove it. I suppose she's either a very brave lady or it was not a very substantial destructive device, but, at any rate, he was spared and they were all spared any injury. It does appear that the incident that the respondent is most concerned about is the one where he received the serious injury to his lung where a bullet went through his body, puncturing his lung and he was very severely injured. The, further concerning the incident in 1992, he indicated that it occurred 10 leagues from his home, and that there are four kilometers in a league, so that the respondent was about 40 kilometers from home. And, again, it makes it somewhat unlikely that the, that these people that had left notes for him, assuming those notes were in fact left, would necessarily be the same people who shot at him on the highway or that they had information that specifically targeted him. I find that the respondent has not shown past persecution on account one or more of the five statutory grounds.

Further, the respondent, after he was injured, moved to a suburb of Guatemala City where he recuperated. He went to a military hospital. Again that indicates his status may was certainly more than a mere civilian, and because of his

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seriousness of his injuries. The, he was able to live there without difficulty while he was recuperating. He indicated that some people came to the hospital where he had been, and that there was an incident there. Again, as to whether this was related to the respondent or not is simply a matter of conjecture. There is some indication from someone who told him something, but, again, we have only rumor and I don't find that it's reliable enough to substantiate a nexus.

The respondent's spouse indicated that about a month and a half after the respondent left for the United States, some, about 2 or 3 people came to the home and asked one of the sons if the respondent was his father. The wife had instructed the children to say that he was not their father, and the son did that and, thereafter, these men left and he was, the respondent was never inquired after again. That was almost 10 years ago. The wife of the respondent moved to another home. She hired security, security guard, and they were able to live, she and the 8 children, were able to live peacefully in her home with the security. The female respondent has come and gone to this country about 2 or 3 times, and she indicates that she has no fear of returning to Guatemala. I note that the civil was has ended. It has ended some time ago, and the, they maybe demobilized combatance and there may be difficulty with crime, but it does not appear that the respondent has a well-founded fear of persecution on account of one or more of the five

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statutory grounds. The Service has also presented some documents, Exhibits 13, and (indiscernible) and I also into consideration the other materials that the respondent has submitted, but I note that these were early on, these were 1981 articles. Articles from 1981, and, again, I have not found that there is a sufficient nexus to show past persecution to this respondent. I find that the respondent has not met his burden for asylum. In considering the respondent's asylum claim, I considered lead cases on asylum. INS v Elias Zacharias; INS v Cardoza-Fonseca; pertinent First Circuit cases; Board cases; Matter of Acosta; Matter of Mogharrabi; Matter of Doss; Matter of Y-B-; Matter of H-; Matter of S-P-; Matter of S-M-J-; and other lead cases.

Because the respondent cannot meet the more generous well-founded fear standard, he cannot meet the more stringent standard for withholding of removal under 241(b)(3) of the Act. INS v Stevic, 467 U.S. 407 (1984). In the respondent's pleading and the spouse's pleading, they did not actually seek Convention Against Torture; however, considering the applications is they have not shown, the respondent has not shown that he would be tortured by the government or by through the acquiesce of a public official. The female respondent has not shown any issue concerning torture herself.

On the issue of Voluntary Departure, both appear to be statutorily eligible. I am not pleased that the female

sdh

respondent lied to get a visa indicating that she had no relatives here. She understood that if she told the Consult Officer that her husband was here that she wouldn't get the visa. So she lied. She got the visa, and she came to the United States and used it a number of times to come back and forth. It does appear on the first visit, she only stayed a couple of months, and that was appropriate period of time and then returned. But after her visa expired as her terms of the length of time that she could use the multiple entries, she stayed permanently with her husband here. I shall grant Voluntary Departure nonetheless to both respondents on the condition that they post a \$500 departure bond. I will give them a period of sixty days, which is the maximum allowed at the conclusion of the merits hearing.

ORDER

IT IS HEREBY ORDERED the respondent's applications for asylum; withholding of removal under 241(b)(3) of the Act; relief under Article III of the Convention Against Torture be, and the same are, hereby denied.

IT IS FURTHER ORDERED that the respondent's application for Voluntary Departure be, are the same are, hereby granted with the condition that each post a \$500 departure bond with the Immigration Naturalization Service within five business days of this decision to leave on or before April 5, 2002 or any extension as may be granted by the District Director, Immigration Naturalization Service.

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IT IS FURTHER ORDERED that should the respondents fail to depart this country on or before April 5, 2002 or any extensions as may be granted by the District Director, and or fail to post a \$500 bond each with the Immigration Naturalization Service, the following order shall enter without further proceedings. The respondents be, and the same are, hereby ordered removed and deported to Guatemala on the charge in their respective Notices to Appear.

PATRICIA SHEPPARD
Immigration Judge

EXHIBIT B



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

Kaplan, Harvey
Ten Winthrop Square
3rd Floor
Boston, MA 02110-0000

Office of the District Counsel/BO
P.O. Box 8728
Boston, MA 02114

Name: SAMAYOA CABRERA, JUAN ALICIO
Riders: 73-617-650

A73-182-454

Date of this notice: 01/16/2003

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Jeffrey Fratter
Chief Clerk

Enclosure

Panel Members:
HESS, FRED

**U.S. Department of Justice
Executive Office for Immigration Review**

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A73-182-454 - Boston

Date:

JAN 16 2003

In re: SAMAYOA CABRERA, JUAN ALICIO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kaplan, Harvey

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than \$1,000 and not more than \$5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.


FOR THE BOARD

**U.S. Department of Justice
Executive Office for Immigration Review**

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A73-617-650 - Boston

Date:

JAN 16 2003

In re: VELASQUEZ, BLANCA MARGARITA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kaplan, Harvey

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than \$1,000 and not more than \$5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.


FOR THE BOARD

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

03-1180
Juan Ailio SAMAYOA Cabrera et. al.
Petitioners

v.

John ASHCROFT, Attorney General of the United States
Respondent

FILED IN CLERK'S OFFICE
U.S. COURT OF APPEALS
FOR THE FIRST CIRCUIT

2003 MAR - 7 AM 11:45

**PETITIONERS' RESPONSE
TO RESPONDENT'S OPPOSITION
TO PETITIONERS' MOTION FOR STAY OF DEPORTATION**

I INTRODUCTION.

Petitioners respectfully move this honorable Court to grant their motion for a stay of deportation despite the Respondent's opposition to that motion.

The Respondent bases his opposition to the Petitioners' motion on two grounds: He argues firstly that 8 USC §1252(f)(2) governs their motion and that, according to that provision, they are required to establish that their deportation from the United States is prohibited as a matter of law in order to prevail on their motion for a temporary stay pending adjudication of their petition for review. That provision does not, however, govern motions for temporary stays of deportation. Petitioner respectfully requests that this Court follow the leads of the Second, Sixth, Seventh and Ninth Circuit Courts of Appeals, and rule that a motion for a stay of deportation is governed not by 8 USC §1252(f)(2), but by the type of traditional equitable analysis laid forth by this Court in Cintron-Garcia v. Romero-Barcelo, 671 F.2d 1, 4 n.2 (1st Cir. 1982).

Because the Petitioners have established that they have a likelihood of success on the merits of their claims for relief, that they will suffer irreparable injury if deported, that the Attorney General of the United States will suffer no hardship if they are permitted to remain in the United States during the pendency of their petition for review, and that permitting them to do so would serve the public interest, Petitioners respectfully submit that they have met their burden, and warrant a temporary stay of deportation.

II ANALYSIS

1. 8 USC §1252(f)(2) DOES NOT GOVERN THE INSTANT MOTION.

Prior to 1997, an alien who appealed a decision of the Board of Immigration Appeals to a Circuit Court of Appeal was automatically entitled to a stay of deportation, unless the Court ordered otherwise. Former 8 USC §1105a(a)(3). The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [“IIRIRA”] repealed that provision, and replaced it with 8 USC §1252(b)(3)(B), which provides that,

Service of the petition [for review] on the officer or employee does not stay the removal of the alien pending the court’s decision on the petition, unless the court orders otherwise.

That provision establishes that courts retain the power to stay an alien’s removal pending a petition for review. It does not, however, specify what standards govern adjudication of a petitioner’s motion for such a stay.

Respondent submits that 8 USC §1252(f) provides the guidance which §1252(b)(3)(B) lacks. That section, entitled “Limit on Injunctive Relief,” provides that,

(1) *In general.* - Regardless of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated.

(2) *Particular cases.* - Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry of such order is prohibited as a matter of law.

To the best of Counsel's knowledge, this Court has not addressed the question of whether 8 USC §1252(f) governs the adjudication of motions for temporary stays of deportation pending adjudication of a timely filed petition for review. In June of 2001, however, the Ninth Circuit Court of Appeals, sitting *en banc*, ruled that 8 USC §1252(f) does not govern those cases, and provided a detailed analysis of the reasoning behind its decision Andreiu v. Ashcroft, 253 F.3d 477 (9th Cir. 2001). In the year that followed, the Second and Sixth Circuit Courts of Appeals adopted Andreiu's analysis and holding. Petitioner respectfully requests that this Court join those circuits, and hold that 8 USC §1252(f) is inapplicable to the case at bar.

The Andreiu Court looked to the dictionary definition of the terms in question, the language and structure of the statute, legislative history, Supreme Court interpretation of an analogous subsection of 8 USC §1252, and the need to avoid interpreting a statute in such a way as to lead to absurd results to conclude that the heightened standard for injunctive relief at 8 USC §1252(f)(2) refers to a limit on the power of the courts to enjoin the operation of the immigration laws, not to the courts' power to temporarily halt the legal

proceedings (to wit, the act of deportation) so as to avoid an unnecessary hardship to individual aliens.

A. The dictionary definition.

It is instructive, firstly, to look to the dictionary definition of the terms “enjoin” and “stay” for guidance as to whether the former includes the latter.

The Andreiu Court turned to the dictionary definition of the terms in question, to support its conclusion that the term “enjoin” does not encompass the term “stay.”

Black’s defines “enjoin” as “[t]o legally prohibit or restrain by *injunction*.” Black’s Law Dictionary, 550 (7th ed. 1999) (emphasis added). It defines “stay” as the “postponement or halting of a proceeding, judgment or the like.” *Id.* at 1425. These are very different definitions. “Enjoin” refers to prohibitions or restraints on conduct through the equitable mechanism of an injunction. A stay, by contrast, is a temporary halt to legal proceedings. Put simply, injunctions run against parties; stays run against courts and judgments. Nothing in Black’s suggests that they amount to the same thing. Indeed, Black’s definition of “injunction” contains a lengthy list of various types of injunctions; nowhere in this list does the term “stay” appear. *See id.* at 788.

Andreiu at 483.

The Court concluded by noting that the Supreme Court itself had forbidden the simple equation of the terms “enjoin” and “stay” on the basis of dictionary definitions Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 US 271, 279, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988) (rejecting a doctrine relating to the merger of law and equity under which certain types of stay orders had been considered injunctions. The Court held that “[a]n order by a federal court that relates only to conduct or progress of litigation before that court ordinarily is not considered an injunction...”); Andreiu at 483.

B. The language and structure of the statute.

The Andreiu Court began its analysis with a review of fundamental principles of statutory construction, noting that,

[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Andreiu, 253 F.3d 477, 480 (9th Cir. 2001) quoting INS v. Cardosa-Fonseca, 480 U.S. 421, 432, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) and that,

Statutes must be interpreted, if possible, to give each word some operative effect.

Id, quoting Walters v. Metro. Educ. Enters. Inc., 519 U.S. 202, 209, 117 S.Ct. 660, 136 L.Ed.2d 644 (1997).

The Court noted that the first subsection of 8 USC §1252(f) states that no court other than the Supreme Court has the jurisdiction or authority to “enjoin or restrain” the operation of the provisions of the subchapter Andreiu at 480; 8 USC §1252(f)(1). It concluded, then, that,

It is clear from this language that Congress did not view the terms “enjoin” and “restrain” as synonymous. If Congress had intended the term “enjoin” to cover the entire universe of judicial power over immigration proceedings, there would have been no need to include the phrase “or restrain.” Under the INS’s interpretation, this second term is reduced to mere surplusage. If “restrain” has any operative meaning, as we must presume it does, Congress’s omission of this term from 8 USC §1252(f)(2) must be significant. The only construction that saves 8 USC §1252(f)(1) from surplusage is that “enjoin” refers only to the class of actions properly defined as injunctions, not to the full range of judicial action.

Andreiu at 480. As such, the court concluded, a temporary stay of deportation is not the sort

of injunction contemplated by the term “enjoin” in 8 USC §1252(f).

Indeed, the Court noted, 8 USC §1252(b)(3)(B), the only provision in the statute which does contain the term “stay,” confirms its interpretation that the term “enjoin” does not encompass a stay. That section provides that,

Service of the petition on the officer does not stay the removal of an alien pending the court’s decision on the petition, unless the court orders otherwise.

The Andreiu Court pointed out that, in §1252(b)(3)(B), Congress specifically used the term “stay” to describe a hold on deportation pending a decision on a petition for review, but that it did not use the term “stay” in 8 USC §1252(f), although it could easily have done so.

Just as Congress added the term “restrain” to 8 USC §1252(f)(1), it could have written 8 USC §1252(f)(2) to limit courts’ power to “enjoin or stay” the deportation of an alien. But it did not do so, and we will not lightly conclude that this omission was an oversight.

Moreover, if Congress had intended to limit courts’ power to stay deportation proceedings pending petitions for review, the most logical place to include that provision would have been in 8 USC §1252(b)(3)(B) itself, the provision governing stay orders. It would be quite strange to announce the abolition of automatic stay orders in 8 USC §1252(b)(3)(B), but announce the replacement standards in 8 USC §1252(f)(2). Indeed, if 8 USC §1252(f)(2) has the effect that the INS claims, all of 8 USC §1252(b)(3)(B) would be reduced to surplusage. If 8 USC §1252(f)(2) clearly means that courts can only issue stays of deportation upon a showing that the order was “prohibited as a matter of law,” there would be no need to statue in 8 USC §1252(b)(3)(B) that stays are not automatic.

Andreiu at 481.

The Court looked next to the provision’s heading, and found within it confirmation that 8 USC §1252(f) does not refer to temporary stays of deportation.

The heading of 8 USC §1252(f) is also instructive. This heading describes the purpose of the section as a “[l]imit on injunctive relief.” As the Supreme Court has explained, “By its plain terms, and even by its title, that provision is *nothing more or less* than a limit on *injunctive relief*. It prohibits federal courts from granting classwide injunctive relief against the operation of §§ 1221-1231, but specifies that this ban does not extend to individual cases. **The clear concern of the section is limiting the power of the courts to enjoin the operation of the immigration laws, not with stays of removal in individual asylum cases.**

Andreiu at 481, quoting Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 481-482, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) (“AAADC”) (emphasis added).

C. Legislative history.

Having concluded that the plain language and structure of the statute indicated that the heightened standard for injunctive relief at 8 USC §1252(f) refers to a limitation on the power of the courts to enjoin the operation of the new immigration laws which Congress created in IIRIRA, not to a limitation on those courts’ power to temporarily halt legal proceedings (that is, deportation) during the pendency of a petition for review so as to avoid unnecessary hardship to the petitioner, the Andreiu court looked next to IIRIRA’s legislative history, and found within it support for that interpretation.

As the House Report explained, under 8 USC §1252(f)(2), “single district courts or courts of appeal do not have authority to enjoin procedures established by Congress to reform the process of removing illegal aliens from the U.S.” H.R.Rep. No. 104-469(I), at 161 (1996). “These limitations,” however, “do not preclude challenges to the new procedures, but the procedures will remain in force while such lawsuits are pending.” Id. Specifically referring to 8 USC §1252(f)(2), the Report states, “In addition, courts may issue injunctive relief pertaining to the case of an individual alien, and may protect against any immediate violation of rights.” Id. There is nothing in this legislative history that suggests that 8 USC §1252(f)(2) has anything to do with the standards governing stay requests.

Andreiu at 481. The “limitations” described in the legislative history, simply put, refer to limitations on the courts’ authority to enjoin the operation of the new laws while those laws are being challenged. Congress’ description of those limitations, however, specifically provides that the courts retain their authority to order “injunctive relief pertaining to the rights of an individual alien,” and to “protect against any immediate violation of rights.” Id.

D. Supreme Court analysis of IIRIRA.

Looking outside of the realm of 8 USC §1252(f) itself, the court next looked for guidance to Supreme Court interpretation of a different section of 8 USC §1252, and found that that interpretation supported its conclusion that 8 USC §1252(f) does not refer to temporary stays of deportation.

In AAADC, the Supreme Court addressed the scope of 8 USC §1252(g), a provision which limits judicial review over “the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders,” and concluded that it did not cover “the universe of deportation claims.” The Supreme Court found it,

implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings. Not because Congress is too poetic to use synecdoche, but because that literary device is incompatible with the need for precision in legislative drafting.

AAADC, 525 US at 482.

The Andreiu Court relied on the Supreme Court’s reasoning in AAADC to conclude, similarly, that it should not

lightly assume that Congress intended the term “enjoin in§1252(f) as shorthand for the term “stay.” Congress knew very well how to use the term “stay” when it wanted to, and it is not plausible that here, and only here, Congress meant “enjoin” to include the entire universe of court actions that have a prohibiting or restraining effect.

Andrieu at 482.

D. The avoidance of absurd results.

Finally, the Andrieu court noted that statutes must be interpreted so as to preclude absurd results, and concluded that interpreting 8 USC §1252(f) to govern temporary stays of deportation would lead to precisely such an absurd result.

The INS’s interpretation of §1252(f)(2) would limit the courts’ ability to issue stays of deportation except when the petitioner has shown by “clear and convincing evidence” that the removal order is “prohibited as a matter of law.” However, the courts of appeal review the legal determinations of the BIA de novo. In any case raising legal issues, INS’s interpretation would require a more substantial showing for a stay of deportation than it would for a reversal on the merits. This would effectively require the automatic deportation of large numbers of people with meritorious claims, including every applicant who presented a case of first impression.

Moreover, adherence to the rigid standard the INS urges would essentially duplicate the decision on the merits, requiring the petitioner to show a *certainty* of success. Such a standard would require full-scale briefing at the beginning of the appellate process, often before the petitioner has even received a copy of the administrative record. In those cases in which a motions panel grants the stay on the basis that the INS’s order is clearly prohibited as a matter of law, the issue before the merits panel would be the same issue that a motions panel had previously resolved in favor of the petitioner. None of these results are at all sensible as a matter of judicial administration or of the detailed structure the statute establishes for review of BIA decisions.

Andrieu at 482. In conclusion, the Andrieu Court held that,

Section 1252(f)(2) does not limit our ability to stay the deportation of asylum seekers pending the resolution of their petitions for review. To hold otherwise... would mean that thousands of asylum seekers who fled their native lands based on well-founded fears of persecution will be forced to return to that danger under the fiction that they will be safe while awaiting the slow wheels of American justice to grind to a halt... The statute cannot support such a reading, and we are convinced that Congress had no such intent in mind.

Andreiu at 484.

2. THIS COURT SHOULD FOLLOW THE LEAD OF THE SECOND, SIXTH, SEVENTH, AND NINTH CIRCUITS, TO CONCLUDE THAT THE LIMITATIONS ON INJUNCTIVE RELIEF SET FORTH AT 8 USC §1252(F) DO NOT APPLY TO TEMPORARY STAYS OF DEPORTATION PENDING ADJUDICATION OF A PETITION FOR REVIEW.

Prior to the Ninth Circuit's decision in Andreiu, the only Circuit Court to address the issue of whether 8 USC §1252(f) limits courts' ability to issue temporary stays of deportation was an unpublished Seventh Circuit opinion: In Lal v. Reno, 221 F.3d 1338 (7th Cir. 2000) (unpublished), the Seventh Circuit Court of Appeals held that, we do not read the requirements for injunctive relief imposed by 8 USC §1252(f)(2) as governing stays pending a decision on a timely petition for review. See 8 USC §1252(b)(3)(B) (speaking more directly to such stays). Id. at 2.

In the years which have followed the Ninth Circuit's decision in Andreiu, the Second and Sixth Circuits have formally adopted Andreiu's reasoning and holding: Beijani v. INS, 271 F.3d 670, 687-689 (6th Cir. 2001) (Quoting Andreiu's conclusion that, "the clear concern of [] section [1252(f)(2)] is limiting the power of courts to enjoin the operation of the immigration laws, not with stays of removal in individual asylum cases."); Mohammed v.

Reno, 309 F.3d 95, 99 (2nd Cir. 2002) (“We agree with the Ninth and Sixth Circuits for all of the reasons explained in the Ninth Circuit’s in banc decision in Andreiu”)¹.

The Ninth Circuit has since expanded its holding in Andreiu to encompass motions for stays of deportation pending appeal of a habeas denial Mohammed v. Ashcroft, 295 F.2d 963 (9th Cir. 2002). In Mohammed, the court relied on its decision in Andreiu for the proposition that “§1252(f)(2) refers only to permanent injunctive relief and not to temporary relief such as an injunction pending appeal,” *Id.* at 965, and noted that,

This conclusion is supported by the Hobbs Act, the statute that generally governs review of agency decisions in the courts of appeals. Section 1252(a)(1) expressly incorporates the Hobbs Act, which specifically distinguishes between “restraining” an agency order on an interlocutory basis and entering a judgment that “enjoins” the order permanently. *See* 28 USC §2349(a), (b).

Mohammed at 965.

3. THE PROPER STANDARD TO WHICH TO HOLD A MOTION FOR A STAY OF DEPORTATION PENDING ADJUDICATION OF A PETITION FOR REVIEW IS A TRADITIONAL WEIGHING OF THE EQUITIES, IN WHICH THE RELATIVE HARDSHIP TO THE PARTIES IS THE CRITICAL ELEMENT.

Having concluded that 8 USC §1252(f)(2) does not govern the adjudication of motions for stays of deportation pending adjudication of a timely filed petition for review, the Ninth Circuit in the Andreiu case went on to rule that the proper standard for such a

¹ To the best of counsel’s knowledge, the only Circuit which has disagreed with Andreiu is the Eleventh Weng v. U.S. Attorney General, 287 F.3d 1335 (11th Cir. 2002); Bonhomme-Ardouinne v. U.S. Attorney General, 291 F.3d 1289 (11th Cir. 2002); Dorelien v. U.S. Attorney General, 317 F.3d 1314 (11th Cir. 2003).

motion is a traditional balancing test, in which

the petitioner must show “either (1) a probability of success on the merits and the possibility of irreparable injury, or (2) that serious legal questions are raised and the balance of hardships tips sharply in the petitioner’s favor.”²

Andreiu at 483, quoting Abbassi v. INS, 143 F.3d 513, 514 (9th Cir. 1998). The Court went on to clarify that,

These standards represent the outer extremes of a continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified.

And that,

Ordinarily, the balance of hardships will weigh heavily in the applicant’s favor, especially if it appears that the country of origin will not freely permit a return to the United States upon a grant of asylum.

Andreiu at 484.

This analysis was fully in keeping with standards laid forth in Circuit Courts across the nation: Ofosu v. McElroy, 98 F.3d 694 (2nd Cir. 1996) (“ordinarily, when a party seeks [a stay] pending appeal, it is deemed that exclusion is an irreparable harm, and that the INS suffers no offsetting injury”); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (“the necessary ‘level’ or ‘degree’ of possibility of success will vary according to the court’s assessment of the other [stay] factors.”); Sofinet v. INS, 188 F.3d 703, 707 (7th Cir. 1999) (requiring only that a petitioner show a “better than negligible” chance of success on the merits portion of the stay test).

² The balancing test laid forth in Abbassi, and in those Circuits which followed Andreiu, is functionally identical to those which this Court has followed for years See Cintron-Garcia v. Romero-Barcelo, 671 F.2d 1, 4 n.2 (1st Cir. 1982).

It is also a principle which the Circuit Courts following Andreiu have upheld: Mohammed v. Reno, 309 F.3d at 101 (“The probability of success that must be demonstrated in inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay. Simply put, more of one excuses less of the other.”). In Mohammed, the Second Circuit held that,

In the context of a stay of removal of an alien pending appeal of an adverse habeas decision, the gravity of the injury to the alien if a stay is denied, compared to the lesser “injury” to the Government if one alien is permitted to remain while an appeal is decided, suggests that the degree of likelihood of success on appeal need not be set too high.

Id. at 102. Similarly, in Beijani, the Sixth Circuit held that,

Although his removal may not have been a totally “irreparable” harm, the potential harm was substantial, particularly in light of the important question of law presented by his petition for review. Furthermore, the potential harm to Beijani greatly outweighed any inconvenience to the INS, and the stay certainly served the public interest of ensuring that the INS complies with the law.

Beijani, 271 F.3d at 689.

In this case, the Petitioners laid forth in their Petition for Review a pattern of protracted and severe persecution at the hands of armed rebel factions who targeted Mr. Samayoa on account of his support for, and complicity with, the country’s military establishment. That abuse included written and verbal death threats, detention at gunpoint, several bombings - some attempted, some successful -, gunshots, surveillance and attacks on those who sought to protect him. Two of the attempts on his life left him wounded so severely that he required protracted hospitalization, once for fifteen days, and once for a month [*See Petition for Review and Motion for Stay of Deportation at 3-4*].

In order to establish eligibility for asylum, Mr. Samayoa need only establish that he has better than a 10% chance of being persecuted upon his return to Guatemala. INS v. Cardoza-Fonseca, 480 U.S. 421, 431, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987).. Once he established that he had suffered past persecution, he became entitled to a regulatory presumption that he had such a well founded fear. 8 CFR §208.13(b)(1)(I).

Given that low standard, and given that neither the Judge nor the Board of Immigration Appeals questioned that the facts which he presented were true, it is clear that Mr. Samayoa has established a likelihood of success on the merits.

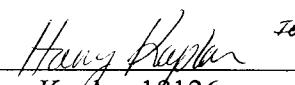
Even if this Court concludes that the likelihood of success is relatively low, it may still grant the Petitioners a stay of deportation given the dramatic disparity in the harm which they will suffer if they are deported to Guatemala and the negligible harm which the Government will suffer if they are permitted to remain in this country for the few months needed to complete review of their petition for review. Indeed, the Respondent has not pointed to any potential harm or hardship to the Government.

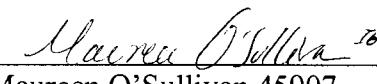
For all of these reasons, the Petitioners respectfully request that the Court **GRANT** their motion for a stay of deportation pending adjudication of their petition for review, despite the Respondent's opposition to that motion.

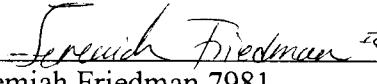
Respectfully submitted,

3/6/2003
Date


Ilana Greenstein 62449, counsel for Petitioners


Harvey Kaplan 18126, counsel for Petitioners


Maureen O'Sullivan 45907


Jeremiah Friedman 7981
Kaplan, O'Sullivan & Friedman
10 Winthrop Square, 3rd floor
Boston, MA 02110
(617) 482-4500

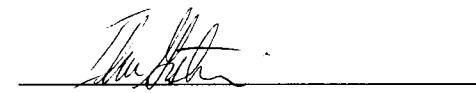
CERTIFICATE OF SERVICE

I, Ilana Greenstein, hereby certify that I have served a copy of the foregoing Petition for Review by sending, postage prepaid this 6th day of March, 2003 to:

Brenda O'Malley, Esq.
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

and to:

Fred McGrath, District Counsel
Department of Homeland Security
John F. Kennedy Federal Building, Room 425
Government Center
Boston, MA 02203



Ilana Greenstein

United States Court of Appeals For the First Circuit

No. 03-1180

JUAN ALICIO SAMAYOA CABRERA
AND BLANCA MARGARITA VELASQUEZ,

Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Before

Boudin, Chief Judge,
Lipez and Howard, Circuit Judges.

CLERK'S OFFICE
COURT OF APPEALS
FOR THE FIRST CIRCUIT

APR 7 A 9:50

ORDER OF COURT

Entered: April 7, 2003

The motion for a stay of removal pending appeal is allowed.

By the Court:

Richard Cushing Donovan, Clerk.

Certified Copy to INS

cc: Messrs. Kaplan, Friedman, Cashman, McGrath, Sullivan, Ms.
O'Malley, Ms. O'Sullivan & Ms. Greenstein

United States Court of Appeals For the First Circuit

No. 03-1180

JUAN ALICIO SAMAYOA CABRERA; BLANCA MARGARITA VELASQUEZ
Petitioners,
v.
JOHN ASHCROFT,
Attorney General of the United States,
Respondent.

2003 MAY -6
11:19
U.S. COURT OF APPEALS
OFFICE
OF THE CLERK
FIRST CIRCUIT

Order of Court

Entered: May 6, 2003

On February 25, 2003, this court docketed the above-captioned petition for review and notified respondent that the certified list was due to be filed on or before [insert deadline for certified list]. See Fed. R. App. P. 17(a) ("The agency must file the record with the circuit clerk within 40 days after being served with a petition for review.") To date, the certified list has not been filed.

Accordingly, respondent is directed to file the certified list on or before **May 27, 2003**. A briefing schedule will be set once the administrative record is complete.

By the Court:
Richard Cushing Donovan, Clerk

By: *rdl*
Chief Deputy Clerk

[cc: Messrs. Kaplan, Friedman, Cashman, McGrath, Sullivan, Ms. O'Malley, Ms. O'Sullivan & Ms. Greenstein]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

2003 JUN -2 P 4:31

No. 03-1180

JUAN ALICIO SAMAYOA CABRERA; BLANCA MARGARITA VELASQUEZ
CLERKS OFFICE
COURT OF APPEALS
FOR THE FIRST CIRCUIT

Petitioners

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

ORDER OF COURT

Entered: June 2, 2003

Upon consideration of motion,

It is ordered that the time for the respondent to file the certified administrative record be enlarged until June 30, 2003 only.

No further extensions of this deadline should be expected.

By the Court:

Richard Cushing Donovan, Clerk

By 
Appeals Attorney

cc: Ilana Greenstein, Esq.
Harvey Kaplan, Esq.
Maureen O'Sullivan, Esq.
Jeremiah E. Friedman, Esq.
Brenda M. O'Malley, Esq.
Neil Cashman, Esq.
Fred McGrath, Esq.
Michael J. Sullivan, Esq.

Direct Recipients:

Ilana Greenstein, Esq.
Harvey Kaplan, Esq.
Maureen O'Sullivan, Esq.
Jeremiah E. Friedman, Esq.
Brenda M. O'Malley, Esq.
Neil Cashman, Esq.

Fred McGrath Esq.

Michael J. Sullivan, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUAN ALICIO SAMAYOA CABRERA,)
)
)
Petitioner,)
)
)
v.) No. 03-1180
)
)
) A73 182 454
IMMIGRATION & NATURALIZATION)
SERVICE,)
)
)
Respondent.)

**RESPONDENT'S LATE MOTION FOR AN EXTENSION OF TIME
TO FILE THE CERTIFIED ADMINISTRATIVE RECORD OUT OF TIME**

Respondent, by its undersigned counsel, hereby moves the Court for a 90-day extension of time from May 27, 2003 to August 25, 2003, within which to file the certified administrative record in this case.

This motion is made in good faith and not for the purpose of delay. This extension is necessary in order to permit the Executive Office of Immigration Review (EOIR) to adequately prepare the Certified Administrative Record in this case.

MAY 30 P 12:55
CLERKS OFFICE
COURT OF APPEALS
FOR THE FIRST CIRCUIT

/ / /
/ / /

In support thereof, the Court is respectfully referred to
the Declaration of Valarie E. A. Dickson, filed herewith.

Respectfully submitted,

ROBERT D. MCCALLUM, JR.
Assistant Attorney General
Civil Division

MICHAEL P. LINDEMANN
Assistant Director

Brenda M. O'Malley
BRENDA M. O'MALLEY, Attorney
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P. O. Box 878, Ben Franklin Station
Washington, D.C. 20044
202-616-2872

Executed on: May 29, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUAN ALICIO SAMAYOA CABRERA,)
Petitioner,)
v.) No. 03-1180
IMMIGRATION & NATURALIZATION)
SERVICE,)
Respondent.) A73 182 454

DECLARATION OF VALARIE E. A. DICKSON

1. I, Valarie E. A. Dickson, am a Paralegal, employed by the United States Department of Justice, Civil Division, Office of Immigration Litigation.
2. Part of my responsibilities includes assisting in the timely filing of certified administrative records.
3. I regularly communicate to the Executive Office for Immigration Review (EOIR) the need for preparation and certification of administrative records for this Circuit. I periodically follow-up the initial call to monitor the progress of EOIR in meeting the record due date.
4. The record in this case was originally due on March 17, 2003.

4. The administrative record was requested from EOIR on March 17, 2003.

5. We have yet to receive the administrative record, and have placed it on an expedited request list for EOIR.

6. Because of the voluminous amount of new petitions, EOIR is presently behind schedule in getting administrative records to this office. EOIR prepares Certified Administrative Records for all of the Federal Courts of Appeals and the district courts.

7. Upon information and belief every endeavor is being made by this office and EOIR to have the record filed in advance of the requested extension date.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 29, 2003

Valarie E. A. Dickson
VALARIE E. A. DICKSON
Paralegal
Office of Immigration Litigation
(202) 616-4967

CERTIFICATE OF SERVICE

I hereby certify that on this **29th day of May 2003**, a copy of **Respondent's Late Motion for an Extension of Time to File the Certified Administrative Record Out of Time** was served on petitioner's counsel by mailing a copy thereof, first class postage prepaid, to:

Ilana Greenstein, Esq.
Kaplan, O'Sullivan & Friedman, LLP
10 Winthrop Square, 3rd Floor
Boston, MA 02110

Valarie E. A. Dickson

VALARIE E. A. DICKSON
Paralegal
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
(202) 616-4967

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUAN ALICIO SAMAYOA CABRERA,)
)
)
Peti~~100~~ 101r-3 P) 12: 15)
)
v. FILED IN CLERKS OFFICE No. 03-1180
 US COURT OF APPEALS
 FOR THE FIRST CIRCUIT A73 182 454
IMMIGRATION & NATURALIZATION)
SERVICE,)
)
)
Respondent.)

**RESPONDENT'S SECOND MOTION FOR AN EXTENSION OF TIME
TO FILE THE CERTIFIED ADMINISTRATIVE RECORD OUT OF TIME**

Respondent, by its undersigned counsel, hereby moves the Court for a 90-day extension of time from June 30, 2003 to September 29, 2003, within which to file the certified administrative record in this case.

This motion is made in good faith and not for the purpose of delay. This extension is necessary in order to permit the Executive Office of Immigration Review (EOIR) to adequately prepare the Certified Administrative Record in this case.

In support thereof, the Court is respectfully referred to the Declaration of Valarie E. A. Dickson, filed herewith.

Respectfully submitted,

ROBERT D. MCCALLUM, JR.
Assistant Attorney General
Civil Division

MICHAEL P. LINDEMANN
Assistant Director

Brenda M O'Malley
BRENDA M. O'MALLEY, Attorney
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P. O. Box 878, Ben Franklin Station
Washington, D.C. 20044
202-616-2872

Executed on: July 1, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUAN ALICIO SAMAYOA CABRERA,)
)
Petitioner,)
)
v.) No. 03-1180
)
)
) A73 182 454
IMMIGRATION & NATURALIZATION)
SERVICE,)
)
Respondent.)

DECLARATION OF VALARIE E. A. DICKSON

1. I, Valarie E. A. Dickson, am a Paralegal, employed by the United States Department of Justice, Civil Division, Office of Immigration Litigation.
2. Part of my responsibilities includes assisting in the timely filing of certified administrative records.
3. I regularly communicate to the Executive Office for Immigration Review (EOIR) the need for preparation and certification of administrative records for this Circuit. I periodically follow-up the initial call to monitor the progress of EOIR in meeting the record due date.
4. The record in this case was originally due on March 17, 2003.

5. The administrative record was requested from EOIR on March 17, 2003.

6. We have yet to receive the administrative record, and have again placed it on an expedited request list for EOIR.

7. Because of the voluminous amount of new petitions, EOIR is presently behind schedule in getting administrative records to this office. EOIR prepares Certified Administrative Records for all of the Federal Courts of Appeals and the district courts.

8. Upon information and belief every endeavor is being made by this office and EOIR to have the record filed in advance of the requested extension date.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 1, 2003

Valarie E. A. Dickson
VALARIE E. A. DICKSON
Paralegal
Office of Immigration Litigation
(202) 616-4967

CERTIFICATE OF SERVICE

I hereby certify that on this **2nd day of July 2003**, a copy of **Respondent's Second Motion for an Extension of Time to File the Certified Administrative Record Out of Time** was served on petitioner's counsel by mailing a copy thereof, first class postage prepaid, to:

Ilana Greenstein, Esq.
Kaplan, O'Sullivan & Friedman, LLP
10 Winthrop Square, 3rd Floor
Boston, MA 02110

Valarie E. A. Dickson
VALARIE E. A. DICKSON
Paralegal
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
(202) 616-4967

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 03-1180

JUAN ALICIO SAMAYOA CABRERA; BLANCA MARGARITA VELASQUEZ

Petitioners

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

CLERK'S OFFICE
OF APPEALS
FOR THE
FIRST CIRCUIT

003 JUL -3 P 1:34

ORDER OF COURT

Entered: July 3, 2003

Upon consideration of motion of respondent,

It is ordered that the time for the respondent to file the Certified Administrative Record is enlarged to and including 9/29/03.

By the Court:

Richard Cushing Donovan, Clerk

By rd g bl
Chief Deputy Clerk

cc: Ilana Greenstein, Esq.
Harvey Kaplan, Esq.
Maureen O'Sullivan, Esq.
Jeremiah E. Friedman, Esq.
Brenda M. O'Malley, Esq.
Neil Cashman, Esq.
Fred McGrath, Esq.
Michael J. Sullivan, Esq.

Direct Recipients:

Ilana Greenstein, Esq.
Harvey Kaplan, Esq.
Maureen O'Sullivan, Esq.

Jeremiah Friedman, Esq.
Brenda M. O'Malley, Esq.
Neil Cashman, Esq.
Fred McGrath, Esq.
Michael J. Sullivan, Esq.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

2003 AUG 21 P 12:39

03-1180

Juan Alacio SAMAYOA Cabrera and
US COURT OF APPEALS Margarita VELASQUEZ
FOR THE FIRST CIRCUIT Petitioners

v.

John ASHCROFT, Attorney General of the United States
Respondent

**PETITIONERS' MOTION FOR AN
EXTENSION OF TIME**

Now come the Petitioners, by and through counsel, and move this honorable Court for a 30-day extension of time in which to file their opening brief. That brief is currently due on September 2nd, 2003. In support of that motion, counsel states the following:

1. Counsel submitted one opening brief to the First Circuit on August 18th; she has another brief due on August 22nd, one due on September 4th, one due on September 9th, and several memos due in the weeks in between.
2. Two of the six attorneys at counsel's firm are on vacation during the two weeks preceding the current due date; counsel with responsibility for writing the Petitioners' brief is responsible for covering those attorneys' cases, as well as her own. During the past week, two emergencies have come up which have taken up a good deal of counsel's time and which have prevented her from dedicating time to the Petitioners' brief.
3. Without an extension of time, counsel will not have time to adequately prepare the Petitioners' opening brief.

4. Counsel has spoken to Brenda O'Malley, counsel for the Respondent; Attorney O'Malley indicated that she has no objection to the request for an extension of time.

Respectfully submitted,

8/20/2003
Date


Ilana Greenstein 62449, counsel for Petitioners


Harvey Kaplan 18126, counsel for Petitioners


Maureen O'Sullivan 45907


Jeremiah Friedman 7981
Kaplan, O'Sullivan & Friedman
10 Winthrop Square, 3rd floor
Boston, MA 02110
(617) 482-4500

CERTIFICATE OF SERVICE

I, Ilana Greenstein, hereby certify that I have served a copy of the foregoing Petition for Review by sending, postage prepaid this 20th day of August, 2003 to:

Brenda O'Malley, Esq.
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044

and to:

Fred McGrath, District Counsel
Department of Homeland Security
John F. Kennedy Federal Building, Room 425
Government Center
Boston, MA 02203



Ilana Greenstein

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 03-1180

JUAN ALICIO SAMAYOA CABRERA; BLANCA MARGARITA VELASQUEZ

Petitioners

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

2003 AUG 22 A 9:23

CLERKS OFFICE
OF APPEALS
THE FIRST
CIRCUIT

ORDER OF COURT

Entered: August 22, 2003

Upon consideration of motion of Petitioners,

It is ordered that the time for the Petitioners to file their brief be enlarged to and including 10/2/03.

By the Court:

Richard Cushing Donovan, Clerk

By Neil N. Glue
Chief Deputy Clerk

cc: Ilana Greenstein, Esq.
Harvey Kaplan, Esq.
Maureen O'Sullivan, Esq.
Jeremiah E. Friedman, Esq.
Brenda M. O'Malley, Esq.
Neil Cashman, Esq.
Fred McGrath, Esq.
Michael J. Sullivan, Esq.

Direct Recipients:

Ilana Greenstein, Esq.
Harvey Kaplan, Esq.
Maureen O'Sullivan, Esq.
Jeremiah E. Friedman, Esq.
Brenda M. O'Malley, Esq.
Neil Cashman, Esq.

Fred McGooch, Esq.
Michael J. Sullivan, Esq.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEARANCE FORM

(Please type or print all answers)

No. 03-1180

1001 MAR 22 A 11:45

*Samayoa Cabrea v. Ashcroft*CLERK'S OFFICE
U.S. COURT OF APPEALSFAILURE TO FILL OUT COMPLETELY MAY RESULT IN THE REJECTION
OF THIS FORM AND COULD AFFECT THE PROGRESS OF THE APPEAL

THE CLERK WILL ENTER MY APPEARANCE AS COUNSEL ON BEHALF OF:

John Ashcroft, Attorney General of the U.S. as the
(Specify name of person or entity represented)If you represent a litigant who was a party below, but who is not a party on appeal, do not
designate yourself as counsel for the appellant or the appellee. appellant(s) appellee(s) amicus curiae petitioner(s) respondent(s) intervenor(s) I do not represent a party to the appeal.Name of Counsel: Isaac R. CampbellName of Firm: U.S. Dept of Justice, Office of Imm. Lit.Firm Address: 20 Massachusetts Ave., N.W.
Washington, DC 20530Telephone: (202) 616-8476Court of Appeals Bar Number: PendingFax: (202) 616-8460Signature: Isaac R. CampbellE-mail: isaac.campbell@usdoj.govDate: 3-19-04

Has this case or any related case previously been on appeal?

Yes _____
No X

Court of Appeals No. _____

Appearances should be signed by a member of this Court. If you have not been admitted,
you may file an appearance subject to subsequent admission to practice in this Court.COUNSEL MUST COMPLETE AND RETURN THIS FORM
IN ORDER TO FILE PLEADINGS IN THIS COURT

DOCKETED

United States Court of Appeals For the First Circuit

No. 03-1180

JUAN ALICIO SAMAYOA CABRERA and
BLANCA MARGARITA VELASQUEZ,

Petitioners,

v.

JOHN ASHCROFT,

Respondent.

JUDGMENT

Entered: May 4, 2004

FILED IN CLERK'S OFFICE
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

2004 MAY - 4 P 12:02

This cause came on to be heard on a petition for review of an order of the Board of Immigration Appeals, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The order of the Board of Immigration Appeals is affirmed.

By The Court:


Mark R. Syska, Chief Deputy Clerk

[cc: Mr. Kaplan and Mr. Campbell.]

United States Court of Appeals For the First Circuit

No. 03-1180

JUAN ALICIO SAMAYOA CABRERA and
BLANCA MARGARITA VELASQUEZ,

Petitioners,

v.

JOHN ASHCROFT,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

FILED IN CLERK'S OFFICE
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

2004 MAY - 4 P 12:02

Before

Selya and Howard, Circuit Judges,
and Singal, * District Judge.

Harvey Kaplan, with whom Ilana Greenstein, Maureen O'Sullivan, Jeremiah Friedman and Kaplan, O'Sullivan & Friedman, LLP were on brief, for petitioners.

Isaac R. Campbell, Trial Attorney, Office of Immigration Litigation, with whom Peter D. Keisler, Assistant Attorney General, and Papu Sandhu, Senior Litigation Counsel, were on brief, for respondent.

May 4, 2004

* Of the District of Maine, sitting by designation.

SINGAL, District Judge. Juan Alicia Samayoa Cabrera and Blanca Margarita Velasquez, citizens of Guatemala,¹ applied for asylum, relief under the Convention Against Torture, and withholding of removal. The Immigration Judge ("IJ") denied the applications, and the Board of Immigration Appeals ("BIA") affirmed without opinion. Mr. Samayoa and Ms. Velasquez petition for judicial review, claiming that the IJ erred in concluding that they are ineligible for asylum and withholding of removal. We affirm the BIA's decision.

I. Background

Juan Alicia Samayoa Cabrera is a fifty-four-year-old man from the Quiche region of Guatemala. His claims for asylum are based on his mistreatment at the hands of guerilla fighters in Guatemala from 1982 to 1992, which he attributes to his political opinion. Following the events described below, he came to the United States illegally in 1992, and applied for asylum on December 27, 1993. His case was finally heard by an Immigration Judge on February 4, 2002. The oral decision rendered on that date was not in his favor, and he appealed to the BIA. The BIA

¹ Ms. Velasquez, Mr. Samayoa's wife, is included in the asylum petition based solely on Mr. Samayoa's experiences. While this opinion refers mainly to petitioner Samayoa, the decision rendered applies to both petitioners.

summarily affirmed the IJ's decision, and Samayoa petitioned this court for judicial review.

A. Facts

The petitioners' testimony elicited the following facts.

Mr. Samayoa's first run-in with the guerillas occurred in 1982, when his car was stopped by a group of guerillas who tied him up, put a gun to his head and threatened to kill him in order to steal gasoline from him. The guerillas warned Mr. Samayoa that if he mentioned the incident to authorities, they would kill him, and that they knew where he lived. Instead of following the guerillas' instructions, he reported the incident to an army colonel. The colonel advised him that he should leave town, but Mr. Samayoa did not want to, so the colonel made him an aide to the military commissioner, a volunteer position which entitled him to carry a gun. Thereafter, Mr. Samayoa was promoted to military commissioner, in which capacity he engaged in military recruiting. He also became the leader of his neighborhood civil patrol, a position that put him in charge of a group of five hundred patrolmen that protected the village from guerilla fighters.

Mr. Samayoa received between thirty and fifty death threats in the years after he became a military commissioner. The

threats were addressed to him by name, and explicitly stated that he would be killed by guerillas. In either 1987 or 1990, his wife found a bomb under his car outside their house, which she was able to deactivate before it detonated. In 1988, Mr. Samayoa was falsely accused of kidnapping. He was told afterwards that the plan had been for someone to kill him while he was in jail.

In 1991, a land mine exploded on Mr. Samayoa's property while he was walking to milk his cows. He was wounded in the face and was immediately surrounded by about eight armed men. (His son informed him later that there had been approximately sixty guerillas altogether.) Mr. Samayoa escaped on foot after fending them off with the pistol he had been issued by the military. In the meantime, the guerillas destroyed his truck. Soldiers who went looking for the guerillas that attacked Mr. Samayoa were bombed, and seven soldiers were killed.

In 1992, Mr. Samayoa was shot while driving along a mountainous road about forty kilometers from his home. Other vehicles were traveling along the road as well, and Mr. Samayoa swerved to avoid a bus when a land mine exploded nearby. At that point, twenty-five to thirty guerillas ran towards his car, shooting at him. Mr. Samayoa escaped when his passenger took control of the vehicle and transported them to a hospital in

Joyabaj. There was no fighting going on in the region at the time, and no other vehicles on the road were subjected to such an attack. While he was at the Joyabaj hospital, the building was subject to guerilla surveillance, but Mr. Samayoa was smuggled out and airlifted to a military hospital in Guatemala City. Mr. Samayoa was in a coma for three days. He remained in intensive care for a month and was guarded by two military personnel.

Upon his discharge from the hospital, Mr. Samayoa was unwilling to return to his home for fear of the guerillas, so his wife rented a house in Guatemala City. He was put on active payroll by the military and received outpatient treatment at the hospital. Even after Mr. Samayoa had relocated to Guatemala City, the guerillas continued to search for him.

Mr. Samayoa determined that he could not remain in Guatemala, and applied for a visa at the United States embassy. His application was denied, and although the Guatemalan military authorities offered to help him obtain a visa, he thought it best to enter the United States illegally. Even after he had left the country the guerillas continued to look for him.

B. The IJ's Decision

The IJ did not make an express finding, one way or the other, as to Mr. Samayoa's credibility, but concluded that he had

not suffered persecution on account of one or more of the five statutory grounds set forth in Section 101(a)(42)(A) of the Immigration and Nationality Act. The IJ determined that the acts suffered by Mr. Samayoa did not constitute persecution but were instead attributable to generalized violence in the area. Assuming for the sake of argument that Mr. Samayoa had been persecuted in the 1992 incident, the IJ concluded that there had not been a showing that he had been targeted on one or more of the five statutory grounds. The IJ noted that Ms. Velasquez was able to live peacefully in her home with hired security and that the guerillas had not come looking for Mr. Samayoa since shortly after he left Guatemala in 1992. The IJ noted that the civil war in Guatemala ended some time ago, and that although there remains a high level of crime, Mr. Samayoa did not appear to have a well-founded fear of future persecution on one or more of the five statutory grounds. Because Mr. Samayoa had not established eligibility for asylum, he was not eligible for withholding of removal. The IJ concluded that there had been no showing that Samayoa or his wife were eligible for protection under the Convention Against Torture.

II. Discussion

On appeal, the BIA's findings of fact must be upheld "unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B); Laurent v. Ashcroft, 359 F.3d 59, 64 (1st Cir. 2004). Because the BIA summarily affirmed the IJ's decision, we review the IJ's decision. Laurent, 359 F.3d at 64 n.3.

As a prerequisite to establishing eligibility for asylum, an alien must establish that he is a refugee, as set forth in section 101(a)(42)(A) of the Immigration and Nationality Act. 8 U.S.C. § 1158(b). In that section, "refugee" is defined as:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A). In order to demonstrate that he is a refugee, Mr. Samayoa must establish both that he suffers from a well-founded fear of persecution and that the feared persecution is based on one of the five statutory grounds.

The crux of Mr. Samayoa's petition for judicial review is that the IJ erred when she found that Mr. Samayoa had not been specifically targeted because of his opposition to the guerilla movement given the number of threats and attempts he had been subjected to. While Mr. Samayoa presents a sympathetic case and his argument that he was specifically targeted has some merit, he must also establish that he was persecuted on one of the five statutory grounds.

Mr. Samayoa argues that his task is not to establish the exact motivation of a persecutor, but only to demonstrate the reasonableness of a motivation which is related to one of the enumerated grounds. While an alien seeking asylum is not required to provide direct proof of his persecutors' motives, he must provide some evidence of such motives. INS v. Elias-Zacarias, 502 U.S. 478, 483-84 (1992). There is little to tie the alleged persecution to Mr. Samayoa's imputed political opinion other than the fact that after the first attack, he initiated his involvement with the military in order to secure the right to carry a weapon. Participation in a civil defense patrol does not by itself compel a conclusion that an individual is subject to politically-inspired persecution. See Aguilar-Solis v. INS, 168 F. 3d 565, 572 (1st Cir. 1999). Mr. Samayoa

ARGUED

Cg

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

2004 JUN 18 P 2:22

Case No. 3-1180

FILED IN CLERKS OFFICE
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

**Juan Alecio SAMAYOA Cabrera
Blanca Margarita VELASQUEZ
Petitioners**

v.

**John ASHCROFT, Attorney General of the United States
Respondent**

**PETITION FOR PANEL REHEARING/
REHEARING EN BANC**

Harvey Kaplan
Ilana Greenstein
Maureen O'Sullivan
Jeremiah Friedman
Kaplan, O'Sullivan & Friedman, LLP
10 Winthrop Square, 3rd Floor
Boston, MA 02110
(617) 482-4500

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has not provided such evidence as would require a reasonable factfinder to conclude that his fear of future persecution was based on his actual or imputed political opinion.

III. Conclusion

For the reasons set forth above, the order of the BIA is **affirmed**.

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INTRODUCTION

Petitioners Juan Alecio Samayoa and Blanca Margarita Velasquez

respectfully request that this Court rehear their case and/or rehear the case en banc, and reconsider the decision which it entered on May 4th, 2004 because that decision is inconsistent with Board of Immigration Appeals [“BIA” or “the Board”] and Supreme Court caselaw. In addition, the Petitioners respectfully request that this Court stay their deportation while this petition is pending.

ARGUMENT

I. THE PUBLISHED DECISION IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND BIA CASELAW

This Court denied the Petitioners’ applications for asylum and withholding of removal on the sole ground that they had failed to establish a nexus between the persecution which the lead Petitioner suffered in Guatemala, and his actual or imputed political opinion.¹ Samayoa v. Ashcroft, 367 F.3d 10, 13-14 (1st Cir. 2004). That decision does not address the leading Board case on the issue of proving motive, and misconstrues the Supreme Court’s instruction on that issue.

As the Court correctly noted, Mr. Samayoa’s troubles with the

¹ Because the Court refers only to the lead Petitioner in its decision, counsel will do so for the purposes of this petition. References to Mr. Samayoa alone should not be construed as to divest Mrs. Velasquez of her status as a party to this petition for rehearing, or of her interest in the outcome of the case.

guerillas began after he reported a run-in with the guerillas to the military, despite the guerillas' clear instruction that he would be killed if he reported the incident. The military officer to whom he spoke recommended that he leave the country and, when he refused, offered him a volunteer position as an army recruiter. Eventually, he was made a military commissioner, and assumed leadership of his local 500-man anti-guerilla civil patrol. Id. at 12.

In the years which followed Mr. Samayoa's first encounter with the rebels, and which culminated in his flight from Guatemala, the guerillas targeted Mr. Samayoa for repeated and increasingly violent abuse: 1) between thirty and fifty written death threats addressed to him by name, which stated that he would be killed by the guerillas, 2) the planting of a bomb under his car, 3) the planting of a land mine on his property followed by the attack of eight armed men who came onto his property and surrounded him, and 4) being bombed and shot at on the highway by uniformed men who followed him to the hospital where he was admitted in critical condition, where they attempted to apprehend him. Id at 12.

Because the circumstances compel a finding that Mr. Samayoa was targeted by the guerillas specifically because they considered him an enemy of their cause, the Petitioners respectfully request that this Court rehear the case, and reconsider its decision.

The Immigration and Nationality Act clearly provides that an applicant for asylum can only establish eligibility for relief if the persecution which he fears is reasonably related to a protected ground. INA §101(a)(42)(A). That is, the applicant bears the burden of establishing that his persecutors were, or would be, motivated by his race, religion, nationality, membership in a particular social group or political opinion.

It is well-established, however, that an applicant for asylum is not required to present direct proof of his persecutors' motives; those motives may be inferred from circumstance:

Elias-Zacarias objects that he cannot be expected to provide direct proof of his persecutors' motives. We do not require that. But since the statute makes motive critical, he must provide *some* evidence of it, **direct or circumstantial.**

INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992) (emphasis added).

The Board of Immigration Appeals is the highest tribunal in the nation with jurisdiction solely over immigration-related cases; its members are dedicated to interpreting the often complex and esoteric immigration laws, and to applying them in a manner which comports with Congressional intent. Because the Board is the country's leading authority on immigration law, this Court defers to its interpretations of the statute which it enforces and the regulations which it promulgates. Albathani v. INS, 318 F.3d F.3d 365, 372 (1st Cir. 2003); Haoud v.

Ashcroft, 350 F.3d 201, 204 (1st Cir. 2003); Debab v. INS, 163 F.3d 21, 24 (1st Cir. 1998); Menguenine v. INS, 139 F.3d 25, 27 (1st Cir. 1998).

In 1996, the BIA issued a precedent decision which lays forth in detail the proper nexus analysis in cases, such as this, where there is no direct proof of the persecutor's motive. The Board began by noting that,

Proving the actual, exact reason for persecution or feared persecution may be impossible in many cases. An asylum applicant is not obliged to show conclusively why persecution has occurred or may occur. Such a rigorous standard would largely render nugatory the Supreme Court's decision in INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), and would be inconsistent with the "well-founded fear" standard embodied in the "refugee" definition.

The Board, recognizing the "well-founded fear" standard and the fact that an applicant for asylum may well face difficulty in showing the exact motivation for an act or feared act of persecution, has held that "an applicant does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor' where different reasons for actions are possible." Matter of Fuentes, 19 I & N Dec. 658, 662 (BIA 1988). Rather, an asylum applicant "bear[s] the burden of establishing facts on which a reasonable person would fear that the danger arises on account of his race, religion, nationality, membership in a particular social group, or political opinion.

Matter of S-P, 21 I & N Dec. 486, 489-490 (BIA 1996).

The circumstances surrounding the applicant's abuse, therefore, are of critical importance in assessing motive; indeed, both the BIA and this Court have unequivocally held that an asylum case can only be understood in light of the circumstances under which it arose, and the facts of each case must be viewed in

concert, rather than in isolation. Cordero-Trejo v. INS, 40 F.3d 482, 491 (1st Cir. 1994). Accordingly, the S-P Board laid forth the elements which it considered relevant in identifying the motive for persecution in situations of civil unrest:

[T]he evidence must be evaluated in the context of the ongoing civil conflict to determine whether the motive for the abuse in a the particular case was directed toward punishing or modifying perceived political views, as opposed to punishment for criminal acts; was part of the violence inherent in an armed conflict (i.e., lawful acts of war); or, was motivated by some other reason unrelated to asylum law.

S-P at 493-494.

Neither the Immigration Judge, the BIA, nor this Court articulated the burden of proof to prove motive; none of them articulated the elements relevant to a motive analysis. And, with the exception of the rote inclusion of the case in a laundry-list of cases which the Judge cited in her opinion, none of the adjudicators in this case addressed Matter of S-P or its instruction on analyzing nexus.

This Court did not mention S-P at all in its decision; indeed, to the best of counsel's knowledge, this Court has never fully analyzed the application of S-P's guidance to an assessment of motive and nexus.² Given that S-P is the leading

² Counsel's research revealed that this Court has only cited to S-P once in the twelve years since it was published, and then only in a relatively cursory fashion (*see Velasquez-Valencia v. INS*, 244 F.3d 48, 50-51 (1st Cir. 2001) (Citing S-P for the general propositions that 1) an asylum applicant bears the burden of proving the reasonableness of his fear, 2) the motivation for threatened persecution need not be shown to a certainty, and 3) the BIA recognizes the mixed

Board case on that issue, that it provides sound, thoughtful and detailed instruction on analyzing cases like Mr. Samayoa's, and that this Court is bound to defer to the Board's interpretation of the immigration statutes and regulations, counsel respectfully submits that an assessment of motive is incomplete without consideration of, and references to, Matter of S-P.

And, in this case, the application of S-P's analysis reveals that the guerillas' actions toward Mr. Samayoa were clearly politically motivated. The death threats and physical attacks which they visited upon him were clearly not part of the violence inherent in an armed conflict (i.e., lawful acts of war); and were clearly not motivated by any reason other than his political opinion. One could interpret two of the incidents in question as the result of random violence inherent to the civil war if taken in isolation: his first run-in with the guerillas in 1982 was clearly unrelated to his political opinion - it was likely a random incident sparked by the guerillas' need for gasoline. And the incident in 1992, when he was shot on the highway after avoiding a landmine could, if taken in isolation, be seen as a random event, the unfortunate result of life in a country at war.

Every other incident which Mr. Samayoa described, and which the Judge, the BIA and this Court accepted as true, however, was very specifically targeted motive doctrine.

toward him; none of those incidents could realistically have been the result of random violence or violence inherent to an armed conflict.

As this Court noted, Mr. Samayoa “received between thirty and fifty death threats in the years after he became a military commissioner. The threats were addressed to him by name, and explicitly stated that he would be killed by the guerillas.” Samayoa v. Ashcroft, 367 F.3d 10, 12 (1st Cir. 2004). A bomb was planted underneath his car. Id. A land mine was planted on his property and, after he was wounded by it, eight armed guerillas came onto his property, surrounded him, and shot at him. Id. When he was taken to the hospital following the highway incident in 1992, guerillas came to the hospital, asking for him by name [AR 106-107, 238]. He was subsequently airlifted to a military hospital in Guatemala City, where he was guarded by two military personnel. [AR 106, 133, 238]. His wife and children abandoned the family home, and moved to the capital city [AR 114].

None of these incidents bear indicias of random violence or inevitable consequences of civil war. Each was specifically targeted to Mr. Samayoa. Furthermore, there is no logical alternative reason for him to have been targeted other than his affiliation with the military and the civil patrol; each incident was clearly directed toward modifying or punishing his actual or imputed political

opinion.

The Immigration Judge characterized the incidents as unfortunate accidents of fate - of a man simply present in the wrong place at the wrong time, in areas “controlled by the guerillas.” [AR 46-47]. As a preliminary matter, the Judge’s conclusion in this regard is largely incoherent given that only one of the incidents in question occurred in an area which could conceivably have been “controlled by the guerillas.” The death threats came to his home; one bomb was planted under his car and another on his property; he was surrounded and shot at on his property; and guerillas eventually came looking for him at a hospital. In none of these instances did Mr. Samayoa stray inadvertently into hostile territory; rather, in each case the guerillas came looking for him individually, on private property.

This is not a case in which “the constellation of facts and circumstances alleged by an asylum applicant, together with the other record evidence, supports two or more competing inferences,” and in which the IJ simply disagreed with the applicant’s choice between those inferences. Aguilar-Solis v. INS, 168 F.3d 565, 571 (1st Cir. 1999). There is no reasonable explanation for Mr. Samayoa’s numerous death threats, the attacks on his property, and the fact that guerillas came to the hospital searching for him personally after they wounded him, other than that they considered him an enemy of their cause. The published decision

acknowledges that “his argument that he was specifically targeted has some merit,” Samayoa at 13, but offers no theory as to why he would be “specifically targeted” if not for his political opinion.

Instead, the Court cites Aguilar-Solis for the proposition that “participation in a civil patrol does not by itself compel a conclusion that an individual is subject to politically-inspired persecution.” Samayoa at 14. While that is undoubtably true, Mr. Samayoa never argued that membership in the civil patrol alone supported his claim - his leadership of the civil patrol is one fact among many which, when considered in concert, compel a conclusion that the guerillas had targeted him on account of his actual or imputed political opinion.

The Ninth Circuit Court of Appeals recently warned against adjudicators’ tendencies to view the individual facts of an asylum claim in isolation, rather than in context. Garcia-Martinez v. Ashcroft, – F.3d – 2004 WL 1301918 (9th Cir. June 14th, 2004) (“The IJ treated Garcia’s personal experiences as if they had occurred in a vacuum... rather than examining the events in context.”).

The Court in that case criticized the Judge’s reliance on the fact that “the soldiers who raped Garcia did not make any kind of reference whatsoever to her brother Mario while they were attacking the family.” It found that,

By seizing upon the soldiers’ failure to explicitly state why they were

raping Garcia, the IJ appeared to require that Garcia provide *direct* evidence of the soldiers' motive, when we have consistently allowed circumstantial evidence to suffice.

Garcia-Martinez at p4. It is, of course, wholly unreasonable to expect that a rapist would explain to his victim the thought process and motivations behind his actions. By the same token, it is wholly unreasonable to expect that guerillas targeting a suspected enemy would explain to him during the course of an attempt on his life why it is that they wish him harm. Such a requirement would be contrary to Supreme Court and BIA rulings, and contrary to the fundamental principles of asylum law.

CONCLUSION

Because the published decision in this case does not take the leading Board case on the issue of motive and nexus into account, and because its analysis and holding are contrary to Supreme Court and BIA precedent, the Petitioners respectfully request that this Court GRANT this petition for rehearing, and GRANT their applications for asylum and withholding of removal. Petitioners further respectfully request that the Court stay their deportation during the pendency of this petition.

RESPECTFULLY SUBMITTED this 18th day of June, 2004,

18126

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CERTIFICATE OF SERVICE

I, Ilana Etkin Greenstein, certify that a copy of the foregoing PETITION FOR REHEARING, and all attachments including the Appendix, were sent by regular mail, postage prepaid, to:

Isaac R. Campbell, Esq. (2 copies)
Office of Immigration Litigation
U.S. Department of Justice, Civil Division
1331 Pennsylvania Ave, Room 7025 South
Washington, D.C. 20044

and

Department of Homeland Security
Office of District Counsel
John F. Kennedy Federal Building, Room 425
15 New Sudbury Street
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this 18th day of June, 2004.



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CERTIFICATE OF COMPLIANCE

I, Ilana Etkin Greenstein, hereby certify that the enclosed Petition for Rehearing/Rehearing En Banc contains less than the maximum 15 pages permitted by Rule 40 of the First Circuit Rulebook.

6/19/2004
Date


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Appendix I
Samayoa v. Ashcroft, 367 F.3d 10 (1st Cir. 2004)

United States Court of Appeals,
First Circuit.
Juan Alicia SAMAYOA CABRERA and Blanca Margarita Velasquez, Petitioners,
v.
John ASHCROFT, Respondent.
No. 03-1180.
Heard April 5, 2004.
Decided May 4, 2004.

Background: Aliens, citizens of Guatemala, petitioned for review of the decision of the Board of Immigration Appeals (BIA) denying applications for asylum, relief under the Convention Against Torture (CAT), and withholding of removal.

Holding: The Court of Appeals, George Z. Singal, District Judge, held that alien failed to establish that he was specifically targeted by guerillas.

Affirmed.

West Headnotes



[1] KeyCite Notes

- 24 Aliens
 - 24III Immigration
 - 24k52 Detention, Supervision and Deportation
 - 24k54.3 Judicial Remedies and Review
 - 24k54.3(1) k. In General. Most Cited Cases

When the Board of Immigration Appeals (BIA) summarily affirms the Immigration Judge's decision, the Court of Appeals reviews the IJ's decision.



[2] KeyCite Notes

- 24 Aliens
 - 24III Immigration
 - 24k52 Detention, Supervision and Deportation
 - 24k53.10 Relief Against Exclusion or Deportation
 - 24k53.10(3) k. Asylum and Hardship. Most Cited Cases

Alien, a citizen of Guatemala, failed to establish that he was specifically targeted by guerillas in Guatemala because of his opposition to the guerilla movement to establish a well founded fear of future persecution based on actual or imputed political opinion, as required to support alien's application for asylum.



[3] KeyCite Notes

- 24 Aliens
 - 24III Immigration
 - 24k52 Detention, Supervision and Deportation
 - 24k54.1 Evidence in Administrative or Judicial Proceedings
 - 24k54.1(4) Sufficiency, Particular Issues
 - 24k54.1(4.1) k. In General. Most Cited Cases

While an alien seeking asylum is not required to provide direct proof of his persecutors' motives, he must provide some evidence of such motives.



[4] KeyCite Notes

- 24 Aliens
 - 24III Immigration
 - 24k52 Detention, Supervision and Deportation
 - 24k53.10 Relief Against Exclusion or Deportation
 - 24k53.10(3) k. Asylum and Hardship. Most Cited Cases

Participation in a civil defense patrol does not by itself compel a conclusion that an individual is subject to politically inspired persecution.

*¹¹ Harvey Kaplan, with whom Ilana Greenstein, Maureen O'Sullivan, Jeremiah Friedman and Kaplan, O'Sullivan & Friedman, LLP were on brief, for petitioners.

Isaac R. Campbell, Trial Attorney, Office of Immigration Litigation, with whom Peter D. Keisler, Assistant Attorney General, and Papu Sandhu, Senior Litigation Counsel, were on brief, for respondent.

Before SELYA and HOWARD, Circuit Judges, and SINGAL, [FN*] District Judge.

FN* Of the District of Maine, sitting by designation.

SINGAL, District Judge.

Juan Ailio Samayoa Cabrera and Blanca Margarita Velasquez, citizens of Guatemala[FN1] applied for asylum, relief under the Convention Against Torture, and withholding of removal. The Immigration Judge ("IJ") denied the applications, and the Board of Immigration Appeals ("BIA") affirmed without opinion. Mr. Samayoa and Ms. Velasquez petition for judicial review, claiming that the IJ erred in concluding that they are ineligible for asylum and withholding of removal. We affirm the BIA's decision.

FN1. Ms. Velasquez, Mr. Samayoa's wife, is included in the asylum petition based solely on Mr. Samayoa's experiences. While this opinion refers mainly to petitioner Samayoa, the decision rendered applies to both petitioners.

I. Background

Juan Ailio Samayoa Cabrera is a fifty-four-year-old man from the Quiche region of Guatemala. His claims for asylum are based on his mistreatment at the hands of guerilla fighters in Guatemala from 1982 to 1992, which he attributes to his political opinion. Following the events described below, he came to the United States illegally in 1992, and applied for asylum on December 27, 1993. His case was finally heard by an Immigration Judge on February 4, 2002. The oral decision rendered on that date was not in his favor, and he appealed to the BIA. The BIA summarily*¹² affirmed the IJ's decision, and Samayoa petitioned this court for judicial review.

A. Facts

The petitioners' testimony elicited the following facts. Mr. Samayoa's first run in with the guerillas occurred in 1982, when his car was stopped by a group of guerillas who tied him up, put a gun to his head and threatened to kill him in order to steal gasoline from him. The guerillas warned Mr. Samayoa that if he mentioned the incident to authorities, they would kill him, and that they knew where he lived. Instead of following the guerillas' instructions, he reported the incident to an army colonel. The colonel advised him that he should leave town, but Mr. Samayoa did not want to, so the colonel made him an aide to the military commissioner, a volunteer position which entitled him to carry a gun. Thereafter, Mr. Samayoa was promoted to military commissioner, in which capacity he engaged in military recruiting. He also became the leader of his neighborhood civil patrol, a position that put him in charge of a group of five hundred patrolmen that protected the village from guerilla fighters.

Mr. Samayoa received between thirty and fifty death threats in the years after he became a military commissioner. The threats were addressed to him by name, and explicitly stated that he would be killed by guerillas. In either 1987 or 1990, his wife found a bomb under his car outside their house, which she was able to deactivate before it detonated. In 1988, Mr. Samayoa was falsely accused of kidnapping. He was told afterwards that the plan had been for someone to kill him while he was in jail.

In 1991, a land mine exploded on Mr. Samayoa's property while he was walking to milk his cows. He was wounded in the face and was immediately surrounded by about eight armed men. (His son informed him later that there had been approximately sixty guerillas altogether.) Mr. Samayoa escaped on foot after fending them off with the pistol he had been issued by the military. In the meantime, the guerillas destroyed his truck. Soldiers who went looking for the guerillas that attacked Mr. Samayoa were bombed, and seven soldiers were killed.

In 1992, Mr. Samayoa was shot while driving along a mountainous road about forty kilometers from his home. Other vehicles were traveling along the road as well, and Mr. Samayoa swerved to avoid a bus when a land mine exploded nearby. At that point, twenty-five to thirty guerillas ran towards his car, shooting at him. Mr. Samayoa escaped when his passenger took control of the vehicle and transported them to a hospital in Joyabaj. There was no fighting going on in the region at the time, and no other vehicles on the road were subjected to such an attack. While he was at the Joyabaj hospital, the building was subject to guerilla surveillance, but Mr. Samayoa was smuggled out and airlifted to a military hospital in Guatemala City. Mr. Samayoa was in a coma for three days. He remained in intensive care for a month and was guarded by two military personnel.

Upon his discharge from the hospital, Mr. Samayoa was unwilling to return to his home for fear of the guerillas, so his wife rented a house in Guatemala City. He was put on active payroll by the military and received outpatient treatment at the hospital. Even after Mr. Samayoa had relocated to Guatemala City, the guerillas continued to search for him.

Mr. Samayoa determined that he could not remain in Guatemala, and applied for a visa at the United States embassy. His application was denied, and although the Guatemalan military authorities offered to¹³ help him obtain a visa, he thought it best to enter the United States illegally. Even after he had left the country the guerillas continued to look for

him.

B. The IJ's Decision

The IJ did not make an express finding, one way or the other, as to Mr. Samayoa's credibility, but concluded that he had not suffered persecution on account of one or more of the five statutory grounds set forth in Section 101(a)(42)(A) of the Immigration and Nationality Act. The IJ determined that the acts suffered by Mr. Samayoa did not constitute persecution but were instead attributable to generalized violence in the area. Assuming for the sake of argument that Mr. Samayoa had been persecuted in the 1992 incident, the IJ concluded that there had not been a showing that he had been targeted on one or more of the five statutory grounds. The IJ noted that Ms. Velasquez was able to live peacefully in her home with hired security and that the guerillas had not come looking for Mr. Samayoa since shortly after he left Guatemala in 1992. The IJ noted that the civil war in Guatemala ended some time ago, and that although there remains a high level of crime, Mr. Samayoa did not appear to have a wellfounded fear of future persecution on one or more of the five statutory grounds. Because Mr. Samayoa had not established eligibility for asylum, he was not eligible for withholding of removal. The IJ concluded thatthere had been no showing that Samayoa or his wife were eligible for protection under the Convention Against Torture.

II. Discussion



[1] On appeal, the BIA's findings of fact must be upheld "unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C§ 1252(b)(4)(B); Laurent v. Ashcroft, 359 F.3d 59, 64 (1st Cir.2004). Because the BIA summarily affirmed the IJ's decision, we review the IJ's decision Laurent, 359 F.3d at 64 n. 3.

As a prerequisite to establishing eligibility for asylum, an alien must establish that he is a refugee, as set forth in section 101(a)(42)(A) of the Immigration and Nationality Act. 8 U.S.C.§ 1158(b). In that section, "refugee" is defined as: any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a wellfounded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A). In order to demonstrate that he is a refugee, Mr. Samayoa must establish both that he suffers from a well-founded fear of persecution and that the feared persecution is based on one of the five statutory grounds.



[2] The crux of Mr. Samayoa's petition for judicial review is that the IJ erred when she found that Mr. Samayoa had not been specifically targeted because of his opposition to the guerilla movement given the number of threats and attempts he had been subjected to. While Mr. Samayoa presents a sympathetic case and his argument that he was specifically targeted has some merit, he must also establish that he was persecuted on one of the five statutory grounds.



[3] [4] Mr. Samayoa argues that his task is not to establish the exact motivation of a persecutor, but only to demonstrate the reasonableness of a motivation*14 which is related to one of the enumerated grounds. While an alien seeking asylum is not required to provide direct proof of his persecutors' motives, he must provide some evidence of such motives. INS v. Elias-Zacarias, 502 U.S. 478, 483-84, 112 S.Ct. 812, 117 L.Ed.2d 38 (1992). There is little to tie the alleged persecution to Mr. Samayoa's imputed political opinion other than the fact that after the first attack, he initiated his involvement with the military in order to secure the right to carry a weapon. Participation in a civil defense patrol does not by itself compel a conclusion that an individual is subject to politicallyinspired persecution. See Aguilar-Solis v. INS, 168 F.3d 565, 572 (1st Cir.1999). Mr. Samayoa has not provided such evidence as would require a reasonable factfinder to conclude that his fear of future persecution was based on his actual or imputed political opinion.

III. Conclusion

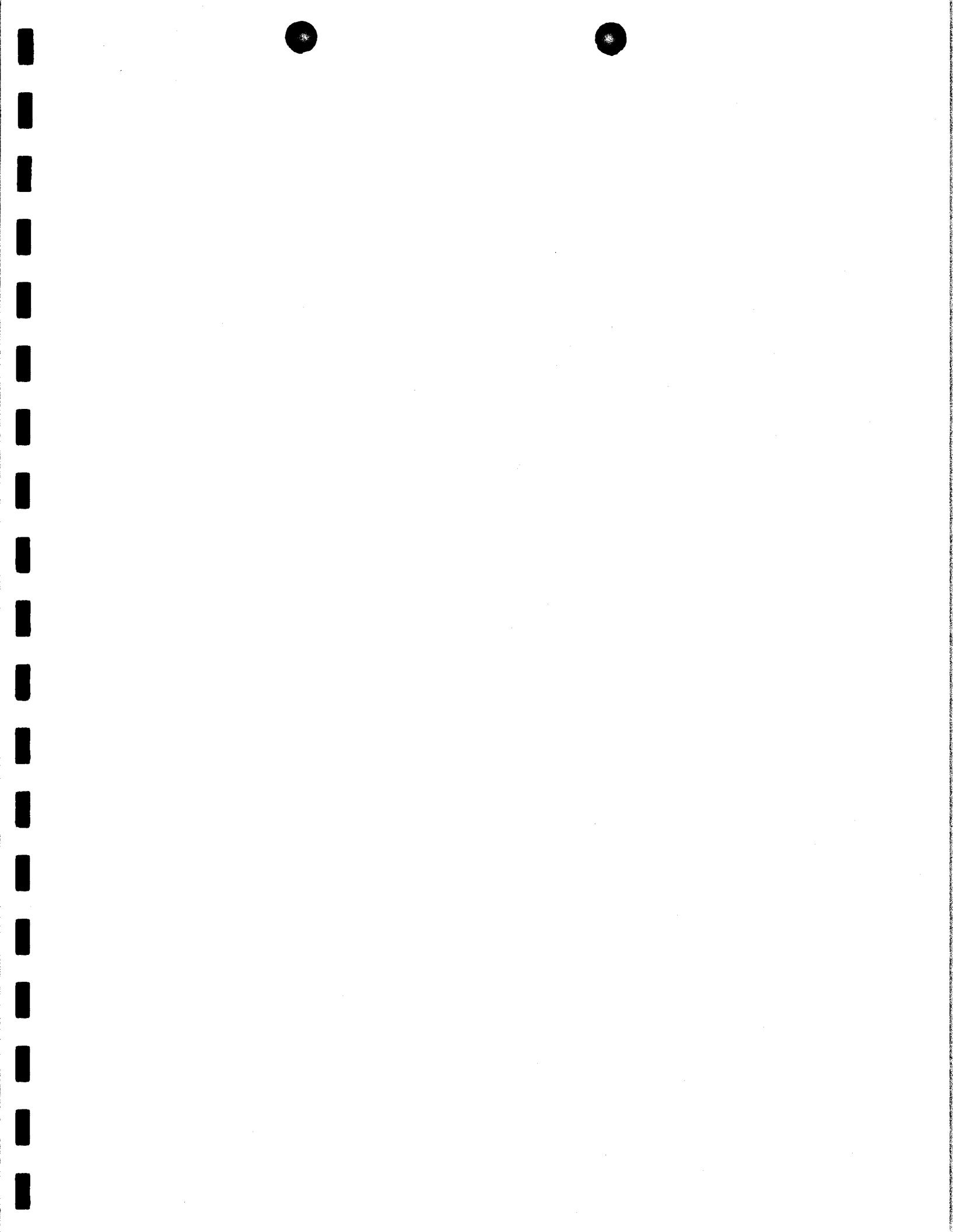
For the reasons set forth above, the order of the BIA isaffirmed.

C.A.1,2004.

Samayoa Cabrera v. Ashcroft

367 F.3d 10

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 03-1180

JUAN ALICIO SAMAYOA CABRERA; BLANCA MARGARITA VELASQUEZ

Petitioners

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

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US COURT OF APPEALS
FOR THE FIRST CIRCUIT

2004 JUL 13 A 11:07

ORDER OF COURT

Entered: July 13, 2004

Before: Chief Judge Boudin,
Judges Torruella, Selya, Lynch, Lipez, Howard; Circuit Judges
Chief Judge Singal*

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be denied.

By the Court:
Richard Cushing Donovan, Clerk

By R.C.D.
Chief Deputy Clerk

*of the District of Maine, sitting by designation.

cc: Ilana Greenstein, Esq.
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United States Court of Appeals For the First Circuit

No. 03-1180

A73-617 650

JUAN ALICIO SAMAYOA CABRERA and
BLANCA MARGARITA VELASQUEZ,

Petitioners,

v.

JOHN ASHCROFT,

Respondent.

JUDGMENT

Entered: May 4, 2004

FILED IN CLERKS OFFICE
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

JUL 20 A 10:30

This cause came on to be heard on a petition for review of an order of the Board of Immigration Appeals, and was argued by counsel.

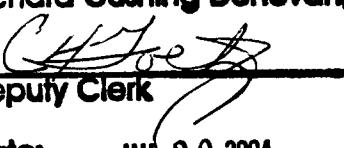
Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The order of the Board of Immigration Appeals is affirmed.

Certified and Issued as Mandate
under Fed. R. App. P. 41.

By The Court:

Richard Cushing Donovan, Clerk

MARK R. SYSKA


Deputy Clerk

Date: JUL 20 2004

Mark R. Syska, Chief Deputy Clerk

[cc: Mr. Kaplan and Mr. Campbell.]

NARA, Northeast Region (Boston)380 Trapelo Rd.
Waltham, MA 02452**NATIONAL ARCHIVES TRUST FUND**

866-329-6465

Customer's Order No.		Date <u>11-15-17</u>					
Name <u>Simoni Rios</u>							
Address <u>S RIOS @ WBUR.ORG</u>							
SOLD BY	CASH	CHECK	CHARGE	ON ACCT.	MDSE. RETD.	PAID OUT	
QUAN	DESCRIPTION			PRICE	AMOUNT		
1	Entire Case Scan or			<u>.90</u>	<u>.90 .00</u>		
	APPEALS CASE #3-1180						
	150 PAGES SCANNED						
1	LABOR FEE FOR SCANNING			<u>.22</u>	<u>.22 .00</u>		
	ABOVE 150 PAGES						
	87 PAGES SCANNED						
	237 TOTAL PAGES SCANNED						
All claims and returned goods MUST be accompanied by this bill.							
Received By	<u>ABG</u>			TOTAL	<u>112 .00</u>		

(000) 000-0000 Ext. 0000

Trx Type: Sale-Manual
 Date: 11/15/2017 12:00:46 PM
 Merch Id: 4445025523076
 Term Id: BOSFRC-1
 Ref #: 311910
 Card Type: Visa
 Acct #: XXXXXXXXXXXX8273
 Name:
 Auth Code: 025773
 Trx #: AFO-BO-INV001563
 Amount: \$112.00

I AGREE TO PAY THE ABOVE TOTAL AMOUNT ACCORDING TO THE CARD ISSUER AGREEMENT.

CUSTOMER COPY