

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 Alicia 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 Samayoa 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...)

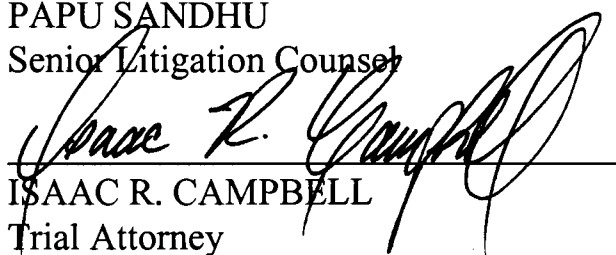
CONCLUSION

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

Respectfully submitted,

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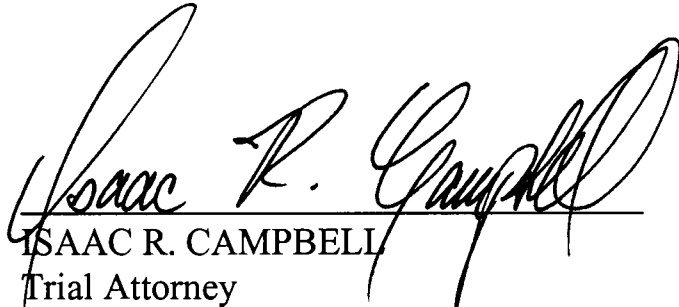
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⁶(...continued)

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).

A handwritten signature in black ink, reading "Isaac R. Campbell", is written over a horizontal line.

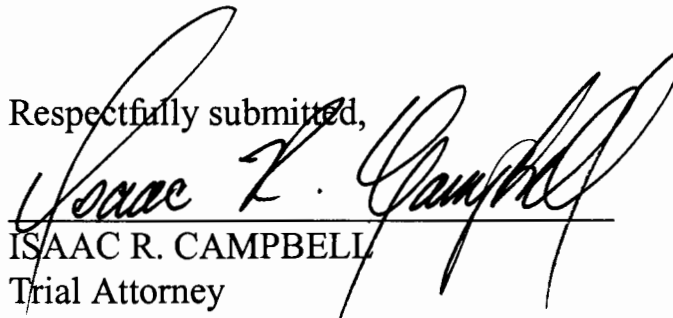
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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 3-1180

Juan Alecio SAMAYOA Cabrera
Blanca Margarita VELASQUEZ
Petitioners

v.

John ASHCROFT, Attorney General of the United States
Respondent

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STATEMENT OF JURISDICTION

The First Circuit has jurisdiction pursuant to § 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.

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

ISSUES PRESENTED

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

1996 constitute a substantial, durable and effective change in circumstances

which eviscerated Mr. Samayoa's claim to a well founded fear of persecution?

4. Was the abuse which Mr. Samayoa suffered over the course of a decade

sufficiently severe and atrocious as to warrant a grant of asylum on

humanitarian grounds, without regard for the likelihood that he would be

persecuted in the future?

5. Did Mr. Samayoa establish eligibility for withholding of removal?

STATEMENT OF THE CASE

Juan Samayoa appeals from the decisions of the Board of Immigration Appeals

to deny him asylum and withholding of removal¹.

SUMMARY OF ARGUMENT

The Immigration Judge committed reversible error when she concluded that

Mr. Samayoa had not been specifically targeted by Guatemala's guerrilla forces

because of his status as a military commissioner and leader of his local civil patrol,

¹ Mr. Samayoa's wife, Blanca Margarita Velasquez, is included in Mr. Samayoa's application, and is a co-Petitioner in this case. Because the application is based solely on Mr. Samayoa's experiences in Guatemala, counsel will refer to him alone throughout the course of this brief. Those references should not be construed as to dismiss Mrs. Velasquez's interest in this claim.

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 aiming at other people who were in the area at the time, and who would have made 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 eviscerate 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.

FACTS

Juan Alecio² Samayoa was born on April 7th, 1950 in Aldea Chuaxan, Chinique, in Guatemala's Quiche region [AR 230]. He lived in that town until approximately 1982, when he moved to the nearby Aldea Chinique, where he remained for the next ten years, until he fled Guatemala for the United States [AR 73-74]. He married Blanca Margarita Velasquez in 1977, and together they had eight children. At the time of his trial, his children ranged in age from 15 to 31; all but one of them remained in Guatemala [AR 76].

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

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

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

Mr. Samayoa's problems with the guerrillas³ 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].

Despite the warning, Mr. Samayoa went to an army colonel, and told him about 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 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 protect himself. [AR 86-87].

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.

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

For years after he became a military commissioner, Mr. Samayoa received written death threats from the guerrillas, warning him that if he did not leave town, they would kill him. He estimated that he received between 30 and 50 death threats between 1984 and 1991 [AR 104]. The notes were addressed to him by name, and stated explicitly that he would be killed by the guerrillas. [AR 106]. In 1987, his wife found a bomb planted under his car outside their house; she was able to deactivate it before it detonated. [AR90, 238].

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

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 Mr. Samayoa had gone; they apparently did not realize that they were speaking to 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].

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

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

Around three months later, in February or March of 1992, Mr. Samayoa was bombed and shot at again by members of the guerrilla forces. [AR 95, 238]. This time, he was driving in his pickup truck with another man on the mountainous road around 40 kilometers from his home. As he was driving up an incline, a bus full of people approached from the opposite direction, and passed him, continuing on down the mountain side [AR 102, 111]. A few seconds later, a landmine exploded on the road approximately ten meters away, narrowly missing him, and a small pickup truck passed by. [AR 95-96, 102, 105, 109-110]. Mr. Samayoa swerved over to the far side of the road, to avoid the explosion. At that moment, he saw 25-30 guerrillas wearing green uniforms and carrying M-16's and AK-47's coming out of the hills above the road, toward him. [AR 101]. The guerrillas began running toward him, shooting at him. [AR 97, 102].

The night before, an acquaintance of Mr. Samayoa's had asked him what time

Mr. Samayoa remained in a coma for three days; he awoke in the intensive care unit at the Guatemala City military hospital. [AR 108, 238]. He remained there for approximately a month, during which time he underwent surgery and had the bullet

knifed a guard and, 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

The guerrillas surrounded the building, watching for his car, but he was

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. [AR238]. He continued driving, but was so badly wounded, he could not

Mr. Samayoa, however, was shot. The bullet entered his shoulder from the

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,

removed from his shoulder. [AR 113]. Two soldiers guarded him around the clock. [AR 133]. Two days before he was released, his wife left their house in Chinique, and rented a house in Guatemala City's Mixco neighborhood. She was afraid that, if he returned to Chinique, the guerrillas would find and kill him. [AR 114]⁵.

When he was released from the hospital, Mr. Samayoa joined his wife and children in the rented house; he continued to be treated as an outpatient at the military hospital and, for the first time, the military put him on active payroll. [AR 114, 136]. Soon thereafter, the guerrillas came looking for him again. Uniformed men went to his aunt's house, a few blocks away from the house he and his wife were renting, and asked about him. [AR 115].

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

⁵ The transcript reflects that Mrs. Velasquez also testified at trial, but her testimony does not appear as a part of the certified administrative record. [AR 143]. 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 230, 382]. The record does not reflect when or how this happened.

124-125].

In 1996, Guatemala's 36-year long civil war finally came to an end. At that time, Mr. Samayoa was in the United States, pursuing his asylum application. The mere end to formal combat did not, however, mark the end of armed conflict between those loyal to the government and those loyal to the guerrillas. The guerrillas signed peace accords, but did not turn over their weapons, and continued to fight and kill those whom it had for so long fought as bitter enemies. [AR 126]. At trial, Mr. Samayoa testified that hundreds of thousands of guerrillas remained in operation all over Guatemala, and that they maintained the networks which they had established over the past four decades. [AR 131].

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

three individuals who had known him in Guatemala and who corroborated specific details of his claim [AR 265-274]; and a newspaper article published at the time of his hospitalization which included a photograph of him, identified him as a military commissioner, and reported that he had been "ambushed," wounded in the right lung, and was undergoing treatment at the Military Medical Center. The article included direct quotes from military spokesperson, who stated that, "the army condemns this act." [AR 204-205].

After languishing at the Immigration and Naturalization Service's⁶ Asylum Office for nearly seven years, the case was referred to the Immigration Court in October of 2000. [AR 250]. Immigration Judge Patricia Sheppard heard testimony, and issued her oral decision, on February 4, 2002.

In that decision, Judge Sheppard concluded that Mr. Samayoa had not established that the abuse which he had suffered in Guatemala had been visited upon him on account of a protected ground [AR 51], and that the fact that the civil war had formally ended eviscerated any claim which he might have had to a well founded fear of future persecution. [AR 52-53]. Mr. Samayoa and Mrs. Velasquez timely appealed, and, on January 16, 2003, the Board of Immigration Appeals summarily

⁶ 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.

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

ARGUMENT

I. STANDARD OF REVIEW

The Court of Appeals reviews findings of fact and credibility by the BIA [hereinafter "BIA" or "the Board"] "under a substantial evidence standard." *Alvarez-Flores v. INS*, 909 F.2d 1, 3 (1st Cir. 1990); *Novoa-Umania v. INS*, 896 F.2d 1, 2 (1st Cir. 1990) ("we must uphold any finding of fact that is supported by substantial evidence"). Board determinations of statutory eligibility for relief from deportation are conclusive if "supported by reasonable, substantial, and probative evidence on the record considered as a whole." Former INA §106; 8 U.S.C. §1105a. See also *Gebremichael v. INS*, 10 F.3d 28, 34 (1st Cir. 1993). Questions of law are reviewed *de novo* *Fergiste v. INS*, 138 F.3d 14, 17 (1st Cir. 1998).

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

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

In a case such as this, where the Board summarily affirms the decision of the Immigration Judge without analysis, it is the Judge's decision which the Court reviews. 8 CFR § 1003.1(e)(4). And, in this case, the Judge's decision is entirely unfounded when viewed in light of the evidence presented.

Judge Sheppard did not question Mr. Samayoa's credibility, and appears to have accepted all of his testimony as true and accurate⁷. Her decision is based solely on her conclusions that: 1) any violence which Mr. Samayoa did suffer was not visited upon him on account of his political opinion; and 2) the fact that military and guerrilla leaders had signed peace accords in 1996 eviscerated any claim which he may have had to a well founded fear of future persecution. [AR 51-53].

⁷ 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).

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

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

An applicant for asylum and withholding of deportation⁸ must demonstrate firstly that he is statutorily eligible and secondly that he warrants relief in the exercise of discretion. An alien is prima facie eligible for asylum if he can show that he either has suffered past persecution, or has a well-founded fear of future persecution, on account of his race, religion, nationality, membership in a particular social group, or political opinion. INA § 208.

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

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

that an applicant may establish eligibility for asylum if he can demonstrate a 10% chance that he will persecuted in the future *Id.*

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

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 functions or should function.

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.

Deborah Anker, *Law of Asylum in the United States*, 1999 Refugee Law Center, Boston, MA p29.

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

cannot be expected to produce the type of corroborating evidence which courts typically require in other contexts Aguilera-Cota v. INS, 914 F.2d 1375, 1380 (9th Cir. 1990) (Persecutors "have not been given adequate notice that our government expects them to sign their names and reveal their individual identities when they deliver threatening messages"); Cordero-Trejo at 488 (Petitioner not required to present conclusive evidence of his persecutor's identity where he is targeted by a "shadowy, extralegal entity associated with" the government); *see also* Turcios v. INS, 821 F.2d 1396, 1402 (9th Cir. 1987); Gallius, 147 F.3d at 45; Matter of S-M-J, Int. Dec. 3303 at 5 (BIA 1997); Matter of Mogharrabi, 19 I & N Dec. 439 at 4 (BIA 1987).

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

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...

Perez-Alvarez at 24.

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

relief in the exercise of the Judge's discretion.

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

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

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

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

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

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

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

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

Neither the Immigration and Nationality Act nor its implementing regulations define the term "persecution." As such, this Court has held that the determination of whether an applicant's experience rise above the level of harassment and discrimination, to that of persecution, is one left to judicial exposition Nelson v. INS, 232 F.3d 258 (1st Cir. 2000); Aguilar-Solis v. INS, 168 F.3d 565 (1st Cir. 1999).

In Matter of Acosta, the BIA defined the term as "either a threat to the life or

freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." Matter of Acosta, 19 I & N Dec. 211, 222 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I & N Dec. 439, 441 (BIA 1987). The Board did not enumerate all activities which may constitute persecution but, by way of example, mentioned confinement, torture, and significant economic deprivation. *Id.*; see also Matter of Sanchez and Escobar, 19 I & N Dec. 276, 284 (BIA 1985); Matter of Kulle, 19 I & N Dec. 318, 331 (BIA 1985).

According to the INS's Basic Law Manual, elements which may be significant in determining whether a harm rises to the level of persecution include: "arbitrary interference with a person's privacy, family, home or correspondence; deprivation of virtually all means of earning a livelihood; relegation to sub-standard dwellings; exclusion from institutions of higher learning; enforced social or civil inactivity; passport denial; constant surveillance or; pressure to become an informer." *Id.* at 31. The Basic Law Manual also recognizes that, "[s]erious violations of basic human rights can constitute acts of persecution..." *Id.* at 28.

Case law is replete with instances in which federal courts and the BIA have held 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 did constitute persecution. See Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir.

1985) (seizure of bank accounts, house arrest, and physical beatings); Fergiste, 138 F.3d at 17-18; see also Hernandez-Ortiz v. INS, 777 F.2d 509 (9th Cir. 1985) (murder, intimidation, kidnapping, and beating of family members); Matter of B, Int. Dec. 3251 (BIA 1995) (detention and imprisonment); Arteaga v. INS, 836 F.2d 1227, 1232 (9th Cir. 1988) (forced conscription by a revolutionary army); Gomez-Saballo v. INS, 79 F.3d 912 (9th Cir. 1996) (death threats).

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

B. MR. SAMAYOA WAS PERSECUTED ON ACCOUNT OF HIS 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-government, pro-military political opinion.

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

Three months later, in early 1992, his car was bombed as he was driving through the mountains, on a route which he believes the guerrillas knew he was to

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,

drive that day. The bomb missed his car, but immediately after the explosion, 25-30 armed, uniformed guerrillas appeared, and ran toward him, firing M-16's and AK-47's. [AR 95-102]. There was no fighting going on between the rebels and the military in the region at that time, and, so, no reason to believe that Mr. Samayoa was simply caught in crossfire. The guerrillas fired only at Mr. Samayoa; they did not fire a single shot at either a bus full of people or a pickup truck, both of which passed by while Mr. Samayoa was being attacked. [AR 106, 111].

Mr. Samayoa was shot, and wounded so badly that he remained in a coma for three days, underwent surgery, and was hospitalized for a month. [AR 238]. He was taken first to a nearby hospital in Joyabaj, but was smuggled out and transferred that same day to the military hospital in Guatemala City. [AR 238]. Soon after he left Joyabaj, guerrillas entered the hospital, asking for him by name, and knifed a guard. [AR 106-107, 238]. At the hospital in Guatemala City, he was guarded by two armed soldiers. [AR 133].

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

[AR 124-125].

The Immigration Judge did not question the veracity of Mr. Samayoa's

testimony, but concluded that there "doesn't appear to have been any direct targeting of the respondent." [AR 47]. With regard to the 1992 incident, the Judge concluded that, "what the respondent has described appears to me to be an attack on traffic on that road." [AR 48-49]. After noting that the landmine explosion might have been

accidental and, if it was indeed intentional, might have been aimed at the bus, the

Judge concluded that, "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 on the road." [AR

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

It appears that the guerrillas 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 young men for the military, and the guerrillas may well have come to his home and left notes... But all of these 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...

[AR 50].

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

record, and of the controlling law. As noted above, the asylum statute does not

require that an applicant establish either the reasonableness of his fear or his

persecutor's motivations beyond a reasonable doubt or even by a preponderance of

the evidence; it requires only that he demonstrate that the inferences he draws from his persecutor's behavior be objectively and subjectively reasonable. Cardoza-Fonseca, 480 U.S. 421.

In Matter of S-P, the Board of Immigration Appeals provided sound instruction for analyzing cases such as this, where evidence arguably suggests multiple possible motives for persecution, only some of which are related to a protected ground. In adjudicating that type of case, the BIA noted that, "it is important to keep in mind the fundamental humanitarian concerns of asylum law." Interim Decision 3287 at 4 (BIA 1996). The Board went on to instruct that, "the difficulty of determining motive in situations of general civil unrest should not...diminish the protections of asylum for persons who have been punished because of their actual or imputed political views." Id. at 6.

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

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 0 persecution on account of political opinion." Gomez-Saballo, 79 at 917; Castellanos-Castillo v. INS, 191 F.3d 459 (9th Cir. 1999) (unpublished opinion). 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, In re S-M-J*, Int. 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).

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];

sworn statements from three individuals who had known him in Guatemala and who corroborated specific details of his claim [AR 265-274]; and a newspaper article published at the time of his hospitalization which included a photograph of him, identified him as a military commissioner, and reported that he had been "ambushed," wounded in the right lung, and was undergoing treatment at the Military Medical Center. The article included direct quotes from military spokesperson, who stated that, "the army condemns this act." [AR 204-205].

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

In Ramos-Calmo v. INS, 285 F.3d 868 (9th Cir. 1999) (unpublished opinion), the Ninth Circuit Court of Appeals considered the case of a young Guatemalan man who had been, like Mr. Samayoa, a member of his local civil patrol (unlike Mr. Samayoa, the 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 activities and, when he denied being a member of the patrol, threatened to kill him unless he joined them. Rather than joining the guerrillas, Ramos-Calmo fled his home the next

day, and eventually made his way to the United States. After his departure, the guerrillas returned to his family's house, killed two of their horses, tied up his father, and threatened to kill Ramos-Calmo should he return. *Id.* at 1.

The Court found that the guerrillas' death threats constituted persecution. *Id.* at 2. It went on, then, to address the central issue: whether the persecution was on account of the Petitioner's political opinion.

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

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.

Id. at 2-3, *citing* *INS v. Elias-Zacarias*, 502 U.S. 472 (1992). The Court concluded that, Ramos' willing participation in the Civil Patrol is strong evidence of his political opinion - an opinion favoring the government and opposing the guerrillas.

Id. at 2. And, accordingly, it determined that "a reasonable factfinder would have to conclude that Ramos suffered past persecution from the URNA on account of his political opinion." *Id.* at 3.

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

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

approached by members of the URNG in his capacity as president of a trade union in a factory, and asked to distribute communist propaganda to his fellow workers. When he refused, he was kidnapped and threatened, and then released. *Id.* at 1. The Court noted that,

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

Id. at 4. And it reasoned that,

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

Id. at 3. Accordingly, it found that, "[t]he evidence compels the conclusion that the URNG believed Castellanos opposed its goals..." and that it targeted him for persecution for that reason. *Id.* at 3.

The facts of Mr. Samayoa's case are much more compelling than those of the Castellanos or Ramos case. He was not simply a civil patrol member, but was a high-profile military commissioner and leader of a 500-man-strong civil patrol. He was threatened not just once or twice, but between 30 and 50 times, over the course of ten

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.

vicinity 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,

could give them in terms of material things, such as gas," [AR 50] has absolutely no basis in the evidence of record. With the exception of one occasion, in 1981, before any of his troubles with the rebels began, there is no evidence that the guerrillas wanted to take anything from Mr. Samayoa with the exception of his life. He did not receive demands for money or goods; he received death threats. He was not held at gunpoint and robbed; he was bombed and shot. His car was not stolen; it was bombed and riddled with bullets so that he could not use it to escape⁹.

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

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

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

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

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

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.

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

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

political opinion, he became entitled to a presumption that he has a well founded fear of future persecution. 8 CFR § 1208.13(b)(II).

The asylum statute creates alternative bases for asylum: past persecution and a well-founded fear of persecution. Federal regulations, Board decisions, and federal court decisions also clearly establish that past persecution and well founded fear of future persecution are separate and distinct methods of establishing asylum eligibility. 8 CFR § 1208.13(b); Matter of H, 21 I & N Dec. 337 (BIA 1996); Matter of Chen, 20 I & N Dec. 16 at 3-4 (BIA 1989); Desir v. Ilchert, 840 F.2d 723 (9th Cir. 1988).

The Board set forth a detailed explanation of past persecution in Matter of H, 21 I & N Dec. 337 (BIA 1996). That case clearly establishes that proof of past persecution, standing alone, establishes eligibility for asylum: a "finding of past persecution gives rise to a regulatory presumption that the applicant has a well-founded fear of persecution." Id. at 5. Thus, once an applicant has established past persecution, he need not present additional evidence to demonstrate a well-founded fear of future persecution. Rather, at that point, the burden shifts to the Department to produce evidence which establishes that a fundamental change in circumstances vitiates the reasonableness of the applicant's fear, and rebuts the regulatory presumption 8 CFR § 1208.16(b)(1)(i)(A)(2001); See also, The Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva,

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

Matter of Izatula, 201 & N Dec. 149, 152-154 (BIA 1990).

Nor 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 a 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:

An alien who has demonstrated past persecution is not separately required by 8 C.F.R. §208.13(b)(1)(ii) to demonstrate compelling reasons for being unwilling 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 persecution which is presumed.

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

Mr. Samayoa therefore established eligibility for asylum when he demonstrated

that he had been persecuted in the past on account of his political opinion. Because the

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 additional facts to establish that he has a well-founded fear of future persecution.

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.

In order to overcome the regulatory presumption of a well founded fear of persecution, the government bore the burden to establish a fundamental change in circumstances which vitates the reasonableness of the Mr. Samayoa's fear, and rebuts the regulatory presumption that he will suffer persecution in the future. 8 CFR § 1208.16(b)(1)(i)(A)(2001).

This Court addressed the issue of when general evidence of changed country conditions may rebut the regulatory presumption of a well founded fear in the 1998 *Fergiste* case. In that case, this Court held that,

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

Fergiste, 138 F.3d at 19 (*citing* former 8 CFR § 208.13(b)(1)(I); *See also* *Vallecillo-Castillo v. INS*, 121 F.3d 1237, 1240 (9th Cir. 1996); *Osorio v. INS*, 9 F.3d 928, 932-33

(9th Cir. 1996); Li Wu Lin v. INS, 238 F.3d 239 (3rd Cir. 2000); Galina 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).

In the Fergiste 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 Fergiste'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 guerrilla movement and military signed peace accords in 1996, hostilities between those loyal to the government and those loyal to the guerrillas continue to this day. [AR 126, 131].

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.

F. EVEN IF MR. SAMAYOA NO LONGER HAS A WELL FOUNDED 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.

Even if this Court concludes that circumstances have changed sufficiently to eviscerate Mr. Samayoa's claim to a well founded fear of future persecution, it may still grant him asylum on humanitarian grounds because the persecution which he suffered in Guatemala was so severe as to render his forced return to that country inhumane.

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); Dobrota v. INS, 195 F.3d 970 (7th Cir. 1999); Vongsakdy v. INS, 171 F.3d 1203 (9th Cir. 1999); Rivera-Cruz v. INS, 948 F.2d 962 (5th Cir. 1991).

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

principle" in *The Handbook on Procedures and Criteria for Determining Refugee Status*

Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees

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

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.

Handbook at para. 136.

In this case, the treatment to which Mr. Samayoa was subjected clearly rises to the level of severe and atrocious persecution which warrants a grant of asylum on humanitarian grounds, without a showing of a well founded fear of future persecution. Over the course of ten years, he lived with incessant death threats, and repeated attempts on his life. Members of the guerilla forces tried to bomb him three times, and surrounded and shot at him twice. The last bombing and shooting incident left him close to death, in a coma for three days, and hospitalized for a month. And, when the guerillas realized that they had wounded but not killed him, they came looking for him in the hospital, at his aunt's house and, finally, at his own home. Such protracted, traumatic violence surely constitutes the sort of "atrocious" persecution which warrants a grant of asylum on humanitarian grounds, regardless of the likelihood of future persecution.

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

In order to establish eligibility for withholding of deportation, an applicant must establish that his "life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion," Former INA § 243(h). One who has suffered past persecution on account of a protected ground is presumed to have established eligibility for withholding of removal, just as he is presumed to have established eligibility for asylum. 8 CFR § 1208.16(b)(2); Fergiste v. INS, 138 F.3d 14 (1st Cir. 1998).

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

CONCLUSION

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

RESPECTFULLY SUBMITTED this 26th day of September, 2003,

18126

Harvey Kaplan, Attorney for
Juan Samayoa, Petitioner

62449

Iana Greenstein, Attorney for
Juan Samayoa, Petitioner

45907

Maureen O'Sullivan

7981

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

CERTIFICATE OF SERVICE

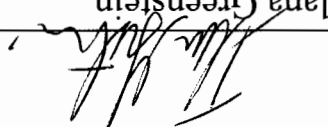
I, Ilana Greenstein, certify that a copy of the foregoing PETITIONER'S BRIEF, and all attachments including the Appendices, were sent by regular mail, postage prepaid, to:

Brenda O'Malley, 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
Boston, MA 02203

this 26th day of September, 2003.



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

CERTIFICATE OF COMPLIANCE

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.

9/26/2003
Date

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

Appendix A
Decision of the Board of Immigration Appeals



Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

BOS

5201 Leesburg Pike, Suite 1300
Falls Church, Virginia 22041

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

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
IMMIGRATION COURT
BOSTON, MASSACHUSETTS

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JAN 16 2003

Date:

File: A73-182-454 - Boston

In re: SAMAYOA CABRERA, JUAN ALICIO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kaplan, Harvey

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

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
[Signature]

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOSTON, MASSACHUSETTS

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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

Handwritten signature

Appendix 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,)
Lead Respondent)
IN REMOVAL PROCEEDINGS

AND

File A 73 617 650

In the Matter of

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

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.

APR 000042

ON BEHALF OF RESPONDENTS:

Susan Mills, Esquire
1165 Elmwood Avenue
Providence, RI 02907

ON BEHALF OF SERVICE:

Susan Hillier, 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.

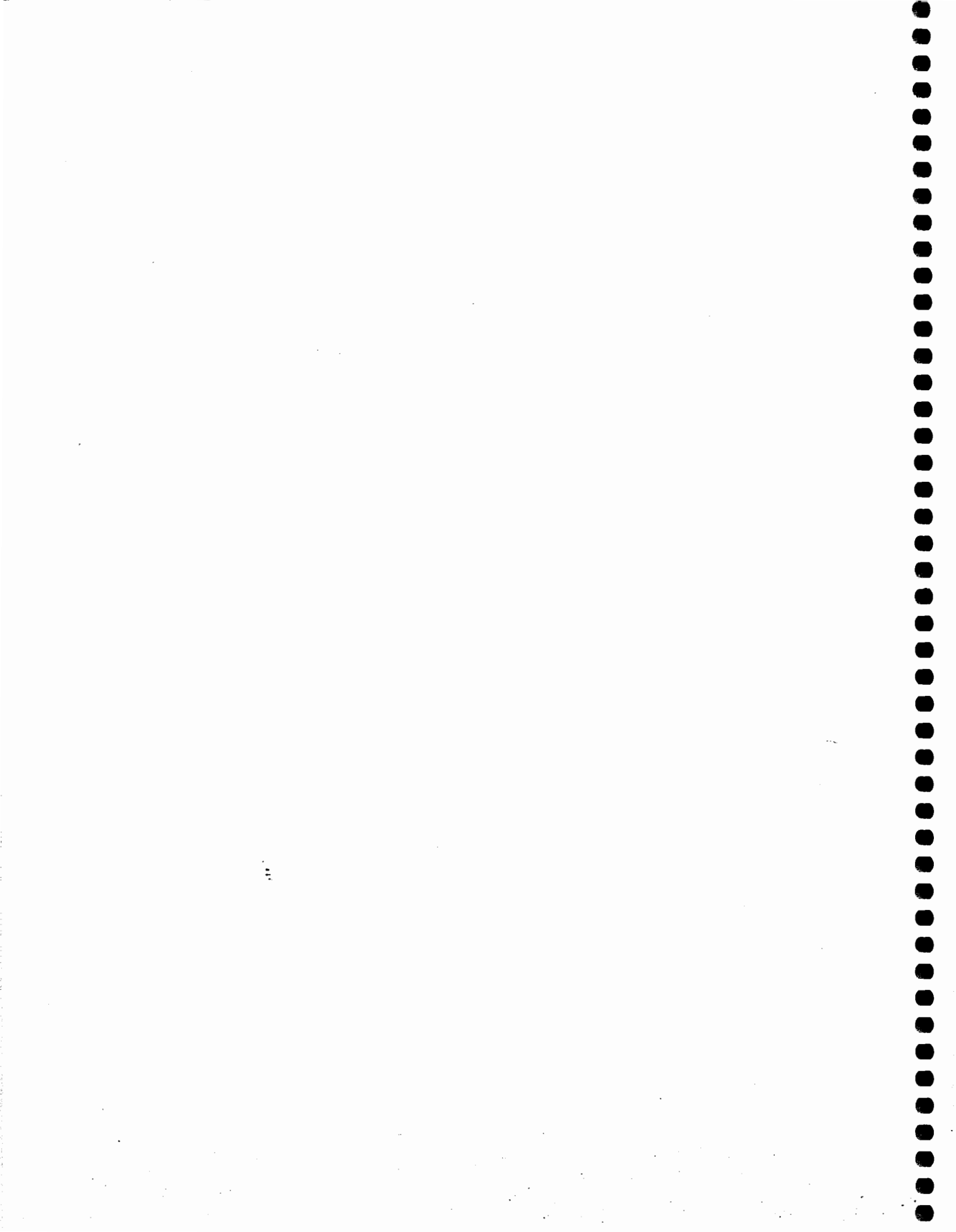
Removal proceedings were instituted against them when the

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



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 guerrillas 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

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 guerrillas when they

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 guerrillas 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

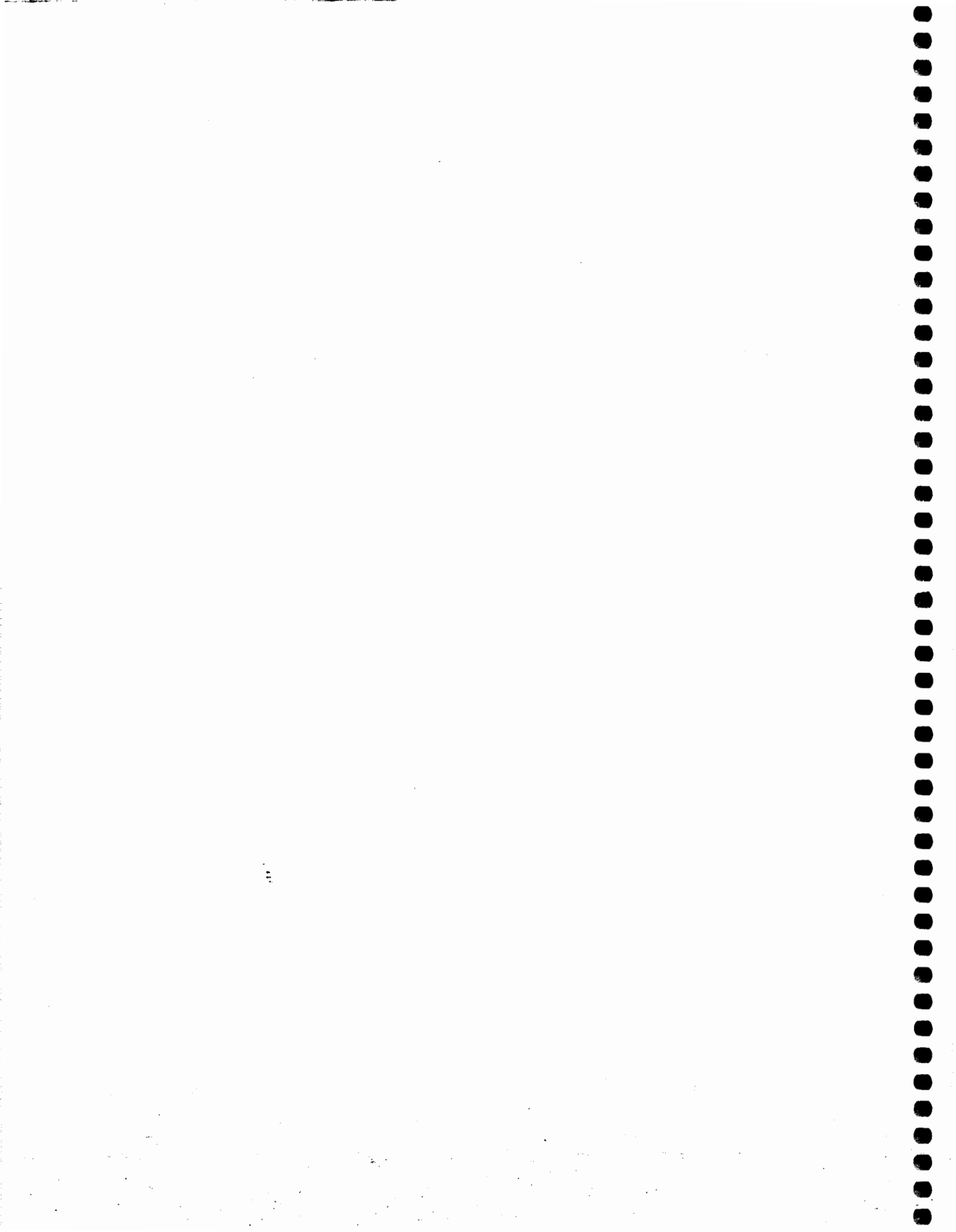
appointed him a military commissioner in '84. Respondent claims that he received numerous notes from people whom he believe to be guerrillas, harassing him. However, the only time that he

encountered directly guerrillas, 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

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 decides 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

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



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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 guerrillas, according to the respondent's

description of people in green and his understanding that, that

represented the guerrillas. There seems to have been a large

number of guerrillas 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

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 guerrillas. And then gave this information to the guerrillas who then lay in wait for him. I find that to be less than probable, certainly. At first, it appears that the guerrillas 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 guerrillas 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 guerrillas 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

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 guerrillas 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

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

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 acquiescence 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

respondent lied to get a visa indicating that she had no

relatives here. She understood that if she told the Consul

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
PATRICIA SHEPPARD
Immigration Judge

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 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.

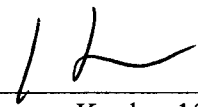
Should the Court decline jurisdiction in this matter, the Petitioner requests that a stay of deportation remain in effect for an additional 30 days pending the filing of a new petition for writ of habeas corpus in the U.S. District Court.

Respectfully submitted,


2/4/2003
Date



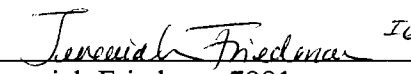
Ilana Greenstein 62449, counsel for Petitioners



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

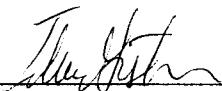
CERTIFICATE OF SERVICE

I, Ilana Greenstein, hereby certify that I have served a copy of the foregoing Petition for Review by sending, postage prepaid this 4th 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**

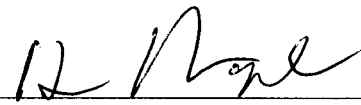
and


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 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 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,

A handwritten signature in black ink, reading "Jeffrey Fratter", is positioned below the word "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

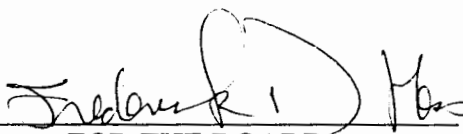
ON BEHALF OF RESPONDENT: Kaplan, Harvey

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.



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

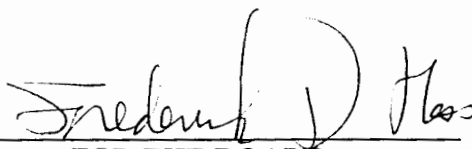
ON BEHALF OF RESPONDENT: Kaplan, Harvey

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,

Lead Respondent

)
)
)

IN REMOVAL PROCEEDINGS

AND

File A 73 617 650

In the Matter of

BLANCA MARGARITA VELASQUEZ,

a/k/a BLANCA MARGARITA

VELASQUEZ-RODRIGUEZ

a/k/a BLANCA MARGARITA SAMAYOA,

spouse of the respondent

Respondent

)
)
)
)
)
)
)

IN REMOVAL PROCEEDINGS

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

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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

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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

sdh

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

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 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 war has ended. It has ended some time ago, and the, they maybe demobilized combatants 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

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

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, and 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

Emboscan 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 restablece", 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)

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 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.


(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
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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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☒ petitioner(s) ☐ respondent(s) ☐ intervenor(s)
☐ I do not represent a party to the appeal.

Harvey Kaplan¹⁶
(signature)

(SIGN ONLY IF PARTICIPATING)

Corrections:

Status: a

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FOR THE FIRST CIRCUIT

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2003 FEB 25 A 10:40

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US COURT OF APPEALS
FOR THE FIRST CIRCUIT

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(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'Sullivan¹⁶
(signature)

(SIGN ONLY IF PARTICIPATING)

Corrections:

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E-Mail: mosullivan@kof-law.com

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Court of Appeals No. _____

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEARANCE FORM

Case No. 3-1180 Samayoa Cabrera v. INS 2003 FEB 25 A D: 40

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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

Jeremiah E. Friedman, Esq.
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Fax: (617) 422-0997 E-Mail: jfriedman@kof-law.com

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No ☒

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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.,

Petitioner

v.

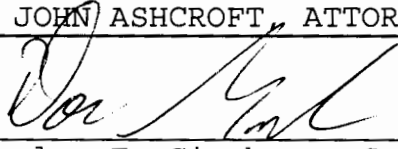
JOHN ASHCROFT, ATTORNEY GENERAL OF THE US

Respondent

The Clerk will enter my appearance as Counsel for the

JOHN ASHCROFT, ATTORNEY GENERAL OF THE US

Name:


Douglas E. Ginsburg, Senior Litigation Counsel

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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.

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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
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



BRENDAM. 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

sdh

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

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

sdh

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

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 war has ended. It has ended some time ago, and the, they maybe demobilized combatants 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

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,

A handwritten signature in cursive script, reading "Jeffrey Fratter".

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

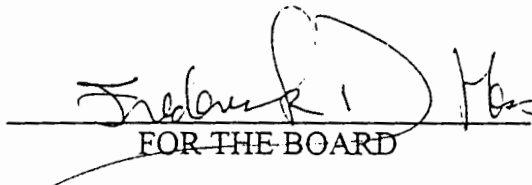
ON BEHALF OF RESPONDENT: Kaplan, Harvey

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.


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 Alicia SAMAYOA Cabrera et. al.
Petitioners

v.

John ASHCROFT, Attorney General of the United States
Respondent

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

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

2003 MAR -7 A 11:45

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 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 Andreu 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.

Andreu, 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 Andreu 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.

Andreu 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 statute 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.

Andreu 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 Andreu 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.

Andrieu 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 Andrieu, 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 Andrieu, the Second and Sixth Circuits have formally adopted Andrieu's reasoning and holding: Bejjani v. INS, 271 F.3d 670, 687-689 (6th Cir. 2001) (Quoting Andrieu'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

Andrei 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.

Andrei at 484.

This analysis was fully in keeping with standards laid forth in Circuit Courts across the nation: Oforu 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 Andrei, 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 Andrieu 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 Beinjani, 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 Beinjani greatly outweighed any inconvenience to the INS, and the stay certainly served the public interest of ensuring that the INS complies with the law.

Beinjani, 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.

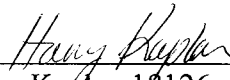
Even if this Court concludes that the likelihood of success is relatively low, it may still grant the Petitioners a stay of deportation given the dramatic disparity in the harm which they will suffer if they are deported to Guatemala and the negligible harm which the Government will suffer if they are 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

 ¹⁶
Harvey Kaplan 18126, counsel for Petitioners

 ¹⁶
Maureen O'Sullivan 45907

 ¹⁶
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.

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

RECEIVED
OFFICE
OF THE
CLERK
U.S. COURT OF APPEALS
FOR THE FIRST CIRCUIT

2003 APR 7 A 9:50

United States Court of Appeals For the First Circuit

No. 03-1180

JUAN ALICIO SAMAYOA CABRERA; BLANCA MARGARITA VERA QUEZ,

Petitioners,

v.

JOHN ASHCROFT,

Attorney General of the United States,

Respondent.

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: 

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

Petitioners

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent

ORDER OF COURT

Entered: June 2, 2003

Upon consideration of motion,

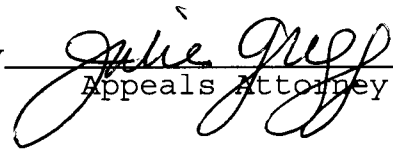
It is ordered that the time for the respondent to file the certified administrative record be enlarged until June 30, 2003 only.

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.

/ / /

/ / /


FILED IN CLERKS OFFICE
U.S. COURT OF APPEALS
FOR THE FIRST CIRCUIT
2003 MAY 30 P 12:55

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, 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
)	
)	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.

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,

Petitioner.)
2003 JUL -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.

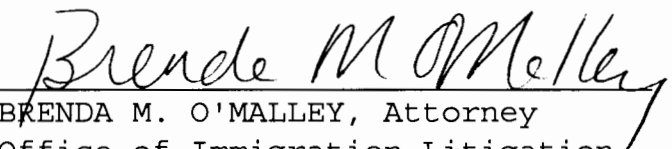
This motion is made in good faith and not for the purpose of delay. This extension is necessary in order to permit the Executive Office of Immigration Review (EOIR) to adequately prepare the Certified Administrative Record in this case.

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


BREND A 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

ORDER OF COURT

Entered: July 3, 2003

2003 JUL - 3 P 1:34
CLERK'S OFFICE
U.S. COURT OF APPEALS
FOR THE FIRST CIRCUIT

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 *Richard Cushing Donovan*

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

FILED IN CLERK'S OFFICE
US COURT OF APPEALS
FOR THE FIRST CIRCUIT
Juan Alicia SAMAYOA Cabrera and
Blanca Margarita VELASQUEZ
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:

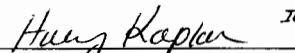
1. Counsel submitted one opening brief to the First Circuit on August 18th; she has another brief due on August 22nd, one due on September 4th, one due on September 9th, and several memos due in the weeks in between.
2. Two of the six attorneys at counsel's firm are on vacation during the two weeks preceding 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.

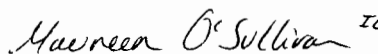
4. Counsel has spoken to Brenda O'Malley, counsel for the Respondent;
Attorney O'Malley indicated that she has no objection to the request for an
extension of time.

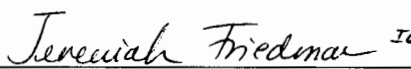
Respectfully submitted,

8/20/2003
Date


Ilana Greenstein 62449, counsel for Petitioners

 ¹⁶
Harvey Kaplan 18126, counsel for Petitioners

 ¹⁶
Maureen O'Sullivan 45907

 ¹⁶
Jeremiah Friedman 7981
Kaplan, O'Sullivan & Friedman
10 Winthrop Square, 3rd floor
Boston, MA 02110
(617) 482-4500

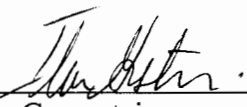
CERTIFICATE OF SERVICE

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

ORDER OF COURT

Entered: August 22, 2003

2003 AUG 22 A 9:23
CLERK'S OFFICE
COURT OF APPEALS
FOR THE FIRST CIRCUIT

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 *Paul N. Glavin*
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 McGoeth, 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

2004 MAR 22 A 11:45

Samayoa Cabrera v. Ashcroft

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:

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. Campbell

Name of Firm:

U.S. Dep't of Justice, Office of Imm. Lit.

Firm Address:

20 Massachusetts Ave., N.W.

Washington, DC 20530

Telephone:

(202) 616-8476

Court of Appeals Bar Number:

Pending

Fax:

(202) 616-8460

Signature:

Isaac R. Campbell

E-mail:

isaac.campbell@usdoj.gov

Date:

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

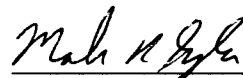
Entered: May 4, 2004

2004 MAY - 4 P 12:02
FILED IN CLERK'S OFFICE
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

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.

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

2004 MAY -4 P 12:02

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**

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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 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 indicia 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 undoubtedly 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

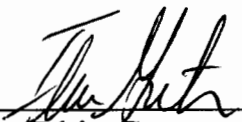
I, Ilana Etkin Greenstein, certify that a copy of the foregoing PETITION FOR REHEARING, and all attachments including the Appendix, were sent by regular mail, postage prepaid, to:

Isaac R. Campbell, Esq. (2 copies)
Office of Immigration Litigation
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and

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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.

6/17/2004
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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 Alicia 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 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 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 to***13** 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

[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 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.

[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 politically inspired 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 is **affirmed**.
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

ORDER OF COURT

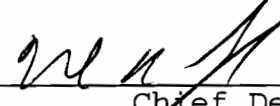
Entered: July 13, 2004

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 
Chief Deputy Clerk

*of the District of Maine, sitting by designation.

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, USA
Isaac R. Campbell

2004 JUL 13 A 11:07
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US COURT OF APPEALS
FOR THE FIRST CIRCUIT

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United States Court of Appeals For the First Circuit

No. 03-1180

973-617 650

JUAN ALICIO SAMAYOA CABRERA and
BLANCA MARGARITA VELASQUEZ,

Petitioners,

v.

JOHN ASHCROFT,

Respondent.

JUDGMENT

Entered: May 4, 2004

2004 JUL 20 A 10:30
FILED IN CLERKS OFFICE
US COURT OF APPEALS
FOR THE FIRST CIRCUIT

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.**

Richard Cushing Donovan, Clerk


Deputy Clerk

Date: JUL 20 2004

By The Court:

MARK R. SYSKA

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>Simon Rios</u>						
Address <u>SRIOS @ WBUR-ORG</u>						
SOLD BY	CASH	CHECK	CHARGE	ON ACCT.	MOSE. RETD.	PAID OUT
QUAN	DESCRIPTION				PRICE	AMOUNT
1	ENTIRE CASE SCAN OF				90	90 00
	APPEALS CASE 03-1180					
	150 PAGES SCANNED					
1	LABOR FEE FOR SCANNING				22	22 00
	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	112 00

(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