

**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
UNITED STATES IMMIGRATION COURT  
26 FEDERAL PLAZA  
NEW YORK, NEW YORK**

File No.: [REDACTED]

In the Matter of: \_\_\_\_\_ :

[REDACTED] \_\_\_\_\_ :

The Respondent \_\_\_\_\_ :

**IN REMOVAL PROCEEDINGS**

**CHARGE:** INA § 212(a)(6)(A)(i) Present Without Being Admitted or Paroled

**APPLICATIONS:** INA § 208 Asylum  
INA § 241(b)(3) Withholding of Removal  
8 C.F.R. § 1208.16 Convention Against Torture

**ON BEHALF OF RESPONDENT**

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**ON BEHALF OF DHS**

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**DECISION AND ORDER OF THE IMMIGRATION JUDGE**

**I. PROCEDURAL HISTORY**

[REDACTED] (“the Respondent”) is a twenty year-old male native and citizen of Guatemala. [Exhs. 1; 2; 7, Tabs A-B; 10.] The Respondent entered the United States (“U.S.”) on or about August 17, 2009, at the U.S.-Mexico border, when he was seventeen years old. [Exhs. 1; 2; 7, Tab A.] He was not inspected, admitted, or paroled at that time. [Exhs. 1; 2; 7.] On August 18, 2009, a Border Patrol agent apprehended the Respondent near Nogales, Arizona. [Exh. 2.] As the Respondent was an unaccompanied alien minor, he was transferred to the custody of the Department of Health and Human Services, Office of Refugee Resettlement (“ORR”) in El Cajon, California. [Exh. 2; 6.] On August 20, 2009, the Department of Homeland Security (“DHS”) personally served the Respondent with a Form I-862, Notice to Appear (“NTA”), charging him as removable pursuant to section 212(a)(6)(A)(i) of the

Immigration and Nationality Act (“INA”), as an alien present without being admitted or paroled. [Exh. 1.]

On October 1, 2009, the Respondent appeared with counsel before the San Diego Immigration Court, admitted the factual allegations contained in the NTA, and conceded removability as charged. Removability was therefore established by clear and convincing evidence. See 8 C.F.R. §§ 1240.8, 1240.10. Guatemala has been designated as the country of removal. On November 17, 2009, ORR released the Respondent to the custody of his father, who was residing in Far Rockaway, New York. [Exhs. 4; 6.] Venue was changed to the New York Immigration Court on December 3, 2009.

On April 13, 2010, the Respondent appeared before this Court and filed a Form I-589, Application for Asylum and for Withholding of Removal. [Exh. 7.] On October 5, 2011, the Respondent appeared with counsel for an individual hearing. The Respondent provided testimony in support of his application. Doctor [REDACTED], a medical doctor who evaluated the Respondent at the [REDACTED] School of Medicine, also testified. For the following reasons, the Court will grant the Respondent’s request for asylum pursuant to INA § 208.

## II. EXHIBITS

- |                  |   |
|------------------|---|
| Exhibit 1:       | Form I-862, Notice to Appear, served August 20, 2009;   |
| Exhibit 2:       | Form I-213, Record of Deportable/Inadmissible Alien;  |
| Exhibit 3:       | Form EOIR-55, Record of Master Calendar Pre-Trial Appearance and Order, dated October 1, 2009;  |
| Exhibit 4:       | Motion for Change of Venue, filed December 1, 2009;   |
| Exhibit 5:       | Motion for Substitution of Counsel, filed December 1, 2009;   |
| Exhibit 6:       | ORR Release Notification, dated November 17, 2009;  |
| Group Exhibit 7: | Form I-589, Application for Asylum and for Withholding of Removal, and attached affidavit and supporting documents, Tabs A-I, filed April 13, 2010; |
| Exhibit 8:       | Request for Comment from the Department of State Regarding the Respondent’s Form I-589, dated April 13, 2010;                                       |
| Group Exhibit 9: | Respondent’s supplemental exhibits, Tabs J-P, filed September 8, 2011;  |
| Exhibit 10:      | Amendment to Form I-589 and copy of Respondent’s Guatemalan passport, filed October 5, 2011.  |

## III. TESTIMONY

### A. The Respondent

On October 5, 2011, the Respondent testified under oath as follows:

The Respondent was born on [REDACTED], in [REDACTED], San Marcos, Guatemala. He lived with his mother and siblings in [REDACTED] until he left Guatemala in August 2009. When the Respondent was fifteen years old, he began working part-time for [REDACTED], the owner and driver of a large passenger van, commonly referred to as a bus, which traveled between Sipacapa and Quetzaltenango. The Respondent's job was to collect fares and help passengers with their luggage. When he was seventeen years old, he became a full-time employee, earning between 230 and 250 quetzales, the equivalent of 30 to 40 dollars, each week.

Around the end of 2008, members of a gang known as Mara-18 began to demand that the Respondent pay them a monthly "tax" of 500 quetzales. They charged "everyone" this "tax," and most people paid it. The gang had been demanding money from bus owners long before they began to demand money from bus employees, and the Respondent's boss, Mr. [REDACTED], was accustomed to paying the "tax." He advised the Respondent to do the same and told him that Mara-18 would kill him if he did not. However, the Respondent refused to pay the "tax," because his family needed the money badly. The gang threatened to beat him, but he continued to refuse. A few days later, in January 2009, gang members boarded the bus while the Respondent was working and robbed him of all the money he had with him at the time. About a week after they robbed him, six or seven gang members attacked the Respondent at a bus station in Quetzaltenango. They beat him, demanded that he pay his "taxes," and pushed him onto the floor, where he fell on a sharp piece of iron and cut his back. His mother treated the cut at home.

About five weeks after the first attack, in February 2009, six or seven members of Mara-18 again attacked the Respondent, beat him, and demanded payment. He recognized them from the assault in January. The two attacks also occurred close to the same place. This time, however, one of the gang members pulled out a knife and cut the Respondent across the stomach. It was a long cut, but not deep, and the Respondent's mother took him to a clinic called Centro de Salud, where he received seven stitches, a powder to put on his wounds, and pain medication. The Respondent told his boss, Mr. [REDACTED], what had happened, and they walked to the police together to complain. The police asked the Respondent for photographs of his assailants. He did not have photographs, so the officers asked him if he knew the gang members' names or addresses. He did not. Without names, addresses, or photographs, the officers claimed that they could not help the Respondent. The Respondent had never spoken with the police before, but he never went to them again, because they seemed unwilling to help.

For the next five months, the Respondent had no problems with Mara-18. Then, at the end of July 2009, they attacked him while he was on a break from work. He had gone to eat and was on his way back to the bus when he felt something strike him over the head. The Respondent remembers nothing for a period of time following the blow. When he regained consciousness, he was blindfolded, traveling in a car with his hands tied behind his back. He wore neither a shirt nor shoes. Eventually, the car arrived at a very old, abandoned house. The house was dark, and its floors were covered in garbage and "food for the animals." The gang took the Respondent out of the car and pushed him

into the house. They tied his arms and legs to a chair and did not remove the blindfold. There were more Mara-18 members present this time than there had been during previous attacks, about nine of them, but the Respondent recognized some as participants in the January and February beatings. The gang members beat the Respondent all over his body and told him that they would continue to beat him until he either gave them the money they demanded or gave them a phone number for his family so they could demand payment from his family. The Respondent told the gang that his family had neither a phone nor any money to give. The gang members told him that they would kill him if he did not pay, and the Respondent believed them. He had heard of other people and of friends who were killed under the same circumstances.

Eventually the gang stopped beating the Respondent. He heard them leave and go to a nearby room, where they discussed what to do with him. They said they could not let him go unless he paid, but they were worried about leaving him in the house for a lengthy period of time. The Mara-18 members agreed that they would have to kill the Respondent. With that issue settled, they left the house, leaving him to spend the night tied to the chair. The gang returned the following afternoon. There were approximately nine gang members present, but not all of them had been there the day before. The gang members beat the Respondent until he was unable to tolerate any more pain, and broke down and gave them his family's phone number. He heard them say that they were going to take him out of the house that night and kill him, and then they left again. The Respondent later learned that Mara-18 did not call his family that day.

The Respondent was very afraid. He remembers crying and praying after the gang members left the house. He realized that if he did not find a way out of the house then, he would die. The Respondent began to rock in the chair, trying to break it. He fell to the floor, and an arm of the chair broke. After about forty minutes or an hour, he managed to free his hands, but he could not move them for twenty minutes. Once he was able to move his hands, he untied his feet, but he could not move one of his legs right away. The Respondent was able to walk at around four or five o'clock in the afternoon, and he immediately began a desperate search for a way out of the house. All the doors were locked, but after a great deal of struggle which the Respondent described in detail, he managed to break a tall window with pieces of the chair and escape from the house. He was in a deserted forest area, and there were no other houses nearby. Tall grasses covered in spines prevented him from walking in one direction. In the other direction, he saw a covered walkway. He walked for about thirty minutes on the walkway until he reached a highway, where he hailed a passing car and begged for help. He told the driver everything that had happened, and the driver took the Respondent to his house. He gave the Respondent a shirt, shoes, and pants, and he asked if the Respondent wanted to go to the police. The Respondent declined, because the police did nothing the first time he spoke with them, and he was sure they would do equally little after his kidnapping. The Respondent testified that he believes the police are afraid of the gang. He stated that even if they make arrests, the police officers release gang members immediately, because if they do not, the officers' families will be killed. The driver took the Respondent to a bus station, and the Respondent went home.

On cross examination, DHS asked the Respondent why he did not include the third attack in the affidavit he submitted on April 13, 2010, but rather added it in an addendum filed on September 8, 2011. The Respondent replied that he was initially afraid to speak about the incident, but eventually, his mother convinced him that he must tell the whole truth to the Court.

The Respondent's life in Guatemala after his kidnapping was "very disastrous and bad." He could not sleep, because he was in pain from the beatings, and if he did fall asleep, he had nightmares of the beatings and of the gang searching to kill him. The Respondent had no more contact with Mara-18, but later, a friend called the Respondent to tell him the gang was looking for him. He said they were passing around a photograph of him, offering 100 quetzales to anyone who knew or could find the person in the picture. The gang did not know the Respondent's real name, because he called himself Lazaro when he worked on the bus so that the gang could not find him outside of work. It was common for bus employees to use false names for this reason.

The Respondent acknowledges that Mara-18 never threatened him outside of the bus or the bus stations, and he states that his mother has had no "problems" with Mara-18, although the gang eventually called her several times using the phone number the Respondent provided. She still lives in the same house where the Respondent lived with her in Guatemala. However, if he were returned to Guatemala, the Respondent is sure that the gang would kill him. The police do nothing, he says, because they fear for their own lives, and he claims that country conditions have worsened. When the Respondent was in Guatemala, Mara-18 "taxed" everyone monthly. Now, bus owners pay the gang every other Sunday, and they ask for money every week. The Respondent's brother was also a fare collector on a bus, and the gang began to threaten him as well, even though he usually paid his "taxes." The Respondent's brother knew what had happened to the Respondent, but he continued working as a fare collector because he needed the money. As a result of the threats, he also left Guatemala. At the time of the Respondent's testimony, the Respondent's brother was traveling through Mexico, on his way to the U.S.

Since arriving in the U.S., the Respondent has been employed in construction, painting, and demolitions. He does not regularly attend school, but he has taken a few classes in English, art, and music at [REDACTED] a nonprofit organization that offers educational services in Manhattan. The Respondent is unaware of the existence of any Mara-18 members in the U.S.

**B. Doctor [REDACTED]**

On October 5, 2011, Doctor [REDACTED] testified under oath as follows:

Dr. [REDACTED] is a medical doctor who works at [REDACTED] School of Medicine. He received special training in the evaluation of trauma survivors in 2001, and for the past ten years, he has been evaluating survivors of trauma. Dr. [REDACTED] met with the Respondent for about three and a half hours on February 3, 2011. He completed a

medical and psychological evaluation at that time, and he found that the Respondent had a “significant number” of scars, some of which were consistent with his account of the attacks he suffered.

Dr. ██████ diagnosed the Respondent with Post-Traumatic Stress Disorder (“PTSD”), finding that the Respondent exhibited symptoms of each of the five criteria which must be present for such a diagnosis. His findings are entirely based on his interview with the Respondent. Dr. ██████ stated that the Respondent’s symptoms include nightmares, recollections that persistently return despite efforts to prevent them, and “avoidance activities,” a medical term describing an effort to avoid anything associated with the trauma the Respondent experienced. He remarked that the Respondent was difficult to evaluate because when people experience trauma as teenagers, they frequently do not recognize or remember the symptoms they experience shortly after the trauma. Dr. ██████ stated that if the Respondent is forced to return to the place where his trauma occurred, his symptoms may worsen, and he may experience additional psychological harm.

#### IV. LEGAL STANDARDS AND ANALYSIS

##### A. Asylum

To be statutorily eligible for asylum, an applicant bears the burden of establishing that he is a refugee, which requires a showing of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA §§ 101(a)(42)(A), 208(b)(1)(A); 8 C.F.R. §§ 1208.13, 1240.8(d). If eligibility is established, asylum may be granted in the exercise of discretion. INA § 208(b)(1)(A); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987); *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999).

##### 1. *Credibility and Corroboration*

In all applications for asylum, the Court must make a threshold determination of the alien’s credibility. *Matter of O-D-*, 21 I&N Dec. 1079, 1081 (BIA 1998). Because the Respondent filed his application for asylum after May 11, 2005, his case is governed by the REAL ID Act. See Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005) (“REAL ID”). Under the REAL ID Act, after considering “the totality of the evidence, and all relevant factors,” the Court may base a credibility determination on: the demeanor, candor, or responsiveness of the applicant or witness; the inherent plausibility of the account; the consistency between oral and written statements; the internal consistency of such statements; the consistency of such statements with evidence of record; any inaccuracy or falsehood in such statements, “without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim”; or any other factor. INA § 208(b)(1)(B)(iii); see also *Matter of J-Y-C-*, 24 I&N Dec. 260, 266 (BIA 2007); *Diallo v. U.S. Dep’t of Justice*, 548 F.3d 232, 234 n.1 (2d Cir. 2008).

Under the REAL ID Act, an applicant's own testimony may be sufficient to meet his burden of proof for his asylum claim if the testimony is credible, persuasive, and "refers to specific facts sufficient to demonstrate that the applicant is a refugee." INA § 208(b)(1)(B)(ii); see also 8 C.F.R. § 1208.13(a); J-Y-C-, 24 I&N Dec. at 263. In determining whether the applicant has met his burden of proof, the Court "may weigh the credible testimony along with other evidence of record." INA § 208(b)(1)(B)(ii). However, where the Court determines that the applicant should "provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." INA § 208(b)(1)(B)(ii).

In the present case, the Court finds that the Respondent testified credibly and that he has provided sufficient evidence to corroborate his testimony. See INA § 208(b)(1)(B)(ii)-(iii). The Respondent spoke with compelling, emotional detail about the attacks he suffered in Guatemala, in particular the third attack, which he recalled vividly and with evident terror. The Respondent's fear was apparent in his rapid speech, shortness of breath, and increasing use of expressive gestures. In addition, his testimony was internally consistent and generally consistent with his asylum application and the attached affidavit. [Exh. 7, Tab A.] The Court notes DHS's concern that the Respondent did not include his third violent encounter with Mara-18 in his original asylum application and affidavit, but rather provided it in an addendum filed with the Court over a year later. [Exh. 9, Tab J.] However, the Respondent has amply explained the reasons for his original omission of this information, and the Court does not find that it reflects negatively on his credibility. As he wrote in the addendum, the third attack "is something that is very difficult for me to talk about even now because it was the most afraid I have ever been. I did not tell people here about it until finally my mom convinced me that I have to tell everything even if I wish I could forget it." Id. The Respondent testified very credibly about the incident, and the Court observed his agitation as he remembered his kidnapping, the threats to his life, his desperate attempts to escape, and his belief that he would die. In addition, Dr. ██████ explained that the Respondent suffers from PTSD, which has caused him to "avoid situations that arouse recollection of the trauma." [Exh. 9, Tab K.] The Court credits the Respondent's explanation that he did not initially reveal the third attack by Mara-18 because it was extremely traumatic, and he wished to forget it rather than relive it in the retelling. See [Exh. 9, Tab J.]

There is one further inconsistency between the Respondent's testimony and his asylum affidavit, but the Court considers it a minor error and gives it very little weight. The Respondent testified that his complaint to the police regarding Mara-18 took place after the second attack. In his affidavit, he described the same reaction to his complaint by the police, but he implied that it took place earlier. [Exh. 7, Tab A.] He wrote that he decided not to go to the police after the second attack, because he knew they would not help him. Id. This error may be a lapse in memory, or it may be attributable to the trauma surrounding the incidents in Guatemala and to confusion resulting from the Respondent's efforts to hide and suppress the third incident in his initial interviews with his lawyer. Whatever the cause, the remainder of the Respondent's testimony was

strikingly clear and consistent, and the Court therefore places little importance on this lapse.

The Court notes that “unreasonable demands are not placed on an asylum applicant to present evidence to corroborate particular experiences (e.g., corroboration from the persecutor).” Matter of S-M-J-, 21 I&N Dec. 722, 725 (BIA 1997). Nonetheless, the Respondent has submitted substantial corroboration of his experiences in Guatemala, including statements by both his mother and the Municipal Health Coordinator at the Health Center of the Municipality of Sipacapa, confirming his injuries after the second attack in February 2009. [Exh. 7, Tabs C-D.] In addition, his experiences are wholly consistent with the background information he has submitted to the Court, some of which deals directly with the frequency of attacks by Mara-18 and other Guatemalan gangs on bus owners and employees who fail to pay their “taxes.” See [Exhs. 7, Tabs E, F; 9, Tabs M at 104, O at 131.] Human Rights Watch reports that the National Civilian Police of Guatemala (“PNC”) recorded the murders of fifty-seven bus drivers and thirty drivers’ assistants in the first seven months of 2010 alone. [Exh. 9, Tab O at 131.] According to the International Crisis Group (“ICG”), in 2009, the year the Respondent fled Guatemala, 192 Guatemalan bus drivers were killed in “the struggle between bus company owners and gangs.” [Exh. 9, Tab M at 104.] For all the above reasons, the Court finds that the Respondent testified credibly and provided adequate evidence to corroborate his claim. See INA § 208(b)(1)(B)(ii)-(iii).

## 2. *Statutory Eligibility*

An asylum applicant may demonstrate that he is a “refugee” in either of two ways. First, he may demonstrate that he suffered past persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A). Second, he may demonstrate a well-founded fear of future persecution on account of a protected ground by demonstrating that he subjectively fears persecution and that his fear is objectively reasonable. INA § 101(a)(42)(A); Ramsameachire v. Ashcroft, 357 F.3d 169, 178 (2d Cir. 2004).

### a. **Persecution**

To establish past persecution, an asylum applicant must demonstrate that he suffered persecution in his country of nationality on account of an actual or imputed protected ground, and that he is unable or unwilling to return to, or avail himself of the protection of, that country because of such persecution. INA §§ 101(a)(42)(A), 208(b)(1)(A)-(B); 8 C.F.R. § 1208.13(b)(1). The persecution must have been either by the government of the country to which the alien is returnable or “at the hands of an organization or person from which the government cannot or will not protect the alien.” Matter of McMullen, 17 I&N Dec. 542, 545 (BIA 1980).

There is no universally accepted definition of “persecution.” See Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees ¶ 51, p.14 (Geneva, January 1992). “Persecution” has

generally been interpreted to include threats to life or freedom, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom. Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985). Persecution may include “non-life-threatening violence and physical abuse.” Ivanishvili v. U.S. Dep’t of Justice, 433 F.3d 332, 341 (2d Cir. 2006) (internal quotation marks and citations omitted). Conversely, harassment and discrimination typically do not rise to the level of persecution. See Matter of A-E-M, 21 I&N Dec. 1157, 1159 (BIA 1998). In the Second Circuit, “violent conduct generally goes beyond the mere annoyance and distress that characterize harassment.” Edimo-Doualla v. Gonzales, 464 F.3d 276, 283 (2d Cir. 2006) (internal citations omitted). In addition, “a ‘minor beating’ or, for that matter, any physical degradation designed to cause pain, humiliation or other suffering, may rise to the level of persecution if it occurred in the context of an arrest or detention on the basis of a protected ground.” Beskovic v. Gonzales, 467 F.3d 223, 226 (2d Cir. 2006). When evaluating whether persecution has occurred, the Court must consider events cumulatively. Poradisova v. Gonzales, 420 F.3d 70, 79-80 (2d Cir. 2005).

If past persecution is established, a regulatory presumption arises that the applicant has a well-founded fear of future persecution on the basis of his original claim. 8 C.F.R. § 1208.13(b)(1). DHS may rebut this presumption if it establishes by a preponderance of the evidence that the applicant’s fear is no longer well-founded due to a fundamental change in circumstances or because the applicant could avoid future persecution by relocating to another part of the country and it would be reasonable to expect him to do so. 8 C.F.R. § 1208.13(b)(1)(i)-(ii).

#### **i. The Respondent has suffered past persecution**

In the present case, the Court finds that in the aggregate, the violence, threats, and kidnapping suffered by the Respondent undoubtedly rise to the level of persecution. Beginning at the end of 2008, Mara-18 engaged in a course of escalating violence against the Respondent. Gang members began to threaten him with beatings, and then, in January 2009, they robbed him on one occasion and attacked and beat him on another. In February 2009, Mara-18 members beat the Respondent again and cut him with a knife across the stomach. The wound was sufficiently serious that the Respondent required seven stitches. Finally, in July 2009, Mara-18 kidnapped the Respondent, threatened him with death, held him overnight tied to a chair, beat him until he gave them his family’s phone number, and discussed the necessity of killing him while he was in a position to overhear their conversation. Each time, Mara-18 attacked the Respondent in overwhelming numbers, ranging from about six to about nine assailants. The Respondent developed PTSD as a result of these attacks. As stated above, the U.S. Court of Appeals for the Second Circuit has held that “violent conduct” generally rises to the level of persecution. See Edimo-Doualla, 464 F.3d at 283; Beskovic, 467 F.3d at 226; Aliyev v. Mukasey, 549 F.3d 111, 117 (2d Cir. 2008) (finding past persecution where an alien was detained for one day, held overnight, and hit several times in the face and body). The harm that the Respondent suffered was substantially more serious than that involved in Aliyev, as the beatings were much more severe, were coupled with credible death threats, and were not isolated incidents, but rather occurred as part of a gradually escalating series

of attacks. As such, the Court finds that the Respondent has suffered harm rising to the level of persecution.

In addition, the Court finds that the harm the Respondent suffered was “at the hands of an organization or person from which the government cannot or will not protect the alien.” McMullen, 17 I&N Dec. at 545. The Respondent credibly testified that he approached the PNC with a complaint regarding his mistreatment by Mara-18 members. The PNC’s response was that if he could not provide photographs, names, or addresses for his assailants, none of which he had any realistic way of obtaining, the police could not help him. The Respondent further testified that he believed the PNC feared Mara-18 and would not arrest its members. He noted his observation that when the PNC did arrest Mara-18 members, they were always released immediately.

The Respondent’s background evidence overwhelmingly supports his assertion that the Guatemalan government cannot or will not protect him from Mara-18. According to the 2010 State Department Human Rights Report for Guatemala, the PNC is “understaffed, inadequately trained, and insufficiently funded,” and “impunity for criminal activity” is a serious nation-wide problem. [Exh. 9, Tab N at 115, 118.] In 2008, a survey found that 58 percent of victims did not report crimes, and by far the most common reason – given by 45 percent of victims – was that “it does not do any good.” [Exh. 9, Tab M at 101.] Moreover, there is widespread corruption within the police force, much of which directly links the PNC to the activity of Mara-18 and other major Guatemalan gangs. [Exhs. 7, Tab I at 44; 9, Tab M at 98, 103-105, N at 115-116, 121.] See infra, pp. 13-14. Most strikingly, the Respondent provided evidence that elements of the PNC are so intertwined with gang activity that they not only reap a share of the gangs’ proceeds, but are in fact responsible for formulating the “tax” systems used by the gangs. [Exh. 9, Tab M at 103.] Given the Respondent’s compelling documentary evidence of incompetence and corruption within the PNC, as well as his own experience with the PNC’s unwillingness to protect him, the Court finds that the Guatemalan government either cannot or will not protect the Respondent from Mara-18. See McMullen, 17 I&N Dec. at 545.

**ii. The Respondent has a well-founded fear of future persecution**

Because the Respondent established past persecution, a regulatory presumption arises that he has a well-founded fear of future persecution on the basis of his original claim. 8 C.F.R. § 1208.13(b)(1). DHS neither argued nor presented evidence to rebut this presumption. See 8 C.F.R. § 1208.13(b)(1)(i)-(ii). Therefore, the presumption that the Respondent has a well-founded fear of future persecution stands. 8 C.F.R. § 1208.13(b)(1).

Even if the Respondent had not established past persecution, he would have demonstrated a well-founded fear of future persecution, because he testified credibly to his subjective fear, and his fear is objectively reasonable. See INA § 101(a)(42)(A); Ramsameachire, 357 F.3d at 178. The Respondent testified that Mara-18 not only

threatened, but planned, to kill him in July 2009, and just before he left Guatemala in August 2009, he learned that Mara-18 was passing around his photograph and offering money to learn his real name or whereabouts. The Court finds that this testimony strongly supports a finding of an objectively well-founded fear of future persecution. In addition, the Respondent's background evidence demonstrates that it is unlikely that he would be able to avoid future persecution by relocating to another part of Guatemala. See 8 C.F.R. § 1208.13(b)(1)(i). Mara-18 is one of the two most widespread and powerful gangs in Central America, and it is concentrated in Guatemala, Honduras, and El Salvador. [Exh. 9, Tab M at 103.] As a nation-wide and regional presence, Mara-18 would continue to pose a threat to the Respondent regardless of where in Guatemala he is located. The Respondent also testified that conditions in Guatemala have not improved, but rather have worsened, since he left the country. The "taxes" charged by Mara-18 have greatly increased, and the Respondent's brother, who also worked as a bus fare collector, was forced to flee Guatemala on account of threats he received from Mara-18 gang members. Furthermore, the atmosphere of impunity discussed above contributes to the objective likelihood that the Respondent would be persecuted if he were forced to return to Guatemala, because Guatemala's "understaffed, inadequately trained, and insufficiently funded" police force will not dissuade Mara-18 from continuing to persecute the Respondent. [Exh. 9, Tab N at 118.] Therefore, the Respondent has demonstrated that he has a well-founded fear of future persecution. See INA § 101(a)(42)(A).

**iii. The Respondent is unable to return to Guatemala due to the severity of his past persecution**

Finally, even if the Respondent has not demonstrated a well-founded fear of future persecution, the Court finds that the past persecution he experienced in Guatemala and the continuing psychological harm that resulted are sufficiently severe to merit a grant of humanitarian asylum. An applicant may warrant a grant of asylum in the exercise of discretion, even where there is little likelihood of future persecution, if he demonstrates compelling reasons for being unwilling or unable to return to his country of nationality arising out of the severity of the past persecution. 8 C.F.R. § 1208.13(b)(1)(iii)(A). In order to qualify for humanitarian asylum, an alien must establish both "the severe harm and the long-lasting effects of that harm." Jalloh v. Gonzales, 498 F.3d 148, 151 (2d Cir. 2007) (citing Matter of N-M-A-, 22 I&N Dec. 312, 326 (BIA 1998)); see also Matter of Chen, 20 I&N Dec. 16, 20 (BIA 1989) (granting humanitarian asylum to an alien who suffered severe persecution in the past, leaving him physically debilitated, anxious and fearful, and often suicidal).

In this case, after a series of beatings gradually increasing in severity, the Respondent was kidnapped, held overnight tied to a chair, and severely beaten, while his kidnappers openly planned the Respondent's murder in his presence. The Respondent testified that he was certain during his captivity that he was going to die and that he has never been more afraid than he was during that attack. See [Exh. 9, Tab J.] Additionally, the Respondent was only seventeen years old when Mara-18 kidnapped him, and his youth undoubtedly added to the trauma of the event. See Jorge-Tzoc v. Gonzales, 435

F.3d 146 (2d Cir. 2006) (finding that the definition of persecution for a child may include forms of harm that would not be sufficiently severe to qualify as persecution if inflicted upon an adult); see also Jeff Weiss, U.S. Dep't of Justice, Guidelines for Children's Asylum Claims, at 1998 WL 34032561 (1998) (“As in all asylum cases, the Asylum Officer must assess whether the harm that the child fears or has suffered is serious enough to constitute ‘persecution’ ... The harm a child fears or has suffered, however, may be relatively less than that of an adult and still qualify as persecution.”). Based on the forgoing, the Court finds that the Respondent suffered “severe harm” in Guatemala. See Jalloh, 498 F.3d at 151.

Moreover, the “long-lasting effects of th[e] harm” the Respondent suffered were evident in his testimony and in the documentation he provided from a medical expert, Dr. [REDACTED]. See id.; see also [Exh. 9, Tab K.] As noted above in the Court’s discussion of credibility, the Respondent’s continuing fear and agitation was apparent when he spoke of his kidnapping. His speech became more rapid, he seemed short of breath, and he increasingly relied on expressive gestures rather than words to communicate the way that Mara-18 beat him. Dr. [REDACTED] also testified that the Respondent suffers from PTSD as a result of the Mara-18 attack, with symptoms including nightmares, persistent recollections of the trauma he experienced, and efforts to avoid anything associated with those memories. See [Exh. 9, Tab K.] Dr. [REDACTED] stated that if the Respondent is forced to return to the place where his trauma occurred, his symptoms may worsen, and he may experience additional psychological harm. Therefore, the Court finds that the Respondent has demonstrated compelling reasons for being unwilling or unable to return to Guatemala arising out of the severity of the harm he experienced there. 8 C.F.R. § 1208.13(b)(1)(iii)(A). Thus, even if he no longer has a well-founded fear of persecution in Guatemala, the Court will grant the Respondent humanitarian asylum, subject to the discussion of nexus below. See id.

#### b. Nexus

An applicant for asylum must demonstrate that the persecution he fears would be on account of his race, nationality, religion, membership in a particular social group, or political opinion. The protected ground need not be the sole motive for persecution. See Uwais v. U.S. Att’y Gen., 478 F.3d 513, 517 (2d Cir. 2007); see also Aliyev, 549 F.3d at 116. However, the applicant must demonstrate that a protected ground was or will be “at least one central reason for persecuting the applicant.” INA § 208(b)(1)(B)(i); see also Matter of N-M-, 25 I&N Dec. 526 (BIA 2011); Matter of J-B-N- & S-M-, 24 I&N Dec. 208 (BIA 2007). In discerning persecutory motives, the Court must consider the “totality of the circumstances.” Matter of S-P-, 21 I&N Dec. 486, 494 (BIA 1996).

In this case, the Respondent alleges that Mara-18 persecuted him on account of an anti-Mara political opinion the gang members imputed to him when he refused to pay his “taxes.” In the alternative, he suggests that he was harmed on account of his membership in a particular social group made up of “Guatemalans who, as bus assistants, refused to pay their ‘taxes’ to the Mara.” For the following reasons, the Court finds that the

Respondent was persecuted on account of his imputed political opinion. Therefore, the Court will not reach his particular social group argument.

In a claim of persecution on account of political opinion, the applicant must allege specific facts from which it can be inferred that he holds a political opinion, which is known to his persecutor, and that the persecution was or will be on account of that political opinion. See INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992); Gomez v. INS, 947 F.2d 660, 663 (2d Cir. 1991). The applicant may provide either direct or circumstantial evidence to show that the motive for persecution is the applicant's own political beliefs, real or imputed. See Castro v. Holder, 597 F.3d 93, 100 (2d Cir. 2010). "The relevant question is not whether an asylum applicant subjectively holds a particular political view, but instead whether the authorities in the applicant's home country *perceive* him to hold a political opinion and would persecute him on that basis." See Koudriachova, 490 F.3d at 264. In addition, in order to avoid "an impoverished view of what political opinions are, especially within a country where...certain democratic rights have only a tenuous hold," the "broader political context" must be carefully considered in order to properly evaluate an applicant's claim. Castro, 597 F.3d at 106. The Board of Immigration Appeals ("BIA") has established a non-exhaustive list of factors that should be considered when an applicant alleges that the motive for persecution was "punishing or modifying perceived political views," including "indications in the particular case that the abuse was directed toward modifying or punishing opinion rather than conduct (e.g., statements or actions by the perpetrators or abuse out of proportion to nonpolitical ends)." S-P-, 21 I&N Dec. at 494; see also Vumi v. Gonzales, 502 F.3d 150, 158 (2d Cir. 2007) (citing S-P-, 21 I&N Dec. at 494).

At the outset, it is important to examine "the broader political context" in Guatemala in order to correctly evaluate whether the Respondent was persecuted on account of a political opinion. See Castro, 597 F.3d at 106. Notably, the Respondent's background materials are replete with references to the relative ineffectiveness of the Guatemalan government. Guatemala is a "historically weak state," where "a strong central government and state were never established." [Exh. 9, Tab M at 93.] The Guatemalan police force is extremely understaffed, employing less than half the number of officers it needs to maintain control of the country, and this scarcity of resources has contributed to the emergence of "extensive ungoverned territories" in Guatemala. Id. at 102-103. According to the U.S. State Department, two-thirds of police districts in Guatemala are understaffed. [Exh. 9, Tab N at 116.] The result is a power vacuum in much of the country. In some cases, "vigilante mobs" of private citizens have stepped into the vacuum and begun to lynch suspected criminals. [Exh. 9, Tab N at 116; Tab P.] In many cases, however, gangs like Mara-18 have filled the vacuum and become the *de facto* government. See, e.g., [Exhs. 7, Tab I at 44; 9, Tab M at 98.]

The of pattern of gangs taking on government roles in otherwise ungoverned areas has been explored by Dr. Max G. Manwaring of the Strategic Studies Institute, a research unit within the U.S. Army. [Exh. 9, Tab L.] Manwaring focuses on Central American gangs in his research, specifically naming Mara-18 as one of the two major groups composing the Central American "gang phenomenon." Id. at 84. According to

Manwaring's research, where a government "fail[s] to extend a legitimate sovereign presence throughout its national territory," territories frequently emerge which are governed by gangs. Id. at 81-82. In such circumstances, "whether the gang is specifically a criminal or insurgent type organization is irrelevant. Its putative objective is to neutralize, control, or depose governments to ensure self-determined (nondemocratic) ends. This objective defines insurgency, a serious political agenda..." Id. at 71. Mara-18 and Mara Salvatrucha, the two groups in which "gang activity is concentrated" in Guatemala, are examples of the type of gang studied by Manwaring. [Exh. 9, Tabs L at 84; M at 103.] These two gangs have "contributed to escalating violence in Guatemala" by "us[ing] lethal violence against those who defy their control." [Exh. 9, Tab O at 131.] The ICG echoes Manwaring's report by noting that "the situation parallels that of an insurgency: several provinces are considered under DTO [drug trafficking organization] control." [Exh. 9, Tab M at 98.] Similarly, the United Nations High Commissioner for Refugees ("UNHCR") has stated that "...in the context of Central America... powerful gangs, such as the Maras, may directly control society and *de facto* exercise power in the areas where they operate." [Exh. 7, Tab I at 44.]

Complicating matters still further, the Guatemalan police are not merely ineffective; rather, large segments of the PNC may be under the control of criminal-insurgent gangs, such as Mara-18. In March 2010, Guatemalan authorities arrested the chief of police and his top intelligence official for alleged connections to unidentified DTOs. [Exh. 9, Tab M at 98.] In addition, the U.S. Department of State has documented extensive police corruption in Guatemala and the involvement of the police in serious crimes, such as unlawful killings, drug trafficking, and extortion, all of which were committed with impunity. [Exh. 9, Tab N at 115-116.] According to the UNHCR, in Central America, "the activities of gangs and certain State agents may be so closely intertwined that gangs exercise direct or indirect influence over a segment of the State or individual government officials." [Exh. 7, Tab I at 44.] In short, the Guatemalan police "have become a symbol of instability, corruption, impunity, and ineptitude." [Exh. 9, Tab M at 103.]

Against this background, the "taxes" demanded by Mara-18 in the Respondent's case take on dimensions not readily apparent from the standpoint of a more democratic society. The Guatemalan government has never established a functional tax system of its own, possessing "one of the most inefficient and under-funded" tax systems in Latin America. [Exh. 9, Tab M at 95.] Gangs have stepped into this void, taxing business owners, transportation companies, and other individuals throughout much of Guatemala. See [Exhs. 7, Tabs F-G; 9, Tab M at 104-105.] Moreover, the gangs are extensively supported in their "tax collection" efforts by co-opted elements of the Guatemalan government, as evidenced by an alarming statistic from the ICG: "73 per cent of ex-gang members polled said the police set the 'tax rate' the gangs extorted from local businesses and neighbors." [Exh. 9, Tab M at 103.] The extortion of the public transit system, in particular, showcases the "nearly complete absence of governmental authority on every level." Id. at 105.

The government arguably starts the chain of events that leads to the murders [of bus drivers and employees] by not regulating the [transportation] subsidy. At every stage thereafter, someone appears to be trying to benefit from the initial absence of state regulation: from the *mara* leaders and their families; to the *brochas* [bus assistants] and possibly the drivers; and finally to the police and prison guards. No authority figure breaks the chain.

Id. Given the lack of interference by the Guatemalan government and the active involvement of state institutions co-opted by the gangs, the money that Mara-18 demanded of the Respondent is best characterized as a tax, sans quotation marks, by the *de facto* government of his region, rather than as extortion.

Having fully examined the political context of the Respondent's claim, the Court is persuaded that by refusing to pay the taxes demanded by Mara-18, the Respondent engaged in an activity that was viewed by the gang as a politically charged rejection of its authority. As stated above, the ICG has compared Guatemala's powerful criminal organizations, such as Mara-18, to an insurgency. See [Exh. 9, Tab M at 98.] In countries like Guatemala, "gangs' illicit commercial motives are, in fact, becoming an ominous political agenda" in which the object is to "neutralize, control, or depose governments." [Exh. 9, Tab L at 71.] The situation is complicated by evidence that elements of the Guatemalan government, especially parts of the PNC, are under the control of gangs, so that opposition to the authority of gangs may entail opposition to the Guatemalan government itself as well as to the *de facto* governance of Mara-18. See, e.g., [Exhs. 7, Tab I at 44; 9, Tabs M at 98, 103, 105, N at 115-116.] The Respondent's testimony concerning the PNC's refusal to assist him when he complained about harassment and beatings by Mara-18, as well as his observation that the PNC always released Mara-18 members immediately if they were arrested, suggest that the police in his region were either under Mara-18 control or had been effectively "neutralized" by gang intimidation. In the context of the power struggle in Guatemala between gangs and various government actors who may be at odds with one another, the Respondent's refusal to pay "taxes" to one of the parties to the conflict could easily be viewed as an expression of a political opinion against Mara-18.

Moreover, there is evidence in this case that Mara-18 in fact attributed an anti-Mara political opinion to the Respondent by the third time it attacked him. Initially, the Respondent appears to have been targeted solely for extortionist reasons, unrelated to any political opinion that the gang may have attributed to him. However, the Respondent's testimony strongly indicates that by the time that Mara-18 attacked him in July 2009, their purpose was to punish his resistance to their authority and his imputed anti-Mara political opinion, rather than merely to extort money from him or punish his failure to pay. Several facts drawn from the Respondent's credible testimony support this change in purpose. First, the Respondent overheard the gang planning to kill him. Killing the Respondent would obviously not achieve the objective of obtaining payment from him. In addition, murder is out of all proportion to punishment for evasion of "taxes" and

makes much more sense as punishment for an anti-Mara political opinion in the context of gang's ongoing struggle with some elements of the Guatemalan government. See S-P, 21 I&N Dec. at 494 (Courts should consider, in determining whether respondents were harmed on account of a protected ground, "indications in the particular case that the abuse was directed toward modifying or punishing opinion rather than conduct (e.g., statements or actions by the perpetrators or *abuse out of proportion to nonpolitical ends*).") (emphasis added).

Another important factor in the Court's finding that the Respondent was persecuted on account of his imputed political opinion is his testimony that the gang members did not call the phone number they obtained from him as a result of their prolonged beating. Their failure to call was at odds with their initial statement that they would beat the Respondent until he either paid or provided a phone number with which the gang could demand money from his family, and it indicates that by the second day of the Respondent's captivity, they had almost entirely lost interest in receiving payment and were seeking instead to punish his perceived opposition to their activities. In addition, the discussion that the Respondent overheard among the gang members on the first day of his kidnapping indicated that they were holding him captive for a different reason than his failure to pay. They stated that they *could not* release him if he did not pay his "taxes," implying that Mara-18 saw the Respondent as a potentially dangerous threat to their power and his failure to pay them as an outward manifestation of his views.

Finally, it is noteworthy that the gang members continued to look for the Respondent after their third attack, to the point of offering money to anyone who could provide information regarding his whereabouts. They did this even though, according to the Respondent's affidavit, he stopped working as a bus assistant before he left Guatemala. See [Exh. 7, Tab A at 3.] As the Respondent was not working, the Mara-18 "tax system," as described by the Respondent, no longer applied to him. Moreover, Mara-18 would have realized that the Respondent was no longer in a position to skim sufficient funds from the bus company to pay the money they had attempted to exact from him in the past. The fact that the gang searched for the Respondent despite his change in circumstances indicates that they sought him for a non-economic reason related to what they viewed as his opposition to their activities. It further suggests that he has a well-founded fear of future persecution on account of the same imputed political opinion. In this regard, the Respondent's case is analogous to Delgado v. Mukasey, in which the Second Circuit reversed the BIA's denial of asylum where an applicant was kidnapped by the Revolutionary Armed Forces of Colombia ("FARC") because of her computer expertise, but her refusal to provide assistance formed the basis for an imputed political opinion of opposition to the FARC. See 508 F.3d 702 (2d Cir. 2007). Similarly, the Respondent was initially targeted for a non-political reason, but now, as a result of his refusal to pay the gang and his subsequent flight, he has a well-founded fear of persecution for an imputed political opinion of opposition to Mara-18.

As noted above, "an asylum applicant need not demonstrate that a protected ground was the exclusive reason for persecution," provided that it was "at least one central reason." See INA § 208(b)(1)(B)(i); Castro, 597 F.3d at 103. "Thus, careful

attention to the particular circumstances surrounding the alleged persecution remains necessary even if the persecution is generally categorized as extortion or recruitment.” Castro at 103 (internal citations omitted); see also Aliyev, 549 F.3d at 117 (when the BIA determined that an alien was not persecuted on account of a protected ground because the harm he suffered was “extortionist in nature,” it erred by failing to consider evidence that the extortion may also have been motivated in part by the alien’s ethnicity). After a careful examination of the political context in which the Respondent became a victim of Mara-18, as well as the words and actions of Mara-18 in connection with their abuse and pursuit of him, the Court finds that the Respondent’s imputed anti-Mara political opinion was “at least one central reason” why he was persecuted. See INA § 208(b)(1)(B)(i).

Therefore, the Court finds that the Respondent has demonstrated that he suffered past persecution on account of an imputed political opinion and that he has a well-founded fear of future persecution on account of the same ground. See INA § 101(a)(42)(A). Thus, he has established his statutory eligibility for a grant of asylum pursuant to INA § 208.

### 3. *Discretion*

An applicant who establishes statutory eligibility for asylum still bears the burden of demonstrating that he merits a grant of asylum as a matter of discretion. INA § 208(b)(1); Cardoza-Fonseca, 480 U.S. at 428. In determining whether a favorable exercise of discretion is warranted, both favorable and adverse factors should be considered. Matter of Pula, 19 I&N Dec. 467, 473 (BIA 1987) (superseded by regulation on other grounds). Humanitarian factors, such as age, health, or family ties, should be considered in the exercise of discretion. Matter of H-, 21 I&N Dec. 337, 347-48 (BIA 1996) (citing Pula, 19 I&N Dec. at 467). The danger of persecution should outweigh all but the most egregious adverse factors. Wu Zheng Huang v. I.N.S., 436 F.3d 89, 98 (2d Cir. 2006) (citing Pula, 19 I&N Dec. at 474).

Here, the Court finds that the Respondent merits a favorable exercise of discretion. He is a young man who shows every indication of becoming a productive member of society. He testified that he is gainfully employed in the U.S. painting and doing construction work and demolition, and that he has attended several classes offered by ██████ in Manhattan, including classes in the English language. He has family ties in the U.S., including his father and possibly an uncle, as recorded by the Border Patrol in its Record of Deportable/Inadmissible Alien. See [Exhs. 2; 4; 6.] In addition, he is suffering from PTSD, a condition which Dr. ██████ testified may worsen if the Respondent is forced to return to Guatemala. See [Exh. 9, Tab K.] There are no negative discretionary factors in this case. Therefore, the Court will grant the Respondent asylum in the exercise of discretion pursuant to INA § 208(b)(1).

Because the Court has granted the Respondent asylum pursuant to INA § 208, it will not address his eligibility for withholding of removal under INA § 241(b)(3) or protection under the Convention Against Torture.

**V. CONCLUSION**

The Court finds that the Respondent has met his burden to prove his eligibility for asylum pursuant to INA § 208 and that he merits a favorable exercise of discretion. See INA §§ 101(a)(42)(A), 208(b)(1)(A); 8 C.F.R. §§ 1208.13, 1240.8(d).

Accordingly, after a careful review of the record, the following order will be entered:

**ORDER**

**IT IS HEREBY ORDERED** that the Respondent's application for asylum pursuant to INA § 208 be **GRANTED**.

January 26, 2012  
Date

  
\_\_\_\_\_  
George T. Chew  
Immigration Judge