

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, IL
(Kansas City, Mo. Docket)**

File: A97-736-084

Date: November 3, 2005

In the Matter of:

Benito Saldibar-Payes,

Respondent.

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IN REMOVAL PROCEEDINGS

CHARGES: INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i)– Alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATIONS: INA § 208 and 241(b)(3) – Asylum and Withholding of Removal.

ON BEHALF OF THE RESPONDENT:

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Rogers, AR 42756

ON BEHALF OF THE GOVERNMENT:

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DECISION OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The Respondent is a 17-year-old male native and citizen of El Salvador who entered the United States without being admitted or paroled on or about October 24, 2005. The Department of Homeland Security (“DHS”) initiated removal proceedings against the Respondent through the issuance of a Notice to Appear (hereinafter “NTA”), dated October 28, 2003, charging that he is removable from the United States pursuant to the above-captioned section of the Immigration and Naturalization Act (“Act” or “INA”). See Ex. 1.

Through written pleadings, the respondent conceded that he is removable as charged in the NTA. Thus, the Court found that removability has been established by clear and convincing evidence as required by the Act. See INA § 240(c)(3)(A); 8 C.F.R. §1240.8(a); Cf. Woodby v. INS, 385 U.S. 276, 286 (1966). The respondent declined to designate a country of removal; therefore the Court designated El Salvador in accordance with Section 241(b)(1)(C2) of the Act.

In lieu of removal, the respondent seeks relief in the form of asylum under INA Section 208, and withholding of removal under INA § 241(b)(3). See Ex. 3.¹ The respondent fears persecution if returned to El Salvador on account of his membership in a particular social group defined as “young men living without parents in La Libertad, El Salvador, who are sought out for recruitment by street gangs.”

II. EVIDENCE PRESENTED

A. DOCUMENTARY EVIDENCE

The following exhibits were entered into the record in the Respondent’s case:

- Exhibit 1: NTA, Form I-862, dated October 28, 2003.
- Exhibit 2: Respondent’s Written Pleadings and Motion for Change of Venue.
- Exhibit 3: Respondent’s application for Asylum and for Withholding of Removal (Form I-589).
- Exhibit 4: Department of Homeland Security filing of Documents, including: A) Bureau of Democracy, Human Rights and Labor, U.S. Department of State, El Salvador 2004 Country Report on Human Rights Practices (February 28, 2005); B) Bureau of Western Hemisphere Affairs, U.S. Department of State, Background Notes: El Salvador (September 2005); C) U.S. Dept. of State, Bureau for International Narcotics and Law Enforcement Affairs, “*Counternarcotics and Law Enforcement Country Program: El Salvador*” (June 30, 2005).

B. TESTIMONIAL EVIDENCE

At an individual merits hearing conducted on October 31, 2005, the respondent and his

¹ At respondent’s merits hearing on October 31, 2005, Respondent’s attorney stated that his client is not seeking withholding of removal under the Convention Against Torture. His attorney also acknowledged that his client is not statutorily eligible for Voluntary Departure.

father testified in support of his requests for relief from removal. The respondent testified to the following facts:

He was born on September 29, 1988 in Canton Las Campanas, Departamento La Libertad, in El Salvador. The Respondent testified that he lived in Las Campanas his entire life until he left El Salvador for the United States at the age of 14. The respondent testified that he presently is living with his parents and two siblings in Carthage, Missouri. He stated that his father is an asylum applicant and that his mother is in the United States without any authorization. The respondent recalled that his father came to the United States when he was very young but he could not remember the year. His two siblings in the country are both United States citizens, ages 5 and 1. The respondent also testified that he has two additional siblings and that they are living with an aunt in Las Campanas, El Salvador. Those siblings are 13 and 11 years of age.²

Respondent testified that after his parents left El Salvador, he was left in the care of his elderly grandfather in Las Campanas. Since the grandfather was old and of ill health, the respondent testified that it was as if he was living alone. He stated that he received little attention from his grandfather and that the community knew that he and his grandfather were living alone. The respondent testified that his grandfather became very ill and was hospitalized for approximately one month. It was during this time that local members of the MS 18 street gang began approaching him for recruitment because they knew he was alone, and presumably, an easier target to recruit. According to the respondent, the MS 18 gang members came to his grandfather's home approximately 3 or 4 times and told him that they wanted him to join their ranks so that he could help them steal and kill. The respondent did not know any of the men who approached him but he recognized them as gang members because of their tattoos and the switchblades they carried. The respondent never agreed to join them and he was never harmed on any of those visits. However, he was warned by the MS 18 gang members that they would hurt his family if he did not join them. The respondent was frightened by these visits but he chose not to call the police because the MS 18 members told him not to do so and because the police only come to Las Campanas once daily. He also failed to tell any of his relatives, friends, teachers, or neighbors about the threats. The respondent was asked if his other siblings living in Las Campanas were targeted for gang recruitment to which he replied in the negative. He explained that because his other two siblings were living with relatives, they were not sought-out by the MS 18 gang.

The respondent decided to leave El Salvador when he realized that his grandfather could no longer care for him and when he received the gang recruitment visits. His grandfather gave him the equivalent of \$3,000 USD and the respondent left El Salvador with the plans of joining his mother and father in the United States. He never told his parents that he was leaving El Salvador nor did he tell them about the gang visits because he did not want to worry them. He traveled for

² Respondent's father later testified that he also has a 19 year old daughter who was living in El Salvador but only recently moved to Guatemala.

approximately 3 ½ months through Guatemala and Mexico before reaching the United States in October 2003. It was only after his apprehension by the Border Patrol that he contacted his father and told him why he had left El Salvador.

The respondent, now 17, still fears returning to El Salvador because he would have to live alone, thereby remaining a likely candidate for renewed gang recruitment efforts by the MS 18 in Las Campanas. Although he has two siblings living with an aunt in that same village, he testified that he cannot live with her and his siblings because she has too many children already living there and she will only take girls, not boys. He has an uncle but he suffers from blindness and would not be able to care for the respondent either.

The respondent's father, Carlos Saldivar-Mojica, testified as follows:

Mr. Saldivar stated that he came to the United States in 1994 and that he is an applicant for asylum. He has a common law wife who is the mother of his 6 children, including the respondent Benito. His wife, Rosa Magali' Payes Hernandez, came to the United States from El Salvador in 1999. She remained in this country for approximately 2 years and then returned to El Salvador after Mr. Saldivar-Mojica's mother died. She chose to return to Las Campanas in order to care for her young children because her husband's father was elderly and incapable of caring for them by himself. She remained in El Salvador approximately three years but she returned to the United States illegally when she could no longer provide for her family with only the earnings of her husband from the United States. She left her son Benito with his grandfather in Las Campanas.

Mr. Saldivar-Mojica further testified that he never knew his son was coming to the United States until he was contacted by Benito upon his arrest by the United States Border Patrol. It was only then that he was told by his son that he had left El Salvador in order to escape from the recruitment attempts of the MS 18 street gang. He testified that he is worried for his son's safety if returned to El Salvador based upon what Benito has told him and what he has heard from news reports about the vicious nature of the MS 18 gang.

Mr. Saldivar-Mojica was asked with whom the respondent was living in El Salvador before coming to the United States. He replied that Benito had been living with his grandfather and his two siblings Roxana and Luis Alonzo Saldivar (13 and 12 years of age). He stated that since the grandfather passed away, Luis and Roxana have been living with their aunt in Las Campanas.

Mr. Saldivar-Mojica also testified that he has a 19-year-old daughter that, until very recently, was living in Las Campanas on her own. However, he has learned from her and another relative that she was kidnaped by a local leader of the MS 18 gang, held against her will, raped, and became pregnant. She escaped from the gang leader during a recent earthquake. He testified that he only learned of this a week ago and was unable to provide more detail. He admitted that he never asked his daughter why she had been kidnaped but he did learn that she has moved to Guatemala in order to seek safety.

Mr. Saldivar-Mojica does not believe that his son would be safe in El Salvador because he would have nowhere to live and nobody to watch him. He believes that this would render him a prime target for continued gang recruitment efforts by the MS 18.

III. ANALYSIS

A. ASYLUM

The respondent in this case claims asylum eligibility on the basis of an alleged well-founded fear of future persecution in El Salvador. He has stated to the Court that he does not allege any past persecution but believes that his experiences in La Libertad with the MS 18 gang members, along with corroborative country condition information, demonstrate that he has a well-founded fear of future persecution in El Salvador on account of his membership in a particular social group.

Under section 208(a) of the Act, the Attorney General may grant asylum to an alien who is physically present in the United States if the alien meets the statutory definition of a refugee. A refugee is defined as an individual who is unable or unwilling to return to his or her native country "because of 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). In order to establish eligibility for asylum, the Respondent carries the burden of establishing past persecution or a well-founded fear of future persecution. See INA §101(a)(42)(A); Matter of Chen, 20 I&N Dec. 16, 17 (BIA 1989); Matter of Acosta, 19 I&N Dec. 211, 215 (BIA 1985). The statute provides no definition for the phrase "well-founded fear of persecution." Courts have indicated, however, that a Respondent can establish a well-founded fear by showing that a reasonable person in his or her circumstances would fear persecution for one of the five grounds specified in the Act. See Cardoza-Fonseca, 400 U.S. 421, 400 (1987); Matter of Mogharrabi, 19 I&N Dec. 439, 400-41 (BIA 1987). Finally, the Respondent must also demonstrate that he merits such relief as a matter of discretion. See In re V-T-S-, 21 I&N Dec. 792 (BIA 1997).

An applicant for asylum whose claim is based upon membership in a particular social group must "(1) identify a group that constitutes a 'particular social group' ..., (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership." Safaie v. I.N.S., 25 F.3d 636, 640 (8th Cir.1994) (quoting Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir.1993)). The Board of Immigration Appeals (BIA), in Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996), defined particular social group as "membership in a group of people all of whom share a common, immutable, characteristic, that is, a characteristic that is either beyond the power of the individual to change, or that is so fundamental to their identities or consciences that it should not be required to be changed."

In this case, the respondent has not established that he has a well-founded fear of persecution in that he has failed to identify a group which constitutes a "particular social group"

for asylum purposes. More specifically, he has not shown that the identified social group of "young men living without parents in La Libertad, El Salvador, who are sought out for recruitment by street gangs" meets the definition of "particular social group" for asylum and withholding of removal purposes. The Court does not find that persons within this group are "a collection of people closely affiliated with each other who are actuated by some common impulse or interest." Safaie, supra, at 640 (concluding that the category Iranian women is overbroad). The Eighth Circuit has held that "mentally ill Jamaicans," who were being persecuted due to their common characteristic, were "too large and diverse a group to qualify." Raffington v. INS, 340 F.3d 720, 723 (8th Cir.2003). Using analogous reasoning, the Ninth Circuit concluded that "business owners in Colombia who had rejected demands by narcotic traffickers to participate in illegal narcotics activity" was too broad to qualify as a particular social group. Ochoa v. Gonzalez, 406 F.3d 1166, 1171 (9th Cir.2005). The Ochoa Court explained its conclusion as follows:

Major segments of the population of an embattled nation, even though undoubtedly at some risk from general political violence, will rarely, if ever, constitute a distinct "social group" for the purposes of establishing refugee status. To hold otherwise would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country.

Id. at 1171.

Similarly, there exists no voluntary relationship or innate characteristic that binds together all young men in La Libertad, El Salvador, who are approached for recruitment by gangs. The group is far too broad and, much like the business persons in Ochoa, boys being recruited by gangs are analogous to the young, working class men of military age that the Ninth Circuit found did not constitute a social group in Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir.1986). The BIA, in Matter of Vigil, 19 I&N Dec. 572 (BIA 1988), found that the forced recruitment of young males by guerrilla organizations did not constitute persecution within the Act. Similarly, the attempted recruitment of the respondent by a gang which is involved solely in criminal activity does not fall within any of the five protected grounds of the asylum statute. While the respondent was recruited by the MS 18 as a consequence of factors he could not control, his status as a gang recruit is not a fact innate to his identity; it is something that happened by misfortune and hard experience, not something he is by nature. It is unfortunate circumstance that unites young men who are approached for recruitment into gangs and such circumstance cannot be considered either a "voluntary association" or an "innate characteristic" as required by the definition of particular social group. See, e.g., Hernandez-Montiel v. INS, 225 F.3d 1084, 1093 (9th Cir.2000).

Thus, although the Respondent's predicament is very sympathetic, the group in which he claims membership is overly broad and does not constitute a particular social group as that phrase has been interpreted by the Eighth Circuit and the Board of Immigration Appeals. Inasmuch as the Respondent failed to establish that he suffered persecution or that he has a well-founded fear of persecution on account of his membership in a particular social group, the Court finds that he

failed to establish eligibility for asylum on this basis.

Even assuming *arguendo*, that the identified group constitutes a particular social group for asylum purposes, the harm an alien fears in his native country must be inflicted either by the government of the alien's native country or by persons or an organization that the government is unwilling or unable to control. INA, §§ 101(a)(42), 8 U.S.C.A. §§ 1101(a)(42); See also Miranda v. INS, 139 F.3d 624, 627 (8th Cir.1998). The Respondent testified that he never sought the assistance or protection of the police in La Libertad because the police only came to his village once daily. The failure of the respondent to seek the help of law enforcement officials on any of the several occasions when he was visited by MS 18 gang members hardly demonstrates a general inability or unwillingness by the El Salvadoran authorities to assist individuals in altercations with gang members. The country reports on human rights practices in El Salvador indicate that if the police are to be criticized for their actions with respect to gang members, it is due to their harsh crackdown on gangs. While not always successful, due to the great scope of the problem, the El Salvadoran government is working towards ensuring the safety of its citizens from gang crimes, luring gang members away from the gangs, and educating young men against joining such violent gangs. See Exhibit 4, Tab C.

Additionally, the Board has held that a respondent must show more than that he has a well-founded fear of persecution in a particular place within a country. See Matter of C-A-L-, 21 I&N Dec. 754 (BIA 1997). He must show that the threat of persecution exists throughout the country. See id.; Matter of R-, 20 I&N Dec 621 (BIA 1992). To determine the reasonableness of internal relocation, the Court should consider, but is not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country, administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and family ties. See 8 C.F.R. § 1208.13 (b)(3).

The Respondent testified that he could not relocate within El Salvador because he has no family in that country besides in Las Campanas. The Respondent, however, is not forced to return to Las Campanas and as a 17-year-old could reasonably be placed with friends or schools elsewhere in the country of El Salvador. The respondent is not of such a tender age that he would require continuous adult supervision if returned to El Salvador. He failed to provide the Court with anything more than his self-serving statements that he would have nowhere to live in El Salvador because no adult relative will take him into his/her home. He has an aunt who has taken in his other siblings and he has not provided the Court with any corroboration of his claim that she would not take him because he is a male and that she is watching too many children already. Moreover, the Court notes that his mother presently resides in the United States without any authorization and his father is only granted employment authorization pending a determination on his asylum request. The respondent's mother previously had returned to El Salvador to watch her children when she believed that they needed her care and only left El Salvador when she decided that the family's finances required her to return to the United States. There is no evidence to show

that she would not be willing to help her son in the same way if he were to return to El Salvador.

I also find that the respondent's ability to fend for himself while living with his ill and elderly grandfather in Las Campanas for several years, and his ability to arrange for, and accomplish, a trip to the United States without the assistance of any family (besides the money provided by his grandfather) reflects the respondent's independence and maturity and puts into doubt his claim that he cannot return to El Salvador because no adult family member will take him and watch him. With the assistance of family and friends, it is entirely reasonable that the respondent could enroll in a school or college in another area of El Salvador, locate suitable living arrangements for a person his age, and find safety away from the group he fears in the small village of Las Campanas. The respondent never testified that he feared MS 18 gang member recruitment outside of La Libertad and it has not been shown that the local gang would seek him out and find him regardless of his location within the country.

These factors lead the Court to find that the Respondent does not have a well-founded fear of future persecution, because he could relocate within El Salvador in order to avoid further harassment by the MS gang.

B. WITHHOLDING OF REMOVAL

To establish eligibility for withholding of removal under 8 U.S.C. § 1231(b)(3), the Respondent must demonstrate a clear probability of persecution if removed to El Salvador. A "clear probability" exists where the applicant demonstrates that it is "more likely than not" that he would be persecuted if returned to the designated country. Withholding of removal involves a higher degree of certainty that persecution will occur than that required for asylum eligibility. Before the government will grant withholding, the alien must present evidence to establish that it is "more likely than not that the alien would be subject to persecution on one of the protected grounds." INS v. Stevic, 467 U.S. 407, 429-30 (1984).

As the Respondent was unable to meet his burden for obtaining asylum, he necessarily fails to meet the higher burden of showing the probability of persecution required to qualify for withholding of removal. See Al Tawm v. Ashcroft, 363 F.3d 740, 744 (8th Cir.2004).

In sum, the Respondent has failed to establish that his being targeted by a gang rose to the level of persecution, that he was targeted by the gang on account of one of the protected grounds, and that these incidents were perpetrated by a group that the government is unable or unwilling to control. Thus, he has failed to satisfy his burdens of proof for asylum and withholding of removal.

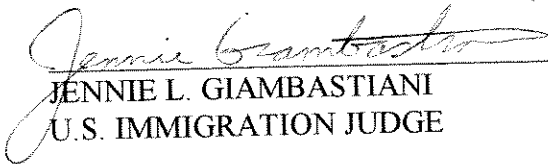
Accordingly, the following orders will be entered:

ORDER OF THE IMMIGRATION JUDGE

IT IS ORDERED that the Respondent's application for asylum be DENIED.

IT IS FURTHER ORDERED that the Respondent's application for withholding of removal under INA § 241(b)(3) be DENIED.

IT IS FURTHER ORDERED that the Respondent be removed from the United States to El Salvador on the charges contained in the Notice to Appear.


JENNIE L. GIAMBASTIANI
U.S. IMMIGRATION JUDGE