Sample Immigration Judge Decision

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
OMAHA, NEBRASKA

File #: A

Date: FEB 2 6 2018

In the Matter of:)
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)
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Respondent.)
)

IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "Act")—alien present without being admitted or paroled.

APPLICATIONS: Asylum—INA § 208; Withholding of Removal—INA § 241(b)(3); Withholding or Deferral of Removal under the United Nations Convention Against Torture—8 C.F.R. §§ 1208.16, 1208.17.

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WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. BACKGROUND AND PROCEDURAL HISTORY

Respondent is a native and citizen of Guatemala who entered the United States without inspection at Hidalgo, Texas, on 1 November 2013. *See* Exh. 1. The Department of Homeland Security ("DHS" or "the government") initiated removal proceedings against Respondent by filing a Notice to Appear ("NTA") on 6 November 2013. *See id.* Based on those allegations, DHS charged Respondent under the above-captioned section of the Act. *See id.* The Court found the allegations and therefore found Respondent removable as charged. *See id.* DHS designated Guatemala as Respondent's country of removal. *See id.*

On 8 September 2017, Respondent filed a form I-589, Application for Asylum and for Withholding of Removal ("I-589"). *See* Exh. 12. Respondent's merits hearing involved only his eligibility for relief. Respondent offered membership in three particular social groups as his bases for relief: (1) Members/perceived members of the LGBTI community in Guatemala; (2) Guatemalans with disabilities; and (3) Members of the family.

For the following reasons, Respondent's application for asylum will be granted.

II. FACTUAL RECORD

The Court has considered all relevant testimonial and documentary evidence in Respondent's record of proceedings, even if not specifically summarized herein. *See Lemuz-Hernandez v. Lynch*, 809 F.3d 392 (8th Cir. 2015).

A. Documentary Evidence

Respondent's record of proceedings contains the following documents:

Exhibit 1: Notice to Appear (filed 6 Nov. 2013);

Exhibit 2: Record of Deportable/Inadmissible Alien (filed 26 Aug. 2014) ("I-213");

Exhibit 3: Notice of Hearing scheduled for 26 August 2014 at 1:00pm (entered 26 Aug. 2014);

Exhibit 4: Decision of the Immigration Judge (6 June 2017);

Exhibit 5: Respondent's Motion to Reopen *In Absentia* Removal Order (6 June 2017);

Exhibit 6: Additional Argument and Documentation in Support of Motion to Reopen *In Absentia* Removal Order (6 June 2017);

Exhibit 7: Order of the Immigration Judge reopening proceedings (6 June 2017);

Exhibit 8: Order of the Immigration Judge recusing IJ from proceedings (6 June 2017);

Exhibit 9: Documentation of Respondent's Criminal Record (6 June 2017);

Exhibit 10: Respondent's Motion to File Exhibits Under Safeguards (6 June 2017);

Exhibit 11: DHS Submission of Evidence (22 Aug. 2017);

Exhibit 12: Respondent's Form I-589, Application for Asylum and for Withholding of Removal (8 Sept. 2017);

Exhibit 13: DHS Submission of Additional Evidence (29 Jan. 2018);

Exhibit 14: Respondent's Supporting Documentation for Form 1-589, Application for Asylum and for Withholding of Removal (29 Jan. 2018):

Tab A: I-589 Receipt Notice and Addendum;
Tab B: Proof of Respondent's Past Persecution;
Tab C: Respondent's Mental Health;
Tab D: Evidence of Current Country Conditions.

B. Testimonial Evidence

1. _____

The witness provided sworn testimony at a hearing conducted on 29 January 2018. The following is a summary of her testimony:

Andrea Ramos identified Respondent as her husband. They married 1 Feb. 2017. They married the first time 1 June 2015 and they knew each other beginning in April 2014. The couple began living together shortly before their marriage. She was initially attracted to Respondent because he was kind to her and helped her get through a bad breakup. They enjoyed normal life events together as a couple, such as going for walks in the park, watching television, barbequing, and spending time with family.

Respondent has high blood pressure. He also has PTSD, depression, and many mental health issues going on. Respondent did not tell his wife very much about the events that caused his PTSD, but he did tell her that he grew up poor and that his parents fought often. His parents are both ill. Additionally, something traumatic happened to him when he was younger and he had people trying to force him to make bad choices and get into trouble. Respondent did not give her details about what happened. However, after one of his hearings in criminal court, his attorney told her that she should look at a report that detailed the trauma. Respondent's wife is still not sure that she knows the whole story, but she testified that she learned that her husband was raped by three men when he was a child. She was uncertain about Respondent's age at that time but stated she believes he was about thirteen or fourteen at the time. The men attacked him in Guatemala and the ordeal went on for an extended period of time.

Shortly after Respondent and his wife were married, Respondent woke up one morning and said, "Andrea I don't feel good. I don't feel right." When Respondent's wife asked him what he meant by that, he said "I don't feel like myself." He also started saying strange things, for example, that he believed he had a "shadow that was telling him what to do." After that, Respondent began to tell his wife about issues he experienced in Guatemala, which she confirmed with his parents. Specifically, they confirmed that Respondent believed he could fly and that he believed he had the ability to run faster than a car. On three occasions, Respondent ran away from home and his family found him running through the streets, nude.

When Respondent's wife asked how the family handled these incidents, Respondent's parents said that they would pray for him because they believed he was under a "demonic spell." They did not try to provide Respondent with mental health treatment. Respondent's parents both have health issues but they cannot afford medical treatment.

A few days after Respondent's wife spoke with his parents, she found him in their bedroom with a belt around his neck; he was trying to kill himself. He said that no one ever loved him and that no one ever would. Respondent's wife eventually was able to get him to stop his attempt but the two struggled and she had a hard time convincing him. She asked him to get help and he agreed to do so, but never followed through. He talked about having thoughts of killing himself several times after that incident.

On a different occasion, Respondent had been acting "irrational" and "bigger than life." The couple had argued and Respondent told his wife that he no longer loved her. She told him that was a strange thing to say because they had just gotten married. Respondent gathered some of his things and was "laughing maniacally, like he thought he was on television or something." He said strange things then would burst out laughing. At some point during this incident, Respondent poured gasoline inside their house. Respondent's wife and her son did not see him do this, but they could smell gasoline. Respondent left the house without lighting anything on fire. His wife did not feel threatened and did not get the sense that Respondent was trying to harm her or her son, but she was frightened by how "insane" he was acting. It seemed to her that Respondent was not aware of the things he was saying and doing. He did not threaten to harm her or her son, he was trying to hurt himself.

A neighbor called the police because they smelled the gasoline. After that, Respondent was arrested. His erratic and frightening behavior made his wife angry and confused. She applied to have their marriage annulled and was granted an annulment because the marriage had not been consummated. The police took Respondent to a mental hospital after he was arrested because they were aware of his mental health issues. Respondent remained there for a couple of months and received treatment for his mental illness before he was taken to jail. He was found incompetent to stand trial twice.

The two remained in contact after the annulment and she noticed a change when Respondent started taking medication, it was like he was "back to his normal self." She could tell that Respondent did not take his medication all the time or that his medications were being adjusted, though, because he would still occasionally tell her about strange thoughts. For example, on one such occasion, Respondent told her that he believed he had metal inside his body that was controlling his actions. Overall, the medication has really helped Respondent. However he does occasionally have days where he is very depressed. He also physically shakes sometimes but the medication helps him think and speak rationally most of the time. If Respondent were to stop taking his medicine, his wife believes he would die or "burn himself out some way" due to his inability to take care of himself.

Currently, Respondent's wife visits him once a week and they talk on the phone at least three times per day. They also write letters to one another and have a good relationship. She does not want Respondent to be forced to return to Guatemala because there he will not have

access to the medication and healthcare that he needs. She loves Respondent but she will not move to Guatemala with him because her son is ill and she needs to remain in the United States to care for him.

For a while, Respondent's wife communicated with his parents about once per month. However, they are private about unpleasant issues. It was difficult for her to get them to open up about the men who raped their son. They did not provide many details and they also do not tell her about their own problems, though they did mention that Respondent's sister had been raped.

2. **Respondent**

Respondent provided sworn testimony at a hearing conducted on 29 January 2018. The following is a summary of his testimony:

Respondent was born in Guatemala on 31 January 1996. He left Guatemala on 28 October 2013 and arrived in the United States on 1 November 2013. He was caught at the border. He was 17 at the time. Respondent came to the United States after being sexually assaulted by gang members in February or March of 2012. He went to church and when he was on his way home, there were three men who grabbed him. One of the men pulled a nine-millimeter gun on him and held it up to his head. The men targeted him because they thought he was gay and because he did not have brothers to look out for him. All three of the men sexually assaulted Respondent, one after the other. The whole incident took about half an hour. Respondent did not know the men, he had never seen them before that day. The men told Respondent they thought he was gay and Respondent believes they targeted him because they were in a gang, specifically the MS-13 gang, and because they thought he was gay.

The men did not know Respondent's name, though everyone in town called Respondent by his nickname, "Bin." The men may have overheard when people called him "Bin" but they did not call him by his name or his nickname. They said degrading things to him, spit on him, and said that he was not a man. They also repeatedly called him gay. Respondent does not identify as gay. As far as he is aware, no one in his family thought he was gay. The people he knew at school did not think he was gay. He had a girlfriend at the time of his attack. However, the three men raped him because they thought he was gay.

When Respondent finally got away from his attackers, he told his mother and father what had happened to him, but they just thought he was possessed with a bad spirit. His parents never took him to be checked by a doctor. After being attacked, Respondent has experienced mental illness—he feels afraid of everyone who gets close to him and worries they will harm him.

He also has had suicidal thoughts and has attempted suicide as a result of the gang rape. Respondent attempted suicide several times while he was still in Guatemala. He once tried to kill himself while he was riding a motorcycle. He also attempted to kill himself with a knife. Additionally, he tried to hang himself from a tree with a rope. He wanted to die and imagined being killed by the train when he was crossing through Mexico; he did not care about anything. From about March 2012 to about February 2013, Respondent was in hiding, living and working in the mountains. The place he moved to was 15 minutes away by bicycle.

In 2013, before he fled Guatemala, he was attacked by a different group of men from the same gang. At that time he was on his way to stop at the store on his way home from school and the men stopped him. These men mentioned that they knew Respondent had been raped by other members of their gang and threatened that they would rape him, too, if he did not join their gang. The men beat him up by kicking and hitting him. To beat Respondent, these attackers used "chains" made from bike chains, cement, and steel. Respondent does not recall what that type of weapon is called, but it is best described as a chain. Respondent had two interviews with asylum officers. While he mentioned this attack during his asylum interviews, he did not mention the chains until his in-court testimony. The attackers even broke his bike and Respondent did not feel that he stood a chance against them because there were five of them. Additionally, he fears that these men can never really be stopped because their gang is powerful throughout Guatemala and Central America. These men said they wanted him to join the gang, but they also said they would kill him and/or harm his family if failed to leave Guatemala. What they really wanted was to kill Respondent.

After some encouragement from his brother, Respondent reported the 2013 attack to the police. Yet, the police did nothing about the report because Respondent believes the police are connected with the gang. Respondent reported the incident about a month after the attack. As far as Respondent is aware, the police did not investigate after he filed the report. The MS-13 gang is more powerful than the police force in Guatemala and even has control over and cooperation from some members of the police force. The MS-13 is extremely powerful and strong in Central America.

In September 2013, one of Respondent's close friends was killed by the MS-13. The gang members who did this had mistaken the friend for Respondent. Respondent was supposed to meet up with his friend that day to play soccer, but he did not go. People saw what happened to Respondent's friend but no one reported what happened. Respondent's friend was shot in the chest. This incident ultimately led Respondent to leave Guatemala.

In 2015, Respondent's sister was also attacked. She was raped at 5 o'clock in the morning when she was on her way to work. She worked for a company that cultivates bananas and the men stopped her near where sugar cane was growing. The men told her that what they did to her should serve as a warning for Respondent for what they would do to him. Respondent's sister became pregnant as a result of the rape. She did not recognize any of her attackers because they were dressed in black and wore face masks. Respondent is unaware of whether his sister reported this attack to the police or sought medical attention after it happened. She did lose the baby before it was born though because she was tormented with the trauma from the rape.

At present, Respondent feels better because he is taking pills that help with his mental illness. In 2015, before he started taking the medicine, he was still really struggling. The medicine treats Respondent's depression and anxiety. It helps him relax and allows him to avoid focusing on the attacks he underwent. He takes the pills every day because he needs them every day and feels unwell if he does not take them. He takes five pills per day: two for depression; one for his heart; one for his anxiety; and one to help him sleep.

Before Respondent began taking medicine for his mental illness, and after he had settled in the United States, he tried to kill himself. He tried to burn himself alive, he also tried to cut his veins and hang himself when he was in jail. He tried to hang himself using a sheet, but ultimately failed because his foot became caught. As previously mentioned, Respondent also attempted suicide in Guatemala.

Respondent is afraid to return to Guatemala because he fears for his life there. If Respondent is forced to return to Guatemala he knows the MS-13 will learn of his return and will come after him very quickly. He does not believe he will be safe in any part of Guatemala because of the widespread power and influence of the gang. The police will not protect him from the MS-13 because the police force is largely corrupt. Even the newspapers report about the corruption and governance of the MS-13. Respondent has two brothers who currently live in Guatemala and neither of his brothers has had problems with the MS-13. Respondent and his sister and the only people in their immediate family to have been attacked by the MS-13. He also does not believe he would survive in Guatemala because he would be unable to obtain the proper medications that have been proscribed to control his mental illness. It would be too hard for him to afford the medication he needs and the medication available in Guatemala does not work the way the medicines here do. Respondent also feels it would be harmful to his well-being to return to Guatemala because of the things that happened to him there.

Regarding the incident in July 2015, Respondent testified that he had told his wife that he was going to leave her that day. He did not threaten his wife or stepson, he just wanted to set himself on fire that day. He pleaded guilty to harassment because that was a condition of the deal he was offered by the prosecutor. Respondent has also been convicted of unlawful use of an ID and misuse of a social security number. He has not been convicted or charged with any other crimes.

C. Country Conditions

Respondent placed country condition evidence into the record, including the State Department's 2016 Human Rights Report for Guatemala. Exh. 14 at Tab D. Those documents, and all country condition evidence adduced, were considered in this decision.

III. CREDIBILITY

Relief applications filed on or after May 11, 2005, such as Respondent's, are governed by the credibility provisions instituted by the REAL ID Act of 2005. *See* INA § 240(c)(4), note 29.3. The following factors may be considered in the assessment of an applicant's credibility: demeanor, candor, responsiveness, inherent plausibility of the claim, consistency between oral and written statements, internal consistency of such statements, consistency of such statements with evidence of record, and any inaccuracy or falsehood in such statements, whether or not the inaccuracy or falsehood goes to the heart of the applicant's claim. *See* INA § 240(c)(4)(C). Based on the totality of the testimonial and documentary record, the Court finds no significant external or internal inconsistencies and that Respondent has presented a plausible and credible record in support of his relief application.

IV. ASYLUM

A. Statement of Law

Any alien who is physically present in the United States may apply for asylum. INA § 208(a)(1). To qualify, the alien must: demonstrate that he or she is a "refugee" as defined in INA § 101(a)(42)(A); and, demonstrate that the application was filed within 1 year after the date of the alien's arrival. INA §§ 208(a)(2), 208(b)(1). An applicant is excused from the filing deadline if he or she can demonstrate either changed or extraordinary circumstances, or that he or she is an "unaccompanied juvenile." INA §§ 208(a)(2)(B)–(E); 6 U.S.C. § 279(g). An applicant who otherwise establishes statutory eligibility for asylum must also demonstrate that he or she merits a favorable exercise of discretion by the Immigration Judge ("IJ"). *See Yu An Li v. Holder*, 745 F.3d 346 (8th Cir. 2014); 8 C.F.R. § 1208.14(a); INA § 208(b)(1)(A). The term "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.

INA § 101(a)(42)(A); *see also* 8 C.F.R. § 1208.13(b)(1); *Rodriguez-Mercado v. Lynch*, 809 F.3d 415, 416–17 (8th Cir. 2015). The "persecution" required to establish refugee status may either be in the past, or it may exist in the applicant's mind as a "well-founded fear" of future persecution. *See* 8 C.F.R § 1208.13(b). If in the past, the persecution creates a rebuttable presumption that an applicant's fear of persecution if returned to his or her country of removal is "well-founded." *See* 8 C.F.R § 1208.13(b)(1). In that case, the burden shifts to the government to rebut the presumption, which it may do by showing by a preponderance of evidence either a "fundamental change in circumstances" in the country of removal sufficient to negate the applicant's well-founded fear, or that the alien may reasonably relocate to some other part of the country of removal. 8 C.F.R. §§ 1208.13(b)(1)(i)(a)–(b).

To establish a well-founded fear of future persecution without the benefit of a presumption, the applicant must demonstrate (1) a fear of persecution; (2) a "reasonable possibility" of suffering such persecution; and, (3) that "[h]e or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear." 8 C.F.R. § 1208.13(b)(2)(i)(A)–(C). In other words, an applicant must demonstrate that his or her fear is both "subjectively genuine and objectively reasonable," and "the fear must have basis in reality and must be neither irrational nor so speculative or general as to lack credibility." *See Castillo-Gutierrez v. Lynch*, 809 F.3d 449, 452 (8th Cir. 2016) (citations and internal quotation marks omitted). An applicant need not demonstrate that his or her feared persecution is more likely than not; persecution with as little as a ten percent chance of coming to fruition may still represent a "reasonable possibility." *See Cardoza-Fonseca v. INS*, 480 U.S. 421, 440 (1987). Further, an applicant who lacks the presumption that his or her fear is well-founded has the burden of showing that relocation within the country of removal would not be reasonable. 8

C.F.R §§ 1208.13(b)(2)(ii); 1208.13(b)(3). Additionally, such an applicant must individualize the feared persecution unless he or she can demonstrate a pattern or practice of persecuting similarly-situated individuals within the country of removal. Finally, the applicant must demonstrate that the persecutory harm was inflicted either by the government or by persons that the government is unable or unwilling to control. *See Gathungu v. Holder*, 725 F.3d 900, 906 (8th Cir. 2013); *De Castro-Gutierrez v. Holder*, 713 F.3d 375, 380 (8th Cir. 2013).

For any applicant's persecution—past or future—to support a claim for asylum, it must be "on account of" one of the five statutorily-protected grounds: race, nationality, political opinion, religion, or particular social group. *See* INA §§ 101(a)(42)(A); 208(b)(1)(B). An applicant must demonstrate a "nexus" between his or her asserted protected ground(s) and any persecution suffered or feared. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 243 (BIA 2014). In other words, he or she must demonstrate the protected trait was "at least one central reason" for the harm. *See* INA §§ 101(a)(42)(A), 208(b)(1)(B)(i). The protected ground "cannot play a minor role in the applicant's past mistreatment," which means it "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007). An applicant must present direct or circumstantial evidence of a motive that is protected under the Act. *INS v. Elias-Zacarias*, 502 U.S. 478, 483–84 (1992); *J-B-N- & S-M-*, 24 I&N Dec. at 214. Whether the nexus exists depends on the views and motives of the persecutor. *See W-G-R-*, 26 I&N Dec. at 223-24; *J-B-N- & S-M-*, 24 I&N Dec. at 214.

Where an applicant establishes past persecution but DHS rebuts the resultant presumption that his or her fear of future persecution is well-founded, he or she may still be granted "humanitarian asylum" based either on the severity of the past persecution or a reasonable possibility of "other serious harm" in the country of removal. *See Mambwe v. Holder*, 572 F.3d 540, 546–47 (8th Cir. 2009); 8 C.F.R §§ 1208.13(b)(1)(iii)(A)–(B). For such past persecution to qualify, the persecution must have been "particularly atrocious." *See Mambwe*, 572 F.3d at 547 (quoting *Cigaran v. Heston*, 159 F.3d 355, 358 (8th Cir. 1998) (internal quotation marks omitted)); *Abrha v. Gonzales*, 433 F.3d 1072, 1076 (8th Cir. 2006). The Court may consider "the degree of harm suffered, the length of time over which the harm was inflicted, and evidence of psychological trauma resulting from the harm." *Mambwe*, 572 F.3d at 550 (quoting *Matter of N-M-A-*, 22 I&N Dec. 312, 326 (BIA 1998) (internal quotation marks omitted)).

Finally, the applicant must not be subject to a mandatory bar to asylum. For applications filed on or after 1 April 1997, any applicant who is subject to Sections 208(a)(2) or (b)(2) is ineligible for asylum. 8 C.F.R. § 1208.13(c). This includes any applicant: who failed to timely file; who may be sent to a safe third country; who previously filed for and was denied asylum; who was himself or herself a persecutor on a protected ground; who has been convicted of a particularly serious crime; who has committed a serious nonpolitical crime prior to his or her arrival in the United States; who is a danger to the security of the United States; who has engaged in terrorist activity; or who has firmly resettled. *See* INA §§ 208(a)(2), 208(b)(2)(A)(i)–(vi). Whenever evidence "indicates" one of these grounds apply, the burden is the applicant's to show by a preponderance of evidence that it does not. 8 C.F.R. § 1208.13(c)(2)(ii).

In sum, a successful asylum application must demonstrate: (1) that the one year filing deadline was met or excused; (2) that the applicant suffered past persecution on account of a

protected ground; or (3) the applicant has a well-founded fear of future persecution on account of a protected ground; (4) that no mandatory bars to asylum apply; and, (5) that the applicant merits asylum in the exercise of discretion.

B. Findings and Analysis

For the following reasons, the Court finds that Respondent has demonstrated eligibility for asylum and merits relief in the exercise of discretion:

1. One-Year Filing Deadline

An asylum applicant must either demonstrate by clear and convincing evidence that he or she complied with the filing deadline, or demonstrate to the Court's satisfaction that his or her failure to do so is excused by either changed or extraordinary circumstances relating to the filing delay. INA § 208(a)(2)(D); 8 C.F.R §§ 1208.4(a)(2)(i), (a)(4)–(5). The one-year period begins to run from the date of the applicant's most recent entry to the United States, regardless of the aggregate length of the applicant's time in the country. *See* 8 C.F.R. § 1208.4(a)(2).

"Changed circumstances" can include changes in the country of removal, changes in the applicant's circumstances (including changes in relevant law), or reaching the age of 21. *See id.*; *Goromou v. Holder*, 721 F.3d 569 (8th Cir. 2013). "Extraordinary circumstances" must directly relate to the failure to timely file and include "serious illness or mental or physical disability," "legal disability," ineffective assistance of counsel, maintenance by the applicant of special immigration status within a reasonable period prior to filing, the rejection of a timely-filed application for improper service, or the death, serious illness, or incapacitation of the applicant's legal representative or immediate family member. 8 C.F.R. § 1208.4(a)(5)(i)–(vi); *Goromou*, 721 F.3d 569. In either case, the alien must still file for asylum within a "reasonable" period following the change. 8 C.F.R § 1208.4(a)(4)(ii). *See also Matter of M-A-F-*, 26 I&N Dec. 651 (BIA 2015); *Bernal-Rendon v. Gonzales*, 419 F.3d 877 (8th Cir. 2005).

Respondent arrived in the United States on 1 November 2013; he was an unaccompanied minor at the time. *See* Exhs. 1–2. The record shows that his failure to comply with the filing deadline was due to the exceptional circumstance of legal disability, as Respondent was an unaccompanied minor during the one-year period after arrival and filed within a reasonable period given those circumstances. *See* INA § 208(a)(2)(E); 8 C.F.R. § 1208.4(a)(5)(ii); *Matter of Y-C-*, 23 I&N Dec. 286, 288 (BIA 2002).

2. Past Persecution

a. Level of Harm

Persecution is defined as "the infliction or threat of death, torture, or injury to one's person or freedom, on account of race, religion, nationality, membership in a particular social group, or political opinion." *Litvinov v. Holder*, 605 F.3d 548, 553 (8th Cir. 2010) (quoting *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628 (8th Cir. 2008)). It is "an extreme concept" that "does not include low-level intimidation and harassment." *Id.* (quoting *Zakirov v. Ashcroft*, 384

F.3d 541, 546 (8th Cir. 2004)). "The mere presence of some physical harm does not require a finding of past persecution." *Al Tawm*, 363 F.3d 740, 743 (8th Cir. 2004). Brief beatings and detentions, isolated threats, and occasional police harassment generally do not amount to persecution. *See Bhosale v. Mukasey*, 549 F.3d 732, 735 (8th Cir. 2008); *Eusebio v. Ashcroft*, 361 F.3d 1088, 1091 (8th Cir. 2004). Furthermore, threats that are "exaggerated, non-specific, or lacking in immediacy," including death threats, may not rise to the level of persecution. *See Malonga v. Holder*, 621 F.3d 757, 766 (8th Cir. 2010) (*quoting Corado v. Ashcroft*, 384 F.3d 945, 947–48 (8th Cir. 2004) (noting, however, that a single "specific, credible, and immediate" death threat could constitute persecution)). Nonetheless, non-life-threatening mistreatment can constitute persecution if the harm suffered, in the aggregate, rises to the level of persecution contemplated by the Act. *See Malonga*, 621 F.3d at 765.

In this case, Respondent was gang raped in 2012 by three members of the MS-13 gang—one of whom held a gun to Respondent's head during the attack. In 2013, a different group of MS-13 members physically attacked Respondent, broke his bicycle, and threated to kill Respondent or harm his family. The second group of attackers also mentioned the 2012 rapes and threatened to do the same. Therefore, the Court holds the cumulative harm Respondent suffered meets the definition of persecution. *See id.* Additionally, the Court holds that the gang rape incident alone caused Respondent "grievous harm" and constitutes persecution. *Matter of D-V-*, 21 I&N Dec. 77, 79 (BIA 1993).

b. Nexus

In order to benefit from the presumption, arising from past persecution, that his life or freedom would be threatened in Guatemala, Respondent must demonstrate that the harm he suffered was "on account of" one of the five protected grounds. 8 C.F.R. § 1208.16(b). In essence, the protected ground must be "at least one central reason" for the persecution. INA § 208(b)(1)(B). Respondent offered membership three particular social groups as his bases for relief: (1) Members and perceived members of the LGBTI community in Guatemala; (2) Guatemalans with disabilities; and (3) Members of the Ramos-Ramos family. The following analysis will focus on Respondent's first proposed group—members and perceived members of the LGBTI community.

i. Membership in a Particular Social Group

A cognizable particular social group is: (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question. *See M-E-V-G-*, 26 I&N Dec. at 237; *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). The term "particular social group" has been construed to mean a group of persons who "hold an immutable characteristic, or common trait such as sex, color, kinship, or in some cases shared past experiences." *Davila-Mejia*, 531 F.3d at 628 (citing *Acosta*, 19 I&N Dec. at 233). Persecution for "imputed" membership in a social group "can satisfy the 'refugee' definition." *Matter of S-P-*, 21 I&N Dec. 486, 489 (BIA 1996) (citing *Matter of A-G-*, 19 I&N Dec. 502, 507 (BIA 1987)). In fact, the Board has specifically recognized imputed homosexuality "in a society that considers homosexuals a distinct group united by a common immutable characteristic" as a cognizable group. *M-E-V-G-*, 26 I&N Dec. at 243.

A characteristic is immutable when either it cannot be changed or forcing change on the applicant would alter his or her fundamental identity or conscience. *See W-G-R-*, 26 I&N Dec. at 212 (quoting *Acosta*, 19 I&N Dec. at 233). In this case, Respondent's proposed social group—members and perceived members of the LGBTI community—rests on sexual orientation. A person cannot be expected to change their sexual orientation. *See Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 823 (BIA 1990) (upholding the finding that homosexuality is an immutable characteristic); *Nabulwala v. Gonzales*, 481 F.3d 1115, 1117 (8th Cir. 2007); *Kimumwe v. Gonzales*, 431 F.3d 319, 232 (8th Cir. 2005). Thus, the Court holds Respondent's proposed social group is based on an immutable characteristic.

A cognizable particular social group is particularized by characteristics that clearly benchmark membership therein. *See M-E-V-G-*, 26 I&N Dec. at 239. A group with sufficient particularity is not amorphous, diffuse, overbroad, or subjective. *See id.* (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170–71 (9th Cir. 2005)). Not every immutable characteristic is sufficiently particular, especially when such a characteristic is vague or all encompassing. *See id.* at 239–40 (citing *Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005)). A group that has "discrete and . . . definable boundaries" will satisfy the particularity requirement. *Id.* at 239. A court may not rely solely on the size of a group within the country of removal to determine its viability as particular social group. *Malonga*, 546 F.3d at 553–54. In this case, it is not difficult to draw a line around sexual orientation. Therefore, the Court holds Respondent's group is sufficiently particular.

To be viable, a social group must also be recognized as distinct within its own society. *See M-E-V-G-*, 26 I&N Dec. at 239. For example, a group may not be distinguished solely by fact of the persecution itself, but a society that recognizes a group solely by its having been persecuted will make that group socially distinct. *See id.* Thus, a group that is seen as "other" in an asserted society satisfies the social distinction requirement. *See id.* at 243–44. Moreover, a society may perceive "homosexuals" as distinct "for a host of reasons, such as sociopolitical or cultural conditions in the country." *Id.* at 240. Here, Respondent's social group is comprised of members and imputed members of the LGBTI community in Guatemala. The country condition evidence of record indicates that actual and perceived members of the LGBTI are socially distinct. *See generally*, Exh. 14 at Tab D. Hence, the Court holds Respondent's group is socially distinct.

ii. <u>One Central Reason</u>

Having determined that Respondent is a member of a cognizable particular social group, the Court must next consider whether the harm he fears is "on account of his membership in that particular social group." *Matter of L-E-A-*, 27 I&N Dec. 40, 43 (BIA 2017). Essentially, the Court is tasked with deciding whether Respondent's protected trait is "at least one central reason" for the feared persecution; meaning that it "'cannot play a minor role'—that is, 'it cannot be incidental [or] tangential . . . to another reason for harm.'" *Id.* at 44 (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 212 (BIA 2007)).

The Court finds Respondent has met his burden to show that his imputed membership in the LGBTI community in Guatemala is "at least one central reason" for the persecution he suffered. INA § 208(b)(1)(B). In this case, Respondent testified credibly that he was gang-raped at gunpoint by three members of the MS-13. During that attack, Respondent's attackers repeatedly called him gay and told Respondent that they were raping him *because* he was gay. Respondent also testified that he was attacked a second time by members of the same gang. The second group of attackers made reference to the gang-rape and threatened to do the same. DHS argues Respondent's harm was due to gang recruitment, not imputed sexual orientation. Specifically, DHS contends that even though Respondent's attackers called Respondent gay and said they were singling him out for that reason, they were doing so to emasculate or make fun of him and to coerce him to join their ranks. The Court is unconvinced by the government's argument.

Although Respondent's persecutors may have had mixed motives, including the desire to recruit him, Respondent's testimony establishes that the gang members' belief that he was gay was "at least one central reason" for his persecution. INA § 208(b)(1)(B). And Board precedent makes clear that "aliens whose persecutors were motivated by more than one reason continue to be protected under section 208 of the Act if they can show a nexus to a protected ground." *J-B-N- & S-M-*, 24 I&N Dec. at 213. Here, Respondent has met his burden to show that his imputed membership in the LGBTI community was more than "incidental, tangential, superficial, or subordinate to" the recruitment efforts. *Id.* at 214.

Finally, the Court notes that Respondent's case is distinguishable from the line of cases rejecting gang recruitment-based social groups. *See, e.g.*, *Ortiz-Puentes v. Holder*, 662 F.3d 481, 483 (8th Cir. 2011) (rejecting the social group of "young Guatemalans who refused to join gangs and were persecuted—beaten—as a result" and holding the respondents failed to establish a nexus between their harm and a protected ground). Respondent has shown that he is a member of a cognizable particular social group and has met his burden to establish a nexus between that protected ground and the persecution he underwent.

c. Government Unable or Unwilling to Control

An applicant for asylum must be unable to return to the country of removal, thus the feared persecution must be either "condoned by the government or . . . committed by private actors that the government was unwilling or unable to control." *Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732 (8th Cir. 2013). This requires more than a showing that the government has "difficulty...controlling" private actors. *Ngengwe v. Mukasey,* 543 F.3d 1029 (8th Cir. 2008). Rather, a government is unable or unwilling to control the persecutor when it demonstrates "complete helplessness." *Gutierrez-Vidal*, 709 F.3d at 732–33; *Menjivar v. Gonzales*, 416 F.3d 918 (8th Cir. 2005). "Inability to control private actors is an imprecise concept that leaves room for discretion by [the Court]." *Saldana v. Lynch*, 820 F.3d 970, 977 (8th Cir. 2016).

The country condition reports establish that the Guatemalan government is complicit in the widespread problem of discrimination and violence on the basis of sexual orientation. *See generally* Exh. 14 at Tab D. First, Guatemala's "antidiscrimination laws do not apply to LGBTI individuals." *Id.* at 54. Additionally, "LGBTI people are frequently the target of different forms

of violence due to their real or perceived sexual orientation and/or gender identity, such as, for example, intimidation, threats, physical aggression, sexual violence and even murder." *Id.* at 143. Gangs in particular often attack people based on their actual "or perceived gender identity or sexual orientation" and subject "them to acts of physical and sexual violence, as well as blackmail." *Id.* at 144. LGBTI individuals are routinely subject to police abuse, which has instilled them with fear of law enforcement and unwillingness to report crimes. *Id.* at 54. In fact, country condition reports reflect "impunity for murders motivated by hatred towards persons identifying as gay, lesbian, transgender, and transsexual." *Id.* at 184. Respondent testified credibly that he does not trust the police in Guatemala. He filed a police report about a month after his second attack, but no criminal investigation took place. Respondent was reluctant to file the report because he believes the police force is corrupt and has ties to the MS-13. The country condition reports coupled with Respondent's testimony regarding police corruption paint a clear picture that had Respondent reported the first incident to police, it is unlikely they would have been able or willing to protect him. Therefore, the Court finds that the Guatemalan government is unable and unwilling to protect Respondent from harm at the hands of gang members who believe he is gay. *See Saldana*, 820 F.3d at 977.

In sum, because Respondent suffered persecution on account of a protected ground, namely his membership in the particular social group "Members and perceived members of the LGBTI community in Guatemala," the Court holds that Respondent has met his burden in establishing that he suffered past persecution.

3. **Well-Founded Fear of Future Persecution**

Because Respondent has satisfied his burden of showing that he suffered past persecution on account of his social group, he is entitled to a presumption of a well-founded fear of future persecution on the basis of that claim. 8 C.F.R. § 1208.13(b)(1). When an applicant establishes past persecution, the burden shifts to DHS to rebut the presumption of a well-founded fear of future persecution. *See Bushira v. Gonzales*, 442 F.3d 626 (8th Cir. 2006). DHS may rebut the presumption of Respondent's well-founded fear if it can show by a preponderance of evidence either that there is a "fundamental change in circumstances" or that Respondent could reasonably avoid the persecution by relocating within the country of removal. 8 C.F.R. §§ 1208.13(b)(1)(i)–(ii).

When an applicant establishes past persecution "it shall be presumed that internal relocation would not be reasonable" unless the DHS establishes that, "under all the circumstances, it would be reasonable for the applicant to relocate." *Yang v. Gonzales*, 427 F.3d 1117, 1122 (8th Cir. 2005). Criteria for the reasonableness of relocation include whether Respondent would face other serious harm in place of 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 familial ties. 8 C.F.R. § 1208.13(b)(3).

The Court finds that DHS has failed to show by a preponderance of the evidence that there has been a fundamental change in circumstance or that Respondent could avoid persecution by relocating to a different part of Guatemala. Respondent's credible testimony and

corroborative country condition evidence indicate that internal relocation is unreasonable, and DHS has not met its burden to prove otherwise. *See* 8 C.F.R. §§ 1208.13(b)(1)(i)–(ii).

4. Mandatory Denial

An applicant for relief from removal has the burden to demonstrate his or her statutory eligibility for relief and that he or she merits a favorable exercise of discretion. 8 C.F.R. § 1240.8(d). If the evidence indicates that one or more of the grounds for mandatory denial of relief may apply, the applicant bears the burden of proving by a preponderance of the evidence that such grounds do not apply. *Id.*

a. Particularly Serious Crime

An applicant is ineligible for asylum if he or she has been convicted of a "particularly serious crime" and therefore "constitutes a danger to the community of the United States." INA § 208(b)(2)(A)(ii). A crime is *per se* particularly serious if it is an aggravated felony. *See* INA § 208(b)(2)(B)(i). Even if a crime falls outside the *per se* classification, it may fit within the *ad hoc* category, in which the particular seriousness is adjudicated on a case-by-case basis. *See Matter of N-A-M-*, 24 I&N Dec. 336, 342 (BIA 2007); *Matter of M-H-*, 26 I&N Dec. 46, 49–50 (BIA 2012) (applying the *N-A-M-* framework to the particularly serious crime analysis in the context of asylum); *Tian v. Holder*, 576 F.3d 890, 897 (8th Cir. 2009) (endorsing the case-by-case approach to particularly serious crimes). In the latter category, if an IJ finds the elements of the offense "potentially bring [it] within the ambit of a particularly serious crime," the IJ must "examine the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction." *N-A-M*, 24 I&N Dec. at 342. In doing so, the IJ may consider "all reliable information," including information "outside the confines of a record of conviction." *Id.*

However, this analysis does not include an inquiry into whether the applicant is rehabilitated or has a viable claim of relief. *See Tian*, 576 F.3d at 897–98; *Matter of R-A-M-*, 25 I&N Dec. 657, 662 (BIA 2012) (citing *Matter of S-S-*, 22 I&N Dec. 458, 466 (BIA 1999)). The Board cautions that although the type of sentence is a factor in the analysis, "the severity of the crime is not always reflected in the length of the sentence." *R-A-M-*, 25 I&N Dec. at 662 (quoting *N-A-M-*, 24 I&N Dec. at 344 n.8) (quotation marks omitted). Thus, some crimes are "so condemnable that the length of the sentence is less significant to the analysis." *Id.* Moreover, the statutory question of whether an applicant presents a "danger to the community" requires no separate finding of "dangerousness" where his or her crime has already been found to be particularly serious. *See Matter of G-G-S-*, 26 I&N Dec. 339, 342–43 (BIA 2014); INA § 241(b)(3)(B)(ii). In sum, even if an applicant's conviction does not bring it into the *per se* category of particularly serious crimes so as to preclude eligibility for asylum, an IJ may still find that the crime of conviction is particularly serious after reviewing the elements of the offense and performing the *ad hoc* analysis.

Preliminarily, the Court finds that Respondent's convictions do not trigger *per se* classification as particularly serious crimes because they are not aggravated felonies. INA § 208(b)(2)(B)(i). If these convictions are for particularly serious crimes, then, it will be because

the elements of the statutes of conviction bring the crimes potentially "within the ambit" of particularly serious crimes, and the nature of the crimes, sentence lengths, and underlying circumstances confirm their seriousness. *See N-A-M*, 24 I&N Dec. at 342. Respondent has four convictions of record, but DHS specifically argues that his convictions for Reckless Use of Fire or Explosives and Harassment in the Second Degree under IOWA CODE §§ 712.5 and 708.7(3), respectively, are particularly serious crimes.

i. Reckless Use of Fire or Explosives under IOWA CODE § 712.5

The elements of this offense are found within the Iowa Code and clarified in Iowa's model jury instructions. Section 712.5 provides, "Any person who shall so use fire or any incendiary or explosive device or material as to recklessly endanger the property or safety of another shall be guilty of a serious misdemeanor." IOWA CODE § 712.5. The term "reckless"/"recklessly" is defined as acting with willful or wanton disregard for "the safety of persons or property." IOWA CODE § 702.16. Iowa defines "incendiary device" to mean "a device, contrivance, or material causing or designed to cause destruction of property by fire!" IOWA CODE § 702.21. The elements of Reckless Use of Fire or Explosives are synthesized in the crime's model jury instructions as requiring proof that: (1) the defendant used fire/device or material; (2) said fire/instrument was an explosive or incendiary device or material; (3) defendant used the fire/instrument in a reckless manner; and (4) thereby endangered the property or safety of another. *See Iowa Criminal Jury Instruction* No. 1200.7. The Court holds that the elements of Reckless Use of Fire or Explosives under IOWA CODE § 712.5 as delineated above bring it potentially "within the ambit of a particularly serious crime." *N-A-M*, 24 I&N Dec. at 342. That being so, the analysis involves using "all reliable information" in the record to examine the nature of the crime, the length of the sentence, and the circumstances underlying Respondent's conviction. *Id.*

The documentary and testimonial evidence of record reveals the following narrative of the incident: On 19 July 2015, in an effort to commit suicide, Respondent poured gasoline on himself and in parts of the house where he resided with his wife and step-son. Respondent then left the house without igniting the gasoline. A short time later, a neighbor smelled the gasoline and called the police. Respondent was later taken into police custody. He was initially charged with Arson in the First Degree under IOWA CODE § 712.2. *See* Exh. 9 at 27. The charge was amended and an Amended Trial Information charged him with Reckless Use of Fire or Explosives under IOWA CODE § 712.5 and Harassment in the Second Degree under IOWA CODE § 708.7(3). *See* Exh. 9 at 16. Respondent was found incompetent to stand trial and received intensive in-patient treatment and medication for Major Depressive Disorder and Post Traumatic Stress Disorder ("PTSD"). *See* Exh. 14, Tab C at 7–27. In August 2016, several months later, Respondent was found competent to stand trial. *See* Exh. 10 at 11–13. This was largely due to positive changes in Respondent's mood and behavior as a result of his psychiatric medications. *See id.* On 18 November 2016, Respondent pleaded guilty to the charges contained in the Amended Trial Information. *See* Exh. 9 at 9–12. He was sentenced to concurrent 180-day terms of imprisonment. *See id.* at 10. A no-contact order issued following the incident but it was removed some time later. *See id.* at 13.

Reckless Use of Fire or Explosives is a "serious misdemeanor" which under Iowa law carries a maximum sentence of one year. *See* IOWA CODE § 903.1(b). Respondent's prison sentence was thus less than half the maximum allowable under the law. *See* Exh. 9 at 10. While sentence length is not necessarily reflective of the seriousness of an offense, in general, misdemeanors are unlikely to be found particularly serious. *See R-A-M-*, 25 I&N Dec. at 661–62; *Matter of Juarez*, 19 I&N Dec. 664, 664–65 (BIA 1988). Like the respondent in *Juarez*, who was sentenced to six months on a simple misdemeanor, Respondent's serious misdemeanor and corresponding 180-day sentence weigh against finding that his crime was particularly serious. 19 I&N Dec. at 664–65. Finally, the circumstances underlying Respondent's conduct place his conviction squarely outside "the ambit of a particularly serious crime." *N-A-M*, 24 I&N Dec. at 342. Testimonial evidence from Respondent and his wife indicates that Respondent was suicidal and not of sound mind when he poured gasoline on himself inside their home.

Based on the above analysis of the nature of Respondent's offense, the length of his sentence, and the circumstances underlying his conduct, the Court finds Respondent's conviction under IOWA CODE § 712.5 is not a particularly serious crime.

ii. Harassment in the Second Degree under IOWA CODE § 708.7(3)

Section 708.7(3) provides, "A person commits harassment in the second degree when the person commits harassment involving a threat to commit bodily injury, or commits harassment and has previously been convicted of harassment two times under this section or any similar statute during the preceding ten years." IOWA CODE § 708.7(3). The elements of Harassment in the Second Degree are synthesized in the crime's model jury instructions as requiring proof that: (1) the defendant placed an explosive or incendiary device in or near a building, vehicle, airplane, railroad car, or boat occupied by another person; (2) the defendant communicated a threat to commit bodily injury; and (3) the defendant did so with the specific intent to intimidate, annoy or alarm another. *See Iowa Criminal Jury Instruction* No. 810.2. The Court therefore holds that the elements of Harassment in the Second Degree bring it potentially "within the ambit of a particularly serious crime." *N-A-M*, 24 I&N Dec. at 342.

The Court next turns to the circumstances underlying this conviction, which arise from the same incident analyzed above. Respondent testified that he only intended to harm himself when he poured the gasoline. His wife testified that Respondent did not threaten to harm her or her son and that she did not feel that Respondent was trying to harm her or her son. No one witnessed Respondent pouring the gasoline, but Respondent's wife and a neighbor became alarmed when they smelled gasoline. It is unclear whether Respondent's wife and step-son were in the house when Respondent poured the gasoline. Respondent was charged with and pleaded guilty to Harassment in the Second Degree under IOWA CODE § 708.7(3). *See* Exh. 9 at 9–12, 16. He was sentenced to 180-days imprisonment for that offense. *See id.* at 10.

Under Iowa law, Harassment in the Second Degree is a "serious misdemeanor" and carries a maximum sentence of one year. *See* IOWA CODE § 903.1(b). Respondent's prison sentence was thus less than half the maximum allowable under the law. *See* Exh. 9 at 10. While sentence length is not always indicative of the seriousness of an offense, in general, misdemeanors are unlikely to be found particularly serious. *See R-A-M-*, 25 I&N Dec. at 661–62; *Juarez*, 19 I&N Dec. at 664–65. As in *Juarez*, Respondent's serious misdemeanor and corresponding 180-day

sentence weigh against finding that his crime was particularly serious. 19 I&N Dec. at 664–65. Moreover, the circumstances underlying Respondent's conduct show that his conviction falls outside "the ambit of a particularly serious crime." *N-A-M*, 24 I&N Dec. at 342. Aside from Respondent's guilty plea, which contains no details about the circumstances of the crime, no evidence of record suggests that he threatened anyone or poured the gasoline with any intent other than to harm himself.

Based on the above analysis of the nature of Respondent's offense, the length of his sentence, and the circumstances underlying his conduct, the Court finds Respondent's conviction under IOWA CODE § 708.7(3) is not a particularly serious crime.

V. CONCLUSION

Because Respondent established that he suffered persecution on account of his perceived LGBTI identity, and the government is unable to control his persecutors, the Court holds that Respondent has demonstrated that he is a refugee. INA § 101(a)(42)(A). The Court further finds that Respondent merits asylum in the exercise of discretion. INA § 208(b)(1)(A); 8 C.F.R. § 1208.14. Respondent does not have a perfect record but the Court is convinced that he is on a better path now that he has received treatment and takes medication for his mental health issues. The Court need not address his other applications for relief.

Accordingly, the following order will be entered:

ORDER OF THE IMMIGRATION JUDGE

IT IS ORDERED that Respondent's application for asylum is **GRANTED.**

JACK L. ANDERSON
Immigration Judge