

## **APPENDICES**

**APPENDIX A**

UNITED STATES COURT OF  
APPEALS FOR THE FIFTH  
CIRCUIT

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No. 19-60355

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LEON SANTOS-ZACARIA, ALSO  
KNOWN AS LEON SANTOS-  
SACARIAS,

Petitioner,

*versus*

MERRICK GARLAND, UNITED  
STATES ATTORNEY GENERAL,

Respondent.

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Petition for Review of an Order of the  
Board of Immigration Appeals

BIA No. A098 372 949

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(January 10, 2022)

Before OWEN, *chief judge*, and CLEMENT and  
HIGGINSON, *circuit judges*.

PRISCILLA R. OWEN, Chief Judge:

Leon Santos-Zacaria (Santos), a native and citizen of Guatemala, petitions for review of the Board of Immigration Appeals's (BIA's) decision denying her application for withholding of removal and for relief under the Convention Against Torture (CAT). We DENY in part and DISMISS in part for lack of jurisdiction.

## I

Santos, who is a transgender woman and is attracted to men, alleged that she was sexually assaulted by a neighbor in Guatemala at the age of 12 for being gay and asserted that she was likely to face persecution if she returned to Guatemala due to her sexual orientation and gender identity. The immigration judge (IJ) denied her application for withholding of removal, concluding that Santos's prior assault was insufficient to establish past persecution. The IJ also denied Santos's claim for relief under the CAT. Santos appealed to the BIA.

The BIA dismissed her appeal. First, the BIA concluded that Santos's allegation of sexual assault was sufficient to establish past persecution on account of membership in a particular social group. Consequently, Santos was entitled to a presumption of future persecution. However, the BIA ruled that the government had rebutted the presumption. The BIA also affirmed the IJ's ruling that Santos had not established eligibility for relief under the CAT. Finally, the BIA rejected an argument that the IJ

ignored or failed to consider relevant evidence. Santos filed a timely petition for review.

## II

Santos contests the BIA's decision that she is not eligible for withholding of removal. Whether an applicant is eligible for withholding of removal is a factual determination that this court reviews under the substantial evidence standard.<sup>1</sup> "The substantial evidence standard requires only that the BIA's decision be supported by record evidence and be substantially reasonable."<sup>2</sup> "[R]eversal is improper unless we decide 'not only that the evidence supports a contrary conclusion, but [also] that the evidence compels it.'"<sup>3</sup>

"To be eligible for withholding of removal, an applicant must demonstrate a 'clear probability' of persecution upon return."<sup>4</sup> "A clear probability means that it is more likely than not that the applicant's life or freedom would be threatened by persecution on account of either h[er] race, religion, nationality, membership in a particular social group, or political opinion."<sup>5</sup> If an applicant proves past persecution, she

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<sup>1</sup> *Zhang v. Gonzales*, 432 F.3d 339, 344 (5th Cir. 2005).

<sup>2</sup> *Omagah v. Ashcroft*, 288 F.3d 254, 258 (5th Cir. 2002).

<sup>3</sup> *Zhang*, 432 F.3d at 344 (alteration in original) (quoting *Zhao v. Gonzales*, 404 F.3d 295, 306 (5th Cir. 2005)).

<sup>4</sup> *Roy v. Ashcroft*, 389 F.3d 132, 138 (5th Cir. 2004) (per curiam) (quoting *Faddoul v. INS*, 37 F.3d 185, 188 (5th Cir. 1994)).

<sup>5</sup> *Id.*

is entitled to a rebuttable presumption of future persecution.<sup>6</sup>

### A

As an initial matter, Santos argues for the first time on appeal that the BIA engaged in impermissible factfinding. This court “may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right.”<sup>7</sup> “[F]ailure to exhaust an issue deprives this court of jurisdiction over that issue.”<sup>8</sup> “[A]llegations of impermissible factfinding by the BIA must first be brought before the BIA in a motion for reconsideration to satisfy exhaustion.”<sup>9</sup> Accordingly, because Santos did not present this argument before the BIA in a motion for reconsideration, it is unexhausted, and we lack jurisdiction to consider it.

JUDGE HIGGINSON’s dissenting opinion contends that this court has jurisdiction because of a request for potential additional factfinding in Santos’s brief appealing the IJ’s decision.<sup>10</sup> That request occurred before the BIA ruled on Santos’s claims. It is unrelated to the factfinding Santos asserts the BIA made. The first objection she made to the BIA’s alleged factfinding was in her brief to this court.

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<sup>6</sup> 8 C.F.R. § 1208.16(b)(1)(i).

<sup>7</sup> 8 U.S.C. § 1252(d)(1).

<sup>8</sup> *Omari v. Holder*, 562 F.3d 314, 319 (5th Cir. 2009).

<sup>9</sup> *Id.* at 320.

<sup>10</sup> *Post* at 8 (citing ROA.29).

Because this objection was not made to the BIA, Santos has not met the exhaustion requirement.

### **B**

Next, Santos asserts that the BIA's determination that the government rebutted the presumption of future persecution is not supported by substantial evidence. "The government may rebut th[e] presumption [of future persecution] by demonstrating that there has been a fundamental change in the circumstances of the country of removal, or that the applicant could avoid a future threat to h[er] life or freedom by reasonably relocating to a different part of the country of removal."<sup>11</sup> Santos further argues that the BIA erred by "lumping together Ms. Santos' claim as a homosexual Guatemalan and Ms. Santos' claim as a transgender Guatemalan."

The BIA accepted Santos's "proposed particular social groups, described as 'gay' and 'transgender,'" but nevertheless found that "the presumption of future persecution on account of [Santos's] homosexuality or transgender identity has been rebutted in this case." In reaching its conclusion, the BIA found that Santos acknowledged that she "would be able to safely relocate within Guatemala." Santos argues that the BIA mischaracterized her statements and that she never stated that she could safely relocate.

During cross-examination at a hearing before the IJ, the government questioned Santos about cities in

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<sup>11</sup> *Arif v. Mukasey*, 509 F.3d 677, 681 (5th Cir. 2007) (per curiam).

Guatemala that have pride parades and where people participate in “gay and lesbian lifestyles.” The government then asked, “[b]ut if you know of cities that are open to gay and lesbian and transgender lifestyles you would rather move to those cities than the one you lived in correct?” Santos replied, “[y]es, probably there is another place where I can live down there but I don’t but I try to stay here to get this protection because besides that I have a brother living here so I’m trying to have him help me.” Because Santos agreed that there was probably a place where she could safely relocate within Guatemala, the BIA’s determination that the government rebutted the presumption of future persecution is supported by substantial evidence for both of Santos’s particular social groups.

JUDGE HIGGINSON’s dissenting opinion views Santos’s statement as “vague and equivocal” because it was made in response to a hypothetical question and through an interpreter.<sup>12</sup> We do not agree with the characterization of Santos’s statement as vague and equivocal. The BIA reasonably interpreted her statement to mean that she did in fact know of a city or cities in Guatemala where it was probably safe for gay and transgender people to live. As the Supreme Court has explained, “[t]he BIA’s determination that [an alien] was not eligible for asylum must be upheld if ‘supported by reasonable, substantial, and probative evidence on the record considered as a

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<sup>12</sup> *Post* at 10.

whole.”<sup>13</sup> Such a determination “can be reversed only if the evidence presented by [the alien] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed.”<sup>14</sup>

“[A]n applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.”<sup>15</sup> Because the BIA’s determination that Santos could reasonably relocate within Guatemala is supported by substantial evidence, the BIA did not err in concluding that Santos is ineligible for withholding of removal.

### III

Santos also challenges the BIA’s determination that she is not eligible for relief under the CAT. To be eligible for relief under the CAT, an applicant bears the burden to “establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.”<sup>16</sup> “Torture is defined as any act by which severe pain or suffering . . . is intentionally inflicted on a person . . . for any reason based on discrimination of any kind, when such pain

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<sup>13</sup> *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 481 (1992) (citing 8 U.S.C. § 1105a(a)(4)) (current version at 8 U.S.C. § 1252).

<sup>14</sup> *Id.*

<sup>15</sup> 8 C.F.R. § 1208.16(b)(2).

<sup>16</sup> *Id.* § 1208.16(c)(2).



or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official acting in an official capacity or other person acting in an official capacity.”<sup>17</sup> Whether an applicant is eligible for relief under the CAT is a factual determination that we review for substantial evidence.<sup>18</sup>

First, Santos asserts that neither the IJ nor the BIA adequately analyzed her CAT claim. We lack jurisdiction to review Santos’s challenge to the adequacy of the BIA’s analysis because Santos could have raised this argument in a motion for reconsideration before the BIA but failed to do so.<sup>19</sup> As to the IJ’s analysis, the IJ is merely required to show “that it consider[ed] the issues raised, and [to] announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted.”<sup>20</sup> The IJ’s decision, which set out the pertinent law and relevant facts surrounding Santos’s claim for relief under the CAT, adequately conveyed the reasoning behind denying the claim.

Second, Santos challenges the merits of her CAT claim, arguing that she faces a risk of torture from disparate groups in Guatemala, and that the probability of torture from these groups should have

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<sup>17</sup> *Id.* § 1208.18(a)(1).

<sup>18</sup> *Zhang v. Gonzales*, 432 F.3d 339, 344 (5th Cir. 2005).

<sup>19</sup> *See Omari v. Holder*, 562 F.3d 314, 319-21 (5th Cir. 2009).

<sup>20</sup> *Efe v. Ashcroft*, 293 F.3d 899, 908 (5th Cir. 2002) (quoting *Becerra–Jimenez v. INS*, 829 F.2d 996, 1000 (10th Cir. 1987)).

been aggregated. Even giving full weight to Santos's evidence, the evidence does not compel a finding that she will be tortured with the consent or acquiescence of a public official in Guatemala.<sup>21</sup>

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For these reasons, Santos's petition for review is DENIED in part and DISMISSED in part for lack of jurisdiction.

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<sup>21</sup> See 8 C.F.R. § 1208.18(a)(1).

STEPHEN A. HIGGINSON, *Circuit Judge*, dissenting:

The Board exceeded its scope of review by engaging in impermissible factfinding. The Immigration Judge concluded that Santos did not suffer past persecution on account of a protected ground, so it did not reach the question of whether DHS had rebutted the presumption of future persecution. When the Board, in a single-member decision, determined that “the presumption of future persecution . . . has been rebutted in this case,” it engaged in factfinding not permitted by the regulation.<sup>1</sup> 8 C.F.R. § 1003.1(d)(3)(iv); *see also Singh v. Barr*, 920 F.3d 255, 259 (5th Cir. 2019) (BIA finding that DHS has rebutted the presumption of future persecution is a factual finding reviewed for substantial evidence). Santos adequately requested that the Board remand her case for additional factfinding,<sup>2</sup> so we have jurisdiction to review this claim. *See Omari v. Holder*, 562 F.3d 314, 324 (5th Cir. 2009). I would remand.

Even if it were a valid exercise of its authority, the Board’s decision is not supported by substantial

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<sup>1</sup> On appeal, the Government cites *Enriquez-Gutierrez v. Holder*, 612 F.3d 400, 409–10 (5th Cir. 2010) to suggest that administratively noticeable factfinding by the Board is permissible. The decision in *Enriquez-Gutierrez*, however, is manifestly inapt, as it pertains to appropriate administrative notice of a stipulated prior conviction, *id.* at 411, not crediting a cross-examination remark over direct testimony the IJ found credible.

<sup>2</sup> ROA.29.

evidence. The Government may rebut a presumption of future persecution by “demonstrating that there has been a fundamental change in the circumstances of the country of removal, or that the applicant could avoid a future threat to his life or freedom by reasonably relocating to a different part of the country of removal.” *Arif v. Mukasey*, 509 F.3d 677, 681 (5th Cir. 2007). The Government has not made either showing.

Regarding country conditions, the Government’s evidence suggests that gay and transgender persons regularly face violence, harassment, and discrimination in Guatemala. The United States Department of State 2017 Human Rights Report on Guatemala, submitted by the Government but not discussed by the Board, lists one of “[t]he most significant human rights issues” in Guatemala as “police violence against lesbian, gay, bisexual, transgender, and intersex individuals.” The report also notes that “[t]here was general societal discrimination against LGBTI persons in access to education, health care, employment, and housing” and that “[t]he government undertook minimal efforts to address this discrimination.” In addition, Santos’s two return trips to Guatemala are not probative of changed country conditions; she needed to conceal her transgender identity by wearing male clothing and cutting her hair, hire private transportation, and hide in her parents’ home for the duration of both visits. “The case law is clear that an alien cannot be forced to live in hiding in order to avoid persecution.” *Singh v. Sessions*, 898 F.3d 518, 522 (5th Cir. 2018).

Regarding the possibility of relocation within Guatemala, the Government makes much of Santos's alleged "acknowledgement" that she could safely relocate. This is a gross mischaracterization of the record. On direct examination before the Immigration Judge, Santos categorically denied that she could live safely anywhere within Guatemala:

[Santos's Counsel]: And last question. Is there anywhere that you think that you could safely live in Guatemala?

[Santos]: No. That whole country Guatemala it's going to be the same for me because there is no police in—anywhere that is going to protect me so I'm not going to get what I'm looking for so that's why I want to stay in this country because I know I'm going to have that protection here.

But the Government fixates instead on a fragment of a hypothetical considered by Santos during cross-examination:

[Government]: And did you ever try to move to a city that was more open and free than the one that you grew up in as a child?

[Santos]: But I don't know where to go down there. I don't know who would—kind—what kind of people I'm going to get there to live there.

[Government]: But if you know of cities that are open to gay and lesbian and transgender lifestyles you would rather move to those cities than the one you lived in correct?

[Santos]: Yes, probably there is another place where I can live down there but I don't but I try to stay here to get this protection because besides that I have a brother living here so I'm trying to have him help me.<sup>3</sup>

Santos's vague and equivocal statement in response to the Government's hypothetical question<sup>4</sup> does not constitute an admission that she could safely relocate within Guatemala, where she was twice raped.

I respectfully dissent.

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<sup>3</sup> Although it urged this court to rely on this hypothetical, the Government during oral argument before our court could not “recall[] that specific snippet of the record” in which Santos categorically denied being unable to relocate safely within Guatemala. U.S. Court of Appeals for the Fifth Circuit, *19-60355 Santos-Zacaria v. Garland*, April 28, 2021, YOUTUBE at 20:15 (May 18, 2021), <https://youtu.be/zt3ssKgUtpQ?t=1215>.

<sup>4</sup> Throughout the exchange, Santos spoke in Kanjobal, a Mayan language spoken in parts of Guatemala, through an interpreter.

**APPENDIX B**

U.S. DEPARTMENT OF JUSTICE  
DECISION OF THE BOARD OF  
IMMIGRATION APPEALS  
EXECUTIVE OFFICE FOR  
IMMIGRATION REVIEW  
FALLS CHURCH, VIRGINIA 22041

File: A098-372-949 — Jena, LA

Date: Apr 30, 2019

In re: Leon SANTOS-ZACARIA a.k.a. Leon Santos-  
Sacarias

IN ASYLUM AND/OR WITHHOLDING  
PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Benjamin J. Osorio, Esquire

APPLICATION: Withholding of removal; Convention  
Against Torture

The applicant, a native and citizen of Guatemala, has appealed from the Immigration Judge's November 29, 2018, decision denying his applications for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §1231(b)(3), and for protection under the

Convention Against Torture. *See* 8 C.F.R. §§ 1208.13, 1208.16-.18.<sup>1</sup> The applicant's appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo questions of law, discretion, and judgment, and all other issues in appeals from an Immigration Judge's decision. 8 C.F.R. § 1003.1(d)(3)(ii).

The applicant testified that he is gay and identifies as transgender (IJ at 4, 6; Tr. at 30, 32-33). Reportedly, at the age of 12, he was sexually assaulted by a neighbor because he was gay, and he was threatened with death if he did not leave the community where he lived (IJ at 3-4; Tr. at 32, 34-35). The applicant did not report the attack to the authorities or to his family because the police do not protect gay or transgender people (IJ at 4; Tr. at 35, 57, 61-62). Reportedly, he was also threatened and made fun of because of the way he walked, looked, and dressed (IJ at 5-6; Tr. at 32-34).

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<sup>1</sup> We note that the applicant reports to be a member of the transgender community and identifies as a female (IJ at 4, 6; Tr. at 33-34; Exh.4, Tab B, p.34) (*see* Applicant's Br.) However, the applicant's birth certificate reflects that he is male, the record does not reflect that he underwent any gender reassignment procedure, and the Immigration Judge used a male pronoun to refer to the applicant throughout her decision. Likewise, the applicant's expert witness referred to the applicant with a male pronoun, consistent with his legal name (Exh. 4, p.44). As such, for the sake of consistency and clarity, we will refer to the applicant as "he."



The applicant initially left his native Guatemala in his early teens, at the age of 13 or 14, having moved to Mexico for many years (IJ at 2-4; Tr. at 31-32, 39-40). Before his most recent entry into the United States in May 2018, he entered and was removed from the United States to Guatemala in 2008 and 2012 (IJ at 2-3; Tr. at 35-39; Exh.2). Additionally, the applicant traveled voluntarily from Mexico to Guatemala in 2015 (IJ at 4; Tr. at 39, 40, 42) and again in 2018 (IJ at 4; Tr. at 44). At the time of his hearing the applicant was 30 years old (IJ at 1).

The applicant claims eligibility for relief from removal based on membership in proposed particular social groups, described as "gay" and "transgender" (IJ at 6; Tr. at 19, 30, 65; Exh. 3) (see Applicant's Br. at 9-10). *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018) (holding that an applicant raising membership in a particular social group as the basis of the claim for relief has the burden to clearly delineate the group to which she claims she belongs). The Immigration Judge denied withholding of removal, concluding that the applicant did not suffer past persecution and did not demonstrate that it is more likely than not that he will be persecuted on account of any protected ground (IJ at 5-7).

On de novo review, we conclude that the harm that the applicant suffered, consisting of rape at the age of 12, was sufficiently severe to rise to the level of past persecution (IJ at 3). *See Arif v. Mukasey*, 509 F.3d 677, 680 (5th Cir. 2007) (noting that persecution is an extreme concept that does not include all treatment our society regards as offensive). Moreover, the evidence reflects that the applicant was raped

because he was gay (IJ at 3-4; Tr. at 34-35; Exh. 4). As such, the Immigration Judge's conclusion that the evidence did not demonstrate a nexus between the harm suffered and a protected ground under the Act was clearly erroneous (IJ at 5-6). *See Matter of D-R-*, 27 I&N Dec.105,122 (BIA 2017) (explaining that motive findings are factual ones reviewable for clear error); *see also Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1990) (holding that homosexuals in Cuba constitute a particular social group).

Because the applicant has established that he suffered past persecution on account of membership in a particular social group, he is presumed to face future persecution on the basis of the original claim. *See* 8 C.F.R. § 1208.16(b)(1); *see also Matter of D-I-M-*, 24 I&N Dec. 448, 450 (BIA 2008). Overall, we conclude that the presumption of future persecution on account of the applicant's homosexuality or transgender identity has been rebutted in this case. *See* 8 C.F.R. § 1208.16(b)(1)(i). Specifically, the applicant was raped 18 years ago, when he was a child, and he is now an adult (IJ at 5; Tr. at 34,60-61; Exh.3). He has lived outside of Guatemala for more than 15 years since his initial departure from that country at the age of 13 or 14, he voluntarily returned there on at least two occasions; he does not appear to have suffered any harm upon return (IJ at 2-5; Tr. at 30-31; 34-37, 41, 45). Furthermore, the applicant does not know his attacker's current whereabouts (IJ at 5-6; Tr. at 61).

The applicant acknowledged that he would be legally allowed to change his gender to female in Guatemala and that he would be able to safely relocate within Guatemala (but he preferred to

remain in the United States because of his brother) (Tr. at 62-63). Likewise, the applicant's expert witness acknowledged in her written statement that homosexuality is not a crime in Guatemala (Exh. 4, p. 48).<sup>2</sup>

In addition, the applicant acknowledged that he did not report his rape to the authorities in Guatemala (IJ at 4; Tr. at 61-62). As such, the authorities are not shown to have been given an opportunity to investigate the crime and to punish the perpetrator. *See Shehu\_v. Gonzales*, 443 F.3d435, 438 (5th Cir. 2006) (stating that an applicant's opinion that the government condoned the actions against him were insufficient to demonstrate persecution because the applicant did not report to or seek protection from the authorities). Thus, the evidence does not support a conclusion that the government was or would be unable or unwilling to protect him (IJ at 6). *See Matter of A-B-*, 27 I&N Dec.316 (A.G. 2018) (holding that the asylum statute does not provide redress for aliens suffering threats and violence in their country for reasons relating to social, economic, family, or other personal circumstances, and that a victim of private criminal activity must demonstrate that government protection is unavailable); *see also Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015) (stating that predictive findings of what may or may not occur in the future

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<sup>2</sup> We note that the Immigration Judge did not specifically acknowledge the expert witness' written statement in her decision, or the applicant's testimony regarding current country conditions in Guatemala, but she acknowledged that all evidence has been reviewed and considered, even if not specifically mentioned (IJ at 2).

are findings of fact, and they are reviewed for clear error). Consequently, the applicant has not demonstrated eligibility for withholding of removal (IJ at 7). *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 443-44 (1987); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (holding that the "one central reason" standard applies to withholding of removal as well as asylum).

We also affirm the Immigration Judge's determination that the applicant has not established eligibility for protection under the Convention Against Torture because he has not demonstrated that he is more likely than not to be tortured in Guatemala, by or with the acquiescence (including willful blindness) of a public official upon his return (IJ at 5, 7). 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1). Based on the entirety of the record, we discern no clear error in the Immigration Judge's finding that the applicant has not demonstrated that it is more likely than not that he would be tortured upon return to Guatemala. *See Matter of Z-Z-O-*, 26 I&N Dec. at 586.

The applicant contends on appeal that the Immigration Judge failed to fully and independently analyze his relief from removal claim based on each proposed particular social group, as articulated above (*see Applicant's Br.* at 2, 9). He also contends that the Immigration Judge did not fully and adequately analyze his claim of protection under the Convention Against Torture, and that she did not adequately acknowledge all evidence that has been submitted in support of the application for relief and protection from removal (*see Respondent's Br.* at 2, 8).

We disagree. The Immigration Judge confirmed that she considered the entirety of the evidence of record, even if not mentioning any piece thereof specifically (IJ at 2). Overall, the record does not reflect that the Immigration Judge ignored or otherwise failed to consider any relevant evidence that may have affected the outcome of the case. As such, the evidence does not support a conclusion that the Guatemalan authorities would be unable or unwilling to protect the applicant from threats and harm throughout the country of Guatemala (IJ at 2; Tr. at 62-63). *See Matter of A-B-*, 27 I&N Dec. at 320. In view of the foregoing, the following order will be entered.

ORDER: The respondent's appeal is dismissed.

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FOR THE BOARD

**APPENDIX C<sup>1</sup>**

UNITED STATES DEPARTMENT OF  
JUSTICE

EXECUTIVE OFFICE FOR  
IMMIGRATION REVIEW

UNITED STATES IMMIGRATION  
COURT

JENA, LOUISIANA

File: A098-372-949

November 29, 2018

In the Matter of

LEON SANTOS-SACARIAS

APPLICANT

IN WITHHOLDING ONLY PROCEEDINGS

CHARGES:

APPLICATIONS:

ON BEHALF OF APPLICANT: BENJAMIN  
OSARIO

ON BEHALF OF DHS: MR. JONES

**ORAL DECISION OF THE**  
**IMMIGRATION JUDGE**

The respondent is a 30-year-old citizen of Guatemala who is subject to a previous order of removal. He filed an application for withholding of

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<sup>1</sup> Redlines in this document are reproduced from the original.

removal and for protection under the Convention against Torture.

An addendum stating the standards of law and burdens of proof relevant to these issues will be served on the parties at the conclusion of this decision and a copy will be placed in the Record of Proceedings. That addendum is hereby incorporated into this decision by reference.

The Court has considered all the evidence submitted on the record. Even if a specific piece of evidence or portion of testimony is not described with particularity it does not mean it was not reviewed or considered.

The Court carefully observed the respondent's demeanor while testifying and I found him to be credible in most respects and I would say on the material issues I found him credible. The issues that I struggle with factually with respect to his testimony, where I find him lacking, is not as a result of what I would deem lack of credibility or deception, it is just things do not add up. He was born in 1988. He first testified that he left Guatemala in 2012, but then he testified that he left Guatemala when he was 13 or 14 years old, which would mean Respondent actually ~~be~~ ~~he~~ first left Guatemala in 2001 or 2002. And if ~~he~~ Respondent first left Guatemala in 2012 ~~that-which~~ does not make any sense because ~~he-Respondent~~ was deported from the United States in 2009. So there are some discrepancies there, but I think we have enough objective evidence to establish a timeline that relates to when he entered the United States and that he is a Guatemalan citizen.

During ~~his Respondent's~~ credible fear interview on page 17, he ~~testified-stated~~ that he came to the United States ~~in 2008~~ and ~~then he~~ was deported to Guatemala in 2008, which is contained in ~~Exhibit 2, which is~~ the prior removal order, Exhibit 2. He Respondent was deported on January 16, 2008, by an immigration Court in Omaha, Nebraska. ~~He also Respondent testified-stated~~ in his credible fear interview that he came to the United States in 2012. ~~H, and some time afterward eRespondent~~ was removed. It appears the parties do not disagree that ~~he Respondent~~ was removed again, ~~A pursuant to a~~ reinstatement of ~~that~~ the original removal order. ~~Occurred and he was removed back to Guatemala.~~ It is not clear to the Court how long ~~he Respondent~~ remained in Guatemala after ~~that entry~~ his return in sometime around 2012. There is nothing in the record that describes when ~~he Respondent~~ was deported after ~~that his~~ entry into the United States in 2012, but then the timeline picks back up that ~~he Respondent~~ came back to the United States in May of 2018 and that gives rise to ~~these particular~~ the instant removal proceedings.

~~There is other~~ confusion ~~that seems to exist~~ surrounding the circumstances of ~~this a child~~ that the ~~rRespondent~~ brought to the United States with him who is referred during these proceedings as "Brian." Today, ~~Rthe~~ Respondent gave conflicting statements regarding where the child was, and, when and who within ~~Rthe~~ respondent's family, ~~whether it was his~~ (Respondent's mother or ~~his~~ brother,) was caring for the child when ~~Rthe~~ respondent was coming in and out of the United States, ~~and in and out of Chiapas, Mexico to Guatemala and then back to Chiapas and Guatemala.~~ All of ~~that the information surrounding~~



the status of Brian during Respondent's previous world travels is completely unclear. Based on this-the record before the court, these facts~~I just do not think that that~~ can-not be sorted out. And so, the Court finds ~~I find~~ that ~~the r~~Respondent has provided very limited and very disorganized and very confusing information regarding dates, places, countries and relationships. ~~I gave great~~The Court gave great latitude to ~~Rthe r~~epondent's attorney to ask follow up questions and to ask the same question several times and, through no fault of the attorney, ~~Rthe r~~espondent continued to give very convoluted information.

~~RThe r~~espondent does concede that he was born in San Pedro in Guatemala. ~~He-Respondent~~ testified that he is gay and that he lived in Guatemala for 13 or 14 years. ~~He-Respondent~~ testified that he left Guatemala to go to Chiapas, Mexico, when he was in his early teens. ~~His-Respondent testified that his~~ father was sick and his mother could not support ~~them~~ "them"<sup>2</sup> and so he left home.

~~He also~~Respondent testified that he was sexually assaulted by ~~the-a~~ neighbor when he was 12. It appears that ~~he-Respondent~~ did not leave Guatemala (or his home or ~~from being the~~neighboring neighbor to this person that sexually assaulted him) until a year or two after this-the sexual assault. When asked if ~~he-Respondent~~ was ever threatened or harmed for being gay in Guatemala, ~~Rthe r~~espondent testified that he was assaulted by the neighbor and that the neighbor did not want ~~Rthe r~~espondent to tell anyone

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<sup>2</sup> When asked why Respondent left Guatemala, Respondent stated that he left because his mother could not afford to support "them" and the Court finds "them" to refer to Respondent and his siblings, his family.

or ~~he the neighbor threatened to would~~ kill him. ~~He Respondent testified that the neighbor~~ did not want to see the respondent anymore and the neighbor told the respondent that if the respondent did not leave--- the neighbor would kill him. ~~RThe~~ respondent did not report ~~this incident~~ the sexual assault to the police and, ~~according to his testimony,~~ he never reported it to his family either because his family ~~was not aware of this incident.~~ Based upon the record before this Court, ~~It is not clear that he Respondent~~ has not told anyone in any prior proceedings about this sexual assault until ~~this now during Respondent's,~~ his third round of removal proceedings. ~~RThe~~ respondent testified ~~that he did not report the incident to the police. He says~~ that the police do not protect gay or transgender people. ~~So the record is clear, this~~ The Court understands the definition of transgender to mean "people who have a gender identity or gender expression that differs from their assigned gender at birth."

~~When asked why he left Guatemala, the respondent indicated that he left because his mother could not afford to support them and I took that to mean him and his siblings, his family.~~

~~RThe~~ respondent testified that he returned to Guatemala after his deportation in 2008. ~~He was~~ Respondent testified that he was in Guatemala for one to two weeks upon his return and then he immediately again went to Chiapas until he heard from his mother that his father was sick. After Respondent learned of his father's illness, and then he returned back to Guatemala. When ~~he Respondent~~ arrived, his father had already passed away.

~~Respondent and he~~ estimates this to ~~be have occurred~~ about 2015.

Given the evidence in the record, the Court finds the following timeline: ~~that he would have been in~~ Respondent entered the United States in 2008; ~~sometime after Respondent's entry, he returned to Guatemala pursuant to the first removal order; went back,~~ Respondent came back to the United States at an unknown time and was, ~~would be~~ returned back to Guatemala. Sometime ~~—and then—~~ in 2015, Respondent's—his father passed away. ~~The~~ Respondent testified that he spent most of the last nine years in Chiapas, Mexico. ~~and that i~~ In 2018, ~~Respondent he~~ went to Guatemala to tell his mother he was going to move to the United States and find a job. Respondent testified that and that he was ~~there~~ in Guatemala for 15 days with his mother in 2018, and he was not discriminated against while he was there during his visit with his mother.

~~The~~ respondent testified that he was attacked in Mexico six to eight months ago, but ~~that also was he~~ did not report the attacked to the police in Mexico.

~~I have~~ The Court reviewed the Department of State Guatemala Country Report, both that which was submitted by ~~Rthe~~ respondent's attorney and that which is the most current Country Report. ~~I would like to~~ The Court notes for the purposes of this record with respect to having two different Country Reports, neither of these seem to be relevant to ~~the~~ Respondent's understanding of what Guatemala was like ~~15~~ fifteen years ago when he lived there. ~~Because as best I can tell f~~ For the last ~~10~~ ten to, 12 twelve years, ~~he~~ Respondent resided other places other than ~~has been out of~~ Guatemala. ~~And t~~ The time that he

~~Respondent has~~ spent in Guatemala in recent history (2018). ~~he—~~Respondent did not experience any discrimination.

So with regard to the applications for relief, the issues before this Court is whether the respondent experienced harm that would rise to the level of persecution on account of a protected ground and whether the respondent demonstrated a well-founded fear on account of his membership in a particular social group and whether the respondent has shown that he will more likely than not be tortured in Guatemala with the consent or acquiescence of the Guatemalan government.

~~R~~The respondent has not established past persecution. Here, Rrespondent testified that he was threatened and physically harmed by a neighbor in Guatemala when he was 12. That ~~was~~ is 18 years ago. ~~R~~The respondent testified that he received threats from unidentified individuals to leave Guatemala, as well as the neighbor, or he would be killed. The Court finds that ~~this the~~ harm and threats ~~that he~~ described ~~does~~ not rise to the level of persecution contemplated by the Immigration and Nationality Act. In this case, the evidence showed that ~~the r~~Rrespondent did not suffer past persecution in Guatemala. His claim is based on a fear of ~~past harm and~~ future harm in that his case is primarily going to turn on whether or not he has proven a well-founded fear of future persecution. But the harm ~~R~~the respondent described at the hands of the neighbor was that of a single private individual approximately 18 years ago. There is no indication that that individual either still lives there or that this individual was motivated ~~for any improper purpose by~~ Respondent's membership to a

Particularized Social Group. The threats communicated to ~~Rthe~~ respondent by these other unidentified individuals were never fully described as to the source or the number of threats or the method that these threats were communicated to him. The ~~closest-only~~ description ~~I have~~ on the record is that individuals made fun of the way he walked and that they did not like the way he looked and the way he dressed. ~~He-Respondent~~ characterized these threats as people would come to him and tell him they do not want to see him and people would come to him and tell him to get out or they would kill him, but none of this was developed with any kind of particularity or specificity as to date, time, place, source, methods.

Because ~~Rthe~~ respondent has not established that he was persecuted in the past in Guatemala, he is not entitled to a presumption that he would be persecuted there in the future. Therefore, he would have to show either that there is a reasonable probability that he will be singled out individually for persecution or that there is a pattern or practice of persecution of an identifiable group to which the respondent demonstrates he belongs such that his fear is reasonable.

~~RThe~~ respondent suggests that he will be persecuted in Guatemala because of his gay or transgender lifestyle. However, his evidence is speculative. Furthermore, he has been away from the country at least for the last nine years and he has not presented any evidence that this neighbor or any of these others that communicated threats against him ~~is are~~ still looking for him.

In addition, ~~Rthe~~ respondent has not shown that the Guatemalan government is unwilling or unable to

protect him. ~~He-Respondent~~ testified that he did not report the incident where he was attacked by the neighbor because he does not feel like the police would help him. For these reasons, the Court finds that ~~Rthe~~ ~~r~~espondent has not shown that the Guatemalan government was unable to protect him from harm.

Therefore, because ~~Rthe~~ ~~r~~espondent did not establish a well-founded fear of future persecution, the Court must find that he does not meet the burden for relief that would be required for asylum and a respondent who fails to satisfy the lower asylum standard necessarily fails to satisfy the more stringent standard for withholding of removal. Because ~~Rthe~~ ~~r~~espondent did not establish a cognizable ground and the harm that he feared, his application for withholding must be denied.

~~Rthe~~ ~~r~~espondent also has not demonstrated that if removed to Guatemala he would more likely than not be tortured in the future by or with the acquiescence of the officials of the government of Guatemala. Therefore, his request for relief under the Convention against Torture will be denied.

### ORDERS

IT IS HEREBY ORDERED that ~~Rthe~~ ~~r~~espondent's application for withholding of removal be denied.

IT IS FURTHER ORDERED that ~~Rthe~~ ~~r~~espondent's application for protection under the Convention against Torture be denied.

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IT IS FURTHER ORDERED that the prior order of removal be reinstated and ~~the r~~Respondent be removed to Guatemala pursuant to this prior order.

**Please see the next page for electronic signature**

ANGELA MUNSON

United States Immigration Judge