APPENDIX

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 24-1782

WUENDY ZAPET-ALVARADO AND G.J.A.Z.,
Petitioners

v.

PAMELA J. BONDI, ATTORNEY GENERAL,
Respondent

Filed: September 22, 2025

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

Before Montecalvo, Aframe, Circuit Judges, and Vélez-Rivé,* U.S. District Judge.

AFRAME, Circuit Judge.

Wuendy Celeny Zapet-Alvarado ("Zapet"), a citizen of Guatemala, petitions for review of the administrative denial of her applications for asylum, withholding of removal under the Immigration and Nationality Act ("INA"), and protection under the Convention Against Torture ("CAT"). Zapet argues that the Board of Immigration Appeals ("BIA") erred in affirming the immigration judge's (the "IJ," and collectively with the BIA "the agency") determinations that her asylum application was untimely and that she did not qualify for withholding of removal or CAT protection. We lack

* Of the District of Puerto Rico, sitting by designation.

jurisdiction to review the discretionary denial of Zapet's asylum application and determine that substantial evidence supports the denial of her withholding of removal and CAT claims.

I.

A.

Zapet and her minor son arrived in the United States on or about August 28, 2021, without visas or official immigration status. On November 18, 2022, the Department of Homeland Security served Zapet a notice to appear and initiated removal proceedings. Nearly a year later, on October 19, 2023, Zapet applied for asylum, withholding of removal, and CAT protection, with her son as a derivative applicant.[1] A few months later, the IJ convened a removal hearing to consider Zapet's applications for relief.

The IJ made the following findings. Zapet is a native and citizen of Guatemala. Her home village of Loma Linda is in an area subject to land conflicts between the Tajumulco village and the Ixtahuacan community. For roughly four years before Zapet arrived in the United States, unidentified hooded men approached Zapet and her husband to obtain their support in the ongoing conflict.[2] The men did not specify the nature of the support they sought. However, the men threatened to kidnap Zapet's children if

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[1] Zapet's son also applied separately for the same relief on the same grounds asserted by Zapet. Because Zapet was the lead respondent before the agency and the only one who testified, we will focus our discussion on her. See Chun Méndez v. Garland, 96 F.4th 58, 61 n.1 (1st Cir. 2024).

[2] At oral argument in this Court, Zapet's counsel disputed the period over which the threat occurred. Arguments first raised at oral argument are waived. See, e.g., Capen v. Campbell, 134 F.4th 660, 675 (1st Cir. 2025).

support was not forthcoming. The threats continued until 2021, when Zapet left for the United States. Zapet never called the police or otherwise informed the authorities of the men's threats. No kidnapping occurred and neither she, her husband, nor her children suffered physical harm while in Guatemala.

B.

Prior to the removal hearing, Zapet conceded removability. The IJ accepted that stipulation and addressed Zapet's asylum, withholding of removal, and CAT claims.

The IJ denied Zapet's asylum application as untimely. While Zapet did not dispute that she filed her asylum claim after the one-year deadline following her arrival in the United States, 8 U.S.C. § 1158(a)(2)(B), she claimed that she should nonetheless receive relief from that deadline because of extraordinary circumstances, id. § 1158(a)(2)(D). Zapet specifically cited her unawareness of U.S. immigration laws as the extraordinary circumstance. The IJ rejected this argument, concluding that a "lack of knowledge of [i]mmigration laws is not considered an extraordinary circumstance."

The IJ turned next to whether Zapet had established past persecution or a well—founded fear of future persecution as needed to qualify for asylum. The IJ concluded that the hooded men's threats to kidnap Zapet's children did not constitute past persecution because the threats were not serious enough to meet the applicable standard. In support of this conclusion, the IJ observed that the threats were never fulfilled despite occurring over a four-year period, that "the threats were not menacing in nature," and that the threats did not cause Zapet or her family to suffer physical harm.

The IJ also rejected Zapet's claims that she had a well-founded fear of future persecution. Zapet had argued that she feared future threats if she were to return to Guatemala based on her indigenous race, political opinion, familial relationships, and landowner status. The IJ noted that Zapet had not: (1) shown a connection between the identified protected grounds and the previous threats; (2) demonstrated how the conflict between the Tajumulco village and the Ixtahuacan community had affected or harmed her; or (3) established why harm should be expected on her return to Guatemala, given that the threats about which she complains went unfulfilled for four years. The IJ also stated that, because Zapet had remained safely in Guatemala for four years while the threats persisted, it was reasonable to believe that she could relocate safely within the country. For these reasons, the IJ concluded that Zapet's asylum claim failed even if timely. The IJ likewise denied her withholding of removal claim, finding that Zapet's failure to establish eligibility for asylum made her necessarily unable to satisfy the "highe[r] burden" required to prove withholding of removal.[3]

Finally, the IJ rejected Zapet's application for CAT protection because Zapet failed to demonstrate that she would more likely than not be tortured upon her return to Guatemala or that the Guatemalan govern-

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[3] While qualifying for asylum requires that "an applicant must establish that she suffered in the past or has a well-founded fear of suffering in the future[,] . . . [t]o obtain withholding of removal, the burden is even higher: The applicant 'must establish a clear probability that, if returned to [her] homeland, [s]he will be persecuted on account of a statutorily protected ground.'" Varela-Chavarria v. Garland, 86 F.4th 443, 449 (1st Cir. 2023) (third and fourth alterations in original) (quoting Sánchez-Vásquez v. Garland, 994 F.3d 40, 46 (1st Cir. 2021)).

ment would consent or acquiesce in any torture. As support for this determination, the IJ again relied on Zapet's failure to demonstrate that she suffered physical harm in Guatemala and noted that the threats Zapet received did not involve imminent death or harm to her.

Following the IJ's decision, Zapet appealed each adverse ruling to the BIA. For her untimely asylum claim, Zapet asserted additional reasons to justify extraordinary circumstances warranting relief from the one-year deadline, including lack of education, lack of English skills, unfamiliarity with U.S. culture, and fear of drawing attention to herself as being unlawfully present. The BIA rejected these considerations as constituting extraordinary circumstances "because they are disabilities facing many, if not most, asylum applicants."

The BIA next addressed Zapet's withholding of removal claim. The BIA affirmed the IJ's finding that Zapet had not suffered past persecution. It held that, because the alleged threats "were not accompanied by displays of force or violence," the threats "were not specific or credible enough under the circumstances to rise to the extreme level of 'persecution[.]'"

The BIA also rejected Zapet's argument that future persecution would "more likely than not" occur. Zapet argued on appeal that the prior threats she experienced, when coupled with country conditions evidence showing the general prevalence of violent crime and conflict in Guatemala and that indigenous persons are particularly susceptible to such violence, sufficed to show requisite fear of future persecution. The BIA disagreed. It concluded that the general country conditions evidence did not tip the scale because it did not establish that "a person in [Zapet's] particular and

individualized circumstances will 'more likely than not' suffer persecution in Guatemala."

The BIA likewise affirmed the denial of the CAT claim. It explained that torture requires "severe pain or suffering" to be "intentionally inflicted on a person . . . by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity." The BIA found that neither general evidence of gender-based and gang-perpetuated violence nor law enforcement's lack of full control over violence in the region sufficed to displace the IJ's "predictive finding that [Zapet] does not personally face an individualized risk of torture in Guatemala . . . much less with official complicity or acquiescence."

Zapet timely petitioned this Court for review.

II.

Zapet argues that the agency erroneously denied her requests for asylum, withholding of removal, and CAT protection. We consider each claim in turn.

A.

For her asylum claim, Zapet contends that the BIA incorrectly affirmed the IJ's determination that she failed to present extraordinary circumstances sufficient to warrant consideration of her untimely application. The government counters that we lack jurisdiction to review the agency's determination. We agree with the government.[4]

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[4] Zapet also argues that the BIA erred because it did not separately consider whether there was a basis to excuse her child's derivative application for relief. That argument was not presented to the BIA and therefore cannot be considered here. See Sunoto v. Gonzales, 504 F.3d 56, 59 (1st Cir. 2007) ("A petitioner who fails to present a claim to the BIA has failed to

Under the INA, asylum applicants must demonstrate by clear and convincing evidence that their application was filed within one year from the date on which the applicant arrived in the United States. See 8 U.S.C. § 1158(a)(2)(B). However, the agency may still consider an untimely application if the applicant "demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application" within the one-year period. Id. § 1158(a)(2)(D).

There are two INA provisions that bear on our jurisdiction to review the BIA's determination that Zapet failed to show extraordinary circumstances under section 1158(a)(2)(D). See 8 U.S.C. § 1158(a)(2)(D). The first is an adjacent provision that provides "[n]o court shall have jurisdiction to review any determination of the Attorney General under [the] paragraph" containing the extraordinary-circumstances exception to the one-year bar. See id. § 1158(a)(3). The second is a catchall provision that broadly preserves federal appeals court jurisdiction under the INA for "constitutional claims or questions of law raised upon a petition for review." See id. § 1252(a)(2)(D).

We previously considered the interplay between these two INA provisions in Chahid Hayek v. Gonzales. See 445 F.3d 501, 506-07 (1st Cir. 2006). There, we held that, under section 1158(a)(3), "we have no jurisdiction to review the BIA's decision that [petitioner's] application for asylum was untimely and that the untimeliness was not excused." Id. at 506. We determined that section 1252(a)(2)(D) does not affect

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exhaust [their] administrative remedies on that issue, and we consequently lack jurisdiction to review the claim.").

this rule because "[u]nder the terms of this limited jurisdictional grant, discretionary or factual determinations continue to fall outside the jurisdiction of the courts of appeals, and BIA findings as to timeliness and changed circumstances are usually factual determinations." Id. at 507 (alteration in original) (quoting Mehilli v. Gonzales, 433 F.3d 86, 93 (1st Cir. 2005)).

Zapet argues, however, that under the United States Supreme Court's later decision in Guerrero-Lasprilla v. Barr, 589 U.S. 221, 140 S.Ct. 1062, 206 L.Ed.2d 271 (2020), this Court's jurisdiction to review the BIA's timeliness determination is not so circumscribed. Zapet contends that there, the Supreme Court established that whether a settled fact satisfies a legal standard is a question of law that is reviewable under section 1252(a)(2)(D). Seeking to apply that holding here, Zapet argues that the BIA's rejection of a late-filed asylum application for failing to meet the legal standard for extraordinary circumstances codified under section 1158(a)(2)(B) constitutes a question of law that we may review under section 1252(a)(2)(D). We disagree.

In Guerrero-Lasprilla, the petitioner requested that the BIA equitably toll the filing deadline for reopening a removal proceeding. See 589 U.S. at 225-26, 140 S.Ct. 1062. The BIA declined the request, concluding that the petitioner had failed to show the required due diligence to obtain equitable tolling. See id. at 226, 140 S.Ct. 1062. The Supreme Court subsequently rejected the contention that the BIA's due diligence determination was a question of fact for which there was no appellate jurisdiction. See id. at 228, 140 S.Ct. 1062. The Court explained that a "question[] of law" under section 1252(a)(2)(D) "includes the application of a legal standard to undisputed or established facts," i.e.,

mixed questions of law and fact. Id. at 227, 140 S.Ct. 1062. Employing this holding, the Court concluded that application of settled facts to the due diligence standard was the kind of mixed question for which there was appellate jurisdiction under section 1252(a)(2)(D). See id. at 228, 236, 140 S.Ct. 1062.

About four years later, the Supreme Court again considered the scope of our jurisdiction under section 1252(a)(2)(D) in Wilkinson v. Garland, 601 U.S. 209, 144 S.Ct. 780, 218 L.Ed.2d 140 (2024). There, the Court considered a similar mixed question concerning whether a person seeking cancellation of removal had shown that removal would cause a qualifying spouse, parent, or child to suffer "exceptional and extremely unusual hardship" under title 8, section 1229b(b)(1)(D). Id. at 216-17, 144 S.Ct. 780. The Supreme Court concluded again that this mixed question was reviewable under section 1252(a)(2)(D) as a question of law. See id. at 217, 222, 144 S.Ct. 780. Critically, however, the Court distinguished the "exceptional and extremely unusual hardship" standard in section 1229b(b)(1)(D) from other INA standards that are applied "to the satisfaction of the Attorney General." Id. at 224, 144 S.Ct. 780 (citing 8 U.S.C. § 1182(h)(1)(B), (i)(1)) (emphasis added). The inclusion of such additional language, the Court made clear, should be understood to demonstrate a congressional intent to establish a discretionary judgment not subject to review under section 1252(a)(2)(D). See id. at 224, 144 S.Ct. 780; see also Rahman v. Bondi, 131 F.4th 399, 407-08 (6th Cir. 2025) (applying this reasoning in the context of an "extreme hardship" waiver under 8 U.S.C. § 1182(a)(9)(B)(v), (i)(1)).

Here, we face precisely the kind of situation that Wilkinson identified as a discretionary determination

not subject to judicial review. See 601 U.S. at 224, 144 S.Ct. 780. Zapet challenges the BIA's denial of her asylum application, arguing that the agency should have excused her failure to timely file under section 1158(a)(2)(D) given that her "cumulative circumstances . . . are clearly extraordinary and not intentionally created."[5] As discussed, section 1158(a)(2)(D) permits an untimely application for asylum to be considered if the petitioner demonstrates "to the satisfaction of the Attorney General . . . extraordinary circumstances relating to the delay in filing an application within the period." 8 U.S.C. § 1158(a)(2)(D). Congress's specific inclusion in section 1158(a)(2)(D) of the words "to the satisfaction of the Attorney General" demonstrates that the extraordinary-circumstances determination is an unreviewable discretionary judgment. See Wilkinson, 601 U.S. at 224, 144 S.Ct. 780. We therefore conclude, consistent with Wilkinson, that we lack jurisdiction to review the BIA's decision that Zapet failed to establish extraordinary circumstances under

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[5] We note that Zapet's challenge differs from that considered in Escobar v. Garland, 122 F.4th 465, 477 (1st Cir. 2024). There, this Court found jurisdiction to review the agency's denial of asylum relief on the grounds that the application was untimely and did not qualify under the change-of-circumstances exception under section 1158(a)(2)(D). See Escobar, 122 F.4th at 476-77. The Court considered in Escobar whether the text of section 1158(a)(2)(D) permits the agency to impose an additional requirement to qualify for the changed-circumstance exception – specifically, that a petitioner must prove ineligibility for relief prior to the changed circumstance. See id. The Court found it had jurisdiction to consider this question of law. See id. Escobar therefore was not assessing the agency's exercise of its discretion (whether there was in fact a changed circumstance) but rather the correctness of a predicate legal determination to the exercise of its discretion (whether the agency was applying the correct changed-circumstance standard). See id.

section 1158(a)(2)(D). In so holding, we join other courts of appeals that, after Wilkinson, have reached the same conclusion. See Real v. Att'y Gen., 147 F.4th 361, 366-68 (3d Cir. 2025); A.P.A. v. Att'y Gen., 104 F.4th 230, 240-41 (11th Cir. 2024).[6]

B.

We next address the BIA's denial of Zapet's application for withholding of removal. Zapet contends that the evidence she presented compelled the BIA to find that she suffered past persecution and would more likely than not suffer future persecution.

To qualify for withholding of removal, Zapet must show that there is a clear probability that her life or freedom would be threatened in Guatemala because of her "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A); see also López-Pérez v. Garland, 26 F.4th 104, 111 (1st Cir. 2022). Zapet bears the burden to establish her eligibility for relief by demonstrating that, if she returns to Guatemala, it is more likely than not that she will be persecuted on one of the five protected grounds. See 8 C.F.R. § 1208.16(b); see also Hernández-Lima v. Lynch, 836 F.3d 109, 113 (1st Cir. 2016). Alternatively, Zapet can show that she already suffered persecution in Guatemala, which would estab-

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[6] Zapet also cites Loper Bright Enterprises v. Raimondo, 603 U.S. 369, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024), to argue, as we understand it, that the interpretation of the "extraordinary-circumstances standard" under section 1158(a)(2)(D) is "exclusively a judicial function." Loper Bright is irrelevant to this inquiry. There, the Supreme Court held that courts should not give deference to an agency's interpretation of a statute. See 603 U.S. at 412, 144 S.Ct. 2244. Here, we are not reviewing the agency's interpretation of a statute, but rather whether we have jurisdiction to review an agency's discretionary application of a statutory standard.

lish a rebuttable presumption of future persecution. See Hernández-Lima, 836 F.3d at 113 (citing 8 C.F.R. § 1208.16(b)(1)). These "two methods" for seeking withholding of removal are "commonly referred to as past and future persecution." Id. (quoting Sompotan v. Mukasey, 533 F.3d 63, 68 (1st Cir. 2008)). Importantly, each requires proof of harm sufficient to amount to persecution and a nexus between the persecution and one of the five statutory grounds. See id.

Before the agency, Zapet presented evidence of both past and future persecution. We begin with the former. An applicant "bears a heavy burden and faces a daunting task in establishing subjection to past persecution." Martínez-Pérez v. Sessions, 897 F.3d 33, 39 (1st Cir. 2018) (internal quotation marks omitted) (quoting Vasili v. Holder, 732 F.3d 83, 89 (1st Cir. 2013)). Persecution exists where "the discriminatory experiences . . . reached a fairly high threshold of seriousness." Id. (quoting Alibeaj v. Gonzales, 469 F.3d 188, 191 (1st Cir. 2006)). It requires "more than mere discomfiture, unpleasantness, harassment, or unfair treatment." Id. at 40 (quoting Vasili, 732 F.3d at 90).

A past persecution claim may be based on threats. See Lobo v. Holder, 684 F.3d 11, 18 (1st Cir. 2012). To constitute persecution, however, the threats must be "so menacing as to cause significant actual suffering or harm." Id. (quoting Vilela v. Holder, 620 F.3d 25, 29 (1st Cir.2010)). "[V]ague or hollow threats, without more, are insufficient to establish persecution." Cano-Gutiérrez v. Bondi, 146 F.4th 26, 32 (1st Cir. 2025). "'[T]he addition of physical violence, although not required, makes a threat more likely to constitute' persecution." Montoya-López v. Garland, 80 F.4th 71,

80 (1st Cir. 2023) (quoting Javed v. Holder, 715 F.3d 391, 396 (1st Cir. 2013)).

The BIA concluded that Zapet's evidence of threats did not meet the standard for past persecution because the threats were not accompanied by violence and her description of them was "not specific . . . enough" to "rise to the extreme level of 'persecution[.]'" We review the BIA's finding that Zapet failed to show past persecution under the substantial evidence standard. See Barnica-López v. Garland, 59 F.4th 520, 527 (1st Cir. 2023). Under that standard, we "only disturb the agency's findings if, in reviewing the record as a whole, 'any reasonable adjudicator would be compelled to conclude to the contrary.'" Id. (quoting Gómez-Medina v. Barr, 975 F.3d 27, 31 (1st Cir. 2020)).

Substantial evidence supports the BIA's determination that Zapet failed to demonstrate past persecution. Zapet's testimony regarding the threats at the core of her claim lacked specificity. The record indicates that she did not provide particular details about the threats that she experienced. For example, she was unable to describe what the hooded men wanted her to do and could not recall the timeline of events, including the number of times that she had been threatened. Nor does she dispute that the alleged threats went unfulfilled. Zapet acknowledged that there were no actual kidnapping attempts on her children and admitted that no one in her family suffered physical harm. She also did not describe any non-physical harm or suffering that she endured because of the threats.

"Presented with evidence that threats of physical harm were never fulfilled . . . and a total dearth of evidence that [the threats] caused any non-physical

harm or suffering . . . the BIA had a substantial basis for concluding that [Zapet] failed to meet [her] burden of proving that the threats [she] received were sufficiently menacing." Hernández-Lima, 836 F.3d at 114. There may be occasions in which threats without proof of physical harm are sufficiently menacing to constitute persecution. See, e.g., Ruiz v. Mukasey, 526 F.3d 31, 37 (1st Cir. 2008) ("[A]n applicant . . . is not obliged to show the infliction of physical harm in order to carry her burden of proving past persecution."). But where, as here, the proof permits the conclusion that the applicant suffered "hollow threats," the record "do[es] not compel a finding of past persecution." Hernández-Lima, 836 F.3d at 114 (emphasis omitted) (quoting Moreno v. Holder, 749 F.3d 40, 44 (1st Cir. 2014)).

We similarly conclude that the BIA's rejection of Zapet's claim that she would more likely than not be faced with future persecution was supported by substantial evidence. Because, as already discussed, the BIA made a supportable determination that the threats themselves do not constitute persecution, Zapet's only remaining argument is that the circumstances in Guatemala are so dangerous that she should not be required to return. In support of this contention, Zapet submitted information about country conditions in Guatemala.

Substantial evidence supports the finding that Zapet did not show any individual circumstances that make it likely that she will face persecution were she to return to Guatemala. The country conditions reports identify difficult aspects of life in Guatemala, but the record lacks evidence showing how these difficulties apply to Zapet. See Bopaka v. Garland, 123 F.4th 552, 562 (1st Cir. 2024) (finding country

conditions reports insufficient for failing to proffer particularized facts relating to petitioner's claims).

Additionally, the record evidence does not compel a finding that Zapet would face danger if she relocated within Guatemala from the area where she previously lived. Cf. Hernández-Méndez v. Garland, 86 F.4th 482, 489 (1st Cir. 2023) (declaring in the context of asylum, which contains a more petitioner-friendly standard than withholding of removal, that "[a] petitioner does not have a well-founded fear of persecution if [she] could 'avoid persecution by relocating to another part of [her] country of nationality . . . if under all the circumstances it would be reasonable to expect [her] to do so.'" (quoting 8 C.F.R. § 1208.13(b)(2)(ii))). In short, because Zapet's claim relies mostly on "[g]eneralized country conditions reports that do not shed light on [her] particular situation," Rodrigues v. Garland, 124 F.4th 58, 66 (1st Cir. 2024), we cannot say on this record that the agency was compelled to find that Zapet would more likely than not suffer future persecution in Guatemala. For these reasons, we leave undisturbed the BIA's denial of Zapet's withholding of removal claim.

C.

Finally, we address the BIA's denial of Zapet's application for CAT relief. For Zapet to succeed on her CAT claim, she would need to prove that if she returned to Guatemala, it is more likely than not that she would be tortured by the Guatemalan government or with the Guatemalan government's consent or acquiescence. Mayancela v. Bondi, 136 F.4th 1, 6 (1st Cir. 2025). A finding of torture requires, among other elements, proof that a person will suffer severe physical pain or mental pain or suffering from an intentionally inflicted act. Samayoa Cabrera v. Barr,

939 F.3d 379, 382 (1st Cir. 2019). The BIA endorsed the IJ's finding that Zapet had failed to show that she "personally face[d] an individualized risk of torture . . . much less with official complicity or acquiescence."

The BIA's determination again is supported by substantial evidence. Zapet says that she was threatened with forced conscription and the risk of her children's kidnapping. But, as we have already noted, the threats Zapet experienced did not manifest in actions against her or her children despite her refusal to comply with her perpetrators demands, and she has shown no reason to expect more severe treatment were she to return. See Méndez v. Garland, 67 F.4th 474, 487 (1st Cir. 2023) (concluding that there was substantial evidence to reject a CAT claim because the evidence fell short of torture where the record showed that the past persecution consisted of "death threats, intimidation, and non-life-threatening physical violence"). Moreover, Zapet's reliance on generalized facts from country conditions reports is insufficient to establish that she would be subject to torture with the consent or acquiescence of the government. See Méndez-Barrera v. Holder, 602 F.3d 21, 28 (1st Cir. 2010) (upholding the denial of CAT protection where "petitioner failed to proffer any particularized facts relating to her specific claim that she would face a likelihood of government-sanctioned torture").

III.

For the reasons stated, the petition for review is **dismissed** in part and **denied** in part.

NOT FOR PUBLICATION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF:

Wuendy Celeny ZAPET-ALVARADO, A220-602-217
Gadiel Joab AGUILON-ZAPET, A220-943-349

Respondents

[FILED July 24, 2024]

ON BEHALF OF RESPONDENTS: Kevin P. MacMurray, Esquire

IN REMOVAL PROCEEDINGS
On Appeal from a Decision of the Immigration Court
Boston, MA

Before: Crossett, Temporary Appellate Immigration Judge[1]

CROSSETT, Temporary Appellate Immigration Judge

The respondents,[2] natives and citizens of Guatemala, appeal from the February 2, 2024, decision of the Immigration Judge denying them asylum and with-

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[1] Temporary Appellate Immigration Judges sit pursuant to appointment by the Attorney General. *See generally* 8 C.F.R. § 1003.1(a)(1), (4).

[2] The respondents are an adult female (hereafter "the respondent") and her minor child.

holding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act ("INA"), 8 U.S.C. §§ 1158, 1231(b)(3), and protection under the regulations implementing the Convention Against Torture ("CAT").[3] The appeal will be dismissed.

We review the findings of fact, including the determination of credibility made by the Immigration Judge, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent, who is of indigenous Guatemalan ethnicity, argues that she experienced and fears persecution in Guatemala because she refused to take sides in a land dispute between the indigenous communities of Ixchiguán and Tajumulco (IJ at 3; Tr. at 40-45). According to the respondent, she was threatened several times by anonymous hooded men, who told her they would take her children away if she did not support their side in the conflict; however, the threats did not escalate and the respondent did not experience physical harm (IJ at 3, 5; Tr. at 41-42, 44, 46-47).

The Immigration Judge found the respondent credible (IJ at 3-4) but denied her asylum application as untimely because she did not file it within 1 year of her arrival in the United States or demonstrate grounds for excusing her failure to do so (IJ at 4-5). INA § 208(a)(2)(B), (D), 8 U.S.C. § 1158(a)(2)(B), (D). On appeal, the respondent concedes that she filed

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[3] The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994). 8 C.F.R. §§ 1208.16(c), 1208.18(a) (2020); 8 C.F.R. § 1208.17.

her asylum application more than 2 years after her arrival in the United States but argues that her non-compliance with the 1-year filing deadline was due to "extraordinary circumstances" within the meaning of section 208(a)(2)(D) of the INA, 8 U.S.C. § 1158(a)(2)(D).

In her written asylum application, the respondent's only explanation for missing the 1-year filing deadline was that she "was unaware of immigration laws" (Exh. 3 at 8), though her trial brief also mentioned her "limited education." On appeal, the respondent adds that she was also prevented from meeting the deadline by her inability to speak English, her unfamiliarity with United States culture and law, and her fear that drawing attention to herself would place her at risk of removal (Respondent's Br. at 5-6). We do not minimize the challenges the respondent faced upon arrival to the United States; however, the foregoing factors—whether viewed separately or cumulatively—do not constitute "extraordinary circumstances" because they are disabilities facing many, if not most, asylum applicants and are not comparable to the physical, mental or legal disabilities enumerated in 8 C.F.R. § 1208.4(a)(5). *See Alquijay v. Garland*, 40 F.4th 1099, 1103 (9th Cir. 2022) (holding that an asylum applicant's "youth, language barrier, ignorance of the legal requirement to file his application within a year, and stress from fleeing his home country" were not "exceptional circumstances," either individually or in the aggregate).[4] Accordingly, we will dismiss the appeal on this basis as it pertains to the respondent's asylum application and turn to her request for withholding of removal under the INA.

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[4] Though Ninth Circuit precedent is not controlling in this jurisdiction, we nevertheless cite it as persuasive authority.

To qualify for statutory withholding of removal, the respondent must prove that her life or freedom will be threatened in Guatemala on account of a protected ground, and she can do so by proving either that she suffered past persecution in Guatemala on account of such a ground or that future persecution will "more likely than not" befall her there. 8 C.F.R. § 1208.16(b)(1), (2). Upon de novo review, we agree with the Immigration Judge that the threats the respondent experienced in Guatemala—which were not accompanied by displays of force or violence—were not specific or credible enough under the circumstances to rise to the extreme level of "persecution" (IJ at 5). *See Montoya-Lopez v. Garland*, 80 F.4th 71, 80-81 (1st Cir. 2023) (affirming, on substantial evidence review, the agency's determination that a pattern of extortionate threats the petitioner experienced at the hands of gangs in El Salvador did not qualify as persecution). Accordingly, the respondent is not eligible for withholding of removal solely by virtue of past persecution.

The Immigration Judge also found that the respondent did not demonstrate the requisite likelihood of future persecution in Guatemala because the past threats she experienced were neither persecutory in themselves nor predictive of future persecution, given that she remained in her neighborhood for approximately 4 years without any indication that the threats would escalate to violence or other, non-physical form of persecution (IJ at 6-7). The respondent challenges that finding on appeal, arguing that the past threats she experienced establish a high risk of future persecution when considered in light of country conditions evidence indicating that violent crime and conflict is widespread in Guatemala and that indigenous persons are particularly susceptible to such violence

given societal discrimination and their geographic proximity to lands desired by drug traffickers (Respondent's Br. at 15-17). But though this general country conditions evidence is informative and relevant, it does not establish clear error in the Immigration Judge's predictive findings because it does not show that a person in her particular and individualized circumstances will "more likely than not" suffer persecution in Guatemala. *Olmos-Colaj v. Sessions*, 886 F.3d 168, 176 (1st Cir. 2018). Thus, we do not disturb the Immigration Judge's decision denying the respondent's request for withholding of removal under the INA.

We also affirm the denial of the respondent's application for protection under the CAT, which can only be granted to an applicant who demonstrates that she will more likely than not suffer "torture" upon removal. 8 C.F.R. § 1208.16(c)(2). For purposes of the CAT, "torture" occurs when "severe pain or suffering . . . is intentionally inflicted on a person . . . by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a) (2020). Here, the Immigration Judge found that the respondent's evidence established neither a probability of future torture in Guatemala nor a probability that a public official would acquiesce in such torture should it occur (IJ at 9). Though the respondent's appeal brief alludes to general country conditions evidence about "gender-based and gang-perpetuated violence" in Guatemala and the failure of the Guatemalan government to effectively control such violence, this generic evidence—while relevant—is not sufficient to establish clear error in the Immigration Judge's predictive finding that she does not personally face an individualized risk of

torture in Guatemala that exceeds the "more likely than not" threshold, much less with official complicity or acquiescence. *See Cabrera v. Garland*, 100 F.4th 312, 325 (1st Cir. 2024).

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOSTON IMMIGRATION COURT

Respondent Name:
ZAPET-ALVARADO, WUENDY CELENY

To:
Klub, Benjamin David
2 Center Plaza
Floor 6
Boston, MA 02108

A-Number
220602217

Riders:
220943349 AGUILON-ZAPET, GADIEL

In Removal Proceedings

Date:
02/02/2024

ORDER OF THE IMMIGRATION JUDGE

[X] This is a summary of the oral decision entered on 02/02/2024. The oral decision in this case is the official opinion, and the immigration court issued this summary for the convenience of the parties.

[ ] Both parties waived the issuance of a formal oral decision in this proceeding.

I. Removability

The immigration court found Respondent [X] removable [ ] inadmissible under the following Section(s) of

the Immigration and Nationality Act (INA or Act): 212(a)(6)(A)(i) and 212(a)(7)(A)(i)(I)

The immigration court found Respondent [ ] not removable [ ] not inadmissible under the following Section(s) of the Act:

II. Applications for Relief

Respondent's application for:

A. Asylum/Withholding/Convention Against Torture

[X] Asylum was [ ] granted [X] denied [ ] withdrawn with prejudice [ ] withdrawn without prejudice

[X] Withholding of Removal under INA § 241(b)(3) was [ ] granted [X] denied [ ] withdrawn with prejudice [ ] withdrawn without prejudice

[X] Withholding of Removal under the Convention Against Torture was [ ] granted [X] denied [ ] withdrawn with prejudice [ ] withdrawn without prejudice

[ ] Deferral of Removal under the Convention Against Torture was [ ] granted [ ] denied [ ] withdrawn with prejudice [ ] withdrawn without prejudice.

[ ] Respondent knowingly filed a frivolous application for asylum after notice of the consequences. *See* INA § 208(d)(6); 8 C.F.R. § 1208.20

B. Cancellation of Removal

[ ] Cancellation of Removal for Lawful Permanent Residents under INA § 240A(a) was [ ] granted [ ] denied [ ] withdrawn with prejudice [ ] withdrawn without prejudice.

[ ] Cancellation of Removal for Nonpermanent Residents under INA § 240A(b)(1) was [ ] granted [ ] denied [ ] withdrawn with prejudice [ ] withdrawn without prejudice.

[ ] Special Rule Cancellation of Removal under INA § 240A(b)(2) was [ ] granted [ ] denied [ ] withdrawn with prejudice [ ] withdrawn without prejudice.

C. Waiver

[ ] A waiver under INA § was [ ] granted [ ] denied [ ] withdrawn with prejudice [ ] withdrawn without prejudice.

D. Adjustment of Status

[ ] Adjustment of Status under INA § was [ ] granted [ ] denied [ ] withdrawn with prejudice [ ] withdrawn without prejudice.

E. Other

III. Voluntary Departure

[ ] Respondent's application for [ ] pre-conclusion voluntary departure under INA § 240B(a)

[ ] post-conclusion voluntary departure under INA § 240B(b) was [ ] denied.

[ ] Respondent's application for [ ] pre-conclusion voluntary departure under INA § 240B(a)

[ ] post-conclusion voluntary under INA § 240B(b) departure was [ ] granted, and

Respondent is ordered to depart by [ ]. The respondent must post a $ [ ] bond with DHS within five business days of this order. Failure to post the bond as required or to depart by the required date will result in an alternate order of removal to [ ] taking effect immediately.

[ ] The respondent is subject to the following conditions to ensure his or her timely departure from the United States:

[ ] Further information regarding voluntary departure has been added to the record.

[ ] Respondent was advised of the limitation on discretionary relief, the consequences for failure to depart as ordered, the bond posting requirements, and the consequences of filing a post-order motion to reopen or reconsider:

If Respondent fails to voluntarily depart within the time specified or any extensions granted by the DHS, Respondent shall be subject to a civil monetary penalty as provided by relevant statute, regulation, and policy. *See* INA § 240B(d)(1). The immigration court has set

[ ] the presumptive civil monetary penalty amount of $3,000.00 USD

[ ] $ USD instead of the presumptive amount.

If Respondent fails to voluntarily depart within the time specified, the alternate order of removal shall automatically take effect, and Respondent shall be ineligible, for a period of 10 years, for voluntary departure or for relief under sections 240A, 245, 248, and 249 of the Act, to include cancellation of removal, adjustment of status, registry, or change of nonimmigrant status. *Id.*

If Respondent files a motion to reopen or reconsider prior to the expiration of the voluntary

departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of such a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply.

If Respondent appeals this decision, Respondent must provide to the Board of Immigration Appeals (Board), within 30 days of filing an appeal, sufficient proof of having posted the voluntary departure bond. The Board will not reinstate the voluntary departure period in its final order if Respondent does not submit timely proof to the Board that the voluntary departure bond has been posted.

In the case of conversion to a removal order where the alternate order of removal immediately takes effect, where Respondent willfully fails or refuses to depart from the United States pursuant to the order of removal, to make timely application in good faith for travel or other documents necessary to depart the United States, to present himself or herself at the time and place required for removal by the DHS, or conspires to or takes any action designed to prevent or hamper Respondent's departure pursuant to the order of removal, Respondent may be subject to a civil monetary penalty for each day Respondent is in violation. If Respondent is removable pursuant to INA § 237(a), then he or she shall be further fined or imprisoned for up to 10 years.

IV. Removal

[X] Respondent was ordered removed to Guatemala.

[ ] In the alternative, Respondent was ordered removed to

[ ] Respondent was advised of the penalties for failure to depart pursuant to the removal order:

> If Respondent is subject to a final order of removal and willfully fails or refuses to depart from the United States pursuant to the order, to make timely application in good faith for travel or other documents necessary to depart the United States, to present himself or herself at the time and place required for removal by the DHS, or conspires to or takes any action designed to prevent or hamper Respondent's departure pursuant to the order of removal, Respondent may be subject to a civil monetary penalty for each day Respondent is in violation. If Respondent is removable pursuant to INA § 237(a), then he or she shall be further fined or imprisoned for up to 10 years.

V. Other

[ ] Proceedings were [ ] dismissed [ ] terminated with prejudice [ ] terminated without prejudice [ ] administratively closed.

[ ] Respondent's status was rescinded under INA § 246.

[ ] Other:

/s/ [Juliana Zach]
Immigration Judge: ZACH, JULIANA
02/02/2024

Appeal: Department of Homeland Security: [ ] waived [ ] reserved
Respondent: [ ] waived [ ] reserved

Appeal Due: 03/04/2024

Certificate of Service

This document was served:

Via: [M] Mail | [P] Personal Service | [E] Electronic Service

To: [ ] Noncitizen | [ ] Noncitizen c/o custodial officer | [E] Noncitizen's atty/rep. | [E] DHS

Riders:

220943349 AGUILON-ZAPET, GADIEL

By: ZACH, JULIANA, Immigration Judge

Date: 02/02/2024

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BOSTON, MASSACHUSETTS

Files: 220-602-217
220-943-349

February 2, 2024

In the Matter of

WUENDY CELENY ZAPET-ALVARADO
GADIEL AGUILON-ZAPET

RESPONDENTS

IN RE REMOVAL PROCEEDINGS

CHARGES:

APPLICATIONS:

ON BEHALF OF RESPONDENTS: BENJAMIN KLUB

ON BEHALF OF DHS: PARIS DASKALAKIS

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents are natives and citizens of Guatemala. The Department of Homeland Security has issued and filed a Notice to Appear which initiated these removal proceedings. The Court at this time is denying the respondents' all three applications. The Court is denying the asylum application. The Court is denying withholding of removal. And also the Court is denying the withholding of removal under the CAT Convention.

REMOVABILITY

The respondents did submit written pleadings. The Court sustained removability and designated Guatemala as the country of removal.

EVIDENTIARY RECORD

The evidentiary record of these proceedings consists of the following documentary exhibits: Exhibits 1 through 6. Exhibits were admitted in full without any objections. The Court has also admitted as Exhibit No. 7, which is labeled as Addendum of Law. The Addendum of Law shall be incorporated in full into the record. The Individual hearing for this case was held on February 2, 2024, and only the lead respondent testified during the hearing.

The respondent arrived in the United States on August 28, 2021, and she filed her asylum application on October 19, 2023. All evidence admitted has been reviewed and taken into consideration by this Court even if not mentioned during this oral decision.

STATEMENT OF THE LAW

The Court has incorporated in full the Addendum of Law, which guides this oral decision.

Asylum is a discretionary form of relief that hinges on persecution in the applicant's country of nationality, or for people with no nationality, the country of last habitual residence. To establish eligibility an asylum applicant must show that he or she is unable or unwilling to return to their home country of nationality because he or she has suffered past persecution or has a well-founded fear of future persecution on account of a protected ground.

To qualify for withholding of removal, the respondent's facts must show a clear probability that her life or freedom would be threatened in her home country

if she were to return on account, again, of a protected ground.

Finally, an applicant for withholding of removal under the Convention against Torture bears the burden of proving that it is more likely than not that she would be tortured with the acquiescence of her home country's government.

FINDINGS OF FACT

The respondent, in this case, is a woman, an indigenous woman, native and citizen of Guatemala. She is married and has two children. Her husband came to the United States in 2020, and she arrived in the United States a year later on August 28, 2021. The respondent, her husband, and her children have never been physically harmed while living in Guatemala. The respondent is from the village of Loma Linda.

In Guatemala in the area where the respondent used to live, there have been several conflicts between the Tajumulco village and the Ixtahuacan community over land. Those conflicts still persist to this day. Despite the conflicts, police and the government of Guatemala have not been involved in the conflict. About four years ago the respondent was approached for the first time by hooded men who asked her to join the conflict. Those men did not specify to the respondent what the respondent's participation in the conflict would be. They informed the respondent that she had to join their conflict, and if she did not join the conflict, they would take her children away. Those threats continued until 2021. Despite the threats, the respondent never called the police to inform them that she had been threatened by the hooded men. The respondent is afraid to return to Guatemala because of the conflict and because of the threats that they would take her children away if she did not join the conflict.

ANALYSIS AND FINDINGS OF ELIGIBILITY FOR RELIEF

CREDIBILITY AND CORROBORATION

This Court finds the respondent credible. However, this Court finds that the testimony was vague and provided no details of the events claimed on her application. Her statements were general in nature and she was unable to recall dates. And when asked how many times she was threatened, she was, again, unable to recall the dates, and she only stated that she had been threatened several times.

ASYLUM

An alien is a refugee within the meaning of the INA if he is unwilling or unable to return to his country of nationality because of persecution or a well-founded fear of future persecution on account of a protected ground.

STATUTORY ELIGIBILITY

Time: One-year Bar

Generally, an asylum applicant must prove by clear and convincing evidence that he filed his application within one year of his most recent entry into the United States or that he qualifies for an exception to the one-year deadline. To qualify for an exception to the filing deadline the applicant must demonstrate either (1) changed circumstances that materially affect his eligibility for asylum or (2) extraordinary circumstances relating to the delay in filing the application. In either case the applicant must apply for asylum within a reasonable period following the change in circumstances or extraordinary circumstances.

The respondent here entered the United States on August 28, 2021, and she filed her asylum application

on October 19, 2023. Her application therefore was untimely. Respondent provided no testimony during the Individual hearing as to why her application was not timely filed. Her Form I-589 application, however, states the application was untimely because she was unaware of the Immigration laws. This Court finds that the lack of knowledge of Immigration laws is not considered an extraordinary circumstance to allow the respondent to file the application beyond the one-year deadline. Considering that, the respondent's application is hereby considered untimely.

PAST PERSECUTION

The first issue here is whether the respondent suffered past persecution on account of a protected ground. Persecution is an extreme concept which must be evaluated by considering the sum total of past mistreatment that the respondent has experienced. Harassment and discrimination do not generally rise to the level of persecution as contemplated by the Act.

In the present case, the respondent was approached by hooded men who told her that she had to join the conflict otherwise they would take her children. Those contacts with the hooded men started about four years before the respondent came to the United States and continued until about 2021. The hooded men never described to the respondent what they really wanted her to do after joining the conflict. They simply told her that she had to join, and if she did not join, they would take her children away.

While credible verbal threats may fall within the meaning of persecution, this is only when the threats are so menacing as to cause significant actual suffering or harm. Here, this Court finds that being told on multiple occasions to join a conflict or your children will be taken away does not rise to the level of

persecution. This Court finds that those threats were completely unfulfilled since they lasted for about four years, and/or for four years identical in form and content. Those threats never escalated and the respondent was never physically harmed. Therefore, this Court finds that the threats were unfulfilled and did not rise to the level of persecution. Additionally, the threats were not menacing in nature and never caused significant actual suffering or harm to the respondent. Consequently, the respondent has failed to show that she has suffered past persecution.

WELL-FOUNDED FEAR OF FUTURE PERSECUTION AND NEXUS

Since the Court does not find that the respondent has suffered past persecution, the respondent must show a well-founded fear of future persecution to qualify for asylum. Here the respondent is unable to meet her burden because she has failed to show that she has a well-founded fear of future persecution. The respondent here claims a well-founded fear of future persecution based on the following protected grounds: (1) race; (2) political opinion; (3) particular social group of family unit; and (4) her membership in a particular social group of landowners.

A legally cognizable particular social group must be: (1) composed of members who share a common immutable characteristic; (2) defined with particularity; and (3) socially distinct within the society in question.

The respondent has failed to show that she has a well-founded fear of future persecution because of her race as an indigenous woman. Respondent was approached by hooded men who threatened to take her children away if she did not join the conflict. There is nothing on the record showing that she will

be harmed in Guatemala based on her race. She fears returning to Guatemala because of the conflict and because they had threatened to take her children away if she did not join the conflict. However, she provided no evidence that the conflict has affected her or harmed her in any way. She has also not shown that if she returns she will be harmed by the conflict based on her race. And additionally, since the respondent remained in Guatemala for four years since the first threat without any harm, she is unable to show that she will be harmed in the future. Finally, she has not shown that she was threatened or that she will be harmed in the future based on her indigenous race. Since here she was only threatened and asked to join the conflict for some unspecified reason, there is nothing on the record that shows that she was approached specifically because of her race. In that case, the Court does not find that she has shown that she has a well-founded fear of future persecution based on her race.

The respondent has also claimed that she will be harmed if she returns to Guatemala because of the threats that they will take her children. The respondent has failed to show a well-founded fear of future persecution because those threats were unfulfilled, never escalated, and she remained in the same location for four years without any physical harm.

Respondent has also failed to show a well-founded fear of future persecution based on her political opinion. The respondent did not make any statement to the hooded men when they approached her and asked her to join the conflict. During the encounters the respondent never informed them that she is refusing because of a political belief or reason that she held. In fact, the respondent has failed to even state on the

record or in her application what her political opinion really is. Therefore, this Court finds that the respondent has not shown what her political opinion is. And she has not shown that she will be persecuted on account of her political opinion.

Now, moving on to the particular social groups. The first one, family unit.

The respondent argues that she has a well-founded fear of future persecution based on her membership in a family unit. Even though family is a cognizable particular social group, the respondent must still show that she will be persecuted on account of her familial relationship. Here, the respondent was threatened to have her children taken away because they wanted her to join the conflict. There is no evidence on the record showing that they approached her based on any familial relationship that she has or she had. Therefore, she has failed to show that she is a member of the particular social group and that she will be persecuted based on that membership.

Finally, she argues that she is a member of the particular social group composed of landowners. During closing arguments her attorney argued that this case shall be granted based on Espinoza-Ochoa v. Garland. Espinoza offers the respondent, however, no support in her case. In Espinoza the Court dealt with the issue of whether landowners was a cognizable particular social group and whether the respondent's status in that case as a landowner was one central reason for the persecution. Here, however, we are not dealing with a respondent who owns land. There is no evidence on the record showing the respondent owns land or that the hooded men approached her because she was a landowner. The only evidence is that the man approached her to convince her to join the conflict and

nothing more. Based on that, this Court finds that the respondent has not shown that she is a member of a particular social group composed of landowners. In light of the above, the respondent has failed to show that she has suffered past persecution and that she has a well-founded fear of future persecution. And as such, her asylum application is hereby denied.

A lack of nexus alone is fatal to respondent's application. Despite that the Court still points out that her application could still be denied based on her not showing that it would not be reasonable for her to relocate within Guatemala. The respondent testified that she does not have a safe place where she could relocate within Guatemala because she would not have a place to live. Furthermore, since the respondent remained safe in Guatemala for four years since the beginning of the threats, it is reasonable for her to relocate to another area within Guatemala. Therefore, she would not meet her burden of showing that it would not be reasonable for her to relocate. And, again, her asylum application is denied.

WITHHOLDING OF REMOVAL

Because the respondent was unable to establish eligibility for asylum, she was necessarily unable to meet the highest burden required to succeed on her claim for withholding of removal. The respondent's withholding of removal application is hereby denied.

WITHHOLDING OF REMOVAL UNDER THE CONVENTION AGAINST TORTURE

Finally, the respondent's claim for protection under the CAT also fails because she has not shown that she will be subjected to torture through the instigation or with the acquiescence of the Guatemalan government. Here, the respondent has not shown that she suffered

any physical harm. She was only threatened by hooded men who asked her asked her to join a conflict. She has not demonstrated that she will be tortured in Guatemala. And she has not demonstrated that the government in Guatemala would acquiesce to any torture. Despite the fact that respondent has received threats from the hooded men, her threats were not of such imminent nature. The threats were not of imminent death. As such, she has failed to demonstrate that she will be tortured if she were to return to Guatemala. Therefore, her application for withholding of removal under the Convention against Torture is also denied.

ORDERS

Based on the above, the following orders will be entered.

ORDER, IT IS ORDERED that the respondent's application for asylum, withholding of removal, and withholding under the CAT Convention are denied. ORDER, IT IS ORDERED the respondent be removed to Guatemala.

Please see the next page for electronic signature

Zach, Juliana
Immigration Judge

Digitally signed by
Menezes de Araujo, Juliana Immigration Judge
May 10, 2024 6:32 PM

* * *

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 24-1782

WUENDY ZAPET-ALVARADO AND G.J.A.Z.,
Petitioners

v.

PAMELA J. BONDI, ATTORNEY GENERAL,
Respondent

Before

Barron, Chief Judge,
Gelpí, Montecalvo, Rikelman, Aframe, Dunlap,
Circuit Judges, and Vélez-Rivé,* U.S. District Judge.

ORDER OF COURT

Entered: December 18, 2025

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case

* Of the District of Puerto Rico, sitting by designation.

be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:
Anastasia Dubrovsky, Clerk

cc:
Kevin Patrick MacMurray, Kristian Robson Meyer, Derek Reinbold, Brett Allen Shumate, Jesse David Lorenz, Brett Kinney, Oil

STATUTORY PROVISIONS INVOLVED

1. Section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158, provides in relevant part:

§ 1158. Asylum

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(E) Applicability

Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 279(g) of title 6).

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

* * *

2. Section 212 of the Immigration and Nationality Act, 8 U.S.C. § 1182, provides in relevant part:

§ 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(9) Aliens previously removed

* * *

(B) Aliens unlawfully present

* * *

(v) Waiver

The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

* * *

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E)

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if—

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that—

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; or

(C) the alien is a VAWA self-petitioner; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures

as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

(i) Admission of immigrant inadmissible for fraud or willful misrepresentation of material fact

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien or, in the case of a

VAWA self-petitioner, the alien demonstrates extreme hardship to the alien or the alien's United States citizen, lawful permanent resident, or qualified alien parent or child.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

* * *

3. Section 241 of the Immigration and Nationality Act, 8 U.S.C. § 1231, provides in relevant part:

§ 1231. Detention and removal of aliens ordered removed

* * *

(b) Countries to which aliens may be removed

* * *

(3) Restriction on removal to a country where alien's life or freedom would be threatened

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception

Subparagraph (A) does not apply to an alien deportable under section 1227(a)(4)(D) of this title or if the Attorney General decides that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 1227(a)(4)(B) of this title shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.

(C) Sustaining burden of proof; credibility determinations

In determining whether an alien has demonstrated that the alien's life or freedom would be

threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 1158(b)(1)(B) of this title.

* * *

4. Section 242 of the Immigration and Nationality Act, 8 U.S.C. § 1252, provides in relevant part:

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

* * *

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order

of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * *

5. 8 C.F.R. § 208.4 provides:

§ 208.4 Filing the application.

Except as prohibited in paragraph (a) of this section, asylum applications shall be filed in accordance with paragraph (b) of this section.

(a) *Prohibitions on filing.* Section 208(a)(2) of the Act prohibits certain aliens from filing for asylum on or after April 1, 1997, unless the alien can demonstrate to the satisfaction of the Attorney General that one of the exceptions in section 208(a)(2)(D) of the Act applies. Such prohibition applies only to asylum applications under section 208 of the Act and not to applications for withholding of removal under § 208.16. If an applicant files an asylum application

and it appears that one or more of the prohibitions contained in section 208(a)(2) of the Act apply, an asylum officer, in an interview, or an immigration judge, in a hearing, shall review the application and give the applicant the opportunity to present any relevant and useful information bearing on any prohibitions on filing to determine if the application should be rejected. For the purpose of making determinations under section 208(a)(2) of the Act, the following rules shall apply:

(1) *Authority*. Only an asylum officer, an immigration judge, or the Board of Immigration Appeals is authorized to make determinations regarding the prohibitions contained in section 208(a)(2)(B) or (C) of the Act.

(2) *One-year filing deadline*. (i) For purposes of section 208(a)(2)(B) of the Act, an applicant has the burden of proving:

(A) By clear and convincing evidence that the application has been filed within 1 year of the date of the alien's arrival in the United States, or

(B) To the satisfaction of the asylum officer, the immigration judge, or the Board that he or she qualifies for an exception to the 1-year deadline.

(ii) The 1-year period shall be calculated from the date of the alien's last arrival in the United States or April 1, 1997, whichever is later. When the last day of the period so computed falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day that is not a Saturday, Sunday, or legal holiday. For the purpose of making determinations under section 208(a)(2)(B) of the Act only, an application is considered to have been filed on the date it is received by the Service, pursuant to § 103.2(a)(7) of

this chapter. In a case in which the application has not been received by the Service within 1 year from the applicant's date of entry into the United States, but the applicant provides clear and convincing documentary evidence of mailing the application within the 1-year period, the mailing date shall be considered the filing date. For cases before the Immigration Court in accordance with § 3.13 of this chapter, the application is considered to have been filed on the date it is received by the Immigration Court. For cases before the Board of Immigration Appeals, the application is considered to have been filed on the date it is received by the Board. In the case of an application that appears to have been filed more than a year after the applicant arrived in the United States, the asylum officer, the immigration judge, or the Board will determine whether the applicant qualifies for an exception to the deadline. For aliens present in or arriving in the Commonwealth of the Northern Mariana Islands, the 1-year period shall be calculated from either January 1, 2030 or the date of the alien's last arrival in the United States (including the Commonwealth of the Northern Mariana Islands), whichever is later. No period of physical presence in the Commonwealth of the Northern Mariana Islands prior to January 1, 2030, shall count toward the 1-year period. After November 28, 2009, any travel to the Commonwealth of the Northern Mariana Islands from any other State shall not re-start the calculation of the 1-year period.

(3) *Prior denial of application.* For purposes of section 208(a)(2)(C) of the Act, an asylum application has not been denied unless denied by an immigration judge or the Board of Immigration Appeals.

(4) *Changed circumstances.* (i) The term "changed circumstances" in section 208(a)(2)(D) of the Act shall

refer to circumstances materially affecting the applicant's eligibility for asylum. They may include, but are not limited to:

(A) Changes in conditions in the applicant's country of nationality or, if the applicant is stateless, country of last habitual residence;

(B) Changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum, including changes in applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk; or

(C) In the case of an alien who had previously been included as a dependent in another alien's pending asylum application, the loss of the spousal or parent-child relationship to the principal applicant through marriage, divorce, death, or attainment of age 21.

(ii) The applicant shall file an asylum application within a reasonable period given those "changed circumstances." If the applicant can establish that he or she did not become aware of the changed circumstances until after they occurred, such delayed awareness shall be taken into account in determining what constitutes a "reasonable period."

(5) The term "extraordinary circumstances" in section 208(a)(2)(D) of the Act shall refer to events or factors directly related to the failure to meet the 1-year deadline. Such circumstances may excuse the failure to file within the 1-year period as long as the alien filed the application within a reasonable period given those circumstances. The burden of proof is on the applicant to establish to the satisfaction of the asylum officer, the immigration judge, or the Board of Immigration Appeals that the circumstances were not

intentionally created by the alien through his or her own action or inaction, that those circumstances were directly related to the alien's failure to file the application within the 1-year period, and that the delay was reasonable under the circumstances. Those circumstances may include but are not limited to:

(i) Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival;

(ii) Legal disability (e.g., the applicant was an unaccompanied minor or suffered from a mental impairment) during the 1-year period after arrival;

(iii) Ineffective assistance of counsel, provided that:

(A) The alien files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard;

(B) The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and

(C) The alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not;

(iv) The applicant maintained Temporary Protected Status, lawful immigrant or nonimmigrant status, or was given parole, until a reasonable period before the filing of the asylum application;

(v) The applicant filed an asylum application prior to the expiration of the 1-year deadline, but that application was rejected by the Service as not properly filed, was returned to the applicant for corrections, and was refiled within a reasonable period thereafter; and

(vi) The death or serious illness or incapacity of the applicant's legal representative or a member of the applicant's immediate family.

(6) *Asylum Cooperative Agreements*. Immigration officers have authority to apply section 208(a)(2)(A) of the Act, relating to the determination that the alien may be removed to a third country pursuant to a bilateral or multilateral agreement, as provided in § 208.30(e). For provisions relating to the authority of immigration judges with respect to section 208(a)(2)(A), see 8 CFR 1240.11(g) and (h).

(b) *Amending an application after filing*. (1) For applications being considered by USCIS pursuant to § 208.2(a)(1)(i), upon the request of the alien, and as a matter of discretion, the asylum officer or immigration judge with jurisdiction may permit an asylum applicant to amend or supplement the application. Any delay in adjudication or in proceedings caused by a request to amend or supplement the application will be treated as a delay caused by the applicant for purposes of § 208.7 and 8 CFR 274a.12(c)(8).

(2) For applications being considered by USCIS pursuant to § 208.2(a)(1)(ii), the asylum applicant may subsequently amend or correct the biographic or credible fear information in the Form I-870, Record of Determination/Credible Fear Worksheet, or supplement the information collected during the process that concluded with a positive credible fear determination,

provided the information is submitted directly to the asylum office no later than 7 calendar days prior to the scheduled asylum interview, or for documents submitted by mail, postmarked no later than 10 calendar days prior to the scheduled asylum interview. The asylum officer, finding good cause in an exercise of USCIS's discretion, may consider amendments or supplements submitted after the 7- or 10-day (depending on the method of submission) deadline or may grant the applicant an extension of time during which the applicant may submit additional evidence, subject to the limitation on extensions described at § 208.9(e)(2). Any amendment, correction, or supplement shall be included in the record.

* * *

6. 8 C.F.R. § 1208.16 provides:

§ 1208.16 Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

(a) *Consideration of application for withholding of removal.* Consideration of eligibility for statutory withholding of removal and protection under the Convention Against Torture by a DHS officer is as provided at 8 CFR 208.16. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

(b) *Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof.* The burden of proof is on the applicant for withholding of removal

under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) *Past threat to life or freedom.*

(i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

(B) 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.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

(2) *Future threat to life or freedom.* An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an 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. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

(i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

(3) *Reasonableness of internal relocation.* For purposes of determinations under paragraphs (b)(1) and (2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for withholding of removal.

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government-sponsored.

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless the DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a

preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors, including persecutors who are gang members, public official who are not acting under color of law, or family members who are not themselves government officials or neighbors who are not themselves government officials, shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

(c) *Eligibility for withholding of removal under the Convention Against Torture.*

(1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277, 112 Stat. 2681, 2681-821). The definition of torture contained in § 1208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible,

may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of

withholding of removal under paragraphs (d)(2) or (d)(3)
of this section, the alien's removal shall be deferred under § 1208.17(a).

(d) *Approval or denial of application—*

(1) *General.* Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.

(2) *Mandatory denials—*

(i) *In general.* Except as provided in paragraph (d)(3) of this section, an application for withholding of removal under section 241(b)(3) of the Act or under the regulations issued pursuant to the legislation implementing the Convention Against Torture shall be denied if the applicant falls within section 241(b)(3)(B) of the Act or, for applications for withholding of deportation adjudicated in proceedings commenced prior to April 1, 1997, within section 243(h)(2) of the Act as it appeared prior to that date. For purposes of section 241(b)(3)(B)(ii) of the Act, or section 243(h)(2)(B) of the Act as it appeared prior to April 1, 1997, an alien who has been convicted of a particularly serious crime shall be considered to constitute a danger to the community. If the evidence indicates the applicability of one or more of the grounds for denial of withholding enumerated in the Act, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

(ii) *Public health emergencies.* If a communicable disease has triggered an ongoing declaration of a public health emergency under Federal law, such as

under section 319 of the Public Health Service Act, 42 U.S.C. 247d, or section 564 of the Food, Drug, and Cosmetic Act, 21 U.S.C. 360bbb-3, then an alien is ineligible for withholding of removal under section 241(b)(3) of the Act and under the regulations issued pursuant to the legislation implementing the Convention Against Torture on the basis of there being reasonable grounds for regarding the alien as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act if the alien—

(A) Exhibits symptoms indicating that he or she is afflicted with the disease, per guidance issued by the Secretary or the Attorney General, as appropriate; or

(B) Has come into contact with the disease within the number of days equivalent to the longest known incubation and contagion period for the disease, per guidance issued by the Secretary or the Attorney General, as appropriate.

(iii) *Danger to the public health caused by an epidemic outside of the United States.* If, regarding a communicable disease of public health significance as defined at 42 CFR 34.2(b), the Secretary and the Attorney General, in consultation with the Secretary of Health and Human Services, have jointly—

(A) Determined that the physical presence in the United States of aliens who are coming from a country or countries (or one or more subdivisions or regions thereof), or have embarked at a place or places, where such disease is prevalent or epidemic (or had come from that country or countries (or one or more subdivisions or regions thereof), or had embarked at that place or places, during a period in which the disease was prevalent or epidemic there) would cause a danger to the public health in the United States; and

(B) Designated the foreign country or countries (or one or more subdivisions or regions thereof), or place or places, and the period of time or circumstances under which they jointly deem it necessary for the public health that aliens or classes of aliens described in paragraph (d)(2)(iii)(A) of this section who are still within the number of days equivalent to the longest known incubation and contagion period for the disease be regarded as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act, including any relevant exceptions as appropriate, then—

(C) An alien or class of aliens are ineligible for withholding of removal under section 241(b)(3) of the Act and under the regulations issued pursuant to the legislation implementing the Convention Against Torture on the basis of there being reasonable grounds for regarding the alien or class of aliens as a danger to the security of the United States under section 241(b)(3)(B)(iv) of the Act if the alien or class of aliens are described in paragraph (d)(2)(iii)(A) of this section and are regarded as a danger to the security of the United States as provided for in paragraph (d)(2)(iii)(B) of this section.

(iv) The grounds for mandatory denial described in paragraphs (d)(2)(ii) and (iii) of this section shall not apply to an alien who is applying for asylum or withholding of removal in the United States upon return from Canada to the United States and pursuant to the Agreement Between the Government of the United States and the Government of Canada for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries).

(3) *Exception to the prohibition on withholding of deportation in certain cases.* Section 243(h)(3) of the

Act, as added by section 413 of Pub. L. 104-132 (110 Stat. 1214), shall apply only to applications adjudicated in proceedings commenced before April 1, 1997, and in which final action had not been taken before April 24, 1996. The discretion permitted by that section to override section 243(h)(2) of the Act shall be exercised only in the case of an applicant convicted of an aggravated felony (or felonies) where he or she was sentenced to an aggregate term of imprisonment of less than 5 years and the immigration judge determines on an individual basis that the crime (or crimes) of which the applicant was convicted does not constitute a particularly serious crime. Nevertheless, it shall be presumed that an alien convicted of an aggravated felony has been convicted of a particularly serious crime. Except in the cases specified in this paragraph, the grounds for denial of withholding of deportation in section 243(h)(2) of the Act as it appeared prior to April 1, 1997, shall be deemed to comply with the Protocol Relating to the Status of Refugees, Jan. 31, 1967, T.I.A.S. No. 6577.

(e) [Reserved]

(f) *Removal to third country.* Nothing in this section or § 1208.17 shall prevent the Service from removing an alien to a third country other than the country to which removal has been withheld or deferred.

* * *

7. 8 C.F.R. § 1208.18 provides:

§ 1208.18 Implementation of the Convention Against Torture.

(a) *Definitions.* The definitions in this subsection incorporate the definition of torture contained in

Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain 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. Pain or suffering inflicted by a public official who is not acting under color of law shall not constitute pain or suffering 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, although a different public official acting in an official capacity or other person acting in an official capacity could instigate, consent to, or acquiesce in the pain or suffering inflicted by the public official who is not acting under color of law.

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed

sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity. Such awareness requires a

finding of either actual knowledge or willful blindness. Willful blindness means that the public official acting in an official capacity or other person acting in an official capacity was aware of a high probability of activity constituting torture and deliberately avoided learning the truth; it is not enough that such public official acting in an official capacity or other person acting in an official capacity was mistaken, recklessly disregarded the truth, or negligently failed to inquire. In order for a public official to breach his or her legal responsibility to intervene to prevent activity constituting torture, the official must have been charged with preventing the activity as part of his or her duties and have failed to intervene. No person will be deemed to have breached a legal responsibility to intervene if such person is unable to intervene, or if the person intervenes but is unable to prevent the activity that constitutes torture.

(8) Noncompliance with applicable legal procedural standards does not *per se* constitute torture.

(b) *Applicability of §§ 1208.16(c) and 1208.17(a)—*

(1) *Aliens in proceedings on or after March 22, 1999.*

(i) An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999, may apply for withholding of removal under § 1208.16(c), and, if applicable, may be considered for deferral of removal under § 1208.17(a).

(ii) In addition, an alien may apply for withholding of removal under 8 CFR 208.16(c), and, if applicable, may be considered for deferral of removal under 8 CFR 208.17(a), in the following situation: The alien is determined to be an applicant for admission under section 235(b)(1) of the Act, the alien is found to have a credible fear of persecution or torture, the alien's

case is subsequently retained by or referred to USCIS pursuant to the jurisdiction provided at 8 CFR 208.2(a)(1)(ii) to consider the application for asylum, and that application for asylum is not granted.

(2) *Aliens who were ordered removed, or whose removal orders became final, before March 22, 1999.* An alien under a final order of deportation, exclusion, or removal that became final prior to March 22, 1999 may move to reopen proceedings for the sole purpose of seeking protection under § 1208.16(c). Such motions shall be governed by §§ 1003.23 and 1003.2 of this chapter, except that the time and numerical limitations on motions to reopen shall not apply and the alien shall not be required to demonstrate that the evidence sought to be offered was unavailable and could not have been discovered or presented at the former hearing. The motion to reopen shall not be granted unless:

(i) The motion is filed within June 21, 1999; and

(ii) The evidence sought to be offered establishes a prima facie case that the applicant's removal must be withheld or deferred under §§ 1208.16(c) or 1208.17(a).

(3) *Aliens who, on March 22, 1999, have requests pending with the Service for protection under Article 3 of the Convention Against Torture.*

(i) Except as otherwise provided, after March 22, 1999, the Service will not:

(A) Consider, under its pre-regulatory administrative policy to ensure compliance with the Convention Against Torture, whether Article 3 of that Convention prohibits the removal of an alien to a particular country, or

(B) Stay the removal of an alien based on a request filed with the Service for protection under Article 3 of that Convention.

(ii) For each alien who, on or before March 22, 1999, filed a request with the Service for protection under Article 3 of the Convention Against Torture, and whose request has not been finally decided by the Service, the Service shall provide written notice that, after March 22, 1999, consideration for protection under Article 3 can be obtained only through the provisions of this rule.

(A) The notice shall inform an alien who is under an order of removal issued by EOIR that, in order to seek consideration of a claim under §§ 1208.16(c) or 1208.17(a), such an alien must file a motion to reopen with the immigration court or the Board of Immigration Appeals. This notice shall be accompanied by a stay of removal, effective until 30 days after service of the notice on the alien. A motion to reopen filed under this paragraph for the limited purpose of asserting a claim under §§ 1208.16(c) or 1208.17(a) shall not be subject to the requirements for reopening in §§ 1003.2 and 1003.23 of this chapter. Such a motion shall be granted if it is accompanied by a copy of the notice described in paragraph (b)(3)(ii) or by other convincing evidence that the alien had a request pending with the Service for protection under Article 3 of the Convention Against Torture on March 22, 1999. The filing of such a motion shall extend the stay of removal during the pendency of the adjudication of this motion.

(B) The notice shall inform an alien who is under an administrative order of removal issued by the Service under section 238(b) of the Act or an exclusion, deportation, or removal order reinstated by the Service

under section 241(a)(5) of the Act that the alien's claim to withholding of removal under § 1208.16(c) or deferral of removal under § 1208.17(a) will be considered under § 1208.31.

(C) The notice shall inform an alien who is under an administrative order of removal issued by the Service under section 235(c) of the Act that the alien's claim to protection under the Convention Against Torture will be decided by the Service as provided in § 1208.18(d) and 1235.8(b)(4) and will not be considered under the provisions of this part relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

(4) *Aliens whose claims to protection under the Convention Against Torture were finally decided by the Service prior to March 22, 1999.* Sections 208.16(c) and 208.17(a) and paragraphs (b)(1) through (b)(3) of this section do not apply to cases in which, prior to March 22, 1999, the Service has made a final administrative determination about the applicability of Article 3 of the Convention Against Torture to the case of an alien who filed a request with the Service for protection under Article 3. If, prior to March 22, 1999, the Service determined that an applicant cannot be removed consistent with the Convention Against Torture, the alien shall be considered to have been granted withholding of removal under § 1208.16(c), unless the alien is subject to mandatory denial of withholding of removal under § 1208.16(d)(2) or (d)(3), in which case the alien will be considered to have been granted deferral of removal under 208.17(a). If, prior to March 22, 1999, the Service determined that an alien can be removed consistent with the Convention Against Torture, the alien will be considered to have

been finally denied withholding of removal under § 1208.16(c) and deferral of removal under § 1208.17(a).

(c) *Diplomatic assurances against torture obtained by the Secretary of State.*

(1) The Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.

(2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien's removal to that country consistent with Article 3 of the Convention Against Torture. The Attorney General's authority under this paragraph may be exercised by the Deputy Attorney General or by the Commissioner, Immigration and Naturalization Service, but may not be further delegated.

(3) Once assurances are provided under paragraph (c)(2) of this section, the alien's claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.

(d) *Cases involving aliens ordered removed under section 235(c) of the Act.* With respect to an alien terrorist or other alien subject to administrative removal under section 235(c) of the Act who requests protection under Article 3 of the Convention Against Torture, the Service will assess the applicability of Article 3 through the removal process to ensure that a

removal order will not be executed under circumstances that would violate the obligations of the United States under Article 3. In such cases, the provisions of Part 208 relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer shall not apply.

(e) *Judicial review of claims for protection from removal under Article 3 of the Convention Against Torture.*

(1) Pursuant to the provisions of section 2242(d) of the Foreign Affairs Reform and Restructuring Act of 1998, there shall be no judicial appeal or review of any action, decision, or claim raised under the Convention or that section, except as part of the review of a final order of removal pursuant to section 242 of the Act; provided however, that any appeal or petition regarding an action, decision, or claim under the Convention or under section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 shall not be deemed to include or authorize the consideration of any administrative order or decision, or portion thereof, the appeal or review of which is restricted or prohibited by the Act.

(2) Except as otherwise expressly provided, nothing in this paragraph shall be construed to create a private right of action or to authorize the consideration or issuance of administrative or judicial relief.