IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[redacted],

Petitioner,

v.

WILLIAM P. BARR,
Attorney General

Respondent

Case No. [redacted]

PETITIONER'S SUPPLEMENTAL MOTION TO STAY ORDER OF REMOVAL

[redacted]

When a drug cartel wanted to take over the [redacted] family farm, they leveraged the family's love for each other. The threat to Petitioner [redacted] father was simple: do what we want, or we will kill you, and then we will kill your son. About a month later, the cartel murdered [redacted] father. [redacted] fled, but the Immigration Judge denied his application for asylum. In a published decision, the Board of Immigration Appeals ("Board" or "BIA") held that neither [redacted] family nor landowners in Guatemala were "particular social group[s]" under the Immigration and Nationality Act. *Matter of E-R-A-L-*, 27 I. & N. Dec. 767 (BIA 2020). The Board's decision conflicts with this Court's precedents regarding the legal cognizability of family- and landowner-based particular social groups. The Board's disregard for this Court's authoritative decisions, together with the irreparable harms that the asylum-seeking petitioner would face if deported, warrant the grant of a stay of removal.

BACKGROUND

I. The Cuaches Cartel threatens [redacted] and kills his father.

[redacted] and his family own a large farm in El Progreso, Guatemala. Administrative Record ("A.R.") 430-31. [redacted][1] father, [redacted] inherited the farm

[1] Because exposition of the facts of this case involves discussion of multiple members of the [redacted] family, this motion uses first names as needed for clarity. The motion uses [redacted] to refer to Petitioner [redacted]

from [redacted] grandfather. A.R. 427-28, 431. The two-square-kilometer[2] farm produced coffee, tomatoes, carrots, and radishes, and it paid wages to up to 20 seasonal workers. A.R. 430-32.

In 2007, the [redacted] Cartel targeted a family of farmers nearby the [redacted] A.R. 443. They threatened the father of that family, telling him that if he did not permit the cartel to use his land for the cultivation of marijuana, they would kill him and then his son. A.R. 492. That same year, the cartel killed the neighboring farmer. A.R. 443. In 2008, true to their word that they would target the farmer's family, the cartel also shot and killed the neighboring farmer's 13-year-old son. *Id*. The cartel kept the land, and nobody knows where the rest of the neighbor's family fled. *Id*.

In early 2008, the cartel set its sights on another landowning family in El Progreso, the [redacted]. Three cartel members ambushed [redacted] and his father on their way into town. A.R. 441. Each cartel member carried a firearm. *Id*. They told [redacted] father that if he did not collaborate in the cultivation of marijuana on his farmland, they would kill him. *Id.*. They also told [redacted] father that they would kill [redacted] next. *Id*. Approximately four months later, [redacted] and his father were eating at a restaurant, and the same man who had threatened them before came in

[2] For reference, one square kilometer equals approximately 247 acres. *Square Kilometers to Acres*, https://www.metric-conversions.org/area/square-kilometers-to-acres.htm (Last Accessed Apr. 14, 2020).

with three or four other people. *Id*. They told [redacted] father that "this is going to be the last time that we're going to threaten you so that we cultivate the land. If you don't make a decision, we're going to kill you and then we'll kill your son." A.R. 442. A month later, they assassinated [redacted] father. A.R. 443. Fearful that the cartel would once again be true to their word, [redacted] fled his country. A.R. 480. Since his departure, the violence inflicted on his family has continued. In 2012, while his mother and grandmother were sleeping, gunfire rained down on them, striking his grandmother in the arm. A.R. 480, 486, 492.

II. [redacted] applies for asylum.

After being placed in removal proceedings, [redacted] applied for asylum, withholding of removal, and protection under the Convention Against Torture. A.R. 476-86. The Immigration Judge credited his testimony, A.R. 403, and assumed that the threats suffered by [redacted] would qualify as past persecution, entitling him to a legal presumption that his fear of future persecution is well founded, A.R. 405. However, the Immigration Judge denied asylum, finding that [redacted] had not established that landowners are a particular social group and that he had not established a nexus between his persecution and a protected ground. A.R. 408.

[redacted] appealed, and the Board remanded. Holding that both this Court and the Board "have recognized that 'landownership may form the basis of a

particular social group within the meaning of the [Act][,]'" the Board concluded that the Immigration Judge did not sufficiently consider all of the evidence when he evaluated [redacted] proposed social group. A.R. 352 (quoting *Cordoba v. Holder*, 726 F.3d 1106, 1114 (9th Cir. 2013) and citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985)).

On remand, [redacted] restated his claims that he would be persecuted on account of his membership in a particular social group defined as "landowners in Guatemala," A.R. 97, "landowners in rural areas in Guatemala," A.R. 103, 104, 105, or "landowners in Guatemala who resist drug cartels," A.R. 96. [redacted] also argued that the cartel targeted him on account of his membership in his family, noting that this Court had issued an intervening decision in *Rios v. Lynch*, which held that even under then-recent changes to asylum law, "the family remains the quintessential particular social group[,]" 807 F.3d 1123, 1128 (9th Cir. 2015). *See* A.R. 96, 144.

The Immigration Judge once again denied relief. And, once again, the Immigration Judge credited [redacted] testimony and found his factual contentions to be "well-documented." Oral Decision of the Immigration Judge at 5 (L.A. Imm. Ct. Apr. 18, 2017) ("I.J.").[3] The Immigration Judge's opinion again

[3] The Certified Administrative Record filed on April 14, 2020, does not include the Immigration Judge's decision. Petitioner has attached a copy of that decision to this motion and will work with counsel for the government to correct the record.

assumed that [redacted] suffered harm severe enough to qualify as past persecution, and announced that whether that harm was on account of his membership in a particular social group "will determine … whether [[redacted] is] entitled to a rebuttable presumption of future persecution." I.J. at 6; *see also* I.J. at 9 (stating that if the Board "disagrees with my assessment that this is not a particular social group—they should merely grant the case."). However, the Immigration Judge found that the landowner-based groups proffered by [redacted] are not socially distinct in Guatemalan society under the Board's decision in *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014). I.J. at 10. The Immigration Judge also determined that the proposed group is "too amorphous, overbroad, diffuse, and objective [sic], and also that it lacks immutability." *Id.* Further, the Immigration Judge found that "it doesn't seem that the cartels were really interested in landowners. They were interested in the land." I.J. at 7.

The Immigration Judge also rejected [redacted] argument that he had been persecuted on account of his membership in a particular social group consisting of his family. The Immigration Judge found that the portion of the cartel's threats that were directed at [redacted] were "leverage against the father." I.J. at 8. However, according to the Immigration Judge, this showing was insufficient because the cartel did not "turn[ ] to [redacted] and [say], 'We don't care if we get this land or not; we're just against you because you're a member of the

family . . . .'" I.J. at 8-9. The Immigration Judge also held that the Albizures family was not socially distinct because, in order for a family to be socially distinct under *M-E-V-G-* and *W-G-R-*, "[t]here has to be some prominence to the family." I.J. at 11.

The Immigration Judge denied [redacted] application for withholding of removal under 8 U.S.C. § 1231(b)(3), reasoning that because the he "held above that [redacted] has not established past persecution on account of one of the five grounds, it follows that he's not eligible for withholding of removal." I.J. at 12.

III. The Attorney General decides *Matter of L-E-A-*.

[redacted] appealed the Immigration Judge's order. After filing his appellate brief, the Attorney General issued an opinion in *Matter of L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019), holding that "unless an immediate family carries greater societal import, it is unlikely that a proposed family-based group will be 'distinct' in the way required by the INA for purposes of asylum." *Id.* at 595. The Attorney General surmised that "[t]he fact that 'nuclear families' or some other widely recognized family unit generally carry societal importance says nothing about whether a *specific* nuclear family would be 'recognizable by society at large.'" *Id.* at 594 (citation omitted). The "average family[,]" concluded the Attorney General, "is unlikely to be so recognized." *Id.*

IV. The Board denies relief.

On February 10, 2020, the Board dismissed [redacted] appeal and designated its order as a precedent decision. *Matter of E-R-A-L-*, 27 I. & N. Dec. 767 (BIA 2020). The Board held that [redacted] proposed particular social group of landowners was not valid for three reasons. First, the Board stated that the group is not "defined by an immutable characteristic that is 'beyond [redacted] power . . . to change or is . . . fundamental to [his] identity." *Id.* at 771 (quoting *Matter of Acosta*, 19 I. & N. Dec. at 233). According to the Board, because [redacted] can "giv[e] up[,]" "sell[ ][,]" or "abandon[ ]" his land, his status as a landowner is not immutable. *E-R-A-L-*, 27 I. & N. Dec. at 771. Second, the Board found that a group comprised of landowners "lack[s] particularity because they can encompass landowners of varying backgrounds, circumstances and motivations." *Id.* Next, the Board found that [redacted] "has not identified record evidence demonstrating that his proposed groups are perceived as 'significantly distinct group[s]' with the society in question—namely, El Progreso, Guatemala." *E-R-A-L-*, 27 I. & N. Dec. at 772 (quoting *M-E-V-G-*, 26 I. & N. Dec. at 241). Finally, the Board declined to address the validity of the "rural landowners", claiming that the group was "not articulated or advanced below." *Id.* at 768 n.2.

In addition to finding that landowners in Guatemala do not qualify as a particular social group under the Immigration and Nationality Act, the Board also held that [redacted] had not "demonstrated the required nexus between the harm he fears and his status as a Guatemalan landowner" because the cartel's "focus was on [redacted] land itself, not his landowner status." *E-R-A-L-*, 27 I. & N. Dec. at 772, 773.

The Board also denied [redacted] family-based asylum claim, quoting the Attorney General's generalization in *L-E-A-* that "in the ordinary case, a nuclear family will not . . . constitute a 'particular social group' because most nuclear families are not inherently socially distinct." *E-R-A-L-*, 27 I. & N. Dec. at 774 (quoting *L-E-A-*, 27 I. & N. Dec. at 589). The Board held that [redacted] "has not shown that his family is socially distinct or was viewed as anything besides a typical nuclear family in Guatemala." *E-R-A-L-*, 27 I. & N. Dec. at 774. Further, the Board found that even if [redacted] family-based group were valid, the cartel's actions "were merely a means" to achieving the "end" of appropriating his family's land, and, therefore, [redacted] "family membership was tangential and incidental to this motive . . . ." *Id.* at 775 (citation and internal quotation marks omitted).

Turning to [redacted] application for withholding of removal, the Board claimed to "uphold the Immigration Judge's finding that [redacted] has

failed to demonstrate . . . that it is more likely than not that a valid protected ground will be 'a reason' for any persecution he may experience in Guatemala." *E-R-A-L-*, 27 I. & N. Dec. at 776 (quoting *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017)). However, the Immigration Judge did not cite *Barajas-Romero*, nor did he employ the "a reason" standard applicable to withholding of removal claims. I.J. at 12.

Having affirmed the denial of [redacted] applications for relief from removal, the Board dismissed his appeal and reinstated the Immigration Judge's order permitting voluntary departure under 8 U.S.C. § 1229c. *Id.* at 776-777. On March 9, 2020, [redacted] timely filed a petition for review of the Board's order.

ARGUMENT

In reviewing this motion, the Court must consider four factors: (1) whether [redacted] has demonstrated a likelihood of success on the merits; (2) whether he faces irreparable injury; (3) whether a stay would substantially injure the government; and (4) whether the stay would serve the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The first two factors "are the most critical." *Id.* This Court employs a "flexible approach," *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011), under which "a stronger showing of one element may offset a weaker showing of another." *Id.* at 964 (quoting *Alliance for the Wild Rockies v.*

Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011)) (internal quotation marks omitted). "[A] petitioner seeking a stay of removal must show that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the petitioner's favor." *Leiva-Perez*, 640 F.3d at 970. These standards "represent the outer extremes of a continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified." *Id.* (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)).

I. [redacted] is likely to succeed on the merits.

A stay petitioner must make "a strong showing that he is likely to succeed on the merits." *Leiva-Perez*, 640 F.3d at 966 (citations omitted). This standard is not a high one. "[T]o justify a stay, petitioners need not demonstrate that it is more likely than not that they will win on the merits." *Id*. Whether the Court determines that the equities require a "strong likelihood" of success or only a "substantial case" on the merits, [redacted] has carried his burden to show that a stay is warranted.

A. The Board's holding that a typical nuclear family is not a particular social group conflicts with *Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015).

An applicant for asylum must show that the persecution they fear is on account of their "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). When the claim is based on the particular social group criterion, this Court employs the three-part test adopted by the Board in *Matter of M-E-V-G-*, 24 I. & N. Dec. 227 (BIA 2014) and *Matter of W-G-R-*, 26 I. & N. Dec. 208 (BIA 2014). *Reyes v. Lynch*, 842 F.3d 1125, 1135-36 (9th Cir. 2016). First, a particular social group must be based on a common, immutable characteristic, that is, one that group members "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *M-E-V-G-*, 26 I. & N. Dec. at 231 (quoting *Matter of Acosta*, 26 I. & N. Dec. 211, 233 (BIA 1985)). Second, a social group must be described with "particularity," that is, the group must "have clear boundaries" and its characteristics have "commonly accepted definitions." *Reyes*, 842 F.3d at 1135 (citations omitted). Finally, a particular social group must be socially distinct—members of the group should be "set apart, or distinct, from other persons within the society in some significant way." *M-E-V-G-*, 26 I. & N. Dec. at 238.

This Court has considered the application of this framework to the proposition that families are particular social groups[4] and has unambiguously held that "even under this refined framework, the family remains the *quintessential* particular social group." *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (emphasis added). Relying on *L-E-A-*, the Board held in this case that the proposed family-based social group failed because [redacted] had not shown that his family "was viewed as anything besides a typical nuclear family in Guatemala." *E-R-A-L-*, 27 I & N. Dec. at 774. The Board's opinion even recognizes that the precedent of this Court is "contrary" to *L-E-A-*. *Id.* at 774 n.8; *see also L-E-A-*, 27 I. & N. Dec. at 589-590 (recognizing that this court has "expressly observed" that family is the quintessential particular social group under the *M-E-V-G-* framework). Because there is a "strong likelihood" that this Court's precedent will

[4] Indeed, nearly every circuit has held that families qualify as particular social groups. *See Villalta-Martinez v. Sessions,* 882 F.3d 20, 26 (1st Cir. 2018) ("[I]t is well established that the nuclear family constitutes a recognizable social group . . . ."); *Vanegas-Ramirez v. Holder*, 768 F.3d 226, 237 (2d Cir. 2014) (alien's "membership in his family may, in fact, constitute a 'social-group basis of persecution' against him"); *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011) (nuclear families are "prototypical" PSGs because "[i]nnate characteristics such as … family relationship are generally easily recognizable and understood by others to constitute social groups"); *Al–Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009) ("[A] family is a 'particular social group' . . . ."); *Torres v. Mukasey*, 551 F.3d 616, 629 (7th Cir. 2008) ("Our prior opinions make it clear that we consider family to be a cognizable social group . . . ."); *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005) ("[P]etitioners correctly contend that a nuclear family can constitute a social group.")

prevail over the Attorney General's novel interpretation, a stay is warranted. *Leiva-Perez*, 640 F.3d at 970.

The Attorney General claims that his departure from *Rios* is permitted under *Brand X*[5] because he offers a reasonable interpretation of an ambiguous statute. However, the Attorney General's appeal to *Brand X* fails for several reasons.

First, while the phrase "particular social group" is ambiguous, *Reyes*, 842 F.3d at 1134, this Court's recognition of the family as the "quintessential" particular social group, *Rios*, 807 F.3d at 1128, demonstrates this Court's view that the phrase "particular social group" clearly applies to typical families.

Further, *L-E-A-* unreasonably discards *Rios* only by mischaracterizing its holding. In one fell swoop, the Attorney General jettisons the consensus view of the federal courts by accusing them all of "rel[ying] upon outdated dicta from the Board's early cases." 27 I. & N. Dec. at 590. Specifically, the Attorney General alleges that the courts of appeals have over-relied on the statement in *Matter of Acosta* that "kinship ties 'might' be the kind of innate characteristic that could form the basis of a particular social group." *Id.* But *Rios* did not rely on *Acosta*; it specifically held that family was the quintessential particular social group under the "refined framework" announced in *M-E-V-G-*. *Rios*, 807 F.3d at 1128.

[5] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

Finally, the Attorney General's conclusion that a typical family cannot be a particular social group is poorly reasoned. Central to the Attorney General's statutory argument is the proposition that "as almost every alien is a member of a family of some kind, categorically recognizing families as particular social groups would render virtually every alien a member of a particular social group." *L-E-A-*, 27 I. & N. Dec. at 593. However, both the Attorney General and the Board's seminal decision in *Matter of Acosta* agree that the phrase "particular social group" should be interpreted as being a quality "of the same kind" as the other four grounds for asylum: race, religion, nationality, and political opinion. *See L-E-A-*, 27 I. & N. Dec. at 592 (relying on the *ejusdem generis* canon of statutory interpretation); *Acosta*, 19 I. & N. Dec. at 233 (same). But "virtually every alien" *does* have a race, most people in the world have a religion, essentially everyone has a nationality, and almost every person has at least one political opinion. In short, virtually every human *possesses* the characteristics protected by the asylum statute. The limiting principle of asylum is that a person must reasonably fear persecution on account of a protected characteristic. The protected characteristic itself need not be uncommon.

Even if the Court assumes that *L-E-A-* is likely to survive judicial scrutiny, [redacted] family-based asylum claims are likely to succeed for two additional reasons. First, even though *L-E-A-* was decided after briefing was

completed in this case, and even though *L-E-A-* clearly purports to abrogate this Court's decision in *Rios*, neither the Attorney General in *L-E-A-* nor the Board in this case took up the question of whether *L-E-A-* could be retroactively applied to prior asylum applications. *Cf. Garfias-Rodriguez v. Holder*, 702 F.3d 504, 520 (9th Cir. 2012) (*en banc*) (holding that when this Court overturns its own precedent due to an extension of deference under *Brand X*, the retroactivity of that decision must also be reviewed). Further, as the Attorney General recognized in *L-E-A-*, whether a family-based group is legally cognizable "requires a fact-based inquiry made on a case-by-case basis." *L-E-A-*, 27 I. & N. Dec. at 584 (citation and internal quotation omitted). The Board cannot engage in factfinding in the course of deciding appeals, 8 C.F.R. § 1003.1(d)(3)(iv), and [redacted] had no reason to provide evidence of the "greater social import" of his family in light of this Court's decision in *Rios*. Therefore, instead of simply dismissing the appeal for failure to show that his family was "anything besides [ ] typical," *E-R-A-L-*, 27 I. & N. Dec. at 774, the Board should have remanded to the Immigration Judge to permit [redacted] to make that showing in the first instance. *See Pena Oseguera v. Barr*, 936 F.3d 249, 251 (5th Cir. 2019) (remanding for further factfinding in light of *L-E-A-*); *Perez-Sanchez v. Att'y Gen.*, 935 F.3d 1148, 1158 n.7 (11th Cir. 2019) (declining to reach the effect of *L-E-A-* on appeal).

B. The Board's holding that landowners are not a particular social group conflicts with *Cordoba v. Holder*, 726 F.3d 1106 (9th Cir. 2013).

According to the Board, the particular social group of landowners in Guatemala fails each prong of *M-E-V-G-*'s three-part test. However, this Court has already spoken on the circumstances under which landowners may be particular social groups. *See Cordoba v. Holder*, 726 F.3d 1106 (9th Cir. 2013). The Board essentially ignores *Cordoba*, relegating it to a footnote and limiting it to "the proposition 'that landownership *may* be the basis of a particular social group,' if the group of landowners in question is defined by an immutable characteristic and is sufficiently particular and socially distinct." *E-R-A-L-*, 27 I. & N. Dec. at 771 n.4 (emphasis in original) (citing *Cordoba*, 726 F.3d at 1114). However, *Cordoba* said much more than "landownership may be the basis of a particular social group." *Cordoba* 726 F. 3d at 1114. It also provided a framework within which the Board was required to assess the immutability, particularity, and social distinction of landowner-based groups.

With regard to the immutability criterion, *Cordoba* points the Board's long history of identifying landowners as possessing a common, immutable characteristic. *See id*. (citing *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). In *E-R-A-L-*, the Board performs an about-face, holding that landownership is not an immutable characteristic because land can be given up, sold, or

abandoned. 27 I. & N. Dec. at 771. But landowners have always been able to sell their land, and the Board fails to explain how its new rule on the mutability of landownership can be reconciled with the long line of Ninth Circuit and BIA cases stating a contrary conclusion. *See Cordoba*, 726 F.3d at 1114 (collecting cases).

The Board's decision in this case directly conflicts with *Cordoba*'s discussion of the particularity criterion. *Cordoba* reaffirmed that this Court has "expressly rejected" a view of the particularity criterion which would exclude proposed social groups that "encompass too many diverse elements in society." 726 F.3d at 1116 (citations omitted). Rather than focusing on whether a proposed particular social group is internally diverse, the particularity criterion only requires that there be "a clear benchmark for determining who falls within the group." *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 239 (BIA 2014) (citation omitted). In this case, the Board adopted an internal diversity test that directly conflicts with *Cordoba*, holding that [redacted] proposed groups lack particularity "because they can encompass landowners of varying backgrounds, circumstances, and motivations." *E-R-A-L-*, 27 I. & N. Dec. at 771.

Finally, contrary to the Board's holding, there is a strong likelihood that landowners in Guatemala are a socially distinct group. As this Court noted in *Cordoba*, "even casual readers of Latin American literature 'will recall that the history of conflict between large landowners and the rest of society is a long one in

Latin America.'" 726 F.3d at 1114 (quoting *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 668 (7th Cir. 2005)). In short, landowners in Guatlemala are likely "set apart within society in some significant way." *M-E-V-G-*, 26 I. & N. Dec. at 244. [redacted] fits the mold of the sort of landowner who is distinctive within Latin American society, owning a large farm that, when operated, employs 20 people. A.R. 430-32.

C. The Board incorrectly ignored the "rural landowner" group.

The Board wholly failed to address the validity of the proposed social group rural landowners in Guatemala, falsely asserting that the group was "not articulated or advanced below." *E-R-A-L-*, 27 I. & N. Dec. at 768 n.2. However, [redacted] counsel below expressly argued that one of the features of the proposed groups that made them "so particular[,]" A.R. 106, is that the land was in "rural areas[,]" A.R. 105; I.J. at 7. He also argued that "being a landowner in a rural area" is part of what made the group socially distinct. A.R. 103-04. Failure to address a proposed particular social group, itself, is an error requiring remand. *See Rios*, 807 F.3d at 1126 ("The BIA did not address this social group claim—a failure that constitutes error and requires remand.") (citation omitted).

D. The Board's nexus analysis suffers from multiple errors.

If either of the Board's analyses regarding the validity of [redacted] particular social groups are likely to be reversed, then at a minimum, [redacted]

[redacted] application for withholding of removal is likely to be remanded. This Court has held that, for withholding of removal, a protected ground need only be "a reason" for persecution, as opposed to the stricter "one central reason" standard used for asylum. *Barajas-Romero v. Lynch*, 846 F.3d 351, 358-59 (9th Cr. 2017). However, the Immigration Judge conflated the two standards, holding that "[a]s I've held above [with regard to asylum] that [redacted] has not established past persecution on account of one of the five grounds, *it follows* that he's not eligible for withholding of removal." I.J. at 12 (emphasis added). The Board erroneously purported to "uphold" a nonexistent Immigration Judge finding that [redacted] had not shown "that a valid protected ground will be 'a reason' for any persecution he may experience in Guatemala." *E-R-A-L-*, 27 I. & N. Dec. at 776 (quoting *Barajas-Romero*, 846 F.3d at 360); *cf. Kassim v. Barr*, No. 18-3618, 2020 WL 1647221, at *3 (8th Cir. Apr.3, 2020) (finding legal error and remanding where "the Board[] [falsely] state[d] than an immigration judge 'correctly found' a necessary fact when the judge 'made no such finding.'") (quoting *Nabulwala v. Gonzales*, 481 F.3d 1115, 1118 (8th Cir. 2007)). Because the Immigration Judge did not conduct the separate factfinding necessary to determine whether [redacted]. [redacted] family membership or landowner status was at least "a reason" for his persecution, the Board erred in upholding the Immigration Judge's decision as being compliant with *Barajas-Romero*. *Cf. Guerra v. Barr*, 951 F.3d 1128, 1136

(9th Cir. 2020) ("[T]he BIA may not engage in factfinding."). The Board's error with regard to withholding of removal is sufficient to grant a stay because, assuming that the Board's decision is also likely wrong with respect to *either* of [redacted] proposed social groups, the failure to correctly apply *Barajas-Romero* entitles [redacted] to at least some relief.

The Board also erred with respect to [redacted] asylum claim. The Board held that [redacted] claim fails because "[t]he cartel's actions against [Ennio] and his father were merely 'a means to [achieving the] end" of appropriating his land. *E-R-A-L-*, 27 I. & N. Dec. at 775 (citing *L-E-A-*, 27 I. & N. Dec. at 45). But the standard for asylum only requires that a protected ground is "at least one central reason for persecuting the applicant." 8 U.S.C. § 1158(b)(1)(B)(i). Under this standard, "an applicant need not prove that a protected ground was the most important reason why the persecution occurred." *Parussimova v. Mukasey*, 555 F.3d 734, 740 (9th Cir. 2009). Indeed, the Seventh Circuit has expressly rejected the government's "means to an end" formulation as being incompatible with the "one central reason" standard. *See Gonzalez Ruano v. Barr*, 922 F.3d 346, 355-56 (7th Cir. 2019). Further, the Immigration Judge in the case made a factual finding that the cartel "leverage[d]" the filial relationship between Ennio and his father to obtain compliance with their demands. I.J. at 8. Several courts have held that where a family relationship is leveraged by a criminal organization in this

way, family membership is at least one central reason for the persecution. *See Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 (4th Cir. 2015) ("Hernandez's relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members' demands *leveraged* her maternal authority to control her son's activities.") (emphasis added); *Perez-Sanchez*, 935 F.3d at 1158 ("[I]t is impossible to disentangle his relationship to his father-in-law from the Gulf Cartel's pecuniary motives . . . .").

II. [redacted] will suffer irreparable injury absent a stay.

In evaluating the irreparable injury requirement for stays of removal, this Court has recognized that "[i]n asylum, withholding of removal and CAT cases, the claim on the merits is that the individual is in physical danger if returned to his or her home country." *See Leiva-Perez*, 640 F.3d at 969. This observation holds true here, where the Immigration Judge presumed that [redacted] will suffer persecution if returned to Guatemala, and went so far as to hold that if the Board disagreed with his social group analysis they should "grant the case." I.J. at 9. Further, [redacted] is married, A.R. 476-77, and his removal would entail separation from his spouse.

III. The balance of harms and the public interest favor a stay.

The final two factors in the stay analysis—substantial injury to other parties and the public's interest—both also favor a stay. *See Nken*, 556 U.S. at 436 (recognizing that these two factors merge in immigration cases).

As discussed above, [redacted] faces serious harm if removed to Guatemala. This likelihood of harm far outweighs the government's interest in the "prompt execution of removal orders" absent a showing that Petitioner is "particularly dangerous" or "abus[ed] the process provided to him." *Id*. at 436. There is no indication in the record that [redacted] is "dangerous" or has abused the immigration process.

Moreover, there is a "public interest in preventing aliens from being wrongfully removed," especially in asylum cases, which also weighs in favor of staying the deportation of [redacted] during the pendency of this petition. *Nken*, 556 U.S. at 436; *see also Leiva-Perez* 640 F.3d at 971 (noting "the public's interest in ensuring that we do not deliver aliens into the hands of their persecutors").

Finally, the United States is in the midst of a "rapidly escalating public health crisis, which public health authorities predict will especially impact immigration detention centers." *Xochihua-Jaimes v. Barr*, 798 Fed. App'x 52 (9th Cir. 2020) (unpublished order); *see also Castillo v. Barr*, CV 20-00605 TJH (AFMx), 2020 WL 1502864, at *1, *5 (C.D. Cal. Mar. 27, 2020) (holding that

conditions at the Adelanto Detention Center—the largest detention center in the District where Petitioner resides—likely pose an unconstitutional risk to the health of detainees). Indeed, Immigration and Customs Enforcement (ICE) has "adjust[ed] its enforcement posture" in an effort "[t]o ensure the welfare and safety of the general public as well as officers and agents in light of the ongoing COVID-19 pandemic response." *ICE Guidance on COVID-19*, https://www.ice.gov/coronavirus (Last Accessed Apr. 14, 2020). Specifically, ICE has decided to "delay enforcement actions" regarding people who are not public-safety risks and who are not subject to mandatory detention. *Id.* Critically, in order to prevent the spread of the virus that causes COVID-19, ICE "has limited the intake of new detainees being introduced into the ICE detention system." *Id.* [redacted] detention and removal pending the Court's review would undermine efforts to secure public health and welfare, and, for that reason alone, "the balance of hardships tips sharply in the petitioner's favor." *Leiva-Perez*, 640 F.3d at 970.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court stay the Board's order of removal.

Respectfully submitted,

April [redacted], 2020

CERTIFICATE OF COMPLIANCE

This motion contains 5,530 words, excluding the items exempted by Fed. R. App. P. 32(f). I certify that this motion complies with Cir. R. 27-1(d) because, under Cir. R. 32-3(2), the word count divided by 280 is less than the designated page limit of 20 pages. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the motion has been prepared in Times New Roman 14-point font using Microsoft Word 2016.

April 15, 2020 [redacted]

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File: [redacted] April [redacted] 2017

In the Matter of

[redacted]) IN REMOVAL PROCEEDINGS
RESPONDENT)

CHARGE: Section 212(a)(6)(A)(i) of the INA, as amended, present without admission or paroled

APPLICATIONS: Asylum, Withholding, protection under the Convention Against Torture, and voluntary departure

ON BEHALF OF RESPONDENT: John Ayala
601 South Glen Oaks Blvd, Suite 305
Burbank, California 91502

ON BEHALF OF DHS: Jonathan Forstil
Immigration and Customs Enforcement
606 South Olive Street, 8th Floor
Los Angeles, California 90014

ORAL DECISION OF THE IMMIGRATION JUDGE

On December 13th, 2013, the United States Department of Homeland Security filed a Notice to Appear against the above-named respondent. The filing of the Notice to Appear vested jurisdiction with this court. In the Notice to Appear, the Department of Homeland Security alleges the respondent is a citizen of Guatemala who

entered the United States, and that when he entered, he was not admitted or paroled after inspection by an immigration officer. Respondent appeared in court, admitted Allegations 1, 2, and 4, and the legally operative part of Allegation 3 -- which is that respondent arrived or entered the United States -- and conceded the charge. And based on the pleadings, I do find that respondent's removable from the United States by clear and convincing evidence. The Notice to Appear has been admitted into evidence as Exhibit 1. Guatemala has been directed as the country for removal, and respondent has applied for relief in the form of asylum, withholding, and protection under the Convention Against Torture.

Evidence and Testimony

All evidence and testimony has been considered, whether or not specifically referenced in this decision. The documentary evidence consists of the following: Exhibit 1; Notice to Appear. Exhibit 2, I-589 and sub-exhibits, Tabs A through N, to include, among other things, fingerprint results, death certificate of respondent's father, for other relatives, country condition reports for 2009. Exhibit 3 -- it's not evidentiary. It is a copy of the case in Cordoba v. Holder, April 11, 2013, argument and submitted. The decision is dated August 13th, 2013 -- basically, remanding, pointing out that land ownership may be the basis for a particular social group. There was a prior decision, and that was appealed, and the Board remanded the case. So, the rest of the exhibits are going to be prefaced by the letter "R" (for "remand") to make clear what documents came after the remand. The first document is going to be the remand decision. I'm going to make that R1. It's not evidentiary, I suppose, but we need to consider it and it shall be part of the record. R2 are respondent's documents, Tabs O, P, and Q, which contains a number of land records, property ownership records. R3 contains sub-exhibits, Tabs A and B, and a brief. The sub-exhibits are an updated

human rights report and a report prepared by the Woodrow Wilson International Center, dated 2011: "Criminal Organizations and Illicit Trafficking in Guatemala's Border Communities." R4 is the Department of Homeland Security's reply brief. These were all of the documents that were considered in the case. There was one witness, and that is respondent. And again, as his testimony was already part of the record, it's going to be summarized here. Now, obviously, I did read through the transcript from the prior hearing. I am aware of what happened at the prior hearing -- highlighting what I think are the most salient, prominent facts, but all facts have been considered. Respondent testified that he was born on [redacted] in Guatemala. And the day of the hearing, he was [redacted] His parents are [redacted] and [redacted] He was married in the United States on [redacted] It's his first marriage. He lives in Newhall, California. He entered the United States on March 2nd, 2009 without inspection. In Guatemala, he lived in the Department Progreso, in a rural area of that Department. His family owned land there, approximately two square kilometers. His grandfather left it for his father, and the land was there to cultivate coffee, tomatoes, carrots, radishes. It was a working farm. His father would have up to 20 seasonal workers. Merchandise was transported by trucks, which respondent owned one truck. The harvest schedules were different for the different produce. The family previously lived on the land, but not anymore. Respondent has several siblings: [redacted] His siblings all lived with the respondent and respondent's parents on the farm. It was a ranch home. There was one bathroom, a kitchen, a living room, washroom. There are two houses side-by-side. No other structures. There were some machines, one to yield coffee or water tanks. Respondent left Guatemala when he was 23 years old. He graduated high school at 17 and he worked for his father between the ages of 17 and 23. His father was threatened by drug cartels. They

wanted the land so that they could cultivate drugs. The respondent said that it was the Calachas [phonetic] Cartel. He really doesn't know who they are or where they lived. Anyway, they told respondent's father that the father needed to cultivate marijuana. And they said that if the respondent's father did not collaborate, they would kill him. The first time this happened, the respondent and his father were walking from a park to the municipality to pay taxes. Three men approached them. There were two in front of the father, one in back of the father. They were wearing coats. They held a gun. The respondent and his father were approached again in the restaurant. Actually, from the testimony, respondent was with his father in the restaurant, and his father was approached, if you look at the specific testimony at that juncture. Anyway, they told the father this was the last threat. And the father was told that if he didn't make a decision to grow marijuana for the cartel, the cartel would kill him -- that is, the father -- and the respondent. And then they left. At that point, the respondent asked the father what they were going to do. And the father said, "If anything happens to me, take some money that I have hidden." Respondent considered the threat to be real because the men were speaking seriously and they pulled out a gun. Thirty days later, respondent's father was dead. Respondent's had other family members who were killed. Both the father's lands and respondent's godfather's lands were very good, and the same cartel threatened the godfather. The godfather had a son who was 13 years old. They threatened to kill the godfather and the godfather's son, get to the godfather's land. In fact, both the godfather and the son were killed in 2007 and 2008, and the cartel kept the godfather's land. The relatives of the godfather had to flee, and nobody knows where they are. The cartel cultivates those lands today. Again, there was additional testimony. All testimony has been considered, whether or not specifically referenced in its decision. On cross-examination, the most relevant testimony was that respondent

said he could not relocate in Guatemala because the cartel is very big, and wherever he goes, they will find him. The cartel is known throughout Guatemala, and they know respondent personally, and the respondent believes the police have been in contact with the cartel. There was no re-direct.

Relief Applications

Respondent has applied for relief in the form of asylum, withholding, and protection under the Convention Against Torture. Voluntary departure will also be considered in this decision. Respondent bears the burden of proving that he qualifies for and merits relief from removal. The court must make a threshold determination on respondent's credibility before considering whether he meets any of the statutory criteria for asylum, withholding, and/or relief under the Convention Against Torture. Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998). Following the enactment of the REAL ID Act, the testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that his testimony is credible, persuasive, and refers to sufficient facts to demonstrate that the applicant is a refugee. Matter of J-Y-C-, 24 I&N Dec. 260 (BIA 2007). Respondent's application is clearly governed by the REAL ID act because it was filed in 2014, nine years after the REAL ID Act effective date. There is no issue with credibility in this case. The respondent has provided all corroboration requested by the court. The case is well-documented. Respondent's been a credible witness. To qualify for asylum under Section 208 of the Act, the applicant bears the burden of proving that he's a refugee within the meaning of Section 101(a)(42) of the Act. That is, he must demonstrate that he's unable or unwilling to return to his country of origin because of past persecution or a well-founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. INA Section 101(a)(42)(A).

If the applicant for asylum presents specific facts establishing that he's actually been the victim of past persecution based on one of the five enumerated grounds, then the applicant is entitled to a rebuttable presumption of a well-founded fear of future persecution. 8 C.F.R. § 1208.13. And this really is the issue in this case. Is there a nexus? And if there is a particular social group -- which is the nexus claim -- is the persecution on account of? That will determine whether or not there's past persecution and whether respondent's entitled to a rebuttable presumption of future persecution. And we had a lot of discussion on that in this case. So, why am I discussing this here? Because respondent also has to not be ineligible for asylum for one of the several bars. Of course, there is no issue with regard to respondent being ineligible because of the criminal bars or particularly serious crime. The respondent is not a criminal. The government has argued that respondent should be found ineligible for asylum because of the one-year bar. Well, in looking at this case, the respondent's application was filed in 2014. The respondent has placed great emphasis on Cordoba v. Holder, and the respondent's emphasis on this is not at all frivolous, as in fact, this case shows -- because we've had a lot of discussion on this. Just this morning we've had a lot of discussion on this. Probably talked for 45 minutes around issues that really are largely addressed or raised in Cordoba v. Holder. So, really, I cannot find against respondent on the one-year issue. I mean, there was a significant change in law -- at least it's been billed as a significant change in law by the Court of Appeals. The Board of Immigration Appeals in the remand decision thought that it was significant. If it's significant enough to warrant a remand, then I think it's significant enough to be a material change in law supporting an exception to the one-year filing requirement. So, I do find that respondent is not barred by the one-year filing requirement. Now, again, we've had a lot of discussions today on whether respondent is a member of one of several particular

social groups: "landowners who resist drug cartels," "the Albizures family," and landowners generally. And the government has argued in its reply brief at R4 that respondent is essentially spelling out his exact situation and calling it a particular social group -- that is, "landowners who resisted drug cartels." And I did ask respondent, through counsel, about this today -- how this could be a particular social group, how this varied from a situation in which some criminals simply trying to obtain property through the person who possessed the property -- how this differed from any sort of robber who wished to rob the property belonging to another. I mean, if this particular social group articulated by respondent is a particular social group, then would "People targeted for robbery" be a particular social group? Our discussion is all there on the record for today, actually. In this case, I do agree with the government's characterization that respondent is spelling out his exact situation and calling it a particular social group, with regard to the particular social group of "landowners who resist cartels" -- because on the record before us, it doesn't seem that the cartels were really interested in landowners. They were interested in the land. They wanted the land. They could only get the land through the owners of the land, by getting them to either cooperate or give up their land. But respondent has presented no evidence, which would indicate that once a landowner has given up the land, the cartels wouldn't have any more interest. The cartel members even said that they wanted the land because it's good for growing drugs. They aren't interested in all landowners and they're not interested in all land -- only land that would be good for growing drugs. Respondent essentially admits as much when he says that what makes this case particular is the land is in the rural areas, where the police and government have limited control. So, it's land which is a good platform for projecting criminality; not any land would do it. Now, respondent leans heavily on Cordoba v. Holder, which ultimately remanded the case for examination of a particular social group,

among other things in light of Henriquez-Rivas and other cases. And the Board decision asks me to consider, in the first instance, to evaluate the existence of the claimed particular social group based on the evidence and particular country conditions in Guatemala in accordance with the decisions in W-G-R- and M-E-V-G-. And the applicability of these cases is somewhat opaque; it really is. But I would say that if M-E-V-G- and W-G-R- stand for anything, they have to stand for the proposition that the proposed group must be socially distinct by the society in question. There has to be some social distinction. I do understand that landowners may be a particular social group. But the question is, are landowners a particular social group in this particular situation? And as the government pointed out in their argument, there's no evidence that the persecutors were interested in landowners. There was no ideological threat to the landowners. They merely wanted what the landowners had. It's really a subset of a larger problem of criminals wanting what people with money or property have. And people can be taken out of the asserted particular social group of "landowners who resist drug cartels" simply by not resisting. It's not immutable. And if they cease to resist, they just give up their property. On this record, there's no indication that there's further harm to come. Now, respondent's counsel says, "Well, we don't know that." Okay. Well, it was really respondent's burden to show that. It's not the court's burden to disprove it. There's no presumption of worldwide persecution or countrywide persecution. And the logical inference is that criminals do target people for their property. Our respondent argued that he was targeted too, in the restaurant, when the cartels came. But a review of the transcript reveals that that's not the case; that they targeted the father. They came to the father, they threatened the father. And they told the father, "If you don't give us the land, we'll kill your son." It was a threat against the father. It was leverage against the father. The testimony was not that they turned to the

respondent and they said, "We don't care if we get this land or not; we're just against you because you're a member of the family, because you're connected to land ownership somehow." That wasn't the testimony at all. Now, the Board disagrees with this decision, they disagree with my assessment that this is not a particular social group -- they should merely grant the case. It'll be good for immigration judges to have guidance on this, because it does seem like the boundaries of particular social group are getting more and more amorphous and there's limiting guidance. And as immigration judges, we're doing the best we can to apply all the cases. But as I see it, for the term "particular social group" to mean anything, there has to be some particularity beyond saying, "Well, it happened in particular place, at a particular time, and the object was a particular property." To be a social group, there has to be some social connection in the group. It can just be an aggregation of individuals. I mean, people who get robbed at ATMs are just statistics. It's just an aggregation of individuals. How could that be considered a social group -- criminals wanting the property of another? And this is really, as I see it, just that on a large scale. That seems to be the logical inferences from the testimony that was given. There's really no inferences, I see, actually -- or at least limited inferences that there was anything beyond cartel members seeking to get property. Now, respondent points out that people were actually killed. I do understand that. But the question is, were they killed on account of a particular social group? I mean, put quite bluntly, what the cartels wanted was collaboration. They wanted a place to grow their drugs, a place to produce drugs. I think the name says it all: "drug cartel." They're in the business of drugs. The respondent has also articulated the particular social group of landowners, generally. Under Acosta, there needs to be some sort of immutability to the group. Landowners can simply sell their land and not become landowners anymore. I do understand that

that's not the case in every society. Some societies in post-revolutionary Russia and China -- landowners were branded as landowners, regardless of whether they still had the land. That just really proves the point. They were viewed as socially distinct by the society in question, as opposed to someone who just had some property. I've reviewed the articles submitted by respondent, and I don't see any articles which indicate that the cartels are seeking out and persecuting or harming former property owners -- people who formerly had property and gave it up. There's no evidence of that no this record. So, I would have to say that respondent fails to establish that landowners generally are socially distinct by the society in question, under W-G-R-. That is, it's too amorphous, overbroad, diffuse, and objective, and also that it lacks immutability. Respondent has an additional particular social group: family. And respondent was not harmed. He was there when his father was threatened and when his father was told that he would be harmed -- he would be murdered. But respondent did not testify that he was directly threatened. Respondent testified, and there is evidence in the record, that the respondent's father and two other family members were, in fact, murdered. So, respondent's family certainly has had some problems. Now, returning to the presumption of past persecution, if the murders were on account of the particular social group of "family," then respondent would be entitled to a presumption of future persecution. But as I said above, the question is, is there a nexus? Is there persecution on account of a particular social group? That's the big question. The respondent testified that his godfather and the godfather's son were murdered for their property, not because they were members of the Albizures family. I think, for particular social group, family -- to mean anything, there has to be some connection to one particular family. The respondent testified that it was his godfather and godfather's son. Well, at this time, we're really looking at people outside of his nuclear family -- and,

really, a very attenuated relationship. And they didn't persecute the godfather and the godfather's son because they were related to the respondent and the respondent's father. Again, the godfather and his son were killed because they were landowners who wouldn't give up the land. It's like somebody who's robbed at an ATM who won't give up the money -- except on a larger scale. And again, I'm not making light of the situation. But the law in asylum isn't that if the harm is great, we just ignore nexus. The law is that there has to be past persecution or a well-founded fear of future persecution on account of one of the five grounds. I didn't make the law. That was the law that Congress made. So, with regard to respondent's godfather and his son, the motivation that was proffered was not family. It was proffered that there was a family relationship, but again, the relationship of godfather seems to indicate that there's no direct biological relationship. Respondent's father was murdered. That is a direct family relationship, direct biological relationship, and part of the nuclear family. But again, respondent's father was killed to get at the property. Respondent's father was threatened with respondent being murdered. That was a threat to the father to get leverage to get ownership of the land. So, if we look at this as sort of a mixed motive case, the issue is -- the Albizures family, is it seen as socially distinct by the society in question? In the case where a family could be a prototypical social group, still we're left with M-E-V-G- and W-G-R-: Is the group seen as socially distinct by the society in question? And again, the immigration courts are given limited guidance on this. I suppose you could say that every member of a family is socially distinct in that they're not a member of another family. But it seems to me, for the social distinction prong to mean anything, it has to be socially distinct in some sort of larger sense. There has to be some prominence to the family, rather than it just being defined by what it's not -- member of another family. I mean, really, if we allowed family to be defined merely by the fact that

you aren't the member of another family, we wouldn't need these cases of W-G-R- and M-E-V-G-. Just asserting that you're a member of a family would be sufficient to establish nexus to family. So, I would have to find that respondent has not established a nexus to any of the three asserted particular social groups. That is, I have issue both with whether the groups are particular social groups in this instance and whether the persecution is on account of social groups -- even if they are particular social groups. To point out here -- as I said at the beginning -- the burden is on the respondent. It's a burden of proof. It goes to facts, not to law. Just as the court has obviously had some difficulties in applying these cases, it's not reasonable to expect the respondent to have all the answers in an area of law that this court sees as being not particularly clear. So, I have done the additional fact-finding and allowed arguments to be taken on this. And I've done my best with the legal issues, but I wish to make clear I'm not finding against the respondent because he didn't make the law clear. I don't believe that's respondent's burden. The burden of proof required for withholding of removal is greater than the burden of proof for asylum. INS v. Stevic, 467 U.S. 407 at 413 (1984). To qualify for withholding of removal, the applicant must show a clear probability of future persecution on account of one of the five statutory grounds. INA Section 241(b)(3); INS v. Stevic, 467 U.S. at 413. In other words, an applicant must show that it's more likely than not that his life or freedom would be threatened on account of one of the five specified grounds. As I've held above that respondent has not established past persecution on account of one of the five grounds, it follows that he's not eligible for withholding of removal. But again, I have to point out here, if respondent did establish nexus to one of the five grounds, we wouldn't be talking about withholding. We'd be talking about a grant of asylum. So, again, the whole case comes down to: Is respondent a member of a particular social group cognizable by our asylum and

withholding statutes? Now, pursuant to the Convention Against Torture, the United States may not remove an alien to a country where it's more likely than not where he would be tortured. And the applicant bears the burden of establishing that it's more likely than not that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 1208.16(c)(2); Ali v. Ashcroft, 394 F.3d 780 (9th Cir. 2005). 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 a confession, punishment, intimidation or coercion. 8 C.F.R. § 1208.18(a)(1). And the torture must be inflicted by, or at the instigation of, or with the consent, or acquiescence of a public official or other person acting in an official capacity. Respondent asserts that the police in Guatemala are corrupt, especially in his area. They cooperate with the cartels. On cross-examination, the government asked respondent a number of questions regarding relocation. The respondent says he can't relocate because the cartel is very big. And wherever he goes, they would find him -- and that they know him personally. All right. Well, I'm not sure how respondent would know that every member of the cartel throughout Guatemala knows him personally, but respondent's testimony was that he would be targeted because of land ownership -- the fact that he would be resisting the cartels. So, if respondent is removed from the land and not resisting the cartels, again, I'm not sure how respondent reasons that he would still be targeted, unless he were resisting the cartel from some other location. But it doesn't seem that he could really do that if, in fact, the police in his local area are so corrupt and he's out of that area. So, we're sort of into a bit of a logical inconsistency there regarding government persecution of respondent, once we add possible relocation. Based on the foregoing, I would have to find that respondent could relocate and avoid any possibility of torture by the government or any torture at the instigation of or with the consent or

acquiescence of a public official or other person acting in an official capacity. Now, I did say that I would consider respondent for voluntary departure -- and he's not really eligible for pre-conclusion voluntary departure because he's going to be reserving appeal to have the Board decide the legal issues in the case. And if he prevails on those issues, then he won't need the post-conclusion voluntary departure. However, if respondent does not prevail on those issues, I see no bar to voluntary departure in this case. The Notice to Appear was issued more than one year after respondent's arrival in the United States. There's no issue with whether respondent is a person of good moral character. He's not removable under any of the sections. And so, I will grant the respondent the privilege of post-conclusion voluntary departure for a 60-day period. Now, if respondent were not reserving appeal, that would be until June 19th, 2017. He is going to be reserving appeal, but for whatever it's worth, it's 60 days of voluntary departure with an alternate order of removal to Guatemala. Based on the foregoing, the following orders will enter:

Order

Respondent's applications for asylum, withholding, and protection under the Convention Against Torture are hereby denied. Respondent's application for pre-conclusion voluntary departure is hereby denied. Respondent's application for post-conclusion voluntary departure is granted for a 60-day period, to June 19th, 2017, with an alternate order of removal to Guatemala.

DAVID BURKE
Immigration Judge