



U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals
Office of the Clerk*

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Nochomovitz, Lara
LSN Legal LLC
118 Partridge Lane
Chagrin Falls, OH 44022

DHS/ICE Office of Chief Counsel - CLE
925 Keynote Circle, Room 201
Brooklyn Heights, OH 44131

Name: D- L-, D- E-

A-662

Date of this notice: 4/10/2020

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Gemoets, Marcos
Creppy, Michael J.
Liebowitz, Ellen C

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User team: Docket

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Falls Church, Virginia 22041

File: A-662 – Cleveland, OH

Date: **APR 10 2020**

In re: D-E-D-L-

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lara Nochomovitz, Esquire

ON BEHALF OF DHS: Dustin T. Roth
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Nicaragua, appeals from the Immigration Judge's decision dated August 21, 2019, denying his applications for asylum and withholding of removal pursuant to sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A), 1231(b)(3)(A), as well as his request for protection under the Convention Against Torture. 8 C.F.R. §§ 1208.16(c), 1208.18. The Department of Homeland Security (DHS) opposes the appeal. The appeal will be sustained and the record will be remanded.

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 claimed that he suffered past persecution and has a well-founded fear of persecution in Nicaragua on account of his political opinion (IJ at 1, 11-12; Respondent's Br. at 2-3, 7; Exhs. 3, 8).¹ Specifically, the respondent testified that he participated in a number of marches and protests in Nicaragua, beginning in April 2018, in response to the Nicaraguan President's announcement of unpopular social security reforms (IJ at 3; Tr. at 73). During these protests, the police and paramilitary forces shot at the participants, killing some and injuring others (IJ at 3-4; Tr. at 76-78, 80-81). After one such protest, the respondent encountered police and paramilitary forces, who allegedly took the respondent's picture and then beat the respondent with their guns until the respondent lost consciousness (IJ at 4; Tr. at 86, 90-94, 143). The respondent

¹ We note that the respondent also indicated he was seeking asylum and related forms of protection from removal based on his membership in a particular social group (IJ at 11; Exhs. 3, 8). However, the Immigration Judge noted that the respondent did not proffer any particular social group to which he might belong, and therefore, we agree with the Immigration Judge that the respondent did not meet his burden to demonstrate his membership in a cognizable particular social group (IJ at 11). *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014); *see also Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018) (emphasizing the importance of articulating the contours of any proposed particular social group before the Immigration Judge).

indicated that he suffered injuries to his hand and to his head as a result of this beating (IJ at 4; Tr. at 91-94). The respondent believes that if he were to return to Nicaragua, then he would be arrested and persecuted or tortured for his participation in these protests (Tr. at 96-99; Respondent's Br. at 7; Exhs. 3, 8).

The Immigration Judge found the testimony of the respondent and his witnesses to be credible (IJ at 9). However, the Immigration Judge determined that the respondent had not established that he held a political opinion, and thus, he determined that the respondent was unable to demonstrate a nexus between his political opinion and any harm the respondent suffered in the past or fears in the future in Nicaragua (IJ at 11-13). Based on this finding, the Immigration Judge denied the respondent's applications for asylum and withholding of removal (IJ at 11-13).

On appeal, the respondent argues that the Immigration Judge's analysis of his asylum claim is flawed (Respondent's Br. at 2-7). We agree. Regardless of whether the respondent holds an actual political opinion, he may establish his eligibility for relief from removal by demonstrating that his persecutors imputed a political opinion to him and harmed him on account of or because of such imputed political opinion. See *Haider v. Holder*, 595 F.3d 276, 284-85 (6th Cir. 2010) (reaffirming that a respondent may establish his eligibility for asylum or withholding of removal by virtue of his imputed political opinion). Further, a respondent need only provide some evidence—either direct or circumstantial—that his persecutors imputed a political opinion to him and harmed him because of it. *Bu v. Gonzales*, 490 F.3d 424, 430 (6th Cir. 2007) (citation omitted).

Here, the Immigration Judge did not analyze the evidence of record—including the credible testimony that the respondent was a participant in marches and protests against Nicaraguan government policy—to determine whether the respondent sufficiently established that his persecutors imputed a political opinion to him (IJ at 11-13; Tr. at 73, 76-81, 90-94, 143; Respondent's Br. at 2-7). *Id.* Additionally, the Immigration Judge did not engage in fact-finding related to the motive behind the assault the respondent suffered in Nicaragua to determine whether this assault may have been motivated at least in part by an actual or imputed protected ground (IJ at 11-13; Tr. at 96-99, 143; Respondent's Br. at 2-5). See *Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011) (noting that a persecutor's actual motive is a matter of fact to be found by the Immigration Judge, reviewed by the Board for clear error). Thus, as the Board cannot make findings of fact in the first instance on appeal, we must remand the record to the Immigration Judge for further consideration of the respondent's applications for relief. See 8 C.F.R. § 1003.1(d)(3)(iv) (setting forth the Board's limited fact-finding authority on appeal).

Specifically, on remand, the Immigration Judge should assess whether the individuals who harmed the respondent imputed a political opinion to him, and if so, whether such imputed political opinion was "at least one central reason" that the respondent was harmed in Nicaragua.²

² We note that the Immigration Judge did not fully explain whether the harm the respondent experienced in Nicaragua constituted past persecution. See *Matter of D-I-M-*, 24 I&N Dec. 448, 451 (BIA 2008) ("Because the regulations set forth varying burdens of proof depending on whether an applicant suffered past persecution, it is of paramount importance that Immigration Judges

Matter of N-M-, 25 I&N Dec. at 529 (explaining that an asylum applicant must demonstrate that a protected ground was “at least one central reason” for the claimed persecution). The Immigration Judge should also consider whether the individuals who harmed the respondent were government actors, or, if not, whether the Nicaraguan government is unable or unwilling to control these actors. See *Matter of A-B-*, 27 I&N Dec. 316, 343 (A.G. 2018) (emphasizing the factual nature of the inquiry into whether a purported persecutor is a government actor); see also *Khalili v. Holder*, 557 F.3d 429, 436 (6th Cir. 2009) (providing that the issue of whether a government is unwilling or unable to control actions by non-state actors is a factual determination).

If the respondent does not establish that he suffered past persecution on account of an imputed political opinion, then the Immigration Judge should analyze whether the respondent has an objectively reasonable well-founded fear of persecution should he return to Nicaragua. See 8 C.F.R. § 1208.13(b)(2)(i) (explaining that, in the absence of past persecution, an asylum applicant bears the burden to demonstrate “a reasonable possibility” of suffering persecution on account of a protected ground). On the other hand, should the Immigration Judge determine that the respondent was persecuted on account of an imputed political opinion in Nicaragua, then the DHS bears the burden to rebut the presumption that the respondent maintains a well-founded fear of persecution by demonstrating either (1) a fundamental change in circumstances in Nicaragua, or (2) that there is an area within Nicaragua where the respondent could relocate to avoid future persecution and that, under the circumstances, it would be reasonable to expect the respondent to do so. 8 C.F.R. § 1208.13(b)(1)(i)-(ii).

Given the foregoing, we decline to address the respondent’s remaining appellate arguments. See *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (reiterating the general rule that courts and agencies are not required to make findings on issues which are not dispositive to the outcome of cases) (citing *INS v. Bagamasbad*, 429 U.S. 24, 25-26 (1976)). On remand, both parties should be provided the opportunity to update the record with relevant evidence, including evidence of current country conditions in Nicaragua. The Immigration Judge should also reassess the respondent’s claim for protection under the Convention Against Torture based on any additional fact finding or as he otherwise deems appropriate. In remanding, we express no opinion as to the ultimate outcome of these proceedings.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.



FOR THE BOARD

make a specific finding that an applicant either has or has not suffered past persecution.”). The Immigration Judge should address this issue on remand as necessary.