UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
290 BROADWAY - 29TH FLR
NEW YORK, NY 10007

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DATE 6.29.20 IJ AM? LEGAL ASST SN

Hofstra Law Clinic
Holtzman, Alexander Thomas
108 Hofstra University
Hempstead, NY 11549

In the matter of [redacted]

DATE: Jun 29, 2020

__ Unable to forward - No address provided.

_X_ Attached is a copy of the decision of the Immigration Judge. This decision is final unless an appeal is filed with the Board of Immigration Appeals within 30 calendar days of the date of the mailing of this written decision. See the enclosed forms and instructions for properly preparing your appeal. Your notice of appeal, attached documents, and fee or fee waiver request must be mailed to: Board of Immigration Appeals
Office of the Clerk
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

__ Attached is a copy of the decision of the immigration judge as the result of your Failure to Appear at your scheduled deportation or removal hearing. This decision is final unless a Motion to Reopen is filed in accordance with Section 242b(c)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(c)(3) in deportation proceedings or section 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) in removal proceedings. If you file a motion to reopen, your motion must be filed with this court:
IMMIGRATION COURT
290 BROADWAY - 29TH FLR
NEW YORK, NY 10007

__ Attached is a copy of the decision of the immigration judge relating to a Reasonable Fear Review. This is a final order. Pursuant to 8 C.F.R. § 1208.31(g)(1), no administrative appeal is available. However, you may file a petition for review within 30 days with the appropriate Circuit Court of Appeals to appeal this decision pursuant to 8 U.S.C. § 1252; INA §242.

__ Attached is a copy of the decision of the immigration judge relating to a Credible Fear Review. This is a final order. No appeal is available.

__ Other: _____

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
290 BROADWAY
NEW YORK, NEW YORK

File No.: [redacted]

In the Matter of: [redacted]	**IN REMOVAL PROCEEDINGS**
Respondent.	

CHARGE:	INA § 212(a)(6)(A)(i)	Alien Present Without Admission or Parole
APPLICATIONS:		Suppression/Termination
	INA § 208	Asylum
	INA § 241(b)(3)	Withholding of Removal
	8 C.F.R. § 1208.16(c)	Convention Against Torture Protection

ON BEHALF OF THE RESPONDENT
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ON BEHALF OF THE DEPARTMENT
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DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

[redacted] ("respondent") is a male, native and citizen of El Salvador. Exhibit ("Exh.") 1. He alleges entry into the United States ("U.S.") at an unknown place on July 12, 2006. Exh. 3. On September 15, 2017, the Department of Homeland Security ("the Department" or "DHS") served a Form I-862, Notice to Appear ("NTA"), upon the Varick Immigration Court, charging respondent with removability pursuant to section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA"), as an alien present in the U.S. without admission or parole, or who arrived in the U.S. at any time or place other than as designated by the Attorney General. This commenced removal proceedings against respondent. *Id.*

While in DHS custody, respondent filed a motion to suppress all evidence obtained from him during his encounter with the Suffolk County Sheriff's Office and shared with DHS on August 9, 2017, as well as any additional evidence arising from the allegedly illegally obtained evidence

("MTS"). DHS opposed suppression. On December 1, 2017, a prior Immigration Judge denied respondent's motion to suppress the aforementioned information and terminate these proceedings. Respondent filed an interlocutory appeal with the Board of Immigration Appeals ("BIA" or "Board"). The Board declined to address the appeal by order dated March 7, 2018. Respondent renewed that motion before the instant court following his release from DHS custody and change of venue.

At the December 1, 2017, respondent filed an admittedly untimely Form I-589, Application for Asylum and for Withholding of Removal ("asylum application"), including a claim for withholding of removal under Article III of the United Nations Convention Against Torture ("CAT") with the Varick Immigration Court. The Court found Respondent removable as charged, based on evidence filed by DHS. *Id.* Removability was therefore established by clear and convincing evidence. *See* INA § 240(c)(2)(B). Respondent declined to designate a country of removal. The court, upon the Department's recommendation, designated El Salvador for that purpose. Following his release from custody, respondent appeared before this court on February 26, 2020, for a merits hearing. For the reasons that follow, respondent's motion to suppress and terminate will be denied. His asylum application will be granted.

II. MOTION TO SUPPRESS AND TERMINATE

A motion to suppress is used to challenge admissibility of evidence and may be granted when it is supported by a specific and detailed statement based on personal knowledge that establishes a *prima facie* case for suppression. *Matter of Barcenas*, 19 I&N Dec. 609, 611 (BIA 1988). To set forth a *prima facie* case, the applicant bears the burden to assert a basis for suppression and must enumerate the articles to be suppressed. *Matter of Wong*, 13 I&N Dec. 820, 821-22 (BIA 1971); *see also Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 505 (BIA 1980); *Matter of Tang*, 13 I&N Dec. 691, 692 (BIA 1971).

If the affidavit is such that the facts alleged, if true, could support a basis for excluding the evidence in question, then the claims must also be supported by testimony. *Id.* at 611–12 (emphasis added); *Zuniga-Perez v. Sessions*, 897 F.3d 114, 125 (2d Cir. 2018) (*quoting Maldonado v. Holder*, 763 F.3d 155, 162 (2d Cir. 2014) (If a respondent "provide[s] an affidavit that, taken as true, 'could support a basis for excluding the evidence,'" the respondent "is entitled to 'an opportunity to confirm those allegations in an evidentiary hearing.'"); *see also Cotzojay v. Holder*, 725 F.3d 172, 179 (2d Cir. 2013). If a *prima facie* case is established, the burden then shifts to DHS to justify the manner in which it obtained the evidence at issue. *Matter of Burgos*, 15 I&N Dec. 278, 279 (BIA 1975). DHS's failure to justify the conduct of its agents resolves the issue in favor of suppression. *Matter of Tang*, 13 I&N Dec. 691, 692 (BIA 1971).

A. *Fourth Amendment Violation*

Generally, the Fourth Amendment exclusionary rule does not apply in removal proceedings unless the alleged violations are so "egregious" as to "transgress notions of fundamental fairness" the use of that evidence would violate the Fifth Amendment requirement of due process. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1040-51 (1984); *Zuniga-Perez v. Sessions*, 897 F.3d 114, 124 (2d Cir. 2018). Consequently, evidence obtained pursuant to an egregious Fourth Amendment

violation can be suppressed under the Fifth Amendment. *Melnitsenko v. Mukasey*, 517 F.3d 42, 47–48 (2d Cir. 2008). In the Second Circuit, suppression may be warranted under the Fourth Amendment when the evidence indicates "either (a) that an egregious violation that was fundamentally unfair has occurred, or (b) that the violation—regardless of its egregiousness or unfairness—undermine[s] the reliability of the evidence in dispute." *Rajah v. Mukasey*, 544 F.3d 427, 441 (2d Cir. 2008) (*quoting Almeida-Amaral v. Gonzales*, 461 F.3d 231, 235 (2d Cir. 2006)); *Zuniga-Perez*, 897 F.3d at 124.

The first prong, set forth in *Rajah* and *Almeida-Amaral*, implicates the Fifth Amendment in that suppression is only warranted when evidence is obtained pursuant to an egregious Fourth Amendment violation which "transgress[es] the fundamental notions of 'fair play' that animate the Fifth Amendment." *Rajah*, 544 F.3d at 441; *Matter of Toro*, 17 I&N Dec. 340, 343 (BIA 1980) (egregious Fourth Amendment violation may render evidence inadmissible under the due process clause); *Matter of Garcia*, 17 I&N Dec. 319, 320 (BIA 1980) (holding that statements given involuntarily should be suppressed under the due process standard); *see, e.g., United States v. Isiofia*, 370 F.3d 226, 234-35 (2d Cir. 2004) (suppressing evidence of defendant's identity because he had not given voluntary consent for search of his home, where his passport was seized); *Melnitsenko*, 517 F.3d at 47–48 (finding no Fourth Amendment violation where petitioner was stopped by DHS 107 miles from the Canadian border and interrogated, fingerprinted, and photographed for three hours with no Miranda warnings); *Cotzojay*, 725 F.3d at 179 (finding that Petitioner had established a prima facie case of non-consensual warrantless entry into his home by ICE officers and that the ICE officers' alleged conduct amounted to egregious Fourth Amendment violation).

The Second Circuit has cautioned that "the egregiousness of a constitutional violation cannot be gauged solely on the basis of the validity (or invalidity) of the stop, but must also be based on the characteristics and severity of the offending conduct." *Zuniga-Perez v. Sessions*, 897 F.3d 114, 124 (2d Cir. 2018) (*quoting Almeida-Amaral*, 461 F.3d at 235). Factors to consider in determining whether that there was an egregious violation include "whether the violation was intentional; whether the seizure was gross or unreasonable, and without plausible legal ground; whether the invasion involved threats, coercion, physical abuse or unreasonable shows of force; and whether the seizure or arrest was based on race or ethnicity." Id. (*quoting Cotzojay*, 725 F.3d at 182) (internal quotation marks omitted). A seizure may be an egregious violation, even when it is not "especially severe," if the seizure was "based on race (or some other grossly improper consideration)." *Zuniga-Perez*, 897 F.3d at 124 (*quoting Cotzojay*, 725 F.3d at 181).

However, jurisdictional identity evidence, such as an individual's name, is not suppressible under the Fourth Amendment, even if it was obtained as a result of an unlawful arrest, search, or interrogation. *Lopez-Mendoza*, 468 U.S. at 1039-40; *Pretzantzin*, 725 F.3d at 650-51; *Katris v. INS*, 562 F.2d 866, 869 (2d Cir. 1977); *see also Zerrei v. Gonzales*, 471 F.3d 342, 346 (2d Cir. 2006) (finding admission of copy of alien's passport did not violate alien's due process rights because the alien never objected to its submission and it was treated as authentic by alien's counsel); *see also Matter of Cervantes-Torres*, 21 I&N Dec. 351, 353 (BIA 1996) (finding that the "identity of an alien is never itself suppressible as a fruit of an unlawful arrest."). In *Pretzantzin v. Holder*, the Second Circuit joined the Fourth, Eighth and Tenth Circuits in holding that *Lopez-Mendoza* merely confirmed the long-standing jurisdictional rule that an unlawful arrest has no

bearing on the validity of a subsequent proceeding; it did not create an evidentiary rule insulating specific pieces of identity-related evidence from suppression. 725 F.3d 641, 647 (2d Cir. 2013). Accordingly, the Second Circuit held that the BIA erred in concluding that the government had met its burden of establishing that certain alienage-related evidence had been obtained independent of any constitutional violation. *Pretzantzin*, 736 F.3d at 652.

B. *Regulatory Violations*

When an agency violates its own regulations prior to the initiation of removal proceedings, the relevant inquiry is whether "DHS's error implicated a fundamental right." *Nolasco v. Holder*, 637 F.3d 159, 165 (2d Cir. 2011). Pre-hearing regulatory violations are not grounds for termination "absent prejudice that may have affected the outcome of the proceeding, conscience-shocking conduct, or a deprivation of fundamental rights." *Rajah*, 544 F.3d at 447. Where a regulation was promulgated to protect a due process right, such as the "right . . . to receive notice provided for in the NTA," but "it is clear that the . . . alien received such notice, she has no due process claim, regardless of any technical defect in the manner in which the NTA has been served." *Nolasco*, 637 F.3d at 164. Where a regulatory violation does not affect a fundamental right, the proceeding should be invalidated only if petitioner shows that the "infraction affected either the outcome or the overall fairness of the proceeding." *See Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997); *see also Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1993) (noting that, where no regulation violates a fundamental right, it "is best to invalidate a challenged proceeding only upon a showing of prejudice to the rights sought to be protected by the subject regulation"). In the absence of such prejudice, termination would "place an unwarranted and potentially unworkable burden on the government's adjudication of immigration cases." *Waldron*, 17 F.3d at 518.

C. *Analysis*

Respondent argues that he was subject to an egregious violation of his Fourth Amendment rights during his late night/early morning encounter with the Suffolk County Sheriff's Office ("SCSO") at a bar called [redacted] in Patchogue, New York. [redacted] *Id.* at 25.

Specifically, according to Respondent, the Suffolk County police officers, along with the ICE agents, egregiously violated his Fourth Amendment rights because he was detained and questioned along with the other patrons primarily due to their Latino heritage and their clothing.

See MTS at 4-5. Therefore, any evidence and testimony obtained from the Respondent's arrest should be suppressed. *See id.* Respondent indicates that he went to [redacted] around 11:00 p.m. Exh. 2. Approximately 15 minutes later, 20 officers from the Suffolk County police department entered the bar and stated that they were looking for a known gang member and asked everyone present for identification ("ID"). *Id.* Respondent gave them his Salvadoran identity card because the officers were not allowing any of the patrons to leave without showing their IDs. *Id.* The police officers took respondent's ID and asked him to speak to ICE agents who were standing outside of the bar. *Id.* The agents questioned respondent about his work history, how often he patronized [redacted] and how long he had been in the U.S. *Id.* The agents asked respondent if he was a gang member and asked him to remove his shirt so that they could look for tattoos. *Id.* They also took photographs of his upper body. *Id.* Respondent was then sent back inside where he was again asked to remove his shirt, belt and shoes. *Id.* He was arrested by ICE around 3:00 a.m. and put into an ICE van. *Id.* He was then informed that he was under arrest based upon his immigration status. *Id.* The ICE agents then further questioned him about that status. *Id.*

DHS argues that even though the Suffolk County police officers did not have a warrant to inspect the bar in question, they could do so because courts have long recognized that administrative inspections of closely regulated businesses, such as bars and the liquor industry, fall within the reasonable exception to the warrant requirement under the Fourth Amendment. Respondent argues that the warrantless administrative inspections exception only applies to commercial properties and does not circumvent Fourth Amendment privacy rights of individuals. Furthermore, an administrative inspection cannot be used as a pretext for a warrantless search.

The Court recognizes that respondent has presented some valid arguments regarding the scope of a warrantless search. However, he did not establish that he was detained along with the other patrons primarily because of his racial heritage. The background evidence submitted by DHS shows that law enforcement officials targeted [redacted] because it was considered a public nuisance and was a known MS-13 hangout. *See* Exh. 1A, tab E. The building itself was not structurally sound and was condemned after this incident. The police themselves indicated to respondent that they were also looking for a particular gang member and released other patrons after they showed satisfactory identification documents, apparently regardless of their heritage. Further, while respondent assumes that all of the other patrons of the bar were of Latino heritage, there is no factual basis to support that assertion.

Even assuming that a Fourth Amendment violation occurred because respondent was not suspected of committing any crimes when Suffolk County police officers asked him for his identification and they did not have a warrant to search for any specific individuals associated with the gang, the Court cannot conclude that any such violation was an egregious one. The growing presence of MS-13 poses a serious danger to public safety in many parts of New York and especially on Long Island, in Suffolk County. Our society has a very real interest in addressing the problems posed by MS-13. Again, the background evidence also shows that [redacted] along with another bar, was raided by law enforcement officers because of both administrative violations and known gang presence. Exh. 1A, Tab E, *Cf. Rodriguez v. Barr*, 943 F.3d 134 (2d Cir. 2019) (inference that the respondent's arrest was racially based where it occurred during a raid on a Hispanic neighborhood, in violation of ICE policy and where officers' comments revealed a racial animus as motivation for the raid). At the conclusion of the raids, both bars were closed down and

condemned, seven people were arrested on criminal charges and two were arrested by ICE agents for immigration violations. *See id.* Here, the evidence indicates that rather than targeting individuals of Latino heritage, law enforcement officers were targeting members of the MS-13 gang. While many, if not most of the MS-13 gang members on Long Island may be of Latino heritage, the police would likely arrest any known or suspected gang member, regardless of their ethnic heritage.

Respondent also argues that DHS violated 8 C.F.R. § 287.8(b)(1), which states that immigration officers may pose questions to anyone in consensual encounters as long as they do not restrain the freedom of the person to walk away. DHS argues that Respondent has not provided any evidence to show that the ICE agents restrained his freedom. However, respondent indicates that the police officers kept his ID and asked him to speak to ICE agents. It seems unlikely that someone in the Respondent's situation would think that it is reasonable to walk away from the ICE agents without first speaking to them, such that a regulatory violation could have occurred. Respondent also argues that ICE agents violated 8 C.F.R. § 287.8(b)(2), which allows immigration officers to briefly detain persons for questioning when they have a reasonable suspicion that the subject is an alien illegally in the U.S. Respondent asserts that he was kept at the bar for several hours and was then arrested and place in ICE custody. Respondent did not establish that DHS violated this regulation because ICE agents were aware that he gave the police a Salvadoran ID card, which gave rise to a reasonable suspicion that the Respondent could be in the U.S. without authorization or legal status.

Nevertheless, even if ICE agents did violate 8 C.F.R. § 287.8(b)(1), the Court does not find that termination is appropriate here. Under *Rajah,* termination of proceedings is not warranted unless there is "prejudice that may have affected the outcome of the proceeding, conscience-shocking conduct, or a deprivation of fundamental rights." *Id.* ICE's conduct does not fall into any of these categories. Respondent was present in a bar, which police officers have identified as a public nuisance and a known hangout for MS-13 gang members. He gave the police officers his Salvadoran ID card when they demanded IDs from all of the bar patrons. Subsequently, the ICE agents questioned him based on the suspicion that he was in the U.S. without authorization. Respondent himself admitted that other patrons who were not suspected of violating any criminal or immigrations laws were allowed to leave the bar after the police checked their IDs. Under these circumstances, the Court cannot conclude that even if there was any regulatory violation that it was sufficiently egregious to warrant suppression of any evidence or termination of the removal proceedings.[1]

III. ASYLUM, WITHHOLDING OF REMOVAL AND CAT PROTECTION

A. *Summary of Claim*

The parties stipulated that respondent filed a credible asylum claim. *See Matter of Fefe*, 20 I&N Dec. 116 (BIA 1989). Therefore, this summary is derived from the documentary record.

[1] Having made this finding, the Court declines to reach DHS's argument regarding independent evidence of respondent's alienage. *See e.g., Matter of A-B-*, 27 I & N Dec. 316, 340 (A.G. 2018) (where an asylum application is fundamentally flawed in one respect, the immigration judge need not consider remainder of claim).

Respondent indicates that he entered the U.S. in or about April of 2006. Exh. 6. Prior to his departure from El Salvador, he and his family members were extorted and threatened by gang members. Exh. 4, Tab A. Respondent was also targeted by the gang for recruitment. His sister was once beaten by gang members. On one occasion, respondent was stabbed in the stomach by a gang member who was extorting him. *Id.* He did not seek medical treatment or report this stabbing to the police because he felt the police would not assist him. Respondent does not indicate in his most recent statement why he did not apply for asylum within one year of his entry, although he experienced a stabbing shortly before his departure from El Salvador. Exh. 6.

Respondent applied for asylum after he was detained by DHS. He was motivated to do so because he learned while detained that he had been labeled a gang member by U.S. authorities.[2] Respondent also learned that a cousin of his, who had joined a gang, was killed shortly after he was deported to El Salvador from the U.S. He also indicates that other members of his family were targeted for extortion since he came to the U.S., and his brother was threatened with a gun when he moved back to El Salvador. Exh. 6, p. 8. No specific dates are provided for these latter two events.

Respondent is afraid to return to El Salvador because his attorneys told him that if he is deported, the U.S. government will inform Salvadoran officials that he is a gang member. Exh. 4, Tab A, p. 1. Many parties, including the police, the military, vigilante groups and rival gangs all wish to kill gang members. Respondent believes that no one can protect him in El Salvador because many police and government officials are corrupt and work with the gangs.

B. *Expert Testimony*

Respondent presented the testimony of an expert on country conditions in El Salvador, Dr. Thomas J. Boerman.[3] *See* Exh. 5. He explained that El Salvador is a country roughly the same size as the state of Massachusetts. It has approximately 60-65,000 gang members and millions of sympathizers. The country is divided between the MS-13 and Mara-18 gangs.

Over the past twenty years, the Salvadoran government's response to gangs has been high high-profile, visible government policy and legislation, known as the *Mano Dura*, or Iron Fist. It includes a police and military suppression strategy, and extensive, enhanced prison sentences. According to Dr. Boerman, there is enmity and animosity between the police and military and the gangs, who kill each other "left and right," but on the other hand they have a symbiotic relationship. The gangs are recognized as political actors, "tiptoeing around the edges," and they can disrupt rallies, intimidate voters, and terrorize neighborhoods in support of a candidate or party. Clandestine negotiations and agreements between government officials and gangs occur as well. Dr. Boerman opines that the police cannot control the gangs in El Salvador because the necessary infrastructure does not exist. The country has been ravaged by gang members, but at the same time the police and government are hyper-vigilant about gang presence, and violence is an integral part of policing and law enforcement. The police stop anyone they do not know,

[2] This fear arising from being labeled as a gang member in the U.S. was not included in respondent's initial asylum application, filed with the court on December 1, 2017. Exh. 3.

[3] DHS did not challenge Dr. Boerman's qualification as an expert witness.

particularly young to middle-aged men, strip the individual to search for tattoos, and subject him to threats or abuses.

According to Dr. Boerman, protocols exist between the U.S. and Salvadoran governments, such that the U.S. government alerts the Salvadoran government when a criminal deportee is returned to that country. If a criminal deportee returns to their former neighborhood, the residents become aware of the return. If the deportee relocates to a new area, residents inquire about them. If an actual or suspected gang member arrives in a certain area, the police will know of his presence.

If a deportee is labeled as gang affiliated by the U.S. government, for example if designated as such on an I-213 form or through the U.S. embassy, that individual is subject to additional scrutiny at customs processing at the airport, and immigration and security forces may be involved. Dr. Boerman believes this is an "entirely appropriate" interview, which may become an interrogation. The deportee is questioned about gang affiliation and which items they are bringing from the U.S. The individual is also fingerprinted and photographed. Once an individual gets past this legal dimension, the door is opened to extra-judicial problems. Dr. Boerman is familiar with several dozen incidents involving such problems.

Dr. Boerman described Decree 717, a provision of Salvadoran law that requires returned Salvadorans labeled as members or collaborators of gangs or other illicit groups to register with the government, and provide their address. *See* Exh. 4, tab F. An individual can be taken into longterm custody for failing or refusing to comply. Dr. Boerman was not aware of exactly how an individual complies with the registration requirement; whether the deportee must go to a police substation or to a parole-type office. Dr. Boerman believes that Salvadoran immigration authorities would initiate this process and input the deportee's information into a government computer system, such that the police and military would be aware of the information. No protocol exists to purge gang membership from a government database, and if officers on the street believe that an individual is a gang member, the purging of that person's name from a database would not change that belief.

Gang members cannot function without a political agenda. They shape the sociopolitical climate through the use of terror and manipulation of the political system to gain relative assurances of their ability to operate. They negotiate with political and police officials to establish the parameters of each party's allowable actions. It is impossible to distinguish criminality from politics.

Dr. Boerman reviewed respondent's written file, including the I-213, and spoke to respondent's counsel. He did not interview respondent himself. Dr. Boerman concludes that respondent's life is at risk in El Salvador because he was identified as a gang member in the U.S. Between 2014-2018 or so, the Salvadoran government reported almost 2,000 confrontations between gang members and the police. Approximately 1500 gang members were killed in the last several years, but this number does not include beatings, torture, and disappearances. The police do make reports regarding these incidents, but they are not investigated. Forensic teams remove the body and take it to a morgue, but the number of killings that occur but are not reported is unknown. Longterm residents of the US are generally not seen as residents of El Salvador anymore. If respondent returns there and engages in activities a gang sees as a challenge, for example religious proselytizing, that would put R in greater danger because he

would be seen as a stranger getting involved in gang activity.[4] The Salvadoran government leaves individuals alone to deal with these problems. The ability to relocate internally is a fallacy, as El Salvador is a small country and the population is hypervigilant about who is present in the social environment. People are posted at the entrance to neighborhoods who monitor the ingress of every individual. If they encounter a stranger, they call a designated point of contact and then stop the entering individual to look for tattoos, and rob him of state- issued identity documents. They then investigate the individual's identity, including from whence be has come. According to Dr. Boerman, the main concerns for respondent are the Salvadoran military and police. Gang members are a secondary concern. An anti-gang political opinion would endangers respondent only if he expressed that in a visible way.

There are gated communities in El Salvador where respondent could live safely, but that lifestyle would require significant financial resources. Respondent is unlikely to have access to such funds. Without them, he will likely live in a lower income area that is gang affected or gang controlled.

On cross-examination, Dr. Boerman acknowledged that residents who "keep their heads down" and comply with extortion demands can be safe, but a person who is "on the gang's radar" for whatever reason is exposed to particularized risk. Dr. Boerman does not know how many known or suspected gang members are deported back to El Salvador every year. He was not aware if the U.S. government shares the form I-213 itself with the Salvadoran government, rather than just the information on the document. There are two different information sharing protocols, but Dr. Boerman was not aware if there exists another particular document that would be shared. There are no statistics regarding the number of individual imprisoned for suspected gang membership who are tortured but abuses are rampant, widespread and occur with impunity. 400-600 police officers are arrested for abuses every year, and the majority go back to work without charge. It would be impossible to conduct a study regarding how many individuals who like respondent returned to El Salvador after being identified as a gang member, were tortured or killed, such that no such statistics exist.

C. *Legal Standards*

i. Asylum

To be statutorily eligible for asylum, an applicant bears the burden of establishing that he is a refugee, which requires a showing of past persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA §§ 101(a)(42)(A), 208(b)(1)(A); 8 C.F.R. §§ 1208.13, 1240.8(d). If eligibility is determined, asylum may be granted in the exercise of discretion. INA § 208(b)(1)(A); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987).

[4] Respondent indicates that he is regular churchgoer in the U.S., but did not assert religion as a basis for his claim in the most recent version of his asylum application. Exh. 6, p. 5.

a. *Credibility and Corroboration*

In all applications for asylum, the court must make a threshold determination of the applicant's credibility. *Matter of O-D-*, 21 I&N Dec. 1079, 1081 (BIA 1998). Under the REAL ID Act, after considering "the totality of the evidence, and all relevant factors," the court may base a credibility determination on: the demeanor, candor, or responsiveness of the applicant; the inherent plausibility of the account; the consistency between oral and written statements; the internal consistency of such statements; the consistency of such statements with other evidence of record; and any inaccuracy or falsehood in such statements, "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor." INA § 208(b)(1)(B)(iii); *see also Diallo v. U.S. Dep't of Justice*, 548 F.3d 232, 234 n.1 (2d Cir. 2008); *Matter of J-Y-C-*, 24 I&N Dec. 260, 266 (BIA 2007).

In addition, an applicant requesting asylum under INA § 208 bears the evidentiary burden of proof and persuasion. Testimony that is credible, persuasive, and "refers to specific facts sufficient to demonstrate that the applicant is a refugee" may be sufficient to meet this burden of proof absent corroboration. INA § 208(b)(1)(B)(ii); *see also* 8 C.F.R. § 1208.13(a). However, where the Immigration Judge determines that "the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence." INA § 208(b)(1)(B)(ii). The court should provide an applicant who has not submitted reasonably available corroborating evidence, both an opportunity to explain the absence of such evidence and a continuance if he demonstrates good cause. *Matter of L-A-C-*, 26 I&N Dec. 516, 519 (BIA 2015).

b. *Statutory Eligibility*

An asylum applicant may demonstrate that he is a "refugee" in either of two ways. First, he may demonstrate that he suffered past persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA §§ 101(a)(42)(A), 208(b)(1)(A); 8 C.F.R. § 1208.13(b)(1). Second, he may demonstrate a well-founded fear of future persecution on account of a protected ground by demonstrating that he subjectively fears persecution and that his fear is objectively reasonable. INA § 101(a)(42)(A); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004).

c. *Past Persecution*

To establish past persecution, an asylum applicant must demonstrate that he suffered persecution in his country of nationality or, if stateless, in his country of last habitual residence, on account of a protected ground, and that he is unable or unwilling to return to, or avail himself of the protection of, that country because of such persecution. INA §§ 101(a)(42)(A), 208(b)(1)(B); 8 C.F.R. § 1208.13(b)(1). "Persecution" has generally been interpreted to include threats to life or freedom. *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). "[It] is the infliction of suffering or harm upon those who differ on the basis of a protected statutory ground," and includes "non-life-threatening violence and physical abuse." *Ivanishvili v. U.S. Dep't of Justice*, 433 F.3d 332, 341 (2d Cir. 2006) (internal quotation marks and citations omitted). To constitute persecution, threats typically must be "imminent," "concrete," or "so menacing as to

cause significant actual suffering or harm." *Ci Pan v. U.S. Att'y Gen.*, 449 F.3d 408, 412 (2d Cir. 2006); *see also Guan Shan Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 70 (2d Cir. 2002). Moreover, persecution must be inflicted by either the government or by a person or entity the government is "unwilling or unable to control." *Matter of Acosta*, 19 I&N Dec. at 222; see also *Pavlova v. I.N.S.*, 441 F.3d 82, 91 (2d Cir. 2006) (internal citations omitted). In *Matter of A-B-*, though the Attorney General did not negate the possibility that violence inflicted by non-governmental actors may serve as the basis for an asylum or withholding application based on membership in a particular social group, he stated that outside "exceptional circumstances"' such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address. 27 I&N Dec. 316, 317 (A.G. 2018).

d. *Well-Founded Fear of Future Persecution*

If past persecution is established, a regulatory presumption arises that the applicant has a well-founded fear of future persecution on the basis of his original claim. 8 C.F.R. § 1208.13(b)(1). The Department may rebut this presumption if it demonstrates by a preponderance of the evidence that the applicant's fear is no longer well-founded due to a fundamental change in circumstances or because the applicant could avoid future persecution by relocating to another part of the country and that it would be reasonable to expect him to do so. 8 C.F.R. § 1208.13(b)(1)(i)-(ii).

e. *Discretion*

An applicant who establishes statutory eligibility for asylum still bears the burden of demonstrating that he merits a grant of asylum as a matter of discretion. INA § 208(b)(1)(A); *Cardoza-Fonseca*, 480 U.S. at 428 n. 5 (noting that the Attorney General is not required to grant asylum to everyone who meets the refugee definition). In determining whether a favorable exercise of discretion is warranted, both favorable and adverse factors should be considered. *Matter of Pula*, 19 I&N Dec. 467, 473–74 (BIA 1987) (superseded by regulation on other grounds). General humanitarian factors, such as age, health, or family ties, should also be considered in the exercise of discretion. *Matter of H-*, 21 I&N Dec. at 347–48; *Matter of Pula*, 19 I&N Dec. at 474. In the absence of any adverse factors, asylum should be granted. *Id.* at 474. In addition, the danger of persecution should outweigh all but the most egregious adverse factors. *Wu Zheng Huang v. INS*, 436 F.3d 89, 98 (2d Cir. 2006).

IV. ANALYSIS

A. *Asylum-Timeliness*

Under INA § 208(a)(2)(B), it is the respondent's burden to show by clear and convincing evidence that he applied for asylum within one year of his last arrival in the U.S. Here, respondent claims to have entered the U.S. in or about April 2006, and the asylum application was filed on December 1, 2017, after respondent was taken into DHS custody. Therefore, the application was admittedly untimely filed by over ten years. However, even if a respondent does not file within one year of entry, he may still pursue an application for asylum if she shows either changed or extraordinary circumstances. INA § 208(a)(2)(D). An application must be filed within a reasonable time after the occurrence of the changed or extraordinary circumstances. Here, respondent alleges that he filed his application within a reasonable time after he became aware that

he had been labeled a gang member by U.S. authorities. Respondent also learned while he was detained that a cousin of his, who had joined a gang, was killed shortly after he was deported to El Salvador from the U.S.

The latter reason is not sufficient to establish changed or extraordinary circumstances, as respondent does not indicate when his cousin was deported, or any details surrounding the killing, such as where and why it may have occurred, or the identity of the perpetrators. It is lacking in the details necessary to establish exactly how it relates to respondent's asylum application. However, respondent becoming aware that DHS had labeled him a gang member constitutes such a circumstance, as it created a new basis for him to fear persecution should he return to El Salvador. Further, respondent filed within a reasonable period of time, less than four months, after learning that he had been labelled a gang member by DHS. Accordingly, he has met an exception to the one-year filing deadline and his application for asylum will be considered on the merits.

B. Credibility and Corroboration

The parties stipulated that respondent filed a credible claim. The court finds that Dr. Boerman testified credibly. His testimony, as a whole, was specific, internally consistent, and consistent with his written statement and other documentary evidence. *See* INA § 208(b)(1)(B)(iii); *see also Matter of J-Y-C-*, 24 I&N Dec. at 266; *Diallo*, 548 F.3d at 234 n. 1. DHs made no specific challenge to his credibility either.

C. Statutory Eligibility

i. Past Persecution

Respondent did not establish that he suffered past persecution on account of a statutorily protected ground. To establish persecution on account of a political opinion, the applicant must demonstrate through direct or circumstantial evidence that the persecution is "on account of the victim's political opinion, not the persecutor's." *See INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (emphasis in original); *see also Castro v. Holder*, 597 F.3d 93, 100 (2d Cir. 2010). The Second Circuit has explained that a political opinion does not necessarily mean the expression of an allegiance to a particular political group. *Osorio v. I.N.S.*, 18 F.3d 1017, 1030 (2d Cir. 1994). An imputed political opinion can constitute a ground of persecution whether correctly or incorrectly attributed. *See Yumi v. Gonzales*, 502 F.3d 150, 156 (2d Cir. 2007); *see also Castro*, 597 F.3d at 100. He contends that he was persecuted on account of his anti-gang political opinion, which he manifested by refusing to join the gang. Respondent, however, does not indicate that he expressed an anti-gang political opinion to them, other being unwilling to join them or be extorted by them. Exh. 4, tab A. He also did not establish that the gang imputed any opinion to him, other than his unwillingness to be recruited or subjected to the crime of extortion.

ii. Well-Founded Fear of Future Persecution

As respondent did not establish past persecution on account of a statutorily protected ground, he does not benefit from a regulatory presumption of a well-founded fear of future persecution and therefore continues to bear the burden of proof. *See* 8 C.F.R. § 1208.13(b)(1). The court finds that respondent met that burden.

Respondent argues that he has an objectively well-founded fear of future persecution on account of his membership in a particular social group defined as "U.S. law enforcement labeled gang members." The BIA has interpreted "particular social group" to mean a group with members who "share a common, immutable characteristic" that members cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. *See Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985); *Matter of Kasinga*, 21 I&N Dec. 357, 365-66 (BIA 1996). Social groups must be classes recognizable by society at large. *Matter of A-B-*, 27 I&N Dec. 316, 336 (AG 2018).

Moreover, the purported group must also exhibit a shared characteristic that is socially distinct[5] within the society in question and defined with sufficient particularity.[6] *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208, 210-12 (BIA 2014); *Paloka v. Holder*, 762 F.3d 191, 196 (2d Cir. 2014). When assessing the particularity and social distinction of a putative social group, defining characteristics must be assessed in the social and cultural context of the applicant's country of citizenship or nationality. *M-E-V-G-*, 26 I&N Dec. at 241; *see also W-G-R-*, 26 I&N Dec. at 214-15.

The BIA held that the "'particularity' requirement relates to the group's boundaries or, as earlier court decisions described it, the need to put 'outer limits' on the definition of a 'particular social group.'" *M-E-V-G-*, 26 I&N Dec. at 238. While neither cohesiveness nor homogeneity among group members is required, *see Koudriachova v. Gonzales,* 490 F.3d 255, 263 (2d Cir. 2007), particular social groups must be defined by concrete characteristics that provide a "clear benchmark for determining who falls within the group," and who does not. *M-E-V-G-*, 26 I&N Dec. at 239. "It is critical that the terms used to describe the group have commonly accepted definitions in the society of which the group is a part." *Id.* at 238. Particularity ensures that the group is "discrete" with "definable boundaries" such that it is not "amorphous, overbroad, diffuse, or subjective." *Id.*; *see also Matter of A-B-*, 27 I&N Dec. at 335 (noting that social groups defined by their vulnerability to private criminal activity likely lack particularity, given that broad swaths of society may be susceptible to victimization).

Respondent met his burden of establishing a well-founded fear of persecution on account of a statutorily protected ground, his membership in a particular social group. Respondent's social group, "U.S. law enforcement labeled gang members" is cognizable, in that its members share an immutable characteristic that is socially distinct within Salvadoran society and defined with sufficient particularity. This characteristic is immutable, in that, according to Dr. Boerman, once an individual is labeled as a gang member in police records in El Salvador, there is no means by which to purge that identification from national databases, or from the awareness of local police

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[5] The BIA renamed the "social visibility" requirement "social distinction" to clarify that it does not refer to the literal or "ocular" visibility of a social group. *M-E-V-G-*, 26 I&N Dec. at 236; *W-G-R-*, 26 I&N Dec. at 216; *Paloka*, 762 F.3d at 196 n.2. The two terms are substantively identical. *M-E-V-G-*, 26 I&N Dec. at 236; *W-G-R-*, 26 I&N Dec. at 216.

[6] The concept of particular social group is "broad enough to encompass groups whose main shared trait is a common one, such as gender, at least so long as the group shares a further characteristic that is identifiable to would-be persecutors and is immutable or fundamental." *Gao v. Gonzales*, 440 F.3d 62, 64 (2d Cir. 2006), *vacated and remanded on other grounds sub nom. Keisler v. Gao*, 552 U.S. 801 (2007).

officers. The group is socially distinct, in that its members are compelled by Decree 717 to register and regularly report to the government, and the existence of the decree itself demonstrates a governmental and societal view of suspected gang-affiliated deportees from the U.S. to be especially suspect and warranting governmental surveillance. There is also sufficient evidence to suggest that respondent is a member of this group, as the record established that the U.S. and Salvadoran governments participate in two information sharing protocols, which apply to both criminal and immigration removal investigation records. Exh. 4, tab Z, p. 231. There is no evidence to suggest that respondent's I-213, which identifies him as a gang member, will not automatically be shared with the Salvadoran government. While DHS counsel indicated that according to his own investigation, personnel from ICE in New York do not share such information with Salvadoran authorities, counsel's statements cannot be construed as testimony or evidence. Further, those statements do not obviate the possibility that there may be additional documents in respondent's A file from the Suffolk County Sheriff's Department that label respondent as a gang member.

Further, respondent's fear is subjectively reasonable, considering that he was previously stabbed by a gang member and currently has an additional reason to fear their renewed interest, as he has been labeled an MS-13 gang member by the U.S. government, which may cause him to be targeted by rival gangs in addition to paramilitary forces or the Salvadoran police. His fear is also objectively reasonable, as the record evidence, specifically Dr. Boerman's written statement and testimony indicate that the Salvadoran government will have access to respondent's I-213, which identifies him as an MS-13 member. Dr. Boerman described several dozen incidents in which deportees identified as criminals, returned to El Salvador, were stopped and identified by Salvadoran authorities upon entry, and then faced extra-judicial problems. The Salvadoran police and gangs have a violent, if at other times, symbiotic relationship with gangs, and respondent is likely to be targeted as a gang member once he is identified upon entry into the country as a labeled gang member. Respondent also faces targeting by extra-judicial groups, which are often composed of police officers. Gang members are disproportionately killed during confrontations with members of the police, and El Salvador's Vice-President indicated in 2017 that police officers had the right to use deadly force against gang members "without any fear of suffering consequences." Exh. 4 tab H, p. 110, tab I, p. 122. According to the U.S. State Department *2017 El Salvador Country Report on Human Rights Practices*, the most significant human rights issues included alleged unlawful killings of suspected gang members and others by security forces; forced disappearances by military personnel, which the government prosecuted; torture by security forces; harsh and life-threatening prison conditions; arbitrary arrest and detention; lack of government respect for judicial impartiality and independence and widespread government corruption. Impunity persisted despite government steps to dismiss and prosecute some officials in the security forces, the executive branch, and the justice system who committed abuses.[7]

In many neighborhoods, armed groups and gangs targeted certain persons, interfered with privacy, family, and home life, and created a climate of fear. Efforts by authorities to remedy these situations were generally ineffective. The major gangs controlled their own territory. Gang members did not allow persons living in another gang's controlled area to enter their territory, even when travelling via public transportation. Gangs forced persons to present identification cards

[7] The court takes administrative notice of the most recent State Department report, as it was not filed by either party. *Yang v. McElroy*, 277 F.3d 158 (2d. Cir. 2002).

(containing their addresses) to determine their residence. If gang members discovered that a person lived in a rival gang's territory, that person risked being killed, beaten, or not allowed to enter the territory.

In sum, the testimonial and documentary record demonstrates that respondent has an objectively well-founded fear of persecution at the hands of both state and non-state actors in El Salvador on account of his membership in a particular social group. *Cf. Scarlett v. Barr*, --F.3d--, 2020 WL 2046544 (2d Cir. Apr. 28, 2020). Respondent's status as a U.S. labelled gang member will render him subject to the requirements of Decree 717, which in turn will make him a target for Salvadoran police, extra-judicial forces and by rival gangs. This demonstrates a nexus between his feared harm and his membership in his social group. Accordingly, respondent has demonstrated his statutory eligibility for asylum.

iii. *Discretion*

The court finds that respondent warrants a favorable exercise of discretion. While DHS has labeled respondent a gang member in the U.S., no evidence was provided to establish that respondent is or was in fact so affiliated. Further, despite having resided in the U.S. for many years, he has no criminal record. Although respondent entered the U.S. illegally and has remained here for over a decade, these actions are insufficient to deny his asylum application in the exercise of discretion. *See Wu Zheng Huang*, 436 F.3d at 99; *see also Matter of Pula*, 19 I&N Dec. at 473-74 ("Discretionary denial should not be based solely on the respondent's matter of entry into the United States.") Thus, when considering the totality of the circumstances, a grant of the application is warranted. *Id.* Accordingly, the court grants the respondent's application for asylum.[8]

V. CONCLUSION

The respondent established that he is statutorily eligible for asylum and that he merits a favorable exercise of discretion under INA § 208. Accordingly, after a careful review of the record, the following order will be entered:

Accordingly, after careful review of the record, the following orders will be entered:

[8] As the court has granted the respondent's application for asylum pursuant to INA § 208, the remainder of his arguments and his applications for withholding of removal under INA § 241(b)(3) and under CAT will not be reached in this decision. 8 C.F.R. §1208.16(c).

ORDER

IT IS HEREBY ORDERED that the respondent's application for asylum under INA § 208 be **GRANTED.**

Date: 6/15/20

Aviva L. Poczter
Aviva L. Poczter
Immigration Judge