Files: (b)(6) [redacted]

Date: OCT 11 2011

In re: (b) (6) [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: William P. Joyce, Esquire

ON BEHALF OF DHS: John P. Marley
Senior Attorney

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law (all respondents)

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The United States Court of Appeals for the (b)(6) [redacted] remanded this case to the Board on March 24, 2011. This case has an extremely lengthy procedural history, marked by complications due to the uncertainty of what occurred during the Accomarca massacre of 1985 and the violent retribution that ensued thereafter. Due to the lengthy series of proceedings adjudicating the lead respondent's application for asylum, th(b)(6) [redacted] requested expeditious and final resolution of the lead respondent's claim. The issue on remand is whether "Peruvian military officers whose names became associated with the Accomarca massacre" constitute a particular social group, which would necessitate a finding of past persecution on account of that social group and trigger the presumption for a well-founded fear of persecution. Both parties have presented briefs.

"Particular social group" has been defined as "a group of persons sharing a common, immutable characteristic that makes the group socially visible and sufficiently particular." *See Larios v. Holder*, 608 F.3d 105, 108 (1st Cir. 2010). "Peruvian military officers whose names became associated with the Accomarca massacre" are a highly recognizable group who are identified as a group by the community due to the media attention the massacre and commanding officers received over the years. Thus, we find that the respondent's group met the requisite "social visibility" requirement. *See, e.g., Scatambuli v. Holder*, 558 F.3d 53, 59-60 (1st Cir. 2009). We further find that the lead respondent's group has sufficiently well-defined boundaries inasmuch as its members are limited to the four commanding officers of the Peruvian army who are associated with the events at

Accomarca in 1985. In other words, the group is not too amorphous or loosely defined. *See Matter of A-M-E & J-G-U-*, 24 I&N Dec. 69 (BIA 2007).

Moreover, as noted by the (b)(6) 'membership in a social group 'may stem from an innate characteristic or shared experience.'" *See* (b)(6) *v. Holder* (b)(6) (b)(6) *citing Ang v. Gonzales*, 430 F.3d 50, 55 (1st Cir. 2005); *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) (noting that "[t]he shared characteristic . . . might be a shared past experience such as former military leadership"). The Board has explained that when an alien claims persecution on account of membership in a group of persons who share a common past experience, which is unchangeable or immutable because of the passage of time, an alien may have to show something more than a common past unchangeable experience. *See Matter of C-A-*, 23 I&N Dec. 951, 958-59 (BIA 2006). The Board suggested that assumption of the risk may be a consideration that would preclude a social group based on a shared past characteristic or status where group members assumed the risk of harm, such as police officers. *Id.* However, as found by the (b) (6) (b) (6) there is not a *per se* rule barring claims of asylum founded on persecution suffered while an active member of the military or police force. *See* (b) (6) *supra*, at (b) (6) (discussing limitations of *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988)).

The lead respondent was attacked beyond the scope of his employment. He was attacked near his home while dressed in civilian clothes, approached by gunmen while riding in a taxi, and attacked at a restaurant while dining. The attacks were not limited to the lead respondent. The lead respondent's family received death threats, a bomb was detonated near his parents' house, a kidnaping attempt was foiled at his daughter's school, and a neighbor was murdered in front of his family. Thus, the violence the lead respondent experienced was well beyond that typically experienced in the line of military duty. Additionally, the persecutory acts were not directed at military officers in general, but were specific to the respondent and his status as an officer who is associated with the events at Accomarca. As noted by the (b)(6) the Shining Path made references to the respondent's involvement in Accomarca. (b) (6) *supra*, at (b) (6) Inasmuch as the respondent suffered harm beyond that assumed in his role as military officer and the harm he suffered occurred during personal moments and extended to acts of violence against his family, we recognize the (b) (6) determination that the facts of this case are distinguishable from *Matter of Fuentes*, *supra*.

The Department of Homeland Security (DHS) argues on appeal that "Peruvian military officers whose names became associated with the Accomarca massacre" is not a viable social group because "treating affiliation with a group associated with atrocities is repugnant to the object and purpose of our refugee laws" (DHS brief at 7-9). The DHS then goes on to claim that granting such a group protected status would open the doorway for groups like "Bosnian Serb military officers whose names became associated with the Srebrenica massacre," "Rwandan military or police officers whose names became associated with the Rwandan genocide," and "Nazi Waffen SS officers whose names became associated with the Auschwitz concentration camp" (DHS brief at 9). The DHS's argument, however, ignores that many of the individuals within those groups would be barred from seeking asylum in the first place. 8 U.S.C. § 1158(b)(2) (barring aliens who, among other things, engaged

in persecutory acts, have been convicted of particularly serious crimes, committed serious nonpolitical crimes outside the United States, are a danger to the security of the United States, or engaged in terrorist activity). Such was the concern of this Board in our May 26, 2009, decision. Upon thorough review of the record, however, we determined that the respondent in this instance was not subject to the persecutor bar. Moreover, the lead respondent's particular social group is defined by those who are "associated" with the Accomarca massacre, rightfully or wrongfully, not those who *engaged* in the massacre. Thus, the defined social group is not comprised of those who engaged in criminal or persecutory acts, but includes all who are associated with the event. We acknowledge that the (b) (6) has found that the "particular social group" definition does not extend to groups of people who voluntarily engage in illicit activity. *See Elien v. Ashcroft*, 364 F.3d 392 (1st Cir. 2004). The record does not establish that the respondent has participated in any illicit activity; therefore, the respondent is not subject to that limitation.

Based on our above analysis and the concerns expressed by the (b) (6) in (b) (6), we conclude that the lead respondent established that he is a member of a particular social group and that he suffered past persecution on account of his membership in that group. The lead respondent is thus entitled to a presumption of a well-founded fear of persecution, absent a sufficient rebuttal by the DHS. 8 C.F.R. § 1208.13(b)(1). The burden shifts to the DHS to prove by a preponderance of the evidence that there are changed country conditions, or that the respondents could avoid future persecution by relocating, and that it would be reasonable to do so under all of the circumstances. *See Matter of D-I-M-*, 24 I&N Dec. 448 (BIA 2008).

The respondents argue that the DHS failed to rebut their presumption of a well-founded fear of persecution (Respondent's brief at 25-29). The respondents have submitted seven new and previously unavailable documents to support their argument. We do not consider evidence first offered on appeal because the Board is an appellate body whose function is to review, not to create, a record. *See Matter of Fedorenko*, 19 I&N Dec. 57 (BIA 1984). The DHS argues that the Board should remand the record to the Immigration Judge to allow the parties to further develop the record and to provide the Immigration Judge the opportunity to assess whether circumstances have changed in Peru since the lead respondent left in 1991. The DHS has presented two new and previously unavailable documents to support their argument.

We also consider and take administrative notice of a recent report issued by the State Department. *See* 8 C.F.R. § 1003.1(d)(3)(iv) (Board's authority to take administrative notice); *Gebremichael v. INS*, 10 F.3d 28, 39 (1st Cir. 1993). The 2010 Country Report indicates that although the Shining Path is present in Peru, the group is primarily engaged in narcotic trafficking and is located in remote coca-growing areas. *See* Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, 2010 Human Rights Report: Peru. Thus, there is evidence indicating that relocation within Peru may be "reasonable" for the respondents.

We understand the need for an expeditious outcome in this case. Nonetheless, both parties have asserted that there is new and relevant evidence available. We therefore conclude that the record is stale and will remand the record to the Immigration Court to provide the parties the opportunity to

further develop the record. We reach this conclusion with great reluctance considering the arduous history of this case. We share the sentiment of the (b)(6) and request that the remand be adjudicated as expeditiously as possible.

ORDER: The record is remanded to the Immigration Judge for further fact-finding and legal analysis in regards to the respondents' presumption of a well-founded fear of persecution.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
(b) (6) [redacted]

IN THE MATTER OF:

(b) (6) [redacted] (Lead)	)	**In Removal Proceedings**
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Respondents[1]	)	

CHARGE: Immigration and Nationality Act (INA) § 237(a)(1)(B) – Nonimmigrant who remained in the United States for longer than permitted

APPLICATIONS: Asylum, pursuant to INA § 208;
Withholding of removal, pursuant to INA § 241(b)(3);
Voluntary Departure, pursuant to INA § 240B.

ON BEHALF OF RESPONDENTS:
William P. Joyce, Esq.
Joyce & Associates, P.C.
(b) (6) [redacted]

ON BEHALF OF DHS:
John P. Marley, Senior Attorney
U.S. Immigration and Customs Enforcement
(b) (6) [redacted]

DECISION OF THE IMMIGRATION COURT

I. Procedural History

This case has a lengthy procedural history, and only the portions pertinent to this decision are recited here. The earlier procedural history can be found in the previous decisions. *See* (b) (6) [redacted] *v. Holder*, (b) (6) [redacted] Decision of the Immigration Court (July 14, 2008) at 1-5.

On (b) (6) [redacted] the United States Court of Appeals for the (b)(6) [redacted] vacated the

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[1] (b) (6) [redacted] was also originally a Co-Respondent in this case. The Court previously continued her case to allow her the opportunity to adjust her status based on a visa petition filed on her behalf by her United States citizen husband. Decision of the Immigration Court (July 14, 2008) at 31. The Court granted her adjustment of status application and she became a conditional lawful permanent resident on November 19, 2009. On remand, she is no longer considered a Co-Respondent.

Board of Immigration Appeals' (BIA or Board) denial of the asylum claim and remanded the case to the Board to determine whether "Peruvian military officers whose names became associated with Accomarca" was a cognizable social group. (b)(6) *Holder*, (b) (6) (b) (6) Finding that it was, the Board then remanded this case to the (b) (6) Immigration Court (Court) "for further fact finding and legal analysis in regard to the respondents' presumption of a well-founded fear of persecution." (b)(6) (b)(6)

The Court convened a pre-hearing conference on October 20, 2011, during which both parties requested the opportunity to submit additional evidence, including expert testimony. The parties timely filed their respective pre-hearing submissions, and an individual hearing was held on December 20, 2011, in which the Court heard testimony from Dr. (b) (6) and Mr. (b) (6)

II. Documentary Evidence

The Court carefully considered all of the documents previously submitted, in addition to:

Remand Group Exhibit 1 DHS Submission of Evidence (Nov. 21, 2011), including:[2]

(1) Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, Letter from Scott Busby to Ms. Kelly Fry (dated Nov. 10, 2011);
(2) Rick Vecchio, *Former Peruvian army officer's deportation from U.S. to Peru imminent to face massacre charges*, Peruvian Times, Aug. 14, 2008;
(3) *Criminal Trial Starts in Peru for the Accomarca Massacre*, Center for Justice and Accountability, Nov. 18, 2010;
(4) *Peru revokes law denying justice for victims of past crimes*, Amnesty International, Sept. 15, 2010;
(5) Ángel Páez, *Three More Bodies Found at Accomarca*, IPS, Oct. 20, 2011;
(6) Lucien Chauvin, *Peru's newly sworn-in Humala will face remnants of Shining Path*, Christian Science Monitor, July 28, 2011;
(7) Simon Romero, *Cocaine Trade Helps Rebels Reignite War in Peru*, N.Y. Times, Mar. 17, 2009;
(8) Annie Murphy, *Old Rebel Group Looks For Foothold In Modern Peru*, NPR, June 21, 2011;
(9) *30 years on, Peru's Shining Path remnants live on*, Radio Netherlands Worldwide, May 19, 2010;
(10) *Shining Path Communication Network in Jungle of Peru Jungle* [sic] *Destroyed*, Diálogo, June 15, 2009;

[2] All news articles were printed from internet sources. DHS did not provide the internet URLs.

(11) *Peru police capture alleged high ranking Shining Path member*, Peruvian Times, Oct. 14, 2010;
(12) *Peru announces capture of key Shining Path guerilla,* asiaone, Dec. 30, 2010;
(13) *Freedom in the World 2011 – Peru*, Freedom House, July 26, 2011;.
(14) Naomi Mapstone, *Shining Path splinter groups swap ideology for cocaine*, Financial Times (UK), May 17, 2010;
(15) Derek Henry Flood, *The Shining Path's Comrade Artemio: Leader of Peru's Narco-Maoists*, Militant Leadership Monitor, Nov. 2010;
(16) *Peru rebels ambush coca clearers*, BBC News, Apr. 4, 2010;
(17) Dan Collyns, *Peru guerillas tread a new path*, BBC News, Feb. 1, 2009;
(18) Brigadier General (Ret.) Andrés Acosta, *Shining Path and Its Changing Threat*, Diálogo, July 1, 2011;
(19) *Amnesty International Annual Report 2011 – Peru*, Amnesty International, May 13, 2011;
(20) *Country Reports on Terrorism 2010 – Peru*, U.S. Dep't of State, Aug. 18, 2011;
(21) *Peru country profile*, BBC News, July 28, 2011;
(22) *Responses to Information Requests*, Immigration and Refugee Board of Canada, Feb. 17, 2011;
(23) *Responses to Information Requests*, Immigration and Refugee Board of Canada, Feb. 3, 2006;
(24) *Shining Path members attacked tourists in Choquequirao*, PeruthisWeek.com, Aug. 18, 2011;
(25) *Peruvian Says Shining Path Can Take Part in Elections*, Latin American Herald Tribune, Oct. 27, 2011;
(26) *The Rise and Fall of Shining Path*, Council on Hemispheric Affairs, May 6, 2008;
(27) *U.S. State Department offers reward for Shining Path leaders*, Peruvian Times, July 20, 2010;
(28) *Reward Offered for Militants*, Diálogo, 2010;
(29) Jason Simpkins, *The Booming Economy You Never Heard About: Peru Makes Its Way In South America*, Money Morning, Sept. 14, 2007;
(30) *Peru Economy Profile 2011*, index mundi;
(31) Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Peru Country Reports on Human Rights Practices – 2010* (Apr. 2011);

(32) Rocio Maldonado, *Sendero Luminoso Does Not Represent the Threat that was Present in the 80's and 90s's*, La República, May 16, 2010 (translated);
(33) Declaration of (b) (6) (dated Mar. 10, 2008);
(34) Curriculum Vitae of Dr. (b) (6)
(35) Affidavit of (b) (6) Ph.D;

Remand Group Exhibit 2

Respondents' Additional Documents in Support of their Application for Asylum and Withholding of Removal (Dec. 14, 2011), including:[3]

(A) Affidavit of (b) (6) dated Dec. 14, 2011);
(B) Curriculum Vitae of (b) (6)
(C) Ángel Páez, *SL fails in attempt to shoot down Mi-17, but kills the pilot and a captain*, La República, Sept. 15, 2011 (translated);
(D) *Taking up of arms encouraged, Terrorist mural graffiti appears in Chiclayo*, La Razón (translated);[4]
(E) *Car bomb outside U.S. Embassy in Peru kills 9*, CNN.com, Mar. 21, 2002;
(F) *Peruvian troops seek hostages*, BBC News, June 10, 2003;
(G) Arthur Brice, *Shining Path rebels stage comeback in Peru*, CNN.com, Apr. 21, 2009;
(H) Joe Contreras, *Turning the Clock Back to Chaos?*, The Daily Beast, Mar. 17, 2002;
(I) *19 killed in Peru in worst Shining Path attack in 10 years*, AFP, Oct. 10, 2008;
(J) Geoffrey Ramsey, *Shining Path Rebel Leader Calls for Truce with Peru's Govt*, In Sight, Dec. 8, 2011;
(K) *Shining Path (SL) attacks again*, La Voz (translated);
(L) *Guerrillas Kill Soldier, Wound 2 Others in Southern Peru*, Latin American Herald Tribune, Dec. 6, 2011;
(M) *Shining Path and the Drug War*, GlobalSecurity.org, Dec. 13, 2011;
(N) Gretchen Small, *Peru's 'Shining Path' exposed: How to fight narco-terrorism*, EIR, Oct. 1, 1984;
(O) Max G. Manwaring, *The Resurgence of Peru's Shining Path*, World Politics Review, Feb. 22, 2011;
(P) Isabel Guerra, *Peru: Still no trials 25 years after Accomarca massacre*, LivinginPeru.com, Aug. 13,

[3] With the exception of the articles located at tabs C, D, N, T, and X (and possibly K), all articles were printed from the news sources' websites.

[4] The photocopy of the article and accompanying translation did not indicate the publication date. In the Table of Contents submitted by the Respondents, the date of publication is indicated as November 1, 2011.

2010;

(Q) Angel Páez, *US Judge Awards Millions in Damages to Massacre Survivors*, IPS, Mar. 5, 2008;

(R) Rick Vecchio, *Former Peruvian army officer's deportation from U.S. to Peru imminent to face massacre charges*, Peruvian Times, Aug. 14, 2008;

(S) *[Victims] Request that Alan Garcia be Included in the Telmo Hurtado (III) Case*, Crónica Viva, July 16, 2011 (translated);

(T) Cesar Romero C., *Telmo Hurtado Denied Charges*, La República, Aug. 16, 2011 (translated);

(U) Office of the Coordinator for Counterterrorism, U.S. Dep't of State, *Country Reports on Terrorism: Western Hemisphere Overview – 2009* (Aug. 2010);

(V) Geoffrey Ramsey, *Peru Looks to Colombia for Counterinsurgency Model*, In Sight, Aug. 15, 2011;

(W) Hannah Stone, *Peru Extends State of Emergency in Rebel Heartland*, In Sight, Nov. 7, 2011;

(X) [redacted] *Peru's Sendero Luminoso: From Maoism to Narco-Terrorism*, TerrorismMonitor, Dec. 8, 2008;

Remand Exhibit 3 [redacted] *v. Holder*, [redacted] (order directing parties to file joint status report on or before Jan. 10, 2012, and every sixty days thereafter);

Remand Exhibit 4 *In the Matter of the Extradition of* [redacted] (order granting government's Motion to Dismiss Extradition Proceedings).

III. Applicable Law

A. Presumption of Well-Founded Fear based on Past Persecution

An applicant who has suffered past persecution on account of a statutorily protected ground is presumed to have a well-founded fear of future persecution on account of that same protected ground. 8 C.F.R. § 1208.13(b)(1). This presumption may only be rebutted if the government establishes, by a preponderance of the evidence, that there has been a "fundamental change in circumstances" in the country at issue such that the applicant no longer has a well-founded fear of future persecution, or that the applicant could avoid future persecution by relocating to another part of the country. 8 C.F.R. § 1208.13(b)(1)(i).

In determining whether internal relocation is reasonable, the Court considers whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; any administrative, economic, or judicial infrastructure problems; any

geographical limitations; or any social and cultural constraints. 8 C.F.R. § 1208.16(b)(3); *see also Tendean v. Gonzales*, 503 F.3d 8, 11 (1st Cir. 2007) (holding that, even with a finding of past persecution, alien's asylum application was defeated because he could safely relocate within Indonesia).

B. Humanitarian Relief

The Court may also grant an applicant asylum if he or she demonstrates "compelling reasons for being unwilling or unable to return" to his or her country of nationality, or "a reasonable possibility that he or she may suffer other serious harm upon removal to that country." 8 C.F.R. §§ 1208.13(b)(1)(iii)(A), (B); *see also Precetaj v. Holder*, 649 F.3d 72, 75 (1st Cir. 2011) (noting that this approach is sometimes referred to as "'humanitarian' asylum").

An applicant may warrant a grant of asylum in the exercise of discretion, even where there is little likelihood of future persecution, if compelling, humanitarian considerations would be involved if he were forced to return to the country where he suffered persecution in the past. *Matter of H-*, 21 I&N Dec. 337, 347 (BIA 1996) (noting that "asylum should be granted in the exercise of discretion ... where the asylum applicant has suffered such severe persecution that he or she should not be expected to repatriate"); *Matter of Chen*, 20 I&N Dec. 16, 20-21 (BIA 1989) (granting asylum to a respondent who suffered severe past persecution in China and demonstrated other compelling factors to warrant a favorable exercise of discretion); *Matter of S-A-K- and H-A-H-*, 24 I&N Dec. 464 (BIA 2008) (following *Matter of Chen, supra*, and holding that a mother and daughter from Somalia who provided sufficient evidence of past persecution in the form of female genital mutilation with aggravated circumstances were eligible for a grant of asylum based on humanitarian grounds pursuant to 8 C.F.R § 1208.13(b)(1)(iii)(A), regardless of whether they could establish a well-founded fear of future persecution).

"Other serious harm" is defined as "harm that is not inflicted on account of race, religion, nationality, membership in a particular social group, or political opinion, but is so serious that it equals the severity of persecution." 65 Fed.Reg. 76121-01, 76127 (Dec. 6, 2000). The Federal Register further provides that, "[m]ere economic disadvantage or the inability to practice one's chosen profession would not qualify as 'other serious harm.'" *Id.* In discussing the "reasonable possibility ... of other serious harm," the First Circuit applied the "reasonable possibility" of future harm standard, which it suggested could be met by as little as a one in ten chance. *Quevedo v. Ashcroft*, 336 F.3d 39, 45 (1st Cir. 2003) (citing *INS v. Cardoza–Fonseca,* 480 U.S. 421, 440 (1987)).

C. 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); *see also INS v. Cardoza-Fonseca*, 480 U.S. at 428 (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 (BIA 1987). Humanitarian factors, such as age, health, or family ties, should be considered in the exercise of discretion. *Matter of H-*, 21

I&N Dec. at 347-48 (citing *Matter of Pula, supra*). The danger of persecution should outweigh all but the most egregious adverse factors. *Matter of Pula*, 19 I&N Dec. at 474.

IV. Findings of Fact and Conclusions of Law

A. Presumption of Well-Founded Fear based on Past Persecution

The Court was charged with the narrow and specific task of conducting further fact-finding and legal analysis regarding the presumption of a well-founded fear of future persecution. (b) (6) As the Court found, and the Board and (b) (6) affirmed, that the Lead Respondent suffered harm that rose to the level of past persecution, he is presumed to have a well-founded fear of future persecution on account of that same protected ground. *See* 8 C.F.R. § 1208.13(b)(1); *see also* Decision of the Immigration Court (July 14, 2008) at 24; (b) (6) (b) (6) This presumption inures to the benefit of the co-Respondents as well. *See* 8 C.F.R. § 1208.13(b)(1). The Court finds that DHS has not rebutted the presumption.

The parties presented competing expert opinions and documentary evidence of the likelihood of harm that the Respondents would face in Peru. Both experts were subjected to voir dire and both were tendered as expert witnesses.[5] Dr. (b) (6) was qualified as an expert on country conditions in Peru, and tendered as an expert on the Shining Path's history, expansion, demise, current disposition, current motives, and methods of operation. The Court found the witness qualified to render an expert opinion, over the Respondent's objection, to those areas of expertise. DHS did not object to Mr. (b) (6) testifying as an expert regarding how terrorist organizations operate, but did object to his expertise on the present intentions, motivations, and capabilities of the Shining Path, as well as his qualifications as an expert on country conditions. The Respondent did not tender Mr (b) (6) as an expert on the academic history of the Shining Path or all political aspects of life in Peru. The Court found Mr. (b) (6) to be qualified to offer expert opinion on (1) how terror organizations such as the Shining Path operate, and (2) the Shining Path's capacity, will, and ability to harm the Respondents if they return to Peru.

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[5] The Federal Rules of Evidence provide that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. As the BIA has noted, "The Federal Rules of Evidence, while not binding, may provide helpful guidance in immigration proceedings because the fact that specific evidence would be admissible under the Federal Rules 'lends strong support to the conclusion that admission of the evidence comports with due process.'" *Matter of D-R-*, 25 I&N Dec. 445, fn. 9 (BIA 2011). As the trier of fact, the Court found both witnesses to be qualified as experts and found their testimony to be helpful in reaching its conclusions as set forth *infra*.

Both experts testified that country conditions in Peru have changed significantly since the Respondents' departure. Both discussed the two factions of the Shining Path in the Upper Huallaga Valley (Huallaga or UHV) and the Apurimac and Ene River (VRAE) regions and testified that drug trafficking has become a central component in the organization of the Shining Path faction in the VRAE region. The experts both cited a car bombing in Peru in 2002, attributed to the Shining Path, and the recent attempts by Comrade Artemio to initiate a dialogue with the Peruvian government. Articles submitted by each party supported the experts' assertions that the Shining Path no longer has the same violent presence in Lima that it did prior to the Respondents' departure. However, the experts presented competing opinions when addressing the potential threat that the Shining Path poses to the Respondents presently.

Dr. (b) (6) DHS' country conditions expert, testified consistently with her affidavit in which she offered her expert opinion that "there is simply neither the motivation nor ability for the Shining Path to target former military officers whose names became associated with specific instances of state-sponsored massacres." (b) (6) Affidavit, Remand Group Exh. 1 at 158. While much of her testimony focused on her disagreements with Mr. (b) (6) opinions and the basis for those opinions, Dr. (b) (6) explained that she based her own opinion on a comparison of the Lead Respondent's situation to that of his similarly-situated colleagues, the recently-returned (b) (6) are members of the Lead Respondent's particular social group and are also named defendants along with the Lead Respondent in the criminal case in Peru regarding the events at Accomarca.[6] Dr. (b) (6) testified that the Shining Path has not attempted to harm either (b) (6) She also based her opinion on the fact that the Shining Path's attacks today are almost exclusively related to narco-trafficking and that the "campaigns of selected assassinations in the '80s and early '90s virtually no longer exist." She testified that her "sense," supported by evidence, was that the Shining Path is no longer interested in targeted assassinations.

Mr. (b) (6) the Respondents' counterterrorism expert, on the other hand, offered the expert opinion that a lull in activity does not indicate that the group will not carry out another terrorist act. His testimony is consistent with his affidavit.[7] *See* (b) (6) Affidavit, Remand Group Exh. 2 at 5 ("The fact that no such attacks have been reported to date does not eliminate the possibility that they will be carried out in the future"). Mr. (b) (6) testified that when a terrorist organization makes specific plans, the group "goes silent, or virtually silent," as making their plans accessible would provide a means to prevent the attack. In his affidavit, he further

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[6] On April 12, 2011, the extradition proceedings against the Lead Respondent were terminated by the United States District Court, (b) (6) upon a motion to dismiss filed by the United States government. Remand Group Exh. 4.

[7] DHS' attack on Mr. (b) (6) credibility during cross-examination due to his consulting company's political involvement and affiliation does not affect the outcome of this case. Mr. (b) (6) testified that he is politically independent, and that his political beliefs do not affect his opinions in this case in any way. No contradicting evidence was presented. DHS also suggested that Mr. (b) (6) is biased because of his work in counterterrorism and the kinship he might feel for others in the field. While Mr. (b) (6) may be sympathetic to the Lead Respondent's situation, his sympathy did not alter his opinions or testimony and the Court finds Mr. (b) (6) testimony to be reliable, credible and without significant bias.

explained that the Shining Path "would want their attack(s) to be unprecedented because that would increase the likelihood of success. Therefore, if such attacks do take place, they will likely be without warning and without precedent." *Id.* Mr. (b) (6) expert opinion is that the Lead Respondent and his family would be at risk if he were to return to Peru. *Id.* at 3. The basis for this opinion is that the Shining Path tried to assassinate him in the past and even kidnap his daughter. They distributed leaflets that asserted that what he did would 'never be forgotten.' The Shining Path has a long-held grudge that began with Accomarca, and like a Fatwa, it never goes away. Moreover, the Shining Path would have no trouble finding the Respondents. Mr. (b) (6) expert opinion was also that it would be to the advantage of the Shining Path to assisinate the Lead Respondent to send a message to warn people against cooperating with authorities and against turning in drug traffickers. Further, since the Lead Respondent is no longer associated with the government, his concerns are heightened because he is no longer under government protection.

Mr. (b) (6) testimony supports the Court's finding that the Lead Respondent's position is distinguishable from that of the other officers' because he played a lesser role in the Accomarca attack than the others and has already been acquitted by a Peruvian military court. The Court also finds that if the other defendants are convicted, but the Lead Respondent is not, it is likely that he will be a more vulnerable target of private retribution. The fact that the Lead Respondent's particular social group continues to receive public and media attention creates and increases the risk that he will be targeted for persecution on that protected ground. *See* (b) (6) Affidavit, Remand Group Exh. 2 at 4.

Both experts testified that at least one of the Shining Path factions, the group in the Huallaga region, remains politically motivated. Dr (b) (6) testified that Comrade Artemio (the leader of the Huallaga faction) continued the armed struggle after founding leader Abimael Guzman's capture in 1992, and he continues to follow the ideology of the organization. Though this group is seeking to negotiate with the government, to reach a truce in which the group lays down its arms in exchange for peace and amnesty, both experts testified that it is unlikely that an agreement would be reached. *See also* Remand Group Exh. 2 at 30. Dr. (b) testified that Artemio is asking for concessions that the Peruvian government is not willing to give, and she interpreted his actions as revealing that his faction has no political future. Though Guzman has been advocating for peace talks since 1993, the Shining Path has continued to carry out terrorist attacks. *See, e.g.*, Dep't of State Letter, Remand Group Exh. 1 at 2.[8] Both factions, including

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[8] This document is given significant weight, as discussed *infra*. Although all asylum applications must be sent to the Department of State for response pursuant to 8 C.F.R. § 1208.11, few if any receive specific comment. On the rare occasion when a response is received, it refers the Court to the current Department of State report on the country in question. This is the first occasion that this Immigration Judge has ever received a Respondent-specific response from the State Department, which makes it particularly noteworthy. According to the Board, the State Department's letter, submitted in compliance with 8 C.F.R. § 1208.11, is highly probative, even though it is an ex parte declaration submitted without the traditional safeguards required of admissible evidence in judicial proceedings, because:

> The purpose in admitting the advisory opinion of the State Department into evidence at a hearing on an asylum claim is three-fold: (1) to establish compliance with the regulatory requirement of 8 C.F.R. [§] 208.10(b) [sic] [proper citation is 8 C.F.R. § 208.11]; (2) to bring forth any information available to the State Department which supports the applicant's claim; and (3) to indicate the State Department's opinion regarding the

Artemio's politically-motivated group, are involved in narcotics trafficking. Dep't of State Country Report on Terrorism, Remand Group Exh. 2 at 68. Thus, the Court finds that, despite peace proposals, because of the Shining Path's political motivations and connections to narcotics trafficking, the group continues to be a danger.

Though Dr. (b) (6) offered the opinion that the Shining Path no longer has the resources to harm the Respondents, her own testimony, as well as the testimony of Mr. (b) (6) and many of the materials submitted by both parties, contradict that assertion. The evidence in the record indicates that both remaining factions of the Shining Path have become heavily involved in narcotics trafficking, which affords the groups resources including significant amounts of money and weapons. *See, e.g.*, Remand Group Exh. 2 at 14. Dr. (b) (6) testified that the Shining Path faction in the VRAE region is the one predominantly involved in narcotics trafficking, but evidence supports a finding that the group in the UHV region is also involved. *The Shining Path's Comrade Artemio: Leader of Peru's Narco-Maoists*, Remand Group Exh. 1 at 30. The State Department reported that "[b]oth factions continued to engage in drug trafficking, and in 2009 carried out more than 100 terrorist acts that killed at least three police officers and 26 civilians." *Id.* at 68.[9] In a subsequent report, the State Department noted that "[i]n 2010, the U.S. State Department added the leaders of both [Shining Path] factions to its Narcotics Rewards Program, and offered up to US$5 million each for information leading to the arrest and/or conviction of Florindo Eleuterio Flores-Hala (aka 'Artemio,' of the UHV) and Victor Quispe Palomino (aka 'Jose,' of the VRAE)." Dep't of State Country Report on Terrorism, Remand Group Exh. 1 at 41. Based on these facts, the Court finds that the Shining Path has the resources to carry out an attack on the Respondents. The Court also finds that these resources support the Respondents' argument that they cannot safely relocate because the Shining Path has the resources to find them anywhere in the country, as Mr. (b) (6) testified (the money available from drug trafficking is "staggering"). *See also* (b) (6) Affidavit, Remand Group Exh. 2 at 6.

Though, as Dr. (b) (6) discussed in her testimony, the Shining Path's recent targets have been police and military forces in the areas where the Shining Path operates in the Huallaga and VRAE regions, the State Department indicated that some analysts interpreted recent attacks as the Shining Path attempting to expand. Dep't of State Letter, Remand Group Exh. 1 at 1.[10] Recently-elected President Humala "has said that one of the first orders of business when he is president will be to sit down with military and police leadership to formulate a plan to 'wipe out the scourge' of terrorism." Remand Group Exh. 1 at 11. Previously, when the government

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likelihood of persecution given the specific facts presented by the applicant.

Matter of Exilus, 18 I&N Dec. 276, 279 (BIA 1982). As the letter from the State Department in this case was Respondent-specific, recent, and based on current country conditions, the Court gives this piece of evidence significant weight and relies on the statements made therein. The Court finds that this document is part of the support for its finding that DHS has not rebutted the Respondents' presumed well-founded fear of future persecution.

9 The State Department "has acknowledged expertise in discerning the conditions that prevail in foreign lands" and thus its reports are generally probative evidence of country conditions. *Palma-Mazariegos v. Gonzales*, 428 F.3d 30, 36 (1st Cir. 2005).

10 *See* fn. 8, *supra*.

intensified its counterinsurgency campaign, there was an increase in killings. *See id.* at 13. Thus, the more the government attempts to control or eliminate the group, the more violent the reaction becomes. Comrade Artemio has previously attacked targets in ways that would garner media attention. *Peru's Sendero Luminoso: From Maoism to Narco-Terrorism*, Remand Group Exh. 2 at 74. The criminal charges associated with the Lead Respondent's name have garnered international media coverage. *See, e.g., id.* at 51, 54, 55, 58; *see also, e.g.*, Remand Group Exh. 1 at 5, 8. Thus, an attack on a target such as the Lead Respondent during a trial regarding events that occurred during a powerful time in the Shining Path's history, and against a person whom they have targeted in the past, would be consistent with their modus operandi. *See Peru's Sendero Luminoso: From Maoism to Narco-Terrorism*, Remand Group Exh. 2 at 74. As noted above, although Artemio (who leads the politically-motivated faction of the Shining Path) has recently called for a truce, both experts agreed that it was unlikely that the Peruvian government would negotiate with the group. *See, e.g.*, Remand Group Exh. 2 at 30.

The State Department's recent Respondent-specific letter enforced Mr. (b) (6) opinions. Though the State Department reports that "there have been no reports of Shining Path members targeting former military and/or intelligence personnel," the State Department is of the opinion that the Shining Path "remains a threat." Dep't of State Letter, Remand Group Exh. 1 at 1. According to the State Department, "[t]he two Shining Path factions combined are believed to have several hundred armed members, while the number of its supporters in the urban areas is unknown. From 2008 to the present, the government of Peru has declared emergency zones in the provinces of Ayacucho, Cusco, Huancavelica, and Junin based on Shining Path activities." *Id.* In 2010, *both* factions of the Shining Path carried out a combined 136 terrorist acts. *Id.* at 2. The letter describes the current Shining Path organization as "entwined with narcotics trafficking," as both experts agreed in their testimony. *Id.* at 1.

Although country conditions in Peru have improved since the Respondents left in 1991, and while it is impossible to predict the Shining Path's precise actions in the future, this does not mean that the Respondents will be free from persecution. The evidence adduced by DHS is insufficient to rebut the presumption of the Respondents' well-founded fear.

Moreover, under the so-called 'Bathtub Model,' as explained by Mr. (b) (6) in his testimony and affidavit, a period of relative calm is not necessarily an indication of peace. (b) (6) Affidavit, Remand Group Exh. 2 at 4. As the Shining Path continues to operate in Peru, and has access to significant amounts of money and weapons through narcotics trafficking, the risk of another terrorist attack remains. Further, while the Court recognizes that the Peruvian government has taken significant measures to combat the Shining Path, it is still not able to control the terrorist group, as evidenced by the 136 terrorist acts committed in 2010, including the killing of civilians, military, and police personnel. Comrades Artemio and Jose have been fugitives for decades and the Peruvian government has not been able to capture either man or effectively curb their growing involvement in drug trafficking.

For all of these reasons, the Court finds that DHS has not shown by a preponderance of the evidence that there has been a fundamental change in circumstances such that the Respondents no longer have a well-founded fear of future persecution. Because DHS has failed to rebut the Respondents' presumed well-founded fear, the Court grants their applications for

asylum.

B. Humanitarian Relief

In the alternative, the Court grants the Respondents asylum based on humanitarian considerations. The Lead Respondent suffered severe past persecution in the forms of multiple attempted assassinations, approximately twenty credible death threats, and the attempted kidnapping of one of his daughters. *See* Decision of the Immigration Court (July 14, 2008) at 24; *see also* (b) (6) Based on this persecution, the Lead Respondent fled to the United States with his family where they have lived for more than twenty years. Thus, even if there were little likelihood of future persecution, the Court would grant the Respondents' applications for humanitarian asylum. *See Matter of Chen*, 20 I&N Dec. at 20-21.

Additionally, the Court finds there to be a reasonable possibility that the Respondents will suffer other serious harm upon removal to Peru. *See* 8 C.F.R. § 1208.13(b)(1)(iii)(B). As the Court has found, the Shining Path remains a threat in Peru, and to the Respondents in particular, and through its involvement in narcotics trafficking, has the resources and ability to carry out attacks against the Respondents, regardless of their membership in a particular social group. *See, e.g.*, Testimony of (b) (6) and Dep't of State Letter, Remand Group Exh. 1 at 1-2 (regarding the ongoing threat of the Shining Path and the numerous terrorist activities carried out by the group).

C. Discretion

The Respondents have been in the United States for over two decades, working, studying, paying taxes, and obeying the laws of the country. One of the daughters has married a citizen of the United States and been granted conditional lawful permanent resident status. Not a single adverse factor weighs against their many positive equities. The Court therefore finds that its discretion should be favorably exercised.

Because the Respondents have been granted asylum, the Court does not reach the remaining claims for withholding of removal or voluntary departure.

ORDERS

IT IS HEREBY ORDERED that (b) (6) [redacted] application for asylum, pursuant to INA § 208, is **GRANTED.** The two Co-Respondents' applications for derivative asylum are also **GRANTED.**

IT IS HEREBY FURTHER ORDERED that the Respondents' remaining applications are moot.

If any party elects to appeal this decision, the Notice of Appeal must be received by the Board of Immigration Appeals within thirty (30) days of this decision.

2/6/12
Date

ROBIN E. FEDER
United States Immigration Judge

Files: (b) (6) [redacted]

Date: JUL 12 2010

In re: (b) (6) [redacted]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENTS: William P. Joyce, Esquire

ON BEHALF OF DHS: John P. Marley
Senior Attorney

APPLICATION: Reopening to hold proceedings in abeyance

A final administrative order of removal in these proceedings was entered by this Board on May 26, 2009. The Department of Homeland Security ("DHS") now moves this Board to reopen these removal proceedings and hold the proceedings in abeyance pending the completion of extradition proceedings for the lead respondent. The respondents oppose the motion, which will be denied.

In its motion, the DHS states that the lead respondent is in the custody of the United States Marshals Service and that, on March 10, 2010, extradition proceedings were initiated against him in the United States District Court for the (b) (6) [redacted] Relying on *Matter of Perez-Jimenez*, 10 I&N Dec. 309 (BIA 1963), the DHS contends that "the Board should defer resolving the respondent's appeal in the above-referenced matter pending the conclusion of the extradition proceedings." (DHS Motion at 3). In that case, the Board granted the government's motion to withdraw the order of deportation and hold the deportation proceedings in abeyance. The Board based its decision "on the grounds that, in view of the extradition proceedings, further deportation proceedings would serve no useful purpose and may unnecessarily and improperly complicate the extradition proceedings." *Id.* at 312.

This case arises under different circumstances than those in *Matter of Perez-Jimenez* in which the respondent was separately seeking the reopening of his deportation proceedings to pursue an application for withholding of deportation under then section 243(h) of the Act, 8 U.S.C. § 1253(h) (1963). In deciding the case, the Board noted that "while the deportation order [was] outstanding respondent remain[ed] entitled to pursue his section 243(h) application." *Id.* at 315. In this case, the removal proceedings are administratively final. There are no pending matters before the Board nor are the parties seeking the reopening of proceedings to pursue matters within our jurisdiction. *See generally Matter of Yauri*, 25 I&N Dec. 103, 110 (BIA 2009).

Further, a petition for review of the May 26, 2009, Board decision is presently pending before the United States Court of Appeals for th (b)(6) [redacted] the (b) (6) [redacted] provisionally denied the government's motion to remand and ordered: "If the government seeks to rely on the pending

extradition proceedings as a basis for remanding the matter to the agency, it should include in its brief a fuller explanation of the grounds for and status of the extradition proceedings and address what effect that proceedings might have on this appeal."

Given these circumstances, the DHS motion will be denied.

ORDER: The motion is denied.

FOR THE BOARD

Files: (b) (6) [redacted]

Date: MAY 26 2009

In re: (b) (6) [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: William P. Joyce, Esquire

ON BEHALF OF DHS: John P. Marley
Senior Attorney

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B)] -
In the United States in violation of law(all respondents)

APPLICATION: Asylum; withholding of removal; Convention Against Torture

This case has a lengthy procedural history that is throughly outlined in the Immigration Judge's July 14, 2008, decision. Hence, we will incorporate by reference the Immigration Judge's outline of the procedural history for this case (I.J. at 1-5). The Immigration Judge's July 14, 2008, decision finds that the lead respondent (b) (6) [redacted] was barred from applying for asylum and withholding of removal under sections 208(b)(2)(A)(i) and 241(b)(3)(B)(i) of the Immigration and Nationality Act (Act), 8 U.S.C. §§ 1158(b)(2)(A)(i) and 1231(b)(3)(B)(i), and further finds that the lead respondent failed to meet his burden of proof for asylum. The respondents argue on appeal that the Immigration Judge violated their due process rights and they contest the persecutor bar and failure of proof findings. The Department of Homeland Security (DHS) argues that the Immigration Judge's credibility determination is clearly erroneous and evidence was improperly excluded.

The respondents are natives and citizens of Peru who fear persecution on account of the lead respondent's past involvement with the Peruvian military. Specifically, the respondents fear that the Shining Path will harm the lead respondent and his family because he was publicly associated with the massacre in Accomarca. The Immigration Judge found that although the lead respondent's testimony and evidence contained inconsistencies, both minor and material, which caused the Immigration Judge to question the lead respondent's veracity, there was insufficient support in the record to find that the respondent lacked credibility. The Immigration Judge then highlighted areas

of concern, noting that the court was unable to "discern the truth" in those areas (I.J. at 15-22). We interpret the Immigration Judge's analysis to mean that although there was insufficient cause to reach an adverse credibility finding under controlling (b) (6) case law, there was sufficient cause to question the lead respondent's claim and take a closer look at the evidence. The DHS argues on appeal that the Immigration Judge's failure to make an adverse credibility finding was clearly erroneous. DHS brief at 3-13. Inasmuch as the Immigration Judge thoroughly considered the respondent's testimony, its consistency with other evidence, and further questioned and considered the reliability and probative value of the evidence used to impeach the respondent, we do not find that the credibility finding is clearly erroneous. 8 C.F.R. §1003.1(d)(3)(i). *Matter of R-S-H-*, 23 I&N Dec. 629 (BIA 2003) ("[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed") (*quoting from United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

Of major concern in this case is the issue of whether the lead respondent is barred from asylum and withholding of removal under the "persecutor bar." 8 U.S.C. §§ 1158(b)(2)(A)(i) and 1231(b)(3)(B)(i). The Immigration Judge found that the lead respondent's involvement in two separate and distinct military operations establishes that the respondent assisted in the persecution of others on two occasions (I.J. at 27-29). We will first review whether the respondent's involvement in incidents in Accmay bars the respondent from asylum and withholding of removal.

The Immigration Judge found that the respondent is barred from seeking asylum under the persecutor bar due to events that occurred in Accmay on August 8 or 9, 1985. On that occasion, the respondent's patrol captured two fleeing individuals, interrogated them, learned that they had participated in a meeting with "DDSS," and found ammunition on them (I.J. at 15). When the individuals attempted to escape, the respondent ordered his soldiers to shoot "toward" the individuals. The individuals were then "eliminated." (I.J. at 15), (Exh. EE), (Exh. GG) (respondent's October 1985 statement). The Immigration Judge highlighted in the July 14, 2008, decision that the respondent did not characterize the individuals as terrorists or guerilla combatants (I.J. at 28). On the other hand, we note that there is no evidence indicating that the individuals were not terrorists or guerilla combatants. Indeed, the fact that the individuals fled upon sight of the respondent's patrol and possessed ammunition indicates that they were likely considered part of a subversive element. Moreover, the Immigration Judge noted in a footnote that the Peruvian government referred to the individuals as "suspected terrorists." (I.J. at 28, n19), (Exh. GG). Hence, we find that the evidence does not "indicate that one or more of the grounds for mandatory denial . . . may apply" because it does not indicate that the "elimination" occurred on account of a protected ground. 8 C.F.R. § 1240.8(d). *See Matter of A-H-*, 23 I&N Dec. 774 (A.G. 2005). Rather, it appears that the respondent and his patrol were active participants in unfortunate guerilla warfare. Inasmuch as the evidence does not indicate that the persecutor bar applies, the burden does not shift to the respondent in this instance. 8 C.F.R. § 1240.8(d). In conclusion, we find that the DHS provided insufficient evidence regarding the events that occurred in Accmay to invoke the persecutor bar.

We must now determine if the respondent's involvement in Accomarca bars him from asylum and withholding of removal. The United States Court of Appeals for th(b)(6) provided in

(b) (6) that the issue in this case is narrowed to whether the respondent had "prior or contemporaneous knowledge" of the persecution that occurred in Accomarca. The (b) (6) highlighted that disbelief in (b) (6) denial of knowledge would require "a rational explanation, rooted in the record." (b) (6) *v. Gonzales*, *supra,* at (b) (6) additionally provided that if the Immigration Judge believed (b) (6) "it would be appropriate-although not necessarily required-for us to treat the issue of knowledge as definitively resolved in (b) (6) favor." (b) (6) *v. Gonzales*, *supra,* at (b) With the (b) (6) guidance in mind, we will determine if the Immigration Judge's finding that the respondent failed to disprove that he was engaged in persecution is correct.

(b) (6) has the burden of proving by a preponderance of the evidence that the persecutor bar does not apply. 8 C.F.R. §§ 1240.8(d), 1208.13(c)(2)(ii). In determining whether the respondent met his burden of establishing the requisite knowledge or lack thereof, the Immigration Judge considered the lead respondent's testimony and the evidence of record (I.J. at 28-29). To better highlight the Immigration Judge's comprehensive analysis, we find it helpful to enumerate the evidence specifically mentioned by the Immigration Judge:

1) (b) (6) testified that human rights abuses by the Peruvian military occur, although such abuses are not the norm. (Exh. AA, 382-85), (I.J. at 28).
2) (b) (6) patrol was implicated in potential extrajudicial killings in Accmay (I.J. at 18-20, 28), (Exh. BB-15 at 392, 399, 403, and GG).
3) (b) (6) provided a statement to a military judge that the purpose of Operation Huancayoc was to capture or destroy existing subversive elements in Accomarca. (Exh. GG), (I.J. at 28).
4) (b) (6) statement to the military judge is corroborated by (b) (6) statement that the patrol's mission was to capture and annihilate the TTCC. (Exh. FF), (I.J. at 28).
5) (b) (6) provided that when individuals were captured, they were turned over to G-2 and that he had prior knowledge that persons turned over to G-2 were sometimes executed. (Exh. L, p 294-95), (I.J. at 28-29).
6) (b) (6) testified that he possessed no prior or contemporaneous knowledge of the massacre (I.J. at 29).
7) (b) (6) provided various accounts as to his distance from the massacre and his ability to hear shots (I.J. at 21,29), (Exh. FF). We note that the Immigration Judge gave limited weight to (b) (6) statement regarding (b) (6) ability to hear gunshots (Exh. FF).

The above described evidence reveals that the Immigration Judge was relying in part upon the perception that because the respondent had knowledge that human rights abuses by the Peruvian military, although rare, did occur and the respondent himself was implicated in such abuses in Accmay, the respondent was likely aware of the abuses that occurred in Accomarca when they occurred. The underlying presumption being that implication in the alleged Accmay persecution suggests contemporaneous knowledge of the Accomarca massacre. Such presumption is substantially reduced by our finding that the evidence does not implicate the respondent in acts of persecution in Accmay. Hence, part of the fundamental basis for the Immigration Judge's cause to question the respondent's knowledge of the Accomarca massacre lacks the support attributed to it by the Immigration Judge.

Without a finding that the respondent committed acts of persecution in Accmay, we find that there is too slim a reed of evidence upon which to conclude that the respondent had prior or contemporaneous knowledge of the Accomarca massacre. The remaining emphasis of the Immigration Judge's persecutor bar finding rests upon the fact that the respondent failed to present evidence establishing whether he could have heard shots from the gorge (I.J. at 29). The evidence the Immigration Judge found the respondent "could have presented" was not reasonable to expect considering the length of time that has passed since the events took place and the high, if not unattainable, level of expertise it would require for a witness to corroborate the terrain and the respondent's ability to hear gunshots. *Matter of M-D-*, 21 I&N Dec.1180 (BIA 1998) (finding that respondent failed to meet burden of proof because respondent failed to present corroboration when it was reasonable to expect such evidence); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989) (providing that the general rule is that supporting evidence should be presented when available). Moreover, we would be reluctant to find that evidence of the respondent's ability to hear gunshots would constitute conclusive evidence that the respondent was aware of the massacre. The Peruvian army was present in the gorge to "capture or destroy" subversive elements, an objective that would likely create gunshots. Hence, one's ability to hear gunshots would not necessarily indicate that they had contemporaneous knowledge that the plan had gone awry and resulted in a massacre. In conclusion, we do not find the respondent to be a persecutor based on the evidentiary record properly before us.[1]

We will now address the merits of the respondent's asylum claim. The Immigration Judge found that while the incidents suffered by the respondent went beyond "unpleasantness, harassment and even basic suffering," the respondent failed to establish that he was targeted on account of his political opinion or membership in a particular social group (I.J. at 24-25). The Shining Path targeted the respondent due to his involvement with the Peruvian military during the Accomarca massacre. The evidence does not reveal that the respondent ever expressed a political opinion or that he was targeted for having one (I.J. at 25). Rather, it appears that the respondent was targeted out of revenge. The respondent argues on appeal that he was a member of a particular social group defined as Peruvian military officers whose names became associated with the Accomarca massacre. Respondent's brief at 56. Four military officers, the respondent being one of them, led the military operation in Accomarca that resulted in the massacre. (b) (6) *v. Gonzales*, *supra.* Even assuming that Peruvian military officers whose names became associated with the Accomarca massacre constitutes a cognizable particular social group, we nonetheless find that the respondent has failed to establish that his life or freedom would be threatened in Peru because of his membership in that particular social group. The respondent has not adequately shown that his military rank is the motivating factor behind the Shining Path's actions in this matter. Rather, it appears that revenge is the motivation behind the Shining Path's actions, with public military rank being a necessary component, but not the motivating factor.

We agree with the Immigration Judge's conclusion that because the respondent failed to establish past persecution on account of a protected ground, he is not entitled to a presumption of a well-

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[1] This Board explains why the Immigration Judge's decision to exclude some of the DHS's untimely evidence was reasonable on pages five through six of this decision.

founded fear (I.J. at 26). 8 C.F.R. § 1208.13(b)(1). We further agree that the respondent has established a subjectively genuine fear of future persecution given the threats and harm he endured in the past (I.J. at 26). *Kadri v. Mukasey*, 543 F.3d 16, 21 (1st Cir. 2008) (providing that a well-founded fear must be subjectively genuine and objectively reasonable). The respondent, however, must also establish that his fear is objectively reasonable. *Id.* The relevant incidents occurred more than 20 years ago. The record reflects that the Shining Path is less pronounced and powerful than before. There is insufficient objective evidence of record to indicate that the Shining Path is currently interested in the respondent or in pursuing former military officers from the 1980s. Thus, we do not find that the respondent has established that his fear of harm is objectively reasonable (I.J. at 27). Accordingly, we find that the respondent failed to meet his burden of establishing that he is a refugee as defined by the Act. 8 C.F.R. § 1208.13(a) (burden of proof for asylum); 8 U.S.C. § 1101(a)(42). Inasmuch as we find that the respondent failed to meet his burden of proof for asylum, it follows that he further failed to meet the higher burden of proof for withholding of removal. *See INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

The respondents also argue that their due process rights were violated because the Immigration Judge "favored" the DHS and considered improper evidence. The respondents are particularly concerned with the Immigration Judge's consideration of evidence linking the lead respondent to acts of persecution in Accmay because the evidence resulted in an additional "persecutor bar" finding separate and distinct from the Accomarca massacre. First, we have not affirmed the Immigration Judge's finding that the respondent assisted in acts of persecution in Accmay. Second, the respondents were provided with the opportunity to cross examine the DHS's witness and review the related documents, and the lead respondent was presented the opportunity to provide testimony regarding his version of the Accmay events (Tr. at 448-52). Third, the respondents have not specified on appeal what, if any, evidence they would have produced had they been presented a lengthier time period to produce rehabilitating evidence. Finally, as conceded by the respondent, the Immigration Judge was not bound by the Federal Rules of Civil Procedure. *See Yongo v. INS*, 355 F.3d 27 (1st Cir. 2004); *Matter of McNeil*, 11 I&N Dec. 378 (A.G. 1965). Hence, the respondents have not shown that they were prejudiced by the Immigration Judge's consideration of the evidence regarding Accmay. *See generally Yongo v. INS, supra,* at 31 (finding that admission of a document that may contain hearsay and was not authenticated under the regulations was not so unreliable that it offended due process)

Finally, the DHS argues that the Immigration Judge erred by excluding evidence as untimely filed. We disagree. The Immigration Judge reasonably set deadlines and requested that both parties submit all evidence and affidavits from all potential witnesses under those deadlines, unless such evidence would be used for the sole purpose of impeaching the respondent (Tr. at 93-96). It is well-established that an Immigration Judge has the authority to set deadlines for the filing of evidence, and that a party–whether an alien or the DHS–may be deemed to have waived the opportunity to file such documents upon that party's failure, without good cause, to comply with such deadlines. *See* 8 C.F.R. § 1003.31(c). In response to the Immigration Judge's request, the DHS attempted to withhold or "protect" evidence from the respondent under the theory that the evidence would be used solely for impeachment purposes. On February 28, 2008, the Immigration Judge found that two of the three witnesses the DHS attempted to withhold or "protect" would not appropriately be classified

as "rebuttal witnesses" because their testimony would not be withheld as a potential means to impeach the respondent's future testimony, but rather used to rebut events described in the respondent's previous testimony (I.J. at 2) (February 28, 2008, decision). Consequently, the Immigration Judge found that the DHS failed to meet the evidentiary deadlines and did not allow the DHS to present the late filed evidence.

To better understand the Immigration Judge's decision to exclude the DHS's evidence, we must detail the nature of the items excluded. DHS attempted to introduce the testimony of two expert witnesses, Dr. (b) (6) and (b) (6) who would provide general background information regarding the Peruvian military structure and technology, the prevalence of human rights abuses by the Peruvian military, the "military 'plausibility'" of the events as alleged by the respondent, and the terrain in Accomarca (I.J. at 2) (February 28, 2008 decision); (Exh. BB-17, BB-18). Both experts appear to have opinions based upon circumstantial and background evidence. Moreover, (b) (6) overtly states that his opinions were based in part upon the respondent's prior statements. *See* Exh. BB-18 pg 529 ("I can only conclude that the respondent's explanation . . .is not an accurate statement); Exh. BB-18 pg 529-30 ("This is also consistent with his prior statements . . . ."). Hence, we are in agreement with the Immigration Judge that the general background information and the expert opinions based upon the respondent's prior testimony is information that should have been submitted under the Immigration Judge's reasonable evidentiary deadline inasmuch as it was not limited to impeachment purposes. Finally, we again highlight that the Immigration Judge was not bound by the Federal Rules of Civil Procedure. *See Yongo v. INS*, *supra*.

DHS further argues that the Immigration Judge erred in excluding the Department of State's comment on the respondent's asylum application. The information provided within the Department of State's comment supports the Immigration Judge's conclusion that the respondent does not have a well-founded fear of persecution. This Board affirmed that finding. Thus we conclude that the DHS was not prejudiced by the fact that the comment was not entered into evidence under 8 C.F.R. § 1208.11(d). *See generally Matter of Garcia-Flores*, 17 I&N Dec. 325 (BIA 1980) (alien must establish that violation of regulation prejudiced his interests that were protected by the regulation).

The following orders will be entered:

ORDER: The respondents' appeal is dismissed.

FURTHER ORDER: The DHS's appeal is dismissed.

FURTHER ORDER: The respondent's (b) (6) record is remanded to the Immigration Judge for further proceedings consistent with the Immigration Judge's order continuing proceedings pending adjudication of a visa petition filed on her behalf by her United States citizen husband.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondents (b) (6) are permitted to voluntarily depart the United States, without

expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security ("DHS"). *See* section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondents (b) (6) fail to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondents (b) (6) shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondents (b) (6) file a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. *See* Voluntary Departure: Effect of a Motion To Reopen or Reconsider or a Petition for Review, 73 Fed. Reg. 76,927, 76,937-38 (Dec. 18, 2008) (to be codified at 8 C.F.R. §§ 1240.26(c)(3)(iii), (e)(1)).

WARNING: If, prior to departing the United States, the respondents (b) (6) and (b) (6) file any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondents (b) (6) file a petition for review and then departs the United States within 30 days of such filing, the respondents (b) (6) will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 73 Fed. Reg. at 76,938 (to be codified at 8 C.F.R. § 1240.26(i)).

Anne J. Hess

FOR THE BOARD

Board Member Roger A. Pauley concurs in the results though not all the reasoning of the majority opinion.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
(b) (6) [redacted]

IN THE MATTER OF:

(b) (6) [redacted] **(Lead)**	)	**In Removal Proceedings**
	)	**DETAINED ALIEN**
	)	**(Lead only)**
	)	
	)	**July 14, 2008**
	)	
	)	
	)	
	)	
Respondents	)	

CHARGE: Immigration and Nationality Act (INA) § 237(a)(1)(B) - Nonimmigrant who remained in the United States for longer than permitted

APPLICATIONS: Asylum, pursuant to INA § 208;
Withholding of removal, pursuant to INA § 241(b)(3);
Voluntary Departure, pursuant to INA § 240B.

ON BEHALF OF RESPONDENTS:
William P. Joyce, Esq.
Joyce & Associates, P.C.
(b) (6) [redacted]

ON BEHALF OF DHS:
John P. Marley
Senior Attorney
Office of the Chief Counsel
(b) (6) [redacted]

DECISION OF THE IMMIGRATION COURT[1]

I. Procedural History

(b) (6) [redacted] or Lead Respondent) and Co-Respondent (b) (6) [redacted] were admitted to the United States at Miami, Florida, on or about August 29, 1991, as nonimmigrant B-2 visitors with authorization to remain in the United States for a temporary period, not to exceed February 28, 1992. They remained in the United States beyond February 28, 1992, without authorization. Ex. H, pp. 122-24. Co-Respondents (b) (6) [redacted] and (b) (6) [redacted] were admitted to the United States on or about January 19, 1993, as non-immigrant B-2 visitors with authorization to

[1] This decision is prepared, as are all Immigration Court decisions – oral and written, without the benefit of a transcript.

remain in the United States for a temporary period, not to exceed February 28, 1992.[2] They remained in the United States beyond February 28, 1992, without authorization. Ex. H, pp. 125-128.

On or about January 19, 1993, (b) (6) affirmatively filed a request for asylum in the United States, naming the remaining Co-Respondents as derivative applicants (original application for asylum). Exs. J, pp. 142-281, W. According to a report dated May 19, 1999, (b) (6) appeared for an interview before an Asylum Officer. The Asylum Officer determined that (b) (6) testimony was only partially credible, based upon inconsistencies between the written and oral accounts of his activities in Peru, as well as vague and evasive answers he provided regarding his duties as a military officer. The Asylum Officer then found (b) (6) ineligible for asylum and (b) (6) application was referred to the Immigration Court (the Court). Ex. W, pp. 343-45.

Based upon the Asylum Officer's conclusions, the former Immigration and Nationality Service (INS) served all of the Respondents with Notices to Appear (NTAs), dated July 7, 1999.[3] Ex. H. The INS charged each of the Respondents with removability from the United States as an alien who, after admission as a nonimmigrant under INA § 101(a)(15), remained in the United States for a time longer than permitted. *Id.* Thereafter, the Court consolidated the Respondents' removal proceedings. On May 1, 2000, each of the Respondents, in written pleadings, admitted the factual allegations and conceded removability under the removal charge contained in his or her respective NTA. Ex. I, pp. 134-41. Each of the Respondents identified asylum and withholding of removal as the form of relief he or she intended to pursue. *Id.* On April 7, 2008, Pia identified adjustment of status as a potential additional form of relief from removal for her.

On February 28, 2001 (b) (6) filed a supplemental Form I-589 application for asylum and withholding of removal, which again named his Co-Respondents as derivative applicants (supplemental application for asylum). Ex. K, pp. 282-89. On October 4, 2004, the Court denied (b) (6) applications for relief, finding that he was not credible and that he was statutorily ineligible for asylum because he had assisted and participated in the persecution of others in Peru. The Court also denied (b) (6) voluntary departure, but granted voluntary departure to the remaining Respondents until November 3, 2004, with an alternate order of removal to Peru. Ex. D, pp. 8-56. The Respondents appealed the Court's decision to the Board of Immigration Appeals (Board or BIA).

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[2] *But see*, Ex. W, which indicates that (b) (6) and (b) (6) all arrived on the same date as the Lead Respondent.

[3] The Homeland Security Act of 2002, as amended, transferred the enforcement, services, and administrative functions of the Immigration and Naturalization Service (INS) to the Department of Homeland Security (DHS). *See 68 Fed. Reg.* 9824 (2003). As of March 1, 2003, the INS ceased to exist. *Id.*

On September 9, 2005, the Board affirmed the Court's October 4, 2004, denial of (b) (6) applications for asylum and withholding of removal. Ex. E, pp. 57-61. Thereafter, on October 4, 2006, DHS took (b) (6) into custody pursuant to its authority under INA § 236 and 8 C.F.R. § 236, where he remains. The remaining Respondents were not detained by DHS at any time.

The Respondents petitioned the (b) (6) to review the Board's decision. On (b) (6) a three-judge panel of the (b) (6) concluded that the Court's adverse credibility finding was not supported by substantial evidence. The (b) (6) panel similarly concluded that the finding that (b) (6) had participated in persecution was not supported by substantial evidence. (b) (6) *v. Gonzales,* (b) (6) (b) (6) *rehearing en banc granted, opinion vacated* (b) (6) Ex. F, pp. 62-100. DHS filed a petition for rehearing before an *en banc* panel of the (b) (6) which was granted on (b) (6)

On (b) (6) the (b) (6) issued an *en banc* decision vacating the September 9, 2005, decision of the Board. Ex. G, pp. 107-21. In the *en banc* decision, the (b) (6) held that in order for the persecutor bar to asylum eligibility to apply to an alien, the alien must have prior or contemporaneous knowledge of the persecution, regardless of whether the objective effect of his actions was to assist in the persecution of innocent villagers. (b) (6) *v. Gonzales,* (b) (6) also rejected both the Board's and the Court's adverse credibility determination as "vulnerable." *Id.* at 22. The (b) (6) (b) (6) then remanded the case for a well-reasoned and specific determination, based on the Record, that (b) (6) was not credible in denying timely knowledge of the alleged persecution or to adopt a different standard for scienter and/or to take additional evidence. *Id.* at 25. On September 7, 2007, the Board vacated its September 9, 2005, decision and remanded the matter to the Immigration Court for further proceedings consistent with the (b) (6) *en banc* decision.

The Court held several conferences with the parties, beginning in October 25, 2007, to determine the course of the remanded proceedings. The parties agreed that the issues could be streamlined for presentation to the Court. With this in mind, on January 25, 2008, the Court ordered the parties to jointly file, on or before February 11, 2008: (1) an agreed statement of facts; (2) a statement of disputed issues and/or facts; and (3) an exhibit list. The Order also directed the parties to jointly submit, on or before February 14, 2008, an Exhibit Notebook and to independently submit lists of proposed witnesses and affidavits from each witness, outlining the witness' expected testimony on direct examination, made under penalty of perjury.

On February 11, 2008, the Court received a submission from the Respondents alone. On February 14, 2008, the Court received a submission from DHS, which indicated that "DHS agrees with and joins in counsel's submission to include his proposed agreed statement of facts, disputed issues and/or impeachment." DHS' submission purportedly added "important details upon which [DHS was] certain counsel will ultimately agree." On February 28, 2008, the Court ruled that any such additional facts were untimely, and accepted the Respondents' proposed agreed statement of facts as stipulations of the parties. Ex. A.

DHS' February 14, 2008, filing included a Motion to Protect Documents (DHS' proposed impeachment evidence), along with a witness list, but no affidavits from those witnesses. On February 28, 2008, the Court ruled that DHS would be precluded from presenting any of the witnesses during its case in chief for failure to comply with the Court's Order of January 25, 2008. *See Fusco v. General Motors*, 11 F.3d 259, 265 (1st Cir. 1993) ("[T]rial court could readily exclude a witness or exhibit if some previous order had set a deadline for identification and the proponent had without adequate excuse failed to list the witness or exhibit.").[4] Nonetheless, the Court ordered that DHS would be allowed to present testimony to otherwise impeach or rebut evidence submitted by (b) (6) The Court further ordered DHS to submit the proposed impeachment documents it sought to protect directly to the Court for an *in camera* review. *See* 8 C.F.R. § 1003.31(d) ("The Service may file documents under seal by including a cover sheet identifying the contents of the submission as containing information which is being filed under seal. Documents filed under seal shall not be examined by any person except pursuant to authorized access to the administrative record."). On April 7, 2008, the Court conducted a final pre-trial conference during which it ruled that DHS' proposed impeachment evidence need not be disclosed prior to (b) (6) cross-examination.

On April 10, 2008, the Court convened an individual hearing to address the merits of (b) (6) applications for relief and to further address the persecutor bar pursuant to the *en banc* (b) (6) decision and the Board's remand. The hearing continued on April 18, 2008. The Court set May 8, 2008, as the date for the parties to submit closing arguments in the form of post-trial memoranda. All parties submitted their closing arguments/memoranda in a timely fashion.

On June 26, 2008, DHS filed a "Motion for Appropriate Relief."[5] Several documents were appended to the motion, and all were untimely. As to the State Department Report, if this document had been requested when the original asylum application was filed in 1993, or when the supplemental application for asylum was filed in 2001, or even when the case was first

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[4] The Court recognizes that Federal Court rules are not controlling in immigration proceedings. *See Matter of McNeil*, 11 I&N Dec. 378, 389 (AG 1965) (Federal Rules of Civil Procedure); *see also Yongo v. INS*, 355 F.3d 27, 30 (1st Cir. 2004) (Federal Rules of Evidence). However, both the Executive and Judicial branches often rely upon Federal Court Rules as guideposts for setting the boundaries of appropriate procedure in Immigration Court. For example, INS regulations in effect from 1975 until 1987 specifically tied deposition procedures used in Immigration Court to the Federal Rules of Civil Procedure. *See* 8 C.F.R. 242.14(e) (1987) ("The Federal Rules of Civil Procedure shall be used as a guide to the extent practicable."); 40 Fed. Reg. 20791, 20816 (May 14, 1975). In another example, various Circuit Courts have adopted the Federal Rules of Civil Procedure and Evidence as benchmarks to judge the fairness of evidence admitted in immigration proceedings. *See, e.g., Khan v. INS*, 237 F.3d 1143, 1144 (9th Cir. 2001) (allowing evidence to be authenticated in immigration proceedings through procedure adopted in the Federal Rules of Civil Procedure); *Secaida-Rosales v. INS*, 331 F.3d 297, 306, n. 2 (2d Cir. 2003) (holding that the Federal Rules of Evidence may guide an Immigration Judge in admitting evidence consistent with due process).

[5] It is not clear to the Court what is meant by the title of this motion; the Court treats it as a supplement to the Government's closing argument/memorandum.

remanded in 2007, or when it became clear in January 2008 that a new proceeding would take place, the Court might be inclined to overlook the untimeliness of the submission as unavailable within the time limits set by the Court; however, the document was not even requested until March 18, 2008, more than a month after evidentiary submissions were due in Court. In any event, the document would not affect the outcome of the case and is cumulative of the information that appears in the current United States Department of State Country Reports on Human Rights Practices in Peru. Ex. LL. DHS' request to submit evidence on the issue of changed country conditions is also tardy. The remanded removal proceedings in this case were not bifurcated; indeed, the Court does not bifurcate such proceedings. All evidence was to be submitted in advance of the hearing, including evidence on changed conditions. This, DHS' third attempt to get the affidavit of Dr. (b) (6) into evidence, is again rejected as untimely.

II. Evidence Presented

A. Testimonial Evidence

(b)(6) presented testimony from the following individuals in support of his applications for relief: (b) (6) Lead Respondent; (b) (6) (b) (6) Co-Respondent (via testimonial proffer); and (b) (6) Co-Respondent (via testimonial proffer). DHS presented the testimony of Special Agent (b) (6) (b) (6) to lay the foundation for its impeachment/rebuttal evidence.

B. Documentary Evidence

The Court carefully considered the following documents contained in the Record of Proceedings:

Exhibit	Title of Document
A, pp. 1-2	Agreed Statement of Facts
B, pp. 3	Statement of Disputed Issues/Facts
C, pp. 4-5	Witness List
D, pp. 5-56	Order and Oral Decision of previously-assigned Immigration Judge, dated October 4, 2004
E, pp. 57-61	Decision from the Board, dated September 9, 2005
F, pp. 62-100	Panel decision of the (b) (6) dated (b) (6)
G, pp. 107-21[6]	*En banc* decision of the (b) (6) dated (b) (6)
H, pp. 122-33	Notices to Appear: ▪ NTA for (b) (6) Lead Respondent ▪ NTA for (b) (6) Respondent ▪ NTA and supplemental charges for (b) (6) Respondent ▪ NTA for (b) (6) Respondent

[6] Exhibit G's page numbers are not sequential, leaving a gap between pages 100 and 107.

I, pp. 134-41	Pleadings for (b) (6) and Co-Respondents, dated May 1, 2000
J, pp. 142-281	Form I-589 Application for (b) (6) dated January 14, 1993, with supporting documents: ▪ DIPRIO – Information Report, dated June 26, 1986 (also found at Ex. R) ▪ Identity documents for (b) (6) and Co-Respondents: ▪ Appeals Division documents affirming the ruling from the Military Court of the Supreme Council of Ministry Justice dismissing the charges against (b) (6) (also found at Ex. Q) ▪ Country Reports (various years)
K, pp. 282-89	Supplemental Form I-589 for (b) (6) dated January 14, 2001
L, pp. 290-301	Affidavit of (b) (6) dated January 13, 2001
L(1)	Supplemental Affidavit of (b) (6) dated February 12, 2008
M, pp. 302-07	Affidavit of (b) (6) Respondent, dated January 13, 2001
N, pp. 308-12	Affidavit of (b) (6) Respondent, dated January 13, 2001
O, pp. 313-14	Certificate of Promotion of (b) (6) to Lieutenant, dated January 1, 1986
P, p. 315	Military Photo
Q, pp. 316-19	Case disposition from the Appeals Division affirming the ruling from the Military Court of the Supreme Council of Military Justice dismissing the charges against (b) (6)
R, pp. 320-21	DIPRO – Information Report, dated June 26, 1986
S, pp. 322-23	Affidavit of Colonel (b) (6) pertaining to the harassment (b) (6) encountered in Peru, dated May 15, 1993
T, pp. 327-30	Affidavit of (b) (6) Commander of the National Police of Peru pertaining to the assassination attempts against (b) (6) dated May 19, 1993
U, pp. 331-40	Affidavits from the residents/association "Margaret" Building, neighbors of (b) (6) and Respondents pertaining to harassment, dated May 19, 1993
V, pp. 341-42	Affidavit of (b) (6) pertaining to the threats his family has been receiving because of (b) (6)
W, pp. 343-58	Assessment to Grant Asylum/Asylum Referral, dated May 19, 1999, and Asylum Officer interview notes, dated April 14, 1999
X, pp. 359-62	Promotion Certificate of (b) (6) to Captain, dated January 1, 1990
Y, pp. 363-462	(b) (6) August 26, 2004, submission to the (b) (6) Immigration Court, in support of his Form I-589 application
Z, pp. 463-533	Country Information (various years)
AA, pp. 1-525	Transcript of previous hearings
BB, pp. 1-	DHS' Submission

559	1. Library of Congress Research Letter 2. United Nations Rapporteur Report 3. Profile on Peru, Resource Information Center (RIC) 4. Sworn Statement of Lt. (b) (6) [redacted] 5. 1994 United States Department of State Country Reports on Human Rights Practices 6. United States Department of State Cable from US Embassy in Peru to Secretary of State 7. United States Defense Intelligence Agency (DIA) Cable (1993) 8. United States Department of State cable from US Embassy in Peru to Secretary of State (1994) 9. Documents submitted to the United States Department of State in support of an Extradition Request for (b)(6) [redacted] 10. Peruvian Senate Investigative Committee Report 11. Truth and Reconciliation Commission (CVR) Final Report on the Accomarca Case (2003) 12. Organization of American States, Inter-American Commission on Human Rights, Cayara Complaint (1993) 13. United States District Court Transcript, (b)(6) [redacted] No. 07-21783-CIV-Jordan, (Feb. 11, 2008) 14. Inter Press Service News Agency, "Time is of the Essence in the Extradition of War Criminal," (Oct. 17, 2006) 15. "Accomarca Case II," Attorney General Criminal Investigation Report 16. Sworn Statement of Lt. (b) (6) [redacted] 17. Affidavit of Dr. (b) (6) [redacted] [marked for identification only; not considered by the Court] 18. Affidavit of (b) (6) [redacted] [marked for identification only; not considered by the Court] 19. 1999 United States Department of State Country Reports on Human Rights Practices 20. Demonstrative Exhibits (Maps)
CC	Photograph
DD	Satellite Photograph
EE	Respondent's statement and translation (Substitution for BB4)
FF	Statement of Captain (b) (6) [redacted]
GG	Second statement of (b) (6) [redacted]
HH	Map
II	Military Investigation Report
JJ	Metric Conversion Table (kilometers to nautical miles)
KK	Enlarged version of map found at Ex. HH
LL	1986 United States Department of State Country Reports on Human Rights Practices
MM	2007 United States Department of State Country Reports on Human Rights Practices

III. Applicable Law

A. Credibility and Corroboration

In all applications for asylum and withholding of removal, the Court must make a threshold determination of the alien's credibility. *See Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998); *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987). The REAL ID Act of 2005 amended various sections of the INA relating to the adjudication of asylum applications, including credibility determinations; however, those amendments only apply to asylum applications filed on or after May 11, 2005. Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005). Indications of credible testimony include: (1) consistency on direct and cross-examination; (2) consistency with the written application; and (3) the absence of embellishment as the applicant repeatedly tells his story. *Matter of B-*, 21 I&N Dec. 66, 70 (BIA 1995). An applicant's own testimony is sufficient to meet the burden of proving his or her asylum claim if it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his fear. *Matter of Dass*, 20 I&N Dec. 120, 124 (BIA 1989); *see also Dhima v. Gonzales*, 416 F.3d 92, 95 (1st Cir. 2005) (citing 8 C.F.R. §1208.13(a)). If an alien is not "entirely" credible, corroborating evidence may be used to "bolster" his credibility. *Id.* at 95 (*quoting Diab v. Ashcroft*, 397 F.3d 35, 39 (1st Cir. 2005).

While minor and isolated discrepancies in the applicant's testimony are not necessarily fatal to credibility, omission of key events coupled with numerous inconsistencies may lead to a finding that the applicant is not credible. *Matter of A-S-*, 21 I&N Dec. 1106, 1109-10 (BIA 1998). Inconsistent statements which go to the heart of an alien's claim or concern the central facts of a key event will support an adverse credibility finding. *Toure v. Ashcroft*, 400 F.3d 44, 47-48 (1st Cir. 2005) (citing *Bojorques-Villanueva v. INS*, 194 F.3d 14, 17 (1st Cir. 1999). Moreover, testimony is not considered credible when it is inconsistent, contradictory with current country conditions, or inherently improbable. *Matter of S-M-J-*, 21 I&N Dec. 722, 729 (BIA 1997). Inconsistencies between an alien's testimony before the Court and the alien's prior statements are not necessarily sufficient to support an adverse credibility finding without consideration of the other evidence of record and the alien's explanations for the inconsistencies. *See Simo v. Gonzales*, 445 F.3d 7, 12 (1st Cir. 2006). The Court is not required to resolve all inconsistencies and discrepancies in favor of the alien. *See Dhima v. Gonzales*, 416 F.3d 92, 96 (1st Cir. 2005).

Unreasonable demands are not placed on an asylum applicant to present evidence to corroborate particular experiences. *Matter of S-M-J-*, 22 I&N Dec. 722, 724 (BIA 1997). Nonetheless, where it is reasonable to expect corroborating evidence for certain alleged facts, such evidence should be provided. *Id.* If such evidence is unavailable, the applicant must explain its unavailability, and the Court must ensure that the applicant's explanation is included in the record. *Id.* The absence of such corroboration can lead to a finding that an applicant has failed to meet his burden of proof. *Id.* at 725.

B. Asylum-Based Relief

1. Asylum, Pursuant to INA § 208

If not otherwise barred, an applicant may receive asylum provided he timely files an application and meets the definition of refugee. INA § 208. An applicant is a "refugee" within the meaning of INA § 101(a)(42)(A) if he is unwilling or unable to return to his country of nationality because of persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The asylum applicant bears the burden of establishing that he is a refugee within the meaning of INA § 101(a)(42)(A); Title 8 of the Code of Federal Regulations (8 C.F.R.) § 1208.13(a)(2007); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 423 (1987). The spouse and children (as defined in INA § 101(b)(1)(A), (B), (C), (D), or (E)) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien. INA § 208(b)(3)(A) (derivative asylum).

a. Timeliness of Application

An alien seeking asylum must prove by clear and convincing evidence that his application was filed within one year of arrival in the United States or before April 1, 1997, whichever is later, or that changed or extraordinary circumstances justify a late filing. 8 C.F.R. § 1208.4(a)(2), (4), (5) (2008).

b. Past Persecution

Persecution does not encompass generally harsh conditions shared by many others in a country or the harm an individual may experience as a result of civil strife. *Matter of Sanchez and Escobar,* 19 I&N Dec. 276, 284 (BIA 1984); *Matter of Maldonado-Cruz,* 19 I&N Dec. 509, 513 (BIA 1988); *Maryam v. Gonzales,* 421 F.3d 60, 63 (1st Cir. 2005). Instead, to qualify as persecution, a person's experience must rise above unpleasantness, harassment, and even basic suffering and consist of systemic mistreatment rather than a series of isolated events. *See Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2004); *Bocova v. Gonzales,* 412 F.3d 257, 263 (1st Cir. 2005). The First Circuit has held that credible verbal death threats may fall within the meaning of "persecution." *Un v. Gonzales*, 415 F.3d 205, 210 (1st Cir. 2005); *Aguilar-Solis v. INS*, 168 F.3d 565, 570 (1st Cir. 1999).

c. Basis

In order to be statutorily eligible for asylum, an alien must be persecuted on account of at least one of five statutorily protected grounds: race, religion, nationality, membership in a particular social group or political opinion. INA § 101(a)(42)(A). Persecution on account of the statutorily protected grounds refers to persecution motivated by the victim's traits, not the persecutor's. *INS v. Elias-Zacarias*, 502 US 478, 482 (1992).

The Board has interpreted the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. *Matter of Acosta*, 19 I&N Dec. 331 (BIA 1985); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1997).

The Board has concluded that dangers which arise from the nature of employment as a law enforcement officer in an area of civil unrest (*e.g.*, attacks because they are viewed as extensions of a government's military forces) do not support a claim of a well-founded fear of "persecution" within the scope of INA § 208. *Matter of Fuentes*, 19 I&N Dec. 658, 661 (BIA 1988). According to the Board, police are often attacked because they are highly visible embodiments of the power of the State and, under such circumstances, the dangers they face are no more related to their personal characteristics or political beliefs than are the dangers faced by military combatants. *Id.* Such dangers are perils arising from the nature of their employment and domestic unrest rather than "on account of" immutable characteristics or beliefs. *Id.*

Nonetheless, in *Fuentes*, the Board also found that having the status of a *former* member of the national police is an immutable characteristic, as it is beyond the capacity of a Respondent to change. *Id.* at 662. According to the Board, it is possible that mistreatment occurring because of such a status, in appropriate circumstances, could be found to be persecution on account of political opinion or membership in a particular social group; for example, where hostilities have ceased, an asylum applicant who is subject to mistreatment because of a past association may be able to demonstrate a well-founded fear of persecution on account of a ground protected by the INA. *Id.*

d. Nexus

An alien must also demonstrate that his persecutors inflicted harm "on account of" the statutorily protected ground. *See, e.g., Raza v. Gonzales*, 484 F.3d 125, 128-29 (1st Cir. 2007); *Makhoul v. Ashcroft*, 387 F.3d 75, 79 (1st Cir. 2004). To accomplish this, the alien must "provide sufficient evidence to forge an actual connection between the harm and some statutorily protected ground." *Hincapie v. Gonzales*, 494 F.3d 213, 218 (1st Cir. 2007); *see also Da Silva v. Ashcroft*, 394 F.3d 1, 6 (1st Cir. 2005); 8 C.F.R. § 208.13(b)(1).

e. Government Action

In addition to the above, the persecution must be the direct result of government action, government-supported action, or government's unwillingness or inability to control private conduct. *Orelien v. Gonzales*, 467 F.3d 62, 72 (1st Cir. 2006) (quoting *Nikijuluw v. Gonzales*, 427 F.3d 115, 121 (1st Cir. 2005)); *see also Da Silva v. Ashcroft*, 394 F.3d 1, 7 (1st Cir. 2005) ("Action by non-governmental actors can undergird a claim of persecution only if there is some showing that the alleged persecutors are in league with the government or are not controllable by the government."). "[A]n applicant seeking to establish persecution by a government based on violent conduct of a private actor must show more than 'difficulty ... controlling' private behavior." *Ortiz-Araniba v. Keisler*, 505 F.3d 39, 42 (1st Cir. 2007); *Matter of McMullen*, 17 I&N Dec. 542, 546 (BIA 1980). An applicant must show the government's acquiescence in the persecutor's acts or its inability or unwillingness to investigate and punish those acts, and not just

a general difficulty preventing the occurrence of particular future crimes. *Ortiz-Araniba*, 505 F.3d at 42; *Harutyunyan v. Gonzales*, 421 F.3d 64, 68 (1st Cir. 2005).

f. Well-founded Fear of Future Persecution

An applicant who has suffered past persecution on account of a statutorily protected ground is presumed to have a well-founded fear of future persecution on account of that same protected ground. 8 C.F.R. § 1208.13(b)(1). This presumption may only be rebutted if the government establishes, by a preponderance of the evidence, that there has been a "fundamental change in circumstances" in the country at issue such that the applicant no longer has a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1)(i)(A).

An individual who has not suffered past persecution may receive asylum if he or she demonstrates a well-founded fear that his or her life or freedom would be threatened in the future on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 1208.16(b)(2). Moreover, if an individual fails to establish past persecution, he will be entitled to asylum only if he can demonstrate that this well-founded fear is both (1) subjectively genuine and (2) objectively reasonable. *Palma-Mazariegos v. Gonzeles*, 428 F.3d 30, 34-35 (1st Cir. 2005).

An individual cannot establish that his or her life or freedom would be threatened if he could avoid a future threat by relocating to another part of the proposed country of removal, provided that, under all the circumstances, it would be reasonable to expect that individual to do so. 8 C.F.R. § 1208.16(b)(3) (2008). In determining whether internal relocation is reasonable, the Court considers whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; any administrative, economic, or judicial infrastructure problems; any geographical limitations; or any social and cultural constraints. 8 C.F.R. § 1208.16(b)(3). When the applicant has not established past-persecution, he shall bear the burden of establishing that it would not be reasonable for him to relocate. 8 C.F.R. § 1208.16(b)(3)(i); *see also Tendean v. Gonzales*, 503 F.3d 8, 11 (1st Cir. 2007) (holding that, even with a finding of past persecution, alien's asylum application was defeated because he could safely relocate within Indonesia).

g. 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); *see also Cardoza-Fonseca*, 480 U.S. at 428 (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 (BIA 1987). Humanitarian factors, such as age, health, or family ties, should be considered in the exercise of discretion. *Matter of H-*, 21 I&N Dec. 337, 347-48 (BIA 1996) (citing *Matter of Pula*, 19 I&N Dec. 467 (BIA 1987)). The danger of persecution should outweigh all but the most egregious adverse factors. *Matter of Pula*, 19 I&N Dec. at 474.

An applicant may warrant a grant of asylum in the exercise of discretion, even where there is little likelihood of future persecution, if compelling, humanitarian considerations would be involved if he were forced to return to the country where he suffered persecution in the past. *Matter of H-*, 21 I&N Dec. at 347 (noting that "asylum should be granted in the exercise of discretion ... where the asylum applicant has suffered such severe persecution that he or she should not be expected to repatriate"); *Matter of Chen*, 20 I&N Dec. 16, 20-21 (BIA 1989) (granting asylum to a respondent who suffered severe past persecution in China and demonstrated other compelling factors to warrant a favorable exercise of discretion).

2. Withholding of Removal, Pursuant to INA § 241(b)(3)

INA § 241(b)(3) is a non-discretionary provision requiring the Immigration Court to withhold removal of an individual upon proof that his life or freedom would be threatened in the proposed country of removal on account of his race, religion, nationality, political opinion, or membership in a particular social group. *See also* 8 C.F.R. § 1208.16(b). To be eligible for withholding of removal, an applicant must establish either (1) that he has experienced past persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion, or (2) that it is "more likely than not" that his life or freedom would be threatened in the future on account of a statutorily-protected ground. 8 C.F.R. § 1208.16(b)(1)-(2). Unlike asylum, which the spouse and children of an alien may derivatively obtain, the INA does not provide for derivative withholding of removal in any circumstance. *Matter of A- K-*, 24 I&N Dec. 275, 278 (BIA 2007).

3. Persecutor Bar

An applicant is statutorily ineligible for asylum-based relief if he ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group or political opinion. INA § 208(b)(2)(A)(i) (persecutor bar to asylum); INA § 241(b)(3)(B)(i) (persecutor bar to withholding of removal). If the persecutor bar is found to apply to an alien, he is statutorily ineligible for either asylum or withholding of removal, even if he can otherwise satisfy the requirements for obtaining those forms of relief. If sufficient indicia demonstrate that the persecutor bar applies to an alien, the burden shifts to the alien to show, by a preponderance of the evidence, that he did not incite, assist or otherwise participate in the persecution of any person on account of a statutorily-protected ground. 8 C.F.R. § 1208.13(c)(2)(ii) (mandatory denial of certain asylum applications filed before April 1, 1997). *See also,* (b) (6) [redacted] (*en banc*).

Personal involvement in killing or torture is not necessary to impose responsibility for assisting or participating in persecution. *See Fedorenko v. United States*, 449 U.S. 490, 514 (1981) (finding culpable an armed concentration camp guard who did not participate in murders but knew that inmates were being murdered); *Xie v. INS*, 434 F.3d 136 (2d Cir. 2006) (finding culpable a driver for the Changle County Department of Health who helped transport captive women to undergo forced abortions, even though he released one woman, resulting in his termination from the job); *Maikovskis v. INS*, 773 F.2d 435, 446 (2d Cir. 1985) (finding culpable a police chief who, on orders from Nazis, ordered his men to bring residents to the police station

and burn their village to the ground, even though he did not assist in their execution); *Matter of Kulle*, 19 I&N Dec. 318 (BIA 1985) (finding culpable a perimeter guard who prevented prisoners from escaping a Nazi work camp); *Matter of McMullen*, 19 I&N Dec. 90 (BIA 1984) (finding culpable a member of the Provisional Irish Republican Army who coordinated a number of illegal arms shipments from the United States to Northern Ireland and trained other PIRA members).

An alien will be found to have participated in persecutory acts if his action or inaction furthers the persecution in some way, even if his participation is forced or obligated. *Matter of Rodriguez-Majano*, 19 I&N Dec. 811 (BIA 1988); *see also Fedorenko*, 449 U.S. 490. However, evidence beyond the fact that an applicant was a member of an organization that engaged in persecution is required to establish that he is a persecutor and, thus, ineligible for asylum or withholding of removal. *Matter of Rodriguez-Majano*, 19 I&N Dec. at 814-815.

An *en banc* panel of the (b) (6) held that presumptively the persecutor bar should not apply to an alien who did not have prior or contemporaneous knowledge of the acts constituting persecution. (b) (6) Although the (b) (6) left open the possibility that this Court might adopt a different legal standard as to scienter, we decline to do so. The (b) (6) has further instructed that any conclusion that an alien possessed prior or contemporaneous knowledge of persecution must be reached "expressly and persuasively," and not "by vague reference to the 'totality of the ... conduct' that conflates the question whether one's conduct constitutes 'assistance' with the question of whether one possessed scienter as may be required under the circumstances." *Id.* at (b) (6)

C. Voluntary Departure, Pursuant to INA § 240B

At the conclusion of removal proceedings, the Court may grant voluntary departure in lieu of removal. INA § 240B(b). The alien bears the burden of establishing both that he is eligible for relief and that he merits a favorable exercise of discretion. *See Matter of Gamboa*, 14 I&N Dec. 244 (BIA 1972); *see also Matter of Arguelles*, 22 I&N Dec. 811 (BIA 1999). To establish eligibility, the alien must prove that he: (1) has been physically present in the United States for at least one year immediately preceding service of the NTA; (2) is, and has been, a person of good moral character[7] for at least five years immediately preceding his application for voluntary departure; (3) is not removable under INA § 237(a)(2)(A)(iii) (aggravated felony) or INA § 237(a)(4) (security and related grounds); and (4) has established by clear and convincing evidence that he has the means to depart the United States and intends to do so. INA § 240B(b)(1). The alien must be in possession of a valid travel document. 8 C.F.R. § 1240.26(c)(2). He must also post a voluntary departure bond in an amount necessary to ensure that he will depart; the amount must be at least $500 and must be posted within five business days of the voluntary departure order. INA § 240B(b)(3); 8 U.S.C. § 1240.26(c)(3). An alien who was previously granted voluntary departure after having been found inadmissible for

[7] Certain aliens described in INA § 101(f) cannot be found to be persons of good moral character. Even if the alien is not barred by INA § 101(f), the Immigration Judge retains discretion to evaluate the alien's moral character by weighing the negative against the favorable factors.

entering the United States without inspection is ineligible for voluntary departure. INA § 240B(c).

To determine whether a favorable exercise of discretion is warranted as to a request for voluntary departure, the Court must weigh the relevant adverse and positive factors, including the alien's prior immigration history; criminal history, if any; length of his residence in the United States; and extent of his family, business, and societal ties in the United States. *Matter of Gamboa*, 14 I&N Dec. at 248; *see also Matter of Arguelles*, 22 I&N Dec. at 817; *Matter of Thomas*, 21 I&N Dec. 20, 22 (BIA 1995). No court has jurisdiction to review a decision to deny a request for voluntary departure. INA § 240B(f).

If the alien is statutorily eligible and has established that he warrants a favorable exercise of discretion, the Court may grant voluntary departure for a period of up to sixty days. An alien who is granted voluntary departure, but fails to depart the United States by the scheduled date of departure, shall be subject to a civil penalty (currently between $1000 and $5000) and be ineligible for a period of ten years for relief in the form of voluntary departure, cancellation of removal, and any change or adjustment of status. INA § 240B(d).

IV. Credibility Determination

A. (b) (6) Lead Respondent

Because (b) (6) filed his original application for asylum before May 11, 2005, the Court's analysis of his credibility is not governed by the REAL ID Act and its amendments to the INA.

(b) (6) was a notably calm and collected witness. He was poised and well-spoken; his testimony was fluid and articulate. His bearing and mien comported with his military training. Despite lengthy direct and cross-examination, he waivered and appeared caught off-guard on only one occasion: when DHS presented evidence of the events of August 9, 1985, in Accmay, Peru.

(b) (6) testimony was, with few exceptions, internally consistent with his application and affidavit, although inconsistent, in some respects, with his prior testimony and, in a number of respects, with certain evidence offered by the Government. Based on these inconsistencies, the Government urges the Court to make an adverse credibility finding against (b) (6) The Court declines to do so.

Although the Record contains evidence that is inconsistent in some material respects, not all of the contradictory evidence is reliable. Some of the evidence is attributable to third parties who were not present in Court and were unavailable for cross-examination. Some of these third parties may have had interests adverse to (b) (6) At least one of the statements is attributable to a third party who is unidentified and whose credibility may not be reliable, "considering he was cashiered for narcotics involvement." Ex. BB-8 at 215. Some of the statements were pulled from larger documents or investigations and the entire document was not made available to the Court or the Respondents, and some of the statements are themselves

incomplete. Moreover, the mere fact that there are inconsistencies, material or otherwise, does not necessarily mean that (b) (6) did not testify credibly. In some instances, the inconsistencies were explained to the satisfaction of the Court, and the Court accepted (b) (6) testimony. In other instances, although the Court had doubts about (b) (6) testimony, it was unable to discern the truth of the matter on the Record of evidence presented to it.

Declining to make an adverse credibility finding does not mean that the Court has found (b) (6) to have testified credibly in every respect. Rather, the Court has concerns about the inconsistencies discussed below:

1. August 9, 1985, Accmay

No evidence was presented or testimony adduced regarding Accmay during the 2004 hearing. It was not until cross-examination by DHS in these remanded proceedings that (b) (6) was asked about his involvement in Accmay in August 1985, and his testimony evolved over the course of his questioning. He initially responded that he was not present in Accmay on August 8 or 9, 1985, but then indicated that he did not recall if he was in Accmay and that he did not remember his location on that date.[8] As noted above, (b) (6) was noticeably shaken when presented with what appeared to be his prior statements regarding Accmay.

In a statement (b) (6) purportedly provided in September 1985 to an investigating officer, he disclosed that "[o]n 9 august 1985, [he] carried out an operation in ACCMAY for 2 days." Ex. EE at 3. He further disclosed that upon reaching the area of Tablapampa Hill, his patrol spotted two individuals who began running upon seeing the patrol. (b) (6) then stated that his patrol apprehended these two individuals, interrogated them, learned that they had participated in the meeting with the DDSS, and found four munitions of 7.62 mm cartridges that "DDSS" forced them to obtain.[9] (b) (6) then indicated that these two individuals "wanted to escape." The rest of the statement is unclear, although there is reference to some persons or things being "eliminated." It is not clear what or who was eliminated, although when read in conjunction with Ex. GG, it appears that these two individuals were eliminated upon attempting to escape.

(b) (6) acknowledged his signature at the end of this document and acknowledged that it appeared to be a statement, but he did not recall stating that he captured subversive elements. He initially denied that this document was a statement given to military investigators; then he stated that he could not recall if this was the statement he gave to military investigators.

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[8] The documentary evidence is somewhat inconsistent as to whether the events at Accmay took place on August 8 or 9, 1985, and the questions varied accordingly. Compare, *e.g.*., Exhibit BB, p. 305, with Exhibit EE, p. 3, and Exhibit GG, p. 11.

[9] "DDSS" (alternatively referred to as "TTCC") was not explained in the statement or in testimony. The primary target of the military was the Maoist terrorist group known as "Shining Path," or "Sendero Luminoso" in Spanish.

He also stated that more than twenty years have elapsed so "it is not easy to remember."

In a separate statement, made to a military judge on October 9, 1985, (b) (6) appears to state that on August 9, 1985, while carrying out a patrol at Accmay, Huambalpa, and vicinities, he ordered his soldiers to "shoot toward the fleeing individuals." Ex. GG.[10] In this version, (b) (6) stated that his patrol discovered 7.62 ammunition cartridges on an unspecified number of "fallen persons," but no identification. The separate statements are consistent with each other in significant respects and consistent with (b) (6) testimony (*i.e.*, that he was serving at the Vilcashuaman base of counter-guerrillas under the command of Capt. (b) (6) who was on welfare leave at the time), although he does not mention interrogating the individuals in Accmay in this second account.[11]

(b) (6) testified that the signature at the end of this second statement (Ex. GG) seems to be his. He recalled appearing before a military judge, but did not recall the specific date. He then testified that this document seems to be his declaration, but pointed out that the statement says his mission (referring to the later Accomarca, and not the Accmay, mission) ended on August 16, when according to (b) (6) it concluded on August 14. When asked whether there were other problems with the statement, (b) (6) stated that the statement was made more than twenty years ago and he may have forgotten some things. He did not indicate that the information contained within was incorrect (except for the end date of August 16). When specifically asked whether the events related in Exhibit GG as to the two "suspected terrorists" in Accmay was correct, (b) (6) stated that part of the statement was missing, but he did remember ordering his soldiers to fire, noting that "it is not well recorded how these things happened before they shot." The Court notes that, despite (b) (6) acceptance of this statement, it is not without its own problems. As he pointed out, there is a page break in the middle, and where the text resumes, the previous sentence is not completed.

At first, it was not clear to the Court whether (b) (6) break in composure when presented with this evidence was attributable to having forgotten or suppressed the incident or surprise that the Government uncovered it. In the end, as noted, (b) (6) conceded that Exhibit GG seemed to be his statement and acknowledged that it was made shortly after the events. Although (b) (6) did not explicitly say so, the Court accepted his testimony as implying that this was the more accurate version of the events than that of his memory. That (b) (6) adopted the second statement as his plays a not-insignificant role in the Court's declining to make an adverse credibility finding. As he testified, the memory of Accmay seemed to vaguely return to him, although not clearly. In short, the Court finds that (b) (6) did not remember Accmay at all until confronted with some evidence of what happened there. His acceptance of

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[10] In this document, "Accmay" is alternatively spelled "Acomay." It is also spelled "Accmey" at other places in the Record. Other place and/or person names in the Record carry alternative spellings, as well. As most of the spellings were phonetic, these differences are not held against (b) (6)

[11] This name also appears in the Record as (b) (6) and as Capt. (b) (6) and he is also referred to as (b) (6) "base commander."

having made this statement enhances his credibility. Had he completely denied his role at Accmay or disavowed both of the statements, the Court might have been compelled to find otherwise.

2. August 13, 1985, Pitec

a. Location

In 2004, while under cross-examination, (b) (6) was asked what he found at his objective when he arrived. The transcript of those proceedings discloses that he answered, "There were absolutely at the place. It's a — between two mountains." Ex. AA at 351.[12] During cross-examination in these remanded proceedings, (b) (6) characterized Pitec as a place that "had no one living there." He testified that there were no houses, no people and no vegetation. On the other hand, (b) (6) stated that upon (b) (6) return from the mission, (b) (6) told (b) (6) that when he arrived in Pitec, "there was a fair going on at that place." Ex. FF. Although (b) (6) was adamant during his recalled testimony that there were no people there, the existence of people and a fair or market in Pitec, particularly on August 13, 1985, appears to be corroborated by the statements of those who were present in Pitec on that date, in connection with the Accomarca investigation in Peru. One of the witnesses, (b) (6) (b) (6) says it was a "weekly" fair. Ex. BB-15 at 402. The other witness, (b) (6) says that soldiers arrived at the market on August 13 at approximately 10:00 a.m. Ex. BB-15 at 399. It was at that time that (b) (6) was shot.

The evidence is not necessarily inconsistent. It is possible that a "fair" took place one morning per week in a location that was uninhabited, which would comport with (b) (6) impression that the place was uninhabited and no one was present. It can also reasonably be inferred that the weekly fair was disbanded by 2:00 p.m. (the earliest of the three times (b) (6) says he arrived at Pitec, *see infra*). Finally, to the extent that (b) (6) alleged statement to (b) (6) suggests that the fair was still going on when he arrived in Pitec, an inconsistency from his recalled testimony that there were no people there, (b) (6) statement, although raising serious questions about what happened at Pitec, is simply insufficient to impeach (b) (6) and give rise to an adverse credibility finding. (b) (6) was not presented as a witness, and no effort was made to subpoena him. His statement contains no particular indicia of reliability. Although the Court is satisfied that it was obtained by Special Agent (b) (6) through his contacts in Peru, this does not change the fact that the statement is not an original, is not authenticated, and (b) (6) could not be questioned about it. Therefore, it can only be given limited weight. (b) (6) and (b) (6) statements are no more reliable than (b) (6) statement. In fact, (b) (6) is much less reliable. The statement is incomplete, at least one portion is missing, and it is difficult to discern what happened on what date. All of these statements could have, and should have, been authenticated (or alternatively – found to be forgeries) as they appear to be government documents and the witnesses were identified.

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[12] There appears to be an error in the transcription of the 2004 tapes and one or more words are missing. Additionally, "the objective" was spelled "PETET," which appears to be a phonetic spelling, or misspelling, of "PITEC."

b. Time

During the 2004 proceedings, (b) (6) testified that he deployed his patrol [in Pitec] at approximately 6:30 p.m. Ex. AA at 365. (b) (6) testified in these remanded proceedings that he arrived in Pitec at approximately 5:30 or 6:00 p.m. However, according to (b) (6) indicated that he arrived in Pitec "more or less at" 1500 hours (3:00 p.m.), Ex. FF, and in his statement to the military judge, (b) (6) stated he arrived "more or less at" 1400 hours (2:00 p.m.). Ex. GG. Additionally, (b) (6) reported that (b) (6) left at about 10:00 a.m. and arrived at Pitec at approximately 1500 hours (3:00 p.m.). Thus, the 2:00 – 3:00 time frame is probably more reliable, as the statements were made closer to the events in question, although the inconsistencies are not material in any event, and the lapse of time (and concomitant forgetfulness) between (b) (6) 1985 statements and his 2004 and 2008 in-Court testimony may explain the difference.

c. Engagement

i. Pitec Market

As noted above, (b) (6) 2004 testimony about Pitec is unclear at best, most likely due to a transcription error. Ex. AA at 351; *see also* note 12. During those proceedings, further elaboration was neither given nor requested. Consequently, neither the existence of a market at Pitec nor any activity at such a market was discussed. As referred to above, (b) (6) in his statement, indicated that at approximately 10:00 a.m. on August 13, 1985, he was in Pitec at the market when four soldiers arrived. Ex. BB-15 at 399. Because (b) (6) did not have identification documents with him, which he knew the soldiers would ask to see, he fled, but not before being shot in the leg. *Id.* In connection with this same investigation, (b) (6) disclosed that on August 13, 1985, a group of approximately nine soldiers killed two people at the Pitec market, then joined twenty-four other soldiers to stay in Pitec overnight. Ex. BB-15 at 403. He then stated that on August 14, 1985, two groups "came in;" the group from "Pitec-Huancayoc" shot and killed two elderly people, whose bodies were burned.

These statements are clearly inconsistent in material respects with (b) (6) purported statement to (b) (6) (in two days at Pitec he had seen nothing and there were no confrontations or "TTCs" captured) and inconsistent with each other in certain respects; however, no specific mention is made of (b) (6) in either account. Ex. FF.[13] The statements are insufficient to form the basis of an adverse credibility finding, as they are unreliable for reasons explained, *supra*. Nonetheless, they are troubling.

ii. Hand-Made Grenades

The Record contains inconsistent accounts of an incident involving people throwing hand-made grenades at (b) (6) patrol.[14] During his 2004 testimony, although not

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[13] The term TTC was not defined in this document. Prior abbreviations in the evidence include "DDSS" and "TTCC." These abbreviations were not defined either.

[14] The testimony was either "hand-made" or "home-made" grenades, or both.

specifically asked, (b) (6) made no mention of any engagement with people throwing hand-made grenades at his patrol at or near Pitec at any time. He was asked what happened during the mission, and he stated he did not fire his weapon during the Accomarca operation and that there was no fighting, hand-to-hand or otherwise. Ex. AA at 459. Similarly, (b) (6) stated that (b) (6) reported "no *confrontation*" during his two days in Pitec. Ex. FF.

During these remanded removal proceedings, (b) (6) testified that approximately 25 minutes, or 800 meters, *prior* to reaching Pitec on August 13, 1985, his patrol was "harassed" by people setting off explosions at higher elevations. He testified that he ordered his soldiers to fire on the location of the explosions, but upon investigation of that location, his patrol found no personnel, only binoculars and subversive propaganda.

When asked to explain why he did not mention this incident in his 2004 testimony, (b) (6) stated that he previously testified only as to what happened during the mission, which he defined as beginning after he reached Pitec. Indeed, the transcript shows that the Government's questions were limited to topics such as the source of (b) (6) orders, how he traveled to Pitec, what he found there upon arrival, what his objective was, how he deployed his patrol and what the objectives of the other patrols were. Ex. AA at 348-65. In short, the Government's questions did not allow for extraneous narration, and the Court accepts that (b) (6) was not presented with an opportunity to discuss the "harassment" with hand-made grenades during the 2004 proceedings.

In an explanation of why he reported "no *confrontation*," (b) (6) clarified the difference between "harassment" and "confrontation," stating that he did not consider the incident with these people to have been a "confrontation." He said this incident was "harassment." The Court accepts (b) (6) explanation as to the confrontation-harassment distinction.

In (b) (6) statement to the military judge, he stated that *after* reaching Pitec on August *14*, 1985, a group of approximately fifteen people started throwing hand-made grenades and running toward the ravine. Ex. GG. He stated that he instructed his soldiers to fire on these people, and one of them was wounded and dropped a pair of binoculars. (b) (6) ordered his soldiers to pursue these people, but they did not find anyone.

The inconsistent statements regarding the timing of the incident (August 13 versus August 14, 1985) are also material. Nonetheless, the August 14, 1985, date may be in error. It appears that (b) (6) arrived in Pitec on August 13, 1985. The patrol began on August 13, 1985, and concluded on August 14, 1985. This exhibit also indicates that the mission ended on August 16, 1985 but (b) (6) testimony has consistently been that the mission ended the next day, specifically, August 14, 1985. Thus, to the extent there is an error as to the date in the document itself, this error cannot be held against (b) (6)

The bigger problems are that the statement to the military judge indicates the incident occurred *after* arriving in Pitec and the statement to (b) (6) indicates (b) (6) ordered his patrol to shoot, wounding one who dropped a pair of binoculars. This testimony cannot be reconciled with (b) (6) in-Court testimony in these remanded proceedings that the grenade

throwing occurred *before* reaching Pitec and that no "personnel" were found upon investigation. On the other hand, if, in fact, the grenade-throwing occurred after (b) (6) arrival in Pitec, the statements of (b) (6) and (b) (6) are no longer inconsistent with (b) (6) statement to the military judge. This latter statement about seeing Lt. (b) (6) after arriving in Pitec further fleshes out this scenario. Ex. GG.[15] On the Record before it, the Court simply cannot tease out the truth.

d. Communication with Lt. (b) (6)

The Record contains inconsistent statements regarding (b) (6) communication with (b) (6) in Pitec. During the 2004 proceedings, (b) (6) was not asked about, and did not discuss, an encounter with (b) (6) prior to or after arriving at Pitec. (b) (6) testified in 2004 that during his court martial he told officials that he "never caught up with the other patrol," but the Record is unclear as to which patrol he was referring. On cross-examination during these remanded removal proceedings, (b) (6) testified that he passed (b) (6) patrol at a distance of 40-60 meters and communicated with him via hand signals. He further testified that he was not surprised that (b) (6) did not investigate the throwing of hand-made grenades because he may not have heard the explosions. (b) (6) also testified that he saw (b) (6) approximately 10-12 minutes after encountering the grenade-throwers and that his encounter with (b) (6) patrol was coincidental.

In his statement to the military judge on October 9, 1985, (b) (6) "clarified" that *once he arrived in Pitec*, he met (b) (6) patrol and that (b) (6) told him that they had come because, among other reasons, they had heard the shots. Ex. GG at 13.

These statements seem at odds; in one version of the encounter with (b) (6) they communicated via hand-signals 10-12 minutes after the grenade throwing incident, but before arriving in Pitec, and (b) (6) may not have heard the shots. In the other, (b) (6) told (b) (6) he heard shots after (b) (6) arrived in Pitec. Ex. GG at 13.

With the exception of the verbal communication/hand signal dichotomy, the statements are not necessarily inconsistent, just different, but without more information, the Court cannot be sure. The exact size and location of Pitec, and indeed its very nature, are far from a settled matter (*see* § 2(a), *supra*, and § 3(b), *infra*). Similarly, the amount of time needed to get to Pitec (10-12 minutes or 25 minutes) may vary for any number of reasons. Thus, "10-12 minutes after the grenade throwing incident" may be the same as saying "once (b) (6) arrived in Pitec." *But see* § 2(b)(ii), *supra* (the harassment was 25 minutes before reaching Pitec).

Even if (b) (6) testimony regarding communication with (b) (6) by hand signals is accurate, it is not a material inconsistency and is insufficient, in and of itself, to support an adverse credibility finding. What happened in Pitec is the more serious matter, and on this important point, as noted above, there is insufficient evidence and the Court cannot discern the

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[15] Lt. (b) (6) is referred to at various places in the record as Lt. (b) (6) and Lt. (b) (6)

truth.

3. August 14, 1985, Accomarca

a. Gunshots

There is no evidence in the Record of Proceedings that suggests that (b) (6) played a direct role in the atrocities at Accomarca; indeed, Special Agent (b) (6) testified that it is clear that (b) (6) did not kill anyone in Accomarca, and the Government stipulated that (b) (6) was not present in Accomarca village when the massacre occurred. Ex. A, p. 2, ¶ 12. Therefore, the degree of prior or contemporaneous knowledge (b) (6) possessed regarding those incidents is one of the keys needed to unlock this case. *See* (b) (6)

During the 2004 proceedings, DHS did not ask (b) (6) and (b) (6) did not testify, as to whether he heard gunshots while in Pitec. On cross-examination in these remanded proceedings, (b) (6) testified that on August 14, 1985, he did not see or hear anyone and was unaware of any combat taking place in the gorge. According to (b) (6) however, (b) (6) reported that he "maybe (sic) heard some isolated shots on August 14, by the Huancayoc ravine." Ex. FF. When presented with (b) (6) statement, (b) (6) testified that he does not recall making that statement, although he did not deny it. (b) (6) statement has been given limited weight for the reasons explained above. This does not mean that the Court believes (b) (6) in-Court testimony regarding the gunshots. In fact, the Court has serious doubts about (b)(6) testimony on this point, for reasons explained more fully below. However, the Court's doubts, without reliable, objective evidence, cannot form the basis of an adverse credibility finding.

b. Distance and Location

Although (b) (6) has always maintained that he was located in Pitec during the Accomarca massacre, he has provided inconsistent testimony regarding the distance between his location and that of the massacre. In the 2004 proceedings, (b) (6) initially testified that he was "approximately three miles, four to five miles" away. (Ex. AA at 355). On cross-examination in these remanded proceedings, (b) (6) testified that he was 4-5 miles away from Accomarca; however, on redirect he amended the estimate to 4-5 kilometers, the unit of measure used in Peru. His explanation for the miles/kilometers dichotomy was that he was confused between miles and kilometers. (b) (6) testified in these remanded proceedings that he "may not have heard [grenades or explosions] because he was far away; [and that] neither he nor his men saw anything on August 14."

The Government suggests that (b) (6) was assigned to a location known as Cercopampa Hill, which is only 2.5-3 km from the massacre site. Ex. BB-20 at 559. In his September 1985 statement, (b) (6) stated that he carried out "[a]nother operation on 13 August 1985 towards the CERCOPAMPA hill lasting 3 days." Ex. EE at 3. He further stated that he received orders from (b)(6) "to go to CERCOPAMPA Hill and close off the HUANCAYOC ravine in the area of PITEC to avoid the escape of subversive elements." *Id.* at 4. This evidence is corroborated by (b) (6) statement that (b) (6) mission was to "close

the possible escape of the TTCC by the CERCOPAMPA Hill (south slope) by capturing or annihilating them." Ex. FF. In his statement to the military judge on October 9, 1985, [redacted] explained that his mission was to capture or destroy the existing subversive elements in the zone of Accomarca, which consisted of a movement to a pre-determined site in Cercopampa to carry out an operation with other patrols. Ex. GG at 13.

As noted, the Court is not satisfied with [redacted] explanation of his distance from Accomarca or the Huancayoc Gorge, but not for the reasons suggested by the Government. For example, it is clear that [redacted] objective was Pitec and not Cercopampa Hill itself. Also, none of the maps provided to him by DHS identified Pitec. Additionally, the metric conversion table contained in the Record at Exhibit JJ converts nautical miles to kilometers, and no foundation was laid for the appropriateness of such a conversion.[16] However, the larger evidentiary problem on this issue belongs to [redacted] who has the burden of proving that he was not aware of the murder and/or massacre of civilians. His distance from these locations is critical evidence in determining what he could and could not have heard. The Court finds that the Respondent could have, and should have, provided maps and expert, or even lay, testimony to corroborate his testimony on this point, rather than just his recollection, which has proved faulty and inconsistent with one of his purported statements (albeit one that is not entirely reliable). Ex. FF.

4. Past Persecution

The evidence includes inconsistent accounts of two of the persecutory incidents [redacted] experienced in Peru.

a. Bus Stop

[redacted] affidavit, Ex. L, provides that on June 26, 1986, while waiting for public transport, members of the Shining Path attempted to murder him by shooting at him, and setting off an explosive device. They also left subversive propaganda. [redacted] did not testify regarding this incident in 2004. During these remanded proceedings, [redacted] testified that in 1987 (not 1986), an explosive device was placed at the bus stop (but it did not detonate); that no one shot at him during this incident; and that the shooting referred to the incident in which he was targeted in a taxi cab. [redacted] in-Court testimony was credible, DHS did not cross-examine [redacted] on this point, and the Court accepts [redacted] testimony in these remanded proceedings as the accurate version of this assassination attempt or threat.

b. El Piano Bombing

Neither [redacted] original asylum application nor his affidavit make any mention of the bombing of the El Piano restaurant. In his 2004 testimony, [redacted] testified about an incident at Restaurant El Piano, which occurred after the attempted kidnapping of his daughter [redacted] The restaurant, in which he had been dining with fellow officers, was destroyed by

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16 The Court takes administrative notice of the fact that nautical miles are not equivalent to standard miles; 1 nautical mile equals approximately 1.15 standard miles.

dynamite minutes after he left the establishment. Approximately seven people were killed in this explosion, including three other officers. (b) (6) believes he was personally targeted, although (b) (6) belief makes for only the thinnest veneer of evidence. No mention of this incident was made during his testimony in these remanded proceedings; however, (b) (6) testimony in these remanded proceedings was limited by direct examination questions from counsel, and neither counsel asked (b) (6) about the El Piano bombing. Consequently, the Court does not hold the absence of testimony regarding this incident in the remanded proceedings against (b) (6) and his evidentiary account of those events is uncontroverted and accepted as credible.

c. Departure for the United States

Additionally, the Court believes that (b) (6) would not have retired from the Peruvian military in 1991 and left Peru but for the persistent and credible threats of death and assassination and kidnapping attempts.

B. (b) (6) Respondent

DHS declined to cross-examine (b) (6) and her testimony is uncontroverted and accepted as credible.

C. (b) (6) Respondent

DHS declined to cross-examine (b) (6) and her testimony is uncontroverted and accepted as credible.

D. Special Agent (b) (6)

The Court finds that Special Agent (b) (6) testified candidly, consistently, and credibly regarding, *inter alia*, the processes by which each of DHS' impeachment exhibits was obtained.

V. Findings of Fact and Conclusions of Law

A. Asylum

1. One-Year Filing

(b)(6) filed his original application for asylum on January 19, 1993, as evidenced by the time stamp appearing on that document. Ex. J; *see also* Ex. W. Consequently, the Court finds that he has established by clear and convincing evidence that his application was timely filed before April 1, 1997, in accordance with 8 C.F.R. § 1208.4(A)(2) (2008).

2. Statutory Eligibility

a. Past Persecution

The Court finds that (b) (6) name became known following the publication of an article in *El Nacional*, on or about October 12, 1985, disclosing his military affiliation, code name (b)(6) and alleged participation in a massacre in the Emergency Zone. *See* Ex. L.

Following publication of the article, (b) (6) was the victim of a series of credible threats and attempted assassinations, and an attempted kidnapping of (b) (6) daughter (b) (6) which collectively constitute past persecution. These incidents include: threatening phone calls stating that he would pay for the bloodshed; an attempted explosion of his parents' house in May or June 1986; an apparent assassination attempt at a restaurant on an undisclosed date and in the separate, but equally terrifying, taxi incident; the placing of an explosive device at his bus stop in 1987; and the attempted kidnapping of his daughter (b) (6) in 1989. In addition, his colleague (b)(6) (b)(6) was assassinated in 1990. (b)(6) like (b) (6) had been repeatedly threatened. (b) (6) experience with the Shining Path also conforms to the prevailing country conditions in Peru at that time. According to the 1986 Department of State Country Reports on Human Rights Practices, the Shining Path had stepped up its attacks in Lima and in rural areas.[17] In cities, the Shining Path frequently bombed restaurants, shopping centers, movie theaters, and foreign embassies, and set off car bombs. The Shining Path assassinated police officers, soldiers, local officials and recalcitrant peasants, sometimes after torture or mock trials. There were more than 2,100 terror attacks between January and September 1986, and attacks in Lima and rural areas resulted in the deaths of approximately 527 people between January and December 1986.

The Court finds that (b) (6) suffered incidents well beyond "unpleasantness, harassment and even basic suffering," as the Shining Path was making a concerted effort to assassinate him. Thus, the Court also finds that the credible threats (b) (6) received while he was in Peru constitute systematic mistreatment. *See Nelson*, 232 F.3d at 263.

b. Basis

The Court finds that the basis of (b) (6) claim is his membership in a particular social group: specifically, the Peruvian Military (while in Peru) and former Peruvian Military (after January 1991). In his supplemental asylum application, (b) (6) identified political opinion as an additional basis for seeking asylum. Ex. K. The Court also finds that active

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[17] The Court takes administrative notice of the State Department's 1986 Country Reports for Peru and adds it to the Record as Ex. LL. The State Department "has acknowledged expertise in discerning the conditions that prevail in foreign lands" and thus its reports are generally probative evidence of country conditions. *See Palma-Mazariegos v. Gonzales*, 428 F.3d 30, 36 (1st Cir. 2005); *Negey v. Gonzales*, 417 F.3d 78, 84 (1st Cir. 2005) (referring to the Country Report as "authoritative documentary evidence" which supported the Court's decision and noting that where the Court has conflicting documentary reports from various sources to review, the choice as to which reports to rely on is left to fact finder and not the appellate court).

military status is not a protected social group in an asylum or withholding claim. *Matter of Fuentes*, 19 I&N Dec. at 661. Although former military members can be a protected social group, in this case, (b) (6) has been in the United States throughout his retirement. While the latter status serves as a basis for a well-founded fear, it is not a valid basis for his claim of past persecution.

c. Nexus

The Court finds that each of the threats and attempted assassinations and attempted kidnapping occurred while (b) (6) served in the Peruvian military in an anti-subversive batallion. However, as (b) (6) held an inherently dangerous position, these dangers were "perils arising from the nature of [his] employment and domestic unrest, rather than 'on account' of immutable characteristics or beliefs." *Fuentes*, 19 I&N Dec. at 661. Consequently, (b) (6) was not targeted by the Shining Path in Peru on account of his membership in a particular social group.

(b) (6) also asserts that he was persecuted on account of his political opinion. There is no evidence in the Record that compels a finding that (b) (6) held an affirmative political belief or that he was persecuted for one. (b) (6) did not testify that he had particular political beliefs or opinions, much less political motives for joining the Peruvian military. In his affidavit, (b) (6) states that he volunteered to serve in the Emergency Zone and that he was motivated by a desire to put his training to use, and does not indicate any political ideology. Ex. L at 291-92.

Although it might be assumed that (b) (6) had a pro-government, anti-communist political philosophy, there is no evidence that members of the Shining Path imputed such a protected political opinion to him. The Court finds that the threats against (b) (6) were related to his military activities: "The miserable dogs who killed our soldiers of the New Popular Republic and his family be executed. Long live the PCP-SL. Long live President Gonzalo!;" "All the dogs of the army who fought against us will die. Long live President Gonzalo!;" and "Leopard, you dog, your head will be hung on a pole for having killed our People's Army's soldiers. Long live the armed battle!" Ex. L.

As (b) (6) has failed to link his persecution to anything other than his status as an active military officer, which is not a protected ground, he has failed to establish that he was persecuted "on account of" a protected ground.

d. Government Action

The Court finds that the threats and assassination and kidnapping attempts were the actions of the Shining Path, not the Peruvian Government. The Court also finds that the Government of Peru was not unwilling to control the Shining Path. Indeed, at that time, the Government of Peru was at war with the Shining Path, and (b) (6) played a role in subduing the subversive organization. Whether the Government of Peru was unable to control the Shining Path is a different question, however. The Shining Path began its terror attacks in Peru in 1980. Ex. LL. Beginning in 1983, the antiterrorist role of the armed forces dramatically increased, and

all executive branch authority was vested in the local military command in areas under a state of emergency, in which the President suspended restrictions on arbitrary detention and search warrants and restricted the rights to movement and assembly. *Id.* By 1986, such measures were in effect in 24 of Peru's 181 provinces, including Lima. *Id.* The Peruvian military reported 2,123 terrorist incidents nationwide between January and September 1985. *Id.* Although the Peruvian Government was not unwilling to control the Shining Path in 1985, based upon this information, the Court accepts, for the purposes of this decision, that it was unable to do so at the time of the events in question.

Although (b) (6) was persecuted by the Shining Path, the Shining Path did not commit these acts against (b) (6) "on account of" a statutorily protected ground. Thus, (b) (6) failed to demonstrate eligibility for asylum based upon past persecution.

e. Well-founded Fear of Future Persecution

As (b) (6) failed to establish past persecution on account of a protected ground, he is not entitled to a presumption of a well-founded fear of future persecution. Nonetheless, if he has a fear of being persecuted on account of a protected ground that is both subjectively genuine and objectively reasonable, he could still prevail on his claims, independent of any presumption.

(b) (6) resigned from the Peruvian military in January 1991, and is now a *former* member of the armed forces. As such, the Court finds that he is now a member of a cognizable particular social group. *Fuentes*, 19 I&N Dec. at 662. Moreover, given the threats, assassination and kidnapping attempts and the murders of other military officers in Peru, the Court finds that (b) (6) has a subjectively genuine fear of future persecution.

However, (b) (6) has failed to demonstrate that he presently has an objectively reasonable fear of persecution on account of this status or on account of his political opinion. These events occurred more than twenty years ago; there is no evidence in the Record that the Shining Path has an ongoing interest in harming (b) (6) nor is there any evidence that the Shining Path is attacking former military or police officers from the 1980s.[18] *See* Ex. LL at 2. The 2007 United States Department of State Country Reports on Human Rights Practices for Peru discloses that in 2007 there were some attacks on active police officers. *Id.* Although the threatening telephone calls to (b) (6) family remaining in Peru apparently continued until 2004, there is no evidence of any attempt to harm those family members after (b) (6) left for the United States, and no evidence of any contact for the last four years.

Moreover, (b) (6) has failed to demonstrate that the Shining Path continues to be a force the Government of Peru is unable to control. The 2007 Department of State Country Reports on Human Rights Practices indicates that the Shining Path killed several police officers in different attacks; interrupted the free movement of persons by establishing roadblocks in sections of the Upper Huallaga, Apurimac and Ene River valleys; and held indigenous families captive in rural areas. Ex. MM, pp. 2, 7 and 14. These activities are far more limited than those

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[18] The Court takes administrative notice of the State Department's 2007 Report on Peru and adds it to the Record as Ex. MM. *See also*, n. 17, *supra*.

disclosed in the 1986 Country Reports. That the Shining Path still operates, albeit in a more limited capacity than during the 1980s, is insufficient to demonstrate that the Government of Peru is unable to control the Shining Path. For example, (b) (6) has presented no evidence that the Peruvian authorities do not investigate incidents of violence committed by the Shining Path and institute criminal proceedings against the perpetrators. Consequently, he has failed to demonstrate more than difficulty controlling private behavior, as required. *Ortiz-Araniba*, 505 F.3d at 42.

In addition, because the source of feared persecution is not the Peruvian Government, (b) (6) bears the burden of establishing that he cannot avoid potential future harm by relocating within Peru. 8 C.F.R. § 1208.16(b)(3)(i) ("In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecutor is a government or is government-sponsored."). He has not done so. (b) (6) offers no evidence that the threat he perceives from the Shining Path is a nation-wide threat, or that it would be unreasonable for him to relocate within Peru to an area that is secure from Shining Path activities.

Consequently, (b) (6) has failed to demonstrate that he has a well-founded fear of future persecution in Peru.

3. Persecution of Others Bar

Even assuming (b) (6) established statutory eligibility for asylum, he would be barred from receiving such relief because he has failed to show, by a preponderance of the evidence, that he did not assist or otherwise participate in the persecution of others on account a statutorily-protected ground and that he had no prior or contemporaneous culpable knowledge of that persecution (b)(6) The Court is well aware that at the time of the events in question, Peru was under attack by the Shining Path, "a revolutionary Marxist organization, well known for its energy and brutality ..." *Id.* at (b) (6) However, as the (b) (6) declared, "the deliberate massacre of civilians because of their perceived connection with or support for the Shining Path amount[s] to persecution." *Id.* a (b) (6)

In this case, the only thing that is clear is that (b) (6) did not massacre civilians at Accomarca. *See* Ex. A ("The Respondent was not present in the Accomarca village when the massacre occurred."). His role at Accmay is less clear. Likewise, what he knew about the massacre at Accomarca, both before and during, is not completely clear. Because the Record is not clear, the Court is unwilling to affirmatively find that (b) (6) is a persecutor of others. On the other hand, "once the government introduced evidence of the applicant's association with persecution, it then became (b) (6) burden to disprove that he was engaged in persecution." *Id.* at 21. "The rule in *Moore v. Chesapeake & Ohio Ry. Co.*, 340 U.S. 573, 576 (1951) – that a fact cannot be established by disbelieving a witness's denial of that fact – does not assist one who (like (b) (6) bears the burden of proof as to the existence of the fact (here, lack of knowledge) and fails to carry it." *Id.* at (b) (6)

Although the [redacted] limited the scope of [redacted] proof to disproving "knowledge" of what occurred in Accomarca, it did not have the benefit of the evidence regarding Accmay. *Id.* Thus, not only did [redacted] have to disprove knowledge of events at Accomarca (before and during), but he also had to disprove his role in killing individuals at Accmay.

a. Accmay

[redacted] testimony, together with his prior statements, disclose that [redacted] ordered his troops to shoot at "two individuals" when they attempted to flee, and these two individuals were eliminated in Accmay on August 9, 1985, by [redacted] patrol. *See* Exhibits EE and GG. Further, [redacted] specifically identified Ex. GG as a statement he provided to a military investigator in Peru. [redacted] did not characterize these individuals as terrorists or guerrilla combatants.[19] *See id.* It was [redacted] burden to disprove his involvement in the killing of the two individuals, and he did not do so. In fact, despite the identified weaknesses in the evidence, he offered no direct evidence that would allow the Court to conclude that he was not involved in their deaths, other than his initial denial of being at Accmay on August 8 or 9, from which he later backed away.

Because the Court lacks sufficient evidence to conclude that [redacted] was not involved in the killing of individuals at Accmay and it was [redacted] burden to disprove his involvement, the Court finds that [redacted] has not met his burden of proving that he did not order, assist or otherwise participate in the persecution of another on account of a protected ground.

b. Accomarca

Evidence in the Record leads the Court to question [redacted] assertion that he did not know and could not have known that civilians would be, or were being, murdered in Accomarca. During the 2004 proceedings, [redacted] testified that he knew about extrajudicial killings, disappearances, torture and arbitrary detentions perpetrated by the Peruvian military, even though such activity was not the norm. Ex. AA 382-84. In these remanded proceedings, [redacted] similarly testified that human rights abuses by the Peruvian military were not routine; they were the exception. However, the Court finds that [redacted] patrol was at least implicated in extrajudicial killings that occurred in Accmay on August 9, 1985, just days before Operation Huancayoc. Moreover, according to [redacted] statement to the military judge, the purpose in Operation Huancayoc was to capture or *destroy* the existing subversive elements in Accomarca. Ex. GG at 13. This statement is corroborated by [redacted] statement (the patrol's mission was to close escape of the TTCC "by capturing or *annihilating* them.") Ex. FF. Additionally, in these remanded proceedings, [redacted] testified that when individuals were captured, they were turned over to G-2; that he knew prior to August 13, 1985, some would be executed; and that on one occasion, he turned a prisoner (described as a peasant) over to G-2

[19] Although [redacted] did not characterize the individuals as terrorists or guerrilla combatants, in its last series of questions about Accmay, the Government referred to them as "suspected terrorists."

(although in [redacted] affidavit, he implies that he captured and turned over more than one prisoner to G-2). Ex. L, pp. 294-95.

The [redacted] instructed this Court not to conflate the question of whether [redacted] conduct constituted assistance in the massacre that occurred in Accomarca with the question of whether he possessed prior or contemporaneous knowledge of what was occurring there. Looking strictly at the evidence in the Record regarding [redacted] knowledge leads the Court to question [redacted] denial of hearing shots during Operation Huancayoc. [redacted] testified that he did not see or hear anyone on August 14, 1985, and that he was unaware of any combat taking place in the gorge on that date, relying solely on his testimony to establish that his position in Pitec was too far away to hear anything occurring in Accomarca. However, given [redacted] various accounts of his distance from Accomarca, his knowledge of extra-judicial killings, however rare, and other inconsistencies in the Record, most importantly his report to the base commander of maybe having heard shots in the gorge, it is reasonable to expect [redacted] to have offered corroborating evidence on this crucial point.

[redacted] could have presented evidence in the form of testimony or affidavits from other soldiers who participated in the operation at Pitec in order to corroborate the patrol's location and observations on August 14, 1985. [redacted] also could have retained an expert with familiarity of the region and terrain to establish that his position was sufficiently distant. No such evidence or witness was offered. As noted, the only evidence presented on this point by [redacted] was his own testimony consisting of varying estimated distances from Accomarca, an inability to locate his position on a topographical map and the assertion that he and his men were too far to hear any combat taking place in the gorge. As previously discussed, this testimony is in apparent conflict with the account [redacted] allegedly provided to [redacted] upon his return from the mission in which he stated that he "maybe (sic) heard some isolated shots on August 14, by the Huancayoc ravine." Ex. FF.

Nor can [redacted] reliance on his acquittal in Peru provide the crucial corroborating evidence. As in the first hearing, he supplied no information about the circumstances of the acquittal or how the grounds or evidence related to the issue of knowledge. *See* [redacted] Similarly, the fact that Peru has not attempted to extradite [redacted] and the fact that no additional charges have been lodged against him cannot overcome the inconsistencies in the Record and the ample evidence in the Record calling into question the impartiality of the tribunal in Peru. *Id.*; *see also*, Exs. BB-3, pp. 94-103; MM, p. 2.

In short, the Court lacks sufficient evidence to find that [redacted] was too far way to hear any shots or combat. It was [redacted] burden to disprove knowledge and he did not do so. Thus, the Court finds that [redacted] failed to demonstrate that he did not know, and could not have known, that civilians would be, or were being, murdered in Accomarca.

In addition, by blocking a potential escape route from the village of Accomarca, the objective effect of [redacted] actions was to assist in the massacre of civilians therein.

Accordingly, the Court finds that [redacted] has not met his burden of proving that he did not order, incite, assist or otherwise participate in the persecution of any person on account of a

protected ground.

B. Withholding of Removal

As (b) (6) failed to demonstrate that he was persecuted on account of a protected ground or that he has a "well founded fear" of persecution to qualify for asylum, he necessarily fails to establish eligibility for relief under the more stringent, "more likely than not" withholding of removal standard.

(b) (6) is similarly barred from receiving withholding of removal based upon the Court's finding that he did not meet his burden of proving that he was not involved in the killing of civilians in Accmay and that he did not know and could not have known that civilians would be, or were being, murdered in Accomarca, *see supra.*

The remaining Respondents are not eligible to receive withholding of removal because they did not apply for it and the INA does not allow derivative withholding of removal in any circumstance. *Matter of A-K-*, 24 I&N Dec. at 278.

C. Voluntary Departure

1. (b) (6)

Based upon the Court's finding that (b) (6) did not meet his burden of proving that he was not involved in the killing of civilians in Accmay and that he did not know and could not have known that civilians would be, or were being, murdered in Accomarca, *see supra*, the Court denies (b) (6) voluntary departure as a matter of discretion.

2. Respondents, (b) (6) and (b) (6)

The Respondents (b) (6) and (b) (6) were physically present in the United States for at least one year prior to service of their respective NTAs and have been persons of good moral character throughout this time. Other than overstaying their visas, there are no adverse factors present. Consequently, the Court grants the Respondents (b) (6) and (b) (6) voluntary departure as a matter of discretion, upon posting a voluntary departure bond in the amount of $500.00 within five business days of this order and presenting their travel documents and tickets to DHS within 30 days from the date of this order. Failure to comply with the terms of this voluntary departure order will result in an alternative order of removal to Peru.

3. Respondent, (b) (6)

The Respondent (b) (6) is the beneficiary of a pending visa petition (Form I-130), filed on her behalf by her United States citizen husband, and has requested a continuance of her case, pending adjudication of the petition. The Court grants this request and continues her removal proceedings.

Accordingly, the Court enters the following orders:

ORDERS

IT IS HEREBY ORDERED that (b) (6) application for asylum, pursuant to INA § 208, is **DENIED.** The three Co-Respondents' applications for derivative asylum are also **DENIED.**

IT IS HEREBY FURTHER ORDERED that (b) (6) application for withholding of removal, pursuant to INA § 241(b)(3), is **DENIED.**

IT IS HEREBY FURTHER ORDERED that (b) (6) application for voluntary departure is **DENIED.**

IT IS HEREBY FURTHER ORDERED that (b) (6) shall be **REMOVED TO PERU.**

IT IS HEREBY FURTHER ORDERED that the Respondents, (b) (6) (b) (6) and (b) (6) are **GRANTED VOLUNTARY DEPARTURE** until, **SEPTEMBER 12, 2008.**

IT IS HEREBY FURTHER ORDERED that the removal proceedings for Respondent (b) (6) are **CONTINUED**, pending adjudication of the visa petition filed on her behalf by her United States Citizen husband.

If any party elects to appeal this decision, the Notice of Appeal must be received by the Board of Immigration Appeals on or before **AUGUST 13, 2008.**

July 14, 2008
Date

ROBIN E. FEDER
United States Immigration Judge

File: (b) (6) [redacted] Date: SEP 0 7 2007

In re: (b) (6) [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jane C. Chiang, Esquire

ON BEHALF OF DHS: John P. Marley
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal

ORDER:

PER CURIAM. This case is presently before us pursuant to the (b) (6) [redacted] en banc decision of the United States Court of Appeals for the (b)(6) [redacted] *Gonzales* (b) (6) [redacted] (b) (6) [redacted] (en banc). The court's decision requires further findings which should be made by an Immigration Judge in the first instance. Accordingly, the September 9, 2005, decision of the Board in this case is vacated and the record is remanded to the Immigration Court for further proceedings consistent with the court's decision. We note the court's suggestion that this case be assigned to a different Immigration Judge on remand.

FOR THE BOARD