Files: (b) (6)

Date: OCT 11 2011

In re: (b) (6)

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) remanded this case to the Board on (b) (6) 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, the (b) (6) 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) *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) 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 365 n.10. 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)

IN THE MATTER OF:

(b) (6) (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)

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

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) *v. Holder*, (b) (6) Decision of the Immigration Court (July 14, 2008) at 1-5.

On (b) (6) the United States Court of Appeals for th (b) (6) vacated the

[1] (b) (6) 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) *v. Holder* (b) (6) (b) (6) Finding that it was, the Board then remanded this case to the Boston 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 (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) (b) (6) *Peru's Sendero Luminoso: From Maoism to Narco-Terrorism*, TerrorismMonitor, Dec. 8, 2008;

Remand Exhibit 3 (b) (6) *v. Holder* (b) (6) (b) (6) (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* (b) (6) (b) (6) (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 (b) (6) 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) (BIA Oct. 11, 2011) at 4. 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; *Castañeda-Castillo*, 638 F.3d at 358; (b) (6) (BIA Oct. 11, 2011) at 4. 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) and (b) (6) and (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) (6) 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 Castañeda-Castillo*, 638 F.3d at 358. 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) 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