No. 02-29

# In the Supreme Court of the United States

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

*v.*

FREDY ORLANDO VENTURA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

Whether the court of appeals exceeded the scope of its review when, having overturned a determination by the Board of Immigration Appeals (BIA) that an alien had not established persecution on account of a protected characteristic for purposes of obtaining asylum or withholding of deportation from the United States, the court itself decided the remaining legal and factual issues relevant to the alien's eligibility for asylum and withholding of deportation, rather than remanding the case to the BIA for it to address those issues in the first instance.

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# In the Supreme Court of the United States

No. 02-29

IMMIGRATION AND NATURALIZATION SERVICE,
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*v.*

FREDY ORLANDO VENTURA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Immigration and Naturalization Service, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 264 F.3d 1150. The order of the Board of Immigration Appeals (App., *infra*, 14a-16a) and the oral decision of the immigration judge (App., *infra*, 17a-23a) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on September 10, 2001. A petition for rehearing was

denied on February 4, 2002 (App., *infra*, 24a). On May 28, 2002, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including July 4, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATUTORY PROVISIONS INVOLVED**

1. Section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(42)(A), provides in pertinent part:

> The term "refugee" means * * * any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]

2. Section 1105a of Title 8 of the United States Code (1994) provided in pertinent part:

> **Judicial review of orders of deportation and exclusion**
>
> **(a) Exclusiveness of procedure**
>
> The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States * * * , except that—
>
> * * * * *

> **(4) Determination upon administrative record**
>
> * * * the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive[.]

3. Section 1158(a) of Title 8 of the United States Code (1994) provided:

> **Establishment by Attorney General; coverage**
>
> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

4. Section 1253(h) of Title 8 of the United States Code (1994) provided in pertinent part:

> **Withholding of deportation or return**
>
> (1) The Attorney General shall not deport or return any alien * * * to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

**STATEMENT**

1. a. The Immigration and Nationality Act (INA) defines the term "refugee" to mean an alien who is unwilling or unable to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). An alien who is a refugee is eligible to be considered for asylum in the United States, provided that the alien is not disqualified from consideration because of past conduct. See 8 U.S.C. 1158 (1994).[1] The Attorney General is vested with discretion whether to grant asylum to an eligible refugee. 8 U.S.C. 1158(a) (1994).

The asylum applicant has the burden of proving that he is a refugee. 8 C.F.R. 208.13(a). An asylum applicant who establishes that he suffered past persecution on account of a statutorily protected characteristic is rebuttably presumed to have a well-founded fear of future persecution. 8 C.F.R. 208.13(b)(1). That presumption may be rebutted if the immigration judge (IJ) finds that (1) there has been a fundamental change in circumstances such that the asylum applicant no longer

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[1] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-575 to 3009-627, revised the INA's provisions for obtaining relief from deportation. See, *e.g.*, 8 U.S.C. 1158 (1994); 8 U.S.C. 1231(b)(3). In Section 304(a) of IIRIRA, 110 Stat. 3009-587 to 3009-593, Congress established a new form of proceeding known as "removal," which applies to aliens who have entered the United States but are deportable, as well as to aliens who are excludable at the border. See 8 U.S.C. 1229, 1229a. Those amendments do not govern the present case because they apply only to applications filed by aliens who were placed in removal proceedings on or after April 1, 1997. IIRIRA § 309(a), 110 Stat. 3009-625.

has a well-founded fear of persecution on account of one of the protected grounds, or (2) the applicant could avoid future persecution by taking reasonable steps to relocate within the country of removal. *Ibid.* The IJ's asylum decision—like other rulings by an IJ in deportation proceedings brought against the alien—is appealable to the Board of Immigration Appeals (BIA). The BIA has the power to conduct a de novo review of the record, to make its own findings of fact, and to determine independently the sufficiency of the evidence. See, *e.g.*, *Elnager* v. *INS*, 930 F.2d 784, 787 (9th Cir. 1991).[2]

b. If the Attorney General determines that an alien's "life or freedom would be threatened" in the country of deportation on account of race, religion, nationality, membership in a particular social group, or political opinion, the alien may be eligible for "withholding of deportation or return." 8 U.S.C. 1253(h)(1) (1994). To be entitled to withholding of deportation, the alien must demonstrate a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. 208.16(b) (applicant bears burden of proving eligibility for withholding). If the alien makes such a showing, withholding of deportation (unlike the discretionary relief of asylum) is mandatory. 8 U.S.C. 1253(h)(1) (1994).

2. Respondent is a native and citizen of Guatemala who was born in 1971. App., *infra*, 2a; A.R. 141 (translation of birth certificate). In August 1993, respondent crossed the United States border unlawfully and without inspection, and entered Texas. A.R. 162. Respon-

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[2] An asylum claim filed by an alien who has not yet been placed in removal proceedings is decided by an asylum officer. See 8 C.F.R. 208.2, 208.9-208.12. Asylum officers' decisions are not appealable to the BIA.

dent applied for asylum in the United States, asserting that he feared he would be killed by members of a Guatemalan guerrilla organization if he was returned to Guatemala. A.R. 129, 134. In October 1994, an asylum officer notified respondent that the Immigration and Naturalization Service (INS) intended to deny him asylum and withholding of deportation. A.R. 129-131; App., *infra*, 19a; see note 2, *supra*.

In August 1995, the INS served respondent with an order to show cause why he should not be deported from the United States. A.R. 162-166. In October 1996, an IJ held a hearing at which respondent conceded that he is deportable from the United States but requested a hearing on his earlier asylum application. A.R. 37-39.

At an evidentiary hearing held in February 1998, respondent testified that, on a total of three occasions in 1992 and 1993, a Guatemalan guerilla group had left messages at his house that implied that harm would come to respondent or his family if he did not join the guerillas' cause. Respondent testified that he did not want to join the guerillas because his family members were allied with the Guatemalan army. Respondent also testified that he believed that the guerillas singled him out because members of his family, including a cousin to whom respondent is close, served in the Guatemalan military. Respondent stated that his uncle was a military commissioner who was attacked in the 1980s by persons whom the family believed to be guerillas; that one of respondent's cousins was killed by guerillas in 1988; and that a friend who lived near respondent was murdered in 1993 when he refused to join the guerillas. App., *infra*, 2a-3a, 20a-21a.

The INS introduced a State Department report about human-rights conditions in Guatemala in 1997, which stated that the Guatemalan guerillas signed

peace accords with the Guatemalan government in 1996 and that, although guerilla groups continued to make death threats in 1996, the groups were disbanding. The State Department report indicated that only leaders or high-profile supporters of Guatemalan political parties were likely to suffer harassment by the guerillas based on their political opinion—and they often could avoid the harassment by relocating within Guatemala. A.R. 59-67.

The IJ found respondent's testimony credible but denied his application for asylum and withholding of deportation. App., *infra*, 19a-20a, 22a-23a. The IJ found (*id.* at 22a) this case to be controlled by *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), in which this Court held that an alien who refused to join a Guatemalan guerilla group out of a fear that he would be punished by the government, and who feared retaliation by the guerillas for refusing to join their group, had not established persecution on account of political opinion or any other protected ground, and therefore was not entitled to refugee status or asylum. See *id.* at 481-484. As an additional basis for her decision, the IJ in this case also held that, "[i]n view of changing country conditions" in Guatemala, respondent had failed to demonstrate "that even if the guerillas, in fact, had an interest in him in the past, that they would continue to have motivation and inclination to persecute him in the future." App., *infra*, 22a.

3. The BIA dismissed respondent's appeal. App., *infra*, 14a-16a. The BIA held in a per curiam order that respondent had not provided anything more than his own speculative opinion that the guerillas threatened him on account of his contacts with the Guatemalan army (or any other protected characteristic). *Id.* at 15a. The BIA therefore determined that it was not neces-

sary to address respondent's further argument that conditions in Guatemala had not changed materially since he left that country in 1993. *Ibid.*

4. The United States Court of Appeals for the Ninth Circuit granted respondent's petition for review and awarded him eligibility for the discretionary relief of asylum, as well as mandatory withholding of deportation. App., *infra*, 2a, 13a. First, the court of appeals found it "clear from the record" that the guerillas' threats against respondent and their efforts at forced recruitment constituted persecution of respondent. *Id.* at 5a-6a. Next, the court held that the past persecution was on account of a political opinion that the guerillas imputed to respondent, and therefore supported a claim to refugee status. See *id.* at 6a-10a. The court stated that respondent "presented credible, uncontradicted testimony that the guerrillas threatened him on account of his imputed anti-guerrilla beliefs," and that "the record establishes that [respondent] * * * had an identifiable political opinion—anti-guerilla sympathy for the military." *Id.* at 7a. The court therefore concluded that the record evidence "compels" a finding that respondent was persecuted in Guatemala on account of an imputed political opinion. *Ibid.*

The court of appeals rejected the IJ's reliance upon *Elias-Zacarias*. The court reasoned that respondent's claim is "far different" from the asylum claim that was rejected by this Court because the alien in *Elias-Zacarias*, unlike respondent, did not offer evidence that he had an actual or imputed political motive for resisting the guerillas' recruitment. App., *infra*, 8a-9a.

The court of appeals then invoked the rebuttable presumption of a well-founded fear of future persecution that arises under administrative regulations from a showing of past persecution. App., *infra*, 10a-11a; see

8 C.F.R. 208.13(b)(1). The court acknowledged that the BIA—having determined that any persecution of respondent was not on account of a protected characteristic—did not address the significance of changed conditions in Guatemala. App., *infra*, 11a. But the court nevertheless declined to remand the case to the BIA to consider that question in the first instance, relying on Ninth Circuit precedent that a remand is not called for "when it is clear that we would be compelled to reverse the BIA's decision if the BIA decided the matter against the applicant." *Ibid.* (citing *Navas* v. *INS*, 217 F.3d 646, 662 (9th Cir. 2000)).

In this case, the court determined, there was only one conclusion that the BIA could permissibly reach. App., *infra*, 11a-13a. The court reasoned that, based upon the 1997 State Department report, political persecution by Guatemalan guerillas had not ended entirely. Therefore, according to the court, "we cannot say the risk to [respondent] of future persecution on account of an imputed political opinion has been so minimized as to rebut the presumption of such persecution." *Id.* at 12a. On that basis, the court of appeals held that respondent is eligible to be considered by the Attorney General for a grant of asylum, and is entitled to withholding of deportation to Guatemala. *Id.* at 13a.

On February 4, 2002, the court of appeals denied the government's timely petitions for rehearing and rehearing en banc. App., *infra*, 24a.

**REASONS FOR GRANTING THE PETITION**

1. The question presented for review in this case is whether, once a court of appeals rejects the Board of Immigration Appeals' particular grounds for finding that an asylum applicant failed to establish past persecution based upon a protected characteristic, the

court should remand to the BIA for further proceedings, rather than itself adjudicate the applicant's eligibility for relief. The pending petition in *INS* v. *Chen*, No. 02-25 (filed July 3, 2002), presents the same question. In *Chen*, the court of appeals found inadequate the BIA's reasons for deciding that the alien did not provide credible testimony concerning past persecution in China, in support of his application for asylum and withholding of removal. Instead of remanding to the BIA for further proceedings, the court then made de novo determinations that the alien in fact had suffered past persecution on the basis of a protected characteristic, that the INS had not rebutted the resulting presumption of future persecution, and that the alien was eligible for relief. The petition in *Chen* asks this Court to review the court of appeals' reversal of the BIA's adverse credibility finding (Question 1), as well as the court of appeals' failure to remand the case to the BIA once it rejected the the BIA's basis for denying asylum and withholding of removal (Question 2). The second question presented in *Chen* involves the same legal issue as the question presented in this petition.

2. In this case, the court of appeals reversed the BIA's determination that respondent failed to carry his burden of proving that the persecution he alleged was on account of political opinion.[3] The court of appeals

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[3] The court of appeals' overturning of the BIA's reasonable factual determination that respondent failed to carry his burden of proof on the past-persecution issue was error, for many of the same reasons that it was error for the Ninth Circuit to overturn the BIA's adverse credibility determination in *Chen*. See Pet. at 13-19, *Chen*, *supra*, (No. 02-25). The government does not, however, seek further review on this issue. In December 2000, the INS proposed, among other new regulations, a regulation that

recognized (App., *infra*, 11a) that its holding compelled additional factual findings about issues that the BIA, given its own view of the evidence, did not need to address. In such a situation, a court of appeals "is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985). Rather, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Ibid.* Just as the Ninth Circuit erred by undertaking de novo fact-finding in *Chen* (see Pet. at 20-27, *Chen*, *supra* (No. 02-25)), the court of appeals should have remanded this case to the BIA, rather than proceeding to determine whether the evidence currently in the record concerning changed conditions in Guatemala overcomes the rebuttable presumption arising from the court's finding of past persecution.

As the petition in *Chen* also explains (at 22-23), the Ninth Circuit's de novo resolution of asylum and withholding-of-removal issues not decided by the BIA is a recurring error that warrants intervention by this Court. The recurring error, moreover, puts the Ninth Circuit in conflict with other courts of appeals, which generally respect the BIA's role as fact-finder by remanding to the BIA in similar situations. See, *e.g.*, *Begzatowski* v. *INS*, 278 F.3d 665, 671 (7th Cir. 2002) (remanding after reversing BIA finding of no past persecution); *Yang* v. *McElroy*, 277 F.3d 158, 162 (2d

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would address what an asylum applicant must show in order to establish, in the context of a persecutor with mixed motivations, that the persecution was on account of the applicant's protected characteristic. See 65 Fed. Reg. 76,588, 76,597-76,598 (2000) (proposing new 8 C.F.R. 208.15(b)). The INS presently is considering public comments received on its proposed regulations.

Cir. 2002) (noting that remand "recognizes that the [BIA] is the adjudicative body having primary responsibility and experience in asylum matters"); *Alvarado-Carillo* v. *INS*, 251 F.3d 44, 47 (2d Cir. 2001) ("[M]indful of the deference generally granted to the BIA, we remand to permit the BIA to re-evaluate petitioner's claim in light of this opinion."); *Stewart* v. *INS*, 181 F.3d 587, 595 n.6 (4th Cir. 1999); *Gailius* v. *INS*, 147 F.3d 34, 47 (1st Cir. 1998) (remand "is the appropriate remedy when a reviewing court cannot sustain the agency's decision because it has failed to offer legally sufficient reasons for its decision"); *Rhoa-Zamora* v. *INS*, 971 F.2d 26, 34 (7th Cir. 1992) ("We will not weigh evidence that the [BIA] has not previously considered; an appellate court is not the appropriate forum to engage in fact-finding in the first instance."), cert. denied, 507 U.S. 1050 and 508 U.S. 906 (1993).

3. In this case, moreover, the practical importance of the Ninth Circuit's failure to defer is manifest. The critical factual question framed by the court of appeals is whether evidence of changed country conditions rebuts the presumption that respondent has a well-founded fear of persecution (for asylum) or would be threatened with persecution (for withholding of removal) in Guatemala if he is returned to that country. Although the court of appeals answered that question in the negative because the State Department report concerning country conditions in Guatemala in 1997 identified some continuing violence by guerilla groups (App., *infra*, 11a-12a), the court did not address the State Department's further statement that "[i]n our experience, only [political] party leaders or high-profile activists generally would be vulnerable to such harassment and usually only in their home communities,

making internal relocation a viable alternative in many cases." A.R. 66. A remand would permit the BIA to evaluate the State Department report as a whole and determine in the first instance the extent to which it rebutted a presumption of a fear of, or actual, persecution in the future. A remand also would permit the BIA to consider whether additional relevant evidence should be obtained in order to update information about conditions in Guatemala at the present time, more than five years after the period covered by the State Department report in the record.

The court of appeals thus was grossly mistaken when it declared that the correct disposition of this case was so "clear" that no remand was required. App., *infra*, 11a. That statement ignored the possibility of further administrative fact-finding, and also that the *existing* record evidence was itself equivocal. A remand to the BIA therefore is plainly required in this case. See *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration."). That is all the more so because the rebuttable presumption on which the court of appeals relied is a creature of regulations issued by the Attorney General. The BIA must be given an opportunity to interpret and apply those regulations in the first instance and to determine what sort of evidence is sufficient in this case to overcome the separate versions of the presumption applicable to asylum and withholding claims.

4. As noted above, the petition in *Chen* presents two questions, each involving a legal error that independently warrants reversal of the court of appeals' judgment. If this Court grants review in *Chen* and reverses the Ninth Circuit's judgment on the ground that the

BIA's adverse credibility determination was permissible and that the BIA's finding of no past persecution therefore should have been sustained, the Court might not address the second question in that case—whether the Ninth Circuit, once it set aside the BIA's credibility determination, should then have remanded the case for further administrative proceedings. In this case, the government seeks certiorari only on the question of whether a remand was required. Accordingly, granting review in this case, as well as in *Chen*, would ensure the Court's ability to address the remand issue that is raised in both cases and in numerous other Ninth Circuit cases, regardless of the Court's disposition of the first question in *Chen*. We therefore respectfully suggest that the Court grant the certiorari petition in this case as well as the pending petition in *Chen* and consolidate the cases for oral argument.

In the alternative, the petition in this case should be held pending this Court's final disposition of *Chen*. If the Court reverses the Ninth Circuit's decision on the first issue presented in *Chen* and does not address the remand issue, it should then grant certiorari in this case to consider the remand issue.[4]

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[4] This case arises under the pre-IIRIRA provisions of the INA, whereas *Chen* is governed by IIRIRA's amendments. That is not a significant difference for purposes of this Court's review, however. The common question presented in both cases involves the correct relationship between the BIA and the courts of appeals in asylum cases, and whether and when a court of appeals should reserve judgment on factual questions not yet addressed by the BIA. IIRIRA's amendments are incidental to that common question. Indeed, IIRIRA's specific standards for judicial review of BIA removal orders (see 8 U.S.C. 1252(b)(4)(A) and (B)) reflect the longstanding "substantial evidence" standard of review (see 8 U.S.C. 1105a(a)(4) (1994)) and essentially codify this Court's hold-

## CONCLUSION

The petition for a writ of certiorari should be granted and the case should be consolidated for oral argument with *INS* v. *Chen*, petition for cert. pending, No. 02-25 (filed July 3, 2002). Alternatively, the petition should be held pending this Court's disposition of the petition in *Chen*, and then should be disposed of as appropriate in light of the final disposition of that case.

Respectfully submitted.

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JULY 2002

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ing in *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 & n.1, 483-484 (1992).

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 99-71004

FREDY ORLANDO VENTURA, PETITIONER

*v.*

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

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**Petition for Review of a Decision of the Board of Immigration Appeals. INS No. A72-688-860**

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Argued and Submitted June 13, 2001
Filed Sept. 10, 2001

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Before: SCHROEDER, Chief Judge, LAY,* and DAVID R. THOMPSON, Circuit Judges.

DAVID R. THOMPSON, Circuit Judge:

The petitioner Fredy Orlando Ventura petitions for review of a Board of Immigration Appeals (BIA) decision dismissing his appeal of the denial of his asylum application. He contends the record compels a finding that he established past persecution on account of imputed political opinion, and the INS's evidence of

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* Honorable Donald Lay, Circuit Judge, Eighth Circuit Court of Appeals, sitting by designation.

changed country conditions failed to rebut the presumption of future persecution. He seeks asylum and withholding of deportation. We grant Ventura's petition for review, and hold that he is entitled to withholding of deportation. We also conclude Ventura is eligible for asylum, and remand his asylum application to the BIA for the Attorney General's exercise of his discretion in granting or denying that application.

**I.**

Ventura is a 30-year-old native and citizen of Guatemala. He first entered the United States without inspection in July 1993. He left Guatemala after guerrillas spray-painted three "notes" on the wall of his house in 1992 and 1993, demanding that he join their forces and threatening harm to his family if he did not. In his testimony before the Immigration Judge (IJ), Ventura stated that all three notes were the same and that they read, "Fredy Ventura, you must join us, or your family will suffer the consequences." He further testified "if I didn't turn myself in to them, that they would kill me, that they would threaten me."

Ventura testified and stated in his asylum application that because members of his family are in the military, the guerrillas perceive him to be their enemy, and for that reason they have threatened him. Ventura's cousin Oswaldo Ventura is a lieutenant in the army and has served in the military for twelve years. Ventura states that he and Oswaldo grew up together and Oswaldo "is like a brother to me." Oswaldo used to visit Ventura during his monthly leave and would sleep at Ventura's house.

Ventura's uncle Arnoldo Ventura is a Military Commissioner, responsible for recruiting Guatemalan men

to join the army. Approximately five years before Ventura fled Guatemala, Arnoldo was nearly killed by guerrillas, who attacked him with machetes. In addition, another of Ventura's cousins, Lorenzo Ventura, a member of the army, was killed by guerrillas in 1988, while walking in a village and not in uniform. Ventura's friend, Martin Contreras, was murdered by guerrillas after receiving threats similar to those Ventura received, demanding that he join the guerrillas.

Ventura testified that he is not familiar with the guerrillas' ideology, but he stated in his asylum application that he sympathizes with the military and not with the guerrillas. Ventura stated that the guerrillas can find him anywhere in Guatemala, and that if he returned to Guatemala he would be killed, even though a peace accord has been signed.

The IJ found Ventura's testimony to be credible, but determined that Ventura "failed to present adequate objective evidence to show that his fear is based on one of the protected statutory grounds." The IJ found Ventura's case was indistinguishable from *INS v. Elias-Zacarias*, 502 U.S. 478, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992). The IJ also concluded, without elaboration, that, "[i]n view of changing country conditions," Ventura failed to demonstrate a well-founded fear of future persecution.

The BIA conducted a de novo review of the record. In its six-paragraph per curiam order, it briefly discussed and rejected Ventura's "on account of" argument and stated that it agreed with the IJ's decision that Ventura had failed to make the required showing that he was persecuted on account of a statutorily protected ground. The BIA declined to address the

issue of changed country conditions, and dismissed Ventura's appeal.[1] This petition for review followed.

**II.**

When the BIA conducts its own review of the record, our review is limited to its decision. *Singh v. INS*, 94 F.3d 1353, 1358 (9th Cir. 1996). A factual determination by the BIA must be upheld if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." *Elias-Zacarias*, 502 U.S. at 481, 112 S. Ct. 812. That determination "can be reversed only if the evidence presented by [the petitioner] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *Id.* (citing *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300, 59 S. Ct. 501, 83 L. Ed. 660 (1939)). The petitioner "must establish that the evidence not only supports the conclusion that [he] suffered persecution or has a well-founded fear of persecution, but compels it." *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc) (citing *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995)).

We will accept as true an applicant's testimony when neither the IJ nor the BIA question the applicant's credibility. *See Kamla Prasad v. INS*, 47 F.3d 336, 339 (9th Cir. 1995). We recognize that corroborating evidence of a persecutor's motive may be difficult or impossible to come by. "[W]e have repeatedly emphasized that 'asylum applicants are not required to produce documentary evidence' to support their claims

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[1] Apparently, because Ventura's brief was untimely filed, the BIA did not consider it in reaching its decision. *In re Fredy Orlando Ventura*, A72 688 860 (Board of Immigration Appeals Feb. 24, 1999) (interim order).

of persecution. We have also emphasized that '[b]ecause asylum cases are inherently difficult to prove, an applicant may establish his case through his [or her] own testimony alone.'" *Shoafera v. INS*, 228 F.3d 1070, 1075 (9th Cir. 2000) (citations omitted).

A determination of past persecution such that a petitioner's life or freedom was threatened creates a presumption of entitlement to withholding of deportation. *Duarte de Guinac v. INS*, 179 F.3d 1156, 1164 (9th Cir. 1999). The INS may rebut that presumption by showing by a preponderance of the evidence that persecution is no longer more likely than not due to changed country conditions. *Id.*

**III.**

Neither the BIA, the IJ, nor the parties addressed the question of whether the threats to Ventura rose to the level of past persecution. However, it is clear from the record that they did.

Death threats and forced recruitment efforts by a revolutionary group constitute persecution. *See Garrovillas v. INS*, 156 F.3d 1010, 1016 (9th Cir. 1998); *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997); *see also Arteaga v. INS*, 836 F.2d 1227, 1232 (9th Cir. 1988) ("Forced recruitment by a revolutionary army is tantamount to kidnapping, and is therefore persecution.").

Past persecution was established on facts similar to those in the present case in *Del Carmen Molina v. INS*, 170 F.3d 1247 (9th Cir. 1999). There, the petitioner received two notes from El Salvadoran guerrillas threatening her family if she did not go with them and talk to them about her cousins. She opposed the guerrillas, her family was involved in the military, and

some relatives had been killed because of the family's military ties.

Consistent with *Del Carmen Molina*, we conclude that the threats and forced recruitment directed toward Ventura rise to the level of past persecution. We turn next to the primary issue in this case, whether Ventura established that he was persecuted on account of an imputed political opinion. To establish this, he had to "show that his persecutors actually imputed a political opinion to him." *Sangha*, 103 F.3d at 1489.

Past political persecution of family members provides evidence of imputed political opinion of an asylum applicant. *Id.; see also Ramirez Rivas v. INS*, 899 F.2d 864, 868-71 (9th Cir. 1990). In such cases, "the trier of fact must examine how close a relationship exists between the persecution of family members and the situation of the applicant." *Sangha*, 103 F.3d at 1489 (citing *Arriaga-Barrientos v. U.S. INS*, 937 F.2d 411, 414 (9th Cir. 1991)). Forced recruitment without evidence of a discriminatory purpose is insufficient to compel a finding of persecution on account of political opinion. *Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir. 2000) (citing *Elias-Zacarias*, 502 U.S. at 482-83, 112 S. Ct. 812).

Ventura's evidence that his persecution occurred on account of imputed political opinion consists of his credible, uncontradicted testimony that the guerrillas targeted him because they believed he held anti-guerrilla sympathies; that his uncle was attacked and his cousin was killed by guerrillas because of their military affiliations; and that he is closely associated with his cousin Oswaldo, an army lieutenant.

In *Del Carmen Molina*, we held the petitioner established a well-founded fear of persecution on account of political opinion. Although notes directed to her by the guerillas gave no explicit indication that the guerillas were motivated by her political opinion, the notes stated that the guerillas wanted to talk to her about her cousins, and to take her with them. 170 F.3d at 1249. The petitioner's credible and uncontradicted testimony was that the guerillas threatened her because of her political opinion. *Id.* at 1250. Relying on this evidence, we concluded that the BIA's determination that the petitioner was not persecuted on account of actual or imputed political opinion was "not supported by reasonable, substantial, and probative evidence." *Id.*

The INS attempts to distinguish *Del Carmen Molina*, arguing that there the petitioner had an identifiable political opinion and her testimony constituted sufficiently compelling evidence to require reversal. Those circumstances, however, are also present in this case. Like the petitioner in *Del Carmen Molina*, Ventura presented credible, uncontradicted testimony that the guerrillas threatened him on account of his imputed anti-guerrilla beliefs. In addition, like the *Del Carmen Molina* petitioner, Ventura testified that he and his family are closely associated with the military, that family members have been targeted because of that affiliation, and that he himself can be readily associated with pro-military, anti-guerrillas views. In addition, the record establishes that Ventura, like Del Carmen Molina, had an identifiable political opinion—anti-guerrilla sympathy for the military.

We conclude the evidence presented by Ventura compels a finding that he was persecuted on account of imputed political opinion. This conclusion is supported

not only by *Del Carmen Molina*, but also by our decision in *Shoafera*, 228 F.3d at 1074-75. There, an Ethiopian woman claimed she was raped on account of her Amharic ethnicity. Evidence of her persecutor's motives consisted solely of her and her sister's credible, uncontradicted testimony that she was raped because she was Amharic. *Id.* We held:

> "[N]either the IJ nor the INS elicited any testimony from Shoafera demonstrating that the nature or basis for her testimony was questionable. A bald assertion that Shoafera's credible testimony was 'speculation' is insufficient. Some evidence or support for that conclusion must be offered. . . . Shoafera's uncontroverted and credible testimony is sufficient to establish that she was persecuted on account of ethnicity."

*Id.* at 1075.

The INS argues the present case is more similar to *Elias-Zacarias* than to either *Del Carmen Molina* or *Shoafera*, and in any event, *Elias-Zacarias*, a Supreme Court decision, is controlling. In *Elias-Zacarias*, Guatemalan guerrillas attempted to recruit the petitioner, but he refused "because the guerrillas [were] against the government and he was afraid that the government would retaliate against him and his family if he did join the guerrillas." *Elias-Zacarias*, 502 U.S. at 480, 112 S. Ct. 812. The Court held that a threat of forced recruitment does not alone constitute persecution on the basis of political opinion. *Id.* at 482-83, 112 S. Ct. 812. The record contained no evidence that the petitioner had an actual or imputed political motive to resist recruitment. *Id.* at 482, 112 S. Ct. 812. The petitioner did not testify that he believed the guerrillas imputed any political

opinion to him, that any family members had been persecuted in the past by guerrillas, or that he had any anti-guerrillas ties. Ventura's circumstances are far different from those of the petitioner in *Elias-Zacarias*.

Ventura's circumstances are also distinguishable from those of the petitioner in *Ochave v. INS*, 254 F.3d 859 (9th Cir. 2001). There, the petitioner declared in her asylum application that she was raped by guerrillas on account of her imputed political opinion because her father was a government official. *See id.* at 862. The IJ found the petitioner's statements credible. *Id.* at 869-70 (Pregerson, J., dissenting). In denying review of her petition, we emphasized that the IJ was not compelled to accept the accuracy of her belief regarding her persecutors' motives because there was "substantial evidence tending in the other direction." *Id.* at 866. There had been many similar attacks on other victims, suggesting that the rape of the petitioner may have been a random act of violence; the attack occurred outdoors, rather than at the petitioner's home or workplace (which would have suggested the rapists were seeking the petitioner specifically); and there was no evidence that the rapists knew who the petitioner was. *Id.* at 865-66. In contrast, Ventura presented overwhelming evidence that his persecutors knew exactly who he was: the guerrillas came to his home and painted notes on the wall of his house three separate times, addressing the notes to him personally. No evidence in the record contradicts Ventura's credible testimony that the persecutors targeted him because they believed he held anti-guerrilla beliefs.

Ventura's circumstances are also different from the petitioner's in *Molina-Morales v. INS*, 237 F.3d 1048

(9th Cir. 2001). In *Molina-Morales*, the petitioner's aunt was raped by a local leader of the ARENA party in El Salvador, but there was no evidence the attack was politically motivated. *See id.* at 1050. Nor was there any evidence that the petitioner had any ties to an opposing political party, or that the persecutors had any reason to believe the petitioner opposed their views. We held that the petitioner had not established persecution on account of actual or imputed political opinion. *Id.* at 1051-52.

In *Arriaga-Barrientos v. INS*, 937 F.2d 411 (9th Cir. 1991), the petitioner testified that his release from the Guatemalan military "might be construed [by pro-government forces] as an act sympathetic to the opposition," and that "his long-standing military service might be construed as an expression of political support for the government." *Id.* at 412. Two of his brothers, who lived eight hundred kilometers away, had previously been abducted by unknown gunmen for unknown reasons. *Id.* Unlike the present case, however, those facts failed to demonstrate any reason for the persecutors to impute a political opinion to the petitioner. We held the petitioner had failed to establish a well-founded fear of future persecution on account of political opinion. *Id.* at 413-15.

In contrast to *Ochave*, *Molina-Morales*, and *Arriaga-Barrientos*, Ventura's level of past persecution and his credible, uncontradicted testimony regarding his persecutors' motives compel the conclusion that he was persecuted on account of imputed political opinion.

Because Ventura established past persecution on account of imputed political opinion, he is presumed to have a well-founded fear of future persecution on account of that protected ground. 65 Fed. Reg. 76,121,

76,133 (Dec. 6, 2000) (to be codified at 8 C.F.R. § 208.13(b)(1)). The INS presented evidence of changed country conditions to rebut this presumption, but the BIA did not address that issue. It failed to consider the issue because it determined Ventura had not met his burden of establishing that he was persecuted on account of an imputed political opinion.

When the BIA does not reach the issue of whether changed country conditions rebutted the presumption of a well-founded fear of future persecution, we generally will remand to the BIA for it to consider the issue. We do not remand, however, when it is clear that we would be compelled to reverse the BIA's decision if the BIA decided the matter against the applicant. *Navas v. INS*, 217 F.3d 646, 662 (9th Cir. 2000); *see also Gafoor v. INS*, 231 F.3d 645, 656 n.6 (9th Cir. 2000). We conclude that remand in this case is inappropriate because the INS's evidence of changed country conditions clearly demonstrates that the presumption of a well-founded fear of future persecution was not rebutted.

In December 1996, after Ventura left Guatemala, a peace agreement was signed between the government of Guatemala and the Guatemalan National Revolutionary Party (URNG) (the umbrella guerrilla organization alliance). Bureau of Democracy, Human Rights and Labor, United States Department of State, Guatemala —Profile of Asylum Claims & Country Conditions 2 (June 1997). In March 1997, the URNG "dissolved itself to devote its efforts to legal political activity." *Id.* As a result, "there was marked improvement in the human rights situation." *Id.* at 3. However, "[e]ven after the March cease-fire, guerrillas continue to employ death threats . . . ." *Id.* The 1997 State Department report also states that "the guerrillas [have] renounced the use

of force to achieve political goals. Although the level of crime and violence now seems to be higher than in the recent past, the underlying motivation in most asylum cases now appears to stem from common crime and/or personal vengeance." *Id.* at 4. "[T]he situation is unlikely to improve significantly in the short-term . . . ." *Id.* Thus, the record shows that although violence stemming from persecution by guerillas has declined since Ventura left Guatemala, guerrillas continue to subject civilians to death threats.

In these circumstances, we cannot say the risk to Ventura of future persecution on account of an imputed political opinion has been so minimized as to rebut the presumption of such persecution. *See Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir. 2000) ("A well-founded fear may be based on no more than a ten percent chance of actual persecution.") (citing *Velarde v. INS*, 140 F.3d 1305, 1310 (9th Cir. 1998)). Ventura's case is similar to *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc), in which we determined that the petitioner's well-founded fear of future persecution by rebels was not rebutted by general evidence of lessened violence in the home country.

In *Borja*, a State Department report stated that the numbers and geographical presence of rebels were declining, the rebels "in most instances" were not interested in the political opinions of their victims, it was "*generally* . . . possible to seek internal resettlement," there were "fewer" disappearances and politically related killings, and peace talks were "adjourned indefinitely" due to "dissension." *Id.* at 738. These factors were not sufficient to rebut the presumption of a well-founded fear of future persecution because "although the current tide of violence may be receding, based on

this record it still exists." *Id; cf. Marcu v. INS*, 147 F.3d 1078, 1081-82 (9th Cir. 1998) (upholding a BIA determination that the presumption was rebutted where (1) a State Department report stated that "current conditions have so altered as to remove any presumption that past mistreatment . . . will lead to mistreatment in the future," and (2) a State Department letter analyzing the petitioner's claim refuted his contention that no real change had taken place and that he would be subjected to retribution if he returned).

We conclude Ventura is eligible for asylum. He is also entitled to withholding of deportation, because the evidence compels the conclusion that it is more likely than not that his life or freedom would be threatened on account of imputed political opinion if he were to return to Guatemala. *See INS v. Stevic*, 467 U.S. 407, 413, 430, 104 S. Ct. 2489, 81 L. Ed. 2d 321 (1984); *Molina-Morales*, 237 F.3d at 1051; *Singh-Kaur v. INS*, 183 F.3d 1147, 1149 (9th Cir. 1999); *see also De Valle v. INS*, 901 F.2d 787, 790 (9th Cir. 1990) (a "clear probability" of future persecution means "more likely than not.").

PETITION FOR REVIEW GRANTED; APPLICATION FOR WITHHOLDING OF DEPORTATION GRANTED; APPLICATION FOR ASYLUM REMANDED for the exercise of the Attorney General's discretion.

**APPENDIX B**

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF
IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

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FILE No. A72 688 860 – SAN FRANCISCO

IN THE MATTER OF
FREDY ORLANDO VENTURA

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[Date: July 19, 1999]

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**IN DEPORTATION PROCEEDINGS**

APPEAL

ON BEHALF OF RESPONDENT:

Jan Austerlitz, Esquire
405 14th Street, #1600
Oakland, California 94612

ON BEHALF OF SERVICE:

Dennise D. Willett
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] – Entered without inspection

APPLICATION: Asylum; withholding of deportation; voluntary departure

**ORDER**

PER CURIAM. The respondent's appeal is dismissed. The Immigration and Naturalization Service's motion for summary dismissal is denied. We find that summary dismissal of this case is not appropriate under the circumstances presented.

On appeal, the respondent argues in his Notice of Appeal that: "The IJ abused her discretion in denying asylum based on changed country conditions when there was evidence to support the fact that conditions have not changed. She also erred in finding that the threats against me by the guerillas were not politically motivated."

We agree with Immigration Judge that the respondent has not satisfactorily met his burden of establishing that he faces persecution "on account of" a qualifying ground. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992) (setting forth the "on account of" standard for asylum"); *Matter of R-O-*, 20 I&N Dec. 455 (BIA 1992). The respondent speculated that the guerrillas were after him because of his contact with the army (Tr. at 11). However, this speculation is entitled to little evidentiary weight because it is merely the respondent's opinion. He did not testify that the guerillas told him or anyone else the reasons for wanting him. *INS v. Elias-Zacarias*, *supra*, at 483 (respondent must provide some evidence of persecutor's motive).

As we find the respondent did not meet his burden of establishing that he faces persecution "on account of" a qualifying ground, we need not address his argument regarding changed country conditions.

Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order.

/s/ JOHN GWENDELSBERG
FOR THE BOARD

**APPENDIX C**

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

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FILE No. A72 688 860 – SAN FRANCISCO

IN THE MATTER OF
FREDY ORLANDO VENTURA, RESPONDENT

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[Feb. 10, 1998]

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**IN DEPORTATION PROCEEDINGS**

CHARGE: Entry without inspection

APPLICATION: Asylum; withholding of deportation; voluntary departure

ON BEHALF OF RESPONDENT: Alice Hall, Esq.

ON BEHALF OF SERVICE: Denise Willett, Esq.

**ORAL DECISION OF THE IMMIGRATION JUDGE**

Respondent is a 20-year-old, single man, native and citizen of Guatemala. At a hearing before this Court on October 29th 1996, Counsel on Respondent's behalf, admitted the factual allegations contained in the Order to Show Cause dated August 15, 1995, and conceded deportability has been established by clear, convincing, and unequivocal evidence. Respondent declined to designate a country of deportation. The Court desig-

nated Guatemala. In lieu of deportation, Respondent has applied for asylum and withholding of deportation or in the alternative voluntary departure.

In order to qualify for withholding of deportation to a particular country, an applicant must demonstrate that his life or freedom would be threatened there on account of race, religion, nationality, membership in a particular social group, or political opinion. Section 242(h) of the Immigration and Nationality Act. The Supreme Court has held that this requires an applicant to meet the clear probability standard, i.e. to show that persecution is more likely that not to occur. *INS* v. *Stevic*, 467 U.S. 407 (1984).

An applicant for asylum must demonstrate that he is unwilling to return to his homeland because of persecution or a well-founded fear of persecution by the government or a group that the government cannot control based on the above enumerated grounds. Section 208 of the Immigration and Nationality Act. The Supreme Court has held that an applicant for asylum must demonstrate an[] actual and genuinely held subjective fear of persecution and further show that that fear is objectively reasonable, i.e. well founded. *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987).

However, past persecution or a well-founded fear of future persecution standing alone is insufficient to establish eligibility for asylum. The statute requires that such harm be on account of one of the specific grounds enumerated in the Act, i.e. a nexus to a protected ground must be shown. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). A generalized political agenda on the part of the persecutor is not enough to establish persecution on account of political opinion. *Zacarias, supra.*

An asylum applicant's testimony is extremely important since an individual [*sic*] applying for asylum relief are often initially limited in the additional evidence that they can obtain to prove past or future persecution. *Plateros-Cortez v. INS*, 804 F.2d 1127 (9th Cir. 1986). An alien's own testimony without corroborative evidence may be sufficient to prove a well-founded fear of persecution where that testimony is believable[,] consistent and sufficiently detailed to provide a plausible and coherent account of the basis for the fear. *Matter of Mogharrabi*, 19 I&N Decs. 439 (BIA 1987).

Finally, even if statutorily eligible for relief, an asylum applicant must demonstrate that he merits a favorable exercise of discretion.

In arriving at my decision today, I very carefully observed Respondent's demeanor while he was on the witness stand. He testified in a candid and forthright fashion without hesitation. His testimony was sincere. His testimony was consistent with his application for relief. This Court paid particular attention to Respondent's testimony in view of the reason for the denial of the affirmative application for asylum in which the asylum officer found respondent not to be credible. This Court strongly disagrees with that finding. The inconsistencies cited by the asylum officer appear to be inconsistencies which can be attributed to miscommunication in translations and/or respondent's nervousness. He apparently corrected himself quickly when he misspoke at his asylum interview. Today, the story he presented was substantially the same in all material respects with the corrected version of the facts in his case which he presented to the asylum officer. In view of his nervousness today, I find it clear that Respondent testified credibly both before this court and I believe it

is likely that he testified credibly before the asylum officer as well and that any inconsistencies were simply attributed to his nervousness and lack of clarity with regard to the interpretation. For these reasons, I find that Respondent has testified credibly and we will afford his testimony as full weight as evidence.

Based upon respondent's testimony the following are this court's findings of fact. Respondent was born and raised in El Barro, Conguaco, Guatemala. He lived there all his life until he came to the United States in July of 1993. His family had many connections to the military. He had an uncle and cousins who were affiliated with the army. Respondent himself began to have problems himself in March of 1992 when the guerillas wrote on his home that he should join them. The incident frightened him but he felt there was nothing that could be done. Two months later, it was again written on his house that Respondent should join the guerillas or his family would suffer the consequences. This time he went to the police, but they also told Respondent that there was nothing that could be done. Respondent was concerned and he discussed the situation with friends and neighbors and he began thinking about leaving Guatemala and coming to the United States. In June of 1993, when the guerillas again wrote on his house that Respondent must join them or his family would suffer the consequences, he feared that they would, in fact, harm him and they decided to come to the United States.

Respondent testified that he didn't want to join the guerillas because all his family are allied with the army. He is very close to one cousin, who is a lieutenant in the army and has he has been serving in the army for close to twelve years. They are close and see each other

frequently. Respondent's uncle, Arnaldo Ventura, is a military commissioner in the local area and has held this job for many, many years. He was attacked by people with machetes in 1987 and the family strongly believes it was the guerillas who w[ere] responsible. Another cousin of Respondent's who was a soldier was killed in 1988 when he and his brother were shot at and one of the two, the soldier, was killed.

Respondent was particularly frightened by the death of his friend and neighbor, Martin Contreras. He and Martin ha[d] discussed the fact that the guerillas had made attempts to recruit them. Martin had told respondent about that and asked for his advice. Respondent had told Martin his belief that neither of them could do anything about that. After regularly receiving notes like the one Respondent received, Martin was murdered in the countryside in February of 1993. A note was left by his body indicating that the reason for his death was that he did not obey. This incident prompted Respondent to make arrangements to leave Guatemala which he did in July of 1993.

Respondent testified that he was not familiar with the guerrilla ideology, that he feels certain that part of their belief encompasses the belief that if one is not with them, one is against them. Respondent did not relocate within the country of Guatemala because he believes that the guerrillas could find him anywhere in the country. He fears that if he were to return to Guatemala at the present time that the guerrillas would kill him because they do not rest until they finish with everyone.

Respondent believes that they would carry out their threats against him despite the fact that the peace

accords have been signed and for this reason Respondent fears returning to Guatemala.

Based an his credible testimony Respondent has clearly demonstrated a subjective fear of persecution. I find, however, he has failed to demonstrate statutory eligibility for asylum because he has failed to present adequate objective evidence to show that his fear is based on one of the protected statutory grounds. Respondent has failed to present objective evidence to demonstrate that the guerillas[’] interest in him was on account of his political opinion or a characteristic which they sought to overcome or persecute him for. Basically, I find that Respondent has failed to distinguish his situation from the similar situation presented in the case of *Elias-Zacarias*, which in essence held that forcible recruitment does not fall within a protected statutory ground. I find, further, the Respondent has failed to present subjective evidence to demonstrate that even if the guerillas, in fact, had an interest in him in the past, that they would continue to have motivation and inclination to persecute him in the future. In view of changing country conditions, I find that Respondent has failed to demonstrate by objective evidence that his subjective fears are well-founded in that regard as well.

For these reasons, I find that Respondent has failed to demonstrate statutory eligibility for asylum. It follows, therefore, that he has failed to meet the heavier burden applicable to withholding of deportation.

In the alternative, Respondent has requested the privilege of voluntary departure. I believe he has demonstrated statutory eligibility for that relief and that he is deserving in the exercise of discretion. Accordingly, I enter the following order:

**ORDER**

IT IS ORDERED that Respondent's request for asylum be denied.

IT IS FURTHER ORDERED that Respondent's request for withholding of deportation be denied.

IT IS FURTHER ORDERED that Respondent be granted the privilege of voluntary departure without expense to the Government, on or before June 10th 1998, or any extension beyond such date as the District Director shall authorize.

IT IS FURTHERED ORDERED that if Respondent should fail to depart when and as required, the privilege of voluntary departure shall be withdraw[n] without further notice or proceedings, the following order shall thereupon become immediately effective:

Respondent shall be deported from the United States to Guatemala on the charges contained in the Order to Show Cause.

/s/ DANA MARKS KEENER
DANA MARKS KEENER
Immigration Judge

APPROVED AS TO CONTENT ONLY
Dated: 5/26/98

**APPENDIX D**

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 99-71004
I&NS No. A72-688-860

FREDY ORLANDO VENTURA, PETITIONER

*v.*

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT

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Feb. 4, 2002

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Before: SCHROEDER, Chief Judge, LAY*, and THOMPSON, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the respondent, INS's petition for hearing. Judge Schroeder has also voted to deny its petition for rehearing by the court en banc, and Judges Lay and Thompson have recommended that petition be denied.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petitions for panel rehearing and for rehearing by the court en banc are DENIED.

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* Honorable Donald Lay, Circuit Judge, Eighth Circuit Court of Appeals, sitting by designation.