

**UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
26 FEDERAL PLAZA  
NEW YORK, NEW YORK**

File: A-----

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In the Matter of :

**IN REMOVAL PROCEEDINGS**

**Octavia** :  
Respondent :

CHARGE: INA § 212(a)(6)(C)(i)

An alien by fraud or willful misrepresentation seeks to procure an immigration benefit

INA § 212(a)(7)(A)(i)(I)

An immigrant not in possession of a valid entry document

APPLICATIONS: INA § 208  
INA § 241(b)(3)  
INA §§ 101(a)(15)(U) & 214(o)

Asylum  
Withholding of Removal  
U Visa

ON BEHALF OF THE RESPONDENT

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ON BEHALF OF THE SERVICE

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**DECISION OF THE IMMIGRATION JUDGE**

**I. PROCEDURAL HISTORY**

On May 25, 2001, the Immigration and Naturalization Service (the “Service”) personally served the respondent a Notice to Appear (“NTA”). [Exh. 1] The NTA alleges that the respondent is a native and citizen of Guatemala who arrived at the San Ysidro, California port of entry on April 30, 2001, and applied for admission to the United States by presenting a photo-altered I-94 issued to Josefina Plascencia Gutierrez. It further alleges that the respondent has no legal right to enter or remain in the United States, that she willfully misrepresented her true identity, and that she was not in possession of a valid entry document. The NTA charges the respondent with removability pursuant to sections 212(a)(6)(C)(i) and 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (the “Act”).

In a plea agreement dated August 31, 2001, the respondent admitted all of the allegations and conceded removability. [Exh. 2] On September 4, 2001, the respondent appeared before the San Diego Immigration Court, where the Court granted the respondent’s motion to change venue

to New York. Subsequently, the New York Immigration Court held a hearing on February 28, 2002, where the respondent submitted numerous documentation. At this hearing and at subsequent hearings on November 7 and December 31, 2002, the Court heard testimony from the respondent and two witnesses.

## **II. EVIDENCE**

- Exhibit 1: Notice to Appear (May 25, 2001)
- Exhibit 2: Plea Agreement (August 31, 2001)
- Exhibit 3: Notice of Filing a Frivolous Application for Asylum
- Exhibit 4: Application for Asylum/Withholding of Removal, Form I-589 (February 28, 2002)
- Exhibit 4A: Respondent's Affidavit
- Exhibit 5: Respondent's motion to amend pleadings to include an application for a U Visa
- Exhibit 6: Brief in support of application and supporting documents including: affidavits of the respondent, Robert Lemus, and Ruth Forero; copy of Form I-589; copy of the respondent's children's birth certificates; copy of protection order from U.S.; copies of various identification documents and title documents; various police, forensic and protection orders from Guatemala; letters from Guatemala; newspaper articles about Miguel Bariloche; various background materials.
- Exhibit 7: U.S. Department of State Country Reports on Guatemala (2001)
- Exhibit 8: U.S. Department of State Profile of Asylum Claims and Country Conditions, Guatemala
- Exhibit 9: Credible Fear Interview
- Exhibit 10: Respondent's Guatemalan passport
- Exhibit 11: Affidavit of Olga Molina
- Exhibit 12: Guatemalan police materials on Miguel Bariloche
- Exhibit 13: Record of Deportable Alien, Form I-213 (January 19, 1986)
- Exhibit 14: Decision of the Immigration Judge (March 5, 1987)

## **III. TESTIMONY**

### **A. Octavia, the respondent**

The respondent currently resides in Queens, New York with her two sons who are U.S. citizens. The father of her sons, Miguel Bariloche, does not live with them. The respondent was born in La Cruz Chicaman, Guatemala. This town is approximately one day by bus to the capital. She testified that she grew up in this town, living with her grandmother and younger brother, Rafael. She stated that in 1986, the army killed Rafael.

The respondent testified that she never attended school in Guatemala. She attended night school at York College in New York. She also studied at her church in Reading, Pennsylvania.

The respondent testified that she had a bad childhood because of the presence of the guerrillas and the institution of a curfew. She did not attend school because she was afraid. She stated that she remained in La Cruz until she was twelve years old. When she was twelve years old, she witnessed the torture of many people. The respondent recalled one Saturday, when she and Rafael went to the market for their grandmother. The market was in another town so they

had to take the bus. While on the bus, two army trucks blocked the road and forced everyone to exit the bus. She stated that some people who appeared well-dressed were allowed to re-board the bus and leave. She and Rafael were not wearing shoes so they appeared poor. She believes that this is the reason they were not allowed back on the bus. The soldiers forced them to walk approximately two hours through a hilly trail until they arrived at their camp. At the camp, there were more soldiers and one man called, Colonel. She recalled there was a large pine tree with five people, whose mouths were taped, tied to it. The soldiers took those people and tied them to a piece of wood. The soldiers removed the tape from their mouths and began hitting their feet on their toenails. The soldiers then placed the tape back on their mouths, poured gasoline on them, and set them on fire. The respondent testified that she and her brother were standing approximately twenty feet in front of where this was occurring. Rafael started having an attack, and the respondent attempted to hold him still. She stated that she and Rafael began to run. She remembers her feet running, but does not know how they made it back to the road. A pickup truck stopped, and the driver took them to his house. The respondent stated that she was nervous so she recounted her story to the driver. The driver took them back to their grandmother's house.

When they returned to their grandmother's house, the respondent told her grandmother what they witnessed. Her grandmother, in turn, told the respondent's father. For two months thereafter, the grandmother protected the respondent by not letting her go outside of the house. The respondent testified that her father returned and said that he had received death threats against the family. He took the respondent and Rafael to the capital where he left the respondent with a cousin and took Rafael to Peten, which is one day and one night from the capital. She stated that she remained three months with her cousin. This occurred in 1981. She left her cousin's and came to the United States to stay with her brother, Gustavo, in Queens, New York. She stated that she left because her life was in danger. She also stated that several cousins had been killed in Quiche.

The respondent testified that she remained at Gustavo's house in New York for three years. She stated that she cleaned houses to support herself. While in New York, she met Felipe Andre Guzman, fell in love and became pregnant. During her pregnancy, Gustavo could not help her because he did not have access to any doctors or health care. She returned to Guatemala to deliver her daughter. She stated that she does not have a copy of her daughter's birth certificate because it was lost along with other documents. She remained in Nueva Concepcion, Guatemala for four months. She further added that she does not have contact with her daughter because subsequently, the child's father and new wife adopted her, and they reside in Boston. She left after only four months because her father informed Gustavo that their family had disappeared from La Cruz, and he feared for her life if she stayed in Guatemala.

She returned to the U.S. in January of 1986, and the Service detained her in Texas for three months. She stated that she came alone, but she was joined by two men when she crossed the border. One of the men was helping people cross the border. She stated that this man told her, in a threatening manner, to tell the authorities that they were married. She also stated that she told the immigration officer that she did not have any family in the U.S. Her attorney, Alex Hanover, helped her apply for asylum, and she was released on bond. She testified that she does not remember appearing before an immigration judge in 1987. She stated that it may have occurred, but she does not remember. She remembers that she was represented by an attorney for some marriage-related issues, but she does not remember if the attorney helped with any

immigration issues. She further stated that she does not remember being ordered to leave the United States by April 7, 1987. She stated that her attorney never said that she had to leave the United States. She explained that there are many things that she forgets because she is on medication.

She testified that she does not know what became of her first asylum application. She also testified that she contacted an attorney in New York, Paul Torelli, but she did not personally contact the Service. She further stated that she applied to become a member of the *ABC* class, but does not know what happened to that application.

In October of 1986, she married Felipe. She testified that Felipe began using drugs. She also stated that in 1987, he divorced her without her knowledge. She stated that Felipe introduced her to Attorney Torelli, and it was through the attorney's office that she discovered that Felipe had divorced her. After hearing of the divorce from the attorney's secretary, she went to the court and found the divorce decree.

In 1989, the respondent met Miguel Bariloche at a Pentecostal church in Queens. She stated that he appeared to be a good person since he was attending church. Miguel worked as a personnel director. They started seeing each other, and after eight months, they moved in together. She stated that they never married. The respondent testified that there were no problems until 1990, when Miguel stopped going to church and began drinking. After this, he would beat her weekly, almost every day. She stated that she was afraid to leave him. In 1991, on one occasion, she returned from her job cleaning houses, and Miguel was home. He stated that he did not want her to continue working, and he punched her so forcefully that she bled from the nose and mouth. She testified that she never called the police.

Sometime after her son, Chris, was born in 1992, the neighbors called the police because Miguel was choking her. Two police officers arrived, and they gave her a piece of paper to take to court. She went to court and filed a complaint against Miguel. In March of 1993, she was given a protective order so that Miguel could not come near her or Chris. After that incident, she did not return to Miguel. She did, however, remain in the same apartment. Eight days after the incident, Miguel returned to collect his clothing and visit Chris, and because she had not changed the locks yet, he was able to enter the apartment. It was not until one month later, in approximately May, when Miguel came to the apartment and attacked her. He raped her. She testified that her second son, David, was a product of that rape. She stated that Miguel raped her on several occasions, but this occasion was imprinted in her memory because it produced David. She stated that Miguel was the father of David because she did not have sexual intercourse with any other man. She also stated that Miguel's name is not on David's birth certificate because at the time of David's birth, Miguel was not with them. She testified that other documents state that Miguel is the father. She further stated that she did not report the rape to the police, nor did she tell anyone about it.

After the rape, the respondent moved to Miami, Florida to Miguel's sister's house. The respondent did not believe that Miguel would follow her there. Nonetheless, Miguel did arrive at his sister's house. The respondent then went to Brownsville, Texas to stay with a friend. She thought the air would be better for Chris because he suffers from asthma. She did not like it there so after two months, she returned to New York. Once in New York, she went to Mateo

Vega, an attorney, to file an asylum application. She stated that he interviewed her for fifteen minutes, filled out a form, but did not read the form back to her. While she did not state what happened with that application, she did state that she received work authorization.

The respondent testified that she moved again after Miguel's sister attacked her with a knife. She stated that Miguel's sister was angry at her for taking Miguel to court. The respondent then moved to Reading, Pennsylvania for two years. While in Reading, in 1996, she was injured at work; her right shoulder was broken and she suffered a hernia. She received a worker's compensation settlement of \$16,000. While she worked, she had a babysitter, Alicia, whom she met through the Mormon Church.

In 1997, the respondent trusted Alicia to take her sons to Guatemala for a vacation while she recovered from her injuries. Alicia was supposed to take the children for two months, but the respondent did not hear from them for three months. She stated that she did not speak with her children at any time while they were in Guatemala, but she did have Alicia's telephone number. She stated that she attempted to call, but no one ever answered the phone. She stated that she did send letters to them. Toward the end of 1997, the respondent went to Guatemala to find her children. She stated that she found Alicia, and Alicia said she had sent a letter to the respondent, but had not received a response from her. The respondent and her sons went to the U.S. Embassy and asked for permission to return to the United States. She was denied because she did not enter Guatemala with a U.S. permit.

While she was searching for her children, she met Antonia Martinez. After she found her children, Antonia let them stay with her in Villa Nueva, which is close to the capital. The oldest sibling of Miguel did not speak of Miguel so she believed that he was unaware of her problems with him. On March 24, 1998, she moved into the house.

One day, someone knocked on the door and said he had a message from Miguel. When she opened the door, Miguel came out of hiding to show himself. The respondent testified that after that, she does not remember anything. She stated that her sons told her that Miguel hit her in the head, and when she fell to the ground, he kicked her. When she awoke, six hours later, she was in a hospital. She stated that Miguel had left her for dead. The doctor asked her questions, and she told him who beat her. An x-ray was taken, and she was sent home. Antonia took her and the children to her house, and they spent the night there. The respondent stated that she had bruises and bandages for two months.

The morning after the beating, the respondent went to the SIC, an organization of the national police. She stated that she went to the SIC because the local police said they would only answer a call if there was a death. She met with Officer Romero of SIC. He took her statement and told her the only thing they could do was kill Miguel. She said that she did not want Miguel dead, but wanted protection. Officer Sanchez gave her an appointment with a forensic doctor and with the Public Ministry. The respondent then went to the Human Rights Commission because she remembered hearing about it when she was hospitalized. She also went to the forensic doctor and the Public Ministry. They took her statement, examined her and gave her a protective order to give to the local police. She brought the order to the local police, but they did not sign it or do anything.

After this experience, the respondent went to the home of some Italians who provided shelter to women. She stated that this shelter housed many women and children who were beaten. She remained at this shelter for three months. Eight days after the attack, she returned to Villa Nueva to collect her belongings from Antonia. She visited another neighbor, Ana Callas, who said she saw Miguel around the house. When the respondent was walking toward Ana's house, Ana told her to move quickly because Miguel was directly behind her. Miguel pushed open the gate, entered the yard, and began shooting a gun. She and Ana called the police, and because the police were nearby and thought someone was killed, they came. When Miguel heard the sirens, he left. However, the police caught him and brought him in front of Ana's house. They asked him whether he intended to shoot the respondent, and Miguel told them he did not. The police, however, noticed the respondent's condition from the previous attack and took her, the children and Miguel to the police station in separate police vans. When they arrived at the police station, the police interviewed all of them in the main hallway. She testified that Miguel was handcuffed, but was approximately eight feet in front of her. The police saw that she was afraid and the children were crying so they took Miguel through a door. She does not know what happened to him. The police gave her a document that said she had to return to see a judge in three days.

The respondent returned for her appointment with the judge. The judge's secretary brought her into the judge's office where the respondent met with the judge. The respondent asked the judge where Miguel was because she believed that he was required to attend the proceeding, as was case when she went to court in the United States. The respondent testified that the judge angrily said she had a "big imagination." She asked him to look at her appearance if he did not believe her. He asked her if she was listening to him and then called in the police. She became afraid so she left. The judge, however, did inform her that he spoke with Miguel and that he was set free. She testified that there were no formal charges filed against Miguel.

The respondent continued living at the Italian's shelter because there were no other shelters in Guatemala. She would alternate between this location and living with friends in the capital. She went to the Public Ministry, Latin American Human Rights and U.S. Embassy, but received no response. She then moved to Jalapa, which was smaller than Villa Nueva and three hours away. She lived there for one year. The respondent established a clothing store. The respondent also traveled from Jalapa to Villa Nueva to attend nursing school at Benafanta Hospital, where she knew one of the doctors. She subsequently began working two to three days a week as a nurse. The respondent also worked as a security guard at a private jail for juveniles and young women. While living in Jalapa, she saw Miguel three times; however, he did not see her. She stated that she does not know what his business was in Jalapa because he had no friends or relatives there.

One night when the respondent was working, a woman came into the store, took out a revolver and told the respondent and her children to go into the bathroom. The woman then let several men into the store, and they stole everything. After this incident, the respondent left Jalapa and returned to Antonia's house in Villa Nueva. Antonia told her that Miguel said he was sorry and that she could return to the house. For two months, however, she and the children lived with Antonia. Thereafter, she returned to live at the Bariloche house because Antonia was old and did not like children. One evening when she returned from work, she saw Miguel waiting for her. She took the children to Ana's house. She saw Miguel exit from a white car in

front of her house. He entered Ana's house and pushed all of them into a room. One of the children had a kitten. Miguel took the cat from his son and threw it out of the window. The respondent stated that Miguel told her she was a "common woman;" however, he used stronger language to describe her as such.

On June 3, 2000, Miguel came again and pushed the respondent into a room in her house. He had a gun and began firing it. The respondent testified that somehow, she defended herself, though she was beaten and bleeding. Ana, her two adult sons and others whom the respondent did not know heard the commotion, and Chris let them in the house. The neighbors began screaming, and Miguel left with the gun still in his hand. The respondent testified that as Miguel was leaving, he said that Ana's sons were her lovers and that he would return and kill them and her. She stated that she did not call the police, nor did she stay in the house that night. The next day, she went to the human rights organization and spoke with Attorney Lopez. She stated that he did not help her, but referred her to a private attorney who also did nothing.

On July 15, 2000, she encountered Miguel again. After work, she went over to Ana's to pick up a plate of food. While waiting for the food, she saw Miguel drive up in a pick-up truck. The children were at the house alone so she told Ana to get the children, but she was too late. The respondent ran to the house. Miguel entered the house to find one of his sons playing with another cat. Miguel took the cat and shot it. He then took the bullets out of the gun and put them back in saying that the first bullet was for the respondent and the rest for the children. One of the children started having an "attack of fits." Miguel took the gun and put it in the respondent's mouth. Chris jumped on Miguel back, but Miguel shook him off. The respondent got Miguel and the gun off of her. Miguel fired the gun in the air. Ana screamed that the police were coming, and Miguel left. Ana called the police, but they told her they would only come if someone died. That night, the respondent and her children stayed at Ana's house. The next day she went to the Human Rights Commission, and Mr. Lopez gave her a document. She begged him to take her to a safe place. She stayed for three days at the same shelter that she had stayed at on previous occasions.

After the three days, the shelter told her that she could not stay because they read in the newspapers that Miguel had taken part in a shooting where a policeman was killed, and Miguel was in critical condition at Roosevelt Hospital. The article also stated that he would be sentenced to a long prison sentence. The shelter said that because Miguel was no longer a threat, they could not allow her to stay any longer. She stated that she was familiar with Miguel's involvement with the shooting through reading the newspapers.

Nevertheless, the respondent testified that Miguel survived, was discharged from the hospital, and did not go to trial or jail. On December 3, 2000, the respondent was returning from work, and she saw Miguel on a bus close to her house. She went to the house of her neighbor, Selma Corrida, who told her that Miguel was waiting all day.

Again, she went to the Human Rights Commission, and they told her that they could give her a protective order. She stated that she did not take it because it would be of no help. She further stated that she did not go to the Human Rights Commission on December 6, 2000, as stated in a document in evidence; she stated that it was a clerical error. On December 4, 2000, she took her children by bus to the Mexican border and received a seventy-two hour pass to enter

Mexico. She stayed in Mexico for six months. While in Mexico, she went to the immigration office to receive help; however, they denied her request and ordered her deported to Guatemala and her children to the United States. Her children were sent to the U.S. She knew a woman from Guatemala whose husband, Julio Sanchez, was able to take the children to Los Angeles. She knew this family because they had attended the Mormon Church together. The respondent testified that in order to be reunited with her children, she did something illegal; she obtained a visa with her picture, but with another person's name.

The respondent testified that she has entered the United States on three occasions. She stated that her statement to the immigration officer at her credible fear interview that she entered only twice was incorrect. She stated that she does not remember stating that she returned to Guatemala in June of 1985. She stated that she did not have contact with Miguel on December 3, 2000, as stated to the officer. She also testified that she never stated that Miguel and another man raped her. She explained that at that time, there were many things that she did not say to the officer because she forgets things, and it is hard for her to give information in the rushed manner in which the interview occurred. She further stated that she told the officer that she returned to Guatemala in March of 1998, to pursue a better life because she did not think that he would believe the truth.

In her affidavit, the respondent indicated that she was born in 1968. Her birth certificate, however, states that she was born in 1958. The respondent believes that she was born in 1968 because her father told her she was born on that date.<sup>1</sup> She stated that he told her this when she returned in 1985 to deliver her daughter. She believes that it was a mistake that her birth certificate states 1958. She further stated that she has a half-brother who was born in 1957, and she is not only one year younger than him. She stated that she did not rectify the mistake in Guatemala because she did not have the time since she was running from one place to another. Since the document stated 1958 as a birth year, she used this date when she filled out paperwork at the human rights office and for a Florida driver's license because they would not have believed her word over the document.

## **B. Roberto Arturo Lemus**

Mr. Lemus currently resides in Berkeley, California. He is a legal assistant at Catholic Charities in Oakland, California. He stated that he is a member of the Human Rights Commission that is based in Washington, D.C. and the Coalition of Immigrants of Guatemala, an organization that monitors the rights of Guatemalans living in the United States.

In 1975, he graduated from the Faculty of Law at the University of San Carlos in Guatemala and became an attorney. He later studied the administration of justice of the criminal system at Harvard University.

In Guatemala, from 1987 through 1991, Mr. Lemus served as a judge in the First Instance Court, which is similar to a district court in the United States. He stated that while on the bench, he heard family, labor, immigration and civil cases. Mr. Lemus testified that he did not have any experience with domestic violence cases because the Guatemalan laws did not address it. He

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<sup>1</sup> The respondent does not possess any documentary proof that she was born in 1968.

stated that the family cases he heard addressed divorce, child support, separation and division of wealth. While some of these cases may have contained domestic violence issues, he, as a judge, had limitations on what he could do because the laws did not contain provisions addressing domestic violence. Mr. Lemus testified that many Guatemalan laws have discriminatory aspects. For example, in the civil code, a woman may divorce, but she must wait 360 days to remarry; the property laws favor husbands because they are seen as the head of household; and if a woman commits adultery, her husband has the right to take her to court, but not vice versa. Mr. Lemus further testified that marital rape is not a crime.

After leaving the bench in 1991, Mr. Lemus became a professor of political science and administrator of the University of San Pedro. Since 1991, he has not practiced as an attorney. On September 15, 1991, he came to the United States as a refugee. Mr. Lemus testified that since 1991, he has returned to Guatemala four times for short trips: in 1997, for two, two week trips; in 1998, for two weeks; in 2000, for two to three weeks; and in 2002, for two-and-one-half weeks. He stated that these trips were part of the Human Rights Commission's investigations, mainly into the death of an American in Guatemala City.

Mr. Lemus testified that three years ago, a law was enacted to protect woman, and two years ago, a general disposition for that law was instituted. He stated, however, that this law is not enforced absolutely, and it does not provide protection from domestic violence. He stated that judges and police do not take women's complaints of domestic violence seriously. He explained that there is a general cultural discrimination against females in Guatemala. He also stated that his knowledge stems from his contact with those who have sought asylum in the United States, from reports he receives from the organizations of which he is a member, and from contacts with Guatemalan organizations. He further stated that he remains in contact with other judges in Guatemala.

He testified that in many cases, if the female is wealthy and is able to hire an attorney, pleas can be made to the government to place pressure on the local police and judges to protect the female. For most poor females, however, the police and judges do not pay attention to their pleas.

Mr. Lemus also testified that he has spoken to the respondent and has read her affidavit, and that her account is consistent with his experience. He believes that it is not safe for her to return to Guatemala. He further believes that the respondent has a reasonable fear of Miguel because of his probable connection with gangs and the mafia, and because of the corruption within the police.

### **C. Ruth Forero**

Ms. Forero resides in Bronx, New York. She earned a Master's degree in clinical social work from New York University in 1983 and is a certified social worker in New York State. She is a Ph.D candidate at New York University, writing her thesis on battered woman. She has not had to defend her thesis yet. For the past thirteen years, she has served as a senior clinical social worker at the Crime Victims Treatment Center at St. Luke's Hospital. She also has a private practice and is a lecturer at the Master's level at New York University. Her practice focuses on providing individual and group therapy to victims of violent crimes.

Ms. Forero stated that she has not visited Guatemala, nor has she taken a class specifically about Guatemala. She has learned about it through her studies and courses on Latin American women and culture, her other patients and a class she teaches on ethno-cross-culture.

Ms. Forero testified that Sanctuary for Families referred the respondent to her. Since November of 2001, she has met with the respondent once a week, for one hour. She stated that the respondent is in her mid-thirties. She also stated that she treats the respondent primarily for the most current traumas that have happened to her. She further stated that she is not paid for her services by the respondent. Rather, the program is funded by the Crime Victims Board. She also stated that she is not being paid to testify in the instant proceeding.

Ms. Forero referred the respondent to a psychiatrist whom the respondent has seen several times. She stated that the psychiatrist prescribed the respondent medicine, which she continues to take. Ms. Forero also interviewed the respondent's children on three occasions. She referred them to a clinic closer to their house because of the severe trauma they suffered and her limited ability to treat them.

In regard to early trauma, Ms. Forero testified that the respondent's mother died when the respondent was very young, and that she was raised by different relatives. She further stated that the respondent suffered physical and sexual abuse at the hands of some of those relatives. She also stated that the respondent's father physically abused her. At approximately twelve years of age, people in uniforms abducted the respondent and her brother on their way to the market. She and her brother were taken to the abductors' camp in the woods, where they viewed the torture and murder of many villagers.

Ms. Forero further testified that the father of the respondent's children beat her to unconsciousness. She further stated that on another occasion, he placed a shotgun in her mouth and broke one of her teeth. He also raped her, and her youngest child is the product of that rape.

Ms. Forero believes that the respondent's account of these events is credible. She stated that she made such a conclusion based upon the congruency between verbal and emotional expression, tone in the voice and body movements. Ms. Forero further stated that her initial assessment of the respondent was that she was very traumatized. She reached this conclusion because the respondent was fidgety, she appeared much older than her actual age, and she became extremely distressed when she spoke of her experiences. Ms. Forero further explained that the respondent displayed the three clusters of symptoms associated with post-traumatic stress disorder ("PTSD"). In the first cluster, the respondent suffers from intrusive sudden images or recollections; nightmares; hearing her children's voices; physical sensations of her experiences; and feelings of darkness. Within the second cluster, the respondent manifests avoidance signs such as not speaking about her experiences; and becoming frenetic — working long hours, unnecessarily cleaning the house, constantly moving from place to place. In the final cluster, the respondent has a sensitive startle reflex; maintains a hyper-alertness to her environment; is unable to filter out unnecessary stimuli; and attends to too many projects at one time.

Ms. Forero agreed that the respondent displayed "very poor" judgment when she allowed her babysitter to take her children to Guatemala. She added that it was difficult for the

respondent to work and care for her children. She further stated that this bad judgment is also a result of her trauma.

Ms. Forero stated that the respondent believes that if she is returned to Guatemala, it will be her and her sons' death sentence. Ms. Forero stated that she performed "a risk assessment" of the respondent returning to Guatemala, and she concluded that there is a high risk that Miguel will carry out his threats of killing her. She based that conclusion on the fact that Miguel had ready access to weapons; he has already caused serious injury to the respondent; and the presence of protective orders or the police have not favorably affected Miguel's contact with the respondent. Although she never interviewed Miguel, she based her characterization of him from the information from the respondent.

Ms. Forero explained that the legal system in Guatemala is twenty-five years behind the United States in terms of judges and police understanding battered women. In the United States, there are shelters specifically for battered women that give women a chance to recover and take charge of their lives.

Ms. Forero stated that one of her goals is to help the respondent stabilize her family. She has discussed with the respondent the need for the children to remain in one location in order to stay in the same school. She stated that she wants the respondent to build skills to maintain and process her overwhelming emotions. Ms. Forero also stated that the respondent is a good mother. The children are clean and fed, and the respondent worries about their safety.

#### **IV. LEGAL STANDARD**

##### **A. Asylum**

A respondent who is seeking asylum must demonstrate that he or she is a "refugee" within the meaning of section 101(a)(42)(A) of the Act. A respondent must demonstrate an unwillingness or inability to return to her country because of past persecution, or a "well-founded fear" of future persecution, on account of one of the following five grounds: race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A). To determine whether a respondent is being persecuted "on account of" one of the five statutory grounds, the Supreme Court has held that a respondent must provide some evidence, either direct or circumstantial, of the persecutor's motive. INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992); see also, Matter of T-M-B-, 21 I. & N. Dec. 775, 777 (BIA 1997).

##### **1. Credibility**

In all applications for asylum, the Court must make a threshold determination of a respondent's credibility. See Matter of O-D-, 21 I. & N. Dec. 1079, 1081 (BIA 1998). A respondent's own testimony is sufficient to meet her burden of proving her asylum claim if it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of her fear. See Matter of Dass, 20 I. & N. Dec. 120, 124 (BIA 1989); 8 C.F.R. § 208.13(a). A respondent may be given the "benefit of the doubt" if there is some ambiguity regarding an aspect of her asylum claim. See Matter of Y-B-, 21 I. & N. Dec. 1136, 1139 (BIA 1998). In some cases, a respondent may be found to be credible even if she has trouble remembering specific facts. See Matter of B-, 21 I. & N. Dec. 66, 70 (BIA 1995) (finding that

failure to provide precise dates when testifying may not be an indication of deception, where an alien fled persecution). Testimony is not considered credible when it is inconsistent, contradictory with current country conditions, or inherently improbable. See Matter of S-M-J, 21 I. & N. Dec. 722, 724 (BIA 1997). While omissions of facts in an asylum application or during testimony might not, in themselves, support an adverse credibility determination, the omission of key events coupled with numerous inconsistencies may provide a specific and cogent reason to support an adverse credibility finding. See Matter of A-S-, 21 I. & N. Dec. 1106, 1109-110 (BIA 1998).

## **2. Persecution**

Past persecution can be a basis for granting asylum, even absent a showing of a well-founded fear of future persecution. See Matter of H-, 21 I. & N. Dec. 337, 339 (BIA 1996). There is no universally accepted definition of “persecution.” See Handbook on Procedures and Criteria for Determining Refugee Status, Office of the United Nations High Commissioner for Refugees, ¶51, p. 14 (Geneva, January 1992) (“Handbook”).<sup>2</sup> Persecution is a flexible concept, one that requires a finding of serious harm but that is not limited to severe physical harm. See, e.g., Fatin v. INS, 12 F.3d 1233, 1242 (3rd Cir. 1993) (“[W]e will assume for the sake of argument that the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual’s deepest beliefs.”); Ghaly v. INS, 58 F.3d 1425, 1431 (9th Cir. 1995) (noting that discrimination can constitute persecution if it is, inter alia, “pervasive”); Balazoski v. INS, 932 F.2d 638, 642 (7th Cir. 1991) (noting that the conduct in question need not necessarily threaten the petitioner’s “life or freedom”); Matter of Acosta, 19 I. & N. Dec. 211, 222 (BIA 1985) (stating that persecution may include mental suffering or even severe economic deprivation). Persecution, within the meaning of the Act, however, does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional. See Matter of V-T-S-, 21 I. & N. Dec. 792, 798 (BIA 1997).

A respondent who establishes past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.<sup>3</sup> 8 C.F.R. § 208.13(b)(1). The regulatory presumption may be rebutted if the Service establishes by a preponderance of the evidence that either: (1) there has been a fundamental change in circumstances<sup>4</sup> such that respondent no longer has a well-founded fear of persecution in her country of nationality or, if stateless, in her country of last habitual residence, on account of one of the enumerated grounds;

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<sup>2</sup> The United States Supreme Court has observed that the Handbook provides significant guidance in construing the United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968, and which Congress sought to follow in enacting United States refugee law. See INS v. Cardoza-Fonseca, 480 U.S. 421, 437-39 (1987).

<sup>3</sup> The presumption raised by a finding of past persecution applies only to a fear of future persecution based on the original persecution, and not to a fear of persecution from a new source unrelated to the past persecution.

<sup>4</sup> By adopting the language “fundamental change in circumstances” rather than requiring a showing of “changed country conditions” to overcome the presumption, other changes in the circumstances surrounding the asylum claim, including a fundamental change in personal circumstances may be considered, so long as those changes are fundamental in nature and go to the basis of the fear of persecution.

or (2) respondent could avoid future persecution by relocating to another part of her country of nationality or, if stateless, another part of her country of last habitual residence, and under the circumstances, it would be reasonable to expect her to do so.<sup>5</sup> 8 C.F.R. § 208.13(b)(1)(i), (ii). If a respondent's fear of persecution is unrelated to the past persecution, such respondent bears the burden of establishing that the fear is well-founded. 8 C.F.R. § 208.13(b)(1).

Where a respondent is found to be a refugee on the basis of past persecution and the Service establishes a fundamental change in circumstances or that internal relocation would be reasonable by a preponderance of the evidence, and such respondent is not barred from a grant of asylum, that respondent may be granted asylum in the exercise of discretion if: (1) she has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or (2) she has established that there is a reasonable possibility that she may suffer other serious harm upon removal to that country. 8 C.F.R. § 208.13(b)(1)(iii).

A respondent may also establish eligibility for asylum by demonstrating that a reasonable person in his or her circumstances would fear persecution in the future on account of a protected ground. INA §§ 101(a)(42)(a), 208(a). A well-founded fear involves both a subjective and an objective component. The subjective component may be satisfied by the respondent's testimony, if the court finds her to be credible. Once a subjective fear of persecution is established, a respondent need only show that such fear is grounded in reality to meet the objective element of the test. Abankwah v. INS, 185 F.3d 18, 22 (2nd Cir. 1999). Documentary evidence establishing past persecution or a threat of future persecution is usually sufficient to satisfy the objective component of the "well-founded fear" standard when evaluating a respondent's claim for refugee status and asylum. Aguilera-Cota v. INS, 914 F.2d 1375, 1379 (9th Cir. 1990).

### **3. On Account of**

A respondent must demonstrate that the persecution alleged was inflicted or would be inflicted on account of her race, religion, nationality, membership in a particular social group, or political opinion. INA §§ 101(a)(42)(A), 208(a).

Where the basis of the asylum claim is membership in a particular social group, a respondent must make a showing from which it is reasonable to conclude that the persecutor is motivated to harm the respondent, at least in part, because of the asserted group membership. See Matter of Kasinga, 21 I. & N. Dec. 357, 366 (BIA 1996); Matter of H-, 21 I. & N. Dec. 337, 343-44 (BIA 1996). A cognizable social group should consist of persons who share a common,

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<sup>5</sup> To determine the reasonableness of internal relocation, the Court should consider, but is not limited to considering, whether a respondent would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties. 8 C.F.R. § 208.13(b)(3). In cases in which a respondent has not established past persecution, such respondent shall also bear the burden of establishing that it would not be reasonable for her to relocate, unless the persecution is by a government or is government-sponsored. 8 C.F.R. § 208.13(b)(3)(i). Where the persecutor is a government or is government-sponsored, or a respondent has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for such a respondent to relocate. See 8 C.F.R. § 208.13(b)(3)(ii).

immutable characteristic, which they either cannot change, or should not be required to change, because it is fundamental to their individual identities or consciences. See Matter of Acosta, 19 I. & N. Dec. 211, 233 (BIA 1985); Matter of Kasinga, 21 I. & N. Dec. 357, 366 (BIA 1996); Matter of H-, 21 I. & N. Dec. 337, 342 (BIA 1996).

A respondent may also show a well-founded fear of persecution if she establishes that there is a pattern or practice in her country of nationality of persecution of a group of persons similarly situated to her and that she is included in, and identified with, such group of persons such that her fear of persecution upon return is reasonable. 8 C.F.R. § 208.13(b)(2)(i); Matter of Mogharrabi, 19 I. & N. Dec. 439, 445 (BIA 1987).

In Gomez v. INS, the Second Circuit established the “distinguishing characteristic” test for determining whether an alien’s stated social group qualifies as such under the Act. Gomez v. INS, 947 F.2d 660, 664 (2nd Cir. 1991). The court held that members of a particular social group must share “some fundamental characteristic” that is “recognizable and discrete” and “serves to distinguish [group members] in the eyes of a persecutor - or in the eyes of the outside world in general.” Id. The court further held that mere “possession of broadly-based characteristics . . . by itself will not endow individuals with membership in a particular social group.” Id. In denying the respondent’s claim the court noted that:

Gomez failed to produce evidence that women who have previously been abused by the guerillas possess common characteristics -- other than gender and youth -- such that would-be persecutors could identify them as members of the purported group. Indeed, there is no indication that Gomez will be singled out for further brutalization on this basis. Certainly, we do not discount the physical and emotional pain that has been wantonly inflicted on these Salvadoran women. Moreover, we do not suggest that women who have been repeatedly and systematically brutalized by particular attackers cannot assert a well-founded fear of persecution. We cannot, however, find that Gomez has demonstrated that she is more likely to be persecuted than any other young woman. Accordingly, because Gomez has not presented evidence that she has a fear of persecution on account of her race, religion, nationality, political opinion or membership in a particular social group, she has not proven her status as a refugee.

Id. In Gomez, the court found that the claimed social group lacked distinguishing characteristics. Id. The court found the social group to be overly-broad, however, it left open the possibility that gender could serve as a basis for a social group claim. Id.

The Board of Immigration Appeals (the “Board”), in Matter of Kasinga, further clarified what distinguishing characteristics were necessary for purposes of social group classification. See Matter of Kasinga, 21 I. & N. Dec. 357, 365-66 (BIA 1996). In Kasinga, the Board held that “[y]oung women of the Tchamba-Kunsutu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice” qualified as a viable social group. Id. at 365. The Board reasoned that being a “young woman and a member of the Tchamba-Kunsutu Tribe” are common characteristics that members of the group could not or should not be required to change

because such characteristics are fundamental to their individual identities. Id. at 366; Matter of Acosta, 19 I. & N. Dec. 211, 222 (BIA 1985). The Board further held that the threat of FGM is a harm rising to the level of persecution because FGM is practiced, “at least in some significant part, to overcome sexual characteristics of young women of the tribe who have been, and do not wish to be, subjected to FGM.” Matter of Kasinga, 21 I. & N. Dec. at 367. The Board concluded that the respondent had a well-founded fear of persecution on account of her membership in the above defined social group. Id.

The Board further addressed the issue of social group classification in Matter of R-A-, 22 I & N Dec. 906 (BIA 1999) (vacated January 19, 2001). In Matter of R-A-, the Board found that the respondent’s asserted social group -- “Guatemalan women intimately involved with abusive Guatemalan male companions who believe that women are to live under male domination” -- was too broadly defined. Matter of R-A-, 22 I & N Dec. at 917. The Board stated that “the mere existence of shared descriptive characteristics is insufficient to qualify those possessing the common characteristics as members of a particular social group.” Id. Rather, the Board suggested that the potential persecutor must be able to identify those common characteristics as a basis for persecution. Id. Consequently, the Board rejected the respondent’s social group formulation reasoning that the respondent’s husband would not be inclined to persecute women bound in other marital relationships. Id. The Board also found that the respondent’s husband did not perceive her as being a member of the defined social group, nor was the defined social group “recognized and understood to be a societal faction.” Id. Instead, the Board held that the respondent was in a group by herself of women married to a particular man. Id.

On January 19, 2001, however, the Attorney General vacated Matter of R-A- and remanded it to the Board for reconsideration following final publication of the proposed rules found at 65 Fed. Reg. 76,588 (Dec. 7, 2000). See Matter of R-A-, 22 I & N Dec. 906 (A.G. 2001). The Proposed Rules issued by the Department of Justice on December 7, 2000, seek to clarify the Board’s decision in Matter of R-A-. 65 Fed. Reg. 76592 (December 7, 2000). Although the Proposed Rules do not serve as primary guidance, the Court finds that the accompanying commentary to these rules can serve as a valuable secondary source for interpreting prior administrative decisions.

The commentary to the Proposed Rules provides that, “in some cases, a persecutor may in fact target an individual victim because of a shared characteristic, even though the persecutor does not act against others who possess the same characteristic.” 65 Fed. Reg. at 76593. The authors recognized that in many circumstances a persecutor is only able/motivated to persecute a singular woman “on account of” her status in a domestic relationship due to social limitations on said relationship. Id. The commentary also offers that “there may be circumstances in which a respondent’s marital status could be considered immutable.” Id. at 76594. This would be the case, for example, if a woman could not reasonably be expected to leave her marriage. Id. at 76593.

#### **4. Discretion**

A respondent who establishes statutory eligibility for asylum must still bear the burden of demonstrating that she merits a grant of asylum as a matter of discretion. See INS v. Cardoza-

Fonseca, 480 U.S. 421, 428 (1987). In determining whether a favorable exercise of discretion is warranted, the courts have been instructed by the Board to apply a “totality of the circumstances” test. Matter of Pula, 19 I. & N. Dec. 467, 473 (BIA 1987). In Matter of H-, the Board found that “our case law also recognizes that general humanitarian reasons, independent of the circumstances that led to the respondent’s refugee status, such as his or her age, health or family ties, should also be considered in the exercise of discretion.” Matter of H-, 21 I. & N. 337, 347-48 (BIA 1996).

## **B. Withholding of Removal**

A respondent seeking withholding of removal to any country must show that her life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3). In general, withholding of removal is mandatory if a respondent establishes that she is more likely than not to “be subject to persecution on [that ground].” INS v. Stevic, 467 U.S. 429, 429-30 (1984). A respondent cannot then be returned to the country where she would face persecution but may be deported to another country under certain circumstances.

## **C. U Visa**

To qualify for a U Visa, an alien must demonstrate that:

- (1) she has suffered substantial physical or mental abuse as a result of having been a victim of certain criminal activity;
- (2) she possesses information concerning that certain criminal activity;
- (3) she has helped or is likely to help law enforcement in investigating or prosecuting such criminal activity; and
- (4) that criminal activity violate the laws of the United States or occurred in the United States.

INA § 101(a)(15)(U). The application for a U Visa must include a certification from law enforcement officials, which states that the alien has been helpful or is likely to be helpful in the investigation or prosecution of the criminal activity. INA § 214(o).

## **V. ANALYSIS**

### **A. Asylum**

#### **1. Credibility**

The Court finds the respondent to be credible, based largely on her plausible and detailed testimony. See Matter of Dass, 20 I. & N. Dec. 120, 124 (BIA 1989). The respondent’s oral testimony was generally consistent with her detailed affidavit. [Exh. 4A]. The severe physical abuse the respondent endured at the hands of Mr. Bariloche was corroborated by a Queens County Order of Protection, Guatemalan police report, forensic medical report, personal protection order from the Guatemalan Public Prosecutor, and a domestic violence complaint to the Government Attorney for Human Rights. [Exh. 6, tab 3, 7-9, 14]. The testimony and

affidavit of Ms. Forero further corroborated the respondent's account of trauma from her childhood and the abuse she suffered at the hands of Mr. Bariloche. [Exh. 6, tab C].

The Court finds that the following inconsistencies do not diminish the respondent's overall credibility. The Court does not believe that the respondent was being untruthful when she gave inconsistent testimony regarding the dates and details surrounding her abusive relationship with Mr. Bariloche. Primarily, several inconsistencies involve the dates on which events occurred.<sup>6</sup> The Court finds, however, that these inconsistencies do not diminish the respondent's overall credibility because the discrepant dates were only days apart. See Matter of A-S-, 21 I & N Dec. at 1110 (upholding an adverse credibility finding where the date discrepancies were more than two years). Further, these inconsistencies do not demonstrate any attempt of deception. See id. Secondly, the respondent testified that she does not recall that she appeared before an Immigration Judge in 1987, and was granted voluntary departure until April 7, 1987. She did, however, remember having an attorney assist her with marital issues at that time, but she did not recall that the attorney assisted her with any immigration matters. The Court finds that the respondent testified in a direct manner and explained that she has trouble recalling events because of the medication she is taking. The respondent's trouble recalling events is further corroborated by Ms. Forero's testimony. Ms. Forero testified that the respondent suffers from post-traumatic stress disorder which can manifest, among other things, signs of avoidance of any event surrounding trauma.

Lastly, the respondent testified that she believes she was born in 1968, while her documents state that she was born in 1958. She explained that it was an administrative error on her birth certificate. She believes this to be the case because her father informed her as such. Since her birth certificate states 1958 as a birth year, every subsequent document states the same, including a Florida driver's license. The Court gives the respondent the "benefit of the doubt" concerning this ambiguity because it finds that the respondent otherwise gave detailed and specific testimony, as well as corroborative evidence. See Matter of Y-B-, 21 I & N Dec. at 1139.

There is additional corroborative evidence regarding other aspects of the respondent's claim. An affidavit from Olga Molina, a Guatemalan attorney, police and judicial documents, and newspaper articles from Guatemala concerning Mr. Bariloche corroborate the respondent's account of Mr. Bariloche's involvement in the shooting and killing of a police officer. [Exhs. 6, 11 & 12]. The U.S. Department of State Country Report on Human Rights Practices (2001) (Guatemala) substantiates the respondent's testimony concerning the futility of seeking governmental protection and the threat of domestic violence. The Report confirms that: (1) violence against women remains common in all social classes; and (2) of the 8,060 complaints of domestic violence received by the Office of the Prosecutor, only fifty-six cases were brought to trial. [Exh. 7]. Based on the foregoing, the Court concludes that the respondent has met her evidentiary burden. See Matter of Mogharrabi, 19 I. & N. Dec. 439, 445-46 (BIA 1987).

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<sup>6</sup> For example, the respondent testified that she went to the Human Rights Commission on December 3, 2000. In evidence, a document states that she went to the Human Rights Commission on December 6, 2000. [Exh. 6, tab 14]. Additionally, she did not recall stating that she returned to Guatemala in June of 1985.

## **2. Persecution**

In the instant case, the source of the respondent's persecution was Mr. Bariloche, and not the government per se. See Matter of S-A-, 22 I & N Dec. 1328 (BIA 2000) (finding past persecution where the source of the respondent's repeated physical assaults, imposed isolation, and deprivation of educations was not the government, but the respondent's father). The respondent lived with Mr. Bariloche for several years and bore him two children. One of their children was a product of a rape committed against the respondent after she had left Mr. Bariloche because of the physical abuse she endured. The respondent detailed many accounts of abuse suffered at the hands of Mr. Bariloche dating back to 1991. On one occasion, the neighbors called the police because of the severity of the abuse. This resulted in the respondent obtaining a protective order in March of 1993. While this abuse occurred in the United States, Mr. Bariloche followed the respondent to Guatemala to perpetuate further severe acts of violence against her. The abuse in Guatemala included the respondent being beaten to unconsciousness while her two small children watched; and suffering a broken tooth while Mr. Bariloche forced a gun into her mouth.

The abuses perpetuated against the respondent were not merely private acts of violence, given the environment of impunity in Guatemala with regard to domestic violence. According to the U.S. State Department Country Reports of Human Practices (2001) violence against women continues to be a problem in Guatemala. The Report indicates that although mechanisms exist for redress within the Guatemalan legal system, complaints of domestic violence are rarely translated into prosecution. The Report further indicates that law enforcement is ill-equipped to handle investigations into crimes of sexual violence. Moreover, Mr. Lemus' testimony and affidavit support the account that there is little, if any, government support of victims of domestic violence. He further stated that the authorities discourage and ridicule those victims who attempt to seek help from the authorities. [Exh. 6, tab B].

On at least five occasions, the respondent sought protection from the police, judiciary or Human Rights Commission following violent beatings and death threats by Mr. Bariloche. On the first occasion, the SIC told her the only thing they could do was kill Mr. Bariloche. When the respondent refused such an offer, the SIC referred her to the Public Ministry. She also went to the Human Rights Commission. The Public Ministry gave her a protective order to give to the local police; however, the local police refused to accept it. On another occasion, she had an appointment with a judge. The judge became angry with her and her "stories" and called the police. Other visits to the police or Human Rights Commission resulted similarly.

In sum, the Court concludes that physical violence perpetrated against the respondent by Mr. Bariloche rises to the level of persecution, given that she could not rely on the governmental authorities to protect her.

## **3. On Account of**

The respondent claims she was persecuted on account of her membership in a particular social group. The respondent's most clearly definable social group is: "women in Guatemalan society who resist male domination by living independently and self-sufficiently."

The respondent has demonstrated that she is part of a social group that shares common, immutable characteristics. See Matter of Acosta, 19 I & N Dec. 211, 233 (BIA 1985). The respondent's status as a Guatemalan woman who opposes male domination by living independently and self-sufficiently is an immutable characteristic that is so fundamental to her individual identity and conscience that she should not be required to change it. See Matter of Acosta, 19 I & N Dec at 233; see also Matter of Kasinga, 21 I & N Dec. 357, 366 (BIA 1996).

The respondent is perceived by Mr. Bariloche and other members of Guatemalan society as a member of the above defined social group because she resisted Mr. Bariloche's abuse and actively fought back when beaten, she obtained protection orders against Mr. Bariloche in response to his abuse, and she pursued educational and work opportunities to remain independent and self-sufficient. The respondent attempted to assert her individual autonomy and to refuse the subservient role that is expected of Guatemalan women. This expected subservience is reflected in several provisions of the Guatemalan Civil and Penal Codes, including: a woman who obtains a divorce must wait 360 days before remarrying; and a woman may not obtain employment if her husband opposes it and demonstrates that he has sufficient means to support her. [Exh. 6, tab C & tab 17].

The respondent's membership in this social group distinguishes her from other women in Guatemala who have not taken such action against their abusers. Members of this particular social group, including the respondent, share a fundamental characteristic that is "discrete and recognizable" by both the persecutor and Guatemalan society. See Gomez v. INS, 947 F.2d at 664. Moreover, the respondent need only demonstrate that the motivation of persecution is based, in part, upon her membership in the particular social group. See Matter of S-P-, 21 I & N Dec. 486 (BIA 1996).

Unlike the respondent in Matter of R-A-<sup>7</sup>, here, the respondent suffered consistent and deliberate violence at the hands of Mr. Bariloche. His motivation may be inferred from circumstantial evidence, including the socio-cultural or political purpose of the harm. See Elias-Zacarias, 502 U.S. at 483. Mr. Bariloche was aware that the respondent was a member of the particular social group that received unequal protection of the law. Mr. Bariloche's actions were undeterred notwithstanding the respondent's attempts to obtain protective orders and assistance from the authorities. On the contrary, the more persistent the respondent became in attempting to escape from his abuse and threats, the more frequent the abuse and death threats became. In part, Mr. Bariloche appeared motivated to harm the respondent in order to prove his ability to dominate her due to her attempts to resist that domination.

The Court notes that the Mr. Bariloche appears only to be targeting the respondent, as opposed to other women who may be included in the claimed social group. The commentary to the Proposed Rules, while not binding, provide that "in some cases, a persecutor may in fact target an individual victim because of a shared characteristic, even though the persecutor does not act against others who possess the same characteristic." See 65 Fed. Reg. 76588, 76593 (Dec. 7, 2000). In the instant case, the respondent is being targeted by Mr. Bariloche because of

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<sup>7</sup> In Matter of R-A-, the Board stated that the abuse suffered by the respondent was "arbitrary in nature," suggesting that it was not her claimed social group that her husband sought to overcome. Matter of R-A-, 22 I & N Dec. at 921 (BIA 1999) (vacated January 19, 2001).

the characteristics that she shares with other Guatemalan women who resist male domination by living independently and self-sufficiently. The fact that Mr. Bariloche has not attempted to target other women in the respondent's claimed social group does not diminish the respondent's claim. In sum, the Court finds that the respondent has suffered past persecution "on account of" her social group.

#### **4. Well-Founded Fear of Future Persecution**

Since the respondent has demonstrated that she was persecuted in the past on account of her membership in a particular social group, she is presumed to have a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1) (2002). Even if the respondent has not established past persecution, the Court finds that she has demonstrated that her fear of future persecution is well-founded. 8 C.F.R. § 208.13(b)(1). The respondent has demonstrated that she has a subjective fear of persecution based on: 1) the past physical abuse she sustained at the hands of Mr. Bariloche; 2) the inability or unwillingness of government authorities in Guatemala to protect women in the respondent's circumstances; and 3) Mr. Bariloche's death threats to her and her children. The respondent also demonstrated that she has an objectively reasonable fear of persecution based on the fact that violence against women remains a problem in Guatemala and that while some laws are in place to protect victims of domestic violence, there is little evidence to suggest that these laws are being fully enforced. See U.S. State Department Country Reports on Human Rights Practices (2001) (Guatemala).

The Service has attempted to rebut this presumption by arguing that there has been a fundamental change in circumstances given that Guatemala has announced the formation of a National Coordinator for the Prevention of Domestic Violence. See U.S. State Department Country Reports of Human Practices (2001) (Guatemala). Despite this new action, the Report further states that of 8,060 complaints of domestic violence, only fifty-six cases were brought to trial. See id. Moreover, the respondent's testimony and affidavit clearly establish that her attempts to gain assistance from the government were fruitless. In light of these facts, there is at least a ten percent chance that Mr. Bariloche will continue to persecute her. See *Cardoza-Fonseca v. INS*, 480 U.S. 421, 440 (1987) (holding that a respondent's fear may be well-founded if there is as little as a ten percent chance of the feared persecution taking place).

The Court finds that it would not be reasonable for the respondent to relocate to another part of Guatemala. Given the small size of the country, Mr. Bariloche would be able to find her with relative ease. The respondent already moved several times within Guatemala, and each time, Mr. Bariloche found her.

#### **5. Discretion**

The Court exercises its discretion to grant asylum favorably towards the respondent. In exercising this discretion, the Court considered the severity of the past persecution and its effect on the respondent's physical health and emotional well-being. For humanitarian reasons, the Court finds that the respondent merits a grant of asylum as a matter of discretion.

**B. Withholding of Removal**

As the respondent has shown that she merits a grant of asylum, the Court does not find it necessary to determine whether Respondent is eligible for withholding of removal.

**C. U Visa**

As the respondent has shown that she merits a grant of asylum, the Court does not find it necessary to reach the merits of her request for a U Visa.

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

**ORDER**

**IT IS ORDERED** that Respondent's application for asylum is hereby **GRANTED**.

Date: March 10, 2003

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John Opaciuch  
Immigration Judge