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File: A95 719 764 - Chicago, IL Date: JUN 25 2007

In re: JOCELYN ISADA BOLANTE a.k.a. Jocelyn Joc Joc Bolante

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Y. Judd Azulay, Esquire

ON BEHALF OF DHS: Seth B. Fitter
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(7)(A)(i)(I), I&N Act [8 U.S.C. § 1182(a)(7)(A)(i)(I)] - Immigrant - no valid immigrant visa or entry document

APPLICATION: Asylum; withholding of removal

ORDER:

PER CURIAM. The respondent is a native and citizen of the Philippines. He appeals the Immigration Judge's February 9, 2007, denial of his applications for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act ("Act"), 8 U.S.C. §§ 1158, 1231(b)(3). The respondent's appeal will be dismissed.

The respondent has been accused of participating in the "Fertilizer Scam" in the Philippines (Tr. at 149).[1] The Senate of the Philippines convened a Committee to investigate the Fertilizer Scam and conducted a number of hearings during this investigation. The respondent was subpoenaed to testify and answer questions before this Senate Committee at least four times (Tr. at 151). The respondent repeatedly failed to comply with the subpoenas (Tr. at 265-67). After the respondent's failure to comply, the Senate in 2005 issued a warrant for his arrest. Upon completion of the investigation, the Senate Committee issued a report that charged the respondent with being the main architect of the Fertilizer Scam and recommended that he be charged. This report also recommended that Mr. Felix Montes, one of respondent's witnesses, be charged for similar crimes. *See* (Exhs. 7, 17, 20); Philippine Senate Report at 33. There is no evidence

[1] The respondent is the subject of an investigation relating to allegations that he assisted in a scheme to illegally divert approximately 728 million Philippine pesos in fertilizer subsidy funds for illicit p
(Exh. 7 Tab Q; Philippine Senate Report).

that Mr. Montes has been arrested or harmed based on the Senate Committee Report and there is no evidence that anyone, including the respondent, has been charged with crimes as a result of the report (Tr. at 207, 293-94). The respondent claims that he will be persecuted as a former government official and based upon the Philippine Senators' ambitions for higher political office (Tr. at 149-52; Asylum Attachment at 2; Amendment to Brief at 2).

Prosecution for the violation of a law of general applicability is not persecution, unless the punishment is imposed for invidious reason. *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), *modified on other grounds, Matter of Mogharrabi, supra, Matter of Nagy*, 11 I&N Dec. 888 (BIA 1966). The exception to this rule arises when the respondent can demonstrate that he will be subjected to a disproportionately severe punishment on account of one of the protected grounds under the Act. Therefore, the respondent must establish that the prohibition against graft and corruption as applied to him were especially unconscionable or were merely a pretext to persecute him for his beliefs and characteristics. *See Abedini v. INS*, 971 F.2d 188, 191 (9th Cir. 1992).

The Immigration Judge noted that the respondent did not present any evidence of past mistreatment or harm (I.J. at 9). *See* (Exh. 7). The evidence revealed that there were presently no charges pending against the respondent with regard to the Fertilizer Scam and only an arrest warrant for his failure to appear and testify before the Senate Committee. *See* (Exh. 7 Tabs I, Q). The Immigration Judge also found that his prosecution was clearly not a pretext for persecution when the respondent had previously been under investigation, but was never sought out for arrest until he failed to comply with numerous subpoenas (I.J. at 13). The Immigration Judge noted that there was no evidence that his punishment would not be in conformity with the general application of the laws (I.J. at 12-13). *See Abedini v. INS, supra.* Moreover, the testimony indicated that the Senators who oppose President Arroyo may want to advance their own political agendas, but that this is not an attempt to punish the respondent for his imputed political opinion. *See Elias-Zacarias*, 502 U.S. 478, 112 S.Ct. 812 (1992) (recognizing that persecution "on account of" is persecution on account of the victim's political opinion). For all the reasons noted by the Immigration Judge, we agree that the respondent failed to establish that he suffered past persecution or a well-founded fear of future persecution on account of his imputed political opinion.

Next we address the respondent's claim that he would be persecuted on account of his membership in a particular social group, namely those individuals who are past government officials or suspected of involvement in corruption. *See* (Exh. 7 at 5). Membership in a particular social group means membership in a group of people who all share a common, immutable characteristic, that is, a characteristic that is either beyond the power of the individual members to change, or that is so fundamental to their identities or consciences that it should not be required to be changed. *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985). Moreover, a particular social group may also be distinguished by its "social visibility." *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006). The United States Court of Appeals for the Seventh Circuit has set forth a three-part test for determining membership in a particular social group, "an alien must (1) identify a particular social group; (2) establish that [he or] she is a member of that group; and (3) establish that [his or] her well-founded fear of persecution is based on [his or] her membership in that group." *See Iliev v. INS*, 127 F.3d 638, 642 n.3 (7th Cir. 1997).

As a matter of simple statutory interpretation, let alone sound public policy, we do not deem criminal behavior that is commonly and properly condemned by civilized societies to be a valid basis for a finding that a perpetrator, or suspected perpetrator, falls within a "particular social group" within the meaning of section 208 of the Act. *See Bastanipour v. INS*, 980 F.2d 1129, 1131-32 (7th Cir. 1992) (declining to treat drug traffickers as a "particular social group" under the Act); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1005 (9th Cir. 1988) (finding that an alien's fear of criminal prosecution does not constitute a protected ground under the Act). Mr. Montes testified that the respondent may or could be harmed if returned to the Philippines. However, Mr. Montes was likewise recommended for prosecution by the Senate Committee and yet, he remains unharmed in the Philippines (Tr. at 292-94) and similarly not charged. *See* (Exhs. 17, 7).

The respondent's son also claimed he received unfulfilled threats and text messages from unknown persons (Tr. at 140, 312-13). However, the Immigration Judge noted that vague, unfulfilled threats to friends or family do not support a claim of past or future persecution. *See Matter of Kasinga, supra.* The respondent also argues that there is a bounty for his capture, that radical groups may attempt to capture him, and the authorities cannot protect him from these groups. *See* Asylum Attachment at 2-3. The respondent also argues that bounties are not legitimate prosecutorial tools. The United States Department of State indicates it is unaware of any such bounty for the respondent. (Exh. 15, Ltr. at 2). The Immigration Judge noted that contempt citations and arrests are distinctly possibly consequences for failing to comply with a subpoena (I.J. at 14), and that these events did not appear to be a pretext for persecution but rather an enforcement of the laws of the democratically elected government (Tr. at 13).[2] Although the Immigration Judge noted there was no evidence of a bounty, this would also be a possible consequence for having an open warrant of arrest in the United States. The Immigration Judge further noted that even a newspaper article indicated that there is no intent to harm the respondent, but instead there is the desire that he discuss his participation in the Fertilizer Scam and "spill the beans." (Exh. 23). For all the reasons noted by the Immigration Judge, we agree that the respondent has not demonstrated his "membership in a particular social group" within the meaning of the Act nor did he possess a well-founded fear of persecution on account of a "particular social group" or any other statutorily protected ground. *See Iliev v. INS, supra.*

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[2] The respondent filed a Amendment to the Appellate Brief, which attempts to offer two newspaper articles to support his claim of persecution. This Board does not ordinarily consider new evidence submitted on appeal as the record we review on appeal is the record before the Immigration Judge. *Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984) (the Board is an appellate body whose function is to review, not to create, a record). This evidence post-dates the hearing and therefore, was technically unavailable and could not have been discovered at his former hearing. However, this new evidence does not advance his appeal as it simply references current political unrest and violence in the Philippines and adds to the articles already before the Immigration Judge. Regardless, contrary to the respondent's claims, neither article confirms a bounty against him. Also, the respondent submitted a document indicating his non-immigrant visa had been extended to June 2, 2006. However, this extension does not alter the Immigration Judge's ruling that the respondent is an intended immigrant and therefore, it would not be relevant to the issue of removability (I.J. at 3).

Finally, the respondent argues that the general violent conditions and existence of political unrest demonstrated that it is more likely than not that he will face persecution if returned to the Philippines. Random isolated criminal acts, civil strife, and general unrest in the alien's homeland, do not arise to the level of persecution. *See Kobugabe v. Gonzales,* 440 F.3d 900 (7th Cir. 2006); *Mitev v. INS,* 67 F.3d 1325, 1331 (7th Cir. 1995) (recognizing that unpleasant and even dangerous conditions do not necessarily rise to the level of persecution). We agree with the Immigration Judge that the respondent failed to carry his burden of establishing he had suffered past persecution or has a well-founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. Inasmuch as the respondent failed to sustain the burden applicable to asylum, the respondent also failed to sustain the more stringent burden applicable to withholding of removal under the Act. *See Kobugabe v. Gonzales, supra.*

Accordingly, the respondent's appeal is dismissed.[3]

FOR THE BOARD

[3] The respondent also moved to strike the DHS' brief as untimely. The DHS' brief was received on May 3, 2007, and therefore, is not untimely. Further, the respondent received the brief on May 10, 2007. Accordingly, we deny the respondent's motion to strike.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, ILLINOIS

File: A95 719 764 **Date: February 9, 2007**

In the Matter of:	)	
	)	
Jocelyn Bolante,	)	**IN REMOVAL**
	)	**PROCEEDINGS**
	)	
Respondent.	)	

CHARGE: **Section 212(a)(7)(i)(I) of the Immigration and Nationality Act - Immigrant not in possession of a valid immigrant visa.**

APPLICATIONS: **Section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a) - Asylum.**

Section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3) - Withholding of Removal.

ON BEHALF OF THE RESPONDENT:

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DECISION AND ORDER OF THE IMMIGRATION JUDGE

Introduction and Procedural Summary

The respondent is a 55-year-old male, native and citizen of the Philippines, who attempted entry into the United States at Los Angeles California on or about July 7, 2006. The Department of Homeland Security (hereinafter "the government" or "DHS") initiated removal proceedings with a Notice to Appear ("NTA") dated July 13, 2006, charging that the respondent is inadmissible to the

United States pursuant to the above-captioned section of the Immigration and Nationality Act (hereinafter "INA" or "the Act"). See Exhibit 1. The Immigration Judged in Los Angeles changed venue to Chicago, Illinois on August 2, 2006. See Exhibit 2.

At a removal proceeding, the respondent admitted factual allegations 1 through 3 contained in the NTA and denied allegation 4 and the charge of inadmissibility. An applicant for admission to the United States bears the burden of establishing that he or she is "clearly and beyond doubt entitled to be admitted and is not inadmissible under section 212(a)." See § 240(c)(2)(A) of the Act. Thus respondent must come forth with evidence to prove that he is not inadmissible as charged.

The only argument advanced by respondent regarding admissibility is that he believes he has a valid non-immigrant visa and therefore he should be admitted. Before discussing that issue further, I would note that neither party addressed the issue of jurisdiction. Section 235(b) of the Act discusses inspection of applicants for admission to the United States. Section 235(b)(1)(A)(i) provides that if an alien arriving in the United States is determined to be inadmissible under section 212(a)(6) or 212(a)(7) of the Act, the inspecting "officer shall order the alien removed from the United States without further hearing or review unless the alien indicates an intention to apply for asylum ... "[1]

The respondent here falls within this provision and pursuant to statute he was referred to an asylum officer for a credible fear interview.[2] Respondent was found to have a credible fear (See Exhibit 9, tab 4) therefore, pursuant to statute he is now "detained for further consideration of the application for asylum." See § 235(b)(1)(B)(ii) of the Act. This section of the Act appears to indicate that the hearing should only relate to asylum consideration and not to admissibility. Certainly in a case where the alien no longer seeks asylum the court should not rule on inadmissibility but send the case back for removal under section 235(b). However, this respondent does seek asylum and there is some tension between section 235(b)(1)(B)(ii) and sections 240(a)(1) and 240(c)(1)(A) of the Act. Therefore, having heard no arguments from the parties I

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[1] The statute does create one exception for citizens of Cuba who arrive by aircraft at a port of entry.

[2] A credible fear interview is a threshold to determine whether the alien should be given a full asylum hearing or should be removed without further review. A credible fear is defined as a significant possibility that the alien could establish eligibility for asylum. Credible fear is found in most cases. EOIR statistics show that of the thousands of arriving alien who are referred for a credible fear interview each year, in 2003 only 43 cases were denied and referred to the Immigration Court nationwide (41 cases in 2004 and 113 cases in 2005). www.usdoj.gov/eoir/statspub/fy05syb.pdf at page c3.

will assume jurisdiction over the issue of admissibility.

There is no doubt that respondent's visa was revoked and that this court lacks jurisdiction to review the decision by the State Department to do so. Bolante v. Achim, 457 F. Supp. 898 (E.D. Wis. 2006); Matter of P-N-, 8 I&N Dec. 456 (BIA 1959); Exhibit 9, tabs 1 and 2. Therefore, respondent's argument that he possesses a valid non-immigrant visa is incorrect. More importantly, the arguments raised concerning the non-immigrant visa are irrelevant to the charge. Respondent is charged with being an **immigrant** not in possession of an immigrant visa, not with being a non-immigrant who does not possess a visa. In addition, respondent's position is incorrect even if he has a valid un-revoked non-immigrant visa. It is well established that merely possessing a visa does not entitle an alien to admission. Vitale v. INS, 463 F. 2d 579 7th Cir. 1972); Matter of Healy and Goodchild, 17 I&N Dec. 22 (BIA 1979). He must truly be seeking admission as a *bona fide* visitor.

The respondent's own statements to this court make it clear that he has no intention of complying with the terms of his non-immigrant visa. To the contrary, respondent seeks to obtain permanent status and remain in the United States. The respondent has failed to meet his burden that he is clearly and beyond doubt entitled to admission to the United States. The respondent has failed to establish that he is not inadmissable under section 212 of the Act. The facts here show that respondent is an intending immigrant and he does not possess a valid immigrant visa. Therefore, inadmissability on the charge contained in the NTA is sustained.

The respondent declined to designate a country of removal and as an arriving alien he is not entitled to designate a country for removal. The statute mandates that removal shall be "to the country in which the alien boarded the vessel or aircraft on which the alien arrived in the United States." See § 241(b)(1)(A) of the Act.[3] The respondent has submitted an application for asylum under Section 208 of the Act which is also considered a concurrent application for withholding of removal under section 241(b)(3) of the Act. See Exhibit 6. The respondent has not indicated in his asylum application or in any other filing that he is seeking protection under Article 3 of the United Nations Convention Against Torture (CAT). Respondent did not present any argument that he qualifies for protection under CAT. See Exhibits 6, 7 and Respondent's Closing Argument.

THE EVIDENCE PRESENTED

There were four witnesses who testified in support of the respondent's applications for relief: the respondent; his son Owen; Retired Major General Rodolfo Estrellado; and

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[3] The court has not been provided with this information. Therefore, should removal become necessary, the statutorily required country will be designated.

Undersecretary of Agriculture Felix Montes. As I will discuss the testimony in more detail later in this opinion, I will briefly summarize the testimony.

In 2001, the respondent was appointed by the current President of the Philippines, Gloria Macapogal-Arroyo (President Arroyo), to serve as one of four Undersecretaries within the Department of Agriculture. The respondent resigned from that position in 2004 because of a new position he obtained with the Rotary International. Before, during, and after his tenure as an Undersecretary, the respondent maintained various businesses in the Philippines as well.

After his resignation from his government post, a Senate Committee was convened to investigate charges of corruption within the Department of Agriculture. These allegations of corruption will be referred to as the "fertilizer scam." The Senate Committee convened to investigate the fertilizer scam is called "Committee on Agriculture and Food and Committee on Accountability of Public Officers and Investigations" (hereinafter "Blue Ribbon Committee" or "Committee"). As part of its investigation, the Committee subpoenaed the testimony of high-ranking officials within the Department of Agriculture, such as the Undersecretaries, which included the respondent. Some officials testified before the Committee, but based upon the advice of his attorney, the respondent did not comply with the Senate's subpoena, did not appear before the Committee and did not testify. According to the respondent, the Senate has made accusations of graft against him and others in the Arroyo government because they are intent on removing her from office. The respondent asserts that he has not been formally charged with any crimes, and that after the Committee concluded the hearings the final Committee Report was forwarded to the Ombudsman for a decision on whether to pursue criminal charges. By all accounts the Ombudsman's Office Acts as a permanent special prosecutor concerning allegations of corruption and wrong doing by government officials. See Exhibit 17, Department of State, Bureau of Democracy, Human Rights, and Labor, 2005 Country Report on Human Rights Practices for the Phillippines at page 9. Apparently a criminal matter cannot be lodged against Bolante unless the Ombudsman files charges. Although it has been over eleven months since the committee forwarded recommendations for prosecution to the Ombudsman, as of yet the Ombudsman has not filed any charges against Bolante. See Exhibit 7, tab I.

After having received a subpoena to testify before the Committee, the respondent departed the Philippines and traveled overseas as part of his duties with the Rotary International. The last time respondent was in the Philippines was in December of 2005, and after his failure to comply with the subpoenas a warrant was issued by the Philippine Senate. The respondent then traveled to the United States and was admitted as a non-immigrant visitor on January 2, 2006. During this visit, the respondent received tooth implants, attended his son's graduation, and participated in Rotary International meetings. Later in 2006, the respondent departed the United States, traveling to various European counties. Respondent testified that also traveled to Korea and Hong Kong before attempting to reenter the United States in July 2006. Respondent's wife then went back to

the Philippines, while the respondent returned to the United States. Later, respondent's wife did return to the United States as a visitor.

On July 7, 2006, the respondent arrived in the United States at Los Angeles, California, International Airport. The respondent claims that his intent for this visit was to attend Rotary International meetings, and to receive treatment for his tooth implants. At the airport, the respondent asserted that he had a return ticket to the Philippines, and that he intended to remain in the United States for only 30-45 days. Upon arrival, the respondent was notified that his non-immigrant visa had been revoked by the United States Department of State. A sworn statement was taken of the respondent by an Inspector for Customs and Border Protection, an agency within the Department of Homeland Security, and the respondent was found inadmissible as an alien who was intending to immigrate to the United States without proper documentation.

The respondent argues that he fears returning to the Philippines because there is a bounty for his capture due to his failure to comply with the Committee's subpoena. He believes that any number of criminal and political groups will seek his capture in order to collect on the bounty. The respondent indicated that he does not think that the government of the Philippines is able to protect him from these groups.

Respondent's son Owen Bolante, Retired Major General Rodolfo Estrellado, and Undersecretary of Agriculture Felix Montes also testified. Mr. Montes testified that he holds the same position in the government that respondent did. Both Montes and the respondent were serving as Undersecretary of Agriculture under President Arroyo. Mr. Montes stated that Bolante's life is in danger. He testified that there a lot of people out to get respondent, who might use him as a tool to get at the President. Mr. Montes also stated that although he had executive immunity from testifying, he did appear before the Blue Ribbon Committee.

Retired Major General Rodolfo Estrellado testified that he has known respondent since 1997 and that they are both involved in the Rotary Club. General Estrellado indicated that he is familiar with respondent's case and that, in his opinion, he would be in danger if returned to the Philippines. General Estrellado stated that respondent is in danger "for so many reasons." He did not elaborate on this statement. The General also stated that there have been 755 political killings in the Philippines and many remain unsolved. Lastly, he stated that the government is unable to protect the respondent from harm.

Respondent's oldest son Owen came from the Philippines in order to testify. Owen stated the he helps run the family businesses and that he has come to the United States as a visitor on a number of occasions, including his last entry in December 2006. Consistent with his father's testimony, Owen described the family business and their residential compound. Owen testified that the home is in a gated and guarded community. In addition to that, the home itself is gated and has a number of armed guards. Owen also stated that he received a threat via a text message and

another threat. He also verified that he has seen suspicious cars near the home. He reported these events to the police but to his knowledge no arrests have been made. Owen has no idea who threatened him and he has not received any other threats. In Owen's opinion, opposition groups might want to use his father as leverage in their quest to oust President Arroyo. He also stated he has heard about a bounty or reward for his father's arrest. Owen fears his father could be harmed by individuals or groups trying to collect this bounty.

In addition to the testimonial evidence and the applications for relief, respondent and the DHS submitted several documents into the record as the following exhibits: Exhibit 1, the NTA; Exhibit 2, motion to change venue and order changing venue to Chicago; Exhibit 3, respondent's brief in support of closed hearing; Exhibit 4, brief in support of motion to strike *amicus* brief; Exhibit 5, respondent's form I-94; Exhibit 6, respondent's application for asylum and withholding of removal (Form I-589); Exhibit 7, respondent's pre-hearing statement and supplemental documents consisting of tabs A-AA; Exhibit 8, DHS trial memorandum; Exhibit 9, DHS document submission consisting of tabs 1-5 ; Exhibit 10, court's pre-hearing order, notice of hearing and State Department transmittal letter; Exhibit 11, respondent's request for issuance of subpoena (withdrawn); Exhibit 12, DHS opposition to subpoena; Exhibit 13, DHS witness list; Exhibit 14, respondent's amended pre-hearing statement; Exhibit 15, U.S. Department of State opinion letter; Exhibit 16, frivolous asylum advisals; Exhibit 17, U.S. Department of State, Bureau of Democracy, Human Rights, and Labor, 2005 Country Report on Human Rights Practices for the Philippines; Exhibit 18, various reports on country conditions; Exhibit 19, respondent's sworn statement; Exhibit 20, Senate of the Philippines report from Committee on Agriculture and Food and the Committee on Accountability of Public Officers and Investigations; Exhibit 22, news article concerning respondent's petition for *habeas corpus*; Exhibit 23, news article concerning NPA denying claim of assassination plot; Exhibit 24, respondent's motion for contempt; Exhibit 25, respondent's second amended pre-hearing statement; Exhibit 26, respondent's motion in *limine*; Exhibit 27, respondent's motion to present telephonic testimony; Exhibit 28, DHS response to motion for contempt; Exhibit 29, DHS response to motion in *limine*.[4]

APPLICABLE LAW & LEGAL ANALYSIS

ASYLUM

Under section 208(a) of the Act, in order to be eligible for asylum an applicant has the burden to establish that he is a refugee within the meaning of the Act. See, Matter of Chen, 20 I&N

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[4] Respondent's motion to strike *amicus* brief is granted. Respondent's objection to Exhibit 21 is sustained. Respondent's other objections to the evidence are overruled and (with the exception of exhibit 21) all exhibits are admitted into evidence as marked.

Dec. 16, 17 (BIA 1989). A refugee is defined as an individual who is unable or unwilling to return to his country of nationality "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." See INA section 101(a)(42)(A).

WITHHOLDING OF REMOVAL

In order to establish eligibility for withholding of removal pursuant to section 241(b)(3) of the Act, an applicant must demonstrate a clear probability of persecution in the country designated for removal on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* INS v. Stevic, 467 U.S. 407, 413 (1984); Matter of Mogharrabi, 19 I&N Dec. 439, 440 (BIA 1987)(*citing* Stevic, 467 U.S. at 413). The clear probability standard requires that the applicant establish that it is more likely than not that he would be subject to persecution on account of one or more of the five enumerated grounds. See id. at 440.

AMENDMENTS UNDER THE REAL ID ACT

Because the respondent filed his application for asylum and withholding of removal after the enactment of the Real ID Act, his application is governed by the amendments to the INA contained in the Real ID Act. The Real ID Act contains several significant amendments to the Act as it relates to the burden of proof and the adjudication of asylum and withholding of removal applications. The Real ID Act added a new § 208(b)(1)(B)(i) to the Act. This new section explicitly provides that the burden of proof is on the applicant to establish that he is a refugee within the meaning of § 101(a)(42)(A) of the Act. To meet this burden, the applicant must establish that race, religion, nationality, membership in a particular social group or political opinion was, or will be at least one central reason, for the claimed persecution.

The Real ID Act also adds §§ 208(b)(1)(B)(ii) and (iii) to the Act relating to credibility determinations. Section 208(b)(1)(B)(ii) states that an applicant's testimony alone may be sufficient to satisfy the burden only if the Immigration Judge determines that the testimony is credible, persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. Where the Immigration Judge determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence or cannot reasonably obtain it. Section 208(b)(1)(B)(iii) provides that considering the totality of the circumstances and all the relevant facts, the Immigration Judge may base a credibility determination on the candor, demeanor, or responsiveness of an applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not made under oath), the internal consistency of each statement, the consistency of such statements with the

other evidence of record, and any inaccuracies or falsehoods in such statements, without regard to whether the inconsistency, inaccuracy or falsehood goes to the heart of the asylum claim.

INA Section 241(b)(3)(C) specifically requires that the criteria enunciated in §§ 208(b)(1)(B) (ii) and (iii) also be applied to determinations on claims for withholding of removal under the more stringent "more likely than not" standard. The amendments made by the Real ID Act essentially codify much of the previous Board of Immigration Appeals ("BIA" or "Board") case-law regarding credibility determinations while rejecting circuit court case-law that is inconsistent with the newly created statutory burden of proof.

In assessing the credibility of the respondent I have taken into account the rationality, internal consistency, and inherent persuasiveness of the claim. It is well-settled that an alien's testimony alone can suffice to meet his burden of proof if the testimony is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of the alien's alleged fear." Matter of S-M-J-, 21 I & N Dec. 722 (BIA 1997); see also Matter of Dass, 20 I & N Dec. 120 (BIA 1989); Matter of Mogharrabi, 19 I & N Dec. 439. However, evidence of general, oppressive conditions that affect the entire population of a country do not provide a basis for asylum. Bradvica v. INS, 128 F.3d 1009 (7th Cir.1997). The respondent's testimony was generally consistent with his asylum application. Therefore, the Court concludes that the respondent is generally credible with respect to the facts surrounding his case. However, a finding of credible testimony is not dispositive as to whether asylum and withholding of removal should be granted; rather, the specific content of the testimony, and any other relevant evidence in the record, is also to be considered. Matter of E-P-, 21 I&N Dec. 860 (BIA 1997)

PAST PERSECUTION

In his application for asylum the respondent makes a vague claim that he has been harmed or mistreated in the past. He states that when last in the Philippines in December 2005, he was "under constant surveillance", that he was advised to be careful and that he saw people in cars with government licence plates near his home. See Exhibit 6. An applicant for asylum and withholding of removal bears the burden of establishing either past persecution or a clear probability that the respondent will be persecuted on account of a protected ground. Persecution has been described as the "punishment or the infliction of harm for political, religious, or other reasons this country does not recognize as legitimate." See De Souza v. INS, 999 F.2d 1156, 1158 (7th Cir. 1993). The harm must also be particularized to the individual rather than a harm suffered by the general population. See Sivaainkaran v. INS, 972 F.2d 161, 165 (7th Cir. 1992). Acts of persecution must "rise above the level of mere harassment but need not be so severe as to constitute threats to life or freedom." Dandan v. Ashcroft, 339 F.3d 567 (7th Cir. 2003)(holding that detention for three days without food and beatings that caused facial swelling did not compel a finding of past

persecution); Tamas-Mercea v. Reno, 222 F.3d 417, 424 (7th Cir. 2000); Sofinet v. INS, 196 F.3d 742, 746 (7th Cir. 1999); Borca v. INS, 77 F.3d 210, 214 (7th Cir. 1996)). "Persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional." Sharif v. INS, 87 F.3d 932 at 935.

If an applicant for asylum under section 208 or withholding of removal under section 241(b)(3) of the Act "is determined to have suffered past persecution in the proposed country of removal on account of the alien's race, religion, nationality, membership in a particular social group or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim." 8 C.F.R. § 1208.16(b)(1). This presumption may be rebutted if an immigration judge finds by a preponderance of the evidence that: (1) there has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of one of the five enumerated grounds; or (2) the applicant could avoid a future threat to his life or freedom by relocating to another part of the proposed country of removal. *See* 8 C.F.R. §§ 1208.16(b)(1)(A), (B).

The Seventh Circuit has "recognized the hard truth that unpleasant and even dangerous conditions do not necessarily rise to the level of persecution." Mitev v INS, 67 F.3d 1325, 1331 (7th. Cir. 1995). The Seventh Circuit has also concluded that far more severe harm than that inflicted on the respondent did not rise to the level of persecution. *See e.g.* Dandan v. Ashcroft, *supra*; Zalega v. INS, 916, F.2d 1257, 1260(7th Cir. 1990)(upholding BIA's determination that alien had not been persecuted despite four years of intermittent searches, arrests and detainments). The 7th Circuit has also found that actions such as "detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture might cross the line from harassment to persecution." Ciorba v. Ashcroft, 323 F.3d 539, 545 (7th Cir. 2003). "However, recognizing that these sorts of activities *might* rise to the level of persecution is not the equivalent of saying that they always do. . . . Review of an applicant's past experience must be carried out on the most specific level - it is the details that reveal the severity of the particular situation." Mei Dan Liu v. Ashcroft, 380 F.3d 307 (7th Cir. 2004).

The respondent here has not presented any evidence of past mistreatment or harm. The facts related by respondent in his asylum application and in his testimony fall far short of establishing past persecution. The respondent has not argued past persecution in his pre-hearing statement or in his closing brief. See Exhibit 7 and Respondent's Closing Argument. On the evidence presented to this court, respondent has failed to meet his burden of establishing past persecution. After careful review of the record as a whole, including the respondent's testimony and the documentary evidence, the court finds that the respondent has failed to establish that he has suffered past persecution based on one of the five enumerated grounds in the Act.

WELL-FOUNDED FEAR OF FUTURE PERSECUTION

In order to establish a "well-founded fear" of persecution, an alien must show that it is both subjectively genuine and objectively reasonable through credible, direct, and specific evidence that a reasonable person in his circumstances would fear persecution on account of one or more of the five grounds specified in the Act. See Cardoza-Fonseca, 480 U.S. 421 (1987); Matter of Mogharrabi, 19 I&N Dec.439 (BIA1987). The objective component of the well-founded fear standard requires the asylum applicant to show: 1) that a reasonable possibility exists that he "would be singled out for persecution;" or 2) that there is a pattern or practice of persecution of an identifiable group" to which the respondent belongs such that his fear is reasonable. Capric v. Ashcroft, 355 F.3d 1075, 1085 (7th Cir. 2004), citing 8 C.F.R. § 1208.13(b)(2).

POLITICAL OPINION

The respondent claims that he has a well-founded fear of persecution on account of his political opinion if he is returned to the Philippines. An asylum applicant under the well-founded fear standard must show that his fear of future persecution is both subjectively genuine and objectively reasonable. *See* Mitev v INS, 67 F.3d 1325, 1331 (7th. Cir. 1995). "Merely alleging a fear of future persecution is not enough." Sharif v. INS, 87 F.3d 932, 935 (7th. Cir. 1996). The Seventh Circuit has held that the objective component criterion requires the applicant to present specific detailed facts showing a good reason to fear that he will be singled out for persecution. Sayaxing v. INS, 179 F.3d 515, 520 (7th Cir. 1999)(citations omitted). Put differently, "the applicant must present *specific evidence* that his encounters with the government were of such a magnitude and frequency that they would cause a reasonable person to fear being singled out for persecution." Id.(emphasis in original).

Prior to the Real ID Act, case law indicated that the alien had to produce evidence from which it is reasonable to conclude that the harm was motivated, at least in part, by an actual or imputed protected ground. Matter of S-V-, 22 I&N Dec. 1306, 1309 (BIA 2000); Matter of S-P-, 21 I&N Dec. 486, 489-90 (BIA 1996). It is the respondent's burden to establish with objective evidence that any alleged persecution is "on account of" a protected ground. The alien need not provide direct proof of a persecutor's motive, but must provide some evidence, either direct or circumstantial, of those motives. INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992). The Real ID Act, which does apply to this case, makes clear the in order to meet this burden, the applicant must establish that race, religion, nationality, membership in a particular social group or political opinion **was or will be at least one central reason for the claimed persecution.**

Even having found respondent generally credible as to the historical facts of his case, an immigration judge is not required to accept the respondent's speculation as to the motivation of the alleged persecutor. *See* Ziu v. Gonzalez, 412 F.3d 202 (1st Cir. 2005)(citing Khalil v Ashcroft,

337 F.3d 50, 55 (1st Cir. 2003))(noting that the respondent's theory regarding his alleged persecutor's motives was just that, a theory). Respondent states that he will be arrested if returned to the Philippines. He also fears the he will be harmed by the government and other entities if he is sent back. Respondent's pre-hearing statement avers that "[r]espondent is likely to be persecuted because he has not testified before a Senate committee ... ." He opines that the investigation and hearing are politically motivated. Respondent does appear to have a subjective fear. However, as indicated above, he must also establish that the fear is objectively reasonable and is on account of a protected ground.

Respondent repeatedly argues that the Senate investigation is politically motivated and that the Senators are using this as a tool to advance their own political agenda in opposition to President Arroyo. I will discuss below whether respondent has met his burden to establish that political opinion was, or will be, at least one central reason for the claimed persecution. First, I will make several general comments concerning the motive of the alleged persecutors. The United States Supreme Court, in INS v. Elias-Zacarias, 502 U.S. 478, 112 S.Ct. 812 (1992), rejected a Court of Appeals decision that the political motivation of the persecutor establishes that persecution is on account of political opinion. The Court held that only persecution on account of the victim's own political opinion can establish a well-founded fear within the meaning of the Act. The Court stated,

> [t]he ordinary meaning of the phrase persecution on account of ... political opinion in § 101(a)(42) is persecution on account of the *victim's* political opinion, not the persecutor's. If a Nazi regime persecutes Jews, it is not, within the ordinary meaning of language, engaging in persecution on account of political opinion; and if a fundamentalist Moslem regime persecutes democrats, it is not engaging in persecution on account of religion. Thus, the mere existence of a generalized "political" motive underlying the guerrillas' forced recruitment is inadequate to establish (and, indeed, goes far to refute) the proposition that Elias-Zacarias fears persecution *on account of* political opinion, as § 101(a)(42) requires.

Elias-Zacarias, *supra* at 482 (Emphasis in original).

Respondent's counsel argues that by remaining silent and refusing to appear before the Senate hearing, the Senate will impute a political opinion on him. Apart from this argument, there is little if, any, evidence to support this claim. Respondent and the witnesses all testified that some members of the Philippine Senate oppose President Arroyo and that the hearings on the fertilizer scam were done to advance those Senators' political agendas, not to punish respondent for his imputed political opinion. Under the holding in Elias-Zacarias, *supra*, respondent's claim must fail. Therefore, respondent's theory that members of the Senate of the Philippines seeks to persecute him in order to further their own political agendas, even if established, does not constitute

persecution on account of respondent's political opinion.

Moreover even if the political motivation of the alleged persecutor were the relevant issue, legitimate prosecution or investigation for a crime has never been held to constitute persecution. Every government has the right to investigate and prosecute violations of law. Only where an asylum applicant establishes that a prosecution or an investigation is illegitimate or done as a pretext or for a nefarious purpose can a criminal investigation be a basis for asylum in the United States. Certainly the government of the Philippines (including the Senate) has the right to investigate allegations of corruption by other members of the government. Therefore, it is clear that the Senate of the Philippines has the right to investigate allegations that the respondent was involved in diverting agriculture subsidy funds for illicit purposes.

That he might very well be arrested upon his return to the Philippines does not support Bolante's claim of persecution on account of a ground that is protected under the INA. Bolante is the subject of an investigation relating to allegations that he assisted in a scheme to misappropriate 728 million Philippine pesos (over 14.5 million U.S. dollars) in fertilizer subsidy funds, known commonly as the fertilizer scam. Public corruption is a sensitive topic in the Philippines as a corruption scandal led to the ouster of previous President Joseph Estrada in 2001 and President Ferdinand Marcos in 1986. See http://news.bbc.co.uk/1/hi/world/asia-pacific/country_profiles/1262783.stm. There appears to be a fair amount of public outcry over the fertilizer scam, including complaints from farmers who claim they did not receive subsidies to which they are entitled. The Senate of the Philippines convened a Blue Ribbon Committee to investigate the fertilizer scam and proceeded to conduct a series of hearings. By all accounts, respondent is widely known to be closely tied to the alleged fertilizer scam and, consequently, he was called to testify before the Philippine Senate. It is also undisputed that the respondent was aware that he was called to testify and that each time he was called he failed to attend, averring that he had previous business matters scheduled. Also undisputed is that *after* Bolante failed to comply with repeated subpoenas the Senate issued a warrant for his arrest. See Exhibit 7, tab Q. There is no indication that any government authority sought to arrest Bolante prior to that time.

Months after Bolante's failure to testify, the Senate Blue Ribbon Committee issued its report. The report recommends to the Ombudsman that Bolante be charged with violations of Law on Plunder and the Anti-Graft and Corrupt Practices Act (Section 3(e), Republic Act 3019). The report names Bolante as the main architect of the fertilizer scam. The Senate also issued the warrant for Bolante's arrest relating to the separate issue of failing to comply with the Senate subpoena. The Senate report also recommends that others, including Felix Montes, be charged. Mr. Montes remains in the Philippines, and testified telephonically in this case on behalf of Bolante . There is no evidence that Montes has been arrested, or harmed based on the report. It has been over eleven months since the Blue Ribbon Committee issued the report recommending prosecution. As of this time, no one, including Bolante, has been charged.

Other than being issued a subpoena, Bolante was allowed to continue his life virtually unmolested while the investigation was pending. However, after Bolante skipped out and failed to appear before the Senate, an arrest warrant was issued against him. The record does not indicate that he was sought for arrest for any reason until he skipped out and failed to comply with multiple subpoenas. Nor is there any indication that Philippine officials ever harassed his family in an effort to locate him or that any government officials took any action against the family members. That is a strong indication that the officials are not seeking to persecute on account of political opinion, but instead, are seeking to prosecute for violations of the law. Such prosecutions do not constitute persecution. See Chanco v. INS, 82 F.3d 298, 302 (9th Cir. 1996) (prosecution for a crime will not ordinarily constitute persecution). Moreover, although a showing of disproportionate punishment may support a claim that the prosecution is a pretext for persecution, such is clearly not the case here, where Bolante was previously under investigation, but was never sought out for arrest until he failed to comply with subpoenas.

In Chanco, *supra*, the Ninth Circuit upheld the BIA's determination that a Philippine Army General was not entitled to asylum. Chanco was alleged to have played a role in a coup attempt. The Court found that in order to show that he was facing "persecution," as opposed to prosecution, for having committed a criminal act of treason or sedition, Chanco had to demonstrate that the Philippine government would act to punish him in a manner not in conformity with the general laws of the Philippines. The BIA for its part cited the United Nations High Commissioner for Refugees' Handbook on Procedures and Criteria for Determining Refugee Status to support this ruling. See also, Abedini v. INS, 971 F.2d 188, 191 (9th Cir. 1992) (prosecution is not persecution where there is a failure to show that a disproportionately severe punishment is on account of political opinion). Relying on the State Department's Country Reports, the Court noted that there had been no apparent need to seek to overthrow a democratically elected government by force, where peaceful opposition to effect political change is tolerated. Further the Court noted that the Philippines has a justice system which contains many of the guarantees of liberty contained in the U.S. criminal system.

The Philippines does have a system of government that is modeled on the United States democratic form of government. There are three independent branches of government consisting of an executive, a legislative and a judiciary. The Senate is democratically elected and given the same constitutional powers over legislation and oversight as our Senate. The Philippine Constitution gives the Senate the power to enact rules in conducting its business. Philippine Constitution, Article VI section 16(1),(3). Under the Rules of the Senate, the president of the Senate has the authority to "issue warrants, orders of arrest, subpoena and subpoena *duces tecum*." Rules of the Philippine Senate, Rule III section 3(c). Pursuant to the Senate of the Philippines' powers and duties, a hearing was held concerning the fertilizer scam and subpoenas were issued. The United States has had numerous instances where there have been employees or former employees of the executive branch who have been called to testify before the U.S. congress and the congress goes on to recommend criminal charges or that a special prosecutor be assigned. That the contents of a

Senate hearing might prove to be embarrassing to the President does not make the entire investigation a political one. In the United States there would most certainly be consequences if anyone called to testify before the Senate refused to comply with a subpoena. Even in this country, a citation for contempt of Congress and arrest are distinctly possible consequence for such behavior.

It is clear to the Court that while the investigation was ongoing, no one ever persecuted the respondent in any manner. Presently no charges are pending against respondent in the fertilizer scam that might cause him to be arrested if he returns, but, rather it is his failure to comply with the order to appear and testify that could result in his arrest. See Exhibit 7, tabs I and Q. There is no evidence whatsoever that anyone has been arrested in this matter or that respondent would have been sought for arrest but for his failure to appear as ordered. Respondent states as much in the pre-hearing statement indicating that he "is likely to be persecuted because he has not testified before a senate committee ... .". I cannot say, given this record, that respondent has established the one central reason for the actions of the Philippine Senate is based on his political opinion. Nor can I conclude that respondent has established that any of the Senate's actions would act to punish him in a manner not in conformity with the general laws of the Philippines. Thus, although Bolante may be facing arrest upon his return to the Philippines, he has not met his burden of showing either past persecution or a well-founded fear of future persecution on account of a ground that is protected under the INA.

MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

The Board of Immigration Appeals ("BIA") has held that members of a particular social group share "a common, immutable characteristic" that "must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." See Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996); Matter of Acosta, 19 I&N Dec. 211, 233 (BIA 1985); Matter of H-, 21 I&N Dec. 337 (BIA 1996). The BIA also recently discussed that a particular social group can be distinguished by its "social visibility." Matter of C-A-, 23 I&N Dec. 936 (BIA 2006).

The Seventh Circuit Court of Appeals has set forth a three-part test for obtaining asylum based on membership in a particular social group. "[A]n alien must: (1) identify a particular social group; (2) establish that [he or] she is a member of that group; and (3) establish that [his or] her well-founded fear of persecution is based on [his or] her membership in that group." *See* Iliev v. INS, 127 F.3d 638, 642 n.3 (7th Cir. 1997) (quoting Sharif v. INS, 87 F.3d 932, 936 (7th Cir. 1996)). In Lwin v. INS, 144 F.3d 505, 512 (7th Cir. 1998), the Seventh Circuit indicated that in some instances family membership can form the basis of a particular social group.

The respondent, in his pre-hearing statement, describes his alleged particular social group as "past government officials." Exhibit 7, page 5. Respondent states that this "is an innate and

immutable characteristic Respondent cannot change." Other than that bald assertion respondent has not elaborated on this claim. Respondent's closing statement merely offers case citation without any reference to his claimed particular social group. The respondent and his witnesses speculate that he will be harmed if returned. Although Mr. Montes was likewise recommended for prosecution he remains unharmed in the Philippines. Mr. Montes stated that Bolante is in danger if returned. His testimony was lacking in detail and entirely speculative. Mr. Montes repeatedly used equivocal words such as "might", "could" and "may" when describing what would happen to Bolante. There was also testimony from respondent's son Owen that he received a threatening text message. Respondent's son did not have any idea as to the source of the threat or what the motivation might have been. There is no indication that the police are unwilling to investigate or that anyone followed this threat with other threatening action. See Exhibit 7, tab c. Vague threats relayed by family and friends are insufficient to support a claim of past or future persecution. Aguilar-Solis v. INS, 168 F3d 565, 573 (1st Cir 1999); Liao v. Reno, 293 F.3d 61 (2nd Cir. 2002).

There was no witness testimony that the government of the Phillippines seeks to harm or persecute "past government officials." There is no corroborative evidence in the record to support such a conclusion. Even if "past government officials" constitutes a particular social group respondent has failed to establish that members of that group are persecuted.

The respondent asserts a fear of returning to the Philippines because there is a bounty for his capture allegedly issued for his failure to comply with the Committee's subpoena. He believes that any number of criminal and other groups including the NPA (a communist insurgent group) will try to capture him in order to collect. The respondent pointedly stated that he does not fear harm from the Philippine Government but he does not think that the government is able to protect him from these groups. For its part the United States Department of State indicates it is unaware of any bounty and that in their opinion the respondent will not face persecution if returned. Exhibit 15. The respondent produced news articles concerning the alleged bounty. The DHS produced a news article relating that the NPA has no interest in harming Bolante, to the contrary the communist would like to see him returned and "spill the beans." Exhibit 23. Based on this information, I do not conclude that respondent has established a well-founded fear of persecution on account of membership in a particular social group or any other protected ground. Therefore, respondent's request for asylum will be denied.

WITHHOLDING OF REMOVAL

In order for an applicant who has not suffered past persecution to be eligible for withholding of removal pursuant to section 241(b)(3) of the Act, the alien must demonstrate a clear probability of persecution in the country designated for removal on account of race, religion, nationality, membership in a particular social group, or political opinion. See INS v. Stevic, 467 U.S. 407

(1984); Matter of Mogharrabi, supra. The applicant must establish that it is more likely than not that he would be subject to persecution on account of one or more of the five enumerated grounds. See id.

In a recent case, the Seventh Circuit reiterated that "[t]he United States does not ensure aliens against unrest . . . in their homelands." Kobugabe v. Gonzales, 440 F.3d 900 (7th Cir. 2006). The Court also emphasized, in accordance with the Supreme Court's decisions in Stevic and Cardoza-Fonseca that "the applicant for withholding of removal bears the burden of demonstrating that loss of life or freedom is more likely than not." Kobugabe v. Gonzales,440 F.3d 900 (7th Cir. 2006).

The burden of proof to establish eligibility for withholding of removal is higher than that required for asylum. See INS v. Cardoza-Fonseca, 480 U.S. 421 (1987). Inasmuch as the respondent has failed to satisfy the lower burden of proof required for asylum, it necessarily follows that the respondent has failed to satisfy the more stringent clear probability of persecution standard required for Withholding of Removal. Accordingly, the respondent's application for Withholding of Removal under section 241(b)(3) of the Act will be denied.

Accordingly, the following Order will be entered:

ORDER OF THE IMMIGRATION JUDGE

ORDER

IT IS HEREBY ORDERED that the respondent's application for asylum be DENIED.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal be DENIED.

IT IS FURTHER ORDERED that the respondent be removed from the United States to the country required in § 241(b)(1)(A) of the Act.

GEORGE P. KATSIVALIS
United States Immigration Judge