No. ________

In the

Supreme Court of the United States

S.A.B.,

Petitioner,

v.

JEFFERSON B. SESSIONS III,
Attorney General of the United States,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Charles Roth
Lisa Koop
NATIONAL IMMIGRANT JUSTICE CENTER
208 South LaSalle Street
Suite 1300
Chicago, IL 60604

Jennifer Yule DePriest
Vanessa Martí Heftman
M. Patrick Yingling
Counsel of Record
Jillian L. Burstein
Karlin E. Sangdahl
REED SMITH LLP
10 S. Wacker Dr., 40th Fl.
Chicago, IL 60606
(312) 207-1000
mpyingling@reedsmith.com

QUESTIONS PRESENTED

An immigration judge granted Petitioner SAB protection from removal because she likely would be tortured by the Ethiopian government if deported, but found her ineligible for asylum because she supported a political opposition group accused of violent separatism by the Ethiopian government. The Seventh Circuit relied on extra-record internet research to credential evidentiary sources disputed as unreliable and conclude—contrary to the testimony of SAB and her expert witness—that the political opposition group employs force and thus qualifies as a terrorist organization. Based on its extra-record research, the Seventh Circuit also held that SAB should have known about and found credible the Ethiopian government's allegations regarding the group's purported activities. The Seventh Circuit then held that it lacked jurisdiction to address SAB's challenges to the agency determination that she was ineligible for an "exemption" to the terrorism bar. The questions presented are:

1. Whether a court of appeals may rely on extra-record factual research to decide a petition for review of a removal order despite a statutory command that such a petition be decided "only on the administrative record[.]" 8 U.S.C. § 1252(b)(4)(A).

2. Whether federal court authority to decide constitutional claims and questions of law under 8 U.S.C. § 1252(a)(2)(D) permits review of legal error in exemption determinations under 8 U.S.C. § 1182(d)(3)(B)(i).

PARTIES TO THE PROCEEDING

Petitioner is SAB, an Ethiopian citizen. The court of appeals provisionally granted SAB's request to use a pseudonym and never retracted that order. The court of appeals referred to Petitioner as SAB throughout the proceedings.[1] Petitioner was also the petitioner in the court of appeals, but was the respondent before the Immigration Court and Board of Immigration Appeals.

Respondent is the Attorney General of the United States, Jefferson B. Sessions III. The respondent in the court of appeals was Attorney General Loretta A. Lynch and later Acting Attorney General Dana J. Boente.

[1] The court of appeals ordered that SAB's *unredacted* briefs and appendices be filed under seal. The court of appeals also ordered that *redacted* copies of the briefs and appendices (concealing personally identifying information) be filed in the public record. The appendix to this petition includes the redacted documents filed in the public record.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING......................... ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW.. 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE................................ 4

I. Statutory background 4

A. Terrorism bar..................................... 4

B. Jurisdictional restrictions 5

II. Factual and procedural history 7

A. Petitioner's administrative proceedings 7

B. Seventh Circuit's ruling 12

REASONS FOR GRANTING THE WRIT............ 14

I. Courts of appeals may not rely on extra-record factual research to decide a petition for review of a removal order. 14

II. Courts of appeals have jurisdiction to decide constitutional claims and questions of law on challenges to exemption determinations under 8 U.S.C. §§ 1182(d)(3)(B)(i) and 1252(a)(2)(D). 23

CONCLUSION 29

APPENDIX ....App. 1

Decision of the Court of Appeals for the Seventh Circuit on Petitions for Review ....App. 1

Decision of the Immigration Judge ....App. 10

Department of Homeland Security Exercise of Authority (OLF Group Exemption) ....App. 74

Decision of the Board of Immigration Appeals Affirming Decision of Immigration Judge ....App. 78

Decision by USCIS on Ineligibility for Exemption ....App. 85

Decision of the Board of Immigration Appeals Denying Motion to Reopen....App. 92

Decision of the Court of Appeals for the
Seventh Circuit Denying
Rehearing En Banc ....App. 96

Constitutional and Statutory Provisions
Involved ....App. 97

TABLE OF AUTHORITIES

Page(s)

Cases

Adame v. Holder,
762 F.3d 667 (7th Cir. 2014)..........................24, 25

Amedome v. Holder,
524 F. App'x 936 (4th Cir. 2013) 25

Ayeni v. Holder,
617 F.3d 67 (1st Cir. 2010) 25

Badasa v. Mukasey,
540 F.3d 909 (8th Cir. 2008)..........................12, 19

Bing Shun Li v. Holder,
400 F. App'x 854 (5th Cir. 2010) 19

Brown v. Entm't Merchants Ass'n,
564 U.S. 786 (2011)..15

Brown-Baumbach v. B&B Auto., Inc.,
437 F. App'x 129 (3d Cir. 2011)...........................22

Cabantac v. Holder,
736 F.3d 787 (9th Cir. 2013)................................18

Chen v. United States Department of Justice,
471 F.3d 315 (2d Cir. 2006) 25

Conrad v. AM Cmty. Credit Union,
750 F.3d 634 (7th Cir. 2014)................................22

Crawford v. Marion Cty. Election Bd.,
553 U.S. 181 (2008)..15

Escoto-Castillo v. Napolitano,
658 F.3d 864 (8th Cir. 2011)...............................18

FH-T v. Holder,
723 F.3d 833 (7th Cir. 2013).................................5

Fisher v. Univ. of Texas at Austin,
136 S. Ct. 2198 (2016)...15

Hussain v. Mukasey,
518 F.3d 534 (7th Cir. 2008)...............................27

INS v. St. Cyr,
533 U.S. 289 (2001)...................................6, 27, 28

Kansas v. Hendricks,
521 U.S. 346 (1997)..18

Kante v. Holder,
634 F.3d 321 (6th Cir. 2011)...............................18

Kerry v. Din,
135 S. Ct. 2128 (2015)...27

Khan v. Holder,
584 F.3d 773 (9th Cir. 2009)...............................27

Khan v. Holder,
766 F.3d 689 (7th Cir. 2014)...............................16

Klyuchenko v. Holder,
545 F. App'x 542 (7th Cir. 2013) 16

Kucana v. Holder,
558 U.S. 233 (2010)..28

Lin v. Holder,
610 F.3d 1093 (9th Cir. 2010)............................25

Mireles-Valdez v. Ashcroft,
349 F.3d 213 (5th Cir. 2003)...............................24

Morales-Flores v. Holder,
328 F. App'x 987 (6th Cir. 2009) 24

Osuna-Gutierrez v. Johnson,
838 F.3d 1030 (10th Cir. 2016)...........................17

Pinos-Gonzalez v. Mukasey,
519 F.3d 436 (8th Cir. 2008)...............................24

Qiu Yun Chen v. Holder,
715 F.3d 207 (7th Cir. 2013)...............................21

Ramadan v. Gonzales,
479 F.3d 646 (9th Cir. 2007)...............................24

Rowe v. Gibson,
798 F.3d 622 (7th Cir. 2015)..........................14, 15

Santana-Albarran v. Ashcroft,
393 F.3d 699 (6th Cir. 2005)...............................24

Tang v. Lynch,
840 F.3d 176 (4th Cir. 2016)...............................17

Vargas v. Attorney General,
543 F. App'x 162 (3d Cir. 2013)..........................25

Statutes

8 U.S.C. § 1182(a)(3)(B)(i)(I) 4

8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd) 4

8 U.S.C. § 1182(a)(3)(B)(vi) 4

8 U.S.C. § 1182(a)(3)(B)(vi)(I) 4

8 U.S.C. § 1182(a)(3)(B)(vi)(II)...................................4

8 U.S.C. § 1182(a)(3)(B)(vi)(III) 4

8 U.S.C. § 1182(d)(3)(B)(i)................................*passim*

8 U.S.C. § 1252(a)(2)(D) ....*passim*

8 U.S.C. § 1252(a)(5) 6, 27

8 U.S.C. § 1252(b)(4)(A) 1, 3, 16, 17

28 U.S.C. § 1254(1)...1

Consolidated Appropriations Act, Pub. L. 110-161, 121 Stat. 2365 (Dec. 26, 2007)................5

Legislative History

H.R. Rep. No. 109-72 (2005) 6, 28

Other Authorities

Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 Duke L.J. 1 (2011) 21

Christina F. Gomez, *Relying on Internet Sources in the Appeals Courts*, 44-NOV Colo. Law. 81 (November 2015) 16

Christopher A. Goelz, Meredith J. Watts and Peder K. Batalden, *Review in Agency Proceedings*, Cal. Prac. Guide Fed. 9th Cir. Civ. App. Prac. Ch. 14-B (March 2017 Update)..25

Colin E. Wrabley and M. Patrick Yingling, *Judicial Internet Research, Fact-Finding: Posner Reignites Debate*, The Legal Intelligencer (Nov. 18, 2015).....................16

Frederick Schauer, *The Decline of "The Record": A Comment on Posner*, 51 Duq. L. Rev. 51 (2013) 16, 21

Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 Minn. L. Rev. 2016, 2022 (2012)..14

Layne S. Keele, *When the Mountain Goes to Mohammed: The Internet and Judicial Decision-Making*, 45 N.M. L. Rev. 125 (2014)..15, 21

Sarah Elizabeth Spencer, *Is the Record Really Complete?*, 59 No. 2 of DRI For Def. 39 (2017)...14

Tina M. Cooper, Jennifer Van Dame, Jonathon Snider, The Honorable Margret G. Robb, *Do You Want to Know A Secret? Do You Promise Not to Tell? Whoa Oh Oh: Judges, Opinions, and Judicial Notice*, 49 Ind. L. Rev. 847 (2016) 16

USCIS, Terrorism-Related Inadmissibility Grounds (TRIG), https://www.uscis.gov/laws/terrorism-related-inadmissability-grounds/terrorism-related-inadmissibility-grounds-trig (last visited Oct. 20, 2017) 4

PETITION FOR A WRIT OF CERTIORARI

Petitioner SAB respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals, App. 1-9,[2] is reported at 847 F.3d 542. There were no district court proceedings. The decision and order of the immigration judge, App. 10-73, and the decisions of the Board of Immigration Appeals, App. 78-84 and 92-95, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2017. Rehearing en banc was denied on June 23, 2017. Justice Kagan extended the deadline for filing a petition for a writ of certiorari to October 23, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in the appendix to this petition are 8 U.S.C. §§ 1182(d)(3)(B)(i), 1252(a)(2)(D), and 1252(b)(4)(A). App. 97-99.

[2] "App." refers to the appendix attached to this petition.

INTRODUCTION

Petitioner SAB was held to be "inadmissible" under the Immigration and Nationality Act's ("INA's") terrorism bar based on her support for an Ethiopian political opposition group, the Oromo Liberation Front ("OLF"), a group which the Secretary of Homeland Security ("DHS Secretary") has exempted from the terrorism bar. The government concedes that SAB, who was tortured by the Ethiopian government and has been granted torture protection, presents no threat to anyone.

The immigration judge ("IJ") found SAB to be "credible" with a "sympathetic story," recognizing that she was tortured and persecuted by the Ethiopian government, and would have granted asylum "but for the terrorist activity exception," which made SAB "inadmissible." In reaching this conclusion, the IJ decided that SAB "should have known" about the OLF's purported activities as described in a government-cited publication called *Jane's World*. The IJ also rejected expert evidence that the Oromo people viewed the Ethiopian government's accusations against the OLF as false propaganda and that *Jane's World* was an unreliable source on this point. The Board of Immigration Appeals ("BIA") affirmed.

Shortly after the IJ's ruling, the DHS Secretary issued an exemption to the terrorism bar for supporters of the OLF (the "OLF Group Exemption"). The exemption, however, included a sentence—notably not in any other terrorism bar exemption—disqualifying individuals who are

currently in removal proceedings. The U.S. Citizenship and Immigration Services agency ("USCIS") determined that SAB was ineligible for the OLF Group Exemption because, although she met "the requirements related to [her] activities with the OLF," she was currently in removal proceedings.

In a petition for review, SAB challenged the IJ's ruling that she was inadmissible under the terrorism bar. SAB also raised legal and constitutional challenges to USCIS's exemption determination. On the terrorism bar, despite 8 U.S.C. § 1252(b)(4)(A)'s command that a petition be decided "only on the administrative record[,]" the Seventh Circuit relied on extra-record internet research to credential the IJ's evidentiary sources, introduce additional factual evidence, and ultimately deny SAB's petition. On the exemption, although 8 U.S.C. § 1252(a)(2)(D) preserves judicial review of "constitutional claims or questions of law" arising from exemption determinations, and SAB raised such claims and questions, the Seventh Circuit held that it lacked jurisdiction.

SAB now petitions for a writ of certiorari. The Court should grant the writ (1) to affirm that a court of appeals may not rely on extra-record factual research to decide a petition for review of a removal order; and (2) to clarify that courts of appeals have jurisdiction to decide constitutional claims and questions of law in the removal context, even as to exemption determinations.

STATEMENT OF THE CASE

I. Statutory background

A. Terrorism bar

A noncitizen is "inadmissible" under the INA if she has "engaged in terrorist activity." 8 U.S.C. § 1182(a)(3)(B)(i)(I). A noncitizen engages in terrorist activity if she, *inter alia*, "commit[s] an act that [she] knows, or reasonably should know, affords material support" to a "terrorist organization." § 1182(a)(3)(B)(iv)(VI)(dd).

The INA recognizes different "tiers" of terrorist organizations. § 1182(a)(3)(B)(vi). The Secretaries of State and Homeland Security officially designate some organizations; those are Tier I and Tier II terrorist organizations. § 1182(a)(3)(B)(vi)(I) and (II). In contrast, Tier III organizations are "undesignated terrorist organizations," defined on a case-by-case basis as "a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in," terrorist activity. § 1182(a)(3)(B)(vi)(III); USCIS, Terrorism-Related Inadmissibility Grounds (TRIG).[3]

Congress counterbalanced the broad scope of the terrorism bar by delegating authority to the Secretaries of State and Homeland Security in § 1182(d)(3)(B)(i) to exempt noncitizens and groups

[3] https://www.uscis.gov/laws/terrorism-related-inadmissability-grounds/terrorism-related-inadmissibility-grounds-trig (last visited Oct. 20, 2017).

of noncitizens from the bar. *FH-T v. Holder*, 723 F.3d 833, 842 (7th Cir. 2013) (recognizing that the exemption provision was drafted in recognition of "breadth" of terrorism bar).

As relevant here, on October 2, 2013, the DHS Secretary exercised his authority under § 1182(d)(3)(B)(i) to exempt from the terrorism bar individuals who supported the OLF in matters where the individual's inadmissibility was based on: (1) solicitation of funds or other things of value for the OLF; (2) solicitation of any individuals for membership in the OLF; (3) material support for the OLF; or (4) receipt of military-style training from or on behalf of the OLF. App. 74-77. The OLF Group Exemption as written, however, does not encompass individuals, like SAB, who are in removal proceedings. *Id.*

B. Jurisdictional restrictions

An exemption determination under § 1182(d)(3)(B)(i) is made in the "Secretary's sole unreviewable discretion." This was the only language in § 1182(d)(3)(B)(i) addressing judicial review until 2007, when Congress added that "no court shall have jurisdiction to review such a determination or revocation except in a proceeding for review of a final order of removal pursuant to section 1252 of this title, and review shall be limited to the extent provided in ***section 1252(a)(2)(D)***." Consolidated Appropriations Act, Pub. L. 110-161, 121 Stat. 2365 (Dec. 26, 2007) (emphasis added).

Section 1252(a)(2)(D) provides that nothing "which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."

Section 1252(a)(2)(D) was enacted in response to this Court's decision *INS v. St. Cyr*, 533 U.S. 289 (2001). In *St. Cyr*, the Court addressed a jurisdictional bar applicable to noncitizens with criminal convictions that eliminated judicial review over legal claims but did not eliminate district court habeas review. *Id.* at 314. Because the bar did not eliminate habeas review as a jurisdictional safety valve, it did not trigger the "substantial constitutional questions" that would have resulted otherwise. *Id.* at 300. The Court made clear that Congress remained free to enact a substitute for habeas provided it was "neither inadequate nor ineffective" in scope. *Id.* at 314 n.38 (citation and internal quotation marks omitted); *see also id.* at 305.

Congress took up the Court's invitation in 2005 and eliminated district court habeas review over removal orders, *see, e.g.*, 8 U.S.C. § 1252(a)(5), but simultaneously enacted § 1252(a)(2)(D) to restore the courts of appeals' petition for review jurisdiction over "constitutional claims or questions of law." With § 1252(a)(2)(D), Congress intended to avoid the problems related to the absence of a forum to raise legal claims. *See* H.R. Rep. No. 109-72, at 175 (2005) (Joint House-Senate Conf. Rep.) (referencing *St. Cyr* and acknowledging Congress'

understanding that it cannot eliminate all review over legal claims).

II. Factual and procedural history

A. Petitioner's administrative proceedings

In 2001, SAB and her husband began their affiliation with the OLF, a political organization whose mission SAB understood to be achieving equality and justice for the Oromo people through non-violent means. App. 14-15. SAB assumed a non-leadership role in her neighborhood OLF women's group, attended local bi-monthly meetings, baked food to raise money for disadvantaged Oromo women, paid nominal dues of approximately 10 Ethiopian birr (less than $1 U.S.) per month, and collected nominal dues from other women in the group. App. 15-17.

In 2002, after hearing two reports on the government-controlled media claiming that OLF members had committed acts of violence, SAB discussed these reports with her husband, close friends, and local OLF leaders. App. 18-19. The OLF leaders stated that these reports were government propaganda designed to suppress the OLF. App. 19. At no time during her discussions with OLF members did anyone discuss using violence to carry out the organization's mission—if they had, SAB would have withdrawn from the group. *Id.*

On February 10, 2004, the Ethiopian police arrested SAB's husband. App. 20. Two days later, they arrested SAB, accusing her of criminal anti-

government activity because of her affiliation with the OLF. *Id.* Over the next four months, SAB endured torture, brutal interrogations, and deplorable living conditions in jail. App. 20-22. While incarcerated, the government prison guards beat her with sticks, kicked her with their boots, burned her with cigarettes, and inflicted water torture. App. 21.

In June 2004, SAB was released from prison. App. 22. She fled to the United States and timely applied for asylum. App. 23. SAB later learned that the Ethiopian government wanted her for questioning. *Id.* When the Ethiopian government could not locate SAB, they detained her sister and subjected her to beatings. *Id.* SAB's other family fared no better—SAB's husband has not returned from government incarceration and is presumed dead. App. 20.

During the immigration proceedings in which SAB sought relief from removal in the form of asylum, the IJ heard the testimony of Professor Charles Schaefer, Ph.D., a court-recognized expert on Ethiopian country conditions, the Ethiopian government's treatment of the OLF, and whether the OLF was a terrorist organization. App. 25-37. Professor Schaefer testified as to the reasonableness of SAB's disbelief of the Ethiopian government's claims that the OLF was responsible for certain attacks and detailed the Ethiopian government's historical use of media propaganda, the Oromo people's resulting long-time skepticism of reports in the government-run media, and the government's use of false accusations of violence as a means of

suppressing political opponents, including the OLF. *Id.*

On July 1, 2013, the IJ found SAB to be "credible" with a "sympathetic story" and ruled that "but for the terrorist activity exception to asylum and withholding of removal, the Court would grant [SAB's] application for asylum." App. 46, 46 n.12, 71. The IJ declined to grant asylum because, according the IJ, the OLF constituted a Tier III terrorist organization, SAB provided material support to the OLF, and SAB reasonably should have known the OLF was a terrorist organization. App. 49-62. The IJ also held that SAB showed a "clear probability of torture" if forced to return to Ethiopia and thus granted her deferral of removal under the Convention Against Torture. App. 67-71.

In holding that the OLF constituted a terrorist organization, the IJ relied on reports from *Jane's World* regarding the OLF's activities, even while acknowledging Professor Schaefer's uncontradicted testimony that *Jane's World* is a publication "shoddily verified," that relies on "biased" sources, and contains "market-driven" content. App. 34, 54. The IJ stated that "Dr. Schaefer has called into question the reliability of this report, but he has not provided independent corroborative evidence that the OLF did not commit or claim responsibility for these attacks." App. 54.

The IJ also held that SAB should have known about the OLF's purported activities, stating that she failed to show that "she did not know or should not reasonably have known of other allegations of

OLF violence." App. 61. The IJ relied on *Jane's World* to state that "the OLF claimed responsibility for three violence attacks during this period." App. 42, 61. The IJ added that SAB "did not live in an isolated, remote area of Ethiopia where it might be reasonable to assume she had no access to information of these attacks; rather, she lived in Addis Ababa, had access to radio and television news, was well-educated and traveled widely abroad on business." App. 61. As such, the IJ concluded that SAB reasonably should have known that the OLF was a terrorist organization during the time of her membership because of "[t]he regularity of the reports of OLF violence, coupled with the respondent's living situation and access to information (even if it was limited to government-sponsored news agencies). . ." App. 61-62.

On October 2, 2013, a few months after the IJ's decision, the DHS Secretary issued the OLF Group Exemption. App. 74-77.

On March 19, 2015, the BIA affirmed the IJ's decision and dismissed SAB's appeal. App. 78-84.

SAB then filed a timely petition for review to the Seventh Circuit. SAB contended that (1) the IJ applied an erroneous evidentiary standard and credited unreliable *Jane's World* reports solely because Professor Schaefer did not provide "independent corroborative evidence that the OLF did not commit or claim responsibility for the attacks"; and (2) the IJ improperly relied on his speculative, unsupported personal beliefs that SAB had access to reliable news—including by

disregarding uncontradicted expert evidence that the Oromo people in Ethiopia, like SAB, reasonably did not believe the Ethiopian government's claims that the OLF committed violence—to conclude that SAB should have known of the OLF's purported activities.

On August 4, 2015, while SAB's petition for review was pending before the Seventh Circuit, SAB's case was referred to USCIS for a decision on her eligibility for a § 1182(d)(3)(B)(i) exemption. App. 85-91. On October 15, 2015, USCIS concluded that SAB was ineligible for the OLF Group Exemption because, although she met "the requirements related to [her] activities with the OLF," she had been placed in removal proceedings that "were not terminated prior to an entry of an order of removal for reasons unrelated to potential eligibility for the OLF group exemption." App. 85-90.

SAB then filed a second petition for review in the Seventh Circuit wherein she raised constitutional and legal challenges to the "removal proceedings" exception in the OLF Group Exemption and explained that: (1) DHS's exclusion of individuals in removal proceedings was inconsistent with the INA and thus invalid; (2) the DHS exclusion was unreasonable, arbitrary, and capricious, and thus in violation of the Administrative Procedures Act; and (3) there was no adequate reason for treating individuals differently based on whether or not they currently were in removal proceedings, and thus the DHS exclusion was unconstitutional on equal protection grounds. *See* Doc. 58 at 50-65, Case No. 15-1835 (7th Cir.). SAB's challenges all involved constitutional claims

or questions of law. The Seventh Circuit consolidated SAB's petitions.[4]

B. Seventh Circuit's ruling

In a precedential opinion, the Seventh Circuit rejected SAB's challenge to the denial of her application for asylum and withholding of removal. App. 1-9. The court upheld the IJ's classification of the OLF as a terrorist organization and ruled that the IJ did not err in concluding that SAB reasonably should have known of the OLF's purported activities. *Id.* To reach these conclusions, the court relied on evidence obtained from extra-record internet research. App. 1-2, 7.

Notably, the Seventh Circuit began its opinion by referencing a Wikipedia[5] page to credential *Jane's World* as an unimpeachable source:

> We introduce this immigration case by noting that Jane's is a long-established British publisher of studies, often book-length, of (so far as relates to this case) warfare, weaponry,

---

[4] After the USCIS decision, SAB moved to reopen proceedings in the BIA in addition to filing a petition for review in the Seventh Circuit. The BIA denied the motion to reopen, App. 92-95, and SAB filed a third petition for review in the Seventh Circuit, challenging the denial. The Seventh Circuit consolidated the third petition with the first two petitions.

[5] "Wikipedia describes itself as 'the free encyclopedia that anyone can edit,' urges readers to '[f]ind something that can be improved, whether content, grammar or formatting, and make it better." *Badasa v. Mukasey*, 540 F.3d 909, 910 (8th Cir. 2008) (Colloton, J.) (citations omitted).

> national security, electronic warfare, insurgency, terrorism, and related topics. *See* "Jane's Information Group," *Wikipedia*, https://en.wikipedia.org/wiki/Jane%27s_Information_Group (visited Feb. 1, 2017, as were the other websites cited in this opinion).

App. 1-2. The Wikipedia page for "Jane's Information Group" indicates that "[t]his article needs additional citations for verification" and that the "article relies too much on references to primary sources."[6] The Wikipedia page was not in the administrative record, and no party cited the Wikipedia page to the court.

Regarding SAB's knowledge, the Seventh Circuit held that she failed to show that she "should not reasonably have known" that the OLF was a terrorist organization because there were "numerous reports" of OLF violence between 2001 and 2004, and SAB "could not have missed all these reports." App. 7-8. In support, the court cited an online article from IRIN News not in the record (a version of which had been *excluded* from evidence by the IJ), reporting that OLF claimed responsibility for an attack.[7] App. 7, 44 n.11, 44-45.

Addressing SAB's petition for review of the USCIS ruling on the OLF Group Exemption, the

---

[6] Wikipedia, "Jane's Information Group," https://en.wikipedia.org/wiki/Jane%27s_Information_Group (last visited Oct. 20, 2017).

[7] "OLF Claims Responsibility for Bomb Blast," IRIN, June 26, 2002, http://www.irinnews.org/news/2002/06/26/olf-claims-responsibility-bomb-blast (last visited Oct. 20, 2017).

Seventh Circuit dismissed the petition "for want of jurisdiction." App. 9. The Seventh Circuit stated that § 1182(d)(3)(B)(i) grants USCIS the "sole unreviewable discretion" to "lift the bar." App. 8-9. The court did not reference the INA's judicial review provision at § 1252(a)(2)(D); nor did it address any of SAB's legal arguments.[8]

REASONS FOR GRANTING THE WRIT

I. Courts of appeals may not rely on extra-record factual research to decide a petition for review of a removal order.

An appellate court considers only evidence in the record. This mainstay of the American judicial system stems from the specialized nature of appellate courts, which do not take evidence, but focus on the law and application of law to facts.[9]

But "[t]he ease of research on the internet has given new life to an old debate about the propriety of and limits to independent factual research by appellate courts." *Rowe v. Gibson*, 798 F.3d 622, 638 (7th Cir. 2015) (Hamilton, J., dissenting) (citing law journal articles on the subject). A wealth of information (and misinformation) is now just a few keystrokes away. Every appellate judge has access to

---

[8] As noted above, SAB challenged the exemption determination on three separate legal grounds.

[9] *See* Sarah Elizabeth Spencer, *Is the Record Really Complete?*, 59 No. 2 of DRI For Def. 39 (2017) (citing Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 Minn. L. Rev. 2016, 2022 (2012)).

the internet and the information that comes with it.[10]

In various opinions, members of this Court have debated the propriety of extra-record factual internet research on appeal. *See, e.g.*, *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2240 n.18 (2016) (Alito, J., dissenting) ("[T]he Court's purported concern about reliance on 'extrarecord materials,' rings especially hollow in light of its willingness to affirm the decision below, which relied heavily on the Fifth Circuit's own extrarecord Internet research."); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 801 n.8 (2011) (criticizing dissent's research because "[t]he vast preponderance of this research is outside the record"); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 202 n.20 (2008) (criticizing dissent's "[s]upposition based on extensive Internet research" as "not an adequate substitute for admissible evidence subject to cross-examination in constitutional adjudication").

The Seventh Circuit has freely relied on extra-record factual internet research to decide cases. *See, e.g.*, *Rowe*, 798 F.3d at 628 (defending decision to rely on "medical websites" outside the record to conclude "that summary judgment was premature") (Posner, J.); *but see id.* at 644 ("The majority's interpretation of its internet research is not a

[10] *See* Layne S. Keele, *When the Mountain Goes to Mohammed: The Internet and Judicial Decision-Making*, 45 N.M. L. Rev. 125, 125, 149 (2014).

reliable substitute for proper evidence subjected to adversarial scrutiny.") (Hamilton, J., dissenting).[11]

The Seventh Circuit, in fact, has gone a step further and relied on extra-record factual internet research in cases, such as this one, involving petitions for review of removal orders, despite Congress's command that "the court of appeals shall decide the petition ***only*** on the administrative record on which the order of removal is based." 8 U.S.C. § 1252(b)(4)(A) (emphasis added). In particular, as it did in this case, the Seventh Circuit commonly relies on extra-record factual internet research to make decisions on a foreign groups' propensity for violence and individuals' awareness of that propensity for violence. *See, e.g.*, *Khan v. Holder*, 766 F.3d 689, 701 (7th Cir. 2014) ("At the time Khan was involved with MQM, Karachi had a population equivalent to that of New York City today, covered a much larger area, and was far less developed—so it's plausible that Khan's awareness was limited by the events occurring in his immediate vicinity.") (citing Wikipedia); *Klyuchenko v. Holder*, 545 F. App'x 542,

[11] The controversial nature of the Seventh Circuit's practice has been noted in many publications. *See, e.g.*, Tina M. Cooper, Jennifer Van Dame, Jonathon Snider, The Honorable Margret G. Robb, *Do You Want to Know A Secret? Do You Promise Not to Tell? Whoa Oh Oh: Judges, Opinions, and Judicial Notice*, 49 Ind. L. Rev. 847, 849-50, 885 (2016); Christina F. Gomez, *Relying on Internet Sources in the Appeals Courts*, 44-NOV Colo. Law. 81, 81 (November 2015); Colin E. Wrabley and M. Patrick Yingling, *Judicial Internet Research, Fact-Finding: Posner Reignites Debate*, The Legal Intelligencer (Nov. 18, 2015); Frederick Schauer, *The Decline of "The Record": A Comment on Posner*, 51 Duq. L. Rev. 51 (2013).

548 (7th Cir. 2013) ("Klyuchenko is a member of an organization with its own history of violence directed at political opponents, so the possibility that the police might be suspicious of Klyuchenko's accounts of unprovoked attacks would not be surprising.") (citing Wikipedia).

The Seventh Circuit's practice of relying on extra-record factual internet research to decide petitions for review of removal orders, which was on full display in this case, is improper, for multiple reasons: (1) it contradicts the plain language of § 1252(b)(4)(A); (2) it risks unreliable and inaccurate results; and (3) it robs petitioners of the benefits of the adversarial process.

First, the Seventh Circuit's practice of relying on extra-record factual internet research to decide petitions for review of removal orders is improper because it contradicts the plain language of § 1252(b)(4)(A), which provides that "the court of appeals shall decide the petition ***only*** on the administrative record on which the order of removal is based." (emphasis added).

Outside the Seventh Circuit, the courts of appeals commonly invoke § 1252(b)(4)(A) to deny consideration of extra-record evidence. *See Tang v. Lynch*, 840 F.3d 176, 182 n.4 (4th Cir. 2016) ("We decline to consider this evidence as it was not part of the administrative record on which the Board and IJ relied."); *Osuna-Gutierrez v. Johnson*, 838 F.3d 1030, 1036 n.8 (10th Cir. 2016) ("Statutory law demands that we decide this petition 'only on the administrative record on which the order of removal

is based.'"); *Cabantac v. Holder*, 736 F.3d 787, 793 (9th Cir. 2013) ("The amended abstract is not properly before this court because it was not part of the administrative record on which the order of removal is based."); *Escoto-Castillo v. Napolitano*, 658 F.3d 864, 866 (8th Cir. 2011) ("Congress has unambiguously provided that we may decide a petition for review 'only on the administrative record on which the order of removal is based.'"); *Kante v. Holder*, 634 F.3d 321, 326 (6th Cir. 2011) ("[T]his Court is unable to address that concern because we are limited to deciding Kante's petition 'only on the administrative record on which the order of removal is based.'").

By relying on extra-record internet research to decide petitions for review of removal orders, the Seventh Circuit defies Congress's unambiguous command.

Second, the Seventh Circuit's practice risks unreliable and inaccurate results. "The prohibition on facts found outside the record is designed to ensure the reliability of the evidence before the Court." *Kansas v. Hendricks*, 521 U.S. 346, 392 (1997) (Breyer, J., dissenting). A court conducting internet research cannot be confident that a website is up-to-date. Nor can a court be certain that a website was not altered by site administrators, hackers, or random third parties. This concern is heightened for the malleable websites, such as Wikipedia, on which the Seventh Circuit has relied in immigration cases. In fact, in holding that it was improper for an IJ to consider information from Wikipedia, the Eighth Circuit once explained:

> Wikipedia describes itself as "the free encyclopedia that anyone can edit," urges readers to "[f]ind something that can be improved, whether content, grammar or formatting, and make it better," and assures them that "[y]ou can't break Wikipedia," because "[a]nything can be fixed or improved later." Wikipedia's own "overview" explains that "many articles start out by giving one—perhaps not particularly evenhanded—view of the subject, and it is after a long process of discussion, debate, and argument that they gradually take on a consensus form." Other articles, the site acknowledges, "may become caught up in a heavily unbalanced viewpoint and can take some time—months perhaps—to regain a better-balanced consensus." As a consequence, Wikipedia observes, the website's "radical openness means that any given article may be, at any given moment, in a bad state: for example, it could be in the middle of a large edit or it could have been recently vandalized."

Badasa v. Mukasey, 540 F.3d 909, 910 (8th Cir. 2008) (Colloton, J.) (internal citations omitted); *Bing Shun Li v. Holder*, 400 F. App'x 854, 857 n.4 (5th Cir. 2010).[12]

---

[12] Wikipedia currently operates under substantially the same model. *See Wikipedia*, About, https://en.wikipedia.org/wiki/Wikipedia:About (last visited Oct. 20, 2017).

These concerns are not merely theoretical, as evidenced by this case. The Wikipedia page for "Jane's Information Group" indicates that "[t]his article needs additional citations for verification" and that the "article relies too much on references to primary sources."[13] "Primary sources" on Wikipedia are "are often accounts written by people who are directly involved."[14] Further evidencing the problems with relying on extra-record internet research, the Seventh Circuit also found and relied upon an IRIN internet article about the OLF's activities that not only was outside the record, but a version of which had been excluded from evidence by the IJ. App. 7, 44 n.11, 44-45. The Seventh Circuit's practice thus risks unreliable and inaccurate results.

Third, the Seventh Circuit's practice robs petitioners of the benefits of the adversarial process. It is one thing to evaluate information from a website *in the record* that has been discussed and debated amongst the parties; it is quite another to conduct *extra-record* factual internet research to decide a dispute outside the adversarial process.

The American legal system's commitment to adversarial justice derives from the belief that adversarial testing is the surest route to the truth.

---

[13] Wikipedia, "Jane's Information Group," https://en.wikipedia.org/wiki/Jane%27s_Information_Group (last visited Oct. 20, 2017).

[14] Wikipedia, No original research, https://en.wikipedia.org/wiki/Wikipedia:No_original_research#Primary.2C_secondary_and_tertiary_sources (last visited Oct. 20, 2017).

Extra-record fact-finding on appeal eliminates the rigorous testing that the adversarial system is designed to ensure.[15] Although appellate judges are learned in the law, a factual point that an appellate judge thinks is obviously right might be wrong, and without adversarial testing, the risks that the appellate judge might be wrong come without any backup protection.[16] The Seventh Circuit has stated that not "all the information available on the Internet is 'voodoo.'" *Qiu Yun Chen v. Holder*, 715 F.3d 207, 212 (7th Cir. 2013). This is true—not *all* information on the internet is voodoo, but a healthy portion of it is, and if parties do not have an opportunity to debate that information, the judicial system's truth-seeking function becomes substantially impaired.

In addition to truth-seeking, the adversarial process brings integrity to the adjudicative process itself. Even if the result is correct, when an appellate court relies on extra-record factual internet research, parties are deprived of the sense of having had a fair hearing. Parties often will be in the dark as to whether the extra-record research was biased, and the losing party is very likely to believe that the research was in fact one-sided.[17]

This is not necessarily to say that appellate courts are prohibited from citing extra-record

---

[15] Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 Duke L.J. 1, 2, 4 (2011).

[16] Keele, *supra* n.10 at 7 (citing Schauer, *supra* n.11 at 64).

[17] Keele, *supra* n.10 at 9-10 (citing Schauer, *supra* n.11 at 65).

internet research to explain and clarify background facts. *See, e.g.*, *Conrad v. AM Cmty. Credit Union*, 750 F.3d 634, 635 (7th Cir. 2014) (explaining for purposes of background in copyright case that plaintiff "calls herself the 'Banana Lady'" and "[y]ou can watch her dancing the 'Banana Shake' on YouTube") (citing YouTube website); *Brown-Baumbach v. B&B Auto., Inc.*, 437 F. App'x 129, 131 n.2 (3d Cir. 2011) (explaining for purposes of background in a hostile work environment case that "[t]he definition in Urban Dictionary for "to get busy" is "to have sex") (citing Urban Dictionary website). Rather, it is only to say that appellate courts should not conduct and rely on extra-record factual internet research to decide issues that are at the heart of a case.

In this case, the Seventh Circuit resolved issues at the heart of the case by passing over the administrative record in favor of an internet browser. The Seventh Circuit's error influenced it toward the wrong outcome, but the harms following from the Seventh Circuit's approach exist apart from results—that approach also undermines the truth-seeking role of courts and the perception of neutrality in the judicial process.

For these reasons, the Court should grant the writ and hold that the courts of appeals may not rely on extra-record factual internet research to decide petitions for review of removal orders.

II. Courts of appeals have jurisdiction to decide constitutional claims and questions of law on challenges to exemption determinations under 8 U.S.C. §§ 1182(d)(3)(B)(i) and 1252(a)(2)(D).

The INA's provision allowing for the Secretaries of State and Homeland Security to issue exemptions for individuals subject to the terrorism bar states that such an exemption determination shall be made in the Secretary's "sole unreviewable discretion," but also that judicial review "shall be limited to the extent provided in section 1252(a)(2)(D)." 8 U.S.C. § 1182(d)(3)(B)(i). Section 1252(a)(2)(D) states that nothing "which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals[.]"

SAB's petition for review to the Seventh Circuit invoked § 1252(a)(2)(D) and raised constitutional and legal challenges to the "removal exception" in the OLF Group Exemption issued under § 1182(d)(3)(B)(i). The government briefed the merits of these challenges. Nonetheless, the Seventh Circuit focused on the "sole unreviewable discretion" language, ignored § 1252(a)(2)(D), and dismissed SAB's challenges "for want of jurisdiction." App. 9. The Seventh Circuit's ruling leaves SAB and others like her without the ability to challenge an adverse exemption determination, even on constitutional and legal grounds, in direct contradiction of the plain language of §§ 1182(d)(3)(B)(i) and 1252(a)(2)(D), as well as their purpose and history.

This case marks an extreme and misguided application of the Seventh Circuit's traditionally limited view of its own jurisdiction to review immigration decisions. The Seventh Circuit described its narrow view in *Adame v. Holder*, 762 F.3d 667 (7th Cir. 2014), when it addressed its jurisdiction to decide whether an IJ incorrectly applied the law to the facts by requiring additional evidence that was not reasonably available. *Id.* at 671. The court acknowledged that many of the courts of appeals would have found jurisdiction over the challenge because such courts "have taken the position that the jurisdiction to review questions of law referred to in 8 U.S.C. § 1252(a)(2)(D) extends to questions involving the application of statutes or regulations to undisputed facts, sometimes referred to as mixed questions of fact and law." *Adame*, 762 F.3d at 671 (citing *Ramadan v. Gonzales*, 479 F.3d 646, 650 (9th Cir. 2007); *Morales-Flores v. Holder*, 328 F. App'x 987, 989 (6th Cir. 2009) (citing *Santana-Albarran v. Ashcroft*, 393 F.3d 699, 703 (6th Cir. 2005)); *Pinos-Gonzalez v. Mukasey*, 519 F.3d 436, 439 (8th Cir. 2008); *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 215 (5th Cir. 2003)) (internal quotation marks omitted).

The court additionally recognized that other courts of appeals have allowed consideration of mixed questions of law and fact under § 1252(a)(2)(D), "permitting review of the threshold question whether the correct legal standard was used, but finding no jurisdiction when the so-called legal question is simply a means of challenging factual conclusions." *Adame*, 762 F.3d at 671 (citing *Chen v. United States Department of Justice*, 471

F.3d 315, 326-27 (2d Cir. 2006); *Vargas v. Attorney General*, 543 F. App'x 162, 163-64 (3d Cir. 2013) (per curiam); *Amedome v. Holder*, 524 F. App'x 936, 937-38 (4th Cir. 2013); *Ayeni v. Holder*, 617 F.3d 67, 72-73 (1st Cir. 2010)).

The Seventh Circuit in *Adame*, however, recognized that "[t]his court's position has been a strict one" and that "[w]e have adhered for years to the rule that § 1252(a)(2)(B) excludes from our jurisdiction challenges to an IJ's application of the law to the facts of a case when the grounds for relief sought are discretionary, and that in such a case the subpart (B) exclusion is unaffected by § 1252(a)(2)(D)." 762 F.3d at 672. The court stated that "[t]he conflict in the circuits on this point is a serious one, but it has stood for some time." *Id.*

The conflict has been recognized by other courts and commentators as well. *See Lin v. Holder*, 610 F.3d 1093, 1098 (9th Cir. 2010) (O'Scannlain, specially concurring) (arguing that the Ninth Circuit is on the wrong end of the circuit split); Christopher A. Goelz, Meredith J. Watts and Peder K. Batalden, *Review in Agency Proceedings*, Cal. Prac. Guide Fed. 9th Cir. Civ. App. Prac. Ch. 14-B (March 2017 Update) ("The circuits are divided on the issue whether reviewable legal questions include mixed questions of law and fact. It is possible the Supreme Court will take up this issue.").

This case marks an extreme example of the Seventh Circuit's narrow reading of its jurisdiction to address legal challenges in immigration cases. The Seventh Circuit's jurisdictional ruling is wrong,

and this Court should grant the writ to address whether courts of appeals have jurisdiction to decide constitutional claims and questions of law on exemption challenges under 8 U.S.C. §§ 1182(d)(3)(B)(i) & 1252(a)(2)(D).

First, the plain language of §§ 1182(d)(3)(B)(i) and 1252(a)(2)(D) confirms the Seventh Circuit's error.

The court of appeals correctly observed that § 1182(d)(3)(B)(i) states that the decision to exempt an individual from the terrorism bar is made in the "Secretary's sole unreviewable discretion," but the court of appeals did not address statutory language allowing review "limited to the extent provided in ***section 1252(a)(2)(D)***." (emphasis added). Section 1252(a)(2)(D) provides that nothing "which limits or eliminates judicial review, shall be construed as precluding review of ***constitutional claims or questions of law*** raised upon a petition for review filed with an appropriate court of appeals[.]" (emphasis added).

By holding that it lacks jurisdiction to review constitutional claims and questions of law raised in SAB's petition for review, the Seventh Circuit defies Congress's unambiguous command.

Second, the purpose §§ 1182(d)(3)(B)(i) and 1252(a)(2)(D) confirm the Seventh Circuit's error.

The exemption authority under § 1182(d)(3)(B)(i), and the judicial review guarantee under § 1252(a)(2)(D), serve as the counterbalance to the terrorism bar, which is unquestionably "broad."

Hussain v. Mukasey, 518 F.3d 534, 537 (7th Cir. 2008); *Khan v. Holder*, 584 F.3d 773, 782 (9th Cir. 2009) (recognizing the terrorism bar's "broad statutory definition"). The terrorism bar, in fact, covers "a vast waterfront of human activity" that may be loosely connected to a group of individuals, who "through many different kinds of actions, might fall within the broad statutorily defined term 'terrorist.'" *Kerry v. Din*, 135 S. Ct. 2128, 2146 (2015) (Breyer, J., dissenting). The Seventh Circuit's narrow reading eliminates that counterbalance by permitting exemption determinations to go unreviewed, even for legal and constitutional error. Under the Seventh Circuit's precedential ruling, the government may limit an exemption to individuals of a particular race, color, religion, creed, sex, sexual orientation, ethnicity, ancestry, age, or disability, even in ways forbidden by the Constitution or Congress, and those executive actions could not be challenged.

Third, Section 1252(a)(2)(D)'s history is indicative of the provision's importance and the Seventh Circuit's error.

In *St. Cyr*, this Court recognized that "substantial constitutional questions" would result from the elimination of review in any court by any means over legal claims. 533 U.S. at 300. Thus, in 2005, when Congress eliminated district court habeas review over removal orders, *see, e.g.*, § 1252(a)(5), it simultaneously enacted § 1252(a)(2)(D) to restore the courts of appeals' petition for review jurisdiction over "constitutional claims or questions of law." With § 1252(a)(2)(D),

Congress intended to avoid the problems related to the absence of a forum to raise legal claims. *See* H.R. Rep. No. 109-72, 175 (2005) (Joint House-Senate Conf. Rep.) (referencing *St. Cyr* and acknowledging Congress' understanding that it cannot eliminate all review over legal claims). By holding that it lacks jurisdiction to review SAB's constitutional claims and questions of law raised in her petition for review, the Seventh Circuit defies Congress's rationale for enacting § 1252(a)(2)(D).

The effect of the Seventh Circuit's error in this particular case is to deny a judicial safety valve for an individual who is entitled to an exemption but for a constitutionally-suspect provision in the exemption that excepts individuals in removal proceedings, a condition attributed to SAB that has nothing to do with the extent of her association with the purported Tier III terrorist organization in question.

This Court previously has intervened to correct the Seventh Circuit's narrow reading of its own jurisdiction in immigration cases. *See Kucana v. Holder*, 558 U.S. 233, 253 (2010) (reversing and remanding after Seventh Circuit ruled that it lacked jurisdiction to review a BIA order denying a motion to reopen). The Court's intervention is warranted once again.

Accordingly, the Court should grant the writ to clarify that courts of appeals have jurisdiction to decide constitutional claims and questions of law on exemption challenges under §§ 1182(d)(3)(B)(i) and 1252(a)(2)(D). In fact, due to the readily apparent nature of the Seventh Circuit's jurisdictional error,

the Court would be justified in granting the writ, vacating the decision, and remanding to the Seventh Circuit, even without merits briefing and argument.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Charles Roth
Lisa Koop
NATIONAL IMMIGRANT JUSTICE CENTER
208 South LaSalle Street
Suite 1300
Chicago, IL 60604

Jennifer Yule DePriest
Vanessa Martí Heftman
M. Patrick Yingling
Counsel of Record
Jillian L. Burstein
Karlin E. Sangdahl
REED SMITH LLP
10 S. Wacker Dr., 40th Fl.
Chicago, IL 60606
(312) 207-1000
mpyingling@reedsmith.com

In the
United States Court of Appeals
for the Seventh Circuit

NOS. 15-1834, 15-3874, 16-1303

S.A.B.,

Petitioner,

v.

DANA J. BOENTE, Acting Attorney General of the United States,

Respondent.

Petitions for Review of Orders of the Board of Immigration Appeals, No. A000-000-000, and of U.S. Citizenship and Immigration Services, a component of the Department of Homeland Security.

ARGUED JANUARY 4, 2017 – DECIDED FEBRUARY 2, 2017

Before POSNER, EASTERBROOK, and SYKES, *Circuit Judges.*

POSNER, *Circuit Judge.* We introduce this immigration case by noting that Jane's is a long-established British publisher of studies, often book-length, of (so far as relates to this case) warfare, weaponry, national security, electronic warfare, insurgency, terrorism, and

related topics. See "Jane's Information Group," *Wikipedia,* https://en.wikipedia.org/wiki/Jane%27s_Information_Group (visited Feb. 1, 2017, as were the other websites cited in this opinion). In 2006 and 2011 Jane's issued two confidential reports on the Oromo Liberation Front (OLF), which the reports describe as having become "the most robust armed group in Ethiopia in the late 1990s." See JANE'S WORLD INSURGENCY AND TERRORISM, *Oromo Liberation Front* (*OLF*) 1 (March 23, 2011) (we'll call it "*Jane's Report* (2011)"); JANE'S WORLD INSURGENCY AND TERRORISM, *Oromo Liberation Front* (*OLF*) 1 (May 31, 2006) ("*Jane's Report* (2006)").

Though the Oromo are the largest ethnic group in Ethiopia, they consider themselves discriminated against by the Ethiopian government, which is the reason or a reason that the OLF would like to see the government overthrown. *Jane's Report* (2006) states at pages 2 and 4 that the OLF, founded in the early 1970s, has long conducted a "low level guerrilla campaign against the Ethiopian security forces," in part from bases that it has established in countries neighboring Ethiopia, such as Kenya and Somalia. The 2011 report states at pages 1-3 that between 1973 and 2011 the OLF wreaked considerable havoc that included a number of killings of Ethiopian security personnel, though it had not come close to overthrowing the government. The immigration judge in this case classified the OLF as a "Tier III" terrorist organization, defined in 8 U.S.C. § 1182(a)(3)(B)(vi)(III) as "a group of two or more individuals, whether organized or not, which engages in, or

has a subgroup which engages in," terrorist activity as defined in subsection iv of the above section.

The petitioner is a former member of the OLF now living in the United States. Her name is not SAB, though that is the name that appears in the briefs; those are her initials; she or her lawyers are concerned that should her name appear in the briefs in this court or in our opinion, she or a member of her family, such as her sister, who had been imprisoned by the Ethiopian government possibly in an attempt to discover SAB's whereabouts after she'd fled the country, might become a target of the Ethiopian government. We'll refer to her by her initials rather than her name, but it would be unrealistic to think they actually conceal her identity; for the opinions of the Immigration Court and the Board of Immigration Appeals use her full name rather than her initials to identify her, and those opinions are public documents.

An Ethiopian citizen now 61 years old, SAB came to the United States in 2004 on a visitor's visa that expired in December of that year. But rather than leave the United States she applied for asylum and alternatively for withholding of removal. When an asylum officer deemed her claims not credible, the Department of Homeland Security charged her in the Immigration Court with being "removable" (deportable) for having remained in the United States after the expiration of her visa, and therefore illegally. See 8 U.S.C. § 1227(a)(1)(B). She conceded removability, and the immigration judge designated Ethiopia as the country to

which she would be removed. But she renewed her application for asylum and her alternative application for withholding of removal, basing both grounds for relief on fear that if removed to Ethiopia she would be tortured by the Ethiopian government because of her past membership (which she acknowledges) in the OLF.

An Oromo, she had joined the OLF in 2001, three years before she came to the United States. She had attended the general meetings of the OLF in 2002 and 2003 and made small financial contributions to the organization, though as we'll note shortly she had helped the organization in other ways as well. In 2002 she'd seen reports on television that the OLF had killed people, but she claims not to have believed the reports because the television station was owned by the Ethiopian government. Subsequently her husband disappeared (and has never reappeared and may well be dead) and she was arrested and imprisoned for four months and, though never tried or sentenced, was tortured in prison.

Her principal witness at her removal hearing was Dr. Charles Schaefer, a history professor at Valparaiso University in Indiana. He specializes in Ethiopian politics, having been born in Ethiopia and lived there for a number of years. He testified that while some bombings and other violent acts have been attributed to the OLF he thinks it unclear whether it rather than some other political group was actually responsible for them. Though aware of Jane's reports he thinks them "biased, market-driven and shoddily verified," but he provided no evidence to support these suspicions. He

contests, again without evidence, statements in our State Department's country reports that the OLF "regularly use[s] landmines." See U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, *Ethiopia Country Reports on Human Rights Practices 2001* (March 4, 2002), www.state.gov/j/drl/rls/hrrpt/2001/af/8372.htm; U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, *Ethiopia Country Reports on Human Rights Practices 2002* (March 31, 2003), https://www.state.gov/j/drl/rls/hrrpt/2002/18203.htm.

He testified that he would expect SAB to "assume that the OLF is a non-violent organization, first and foremost [because] . . . the OLF was a vehicle by which she could validate her Oromo identity." We don't understand the logic of that sentence; if belonging to the OLF validates an Oromo's identity, it does so whether the OLF is violent or peaceful. And finally he testified that he thought SAB would be imprisoned by the Ethiopian government if she returned to Ethiopia.

The immigration judge ruled that while SAB is entitled to deferral of removal under the Convention Against Torture because (according to Schaefer's and other evidence) she indeed risks torture if returned to Ethiopia, owing to the Ethiopian government's continued fierce hostility to the OLF, she is not entitled to either asylum or withholding of removal. That's because she admits having been a member of the OLF and having "provided material support to the OLF," a terrorist organization, when she solicited and donated funds to it, paid monthly dues, and recruited other

Oromo women to join her OLF chapter. She further admits having heard television and radio reports in 2002 that the OLF was responsible for violent attacks. She would have understood those reports, as she is a relatively sophisticated person: a high school graduate who (more important) owned a business in Ethiopia and engaged in extensive international travel in support of the business.

After the Board of Immigration Appeals affirmed the immigration judge and SAB appealed to us, she asked a component of the Department of Homeland Security usually referred to as USCIS (short for U.S. Citizenship and Immigration Services) to lift the terrorism bar that prevented her from obtaining asylum or withholding of removal. USCIS refused.

As noted below, knowing support of a terrorist organization is a bar to asylum or withholding of removal. On the basis of the U.S. State Department country reports, Jane's reports, and other reputable information sources such as Human Rights Watch (conceded by Dr. Schaefer to be a credible source) and START (Study of Terrorism and Responses to Terrorism), and noting that Dr. Schaefer had no evidence that the OLF had *not* engaged in violence during the period in which SAB was a member, the immigration judge had enough evidence to conclude that the OLF had committed a number of violent acts, killing a significant number of people, over a period of years that included the years in which SAB was a member.

But was SAB a terrorist by virtue either of her membership in the OLF or of her having provided "material support" to it? See 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd). Obviously she did provide material support: she donated money to the OLF, recruited women to join it, and helped in fundraising. Her support of the group was not major, but minor material support is still material support within the meaning of the statute. See *Hussain v. Mukasey*, 518 F.3d 534, 538 (7th Cir. 2008).

Although a person who belongs to or provides material support to a terrorist organization is presumed to know it is indeed a terrorist organization, there is an escape hatch if the alien can "demonstrate by clear and convincing evidence that [he or she] did not know," and "should not reasonably have known [in other words, shouldn't have been expected to know], that the organization was a terrorist organization." 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(dd). SAB failed to meet that standard (especially the second half), because among other things the OLF claimed responsibility for a bombing that killed 14 people in 2002, when SAB was living in Addis Ababa (the capital of Ethiopia) with ready access to radio and television. Indeed there were numerous reports of OLF violence between 2001 and 2004 (see, e.g., Nita Bhalla, "Ethiopia Links Blast to Oromo Rebels," BBC, October 2, 2002, http://news.bbc.co.uk/2/hi/africa/2293185.stm; "OLF Claims Responsibility for Bomb Blast," IRIN, June 26, 2002, http://www.irinnews.org/news/2002/06/26/olf-claims-responsibility-bomb-blast), including some from the OLF's official channel – the "Voice of Oromo Liberation."

SAB, solidly middle class, a business woman, could not have missed all these reports or reasonably thought all of them fraudulent. Clearly she didn't provide "clear and convincing evidence" that she had missed or disbelieved all of them.

So the immigration judge found (and the Board of Immigration Appeals affirmed his finding) that SAB knowingly supported a terrorist organization to which she belonged, and this finding, the soundness of which we have no basis for doubting, bars her from obtaining asylum in the United States, see 8 U.S.C. § 1227(a)(4)(B) – that is, makes her deportable despite the immigration judge's also impeccable finding that she is likely to be imprisoned and quite possibly tortured if returned to Ethiopia, given that before leaving for the United States she had been imprisoned and tortured in prison because of her affiliation with the OLF, which continues to be the Ethiopian government's *bete noir.* We must therefore deny the first petition for review that SAB filed in this case, which seeks asylum and withholding of removal. The reader should bear in mind however that the removal order, which is predicated on her being a member of a terrorist organization, can't be executed as long she remains under threat of torture if returned to Ethiopia. See 8 C.F.R. § 1208.17.

SAB has filed two other petitions for review. One asks us to overrule the decision by USCIS not to lift the terrorism bar. The other challenges the refusal of the Board of Immigration Appeals to set aside the removal order. USCIS is authorized to lift the bar for an

individual or a Tier III terrorist group, subject to exceptions inapplicable to SAB. See 8 U.S.C. § 1182(d)(3)(B)(i). And if it had lifted the bar, thereby cutting the link between SAB and OLF, she would be eligible for asylum and withholding of removal. But UCSIS declined to lift the bar, and the statutory provision that we just cited grants the agency "sole unreviewable discretion" whether to do so. With the bar thus fixed in place, there is no basis for our vacating the removal order. The petition is therefore dismissed.

SAB's third petition for review challenges the BIA's decision to deny her motion to reopen. The Board denied the motion as untimely and found no reason to reopen it *sua sponte.* We have jurisdiction to review a denial of a motion to reopen; such review is consolidated with our review of the final order of removal. See 8 U.S.C. § 1252(a)(1), (b)(6). But we find no error in the Board's refusal to reconsider its order of removal in light of USCIS's decision, because remember that USCIS's "sole unreviewable discretion" precludes the Board's reopening the proceeding. We therefore deny the third petition along with the first; the second we dismiss for want of jurisdiction.

And so, to conclude, SAB's petition for review of her final order of removal is denied, as is her petition for review that challenges the BIA's decision to deny her motion to reopen. Her remaining petition is dismissed for want of jurisdiction to review USCIS's discretionary rulings.

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

File: A098-830-649 Date: July 1, 2013

In the Matter of:)
) IN REMOVAL
) PROCEEDINGS
Respondent.)

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act ("INA" or "the Act") – alien who, after admission as a non-immigrant, remained in the United States for a time longer than permitted.

APPLICATIONS: Section 208 of the INA, 8 U.S.C. § 1158 – Asylum.

Section 241(b)(3) of the INA, 8 U.S.C. § 1231(b)(3) – Withholding of Removal.

8 C.F.R. § 1208.16(c) – Protection under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment ("Convention Against Torture" or "CAT").

ON BEHALF OF
THE RESPONDENT:
Raven Moore, Esq,.
Jennifer Yule DePriest, Esq.
Reed Smith LLP
10 South Wacker Drive,
Suite 4000
Chicago, Illinois 60606

ON BEHALF OF
THE GOVERNMENT:
Alexandra Kostich,
Assistant Chief Counsel
Department of
Homeland Security
525 West Van Buren Street,
Suite 701
Chicago, IL 60607

DECISION OF THE IMMIGRATION JUDGE

The respondent requests relief from removal in the form of asylum, withholding of removal and protection under the Convention Against Torture. For the reasons below, the respondent's application for asylum and withholding of removal will be denied, and her application for deferral of removal under the Convention Against Torture will be granted.

I. BACKGROUND

The respondent is a [redacted] married native and citizen of Ethiopia. She was last admitted to the United States on or about July 3, 2004 at Newark, New Jersey as a nonimmigrant visitor for pleasure with authorization to remain in the United States for a temporary period not to exceed December 30, 2004. Exh. 1. On June 29, 2005, the respondent affirmatively filed Form I-589, Application for Asylum and Withholding of Removal, with U.S. Citizenship and Immigration Services ("USCIS"). *See* Exh. 1. USCIS did not grant the respondent's application and issued her a Notice to

Appear ("NTA") on August 3, 2005, charging her with removability under INA § 237(a)(1)(B) for having remained in the United States for a time longer than permitted. Exh. 1. Removal proceedings against the respondent commenced with the filing of the NTA with the Court at Chicago, Illinois on August 8, 2005. *Id.*

The respondent first appeared before the Court for a master calendar hearing on August 25, 2005. On that date, through counsel, she admitted the allegations contained in the NTA and conceded removability. Based on these pleadings, the Court found that alienage and removability had been established by clear and convincing evidence as required by INA § 240(c)(3). The respondent declined to designate a country of removal, so the Court designated Ethiopia, her country of birth and citizenship, pursuant to INA § 241(b)(2)(D).

The respondent renewed her asylum application before this Court, and individual hearings on her claim were held on August 16, 2010; March 14, 2012; April 30, 2012; August 13, 2012; and September 4, 2012. The Court has jurisdiction to consider the respondent's applications under 8 C.F.R. § 1240.1(a)(1)(ii)-(iii).

II. CLAIM AND EVIDENCE PRESENTED

The respondent claims that she is eligible for asylum under INA § 208 and withholding of removal under INA § 241(b)(3) in that she has suffered past persecution and has a well-founded fear of persecution in Ethiopia on account of her membership in and political activities with the Oromo Liberation Front

("OLF"). She also claims that she is eligible for protection under the CAT in that she is more likely than not to be tortured with the consent or acquiescence of the Ethiopian government if she returns to Ethiopia. The Government claims that the respondent is not statutorily eligible for asylum or withholding of removal because she has engaged in terrorist activity under INA § 212(a)(3)(B)(i).

A. Testimony

The respondent and an expert witness on country conditions in Ethiopia testified at her individual merits hearings. Their testimony is summarized as follows:

1. The Respondent's Testimony

The respondent was born on [redacted] in [redacted] Ethiopia. Her father is a member of the Amhara ethnic group, and he currently lives in [redacted] Ethiopia. Her mother, now deceased, was a member of the Oromo ethnic group. The respondent has a sister named [redacted] who also lives in [redacted] As a child, the respondent identified herself as Oromo, and her mother exposed her and her sister to Oromo culture and traditions.

The respondent graduated from high school in [redacted] in [redacted] Thereafter, she moved to [redacted] with her parents. In [redacted] she entered into an arranged marriage with [redacted] a member of the Amhara ethnic group. Their marriage

quickly became abusive; [redacted] drank excessively and verbally and physically abused the respondent because of her mixed ethnic heritage. He threatened to kill her, and she suffered miscarriages twice due to his beatings. The respondent left [redacted] after eight years of marriage and moved back in with her parents in [redacted]

In October 1988, the respondent opened a small clothing shop in [redacted] She earned approximately 30,000 Ethiopian birr annually running the shop. Soon thereafter, she met and entered into a relationship with an Oromo man named [redacted] ("[redacted]"); they married on [redacted] The respondent described [redacted] as a good and loving husband who respected her. [redacted] worked as a manager in the mechanics division of [redacted] which is run by the government of Ethiopia. He was able to obtain free airline tickets for the respondent, which enabled her to travel abroad to the United States, India, England, Germany and Italy to purchase merchandise for her store. The respondent was able to secure exit visas from the Ethiopian government for these trips.

The respondent first learned about the OLF through [redacted] brother, [redacted] [redacted] who was a member of the organization. [redacted] and the respondent talked about the ways in which the Oromo people have been deprived of their rights as citizens of Ethiopia, and [redacted] described the OLF as an organization engaged in a peaceful struggle to achieve equality for all tribes and nationalities in Ethiopia. The respondent testified that [redacted] did not talk to her or

[redacted] about violence or property destruction carried out by the OLF; the respondent understood that the OLF's "struggle was continued with peace and understanding."

[redacted] urged the respondent and her husband to join the OLF, but although they supported the OLF's mission, they initially chose not to formally join the organization. Then on [redacted] the Ethiopian police arrested [redacted] in the town of [redacted] and imprisoned him. The respondent learned from one of [redacted] friends that he died two days later from injuries sustained during his detention and interrogation. After [redacted] death, the police went to his house and raped his seventeen-year-old daughter in front of her mother and brother. Then the police arrested [redacted] family and imprisoned them. The respondent stated that neither she nor anyone she knows has heard from them since, and she believes they are dead.

[redacted] death caused the respondent and her husband to think more about the inequalities Oromo people faced in Ethiopia, and they were motivated to formally join the OLF on October 2, 2001 to support its peaceful struggle for equality for the Oromo people. However, neither the respondent nor her husband openly or publicly identified themselves as OLF members because they knew that the Ethiopian government harmed and imprisoned opposition supporters.

As an OLF member, the respondent attended the bimonthly meetings of a local OLF women's group,

which were held in members' houses.[1] She hosted two such meetings in her home. There were approximately 14 women in the group when the respondent joined, and it grew to about 20 members thereafter. The leader of the women's group was named [redacted] The main purpose of the meetings was to discuss the ways in which Oromo women were disenfranchised and oppressed in Ethiopia. The women's group tried to inform other women of their rights and supported disadvantaged Oromo women financially and emotionally, especially those who were victims of domestic abuse or those who faced employment discrimination due to their ethnicity. Shortly after the respondent joined the OLF, the Ethiopian police arrested two of the organizers of her local group. To date, no one knows where these women are or whether they are alive.

The women in the group were asked to make monetary donations to the OLF each month, in the amount of approximately 10 to 15 Ethiopian birr.[2] The respondent donated approximately 10 birr each month for the two years and four months that she was a member of

---

[1] The respondent indicated that she did not know how this local group was connected to the national structure of the OLF; she stated that she was "simply working as a member in the lower echelon."

[2] The respondent's counsel indicated that ten to fifteen Ethiopian birr is equivalent to about one U.S. dollar. The Court takes administrative notice of the fact that an online currency converter shows that as of early June 2013, eighteen Ethiopian birr is equivalent to one U.S. dollar.

See http://www.xe.currencyconverter/convert/?Amount=1&From=ETB&To=USD; 8 C.F.R. § 1003.1(d)(3)(iv).

the OLF. She was also responsible for collecting contributions from the other members of the women's group, which she then passed on to the group's chairwoman. The largest amount of money the respondent ever collected from the women in one month, including her own contribution, was 100 birr. The respondent and other group members were also asked to fundraise for the OLF, which they did by baking or preparing food individually in their homes every two to three months and then giving it to the person responsible for selling it on the group's behalf. The respondent contributed to this effort by preparing homemade Ethiopian spices. She stated that the food she prepared was probably worth approximately 10 to 30 birr. The respondent also engaged in recruiting efforts for the OLF. She nominated two women for membership in the organization in 2003, and they joined the local women's group in their own neighborhood.[3] The respondent's husband, ██████ was similarly involved in the local OLF men's group. He attended bi-monthly meetings of the group, held in members' homes, and contributed 10 to 15 Ethiopian birr monthly. He hosted one of the bi-monthly meetings in the home he shared with the respondent.

The respondent and ██████ also attended the OLF's annual general meeting twice – in 2002 and 2003. The general meetings were held secretly so as not to draw the attention of government officials. At the meetings, OLF members discussed the organization's principles, inequality faced by the Oromo people,

---

[3] The respondent testified that the women joined a different local group than the one in which she participated.

how to increase OLF membership and how to disseminate OLF ideas to the public. Approximately 150 OLF members attended these meetings, most of whom were elected by local OLF groups to attend; however, the respondent was not an elected attendee. Both the respondent and [redacted] paid 15 birr in dues at each annual meeting they attended. The respondent testified that the OLF chairman told her such dues were used for administrative costs and social outreach, such as donations for members who had lost their jobs or were having problems at home. The respondent stated that including her bi-monthly contributions to her local OLF women's group, the proceeds from the sale of her baked goods, and the dues she paid at the OLF annual general meetings, she contributed a total amount of approximately 300 to 400 birr to the OLF during the two years and four months that she was a member. The respondent testified that she never engaged in or witnessed violence or property destruction as an OLF member, nor was she ever encouraged by anyone in the OLF to use violence or destroy property. Similarly, to the respondent's knowledge, [redacted] never engaged in or witnessed violence or property destruction as an OLF member, and he was not encouraged by other members of the OLF to engage in such acts.

The respondent admitted that after she and her husband joined the OLF in 2001, there were two instances in 2002 in which she heard accusations that the OLF had engaged in violent acts. In both instances, the respondent was watching the news on an Ethiopian government-owned television station, and she

heard that the OLF was responsible for destroying a railway station that resulted in the deaths of several people in Dire Dawa and for an explosion that killed and injured individuals at the Tigray Hotel in Addis Ababa. The respondent stated that she did not hear about these incidents from any source other than the government-ran radio and television station, and although she believed the incidents did occur, she did not believe that the OLF was responsible for perpetrating them. Instead, she, her husband and other local OLF members believed that the allegations against the OLF were fabricated by the Ethiopian government to damage the OLF's reputation. After these news reports aired, the local OLF leadership called a joint meeting between the men's and women's groups to discuss what had happened. The leaders refuted the claim that the OLF was responsible for these attacks and stated that the allegations were government lies disseminated to "spoil the name of the OLF." The respondent indicated that after she heard what the OLF leadership had to say about these incidents, she did not make any further inquiry into whether the OLF was responsible for the attacks. On cross examination, the respondent was asked about a number of other incidents in which the Ethiopian government accused the OLF of perpetrating acts of violence; she responded that she had not heard about any incidents other than the two in 2002. She stated that if she had believed these reports or had otherwise known that the OLF engaged in violence, she would not have joined the group initially or would have withdrawn her membership.

On ██████ 2004, the respondent's husband did not come home after work. She called his workplace looking for him, and one of his co-workers told her that the police had shown up at the workplace, arrested him and brought him to the police station. The respondent immediately went to the station to ask about her husband, but the police refused to give her any information and ordered her to leave. The respondent has not heard from her husband since █████ 2004, and she believes he was killed by Ethiopian officials.

Two days later, on the evening of ██████ 2004, three police officers showed up at the respondent's home while she was inside. They entered the house and searched it room by room, pulling clothes from the closet, breaking things and throwing things on the floor. The respondent asked them to stop breaking her belongings, but they did not listen. She also asked where her husband was, and they told her he was a member of the opposition who should be punished. They also told her that she was a member of the opposition with the same goals as her husband, and they slapped her, handcuffed her and took her to the ████████ police station.

At the station, the police removed the respondent's handcuffs and placed her into a small, dark cell crowded with about ten other female prisoners. The room was dirty, smelly and had no ventilation. The women sat shoulder to shoulder and back to back because there was not enough room to move around or lie down. The respondent and the other prisoners were fed a piece of bread at night and given some dirty water to

drink, which caused the respondent abdominal pain and diarrhea. They were only allowed to use the restroom at certain periods of the day, and they were never allowed to bathe. The respondent never spoke with the other prisoners because she was depressed about what had happened to her.

Every two to three days, prison guards took the respondent into a separate room for interrogation. Two policemen were waiting in the room for her, and they questioned her about her affiliation with the OLF and what her responsibilities were as a member of the organization. The respondent was also asked to name other members of the OLF. When she refused to do so, the officers beat her with their hands or wooden or rubber sticks, kicked her with their boots, burned cigarettes on her skin and forced her to kneel on the ground so that they could repeatedly submerse her head in a pail of dirty water. They also threatened her and told her she would be subjected to these conditions until she revealed OLF member names. The respondent testified that she never revealed the names of other OLF members because she believed she was going to die in prison regardless of what she told the guards, so there was no reason to identify other OLF members and subject them to the same treatment she was enduring. In addition to the interrogation sessions, the respondent and other prisoners were forced to do other activities such as washing the bathroom, walking on gravel and kneeling on gravel for up to one hour. If the prisoners did not walk fast enough on the gravel, prison guards would beat them from behind.

The respondent was detained for four months and 13 days. She was never charged with a crime or brought to court. On the night of [redacted] 2004, guards took her from her cell and placed her in a police car. The respondent believed they were going to kill her, and she started crying and shouting at them to save her life. The guards drove out of the police compound and into a dark alley. They stopped the car there and released the respondent from her handcuffs. Then they left her there, got back into the car and drove off. A few minutes later, another car pulled up and the respondent realized it was her cousin, [redacted] He told her to get into the car, and he drove her to [redacted] a town about 40 kilometers east of [redacted]

During the drive, [redacted] told the respondent how he was able to secure her release. At the time, [redacted] worked as and the [redacted] and the respondent's father contacted him in [redacted] 2004 for assistance in getting the respondent out of detention. [redacted] contacted the prison warden and agreed that he and the respondent's father would pay 10,000 Ethiopian birr as an official bail and an additional 10,000 birr to the warden as a personal bribe. In exchange, the warden agreed to make it look as though he was releasing the respondent on bail. The warden also required [redacted] and the respondent's father to appoint a "guarantor" who was responsible for ensuring that the respondent would be available should the police want to question her again in the future.

The respondent and [redacted] stayed at a hotel in [redacted] for one week. [redacted] was the only person

she had contact with during this time; he brought her food and other personal necessities while she remained in the hotel. also made arrangements for the respondent to leave Ethiopia; he obtained an exit visa for her by paying a bribe, bought her an airline ticket and arranged transport for her to the airport. The respondent decided to travel to the United States to seek asylum in Chicago because she had been there before, had a valid entry visa to the U.S. from a prior visit and had a friend from Ethiopia who lived there. The respondent arrived in the U.S. on July 3, 2004.

The respondent testified that the Ethiopian authorities have inquired into her whereabouts since she left the country. Her sister, was living in the respondent's home after she left for the United States, and she told the respondent that the police delivered a letter to the house requesting that the respondent return to the station for more questioning. When the respondent did not respond to the letter, the police came back to her house and arrested was taken to the police station, interrogated about the respondent's whereabouts, and beaten. The police released after one month imprisonment. has told the respondent not to return to Ethiopia because her life would be in danger there. She also informed the respondent that government officials took control of her clothing store when she was imprisoned, and her relatives no longer run or own the business. The respondent also stated that the Ethiopian authorities arrested the prison warden who had accepted bribes to secure the respondent's release

from prison. Thereafter, her cousin [redacted] fled [redacted] because he was afraid he would also be arrested.

On cross examination, the respondent was questioned about an entry in her passport which appears to indicate that it was renewed at the Ethiopian embassy in Washington D.C. in November 2004, approximately four months after her arrival in the United States.[4] The respondent stated that she did not go to the embassy to get this renewal; instead, she gave her passport to her Ethiopian friend [redacted] who in turn gave it to another friend who was going to the Ethiopian embassy in Washington D.C. The respondent testified that the embassy refused to stamp her passport with the official renewal seal unless she was present, but the respondent was too fearful to come into contact with Ethiopian authorities to go to the embassy herself. Therefore, because there was no government seal, she never got her passport officially renewed, and she asked friend [redacted] to return the passport via postal mail.

The respondent is fearful of returning to Ethiopia because the individuals who detained, imprisoned and beat her are still in power. Family members have told her not to return because officials are still looking for her. Moreover, the respondent does not believe she

---

[4] *See* Exh. 6, Tab B, p. 19.

would be able to live safely anywhere in Ethiopia because the government controls and inspects all localities within the country.

2. Dr. Schaefer's Testimony

Dr. Charles Schaefer is currently the Chair of the International Service Program and an Associate Professor of African History at Valparaiso University in Valparaiso, Indiana.[5] He holds a Ph.D. and Master's degree in history from the University of Chicago, with a specific research focus on Ethiopian history. Dr. Schaefer was born in Addis Ababa, Ethiopia and has lived there off-and-on for a total period of about 15 years. He has researched and studied the social and political climate in Ethiopia for his entire professional career (approximately 30 years), has written or co-written 20 to 30 articles and two books on Ethiopian politics and has spoken at various conferences on the topic of Ethiopia. He has been recognized as an expert on human rights and political issues in Ethiopia in 200 to 300 asylum cases. Based on Dr. Schaefer's extensive research on Ethiopian history and politics, as well as the extended periods of time he has spent in Ethiopia, the Court qualified him as an expert on Ethiopian social and political country conditions, the Ethiopian government's treatment of the OLF, and the status of OLF as a purported terrorist organization. Dr.

[5] Dr. Schaefer's declaration, supplemental declaration and curriculum vitae can be found at Exhibit 2, Tab AA.

Schaefer has met the respondent and is familiar with her asylum application.

Dr. Schaefer testified about the historical context of the current relationship between the Ethiopian government and the Oromo people, specifically the OLF. From the mid-1970s to 1992, a period referred to as "the Derg," Ethiopian politics were dominated by the Marxist regime of Mengistu Haile Mariam. His military dictatorship was "unbelievable brutal"; most Ethiopians suffered oppression during this time, and the Oromos, which accounted for about 40 percent of the population in Ethiopia, figured prominently among those repressed. As a result, different ethnic groups formed secessionist or rebel groups to oppose the Mengistu regime – the Oromo people formed the Oromo Liberation Front, the Tigrayan people formed the Tigrayan People's Liberation Front (TPLF), and the Eritrean people formed the Eritrean People's Liberation Front (EPLF). The TPLF has since been subsumed under its successor party, the Ethiopian People's Revolutionary Democratic Front (EPRDF), the current ruling political coalition in Ethiopia. According to Dr. Schaefer, the U.S. viewed the OLF "very favorably" prior to 1992; the U.S. considered the rebels "freedom fighters" because they were fighting for the overthrow of a Marxist regime with ties to the Soviet Union, and they "actively supported" the rebel groups monetarily, militarily and in intelligence gathering.

These rebel groups were successful both politically and militarily in overthrowing the Mengistu regime, which collapsed in 1991. When it became clear that the

Mengistu regime would be overthrown, the U.S. Assistant Secretary of State for African Affairs, Herman Cohen, invited the leaders of the OLF, the EPLF and the EPRDF to London to form a transitional government. Under the agreed-upon rubric, the three rebel groups agreed to work in concert to hold organized elections in June 1992 so that the people of Ethiopia could express their political choice among the groups. They also agreed to suspend their military operations during the elections and "encamp" their armies in designated areas.

Dr. Schaefer worked as an election observer in June 1992, stationed in the province of Wallega in Western Oromia. He testified that he witnessed a "political spring" in the weeks leading up to the election, where every party was boldly campaigning for their candidates. However, about three or four days prior to the election, it became apparent to the EPRDF that the OLF had the votes to win the election. The EPRDF decided to "disencamp" its military wing from its designated area with the purpose of seizing the OLF's military capacity from its camp. The OLF was caught unaware, and most of its military wing fled into the bush and across the border into Sudan. The OLF considered the EPRDF's actions to be a gross violation of the London agreement, and as a result, its leadership refused to contest the 1992 elections. The EPRDF then installed a puppet party to represent the Oromo people's interests in the election, but the Oromos refused to vote for that party. The EPRDF thus won the 1992

elections, and Ethiopia essentially became a one-party state. The EPRDF has been in power since that time.

Though the London agreement mandated that the EPRDF continue negotiating with the OLF and recognize the OLF as a political party, its leadership made "every effort possible to make it impossible for the OLF to re-enter the political fray in Ethiopia." Dr. Schaefer believes the EPRDF repressed the OLF and its members because the Oromo people "dominate as an ethnic group," and in a free and fair election, "it would be almost inevitable that the Oromo people would vote for an Oromo party." To this end, the ruling party arrested huge numbers of OLF sympathizers and interrogated, tortured or disappeared them. Other members of the OLF were subjected to extrajudicial executions. Dr. Schaefer testified that the EPRDF seldom targeted the leadership of the OLF or other Oromo political opposition parties because they tended to have connections to the international community and their disappearance or arrest would be noticed; rather, the ruling party focused on rank-and-file supporters of the OLF, i.e., those who passed out pamphlets, organized meetings and conducted political campaigning.

According to Dr. Schaefer, human rights abuses against the OLF increased after the start of the Ethiopian-Eritrean war in 1998 because in the government's view, the OLF was sympathetic to and supportive of the Eritrean government. The EPRDF was fearful of being surrounded by a resurgent OLF military campaign in the south of Ethiopia and a hostile Eritrea in the north. Though the OLF never mobilized militarily,

tensions between its leadership and the EPRDF were not eased, and since 1998, there have been no formal channels of communication between the EPRDF and the OLF.

Dr. Schaefer stated that there have been no free and fair elections in Ethiopia since 1992. There appeared to be a political opening prior to the 2005 elections, and several new opposition political parties formed during that time. The OLF was not permitted to contest these elections, but other Oromo-affiliated political parties were established, and they appeared to have "remarkable" levels of support. After the elections were held, however, the EPRDF took control of the ballot boxes, proclaimed itself the winner and did not allow international observers to count the vote. The Ethiopian people were "scandalized and incensed" because they knew the vote was not transparent. They engaged in mass demonstrations in Addis Ababa in June and November 2005, which the EPRDF repressed with violence, including shooting demonstrators.

Between 2005 and 2010, the EPRDF has "totally dismantle[d] all opposition parties." According to Dr. Schaefer, the OLF has been rendered an "ineffective political party," because it cannot operate on the ground within Ethiopia. However, the Oromo people are "so incensed at th[e] consistent abuse that they have suffered under the hands of the EPRDF that almost all of them, if the circumstances changed [so] that the OLF were allowed to run candidates, would vote for the OLF." Dr. Schaefer testified that he interviewed political candidates from other Oromo-based parties,

and they also stated that they would step aside were the OLF to re-enter the political terrain in Ethiopia. According to Dr. Schaefer, the reputation of the OLF among the Oromo people has only strengthened in the OLF's absence from the political scene, to the point where the Oromo see the OLF as their political "savior" and are "amazingly sympathetic" to the party. The EPRDF sees the Oromo people's sympathy for the OLF as threatening to its position of power, and therefore "anybody who says they are OLF would be and are arrested."

Dr. Schaefer also testified regarding three laws that the EPRDF has enacted in Ethiopia in the past several years to stifle political dissent. The first is the Charities and Societies Proclamation of 2009, which requires any Ethiopian NGO or human rights organization that receives more than ten percent of its operating budget from a foreign benefactor – such as the U.S. Department of State or USAID – to open its books and records to EPRDF oversight. If the organization is determined to be in violation of the Proclamation, it must either allow EPRDF officials to sit on its board of directors or face disbandment. Thus far, this law has led to the closure of the two main independent indigenous human rights groups in Ethiopia – the Ethiopian Human Rights Council and the Ethiopian Women Lawyers Association.

The EPRDF also enacted the Mass Media and Freedom of Information Proclamation of 2009, which allows the government to arrest and incarcerate journalists who disseminate information the EPRDF

deems to be critical of the ruling party or detrimental to the government. Dr. Schaefer testified that the government's control of the media today is similar to the lack of freedom of the press under the Derg (1974-1991), during the respondent's formative years in Ethiopia. Under the Derg, Ethiopians learned to disavow the press as a mere spokesperson for the government to disseminate disinformation. The current government of Ethiopia retains the same media outlets as were present under the Derg, and they "are still vehicles to misinform the Ethiopian people." As a result, "the Ethiopian people have been conditioned to look at the Ethiopian government sponsored media – television, radio and newspapers – as vehicles of perpetuating their political agenda and misinforming the Ethiopian public." According to Dr. Schaefer, Ethiopians viewed reports of OLF violence in the Ethiopian press as politically motivated mechanisms to misinform not only the Ethiopian public, but also the international community. Similarly, OLF members were dismissive of reports of OLF violence on government-controlled media as politically motivated attempts to tarnish the OLF's reputation.

The third law the EPRDF enacted is the Anti-Terrorism Proclamation of 2009 which allows the government to arrest without charge anyone who is perceived to violate the constitution, as defined by the government. Taken together, these laws have effectively legalized the oppression of human rights workers and political oppositionists in Ethiopia.

Dr. Schaefer also testified specifically about the OLF and allegations that it is a terrorist organization. The OLF's mission has "deep roots" in the Universal Declaration of Human Rights and the United States Declaration of Independence. Its agenda is to promote political representation, economic freedom and social freedom for the Oromo people, including the ability to preserve their cultural heritage and linguistics. The OLF formed to oppose the Derg and has been oppressed "very dramatically" from that time to the present. The OLF did engage in an armed struggle against the Derg until 1991, but during the time the respondent was a member of the party (2001 to 2004), the OLF's main leadership was committed to non-violently re-engaging in the political arena in Ethiopia, so that there could be legitimate elections that included the voice of the Oromo people.[6] However, Dr. Schaefer described the OLF as politically "ineffectual" during this time frame because the organization existed primarily in the diaspora. It was unable to implement its political agenda on the ground in Ethiopia because government oppression prevented large public gatherings of

---

[6] Dr. Schaefer testified that during the period of the respondent's membership in the OLF, the majority of the OLF leadership wished to retain the territorial integrity of Ethiopia. However, a splinter faction of the party was exasperated with the EPRDF and took a more radical view toward secession and creation of an independent state of Oromia. In December 2011, the leaders of the main and splinter factions of the OLF met in Minneapolis and agreed to re-unite. The secessionist splinter agreed not to seek the secession of Oromia from Ethiopia and to instead promote reengagement in the political sector in Ethiopia. The EPRDF has not allowed the OLF to participate in elections since 1992.

OLF members. Anyone who was associated with the OLF was arrested, harassed or imprisoned, so the organization essentially operated underground through minor community organizations. These local groups focused on building pride in Oromo culture and trying to alleviate some of the hardships the Oromo people suffer. To this end, they collect dues from members and conduct fundraising; the funds they raise are then used to provide a safety net for disenfranchised Oromos. In Dr. Schaefer's opinion, the respondent's monetary contribution to the OLF while she was a member, (approximately 300-400 Ethiopian birr) is immaterial because it is a small sum of money by Ethiopian standards.

Dr. Schaefer stated that these underground groups did not use violence to achieve the OLF's goals because if they had, they "would be routed out immediately." He further testified that at least since 2001, the OLF has not endorsed violent tactics and has "tried to achieve its objectives through non-violent means." The OLF maintains an office in Washington, D.C. and has filed a Foreign Agents Registration Act (FARA) Registration Statement with the Department of Justice, which allows the DOJ to inspect the organization's finances. In Dr. Schaefer's opinion, the OLF does not qualify as a terrorist organization because it has never used terror, explosives, firearms or other weapons to promote its agenda, endanger others or cause property damage. Dr. Schaefer stated that there have been bombings and explosions in Ethiopia attributed to the

OLF, but it is unclear whether the OLF or another opposition group (i.e., the Ogaden National Liberation Front (ONLF) or the Islamic Front for the Liberation of Oromia) is actually responsible for these attacks.

On cross examination, Dr. Schaefer was questioned about documents in the evidentiary record which indicate that the OLF has been linked to a number of violent attacks in Ethiopia.[7] He indicated that he disputes the information in these documents for a number of reasons. He believes that the Jane's World reports are biased, market-driven and shoddily verified. He also believes that reports of OLF violence in other documents are not entirely reliable because they are not based on direct evidence of OLF involvement; rather, they simply repeat allegations made by the EPRDF that the OLF is responsible. Moreover, the sheer number of opposition groups operating in Ethiopia during this time period, coupled with the spill-over effect from unrest in neighboring Eritrea, Sudan and Kenya, makes it difficult to know with certainty that the OLF, rather than another opposition group, perpetrated violent attacks. With respect to statements in the U.S. Department of State country reports on Ethiopia that the OLF and the ONLF "regularly use landmines," Dr. Schaefer states that to his knowledge, no group has laid landmines in Ethiopia since the war of liberation against the Mengistu regime.

Dr. Schaefer further stated that the respondent's contention that she did not know the OLF engaged in

[7] *See generally* Exh. 3 and Exh. 7.

violence when she was a member is “consistent” with what he would perceive to be distrust among the Oromo of media allegations that the OLF was a terrorist organization. There are “many reasons” why the respondent would assume that the OLF is a non-violent organization, first and foremost the fact that the OLF was a vehicle by which she could validate her Oromo identity. Dr. Schaefer also testified specifically about the respondent’s beliefs regarding the Dire Dawa and Tigray Hotel bombings that the respondent heard about in the government-sponsored media. He stated that as an Oromo, he would very much disbelieve these claims, particularly because the OLF leadership disavowed both of these incidents. Dr. Schaefer also has not personally seen any evidence linking the OLF to these attacks. Additionally, in Dr. Schaefer’s opinion, it is also highly reasonable that the respondent would not have heard any other reports of OLF violence when she was a member.

Finally, Dr. Schaefer testified about human rights abuses perpetrated by the EPRDF against OLF supporters. He stated that the respondent’s experience of detention and abuse in Ethiopia is “very consistent” with his personal observations and research regarding the treatment of the OLF by EPRDF forces. He has seen ample evidence in country reports of the kind of abuse the respondent claims to have suffered, including holding detainees in harsh prison conditions, burning them with cigarettes during interrogations, making them walk or crawl on sharp gravel, beating them with different instruments and dunking their heads in

water. Dr. Schaefer saw evidence of the use of these tactics on a research trip to Ethiopia in 2005 and believes the EPRDF still uses these tactics against oppositionists today.

Dr. Schaefer believes it is "very probable" that the respondent would suffer investigation, surveillance, arrest, interrogation and torture if she returns to Ethiopia. If she is ordered removed, the United States would probably inform the Ethiopian government of her return according to international protocol, and the EPRDF would then re-open the respondent's file and realize either that she had previously been imprisoned for being an OLF supporter or that she had left the country through improper channels. When the respondent arrived in Ethiopia, government forces would likely arrest her for further questioning about the manner in which she left the U.S. or her OLF sympathies. If the respondent is somehow able to enter Ethiopia "incognito," local authorities would learn of her presence in the country when she registered with the local *kebele*, the municipal governance structure within Ethiopia. It is nearly impossible to exist in Ethiopia without registering because the *kebele* regulates the basic necessities of Ethiopian life, such as the issuance of identity cards and the granting of permission to rent a residence, drive a car or buy subsidized gasoline. Once the respondent registers with the *kebele*, even if she relocates to a different city and registers with the *kebele* there, she will be investigated to ascertain her identity. Local officials would then likely find out that she left the country improperly, returned after

a lengthy residence in the U.S. or was an OLF supporter and imprison her. Dr. Schaefer believes that the Ethiopian government would still be interested in the respondent today because she was the type of OLF member the EPRDF typically targeted – rank and file, active in the local women's association and involved in OLF meetings.

B. Documentary Evidence

The Court has considered all of the documentary evidence in the record, including:

Exhibit 1: Form I-862, Notice to Appear, filed August 8, 2005; Respondent's original Form I-589, Application for Asylum and for Withholding of Removal and supporting documents, filed with the Asylum Office on June 29, 2005;

Exhibit 2: Respondent's documentary submission, filed March 21, 2008 and including:

Tab A: Respondent's amended sworn statement, dated March 18, 2008;

Tab B: Affidavit of Dr. Nikes Mourikes, M.D.;

Tab C: Affidavit of Dr. Donald N. Levine;

Tab D: Letter from [redacted], Respondent's maid, dated May 25, 2005;

Tab E: Declaration of Mario Gonzalez, clinical supervisor at the Kovler Center for the Treatment of Survivors of Torture;

Tab F: Respondent's student study list from Truman College's Adult Education ESL program;

Tab G: Declaration of ████, dated March 11, 2008;

Tab H: Human Rights Watch, *Suppressing Dissent: Human Rights Abuses and Political Repression in Ethiopia's Oromia Region,* Vol. 17, No. 7(A) (May 2005);

Tab I: Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Ethiopia Country Reports on Human Rights Practices –* 2007 (March 11, 2008);

Tab J: Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Ethiopia Country Reports on Human Rights Practices –* 2004 (Feb. 28, 2005);

Tab K: Human Rights Watch, "Ethiopia: Crackdown Spreads Beyond Capital, As Arbitrary Arrests Continue, Detainees Face Torture and Ill-Treatment" (June 15, 2005);

Tab L: Human Rights Watch, *Country Summary: Ethiopia* (January 2008)

Tab M: Lynn Fredriksson, "Centering Human Rights in U.S. Policy on Somalia, Ethiopia and Eritrea," Hearing Before the Subcomm. on African Affairs, Comm. on Foreign Relations (March 11, 2008);

Tab N: Respondent's Registration Certificate & Foreign Trade License, issued [redacted]

Tab O: Respondent's OLF membership card;

Tab P: Letter from [redacted] leader of a local OLF men's group, dated February 26, 2005; Respondent's OLF membership card;

Tab Q: Letter to Respondent from the Addis Ababa City Government Police Commission, dated November II, 2004;

Tab R: Letter from [redacted] Respondent's sister, dated April 12, 2005;

Tab S: Letter from [redacted] Respondent's sister, dated February 23, 2008;

Tab T: Letter from [redacted] Respondent's cousin, dated February 20, 2008;

Tab U: Letter from [redacted] Respondent's cousin, dated May 19, 2005;

Tab V: Respondent's medical records from the Kovler Center;

Tab W: Respondent's birth certificate;

Tab X: Pages of Respondent's passport;

Tab Z: Respondent's second amended sworn statement, dated September 1, 2009;

Tab AA: Declaration of Dr. Charles G. H. Schaefer, dated August 28, 2009; supplemental declaration of Dr. Charles G. H. Schaefer,

dated February 21, 2012; curriculum vitae of Dr. Charles G. H. Schaefer;

Tab BB: Human Rights Watch Annual Report: Ethiopia (January 2009);

Tab CC: The OLF's Foreign Agents Registration Act (FARA) Registration Statement, filed with the Department of Justice on October 8, 2008;

Tab DD: Website of the National Consortium for the Study of Terrorism and Responses to Terrorism (START);

Tab EE: Website of the Memorial Institute for the Prevention of Terrorism (MIPT);

Tab FF: "Letter from Washington: War on Terror Trumps Ethiopian Democracy," NEW YORK TIMES (October 16, 2007);

Tab GG: *Mailer of A,* Immigration Judge Opinion (March 13, 2009, Chicago, Illinois);

Tab HH: *Matter of U,* Immigration Judge Opinion (April 17, 2008, San Francisco, California);

Tab II: "Clandestine Ogadeni radio brands Ethiopia 'a rogue terrorist state,'" BBC INTERNATIONAL REPORTS (October 10, 2002);

Tab JJ: *Matter of L-H-* (BIA July 10, 2009);

Tab KK: David Martin, *Refining Immigration Law's Role in Counterterrorism* (2009);

Exhibit 3: DHS's documentary submission, filed March 31, 2009 and including:

Tab A: Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Ethiopia Country Reports on Human Rights Practices – 2001* (March 4, 2002);

Tab B: Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Ethiopia Country Reports on Human Rights Practices –* 2002 (March 31, 2003);

Tab C: Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Ethiopia Country Reports on Human Rights Practices –* 2003 (February 25, 2004);

Tab D: Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Ethiopia Country Reports on Human Rights Practices –* 2004 (February 28, 2005);

Tab E: Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Ethiopia Country Reports on Human Rights Practices –* 2008 (February 25, 2009);

Tab F: Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Ethiopia Asylum Country Profile* (August 2007);

Tab G: United Kingdom Home Office, Border and Immigration Agency, Country of Origin Information Service, *Country of Origin Information Report – Ethiopia* (excerpt) (January 18, 2008);

Tab H (ID Only)[8]: Memorial Institute for the Prevention of Terrorism (MIPT), *Group Profile: Oromo Liberation Front (OLF)* (November 28, 2007);

Tab I: Jane's World Insurgency and Terrorism, *Oromo Liberation Front (OLF)* (May 31, 2006;

Tab J (ID Only)[9]: National Consortium for the Study of Terrorism and Response to Terrorism (START), *Terrorist Organization Profile: Oromo Liberation Front (OLF)* (March 1, 2008);

Tab K: Alisha Ryu, "Ethiopian Police Say They Have Foiled Terrorist Plot," GLOBALSECURITY.ORG (August 15, 2007);

Tab L: ONLF Military Communiques (October 22, 2007 and November 2, 2007);

Tab M: Landmine Monitor Report 2000: Kenya (2000);

Tab N: Nita Bhalla, "Ethiopia Links Blast to Oromo Rebels," BBC NEWS (October 2, 2002);

---

[8] The Court did not admit this document into evidence, and it is not part of the evidentiary record. It has been marked here for identification purposes only.

[9] The Court did not admit this document into evidence, and it is not part of the evidentiary record. It has been marked here for identification purposes only.

Exhibit 4 (ID only)[10]: The Department of Homeland Security's Response to Information Request (Number ETH09001.SCO) re: Information on Human Rights Violations the Oromo Liberation Front (OLF) was or may have been Involved in Since Its Formation, USCIS, Asylum, Resource Information Center (RIC), Washington D.C. (November 5, 2008);

Exhibit 5: Forensic Document Laboratory (FDL) Report for the respondent's OLF membership card; birth certificate; and Ethiopia City Police Commission letter, dated [redacted] 2006;

Exhibit 6: DHS's documentary submission, filed August 3, 2010 and including:

Tab A: Bureau of Consular Affairs, U.S. Dep't of State, NIV Applicant Detail (September 22, 2009);

Tab B: The respondent's Ethiopian passport;

Tab C: Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Ethiopia Country Reports on Human Rights Practices* – 2009 (March 11, 2010);

---

[10] The Court did not admit Exhibit 4 into evidence because it is incomplete. The document contains excerpts and summaries of longer publications, which were not included or submitted into evidence.

Exhibit 7: DHS's documentary submission, filed August 16, 2012 and including:

Tab A: Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Ethiopia Country Reports on Human Rights Practices* – 2000 (February 23, 2001);

Tab B: Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Ethiopia Country Reports on Human Rights Practices* – 2010 (April 8, 2011);

Tab C: Jane's World Insurgency and Terrorism, *Oromo Liberation Front (OLF)* (March 23, 2011);

Tab D: National Consortium for the Study of Terrorism and Response to Terrorism (START), *Terrorist Organization Profile: Oromo Liberation Front (OLF);*

Exhibit 8 (1D Only)[11]:

Tab A: Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Ethiopia Country Reports on Human Rights Practices* – 2011;

---

[11] The Court did not admit any of the documents in Exhibit 8 into evidence because they are incomplete. Tab A is incomplete because the right-hand side of the document has been cut off, rendering words and sentences unreadable. Tab B is incomplete because it is only a summary of a longer publication, which the Government did not submit into evidence. Tab C is incomplete because it also is a summary of a longer article which has not been submitted into evidence.

Tab B: Jane's World Insurgency and Terrorism, *Oromo Liberation Front (OLF) (Ethiopia), Groups – Africa Active* (December 6, 2011);

Tab C: "Ethiopia: OLF Claims Responsibility for Bomb Blast," ALLAFRICA.COM (June 26, 2002);

Exhibit 9: Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Ethiopia Country Reports on Human Rights Practices – 2011*;

Respondent's Post-Hearing Submission in Support of Asylum and Eligibility for Relief, filed January 18, 2013;

DHS's Closing Argument in Opposition to Respondent's Request for Asylum, Withholding of Removal and Protection Under the Convention Against Torture, filed January 18, 2013 ("Government's Closing Argument");

Respondent's Response to Department's Closing Argument in Opposition to Respondent's Request for Asylum, Withholding of Removal and Protection Under the Convention Against Torture, filed March 1, 2013;

DHS's Response to Respondent's Closing Argument, filed February 28, 2013.

III. FINDINGS AND ANALYSIS

The Court concludes that the respondent is barred from seeking asylum, withholding of removal and

withholding under the Convention Against Torture because she provided "material support" to the OLF, a Tier III terrorist organization.[12] However, the respondent is not barred from seeking deferral of removal under the CAT, and the Court grants her this form of relief.

A. Credibility

In reaching a decision on the respondent's credibility, this Court has considered the record in its entirety, including the respondent's testimony, her demeanor while testifying, and the record containing her written statements, supporting evidence, and other background information. The Court finds that the respondent's testimony was sufficiently detailed and consistent, both internally and with her asylum application and other supporting evidence in the record. Thus, it finds her credible. *See* INA § 208(b)(1)(B)(iii); *Mitondo v. Mukasey,* 523 F.3d 784, 787-88 (7th Cir. 2008); 8 C.F.R. §§ 1208.13(a), 1208.16(b)-(c).

The Government contends that the Court should render an adverse credibility finding in this case because the respondent's testimony with respect to her ability to obtain exit visas from Ethiopia and seek an extension of her passport once in the U.S. contradicts country conditions evidence about the ability of OLF members to obtain such documents. *See* Government's

---

[12] As explained in Part III.C *supra,* but for the terrorist activity exception to asylum and withholding of removal, the Court would grant the respondent's application for asylum.

Closing Argument, pp. 6-8. The Court finds these arguments unavailing. The respondent credibly testified that she was able to receive exit visas from the Ethiopian government prior to 2004 because the Ethiopian government did not know she was an OLF member until February of that year.[13] The respondent further credibly testified that when she fled Ethiopia in ███ 2004, her cousin arranged an exit visa for her by bribing a government official. Such testimony is consistent with Dr. Schaefer's expert opinion on how exit visas are obtained in Ethiopia.

The Court also finds no inconsistency in the respondent's testimony that she attempted to renew her passport through the Ethiopian embassy in Washington D.C. after she arrived in the United States. The Government contends that by seeking such a renewal, the respondent put the Ethiopian government "on notice" that she was in the United States, and therefore police officers should not have had to question her sister about her whereabouts. However, the Government has presented no evidence that there is a regular system of communication between the Ethiopian embassy in Washington D.C. and the local police in ███ such that any information the embassy had would be shared with the police. Thus, the Court finds the

[13] The respondent initially stated that she was open about her membership in the OLF, but quickly corrected that statement when her counsel restated the question for her. The respondent has consistently maintained that she kept her OLF membership hidden and the EMU did not discover it until they arrested her husband in ███ 2004.

respondent credible. However, this finding is not dispositive as to whether relief should be granted. Rather, the specific contents of her testimony and any other relevant evidence in the record must be considered in determining whether she has met her burden of proof for the relief requested. *Matter of E-P-,* 21 I&N Dec. 860, 862 (BIA 1997).

B. The Terrorist Activity Exception to Asylum and Withholding of Removal

Pursuant to INA § 208(b)(2)(A), certain aliens are not eligible to apply for asylum. Included are aliens who are "described in subclause (I), (II), (III), (IV), or (VI) of section 212(a)(3)(B)(i) or section 237(a)(4)(B) (relating to terrorist activity)." Similarly, section 241(b)(3)(B) of the INA states that an alien described in section 237(a)(4)(B) "shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the United States," and therefore barred from withholding of removal. In the instant case, the respondent is statutorily barred from asylum and withholding of removal because she provided material support to the OLF, an undesignated terrorist organization. Specifically, the respondent engaged in terrorist activity as an OLF member when she solicited and donated funds to the OLF and when she recruited other Oromo women to join her local chapter of the OLF.

The respondent testified orally and in written statements that she was a member of the OLF, participated in the bi-monthly meetings of a local OLF women's group, paid monthly dues to the women's group, donated food products to bake sales held to raise funds for the OLF, and recruited two women to join local OLF women's groups. *See* Exh. 1, Tab A; Exh. 2, Tab A; Exh. 2, Tab Z. She also admitted that in 2002, she heard allegations on Ethiopian television and radio that the OLF was responsible for violent attacks in Dire Dawa and Addis Ababa. These facts are evidence indicating that the terrorist-activity bars "may apply" to the respondent's applications. *See* 8 C.F.R. § 1240.8(d); *Matter of S-K-,* 23 I&N Dec, 936, 939 (BIA 2006). Therefore, the burden of proof shifts to the respondent to show by a preponderance of the evidence that the bars are inapplicable. *Matter of S-K-,* 23 I&N Dec., at 939.

1. The OLF was an undesignated terrorist organization at the time the respondent was involved with the group.

A "terrorist organization" has three statutory meanings. *See* INA § 212(a)(3)(B)(iv)(I)-(III). First, it may refer to an organization designated as a Foreign Terrorist Organization ("FTO") by the Secretary of State pursuant to INA § 219 ("Tier I"). *See* INA § 212(a)(3)(B)(iv)(I). Second, it may refer to an organization otherwise designated, upon publication in the Federal Register, as a terrorist organization ("Tier II").

See INA § 212(a)(3)(B)(iv)(II). Third, it may refer to an "undesignated" terrorist organization, which is defined as "a group of two or more individuals, whether organized or not, which engaged in, or has a subgroup which engages in," terrorist activity as defined by INA § 212(a)(3)(B)(iv)(I)-(VI) ("Tier III"). *See* INA § 212(a)(3)(B)(iv)(III).

The term "terrorist activity" includes "any activity which is unlawful under the laws of the place where it is committed" and which involves highjacking, seizing or threatening to harm another individual in order to compel a third person to do or abstain from doing any act, a violent attack upon an internationally protected person, an assassination, or the use of weapons or other dangerous devices with intent to endanger the safety of one or more individuals or cause substantial damage to property. *See* INA § 212(a)(3)(B)(iii). The term "engage in terrorist activity" includes, among other things: committing or inciting to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity; preparing or planning a terrorist activity; soliciting funds or other things of value for a terrorist activity; soliciting any individual for membership in a terrorist organization; or committing an act which the actor knows, or reasonably should know, affords material support for the commission of a terrorist activity or to any individual who the actor knows, or reasonably should know, plans to commit a terrorist activity. *See* INA § 212(a)(3)(B)(iv).

In the instant case, it is undisputed that the OLF has not been classified as a Tier I or Tier II terrorist organization. However, the Government contends that the OLF was an undesignated Tier III terrorist organization during the time in which the respondent was a member (from 2001 to 2004). After carefully considering the documentary and expert testimonial evidence put forth by the respondent to contest the Government's contention, the Court ultimately finds that the OLF was a Tier III terrorist organization when the respondent was involved with the group.

The respondent argues that the OLF is a non-violent political organization working to bring political representation to the Oromo people. Her country conditions expert, Dr. Charles Schaefer, testified that to his knowledge, the OLF has never used terrorism to promote its agenda, and that the OLF is not an organization that engages in the use of explosives, firearms or other weapons with the intent of endangering individual safety or causing property damage. He also called into question the veracity of the Government's documentary evidence, contending that the reports it submitted are unreliable and based on biased information from the Ethiopian government. While the Court recognizes Dr. Schaefer's expertise on country conditions in Ethiopia, the ultimate decision as to whether the OLF is a terrorist organization is one the Court must make, and it finds the documentary record persuasive in this regard. As indicated below, several different sources, including the U.S. Department of State and independent news agencies, have reported

incidents of violence perpetrated by the OLF, and the OLF has itself claimed responsibility for several attacks that killed or injured others. Further, while Dr. Schaefer stated that he does not have personal knowledge that the OLF has engaged in violence, he was unable to provide direct evidence that the OLF did not in fact commit attacks it claimed responsibility for or that the Ethiopian government alleged it had committed.

Documentary evidence in the record indicates that the OLF was formed in 1973 to champion the political and cultural rights of the Oromo people. Exh. 3, Tab I, p. 218. During the 1980s and early 1990s, the OLF and other rebel groups engaged in an armed insurgency against the Marxist-government of Ethiopia; the OLF represented Oromo demands for self-determination and the right to express their culture freely. *Id.* Since the 1992 elections that brought the EPRDF to power, the OLF has been politically marginalized. However, allegations persisted that the group's armed struggle continued and that it had perpetrated violent attacks that killed or injured government officials and civilians. *See* Exh. 3, Tab A, p. 1; Exh. 3, Tab B, p. 38; Exh. 3, Tab C, p. 77, 79. For example, the OLF, among other groups, was suspected of perpetrating two explosions in April 1997 at the Tigray Hotel and the Blue Tops restaurant in Addis Ababa. *See* Exh. 3, Tab I, p. 220. In 1999, the Ethiopian government accused the OLF of detonating explosives at the Green Hotel in Dire Dawa. *Id.* at 221. In June 2002, the OLF claimed it had

killed more than 300 government troops during a military campaign. *Id.* It also claimed responsibility for a bomb blast in Dire Dawa that killed 14 people. *Id.*

In September 2002, the government accused the OLF of involvement in a bomb attack at the Tigray Hotel in Addis Ababa, in which at least five people died and 38 were wounded. The OLF denied this accusation, however. *Id*; Exh. 3, Tab B, p. 41; Exh. 3, Tab N, p. 237. One year later, a train was struck by a bomb near the Ethiopian border with Djibouti; the Ethiopian government blamed the OLF, but the group denied responsibility. *Id.* Also in September 2003, a bomb planted aboard a passenger train exploded near the town of Adiquala, killing two persons and injuring nine. No group claimed responsibility for the bomb, but the Ethiopian authorities believe the OLF was responsible. Exh. 3, Tab C, p. 80. In January 2004, a small bomb planted on an Ethiopian fuel tanker exploded in Addis Ababa. *Id.* The EPRDF held the OLF responsible, but the group again denied involvement. *Id.* On June 4, 2004, the OLF claimed to have killed four Ethiopian soldiers in the south of the country and to have engaged government troops at two other locations in the country. *Id.* at 222. On July 31, 2004, two explosions occurred near a railway station in Addis Ababa. *Id.* There was no claim of responsibility for the bombs, but the Ethiopian government blamed the OLF.

According to the U.S. Department of State country reports on Ethiopia from 2000 to 2004, the OLF and the Ogaden National Liberation Front also "regularly used landmines, which resulted in numerous civilian

deaths and injuries." Exh. 3, Tab A, p. 5; *see also* Exh. 3, Tab B, p. 41. Observers believe that the OLF laid landmines that allegedly detonated and derailed a freight train near the town of Nazareth; two people were killed and several were injured. Exh. 3, Tab A, p. 5; *see also* Exh. 3, Tab B, p.41.

The OLF's use of bombs and landmines over a prolonged period of time in areas populated by civilians (i.e. hotels and train lines) indicates that such acts were done with the intent to "endanger the safety of one or more individuals or cause substantial damage to property" and therefore qualify as "terrorist activity" under INA § 212(a)(3)(B)(iii). Further the OLF "engaged" in "terrorist activity" when it committed the above mentioned acts under circumstances indicating an intention to cause death or serious bodily injury. *See* INA § 212(a)(3)(B)(iv). The Court acknowledges that the OLF disputes complicity in several of the attacks listed above, but notes that, according to a 2006 report from Jane's World, it has taken responsibility for at least three violent incidents during the years in which the respondent was a member of the group. *See* Exh. 3, Tab 1, pp. 220-221. Dr. Schaefer has called into question the reliability of this report, but he has not provided independent corroborative evidence that the OLF did not commit or claim responsibility for these attacks. Thus, the Court finds the Jane's World report, and other documentary evidence corroborating the information listed in this particular report, persuasive. The fact that the OLF's mission was to advance the

cause of Oromo self-determination and political representation against a repressive regime is of no consequence in the determination as to whether it is a terrorist organization; factors such as an organization's purpose or the nature of the regime the organization opposes are not to be considered in the Tier III analysis. *See Matter of S-K-,* 23 I&N Dec. at 936, 940, 941. Therefore, at the time of the respondent's involvement with the OLF, it was an undesignated terrorist organization pursuant to INA § 212(a)(3)(B)(vi)(III).

2. The respondent engaged in terrorist activity by soliciting funds, soliciting individuals for membership and providing material support to the OLF.

Any alien who "solicits funds or other things of value" for a terrorist organization, who "solicits any individual . . . for membership in a terrorist organization" or who commits any other "act which the actor knows, or reasonably should know, affords material support" to a terrorist organization "engages in terrorist activity," as defined in the Act. *See* INA § 212(a)(3)(B)(iv).[14]

---

[14] An exception to the terrorism bar applies when an alien can show by clear and convincing evidence that she did not know, and should not reasonably have known, that the organization for which she solicited funds, solicited members, or provided material support was a Tier Ill terrorist organization. *See* INA §§ 212(a)(3)(B)(iv)(IV)(cc), 212(a)(3)(5)(iv)(V)(cc), 212(a)(3)(B)(iv)(V)(dd),

With respect to soliciting funds or other things of value, the respondent's testimony and written statements establish that she participated in "fundraising efforts" for the OLF and collected dues for her local women's chapter on a monthly basis. *See* Exh. 2, Tab Z, p. 2. Specifically, the respondent testified that she was responsible for collecting approximately 100 birr in dues each month from the other women in her group and passing this money on to the group's chairwoman. *See id.* The respondent also testified that she prepared Ethiopian spices in her home for bake sales held to raise money for the OLF. The Court finds that these activities constitute soliciting funds for a terrorist organization.

The respondent also engaged in terrorist activity by soliciting individuals for membership in the OLF. *See* INA § 212(a)(3)(B)(iv)(V)(cc), The respondent testified and wrote in her personal statements that she participated in recruiting efforts for the OLF by talking to women in her neighborhood about the OLF's work to protect disenfranchised Oromo women. In 2003, the respondent personally nominated two women for membership in the OLF, and thereafter they did join the local women's chapter in their own neighborhood. The Court finds that the respondent's participation in these recruitment efforts on the OLF's behalf falls squarely within the definition of engaging in terrorist activity as envisioned in INA § 212(a)(3)(B)(iv)(V)(cc).

212(a)(3)(B)(vi). As explained in Part III.A.3, *supra,* that exception does not apply in the instant case.

Finally, the respondent's testimony and written statements establish that she engaged in terrorist activity by providing material support to the OLF. *See* INA § 212(a)(3)(B)(iv)(VI). Section 212(a)(3)(B)(iv)(VI)(dd) of the INA provides that an alien engages in terrorist activity if she "commits an act that [she] knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit . . . to a terrorist organization described in clause (vi)(III) [undesignated terrorist organization], or to any member of such an organization."

The Board of Immigration Appeals ("BIA") and the circuit courts have found that Congress intentionally drafted the terrorism bars to relief very broadly. The definition of "material support" was similarly intended to be quite expansive, covering virtually all forms of assistance, including small monetary contributions confined to non-terrorist activities. *See Matter of S-K-,* 23 I&N Dec. at 941, 945; *Hussain v. Mukasey,* 518 F.3d 534, 537-38 (7th Cir. 2008) (finding the statutory definitions of "engage in terrorist activity" and "material support" to be broad but not vague); *Humanitarian Law Project v Reno,* 205 F.3d 1130, 1136 (9th Cir. 2000) (recognizing that Congress explicitly incorporated a finding into the statute [referring to the Antiterrorism and Effective Death Penalty Act] that "foreign organizations that engage in terrorist activities are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct. It follows that all material support given to

such organizations aids their unlawful goals."). Moreover, "no language in the statute limits 'material support' to the enumerated examples" set forth at INA § 212(a)(3)(B)(iv)(VI); indeed, providing food and setting up tents for members of a terrorist organization has been found to constitute material support. *Singh-Kaur v. Ashcroft,* 385 F.3d 293, 298, 300-01(3d Cir. 2004).

In the instant case, the respondent provided material support to the OLF through the monthly and yearly monetary donations she made to her local women's group and at the OLF annual general meetings, the preparation of food for OLF fundraising efforts, the recruitment of members to other OLF women's groups and the hosting of women's group meetings in her home. The respondent's claim that she did not provide "material support" to a terrorist organization because her contributions to the OLF were minor and made only to support its peaceful activities are without merit; such arguments have been raised and rejected by the BIA and the Seventh Circuit Court of Appeals. *See Hussain,* 518 F.3d at 538 (it is irrelevant that the respondent supported non-violent activities because even support confined to an organization's non-terrorist activities constitutes "material support"; additionally recruiting members to the MQM-H organization constitutes material support). Therefore, the Court finds that the respondent has also engaged in terrorist activity by providing material support to the OLF.

3. The respondent knew or should reasonably have known that the OLF is a terrorist organization.

In general, an alien who has "engage[d] in terrorist activity" for a designated (Tier I or Tier II) terrorist organization is deemed to have known that the organization is a terrorist organization. *See* INA §§ 212(a)(3)(B)(vi), 212(a)(3)(B)(iv)(IV)(bb), 212(a)(3)(B)(iv)(V)(bb), 212(a)(3)(B)(iv)(VI)(cc). However, an exception exists for aliens who have engaged in terrorist activity for an undesignated (Tier III) terrorist organization if the alien can demonstrate by clear and convincing evidence that she did not know, and should not have reasonably known, that the organization was a terrorist organization. INA §§ 212(a)(3)(B)(vi), 212(a)(3)(B)(iv)(IV)(cc), 212(a)(3)(B)(iv)(V)(cc), 212(a)(3)(B)(iv)(VI)(dd).

The respondent argues that the terrorist activity bar is inapplicable to her because she had no knowledge that the OLF was a terrorist organization during the relevant time period. She further argues that her participation in the OLF was limited to nonviolent activities that promoted self-determination for the Oromo people, and that she never witnessed any member of the OLF perpetrating an act of violence or destruction to further the organization's mission. The Court credits the respondent's testimony that she never participated in or witnessed first-hand others participating in violent activities on behalf of the OLF; it further credits her commitment to the OLF's peaceful struggle for equality and political rights for the

Oromo people. Nevertheless, the Court finds that the respondent has not shown by clear and convincing evidence that she did not know, or should not have known, that the OLF was a terrorist organization during the years in which she was a member.

The respondent testified that she heard television and radio news reports that attributed two bombings to the OLF in 2002. The first involved the bombing of a railway station in Dire Dawa in June 2002, which resulted in several civilian deaths. The second involved a bomb attack on the Tigray Hotel in Addis Ababa in September 2002, which also resulted in several civilian deaths and injuries. The respondent stated that although she believed these attacks did occur, she heard about them only on Ethiopian government-sponsored television and radio stations and thus did not believe the allegations that the OLF was responsible for perpetrating them. The respondent also discussed these news reports with her husband and other OLF members, and all of them believed the Ethiopian government had accused the OLF of perpetrating these attacks merely to blacken the organization's name. According to the respondent, the local OLF leadership also called a special meeting shortly after the attacks to disclaim responsibility for them. Dr. Schaefer, the respondent's expert witness, indicated that it would have been reasonable for the respondent to discount news reports linking the OLF to these attacks because of the widespread belief among Oromo people during this time that the media was a tool of government propaganda rather than a neutral outlet for truth.

While it may be true that the respondent did not believe that the OLF was responsible for these attacks, the relevant question is not what she believed but rather what she knew or reasonably should have known about the OLF's involvement in terrorist activities from 2001 to 2004. The documentary evidence indicates that although the OLF denied involvement in the September 2002 bombing of the Tigray Hotel, it "claimed responsibility for a bomb blast at Dire Dawa, which killed 14 people" in June 2002. Exh. 3, Tab I, p. 221. This contradicts the respondent's testimony that the OLF disclaimed responsibility for both bombings in 2002, and the respondent has made no attempt to clarify this discrepancy.

Moreover, the respondent has failed to meet her burden to show by "clear and convincing evidence" that she did not know or should not reasonably have known of other allegations of OLF violence during the time in which she was a member. The documentary evidence details numerous reports of OLF-related violence throughout 2001 to 2004, including several bombings, the use of landmines, and the killing of government soldiers. Exh. 3, Tab I, p. 221; Exh. 3, Tabs A-D. Moreover, the OLF claimed responsibility for three violent attacks during this period. Exh. 3, Tab I, p. 220-221. The respondent did not live in an isolated, remote area of Ethiopia where it might be reasonable to assume she had no access to information of these attacks; rather, she lived in Addis Ababa, had access to radio and television news, was well-educated and traveled widely abroad on business. The regularity of the reports of

OLF violence, coupled with the respondent's living situation and access to information (even if it was limited to government-sponsored news agencies) lead the Court to conclude that the respondent either knew or should reasonably have known that the OLF was a terrorist organization during the time she was a member. Therefore, the respondent has not carried her burden to show by clear and convincing evidence that she did not know, and should not reasonably have known, that her material support and solicitation of funds and members for the OLF would further the OLF's terrorist activity.

In sum, for the above mentioned reasons, the Court finds that the OLF was an undesignated terrorist organization during the time in which the respondent was involved. INA § 212(a)(3)(B)(vi)(III). It further finds that the respondent is an alien "described in" INA § 212(a)(3)(B)(i) as having "engaged in terrorist activity" by providing material support to and soliciting funds and members for the OLF. INA §§ 212(a)(3)(B)(iv)(IV)(cc), 212(a)(3)(B)(iv)(V)(cc), 212(a)(3)(B)(iv)(VI)(dd). Therefore the respondent is statutorily barred from asylum and withholding of removal. INA §§ 208(b)(2)(A), 243(b)(3)(B)(iv).[15]

---

[15] The respondent requests that the Court administratively close her case if it finds her ineligible for asylum and withholding of removal due to the terrorist activity exception. She argues that although the INA allows individuals in her circumstance to seek an exemption from the terrorist activity bar under INA § 212(d)(3)(B), DHS has not yet implemented procedures that allow it to exercise its exemption authority. *See* Respondent's Post-Hearing Submission in Support of Asylum and

C. Asylum

If the respondent were not barred under INA § 208(b)(2)(A) from establishing eligibility for asylum, this Court would grant her application for this relief. Under INA § 208(b), asylum may be granted to an alien who is physically present in the United States if the alien meets the statutory definition of a "refugee." A "refugee" is defined as an individual who is unable or unwilling to return to his or her native country "because of persecution or a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A).

Persecution encompasses "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate," including such actions as "detention, arrest, interrogation, prosecution, imprisonment, illegal searches, confiscation of property, surveillance, beatings, or torture." *Firmansjah v. Gonzales,* 424 F.3d 598, 605 (7th Cir. 2005) (internal quotations and citations omitted).

Eligibility for Relief, pp. 24-25. The Court declines to administratively close this case to await further developments in the exemption process. The respondent's brief contains one sentence indicating that the National Immigrant Justice Center (NIJC) believes the OLF is "far along" in the group exemption process, but the Court finds this information speculative and insufficiently supported. *See Matter of Avetisyan,* I&N Dec. 688 (BIA 2012) (noting that when determining whether administrative closure of proceedings is appropriate, the Court may consider the likelihood the respondent will succeed on actions she is pursuing outside of removal proceedings and the anticipated duration of the closure).

"An asylum applicant need not show that her life or freedom were threatened, but the harm she suffered must rise above the level of 'mere harassment.'" *Nakibuka v. Gonzales,* 421 F.3d 473, 476 (7th Cir. 2005) (citing *Liu v. Aschroft,* 380 F.3d 307, 312 (7th Cir. 2004)). Past persecution may be shown through even a single episode of detention or physical abuse, if it is severe enough. *See Dandan v. Ashcroft,* 339 F.3d 567, 573 (7th Cir. 2003).

The Court finds that the respondent suffered past persecution by the Ethiopian government on account of her membership in the OLF and her political opinion.[16] On ██████ ████, 2004, two days after disappearing her husband, Ethiopian police arrived at the respondent's home, accused her of being a member of an opposition party and placed her under arrest without charge. They took her to a detention facility, where she was held for more than four months in a small cell with about 10 other female prisoners. Prison guards interrogated the respondent every two to three days about her affiliation with the OLF and specifically asked her to name other members of the organization. When the respondent refused, the guards beat her with various objects, kicked her, burned cigarettes on to her skin, forcibly dunked her head into pails of dirty water and threatened to continue such abuse until the respondent revealed the names of other OLF members. The respondent was also forced to walk or kneel on

---

[16] The Court notes that other than its contention that the respondent is not credible, the Government has not contested the merits of her asylum claim.

gravel for up to one hour and would receive beatings from the guards if she did not walk fast enough. The respondent was only released from detention when her cousin and father made arrangements to pay a bribe to prison warden. *See* Exh. 2, Tabs A, Z.

According to recent medical reports, the respondent suffers from symptoms of depression and posttraumatic stress disorder as a result of her abuse. Exh. 2, Tab B. A physical examination revealed that the respondent has circular scars on her hands and right forearm that are "highly consistent" with injuries produced by cigarette burns and scars on the soles of her feet and knees that are consistent with injuries produced by walking or kneeling on gravel. *Id.* Considering the severity and length of the persecution she suffered, as well as the long-lasting physical and mental injuries she has endured, the Court finds that the respondent has suffered persecution.

Because the respondent has established that she suffered past persecution, she is entitled to a presumption that upon removal, her life would be threatened in the future on the same ground. 8 C.F.R. § 1208.13(b)(1); *Marquez v. INS,* 105 F.3d 374, 379 (7th Cir. 1997); *Bace v. Ashcroft,* 352 F.3d 1133, 1137 (7th Cir. 2003). This presumption may be rebutted if the Government establishes by a preponderance of the evidence that there has been a fundamental change in the circumstances of the proposed country of removal, such that the applicant's life would no longer be threatened upon return, or that the respondent could avoid persecution by relocating to another part of the proposed country

of removal and it would be reasonable to expect the applicant to do so. 8 C.F.R. § 1208.13(b)(1)(i)(A), (B), (ii). In cases where the persecutor is governmental or is government-sponsored, it is presumed that internal relocation is not reasonable unless the Government proves otherwise by a preponderance of the evidence. *Id.* § 1208.13(b)(3)(i)-(ii).

In the instant case, the Court finds that the Government has not presented sufficient evidence to rebut the presumption. Instead, the respondent's testimony, the testimony of her expert witness, and the documentary record indicate that she would continue to be a target for persecution by Ethiopian officials if she is returned to that country. In 2001, Ethiopian police killed the respondent's brother-in-law [redacted] because of his affiliation with the OLF, raped his daughter and arrested the rest of his family and imprisoned them. They have not been heard from since. In [redacted] 2004, two days before the respondent was detained, Ethiopian police arrested her husband at his workplace; he has also not been heard from since. Ethiopian authorities have also seized the respondent's clothing business and arrested and imprisoned her sister for a month in an attempt to discover the respondent's whereabouts after she fled Ethiopia. These incidents indicate that the Ethiopian authorities have been particularly interested in the respondent and her family for years, and there is no indication that conditions have changed in Ethiopia to weaken the government's reasons for targeting her. The EPRDF remains in power in Ethiopia, and according to the 2011 State

Department country report, Ethiopian authorities continue to arrest and detain individuals for suspected ties to the OLF. Exh. 9.

Further, Dr. Schaefer testified that the enactment of several laws related to the media and national security have given the EPRDF increased authority to arrest and detain individuals like the respondent who are viewed as opposing the regime. Exh. 2, Tab AA. In his view, if the respondent is returned to Ethiopia, the authorities there will be alerted to her arrival and will arrest and interrogate her at the airport because of her membership in the OLF and her escape from detention. If she is somehow able to enter Ethiopia undetected, local authorities will be tipped off to her presence when she registers at the local *kebele,* which is essential to carrying on a normal existence in Ethiopia. On this evidence, the Court finds that the Government has not shown either changed country conditions in Ethiopia since 2004 or a reasonable possibility that the respondent can relocate within Ethiopia to avoid harm. Therefore, the Court finds that the respondent has a well-founded fear of future persecution. If she were not barred from establishing asylum eligibility, the Court would grant the respondent's application for this relief.

D. Deferral of Removal under the CAT

The Convention Against Torture and the implementing regulations provide that no person may be removed to a country where it is "more likely than not"

that the person will be subject to torture. *See* Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. Doc. A/39/51 (Dec. 10, 1984) (entered into force June 26, 1987; for the United States, April 18, 1988); Pub. L. 105-277 (1998). *See also* 8 C.F.R. §§ 1208.16-18; *Khan v. Filip,* 554 F.3d 681, 690 (7th Cir. 2009). Because the terrorist activity bar to withholding of removal also applies to withholding of removal under the CAT, the respondent is ineligible for that protection. *See* 8 C.F.R. § 1208.16(d)(2); *see also* INA §§ 241(b)(3)(B)(iv), 212(a)(3)(B). However, the respondent may still seek deferral of removal under the CAT, which must be granted if she establishes statutory eligibility. *See* 8 C.F.R. § 1208.17(a).

To qualify for deferral of removal, an alien must establish that it is more likely than not that she will be tortured in the country of removal by, at the instigation of, or with the acquiescence of a public official or an individual acting in an official capacity. *See* 8 C.F.R. §§ 1308.16-18. Torture is an extreme form of cruel and inhuman treatment; it does not include lesser forms of mistreatment or punishment. 8 C.F.R § 1208.18(a)(2). Acts constituting torture must be specifically intended to inflict severe physical or mental pain or suffering; acts that cause unanticipated or unintended harm do not constitute torture. 8 C.F.R. § 1208.18(a)(5).

In assessing whether an alien has satisfied her burden of proof, a court must consider all evidence relevant to the possibility of future torture, including

"evidence of past torture inflicted upon the applicant; evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and other relevant information regarding conditions in the country of removal." 8 C.F.R. § 1208.16(c)(3).

In the instant case, the respondent has met her burden to show a clear probability of torture based on her involvement with the OLF if she is returned to Ethiopia. She has established through credible testimony that she previously suffered severe harm amounting to torture in Ethiopia. Ethiopian police officers arrested her and detained her for more than four months, during which time they interrogated her, beat her with sticks and their hands, kicked her, burned her with cigarettes, dunked her head in pails of water, and forced her to walk and kneel on gravel. Such treatment has been found sufficient to constitute torture by the BIA and circuit courts. *See Matter of J-E-,* 23 I&N Dec. 291, 302 (BIA 2002) ("Instances of police brutality do not necessarily rise to the level of torture, whereas deliberate vicious acts such as burning with cigarettes, choking, hooding, kalot marassa, and electric shock may constitute acts of torture."); *Al-Saher v. INS,* 268 F.3d 1143 (9th Cir. 2001) (holding that Iraqis subjected to repeated beatings and cigarette burns were tortured within the meaning of CAT). Moreover, contrary to the Government's assertion that the abuse she suffered in

detention was not severe enough to cause lasting injury, medical reports in the record indicate that the respondent has physical scars from this abuse and has sought psychological treatment for the emotional toll it took on her. Exh. 2, Tabs A-C, Z; Government's Closing Argument, p. 23. The respondent has further shown that it would not be possible to relocate to another part of Ethiopia to avoid harm; Dr. Schaefer testified that even if she moved to a different region of Ethiopia, she would make herself known to the authorities when she registered with the local *kebele.* After determining her identity, the authorities would likely learn that the respondent has been affiliated with the OLF and escaped the country through improper channels, leading them to detained and mistreat her.

Country conditions evidence in the record further support a finding that it is more likely than not the respondent will be tortured in Ethiopia. According to the 2011 State Department country report on Ethiopia, there are "credible reports that security officials tortured and otherwise abused detainees." Exh. 9. The report goes on to state that in November 2010, the UN Committee Against Torture reported that it was "deeply concerned" about "numerous, ongoing, and consistent allegations" concerning the "routine use of torture" by the police, prison officers, and other members of the security forces – including the military – against political dissidents, opposition party members and alleged supporters of groups like the ONLF and the OLF.

Id. The UN Committee reported that such acts frequently occurred with the participation of, at the instigation of, or with the consent of commanding officers in police stations, detention centers, federal prisons, military bases, and unofficial or secret places of detention. *Id.* Therefore, the respondent's request for deferral of removal under the CAT will be granted.

IV. CONCLUSION

The Court notes that the respondent's facts present a sympathetic story. She suffered severe harm in Ethiopia because of her affiliation with the OLF, and several family members, have been arrested and disappeared because of their OLF membership. If the Court were asked to use its discretion to evaluate the hardship of returning to Ethiopia, this decision might be different. However, on the record presented, the Court must find that the respondent is barred from establishing eligibility for asylum or withholding of removal under INA §§ 212(a)(3)(B)(i)(I) and 241(b)(3)(B)(i). But for these statutory exceptions, the Court would grant the respondent's application for asylum. The Court further finds that the respondent is credible and has established that it is more likely than not that she will be tortured in Ethiopia. Therefore, the Court grants her request for deferral of removal under the CAT.

ORDER OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that the respondent's application for asylum under section 208(a) of the INA be DENIED.

IT IS FURTHER ORDERED that the respondent's application for withholding of removal under section 241(b)(3) of the INA be DENIED.

IT IS FURTHER ORDERED that the respondent be removed to Ethiopia on the charges contained in the Notice to Appear, subject to a grant of deferral of removal to Ethiopia.

IT IS FURTHER ORDERED that the applicant's application for deferral of removal to Ethiopia under the Convention Against Torture be GRANTED.

Notice to Alien Granted Deferral of Removal (8 C.F.R. 1208.17(b)):

Your removal to Ethiopia shall be deferred until such time as the deferral is terminated. This grant of deferral of removal;

1. Does not confer upon you any lawful or permanent immigration status in the United States;

2. Will not necessarily result in you being released from the custody of the Government if you are subject to such custody;

3. Is effective only until terminated;

4. Is subject to review and termination based on a Government motion if the Immigration Judge determines that it is not likely that you would be tortured in the country to which removal has been deferred, or upon your request; and

5. Defers removal only to Ethiopia and does not preclude the Government from removing you to another country where it is not likely you would be tortured.

/s/ Carlos Cuevas
CARLOS CUEVAS
IMMIGRATION JUDGE

9110-9M

DEPARTMENT OF HOMELAND SECURITY

Office of the Secretary

Exercise of Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act

AGENCY: Office of the Secretary, DHS

ACTION: Notice of determination

Authority: 8 U.S.C. 1182(d)(3)(B)(i).

Following consultations with the Secretary of State and the Attorney General, I hereby conclude, as a matter of discretion in accordance with the authority granted to me by section 212(d)(3)(B)(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(d)(3)(B)(i), as amended, as well as the foreign policy and national security interests deemed relevant in these consultations, that paragraphs (iv)(IV), (iv)(V), (iv)(VI), and (i)(VIII) of section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B), shall not apply with respect to an alien who meets the requirements of paragraphs (a) through (c) of this Notice.

(a) The determination in this notice shall apply to any alien who:

(1) solicited funds or other things of value for;

(2) solicited any individual for membership in;

(3) provided material support to; or

(4) received military-type training from or on behalf of the Oromo Liberation Front (OLF).

(b) Additionally, the determination in this notice shall not apply to any such alien unless, on or before the date of this Exercise of Authority, the alien:

(i) was granted asylum, was admitted as a refugee, or had an asylum or refugee application pending; or

(ii) is the beneficiary of an I-730 Refugee/Asylee Relative Petition filed at any time by such an asylee or refugee.

(c) Finally, the determination in this notice shall not apply to any alien unless the alien satisfies the relevant agency authority that the alien:

(1) is seeking a benefit or protection under the INA and has been determined to be otherwise eligible for the benefit or protection;

(2) has undergone and passed all relevant background and security checks;

(3) has fully disclosed, to the best of his or her knowledge, in all relevant applications and interviews with U.S. government representatives and agents, the nature and circumstances of each instance of solicitation, material support, and military-type training, and any other activity or association falling within the scope of section 212(a)(3)(B) of the INA, 8 U.S.C. 1182(a)(3)(B);

(4) has not participated in, or knowingly provided material support to, terrorist activities that targeted noncombatant persons or U.S. interests;

(5) has not engaged in terrorist activity with the OLF outside of the context of civil war activities directed against military, intelligence, or related forces of the Ethiopian Government;

(6) poses no danger to the safety and security of the United States;

(7) has not been placed in removal proceedings unless such proceedings were terminated prior to an entry of an order of removal for reasons unrelated to potential eligibility under this Exercise of Authority; and

(8) warrants an exemption from the relevant inadmissibility provision(s) in the totality of the circumstances.

Implementation of this determination will be made by U.S. Citizenship and Immigration Services (USCIS), which shall ascertain, to its satisfaction and in its discretion, that the particular applicant meets each of the criteria set forth above.

This exercise of authority may be revoked as a matter of discretion and without notice at any time, with respect to any and all persons subject to it. Any determination made under this exercise of authority as set out above can inform but shall not control a decision regarding any subsequent benefit or protection application, unless such exercise of authority has been revoked.

This exercise of authority shall not be construed to prejudice, in any way, the ability of the U.S. government to commence subsequent criminal or civil proceedings in accordance with U.S. law involving any beneficiary of this exercise of authority (or any other person). This exercise of authority creates no substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

In accordance with section 212(d)(3)(B)(ii) of the INA, 8 U.S.C. 1182(d)(3)(B)(ii), a report on the aliens to whom this exercise of authority is applied, on the basis of case-by-case decisions by the U.S. Department of Homeland Security, shall be provided to the specified congressional committees not later than 90 days after the end of the fiscal year.

This determination is based on an assessment related to the national security and foreign policy interests of the United States as they apply to the particular persons described herein and shall not have any application with respect to other persons or to other provisions of U.S. law.

Dated: [October 2, 2013]

/s/ Rand Beers
Rand Beers,
Acting Secretary of
Homeland Security

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

File: A098 830 649 – Chicago, IL Date: MAR 19 2015

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jennifer Yule DePriest, Esquire

ON BEHALF OF DHS: Alexandra Kostich
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent appeals from the Immigration Judge's decision dated July 1, 2013, denying her application for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1231(b)(3), but granting her request for protection under the Convention Against Torture (the "CAT"). *See* 8 C.F.R. §§ 1208.16-1208.18. The Department of Homeland Security ("DHS") opposes the appeal, but does not challenge the Immigration Judge's grant of protection under the CAT. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). As the respondent's application was filed after May 11, 2005, it is governed by the provisions of the REAL ID Act.

The respondent claims past persecution and a well-founded fear of future persecution in Ethiopia on account of her membership in and political activities with the Oromo Liberation Front ("OLF"). The Immigration Judge found the respondent credible and concluded that she would warrant a grant of asylum and withholding of removal in the absence of the material support of terrorists bar under sections 212(a)(3)(B)(i)(I) and 212(a)(3)(B)(iv)(VI) of the Act, 8 U.S.C. §§ 1182(a)(3)(B)(i)(I) and 1182(a)(3)(B)(iv)(VI) (I.J. at 16-25). Sections 208(b)(2)(A)(v) and 241(b)(3)(B)(iv) of the Act. The Immigration Judge granted the respondent's application for deferral of removal under the CAT (I.J. at 25-27).

We adopt and affirm the Immigration Judge's detailed, written decision. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994).

The Immigration Judge, while finding the respondent credible, found her statutorily ineligible for asylum under section 208(b)(2)(A)(v) and for withholding of removal both under section 241(b)(3)(B)(iv) and

under the CAT, 8 C.F.R. § 1208.16(c)(4). These statutory and regulatory provisions generally bar from relief aliens described in section 237(a)(4)(B) of the Act, 8 U.S.C. § 1227(a)(4)(B). Section 237(a)(4)(B) of the Act, renders deportable "any alien who is described in subparagraph (B) or (F) of section 212(a)(3) of the Act."

Section 212(a)(3)(B)(i)(I) of the Act renders inadmissible any alien who "has engaged in a terrorist activity." The term "engage in terrorist activity" means, inter alia, in an individual capacity or as a member of an organization "to commit an act that the actor knows, or reasonably should know, affords material support, including . . . funds" to a designated terrorist organization or to a non-designated (or "Tier III") terrorist organization (i.e., a group of two or more individuals, whether organized or not, which engages in, or has a subgroup which engages in, terrorist activities). Sections 212(a)(3)(B)(iv)(VI) and 212(a)(3)(B)(vi) of the Act. If the DHS shows that the evidence indicates the terrorist activity bar may apply to the respondent's application for relief, the burden of proof shifts to the respondent to show by a preponderance of the evidence that the bar is inapplicable. 8 C.F.R. § 1240.8; *see Matter of S-K-*, 23 I&N Dec. 936, 939 (BIA 2006), *remanded on other grounds*, 24 I&N Dec. 289 (A.G. 2007), *accord, Matter of S-K-*, 24 I&N Dec. 475, 477-78 (BIA 2008).

The Immigration Judge determined that the evidence indicates the respondent engaged in terrorist activity by soliciting funds for a terrorist organization because she participated in fundraising efforts for the OLF and collected dues for her local women's chapter

on a monthly basis (I.J. at 20-21; Exh. 2, Tab Z, at 2). In addition, the respondent solicited individuals for membership by participating in recruiting efforts (I.J. at 20-21; Exh. 2, Tab Z, at 2). Section 212(a)(3)(B)(iv)(V)(cc) of the Act. The Immigration Judge found that the respondent did not demonstrate by clear and convincing evidence that she did not know, and should not reasonably have known, that the OLF was a Tier III terrorist organization during the relevant time period (I.J. at 21-23). The Immigration Judge's findings of fact are not clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i).

We are not persuaded by the respondent's argument that the Immigration Judge erred in finding the OLF a Tier III terrorist organization (Respondent's Brief at 8-13). The Immigration Judge properly considered the evidence of record in arriving at his conclusion (I.J. at 17-20). *Matter of D-R-*, 25 I&N Dec. 445, 454 (BIA 2011) (drawing inferences from direct and circumstantial evidence is a routine and necessary task of any fact finder, and in the immigration context, the Immigration Judge is the fact finder). Moreover, as discussed below, the USCIS has confirmed that the OLF is a Tier III terrorist organization in granting a group exemption. *See* December 31, 2013, USCIS Implementation Memo, "Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) For Activities and Associations Relating to the Oromo Liberation Front (OLF), at 2.

Nor are we persuaded by the respondent's argument that her limited contributions did not reach the level of material support (Respondent's Brief at 21-22).

Even if the respondent's actions were considered de minimis, the material support bar contains no such exception. Congress did not express any intent to exclude de minimis support from the scope of section 212(a)(3)(B)(iv)(VI) of the Act. Even small contributions, when aggregated, can allow a terrorist group to survive and carry out its mission. *See, e.g.*, *Hosseini v. Gonzales*, 471 F.3d 953 (9th Cir. 2006) (holding that even minimal solicitation of funds can constitute engaging in terrorist activity under section 212(a)(3)(B)(iv)(IV) of the Act).

With regard to the respondent's claim that the terrorism bar is overbroad and unconstitutional (Respondent's Brief at 22-23), it is well settled that we lack jurisdiction to rule on the constitutionality of the Act and the regulations we administer. *See Matter of Fuentes-Campos*, 21 I&N Dec. 905 (BIA 1997).

In light of the above, the Immigration Judge properly found that the evidence indicates the "terrorist activity" mandatory ground for denial of asylum and withholding of removal may apply to the respondent, and she did not show by a preponderance of the evidence that such ground does not apply. Thus, the material support of terrorists bar precludes a grant of such relief.

We note that on October 2, 2013, subsequent to the Immigration Judge's decision in this matter, the Acting Secretary of Homeland Security exercised his discretionary authority not to apply certain terrorism-related inadmissibility grounds to certain aliens for

voluntary activities or associations relating to the Oromo Liberation Front (OLF). DHS October 2, 2013 Exercise of Authority (9110-9M-P)[1]; *see also* December 31, 2013, USCIS Implementation Memo.

While it appears that the respondent possibly may be eligible for an exemption under 212(d)(3)(B)(i) based on the OLF's group exemption, this is a matter for DHS to consider, not Immigration Judges or the Board. *See Matter of S-K-*, *supra*, at 941 ("Congress attempted to balance the harsh provisions set forth in the Act with a waiver, but it only granted the power to make exemptions to the Attorney General and the Secretaries of State and Homeland Security, who have not delegated such power to the Immigration Judges or the Board of Immigration Appeals."); *see also* REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, §§ 103(b), 104, 119 Stat. 302, 307-09. The Immigration Judge properly did not administratively close the proceedings. Once a final order of removal has been entered in the respondent's case, it may be referred by to USCIS for exemption consideration. Dep't of Homeland Sec., Fact Sheet, *Department of Homeland Security Implements Exemption Authority for Certain Terrorist-Related Inadmissibility Grounds for Cases with Administratively Final Orders of Removal* (Oct. 23, 2008).[2]

---

[1] Available at http://www.uscis.gov/sites/default/files/USCIS/Laws/TRIG/2013_Implementation_of_New_Discretionary_Exemption_for_Activities_or_Associations_Relating_to_the_OLF.pdf

[2] Available at http://www.uscis.gov/sites/default/files/USCIS/News/Pre-2010%20%20Archives/2008%20Press%20Release/Oct%2008/DHS_implements_exempt_auth_certain_terrorist_inadmissibility.pdf.

The DHS has not challenged the Immigration Judge's grant of protection under the CAT. Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The Immigration Judge's grant of protection under the Convention Against Torture is affirmed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

/s/ [Illegible]
FOR THE BOARD

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Refugee, Asylum and International
Operations Directorate
Washington, DC 20529-2100

[SEAL] U.S. Citizenship
and Immigration Services

Chicago, IL 60640

RE: Notice of Determination, Material Support/Duress Exemption, [redacted], A098 830 649

On February 5, 2014, the Secretary of Homeland Security exercised his discretionary authority under the Immigration and Nationality Act ("INA") section 212(d)(3)(B)(i) not to apply section 212(a)(3)(B)(iv)(VI) of the INA to certain individuals who provided certain limited material support (CLMS) or insignificant material support (IMS) to an undesignated terrorist organization described under subsection 212(a)(3)(B)(vi)(III) of the INA or to a member of such an organization, provided certain requirements are met. 79 FR 6913; 79 FR 6914. This notice of determination of delegated authority for implementing the material support exemption to USCIS, in consultation with U.S. Immigration and Customs Enforcement ("ICE"). USCIS has the discretion to determine whether the exemption criteria are met.

For the CLMS exemption to apply, the applicant must establish, among other things, that he or she has not

provided the material support with any intent or desire to assist any terrorist organization or terrorist activity. Further, the applicant must demonstrate that the conduct involved (1) certain routine commercial transactions or certain routine social transactions (i.e., in the satisfaction of certain well-established social or cultural obligations), (2) certain humanitarian assistance, or (3) substantial pressure that does not rise to the level of duress. The applicant must also establish that he or she warrants an exemption under the totality of the circumstances. See May 8, 2015 USCIS Policy Memorandum, "Implementation of the Discretionary Exemption Authority under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Certain Limited Material Support."

For the IMS exemption to apply, the applicant must establish among other things, that he or she has not provided more than an insignificant amount of material support to a terrorist organization described under subsection 212(a)(3)(B)(vi)(III) of the INA or to a member of such an organization, and that he or she did not provide the material support with the intent of furthering violent or terrorist activities of the individual or organization. The applicant must also establish that he or she warrants an exemption under the totality of the circumstances. See May 8, 2015 USCIS Policy Memorandum, "Implementation of the Discretionary Exemption Authority under Section212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Insignificant Material Support."

On July 1, 2013, an immigration judge ("IJ") found you credible and that you had established past persecution and a presumption of a well-founded fear of future persecution in Ethiopia, but that you were ineligible for asylum and barred from withholding of removal under the INA because you had provided material support to the Oromo Liberation Front ("OLF"), an undesignated terrorist organization under 212(a)(3)(B)(vi)(III) of the INA (referred to as a "Tier III" organization). The IJ found that your asylum application would have been granted but for the material support bar. Additionally, the IJ found that it was more likely than not that you would be tortured if you returned to Ethiopia based on your involvement with the OLF, and granted your application for deferral of removal to Ethiopia under the Convention Against Torture ("CAT"). You appealed this decision, and on March 19, 2015, the Board of Immigration Appeals ("Board") affirmed the IJ's decision and dismissed the appeal. Through counsel you filed a Petition for Review with the U.S. Court of Appeals for the Seventh Circuit. That case is still pending.

According to your testimony, you and your husband joined the OLF in 2001. You testified that you attended bi-monthly meetings of a local OLF women's group whose goal was to support disadvantaged Oromo women financially and emotionally. You stated that you hosted two of the OLF's meetings in your home and solicited members for the OLF, successfully recruiting two members. You testified that you contributed monthly monetary donations of 10 to 15 Ethiopian birr every month to the OLF while you were

a member, a period of two years and four months. You further stated that you participated in fundraising and collection of dues for your local OLF chapter. You testified that you prepared food valued at about 10 to 30 Ethiopian birr that was sold at OLF bake sales held every two to three months. You also testified that you attended the OLF's general annual meetings in 2002 and 2003 and paid 15 Ethiopian birr in dues at each meeting. Finally, you stated that you contributed a total of about 300 to 400 Ethiopian birr during the time you were a member, equivalent to approximately $17.00 to $22.00 U.S. dollars.

After reviewing the record in your case, USCIS has determined that you are not eligible for an exemption under existing exercises of discretionary authority pursuant to section 212(d)(3)(B)(i) of the INA. USCIS finds that you are not eligible for a CLMS exemption because as a voluntary member of the OLF, you intended to support the organization, which meets the definition of an undesignated terrorist organization under subsection 212(a)(3)(B)(vi)(III) of the INA. Further, the material support you provided did not involve certain routine commercial transactions or certain routine social transactions; was not in response to an emergent humanitarian crisis; and was not given under substantial pressure that does not rise to the level of duress, as it was all voluntary. You are also not eligible for an IMS exemption because, based on the evidence in the record that you provided extensive support for over two years, the support you provided

was not insignificant based on the USCIS Policy Memorandum. See May 8, 2015 USCIS Policy Memorandum, "Implementation of the Discretionary Exemption Authority under Section212(d)(3)(B)(i) of the Immigration and Nationality Act for the Provision of Insignificant Material Support."

Finally, it should be noted that on October 2, 2013, the Secretary of Homeland Security exercised his discretionary authority under INA section 212(d)(3)(B)(i) not to apply the following terrorism-related inadmissibility grounds to certain aliens for voluntary activities or associations relating to the OLF: (1) solicitation of funds or other things of value for the OLF; (2) solicitation of any individual for membership in the OLF; (3) material support to the OLF; and (4) receipt of military-type training from or on behalf of the OLF,[1] provided certain requirements are met. To be eligible for this exemption, the applicant must already have an existing or pending immigration benefit such that the applicant: on or before October 2, 2013, was admitted as a refugee or granted asylum, or had an asylum or refugee application pending; or is the beneficiary of an I-730 Refugee/Asylee Relative Petition filed at any time by such an asylee or refugee, and has not been placed in removal proceedings unless such proceedings were terminated prior to an entry of an order of removal for reasons unrelated to potential eligibility under this Exercise of Authority. See December 31, 2013,

[1] This exemption expressly does not apply to persons whom are engaged in or is likely to engage after entry in any terrorist activity. INA section 212(a)(3)(B)(i)(II).

USCIS Implementation Memo, "Implementation of New Discretionary Exemption Under INA Section 212(d)(3)(B)(i) For Activities and Associations Relating to the Oromo Liberation Front (OLF)." You are not eligible for the OLF group exemption, however, because although you meet the requirements related to your activities with the OLF and you filed an asylum application prior to October 2, 2013, you were placed in removal proceedings which were not terminated prior to an entry of an order of removal for reasons unrelated to potential eligibility for the OLF group exemption.

USCIS thus concludes that you are not eligible for a CLMS, IMS or OLF group exemption. As a result of this determination, you remain subject to the final removal order issued by Judge Cuevas on July 1, 2013.

Sincerely,

/s/ K. Sohrakoff
K. Sohrakoff
Chair, USCIS Terrorism-Related Grounds of
Inadmissibility Working Group USCIS-RAIO

CC:

Alexandra Kostich
Assistant Chief Counsel
Office of the Chief Counsel-Chicago
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
525 W. Van Buren, Suite 701
Chicago, IL 60607

Jennifer Yule De Priest
Reed Smith LLP
10 S Wacker Dr., Suite 4000
Chicago, IL 60606

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A098 830 649 – Chicago, IL Date: JAN 19 2016

In re: [redacted]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF
OF RESPONDENT: Jennifer Yule DePriest, Esquire

ON BEHALF
OF DHS: Seth B. Fitter
Senior Attorney

APPLICATION: Reopening; reissuance

The respondent's motion is untimely. The Board entered the final administrative order in these proceedings on March 19, 2015, when it dismissed the respondent's appeal of the Immigration Judge's denial of her applications for asylum and withholding of removal, affirming the Immigration Judge's grant of protection under the Convention Against Torture, and remanding the record for updated security checks. The respondent filed her motion to reopen and reissue the Board's decision on November 13, 2015, approximately 8 months after the Board's final decision. 8 C.F.R. § 1003.2(c)(2). The Department of Homeland Security (DHS) opposes the motion. The motion will be denied.

The respondent has not demonstrated that any of the statutory or regulatory exceptions to the time limitations on motions to reopen apply to her case. *See* section 240(c)(7)(C)(ii-iv) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(7)(C)(ii-iv); 8 C.F.R. § 1003.2(c)(3), We also decline to reopen these proceedings under our *sua sponte* authority. *See* 8 C.F.R. § 1003.2(a), We agree with the DHS that the Board lacks authority to review USCIS's denial of the respondent's request for the Secretary of Homeland Security to exercise his discretionary authority under section 212(d)(3)(B)(i) of the Act, 8 U.S.C. § 1182(d)(3)(B)(I), not to apply section 212(a)(3)(B)(iv)(VI) of the Act to certain individuals who provided certain limited material support (CLMS) or insignificant material support (IMS) to an undesignated terrorist organization described under section 212(a)(3)(B)(vi)(III) of the Act, provided certain requirements are met. 79 Fed: Reg. 6913, 6914 (February 5, 2014); *see Matter of S-K-*, 23 I&N Dec. 936, 941 (BIA 2006) ("Congress attempted to balance the harsh provisions set forth in the Act with a waiver, but it only granted the power to make exemptions to the Attorney General and the Secretaries of State and Homeland Security, who have not delegated such power to the Immigration Judges or the Board of Immigration Appeals."). We find the respondent's arguments regarding 8 C.F.R. § 212.4(b) unavailing as they apply to individuals in proceedings under section 235 or 236 of the Act and the respondent is in proceedings under section 240 of the Act.

In the alternative, the respondent requests that the Board to reissue its March 19, 2015 decision. The Board has on occasion reissued its decisions, but generally only due to Board error or administrative problems involving receipt of the Board's decision. Federal regulations require the Board to serve its final decision on the alien, 8 C.F.R. § 1003.1(f). "Service" is defined as either "physically presenting or mailing a document to the appropriate party or parties." 8 C.F.R. § 1003.13.

The respondent does not allege that she did not receive the Board's decision. Moreover, the respondent acknowledges that she has a timely petition for review of the Board's March 19, 2015, decision currently pending before the United States Court of Appeals for the Seventh Circuit. Thus, we see no reason to reissue our previous decision where it will not alter the outcome of these proceedings or the pending petition for review. It appears that the respondent is arguing that the reissuance of the Board's March 19, 2015, decision will put the USCIS' s exemption denial before the Seventh Circuit. However, as we previously stated, neither the Board nor the Immigration Judge has authority of the Security of Homeland Security's exercise of his discretionary authority under section 212(d)(3)(B)(i) of the Act. Accordingly, the motion to reopen and reissue our decision will be denied.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reissue is denied.

/s/ [Illegible]
FOR THE BOARD

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

June 23, 2017

Before

RICHARD A. POSNER, *Circuit Judge*

FRANK H. EASTERBROOK, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

NOS. 15-1834, 15-3874, 16-1303

S.A.B.,
Petitioner,

v.

JEFFERSON B. SESSIONS, III, Attorney General of the United States,
Respondent.

Petitions for Review of Orders of the Board of Immigration Appeals, No. A000-000-000, and of U.S. Citizenship and Immigration Services, a component of the Department of Homeland Security.

ORDER

On March 24, 2017, the petitioner filed a petition for rehearing *en banc*, and on May 25, 2017, the respondent filed an answer to the petition. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on whether to rehear the case *en banc.* The petition is therefore DENIED.

---

8 U.S.C. § 1182. Inadmissible aliens

* * *

(d) Temporary admission of nonimmigrants

* * *

(3)

* * *

(B)(i) The Secretary of State, after consultation with the Attorney General and the Secretary of Homeland Security, or the Secretary of Homeland Security, after consultation with the Secretary of State and the Attorney General, may determine in such Secretary's sole unreviewable discretion that subsection (a)(3)(B) shall not apply with respect to an alien within the scope of that subsection or that subsection (a)(3)(B)(vi)(III) shall not apply to a group within the scope of that subsection, except that no such waiver may be extended to an alien who is within the scope of subsection (a)(3)(B)(i)(II), no such waiver may be extended to an alien who is a member or representative of, has voluntarily and knowingly engaged in or endorsed or espoused or persuaded others to endorse or espouse or support terrorist activity on behalf of, or has voluntarily and knowingly received military-type training from a terrorist organization that is described in subclause (I) or (II) of subsection (a)(3)(B)(vi), and no such waiver may be extended to a group that has engaged terrorist activity against the United States or another democratic country or that has purposefully engaged in a pattern or practice of terrorist activity that is directed at civilians. Such a determination shall

neither prejudice the ability of the United States Government to commence criminal or civil proceedings involving a beneficiary of such a determination or any other person, nor create any substantive or procedural right or benefit for a beneficiary of such a determination or any other person. Notwithstanding any other provision of law (statutory or non-statutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review such a determination or revocation except in a proceeding for review of a final order of removal pursuant to section 1252 of this title, and review shall be limited to the extent provided in section 1252(a)(2)(D). The Secretary of State may not exercise the discretion provided in this clause with respect to an alien at any time during which the alien is the subject of pending removal proceedings under section 1229a of this title.

* * *

---

8 U.S.C. § 1252. Judicial review of orders of removal

(a) Applicable provision

* * *

(2) Matters not subject to judicial review.

* * *

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

* * *

---

8 U.S.C. § 1252

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

* * *

(4) Scope and standard for review

Except as provided in paragraph (5)(B) –

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based.

* * *