

No. 18-0512

**IN THE
SUPREME COURT OF THE UNITED STATES**

LEILA MARCOS,
Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

*On Writ of Certiorari
To the United States Court of Appeals,
Thirteenth Circuit*

BRIEF FOR PETITIONER

Team 104

Counsel for Petitioner

QUESTIONS PRESENTED

- I. Whether the Thirteenth Circuit correctly applied the Disfavored Group analysis to establish that Marcos has a well-founded fear of future persecution.
- II. Whether the Thirteenth Circuit erred in deciding Petitioner had the burden of demonstrating if the substantial evidence supported a finding that future persecution could be avoided by internal relocation.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iv

JURISDICTIONAL STATEMENT 1

STANDARD OF REVIEW 1

STATEMENT OF THE CASE..... 1

SUMMARY OF THE ARGUMENT 6

ARGUMENT..... 9

I. THE THIRTEENTH CIRCUIT PROPERLY HELD THAT THE DISFAVORED GROUP ANALYSIS IS AN APPROPRIATE TEST OF WHETHER MARCOS HAS DEMONSTRATED A WELL-FOUNDED FEAR OF PERSECUTION 9

 A. Marcos’ Membership Within a Disfavored Group is Parallel to the Claim of Membership in a Particular Social Group to Satisfy Eligibility for Asylum...... 10

 1. *The disfavored group analysis is an appropriate method to establish a well-founded fear of persecution* 10

 2. *Marcos’ membership within her group is a central reason for her persecution* 11

 B. Marcos’ Fear of Persecution Is Considered “Well-Founded” Because It Is Both Subjectively Genuine and Objectively Reasonable as a Member of a Disfavored Group...... 15

 1. *Marcos’ fear that she will be singled out for persecution is subjectively genuine on account of her membership in a disfavored group* 15

 2. *The record supports Marcos’ objective fear of persecution* 18

II. THE THIRTEENTH CIRCUIT ERRED IN FINDING INTERNAL RELOCATION IS REASONABLE BECAUSE IT BYPASSED THE BIA’S ROLE TO DETERMINE WHETHER LIFE INC. IS A “GOVERNMENT-SPONSORED” ACTOR IN THE FIRST INSTANCE..... 19

A.	<u>“Government-Sponsored” is an Ambiguous Term Not Defined by Statute and Should Be Remanded to the BIA for Further Interpretation</u>	21
1.	<i>This Court’s ordinary rule is to remand to the BIA when the BIA has not interpreted an ambiguous term in the first instance</i>	22
2.	<i>The Thirteenth Circuit usurped the BIA’s role to provide guidance to reviewing courts</i>	24
B.	<u>The IJ’s Findings that Internal Relocation is Reasonable is Against the Substantial Evidence in the Record</u>	25
1.	<i>Circuit courts have remanded cases where the BIA’s findings are not supported by the substantial evidence of the record</i>	26
2.	<i>The substantial evidence of the record compels the conclusion that it is unreasonable for Marcos to relocated within Basag to avoid persecution</i>	27
C.	<u>Circuit Court and BIA Decisions Have Repeatedly Found Private Actor Persecution Can Warrant Asylum</u>	28
	CONCLUSION.....	30
	CERTIFICATION	31

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT CASE

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 21, 22

Fedorenko v. United States,
449 U.S. 490 (1981) 23

Gonzales v. Thomas,
547 U.S. 183 (2006) 22

INS v. Aguirre-Aguirre,
526 U.S. 415 (1999) 22

INS v. Elias-Zacarias,
502 U.S. 478 (1992) 26, 28

INS v. Ventura,
537 U.S. 12 (2002) 22

Kiobel v. Royal Dutch Petroleum,
569 U.S. 108 (2013) 25

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005) 23

Neguseie v. Holder,
555 U.S. 511 (2009) *passim*

UNITED STATES APPEALS COURT CASES

Abedini v. INS,
971 F.2d 188 (9th Cir. 1992) 1, 10

Afriyie v. Holder,
613 F.3d 924 (9th Cir. 2010) 24, 26

Argueta v. INS,
759 F.2d 1395 (9th Cir. 1985) 16

Albathani v. INS,
318 F.3d 365 (1st Cir. 2003) 1, 10

<i>Al-Harbi v. INS</i> , 242 F.3d 882 (9th Cir. 2001)	18
<i>Alonzo-Rivera v. United States AG</i> , 649 F.App'x 983 (11th Cir. 2016)	29
<i>Bolanos-Hernandez v. INS</i> , 749 F.2d 1316 (9th Cir. 1984).....	16
<i>Bringas-Rodriguez v. Sessions</i> , 850 F.3d 1051 (9th Cir. 2017)	29, 30
<i>Cardoza-Fonseca v. United States INS</i> , 767 F.2d 1448 (9th Cir. 1985)	28
<i>Carvajal-Munoz v. INS</i> , 743 F.2d 562 (7th Cir. 1984)	15
<i>Chen v. INS</i> , 195 F.3d 198 (4th Cir. 1999)	11
<i>Cruz v. Sessions</i> , 853 F.3d 122 (4th Cir. 2017)	29
<i>Diaz-Escobar v. INS</i> , 782 F.2d 1488 (9th Cir. 1986)	18
<i>Espinoza-Martinez v. INS</i> , 754 F.2d 1536 (9th Cir. 1985)	15
<i>Gambashidze v. Ashcroft</i> , 381 F.3d 187 (3d Cir. 2004)	25, 26
<i>Gao v. Gonzales</i> , 440 F.3d 62 (2d Cir. 2006)	13
<i>Garcia v. Atty'y Gen. of U.S.</i> , 664 F.3d 496 (3d Cir. 2011)	29
<i>Garcia-Cruz v. Sessions</i> , 858 F.3d 1 (1st Cir. 2017)	<i>passim</i>
<i>Garcia-Ramos v. INS</i> , 775 F.2d 1370 (9th Cir. 1985)	16

<i>Hor v. Gonzales</i> , 421 F.3d 497 (7th Cir. 2005)	29
<i>Khan v. Holder</i> , 727 F.3d 1 (1st Cir. 2013)	26
<i>Kho v. Keisler</i> , 505 F.3d 50 (1st Cir. 2007)	11
<i>Kotasz v. INS</i> , 31 F.3d 847 (9th Cir. 1994)	10, 11
<i>Larios v. Holder</i> , 608 F.3d 105 (1st Cir. 2010)	14
<i>Makonnen v. INS</i> , 44 F.3d 1378 (8th Cir. 1995)	11
<i>Mendez-Barrera v. Holder</i> , 602 F.3d 21 (1st Cir. 2010)	14
<i>Mohamed v. Ashcroft</i> , 396 F.3d 999 (8th Cir. 2005)	25
<i>Narayan v. Ashcroft</i> , 384 F.3d 1065 (9th Cir. 2004)	10
<i>Oryakhil v. Mukasey</i> , 528 F.3d 993 (7th Cir. 2008)	25, 26
<i>Patel v. AG of the United States</i> , 259 F.App'x 511 (3d Cir. 2007)	<i>passim</i>
<i>Saballo-Cortez v. INS</i> , 761 F.2d 1259 (9th Cir. 1984)	13, 19
<i>Sael v. Ashcroft</i> , 386 F.3d 922 (9th Cir. 2004)	10
<i>Salim v. Holder</i> , 728 F.3d 718 (7th Cir. 2013).....	11
<i>Shoae v. INS</i> , 704 F.2d 1079 (9th Cir. 1983).....	18

<i>Tampubolon v. Holder</i> , 610 F.3d 1056 (9th Cir. 2010)	9, 10
<i>Tillery v. Lynch</i> , 821 F.3d 182 (1st Cir. 2016)	23
<i>Vasquez v. Holder</i> , 635 F.3d 563 (1st Cir. 2011)	20
<i>Wakkary v. Holder</i> , 558 F.3d 1049 (9th Cir. 1999).....	9

BOARD OF IMMIGRATION APPEALS CASES

<i>Matter of Acosta</i> , 19 I. & N. Dec. 211 (BIA 1985)	12, 13
<i>Matter of A-M-E- & J-G-U-</i> , 24 I. & N. Dec. 69 (BIA 2007).....	13
<i>Matter of E-A-G-</i> , 24 I. & N. Dec. 591 (BIA 2008)	13
<i>Matter of Kasinga</i> , 21 I. & N. Dec. 357 (BIA 1996)	12, 29
<i>Matter of M-E-V-G</i> , 26 I. & N. Dec. 227 (BIA 2014)	12, 14
<i>Matter of Mogharrabi</i> , 19 I. & N. Dec. 439 (BIA 1987)	<i>passim</i>
<i>Matter of S-A-</i> , 22 I. & N. Dec. 1328 (BIA 2000)	29
<i>Matter of Toboso-Alfonso</i> , 20 I. & N. Dec. 819 (BIA 1990)	12

STATUTES

8 U.S.C.S. § 1003(a)(1) (2018)	22
8 U.S.C. § 1101(a)(42)	28

8 U.S.C. § 1158(b)(1)(B)(i) (2015)..... 9

ADMINISTRATIVE MATERIALS

8 C.F.R. § 208.13(b)(3)(i)-(ii) (2019) *passim*

8 C.F.R. § 1003.1(d)(1) (2018) 22

Executive Office for Immigration Review; *New Rules Regarding Procedures for Asylum and Withholding of Removal*, 63 Fed. Reg. 112 at 31948 (proposed June 11, 1998) 23

USCIS Policy Memorandum: *Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B*. (July 11, 2018) 29

OTHER AUTHORITIES

Basag Pen. Code § 4350(a)(1) (2018)..... 3

Basag Pen. Code § 4351 (2018)..... 2

From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law, 44 VA. J. Int’l L. 931, 1024 (2004) 25

Risking Rape to Reach Water,
THE PACIFIC WORLDLY, Jul. 18, 2017..... 19

UN High Commissioner for Refugees (UNHCR),
Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees
(December 2011) 10, 12

No. 18-0512

IN THE
SUPREME COURT OF THE UNITED STATES

LEILA MARCOS,
Petitioner,

v.

ATTORNEY GENERAL OF THE UNITED STATES,
Respondent.

*On Writ of Certiorari
To the United States Court of Appeals,
Thirteenth Circuit*

BRIEF FOR PETITIONER

Team 104

Counsel for Petitioner

TO THE HONORABLE UNITED STATES SUPREME COURT:

Petitioner, Leila Marcos, respectfully submits this brief in support of her request that this Court affirm the Thirteenth Circuit with respect to the first issue and reverse on the second issue.

JURISDICTIONAL STATEMENT

A statement of jurisdiction has been omitted in accordance with the rules of the UC Davis School of Law Asylum and Refugee Law National Moot Court Competition.

STANDARD OF REVIEW

The Immigration Judge’s factual findings on asylum determination, including whether petitioner has established a well-founded fear of persecution, are reviewed under the “substantial evidence test.” *Abedini v. INS*, 971 F.2d 188, 190 (9th Cir. 1992). Legal questions regarding the requirements for establishing asylum eligibility are reviewed *de novo*. *Albathani v. INS*, 318 F.3d 365, 372 (1st Cir. 2003).

STATEMENT OF THE CASE

Basag: Two Islands Two Ethnic Groups

The Petitioner, Leila Marcos (Marcos), is an eighteen-year-old national of Basag. (R. at 16). For centuries Basag has been divided between two ethnic groups: the Hiligan and the Timog. (R. at 2). The country is also divided by two islands, Mayaman and Isda. (R. at 2). For the most part, the Hiligan people live on Mayaman while the Timog reside on Isda. (R. at 2). The Basag Islands are highly dependent on fishing and tourism. (R. at 2). In 1952 Basag declared its independence from Pulo and was formally recognized as a unitary constitutional republic on May 12, 1954. (R. at 2).

The Water Crisis

The effects of global warming hit Isda in 1992. (R. at 2). Over the next twenty years a combination of torrential storms, tide movement, and extreme flooding, destroyed Isda’s fishing industry. (R. at 2). In 2011 the water crisis on Isda became markedly scarce due to extreme

flooding, which polluted the water wells. (R. at 3). While Mayaman remained prosperous, Isda fell into poverty and its residents struggled to access clean water. (R. at 4).

In January 2012, President Ferdinand Aquinto nationalized all of Basags water sources. (R. at 3). While Mayaman's vast tourism produced local taxes to subsidize new water sanitation facilities, Isda faced government shut down of polluted wells in rural areas and relocation of water sources to the Panlalak Bay side of Isda. (R. at 3). Many Isda people concentrated inward toward Panlalak Bay to obtain fresh water, while others fled to Mayaman. (R. at 3). The Isda-Timog people that fled to Mayaman were noticeably poorer than the Hiliagan or Timogs who lived on Mayaman.(R. at 3). Due to the cultural differenced many Isda-Timogs struggled to integrate on Mayaman. (R. at 3).

The 30-Year Concessions Contract

In 2012, President Aquinto signed a 30-year Concessions Contract ("Contract") with Life Incorporated (Life Inc.), an international corporation of Delaware, U.S.A. (R. at 4). The Contract "assigning Life Inc. the exclusive obligation of maintaining and rebuilding water wells throughout Basag in an effort to provide fresh water to all of Basag's occupants. (R. at 4). The Contract does not designate the assignment as "government-sponsored," however, Life Inc. is required to pay annual fees to the Basag government for the assignment. (R. at 4). Furthermore, the Contract indicates the Basag government would provide military aid if the assigned water facilities are threatened. (R. at 4). The liability clause of the Contract requires Life Inc. to comply with Basag law¹. (R. at 5). Although, if violation of the liability clause does not constitute breach, civil and

¹ Basag criminalizes rape and acts of lasciviousness, which includes "molestation." Rape is committed by any person who: through force, threat, intimidation; acts upon a person deprived of reason or who is unconscious; or by grave abuse of authority, inserts his penis into another person's mouth or anal orifice; or who inserts any instrument or object, including penis, into the genital or anal orifice of another person. Basag Pen. Code § 4351 (2018) (R. at 5). Attempted rape is also punished. Basag Pen. Code § 4351(d). Molestation is defined as any person who commits an

criminal remedies are available to potential claimants. (R. at 5). Unless terminated, the Contract is effective until January 1, 2043. (R. at 4). Breach of the Contract would result in substantial liability to Basag. (R. at 5).

Life Inc. Guards and Basag Military

Life Inc. hired armed guards, many of which are Hiligan, to protect various water sources throughout Basag. (R. at 5). In June 2016, a small group of Timogs protested outside a Life Inc. facility demanding more attention to the water crisis on Isda. (R. at 4). Basag military forces at the water facility shot into the crowd and tear gassed them. (R. at 4). After the protest, a small group of Basag citizens, the “Water Warriors,” have worked to undermine Life Inc. and push water accountability back on the Basag government. (R. at 4). The Water Warriors have targeted various Life Inc. government facilities with homemade explosives. (R. at 5). Since July 2016, Basag military along with Life Inc. guards have mistakenly killed over 75 men and women, half of which were killed on Isda alone. (R. at 5).

The Quest for Water

On Isda, the quest for water falls predominantly on the women, while men work in local business or fisheries. (R. at 6). Like many other Isda-Timog women, Marcos travels ten miles every three days to obtain fresh water from Life Inc. facilities. (R. at 6). Marcos and her husband, Bernardo, 24, have moved twice in the past three years due to the extreme flooding on Isda. (R. at 6). In 2017, Life Inc. closed the nearest water facility due to pollution. (R. at 6). Therefore, water on Isda can only be acquired through old scattered wells or through Life Inc.’s storage facilities. (R. at 6).

Act that subjects or exposes another person to unwanted or improper sexual advances or activity. Basag Pen. Code § 4350 (a)(1).

Sexual Harassment at the Water Facilities

The first time Marcos was sexually harassed by a Life Inc. guard was on March 6, 2017, at a water facility five miles from her home. (R. at 6). The guard claimed she could get more water if she had sex with him. (R. at 6). Marcos knew this was a threat, not just harassment; because she heard an Isda woman at a nearby village was raped at a Life Inc. facility after a similar encounter with a guard. (R. at 6). On March 9, Marcos went to a different water facility ten miles away to avoid the guard at the March 6 facility. (R. at 6). On her way back, Marco discovered a newly metered well fifteen miles from her home. (R. at 7). As she approached the new water well she witnessed a Basag soldier forcing a pregnant woman to remove her shirt to ensure she was not carrying explosive for the Water Warriors. (R. at 6).

On March 12, 2017, Marcos returned to the water well only to find it had been destroyed by the Water Warriors. (R. at 7). Marcos returned to the March 9 facility where she recognized the guard from March 6. (R. at 7). As he handed Marcos her allotted water he said, "I'm going to have my way with you, honey, whether you like it or not." (R. at 7). On March 14, the water well was repaired but Marcos was only able to acquire water for a brief time due to a heat wave that hit Isda on March 27, 2017. (R. at 7). Due to the heatwave Life Inc. set up water checkpoint a mile from Marcos village. (R. at 8). On April 5, 2017, as she was leaving the water checkpoint a guard grabbed her backside and whistled at her. (R. at 8). The next day Marcos told her husband Bernardo about the events at the water checkpoint. (R. at 8).

Fleeing to Mayaman

On April 6, 2017, Bernardo was shot in the arm by Life Inc. guards after he confronted them and pulled out a fillet knife. (R. at 8). Life Inc. guards took the wounded Bernardo back to Marcos home. (R. at 8). When Marcos opened the door, she recognized the guard who threatened

her on March 6. (R. at 8). The guard winked at Marco and made a thrusting upward gesture towards her as he left. (R. at 8). That night Marcos and Bernardo left to Mayaman. (R. at 8).

After receiving treatment for his wounds, Marco and Bernardo stayed with Bernardo's fishing mate, Bayani Santos (Santos). (R. at 8). Santos offered them temporary shelter and suggested they find work. (R. at 9). Although water scarcity on Mayaman was more controlled, Santos warned Marco that some of the Life Inc. guards target Isda-Timog women who stand out due to their poorer appearance and financial inability to buy local clothing. (R. at 9). Santos suggested that Marcos buy some nicer clothing to appear more like a local. (R. at 9). Though Santos had not seen any violence towards Timog women on Mayaman, he heard a rumor that an unmarried Isda-Timog woman was impregnated by unknown means. (R. at 9).

After a month on Mayaman, neither Marcos nor Bernardo were able to secure permanent work or housing. (R. at 9). One evening, while panhandling for money, Marcos overheard Life Inc. guards saying, "I cornered her by the well, and hit her until she submitted. Getting sex here is as easy as it is on Isda." (R. at 9). After saving enough money, Marcos bought a one-way ticket to the United States and left Basag on August 6, 2017. (R. at 19). There have been no substantial changes in Basag since Marcos' departure. (R. at 9).

Procedural History

Marcos filed a petition for asylum at a port of entry on August 7, 2017, (R. at 19). Marcos argued that she has a well-founded fear of persecution due to a pattern or practice of rape and harassment against similarly situated Timog women in Basag. (R. at 19). Following a hearing, the Immigration Judge (IJ) found Marcos' membership in a disfavored group, combined with her evidence of individualized risk, created an objectionably reasonable fear of persecution. (R. at 19). Nevertheless, the IJ denied Marcos' application for asylum finding Marcos could avoid

persecution by relocating to another part of Basag. (R. at 19). Marcos appealed the IJ's finding of internal relocation to the Board of Immigration Appeals (BIA). (R. at 20). The BIA summarily affirmed the IJ's findings. (R. at 20).

Marcos appealed to the Thirteenth Circuit which affirmed the IJ's findings that Marcos could relocate within Basag to avoid persecution. (R. at 31). This appeal to the United States Supreme Court followed. (R. at 14).

SUMMARY OF THE ARGUMENT

I.

The Thirteenth Circuit decision should be affirmed with respect to the issue of whether the Disfavored Group analysis is an appropriate test for determining whether Marcos has established a well-founded fear of persecution. Due to the water crisis, the Basag government contracted Life, Inc., a United States corporation, to provide clean water to residents of Isda. During her quests for water, Marcos has been victim of multiple sexual harassments and sexual assault by Life Inc. guards, most of whom are ethnic Hilagan-Mayamans. Her fear of future persecution is based on her membership of a disfavored group, in this case her identity as an Isda-Timog woman. Her fear of future persecution is both subjectively genuine and objectively reasonable.

First, Marcos' membership in a disfavored group is parallel to the claim of membership in a particular social group to satisfy eligibility for asylum. The disfavored group analysis is appropriate to establish a well-founded fear of persecution because it provides protection to those who reasonably face persecution, but do not meet the level of a pattern of systematic persecution. Marcos' fear of persecution is on account of her identity as an Isda-Timog woman, which meets all three requirements of being a particular social group that is: (1) composed of

members who share a common immutable characteristic (2) defined with particularity, and (3) socially distinct within the society in question.

Second, Marcos' fear of persecution is well-founded because it is both subjectively genuine and objectively reasonable. Marcos' fear is subjectively genuine following the "reasonable person standard" as she is a member of a persecuted group, is easily recognized as being a member of said group, has witnessed other members of her group being persecuted, and has previously been harmed due to her membership. Marcos' fear is objectively reasonable due to her credibility as a witness, and her testimony which provided direct and specific evidence in the record that she holds a well-founded fear of future persecution.

II.

With regard to Marcos reasonable relocation, this Court should find the Thirteenth Circuit erred by not defining or remanding to the BIA to interpret the ambiguous term "government-sponsored," at issue here. This error bypasses crucial procedural safeguard and fail to give uniformity and guidance to reviewing courts. First, to determine which party has the burden of proving internal relocation, adjudicators must first determine whether the persecutor is a government or is "government-sponsored." The term "government-sponsored" is an ambiguous term not defined in the statute and should therefore be interpreted by the BIA first. Here, neither the IJ nor the BIA provided any meaningful analysis whether Life Inc. constitute a "government-sponsored" actor within the meaning of the regulation. Although, Life Inc. operates throughout all of Basag and is inextricably linked with the Basag military, the BIA failed to explain why it considered Life Inc. a nongovernmental actor. The Thirteenth Circuit failed to clarify whether Life Inc. is a "government-sponsored" actor. Instead the Thirteenth Circuit adopted the IJ's flawed reasoning that "government-sponsored" is simply defined as not Life Inc. The Thirteenth Circuit

erred by bypassing the BIA, which is statutorily charged with providing reviewing courts guidance in interpreting ambiguous terms, such as the one at issue here.

Second, the Thirteenth Circuit failed to analyze the reasonableness factors and erroneously concluded that Marcos could reasonably relocate to other parts of Basag to avoid herpersecution. Court have previously reversed and remanded cases where relocation is found reasonable but the adjudicator fails to explain how the reasonable relocation factors apply in a particular case. Here, the Thirteenth Circuit did not explain how it would be possible for Marcos to relocate if Life Inc. guards operate throughout all of Basag. Even if Marcos were to remain on Mayaman which has better infrastructure for accessing water, Marcos would still be targeted because of her impoverished appearance as an Isda-Timog. Moreover, in the four months Marcos was on Mayaman she encountered Life Inc. guards that talked confirmed her fear of their practice to target Isda-Timog women on Mayaman.

Lastly, the Thirteenth Circuit failed to consider a long-standing principle of Asylum Law: that private actors can constitute persecutors for purposes of asylum law if the government is unable or unwilling to control them. Marcos has provided substantial evidence that corroborates her credible testimony that the Basag government is aware of the alleged raped perpetrated by Life Inc. guards and has done nothing to stop them. This government acquiescence allows Life Inc. guards to rape Timog women throughout Basag with impunity. Accordingly, this Court should reverse the Thirteenth Circuit's opinion and find that Marcos cannot reasonably relocate to avoid persecution.

ARGUMENT

I. THE THIRTEENTH CIRCUIT PROPERLY HELD THAT THE DISFAVORED GROUP ANALYSIS IS AN APPROPRIATE TEST OF WHETHER MARCOS HAS DEMONSTRATED A WELL-FOUNDED FEAR OF PERSECUTION.

The Immigration and Nationality Act ("INA") states that eligibility for asylum as a "refugee" is established if an applicant proves that she has been persecuted or has a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1158(b)(1)(B)(i) (2015). In the present case, petitioner Marcos satisfies the "well-founded fear" requirement because of her membership in a disfavored social group: Isda-Timog women, victimized by sexual violence from Life Inc. guards. A disfavored group is defined as "a group of individuals in a certain country or part of a country, all of whom share a common, protected characteristic, many of whom are mistreated, and a substantial number of whom are persecuted but who are not threatened by a pattern or practice of systematic persecution." *Tampubolon v. Holder*, 610 F.3d 1056 (9th Cir. 2010), quoting *Wakkary v. Holder*, 558 F.3d 1049, 1063 (9th Cir. 1999). Here, the Thirteenth Circuit properly found that Marcos had a well-founded fear of persecution based on her membership in a disfavored group as an Isda-Timog woman.

A. Marcos' Membership Within a Disfavored Group is Parallel to the Claim of Membership in a Particular Social Group to Satisfy Eligibility for Asylum.

An applicant may demonstrate a well-founded fear of persecution by showing that (1) they are a member of a "disfavored group," and (2) they face "an individualized risk of being singled out for persecution." *Sael v. Ashcroft*, 386 F.3d 922, 923 (9th Cir. 2004). The more serious and widespread the threat to the group in general, the less individualized the threat of persecution needs to be. *Id.* A "disfavored group" is one that is not targeted for systematic persecution within a given country, but whose members are at an increased risk of non-systematic persecution. *Kotasz v. INS*,

31 F.3d 847, 853 (9th Cir. 1994). Therefore, where the country at issue in an asylum case has a history of persecuting people in circumstances similar to the asylum applicant's, weight should be given to that fact in assessing the applicant's claims. UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (December 2011). A well-founded fear can be based on what has happened to others who are similarly situated. *Id.* at 2. Here, the Immigration Judge (“IJ”) found that Marcos’ membership as an Isda-Timog woman was sufficient to satisfy the requirement of membership in a “disfavored group.” (R. at 25).

1. *The disfavored group analysis is an appropriate method of establishing a well-founded fear of persecution.*

Where the BIA adopts the IJ’s decision, reviewing courts look at the IJ’s decision as if it were the BIA’s decision. *Tampubolon v. Holder*, 61 F.3d 1056, 1059 (9th Cir. 2010). The IJ’s determination, whether the petitioner has demonstrated a well-founded fear of persecution, is reviewed under the “substantial evidence” standard. *Abedini v. INS*, 971 F.2d 188, 190 (9th Cir. 1992). The IJ’s findings will not be disturbed unless the evidence presented not only supports the opposite conclusion but compels it. *Narayan v. Ashcroft*, 384 F.3d 1065, 1066 (9th Cir. 2004). Legal questions are reviewed *de novo*. *Albathani v. INS*, 318 F.3d 365, 372 (1st Cir. 2003). Here, the Court reviews the IJ’s findings on whether Marcos has a well-founded fear of persecution under the substantial evidence test and reviews *de novo* whether the disfavored group analysis is proper.

The circuits are evenly split regarding whether the disfavored group test should be applied when examining a well-founded fear of persecution. The Ninth, Fourth, and Eighth circuits follow the disfavored group test, although it is rejected by the First, Third, and Seventh circuits. *Wan*

Chien Kho v. Keisler, 505 F.3d 50, 55 (1st Cir. 2007); *Makonnen v. INS*, 44 F.3d 1378, 1383 (8th Cir. 1995); *Chen v. INS*, 195 F.3d 198, 204 (4th Cir. 1999). Circuits in opposition to the disfavored group test consider the analysis to be too low a standard for individualized fear absent a pattern or practice of persecution. *Keisler*, 505 F.3d at 51. In addition, much of the split between circuits is regarding how it differs from the already existing “pattern or practice” theory of persecution.” *Salim v. Holder*, 728 F.3d 718, 719 (7th Cir. 2013). However, use of the disfavored group analysis acts as a “safety net” for those who “fall short of establishing a pattern or practice of persecution but have shown membership in a historically mistreated group.” *Kho*, 505 F.3d at 55. The Ninth Circuit held that there is a level of persecution between individualized and systematic; a level of persecution that does not specifically single out an individual, yet the persecution is not a pattern of persecution against such a group: an attack on a “disfavored group.” *Kotas*, 31 F.3d at 853. Without the disfavored group test, many asylum-seekers facing persecution would not be granted protections simply for having membership within a group, but not necessarily facing a pattern of systematic oppression. *Id.* The disfavored group analysis is appropriate to determine whether Marcos meets a well-founded fear of persecution.

2. *Marcos’ identity as an Isda-Timog woman is a central reason for her persecution.*

The BIA defines "particular social group" as a group that is (1) composed of members who share a common immutable characteristic (2) defined with particularity, and (3) socially distinct within the society in question. *Matter of M-E-V-G*, 26 I. & N. Dec. 227, 237 (BIA 2014). In general, group members that share a common impulse or interest are "persons of similar background, habits or social status." UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (December 2011).

Under the first prong, an immutable characteristic is one "that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985). An immutable characteristic is determined on a case-by-case basis, determined in "the context of the country of concern and the persecution feared." *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 447 (BIA 1987). See, e.g., *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 820-21 (BIA 1990) (Cuban homosexuals shared a common immutable characteristic in sexual orientation); *Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) (young women who belong to a specific Togolese tribe and oppose FGM share common immutable characteristics regarding the voluntary relationship among members). In *Matter of Acosta*, gender was listed as an immutable characteristic one should not be required to change. *Acosta*, 19 I. & N. Dec. at 233.

In the present case, Marcos shares a common impulse and interest with her persecuted class, Isda-Timog women in their search for water, making her a member of a disfavored group with common immutable characteristics, defined with particularity, and socially distinct. Marcos' immutable characteristics can be divided between being a woman, a resident of Isda, and an ethnic Timog. Although living on the island of Isda is a characteristic that can be changed, being Timog is an ethnic identity that cannot be and should not be required to change. Regardless of whether Marcos is living in Isda or in Mayaman, she is still ethnically Timog. She shares this characteristic with other Timogs by virtue of being in the same ethnic group. As the court held in *Matter of Acosta*, Marcos' identity as a woman is an immutable characteristic that cannot be changed. A severe lack of clean water on Isda also shows that Marcos has no choice but to travel miles to a Life Inc. facility for water, a necessary and vital resource. Her lack of alternative reliable sources for clean water forces her to rely on Life Inc., and subjects her to sexual harassment by Life Inc.

guards with no way of avoiding them. (R. at 6). Marcos being an Isda-Timog woman searching for water successfully constitutes a social group having common immutable characteristics of ethnicity, gender, and goal.

Under the second prong, a group is “particular” if the “group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.” *Matter of E-A-G-*, 24 I. & N. Dec. 591 (BIA 2008). A “particular social group” cannot be defined exclusively by the claimed persecution; it must be “recognizable” as a discrete group by others in the society, and it must have well-defined boundaries. *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74-76 (BIA 2007); *see, e.g., Gao v. Gonzales*, 440 F.3d 62, 63 (2d Cir. 2006) (holding that women sold into marriage in a part of China where forced marriages are valid and enforceable were a particular social group).

Isda-Timog women such as Marcos are particularized from the Hilagan-Mayamans. Marcos’ identity as an Isda-Timog woman, a particular social group, means she is amongst similarly situated people who have been persecuted and thus faces an individualized risk for being singled out for persecution. There is substantial evidence that ethnic Timogs, especially women, are treated as a disfavored group within Mayaman: in addition to witnessing acts of sexual violence against other Timog women throughout Basag, Marcos herself was sexually harassed on four separate occasions by Life Inc. guards. (R. at 17-18). Isda-Timog women disproportionately carry the burden of retrieving water from Life Inc. facilities. (R. at 24). Isda-Timog *women* are thus a discrete class of persons who retrieve water. In addition, due to their impoverished appearance, the Timogs are easily recognized—fetching water miles away from home is a sign of poverty, and poverty being an identifying characteristic of the Timog people. Marcos is easily recognized as an Isda-Timog woman, with the particular identifying factor being their quest for water.

The third requirement, “social distinction,” requires that the group be recognized by society as a distinct class of persons. *Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010). The group has a known common immutable characteristic, and those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it. *Matter of M-E-V-G-*, 26 I&N Dec. at 233. To be known as a distinct group, the court follows two parallel standards of “social visibility” and “social distinction.” *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010). In order to satisfy social visibility, a group 'must be generally recognized in the community as a cohesive group.'" *Id.* In *Matter of M-E-V-G-*, the BIA revised "particular social group" to require "social distinction," a similar standard that still accepts a “visibly distinct” group as interchangeable with “socially distinct.” 26 I. & N. Dec. at 236.

The social hierarchy between the Isda-Timogs and Hilagan-Mayamans exists primarily due to their physical divide by nature of both ethnic groups existing exclusively on their respective islands. (R. at 2). The Isda-Timogs rely heavily on Isda’s fishing industry, while the Hilagan-Mayamans flourish via tourism. (R. at 2). The record shows because both islands had been separated along ethnic lines, cultural differences become apparent. When the relocated Isda-Timog people moved to Mayaman, they have difficulty integrating into the culture on Mayaman in addition to being “noticeably poorer.” (R. at 3). The majority of Life Inc. guards are ethnic Hilagan, and target Isda-Timog women “who sometimes stand out due to their poorer appearance.” (R. at 9). When Marcos moves to Mayaman, she is told to “clean up and buy some nicer clothing to appear more like a local,” exemplifying a visible social status disconnect between the Isda-Timogs and the Hilagan-Mayamans. (R. at 9). Thus, this social hierarchy creates a distinction of Isda-Timogs from their Hilagan-Mayaman counterparts. Marcos, along with other Isda-Timog women, share common immutable characteristics, are defined with particularity, and socially

distinct. Therefore, Marcos satisfies the disfavored group requirement by showing that her identity as an Isda-Timog subjects her to persecution.

B. Marcos' Fear of Persecution Is Considered "Well-Founded" Because it is Both Subjectively Genuine and Objectively Reasonable as a Member of a Disfavored Group.

In order to establish the well-founded fear of persecution, the applicant must present specific facts establishing that "he has actually been victim of persecution or has some good reason to fear that he will be singled out for persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Carvajal-Munoz v. INS*, 743 F.2d 562, 564-567 (7th Cir. 1984). The applicant must be specific in her claims, to show that there is a "reasonable possibility" of persecution, and to show that she has "good reason" for her fear of persecution. *Id.* at 563.

1. *Marcos' fear that she will be singled out for persecution is subjectively genuine on account of her membership in a disfavored group.*

The reasonable person standard provides a "common sense" framework for analyzing whether claims of persecution are well founded. *Matter of Mogharrabi*, 19 I&N Dec. at 445. The subjective component of the well-founded fear standard requires a showing that the "[petitioner's] fear is genuine." *Espinoza-Martinez v. INS*, 754 F.2d 1536, 1540 (9th Cir. 1985). A reasonable person may well fear persecution even where its likelihood is significantly less than clearly probable. *Matter of Mogharrabi*, 754 F.2d at 1540. In *Mogharrabi*, the court held that in order to establish the well-founded fear of persecution required for asylum, the applicant establish that she has actually been the victim of persecution or has some other good reason to fear that she will be singled out for persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *Id.* at 443. For example, in *Argueta v. INS*, the petitioner's fear of persecution was subjectively reasonable because he provided evidence of a direct threat against

him—the fact that his close friend and “brother-in-law” were tortured and killed by the same men who threatened him. 759 F.2d 1395, 1397 (9th Cir. 1985). The court held that the petitioner had provided evidence that “clearly shows that the [death squads] have the ability and the will to carry out their threats.” *Id.*

The measure of subjective reasonableness must also consider the “conditions in the country of origin, its laws, and the experience of others.” *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985). In *Bolanos-Hernandez v. INS*, the petitioner feared persecution due to his membership in a political group in El Salvador, during a time of a “general climate of uncontrolled violence” against members of that political group. 749 F.2d 1316, 1317 (9th Cir. 1984). The court held that if an individual resides in a country “where the lives and freedom of a large number of persons are threatened” the individual threat of persecution is “more serious.” *Id.* at 1323. Here, the IJ found that Marcos’ subjective fear of persecution was well-founded “within the context of widespread sexual violence against ethnic Timog women using Life Inc. facilities.” (R. at 25).

Marcos’ has met her burden of showing a well-founded fear of persecution following the “reasonable person standard” set forth in *Matter of Mogharrabi* and *Garcia-Ramos*. Due to a general climate of ethnic unrest between the Hilagans and the Timogs, Marcos has been individually victim to sexual assault, and has witnessed other Isda-Timog women sexually assaulted as well. As an individual, Life Inc. Guards target Marcos because she is an impoverished Isda-Timog woman seeking water. Isda-Timog women disproportionately carry the burden of retrieving water from Life Inc. facilities and have impoverished appearances compared to Mayamans, which makes Marcos a clear visible target. (R. at 24). Marcos was sexually harassed on March 6th by a Life Inc. guard and then threatened with rape by the same guard shortly after. (R. at 6). Marcos was sexually assaulted by different Life Inc. guards on April 5th. (R. at 8). On

April 6th, her husband was shot by Life Inc. guards and Marcos was once again sexually harassed. (R. at 8). Marcos' repeated exposure to sexual harassment in her experiences attempting to retrieve water shows that there is a very real threat of future sexual harassment and assault to her as an individual.

Isda-Timog women as a group are subject to a climate of sexual assault. Ethnic tensions between Isda-Timogs and Hilagans have escalated following the water crisis in Isda. Some Timogs protested the privatization of water access through Life Inc., but Basag military forces shot into the crowd and tear-gassed protestors. (R. at 4). A group of Basag citizens called the "Water Warriors" target various Life Inc. and government facilities with homemade explosives in retaliation to the Basag government's relinquishment of water facilities. (R. at 5). As a result, Basag military and Life Inc. guards have killed over 75 men and women mistakenly identified as Water Warriors throughout Basag, more than half of which were killed on Isda alone. (R. at 5). At a well near a Life Inc. water facility, Marcos witnessed a Basag soldier threatening a pregnant Timog woman. (R. at 7). One evening while begging in Mayaman, Marcos overheard Life Inc. guards saying, "I cornered her by the well, and hit her until she submitted. Getting sex here is as easy as it is on Isda." (R. at 9). This climate of violence against Isda-Timogs, including specifically Isda-Timog women, makes Marcos' threat of persecution more serious and credible. Marcos' personal experiences of harassment and witnessing harassment of others in her social group shows that there is substantial evidence proving Marcos' subjective fear of persecution.

2. *The record supports Marcos' objective fear of persecution.*

An applicant for asylum is required to "present 'specific facts' through objective evidence to prove either past persecution or 'good reason' to fear future persecution." *Cardoza-Fonseca v. United States INS*, 767 F.2d 1448, 1449 (9th Cir. 1985). The objective component requires a showing, by credible, direct, and specific evidence in the record, of facts that would support a

reasonable fear that the petitioner faces persecution. *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986). The objective component also ensures that an alien's subjective fear is "well-founded" in fact and not in fantasy. *Id.* The well-founded fear standard "implicates a requirement of objective reasonableness." *Id.* at 1374. Thus, there must be some basis in reality or reasonable possibility that a petitioner would be persecuted. *Id.*

When analyzing the calculation of reasonable objectiveness, courts have held that even a ten percent chance of persecution may establish a well-founded fear. *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001). In *Shoae v. INS*, the court recognized the difficulty of obtaining documentary evidence to support an asylum claim and held that if such evidence was not available, the applicant's testimony will suffice if it is credible, persuasive, and specific. 704 F.2d 1079, 1084 (9th Cir. 1983). The court emphasized that applicants' testimony must point to objective facts that support a risk of future persecution. *Id.* Here, the IJ found Marcos' testimony of future fear of persecution to be credible. (R. at 16).

Marcos' membership in the disfavored group meets the requirements to show that her membership as an Isda-Timog woman objectively subjects her to persecution. Marcos' testimony regarding sexual harassments is specific and credible, supported by instances of rape and harassment against both her and other Timog women. Marcos' fear of rape comes from multiple rumors of Life Inc. facility guards raping Timog women, which span from 2013 to early 2017. (R. at 17). A United Nations report presented by Marcos during her testimony verifies the female accounts of sexual harassment instigated by Life Inc. guards from 2013 to February 2017. (R. at 17). Marcos' belief that Isda-Timog women were being attacked at Life Inc. facilities was also supported by an independent report. *See Risking Rape to Reach Water*, THE PACIFIC WORLDLY, at 20 (Jul. 18, 2017) (citing to an increase in the number of attacks on women caused

by the water shortage in Basag) (R. at 25). Because there is substantial evidence that Marcos had a well-founded fear of persecution and was a credible witness, the IJ's ruling should not be overturned. Marcos' testimony alone, including the cited reports that corroborate her story, is sufficient to prove the objective prong of establishing a well-founded fear of future persecution². Therefore, the Thirteenth Circuit should uphold the IJ's ruling that Marcos' fear of persecution is based in objective reasonableness.

II. THE THIRTEENTH CIRCUIT ERRED IN FINDING INTERNAL RELOCATION IS REASONABLE BECAUSE IT BYPASSED THE BIA'S ROLE TO DETERMINE WHETHER LIFE INC. IS A "GOVERNMENT-SPONSORED" ACTOR IN THE FIRST INSTANCE.

Turning to the issue of internal relocation, the First time Marcos was sexually harassed by a Life Inc. guard was on March 6, 2017, at a water facility five miles from her home. (R. at 6). After that, Marcos suffered constant sexual harassment by Life Inc. guards at various Life Inc. water facilities throughout Isda. (R. at 7-8). Her fear escalated after she was sexually assaulted by a Life Inc. guard on April 5, 2017. (R. at 8). After Bernardo's confrontation with Life Inc. guards where he was shot in the arm, Marcos and Bernardo fled to Mayaman. (R. at 8). During her time on Mayaman, Marcos was unable to secure housing or work and was forced to resort to begging for money on the streets. (R. at 9). One evening, while Marcos panhandled for money, she overheard a Life Inc. guard say, "I cornered her by the well, and hit her until she submitted. Getting sex here is as easy as it is on Isda." (R. at 9). Subsequently, on August 6, 2017, Marcos fled to the USA and applied for asylum. (R. at 9-10).

² While we are limited to argue future persecution on appeal, we do not concede that Marcos has not suffered past persecution.

At Marcos' asylum hearing the IJ denied Marcos' application for asylum, holding that Marcos failed to "prove that, under all the circumstances, it would not be reasonable for her to relocate." (R. at 15). The IJ's reasoning conflates the standards of the applicable regulation³ and is devoid of any meaningful analysis on the internal relocation standard. First, the IJ erroneously characterize Life Inc. as a non-governmental actor without first defining the term "government-sponsored." Second, the IJ's finding that Marcos could reasonably relocate to avoid persecution is against the substantial evidence of the record. On appeal, the BIA summarily upheld the IJ's decision on internal relocation without further explanation or reasoning. (R. at 10). The BIA's failure to supplement the IJ's finding in the first instance is a reversible error. Accordingly, this Court should reverse the Thirteenth Circuit and remand to the BIA for further proceedings.

When the BIA employs a streamlined affirmance without opinion, courts review the IJ's decision as a final agency action. *Vasquez v. Holder*, 635 F.3d 563, 564 (1st Cir. 2011). The IJ's factual findings are reviewed under the substantial evidence standard and will only be reversed if, "any reasonable adjudicator would be compelled to conclude the contrary." *Garcia-Cruz v. Sessions*, 858 F.3d 1, 5-6 (1st Cir. 2017). Questions of law are reviewed *de novo*. *Id.* The ultimate question for this Court to consider is whether the BIA's interpretation of "government-sponsored" is a permissible construction of 8 C.F.R. § 208.13(b)(3)(i)-(ii). As such, the Court reviews this question of law *de novo*.

³ The IJ's findings conflates the "under all circumstances" standard of 8 C.F.R. § 208.13(b)(3)(ii) with (b)(3)(i), which only requires applicant to show relocation "would not be reasonable." If this Court finds that 8 C.F.R. § 208.13(b)(3)(i) applies, Marcos must only prove that relocation is unreasonable. Marcos's testimony, which was found to be credible (R. at 16), is sufficient to meet her burden of proof. 8 C.F.R. § 208.13(a). Conversely if this Court applies 8 C.F.R. § 208.13(b)(3)(ii), the "under all circumstances" standard is attributable to DHS not the applicant.

The internal relocation standard provides that an applicant “does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant’s country . . . if under all the circumstances it would be reasonable to expect the applicant to do so.” 8 C.F.R. § 208.13(b)(2)(ii). The issue in the case at bar is the burden of proof component of the regulation, which provides in relevant part that:

- (i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.
- (ii) In cases in which the persecutor is a government or is government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate

8 C.F.R. § 208.13(b)(3)(i)-(ii). The statute does not provide a definition of “government-sponsored.” However, the burden of proof is contingent on the adjudicator’s characterization of the persecutor, meaning that the adjudicator must first determine whether the persecution is committed by a government or is “government-sponsored.”

A. “Government-Sponsored” is an Ambiguous Term Not Defined by Statute and Should Be Remanded to the BIA for Further Interpretation.

It is a well-established principle that reviewing courts must defer to an agency’s construction of a statute which it administers. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845. To determine the level of deference accorded, the first question is whether Congress has spoken to the precise question at issue. *Chevron*, 467 U.S. at 842-843. Here, Congress has not addressed the precise question at issue because it delegated the power of interpreting the INA to the Attorney General (AG). 8 U.S.C.S. § 1003(a)(1). The AG exercised its rulemaking authority and delegated its power to adjudicate cases to the BIA. 8 C.F.R.

§ 1003.1(d)(1). The regulation states the BIA “shall provide clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.” *Id.* This delegation of power shows Congress’ intent to grant unfettered power to the agency, not courts, in interpreting the ambiguous terms of the INA.

Next, this Court considers whether the BIA’s interpretation of “government-sponsored” is based on a permissible construction of the regulation. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999) (citing *Chevron*, 467 U.S. at 842). Here, the IJ and the BIA refrained from interpreting “government-sponsored” in the first instance. This Court has repeatedly held that when the BIA has not spoken on a matter within its jurisdiction, the ordinary rule is to remand to the BIA for additional investigation or explanation. *Neguseie v. Holder*, 555 U.S. 511, 523 (2009); see also *Gonzales v. Thomas*, 547 U.S. 183 (2006) (*per curiam*) (holding the Ninth Circuit’s failure to remand to the BIA for interpretation of “social group” was a legally erroneous); *INS v. Ventura*, 537 U.S. 12, 18 (2002) (reversing the Ninth Circuit and remanding to the BIA for consideration of changed circumstances in petitioner’s asylum claim).

1. *This Court’s Ordinary Rule is to Remand to the BIA When the BIA has not Interpreted an Ambiguous Term in the First Instance.*

In *Neguseie v. Holder*, petitioner sought asylum after he was forced into being a prison guard by the Eritrean government. 555 U.S. at 511. The IJ found petitioner was barred from asylum because he “assisted” in the persecution of prisoners during his time as a prison guard. *Id.* Petitioner appealed to the BIA claiming he did not voluntarily assist in the persecution, and therefore was not subject to the persecutor bar. *Id.* The BIA upheld the IJ’s decision, citing to *Fedorenko v. United States*, holding “motivation and intent are irrelevant to the issue of whether he ‘assisted’ in persecution.” 449 U.S. 490, 542 (1981). *Id.* On appeal, this Court found the term

“assisted” was ambiguous and *Fedorenko* was not controlling on the BIA because it addressed a different statute enacted for a different purpose. *Id.* at 512. The Court held that “[w]hen the BIA has not spoken on a matter that statutes place primarily in agency hands, the ordinary rule is to remand to give the BIA the opportunity to address the matter in the first instance in light of its own experience.” *Id.* at 517. The court stated that “ambiguities in statutes within an agency’s jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. *Id.* at 523. Also, the court reasoned that “filling these gaps ... involves difficult policy choices that agencies are better equipped to make than courts.” *Id.* (quoting *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)).

Like in *Neguseie*, here, neither the INA, the IJ, nor the BIA provide a clear definition of “government-sponsored.” (R. at 13). Because the BIA provided no definition of “government-sponsored,” this Court should follow its ordinary remand rule and remand to the BIA outright. Moreover, interpreting “government-sponsored” involves the exact type of difficult policy decisions this Court warned against *Neguseie*. Additionally, it goes directly against the DOJ’s directive that “[a]s with other aspects of the refugee definition, we expect that the Board and the federal courts, as they interpret this regulation in individual cases, will provide guidance on the question of when internal relocation is reasonable.” *Executive Office for Immigration Review; New Rules Regarding Procedures for Asylum and Withholding of Removal*, 63 Fed. Reg. 112 at 31948 (proposed June 11, 1998) (to be codified at 8 C.F.R. § 208). Therefore, this case should be remanded to the BIA to provide “intelligent review” and guidance for courts to follow. *Tillery v. Lynch*, 821 F.3d 182, 185 (1st Cir. 2016).

2. *The Thirteenth Circuit Usurped the BIA's Role to Provide Guidance to Reviewing Courts.*

The Thirteenth Circuit bypassed the BIA's role to define its chosen path as to which party has the burden of proof. In *Patel v. AG of the United States*, the petitioner sought asylum after being persecuted in India by the Rastriya Sevak Sangh ("RSS"). 259 F.App'x 511, 512 (3d Cir. 2007). The petitioner argued the RSS was "sufficiently intertwined" with the government to constitute government-sponsored persecution under C.F.R. § 208.13(b)(3)(i)-(ii). Like the case at bar, the BIA in *Patel* proposed no definition of "government-sponsored" before denying petitioners. *Id.* at 514. The BIA denied the petition holding that the petitioner could relocate within India where the RSS was not aware of him. *Id.* On appeal, the Third Circuit granted the petitioner's motion to reopen and remanded the case to the BIA to explicitly indicate whether the persecution was "government-sponsored." *Id.* at 513.

Here, the Thirteenth Circuit's analysis of "government-sponsored" is summarized in one sentence: "we conclude Life Inc. is a non-governmental actor and is more comparable to a collection of private actors, such as gang of criminals, as opposed to the government itself" (R. at 16). The court avoided its self-appointed authority to define "government-sponsored" and instead it concluded, without reasoning, that Life Inc. is a non-government actor. Every adjudicator has failed to give a clear definition to the term "government-sponsored," which deprives Marcos of a fair hearing on her asylum petition. Accordingly, this Court should reverse the Thirteenth Circuit and remand to the BIA to determine which party has the burden of proving the internal relocation standard. *Afriyie v. Holder*, 613 F.3d 924, 935 (9th Cir. 2010) (remanding to the BIA where neither the BIA nor the IJ stated who had the burden of proving internal relocation).

Lastly, the Thirteenth Circuit failed to consider the important policy implications of granting immunity to corporations like Life Inc. when they commit human rights violations.

Because concession contracts, such as the ones at issue here, are used all over the world⁴, it is imperative that the BIA provides uniform guidance to reviewing courts. Corporations, such as Life Inc., must be held accountable when they act with impunity. *See e.g. Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013); David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. Int'l L. 931, 1024 (2004). The BIA cannot be absolved from fulfilling its statutory obligation to interpret and guide reviewing courts on “sensitive political functions that implicate questions of foreign relations.” *Negusie* at 517. Therefore, this Court should reverse the Thirteenth Circuit and remand to the BIA.

B. The IJ’s Findings that Internal Relocation is Reasonable is Against the Substantial Evidence in the Record.

When the reasonable relocation rule was first proposed by the Executive Office for Immigration Review (“EOIR”) and the Immigration and Naturalization Services (“Service”), the two agencies stated that, “to meet the well-founded fear standard, the applicant must establish a reasonable possibility of harm *throughout* the applicant’s country of nationality.” 63 Fed. Reg. 112 at 31946. To determine the reasonableness of internal relocation courts employ a two-step process: (1) whether safe relocation is possible, and if so, (2) whether it would be reasonable for the applicant to safely relocate. *Oryakhil v. Mukasey*, 528 F.3d 993, 998 (7th Cir. 2008) (discussing 8 C.F.R. § 208.13(b)(2)); *see also Mohamed v. Ashcroft*, 396 F.3d 999, 106 (8th Cir. 2005) (holding “[r]elocation must not only be possible, it must also be reasonable); *Gambashidze v. Ashcroft*, 381 F.3d 187, 192 (3d Cir. 2004) (finding relocation must be successful and reasonable).

⁴ *See* World Bank Group, *Water and Sanitation Concession Agreement-Example I* (Dec. 11, 2016), <https://ppp.worldbank.org/public-private-partnership/library/water-and-sanitation-concession-agreement-example-1>.

When considering the reasonableness of internal relocation, adjudicators may consider, but are not limited, to the following factors: “whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties.” 8 C.F.R. § 208.13(b)(3).

1. *Circuit Courts Have Remanded Cases Where the BIA’s Findings Are Not Supported by the Substantial Evidence of the Record.*

Circuit Courts have previously remanded cases where the BIA’s finding of internal relocation is not supported by the substantial evidence of the record. *Khattak v. Holder*, 704 F.3d 197, 203 (1st Cir. 2013) (vacating and remanding denial of asylum claim where “[n]either the IJ, nor the BIA, explained how it would be possible for [the applicant] to safely relocate.”) (quoting *Oryakhil v. Mukasey*, 528 F.3d at 998 (7th Cir. 2008); *Afriyie v. Holder*, 613 F.3d 924, 937-938 (9th Cir. 2010) (granting petitioners motion to reopen and remanding to the BIA to consider how the government could protect petitioner when the police station had only one gun to protect petitioner against his persecutor); *Gambashidze v. Ashcroft*, 381 F.3d 187, 194 (3rd Cir. 2004) (granting petition for review where the BIA’s determination of internal relocation was not supported by the substantial evidence of the record); *but see Khan v. Holder*, 727 F.3d 1 (1st Cir. 2013) (denying petition for review where the BIA’s reasoning was supported by the record). To reverse the BIA on the issue of internal relocation, rather than remanding, “the evidence must compel the court to conclude that it would be unreasonable for the alien to relocate within the country of removal.” *Garcia-Cruz v. Sessions*, 858 F.3d 1, 9 (1st Cir. 2017) (citing *INS v. Elias-Zacarias*, 502 U.S. 478 (1992)).

In *Garcia-Cruz v. Sessions*, the petitioner was an active member of the Guatemalan Patriot Party (“*Patriota*”). 858 F.3d 1, 3-5 (1st Cir. 2017). During the mayoral elections, the opposing

party members began to carry weapons and threatened to kill *Patriota* members. *Id.* The petitioner began receiving threatening phone calls and eventually relocated his family to a village 10 hours away. *Id.* The petitioner suffered no harm in the new village, but he knew of other *Patriota* members that had been kidnapped and beaten, and thus fled to the U.S. *Id.* During his asylum hearing, the IJ held the petitioner did not have a well-founded fear of persecution because he was able to relocate undisturbed for four months. *Id.* at 5. The BIA summarily affirmed the IJ's decision. *Id.* On appeal the First Circuit vacated and remanded to the BIA holding that "while the IJ and BIA do not necessarily have to address each of [8 C.F.R. § 1208.13(b)(3)'s] reasonableness factors explicitly ... the agency must explain why the factors that cut against the asylum applicant outweigh the factors in [her] favor." *Id.* at 8-9 (citation omitted).

2. *The Substantial Evidence of the Record Compels the Conclusion that it is Unreasonable for Marcos to Relocate Within Basag to Avoid Persecution.*

Here, the IJ's analysis ended after characterizing Life Inc. as a non-governmental entity. The IJ neglected to consider the substantial evidence in the record that corroborates Marcos's credible testimony. (R. at 3). First, there is physically no other place Marcos could possibly go to avoid Life Inc. guards. Pursuant to the Contract, Life Inc. is the sole provider of water for the two islands. (R. at 4). Because Life Inc. is the only provider of water, Life Inc. members canvass the islands with impunity. Second, due to the cultural differences between the Hilagan and Timog people, Marcos is more of a target on Mayaman because she is an impoverished Isda-Timog woman⁵. Third, it is unreasonable to expect Marcos to relocate to Mayaman where she was unable to secure employment or housing. (R. at 9).

⁵ See UN Report submitted by the DHS stating "Isda-Timog women tend to appear poorer than local Mayaman-Hilagan or Mayaman-Timog women due to cultural and economic differences. (R. at 6).

Like in *Garcia-Cruz*, here, the IJ failed to consider the disabling economic limitations on Marcos during her time on Mayaman. (R. at 9). Marcos was unable to find secure permanent employment on Mayaman and had to resort to panhandling for money because of discrimination. (R. at 9). The IJ made no mention of the UN report submitted by Marcos that corroborates her testimony of nonconsensual sexual interactions with Life Inc. (R. at 4). Lastly, the IJ failed to consider that the Contact between Basag and Life Inc. ends on January 1, 2043. (R. at 4). Since there has been no substantial change since Marcos departure, if Marcos were returned to Basag, she would be subjected to country-wide persecution for the next twenty-five years. (R. at 9).

The substantial evidence, along with Marcos's credible testimony compels the conclusion that it would not be possible or reasonable for Marcos to relocate within Basag. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). Accordingly, this Court should vacate the BIA's order and find that internal relocation is not reasonable.

C. Circuit Court and BIA Decisions Have Repeatedly Found Private Actor Persecution Can Warrant Asylum.

Additionally, the BIA and Thirteenth Circuit decisions discards a fundamental principle of asylum law that private actor persecution can warrant asylum. Congress included a robust definition of "refugee" which is defined as "any person ... who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42). The statute provides no requirement that the persecution be government sponsored.

In cases where the persecutor is a non-government actor, the applicant must show the harm or suffering was inflicted by persons or an organization that his or her home government is unwilling or

unable to control, such that the government either “condoned the behavior or demonstrated complete helplessness to protect the victim.

USCIS Policy Memorandum: Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B*. (July 11, 2018).

Courts have defined private actors in many forms. *See e.g., Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073 (9th Cir. 2017) (finding victim of “beatings and rapes” by private actor constituted persecution); *Cruz v. Sessions*, 853 F.3d 122, 127-131 (4th Cir. 2017) (affirming persecution from organized crime members constituted persecution); *Alonzo-Rivera v. United States AG*, 649 F.App’x 983, 985-992 (11th Cir. 2016) (holding rapes and beatings by private actor could be persecution if the government was unable or unwilling to protect victim); *Garcia v. Atty’y Gen. of U.S.*, 664 F.3d 496, 503-04 (3d Cir. 2011) (stating threats from gang members could form a valid fear of persecution); *Hor v. Gonzales*, 421 F.3d 497, 501-02 (7th Cir. 2005) (holding threat from non-governmental militia group could constitute persecution); *See also Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (finding female genital mutilation performed by tribal members constituted persecution); *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000) (holding frequent beatings by petitioners father constituted past persecution). In the present case, Life Inc. actions of terrorizing Timog women is the type of private actor the statute was intended to protect against.

In the present case, the IJ, BIA, and Thirteenth Circuit failed to consider whether the Basag government was unable or unwilling to protect Marcos from Life Inc. guards. Here, the record supports the conclusion that the government and Life Inc. knew of the alleged rapes and did very little to investigate or stop the guards. First, in response to the rape rumors, Life Inc. issued a public statement—through a state-controlled radio and television broadcast—stating that guards underwent “comprehensive sexual harassment training and informing the public of a new policy that any Life Inc. guard suspected of sexual assault would face immediate termination.” (R. at 5).

Nonetheless, both parties agree that “there are no facts showing Basag police or government took any action against the guard or Life Inc. for the alleged rape.” (R. at 4). Second, the Basag government deployed military aid to Life Inc. guards but did nothing to protect its citizens against Life Inc.’s egregious acts. Third, the government could have terminated the Contract to terminate the Contract to expel Life Inc., however, the record is silent as to any action from the government condoning Life Inc. guards. Although Marcos did not report the sexual assault, courts have rejected the notion that reporting is necessary for an asylum claim when it would be futile. *Bringas-Rodriguez v. Sessions*, 850 F.3d at 105.

The Thirteenth Circuit erred by adopting the IJ’s flawed reasoning which fails to consider whether Life Inc. is a non-governmental actor that the government is unwilling or unable to control. Accordingly, this Court should reverse the Thirteenth Circuit and remand to the BIA for further proceedings.

CONCLUSION

There substantial evidence of the record supports the IJ’s finding that Marcos membership in a disfavored social group coupled with her individualized fear of persecution establishes a well-founded fear of persecution. Accordingly, this Court should affirm the IJ’s findings.

Second, the Thirteenth Circuit erred in placing the burden of proving internal relocation because the BIA did not define “government-sponsored” in the first instance. Therefore, this Court should reverse the Thirteenth Circuit and remand to the BIA to consider: (1) whether Life Inc. is a government sponsored actor within the meaning of the statute; and (2) if Life Inc. is a non-governmental actor, whether the government is able or willing to control them.