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COUNSEL

Gary Finn, Indio, California, for the petitioner.

James A. Hunolt, Heather R. Phillips, United States Department of Justice, Office of Immigration Litigation, Washington, D.C., for the respondent.

OPINION

PAEZ, Circuit Judge:

Petitioner Dagoberto Hermes Salazar-Paucar petitions for review of a Board of Immigration Appeals ("BIA") decision denying his application for asylum and withholding of deportation. He asserts that the BIA erred in concluding that he did

not suffer past persecution by the Sendero Luminoso (also known as the Shining Path) guerrillas in Peru when he received multiple death threats, his parents were beaten, and the other members of the town government in his position were murdered by the guerrillas. He also contends that the BIA erred in concluding that he no longer had a well-founded fear of persecution; the BIA relied on the fact that Petitioner lived "unmolested" away from his hometown for eighteen

In April 1990, the Shining Path guerrillas murdered the mayor of San Pedro de Cajas, from whom Petitioner took

month after they fled San Pedro de Cajas to other regions of Peru.

Two weeks later, Petitioner fled Peru out of fear that the Shining Path would find and kill him.¹ Petitioner entered the United States without inspection at Brownsville, Texas, in October 1992. Three days after his arrival in the United States, the INS issued an Order to Show Cause charging Petitioner as deportable for entering without inspection. Petitioner then applied for asylum and withholding of deportation. After several hearings in which Petitioner and one other witness testified, the Immigration Judge ("IJ") issued an oral decision denying Petitioner's application.

Petitioner then appealed to the BIA, which did not issue a

30, 1996). Cruz-Navarro v. INS, 232 F.3d 1024, 1026 (9th Cir. 2000).²

III. STANDARD OF REVIEW

When the BIA conducts a de novo review of the IJ's decision, as here, we review the BIA's decision rather than the IJ's, except to the extent that the BIA expressly adopts the IJ's ruling. Cordon-Garcia v. INS, 204 F.3d 985, 990 (9th Cir. 2000) (citing Ghaly v. INS, 58 F.3d 1425, 1430 (9th Cir. 1995)). We must uphold the BIA's decision if it is "supported by reasonable, substantial, and probative evidence on the record considered as a whole." INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992) (quoting 8 U.S.C. § 1105a(a)(4)). However, "[the BIA's] decision must be reversed if a reasonable factfinder would have to conclude that the requisite persecution or fear has been shown." Tagaga v. INS, 228 F.3d 1030, 1034 (9th Cir. 2000).

IV. DISCUSSION

A. Eligibility for Asylum

An alien is eligible for asylum if he establishes that he

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painted on the wall of his house in Lima. The BIA dismissed this incident because "it [wa]s not clear from the record that the slogans that were painted on the house in Lima were actually directed at [Petitioner] or someone else. " Although it is



a decline in, but persistence of, arrests and killings, was insufficient to rebut the presumption).

In determining that the INS rebutted the presumption, the BIA also relied on the passage of time -- seven years since Petitioner left Peru, six of which were due to the BIA's delay in ruling on Petitioner's claim. The BIA reasoned that the Shining Path could no longer be interested in Petitioner after this length of time. This conclusion, however, is nothing but speculation and is wholly unsupported by the record. Neither the INS nor the BIA cited any authority for the proposition that the passage of time alone can rebut the presumption of future persecution. It would be fundamentally unfair to permit the BIA to rebut the presumption of persecution by relying on its own administrative delay in processing the claims of petitioners.

be persecuted there, and thus it failed to rebut the presumption. Duarte de Guinac