No. 05-4488

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IBRAHIM PARLAK,
Agency No. A71-803-930
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL
Respondent,

OPPOSITION TO PETITIONER'S MOTION FOR STAY OF REMOVAL

Petitioner is a native of Turkey who was found deportable by an immigration judge and the Board of Immigration Appeals for having engaged in terrorist activity, committed fraud at the time of his entry, and been inadmissible at the time of entry. On November 22, 2005, the Board issued a decision rejecting Petitioner's argument that he should not be held accountable for his past terrorist activities because he has allegedly been a model person since arriving in the United States, except for the misrepresentations he made to secure his lawful permanent residence status. He now seeks a stay of removal based on various constitutional arguments, all of which the Supreme Court has already rejected, and an allegedly erroneous factual finding by the immigration judge, which the Board

expressly did not rely upon in its decision. Because he failed to satisfy any of the standards for a stay, the Court should deny the motion.[1]

FACTS

The facts of this case are set forth in the Board's decision, and are in large part not disputed by Petitioner. Petitioner is a native of Turkey who is of Kurdish ethnicity. BIA Dec. at 3. In the late 1980's, he attended a training camp in Lebanon run by the PKK terrorist organization.[2] At the camp he was trained in using various weapons and in propaganda. Id. After eight months in the camp, he and several formed a small group to reenter Turkey surreptitiously. Id. at 3-4. Before leaving, Petitioner met with Abdullah Ocalan, the PKK leader. Id. In fact, he had met with Ocalan twice before that. Id. With the small group, he then left for Turkey through the Syrian border. Id.

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[1] Aliens are not entitled to a stay of removal, but rather must demonstrate, "(1) a likelihood of success on the merits; (2) that irreparable harm would occur if a stay is not granted; (3) that the potential harm to the movant outweighs the harm to the opposing party if a stay is not granted; and (4) that the granting of the stay would serve the public interest." Bejjani v. INS, 271 F.3d 670, 688 (6th Cir. 2001).

[2] The PKK was designated as a Foreign Terrorist Organization by the United States Department of State in 1997 pursuant to INA section 219, 8 U.S.C. § 1189. See 62 Fed. Reg. 52650 (Oct. 8, 1997); 64 Fed. Reg. 55112 (Oct. 8, 1999) (redesignation); 66 Fed. Reg. 51088 (Oct. 5, 2001) (redesignation); 68 Fed. Reg. 56860 (Oct. 2, 1999) (redesignation).

Petitioner was the leader of this group and used the code name "Ahanran." Id. He was armed with a pistol, a AK-47 automatic weapon, and a grenade. Id. He testified that these weapons were for self defense. Id. At the border, they cut through a fence and crossed, but at some point thereafter they were detected by Turkish border guards. Id. A gun battle ensued. Two border guards were killed. Id. He claims that he accidentally dropped his grenade. Id.

Several weeks after this attack, on or around June 1, 1988, Petitioner returned to Turkey. Id. He traveled to various villages making connections, burying weapons, and constructing underground shelters. Id. In October 1988, he was captured by Turkish soldiers. He at first grabbed his gun, but then instead began to burn documents. Id. He was arrested and charged with advocating separation from Turkey. Id. He was convicted and served eighteen months. Id. He was released under a plea agreement wherein he agreed to show Turkish officials where the weapons (including rockets) were buried. Id. at 5. He was released and spent the next year in Turkey. Id.

He entered the United States in 1991 and applied for asylum. Id. His application stated some of the details of the border attack, but not others, including the fact that two guards were killed. Id. 5-6. He submitted a newspaper article recounting the attack along with his asylum application, but provided an

incomplete translation of the article, omitting material facts. Id.

He later applied for lawful permanent residence and naturalization. In these applications he did not even list his 1988 arrest. Id.

The immigration judge relied on Petitioner's testimony and other facts of record, including the records of conviction from Turkey, in sustaining all of the charges against him. Id. at 7. On appeal Petitioner claimed that those records were tainted because he had been tortured in Turkey. Id. at 5. The Board did not rely on these documents, but found that "the record contains enough evidence, even without resort to the Turkish conviction documents, to affirm most of the Immigration Judge's findings as to removability and, consequently, ineligibility for certain forms of relief." Id. The Board affirmed the immigration judge's decision on all counts, except that it disagreed with the immigration judge's determination that the Turkish conviction constituted an aggravated.

ARGUMENT

In trying to demonstrate the likelihood of success on the merits, Petitioner relies on three constitutional arguments which have been rejected by the Supreme Court. First, he argues that an alien lawfully admitted cannot later become

deportable based on the same facts. The Supreme Court rejected this argument in Carlson v. Landon, 342 U.S. 524 1952). The Court held:

> Since [i]t is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful, the fact that petitioners, and respondent Zydok, were made deportable after entry is immaterial. They are deported for what they are now, not for what they were. Otherwise, when an alien once legally became a denizen of this country he could not be deported for any reason of which he had not been forewarned at the time of entry. Mankind is not vouchsafed sufficient foresight to justify requiring a country to permit its continuous occupation in peace or war by legally admitted aliens, even though they never violate the laws in effect at their entry.

Id. at 537-38 (internal quotations omitted). Petitioner acknowledges that "this Court has allowed extensive retroactivity to apply to aggravated felons and excludable/inadissible aliens." Stay Motion at 9. He claims that the rationale for doing so, expelling criminals, is a legitimate goal, but that apparently, even in a post-September 11 world, expelling terrorists is not. In any event, it is not for this Court to determine if Congress was justified in enacting legislation requiring the expulsion of terrorists for acts committed prior to enactment. See Reno v. Flores, 507 U.S. 292, 305 (1993) ("the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government."); Kleindienst v. Mandel, 408 U.S. 753, 766-67 (1972) ("Policies pertaining to the entry of aliens and their right to

remain here are peculiarly concerned with the political conduct of government").

Second, he claims that the INA's terrorism provision, section 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B), violates the "non-delegation doctrine," because it does not provide the Attorney General with "intelligible principles to determine, for example, why a Turkish Kurd should be deported but an Iraqi Kurd should not, when both have engaged in similar pre-entry conduct." Stay Motion at 10-11. The argument fails with its premise. Both Iraqi and Turkish Kurds who engaged in terrorist activity as defined in the statute are deportable. This is an intelligible principle. In any event, the Supreme Court has rejected nondelegation arguments in the immigration context. In Carlson it held that "Congress can only legislate so far as is reasonable and practicable, and must leave to executive officers the authority to accomplish its purpose. Congress need not make specific standards for each subsidiary executive action in carrying out a policy." Carlson v. Landon, 342 U.S. at 536. Here Congress has created a framework for the Attorney General to apply in determining whether an alien should be deported -- if he engaged in terrorist activity, either before or after entry into the United States, he should be.

Third, Petitioner argues that the Ex Post Facto Clause was violated, even though he acknowledges that the Supreme Court has consistently held that this clause does not apply to deportation proceedings. Stay Motion at 11. Indeed,

permitting the expulsion of aliens based on an alien's prior acts is a sovereign prerogative. See Carlson v. Landon, 342 U.S. at 531 ("So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders"). Thus, this Court has recognized that "[t]he Supreme Court has repeatedly upheld the constitutionality of deportation proceedings that apply new law to past criminal conduct." Hamama v. INS, 78 F.3d 233, 235 (6th Cir. 1996), citing Lehmann v. Carson, 353 U.S. 685, 690 (1957) (which allowed deportation based on convictions that were not grounds for deportation when they occurred); Id. ("It seems to us indisputable, therefore, that Congress was legislating retrospectively, as it may do, to cover offenses of the kind here involved."); and Marcello v. Bonds, 349 U.S. 302, 314 (1955) (allowing deportation based on conviction that was not grounds for deportation when it occurred); see also Galvan v. Press, 347 U.S. 522, 531 (1954) ("whatever might have been said at an earlier date for applying the ex post facto clause, it has been the unbroken rule of this Court that it has no application to deportation"); Harisiades v. Shaughnessy, 342 U.S. 580, 593-96 (1952) (Congress may establish grounds for deportability that apply retroactively without violating the Ex Post Facto Clause).

Petitioner also argues that the Board's affirmance contained reversible error, because the immigration judge relied on the Turkish conviction documents. Stay Motion at 12. As noted, however, the Board did not rely on these documents, but instead found that the record independently supported the charges.

He further argues that "the BIA erroneously disregarded the principle that an alien granted relief with INS knowledge of pre-entry conduct cannot later be deported for the same conduct." Stay Motion at 13. As discussed, Congress has the authority to change the law so that conduct which previously had not been a ground of deportability can later become a ground of deportability. In this case, the law changed, Petitioner's activities fall within the definition of "engaged in terrorist activity," and the Congressional mandate is that he be deported. As a reflection of the public interest, that mandate also demonstrates that it is not in the public interest for the Court to stay execution of this removal order.

He argues that the Board erred in finding that the ERNK, an organization to which petitioner once belonged, was a source of funding for the PKK. Stay Motion at 14. The Board's finding was based on Petitioner's admission that he was aware that some of the money raised by ERNK went to the PKK. Board Dec. at 3. It was also supported by two expert witnesses. Id. at 8. These facts, ignored in Petitioner's Stay Motion, clearly support the Board's finding.

Petitioner argues that it was acceptable for him to omit mention of his 1988 arrest on his applications for lawful permanent residence and naturalization, because he had disclosed it, in part, on his asylum application. The forms, of course, did not excuse disclosure if the information had been listed on other applications for benefits. Petitioner also failed to provide authority for the proposition that disclosing a fact to "the government" for one purpose imputes knowledge of that fact to the government for all purposes. Efficient administration of the immigration laws clearly requires that the burden be placed on the alien to complete the required forms in a complete and honest manner, and not on the government to search its records determine if the required information was set forth in an application for different benefits. Clearly disclosure of the arrest could have lead to questions material to whether he was eligible for naturalization or merited adjustment of status as a matter of discretion. See Price v. INS, 962 F.2d 836, 840 (9th Cir. 1992), cert. denied, 10 U.S. 1040 (1994) ("The government is entitled to know of any facts that may bear on an applicant's statutory eligibility for citizenship, so it may pursue leads and make further investigation if doubts are raised.") (citing Berenyi v. INS, 385 U.S. 630, 638 (1967)).

In addition to demonstrating no likelihood of success on the merits,

Petitioner failed to demonstrate that deportation would result in irreparable injury. As he conceded, he may continue to prosecute this petition for review after his removal. Stay Motion at 15-16. In addition, he already completed his prison sentence in Turkey, and nothing in the record suggests that Turkey has sought to extradite him or has any further interest in him. In any event, as the Board observed, he lived for a year in Turkey after his release from prison, Board Dec. at 5, and his motion does not reflect that he suffered any particular injury during that period.

Accordingly, because he has failed to satisfy the standard for receiving a stay of the Board's removal order, the motion should be denied.

Respectfully submitted,

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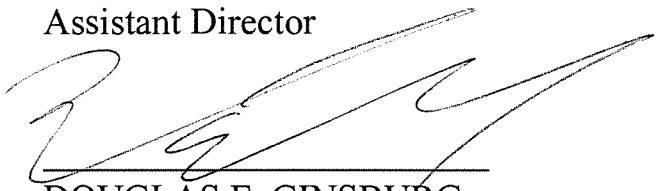

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ATTACHMENT

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

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A71 803 930 - Detroit

Date: NOV 22 2005

In re: IBRAHIM PARLAK

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: John J. Marhoefer, Esquire

ON BEHALF OF DHS: Mark Jebson
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] -
Inadmissible at time of entry or adjustment of status under section 212(a)(6)(C), I&N Act [8 U.S.C. § 1182(a)(6)(C)] -
Fraud or willful misrepresentation of a material fact

Sec. 237(a)(1)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] -
Inadmissible at time of entry or adjustment of status under section 209(b) but who is no longer a refugee under section 101(a)(42)(A) of the Act

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony (as defined in section 101(a)(43)(A))

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony (as defined in section 101(a)(43)(F))

Sec. 237(a)(4)(B), I&N Act [8 U.S.C. § 1227(a)(4)(B)] -
Terrorist activity

APPLICATION: Convention Against Torture

The respondent appeals from an Immigration Judge's December 29, 2004, decision. The Immigration Judge sustained various charges of inadmissibility against the respondent, and denied his application for protection under the Convention Against Torture. The respondent appealed. The appeal will be dismissed.

I. Overview

The respondent entered the United States on April 13, 1991, on a C-1 visa, as a nonimmigrant in transit (I.J. at 2). In 1992, he applied for asylum on the basis of his persecution at the hands of Turkish officials due to his membership and "leading" role in the National Liberation Front of Kurdistan (ERNK), which he described as having "close ties to" the Kurdistan Workers Party (PKK), a group that was designated as a terrorist organization by the United States government in 1997. *See* Exh. 2, Tab A, Respondent's Form I-589, Application for Asylum; Exh. 2, Tab G.[1] His asylum application was granted in July 1992. In 1994, the respondent's status was adjusted to that of a lawful permanent resident. *See* Exh. 2, Tab C. In 1998, he filed an application for naturalization and was interviewed thereon in July 1999. *See* DHS Exh. KK. Apparently due to an outstanding 1995 Turkish arrest warrant against the respondent and the 1997 designation of the PKK as a terrorist organization, action on the respondent's naturalization application was delayed. *See* DHS Brief at 4. In September 2001, the respondent filed a complaint for Declaratory Judgment of Naturalization in U.S. District Court for the Western District of Michigan. His application for naturalization was denied on November 28, 2001. *See* Exh. 3 at 54-55. A Notice to Appear was then served on the respondent in April 2002, charging him with being inadmissible at the time of his adjustment of status under section 237(a)(1)(A) of the Immigration and Nationality Act. Exh. 1.

The bases for the charges in the Notice to Appear were the DHS's allegations that (1) the respondent lied on his adjustment of status and naturalization applications about the fact that he had been arrested in Turkey and (2) the respondent did not remain a refugee under the Act due to prior activities in Turkey that rendered him a persecutor of others. *See* DHS Brief at 4. By extension, those core allegations form the basis for the charges that the respondent has misrepresented a material fact, is a persecutor of others, is an alien convicted of an aggravated felony (due to activities in Turkey), and is an alien who has engaged in terrorist activity. Before the Immigration Judge, the respondent filed an application for withholding of removal or deferral of removal under the Convention Against Torture, which was denied[2] (Tr. at 167; Exh. 6). On appeal, the respondent disputes the allegation that his failure to disclose his 1988 Turkey arrest was a "material" misrepresentation, noting that the fact of this arrest formed the basis for his 1992 asylum application. *See* Respondent's Brief at 72-74. The respondent also argues that his role in the ERNK was limited to supporting legitimate, nonviolent means of advocating for Kurdish rights, and that, therefore, he is not an alien who was a persecutor of others or who has engaged in terrorist activity. *Id.* at 52, 56, 82-85. The respondent also disputes the allegation that his activities in Turkey, culminating in his separatism

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[1] The Department of Homeland Security (the "DHS," formerly, the Immigration and Naturalization Service (INS)) assumed the duties of the former INS in 2003. Exhibits submitted by the DHS will hereafter be designated as "DHS Exh. XX" whereas court exhibits will be referred to as "Exh. XX." Exhibits submitted by the respondent will be referenced as "Resp. Exh. XX."

[2] Aliens who are found to have persecuted others or assisted in such persecution or those who are convicted of a particularly serious crime are ineligible for withholding of removal under the Convention Against Torture. *See* sections 241(b)(3)(B)(i), (ii) of the Act. Such aliens are nevertheless eligible for deferral of removal under the Convention Against Torture.

conviction, constitute an aggravated felony under the Act and, finally, argues that the evidence supports his application for relief under the Convention Against Torture.

Because we find no clear error in the Immigration Judge's key factual determinations regarding the nature of the respondent's activities in Turkey before arriving in the United States, we will affirm the Immigration Judge's decision finding the respondent to be a persecutor of others and an alien who is removable for terrorist activity. We will also affirm the Immigration Judge's decision to sustain the charge that the respondent made material misrepresentations in his applications to the former INS. Finally, we will also affirm the Immigration Judge's determination that the record as a whole does not support a grant of relief under the Convention Against Torture.

II. Facts[3]

The respondent is a male native of Turkey who is of Kurdish ethnicity. Prior to entering the United States, the respondent was active in the organization ERNK, which he described as a "Kurdish liberation front" (Tr. at 72). The respondent indicated he was an "organizer" of the ERNK (Tr. at 72). The respondent stated that his participation in the group was triggered by repression of Kurdish culture and beliefs under the Turks (Tr. at 64). The respondent ultimately left Turkey to study in Europe and to speak on the topic of Kurdish liberation from 1980 to 1987 (Tr. at 72). While in Europe, the respondent was active in the ERNK, organizing celebrations of Kurdish culture and other meetings, handing out literature, conducting seminars, and visiting families in their homes (Tr. at 74). During these celebrations or meetings, both the ERNK and PKK flag would be displayed (Tr. at 83). The respondent was active in organizing events aimed at raising funds for the ERNK (Tr. at 81-82). The respondent admitted that he personally solicited funds for the ERNK (Tr. at 125). He was aware that some of the money raised for the ERNK would go to the PKK, although he stated that he personally did not see such an exchange or know of the specifics of how it occurred (Tr. at 82-85). The respondent stated that he was aware that the PKK was fighting the "village guards," a group of civilians who were aligned with the Turkish government against the PKK (Tr. at 89-90; 92).

While in Germany, the respondent received word that his passport had been revoked by Turkey (Tr. at 537). Sometime thereafter, he decided to attend a camp in Lebanon run by the PKK (Tr. at 93). The respondent admitted that the training he received at the camp was "military" and "guerilla" training (Tr. at 94). While at the camp, the respondent was trained in using certain weapons and in cleaning them and re-assembling them (Tr. at 95). He initially stated that he received training in "shoulder rockets," but later denied this, saying that others at the camp received training in using rockets, although he stated that he personally was not trained on how to use one (Tr. at 95; 98-99). He received training in propaganda (Tr. at 147). The respondent stayed at the camp for 8 months (Tr. at 93) during which time he considered himself "associated with" the PKK (Tr. at 101). After about 8 months at the camp, he decided to re-enter

[3] The facts set forth herein are as found by the Immigration Judge. The majority of the factual findings are not disputed by the respondent. We have noted in our discussion those findings that are disputed by the respondent. *See* Respondent's Brief at 7-14.

Turkey surreptitiously because he wanted to go home and because he had no legitimate travel document with which to enter Turkey legally (Tr. at 101-03). The respondent and several others who also attended the PKK camp formed a group that would enter Turkey through the Syrian border, with the help of a small group of Syrian guides who were also Kurds (Tr. at 101). Before leaving on this trip, the respondent met with Abdullah Ocalan who at that time was the leader of the PKK (Tr. at 188). The respondent actually met Ocalan at least twice before that (Tr. at 199).

Before attempting to cross into Turkey in May 1988, the respondent watched the border to determine the best place to cross without detection (Tr. at 206-07). When he actually set off to cross the border in May 1988, the respondent was accompanied by his five comrades from the PKK camp and the Syrian group (Tr. at 176; 181). The respondent was the leader of the group from the camp (Tr. at 186; 543). He was known by the code name of Ahanran (Tr. at 175). The respondent was armed with a pistol, an AK-47 automatic weapon, and a grenade (Tr. at 208-09; 217). The respondent testified that these weapons, including the grenade, were for self-defense (Tr. at 217-18). When they reached the border, someone in the larger group cut away the fence along the border and the respondent and his men crossed the border (Tr. at 214-15). At some point, they realized that the larger group (including the Syrians) had been detected by Turkish soldiers and that a gun battle between the Syrians and the Turks had ensued (Tr. at 215-16; 626-27). The respondent indicated in his asylum application that "when I was crossing the Turkish border with a dozen friends, we were shot at with automatic guns" and "we returned fire." Exh. 2 at Tab A. In testimony, the respondent indicates that he never fired his gun (Tr. at 216-17). In the melee, the respondent ordered his men to turn around and return to Syria (Tr. at 220; 627). The respondent stated that on his way back into Syria, he saw the body of a Turkish soldier (Tr. at 216). He later stated, however, that he did not realize any Turkish soldiers were killed until the next day (Tr. at 627). On his way back into Syria, the respondent claimed that he accidentally dropped a grenade (Tr. at 217). The respondent claims that this grenade did not explode (Tr. at 558).

Several weeks after the gunfight, on or around June 1, 1988, the respondent and some of his men crossed into Turkey without incident (Tr. at 222). The respondent traveled to various villages to make connections (Tr. at 148) and began to bury extra weaponry and to construct underground shelters (Tr. at 178, 228, 546). The respondent claimed that during this time, he went into villages and talked to people about aid, and promoted Kurdish culture and Kurdish rights (Tr. at 546-47). He was aligned with a group that sought to establish a Kurdish state (Tr. at 524-26). In October 1988, after he had been traveling in Turkey for several months, he was captured without incident by Turkish soldiers (Tr. at 264; 566). Upon being discovered by the soldiers, the respondent stated that the first thing he did was to grab his gun (Tr. at 264). Next, after he decided against fighting back, he attempted to burn his documents, including a journal and some photographs (Tr. at 265). The respondent was arrested and charged with advocating for the separation of Turkey (Separatism) in violation of Article 125 of the Turkish Penal Code. *See* DHS Exh. SS. He was convicted and served about 18 months. *See* Exh. 6 - respondent's application for relief under the Convention Against Torture. He was released in 1990 under unclear circumstances–i.e., some evidence in the record indicates that the respondent was released because of a lack of evidence, whereas other evidence indicates that the prosecutor took an appeal of the sentence. Exh. 2, Tab A; Tr. at 286-88;

DHS Exh. B. The respondent claimed in his asylum application that his family bribed an official to obtain his release. *See* Exh. 2, Tab A. In testimony, the respondent stated that he was released because he essentially entered into a plea agreement wherein he agreed to show Turkish officials where weapons (including rockets) were buried in exchange for their ceasing his torture and harassment of his family (Tr. at 270-76). The plea agreement is referred to as a "code of confession" (Tr. at 282). The respondent claims that he was tortured until he confessed (Tr. at 579-95; 285). After his release, the respondent spent about a year in Turkey until he was able to secure a falsified passport and leave Turkey for the United States. *See* Exh. 2, Tab A.

After his entry into the United States in 1991, the respondent applied for asylum. His asylum application included some, but not all, of the details of the May 1988 gunfight between his group and the Turkish solders. For example, although the respondent disclosed that he was arrested by Turkey and charged with separatism, the respondent's account of the event neglected to mention that two Turkish soldiers died in the gun battle. Exh. 2, Tab A. The respondent also stated that he was sentenced to death by hanging, and gave no indication that this sentence had been reduced or that his case was on appeal. *Id.*

III. Immigration Judge's Reliance upon Turkish Conviction Documents

As an initial matter, we note that the respondent argues on appeal that the Immigration Judge erred by relying in any way upon facts contained in the record of the respondent's conviction for separatism in Turkey. *See* Respondent's Brief at 15-22 (referencing documents contained in the record at DHS Exh. SS). The respondent stated that his confession and statement were extracted by torture and that as such, the facts therein are unreliable. We note at the outset that the Immigration Judge did not make any findings of fact with regard to whether the Turkish conviction documents contain statements induced by torture. Accordingly, we view this issue as a question of fact over which we do not have *de novo* review. *See* 8 C.F.R. § 1003.1(d)(3). Nevertheless, we reject the argument that the Immigration Judge's findings of fact and law are reversible as unduly reliant upon the allegedly torture-induced confession in the conviction documents. That is because, as will be reflected below, the record contains enough evidence, even without resort to the Turkish conviction documents, to affirm most of the Immigration Judge's findings as to removability and, consequently, ineligibility for certain forms of relief. Moreover, the respondent admits that the documents are relevant and reliable evidence of the fact that the respondent was convicted of separatism in 1990 and was resentenced in 2004. Respondent's Brief at 21. We therefore will consider the documents to be reliable evidence of the same facts for purposes of adjudicating the appeal.

IV. Credibility

The Immigration Judge found that the respondent failed to provide credible testimony in support of his application for relief under the Convention Against Torture. In support of this determination, the Immigration Judge made certain demeanor-related observations and noted a "pattern of misrepresentations" that started when the respondent entered the United States on a fraudulent passport and continued through the submission of inaccurate and incomplete applications for asylum and adjustment of status (I.J. at 19-20). To begin with, the Immigration Judge found that in his initial asylum application, the respondent failed to disclose that the firefight in which he engaged in May 1988 resulted in the death of two Turkish soldiers (I.J. at 16). In connection with this, the Immigration Judge noted that the submission (with his asylum

application) of an incomplete translation of the newspaper article about the firefight reflected negatively on the respondent's credibility (*Id.*). Moreover, the Immigration Judge noted that the respondent failed to mention his prior Turkish arrest on (1) his adjustment of status application, (2) his naturalization application, and (3) an application for a liquor license (*Id.*). The Immigration Judge also indicated that she found the respondent's testimony that he had to sneak into Turkey through the Syrian border to be inconsistent with his other statements that he had traveled through Europe via a fake passport and that he feared returning to Turkey. *See* I.J. at 17; *see generally* Tr. at 618-19.

We note that the Board's review of the record is governed by the regulations set forth in 8 C.F.R. § 1003.1, which were amended on August 26, 2002, and became effective on September 25, 2002. Under 8 C.F.R. § 1003.1(d)(3) the Board will not engage in *de novo* review of findings of fact determined by an Immigration Judge. Rather, the facts determined by the Immigration Judge, including findings as to the credibility of testimony, will be reviewed under the clearly erroneous standard. In light of the record as a whole, the Immigration Judge's finding that the respondent lacks credibility is not clearly erroneous. *See United States v. National Assn. of Real Estate Boards*, 339 U.S. 485, 495 (1950) (a factual finding is not "clearly erroneous" merely because there are two permissible views of the evidence); *see also United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948) (a finding is "clearly erroneous" when "reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed").

In this regard, we note the inadequacy of the respondent's explanations for two of the most significant inconsistencies underlying the adverse credibility determination. Specifically, with regard to the incomplete translation of the newspaper article, the respondent attempted to blame this on his translator or to claim that the omitted facts were not material, notwithstanding the fact that the respondent affirmed the content of the application and in any event bears responsibility for the completeness and accuracy of his submissions. *See* Respondent's Brief at 31. Moreover, with regard to the respondent's assertion that his denial of his 1988 arrest in his adjustment and naturalization applications was the result of a mere mistake, we note that this omission occurred three times. We find it implausible that a material omission regarding something as serious as an arrest could be the result of a mistake three consecutive times. In sum, the respondent has failed to rebut the entirely reasonable conclusion of a lack of credibility drawn by the Immigration Judge from the aforementioned "pattern of misrepresentations," and we decline to find clear error in her adverse credibility determination in light of the record before us. Furthermore, to the extent that the adverse credibility determination is rooted in the Immigration Judge's observation of the respondent's "evasive" demeanor, it is entitled to a significant degree of deference, given the Immigration Judge's unique position to make such observations. *See Matter of A-H-*, 23 I&N Dec. 774, 787 (A.G. 2005).

V. Fraud or Willful Misrepresentation

We affirm the Immigration Judge's findings that the respondent is removable as an alien who by fraud or willful misrepresentation sought to procure a benefit under the Immigration and Nationality Act (I.J. at 18-22). *See* § 237(a)(1)(A) of the Act. The specific misrepresentations at issue are, of course, the respondent's failure to admit on his applications for adjustment of status and naturalization that he had been

arrested in Turkey in 1988. Nondisclosure of material facts can be material misrepresentations to the same extent that affirmative statements are. *Matter of B-*, 7 I&N Dec. 465 (BIA 1957). The respondent argues that his failure to disclose this arrest on his adjustment and naturalization applications was harmless in that the United States government was already well aware of the arrest, given that it formed the basis for his 1992 asylum grant. Respondent's Brief at 72-73. We disagree. First, the Immigration Judge found, as a matter of fact, that the respondent submitted a "fraudulent document," in support of his asylum application and made several misstatements on his asylum application as to: (1) the full nature of his role in the ERNK and assistance to the PKK, (2) the fact that he had been implicated in the deaths of two Turkish soldiers (although the respondent was never held personally responsible for the deaths), and (3) the final sentence for his conviction. I.J. at 16 (noting that a submitted translation of a newspaper article relating to the respondent's arrest was false); *see also* Exh. 2. Thus, the respondent's defense that the misrepresentation cannot be material because he already had disclosed the 1988 arrest must fail, in light of the demonstrated shortcomings in this earlier "disclosure." Second, the fact that the respondent disclosed this arrest in an earlier filing in connection with his asylum application does not change the fact that he later failed to advise the former INS of a material fact. *Compare* Exh. 2, Tab A *with* Exh. 2, Tab C and DHS Exh. KK. Given the unambiguous questions on the applications (in which the respondent denied ever being arrested) and the fact that an arrest would be relevant to the respondent's eligibility to adjust his status or to be naturalized, the Immigration Judge properly found that the respondent engaged in fraud or willful misrepresentation in the above-referenced applications. *See Matter of S- & B-C-*, 9 I&N Dec. 436 (A.G. 1961).

A misrepresentation is "material" if either the alien is excludable on the true facts or the misrepresentation tends to shut off a line of inquiry that is relevant to an alien's eligibility for certain forms of relief or other immigration benefits. *See Matter of S- & B-C-, supra*, at 447. As the Immigration Judge stated, the respondent's initial failure to mention the soldiers' deaths in the asylum application and his negative response to the question of whether he had ever been arrested in the other applications shut off a relevant line of inquiry into the respondent's role in the deaths of the two Turkish soldiers and, more broadly, the extent of his role in any armed resistance to the Turkish government.[4] In each circumstance, the respondent's admissibility under section 212(a)(3)(B) of the Act was at issue. In fact, the discovery of the full factual basis for the respondent's arrest ultimately caused the DHS to conclude that the respondent no longer remained a "refugee" under the Act. *See* Exh. 1, Notice to Appear. We therefore affirm the Immigration Judge's findings as to the respondent's removability under section 237(a)(1)(A) of the Act as an alien who has made a wilful misrepresentation of a material fact.

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[4] Our determination that the respondent assisted in the persecution of others, as explained in section VI, *infra*, demonstrates the materiality of his misrepresentation in relation to his acquisition of asylee status and permanent residence. Such assistance would have been a bar to his qualification as a "refugee" under section 101(a)(42) of the Act and would meet the tests for materiality set out in the opinion of either Justice Scalia or Justice Brennan in *Kungys v. United States*, 485 U.S. 759 (1988), assuming that the meaning of "materiality" in the denaturalization context is the same as in the context of the respondent's case.

VI. Persecutor of Others

We affirm the Immigration Judge's findings with regard to her decision that the respondent is ineligible for the relief of withholding of removal because, through his work with the ERNK, he assisted in the persecution of others. *See* I.J. at 22-27; *see* § 101(1)(42)(B) of the Act. A person assists in the persecution of others when he furthers the persecution in some way. *See Matter of Rodriguez-Majano*, 19 I&N Dec. 811, 814 (BIA 1988). The record reflects that the respondent furthered the persecution of those Turks who opposed a separate Kurdistan by providing funding for the PKK and also by transporting weapons into Turkey for use by the PKK. While we recognize that the respondent denies that he transported weaponry into Turkey *for the PKK*, we decline to credit this testimony in light of the adverse credibility determination in this case and in light of credible evidence in the record to the contrary. In fact, we note that the role of the respondent in the ERNK as found by the Immigration Judge is substantially more significant than what the respondent portrays on appeal. Specifically, the respondent himself admitted showing the Turkish authorities the location of stores of buried weapons, including rockets, after being arrested in 1988 (Tr. at 272-76). As the Immigration Judge noted in a finding that is not clearly erroneous, knowledge of the location of stores of weapons, and in particular, rockets, is inconsistent with the respondent's explanation that he carried only a small cache of weapons across the border for his own protection. The DHS expert witness, FBI Agent Robert Miranda, also testified that the activity described by the respondent (i.e., the knowledge of stores of weaponry) indicates he was a fighter for the armed wing of the PKK (Tr. at 413-14). But even if the respondent did not, as he claims, use the weapons against the Turkish forces, his provision of the weapons to PKK fighters qualifies as "assisting in" the persecution of others. *See Matter of A-H-, supra*, at 784 (noting that direct, personal involvement in act of persecution is not required of someone who "incited, assisted in, or otherwise participated in" the persecution of others) (citations omitted). In *Matter of McMullen*, 19 I&N Dec. 90 (BIA 1984), we relied upon evidence showing that the respondent had coordinated arms shipments to the Provisional Irish Republican Army ("PIRA") to find that the respondent in that case "provided. . .the instrumentalities with which the PIRA perpetrated its acts of persecution and violence." *Id.* at 96. In that case, we stated that we were "unwilling to isolate the arms shipments from their ultimate use by the PIRA." *Id.* at 97. As the Immigration Judge stated, the respondent's burying of weapons and ammunition for later use by PKK members[5] is "virtually identical" to the conduct of the alien involved in the *McMullen* case. *See* I.J. at 24.

Further, we also note that both the government expert, Agent Miranda, and the respondent's expert, Professor Gunther, testified that funds raised by the ERNK went to the PKK. *See* Tr. at 411 (Miranda: one of the "main functions" of the ERNK was to raise money for the PKK); 693 (Gunther: some of the goals of the ERNK were "raising money that could be used to finance violence or terrorism"). The respondent admitted knowing that at least part of the money he raised would go to support the PKK (Tr. at 81). He also admitted knowing that the PKK engaged in attacks on the village guards and that they, in

[5] As noted above, this finding of fact by the Immigration Judge is not clearly erroneous in light of the implausibility of the respondent's testimony that all of his arms were for personal use and in light of the expert witness's testimony that the respondent fit the profile of a PKK fighter.

general, advocated "revolutionary terror" (Tr. at 67-68; 90). The record thus supports the conclusion that the respondent knowingly assisted the PKK in its mission, which included the persecution of others who would oppose the creation of an independent Kurdish state. Specifically, these admissions, amounting to knowing assistance in fund-raising, rebut the respondent's claim of having no knowing role in furthering the persecuting activities of the PKK. Moreover, we specifically reject the argument by the respondent that he did not assist in the persecution of others since the "victims" of the PKK were not targeted on account of a protected ground. *See* Respondent's Brief at 87-88. In fact, those targeted for violence by the PKK included Turks or Kurds who aligned themselves with the Turkish government and not the PKK. *See* Exh. 2, Tab I, Report of Foreign Terrorist Tracking Task Force at 10-11. The victims of the violence included teachers and village guards (and the wives and children of guards) who were killed to discourage civilians from aligning themselves with the state. *Id.* The PKK's targeting and intimidation of these civilians is classic persecution on account of political grounds in the same way that it is persecution on account of ~~political opinion for a government to persecute suspected opposition sympathizers who have done nothing~~ to cause them to become the target of law enforcement.

Finally, we agree with the Immigration Judge's conclusion that *Matter of Rodriguez-Majano, supra,* in which we found that activity related to a civil war directed toward the overthrow of a government was not persecution of others, is distinguishable from the respondent's case. *See* I.J. at 26-27. First, in *Matter of Rodriguez-Majano, supra,* the sum total of the alien's activity with the guerillas consisted of driving supplies to a battle with government soldiers on one occasion, undertaking military training, and providing "cover" with his weapon on one occasion. *Matter of Rodriguez-Majano, supra,* at 813. Conversely, the respondent was involved for years with the ERNK and participated in meetings, fund-raising, and propaganda delivery. Also, the PKK *targeted* civilians and not just government soldiers (Tr. at 89-90; 92); the deaths of the civilians were not in any way "incidental," as the respondent argues. *See* Respondent's Brief at 83. Moreover, as the Immigration Judge noted, the alien in *Rodriguez-Majano* was seized by the guerillas and forced to participate with them, whereas the respondent voluntarily joined the ERNK due to his willingness to support that organization, which, he admitted, was affiliated with the PKK. Tr. at 75. Accordingly, there is no basis for a finding that the respondent's activities with the ERNK are not "persecution" because they were akin to the civil war-related activities of the alien in *Rodriguez-Majano, supra.*

VII. Aggravated Felony

The Immigration Judge found that the respondent's conviction for separatism in violation of Article 125 of the Turkish Penal Code constitutes an aggravated felony under sections 101(a)(43)(A) (murder) and 101(a)(43)(F) (crime of violence) of the Act. With regard to these findings contained in section D of the Immigration Judge's opinion (pp. 27-36), we find that this charge was not proven by clear and convincing evidence. *See Woodby v. INS*, 385 U.S. 276 (1966). We will therefore vacate the Immigration Judge's order to the extent that it finds that the respondent is an alien convicted of an aggravated felony.

We note that the crime of which the respondent was convicted, separatism, does not have a counterpart in the aggravated felony definitions contained at section 101(a)(43) of the Act. We have declined to find an alien convicted of an aggravated felony if the nature of the conviction did not correspond

to one of the listed categories of an aggravated felony set forth at section 101(a)(43) of the Act. *See, e.g., Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000) (finding burglary of a motor vehicle not defined as an aggravated felony under section 101(a)(43)(G) of the Act). Similarly, with regard to convictions for crimes involving moral turpitude, we have stated that a foreign conviction must bear substantial similarity to conduct that is deemed criminal by United States standards. *Matter of McNaughton*, 16 I&N Dec. 569, 572 (BIA 1978). We have taken the categorical approach to determining whether a conviction raises the prospect of deportability, which means that the Board looks only to the nature of the offense as defined by the statute rather than to the factual circumstances surrounding any particular violation. *See Matter of Teixeira*, 21 I&N Dec. 316, 318 (BIA 1996) (firearms offenses); *Matter of Alcantar*, 20 I&N Dec. 801, 812 (BIA 1994) (crime of violence); *Matter of Short*, 20 I&N Dec. 136, 137 (BIA 1989) (crime involving moral turpitude). The respondent's conviction for separatism is defined by Turkey as occurring whenever someone "commits an act intended to put the entire or a part of the territory of the State under the sovereignty of a foreign state or to decrease the independence or to separate a part of its territory from the Administration of State." *See* Exh. 2, Tab F. On its face, the statute does not clearly contemplate murder, hence, we cannot find that it constitutes an aggravated felony under section 101(a)(43)(A) of the Act. Nor are we convinced, for purposes of section 101(a)(43)(F) of the Act, that violence is an element of the offense or that there is, on this record, clear and convincing evidence that the crime involves a substantial risk of physical force. We note in this regard that the nature of the respondent's final conviction remains unclear; although the punishment for separatism is "death," the respondent's sentence was reduced several times and finally was set at under 5 years. *See* DHS Exh. SS. As previously indicated, the respondent admits he was released after serving 18 months. Exh. 6. The record thus does not clearly and convincingly reflect that the respondent has been convicted of the aggravated felonies at issue here.

In light of our findings above, we need not address the respondent's argument that the conviction was final for immigration purposes in 1990 (i.e. prior to his entry into the United States) and, therefore, cannot be considered a final conviction at "any time after admission" as required under the Act's definition of an aggravated felony. *See* § 237(a)(2)(A)(iii) of the Act.

VIII. Terrorism Charges

Because we find that the record clearly reflects that the respondent provided material support to terrorists and that he solicited funds that supported terrorist activity, we affirm the Immigration Judge's findings with regard to the respondent's deportability under section 237(a)(4)(B) of the Act. *See* I.J. at 45-54. The Immigration Judge relied to a substantial degree on the respondent's admissions that he (1) was a member and organizer of the ERNK (Tr. at 72); (2) knew that the ERNK was affiliated with the PKK (Tr. at 80-85); (3) felt that he was "associated with" the PKK (Tr. at 101); (4) knew that the PKK engaged in violence (Tr. at 89-90; 92), (5) knew that the money raised by the ERNK helped support the PKK (Tr. at 81, 125); and (6) admitted attending a PKK military training camp and receiving training in weapons and propaganda (Tr. at 93-100, 147, 175). Based on these admissions, the Immigration Judge found that the respondent helped provide, at a minimum, funding to the PKK, and propaganda and education services to the ERNK. This finding is not clearly erroneous (I.J. at 45-51). Moreover, the

respondent's admissions that he conducted propaganda and raised funds that he knew would go to the PKK belie his argument that he had no "intent" to engage in terrorist activity. *See* Tr. at 81-83 (respondent spoke at pro-Kurdish events where he solicited funds and where PKK flag was displayed). The record reflects that even before the PKK was designated as a terrorist organization in 1997, the respondent understood the organization to be conducting terrorist activity. *See* Tr. at 89-90; 92 (respondent aware that the PKK was fighting with the "village guards," a group of civilians who were aligned with the Turkish government against the PKK); *see also Denshvar v. Ashcroft*, 355 F.3d 615, 627-28 (6th Cir. 2004) (alien can engage in terrorist activity even where his organization has not yet been "designated" as terrorist organization). We therefore see no error in the Immigration Judge's determination that the respondent is removable as an alien who provided material support to terrorists and who solicited funds to support a terrorist organization. *See Singh-Kaur v. Ashcroft*, 385 F.3d 293, 300-01 (3d Cir. 2004). Because "material support" encompasses anything that has a "logical connection" to the aims of the terrorist organization, we view the provision of funding and propaganda as directly furthering the goals of the organization and thus providing material support under section 237(a)(4)(B) of the Act. *See Singh-Kaur v. Ashcroft, supra.*

We also disagree with the respondent's assertion that the ERNK cannot be considered an organization that funded the PKK since it is not currently listed as such on the United States Treasury Department's list of "Specially Designated Nationals and Blocked Persons" ("SDN"). *See* Respondent's Brief at 56-58. First, the respondent himself admitted knowing that the money he raised for the ERNK would in part go to support the PKK (Tr. at 82-85). In addition, the Immigration Judge found that the record supported the conclusion that the ERNK raised funds for the PKK (I.J. at 6, 45-51). As we have stated, this finding is not clearly erroneous. Furthermore, the failure to add the ERNK to the current SDN today does not mean that the ERNK was not a source of funding for the PKK at one time. It is clear that since the PKK was originally added to the SDN list in 1997, significant changes have occurred in the PKK/ERNK organization. *See* Exh. 2, Tab I, Report of Foreign Terrorist Tracking Task Force at 7. In any event, the respondent's argument fails to rebut the other evidence of record indicating that the ERNK helped fund the PKK.

Our conclusions with regard to the respondent's removability under section 237(a)(4)(B) of the Act are supported by the testimony of both expert witnesses, who stated that the ERNK operated as a political or popular front for the PKK and that it supported the operations of the PKK and the armed faction of the PKK (i.e., the ARGK) in a significant way (Tr. at 411, 693). The connection between the ERNK and the PKK is also supported by the documentary evidence of record. *See* Exh. 2, Tab I, Report of Foreign Terrorist Tracking Task Force. The evidence of record also supports the escalating violence that characterized the Kurdish separatist movement in general and the PKK operations in particular in the mid-to-late 1980s, when the respondent was active with the ERNK. *See* Exh. 2, Tabs A, I; DHS Exhs. P, R, W, Y. Based upon the respondent's knowledge of the activities of the PKK, the documentary evidence of record, and the testimony of the experts in this case, the respondent should reasonably have known that the PKK was an organization that had committed or planned to commit terrorist acts. *See* sections 212(a)(3)(B)(iv)(IV) and (VI) of the Act; *see also Singh-Kaur v. Ashcroft, supra*, at 300. Our

conclusion that the Immigration Judge correctly found that the record indicates that the respondent is removable under section 237(a)(4)(B) holds without regard to the Immigration Judge's use of the Turkish conviction documents and without resort to the use of the *"Pinkerton"* doctrine. In light of our findings regarding the respondent's material support to, and fund-raising for, the PKK, we need not address the arguments raised with regard to the respondent's removability as an alien who has incited or committed a terrorist act as described in section 212(a)(3)(B)(iv)(I) of the Act.

Finally, we also reject the respondent's argument that application of the removability provisions at section 237(a)(4)(B) is an unconstitutionally retroactive application of amendments to the Act brought about by the Immigration Act of 1990 ("IMMACT"). The respondent argues that the inadmissibility provisions of the IMMACT have never been applied to an alien like him, since he is alleged to be removable (although not inadmissible) for "terrorist activity" that took place before the effective dates of the IMMACT and the alien's date of entry. *See* Respondent's Brief at 58-61. The respondent also argues that he should not be found removable for the "same conduct that warranted granting him asylum . . .in 1992." *Id.* at 50. The respondent offers no legal reason why recent amendments to the Act, which clearly intend for retroactive application of the removability provisions of section 237(a)(4)(B) (referencing inadmissibility provisions relating to terrorism), should not apply to his case. *See* USA PATRIOT Act at § 411 (contained in the record as DHS Exh. YY); *see also Bell v. Reno*, 218 F.3d 86, 95 (2d Cir. 2000) (applying removability provisions amended by the IMMACT to alien whose removal proceedings initiated after the IMMACT's effective date and conduct causing alien's deportability occurred before enactment of the IMMACT). Moreover, the former INS's decision to approve the respondent's asylum application does not preclude the DHS from initiating removal proceedings against the respondent now, particularly in light of the material omissions in the respondent's original asylum application. *See, supra*, sections IV and V of this Order.

Furthermore, our conclusions in this regard are supported by the language chosen by Congress in the recent enactment of the REAL ID Act. *See* "Real ID Act of 2005," Division B of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, (Public Law 109-13) (May 11, 2005). The REAL ID Act expanded and amended the removability provisions at section 237(a)(4)(B) pertaining to terrorism and expressly made these amendments applicable to all aliens who are placed into removal proceedings before, on, or after the date of enactment. *See* §§ 103, 105(a)(2)(B) of the REAL ID Act. Thus, to the extent that the respondent argues that the retroactivity of section 237(a)(4)(B) of the Act was left unclear after the USA PATRIOT Act, the clear intent of Congress in the REAL ID Act trumps that argument. *See* Respondent's Supplemental Brief at 3-8. We also note that the REAL ID Act did not limit the applicability of section 237(a)(4)(B) by adding language stating that the provision would only apply if the alien was inadmissible at the time of entry or deportable under another terrorism-related provision (such as, according to the respondent, the terrorism-related provisions of the IMMACT). *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)

(statutory construction ends if words of Congress are clear). That is, the respondent is not entitled to a "pass" with regard to the Act's terrorism deportability provisions simply because he entered before the terrorism exclusion provisions became effective. The REAL ID Act, by making no distinction regarding when the terrorism-related conduct occurred, renders that argument meritless.

IX Convention Against Torture

We turn now to the respondent's application for relief under the Convention Against Torture. Given our previous findings, the relevant question is whether the respondent has shown eligibility for deferral of removal under the Convention Against Torture by proving that it is more likely than not that, upon return to Turkey, the Turkish government will torture him or will acquiesce in his torture. The Immigration Judge correctly set out the standards for determining whether an applicant under the Convention Against Torture has presented a legally cognizable claim for relief. That is, an alien must show that it is more likely than not that he will be harmed by an intentional act causing severe mental and/or physical pain, that the act would be inflicted for a proscribed purpose under the Act and that the act would be inflicted by or at the instigation of a public official or with the acquiescence of a public official with custody or control of an individual. *See* 8 C.F.R. § 1208.18(a); *Matter of J-E-*, 23 I&N Dec. 219 (BIA 2003).

The two primary groups that the respondent claims to fear, for purposes of his Convention Against Torture claim, are the Turkish government itself and the PKK. The respondent argues that the PKK will seek him out for torture as retribution for his prior confession in connection with his criminal case. *See* Respondent's Brief at 89-93. We find that the respondent's fear of the PKK is not sufficiently supported by evidence from the record; we note in particular that the respondent lived in Turkey for a year after being released from prison without any retaliation from the PKK (Tr. at 150-51). Furthermore, the record does not indicate that even if the PKK would seek to torture the respondent, Turkish officials would *acquiesce* in that torture. *See Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000). "Acquiescence to torture 'requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene and to prevent such activity.'" *Id.* at 1311. A showing that the Turkish government is unable to control the PKK is therefore inadequate to satisfy the burden of proving entitlement to deferral of removal under the Convention Against Torture. The respondent's assertions that the Turkish officials work closely with the Kurdish village guards does not prove, as he asserts, that the "Turkish government accepts, and even encourages, Kurdish murders of fellow Kurds." *See* Respondent's Brief at 94. First, the evidence on which this argument is based is out of date and therefore not probative of the current situation in Turkey. Second, the allegation that the Turkish government pits Kurds against Kurds as a way to quell the separatist movement does not in any way indicate that the government would be aware of, and would assent to, current plans of the PKK to torture the respondent.

With regard to the respondent's claim that he is in danger of torture from Turkish officials, we find that although there is some evidence that the respondent may face a possibility of mistreatment in Turkey, the record does not indicate that torture is more likely than not, as required by the Act. We acknowledge the respondent's argument that his return to Turkey would not go unnoticed. In addition, there is no doubt that the PKK is still the focus of significant law enforcement efforts in Turkey, and recent documents concerning country conditions reflect that in battling the PKK, Turkish security forces continue to commit "serious human rights abuses." The 2002 State Department Country Report for Turkey states that the use of torture is "regular[]," "widespread" and "pervasive" by security forces. *See* Exh. 2, Tab S at 5. The torture was administered by local level authorities regardless of whether it was sanctioned by higher authority. *Id.* The fact that the respondent has been associated with the PKK renders him vulnerable to notice by these security forces, many of whom apparently operate with impunity in certain regions of the country, including the southeast, where the respondent's family is from and where many Kurds live. *See* Tr. at 509 (respondent stating that he grew up in area of Turkey near Syrian border); DHS Exh. LL (map of Turkey showing Turkey borders Syria to the southeast); *see also* Exh. 2, Tab S at 5-6. At the same time, we recognize that evidence of vulnerability to torture and the *possibility* of torture do not satisfy the high burden of proving that torture is "more likely than not." 8 C.F.R. § 1208.17(a). The evidence of record reflects that reports of torture in Turkey are decreasing. Exh. 2, Tab S at 5. Turkey has, in general, taken several steps to eliminate abuses and extra-judicial activities in support of its effort to join the European Union. *Id.*; *see also* DHS Exhs. CC, DD, EE. Furthermore, it is undisputed that the respondent served his sentence and was not re-indicted or retried in his absence; there is likewise no evidence that the government still seeks him for any reason connected with his activities with the ERNK in the 1980s. *See* I.J. at 57-58. Overall, the evidence of record does not reflect that upon respondent's return to Turkey, torture is more likely than not. Accordingly, the Immigration Judge properly denied his application for a grant of deferral of removal under the Convention Against Torture.

X. Conclusion

We therefore affirm the Immigration Judge's decision, insofar as she found the respondent removable under sections 237(a)(1)(A) as an alien inadmissible at time of entry or adjustment of status under section 212(a)(6)(C) (fraud or misrepresentation of a material fact) and inadmissible as an alien who applied to adjust status under section 209(b) but who is no longer a refugee under section 101(a)(42)(A) of the Act. We also affirm the Immigration Judge's findings that the respondent is an alien who is a persecutor of others under section 241(b)(2)(i) of the Act (rendering him ineligible for withholding of removal) and that the respondent is an alien who is removable under section 237(a)(4)(B) as an alien who has solicited funds for a terrorist organization and who has provided material support to a terrorist organization, as set forth in sections 212(a)(3)(B)(iv)(IV) and (VI) of the Act. We vacate the Immigration Judge's finding that the respondent is an alien convicted of an aggravated felony. Finally, we affirm the Immigration Judge's denial of relief under the Convention Against Torture. Accordingly, the following orders will be entered:

A71 803 930

ORDER: The Immigration Judge's order is affirmed with respect to her findings that the respondent is removable under sections 237(a)(1)(A) and 237(a)(4)(B) of the Act and to her denials of all applications for relief.

FURTHER ORDER: The Immigration Judge's findings regarding the respondent's removability under section 237(a)(2)(A)(iii) of the Act are vacated.

FOR THE BOARD

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2005, I served upon Petitioner's counsel with a copy of the foregoing motion by placing it in the mailroom of the Department of Justice for same day Federal Express delivery to:

David S. Foster
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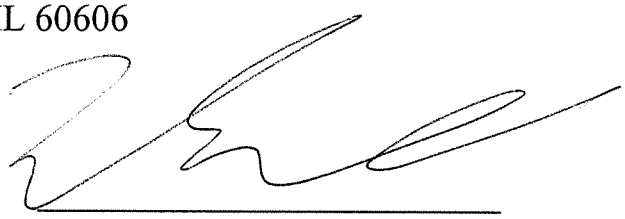

DOUGLAS E. GINSBURG
United States Department of Justice