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**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS**

In the Matter of:)
)
Luis Enrique Alba)
)
)
In removal proceedings)
_____)

File No: A 200 553 090

**DEPARTMENT OF HOMELAND SECURITY
SUPPLEMENTAL BRIEF**

April 21, 2016

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The Department of Homeland Security (Department or DHS) timely submits this brief in response to the supplemental briefing request of the Board of Immigration Appeals (Board or BIA). Specifically, the Board has requested the parties (and amicus) to address the following issues:

(1) Where an asylum applicant has demonstrated persecution because of his or her membership in a particular social group comprised of the applicant's family, has he or she satisfied the nexus requirement without further analysis? Or does the family constitute a particular social group only if the defining family member also was targeted on account of another protected ground?

(2) The parties should address the circuit split on the issue. Compare *Hernand[ez]-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015), and *Flores Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015), with *Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015), *Lin v. Holder*, 411 F. App'x 901 (7th Cir. 2011), and *Malonga v. Holder*, 621 F.3d 757 (8th Cir. 2010).

I. SUMMARY OF THE DHS POSITION

The position of the Department is that family units may, depending on the nature and degree of the relationships involved and how those relationships are regarded by the society in question, constitute particular social groups within the meaning of the Immigration and Nationality Act (Act or INA). Ordinarily, in many, if not most societies, an "immediate family" unit, comprised of a "person's parents, brothers and sisters, husband or wife, and children,"¹ will qualify as a cognizable particular social group. Further, if an applicant for asylum under section 208 of the Act or withholding of removal under section 241(b)(3) of the Act has demonstrated that his or her membership in a cognizable family-based particular social group, such as an immediate family, is at least one central reason for the persecution suffered or feared, then the applicant has satisfied the nexus requirement. The applicant need not additionally demonstrate

¹ See Merriam-Webster (on-line dictionary, definition of "immediate family"), available at <http://www.merriam-webster.com/dictionary/immediate%20family> (last visited Apr. 13, 2016).

that the “defining family member”² was targeted on account of a protected ground. Nexus analysis is fact-specific, and requires a searching review of the evidentiary record to determine if immediate family membership plays a central role for the persecutor’s motivation, rather than an incidental, minor, or tangential role.

II. FACTS AND PROCEDURAL HISTORY

The respondent is a 36-year-old male, native and citizen of Mexico, who first entered the United States with his wife in 1998. *See* Exh. 3; I.J. at 3. In early 2011, following several convictions, he was placed into removal proceedings, and an Immigration Judge ultimately granted him voluntary departure. *See* Tr. at 35; I.J. at 3. The respondent then returned to Mexico to live with his parents in Mexico City. *See* I.J. at 3. He illegally reentered the United States in August 2011 and was once again placed into removal proceedings and charged with inadmissibility under INA § 212(a)(6)(A)(i). *See id.* at 1-2. The respondent, through counsel, conceded removability and applied for asylum, statutory withholding of removal, and protection from removal under the regulations implementing U.S. obligations under Article 3 of the Convention Against Torture (CAT).³ *See id.* at 2. The gravamen of his protection claims relates to incidents that occurred after his return to Mexico following his 2011 removal proceedings. *See* I.J. at 3-6; Respondent’s Brief on Appeal at 2-3.

² The Department understands the Board’s use of the term “defining family member” in the supplemental briefing request to mean the initial family member targeted by the persecutor. Thus, for example, in the instant case, the “defining family member” presumably is the respondent’s father, with whom the criminal organization first had contact. The “defining family member” also helps to provide the base point for identifying the precise family unit at issue, which, in the instant case, the Department understands to be the “immediate family” of the respondent’s father, which, of course, includes the respondent.

³ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46. 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) (implemented in the removal context in principal part at 8 C.F.R. § 1208.16(c) - .18).

Specifically, upon returning to live with his parents in Mexico City, the respondent's father warned him not to go out of their home. The respondent's father, who owned a small general store, advised that members of a criminal organization, La Familia Michoacana (La Familia), had approached him about selling drugs in the store because it would make their distribution easier, but that he had refused. Apparently, the husband of a female cousin of the respondent was a member of La Familia. Despite his father's warning, the respondent went out with two relatives, a cousin and a nephew, and they heard gun shots, which appeared to originate from a black sport utility vehicle (SUV) on the street. The respondent and his relatives were unharmed.

One week after this incident, he was approached by armed men, apparently from the same SUV, who identified themselves as members of La Familia and asked if he would sell their drugs at his father's store. The respondent refused and was advised by the men that he would see them again. One week later, he was walking on the street and was approached by the same SUV occupied by four masked men who attempted to kidnap him. The respondent fought free but the men warned that they would come back for him.

Following this incident, the respondent fled Mexico City for Tijuana where he remained for two months. During his time in Tijuana, the respondent was approached by other individuals asking him to carry drugs across the border, but he refused. The respondent subsequently reentered the United States. His parents continue to reside in Mexico City, though his father now must pay a protective "rent" to La Familia.⁴

⁴ The factual recitation set forth in this paragraph derives from the Immigration Judge's decision and the respondent's appellate brief. See I.J. at 3-6; Respondent's Brief on Appeal at 2-3.

In a decision dated September 10, 2013, the Immigration Judge found the respondent to be credible but denied the respondent's applications for protection. Concerning his applications for asylum and statutory withholding of removal, the Immigration Judge appeared to assume, without analysis, that the family of the respondent's father constituted a cognizable particular social group. *See* I.J. at 8-9. Nevertheless, the Immigration Judge denied the respondent's application for asylum finding that he had failed to establish the required nexus. *See id.* at 8. Specifically, she found that the record evidence reflected that the focus of La Familia was on the use of the store owned by the respondent's father rather than on the respondent's family. *See id.* at 9. The Immigration Judge found that La Familia only was interested in increasing its profits and distribution locations by using the store. *See id.* The Immigration Judge determined that the respondent's asylum application also failed on state protection and internal relocation grounds. *See id.* at 10. Insofar as the Immigration Judge found that the respondent failed to meet his burden for asylum, she also found that he failed to qualify for statutory withholding of removal. *See id.* The Immigration Judge also denied the respondent's application for CAT protection. *See id.*

The respondent, through counsel, then appealed to the Board, arguing in pertinent part:

Mr. Alba has established a nexus between his persecution and his purported membership in particular group constituting family. In this case, the cartel targeted Mr. Alba because they were retaliating against his father's unwillingness to assist them in the sale of controlled substance. Mr. Alba's cousin and nephew were both targeted. His father, a former policeman, did not assist the cartel. As a result, they started to target Mr. Alba given he is his father's son.

Respondent's Brief on Appeal, at 7-8.⁵

⁵ The respondent also appealed from the Immigration Judge's denial of CAT protection. Respondent's Brief on Appeal at 10-11.

III. DHS POSITIONS ON FAMILY AS A PARTICULAR SOCIAL GROUP AND NEXUS

A. Family as a Particular Social Group

Implicit in the Board's supplemental briefing questions are the fundamental issues of whether and, if so, under what circumstances, a family unit can constitute a cognizable particular social group. The Board has not yet definitively addressed these issues in a precedent decision. *See generally Gonzales v. Thomas*, 547 U.S. 183, 186-87 (2006) (observing that the Board had "not yet considered whether Boss Ronnie's family presents the kind of 'kinship ties' that constitute a 'particular social group,'" and that the Court could "find no special circumstance . . . that might have justified the Ninth Circuit's determination of the matter in the first instance"); *Matter of S-E-G-*, 24 I&N Dec. 579, 585 n.2 (BIA 2008) (noting that the Board "need not address the question whether 'family' alone is a social group under the circumstances of this case").

The Board has set out a three-pronged test for determining when a proposed particular social group is cognizable. The asylum applicant must establish that the group is (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question, and (3) defined with particularity. *See Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208, 210-12 (BIA 2014).

Membership in a family has long been recognized as a potential basis for membership in a particular social group. *E.g.*, *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004); *Iliev v. INS*, 127 F.3d 638, 642 (7th Cir. 1997); *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1028 (9th Cir. 2004); *see also Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) ("prototypical example of a 'particular social group' would

consist of the immediate members of a certain family, the family being a focus of fundamental affiliational concerns and common interests for most people”). The Board suggested as much over 30 years ago in *Matter of Acosta*, 19 I&N 210, 232 (BIA 1985) (noting “kinship ties” as a prototypical example of a “common, immutable characteristic”), *modified on other grounds*, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The Office of the United Nations High Commissioner for Refugees (UNHCR) likewise has advised that family-based refugee status claims may be cognizable.⁶ See UNHCR, *Position on claims for refugee status under the 1951 Convention relating to the Status of Refugees based on a fear of persecution due to an individual's membership of a family or clan engaged in a blood feud* ¶ 18 (Mar. 2006) (“[I]t is UNHCR’s view that a family unit represents a classic example of a ‘particular social group.’”), available at <http://www.refworld.org/docid/44201a574.html>.

There are, of course, group formulations involving family ties that do not qualify as particular social groups. The Board has held, for example, that “family members of Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang” is not a group defined with sufficient particularity to constitute a particular social group. See *S-E-G-*, 24 I&N Dec. at 585. Courts have also rejected family-based claims where the family relationship is attenuated. See, e.g., *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir. 1991) (extended family relationship of second cousins living far apart did not establish a cognizable claim).

Where, as in this case, the question is whether family relationship to a given individual defines a cognizable particular social group, the type of shared relationship should be examined

⁶ Although UNHCR guidance is not binding, it often serves as a useful interpretive aid. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427-28 (1999); see also *Matter of Q-T-M-T-*, 21 I&N Dec. 639, 649-50 & n.5 (BIA 1996) (noting that UNHCR guidance is advisory and not binding).

to determine whether it meets the Board's three-part test. The adjudicator should first assess whether the type of family relationship in question is something that the applicant cannot change or that is so fundamental to the applicant that he should not be expected to change it. The adjudicator would then assess whether the society in question distinguishes individuals who share that type of relationship from individuals who do not. Finally the adjudicator would assess whether the type of relationship at issue defines a family group with sufficient particularity to provide a clear benchmark for determining who is in the group and who is not.⁷

In this case, the respondent has asserted his relationship with his father defines his membership in a particular social group. The Department believes that the putative particular social group in this case is best characterized as the immediate family of the respondent's father, and that an immediate family will constitute a cognizable particular social group in most cases.

Specifically, immediate family membership usually is immutable, i.e., a characteristic that group members "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *M-E-V-G-*, 26 I&N Dec. at 231 (quoting *Acosta*, 19 I&N Dec. at 233). DHS does not dispute that membership in an immediate family meets this requirement. It is generally not possible to change the fact of who is one's parent or child. And even where it may be possible to leave an immediate family group in such a way that one can no longer be considered to have the trait, this type of family relationship is

⁷ The question here is not whether a specific family is famous, or "distinct" in the society. Rather, the question is whether the society views the degree of relationship shared by the family group at issue as so significant that the society distinguishes groups of people based on that type of degree of relationship. To analogize pursuant to the interpretive canon of *ejusdem generis*, see *Acosta*, 19 I&N Dec. at 233, in assessing when a case of "whistleblowing" against state corruption may amount to an expression of "political opinion," whether the whistleblower's cause is well known in the society is not determinative. See *Matter of N-M-*, 25 I&N Dec. 526, 526 (BIA 2011) (noting, *inter alia*, that under some circumstances, merely threatening to internally expose government corruption, such as to higher government authorities, could constitute the expression of a political opinion).

generally fundamental to an individual's identity, and is not a change that one should be required to make. *See infra* note 10.

Immediate family relationships also define groups that meet the particularity test, which requires a social group to be discrete and have definable boundaries. *See, e.g., M-E-V-G-*, 26 I&N Dec. at 238-39. It has long been recognized that certain family units are discrete and have identifiable boundaries. *See, e.g., Hernandez-Ortiz v. INS*, 777 F.2d 509, 516 (9th Cir. 1985) (describing a family as "a small, readily identifiable group"). A defined family unit, such as an immediate family, ordinarily will satisfy the requirement of particularity insofar as it generally provides a "clear benchmark for determining who falls within the group," and is "discrete" with "definable boundaries," as opposed to being "amorphous, overbroad, diffuse, or subjective." *M-E-V-G-*, 26 I&N Dec. at 239; *see S-E-G-*, 24 I&N Dec. at 585 (noting that a less precise "proposed group of 'family members,' which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others, is . . . too amorphous").

In *Matter of C-A-*, 23 I&N Dec. 951, 959-60 (BIA 2006), the Board held that a particular social group must also reflect society's perceptions of the group.⁸ The Board subsequently clarified this requirement in *M-E-V-G-* and *W-G-R-*. Specifically, the Board emphasized that "social distinction" does not require the shared characteristic to be literally visible, but rather to be perceived as distinct by society. *M-E-V-G-*, 26 I&N Dec. at 240; *W-G-R-*, 26 I&N Dec. at 216. The Board further explained, "[T]he 'social distinction' requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable

⁸ The U.S. Court of Appeals for the Eleventh Circuit affirmed the Board's 2004 unpublished decision in *C-A-*, which the Board published after the Eleventh Circuit affirmed its decision in *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006). *See C-A-*, 23 I&N Dec. at 951 n.1.

characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it.” *M-E-V-G-*, 26 I&N Dec. at 238.

An immediate family relationship is a trait based upon which virtually all societies draw significant distinctions such that it will generally meet the social distinction test. Whether other family relationships are socially distinct would depend upon the degree and nature of the relationship asserted to define the group and the cultural context for how that type of relationship is viewed by the society in question. In some societies, more distant relationships may well not be a basis for social distinction. In other societies, however, extended family groupings may have greater social significance, such that they could meet the requirement of social distinction. This approach is consistent with existing case law on family as social group. *See, e.g., Crespin-Valladares v. Holder*, 632 F.3d 117, 126 (4th Cir. 2011) (“[W]e can conceive of few groups more readily identifiable than the family.”); *Al-Ghorbani v. Holder*, 585 F.3d 980, 985 (6th Cir. 2009) (observing that it “is widely recognized by the case law” that family may constitute a particular social group if it is recognizable as a distinctive subgroup of society); *Gebremichael*, 10 F.3d at 36 (“There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family.”); *C-A-*, 23 I&N Dec. at 959 (“[s]ocial groups based on innate characteristics such as . . . family relationship are generally easily recognizable and understood by others to constitute social groups”); *cf. Matter of H-*, 21 I&N Dec. 337, 342-43 (BIA 1996) (recognizing Somali clans as particular social groups within the cultural context of how those kinship ties are viewed in that society).

B. Nexus

An applicant also must show that the persecutor was motivated or would likely be motivated to persecute the individual on account of the protected ground at issue. Simply

because an applicant for asylum or statutory withholding of removal may belong to the same immediate family as the “defining family member” initially targeted by the persecutor does not necessarily mean that any harm the persecutor inflicts or threatens upon the applicant will be “on account of” or “because of” membership in that immediate family. *See Matter of C-T-L-*, 25 I&N Dec. 341, 348 (BIA 2010) (noting that the “on account of” nexus phraseology for asylum at INA §§ 101(a)(42)(A) and 208(b)(1)(A), and the corresponding “because of” phraseology for statutory withholding of removal at INA § 241(b)(3) “are equivalent and have been used interchangeably”). Rather, membership in the immediate family must be a “central reason” for the persecutor’s decision to persecute the applicant. INA § 208(b)(1)(B)(i); *see C-T-L-*, 25 I&N Dec. 341 (holding that the “one central reason” standard applies to both asylum and statutory withholding of removal). A protected trait, such as membership in an immediate family, “cannot play a minor role,” e.g., it cannot be “incidental” or “tangential” to “another reason for harm.” *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007). [If it is a central reason for persecuting the applicant, however, the persecutor’s motivation for targeting the “defining family member” is not controlling and need not be on account of a protected ground.] To require otherwise would be to apply an extratextual, bifurcated nexus analysis to a type of particular social group claim that is not required for claims based on any of the other protected grounds. As such, it would run afoul of the interpretive canon of *ejusdem generis*. *See Acosta*, 19 I&N Dec. at 233. There is no contrary indication in the text signaling that Congress likely intended such a *sui generis* analysis for family-based claims.

1. Federal Court Decisions Addressing Nexus to Family as Particular Social Group

Asylum and statutory withholding of removal claims involving gang violence against family members have been framed in a variety of ways, and, as the Board has suggested in this

briefing request, the existing guidance in relevant precedent can be difficult to reconcile. Many decisions in fact integrate the analysis of nexus with the undeniably related question of whether the proposed group has been articulated in a manner that identifies a cognizable particular social group.

In *Orellana-Monson v. Holder*, for example, the Fifth Circuit upheld the Board's determination that "siblings of Salvador[an] males between the ages of 8 and 15 who have been recruited by Mara 18 but have refused to join the gang because of their principal opposition to the gang and what they want" lacked social distinction and particularity, and reasoned that the applicants in that case "therefore cannot have a well-founded fear of persecution as a result of membership in such group." 685 F3d 511, 522 (5th Cir. 2012). Similarly, the Eighth Circuit has agreed with a Board determination that a social group articulated as "a family that experienced gang violence" was too broad to be recognized as a particular social group. *Constanza v. Holder*, 647 F3d 749, 753 (8th Cir. 2011).

Significantly, these decisions reviewed social group formulations that employed overly broad types of families or relationships to a broad category of relatives, rather than individual relationships to specific family members. In *Orellana-Monson*, 685 F.3d at 522, for example, the family-based group proposed by the younger of two brother applicants was contingent upon the group proposed by the older brother, and the older brother's proposed social group, in turn, relied on overly broad and general age and gender descriptors combined with refusal to be recruited by a gang. The court concluded that "[i]t stands to reason that if Jose's [the older brother's] claim is too amorphous since it encompasses a wide swath of society crossing many political orientations, lifestyles, and identifying factors, then a group consisting of all family members of that already large segment, is even less particularized and therefore does not meet

the particularity requirement.” *Id.* The guidance offered by these decisions on the analysis of nexus, therefore, is clouded by the difficulties identified by the courts with the articulation of the social group. These cases should not be read as requiring that the defining family member (relationship to whom defines the group) must be targeted on account of a protected ground in order for the applicant who is related to him to present a cognizable claim.

Other decisions involving nexus between gang or other criminal violence and membership in a family have focused more directly on what it means for a persecutor’s motivation to be “on account of” the victim’s membership in a family group. Section 208(b)(1)(B)(i) of the Act speaks clearly to the quantum of the persecutor’s motivation in targeting the applicant for harm that must be attributable to the victim’s possession, real or imputed, of a protected ground (i.e., it must be “one central reason” for such). Some courts have errantly suggested that, in addition to examining the role the victim’s protected trait plays in the persecutor’s motivation to target that person, the nexus element also requires examination of the persecutor’s underlying goals in persecuting, and that an asylum applicant must prove what the persecutor was trying to accomplish by targeting him on account of his protected ground.

Specific passages in *Lin v. Holder*, 411 F. App’x 901, and *Malonga v. Holder*, 621 F.3d 757, for example, could be read to imply that, when an applicant claims that he is targeted on account of his familial relationship to another person, he must also show that the persecutor’s purpose was to persecute that other family member because of a different protected ground. *See Lin*, 411 F. App’x at 905-06 (“Any harm that Lin faced arose from a personal dispute between his father and his father’s creditors. Debtors who fear creditors do not qualify for social-group membership.”); *Malonga*, 621 F.3d at 767 (“Nor can we clearly connect the disappearances and deaths of Malonga’s family members during the conflicts of the late 1990s to a protected ground. ‘Acts of

violence against family members on account of a protected basis may demonstrate persecution if they show a pattern of persecution tied to the petitioner.”) (quoting *Vonhm v. Gonzales*, 454 F.3d 825, 828 (8th Cir. 2006)). To the extent that the courts may have suggested such a requirement, the Department respectfully disagrees with this approach. Nexus can be established as long as one central reason motivating a persecutor to target the applicant is the applicant’s membership in a qualifying family-based particular social group.

Consistent with this DHS position, a number of courts have found nexus to family membership in similar scenarios without such additional requirements. Creating a requirement that the defining family member must have an independent claim that is on account of a protected ground would displace numerous precedent decisions on family membership. Such a requirement would contravene the longstanding recognition that asylum and statutory withholding of removal protection should extend to individuals whom persecutors target in order to act against their family member. The First Circuit recognized this principle in *Gebremichael*, explaining that “the Ethiopian security forces applied to petitioner the ‘time honored theory of *cherchez la famille* (‘look for the family’),’ the terrorization of one family member to extract information about the location of another family member or to force the missing family member to come forward.”⁹ 10 F.3d at 36. More recently, the First Circuit explicitly rejected the proposition that “a family cannot qualify as a particular social group unless a member of the family (or, perhaps, the family itself) can also claim another protected ground,” emphasizing that “[t]he law in this circuit and others is clear that a family may be a particular social group simply by virtue of its kinship ties, without requiring anything more.” *Aldana-Ramos v. Holder*, 757

⁹ While the First Circuit elsewhere noted in *Gebremichael*, 10 F.3d at 31, that the petitioner’s father and brother were persecuted on account of religion, political opinion, or both, this was not relevant to the court’s analysis of nexus to family membership.

F.3d 9, 15 (1st Cir. 2014). This First Circuit case addressed the asylum claim of two Guatemalan brothers whose father, a successful business owner, was kidnapped for ransom by gang members. *Id.* at 14. The brothers paid the ransom, but their father was killed and the gang continued to threaten them. *Id.* The First Circuit reversed the Board's conclusion that the brothers had been threatened solely on the basis of wealth and remanded for the Board to consider whether the brothers' family membership was "one central reason" why the gang continued to target them. *Id.* at 19.

Similarly, the Fourth Circuit reasoned that when a mother is chosen as victim because of "her family connection to her son," that is sufficient to establish the requisite nexus:

Hernandez's relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members' demands leveraged her maternal authority to control her son's activities. The BIA's conclusion that these threats were directed at her not because she is his mother but because she exercises control over her son's activities draws a meaningless distinction under these facts. It is therefore unreasonable to assert that the fact that Hernandez is her son's mother is not *at least one* central reason for her persecution.

Hernandez-Avalos, 784 F.3d at 950; *see also Cordova v. Holder*, 759 F.3d 332, 339 (4th Cir. 2014) ("The BIA certainly did not err in holding that Aquino [Cordova]'s cousin and uncle were targeted because of their membership in a rival gang and not because of their kinship ties. But that holding does not provide a basis for concluding that MS-13 did not target *Aquino* on account of *his* kinship ties to his cousin and uncle."); *Crespin-Valladares*, 632 F.3d 117 (gang targeting of individuals because they were family members of witness in gang prosecution was on account of family membership). Similarly, in another of the decisions the Board requested the parties to address, the Ninth Circuit has recently remanded for reconsideration a claim of persecution on account of family as social group in which the applicant claimed that he was at

risk of persecution because of a gang vendetta against his family. *Flores Rios*, 807 F.3d 1123. There, the applicant's father was murdered by gang members outside his Evangelical Christian Church. *Id.* at 1125. The applicant's cousin, who had witnessed the murder and agreed to testify in the trial of the perpetrators, was also murdered before the trial. The applicant's sister, who had not witnessed the murder and had not agreed to testify, also began to receive threats from the gang. *Id.* On these facts, the court determined that the Board "erred in not addressing the family aspect of Flores-Rios's social group claim." *Id.* at 1128. The court also specifically "declined to hold . . . that a family can constitute a particular social group only when the alleged persecution on that ground is intertwined with another protected ground." *Id.* (quotation marks and citations omitted).

2. DHS Position on Nexus to Family as Particular Social Group

DHS believes that these latter courts are correct in determining that the nexus requirement is satisfied when the persecutor is motivated to act against the victim because of the victim's family membership, without further inquiry into the persecutor's underlying objectives in doing so (including whether that underlying objective is to act against the "defining family member" on account of a protected ground). As Congress has set out, if the victim's possession of a protected trait is "one central reason" for the persecutor's choice of victim, nexus is established. INA § 208(b)(1)(B)(i); *see also C-T-L-*, 25 I&N Dec. 341. This interpretation acknowledges that the motivations of any person for a given action sometimes can be complex and involve a range of different factors. The refugee definition singles out for examination one aspect of the persecutor's motivations – whether a reason why he chooses a specific individual for his victim is on account of a protected ground. Choice of victim is in fact the aspect of the persecutor's motivations on which the Supreme Court required focus in *INS v. Elias-Zacarias*,

502 U.S. 478 (1992), the only Supreme Court decision to analyze specifically the meaning of the nexus requirement. The Court observed that “[t]he ordinary meaning of the phrase ‘persecution on account of . . . political opinion’ in 101(a)(42) is persecution on account of the *victim’s* political opinion, not the persecutor’s.” 502 U.S. at 482. Inquiry into the persecutor’s underlying goals in targeting the victim (whether they reflect the persecutor’s political opinion, desire to intimidate or punish a family member of the victim, or some other agenda) should not distract from the core question of whether the persecutor chose the applicant for asylum and/or statutory withholding of removal as a victim in central part because the applicant has (or is perceived to have) a protected trait.

Importantly, this approach to nexus must apply equally to all asylum and statutory withholding of removal claims, including family-based claims in which the persecutor targets the applicant because of family ties to a specific relation, and the persecutor’s motivation toward that “defining family member” is not related to a protected trait or belief. The persecutor may, for example, target the applicant in order to seek revenge on a family member with whom the persecutor has a personal dispute.

This leads to the question of how one distinguishes between persecution on account of family and persecution on account of a personal dispute. As a practical matter, the answer will depend on the careful assessment of the facts of a given case. A useful guide to this endeavor, however, can be to examine the difference between targeting an individual for revenge for something that individual actually did, on the one hand, and targeting an individual because of that individual’s family-based status, on the other hand. Where a persecutor outside the family chooses the applicant as a victim because of the applicant’s family status, the targeting is not in fact because of a personal dispute with the applicant – it is motivated by membership in a family

group that may be recognized by the society in question as creating a very close and “distinct” association.¹⁰

Of course, this does not mean that nexus to membership in a family is established simply because multiple family members may be of interest to the persecutor. In *Ramirez-Mejia*, for example, the court upheld the Board’s affirmance of the Immigration Judge’s determination that

¹⁰ Assuming that the family unit at issue is a cognizable particular social group, where the persecutor is outside the victim’s family, it is the persecutor’s motivation to target the victim’s familial relationship that may establish nexus to a particular social group. It is important to note that this analysis of nexus to membership in a family-based group is generally not relevant to cases involving persecutors who are acting because of their own personal familial relationship to the victim. As a factual matter, harm imposed inside a family involves different motivations than harm imposed from outside a family because of the victim’s kinship ties. When people harm each other, it is often in the context of a personal relationship between the actor and victim, and people often harm each other for purely personal reasons. Without more, harm that is imposed because of the actor’s personal relationship with the victim (familial or otherwise) is generally not on account of membership in a family or other particular social group. When a person divorces his spouse, for example, he is generally acting for personal reasons, and not on account of the spouse’s membership in family as a particular social group. That does not mean, of course, that all harm within a personal or family relationship is purely personal. Claims based on domestic violence, for example, involve harm that the persecutor inflicts on the victim because of their own relationship, but, in some circumstances, also can involve harm on account of a protected ground. *See Matter of A-R-C-G-*, 26 I&N Dec. 388, 394-95 (BIA 2014) (“We point out that cases arising in the context of domestic violence generally involve unique and discrete issues not present in other particular social group determinations, which extends to the matter of social distinction. However, even within the domestic violence context, the issue of social distinction will depend on the facts and evidence in each individual case . . .”). In all cases, the adjudicator must examine whether a central reason that the persecutor is targeting the victim is on account of a protected ground.

Outside the context of domestic violence, family ties as perceived by the relevant society are one type of trait that can define a particular social group to which nexus may be established. There are, of course, other types of traits and statuses that may be immutable, socially distinct, and particular, such that they might also constitute a protected ground as a cognizable particular social group. *See, e.g., Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998) (explaining that parents of Burmese student dissidents share a common, immutable characteristic sufficient to constitute a particular social group); *Cece v. Holder*, 733 F.3d 662, 676 (7th Cir. 2013) (en banc) (in a decision pre-dating the Board’s clarified “social distinction” requirement for cognizable particular social groups, *see id.* at 668-69 & n.1, the court found that the petitioner had a well-founded fear of persecution on account of her membership in a particular social group of “young Albanian women living alone”); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) (finding that both the Immigration Judge and the Board erred by in determining that a group consisting of “female, Cameroonian widows” did not share a common, immutable characteristic); *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 668, 672 (7th Cir. 2005) (in a decision pre-dating the Board’s clarified “social distinction” and “particularity” requirements for cognizable particular social groups, finding that a particular social group of “educated, wealthy, landowning class [of cattle ranchers] in Colombia that opposed FARC” share a common, immutable characteristic sufficient to constitute a particular social group); *Temu v. Holder*, 740 F.3d 887, 892-96 (4th Cir. 2014) (finding that Tanzanian “individuals with bipolar disorder who exhibit erratic behavior” can constitute a cognizable particular social group). However, all such assessments require case specific, society specific analysis pursuant to the Board’s current three-pronged test, and categorical, blanket findings concerning cognizability are to be eschewed. *See W-G-R-*, 26 I&N Dec. at 214-15; *M-E-V-G-*, 26 I&N Dec. at 242-43, 251; *see also Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014).

the petitioner was not persecuted on account of her membership in her family where gang members threatened her to seek unspecified information about her brother.¹¹ 794 F.3d at 493 (“[T]he evidence that gang members sought information from Ramirez-Mejia about her brother, without more, does not support her claim that the gang intended to persecute her on account of her family. This is particularly true in light of the fact that other members of her family, who have remained in Honduras, have not faced persecution on the basis of their membership in the family.”). The Fifth Circuit’s determination that the petitioner’s family membership was not a central reason for the gang’s actions is consistent with the DHS position that the evidence in this case should be examined to determine the persecutor’s motivation(s), including, of course, any evidence about the circumstances of other family members and whether they have been targeted on account of their family relationship. Evidence that the persecutor is or was inclined to persecute other individuals who share the applicant’s actual or imputed protected characteristic or belief is relevant and may be considered but should not be required to sustain a claim. See generally *Matter of N-M-A-*, 22 I&N Dec. 312, 323 (BIA 1998) (citing Department of State report for the applicant’s country of origin that observed that “highly visible leaders of political factions are more likely to be targeted because of their political opinion than those with lower visibility”); UNHCR, *Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1 A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* ¶ 17 (May 7, 2002) (“An applicant need not

¹¹ The Department notes that the Fifth Circuit’s decision could be read to require that, in order to be successful in a family-based particular social group claim, the motivation of the putative persecutor must include some form of animosity towards the family unit. See *Ramirez-Mejia*, 794 F.3d at 493 (“Logically, there is no reason to suppose that those who persecute to obtain information also do so out of hatred for a family, or vice versa.”). We do not believe that it is necessary or correct to read *Ramirez-Mejia* in this way, however, as the point of the court’s reasoning was that the petitioner’s claim failed because her family membership was not a central reason for her targeting.

demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group. As with the other grounds, it is not necessary to establish that all persons in the political party or ethnic group have been singled out for persecution. Certain members of the group may not be at risk if, for example, they hide their shared characteristic, they are not known to the persecutors, or they cooperate with the persecutor.”), available at <http://www.refworld.org/pdfid/3d36f23f4.pdf> (last visited Apr. 18, 2016).

The decision in *Ramirez-Mejia* underscores that the factual analysis in these types of claims is very case specific. There the petitioner’s importance to the persecutors was “predicated on her knowledge of some supposed secret and not based on the fact of her familial relationship to her brother.” *Id.* at 492. Other courts also have found that the mere targeting of multiple family members does not establish that their family group was a central reason for the harm threatened or inflicted. *See, e.g., Perlera-Sola v. Holder*, 699 F.3d 572 (1st Cir. 2012) (applicant for protection did not meet his burden to show that his family membership was a central reason for the harm he suffered where the applicant had, along with several members of his family, been attacked and threatened by unknown criminals because of their perceived wealth, not because of their family ties); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 236-39 (4th Cir. 2004) (upholding the Board’s finding that Lopez-Soto was not targeted by gang members because of his relationship to his two brothers who had previously resisted gang recruitment, but was instead targeted because young males are targeted for gang recruitment).

Although the factual scenarios in these cases involved families, the evidence did not convince the adjudicator, as factfinder, that a central reason for the persecutor’s choice of a victim was that victim’s family. Simply because an applicant for asylum or statutory

withholding of removal may belong to the same immediate family unit as the “defining family member” initially targeted by the persecutor does not necessarily mean that any harm the persecutor inflicts or threatens upon the applicant will be on account of membership in that immediate family unit. Rather, as noted, the immediate family unit must be a “central reason” for the harm that the applicant suffered or fears. See INA § 208(b)(1)(B)(i); *C-T-L-*, 25 I&N Dec. 341. As a protected trait, immediate family unit status “cannot play a minor role,” e.g., it cannot be “incidental,” minor, or “tangential,” *J-B-N- & S-M-*, 24 I&N Dec. at 214. [If it is a central reason for persecuting the applicant, however, the persecutor’s motivation to harm the “defining family member” is irrelevant, i.e., it need not be on account of a protected ground.]

Of course, even when a family group qualifies as a cognizable particular social group and the required nexus is established, a grant of asylum or statutory withholding of removal does not necessarily follow. For example, the harm suffered or feared must be serious enough to constitute persecution, the persecutor either must be the government or an entity the government is unwilling or unable to control, and any fear of persecution must satisfy the requisite “well-founded” or “more likely than not” standards. Further, protection may be denied where it is both possible and reasonable for the applicant to avoid persecution by relocating within the home country.

IV. DHS Position Applied to the Respondent’s Asylum and Statutory Withholding of Removal Applications

In this case, the Department stipulates that the immediate family unit of the respondent’s father qualifies as a cognizable particular social group. Further, the Department will not oppose remand for the Immigration Judge to reassess nexus pursuant to the clarified principles it has set

forth in this brief and respectfully urges the Board to adopt. *See M-E-V-G-*, 26 I&N Dec. at 252-53 (concerning remand in light of clarified legal principles).

The Immigration Judge addressed nexus in this case by finding that the members of La Familia “were very direct and interested in only increasing their profits and increasing their distribution location by using the [father’s] store. The focus here was on the ownership of the store, not respondent’s family.” *See* I.J. at 8-9. There is certainly some evidence that would support the conclusion that the respondent was targeted because of La Familia’s desire to force him to sell drugs in his father’s store. Arguably, however, there also is evidence that would support the conclusion that the targeting was based, at least in some part, on the respondent’s membership in his father’s immediate family group. On remand, after any further evidentiary submissions the Immigration Judge may deem appropriate, the Immigration Judge, as factfinder, could reassess the respondent’s eligibility for asylum and statutory withholding of removal, including whether a central reason for La Familia’s targeting of the respondent was on account of his membership in his father’s immediate family group. In this regard, while the existence of mixed motivations does not preclude establishing nexus to a protected ground, the respondent must demonstrate that his family membership was or would likely be a central motivating reason for the persecutor’s decision to persecute him. *See J-B-N- & S-M-*, 24 I&N Dec. at 212-13.

Finally, to err on the side of caution, given that the Department otherwise will not oppose remand to the Immigration Judge with respect to nexus, the Department also recognizes that the Immigration Judge may determine that it is appropriate to reexamine her state protection and internal relocation assessments as well. *See* I.J. at 10. Consequently, the Department will not oppose the Immigration Judge’s reassessment of these independent requirements for asylum and statutory withholding of removal on remand.

The burden of proof, of course, remains with the respondent on remand, and the Department reserves its prerogative under the law to contest his eligibility for asylum and statutory withholding of removal with respect to nexus, state protection, internal relocation, and any other material grounds, including whether asylum is warranted as a matter of discretion, that may arise on remand.

V. Conclusion

Family units may, depending on the nature and degree of the relationships involved and how those relationships are regarded by the society in question, constitute particular social groups within the meaning of the Act. [In many, if not most societies, an immediate family unit will qualify as a cognizable particular social group.] Further, if an applicant for asylum or statutory withholding of removal demonstrates that his or her membership in a cognizable family-based particular social group is at least one central reason for the persecution suffered or feared, then the applicant has, in fact, satisfied the nexus requirement. [He or she need not additionally demonstrate that the persecutor targeted the “defining family member” on account of another protected ground.] Finally, as noted, the Department does not oppose remand to the Immigration Judge to reassess the respondent’s eligibility for asylum or withholding of removal as described above.¹²

¹² On remand, the Immigration Judge, as necessary, also can provide a more fulsome analysis of the respondent’s application for CAT protection in light of the respondent’s appellate arguments in this regard. See I.J. at 11; Respondent’s Brief on Appeal at 10-11.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "George R. Martin". The signature is written in a cursive style with a horizontal line extending from the end of the name.

George R. Martin

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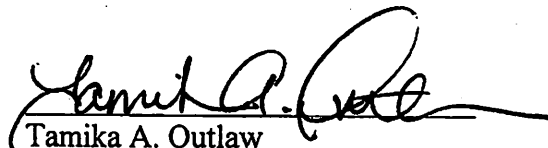
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CERTIFICATE OF SERVICE

On, April 21, 2016, I, Tamika A. Outlaw, Paralegal Specialist, mailed or delivered a copy of this Department of Homeland Security Supplemental Brief to the respondent's counsel, as follows:

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