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

IN THE MATTER OF: §
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AMICUS INVITATION NO. 16-01-11 §
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REQUEST TO APPEAR AS AMICUS CURIAE

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De Mott, McChesney, Curtright, & Armendáriz, LLP (“DMCA, LLP”), is a law firm specializing in immigration law. We are dedicated to the rigorous defense of our clients and the just application of the law. DMCA, LLP is one of the largest immigration firms in the State of Texas. We represent numerous asylum applicants who stand to be affected by the issues presented in the amicus invitation. These issues are of such importance to DMCA, LLP, and our clients, we respectfully request to appear as amicus curiae.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE

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To be eligible for asylum, an applicant must establish that he or she is a “refugee” as defined in the Act. INA § 208(b)(1)(A), (B). A refugee is anyone unable or unwilling to return to, and unable and unwilling to avail themselves of, the protections of their country of nativity because of persecution or a “well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” INA § 101(a)(42)(A). To be granted withholding of removal, the applicant must show that it is more likely than not that his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion. INA § 241(b)(3)(A), (C); 8 C.F.R. § 1208.16(b); *Matter of Mogharabbi*, 19 I. & N. Dec. 439, 440 (BIA 1987). An applicant’s burden for withholding of removal is a higher burden than the standard in asylum cases, where the applicant must similarly establish that he or she is a “refugee” as defined in the Act. INA § 208(b)(1)(A), (B).

By regulation, an applicant may establish that he is a refugee either because of past persecution or a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b) and 1208.16(b). The term persecution includes “the infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive . . . , in a manner condemned by civilized governments.” *Abdel-Masieh v. INS*, 73 F.3d 579, 583 (5th Cir. 1996). An applicant does not have to establish that he would be singled out for persecution, only that there is a pattern or practice of persecution against similarly situated persons. 8 C.F.R. § 1208.13(b)(2)(C)(iii)(A) and 1208.16(b)(2)(i).

I. ISSUES PRESENTED

A. 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?

B. The parties should address the circuit split on the issue. Compare *Hernandos-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).

II. ARGUMENT

A. Demonstrating persecution on account of membership in a particular social group comprised of the applicant's family satisfies the nexus requirement without further analysis. Family constitutes a particular social group and an applicant should not need to establish the defining family member was also targeted on account of another protected ground.

The initial issue presented by the amicus invitation correctly presumes that an applicant's family constitutes a particular social group. Membership in a particular social group refers to membership in a group who hold a "common, immutable characteristic" which is "innate such as sex, color, kinship ties, or in some circumstances . . . a shared past experience." *Matter of Acosta*, 19 I. & N. Dec. 211, 233-34 (BIA 1985). The characteristic of the group must be one which "the group either cannot change, or should

not be required to change because it is fundamental to their individual identities or consciences.” *Id.* In addition, “membership in a purported social group requires that the group have particular and well-defined boundaries.” *Matter of S-E-G-*, 24 I. & N. Dec. 579, 582 (BIA 2008) (citations omitted); *Matter of A-M-E- & J-G-U-*, 24 I. & N. Dec. 69 (BIA 2007).

The Board of Immigration Appeals (BIA) and other courts have long held that the nuclear family may constitute a particular social group. *See Matter of Acosta*, 19 I. & N. Dec. at 233; *Matter of H-*, 21 I. & N. Dec. 337, 343 (BIA 1996); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993). Family members hold common, shared characteristics which cannot change and should not be changed. *Matter of Acosta*, 19 I. & N. Dec. at 233. These characteristics, which “[are] inextricably linked to family ties . . .,” are “recognizable and discrete, allowing would-be persecutors to identify victims as members of the purported group.” *Matter of H-*, 21 I. & N. Dec. at 343 (citing *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2d Cir. 1991)). Persecution on account of an applicant’s membership in the particular social group of his or her family is sufficient to qualify for asylum without further analysis.

This approach is consistent with the statutory and regulatory framework which grants protection to asylum applicants who are refugees “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, *or* political opinion.” INA § 101(a)(42)(A) (emphasis added); *see also* 8 C.F.R. § 1208.13. The statute and regulation list the protected grounds in the alternative, which demonstrates that asylum may be granted if the applicant faces

persecution due to any one of the alternatively listed protected grounds. For no other protected ground is there a requirement of an additional layer of persecution on account of an additional protected ground. Where an applicant establishes persecution on account of his or her political opinion, for example, it is not also required that the applicant establish persecution on account of his or her race. Requiring proof of such an additional layer of persecution for applicants who have suffered persecution on account of membership in the particular social group of their family is inconsistent with the statute.

Even in cases where the applicant is persecuted for a mixed variety of reasons, persecution on account of the applicant's membership in the particular social group of his or her family is sufficient where the family membership is a central reason for the persecution. The requirement that a protected ground be a central reason for the persecution does not mean "that the protected ground be *the* central reason for the actions of the persecutors." *Matter of J-B-N- & S-M-*, 24 I. & N. Dec. 208, 212 (BIA 2009) (emphasis in original). Asylum is available to applicants "whose persecutors were motivated by more than one reason . . . if they can show a nexus to a protected ground."

Id. To constitute a central reason for the persecution, an applicant need only show that "the protected ground cannot be merely 'incidental or tangential to the persecutor's motivation.'" *Id.* Where persecution is on account of an applicant's membership in the particular social group of his or her family and is not merely incidental or tangential to the persecutor's motivation, asylum is warranted without further analysis and without showing additional persecution on account of another protected ground.

B. Review of the cases referenced in the amicus invitation shows that there is not a circuit split on the issue.

A close reading of the circuit court decisions referenced by the amicus invitation reveals that the United States Courts of Appeals generally agree that persecution on account of one's membership in the particular social group of his or her family is sufficient to warrant asylum without further analysis. As demonstrated in the discussion of the various decisions below, there is not a split on this issue. Instead the differences in the cases relate to whether the applicant succeeded in demonstrating a nexus between the persecution suffered or feared and the applicant's membership in his or her family.

Indeed, the outcome of the referenced cases did not turn on whether an applicant's family constitutes a particular social group. Rather, the outcome of the cases was controlled by whether the applicant established that he or she would be persecuted *on account of* membership in the particular social group of the applicant's family. Each circuit either held or acknowledged that membership in one's family constituted membership in a particular social group. The outcome of the cases therefore depended on whether the applicant effectively established a nexus between the persecution feared or experienced and the applicant's membership in the particular social group of his or her family.

For example, in *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015), "the government correctly acknowledges[] that membership in a nuclear family qualifies as a protected ground for asylum purposes." *Id.* at 949 (citing *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) which states "[T]he family provides a prototypical

example of a particular social group.”). Since family membership is enough to constitute a particular social group, the Fourth Circuit correctly found that alternative motivations underlying persecution do “not preclude the existence of another central reason – family ties – for the same persecution.” *Hernandez-Avalos*, 784 F.3d at 950.

Similarly, the Ninth Circuit found that “the family remains the quintessential particular social group.” *Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015). The Ninth Circuit also noted that other “circuits similarly recognize the family as a ‘particular social group.’” *Id.* at 1128 (citing *Crespin-Valladares*, 632 F.3d at 125; *Al-Ghourbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009); and *Gebremichael*, 10 F.3d at 36). As stated by the Ninth Circuit “‘family membership may constitute membership in a ‘particular social group,’ and thus confer refugee status on a family member who has been persecuted or who has a well-founded fear of future persecution on account of that familial relationship.’” *Rios*, 807 F.3d at 1128 (quoting *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005)).

The Fifth Circuit’s decision in *Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015), is not inconsistent with this approach as the Fifth Circuit did not reach the issue of whether an applicant’s family constitutes a particular social group. Indeed, in addressing petitioner Ramirez-Mejia’s claim, the Fifth Circuit specifically stated that it would “not address whether her family was a particular social group.” *Id.* at 492. Instead, the Fifth Circuit denied the petitioner’s claim for withholding of removal under INA § 241(b)(3) after finding the petitioner would not be persecuted *on account of* her family membership. *Ramirez-Mejia*, 794 F.3d at 492. In reaching this decision, the Fifth Circuit

found that the petitioner's value to the persecutors was not predicated on her familial relationship to her brother. *Id.* at 492-93. In other words, the Fifth Circuit denied petitioner Ramirez-Mejia's claim due to a lack of a nexus to her proposed social group and did not outright reject her family as a particular social group.

In *Lin v. Holder*, a Seventh Circuit decision premised on an adverse credibility finding against petitioner Lin, the Seventh Circuit denied petitioner's claim that he would be persecuted on account of his family membership. 411 F.App'x 901 (7th Cir. 2011). Despite upholding the adverse credibility finding, the Seventh Circuit nevertheless acknowledged "[i]t is true that the family unit can constitute a particular social group." *Id.* at 905. Petitioner Lin's claim was denied, however, because he did "not demonstrate[] that his family ties motivated the alleged persecution." *Id.* Petitioner Lin's application was therefore denied because his family membership was not at least one central reason for his persecution.

The Eighth Circuit's decision in *Malonga v. Holder*, 621 F.3d 757 (8th Cir. 2010), also does not represent a split on the issue as the Eighth Circuit did not even address whether family membership constituted a particular social group. Petitioner Malonga feared persecution on account of his ethnicity and political opinion. *Id.* at 767. He did not argue that he was persecuted on account of his membership in the particular social group of his family. *Id.* Since *Malonga* did not advance a family based claim, it is of little wonder the Eighth Circuit spent a single paragraph slightly touching on the issue. Discussing the death of petitioner Malonga's father, the Eighth Circuit found that his death occurred during a period of civil war, and was not on account of his relation to

Malonga or any other protected ground. *Id.* at 767. The brief analysis offered by the Eighth Circuit revolved more around whether harm to Malonga's father and other family members amounted to past persecution of Malonga but ultimately found the harm they suffered was not tied to or related to Malonga. *Id.* The Eighth Circuit did not find family membership would not constitute a particular social group nor did it allay an additional layer of persecution to the analysis.

If anything, the referenced decisions of the Fifth and Seventh Circuits acknowledge family membership might be sufficient to constitute a particular social group. The referenced Fifth and Seventh Circuit decisions upheld denials of the applicants' claims for failure to establish a nexus, not for failing to establish a particular social group. The Eighth Circuit's decision in *Malonga* is inapposite since it addressed ethnicity and political opinion based claims, not whether persecution on account of membership in the particular social group comprised of the applicant's family is sufficient.

Although not referenced in the amicus invitation, the First Circuit also agrees that family can constitute a particular social group. *Aldana-Ramos v. Holder*, 757 F.3d 9, 15 (1st Cir. 2014). In *Aldana-Ramos*, the First Circuit recently reemphasized "[i]t is well established in the law of this circuit that a nuclear family can constitute a particular social group 'based on common, identifiable and immutable characteristics.'" *Id.* (quoting *Gebremichael*, 10 F.3d at 36). Again, the issue turns on whether an applicant can establish a nexus between the persecution and membership in the particular social group of his or her family.


Consistent throughout the various decisions of the circuit courts, then, is an acknowledgement that an applicant's family can constitute a particular social group. The various cases referenced did not question whether family constitutes a particular social group. Instead, in those cases upholding the denial of relief, the issue has been one of nexus. The issue has been whether persecution has or will occur on account of membership in the particular social group of the applicant's family. Whether inversely or directly, each decision supports the argument that an applicant who demonstrates persecution on account of membership in the particular social group of his or family meets the nexus requirement to qualify for asylum.

III. CONCLUSION

Long standing board precedent recognizes family as the quintessential particular social group. An applicant demonstrating persecution on account of membership in the particular social group of his or her family has satisfied the nexus requirement without further analysis. To require an additional layer of persecution to a family member on account of another protected ground in order for the family to be recognized as a particular social group is contrary to statute and regulation. It is also unsupported by case law. Albeit in varying degrees, the various cases referenced by the amicus invitation recognize family as a particular social group. The cases also support granting asylum where an applicant establishes persecution on account of membership in the particular social group of his or her family.

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Amicus Invitation No. 16-01-11

AMICUS INVITATION (Family as a Particular Social Group), DUE FEBRUARY 10, 2016

JANUARY 11, 2016

The Board of Immigration Appeals welcomes interested members of the public to file amicus curiae briefs discussing the below issue:

ISSUES PRESENTED:

- (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 Hernandez-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).

Request to Appear as Amicus Curiae: Members of the public who wish to appear as amicus curiae before the Board must submit a Request to Appear as Amicus Curiae ("Request to Appear") pursuant to Chapter 2.10, Appendix B (Directory), and Appendix F (Sample Cover Page) of the Board of Immigration Appeals Practice Manual. The Request to Appear must explicitly identify that it is responding to Amicus Invitation No. 16-01-11. The decision to accept or deny a Request to Appear is within the sole discretion of the Board. Please see Chapter 2.10 of the Board Practice Manual.

Filing a Brief: Please file your amicus brief in conjunction with your Request to Appear pursuant to Chapter 2.10 of the Board of Immigration Appeals Practice Manual. The brief accompanying the Request to Appear must explicitly identify that it is responding to Amicus Invitation No. 16-01-11. An amicus curiae brief is helpful to the Board if it presents relevant legal arguments that the parties have not already addressed. However, an amicus brief must be limited to a legal discussion of the issue(s) presented. The decision to accept or deny an amicus brief is within the sole discretion of the Board. The Board will not consider a brief that exceeds the scope of the amicus invitation.

Request for Case Information: Additional information about the case may be available. Please contact the Clerk's Office at the below address for this information prior to filing your Request to Appear and brief.

Page Limit: The Board asks that amicus curiae briefs be limited to 30 double-spaced pages.

Deadline: Please file a Request to Appear and brief with the Clerk's Office at the address below by February 10, 2016. Your request must be received at the Clerk's Office within the prescribed time limit. Motions to extend the time for filing a Request to Appear and brief will not be entertained. It is *not* sufficient simply to mail the documents on time. We strongly urge the use of an overnight courier service to ensure the timely filing of your brief.

Service: Please mail three copies of your Request to Appear and brief to the Clerk's Office at the address below. If the Clerk's Office accepts your brief, it will then serve a copy on the parties and provide parties time to respond.

Joint Requests: The filing of parallel and identical or similarly worded briefs from multiple amici is disfavored. Rather, collaborating amici should submit a joint Request to Appear and brief. *See generally* Chapter 2.10 (Amicus Curiae).

Notice: A Request to Appear may be filed by an attorney, accredited representative, or an organization represented by an attorney registered to practice before the Board pursuant to 8 C.F.R. § 1292.1(f). A Request to Appear filed by a person specified under 8 U.S.C. § 1367(a)(1) will not be considered.

Attribution: Should the Board decide to publish a decision, the Board may, at its discretion, name up to three attorneys or representatives. If you wish a different set of three names or you have a preference on the order of the three names, please specify the three names in your Request to Appear and brief.

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Fee: A fee is not required for the filing of a Request to Appear and amicus brief.