



# Access To Law

...the key to justice

PO Box 1614, Norcross, GA 30091

phone 770-685-1499

fax 1-888-308-1931

www.accesstolawfoundation.org

March 3, 2016


Amicus Clerk  
Board of Immigration Appeals  
Clerk's Office  
5107 Leesburg Pike, Ste 2000  
Falls Church, VA 22041

**RE: Request to Appear as *Amicus Curiae* and Brief *Amicus Curiae* in Response to  
Amicus Invitation No. 16-01-11**

Dear Amicus Clerk,

Enclosed please find Access to Law, Inc.'s Request to Appear as *Amicus Curiae* and Brief *Amicus Curiae*, with three copies. Thank you for your consideration of our request. If you require any additional information, please do not hesitate to contact me directly at 770-685-1499 or [mfinn@accesstolawfoundation.org](mailto:mfinn@accesstolawfoundation.org).

Sincerely,  
ACCESS TO LAW, INC.

  
Maura Finn, Esq.  
Staff Attorney

2016

**REQUEST TO APPEAR AS AMICUS CURIAE IN RESPONSE TO AMICUS INVITATION NO. 16-01-11**

Access to Law, Inc. ("Access to Law") is an Atlanta-based nonprofit organization that provides legal representation to low-income immigrants and asylum seekers. Access to Law has represented hundreds of asylum seekers before the United States Citizenship and Immigration Services ("USCIS"), immigration courts, and Board of Immigration Appeals ("BIA"). In particular, Access to Law chiefly represents unaccompanied alien children fleeing persecution in Central America, many of whom seek protection on the basis of membership in a particular social group defined by a familial relationship. Access to Law's Executive Director, Rebeca E. Salmon, Esq. is a certified Child Welfare Law Specialist ("CWLS") who worked with Georgia Appleseed Center for Law & Justice in the rewrite the Juvenile Code of Georgia, specifically those sections that affect immigrant children, and who has successfully participated in advocating immigrant children's claims before the U.S. District Court of the Northern District of Georgia, the 11th Circuit Court of Appeals, and the Court of Appeals of Georgia.

Access to Law believes its subject matter expertise can assist the BIA in its consideration of whether an asylum applicant who has demonstrated persecution because of membership in a particular social group comprised of the applicant's family has satisfied the nexus requirement without further analysis.

U.S. AS Office  
2016  
Engelhard  
10/10

## Summary of Argument of *Amicus Curiae*

*Amicus* offers the following arguments:

- I. Board of Immigration Appeals precedent supports a finding that a family-based particular social group is a protected ground for asylum without an additional analysis of whether the defining family member has also suffered persecution on account of a protected ground;
- II. The circuit split on the issue of whether additional analysis should be required of asylum applicants who establish persecution on account of their membership of a particular social group defined by their family should be resolved by focusing the analysis on the nexus requirement, rather than adding additional particular social group requirements that are not supported by case law; and
- III. Requiring asylum applicants claiming persecution on account of a family-based particular social group to engage in an additional analysis of whether the defining family has also been persecuted on account of a protected ground would place an unreasonable burden on pro se and low income asylum applicants.

### Introduction

A review of established Federal Circuit and Board of Immigration Appeals ("BIA") case law supports the conclusion that family meets all of the requirements of a particular social group. Family has been cited ubiquitously as being emblematic of each required element of a particular social group, and as the type of association that is likely to make an individual a target of persecution. Requiring an additional layer of analysis to determine if the defining family member, or the particular social group as a whole, has been persecuted on account of a protected ground would represent a significant departure from this established case law, and it would be a burdensome requirement that is not imposed on any other social group or protected ground. The Federal Circuit Courts of Appeals that have applied a narrower definition of family-based particular social groups and undertaken additional analysis of the motivations for persecution of the defining family member have inappropriately conflated the nexus analysis with the analysis of whether the proposed particular social group constitutes a protected ground. Further, an additional requirement in family-

based particular social group analysis represents an unreasonable burden to pro se, low income, and child asylum applicants, who would be all but precluded from a favorable grant of asylum on the basis of a family-based particular social group claim.

### Argument

- I. **Board of Immigration Appeals precedent supports a finding that a family-based particular social group is a protected ground for asylum without an additional analysis of whether the defining family member has also suffered persecution on account of a protected ground.**

The BIA should find that family constitutes a particular social group without an additional layer of analysis to determine if the defining family member has suffered persecution on account of another protected ground. The nuclear family meets all of the required elements of a particular social group, and has been repeatedly established as a protected ground for the purposes of asylum in BIA and Federal case law. An additional requirement of analysis of whether another individual who is not a party to the case has suffered persecution on account of a protected ground would be a significant departure from established case law.

In order to qualify for asylum, an applicant must demonstrate a well-founded fear of persecution on account of one of five protected grounds: "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). The BIA has established a three-part test for determining whether an asylum applicant has demonstrated membership in a particular social group; a particular social group must be characterized by immutability, particularity, and social distinction. The BIA determined in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985) that a particular social group is composed of members that share a "common, immutable characteristic." *Matter of Acosta*, 19 I&N Dec. at 233. The defining characteristic of a particular social group should be one that group members "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Id.* at 233. The BIA explicitly named

"kinship ties" as an example of such an immutable characteristic that might define a particular social group. *Id.* at 233.

In *Matter of C-A-*, the BIA determined particularity and social visibility - now termed social distinction - to be additional required elements of a particular social group. 23 I&N Dec. 951, 957, 959-61 (BIA 2006). The BIA clarified the particularity requirement in *Matter of S-E-G-*, ruling that a particular social group must be characterized by "particular and well-defined boundaries." 24 I&N Dec. 579, 582 (BIA 2008); "the essence of the 'particularity' requirement, therefore, is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." *Id.* at 584. In ruling that the broadly-defined proposed particular social group of " '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" does not satisfy the particularity requirement, the BIA explained that the proposed group is "too amorphous a category" because it could include any number of distant relations, implying that a more specific, narrowly defined family-based group may satisfy the particularity requirement. *Id.* at 585.

Recent precedent has established social distinction - previously termed "social visibility" - as a required element of a particular social group. The social distinction requirement relates to the recognition of the particular social group in and by the society in question; "the '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 characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it." *Matter of M-E-V-G-*, I&N Dec. 227, 238 (BIA 2014). Literal ocular visibility is not required for the social distinction requirement to be met. *Id.* In *Matter of C-A-*, the BIA cited "family relationship" as an example of an

innate characteristic that is "generally easily recognizable and understood by others" that may form the basis of a particular social group that would satisfy the social distinction requirement. 23 I&N Dec. at 957, 959-60; see also *Matter of M-E-V-G-*, I&N Dec. at 246.

Immediate family members meet all three required elements of a particular social group as defined by the BIA. Family ties have long been established in case law as providing the basis for a particular social group. While recent case law has expounded upon the definition of "particular social group," as explained above, family has been specifically cited by the BIA as being emblematic of such a group that is likely to be characterized by immutability, particularity, and social distinction. Family ties are formed by blood and marriage, and are - as recognized in *Matter of Acosta* - clearly immutable characteristics. 19 I&N Dec. at 233. The family - particularly the nuclear family or a cohabitating family - is characterized by particularity; traits such as genetics, family names, and cohabitation provide family-based particular social groups with "particular and well-defined boundaries." The family is also characterized by social distinction; societal recognition of the nuclear family is nearly universal. Members of a family enjoy legal rights with respect to other family members that are defined in the law of the society in question. Members of a family are recognizable to society at large by traits such as a shared name and cohabitation.

Family is fundamentally understood across cultures and is well-established in case law across circuits as providing the basis for a particular social group, and even as being paradigmatic of a particular social group. The Ninth Circuit Court of Appeals has described the immediate family as "a prototypical example of a 'particular social group,'" explaining that the family is "a focus of fundamental affiliational concerns and common interests for most people." *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986). The familial relationships that constitute the basis of a particular social group are characterized by a "strong and discernible bond" that is a "foreseeable basis for personal persecution." *Lin v. Ashcroft*, 377 F.3d 1014, 1040 (9th Cir. 2004). The Fourth

Circuit Court of Appeals similarly ruled that kinship ties are a 'paradigmatically immutable' characteristic, and that the family "possesses boundaries that are at least as 'particular and well-defined as other groups.'" *Crespin-Valladares v. Holder*, 632 F.3d 117, 124, 125 (4th Cir. 2011).

Subjecting particular social groups defined by family to an additional layer of analysis not applied to other proposed particular social groups is counterintuitive and prejudicial. Family meets all three required elements of a particular social group defined in BIA precedent. Family is consistently cited by the BIA and several Courts of Appeals as being an emblematic example of such a group that exhibits all three required elements and endows group members with an affiliation that is a predictable motivation for persecution.

**II. The circuit split on the issue of whether additional analysis should be required of asylum applicants who establish persecution on account of their membership of a particular social group defined by their family should be resolved by focusing the analysis on the nexus requirement, rather than adding additional particular social group requirements that are not supported by case law.**

The circuit split on the issue of when a family-based particular social group constitutes a protected ground for the purposes of asylum law hinges on whether substantive analysis of the reason and motivation for persecution of an applicant should occur when assessing the definition of the proposed particular social group, or when assessing the nexus between the harm and the particular social group.

Historically, analysis of the persecutor's motivation has been reserved for assessment of the nexus requirement, or requirement that the protected ground be at least one central reason for the persecution. 8 U.S.C. § 1158(b)(1)(B)(i); *Matter of J-B-N & S-M*, 24 I&N Dec. 208, 214 (BIA 2007). The Fourth Circuit and the Ninth Circuit appear to have taken this approach in *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015) and *Flores Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015). The Circuit Courts departing from this model have conflated the analysis of whether an applicant is a member of an appropriately defined family-based particular social group with the analysis of

whether there is a sufficient nexus between the harm experienced by the applicant and the applicant's membership of the particular social group. In essence, the additional requirement that an applicant demonstrate that the defining family member of a family-based particular social group has been persecuted on a protected ground places the family in the stead of the applicant; the relevant focus becomes the harm suffered by the *family* and the persecutor's motivation in targeting the *family*, rather than on the harm suffered by the applicant and the motivation for the specific harm suffered by the applicant. This mode of analysis has not been applied to any other protected ground, nor any other particular social group recognized in case law.

In *Hernandez-Avalos v. Lynch*, the Fourth Circuit Court of Appeals appropriately accepted that a nuclear family qualifies as a particular social group without applying an additional analysis to determine if the defining family member - in this case the applicant's son - has suffered persecution on the basis of a protected ground. 784 F.3d at 949. The Department of Homeland Security ("DHS") did not contest that the respondent's relationship to her son is protected ground for the purposes of asylum, but rather argued that the respondent had not demonstrated a nexus between the harm she experienced and her relationship to her son. Likewise, the analysis of the BIA in this case prior to the Fourth Circuit ruling appropriately focused on the nexus requirement, rather than on whether the nuclear family constitutes a particular social group. At issue on appeal was how narrowly or broadly to interpret the requirement that the persecution be committed "on account of" the protected ground - an analysis of the nexus, not of whether the respondent's nuclear family constitutes a particular social group.

In *Flores-Rios v. Lynch*, the Ninth Circuit Court of Appeals remanded the respondent's case to the BIA for consideration of the respondent's particular social group claim based on family. 807 F.3d 1123. The Ninth Circuit ruled that family meets all of the requirements of a particular social group, holding that "the family remains the quintessential particular social group." *Id* at 1128. The



Court further ruled that while a family-based particular social group that is related to another protected ground may make members more likely to be targeted for persecution – a nexus analysis, in other words – this is not a requirement for the family to be constitute a particular social group. “We [...] recognized that persecutors are more likely to identify individual family members as part of a particular social group when familial ties are ‘linked to race, religion, or political affiliation.’ We declined to hold, however, ‘that a family can constitute a particular social group only when the alleged persecution on that ground is intertwined with’ another protected ground.” *Id* at 1128 (quoting *Thomas v. Gonzales*, 409 F.3d 1177, 1188 (9<sup>th</sup> Cir. 2005)). Like the Fourth Circuit Court of Appeals, the Ninth Circuit appropriately reserves an analysis of past persecution of the particular social group as a whole (as compared to the individual applicant) for the nexus analysis, and focuses the particular social group analysis on whether the family meets the same criteria required for other particular social groups.

In *Ramirez-Mejia v. Lynch*, the Fifth Circuit Court of Appeals declined to rule on whether the applicant's nuclear family constituted a particular social group. 794 F.3d 485 (5<sup>th</sup> Cir. 2015). The Court addressed the applicant's family-based claim as a question of nexus, much like the Fourth Circuit Court of Appeals in *Hernandez-Avalos v. Lynch*, but applied a narrower interpretation of nexus to reach a different ruling. The applicant requested asylum on the basis of threats she received on account of her membership of her nuclear family; the applicant's brother had been murdered, and she testified to having been threatened by the same individuals who murdered her brother because her family had attempted to file a police report, and because her brother had allegedly relayed some information to the applicant before his death that the individuals wanted. The Court focused its analysis on whether or not the applicant was persecuted on account of the familial relationship, and concluded that the applicant had not established a link between the harms she suffered and her relationship to her brother. While applying a narrower interpretation of the "one central reason"

standard of the nexus requirement than that applied by the Fourth Circuit, the Fifth Circuit appropriately analyzed the applicant's family-based claim as a question of nexus and not on whether the applicant's nuclear family constituted a particular social group.

In *Yin Guan Lin v. Holder*, the Seventh Circuit Court of Appeals also addressed a proposed family-based social group as a question of nexus. 411 Fed.Appx. 901 (7th Cir. 2011). In *Yin Guan Lin v. Holder*, the applicant requested asylum as a member of the particular social group of family members of known debtors, after being repeatedly beaten and detained by his father's creditors. The Seventh Circuit rejected the applicant's proposed particular social group of "family members of known Chinese debtors who fear punishment from creditors for outstanding debt" on the basis that the characteristic of having outstanding debt is not immutable. *Id* at 905. The Seventh Circuit then acknowledged that "a family unit can constitute a social group," and did not reference any additional requirement that the defining family member be persecuted for a protected reason, but found that the applicant had not demonstrated a sufficient nexus between the harm he suffered and his familial relationship; "[a]ny harm that Lin faced arose from a personal dispute between his father and his father's creditors." *Id* at 905-6. The analysis here, as in the Fifth and Seventh Circuits, focuses on whether a sufficient nexus between the harm and the family-based particular social group has been established, not on whether the family meets the definition of a particular social group; the differing rulings were reached by applying a different interpretation of the "one central reason" standard when analyzing the nexus requirement, not by employing different definitions of a family-based particular social group.

In *Malonga v. Holder*, the Eighth Circuit Court of Appeals has endorsed an additional layer of analysis for family-based particular social groups. 621 F.3d 757 (8th Cir. 2010). The Court ruled that "[a]cts 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." *Id* at 767, quoting *Vonbm v.*

*Gonzales*, 454 F.3d 825, 828 (8th Cir. 2006). However, the applicant in *Malonga v. Holder* did not articulate a family-ties claim, and the Court would very likely have reached the same conclusion by analyzing the nexus between the applicant's feared persecution and his membership of his family. Here the applicant articulated past harms inflicted on account of his political activities, which were intertwined with his ethnicity. After the applicant fled for the United States, he testified that he believes his wife, child, and parents were targeted and possibly murdered because of their ethnicity or because of his own political activities. There is no clear family-based claim articulated; the applicant did not claim to be targeted on account of the actions, ethnicity, or beliefs of one of his relatives, but rather suggests that his family may have been targeted on account of their relationship to him. It appears that the Court appropriately assessed whether the applicant's family members were targeted on account of a protected ground in its assessment of the credibility of the applicant's own claims to fear persecution on account of a protected ground; not to determine if the applicant is a member of a family-based particular social group.

**III. Requiring asylum applicants claiming persecution on account of a family-based particular social group to engage in an additional analysis of whether the defining family has also been persecuted on account of a protected ground would place an unreasonable burden on pro se and low income asylum applicants.**

The requirement that an asylum applicant claiming persecution on account of a family-based particular social group engage in essentially *two* separate analyses of whether persecution occurred or is likely to occur on account of a protected ground is unreasonably burdensome, particularly for pro se and low income applicants. The three-part test established by the BIA for applicants requesting asylum as members of a particular social group is already challenging to meet; applicants must demonstrate an immutable trait that defines their proposed particular social group; evidence that this trait is sufficiently recognizable in their given society such that it serves to distinguish those who have the trait from those who do not; and evidence that, though the group is recognizable as a

distinct group in society, it is particular and not so broad so as to encompass too wide a swath of society. Once a particular social group is established, the applicant still must establish that (a) she is a member of the particular social group, and (b) there is a nexus between the persecution she fears and her membership of the particular social group.

Given the difficulty of meeting this burden, requiring an applicant to engage in a second analysis to determine whether their relative has also been persecuted on the basis of a protected ground presents a significant obstacle that will likely preclude pro se and low income applicants from succeeding in worthy asylum applications. Applicants will be required to gather evidence and obtain country conditions expert testimony not only in support of their own claims, but additionally to demonstrate persecution on account of a protected ground of a relative, who may be located in the applicant's native country or may be deceased. This presents a nearly insurmountable obstacle to pro se and low income applicants who often lack the resources to obtain evidence from their native countries and testimony from experts, and who lack the technical knowledge to formulate not one, but two, clearly-articulated and defined asylum claims on the basis of a protected ground.

Many asylum applicants who claim persecution based on membership of a particular social group defined by a familial relationship are pro se and low income minor children. Child asylum applicants are likely to be the most disadvantaged by an additional layer of analysis. Children, if they are mature enough to understand that they have suffered harm and can articulate that harm, still inevitably experience significant difficulty understanding and articulating potential motivations for that harm by their persecutors. It is an unreasonable burden to require traumatized child asylum applicants to first engage in a complicated analysis of harm they themselves have experienced and the nexus between that harm and their membership of their family, and then to further require them to articulate the harm experienced by a relative and identify and articulate a protected ground as the motivation for the harm. Compounding this nearly intractable burden is the fact that children often

are not apprised of all the details regarding harms experienced by adult relatives; while children are perhaps the most likely to be harmed because of a familial relationship, they are also the least likely to be informed of why the state, a group, or an individual is targeting their parent, sibling, or other relative. Requiring an additional analysis of the persecution experienced by the defining relative of a family based particular social group will all but preclude the most vulnerable asylum applicants from succeeding in meritorious claims.

### Conclusion

The Board of Immigration Appeals ("BIA") should reject the notion of an additional requirement for establishing a particular social group that an applicant demonstrate that the defining family member has also suffered persecution on account of a protected ground. A narrowly-defined family-based particular social group already meets all of the requirements of a particular social group established by BIA precedent. The questions raised by Courts applying this additional analysis are most appropriately addressed in an analysis of the nexus between the persecution and the protected ground. Further, requiring additional analysis will unduly burden pro se, low income, and child asylum applicants.

Respectfully submitted this 3rd day of March, 2016.

ACCESS TO LAW, INC

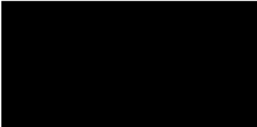
*A 501(c)(3) nonprofit organization*



Rebeca E. Salmon, Esq.

*Executive Director*

*Certified Child Welfare Law Specialist*



Maura Finn, Esq.

*Staff Attorney*

March 3rd 2016  
10:45 AM

Table of Authorities

**Federal and Board of Immigration Appeals Case Law**

*Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011)

*Flores Rios vs. Lynch*, 807 F.3d 1123 (9th Cir. 2015)

*Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015)

*Lin v. Ashcroft*, 377 F.3d 1014 (9th Cir. 2004)

*Lin v. Holder*, 411 F. App'x 901 (7th Cir. 2011)

*Malonga v. Holder*, 621 F.3d 757 (8th Cir. 2010).

*Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985)

*Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006)

*Matter of M-E-V-G-*, I&N Dec. 227 (BIA 2014)

*Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008)

*Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015)

*Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986)

**Statutory Law**

INA § 101(a)(42), 8 U.S.C. § 1101(a)(42)(A)