
**UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL**

MATTER OF L-E-A-,
Respondent

Referred from:
United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

BRIEF AMICI CURIAE

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INTRODUCTION

In an Order issued on December 3, 2018, the Office of the Attorney General of the United States asks the following question: “Whether, and under what circumstances, an alien may establish persecution on account of membership in a ‘particular social group’ under 8 U.S.C. § 1101(a)(42)(A) [INA § 101(a)(42)(A)] based on the alien’s membership in a family unit.”

Amici Curiae are former federal prosecutors and law enforcement agents who are concerned about the broader ramifications of removing asylum protection for family-based “particular social groups,” and caution against a narrow view to the phenomenon of violent non-state actors involved in an array of illicit and/or terrorist activities and their ties to state entities.

Amici are aware of the Attorney General’s reluctance to find persecution based on the acts of seemingly “private” entities. *See e.g. Matter of A-B-*, 27 I &N Dec. 316, 339 (BIA 2018). Here, Amici ask that the AG look deeper and consider the genesis of non-state entities and their ties to governments around the world. With the lens of insight and drawing on knowledge and resources within the AGs particular purview, it is undeniable that foreign non-state actors are often closely aligned, connected, and even merged with the state or parts of the state.

Furthermore, based on their experience with cooperating witnesses and intelligence sources, Amici can attest to the fact that family members are often targeted for harm based on their familial relationship with a known cooperating witness or source. Often, intelligence gathering, investigations and prosecution bring cases to the very doorstep of foreign governments. It is an unfortunate fact that entities of the state are often involved in international illegal activity and have corrupt, yet strong, connections with illegal armed groups and other

nefarious organizations. When this happens, foreign police, military, politicians, and even the judiciary, may be the instrument of persecution.

In turn, many cooperating sources would not assist United States law enforcement efforts if they did not believe their family members are safe from harm. Certainly, every case presents a distinct set of facts, and the kinship ties that form a “social group” must be established on a case-by-case basis. *See Gonzalez v. Thomas*, 547 U.S. 183, 186 (2006). Still, the characteristic of belonging to a family—those immutable kinship ties--represent the quintessential social group. The Attorney General should not close the door on social group membership for the family members of cooperating witnesses and sources. The point is not that U.S. law enforcement will in some cases lose the indispensable benefit of cooperating witnesses who provide valuable intelligence against illegal armed organizations and complicit state actors. Rather, Amici sincerely fear for the safety of innocent family members who, if returned to their home countries, will most certainly be targeted on account of the familial tie, as a consequence of aiding U.S. law enforcement.

Our Supreme Court, the Board of Immigration Appeals (“BIA” or “the Board”) and the circuit courts of appeal have long-held that “particular social groups” formulated on nuclear family membership may form a valid protected ground under Sections 101(a)(42), 208(b) of the Immigration and Nationality Act (“INA” or “the Act”). Whether any particular fact pattern represents persecution (based on established criteria) will depend on the circumstances of the case, notwithstanding the family social group. Amici urge the Attorney General not to take any action inconsistent with long-established precedent and reaffirm that family-based social groups are cognizable under the INA.

STATEMENT OF INTEREST OF AMICI CURIAE

Below is a list of the relevant experience of each of the former federal prosecutors and law enforcement agents submitting this brief. Amici have a distinct interest in ensuring that asylum and withholding of removal continues to view nuclear family membership as a cognizable “particular social group” based on the well-established case law from the BIA and circuit courts of appeals.

Bonnie S. Klapper, Esq. was an Assistant U.S. Attorney in New York from 1986-2012, with a primary focus on the investigation and prosecution of complex money laundering cases and international drug trafficking cases, specifically drug trafficking cases involving Mexican, Guatemalan and Colombian illegal armed organizations. As a federal prosecutor for 25 years, she worked on hundreds, if not thousands of investigations. “These investigations ultimately led to hundreds of convictions of high-level narcotics traffickers and money launderers, the vast majority of whom were extradited from South and Central America to the United States.” In essentially every successful prosecution, Klapper collaborated with special agents from Homeland Security, Drug Enforcement Administration and Federal Bureau of Investigations who “relied heavily on cooperating defendants and/or confidential informants (individuals cooperating with the government who were not otherwise charged criminally in the investigation).” Klapper Aff. at page 2. “Without these cooperating defendants/confidential informants, the great majority of the investigations would not have been successful, let alone initiated.” *Id.* Since retiring from the U.S. Attorney’s Office in February 2012, Klapper has continued to work in private practice representing foreign nationals extradited to the United States, typically on narcotics and/or money laundering charges.

Robert Dunlap, Esq. graduated from Duke University and the University of Miami School of Law. Thereafter he held a position within the Department of Justice as an Assistant U.S. Attorney for the Southern District of Florida for six years. After leaving the government for private practice 30 years ago, Mr. Dunlap has focused on criminal and civil litigation in Miami, Florida. He has successfully represented clients in federal and state criminal cases, grand jury investigations, and other litigation.

Daniel Forman, Esq. is a Senior Partner of Forman Law Group, who began his career as a state, then federal Assistant United States Attorney in Miami, Florida. Mr. Forman's practice includes extensive experience in state, federal, and international contexts. In the course of his legal career, Mr. Forman has traveled to and represented clients from Venezuela, Thailand, the Netherlands, Colombia, Mexico, Canada, Panama, the United Kingdom, France, Guatemala, the Dominican Republic, the Bahamas, and Costa Rica. Mr. Forman is admitted to practice before the United States Supreme Court, is a member of the bars of Florida, Pennsylvania, and the District of Columbia, and has appeared in numerous state and federal courts throughout the United States.

Roy Kahn, Esq. is a former Assistant State Attorney in Miami, Florida, as well as a former Assistant United States Attorney. Attorney Kahn graduated with honors from Boston University, and earned his J.D. at the University of Miami. He is a member of the Florida Bar's Criminal Law Section and the National Association of Criminal Defense Lawyers. He focuses on complex federal litigation and is recognized as an accomplished trial lawyer, which includes but is not limited to federal court appointments authorized under the Criminal Justice Act ("CJA").

Linda Osberg-Braun, Esq. is a former Deputy District Counsel under the former Immigration and Naturalization Service (INS) where she provided legal advice to all enforcement components

and operations and handled complex federal litigation on behalf of the federal government. She also supervised over 64 attorneys who appeared before the Immigration Court daily. Ms. Osberg-Braun is also a former assistant federal public defender. She is the founder of Osberg-Braun & Ruiz, an immigration firm dedicated to solving complex immigration problems and developing winning strategies. She is a board-certified expert in immigration law. Ms. Osberg-Braun is also counsel for the amici.

Romedio Viola served 20 years as a senior special agent with Immigration Customs Enforcement (“ICE”) Homeland Security Investigations (“HSI), the largest investigative agency in the U.S. Department of Homeland Security; ICE HSI agents conduct bulk cash, fraud and drug trafficking investigation. Mr. Viola was the case agent for many of the most significant prosecutions of the past two decades, including the prosecutions of the Norte Valle Cartel. Mr. Viola now utilizes his investigative expertise in the private sector assisting attorneys. Today, he specializes in OFAC matters and has been licensed by OFAC on numerous occasions to assist those who seek removal from OFAC designation.

Mike Chase was a career special agent for the Drug Enforcement Administration up until his retirement in 2014. As a senior special agent with the Miami Field Office, his focus was on investigation of drug trafficking and money laundering, paramilitary blocs, in Colombia, Central and South America. He aided prosecutors not only in the Southern District of Florida, but also the District of Columbia in cases involving high ranking leaders of illegal armed groups in Colombia.

Manuel Recio is a former Drug Enforcement Administration Assistant Supervisor in Charge of the Miami Field Office Division, who retired in November of 2018. He also worked at DEA Headquarters in Washington. After years as a special agent, travelling throughout South and

Central America, and the Caribbean, he was promoted to Assistant Supervisor in Charge and supervised other agents' work in countries around the world, with a focus on the Caribbean, Central and South America.

BACKGROUND

As former prosecutors and agents, Amici attest (and believe that the Attorney General knows) that illegal armed organizations, violent non-state actors, and complex networks of illegal activity are able to flourish around the world due to the active participation and support of state actors. Klapper Aff. at page 2. Indeed, this phenomenon is not simply a few rogue officers or isolated incidents of corruption. *Id.* Rather, very often the state actors' interests align and merge with those of the illegal, private organizations as a means to political power and/or access to vast financial resources. *Id.* Moreover, non-state entities with nefarious motives, including for example political power, insurgency, or religious zealotry, typically engage in complex illegal activity in pursuit of their goals. In Violent Non-state Actors in World Politics,¹ author Klejda Mulaj explains the modern symmetry between violent non-state actors, the global economy, and the complex networks:

The rise of global finance, the ability to hide financial resources in safe havens, the ability to trade in illicit items, the ability to encode communications with advanced technology, and the growth of transnational ethno-religious communities are manifestations of the global networks where VNSAs² can work.

In order to finance the acquisition of arms and other military commodities, some VNSAs have been involved in predatory and criminal activities...Because most VNSAs are usually unable to engage in legitimate business, they tend to turn to illicit commerce including drug trafficking, diamond smuggling, kidnapping for ransom, prostitution, and extortion. Whereas the revenue from these endeavors is

¹ Mulaj, Klejda, Violent Non-state Actors in World Politics, Columbia University Press, 2010, Chapter 1.

² VNSA is an acronym for "Violent Non-state Actors."

likely to widen and prolong the conflict, they also bring with them the risk that VNSAs leaders are affected by the opportunities for personal enrichment through illegal means.³

And how do “VNSAs” succeed? In countries around the world, the unfortunate reality is that illegal activity succeeds because of either alliances or outright merger with the particular state or state’s interests, or at least with certain entities within any given government. Klapper Aff. at 2.

Which brings us to American efforts to combat and prosecute crime and the corruption that often fuels it. U.S. law enforcement operations routinely utilize sources and witnesses as tools in their investigative and prosecutorial functions. *Id.* These witnesses and assets provide valuable insight into the inner workings, structure, and finances of criminal networks, illegal armed organizations, and their state-sponsored components. *Id.* at 6. Without the intelligence and testimony of sources and witnesses, successful investigations and prosecutions would not be possible. *Id.*

Logically, it is extremely dangerous for witnesses to provide intelligence against foreign government officials and powerful illegal-armed groups. Klapper Aff. at page 6. Witnesses pose a threat to the political power structures and economic elites in these foreign countries. *Id.* Consequently, these powerful organizations think nothing of detaining, torturing, and murdering individuals they perceive as threats or disloyal, or simply seek to punish. *Id.* Relevant here, powerful organizations and their complicit state actors systematically target and harm family members as a tool to silence witnesses and obstruct their collaboration with law enforcement. *Id.* at page 6-7. Because of the significant risk, witnesses and informants fear for the safety of their family and will not surrender or cooperate with U.S. law enforcement without a means of

³ See *supra* note 1, Mulaj, Klejda, Violent Non-state Actors in World Politics, at p. 21.

protecting their family. *Id.* Of course, often the threat to family arises because of cooperation that has already transpired. In this case, the persecutor does not act out of a deterrent motive, but purely for punishment based on the family tie.

ARGUMENT

I. Non-state actors, including illegal armed groups, often work with the state to accomplish both illicit and political purposes; American law enforcement investigates and prosecutes both.

An applicant seeking to establish persecution based on violent conduct of a private actor must show more than the government's difficulty controlling private behavior. Specifically, an applicant must show the harm of suffering is "inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control." *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018) (quoting *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985)). The experience of Amici, as well as documented reports, show that non-state actors align with government entities in many parts of the world and, in turn, pose a threat to the cooperating intelligence sources and witnesses, as well as their family members. This brief will not focus on whether the witnesses and intelligence sources themselves qualify as refugees under INA § 101(a)(42), but instead, looks at whether in certain cases, family members face persecution on account of "social group," based on established legal criteria.⁴ The following regions provide just a few clear examples of where so-called private actors align or merge with

⁴ Although beyond the scope of this case, Amici would urge clarification of *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), as its facts relate to a noncriminal confidential informant in a limited investigation, and hence does not reach the factual profile presented by intelligence sources, whom in significant cases are not confidential and will often have a record of criminal activity themselves. Successful investigations and prosecutions are rarely accomplished through the use of saints as witnesses; and the criminal justice discovery process, foreign extradition requirements, and other resources of criminal networks rarely ensure confidentiality of the source.

state actors. The discussion will then turn to incidents of persecution against witnesses and/or family members.

Afghanistan and the Taliban

Depending on whom you ask and the context of the conversation, the Taliban is alternatively a political movement,⁵ terrorist organization, and drug trafficking group. In a 2008 press release quoting Assistant Attorney General Alice S. Fisher, Taliban leader Khan Mohammad of Nangarhar Province was convicted by a jury in the District of Columbia on charges of narcotics distribution and narco-terrorism. A cooperating witness working with the DEA met with Mohammed on several occasions to plan a rocket attack. During the investigation, Mohammed also sold opium destined for the United States.⁶

In 2012, Haji Bagcho, also from Nangarhar Province, was investigated by the DEA for narcotics offenses. The investigation revealed that Bagcho was one of the largest heroin traffickers in the world and manufactured the drug in clandestine laboratories along Afghanistan's border region with Pakistan. Bagcho sent heroin to more than 20 countries, including the United States. Proceeds from trafficking were then used to support high-level

⁵ On December 17, 2018, National Public Radio reported that United States officials were meeting with representatives of the Taliban to discuss a peace process. *See Taliban Says It Is Meeting With U.S. Officials, Amid Escalating Peace Efforts*, NPR, Dec. 17, 2018, available at: <https://www.npr.org/2018/12/17/677342171/taliban-says-it-is-meeting-with-u-s-officials-amid-escalating-peace-efforts>. Afghan President Ghani has offered to recognize the Taliban as a political party. *Id.* The Taliban is believed to control or have significant presence in 70% of Afghanistan, and performs as a parallel government. *See Taliban Threaten 70% of Afghanistan, BBC Finds*, BBC, Jan. 31, 2018 available at <https://www.bbc.com/news/world-asia-42863116>.

⁶ Dep't of Justice, Press Release: "Member of Afghan Taliban Convicted in U.S. Court on Narco-terrorism and Drug Charges" May 15, 2008, available at <https://www.justice.gov/archive/opa/pr/2008/May/08-crm-429.html>.

members of the Taliban to further their insurgency in Afghanistan.⁷ “With the help of cooperating witnesses, the DEA purchased heroin directly from the organization on two occasions, which Bagcho understood was destined for the United States.”⁸

According to the United Nations Office on Drugs and Crime, an “unprecedented” 328,000 hectares of land in Afghanistan are devoted to opium poppy cultivation. The report reveals that the record-high production led to a rapid expansion of the illegal economy in 2017. Being worth between 4.1 billion USD to 6.6 billion USD in 2017—or 20 and 32 per cent of gross domestic product—the value of the opiate-based economy exceeded by far the value of Afghanistan’s legal exports of goods and services during 2016.⁹

In a recent address to the American people, President Trump committed military troops to a renewed engagement in battling the Taliban, while pledging diplomatic and political support to the struggling government: “someday, after an effective military effort, perhaps it will be possible to have a political settlement that includes elements of the Taliban in Afghanistan, but nobody knows if or when that will ever happen.”¹⁰ Clearly, the Taliban is, among other

⁷ Dep’t of Justice, Press Release: “Haji Bagcho Convicted by Federal Jury in Washington, D.C., on Drug Trafficking and Narco-terrorism Charges” March 13, 2012, available at <https://www.justice.gov/opa/pr/haji-bagcho-convicted-federal-jury-washington-dc-drug-trafficking-and-narco-terrorism-charge>

⁸ *Id.*

⁹ U.N. Office on Drugs and Crime, Press Release: “Afghan opium production jumps to record level, up 87 per cent: Survey,” Nov. 15, 2017, available at https://www.unodc.org/unodc/en/press/releases/2017/November/afghan-opium-production-jumps-to-record-level--up-87-per-cent_-survey.html

¹⁰ The White House, “Remarks by President Trump on the Strategy in Afghanistan and South Asia” Aug. 21, 2017, available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-strategy-afghanistan-south-asia/>

nefarious characteristics, first and foremost a political force that seeks control of the Afghan government.

Lebanon and Hezbollah

Hezbollah, Arabic Ḥizb Allāh (“Party of God”), also spelled Hezbollah or Hizbullah, is a militant group and political party that first emerged as a faction in Lebanon following the Israeli invasion of that country in 1982.¹¹ They are a powerful political party in Lebanon today. Hezbollah also operates a complex network of drug trafficking and money laundering through Lebanon, and partners with Colombian organizations like the “Oficina de Envigado” of Colombia. According to a 2016 DEA report, “Operation Cassandra” is an effort that targets a global Hezbollah network responsible for the movement of large quantities of cocaine in the United States and Europe.¹²

Mexico

For decades, the Mexican government’s approach to the activities of large drug trafficking activities was one of “accommodation.”¹³ Mexican law enforcement and security forces either ignore or actively support Mexican Drug Trafficking Organizations, or “DTOs.”

¹¹ Encyclopedia Britannica: “Hezbollah, Lebanese Organization,” accessed Feb. 19, 2019, available at <https://www.britannica.com/topic/Hezbollah>

¹² Drug Enforcement Administration, Press Release: “DEA And European Authorities Uncover Massive Hizballah Drug And Money Laundering Scheme,” Feb. 1, 2016, available at <https://www.dea.gov/press-releases/2016/02/01/dea-and-european-authorities-uncover-massive-hizballah-drug-and-money>

¹³ *Mexico: Organized Crime and Drug Trafficking Organizations*, Congressional Research Service Report, July 3, 2018, available at <https://fas.org/sgp/crs/row/R41576.pdf>

Police corruption has been so extensive that law enforcement officials corrupted or infiltrated by the DTOs and other criminal groups sometimes carry out their violent assignments.¹⁴

La Familia Michoacan

This illegal armed organization is at the center of the case presently before the Attorney General for consideration. La Familia Michoacan, or “LFM” as identified by American Law Enforcement, is more than a “drug cartel.” According to the Congressional Research Service, LFM traces its roots back to 1980 when it was a subsidiary of the Zetas armed organization. The group, which provides “Robin Hood like” social services in poor, rural areas, is known for its symbolic horrific violence, military tactics, and purported religious justifications.¹⁵ According to an April 2018 DOJ/DEA announcement, former LFM leader Arnolando Rueda-Medina was arrested in Mexico in 2009, extradited to the United States in 2017, and ultimately convicted of money laundering and drug trafficking in 2018.¹⁶ The DEA announcement refers to the LFM as a Transnational Crime Organization. Of note, under Mexican law, an extradition request must be supported by investigative reports and evidence, including signed witness statements; this means the cooperating source is revealed to the defendant(s). Art. IV, Mexican Penal Code.

Turning to the *L-E-A* case, and under a holistic view, the LFM is involved in a myriad of trans-national illegal activities, harbors a warped sense of righteousness, and exists because of

¹⁴ *Id.*

¹⁵ Congressional Research Service, *Mexico: Organized Crime and Drug Trafficking Organizations* (July 2018). LFM is morally opposed to the sale and use of methamphetamines by Mexicans, and instead exports to the United States. Their resources includes cells throughout Mexico and the United States, where members use military grade weapons.<https://www.justice.gov/opa/pr/more-300-alleged-la-familia-cartel-members-and-associates-arrested-two-day-nationwide>

¹⁶ <https://www.dea.gov/press-releases/2018/04/11/la-familia-michoacan-drug-cartel-leader-sentenced-43-years-federal-prison>.

strong ties to local state actors. (This last issue is discussed further, below.) LFM engages in a pattern and practice of subjugating local residents into compliance and in this case, a family member was targeted as punishment for the family's resistance to compliance with the regime.

The Northern Triangle

In a November 2018 press announcement, the DEA informed the public that the agency had arrested a former congressman from Honduras and the brother of Honduran President Hernandez.¹⁷ On March 14, 2018, DOJ announced that former Guatemalan President Alfonso Portillo pled guilty to money laundering. In September of 2018, former El Salvadoran president Elias Antonio Sacas was convicted (in El Salvador) of embezzlement and money laundering.¹⁸

Colombia

In an April 10, 2018 press report, the Department of Justice announced indictments against four leaders of the FARC¹⁹ Revolutionary Group. Although they are a decades-old leftist insurgency group, the charges were drug trafficking, not terrorism. One of the men, Hernandez-Solarte, was a candidate for the Colombian Congress.²⁰

For a time there was also a powerfully violent counter-insurgency, classified as a Tier I terrorist organization, the Autodefensas Unidas of Colombia, or AUC. Many AUC leaders have

¹⁷ <https://www.dea.gov/press-releases/2018/11/26/dea-announces-arrest-former-honduran-congressman-and-brother-current>.

¹⁸ <https://www.reuters.com/article/us-el-salvador-corruption/former-el-salvador-president-sentenced-to-10-years-in-prison-idUSKCN1LS39Y>.

¹⁹ *Fuerzas Armadas de Colombia*; Revolutionary Armed Forces of Colombia.

²⁰ U.S. Dep't of Justice, U.S. Attorney's Office Press Release of Sealed Indictment against Seuxis Paucis Hernandez-Solarte, available at <https://www.justice.gov/usao-sdny/press-release/file/1050791/download>

been indicted for drug trafficking in the United States. In addition, the para-political scandal is a still ongoing series of investigations and hearings by the Colombian Supreme Court into political ties to the paramilitaries. According to one scholar, the paramilitaries were not an enemy adverse to the State of Colombia but were allies in consolidating power and pacifying the insurgency.²¹ The rise of a political and economic elite whose foundation is both drug trafficking and counter-insurgency is described in one periodical as thus:

But organized crime also presented the elites with an opportunity. They could be left behind in the new world created by narco-money, or they could throw their lot in with the new narco-elites and hitch a ride to power on the national scale as senators, governors, or party leaders. 'When the regional political class obtains financing from an inexhaustible source of capital, and when it receives the armed support of private armies that regulate a significant portion of the social order, then they achieve a level of political influence never before seen in the country's center.'²²

II. Family members of high-profile cooperating witnesses are at risk from state actors and their nefarious partners on account of the family relationship.

Amici provide the following examples of a few specific instances in which family members of cooperating witnesses are, in fact, in lethal danger from both state actors as well as their allies within illegal armed organizations.

Recently, in a letter dated February 27, 2018, United States Senate leaders asked the Office of Inspector General to investigate the killings of civilians in the town of Allende, Mexico. According to reports, two Zeta associates fled to the United States and agreed to cooperate from Dallas, Texas, regarding the organization's leaders, the Trevino Brothers',

²¹ Civico, Aldo, The Para-State, An Ethnography of Colombia's Death Squads, University of California Press, First edition, 2015 at p. 201.

²² Organized crime and elites in Colombia: an InSightCrime report, Aug. 18, 2016 available at <https://www.opendemocracy.net/democraciaabierta/hannah-stone/organized-crime-and-elites-in-colombia-insightcrime-report>

whereabouts. These informants provided information to the DEA about trafficking activities. In spite of the men's pleas not to, the DEA turned this information over to members of supposedly vetted Mexican police forces (Special Investigative Units), who leaked the information to the Zetas Organization. According to the reports, the Mexican police promptly leaked the information to the Zetas. A massacre ensued. "The Treviño brothers sought revenge on the men's extended families in Allende in a gruesome dragnet that pulled in innocent townspeople."²³ The Senators' letter asks the OIG to investigate whether the DEA should continue to share information with leaders of the vetted special investigative police forces, the implication being that the police leadership is in cahoots with the Zetas organization.²⁴

As another example, in 2010 a young man who as a 12-year-old youth had been forcibly conscripted and escaped to become both a Colombian and U.S. government witness, returned to Colombia under U.S. government protection to testify in para-political hearings against former Senator Luis Gomez-Gallo. The recipient of relentless bribery offers, and then threats, the witness refused to back down from testifying, so his persecutors took another tact. In November of 2010, a group of purported policemen went to the young witness' childhood home, dragged his mother out of her home, and shot her 25 times, killing her.²⁵ Nevertheless, her son went on

²³ Audio series examines DEA culpability in 2011 Allende massacre, *Statesman*, May 3, 2018, available at <https://www.statesman.com/NEWS/20180503/Audio-series-examines-DEA-culpability-in-2011-Allende-massacre>

²⁴ Letter from Congress of the United States to Inspectors General, at U.S. Dep't of Justice, Feb. 27, 2018, available at <https://www.documentcloud.org/documents/4389531-02-27-18-Engel-Nadler-Feinstein-Leahy-to-DOJ-and.html>

²⁵ Witness' mother murdered in the case against Senator Luis H. Gómez Gallo, *Verdadabierta*, Nov. 23, 2010, available at <https://verdadabierta.com/asesinan-a-madre-de-testigo-en-caso-de-luis-h-gomez-gallo/>

to testify before the Colombian Supreme Court, and was then returned to the United States under temporary DEA protection.²⁶

Another illustrative incident occurred in 2008, when Vladimir Vanoy Cifuentes was assassinated in front of an apartment building north of Bogota, Colombia. His father, Ramiro Vanoy, was serving time in a United States prison while cooperating with both U.S. and Colombian authorities. After this incident, the father announced he would no longer cooperate with the Justice and Peace program for fear of the safety of his family members.²⁷

More recently, in May of 2018, the wife of a witness cooperating in investigations of former President (now Senator) Alvaro Uribe and his alleged ties to paramilitaries and drug trafficking was murdered. She was travelling in an armored car, but men in motorcycles were able to shoot and kill her.²⁸

Which brings the discussion back to the LFM. Entitled “Michoacanazo,” in 2009 the Mexican Attorney General's Office brought a case against local and state public officials from the state of Michoacán; politicians and police were indicted for having ties with the LFM. More than 30 public servants were arrested and sent to prison in a roundup carried out by federal authorities. However, within a two-year period, all of those arrested were eventually released. Nevertheless, the Michoacanazo is a case-study in powerful interests colliding, because the federal judiciary and federal prosecutors attempted (and failed) to prosecute powerful, regional

²⁶ *Id.*

²⁷ “Asesinan a uno de los hijos del ex paramilitar ‘Cuco’ Vanoy,” *Semana*, Oct. 20, 2008, available at <https://www.semana.com/nacion/conflicto-armado/articulo/asesinan-hijos-del-ex-paramilitar-cuco-vanoy/96440-3>

²⁸ Who is killing witnesses against Colombia’s former president? *Colombia Reports*, May 14, 2018, available at <https://colombiareports.com/who-is-killing-witnesses-against-colombias-former-president/>

officials. Although the accused state officials walked free, several “protected” witnesses for the prosecution were killed. These included Édgar Enrique Bayardo del Villar and Onofre Hernandez Valdes.²⁹

The above are just a few examples of investigations and prosecutions implicating state entities as well as illegal armed organizations, and the persecution of witnesses and their family members.

III. The family members of individual witnesses cooperating with U.S. law enforcement can be a cognizable social group pursuant to BIA precedent

Generally, social groups formulated by the individual witnesses’ immediate family meet the BIA’s requirements to form a cognizable “particular social group.” INA § 101(a)(42) (indicating that “membership in a particular social group” is a protected ground). The BIA has required that a social group be (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) be socially distinct within the society in question. 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 (BIA 2014). Individual families of witnesses who cooperate with U.S. law enforcement meet these requirements.

²⁹ Ferreyra, Gabriel, *The Michoacanazo: A Case-Study of Wrongdoing in the Mexican Federal Judiciary*, Mexican Law Review, Volume 8, July-December 2015, pgs 3-31 (2016), available at: <https://www.sciencedirect.com/science/article/pii/S1870057815000025#fn0120>.

a. Family membership is “immutable”

The BIA has explained that an immutable characteristic “either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.” *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). This interpretation takes into account that members would “suffer significant harm if asked to give up their group affiliation, either because it would be virtually impossible to do so or because the basis of affiliation is fundamental to the members’ identities or consciences.” *M-E-V-G-*, 26 I&N Dec. at 237-38. Family affiliation is both “virtually impossible” to give up and “fundamental to the members’ identities[.]” *See id.*

As a result, the BIA has long recognized, family ties are a classic immutable characteristic. *See Acosta*, at 233-34 (recognizing “kinship ties” as an example of an innate, immutable characteristic); *see Matter of H-*, 21 I&N Dec. 337, 342 (BIA 1996) (holding that family membership in the Marehan Subclan Constitutes a Social Group because clan membership is a highly recognizable, immutable characteristic that is acquired at birth and is inextricably linked to family ties); *see also Matter of C-A-*, 23 I&N Dec. at 959-60 (noting that “clan membership is a highly recognizable, immutable characteristic that is *acquired at birth* and *is inextricably linked to family ties*”) (emphasis added). Indeed, family connects members by blood, through shared physical attributes, and by law. *See “Family,” Black’s Law Dictionary* (8th ed. 2004) (defining family as “[a] group of persons connected by blood, by affinity, or by law, esp. within two or three generations” or “[a] group consisting of parents and their children.”). Moreover, history has also recognized the bonds of marriage, children, and family as central to the human condition. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) (noting that “Confucius taught that marriage lies at the foundation of government...this

wisdom was echoed centuries later and half a world away by Cicero, who wrote, ‘The first bond of society is marriage; next, children; and then the family.’”). Given that familial bonds have long been considered fundamental to an individual’s identity, a group defined by the specific cooperating witness’ immediate family, meets the requisite immutable characteristic for “membership in a particular social group.” See *Acosta*, at 233-34; *M-E-V-G-*, 237-38.

b. Family members meet the BIA’s “particularity” requirement

Additionally, the family members of a cooperating witness satisfies the BIA’s “particularity” requirement. The BIA has explained the group must “have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective.” *M-E-V-G-*, 26 I&N Dec. at 239. In other words, the “particularity” requirement ensures that there is “a clear benchmark for determining who falls within the group.” *Id.* (quoting *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007)). A sufficiently particular group is described by terms with “commonly accepted definitions in the society of which the group is a part.” *Id.* Indeed, in many societies and cultures, nuclear family satisfies the particularity requirement because the characteristics defining “family” form a precise benchmark, distinguishing those who fall within the family from those who do not. See *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (finding that “the family unit...possesses boundaries that are at least as ‘particular and well-defined’ as other groups whose members have qualified for asylum.”). Family-based groups are generally defined with “particularity” because they are well defined by commonly accepted nuclear family relationships: husband, wife, and children. In fact, family groups defined by blood or marriage ties can be “defined with particularity” because the terms find definition in many societies, and an asylum applicant can provide objective evidence such as birth and marriage certificates to delineate group membership. As such, immediate family

members of cooperating witnesses can generally put forth objective evidence to demonstrate the “definable boundaries” to meet the BIA’s “particularity” requirement.

c. Family is understood as “socially distinct”

Lastly, family membership is inherently “socially distinct.” The BIA has explained, to be socially distinct, the group “must be perceived as a group by society” that is, it must be “set apart, or distinct, from other persons within the society in some significant way.” *Matter of S-E-G-*, 24 I&N Dec. 579, 586 (BIA 2008) (quoting *Matter of C-A-*, 23 I&N Dec. at 956); *M-E-V-G-*, 26 I&N Dec. at 238. The BIA also explained that “members of a particular social group will generally understand their own affiliation with the group[],” as will other members of society. *Id.* A common-sense understanding of a group comprised of a nuclear family satisfies this test. Both members within and without a particular family are able to recognize one another’s affiliation with the group. *See C-A-*, 23 I&N Dec. at 959.

Often, the family members of cooperating witnesses are recognized in their communities due to wealth, fraternization, and media, including social media. For example, the echelons of the drug trade in Colombia and Mexico are written about constantly in the press, and certainly known to one another. If the individual principles go on to become cooperating sources, their families are well recognized. Unfortunately, some societies have glamorized the wives, mistresses and children of these clans.³⁰ Even where a witness and family members come from

³⁰ For example, Netflix has two popular crime-drama series: *Narcos* set in Colombia telling the story of Pablo Escobar and a companion show, *Narcos: Mexico*. *See* Netflix Website available at <https://www.netflix.com/title/80025172> (*Narcos*) and <https://www.netflix.com/title/80997085> (*Narcos Mexico*). Similarly, the *Cartel de Los Sapos*, which is a Colombian television show based on the 2008 novel by the same name by Andrés López López wrote the fictionalized account of his experiences in the Cali Cartel and of what happened within the Norte del Valle Cartel. *See* “Andres Lopez Lopez: The Journey of a Colombian Drug Lord Turned Bestselling Author of 'El Cartel De Los Sapos'” *Latin Times*, August 7, 2013, available at

humble or low profile origins, the governments—police, military, politicians—have the intelligence resources to identify the vulnerable relatives of cooperating sources.

Thus, with respect to the “social distinction” factor, social groups based on family relationship are “easily recognizable and understood by others to constitute social groups.” *Id.* Therefore, a witness’s specific family is a distinct group within society.

d. Consistent with BIA precedent, the circuit courts of appeals have held that family membership may form a viable “particular social group”

Amici is requesting that the Attorney General issue a decision consistent with a majority of the Courts of Appeals, which have determined that family membership constitutes a viable “particular social group.” See *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015). (“[M]embership in a nuclear family qualifies as a protected ground for asylum purposes.”); *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (holding that the family provides “a prototypical example of a ‘particular social group.’”) (quoting *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986)) see also *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (stating that “[t]here can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family”); *Vumi v. Gonzales*, 502 F.3d 150, 154–55 (2d Cir. 2007) (remanding to the Board to consider the applicant’s claim of persecution based on membership in her husband’s family and noting that “the Board has held unambiguously that membership in a nuclear family may substantiate a social-group basis of persecution”); *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009) (acknowledging that “membership in the same family [] is widely recognized by the case law”); *Iliev v. INS*, 127 F.3d 638, 642 n.4 (7th Cir. 1997) (noting that “other circuits have found that a

family is perhaps the most easily identifiable ‘particular social group’ that could serve as the basis for persecution”); *Demiraj v. Holder*, 631 F.3d 194, 198 (5th Cir. 2011) (acknowledging that family may constitute a “particular social group” within the meaning of the asylum and withholding of removal statutes); *Flores-Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (even under the Board’s “refined framework, the family remains the quintessential particular social group.”). Accordingly, if the Attorney General vacates *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017), removing family membership from social group protection, its actions would be inconsistent with long-held BIA case law and Circuit Court decisions.

e. Membership in a Particular Social Group is Distinct from the “Nexus” Requirement

In reaffirming *L-E-A-*, the Attorney General will not be opening the floodgates for all family-based asylum claims. Even if an applicant demonstrates that he or she is a member of a particular social group based on familial relationship, the applicant also needs to establish that the persecution is *on account of* his or her nuclear family membership. INA §§ 101(a)(42); 208(b)(1)(B)(i); *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992); *L-E-A-*, 27 I&N Dec. at 43 quoting *W-G-R-* 26 I&N Dec. at 218 (“[W]e must separate the assessment whether the applicant has established the existence of one of the enumerated grounds (religion, political opinion, race, ethnicity, and particular social group) from the issue of nexus.”).

To that end, an applicant must establish there is a connection, or a “nexus,” between family membership and the persecution feared. Thus, to merit asylum or withholding of removal, the applicant must provide the Immigration Judge with direct or circumstantial evidence relevant to the persecutor’s motive to show that “the family relationship is a least one central reason for the claimed harm.” *L-E-A-*, 27 I&N Dec. at 44-45 (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)). The BIA has instructed that the familial

membership, “cannot play a minor role—that is, “it cannot be incidental [or] tangential...to another reason for harm.” *Id.* (quoting *J-B-N- & S-M-*, at 214). As a result, in evaluating whether an applicant has met his or her burden of proof, the Immigration Judge must engage in “a particularized evaluation of the specific facts and evidence in an individual claim.” *See L-E-A-*, at 44 quoting *Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011). Thus, the Immigration Judge makes the determination on a case-by-case basis based on the specific evidence the applicant provides to the Court. Accordingly, by reaffirming *L-E-A-*, the Attorney General is not giving a blank check for every single family-based asylum claim. The nexus requirement remains a distinct factual inquiry from an asylum applicant’s membership in a particular social group.

Given that nexus is a separate inquiry, Amici urges the Attorney General to not disturb *Matter of L-E-A-* out of fear of a deluge of asylum approvals based on family membership. Each applicant is still required to establish *all* of the requirements for asylum or withholding of removal. *See* 8 C.F.R. § 1240.8(d).

IV. **Law enforcement tools are insufficient to protect witnesses and are not designed to protect refugees.**

Although the asylum process was never intended as a law enforcement tool, U.S. law enforcement and the security of the American people benefit from the availability of family-based asylum claims. The availability of asylum aids agents and prosecutors in obtaining valuable intelligence from cooperating witnesses, as well as in successfully prosecuting criminal cases. *Klapper Aff.* at pages 10-11. Law enforcement officials from investigative agencies, such as DEA and FBI, require the assistance of cooperating witnesses to penetrate the illegal armed organizations. Through their witnesses, law enforcement obtains beneficial information about the complexities of the organizations’ inner workings and transactions with powerful governmental entities, which align with the organizations based on their similar goals. For U.S.

law enforcement, the intelligence obtained from cooperating witnesses is essential to dismantle the organizations and prosecute members and the state actors that actively collude with them. *See Klapper Aff.* at page 5-6.

Law enforcement agents and prosecutors have limited tools at their disposal to protect family members of witnesses. For persons outside the United States, there is the Special Public Benefit Parole, or “SPBP,” issued under INA § 212(d)(5). An agent must apply for a parole and it then follows a chain of command through agency headquarters and the Department of Homeland Security. A parole is for a limited time period: a year or less. Once in the United States, a cooperating witness’ family members may qualify for a one-year deferred action. This benefit is also temporary in nature, one year or less, and must be approved through a multi-agency chain of command.

Status under INA § 101(a)(15)(S) is a nonimmigrant status for three years. INA § 214(k). If the principal cooperating witness receives S, his or her family members may qualify. However, S nonimmigrant status follows a long process. An individual cannot apply affirmatively for S status.³¹ Rather, the application is prepared by the agency, approved by the U.S. Attorney, the Assistant Attorney General for the Criminal Division, and then forwarded to the Department of Homeland Security. 8 C.F.R. § 214.2(t)(4). The Office of Enforcement Operations facilitates the process. The individual’s presence must be essential to the investigation or prosecution of a criminal organization or enterprise. INA § 101(a)(15)(S). By statute, there is a cap of 200 “visa” numbers per year. 8 C.F.R. § 214.2(t)(4). However, to demonstrate the difficulties in obtaining this status, a 2014 response to a Freedom of Information

³¹ In *Matter of G-K-*, 22 I&N Dec. 88, 95 (BIA 2013), the BIA referenced that the respondent had not applied for S status; however, this statement is a misnomer, as the law enforcement agency has complete authority and control of this application process.

“FOIA” Act request reflected that for fiscal year 2013, only 29 nonimmigrant S applications were granted.³² Theoretically, a person with S nonimmigrant status may qualify for permanent resident status through adjustment under INA § 245(j). The law enforcement agency prepares this application and must demonstrate that the foreign national’s assistance “substantially contributed” to the success of a criminal investigation or prosecution. The case (investigation and prosecution) must have concluded successfully. 8 C.F.R. § 245.11. Pursuant to the FOIA request, six (6) S adjustments were completed in fiscal year 2013. In light of the strict criteria, slow process, and limited number of grants, S status for cooperating witnesses and family members is not a viable option for protection.³³

Accordingly, without an avenue for asylum protection to families, cooperating witnesses will not provide the valuable intelligence that U.S. prosecutors and investigators need in order to successfully do their jobs. *See Klapper Aff.* at page 11. Indeed, “[v]irtually no one will cooperate if he or she believes that doing so leaves his or her family exposed and unprotected.” *Id.* Simply put, removing family-based asylum claims “will wreak havoc with the government’s ability to successfully investigate and prosecute serious crimes.” *Id.* Without cooperating witnesses, “federal law enforcement cannot bring the thousands of successful cases it brings each year, prosecutions which protect our society, punish serious wrong-doing and deter criminal activity.” *Id.*

³² *See* Appendix A.

³³ In *Matter of G-K-*, 26 I&N Dec. 88, the BIA looked at the United Nations Convention Against Transnational Crime, an international treaty to protect witnesses, and found that the United States was meeting its obligation under the treaty in part through the S process. Amici would disagree with this premise because, in their experience, S-status is generally granted after a case is completed, is difficult to obtain, and rarely approved.

CONCLUSION

Based on the forgoing, the tools available to law enforcement, such as parole, witness protection, and S status, are insufficient to meet the quantity and myriad of needs for cooperating witnesses and their families. Moreover, these programs were not designed to address the issue of persecution on account of an enumerated ground. Amici urge the Attorney General to consider that so-called “private” actors often have strong ties, or a symbiotic relationship, with state entities. In the context of cooperating witnesses and intelligence sources, their collaboration with law enforcement threatens political and economic establishments as well criminal activities. Family members are identified as kin, and subject to reprisal. Cases must be evaluated based on the independent facts and circumstances and not every family member of a cooperating witness will meet the stringent criteria of particularity and distinction. However the door should not be closed on this group of persons, either. Hence, Amici is requesting the Attorney General affirm *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017), consistent with long-established agency case law and circuit courts of appeals decisions, that membership in the family can form a cognizable “particular social group” under the INA.

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Respectfully submitted

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief Amici Curiae complies with the 9,000 word count laid out in *Matter of L-E-A-*, 27 I&N Dec. 494 (A.G. 2018). Exclusive of cover, captions, table of contents, table of authorities, and signature block, it contains 7,475 words, according to the word count feature of Microsoft Word, which was used to generate this brief.

Date: March 13, 2019

/s/ Mary E. Kramer

PROOF OF SERVICE

I, Mary E. Kramer, hereby certify that I served the required copies of the Brief Amici Curiae and any attachments by U.S. first-class mail on March 13, 2019 to the following:

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And by e-mail to AGCertification@usdoj.gov.

Date: March 13, 2019

/s/ Mary E. Kramer

Appendix A

IN THE MATTER OF: L.E.A.

DECLARATION OF BONNIE S. KLAPPER, ESQ.

I, Bonnie S. Klapper, hereby declare as follows:

1. My full name is Bonnie S. Klapper. My office address is 48 West 25th Street, Suite 600, New York, N.Y.10010. My telephone number is (516) 721-0010. My email address is: bonniesklapper@bskesq.com.
2. I was admitted to the Bar of the State of New York on May 4, 1983. I was admitted to the Bar of the State of California on June 3, 1983. I was admitted to the Bar of the District of Columbia on May 10, 2013.

My Background as a Federal Prosecutor

3. From January 1986 through July 1988, I was an Assistant U.S. Attorney in the Central District of California. From July 1988 through February 2012. I was an Assistant U.S. Attorney in the Eastern District of New York. During my time as an Assistant U.S. Attorney, my primary focus was the investigation and prosecution of complex money laundering cases and international drug trafficking cases, specifically drug trafficking cases involving Colombian, Mexican and Guatemalan organizations. I retired from the U.S. Attorney's Office in February 2012 and entered private practice. My private practice consists largely of representing foreign nationals wanted in the United States, typically on narcotics and/or money laundering charges.
4. During my 25 years as a federal prosecutor, I worked on hundreds, if not thousands of investigations. These investigations ultimately led to hundreds of convictions of high-level traffickers and money launderers, the vast majority of whom were extradited (or had surrendered) from South and Central America to the United States. In virtually every successful prosecution, I and the Homeland Security, Drug Enforcement Administration and

Federal Bureau of Investigations special agents with whom I worked relied heavily on cooperating defendants and sources (individuals cooperating with the government who were not otherwise charged criminally in the investigation, referred to hereafter as “cooperating individuals”). Without these witnesses, a great majority of the investigations would have never commenced, much less been successful.

State Corruption and Prosecutions

5. As a prosecutor, it became abundantly clear to me that illegal, international armed organizations in foreign countries, and particularly in South and Central America, work hand-in-hand with corrupt government officials. These organizations could not function successfully without the support of these State actors. The corruption in these countries is so endemic that the State actors themselves are co-conspirators in the criminal activity. This phenomenon is not simply one of a few “bad apples” or rogue police or military. I can recall numerous instances in which cooperating individuals informed me that government officials were not only accepting funds to allow drugs to pass without inspection or seizure through ports and land crossings; it was the police and military who were actually transporting the drugs for the traffickers. The very State actors whose job it was to interdict narcotics and stop illegal activity were in fact facilitating that very same activity.
6. By way of example, in Colombia in the early 2000s, the Autodefensas Unidas of Colombia (“AUC”) was a political movement aligned with that country’s Conservative party. The AUC began as a way to support entrenched political and commercial interests and to fight land reform. As a counter-insurgency group, the AUC financed itself through “taxes” paid by its supporters and eventually, through drug trafficking. The AUC was tacitly supported by

Conservative officials; it and the Conservative movement shared information, soldiers, and funds.

7. During my career as prosecutor, I interviewed numerous Colombian witnesses. These witnesses discussed having bribed judges, politicians, generals, soldiers and police working with the AUC. By revealing these connections to the U.S. government, these witnesses became political threats and their family members became targets of both the AUC members and State actors.
8. The endemic corruption of State actors in Colombia continues today, with politicians, police and other State actors regularly charged with criminal activity or evading charges through threats and bribery. .By way of a more recent example, on March 1, 2019, Colombian authorities arrested a Colombian prosecutor assigned to investigate that country's largest former rebel group, the Revolutionary Armed Forces of Colombia, commonly referred to as the "FARC." The prosecutor had been assigned to a special court established to investigate the veracity of an individual's claim to be a member of the FARC, the manner in which an individual could obtain immunity from prosecution, financial benefits and job training. That prosecutor, with four others, was arrested in the process of accepting a \$500,000 bribe to keep a former FARC leader who had engaged in a drug conspiracy from being extradited. One of the four other men arrested was an ex-senator with close ties to the current president, Ivan Duque.
9. Credible allegations of political corruption, and therefore threats to family members by State actors, continue to reach to the highest levels. At the recent trial of U.S. v. Joaquin ("Chapo") Guzman, one witness discussed payments to (now retired) General Oscar Naranjo,

the former head of the Colombian National Police and vice-president of Colombia in the previous government.

10. Unfortunately, Colombia is only one of many countries in which State actors and powerful politicians present a threat to witnesses and their families. The former president, vice-president and government minister of the country of Guatemala are awaiting extradition to the United States on narcotics conspiracy charges. I represent an individual who was involved in significant criminal activity in Guatemala. This individual worked directly with the government minister, paying the minister for protection; the family's asylum application is pending. In another case in which I am involved, a member of the Central American Congress used his political power to participate in the export from Guatemala to the United States of ton quantities of cocaine; he continues to represent Guatemala in the Central American Congress and is protected from extradition because of his immunity as a government official.
11. In Venezuela, the police and military have been taken over by the narco-traffickers and money launderer; it is not an exaggeration to say that Venezuela has become a narco-state. As a prosecutor, I interviewed numerous individuals who brought drugs through Venezuela from Colombia. When questioned about corruption, these traffickers responded that they paid the police and the army to do the actual drug transportation. By way of a more recent example, in 2017, the two nephews of the wife of Nicolas Maduro, the current president of Venezuela, were convicted of trafficking in the Southern District of New York. During the trial, it became very clear that Venezuelan politicians, police and the military were directly involved in trafficking and that without their involvement, the trafficking would not have been successful.
12. In Honduras, the situation is just as bad in terms of the involvement of State actors in criminal activity. Numerous government officials are currently under investigation or already charged

and extradited for ties to illegal armed groups in the region. In the past year, Carlos Lobo, the son of the former president of Honduras Fabio Lobo, was extradited to the United States and convicted of participating in an international narcotics trafficking conspiracy. Several months ago, Antonio Hernandez Alvarado, the brother of Juan Orlando Hernandez, the current president of Honduras, was arrested in the United States and is awaiting trial on international narcotics trafficking charges. A powerful Honduran congressional deputy, Freddy Najera, recently pleaded guilty and is awaiting sentence on narcotics trafficking conspiracy charges. In these cases, evidence exists that the former and current presidents of Honduras willingly received drug money as bribes and political campaign contributions.

13. In Mexico, the involvement of State actors in the narcotics trade is what allows the trade to flourish. Without the direct participation of the Mexican government, drugs and people could not transit Mexico and enter the United States. I currently represent a Mexican individual who is cooperating with the United States. In numerous interviews with the government, evidence has been disclosed that reveals the participation of State actors, including members of the military, police and prosecutor's office, in criminal activity. Again, during the trial of Joaquin Guzman, evidence was elicited from numerous witnesses regarding the involvement of numerous Mexican political officials, members of the armed forces and police and prosecutors in facilitating criminal activity.

14. When individuals in positions of power are involved in criminal activity, they are able to bring the full power of the state apparatus to their side, including tainted arrests, prosecutions and detention, and other state-inspired repercussions. Certain government departments are particularly well-poised to know who witnesses are and their location through their own databases, and they locate family members with ease. U.S agents work with heavily vetted

foreign police officers and expect integrity from their counterparts. However, time and again the vetting process fails, and the confidence is misplaced. Information is leaked; there are serious repercussions for the family members of cooperating individuals.

15. The unfortunate reality is that the illegal enterprises succeed because of this merger with States' interests. This is not to say that every foreign state is completely corrupt, but I can say with confidence that many foreign governments contain significant blocs of individuals that may never see cocaine or make an illegal transfer of funds; however, they facilitate these events out of a desire to perpetuate a political and financial power structure and secure their own financial enrichment. This phenomenon is a threat to democratic institutions across the globe, and because of diplomatic considerations, often made my job feel like walking a tightrope. Successful investigation and prosecution would not be possible without the individuals who were willing to step up and provide intelligence and testimony.

Immigration Tools Available to Cooperating Individuals

16. It has been my experience that the greatest fear of every cooperating individual, whether he (or she) is a cooperating defendant, witness, or intelligence source, is fear for the safety of the cooperating individual's family. Especially in money laundering and narcotics trafficking cases, cooperating against government officials and powerful groups is an extremely dangerous proposition. In addition to murdering those they consider or suspect to be disloyal or a threat, individuals who learn that they are subjects of investigation frequently target the cooperating individual's family members, reasoning that there is no better way to punish a suspected informant (or stop someone from becoming an informant) than by killing members of his or her family.

17. Prosecutors and agents have some tools at their disposal to protect witnesses and their family members, but they are insufficient. As described below, part of the problem in securing “cooperating witness benefits” is the bureaucracy and standard of proof; another problem is the limited numbers of available benefits; and finally, there is a significant issue with speed and timing. Moreover, cooperating witness tools do not, and are not intended to, assess political and social group persecution. Cooperating witness tools are meant to provide safety to witnesses (and rarely, their close family members) to ensure the ongoing cooperation. There is really no consideration of the motives behind the danger. I will address the cooperating witness benefits and their distinction from asylum/CAT/withholding process step by step below.

The Special Benefits Parole/Deferred Action

18. In many instances as a prosecutor, it was necessary to bring a cooperating individuals’ family to the United States for their safety, using a mechanism referred to as a special benefits parole (“SPBP”). Under the terms of an SPBP, a family member of a cooperating individual is brought to the United States for a defined and limited period of time as a result of threats or potential threats to the family member resulting from the assistance the cooperating individual is providing to the government. In the United States, under current law, a cooperating individual and family member may be eligible for deferred action, meaning a withholding of their deportation.

19. The SPBP is a tool used by prosecutors and special agents to bring a cooperating individual’s family members to safety in the United States. However, it does not confer status on the family member (nor on the cooperating individual). Thus, family members who must remain in the United States for their own safety must turn to other alternatives to obtain status in the United

States. The most significant alternative is the asylum process. Throughout my years both as a prosecutor and a defense attorney, I have seen the critical roles asylum can play in protecting family members. Often, asylum is the only avenue available to protect family members.

20. When the purpose of the SPBP or deferred action is concluded, i.e., the investigation or prosecution is over, the Government will not issue further extensions. SPBP and deferred action are stop-gap measures intended to secure the witness and his/her family during the investigative and prosecutorial process. These tools, in addition to being issued sparingly, are simply not intended to protect someone from “persecution” as that term is defined in the Immigration and Nationality Act. Ironically, and unfairly, when the prosecution of a target(s) is complete, the witness and family members are in greater danger than before. The organization or entity standing behind a particular defendant does not disappear because of a successful prosecution and imprisonment. The organizations are large, and comprise governmental and private networks, and dangerous individuals continue to exist and work in the native country. Asylum is the sole effective method of protecting family members and insuring that they are not returned to the country where they face persecution and threats.

The S Nonimmigrant and Residency Categories

21. The S Visa program was started years ago as a way to grant legal permanent resident status to a limited number of cooperating individuals and certain members of that individual’s family in high-profile prosecutions of large-scale organizations. Pursuant to the terms of the S Visa program, only 200 nonimmigrant S Visas are authorized each year. As a former Assistant U.S. Attorney who specialized in extradition cases, I prepared and submitted approximately twenty S Visa applications during my career, more than any other prosecutor that I know. Thus, I speak from experience when I say that, from its inception, the S Visa program was fraught

with serious issues and the situation has only gotten worse. First, the application process is extremely cumbersome. As an initial matter, a sponsoring Assistant U.S. Attorney or special agent must prepare a long, complicated application. The application must first be approved by the United States Attorney in the requesting district and the Special Agent-in-Charge (ranking official) of the agency sponsoring the request. Because of the complicated nature of the application and the extent of information required, obtaining the approval for the initial S Visa application is time-consuming and difficult.

22. Once the S Visa application is signed by the United States Attorney and the Special Agent-in-Charge, it is sent to the Office of Enforcement Operations at the Department of Justice (“OEO”) where, in my experience, it lingers for months if not years. The OEO is understaffed and more focused on reviewing wiretap and other applications than S Visa applications. Once the OEO approves an application, it is sent to an office at Immigration and Customs Enforcement (“ICE”). In my experience, it takes years for ICE to review and approve the application. I personally handled S Visa applications that took between four to five years to be approved by ICE. During all the time that the S Visa application is pending, the assigned agent must constantly renew the SPBP of the family members to ensure they do not fall out of status. The frequent renewals are jeopardized because agents transfer, retire, or simply become focused on other cases.

23. Once the S application is approved by both ICE and OEO, it must be approved by the ranking ICE, Drug Enforcement Administration (“DEA”) and Federal Bureau of Investigations (“FBI”) official in the country of origin of the applicant. At this point, politics comes into play. I was personally involved in one S Visa application matter in which the ranking law enforcement officials at DEA and ICE refused to sign off on the S application because officials

in the applicant's country of origin (Colombia) objected. As a result, the S visa was never even presented for approval. In that case, the only way the witness's family was able to obtain status was through the asylum process.

24. Not long ago, I was contacted by a DEA agent asking me about S applications I had submitted for two cooperating individuals. Those applications had been pending for over twelve years without any resolution. Based on the cumbersome chain of command, processing delays, political concerns and other factors, it is very clear that the S visa program is an inadequate method to provide sustained safety and security to family members of cooperating individuals.

The Asylum Process

25. The S Visa program and the asylum process are not at all the same. Under the law, they each have a distinct purpose and criteria. The S Visa does not look at whether a person is persecuted. While the asylum process is neither easy nor guaranteed to succeed, it is a functioning process and a status that family members of cooperating witnesses rightfully seek. First, the family members must have an interview with an asylum official. The burden of proving fear as a result of a familial relationship with a cooperating individual is the first step; the family members must be found to be credible, must submit supporting documentation, and must explain their fear of persecution. If the asylum officer denies the application, the matter may be appealed to an immigration judge, at which time an actual hearing takes place.
26. I currently represent three individuals who are cooperating with law enforcement and assisting law enforcement in making cases against extremely high-level targets. One individual is Guatemalan; his/her family entered the United States on an SPBP, had a credible fear interview and received asylum based on their membership in a familial group of a cooperating individual. The second is Mexican; his/her family entered the United States on an SPBP and is awaiting a

decision from the asylum officer. The third is a Guatemalan; his/her family entered the United States on an SPBP and is also awaiting a decision from the asylum office. In all three cases, I can say without a doubt that, had the government not brought their family to the United States and supported the asylum application, and if asylum were not a viable option, the cooperating individuals would not have felt safe in providing crucial information. In fact, in all three instances, my clients informed me that, absent the SPBP and the asylum process, they would have surrendered and cooperated.

Effect on Law Enforcement of Denial of Family Membership as Ground for Asylum

27. As is clear from the above recitation, the asylum process is the only practical, functioning process to protect family members of a cooperating individual. Removing membership in a family as grounds for asylum will wreak havoc with the government's ability to successfully investigate and prosecute serious crimes. Without cooperating individuals, federal law enforcement cannot bring the thousands of successful cases it brings each year, prosecutions that protect our society, punish serious wrongdoing and deter criminal activity.
28. Even if the S Visa program functioned properly, as stated above, 200 nonimmigrant numbers are available each year. The number of family members of cooperating individuals who need protection far exceeds the number of authorized S visas.

Conclusion

29. To conclude, after being involved in the criminal justice system for over 32 years, both as a prosecutor and as a defense attorney, I can say with absolute certainty that illegal armed organizations exist and flourish due to State involvement. Frequently, investigations lead to State actor targets or at the very least individuals involved in criminal activity who succeed

with the facilitation or acquiescence of at least portions of the State. Virtually no one will cooperate if he or she believes that doing so leaves his or her family exposed and unprotected. The tools available to law enforcement may have some factual overlap with the fear-based protections contained in the INA, but they do not diminish a witness and family members' desire and right to seek asylum in a timely fashion. Rather, in most instances, the asylum process based on membership in a family group is the **only** to protect family members of cooperating individuals. Without such protection, the negative effect on law enforcement and successful prosecutions will be, in my own opinion, devastating.

I declare under penalty of perjury under the laws of the United States the foregoing is true and correct.



Bonnie S. Klapper, Esq.

Signed this 10 day of March 2019 in Brooklyn, NY

CERTIFICATE OF NOTARY

On the 10th day of March, 2019, before me, Lonny Schwartz, a notary public, personally appeared **Bonnie S. Klapper**, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to and acknowledged to me that she executed the same in her authorized capacity, and that by her signature on the attached affidavit she executed the same.

WITNESS my hand and official seal.



Notary Public

My commission expires on 11/20/21

LONNY SCHWARTZ
Notary Public, State of New York
No. 02SC4959120
Qualified in Nassau County
Commission Expires Nov. 20, 2021

Appendix B



South Florida Chapter
AMERICAN IMMIGRATION LAWYERS ASSOCIATION

July 1, 2013

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Charles B. Breslow
(1903-1978)

U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street SW, Stop 5009
Washington, D.C. 20536-5009

RE: Request for Information pursuant to the Freedom of Information Act

Dear Sir or Madam:

The South Florida Chapter of the American Immigration Lawyers Association is comprised of over 650 attorneys. We are a voluntary bar association seeking to advance professionalism and knowledge of law among our members. We submit this request for the benefit of our members and the community.

Pursuant to the Freedom of Information Act, we are respectfully requesting statistics regarding "S" immigrant and nonimmigrant status. We are not requesting case specific information or names of particular individuals. We further note that this is non-classified information provided to Congress under INA § 214(k)(4).

Section 101(a)(15)(S) creates a nonimmigrant visa category for certain individuals who possess critical, reliable information and are working with law enforcement. Subsection (i) relates to approvals of status by the Attorney General and is limited to 200 persons per year. See INA § 214(k). Subsection (ii) relates to approvals by the Secretary of State and Attorney General, and is limited by statute to 50 approvals per year.



South Florida Chapter
AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Please provide the following information with regard to principal "S" applicants only. We do not seek numbers regarding dependent family members.

- (1) The number of "S" nonimmigrant applications submitted by law enforcement agencies, per year, since the 2007 fiscal year;
- (2) The number of "S" nonimmigrant approvals, per year, since 2007, in both categories.
- (3) The number of "S" nonimmigrant applications submitted by the Drug Enforcement Agency, per year, since 2007, and the number of approved applications from this group;
- (4) The number of "S" nonimmigrant applications submitted by the Federal Bureau of Investigation, per year, since 2007, and the number of approved applications from this group;
- (5) The number of "S" nonimmigrant applications submitted by Homeland Security Investigations, per year, since 2007, and the number of approved applications from this group.
- (6) The number of "S" nonimmigrant applications submitted from some other federal LEA, other than DEA, FBI, or HSI, per year, since 2007, and the number of approved applications from this group.
- (7) The number of "S" nonimmigrant applications submitted by a state entity, per year, since 2007, and the number of approved applications from this group.
- (8) Based on the above statistics, please calculate and provide to AILA South Florida Chapter, the average processing time for an "S" nonimmigrant application.

In addition, section 245(j) of the INA allows for adjustment of status of "S" nonimmigrants to permanent residency.



South Florida Chapter
AMERICAN IMMIGRATION LAWYERS ASSOCIATION

(9) How many adjustment of status applications have been submitted for principal "S" applicants, per year, since the 2007 fiscal year? (We do not seek statistics on family members.)

(10) How many adjustment of status applications have been approved for principal "S" applicants, per year, since the year 2007. (We do not seek statistics on family members.)

Upon notification by the Department of Homeland Security, the AILA South Florida Chapter will be responsible for search, copying, and mailing fees associated with this request.

Thank you for your time and consideration given to this important matter.

Sincerely,

Antonio G. Revilla III, Esq.
President, AILA South Florida Chapter

U.S. Department of Homeland Security
National Records Center
P.O. Box 648010
Lee's Summit, MO 64064-8010



U.S. Citizenship
and Immigration
Services

January 21, 2014

COW2013000655

Antonio G. Revilla
AILA
2250 SW 3rd Ave., Suite 501
Miami, FL 33129

Dear Antonio G. Revilla:

This is in response to your Freedom of Information Act/Privacy Act (FOIA/PA) request which was initially submitted to Immigration and Customs Enforcement (ICE) and referred to our office (ICE referral number 2013FOIA25584) in which you seek data pertaining to S immigrant and nonimmigrant applications since the year 2007.

We have completed our search for records that are responsive to your request. The record consists of 3 pages of material and we have determined to release it in full.

Documents responsive to your request may contain discretionary releases of exempt information. If made, these releases are specifically identified in the responsive record. These discretionary releases do not waive our ability to invoke applicable FOIA exemptions for similar or related information in the future.

The National Records Center does not process petitions, applications or any other type of benefit under the Immigration and Nationality Act. If you have questions or wish to submit documentation relating to a matter pending with the bureau, you must address these issues with your nearest District Office.

All FOIA/PA related requests, including address changes, must be submitted in writing and be signed by the requester. Please include the control number listed above on all correspondence with this office. Requests may be mailed to the FOIA/PA Officer at the PO Box listed at the top of the letterhead, or sent by fax to (816) 350-5785. You may also submit FOIA/PA related requests to our e-mail address at uscis.foia@uscis.dhs.gov.

Sincerely,

A black rectangular redaction box covering the signature of Jill A. Eggleston.

Jill A. Eggleston
Director, FOIA Operations

non-immigrant

For FY2007:

In this year, the data collected only displays how many S-Visas were approved. The data does not display whether the individuals were principals or derivatives.

2007 Total S-Visa approvals: 44

For FY2008:

In this year, the data collected only displays how many S-Visas were approved. The data does not display whether the individuals were principals or derivatives.

The data does, however, display which Law Enforcement Agencies sponsored the S-Visa applicants.

Federal Bureau of Investigations (FBI): 7
Immigration and Customs Enforcement (ICE): 4
Drug Enforcement Agency (DEA): 7

2008 Total S-Visa approvals: 18

For FY2009:

Principal Approvals: 6

FBI: 1
ICE: 3
DEA: 2

For FY2010:

Principal Approvals: 2

FBI: 1
ICE: 1

For FY2011:

Principal Approvals: 62

FBI: 25

ICE: 17

DEA: 16

Internal Revenue Service (IRS): 1

Bureau of Alcohol, Tobacco, and Firearms (ATF): 2

U.S. Secret Service (USSS): 1

For FY2012:

Principal Approvals: 62

FBI: 24

ICE: 14

DEA: 20

IRS: 1

ATF: 2

State/Local: 1

For FY2013: 29

FBI: 6

ICE: 11

DEA: 12

Permanent

S-Visa Adjustments by Year

FY2007 - 56

FY2008 - 39

FY2009 - 21

FY-2010- 46

FY-2011 - 54

FY2012 - 24

FY2013 - 6

Note: this information was collected for staffing purposes, not for official reporting.