

Matter of L-E-A-, Respondent

Decided by Acting Attorney General February 8, 2019

U.S. Department of Justice
Office of the Attorney General

BEFORE THE ACTING ATTORNEY GENERAL

On December 3, 2018, pursuant to 8 C.F.R. § 1003.1(h)(1)(i), I directed the Board of Immigration Appeals to refer this case to me for review of its decision. To assist me in my review, I directed that opening briefs from the parties be filed on or before January 4, 2019, that reply briefs from the parties be filed on or before January 18, 2019, and that briefs from amici be filed on or before January 18, 2019.

On December 22, 2018, appropriations lapsed for the Department of Justice and the Department of Homeland Security. On December 31, 2018, in light of that lapse in appropriations, I suspended the briefing schedule. After the Department of Justice and the Department of Homeland Security received funding permitting them to resume normal operations, I set a new briefing schedule. The Department of Homeland Security subsequently requested an extension of the briefing schedule. Considering that request, I set the following briefing schedule in this matter:

The parties' briefs shall not exceed 15,000 words and shall be filed on or before February 18, 2019. Interested amici may submit briefs not exceeding 9,000 words on or before March 4, 2019. The parties may submit reply briefs not exceeding 6,000 words on or before March 4, 2019. All filings shall be accompanied by proof of service and shall be submitted electronically to AGCertification@usdoj.gov, and in triplicate to:

United States Department of Justice
950 Pennsylvania Avenue, NW
Office of the Attorney General, Room 5114
Washington, DC 20530

All briefs must be both submitted electronically and postmarked on or before the pertinent deadlines.

Matter of L-E-A-, Respondent

Decided by Acting Attorney General January 29, 2019

U.S. Department of Justice
Office of the Attorney General

BEFORE THE ACTING ATTORNEY GENERAL

On December 3, 2018, pursuant to 8 C.F.R. § 1003.1(h)(1)(i), I directed the Board of Immigration Appeals to refer this case to me for review of its decision. To assist me in my review, I directed that opening briefs from the parties be filed on or before January 4, 2019, that reply briefs from the parties be filed on or before January 18, 2019, and that briefs from amici be filed on or before January 18, 2019.

On December 22, 2018, appropriations lapsed for the Department of Justice and the Department of Homeland Security. On December 31, 2018, in light of that lapse in appropriations, I suspended the briefing schedule. The Department of Justice and the Department of Homeland Security have since received funding permitting them to resume normal operations. Therefore, I set the following briefing schedule in this matter:

The parties' briefs shall not exceed 15,000 words and shall be filed on or before February 11, 2019. Interested amici may submit briefs not exceeding 9,000 words on or before February 25, 2019. The parties may submit reply briefs not exceeding 6,000 words on or before February 25, 2019. All filings shall be accompanied by proof of service and shall be submitted electronically to AGCertification@usdoj.gov, and in triplicate to:

United States Department of Justice
950 Pennsylvania Avenue, NW
Office of the Attorney General, Room 5114
Washington, DC 20530

All briefs must be both submitted electronically and postmarked on or before the pertinent deadlines.

Matter of L-E-A-, Respondent

Decided by Acting Attorney General December 3, 2018

U.S. Department of Justice
Office of the Attorney General

BEFORE THE ACTING ATTORNEY GENERAL

Pursuant to 8 C.F.R. § 1003.1(h)(1)(i), I direct the Board of Immigration Appeals (“Board”) to refer this case to me for review of its decision. The Board’s decision in this matter is automatically stayed pending my review. See Matter of Haddam, A.G. Order No. 2380-2001 (Jan. 19, 2001). To assist me in my review, I invite the parties to these proceedings and interested amici to submit briefs on points relevant to the disposition of this case, including:

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) based on the alien’s membership in a family unit.

The parties’ briefs shall not exceed 15,000 words and shall be filed on or before January 4, 2019. Interested amici may submit briefs not exceeding 9,000 words on or before January 18, 2019. The parties may submit reply briefs not exceeding 6,000 words on or before January 18, 2019. All filings shall be accompanied by proof of service and shall be submitted electronically to AGCertification@usdoj.gov, and in triplicate to:

United States Department of Justice
Office of the Attorney General, Room 5114
950 Pennsylvania Avenue, NW
Washington, DC 20530

All briefs must be both submitted electronically and postmarked on or before the pertinent deadlines. Requests for extensions are disfavored.

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NON-DETAINED

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

In the Matter of)
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In Removal Proceedings)
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File No.: _____

**U.S. DEPARTMENT OF HOMELAND SECURITY
BRIEF ON REFERRAL TO THE ATTORNEY GENERAL**

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INTRODUCTION

The U.S. Department of Homeland Security (Department or DHS) timely submits this brief in response to the Attorney General's referral of the case to himself in accordance with 8 C.F.R. § 1003.1(h)(1)(i). The respondent filed an appeal in this case to seek review of the immigration judge's September 10, 2013 decision denying the respondent's application for asylum under section 208 of the Immigration and Nationality Act (INA), denying withholding of removal under section 241(b)(3) of the INA (statutory withholding), and denying protection under the Convention Against Torture (CAT)¹. The Board of Immigration Appeals (Board) dismissed the respondent's appeal, finding that although the respondent had presented a valid particular social group of his father's immediate family, his family relationship was only an incidental reason for the harm, and therefore nexus was not established. *See Matter of L-E-A-*, 27 I&N Dec. 40, 43, 46-47 (BIA 2017). The Board nonetheless remanded the record for further proceedings with respect to the respondent's eligibility for protection from removal pursuant to the regulations implementing U.S. obligations under Article 3 of the CAT. *See id.* at 47. On December 3, 2018, the Attorney General directed the Board to refer the case for review of its decision, automatically staying the decision and inviting briefing from the parties and amici curiae to address whether, and under what circumstances, family units can be a cognizable particular social group. *Matter of L-E-A-*, 27 I&N Dec. 494 (A.G. 2018).

ISSUE PRESENTED

The Attorney General has presented the following issue for briefing:

¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature Dec. 10, 1984, G.A. Res. 39/46. 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984) (entered into force June 26, 1987; for the United States Apr. 18, 1988) (implemented in the removal context in principal part at 8 C.F.R. § 1208.16(c) - .18).

Whether, and under what circumstances, an alien may establish persecution on account of membership in a “particular social group” under INA § 101(a)(42)(A) based on the alien’s membership in a family unit?

STANDARD OF REVIEW

The Attorney General reviews decisions of the Board *de novo* and is not confined to review of legal or factual errors. *See Matter of J-F-F-*, 23 I&N Dec. 912, 913 (A.G. 2006); *see also Matter of A-H-*, 23 I&N Dec. 774, 779 n.4 (A.G. 2005); *Matter of D-J-*, 23 I&N Dec. 572, 575 (A.G. 2003). When the Attorney General undertakes review of decisions pursuant to a referral under 8 C.F.R. § 1003.1(h), the delegated authorities of the immigration judge and the Board are superseded, and the Attorney General is authorized to make determinations based on his own conclusions on the facts and the law. *See Matter of D-J-*, 23 I&N Dec. at 575; *see also Deportation Proceedings of Joseph Patrick Thomas Doherty*, 12 Op. O.L.C. 1, 4 (1988).

SUMMARY OF THE ARGUMENT

The Attorney General should interpret “particular social group” as excluding protection claims based on the type of family relationship at issue here. The “particular social group” protected ground is not defined in the INA, and the relevant legislative history does not serve to clarify the ambiguity in the statutory term. Moreover, excluding such family relationship-based protection claims would not be inconsistent with U.S. obligations under the 1967 Protocol Relating to the Status of Refugees (Protocol), 19 U.S.T. 6223, 606 U.N.T.S. 267, which incorporated Articles 2 to 34 of the 1951 Convention Relating to the Status of Refugees (Convention), 189 U.N.T.S. 150. Although the United States largely adopted the Protocol’s definition of “refugee” in the Refugee Act of 1980, the term “membership in a particular social group” was not defined at the time of its inclusion in the Convention, nor was it defined in the

Protocol. Congress also did not define the ambiguous term in statute, leaving to the Attorney General and Secretary of Homeland Security the authority to interpret it in a reasonable manner.

The Attorney General should emphasize that protection claims based on a family unit or familial relationship must be reviewed under the analysis set forth in *Matter of A-B-*, 27 I&N Dec. 316, 326 (A.G. 2018).² Under an individualized, case-by-case analysis, there can be no universal definition of family unit or universal set of circumstances setting forth a family-based particular social group. Further, protection claims based on a family unit or familial relationship will ordinarily fail on the requirements of nexus and state protection. Under a nexus analysis, the proper test is: (1) whether evidence shows one motive for the alleged persecutor to target the applicant is the applicant's membership in a cognizable family-based particular social group; and, (2) where evidence shows the existence of multiple motives, whether membership in a cognizable family-based particular social group is at least one central reason for the alleged harm. Applying that rigorous standard to the respondent's case, the Attorney General should hold that the respondent has failed to meet his burden of establishing asylum eligibility, and therefore deny his applications for asylum and statutory withholding.

STATEMENT OF FACTS

The respondent is a 39-year-old male, native and citizen of Mexico, who first entered the United States in 1998. *See* Exhibit (Exh.) 3; Decision of the Immigration Judge (I.J.) at 3. In early 2011, following several convictions, he was placed in removal proceedings, and an immigration judge ultimately granted him voluntary departure. *See* Transcript (Tr.) at 25; I.J. at

² While *Grace v. Whitaker* concerns some portions of *Matter of A-B-* related solely to credible fear determinations, the decision does not speak to substantive protection law that the Attorney General relied on in *Matter of A-B-*. 344 F. Supp. 3d 96 (D.D.C. 2018) *appeal filed*, No. 19-5013 (D.C. Cir. Jan. 30, 2019) (holding that certain aspects of *Matter of A-B-* concerning the credible fear process, and U.S. Citizenship and Immigration Services policies implemented to apply *Matter of A-B-*, with respect to domestic-, gang-, or family-based violence claims in the credible fear process are contrary to law.)

3. The respondent returned to Mexico to live with his parents in Mexico City. *See* Tr. at 26; I.J. at 3. He illegally reentered the United States in August 2011 and was again placed in removal proceedings and charged with inadmissibility under INA § 212(a)(6)(A)(i). *See* I.J. at 1-2. The respondent, through counsel, conceded removability and applied for asylum, statutory withholding of removal, and protection from removal under CAT. *See id.* at 2. The gravamen of his protection claims relates to incidents that occurred after his return to Mexico, following his 2011 removal proceedings. *See* I.J. at 3-6; Resp't Br. Appeal at 2-3.

Upon returning to live with his parents in Mexico City, the respondent's father warned him not to leave their home. Tr. at 27. The respondent's father owned a small general store, and told the respondent that members of La Familia Michoacána (La Familia) approached him about selling drugs in the store to streamline their distribution, but he had refused. *See id.* at 27. The husband of the respondent's cousin was a member of La Familia. *Id.* at 36. Despite his father's warning not to leave the house, the respondent went out with his cousin and nephew, and heard gun shots, which appeared to originate from a black sport utility vehicle (SUV). *Id.* at 30-31. The respondent and his relatives were unharmed. *See id.*

One week after this incident, he was approached by armed men, apparently from the same SUV, who identified themselves as La Familia members and asked if he would sell their drugs at his father's store. *Id.* at 31-32. The respondent refused and the men said that he would see them again. *Id.* at 32. One week later, he was approached by the same SUV, occupied by masked men who attempted to kidnap him, but he ran away. *Id.*

Following this incident, the respondent fled Mexico City for Tijuana, where he remained for two months. *Id.* at 44-45. While in Tijuana, the respondent was approached by other individuals asking him to carry drugs across the border, but he refused. *Id.* at 47. The

respondent subsequently reentered the United States. *Id.* at 33. His parents continue to reside in Mexico City, though his father now pays “rent” to La Familia. *Id.* at 46.

In a decision dated September [REDACTED] 2013, the immigration judge found the respondent credible but denied his applications for protection. Concerning the respondent’s applications for asylum and statutory withholding, the immigration judge appeared to assume, without analysis, that the family of the respondent’s father constituted a cognizable particular social group. *See* I.J. at 8-9. Nevertheless, the immigration judge denied the respondent’s application for asylum, finding that he had failed to establish the required nexus, as the record reflected that La Familia’s focus was on his father’s store rather than his family. *See id.* at 8-9. The immigration judge found that La Familia only was interested in increasing its profits and distribution locations by using the store. *See id.* The immigration judge determined that the respondent’s asylum application also failed on state protection and internal relocation grounds. *See id.* at 10. Insofar as the immigration judge found that the respondent failed to meet his burden for asylum, she also found that he failed to qualify for statutory withholding of removal. *See id.* The immigration judge also denied the respondent’s application for CAT protection. *See id.* at 11.

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

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

Resp’t Br. Appeal at 7-8.³

³ The respondent also appealed from the immigration judge’s denial of CAT protection. Resp’t Br. Appeal at 10.

ARGUMENT

I. THE ATTORNEY GENERAL IS NOT REQUIRED TO RECOGNIZE MEMBERSHIP IN A FAMILY UNIT AS MEMBERSHIP IN A PARTICULAR SOCIAL GROUP FOR PURPOSES OF ASYLUM AND WITHHOLDING OF REMOVAL ADJUDICATIONS.

A. The Attorney General Has the Authority to Interpret the Ambiguous Term “Membership In A Particular Social Group.”

The term “membership in a particular social group” appears in the INA’s definition of “refugee,” *see* INA § 101(a)(42)(A), which in turn is based on the Protocol, *see Matter of Acosta*, 19 I&N Dec. 211, 219 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). As the Attorney General, Board, and federal courts have recognized, “membership in a particular social group” – which is not defined in the immigration laws or the Convention or Protocol – is ambiguous. *See, e.g., Donchev v. Mukasey*, 553 F.3d 1206, 1215 (9th Cir. 2009) (“Although the other four protected grounds are denoted with a fair degree of clarity, except perhaps around the edges, ‘particular social group’ needs interpretation to be understood. On its face, the term ‘particular social group’ is ambiguous.”); *Matter of A-B-*, 27 I&N Dec. at 326 (“As the Board and the federal courts have repeatedly recognized, the phrase ‘membership in a particular social group’ is ambiguous.”).

“The Attorney General has primary responsibility for construing ambiguous provisions in the immigration laws,” in adjudications, *Matter of A-B-*, 27 I&N Dec. at 326 (citing *Matter of M-E-V-G-*, 26 I&N Dec. 227, 230 (BIA 2014)), and has delegated this responsibility to the Board, *see Negusie v. Holder*, 555 U.S. 511, 516-17 (2009) (explaining that the Attorney General has delegated his discretion and authority to interpret the law to the Board, and that the Board should therefore be accorded deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in fulfilling its role). The Attorney General and the Board have construed “membership in a particular social group,” in several precedent decisions over

the years. See *Matter of A-B-*, 27 I&N Dec. at 317; *Matter of M-E-V-G-*, 26 I&N Dec. at 230-33.

As the Supreme Court has recognized, the determination whether the term can and should reasonably be construed to encompass any sort of family unit rests with the Attorney General and the Board in the first instance. See *Gonzales v. Thomas*, 547 U.S. 183, 186-87 (2006) (criticizing the Ninth Circuit’s failure to allow the Board to decide in the first instance whether and under what circumstances a specific family unit could constitute a particular social group.

B. There is No Indication in the INA or Its Legislative History That “Membership in a Particular Social Group” Encompasses Membership in a Family Unit or a Familial Relationship *Per Se*.

Typically, the starting point of any statutory interpretation is the text of the statute itself and the ordinary meaning of the words used. See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987) (explaining that legislative purpose is expressed by the ordinary meaning of the phrase used in a statute); *Matter of J.M. Acosta*, 27 I&N Dec. 420, 424 (BIA 2018) (beginning analysis of the meaning of “conviction” with the words of the statute). With respect to the phrase “membership in a particular social group,” however, the words are of little help because they denote something that “is almost completely open-ended.” *Fatin v. INS*, 12 F.3d 1233, 1238 (3d Cir. 1993). “Virtually any set including more than one person could be described as a ‘particular social group’ [in the ordinary sense]. Thus, the statutory language standing alone is not very instructive.” *Id.*; accord *Matter of A-B-*, 27 I&N Dec. at 326.

To the extent the statutory scheme of the INA indicates anything about “membership in a particular social group,” see, e.g., *Matter of J.M. Acosta*, 27 I&N Dec. at 426-27 (looking to the relevant statutory scheme, i.e., “the language and design of the statute as a whole,” to ascertain the meaning of “conviction”), it suggests that Congress did not intend for it to encompass family units. For example, Congress has never amended the INA to specify that certain familial

relationships may satisfy the statutory definition of “refugee.” In this regard, Congress has shown that it knows well how to amend that definition in order to extend protection to categories of individuals who do not fit squarely into a protected ground. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress amended INA § 101(a)(42) to expressly include a person who has been persecuted for resistance to coercive family planning. Pub. L. No. 104, div. C, § 601(a)(1), 110 Stat. 3009-546, 3009-689; *see Matter of E-L-H-*, 23 I&N Dec. 814, 815 (BIA 2005) (en banc).

To the extent that Congress has made membership in a family unit an express consideration for protection, Congress has provided for derivative asylum eligibility for certain family members—spouses and children of aliens granted asylum—who may be accorded asylum if they do not otherwise qualify for asylum on their own. *See* INA § 208(b)(3); *see also Matter of A-K-*, 24 I&N Dec. 275, 278 (BIA 2007) (“Automatically treating harm to a family member as being persecution to others within the family is inconsistent with the derivative asylum provisions, as it would obviate the need for these provisions in many respects.”).

Beyond the lack of clarity from the statutory language and scheme, the Board’s construction of the term “membership in a particular social group” has further been complicated by the fact that there is little in the legislative history to decipher the intent behind its inclusion in the statutory definition of “refugee,” other than the need to conform the INA to the Protocol. *See Valdiviezo-Galdamez v. U.S. Att’y Gen.*, 663 F.3d 582, 594 (3d Cir. 2011) (explaining that “there is no clear evidence of legislative intent”); *Matter of A-B-*, 27 I&N Dec. at 326. Given the lack of any legislative clues as to the meaning of “membership in a particular social group” in general, it follows that there is nothing in the legislative history to indicate that Congress

understood the term “membership in a particular social group” to specifically encompass a family unit or a familial relationship *per se*.

C. Neither the Convention Relating to the Status of Refugees nor the Subsequent Protocol Indicates That the Meaning of “Membership in a Particular Social Group” is Intended to Include Membership in a Family Unit.

Congress enacted INA § 101(a)(42) largely to implement U.S. obligations under the Protocol, which incorporates Articles 2 to 34 of the Convention, 189 U.N.T.S. 150, *see* Protocol, art. I(1) and (2), 19 U.S.T. 6223, 6225, 606 U.N.T.S. 268. Accordingly, the Attorney General may look to the Protocol and Convention in interpreting “membership in a particular social group.” *See, e.g., Khan v. Holder*, 584 F.3d 773, 783 (9th Cir. 2009) (“[T]he Protocol is not self-executing. . . . [T]he Protocol serves only as a useful guide in determining congressional intent in enacting the Refugee Act of 1980, which sought to bring United States refugee law into conformity with the Protocol.”) (quotation marks omitted).

The negotiating history of the Convention shows that inclusion of “membership in a particular social group” as a protected ground for purposes of asylum was not in the original draft but put forth in an amendment.⁴ There was no significant debate among the parties as to the parameters of the term “particular social group.” As noted by one court:

When the Conference of Plenipotentiaries was considering the Convention in 1951, the phrase “membership of a particular social group” was added to this definition as an “afterthought.” The Swedish representative proposed this language, explaining only that it was needed because “experience had shown that certain refugees had been persecuted because they belonged to particular social groups,” and the proposal was adopted.

⁴ *See* U.N. High Comm’r for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* 236 (1990), <https://www.unhcr.org/4ca34be29.pdf> (noting that the Swedish representative argued that the language of Article 33 of the 1951 Convention was intimately linked with Article 1 of the Draft Convention).

Fatin, 12 F.3d at 1239 (internal footnotes and citations omitted). In short, neither the Convention nor the Protocol expressly defines “membership in a particular social group.” See *Matter of Acosta*, 19 I&N Dec. at 232 (noting that the meaning of the phrase is not clear in the Protocol).

By the same token, neither the Convention nor the Protocol explicitly provides for recognition of membership in a family unit, including a unit defined by one person’s familial relationship to another person, as a basis for membership in a particular social group. In fact, the Office of the United Nations High Commissioner for Refugees (UNHCR) has issued general guidance merely stating that a particular social group “normally comprises persons of a similar background, habits, or social status,” UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 77 (Geneva 1979; reissued Dec. 2011) (UNHCR Handbook), available at <https://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>, and that “[m]ere membership of such a particular social group will not normally be enough to substantiate a claim to refugee status,” *id.* ¶ 79.⁵

⁵ The UNHCR Handbook, although by no means binding, “may be a useful interpretive aid.” *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999). UNHCR has since suggested that some family-related social groups may be cognizable. For example, it has mentioned the possibility of “family” as a “particular social group” in the context of an additional ground on which to analyze a gender-related protection claim based on an imputed political opinion from male relatives. See UNHCR, *Guidelines on International Protection: Gender Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/01, ¶ 33 (May 7, 2002), <https://www.unhcr.org/3d58ddef4.pdf>. UNHCR has also opined: “[A] family unit represents a classic example of a particular social group. A family is a socially cognizable group in society and individuals are perceived by society on the basis of their family membership.” UNHCR, *UNHCR Position on Claims for Refugee Status Under the 1951 Convention Relating to the Status of Refugees based on a fear of Persecution Due to an Individual’s Membership of a Family or Clan Engaged in a Blood Feud* ¶ 18 (Geneva, Mar. 17, 2006), <https://www.refworld.org/pdfid/44201a574.pdf>. As explained *infra*, however, there is no requirement to interpret “membership in a particular social group” to include membership in a family unit. Moreover, none of the subsequent UNHCR statements indicate that the circumstances of this case—one individual’s familial relationship to another specific individual—must be recognized *per se* as giving rise to “membership in a particular social group.”

The UNHCR *Handbook* leaves the assessment as to who is a refugee to the Contracting States, pursuant to the Protocol and Convention, noting that such is “incumbent upon the Contracting State in whose territory the refugee applies for recognition of refugee status.” UNHCR Handbook ¶ 149. The variations in how Contracting States have interpreted “membership in a particular social group” as a protected ground further highlight that the Convention and Protocol do not implicitly require the recognition of specific particular social group claims, let alone family-based particular social groups.

An interpretation of “particular social group” that excludes family-based protection claims would not violate the obligations that the United States assumed under the Protocol. Since it falls to each Contracting State to make refugee assessments, the fact that some state parties interpret the “particular social group” definition narrower than other state parties does not mean such states are in violation of their Protocol obligations. *See generally* Guy Goodwin-Gill, *The Refugee in International Law* 30 (1985) (observing that “notion of social group . . . possesses an element of open-endedness, which states, *in their discretion*, could expand in favour of a variety of different classes”) (emphasis added). As the Supreme Court has underscored, the Convention and Protocol, and the implementing immigration laws, must be construed so as not to “impose unanticipated . . . obligations.” *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 183 (1993) (observing that despite potential violation of “the spirit” of the Convention, “a treaty cannot impose unanticipated . . . obligations on those who ratify it through no more than its general humanitarian intent”).

See generally *Matter of M-E-V-G-*, 26 I&N Dec. at 242 (emphasizing that social group determinations must be made on a case-by-case basis). Such an interpretation would be fundamentally inconsistent with the Convention’s purpose of outlining groups and characteristics that set certain groups of people apart within a society, as every person has a familial relationship with any number of specific individuals.

II. CLAIMS FOR PROTECTION, ESPECIALLY THOSE BASED ON MEMBERSHIP IN A PARTICULAR SOCIAL GROUP, REQUIRE RIGOROUS INDIVIDUALIZED, CASE-BY-CASE ANALYSIS.

The Board first interpreted the phrase “membership in a particular social group” in *Matter of Acosta*, holding that “‘persecution on account of membership in a particular social group’ refers to persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.” 19 I&N Dec. at 233; *see Matter of M-E-V-G-*, 26 I&N Dec. at 230-31; *see also Matter of W-G-R-*, 26 I&N Dec. 208, 210 (BIA 2014), *vacated in part and remanded on other grounds by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied, Reyes v. Sessions*, 138 S. Ct. 736 (2018). Since *Acosta*, the Board has refined the “particular social group” definition to include the concepts of “particularity” and “social visibility,” which were first discussed in *Matter of C-A-*, 23 I&N Dec. 951, 957, 959-61 (BIA 2006), *aff’d sub nom. Castillo-Arias v. Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006), *cert. denied*, 549 U.S. 1115 (2007). *See Matter of W-G-R-*, 26 I&N Dec. at 210; *Matter of M-E-V-G-*, 26 I&N Dec. at 232, 237. In *Matter of A-M-E- & J-G-U-*, the Board determined that a particular social group cannot be defined exclusively by the claimed persecution, and it must be defined with particularity and be recognizable as a discrete group by others in society. 24 I&N Dec. 69, 74-76 (BIA 2007), *aff’d sub nom. Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007). With *Matter of W-G-R-* and *Matter of M-E-V-G-*, applicants seeking asylum or statutory withholding based on membership in a particular social group must have established that the group was: (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *Matter of W-G-R-*, 26 I&N Dec. at 212; *see Matter of M-E-V-G-*, 26 I&N Dec. at 228, 234.

A. In the Context of Individualized, Case-by-Case Analysis of Protection Claims, There Can Be No Universal Definition of a Family Unit or Universal Set of Circumstances Establishing a Specific Family Unit-Based Particular Social Group.

At the outset, the Department urges caution to the extent that the Attorney General seeks a universal answer to whether, and if so, which specific family units may constitute cognizable particular social groups. *See generally Matter of A-B-*, 27 I&N Dec. 333 n.8 (criticizing the Board's decision in *Matter of L-E-A-* for relying on the stipulations of the parties rather than requisite rigorous, case-by-case analysis required by its own precedent). The Department avers that it is not feasible to assess in this brief all the possible permutations of family unit membership and how they may, or may not, satisfy the governing asylum and statutory withholding standards; nor will the Attorney General be well-served by any suggestion that a universal definition or universal set of circumstances for establishing a family unit-based particular social group should be adopted. To the contrary, adopting a universal standard as to whether, and if so, which, family units are cognizable particular social groups would violate the express requirement that protection claims must be analyzed on a case- and society-specific basis. *See Matter of M-E-V-G-*, 26 I&N Dec. at 242 (BIA 2014) (stating that "a social group determination must be made on a case-by-case basis, because it is possible that under certain circumstances, the society would . . . consider [a qualifying trait] to be a basis for distinction within that society"); *see also Matter of A-B-*, 27 I&N Dec. at 329-31 (discussing the Board's case-by-case interpretations of "particular social group"); *Matter of W-G-R-*, 26 I&N Dec. at 212, 217 (emphasizing the process of giving meaning through case-by-case adjudication and looking to the society in question).

What may constitute a cognizable family unit in one society may not constitute so in another society. *See Matter of M-E-V-G-*, 26 I&N Dec. at 241. It would be inappropriate for the

Department, and ill-advised for the Attorney General, to interpret the ambiguous statutory language to require that any specific family-based particular social group either is not or is universally cognizable.

In any event, it is practically impossible to devise a universal definition of a “family unit”—or even more specific family units such as a “nuclear” or “immediate” family—that would apply across-the-board for purposes of protection law. The concept of a “family unit” is susceptible to a variety of interpretations based on legal, social, and cultural norms. The word “family” would not necessarily be instructive as to who would be able to claim membership in a particular social group on that basis, because the social group is ordinarily defined with the social and cultural context of the society in question, and the family definitions in the INA are based on an American point of view. *Cf., e.g., Lockhart v. Napolitano*, 573 F.3d 251, 258 (6th Cir. 2009) (looking to the “ordinary, contemporary, and common meaning” of “spouse” at the time Congress enacted the INA in interpreting the statute), *superseded on other grounds by Dep’t of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 568(c), 123 Stat. 2142, 2186-87* (amending INA § 201(b)(2)(A)(i)).

Equally unworkable would be generating a universal definition for a family unit based on an extremely fact-intensive analysis of every society’s view of family relationships, including when family members are estranged from each other, the frequency that family members see or communicate with one another, or how attenuated a relationship may be based on legal, social, or cultural customs. *See generally Roberts v. U.S. Jaycees*, 468 U.S. 609, 619-20 (1984) (explaining, in discussion of the types of relationships warranting substantial protection from state interference, the unique “personal affiliations” that family relationships involve, including the sharing of “distinctively personal aspects of one’s life” and the “high degree of selectivity in

decisions to begin and maintain [each] affiliation”). Adopting a universal family unit definition would require review and aggregation of every society’s legal, social, and cultural customs on what constitutes a family—an approach that would run in tension with the case- and society-specific particular social group analysis. *Cf., e.g., McCurdy v. Dodd*, 352 F.3d 820, 829 (3d Cir. 2003) (noting, in the context of civil rights action under 42 U.S.C. § 1983, that “it may be impossible to make sound generalizations about typical family relationships”).

An approach consistent with the current framework for analyzing a “particular social group” would be to consider an applicant’s specific case and the society of his or her country of nationality or removal. For example, the relationship between a father and daughter may evolve over time, and it may be defined or viewed in competing or contrasting ways depending on the legal, social, or cultural customs of the society in question. The applicant’s relevant society may or may not consider a father and daughter to be a family unit in the following illustrative examples: where the father disowns the daughter, becomes estranged from the daughter, gives up the daughter for adoption, places her in an apprenticeship or as an indentured servant to repay debts never to be seen again, parts with her to be raised by another, or if the daughter marries. *See, e.g., Lawson v. Brown*, 349 F. Supp. 203, 207-08 (W.D. Va. 1972) (citing “the general American common law rule that marriage of a minor child, even if not consented to by the parents, emancipates the minor child from his parents”); *cf., e.g., Lehr v. Robertson*, 463 U.S. 248, 266-67 (1983) (stating that “the existence or nonexistence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child”). In addition, a familial relationship may be considered legally, socially, or culturally severed in disparate societies when spouses divorce or when minors seek legal emancipation. *Cf., e.g., United States v. Windsor*, 570 U.S. 744, 770 (2013) (noting



generally that “[t]he responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State’s classifications have in the daily lives and customs of its people”). Because of these fact-specific, society-specific perceptions, beliefs, and practices surrounding family units and family relationships, it would be difficult to define “family unit” universally for purposes of assessing claims for protection.

Thus, the Attorney General should find that there is no universal definition of a “family” for purposes of analyzing “membership in a particular social group,” given the potentially varying meanings of “membership in” a family, “family,” and “family unit” among different societies. In fact, these terms, as well as related terms denoting specific familial relationships, may differ within the same society depending on the context, even the United States. *Compare, e.g.,* INA § 101(b) (defining “child” for purposes of visa petitions, issuance of visas, removal proceedings, and other matters) *with id.* § 101(c) (defining “child” for purposes of citizenship and naturalization). Likewise, an applicant’s society may have legal, social, and cultural practices or customs that will bear upon an analysis of an applicant’s putative particular social group, which involves review of immutable characteristics, particularity, and social distinction. *See, e.g., United States v. Jarvison*, 409 F.3d 1221, 1229 n.12 (10th Cir. 2005) (“Because Navajo society is matrilineal and matrilineal, traditionally, the father and children live with the mother’s family, [and] children are said to ‘belong’ to the mother’s clan.”).

B. Creating Universal Definitions for Family Units or Universal Circumstances for Family-Based Particular Social Groups Is at Odds with a Rigorous Analysis of Protection Claims.

1. Protection Claims Based on Membership in a Family Unit Must Be Rigorously Analyzed Within the Established Framework.

Given the practical impossibility in adopting a universal definition or universal set of circumstances for establishing a family unit-based particular social group, each claim for

protection premised on membership in a family unit must be assessed on its own merit on an individualized, case-by-case basis. Such “rigorous” analysis for protection claims in general, and more specifically for “particular social group”-based protection claims, is mandated by recent precedent from both the Attorney General and the Board. *See Matter of A-B-*, 27 I&N Dec. at 340 (requiring “[f]uture social group cases [to] be governed by the analysis set forth in this opinion and past Board decisions, such as *M-E-V-G-* and *W-G-R-*”). “Neither immigration judges nor the Board may avoid the rigorous analysis required in determining asylum claims, especially where victims of private violence claim persecution based on membership in a particular social group.” *Id.* Immigration judges and the Board must consistently and properly apply the framework for protection claims based on “membership in a particular social group.” *See id.* at 331 (noting that “[a]lthough the Board has articulated a consistent understanding of the term ‘particular social group,’ not all of its opinions have properly applied that framework.”). In this regard, they must “determine whether th[e] facts [presented by an applicant] satisfy all of the legal requirements for asylum,” though if an applicant’s claim “is fatally flawed in one respect,” immigration judges and the Board “need not examine the remaining elements of the asylum claim.” *Id.* at 340.

The Board has set out a three-pronged test for determining when a putative particular social group is cognizable. *Matter of M-E-V-G-*, 26 I&N Dec. at 237; *see Matter of W-G-R-*, 26 I&N Dec. at 210-12 (discussing the three prongs). The asylum applicant must establish that the group is: (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question, and (3) defined with particularity. *Matter of M-E-V-G-*, 26 I&N Dec. at 237; *see Matter of W-G-R-*, 26 I&N Dec. at 210-12. In its initial decision in this case, however, the Board agreed with the parties that family ties may establish a particular social

group, without conducting a fulsome examination of the evidentiary record. *See Matter of L-E-A-*, 27 I&N Dec. 40, 42-43 (BIA 2017). In short, the Board inappropriately relied on the parties' stipulations and otherwise failed to perform the type of rigorous case-by-case and society-specific analysis (in this case, Mexico) otherwise mandated by precedent. *See Matter of A-B-*, 27 I&N Dec. at 334, 340.

Prior to the Board's deficient "particular social group" analysis in this case, neither the Board nor the circuit courts had come to a consensus as to the degree of consanguinity that is required for someone to be considered a member of a family unit, as exemplified by the inconsistent precedent the circuit courts provided on what constitutes a family unit. *See generally Jie Lin v. Ashcroft*, 377 F.3d 1014, 1028 (9th Cir. 2004) (explaining that "some attenuated family links will not *per se* suffice to confer 'particular social group' membership"); *Iliev v. INS*, 127 F.3d 638, 642 & n.4 (7th Cir. 1997) (recognizing that prior decisions of the court had treated family as a particular social group for purposes of analyzing protection claims, without deciding the issue).

"An applicant's burden includes demonstrating the existence of a cognizable particular social group, his membership in that particular social group, and a risk of persecution on account of his membership in the specified particular social group." *Matter of W-G-R-*, 26 I&N Dec. at 223. The applicant bears the burden of showing eligibility for asylum and "must present facts that establish each element of the standard." *Matter of A-B-*, 27 I&N Dec. at 316. To support a claim of membership in a family unit as a particular social group, the applicant must provide sufficient proof of membership in his or her asserted family unit. *Matter of M-E-V-G-*, 26 I&N Dec. at 244. Moreover, the applicant should provide evidence of the nature and degree of the family relationship asserted and evidence regarding how that type of relationship is perceived by

the applicant's society. *Id.* Immigration judges and the Board must carefully parse, on a case-by-case basis, the applicant's testimonial and documentary evidence to assess whether the putative particular social group is sufficiently particular or too diffuse. *Id.*

Although there is no set definition of what shared characteristics may constitute a "particular social group" under INA § 101(a)(42)(A), the Attorney General has noted that, in order to construe the term in keeping with the other four statutory grounds, more would need to be shown than mere shared descriptive characteristics. *See Matter of A-B-*, 27 I&N Dec. at 336. Where an applicant is claiming membership in a family unit as a particular social group, the applicant must provide proof of the putative immutable trait. *See id.* at 330. Membership in a family unit, depending on the unit in the context of the society in question, can be immutable, i.e., a characteristic that group members "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of M-E-V-G-*, 26 I&N Dec. at 231 (quoting *Matter of Acosta*, 19 I&N Dec. at 233). Yet "not every immutable characteristic" will render a putative particular social group cognizable. *Matter of M-E-V-G-*, 26 I&N Dec. at 239 (internal quotations omitted); *see Matter of A-B-*, 27 I&N Dec. at 335. Thus, for example, neither an applicant's relationship to a certain person within the asserted family unit nor the applicant's membership in the asserted family unit compels a finding of a cognizable particular social group; the family unit must also meet the requirements of particularity and social distinction.

The requirement of particularity is met if "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" with "particular and well-defined boundaries." *Matter of S-E-G-*, 24 I&N Dec. 579, 582-84 (BIA 2008) (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec.

at 69, and *Matter of C-A-*, 23 I&N Dec. at 951); *see also Matter of M-E-V-G-*, 26 I&N Dec. at 241; *Matter of W-G-R-*, 26 I&N Dec. at 210. The particularity analysis requires that the group have a “clear benchmark for determining who falls within the group.” *Matter of M-E-V-G-*, 26 I&N Dec. at 239. As a family unit is defined by the legal, social, and cultural constructs of the applicant’s society, it is inherently difficult to universally delineate the boundaries of what constitutes a family unit. *See generally Matter of S-E-G-*, 24 I&N Dec. at 585 (noting that a less precise “proposed group of ‘family members,’ which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others, is . . . too amorphous”). Thus, the Attorney General should hold that so-called “nuclear” and “immediate” family groups are not *per se* sufficiently particular or automatically possess the requisite social distinction because such a holding is contrary to the necessary case-by-case and society-specific analysis. To the extent that prior inconsistent precedent has developed, it did so without the benefit of the rigorous analysis otherwise required Board and Attorney General case law. *See Matter of J-S-*, 24 I&N Dec. 520, 531-32, 537 (A.G. 2008) (rejecting the notion that spouses of any individual subjected to coercive population controls are *per se* entitled to refugee status, and criticizing the Board for adopting such a *per se* rule based only on “the INS’s stipulation” and failing to “engage in a case-by-case assessment” of the applicant’s protection claim).

Lastly, “[a] group’s recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor.” *Matter of M-E-V-G-*; 26 I&N Dec. at 227, 237, 242; *Matter of W-G-R-*, 26 I&N Dec. at 208, 210, 216-17. The Board “clarified that social distinction exists where the relevant society perceives, considers, or recognizes the group as a distinct social group.” *Matter of W-G-R-*, 26 I&N Dec. at 217. Analysis of social distinction “considers whether those persons with a common immutable



characteristic are set apart, or distinct, from other persons within the society in some significant way.” *Matter of M-E-V-G-*, 26 I&N Dec. at 238. Any family unit-based group must be socially distinct within the society in question such that mention of the group may elicit a reaction. *See Castellano-Chacon v. INS*, 341 F.3d 533, 548 (6th Cir. 2003) (noting that a country or society’s reaction to a group is a factor in establishing whether it is a cognizable particular social group). To satisfy the social distinction requirement, applicants must provide proof that their putative particular social groups are socially distinct such that they are “classes recognizable by society at large.” *Matter of A-B-*, 27 I&N Dec. at 336. Whether family relationships are socially distinct depends upon the legal, social, and cultural constructs of the applicant’s society in question, including the degree and nature of the relationship asserted to define the group, how that type of relationship is viewed by the society in question, and whether society at large distinguishes the applicant’s membership in that family unit and the family as a whole. *See id.* at 330.

Depending on the society-specific meanings attached to families, some familial relationships may be too attenuated and be “amorphous, overbroad, diffuse, or subjective.” *Id.* at 335; *see Matter of S-E-G-*, 24 I&N Dec. at 585 (noting that a less precise “proposed group of ‘family members,’ which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others, is . . . too amorphous”). A cognizable particular social group must avoid “being too broad to have definable boundaries and too narrow to have larger significance in society.” *Matter of A-B-*, 27 I&N Dec. at 336. Nonetheless, notwithstanding the size of the group, the concept of a family unit—whether nuclear, immediate, or some other description—remains subject to the legal, social, and cultural practices or customs within an applicant’s country and therefore cannot provide – on a universal basis - a “clear

benchmark for determining who falls within the group.” *Matter of M-E-V-G-*, 26 I&N Dec. at 239.

2. With Respect to Protection Claims Based on Membership in a Family Unit, Nexus Will Ordinarily Be a Determinative Issue.

The requirement of nexus between the alleged harm and a protected ground is a critical and often determinative issue for protection claims. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (“[T]he statute makes motive critical”); *Matter of A-B-*, 27 I&N Dec. at 338 (“Establishing the required nexus between past persecution and membership in a particular social group is a critical step for victims of private crime who seek asylum. . . . The nexus requirement is critically important in determining whether an alien established an asylum claim.”). The nexus requirement serves to ensure that asylum is not granted on the basis of protection from private actors for purely personal issues. *See Matter of A-B-*, 27 I&N Dec. at 338-39 (“When private actors inflict violence based on a personal relationship with a victim, then the victim’s membership in a larger group may well not be ‘one central reason’ for the abuse.”) (footnote omitted).

The nexus requirement is one of the “‘stringent statutory requirements for all asylum seekers’” and is a “‘safeguard against potentially innumerable asylum claims.’” *Id.* at 330 (citing *Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013)). As the Board held in *Matter of W-G-R-*, while “the views of the persecutor might play a role in causing members of society to view a particular group as distinct, the persecutor’s views play a greater role in determining whether persecution is inflicted on account of the victim’s membership in a particular social group.” 26 I&N Dec. at 223. “Whether that nexus exists depends on the views and motives of the persecutor.” *Id.* at 223-24; *see also Matter of N-M-*, 25 I&N Dec. 531, 532-33 (BIA 2011). The

persecutor’s motivation may be established by direct or circumstantial evidence. *Elias-Zacarias*, 502 U.S. at 483.

Where the persecutor may have multiple motives for targeting the applicant, including both protected grounds and non-protected grounds—this situation is often referred to as a “mixed motive” case, *see Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 212 (BIA 2007)—an applicant succeeds on a claim for protection if the applicant can demonstrate that a protected ground is at least one central reason for the persecution, INA § 208(b)(1)(B)(i); *see Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (holding that the “one central reason” standard that applies to asylum applications under INA § 208(b)(1)(B)(i) also applies to applications for statutory withholding). *But see Barajas-Romero v. Lynch*, 846 F.3d 351, 358-59 (9th Cir. 2017) (within the Ninth Circuit, an asylum seeker must demonstrate that her membership in a particular social group is “one central reason” for her persecution, but an alien seeking statutory withholding need only demonstrate that her membership in a particular social group is “a reason”). The “central reason” aspect is critically important, meaning the ‘protected ground cannot play a minor role in the alien’s past mistreatment or fears of future mistreatment.’” *Matter of N-M-*, 25 I&N Dec. at 531 (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. at 214). The “importance of the ‘on account of’ language must not be overlooked.” *Cece*, 733 F.3d at 673. The applicant must “demonstrate a particular link between her mistreatment and her membership in the stated social group.” *Id.* at 674. It cannot be “incidental, minor, or tangential” to the persecutor’s motivation. *Matter of J-B-N- & S-M-*, 24 I&N Dec. at 212-14.⁶ Direct proof of motivation may consist of

⁶ The Board’s decision in *Matter of J-B-N- & S-M-*, 24 I&N Dec. at 214, as well as the Attorney General’s decision in *Matter of A-B-*, 27 I&N Dec. at 338, also mandates that the alleged reason for the harm cannot be “subordinate” to another. However, the Department submits—and the Attorney General may wish to clarify—that disqualifying a reason for harm simply because it may be subordinate to another may be incompatible with the “at least one central reason” nexus standard. That standard, by its own terms, theoretically allows for more than one “central” reason. Indeed, as the Third Circuit noted in ultimately denying J-B-N-’s petition for review:



evidence concerning statements made by the persecutor to the victim, or by the victim to the persecutor. *See, e.g., Kebede v. Ashcroft*, 366 F.3d 808, 812 (9th Cir. 2004). Circumstantial evidence of motivation may include the timing of the persecution and written threats, signs, or emblems left at the site of persecution. *See, e.g., Deloso v. Ashcroft*, 393 F.3d 858, 865-66 (9th Cir. 2005).

In protection cases involving a family unit, nexus can be established so long as one central reason motivating the persecutor to target the applicant is the applicant's membership in a qualifying family-based particular social group. *See Matter of A-B-*, 27 I&N Dec. at 317 (an applicant seeking to establish persecution on account of membership in any particular social group must demonstrate that "membership in that group [is] a central reason for her persecution"). Merely stating that an applicant is a member of a putative family unit, however, does not meet the applicant's burden of showing that the persecutor targeted the applicant due to his or her membership in a particular social group. *Cf. id.* at 339 (explaining that just because criminal gangs target certain victims does not make those victims "persons who have been targeted 'on account of' their membership in any social group"). Simply put, an applicant's family membership or familial relationship to another person does not necessarily mean that any

We conclude that the BIA's interpretation of the "one central reason" standard is in error only to the extent that it would require an asylum applicant to show that a protected ground for persecution was not "subordinate" to any unprotected motivation. That particular term is inconsistent with the plain language of the statute

Section 208's use of the phrase 'one central reason' rather than 'the central reason' . . . was a deliberate change in the drafting of this provision, [which] demonstrates that the mixed-motives analysis should not depend on a hierarchy of motivations in which one is dominant and the rest are subordinate. This plain language indicates that a persecutor may have more than one central motivation for his or her actions; whether one of those central reasons is more or less important than another is irrelevant.

Ndayshimiye v. U.S. Att'y Gen., 557 F.3d 124, 129-30 (3d Cir. 2008) (internal citations omitted); *see also Shaikh v. Holder*, 702 F.3d 897, 902 (7th Cir. 2012) (citing *Ndayshimiye*).

harm inflicted or threatened upon the applicant will be “on account of” or “because of” membership in the purported family unit. *See generally Matter of C-T-L-*, 25 I&N Dec. at 348 (noting that the “on account of” nexus phraseology for asylum at INA §§ 101(a)(42)(A) and 208(b)(1)(A), and the corresponding “because of” phraseology for statutory withholding of removal at INA § 241(b)(3) “are equivalent and have been used interchangeably”). The persecutor’s motive must be against the protected ground of membership in a family-based particular social group, which pertains to the whole family unit and not merely to a distinct relationship to a specific individual within that family unit. *See Matter of A-B-*, 27 I&N Dec. at 336 (stating that “the key thread running through the particular social group framework is that social groups must be *classes* recognizable by society at large” (emphasis added)).

This nuance – that the persecutor’s motive must be directed against the whole family unit, and not to a relationship to a specific person in that family unit – has been clouded by some courts that have failed to differentiate between a single relationship among family unit members and membership in the family unit itself. For example, the Fourth Circuit found that the relationship between a mother and her son was *per se* sufficient for a demonstration of nexus to a particular social *group*, failing to properly consider whether the gang targeted the entire family unit and whether the putative family unit-based particular social group was at least one central reason for the alleged harm. *See Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 (4th Cir. 2015). So, in *Hernandez-Avalos*, while the mother-son relationship may explain why the mother, commendably, interposed herself between her son and the gang in its recruitment efforts, it does not necessarily explain the gang’s motivation to harm her, which is the “critical” focus. *See Elias-Zacarias*, 502 U.S. at 483. To paraphrase the Fourth Circuit’s observation elsewhere in its analysis, “[t]hat same threat could have been directed at any person who [interposed themselves



between the gang and the son].” *Hernandez-Avalos*, 784 F.3d at 950 n.7. Thus, it is difficult to discern why the familial connection was anything more than “incidental, minor, or tangential” to the “particularly violent and aggressive gang[’s],” *id.* at 947 n.3, central motivation of filling its ranks and threatening all those who dared to interfere.⁷ *Cf. Elias-Zacarias*, 502 U.S. at 483 n.2 (“The dissent . . . erroneously describes it as ‘undisputed’ that the cause of the harm . . . will be the guerrilla organization’s displeasure with his refusal to join them in their armed insurrection against the government It is quite plausible, indeed likely, that the taking would be engaged in by the guerrillas in order to augment their troops rather than show their displeasure; and the killing he feared might well be a killing in the course of resisting being taken.”) (internal quotation marks and citations omitted).⁸

As part of a rigorous, case-by-case analysis, nexus should not be conflated with the issue of whether a putative particular social group is cognizable for asylum and statutory withholding purposes. Even if an applicant establishes that his or her purported family may be a cognizable particular social group, membership in that group does not necessarily establish a nexus to a protected ground. *See Matter of 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.

⁷ If not, under the Fourth Circuit’s apparent logic, hypothetically, in addition to the mother, the pastor of her church and a local political leader had joined her in rebuffing the gang’s attempted recruitment of her son, the court presumably would have assigned at least three separate “central” motivations to the gang for a single threat to them all, i.e., particular social group/family, religion, and political opinion, respectively. Respectfully, such a result would seem absurd, and further lays bare the flaws in the court’s nexus regime concerning family-based particular social group claims.

⁸ Relatedly, in terms of particular social group analysis, the court’s emphasis on the mother’s “maternal authority,” *Hernandez-Avalos*, 784 F.3d at 950 n.7, glosses over the fact that only one person in the family unit possessed such “maternal authority,” i.e., Ms. Hernandez. A particular social group is, by definition, composed of a “group of persons.” *See, e.g., Matter of Acosta*, 19 I&N Dec. at 233 (“[W]e interpret the phrase ‘persecution on account of membership in a particular social group’ to mean persecution that is directed toward an individual who is a member of a group of persons”).

The structure of the Act supports preserving this distinction, which should not be blurred . . . ”)). The applicant must demonstrate that membership in a family-based particular social group is at least one central reason for the persecutor to target the applicant.

3. Claims for Protection Are Unsuccessful When Arising from Personal Disputes and Portrayed as Membership in a Family Unit-Based Particular Social Group.

A common scenario in which a claim for protection involves a family unit is one in which the applicant alleges harm or threat of harm against a person with whom the applicant shares some type of familial relationship. *See, e.g., Matter of J-S-*, 24 I&N Dec. 520 (A.G. 2008) (spouse of a person who has been physically subjected to a forced abortion or sterilization procedure); *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007) (parent whose minor daughters would allegedly be subjected to female genital mutilation). In these scenarios, the Board has held that “acts of persecution against [an applicant’s] family members do not serve to establish a risk of future persecution to the applicant himself, absent a pattern of persecution tied to the applicant personally.” *Matter of A-K-*, 24 I&N Dec. at 278 (citing cases); *see, e.g., Matter of J-S-*, 24 I&N Dec. at 528-30 (rejecting the prior rule that the spouse of someone who has undergone a forced abortion or sterilization is *per se* eligible for asylum). The Attorney General has likewise reiterated that “every applicant for personal asylum (as distinct from statutorily prescribed derivative asylum) must establish *his or her own* eligibility for relief under specific provisions of the statute.” *Matter of J-S-*, 24 I&N Dec. at 530 (emphasis in original); *see, e.g., Matter of M-F-W- & L-G-*, 24 I&N Dec. 633, 637 (BIA 2008) (holding that where an alien has not suffered a *per se* form of persecution, i.e., an abortion or sterilization, she must establish that (1) she resisted China’s family planning policy, (2) she has been persecuted (or has a well-founded fear of persecution), and (3) the persecution was or would be because of the alien’s resistance to the



policy); *Matter of Villalta*, 20 I&N Dec. 142, 147 (BIA 1990) (finding that alien had a well-founded fear of persecution because he had established a connection between the threats to his family and his political activities).

Another common scenario in which a protection claim involves a family unit is the converse of the first scenario, one where an applicant is harmed or threatened to be harmed because of his or her familial relationship with another person targeted by the persecutor. The Board encountered a version of this scenario in *Matter of S-E-G-*, 24 I&N Dec. 579, where one of the respondents asserted that she belonged to the 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,” *id.* at 585 (internal quotations omitted). The Board found that such a social group lacked particularity, because “family members could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others.” *Id.* The Board also suggested a problem of nexus, stating that the motivations of gang members could be “quite apart” from the desire to harm a specific class of persons. *See id.* This problem will generally persist even where the purported social group is narrowed to a familial tie with a specific person; an applicant must demonstrate that he or she was targeted because of that familial tie. Merely identifying an applicant’s familial relationship to a single person can be both too broad and too narrow for purposes of defining a particular social group. *See Matter of A-B-*, 27 I&N Dec. at 336 (asserting that “particular social group[s] must avoid, consistent with the evidence, being too broad to have definable boundaries and too narrow to have larger significance in society.”). Such a narrowed group, consisting of a relationship to a specific person, will typically not be distinguished by the applicant’s society in question, simply because the two-person group or single relationship is too small to comprise a “group.” *Id.*; *cf. Fatin*, 12

F.3d at 1238 (stating the ordinary meaning of that, read literally, the term “particular social group” could encompass any set of more than one person).

Other circumstances in which protection claims involve a family unit include: (1) disputes between members of different families, *see, e.g., Matter of E-F-H-L-*, 26 I&N Dec. 319 (BIA 2014) (land dispute between families), *vacated on other grounds*, 27 I&N Dec. 226 (A.G. 2018); (2) disputes between members of the same family, *see, e.g., Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007) (land dispute between nephew and aunt); (3) domestic violence, *see, e.g., Matter of A-B-*, 27 I&N Dec. 316 (physical and emotional abuse from ex-husband); (4) a vendetta or some act of punishment or retaliation, *see, e.g., Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998) (murder of family members by the Shining Path); and (5) acts of extortion or other exploitative conduct, *see, e.g., Matter of N-C-M-*, 25 I&N Dec. 535, 536 n.1 (BIA 2011) (extortion and robbery of family members by gang members); *Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997) (en banc) (kidnapping of members of wealthy families of Chinese ancestry).

The first set of circumstances, disputes between members of different families, may involve family feuds, including blood feuds or disputes over land or money between neighbors. *See, e.g., Spaqi v. Holder*, 451 F. App’x 548, 553-54 (6th Cir. 2011) (blood feud related to land dispute); *Locaj v. Gonzales*, 219 F. App’x 483 (6th Cir. 2007).⁹ Such family feuds are ordinarily based on personal disputes and involve criminal acts of personal retribution committed by private actors. *See Spaqi*, 451 F. App’x at 554 (finding the blood feud related to a land dispute

⁹ The Department recognizes that citing to unpublished opinions is generally disfavored. *See* BIA Practice Manual app. J-3 (Mar. 23, 2018), <https://www.justice.gov/eoir/page/file/1103051/download>. However, the Federal Rules of Appellate Procedure permit citation to unpublished federal judicial decisions issued on or after January 1, 2007. *See* Fed. R. App. P. 32.1. Although the Federal Rules of Appellate Procedure are not controlling in immigration proceedings before the Attorney General or the Board, the Department respectfully requests that the Attorney General consider these citations as examples of protection claims involving disputes between different families. Further, while these cases are labeled “unpublished,” they are nevertheless reported in the Federal Appendix and are thus publicly available. *See The Bluebook: A Uniform System of Citation* R. 10.5(b), at 106 (Columbia Law Review Ass’n et al. eds., 20th ed. 2015).

and was thus a personal matter); *Locaj*, 219 F. App'x at 485 (finding blood feud did not establish persecution on account of a protected ground); *see also Jun Ying Wang v. Gonzales*, 445 F.3d 993, 998-99 (7th Cir. 2006) (observing that dispute based merely on personal animosity, private violence, or a grudge cannot give rise to asylum claim) (collecting cases); *Romilus v. Ashcroft*, 385 F.3d 1, 6 (1st Cir. 2004) (noting that “[t]he INA is not intended to protect aliens from violence based on personal animosity.”); *Abdille v. Ashcroft*, 242 F.3d 477, 494 (3d Cir. 2001) (finding that “acts of private violence fall short of persecution on account of race, nationality, or membership in a particular social group.”).

In the second set of circumstances, disputes between members of the same family, the motivation to harm is likely not because the persecutor seeks to target victims due to membership in the same family.¹⁰ *See, e.g., Velasquez v. Sessions*, 866 F.3d 188, 195-96 (4th Cir. 2017) (rejecting claim based on membership in the nuclear family because it involved a “personal conflict between two family members” and “necessarily invoke[d] the type of personal dispute falling outside the scope of asylum protection”); *Muyubisnay-Cungachi v. Holder*, 734 F.3d 66, 71 (1st Cir. 2013) (“Persecution by a family member resulting from an intra-family conflict is not persecution on account of a ‘particular social group’”).

Similarly, in the third category of domestic violence cases, an abusive spouse inflicts harm on his or her spouse because of their personal relationship, but that fact alone does not suffice to demonstrate nexus between the harm and membership in their family unit. *See Matter of A-B-*, 27 I&N Dec. at 338-39 (“When private actors inflict violence based on a personal

¹⁰ Indeed, the Department is unaware of a published, non-vacated decision in which a federal court or the Board has recognized a family-based “persecution on account of membership in a particular social group” claim in which the persecutor also is a member of the targeted family unit. *But cf. Aguirre-Cervantes v. INS*, 242 F.3d 1169 (9th Cir. 2001) (holding that 19-year-old child abuse victim suffered persecution on account of her membership in her abusive father’s family), *petition for reh’g en banc granted and opinion vacated in 270 F.3d 794* (9th Cir. 2001).

relationship with a victim, then the victim's membership in a larger group may well not be 'one central reason' for the abuse.").

The fourth set of circumstances, a vendetta or some act of punishment or retaliation, generally involves the targeting of a victim and one or more of the victim's family members, but such targeting is not necessarily motivated by family ties. *See, e.g., Marin-Portillo v. Lynch*, 834 F.3d 99, 102 (1st Cir. 2016) (finding threats against family arose from a personal dispute, namely, the desire to seek vengeance against the applicant); *Matter of A-E-M*, 21 I&N Dec. at 1159-60 (finding no evidence that family members were targeted for reasons other than their work as police officers). Similarly, in the fifth category of cases, acts related to extortion or exploitative conduct, the alleged harm or threat of harm arises out of private criminal conduct and tends to be the means to some end separate and apart from membership in a family. *See, e.g., Ramirez-Mejia v. Lynch*, 794 F.3d 485, 493 (5th Cir. 2015) (concluding that evidence that gang members sought information about the applicant's brother did not support claim of persecution based on membership in her family); *Matter of N-C-M*, 25 I&N Dec. at 536 n.1 (finding that encounters with gangs sprang from desire to rob and their "personal grudge" following resistance to robbery attempts).

What these cases all show is that protection claims purportedly based on membership in a family unit will ordinarily fail to satisfy the all-important nexus requirement. That is because, in most protection claims involving a family unit, the nexus between the alleged harm and the reasons for the alleged harm is typically beyond the victim's mere membership in the family at issue. *See, e.g., Matter of A-E-M*, 21 I&N Dec. at 1159-60 (finding no well-founded fear of persecution on account of a protected ground where family members were killed due to their work as police officers); *Matter of V-T-S*, 21 I&N Dec. at 798-99 (finding no past persecution



on account of a protected ground where the kidnapping of sister and attempted kidnapping of brother were motivated by money). In other words, the persecutor generally does not target the victim's membership in the family or seek to harm or threaten the victim merely for being a member of a specific family. While membership in the family may arguably play some role in such "mixed motive" scenarios, it very often is not a "central" reason for the persecutor's targeting of the victim, despite how nexus analysis has been distorted by some circuit courts in this regard. *See, e.g., Hernandez-Avalos*, 784 F.3d at 949-50 (criticizing the Board for an "excessively narrow reading" of the nexus requirement in the context of an applicant who was threatened by a gang for interfering with the recruitment of her son).¹¹ Therefore, protection claims based on family units arising from personal disputes will generally fail for lack of the requisite nexus when rigorously analyzed by courts.

4. Like Nexus, Determinations of Whether a State Government Was or Would Be Unable or Unwilling to Protect the Applicant Is an Important Consideration in Family-Based Particular Social Group Claims.

In protection claims involving a family unit, whether a state is unable or unwilling to protect the applicant will likewise be an important consideration. The persistence of violence between different families, between members of the same family, or between private actors and relatives of targeted individuals does not automatically establish a failure of state protection. *See, e.g., Matter of A-B-*, 27 I&N Dec. at 343-44 ("No country provides its citizens with complete security from private criminal activity, and perfect protection is not required."). Thus, given the inherently personal nature of conflicts involving familial relationships, the purported inability or unwillingness of a government to protect an applicant must be carefully scrutinized.

¹¹ *See supra* note 8.

Cf., e.g., id. at 344 (finding that the Board erred in finding that El Salvador was unable or unwilling to protect a victim of domestic violence).

“Persecution” is a legal term of art that is not defined in the INA; instead, it has been defined almost exclusively by case law. *See, e.g., Ivanishvili v. U.S. Dep’t of Justice*, 433 F.3d 332, 340-41 (2d Cir. 2006). Among other requirements, persecution must be “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. at 337 (quoting *Matter of Acosta*, 19 I&N Dec. at 222 (internal quotation marks omitted)); *see Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062 (9th Cir. 2017) (en banc) (quoting *Baghdasaryan v. Holder*, 592 F.3d 1018, 1023 (9th Cir. 2010)); *see also Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1056 (9th Cir. 2006); *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1196 (9th Cir. 2000). Thus, “[asylum] applicants also bear the burden of showing . . . that their home government was ‘unable or unwilling to control’ [alleged] persecutors.” *Matter of A-B-*, 27 I&N Dec. at 330 (citing *Matter of W-G-R-*, 26 I&N Dec. at 224 & n.8).

The “unable or unwilling to control” aspect of the concept of persecution is of critical importance in scenarios of private criminal victimization, including disputes based on personal familial relationships. “Perfect protection” is not the standard. *Matter of A-B-*, 27 I&N Dec. at 343. Rather, the question is whether there is a reasonably effective government system in place for the prevention, investigation, prosecution, and punishment of mistreatment. *See, e.g., id.* at 343 (noting that the alien was able to reach out to the police and obtain restraining orders, and had the alleged persecutor arrested once); *see also, e.g., Matter of A-E-M-*, 21 I&N Dec. at 1160 (finding no well-founded fear because the Peruvian government had greatly diminished, though not completely eliminated, the Shining Path’s ability to attack opponents). In this regard, the fact



that an individual may suffer severe private criminal victimization and the perpetrator is not brought to justice does not necessarily mean that the government is “unable or unwilling to control” the perpetrator such that the individual has suffered “persecution.” There may be several reasons for such an outcome, including the offense might not have been brought to the attention of the authorities, the perpetrator might have absconded, or there may be a lack of actionable evidence. Further, while a lack of resources is relevant to a government’s “ability” to control private criminal victimization, such an assessment must be informed by the fact that no country in the world has unlimited law enforcement resources. *See, e.g., Matter of A-B-*, 27 I&N Dec. at 343-44 (noting that “domestic violence is a particularly difficult crime to prevent and prosecute, even in the United States, which dedicates significant resources to combatting [it]”). In cases of non-governmental persecution between private individuals, it is appropriate to “consider whether an applicant reported the incidents to police, because in such cases a report of this nature may show governmental inability to control the actors.” *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004). It is insufficient for an applicant to state her belief that the government would do nothing about a report of abuse or harm. *See, e.g., Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005) (finding, among other things, testimony that police would do nothing about rapes to be insufficient to compel a finding that the Honduran government was unable or unwilling to help). Rather, an applicant must show, for example, that “private persecution of a particular sort is widespread and well-known but not controlled by the government or . . . that others have made reports of similar incidents to no avail.” *Rahimzadeh v. Holder*, 613 F.3d 916, 922 (9th Cir. 2010).

Circuit courts have indicated that police inaction subsequent to reporting harm is one method of establishing governmental inability or unwillingness to control a persecutor and



protect a victim. *Id.* at 1066 (citing *Afriyie v. Holder*, 613 F.3d 924, 931 (9th Cir. 2010), and *Rahimzadeh v. Holder*, 613 F.3d 916, 921 (9th Cir. 2010)). In *Bringas-Rodriguez*, the Ninth Circuit held that the Mexican government would not protect the alien based on his evidence that “reporting [abuse] was futile and potentially dangerous, that other young gay men had reported their abuse to Mexican police to no avail, and country reports and news articles documenting official and private persecution of individuals on account of their sexual orientation” compelled the conclusion that the alien suffered past persecution that the Mexican government was unable or unwilling to control. 850 F.3d at 1056, 1073-75. The court summarized the kinds of evidence which may be used to determine whether a government is unable or unwilling to control non-state persecutors. *Id.* at 1066-67. The court reiterated that it never required victims of abuse, especially child victims, to report harm to authorities. *Id.* at 1066, 1069-70.

Like many nations, the United States is afflicted with significant violent crime, including hate crimes and intimate partner violence. See U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Hate Crime Victimization, 2004-2015* (June 2017) (Summary) (noting that from 2004 to 2015, U.S. residents experienced an average of 250,000 hate crime victimizations), https://www.bjs.gov/content/pub/pdf/hcv0415_sum.pdf; U.S. Dep’t of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Intimate Partner Violence: Attributes of Victimization, 1993–2011* (Nov. 2013) at App. Table 3 (noting that, as late as 2000, almost 1 million women over the age of 12 in the U.S. had suffered some form of intimate partner violence), <https://www.bjs.gov/content/pub/pdf/ipvav9311.pdf>. Further, a significant portion of violent crimes in the United States are regrettably never resolved. See Gramlich, *Most violent and property crimes in the U.S. go unsolved*, Pew Research Center (Mar. 1, 2017) (citing official U.S. Government statistics), <http://www.pewresearch.org/fact-tank/2017/03/01/most-violent->



and-property-crimes-in-the-u-s-go-unsolved/; see also *Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009) (rejecting petitioner’s argument “that Lithuania is unable or unwilling to control the problem of human trafficking,” noting that “Lithuania is making every effort to combat human trafficking, a difficult task not only for the government of Lithuania, but for any government in the world”) (internal quotation marks omitted); *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154 (9th Cir. 2005) (observing that police inability to solve the crimes after some investigation does not compel a finding that the government is unwilling or unable to control the persecutors).¹²

C. That Protection Claims Purportedly Based on Membership in a Family Will Ordinarily Fail on Nexus and/or State Protection Does Not Necessarily Leave Applicants Without Recourse or Protection.

That protection claims purportedly based on membership in a family-based particular social group generally will not succeed does not necessarily leave all applicants without recourse or protection under the INA. The other four protected grounds—race, religion, nationality, and political opinion—may cover many claims in which alleged harm occurs to an applicant seemingly in connection with the applicant’s distinct relationship to a family member. An applicant may have a viable protection claim where the persecutor imputes a protected ground to the applicant, in part because of the applicant’s proximity, familial relationship, or affiliation to a family member. For example, if an alleged persecutor targets the family members of an

¹² Due to the varying interpretations that it has engendered, the Department has purposefully avoided reference to the “complete helplessness” language used in the “unable or unwilling to control” standard referenced by the Attorney General in *Matter of A-B-*, citing to the Seventh Circuit’s decision in *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000), *inter alia*. See 27 I&N Dec. at 337. In this regard, the Department understands the Attorney General to rightly mean that the “fact that the local police have not acted on a particular report of an individual crime does not necessarily mean that the government is unwilling or unable to control crime, any more than it would in the United States,” and that “there may be many reasons why a particular crime is not successfully investigated and prosecuted.” *Matter of A-B-*, 27 I&N Dec. at 337-38. Indeed, in *Galina*, the Seventh Circuit ultimately remanded the matter, based, in part, on its conclusion that if the alien suffered the feared future mistreatment, “it would still be persecution, even if the police might take some action against telephone threats.” 213 F.3d at 958.



applicant on account of their political opinion, and the persecutor imputes their political opinion on the applicant, the applicant may have a claim to asylum based on the imputed political opinion. *See Matter of A-K-*, 24 I&N Dec. at 278 (noting that an applicant can establish a well-founded fear if facing a reasonable possibility of persecution based on imputed political opinion, where his family was persecuted on the basis of their political beliefs or activities, and it is reasonable that the applicant would be perceived to share his family's beliefs, and citing case examples). Conversely, harm to family members may support an applicant's claim for protection on account of political opinion or religion, if the applicant establishes a connection between the harm and his own political or religious beliefs or activities. *See, e.g., Matter of Villalta*, 20 I&N Dec. at 147 (finding a well-founded fear of persecution on account of political opinion where testimonial evidence established that family members were singled out because of the applicant's political activities); *Li v. INS*, 92 F.3d 985, 987 (9th Cir. 1996) (noting that the arrest of a family member at a church may establish asylum eligibility on account of religion); *Matter of Chen*, 20 I&N Dec. 16, 19-20 (BIA 1989) (finding past persecution on account of religion based in part on the targeting of the alien's father, a Christian minister).

III. IN APPLYING THE RIGOROUS ASYLUM ANALYSIS TO THE FACTS OF THIS CASE, THE RESPONDENT HAS NOT ESTABLISHED THAT HE MERITS ASYLUM

Under the rigorous analysis reiterated in *Matter of A-B-* and the considerations discussed above, *see Argument supra* Part II, the respondent has failed to establish that he merits asylum based on the gang's actions and threats against him. Specifically, the alleged persecution in this case is not on account of membership in a family unit or any other group.

The dispositive issue in this case, as with most family membership based claims, is whether harm that the applicant claims to fear on account of "his family," or his relationship to

his father as “the male son,” should be recognized as on account of his membership in a particular social group. The Attorney General should answer that question in the negative.

The respondent has most often described his putative particular social group simply as “his family.” *See, e.g.*, Tr. at 18 (“ . . . his membership in a particular social group, specifically, his family. . .”); I.J. at 8 (“his family”); Resp’t Br. Appeal at 4 (“ [REDACTED] has faced severe past persecution and has a well-founded fear of future persecution if returned to Mexico on account of his membership in a particular social group---family.”); *see also id.* at 6-7; Resp’t Supp. Br. Appeal at 5 (“his family”). However, he also described the social group in terms of his relationship to his father, i.e., “the male son.” *See* Resp’t Supp. Br. Appeal at 10 (“ [REDACTED] has established a nexus between his persecution and his purported membership in a particular group constituting family, specifically, the male son.”).¹³ The respondent has failed to establish the cognizability of either of the putative particular social groups.¹⁴

At a minimum, a group simply described as “his family” lacks particularity insofar as there is no clarity as to the degree of attenuation of the relationships involved, e.g., whether it includes the respondent’s spouse, children, parents, grandparents, aunts and uncles, first cousins, second and third cousins, etc. Accordingly, it fails on this ground as there is no “clear

¹³ In his initial clarification of his particular social groups, the respondent posited “(a) persons whose families have refused to pay ransom money and/or (b) persons who have refused participation in the selling of drugs for gang/cartels”. Resp.’s Statement of Basis of Claim for Asylum/Withholding (June 21, 2012). As noted, however, he subsequently focused on different formulations.

¹⁴ Previously, the Department posited, and the Board accepted, that the “immediate family unit of the respondent's father qualifies as a cognizable particular social group.” *See Matter of L-E-A-*, 27 I&N Dec. at 42. However, as has been argued herein, the Department now avers that the Attorney General should hold that so-called “nuclear” and “immediate” family groups are not *per se* sufficiently particular or automatically possess the requisite social distinction because such a holding is contrary to the necessary case-by-case and society-specific analysis. Concomitantly, to the extent that the respondent may now posit this formulation, *see id.*, it is problematic given that the record was not developed before the immigration judge, as factfinder, on this basis, and the Board performed only cursory analysis in light of the parties’ “concessions.” *See Matter of A-B-*, 27 I&N Dec. at 331, 333 (criticizing the Board for performing only cursory particular social group analysis based on the concessions of the parties); *Matter of A-T-*, 25 I&N Dec. 4, 10 (BIA 2009) (observing that it “is essential that the respondent clearly indicate . . . what enumerated ground(s) she is relying upon in making her claim, including the exact delineation of any particular social group(s) to which she claims to belong”).

benchmark for determining who falls within the group.” See *Matter of M-E-V-G-*, 26 I&N Dec. at 239. Given the respondent’s failure to establish that his putative group satisfies the particularity requirement, he also has failed, *a fortiori*, to establish social distinction given that the record does not reflect that an amorphous group of relatives of unknown degrees of attenuation would be “perceived as a group by [Mexican] society,” i.e., “sufficiently separate or distinct” as a “discrete class of persons.” See *id.* at 240-41 (internal quotations marks and citations omitted).

In the alternative, to the extent that the respondent defines his putative particular social group solely by his relationship to his father, i.e., “the male son,” while such a formulation may *arguendo* satisfy the requirements of a common, immutable characteristic and particularity, the respondent has not established that it satisfies the social distinction requirement. Specifically, he has not shown that this paternal relationship between two male individuals is perceived, as noted above, to be a “group” that is “sufficiently separate or distinct, i.e.,” a “discrete class of persons,” by Mexican society. *Id.* Accordingly, pursuant to the rigorous analysis of such protection claims, the Attorney General should hold that the respondent failed to establish that his putative particular social groups are cognizable. But even assuming *arguendo* that the respondent’s putative particular social groups are cognizable, the Attorney General should find that the respondent’s claim for protection fails upon an analysis of the required nexus. Under the rigorous nexus analysis, the respondent must show that persecution or a well-founded fear of persecution was or is “on account of” his membership in a cognizable particular social group. *Matter of J-B-N- & S-M-*, 24 I&N Dec. at 212-14 (explaining the protected ground must play more than, *inter alia*, a minor, incidental, tangential, or superficial role).

The immigration judge addressed nexus in this case by finding members of La Familia “were very direct and interested in only increasing their profits and increasing their distribution location by using the [father’s] store. The focus here was on the ownership of the store, not respondent’s family.” See I.J. at 8-9. There is certainly some evidence supporting the conclusion that the respondent was targeted because of La Familia’s desire to force him to sell drugs in his father’s store.

[T]he cartel attempted to coerce the respondent’s father into selling contraband in his store. When he refused, the cartel approached the respondent to sell its product because he was in a position to provide access to the store, not because of his family relationship. . . . the respondent was targeted only as a means to achieve the cartel’s objective to increase its profits by selling drugs in the store owned by his father. Therefore, the cartel’s motive to increase its profits by selling contraband in the store was one central reason for its actions against the respondent and his family. Any motive to harm the respondent because he was a member of his family, was, at most, incidental. . . . evidence does not indicate that the persecutors had any animus against the family or the respondent based on their biological ties, historical status, or other features unique to that family unit. . . . the cartel would have gone after any family who owned a business there. In fact, after the respondent departed for the United States, the cartel coerced his father into paying “rent” to them. This conduct constitutes criminal extortion and further indicates that the cartel’s motivation was not based on the family relationship.

Matter of L-E-A-, 27 I&N Dec. at 46-47. Therefore, the persecutor was motivated by the desire to sell drugs from the respondent’s father’s store and motivated by financial gain in extorting the respondent’s family for money.

When analyzing nexus in claims involving private violence, the analysis must be rigorously applied to ensure that asylum is not afforded on the basis of protection from purely personal issues. See *Matter of A-B-*, 27 I&N Dec. at 338-39 (“When private actors inflict violence based on a personal relationship with a victim, then the victim’s membership in a larger group may well not be ‘one central reason’ for the abuse.”) (footnote omitted). Although one



reason the respondent was targeted may have been due to his familial relationship to his father, the central reason for the alleged harm was motivated by financial reasons.

The Attorney General should also find the applicant has not met his burden to show that the government was “unable or unwilling to control” his persecutors. Beyond a review of the particular social group in question, and the nexus to the harm suffered, an applicant also bears the burden to show that his or her “home government was ‘unable or unwilling to control’ the persecutors.” *Matter of A-B-*, 27 I&N Dec. at 330 (internal citations omitted). The standard required is not “perfect protection,” but whether there is a reasonably effective government system in place for the prevention, investigation, prosecution, and punishment of mistreatment. In cases of non-governmental persecution between private individuals, it is appropriate to “consider whether an applicant reported the incidents to police, because in such cases a report of this nature may show governmental inability to control the actors.” *Baballah*, 367 F.3d at 1078; *see Bringas-Rodriguez*, 850 F.3d at 1066-67 (noting the types of evidence which may be used to analyze the issue of state protection where applicants fail to report harm to law enforcement).

The respondent’s case is distinguishable from *Bringas-Rodriguez*, 850 F.3d at 1066-67, as the respondent failed to show any direct or circumstantial evidence that reporting the harm he suffered would be futile or potentially dangerous. The respondent only mentioned during testimony in Immigration Court that he never reported the incidents to law enforcement because his father, a former policeman, indicated to him the police were working for the cartel, without providing any additional evidence. Tr. at 42-43. The respondent also testified his father is retired and no longer has any friends in the police force. Tr. at 58. Unlike the alien in *Bringas-Rodriguez*, the respondent has not provided any evidence that other members of his putative particular social group reported abuse to police to no avail, and he has only provided general


country condition reports showing general violence, but no reports or news articles documenting widespread and well-known official and private persecution of his putative particular social groups. *See* 850 F.3d at 1066-67. The respondent only provided a general comment during testimony about police involvement in illegal drug activity. Tr. at 43. He did not provide evidence showing that Mexican laws or customs would deprive him of meaningful government protection. The respondent's subjective belief that the Mexican government is unable or unwilling to control his non-state persecutors and protect him is not supported by the record evidence. Having failed to provide any further evidence, a review of the record shows that the respondent has not met his burden of proving that the Mexican government is unable or unwilling to control his alleged non-state persecutors.

Accordingly, the Attorney General should hold that the respondent failed to establish a nexus between the alleged harm and his putative particular social groups, including the personal familial relationship to his father, and failed to establish that the Mexican government is unable or unwilling to protect him. Insofar as the respondent has failed to establish, for purposes of asylum, that the Mexican government is unable or unwilling to control La Familia, *a fortiori*, his application for statutory withholding, which shares the same requirement of establishing harm amounting to "persecution," also fails. *See* Argument *supra* at pp. 40-42. Insofar as the respondent's application for statutory withholding fails on this basis, it is not necessary to determine whether, for purposes of controlling Ninth Circuit case law, he has established the requisite nexus to a protected ground under the "a reason" standard enunciated in *Barajas-Romero*, 846 F.3d at 358-59. *Cf. Matter of A-B-*, 27 I&N Dec. at 340 (observing that "if an alien's asylum application is fatally flawed in one respect . . . an immigration judge or the Board need not examine the remaining elements of the asylum claim.").


CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Attorney General issue a decision holding that: (1) the ambiguous statutory term, “membership in a particular social group,” does not *per se* encompass membership in a family unit or familial relationship; (2) protection claims based on a family unit or familial relationship must be reviewed pursuant to the rigorous analysis set forth in *Matter of A-B-*, and no universal formulation of a family unit or universal set of circumstances setting forth a family-based particular social group will suffice under the statute; (3) protection claims purportedly based on membership in a family ordinarily fail on the requirements of nexus and state protection, as such claims customarily arise from personal disputes; (4) the proper nexus test involves determining whether evidence shows that the alleged persecutor targeted the applicant due to his or her membership in a cognizable family-based particular social group and, where evidence shows the existence of multiple motives, whether membership in the cognizable family-based particular social group is at least one central reason for the alleged harm; and (5) the respondent has failed to meet his evidentiary burdens and should therefore be denied relief.

Respectfully submitted this 19th day of February, 2019.



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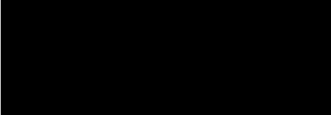


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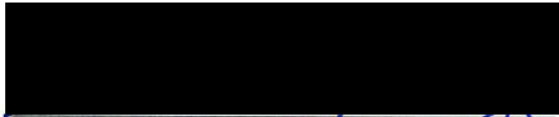
On February 19th, 2019, I, Natalie Salvaggio, mailed a copy of the U.S. Department of Homeland Security Brief on Referral to the Attorney General to:

Mei F. Chen, Esq.
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Courtesy Copy:



Via UPS Next Day Delivery Service.



(signature)

A handwritten signature in blue ink, partially overlapping the redacted signature box.



(date)

