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

REQUEST TO APPEAR AS AMICUS CURIAE

AND

**BRIEF OF THE GEORGE WASHINGTON UNIVERSITY IMMIGRATION CLINIC
AS AMICUS CURIAE IN RESPONSE TO AMICUS INVITATION NO. 16-01-11**



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REQUEST TO APPEAR AS AMICUS CURIAE

The George Washington University Law School Immigration Clinic hereby requests permission from the Board of Immigration Appeals (“Board” or “BIA”) to appear as *amicus curiae* in response to Amicus Invitation No. 16-01-11. The Board may grant permission to amicus curiae to appear, on a case-by-case basis, where it serves the public interest. 8 C.F.R. § 1292.1(d).

Alberto M. Benítez is a professor of immigration law at the George Washington University Law School. He teaches in the area of immigration law. Professor Benítez also directs the Immigration Clinic within the Jacob Burns Community Legal Clinics, which represents individuals *pro bono* in a wide variety of immigration matters but with a focus on asylum applications. Before joining the Law School faculty as director of the Immigration Clinic in 1996, Professor Benítez was on the faculty of the legal clinics at Chicago Kent College of Law and Northwestern University School of Law. Prior to becoming a clinician, he was a staff attorney at the Chicago Lawyers’ Committee for Civil Rights under Law and the Legal Assistance Foundation of Chicago, as well as an intern at the Centro de Estudios Legales y Sociales in Buenos Aires, Argentina. In addition, in the summers he has taught at the law schools of the Instituto Tecnológico Autónomo de México and the Universidad Panamericana, in Mexico City. In the spring 2003 semester Professor Benítez was a visitor at the Boyd School of Law of the University of Nevada at Las Vegas, assisting in the development of that law school’s immigration clinic. Professor Benítez has devoted his entire legal career to working in the public interest, generally with aliens, and so he is familiar with immigration law in its proper context.

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The Immigration Clinic is currently working on multiple cases that concern an individual who has faced or is at risk of persecution on account of their membership in their family. Due to an influx of unaccompanied minors into the United States, an increasingly common narrative is that of an alien who has faced persecution in their home country on account of the activities of their family members in one capacity or another. The matter currently before the Board of Immigration Appeals involves issues significantly related to the work of the GW Immigration Clinic, specifically, whether a particular social group comprised of the applicant's family satisfies the nexus requirement. The GW Immigration Clinic therefore respectfully requests leave to appear as *amicus curiae* and file the following brief.

INTRODUCTION

The issue of what a particular social group is becomes more complicated when applied to an individual who may be at risk of persecution because of his or her familial relationships. Although the nuclear family has long been accepted, and relied on, as a particular social group, some recent decisions by the BIA and certain Courts of Appeal have departed from this by requiring that the nexus requirement be met through another protected ground. This has resulted in a circuit split on the issue of whether an asylum applicant can satisfy the nexus requirement upon demonstrating persecution because of his or her membership in a particular social group comprised of the applicant's family. Currently, the Fourth and Ninth Circuits continue to accept an applicant's family as a particular social group without requiring further analysis with regards to the nexus requirement. The Fifth, Seventh, and Eighth Circuits, on the other hand, reject an applicant's persecution on account of their membership in their family as fulfilling the nexus requirement and instead require that the defining family member also fulfill the nexus requirement. This circuit split on this issue makes it necessary for the BIA to clarify which approach it will use because applicants and practitioners alike depend on BIA case law.



ISSUES PRESENTED

- I. Which approach the Board of Immigration Appeals should adopt regarding the current circuit split with regards to an asylum applicant's eligibility for asylum upon demonstrating persecution because of his or her membership in a particular social group comprised of the applicant's family. Specifically, a comparison of *Hernandos-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015), and *Flores Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015), with *Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015), *Lin v. Holder*, 411 F. App'x 901 (7th Cir. 2011), and *Malonga v. Holder*, 621 F.3d 757 (8th Cir. 2010).

- II. Whether an asylum applicant who has demonstrated persecution because of his or her membership in a particular social group comprised of the applicant's family has satisfied the nexus requirement without further analysis, or whether the family constitutes a particular social group only if the defining family member was also targeted on account of another protected ground.

CIRCUIT SPLIT ANALYSIS

I. The vast case law in favor of a broader approach supports the BIA abandoning the unnecessarily narrow approach taken by some Circuit courts.

Hernandos-Avalos v. Lynch, 784 F.3d 944 (4th Cir. 2015), and *Flores Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015), support a broader approach to accepting a family as a PSG. So long as the relevant familial relationship is one of the central reasons for persecution, the nexus requirement is fulfilled. This approach of the Fourth and Ninth Circuits should be adopted by the BIA over the restrictive requirements set forth in the Fifth, Seventh, and Eighth Circuits. Specifically, *Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015), *Lin v. Holder*, 411 F. App'x 901 (7th Cir. 2011), and *Malonga v. Holder*, 621 F.3d 757 (8th Cir. 2010), unnecessarily require a second degree nexus to be met, taking into account a broader range of facts than is needed to determine whether a single individual is at risk of persecution because of his or her familial relationship.

A. The Fourth and Ninth Circuits have adopted the proper approach to this issue without unnecessarily broadening the definition of a particular social group, but rather remaining consistent with existing case law.

In *Hernandos-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015), the Court of Appeals for the Fourth Circuit vacated and remanded a BIA decision denying asylum to a woman from El Salvador on account of membership in a nuclear family. Members of the gang Mara 18 demanded that she turn over her son to join the gang and she refused, in response to which they threatened her with death. The Court found a sufficient nexus between the death threats from the gang members and the woman's maternal relationship with her son. The Court rejected the "BIA's conclusion that these threats were directed at her not because she is his mother but because she exercises control over her son's activities" as a "meaningless distinction under these

facts.” The Court held that this familial relationship was at least one central reason for her persecution.

In *Flores Rios v. Lynch*, 807 F.3d 1123 (9th Cir. 2015), the Court of Appeals for the Ninth Circuit also vacated and remanded a BIA decision denying asylum on the basis of family membership, here to a national of Guatemala whose father and cousin were killed by gang members. The Court cited an earlier Ninth Circuit case, *Thomas v. Gonzales*, 409 F. 3d 1177, 1180 (9th Cir. 2005) (en banc), *vacated on other grounds, Gonzales v. Thomas*, 547 U.S. 183 (2006), in which it specifically “declined to hold... ‘that a family can constitute a particular social group only when the alleged persecution on that ground is intertwined with’ another protected ground.” The Court also referred to the fact that the family is so widely accepted as a PSG in case law.

B. The Fifth, Seventh, and Eighth Circuits take an excessively narrow approach to an applicant’s persecution on account of his familial relationships and should not be followed by the BIA.

In *Ramirez-Mejia v. Lynch*, 794 F.3d 485 (5th Cir. 2015), the Court of Appeals for the Fifth Circuit affirmed the BIA’s denial of asylum to a Honduran national who received anonymous notes and was shot at after her brother was killed, on the basis of seeking information that her brother had supposedly revealed to her. The Court here found the reason for persecution to be the information at issue rather than the relationship. The Court erred in finding this distinction in the basis for the persecution. Similar to *Hernandos-Avalos*, the applicant’s familial relationship was *at least one central* reason for her persecution. The anonymous notes could have been directed at anyone but the fact that they were directed at the applicant is significant because it suggests that there may have been other reasons the notes were directed at her. Moreover, the sender of the anonymous notes believed that the applicant had confidential

information. There is nothing in the record to suggest why the sender thought this, but presumably the fact that the applicant had a close familial relationship with her brother was a factor. The rejection that there is a nexus between the threatening notes and the applicant's familial relationship is not supported by the factual record.

In *Lin v. Holder*, 411 F. App'x 901 (7th Cir. 2011), the Court of Appeals for the Seventh Circuit denied the appeal of a national of China who sought asylum on the basis of his membership in the particular social group of family members of known Chinese debtors who fear punishment from creditors for outstanding debt. The IJ in lower proceedings asserted that owing money was not a protected ground. The Court of Appeals affirmed this view and further said that the PSG defined does not meet the requirement of having a common characteristic which "cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." The Court found that "any harm [the applicant] faced arose from a personal dispute between his father and his father's creditors." However, the applicant would not have been targeted, but for his familial relationship. If he did not have this familial relationship with his father, he would not have been detained for two months or physically attacked by creditors. This father-son relationship was at least one central reason for the persecution. While it is not the sole reason, it seems to be one of the main reasons, and therefore should be sufficient to find a nexus.

In *Malonga v. Holder*, 621 F.3d 757 (8th Cir. 2010), the Court of Appeals for the Eighth Circuit affirmed the BIA's denial of asylum to a national of the Republic of the Congo who sought relief on the basis of his family relationships. The Court set the standard as "acts of violence against family members on account of a protected basis may demonstrate persecution if they show a pattern of persecution tied to the petitioner." This standard is excessively narrow for

a finding of persecution on account of a family relationship. It requires that the applicant's family member be persecuted on a second ground for persecution. But the applicant's family member is not the individual who is applying for asylum. This requires a second degree of the nexus requirement, when the relevant ground is the applicant's membership in the particular social group of his or her nuclear family.

In all of the above mentioned cases, the common issue is that the nexus requirement is applied to the family member rather than the principal applicant for asylum. The facts relevant to a determination of persecution on account of membership in a particular social group, here a family, are those that affect the individual applicant rather than their family member. To require a tangentially related person to be eligible for protection independently, who is not necessarily applying for asylum, is to broaden the requirement of a nexus so excessively that it denies protection to individuals who need it.

ARGUMENT

I. **Requiring another protected ground other than familial relationship to fulfill the nexus requirement would depart from the obligations set forth in international treaties**

Refugee and asylum law is largely a matter that impacts and is impacted by the international community, given the delicate nature of accepting aliens from other countries who are at risk of being persecuted. The obligations of the U.S. in this realm are defined by The 1951 Convention on the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, which have been incorporated into domestic law.

The approach taken by the United Nations High Commissioner for Refugees (“UNHCR”) can and should be used to inform the United States’ treatment of refugees. The U.N. Handbook defines a social group as persons with similar backgrounds, habits or social status. This is significant because binding precedent confirms the value of the guidance provided by the U.N. Handbook. In *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the Supreme Court of the United States refers to this Handbook because it “provides significant guidance in construing the Protocol, to which Congress sought to conform [in enacting INA § 208].

Further, the UNHCR Guidelines on International Protection discuss membership of a particular social group within the context of Article 1A(s) of the 1951 Convention and/or Protocol: “A group of persons who share a common characteristic other than their risk of being persecuted, *or who are perceived as a group by society*. The characteristic *will often* be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.” The family has been established by the UNHCR as a particular social group.

Because the United States government is bound by its international obligations, these international standards should not only inform the interpretation of relevant domestic legislation but also the standards set out as binding by domestic courts.

II. An asylum applicant who has demonstrated persecution because of his or her familial relationships satisfies the nexus requirement without further analysis if the familial relationship is at least one central reason for the persecution.

A. Family as a PSG

The nuclear family is widely accepted by the BIA as a PSG and therefore is a protected ground for the purposes of asylum applications. Not only is a familial relationship a fundamental and immutable characteristic, but under the BIA's current test, it also meets the requirements of (1) social visibility and (2) particularity.

There is also well-established case law that supports finding the family to be a particular social group. *Gonzales v. Thomas*, 547 U.S. 183 (2006), vacated a Ninth Circuit *en banc* decision that defined a social group before giving the BIA the opportunity to determine whether "the members of a family can and do constitute a 'particular social group' within the meaning of the Act." In *Crespin-Valladares v. Holder*, 632 F.3d 117, 124-28 (4th Cir. 2011), the Court of Appeals for the Fourth Circuit found that relatives of witnesses testifying against MS-13 constituted a social group. *Vumi v. Gonzales*, 502 F.3d 150, 154-44 (2d. Cir. 2007), held that membership in a nuclear family may support the existence of a social group. The case was remanded to the BIA in order to make this determination regarding a woman from DRC who was persecuted because the government sought her husband in connection with the assassination of the President. A mother was found to be part of a family, constituting a social group, in *Bhasin v. Gonzales*, 423 F.3d 977, 983-85 (9th Cir. 2005). *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir.

1993), found a nuclear family to be a social group. And lastly, a similar holding resulted in *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

B. Nexus Requirement

In regards to the nexus requirement, it has been established that the applicable protected ground need not be the sole reason for the persecution. The REAL ID Act, INA §208(b)(1)(B)(i), set the standard that the protected ground “was or will be at least *one central* reason for persecuting the applicant.” This was further clarified by the Court of Appeals for the Ninth Circuit in 2009 when it interpreted the REAL ID provision to mean that a protected ground must be a cause of the persecution and that it must be *one* principal motivation, although the reason need not be 51% of the motivation. *Parussimova v. Mukasey*, 555 F.3d 734, 740-41 (9th Cir. 2009).

Applying this standard to the situation of a familial relationship demonstrates a sufficient nexus if said relationship is at least one of the main reasons for persecution. As discussed above, it has long been established that the family meets the requirements of a particular social group. The nexus requirement may then be fulfilled if the applicant proves that the familial relationship was a central reason for the persecution. The applicant need not prove that the familial relationship was *the* central reason, as it has been established that there are often multiple motives for persecution. This fulfilment of the nexus requirement is further supported by the cases *Hernandos-Avalos v. Lynch* and *Flores Rios v. Lynch*, as discussed above.

C. Public Policy Concerns

The nuclear family has long been recognized as a PSG by the BIA and other courts for the purposes of meeting the nexus requirement, and to change that approach would undercut

public policy. The policy underlying a particular social group as a protected ground is an awareness that the list of protected grounds is not exhaustive and will not provide protection to all asylum applicants who deserve it. Rather than function as a catch-all, this category is meant to provide protection to applicants who can prove that they were or will be persecuted on account of a characteristic that they cannot change. In addition to the fact that the family is a well-established form of a PSG, there are also policy considerations that support this approach.

CONCLUSION

For the foregoing reasons, the George Washington University Law School Immigration Clinic respectfully requests that the BIA adopt the broader approach to the issue of whether an applicant who has demonstrated persecution because of his or her membership in a particular social group comprised of the applicant's family has satisfied the nexus requirement.

Respectfully submitted,



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