CENTER FOR
Gender & Refugee
STUDIES

Protecting Refugees • Advancing Human Rights

June 9, 2020

Via Email
U.S. Immigration and Customs Enforcement
Freedom of Information Act Office
500 12th Street SW, Stop 5009
Washington, DC 20536-5009
ICE-FOIA@ice.dhs.gov

RE: FOIA Request for Records Relating to Formulations of "Gender Alone" Particular Social Groups

Dear Freedom of Information Officer:

This letter is a request pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, by the Center for Gender & Refugee Studies ("CGRS") at the University of California Hastings School of Law. CGRS seeks records from U.S. Immigration and Customs Enforcement ("ICE") pertaining to guidance, instructions, training, and policies relating to asylum and withholding of removal claims based in whole or in part on a "gender alone" Particular Social Group. CGRS seeks a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), on the grounds that disclosure of the information sought is likely to contribute significantly to public understanding of the operations or activities of ICE with respect to asylum claims and that this request is not made for any commercial interest.

DEFINITIONS

The term "agency" refers to ICE and any and all of its subcomponent agencies, divisions, and offices.

The term "asylum" encompasses credible and reasonable fear determinations, and affirmative and defensive applications for protection under asylum, withholding of removal, and protection under the Convention Against Torture ("CAT").

The term "concerning" means referring or pertaining to, describing, evidencing, addressing, commenting on, responding to, showing, analyzing, reflecting, or constituting.

The term "PSG" is an abbreviation for the term Particular Social Group, *see* 8 U.S.C. § 1101(a)(42).

The term "records" includes all records or communications preserved in electronic or written form, including but not limited to correspondence, documents, data, videotapes, e-mails, faxes, files, guidance, guidelines, evaluations, instructions, analyses, memoranda, agreements, notes,

orders, policies, procedures, protocols, reports, rules, manuals, technical specifications, training materials, and studies.

The term "Short Memo" refers to the July 11, 2018 Memorandum from Tracy Short to all OPLA Attorneys titled "Litigating Domestic Violence-Based Persecution Claims Following *Matter of A-B-*", attached hereto for reference.

RECORDS REQUESTED

The time period for the following requests is from July 11, 2018 through the present. The requests include records that have been prepared, received, transmitted, collected, and/or maintained by ICE:

1. All records containing analysis, instructions, guidance, training, protocols, and/or statement of agency policy relating to the formulation of a "gender alone" PSG for purposes of asylum, withholding of removal, and/or CAT claims, as discussed on page 8 of the Short Memo.

2. All records containing analysis, instructions, guidance, training, protocols, and/or statement of agency policy relating to asylum, withholding of removal, and/or CAT claims based in whole or in part on a claim of persecution based on membership in a "gender alone" PSG, as discussed on page 8 of the Short Memo.

3. All records containing analysis, instructions, guidance, training, protocols, and/or statement of agency policy relating to evidentiary facts or factors that may establish a "gender alone" PSG, as discussed on page 8 of the Short Memo, for purposes of pursuing an asylum, withholding of removal, and/or CAT claim based in whole or in part on a claim of persecution based in whole or in part on membership in a "gender alone" PSG.

4. Agency briefing submitted to any immigration judge, the Board of Immigration Appeals, and/or a federal court relating to any asylum, withholding of removal, and/or CAT claim based on a "gender alone"-based particular social group.

THE REQUESTER

CGRS, housed at the University of California Hastings School of Law, works to protect the fundamental human rights of refugees, with a focus on women and children, through litigation, scholarship, expert consultations, and the development of policy recommendations, in addition to providing in-depth training and technical assistance. Attorneys at CGRS include authors of scholarly books and law review articles regarding asylum, experts who advise other attorneys representing asylum seekers, and practicing attorneys who represent asylum seekers throughout the United States. CGRS conducts multiple national trainings each year, including both in-person and web-based trainings, and has published comprehensive studies documenting the procedures and treatment of women and child asylum seekers in the United States. Its reports, studies, and policy briefs are made available via publication in law journals or by academic and/or trade press, via distribution to email list-serves and individuals, and/or on its public website. Each year, CGRS provides technical assistance in over a thousand cases of asylum seekers, including

many women and children from Central America or Mexico who have recently arrived in the United States, many of whom have sought or will seek asylum or withholding of removal based on membership in a gender-based PSG. CGRS's assistance in these cases typically includes the dissemination of relevant materials compiled and/or produced by CGRS. CGRS will make widely available to the public information requested through this FOIA via its website and/or by other means discussed above.

In addition, CGRS is an educational institution with core scholarly, pedagogical, and research objectives. CGRS and its staff have authored numerous scholarly articles and reports, and have published comprehensive studies documenting the treatment of women and child asylum seekers in the United States.[1]

Accordingly, because CGRS's mission includes information dissemination, it is a "representative of the news media" within the meaning of the statute and applicable regulations. *See* 5 U.S.C. § 552(a)(4)(A)(iii) (defining a representative of the news media as an entity that "gathers information of potential interest to a segment of the public" and "uses its editorial skills to tum raw materials into a distinct work, and distributes that work to an audience"); *see also Nat'l Sec. Archive v. Dep't of Defense*, 880 F.2d 1381, 1397 (D.C. Cir. 1989) (same); *Elec. Privacy Information Ctr. v. Dep't of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003) (nonprofit organization that gathered information and published it in newsletters and otherwise for general distribution qualified as representative of news media for purpose of limiting fees). Courts have reaffirmed that nonprofit requestors who are not traditional news media outlets can qualify as representatives of the news media for the purposes of the FOIA, including after the 2007 amendments to the FOIA. *See ACLU of Wash. v. Dep't of Justice*, No. C09-0642RSL, 2011 WL 887731, at *10 (D. Wash. Mar. 10,201 l).

In addition, CGRS, based at the University of California Hastings School of Law, qualifies as an educational institution and seeks requested information to further its scholarly aims. *See* 5 U.S.C. § 552(a)(4)(A) (stating that fees shall be limited for "an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research"); 6 C.F.R. § 5.11(b)(4) (defining

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[1] *See, e,g.*, Center for Gender & Refugee Studies and National University of Lanús, eds., *Childhood and Migration in Central and North America; Causes, Policies, Practices and Challenges* (2015), *available at* http://cgrs.uchastings.edu/Childhood-Migration-HumanRights; CGRS & Kids in Need of Defense, *A Treacherous Journey: Child Migrants Navigating the U.S. Immigration System* (2014), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2834114##; Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, Harvard International Review (2014); Center for Gender & Refugee Studies, *Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdictions: A Resource for U.S. Attorneys* (May 2014); Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 Hastings Women's L.J. 107 (2014); Karen Musalo and Blaine Bookey, *Crimes Without Punishment: An Update on Violence Against Women and Impunity in Guatemala*, 10 Hastings Race & Poverty L.J. 265 (2013); Lisa Frydman and Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs*, 12-10 Immigr. Briefings (2012).

"educational institution" as an "institution of professional education . . . that operates a program of scholarly research").

FEE WAIVER

CGRS seeks a full fee waiver on the grounds that disclosure of the requested records is in the public interest and is "likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requestor." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 6 C.F.R. § 5.11(k). This request aims at furthering public understanding of government conduct: i.e., how the government is responding to and litigating claims of asylum, withholding of removal, and CAT protection based on a "gender-alone" PSG. To the Requester's knowledge, the requested information is not currently available to the public. Thus, the records' disclosure by definition will contribute significantly to the public's understanding of the agency's position on an issue of life-or-death importance to people seeking protection from persecution and torture.

Moreover, CGRS has no commercial interest in the records' disclosure, and has the ability to widely disseminate the requested information. *See Judicial Watch v. Rossotti*, 326 F.3d 1309 (D.C. Cir. 2003) (finding a fee waiver appropriate when the requestor explained, in detailed and non-conclusory terms, how and to whom it would disseminate the information it received). In this respect, the request strongly resembles previous instances in which the government waived all fees associated with responding to FOIA requests by CGRS.[2]

Should the government nonetheless assess fees for the processing of this request, those fees should be "limited to reasonable standard charges for document duplication" alone. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

* * *

Thank you for your consideration of this request. If this request is denied in whole or in part, we ask that the government justify all redactions by reference to specific FOIA exemptions. We expect the government to release all segregable portions of otherwise exempt material.[3] If, under applicable law, any of the information requested is considered exempt, please describe in detail the nature of the information withheld, the specific exemption or privilege upon which the

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[2] For example, in September 2014, the DOJ Executive Office for Immigration Review granted CGRS a fee waiver on a request for documentation regarding cases of individuals detained at the T. Don Hutto Residential Center. In August 2014, the DOJ the DOJ Executive Office for Immigration Review granted CGRS a fee waiver on a request for documentation concerning court handling of immigrant juvenile cases.

[3] All requested records that are responsive may be provided with personally identifying details redacted. FOIA exempts information from disclosure if that disclosure would lead to an unwarranted invasion of privacy. 5 U.S.C. § 552(b)(6). Determination of this exemption requires a balancing of the public's interest in obtaining the information against any possible invasions of privacy which would result from disclosure. *See, e.g.*, *Wood v. FBI*, 432 F.3d 78, 87-89 (2d Cir. 2005).

information is withheld, and whether the portions of withheld documents containing non-exempt or non-privileged information have been provided.

We reserve the right to appeal a decision to withhold any information or to deny a waiver of fees. We look forward to your response to our request within 20 business days, as required under 5 U.S.C. § 552(a)(6)(A)(i).

Please respond to:

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UC Hastings School of Law
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San Francisco, CA 94102
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(415) 565-4877

Please inform us in advance if the cost of photocopying the documents requested exceeds $100.00.

Sincerely,

Jamie. Crook

Office of the Principal Legal Advisor

U.S. Department of Homeland Security
500 12th St. SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

July 11, 2018

MEMORANDUM FOR: All OPLA Attorneys

FROM: for Tracy Short
Principal Legal Advisor

SUBJECT: Litigating Domestic Violence-Based Persecution Claims Following *Matter of A-B-*

Purpose

This memorandum provides guidance to U.S. Immigration and Customs Enforcement (ICE) attorneys litigating asylum and statutory withholding of removal claims in the wake of the Attorney General's (AG's) recent precedent decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).[1]

Background

On June 11, 2018, the AG issued a precedent decision in *A-B-*, 27 I&N Dec. 316, a protection law case that he had certified to himself from the Board of Immigration Appeals (BIA). *See Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018). The AG had invited the parties and interested amici curiae to submit briefs addressing whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable particular social group for purposes of applications for asylum and statutory withholding of removal. 27 I&N Dec. at 317.

Of primary importance, the AG overruled the BIA's precedent decision in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), on which the BIA had relied in finding A-B- eligible for asylum. In *A-R-C-G-*, the BIA had held that, under the circumstances presented in that case (and in light of several concessions by the parties on material issues), women who are victims of domestic violence potentially could qualify for asylum and statutory withholding of removal based on particular social group status. In this regard, the BIA had found A-R-C-G-'s particular social group to be cognizable, i.e., "married women in Guatemala who are unable to leave their relationship." 26 I&N Dec. 388. In *A-B-*, the BIA concluded that A-B-'s particular social group, "El Salvadoran women who are unable to leave their domestic relationships where they have

[1] The memorandum issued by former Principal Legal Advisor Peter Vincent, *Updated Guidance for Litigating Domestic Violence-Based Persecution Claims* (May 31, 2011), and any related guidance, is hereby superseded to the extent inconsistent herewith.

children in common [with their partners]," was "substantially similar" to the group at issue in *A-R-C-G-* and was, thus, cognizable. 27 I&N Dec. at 321 (internal quotation marks omitted).

The AG found that, in analyzing the particular social group at issue in *A-R-C-G-*, the BIA had improperly relied upon the parties' stipulations and failed to correctly apply the legal standards set forth in *Matter of M-E-V-G*, 26 I&N Dec. 227 (BIA 2014), and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), i.e., that a cognizable particular social group is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question. *A-B-*, 27 I&N Dec. at 333-36. Because he overruled *A-R-C-G-*, the AG also found it necessary to vacate the BIA's decision in *A-B-*, given that the BIA's "cursory analysis" simply consisted of "general citation to *A-R-C-G-* and country condition reports." *Id.* at 340.

In addition to discussing persecution claims based on domestic violence, the AG more broadly addressed persecution claims based on private criminal victimization, including gang violence. He opined that, "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum" or statutory withholding of removal. *Id.* at 320. The AG's position in this regard tracks existing BIA case law. For example, the AG emphasized that, to establish the requisite "persecution" in the context of private criminality, an alien must establish that his or her government is unwilling or unable to control the perpetrator, which the AG explained to mean that an applicant must show more than that the government had "difficulty controlling" the private criminality; rather, the government must have either "condoned" the criminality or "at least demonstrated a complete helplessness to protect the victims." *Id.* at 337 (internal citations, quotation marks, and punctuation omitted). The AG noted that, simply because a government has not acted on a reported crime, successfully investigated it, or punished the perpetrator, this does not necessarily establish an inability or unwillingness to control the crime any more than it would in the United States. *Id.*; *see also id.* at 343-44 (concerning the difficulty of preventing and prosecuting domestic violence even in the United States). Rather, there may be many reasons for such. *Id.* at 337-38.

Further, with respect to establishing the requisite nexus to a protected ground, such as particular social group membership, the AG stressed that, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the persecution. *Id.* at 338-39. In this regard, the AG cited with approval to the BIA's vacated precedent decision in *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999) (en banc), *vacated*, 22 I&N Dec. 906 (A.G. 2001), *remanded*, 23 I&N Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I&N Dec. 629 (A.G. 2008),[2] in which the BIA originally had

[2] OPLA attorneys may rely on *R-A-* as persuasive authority. The AG, the Board, and federal circuit courts have recognized the importance of *R-A-*'s analysis. *See A-B-*, 27 I&N Dec. at 329 ("Despite its vacatur, both the Board and federal courts have continued to rely upon *R-A-*."); *see also M-E-V-G-*, 26 I&N Dec. at 231 n.7 (noting that *R-A-*'s "role in the progression of particular social group claims remains relevant"); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1090, n.11 (9th Cir. 2013) (en banc) (observing that, although "*R-A-* was later vacated[,] . . . litigants and other courts have relied heavily upon its analysis"). OPLA attorneys should take care, however, not to misrepresent *R-A-* itself as a controlling, precedential decision, as the decision has been vacated. *Cf.* Model Rules of Prof'l Conduct R. 3.3 (2016). OPLA attorneys seeking to rely upon *R-A-* should either cite to precedential cases like *A-B-*, which approvingly cite to the portions of the analysis from *R-A-* upon which they seek to rely, or cite *R-A-* directly while noting that, although *R-A-* is not precedential, courts and the Board have continued to rely on its analysis. *See A-B-*, 27 I&N Dec. at 319 ("Despite the vacatur of R-A-, both

denied a domestic violence-based persecution claim due to, *inter alia*, a failure to establish nexus to a protected ground.

The AG otherwise emphasized that, in assessing asylum and statutory withholding of removal applications, including those premised on private criminal victimization, adjudicators must give due consideration to all of the other pertinent legal requirements and factors. For example, the AG stressed that adjudicators must consider, consistent with the appropriate regulatory assignment of the burden of proof, whether reasonable internal relocation is possible. *A-B-*, 27 I&N Dec. at 344. Further, with respect to asylum, the AG reminded adjudicators of the "discrete requirement" of meriting a favorable exercise of discretion. *Id.* at 345 n.12.

Finally, the AG found that, in adjudicating A-B-'s appeal from the immigration judge's (IJ) denial of her applications for protection, the BIA had failed to give sufficient deference to various factual findings of the IJ under the "clear error" standard of review, including with respect to credibility, state protection, and nexus. *Id.* at 340-44. Accordingly, the AG vacated the BIA's decision in A-B-'s case and remanded to the IJ for further proceedings consistent with his opinion. *Id.* at 346.

Discussion

In *A-B-*, the AG overruled *A-R-C-G-*, and provided substantial guidance to the BIA and IJs regarding various general requirements for asylum. The AG noted that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Id.* at 320. However, although the AG overruled *A-R-C-G-*, he did not conclude that particular social groups based on status as a victim of private violence could never be cognizable, or that applicants could never qualify for asylum or statutory withholding of removal based on domestic violence. In addition to overruling *A-R-C-G-*, the AG mandated that IJs and the BIA assess protection applications in a fulsome way that covers all pertinent requirements. The AG reiterated the principle that an applicant for asylum has the burden to establish eligibility for asylum, and that he or she "must present facts that undergird *each* of the[] elements" required for relief to be granted. *Id.* at 340. Accordingly, OPLA attorneys should ensure that IJs and the BIA rigorously analyze each claim such that protection is only granted where the alien has met his or her burden with respect to each and every element. *Id.*

Domestic Violence-Based Particular Social Group Claims Post A-B-

Private criminal victimization per se (including domestic violence), even when widespread in nature, is insufficient to establish eligibility for asylum or statutory withholding of removal. *See, e.g.*, *A-B-*, 27 I&N Dec. at 320 (noting that "[t]he mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim"); *M-E-V-G-*, 26 I&N Dec. at 235 (observing that, as a general matter, "asylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions").

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the Board and the federal courts have continued to treat its analysis as persuasive."). OPLA attorneys must exercise care to ensure that whatever approach they take is consistent with the contemporary state of the law in their relevant jurisdiction.

See generally Matter of Mogharrabi, 19 I&N Dec. 439, 447 (BIA 1987) (noting that "aliens fearing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval in their countries, would not qualify for asylum"). The overwhelming weight of federal circuit court case law holds the same.[3]

Additionally, the alien must establish that he or she is a member of a cognizable particular social group, considering conditions in the country of origin and the facts as they relate to the applicant. Consistent with *A-B-*, however, aliens must establish that any particular social group is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct based on the evidence in a particular case and the society in question. Office of the Principal Legal Advisor (OPLA) attorneys should ensure that any proffered particular social group is appropriately tested under the "rigorous analysis required by the Board's precedents." 27 I&N Dec. at 319.

In *A-B-*, the AG held that a particular social group must "exist independently" of the harm asserted in an application for asylum or statutory withholding of removal. *Id.* at 334-35.[4] Further, the AG indicated that, under the circumstances present in *Matter of A-R-C-G-*, the particular social group formulation in that case—"married women in Guatemala who are unable to leave their relationship"—was impermissibly defined because the inability to leave was created by harm or threatened harm. *Id.* at 335-36. Such a formulation would generally not share a "'narrowing characteristic other than their risk of being persecuted.'" *Id.* (quoting *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005)). As explained by the AG, in *Matter of A-R-C-G-* the Board "never considered" whether the proposed particular social group met this requirement. *Id.* Of course, while some particular social group formulations may be more overtly defined in whole or part by the harm at issue, e.g., "women who are *victims of domestic*

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[3] *See, e.g.*, *Sosa-Perez v. Sessions*, 884 F.3d 74, 81 (1st Cir. 2018) (observing that the attacks on the alien were not shown to be on account of a protected ground but rather a "series of highly unfortunate criminal incidents occurring within a culture of widespread societal violence" (quotation marks omitted)); *Zaldana-Menijar v. Lynch*, 812 F.3d 491, 501 (6th Cir. 2015) ("[W]idespread crime and violence does not itself constitute persecution on account of a protected ground . . . ."); *Kanagu v. Holder*, 781 F.3d 912, 918 (8th Cir. 2015) (noting that "the evidence primarily showed the extortionate focus of the Mungiki's interactions with Kanagu and their record of widespread and indiscriminate criminality," and that "a reasonable fact finder could infer that the Mungiki harassed and kidnapped Kanagu for extortionate purposes" as opposed to persecution on account of a protected ground); *Silva v. U.S. Att'y Gen.*, 448 F.3d 1229, 1242 (11th Cir. 2006) ("We agree that Colombia is a place where the awful is ordinary, but we must state the obvious: if four out of every ten murders are on account of a protected ground, six out of ten are not. The majority of the violence in Colombia is not related to protected activity."); *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998) ("Mere generalized lawlessness and violence between diverse populations, of the sort which abounds in numerous countries and inflicts misery upon millions of innocent people daily around the world, generally is not sufficient to permit the Attorney General to grant asylum to everyone who wishes to improve his or her life by moving to the United States without an immigration visa."). *See generally Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) ("[T]he concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional. If persecution were defined that expansively, a significant percentage of the world's population would qualify for asylum in this country—and it seems most unlikely that Congress intended such a result.").

[4] This rule, however, allows for the unique possibility, as recognized by the Board in *M-E-V-G-*, that in some situations "[u]pon their maltreatment, [victims] would experience a sense of 'group,' and society would discern that this group of individuals, who share a common immutable characteristic, is distinct in some significant way." 26 I&N Dec. at 243.

abuse," etc., other particular social group formulations may be more subtly or less clearly defined in whole or in part by the harm at issue.[5] Whether a proposed particular social group exists independently of the harm asserted is a question that must be carefully analyzed on a case-by-case basis.

The analysis of whether a particular social group is cognizable must always be case-by-case and society-specific. In addition, even in those cases where the record evidence may establish the cognizability of a particular social group formulation, the applicant may not be able to establish all of the other requirements for asylum or statutory withholding of removal, such as the requisite nexus between the particular social group and the harm she suffered and/or feared.

The AG did "not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group." *A-B-*, 27 I&N Dec. at 320. Particular social groups premised on domestic or gang violence, or premised on private criminal activity more generally, may not be recognized after *A-B-* unless those asylum claims survive the "rigorous analysis required by the Board's precedents." *Id.* at 319. When analyzing whether a proffered particular social group is cognizable, the key issue for OPLA attorneys is to look at each proposed group on a case-by-case basis and under the facts presented in a given case, and to subject it to the rigorous scrutiny required by *A-B-* and other precedents.

Promoting Detailed and Rigorous Analysis

Much of the AG's decision in *A-B-* was dedicated to reminding adjudicators that they must rigorously analyze claims to ensure that each required element is satisfied by the applicant. The burden of proof is firmly on applicants for asylum and statutory withholding of removal, not only with respect to establishing the cognizability of their putative particular social groups, but with respect to all other requirements as well, including credibility, "persecution," nexus, internal relocation (consistent with the appropriate regulatory burden of proof), etc. *See* Immigration and Nationality Act (INA) §§ 208(b)(1)(B)(i) (asylum), 241(b)(3)(C) (statutory withholding of removal)

In terms of the cognizability of particular social groups, the AG has mandated a "detailed" and "rigorous" analysis in each individual case vis-à-vis the clarified requirements of common immutable characteristic, particularity, and social distinction set out in *M-E-V-G-* and *W-G-R-*. *A-B-*, 27 I&N Dec. at 332, 340. Particular social group analysis is a case-specific and society-specific exercise. Simply because a putative particular social group may be found cognizable in one case and as to one society, does *not* mean that a similar particular social group formulation

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[5] Where a case involves a pro se applicant who raises a particular social group formulation that is clearly based on the harm suffered and/or feared, it is a best practice for an OPLA attorney to advise *the IJ* of this problem as early in proceedings as possible. (OPLA attorneys, of course, should not be providing legal advice to applicants.) Though adversarial, a "cooperative approach" in Immigration Court should not be eschewed. *See Matter of S-M-J-*, 21 I&N Dec. 722, 724 (BIA 1997). Then, as the IJ sees fit, *the IJ* can explain the situation to the applicant and provide her with an opportunity to revise her formulation. Such practice may ultimately help any agency decision denying asylum and statutory withholding of removal withstand judicial scrutiny.

automatically will be cognizable in other cases and as to other societies. *See, e.g.*, *M-E-V-G-*, 26 I&N Dec. at 241. *See generally Pirir-Boc v. Holder*, 750 F.3d 1077, 1083-84 (9th Cir. 2014) ("[T]he BIA may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity, especially where, as here, it is presented with evidence showing that the proposed group may in fact be recognized by the relevant society." (footnote omitted)). Indeed, even within the same society, material conditions may change over time.

Given that *A-R-C-G-* has now been overruled, with the AG mandating more fulsome analysis of the requirements for cognizable particular social group status in future cases, OPLA attorneys can expect to see an increase of voluminous, pre-packaged country/society-specific materials bearing on these requirements. To the extent that an OPLA attorney uncovers deficiencies in such materials, or Department of State reports or similarly available country condition evidence undercut such materials, this information should be submitted, as well as shared with other OPLA field offices. The Immigration Law and Practice Division's (ILPD) SharePoint Discussion Board is one platform for sharing such information. Additionally, OPLA attorneys should appropriately challenge and cross-examine aliens' witnesses, including expert witnesses.[6]

In addition, in terms of application materials concerning the prevalence of private criminal activity in a given country—whether in the form of domestic violence, gang violence, or otherwise—keep in mind that the BIA has observed that "a purely statistical showing" of who is being harmed "is not by itself sufficient proof of the existence of a persecuted group," and that "[i]t is not enough to simply identify the common characteristics of a statistical grouping of a portion of the population at risk." *Matter of Sanchez & Escobar*, 19 I&N Dec. 276, 285 (BIA 1985), *aff'd sub nom. Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986); *see also M-E-V-G-*, 26 I&N Dec. at 250-51 (while eschewing any "blanket rejection of all factual scenarios involving gangs," observing that "gangs may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping, trafficking in drugs and people, and other crimes," and that although "certain segments of a population may be more susceptible to one type of criminal activity than another, the residents all generally suffer from the gang's criminal efforts," and "not all societal problems are bases for asylum"). Indeed, even in the United States, as late as 2000, almost 1 million women over the age of 12 had suffered some form of intimate-partner violence. *See* 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. tbl. 3. Further, even in this country, a significant portion of violent crimes are never resolved. *See* John Gramlich, Most violent and property crimes in the U.S. go unsolved, Pew Research Center (Mar. 1, 2017) (citing official U.S. Government statistics).

While *A-R-C-G-* has now been overruled, existing circuit court case law distinguishing *A-R-C-G-* still may prove useful in any given case. For example, some circuit court decisions distinguished *A-R-C-G-* because the subject alien was never in a domestic relationship with her alleged abuser. *See Cardona v. Sessions*, 848 F.3d 519 (1st Cir. 2017). Others distinguished *A-R-C-G-* because

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[6] *See, e.g.*, *Matter of D-R-*, 25 I&N Dec. 445, 459–60 (BIA 2011) (discussion of expert witnesses).

of the subject alien's ability to leave the relationship. *See Fuentes-Erazo v. Sessions*, 848 F.3d 847 (8th Cir. 2017); *Marikasi v. Lynch*, 840 F.3d 281 (6th Cir. 2016).[7]

Finally, the testimony of the applicant alone may be sufficient to sustain her burden of proof, *only if* she satisfies the adjudicator that her testimony: (i) is "credible," (ii) is "persuasive," and (iii) "refers to specific facts sufficient to demonstrate that the applicant is a refugee." INA §§ 208(b)(1)(B)(ii) (asylum); 241(b)(3)(C) (statutory withholding of removal). Even when an adjudicator determines that the applicant's testimony is "otherwise credible," the adjudicator can require the applicant to produce corroborating evidence unless the applicant establishes that she does not have the evidence and cannot reasonably obtain it.[8] *Id.* In the context of private criminal victimization due to domestic violence, an applicant presumably should have detailed knowledge of her abuser. The applicant's knowledge in this regard, or her failure to reasonably explain the lack thereof, is relevant to whether the applicant's testimony is credible, persuasive, and sufficiently detailed to satisfy her burden of proof. In addition, such information could help to better identify persecutors should they ever attempt to enter the United States or otherwise gain immigration benefits while present here.[9] Moreover, the applicant's current domestic

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7 Both *Marikasi* and *Fuentes-Erazo* reinforce the point that a domestic relationship is not necessarily an immutable trait. DHS recognizes that an applicant's ability, per se, to obtain a legal divorce or separation—if legally married—and leave her country for the United States does not *automatically* mean that her domestic relationship is mutable. Her former husband may not recognize the legal termination of their relationship, the authorities may not enforce it, and the only way she may be free of the relationship is, in fact, to leave her country (as opposed to leaving her husband to reside in another part of her country). However, the ability to obtain a divorce or separation and to leave her country are relevant considerations as to whether that relationship is mutable, and serve as strong evidence of the viability of internal relocation. In this regard, it would be important for an adjudicator to consider whether the applicant actually sought the help of the authorities to enforce the legal termination of her relationship, and their response. In addition, an applicant's ability to marshal support and resources to travel to the United States has a weighty bearing on whether she could have availed herself of those same support networks and resources to reasonably internally relocate within her own country, as opposed to invoking the need for international protection—and, if not, why not. *See generally Silva v. Ashcroft*, 394 F.3d 1, 7 (1st Cir. 2005) (noting that "if a potentially troublesome state of affairs is sufficiently localized, an alien can avoid persecution by the simple expedient of relocating within his own country instead of fleeing to foreign soil").

8 *See Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015). OPLA attorneys practicing in the jurisdiction of the Ninth Circuit should be mindful of *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011), which requires that, where an IJ concludes that corroborative evidence is necessary to support credible testimony, the alien must be given notice and an opportunity to obtain and submit the corroborative evidence or explain his or her failure to do so.

9 Accordingly, when such information is not provided, OPLA attorneys should consider questioning the applicant about the putative persecutor, such as: (i) full name, date of birth, and place of birth; (ii) full names of parents and siblings; (iii) last known address; (iv) last known telephone number (if any); (v) physical characteristics (e.g., race, height, weight, hair color, eye color, prominent scars or tattoos); (vi) copies of photographs (if any); (vii) name and location of last known employer or, if self-employed, name and location of business; (viii) any known criminal record, with approximate dates; (ix) any known military service, with approximate dates; (x) any known violent or otherwise abusive behavior towards other persons, and the identity of such victims; (xi) any known visits to the United States, with approximate dates; (xii) the most recent information as to health; (xiii) the most recent information as to any additional domestic or intimate relationships; and (xiv) any and all direct or indirect contact the applicant may have had with, or information received about, the putative persecutor following the applicant's arrival in the United States. While not all such information may necessarily be within the knowledge of any specific applicant, such does not mean that she should not be asked in the first instance, and to provide a reasonable explanation as to why she cannot provide specific information.

and/or intimate relationships also may have a bearing on her asylum and statutory withholding of removal applications.[10]

Pending Cases Where IJ Granted Asylum/Statutory Withholding Relying on A-R-C-G-

In a case where the IJ granted asylum and/or statutory withholding of removal relying on *A-R-C-G-*, DHS appealed, and the case currently remains pending before the BIA, OPLA field office should determine on a case-by-case basis whether to file a supplemental brief, along with a motion to accept the same, making new arguments based upon the AG's decision in *A-B-*, 27 I&N Dec. 316. *See generally* BIA Practice Manual Ch. 4.6(g)(ii) (rev. Mar. 23, 2018), https://www.justice.gov/sites/default/files/pages/attachments/2018/03/23/practicemanualfy2018.pdf#page=59. The value of filing such a supplemental brief would be dependent, for example, on the importance of the individual case, the available resources of the OPLA field office, whether the IJ provided a fulsome factual and legal analysis as opposed to simply summarily relying on *A-R-C-G-*, whether additional factfinding might be necessary, and the need to make nuanced arguments with respect to the application of *A-B-*. In the absence of such factors, however, it generally will not be necessary to file a "Statement of New Legal Authorities" simply citing to the AG's decision in *A-B-*. *See* BIA Practice Manual Ch. 4.6(g)(i), *supra*. The BIA will be fully aware of the decision.

"Gender Alone" Particular Social Groups

Given that *A-R-C-G-* has now been overruled, it is expected that DHS and the Executive Office for Immigration Review will be forced to address the issue of "gender alone"-based particular social group claims, e.g., "women of Country X." OPLA attorneys should not take a position on the cognizability of such "gender alone" formulations until further guidance is disseminated or without consulting with ILPD.

Matter of L-E-A-

Finally, while it is apparent that the AG has cast doubt on the viability of *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017), in which the BIA held that some particular social groups based on

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[10] When such information is not provided, OPLA attorneys should consider questioning the applicant about: (i) her own current domestic or intimate relationships, if any; (ii) any children born in the United States (along with pertinent birth certificates); and (iii) whether she or her children, if any, have traveled abroad to a place where the putative persecutor could contact them since their arrival in the United States. *It is important that inquiries into an applicant's current domestic or intimate relationships be conducted with due care and appropriate sensitivity.* The legitimate purpose of such an inquiry is to develop the record with material information to better assist the adjudicator in making a fully informed decision. For example, the existence of a new domestic or intimate relationship may be pertinent to the putative persecutor's perception of his relationship with the applicant or to the putative persecutor's inclination to harm the applicant, whether negatively or positively. Additionally, if the applicant has a current domestic or intimate relationship, especially one that is legally recognized in the country of alleged persecution, this may be pertinent to issues of internal relocation and state protection in that country.

family membership may be cognizable,[11] the AG did not overrule that precedent, noting that it was beyond the scope of his opinion. *See A-B-*, 27 I&N Dec. at 333 n.8. Accordingly, unless and until there is a controlling ruling to the contrary, *L-E-A-* remains binding precedent. However, as discussed above, such claims should be rigorously tested and analyzed.

Questions

OPLA attorneys should address any questions they have about this memorandum, or the AG's ruling in *A-B-* in general, to ILPD via the pertinent ILPD-E or ILPD-W mailbox.

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[11] Recall that in *L-E-A-*, the BIA found that an "immediate family" *may* constitute a cognizable particular social group. 27 I&N Dec. at 42. It cautioned, however, that the inquiry is a case-by-case and fact based, dependent on the nature and degree of the relationships involved and how those relationships are regarded by the society in question. *Id.* at 42-43. Simply inserting "family" into a particular social group formulation does not establish cognizability.

Page 001

Withheld pursuant to exemption

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of the Freedom of Information and Privacy Act

Page 002

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From: (b)(6); (b)(7)(C)
Sent: 24 Feb 2020 20:19:55 +0000
To: (b)(6); (b)(7)(C)
Cc:
Subject: RE: OPLA-WAS Brown Bag on Gender PSG
Attachments: (b)(6); Redlined Bullets.docx

(b)(6); (b)(5) I hope this helps! It comes with the caveat to please let me know if something does not make sense. I had to bang it out quickly, as I'm going to be tied up with other taskings. Thx! (b)(6);

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

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From: (b)(6); (b)(7)(C) @ice.dhs.gov>
Sent: Monday, February 24, 2020 1:39 PM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: OPLA-WAS Brown Bag on Gender PSG

(b)(6); (b)(7)(C) (And Managers FYSA)

(b)(5); (b)(6); (b)(7)(C)

(b)(5)

(b)(5)

(b)(5)

(b)(6);

-----Original Appointment-----

From: (b)(6); (b)(7)(C)

Sent: Thursday, February 20, 2020 6:16 PM
To: (b)(6);
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

Subject: Litigation Strategy Session - Women in X Country as a Particular Social Group
When: Thursday, February 27, 2020 3:00 PM-4:00 PM (UTC-05:00) Eastern Time (US & Canada).
Where: Large Conference Room

There is renewed interest in starting up the litigation strategy sessions to discuss certain recurring issues. We are going to try a Thursday afternoon session on 2/27 at 3:00 pm for those who can make it.

(b)(5)

Next Thursday's discussion will focus on:

(b)(5)

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(b)(5)

These and other issues to discuss next Thursday. Please bring your ideas, stories from court, and suggested approaches to further the discussion.

(b)(6);
(b)(7)(C)

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Associate Legal Advisor
Immigration Law & Practice Division
Office of the Principal Legal Advisor
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security
Office: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C) here are my thoughts and suggested edits in redline below:

(b)(5)

(b)(5)

(b)(5)

From: (b)(6); (b)(7)(C)
Sent: 11 Jul 2018 23:45:32 +0000
To: OPLA Field Personnel;OPLA HQ Personnel
Subject: Litigating Domestic Violence-Based Persecution Claims Following Matter of A-B-
Attachments: Litigating Domestic Violence-Based Persecution Claims Following Matter of A-B- (ICE OPLA 07.11.18).pdf

Disseminated on behalf of Tracy Short…

To All OPLA Attorneys:

On June 11, 2018, the Attorney General (AG) issued *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), which he had certified to himself from the Board of Immigration Appeals (BIA) to address the question of whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable particular social group for purposes of applications for asylum and withholding of removal under the Immigration and Nationality Act. In deciding *A-B-*, the AG overruled *Matter of A-R-C-G-*,26 I&N Dec. 388 (BIA 2014), in which the BIA had recognized the asylum claim of an applicant who claimed persecution on account of her membership in the particular social group of "married women in Guatemala who are unable to leave their relationship." The AG noted in *A-B-* that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Id.* at 320. In addition to overruling *A-R-C-G-*, the AG mandated that immigration judges and the BIA assess asylum and withholding applications in a thorough way that addresses all pertinent requirements. The AG reiterated the principle that an applicant for asylum has the burden to establish eligibility for asylum, and that he or she "must present facts that undergird *each* of the[] elements" required for relief to be granted. *Id.* at 340.

The attached memorandum provides guidance to OPLA attorneys litigating asylum and statutory withholding of removal claims in the wake of the AG's precedent decision in *Matter of A-B-*, 27 I&N Dec. 316. Additionally, the memorandum issued by former Principal Legal Advisor Peter Vincent, *Updated Guidance for Litigating Domestic Violence-Based Persecution Claims* (May 31, 2011), and any related guidance, is superseded to the extent it is inconsistent with the attached memorandum issued today.

OPLA attorneys should address any questions they have about this memorandum, or the AG's ruling in *A-B-* in general, to the Immigration Law and Practice Division via the pertinent ILPD-E or ILPD-W mailbox.

Thank you.

Tracy Short
Principal Legal Advisor
U.S. Immigration and Customs Enforcement

(b)(5); (b)(6); (b)(7)(C)

U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

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Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: RE: Gender as PSG Working Group

USCIS colleagues, a quick update: (b)(5) (b)(5) (Thanks to (b)(6); (b)(7)(C) for reminding me that Monday, February 18 is a federal holiday.)

Thx, (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
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Telephone: (b)(6);
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From: (b)(6); (b)(7)(C)
Sent: Monday, February 04, 2019 10:52 AM
To: (b)(6); (b)(7)(C) @HQ.DHS.GOV>; (b)(6); (b)(7)(C) @hq.dhs.gov>;

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(b)(6); (b)(7)(C) @uscis.dhs.gov>;(b)(6); (b)(7)(C)
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(b)(6); (b)(7)(C) @uscis.dhs.gov>(b)(6); (b)(7)(C) @uscis.dhs.gov>;(b)(6);
(b)(6); @uscis.dhs.gov>;(b)(6); (b)(7)(C) @uscis.dhs.gov>
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Subject: RE: Gender as PSG Working Group

~~***SENSITIVE/PRIVILEGED***PRE-DECISIONAL***ATTORNEY WORK PRODUCT***~~*

USCIS working group colleagues,

(b)(5)

(b)(5); (b)(6); (b)(7)(C)

Please let me know if you have any questions.(b)(5)

(b)(5)

(b)(5)

I hope the above makes sense.

Regards, (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
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From: (b)(6); (b)(7)(C) @HQ.DHS.GOV>
Sent: Friday, October 19, 2018 11:23 AM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>; Mazzochi, Sarah <Sarah.Mazzochi@hq.dhs.gov>
Cc: (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>
Subject: RE: Gender as PSG Working Group

Many thanks to all in this super group. Very much appreciated.

(b)(6); (b)(7)(C)
Deputy Associate General Counsel for Immigration
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Cc: (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(6); @uscis.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @uscis.dhs.gov>
Subject: RE: Gender as PSG Working Group

(b)(5); (b)(6); (b)(7)(C)

Any input you or (b)(6); may have at this point, of course, would be most welcome.

Thx! (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
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Subject: RE: Gender as PSG Working Group

Thanks (b)(6);

Sincerely,

(b)(6); (b)(7)(C)
Attorney Advisor
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Office of the General Counsel
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Subject: RE: Gender as PSG Working Group

(b)(5); (b)(6); (b)(7)(C)

(b)(5)

(b)(5)

Many thanks for your consideration! Please let us know if you have any questions.

(b)(6); (b)(7)(C) (on behalf of the working group)

(b)(5)

(b)(6); (b)(7)(C)
Associate Legal Advisor
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(b)(5); (b)(6); (b)(7)(C)

Thx! (b)(6); (b)(7)(C)

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Subject: RE: Gender as PSG Working Group

(b)(6); (b)(7)(C)

(b)(5)

(b)(5)

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(b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6);
(b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6);
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(b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C) @ice.dhs.gov>; Loiacono, Adam V <(b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: RE: Matter of A-B- Draft Brief

Thanks, all. We'll be in touch soon.

-----Original Message-----
From: Loiacono, Adam V (b)(6); (b)(7)(C) @ice.dhs.gov>
Sent: Wednesday, August 1, 2018 8:08 AM
To: (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6);
(b)(6); @hq.dhs.gov>; (b)(6); (b)(7)(C) @HQ.DHS.GOV>; (b)(6);
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(b)(6); (b)(7)(C) @ice.dhs.gov>
Cc: (b)(6); (b)(7)(C) b)(6); @ice.dhs.gov>; (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C) @HQ.DHS.GOV>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6);
(b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C) @cbp.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>;
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(b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6);
(b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C)
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(b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6);
(b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C) @ice.dhs.gov>; Loiacono, Adam V <(b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: RE: Matter of A-B- Draft Brief

(b)(6);

OPLA's POCs will be (b)(6); (b)(7)(C) They are copied here.

Thanks,

Adam V. Loiacono
Deputy Principal Legal Advisor for Enforcement and Litigation
Office of the Principal Legal Advisor

Cc: Davis, Mike P; (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C) ; Loiacono, Adam V
Subject: RE: Matter of A-B- Draft Brief

All:

(b)(5); (b)(6); (b)(7)(C)

(b)(5)

(b)(5)

If you all agree, I suggest sharing POCs and getting this underway as soon as possible.

Thanks,

Adam V. Loiacono
Deputy Principal Legal Advisor for Enforcement and Litigation
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
Desk: (b)(6); (b)(7)(C)
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~~ATTORNEY/CLIENT PRIVILEGE ATTORNEY WORK PRODUCT~~

From: Kelliher, Brian
Sent: Thursday, July 26, 2018 10:55 AM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>; Allred, Esther <Esther.Allred@hq.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @ice.dhs.gov>; Shah, Dimple <Dimple.Shah@hq.dhs.gov>
Cc: Davis, Mike P <(b)(6); @ice.dhs.gov>; Loiacono, Adam V (b)(6); (b)(7)(C) @ice.dhs.gov>; Baroukh, Nader <Nader.Baroukh@HQ.DHS.GOV>; (b)(6); (b)(6); (b)(7)(C) @ice.dhs.gov> (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @cbp.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @ice.dhs.gov>; Ruhs, Katherine <Katherine.Ruhs@hq.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov> (b)(6); (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @uscis.dhs.gov>
Subject: RE: Matter of A-B- Draft Brief

Hi all. In S.E.R.L. v. U.S. Att'y Gen., 894 F.3d 535 (3d Cir. 2018), the Third Circuit affirmed, under Chevron step 2, Matter of M-E-V-G- and Matter of W-G-R-, noting too that the AG has overruled Matter of A-R-C-G-.

Also, we should keep an eye out for this Ninth Circuit remand, Silvestre-Mendoza v. Sessions, 729 F. App'x 597 (July 3, 2018). The court directs the BIA to address whether "Guatemalan women" is a cognizable PSG:

The BIA found that Silvestre failed to show that "young Guatemalan females who have suffered violence due to female gender" were socially distinct. That determination is supported by substantial evidence. However, the BIA should have considered whether "Guatemalan women" is a particular social group. "Guatemalan women" subsumes "young Guatemalan females who have suffered violence due to female gender," and it is the gravamen of Silvestre's persecution claim. In her briefing to the IJ and BIA, Silvestre-Mendoza frequently referenced violence against women generally in Guatemala rather than violence against young women specifically. Cf. Rios v. Lynch, 807 F.3d 1123, 1126 (9th Cir. 2015). Additionally, Silvestre's evidence attests to pervasive femicide in Guatemala,

Office of the General Counsel
U.S. Department of Homeland Security
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From: (b)(6); (b)(7)(C)
<(b)(6); (b)(7)(C) @ice.dhs.gov<mailto:(b)(6); (b)(7)(C) @ice.dhs.gov>>
Sent: Friday, April 20, 2018 6:41 PM
To: (b)(6); (b)(7)(C) @hq.dhs.gov<mailto (b)(6); @hq.dhs.gov>>(b)(6);
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(b)(6); (b)(7)(C) @uscis.dhs.gov<mailto (b)(6); (b)(7)(C) @uscis.dhs.gov>>;
(b)(6); (b)(7)(C)
<(b)(6); (b)(7)(C) @uscis.dhs.gov<mailto (b)(6); (b)(7)(C) @uscis.dhs.
gov>>(b)(6); (b)(7)(C)
<(b)(6); (b)(7)(C) @ice.dhs.gov<mailto (b)(6); (b)(7)(C) @ice.dhs.gov>>; (b)(6); (b)(7)(C)
<(b)(6); (b)(7)(C) @uscis.dhs.gov<mailto (b)(6); (b)(7)(C) @uscis.dhs.gov>>
Cc: Davis, Mike P <(b)(6); @ice.dhs.gov<mailto:(b)(6); @ice.dhs.gov>>;
Loiacono, Adam V
<(b)(6); (b)(7)(C) @ice.dhs.gov<mailto:(b)(6); (b)(7)(C) @ice.dhs.gov>>(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C) @HQ.DHS.GOV<mailto (b)(6); (b)(7)(C) @HQ.DHS.GOV>>;(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C) @ice.dhs.gov<mailto (b)(6); (b)(7)(C) @ice.dhs.gov>>; (b)(6); (b)(7)(C)
(b)(6); @ice.dhs.gov<mailto (b)(6); @ice.dhs.gov>>(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C) @cbp.dhs.gov<mailto:(b)(6); (b)(7)(C) @cbp.dhs.gov>>(b)(6);
(b)(6); (b)(7)(C) @ice.dhs.gov<mailto (b)(6); (b)(7)(C) @ice.dhs.gov>>;
(b)(6); (b)(7)(C) @hq.dhs.gov<mailto (b)(6); (b)(7)(C) @hq.dhs.gov>>;
(b)(6); (b)(7)(C)
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<(b)(6); (b)(7)(C) @uscis.dhs.gov<mailto (b)(6); (b)(7)(C) @uscis.dhs.gov>>(b)(6);
(b)(6); @uscis.dhs.gov<mailto (b)(6); @uscis.dhs.gov>>(b)(6); (b)(7)(C)
<(b)(6); (b)(7)(C) @uscis.dhs.gov<mailto:(b)(6); (b)(7)(C) @uscis.dhs.gov>>; (b)(6);
(b)(6); (b)(7)(C) @ice.dhs.gov<mailto (b)(6); (b)(7)(C) @ice.dhs.gov>>(b)(6);
(b)(6); (b)(7)(C) @uscis.dhs.gov<mailto:(b)(6); @uscis.dhs.gov>>;(b)(6);
(b)(6); (b)(7)(C) @uscis.dhs.gov<mailto (b)(6); (b)(7)(C) @uscis.dhs.gov>>;
(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C) @uscis.dhs.gov<mailto (b)(6); (b)(7)(C) @uscis.dhs.gov>>
Subject: RE: Matter of A-B- Draft Brief

All:

The A-B- brief is out the door. I've attached what was sent out via email.

We appreciated the thoughts, feedback, and help as this brief evolved over the past few weeks, especially today when it became crunch time. Thank you immensely for your work on this.

Looking forward to no AG briefs being due next week. Have a great weekend, all.

(b)(6); (b)(7)(C) @HQ.DHS.GOV<mailto:(b)(6); (b)(7)(C) @HQ.DHS.GOV>>;(b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @ice.dhs.gov<mailto:(b)(6); (b)(7)(C) @ice.dhs.gov>>;(b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @ice.dhs.gov<mailto:(b)(6); @ice.dhs.gov>>
Subject: Matter of A-B- Draft Brief

All:

(b)(5)

Of course, if you have questions or issues, please feel free to contact me or (b)(6);

Thanks!

(b)(6);

(b)(6); (b)(7)(C)
Chief, Immigration Law and Practice
Division (b)(7)(E)
(b)(6); (b)(7)(C)
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
500 12th Street, SW, (b)(6);
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Options Paper

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From: (b)(5)
Sent: 27 Mar 2019 16:09:30 +0000
To: (b)(5)
Cc:
Subject: RE: Gender as PSG Working Group
Attachments: Gender as PSG Options Paper (ice-uscis working draft) (rev. rdln 03-27-19).docx

(b)(5)

(b)(5)

Please let me know if you have any questions. Thx! (b)(5)

(b)(5)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (b)(5)
E-mail (b)(5) @ice.dhs.gov

From: (b)(5) @uscis.dhs.gov>
Sent: Monday, March 18, 2019 5:38 PM
To: (b)(5) @ice.dhs.gov>; (b)(5) (b)(5) @uscis.dhs.gov>; (b)(5) @uscis.dhs.gov>; (b)(5) @uscis.dhs.gov>; (b)(5) @uscis.dhs.gov>; (b)(5) (b)(5) @uscis.dhs.gov>; (b)(5) (b)(5) @uscis.dhs.gov>; (b)(5) (b)(5) @uscis.dhs.gov>
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From: (b)(6); (b)(7)(C)
Sent: 19 Feb 2019 17:03:20 +0000
To: (b)(6); (b)(7)(C) @dhs.gov)
(b)(6); @dhs.gov) (b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
Subject: RE: Gender as PSG Working Group
Attachments: Gender as PSG Options Paper (clean) (kds).docx

(b)(6);

Thanks so much for taking this on and reviving this project. (b)(5)
(b)(5) Let me know if I can further assist.

Best,
(b)(6);

(b)(6); (b)(7)(C) Associate Legal Advisor
Immigration Law & Practice Division
Office of the Principal Legal Advisor
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security
Office: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Wednesday, January 30, 2019 5:46 PM
To: (b)(6); (b)(7)(C) @dhs.gov) (b)(6); @dhs.gov) <(b)(6); @dhs.gov>(b)(6);
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Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6);
(b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: FW: Gender as PSG Working Group

(b)(6); (b)(7)(C)

I thought it best to try to get the DHS PSG/Gender working group's efforts back up to speed after our hiatus. (b)(5)

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(b)(5) Please let me know if you have any questions or concerns. (b)(6); (b)(7)(C) please also feel more than free to chime in!!!

Thanks! (b)(6); (b)(7)(C)

****

USCIS working group colleagues,

(b)(5)

Regards, (b)(6);

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (b)(6); (b)(7)(C)
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From: (b)(6); (b)(7)(C) @HQ.DHS.GOV>
Sent: Friday, October 19, 2018 11:23 AM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @hq.dhs.gov>
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Subject: RE: Gender as PSG Working Group

Many thanks to all in this super group. Very much appreciated.

(b)(6); (b)(7)(C)
Deputy Associate General Counsel for Immigration
Immigration Law Division
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From: (b)(6); (b)(7)(C) @ice.dhs.gov>
Sent: Thursday, October 18, 2018 6:58 PM
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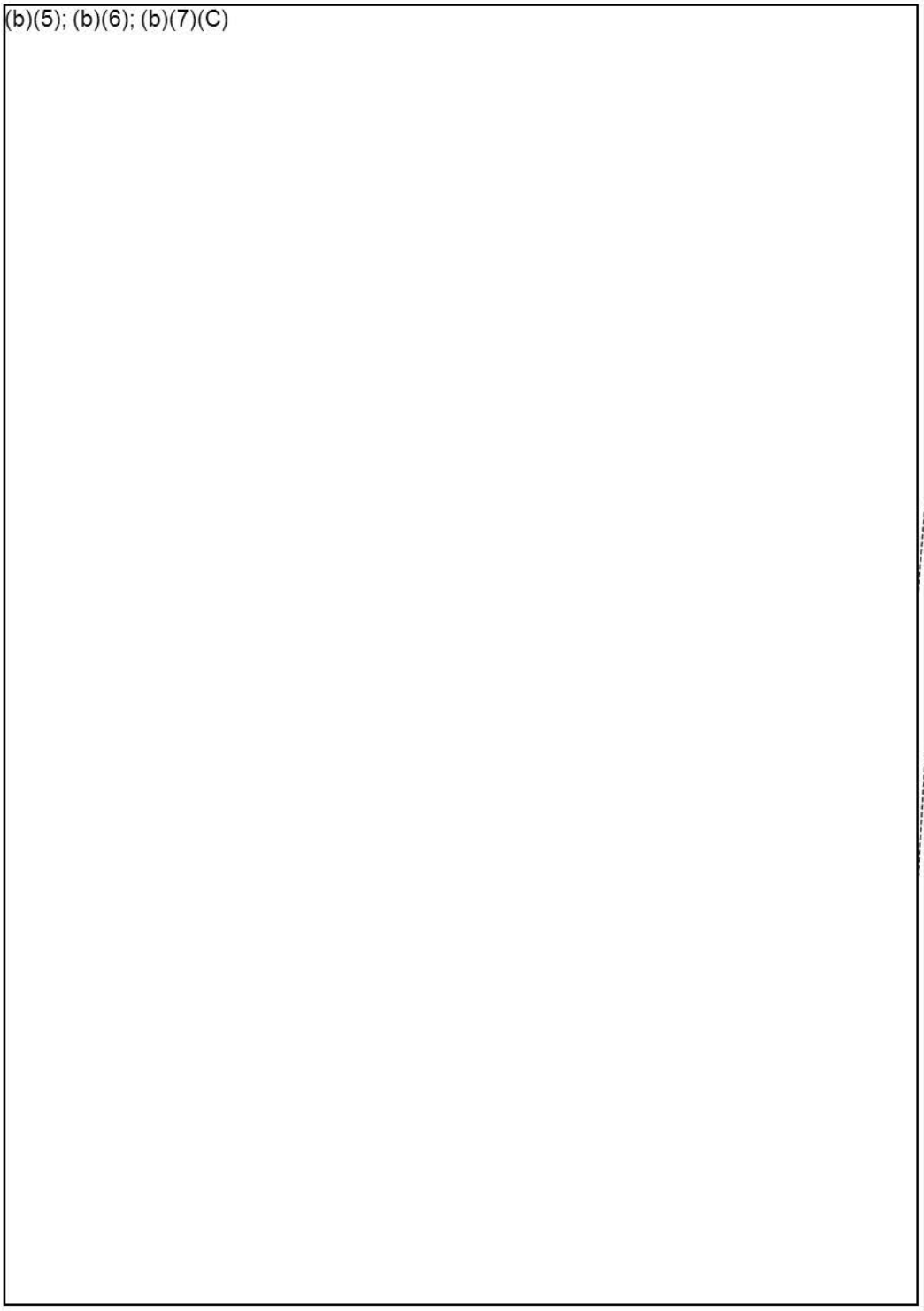
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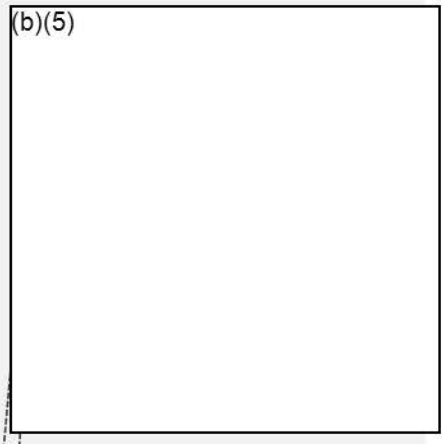
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From: (b)(6); (b)(7)(C)
Sent: 1 May 2019 19:27:57 +0000
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
Subject: RE: A-B- Question...

(b)(5)

(b)(5)

(b)(6); (b)(7)(C)

From: (b)(6);
Sent: Wednesday, May 1, 2019 3:24 PM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>;
(b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: RE: A-B- Question...

I don't have anything to add— (b)(5); (b)(6); (b)(7)(C) Thanks! (b)(6);

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From: (b)(6); (b)(7)(C)
Sent: Wednesday, May 1, 2019 3:21 PM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>;
(b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C)
(b)(6); @ice.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>;
(b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: RE: A-B- Question...

Thanks, (b)(6); (b)(7)(C)

(b)(5); (b)(6); (b)(7)(C)

Rhonda Dent
ICE/OPLA/E&L/ILPD
(b)(6); (b)(7)(C) (office)
(b)(6); (b)(7)(C) (mobile)

~~*** Warning *** Attorney/Client Privilege *** Attorney Work Product ***~~

From (b)(6); (b)(7)(C)
Sent: Thursday, April 25, 2019 1:56 PM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(6); @ice.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: RE: A-B- Question...

[Copying in (b)(6); (b)(7)(C) as well as an FYI. (b)(6); (b)(7)(C) are on the DHS PSG/"gender alone' working group with me.]

(b)(5); (b)(6); (b)(7)(C)

(b)(5)

I hope this helps. Thx, (b)(6); (b)(7)(C)

(b)(5)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (b)(6); (b)(7)(C)
E-mail: (b)(6); @ice.dhs.gov

From: (b)(6); (b)(7)(C)
Sent: Thursday, April 25, 2019 1:16 PM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(6); @ice.dhs.gov>
Subject: FW: A-B- Question...
Importance: Low

Protection law folks,

(b)(5)

Thanks,
(b)(6);

Rhonda Dent
ICE/OPLA/E&L/ILPD
(b)(6); (b)(7)(C) (office)
(b)(6); (b)(7)(C) (mobile)

*** Warning *** Attorney/Client Privilege *** Attorney Work Product ***

From: (b)(6); (b)(7)(C)
Sent: Thursday, April 25, 2019 10:54 AM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: A-B- Question...

(b)(6);

(b)(5); (b)(6); (b)(7)(C)

Thanks!

(b)(6); (b)(7)(C)
Deputy Chief Counsel
Baltimore Office of the Chief Counsel
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
(b)(6); (office) | (b)(6); (mobile)
(b)(6); @ice.dhs.gov

From: (b)(6); (b)(7)(C)
Sent: 15 Jul 2019 14:06:54 +0000
To: ILPD-APPEALS; (b)(6); (b)(7)(C)
Cc: ^Los Angeles OPLA Management; (b)(6); (b)(7)(C)
Subject: RE: Appeal Request LOS(ND) - (b)(6); (b)(7)(C) PSG (Women in Guatemala) NOA due 8/1/19

(b)(5); (b)(6); (b)(7)(C)

(b)(5)

I hope this helps. Thx, (b)(6);

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security
Telephone: (b)(6);
E-mail: (b)(6); @ice.dhs.gov

From: ILPD-APPEALS
Sent: Sunday, July 14, 2019 7:09 PM
To: ILPD-APPEALS (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C)
Cc: ^Los Angeles OPLA Management (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: RE: Appeal Request LOS(ND) - (b)(6); (b)(7)(C) - PSG (Women in Guatemala) NOA due 8/1/19

really adding (b)(6); this time

(b)(6); (b)(7)(C)

From: ILPD-APPEALS
Sent: Sunday, July 14, 2019 7:07 PM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>; ILPD-APPEALS <(b)(6); (b)(6); @ice.dhs.gov>
Cc: ^Los Angeles OPLA Management <(b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: RE: Appeal Request LOS(ND) - (b)(6); (b)(7)(C) - PSG (Women in Guatemala) NOA due 8/1/19

(b)(6);

(b)(5)

(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Friday, July 12, 2019 7:21 PM
To: ILPD-APPEALS (b)(6); (b)(7)(C) @ice.dhs.gov>
Cc: ^Los Angeles OPLA Management <(b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: Appeal Request LOS(ND) - (b)(6); (b)(7)(C) - PSG (Women in Guatemala) NOA due 8/1/19

Dear ILPD,

(b)(5); (b)(6); (b)(7)(C)

(b)(5); (b)(6); (b)(7)(C)

(b)(5); (b)(6); (b)(7)(C)

ACC (b)(6); (b)(7)(C) is handling the appeal.

Thanks,

(b)(6); (b)(7)(C)
Deputy Chief Counsel
Department of Homeland Security
U.S. Immigration and Customs Enforcement
Office of the Principal Legal Advisor-Los Angeles
606 S. Olive Street, (b)(6):

Los Angeles, CA 90014
(b)(6); (telephone)
(b)(6); (cellular)

From: (b)(6); (b)(7)(C)
Sent: 13 Aug 2019 17:43:14 +0000
To: (b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
Subject: RE: Fed Lit Question re PSG/Family Issue

Thanks much (b)(6); this is exceedingly helpful! (b)(6);

(b)(6);
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (b)(6);
E-mail: (b)(6); @ice.dhs.gov

From: (b)(6); (b)(7)(C)
Sent: Tuesday, August 13, 2019 11:27 AM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: RE: Fed Lit Question re PSG/Family Issue

(b)(6);

(b)(5)

(b)(5)

(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Tuesday, August 13, 2019 10:15 AM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: Fed Lit Question re PSG/Family Issue

(b)(5); (b)(6); (b)(7)(C)

(b)(5)

(b)(5)

(b)(5)

I hope my question makes sense. (b)(5)

(b)(5) Thx! (b)(6);

(b)(5)

(b)(5)

(b)(5)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (b)(6);
E-mail: (b)(6); @ice.dhs.gov

From: (b)(6); (b)(7)(C)
Sent: 1 May 2019 18:34:49 +0000
To: (b)(6); (b)(7)(C)
Cc:
Subject: RE: Remand Inquiry: Garcia-Recendiz v. Barr, 9th Cir. Case No. 19-70620 (b)(6);

(b)(6);

(b)(6);

(b)(5); (b)(6); (b)(7)(C)

(b)(5); (b)(6); (b)(7)(C)

(b)(5); (b)(6); (b)(7)(C)

(b)(5)

(b)(5)

Thanks.

(b)(6);

(b)(6); (b)(7)(C)

Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law and Practice Division
U.S. Immigration and Customs Enforcement
Tel: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Wednesday, May 1, 2019 1:34 PM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: FW: Remand Inquiry: Garcia-Recendiz v. Barr, 9th Cir. Case No. 19-70620, (b)(6); (b)(7)(C)

(b)(5)

(b)(5)

(b)(6);

From: (b)(6); **On Behalf Of** ILPD-W
Sent: Monday, April 29, 2019 5:09 PM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @ice.dhs.gov>; OCC, Seattle <(b)(6); @ice.dhs.gov>; (b)(6); (b)(6); @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; ILPD-APLS <(b)(6); @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov) <(b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: RE: Remand Inquiry: Garcia-Recendiz v. Barr, 9th Cir. Case No. 19-70620, (b)(6); (b)(7)(C)

(b)(5); (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Monday, April 29, 2019 4:23 PM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>; OCC, Seattle <(b)(6); @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; ILPD-W (b)(6); @ice.dhs.gov>
Subject: RE: Remand Inquiry: Garcia-Recendiz v. Barr, 9th Cir. Case No. 19-70620, (b)(6); (b)(7)(C)

Adding in ILPD. Waiting to hear from them, (b)(5)
(b)(5)

(b)(6); (b)(7)(C)
Chief Counsel
Seattle Office of Chief Counsel
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
(b)(6); (b)(7)(C) Desk)
Mobile)

From: (b)(6); (b)(7)(C)
Sent: Monday, April 29, 2019 1:08 PM
To: OCC, Seattle <(b)(6); @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(6); @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: RE: Remand Inquiry: Garcia-Recendiz v. Barr, 9th Cir. Case No. 19-70620, (b)(6); (b)(7)(C)

(b)(5); (b)(6); (b)(7)(C)

(b)(6);

From: OCC, Seattle
Sent: Monday, April 29, 2019 8:12 AM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: FW: Remand Inquiry: Garcia-Recendiz v. Barr, 9th Cir. Case No. 19-70620, (b)(6); (b)(7)(C)

All:

(b)(5)

(b)(5)

Thanks,

(b)(6); (b)(7)(C)

(b)(6);
Senior Attorney
Seattle Office of the Chief Counsel / OPLA
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
Tel (b)(6); / Fax: (206) 682-0402

From: (b)(6); (b)(7)(C) @usdoj.gov>
Sent: Saturday, April 27, 2019 3:56 PM
To: OCC, Seattle (b)(6); @ice.dhs.gov>
Cc: ILPD-APLS (b)(6); @ice.dhs.gov>
Subject: Remand Inquiry: Garcia-Recendiz v. Barr, 9th Cir. Case No. 19-70620, (b)(6); (b)(7)(C)

Good afternoon,

(b)(5)

(b)(6); (b)(7)(C)

(b)(5); (b)(6); (b)(7)(C)

(b)(5)

(b)(5) Please let me know if there's any additional information I can provide, and I'd be happy to chat about the case by phone as well.

Thank you,

(b)(6); (b)(7)(C)
Trial Attorney, Hiring and Intern Coordinator
United States Department of Justice, Civil Division
Office of Immigration Litigation – Appellate Section
P.O. Box 878 | Ben Franklin Station | Washington, D.C. 20044
Tel: (b)(6); | (b)(6); @usdoj.gov

From: (b)(6); (b)(7)(C)
Sent: 28 Apr 2020 22:15:17 +0000
To: (b)(6); (b)(7)(C)
Cc:
Subject: Summary + Practice Pointers - De Pena-Paniagua v. Barr

Gender as PSG Working Group, (b)(5)

(b)(5)

Thanks!

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Immigration Law and Practice Division (ILPD)
U.S. Immigration and Customs Enforcement
1201 Maryland Ave., SW
(b)(6);
Washington, DC 20536
Office: (b)(6); (b)(7)(C)
Cell: (b)(6); (b)(7)(C)

6/11/20 OPLA Everywhere – ILPD (b)(6); PSG Q&A Transcript
(Responses to the Pre-submitted PSG Questions from the OPLA field offices)

(b)(5)

(b)(5)

(b)(5)

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(b)(5)

(b)(5)

(b)(5)

(b)(5)

Thanks again for all the great questions and helping your colleagues – including myself – to continue to learn!

And, last but not least, the ubiquitous . . .

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ICE

ICE

Protection Law: Technicalities Techniques Tips

(b)(6); (b)(7)(C)

Associate Legal Advisor
OPLA ILPD

August 2020

U.S. Immigration and Customs Enforcement

ICE

Prologue

- "[I]mmigration enforcement obligations do not consist only of initiating and conducting prompt proceedings that lead to removals at any cost. Rather, as has been said, the government wins when justice is done." *Matter of S-M-J-*, 21 I&N Dec. 722, 727 (BIA 1997).

- **FACTS —► LAW = (hopefully) JUSTICE**

U.S. Immigration and Customs Enforcement

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U.S. Immigration and Customs Enforcement

Session Road Map

Where We're Going & Why

ICE

Session Topics

- ***Part I***:
  - Quick Overview: 207 Refugee Status, Asylum, Statutory Withholding, and CAT
  - Bars
  - Credibility v. Corroboration
  - Concept of "Persecution"
  - Nexus

- ***Part II***:
  - Convention Against Torture Issues
  - Particular Social Group Claims
  - Difficult Claim and the Collective Wisdom

U.S. Immigration and Customs Enforcement

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Visual Aids

UNHCR
The UN Refugee Agency

= INA § 207 Refugee,
INA § 208 Asylum, and/or
INA § 241(b)(3)
Withholding of Removal

= CAT Withholding and
Deferral of Removal
(8 C.F.R. §§ 1208.16(c) -
.18)

= 9th Cir. minefield

U.S. Immigration
and Customs
Enforcement

ICE

Four Main Forms of Protection

UNHCR
The UN Refugee Agency

- INA § 207 Overseas Refugee Admission;
- INA § 208 Asylum;
- INA § 241(b)(3) “Statutory” Withholding of Removal; and
- 8 C.F.R. §§ 1208.16(c)-.18 Convention Against Torture (“CAT”) Withholding and Deferral of Removal.

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U.S. Immigration and Customs Enforcement

UNHCR
The UN Refugee Agency

INA § 207 Overseas Refugee Admission

ICE

"Refugee" – INA § 101(a)(42)(A)

UNHCR
The UN Refugee Agency

"[A]ny person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."

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U.S. Immigration and Customs Enforcement

UNHCR
The UN Refugee Agency

INA § 208 Asylum

ICE

U.S. Immigration and Customs Enforcement

UNHCR
The UN Refugee Agency

INA § 241(b)(3) "Statutory" Withholding of Removal

ICE

8 C.F.R. §§ 1208.16(c)-.18 CAT Withholding and Deferral of Removal

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U.S. Immigration and Customs Enforcement

UNHCR
The UN Refugee Agency

BARS, BARS, BARS . . .

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UNHCR
The UN Refugee Agency

Two Types of Bars

- Bars to Applying for Protection 
- Bars to Receiving Grant of Protection 

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UNHCR
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Bars to Asylum

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Bars to *Applying* for Asylum

- Can be removed to a safe third country via a bilateral or multilateral agreement between the United States and other countries (aka "safe third country" or "asylum cooperative" agreements). INA § 208(a)(2)(A); 8 C.F.R. §§ 1208.4(a)(6), 1240.11(g) and (h).

- Failed to file an application within one year of last arrival in the United States. INA § 208(a)(2)(B); 8 C.F.R. § 1208.4(a)(2). [*Mendez-Rojas* class action].

- Had a previous asylum application denied. INA § 208(a)(2)(C); 8 C.F.R. § 1208.4(a)(3).

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Bars to *Receiving* Grant of Asylum

- Involved in the persecution of others on account of protected ground. INA § 208(b)(2)(A)(i); 8 C.F.R. § 1208.13(c)(1).
- Convicted of a "particularly serious crime." INA § 208(b)(2)(A)(ii); 8 C.F.R. § 1208.13(c)(1).
- Serious reasons for believing committed a "serious nonpolitical crime" outside the U.S. prior to arrival. INA § 208(b)(2)(A)(iii); 8 C.F.R. § 1208.13(c)(1).

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Bars to Receiving Grant of Asylum

- Reasonable grounds for regarding the alien as a danger to the security of the United States. INA § 208(b)(2)(A)(iv); 8 C.F.R. § 1208.13(c)(1).

- Involved in terrorist activity or with a terrorist organization. INA § 208(b)(2)(A)(v); 8 C.F.R. § 1208.13(c)(1).

- Firm resettlement in another country before arriving in the United States. INA § 208(b)(2)(A)(vi); 8 C.F.R. §§ 1208.13(c)(1) and .15.

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Recently Promulgated Bars to Receiving Grant of Asylum

- Subject to/violates proclamation/order issued under POTUS's INA §§ 212(f) or 215(a)(1) authorities on/after Nov. 9, 2018, suspending/limiting the entry of aliens along the southern border with Mexico. 8 C.F.R. § 1208.13(c)(3). [Enjoined (as of press time)]

- Enters, attempts to enter, arrives in United States across the southern land border on/after July 16, 2019, after transiting through a 3rd country, unless alien applied for protection in at least one transit country and received a final judgement. 8 C.F.R. § 1208.13(c)(4). [Vacated (as of press time)]

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More Asylum Bars!

(b)(5)

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UNHCR
The UN Refugee Agency

(b)(5)

U.S. Immigration and Customs Enforcement

ICE

UNHCR
The UN Refugee Agency

(b)(5)

U.S. Immigration and Customs Enforcement

ICE

UNHCR
The UN Refugee Agency

(b)(5)

U.S. Immigration and Customs Enforcement

ICE

UNHCR
The UN Refugee Agency

(b)(5)

U.S. Immigration and Customs Enforcement

ICE

UNHCR
The UN Refugee Agency

Even More Asylum (and Withholding) Bars!!

(b)(5)

U.S. Immigration and Customs Enforcement

ICE

U.S. Immigration and Customs Enforcement

UNHCR
The UN Refugee Agency

Bars to Statutory Withholding and CAT Protection

ICE

U.S. Immigration and Customs Enforcement

UNHCR
The UN Refugee Agency

Bars to *Applying* for Statutory Withholding and CAT Protection

- Aliens ineligible to apply for asylum under INA § 208(a)(2)(A) safe third country bar are ineligible to apply for statutory withholding and CAT protection as well. 8 C.F.R. § 1240.11(g)(4) and (h)(2).

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The UN Refugee Agency

Bars to *Receiving Grant* of Statutory Withholding and CAT Withholding

- Involved in the persecution of others on account of protected ground. INA § 241(b)(3)(B)(i) (statutory withholding); 8 C.F.R. § 1208.16(d)(2) (statutory withholding and CAT withholding).
- Convicted of a "particularly serious crime." INA § 241(b)(3)(B)(ii) (statutory withholding); 8 C.F.R. § 1208.16(d)(2) (statutory withholding and CAT withholding).
- Serious reasons for believing committed a "serious nonpolitical crime" outside the United States prior to arrival. INA § 241(b)(3)(B)(iii) (statutory withholding); 8 C.F.R. § 1208.16(d)(2) (statutory withholding and CAT withholding).

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U.S. Immigration and Customs Enforcement

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Bars to Receiving Grant of Statutory Withholding and CAT Withholding

- Reasonable grounds for regarding the alien as a danger to the security of the United States. INA § 241(b)(3)(B)(iv) (statutory withholding); 8 C.F.R. §§ 1208.16(d)(2) (statutory withholding and CAT withholding).

- NOTE: **No bars to receiving a grant of CAT deferral**. 8 C.F.R. §§ 1208.16(c)(4), 1208.17(a) (an alien otherwise entitled to CAT withholding but subject to a mandatory bar "shall" be granted deferral of removal).

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Bars & Burdens

- Burden of proof on alien to establish eligibility for asylum, statutory withholding, and CAT protection. *See, e.g.,* INA §§ 208(b)(1)(B)(i) (asylum), 240(c)(4)(A) (relief and protection in general).

- If record "evidence indicates" that a ground for mandatory denial applies, the alien then has the burden of proving by a preponderance of the evidence that such ground does not apply. *See* 8 C.F.R. §§ 1240.8(d) ("relief" including asylum), 1208.16(d)(2) (statutory withholding and CAT withholding).

ICE

"Credibility" *versus* "Corroboration"

"It's a bedtime story. It doesn't need corroboration."

Michael Massin, *The New Yorker*

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INA § 208(b)(1)(B)(ii)

"The testimony of the applicant **may** be sufficient to sustain the applicant's burden without corroboration, **but only if** the applicant satisfies the trier of fact that the applicant's testimony is **credible**, is **persuasive**, and **refers to specific facts** sufficient to demonstrate that the applicant is a refugee . . . . Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence."

ICE

INA § 208(b)(1)(B)(iii)

"Considering the totality of the circumstances . . . a trier of fact may base a credibility determination on the **demeanor**, **candor**, or **responsiveness of the applicant or witness**, the **inherent plausibility** of the applicant's or witness's account, the **consistency between the applicant's or witness's written and oral statements** . . ., the **internal consistency** of each such statement, the **consistency of such statements with other evidence of record** . . ., and any **inaccuracies or falsehoods** in such statements, **without regard to whether [such] goes to the heart of the applicant's claim** . . ."

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"Persecution" ????

Where do I find the definition?!

ICE

"Persecution"

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The UN Refugee Agency

Matter of A-B-, 27 I&N Dec. 316, 337-38 (A.G. 2018), surveying BIA precedent and noting that "persecution" has 3 specific elements:

1. an intent to target a belief or characteristic;
2. the level of harm must be "severe;" and
3. the harm or suffering 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*."

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Persecution and Children

ICE

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Nexus? Don't Forget It (or Any of the Other Requirements)!

ICE

Convention Against Torture

And where is that darn CAT provision in the INA?!

U.S. Immigration and Customs Enforcement

ICE

Convention Against Torture

- The CAT is a non-self-executing treaty. *See*, *e.g.*, *Pierre v. Gonzales*, 502 F.3d 109, 119-20 (2d Cir. 2007).
- *Foreign Affairs Reform and Restructuring Act of 1998* (FARRA), Pub. L. No. 105–277, div. G, Title XXII, § 2242(b), 112 Stat. 2681 (codified at 8 U.S.C. § 1231 note): Congress directed agencies to "prescribe regulations to implement the obligations of the United States under Article 3 of the [CAT] subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention."
- 8 C.F.R. §§ 1208.16(c) - .18.

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Convention Against Torture

What is torture? ***In part***, pursuant to 8 C.F.R. § 1208.18(a)(1):

- Any act by which **severe pain or suffering**, whether physical or mental, is **intentionally inflicted** on a person for such purposes as obtaining from him information or a confession, punishing him for an act that he has committed or is suspected of having committed, or for any reason based on discrimination of any kind, when such pain or suffering is **inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity**.

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Convention Against Torture

- Evidence as to the risk of future torture, includes, but is not limited to:
  - Evidence of past torture inflicted upon the applicant;
  - Evidence that the applicant could relocate to a part of the country of removal where he is not likely to be tortured;
  - Evidence of gross, flagrant, or mass violations of human rights within the country of removal; and
  - Other relevant information regarding conditions in the country of removal.

8 C.F.R. § 1208.16(c)(3).

U.S. Immigration and Customs Enforcement

ICE

CAT Claims: What's wrong with this sentence?

"The respondent's application under Article 3 of the Convention Against Torture should be denied because he failed to establish that: the gang tortured him in the past; the government is otherwise unable or unwilling to control the gang; the government would acquiesce to the torture; and he could not reasonably relocate to avoid the torture."

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CAT Claims: What's wrong with this sentence?

- "The respondent's application under Article 3 of the Convention Against Torture"

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CAT Claims: What's wrong with this sentence?

- "the gang tortured him"

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CAT Claims: What's wrong with this sentence?

- "should be denied because he failed to establish that [he was] tortured . . . in the past"

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CAT Claims: What's wrong with this sentence?

- "the government is otherwise unable or unwilling to control the gang"

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CAT Claims: What's wrong with this sentence?

- "the government would acquiesce to the torture"

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CAT Claims: What's wrong with this sentence?

- "he could not reasonably relocate to avoid the torture"

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CAT Claims: What's wrong with this sentence?

- "The respondent . . . failed to establish that . . . he could not . . . relocate to avoid the torture."

U.S. Immigration and Customs Enforcement

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Particular Social Group

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Particular Social Group

Three core requirements for a cognizable PSG:

- members share a common immutable characteristic;
- is defined with particularity; and
- and is socially distinct within the society in question.

Two corollary rules:

- PSG analysis is case and society-specific; and
- PSG must "exist independently" of the harm on which the asylum/statutory withholding application is based.

Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018); *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).

U.S. Immigration and Customs Enforcement

ICE

UNHCR
The UN Refugee Agency

Particular Social Group

- **Flash Test!** Are these PSGs cognizable????

1. Mothers of children who disappeared?
2. People who wear eye glasses?
3. Girls who have been kidnapped and sexually abused by militant group “X”?
4. People who own land?

U.S. Immigration and Customs Enforcement

ICE

U.S. Immigration and Customs Enforcement

UNHCR
The UN Refugee Agency

Difficult Protection Claim

versus

ICE

U.S. Immigration and Customs Enforcement

UNHCR
The UN Refugee Agency

Difficult Protection Claim

Extent of AG's holding in *Matter of A-B-*? Are domestic violence or other private criminality-based claims per se non-viable? If not, is there now at least a presumption against them?

ICE

U.S. Immigration and Customs Enforcement

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The UN Refugee Agency

Difficult Protection Claim

"Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum [though] I do not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application . . . ." *A-B-*, 27 I&N Dec. at 320.

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Difficult Protection Claim

"Married Sylvanian women who are *unable to leave their relationships*"?

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Difficult Protection Claim

"Sylvanian women"?

ICE

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Difficult Protection Claim

State Protection / Unable or Unwilling to Control?

ICE

U.S. Immigration and Customs Enforcement

UNHCR
The UN Refugee Agency

Difficult Protection Claim

Reasonable internal relocation?

ICE

Questions

U.S. Immigration and Customs Enforcement

U.S. Immigration
and Customs
Enforcement

ICE

[OPLA 101 Protection Law Training – Talking Points on PSG/Gender (AUG 2020)]

(b)(5)

(b)(5)

From: (b)(6); (b)(7)(C)
Sent: 30 Oct 2018 17:43:05 +0000
To: OPLA-MIA-ATTORNEYS-ALL
Cc: OPLA-MIA-MANAGEMENT
Subject: IJ LRJ's PSG finding and WH grant reversed by the BIA
Attachments: BIA decision 208677231.pdf

All,

The BIA reversed IJ LRJ's withholding grant pursuant to *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). On appeal, the BIA held that "in light of *Matter of A-B-*, the applicant's proposed group 'Salvadoran women who are viewed as property by men and who cannot leave their relationship because their partners are former militants' is not cognizable under the Act." While not a published decision, it is certainly persuasive.

Congratulations, (b)(6); (b)(7)(C) on a well-argued case and brief on appeal. If you are in need of a brief on this issue, please note we have an ILPD approved brief addressing this argument.

Regards,

(b)(6); (b)(7)(C)
Deputy Chief Counsel, OPLA-Miami
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
333 South Miami Avenue, (b)(6); (b)(7)(C)
Miami, FL 33130
Office: (305) 40(b)(6); (b)(7)(C)
Cell: (305) 788-
(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, (b)(6); (b)(7)(C)
Falls Church, Virginia 22041

(b)(6); (b)(7)(C)

Atlanta, GA 30326

DHS/ICE Office of Chief Counsel - SNA
1015 Jackson-Keller Rd, (b)(6); (b)(7)(C)
San Antonio, TX 78213

Name: (b)(6); (b)(7)(C)

Date of this notice: 10/22/2018

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

(b)(6); (b)(7)(C)

Chief Clerk

Enclosure

Panel Members:
(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Userteam: Docket

OCT 2 5 REC'D

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike (b)(6); (b)(7)(C)
Falls Church, Virginia 22041

(b)(6); (b)(7)(C)

ATLANTA, GA 30329

DHS/ICE Office of Chief Counsel - SNA
1015 Jackson-Keller Rd, (b)(6); (b)(7)(C)
San Antonio, TX 78213

Name: (b)(6); (b)(7)(C)

Date of this notice: 10/22/2018

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

(b)(6); (b)(7)(C)

Chief Clerk

Enclosure

Panel Members:
(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Userteam: Docket

File: (b)(6); (b)(7)(C) – Taylor, TX Date: OCT 2 2 2018

In re: (b)(6); (b)(7)(C)

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: (b)(6); (b)(7)(C)

ON BEHALF OF DHS: (b)(6); (b)(7)(C)
Assistant Chief Counsel

APPLICATION: Withholding of removal; Convention Against Torture

The Department of Homeland Security ("DHS") appeals an Immigration Judge's July 26, 2017, decision to grant withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3).[1] The applicant is a native and citizen of El Salvador. The appeal will be sustained. The record will be remanded.

We review an Immigration Judge's findings of fact, including findings regarding witness credibility and what is likely to happen to the applicant, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of law, discretion, and judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge determined that the applicant demonstrated that she was persecuted, and has a clear probability of persecution, on account of her membership in a particular social group described as "Salvadorian women who are viewed as property by men and who cannot leave their relationship because their partners are former militants" (IJ at 8-9, 10). *See* section 241(b)(3) of the Act; 8 C.F.R. § 1208.16. During the pendency of the appeal, and after the DHS submitted its appellate brief, the Attorney General overruled our decision in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014) (holding that "married women in Guatemala who are unable to leave their relationship" can constitute a cognizable particular social group for asylum and withholding of removal purposes), on which the Immigration Judge based the grant of withholding of removal (IJ at 8; DHS Statement of New Authority filed June 21, 2018). In *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), the Attorney General stated that in general a claim by an alien pertaining to domestic violence perpetrated by a non-governmental actor will not qualify for asylum. *Id.* at 320. The Attorney General stated, "Social groups defined by their vulnerability to private criminal

[1] The applicant was placed in withholding of removal-only proceedings after the DHS reinstated an April 26, 2016, removal order and an asylum officer determined that the applicant had a reasonable fear of persecution or torture.

activity likely lack the particularity required under *M-E-V-G-*, given that broad swaths of society may be susceptible to victimization." *Id.* at 335.

In light of *Matter of A-B-*, the applicant's proposed group "Salvadorian women who are viewed as property by men and who cannot leave their relationship because their partners are former militants" is not cognizable under the Act. Therefore, we will reverse the Immigration Judge's decision to grant withholding of removal under section 241(b)(3) of the Act.[2]

We conclude, however, that a remand is warranted for the Immigration Judge to consider the applicant's request for protection pursuant to the United States' obligations under the Convention Against Torture. The Immigration Judge did not address the applicant's torture claim because she had granted withholding of removal (IJ at 10-11). On remand the parties should be given an opportunity to update the record.

Accordingly, the following orders will be entered.

ORDER: The DHS's appeal is sustained.

FURTHER ORDER: The record is remanded for further proceedings consistent with this opinion and for the entry of a new decision.

(b)(6); (b)(7)(C)

FOR THE BOARD

[2] In light of intervening precedent relevant to the applicant's claim, the applicant may further develop the record with regard to her membership in a particular social group on remand.

From: (b)(6); (b)(7)(C)
Sent: 17 Jul 2019 11:58:15 +0000
To: OPLA HQ Personnel;OPLA Field Personnel
Subject: ILPD BIA and Federal Court Weekly Digest for the week of July 8, 2019

*****PRIVILEGED***ATTORNEY WORK PRODUCT***FOR OFFICIAL USE ONLY***NOT FOR DISSEMINATION OUTSIDE OPLA*****

Disseminated at the request of ILPD . . .

Greetings, OPLA!

It's been a crazy few days in the OPLA world, but we hope that you take the time this week reflect on technology, science, and progress, as we celebrate the 50-year anniversary of Apollo 11 launching and moon landing! Honoring the hard work and perseverance of the astronauts and rocket scientists in getting the United States to the moon fifty years ago certainly puts into perspective this writer's reluctance to walk 10,000 steps each day. Here's to drawing on the strength of these heroes to get us through our busy days and weeks!

Here is the ILPD BIA and Federal Court Weekly Digest for the week of July 8, 2019.

(b)(5)

(b)(5)

(b)(5)

(b)(5)

III. Published Attorney General and Board Decisions

- *Matter of Zhang*, 27 I&N Dec. 569 (BIA June 28, 2019) (A042 728 775 – OPLA Chicago (Kansas City)). As reported in the July 1 Digest, the BIA dismissed the respondent's challenge to removability, holding that under the plain language of INA § 237(a)(3)(D)(i), DHS need not prove intent to establish that an alien is deportable for making a false representation of U.S. citizenship, and confirming that while a Certificate of Naturalization is evidence of citizenship, it does not confer citizenship if acquired unlawfully. The respondent immigrated to the United States in 1991 and in 2002, purchased a Certificate of Naturalization from a corrupt USCIS official. USCIS cancelled the naturalization certificate after the fraud scheme was discovered and placed the respondent into removal proceedings. A full summary and practice pointers can now be found here.

IV. Federal Courts of Appeals Decisions

First Circuit

- *Rodriguez-Villar v. Barr*, No. 18-1861, 2019 WL 3024620 (1st Cir. July 11, 2019) (A205 729 849 – OPLA Boston), in which the First Circuit held that the BIA's reasoning was inadequate to support its finding of no past persecution where the agency failed to properly assess salient facts, such as the grave nature of the threats and the length of time the petitioner "was under the compulsion of his persecutors." The court also held that the BIA improperly found that the period of time during which there were no threats negated any likelihood of future persecution when in fact it showed the opposite, as the threats only ceased because the petitioner complied with his persecutors' demand that he abandon his political activity. A summary and link to the opinion can be found here.

- *Twum v. Barr*, No. 18-1992, 2019 WL 2949309 (1st Cir. July 9, 2019) (OPLA Boston – A096 707 685), in which the First Circuit concluded that it did not have jurisdiction to review the BIA's denial of Twum's motion to reopen to consider her application for special rule cancellation under INA § 240A(b)(2). The court further determined that the BIA abused its discretion in denying the MTR for consideration of asylum by

unduly relying on the remoteness of past abuse. A summary and link to the opinion can be found here.

Second Circuit,

- *Gurung v. Barr*, No. 16-3883-ag, 2019 WL 2909158 (2d Cir. July 8, 2019) (A206 070 796 – OPLA New York), in which the Second Circuit found that statements that are not identical are not necessarily "inconsistent" for purposes of an adverse credibility finding and concluded that two of the three inconsistencies on which the IJ relied were merely discrepancies in word choice. The court determined that it could not say whether the IJ would have reached the same conclusion absent the purported inconsistencies and remanded for the BIA to address what kinds of statements should be treated as "inconsistent" in making an adverse credibility finding. The opinion can be found here.

Third Circuit

- *Nkomo v. U.S. Att'y Gen.*, No. 18-3109, 2019 WL 3048577 (3d Cir. Jul. 12, 2019) (A091 540 338 – OPLA Newark (Elizabeth)), in which the Third Circuit (1) joined the BIA and other circuit courts in rejecting Nkomo's argument that the IJ and BIA lacked jurisdiction over her removal proceedings because her NTA was deficient under *Pereira*, and (2) upheld the BIA determination that her conviction for conspiracy to commit wire fraud is a particularly serious crime, explaining that the BIA does not need to separately evaluate whether she poses a danger to the community and that her non-custodial sentence does not preclude a PSC finding. The opinion can be found here.

- *Tilija v. U.S. Att'y Gen.*, No. 17-2765, 2019 WL 3048514 (3d Cir. Jul. 12, 2019) (A208 925 410 – OPLA Newark (Elizabeth)), in which the Third Circuit reversed the BIA's denial of Tilija's motion to reopen. The court held that the BIA had to accept the facts in the MTR as true and, accepting them as true, Tilija established a prima facie claim for asylum. The opinion can be found here.

Fourth Circuit

- No decisions to report.

Fifth Circuit

- *Cruz v. Barr*, No. 17-60510, 2019 WL 2943485 (5th Cir. July 9, 2019) (OPLA San Antonio—A208 887 522, A208 887 523), in which the Fifth Circuit upheld the BIA finding that this Salvadoran police officer did not establish either past persecution or a well-founded fear of persecution at the hands of the Barrio 18 gang, nor that Salvadoran authorities were likely to acquiesce in his torture. A summary and link to the opinion can be found here.

Sixth Circuit

- *Brumbach v. United States*, No. 18-5703, 2019 WL 3024727 (6th Cir. July 11, 2019), a sentencing case in which the Sixth Circuit held that Tennessee aggravated burglary qualifies as generic burglary, in accord with *United States v. Nance*, 481 F.3d 882 (6th Cir. 2007), which is once again controlling circuit law after the recent Supreme Court decision in *United States v. Stitt*, 139 S. Ct 399 (2019). The opinion can be found here.

- *Lorenzo v. Barr*, No. 18-3606, 2019 WL 2934434 (6th Cir. July 9, 2019) (A096 151 319 -- OPLA Detroit), in which the Sixth Circuit found the BIA had erred in denying reopening based on changed country conditions for this farmerworker organizer from Guatemala. A summary and link to the opinion can be found here.

- *United States v. Fuller-Ragland,* No. 18-1773, 2019 WL 2406374 (6th Cir. June 7, 2019), a previously-unpublished sentencing decision published on USG motion, the Sixth Circuit concluded that Michigan unarmed robbery, which requires, at a minimum "putting [the victim] in fear," involves a threatened use of force and hence is a USSG crime of violence. The opinion can be found here.

Seventh Circuit

- *Vyloha v. Barr*, Nos. 18-2290, 18-3298, 2019 WL 3001003 (7th Cir. July 10, 2019) (A099 025 839 – OPLA Chicago), in which the Seventh Circuit upheld the agency's denial of the petitioner's motion to reopen to rescind an *in absentia* order and his subsequent motion to reconsider, where the petitioner failed to establish due diligence in filing his motion to reopen. A summary and link to the opinion can be found here.

Eighth Circuit

- *United States v. Boleyn*, No. 17-3817, 2019 WL 2909307 (8th Cir. July 8, 2019), involving five consolidated sentencing appeals raising a common issue: whether a prior conviction under Iowa Code 124.401 (which makes it unlawful to manufacture, deliver or possess with intent to manufacture or deliver, a controlled substance), qualifies as a predicate offense warranting sentencing enhancements under the Armed Career Criminal Act, the Controlled Substances Act, and the Sentencing Guidelines if the Iowa law of aiding and abetting is overly broad under the three federal enhancement provisions. Applying the categorical approach, the court held that the convictions do qualify as predicate offenses under the three provisions; the Iowa law of aiding and abetting is substantially equivalent to, not meaningfully broader than, the standard adopted by federal courts in applying 18 U.S.C. § 2 aiding and abetting liability. The opinion can be found here.

- *Godinez v. Barr*, No. 18-1060, 2019 WL 2909316 (8th Cir. July 8, 2019) (A208 600 971 – OPLA Chicago (Kansas City)), an Eighth Circuit decision involving four petitioners (a mother, her adult daughter, and the latter's two children) in which the court ruled that substantial evidence supported the agency's factual determination that the adult daughter did not belong to her asserted particular social group (PSG) of "women who are in abusive* relationships in Mexico that they can't leave." Specifically, the court observed that the agency did not find, as a factual matter, that the adult daughter was not a member of the asserted PSG simply due to her ability to reach the United States, but, rather, because she was able to leave each of her abusive partners in her home country for significant periods of time without incident. The court further determined that substantial evidence supported the agency's factual determination that a threat against the mother of the adult daughter from one of the latter's abusive partners was due to her presence on the night of a violent encounter rather than her familial relationship with her daughter. The opinion can be found here. [*Note: there was no discussion in the Eighth Circuit's decision as to whether the adult daughter's PSG may have been impermissibly defined by the persecution suffered/feared, i.e., "abusive." *See, e.g., Matter of A-B-*, 27 I& N Dec. 316, 334–35 (A.G. 2018).]

Ninth Circuit

- *Menendez-Gonzalez v. Barr*, No. 15-73869, 2019 WL 3022376 (9th Cir. July 11, 2019) (A079 062 253 – OPLA Los Angeles), in which the Ninth Circuit found that the alien had failed to establish that the BIA had a settled practice of finding that vacatur of a criminal conviction was an exceptional circumstance warranting *sua sponte* reopening and that the BIA was not required to remand to the Immigration Judge for factfinding prior to making a discretionary decision to deny *sua sponte* reopening. A summary and link to the opinion can be found here.

- *United States v. Perez*, No. 17-10216, 2019 WL 3037044 (9th Cir. July 11, 2019), in which the Ninth Circuit found that a violation of California Penal Code § 243(d) is a crime of violence under U.S.S.G. § 4B1.2(a)(1), which the court noted is identical and analyzed the same as 18 U.S.C. § 16(a), and found that the defendant had not established a realistic probability that California Penal Code § 243(d), which criminalizes battery that inflicts serious bodily injury, would be applied to simple offensive touching that resulted in serious bodily injury, and therefore satisfied the generic definition of use, attempted use, or threatened use of physical force against the person of another. The opinion can be found here. If you have questions about applying the realistic probability holding about CPC § 243(d) to other areas of immigration law, do not hesitate to consult us via the ILPD-E or ILPD-W email boxes.

Tenth Circuit

- No decisions to report.

Eleventh Circuit

- *United States v. Moss*, 920 F.3d 752 (11th Cir. Apr. 4, 2019): see "Top Stories," above.

V. Noteworthy District Court Decisions

- No decisions to report.

As always, please do not hesitate to contact us via the ILPD-E or ILPD-W email boxes should you have any questions or concerns.

This message includes internal guidance provided for internal OPLA use only and is not intended for public disclosure. Please ensure that it is treated consistent with applicable guidance.

Have a great week!

ILPD
Immigration Law and Practice Division
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement

From: (b)(6); (b)(7)(C)
Sent: 10 Sep 2019 16:36:59 +0000
To: (b)(6); (b)(7)(C)
Subject: FW: Supplemental brief- (b)(6); (b)(7)(C) - "women in El Salvador" as PSG
Attachments: (b)(6); (b)(7)(C) supplmental.pdf

(b)(6); (b)(7)(C)

Can you take on this protection law related supplemental brief, please. It shouldn't be too heavy a lift. As you'll see from (b)(6); (b)(7)(C) review below (b)(5) (b)(5) It's currently September 26.

Thanks!

(b)(6); (b)(7)(C)
ICE/OPLA/E&L/ILPD
(202) 732 (b)(6); (b)(7)(C) office)
(202) 904 mobile)

*** Warning *** Attorney/Client Privilege *** Attorney Work Product ***

From: (b)(6); (b)(7)(C)
Sent: Tuesday, September 10, 2019 11:17 AM
To: (b)(6); (b)(7)(C)
Cc:
(b)(6); (b)(7)(C)
Subject: RE: Supplemental brief- (b)(6); (b)(7)(C) "women in El Salvador" as PSG

FYI – I also added the following bullet to the current draft AILR:

(b)(5)

From: (b)(6); (b)(7)(C)
Sent: Tuesday, September 10, 2019 10:03 AM
To: (b)(6); (b)(7)(C)

Cc: (b)(6); (b)(7)(C)

Subject: RE: Supplemental brief- (b)(6); (b)(7)(C) - "women in El Salvador" as PSG

(b)(6); (b)(7)(C); (b)(5)

(b)(5)

(b)(5)

I hope the above makes sense and is not too convoluted. Obviously, please double check my analysis as I may well be missing the boat at some point!

Finally, I agree that (b)(6); (b)(7)(C) would be a good POC, especially as she's been assisting on the PSG/gender working group.

Thx! (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security
Telephone: (202) 732-(b)(6); (b)(7)(C)
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Monday, September 9, 2019 7:02 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
Subject: RE: Supplemental brief- (b)(6); (b)(7)(C) - "women in El Salvador" as PSG

(b)(6); (b)(7)(C)

(b)(5)

(b)(6);
(b)(7)(C)

(b)(6);
(b)(7)(C)

(b)(6); (b)(7)(C)
Acting Chief, Immigration Law and Practice Division
Office of the Principal Legal Advisor
DHS | U.S. Immigration and Customs Enforcement
1201 Maryland Ave., S.W. Washington, DC 20536-5111
202.732 (b)(6); (b)(7)(C) Mobile)
(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Monday, September 9, 2019 6:25 PM
To: (b)(6); (b)(7)(C)
Cc:
Subject: RE: Supplemental brief (b)(6); (b)(7)(C) "women in El Salvador" as PSG

(b)(6); (b)(7)(C)

(b)(5); (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
ICE/OPLA/E&L/ILPD
(202) 732 (b)(6); (b)(7)(C) office)
(202) 904 mobile)

*** Warning *** Attorney/Client Privilege *** Attorney Work Product ***

From (b)(6); (b)(7)(C)
Sent: Friday, September 6, 2019 6:39 PM
To: (b)(6); (b)(7)(C)
Cc:
(b)(6); (b)(7)(C)
Subject: RE: Supplemental brief (b)(6); (b)(7)(C) - "women in El Salvador" as PSG
Importance: High

(b)(5); (b)(6); (b)(7)(C)

(b)(5)

(b)(5)

Please let me know if there is anything else I can do on this case.

Thx! (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732 (b)(6); (b)(7)(C)
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Thursday, September 5, 2019 2:51 PM
To: (b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
Subject: RE: Supplemental brief (b)(6); (b)(7)(C) - "women in El Salvador" as PSG

(b)(6); (b)(7)(C) quick update.

(b)(5)

(b)(5)

Thx (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732 (b)(6); (b)(7)(C)
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Tuesday, August 27, 2019 5:35 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Supplemental brief- (b)(6); (b)(7)(C) - "women in El Salvador" as PSG

(b)(6); (b)(7)(C)

(b)(5)

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Deputy Chief, Immigration Law and Practice Division
Office of the Principal Legal Advisor
DHS | U.S. Immigration and Customs Enforcement
1201 Maryland Ave., S.W. | Washington, DC 20536-5111
202.732 (b)(6); (b)(7)(C) (Mobile)
(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Tuesday, August 27, 2019 5:31 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

Subject: RE: Supplemental brief- Palacioas-Alarcon, Yoselin Vanesa (b)(6); (b)(7)(C) - "women in El Salvador" as PSG

(b)(5)

Thx (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Tuesday, August 27, 2019 11:31 AM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Supplemental brief- (b)(6); (b)(7)(C) - "women in El Salvador" as PSG

(b)(5)

(b)(5) (b)(6); (b)(7)(C)

Sent with BlackBerry Work
(www.blackberry.com)

From: (b)(6); (b)(7)(C)
Date: Tuesday, Aug 27, 2019, 9:41 AM
To: (b)(6); (b)(7)(C)
Cc:

Subject: Supplemental brief (b)(6); (b)(7)(C) - "women in El Salvador" as PSG

(b)(6); (b)(7)(C)

Attached is the supplemental that came in today. Cc-ing (b)(6); (b)(7)(C) to get it on his radar sooner rather than later, but let me know if it should go to anyone else. Thanks!

(b)(6); (b)(7)(C)

Deputy Chief (Acting)
Immigration Law and Practice Division
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
1201 Maryland Avenue, (b)(6); (b)(7)(C)
Washington, D.C. 20536-5111
(202) 732 (b)(6); (b)(7)(C) desk)
(202) 494) cell)

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Chief Clerk
5107 Leesburg Pike, (b)(6); (b)(7)(C)
Falls Church, Virginia 22041

August 27, 2019

(b)(6); (b)(7)(C)
Los Angeles, CA 90044

DHS/ICE Office of Chief Counsel - LOS
606 S. Olive Street, (b)(6); (b)(7)(C)
Los Angeles, CA 90014

Re: (b)(6); (b)(7)(C)

Dear Parties:

The Board requests supplemental briefing for the subject case. Both parties are granted until **September 26, 2019,** to submit their supplemental brief to the Board of Immigration Appeals. Please address the following:

Whether the respondent established, based on the record in this case, that "women in El Salvador" constitutes a particular social group for purposes of asylum and withholding of removal. The parties may also address any other issues relevant to resolving the appeal.

Please note: The supplemental brief is limited to 30 double-spaced pages. Two copies of this letter have been sent to you. Please attach one copy of this letter to the front of your brief when you mail or deliver it to the Board, and keep one for your records.

A fee is not required for the filing of this brief. Your brief or extension request must be RECEIVED at the Office of the Board of Immigration Appeals within the prescribed time limits. It is NOT sufficient simply to mail the brief and assume your brief will arrive on time. We strongly urge the use of an overnight courier service to ensure the timely filing of your brief. If you have any questions about how to file something at the Board, you should review the Board's Practice Manual at www.justice.gov/eoir.

Proof of service on the opposing party at the address above is required for ALL submissions to the Board of Immigration Appeals–including correspondence, forms, briefs, motions, and other documents. If you are the Respondent or Applicant, the "Opposing Party" is the Chief Counsel for the DHS at the address shown above. Your certificate of service must clearly identify the document sent to the opposing party, the opposing party's name and address, and the date it was sent to them. Any submission filed with the Board without a certificate of service on the opposing party will be rejected.

Filing Address:

To send by courier or overnight delivery service, or to deliver in person:
Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, (b)(6); (b)(7)(C)
Falls Church, VA 22041

Business hours: Monday through Friday, 8:00 a.m. to 4:30 p.m.

Sincerely,

(b)(6); (b)(7)(C)

Appeals Examiner
Information Management Team

cc: (b)(6); (b)(7)(C) Chief
Immigration Law and Practice Division
Office of the Principal Legal Advisor
ICE Headquarters
Potomac Center North
500 12th Street, S.W., (b)(6); (b)(7)(C)
Washington, DC 20536

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Chief Clerk
5107 Leesburg Pike, (b)(6); (b)(7)(C)
Falls Church, Virginia 22041

May 19, 2020

(b)(6); (b)(7)(C)

Grand Island, NE 68801

DHS/ICE Office of Chief Counsel - DAL
125 E. John Carpenter Fwy.
(b)(6); (b)(7)(C)
Irving, TX 75062-2324

Re: (b)(6); (b)(7)(C)

Dear Parties:

The Board of Immigration Appeals requests supplemental briefing for the subject case. Both parties are granted until **June 18, 2020**, to submit their supplemental brief to the Board. Please note that the supplemental brief should be limited to 30 double-spaced pages and include proof of service on opposing counsel. Please see Chapter 4.6 and 4.7 of the Board's Practice Manual. In addition, two copies of this letter have been sent to both parties. Please attach one copy of this letter to the front of your brief when you mail or deliver it to the Board, and keep one for your records.

Matter of (b)(6); (b)(7)(C)

The Board requests supplemental briefing from the parties on the following:

1) Whether the proposed group of "Women in El Salvador" is a cognizable particular social group under the Immigration and Nationality Act;

2) Whether there is any evidence that the United States Congress or the drafters of the 1951 Refugee Convention or the 1967 Protocol Relating to the Status of Refugees intended gender, in and of itself, to be a protected ground, particularly a particular social group, for purposes of asylum.

The parties may address any additional issues they deem appropriate.

Please note: The supplemental brief is limited to 30 double-spaced pages. Two copies of this letter have been sent to you. Please attach one copy of this letter to the front of your brief when you mail or deliver it to the Board, and keep one for your records.

A fee is not required for the filing of this brief. Please note: requests for extensions are highly disfavored. It is NOT sufficient simply to mail the brief and assume your brief will arrive on time. We strongly urge the use of an overnight courier service to ensure the timely filing of your brief. If you have any questions about how to file something at the Board, you should review the Board's Practice Manual at www.justice.gov/eoir.

Proof of service on the opposing party at the address above is required for ALL submissions to the Board of Immigration Appeals–including correspondence, forms, briefs, motions, and other documents. If you are the Respondent or Applicant, the "Opposing Party" is the Chief Counsel for the DHS at the address shown above. Your certificate of service must clearly identify the document sent to the opposing party, the opposing party's name and address, and the date it was sent to them. Any submission filed with the Board without a certificate of service on the opposing party will be rejected.

Filing Address:

To send by courier or overnight delivery service, or to deliver in person:
Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, (b)(6); (b)(7)(C)
Falls Church, VA 22041

Business hours: Monday through Friday, 8:00 a.m. to 4:30 p.m.

Sincerely,

(b)(6); (b)(7)(C)

Supervisory Case Management Specialist
Information Management Team

cc: (b)(6); (b)(7)(C) Chief
Immigration Law and Practice Division
Office of the Principal Legal Advisor
ICE Headquarters
Potomac Center North
500 12th Street, S.W., (b)(6); (b)(7)(C)
Washington, DC 20536

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

OMB#1125-0005
Notice of Entry of Appearance as Attorney or Representative Before the Board of Immigration Appeals

(Type or Print)
NAME AND ADDRESS OF REPRESENTED PARTY

(b)(6); (b)(7)(C) (First) (Middle Initial) (b)(6); (b)(7)(C) (Last)

(b)(6); (b)(7)(C) (Number and Street) (Apt. No.)

(b)(6); (b)(7)(C) (City) (State) (Zip Code)

ALIEN ("A") NUMBER
(Provide A- number of the party represented or the visa beneficiary in this case.)
(b)(6); (b)(7)(C)

USCIS Visa Appeal (Provide beneficiary name)

Fine (Provide fine number)

Disciplinary case (Provide docket number)

Attorney or Representative (please check one of the following):

☑ I am an attorney eligible to practice law in, and a member in good standing of, the bar of the highest court(s) of the following states(s), possession(s), territory(ies), commonwealth(s), or the District of Columbia (use additional space on reverse side if necessary) and I am not subject to any order disbarring, suspending, enjoining, restraining or otherwise restricting me in the practice of law in any jurisdiction (if subject to such an order, do not check this box and explain on reverse).

(b)(6); (b)(7)(C)

Full Name of Court (b)(6); (b)(7)(C) **Bar Number (if applicable)**

☐ I am a representative accredited to appear before the Executive Office for Immigration Review as defined in 8 C.F.R. § 1292.1(a)(4) with the following recognized organization:

☐ I am a law student or law graduate of an accredited U.S. law school as defined in 8 C.F.R. § 1292.1(a)(2).

☐ I am a reputable individual as defined in 8 C.F.R. § 1292.1(a)(3).

☐ I am an accredited foreign government official, as defined in 8 C.F.R. § 1291.1(a)(5), from _____ (country).

☐ I am a person who was authorized to practice on December 23, 1952, under 8 C.F.R. § 1292.1(b).

Attorney or Representative (please check one of the following):

☑ I hereby enter my appearance as attorney or representative for, and at the request of, the party named above.

☐ EOIR has ordered the provision of a Qualified Representative for the party named above and I appear in that capacity.

I have read and understand the statements provided on the reverse side of this form that set forth the regulations and conditions governing appearances and representations before the Board of Immigration Appeals. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

SIGNATURE OF ATTORNEY OR REPRESENTATIVE **EOIR ID NUMBER** **DATE**

X (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) 11/7/18

NAME OF ATTORNEY OR REPRESENTATIVE, ADDRESS, FAX & PHONE NUMBERS, & EMAIL ADDRESS

Name: (b)(6); (b)(7)(C) (First) (b)(6); (b)(7)(C) (Middle Initial) (Last)

Address: (b)(6); (b)(7)(C) (Number and Street)

San Francisco (City) CA (State) 94102 (Zip Code)

Telephone: 41556(b)(6); (b)(7)(C) Facsimile: 41558(b)(6); (b)(7)(C) Email: (b)(6); (b)(7)(C)

☐ Check here if new address

Form EOIR - 27
Rev. July 2015

U.S. Department of Justice
Executive Office for Immigration Review
United States Immigration Court

In the Matter of

File: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

RESPONDENT

)
)
)
)

IN REMOVAL PROCEEDINGS

Transcript of Hearing

Before V. STUART COUCH, Immigration Judge

Date: August 18, 2017

Place: CHARLOTTE, NORTH CAROLINA

Transcribed by Free State Reporting, Inc.-3

Official Interpreter: (b)(6); (b)(7)(C)

Language: SPANISH

Appearances:

For the Respondent: (b)(6); (b)(7)(C)

For the DHS: (b)(6); (b)(7)(C)

JUDGE FOR THE RECORD

These are removal proceedings in the Charlotte Immigration Court. Today is August 18, 2017. Judge V. Stuart Couch presiding. We are on the record in A file (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) in the matter of (b)(6); (b)(7)(C) also known as (b)(6); (b)(7)(C) with an alternate spelling. The respondent is present in Court. She's represented at this hearing by her attorney, (b)(6); (b)(7)(C) who is appearing on behalf of attorney (b)(6); (b)(7)(C) who is on vacation. The Department of Homeland Security is represented by (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) We also have with us (b)(6); (b)(7)(C) our Spanish interpreter. She's previously been sworn.

JUDGE TO (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C) is Spanish the respondent's best language?

(b)(6); (b)(7)(C) TO JUDGE

It is, Your Honor.

JUDGE TO (b)(6); (b)(7)(C)

And is (b)(6); (b)(7)(C) still living at (b)(6); (b)(7)(C) in (b)(6); (b)(7)(C) (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C) TO JUDGE

Yes, she is, Your Honor.

JUDGE TO (b)(6); (b)(7)(C)

Okay. Counsel, this is case back before the Court on an order of remand by the Board of Immigration Appeals of December the 8th of 2016. The Court, upon review of the Board's decision and in light of recent precedent published by the Fourth Circuit Court of Appeals has two issues that I need to resolve before the Court proceeds any further. The first issue was that that was raised in the remand order by the Board, and that is whether the respondent's background checks and security review have been

completed and is clear.

JUDGE TO (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C) can you advise the Court on that issue?

(b)(6); (b)(7)(C) TO JUDGE

They are current and clear, Your Honor.

JUDGE TO (b)(6); (b)(7)(C)

Very well.

JUDGE FOR THE RECORD

Then the Court does find that the requirements under 8 C.F.R. Section 1003.47(h) are, therefore, satisfied.

JUDGE TO (b)(6); (b)(7)(C)

Now, counsel, the next question that I have to have answered by the Department of Homeland Security is does the Department of Homeland Security intend to make the same concessions in this case that were made on appeal in the case of Matter of A-R-C-G-?

(b)(6); (b)(7)(C) TO JUDGE

No, Your Honor. We do not, in accordance with Velasquez v. Sessions, a case that came out this year in the Fourth Circuit. And they're not making those concessions any longer. And, in fact, we find that the domestic, domestic disputes that are personal in nature do not meet the nexus or immutable characteristic for a particular social group and it's, particularly in this case. The facts are laid out.

JUDGE TO (b)(6); (b)(7)(C)

Counsel, in light of the position of the Government, that they no longer make the same concessions that were integral to Matter of A-R-C-G-, at this point the Court intends to re-certify this case back to the Board of Immigration Appeals in light of what

this Court views as a precedent in the Fourth Circuit that may render Matter of A-R-C-G- as not legally valid. I'll hear from the parties right now as to their relative positions on the Court's consideration of re-certifying this case to the Board of Immigration Appeals. (b)(6); (b)(7)(C)?

(b)(6); (b)(7)(C) TO JUDGE

Your Honor, I would just point out that the, the date of the decision from the Board was obviously prior to Velasquez and, so, naturally there was not an opportunity for that to be reviewed, that precedent to be reviewed by the Board. But I would just note that typically as, at least in the context of domestic violence law, there is a stark differentiation between domestic violence and mere conflict between domestic partners and that it's recognized as a wider issue. And, so, I would just like to put on the record on (b)(6); (b)(7)(C) behalf that, that we would reserve any and all, I guess, rights to raise these arguments on, on re-appeal or on re-cert.

JUDGE TO (b)(6); (b)(7)(C)

Okay. And I'll address that in a moment. Thank you, (b)(6); (b)(7)(C)

JUDGE TO (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C) what's the position of the Government on the Court's consideration whether to re-certify this case to the Board.

(b)(6); (b)(7)(C) TO JUDGE

We ask that you please do re-certify it.

JUDGE TO (b)(6); (b)(7)(C)

Counsel, it's my understanding that when this, if I do re-certify this case to the Board, that any issues related to the legal viability, for lack of a better term, of Matter of A-R-C-G-, in light of the Fourth Circuit precedent of Velasquez v. Sessions, that will be a matter that the, both parties will be able to brief to the Board. The Board is able to

make a final decision, should they, they choose to do so. I have now determined that the respondent has complied with the background and security requirements under the regulations. The Court is re-certifying it to the Board. I am going to, I am making a decision. I am going to re-certify it. It is up to the Board as to whether they accept that certification or what they choose to do next. And, so, that's, that's the extent of this Court's authority. However, I'm, I am satisfied that should either of the parties decide to brief this issue and want those briefs to be consider, that the Board will take that, would accept those briefs and, on the Court's certification. At this point then, counsel, I'm going, the Court's going to stand in recess.

(b)(6); (b)(7)(C) TO JUDGE

Thank you, Your Honor.

(b)(6); (b)(7)(C) TO JUDGE

Thank you, Your Honor.

[OFF THE RECORD]

[ON THE RECORD]

JUDGE FOR THE RECORD

This Court will come to order. Let the record reflect all parties present at the beginner of the recess are again present. The Court has provided to counsel for both parties a summary order of a certification to the Board of Immigration Appeals. And accompanied, that summary order is accompanied by an order to certification signed by this Immigration Judge providing the Court's analysis, both of the Board of Immigration Appeals and analyzing it in light of the new case, Velasquez v. Sessions, that was published on July 31st, 2017.

JUDGE TO (b)(6); (b)(7)(C)

Do both parties acknowledge receipt of the Court's order of certification?

(b)(6); (b)(7)(C) TO JUDGE

Yes, Your Honor.

(b)(6); (b)(7)(C) TO JUDGE

Yes, Your Honor.

JUDGE TO MS. SEERY

Then, counsel, under the regulations there technically is not an appeal of this order of certification. And, at this point, once it's been certified, jurisdiction rests with the Board of Immigration Appeals. (b)(6); (b)(7)(C) I would advise you to make sure you inform (b)(6); (b)(7)(C) of this action and to make sure that the respondent's address is, is kept current with the Board.

(b)(6); (b)(7)(C) TO JUDGE

I will do so, Your Honor.

JUDGE TO (b)(6); (b)(7)(C)

To the respondent, through the interpreter. (b)(6); (b)(7)(C) your case was back before me because of an order by the Board of Immigration Appeals. The Board of Immigration Appeals disagreed with the majority of the decision that I issued in your case and the Board determined that you were eligible for asylum. The Board sent the case back to me for the Government to confirm that your fingerprints and biometrics information are clear and that you're able to receive a final order. That part has already been resolved and the Government states that you do not have any problems with your security background check. However, ma'am, the Court that is above the Board of Immigration Appeals is called the Fourth Circuit Court of Appeals. That Court published a decision on July the 31st of 2017 that I am obliged to follow. Based upon my observation of the law, I'm concerned that there is now a conflict between the law I'm supposed to follow by the Fourth Circuit compared to the law I'm supposed to follow by

the Board of Immigration Appeals. So what I've done today is I'm sending your case back to the Board of Immigration Appeals and advising them of this conflict in the law. So, it will be up to the Board as to what they decide to do next. Ma'am, I want to make sure you understand that this is not anything personal against you or reflects anything that I think you did wrong. It's just because the law that covers the kind of case that you presented has changed many times over the last few years. And I'm obliged, as the Judge, to make sure that the law is done correctly. But that's just my view of the law and that's why we have Courts that are above my level to make sure that the law is done correctly. And that is the way our system works. Ma'am, do you understand everything I've explained to you today?

(b)(6); (b)(7)(C) TO JUDGE

Yes.

JUDGE TO (b)(6); (b)(7)(C)

Ma'am, do you have any questions for me?

(b)(6); (b)(7)(C) TO JUDGE

No.

JUDGE TO (b)(6); (b)(7)(C)

Okay.

JUDGE TO (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C) is there anything else for the record, ma'am?

(b)(6); (b)(7)(C) TO JUDGE

Nothing further, Your Honor. Thank you for the explanation.

JUDGE TO (b)(6); (b)(7)(C)

You're welcome.

JUDGE TO (b)(6); (b)(7)(C)

Is there anything else from the Government?

(b)(6); (b)(7)(C) TO JUDGE

No, thank you, Your Honor.

JUDGE TO (b)(6); (b)(7)(C)

All right.

JUDGE TO (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C) best of luck to you, ma'am.

(b)(6); (b)(7)(C) TO JUDGE

Yes.

JUDGE FOR THE RECORD

This matter's adjourned

(b)(6); (b)(7)(C) TO JUDGE

Thank you.

HEARING CLOSED

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE V. STUART COUCH, in the matter of:

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

CHARLOTTE, NORTH CAROLINA

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

(b)(6); (b)(7)(C)

er)

Free State Reporting, Inc.-3

JULY 4, 2019

(Completion Date)

From: (b)(6); (b)(7)(C)
Sent: 11 Dec 2019 19:27:01 +0000
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: #AppealsPanelOPLAWAS
Subject: DHS Appeal--OPLA WAS (ND)-(b)(6); (b)(7)(C)-IJ Asylum Grant (Appeal on Nexus, Changed Circumstances)

Chief and Deputies,

(b)(6); (b)(7)(C); (b)(5)

(b)(5)

ACC (b)(6); (b)(7)(C) is the OPLA-WAS POC.

(b)(6); (b)(7)(C)
Assistant Chief Counsel (Employment Law)
Office of the Principal Legal Advisor, Washington D.C.
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security
1901 S. Bell Street, (b)(6); (b)(7)(C)
Arlington, VA 22202

(703) 235-(b)(6); (b)(7)(C) (direct)
(202) 258- (cell)
(703) 235-2777 (fax)

***** Warning *** Attorney/Client Privilege *** Attorney Work Product *****

From: (b)(6); (b)(7)(C)
Sent: 28 May 2020 22:11:14 +0000
To: (b)(6); (b)(7)(C)
Subject: FW: Request - Supplemental Briefing - (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Attachments: (b)(6); (b)(7)(C) pdf
Importance: High

(b)(6); (b)(7)(C)

(b)(5)

(b)(5)

Thanks,

(b)(6); (b)(7)(C)

Associate Legal Advisor
Immigration Law & Practice Division
Office of the Principal Legal Advisor
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security
Office: (202) 732-(b)(6); (b)(7)(C)

document is for INTERNAL GOVERNMENT USE ONLY and may be exempt from disclosure under the Freedom of Information Act, 5 USC §§ 552(b)(5), (b)(7).

From: (b)(6); (b)(7)(C)
Sent: Wednesday, May 27, 2020 3:01 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: Re: Request - Supplemental Briefing - (b)(6); (b)(7)(C)
Importance: High

Adding (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C); (b)(5)

Thanks,

(b)(6); (b)(7)(C)

Acting Chief, Immigration Law and Practice Division

Office of the Principal Legal Advisor

DHS | U.S. Immigration and Customs Enforcement

202.732 (b)(6); (b)(7)(C) (Mobile)

202.484.5640 (Fax) (b)(6); (b)(7)(C)

From (b)(6); (b)(7)(C)
Sent: Wednesday, May 27, 2020 2:50 PM
To (b)(6); (b)(7)(C)
ILPD-APPEALS (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: FW: Request - Supplemental Briefing - (b)(6); (b)(7)(C)

All,

I don't recall seeing our typical courtesy email from the BIA about this one. The respondent's brief is in PLAnet but the summary affirmance filed by OPLA-Dallas is not in PLAnet.

Matter of (b)(6); (b)(7)(C)

The Board requests supplemental briefing from the parties on the following:

(b)(5)

The parties may address any additional issues they deem appropriate.

(b)(6); (b)(7)(C)
Deputy Chief
DHS/ICE/OPLA/E&LD
(202) 904-(b)(6); (b)(7)(C) (mobile)

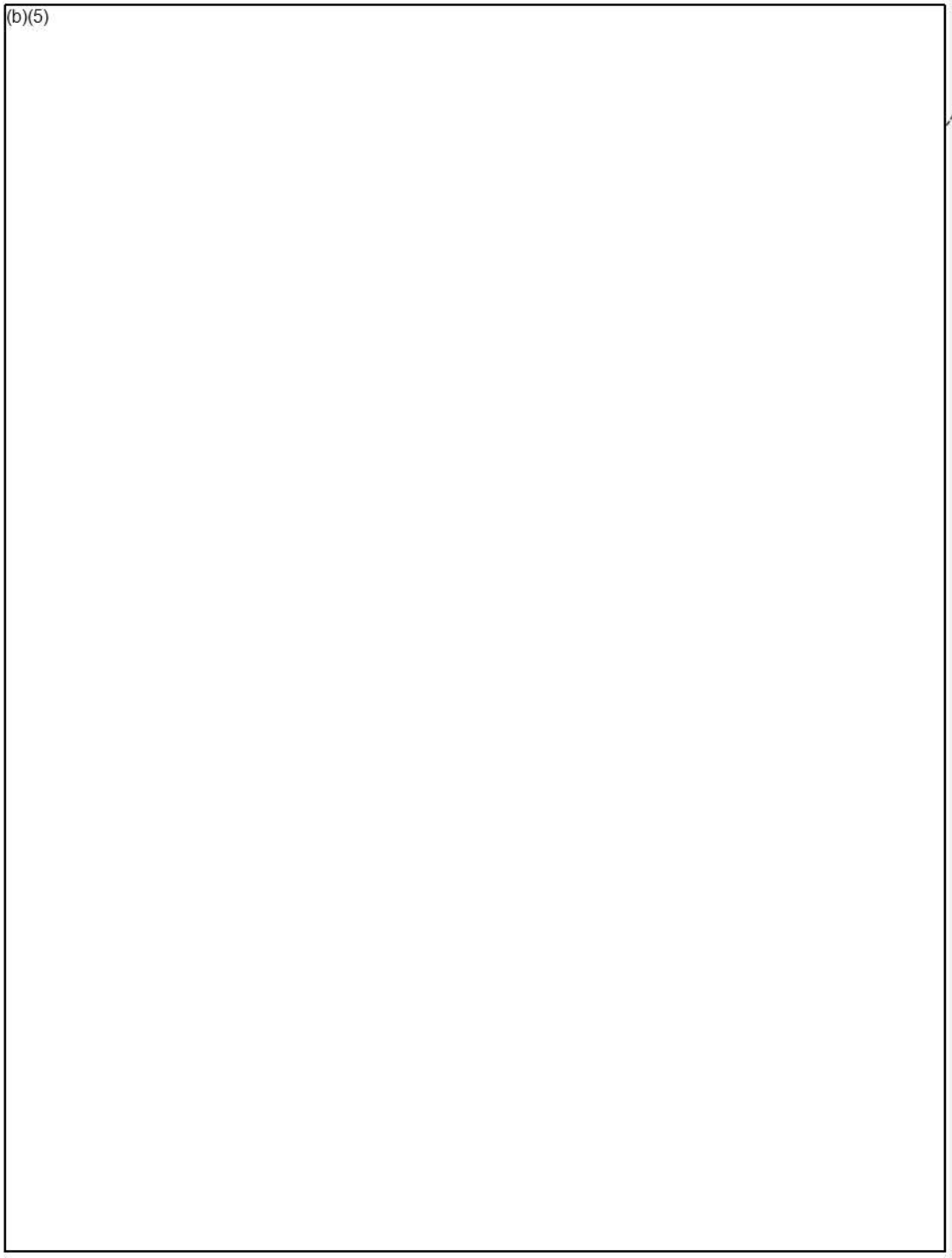
*** Warning *** Attorney/Client Privilege *** Attorney Work Product ***

From: (b)(6); (b)(7)(C)
Sent: Wednesday, May 27, 2020 2:29 PM
To: (b)(6); (b)(7)(C)
Cc:
Subject: FW: Request - Supplemental Briefing

Good afternoon (b)(6); (b)(7)(C)

Attached, please find a supplemental briefing notice in the matter of (b)(6); (b)(7)(C)
The notice was saved to PLAnet.

Best,
(b)(6); (b)(7)(C)


(b)(5)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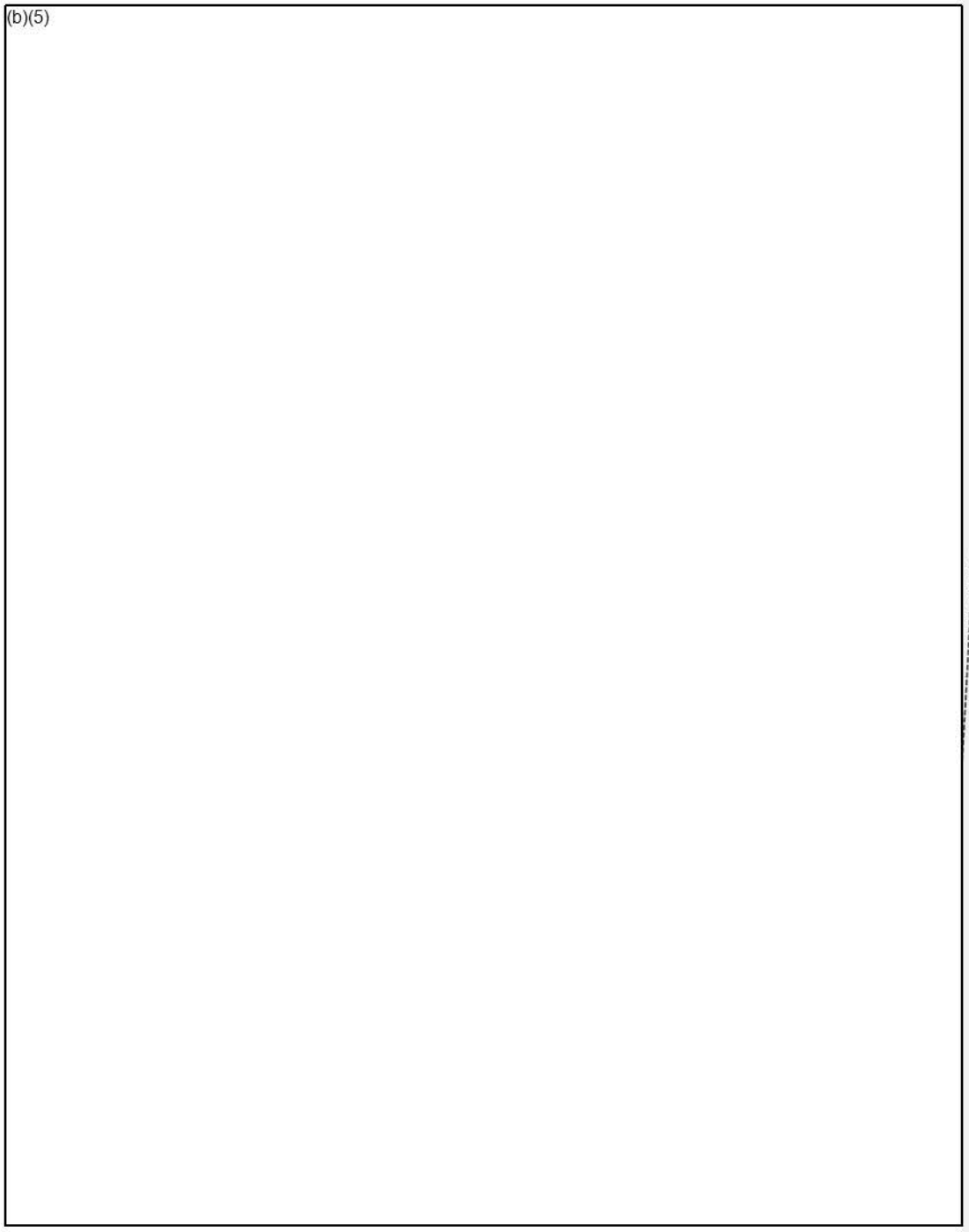
(b)(5)

APPENDIX

(b)(5)



(b)(5)

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(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

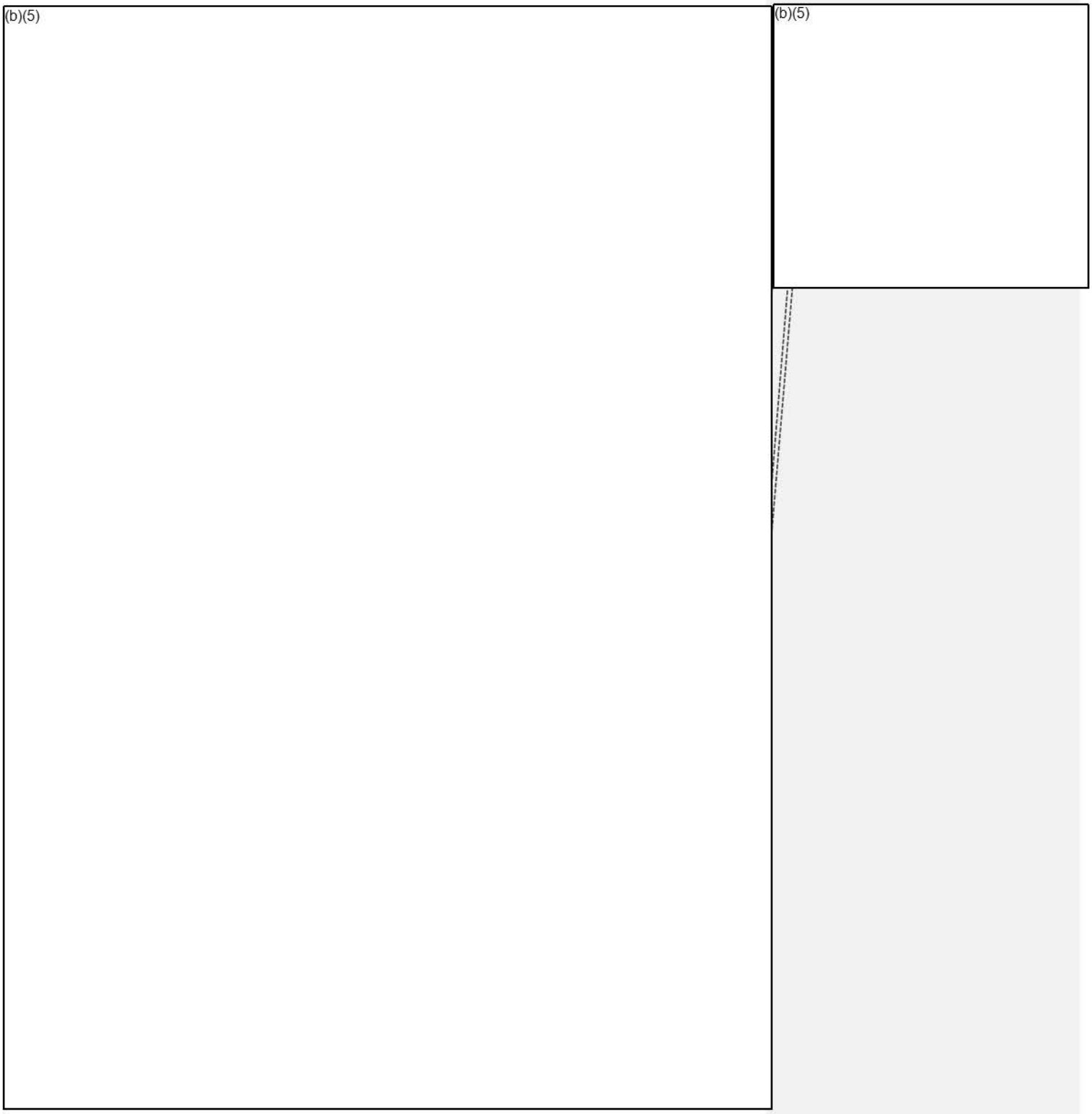
From: (b)(6); (b)(7)(C)
Sent: 5 Jun 2020 14:19:02 +0000
To: (b)(6); (b)(7)(C)
Subject: (b)(6); (b)(7)(C) Draft Motion
Attachments: Draft Motion to Remand.docx

(b)(6); (b)(7)(C)

My draft of the (b)(6); (b)(7)(C) motion to remand is attached. I would appreciate any comments or edits you have (I have a couple of questions in the document for your consideration). (b)(5)
(b)(5)
(b)(5) I'm on doc review next week, but hopefully there's not much left to do. Thanks!

(b)(6); (b)(7)(C)
Associate Legal Advisor
Immigration Law & Practice Division
Office of the Principal Legal Advisor
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security
Office: (202) 732 (b)(6); (b)(7)(C)

(b)(5)


(b)(5)
(b)(5)

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(b)(5)

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(b)(5)

(b)(5)

(b)(5)

(b)(5)

(b)(5)

From: (b)(6); (b)(7)(C)
Sent: 12 Jun 2020 15:29:04 +0000
To: (b)(6); (b)(7)(C)
Cc:
Subject: (b)(6); (b)(7)(C) Motion to Remand
Attachments: (b)(6); (b)(7)(C) Motion to Remand FINAL.docx

Good Morning, (b)(6); (b)(7)(C)

Thanks again for your help with filing. I really appreciate your and (b)(6); (b)(7)(C) willingness to assist. I updated the attached motion to include everyone in the signature blocks. The dates in the signature line and on the cert of service are highlighted so you can update them to reflect the actual date of filing. I think the remaining steps are as follows:

(b)(5)

If you don't mind, I would really appreciate if you could also scan the whole doc (including the cover pages and signatures) as a .pdf and email it to me. (b)(5)
(b)(5) The motion is due at the BIA by next Thursday, June 18. Please feel free to reach out if anything here is unclear. Thanks again!

Best,

(b)(6); (b)(7)(C)
Associate Legal Advisor
Immigration Law & Practice Division
Office of the Principal Legal Advisor
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security
Office: (202) 732-
(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Thursday, June 11, 2020 7:55 PM
To: (b)(6); (b)(7)(C)
Subject: RE: (b)(6); (b)(7)(C)

Sorry for the delay! Just learned my Chief Counsel Paul Hunker is in the office most days, so he can sign the motion. He will be in the office tmrw.

(b)(6); (b)(7)(C)
Assistant Chief Counsel
Office of the Principal Legal Advisor, Dallas
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

From: (b)(6); (b)(7)(C)
Sent: Thursday, June 11, 2020 5:06 PM
To: (b)(6); (b)(7)(C)
Subject: RE: (b)(6); (b)(7)(C)

Hi (b)(6); (b)(7)(C)

(b)(5)

(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Thursday, June 11, 2020 2:05 PM
To: (b)(6); (b)(7)(C)
Subject: RE: (b)(6); (b)(7)(C)

We have someone in the office today, tmrw, and all of next week who can mail the motion!

(b)(6); (b)(7)(C)
Assistant Chief Counsel
Office of the Principal Legal Advisor, Dallas
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

From: (b)(6); (b)(7)(C)
Sent: Thursday, June 11, 2020 12:20 PM

To: (b)(6); (b)(7)(C)
Subject: RE: (b)(6); (b)(7)(C)

Hi (b)(6); (b)(7)(C)

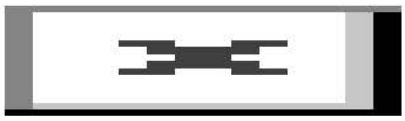
The Board's e-filing process does not cover motions. Does your office have a current process for filing via snail mail?

From: (b)(6); (b)(7)(C)
Sent: Thursday, June 11, 2020 1:10 PM
To: (b)(6); (b)(7)(C)
Subject: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C) we've been using the inboxes below, but I'm happy to help with the filing! I can also ask (b)(6); (b)(7)(C) if she's okay with email service.

(b)(6); (b)(7)(C)
Assistant Chief Counsel
Office of the Principal Legal Advisor, Dallas
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

From: U.S. Department of Justice (b)(6); (b)(7)(C)
Sent: Tuesday, April 7, 2020 12:01 PM
To: (b)(6); (b)(7)(C)
Subject: EOIR Stakeholder Update - April 7, 2020



EOIR has established two temporary email accounts for limited filings for **both detained and non-detained** cases pending before the Board of Immigration Appeals (BIA). The BIA will accept only Briefs, Motions to Accept a Late Filed Brief, Motions for Summary Affirmance, and, if new to the case, courtesy copies of the Form EOIR-27. Please also submit Form EOIR-27s electronically through EOIR's Courts & Appeals System. Failure to follow the guidelines listed here may result in the rejection of your submitted document filing. If your submission is rejected, you will be notified by mail. Please note EOIR cannot provide technical support at this time. If you have questions, please contact the EOIR Office of Policy, Communications and Legislative Affairs Division at (b)(6); (b)(7)(C) usdoj.gov.

Email addresses for the BIA:

Detained briefs filed at the BIA: (b)(6); (b)(7)(C) @usdoj.gov
Non-Detained briefs filed at the BIA: (b)(6); (b)(7)(C) @usdoj.gov

Executive Office for Immigration Review
Office of Policy
Communications and Legislative Affairs Division
(b)(6); (b)(7)(C) @usdoj.gov
703-305-(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: 15 Jul 2020 17:24:36 +0000
To: (b)(6); (b)(7)(C)
Cc:
Subject: Matter of A-B- / (b)(6); (b)(7)(C) BIA dismisses alien's appeal
Attachments: Scanned from a Xerox Multifunction Printer.pdf
Importance: High

(b)(6); (b)(7)(C); (b)(5)

(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Wednesday, May 6, 2020 5:33 PM
To: (b)(6); (b)(7)(C)
Cc:
Subject: Fw: Matter of A-B- / (b)(6); (b)(7)(C) - Alien New Authority Supp. Brief

Good Evening (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C); (b)(5)

Best,
(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Acting Deputy Division Chief

Immigration Law and Practice Division (ILPD)
U.S. Immigration and Customs Enforcement
Potomac Center North
500 12th St., S.W.
Mail Stop 5900
Washington, DC 20536

Phone: 202-732-(b)(6); (b)(7)(C)

Cell: 202-520-(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Wednesday, May 6, 2020 5:04 PM
To: (b)(6); (b)(7)(C)
Cc:
(b)(6); (b)(7)(C)
Subject: RE: Matter of A-B- (b)(6); (b)(7)(C) - Alien New Authority Supp. Brief

(b)(5)

(b)(6); (b)(7)(C)
Deputy Principal Legal Advisor for Enforcement and Litigation
Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
Iphone: 202-500-(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Wednesday, May 6, 2020 11:59 AM

To: (b)(6); (b)(7)(C)
Cc:
(b)(6); (b)(7)(C)
Subject: FW: Matter of A-B- A (b)(6); (b)(7)(C) - Alien New Authority Supp. Brief
Importance: High

(b)(6); (b)(7)(C)

(b)(5)

Thanks,
(b)(6);
(b)(7)(C)

(b)(6); (b)(7)(C)
Acting Chief, Immigration Law and Practice Division
Office of the Principal Legal Advisor
DHS | U.S. Immigration and Customs Enforcement
202.732.(b)(6); (b)(7)(C) (Mobile)
(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Friday, February 14, 2020 1:40 AM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Subject: RE: Remanded Matter of A-B- proceedings - Amicus Briefing

(b)(6); (b)(7)(C)

As always, thanks for keeping us up to date. FWIW, we agree with your approach.

(b)(6);
(b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Thursday, February 13, 2020 12:03 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

Subject: RE: Remanded Matter of A-B- proceedings - Amicus Briefing

Thanks (b)(6);
(b)(7)(C)

(b)(6); (b)(7)(C)

Attorney Advisor
Immigration Law Division
Office of the General Counsel
U.S. Department of Homeland Security
(202) 282 (b)(6); (b)(7)(C) (office)
(202) 815 (mobile)

From: (b)(6); (b)(7)(C)
Sent: Thursday, February 13, 2020 11:49 AM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

Cc: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Subject: Remanded Matter of A-B- proceedings - Amicus Briefing

*****SENSITIVE/PRIVILEGED***PRE-DECISIONAL***ATTORNEY WORK PRODUCT*****

Colleagues,

(b)(5)

(b)(5)

Thanks, (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732 (b)(6); (b)(7)(C)
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Tuesday, February 11, 2020 10:13 AM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Remanded Matter of A-B- proceedings - BIA briefing

Attaching copies of the four amicus briefs, as discussed. Thx, (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732 (b)(6); (b)(7)(C)
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Tuesday, February 11, 2020 10:01 AM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Remanded Matter of A-B- proceedings - BIA briefing

Colleagues, I just wanted to provide an update on the status of the *A-B-* case now back before the BIA on the alien's appeal in remanded proceedings.

(b)(5)

Please let me know if you have any questions.

Thx! (b)(6); (b)(7)(C)

(b)(6);
(b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732-
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Monday, January 6, 2020 4:57 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Remanded Matter of A-B- proceedings - BIA briefing

Colleagues, attached for your reference, please find the DHS response brief filed today with the BIA in the remanded *Matter of A-B-* proceedings. Thanks! (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732-(b)(6); (b)(7)(C)
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Monday, December 23, 2019 11:34 AM
To: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Cc: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Subject: RE: Remanded Matter of A-B- proceedings - BIA briefing

OGC HQ concurs with the proposed approach. Many thanks.

From: (b)(6); (b)(7)(C)

Sent: Wednesday, December 18, 2019 10:38 AM

To: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Cc: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Subject: RE: Remanded Matter of A-B- proceedings - BIA briefing

Good morning, all. Thanks for the careful consideration of the way forward/litigation strategy and substantive issues. We're conferring with (b)(6); (b)(7)(C) and will report back soon.

From: (b)(6); (b)(7)(C)

Sent: Tuesday, December 17, 2019 4:43 PM

To: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Cc: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Subject: RE: Remanded Matter of A-B- proceedings - BIA briefing

Thanks for following up, (b)(6); (b)(7)(C) We discussed here at USCIS and we agree with ICE's proposed way forward on all points.

(b)(6);
(b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Tuesday, December 17, 2019 3:32 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: Remanded Matter of A-B- proceedings - BIA briefing
Importance: High

*****SENSITIVE/PRIVILEGED***PRE-DECISIONAL***ATTORNEY WORK PRODUCT*****

DHS OGC-IMM and USCIS OCC Colleagues:

Attached for your reference, please find Ms. A-B-'s appeal brief to the BIA that we received last night. Your thoughts on my December 10 litigation strategy email below in terms of crafting the response brief would be most appreciated.

Thx! (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732 (b)(6); (b)(7)(C)
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Tuesday, December 10, 2019 6:50 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Subject: RE: Gender as PSG Working Group [BIA sets briefing schedule in remanded Matter of A-B- proceedings]
Importance: High

*****SENSITIVE/PRIVILEGED***PRE-DECISIONAL***ATTORNEY WORK PRODUCT*****

[Copying in (b)(6); (b)(7)(C) ICE OPLA Deputy PLA for Enforcement and Litigation]

DHS OGC-IMM and USCIS OCC Colleagues:

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Please advise and let us know if you have any questions.

Thx! (b)(6); (b)(7)(C)

PS – I would be happy to provide any other case materials, as needed. Just let me know.

(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Tuesday, December 10, 2019 8:55 AM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Gender as PSG Working Group [BIA sets briefing schedule in remanded Matter of A-B- proceedings]

(b)(5)

(b)(5)

Thx! (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732-
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Monday, November 18, 2019 5:19 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Gender as PSG Working Group [BIA sets briefing schedule in remanded Matter of A-B-proceedings]

(b)(6); (b)(7)(C); (b)(5)

f

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732 (b)(6); (b)(7)(C)
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Monday, November 18, 2019 5:15 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Gender as PSG Working Group [BIA sets briefing schedule in remanded Matter of A-B- proceedings]

(b)(5); (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

(b)(6); (b)(7)(C)
Telephone: (202) 732
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Friday, November 15, 2019 7:47 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

Subject: RE: Gender as PSG Working Group [BIA sets briefing schedule in remanded Matter of A-B- proceedings]

Thanks for the update, (b)(6); (b)(7)(C) Have a good weekend.

From: (b)(6); (b)(7)(C)
Sent: Friday, November 15, 2019 6:04 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

Subject: RE: Gender as PSG Working Group [BIA sets briefing schedule in remanded Matter of A-B- proceedings]

*****SENSITIVE/PRIVILEGED***PRE-DECISIONAL***ATTORNEY WORK PRODUCT*****

All, a new development, please see attached.

(b)(5)

(b)(5)

Thanks and a good weekend ahead to all!

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security
Telephone: (202) 732 (b)(6); (b)(7)(C)
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Wednesday, November 13, 2019 3:49 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Gender as PSG Working Group [BIA sets briefing schedule in remanded Matter of A-B-proceedings]

Thanks, (b)(6); (b)(7)(C) We'll discuss internally here, but we're happy to discuss possibilities for resolving the case. A holiday gift, indeed!

From: (b)(6); (b)(7)(C)
Sent: Wednesday, November 13, 2019 11:45 AM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: Gender as PSG Working Group [BIA sets briefing schedule in remanded Matter of A-B- proceedings]
Importance: High

*****SENSITIVE/PRIVILEGED***PRE-DECISIONAL***ATTORNEY WORK PRODUCT*****

PSG/Gender Working Group Colleagues:

Just in time for the holidays!):

(b)(5)

(b)(5)

Thx!

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732-
E-mail: (b)(6); (b)(7)(C)

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

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No.: (b)(6); (b)(7)(C)
In Removal Proceedings	)	

U.S. DEPARTMENT OF HOMELAND SECURITY
MOTION TO REMAND

On August 27, 2019, the Board of Immigration Appeals (Board) requested supplemental briefing on the following question: "Whether the respondent established, based on the record in this case, that 'women in El Salvador' constitutes a particular social group for purposes of asylum and withholding of removal. The parties may also address any other issues relevant to resolving the appeal." Briefing from the parties is initially due on September 26, 2019. The Department of Homeland Security (Department) respectfully requests that the Board remand these proceedings, pursuant to BIA Practice Manual Chapter 5.8 (July 31, 2019), for the reasons that follow.

I. STATEMENT OF FACTS AND PROCEDURAL POSTURE

The respondent is a native and citizen of El Salvador who last entered the United States without inspection. I.J. at 1. The respondent filed an application for asylum claiming fear of persecution on account of her political opinion and membership in a particular social group, which she defined as "women in El Salvador." I.J. at 2. The Immigration Judge concluded that the respondent's past experiences with gang members were "unrelated to any actual or imputed political opinion." I.J. at 6. The Immigration Judge further found that the respondent had not shown past persecution on account of membership in the particular social group "women in El Salvador" because the proposed group failed to meet the particularity requirement for a cognizable particular social group. *Id*. (citing *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014) and *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014)). Specifically, the Immigration Judge determined that the proposed group could not qualify as a particular social group because "women in El Salvador" "would include at least half or slightly over half of the population without any really cohesive element or particularity to the group." *Id*. The respondent appealed to the Board.

On appeal, the Board adopted and affirmed the Immigration Judge's decision. [redacted] [redacted] (BIA Jan. 12, 2018) at 1. The Board observed: "As the Immigration Judge properly determined, such a group [i.e. 'women in El Salvador'] lacks particularity as it would consist of individuals from a wide cross-section of the country, from different socio-economic backgrounds, religions, and upbringings and would in general 'include at least half or slightly over half the population' of El Salvador." *Id*. at 2 (citation omitted). The respondent filed a petition for review with the U.S. Court of Appeal for the Ninth Circuit. The government filed an unopposed motion to remand to allow the Board to further consider whether the proposed group satisfies the particularity requirement for a particular social group in view of current Ninth Circuit case law, and the court granted the motion. *See Palacioas-Alarcon v. Barr*, No. 18-70422 (9th Cir. Feb. 28, 2019).

II. REQUEST FOR REMAND

The Department respectfully requests that the Board remand proceedings to the Immigration Judge for further consideration of the proposed particular social group—"women in El Salvador"—in light of Ninth Circuit case law. *See Matter of Coelho*, 20 I&N Dec. 464, 471 (BIA 1992) (stating that a motion to remand must comply with the substantive requirements for reopening or reconsideration); 8 C.F.R. § 1003.2(b). The Immigration Judge's particularly serious crime analysis focused on particularity. I.J. at 6. More specifically, the Immigration Judge found the proposed group is not cognizable because it includes individuals from different backgrounds and comprises too large a portion of society. I.J. at 6. Likewise, the Board determined that proposed group lacks particularity due to its numerosity and the diversity of its members' backgrounds and upbringings. [redacted] (BIA Jan. 12, 2018) at 2.

The Ninth Circuit has rejected "amorphous" particular social group formulations and explained that the particularity requirement requires that a cognizable group have clear boundaries and its defining terms have commonly-accepted definitions. *Reyes v. Lynch*, 842 F.3d 1125, 1135 (9th Cir. 2016). In *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986), the court initially observed that a "sweeping demographic division naturally manifest a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings" and that such an "all-encompassing grouping . . . simply is not that type of cohesive, homogeneous group to which we believe the term 'particular social group' was intended to apply." 801 F.3d at 1577. However, the Ninth Circuit more recently rejected the proposition that "considerations of diversity of lifestyle and origin are the sine qua non of 'particularity' analysis," and expressly overruled its decisions holding otherwise. *See Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1093–94 (9th Cir. 2013) ("The diversity of 'lifestyles' and 'origin' to which these cases refer did not concern the 'particularity' requirement per se, nor are they relevant to our analysis….") The *Reyes* court stated:

> The BIA's statement [in *Matter of W-G-R-* and *Matter of M-E-V-G-*] of the purpose and function of *the "particularity" requirement does not, on its face, impose a numerical limit* on a proposed social group or disqualify groups that exceed specific breadth or size limitations. Nor is it contrary to the principle that *diversity within a proposed particular social group may not serve as the sine qua non of the particularity analysis*. *Cordoba v. Holder*, 726 F.3d 1106, 1116 (9th Cir. 2013); *Henriquez–Rivas*, 707 F.3d at 1093–94. Rather, the BIA imposes the "particularity" requirement in order to distinguish between social groups that are discrete and those that are amorphous. *Matter of W-G-R-*, 26 I&N Dec. at 214.

842 F.3d at 1135 (emphasis added); *see also M-E-V-G-*, 26 I&N Dec. at 239 (particularity concerns delineation; i.e., whether there exists a "clear benchmark for determining who falls within the group"); *cf. Ticas-Guillen*, 744 Fed. App'x 410, 410 (9th Cir. 2018) ("The IJ's ground for denial—that the proposed social group was 'just too broad' to satisfy the 'particularity' requirement—cannot stand.").

(b)(6); (b)(7)(C)

Remand is warranted for consideration of whether "women in El Salvador" meets the particularity requirement in view of current Ninth Circuit case law. While the cognizability of a particular social group is ultimately a question of law, the core underlying requirements, including particularity, involve questions of fact. *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018) (observing that "[w]hile we review the ultimate determination whether a proposed group is cognizable de novo, we review an Immigration Judge's factual findings underlying that determination for clear error," and that such "fact-based inquiry made on a case-by-case basis [concerns] whether the group is immutable and is recognized as particular and socially distinct in the relevant society"). The Board generally may not engage in factfinding on appeal but must instead remand to the Immigration Judge to do so. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *see generally W-Y-C- & H-O-B-*, 27 I&N Dec. at 192 ("the Immigration Judge did not have the opportunity to make the underlying findings of fact that are necessary to our analysis of the respondent's eligibility for asylum and withholding of removal, and we cannot make these findings for the first time on appeal"). Thus, the Board should remand proceedings to the Immigration Judge for further factual findings on particularity.[1]

Relatedly, even if the Immigration Judge's factual findings on particularity were sufficient to resolve that issue before the Board, the Immigration Judge made no definitive or circumstance-specific findings as to immutability or social distinction. *See* I.J. at 6 ("While being a woman is arguably an immutable characteristic that may be socially distinct, it is not sufficiently particular."); *see also Matter of A-B-*, 27 I&N Dec. 316, 339–40 (A.G. 2018) (reaffirming the Board's duty to conduct a rigorous, circumstance and country-specific analysis when evaluating the existence of a particular social group). Accordingly, the case is not well-

[1] The Department does not concede that "women in El Salvador" meets the particularity requirement for a particular social group. Rather, the Department requests remand to allow the Immigration Judge to assess particularity in light of Ninth Circuit case law on the role of cohesiveness and numerosity in a particularity analysis.

(b)(6); (b)(7)(C)

positioned for Board review of the overall cognizability of "women in El Salvador" as a particular social group.

On remand, the Immigration Judge should be free to assess and decide the respondent's applications for asylum and statutory withholding of removal on other determinative grounds such as nexus. *See A-B-*, 27 I&N Dec. at 340 ("Of course, 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."). In her initial brief to the Board, the respondent averred that the MS-13 gang is targeting young women for sexual slavery, and that previous recruitment efforts and attempts by her uncle to convince her to date gang members constitutes past persecution: "The social group share the immutable characteristic of age, economic status, and gender, which has become a targeted group for recruitment, sexual assault, and violence against women. MS-13 gang member [sic] insist women in El Salvador to have several romantic relationship [sic] without their will." Respondent's Brief at 7–8. While formulation of a new particular social group before the Board does not warrant remand in itself, *W-Y-C- & H-O-B-*, 27 I&N Dec. at 192, the Immigration Judge could assess whether any harm the respondent experienced occurred on account of her being a "wom[a]n in El Salvador." *See* INA § 208(b)(1)(B)(i) (requiring that a protected ground be "at least one central reason" for persecuting the applicant); *cf. Barajas-Romero v. Lynch*, 846 F.3d 351, 358–60 (9th Cir. 2017) (holding that an applicant for withholding of removal must show that a protected ground was "a reason" for the harm).

jCONCLUSION

(b)(6); (b)(7)(C)

The Department respectfully requests that this matter be remanded to the Immigration Judge for further consideration of whether "women in El Salvador" constitutes a cognizable particular social group in light of current Ninth Circuit case law, or any other issues that may be determinative of the respondent's applications for asylum and statutory withholding of removal.[2]

Respectfully submitted this 26th day of September, 2019

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[2] Should the Board decline to remand, the Department respectfully requests that the Board issue a new briefing schedule.

(b)(6); (b)(7)(C)

PROOF OF SERVICE

On September 26, 2019, I, _____, mailed or delivered a copy of this Department of Homeland Security Motion to Remand and any attached pages to:

(b)(6); (b)(7)(C)

Los Angeles, CA 90044

(b)(6); (b)(7)(C)

Los Angeles, CA 90010

by placing such copy in my office's outgoing mail system in an envelope duly addressed.

_____ _____

(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: 13 Dec 2019 15:21:03 +0000
To: ILPD-APPEALS
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: NOA--WAS (ND)-(b)(6); (b)(7)(C) appeal of IJ Asylum Grant on pre-approved grounds

OPLA-WAS intends to file an appeal in the case of (b)(6); (b)(7)(C) regarding the Immigration Judge's written decision, served November 18, 2019, to grant the respondent's application for asylum.

(b)(5)

(b)(5)

ACC (b)(6); (b)(7)(C) is the OPLA-WAS POC.

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From: (b)(6); (b)(7)(C)
Sent: 29 Jan 2020 19:04:01 +0000
To: (b)(6); (b)(7)(C)
Cc:
Subject: OPLA-WAS Monthly Docket Report - January 2020

Hi (b)(6); (b)(7)(C)

Here is my highlight for the month.

IJ Bryant denies relief in two family-based and gender-based PSG cases

(b)(6); (b)(7)(C) Removal order to Honduras IJ Bryant (1/22/20)

(b)(6); (b)(7)(C) Removal order to El Salvador IJ Bryant (1/27/20)

In both of these cases, IJ Bryant denied relief where the respondent was claiming membership in a family-based particular social group, a gender-based particular social group, and an imputed anti-gang political opinion. Although the IJ found the family-based PSGs to be cognizable over DHS's argument to the contrary, he was ultimately persuaded there was no nexus between the harm suffered/feared and the PSG. Respondent's counsel in each case also presented a gender-based PSG, and DHS persuasively argued no nexus existed related to that PSG either, which was successful before IJ Bryant. He further was not convinced there was sufficient evidence of an anti-gang political opinion, imputed or otherwise. In both cases, the IJ also gave the proper 274D warnings after DHS prompted him to do so.

Regards,

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To: (b)(6); (b)(7)(C)
Subject: RE: BIA Supplemental Briefing Request - (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

Hi, (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C); (b)(5)

Feel free to reach out with any questions, and thanks again for your assistance with this case.

Best,

(b)(6); (b)(7)(C)
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From: (b)(6); (b)(7)(C)
Sent: Wednesday, June 3, 2020 11:44 AM
To: (b)(6); (b)(7)(C)
Subject: RE: BIA Supplemental Briefing Request - (b)(6); (b)(7)(C)

Hi, (b)(6); (b)(7)(C) suggested that I reach out to you now that I've been assigned this brief. I've never worked on a supplemental brief before and look forward to any guidance you may have, especially in this instance where there are no notes on Planet. Thanks in advance!

(b)(6); (b)(7)(C)
Assistant Chief Counsel
Office of the Principal Legal Advisor, Dallas
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

From: (b)(6); (b)(7)(C)
Sent: Wednesday, June 3, 2020 9:54 AM
To: (b)(6); (b)(7)(C)
Cc:
(b)(6); (b)(7)(C)
Subject: RE: BIA Supplemental Briefing Request - (b)(6); (b)(7)(C)

Thanks for the email and helpful analysis. (b)(6); (b)(7)(C) will be the point of contact for Dallas. She is cc'd here.

(b)(6);
(b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Wednesday, June 3, 2020 9:29 AM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: BIA Supplemental Briefing Request - (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

(b)(5)

(b)(5)

(b)(6); (b)(7)(C) will be the ILPD POC for the supplemental briefing request. Could you please identify an OPLA Dallas POC with whom she can discuss and work on this case?

Best,

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Acting Chief, Immigration Law and Practice Division
Office of the Principal Legal Advisor
DHS | U.S. Immigration and Customs Enforcement
202.732(b)(6); (b)(7)(C) (Mobile)
(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: 7 Jun 2020 20:39:04 +0000
To: (b)(6); (b)(7)(C)
Subject: RE: (b)(6); (b)(7)(C) Draft Motion
Attachments: (b)(6); (b)(7)(C) Draft Motion to Remand lba-grm.docx

Agree. Kudos! Just two minor suggested tweak from me – see pp. 2 and 4. Thx! (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
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U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

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From: (b)(6); (b)(7)(C)
Sent: Friday, June 5, 2020 4:00 PM
To: (b)(6); (b)(7)(C)
Cc:
Subject: RE (b)(6); (b)(7)(C) Draft Motion

(b)(6); (b)(7)(C)

Your motion looks great. I had just a few suggested edits, which are reflected in the attached redline.

Thanks.

(b)(6); (b)(7)(C)

Associate Legal Advisor
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Immigration Law and Practice Division
U.S. Immigration and Customs Enforcement
Tel: 941-929- (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Friday, June 5, 2020 10:19 AM
To: (b)(6); (b)(7)(C)
Subject: Martinez-Tobar Draft Motion

(b)(6); (b)(7)(C)

My draft of the (b)(6); (b)(7)(C) motion to remand is attached. I would appreciate any comments or edits you have (I have a couple of questions in the document for your consideration). (b)(5)

(b)(5)

(b)(5) I'm on doc review next week, but hopefully there's not much left to do. Thanks!

(b)(6); (b)(7)(C)

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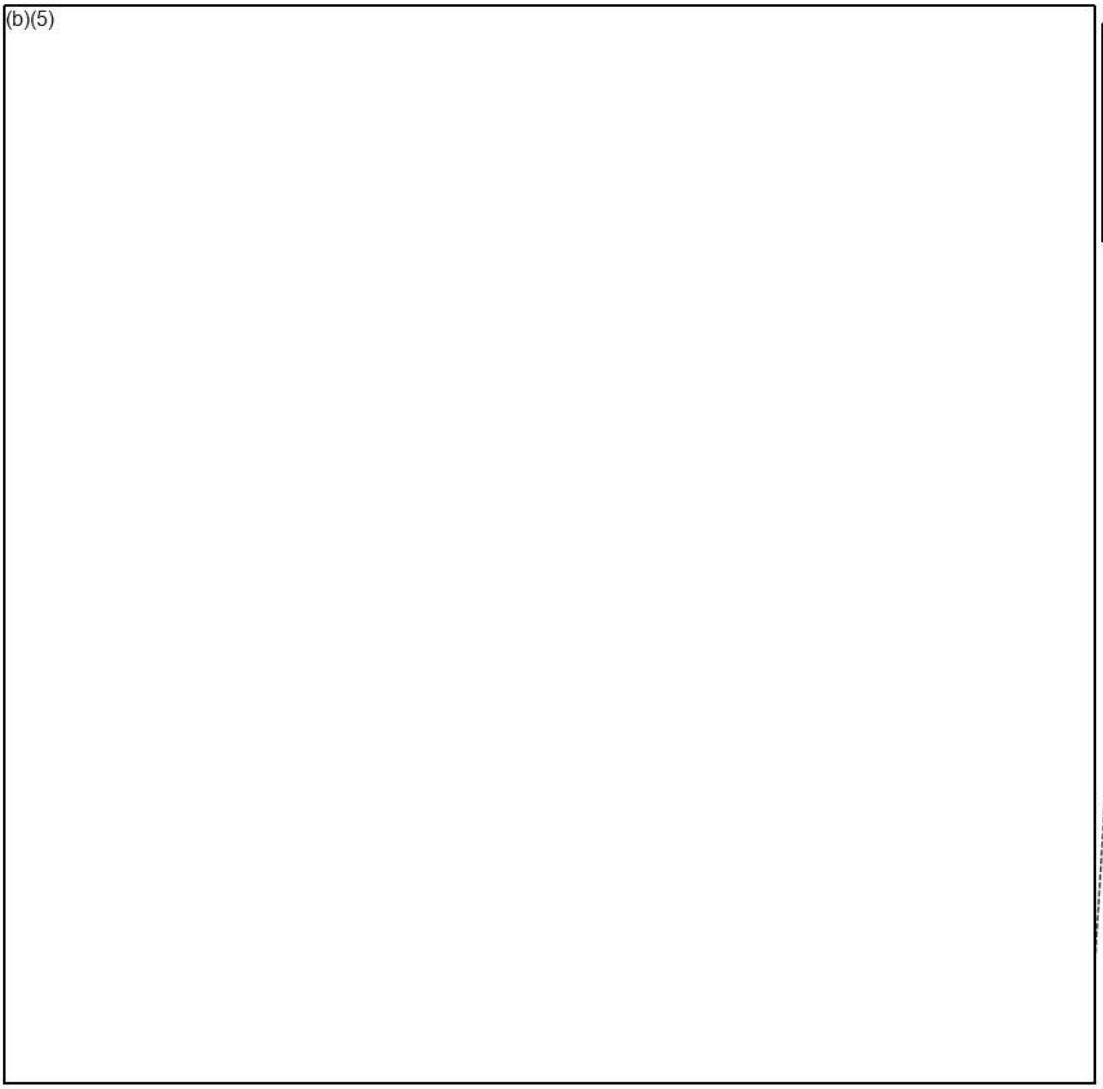
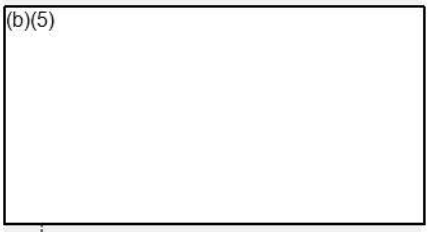
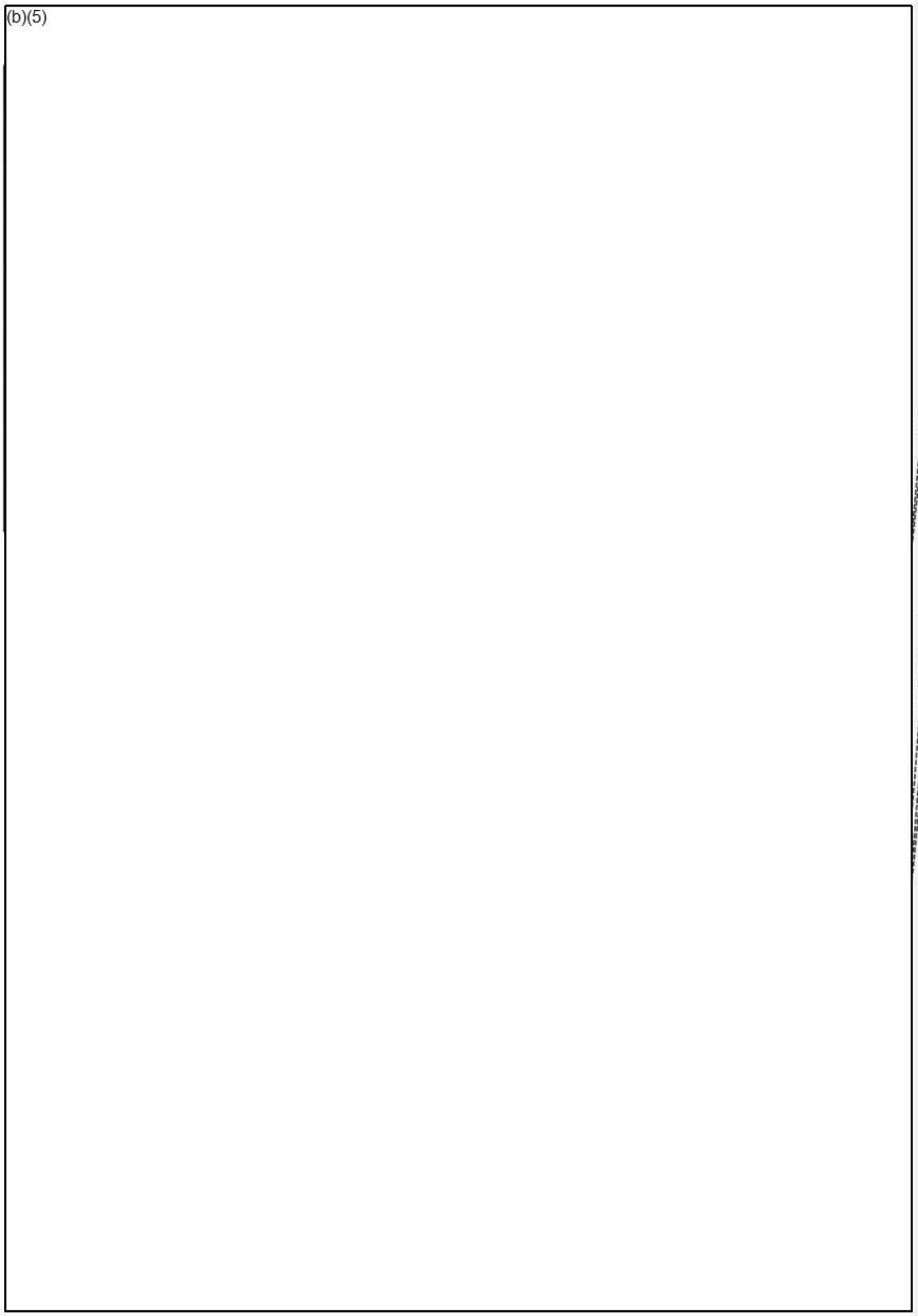

(b)(5)


(b)(5)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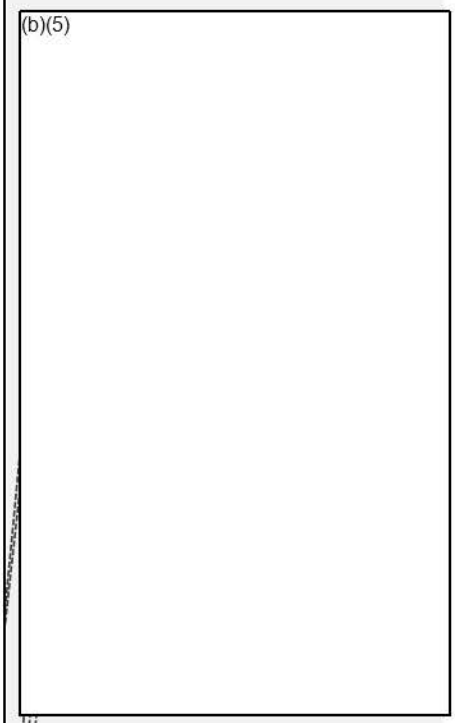
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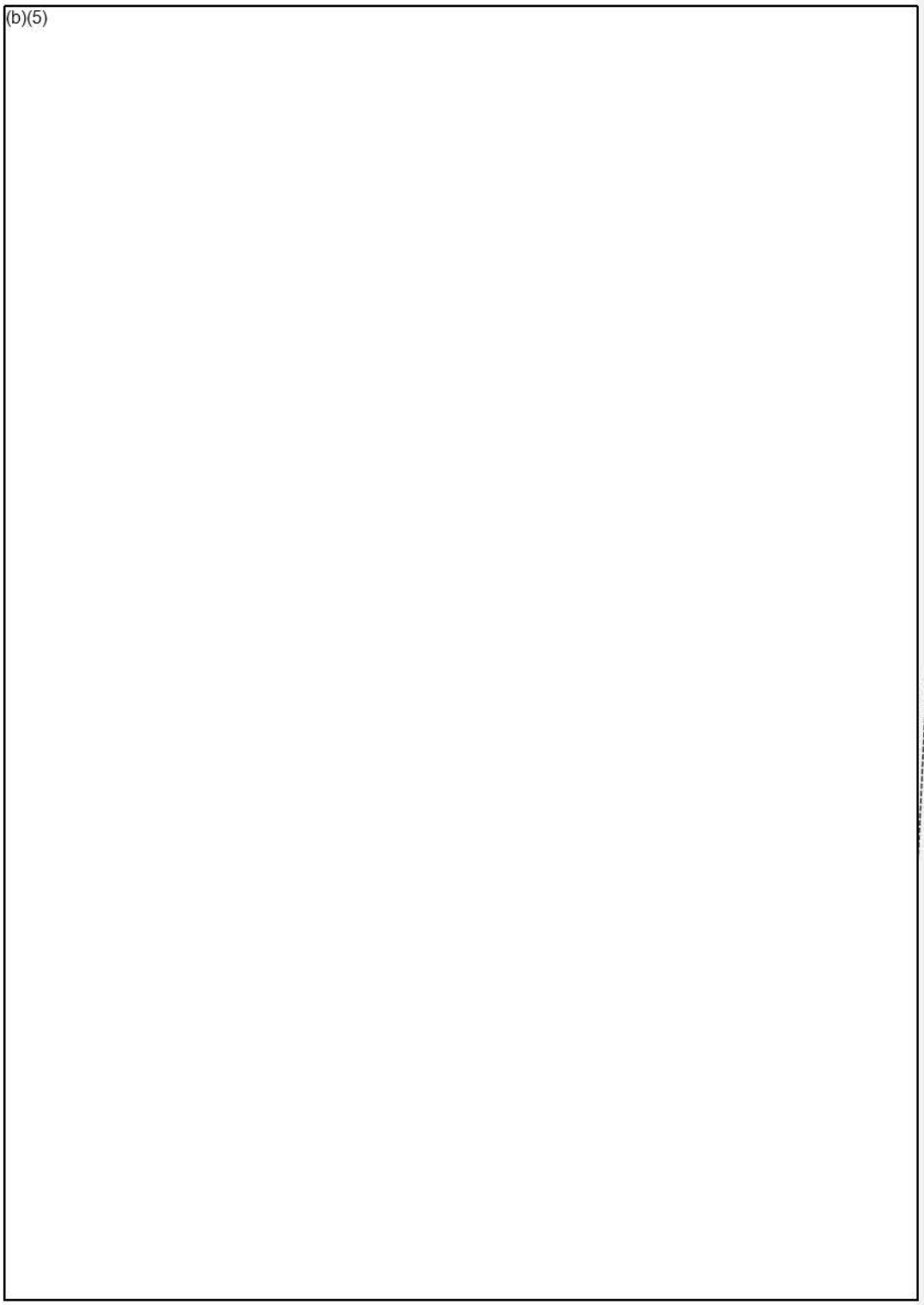
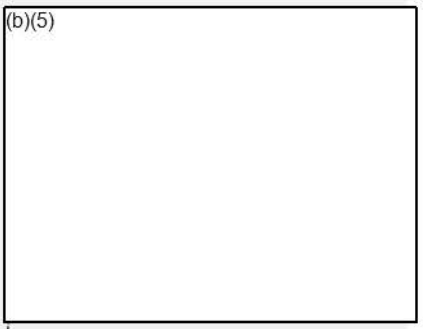

(b)(5)


(b)(5)

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From: ILPD-APPEALS
Sent: 16 Dec 2019 14:39:53 +0000
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Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: NOA--WAS (ND)-(b)(6); (b)(7)(C) appeal of IJ Asylum Grant on pre-approved grounds

(b)(5); (b)(6); (b)(7)(C)

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(b)(6); (b)(7)(C)
Subject: NOA--WAS (ND)-(b)(6); (b)(7)(C) appeal of IJ Asylum Grant on pre-approved grounds

(b)(6); (b)(7)(C); (b)(5)

(b)(5)

(b)(5)

ACC (b)(6); (b)(7)(C) is the OPLA-WAS POC.

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Cc:
Subject: RE: (b)(6); (b)(7)(C)
Attachments: (b)(6); (b)(7)(C) Motion to Remand FINAL.docx

Good Morning, (b)(6); (b)(7)(C)

(b)(5)

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U.S. Department of Homeland Security

From: (b)(6); (b)(7)(C)
Sent: Friday, June 5, 2020 3:52 PM
To: (b)(6); (b)(7)(C)
Subject: RE: Reina Tobar 202185377

(b)(5)

From: (b)(6); (b)(7)(C)
Sent: Friday, June 5, 2020 4:41 PM
To: (b)(6); (b)(7)(C)
Subject: FW: Reina Tobar 202185377

Hello! (b)(5)

(b)(6); (b)(7)(C)
Assistant Chief Counsel
Office of the Principal Legal Advisor, Dallas
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

From: (b)(6); (b)(7)(C)
Sent: Friday, June 5, 2020 3:39 PM
To: (b)(6); (b)(7)(C)
Subject: Re: Reina Tobar 202185377

I'm not opposed.

On Friday, June 5, 2020, (b)(6); (b)(7)(C) wrote:

> Thanks for confirming! (b)(5)
>
> (b)(6); (b)(7)(C)
> Assistant Chief Counsel
> Office of the Principal Legal Advisor, Dallas
> U.S. Immigration and Customs Enforcement
> U.S. Department of Homeland Security

From: (b)(6); (b)(7)(C)
Sent: 23 Dec 2019 16:33:30 +0000
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Remanded Matter of A-B- proceedings - BIA briefing

(b)(5) Many thanks.

From (b)(6); (b)(7)(C)
Sent: Wednesday, December 18, 2019 10:38 AM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Remanded Matter of A-B- proceedings - BIA briefing

Good morning, all. Thanks for the careful consideration of the way forward/litigation strategy and substantive issues. We're conferring with (b)(6); (b)(7)(C) and will report back soon.

From: (b)(6); (b)(7)(C)
Sent: Tuesday, December 17, 2019 4:43 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Remanded Matter of A-B- proceedings - BIA briefing

Thanks for following up, (b)(6); (b)(7)(C) We discussed here at USCIS and w (b)(5)
(b)(5)

(b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Tuesday, December 17, 2019 3:32 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

Subject: Remanded Matter of A-B- proceedings - BIA briefing
Importance: High

*****SENSITIVE/PRIVILEGED***PRE-DECISIONAL***ATTORNEY WORK PRODUCT*****

DHS OGC-IMM and USCIS OCC Colleagues:

Attached for your reference, please find Ms. A-B-'s appeal brief to the BIA that we received last night. Your thoughts on my December 10 litigation strategy email below in terms of crafting the response brief would be most appreciated.

Thx! (b)(6); (b)(7)(C)

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From: (b)(6); (b)(7)(C)
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To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

Subject: RE: Gender as PSG Working Group [BIA sets briefing schedule in remanded Matter of A-B- proceedings]
Importance: High

*****SENSITIVE/PRIVILEGED***PRE-DECISIONAL***ATTORNEY WORK PRODUCT*****

[Copying in (b)(6); (b)(7)(C), ICE OPLA Deputy PLA for Enforcement and Litigation]

DHS OGC-IMM and USCIS OCC Colleagues:

(b)(5)

(b)(5)

(b)(5)

(b)(5)

Thx! (b)(6); (b)(7)(C)

PS – I would be happy to provide any other case materials, as needed. Just let me know.

(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732-
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Tuesday, December 10, 2019 8:55 AM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)

Subject: RE: Gender as PSG Working Group [BIA sets briefing schedule in remanded Matter of A-B- proceedings]

(b)(5)

(b)(5)

Thx! (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732-(b)(6); (b)(7)(C)
E-mail: (b)(6); (b)(7)(C)

From (b)(6); (b)(7)(C)
Sent: Monday, November 18, 2019 5:19 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Gender as PSG Working Group [BIA sets briefing schedule in remanded Matter of A-B- proceedings]

(b)(6); (b)(7)(C); (b)(5)

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
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Telephone: (202) 732
E-mail: (b)(6); (b)(7)(C)

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From: (b)(6); (b)(7)(C)
Sent: Monday, November 18, 2019 5:15 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Gender as PSG Working Group [BIA sets briefing schedule in remanded Matter of A-B- proceedings]

(b)(5); (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732
E-mail: (b)(6); (b)(7)(C)

*** Warning *** Attorney/Client Privilege *** Attorney Work Product ***
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From: (b)(6); (b)(7)(C)
Sent: Friday, November 15, 2019 7:47 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Gender as PSG Working Group [BIA sets briefing schedule in remanded Matter of A-B- proceedings]

Thanks for the update, (b)(6); (b)(7)(C) Have a good weekend.

From: (b)(6); (b)(7)(C)
Sent: Friday, November 15, 2019 6:04 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Gender as PSG Working Group [BIA sets briefing schedule in remanded Matter of A-B- proceedings]

*****SENSITIVE/PRIVILEGED***PRE-DECISIONAL***ATTORNEY WORK PRODUCT*****

(b)(5)

(b)(5)

Thanks and a good weekend ahead to all!

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732 (b)(6); (b)(7)(C)
E-mail: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C)
Sent: Wednesday, November 13, 2019 3:49 PM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: RE: Gender as PSG Working Group [BIA sets briefing schedule in remanded Matter of A-B- proceedings]

(b)(6); (b)(7)(C); (b)(5)

From (b)(6); (b)(7)(C)
Sent: Wednesday, November 13, 2019 11:45 AM
To: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Cc: (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Subject: Gender as PSG Working Group [BIA sets briefing schedule in remanded Matter of A-B- proceedings]
Importance: High

*****SENSITIVE/PRIVILEGED***PRE-DECISIONAL***ATTORNEY WORK PRODUCT*****

PSG/Gender Working Group Colleagues:

Just in time for the holidays!):

(b)(6); (b)(7)(C); (b)(5)

(b)(5)

Thx! (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (202) 732
E-mail: (b)(6); (b)(7)(C)

(b)(6);
(b)(7)(C)

From: Platt, Steven A
Sent: 11 Apr 2019 13:27:09 +0000
To: (b)(6); (b)(7)(C) ;Kent, Allison D;Ho, Cheri L;Jacobs, Elizabeth A;Zengotitabengoa, Colleen R;Whitney, Ronald W;Mazzochi, Sarah;Lay, Dorothea B (Thea);Hammill, Hunter A
Cc: (b)(6); (b)(7)(C) (b)(6); (b)(7)(C)
Subject: RE: Gender as PSG Working Group
Attachments: Gender as PSG Options Paper (ice-uscis working draft) 4-11-19.docx

Hi (b)(6); attached are USCIS's latest rounds of edits. In particular, please note (b)(6 edits to Option 5. Let us know if you have any questions. Thanks,

Steve

From: (b)(6); (b)(7)(C) @ice.dhs.gov>
Sent: Tuesday, April 02, 2019 1:18 PM
To: Platt, Steven A (b)(6); (b)(7)(C) @uscis.dhs.gov>; Kent, Allison D (b)(6); (b)(7)(C) @uscis.dhs.gov>; Ho, Cheri L (b)(6); @uscis.dhs.gov>; Jacobs, Elizabeth A (b)(6); (b)(7)(C) @uscis.dhs.gov>; Zengotitabengoa, Colleen R <(b)(6); (b)(7)(C) @uscis.dhs.gov>; Whitney, Ronald W (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @hq.dhs.gov>; Lay, Dorothea B (b)(6); (b)(7)(C) @uscis.dhs.gov>; Hammill, Hunter A <(b)(6); (b)(7)(C) @uscis.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6 (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @HQ.DHS.GOV>
Subject: RE: Gender as PSG Working Group

USCIS colleagues, I'll send out an invite in the next few minutes scheduling our telecon for tomorrow from 11-12Noon (which I know is a hard stop for some of you.) Stand by. Thx! (b)(6);

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (b)(6);
E-mail: (b)(6); @ice.dhs.gov

From: (b)(6); (b)(7)(C)
Sent: Wednesday, March 27, 2019 3:46 PM

To: Platt, Steven A (b)(6); (b)(7)(C)@uscis.dhs.gov>; Kent, Allison D (b)(6); (b)(7)(C)@uscis.dhs.gov>; Ho, Cheri L (b)(6); @uscis.dhs.gov>; Jacobs, Elizabeth A (b)(6); (b)(7)(C) @uscis.dhs.gov>; Zengotitabengoa, Colleen R (b)(6); (b)(7)(C) @uscis.dhs.gov>; Whitney, Ronald W (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) @hq.dhs.gov>; Lay, Dorothea B (b)(6); (b)(7)(C) @uscis.dhs.gov>; Hammill, Hunter A (b)(6); (b)(7)(C) @uscis.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @HQ.DHS.GOV>
Subject: RE: Gender as PSG Working Group

USCIS colleagues,

(b)(5)

I hope that plan is acceptable to all. Please let me know if you have any questions.

Many thx! (b)(6);

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (b)(6);
E-mail: (b)(6); @ice.dhs.gov

From: Platt, Steven A (b)(6); (b)(7)(C)@uscis.dhs.gov>
Sent: Monday, March 18, 2019 5:38 PM

To: (b)(6); (b)(7)(C) @ice.dhs.gov>; Kent, Allison D <(b)(6); @uscis.dhs.gov>; Ho, Cheri L <(b)(6); @uscis.dhs.gov>; Jacobs, Elizabeth A <(b)(6); (b)(7)(C) @uscis.dhs.gov>; Zengotitabengoa, Colleen R <(b)(6); (b)(7)(C) @uscis.dhs.gov>; Whitney, Ronald W <(b)(6); (b)(7)(C) @uscis.dhs.gov>; Lay, Dorothea B (Thea) <(b)(6); (b)(7)(C) @uscis.dhs.gov>; Hammill, Hunter A (b)(6); (b)(7)(C) @uscis.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(6); (b)(7)(C) @HQ.DHS.GOV>; (b)(6); (b)(7)(C) @hq.dhs.gov>; (b)(6); (b)(6); @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: RE: Gender as PSG Working Group

(b)(6); here are some thoughts from USCIS. Let us know if you'd like to schedule a call to discuss any of this. Thanks,

Steve

From: (b)(6); (b)(7)(C) @ice.dhs.gov>
Sent: Monday, March 11, 2019 11:39 AM
To: Kent, Allison D <(b)(6); @uscis.dhs.gov>; Ho, Cheri L (b)(6); @uscis.dhs.gov>; Jacobs, Elizabeth A <(b)(6); (b)(7)(C) @uscis.dhs.gov>; Zengotitabengoa, Colleen R (b)(6); (b)(7)(C) @uscis.dhs.gov>; Whitney, Ronald W (b)(6); (b)(7)(C) @uscis.dhs.gov>; Lay, Dorothea B (Thea) <(b)(6); (b)(7)(C) @uscis.dhs.gov>; Platt, Steven A <(b)(6); @uscis.dhs.gov>; Hammill, Hunter A (b)(6); (b)(7)(C) @uscis.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(6); (b)(7)(C) @HQ.DHS.GOV>; (b)(6); (b)(7)(C) @hq.dhs.gov>; (b)(6); (b)(6); @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: RE: Gender as PSG Working Group

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USCIS colleagues:

(b)(5)

(b)(5)

(b)(5); (b)(6); (b)(7)(C)

I hope this makes sense. Please let me know if you have any questions.

Many thanks! (b)(6);

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

Telephone: (b)(6);
E-mail: (b)(6); @ice.dhs.gov

From: Kent, Allison D
Sent: Friday, February 22, 2019 4:38 PM
To: Ho, Cheri L <(b)(6); @uscis.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; Jacobs, Elizabeth A <(b)(6); (b)(7)(C) @uscis.dhs.gov>; Zengotitabengoa, Colleen R <(b)(6); (b)(7)(C) @uscis.dhs.gov>; Whitney, Ronald W <(b)(6); (b)(7)(C) @uscis.dhs.gov>; Lay, Dorothea B (Thea) (b)(6); (b)(7)(C) @uscis.dhs.gov>; Platt, Steven A (b)(6); @uscis.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @HQ.DHS.GOV>; (b)(6); (b)(7)(C) @hq.dhs.gov>; Hammill, Hunter A (b)(6); (b)(7)(C) @uscis.dhs.gov>
Subject: RE: Gender as PSG Working Group

(b)(6); please find attached some edits and comments on the options paper. Thanks so much, and have a great weekend, all!
Allison

From: Ho, Cheri L <(b)(6); @uscis.dhs.gov>
Sent: Thursday, February 21, 2019 7:17 PM
To: (b)(6); (b)(7)(C) @ice.dhs.gov>; Jacobs, Elizabeth A <(b)(6); (b)(7)(C) @uscis.dhs.gov>; Zengotitabengoa, Colleen R <(b)(6); (b)(7)(C) @uscis.dhs.gov>; Whitney, Ronald W

(b)(6); (b)(7)(C) @uscis.dhs.gov>; Lay, Dorothea B (Thea) <(b)(6); (b)(7)(C) @uscis.dhs.gov>; Kent, Allison D <(b)(6); @uscis.dhs.gov>; Platt, Steven A (b)(6); (b)(7)(C) @uscis.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @HQ.DHS.GOV>; (b)(6); (b)(7)(C) @hq.dhs.gov>; Hammill, Hunter A (b)(6); (b)(7)(C) @uscis.dhs.gov>
Subject: RE: Gender as PSG Working Group

(b)(6); (b)(7)(C)

Thanks for touching base, and apologies for the delay. We are finalizing our review, and aim to get this back to you all tomorrow. Cheri

Cheri Ho
Associate Counsel
Refugee and Asylum Law Division
Office of the Chief Counsel, USCIS
(b)(6); @uscis.dhs.gov tel: (b)(6); (b)(7)(C)

From: (b)(6); (b)(7)(C) @ice.dhs.gov>
Sent: Thursday, February 21, 2019 11:25 AM
To: Jacobs, Elizabeth A <(b)(6); (b)(7)(C) @uscis.dhs.gov>; Zengotitabengoa, Colleen R (b)(6); (b)(7)(C) @uscis.dhs.gov>; Whitney, Ronald W (b)(6); (b)(7)(C) @uscis.dhs.gov>; Lay, Dorothea B (Thea) <(b)(6); (b)(7)(C) @uscis.dhs.gov>; Kent, Allison D <(b)(6); @uscis.dhs.gov>; Ho, Cheri L <(b)(6); @uscis.dhs.gov>; Platt, Steven A (b)(6); (b)(7)(C) @uscis.dhs.gov>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @HQ.DHS.GOV>; (b)(6); (b)(7)(C) @hq.dhs.gov>
Subject: RE: Gender as PSG Working Group

~~***SENSITIVE/PRIVILEGED***PRE-DECISIONAL***ATTORNEY WORK PRODUCT***~~

USCIS colleagues,

(b)(5)

Many thanks! (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Associate Legal Advisor
Office of the Principal Legal Advisor - Immigration Law & Practice Division

From: Platt, Steven A
Sent: Thursday, September 27, 2018 6:40 PM
To: (b)(6); (b)(7)(C) @hq.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @HQ.DHS.GOV>
Cc: (b)(6); (b)(7)(C) @ice.dhs.gov>; Jacobs, Elizabeth A (b)(6); (b)(7)(C) @uscis.dhs.gov>; Zengotitabengoa, Colleen R (b)(6); (b)(7)(C) @uscis.dhs.gov>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; Whitney, Ronald W (b)(6); (b)(7)(C) @uscis.dhs.gov>; Lay, Dorothea B (Thea) (b)(6); (b)(7)(C) @uscis.dhs.gov>; Kent, Allison D (b)(6); (b)(7)(C) @uscis.dhs.gov>; Allred, Esther R (b)(6); (b)(7)(C) @uscis.dhs.gov>; Ho, Cheri L (b)(6); @uscis.dhs.gov>; (b)(6); (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>; (b)(6); (b)(7)(C) @ice.dhs.gov>
Subject: RE: Gender as PSG Working Group

(b)(6); I've learned of another case, this one from an IJ. Please see attached. (I found it online; it came pre-redacted. Although it's redacted, (b)(6); has identified the alien as (b)(6); (b)(7)(C)

(b)(5)

(b)(6); says that the IJ grant was not appealed to the BIA.

Steve

From: (b)(6); (b)(7)(C) [mailto:(b)(6); (b)(7)(C) @ice.dhs.gov]
Sent: Wednesday, September 26, 2018 1:11 PM
To: (b)(6); (b)(7)(C) Jacobs, Elizabeth A; (b)(6); (b)(7)(C) Zengotitabengoa, Colleen R; (b)(6); (b)(7)(C) Whitney, Ronald W; Lay, Dorothea B (Thea); Kent, Allison D; Allred, Esther R; Ho, Cheri L; (b)(6); (b)(7)(C) (b) Platt, Steven A
Subject: RE: Gender as PSG Working Group

(b)(6); (b)(7)(C) apologies!

From: Jacobs, Elizabeth A
Sent: Thursday, April 19, 2018 12:46 PM
To: (b)(6); (b)(7)(C) @hq.dhs.gov<mailto:(b)(6); @hq.dhs.gov>>; Zengotitabengoa, Colleen R (b)(6); (b)(7)(C) @uscis.dhs.gov<mailto:(b)(6); (b)(7)(C) @uscis.dhs.gov>>; (b)(6); (b)(7)(C) <(b)(6); (b)(7)(C) @ice.dhs.gov<mailto:(b)(6); (b)(7)(C) @ice.dhs.gov>>; Allred, Esther R (b)(6); (b)(7)(C) @uscis.dhs.gov<mailto:(b)(6); (b)(7)(C) @uscis.dhs.gov>>
Cc: Davis, Mike P <(b)(6); @ice.dhs.gov<mailto(b)(6); @ice.dhs.gov>>; Loiacono, Adam V (b)(6); (b)(7)(C) @ice.dhs.gov<mailto(b)(6); (b)(7)(C) @ice.dhs.gov>>; (b)(6); (b)(7)(C) <(b)(6); (b)(7)(C) @HQ.DHS.GOV<mailto:(b)(6); (b)(7)(C) @HQ.DHS.GOV>>; (b)(6); (b)(7)(C) <(b)(6); (b)(7)(C) @ice.dhs.gov<mailto(b)(6); (b)(7)(C) @ice.dhs.gov>>; (b)(6); (b)(7)(C) (b)(6); @ice.dhs.gov<mailto:(b)(6); @ice.dhs.gov>>; (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) @cbp.dhs.gov<mailto:(b)(6); (b)(7)(C) @cbp.dhs.gov>>; (b)(6); (b)(6); (b)(7)(C) @ice.dhs.gov<mailto:(b)(6); (b)(7)(C) @ice.dhs.gov>>; (b)(6); (b)(7)(C) @HQ.DHS.GOV<mailto:(b)(6); @HQ.DHS.GOV>>; (b)(6); (b)(6); (b)(7)(C) @hq.dhs.gov<mailto(b)(6); (b)(7)(C) @hq.dhs.gov>>; Mazzochi, Sarah K (b)(6); (b)(7)(C) @uscis.dhs.gov<mailto:(b)(6); (b)(7)(C) @uscis.dhs.gov>>; Lay, Dorothea B (Thea) (b)(6); (b)(7)(C) @uscis.dhs.gov<mailto:(b)(6); (b)(7)(C) @uscis.dhs.gov>>; Ho, Cheri L (b)(6); @uscis.dhs.gov<mailto(b)(6); @uscis.dhs.gov>>; Whitney, Ronald W <(b)(6); (b)(7)(C) @uscis.dhs.gov<mailto(b)(6); (b)(7)(C) @uscis.dhs.gov>>; (b)(6); (b)(6); (b)(7)(C) @ice.dhs.gov<mailto(b)(6); (b)(7)(C) @ice.dhs.gov>>; (b)(6); (b)(6); (b)(7)(C) @ice.dhs.gov<mailto:(b)(6); (b)(7)(C) @ice.dhs.gov>>; Kent, Allison D <(b)(6); @uscis.dhs.gov<mailto:(b)(6); @uscis.dhs.gov>>; Groom, Molly M (b)(6); (b)(7)(C) @uscis.dhs.gov<mailto:(b)(6); (b)(7)(C) @uscis.dhs.gov>>
Subject: RE: Matter of A-B- Draft Brief

Hi everyone,

With regard to point one, (b)(5)

(b)(5)

Sent: Wednesday, April 18, 2018 11:48 AM
To: (b)(6); (b)(7)(C)
<(b)(6); (b)(7)(C) @ice.dhs.gov<mailto:(b)(6); (b)(7)(C) @ice.dhs.gov>>; Allred, Esther R
<(b)(6); (b)(7)(C) @uscis.dhs.gov<mailto:(b)(6); (b)(7)(C) @uscis.dhs.gov>>; (b)(6);
<(b)(6); @hq.dhs.gov<mailto:(b)(6); @hq.dhs.gov>>
Cc: Davis, Mike P <(b)(6); @ice.dhs.gov<mailto:(b)(6); @ice.dhs.gov>>;
Loiacono, Adam V
<(b)(6); (b)(7)(C) @ice.dhs.gov<mailto:(b)(6); (b)(7)(C) @ice.dhs.gov>>; (b)(6); (b)(7)(C)
<(b)(6); (b)(7)(C) @HQ.DHS.GOV<mailto:(b)(6); (b)(7)(C) @HQ.DHS.GOV>>; (b)(6); (b)(7)(C)
<(b)(6); (b)(7)(C) @ice.dhs.gov<mailto:(b)(6); (b)(7)(C) @ice.dhs.gov>>; (b)(6);
<(b)(6); (b)(7)(C) @ice.dhs.gov<mailto:(b)(6); @ice.dhs.gov>>; (b)(6); (b)(7)(C)
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Subject: RE: Matter of A-B- Draft Brief

In the meantime, USCIS is working on an offline version that will have our consolidated edits.

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Sent: Wednesday, April 18, 2018 11:13 AM
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Thx, (b)(6);

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I do not have access yet on Sharepoint either, unfortunately.
Thanks,
Allison

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Sent: Wednesday, April 18, 2018 10:43 AM
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(b)(6); (b)(7)(C)
Cc: Davis, Mike P; Loiacono, Adam V;(b)(6); (b)(7)(C)
Subject: RE: Matter of A-B- Draft Brief

Good morning everyone,

I still don't appear to have access. (I have reviewed the attachment but not able to place any Has anyone else from USCIS been able to successfully access the doc on SharePoint?

Thanks in advance for your help,

Liz

Elizabeth Jacobs
Senior Advisor | Office of the Chief Counsel
U.S. Citizenship and Immigration Services
U.S. Department of Homeland Security

[DHS ICON]

From: Zengotitabengoa, Colleen R
Sent: Tuesday, April 17, 2018 6:27 PM
To:(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C) Mazzochi, Sarah K; Whitney, Ronald W; Lay, Dorothea B (Thea); Ho, Cheri L; Kent, Allison D; Jacobs, Elizabeth A; Allred, Esther R;(b)(6); (b)(7)(C)
Cc: Davis, Mike P; Loiacono, Adam V; (b)(6); (b)(7)(C)
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Thanks, (b)(6) We'll add our USCIS edits into the document on the collaboration site.

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(b)(6); Mazzochi, Sarah K; Whitney, Ronald W; Lay, Dorothea B (Thea); Ho, Cheri L; Kent, Allison D; Zengotitabengoa, Colleen R; Jacobs, Elizabeth A; Allred, Esther R; (b)(6); (b)(7)(C)
Cc: Davis, Mike P; Loiacono, Adam V; (b)(6); (b)(7)(C)
Subject: RE: Matter of A-B- Draft Brief

All:

I just heard back from my contact at DHS, who is adding all of you to the site now, so you should be good to edit on the collaboration site tonight.

I'd also note that you'll want to confirm that your edits are saving, and I recommend saving a copy to your desktop when you're done, just in case. Generally, it's worked flawlessly, but we had a couple of issues with the document not saving conflicting edits. It notes in the bottom right-hand corner of the page if your edits did not successfully save.

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NON-DETAINED[1]

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

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No.: (b)(6); (b)(7)(C)
In withholding-only proceedings	)	

DEPARTMENT OF HOMELAND SECURITY
BRIEF ON REMAND

[1] The applicant was removed from the United States on or about August 5, 2019.

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INTRODUCTION

On January 31, 2019, the Immigration Judge granted the applicant withholding of removal, finding that the violence the applicant suffered at the hands of her former spouse was on account of the applicant's membership in the group "Mexican women who terminate the marriage without the consent of the husband." The Department of Homeland Security (Department) timely appealed the Immigration Judge's decision and, on July 25, 2019, the Board of Immigration Appeals (Board) sustained the Department's appeal and vacated the Immigration Judge's decision. While the applicant did not file an appeal of the Immigration Judge's decision, she did file a petition for review of the Board's decision with the United States Court of Appeals for the Tenth Circuit (Tenth Circuit). *See Rios Bamac v. Barr*, No. 19-9559 (10th Cir. remanded Feb. 6, 2020). On February 6, 2020, the United States government moved to remand the case from the Tenth Circuit to the Board. *Id.*

The Department hereby submits its brief on remand in support of its appeal of the Immigration Judge's decision granting the applicant withholding of removal pursuant to section 241(b)(3) of the Immigration and Nationality Act (INA or Act). On remand, the Board should find that the applicant has waived her opportunity to challenge any aspect of the Immigration Judge's decision and, alternatively, the Board should uphold the Immigration Judge's decision to the extent it rejects the applicant's initial six proposed particular social groups. However, the Board should again reverse the decision of the Immigration Judge granting withholding. The Board should, finally, find that the Immigration Judge correctly denied the applicant's request for protection pursuant to the regulations implementing the United States government's obligation under Article 3 of the United Nations Convention Against Torture (CAT).

(b)(6); (b)(7)(C)

The Department requests that this case be reviewed by a three-member panel given the need to review a decision by an Immigration Judge not in conformity with existing law or applicable precedent, the need to review clearly erroneous factual determinations, and the need to reverse a decision of an Immigration Judge not arising under 8 C.F.R. § 1003.1(e)(5). *See* 8 C.F.R. § 1003.1(e)(6)(iii), (v), (vi).

ISSUES PRESENTED

- Whether the applicant, who did not file a separate appeal and who moved to summarily affirm the Immigration Judge's decision, waived her right to challenge any aspect of the underlying order?

- Whether the applicant failed to show that she was harmed on account of her membership in the particular social group, "Mexican women," where she did not present evidence that her former spouse targeted her in order to overcome her membership in that group?

- Whether the Immigration Judge erred in determining that the applicant's proposed social group, "Mexican women who terminate the marriage without the consent of the husband," was cognizable where the applicant did not present any evidence that the group was recognized throughout Mexican society?

- Whether the Immigration Judge erred in determining that the applicant was harmed on account of her membership in the particular social group, "Mexican women who terminate the marriage without the consent of the husband," where she did not present evidence that her former spouse targeted her in order to overcome her membership in that group?

- Whether the Immigration Judge erred in finding that the government of Mexico was unable or unwilling to protect the applicant, despite the applicant being afforded a civil divorce?

- Whether the Immigration Judge erred in shifting the burden to the Department to show a change in country conditions, despite the applicant not showing past persecution?

STANDARD OF REVIEW

The Board reviews findings of fact, including "predictive findings of what may or may not occur in the future," for clear error. *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015); 8

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C.F.R. § 1003.1(d)(3)(i). The Board reviews de novo "questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges." *Z-Z-O-*, 26 I&N Dec. at 588; 8 C.F.R. § 1003.1(d)(3)(ii). The Board's de novo review authority includes "whether the underlying facts found by the [i]mmigration [j]udge meet the legal requirements for relief from removal . . . ." *Z-Z-O-*, 26 I&N Dec. at 591. The Board also reviews de novo the questions of whether a group is a particular social group within the meaning of the Act, *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018), and "whether . . . respondents were persecuted 'on account of a protected ground,'" *see Matter of S-E-G-*, 24 I&N Dec. 579, 588 n.5 (BIA 2008).

Whether an applicant is a member of a particular social group, as well as the underlying requirements to establish a cognizable particular social group, such as social distinction, necessarily involve fact-finding. *Id.* at 192. Similarly, a persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by the Board for clear error. *See Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011).

Finally, whether the applicant can internally relocate within his or her home country is a mixed question of fact and law. *See Matter of M-Z-M-R-*, 26 I&N Dec. 28, 36 (BIA 2012).

SUMMARY OF THE ARGUMENT

The applicant bears the burden of proof to establish that her life or freedom would be threatened in the country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 1208.16(b).

In this case, the applicant waived her opportunity to challenge any aspect of the Immigration Judge's decision, first by electing not to file an appeal and, second, by moving to summarily affirm the Immigration Judge's decision. However, even if the applicant did not waive her right to challenge the Immigration Judge's decision, the applicant has not met her

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burden of showing that her membership in the proposed particular social group of "Mexican women" was one central reason for the harm she experienced at the hands of her husband over twenty years ago.

The Immigration Judge, however, did err in finding that "Mexican women who terminate the marriage without the consent of the husband" constitutes a cognizable particular social group under the Act. When an applicant seeks withholding, she must "establish that the group is composed of members who share a common immutable characteristic, defined with particularity, and socially distinct within the society in question." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014). The applicant's particular social group is not defined with particularity, and the record does not establish that this group is socially distinct within Mexico. Further, even if the particular social group is cognizable, the Immigration Judge erred in concluding that the applicant's particular social group was at least one central reason for the harm she fears from a private actor, her former husband. The record demonstrates that the applicant was subjected to spousal abuse in the 1990s. However, there is no evidence in the record that the applicant's former spouse targeted her on account of her inclusion in the group "Mexican women who terminate the marriage without the consent of the husband."

Moreover, the Immigration Judge erred in finding that the Mexican government would be unable or unwilling to protect the applicant. The applicant never personally reported any harm to the police. And, when the applicant did civilly seek assistance from the Mexican government, the Mexican legal system gave her the divorce she requested.

Finally, the Immigration Judge erred in finding past persecution on the basis of a protected ground, and so erred in shifting the burden to the Department to show that there has been no fundamental change in circumstances and that internal relocation is not possible.

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Further, even if there was past persecution, the Immigration Judge erred in finding that the Department had not established that there has been a fundamental change in circumstances and that internal relocation is possible and reasonable.

STATEMENT OF FACTS

The applicant is a forty-two-year-old native and citizen of Mexico. Tr. at 18–19. She first came to the United States without authorization in 1999 but was apprehended by immigration authorities and returned to Mexico. Tr. at 22–23. She did not seek asylum at that time, though she claimed at her hearing before the Immigration Judge that she was then fleeing for her life. Tr. at 34. The applicant returned to the United States a week later. Tr. at 23. She did not testify about where in Mexico she was during that week. Again, she did not seek asylum when she entered the United States. Instead, she remained in the United States until July 4, 2005, returning to Mexico on her own volition to see her grandmother. Tr. at 23. She then remained in Mexico for approximately two weeks before returning to the United States. Tr. at 42.

The applicant testified that she attempted to enter the United States twice in 2005. Tr. at 24; Exh. 1.[2] According to the applicant, "The first time I came, I was caught, and the second time I came, I managed to get through." Tr. at 24. Again, she did not seek asylum when she entered the United States in 2005. Department officers most recently encountered the applicant in the United States on July 27, 2018. Exh. 1. The Department determined that the applicant had illegally entered the United States and, accordingly, reinstated the prior order of removal pursuant to section 241(b)(5) of the Act. *Id*. The applicant claimed fear of persecution or torture if removed to Mexico and her case was referred to the Asylum Office pursuant to 8 C.F.R. §

[2] According to Department records, the applicant unsuccessfully attempted to enter the United States twice in 2005—once on July 18, 2005, and again on July 22, 2005. *See* Exh. 1.

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208.31(b). Exh. 1; I.J. at 1. On October 22, 2019, the applicant submitted Form I-589, Application for Asylum and Withholding of Removal, for consideration in withholding-only proceedings pursuant to 8 C.F.R. § 1208.31(g). Tr. at 7–9; I.J. at 2.

On January 28, 2019, the applicant appeared for her individual merits hearing where the applicant and her mother both testified. Tr. at 10–89; I.J. at 2. The applicant testified that she was physically abused in Mexico by her now ex-husband from approximately 1992 until their divorce in 1999. Tr. at 24–31, 39. The abuse included physical and sexual assaults. Tr. at 24–31, 39. She stated that she was beaten at least three times a week, every week for seven years. Tr. at 49. She further stated he would lock her in a room when he was not home. Tr. at 22. The applicant admitted that she never sought medical assistance at any time and that she never reported the abuse to the authorities in Mexico. Tr. at 30, 32, 49–50. The applicant never attempted to report the abuse to the police, testifying vaguely that the police do not "do anything." Tr. at 37. Her mother testified that she had made complaints to the police, but that nothing was done by them; the police purportedly told her that they could not do anything because there was "no blood." Tr. at 59–62. The applicant's mother did not provide any documentary evidence of any reports filed and could not provide dates on which she went to the police. She did not inform the applicant of any reports or ask the applicant to assist in filing any reports with information regarding the crimes. Tr. at 44, 59–62.

In 1999, the applicant was able to obtain a divorce from her husband from the civil authorities in Mexico. Tr. 22, 33, 40–41; I.J. at 7. She stated that she decided to leave him because she caught him with another woman after returning from the store. Tr. at 33, 40. When the Department asked, "You were able to leave?", she replied, "Yes, sir." Tr. at 40. She initially testified on direct examination that when the divorce was final, her former spouse got angry and

started threatening her, but that the physical abuse all happened before the divorce. Tr. at 41. However, when questioned by the Immigration Judge, she stated that her former spouse attacked her and choked her the day she signed the divorce decree. Tr. at 48. Once the divorce was finalized, the physical abuse stopped. Tr. at 41; I.J. at 7. After the divorce, the applicant resided with her mother in Mexico and allegedly received threats from her former spouse. I.J. at 7. The applicant moved to live with her uncle in Veracruz, approximately eighteen hours away from the applicant's hometown Chiapas; but allegedly she continued to receive threats while living with her uncle. I.J. at 8. However, the applicant's former spouse did not travel to Veracruz and did not commit any acts of violence against her. I.J. at 8.

The applicant returned to Mexico of her own volition in 2005. Tr. at 44, 59–62. She stated that while she was in Mexico in 2005, she received one threatening call from her ex-husband. Tr. at 42–43. He never made any attempt at physical contact with her and never physically harmed her while she was back in Mexico during that time. Tr. at 44. The applicant stated that she does not know where her former spouse is now and that she has not personally received any threats from him since 2005. Tr. at 53–54. She believes he has children with another woman. Tr. at 54. The applicant's mother, siblings, and children reside in the United States lawfully; her father resides in Mexico. Tr. at 19–21. The applicant's mother testified that, between 2014 and 2018, the mother would return once a year to Mexico to see friends. Tr. at 72–72. During these trips, the applicant's former spouse would make makes vague threats about the applicant. Tr. at 72.

In his written decision, the Immigration Judge granted the applicant's application for withholding of removal and denied applicant's request for protection under the CAT. The Immigration Judge held that "the applicant's execution of the divorce without the consent of her

husband was at least one central for the harm and threats she experienced." I.J. at 16. The Immigration Judge noted that the applicant defined her particular social group as "Mexican women who terminate the marriage without the consent of the husband." I.J. at 15.[3] The Immigration Judge found the group is "sufficiently socially distinct" because "Mexican women would generally understand their own affiliation in this group, based on socially construed categories such as nationality and gender." I.J. at 12. The Immigration Judge noted that membership in the group includes only woman who are Mexican and requires that they have terminated a marriage without the consent of their spouse. The Immigration Judge further found that the applicant's execution of the divorce "was viewed as an act of defiance" and is particularly compelling given the former partner's "ability to control all aspects of the applicant's life." I.J. at 16. The Immigration Judge concluded that the former partner "still holds a vendetta against the applicant for divorcing him and would seek to harm her because of it." *Id.* The Department filed a timely appeal of the Immigration Judge's decision. The applicant did not appeal.

On July 25, 2019, the Board sustained the Department's appeal. *See* Dec. of the Board of Immigration Appeals at 4 (July 25, 2019). The Board noted, "The applicant did not file an appeal of the Immigration Judge's decision denying her application for protection under the Convention Against Torture" or "challenging the Immigration Judge's findings and conclusions with regard to other proposed social group definitions and her claim of political persecution" and that those issues were, therefore, waived. *Id.* at 1 n. 1, 2. Therefore, the Board limited its review to the Immigration Judge's analysis of the proposed social group consisting of "Mexican women

[3] As the Immigration Judge noted, the applicant initially outlined six proposed particular social groups. I.J. at 10; I.J. at 10 n.3; Tr. at 15–16. It was not until the end of the hearing that the Immigration Judge and the applicant agreed to the newly formulated particular social group which the Immigration Judge then found to be cognizable. Tr. at 84.

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who terminate the marriage without the consent of the husband." *Id.* at 1. The Board first found that the proposed social group of "Mexican women who terminate the marriage without the consent of the husband" was not a cognizable particular social group for purposes of withholding of removal under the Act. *Id.* at 2–3. The Board, further, found "the Immigration Judge clearly erred in finding that the applicant suffered persecution, and faces a clear probability of future persecution, on account of her membership in a group of 'Mexican women who terminate the marriage without the consent of the husband.'" *Id.* at 3.

On August 16, 2019, the applicant filed a petition for review with the Tenth Circuit. *Rios-Bamac*, No. 19-9559. On February 6, 2020, the Tenth Circuit granted the United States government's motion to remand the case to the Board. *Id.*; *see also* Order, No. 19-9559 (10th Cir. Feb. 6, 2020) ECF No. 30. In granting the motion for remand, the Tenth Circuit noted, "This matter is remanded fully to the [Board] to conduct any and all additional proceedings it deems necessary and appropriate to address the matters raised in the Motion." *Id.*

ARGUMENT

I. THE APPLICANT WAIVED HER RIGHT TO CHALLENGE ANY FINDING IN THE IMMIGRATION JUDGE'S DECISION

"The Board is an appellate body whose function is to review, not to create a record." *Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984). In its role as an appellate body, the Board relies on the parties to advance arguments both before the immigration judge in the first instance, and before the Board where the parties disagree with the ultimate findings of the immigration judge.

In this case, the applicant did not appeal any aspect of the Immigration Judge's decision in her case. The applicant did not, for instance, appeal the Immigration Judge's finding that "[t]he applicant has provided *one viable protected ground*, which is the particular social group

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defined as: 'Mexican women who terminate the marriage without the consent of the husband,'" I.J. at 10 (emphasis added), or that "the applicant has failed to propose *any other* cognizable group or protected ground," I.J. at 12 (emphasis added). The Immigration Judge reached this conclusion after listing each of the applicant's six other proposed social groups, including, "Mexican women." I.J. at 2; *see also* I.J. at 12–14 (discussing the applicant's other proposed social groups and the applicant's political opinion). Nor did the applicant challenge the Immigration Judge's decision to "decline[] to address whether the applicant's proposed particular social group defined as, 'Mexican women,' is a valid particular social group" or the conclusion that "the harm the applicant experienced was on account of the applicant's alternative group: 'Mexican women who terminate the marriage without the consent of the husband.'" I.J. at 15 n. 4. The applicant, likewise, did not appeal the Immigration Judge's finding that she was ineligible for protection under the CAT. I.J. at 25.

Rather, on May 10, 2019, the applicant moved for summary affirmance of the Immigration Judge's decision. *See* Motion for Summary Affirmance and Brief in Opposition to DHS Appeal (May 10, 2019) (Mot. for Sum. Aff.). The regulations permit a Board member to summarily affirm the decision of an immigration judge where the "issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation" and the "factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case." 8 C.F.R. §§ 1003.1(e)(4)(i)(A)–(B). Where the Board summarily affirms the decision of an immigration judge, the immigration judge's decision becomes the final agency determination. *Id.* § (e)(4)(ii). Accordingly, where a party on appeal moves to summarily affirm the decision of an immigration judge, the moving party is necessarily agreeing that the immigration judge reached the correct

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decision "such that any errors in the decision of the immigration judge . . . were harmless or nonmaterial." *Id.*

While the Board ultimately denied the applicant's motion for summary affirmance and sustained the Department's appeal, in moving for summary affirmance of the Immigration Judge's decision, the applicant was necessarily requesting that the Board affirm the Immigration Judge's conclusions, including the conclusion that"[t]he applicant has provided one viable protected ground, which is the particular social group defined as: 'Mexican women who terminate the marriage without the consent of the husband," I.J. at 10, and "the applicant has failed to propose any other cognizable group or protected ground," I.J. at 12. Thus, the applicant cannot now resuscitate a particular social group consisting of "Mexican women" simply because she received an adverse decision from the Board.

Indeed, in her motion for summary affirmance, the applicant "note[d] that the [Immigration Judge] did not reach a finding as to whether [applicant's] proposed PSG, 'Mexican women' is a cognizable PSG." Mot. for Sum. Aff. at 9. The applicant, however, did not expand on this note and, instead, returned to arguments regarding the alternative PSG, "Mexican women who terminate the marriage without consent of the husband." *See, generally, id.*

Having failed to appeal the Immigration Judge's decision or to raise these arguments before the Board in her motion for summary affirmance, the respondent's arguments should be deemed waived. *See, e.g., Matter of J-Y-C-*, 24 I&N Dec. 260, 261 n.1 (BIA 2007) (matters not raised before the Immigration Judge are waived on appeal); *Matter of R-S-H-*, 23 I&N Dec. 629, 638 (BIA 2003) (same); *see also* INA § 242(d) (requiring exhaustion of administrative remedies for federal court review of final orders); *United States v. Black*, 369 F.3d 1171, 1176 (10th Cir.

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2004) (legal issues not raised in opening brief are deemed waived). The applicant, therefore, is precluded from arguing on remand that the PSG, "Mexican women," is legally cognizable.

II. THE APPLICANT HAS NOT SHOWN THAT SHE WAS PERSECUTED ON ACCOUNT OF HER MEMBERSHIP IN A PARTICULAR SOCIAL GROUP CONSISTING OF "MEXICAN WOMEN."

Assuming, *arguendo*, the Board finds that the applicant has not waived her opportunity to challenge the Immigration Judge's decision, the applicant has not met her burden of showing that she was harmed on account of her membership in the PSG "Mexican women."

A. The Board does not need to remand this case to the Immigration Judge.

A persecutor's actual motive is a matter of fact to be determined by the immigration judge and reviewed by the Board for clear error. *See N-M-*, 25 I&N Dec. at 532. However, the Board's de novo review authority includes "whether . . . respondents were persecuted 'on account of a protected ground.'" *S-E-G-*, 24 I&N Dec. at 588 n.5.

In this case, the Immigration Judge reached a factual conclusion that the applicant's ex-husband harmed her on account of her membership in a particular social group consisting of "Mexican women who terminate the marriage without the consent of the husband." I.J. at 10, 15–17. The Immigration Judge acknowledged that "the majority of the emotional and physical abuse that the applicant endured was prior to her divorce, *and therefore has no nexus to a protected ground*." I.J. at 15 (emphasis added).[4] However, the Immigration Judge went on to find that the "applicant's execution of the divorce without the consent of her husband was at least 'one central reason' for the harm and threats she experienced." I.J. at 16. Thus, the Immigration Judge has reached a factual conclusion regarding the purported persecutor's actual motive, which the Board can review for clear error. The Board, further, can review de novo whether the

[4] Again, as noted above, the applicant did not appeal this finding by the Immigration Judge.

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Immigration Judge erred in concluding that the applicant was harmed on account of the particular social group.

Accordingly, the record in this case is complete, no additional fact-finding is necessary, and the Board can review the Immigration Judge's factual and legal conclusions based upon the record before it.

B. The applicant did not meet her burden of showing that she was harmed "on account of" her membership in the proposed social group, "Mexican women."

An applicant seeking withholding of removal must demonstrate that it is more likely than not that, upon removal, his or her life or freedom would be threatened on account of his or her race, religion, nationality, political opinion, or membership in a particular social group. INA § 241(b)(3). To demonstrate that harm was "on account of" a protected ground, the applicant must show that the protected characteristic was "one central reason" for the harm. *See* INA § 241(b)(3); *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F. 3d 641, 646 (10th Cir. 2012); *Matter of C-T-L-*, 25 I&N Dec. 341, 348 (BIA 2010). The protected ground cannot play a minor role in the persecution, nor can it be "incidental, tangential, superficial, or subordinate to another reason for the harm." *Karki v. Holder*, 715 F.3d 792, 800 (10th Cir. 2013) (citations omitted); *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010). The applicant must show that the persecutor sought to "overcome" the protected characteristic. *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985); *cf. Matter of E-R-A-L-*, 27 I&N Dec. 767, 774 (BIA 2020) (affirming the continued focus on a persecutor's attempt to "overcome" the protected characteristic).

Private criminal victimization, including domestic violence, even when widespread in nature, is insufficient to establish eligibility statutory withholding of removal. *See, e.g.*, *Matter*

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of A-B-, I&N Dec. 316, 320 (A.G. 2018) ("The mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim"); *M-E-V-G-*, 26 I&N Dec. at 235 ("asylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions"); *see generally Matter of Mogharrabi*, 19 I&N Dec. 439, 447 (BIA 1987) ("aliens fearing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval in their countries, would not qualify for asylum."). Thus, "claims by aliens pertaining to domestic violence . . . perpetrated by non-governmental actors will," generally, "not qualify for asylum" or statutory withholding of removal. *A-B-*, 27 I&N Dec. at 320.

In this case, while the applicant testified at length about the abuse she suffered at the hands of her former husband, *see* Tr. at 26–31, she did not present evidence that he was attempting to overcome her membership in a social group composed of "Mexican women."[5] For instance, the applicant testified that, when she and her ex-husband were first married, they lived together as a couple with the applicant's mother. Tr. at 25–27. However, the applicant did not testify that her former husband was abusive toward the applicant's mother, who was also a woman living in Mexico. She and her mother testified to one incident where the applicant's mother witnessed a physical altercation between the applicant and her ex-husband. Tr. at 27 (applicant's testimony), 58 (applicant's mother's testimony). The applicant's mother attempted to intervene, but the applicant's ex-husband "closed the door on [the applicant's mother] with his foot, and [she] tried to put [her] hand in, and he ended up smashing [her] finger." Tr. at 57.

[5] The Board need not address whether "Mexican women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach).

However, neither the applicant nor her mother insinuated that her mother was harmed for any particular reason, and the testimony strongly suggests the applicant's former husband was attempting to prevent her mother's entry to the room.

Similarly, the applicant testified that when her ex-husband "was in a good mood" he would "coddle" their daughter. Tr. at 32. And, while she also testified that he would tell the applicant to "get [their daughter] away from here, remove her," Tr. at 32, she did not testify that he harmed their daughter. Indeed, when asked by the Immigration Judge, "despite him not wanting you to have your daughter, he still cared about your daughter, is that right?" the applicant responded, "That's what he would say." Tr. at 51–52. Further, both the applicant and her mother testified that the applicant's former husband was incensed that the applicant was awarded custody of their daughter. The applicant explained: "When I was awarded the custody of my daughter. He said that he was going to make sure that my daughter didn't stay with me . . .." Tr. at 48. Similarly, when asked what she thought was the reason for her ex-husband's threatening and harmful conduct post-divorce, the applicant indicated that it was because her ex-husband was and always will be violent and abusive, and he wants to take revenge because she took their daughter. Tr. at 36–38, 48.

Thus, the applicant did not show that her spouse held generalized animosity toward other "Mexican women." Nor did she show that her former husband was attempting to overcome the applicant's status as a "Mexican woman." Therefore, the applicant did not meet her burden of showing a nexus between her husband's deplorable conduct and her membership in the particular social group.

III. THE IMMIGRATION JUDGE ERRED IN FINDING THAT THE APPLICANT'S PROPOSED SOCIAL GROUP OF "MEXICAN WOMEN WHO TERMINATE THE MARRIAGE WITHOUT THE CONSENT OF THE HUSBAND" WAS A COGNIZABLE PARTICULAR SOCIAL GROUP UNDER THE ACT.

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Where an applicant seeks withholding of removal under INA § 241(b)(3) as a member of a particular social group, the applicant "must establish that the group is composed of members who share a common immutable characteristic, defined with particularity, and socially distinct within the society in question." *M-E-V-G-*, 26 I&N Dec. at 237. If the applicant fails to establish a cognizable particular social group, the "immigration judge or Board need not examine the remaining elements of the [withholding] claim." *A-B-*, 27 I&N Dec.at 340. It is the applicant's burden to clearly indicate on the record before the Immigration Judge the exact delineation of the proposed particular social group. *See W-Y-C- & H-O-B-*, 27 I&N Dec. at 191 (citing *Matter of W-G-R-*, 26 I&N Dec. at 209-10 (BIA 2014)).

The Board has established a three-pronged test for determining when a proposed particular social group is cognizable. The applicant must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *A-B-*, 27 I&N Dec. at 320 (citing *M-E-V-G-*, 26 I&N Dec. at 234, 237); *see also Matter of L-E-A-*, 27 I&N Dec. 40, 42 (BIA 2017), *overruled on other grounds by Matter of L-E-A-*, 27 I&N Dec. 581, 596–97 (A.G. 2019); *W-G-R-*, 26 I&N Dec. at 210–12. To be cognizable, the particular social group must exist independently of the harm alleged in the application. *A-B-*, 27 I&N Dec. at 334-35. Social group determinations are made on a case-by-case basis. *L-E-A-*, 27 I&N Dec. at 42 (BIA 2017); *M-E-V-G-*, 26 I&N Dec. at 251; *Acosta*, 19 I&N at 233. The applicant's proposed particular social group, "Mexican women who terminate the marriage without the consent of the husband" fails under this test.

First, the proposed group lacks particularity. The particularity requirement addresses "the question of delineation," and "clarifies the point . . . that not every 'immutable

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characteristic' is sufficiently precise to define a particular social group." *W-G-R-*, 26 I&N Dec. at 214. Particularity requires that the "terms used to describe the group [must] have commonly accepted definitions in the society of which the group is a part." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2008)). The group must have "discrete and [] definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." *M-E-V-G-*, 26 I&N Dec. at 239 (citations omitted). To meet the particularity requirement, the proposed group must "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." *Matter of E-A-G-*, 24 I&N Dec. 591, 594 (BIA 2008). Further, social groups defined by their vulnerability to private criminal activity likely lack the particularity requirement under *M-E-V-G-*. *A-B-*, 27 I&N Dec. at 335.

The applicant failed to articulate her particular social group such that it has defined boundaries; therefore, it lacks particularity. More specifically, the applicant's particular social group—"Mexican women who terminate the marriage without the consent of the husband"—fails to describe "a discrete class of persons." *W-G-R-*, 26 I&N Dec. at 214. The Immigration Judge noted that membership in the group is limited to only woman who are Mexican and requires that they have terminated a marriage without the consent of their spouse. The fact that the group includes divorced women whose spouses did not agree to the divorce and does not include men or single women does not establish that "Mexican women who terminate the marriage without the consent of the husband" is a group "with 'well defined boundaries' delineating who does and does not belong." I.J. at 13–14 (quoting *S-E-G-*, 24 I&N Dec. at 582). Adding gender and nationality modifiers to the group gives only the illusion of particularity. The applicant's group does not sufficiently delineate who does and does not belong.

Second, there is no evidence in the record that "Mexican women who terminate the marriage without the consent of the husband" has a commonly accepted definition in Mexican society or that Mexican society recognizes that group as set apart in any way and it is, therefore, not socially distinct. *See M-E-V-G-*, 26 I&N Dec. at 239. Social distinction "considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way." *M-E-V-G-*, 26 I&N Dec. at 238. "In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it." *Id.* The recognition of the group is "determined by the perception of the society in question, rather than by the perception of the persecutor." *Id.* at 242; *see also W-G-R-*, 26 I&N Dec. at 214 (noting there is some degree of overlap between the particularity and social distinction requirements because both take societal context into account).

The Immigration Judge found the group is "sufficiently socially distinct," finding that "Mexican women would generally understand their own affiliation in this group, based on socially construed categories such as nationality and gender." However, again, the inclusion of nationality and gender only give the illusion of social distinction. The applicant did not provide any evidence that Mexican society, in general, recognizes the proposed group or would be able to identify her as a member of the proposed group.

Therefore, because the applicant failed to articulate a cognizable particular social group, the applicant failed to meet her burden of proof.

IV. THE IMMIGRATION JUDGE ERRED IN FINDING THAT THE HARM THE APPLICANT SUFFERED BY HER FORMER HUSBAND WAS ON ACCOUNT OF THE PARTICULAR SOCIAL GROUP OF "MEXICAN WOMEN WHO TERMINATE THE MARRIAGE WITHOUT THE CONSENT OF THE HUSBAND."

To demonstrate that harm was "on account of" a protected ground, the applicant must show that the protected characteristic was "one central reason" for the harm. *See* INA § 241(b)(3). The applicant must show that the persecutor sought to "overcome" the protected characteristic. *Acosta*, 19 I&N Dec. at 222. "[C]laims by aliens pertaining to domestic violence . . . perpetrated by non-governmental actors will," generally, "not qualify for asylum" or statutory withholding of removal. *A-B-*, 27 I&N Dec. at 320.

The applicant failed to establish a nexus between the harm she fears and her status as a member of the particular social group consisting of "Mexican women who terminate the marriage without the consent of the husband." The Immigration Judge found past persecution based on the harm inflicted on the applicant before she got divorced in 1999. After the day of the divorce, however, the former spouse did not harm the applicant—he merely contacted her with vague threats, which were never acted upon. Threats alone do not generally constitute persecution. *Vatulev v.* Ashcroft, 354 F.3d 1207, 1209–10 (10th Cir. 2003). Rather, the Immigration Judge found that the pre-divorce harm (the abuse and imprisonment) rose to the level of persecution and, in a footnote, found that the harm experienced after the divorce (the choking the day of the divorce and the threats after) also rose to the level of persecution since the applicant had been previously abused before the divorce. In so doing, the Immigration Judge acknowledged that the pre-divorce harm was not on account of the proposed particular social group, but still used the one to bootstrap the other. However, any harm suffered by the applicant was at the hands of her now ex-husband at a time prior to her membership in the named group. After she returned to Mexico in 2005 (voluntarily once and by removal twice), the only incident involving her former husband was her receipt of a telephone call, in which he made what she

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considered to be a threat, with no follow-up or action. This was approximately fourteen years ago, and six years after the physical abuse ceased.

Further, all of the harm committed against the applicant and feared by the applicant was committed by her former husband. "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *A-B-*, 27 I&N Dec. at 320. The same principle applies to withholding claims. The applicant provided no evidence that her former spouse was motivated by any other reason than the nature of their relationship or that he was generally hostile to Mexican women who terminate their marriages without the consent of their husbands as a group. *A-B-*, 27 I&N Dec. at 339. To be sure, the applicant may have been the victim of crimes committed by her former spouse when they were married and the day of the divorce, but those relationship-based crimes are insufficient to establish eligibility for withholding.

Because the applicant failed to establish that her former spouse was motivated by any reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the proposed particular social group.

V. THE IMMIGRATION JUDGE ERRED IN FINDING THAT THE GOVERNMENT OF MEXICO IS UNABLE OR UNWILLING TO CONTROL THE APPLICANT'S FORMER SPOUSE

Where the alleged persecutor is unaffiliated with the government, the applicant must show that the government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993); *A-B-*, 27 I&N Dec. at 319. In instances where the applicant is a victim of private criminal activity, "the analysis must also 'consider whether government protection is available.'" *A-B-*, 27 I&N Dec. at 320 (quoting *M-E-V-G-*, 26 I&N Dec. at 243). Relevant factors include both "the government's response" to the claimed

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persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470, 476 (6th Cir. 2019). "No country provides its citizens with complete security from private criminal activity, and perfect protection is not required." *A-B-*, 27 I&N Dec. at 343. An applicant "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *Id.* at 338; *see also Matter of O-F-A-S-*, 27 I&N Dec. 709, 722 (BIA 2019) (a failure to report to the police is generally fatal to a persecution claim "unless the alien can show it would be futile to make a report").

The record here does not establish that the police were unwilling to assist the applicant; at most it establishes that they did have enough evidence that a crime had been committed to prompt an investigation. The applicant herself never reported any crime to the authorities in Mexico. Tr. at 30, 32, 49–50. She stated that she was "constantly locked in that room, how could I go?" But she did leave that room, go to the store, return to discover her then-spouse involved in extramarital relations with another woman, separate from him, and file for and obtain her divorce, all without providing any explanation for that contradiction or for why she did not at any time during that period go to the police. Tr. at 33. Her only explanation for her failure to report her former spouse's abuse was that the police do not "do anything." Tr. at 37.

While the applicant's mother testified that she had made complaints to the police, but that nothing was done by them; they police purportedly told her that they could not do anything because there was "no blood"; that is, there was no evidence of a crime. Tr. at 62. The applicant's mother provided no documentary evidence of any reports filed; in fact, she could not even provide dates on which she went to the police. She did not inform the applicant of any reports or ask the applicant to assist in filing any reports with information regarding the crimes. Tr. at 44, 59–62.

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This is insufficient for the applicant to meet her burden to show that the government of Mexico was or is unable or unwilling to assist the applicant. As such, the Immigration Judge erred in finding that she met her burden.

VI. THE IMMIGRATION JUDGE ERRED SHIFTING THE BURDEN TO THE DEPARTMENT TO ESTABLISH A FUNDAMENTAL CHANGE IN CIRCUMSTANCES OR THE ABILITY TO RELOCATE WITHIN MEXICO.

If an applicant is determined to have suffered past persecution in the proposed country of removal on account of one of the five protected grounds, it is presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. 8 C.F.R. § 1208.16(b)(1)(i). This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence that there has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of a protected ground; or that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. *Id.* § (b)(1)(i)(A)–(B).

As the Immigration Judge erred in finding the applicant established past persecution, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the applicant bears the burden of establishing that internal relocation within Mexico was unreasonable. *M-Z-M-R-*, 26 I&N Dec. at 35–36 ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored." (citing 8 C.F.R. § 1208.13(b)(3)(i))). Further, even if the Department bears the burden of proof on these issues, the Immigration Judge erred in finding that the Department did

not establish that there has been a fundamental change in circumstances or that internal relocation is reasonable.

The Immigration Judge held that the applicant faces a threat of persecution anywhere in Mexico even though a single actor perpetrated her harm. The Immigration Judge based this determination on the fact that, when the applicant resided with her uncle eighteen hours away from the town in which her former spouse lives, the former spouse was able to find her and make a threatening call to her. The Immigration Judge further found that the applicant's long-term illegal presence in the United States, after multiple removals, and her family in the United States made it unreasonable to expect her to relocate within Mexico. Though the Immigration Judge should "consider, among other things, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties," "these factors may or may not be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.16(b)(3). This is particularly true for victims of private violence, who "face the additional challenge of showing that internal relocation is not an option . . .." *A-B-*, 27 I&N Dec. at 345.

Mexico is a large and diverse country. The applicant's father resides in Mexico, so she is not without family support there. The applicant has been divorced from her former spouse for almost twenty years, does not currently know where he is, and believes he has children with another woman. There is no evidence that he remains interested in harming her after the passage of two decades, though there is evidence that he has moved on, having children with another woman; there is certainly no evidence that he would physically pursue her, after all this time, to

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other parts of Mexico. When the applicant lived with her uncle, her former spouse purportedly made threatening phone calls; he never, however, travelled to Veracruz to seek the applicant out. Though the Immigration Judge found that "gender-based violence is country-wide," that is not the basis for the applicant's claim. The applicant's claim is specific to victimization by her former spouse and there is no evidence that the applicant would be subject to gender-based violence throughout the entirety of Mexico.

Finally, even if the Immigration Judge did not err in shifting the burden to the Department, the significant passage of time since the applicant last purportedly suffered harm at the hands of her former spouse alone presents a fundamental change in circumstances. That passage of time, coupled with the evidence from the applicant that she believes her former spouse has children with another woman, demonstrating that he is no longer interested in a relationship with the applicant, establish that circumstances have changed such that the applicant no longer has a reasonable fear.

Even if the Department bears the burden of proof on this issue, the Immigration Judge erred in finding internal relocation unreasonable. I.J. at 19. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id.*

CONCLUSION

The applicant waived her right to appeal the Immigration Judge's decision. First, the applicant did not file a separate appeal of any aspect of the Immigration Judge's decision. Second, she filed a motion for summary affirmance under 8 C.F.R. § 1003.1(e)(4), in which she

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necessarily moved the Board to adopt the decision of the Immigration Judge as the final agency interpretation, including the Immigration Judge's conclusions that "[t]he applicant has provided one viable protected ground, which is the particular social group defined as: 'Mexican women who terminate the marriage without the consent of the husband," I.J. at 10, and that "the applicant has failed to propose any other cognizable group or protected ground," I.J. at 12.

Assuming, *arguendo*, the applicant has not waived these issues, the applicant did not meet her burden of showing that she was harmed on account of her membership in a particular social group consisting of "Mexican women." Similarly, the applicant did not meet her burden of showing that her proposed social group—"Mexican women who terminate the marriage without the consent of the husband"—is legally cognizable or that she was harmed on account of her membership in that group. Further, the applicant, who was able to obtain a civil divorce from her husband, did not meet her burden of showing that the government of Mexico was unable or unwilling to assist her. Accordingly, the Board should sustain the Department's appeal.

Respectfully submitted on this 14th day of April 2020,

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U.S. Department of Homeland Security

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CERTIFICATE OF SERVICE

On April 14, 2020, I electronically served a copy of this Department of Homeland Security Amended Brief on Appeal and any attached pages normal government process to:

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(signature)

April 14, 2020
(date)

Matter of A-B-, Respondent

Decided by Attorney General March 30, 2018

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

The Attorney General denied the request of the Department of Homeland Security that the Attorney General suspend the briefing schedules and clarify the question presented, and he granted, in part, both parties' request for an extension of the deadline for submitting briefs in this case.

BEFORE THE ATTORNEY GENERAL

On March 7, 2018, pursuant to 8 C.F.R. § 1003.1(h)(1)(i) (2017), I directed the Board of Immigration Appeals ("Board") to refer its decision in this case to me for review. To assist in my review, I invited the parties to submit briefs not exceeding 15,000 words in length and interested amici to submit briefs not exceeding 9,000 words in length. I directed that the parties file briefs on or before April 6, 2018, that amici file briefs on or before April 13, 2018, and that the parties file any reply briefs on or before April 20, 2018.

On March 14, 2018, the respondent filed a request for an extension of the deadline for submitting briefs from April 6, 2018, to May 18, 2018. On March 16, 2018, the Department of Homeland Security ("DHS") submitted a motion containing three requests: (1) that I suspend the briefing schedules to permit the Board to rule on the Immigration Judge's August 18, 2017, certification order; (2) that I clarify the question presented in this case; and (3) that I extend the deadline for submitting opening briefs to May 18, 2018. The respondent subsequently filed a response requesting that I grant the same relief.

This Order addresses all pending requests from the parties.

I. DHS's Request To Suspend the Briefing Schedules

DHS's request to suspend the briefing schedules until the Board acts on the Immigration Judge's certification request is denied. DHS suggests that this case "does not appear to be in the best posture for the Attorney General's review," because the Board has not yet acted on the Immigration Judge's attempt, on remand from the Board, to certify the case back to the Board. *See* DHS's Mot. on Cert. to the Att'y Gen. at 2 (citing *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954)).

The certification from the Immigration Judge pending before the Board does not require the suspension of briefing because the case is not properly pending before the Board. The Immigration Judge did not act within his authority, as delineated by the controlling regulations, when he purported to certify the matter. The Immigration Judge noted in his order that an "Immigration Judge may certify to the [Board] any case arising from a *decision* rendered in removal proceedings." Order of Certification at 4, (Aug. 18, 2017) (emphasis added) (citing 8 C.F.R. § 1003.1(b)(3), (c)). The regulations also provide that an "Immigration Judge or Service officer may certify a case only after an initial decision has been made and before an appeal has been taken." 8 C.F.R. § 1003.7 (2017).

Here, the Immigration Judge did not issue any "decision" on remand that he could certify to the Board. The Board's December 2016 decision sustained the respondent's appeal of the Immigration Judge's initial decision and remanded the case to the Immigration Judge "for the purpose of allowing [DHS] the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h)." *Matter of A-B-* at 4 (BIA Dec. 8, 2016). Under 8 C.F.R. § 1003.47(h) (2017), the Immigration Judge on remand was directed to "enter an order granting or denying the immigration relief sought" after considering the "results of the identity, law enforcement, or security investigations." "If new information is presented, the immigration judge may hold a further hearing if necessary to consider any legal or factual issues . . . ." *Id.*

In this matter, DHS informed the Immigration Judge that the respondent's background checks were clear. *See* Order of Certification at 1. Given the scope of the Board's remand and the requirements of the regulations, the Immigration Judge was obliged to issue a decision granting or denying the relief sought. If the Immigration Judge thought intervening changes in the law directed a different outcome, he may have had the authority to hold a hearing, consider those legal issues, and make a decision on those issues. *Cf.* 8 C.F.R. § 1003.47(h). Instead, the Immigration Judge sought to "certify" the Board's decision back to the Board, essentially requesting that the Board reconsider its legal and factual findings. That procedural maneuver does not fall within the scope of the Immigration Judge's authority upon remand. Nor does it fall within the regulations' requirements that cases may be certified when they arise from "[d]ecisions of Immigration Judges in removal proceedings," *id.* § 1003.1(b)(3); *see also id.* § 1003.1(c), and that an Immigration Judge "may certify a case only after an initial decision has been made and before an appeal has been taken," *id.* § 1003.7. Because the Immigration Judge failed to issue a decision on remand, the Immigration Judge's attempt to certify the case back to the Board was procedurally

defective and therefore does not affect my consideration of the December 16, 2016, Board decision.

Furthermore, the present case is distinguishable from *Accardi*, because, here, the Board rendered a decision on the merits, consistent with the applicable regulations. It is that December 8, 2016, decision that I directed the Board to refer to me for my review. *See Matter of A-B-*, 27 I&N Dec. 227, 227 (A.G. 2018) (directing the Board "to refer this case to me for review of *its decision*" (emphasis added)). The Board issued that decision "exercis[ing] its own judgment" and free from any perception of interference from the Attorney General. *Accardi*, 347 U.S. at 266. My certification of that decision for review complies with all applicable regulations. *See* 8 C.F.R. § 1003.1(h)(1)(i) ("The Board shall refer to the Attorney General for review of *its decision all cases* that . . . [t]he Attorney General directs Board to refer to him." (emphasis added)). It is therefore unnecessary to suspend the briefing schedule pending a new decision of the Board.

II. DHS's Request To Clarify the Question Presented

I deny DHS's request to clarify the question presented. In my March 7, 2018, order, I requested briefing on "[w]hether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable 'particular social group' for purposes of an application for asylum or withholding of removal." *Matter of A-B-*, 27 I&N Dec. at 227. Although "there is no entitlement to briefing when a matter is certified for Attorney General review," *Matter of Silva-Trevino*, A.G. Order No. 3034-2009 (Jan. 15, 2009), I nevertheless invited the parties and interested amici "to submit briefs on points relevant to the disposition of this case" to assist my review. *Matter of A-B-*, 27 I&N Dec. at 227. As the Immigration Judge observed in his effort to certify the case, several Federal Article III courts have recently questioned whether victims of private violence may qualify for asylum under section 208(b)(1)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(B)(i) (2012), based on their claim that they were persecuted because of their membership in a particular social group. If being a victim of private criminal activity qualifies a petitioner as a member of a cognizable "particular social group," under the statute, the briefs should identify such situations. If such situations do not exist, the briefs should explain why not.

DHS requests clarification on the ground that "this question has already been answered, at least in part, by the Board and its prior precedent." Board precedent, however, does not bind my ultimate decision in this matter. *See* section 103(a)(1) of the Act, 8 U.S.C. § 1103(a)(1) (2012) (providing that "determination and ruling by the Attorney General with respect to all

questions of law shall be controlling"). The parties and interested amici may brief any relevant issues in this case—including the interplay between any relevant Board precedent and the question presented—but I encourage them to answer the legal question presented.

III. The Parties' Requests for an Extension of the Deadline for Submitting Briefs

I grant, in part, both parties' request for an extension of the deadline for submitting briefs in this case. The parties' briefs shall be filed on or before April 20, 2018. Briefs from interested amici shall be filed on or before April 27, 2018. Reply briefs from the parties shall be filed on or before May 4, 2018. No further requests for extensions of the deadlines from the parties or interested amici shall be granted.

In support of respondent's request for an extension, she asserted that "an extension of the briefing deadline is warranted because [r]espondent intends to submit additional evidence with her brief in support of her claim," including the possibility that she might obtain new evidence from El Salvador. Resp't Request for Extension of Briefing Deadline at 4 (Mar. 14, 2018). Although I retain "full decision-making authority under the immigration statutes," *Matter of A-H-*, 23 I&N Dec. 774, 779 n.4 (A.G. 2005), I requested briefing on a purely legal question to assist my review of this case, and I encourage the parties to focus their briefing on that question. Further factual development may be appropriate in the event the case is remanded, but the opportunity to gather additional factual evidence is not a basis for my decision to extend the briefing deadline.

NON-DETAINED

(b)(6); (b)(7)(C)
Exec. Deputy Principal Legal Advisor
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(b)(6); (b)(7)(C)

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No: (b)(6); (b)(7)(C)
In removal proceedings	)	

U.S. DEPARTMENT OF HOMELAND SECURITY REPLY TO AMICUS CURIAE BRIEFS

The Department of Homeland Security ("Department" or "DHS") timely submits this reply to the amicus curiae briefs of the Harvard Immigration and Refugee Clinical Program, the American Immigration Lawyers Association, Human Rights First, and Kids in Need of Defense (hereinafter "HIRC Brief"), and the Tahirih Justice Center, the Asian Pacific Institute on Gender-Based Violence, Asista Immigration Assistance, and Casa de Esperanza (hereinafter "Corrected Tahirih Brief"). For purposes of efficiency, the Department provides a consolidated response focusing on two salient issues.[1]

A. HIRC Brief.

The primary argument of the HIRC Brief is that gender alone may constitute a cognizable particular social group for purposes of applications for asylum and statutory withholding of removal. The brief alleges that "DHS offers no rebuttal to the arguments outlined herein that gender alone may define a particular social group," and that, contrary to a point made by the Department in its own brief, "whether gender alone can establish membership in a particular social group under the refugee definition is [a] question of law, not policy." HIRC Brief at 17 n.5.

The Department wishes to re-emphasize that adequately addressing the legal and policy aspects of the "gender alone" issue was beyond the limitations of the Attorney General's briefing request.[2] Whether to interpret "membership in a particular social group" as including membership

[1] The lack of a DHS response to other aspects of the HIRC or Corrected Tahirih Briefs, or any of the remaining ten amicus curiae briefs, should not be taken as agreement with any or all the points raised therein. Rather, the Department continues to adhere to the arguments set forth in its own brief.

[2] As noted in the Department's brief, even a minimal assessment of the issue likely would require closer examination of the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 197; the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223; and the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, likely including any relevant legislative, ratification, and negotiation history. *See* DHS Brief on Referral to the Attorney General at 21 n.13. Such material, along with the statutory text and scheme of the Immigration and Nationality Act ("INA"), subsequent amendments to the immigration laws relating to gender-based harm (e.g., INA § 204(a)(1)(A)(iii), (B)(ii)), and the pre-existence and emergence of international human rights instruments specifically addressing

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in a particular gender is suffused with unique, weighty, and complex policy implications in addition to the difficult statutory interpretation questions. *See, e.g.*, DHS Brief on Referral to the Attorney General at 21-22 (discussing implications with respect to the persecutor bar of a significant expansion of the concept of "persecution" and the scope of the protected grounds). If the Attorney General would like further briefing on that question or others, the Department would be pleased to address such issues.

B. Corrected Tahirih Brief.

The Corrected Tahirih Brief argues, in pertinent part, that the Department "seeks to impose extensive documentation requirements in asylum claims raising domestic violence issues, requirements that do not apply in other asylum cases," and that "extend beyond the statutory requirements." Corrected Tahirih Brief at 30. Respectfully, the brief fundamentally mischaracterizes the Department's position.

The Department does not seek any heightened evidentiary standards or requirements for asylum and statutory withholding of removal applications premised upon domestic violence. Instead, the Department offers potential lines of inquiry that the Attorney General may wish to adopt to assist adjudicators in assessing such claims. *See* DHS Brief on Referral to the Attorney General at 23-25. As the Department argues in its brief, *all* asylum and statutory withholding of removal applicants should be held to their statutory burden of proof, including providing corroborative evidence when necessary, *see id.* at 23 (citing Immigration and Nationality Act ("INA") §§ 208(b)(1)(B)(ii) (asylum), 241(b)(3)(C) (statutory withholding of removal)), but immigration judges sometimes have failed to hold applicants to their burden of proof in particular

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gender-related issues (e.g., Convention on the Political Rights of Women, Mar. 31, 1953, 27 U.S.T. 1909), and relevant case law would have to be carefully considered were the Attorney General to request further briefing on that question.

social group-based claims. Paying mere lip service to the particular social group requirements often involved with such claims is too frequently the norm. *See* DHS Brief on Referral to the Attorney General at 7. The Department's brief accordingly asks the Attorney General to clarify those substantive and evidentiary requirements and to re-emphasize that applicants should be held to their proper burden of proof. The Department is *not* arguing that the Attorney General should create new evidentiary standards specific to domestic violence-based claims.[3] To be clear, however, an application for asylum or statutory withholding of removal is not fatally deficient simply because a persecutor may not have elaborated in detail on his or her motive(s) for inflicting harm. *See INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (holding that while the "statute makes motive critical," direct evidence of motive is not required, and that "circumstantial" evidence may suffice).

The Corrected Tahirih Brief contends that the Department's suggested lines of inquiry create an "undue hardship," and that requiring domestic violence victims to remember facts about their purported abuser shows a fundamental lack of understanding of the dynamics of domestic violence. *See* Corrected Tahirih Brief at 30-32. To the contrary, remembering and knowing basic biographic information about the person with whom a victim is engaged in an intimate relationship is not an undue hardship. Rather, it can provide significant relevant evidence establishing that the alleged persecutor and relationship actually existed. The Department recognizes that an applicant may have legitimate reasons for not knowing or remembering certain

[3] That said, such applicants should be held to their burden of proof. For example, much as a member of a particular political party claiming persecution on account of her political opinion should generally be able to explain the party's basic platform and answer questions about how and why she joined, an applicant credibly claiming persecution in a domestic relationship should generally be able to answer questions about her domestic partner and the relationship itself. Of course, such an applicant also should be able to provide basic information about other elements of her claim, including the identification and delineation of her particular social group, why such individuals are perceived as a distinct group by her society, internal flight alternatives, and the ability and willingness of the authorities to afford reasonable protection.

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information, but this does not mean that one should not attempt to elicit the information in the first instance. As the Department explained: "The applicant's knowledge in this regard, *or failure to reasonably explain the lack thereof*, is relevant as to whether the applicant's testimony is credible, persuasive, and sufficiently detailed to satisfy the applicant's burden of proof under the Act." *See* DHS Brief on Referral to the Attorney General at 23 (emphasis added). Excusing such details in blanket fashion from what is, in part, a highly individualized fact-based claim, would render the burden of proof meaningless and serve as a clear invitation for fabricated protection claims that cannot be meaningfully probed by adjudicators. *See generally* INA §§ 208(b)(1)(B)(iii) (mandating, inter alia, that "[c]onsidering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant"), 241(b)(3)(C) (same).

Accordingly, the Attorney General should decline the Corrected Tahirih Brief's invitation to create an effectively lower burden of proof for one type of persecution claim, i.e., those based upon domestic violence.

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Respectfully submitted on this 4th day of May, 2018, by:

(b)(6); (b)(7)(C)

Exec. Deputy Principal Legal Advisor
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security[4]

[4] The Department respectfully requests that all correspondence to it in this matter continue to be directed, in the first instance, to the local U.S. Immigration and Customs Enforcement (ICE) Office of the Chief Counsel in Charlotte, North Carolina, with copies to (b)(6); (b)(7)(C) Chief of the Immigration Law and Practice Division within ICE's Office of the Principal Legal Advisor.

(b)(6); (b)(7)(C)

PROOF OF SERVICE

On May 4, 2018, I, (b)(6); (b)(7)(C) mailed a copy of this U.S. Department of Homeland Security Reply to Amicus Curiae Briefs and any attached pages to the respondent's co-counsel, (b)(6); (b)(7)(C) Immigrant & Refugee Appellate Center, LLC, 3602 Forest Drive, Alexandria, VA 22302, by placing such copy in my office's outgoing mail system in an envelope duly addressed.

(b)(6); (b)(7)(C)

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☐ DETAINED

☒ NON-DETAINED

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

In the Matter of: (b)(6); (b)(7)(C)	File No.: (b)(6); (b)(7)(C)
In Removal Proceedings	

DEPARTMENT OF HOMELAND SECURITY'S CONSOLIDATED RESPONSE TO AMICI CURIAE, AND MOTION TO ACCEPT AND OPPOSITION TO RESPONDENT'S MOTION TO REOPEN, RECONSIDER AND STAY OF REMOVAL

The respondent is a native and citizen of Guatemala who arrived in the United States near Rio Grande, Texas on January 15, 2015. *Exh.* 1. On February 16, 2016, the Department of Homeland Security ("DHS") served the respondent with a Notice to Appear ("NTA"), charging her with removability pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act ("INA" or "Act"). *Id.* At a master calendar hearing on July 27, 2016, the respondent, through counsel, admitted to the allegations and charge of removability as set out in the NTA. The Court designated Guatemala as the country of removal. As relief and protection from removal, the respondent submitted a defensive application for asylum, withholding of removal under the Act, and protection under the regulations implementing the U.S. obligations pursuant to Article 3 of the United Nations Convention Against Torture ("CAT"). *Exh.* 2. The hearing on the merits of the respondent's application was held on March 23, 2017, followed by the Immigration Judge's 18-page written decision, dated July 5, 2017. The Immigration Judge denied all applications for relief and protection in the July 5, 2017 decision and ordered the respondent removed from the United States. After a timely appeal, the Board of Immigration Appeals ("BIA") dismissed the respondent's appeal in a decision dated June 15, 2018. Shortly before the Board issued its decision on appeal, on June 11, 2018, the Attorney General issued *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). On July 18, 2018, the respondent filed Respondent's Motion to Reconsider. Thereafter, on July 27, 2018 the respondent filed Respondent's Motion Emergency Motion to Reopen and Re-Issue the Board's June 15, 2018 Decision in Her Case and Emergency Motion for Stay of Removal ("First Motion to Reopen"). In orders dated August 30, 2018, the Board issued notices to four amici curiae briefing requests advising that their respective requests for file amicus curiae briefs has been granted. The four entities submitting briefs are the Harvard Law School ("Harvard Brief"), Twenty Former

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Immigration Judges and Members of the Board of Immigration Appeals ("Judges' Brief"), Tahiri Justice Center ("Tahiri Brief") and Immigration Law Professors ("Professors' Brief"). In a motion dated September 13, 2018, the respondent submitted Respondent's Motion to Reopen ("Second Motion to Reopen").

The DHS requests that the Board accept its untimely response to the respondent's First Motion to Reopen and Second Motion Reopen. Ordinarily a party has 13 days to respond to a motion before the Board. *See* 8 C.F.R. § 1003.2(g)(3). On August 30, 2018, the DHS was apprised that the respondent had failed to appear for removal after an August 6, 2018 demand for her appearance. *See* Tab A (Notice – Immigration Bond Breached). This failure to appear triggers the fugitive disentitlement doctrine, which will be discussed in detail below. The initial briefing schedule for a response to the amici's briefs was September 20, 2018. The DHS requested an extension and was permitted to file a response on or before October 11, 2018. Given the multiple motions filed by the respondent, including the September 13, 2018 Second Motion to Reopen, the issues presented and in the interests of justice, the DHS respectfully requests that the Board accepts this untimely filing in response to each of the pending motions in this matter. Furthermore, the DHS requests that the Board consider its present submission as a consolidated response to each of the respondent's motions to reopen, reconsider, and stay as well as the amici's pending briefs in this matter. The DHS urges the Board to dismiss and otherwise deny the respondent's motions. In the alternative, if the Board is inclined to reopen or reconsider this matter, the DHS moves that it be remanded to the Immigration Judge for an initial determination of new facts and evidence in light of case developments.

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I. The respondent's motion to reopen and reconsider should be denied as a matter of discretion.

The decision whether to grant a motion to reopen deportation proceedings is a matter within the discretion of this Board. *See INS v. Rios-Pineda*, 471 U.S. 444 (1985). The Board's denial of a motion to reopen is extremely deferential, and the decision will not be reversed absent abuse of discretion. *Stewart v. INS,* 181 F.3d 587, 595 (4th Cir. 1999). Motions to reopen are disfavored. *INS v. Doherty,* 502 U.S. 314 (1992). A party seeking reconsideration requests that the original decision be reexamined in light of additional legal arguments, a change of law, or an argument or aspect of the case that was overlooked. *See Matter of O-S-G-,* 24 I&N Dec. 56 (BIA 2006); *Matter of Cerna,* 20 I&N Dec. 399 (BIA 1991). 8 C.F.R. § 1003.2(b)(1). A motion to reconsider based upon a legal argument that could have been raised earlier in the proceedings will be denied. *O-S-G-*, 24 I&N Dec. at 58. A motion to reconsider is not an opportunity to present previously available arguments, to repeat previously considered and rejected arguments, or to make new or alternative requests for previously available relief.

When the Board chooses to rely on the express reasoning of the Immigration Judge in a short per curiam opinion, that reasoning is the sole basis for review and will be reversed if inadequate. *Gandarillas–Zambrana v. Board of Immigration Appeals,* 44 F.3d 1251, 1255 (4th Cir.1995). When the Board determines that reopening is not warranted in the exercise of discretion, the question of statutory eligibility for the requested relief need not be considered. *See INS v. Bagamasbad*, 429 U.S. 24 (1976). Furthermore, even if prima facie eligibility has been established, the Board may deny a motion to reopen for purely discretionary reasons where the record reflects that significant grounds exist for denying reopening based on the respondent's actions. *Matter of Reyes*, 18 I&N Dec. 249 (BIA 1982); *Matter of Rodriguez—Vera*, 17 I&N Dec. 105 (BIA 1979).

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The respondent's case does not warrant reopening *sua sponte* as a matter of discretion since the fugitive disentitlement doctrine is applicable to the respondent's case. *See Girt v. Keisler*, 507 F.3d 833, 835-836 (5th Cir. 2007) (extending the fugitive disentitlement doctrine to the immigration context where the petitioners were fugitive aliens who evaded custody and failed to comply with a removal order); *Matter of Barocio*, 19 I&N Dec. 255, 257 (BIA 1985) (finding that an alien in immigration proceedings who fails to report for deportation does not merit the favorable exercise of discretion required for reopening).

The respondent could have continued to pursue her motions to reopen and reconsider from outside the United States. *See Williams v. Gonzales*, 499 F.3d 329, 332-34 (4th Cir. 2007). The respondent has failed to appear for removal. The respondent was released from detention on a bond of $12,000 on February 22, 2016. *See* Tab A (Notice- Immigration Bond Breached). On August 6, 2018 the DHS issued a Notice to Obligor to Deliver Alien (Form I-340). *See* Tab B. This notice placed the burden on the bond obligor to produce the respondent for removal or risk the loss of the posted bond. To date, the respondent has yet to appear for execution of the removal order in compliance with the Form I-340 request. The Board has held that an unjustified refusal to report for removal pursuant to a surrender notice is a very serious factor which warrants the denial of a motion to reopen as a matter of discretion. *Matter of Barocio*, *supra*. Given the respondent's failure to appear for execution of her removal order, the respondent has not demonstrated that she warrants a reopening or reconsideration of her applications as a matter of discretion.

The respondent cannot demonstrate likelihood of success on the merits upon reopening or reconsideration of this matter when the Immigration Judge made several alternative findings fatal to the asylum claim that do not touch upon the feasibility of a particular social group. First, the

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Immigration Judge, after careful analysis of the evidence, found that the respondent failed to corroborate her claim. *I.J.* at 8. The Immigration Judge also found that the respondent failed to show that it would be unreasonable for the respondent to internally relocate within Guatemala. *I.J.* at 4,15. The Immigration Judge further found that the respondent failed to demonstrate that the government is unable to or unwilling to protect her from harm. *Id.* at 15. *See Matter of A-B-*, 27 I&N Dec. at 343. The respondent simply never requested the Guatemalan government's help with her domestic abuse issues. She testified that she never told anyone in Guatemala about the abuse. *I.J.* at 4.

II. The respondent cannot raise a new particular social group on appeal.

In the alternative, assuming, arguendo, that the Board reopens and reconsiders, the respondent cannot raise a new particular social group formulation for consideration by the Board that was not raised before, and considered, by the Immigration Judge.

The asylum applicant must clearly indicate on the record and before the Immigration Judge the exact delineation of any proposed particular social group. *Matter of A-B-*, 27 I&N Dec. at 344. The Board cannot sustain an asylum applicant's appeal based on newly articulated social group not presented before or analyzed by the Immigration Judge. *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191–92 (BIA 2018). Here, in as much as the respondent and the amici proffer any new particular social group, such as "gender alone," or any new version of a previous group such as "indigenous Guatemalan women," these attempts must fail.

Moreover, as previously discussed, the Board has alternate determinative bases upon which it can decide that the respondent's applications fail other than the cognizability of the respondent's particular social group, and the respondent's ability to proffer new groups on

appeal. Should the Board decide to reconsider and reopen, and it can ultimately dismiss the respondent's appeal on these alternate bases, it need not address the particular social group issues. *See Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018) ("[I]f 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."); *see also INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

At most, if the Board is inclined to reopen or reconsider this matter, the matter should be remanded to the Immigration Judge consistent with principles set forth above for an initial determination of any newly proffered basis for asylum or newly proffered facts supporting any application. The respondent argues before the Immigration Judge that she is a member of a single particular social group comprised of "Guatemalan women in domestic relationships they are unable to leave". *B.I.A.* at 2; *I.J.* at 8. Although the cognizability of a particular social group ultimately is a question of law that the Board reviews de novo, it necessarily involves a number of factual findings, and the Board cannot act as such a factfinder. *See, e.g., A-B-*, 27 I&N Dec. at 335 (rejecting isolated focus on potential subparts to a particular social group formulation, i.e., "To say that each term has a commonly understood definition, standing alone, does not establish that these terms have the requisite particularity in identifying a distinct social group as such, or that people who meet all of those criteria constitute a discrete social group."); *W-Y-C- & H-O-B-*, 27 I&N Dec. at 191 ("The importance of articulating the contours of any proposed social group before the Immigration Judge is underscored by the inherently factual nature of the social group analysis. A determination whether a social group is cognizable is a fact-based inquiry made on a case-by-case basis, depending on whether the group is immutable and is recognized as particular

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and socially distinct in the relevant society. Moreover, even if a particular social group is deemed cognizable, an applicant must establish her membership in that group, and persecution or fear of persecution on account of [her] membership in that group. The resolution of such issues is also inherently factual in nature.") (internal quotation marks and citations omitted); 8 C.F.R. § 1003.1(d)(3)(iv). If the Board rules otherwise, it would mean that the immigration judge, DHS, and the BIA automatically would be required to consider all possible subgroups of a posited particular social group, which is inconsistent with the cited Attorney General and Board precedent.

Accordingly, the respondent's motions to reopen, reconsider, and stay of removal must be denied. In the alternative, if the Board is inclined to reopen or reconsider this matter, it should be remanded to the Immigration Judge for initial findings of fact and legal analysis relevant to new case developments.

Respectfully submitted,

On behalf of
U.S. Immigration and Customs Enforcement,
U.S. Department of Homeland Security

(b)(6); (b)(7)(C)

Assistant Chief Counsel
5701 Executive Center Drive
Charlotte, North Carolina 28212

(b)(6); (b)(7)(C)

Date: October 11, 2018

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

On October 11, 2018, I, (b)(6); (b)(7)(C) Assistant Chief Counsel, mailed or delivered a copy of this Department of Homeland Security's Consolidated Response to Amici Curiae, and Motion to Accept and Opposition to Respondent's Motion to Reopen, Reconsider, and Stay of Removal and any attached pages to (b)(6); (b)(7)(C) Esquire at the following address: Hatch Rockers Immigration, PO Box 1847, Durham, NC 27702 by United States Mail.

(b)(6); (b)(7)(C)

Assistant Chief Counsel

Attachments:

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NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No: (b)(6); (b)(7)(C)
In removal proceedings	)	

U.S. DEPARTMENT OF HOMELAND SECURITY'S
OPPOSITION TO RESPONDENT'S REPLY BRIEF

The Department of Homeland Security (Department or DHS) respectfully opposes the respondent's submission of a reply brief, dated January 27, 2020.[1] The filing is not compliant with the Board of Immigration Appeals' (Board or BIA) rules pertaining to such briefs, *see* BIA Practice Manual, Chapter 4.6(h) (Sept. 23, 2019), and, therefore, should be rejected.

Specifically, in an attempt to wedge within the strict parameters of a reply brief, the respondent's Motion to Accept Reply Brief (Jan. 27, 2020) (Motion to Accept) fashions a number of straw man assertions of requisite "surprise," *see* Practice Manual, Chap. 4.6(h), at the arguments set forth by the Department in its response brief. In effect, however, the respondent's 22-page "reply" brief is simply an attempt to bolster her appellate arguments by means of an impermissible response brief to the Department's 25-page response brief.

Proceeding point by point, the respondent first asserts surprise that "for the first time on appeal, DHS argues that Ms. (b)(6); (b)(7)(C) failed to establish the inability or unwillingness of the Salvadoran government to protect her and does not otherwise dispute (b)(6); (b)(7)(C) eligibility for asylum." Motion to Accept at 1. However, whether the respondent has met her burden of proof in this regard has been at issue throughout the course of these proceedings. *See, e.g.*, I.J. at 14-15 (Dec. 1, 2015); BIA at 3-4 (Dec. 8. 2016); *see also Matter of A-B-*, 27 I&N Dec. 316, 343-44 (A.G. 2018). Most importantly, in the decision currently pending before the Board on appeal, the Immigration Judge specifically denied the respondent's applications for asylum and statutory

[1] While the BIA Practice Manual, Chapter 4.6(h) (Sept. 23, 2019), does not directly reference oppositions to reply briefs, the Board has the discretion to consider such. *See Matter of Fedorenko*, 19 I&N Dec. 57, 73 (BIA 1984) (denying the subject alien's motion to strike the legacy Immigration and Naturalization Service response to his reply brief as not permitted by appellate procedure). In any event, a party should be allowed to object to a reply brief when, as here, it is clearly not compliant with the requirements the Board has established for potential acceptance. Further, analogizing to the truncated 13-day period to oppose motions to reopen and reconsider at 8 C.F.R. § 1003.2(g)(3), the Department has timely filed its opposition to the respondent's January 27, 2020 reply brief and motion to accept the same. As the thirteenth day in this case fell on a weekend, Sunday, February 9, 2020, the deadline should be construed as the next business day, i.e., Monday, February 10, 2020. *See* BIA Practice Manual, Chapter 3.1(b)(ii) (Sept. 23, 2019).

withholding in part due to her failure to satisfy this requirement, *see* I.J. at 15 (Oct. 10, 2018), and the respondent appealed from that finding, *inter alia*, *see* Notice of Appeal from a Decision of an Immigration Judge, Form EOIR-26 (Nov. 8, 2018); Respondent's Brief on Appeal at 28-32 (Dec. 16, 2019). Consequently, the fact that the Department has addressed this issue in its response brief cannot legitimately come as a surprise to the respondent.

Concomitantly, contrary to the respondent's assertion, the fact that the Department focused its response brief on this dispositive issue, as well as a limited number of others, cannot properly be interpreted to mean that the Department "does not otherwise dispute [the respondent's] eligibility for asylum." Motion to Accept at 1. The statutory burden of proof is squarely on the respondent to prove all elements of her claim. *See, e.g.*, Immigration and Nationality Act (Act or INA) § 208(b)(1)(B); *see also A-B-*, 27 I&N Dec. at 340. The burden of proof is not on the Department to disprove them. The Department's focus on key dispositive appellate issues simply should be taken for the unremarkable – and permissible – proposition that it "*need not* dispute" other aspects of the respondent's eligibility, not that it concedes them. *See generally INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach."); *A-B-*, 27 I&N Dec. at 340 ("Of course, 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.") (internal citation omitted).

Next, the respondent alleges surprise at a specific aspect of the Department's argument concerning whether she established that the Salvadoran Government was unable or unwilling to control her abuser. Specifically, she avers that the Department has "invent[ed]" a "standard from whole cloth" that "the United States' failure to provide 'ideal protection' to all domestic violence survivors provides an 'important touchstone' for evaluating the effectiveness of El Salvador's

protection system," citing to a footnote in the Department's response brief. Motion to Accept at 1. As a primary matter, the respondent's attempt to summarize the Department's point loses important context. The full footnote reads as follows:

> The fact that the Government of El Salvador cannot provide even the same imperfect level of protection as the Government of the United States does not mean that it was, or will be, unwilling or unable to control the respondent's abuser. *Cf. Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (recognizing that the "concept of persecution does not encompass all treatment that [U.S.] society regards as unfair, unjust, or even unlawful or unconstitutional," and that "[i]f persecution were defined that expansively, a significant percentage of the world's population would qualify for asylum in this country—and it seems most unlikely that Congress intended such a result"). The law enforcement regime of the United States does not set the legal standard in this regard, though certainly it can be an important touchstone in terms of the practical realities involved.

U.S. Department of Homeland Security's Response Brief at 14 n.13 (Jan. 6, 2020) (Department's Response Brief). More importantly, the Department, of course, is not proposing some new standard.[2] Rather, it simply is applying well-established law and propositions in support of its argument that "perfect" state protection is not the standard, as not even United States law enforcement can provide such ideal protection. *See* Department's Response Brief at 12-13 (citing *A-B-*, 27 I&N Dec. at 343-44, as well as *Burbiene v. Holder*, 568 F.3d 251, 255 (1st Cir. 2009), and *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154 (9th Cir. 2005)). Indeed, in its response brief, the Department specifically referenced its arguments to the Attorney General in this matter, wherein the Department cited to official United States Government reports, *inter alia*, concerning the lack of ideal state protection even in the United States. *See* Department's Response Brief at 13-14 (citing to the U.S. Department of Homeland Security Brief on Referral to the Attorney General at

[2] Indeed, it is surprising that the respondent would suggest that the Department proposes a new standard in this regard, especially in light of the Department's stated hesitancy to employ one of the Attorney General's alternate articulations of the "unwilling or able to control" concept, even though the Department does not view the Attorney General as modifying settled case law. *See* Department's Response Brief at 12 n.11 (concerning the Attorney General's articulation – deriving from circuit court precedent – that an applicant for asylum or statutory withholding of removal "must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims," *A-B-*, 27 I&N Dec. at 337 (internal quotation marks and citation omitted)).

(b)(6); (b)(7)(C)

33 (Apr. 20, 2018)). In short, the Department has not proposed a new standard, and the arguments that it does make in support of its position in this regard cannot come as any surprise to the respondent.

The respondent further takes issue with an aspect of the Department's argument concerning her failure to establish eligibility for protection pursuant to the pertinent regulations implementing the U.S. obligations under Article 3 of the Convention Against Torture (CAT).[3] She contends that "DHS also argues the IJ correctly faulted (b)(6); (b)(7)(C) for not reporting her abuser to 'superior authorities,' DHS Br. at 21, which neither the statute nor case law has ever required to demonstrate consent or acquiescence on the part of a public official." Motion to Accept at 1-2. Once again, the respondent's summarization of the pertinent point being made by the Department lacks critical context and results in mischaracterization. Specifically, in this aspect of its response brief, the Department was not focused on "acquiescence." (Indeed, neither was the Immigration Judge when he made the pertinent observation in his decision. *See* I.J. at 17 (Oct. 10, 2018)). Instead, the Department was responding to the respondent's allegation that the Immigration Judge had refused to engage with the record evidence concerning her application for CAT protection, and that he had specifically ignored evidence that her ex-brother-in-law was a police officer. *See* Department's Response Brief at 21-22. Thus, there can be no proper assertion of surprise with respect to this aspect of the Department's response brief as well.[4]

[3] 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).

[4] The Department also avers that the respondent has attempted to include arguments in her reply brief that do not even appear to be associated with any allegation of surprise vis-à-vis the Department's response brief. *Compare* Motion to Accept at 1-2 (concerning CAT protection and the issue of "acquiescence") *with* Respondent's Reply Brief at 14-16 (Jan. 27, 2020) (section captioned "The IJ Erred by Placing the Burden of Proof on Ms. Bonilla to Demonstrate Her Inability to Internally Relocate, Which the Record Establishes").

(b)(6); (b)(7)(C)

In addition, the respondent takes issue with the Department's argument concerning her credibility, alleging that it "rais[es] never before heard attacks, while simultaneously acknowledging that her credibility is not at issue in this appeal." Motion to Accept at 2. Respectfully, yet again, the respondent has mischaracterized the Department's response brief. As clearly noted in the section of the Department's response brief concerning credibility, and pursuant to statute, because the Immigration Judge declined to enter an explicit adverse credibility determination, the respondent is entitled to a rebuttable presumption of credibility on appeal before the Board. *See* Department's Response Brief at 1 n.3 (citing INA §§ 208(b)(1)(B)(iii), 240(c)(4)(C)), 23 (same). Having made this foundational, black letter legal point, the Department, referencing credibility considerations previously raised and/or argued in this proceeding, then avers that such were more than sufficient to rebut the statutory presumption of credibility on appeal, as the Department is entitled to do by statute. Such a response is clearly foreseeable. If the presumption of credibility on appeal is "rebuttable," *see* INA §§ 208(b)(1)(B)(iii), 240(c)(4)(C), a party must be permitted the opportunity to rebut. Further, while the Department did reference one new credibility consideration, i.e., the inconsistency between at least two of the respondent's affiants and her own statements as to whether the Salvadoran authorities had ever issued a protective order, the Department specifically cabined this point. *See* Department's Response Brief at 24. It was not part of the Department's rebuttal of the presumption of credibility on appeal, but rather a point for "the respondent to address, and the Immigration Judge to consider" should the matter be remanded. *Id.* With the respondent's misperception of the Department's credibility arguments corrected, any assertion of surprise rings hollow.

Finally, the respondent avers that "DHS takes the remarkable position that the IJ's irregular conduct did not prejudice (b)(6); (b)(7)(C) because he was entitled to deny her protection on remand even after her background checks cleared, DHS Br. at 7, in direct contravention of the Board's

(b)(6); (b)(7)(C)

order and the regulations." Respectfully, this point does not equate to the surprise contemplated by Practice Manual, Chap. 4.6(h) to justify the filing of a reply brief. Rather, at bottom, it appears to be merely an expression of surprise that the Department disagrees with the respondent's appellate position.

Accordingly, for the reasons set forth above, the Department avers that the respondent's January 27, 2020 brief fails to meet the pertinent parameters of a reply brief and should be rejected.

Date: February 10, 2020

Respectfully submitted,

(b)(6); (b)(7)(C)

Associate Legal Advisor[5]

(b)(6); (b)(7)(C)

Assistant Chief Counsel

[5] The Department requests that all correspondence to it in this matter continue to be directed, in the first instance, to the local U.S. Immigration and Customs Enforcement (ICE) Office of the Chief Counsel in Charlotte, North Carolina, with copies to Ronald Lapid, Acting Chief of the Immigration Law and Practice Division, within ICE's Office of the Principal Legal Advisor.

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

PROOF OF SERVICE

On February 10, 2020, I, (b)(6); (b)(7)(C) Paralegal Specialist, mailed a copy of this U.S. Department of Homeland Security Opposition to Respondent's Reply Brief and any attached pages to the respondent's counsel, (b)(6); (b)(7)(C) Esq., Center for Gender and Refugee Studies, University of California, Hastings College of the Law, 200 McAllister Street, San Francisco, CA 94102, by placing such copy in my office's outgoing mail system in an envelope duly addressed.

(b)(6); (b)(7)(C)

(b)(6);
Chief Counsel
(b)(6); (b)(7)(C)
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Charlotte, NC 28212

NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHARLOTTE, NORTH CAROLINA

In the Matter of:		
(b)(6); (b)(7)(C)	**File No.:**	(b)(6); (b)(7)(C)
In Removal Proceedings		

THE DEPARTMENT OF HOMELAND SECURITY'S
BRIEF ON REMAND

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHARLOTTE, NORTH CAROLINA

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	**File No.:** (b)(6); (b)(7)(C)
Respondent	)	**Charlotte, North Carolina**
In Removal Proceedings	)	

THE DEPARTMENT OF HOMELAND SECURITY'S BRIEF ON REMAND

The Department of Homeland Security, Immigration and Customs Enforcement (Department) respectfully submits the following brief on remand from the Attorney General's decision, *Matter of A-B,* 27 I&N Dec. 316 (A.G. 2018). For the reasons contained herein, the respondent has not demonstrated her eligibility for asylum under Section 208 of the Immigration and Nationality Act (INA) or statutory withholding of removal under INA § 241(b)(3).

I. PROCEDURAL HISTORY

On December 1, 2015, the Immigration Judge issued a written decision denying the respondent's applications for asylum, statutory withholding of removal of removal and protection under the regulations implementing the U.S. obligations pursuant to Article III of the Convention

Against Torture (CAT). *See* I.J. decision dated December 1, 2015. In his decision, the Immigration Judge found the respondent not credible. *Id.* at 5. On December 8, 2016, the Board of Immigration Appeals (Board) vacated the Immigration Judge's decision finding the Immigration Judge's credibility determination clearly erroneous, determined that the respondent was otherwise eligible for asylum, relying, in part, on *Matter of A-R-C-G,* 26 I&N Dec. 338 (BIA 2014), and remanded to the Immigration Judge for background checks. *See* Board decision dated December 8, 2016. On August 8, 2017, the Immigration Judge issued an order certifying the case back to the Board.[1] *See* I.J. decision dated August 8, 2017. After referring the case to himself,[2] in a published decision, on June 11, 2018, the Attorney General vacated the December 6, 2016[3] decision of the Board and overruled *A-R-C-G. A-B,* 27 I&N Dec. 316. The Attorney General determined the Board "erred in finding the immigration judge's factual and credibility determinations to be 'clearly erroneous.' *Id.* at 340. The Attorney General found that "[t]he Board further erred in concluding that the immigration judge's factual finding concerning the respondent's ability to leave her relationship and El Salvador's ability to protect her were clearly erroneous." *Id.* at 342. The Attorney General remanded the case to the Immigration Judge. On July 9, 2018, the Immigration Judge issued a scheduling order.[4]

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[1] The Attorney General determined that the Immigration Judge's certification order was procedurally defective. *See Matter of A-B-*, 27 I&N Dec. 247, 248–49 (A.G. 2018); *A-B-*, 27 I&N at 321-22 n.2.

[2] *Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018).

[3] The published decision uses the date of December 6, 2016, however, the Board decision is actually dated December 8, 2016.

[4] In this Court's scheduling order, the Court noted the respondent failed to appeal the Immigration Judge's denial of CAT protection and this claim was deemed waived or abandoned. *See* I.J. order dated July 9, 2018 and EOIR-26 dated December 16, 2016. Counsel in its brief on appeal to the Board, dated February 25, 2016, did not brief the CAT claim. Therefore, the Department is not addressing the CAT denial in this brief in substantive detail. The Department avers, however, that the Court's initial denial of CAT protection was correctly decided as the respondent provided no credible evidence establishing that she would suffer severe pain or suffering by, or at the instigation of, or with the consent or acquiescence of, a Salvadoran public official. I.J. at 16.

II. ASYLUM AND STATUTORY WITHHOLDING OF REMOVAL

The respondent bears the burden of proving eligibility for asylum. *Naizgi v. Gonzales*, 455 F.3d 484, 486 (4th Cir. 2006); 8 C.F.R. § 1208.13(a).[5] To meet their burden, respondents may show, in part, that they have a well-founded fear of future persecution, or that they suffered past persecution. *Naizgi*, 455 F.3d at 486; 8 C.F.R. § 1208.13(b). A respondent who demonstrate past persecution is presumed to have a well-founded fear of future persecution. *Naizgi*, 455 F.3d at 486; 8 C.F.R. § 1208.13(b)(1). An independently established well-founded fear of persecution requires both a genuine subjective fear of persecution and that "a reasonable person in like circumstances would fear persecution." *Chen v. INS,* 195 F.3d 198, 201–02 (4th Cir.1999).

Isolated incidents that result in minimal harm do not rise to the level of persecution. *Li v. Gonzalez*, 405 F.3d 171, 177 (4th Cir. 2005). As the Attorney General reiterated in *A-B-*, persecution has three specific elements. "First, 'persecution' involves an intent to target a belief or characteristic…Second, the level of harm must be 'severe.'… Third, the harm or suffering 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." 27 I&N Dec. at 337. The "threat of death qualifies as persecution." *Crespin–Valladares v. Holder,* 632 F.3d 117, 126 (4th Cir.2011) (*citing Li,* 405 F.3d at 177). Violence or threats to one's close relatives is an important factor in deciding whether mistreatment sinks to the level of persecution. *Baharon*, 588 F.3d at 232.

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[5] An alien seeking statutory withholding of removal bears the higher burden of showing that it is "more likely than not" that, if removed to a particular country, his life or freedom would be threatened on account of one of the enumerated grounds. *Camara v. Ashcroft,* 378 F.3d 361, 367 (4th Cir. 2004). Since the respondent has not met his burden of establishing eligibility for asylum, he would not meet his burden of establishing eligibility for statutory withholding. *See Matter of J-Y-C-*, 24 I&N Dec. 260, 266 (BIA 2007) ("Inasmuch as the respondent has not met the lower burden of proof required for asylum, it follows that he has also failed to satisfy the clear probability standard required to establish eligibility for withholding of removal.").

"Although the term 'persecution' includes actions less severe than threats to life or freedom, actions must rise above the level of mere harassment to constitute persecution." *Dandan v. Ashcroft,* 339 F.3d 567, 573 (7th Cir.2003) (internal quotation marks omitted).

Generally, status as a victim of violence by a private actor is insufficient to establish eligibility for asylum or statutory withholding or removal. *See Matter of A-B-,* 27 I&N Dec. at 320; *see also Matter of M-E-V-G-, 26* I&N Dec. 227, 235 (BIA 2014). However, victims of private criminal acts are not precluded from establishing eligibility for asylum if they can establish the statutory requirements, including persecution on account of a protected ground.

a. Credibility

The respondent's application was filed after May 11, 2005; thus her case is governed by the Real ID Act amendments and the standard applicable to credibility determinations contained therein[6]:

> Considering the totality of the circumstances and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the application or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of such statement, the consistency of such statements with other evidence of record… *and any inaccuracies or falsehoods in such statements, without regard to whether the inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.* There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

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[6] *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

INA § 208(b)(1)(B)(iii) (emphasis added).

The Fourth Circuit Court of Appeals has recognized that "omissions, inconsistent statements, contradictory evidence, and inherently improbable testimony are appropriate bases for making an adverse credibility determination." *Djadjou v. Holder,* 662 F.3d 265 (4th Cir. 2011). In *A-B-,* the Attorney General, cited with approval from the *Djadjou* decision that "the existence of 'only a few' such issues can be sufficient to make an adverse credibility determination as to the applicant's entire testimony regarding past persecution." *A-B-,* 27 I&N Dec. at 342 (quoting *Djadjou,* 662 F. 3d at 273-274.). In *A-B-,* the Attorney General discussed that "identified inconsistencies do not have to be related to an applicant's core asylum claim to support an adverse credibility determination." 27 I&N Dec. at 342.

As a preliminary matter, the Court's initial credibility determination was correctly decided and persuasively supported by the evidence. I.J. decision dated December 1, 2015 at 5. The Court's determination was correct where the respondent's testimony was inconsistent with previous testimony and her declaration. *Id.*[7] On remand the respondent's credibility is further undermined by the declaration submitted in briefing before the Attorney General.

i. <u>Date the Abuse Began</u>

During a credible fear interview in August 2014, where the respondent was represented by an attorney and made use of a Spanish interpreter, the respondent stated the violence began "about five years back", so approximately August of 2009. *See* Exh. 1, Form I-870 at 1, 4; Tr. at 48-49. However, at the individual hearing on September 1, 2015 the respondent testified the violence began in 1999; 10 years prior the time stated during her interview. Tr. at 48-49. When

confronted with this discrepancy, the respondent failed to adequately explain, simply stating that she was providing a summary of her testimony. Tr. at 48-50. This ten-year difference as to when the abuse began is a major discrepancy, and the Court correctly relied on it in making an adverse credibility finding. *See e.g. Camara v. Ashcroft,* 378 F.3d 361 (4th Cir. 2004) (substantial evidence upon which IJ could support adverse credibility determination based upon initial asylum application claiming no children where applicant had two children and a three year discrepancy relating to a miscarriage).

ii. Rape in January/February 2014

During cross-examination, the respondent testified she was raped by her ex-husband in January or February 2014 and that she did not report this to the police. Tr. at 51. This incident was not in the sworn statement submitted with her initial asylum application nor revealed during her credible fear interview. *Compare* Exh. 2, Tab C, page 14, *with* Exh. 1, Form I-870, *with* Tr. at 51. The respondent's explanation during her individual hearing for this omission was that it "slipped her mind." Tr. at 52. This material omission and explanation is another major discrepancy the Court correctly relied upon to determine the respondent was not credible. *See e.g. Djadjou v. Holder,* 662 F. 3d 265 (4th Cir. 2011) ("[t]he existence of only a few such inconsistencies, omission, or contradictions can be sufficient for the agency to make an adverse credibility determination as to the applicant's entire testimony regarding past persecution.")

In briefing before the Attorney General, the respondent submitted a fifty-one-paragraph supplemental declaration dated March 30, 2018. *See* Respondent's Appendix: Supplemental Documents to Attorney General, Tab. A. at 2-11. In it, the respondent discusses her life in great

[7] The inconsistency in age difference between the respondent and her ex-husband previously cited by the Court should not form a basis for any new adverse credibility determination as it apparently was based on a translation

detail to the point of mentioning extensive childhood memories. Notably, this detailed declaration, again fails to specifically mention that the respondent's ex-husband raped her in January/February 2014, thus calling into question the veracity of her testimony during the individual hearing regarding this incident. *Compare* Respondent's Appendix: Supplemental Documents to Attorney General, Tab. A[8] at 2-11, *and* Exh. 2, Tab C at 14, *and* Exh. 1, Form I-870, *with* Tr. at 51. The omission of this fact from her supplemental declaration further undermines the credibility of her claim.

iii. Reason 2001 charges not pursued

The respondent testified during her individual hearing that her husband was arrested in 2001. Tr. at 56. Ultimately, after extensive questioning and the Court finding the respondent non-responsive, the following exchange occurred:

Judge to (b)(6); (b)(7)(C). Did you pursue the charges with the police after he was released from jail or not? Yes or no?

(b)(6); (b)(7)(C) **to Judge:** No

Judge to (b)(6); Okay. Why not?

(b)(6); (b)(7)(C) Because he had promised me that he was going to change, that he wanted to have a home with me.

Tr. at 58.

In the respondent's supplemental declaration, she now submits an entirely different explanation, stating:

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error.

[8] The respondent's filing to the Attorney General labels these documents as exhibits. However, as there has been evidence marked as actual exhibits by the Court, the Department will refer to them as tabs so as not to confuse documentation marked into evidence by the Court versus documents submitted to the Attorney General on appeal.

> "[w]hile my husband was in the cell, some of his friends came to the house and threatened that if I didn't drop the complaint, I would be a dead woman. Two men also came to the house during this time and pressured me to sign something that would let my husband go free. I think these men were private detectives or somehow affiliated with the police because they had badges. Because of the threats from his friends and because I knew my husband's brother (b)(6); was a police officer, I was afraid I would be killed if I didn't cooperate. I signed the papers and they released him."

See Respondent's Appendix: Supplemental Documents to Attorney General, Tab. A. at 6, para. 25.

The respondent has now provided a completely different explanation about why the 2001 charges against her ex-husband were not pursued. In her supplemental declaration she is alleging that she was threatened and that is why she dropped the charges. Whereas, during her individual hearing the respondent testified that charges were dropped because her ex-husband promised he would change. Tr. at 58. This change in her story demonstrates that the respondent failed to provide consistent and credible testimony in support of her claim for relief and protection.

Although, the Board determined this Court's credibility assessment was clearly erroneous, the Attorney General found the Board "failed to give adequate deference to the credibility determinations and improperly substituted its own assessment of the evidence." *A-B,* 27 I&N at 341.

The respondent has attempted to counteract her lack of credibility by submitting evidence before the Court and again before the Attorney General that she has been diagnosed with "ongoing" Posttraumatic Stress Disorder (PTSD). *See* Respondent's Appendix: Supplemental

Documents to Attorney General, Tab. F, G.[9] There are two reports: one from psychotherapist (b)(6); and (b)(6); (b)(7)(C) (b)(6); appears to have never personally evaluated the respondent herself merely reviewing (b)(6); (b)(7)(C) evaluation. *See* Respondent's Appendix: Supplemental Documents to Attorney General, Tab. G page 122, para. 4 These reports attempt to attribute ongoing PTSD with her inability to recall instances of mistreatment. However, this does not explain why the respondent would be able to recall a rape by her ex-husband during her individual hearing but not before or after, omitting the event from her credible fear interview, initial asylum application, and supplemental declaration before the Attorney General. Likewise, the diagnosis does not adequately account for the glaring inconsistencies in her testimony regarding when the abuse began and why she did not pursue criminal charges against her husband in 2001. *See* Respondent's Appendix: Supplemental Documents to Attorney General, Tab F, G. Moreover, there are concerns with the reports themselves. For example, (b)(6); never personally evaluated the respondent. *Id.* at Tab G.

With the addition of the respondent's supplemental declaration to the Attorney General, the respondent has further undermined her credibility.

b. Lack of Corroboration

The respondent's claim rests in part that she fears returning to El Salvador because her ex-brother in law was member of the police, so the police would not protect her from her abusive ex-husband. *See* Exh. 2, at 1, para. 7, 13. However, the respondent failed to corroborate the simple fact that her ex-brother in law was in fact a policeman, admitting she had no proof that

[9] It should be noted that in Tab G, (b)(6); evaluation, in both the electronic version and hard copy version that the Department received, there is a missing part. While the document is paginated correctly at pages 126 to 127, the evaluation skips from paragraph 12 to 16 with paragraphs 13 to 15 missing. Therefore, the Department does not appear to have been properly served with a complete copy this document. The undersigned emailed counsel on

her ex-brother in law was a policeman. Tr. at 54. She did not otherwise explain why such evidence would not have been reasonably available. She also admitted she never reported her ex-brother in law to the police for any threats he may have made to her. Tr. at 55.

Therefore, the respondent has not adequately corroborated a key element of her claim for asylum.

c. Membership in a Particular Social Group

> Are "El Salvadoran women who are unable to leave their *domestic relationships* where they have children in common" with their partners;" "Salvadoran women in *domestic relationships* they are unable to leave where they have children in common;" "Salvadoran women viewed as property by virtue of their status in a *domestic relationship*" cognizable social groups?

Before the Court, the respondent sets forth the particular social group "'El Salvadoran women who are unable to leave their domestic relationships where they have children in common' with their partners." I.J. at 8. However, in briefing before the Attorney General, the respondent set forth alternate formulations of "Salvadoran women in domestic relationships they are unable to leave where they have children in common," "Salvadoran women viewed as property by virtue of their status in a domestic relationship," or "Salvadoran women."[10] Respondent's brief to Attorney General at 32. The Attorney General in *A-B-* focused on the particular social group at issue before the Immigration Judge and the Board, i.e., "El Salvadoran women who are unable to leave their domestic relationships where they have children in

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August 9, 2018 to advise them. Therefore, it is unknown to the undersigned what is contained in the missing paragraphs and pages.

[10] This latter particular social group formulation will be addressed separately in this brief.

common' with their partners." *A-B-*, 27 I&N Dec. at 326. The respondent's feared persecutor is her ex-husband, a private actor. *See* Exh. 2.

Specifically, to establish a cognizable particular social group, the respondent must show that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *See Matter of M-E-V-G-*, 26 I&N Dec. at 237; *see also Matter of W-G-R-*, 26 I&N Dec. 208, 210-12 (BIA 2014). Further, as an important corollary principle, the group must "exist independently" of the harm asserted in an application for asylum or statutory withholding of removal and must have existed prior to the alleged persecution. *Matter of A-B-,* 27 I&N at 334-35; *see also Temu v.* Holder, 740 F.3d 887, 894 (4th Cir. 2014). Whether a proposed social group exists independently of the harm is a question that must be carefully analyzed on a case-by-case basis, but groups defined because of the "inability to leave a relationship" in the domestic violence context are impermissibly defined by the persecution suffered or feared if the inability to leave was created by harm or threatened harm by the abusive partner. *Matter of A-B-,* 27 I&N at 335-36.

The respondent has not shown that three of particular social groups formulations exist fully independently of the persecution suffered or feared.

> "El Salvadoran women who are unable to leave their *domestic relationships* where they have children in common" with their partners." "Salvadoran women in *domestic relationships* they are unable to leave where they have children in common." "Salvadoran women viewed as property by virtue of their status in a *domestic relationship*."

These three social group definitions fail because the respondent has not established that they exist independent of the harm suffered or feared. For example, the harm of being viewed, and thus, logically, treated "as property." The other two definitions also suffer from the fatal

flaw of being "unable to leave the relationship," when the respondent has failed to persuasively establish that such a trait exists independently of the harm and threats from abusive partners. *See A-B-*, 27 I&N Dec. at 335 ("*A-R-C-G-* never considered that 'married women in Guatemala who are unable to leave their relationship' was effectively defined to consist of women in Guatemala who are victims of domestic abuse because the inability 'to leave' was created by harm or threatened harm."). Therefore, none of these three groups exist independently of the alleged persecution they claim to be suffering and would not have existed prior to the alleged harm. Thereby, all three groups are impermissibly defined and are not cognizable social groups.

Because the respondent has failed to establish membership in a cognizable particular social group with respect to these three formulations, she cannot establish nexus to a protected ground on these bases to support her application for asylum and statutory withholding or removal.

d. Nexus

Has the respondent established a nexus to a statutorily protected ground?

Assuming *arguendo* the respondent established membership in a cognizable particular social group, the respondent failed to establish a nexus between any harm and a statutorily protected ground. To establish eligibility for asylum the respondent must establish she is a refugee, within the meaning of INA § 101(a)(42)(A). INA § 208(b)(1)(A).

To establish that the respondent is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be "at least one central reason for persecuting the applicant." INA § 208(b)(1)(B)(i); *see also Crespin–Valladares v. Holder,* 632 F.3d 117, 127 (4th Cir. 2011); *see also Oliva v. Lynch*, 807 F.3d 53, 59 (4th Cir. 2015). The respondent need not demonstrate that an enumerated ground is "'*the* central reason or even a dominant central reason' for his persecution, [but] he must demonstrate that these ties are more than 'an incidental, tangential, superficial, or subordinate reason' for his persecution." *Crespin–Valladares,* 632 F.3d at 127 (*quoting Quinteros–Mendoza v. Holder,* 556 F.3d 159, 164 (4th Cir.2009)) (emphasis in original). Among the protected grounds listed in the asylum statute is "membership in a particular social group." INA § 208(b)(1)(B)(i).

> Unless an applicant has been targeted on the basis of an enumerated ground, he or she cannot establish a claim for asylum. *Saldarriaga v. Gonzales*, 402 F.3d 461, 467 (4th Cir. 2005) ("[T]he asylum statute was not intended as a panacea for the numerous personal altercations that invariably characterize economic and social relationships."). "Evidence consistent with acts of private violence or that merely shows that an individual has been the victim of criminal activity does not constitute evidence of persecution on a statutorily protected ground." *Velasquez v. Sessions*, 866 F.3d 188, 194 (4th Cir. 2017) (quoting *Sanchez v. U.S. Att'y General*, 392 F.3d 434, 438 (11th Cir. 2004)). As the Attorney General has observed: The nexus requirement is critically important in determining whether an alien established an asylum claim. That requirement is "where the rubber meets the road" because the "importance of the 'on account of' language must not be overlooked." *Cece*, 733 F.3d at 673. "Although the category of protected persons [within a particular group] may be large, the number of those who can demonstrate the required nexus likely is not." *Id.* Indeed, a "safeguard against potentially innumerable asylum claims" may be found "in the stringent statutory requirements for all asylum seekers." *Id.* at 675.
>
> 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. *See, e.g., Zoarab*, 524 F.3d at 781 ("Courts have routinely rejected asylum applications grounded in personal disputes."). A criminal gang may target people because they have money or property within the

> area where the gang operates, or simply because the gang inflicts violence on those who are nearby. *See, e.g.*, *Constanza*, 647 F.3d at 754. That does not make the gang's victims persons who have been targeted "on account of" their membership in any social group.
>
> Similarly, in domestic violence cases, like *A-R-C-G-*, the Board cited no evidence that her ex-husband attacked her because he was aware of, and hostile to, "married women in Guatemala who are unable to leave their relationship." Rather, he attacked her because of his preexisting personal relationship with the victim. *See R-A-*, 22 I&N Dec. at 921 ("the record does not reflect that [R-A-'s] husband bore any particular animosity toward women who were intimate with abusive partners, women who had previously suffered abuse, or women who happened to have been born in, or were actually living in, Guatemala"). When "the alleged persecutor is not even aware of the group's existence, it becomes harder to understand how the persecutor may have been motivated by the victim's 'membership' in the group to inflict the harm on the victim." *Id.* at 919.

A-B-, 27 I&N Dec. at 338-39.

As a result, "even aliens with a 'well-founded fear' of persecution supported by concrete facts are not eligible for asylum if those facts indicate only that the alien fears retribution over purely personal matters or general conditions of upheaval and unrest." *See Huaman-Cornelio v. Board of Immigration Appeals*, 979 F.2d 995, 1000 (4th Cir. 1992) (citing *Matter of Maldonado-Cruz,* 19 I&N Dec. 509, 512 (BIA 1988), *rev'd on other grounds,* 883 F.2d 788 (9th Cir.1989)); *see also Al Fara v. Gonzales*, 404 F.3d 733, 740 (3d Cir. 2005) ("'[G]enerally harsh conditions shared by many other persons do not amount to persecution.' . . . [H]arm resulting from country-wide civil strife is not persecution 'on account of' an enumerated statutory factor").

In this case, the respondent claims she was targeted by her ex-husband based on her membership in a particular social group. The Court previously found that the respondent had failed to demonstrate a nexus between the harm she suffered in El Salvador and a statutorily

protected ground because it was "related to the violent and criminal tendencies of her abusive former spouse" I.J. at 13.

The respondent claims, that since her departure from El Salvador the respondent's ex-husband has been violent with their children in common, beating her daughter and two sons. *See* Respondent's Appendix: Supplemental Documents to Attorney General, Tab. A. at 11, para. 49. This claim, that the respondent's ex-husband, a private actor, is harming individuals outside of the respondent's proposed social group undermines the respondent's claim that one central reason she was targeted was on account of her membership in a particular social group. Instead it suggests it is more likely the respondent's ex-husband was motivated because of their private relationship. *A-B-,* 27 I&N Dec. at 338-39 ("[w]hen 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."). *Assuming arguendo,* that the respondent is credible, she has not persuasively established that anything that happened to her is other than strictly private violence unrelated to a protected ground. Therefore, the respondent has failed to establish a nexus between any alleged harm and any membership in a particular social group.

Because the respondent failed to establish past persecution on account of an enumerated ground she is not entitled to the presumption of a well-founded fear of future persecution. *Marynenka v. Holder,* 592 F.3d 594 (4th Cir. 2010).

e. <u>"Salvadoran women" as a Particular Social Group</u>

Before the Attorney General, the respondent added another particular social group of "Salvadoran women." At this time, the Department does not have a formal position on whether "Salvadoran women" comprises a legally cognizable particular social group.[11] As the Attorney General stated in *A-B-*, however, "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." *A-B-*, 27 I&N Dec. at 340. *Assuming arguendo* it is cognizable, the claim still fails because the respondent is not credible and the respondent failed to show any nexus between any harm suffered from her alleged persecutor and her membership in any proposed social group. Therefore, the Department asserts the respondent failed to establish eligibility for asylum on this basis.

f. Statutory Withholding of Removal

As the respondent fails to meet the lower burden to establish eligibility for asylum, the respondent fails to meet the higher burden to establish eligibility for withholding of removal under INA § 241(b)(3). *See Mulanyi v. Holder,* 771 F.3d 190, 198 (4th Cir. 2014).

[11] As noted by the Department in its briefing to the Attorney General in this case, even a minimal assessment of this issue likely would require closer examination of the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 197; the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223; and the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, likely including any relevant legislative, ratification, and negotiation history. Such material, along with the statutory text and scheme of the INA, subsequent amendments to the immigration laws relating to gender-based harm (e.g., INA § 204(a)(1)(A)(iii), (B)(ii)), and the pre-existence and emergence of international human rights instruments specifically addressing gender-related issues (e.g., Convention on the Political Rights of Women, Mar. 31, 1953, 27 U.S.T. 1909), and relevant case law would have to be carefully considered.

CONCLUSION

WHEREFORE, based upon the foregoing, the Department submits that the respondent has failed to meet her burden to establish a claim for asylum. The respondent failed to present a credible claim for relief and protection. In addition, the respondent failed to establish any harm suffered or feared is on account of her membership in any particular social group. Finally, the respondent failing to meet the lower burden for asylum fails to meet the higher burden to establish eligibility for statutory withholding of removal. The Department respectfully requests that these applications for relief and protection be denied, and that the respondent be ordered removed to El Salvador.

8/20/18
Dated:

Respectfully submitted,

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NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	File No:	(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)		
In removal proceedings		

U.S. DEPARTMENT OF HOMELAND SECURITY'S
RESPONSE BRIEF

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INTRODUCTION

This matter is before the Board of Immigration Appeals (Board or BIA) on the respondent's appeal from the October 10, 2018 decision[1] of the Immigration Judge in remanded proceedings from the Attorney General. *See Matter of A-B-*, 27 I&N Dec. 316, 346 (A.G. 2018). Specifically, the respondent appeals from the Immigration Judge's denial of her motion for recusal and her applications for asylum under section 208 of the Immigration and Nationality Act (Act or INA), withholding of removal under section 241(b)(3) of the Act (statutory withholding of removal), and protection under the regulations implementing the U.S. obligations pursuant to Article 3 of the Convention Against Torture (CAT).[2] The Department of Homeland Security (Department or DHS) respectfully submits this response brief urging the Board to affirm the Immigration Judge's decision in dispositive parts and to dismiss the respondent's appeal. In the alternative, the case should be remanded to the Immigration Judge for further factfinding and analysis, including making a definitive determination as to the respondent's credibility.[3]

ISSUES PRESENTED

I. Whether the respondent has established that the Immigration Judge should have recused himself and that he otherwise denied her due process of law.

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[1] Unless otherwise indicated, all references to the Immigration Judge's decision are to his October 18, 2018 order.

[2] 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). Because the CAT is a non-self-executing treaty, *see, e.g.*, *Hui Zheng v. Holder*, 562 F.3d 647, 655–56 (4th Cir. 2009), adjudicators do not apply the CAT itself, but rather the implementing regulations. Thus, the references to the CAT in this brief (for example, "CAT protection") serve as a convenient shorthand for the regulations implementing the U.S. obligations pursuant to Article 3 of the CAT.

[3] The Immigration Judge affirmatively declined to make a definitive determination as to the respondent's credibility. *See* I.J. at 6 (noting that he was "hesitant to now find as fact she provided credible testimony in support of her claim," but that, "in fairness to the respondent and viewing the evidence in a light most favorable to her, the Court will assume without deciding she is credible for purposes of its legal analysis"). Consequently, while there is no presumption of credibility in removal proceedings, given that the Immigration Judge declined to enter an explicit adverse credibility determination, the respondent is entitled to a rebuttable presumption of credibility on appeal before the Board. *See* INA §§ 208(b)(1)(B)(iii), 240(c)(4)(C).

II. Whether the Immigration Judge clearly erred in finding that the respondent failed to establish that the Government of El Salvador was, or will be, unable or unwilling to control her abuser, a non-state actor—a determinative requirement for the respondent's applications for asylum and statutory withholding of removal.

III. Whether the respondent established that she is more likely than not to be tortured if returned to El Salvador and that, accordingly, the Immigration Judge erred in denying her application for CAT protection.

IV. In the alternative, whether the case should be remanded to the Immigration Judge to conduct further factfinding and analysis, including making a definitive determination with respect to the respondent's credibility.

STANDARD OF REVIEW

The Board reviews factual determinations of the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *see Matter of R-S-H-*, 23 I&N Dec. 629, 637 (BIA 2003) (discussing the "clearly erroneous" standard of review). Factual determinations reviewed for clear error include findings concerning the likelihood of future events, inferences from direct and circumstantial evidence, and decisions about whether or not to credit the plausible testimony of a witness when there are other permissible views of the evidence based on the record. *Matter of Vides Casanova*, 26 I&N Dec. 494, 498 (BIA 2015). Whether a government is unable or unwilling to control a non-state actor is a question of fact. *See Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011); *A-B-*, 27 I&N Dec. at 343. The Board reviews *de novo* whether the underlying facts found by the Immigration Judge meet the legal requirements for relief and protection or resolve any other legal issues that are raised. *See Matter of Z-Z-O-*, 26 I&N Dec. 586, 591 (BIA 2015); *see also* 8 C.F.R. § 1003.1(d)(3)(ii).

SUMMARY OF THE ARGUMENT

The respondent has failed to establish that the Immigration Judge should have recused himself or that his conduct of the removal proceedings violated her due process rights. With respect to the merits of the respondent's applications for asylum and statutory withholding of removal, she has not met the high bar of clear error vis-à-vis the Immigration Judge's factual

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finding that she failed to establish that Government of El Salvador was, or will be, unable or unwilling to control her abuser, a non-state actor. This issue is determinative of the respondent's applications for asylum and statutory withholding of removal. In addition, the respondent has failed to establish that she is more likely than not to be tortured if returned to El Salvador and that, accordingly, the Immigration Judge erred in denying her application for CAT protection. Finally, in the alternative, the record contains sufficient evidence to rebut the statutory presumption of the respondent's credibility on appeal, such that the case should be remanded to the Immigration Judge to conduct any further necessary factfinding and analysis, and make a definitive determination as to the respondent's credibility.

STATEMENT OF FACTS

The factual record (as well as procedural history) in this matter is extensive and, for purposes of efficiency, only will be referenced in the instant brief as it pertains to the core issues cited above. In sum, the respondent is a native and citizen of El Salvador, who entered the United States illegally and was apprehended by U.S. Customs and Border Protection agents in July 2014. *See A-B-*, 27 I&N Dec. at 320. She asserts that her ex-husband, with whom she shares three children, repeatedly abused her physically, emotionally, and sexually during and after their marriage, and will continue to do so if she is returned to El Salvador. *See id.* at 321.

ARGUMENT

I. THE RESPONDENT HAS FAILED TO ESTABLISH THAT THE IMMIGRATION JUDGE SHOULD HAVE RECUSED HIMSELF OR THAT HIS CONDUCT OF THE REMOVAL PROCEEDINGS OTHERWISE VIOLATED HER DUE PROCESS RIGHTS.

The respondent has failed to establish that the Immigration Judge should have recused himself, and her request to remand for a new hearing should be denied, where the Immigration Judge provided a full and fair hearing devoid of any due process violation. To prevail on a due process claim, the respondent must show that the defect in proceedings rendered it fundamentally unfair and that the defect prejudiced the outcome of her case. *See Anim v. Mukasey*, 535 F.3d 243,

256 (4th Cir. 2008); *Rusu v. INS*, 296 F.3d 316, 320 (4th Cir. 2002). "These two elements are aimed at the same concern—the fairness of the proceeding." *Anim*, 535 F.3d at 256. Though the respondent alleges due process violations in the Immigration Judge's denial of the motion to recuse and the general handling of her case (focusing on proceedings subsequent to the Board's December 8, 2016 decision),[4] the record simply does not support the respondent's assignments of error.

A. The Immigration Judge Properly Denied the Motion to Recuse Where There Was No Evidence of Extrajudicial Bias.

The Board's decision in *Matter of Exame*, in which the Board discussed motions to recuse in the immigration context, is controlling here. 18 I&N Dec. 303 (BIA 1982). The "constitutional due process requirement that [a] hearing be before a fair and impartial arbiter" is a quintessential requirement of immigration proceedings. *Id.* at 306. However, an alien "is not denied a fair hearing merely because the immigration judge has a point of view about a question of law or policy." *Id.*; *see also Hortonville Joint Sch. Dist. No. 1 v. Hortonville Ed. Ass'n.*, 426 U.S. 482, 493 (1976) (mere familiarity with the facts of a case does not render a decisionmaker impermissibly biased). To the extent that the respondent alleges that the Immigration Judge's denial of relief and protection evidences bias or the appearance of bias, *see* Respondent's Brief at 43-5,[5] the respondent's assignment of error conflates legal error with legal and factual analysis that does not end with a favorable result for her. Where, as here, the Immigration Judge analyzed and evaluated the record, but made permissible findings of fact contrary to the respondent's stated position, the record is insufficient to support the respondent's claims of bias or perceived bias. *See, e.g.*, I.J. at 5-19 (discussing, *inter alia*, the evidence considered, viability of the respondent's putative particular social groups, nexus to protected ground, and whether the Salvadoran Government was,

[4] *See, e.g.*, Respondent's Brief on Appeal at 40 (Dec. 16, 2019) (arguing that "[b]ased on the events that transpired following the last remand from the Board, any reasonable person could doubt the IJ's ability to impartially consider Ms. Bonilla's case following the remand from the Attorney General").

[5] Unless otherwise indicated, references to the "Respondent's Brief" refer to the Respondent's Brief on Appeal (Dec. 16, 2019).

or will be, unable or unwilling to protect the respondent); *cf. Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). Moreover,

> [a]s a general rule, in order to warrant a finding that an immigration judge is disqualified from hearing a case it must be demonstrated that the immigration judge had a personal, rather than judicial, bias stemming from an "extrajudicial" source which resulted in an opinion on the merits on some basis other than what the immigration judge learned from his participation in the case.

Exame, 18 I&N Dec. at 306. While the Department acknowledges the procedural irregularity of the Immigration Judge's 2017 certification to the Board, the record does not support the respondent's claim of bias where the Immigration Judge repeatedly—in writing and orally—demonstrated the desire to follow current and controlling caselaw. I.J. at 2-4. Indeed, the Attorney General's most recent decision in this case, including the merits portion, favorably discusses at length the case law cited by the Immigration Judge in the certification order. *See A-B-*, 27 I&N Dec. at 322-23, 332 (discussing *Velasquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017)).

The record does not show any "extrajudicial source" of bias—either implied or in fact. On the contrary, the Immigration Judge's decision reflects the attempt to "discharge of its duty and to find the facts and apply the law in this case." I.J. at 5; *see also* Tr. at 2-4 (2017). On this point, it is relevant to note that following remand from the Board, the Immigration Judge questioned both parties as to their position on certification back to the Board, and rather than demand a grant of relief or protection, or request the opportunity to further brief the relevant law, i.e., *Velasquez*, 866 F.3d 188, the respondent's counsel stated that she "would reserve any and all . . . rights to raise these arguments on, on re-appeal or on re-cert." Tr. at 3 (2017). Moreover, the Immigration Judge specifically acknowledged that certification was for the benefit of the parties to fully brief the impact of intervening caselaw—not to prevent the opportunity to do so. *Id.* at 3-4. Ultimately, the Immigration Judge exercised his "duty to find the facts and apply the law in this case," but the

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result was not relief or protection for the respondent. I.J. at 5. The denial of such relief or protection, "however, should not be misinterpreted to mean [the Immigration Judge] lacks empathy for the respondent's past experiences of violence and domestic abuse, or maligned as cold indifference to the suffering [the respondent] endured." *Id.* Proper application of the law to the facts of the instant case simply does not support a grant of relief or protection.

An Immigration Judge is not disqualified simply because he has taken a position, even in public, or in prior unrelated cases or controversies, on an issue or point of law related to the dispute, in the absence of a showing that he is not "capable of judging a particular controversy fairly on the basis of its own circumstances." *See United States v. Morgan*, 313 U.S. 409, 421 (1941) (concerning allegations of bias against the Secretary of Agriculture). This notwithstanding, the respondent alleges that the Immigration Judge's decisions in unrelated matters evince bias. Respondent's Brief at 44. The respondent's claim is not supported as a matter of law, however, because "opinions formed by [a] judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). The degree of favoritism or antagonism required to support a motion for recusal can only be shown in the "rarest circumstances." *Id.* Moreover, "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id.* In light of the Immigration Judge's decision, as well as the record as a whole, the respondent's claim of bias or perceived bias is entirely speculative and fails to adequately demonstrate basis for recusal; a judge is not "required to recuse himself simply because of unsupported, irrational or highly tenuous speculation." *United States v. Lentz*, 524 F.3d 501, 530 (4th Cir. 2008) (citing *United States v. Chery*, 330 F.3d 658, 665 (4th Cir. 2003) (internal quotation marks omitted)); *see also* I.J. at 5 ("The Court relies on the record of proceedings and

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concludes the respondent has not been denied a fair hearing, or demonstrates the undersigned Immigration Judge has a personal bias against her . . . ."). The respondent's claims of bias or perceived bias are therefore unfounded, and the appeal of the denial of the motion to recuse must be dismissed.

Furthermore, even assuming *arguendo* that the Immigration Judge's certification is deemed fundamentally unfair, the respondent nevertheless is unable to demonstrate that it prejudiced the outcome of the proceedings. *See generally Anim*, 535 F.3d at 256. The respondent's contention that she would have asylum today but for the actions of the Immigration Judge is contradicted by the respondent's own admissions in her brief on appeal. *See* Respondent's Brief at 41, 46. As both the respondent and the Attorney General acknowledged, the Immigration Judge was not required to grant relief or protection upon the Board's first remand. Respondent's Brief at 41 (citing *A-B-*, 27 I&N Dec. at 248). Instead, the Immigration Judge was authorized to hold a hearing and, if appropriate, issue an order denying the relief and protection sought. *Id.* Where the respondent acknowledges that the Immigration Judge could have denied relief and protection, but did not issue an order doing so at that time, the Immigration Judge's certification can hardly be described as prejudicing the outcome of the case. Thus, even if the Board finds that the respondent met her burden of proof to demonstrate defects in the proceedings, the respondent is unable to demonstrate that the perceived defects prejudiced the outcome of the proceedings, and the respondent's related request to vacate the Immigration Judge's order and grant relief and protection should be denied.

B. The Respondent's Request to Remand Proceedings for a New Hearing Should be Denied Where the Record Demonstrates a Full and Fair Hearing.

Section 240(b)(4) of the Act provides that an alien is entitled to (1) "the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing"; (2) "a reasonable opportunity to examine the evidence against" her; (3) a reasonable opportunity to

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"present evidence on [her] own behalf"; and (4) a reasonable opportunity to "cross-examine witnesses presented by the Government." INA § 240(b)(4)(A), (B). Here, the respondent was represented by the counsel of her choosing. Tr. at 1 (2017); I.J. at 5. After both the Immigration Judge and the Attorney General outlined deficiencies, discrepancies, and evidentiary issues in the respondent's case, *see, e.g.*, *A-B-*, 27 I&N Dec. at 340-46, the respondent was permitted to respond to those issues, and indeed she filed updated evidence, *see, e.g.*, I.J. at 5-6; Exh. R1. Thus, not only was the respondent permitted the opportunity to review adverse information, she was permitted to attempt to respond to and attempt to rebut it. Indeed, throughout the removal proceedings, the respondent was afforded an opportunity to fully and fairly present her case.[6]

The instant case is easily distinguishable from the scenario presented in *Matter of Y-S-L-C-*, 26 I&N Dec. 688 (BIA 2015), which the respondent cites in support of her request for remand. Respondent's Brief at 47. The subject respondent in *Y-S-L-C-* was a child, and the Immigration Judge's questioning and colloquy with him and his counsel impeded the child's ability to testify and was deemed belittling and insensitive. *Id.* at 690-91. In the instant case, however, the respondent is an adult who has been permitted to fully develop a voluminous record with testimony, multiple affidavits, declarations, and additional evidence. *See* I.J. at 5-6 (referencing evidence considered); Exh. R1. The respondent acknowledges that the facts in her case deviate from those in *Y-S-L-C-* because the Immigration Judge here was "more restrained in his on-record commentary," choosing to frame her bias argument on a nebulous "crusade against domestic violence cases" rather than specific examples of the Immigration Judge evincing belittling or insensitivity toward her. *See* Respondent's Brief at 47. The reason for this is simple: the record is devoid of any instance where the Immigration Judge treated the respondent or her counsel in

[6] In her brief, the respondent references the 2015 proceedings which preceded the Board's 2016 remand order. Respondent's Brief at 43 n.21. If, as the respondent now claims, "[t]he extrajudicial bias the IJ brought with him to these proceedings, appears throughout the record," *see id.*, including the 2015 proceedings, then one is left to question why the respondent—then represented by one of the same counsels who still represents her—did not directly raise any allegation of bias or due process violations in her initial appeal to the Board.

any way other than respectfully or otherwise failed to "meet the high standards expected of Immigration Judges." *Y-S-L-C*, 26 I&N Dec. at 691; *see, e.g.*, Tr. at 5-6 (2017) (reflecting a colloquy between the Immigration Judge and the respondent for the benefit of the respondent's understanding of the proceedings); I.J. at 5 (referring to domestic violence as "tragedy" and "awful crimes"). On the contrary, the Immigration Judge provided a full and fair hearing on the respondent's requests for relief and protection. The Immigration Judge reserved the matter for his consideration, subsequently issuing a 19-page decision considering all the evidence of record and the relevant law. The fact that the Immigration Judge was not persuaded that the respondent met her burden of proof does not support the respondent's request for remand to present her claim to a new Immigration Judge. As noted above, the respondent conflates alleged bias and due process concerns with legal and factual analysis that does not end with a favorable result for her. To the extent that the respondent asserts error in the Immigration Judge's certification of this case to the Board, while such certification was procedurally defective, it did not impede or affect the Attorney General's review of the Board's December 8, 2016 decision. *A-B*, 27 I&N Dec. at 249. Both the record and the decision in this case demonstrate that the Immigration Judge subsequently conducted a thoughtful and proper analysis under the law, and neither supports the respondent's claim that she was denied due process. Thus, the record fails to support the respondent's claim that she was denied due process, and the request to remand proceedings should be denied. The respondent's appeal from the Immigration Jude's denial of her recusal motion should likewise be dismissed.[7]

[7] Although in her Notice of Appeal from a Decision of an Immigration Judge, Form EOIR-26 (Nov. 8, 2018), the respondent also raises due process issues with respect to the Attorney General, in her appeal brief, she does not appear to directly continue advancing these issues. To the extent, however, that they remain before the Board on appeal, with respect to alleged due process violations involving the Attorney General's issuance of a decision in her case, the Attorney General addressed and rejected these concerns in his precedent decisions in this matter. *See A-B-*, 27 I&N Dec. at 323-25; 27 I&N Dec. 247, 247-49 (A.G. 2018). Moreover, these claims are otherwise beyond the Board's purview as a delegate of the Attorney General. *See, e.g.*, 8 C.F.R. § 1003.1(a)(1), (d)(1), (g), (h); *see also, e.g.*, *Matter*

(b)(6); (b)(7)(C)

II. THE RESPONDENT HAS NOT SHOWN THAT THE IMMIGRATION JUDGE CLEARLY ERRED IN FINDING THAT SHE FAILED TO ESTABLISH THAT THE GOVERNMENT OF EL SALVADOR WAS, OR WILL BE, UNABLE OR UNWILLING TO CONTROL HER ABUSER, A NON-STATE ACTOR—A DETERMINATIVE REQUIREMENT FOR HER APPLICATIONS FOR ASYLUM AND STATUTORY WITHHOLDING OF REMOVAL.

The burden of proof is on the respondent to establish that she is eligible for asylum or statutory withholding of removal. *See* INA §§ 208(b)(1)(B)(i) (asylum), 240(c)(4)(A) (applications for relief or protection from removal, in general), 241(b)(3)(C) (statutory withholding of removal); *Matter of R-K-K-*, 26 I&N Dec. 658, 659 (BIA 2015). To qualify for asylum, the respondent must establish, *inter alia*, either past persecution or a well-founded fear of future persecution. *See* INA § 208(b)(1)(B)(i). "Persecution" is a term of legal art and includes the concept that the harm or suffering 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.'" *A-B-*, 27 I&N Dec. at 337 (quoting *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds*, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987)).

In his decision, after due consideration of the record evidence, the Immigration Judge determined that the respondent had failed to establish that the Government of El Salvador was, or will be, unable or unwilling to control her abuser, a non-state actor. *See* I.J. at 15. The Immigration Judge's finding in this regard is a factual determination that the Board must review under the clear error standard. *See Crespin-Valladares*, 632 F.3d at 128; *A-B-*, 27 I&N Dec. at 343.

Respectfully, the respondent has failed to meet this high standard on appeal. *See* Respondent's Brief at 28-32. In this regard, she has not shown that the Immigration Judge failed to take into account material evidence to the contrary or that his factual finding was against the clear weight of the evidence considered as a whole. *See United States v. Antone*, 742 F.3d 151,

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of Jimenez, 21 I&N Dec. 567, 571 (BIA 1996) (en banc) ("[I]t is doctrine that this Board and all Immigration Judges are strictly bound by the determinations of the Attorney General.").

165 (4th Cir. 2014). Simply put, her arguments on appeal are insufficient to establish a "definite and firm conviction that a mistake has been committed." *Id.* (internal quotation marks and citation omitted).

In this regard, although the respondent argues on appeal that the Immigration Judge "disregarded," "failed to consider," "ignored," or "failed to factor" relevant evidence, *see* Respondent's Brief at 29-31, the Immigration Judge's decision simply does not bear this out. Rather, his 19-page, single-spaced decision reflects that he examined all the pertinent aspects of the record before him and made a fully informed finding on this issue. *See* I.J. at 5-8, 15;[8] *see also Matter of G-K-*, 26 I&N Dec. 88, 98 (BIA 2013) ("The Immigration Judge's detailed and thorough decision reflects that she considered the totality of the material evidence, even if it did not reference each piece of evidence individually."); *see also Ai Hua Chen v. Holder*, 742 F.3d 171, 179 (4th Cir. 2014) ("We recognize that the BIA and IJ are not required to discuss every piece of evidence in the record, but they must announce their decisions in terms sufficient to enable a reviewing court to perceive that they have heard and thought and not merely reacted." (internal quotation marks and citation omitted)).[9]

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[8] For example, the Immigration Judge verified:

> The Court afforded the respondent an evidentiary hearing on September 1, 2015, during which she was represented by counsel. 8 C.F.R. § 1240.11(c)(3). After remand, the Court has again considered all the evidence of record and the supplemental documents filed by the respondent. Exhibit R1, tabs A through EE, *passim*. The new evidence includes, *inter alia*, a revised written declaration by the respondent (tab A); corrected translations of previously-filed documents (tab B); a psychological assessment of the respondent and forensic evaluation (tabs F, G, X); and additional reports related to El Salvador regarding general country conditions (tabs L, Z, AA, DD) and reports specific to women and domestic violence (tabs H through K, M through W, Z, CC, EE).

I.J. at 5-6 (footnotes omitted).

[9] Should the Board nevertheless determine that the Immigration Judge did not properly address all of the pertinent evidence concerning whether the respondent has met her burden to establish that the Government of El Salvador was, or will be, unable or unwilling to control her abuser, the appropriate remedy would be to remand to the Immigration Judge to do so, as the Board is precluded from acting as a fact-finder. *See* 8 C.F.R § 1003.1(d)(3)(iv).

Assuming the respondent's credibility, she has experienced horrific and repeated severe harm at the hand of her abuser.[10] Further, as acknowledged by the Immigration Judge, the record evidence reflects a less than ideal protection regime in El Salvador for the respondent and other women who suffer domestic violence. *See* I.J. at 15 ("The Court recognizes that police reports and court proceedings are not always effective in protecting Salvadoran women and children from violence."). Perfect protection, however, is not the standard.[11] *See A-B-*, 27 I&N Dec. at 343; *see*

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[10] In this regard, among other incidents, the Immigration Judge accepted the respondent's prior statements as to being raped by her ex-husband following their November 2013 divorce, even though the respondent did not specifically refer to this incident in her most recent March 30, 2018 supplemental declaration. *See* I.J. at 8 & n.7; Exh. R1, Tab A, ¶¶ 38-44 (respondent's supplemental declaration describing only general abuse and threats by her ex-husband following their 2013 divorce). It is noteworthy that this post-divorce rape was not included in the respondent's most recent supplemental declaration despite the fact that its omission from prior statements was a focal point of earlier credibility assessments. *See, e.g.*, I.J. at 5 (Dec. 1, 2015); BIA at 2 (Dec. 8, 2016); Respondent's Brief on Her Eligibility for Asylum, Withholding of Removal, and Protection Under the Convention Against Torture After *Matter of A-B-* at 4-5 (Aug. 20, 2018); Department of Homeland Security's Brief on Remand at 7-8 (Aug. 20, 2018); *see generally A-B-*, 27 I&N Dec. at 341 (observing that in reviewing the discrepancies and omissions the Immigration Judge identified, the Board failed to give adequate deference to his credibility determination and improperly substituted its own assessment of the evidence). Although the respondent, through counsel, averred that in her supplemental declaration describing her ex-husband's behavior following their divorce, "[r]ape is clearly encompassed within the broader term 'abuse'," *see* Respondent's Response to the Department of Homeland Security's Brief on Remand at 4 (Aug. 30, 2018), it is notable that the same supplemental declaration also refers to numerous specific incidents of "rape" as opposed to general "abuse" prior to their divorce, *compare* Exh. R1, Tab A, ¶¶ 9, 29, 30, 36 (pre-divorce incidents involving her cousin and her then-husband specifically referring to rape and attempted rape) *with id.* ¶¶ 38-44 (post-divorce incidents involving her ex-husband not specifically mentioning rape or attempted rape). In her current appeal brief to the Board, the respondent's statement of facts refers to her being physically assaulted by her ex-husband following their divorce, but does not specifically recount that she was raped. *See* Respondent's Brief at 3. However, in the brief's Argument section, she implies that she was, in fact, raped by her ex-husband following their divorce. *See id.* at 19-20.

Should this matter be remanded to the Immigration Judge to enter a definitive credibility determination, *see* Argument *infra* Part IV, he can clarify and correct his apparently mistaken reference to a prior statement by the respondent as to her alleged post-divorce rape occurring in "June 2014," citing, *inter alia*, "Tr. at 44 [(2015)]." *See* I.J. at 8 & n.7. The respondent, however, actually dated this rape as "January or February of 2014." *See* Tr. at 50-51 (2015).

[11] As a collateral matter, the Department will avoid use of one of the Attorney General's alternate articulations of the "unwilling or able to control" concept, i.e., that an applicant for asylum or statutory withholding of removal "must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims." *See A-B-*, 27 I&N Dec. at 337 (internal quotation marks and citation omitted). To be clear, in the Department's view, this articulation does not modify settled case law or otherwise somehow heighten the standard. *See also* Respondent's Brief at 28 n.16. Indeed, as noted by the Attorney General, it has been employed by the federal circuit courts. *See A-B-*, 27 I&N Dec. at 337 (citing *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)). However, given that it has been the subject of litigation, *see, e.g.*, *Grace v. Whitaker*, 344 F. Supp. 3d 96, 127–30 (D.D.C. 2018), and its usage is not necessary either to the Department's argument or the Board's adjudication of the respondent's appeal, the Department will refrain from employing it. Although the Immigration Judge cited to the articulation in his statement of the applicable requirements for asylum, *see* I.J. at 9, there is no indication he improperly applied the articulation, *see* I.J. at 15.

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 a government is unwilling or unable to control the perpetrators). As the Attorney General emphasized in this case:

> For many reasons, domestic violence is a particularly difficult crime to prevent and prosecute, even in the United States, which dedicates significant resources to combating domestic violence. *See, e.g.*, Office of Justice Programs, U.S. Dep't of Justice, Extent, Nature, and Consequences of Intimate Partner Violence (2000). The persistence of domestic violence in El Salvador, however, does not establish that El Salvador was unable or unwilling to protect A-B- from her husband, any more than the persistence of domestic violence in the United States means that our government is unwilling or unable to protect victims of domestic violence.

Id. at 343–44.[12] Indeed, in its brief to the Attorney General in this case, the Department provided further information concerning the lack of ideal protection even in the United States:

> [T]he 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,

[12] The Attorney General further found that "the Board erred in finding, contrary to the record and the immigration judge's findings, that El Salvador was unable or unwilling to protect A-B- and that she thus had no choice but to flee the country." *A-B-*, 27 I&N Dec. at 344. Despite the Attorney General having de novo review authority over both issues of fact and law, *see, e.g.*, *Matter of J-F-F-*, 23 I&N Dec. 912, 913 (A.G. 2006), on remand, neither the Immigration Judge nor the parties interpreted the Attorney General's statement in this regard to be a controlling finding. Rather, it appears that the Attorney General was referring to the prior record before the Board in conjunction with the Board's failure to apply the appropriate standard of review to the Immigration Judge's finding. Given the determinative nature of the issue, had the Attorney General made a controlling finding in this regard, he presumably would not have remanded the record to the Immigration Judge for further proceedings with respect to the respondent's applications for asylum and statutory withholding of removal.

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> 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. And, in the United States, a significant portion of violent crimes are 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/[.]

U.S. Department of Homeland Security Brief on Referral to the Attorney General at 33 (Apr. 20, 2018).[13]

The respondent has presented extensive background information and expert affidavits[14] concerning the Government of El Salvador's response to violence against women. *See, e.g.*, Exh.

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[13] The fact that the Government of El Salvador cannot provide even the same imperfect level of protection as the Government of the United States does not mean that it was, or will be, unwilling or unable to control the respondent's abuser. *Cf. Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (recognizing that the "concept of persecution does not encompass all treatment that [U.S.] society regards as unfair, unjust, or even unlawful or unconstitutional," and that "[i]f persecution were defined that expansively, a significant percentage of the world's population would qualify for asylum in this country—and it seems most unlikely that Congress intended such a result"). The law enforcement regime of the United States does not set the legal standard in this regard, though certainly it can be an important touchstone in terms of the practical realities involved.

[14] For purposes of this response brief, the Department will assume, *arguendo*, that the following affiants for the respondent are experts on violence against women in El Salvador: Ms. Menjivar and Ms. Bautista. *See* Exh. R1, Tabs H (Menjivar declaration), I (Bautista declaration). However, should this case be remanded, the Department would seek a more thorough examination of their credentials from a more holistic general gender, i.e., female and male, violence perspective, as well as the weight to be accorded to their opinions. *See, e.g., Matter of D-R-*, 25 I&N. Dec. 445, 460 n.13 (BIA 2011) ("An Immigration Judge who finds an expert witness qualified to testify may give different weight to the testimony, depending on the extent of the expert's qualifications or based on other issues regarding the relevance, reliability, and overall probative value of the testimony as to the specific facts in issue in the case."). For example, it would be helpful for these affiants to comment upon the apparent disparity—and the accuracy of the underlying report—in the percentage of male versus female intentional homicides in El Salvador, which, according to a United Nations report, was 89% male and only 11% female in 2012 (two years before the respondent left for the United States). *See* United Nations Office on Drugs and Crime, Global Study on Homicide 2013 tbl. 8.2, https://www.unodc.org/documents/data-and-analysis/statistics/GSH2013/2014_GLOBAL_HOMICIDE_BOOK_web.pdf. By comparison, the relative reported percentage of intentional female homicides in the United States for 2012 was double: 22.2% female versus 77.8% male. *Id.* Concomitantly, in terms of more recent general gender-based data, the current relative reported life expectancy at birth in El Salvador is 78.6 years for females and 71.8 years for males, a female/male disparity of + 6.8 years, whereas in the United States it is 82.3 years for females and 77.8 years for males, a female/male disparity of only + 4.5 years. Central Intelligence Agency, *World Fact Book* (El Salvador and United States sections, "People and Society" tabs), https://www.cia.gov/library/publications/resources/the-world-factbook/ (last accessed Jan. 5, 2020).

Further, although the respondent's assumed experts on violence against women in El Salvador apparently were familiar with the respondent's specific situation, *see* Respondent Brief at 30-31, for her part, Ms. Menjivar does not reference any specific details concerning the Government of El Salvador's response in the respondent's case in opining on the risk of harm that the respondent purportedly faces, *see* Exh. R1, Tab H, ¶¶ 40-45 (Menjivar declaration: "The Risk of Harm to Anabel Bonilla"). While Ms. Bautista does refer to a few specific details, she fails to assess many other material details, including the apparent effectiveness of the 2001 protective order, *see, e.g.*, Tr. at 59 (2015). *See* Exh. R1, Tab I, ¶¶ 69-71 (Bautista declaration).

R1. As noted, the Immigration Judge acknowledged that the Government of El Salvador is not always effective in preventing violence against women. *See* I.J. at 15. However, the critical assessment is how the authorities responded, and would respond in the future, in the respondent's individual case. *Cf. Gitimu v. Holder*, 581 F.3d 769, 773 (8th Cir. 2009) ("Use of country reports cannot substitute for an analysis of the unique facts of each applicant's case.").

In this regard, the record reflects that the Government of El Salvador did not provide perfect protection to the respondent. At times, when her neighbors reported the abuse she suffered to the police, the officers either did not come, advised that they needed to see a serious injury in order to take action, or were simply dismissive. *See, e.g.*, Exh. R1, Tab A, ¶ 24 (respondent's supplemental declaration). In addition, the authorities did not aid her in serving her 2001 protection order on her then-husband, *see id.* ¶ 26, and after a 2008 incident in which he had threatened her with a knife, the police advised that they could not help her and that she needed to leave her relationship, *see id.* ¶ 33. Even assuming, *arguendo*, that there were legitimate reasons as to why the authorities did not act in some circumstances, *see A-B-*, 27 I&N Dec. at 337–38, the overall responses in these particular instances was less than ideal.

Nevertheless, the record also reflects many other instances in which the Salvadoran authorities provided concrete and effective assistance to the respondent vis-à-vis her then-husband, showing that he could not act with impunity. In this regard, the Immigration Judge referred to the issuance of protective orders in 2001 and 2008 as specific exemplars. *See* I.J. at 15. Indeed, following the issuance of the 2001 order, the respondent's then-husband left to live with his father for a period of some months. *See* Exh. R1, Tab A, ¶ 27 (respondent's supplemental declaration). Far from being "entirely ineffective" as the respondent contends on appeal, *see* Respondent's Brief at 29, the respondent testified that while the protection order was in place, her partner abided by it and that he "changed for like a year and some months," Tr. at 59 (2015); *see also* Exh. R1, Tab B (translation of affidavit of Delmis Elisa Rosales de Benitez, stating that the respondent's then-

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husband "went for a few months to his father's home, who lived in another town, because those days he could not see Ms. (b)(6); (b)(7)(C) because of what he had done that had put him in jail"). The fact that the respondent's then-sister-in-law later assaulted her for having her brother jailed and that her then-brothers-in-law tried to convince her to let him come home, *see* Exh. R1, Tab A, ¶ 27 (respondent's supplemental declaration), are further evidence that her then-husband was not able to act with impunity in their domestic relationship and that the response of the authorities was effective. In the same vein, her then-husband apparently only was able to return to her home because the respondent agreed to his return. *Id.* Further, as noted, the respondent was able to obtain another protection order in 2008. *Id.* ¶¶ 28, 35. Although the respondent asserts that the order did "nothing to help," she does not provide specific details as to why not. *Id.*

Moreover, aside from the exemplars directly referenced by the Immigration Judge, the record reflects that respondent successfully sought the assistance of the Procurator General's office in 1996 to have her then-husband officially recognized as the father of their first child after he had denied paternity. *See* Exh. R1, Tab A, ¶ 16 (respondent's supplemental declaration). The respondent further recounted that when her then-husband threatened her with a gun in 2001, neighbors apparently called the police, who arrived and took him to jail. *Id.* ¶ 25. He only was released after the respondent allegedly was pressured and threatened by his associates to sign papers for this purpose. *Id.*[15] Given that neither the respondent's then-husband nor his associates prevented his initial detention by the police or could secure his release on their own, it is unclear how the authorities would have responded had the respondent reported the pressure and threats instead of signing the papers. *See generally Orellana v. Barr*, 925 F.3d 145, 153 (4th Cir. 2019)

[15] However, in her original testimony, the respondent stated that she dropped the charges against her husband "[b]ecause he had promised me that he was going to change, that he wanted to have a home with me." Tr. at 58 (2015).

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("[A]n applicant who relinquishes a protective process without good reason will generally be unable to prove her government's unwillingness or inability to protect her.").

In addition, the respondent recounted that she was able to obtain the assistance of the Salvadoran Institute for the Development of Women (ISDEMU) in 2008, which, at a minimum, "helped [her] see that what [she] was living through was abuse and that it wasn't right." *See* Exh. R1, Tab A, ¶ 34 (respondent's supplemental declaration). The latter point is far from inconsequential in terms of meaningful official assistance, given the respondent's prior views about her status in her domestic relationship, including having to endure abuse from her partner and her "duty as his wife." *See, e.g., id.* ¶ 29.

Ultimately, the respondent was able to obtain an official divorce from her then-husband in 2013. *Id.* ¶ 39. Although the respondent recounted that she was thereafter raped by her ex-husband, *see supra* n.10, threatened by him and his associates, including his brother, who she stated was a police officer,[16] the respondent did not indicate that she reported these incidents to the authorities. *See* Exh. R1, Tab A, ¶¶ 39-44 (respondent's supplemental declaration). Moreover, after she started to receive anonymous telephonic threats, although the respondent stated that the police simply advised her to change her mobile phone number, i.e., her "chip," she apparently did not return to the police after circumstances had narrowed the origin of the threats to an identifiable individual, i.e., her ex-husband. *Id.* ¶ 43.

With respect to the respondent being threated against reporting various incidents to the authorities, there is no absolute requirement that an applicant for asylum or statutory withholding of removal do so in order to establish the authorities' inability or unwillingness to control the perpetrators. However, an applicant must show that doing so would have been futile or resulted

[16] The respondent testified that she had no proof that her ex-brother-in-law was, in fact, a police officer. Tr. at 54 (2015). In any event, assuming that he was, his position or authority did not prevent her then-husband from being arrested, jailed, and/or having protective orders entered against him.

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in further harm without consequence. *See Orellana*, 925 F.3d at 153; *Matter of S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000). The respondent has failed to establish such futility or inconsequence on the record in this case, especially given the past official assistance provided. Indeed, the fact that the respondent may have been threatened against making reports to the authorities cuts both ways. While the respondent references the threats in support of her position, it also belies the authorities' alleged ineffectiveness: if the perpetrators could act with total impunity, why would they be concerned about the respondent reporting their actions to the authorities? *Cf. Mulyani v. Holder*, 771 F.3d 190, 199 (4th Cir. 2014) (noting that the alien never notified the police or any other governmental authorities about the attacks on her, and her claim that the government was unable or unwilling to control her attackers was belied by the fact that they fled when a man nearby yelled at them or when police sirens were heard).

Finally, it is noteworthy that the specific facts of the respondent's case are readily distinguishable from those in *Orellana*, 925 F.3d 145, cited by the respondent, *see* Respondent's Brief at 28, where the U.S. Court of Appeals for the Fourth Circuit, in whose jurisdiction this matter arises, found that substantial evidence did not support the agency's determination that the subject alien had failed to establish that the Government of El Salvador was unwilling or unable to control her abusive domestic partner. Here, in contrast to *Orellana*, the Immigration Judge did not "disregard[] and distort[] important aspects of the applicant's claim." *See id.* at 152. As argued above, he issued a detailed decision considering an evidentiary record that he acknowledged was mixed on the issue of state protection. Further, while in *Orellana* the subject alien only was able to secure one temporary protective order despite three separate attempts stemming from separate incidents, and the one temporary order lapsed after the family court closed her case when, *inter alia*, the abusive partner first ignored the court's summons and then both parties subsequently failed to appear, *see id.* at 149, the respondent here obtained protective orders in 2001 and 2008, *see* Exh. R1, Tab A, ¶¶ 26-27, 28, 35 (respondent's supplemental declaration). More importantly,

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as discussed above, her 2001 protective order was demonstrably effective by the respondent's own statements, and her then-husband only was able to return home because she allowed him to do so. *See* Exh. R1, Tab A, ¶ 27 (respondent's supplemental declaration); Tr. at 59 (2015); *see also* Exh. R1, Tab B (translation of affidavit of Delmis Elisa Rosales de Benitez). Moreover, she did not provide any detailed reason as to why her 2008 protective order was not similarly effective, such as when and how she ever attempted to enforce it, but to no avail. *See* Exh. R1, Tab A, ¶¶ 28, 35 (respondent's supplemental declaration). Consequently, the respondent failed to persuasively establish that seeking government assistance would have been futile or subjected her to further abuse from her abuser without consequence. *See Orellana*, 925 F.3d at 153. She likewise failed to establish that the Government of El Salvador provided only "empty or token 'assistance'" in her specific case. *Id.*

In sum, the Immigration Judge properly assessed the record evidence, weighing both for and against whether the respondent had met her burden to establish that the Government of El Salvador was, or will be, unwilling or unable to control her abuser, and found that, on balance, she had failed to do so. The respondent has not shown on appeal that the Immigration Judge's factual finding in this regard was against the clear weight of the evidence, such as to give rise to a "definite and firm conviction that a mistake has been committed." *Antone*, 742 F.3d at 165 (internal quotation marks and citation omitted). Consequently, the Immigration Judge properly denied her application for asylum on this basis alone, and the Board need not address any remaining issues with respect to her statutory or discretionary eligibility for the same. *See A-B-*, 27 I&N. Dec. at 340 ("Of course, 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." (internal citation omitted)); *see also INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.").

(b)(6); (b)(7)(C)

Inasmuch as the respondent cannot establish statutory eligibility for asylum, it follows that she cannot establish eligibility for statutory withholding of removal. *See Matter of J-Y-C-*, 24 I&N Dec. 260, 266 (BIA 2007).[17]

III. THE RESPONDENT HAS FAILED TO ESTABLISH THAT SHE IS MORE LIKELY THAN NOT TO BE TORTURED IF RETURNED TO EL SALVADOR AND THAT, ACCORDINGLY, THE IMMIGRATION JUDGE ERRED IN DENYING HER APPLICATION FOR CAT PROTECTION.

As a primary matter, and contrary to the Immigration Judge's determination, *see* I.J. at 16, the Department does not believe that the respondent was precluded from pursuing CAT protection in the remanded proceedings from the Attorney General. *See A-B-*, 27 I&N Dec. at 325 n.4; *Matter of Patel*, 16 I&N Dec. 600, 601 (BIA 1978) (holding that unless a remand order is qualified or limited for a specific purpose, "the remand is effective for the stated purpose and for consideration of any and all matters"). That being said, the Department avers that the Immigration Judge's alternate finding, denying the respondent's application for CAT withholding of removal on the merits, is correct for the reasons stated, *see* I.J. at 16-18, and the respondent's appeal in this regard should be dismissed.

For example, as previously discussed, the response of the Salvadoran authorities in the respondent's case was less than ideal. *See* Argument *supra* Part II. However, the respondent has, in fact, been effectively assisted by the authorities on numerous occasions. *Id.* On appeal, she has failed to show the requisite error in the Immigration Judge's assessment as to the likelihood that a "public official or other person acting in an official capacity" either will inflict severe pain or

[17] On the basis of the ample analysis set forth in its decision in *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010), the Board should decline the respondent's invitation, *see* Respondent's Brief at 32-33, to revisit its holding that the "one central reason" standard for asylum under INA § 208(b)(l)(B)(i) also applies to statutory withholding of removal under INA § 241(b)(3)(A), and otherwise adopt the Ninth Circuit's decision in *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017). *See Gonzalez-Posadas v. Attorney Gen. U.S.*, 781 F.3d 677, 685 n.6 (3d Cir. 2015) ("We believe that the Board's decision in *Matter of C-T-L-* to extend the 'one central reason' test to withholding of removal was sound and we likewise adopt that conclusion now. In particular, we agree that the language and design of the statute evidences Congress's intent to eliminate the confusion and disparity inherent in the 'mixed motive' persecution tests in the context of both claims for asylum and claims for withholding of removal." (internal quotation marks and citation omitted)).

suffering upon her, or consent or acquiesce to her ex-husband doing so upon her return to El Salvador. *See generally* 8 C.F.R. § 1208.18(a) (definition of "torture"); *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006) (holding that an alien's eligibility for CAT protection cannot be established by stringing together a series of suppositions to show that it is more likely than not that torture will result where the evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen).[18]

In this regard, as has been previously noted with respect to the respondent's applications for asylum and statutory withholding of removal, *see* Argument *supra* Part II, the Immigration Judge did not refuse "to engage with the record before him" with respect to her application for CAT protection. *See* Respondent's Brief at 36. Rather, the Immigration Judge's detailed decision shows that he was fully engaged. *See* I.J. at 5-6 (detailing the evidence considered in rendering his decision in general), 17-18 (referencing specific aspects of the record evidence in assessing the respondent's application for CAT protection); *see generally Ai Hua Chen*, 742 F.3d at 179 (acknowledging that an Immigration Judge is not required to discuss every piece of evidence as long as his or her decision reflects sufficient consideration of the evidence as a whole); *G-K-*, 26 I&N Dec. at 98 (same). Further, contrary to the respondent's specific assertion, the Immigration Judge did not ignore her testimony that her ex-brother-in-law was a police officer. *See* Respondent's Brief at 36-37. Rather, the Immigration Judge properly observed that the respondent conceded that she had no evidence to confirm his status as such and that, even if he was a police officer, the respondent had failed to report his threats to "superior authorities." *See* I.J. at 17. Similarly, contrary to the respondent's allegation, the Immigration Judge did not ignore record

[18] Pursuant to controlling case law, whether the respondent has shown likely future mistreatment that satisfies the regulatory definition of "torture" is a mixed question of law and fact: the Immigration Judge's holding as to the likelihood that the respondent will face harm amounting to torture involves a purely factual, predictive determination, subject to clear error review; but whether that predicted outcome meets the regulatory definition of "torture" is a distinct legal judgment subject to de novo review, "as it necessarily involves applying the law to decided facts." *See Cruz-Quintanilla v. Whitaker*, 914 F.3d 884, 889–90 (4th Cir. 2019) (internal quotation marks and citations omitted).

(b)(6); (b)(7)(C)

evidence as to the possibility of internal relocation. *See* Respondent's Brief at 37-38; *see generally* 8 C.F.R. § 1208.16(c)(3)(ii). Rather, the Immigration Judge found that the record was "inconclusive" in this regard, i.e., that there was evidence cutting both ways, and that the respondent bore the overall burden of proof. *See* I.J. at 18.

Moreover, respectfully, the respondent's allegations of legal error in the Immigration Judge's analysis of her application for CAT protection are similarly unpersuasive. For example, she argues that the Immigration Judge incorrectly found that the "government" per se must acquiesce to severe harm or suffering being inflicted upon her, as opposed to simply a "public official or other person acting in an official capacity" doing so. *See* Respondent's Brief at 35-36; *see generally* 8 C.F.R. § 1208.18(a) (definition of "torture"). While the Immigration Judge may have used such unartful short-hand terminology once in passing, *see* I.J. at 17 ("acquiescence of the Salvadoran government"), such reference was obviously inadvertent and not prejudicial, as the bulk of his CAT analysis reflects his proper focus on "public official" acquiescence. *See id.* at 16 ("A *public official* acquiesces to torture if") (emphasis added), 18 ("does not raise an inference that *public officials* are likely to acquiesce to torture" and "The totality of the record does not demonstrate a clear probability that the respondent has been or would be tortured by, or at the instigation of, or with the consent or acquiescence of, a *public official*.") (emphasis added). Indeed, even the Fourth Circuit has made the same inadvertent use of such short-hand terminology in its published decisions. *See, e.g., Cruz-Quintanilla v. Whitaker*, 914 F.3d 884, 885 (4th Cir. 2019) ("To qualify, he must establish not only that it is more likely than not that he will be tortured if removed, but also that the *government will acquiesce* in that torture.") (emphasis added).[19]

[19] While, arguably, the Immigration Judge's CAT analysis does contain a legal error, it is one that actually benefited the respondent. Specifically, the Immigration Judge incorrectly applied the distinct regulatory "reasonable" internal relocation factor pertaining to asylum and statutory withholding of removal to CAT protection. *See* I.J. at 18 (finding that "she failed to establish it would be unreasonable for her to relocate," and citing to *Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012), which concerns "reasonable" internal relocation in the asylum regulatory context). Of course, unlike the regulations governing internal relocation for asylum and statutory withholding of removal, *see, e.g.*, 8

Accordingly, the Board should dismiss this aspect of the respondent's appeal.[20]

IV. IN THE ALTERNATIVE, THE RECORD CONTAINS SUFFICIENT EVIDENCE TO REBUT THE STATUTORY PRESUMPTION OF CREDIBILITY ON APPEAL, SUCH THAT THE CASE SHOULD BE REMANDED TO THE IMMIGRATION JUDGE TO CONDUCT ANY NECESSARY FACTFINDING AND ANALYSIS, AND MAKE A DEFINITIVE DETERMINATION AS TO THE RESPONDENT'S CREDIBILITY.

In the alternative, should the Board otherwise find that the respondent has met the requirements for asylum, statutory withholding of removal, and/or CAT protection, the Board should remand this matter to the Immigration Judge to issue a definitive determination on the respondent's credibility, as such is a core component of any proper assessment prior to the granting of such relief and protection. *See* INA §§ 208(b)(1)(B)(ii)-(iii) (asylum), 240(c)(4)(B) and (C) (applications for relief and protection, including CAT, generally), 241(b)(3)(C) (statutory withholding of removal). As previously discussed, *see supra* n.3, given that the Immigration Judge declined to enter an explicit adverse credibility determination, the respondent is entitled to a rebuttable presumption of credibility on appeal before the Board, *see* INA §§ 208(b)(1)(B)(iii), 240(c)(4)(C). The Department avers, however, that the record contains more than sufficient evidence in terms of inconsistencies and omissions to rebut the presumption, even considering the respondent's credibility arguments and related evidence before the Immigration Judge on remand from the Attorney General. *See, e.g.*, Respondent's Brief on Her Eligibility for Asylum, Withholding of Removal, and Protection Under the Convention Against Torture After *Matter of*

C.F.R. §§ 1208.13(b)(1)(i)(B), 1208.16(b)(1)(B), the pertinent regulation for CAT protection does not call for an assessment as to whether internal relocation is "reasonable," *see id.* § 1208.16(c)(3)(ii). Instead, the pertinent CAT regulation focuses simply on whether an applicant "could relocate." *Id.*; *see generally Maldonado v. Lynch*, 786 F.3d 1155, 1163 (9th Cir. 2015) (noting the marked difference between the asylum and CAT protection regulations concerning internal relocation).

[20] The Immigration Judge's decision pre-dates the Board's recent precedent in *Matter of O-S-A-F-*, 27 I&N Dec. 709 (BIA 2019) (holding, in pertinent part, that while "torturous conduct" committed by a public official who is acting "in an official capacity," i.e., "under color of law," is covered by the CAT regulations, they do not cover such conduct by a "rogue official" who is not operating under the "color of law"). Consequently, as the Immigration Judge could not have applied this new precedent in denying the respondent's application for CAT protection, and as the Board need not otherwise apply it in dismissing the respondent appeal in this regard, there would be no need for the Board to remand to the Immigration Judge to allow the respondent "the opportunity to tailor her arguments and record with an eye towards the intervening decision." *See* Respondent's Brief at 36-37 n.17.

A-B- at 2-6 (Aug. 20, 2018); Exh. R1, Tab A ¶ 2 (respondent's supplemental declaration), Tab F (respondent's psychological evaluation by Dr. Pena-Cabana, noting, *inter alia*, that there "is a possibility that the trauma may have impacted [the respondent's] memory"); Respondent's Response to the Department of Homeland Security's Brief on Remand at 1-11 (Aug. 30, 2018). In this regard, the Department respectfully refers the Board to the Immigration Judge's specific concerns pertaining to the respondent's credibility, as well as to its related arguments set forth in its brief to the Immigration Judge on remand from the Attorney General. *See, e.g.*, I.J. at 6, 8 n.7; Department of Homeland Security's Brief on Remand at 5-11 (Aug. 20, 2019). In addition, the Department avers that the material credibility issue concerning the respondent's omission of her alleged rape in 2014 by her ex-husband remains unsettled. *See supra* n.10.

Consequently, the Board should find the presumption of credibility rebutted under INA §§ 208(b)(1)(B)(iii), 240(c)(4)(C), and remand the case to the Immigration Judge for any necessary further proceedings and fact-finding, and to enter a definitive determination as the respondent's credibility, which is critical to all her applications for relief and protection given that they are premised on the same basic story. *See, e.g.*, *Matter of Y-I-M-*, 27 I&N Dec. 724, 732 (BIA 2019) (citing *Hong Fei Gao v. Sessions*, 891 F.3d 67, 76 (2d Cir. 2018)); 8 C.F.R. § 1003.1(d)(3)(iv). Remand also would allow the respondent to address, and the Immigration Judge to consider, why at least two of the respondent's affiants, who apparently knew her well in El Salvador, stated that the Salvadoran authorities never issued a protective order against the respondent's then-husband, even though she unequivocally stated that two such orders were, in fact, issued. *Compare, e.g.*, Exh. R1, Tab B (translation of affidavit of (b)(6); (b)(7)(C) stating that the respondent "had reported to the authorities, but they never put a restraining order on him") *and id.* (translation of affidavit of (b)(6); (b)(7)(C) stating that the respondent "had previously reported him to the competent authorities, but they never gave her a restraining order"),

with Exh. R1, Tab A, ¶¶ 26, 28, 35 (respondent's supplemental declaration, detailing the issuance of protective orders in 2001 and 2008).

CONCLUSION

The Department respectfully requests the Board to dismiss the respondent's appeal for the dispositive reasons set forth above or, in the alternative, to remand to the Immigration Judge for further fact-finding and a definitive decision as to the respondent's credibility.

Date: January 6, 2020

Respectfully submitted,

(b)(6); (b)(7)(C)

Acting Chief, for

(b)(6); (b)(7)(C)
Associate Legal Advisor[21]

(b)(6); (b)(7)(C)
Assistant Chief Counsel

[21] The Department requests that all correspondence to it in this matter continue to be directed, in the first instance, to the local U.S. Immigration and Customs Enforcement (ICE) Office of the Chief Counsel in Charlotte, North Carolina, with copies to Ronald Lapid, Acting Chief of the Immigration Law and Practice Division, within ICE's Office of the Principal Legal Advisor.

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PROOF OF SERVICE

On January 6, 2020, I, (b)(6); (b)(7)(C) Paralegal Specialist, mailed a copy of this U.S. Department of Homeland Security Briefing Extension Request and any attached pages to the respondent's counsel, (b)(6); (b)(7)(C) Esq., Center for Gender and Refugee Studies, University of California, Hastings College of the Law, 200 McAllister Street, San Francisco, CA 94102, by placing such copy in my office's outgoing mail system in an envelope duly addressed.

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:

(b)(6); (b)(7)(C)

In removal proceedings

File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
MOTION TO REMAND TO THE IMMIGRATION JUDGE
IN LIEU OF BRIEFING

INTRODUCTION

The Department of Homeland Security (the Department) submits this motion to the Board of Immigration Appeals to remand proceedings to the Immigration Judge for the limited purpose of issuing a decision as to the respondent's application for withholding of removal, consistent with *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017). The Immigration Judge relied on the "one central reason" standard to deny the lead respondent's withholding of removal claim. Remand will provide the Immigration Judge with an opportunity to further explain whether the respondent established that a statutorily protected ground was "a reason" for her experiences in Guatemala, as it pertains solely to her withholding claim. Remand will also allow the Immigration Judge to consider whether the respondent's proposed social group of female head of household is viable in light of the evidence provided and the Attorney General's decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

On November 27, 2018, the Ninth Circuit Court of Appeals granted the Government's unopposed motion to remand.

MOTION TO REMAND

Motions to remand are provided for in the Board's Practice Manual. *See* Practice Manual, Chaps. 4.8(b), 5.8. A motion to remand is filed with the Board during the pendency of an appeal and seeks to return jurisdiction of a case pending before the Board to the Immigration Judge. *Id.* at Chap. 5.8(a). Parties may also move to remand proceedings to the Immigration Judge to consider newly acquired eligibility for relief. *Id.* Inasmuch as the motion to remand most commonly seeks introduction of new evidence and entry of a new decision, motions to remand are in the nature of motions to reopen and reconsider. Consequently, such motions must comply with the substantive requirements of motions to reopen and motions to reconsider. *See*

(b)(6); (b)(7)(C)

generally Matter of Coelho, 20 I&N Dec 464, 471 (BIA 1992); 8 C.F.R. §§ 1003.2(c)(1), 1003.23(b)(3). If the Board grants a motion to remand resulting in a new Immigration Judge decision, a party may file a new appeal. *See* Practice Manual, Chap. 5.8(e). In that new appeal, the party may pursue any new issues or any unresolved issues from the prior appeal. *Id.*

After review, the Department requests that the Board remand the instant matter to the Immigration Judge to afford him the opportunity to clarify and expand his decision regarding withholding of removal, and to conduct a more thorough analysis of the respondent's withholding claim in light of *Barajas-Romero v. Lynch.* The Department does not concede that the respondent has shown prima facie eligibility for relief, and the Department does not waive the right to contest, if appropriate, any applications for relief made by the respondent or the evidence presented upon remand.

Accordingly, the Department respectfully request that the Board grant this Motion to Remand in Lieu of Briefing.

Respectfully submitted,

(b)(6); (b)(7)(C)

02/27/2019
/Date

Senior Attorney/ICE
Department of Homeland Security
Seattle, Washington

CERTIFICATE OF SERVICE

I hereby certify and declare under penalty of perjury that, on February 27, 2019, I caused to be served the attached document:

DEPARTMENT OF HOMELAND SECURITY
MOTION TO REMAND TO THE IMMIGRATION JUDGE
IN LIEU OF BRIEFING

☒ by placing a true copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process and causing the same to be mailed by first class mail to the person at the address set forth below

☐ by causing to be personally delivered a true copy thereof to the person at the address set forth below;

☐ by electronic filing, in accordance with applicable regulations, to the person at the address set forth below;

☐ by FEDERAL EXPRESS to the person at the address set forth below;

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No. 17-73289

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(b)(6); (b)(7)(C)

Petitioners,

v.

MATTHEW G. WHITAKER, Acting Attorney General,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

RESPONDENT'S UNOPPOSED MOTION TO REMAND

NOT DETAINED

Respondent moves the Court to remand these proceedings to the Board of Immigration Appeals. Petitioners do not oppose this motion. In its decision, the Board affirmed an immigration judge's decision to deny the lead Petitioner's application for asylum, withholding of removal, and protection under the regulations implementing the Convention Against Torture. Certified Administrative Record ("A.R.") 3-6. As part of its analysis, the Board made two

determinations. First, it held that "the Immigration Judge properly concluded that [Ramirez Pablo's] family relationship is not one central reason for the harm she experienced and fears." A.R. 2. And, second, the Board determined that the social group "indigenous *family* head[s] of household[s] in Guatemala" was not cognizable under the Immigration and Nationality Act. *See* A.R. 2.

This petition is remanded to the Board for it to address what effect, if any, *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017), has on its holding in this case with respect to withholding of removal. Further, the Board should consider what effect, if any, the particular social group of "indigenous *female* head[s] of household[s] in Guatemala" has on its holding in this case. *See* A.R. 57 (immigration judge's decision primarily referencing "indigenous female head[s] of household[s] in Guatemala"); *see also* A.R. 19, 41 ¶ 6, 199-200, 297.

This remand is not a concession of error, and Respondent requests that each side bear its own attorney's fees, costs, and expenses. *See Ren v. Gonzales*, 440 F.3d 446, 448 (7th Cir. 2006) (recognizing that "'an agency may request a remand (without confessing error)'" in order to conduct further investigation, provide further explanation, or further consider its prior position) (citations omitted). The remand order should stay Petitioners' removal pending a Board decision.

Respectfully submitted,

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Dated: November 23, 2018

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

This motion complies with 9th Cir. R. 40-1(a) because it contains no more than 537 words.

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CERTIFICATE OF SERVICE

I certify that on November 23, 2018, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. I also certify that opposing counsel is a registered CM/ECF user and that service will be accomplished by the CM/ECF system.

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NON-DETAINED

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

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No.: (b)(6); (b)(7)(C)
In Removal Proceedings	)	

JOINT MOTION TO REMAND TO THE IMMIGRATION JUDGE IN LIEU OF SUPPLEMENTAL BRIEFING

INTRODUCTION

On March 29, 2021, the Board of Immigration Appeals (Board) requested supplemental briefing on the following questions: (1) whether the respondent's proposed particular social groups, defined as "women" and "women who have had miscarriages," are cognizable; and (2) whether the respondent has demonstrated that any harm she suffered or fears was or would be inflicted either by the government of a country, or by persons or an organization that the government was unable or unwilling to control. The Department of Homeland Security (Department) and the respondent, through counsel, respectfully request that the Board remand the case in order to afford the Immigration Judge the opportunity for further analysis and factfinding. *See* 8 C.F.R. § 1003.1(d)(3)(iv) (2021).

PROCEDURAL HISTORY

The respondent and her daughter, both of whom are natives and citizens of El Salvador, entered the United States at or near Hidalgo, Texas, on October 15, 2016. Exh. 1; I.J. at 1. The respondents did not present a valid immigration visa, reentry permit, border crossing identification card, or other valid entry document. Exh. 1. On October 31, 2016, the Department served the respondents with Notices to Appear (NTA), charging them as removable from the United States pursuant to section 212(a)(7)(A)(i)(I) of the Immigration and Nationality Act (INA) for not being in possession of valid documents at the time of entry. *Id.*

On April 11, 2017, the respondents, through counsel, submitted written pleadings with their motions to change venue, admitting to the allegations in the NTA and conceding removability as charged. I.J. at 1-2; Exh. 2. The respondents applied for asylum and statutory withholding of removal and also sought protection pursuant to the regulations implementing the U.S. obligations under Article 3 of the

(b)(6);
(b)(7)(C)

Convention Against Torture, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988) (CAT).[1] I.J. at 2; *see* Exh. 4. The respondents' merits hearing occurred on September 12, 2018. The Immigration Judge issued his oral decision on October 4, 2018, and held that the respondents failed to establish eligibility for asylum, statutory withholding of removal, and CAT, and ordered the respondents removed to El Salvador. I.J. at 3-11.

JOINT MOTION TO REMAND

Motions to remand are provided for in the EOIR Policy Manual. *See* EOIR Policy Manual, pt. III, chapter 5.8 (Dec. 22, 2020). A motion to remand is filed with the Board during the pendency of an appeal and seeks to return jurisdiction of a case pending before the Board to the Immigration Judge. *Id.* chap. 5.8(a). Parties may also move to remand proceedings to the Immigration Judge to consider newly acquired eligibility for relief. *Id.* If the Board grants a motion to remand resulting in a new Immigration Judge decision, a party may file a new appeal. *Id.* chap. 5.8(e). In that new appeal, the party may pursue any new issues or any unresolved issues from the prior appeal. *Id.*

Upon further review of the record, the parties respectfully request that the Board remand proceedings to the Immigration Judge for consideration of the cognizability of the respondent's proposed particular social groups, as well as her eligibility for statutory withholding of removal in light of *Barajas-*

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[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).

The CAT is a non-self-executing treaty. *See, e.g.*, *Pierre v. Gonzales*, 502 F.3d 109, 119-20 (2d Cir. 2007); *Singh v. Ashcroft*, 398 F.3d 396, 404 n.3 (6th Cir. 2005); *Matter of H-M-V-*, 22 I&N Dec. 256, 259-60 (BIA 1998). Adjudicators do not apply the CAT itself, but rather the implementing regulations. The latter, for example, contain important United States ratification "reservations, understandings, declarations, and provis[ions]" with respect to the definition of "torture" not contained in the text of the Convention Against Torture itself. *See* 8 C.F.R. § 1208.18(a); *see also id.* § 1208.16(c)(1) ("The definition of torture contained in § 1208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture."). For ease of reference, however, the Department will use "CAT" to refer to the implementing regulations.

(b)(6); (b)(7)(C)

Romero v. Lynch, 846 F.3d 351 (9th Cir. 2017). Additional factfinding is necessary to develop the evidentiary record on those particular issues and more generally as to whether the respondents are eligible for relief or protection. *See generally* 8 C.F.R. § 1003.1(d)(3)(iv) (providing that the Board will not engage in factfinding on appeal). In remanded proceedings, the parties reserve the right to litigate any and all issues regarding relief and protection.[2]

Accordingly, the parties respectfully request that the Board grant the parties' Joint Motion to Remand in Lieu of Supplemental Briefings.

Respectfully submitted on this 16th day of April, 2021,

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[2] In addition, the parties observe that, on remand, the parties and the Immigration Judge may have the benefit of regulations clarifying the parameters of a cognizable social group in light of the President directing the promulgation of joint regulations in this regard. *See* Exec. Order No. 14,010, 86 Fed. Reg. 8267, 8271 (Feb. 2, 2021) (directing the Attorney General and the Secretary of Homeland Security to address, within 270 days of the Executive Order, circumstances under which a person should be considered a member of a particular social group).

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DETAINED

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

In the Matter of:

(b)(6); (b)(7)(C)

In withholding only proceedings

File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
MOTIONS TO RECONSIDER *SUA SPONTE*
AND EXPEDITE

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS) respectfully moves the Board of Immigration Appeals (Board or BIA) to exercise its discretion and reconsider its March 13, 2019, decision *sua sponte*, pursuant to 8 C.F.R. § 1003.2(a). *See, e.g., Matter of O-S-G-*, 24 I&N Dec. 56 (BIA 2006); *Matter of G-D-*, 22 I&N Dec. 1132 (BIA 1999). In addition, the Department respectfully requests the Board to expedite its consideration of the same. In the latter regard, the Department avers that the respondent is detained, and that her petition for review of the Board's decision is currently pending before the U.S. Court of Appeals for the Ninth Circuit. *See Garcia-Recendiz v. Barr*, No. 19-70620, (9th Cir. filed Mar. 14, 2019). The Government's answering brief currently is due to the Court on or before December 13, 2019.

The Department argues that "truly exceptional" factors exist that warrant the Board reconsidering its prior decision on its own motion. *See G-D-*, 22 I&N Dec. at 1134. Specifically, upon further review, it has come to the Department's attention that the Board's March 13, 2019, decision contains errors of legal analysis that the Ninth Circuit recently highlighted in unpublished remand orders pertaining to similar Board decisions.[1] Reconsideration in light of those Ninth Circuit orders, as well as in light of other issues raised herein, will conserve the parties' as well as judicial and administrative resources, given that a Ninth Circuit remand is a likely outcome. In so moving, the Department does not concede that the respondent is eligible for any form of protection.

The Board's decision dismissing the respondent's appeal from the Immigration Judge's denial of her applications for withholding of removal under section 241(b)(3) of the Immigration

[1] The Department acknowledges that "[c]itation to unpublished cases is discouraged." *See* BIA Practice Manual, Appendix J-3 (Sept. 23, 2019). However, the unpublished Ninth Circuit decisions are directly pertinent to the Department's motion and they are all available on-line via the Westlaw service.

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and Nationality Act (INA) (statutory withholding of removal) and the regulations implementing the U.S. obligations pursuant to Article 3 of the Convention Against Torture[2] are presently under consideration by the Ninth Circuit. One issue before the Court in relation to respondent's statutory withholding of removal application concerns whether her putative particular social groups are cognizable.

In this regard, while recognizing that particular social group analysis must be performed on a case-by-case and society-specific basis, *see, e.g., Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 241 (BIA 2014), the Board's conclusion that the respondent's putative particular social group of "Mexican women" is not sufficiently particular, *see* BIA at 2, is in tension with the Ninth Circuit's decision in *Perdomo v. Holder*, 611 F.3d 662, 668 (9th Cir. 2010). There, the Ninth Circuit reversed the Board's holding that "Guatemalan women" was too broad to be a particular social group and remanded for the Board to consider whether the group was cognizable. *Perdomo*, 611 F.3d at 669 ("[W]e have rejected the notion that a persecuted group may simply represent too large a portion of a population to allow its members to qualify for asylum."); *see also Matter of S-E-G-*, 24 I&N Dec. 579, 586 n.3 (BIA 2008) (observing, *inter alia*, that "cohesiveness" or "homogeneity among group members" is not a requirement).

The Ninth Circuit has recently remanded at least two cases in which it rejected or indicated disagreement with the reasons the Board has given for finding such a group not particular or socially distinct—the same basic grounds given by the Board here. In November

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[2] 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).

2018, in *Ticas-Guillen v. Whitaker*, 744 F. App'x 410 (9th Cir. 2018), the Ninth Circuit remanded the case where the Immigration Judge, upheld by the Board, found the proposed group of "women in El Salvador" not particular because it was "just too broad." The Court went so far as to say that *Perdomo* stood for the proposition that "gender and nationality can form a particular social group." *Id.* at 410. The Court remanded not only for the Board to reassess the cognizability of the particular social group but also whether Ticas-Guillen's group was "a reason" for the persecution for statutory withholding of removal purposes. *Id.* at 411.

Further, in September 2019, the Court decided *Torres Valdivia v. Barr*, 777 F. App'x 251 (9th Cir. 2019), where the Board concluded that the proposed group "all women in Mexico" lacks particularity and was not socially distinct. The Court rejected the particularity finding, citing *Perdomo* and *Ticas-Guillen*. *Torres Valdivia*, 777 F. App'x at 252. The Court rejected the social distinction finding because the Board concluded there was no evidence that "women who fear violence in Mexico" are perceived as a group, observing that was not the group Torres Valdivia proposed. *Id.* at 252-53. In the latter regard, by comparison, the Board reasoned in its decision in the instant case:

> As the Attorney General explained in *Matter of A-B-*, the fact that the term "women" may have a commonly understood definition does not, in itself, establish the requisite particularity for a particular social group. *Matter of A-B-*, 27 I&N Dec. at 335 ("*Social groups defined by their vulnerability to private criminal activity likely lack the particularity required* under [*Matter of M-E-V-G-*], given that broad swaths of society may be susceptible to victimization.").

BIA at 2 (emphasis added). As in *Torres Valdivia*, the respondent's putative particular social group of "Mexican women" contains no such trait. In the quoted language from *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), the Attorney General was analyzing a complex putative particular social group formulation that, at least ostensively, appeared to contain such a trait, i.e., "married

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women in Guatemala *who are unable to leave their relationship*." *Id.* at 335 (emphasis added); *see also id.* (wherein the Attorney General discussed putative particular social groups containing the trait "resistant to gang violence"). Moreover, the broader point of the Attorney General's discussion was that for putative particular social group formulations based on multiple traits, the traits must be assessed holistically, rather than in isolation: "To say that each term has a commonly understood definition, *standing alone*, does not establish that these terms have the required particularity in identifying a distinct social group as such, or that people who meet all of those criteria constitute a discrete social group." *Id.* (emphasis added).

In addition to the above, the Department respectfully points out that, in its decision, the Board apparently engaged in impermissible fact finding, which would likely be another ground for remand from the Ninth Circuit. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *see also Rodriguez v. Holder*, 683 F.3d 1164, 1170 (9th Cir. 2012) (citing the regulation and noting that "[w]here the IJ has not made a finding of fact on a disputed matter, and such a finding is necessary to resolution of the case, the BIA must remand to the IJ to make the required finding; it may not conduct its own fact-finding"); *A-B-*, 27 I&N Dec. 340-41. Specifically, the Board found that despite the record evidence of violence against women in Mexico, the respondent has not established social distinction because she "has not pointed to evidence in the record demonstrating that all 'Mexican women' would be perceived as a distinct group by Mexican society." BIA at 2. Determining whether the respondent's putative particular social group satisfies the social distinction requirement, however, involves findings of fact. *See Matter of L-E-A-*, 27 I&N Dec. 40, 42 (BIA 2017) ("A determination whether a social group is cognizable is a fact-based inquiry made on a case-by-case basis, depending on whether the group is immutable and is recognized as particular and socially distinct in the relevant society."), *overruled, in part, on other grounds*, 27

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I&N Dec. 581 (A.G. 2019); *see also Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018) (observing that where an Immigration Judge has not had the opportunity to make the relevant factual findings underlying an assessment of whether a proposed group is cognizable, the Board cannot do so in the first instance on appeal), *aff'd sub nom. Cantarero-Lagos v. Barr*, 924 F.3d 145 (5th Cir. 2019). The Immigration Judge's decision does not reflect that he made any factual findings concerning the social distinction of the respondent's putative particular social group of "Mexican women." *See* I.J. at 4-5. The Immigration Judge did so, for example, with respect to the putative particular social group "Mexican women viewed as property," *see id.* at 6, but not with respect to "Mexican women." Consequently, the Board should not have decided whether the respondent satisfied the social distinction requirement for this group for the first time on appeal.

Moreover, turning to the issue of nexus, the Department respectfully avers that since the Board's decision in the respondent's case, the Ninth Circuit has issued at least one unpublished decision in which it determined that a criminal motive did not obviate a finding that membership in a particular social group was "a reason" for the harm even where it was not "one central reason." In *Villa-Meraz v. Barr*, 779 F. App'x 458 (9th Cir. 2019), the subject alien was kidnapped and held for ransom by a cartel. The Ninth Circuit concluded that this happened at least in part due to Villa-Meraz's family membership although the record established that the kidnapping was motivated by financial gain. *Id.* at 469-61. The Court determined that the record compelled the conclusion that Villa-Meraz's family membership was "a reason" for the harm but did not compel the conclusion that it was "one central reason." Id. at 461. Accordingly, the Department urges the Board to consider whether its nexus analysis in this case is sufficient under Ninth Circuit case law, where it concluded that the respondent's membership

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in the group of "Mexican women" was not "a reason" for the harm claimed because of pre-existing relationships and criminal intent, without more. BIA at 3. *See Ayala v. Sessions*, 855 F.3d 1012, 1021 (9th Cir. 2017) (membership in a family particular social group was "a reason" for the harm even though the main reason for the crime was money).

Finally, the Department respectfully points out that, to the extent that the Board intended to address the internal relocation issue vis-à-vis statutory withholding of removal in an all-encompassing manner, the Board, BIA at 3, as did the Immigration Judge, I.J. at 20-21, only focused on the issue in terms of the respondent's ability to avoid harm by her former partner. Such an assessment, however, does not entirely dispose of the relocation issue in light of the respondent's claim of past and future persecution from multiple sources. While the Immigration Judge and the Board considered relocation more broadly with respect to CAT protection, *see* I.J. at 26; BIA at 4, in addition to different regulatory language pertaining to the relocation factor in the CAT protection context as opposed to the statutory withholding of removal context, *compare* 8 C.F.R. § 1208.16(c)(3)(ii) (containing no "reasonableness" modifier in the context of CAT protection) *with* § 1208.16(b)(1)(B), (b)(2), (b)(3) (containing a "reasonableness" modifier in the context of statutory withholding of removal), in the Ninth Circuit, the related burden of proof issues must be assessed differently as well, *see Maldonado v. Lynch*, 786 F.3d 1155, 1163-64 (9th Cir. 2015) (en banc). Concomitantly, an assessment of internal relocation involves fact finding that the Board is unable to do on appeal. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 36 (BIA 2012) (observing, with respect to reasonable internal relocation for asylum at 8 C.F.R. § 1208.13(b)(3) - and, by extension, for the pertinent statutory withholding of removal provision – that "it is necessary for the Immigration Judge to make findings of both fact and law").

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Accordingly, for the above reasons, the Department moves the Board to *sua sponte* reconsider its March 13, 2019, decision on an expedited basis.

Respectfully submitted on this 5th day of November 2019,

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for

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PROOF OF SERVICE

I hereby certify and declare under penalty of perjury that, on November 5, 2019, I caused to be served the attached documents:

☒ by placing a true copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process and causing the same to be mailed by first class mail to the person at the address set forth below;

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☐ by electronic filing, in accordance with applicable regulations, to the person at the address set forth below;

☐ by FEDERAL EXPRESS to the person at the address set forth below;

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Non-Detained

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

In the Matter of:	
(b)(6); (b)(7)(C) Respondent In Removal Proceedings.	File Number: (b)(6);

DEPARTMENT OF HOMELAND SECURITY
BRIEF ON APPEAL

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INTRODUCTION

This appeal is before the Board of Immigration Appeals on Respondents' appeal of the Immigration Judge's decision denying Respondent's applications for asylum and related protection.

ISSUES PRESENTED

- **Political Opinion**. Whether the Immigration Judge was correct to rule that Respondent's flight from Mexico and refusal to comply with extortion demands does not constitute a political opinion.

- **PSG: "Those Opposed to Organized Crime."** Whether "those opposed to organized crime" is a cognizable particular social group.

- **Nexus**. Whether Respondent established that she will be targeted on account of her membership in the group, "those opposed to organized crime," where there is no evidence that the gangs knew she made a police report and, even if they knew, the gangs were motivated by retaliation.

- **Nexus**. Whether the Immigration Judge was correct to rule that Respondent was not targeted because of her gender, where the gangs in the area also targeted Respondent's own brother-in-law.

- **Torture**. Whether the Immigration Judge was correct to rule that Respondent has failed to establish that she would likely be tortured in Mexico, where Respondent has not been physically harmed in Mexico and has not provided any evidence that she would likely be tortured in Mexico because of her gender (or any other reason).

STANDARD OF REVIEW

The Board of Immigration Appeals reviews findings of fact, including credibility findings, to determine whether the findings were clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i). Questions of law, discretion, judgment, and all other issues are reviewed de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

SUMMARY OF THE ARGUMENT

Multiple Ninth Circuit cases preclude the argument that refusing to comply with criminal demands constitutes a political opinion. Similarly, the Board and Ninth Circuit have made clear

that opposing crime does not make one a member of a particular social group ("PSG"). The Board and Ninth Circuit have also recently held that retaliation for cooperating with police does not constitute a nexus to a protected ground. Therefore, Respondent's argument that she was (or will be) targeted because of her refusal to comply with the gangs must fail.

Moreover, the Immigration Judge correctly found that Respondent was not targeted on account of her membership in her proposed gender-based PSGs because the evidence shows that the gangs also targeted men in the area.

Finally, the Immigration Judge correctly found that Respondent was not tortured in Mexico—indeed, she was not even physically harmed in Mexico—and that there is not sufficient evidence to conclude that Respondent would likely be tortured if she returned to Mexico.

STATEMENT OF FACTS

Respondent is a native and citizen of Mexico. She lived in the United States without authorization between 1995 and 2011 before moving back to Mexico.

In March of 2012, Respondent received a phone call from someone claiming to be Respondent's nephew. The person said he had been in an accident and his child was injured. Respondent knew the caller was not her nephew, because her nephew did not have a child. The caller asked for 3,000 pesos. Respondent told him to call his uncle, and the caller hung up.

Two months later, Respondent received another call. The caller said he was from the gang La Familia Michoacana and demanded 600,000 pesos. He mentioned Respondent's children's names, but with some inaccuracy, and insulted Respondent with foul language. He said that if Respondent did not pay, he would rape Respondent's children.

Respondent received another call at a later date from a person claiming that he could see her Respondent through the window. Respondent hung up on the caller. She received other

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phone calls, but she stopped answering. Respondent tried to tell the police about the phone calls, but they said they could not help her if no harm had actually been done.

One morning in October of 2012, while Respondent was going to buy milk, three men pulled up in a pickup truck near Respondent. When two men stepped out of the truck and walked toward Respondent, she dropped her things and ran home.

After that incident, Respondent immediately gathered her children and went to Mexico City to look for her uncle. After five days of searching without success, she took her children to Tijuana via bus. During the bus trip, some people kicked the back of her seat. Apparently fearing these people, Respondent switched buses and eventually arrived in Tijuana, where she sent her daughters on a bus to the United States while she and her son went to Ensenada, Mexico.

Respondent and her son stayed in Ensenada for about a month. At a market in Ensenada, a young man took some pictures of Respondent and ran off. Respondent then took her son and returned to Tijuana, and eventually sought admission at a port of entry in March of 2013.

ARGUMENT

I. THE IMMIGRATION JUDGE CORRECTLY RULED THAT RESPONDENT WAS NOT TARGETED FOR HER POLITICAL OPINIONS.

Respondent argues that she "expressed her political opinion opposing organized crime by refusing to comply with the demands of the Familia Michoacana" and by "taking her children and trying to escape." Resp. Br. at 8.

But the argument that that refusing to comply with criminal demands constitutes a political opinion has been repeatedly rejected by the Ninth Circuit. *Barrios v. Holder*, 581 F.3d 849, 854–55 (9th Cir. 2009), *abrogated in part on other grounds by Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc); *Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009), *abrogated in part on other grounds by Henriquez-Rivas*, 707 F.3d at 1085; *Santos-Lemus*

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v. Mukasey, 542 F.3d 738, 747 (9th Cir. 2008); *abrogated in part on other grounds by Henriquez-Rivas*, 707 F.3d at 1085.[1]

For example, in *Santos-Lemus*, the respondent argued that he had expressed his "anti-gang" political opinion by refusing to join a gang, which resulted in persecution. 542 F.3d at 746. The Ninth Circuit rejected this argument, pointing out that "[n]o evidence suggests that the gang held any sort of belief system that they perceived Santos–Lemus to oppose." *Id.* The court also gave deference to the Board's conclusion that "a general aversion to gangs does not constitute a political opinion." *Id.*

Similarly, in *Barrios* and *Ramos-Lopez*, the respondents argued that they were (or would be) persecuted on account of their political opinions because they refused to join a gang. *Barrios*, 581 F.3d at 855; *Ramos-Lopez*, 563 F.3d at 857. The Ninth Circuit again rejected this argument, holding in *Barrios* that "[t]he evidence instead supports the conclusion that the gang victimized him for economic and personal reasons," 581 F.3d at 856, and in *Ramos-Lopez* that the respondent "alleged no facts in support of a political opinion, actual or imputed, beyond his refusal to join the MS-13," 563 F.3d at 857.

Santos-Lemus, *Barrios*, and *Ramos-Lopez* are indistinguishable here. Like Respondent here, the respondents in those cases feared harm from gangs in their home countries because they refused to comply with the gangs' demands. Like the respondents in those cases, Respondent here provided no evidence that the gang she fears held "any sort of belief system that they perceived [Respondent] to oppose." *Santos-Lemus*, 542 F.3d at 746. Rather, the gangs threatened because they wanted money. Thus, like in *Santos-Lemus*, *Barrios*, and *Ramos-Lopez*, the evidence does not support the conclusion that Respondent was targeted for her opinion; "[t]he

[1] *Barrios*, *Ramos-Lopez*, and *Santos-Lemus* were abrogated by *Henriquez-Rivas* only with regard to their findings about the "social visibility" of the proposed PSGs. Their "political opinion" analysis is still good law.

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evidence…instead supports the conclusion that the gang victimized [Respondent] for economic and personal reasons." *Barrios*, 581 F.3d at 856. Respondent was not targeted for her political opinions.

The only cases the undersigned could find holding that defying extortion demands constituted a political opinion are not applicable here. For example, in *Borja v. I.N.S.*, 175 F.3d 732, 734 (9th Cir. 1999), the respondent was confronted by a "violent, revolutionary Communist group which actively oppose[d] the Philippine government" who demanded she "join and support their organization." *Id.* at 734. She refused, saying that she was "pro-government" and explaining that she disliked the Communist group because "they kill people, women and children." *Id.* The Communists responded by demanding that she pay a "revolutionary tax." *Id.* at 734–35. She agreed to pay the tax at first, but when she could no longer afford it, the Communists "beat her, put a gun to her head, and slashed her with a knife." *Id.* at 735. The Ninth Circuit concluded that the Communists' behavior was not "purely economic in nature" and that "no reasonable factfinder could fail to see the role her outspoken political opinion played…in what happened to her." *Id.* at 736. In particular, the court found that, had the respondent not initially agreed to pay the tax, the Communists "would have taken her life as a response to her political statement." *Id.* The respondent's statements, the court explained, made her a "political adversary" to the Communist group, and their treatment of her was at least partially motivated by her political opposition to them. *Id.*

Similarly, in *Desir v. Ilchert*, 840 F.2d 723, 724 (9th Cir. 1988), the Ninth Circuit held that refusing extortion demands from the Haitian government constituted a political opinion. The court explained that the Haitian government "operated as a 'kleptocracy,' or government by thievery, enforced by the Ton Ton Macoutes' terrorizing and extortion of powerless citizens." *Id.*

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Thus, the court further explained, "[p]ersons who resisted the extortion were marked as political subversives and subjected to official repression." *Id.*

The present case is nothing like the situations in the Philippines and Haiti discussed in *Borja* and *Desir*. Unlike the Communists in *Borja*, La Familia is not a political group that sought to both recruit and extort Respondent for political reasons. Also unlike the respondent in *Borja*, Respondent here did not express political opposition to La Familia. Moreover, unlike in *Desir*, La Familia is not the government itself, so defying its extortion does not make Respondent a "political subversive[]...subjected to official repression." In short, both the respondents and the persecutors in *Borja* and *Desir* held political opinions and the respondents in those cases were persecuted because of those opinions.; the same cannot be said of Respondent or La Familia.

Respondent's reliance on *Lazo-Majano*, 813 F.2d 1432 (9th Cir. 1987), *abrogated on other grounds by Fisher v. I.N.S.*, 79 F.3d 955, 963 (9th Cir. 1996), is misplaced. In that very old case, the respondent's husband had fled El Salvador "for political reasons." *Id.* at 1433. After he left, the respondent began working for a military leader in El Salvador who brutally beat and raped the respondent. *Id.* The military leader warned the respondent that if she reported the mistreatment, "he would have her tongue cut off, her nails removed one by one, her eyes pulled out, and she would then be killed." *Id.* He told the respondent that he would get away with it because he would simply tell authorities that the respondent, like her husband, is "contrary to us; subversive." *Id.* Indeed, during one incident while the military leader was abusing the respondent in a restaurant, he "told a friend from the police in front of all the other people in the restaurant that she was a subversive and that was why her husband had left." *Id.* (internal quotations marks omitted). The respondent eventually escaped to the United States.

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The Ninth Circuit held that, under these circumstances, the respondent "suffered persecution because of one specific political opinion [the military leader] attributed to her. She is, she has been told by [the military leader], a subversive." *Id.* at 1435. The court explained that "[o]ne cannot have a more compelling example of a political opinion generating political persecution than the opinion that is held by a subversive in opposition to the government. [The military leader] viewed [the respondent] as having such an opinion." *Id.* The court further noted that, under these circumstances, the respondent's flight from the military leader constituted an expression of an imputed political opinion. *See id.* at 1435.

Respondent's reading of *Lazo-Majano*—that simply fleeing crime is enough to establish a well-founded fear of persecution based on political opinion—is too broad. Indeed, if it is accepted, then virtually everyone would be eligible for asylum. A more careful reading of that case makes clear that the alien was targeted not simply for fleeing crime, but because her persecutor had labeled her as a political "subversive." Given her husband's background as a political activist, the position her persecutor held in the government, and her persecutor's statements that he could get away with anything because the respondent was a "subversive," flight from the military leader's grasp would have been seen as a political act.

Here, however, La Familia imputed no political opinion to Respondent. They did not accuse her or her family members of being "subversive" or of taking any other political positions. They did not threaten to expose Respondent's imputed political opinions if she reported their illegal activities. Moreover, Respondent, unlike the respondent in *Lazo-Majano*, had no politically active family members. And, unlike the military leader in *Lazo-Mojano*, La Familia is not a governmental actor, so opposition to its demands does not constitute a political opinion. In short, nothing about Respondent's interactions with the gangs in Mexico had any

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connection to a political opinion held by anyone. Thus, the facts of the present case are distinguishable from *Lazo-Majano*.

Therefore, Board and Ninth Circuit case law make clear that Respondent has not been harmed or threatened because of any political opinion, imputed or otherwise. Because Respondent has not provided any evidence of political persecution outside her alleged past persecution, Respondent has failed to establish a well-founded fear that she would be persecuted because of a political opinion if she returned to Mexico.

II. RESPONDENT FAILED TO ESTABLISH THAT SHE WAS PERSECUTED ON ACCOUNT OF HER MEMBERSHIP IN A PARTICULAR SOCIAL GROUP.

A. "Those opposed to organized crime" is not a cognizable particular social group.

Respondent argues that she was targeted because of her membership in the particular social group, "those opposed to organized crime." Resp. Br at 9. Specifically, she argues that because the country conditions evidence indicates some level of collusion between police and the gangs, "it is highly likely that the persecutors knew (b)(6); reported the threatening phone calls." *Id.*

The Ninth Circuit has squarely rejected this argument. In *Conde Quevedo v. Barr*, 947 F.3d 1238, 1243 (9th Cir. 2020), the court held that "people who report the criminal activity of gangs to police" is not a PSG because there is no evidence that "Guatemalan society *recognizes* those who, without more, report gang violence as a distinct group." The court also explained that the PSG was not cognizable because, unlike in *Henriquez-Rivas*, it did not involve a group that "had testified in open court" and the Guatemalan government had not "enacted a special witness protection law to protect those who testify against violent criminals." *Id.*

The Board recently adopted the reasoning of *Conde Quevedo*, holding that those who cooperate with police do not constitute a PSG unless "their cooperation is public in nature,

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particularly where testimony was given in public court proceedings, and the evidence in the record reflects that the society in question recognizes and provides protection for such cooperation." *Matter of H-L-S-A-*, 28 I&N Dec. 228 (BIA 2021).[2] The Board emphasized that a prime example of evidence showing social distinction of such a PSG is "legislation or other formal legal protections for testifying witnesses." *Id.* at 237. (b)(7)(E) (b)(7)(E) did not testify in open court or take any other "public" actions, the Board rejected his proposed PSG, "prosecutorial witnesses," as "broad," "unclear," and lacking social distinction. *Id.* at 238.

Here, Respondent's proposed PSG—"those opposed to organized crime"—is even broader than those rejected by the Ninth Circuit and the Board in *Conde Quevedo* and *Matter of H-L-S-A-*. "Those opposed to organized crime" includes people who have taken *no* steps—public or private—to cooperate with police or otherwise fight organized crime. Indeed, Respondent herself did not testify in open court or take any other step to make her cooperation with the police "public in nature"; rather, the only step Respondent took against her extorters was to make a single report to the police, which was not even recorded. Moreover, there is no evidence in the record that Mexico "provides protection for…cooperation [with police]" or that Mexican society views "those opposed to organized crime" as socially distinct. Thus, Respondent's proposed PSG must fail under *Conde Quevedo* and *Matter of H-L-S-A-*.

[2] There are multiple other cases in which Ninth Circuit and the Board have held that those who oppose criminal activity do not constitute a particular social group. *See, e.g.*, *Barrios v. Holder*, 581 F.3d 849, 855 (9th Cir. 2009) ("young Honduran men who have been recruited by gangs but refuse to join do not constitute a particular social group" (quoting *Ramos-Lopez*, 563 F.3d at 860); *Santos-Lemus*, 542 F.3d at 744–46; *Matter of S-E-G-*, 24 I. & N. Dec. 579, 579 (BIA 2008) ("Neither Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities nor the family members of such Salvadoran youth constitute a "particular social group."). These cases, however, have been called into question by *Henriquez-Rivas* because they relied on the Board's "social visibility" reasoning. *Henriquez-Rivas*, 707 F.3d at 1085–90.

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In sum, "those who oppose organized crime" is not a cognizable PSG because it is too broad and lacks social distinction.

B. Respondent has not established a nexus between her membership in the group "those opposed to organized crime" and the harm she fears in Mexico.

Respondent argues that the nexus between her proposed social group, "those opposed to organized crime" and the harm she fears in Mexico lies in the fact that she reported the extortion calls to the police. According to Respondent, it is "highly likely the cartel knew [(b)(6); (b)(7)(C)] reported them" because there is "so much corruption and collusion between the police and the cartels." Resp. Br. at 12. As such, Respondent believes that the cartels will harm her if she returns to Mexico, and that this constitutes persecution on account of her membership in a PSG. *See id.*

Respondent's pure speculation that the gangs learned of her police report, which was not recorded or acted on by police, cannot establish a well-founded fear of being harmed in Mexico. And even if it could, the Board and the Ninth Circuit have made clear that retaliation for cooperating with police does not constitute persecution. *Matter of H-L-S-A-*, 28 I&N Dec. 228 (BIA 2021) ("a gang member retaliating against an applicant for merely cooperating with law enforcement only shows individual retaliation, not persecution on account of a protected ground"); *id.* at 234–35 n.5 ("an applicant cannot meet his burden by merely showing that members of a gang sought to punish him for reporting or testifying about their criminal behavior"), *id.* at 238 ("Even if the gang members knew or suspected that he had provided law enforcement with information about them, this 'individual retaliation' does not qualify as persecution based on his membership in his proposed group."). Similarly, in *Conde Quevedo v. Barr*, 947 F.3d 1238, 1243 (9th Cir. 2020) (explaining that making a police report "shows only individual retaliation, not persecution on account of membership in a distinct social group"). In

other words, a gang that retaliates against someone for making a police report is motivated by personal vendetta, not the victim's membership in a group.

Thus, even if "those opposed to gang violence" were a cognizable particular social group, and even if Respondent's speculation that the cartels found out about her police report is enough to establish that she would be at risk of harm in Mexico, retaliation does not constitute a nexus to a protected ground. Thus, Respondent has failed to establish that she would be persecuted on account of her membership in the group, "those opposed to organized crime."

C. The Immigration Judge correctly ruled that Respondent was not targeted on account of her gender.

Respondent claims she was targeted on account of her membership in the PSGs "female heads of household" and "women or Mexican women." She argues that "[b]ecause the cartel knew her husband was not there, they singled her out." Resp. Br. at 10. She also argues that "[t]he threats made to (b)(6); (b)(7)(C) by the cartel were very vulgar and demeaning to women and specifically to (b)(6); (b)(7)(C). This shows that the persecutor was motivated by the fact that (b)(6); (b)(6); is a woman." Resp. Br. at 11.

The Immigration Judge, however, correctly rejected these arguments, pointing out that Respondent's brother-in-law and others in the area were also targeted for extortion by the same gang. I.J. at 9. In other words, because the gang targets people regardless of gender, Respondent's gender was not a "but-for cause" of the mistreatment. *Matter of A-B-*, 28 I&N Dec. 199, 200 (A.G. 2021). As such, there is no nexus between Respondent's membership in the two proposed gender-based PSGs and the mistreatment she experienced.

III. THE IMMIGRAITON JUDGE CORRECTLY RULED THAT RESPONDENT HAS NOT ESTABLISHED A LIKELIHOOD OF TORTURE IN MEXICO.

"Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a

(b)(6); (b)(7)(C)

third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(1) (2000)). "Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." *Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1059 (9th Cir. 2006) (citing 8 C.F.R. § 208.18(a)(1))

Respondent argues, without citing any evidence, that she should have been granted protection under the CAT because "the prevalence of violence against women in Mexico is shockingly high." Resp. Br. at 14. She claims, again without citing any evidence, that such violence is with the acquiescence of the Mexican government because "Mexican authorities are well aware of the brutal treatment faced by women who have been beaten and threatened by an intimate partner and yet they almost never intervene." *Id.*

These broad, unsupported assertions cannot carry Respondent's burden to establish a likelihood of torture. While certainly some—and probably many—women in Mexico are victims of physical abuse, Respondent has cited no evidence suggesting that women in Mexico have at more than a 50% chance of being *tortured*. Indeed, as the Immigration Judge correctly found, "the threats and attempted confrontation that the lead respondent experienced do not rise to the level or torture," I.J. at 10, so Respondent cannot even point to her own experience as evidence. Similarly, while certainly some—and perhaps many—Mexican police officers acquiesce to the

physical abuse of women, Respondent has provided no evidence that such acquiescence is so ubiquitous as to make torture in Mexico more likely than not for a woman. In short, Respondent has not established that simply being a woman in Mexico makes her likely to be a victim of torture, as her argument suggests.

Respondent also argues that because her son was tortured in Mexico, "it is more likely than not that (b)(6); will be tortured if she returns to Mexico." *Id.* at 15. But nothing in the record indicates that the police would have any reason to redirect their animus from Respondent's son to Respondent. The record reflects, and the Immigration Judge found, that the officers harmed Respondent's son "in retaliation for Respondent's refusal to pay the money the officers demanded of him" and "on account of the opinion he was expressing to them, an explicit statement that he would not tolerate the unlawful actions of corrupt police officers." I.J. at 12. They did not threaten to hurt his family or do anything else that would lead Respondent to reasonably believe that she was more at risk of torture simply because of her relationship to her son. Without such evidence, Respondent cannot support her argument that her son's past torture makes her own future torture more likely.

Accordingly, the Immigration Judge's finding that Respondent did not establish a likelihood of being tortured in Mexico was correct.

CONCLUSION

For the reasons explained above, DHS respectfully requests that the Board dismiss Respondent's appeal.

(b)(6); (b)(7)(C)

Respectfully submitted on this 9th day of February, 2021,

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NON- DETAINED

ORIGINAL

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

In the Matter of:

(b)(6); (b)(7)(C)

In removal proceedings

File Nos.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
BRIEF ON APPEAL

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(b)(6); (b)(7)(C)

INTRODUCTION

This case is before the Board upon the respondents' appeal of the Immigration Judge's decision denying the respondents' applications for asylum, withholding, and CAT protection. The respondents' brief does not challenge the Immigration Judge's conclusions that (1) "young females living in Mexico" and "young single women living in Mexico" are likely not cognizable particular social groups, or (2) even if they are cognizable, there is no evidence in the record that the abuse Lead Respondent endured from her father and brother was on account of her membership in a proposed PSG. Rather, the respondents appeal only the Immigration Judge's conclusions that (1) the respondents failed to establish past persecution, and (2) the respondents failed to establish that internal relocation was unreasonable. As such, this brief addresses only these two issues.

ISSUES PRESENTED

- **Past persecution**. Did the Immigration Judge err in finding that the respondents failed to establish past persecution because the threats they received, which have gone unfulfilled since approximately 2014, were not "especially menacing" under Ninth Circuit case law?
- **Internal relocation**. Did the Immigration Judge err in finding that the respondents failed to establish that internal relocation to Morelia, Mexico is unreasonable, given that the respondents themselves lived there for two years without harm and they still have family safely residing there?

STANDARD OF REVIEW

The Board of Immigration Appeals reviews findings of fact, including credibility findings, to determine whether the findings were clearly erroneous. *See* 8 C.F.R. § 1003.1(d)(3)(i). Questions of law, discretion, judgment, and all other issues are reviewed de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

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SUMMARY OF THE ARGUMENT

The Immigration Judge correctly concluded that the respondents failed to establish past persecution because the threats they experienced were not "especially menacing" under Ninth Circuit case law. The drug traffickers' threats, which demanded that the respondents move away from Morelia and Salamanca, were not accompanied by any physical violence or shows of force, and were never fulfilled despite the family remaining in Morelia for two years and Salamanca for one year.

The Immigration Judge also correctly concluded that the respondents failed to establish that internal relocation to Morelia was unreasonable. The respondents have family living in Morelia who have gone unharmed for years, despite one of them owning legal property to the land the drug traffickers want. Moreover, the respondents themselves lived in Morelia for two years without harm.

STATEMENT OF FACTS

The respondents, a mother ("Lead Respondent") and her three minor children, are natives and citizens of Mexico who came to the United States in April of 2015. I.J. at 1–2.

In 2007, Lead Respondent and her husband moved into the husband's family home in Arteaga, Mexico. I.J. at 3–4. In 2013, Lead Respondent's father-in-law was threatened by criminals after he refused to allow them access to his land for their drug trafficking activities. I.J. at 4. He was shot to death while walking along a road near the family home. I.J. at 4. Nine days after the funeral, Lead Respondent's husband was approached by the drug traffickers and told that if he and his family did not leave town, they were next. I.J. at 4. Lead Respondent and her

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family immediately packed up and moved four hours away to Morelia, Mexico, where Lead Respondent's father-in-law owned another home. I.J. at 4; Tr. at 66.

After some time in Morelia, a man came to Morelia and told Lead Respondent's family that they would be killed if they ever returned to Arteaga. I.J. at 4–5. The "exact content of this message was not entirely clear, but it may have also included a demand that they move farther away." I.J. at 5. At some point, Lead Respondent's mother-in-law in Morelia (who accompanied the respondents to the United States) also received a threat from the drug traffickers indicating that they "wanted everyone out of the property so that they could take over the land." Tr. at 66; I.J. at 5.

After living in Morelia for two years, the respondents moved to Salamanca, Mexico where they lived for about a year with other members of Lead Respondent's husband's family. I.J. at 5; Tr. at 68. While living there, Lead Respondent's husband's nephew, who had recently visited Arteaga, delivered a message to Lead Respondent's husband from the drug traffickers indicating that they knew where the family was living and that the respondents should move farther away. I.J. at 5. At that point, Lead Respondent's husband came to the United States and the respondents moved back to Morelia for a few days before also coming to the United States. I.J. at 5; Tr. at 68..[1]

Lead Respondent's husband still has family in Morelia, including a sister who is married with children and a brother who is studying there. I.J. at 5. Neither of them have experienced any problems. I.J. at 5. Notably, Lead Respondent's husband's brother in Morelia has not been

[1] There are also several unexplained incidents of harm to the respondents' family. *See* I.J. at 3 (Lead Respondent's brother, (b)(6); attacked in Arteaga "for reasons that are not entirely clear"); I.J. at 5 (Lead Respondent's brother, (b)(attacked in Arteaga for unknown reasons); I.J. at 6 (Lead Respondent's mother-in-law's sister killed in Arteaga by unknown person for unknown reasons). Because the reason for these incidents is unknown, they cannot form the basis for an asylum, withholding, or CAT claim and will not be addressed in this brief.

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harmed despite the fact that he is "co-holder of the legal title to the majority of the property that set off the problems in the first place." I.J. at 10.[2]

ARGUMENT

I. THE IMMIGRATION JUDGE CORRECTLY CONCLUDED THAT THE RESPONDENTS FAILED TO ESTABLISH PAST PERSECUTION BECAUSE THE THREATS THEY EXPERIENCED WERE NOT "ESPECIALLY MENACING."

An applicant seeking to establish past persecution must show, inter alia, "an incident, or incidents, that rise to the level of persecution." *Navas v. INS*, 217 F.3d 646, 655–56 (9th Cir. 2000).

The Ninth Circuit "generally treats unfulfilled threats, without more, as within that category of conduct indicative of a danger of future persecution, rather than as past persecution itself." *Lim v. I.N.S.*, 224 F.3d 929, 936 (9th Cir. 2000) (citing *Briones v. I.N.S.*, 175 F.3d 727, 729 (9th Cir. 1999); *Mgoian v. I.N.S.*, 184 F.3d 1029 (9th Cir.1999); *Barraza Rivera*, 913 F.2d 1443, 1453 (9th Cir.1990); *Arteaga v. I.N.S.*, 836 F.2d 1227, 1231 n. 6 (9th Cir. 1988)). This is because threats are "sometimes hollow and, while uniformly unpleasant, often do not effect significant actual suffering or harm." *Id.* Moreover, because claims of unfulfilled threats are "hard to disprove" and a finding of past persecution "flips the burden of proof" to the government, " it would "unduly handcuff" immigration enforcement to if all threats necessarily rose to the level of persecution. *Id.* Thus, threats qualify as past persecution only in "extreme cases" where they are "repeated and especially menacing." *Id.* (citing *Reyes-Guerrero v. I.N.S.*, 192 F.3d 1241, 1243–46 (9th Cir. 1999); *Del Carmen Molina v. I.N.S.*, 170 F.3d 1247, 1249 (9th Cir.1999); *Sangha v. I.N.S.*, 103 F.3d 1482, 1487 (9th Cir. 1997)). More specifically, stand-alone

[2] The Immigration Judge found that Lead Respondent's husband would not return to Mexico with her if she were removed. I.J. at 6, 10. This conflicts with the transcript of the testimony, which shows that Lead Respondent, when that he husband "would go with us" if the respondents had to go back to Mexico. Tr. at 98–99.

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threats constitute past persecution "only when the threats are so menacing as to cause significant actual 'suffering or harm.'" *Id.* (citing *Sangha*, 103 F.3d at 1487; *Boykov v. I.N.S.*, 109 F.3d 413, 416 (7th Cir. 1997)).

For example, in *Sangha*, the alien's father had been an outspoken political leader who publicly criticized a terrorist group called the Bhindrawala Tiger Force ("BTF"). 103 F.3d at 1486. In response to his advocacy, armed BTF members "forced their way into the Sangha home," "beat up Sangha's father until Sangha and his brother came to protect him," and "demanded that Sangha's father cease his political activities, pay them 100,000 rupees, and give over Sangha and his brother." *Id.* A month or two later, the father received a letter from the BTF that "reiterated the BTF's demands and threatened to kill the Sangha family." *Id.* With little analysis, the Ninth Circuit concluded that "[t]hese BTF actions are sufficient to show persecution under the Act." *Id.* at 1487.

On the other hand, the Ninth Circuit distinguished *Sangha* in *Lim*, the case cited by the Immigration Judge here. In that case, Mr. Lim had served as a police officer in the Philippine government investigating the New People's Army ("NPA"), the military arm of a local communist dissident group. 224 F.3d at 932. He also engaged in firefights with the NPA and its leader, Mario Subona, and testified in open court against Subona and other NPA leaders. *Id.* Mr. Lim later "appeared on an NPA death list" and began receiving death threats via phone "as well as threatening letters tied with a black ribbon, which signifies an NPA death threat." *Id.* at 932–33. Eventually, "three of Lim's former colleagues in the Mario Subona investigation were murdered one-by-one" and Mr. Lim began noticing that "he was being followed by unidentified men." *Id.* at 933.

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Despite these terrifying circumstances, the Ninth Circuit held that the threats "did not constitute past persecution." *Id.* at 936. Although Mr. Lim's fellow NPA investigators had been murdered, the Ninth Circuit noted that "[n]either Lim nor his family was ever touched, robbed, imprisoned, forcibly recruited, detained, interrogated, trespassed upon, or even closely confronted" and that "Lim carried on for six years [in the Philippines] without harm." *Id.* These facts, the Ninth Circuit reasoned, "offer[] clear indication of both family safety and Lim's own safety in the Philippines for several years." *Id.* at 937. Thus, the court concluded that although the threats were relevant to the question of future harm, they did not rise to the level of past persecution. *Id.* at 936, 937.

Here, the threats experienced by the respondents are similar to the threats in *Lim* and altogether unlike the threats in *Sangha*. Like the alien in *Lim*, the respondents here were never "touched, robbed, imprisoned, forcibly recruited, detained, interrogated, trespassed upon, or even closely confronted." *Lim*, 224 F.3d at 936. Rather, like the threats in *Lim*, which were delivered by phone and letter, the threats the respondents received here were delivered without any physical intimidation or shows of force. The respondents admit as much. *See* Respondent's Br. at 8 ("The petitioner in *Lim*, like Ms. Zapien, was never confronted…."). This is a far cry from the "especially menacing" threats experienced by the alien in *Sangha*, whose house was broken into by armed men who beat the family up before threatening to kill them.

Additionally, just as the alien in *Lim* lived in the Philippines after the threats for "several years" without harm, the respondents here lived in Morelia for two years without harm (and another year in Salamanca). Their family members in Morelia have likewise lived there safely

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since at least 2013. This, and the Ninth Circuit explained in *Lim*, is a "clear indication of both family safety and [an applicant's] own safety." *Lim*, 224 F.3d at 937.

Moreover, although Lead Respondent's father-in-law was killed by the drug traffickers, the alien in *Lim* similarly saw his fellow investigators murdered by the people they had investigated. The Ninth Circuit held, however, that these murders were not enough to render the threats "especially menacing." The same is true here.

In short, *Lim* applies here and *Sangha* in inapposite. Accordingly, the Board should follow the Ninth Circuit's lead in *Lim* and uphold the Immigration Judge's conclusion that the threats the respondents received were not "especially menacing" and do not constitute past persecution.

II. THE IMMIGRATION JUDGE CORRECTLY CONCLUDED THAT THE RESPONDENTS FAILED TO ESTABLISH THAT INTERNAL RELOCATION IS NOT REASONABLE GIVEN THAT THEIR FAMILY, INCLUDING THE PERSON WHO OWNS THE LAND, STILL SAFELY LIVES IN MORELIA, MEXICO.

Because the respondents have failed to establish past persecution, the burden remains on the respondents to establish that relocation within Mexico is not reasonable. 8 C.F.R. § 1208.13(b)(1)(i)(B); *Afriyie v. Holder*, 613 F.3d 924, 936 n.9 (9th Cir. 2010) ("Without demonstrating past persecution, Afriyie, not the government, had the burden of showing that relocation would not be safe or reasonable where the alleged persecutors were private parties.") (citing See 8 C.F.R. §§ 1208.13(a); (b)(3)(i)).

For purposes of determining whether internal relocation is reasonable, "adjudicators should consider, but are not limited to considering, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and

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cultural constraints, such as age, gender, health, and social and familial ties." 8 C.F.R. §§ 1208.13(b)(3); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1214–15 (9th Cir. 2004).

Here, the evidence establishes that the respondents could reasonably relocate to Morelia. The Immigration Judge correctly found, and the respondents do not appear to dispute, that the respondents have family who safely live in Morelia, which is about four hours away from Arteaga and where the respondents lived for two years without harm. Lead Respondent's sister-in-law and brother-in-law have lived in Morelia at least since 2013—and likely much longer—without harm. Before coming to the United States with the respondents, Lead Respondent's mother-in-law also lived in Morelia without harm. Importantly, her brother-in-law has not been harmed despite the fact that he owns legal title to the land the drug traffickers want. The Immigration Judge found this "highly significant" because "the drug traffickers' interest appears to be in securing the unfettered use of the land at the expense of the true owners." I.J. at 9. In other words, if the drug traffickers were inclined to inflict harm on someone living in Morelia in order to secure use of the respondents' family's land, they certainly would have done *something* to Lead Respondent's brother-in-law, who has the legal right to control the land. But because they have not done anything to the brother, it is unlikely that they will do anything to the respondents if they move back to Morelia.

The respondents dispute this conclusion, arguing that the Immigration Judge should have found that, in addition to wanting access to the land, the drug traffickers had a "corollary" interest in preventing the respondents from speaking to the authorities. Respondents' Br. at 9. But there is no evidence of this in the record. To the contrary, the evidence shows that every action the drug traffickers took against the respondents' family was with the sole purpose of

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obtaining access to the land by keeping the family away from the property. Lead Respondent's father in law was killed after he was "resistant" to the traffickers' request for access to the land; the traffickers mentioned nothing about the authorities. I.J. at 4. The threats the respondents' family received in Morelia and Salamanca warned them to stay away from the land and to move farther away from Arteaga; the threats mentioned nothing about the authorities. I.J. at 4–5. The drug traffickers threatened Lead Respondent's mother-in-law because they "wanted everyone out of the property so that they could take over the land"; there was no mention of the authorities. Tr. at 66. In short, the respondents' claim that the drug traffickers were targeting their family to prevent them from speaking to the authorities us belied by the record.

But even if the drug traffickers were interested in keeping the respondents quiet, that does not alter the Immigration Judge's reasoning that internal relocation to Morelia would be safe. Regardless of the drug traffickers' motivation for targeting the respondents' family, the fact remains that no one from the respondents' family has ever been harmed in Morelia and that two of their family members remain in Morelia to this day, unharmed. Indeed, the respondents themselves lived in Morelia for two years without being harmed. Thus, the Immigration Judge's conclusion that the respondents could safely relocate to Morelia is unchanged by the respondents' claim that the drug traffickers were interested in preventing the respondents from speaking to the authorities.

In short, the Immigration Judge was correct to conclude that because the respondents' family has been safe in Morelia, despite one family member there having legal title to the land the drug traffickers wanted, the respondents have failed to establish that internal relocation to Morelia is not reasonable.

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CONCLUSION

In summary, because the threats the respondents experienced were not "especially menacing," they cannot constitute past persecution. Additionally, because their family still safely lives in Morelia, Mexico, the respondents have failed to establish that internal relocation there is not reasonable. Accordingly, DHS respectfully requests that the Board dismiss the respondents' appeal.

Respectfully submitted on this 25th day of August, 2020,

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEAL
FALLS CHURCH, VA

In the Matter of:

(b)(6); (b)(7)(C)

Respondent

In Withholding-Only Proceedings

File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY'S MOTION TO REMAND

The Department moves the Board to remand these proceedings back to the Immigration Judge for further fact finding. On November 5, 2019, the Department filed a Motion to Reconsider alleging there were errors in the Board's March 13, 2019 decision. The Board granted the Department's motion and reopened removal proceedings pursuant to the Board's sua sponte authority. The Board then vacated its March 13, 2019 ordered and permitted the parties until December 20, 2019 to file supplemental briefing regarding the Applicant's appeal of the Immigration Judge's denial of her applications. Upon further review and given the issues outlined by the Department in its recent Motion to Reconsider, the Department believes this case needs to be remanded to the Immigration Judge for further fact finding.

In its Motion to Reconsider, the Department respectfully noted that the Board engaged in impermissible fact finding when determining the social distinction requirement of the Respondent's proposed particular social group of "Mexican women". As noted by the Department, the Immigration Judge did not make any factual findings concerning the social distinction of the proposed particular social group of "Mexican women." *See* IJ at 4-5. In order to correct this error, the Department requests the Board remand the case to the Immigration Court so that the Immigration Judge can determine whether the social distinction requirement is met.

The next point the Department made it in motion regards the issue of nexus. The Department believes this too requires remand to the Immigration Court for further fact finding. The Department noted that under Ninth Circuit case law may require a more extensive analysis by the Board on whether the Respondent's membership in a particular social group was "a reason" for the harm suffered even if simple criminal intent was also an apparent reason. This analysis will require more fact finding by the Immigration Court. As the motives of a particular persecutor is often a question of fact, the case should be remanded to the Immigration Court to provide the Immigration Judge with the opportunity to develop and make those factual determinations that the Board cannot.

Finally, the issue of internal relocation requires further analysis to address all the sources of harm the Application fears. The Board's and the Immigration Judge's analysis only focused on the Applicant's ability to relocate to avoid harm from her former partner. BIA at 3, IJ at 20-21. However, the Applicant claimed fear from multiple sources and the analysis related to her fear of her former partner does not necessarily address internal relocation in relation to the other sources of harm. Additionally, the analysis for internal relocation under the context of CAT protection is different than the analysis for internal relocation for withholding. *Compare* 8 C.F.R. § 1208.16(c)(3)(ii) *with* 8 C.F.R. 1208.16(b)(1)(B), (b)(2), (b)(3), *See Maldonado v. Lynch*, 786 F.3d 1155, 1163-64 (9th Cir. 2015) (en banc). The internal relocation analysis involved finding of facts that the Board cannot do. Therefore, a remand is appropriate to allow the Immigration Judge the opportunity to engage in the fact finding necessary.

For the foregoing reasons, the Department requests the Board remand these proceedings back to the Immigration Court for further fact finding.

(b)(6); (b)(7)(C)

Assistant Chief Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served on the parties listed below, on December 13, 2019.

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(Notice of Appeal- Continuation of Item #6)

(b)(6); (b)(7)(C)

The Department of Homeland Security (Department) appeals from the order of the Immigration Judge, dated February 18, 2020, granting asylum pursuant to section 208 of the Immigration and Nationality Act (Act or INA).

The Immigration Judge further erred in finding the lead respondent to be a credible witness. An Immigration Judge, in making a credibility analysis, should "consider[] the totality of the circumstances and all the relevant factors," and may base the finding on a number of considerations, including "the demeanor, candor, or responsiveness of the applicant or witness" and "the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made)." INA § 208(b)(1)(B)(iii); *see also Matter of J-Y-C-*, 24 I&N Dec. 260, 262-63 (BIA 2007). Inconsistencies between an alien's written submissions and oral testimony, coupled with events that are omitted from the former and asserted only in the latter, will be sufficient for a finding of adverse credibility, even where the applicant's manner, demeanor, and candor during testimony do not supply additional grounds for that finding. *Matter of A-S-*, 21 I&N Dec. 1106, 1109, 1111 (BIA 1998). As the Board recently reiterated, "[C]onsideration of inconsistencies, whether occurring in testimony or between testimony and other evidence, is a fundamental component of an adverse credibility determination." *Matter of Y-I-M-*, 27 I&N Dec. 724, 726 (BIA 2019). In evaluating inconsistencies or omissions between oral and written testimony, an Immigration Judge should take into account whether the alien has provided a convincing explanation for the variation. *Matter of J-Y-C-*, 24 I&N Dec. 260, 264 (BIA 2007); *Matter of S-A-*, 22 I&N Dec. 1328, 1331 (2000); *A-S-*, 21 I&N Dec. at 1109, 1111-12. Here, the lead respondent's oral and written testimony contained a number of inconsistencies for which the lead respondent did not supply adequate explanations. The Immigration Judge's decision fails to mention or analyze these inconsistencies or purported explanations in evaluating the lead respondent's credibility, which constitutes clear error.

The Immigration Judge further erred in finding a nexus between the past harm the lead respondent claims to have suffered in Guatemala and a protected ground enumerated in the statute. INA § 101(a)(42)(A). Specifically, the Immigration Judge erred by finding that the lead respondent met her burden to show that she was harmed on account of her ethnicity and on account of her membership in the particular social group "Guatemalan women." As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Matter of A-B-*, 27 I&N Dec. 316, 338-39 (A.G. 2018). The lead respondent provided no evidence that her claimed persecutors were motivated by any other reason than the nature of their

relationship, or that they were generally hostile to members of the Popti tribe or to "Guatemalan women" as a group. *A-B-*, 27 I&N Dec. at 339. These relationship-based crimes are insufficient to establish eligibility for asylum. Because the lead respondent failed to meet her burden in this regard, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and either the lead respondent's ethnicity or her membership in the particular social group of "Guatemalan women."

As the Immigration Judge erred in finding the respondent established past persecution on account of a protected ground, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the respondent bore the burden of establishing that internal relocation within Guatemala was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored.") (citing 8 C.F.R. § 1208.13(b)(3)(i)). The lead respondent failed to meet that burden with her testimony, which was inconsistent and uncorroborated on the issue of her efforts to relocate to escape her claimed persecutors.

Because the lead respondent failed to meet her burden to show she is eligible for asylum, it was error for the Immigration Judge to find that she is eligible for withholding of removal under section 241(b)(3) of the Act, as the standard for eligibility for withholding of removal is higher than that required for asylum under section 208 of the Act. *INS v. Stevic*, 467 U.S. 407 (1984).

Finally, the Immigration Judge erred in granting the lead respondent protection under the Convention Against Torture, as the respondent failed to demonstrate that any harm she experienced in the past, or is more likely than not to experience in the future, occurred with the acquiescence of a public official. 8 C.F.R. § 1208.18(a). The lead respondent's testimony regarding past harm she experienced in Guatemala was at the hand of private individuals, and the lead respondent did not demonstrate the requisite link between their actions and the Guatemalan government.

The Department reserves the right to raise additional issues or claims of error in its brief on appeal.

The Department appeals the Immigration Judge's May 9, 2019 decision granting the respondent asylum pursuant to section 208 of the Immigration and Nationality Act (Act or INA). The Immigration Judge erred in finding the facts established by the respondent met her burden of proof for protective relief.[1] Specifically, the respondent failed to demonstrate a nexus between the harm she suffered and a protected ground, failed to demonstrate that internal relocation is unreasonable, and failed to establish that the Salvadoran government is unable or unwilling to protect her from the private actors she fears. The Department asks the Board to reverse the decision of the Immigration Judge and remand the matter for consideration of the alternatively-proposed particular social groups and protection pursuant to the regulations implementing the U.S. obligation under Article 3 of the United Nations Convention Against Torture (CAT).

I. The Respondent Failed to Establish a Nexus to a Protected Ground

The Immigration Judge erred in finding that the respondent met her burden to establish that she was singled out for harm[2] because of her membership in the particular social group of "Salvadoran women."[3] To demonstrate that harm was "on account of" a

[1] As the respondent failed to meet the lower burden of proof required for asylum, it follows that she also failed to satisfy the clear probability standard to establish eligibility for withholding of removal. *See INS v. Stevic*, 467 U.S. 407 (1984); *see also* 8 C.F.R. §§ 1208.13, 1208.16(b) (2008). Furthermore, she failed to prove that it is more likely than not that she will be tortured if she is returned to El Salvador. *See* 8 C.F.R. § 1208.16(c)(2). The respondent has not provided evidence that she was tortured in El Salvador or that a Government official either seeks to torture her or will acquiesce in her torture if she is returned to that country. *See* 8 C.F.R. § 1208.18(a)(1) (2008); *see also Matter of J-R-G-P-*, 27 I&N Dec. 482 (BIA 2018); *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000).

[2] Due to the lack of any nexus to the harm the respondent suffered, she has likewise failed to establish past persecution such that she is not entitled to a presumption of a well-founded fear. *See* 8 C.F.R. § 1208.13(b)(1) (noting that an applicant must establish that the persecution was "on account of" a protected ground.

[3] The Board need not address whether "Salvadoran women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds as asserted in this Notice of Appeal. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach). However, the Immigration Judge declined to analyze the other proposed particular social groups. I.J. at 7, n.2.

protected ground, an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)).

The respondent failed to establish a nexus between the group of which she claims to be a member – "Salvadoran women" – and the harm she suffered. Rather, the respondent established that she was the victim of crimes committed by two separate individuals who were motivated by the nature of their personal relationship with the respondent.

This fact was underscored by the Immigration Judge, who emphasized and relied on the existence and nature of respondent's personal relationship with her prior partner to find a nexus to the stated particular social group. *See* I.J. at 2-4. The Immigration Judge erred by finding a nexus to "Salvadoran women" based on the court's determination that the harm suffered by respondent was because the respondent experienced violence at the hands of her former partners, which is in line with information about the "machismo culture" and views on gender roles in El Salvador. I.J. at 9-10. However, this reasoning does not bolster the Immigration Judge's finding that the respondent was harmed because

she is a "Salvadoran woman," but rather supports a finding that she was harmed because of her relationship with her prior partners.

The respondent's former husband married her at age 14. She testified that when she was 15 in 1984, her former husband started to abuse her, and the abuse continued until 2001, when her husband left her and their ten children. She testified that he does not want any further relationship with her. The respondent did not testify that her former husband engaged in any other acts of violence towards women; indeed, he was responsible for providing care to his own mother. There was no evidence of general animosity towards women or any explanation as to why the respondent's husband began abusing her approximately a year into their marriage. He ended the relationship and has not attempted any additional harm to the respondent in nearly twenty years. After her husband left, the respondent experienced approximately 11 years without any harm or abuse.

In 2012, the respondent began another relationship with (b)(6); (b)(7)(C) which lasted until 2014. The relationship was apparently fine until her partner was twice detained by Salvadoran police on a charge of attempted murder. He was released after six to eight months in jail when no witnesses came forward at his trial. I.J. at 2. Following his release from jail, he was "different." I.J. at 3. He became more violent, abused alcohol and drugs, and began to threaten the respondent. *Id.* Ultimately, he kicked her out of the home, but he continued to threaten her with a machete. He later lost a hand to a machete attack, and he blamed the respondent for it. *Id.* Both the respondent and her son testified that (b)(6); (b)(7)(C) was in a new relationship; the respondent acknowledged he did not seek to rekindle any relationship with her. The respondent's

son was not aware of any violent acts committed by (b)(6); (b)(7)(C) against his new partner.

The respondent provided no evidence that her former husband or partner were motivated by any other reason than the nature of their relationship, or that they were generally hostile to "Salvadoran women" as a group. *Matter of A-B-*, 27 I&N Dec. 316, 339 (A.G. 2018). For example, the respondent testified to interactions between her former partner and the respondent's daughters during and after the time he was in a relationship with the respondent that did not involve violence towards them. However, after her former partner lost his hand in a machete attack, he twice threatened to cut off the hand of one of the respondent's daughters who live in El Salvador. I.J. at 3. The respondent's testimony demonstrates that her former partner held no generalized animosity towards the other "Salvadoran women" in his life and is simply motivated by his anger over losing his own hand.

As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *A-B-*, 27 I&N Dec. at 338-39. To be sure, the respondent was the victim of crimes committed by her former husband and her former partner, but those relationship-based crimes are insufficient to establish eligibility for asylum. Because the respondent failed to establish that her former husband or former partner were motivated by any other reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the stated particular social group of "Salvadoran women."

Because the Immigration Judge erred in finding a nexus to a protected ground, the respondent has failed to establish past persecution such that she is not entitled to a presumption of well-founded fear and the burden remained on the respondent to establish both a well-founded fear and that internal relocation was not reasonable.

II. The Immigration Judge Erred in Concluding That the Government of El Salvador Is Unable or Unwilling to Protect the Respondent

Additionally, the Immigration Judge erred in concluding that the Salvadoran government was involved in the feared harm by private actors. I.J. at 11-12. Where the alleged persecutor is unaffiliated with the government, the applicant must show that the government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993); *A-B-*, 27 I&N Dec. at 319 (citing *Acosta*, 19 I&N Dec. at 222). In instances where the applicant is a victim of private criminal activity, "the analysis must also 'consider whether government protection is available.'" *A-B-*, 27 I&N Dec. at 320 (quoting *M-E-V-G-*, 26 I&N Dec. at 243). "'[V]iolence by private citizens . . . , absent proof that the government is unwilling or unable to address it, is not persecution[.]'" *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) (quoting *Butt v. Keisler*, 506 F.3d 86, 92 (1st Cir.2007)). Relevant factors include both "the government's response" to the claimed persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470 (6th Cir. 2019).[4]

"No country provides its citizens with complete security from private criminal activity, and perfect protection is not required." *A-B-*, 27 I&N Dec. at 343. Rather "[a] government's steps 'to punish the persons responsible for the violence' supports a conclusion that it is not unwilling or unable to protect individuals who have been the

[4] As of May 3, 2019, Westlaw does not provide pin cites for *K.H.* The quoted text appears on page seven of the slip opinion, available at http://www.opn.ca6.uscourts.gov/opinions.pdf/19a0065p-06.pdf.

victims of ethnic attacks." *Bitsin v. Holder*, 719 F.3d 619, 630 (7th Cir. 2013) (quoting *Vahora v. Holder*, 707 F.3d 904, 908 (7th Cir.2013)). As such, an applicant "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *Matter of A-B-*, 27 I&N Dec. at 338.

Although the government of El Salvador may at times have difficulty controlling interpersonal violence, "where a government is 'making every effort to combat' violence by private actors, and its "inability to stop the problem" is not distinguishable "from any other government's struggles," the private violence has no government nexus and does not constitute persecution." *Khan*, 727 F.3d at 7 (quoting *Burbiene v. Holder*, 568 F.3d 251 (1st Cir. 2009)).

Here, the respondent failed to establish that the Salvadoran government is unable or unwilling to protect her from either private actor she fears. The respondent never reported to government authorities any abuse by either her former husband or her former partner. Although there are difficulties addressing domestic violence, the country condition evidence shows ongoing attempts by the Salvadoran government to improve its response by setting up domestic violence courts, adding shelters for women, and removing a police chief for violating a protection order. Exh. 11. Furthermore, the Salvadoran government attempted to prosecute (b)(6); (b)(7)(C) for attempted murder, but the case fell apart due to a lack of witnesses. This evidence does not demonstrate an unwilling or unable government, especially where the respondent never sought the government's assistance in protecting her from either abuser.

III. The Respondent Can Reasonably Relocate Within El Salvador

As the Immigration Judge erred in finding the respondent established past persecution on account of a protected ground, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the respondent bore the burden of establishing that internal relocation within El Salvador was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored.") (citing 8 C.F.R. § 1208.13(b)(3)(i)).

Even if the Department bears the burden of proof on this issue, however, the Immigration Judge erred in finding internal relocation unreasonable. I.J. at 12-13. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id.*

The Immigration Judge held that respondent faced a threat of persecution anywhere in El Salvador as a Salvadoran woman even though the harm she received was perpetrated by two private actors. This finding is contrary to the U.S. Department of State, Country Reports on Human Rights Practices for 2016 through 2018 for El Salvador submitted into evidence by the Department. Exh. 11; *see also A-B-*, 27 I&N Dec. at 320 (when the harm is by private actors, the analysis must also "consider whether government protection is available, internal relocation is possible, and persecution exists countrywide.") (quoting *Matter of M-E-V-G-*, 26 I&N Dec. 227, 243 (BIA 2014)).

The Immigration Judge further found that internal relocation would be unreasonable because of gang violence, financial difficulties due to living away from the respondent's family, and the inability to live with her children because (b)(6); (b)(7)(C) knows where those children live. I.J. at 13. However, having challenges in life is not the equivalent of an unreasonable life. The Attorney General has noted that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)." *A-B-*, 27 I&N Dec. at 345. The respondent failed to meet her burden of proof on this issue.

The Department reserves the right to raise additional arguments upon receipt and review of the transcript.

On April 22, 2019, the Immigration Judge granted the respondents' request for asylum from El Salvador under section 208 of the Act. I.J. at 10. The Department appeals the grant of asylum and requests remand for full consideration of the respondents' request for protection under the Convention Against Torture (CAT).

1. The Immigration Judge Erred in Finding a Cognizable Particular Social Group

First, the Department asserts that the Immigration Judge erred in concluding that the respondents presented a cognizable particular social group (PSG). I.J. at 6-7. The respondents proposed that they are members of a PSG defined as "family members of military [personnel]." I.J. at 6. When the basis for seeking asylum is as a member of a particular social group, the applicant "must establish that the group is (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 M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014).

The proposed PSG lacks particularity as it is amorphous and lacks definable boundaries. "A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014) (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007)). The "terms used to describe the group [must] have commonly accepted definitions in the society of which the group is a part." *Id.* The group must have "discrete and [ ] definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)). Here, the Immigration Judge determined that the respondents

proposed group of "family members of military [personnel]" to be sufficiently particular; however, this was in error. *See Matter of S-E-G-*, 24 I&N Dec. 579, 585 (BIA 2008) ("[t]he proposed group of 'family members,' which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others, is also too amorphous a category"); *see also Matter of L-E-A-*,[1] 27 I&N Dec. 40, 42-43 (BIA 2017) (not all familial relationship-based claims will satisfy a particular social group as it depends on the nature and degree of the relationship as well as establishing that such a relationship is viewed as socially distinct). The group includes family members of all manner of degree of relationship to any military member worldwide. Importantly, the respondents never submitted any evidence into the record that Salvadoran society would recognize such a broad group, especially where the boundaries of such a group are unknown. The Immigration Judge's determination that the group was sufficiently particular was in error, particularly given the respondents' failure to submit evidence supporting the cognizability of this particular group.

2. The Immigration Judge Erred in Finding That a Protected Ground Was at Least "One Central Reason" for the Respondents Being Targeted

The Immigration Judge also erred in concluding that the reason the respondents were targeted was on account of a protected ground. I.J. at 7-8. To demonstrate that harm was "on account of" a protected ground, the applicant must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780

[1] On December 3, 2018, the Acting Attorney General referred *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017), to himself for further review and stayed the decision. *Matter of L-E-A-*, 27 I&N Dec. 494 (A.G. 2018). However, the Board's decision in *Matter of L-E-A-* remains binding until it is modified or overruled. *See Matter of E-L-H-*, 23 I&N Dec. 814, 815 (BIA 2005) (("[A] [BIA] precedent decision applies to all proceedings involving the same issue unless and until it is modified or overruled by the Attorney General, the [BIA], Congress or a Federal court.").

F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)). A finding of past persecution results in a rebuttable presumption of a well-founded fear on that same basis. *Woldemeskel v. INS*, 257 F.3d 1185, 1189 (10th Cir. 2001); 8 C.F.R. § 1208.13(b)(1). In this matter, the Immigration Judge concluded that the respondents had suffered past persecution on account of a protected ground, to wit: family members of military personnel. I.J. at 4-8. However, the Immigration Judge erred in concluding that the respondents had established that they were persecuted on account of their membership in the proposed social group. Assuming for argument that the group is cognizable, the evidence does not establish a direct targeting of the respondents because of their familial relationship to a military member. "[N]exus is not established simply because a particular social group of family members exists and the family members experience harm. Thus, the fact that a persecutor has threatened an applicant and members of his family does not necessarily mean that the threats were motivated by family ties." *Matter of L-E-A-*, 27 I&N Dec. at 45 (citing *Marin-Portillo v. Lynch*, 834 F.3d 99, 102 (1st Cir. 2016)). Instead, the evidence demonstrates that the unspecified gang was seeking out information from individuals who might know about [(b)(6); (b)(7)(C)] There was no direct animosity toward the family or its members; they were just a means to an end to try to obtain information about [(b)(6); (b)(7)(C)]. This is further demonstrated by the fact that other family members continue to reside safely in El

Salvador, notwithstanding that some have had contact with the gangs: (b)(6); wife and children, (b)(6); (b)(7)(C) brother (b)(6); (b)(7)(C) uncle. Indeed, (b)(6); (b)(7)(C) the target of this gang action, continues to reside in El Salvador and has not been harmed despite being the principal target of the gang. As such, the evidence supports that the targeting of the respondents was simply a means to an end, which the Board noted is insufficient to establish nexus to a protected group:

> [T]he fact that a persecutor targets a family member simply as a means to an end is not, by itself, sufficient to establish a claim, especially if the end is not connected to another protected ground. *See, e.g., Mendoza-Alvarez v. Holder*, 714 F.3d 1161, 1165 (9th Cir. 2013) ("If someone suffers harm on grounds that are associated with group membership but also apply to many others, then the harm is not because of membership in a particular social group . . . ."). Circumstances such as these may indicate that family membership was not at least one central reason that the applicant was harmed. *Ramirez-Mejia [v. Lynch]*, 794 F.3d [485,] 493 [(5th Cir. 2015)] (concluding that "the evidence that gang members sought information from [the applicant] about her brother, without more, does not support her claim that the gang intended to persecute her on account of her family").

L-E-A-, 27 I&N Dec. at 45-46. Therefore, the Immigration Judge's finding that the respondents established a nexus to a protected ground was in error, especially where other family members continue to reside unharmed in El Salvador. *See generally Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998) (citing *Cuadras v. United States INS*, 910 F.2d 567, 571 (9th Cir. 1990)). Likewise, as there is no nexus, the Immigration Judge's finding a well-founded fear, both presumed and independently, was in error. I.J. at 8-10.

3. The Immigration Judge Erred in Finding That the Salvadoran Government Is Unable or Unwilling to Protect the Respondents

Additionally, the Immigration Judge erred in concluding that the Salvadoran government was involved in the feared harm by private actors. I.J. at 8. Where the alleged persecutor is unaffiliated with the government, the applicant must show that the

government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. I.N.S.*, 9 F.3d 819, 822 (10th Cir. 1993); *Matter of A-B-*, 27 I&N Dec. 316, 319 (A.G. 2018) (citing *Acosta*, 19 I&N Dec. at 222). In instances where the applicant is a victim of private criminal activity, "the analysis must also 'consider whether government protection is available.'" *A-B-*, 27 I&N Dec. at 320 (quoting *M-E-V-G-*, 26 I&N Dec. at 243. "'[V]iolence by private citizens ..., absent proof that the government is unwilling or unable to address it, is not persecution[.]'" *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) (quoting *Butt v. Keisler*, 506 F.3d 86, 92 (1st Cir.2007)). Relevant factors include both "the government's response" to the claimed persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470 (6th Cir. 2019).[2]

"No country provides its citizens with complete security from private criminal activity, and perfect protection is not required." *A-B-*, 27 I&N Dec. at 343. Rather "[a] government's steps 'to punish the persons responsible for the violence' supports a conclusion that it is not unwilling or unable to protect individuals who have been the victims of ethnic attacks. *Bitsin v. Holder*, 719 F.3d 619, 630 (7th Cir. 2013) (quoting *Vahora v. Holder*, 707 F.3d 904, 908 (7th Cir.2013)). As such, an applicant "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *Id*. at 338.

Although the government of El Salvador may at times have difficulty controlling the gang violence, "where a government is 'making every effort to combat' violence by private actors, and its "inability to stop the problem" is not distinguishable "from any other government's struggles," the private violence has no government nexus and does

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not constitute persecution." *Khan*, 727 F.3d at 7 (quoting *Burbiene v. Holder*, 568 F.3d 251 (1st Cir.2009)).

Specifically, the Immigration Judge erred in generalizing that some corruption in the Salvadoran government involving gangs was sufficient for the respondents to meet their burden that the Salvador government would be unable or unwilling to assist them in their particular situation with the unknown assailants. Indeed, the respondents' relative, (b)(6); (b)(7)(C), as a member of the Salvadoran military, works directly with local police to target the gangs; he has worked in this capacity for years targeting gangs. Furthermore, (b)(6); (b)(7)(C) reported the January 2019 gang threat to the police, and there is an open investigation with the local prosecutor's office. Conversely, the respondents never reported any of their problems with the gang to the police. The Immigration Judge's finding that the Salvadoran government is unable or unwilling to protect the respondents simply due to corruption and an increase in gang violence was in error, both factually and legally.

The Department reserves the right to raise additional arguments upon receipt and review of the transcript.

On April 22, 2019, the Immigration Judge granted the respondents' request for asylum from El Salvador under section 208 of the Act. I.J. at 10. The Department appeals the grant of asylum and requests remand for full consideration of the respondents' request for protection under the Convention Against Torture (CAT).

1. The Immigration Judge Erred in Finding a Cognizable Particular Social Group

First, the Department asserts that the Immigration Judge erred in concluding that the respondents presented a cognizable particular social group (PSG). I.J. at 6-7. The respondents proposed that they are members of a PSG defined as "family members of military [personnel]." I.J. at 6. When the basis for seeking asylum is as a member of a particular social group, the applicant "must establish that the group is (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 M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014). In this matter, the respondents' proposed PSG is not immutable. Notwithstanding the familial relationship, one's job status is generally something within one's power to control and not so fundamental to one's identity that it cannot or should not be changed. *Matter of Acosta*, 19 I&N Dec. 211, 234 (BIA 1985) (in rejecting the respondent's claim for protection as a taxi driver, the Board noted that "the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice"), modified on other grounds by *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The respondents assert a PSG based upon a relationship to military personnel. However, joining the military service is often a matter of choice, and there is no evidence in the record that their relative cannot leave his

service. Indeed, when asked about quitting the Salvadoran military, their relative simply noted that finding another job was difficult with the economy. In this matter, employment in the military is no different than employment as a taxi driver—it is not immutable. As such, the Immigration Judge's conclusion that the respondents' established a cognizable PSG as the proposed group fails on immutability.

Additionally, the proposed PSG lacks particularity as it is amorphous and lacks definable boundaries. "A particular social group must be defined by characteristics that provide a clear benchmark for determining who falls within the group." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014) (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007)). The "terms used to describe the group [must] have commonly accepted definitions in the society of which the group is a part." *Id*. The group must have "discrete and [ ] definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)). Here, the Immigration Judge determined that the respondents proposed group of "family members of military [personnel]" to be sufficiently particular; however, this was in error. *See Matter of S-E-G-*, 24 I&N Dec. 579, 585 (BIA 2008) ("[t]he proposed group of 'family members,' which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others, is also too amorphous a category"); *see also Matter of L-E-A-*,[1] 27 I&N Dec. 40, 42-43 (BIA 2017) (not all familial relationship-based claims will satisfy a particular

[1] On December 3, 2018, the Acting Attorney General referred *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017), to himself for further review and stayed the decision. *Matter of L-E-A-*, 27 I&N Dec. 494 (A.G. 2018). However, the Board's decision in *Matter of L-E-A-* remains binding until it is modified or overruled. *See Matter of E-L-H-*, 23 I&N Dec. 814, 815 (BIA 2005) (("[A] [BIA] precedent decision applies to all proceedings involving the same issue unless and until it is modified or overruled by the Attorney General, the [BIA], Congress or a Federal court.").

social group as it depends on the nature and degree of the relationship as well as establishing that such a relationship is viewed as socially distinct). The group includes family members of all manner of degree of relationship to any military member worldwide. Importantly, the respondents never submitted any evidence into the record that Salvadoran society would recognize such a broad group, especially where the boundaries of such a group are unknown. The Immigration Judge's determination that the group was sufficiently particular was in error, particularly given the respondents' failure to submit evidence supporting the cognizability of this particular group.

Likewise, the Immigration Judge's determination that this proposed group is socially distinct is flawed. Without knowing the parameters of the group, it is unclear how the group would be recognized within Salvadoran society. The respondents presented no evidence that their proposed group is socially distinct or that others in Salvadoran society would know of members' familial relationships to "military personnel." As such, the respondents' proposed PSG fails each element required to support a cognizable group.

Furthermore, the Immigration Judge accepted the respondents' definition, yet he did not perform an accurate analysis of cognizability pursuant to the proffered PSG. Instead, the Immigration Judge analyzed the social group as immediate relatives of (b)(6); (b)(7)(C) I.J. at 6-7. However, if the Immigration Judge wanted to base a grant of asylum on his own particular social group formulation, the Immigration Judge should have specifically announced such to the parties to allow them to litigate it at the hearing and stated so in his decision. *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018).

2. The Immigration Judge Erred in Finding That a Protected Ground Was at Least "One Central Reason" for the Respondents Being Targeted

The Immigration Judge also erred in concluding that the reason the respondents were targeted was on account of a protected ground. I.J. at 7-8. To demonstrate that harm was "on account of" a protected ground, the applicant must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)). A finding of past persecution results in a rebuttable presumption of a well-founded fear on that same basis. *Woldemeskel v. INS*, 257 F.3d 1185, 1189 (10th Cir. 2001); 8 C.F.R. § 1208.13(b)(1). In this matter, the Immigration Judge concluded that the respondents had suffered past persecution on account of a protected ground, to wit: family members of military personnel. I.J. at 4-8. However, the Immigration Judge erred in concluding that the respondents had established that they were persecuted on account of their membership in the proposed social group. Assuming for argument that the group is cognizable, the evidence does not establish a direct targeting of the respondents because of their familial relationship to a military member. "[N]exus is not established simply because a particular social group of family members exists and the family members experience harm. Thus, the fact that a persecutor has threatened an applicant and members of his family does not necessarily mean that the threats were motivated by family ties." *Matter of L-E-A-*, 27 I&N Dec. at 45 (citing *Marin-Portillo v. Lynch*, 834

F.3d 99, 102 (1st Cir. 2016)). Instead, the evidence demonstrates that the unspecified gang was seeking out information from individuals who might know about (b)(6); (b)(6); There was no direct animosity toward the family or its members; they were just a means to an end to try to obtain information about (b)(6); (b)(7)(C) This is further demonstrated by the fact that other family members continue to reside safely in El Salvador, notwithstanding that some have had contact with the gangs: (b)(6); (b)(6); wife and children, (b)(6); (b)(7)(C) brother, (b)(6); (b)(7)(C) uncle. Indeed, (b)(6); (b)(7)(C), the target of this gang action, continues to reside in El Salvador and has not been harmed despite being the principal target of the gang. As such, the evidence supports that the targeting of the respondents was simply a means to an end, which the Board noted is insufficient to establish nexus to a protected group:

> [T]he fact that a persecutor targets a family member simply as a means to an end is not, by itself, sufficient to establish a claim, especially if the end is not connected to another protected ground. *See, e.g., Mendoza-Alvarez v. Holder*, 714 F.3d 1161, 1165 (9th Cir. 2013) ("If someone suffers harm on grounds that are associated with group membership but also apply to many others, then the harm is not because of membership in a particular social group . . . ."). Circumstances such as these may indicate that family membership was not at least one central reason that the applicant was harmed. *Ramirez-Mejia [v. Lynch]*, 794 F.3d [485,] 493 [(5th Cir. 2015)] (concluding that "the evidence that gang members sought information from [the applicant] about her brother, without more, does not support her claim that the gang intended to persecute her on account of her family").

L-E-A-, 27 I&N Dec. at 45-46. Therefore, the Immigration Judge's finding that the respondents established a nexus to a protected ground was in error, especially where other family members continue to reside unharmed in El Salvador. *See generally Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998) (citing *Cuadras v. United States INS*, 910 F.2d 567, 571 (9th Cir. 1990)). Likewise, as there is no nexus, the Immigration Judge's finding a well-founded fear, both presumed and independently, was in error. I.J. at 8-10.

3. The Immigration Judge Erred in Finding That the Salvadoran Government Is Unable or Unwilling to Protect the Respondents

Additionally, the Immigration Judge erred in concluding that the Salvadoran government was involved in the feared harm by private actors. I.J. at 8. Where the alleged persecutor is unaffiliated with the government, the applicant must show that the government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. I.N.S.*, 9 F.3d 819, 822 (10th Cir. 1993); *Matter of A-B-*, 27 I&N Dec. 316, 319 (A.G. 2018) (citing *Acosta*, 19 I&N Dec. at 222). In instances where the applicant is a victim of private criminal activity, "the analysis must also 'consider whether government protection is available.'" *A-B-*, 27 I&N Dec. at 320 (quoting *M-E-V-G-*, 26 I&N Dec. at 243. "'[V]iolence by private citizens ..., absent proof that the government is unwilling or unable to address it, is not persecution[.]'" *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) (quoting *Butt v. Keisler*, 506 F.3d 86, 92 (1st Cir.2007)). Relevant factors include both "the government's response" to the claimed persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470 (6th Cir. 2019).[2]

"No country provides its citizens with complete security from private criminal activity, and perfect protection is not required." *A-B-*, 27 I&N Dec. at 343. Rather "[a] government's steps 'to punish the persons responsible for the violence' supports a conclusion that it is not unwilling or unable to protect individuals who have been the victims of ethnic attacks. *Bitsin v. Holder*, 719 F.3d 619, 630 (7th Cir. 2013) (quoting *Vahora v. Holder*, 707 F.3d 904, 908 (7th Cir.2013)). As such, an applicant "must show

[2] As of May 3, 2019, Westlaw does not provide pin cites for *K.H.* The quoted text appears on page seven of the slip opinion, available at http://www.opn.ca6.uscourts.gov/opinions.pdf/19a0065p-06.pdf.

not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *Id*. at 338.

Although the government of El Salvador may at times have difficulty controlling the gang violence, "where a government is 'making every effort to combat' violence by private actors, and its "inability to stop the problem" is not distinguishable "from any other government's struggles," the private violence has no government nexus and does not constitute persecution." *Khan*, 727 F.3d at 7 (quoting *Burbiene v. Holder*, 568 F.3d 251 (1st Cir.2009)).

Specifically, the Immigration Judge erred in generalizing that some corruption in the Salvadoran government involving gangs was sufficient for the respondents to meet their burden that the Salvador government would be unable or unwilling to assist them in their particular situation with the unknown assailants. Indeed, the respondents' relative, (b)(6); (b)(7)(C), as a member of the Salvadoran military, works directly with local police to target the gangs; he has worked in this capacity for years targeting gangs. Furthermore, (b)(6); (b)(7)(C) reported the January 2019 gang threat to the police, and there is an open investigation with the local prosecutor's office. Conversely, the respondents never reported any of their problems with the gang to the police. The Immigration Judge's finding that the Salvadoran government is unable or unwilling to protect the respondents simply due to corruption and an increase in gang violence was in error, both factually and legally.

4. The Immigration Judge Erred in Implicitly Considering a Fact Witness to be an Expert in Salvadoran Country Conditions

Finally, the Department appeals the Immigration Judge's implicit determination that (b)(6); (b)(7)(C) was an expert. Notably, the Immigration Judge fails to articulate

his findings about the nature and scope of any expertise. *See generally Matter of D-R-*, 25 I&N Dec. 445, 459 (BIA 2011). Although (b)(6); (b)(7)(C) submitted a curriculum vitae, it pertained to his role in the Salvadoran military and the United Nations peace-keeping force abroad. Notably, the respondents never presented him as an expert witness. Yet, the Immigration Judge appears to have given great weight to M (b)(6); (b)(7)(C) testimony that gangs target family members as a means to eliminate the army's morale and is a trophy for gang members hoping to ascend hierarchy. I.J. at 7. Further, the Immigration Judge cites the testimony of (b)(6); (b)(7)(C) in support of the proposition that government is unable to protect family members of military personnel except for giving them alerts as to danger. I.J. at 8 (also relying upon evidence supporting that the military did issue that alert). Finally, the Immigration Judge quoted (b)(6); (b)(7)(C) testimony that gangs are everywhere in country and looking to find military and family and that gangs trade info with civil police to find addresses. I.J. at 9. All of this calls into question whether the Immigration Judge inappropriately considered (b)(6); (b)(7)(C) to be an expert witness, especially where he was not offered as such and there is no articulation of what particular expertise he may have to address his testimony such great weight on the security situation in El Salvador.

The Department reserves the right to raise additional arguments upon receipt and review of the transcript.

On January 30, 2020, the Immigration Judge ordered the respondents removed but granted the respondents'[1] applications for withholding of removal under Immigration and Nationality Act (INA) § 241(b)(3). The Immigration Judge found the lead respondent would more likely than not be persecuted in Mexico in the future on account of her particular social group (PSG) of "lesbian women in Mexico." The Department of Homeland Security (Department) appeals the Immigration Judge's decision.

Withholding of removal does not provide derivative benefits. *See Lanza v. Ashcroft*, 389 F.3d 917, 933 (9th Cir. 2004) ("Unlike an application for asylum," the Court noted that family members are not granted derivative status based on "a grant of an alien's application for withholding") (internal citation omitted). Therefore, the Immigration Judge erred in granting the minor respondents withholding of removal where he only analyzed the lead respondent's withholding eligibility.

The Immigration Judge also erred in concluding that the lead respondent, who he found had not established past persecution, would more likely than not face future persecution for withholding purposes based on her PSG due to internal relocation being unreasonable. Based on the evidence presented, the lead respondent failed to meet her burden of establishing that it was more likely than not her life or freedom would be threatened in Mexico on account of her PSG. INA § 241(b)(3)(C); 8 C.F.R. § 1208.16(b)(2).

The Immigration Judge correctly concluded that the lead respondent failed to meet the lower burden of proof for a well-founded fear of future persecution for asylum purposes because

[1] The respondents are a family. The lead respondent, (b)(6); (b)(7)(C) is the mother. She filed an application for asylum and for withholding of removal (Form I-589) that listed her children, (b)(6); (b)(6); (b)(7)(C) and (b)(6); (b)(7)(C) as derivative beneficiaries. The children also filed separate Form I-589s.

internal relocation was *reasonable*. *See Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) ("[E]ven a ten percent chance of persecution may establish a well-founded fear" for asylum purposes). Therefore, the Immigration Judge erred in simultaneously concluding that the lead respondent met the higher burden of proof that she would more likely than not face future persecution for withholding purposes due to internal relocation being *unreasonable*. *See Hoxha v. Ashcroft*, 319 F.3d 1179, 1185 (9th Cir. 2003) ("To qualify for mandatory withholding, Hoxha was required to show a clear probability—i.e. that it is more probable than not—that he would suffer future persecution.").

The factors the Court should consider when determining whether relocation is reasonable are identical for asylum and withholding of removal. *Compare* 8 C.F.R. 1208.13(b)(3) (listing asylum factors), *with* 8 C.F.R. § 1208.16(b)(3) (listing withholding factors). Therefore, if the lead respondent could not show a 10% chance of persecution for asylum due to reasonable relocation, she cannot show a 51% chance of persecution for withholding based on the same relocation factors.

The lead respondent also failed to show she would be singled out individually for future persecution. 8 C.F.R. § 1208.16(b)(2). Based on her Form I-589 declaration, Exh. 2 at 20-25, and her testimony on January 30, 2020, she never lived as an openly lesbian woman in Mexico, never had a relationship with a woman, never been physically harmed for being a lesbian, and never openly threatened for her sexual orientation. At most, the lead respondent heard a single comment that may have been about her sexual orientation. Specifically, she testified that in approximately October or November of 2018, several cartel members visited her store demanding that she sell drugs. In a fit of anger over an argument with her husband, the respondent told cartel members she would marry a woman. In response, the cartel members

asked her if she had seen the bodies of two women whose had appeared on rooftops in the area. The respondent replied that she had, and the cartel members told the respondent that those women were lesbians. After the respondent refused to sell drugs, the cartel members threw things around her store. In sum, there is insufficient evidence that anyone in Mexico will pursue the respondent to harm her for her sexual orientation.

The lead respondent, who didn't suffer past persecution and does not fear future persecution from the "government" or a "government-sponsored" actor, but rather a cartel, failed to meet her "burden of establishing that it would not be reasonable for . . . her to relocate . . . ." 8 C.F.R. § 1208.16(b)(3)(i). An applicant for statutory withholding of removal who has not suffered past persecution cannot show future persecution where "the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so." 8 C.F.R. § 1208.16(b)(2).

Here, the Immigration Judge erred in finding that relocation was unreasonable for withholding purposes because the evidence demonstrates that the lead respondent failed to meet her burden on this issue. She is a seemingly physically healthy 33-year-old woman who did in fact successfully relocate to Tijuana for 1 month prior to coming to the United States without suffering any threats or harm. According to a 2018 Refworld report by the Canadian Immigration and Refugee Board, Tijuana, is one of "many cities that are quite friendly" towards homosexuals." Exh. 3 at 67. The lead respondent can also reasonably relocate to Mexico City, Guadalajara, Cancun, Acapulco, or Monterey as these regions are "gay friendly zones where the LGBTI community feels safe . . . ." *Id.*

Relocation is further reasonable because the lead respondent's most updated country condition evidence, i.e., the 2018 Refworld report, Exh. 3 at 65-74, demonstrates recent government efforts to combat harm against sexual minorities.[2] *But cf. Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1075 (9th Cir. 2017) (finding Mexican alien established past persecution based on his sexual orientation due to beatings and rapes, and noting the 2009 and 2010 Department of State Human Rights Reports "documented violence against, including murders of, gays and lesbians.").

While the 2018 Refworld report concedes ongoing discrimination of, and harm to, sexual minorities, Exh. 3 at 67-68, the report also notes numerous improvements since 2014. For instance, in 2015, the "Supreme Court of Justice ruled that laws restricting same-sex marriage were unconstitutional." *Id.* at 66. While "some municipalities of Jalisco," where the respondent lived, Exh. 2 at 4, are among the "worst places" to be a homosexual, Exh. 3 at 67, Jalisco nevertheless allows same-sex marriage, *id.* at 66.

Moreover, Mexico's political constitution "obliges all authorities in Mexico to combat discrimination on the basis of sexual orientation . . . within their respective areas of competency." Exh. 3 at 65. In 2014, "the Federal Law to Prevent and Eliminate Discrimination . . . was amended . . . to include homophobia and violence against sexual minorities as discrimination grounds . . . ." *Id.* Along the same lines, as of 2017, the Federal Penal Code "criminalize[d] employment discrimination based on sexual orientation . . . and aggravate[d] penalties for employers . . . ." *Id.* at 66.

[2] While not specifically addressed by the Immigration Judge, the country condition evidence likewise demonstrates that the lead respondent failed to establish future persecution for withholding based on a "pattern or practice of persecution of a group of persons similarly situated to" her in Mexico, i.e., lesbian women. 8 C.F.R. § 1208.16(b)(2)(i), (ii).

In 2015, a Latin American network promoting LGBT Rights observed that while "legislation to protect sexual minorities is only partially effective. . . it is [Mexican] society itself which has been promoting change through campaigns, television shows and private companies that support the rights of LGBT persons . . . ." Exh. 3 at 66.

The Department respectfully reserves the right to raise any other issues in a brief on appeal that may arise after a full review of the Immigration Judge's oral decision and the transcript of proceedings.

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NON-DETAINED

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

In the Matter of:

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

In removal proceedings

File Nos.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY'S
BRIEF ON APPEAL

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(b)(6); (b)(7)(C)

INTRODUCTION

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), submits this brief in support of the Immigration Judge's June 5, 2018 decision denying the respondents'[1] applications for asylum, withholding of removal under the Immigration and Nationality Act (INA), and withholding of removal under the regulations implementing the U.S. obligations pursuant to Article 3 of the United Nations Convention Against Torture (CAT).[2]

ISSUE PRESENTED

While the respondents raise several issues on appeal, the issue the Department addresses in this brief is whether the Immigration Judge correctly concluded that there was no nexus between the lead respondent's purported particular social group (PSG) of "Salvadoran women" and the past harm she suffered.[3]

STANDARD OF REVIEW

The Board utilizes a clearly erroneous standard when reviewing underlying factual findings of an Immigration Judge, including findings as to the credibility of testimony and predictive findings of what may or may not occur in the future. 8 C.F.R. § 1003.1(d)(3)(i);

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[1] The respondents are related. The lead respondent is the mother (b)(6); , and the derivative respondent on her asylum application (Form I-589) is her child (b)(6); . Insofar as the derivative respondent did not testify in support of the lead respondent's Form I-589, references hereinafter to the "lead respondent" or "the respondent" will relate to (b)(6); (b)(7)(C)

[2] 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).

[3] For purposes of this appeal brief, the Department assumes arguendo that "Salvadoran women" constitute a cognizable PSG. However, the Board need not address whether "Salvadoran women" constitute a cognizable particular social group as it may find that the respondent failed to meet her burden on other grounds as asserted by the Immigration Judge. *See Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach).

(b)(6); (b)(7)(C)

Matter of Z-Z-O, 26 I&N Dec. 586, 591 (BIA 2015). "A persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by [the Board] for clear error." *Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011).

Questions of law, discretion, judgment, and all other issues—including whether respondents have met their burdens of proof—are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of Vides-Casanova*, 26 I&N Dec. 494, 498 (BIA 2015). Likewise, "[w]hether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal" is reviewed under the de novo standard. *Matter of Z-Z-O-*, 26 I&N Dec. at 591.

SUMMARY OF THE ARGUMENT

The Immigration Court correctly concluded that the lead respondent failed to demonstrate a nexus between her membership in the purported PSG of "Salvadoran women" and the past harm she suffered where no reliable evidence demonstrated that the respondent's husband and the Mara 18 street gang harmed her due to her status as a Salvadoran woman.

STATEMENT OF RELEVANT FACTS

The lead respondent, (b)(6); (b)(7)(C) is 25-year-old native and citizen of El Salvador. Exh. 1. The rider respondent is (b)(6); (b)(7)(C), an 8-year-old native and citizen of El Salvador. Exh. 1a. On or about September 22, 2016, the respondents were placed into removal proceedings through the issuance of Notices to Appear (NTAs) that charged them with removability under INA section 212(a)(7)(A)(i)(I) for not being in possession of valid immigration documents at the time of application for admission to the United States. Exhs. 1-1a.

On May 31, 2017, the lead respondent filed an application for asylum, withholding of removal under the Act, and protection under

(b)(6); (b)(7)(C)

the regulations implementing the U.S. obligations pursuant to Article 3 of the CAT (Form I-589). Exh. 2. The Form I-589 listed the rider respondent as a derivative beneficiary. *Id.* At a September 7, 2017 master calendar hearing, the respondents, through counsel, admitted the allegations and conceded the removal charge on their NTAs. Tr. at 13. At a June 5, 2018 merits hearing, the lead respondent testified.

According to the lead respondent's affidavit and testimony, she began a relationship with her husband, (b)(6); when she was about 15 or 16-years-old, and they married in about 2011. Exh. 4, Tab A at 2; Tr. at 28, 45. After they moved in together, (b)(6); (b)(7)(C) "was very controlling, and he constantly wanted to know what [she] was doing and who [she] was with." Exh. 4, Tab A at 2. He "regularly use[d] drugs and alcohol, and when he did he was often violent." *Id.* He would sometimes push and shove her. *Id.*; Tr. at 28. During their marriage, (b)(6); was also involved with criminals, specifically he helped the Mara 18 street gang commit crimes. Exh. 4, Tab A at 2; Tr. at 30.

In January 2012, Miguel moved to the United States for economic reasons, and the respondent has not seen him since. Exh. 4, Tab A at 3; Tr. at 30, 43-45. About a year after he moved to the United States, (b)(6); "started becoming very controlling and jealous with" the respondent by calling her and asking her whom she was speaking with as well as prohibiting her from speaking with her family. Exh. 4, Tab A at 3. He often called her on the phone from the United States and told her not to leave the house or to leave him, and he threatened her and her family with death if she failed to comply with his instructions. Tr. at 32, 36.

The respondent testified she believed (b)(6); "reasons for wanting to control" her were "jealousy," possessiveness, that he believed she was "cheating on him," and "[b]ecause of the male chauvinisms that exist in El Salvador . . . ." Tr. at 32-33.

(b)(6); (b)(7)(C)

In 2016, the respondent told (b)(6); she wanted to end their relationship. Exh. 4, Tab A at 4; Tr. at 37-38, 47. Two days later, two Mara 18 gang members came to her home, held a gun to her head, and told her she had to remain with (b)(6); or she and her family would be killed. Tr. at 37-38. The respondent testified she believed the gang members targeted her "[b]ecause of the male chauvinism that is predominate in El Salvador." *Id.* at 39. However, the respondent also testified that the gang members would benefit from threatening her because (b)(6); "was going to pay them." *Id.* These threats spurred the respondent to flee to the United States, and since coming to the United States in 2016, (b)(6); has not tried to contact her, despite knowing she is in the United States. *Id.* at 45-46.

At the June 5, 2018 merits hearing, the Immigration Judge denied the respondents' applications, in part because he concluded that, even if the PSG of "Salvadoran women" were a cognizable PSG, the lead respondent "ha[d] not established a nexus between the claimed harm and her membership" in this PSG. I.J. at 7.

ARGUMENT

I. THE IMMIGRATION JUDGE CORRECTLY CONCLUDED THAT THERE WAS NO NEXUS BETWEEN THE LEAD RESPONDENT'S MEMBERSHIP IN THE PSG OF "SALVADORAN WOMEN" AND THE PAST HARM SHE SUFFERED.

A. The Immigration Judge Correctly Applied the "One Central Reason" Nexus Standard to the Respondent's Asylum Claim.

For asylum purposes, the respondent must establish that her PSG is "at least one central reason" for the feared persecution. INA § 208(b)(1)(B)(i); *Matter of A-B-*, 27 I&N Dec. 316, 338 (A.G. 2018) ("Establishing the required nexus between . . . persecution and membership in a particular social group is a critical step for victims of private crime who seek asylum.").

(b)(6); (b)(7)(C)

On appeal, the respondent implies that the Immigration Judge erred because he failed to apply the "one central reason" nexus standard to the respondent's asylum claim. *See* Respondent's brief on appeal at 6-7. However, the Immigration Judge had no need to overtly reference this nexus standard where he "was not convinced that (b)(6); controlling behavior . . . was because of [the respondent's] gender . . . ." I.J. at 7. In other words, the Immigration Judge found the respondent's gender was not a reason for (b)(6); behavior, much less a central reason. Similarly, where the Immigration Judge concluded that there was "*no evidence*" the Mara 18 gang members who threatened the respondent were "motivated by" her status as a Salvadoran woman, I.J. at 9 (emphasis added), he had no need to specify that the respondent's PSG was not "one central reason" for the gang's harm.

The respondent also argues that the Immigration Judge erred because he "did not properly determine if [R]espondent's membership" in the PSG of "Salvadoran women" was a central reason for her harm. Respondent's brief on appeal at 6. To support this argument, the respondent references the Immigration Judge's conclusion that he "was not convinced that (b)(6); controlling behavior . . . was because of [the respondent's] gender *or* inability to overcome her gender." *Id.* (citing I.J. at 7) (emphasis added). Specifically, the respondent argues that nexus "does not exclusively look to whether the persecution is because of an inability of overcoming the PSG." Respondent's brief on appeal at 6.

The Immigration Judge's conclusion that (b)(6); behavior was not motivated by the respondent's inability to overcome her gender is immaterial because the Immigration Judge also separately concluded that (b)(6); behavior was not motivated by the respondent's gender, *i.e.*, the respondent's PSG of "Salvadoran women."

(b)(6); (b)(7)(C)

B. The Immigration Judge Correctly Concluded that the Respondent's Testimony and Documentary Evidence Failed to Establish a Nexus Between her Past Harm and her PSG of "Salvadoran Women."

"Generally, claims by aliens pertaining to . . . violence perpetrated by non-governmental actors will not qualify for asylum" because "[a]n alien may suffer threats and violence . . . for any number of reasons," and "private criminals are motived more often by greed or vendettas" than a protected nexus. *Matter of A-B-*, 27 I&N Dec. at 316, 318, 320, 337.

On appeal, the respondent argues the Immigration Judge "misapplied the facts in this case" when he found no nexus between the respondent's PSG of Salvadoran women and the harm (b)(6); (b)(7)(C) and the Mara 18, both private actors, inflicted upon her. Respondent's brief on appeal at 7. The respondent supports this argument by citing her testimony that (b)(6); (b)(7)(C) harmed her "because of the strong culture of Machismo that exists in El Salvador," as well as citing numerous country reports and news articles that demonstrate Salvadoran women "often face extreme violence, especially at the hands of their domestic partners." *Id.*

The Immigration Judge correctly applied the facts in the case when assessing the respondent's documentary evidence about domestic violence in El Salvador. The Immigration acknowledged "high levels of violence against women and the fact that culturally there is a culture of violence against women and that crimes against women are not prosecuted as they should be." I.J. at 7. The Immigration Judge did not err when, after reviewing such evidence, he reasonably concluded that "simply being a victim of this type of behavior would [not] lead to a finding that this behavior was on account of" the victim being a Salvadoran woman. *Id. See Matter of L-A-C-*, 26 I&N Dec. 516, 524-25 (BIA 2015) (noting that providing the Department of State country condition report with general country conditions not tied to the specific facts underlying the alien's claim will not suffice).

(b)(6); (b)(7)(C)

The Immigration Judge also correctly applied the facts in this case when he concluded that the respondent's testimony about the "machismo and chauvinistic culture of El Salvador" was a "self-serving statement" because there was "no evidence that this is what" motivated the Mara 18's actions, and by inference, Miguel's actions. I.J. at 9.

Beyond the respondent's self-serving testimony, there is insufficient evidence that (b)(6); (b)(7)(C) or the Mara 18 members who threatened the respondent possessed or expressed a Machismo opinion or that they harmed the respondent or any other Salvadoran woman for being female.

Instead, the respondent's affidavit and remaining testimony demonstrate that (b)(6); (b)(7)(C) motivations for harming the respondent related to the nature of their personal relationship—specifically—jealousy, possessiveness, suspicion that the respondent was cheating, and his own alcohol and drug use. Exh. 4, Tab A at 2; Tr. at 32-33. As such, the Immigration Judge reasonably concluded that, for instance, (b)(6); (b)(7)(C) long-distance harassment was "motivated out of his own jealousy and selfish interests." I.J. at 9. *See Matter of A-B-*, 27 I&N Dec at 338-39 (finding that the evidence in *A-B* demonstrated the alien's husband "attacked her because of his preexisting personal relationship with the victim" as there was no evidence he attacked her "because he was aware of, and hostile to, 'married women in Guatemala who are unable to leave their relationship' . . . .").

Likewise, the evidence fails to demonstrate that the Mara 18's motivation for harming the respondent was her status as a Salvadoran woman rather than (b)(6); (b)(7)(C) ability to pay them for their actions. Tr. at 39. As such, the Immigration Judge reasonably concluded that the gang members who threatened the respondent "were motivated by gang ties and by money . . . ." I.J.

(b)(6); (b)(7)(C)

at 9. *See Molina-Morales v. INS*, 237 F.3d 1048, 1052 (9th Cir. 2001) (indicating that neither "personal vendetta" nor "purely personal retribution" constitutes a protected ground for asylum).

CONCLUSION

Based on the foregoing, the Board should dismiss the respondents' appeal and affirm the Immigration Judge's decision denying the respondents' applications for asylum, withholding of removal under the INA, and withholding of removal under the regulations implementing the U.S. obligations pursuant to Article 3 of the CAT.

Respectfully submitted on this 16th day of October, 2019,

_____

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(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the date indicated below, I served a copy of this **DEPARTMENT OF HOMELAND SECURITY'S BRIEF ON APPEAL** and any attached pages by placing a true copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process, and causing the same to be mailed by first class mail to the respondent's counsel, at the following address:

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Date: October 16, 2019

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The Department appeals the Immigration Judge's March 8, 2019 decision granting the lead respondent (respondent) asylum pursuant to section 208 of the Immigration and Nationality Act (Act or INA), which also conferred asylum to the two riding respondents as derivatives. The Immigration Judge erred in finding the facts established by the respondent met her burden of proof for protective relief.[1] Specifically, the respondent failed to establish past persecution, failed to demonstrate a nexus between the harm she suffered and a protected ground, failed to demonstrate that internal relocation is unreasonable, and failed to establish that she merited relief from removal as a matter of discretion. The Department asks the Board to reverse the decision below and remand the matter to the Immigration Judge to consider protection pursuant to the regulations implementing the U.S. obligation under Article 3 of the United Nations Convention Against Torture (CAT).

The Respondent Failed to Establish Past Persecution

Respondent's harm did not rise to the level of persecution.

The Immigration Judge erred in finding that the harm suffered by the respondent rose to the level of persecution. The respondent testified that she was, on a few occasions, battered by her former partner (twice resulting in her seeking medical attention); that her former partner pushed her to the ground on two occasions; and that her former partner once temporarily denied her access to their child. I.J. at 3-6. She testified that her former partner also threatened her, belittled her, and at times restricted her movements outside of the home. *Id*. As harmful as such actions are, they are not, even collectively as found by the Immigration Judge, severe enough to rise to the level of persecution. *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018) (citing *Matter of T-Z-*, 24 I&N Dec. 163, 172-73 (BIA 2007)); *see also Sidabutar v. Gonzales,* 503 F.3d 1116, 1124 (10th Cir. 2007) (affirming the Board's finding of no persecution where petitioner was repeatedly beaten and robbed at the hands of Muslim classmates); *Kapcia v. INS,* 944 F.2d 702, 704–05, 708 (10th Cir. 1991) (affirming the Board's finding of no persecution where petitioner was detained twice for two-day periods during which he was interrogated and beaten based on his political affiliation, was assigned poor work tasks and denied bonuses, was conscripted into the army where he experienced constant harassment, and was fired from his job). Because the harm described by the respondent does not rise to the level of persecution, the Immigration Judge erred in finding the respondent suffered past persecution.

[1] As the respondent failed to meet the lower burden of proof required for asylum, it follows that she also failed to satisfy the clear probability standard to establish eligibility for withholding of removal. *See INS v. Stevic*, 467 U.S. 407 (1984); *see also* 8 C.F.R. §§ 1208.13, 1208.16(b) (2008). Furthermore, she failed to prove that it is more likely than not that she will be tortured if she is returned to Mexico. *See* 8 C.F.R. § 1208.16(c)(2). The respondent has not provided evidence that she was tortured in Mexico or that a Government official either seeks to torture her or will acquiesce in her torture if she is returned to that country. *See* 8 C.F.R. § 1208.18(a)(1) (2008); *see also Matter of J-R-G-P-*, 27 I&N Dec. 482 (BIA 2018); *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000).

The Mexican government assisted respondent.

The Immigration Judge erred in finding that the Mexican government was unwilling or unable to control the respondent's former partner. I.J. at 16. "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27 I&N Dec. at 320. The respondent must establish that his or her government is unwilling or unable to control the perpetrator which requires the respondent to show more than that the government had "difficulty controlling" the private criminality; rather, the government must have either "condoned" the criminality or "at least demonstrated a complete helplessness to protect the victims." *Id*. at 337. Simply because a government has not acted on a reported crime, successfully investigated it, or punished the perpetrator, does not necessarily establish an inability or unwillingness to control the crime any more than it would in the United States. *Id*. at 343-44. Here, the respondent testified that the local police were able to intervene and limit her partner's behavior. I.J. at 4. The record establishes that the local police were willing to assist the respondent, though their resources were limited. I.J. at 3, 6. Additionally, threats to contact the state police were effective in curbing her partner's behavior. I.J. at. 4. The respondent failed to demonstrate that the police condoned the private actions of her partner or that they were completely helpless to protect her. In fact, the police requested that the respondent report to their precinct after she filed a report against her former partner so they could take pictures and conduct a medical and psychological exam; however, the respondent decided to cross the border into the United States rather than engage in the protection and assistance offered by the Mexican government. I.J. at 6. Based on the finding of facts, the Immigration Judge's conclusion that the government of Mexico was and is unwilling or unable to protect the respondent is erroneous. *Matter of A-B*, 27 I&N Dec. at 337.

The Respondent Failed to Establish a Nexus to a Protected Ground

Even if the respondent suffered past persecution, the Immigration Judge erred in finding that the respondent met her burden to establish that she was singled out for harm because of her membership in the particular social group of "Mexican women."[2] To demonstrate that harm was "on account of" a protected ground, an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)).

[2] The Department takes no position on whether "Mexican women" constitutes a cognizable particular social group. The Board need not address this issue as it may find that the respondent failed to meet her burden on other grounds as asserted in this Notice of Appeal. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach). The Department concurs with the Immigration Judge's holdings that the respondent's three additional proposed particular social groups are not cognizable. I.J. at 13-14.

The respondent failed to establish a nexus between the group of which she claims to be a member – "Mexican women" – and the harm she suffered. Rather, the respondent established that she was the victim of crimes committed by her former partner that were motivated by the nature of their personal relationship. This fact was underscored by the Immigration Judge, who emphasized and relied on the existence and nature of respondent's personal relationship with her prior partner to find a nexus to the stated particular social group. *See* I.J. at 3. The Immigration Judge erred by finding a nexus to "Mexican women" based on the Court's determination that the harm suffered by respondent was because the respondent and her prior partner shared a home together, had defined gender roles vis-à-vis each other, and that the respondent was harmed "whenever she attempted to leave" the home. I.J. at 15. This reasoning does not bolster the Immigration Judge's finding that the respondent was harmed because she is a "Mexican woman", but rather supports a finding that she was harmed because of her relationship with her prior partner.

The respondent provided no evidence that her former partner was motivated by any other reason than the nature of their relationship, that he ever harmed any other "Mexican women" aside from her, or that he was generally hostile to "Mexican women" as a group. For example, the respondent testified to interactions between her former partner and the respondent's daughters, his own mother, other female relatives, and female neighbors during and after the time he was in a relationship with the respondent that did not involve violence or the threat of violence towards them. I.J. at 3-4. The respondent's testimony demonstrates that her former partner held no generalized animosity towards the other "Mexican women" in his life. In fact, her testimony demonstrates instead that her former partner deferred to other "Mexican women", including his mother, who successfully intervened on the respondent's behalf on at least one occasion, and her female neighbor, who also interacted with the respondent's former partner during a domestic incident and was not threatened or harmed in any manner. I.J. at 3.

As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Matter of A-B-*, 27 I&N Dec. at 338-39. To be sure, the respondent was the victim of crimes committed by her former partner, but those relationship-based crimes are insufficient to establish eligibility for asylum. Because the respondent failed to establish that her former partner was motivated by any other reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the stated particular social group of "Mexican women."

The Respondent Can Reasonably Relocate Within Mexico

As the Immigration Judge erred in finding the respondent established past persecution, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the respondent bore the burden of establishing that internal relocation within Mexico was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("By contrast, where past persecution has not been established, the

applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored." (citing 8 C.F.R. § 1208.13(b)(3)(i))). Even if the Department bears the burden of proof on this issue, the Immigration Judge erred in finding internal relocation unreasonable. I.J. at 19. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *Matter of M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id.*

The Immigration Judge held that respondent faced a threat of persecution anywhere in Mexico as a Mexican woman even though her instances of harm were perpetrated by a single actor. This finding is contrary to the U.S. Department of State, Country Reports on Human Rights Practices for 2017 for Mexico submitted into evidence by the Department. The Immigration Judge further found that internal relocation would be unreasonable because the respondent only has a high school education, has never had a successful job in Mexico, and would not have family to assist with childcare. I.J. at 19. In reaching this decision, the Immigration Judge did not consider the fact that the respondent was educated through high school in the United States, obtained at least some collegiate education in Mexico, and for a time did have a job in Mexico. I.J. at 2, 5. Having challenges in life is not the equivalent of an unreasonable life. The Attorney General noted that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)" and respondent failed to meet her burden of proof on this issue. *Matter of A-B-*, 27 I&N Dec. at 345.

The Respondent Does Not Merit Discretionary Relief

The Immigration Judge erred in failing to properly consider whether the respondent merits asylum as a matter of discretion. Asylum is a discretionary form of relief from removal, and the applicant bears the burden of proving that she merits asylum as a matter of discretion. INA § 208(b)(1); INA § 240(c)(4)(A)(ii); *Matter of A-B-,* 27 I&N Dec. at FN 12. The Immigration Judge addressed the issue of discretion with one summary sentence, providing no analysis. I.J. at 20. The Immigration Judge failed to address the respondent's 2018 Denver County Court conviction for Wrongs to Minors, a crime which should be considered in any sufficient discretionary finding.

The Department reserves the right to raise additional arguments upon receipt and review of the transcript.

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DETAINED

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

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No.: (b)(6); (b)(7)(C)
In removal proceedings	)	

DEPARTMENT OF HOMELAND SECURITY
AMENDED BRIEF ON APPEAL

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INTRODUCTION

The Department of Homeland Security (Department) submits its brief on appeal and requests that the Board of Immigration Appeals (Board) vacate the Immigration Judge's decision dated September 16, 2019, granting asylum. The respondent, whose prior application for asylum was denied, and who had been convicted of sexual battery of a fifteen-year-old child, possession of a controlled substance, and driving under the influence, failed to meet his burden of showing his eligibility for asylum or that he warranted a favorable exercise of discretion. The Immigration Judge therefore erred in granting the respondent's application for asylum under section 208(a) of the Immigration and Nationality Act (INA or Act). Accordingly, the Board should sustain this appeal and vacate the Immigration Judge's decision.

The Department requests that this case be reviewed by a three-member panel given the need to review a decision by an Immigration Judge not in conformity with existing law or applicable precedent, the need to review clearly erroneous factual determinations, and the need to reverse a decision of an Immigration Judge not arising under 8 C.F.R. § 1003.1(e)(5). *See* 8 C.F.R. § 1003.1(e)(6)(iii), (v), (vi).

ISSUES PRESENTED

The following issues are implicated in this appeal:

- Did the Immigration Judge err in concluding that the respondent was eligible to file a successive application for asylum and for an exception to the one-year filing requirement where the respondent did not show the existence of changed circumstances which materially affected his eligibility for asylum?

- Did the Immigration Judge err in concluding that the respondent was eligible for asylum and withholding of removal under the Act where the respondent's conviction for sexual battery of a fifteen-year-old child constituted a particularly serious crime?

- Did the Immigration Judge err in concluding that the respondent warranted a favorable exercise of discretion where the respondent had convictions for sexual battery, driving while under the influence, and use of a controlled substance?

(b)(6); (b)(7)(C)

- Did the Immigration Judge err in concluding that the respondent's proposed particular social group of "Mexican males with psychotic disorders who exhibit erratic and perceptible behavior" was a legally cognizable particular social group?

- Did the Immigration Judge err in concluding that the respondent would be persecuted on account of his proposed particular social group?

STANDARD OF REVIEW

The Board reviews findings of fact, including "predictive findings of what may or may not occur in the future," for clear error. *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015); 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews de novo "questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges." *Z-Z-O-*, 26 I&N Dec. at 588; 8 C.F.R. § 1003.1(d)(3)(ii). Whether a respondent is statutorily ineligible to apply for or receive asylum or withholding of removal for a reason like a previously denied asylum application or a conviction for a particularly serious crime is a question of law subject to de novo review, *see, e.g.*, *Matter of G-G-S-*, 26 I&N Dec. 339, 347 (BIA 2014), but it often is based on underlying findings of fact or evidentiary weight that are subject to clear error review.

The Board's de novo review authority includes "whether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal . . . ." *Z-Z-O-*, 26 I&N Dec. at 591. The Board also reviews de novo the questions of whether a group is a particular social group within the meaning of the Act, *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018), and "whether . . . respondents were persecuted 'on account of a protected ground,'" *see Matter of S-E-G-*, 24 I&N Dec. 579, 588 n.5 (BIA 2008).

Whether the respondent is a member of a particular social group, as well as the underlying requirements to establish a cognizable particular social group, such as social distinction, necessarily involve fact-finding. *Id.* at 192. Similarly, a persecutor's actual motive

(b)(6); (b)(7)(C)

is a matter of fact to be determined by the Immigration Judge and reviewed by the Board for clear error. *See Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011).

SUMMARY OF THE ARGUMENT

The Immigration Judge erred in granting the respondent's application for asylum under section 208(a) of the Act. First, the respondent was statutorily barred from filing a successive application for asylum; and, similarly, from filing an application for asylum more than one year after he entered the United States. Second, the respondent was ineligible for asylum or withholding of removal under the Act because his conviction for sexual battery of a fifteen-year-old child was a particularly serious crime. Third, the respondent, who had been convicted of sexual battery, driving while under the influence, and use of a controlled substance, did not warrant a favorable exercise of discretion. Fourth, the proposed particular social group (PSG), "Mexican males with psychotic disorders who exhibit erratic and perceptible behavior," was not legally cognizable. Finally, the protected ground was not "at least one central reason" for the harm he suffered or feared. INA § 208(b)(1)(B)(i).

STATEMENT OF FACTS

The respondent is a twenty-six-year-old native and citizen of Mexico who is present in the United States without admission or parole. I.J. at 1. The respondent entered the United States with his mother in July 1999. Tr. at 165; Exh. 1.

On June 22, 2014, Wyoming state police officers arrested the respondent and charged him with sexual abuse of a minor in the second degree, in violation of Wyoming Statutes Annotated (Wyo. Stat. Ann.) section 6-2-315(a)(i), and furnishing alcohol to a minor, in violation of Wyo. Stat. Ann. section 12-6-101(a). *See* Exh. 20 at 5–10. According to the affidavit of probable cause included with the charging document, the respondent—who was then

(b)(6); (b)(7)(C)

twenty-one years' old—plied a fifteen-year-old girl with alcohol before sexually assaulting her. *Id*. at 6–7. In generating the affidavit, Wyoming police officers interviewed the victim, the respondent, and two witnesses. According to the victim, the respondent first offered her alcohol and then took her to his room where the victim performed oral sex on the respondent. *Id*. Afterwards, the respondent directed the victim to the shower and "poured soap on her hand, instructing her to wash her genital area with it." *Id*. at 7. The respondent then "discarded a black bra that [the victim] left at the house in some bushes." *Id*. The police were later able to locate a black bra in the bushes. *Id*. Based on statements from the victim and two witnesses, police obtained and executed a search warrant at the respondent's residence. *Id*. Police officers seized a bottle of "Ice 101," an opened condom wrapper, and various bedding from the storage closet. *Id*. at 9–10. Police officers arrested the respondent and charged him with sexual battery. *Id*.

The Department initiated removal proceedings by filing a Notice to Appear (NTA) dated June 22, 2017, with the immigration court. Exh. 1. The NTA charged the respondent as removable from the United States under section 212(a)(6)(A)(i) of the Act. Exh. 1.

On August 8, 2017, the respondent filed applications for cancellation of removal under section 240A(b) of the Act and asylum under section 208 of the Act, withholding of removal under section 241 of the Act, and protection under the regulations implementing Article 3 of the Convention Against Torture (CAT). First Tr. [1] at 4. On October 17, 2017, the respondent submitted updated applications for both forms of relief. *See* Exh. 2; Exh. 3; First Tr. at 12. On October 31, 2017, the respondent appeared for an individual hearing on his applications. *See* First Tr. at 7–159. At that hearing, the respondent argued, inter alia, that he had a well-founded

[1] The full transcript in these proceedings is separated into two parts. The first transcript (First Tr.) begins with the hearing on August 8, 2017, and ends with the hearing on October 31, 2017. *See generally* First Tr. at 1–159. The second transcript (Tr.) begins with the hearing on December 4, 2018, and ends with the hearing on August 21, 2019. *See generally* Tr. at 1–200.

fear of persecution based upon his membership in two PSGs: (1) "persons suffering from mental health disorders residing in Mexico" and (2) "patients who suffer from epilepsy who have no family or economical support in Mexico." I.J. Dec. at 16 (Dec. 22, 2017). On December 22, 2017, the Immigration Judge issued a written decision granting the respondent's application for cancellation of removal and denying respondent's application for asylum. *See id*. In part, the Immigration Judge denied the respondent's applications for asylum and for withholding of removal because the respondent's "articulated group of 'Persons suffering from mental health disorders residing in Mexico' fail[ed] on particularity." *Id*. at 16–17.

On January 17, 2018, the Department timely appealed the Immigration Judge's decision granting cancellation of removal. *See generally* Dep't of Homeland Security Notice of Appeal (Jan. 17, 2019). The respondent did not appeal the decision denying his application for asylum, withholding of removal, and protection under CAT. *See* Dec. of the Board of Immigration Appeals at 1 n.1 (Aug. 29, 2018). On August 29, 2018, the Board sustained the Department's appeal, vacated the decision of the Immigration Judge, and remanded the case for further consideration of whether the respondent met his burden of proof in establishing good moral character and whether he merited a favorable exercise of discretion. *See id*. at 3–4.

On February 23, 2018, while the Department's appeal was still pending, the Immigration Judge issued an order releasing the respondent on his own recognizance. I.J. Dec. in Bond (Feb. 23, 2018). On September 7, 2018, the respondent was arrested and ultimately convicted of possession of a controlled substance, in violation of Wyo. Stat. Ann. section 35-7-1031(c)(i)(A); driving under the influence, in violation of Wyo. Stat. Ann. section 31-5-233(b)(iii)(B); use of a controlled substance, in violation of Wyo. Stat. Ann. section 35-7-1039; no valid driver's license, in violation of Wyo. Stat. Ann. section 31-7-106(a); and failure to obey traffic control device, in

(b)(6); (b)(7)(C)

violation of Wyo. Stat. Ann. section 31-5-402(a). *See* Exh. 20 at 14–15. On November 16, 2018, the respondent entered an *Alford* plea, *see Alford v. North Carolina*, 400 U.S. 25 (2015), to his pending 2014 charges for sexual assault. *See* Exh. 22 at 150–53. The respondent pleaded to sexual battery, in violation of Wyo. Stat. Ann. section 6-2-313(a)(b). *Id.*

The respondent appeared for a second individual hearing on August 21, 2019. At that hearing, the respondent formally withdrew his application for cancellation or removal and elected to go forward on the successive application for asylum only. The respondent presented testimony from four witnesses: the respondent's psychologist, (b)(6); (b)(7)(C) Tr. at 92–126; the respondent himself, Tr. at 126–62; the respondent's mother, (b)(6); (b)(7)(C) (b)(6); Tr. at 163–75; and (b)(6); (b)(7)(C) Tr. at 176–85.

(b)(6); testified regarding her interview with the respondent and her review of various records, including the records submitted by the respondent in support of his application for cancellation of removal and records obtained from a Wyoming detention facility. Tr. at 93–94. Following her review, (b)(6); concluded that the respondent met "criteria for schizoaffective disorder, bipolar type, ADHD, mild neuro-cognitive disorder, and some subclinical PTSD." Tr. at 94. (b)(6); explained that "schizoaffective disorder" includes "persistent symptoms of psychosis" and that the respondent met the requirements for this diagnosis "because of active hallucinations, delusions, and significant paranoia." Tr. at 95. (b)(6); opined that the respondent's schizoaffective disorder, "emerged at a clinical level, in terms of criteria, in 2017," and that, prior to 2017, the diagnosis was likely "prodomal," meaning, "it was present but not meeting criteria." Tr. at 95. In other words, "some symptoms [were] emerging, some concerns about functioning, symptom expression, but it [did not] meet criteria, based on the DSM." Tr. at 97. The respondent's schizoaffective disorder remained prodomal because the "medications that

were treating his seizure disorder were also treating the underlining psychiatric issues." Tr. at 96.

The respondent testified that he first entered the United States when he was approximately five years' old. Tr. at 127. On direct examination, the respondent testified that he had been taking medication, including Depakote and Lamictal, since he was born, but did not know his diagnosis. Tr. at 128–29. He testified that, at one point, he stopped taking Depakote. Tr. at 129–30. While off his medication, the respondent explained, "[m]y brain just—it's not good." Tr. at 130. He confirmed that, at his prior hearing, he testified that he would sometimes "space off," "get shakes" and "sometimes twitch." Tr. at 142. The respondent also testified that he had been hearing voices since he was in high school, but did not want to tell anyone. Tr. at 143. While taking his medication, the respondent hears voices less often, but still hears them. Tr. at 145. The respondent explained, "Depakote really, really, really helps me with the voices and the problems with my brain . . . ." Tr. at 145. In response to a question about whether the respondent is experiencing any difference in his mental health since 2017, the respondent stated, "Nothing. Nothing's different except for that my body, my—physically, I feel a little better." Tr. at 157; *see also* Tr. at 142 (when discussing new symptoms, the respondent stated, "I still feel a little bit, sometimes, oncoming seizures."). The respondent opined that the major difference between 2017 and the present was that he changed medications. Tr. at 158.

When asked whether he could continue to afford his medication in Mexico, the respondent stated that he did not think he could. Tr. 148. The respondent, however, conceded that he has not done any research into the availability of medicine in Mexico. Tr. at 151. The respondent was similarly unaware whether Mexico offered universal healthcare. Tr. at 151. When asked whether his parents would continue to help him, the respondent replied, "I'm not

going to answer that question." Tr. at 149. The respondent could not recall any specific incidents of individuals being harmed in Mexico on account of their mental disabilities. Tr. at 150. When asked about his conviction for sexual battery, the respondent maintained his innocence, but generally refused to answer questions about the underlying facts. Tr. at 154–57.

The respondent's mother, (b)(6); (b)(7)(C), testified that she initially came to the United States in July 1999 due to poverty. Tr. at 165–66. While living in Mexico, she was able to obtain medicine for the respondent. Tr. at 172–73. She had to pay for the medication. Tr. at 173. The respondent's mother testified that she would help the respondent pay for the respondent's medication in the United States. Tr. at 167–68. The respondent's mother testified that she did not think she could help support the respondent financially in Mexico because she has a fourteen-year-old-son living with her in the United States. Tr. at 173. She, however, also testified that she helped provide for the respondent's medication for approximately five years, also while her younger son was living with her. Tr. at 174. She has family in Mexico, but she was dubious as to whether they could help support the respondent. Tr. at 167.

(b)(6); (b)(7)(C) testified that she was employed with the group Disability Rights International (DRI). Tr. at 180. From January 2012 through August 2016, (b)(6); (b)(7)(C) was employed as the director of the Women's Rights Initiative through DRI. Tr. at 181. However, she also testified that she was the primary author of various reports about mental health conditions in Mexico. Tr. at 181. (b)(6); (b)(7)(C) testified that there is no law against having a mental disability in Mexico. Tr. at 184. When asked to estimate how many people were living in Mexico with mental disabilities, (b)(6); (b)(7)(C) opined that, of Mexico's 123,000,000 inhabitants, perhaps 8 to 9 million individuals suffered from some sort of mental disability. Tr. at 185. (b)(6); (b)(7)(C) could not offer an estimate as to how many individuals were housed in

mental health facilities in Mexico, but noted, "the government also doesn't have that information." Tr. at 185.[2]

On September 17, 2019, the Immigration Judge granted the respondent's application for asylum. The Immigration Judge, as a threshold determination, found that the respondent was not competent to represent himself and, accordingly, appointed safeguards, including the appointment of a representative and "additional proposed safeguards requested by [r]espondent's counsel, which included sitting at counsel's table during questioning, conducting cross-examination in a sensitive manner, and providing Respondent with breaks when necessary." I.J. at 6. The Immigration Judge further found that the respondent was generally a credible witness. I.J. at 7. The Immigration Judge also found the respondent eligible to file a successive application for asylum because "the Court's competency determination, the appointment of a qualified representative, the mental health evaluations of (b)(6); (b)(7)(C) and (b)(6); (b)(7)(C) and Respondent's recent diagnosis of Schizoaffective Disorder-Bipolar Type cumulatively qualify as materially changed circumstances." I.J. at 9. Having found a material change in circumstances, the Immigration Judge likewise concluded that the respondent was excepted from the one-year filing requirement. I.J. at 10.

The Immigration Judge also concluded that the respondent's conviction for sexual battery did not constitute a particularly serious crime. I.J. at 13. The Immigration Judge found that, while the elements of the respondent's conviction for sexual battery "*potentially* bring the crime into the ambit of a particularly serious crime," IJ at 12 (emphasis in original) (citations omitted), the conviction did not constitute a particularly serious crime. I.J. at 13. The Immigration Judge first noted that he was inclined to give the police report—which detailed what the Immigration

[2] Portions of (b)(6); testimony may not have been captured. At page 185, the transcript jumps abruptly from the Department's questioning to a discussion between the Immigration Judge and respondent's counsel.

Judge described as the respondent's "consensual sexual relations with a 15-year-old girl"—little weight because the police report was based on hearsay. I.J. at 13. The Immigration Judge found that the respondent had "consistently and credibly denied committing the acts alleged" in the police report, and that the respondent "was allowed to plead to a much lesser charge." I.J. at 13.

Finding that the respondent was prima facie eligible to reapply for asylum, the Immigration Judge next considered the merits of the respondent's asylum application. The Immigration Judge first held that the respondent had not suffered past persecution in Mexico on account of a protected ground. I.J. at 14. However, the Immigration Judge concluded that the respondent had a well-founded fear of future persecution based upon the proposed social group, "Mexican males with psychotic disorders who exhibit erratic and perceptible behavior." I.J. at 16–21. The Immigration Judge further found that "[a]lthough Mexican law prohibits discrimination against persons with physical, sensory, intellectual, and mental disabilities, the government did not effectively enforce the law." I.J. at 22. Finally, the Immigration Judge held that the respondent could not internally relocate within Mexico to avoid persecution. I.J. at 23.

The Immigration Judge further found that the respondent merited a favorable exercise of discretion based, primarily, upon the length of time the respondent had lived in the United States, the respondent's stated intent to pursue treatment for his mental disorder, and the unavailability of similar access to treatment in Mexico. I.J. at 24. The Immigration Judge did not discuss the respondent's criminal history when evaluating discretion. *See generally* I.J. at 23–24. Accordingly, the Immigration Judge granted the respondent's application for asylum and held in abeyance a decision on the respondent's applications for withholding of removal under the Act and withholding or deferral of removal under CAT.

(b)(6); (b)(7)(C)

ARGUMENT

An applicant for asylum bears the burden of demonstrating eligibility for relief. INA § 240(c)(4)(A)(i). To establish eligibility for relief under section 208(a) of the Act, an alien must show that he or she is unwilling to return to his or her country or is unable to avail him or herself of that country's protection because he or she has suffered past persecution or has a well-founded fear of future persecution on account of one of five protected grounds. INA § 208(b)(1); 8 C.F.R. § 1208.13(a); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 230 (BIA 2014).

I. THE RESPONDENT DID NOT MEET HIS BURDEN OF SHOWING A MATERIAL CHANGE IN CIRCUMSTANCES OR EXTRAORDINARY CIRCUMSTANCES SUFFICIENT TO ALLOW HIM TO FILE A SUCCESSIVE APPLICATION FOR ASYLUM OR TO EXCUSE HIS UNTIMELY FILING

Generally, an alien may file only one claim for asylum, which must be filed within one year of his or her arrival in the United States. *See* INA §§ 208(a)(2)(B)–(C). Exceptions to this general rule state that the one-year filing deadline and the prohibition on refiling after the denial of an asylum application do not apply "if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified." INA § 208(a)(2)(D). The regulations provide a non-exclusive list of examples of changed circumstances for purposes of section 208(a)(2)(D), including changes in the applicant's circumstances that materially affect the applicant's eligibility for asylum. 8 C.F.R. § 1208.4(a)(4)(i)(B). Further, the Board has held that a newly-filed application which presents a "previously unraised basis for relief" or presents a "new or substantially different factual basis" will be considered a new application for purposes of the one-year bar. *Matter of M-A-F-*, 26 I&N Dec. 651, 655 (BIA 2015). However, a new

application which "merely clarifies or slightly alters the initial claim will generally not be considered a new application." *Id.*

In this case, the respondent entered the United States in 1999 and filed his first application for asylum on August 8, 2017, and an updated application on October 13, 2017. At his individual hearing on the updated application, the respondent argued, inter alia, that he had a well-founded fear of persecution based upon his membership in two PSGS: (1) "persons suffering from mental health disorders residing in Mexico;" and (2) "patients who suffer from epilepsy who have no family or economical support in Mexico." I.J Dec. at 16 (Dec. 22, 2017).

On December 22, 2017, the Immigration Judge denied the respondent's application for asylum, but granted his application for cancellation of removal. *See generally id.* In denying the respondent's application for asylum, the Immigration Judge opined that the respondent's "articulated group of 'Persons suffering from mental health disorders residing in Mexico' fails on particularity." *Id.* at 16–17. The Department timely appealed Immigration Judge's decision granting cancellation and the respondent did not appeal. On August 29, 2018, the Board sustained the Department's appeal, vacated the decision of the Immigration Judge, and remanded the case for further consideration of whether the respondent met his burden of proof in establishing good moral character.

On remand, the respondent filed a successive application for asylum. The respondent argued that he was entitled to file a successive application for asylum because of a change in his personal circumstances, namely that the mental health disorder he previously claimed had expanded to include a recent diagnosis for a psychotic disorder. In support of this argument, the respondent proposed several new PSGs. *See* Exh. 17.

The respondent's reformulation of his prior PSG did not constitute a material change in circumstances affecting his eligibility for asylum. Just as the respondent's prior PSG relied heavily on his diagnosis for epilepsy, the respondent's new articulation relied on his diagnosis of schizoaffective disorder. Epilepsy, like schizoaffective disorder, is a serious and persistent disorder. Tr. at 123 (b)(6); explaining, "Epilepsy is a serious and persistent neurological disorder."). Moreover, irrespective of whether the respondent's diagnosis was new, the respondent did not show that the actual mental disorder was new. Rather, the respondent was exhibiting odd behaviors prior to 2017. Tr. at 114. For instance, in (b)(6); review of the respondent's prior application for cancellation of removal, she noted, "[t]here was a narrative about him standing in lines in Walmart and staring at people." Tr. at 114. Similarly, respondent's coworkers "described somewhat odd behaviors," and his ex-wife described "odd behaviors" when the respondent was not taking his medication. Tr. at 114.

Thus, the newly proposed designation is that one with "psychotic disorders" is merely a more descriptive term for those "suffering from mental health disorders." Like the respondent's recent diagnosis for schizoaffective disorder, his diagnosis for epilepsy was chronic and will require a lifetime of treatment and, particularly if left untreated, manifest in outward physical symptoms. Further, a diagnosis, on its own, does not constitute a material change in circumstances, particularly where the symptoms regarding the diagnosis were present prior to the diagnosis itself. Therefore, because the subsequent application "merely clarifies or slightly alters the initial claim," it should not be considered a new application and is therefore untimely. *M-A-F-*, 26 I&N Dec. at 655. Thus, the respondent was ineligible to file a successive application for asylum because he failed to demonstrate a change in circumstances materially affecting his

(b)(6); (b)(7)(C)

eligibility for asylum. Similarly, the respondent could not show an exception to the one-year filing requirement.

II. THE RESPONDENT'S CONVICTION FOR SEXUAL BATTERY OF A FIFTEEN-YEAR-OLD CHILD IS A CONVICTION FOR A PARTICULARLY SERIOUS CRIME

An alien is ineligible for asylum under section 208(b) or withholding of removal under section 241(b)(3) if the alien has been convicted of a "particularly serious crime." INA §§ 208(b)(2)(A)(ii), 241(b)(3)(B). An offense need not necessarily qualify as an aggravated felony to be considered a particularly serious crime. *Matter of N-A-M-*, 24 I&N Dec. 336, 337 (BIA 2007). Where a crime is not an aggravated felony, the court must first "examine the nature of the conviction, the type of sentence imposed, and the circumstances and underlying facts of the conviction." *Id.* at 341–42; *Matter of L-S-*, 22 I&N Dec. 645, 650–52 (BIA 1999). If the elements and nature of the offense bring it within the "ambit of a particularly serious crime, all reliable information may be considered in making a particularly serious crime determination, including the conviction records and sentencing information, as well as other information outside the confines of a record of conviction." *N-A-M-*, 24 I&N at 342.

In this case, the Immigration Judge correctly concluded that the elements of the respondent's offense brought it within the ambit of a particularly serious crime. I.J. at 12. Having concluded that the offense was within the ambit of a particularly serious crime, the Immigration Judge should have then examined "all reliable information." *N-A-M-*, 24 I&N Dec. at 342. The Immigration Judge, instead, committed clear error by dismissing as hearsay the multiple witness accounts contained in the affidavit of probable cause and, instead, relied heavily on the respondent's unsupported, self-serving testimony. *See* I.J. at 13.

(b)(6); (b)(7)(C)

As a threshold issue, the Immigration Judge's description of the allegations in the probable cause affidavit as involving "*consensual sexual relations*" between the respondent and the minor victim is legally erroneous. I.J. at 13 (emphasis added). Wyoming law does not recognize that a fifteen-year-old is capable of consenting to a sexual relationship with a twenty-one-year-old. Under Wyo. Stat. Ann. sections 6-2-314 through 317, the elements constituting sexual assault of a minor include the age of the victim, the age of the perpetrator, and the relationship between the two. None of the statutes, however, provide that lack of consent is an element of the offense, or that consent is a defense to the offense. *Compare* Wyo. Stat. Ann. § 6-2-302(a)(iii) (requiring proof that "[t]he victim is physically helpless, and the actor knows or reasonably should know that the victim is physically helpless *and that the victim has not consented*") (emphasis added) *with* Wyo. Stat. Ann. §§ 6-2-314–317 (no similar requirement). Thus, Wyoming law indicates that certain minor victims are incapable of providing consent to a sexual relationship. Accordingly, the Immigration Judge erred in determining that the victim was capable of engaging in "consensual sexual relations" with the respondent because there is no provision in Wyoming law that would permit a fifteen-year-old girl to consent to sexual relations with the respondent.

The Immigration Judge further erred in not giving full weight to the affidavit of probable cause, which contained the accounts of multiple witnesses, including the victim. *See* Exh. 20 at 6–10. According to the affidavit of probable cause prepared by Wyoming state police officers on June 22, 2014, the respondent, just five days earlier on June 17, 2014, brought a fifteen-year-old-girl to his home where he offered her alcohol and then proceeded to engage in multiple acts of sexual activity with her. *Id.* The affidavit of probable cause included witness statements from

multiple individuals who were present at the home, including the victim herself; a friend of the respondent, (b)(6); (b)(7)(C) and the respondent's roommate, (b)(6); (b)(7)(C)

According to the victim's account of the evening, the victim, respondent, and (b)(6) (b)(6); (b)(7)(C) were all at (b)(6); (b)(7)(C) home on the night of June 17, 2014. *Id.* at 7. The three of them then left and went to the respondent's apartment, where the respondent provided "some kind of liquor with the word 'Ice' in it." *Id.* at 7. The victim "was sitting on a couch in the living room when [the respondent] came over and sat next to her." *Id.* "He began touching her leg and eventually told her to go into his room with him." *Id.* Once in his bedroom, the minor victim performed oral sex on the respondent. *Id.* He violently "thrust[] his penis inside of [the victim's] mouth" until she "gagged . . . and threw up" and penetrated her with his fingers." *Id.* The victim recalled that the respondent left the bedroom at some point and returned with (b)(6); (b)(7)(C) the respondent's roommate. *Id.* (b)(6); (b)(7)(C) and the respondent then continued having sex with the victim. *Id.* Afterwards, the respondent directed the victim to the shower and "poured soap on her hand, instructing her to wash her genital area with it." *Id.*

(b)(6); (b)(7)(C) who was also present in the living room with the respondent and victim, recalled that the respondent "grabbed [the victim's] hand or wrist and told her to go to the bedroom with him." *Id.* Shortly after guiding the victim to his bedroom, the respondent "came back out and grabbed a condom from the basket on the table, then returned to the bedroom and closed the door." *Id.* (b)(6); (b)(7)(C) then witnessed the victim leaving the bedroom to take a shower; and "[the respondent] joined her." *Id.* The respondent's roommate, (b)(6); (b)(7)(C) arrived at the home later in the evening. *Id.* at 8. When questioned by police, (b)(6); (b)(7)(C) stated that he "walked into the bedroom and saw [the respondent] and [the victim] having sex." *Id.* (b)(6); (b)(7)(C)

then also had sexual intercourse with the minor victim. *Id.* at 9. Thus, according to statements from multiple witnesses, the respondent had sexual contact with the fifteen-year-old victim.

The statements also corroborate one another. For instance, according to the victim's statements she drank alcohol with the word "Ice" in it. *Id.* (b)(6); (b)(7)(C) confirmed that they were drinking a liquor called "Ice 101." *Id.* at 8. When police officers searched the respondent's home, police officers seized a bottle of "Ice 101." *Id.* at 9–10. The respondent's attempts to cover up the crime are also corroborated by multiple witnesses and the police investigation. According to the victim, she left a black bra at the respondent's home. *Id.* at 8. According to (b)(6); (b)(7)(C) the respondent, after learning that the victim had accused him of rape, removed the bra from the apartment and "threw the black bra over the vehicle and into some bushes." *Id.* at 9. The police were later able to locate a black bra in the bushes. *Id.* Similarly, (b)(6); (b)(7)(C) recounted that, after the respondent learned that the victim was alleging that she had been raped, the respondent "began stripping the bedding from both beds in the room . . . [the respondent] put all of the bedding in a storage closet outside of the front door to the apartment." *Id.* The respondent himself, while "den[ying] having sex with [the victim]," "admitted to flipping the mattress over and hiding the bedding in the storage closet." *Id.* at 9.

The respondent, by contrast, did not offer any proof other than his own scant self-serving testimony that would show the facts in affidavit of probable cause were inaccurate. When asked questions on cross-examination about the affidavit, the respondent refused to answer or was evasive in his answers. Tr. at 153–56. In one exchange, Department counsel asked, "When the police came to your house, did they find your bedding in a storage shed?" Tr. at 155. The respondent responded, "If that's what it says." Tr. at 156. Department counsel again asked, "Is that what happened?" Tr. at 156. To which the respondent reiterated, "Is that what is [sic]

says?" Tr. at 156. The respondent provided similar combative responses regarding whether he knew (b)(6); (b)(7)(C) and whether he had any statements from other individuals about that evening. Tr. at 154–55. The respondent explained, "I believe that I don't need to answer those questions or—everything you have on file, that's what it is." Tr. at 154. Indeed, at one point the respondent denied knowing the victim at all. Tr. at 154. Therefore, in light of the respondent's refusal to answer questions or provide contradictory objective evidence, and given that the affidavit of probable cause contained detailed statements from multiple witnesses and that the respondent was ultimately convicted of sexual battery, the Immigration Judge erred in refusing to give the affidavit of probable cause the full weight it deserved.

The Immigration Judge thus erred in concluding that the respondent met his burden of showing that he had not been convicted of a particularly serious crime where the elements of sexual battery brought the conviction within the "ambit" of a particularly serious crime and the facts showed that the respondent raped a fifteen-year-old girl.

III. THE RESPONDENT, WHO HAD CONVICTIONS FOR SEXUAL BATTERY, DRIVING WHILE ABILITY IMPAIRED, AND POSSESSION OF A CONTROLLED SUBSTANCE, DID NOT WARRANT A FAVORABLE EXERCISE OF THE COURT'S DISCRETION

"Asylum is a discretionary form of relief from removal, and an applicant bears the burden of proving not only statutory eligibility for asylum but that she also merits asylum as a matter of discretion." *Matter of A-B-*, 27 I&N Dec. 316, 345 n.12 (A.G. 2018) (citing INA §§ 208(b)(1), 240(c)(4)(A)(ii)). Since entering the United States, the respondent has been arrested and convicted on two separate occasions. On November 16, 2018, the respondent was convicted of sexual battery. As discussed more fully above, the respondent's conviction involved an incident where the respondent plied a child with alcohol before he and another individual engaged in sexual activities with her.

(b)(6); (b)(7)(C)

In addition to the respondent's conviction for sexual battery, the respondent has been convicted of driving while under the influence, in violation of Wyo. Stat. Ann. section 31-5-233(b)(iii)(B), and use of a controlled substance, in violation of Wyo. Stat. Ann. section 35-7-1039. The respondent was arrested and convicted of these offenses on September 7, 2018, while he was in removal proceedings, and after being granted release on his own recognizance by the Immigration Judge. *See* Exh. 20 at 14–15. The respondent's decision to drive while intoxicated exhibited a gross disregard for the safety of others. *See Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2531 (2019) (noting "the country's efforts over the years to address the terrible problem of drunk driving"); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2166 (2016) ("Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year."); *see also Matter of Castillo-Perez*, 27 I&N Dec. 664, 670 (A.G. 2019) (holding that the immigration courts should decline to exercise discretion for individuals with multiple DUI offenses); *see generally Matter of Siniauskas*, 27 I&N Dec. 207, 209 (BIA 2018) ("Driving under the influence is a significant adverse consideration in bond proceedings.").

The Immigration Judge, however, did not consider the respondent's criminal history at all when discussing discretion. *See* I.J. at 23–24. The Immigration Judge, instead, discussed only the respondent's positive equities. I.J. at 24. In its previous remand in this case, the Board ordered that "the nature of the respondent's arrest and pending criminal charges should have been given more consideration in determining whether he merits a favorable exercise of discretion." Dec. of the Board of Immigration Appeals at 4 (Aug. 29, 2019) (citations omitted). The Immigration Judge, in his decision granting asylum, did not consider any of the respondent's convictions, or weigh the recency, nature, and seriousness of those convictions against the

(b)(6); (b)(7)(C)

positive equities in the respondent's case. When these convictions are appropriately considered, the respondent did not present evidence of the extraordinary equities necessary to warrant the Immigration Judge's discretion. Accordingly, the Immigration Judge erred in holding that the respondent merited a favorable exercise of discretion.

IV. THE RESPONDENT'S PROPOSED PARTICULAR SOCIAL GROUP—"MEXICAN MALES WITH PSYCHOTIC DISORDERS WHO EXHIBIT ERRATIC AND PERCEPTIBLE BEHAVIOR"—LACKS PARTICULARITY AND DOES NOT MEET THE LEGAL REQUIREMENTS FOR SOCIAL DISTINCTION

To establish eligibility for relief under section 208(a) of the Act, an alien must show that he is unwilling to return to his country or is unable to avail himself of his country's protection because he has suffered past persecution or has a well-founded fear of future persecution on account of one of the five protected grounds, including the alien's membership in a "particular social group." INA § 208(b)(1); 8 C.F.R. § 1208.13(a). An "essential component" of the PSG analysis requires that it be a "common, immutable characteristic" or a characteristic that so fundamental to identity or conscience that an applicant should not be expected to change it. *M-E-V-G-*, 26 I&N Dec. at 231–32. To be cognizable, a PSG must exist independently of the harm in an application for asylum and must meet the particularity and social distinction requirements. *A-B-*, 27 I&N Dec. at 334–35; *M-E-V-G-*, 26 I&N Dec. at 232, 236; *Matter of W-G-R-*, 26 I&N Dec 208, 215 (BIA 2014).

The particularity analysis includes the requirement that "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." *Matter of E-A-G-*, 24 I&N Dec. 591, 594 (BIA 2008). The social distinction requirement "considers where those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some

(b)(6); (b)(7)(C)

significant way" and that members "of a particular social group will generally understand their own affiliation with that group, as will other people in their country." *M-E-V-G-*, 26 I&N Dec. at 238, 240. A PSG defined by its vulnerability to private criminal activity likely lacks the particularity requirement given that "broad swaths of society might be susceptible to victimization"; and where the PSG is defined to avoid particularity issues by defining a narrow class, it will "often lack social distinction to be cognizable as a PSG, rather than a description of individuals sharing certain traits or experiences." *A-B-*, 27 I&N Dec. at 335–36.

The respondent's proposed PSG of "Mexican males with psychotic disorders who exhibit erratic and perceptible behavior" fails under each of these standards. First, the social group lacks particularity. Adjectives such "erratic" are amorphous and subjective. There is no evidence in the record as to what would be considered erratic behavior in general or to a person in Mexican society. Further, adding a gender modifier to the group gives only the illusion of particularity. In the end, there is no evidence that the proposed group would be recognized in Mexico as a distinct class of persons.

Second, it does not meet the legal requirements for social distinction. "To be socially distinct, a group need not be seen by society; rather it must be perceived as a group by society." *M-E-V-G-*, 26 I&N Dec. at 240. In order to demonstrate social distinction, there must be "evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *W-G-R-*, 26 I&N Dec. at 217. Social distinction "considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it." *M-E-V-G-*, at 238. In this

(b)(6); (b)(7)(C)

case, the psychologist who examined the respondent diagnosed him with a range of disorders, including "schizoaffective disorder, bipolar type, ADHD, mild neuro-cognitive disorder, and some subclinical PTSD." Tr. at 94. "Psychotic disorders" thus describes a range of mental health conditions, including disorders that are temporary and where the individual suffering from the disorder has no outward signs of distress, to chronic, untreatable disorders where the symptoms include involuntary actions or ticks. As explained by (b)(6); "core psychotic symptoms" include "hallucinations, delusions, disorganized thinking, difficulty reality testing." Tr. at 95. "[W]hat we know about psychotic disorders is that they often can be activated by genetic predisposition, stress, trauma, or substance induced." Tr. at 106.

Further, assuming the respondent's behavior is "outwardly visible," does not mean that Mexicans would lump him and all other people who experience the full and wide array of observable mental health conditions in a giant, undifferentiated group. Erratic behavior is also not limited to those with mental illnesses. An individual who shuns society may just be shy and an individual who is quick to anger and fights irrationally with others may just be a miscreant. That the respondent has a subjective fear of removal to Mexico does not bear on the legal question of the social distinction. Moreover, the Immigration Judge appeared to conflate the question of whether the group is social distinct with the separate question of whether the various traits in the group describe the respondent. Thus, the Immigration Judge erred in finding that this is a socially distinct group, rather than a description of individuals who share certain traits or experiences.

Third, the Immigration Judge erred in finding that the list of traits in the putative group describe the respondent. Rather, the evidence shows that for much of the respondent's life he was able to function within society and not be singled out as different despite his mental

condition. Indeed, the respondent has been unknowingly treating and suppressing his psychotic disorder simply by taking Depakote, a medicine used to treat epilepsy. As explained by (b)(6); "Depakote is a first-line antipsychotic as well as something that's frequently used for people who struggle with bipolar when they're nonresponsive to other meds." Tr. at 112–13. Similarly, the respondent did not show that his use of marijuana did not increase, or even cause, certain symptoms. As (b)(6); explained, emerging research suggests marijuana can lead to the expression of a psychiatric instability. Tr. at 112. The respondent, therefore, did not meet his burden of showing that his "erratic behavior" was, in fact, caused by the mental illness, rather than use of an illicit substance, or that he was unable to control his erratic behavior such that he would not be a part of the proposed PSG. Thus, the Immigration Judge erred in concluding that the respondent met his burden of showing that the proposed PSG of "Mexican males with psychotic disorders who exhibit erratic and perceptible behavior" is legally cognizable, or that the respondent is a member of the group.

V. THE EVIDENCE DID NOT SHOW THAT THE RESPONDENT WOULD BE PERSECUTED "ON ACCOUNT OF" HIS PROPOSED PARTICULAR SOCIAL GROUP

An applicant for asylum must show that his or her race, religion, nationality, political opinion, or membership in a PSG is "one central reason" for the persecution. INA § 208(b)(1)(B)(i); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211–12 (BIA 2007). *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012). Under the "one central reason" standard, "the protected ground cannot play a minor role in the alien's past mistreatment or fears of further mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (citation omitted).

(b)(6); (b)(7)(C)

Assuming, *arguendo*, the respondent's proposed PSG is cognizable, and the respondent is a member of the proposed PSG, he did not show that he would be harmed "on account of" his membership in that PSG. Any evidence of potential harm in the respondent's case is speculative. Although the Immigration Judge can take into consideration that there is a "pattern or practice" of persecution of others similarly situated, here the evidence does not suggest that the Mexican government seeks to identify and persecute people with mental health issues. 8 C.F.R. §§ 1208.13(b)(2)(iii)(A)–(B). The government of Mexico is both a signatory to and sponsor of the United Nations Convention on the Rights of Persons with Disabilities (CRPD). Exh. 17, Tab B, at iii. Mexican law prohibits discrimination against persons with physical, sensory, intellectual, and mental disabilities. *See id*., Tab A, at 20. The law also "requires the Ministry of Health to promote the creation of longterm institutions for persons with disabilities in distress, and the Ministry of Social Development must establish specialized institutions to care for, protect, and house poor, neglected, or marginalized persons with disabilities." *Id*. Accordingly, while "[t]he government did not effectively enforce the law," that is insufficient to show that the approach to mental health treatment in Mexico is a result of the Mexican government's attempt to injure the respondent, or more generally, individuals with mental illnesses.

While this case arises in the Tenth Circuit, a decision from the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) decision is instructive. In *Kholyavskiy v. Mukasey*, the Seventh Circuit found specifically that the lack of similar mental health treatment in the respondent's country of origin cannot meet the respondents burden to show persecution, stating "there is no evidence in the record to suggest that the unavailability of the medication is the result of the Russian government's attempt to injure Mr. Kholyavskiy or, more generally, individuals with mental illnesses." 240 F.3d 555, 573 (7th Cir. 2008). Rather, the Seventh

Circuit accurately found that "the motive of those engaging in oppressive acts is a 'critical element' of the asylum laws." 240 F.3d 555, 573 (7th Cir. 2008). Similarly, here, substandard conditions in mental health facilities in Mexico that are due to a lack of resources, inadequate training, and neglect are insufficient to show the government of Mexico has specifically intended to create and maintain such conditions to inflict harm on any specific group of individuals. As such, the Immigration Judge erred in finding that the respondent's particular social group would be one central reason for his persecution if he were returned to Mexico.

CONCLUSION

The Immigration Judge erred in determining that the respondent met his burden to meet his burden of demonstrating eligibility for asylum. The Department, therefore, respectfully requests that the Board sustain the Department's appeal and find that the respondent has not met his burden of establishing eligibility for asylum under section 208(a) of the Act. Further, because the respondent has failed to satisfy his burden of proof for asylum, he necessarily has failed to meet the more stringent burden of proof for statutory withholding of removal under the Act. *See Matter of J-Y-C-*, 24 I&N Dec. 260, 265 (BIA 2007). Accordingly, this matter should be remanded to the Immigration Judge to consider the respondent's request for protection pursuant to CAT.[3]

Respectfully submitted on this 18th day of December 2019,

(b)(6); (b)(7)(C)
Assistant Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

[3] The Immigration Judge held in abeyance the respondent's applications for withholding of removal under the Act and protection under CAT. I.J. at 25.

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

On December 18, 2019, I mailed or delivered a copy of this Department of Homeland Security Amended Brief on Appeal and any attached pages by placing a true copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process and causing the same to be mailed by first class mail to the person at the address set forth below:

(b)(6); (b)(7)(C)

Rocky Mountain Immigrant Advocacy Network
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DETAINED

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

In the Matter of

(b)(6); (b)(7)(C)

In removal proceedings

File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY'S
MOTION TO AMEND

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), through undersigned counsel, respectfully moves the Board of Immigration Appeals (Board) to accept the attached Amended Brief on Appeal for consideration in the respondent's detained removal proceedings.

The Board will entertain a motion to amend a previous filing in limited situations, such as amending a clerical error. Board of Immigration Appeals Practice Manual ch. 5.9(k). The Department timely filed its Brief on Appeal on December 10, 2019. On December 13, 2019, the Department received the respondent's Motion for Summary Affirmance. In the Motion for Summary Affirmance, the respondent states that the Department's "notice of appeal materially misstates the record." Resp't Motion for Summary Affirmance at 3 (Dec. 10, 2019). The Department respectfully moves the Board to accept the attached Amended Brief on Appeal, which contains certain amendments in response to the respondent's concerns.

First, the respondent states that the Department's Notice of Appeal (NOA) incorrectly describes the respondent's conviction as a conviction for "sexual assault." *Id*. at 6. Title 6, Chapter 6, Article 2 of the Wyoming States generally describes a class of offenses as "sexual assault." *See* Wyo. State. Ann. §§ 6-2-301–320. Similarly, "sexual assault" is defined as "any act made criminal pursuant to [Wyoming Statutes sections] 6-2-302 through 6-2-319." Wyo. Stat. Ann. § 6-2-301(a)(v). Therefore, both the respondent's original charge for second-degree sexual abuse of a minor, in violation of Wyo. Stat. § 6-2-315(a)(i), *see* Exh. 20 at 5, and his conviction for sexual battery, in violation of Wyo. Stat. § 6-2-313, *see* Exh. 22 at 150, fall within the ambit of what Wyoming classifies as "sexual assault," both by Article title and definition.

Nevertheless, in the interest of avoiding any confusion, the attached Amended Brief on Appeal amends "sexual assault" to "sexual battery" in two places. *See* Exh. A at 2, 18. The

(b)(6); (b)(7)(C)

attached brief also corrects one citation. *Id*. at 3 (correcting the citation to Wyo. Stat. Ann. § 6-2-315). The Department did not amend the term "sexual assault" in several other portions of the brief. *See id*. at 4 (discussing the affidavit of probable cause), 6 (discussing the "pending 2014 charges for sexual assault"), 15 (discussing Wyoming statutes, generally).

The respondent's Motion for Summary Affirmance also states that the Department's NOA misidentifies the particular social group (PSG) articulated in the Immigration Judge's decision. Resp't Motion for Summary Affirmance at 9 (Dec. 10, 2019). The attached Amended Brief contains amendments to accurately reflect the correct PSG. *See* Exh. A at 2, 20, 21, 23 (amending the PSG of "Mexican males with psychotic disorders, who exhibit erratic and *bizarre* behavior" to "Mexican males with psychotic disorders who exhibit erratic and *perceptible* behavior."); *id*. at 10 (correcting "behaviors" to "behavior" in the Immigration Judge's articulation of the PSG); *id*. at 17 (removing the reference the "Mexican males with psychotic disorders, who exhibit erratic and bizarre behavior" because that precise PSG is not discussed in Exh. 17). The attached Amended Brief, similarly, removes the word "bizarre" when discussing "erratic" and "bizarre" behavior. *Id*. at 21, 22. The attached Amended Brief also amends the table of contents and contains corrections to maintain grammatical consistency.

Wherefore, the Department respectfully moves the Board to accept the attached Amended Brief on Appeal.

Respectfully submitted this 18th day of December 2019,

(b)(6); (b)(7)(C)
Assistant Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

(b)(6); (b)(7)(C)

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NON-DETAINED

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

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No.: (b)(6); (b)(7)(C)
In removal proceedings	)	

DEPARTMENT OF HOMELAND SECURITY
BRIEF ON APPEAL

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INTRODUCTION

The Immigration Judge indicated her "inclination to grant these proceedings" prior to hearing all of the respondent's testimony, even though the respondent's particular social group and the nexus on which the Immigration Judge ultimately granted relief were not articulated until after all evidence and testimony was submitted; even as subsequently articulated, the proposed particular social group and nexus are insufficient to meet the respondent's burden. The Department of Homeland Security (Department) hereby submits its brief in support of its appeal of the decision of the Immigration Judge granting the respondent asylum pursuant to section 208 of the Immigration and Nationality Act (INA or Act). The Department requests that the Board of Immigration Appeals (Board) reverse the decision of the Immigration Judge in its entirety. The Department respectfully requests three-member panel review due to the need to review a decision by an Immigration Judge that is not in conformity with the law or with applicable precedents and the need to review a clearly erroneous factual determination. *See* 8 C.F.R. § 1003.1(e)(6)(iii), (v).

ISSUES PRESENTED

To resolve this appeal, the Board must address four issues:

1. Whether the Immigration Judge erred in concluding that the respondent's proposed particular social group – "non-Tutsi Congolese men in the Goma province" – constituted a cognizable particular social group for purposes of asylum.

2. Whether the Immigration Judge erred in concluding that the respondent demonstrated a nexus between his proposed particular social group – "non-Tutsi Congolese men in the Goma province" – and the harm he suffered when the harm was in fact the result of general civil strife within the Democratic Republic of Congo.

3. Whether the Immigration Judge erred in concluding that the record was sufficient to find that the respondent articulated a cognizable particular social group when the respondent identified his

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particular social group for the first time in his closing brief after all evidence and testimony was submitted.

4. Whether the Immigration Judge erred in finding that internal relocation in the Democratic Republic of Congo was unreasonable where the respondent lived his entire life in Kinshasa prior to moving to Goma in 2011 when he was twenty-nine years old, and where the respondent has family in Kinshasa.

STANDARD OF REVIEW

The Board reviews findings of fact, including "predictive findings of what may or may not occur in the future," for clear error. *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015); 8 C.F.R. § 1003.1(d)(3)(i). On the other hand, the Board reviews de novo "questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges." *Z-Z-O-*, 26 I&N Dec. at 588; 8 C.F.R. § 1003.1(d)(3)(ii). This de novo review includes "whether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal . . . ." *Z-Z-O-*, 26 I&N Dec. at 591. Whether a respondent has met his or her burden of proof is a question of law. *Matter of Vides-Casanova*, 26 I&N Dec. 494, 498 (BIA 2015).

While the Board reviews de novo whether a proposed particular social group is cognizable, that analysis fundamentally draws on underlying factual determinations. *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018) (citing *Matter of W-G-R-*, 26 I&N Dec. 208, 209-10 (BIA 2014)). As the Immigration Judge made findings of fact in this case, the Board may, as an exercise of its de novo review authority, decide whether those facts, as found by the Immigration Judge, satisfied the legal requirements for relief. *Cf. Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 212 (BIA 2010) ("In order to determine, under de novo review, whether specific facts are sufficient to meet a legal standard such as a 'well-founded fear,' the Board has authority to give different weight to the evidence from that given by the Immigration Judge."). Whether

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the respondent established that he was persecuted "on account of" a protected ground is an issue the BIA reviews de novo. *See Matter of S-E-G-*, 24 I&N Dec. 579, 588 n.5 (BIA 2008). Whether a respondent can relocate internally requires findings of both fact and law. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 36 (BIA 2012).

No additional factfinding is required to address the issues raised in this appeal. *See* 8 C.F.R. § 1003.1(d)(3)(iv) ("If further *factfinding* is needed in a particular case, the Board may remand the proceeding to the Immigration Judge . . . .") (emphasis added).

SUMMARY OF THE ARGUMENT

The Immigration Judge erred in concluding that the respondent established a cognizable particular social group and that the respondent demonstrated the requisite nexus between the harm he fears and his proposed particular social group. Additionally, the Immigration Judge erred in finding that the record was sufficient to find the respondent's proposed particular social group is a cognizable group under the Act when the particular social group was articulated for the first time in a closing statement after all evidence and testimony was submitted. Finally, the Immigration Judge erred in concluding that internal relocation within the Democratic Republic of Congo (DRC) would be unreasonable where the respondent lived his entire life in Kinshasa, the country's capital, prior to moving to Goma in 2011 when he was twenty-nine years old, and has close family members who currently live in Kinshasa.

STATEMENT OF FACTS

The respondent is a 35-year-old native and citizen of the DRC. Exh. 2; Tr. at 6. He applied for admission to the United States at Paso del Norte, El Paso, Texas, on January 4, 2017.

Exh. 1; Tr. at 6.[1] At that time, he did not possess or present a valid immigrant visa, reentry permit, border crossing identification card, or other valid entry document. Exh. 2. The respondent was processed for expedited removal pursuant to section 235 of the Act. The respondent claimed fear of returning to the DRC and was scheduled for a credible fear interview with an Asylum Officer pursuant to 8 C.F.R. § 235.3(b)(4). Due to difficulty obtaining a Lingala interpreter, the Asylum Officer determined that the interview could not be conducted fully and issued a Notice to Appear (NTA) to avoid undue delay. *Id.*

On May 2, 2017, the respondent admitted the allegations contained in the NTA, and the Immigration Judge sustained the charge of removability and designated the DRC as the country of removal should removal become necessary. Tr. at 6-8. The respondent was provided a Form I-589, Application for Asylum and Withholding of Removal. Tr. at 9. The respondent appeared *pro se* at his merits hearing on July 31, 2017, and filed his application with the court. Tr. at 21-81. The Immigration Judge subsequently issued a decision finding the respondent not credible and denied the respondent's application for asylum and withholding of removal under the Act and the United Nations Convention Against Torture (CAT). I.J. Decision, (b)(6); (b)(7)(C) (August 15, 2017). The respondent appealed the decision. While the respondent's appeal was pending before the Board, the respondent retained counsel, and his new counsel filed a brief on appeal with additional evidence, including a psychiatric evaluation, requesting that the matter be remanded to the Immigration Judge. The Board remanded the matter to the Immigration Judge for "further consideration of the respondent's credibility and his claims." (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) (BIA January 19, 2018).

[1] The respondent's record of proceedings contains two transcripts. As discussed *infra*, after his first individual hearing on July 31, 2017, the respondent's case was remanded to the Immigration Judge and a second individual hearing was held on March 5, 2018. References to the transcript for the remanded hearing on March 5, 2018 will be cited as "R. Tr. at __."

At the respondent's remanded hearing on March 5, 2018, the Immigration Judge stated that "given the description of what occurred to him in his home country, [she] really [has] no choice but to grant his request for asylum" and inquired as to whether the Department would appeal her decision. R. Tr. at 11. The Department stated that there was no way to evaluate an appeal when the Immigration Judge had not given her reasoning for granting the respondent's application. R. Tr. at 12. The Department noted that the only ground on which the respondent claimed fear was political opinion, and no evidence in the record suggested that he possessed a political opinion or that a political opinion was ever imputed to him. *Id.*; Exh. 2. The Department also stated that it was unable to determine whether an appeal would be appropriate without reviewing the Immigration Judge's analysis regarding the respondent's ability to internally relocate within the DRC. *Id.* Finally, the Department argued that it was inappropriate for the Court to make such a determination prior to the evaluation of the new evidence, including the examination by a psychologist, when such direction was specifically given to the Immigration Judge by the Board on remand. *Id.*; (b)(6); (b)(7)(C) (BIA January 19, 2018). Testimony was then taken from (b)(6); (b)(7)(C) and additional testimony was taken from the respondent. *See generally* R. Tr. at 15-49. On March 16, 2018, the respondent submitted a closing brief after all evidence was submitted and testimony was taken, asserting for the first time his membership in a particular social group of "non-Tutsi Congolese men in the Goma province." *See* Respondent's Brief in Support of Remand Hearing.

The respondent was born on (b)(6); (b)(7)(C) in Kinshasa. Exh. 2. The respondent grew up in Kinshasa, the capital of the DRC, and lived there until he moved to Goma sometime between September and November in 2011, when he was twenty-nine years old. Exh. 2; TR. at 38, 54. The respondent was living with his father, mother, his two children, and two of his cousins in

Kinshasa. Tr. at 59. He listed his cousins, (b)(6); (b)(7)(C) on his application for asylum as his siblings because, as he stated, he views them as his siblings. Tr. at 60. These two cousins still live in Kinshasa. Tr. at 53. After the respondent's father died in September or November of 2011, the respondent and his family were unable to care for themselves, so they decided to move to Goma, where the respondent's uncle lived. Tr. at 39, 54. The respondent lived with his uncle, his uncle's two children, his mother, his sister, and his two children in Goma. Tr. at 41. The respondent described Goma as a "big city" in the "eastern part" of the DRC. Tr. at 42.

The respondent explained that in September 2014, six armed members of the M23 rebel group came to his house and took the respondent to a former school about three hours from his house in Goma, where he was then trained as a security guard. Tr. at 43-46. According to the respondent, the M23 "need[s] young men so they took [him] by force." Exh. 2. The respondent claimed that he had never heard of the M23 during the three years he lived in Goma prior to his capture. Tr. at 68. The respondent was trained by the M23 to guard land that contained minerals. Tr. at 46. The respondent was harmed by the rebels and claims that his right leg was broken. Tr. at 49-50. He stated that he was held by the M23 rebels for nine months. Tr. at 32.

The respondent explained that he escaped with the help of a truck driver who spoke the respondent's native language of Kikongo. Tr. at 47, 62. The driver gave the respondent USD $450. Tr. at 63. The respondent fled to Zambia, where he stayed for seven days. Tr. at 61. The respondent testified that he could not return to Kinshasa because he had no place to stay, his leg was injured, and it was "too far" for him to return there, a journey that would take four days on a bus. Tr. at 39, 50-51. The respondent then went to Zimbabwe, where he stayed for two months with a man from the DRC whom he met at the Zimbabwe border. Tr. at 61. This was the first time he ever met this man. Tr. at 62. This man ultimately drove the respondent over eight hours

to a "big sea" and arranged for the respondent to board a shipping vessel. Tr. at 65-66. The respondent did not pay this man and did not know his name even though he lived with him for over two months. Tr. at 62, 64. The respondent does not know the port from which the shipping vessel departed. Tr. at 65. Though the respondent stated that a four-day bus ride to Kinshasa was "too far" for him to travel, it took him two months traveling in the hull of a container ship before he reached Ecuador. Tr. at 39, 64, 74; Exh. 2. When he reached Ecuador, he stayed at the Saint Cyprian Catholic Church for ten months. Tr. at 33-34. The respondent did not know the name of the reverend and only called him "father," and was only able to communicate through the reverend's friend who visited every Sunday. Tr. at 35, 36. The respondent then travelled to Panama, where he stayed for approximately two months prior to completing his travels to the United States. Tr. at 76.

In her written decision, the Immigration Judge granted the respondent's application for asylum. I.J. at 9. Specifically, the Immigration Judge concluded that the M23 persecuted the respondent in the past on account of his membership in a particular social group. I.J. at 6. The Immigration Judge found that there was "no prejudice to the government in allowing Respondent's counsel to articulate with specificity the ground that subjected the Respondent to persecution" even though such articulation was contained in a closing brief after all evidence and testimony was submitted. I.J. at 4; Respondent's Brief in Support of Remand Hearing, March 16, 2018.

With respect to the respondent's particular social group, the Immigration Judge noted that the respondent defined his particular social group as "non-Tutsi Congolese men in the Goma province." I.J. at 4. The Immigration Judge concluded that "Respondent's gender and his ties to a non-Tutsi family are fundamental to who he is," and therefore they "are not characteristics that

he can hide or change." I.J. at 5. The Immigration Judge also determined that the respondent defined his social group with particularity because "non-Tutsi Congolese men in the Goma province" is "defined with clear boundaries and out [sic] limits. It is defined by gender, nationality, geographical location, and non-inclusion in an opposing social group." I.J. at 5. Finally, the Immigration Judge found that the respondent's particular social group was socially distinct because "[t]he record in this case contains overwhelming country condition evidence which shows that M23 rebels specifically target non-Tutsi males." *Id.*

Regarding the requisite nexus, the Immigration Judge stated "[t]he circumstances of [the respondent's] abduction, enslavement, physical assaults and violent beatings by M23 rebels demonstrate that M23 targeted Respondent because of his membership in his particular social group." I.J. at 6. The Immigration Judge found that the work the respondent was forced to perform during his captivity was "work that women and children would find difficult to do." *Id.*

Finally, the Immigration Judge found that relocation within the DRC "would unreasonably require Respondent to sever all family and community ties in Goma and start a life in unfamiliar regions without any support." I.J. at 8. Regarding the respondent's family ties in Kinshasa, the Immigration Judge concluded that he "does not have a close relation to those family members and has not been in contact with them for years" and that the respondent would be "at great risk of being found and subjected to further harm at the hands of M23 rebels" because "Kinshasa is one of the locations which the Congolese government had deployed M23 rebels to in recent years to suppress political opposition." *Id.*

For those reasons, the Immigration Judge granted the respondent's application for asylum. I.J. at 9. The Immigration Judge declined to reach the respondent's eligibility for relief

in the form of withholding of removal under the act and withholding of removal under the CAT. The Department filed a timely appeal.

ARGUMENT

I. THE IMMIGRATION JUDGE ERRED IN CONCLUDING THAT THE RESPONDENT'S PROPOSED PARTICULAR SOCIAL GROUP CONSTITUTED A COGNIZABLE PARTICULAR SOCIAL GROUP FOR ASYLUM PURPOSES.

The respondent bears the burden of establishing that he is a "refugee" as defined in the Act. INA § 208(b)(1)(B)(i); 8 C.F.R. § 208.13(a); see also INA § 240(c)(4)(A)(i); *Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1335 (10th Cir. 2008) ("in order to be eligible for asylum, an alien must demonstrate by a preponderance of the evidence that she is a refugee"); *Woldemeskel v. INS*, 257 F.3d 1185, 1189 (10th Cir. 2001). An asylum applicant "must present facts that undergird each of the [] elements" required for relief to be granted. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018). A "refugee" is defined as any person outside of his country of nationality, or if he has no nationality, is outside of the country where he habitually resided, who is unable or unwilling to avail himself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A); 8 C.F.R. § 1208.13(b)(1)-(2). A refugee can show three types of persecution to satisfy the statutory requirement: (1) "a well-founded fear of future persecution," (2) "past persecution sufficient to give rise to a presumption of future persecution," or (3) "past persecution so severe it supports an unwillingness on the applicant's' part to return to that country." *Chaib v. Ashcroft*, 397 F.3d 1273, 1277 (10th Cir. 2005).

The Immigration Judge found that the respondent's particular social group of "non-Tutsi Congolese men in the Goma province" is a cognizable group under the Act. I.J. at 4-5. When an

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applicant seeks asylum as a member of a particular social group, the applicant "must establish that the group is (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 M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014). If the respondent fails to establish a cognizable particular social group, the "immigration judge or Board need not examine the remaining elements of the asylum claim." *Matter of A-B-*, 27 I&N Dec. at 340. In reviewing de novo whether the respondent has articulated a cognizable particular social group under the Act, the Board should, for the reasons stated below, reverse the Immigration Judge's finding and deny the respondent's asylum application. *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. at 191 (BIA 2018) (citing *Matter of W-G-R-*, 26 I&N Dec. at 209-10 (BIA 2014)).

A. The Respondent's Group Lacks Common Immutable Characteristics.

An immutable characteristic is one "that the members either cannot change, or should not be required to change because it is so fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 201 (BIA 1985).

The respondent's group as articulated is not characterized by common immutable characteristics. The Board found in *Matter of Acosta* that because that respondent's group was defined by characteristics that the respondent had the power to change to avoid persecution, the harm he feared was not on account of his membership in a particular social group. *Id*. at 234. In *Acosta*, "[t]he issue of immutability was dispositive." *Matter of W-G-R-*, 26 I&N Dec. at 213. In this case, the respondent's characteristic of "in the Goma province," is not an immutable characteristic. The respondent can change the province in the DRC in which he lives, and such

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characteristic is not so fundamental to his "individual identit[y] or conscience" that he should not be required to change it. *Matter of Acosta*, 19 I&N Dec. at 233.

The Immigration Judge clearly erred in finding that the reference to "Goma province" "is primarily historical and cannot be changed—that is, *Respondent was from that province*." I.J. Dec. at 5, Note 1 (emphasis added). The record is void of evidence to establish that the respondent is "from" the Goma province. The respondent testified that he did not speak Swahili, the language spoken in the Goma province, only lived there for a few years after moving there when he was twenty-nine years old, had never previously visited the area, and did not have employment there. Tr. at 55, 56-57, 68, 73-74. No contrary evidence, outside of simply being present in the Goma province for a certain period, suggests that he has any ties that would lead to the conclusion he was "from" that province. In fact, the evidence shows that the respondent is "from" Kinshasa, his place of birth and residence for the first twenty-nine years of his life.

Moreover, the Immigration Judge erred in looking to the respondent's circumstances of being from the Goma province, rather than the evidence in the record, to determine whether the group, as defined by the respondent, is comprised of common immutable characteristics. Indeed, the Immigration Judge's finding ignores the plain language of the respondent's asserted group. The respondent articulated his group as those non-Tutsi Congolese men *in* the Goma province, not *from* the Goma province, an important distinction as *the respondent's* articulation of the particular social group is geographically limited in scope and lacks any historical context or inability to change. *See* Respondent's Brief in Support of Remand Hearing, March 16, 2018, at 18. In fact, the respondent testified at his first individual hearing on July 31, 2017, that he moved from Kinshasa to Goma in 2011, confirming that his physical location within the DRC is not immutable. Tr. at 54. Thus, the Immigration Judge clearly erred in finding that the respondent's

(b)(6); (b)(7)(C)

particular social group is comprised of common immutable characteristics, and as the issue of immutability is dispositive, the Immigration Judge erred in granting the respondent's application for asylum. *Matter of W-G-R-*, 26 I&N Dec. at 213.

B. The Respondent's Group Lacks Particularity

As to particularity, the "terms used to describe the group [must] have commonly accepted definitions in the society of which the group is a part." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2008). The group must have "discrete and [] definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)).

The respondent also failed to articulate his particular social group such that it has defined boundaries; therefore, it lacks particularity. More specifically, the respondent's particular social group—"non-Tutsi Congolese men in the Goma province"—fails to describe "a discrete class of persons." *Matter of W-G-R-*, 26 I&N Dec. at 214. The main characteristic of the respondent's group is that it is defined by the "non-inclusion in an opposing social group." I.J. at 5. That is, the group is defined to include all Congolese men who are not Tutsi who happen to be in Goma for any length of time—an hour, a month, a year, a decade. A group defined in the negative to include all members of society who are not a member of one ethnic group, without evidence to suggest society would recognize such a group as a singular group separate and distinct from the named ethnicity, is not particular or discrete. *See Rivera-Barrientos v. Holder*, 666 F.3d 641, 649 (10th Cir. 2012) ("The essence of the 'particularity requirement, therefore, is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." (quoting *Matter of S-E-G-*, 24 I&N Dec. at 584 (BIA 2008))). Notably, neither the respondent or Immigration

(b)(6); (b)(7)(C)

Judge points to any evidence in the record to support a finding that Congolese society is comprised of a discrete class of people who fall into the "non-Tutsi" category. *See Matter of W-G-R-*, 26 I&N Dec. at 214 (BIA 2014) (observing that in evaluating a group's particularity, it may be necessary to examine the social and cultural context of the relevant country). To further emphasize the amorphous nature of this group, the respondent, a member of Congolese society, testified that he could not discern between Tutsi and non-Tutsi. Tr. at 69. For these reasons, the Immigration Judge's factual findings regarding the particularity requirement are clearly erroneous and the respondent failed to establish a cognizable particular social group.

C. The Respondent's Group Lacks Social Distinction.

To have "social distinction," there must be "evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *W-G-R-*, 26 I&N Dec. at 217. The Board has held that social distinction "considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way." *M-E-V-G-*, 26 I&N Dec. at 238. "In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it." *Id.* The recognition of the group is "determined by the perception of the society in question, rather than by the perception of the persecutor." *Id.* at 242; *see also W-G-R-*, 26 I&N Dec. at 214 (noting there is some degree of overlap between the particularity and social distinction requirements because both take societal context into account).

In determining that the respondent's group is socially distinct, the Immigration Judge relied solely on her finding that the M23 rebels specifically single out and target non-Tutsi males for harm. I.J. at 5. In this case, the record evidence establishes that, in addition to targeting

(b)(6); (b)(7)(C)

males, the M23 rebels also targeted numerous other segments of society to further their criminal objectives. *See* Exh. R-8, Tab C at 179 (referencing the July 2013 Human Rights Watch report that "details numerous abuses committed by M23 fighters, including the following: executing, beating, detaining, or abducting civilians suspected of collaborating with other militias; executing people who refused to surrender money or their children to M23; torturing captured government soldiers; forcing local chiefs and civilians to undergo military and ideological training; and threatening women they had raped with death if they reported the rape or sought medical treatment").

Importantly, "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." *M-E-V-G-*, 26 I&N Dec. at 242. The respondent's evidence, however, lacks any indication that *Congolese society* would perceive the respondent's defined group as socially distinct. *See Matter of A-B-*, 27 I&N Dec. at 340 (stating that it is the respondent's burden establish eligibility for asylum, including presenting facts to establish a cognizable particular social group). There is no evidence in the record to support a finding that this group exists independently of the harm the respondent fears. *See Matter of A-B-*, 27 I&N Dec. at 334 (citing *Matter of M-E-V-G-*, 26 I&N Dec. at 236 n.11; *Matter of W-G-R-*, 26 I&N Dec. at 215).

Therefore, because the respondent failed to articulate a cognizable particular social group on which to base his claim for asylum, the respondent failed to meet his burden of proof. The Immigration Judge thus erred in granting his application for asylum.

II. THE IMMIGRATION JUDGE ERRED IN CONCLUDING THAT THE HARM THE RESPONDENT SUFFERED WAS ON ACCOUNT OF HIS MEMBERSHIP IN A PARTICULAR SOCIAL GROUP, WHERE THE HARM SUFFERED WAS THE RESULT OF GENERAL CIVIL STRIFE.

(b)(6); (b)(7)(C)

The respondent bears the burden of establishing that his life or freedom would be threatened on account of one of the five protected grounds. INA § 241(b)(3)(A); 8 C.F.R. § 1208.16(b). Simply because an individual may belong to a cognizable particular social group does not necessarily mean that any harm inflicted or threatened will be on account of, or because of, such a protected ground. Rather, the requisite nexus must be independently established. *Matter of L-E-A-*, 27 I&N Dec. 40, 43 (BIA 2017). In *L-E-A-*, the Board noted that, "membership in the particular social group must be at least one central reason for the persecutor's treatment of the respondent . . . [it] cannot play a minor role—that is, it cannot be incidental or tangential to another reason for harm." *Id*. at 44 (internal quotation marks and citations omitted) (citing INA § 208(b)(1)(B)(i) and *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 212, 214 (BIA 2007)).

Even if the respondent had defined a cognizable social group, he nevertheless failed to establish a nexus between the harm and his status as a "non-Tutsi Congolese male in the Goma Province." The respondent presented no evidence that M23 intended to harm him because of his membership in his purported social group, i.e. the respondent failed to establish that his membership in a group of non-Tutsi Congolese men in the Goma province would motivate M23 to harm him. The M23 viewed the respondent as a strong person who could work for them. R. Tr. at 43. The respondent testified on direct that the M23 "only take men because men have the strength to work." R. Tr. at 39. There is, however, no indication that the respondent's uncle, whom the respondent believed to be "60-something," was ever targeted by the M23, though he is also a non-Tutsi Congolese man in the Goma province. Tr. at 59. Furthermore, while the respondent testified that the M23 are only interested in taking men, the record evidence establishes that the harm they inflicted on Congolese society in eastern DRC was indiscriminate and not directed toward any one group in particular. *See* Exhibit R-8, Tab C at 162 ("M23 rebels

(b)(6); (b)(7)(C)

have summarily executed at least 44 people and raped at least 61 women and girls since March 2013 in eastern Democratic Republic of Congo."). Indeed, M23's motivation for harming members of Congolese society in the eastern DRC was to prevent cooperation with competing militias, increase their ranks, earn money to support their criminal objectives, and protect their areas of control. *See id.*, Tab C at 179-80.

The evidence in the record establishes that the harm the respondent purportedly suffered and fears from the M23 was indiscriminate and undermines the conclusion that there is a nexus to his membership in a particular social group. *See Matter of M-E-V-G-*, 26 I&N Dec. at 250. The respondent's experience in the DRC is that of widespread violence and civil strife and there is no evidence that the respondent was singled out on account of a protected ground. *See Matter of Sanchez & Escobar*, 19 I&N Dec. 276 (1985) ("[G]enerally harsh conditions shared by many others in a country and the harm rising out of civil strife did not amount to 'persecution' within the meaning of our law."). Therefore, the Immigration Judge erred by finding the respondent met his burden to establish his harm was on account of a protected ground.

III. THE IMMIGRATION JUDGE ERRED IN FINDING THAT THE RECORD WAS SUFFICIENT TO FIND THAT THE RESPONDENT ARTICULATED A COGNIZABLE PARTICULAR SOCIAL GROUP, WHERE THE RESPONDENT IDENTIFIED HIS PROPOSED GROUP FOR THE FIRST TIME IN HIS CLOSING BRIEF.

The Board has recognized that the inquiry into a proposed particular social group is "inherently factual." *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. at 191. Whether a particular social group is cognizable is ultimately a question of law, but it must be based upon factual findings subject to review for clear error on appeal; it is "a fact-based inquiry made on a case-by-case basis." *Id.* (*citing Matter of L-E-A-*, 27 I&N at 42; *Matter of W-G-R-*, 26 I&N Dec. at 209-210). As such, it is critical that the proceedings "provide the parties with an opportunity to

(b)(6); (b)(7)(C)

develop the record by presenting evidence and testimony before an Immigration Judge," and the respondent should not be permitted to change the definition of the claimed particular social groups "midstream" or to offer a newly-articulated group on appeal. *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. at 190-92. Thus, the respondent "must clearly indicate, *on the record* and before the immigration judge, the exact delineation of any proposed particular social group." *Matter of A-B-*, 27 I&N Dec. at 334 (citing *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. at 190-91) (emphasis added). Critically, the record must be "fully developed." *Id.*

Considering these holdings, the Immigration Judge erred in making a finding on a particular social group that was presented in a closing statement after the case was remanded from the Board and all testimony had been taken, failing to develop the factual record and disregarding the principles articulated in *Matter of W-Y-C- & H-O-B-*, *supra*. The Department elicited testimony and developed a factual record exclusively based on the respondent's claim that he was harmed on account of his political opinion and other indicia of other protected grounds through testimony. *See* Exh. 2 at 5 (identifying political opinion as the only ground on which the respondent sought asylum and withholding of removal). The respondent asserted for the first time in a closing brief before the Immigration Judge, after his initial merits hearing and appeal to the Board and after his remanded proceedings, that he was harmed on account of his membership in a particular social group. *See* Respondent's Brief in Support of Remand Hearing, March 16, 2018. For the respondent to define his particular social group in a brief submitted to the Immigration Judge after the close of evidence is indistinguishable in effect from the respondent submitting a newly-defined proposed group on appeal; in either posture, the factual record is inadequate for the adjudicator to find a cognizable particular social group. Thus, should the Board find that the respondent's proposed particular social group not necessarily fail as a

(b)(6); (b)(7)(C)

matter of law, the record should be remanded for the immigration judge to develop the factual record with regard to the respondent's proposed particular social group.

IV. THE IMMIGRATION JUDGE ERRED IN FINDING THAT THE DEPARTMENT DID NOT MEET ITS BURDEN TO ESTABLISH THAT THE RESPONDENT COULD RELOCATE WITHIN THE DRC AND THAT RELOCATION WOULD BE REASONABLE.

Where the Immigration Judge finds that a respondent has suffered past persecution, she nevertheless "shall deny the asylum application of an alien … if any of the following is found by a preponderance of the evidence: … (B) The applicant could avoid future persecution by relocating to another party of the applicant's country of nationality … and under all the circumstances, it would be reasonable to expect the applicant to do so." 8 C.F.R. § 1208.13(b)(1)(i). The burden of proof lies with the Department. 8 C.F.R. §1208.13(b)(3)(ii). For the first prong, the Department must show that there is "an area of the [respondent's] country where he or she has no well-founded fear of persecution." *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 33 (BIA 2012) (citations omitted). When considering the second prong, whether internal relocation would be reasonable, the court may consider, *inter alia*, "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." 8 C.F.R. § 1208.13(b)(3); *accord Matter of M-Z-M-R-*, 26 I&N Dec. at 34-35. These factors "may, or may not, be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.13(b)(3).

The Immigration Judge's conclusion that the respondent would face persecution throughout the DRC is erroneous. I.J. at 8. First, the evidence establishes that the respondent

could relocate to his home city of Kinshasa and live without fear of persecution. The respondent testified that he did not return to Kinshasa after he escaped the M23 because it was too far for him to travel—a four-day bus ride—not because he feared persecution there. Tr. at 47-48, 55. The Immigration Judge erroneously relied on evidence that the respondent submitted showing factions of M23 have, in certain circumstances, been used to suppress political speech in areas outside of the Goma province. *See* Exh. R-8. The record establishes that these acts, however, are isolated and limited in scope for suppressing political speech, and not for the purpose of targeting any members of a particular social group. *See id.* at 64 (noting that M23 were deployed in response to political protests to "protect Kabila and help quash the anti-Kabila protests."); *id.* at 71 (recommending that the government of the DRC "take all necessary measures to stop the unlawful and excessive use of force by the security forces and other forms of repression against protesters and the political opposition"). As the respondent holds no political opinion that would cause him to participate in expressing such opinion and thus fear reprisal from the DRC government, the evidence establishes that he could relocate back to his home city of Kinshasa without fear of persecution.

The Immigration Judge also erroneously found that even assuming the respondent could avoid persecution by relocating, it would be unreasonable under the circumstances for him to do so. I.J. at 8. The Immigration Judge found that Kinshasa was an "unfamiliar region" to the respondent, even though that is where the respondent was born and spent the first twenty-nine years of his life, only moving to Goma in 2011 after his father died. *Id.*; Tr. at 54. Furthermore, the Immigration Judge found that the respondent does not have a "close relation" to his family members who live in Kinshasa, even though he listed his cousins, (b)(6); (b)(7)(C), on his application for asylum as his *siblings* because he views them as his siblings. *Id.*; Tr. at 60. These

(b)(6); (b)(7)(C)

two cousins still live in Kinshasa. Tr. at 53. The respondent's relocation to Kinshasa would be reasonable as he could safely resume his life in a familiar city with family members close enough to be considered siblings.

The record evidence is sufficient to meet the Department's burden to establish that the respondent could reasonably relocate to Kinshasa where he could live without fear of persecution. The Immigration Judge's contrary findings are clearly erroneous and the Board should vacate the Immigration Judge's grant of asylum.

CONCLUSION

The Immigration Judge erred in finding that "non-Tutsi Congolese men in the Goma province" was a cognizable particular social group. The evidence establishes that the purported social group does not have immutable characteristics, and is not particular or socially distinct. The Immigration Judge further erred in concluding that, even if the social group is cognizable, that the respondent was harmed on account of his membership in such group. Furthermore, the Immigration Judge erred in finding that the record was sufficient to find the particular social group was cognizable, when the respondent articulated the group in his closing brief, after all the evidence and testimony was submitted. Finally, even assuming that the respondent was harmed on account of a protected ground, the Immigration Judge erred in finding that the Department failed to meet its burden to establish that the respondent could relocate within the DRC and that any such relocation would be reasonable.

The Department respectfully requests that the Board reverse and vacate the decision of the Immigration Judge granting asylum, deny the respondent's application for withholding of removal under INA § 241(b)(3), and remand the case to the Immigration Judge for the sole

purpose to determine the respondent's eligibility for relief under withholding of removal under the CAT. Should the Board determine that the respondent's claim for asylum does not fail as a matter of law, the Board should remand the case to the immigration judge to develop the factual record with regard to the respondent's proposed particular social group.

DATE: July__, 2018

Respectfully submitted,

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PROOF OF SERVICE

On Month Day, 2018, I, (b)(6); (b)(7)(C) Assistant Chief Counsel, mailed or delivered a copy of this Department of Homeland Security Brief and any attached pages to (b)(6); (b)(7)(C) and (b)(6); (b)(7)(C) at the following address: Santa Fe Dreamers Project, P.O. Box 8009, Santa Fe, NM, 8009 by placing said copy in an envelope and placing said envelope in my office's receptacle designated for official "out-going" regular mail, said envelope having been addressed to the name and address indicated.

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NON-DETAINED

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

In The Matter Of: (b)(6); (b)(7)(C)	File Nos. (b)(6); (b)(7)(C)
In Removal Proceedings	

DEPARTMENT OF HOMELAND SECURITY
BRIEF ON APPEAL

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INTRODUCTION

The respondent failed to establish past persecution, failed to demonstrate a nexus between the harm she suffered and a protected ground, failed to demonstrate that internal relocation is unreasonable, and failed to establish that she merited relief from removal as a matter of discretion. Nevertheless, the Immigration Judge found she met her burden of proof and granted asylum. The Department of Homeland Security (Department) appeals the Immigration Judge's March 8, 2019 decision granting the lead respondent (respondent) asylum pursuant to section 208 of the Immigration and Nationality Act (Act or INA), which also conferred asylum to the two riding respondents as derivatives. The Department asks the Board of Immigration Appeals (Board) to find that the respondent has not met her burden for asylum and reverse the decision of the Immigration Judge. As the respondent cannot meet her burden for asylum under section 208 of the Act, she similarly cannot meet the higher burden of proof for a grant of withholding removal under INA § 241(b)(3), so the Board should also find that her application for withholding of removal under the Act must be denied. Lastly, the Board should remand the matter to the Immigration Judge to consider protection pursuant to the regulations implementing the United States government's obligations under Article 3 of the United Nations Convention Against Torture (CAT).

The Department respectfully requests three-member panel review due to the need to review a decision by an Immigration Judge that is not in conformity with the law or with applicable precedents and the need to review a clearly erroneous factual determination. *See* 8 C.F.R. § 1003.1(e)(6)(iii), (v) (2016).

.ISSUES PRESENTED

I. Did the Immigration Judge err in concluding that the respondent established past persecution, as any harm inflicted on her in the past was committed by a private actor and she failed to establish that the government of Mexico was unwilling or unable to protect her?

II. Did the Immigration Judge erred in find that the respondent established a nexus to a protected ground, as the respondent failed to establish that the harm Omar inflicted was on account of the respondent's membership in a particular social group?

III. Did the Immigration Judge err in finding the respondent established past persecution, she further erred in shifting the burden to the Department on internal relocation and in finding that the respondent could not reasonably relocate within Mexico?

IV. Did the Immigration Judge erred in finding that the respondent met her burden of demonstrating that a favorable exercise of discretion should be granted**?**

STANDARD OF REVIEW

The Board reviews findings of fact, including "predictive findings of what may or may not occur in the future" for clear error. *Matter of Z-Z-O-*, 26 I&N Dec. 586, 587, 590 (BIA 2015); 8 C.F.R. § 1003.1(d)(3)(i). On the other hand, the Board reviews de novo "questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges." *Z-Z-O-*, 26 I&N Dec. at 588; 8 C.F.R. § 1003.1(d)(3)(ii). This de novo review includes "whether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal…." *Z-Z-O-*, 26 I&N Dec. at 591. Whether a respondent has met her burden of proof is a question of law. *Matter of Vides-Casanova*, 26 I&N Dec. 494, 498 (BIA 2015). Whether the facts, as found, establish persecution "on account of" a protected ground is a legal issue reviewed by the Board de novo. *Matter of S-E-G-*, 24 I&N Dec. 579, 588 n.5 (BIA 2008). A persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by the Board for clear error. *See Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011). Whether the applicant can internally relocate within Mexico is a mixed question of fact and law. *See Matter*

of M-Z-M-R-, 26 I&N Dec. 28, 36 (BIA 2012). Whether an individual merits a favorable exercise of discretion is subject to de novo review.

SUMMARY OF THE ARGUMENT

In granting the respondent asylum pursuant to INA § 208, which also conferred asylum to the two riding respondents as derivatives, the Immigration Judge erred in finding the facts established by the respondent met her burden of proof for protective relief.[1] Specifically, the respondent failed to establish past persecution, failed to demonstrate a nexus between the harm she suffered and a protected ground, and failed to establish that the government of Mexico was and is unwilling or unable to protect her. Given that the Immigration Judge erred in finding past persecution, the Immigration Judge further erred in shifting the burden to the Department regarding internal relocation. Additionally, the respondent failed to establish that she merited relief from removal as a matter of discretion.

STATEMENT OF FACTS

There are three respondents in this matter, a mother and her two minor children. *See* Tr. at 14; Exh. 5 (I-589). The respondent was 32 years old and unmarried at the time of the hearing. Tr. at 15, 21. Her mother is a lawful permanent resident. Tr. at 24. Her father is deceased; he was a citizen of Mexico. Tr. at 24. The respondent was born and grew up in Chihuahua, Mexico. Tr. at 22. In 2001, she entered the United States, purportedly with a visa.[2] Tr. at 22. She travelled in

[1] As the respondent failed to meet the lower burden of proof required for asylum, it follows that she also failed to satisfy the clear probability standard to establish eligibility for withholding of removal. *See INS v. Stevic*, 467 U.S. 407 (1984); *see also* 8 C.F.R. §§ 1208.13, 1208.16(b) (2008). Furthermore, she failed to prove that it is more likely than not that she will be tortured if she is returned to Mexico. *See* 8 C.F.R. § 1208.16(c)(2). The respondent has not provided evidence that she was tortured in Mexico or that a Government official either seeks to torture her or will acquiesce in her torture if she is returned to that country. *See* 8 C.F.R. § 1208.18(a)(1) (2008); *see also Matter of J-R-G-P-*, 27 I&N Dec. 482 (BIA 2018); *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000).

[2] The respondent neglected to include this initial entry on her Application for Asylum and Withholding of Removal. *See* Exh. 5 at 1. She claimed that she was in possession of a valid multiple entry visa, which she used to travel to the United States – she would enter the United States, remain until her authorized stay expired, then leave and return (facts which, if true, would have invalidated any nonimmigrant visa, as she was not a bona fide nonimmigrant). Tr.

and out of the United States, using this visa, until 2006; she attended and graduated from high school in Colorado. Tr. at 22-23. She gave birth to two children in the United States. *See* Tr. at 21-22. The respondent claimed that, when she was in the United States, she was on a valid multiple entry visa. *See* Tr. at 22-23. Her mother is a lawful permanent resident. *See* Tr. at 24. Her father is deceased; he was a citizen of Mexico. *See* Tr. at 24. After the respondent graduated high school, she returned to Mexico, where she attended college online for six months. Tr. at 26. She stopped attending online college when her son became very ill at the age of 6 or 8 months; she stated that she could no longer afford to pay her tuition. Tr. at 26; I.J. at 2.

The respondent has four children— the two in the instant removal proceedings with her and two born in the United States. Tr. at 21-22. (b)(6); (b)(7)(C) is the father of the respondent's children (b)(6); (b)(7)(C), both born in the United States. Tr. at 26. The father of her daughters is (b)(6); (b)(7)(C) Tr. at 26. Jesus resides in Mexico. Tr. at 16.

In 2008, two years after she returned to Mexico from the United States, the respondent met (b)(6); and began a romantic relationship with him; they began living together on March 1, 2009. Tr. at 27. The respondent described (b)(6); at that time as respectful and kind and stated that they had a good relationship. Tr. at 27. Shortly after they began living together, the respondent learned that she was pregnant with their daughter, (b)(6); Tr. at 27. The respondent testified that (b)(6); cared for her well and was glad that she was pregnant; suggesting that (b)(6); was glad they were having a daughter, she stated, "It was his first girl." Tr. at 27. The respondent did not continue with college as she was pregnant, though she also notes that (b)(6); "mentioned" it was no longer necessary for her to attend school. Tr. at 27.

After their first daughter, (b)(6); was born on (b)(6); (b)(7)(C) the respondent and (b)(6); lived for some time with the respondent's parents.[3] Tr. at 27. They moved back to their

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at 22-23.

own home, but three days later, that home burned down; they then returned to the respondent's parents' home. *Id.* After neighbors helped them rebuild their own house, (b)(6); asked the respondent "in an angry way" to return to that house. *Id.* The respondent did not want to reside in that house, however, because it "was very uncomfortable." Tr. at 28. The respondent testified that (b)(6); would get angry because the respondent's parents would give them things that he himself wanted to provide but could not afford. *Id*.

When their daughter (b)(6) was approximately nine months old, the respondent was physically assaulted by (b)(6); for the first time. Tr. at 28. During this incident, a female neighbor attempted to end the assault, asking (b)(6); to stop, but he would not. The respondent asked the neighbor to take the baby and to call (b)(6); mother – "maybe call his mother over because she might be able to calm him down." Tr. at 28-29. (b)(6); mother arrived and was able to stop the assault by telling (b)(6); that he was not only hurting the respondent, but that he was hurting her (his mother) as well. Tr. at 29. The respondent stated that she called the police when (b)(6); assaulted her – "Every time I called them they'd come." Tr. at 30. However, by the time the police would arrive, (b)(6); would be gone, so the police would tell the respondent to "call us when he's back." *Id.* The respondent testified that they police would never return.

After this incident, in July of 2011, the respondent took (b)(6); and moved to another town, Meoqui, so that (b)(6); could not find her.[4] Tr. at 30-31. She lived there for three months with an uncle, working in the town. (b)(6); knew that she had family in Meoqui, however, so was able to find the respondent, in part because he located a picture of her on one of her co-workers social

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[3] The respondent's Form I-589 dated December 9, 2015, indicates, however, that she lived at two addresses in Chihuahua, Chihuahua, between June of 2006 and January of 2015. Exh. 5

[4] Meoqui is a municipality in the Mexican state of Chihuahua. It is approximately 75 kilometers or 46.6 miles from the city of Chihuahua, Chihuahua. *See* https://www.google.com/maps/dir/Chihuahua,+Mexico/Pedro+Meoqui,+Chihuahua,+Mexico/@28.4508357,-106.0559119,10z/data=!3m1!4b1!4m14!4m13!1m5!1m1!1s0x86ea449d5d484033:0xb7f1a7a706dd1d7b!2m2!1d-106.0691004!2d28.6329957!1m5!1m1!1s0x86eb1233c0b17d69:0xe2cc43a58ffb6c04!2m2!1d-105.4808081!2d28.2697374!3e0?hl=en-US.

media; he and his brother and brother-in-law assaulted the respondent's brother and threatened the respondent's family, so she and the child returned to Chihuahua with him. Tr. at 31.

Sometime thereafter ("a few weeks"), the respondent's father became ill. The respondent was working at a textile factory at the time. Tr. at 32. She went to care for her father, but (b)(6); mother contacted her and advised her to return home, to avoid angering (b)(6); *Id.* The respondent's father died on December 15, 2011. The respondent testified that (b)(6) would not let her "get around" by herself, and prevented her from attending funeral services when her father died, because he could not get time off from his work; notably, however, (b)(6) worked as a truck driver and travelled often, according to the respondent's testimony. Tr. at 31, 52; Exh. 13 at 1. After the respondent's father died, she, (b)(6); , and (b)(6) moved to Meoqui. Tr. at 32. Around the time of her father's death, the respondent found out she was pregnant. Tr. at 33. When the respondent told her mother about this pregnancy, her mother told her that she did not have to live with (b)(6); if she did not want to. Tr. at 33.

Though she had previously stated that she was prevented by (b)(6); from attending funeral services for her father, the respondent testified that a month after his death, she and her baby were with her family celebrating a mass in her father's memory. Tr. at 33. The respondent's testimony suggests that, contrary to the respondent's assertions that (b)(6); never allowed her to go anywhere without him, the respondent was able to go to mass with her family in January of 2012; the respondent's written statement indicates that (b)(6); did not know where she had been. Exh. 13 at 2. At this mass, the respondent asked her mother if she could borrow her mother's car, so she could go get her things from the house she shared with (b)(6); on the outskirts of Chihuahua. Tr. at 33-34. Instead of loaning her the car, the respondent's mother went with her to the house. Tr. at 33. When they arrived, (b)(6); his aunt, and his brother were already there.

(b)(6); told the respondent she was not leaving, pushed her down, took the baby from the respondent's mother, and fled two blocks away to his brother's house. Tr. at 34. The respondent's mother called the police; two local officers arrived, one of whom was (b)(6); cousin. Tr. at 34-35. Though these officers were not initially helpful, the respondent's mother threatened to call the capital police from Chihuahua; this threat induced the officers on the scene to convince (b)(6); to return the baby to the respondent. Tr. at 35; Exh. 13 at 2. The respondent and the baby went to the respondent's mother's house after this incident, where the respondent remained for three months, until her mother left for the United States with two of the respondent's children, the respondent went into the hospital due to complications with her pregnancy, and (b)(6 went to live with (b)(6); mother. Tr. at 35-36.

The respondent stated that she was working but in and out of the hospital due to a blood clot in her uterus she claims was caused when (b)(6); pushed her and she fell.[5] Tr. at 36. She claims she spent approximately five months during her pregnancy; her second daughter was born on (b)(6); (b)(7)(C) *Id.* The respondent did not testify as to where she was living during this time; when asked if she had contact with (b)(6) during this time (January to August 2012), she replied, "No, not really. It was very little." *Id.* She did have contact, however, with (b)(6); mother, who was caring for the respondent's older daughter. *Id.*

After their second daughter was born on (b)(6); (b)(7)(C) (b)(6); 'demanded" that the respondent return to live with him, because "he needed to live with [h]is daughters." Tr. at 37. So, the respondent returned to (b)(6); She testified that everything was better until the beginning of the following year, when (b)(6); beat her again[6] and she ran away again, this time to live with an aunt in Juarez.[7] (b)(6); found the respondent and the children at a shopping mall[8] in Juarez

[5] The respondent did not provide any medical records to corroborate these claims, even though such records should have been available to her.

about a week later and made them return back home. Tr. at 37-38. The respondent stated things were better for about a week, until she discovered messages (b)(6); had received from other women – messages of which (b)(6); was proud, because they made him appear to be a "ladies' man." Tr. at 38. The respondent confronted (b)(6); and he stopped communicating with this woman, it seems, until December of 2014 or January of 2015. Tr. at 38.[9]

In January of 2015, the respondent again confronted (b)(6); about his involvement with another woman, after finding messages on (b)(6); phone while going to a party. Tr. at 39. The respondent told (b)(6); that she was finished pretending they were a happy family and that she was leaving. (b)(6); in turn told her she was not going to leave, that he would not leave her alone "because his daughters are not going to be away from him." Tr. at 40. (b)(6) assaulted the respondent again, stopping when (b)(6) woke up, grabbed his hand, and "took him off" of the respondent. Tr. at 40. The respondent ran from the house, but (b)(6); caught her; she managed to escape from him again and ran with two of her children to a neighbor's house. Tr. at 41. The neighbor allowed the respondent and the children to stay at the house. The respondent was afraid that (b)(6); would come and try to take (b)(6); who was with her, away again, as he had done in the past, but the neighbors intervened and eventually one of the neighbors brought the respondent's baby to her. Tr. at 41. The respondent stayed at the neighbor's house "for a while because I knew he had to go to a small town." *Id.* Once (b)(6); left their house to go to this small town, the respondent returned to the house to try to locate her cell phone; she could not, so she took his. Tr.

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[7] Juarez is a city in the state of Chihuahua, approximately four hours by car from the city of Chihuahua. Tr. at 38.
[8] The respondent's written statement says that they were at a grocery store. Exh. 13 at 2.
[9] The respondent did not testify about much that happened between January of 2013, when the incidents at the shopping mall in Juarez and with the messages, presumably at their home in Chihuahua, seem to have occurred and December of 2014 or January of 2015, almost two years later. She stated that during 2014, she worked at a telepharmacy in Chihuahua, but that Omar, who drove her to work, regularly and intentionally would make her late for work, so she was "forced to quit." Tr. at 50-51.

at 41-42. The respondent then travelled by either taxi or bus to Juarez with her daughter (b)(6); Tr. at 42.

Upon arrival at Juarez, the respondent's aunt met the respondent. They went to make a police report, but the respondent claims "my report was never processed because they lacked the personnel." Tr. at 43. The respondent testified that the police advised her to return the next morning for examination and evaluation by a doctor and a psychologist.[10] *Id.* The respondent did not, however, return to finalize matters with the police – instead, she went with both daughters to the port of entry to enter the United States, on January 12, 2015. *Id.*

The respondent claimed that since her arrival in the United States, she and her family members have been threatened by (b)(6); through various means, including on social media. Tr. at 47 *et seq*; Exh. 13. The respondent stated that (b)(6); is "enraged that I have taken the daughters – the girls away from him." Tr. at 56.

The respondent's mother testified in support of the respondents' case. She testified that (b)(6); assaulted her when she was with the respondent picking up the respondent's clothing. Tr. at 65. (b)(6); cousin, who is a police officer, told (b)(6); to return the respondent's daughter to the respondent and he did. Tr. at 65, 67. The respondent's mother testified that the respondent made police reports many times. Tr. at 65. She did not see the police respond to the respondent's complaints. Tr. at 65. However, she confirmed that her own threat to contact the Chihuahua police was compelling. Tr. at 66.

The respondent testified very briefly about an "incident" – "a huge mistake" – in which she left her children alone "for some time" and at least one of them was found outside without shoes or a jacket. Tr. at 54-55. On September 28, 2018, the respondent was convicted of Wrongs

[10] In a slightly different account, the respondent indicated in her written statement that her aunt took her to a domestic violence shelter, where she was inexplicably told to come back the next day. Exh. 13 at 3.

to Minors pursuant to Denver Revised Municipal Code section 34-46 for injuring or endangering a child. *See* Exh. 13 at 170-173. She was sentenced to a twelve-month deferred judgement and ordered to attend parenting classes. The respondent did not provide a copy of the police report or any other documentation to corroborate her version of the events.

ARGUMENT

I. The Immigration Judge erred in concluding that the respondent established past persecution, as any harm inflicted on her in the past was committed by a private actor and she failed to establish that the government of Mexico was unwilling or unable to protect her.

To establish past persecution, the respondent must not only prove a sufficiently serious level of harm, but also, as pertinent here, that the harm was inflicted by "persons or an organization that the government was unable or unwilling to control." *See, e.g., Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The Immigration Judge found that the respondent "suffered harm at the hands of her domestic partner." I.J. at 15. While acknowledging the applicable case law and the respondent's resulting high burden, the Immigration Judge nevertheless found that the respondent met that burden to show that the Mexican government was unwilling or unable to control the respondent's former partner. I.J. at 16. This finding was erroneous.

"Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018). The respondent must establish that her government is unwilling or unable to control the perpetrator, which requires the respondent to show more than that the government had "difficulty controlling" the private criminality; rather, the government must have either

"condoned" the criminality or "at least demonstrated a complete helplessness to protect the victims." *Id.* at 337. Simply because a government has not acted on a reported crime, successfully investigated it, or punished the perpetrator, does not necessarily establish an inability or unwillingness to control the crime "any more than it would in the United States." *Id.* at 343-44.

Here, the respondent testified that her husband's cousin was a member of the police, and when he intervened it altered her partner's behavior. *See* Tr. at 65, 67. The record establishes that the local police responded when the respondent contacted them. *See* Tr at. 58. In fact, the police in Juarez requested that the respondent report to their precinct after she filed a report against her former partner, so they could take pictures and conduct a medical and psychological exam; however, the respondent decided to cross the border into the United States rather than engage in the protection and assistance offered by the Mexican government. *See* Tr. at 43, 57. The Immigration Judge erroneously found that the police "only helped her on one occasion" – the time when (b)(6); cousin persuaded (b)(6); to return the baby to the respondent. I.J. at 16. This ignores the respondent's report to the police in Juarez and their request that she return the next day for additional evaluation, an offer that the respondent discarded in favor of going to the port entry. And though finding that (b)(6); cousin acted as he did because the respondent's mother "threatened to involve an external police force," the Immigration Judge erroneously dismissed the importance of this threat and its resulting action, declining to "speculate what a different police force might have done." I.J. at 16. The Immigration Judge cannot, however, decline to consider the evidence before her – she cannot ignore evidence that establishes that the respondent could have effectively availed herself of the protection of the capital police, she

cannot pick one ineffective police department out of the many from which the respondent might have sought assistance and find the respondent has met her burden.

The Immigration Judge excused herself from engaging in speculation about what other available police departments might have done had the respondent sought their assistance by relying heavily on country conditions reports to find that a generic Mexican "police force" is incompetent, lacking in resources, corrupt, and plagued by a culture of machismo. I.J. at 16. Though she briefly gave it lip service, the Immigration Judge failed to recognize adequately the evidence that Mexican law protects domestic violence victims and that the Mexican government offers assistance to such victims. *See* Exh. 6 at 26 (U.S. Department of State Country Report on Human Rights); I.J. at 17. Further, this paints some singular Mexican "police force" with too broad a brush and is insufficient for the respondent to meet her burden. The Juarez police response alone undermines the Immigration Judge's conclusions, as does the fact that the threat of calling the Chihuahua police changed the course of the incident involving (b)(6); police officer cousin. Additionally, incompetence and a lack of resources are not enough to establish that the government is unwilling and unable to protect anyone from crime. *Matter of A-B-*, 27 I&N Dec. at 343; *see also Matter of O-F-A-S-*, 27 I&N Dec. 709, 722-723 (BIA 2019). That (b)(6); may remain unpunished is not enough for the respondent to meet her burden – "perfect protection" is not required. *Matter of A-B-*, 27 I&N Dec. at 338, 343. The Immigration Judge's conclusion that the government of Mexico was and is unwilling or unable to protect the respondent was erroneous.

II. The Immigration Judge erred in find that the respondent established a nexus to a protected ground, as the respondent failed to establish that the harm (b)(6); inflicted was on account of the respondent's membership in a particular social group.

Even if the respondent suffered past harm, the Immigration Judge erred in finding that the respondent met her burden to establish that she was singled out for such harm because of her membership in the particular social group of "Mexican women."[11] To demonstrate that harm was "on account of" a protected ground, an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)).

As recently noted by the Attorney General in determining whether an individual asserting "Salvadoran female" as the basis for the inflicted harm, "Even if an applicant is a member of a cognizable particular social group and has suffered persecution, an asylum claim should be denied if the harm inflicted or threatened by the persecutor is not 'on account of' the alien's membership in that group. That requirement is especially important to scrutinize when, as here,

[11] The Board need not address whether "Mexican women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds as asserted in this appeal. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach). The respondent proposed three other particular social groups before the Immigration Judge: "Mexican mothers," "Mexican women or mothers unable to leave domestic relationships," and "Mexican women who believe in women's rights." The Immigration Judge found that none of these three proposed groups was cognizable. I.J. at 13-14. The Department concurs with the Immigration Judge's holdings that the respondent's three additional proposed particular social groups are not cognizable. The respondents did not file an appeal to challenge the Immigration Judge's holdings with regard to those three groups, so those holdings are final and those issues are not before the Board.

the asserted particular social group encompasses millions of Salvadorans." *Matter of A-C-A-A-*, 28 I&N Dec. 84, 92 (A.G. 2020).[12] The Attorney General emphasized that "if the persecutor has neither targeted nor manifested any animus toward any member of the particular social group other than the applicant, the applicant may not satisfy the nexus requirement." *Id.* In so finding, the Attorney General noted the Board's 1999 decision of *Matter or R-A-*, 22 I&N Dec. 906 (BIA 1999), in which the Board stated that the harm was not inflicted because the alien "was a member of some broader collection of women"…whom the perpetrator "believed warranted the infliction of harm." *Matter of R-A-*, 22 I&N Dec. at 921.

The respondent failed to establish a nexus between the group of which she claims to be a member – "Mexican women" – and the harm she suffered. Rather, the respondent established that she was the victim of crimes committed by her former partner that were motivated by the nature of their personal relationship. This fact was underscored by the Immigration Judge, who emphasized and relied on the existence and nature of respondent's personal relationship with her prior partner to find a nexus to the stated particular social group. I.J. at 3. The Immigration Judge erred by finding a nexus to "Mexican women" based on the court's determination that the harm suffered by respondent was because the respondent and her prior partner shared a home together, had defined gender roles vis-à-vis each other, and that the respondent was harmed "whenever she attempted to leave" the home.[13] I.J. at 15. This reasoning does not bolster the Immigration Judge's finding that the respondent was harmed because she is a "Mexican

[12] The Department acknowledges that the Attorney General rendered this decision well after the Immigration Judge rendered hers in the respondents' case; however the analysis is relevant to this appeal, particularly as the Attorney General references the Board's decision in *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999), which was issued far in advance of the Immigration Judge's decision.

[13] This finding that the respondent was harmed "whenever she attempted to leave" the home was clearly erroneous, as there were times when she stated she left and was not harmed, such as when she went to work or when she went to the mass with her mother after her father's death (an occasion where she indicated in her written statement that Omar did not know where she had even been).

woman," but rather supports a finding that she was harmed solely because of her relationship with her prior partner.

The respondent provided no evidence that her former partner was motivated by any other reason than the nature of their relationship, or that he was generally hostile to "Mexican women" as a group or targeted any other Mexican woman for harm. *Matter of A-B-*, 27 I&N Dec. at 339; *Matter of A-C-A-A-*, 28 I&N Dec. at 92. For example, the respondent testified to interactions between her former partner and the respondent's daughters, his own mother, other female relatives, and a female neighbor during and after the time he was in a relationship with the respondent that did not involve violence or the threat of violence towards them. I.J. at 3-4. The respondent's testimony demonstrates that her former partner held no generalized animosity towards the other "Mexican women" in his life. In fact, her testimony demonstrates instead that her former partner deferred to other "Mexican women," including his mother, who successfully intervened on the respondent's behalf on at least one occasion, and her female neighbor, who also interacted with the respondent's former partner during a domestic incident and was not threatened or harmed in any manner. Tr. at 28. The evidence further demonstrates that the respondent's former partner was happy to have daughters and was angered by the respondent's attempts to take his daughters away from him; there is certainly no evidence that he had any animosity toward his daughters.

As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Matter of A-B-*, 27 I&N Dec. at 338-39. To be sure, the respondent was the victim of crimes committed by her former partner, but those relationship-based crimes are insufficient to establish eligibility for asylum. Because the respondent failed to

establish that her former partner was motivated by any other reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the stated particular social group of "Mexican women."

III. Because the Immigration Judge erred in finding the respondent established past persecution, she further erred in shifting the burden to the Department on internal relocation and in finding that the respondent could not reasonably relocate within Mexico.

As the Immigration Judge erred in finding the respondent established past persecution, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the respondent bears the burden of establishing that internal relocation within Mexico was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored." (citing 8 C.F.R. § 1208.13(b)(3)(i))). Even if the Department bears the burden of proof on this issue, the Immigration Judge erred in finding internal relocation unreasonable. I.J. at 19. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *Matter of M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id.*

The Immigration Judge held that respondent faced a threat of persecution anywhere in Mexico as a Mexican woman even though her instances of harm were perpetrated by a single actor. This finding is contrary to the U.S. Department of State, Country Reports on Human Rights Practices for 2017 for Mexico submitted into evidence by the Department. The

Immigration Judge further found that internal relocation would be unreasonable because the respondent only has a high school education, has never had a successful job in Mexico, and would not have family to assist with childcare. I.J. at 19. In reaching this decision, the Immigration Judge did not consider the facts that the respondent was educated through high school in the United States, obtained at least some collegiate education in Mexico, and for a time did have jobs in Mexico; additionally, the father of two of the respondent's children lives in Mexico. Tr. at 22-26, 51. Having challenges in life is not the equivalent of having an unreasonable life. The Immigration Judge additionally relied on the respondent's testimony that her former partner is a truck driver, and therefore travels extensively[14], but there is no evidence demonstrating that he has any reach beyond the locations the respondent identified within the state of Chihuahua: the city of Chihuahua, the municipality of Meoqui, and the city of Juarez. Simply put, Mexico is a big place. The respondent is not restricted to these three locations in Chihuahua, and there is no evidence to support a finding that the respondent cannot relocate somewhere else in Mexico. The Attorney General noted that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)" and respondent failed to meet her burden of proof on this issue. *Matter of A-B-*, 27 I&N Dec. at 345.

IV. The Immigration Judge erred in finding that the respondent met her burden of demonstrating that a favorable exercise of discretion should be granted.

The Immigration Judge found, without analysis, that the respondent "merits a favorable exercise of discretion." I.J. at 20. In so doing, the Immigration Judge erred in failing to properly consider whether the respondent merits asylum as a matter of discretion. Asylum is a

[14] Of course, his extensive travels during their relationship undermines the Immigration Judge's findings that the respondent's movements were always controlled by him.

discretionary form of relief from removal, and the applicant bears the burden of proving that she merits asylum as a matter of discretion. INA § 208(b)(1); INA § 240(c)(4)(A)(ii); *Matter of A-B,* 27 I&N Dec. at FN 12.

On September 28, 2018, the respondent was convicted of Wrongs to Minors pursuant to Denver Revised Municipal Code section 34-46 for injuring or endangering a child. *See* Exh. 5 at 170-173. She was sentenced to a twelve-month deferred judgement and ordered to attend parenting classes. The respondent testified that she left the children alone for some time and that a neighbor found one of them outside without shoes or a coat. The statute of conviction, as provided by the respondent in Exhibit 13, pages 173-174, criminalizes a variety of harms: endangering the life of a minor; injuring or endangering the health or physical well-being of a minor; punishing or tormenting a minor not in the person's legal care, custody, or control; endangering or impairing the morals of a minor; abandoning a minor; torturing, tormenting, or cruelly punishing a minor; depriving a minor of food, clothing, shelter; injuring a minor unnecessarily; or providing a minor with a weapon or failing to take a weapon from a minor. Given the serious nature of these crimes, the respondent's explanation of her conduct on the day in question leaves much unanswered and serves only to attempt to excuse and minimize her unlawful behaviors, whatever they may have actually been, by asserting she left all the children in the care of the oldest so she could work and go to the grocery store. The Immigration Judge failed to address the respondent's 2018 Denver County Court conviction for Wrongs to Minors, a crime which should be considered in any sufficient discretionary finding, addressing the issue of discretion with one summary sentence, providing no analysis. The Immigration Judge did not properly balance the factors in this case and erred in failing to require the respondent to produce additional information, particularly police reports, with regard to this incident – this is

information that was readily available to the respondent and which she had the burden to produce. Just as an alien produces evidence supporting a favorable exercise of discretion, so must she, who bears the burden, present all available evidence of unfavorable factors. *See generally Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009) (in the context of a cancellation application; an alien has the burden to prove that she satisfies applicable eligibility requirements and merits a favorable exercise of discretion and must provide corroborating evidence requested by the Immigration Judge unless it cannot be reasonably obtained). The Immigration Judge erred in finding that the respondent met her burden of establishing she merits a favorable exercise of discretion.

CONCLUSION

The respondent bears the burden of proof to establish that her life or freedom would be threatened in the country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 1208.16(b). The Immigration Judge erred in finding the respondent met her burden to establish eligibility for asylum pursuant to the Act, because the respondent failed to show that her life or freedom had been threatened in Mexico or would be threatened if removed to Mexico on account of a protected ground, failed to show that the government of Mexico is unwilling or unable to protect her, and failed to show that she merits a favorable exercise of discretion. Because the Immigration Judge erroneously found past persecution, the Immigration Judge erroneously shifted the burden to the Department on internal relocation. Therefore, the Department asks the Board to sustain its appeal, vacate the Immigration Judge's decision granting asylum, and remand the matter to the Immigration Judge to consider protection under CAT.

DATE: October 28, 2020

Respectfully submitted,

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Certificate of Service

I hereby certify that, on October 28, 2020, I served a true copy of this DEPARTMENT OF HOMELAND SECURITY BRIEF ON APPEAL and any attached pages by placing it in the outgoing mail bin as first-class mail, postage prepaid and addressed to:

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NON-DETAINED[1]

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

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No.: (b)(6); (b)(7)(C)
In withholding-only proceedings	)	

DEPARTMENT OF HOMELAND SECURITY
BRIEF ON REMAND

[1] The applicant was removed from the United States on or about August 5, 2019.

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(b)(6); (b)(7)(C)

INTRODUCTION

On January 31, 2019, the Immigration Judge granted the applicant withholding of removal, finding that the violence the applicant suffered at the hands of her former spouse was on account of the applicant's membership in the group "Mexican women who terminate the marriage without the consent of the husband." The Department of Homeland Security (Department) timely appealed the Immigration Judge's decision and, on July 25, 2019, the Board of Immigration Appeals (Board) sustained the Department's appeal and vacated the Immigration Judge's decision. While the applicant did not file an appeal of the Immigration Judge's decision, she did file a petition for review of the Board's decision with the United States Court of Appeals for the Tenth Circuit (Tenth Circuit). *See Rios Bamac v. Barr*, No. 19-9559 (10th Cir. remanded Feb. 6, 2020). On February 6, 2020, the United States government moved to remand the case from the Tenth Circuit to the Board. *Id.*

The Department hereby submits its brief on remand in support of its appeal of the Immigration Judge's decision granting the applicant withholding of removal pursuant to section 241(b)(3) of the Immigration and Nationality Act (INA or Act). On remand, the Board should find that the applicant has waived her opportunity to challenge any aspect of the Immigration Judge's decision and, alternatively, the Board should uphold the Immigration Judge's decision to the extent it rejects the applicant's initial six proposed particular social groups. However, the Board should again reverse the decision of the Immigration Judge granting withholding. The Board should, finally, find that the Immigration Judge correctly denied the applicant's request for protection pursuant to the regulations implementing the United States government's obligation under Article 3 of the United Nations Convention Against Torture (CAT).

(b)(6); (b)(7)(C)

The Department requests that this case be reviewed by a three-member panel given the need to review a decision by an Immigration Judge not in conformity with existing law or applicable precedent, the need to review clearly erroneous factual determinations, and the need to reverse a decision of an Immigration Judge not arising under 8 C.F.R. § 1003.1(e)(5). *See* 8 C.F.R. § 1003.1(e)(6)(iii), (v), (vi).

ISSUES PRESENTED

- Whether the applicant, who did not file a separate appeal and who moved to summarily affirm the Immigration Judge's decision, waived her right to challenge any aspect of the underlying order?

- Whether the applicant failed to show that she was harmed on account of her membership in the particular social group, "Mexican women," where she did not present evidence that her former spouse targeted her in order to overcome her membership in that group?

- Whether the Immigration Judge erred in determining that the applicant's proposed social group, "Mexican women who terminate the marriage without the consent of the husband," was cognizable where the applicant did not present any evidence that the group was recognized throughout Mexican society?

- Whether the Immigration Judge erred in determining that the applicant was harmed on account of her membership in the particular social group, "Mexican women who terminate the marriage without the consent of the husband," where she did not present evidence that her former spouse targeted her in order to overcome her membership in that group?

- Whether the Immigration Judge erred in finding that the government of Mexico was unable or unwilling to protect the applicant, despite the applicant being afforded a civil divorce?

- Whether the Immigration Judge erred in shifting the burden to the Department to show a change in country conditions, despite the applicant not showing past persecution?

STANDARD OF REVIEW

The Board reviews findings of fact, including "predictive findings of what may or may not occur in the future," for clear error. *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015); 8

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C.F.R. § 1003.1(d)(3)(i). The Board reviews de novo "questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges." *Z-Z-O-*, 26 I&N Dec. at 588; 8 C.F.R. § 1003.1(d)(3)(ii). The Board's de novo review authority includes "whether the underlying facts found by the [i]mmigration [j]udge meet the legal requirements for relief from removal . . . ." *Z-Z-O-*, 26 I&N Dec. at 591. The Board also reviews de novo the questions of whether a group is a particular social group within the meaning of the Act, *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018), and "whether . . . respondents were persecuted 'on account of a protected ground,'" *see Matter of S-E-G-*, 24 I&N Dec. 579, 588 n.5 (BIA 2008).

Whether an applicant is a member of a particular social group, as well as the underlying requirements to establish a cognizable particular social group, such as social distinction, necessarily involve fact-finding. *Id.* at 192. Similarly, a persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by the Board for clear error. *See Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011).

Finally, whether the applicant can internally relocate within his or her home country is a mixed question of fact and law. *See Matter of M-Z-M-R-*, 26 I&N Dec. 28, 36 (BIA 2012).

SUMMARY OF THE ARGUMENT

The applicant bears the burden of proof to establish that her life or freedom would be threatened in the country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 1208.16(b).

In this case, the applicant waived her opportunity to challenge any aspect of the Immigration Judge's decision, first by electing not to file a separate notice of appeal and, second, by moving to summarily affirm the Immigration Judge's decision. However, even if the applicant did not waive her right to challenge the Immigration Judge's decision, the applicant has

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not met her burden of showing that her membership in the proposed particular social group of "Mexican women" was one central reason for the harm she experienced at the hands of her husband over twenty years ago.

The Immigration Judge, however, did err in finding that "Mexican women who terminate the marriage without the consent of the husband" constitutes a cognizable particular social group under the Act. When an applicant seeks withholding, she must "establish that the group is composed of members who share a common immutable characteristic, defined with particularity, and socially distinct within the society in question." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014). The applicant's particular social group is not defined with particularity, and the record does not establish that this group is socially distinct within Mexico. Further, even if the particular social group is cognizable, the Immigration Judge erred in concluding that the applicant's particular social group was at least one central reason for the harm she fears from a private actor, her former husband. The record demonstrates that the applicant was subjected to spousal abuse in the 1990s. However, there is no evidence in the record that the applicant's former spouse targeted her on account of her inclusion in the group "Mexican women who terminate the marriage without the consent of the husband."

Moreover, the Immigration Judge erred in finding that the Mexican government would be unable or unwilling to protect the applicant. The applicant never personally reported any harm to the police. And, when the applicant did civilly seek assistance from the Mexican government, the Mexican legal system gave her the divorce she requested.

Finally, the Immigration Judge erred in finding past persecution on the basis of a protected ground, and so erred in shifting the burden to the Department to show that there has been no fundamental change in circumstances and that internal relocation is not possible.

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Further, even if there was past persecution, the Immigration Judge erred in finding that the Department had not established that there has been a fundamental change in circumstances and that internal relocation is possible and reasonable.

STATEMENT OF FACTS

The applicant is a forty-two-year-old native and citizen of Mexico. Tr. at 18–19. She first came to the United States without authorization in 1999 but was apprehended by immigration authorities and returned to Mexico. Tr. at 22–23. She did not seek asylum at that time, though she claimed at her hearing before the Immigration Judge that she was then fleeing for her life. Tr. at 34. The applicant returned to the United States a week later. Tr. at 23. She did not testify about where in Mexico she was during that week. Again, she did not seek asylum when she entered the United States. Instead, she remained in the United States until July 4, 2005, returning to Mexico on her own volition to see her grandmother. Tr. at 23. She then remained in Mexico for approximately two weeks before returning to the United States. Tr. at 42.

The applicant testified that she attempted to enter the United States twice in 2005. Tr. at 24; Exh. 1.[2] According to the applicant, "The first time I came, I was caught, and the second time I came, I managed to get through." Tr. at 24. Again, she did not seek asylum when she entered the United States in 2005. Department officers most recently encountered the applicant in the United States on July 27, 2018. Exh. 1. The Department determined that the applicant had illegally entered the United States and, accordingly, reinstated the prior order of removal pursuant to section 241(b)(5) of the Act. *Id*. The applicant claimed fear of persecution or torture if removed to Mexico and her case was referred to the Asylum Office pursuant to 8 C.F.R. §

[2] According to Department records, the applicant unsuccessfully attempted to enter the United States twice in 2005—once on July 18, 2005, and again on July 22, 2005. *See* Exh. 1.

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208.31(b). Exh. 1; I.J. at 1. On October 22, 2019, the applicant submitted Form I-589, Application for Asylum and Withholding of Removal, for consideration in withholding-only proceedings pursuant to 8 C.F.R. § 1208.31(g). Tr. at 7–9; I.J. at 2.

On January 28, 2019, the applicant appeared for her individual merits hearing where the applicant and her mother both testified. Tr. at 10–89; I.J. at 2. The applicant testified that she was physically abused in Mexico by her now ex-husband from approximately 1992 until their divorce in 1999. Tr. at 24–31, 39. The abuse included physical and sexual assaults. Tr. at 24–31, 39. She stated that she was beaten at least three times a week, every week for seven years. Tr. at 49. She further stated he would lock her in a room when he was not home. Tr. at 22. The applicant admitted that she never sought medical assistance at any time and that she never reported the abuse to the authorities in Mexico. Tr. at 30, 32, 49–50. The applicant never attempted to report the abuse to the police, testifying vaguely that the police do not "do anything." Tr. at 37. Her mother testified that she had made complaints to the police, but that nothing was done by them; the police purportedly told her that they could not do anything because there was "no blood." Tr. at 59–62. The applicant's mother did not provide any documentary evidence of any reports filed and could not provide dates on which she went to the police. She did not inform the applicant of any reports or ask the applicant to assist in filing any reports with information regarding the crimes. Tr. at 44, 59–62.

In 1999, the applicant was able to obtain a divorce from her husband from the civil authorities in Mexico. Tr. 22, 33, 40–41; I.J. at 7. She stated that she decided to leave him because she caught him with another woman after returning from the store. Tr. at 33, 40. When the Department asked, "You were able to leave?", she replied, "Yes, sir." Tr. at 40. She initially testified on direct examination that when the divorce was final, her former spouse got angry and

started threatening her, but that the physical abuse all happened before the divorce. Tr. at 41. However, when questioned by the Immigration Judge, she stated that her former spouse attacked her and choked her the day she signed the divorce decree. Tr. at 48. Once the divorce was finalized, the physical abuse stopped. Tr. at 41; I.J. at 7. After the divorce, the applicant resided with her mother in Mexico and allegedly received threats from her former spouse. I.J. at 7. The applicant moved to live with her uncle in Veracruz, approximately eighteen hours away from the applicant's hometown Chiapas; but allegedly she continued to receive threats while living with her uncle. I.J. at 8. However, the applicant's former spouse did not travel to Veracruz and did not commit any acts of violence against her. I.J. at 8.

The applicant returned to Mexico of her own volition in 2005. Tr. at 44, 59–62. She stated that while she was in Mexico in 2005, she received one threatening call from her ex-husband. Tr. at 42–43. He never made any attempt at physical contact with her and never physically harmed her while she was back in Mexico during that time. Tr. at 44. The applicant stated that she does not know where her former spouse is now and that she has not personally received any threats from him since 2005. Tr. at 53–54. She believes he has children with another woman. Tr. at 54. The applicant's mother, siblings, and children reside in the United States lawfully; her father resides in Mexico. Tr. at 19–21. The applicant's mother testified that, between 2014 and 2018, she would return once a year to Mexico to see friends. Tr. at 72–72. During these trips, the applicant's former spouse would make makes vague threats about the applicant. Tr. at 72.

In his written decision, the Immigration Judge granted the applicant's application for withholding of removal and denied applicant's request for protection under the CAT. The Immigration Judge held that "the applicant's execution of the divorce without the consent of her

husband was at least one central for the harm and threats she experienced." I.J. at 16. The Immigration Judge noted that the applicant defined her particular social group as "Mexican women who terminate the marriage without the consent of the husband." I.J. at 15.[3] The Immigration Judge found the group is "sufficiently socially distinct" because "Mexican women would generally understand their own affiliation in this group, based on socially construed categories such as nationality and gender." I.J. at 12. The Immigration Judge noted that membership in the group includes only woman who are Mexican and requires that they have terminated a marriage without the consent of their spouse. The Immigration Judge further found that the applicant's execution of the divorce "was viewed as an act of defiance" and is particularly compelling given the former partner's "ability to control all aspects of the applicant's life." I.J. at 16. The Immigration Judge concluded that the former partner "still holds a vendetta against the applicant for divorcing him and would seek to harm her because of it." *Id.* The Department filed a timely appeal of the Immigration Judge's decision. The applicant did not appeal.

On July 25, 2019, the Board sustained the Department's appeal. *See* Dec. of the Board of Immigration Appeals at 4 (July 25, 2019). The Board noted, "The applicant did not file an appeal of the Immigration Judge's decision denying her application for protection under the Convention Against Torture" or "challenging the Immigration Judge's findings and conclusions with regard to other proposed social group definitions and her claim of political persecution" and that those issues were, therefore, waived. *Id.* at 1 n. 1, 2. Therefore, the Board limited its review to the Immigration Judge's analysis of the proposed social group consisting of "Mexican women

[3] As the Immigration Judge noted, the applicant initially outlined six proposed particular social groups. I.J. at 10; I.J. at 10 n.3; Tr. at 15-16. It was not until the end of the hearing that the Immigration Judge and the applicant agreed to the newly formulated particular social group which the Immigration Judge then found to be cognizable. Tr. at 84.

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who terminate the marriage without the consent of the husband." *Id.* at 1. The Board first found that the proposed social group of "Mexican women who terminate the marriage without the consent of the husband" was not a cognizable particular social group for purposes of withholding of removal under the Act. *Id.* at 2–3. The Board, further, found "the Immigration Judge clearly erred in finding that the applicant suffered persecution, and faces a clear probability of future persecution, on account of her membership in a group of 'Mexican women who terminate the marriage without the consent of the husband.'" *Id.* at 3.

On August 16, 2019, the applicant filed a petition for review with the Tenth Circuit. *Rios-Bamac*, No. 19-9559. On February 6, 2020, the Tenth Circuit granted the United States government's motion to remand the case to the Board. *Id.*; *see also* Order, No. 19-9559 (10th Cir. Feb. 26, 2020) ECF No. 30. In granting the motion for remand, the Tenth Circuit noted, "This matter is remanded fully to the [Board] to conduct any and all additional proceedings it deems necessary and appropriate to address the matters raised in the Motion." *Id.*

ARGUMENT

I. THE APPLICANT WAIVED HER RIGHT TO CHALLENGE ANY FINDING IN THE IMMIGRATION JUDGE'S DECISION

"The Board is an appellate body whose function is to review, not to create a record." *Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984). In its role as an appellate body, the Board relies on the parties to advance arguments both before the immigration judge in the first instance, and before the Board where the parties disagree with the ultimate findings of the immigration judge.

In this case, the applicant did not appeal any aspect of the Immigration Judge's decision in her case. The applicant did not, for instance, appeal the Immigration Judge's finding that "[t]he applicant has provided *one viable protected ground*, which is the particular social group

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defined as: 'Mexican women who terminate the marriage without the consent of the husband,'" I.J. at 10 (emphasis added), and that "the applicant has failed to propose *any other* cognizable group or protected ground," I.J. at 12 (emphasis added). The Immigration Judge reached this conclusion after listing each of the applicant's six other proposed social groups, including, "Mexican women." I.J. at 2; *see also* I.J. at 12–14 (discussing the applicant's other proposed social groups and the applicant's political opinion). Nor did the applicant challenge the Immigration Judge's decision to "decline[] to address whether the applicant's proposed particular social group defined as, 'Mexican women,' is a valid particular social group" or the conclusion that "the harm the applicant experienced was on account of the applicant's alternative group: 'Mexican women who terminate the marriage without the consent of the husband.'" I.J. at 15 n. 4. The applicant, likewise, did not appeal the Immigration Judge's finding that she was ineligible for protection under the CAT. I.J. at 25.

Rather, on May 10, 2019, the applicant moved for summary affirmance of the Immigration Judge's decision. Motion for Summary Affirmance and Brief in Opposition to DHS Appeal (May 10, 2019) (Mot. for Sum. Aff.). The regulations permit a Board member to summarily affirm the decision of an immigration judge where the "issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation" and the "factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case." 8 C.F.R. §§ 1003.1(e)(4)(i)(A)–(B). Where the Board summarily affirms the decision of an immigration judge, the immigration judge's decision becomes the final agency determination. *Id.* § (e)(4)(ii). Accordingly, where a party on appeal moves to summarily affirm the decision of an immigration judge, the moving party is necessarily agreeing that the immigration judge reached the correct

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decision "such that any errors in the decision of the immigration judge . . . were harmless or nonmaterial." *Id.*

While the Board ultimately denied the applicant's motion for summary affirmance and sustained the Department's appeal, in moving for summary affirmance of the Immigration Judge's decision, the applicant was necessarily requesting that the Board affirm the Immigration Judge's conclusions, including the conclusion that"[t]he applicant has provided one viable protected ground, which is the particular social group defined as: 'Mexican women who terminate the marriage without the consent of the husband," I.J. at 10, and "the applicant has failed to propose any other cognizable group or protected ground," I.J. at 12. Thus, the applicant cannot now resuscitate a particular social group consisting of "Mexican women" simply because she received an adverse decision from the Board.

Indeed, in her motion for summary affirmance, the applicant "note[d] that the [Immigration Judge] did not reach a finding as to whether [applicant's] proposed PSG, 'Mexican women' is a cognizable PSG." Mot. for Sum. Aff. at 9. The applicant, however, did not expand on this note and, instead, returned to arguments regarding the alternative PSG, "Mexican women who terminate the marriage without consent of the husband." *See, generally, id.*

Thus, the applicant waived her opportunity to appeal the Immigration Judge's decision and, further, moved the Board to adopt the Immigration Judge's decision as the final agency determination. The applicant, therefore, is precluded from arguing on remand that the PSG, "Mexican women," is legally cognizable.

II. THE APPLICANT HAS NOT SHOWN THAT SHE WAS PERSECUTED ON ACCOUNT OF HER MEMBERSHIP IN A PARTICULAR SOCIAL GROUP CONSISTING OF "MEXICAN WOMEN."

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Assuming, *arguendo*, the Board finds that the applicant has not waived her opportunity to challenge the Immigration Judge's decision, the applicant has not met her burden of showing that she was harmed on account of her membership in the PSG "Mexican women."

A. The Board does not need to remand this case to the Immigration Judge.

A persecutor's actual motive is a matter of fact to be determined by the immigration judge and reviewed by the Board for clear error. *See N-M-*, 25 I&N Dec. at 532. However, the Board's de novo review authority includes "whether . . . respondents were persecuted 'on account of a protected ground.'" *S-E-G-*, 24 I&N Dec. at 588 n.5.

In this case, the Immigration Judge reached a factual conclusion that the applicant's ex-husband harmed her on account of her membership in a particular social group consisting of "Mexican women who terminate the marriage without the consent of the husband." I.J. at 10, 15–17. The Immigration Judge acknowledged that "the majority of the emotional and physical abuse that the applicant endured was prior to her divorce, *and therefore has no nexus to a protected ground*." I.J. at 15 (emphasis added).[4] However, the Immigration Judge went on to find that the "applicant's execution of the divorce without the consent of her husband was at least 'one central reason' for the harm and threats she experienced." I.J. at 16. Thus, the Immigration Judge has reached a factual conclusion regarding the purported persecutor's actual motive, which the Board can review for clear error. The Board, further, can review de novo whether the Immigration Judge erred in concluding that the applicant was harmed on account of the particular social group.

Accordingly, the record in this case is complete, no additional fact-finding is necessary, and the Board can review the Immigration Judge's factual and legal conclusions based upon the record before it.

[4] Again, as noted above, the applicant did not appeal this finding by the Immigration Judge.

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B. The applicant did not meet her burden of showing that she was harmed "on account of" her membership in the proposed social group, "Mexican women."

An applicant seeking withholding of removal must demonstrate that it is "more likely than not that, upon removal, [her] life or freedom would be threatened on account of [her] race, religion, nationality, political opinion, or membership in a particular social group. INA § 241(b)(3). To demonstrate that harm was "on account of" a protected ground, the applicant must show that the protected characteristic was "one central reason" for the harm. *See* INA § 241(b)(3); *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F. 3d 641, 646 (10th Cir. 2012); *Matter of C-T-L-*, 25 I&N Dec. 341, 348 (BIA 2010). The protected ground cannot play a minor role in the persecution, nor can it be "incidental, tangential, superficial, or subordinate to another reason for the harm." *Karki v. Holder*, 715 F.3d 792, 800 (10th Cir. 2013) (citations omitted); *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010). The applicant must show that the persecutor sought to "overcome" the protected characteristic. *Acosta*, 19 I&N Dec. at 222; *cf. Matter of E-R-A-L-*, 27 I. & N. Dec. 767, 774 (BIA 2020) (affirming the continued focus on a persecutor's attempt to "overcome" the protected characteristic).

Private criminal victimization, including domestic violence, even when widespread in nature, is insufficient to establish eligibility statutory withholding of removal. *See, e.g.*, *Matter of A-B-*, I&N Dec. 316, 320 (A.G. 2018) ("The mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim"); *M-E-V-G-*, 26 I&N Dec. at 235 ("asylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions"); *see generally Matter of*

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Mogharrabi, 19 I&N Dec. 439, 447 (BIA 1987) ("aliens fearing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval in their countries, would not qualify for asylum.") Thus, "claims by aliens pertaining to domestic violence . . . perpetrated by non-governmental actors will," generally, "not qualify for asylum" or statutory withholding of removal. *A-B-*, 27 I&N Dec. at 320.

In this case, while the applicant testified at length about the abuse she suffered at the hands of her former husband, *see* Tr. at 26–31, she did not present evidence that he was attempting to overcome her membership in a social group composed of "Mexican women."[5] For instance, the applicant testified that, when she and her ex-husband were first married, they lived together as a couple with the applicant's mother. Tr. at 25–27. However, the applicant did not testify that her former husband was abusive toward the applicant's mother, who was also a woman living in Mexico. She and her mother testified to one incident where the applicant's mother witnessed a physical altercation between the applicant and her ex-husband. Tr. at 27 (applicant's testimony), 58 (applicant's mother's testimony). The applicant's mother attempted to intervene, but the applicant's ex-husband "closed the door on [the applicant's mother] with his foot, and [she] tried to put my hand in, and he ended up smashing [her] finger." Tr. at 57. However, neither the applicant nor her mother insinuated that her mother was harmed for any particular reason, and the testimony strongly suggests the applicant's former husband was attempting to prevent her mother's entry to the room.

Similarly, the applicant testified that when her ex-husband "was in a good mood" he would "coddle" their daughter. Tr. at 32. And, while she also testified that he would tell the

[5] The Board need not address whether "Mexican women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach).

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applicant to "get [their daughter] away from here, remove her," Tr. at 32, she did not testify that he harmed their daughter. Indeed, when asked by the Immigration Judge, "despite him not wanting you to have your daughter, he still cared about your daughter, is that right?" the applicant responded, "That's what he would say." Tr. at 51–52. Further, both the applicant and her mother testified that the applicant's former husband was incensed that the applicant was awarded custody of their daughter. The applicant explained: "When I was awarded the custody of my daughter. He said that he was going to make sure that my daughter didn't stay with me . . .." Tr. at 48. Similarly, when asked what she thought was the reason for her ex-husband's threatening and harmful conduct post-divorce, the applicant indicated that it was because her ex-husband was and always will be violent and abusive, and he wants to take revenge because she took their daughter. Tr. at 36–38, 48.

Thus, the applicant did not show that her spouse held generalized animosity toward other "Mexican women." Nor did she show that her former husband was attempting to overcome the applicant's status as a "Mexican woman." Therefore, the applicant did not meet her burden of showing a nexus between her husband's deplorable conduct and her membership in the particular social group.

III. THE IMMIGRATION JUDGE ERRED IN FINDING THAT THE APPLICANT'S PROPOSED SOCIAL GROUP OF "MEXICAN WOMEN WHO TERMINATE THE MARRIAGE WITHOUT THE CONSENT OF THE HUSBAND" WAS A COGNIZABLE PARTICULAR SOCIAL GROUP UNDER THE ACT.

Where an applicant seeks withholding of removal under INA § 241(b)(3) as a member of a particular social group, the applicant "must establish that the group is composed of members who share a common immutable characteristic, defined with particularity, and socially distinct within the society in question." *M-E-V-G-*, 26 I&N Dec. at 237. If the applicant fails to establish a cognizable particular social group, the "immigration judge or Board need not examine

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the remaining elements of the [withholding] claim." *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018). It is the applicant's burden to clearly indicate on the record before the Immigration Judge the exact delineation of the proposed particular social group. *See W-Y-C- & H-O-B-*, 27 I&N Dec. at 191 (citing *Matter of W-G-R-*, 26 I&N Dec. at 209-10 (BIA 2014)).

The Board has established a three-pronged test for determining when a proposed particular social group is cognizable. The applicant must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *A-B-*, 27 I&N Dec. at 320 (citing *M-E-V-G-*, 26 I&N Dec. at 234, 237); *see also Matter of L-E-A-*, 27 I&N Dec. 40, 42 (BIA 2017), *overruled on other grounds by Matter of L-E-A-*, 27 I&N Dec. 581, 596–97 (A.G. 2019); *W-G-R-*, 26 I&N Dec. at 210–12. To be cognizable, the particular social group must exist independently of the harm alleged in the application. *A-B-*, 27 I&N Dec. at 334-35. Social group determinations are made on a case-by-case basis. *L-E-A-*, 27 I&N Dec. at 42 (BIA 2017); *M-E-V-G-*, 26 I&N Dec. at 251; *Acosta*, 19 I&N at 233. The applicant's proposed particular social group, "Mexican women who terminate the marriage without the consent of the husband" fails under this test.

First, the proposed group lacks particularity. The particularity requirement addresses "the question of delineation," and "clarifies the point . . . that not every 'immutable characteristic' is sufficiently precise to define a particular social group." *W-G-R-*, 26 I&N Dec. at 214. Particularity requires that the "terms used to describe the group [must] have commonly accepted definitions in the society of which the group is a part." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2008)). The group must have "discrete and [] definable boundaries—it must not be amorphous, overbroad, diffuse, or

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subjective." *M-E-V-G-*, 26 I&N Dec. at 239 (citations omitted). To meet the particularity requirement, the proposed group must "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." *Matter of E-A-G-*, 24 I&N Dec. 591, 594 (BIA 2008). Further, social groups defined by their vulnerability to private criminal activity likely lack the particularity requirement under *M-E-V-G-*. *A-B-*, 27 I&N Dec. at 335.

The applicant failed to articulate her particular social group such that it has defined boundaries; therefore, it lacks particularity. More specifically, the applicant's particular social group— "Mexican women who terminate the marriage without the consent of the husband"— fails to describe "a discrete class of persons." *W-G-R-*, 26 I&N Dec. at 214. The Immigration Judge noted that membership in the group is limited to only woman who are Mexican and requires that they have terminated a marriage without the consent of their spouse. The fact that the group includes divorced women whose spouses did not agree to the divorce and does not include men or single women does not establish that "Mexican women who terminate the marriage without the consent of the husband" is a group "with 'well defined boundaries' delineating who does and does not belong." I.J. at 13–14 (quoting *S-E-G-*, 24 I&N Dec. at 582). Adding gender and nationality modifiers to the group gives only the illusion of particularity. The applicant's group does not sufficiently delineate who does and does not belong.

Second, there is no evidence in the record that "Mexican women who terminate the marriage without the consent of the husband" has a commonly accepted definition in Mexican society or that Mexican society recognizes that group as set apart in any way and it is, therefore, not socially distinct. *See M-E-V-G-*, 26 I&N Dec. at 239. Social distinction "considers whether those with a common immutable characteristic are set apart, or distinct, from other persons

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within the society in some significant way." *M-E-V-G-*, 26 I&N Dec. at 238. "In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it." *Id.* The recognition of the group is "determined by the perception of the society in question, rather than by the perception of the persecutor." *Id.* at 242; *see also W-G-R-*, 26 I&N Dec. at 214 (noting there is some degree of overlap between the particularity and social distinction requirements because both take societal context into account).

The Immigration Judge found the group is "sufficiently socially distinct," finding that "Mexican women would generally understand their own affiliation in this group, based on socially construed categories such as nationality and gender." However, again, the inclusion of nationality and gender only give the illusion of social distinction. The applicant did not provide any evidence that Mexican society, in general, recognizes the proposed group or would be able to identify her as a member of the proposed group.

Therefore, because the applicant failed to articulate a cognizable particular social group, the applicant failed to meet her burden of proof.

IV. THE IMMIGRATION JUDGE ERRED IN FINDING THAT THE HARM THE APPLICANT SUFFERED BY HER FORMER HUSBAND WAS ON ACCOUNT OF THE PARTICULAR SOCIAL GROUP OF "MEXICAN WOMEN WHO TERMINATE THE MARRIAGE WITHOUT THE CONSENT OF THE HUSBAND."

To demonstrate that harm was "on account of" a protected ground, the applicant must show that the protected characteristic was "one central reason" for the harm. *See* INA § 241(b)(3). The applicant must show that the persecutor sought to "overcome" the protected characteristic. *Acosta*, 19 I&N Dec. at 222. "[C]laims by aliens pertaining to domestic violence

(b)(6); (b)(7)(C)

. . . perpetrated by non-governmental actors will," generally, "not qualify for asylum" or statutory withholding of removal. *A-B-*, 27 I&N Dec. at 320.

The applicant failed to establish a nexus between the harm she fears and her status as a member of the particular social group consisting of "Mexican women who terminate the marriage without the consent of the husband." The Immigration Judge found past persecution based on the harm inflicted on the applicant before she got divorced in 1999. After the day of the divorce, however, the former spouse did not harm the applicant—he merely contacted her with vague threats, which were never acted upon. Threats alone do not generally constitute persecution. *Vatulev v.* Ashcroft, 354 F.3d 1207, 1209–10 (10th Cir. 2003). Rather, the Immigration Judge found that the pre-divorce harm (the abuse and imprisonment) rose to the level of persecution and, in a footnote, found that the harm experienced after the divorce (the choking the day of the divorce and the threats after) also rose to the level of persecution since the applicant had been previously abused before the divorce. In so doing, the Immigration Judge acknowledged that the pre-divorce harm was not on account of the proposed particular social group, but still used the one to bootstrap the other. However, any harm suffered by the applicant was at the hands of her now ex-husband at a time prior to her membership in the named group. After she returned to Mexico in 2005 (voluntarily once and by removal twice), the only incident involving her former husband was her receipt of a random telephone call, in which he made what she considered to be a threat, with no follow-up or action. This was approximately fourteen years ago, and six years after the physical abuse ceased.

Further, all of the harm committed against the applicant and feared by the applicant was committed by her former husband. "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *A-B-*, 27

I&N Dec. at 320. The same principle applies to withholding claims. The applicant provided no evidence that her former spouse was motivated by any other reason than the nature of their relationship or that he was generally hostile to Mexican women who terminate their marriages without the consent of their husbands as a group. *A-B-*, 27 I&N Dec. at 339. To be sure, the applicant may have been the victim of crimes committed by her former spouse when they were married and the day of the divorce, but those relationship-based crimes are insufficient to establish eligibility for withholding.

Because the applicant failed to establish that her former spouse was motivated by any reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the proposed particular social group.

V. THE IMMIGRATION JUDGE ERRED IN FINDING THAT THE GOVERNMENT OF MEXICO IS UNABLE OR UNWILLING TO CONTROL THE APPLICANT'S FORMER SPOUSE

Where the alleged persecutor is unaffiliated with the government, the applicant must show that the government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993); *A-B-*, 27 I&N Dec. at 319. In instances where the applicant is a victim of private criminal activity, "the analysis must also 'consider whether government protection is available.'" *A-B-*, 27 I&N Dec. at 320 (quoting *M-E-V-G-*, 26 I&N Dec. at 243). Relevant factors include both "the government's response" to the claimed persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470, 476 (6th Cir. 2019). "No country provides its citizens with complete security from private criminal activity, and perfect protection is not required." *A-B-*, 27 I&N Dec. at 343. An applicant "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *Id.* at 338; *see also Matter of O-F-A-S-*, 27 I&N Dec. 709, 722 (BIA 2019) (a

(b)(6); (b)(7)(C)

failure to report to the police is generally fatal to a persecution claim "unless the alien can show it would be futile to make a report").

The record here does not establish that the police were unwilling to assist the applicant; at most it establishes that they did have enough evidence that a crime had been committed to prompt an investigation. The applicant herself never reported any crime to the authorities in Mexico. Tr. at 30, 32, 49-50. She stated that she was "constantly locked in that room, how could I go?" But she did leave that room, go to the store, return to discover her then-spouse involved in extramarital relations with another woman, separate from him, and file for and obtain her divorce, all without providing any explanation for that contradiction or for why she did not at any time during that period go to the police. Tr. at 33. Her only explanation for her failure to report her former spouse's abuse was that the police do not "do anything." Tr. at 37.

While the applicant's mother testified that she had made complaints to the police, but that nothing was done by them; they police purportedly told her that they could not do anything because there was "no blood"; that is, there was no evidence of a crime. Tr. at 62. The applicant's mother provided no documentary evidence of any reports filed; in fact, she could not even provide dates on which she went to the police. She did not inform the applicant of any reports or ask the applicant to assist in filing any reports with information regarding the crimes. Tr. at 44, 59-62.

This is insufficient for the applicant to meet her burden to show that the government of Mexico was or is unable or unwilling to assist the applicant. As such, the Immigration Judge erred in finding that she met her burden.

VI. THE IMMIGRATION JUDGE ERRED SHIFTING THE BURDEN TO THE DEPARTMENT TO ESTABLISH A FUNDAMENTAL CHANGE IN CIRCUMSTANCES OR THE ABILITY TO RELOCATE WITHIN MEXICO.

(b)(6);

If an applicant is determined to have suffered past persecution in the proposed country of removal on account of one of the five protected grounds, it is presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. 8 C.F.R. § 1208.16(b)(1)(i). This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence that there has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of a protected ground; or that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. *Id.* § (b)(1)(i)(A)–(B).

As the Immigration Judge erred in finding the applicant established past persecution, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the applicant bears the burden of establishing that internal relocation within Mexico was unreasonable. *M-Z-M-R-*, 26 I&N Dec. at 35–36 ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored." (citing 8 C.F.R. § 1208.13(b)(3)(i))). Further, even if the Department bears the burden of proof on these issues, the Immigration Judge erred in finding that the Department did not establish that there has been a fundamental change in circumstances or that internal relocation is reasonable.

The Immigration Judge held that the applicant faces a threat of persecution anywhere in Mexico even though a single actor perpetrated her harm. The Immigration Judge based this determination on the fact that, when the applicant resided with her uncle eighteen hours away from the town in which her former spouse lives, the former spouse was able to find her and make

a threatening call to her. The Immigration Judge further found that the applicant's long-term illegal presence in the United States, after multiple removals, and her family in the United States made it unreasonable to expect her to relocate within Mexico. Though the Immigration Judge should "consider, among other things, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties," "these factors may or may not be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.16(b)(3). This is particularly true for victims of private violence, who "face the additional challenge of showing that internal relocation is not an option . . . ." *A-B-*, 27 I&N Dec. at 345.

Mexico is a large and diverse country. The applicant's father resides in Mexico, so she is not without family support there. The applicant has been divorced from her former spouse for almost twenty years, does not currently know where he is, and believes he has children with another woman. There is no evidence that he remains interested in harming her after the passage of two decades, though there is evidence that he has moved on, having children with another woman; there is certainly no evidence that he would physically pursue her, after all this time, to other parts of Mexico. When the applicant lived with her uncle, her former spouse purportedly made threatening phone calls; he never, however, travelled to Veracruz to seek the applicant out. Though the Immigration Judge found that "gender-based violence is country-wide," that is not the basis for the applicant's claim. The applicant's claim is specific to victimization by her former spouse and there is no evidence that the applicant would be subject to gender-based violence throughout the entirety of Mexico.

(b)(6); (b)(7)(C)

Finally, even if the Immigration Judge did not err in shifting the burden to the Department, the significant passage of time since the applicant last purportedly suffered harm at the hands of her former spouse alone presents a fundamental change in circumstances. That passage of time, coupled with the evidence from the applicant that she believes her former spouse has children with another woman, demonstrating that he is no longer interested in a relationship with the applicant, establish that circumstances have changed such that the applicant no longer has a reasonable fear.

Even if the Department bears the burden of proof on this issue, the Immigration Judge erred in finding internal relocation unreasonable. I.J. at 19. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id.*

CONCLUSION

The applicant waived her right to appeal the Immigration Judge's decision. First, the applicant did not file a separate appeal of any aspect of the Immigration Judge's decision. Second, she filed a motion for summary affirmance under 8 C.F.R. § 1003.1(e)(4), in which she necessarily moved the Board to adopt the decision of the Immigration Judge as the final agency interpretation, including the Immigration Judge's conclusions that "[t]he applicant has provided one viable protected ground, which is the particular social group defined as: 'Mexican women who terminate the marriage without the consent of the husband," I.J. at 10, and that "the applicant has failed to propose any other cognizable group or protected ground," I.J. at 12.

(b)(6); (b)(7)(C)

Assuming, *arguendo*, the applicant has not waived these issues, the applicant did not meet her burden of showing that she was harmed on account of her membership in a particular social group consisting of "Mexican women." Similarly, the applicant did not meet her burden of showing that her proposed social group—"Mexican women who terminate the marriage without the consent of the husband"—is legally cognizable or that she was harmed on account of her membership in that group. Further, the applicant, who was able to obtain a civil divorce from her husband, did not meet her burden of showing that the government of Mexico was unable or unwilling to assist her. Accordingly, the Board should sustain the Department's appeal.

Respectfully submitted on this 14th day of April 2020,

(b)(6); (b)(7)(C)

Assistant Chief Counsel
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CERTIFICATE OF SERVICE

On April 14, 2020, I electronically served a copy of this Department of Homeland Security Amended Brief on Appeal and any attached pages normal government process to:

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(date)

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Riders:

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The Immigration Judge erred in granting the respondent's applications for withholding of removal under the regulations implementing the United States' obligations under the Convention Against Torture (CAT).[1]

Withholding of removal under the regulations implementing the CAT must be granted if (1) the applicant is found under 8 C.F.R. § 1208.16(c) to be entitled to protection under the regulations implementing the CAT and (2) the applicant is not subject to the provisions for mandatory denial of withholding of removal under 8 C.F.R. § 1208.16(d)(2) or (d)(3). The respondent bears the burden of showing it is "more likely than not" that he or she would be tortured if removed. 8 C.F.R. § 1208.16(c)(2). For an act to constitute "torture" under the regulations implementing the CAT, it must satisfy each of the five elements set forth in 8 C.F.R. § 1208.18(c): (1) the act must cause severe physical or mental pain or suffering, (2) the act must be intentionally inflicted, (3) the act must be inflicted for a proscribed purpose, (4) the act must be inflicted by or at the instigation of or with consent or acquiescence of a public official, and (5) the act cannot arise from lawful sanctions. *Matter of J-E-*, 23 I&N Dec 291 (BIA 2002), *overruled on other grounds by Azanov v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004). "[N]egligent acts or acts by private individuals not acting on behalf of the government" are not included in the definition of torture. *Id*. at 297-99. However, "willful blindness" is sufficient to prove acquiescence. *Karki v. Holder*, 715 F.3d 792, 794 (10th Cir. 2013). The respondents' substantial burden cannot be met by stringing together a series of suppositions where the evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen. *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006).

In this case, the lead respondent (and only witness) described her experience with gang violence in Guatemala, including frequent attempts at extortion. She testified to a pattern of harassment and threats from those involved in criminal groups. She stated she was once raped by a man who demanded extortion money. The respondent also described incidents of domestic violence at the hands of her husband. The respondent testified that she did not call the police in response to the extortion issues, though she did call about the domestic abuse. The respondent says the police never responded to her calls. The respondent relocated for a short time in the capital with her sister. There, she faced general criminal activity but no specific harm.

[1] The Immigration Judge correctly denied the respondents' applications for asylum under INA § 208 and withholding of removal under INA § 241.

The record evidence does not establish that it is more likely than not that the respondents will be singled out for torture by or at the instigation of or with consent or acquiescence of a public official. Indeed, her failure to report the gang-related violence significantly undermines her claims. *Matter of O-F-A-S-*, 27 I&N Dec. 709, 720 (BIA 2019).

As such, the Immigration Judge erred in finding that the respondents met their high burden of proof.

The Department respectfully reserves the right to raise additional issues or claims of error in its brief on appeal.

The Department of Homeland Security (Department) appeals the decision of the Immigration Judge, dated December 23, 2019, granting the lead respondent asylum, which conferred asylum to the two riding respondents as derivatives, and granting all respondents withholding of removal under the regulations implementing the United States' obligations under the Convention Against Torture (CAT) in the alternative.

The Immigration Judge erred in finding that the facts established by the lead respondent met her burden of proof for protective relief. Specifically, the lead respondent failed to establish past persecution, failed to demonstrate a nexus between the harm she suffered and a protected ground, failed to demonstrate that internal relocation is unreasonable, and failed to establish that the government of Mexico is unwilling or unable to protect her. Moreover, the respondents failed to establish that it is more likely than not that they would be tortured if they return to Mexico.

The Lead Respondent Failed to Establish Past Persecution

To establish past persecution, a respondent must not only prove a sufficiently serious level of harm, but also, as pertinent here, that the harm was inflicted by "persons or an organization that the government was unable or unwilling to control." *See, e.g., Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018). In the instant matter, the lead respondent testified that she suffered domestic violence at the hands of her husband and her cousin's husband and threats from someone she did not know in retaliation for her husband's involvement in a criminal organization. *See* I.J. Dec. at 4.

The Lead Respondent Failed to Establish the Government of Mexico Was and Is Unwilling or Unable to Protect Her

The lead respondent must establish that her government is unwilling or unable to control the perpetrator. Simply because a government has not acted on a reported crime, successfully investigated it, or punished the perpetrator, does not necessarily establish an inability or unwillingness to control the crime any more than it would in the United States. *Id*. at 343-44. The lead respondent testified that she never reported any of the harm she suffered to authorities. *See* I.J. Dec. at 7. Based on the finding of facts, the Immigration Judge's conclusion that the government of Mexico was and is unwilling or unable to protect the lead respondent is erroneous. *Matter of A-B*, 27 I&N Dec. at 337.

The Lead Respondent Failed to Establish a Nexus to a Protected Ground

The Immigration Judge erred in finding that the lead respondent met her burden to establish that she was singled out for harm because of her membership in the particular social group of "Mexican women."[1] To demonstrate that harm was "on account of" a protected ground,

[1] The Board need not address whether "Mexican women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds as asserted in this Notice of Appeal. *Matter*

an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)).

The lead respondent failed to establish a nexus between the group of which she claims to be a member – "Mexican women" – and the harm she suffered. Rather, the lead respondent established that she was the victim of crimes committed by her former partner that were motivated by the nature of their personal relationship. The lead respondent provided no evidence that her former partner and her husband's cousin were motivated by any other reason than the nature of their relationship, or that either was generally hostile to "Mexican women" as a group. *Matter of A-B-*, 27 I&N Dec. at 339. As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Matter of A-B-*, 27 I&N Dec. at 338-39. The Immigration Judge erroneously found that the domestic violence inflicted on the lead respondent was "informed by Mexico's deep-seated view of gender relations and a woman's role in society," citing no authority and instead referencing the contrary authority of *Matter of A-B-*. *See* I.J. Dec. at 6. To be sure, the lead respondent was the victim of crimes, but those relationship-based crimes are insufficient to establish eligibility for asylum. Because the lead respondent failed to establish that her former partner was motivated by any other reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the stated particular social group of "Mexican women." Similarly, the threats that the lead respondent received from a stranger related to her husband's involvement in organized crime rather than because she is a Mexican woman.

The Lead Respondent Can Reasonably Relocate Within Mexico

As the Immigration Judge erred in finding the lead respondent established past persecution, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the lead respondent bore the burden of establishing that internal relocation within Mexico was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored." (citing 8 C.F.R. § 1208.13(b)(3)(i))). Even if the Department bears the burden of proof on this issue, the Immigration Judge erred in finding internal relocation unreasonable. I.J. Dec. at 9. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *Matter of M-Z-M-R-*, 26 I&N Dec. at 33. The Immigration Judge erroneously relied on the fact that the lead respondent testified that it would be difficult for her to relocate as

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of J-G-, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach).

all of her family is in the town of Ometepec and that she lived there exclusively before coming to the United States. *See* I.J. Dec. at 9.

The Attorney General noted that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)," and lead respondent failed to meet her burden of proof on this issue. *Matter of A-B-*, 27 I&N Dec. at 345.

The Immigration Judge Erroneously Granted the Respondents Withholding of Removal

The Immigration Judge erroneously granted the respondents withholding of removal under the CAT. *See* I.J. Dec. at 9. The respondents failed to meet their high burden of demonstrating it is more likely than not that they would be tortured by or with the acquiescence of a public official or other person acting in an official capacity of the government in Mexico. *See* 8 C.F.R. §§1208.16, 1207.17. Torture is an, "extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that does not amount to torture." 8 C.F.R. § 1207.18(a)(2). For an act to constitute "torture" under the regulations implementing the CAT, it must satisfy each of the five elements set forth in 8 C.F.R. § 1208.18(c): (1) the act must cause severe physical or mental pain or suffering, (2) the act must be intentionally inflicted, (3) the act must be inflicted for a proscribed purpose, (4) the act must be inflicted by or at the instigation of or with consent or acquiescence of a public official, and (5) the act cannot arise from lawful sanctions. *Matter of J-E-*, 23 I&N Dec 291 (BIA 2002), *overruled on other grounds by Azanov v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004). "[N]egligent acts or acts by private individuals not acting on behalf of the government" are not included in the definition of torture. *Id*. at 297-99. However, "willful blindness" is sufficient to prove acquiescence. *Karki v. Holder*, 715 F.3d 792, 794 (10th Cir. 2013). The respondents' substantial burden cannot be met by stringing together a series of suppositions where the evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen. *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006).

The Immigration Judge erroneously found that the respondents would more likely than not be tortured if they return to Mexico because they received threats from a criminal organization in October of 2018. *See* I.J. Dec. at 10. The Immigration Judge further erroneously found that country conditions evidence in the record corroborated this finding, noting that the 2018 U.S. Department of State Country Report on Human Rights states that torture was "widespread" in Mexico. *See* I.J. Dec. at 11. However, the evidence of record, including the country conditions evidence, does not suffice to meet the respondents' burden to show that they specifically are more likely than not to suffer torture. The Immigration Judge further erred in finding that the Mexican government would acquiesce in torture of the respondents and in finding that the respondents had established that they could not relocate within Mexico to avoid torture. *See Matter of O-F-A-S-,* 27 I&N Dec. 709, 722 (BIA 2019) ("a failure to report

'generally is fatal' to a persecution claim unless the alien can show it would be futile to make a report") (internal citations and quotations omitted).

The Department reserves the right to raise additional arguments upon receipt and review of the transcript.

EOIR-26 Continuation Page, Question #6

The Department appeals the Immigration Judge's February 28, 2020 decision granting the respondents asylum pursuant to section 208 of the Immigration and Nationality Act (Act or INA). The Immigration Judge erred in finding that the lead respondent (respondent) is credible and that the respondent met her burden to establish eligibility for asylum. Specifically, the Immigration Judge erred in finding (1) that the respondent was credible, (2) a a nexus between the harm the respondent fears and a protected ground, (3) that internal relocation is unreasonable, and (4) that the Honduran government is unable or unwilling to protect her from the private actor she fears.

I. The Respondent Failed to Establish that she is Credible

The Immigration judged erred in finding that the respondent established she was credible. When testimony is offered in support of an application, the Immigration Judge must make a credibility determination. INA § 240(c)(4)(B). For applications filed after May 11, 2005, the provisions of the REAL ID Act of 2005 govern the credibility analysis. In making a credibility determination, the Immigration Judge must consider the totality of the circumstances and all relevant factors. INA § 240(c)(4)(C); *Matter of J-Y-C-*, 24 I&N Dec. 260, 262 (BIA 2007). Generally, to be credible, testimony should satisfactorily explain any material discrepancies or omissions. INA § 240(c)(4)(C); *Matter of Y-I-M-,* 27 I&N Dec. 724, 724 (BIA 2019). The Immigration Court may base a credibility determination on the witnesses' demeanor, candor, or responsiveness, and the inherent plausibility of the testimony. INA § 240(c)(4)(C). Other factors include the consistency between written and oral statements, without regard to whether an inconsistency goes to the heart of a respondent's claim. INA § 240(c)(4)(C); *J-Y-C-*, 24 I&N Dec. at 263-66.

Adverse credibility findings are to be based on inconsistent statements, contradictory evidence, and inherently improbable testimony. *Matter of S-M-J-*, 21 I&N Dec. 722, 729 (BIA 1997). Moreover, "specific and cogent" reasons that go to the crux of one's claim must support an adverse credibility finding. *Matter of A-S-*, 21 I&N Dec. 1106, 1110 (BIA 1998). "[T]he existence of 'only a few' such issues can be sufficient to make an adverse credibility determination." *Matter of A-B*, 27 I&N Dec. 316, 342 (AG 2018) (citing *Djadjou v. Holder*, 662 F.3d 265, 273-74 (4th Cir. 2011)). An Immigration Judge may rely on inconsistencies to support an adverse credibility finding as long as either the Immigration Judge, the applicant, or the Department of Homeland Security has identified the discrepancies and the applicant has been given an opportunity to explain them during the hearing. *Y-I-M-,* 27 I&N Dec. at 724. Further, the Board has clarified that "[b]ecause the alien carries the burden of proof for relief under section 208(b)(1)(B) of the Act, it is incumbent upon [her] to directly raise and clarify information that is obviously consistent." *Y-I-M-*, 27 I&N Dec. at 728.

Here the Immigration Judge clearly erred in finding the respondent credible when her testimony and the corroborating evidence she submitted reflect an obvious inconsistency. After the conclusion of the merits hearing, the record was left open for the respondent to submit additional evidence. I.J. at 2. On or about December 17, 2019, the respondent submitted the following: 1) A news article titled "Matan a colegiala en cañeras de Villanueva" and it's uncertified English translation, 2) a letter from a parishioner from Villanueva who stated that the respondent had to flee because "criminal structures … persecuted her in her Study Center" and it's uncertified English translation, 3) an article titled "Muerta en cañera de San Manuel, Cortés, era una colegiala" and it's

uncertified English translation, 4) the respondent's certificate of enrollment and it's uncertified English translation, and 5) two photographs of young women or girls. Notably, in all of the documents submitted by the respondent, the victim's name was (b)(6); Exh. 3. However, the respondent had consistently testified in Immigration Court that the victim's name was (b)(6);

The Immigration Judge states in a footnote that she does not know why there is a discrepancy in the names, notes the Department did not request additional testimony, and then presumes—without any supporting evidence—that the respondent may have used (b)(6); as a nickname for (b)(6); I.J. at 2 n.3. Based on this presumption, the Immigration Judge finds that the discrepancy does not undermine the respondent's claim. *Id*. The Immigration Judge is in clear error as she shifts the burden to the Department. The Department does not have the burden to establish that the respondent is or is not credible. Thus, the Department did not have to request a subsequent hearing based on the clearly contradictory evidence. Given that the discrepancy was "sufficiently conspicuous . . . as to be self-evident," *Y-I-M-*, 27 I&N Dec. at 728 (citing *Ming Shi Xue v. BIA*, 439 F.3d 111, 114 (2d Cir. 2006)), it was incumbent upon the respondent to provide an explanation by either submitting an affidavit with her supplementary documents or by requesting an opportunity to provide additional clarifying testimony in Immigration Court. She did neither. Moreover, the Immigration Judge has broad authority and could have set the case for a subsequent hearing sua sponte. As it is the respondent's burden to establish that she is credible, her submission of clearly contradictory evidence—without any explanation—undermines her testimony in its entirety. Furthermore, in the absence of an explanation from the respondent as to why she submitted documents regarding

someone named "(b)(6);", after testifying at length about someone named (b)(6); (b)(7)(C), it is not the Immigration Judge's role to provide an explanation—particularly without any evidentiary basis for the presumption.

Regardless of whether the Department challenged the respondent's credibility or requested an additional hearing, it is the respondent's burden to establish that she is credible and the Immigration Judge is required to apply the law considering the totality of the circumstances and not presume facts not in the record. Accordingly, the Immigration Judge erred in finding the respondent credible.

II. The Respondent Failed to Establish a Nexus to a Protected Ground

The Immigration Judge erred in finding that the respondent met her burden to establish that she would be singled out for harm because of her membership in the particular social group of "Honduran women."[1] To demonstrate that harm was "on account of" a protected ground, an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)).

[1] The Board need not address whether "Honduran women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds as asserted in this Notice of Appeal. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach).

The respondent failed to establish a nexus between the group of which the Immigration Judge found her to be a member—"Honduran women"—and the harm she fears. Rather, the respondent established that she fears the harm threatened by a single individual who used to date her friend from school, (b)(6); (b)(7)(C).

The Immigration Judge erred by finding a nexus to "Honduran women" based on the respondent receiving threats from her school friend's ex-boyfriend being in line with the "machismo culture" and views on gender roles in Honduras. I.J. at 7. However, this reasoning does not bolster the Immigration Judge's finding that the respondent was harmed because she is a "Honduran woman," but rather supports a finding that she was harmed because of her association with her school friend and her ex-boyfriend.

The respondent's friend from school, (b)(6); (b)(7)(C), told the respondent that her ex-boyfriend was threatening her. I.J. at 2. When the respondent's friend stopped attending school due to the threats, the respondent started to receive threats from (b)(6); ex-boyfriend. *Id*. The respondent testified that (b)(6); (b)(7)(C) ex-boyfriend knew they were friends and would say that the respondent knew where she was. *Id*. at 3. She also testified that (b)(6); ex-boyfriend threatened her family. *Id*. After (b)(6); (b)(7)(C) death, the respondent stated that (b)(6); s ex-boyfriend said the same thing would happen to the respondent and her daughter. *Id*. There was no evidence of general animosity towards women or any explanation as to why the respondent's school friend's ex-boyfriend decided to threaten the respondent after (b)(6); death.

The respondent provided no evidence that her school friend's ex-boyfriend was motivated to threaten her by any other reason than the nature of their relationship, or that he was generally hostile to "Honduran women" as a group. *Matter of A-B-*, 27 I&N Dec.

316, 339 (A.G. 2018). Although not mentioned by the Immigration Judge, the respondent provided no evidence that (b)(6); was actually killed by her ex-boyfriend. She simply supposes he did it. The respondent also just thinks (b)(6); ex-boyfriend is in a gang because he has tattoos and (b)(6); mentioned that he might be in a gang. However, the respondent does not know what gang he could be a member of and in fact does not know (b)(6); ex-boyfriend's name.

As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *A-B-*, 27 I&N Dec. at 338-39. To be sure, the respondent did testify that she was threatened by (b)(6); ex-boyfriend, but such relationship-based crimes are insufficient to establish eligibility for asylum. Because the respondent failed to establish that her friend from school's ex-boyfriend was motivated by any other reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the stated particular social group of "Honduran women."

III. The Immigration Judge Erred in Concluding That the Government of El Salvador Is Unable or Unwilling to Protect the Respondent

Additionally, the Immigration Judge erred in concluding that the Honduran government was involved in the feared harm by the sole private actor. I.J. at 8. Where the alleged persecutor is unaffiliated with the government, the applicant must show that the government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993); *A-B-*, 27 I&N Dec. at 319 (citing *Acosta*, 19 I&N Dec. at 222). In instances where the applicant is a victim of private criminal activity, "the analysis must also 'consider whether government protection is available.'" *A-B-*, 27

I&N Dec. at 320 (quoting *M-E-V-G-*, 26 I&N Dec. at 243). "'[V]iolence by private citizens . . . , absent proof that the government is unwilling or unable to address it, is not persecution[.]'" *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) (quoting *Butt v. Keisler*, 506 F.3d 86, 92 (1st Cir.2007)). Relevant factors include both "the government's response" to the claimed persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470, 476 (6th Cir. 2019).

"No country provides its citizens with complete security from private criminal activity, and perfect protection is not required." *A-B-*, 27 I&N Dec. at 343. Rather "[a] government's steps 'to punish the persons responsible for the violence' supports a conclusion that it is not unwilling or unable to protect individuals who have been the victims of ethnic attacks." *Bitsin v. Holder*, 719 F.3d 619, 630 (7th Cir. 2013) (quoting *Vahora v. Holder*, 707 F.3d 904, 908 (7th Cir.2013)). As such, an applicant "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *Matter of A-B-*, 27 I&N Dec. at 338.

Although the government of Honduras may at times have difficulty controlling interpersonal violence, "where a government is 'making every effort to combat' violence by private actors, and its 'inability to stop the problem' is not distinguishable 'from any other government's struggles,' the private violence has no government nexus and does not constitute persecution." *Khan*, 727 F.3d at 7 (quoting *Burbiene v. Holder*, 568 F.3d 251 (1st Cir. 2009)).

Here, the respondent failed to establish that the Honduran government is unable or unwilling to protect her from the private actor she fears. The respondent never reported to government authorities the threats made by her school friend's ex-boyfriend.

Country condition evidence shows ongoing attempts by the Honduran government to improve its resources for women by setting up 298 government-operated women's offices focusing on education, personal finance, health, social and political participate, environmental stewardship, and prevention of gender-based violence. DOS 2018 at 18. Moreover, the respondent's own evidence indicates that the National Police and the Police Directorate of Investigation arrived at the scene and a forensic exam was conducted and a Forensic Medical report was completed. Ex. 3 at 6, 8. This evidence does not demonstrate an unwilling or unable government, especially where the respondent never herself sought the government's assistance in protecting her from her school friend's ex-boyfriend.

IV. The Respondent Can Reasonably Relocate Within El Salvador

Based on the Immigration Judge's correct finding that the respondent failed to establish past persecution, the respondent bears the burden of establishing that internal relocation within Honduras is unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("[W]here past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored.") (citing 8 C.F.R. § 1208.13(b)(3)(i)).

The Immigration Judge erred in finding internal relocation unreasonable. I.J. at 8-9. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id.*

The Immigration Judge held that respondent faced a threat of persecution anywhere in Honduras as a Honduran woman even though the harm she fears is related to a single private actor. This finding is contrary to the U.S. Department of State, Country Reports on Human Rights Practices for 2016 and 2018 for Honduras made part of the record by the Immigration Judge. Additionally, the 2019 State Department Crime and Safety Report for Honduras referenced by the Immigration Judge is for U.S. citizens traveling to Honduras, does not mention crimes specifically against women, and notes that the Honduran Government has established a police unit dedicated to investigating violent crimes against the LGBTI and other vulnerable communities. Moreover, the bulletin cited by the Immigration Judge was last updated on July 28, 2014 and references data ending in 2012—over seven years ago. *See also A-B-*, 27 I&N Dec. at 320 (when the harm is by private actors, the analysis must also "consider whether government protection is available, internal relocation is possible, and persecution exists countrywide.") (quoting *Matter of M-E-V-G-*, 26 I&N Dec. 227, 243 (BIA 2014)).

The Immigration Judge further found that internal relocation would be unreasonable because of gang violence. I.J. at 9. However, the Attorney General has noted that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)." *A-B-*, 27 I&N Dec. at 345. The respondent failed to meet her burden of proof on this issue.

The Department reserves the right to raise additional arguments upon receipt and review of the transcript.

(b)(6); (b)(7)(C) lead and (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C) rider- EOIR-26 Continuation Page, Question #6

The Department of Homeland Security (Department) appeals the Immigration Judge's December 4, 2019 decision granting the lead respondent (respondent) asylum pursuant to section 208 of the Immigration and Nationality Act (Act or INA), which also conferred asylum to the riding respondent as a derivative.[1] The Immigration Judge also erred in granting the respondents withholding of removal under section 241(b)(3) of the Act and protection under the regulations implementing the United States' obligations under Article 3 of the United Nations Convention Against Torture (CAT). The Immigration Judge erred in finding the facts established by the respondent met her burden of proof for relief. Specifically, the respondents failed to establish past persecution, failed to demonstrate a nexus between the harm she suffered and a protected ground, and failed to demonstrate that internal relocation is unreasonable. The respondents further failed to meet their burden on withholding of removal and protection under the CAT. The Department asks the Board of Immigration Appeals (Board) to reverse the decision below and enter orders of removal for the respondents.[2]

The Respondent Failed to Establish Past Persecution

To establish past persecution, a respondent must not only prove a sufficiently serious level of harm, but also, as pertinent here, that the harm was inflicted by "persons or an organization that the government was unable or unwilling to control." *See, e.g., Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The Immigration Judge erred in finding that the Mexican government was unwilling or unable to control the respondent's former partner. I.J. at 11-12. "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27 I&N Dec. at 320. The respondent must establish that her government is unwilling or unable to control the perpetrator, which requires the respondent to show more than that the government had "difficulty controlling" the private criminality. *Id*. at 337. Simply because a government has not acted on a reported crime, successfully investigated it, or punished the perpetrator, does not necessarily establish an inability or unwillingness to control the crime any more than it would in the United States. *Id*. at 343-44. The Immigration Judge's conclusion that the government of Mexico was and is unwilling or unable to protect the respondent is erroneous. *Matter of A-B*, 27 I&N Dec. at 337.

The Respondent Failed to Establish a Nexus to a Protected Ground

Even if the respondent suffered past persecution, the Immigration Judge erred in finding that the respondent met her burden to establish that she was singled out for harm because of her membership in the particular social group of "Mexican women."[3] To demonstrate

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[1] The Immigration Court did not properly serve the Immigration Judge's decision on the Department. The Department is filing a motion to accept this appeal by certification concurrently with this Notice of Appeal.

[2] The Immigration Judge did not enter an order of removal against the respondents, as she granted they asylum. However, the respondents admitted the truth of the allegations contained in the Notices to Appear and conceded removability, and the Immigration Judge found that they were removable as charged. I.J. at 2. As such, no additional fact-finding is required and the Board can enter an order of removal.

[3] . The Board need not address whether "Mexican women" constitutes a cognizable particular social group,

that harm was "on account of" a protected ground, an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)).

The respondent failed to establish a nexus between the group of which she claims to be a member – "Mexican women" – and the harm she suffered. Rather, the respondent established that she was the victim of crimes committed by her former partner that were motivated by the nature of their personal relationship. *See* I.J. at 5-6. The Immigration Judge erred by finding a nexus between the harm and the group "Mexican women." *See* I.J. at 8-9. The evidence does not support the Immigration Judge's finding that the respondent was harmed because she is a "Mexican woman," but rather supports a finding that she was harmed because of her relationship with her prior partner.

The respondent provided no evidence that her former partner was motivated by any other reason than the nature of their relationship, or that he was generally hostile to "Mexican women" as a group. *Matter of A-B-*, 27 I&N Dec. at 339.

As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Matter of A-B-*, 27 I&N Dec. at 338-39. To be sure, the respondent was the victim of crimes committed by her former partner, but those relationship-based crimes are insufficient to establish eligibility for asylum. Because the respondent failed to establish that her former partner was motivated by any other reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the stated particular social group of "Mexican women."

The Respondent Can Reasonably Relocate Within Mexico

As the Immigration Judge erred in finding the respondent established past persecution, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the respondent bore the burden of establishing that internal relocation within Mexico was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored." (citing 8 C.F.R. § 1208.13(b)(3)(i))). Even if the Department bears the burden of proof on this issue, the

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as it may find that the respondent failed to meet her burden on other grounds as asserted in this Notice of Appeal. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach). The Department concurs with the Immigration Judge's holdings that the respondent's three additional proposed particular social groups are not cognizable. I.J. at 13-14.

Immigration Judge erred in finding internal relocation unreasonable. I.J. at 13. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *Matter of M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id*.

The Immigration Judge held that the respondent faced a threat of persecution anywhere in Mexico as a Mexican woman even though her instances of harm were perpetrated by a single actor. I.J. at 13. The Attorney General noted that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)" and the respondent failed to meet her burden of proof on this issue. *Matter of A-B-*, 27 I&N Dec. at 345.

The Immigration Judge erred in alternatively granting withholding of removal under section 241(b)(3) of the Act.

As the respondents failed to meet the lower burden of proof required for asylum, it follows that they also failed to satisfy the clear probability standard to establish eligibility for withholding of removal. *See INS v. Stevic*, 467 U.S. 407 (1984); *see also* 8 C.F.R. §§ 1208.13, 1208.16(b) (2008). Additionally, there are no derivative benefits associated with a grant of withholding of removal because, unlike the asylum statute, the withholding statute does not provide for derivative protection. *See* INA § 208(b)(3)(A) *compared to* INA § 241(b)(3). As such, the Immigration Judge erred in alternatively granting withholding of removal to the respondents.

The Immigration Judge erred in alternatively granting withholding of removal under the CAT.

Furthermore, the respondents failed to prove that it is more likely than not that they will be tortured if returned to Mexico. *See* 8 C.F.R. § 1208.16(c)(2). The respondents have not provided evidence that they were tortured in Mexico and that a public official either seeks to torture them or will acquiesce in their torture if they are returned to that country. *See* 8 C.F.R. § 1208.18(a)(1) (2008); *see also Matter of J-R-G-P-*, 27 I&N Dec. 482 (BIA 2018); *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000). "The burden of proof is on the applicant for withholding of removal […] to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal." 8 C.F.R. § 1208.16(c)(2); *see also* 8 C.F.R. § 1208.16(c)(4); *Matter of J-E-,* 23 I&N Dec. 291 (BIA 2002). This substantial burden cannot be met by stringing together a series of suppositions where the evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen. *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006). Further, the regulations implementing protection pursuant to the CAT do not provide for derivative benefits for an applicant's children. *See* 8 C.F.R. §§ 1208.16, 1208.17, 1208.18; *See also Matter of A-K-*, 24 I. & N. Dec. 275, 279 (BIA 2007) ("[W]hile section 208(b)(3)(A) of the Act provides for derivative asylum in certain circumstances, the Act does not permit derivative withholding of removal under any circumstances."). As such, the Immigration Judge erred in alternatively providing CAT protection to the respondents.

(b)(6); (b)(7)(C), lead and (b)(6); (b)(7)(C) rider- EOIR-26 Continuation Page, Question #6

The Department reserves the right to raise additional arguments upon receipt and review of the transcript.

The Department of Homeland Security (Department) appeals the decision of the Immigration Judge, dated December 23, 2019, granting the lead respondent asylum, which conferred asylum to the two riding respondents as derivatives, and granting all respondents withholding of removal under the regulations implementing the United States' obligations under the Convention Against Torture (CAT) in the alternative.

The Immigration Judge erred in finding that the facts established by the lead respondent met her burden of proof for protective relief. Specifically, the lead respondent failed to establish past persecution, failed to demonstrate a nexus between the harm she suffered and a protected ground, failed to demonstrate that internal relocation is unreasonable, and failed to establish that the government of Mexico is unwilling or unable to protect her. Moreover, the respondents failed to establish that it is more likely than not that they would be tortured if they return to Mexico.

The Lead Respondent Failed to Establish Past Persecution

To establish past persecution, a respondent must not only prove a sufficiently serious level of harm, but also, as pertinent here, that the harm was inflicted by "persons or an organization that the government was unable or unwilling to control." *See, e.g., Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018). In the instant matter, the lead respondent testified that she suffered domestic violence at the hands of her husband and her cousin's husband and threats from someone she did not know in retaliation for her husband's involvement in a criminal organization. *See* I.J. Dec. at 4.

The Lead Respondent Failed to Establish the Government of Mexico Was and Is Unwilling or Unable to Protect Her

The lead respondent must establish that her government is unwilling or unable to control the perpetrator. Simply because a government has not acted on a reported crime, successfully investigated it, or punished the perpetrator, does not necessarily establish an inability or unwillingness to control the crime any more than it would in the United States. *Id*. at 343-44. The lead respondent testified that she never reported any of the harm she suffered to authorities. *See* I.J. Dec. at 7. Based on the finding of facts, the Immigration Judge's conclusion that the government of Mexico was and is unwilling or unable to protect the lead respondent is erroneous. *Matter of A-B*, 27 I&N Dec. at 337.

The Lead Respondent Failed to Establish a Nexus to a Protected Ground

The Immigration Judge erred in finding that the lead respondent met her burden to establish that she was singled out for harm because of her membership in the particular social group of "Mexican women."[1] To demonstrate that harm was "on account of" a protected ground,

[1] The Board need not address whether "Mexican women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds as asserted in this Notice of Appeal. *Matter*

an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)).

The lead respondent failed to establish a nexus between the group of which she claims to be a member – "Mexican women" – and the harm she suffered. Rather, the lead respondent established that she was the victim of crimes committed by her former partner that were motivated by the nature of their personal relationship. The lead respondent provided no evidence that her former partner and her husband's cousin were motivated by any other reason than the nature of their relationship, or that either was generally hostile to "Mexican women" as a group. *Matter of A-B-*, 27 I&N Dec. at 339. As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Matter of A-B-*, 27 I&N Dec. at 338-39. The Immigration Judge erroneously found that the domestic violence inflicted on the lead respondent was "informed by Mexico's deep-seated view of gender relations and a woman's role in society," citing no authority and instead referencing the contrary authority of *Matter of A-B-*. *See* I.J. Dec. at 6. To be sure, the lead respondent was the victim of crimes, but those relationship-based crimes are insufficient to establish eligibility for asylum. Because the lead respondent failed to establish that her former partner was motivated by any other reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the stated particular social group of "Mexican women." Similarly, the threats that the lead respondent received from a stranger related to her husband's involvement in organized crime rather than because she is a Mexican woman.

The Lead Respondent Can Reasonably Relocate Within Mexico

As the Immigration Judge erred in finding the lead respondent established past persecution, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the lead respondent bore the burden of establishing that internal relocation within Mexico was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored." (citing 8 C.F.R. § 1208.13(b)(3)(i))). Even if the Department bears the burden of proof on this issue, the Immigration Judge erred in finding internal relocation unreasonable. I.J. Dec. at 9. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *Matter of M-Z-M-R-*, 26 I&N Dec. at 33. The Immigration Judge erroneously relied on the fact that the lead respondent testified that it would be difficult for her to relocate as

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of J-G-, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach).

all of her family is in the town of Ometepec and that she lived there exclusively before coming to the United States. *See* I.J. Dec. at 9.

The Attorney General noted that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)," and lead respondent failed to meet her burden of proof on this issue. *Matter of A-B-*, 27 I&N Dec. at 345.

The Immigration Judge Erroneously Granted the Respondents Withholding of Removal

The Immigration Judge erroneously granted the respondents withholding of removal under the CAT. *See* I.J. Dec. at 9. The respondents failed to meet their high burden of demonstrating it is more likely than not that they would be tortured by or with the acquiescence of a public official or other person acting in an official capacity of the government in Mexico. *See* 8 C.F.R. §§1208.16, 1207.17. Torture is an, "extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that does not amount to torture." 8 C.F.R. § 1207.18(a)(2). For an act to constitute "torture" under the regulations implementing the CAT, it must satisfy each of the five elements set forth in 8 C.F.R. § 1208.18(c): (1) the act must cause severe physical or mental pain or suffering, (2) the act must be intentionally inflicted, (3) the act must be inflicted for a proscribed purpose, (4) the act must be inflicted by or at the instigation of or with consent or acquiescence of a public official, and (5) the act cannot arise from lawful sanctions. *Matter of J-E-*, 23 I&N Dec 291 (BIA 2002), *overruled on other grounds by Azanov v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004). "[N]egligent acts or acts by private individuals not acting on behalf of the government" are not included in the definition of torture. *Id*. at 297-99. However, "willful blindness" is sufficient to prove acquiescence. *Karki v. Holder*, 715 F.3d 792, 794 (10th Cir. 2013). The respondents' substantial burden cannot be met by stringing together a series of suppositions where the evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen. *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006).

The Immigration Judge erroneously found that the respondents would more likely than not be tortured if they return to Mexico because they received threats from a criminal organization in October of 2018. *See* I.J. Dec. at 10. The Immigration Judge further erroneously found that country conditions evidence in the record corroborated this finding, noting that the 2018 U.S. Department of State Country Report on Human Rights states that torture was "widespread" in Mexico. *See* I.J. Dec. at 11. However, the evidence of record, including the country conditions evidence, does not suffice to meet the respondents' burden to show that they specifically are more likely than not to suffer torture. The Immigration Judge further erred in finding that the Mexican government would acquiesce in torture of the respondents and in finding that the respondents had established that they could not relocate within Mexico to avoid torture. *See Matter of O-F-A-S-,* 27 I&N Dec. 709, 722 (BIA 2019) ("a failure to report

'generally is fatal' to a persecution claim unless the alien can show it would be futile to make a report") (internal citations and quotations omitted).

The Department reserves the right to raise additional arguments upon receipt and review of the transcript.

The Department appeals the Immigration Judge's February 28, 2020 decision granting the respondents asylum pursuant to section 208 of the Immigration and Nationality Act (Act or INA). The Immigration Judge erred in finding that the lead respondent (respondent) is credible and that the facts established by the respondent met their burden of proof for protective relief.[1] Specifically, the respondent failed to demonstrate that she is credible, failed to demonstrate a nexus between the harm she fears and a protected ground, failed to demonstrate that internal relocation is unreasonable, and failed to establish that the Honduran government is unable or unwilling to protect her from the private actor she fears. The Department asks the Board to reverse the decision of the Immigration Judge and remand the matter for consideration of protection pursuant to the regulations implementing the U.S. obligation under Article 3 of the United Nations Convention Against Torture (CAT).

I. The Respondent Failed to Establish that she is Credible

The Immigration judged erred in finding that the respondent established she was credible. When testimony is offered in support of an application, the Immigration Judge must make a credibility determination. INA § 240(c)(4)(B). For applications filed after May 11, 2005, the provisions of the REAL ID Act of 2005 govern the credibility analysis. In making a credibility determination, the Immigration Judge must consider the totality of the circumstances and all relevant factors. INA § 240(c)(4)(C); *Matter of J-Y-*

[1] As the respondent failed to meet the lower burden of proof required for asylum, it follows that she also failed to satisfy the clear probability standard to establish eligibility for withholding of removal. *See INS v. Stevic*, 467 U.S. 407 (1984); *see also* 8 C.F.R. §§ 1208.13, 1208.16(b) (2008). Furthermore, she failed to prove that it is more likely than not that she will be tortured if she is returned to Honduras. *See* 8 C.F.R. § 1208.16(c)(2). The respondent has not provided evidence that she was tortured in Honduras or that a Government official either seeks to torture her or will acquiesce in her torture if she is returned to that country. *See* 8 C.F.R. § 1208.18(a)(1) (2008); *see also Matter of J-R-G-P-*, 27 I&N Dec. 482 (BIA 2018); *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000).

C-, 24 I&N Dec. 260, 262 (BIA 2007). Generally, to be credible, testimony should satisfactorily explain any material discrepancies or omissions. INA § 240(c)(4)(C); *Matter of Y-I-M,* 27 I&N Dec. 724, 724 (BIA 2019). The Immigration Court may base a credibility determination on the witnesses' demeanor, candor, or responsiveness, and the inherent plausibility of the testimony. INA § 240(c)(4)(C). Other factors include the consistency between written and oral statements, without regard to whether an inconsistency goes to the heart of a respondent's claim. INA § 240(c)(4)(C); *J-Y-C-*, 24 I&N Dec. at 263-66.

Adverse credibility findings must be based on "specific, cogent reasons" such as "inconsistent statements, contradictory evidence, and inherently improbable testimony." *Figeroa v. INS*, 886 F.2d 76, 78 (4th Cir. 1989); *Tewabe v. Gonzales*, 446 F.3d 533, 538 (4th Cir. 2006). "[T]he existence of 'only a few' such issues can be sufficient to make an adverse credibility determination." *Matter of A-B*, 27 I&N Dec. 316, 342 (AG 2018) (citing *Djadjou v. Holder*, 662 F.3d 265, 273-74 (4th Cir. 2011)). An Immigration Judge may rely on inconsistencies to support an adverse credibility finding as long as either the Immigration Judge, the applicant, or the Department of Homeland Security has identified the discrepancies and the applicant has been given an opportunity to explain them during the hearing. *Y-I-M,* 27 I&N Dec. at 724.

Here the Immigration Judge clearly erred in finding the respondent credible when her testimony and the corroborating evidence she submitted are entirely inconsistent. After the conclusion of the merits hearing, the record was left open for the respondent to submit additional evidence. I.J. at 2. On or about December 17, 2019, the respondent submitted the following: 1) A news article titled "Matan a colegiala en cañeras de

Villanueva" and it's uncertified English translation, 2) a letter from a parishioner from Villanueva who stated that the respondent had to flee because "criminal structures … persecuted her in her Study Center" and it's uncertified English translation, 3) an article titled "Muerta en cañera de San Manuel, Cortés, era una colegiala" and it's uncertified English translation, 4) the respondent's certificate of enrollment and it's uncertified English translation, and 5) two photographs of young women or girls. In all of the articles submitted by the respondent, the victim's name is [redacted] not [redacted] as she testified. Exh. 3.

The Immigration Judge states in footnote 3 that she does not know why there is a discrepancy in the names, notes the Department did not request additional testimony, and then presumes the respondent used "[redacted] as a nickname for [redacted]." I.J. at fn. 2. Based on this presumption, the Immigration Judge finds the discrepancy does not undermine the respondent's claim. *Id.* The Immigration Judge is in clear error as she tries to shift the burden to the Department. The Department does not have the burden to establish that the respondent is or is not credible. Thus, the Department did not have to request a subsequent hearing based on the contradictory evidence. Moreover, the Immigration Judge has broad authority and could have set the case for a subsequent hearing sua sponte. As it is the respondent's burden to establish that she is credible, her submission of evidence – without any explanation – undermines her testimony in its entirety. Furthermore, in the absence of an explanation from the respondent as to why she submitted documents regarding someone named "[redacted] after testifying at length about someone named "[redacted] it is not the Immigration Judge's role to provide an explanation – in this case presuming it could be a nickname. *Id.*

Regardless of whether the Department challenged the respondent's credibility or requested an additional hearing, it is the respondent's burden to establish that she is credible and the Immigration Judge is required to apply the law considering the totality of the circumstances – and not add "facts" not presented into evidence. The inconsistency regarding the respondent's friend's name – and thus the contradictory oral and documentary evidence – goes to the crux of the respondent's claim and thus, must go to the foundation of the credibility determination in this case. Accordingly, the Immigration Judge erred in finding the respondent credible.

II. The Respondent Failed to Establish a Nexus to a Protected Ground

The Immigration Judge erred in finding that the respondent met her burden to establish that she would be singled out for harm because of her membership in the particular social group of "Honduran women."[2] To demonstrate that harm was "on account of" a protected ground, an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)).

[2] The Board need not address whether "Honduran women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds as asserted in this Notice of Appeal. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach).

The respondent failed to establish a nexus between the group of which she claims to be a member – "Honduran women" – and the harm she fears. Rather, the respondent established that she fears the harm threatened by a single individual who used to date her friend from school, (b)(6);

The Immigration Judge erred by finding a nexus to "Honduran women" based on the court's determination that the harm feared by respondent was because the respondent was threatened her school friend's ex-boyfriend, is in line with information about the "machismo culture" and views on gender roles in Honduras. I.J. at 7. However, this reasoning does not bolster the Immigration Judge's finding that the respondent was harmed because she is a "Honduran woman," but rather supports a finding that she was harmed because of her association with her school friend and her ex-boyfriend.

The respondent's friend from school, (b)(6); , told the respondent that her ex-boyfriend was threatening her. I.J. at 2. When the respondent's friend stopped attending school due to the threats, the respondent started to receive threats from (b)(6); ex-boyfriend. *Id*. The respondent testified that (b)(6); ex-boyfriend knew they were friends and would say that the respondent knew where she was . *Id*. at 3. She also testified that (b)(6); ex-boyfriend threated her family. *Id*. After (b)(6); death, the respondent stated that (b)(6); ex-boyfriend said the same thing would happen to the respondent and her daughter. *Id*. There was no evidence of general animosity towards women or any explanation as to why the respondent's school friend's ex-boyfriend decided to threaten the respondent after (b)(6); death.

The respondent provided no evidence that her school friend's ex-boyfriend was motivated to threaten her by any other reason than the nature of their relationship, or that

he was generally hostile to "Honduran women" as a group. *Matter of A-B-*, 27 I&N Dec. 316, 339 (A.G. 2018). Although not mentioned by the Immigration Judge, the respondent provided no evidence that (b)(6); was actually killed by her ex-boyfriend. She simply supposes he did it. The respondent also just thinks (b)(6); ex-boyfriend is in a gang because he has tattoos and (b)(6); mentioned that he might be in a gang. However, the respondent does not know what gang he could be a member of and in fact does not know (b)(6); ex-boyfriend's name.

As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *A-B-*, 27 I&N Dec. at 338-39. To be sure, the respondent did testify that she was threatened by (b)(6); ex-boyfriend, but those relationship-based crimes are insufficient to establish eligibility for asylum. Because the respondent failed to establish that her friend from school's ex-boyfriend was motivated by any other reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the stated particular social group of "Honduran women."

III. The Immigration Judge Erred in Concluding That the Government of El Salvador Is Unable or Unwilling to Protect the Respondent

Additionally, the Immigration Judge erred in concluding that the Honduran government was involved in the feared harm by the sole private actor. I.J. at 8. Where the alleged persecutor is unaffiliated with the government, the applicant must show that the government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993); *A-B-*, 27 I&N Dec. at 319 (citing *Acosta*, 19 I&N Dec. at 222). In instances where the applicant is a victim of private criminal activity,

"the analysis must also 'consider whether government protection is available.'" *A-B-*, 27 I&N Dec. at 320 (quoting *M-E-V-G-*, 26 I&N Dec. at 243). "'[V]iolence by private citizens . . . , absent proof that the government is unwilling or unable to address it, is not persecution[.]'" *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) (quoting *Butt v. Keisler*, 506 F.3d 86, 92 (1st Cir.2007)). Relevant factors include both "the government's response" to the claimed persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470, 476 (6th Cir. 2019).

"No country provides its citizens with complete security from private criminal activity, and perfect protection is not required." *A-B-*, 27 I&N Dec. at 343. Rather "[a] government's steps 'to punish the persons responsible for the violence' supports a conclusion that it is not unwilling or unable to protect individuals who have been the victims of ethnic attacks." *Bitsin v. Holder*, 719 F.3d 619, 630 (7th Cir. 2013) (quoting *Vahora v. Holder*, 707 F.3d 904, 908 (7th Cir.2013)). As such, an applicant "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *Matter of A-B-*, 27 I&N Dec. at 338.

Although the government of Honduras may at times have difficulty controlling interpersonal violence, "where a government is 'making every effort to combat' violence by private actors, and its "inability to stop the problem" is not distinguishable "from any other government's struggles," the private violence has no government nexus and does not constitute persecution." *Khan*, 727 F.3d at 7 (quoting *Burbiene v. Holder*, 568 F.3d 251 (1st Cir. 2009)).

Here, the respondent failed to establish that the Honduran government is unable or unwilling to protect her from the private actor she fears. The respondent never

reported to government authorities the threats made by her school friend's ex-boyfriend. Country condition evidence shows ongoing attempts by the Honduran government to improve its resources for women by setting up 298 government-operated women's offices focusing on education, personal finance, health, social and political participate, environmental stewardship, and prevention of gender-based violence. DOS 2018 at 18. Moreover, the respondent's own evidence indicates that the National Police and the Police Directorate of Investigation arrived at the scene and a forensic exam was conducted and a Forensic Medical report was completed. Ex. 3 at 6, 8. This evidence does not demonstrate an unwilling or unable government, especially where the respondent never sought the government's assistance in protecting her from her school friend's ex-boyfriend.

IV. The Respondent Can Reasonably Relocate Within El Salvador

Based on the Immigration Judge's correct finding that the respondent failed to establish past persecution, the respondent bears the burden of establishing that internal relocation within Honduras is unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("[W]here past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored.") (citing 8 C.F.R. § 1208.13(b)(3)(i)).

The Immigration Judge erred in finding internal relocation unreasonable. I.J. at 8-9. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are substantially better

than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id*.

The Immigration Judge held that respondent faced a threat of persecution anywhere in Honduras as a Honduran woman even though the harm she fears is related to a single private actor. This finding is contrary to the U.S. Department of State, Country Reports on Human Rights Practices for 2016 and 2018 for Honduras made part of the record by the Immigration Judge. Additionally, the 2019 State Department Crime and Safety Report for Honduras referenced by the Immigration Judge is for U.S. citizens traveling to Honduras, does not mention crimes specifically against women, and notes that the Honduran Government has established a police unit dedicated to investigating violent crimes against the LGBTI and other vulnerable communities. Moreover, the bulletin cited by the Immigration Judge was last updated on July 28, 2014 and references data ending in 2012 – over seven years ago. *See also A-B-*, 27 I&N Dec. at 320 (when the harm is by private actors, the analysis must also "consider whether government protection is available, internal relocation is possible, and persecution exists countrywide.") (quoting *Matter of M-E-V-G-*, 26 I&N Dec. 227, 243 (BIA 2014)).

The Immigration Judge further found that internal relocation would be unreasonable because of gang violence. I.J. at 9. However, the Attorney General has noted that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)." *A-B-*, 27 I&N Dec. at 345. The respondent failed to meet her burden of proof on this issue.

EOIR-26 Continuation Page, Question #6

The Department reserves the right to raise additional arguments upon receipt and review of the transcript.

The Department of Homeland Security (Department) appeals the decision of the Immigration Judge, dated December 23, 2019, granting the lead respondent asylum, which conferred asylum to the two riding respondents as derivatives, and granting all respondents withholding of removal under the regulations implementing the United States' obligations under the Convention Against Torture (CAT) in the alternative.

The Immigration Judge erred in finding that the facts established by the lead respondent met her burden of proof for protective relief. Specifically, the lead respondent failed to establish past persecution, failed to demonstrate a nexus between the harm she suffered and a protected ground, failed to demonstrate that internal relocation is unreasonable, and failed to establish that the government of Mexico is unwilling or unable to protect her. Moreover, the respondents failed to establish that it is more likely than not that they would be tortured if they return to Mexico.

The Lead Respondent Failed to Establish Past Persecution

To establish past persecution, a respondent must not only prove a sufficiently serious level of harm, but also, as pertinent here, that the harm was inflicted by "persons or an organization that the government was unable or unwilling to control." *See, e.g., Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018). In the instant matter, the lead respondent testified that she suffered domestic violence at the hands of her husband and her cousin's husband and threats from someone she did not know in retaliation for her husband's involvement in a criminal organization. *See* I.J. Dec. at 4. As the harm she suffered was inflicted by a private actor, she did not demonstrate that the crime constituted persecution.

The Lead Respondent Failed to Establish the Government of Mexico Was and Is Unwilling or Unable to Protect her

The lead respondent must establish that her government is unwilling or unable to control the perpetrator, which requires the lead respondent to show more than that the government had "difficulty controlling" the private criminality; rather, the government must have either "condoned" the criminality or "at least demonstrated a complete helplessness to protect the victims." *Matter of A-B-*, 27 I&N Dec. at 337. Simply because a government has not acted on a reported crime, successfully investigated it, or punished the perpetrator, does not necessarily establish an inability or unwillingness to control the crime any more than it would in the United States. *Id*. at 343-44. The lead respondent testified that she never attempted to report any of the harm she suffered to authorities. *See* I.J. Dec. at 7. Based on the finding of facts, the Immigration Judge's conclusion that the government of Mexico was and is unwilling or unable to protect the lead respondent is erroneous. *Matter of A-B*, 27 I&N Dec. at 337.

The Lead Respondent Failed to Establish a Nexus to a Protected Ground

The Immigration Judge erred in finding that the lead respondent met her burden to establish that she was singled out for harm because of her membership in the particular social

group of "Mexican women."[1] To demonstrate that harm was "on account of" a protected ground, an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)).

The lead respondent failed to establish a nexus between the group of which she claims to be a member – "Mexican women" – and the harm she suffered. Rather, the lead respondent established that she was the victim of crimes committed by her former partner that were motivated by the nature of their personal relationship. The lead respondent provided no evidence that her former partner and her husband's cousin were motivated by any other reason than the nature of their relationship, or that either was generally hostile to "Mexican women" as a group. *Matter of A-B-*, 27 I&N Dec. at 339. As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Matter of A-B-*, 27 I&N Dec. at 338-39. The Immigration Judge erroneously found that the domestic violence inflicted on the lead respondent was "informed by Mexico's deep-seated view of gender relations and a woman's role in society," citing no authority and instead referencing the contrary authority of *Matter of A-B-*. *See* I.J. Dec. at 6. To be sure, the lead respondent was the victim of crimes, but those relationship-based crimes are insufficient to establish eligibility for asylum. Because the lead respondent failed to establish that her former partner was motivated by any other reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the stated particular social group of "Mexican women." Similarly, the threats that the lead respondent received from a stranger related to her husband's involvement in organized crime rather than because she is a Mexican woman.

The Lead Respondent Can Reasonably Relocate Within Mexico

As the Immigration Judge erred in finding the lead respondent established past persecution, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the lead respondent bore the burden of establishing that internal relocation within Mexico was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored." (citing 8 C.F.R. § 1208.13(b)(3)(i))). Even if the Department bears the burden of proof on this issue, the Immigration Judge erred in finding internal relocation unreasonable. I.J. Dec. at 9. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future

[1] The Board need not address whether "Mexican women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds as asserted in this Notice of Appeal. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach).

persecution." *Matter of M-Z-M-R-*, 26 I&N Dec. at 33. The Immigration Judge erroneously relied on the fact that the lead respondent testified that it would be difficult for her to relocate as all of her family is in the town of Ometepec and that she lived there exclusively before coming to the United States. *See* I.J. Dec. at 9.

The Attorney General noted that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)," and lead respondent failed to meet her burden of proof on this issue. *Matter of A-B-*, 27 I&N Dec. at 345.

The Immigration Judge Erroneously Granted the Respondents Withholding of Removal

The Immigration Judge erroneously granted the respondents withholding of removal under the CAT. *See* I.J. Dec. at 9. The respondents failed to meet their high burden of demonstrating it is more likely than not that they would be tortured by or with the acquiescence of the government in Mexico. *See* 8 C.F.R. §§1208.16, 1207.17. Torture is an, "extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that does not amount to torture." 8 C.F.R. § 1207.18(a)(2). For an act to constitute "torture" under the regulations implementing the CAT, it must satisfy each of the five elements set forth in 8 C.F.R. § 1208.18(c): (1) the act must cause severe physical or mental pain or suffering, (2) the act must be intentionally inflicted, (3) the act must be inflicted for a proscribed purpose, (4) the act must be inflicted by or at the instigation of or with consent or acquiescence of a public official, and (5) the act cannot arise from lawful sanctions. *Matter of J-E-*, 23 I&N Dec 291 (BIA 2002), *overruled on other grounds by Azanov v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004). "[N]egligent acts or acts by private individuals not acting on behalf of the government" are not included in the definition of torture. *Id*. at 297-99. However, "willful blindness" is sufficient to prove acquiescence. *Karki v. Holder*, 715 F.3d 792, 794 (10th Cir. 2013). The respondents' substantial burden cannot be met by stringing together a series of suppositions where the evidence does not establish that each step in the hypothetical chain of events is more likely than not to happen. *Matter of J-F-F-*, 23 I&N Dec. 912 (A.G. 2006).

The Immigration Judge erroneously found that the respondents would more likely than not be tortured if they return to Mexico because they received threats from a criminal organization in October of 2018. *See* I.J. Dec. at 10. The Immigration Judge further erroneously found that country conditions evidence in the record corroborated this finding, noting that the 2018 U.S. Department of State Country Report on Human Rights states that torture was "widespread" in Mexico. *See* I.J. Dec. at 11. However, the evidence of record, including the country conditions evidence, does not suffice to meet the respondents' burden to show that they specifically are more likely than not to suffer torture. The Immigration Judge further erred in finding that the Mexican government would acquiesce in torture of the respondents and in finding that the respondents had established that they could not relocate within Mexico to avoid torture. *See Matter of O-F-A-S-,* 27 I&N Dec. 709, 722 (BIA 2019) ("a failure to report

'generally is fatal' to a persecution claim unless the alien can show it would be futile to make a report") (internal citations and quotations omitted.

The Department reserves the right to raise additional arguments upon receipt and review of the transcript.

The Department appeals the Immigration Judge's March 8, 2019 decision granting the lead respondent (respondent) asylum pursuant to section 208 of the Immigration and Nationality Act (Act or INA), which also conferred asylum to the two riding respondents as derivatives. The Immigration Judge erred in finding the facts established by the respondent met her burden of proof for protective relief.[1] Specifically, the respondent failed to establish past persecution, failed to demonstrate a nexus between the harm she suffered and a protected ground, failed to demonstrate that internal relocation is unreasonable, and failed to establish that she merited relief from removal as a matter of discretion. The Department asks the Board to reverse the decision below and remand the matter to the Immigration Judge to consider protection pursuant to the regulations implementing the U.S. obligation under Article 3 of the United Nations Convention Against Torture (CAT).

The Respondent Failed to Establish Past Persecution

Respondent's harm did not rise to the level of persecution.

The Immigration Judge erred in finding that the harm suffered by the respondent rose to the level of persecution. The respondent testified that she was, on a few occasions, battered by her former partner (twice resulting in her seeking medical attention); that her former partner pushed her to the ground on two occasions; and that her former partner once temporarily denied her access to their child. I.J. at 3-6. She testified that her former partner also threatened her, belittled her, and at times restricted her movements outside of the home. *Id*. As harmful as such actions are, they are not, even collectively as found by the Immigration Judge, severe enough to rise to the level of persecution. *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018) (citing *Matter of T-Z-*, 24 I&N Dec. 163, 172-73 (BIA 2007)); *see also Sidabutar v. Gonzales,* 503 F.3d 1116, 1124 (10th Cir. 2007) (affirming the Board's finding of no persecution where petitioner was repeatedly beaten and robbed at the hands of Muslim classmates); *Kapcia v. INS,* 944 F.2d 702, 704–05, 708 (10th Cir. 1991) (affirming the Board's finding of no persecution where petitioner was detained twice for two-day periods during which he was interrogated and beaten based on his political affiliation, was assigned poor work tasks and denied bonuses, was conscripted into the army where he experienced constant harassment, and was fired from his job). Because the harm described by the respondent does not rise to the level of persecution, the Immigration Judge erred in finding the respondent suffered past persecution.

[1] As the respondent failed to meet the lower burden of proof required for asylum, it follows that she also failed to satisfy the clear probability standard to establish eligibility for withholding of removal. *See INS v. Stevic*, 467 U.S. 407 (1984); *see also* 8 C.F.R. §§ 1208.13, 1208.16(b) (2008). Furthermore, she failed to prove that it is more likely than not that she will be tortured if she is returned to Mexico. *See* 8 C.F.R. § 1208.16(c)(2). The respondent has not provided evidence that she was tortured in Mexico or that a Government official either seeks to torture her or will acquiesce in her torture if she is returned to that country. *See* 8 C.F.R. § 1208.18(a)(1) (2008); *see also Matter of J-R-G-P-*, 27 I&N Dec. 482 (BIA 2018); *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000).

The Mexican government assisted respondent.
The Immigration Judge erred in finding that the Mexican government was unwilling or unable to control the respondent's former partner. I.J. at 16. "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27 I&N Dec. at 320. The respondent must establish that his or her government is unwilling or unable to control the perpetrator which requires the respondent to show more than that the government had "difficulty controlling" the private criminality; rather, the government must have either "condoned" the criminality or "at least demonstrated a complete helplessness to protect the victims." *Id*. at 337. Simply because a government has not acted on a reported crime, successfully investigated it, or punished the perpetrator, does not necessarily establish an inability or unwillingness to control the crime any more than it would in the United States. *Id*. at 343-44. Here, the respondent testified that the local police were able to intervene and limit her partner's behavior. I.J. at 4. The record establishes that the local police were willing to assist the respondent, though their resources were limited. I.J. at 3, 6. Additionally, threats to contact the state police were effective in curbing her partner's behavior. I.J. at. 4. The respondent failed to demonstrate that the police condoned the private actions of her partner or that they were completely helpless to protect her. In fact, the police requested that the respondent report to their precinct after she filed a report against her former partner so they could take pictures and conduct a medical and psychological exam; however, the respondent decided to cross the border into the United States rather than engage in the protection and assistance offered by the Mexican government. I.J. at 6. Based on the finding of facts, the Immigration Judge's conclusion that the government of Mexico was and is unwilling or unable to protect the respondent is erroneous. *Matter of A-B*, 27 I&N Dec. at 337.

The Respondent Failed to Establish a Nexus to a Protected Ground
Even if the respondent suffered past persecution, the Immigration Judge erred in finding that the respondent met her burden to establish that she was singled out for harm because of her membership in the particular social group of "Mexican women."[2] To demonstrate that harm was "on account of" a protected ground, an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)).

[2] The Department takes no position on whether "Mexican women" constitutes a cognizable particular social group. The Board need not address this issue as it may find that the respondent failed to meet her burden on other grounds as asserted in this Notice of Appeal. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach). The Department concurs with the Immigration Judge's holdings that the respondent's three additional proposed particular social groups are not cognizable. I.J. at 13-14.

The respondent failed to establish a nexus between the group of which she claims to be a member – "Mexican women" – and the harm she suffered. Rather, the respondent established that she was the victim of crimes committed by her former partner that were motivated by the nature of their personal relationship. This fact was underscored by the Immigration Judge, who emphasized and relied on the existence and nature of respondent's personal relationship with her prior partner to find a nexus to the stated particular social group. *See* I.J. at 3. The Immigration Judge erred by finding a nexus to "Mexican women" based on the Court's determination that the harm suffered by respondent was because the respondent and her prior partner shared a home together, had defined gender roles vis-à-vis each other, and that the respondent was harmed "whenever she attempted to leave" the home. I.J. at 15. This reasoning does not bolster the Immigration Judge's finding that the respondent was harmed because she is a "Mexican woman", but rather supports a finding that she was harmed because of her relationship with her prior partner.

The respondent provided no evidence that her former partner was motivated by any other reason than the nature of their relationship, that he ever harmed any other "Mexican women" aside from her, or that he was generally hostile to "Mexican women" as a group. For example, the respondent testified to interactions between her former partner and the respondent's daughters, his own mother, other female relatives, and female neighbors during and after the time he was in a relationship with the respondent that did not involve violence or the threat of violence towards them. I.J. at 3-4. The respondent's testimony demonstrates that her former partner held no generalized animosity towards the other "Mexican women" in his life. In fact, her testimony demonstrates instead that her former partner deferred to other "Mexican women", including his mother, who successfully intervened on the respondent's behalf on at least one occasion, and her female neighbor, who also interacted with the respondent's former partner during a domestic incident and was not threatened or harmed in any manner. I.J. at 3.

As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Matter of A-B-*, 27 I&N Dec. at 338-39. To be sure, the respondent was the victim of crimes committed by her former partner, but those relationship-based crimes are insufficient to establish eligibility for asylum. Because the respondent failed to establish that her former partner was motivated by any other reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the stated particular social group of "Mexican women."

The Respondent Can Reasonably Relocate Within Mexico

As the Immigration Judge erred in finding the respondent established past persecution, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the respondent bore the burden of establishing that internal relocation within Mexico was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("By contrast, where past persecution has not been established, the

applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored." (citing 8 C.F.R. § 1208.13(b)(3)(i))). Even if the Department bears the burden of proof on this issue, the Immigration Judge erred in finding internal relocation unreasonable. I.J. at 19. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *Matter of M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id.*

The Immigration Judge held that respondent faced a threat of persecution anywhere in Mexico as a Mexican woman even though her instances of harm were perpetrated by a single actor. This finding is contrary to the U.S. Department of State, Country Reports on Human Rights Practices for 2017 for Mexico submitted into evidence by the Department. The Immigration Judge further found that internal relocation would be unreasonable because the respondent only has a high school education, has never had a successful job in Mexico, and would not have family to assist with childcare. I.J. at 19. In reaching this decision, the Immigration Judge did not consider the fact that the respondent was educated through high school in the United States, obtained at least some collegiate education in Mexico, and for a time did have a job in Mexico. I.J. at 2, 5. Having challenges in life is not the equivalent of an unreasonable life. The Attorney General noted that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)" and respondent failed to meet her burden of proof on this issue. *Matter of A-B-*, 27 I&N Dec. at 345.

The Respondent Does Not Merit Discretionary Relief

The Immigration Judge erred in failing to properly consider whether the respondent merits asylum as a matter of discretion. Asylum is a discretionary form of relief from removal, and the applicant bears the burden of proving that she merits asylum as a matter of discretion. INA § 208(b)(1); INA § 240(c)(4)(A)(ii); *Matter of A-B-,* 27 I&N Dec. at FN 12. The Immigration Judge addressed the issue of discretion with one summary sentence, providing no analysis. I.J. at 20. The Immigration Judge failed to address the respondent's 2018 Denver County Court conviction for Wrongs to Minors, a crime which should be considered in any sufficient discretionary finding.

The Department reserves the right to raise additional arguments upon receipt and review of the transcript.

The Department of Homeland Security (Department) appeals the decision of the Immigration Judge, dated January 16, 2019[1], granting the lead respondent asylum, which conferred asylum to the riding respondent as a derivative, and granting the respondent humanitarian asylum in the alternative.

The Immigration Judge erred in finding that the facts established by the lead respondent met her burden of proof for protective relief. Specifically, the lead respondent failed to establish past persecution, failed to demonstrate a nexus between the harm she suffered and a protected ground, failed to demonstrate that internal relocation is unreasonable, and failed to establish that the government of El Salvador is unwilling or unable to protect her. The Immigration Judge further erred in finding that the lead respondent was eligible for humanitarian asylum.

The Lead Respondent Failed to Establish Past Persecution

To establish past persecution, a respondent must not only prove a sufficiently serious level of harm, but also, as pertinent here, that the harm was inflicted by "persons or an organization that the government was unable or unwilling to control." *See, e.g., Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018). In the instant matter, the lead respondent testified that she suffered domestic violence at the hands of her ex-partner, she was sexually abused as a child by her grandmother's boyfriend, and she was sexually assaulted by associates of her ex-partner. *See* I.J. Dec. at 2-3. Although the respondent did suffer harm, each incidence of harm stemmed from her relationship with a private actor, and she did not establish that the government of El Salvador was unwilling or unable to control these private actors.

The Lead Respondent Failed to Establish the Government of El Salvador Was and Is Unwilling or Unable to Protect Her

The lead respondent must establish that her government is unwilling or unable to protect her. Simply because a government has not acted on a reported crime, successfully investigated it, or punished the perpetrator, does not necessarily establish an inability or unwillingness to control the crime any more than it would in the United States. *Matter of A-B*, 27 I&N Dec. at 343-44. The lead respondent was required to show more than that the government had "difficulty controlling" the private criminality to which she was subjected; she failed to meet her burden in this regard. *Id.* at 337.The lead respondent testified that she never reported any of the harm she suffered to authorities. *See* I.J. Dec. at 3. The Immigration Judge's conclusion that the government of El Salvador was and is unwilling or unable to protect the lead respondent was erroneous.

The Lead Respondent Failed to Establish a Nexus to a Protected Ground

[1] The Immigration Court mailed the decision on January 22, 2020.

The Immigration Judge erred in finding that the lead respondent met her burden to establish that she was singled out for harm because of her membership in the particular social group of "Salvadoran women."[2] To demonstrate that harm was "on account of" a protected ground, an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)).

The lead respondent failed to establish a nexus between the group of which she claims to be a member – "Salvadoran women" – and the harm she suffered. Rather, the lead respondent established that she was the victim of crimes committed by the nature of her personal relationship with her abusers. Criminal acts committed against an individual – even heinous acts such as rape – are not persecution where they are not committed on account of a protected ground. *Matter of S-E-G-*, 24 I&N Dec. 579, 589 (BIA 2008); *Rivera-Barrientos v. Holder*, 658 F.3d 1222 (10th Cir. 2011); *Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997); *Matter of Mogharrabi*, 19 I&N Dec. 139 (BIA 1987). The lead respondent provided no evidence that her former partner and his associates or her grandmother's boyfriend were motivated by any other reason than the nature of their relationship, or that any of them were generally hostile to "Salvadoran women" as a group. *Matter of A-B-*, 27 I&N Dec. at 339. As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Matter of A-B-*, 27 I&N Dec. at 338-39. The Immigration Judge erroneously found that the harm inflicted on the lead respondent was "paradigmatic of such gender-motivated abuse and indicative of El Salvador's patriarchal culture," citing no authority and instead referencing the contrary authority of *Matter of A-B-*. *See* I.J. Dec. at 8. To be sure, the lead respondent was the victim of crimes, but those relationship-based crimes are insufficient to establish eligibility for asylum. Because the lead respondent failed to establish that her former partner, his associates, and her grandmother's boyfriend were motivated by any other reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the stated particular social group of "Salvadoran women."

Additionally, for that reason, the respondent is not eligible for humanitarian asylum. An asylum applicant not otherwise barred from asylum who has established past persecution but no longer has a well-founded fear of future persecution may nevertheless warrant a favorable exercise of discretion in the form of what is commonly known as humanitarian asylum, if: "[t]he applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or . . . [t]he applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to

[2] The Board need not address whether "Salvadoran women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds as asserted in this Notice of Appeal. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach).

that country." 8 C.F.R. 1208.13(b)(1)(iii); *see also Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012). Only after the court finds the alien is a refugee who suffered past persecution, and then denies the application based on one of two permitted reasons, may the court then consider granting an asylum application in the exercise of discretion based on the severity of the past persecution or based on other serious harm that may be suffered in the country of removal. 8 C.F.R. § 1208.13(b)(1)(iii). The harm the respondent suffered does not relate to a protected ground. Thus, the respondent has failed to establish past persecution. Thus, the Immigration Judge erred in granting humanitarian asylum in the alternative.

The Lead Respondent Can Reasonably Relocate Within El Salvador

As the Immigration Judge erred in finding the lead respondent established past persecution, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the lead respondent bore the burden of establishing that internal relocation within El Salvador was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored." (citing 8 C.F.R. § 1208.13(b)(3)(i))). Even if the Department bears the burden of proof on this issue, the Immigration Judge erred in finding internal relocation unreasonable. I.J. Dec. at 10. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *Matter of M-Z-M-R-*, 26 I&N Dec. at 33. In this case, the respondent testified that her ex-partner had been killed by police and therefore was no longer a threat to her. I.J. Dec. at 10. Moreover, she had not seen her grandmother's boyfriend since she was a child. I.J. Dec. at 2. While the respondent may have been afraid of her ex-partner's associates, the evidence did not support a finding that these unknown individuals would still be looking for her, or that they would be capable of locating her anywhere in El Salvador.

The Attorney General noted that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)," and lead respondent failed to meet her burden of proof on this issue. *Matter of A-B-*, 27 I&N Dec. at 345.

The Department reserves the right to raise additional arguments upon receipt and review of the transcript.

On October 9, 2018, the Immigration Judge granted the respondent's[1] request for asylum from Honduras under section 208 of the Act. I.J. Decision at 2, 13. The Department appeals the grant of asylum and requests remand for full consideration of the respondent's request for asylum, withholding of removal, and protection under the CAT.

First, the Department asserts that the Immigration Judge erred in concluding that the respondent was credible. I.J. Decision at 4-5. "When an asylum applicant makes inconsistent statements, the immigration judge is uniquely advantaged to determine the applicant's credibility, and the Board may not substitute its own view of the evidence on appeal." *Matter of A-B-*, 27 I&N Dec. 316, 341 (A.G. 2018). However, in this case, the Immigration Judge made cursory factual findings and failed to address the inconsistencies in the respondent's 2018 removal proceeding. Instead of meaningfully addressing the respondent's testimony, the Immigration Judge simply noted that the respondent's testimony "generally conformed to the information provided in her application for relief and her answers were consistent with other evidence of record." I.J. Decision at 5. However, the record establishes numerous inconsistencies that the Immigration Judge's decision does not mention or attempt to resolve.

One critical inconsistency pertains to the alleged persecutor, (b)(6); (b)(7)(C) (b)(6); (b)(7)(C). The respondent's application and declaration describe generalized fear of the Los Rebos gang[2] and a problem with (b)(6); (b)(7)(C), in which he tried to kill the respondent in 2017. The respondent's declaration described at attempted kidnapping and rape by (b)(6); (b)(7)(C) on December 24, 2017, although she was not seriously harmed.

[1] The respondent identifies as a transgender female, and the Department's pronoun use will reflect the respondent's identity as a female.
[2] The Court expressly declined to consider the other bases upon which the respondent requested asylum, namely political opinion and her familial relationship to her brother Carlos. I.J. Decision at 7, n.4.

She reported this to the police and obtained a police report on January 12, 2018. However, in her testimony, the respondent added harm was that not mentioned in her application or declaration. The respondent vaguely testified (b)(6); tried to kill her while on a Ferris wheel. She stated that she believed he asked the operator of the ride to speed it up, and she and other passengers suffered some minor injuries. The respondent was unable to explain when this occurred, but she noted it happened after she filed her report with the police. At no point in her declaration or her application did the respondent mention any harm or contact with (b)(6); after the December 2017 incident. Yet the Immigration Judge found that it constituted an "attempted murder." I.J. Decision at 7. However, the Immigration Judge failed to address the credibility of the this "attempted murder" where the respondent never raised it prior to her hearing and was extremely vague in her testimony about the event, including being unable to explain when it occurred. Omission of a key event from the asylum application, "determined by context," can support a finding that the applicant was not credible. *Ismaiel v. Mukasey*, 516 F.3d 1198, 1205 (10th Cir. 2008) (holding that an applicant's failure to mention torture on his asylum application and on supplemental letters submitted two weeks before hearing could form basis for adverse credibility determination in denying restriction on removal, particularly where application explicitly asked for such information and alien had assistance of counsel).

Regarding the alleged 2012 rape by (b)(6); (b)(7)(C) relied upon by the Immigration Judge, the respondent never previously claimed that he raped her. Indeed, in her 2013 credible fear interview, Exh. 10, the respondent generally stated that (b)(6); (b)(7)(C) was one of the people who had "abused" her since she was seven years old. She never

explained what she meant by that and instead focused much of the claim on a man named (b)(6); (b)(7)(C). She then went on to mention a 2011 rape by an unknown male. She never mentioned any problem in 2012, whether by (b)(6); (b)(7)(or anyone else. Subsequently, in her 2017 asylum application filed while in withholding-only proceedings, she mentioned a problem with (b)(6); in 2012 in which he threatened to kill her and asserted that he was a leader of the Ultrafiel gang. Exh. 2, Tab D. She claimed he killed the nephew of her friend because (b)(6); believed that the nephew was a member of a rival gang and also because the nephew's aunt was transgender. She vaguely claimed (b)(6); threatened her while he was in jail after being convicted of the murder, which prompted her to flee to Mexico. Likewise, in her testimony in that proceeding, she did not claim that (b)(6); (b)(7)(had ever raped her. Exh. 2, Tab C. In her third immigration proceeding, she mentioned an attempted murder by (b)(6); in 2017. However, her testimony then added that (b) (b)(6); (b)(7)(C) had raped her in 2012. This rape was a critical factor in the Immigration Judge's decision, including as to whether the threats she received following her second removal constituted past persecution. I.J. Decision at 6. The Immigration Judge never addressed the failure of the respondent to previously raise the alleged rape in 2012 by (b)(6) (b)(6); (b)(7)(C) despite being in immigration proceedings twice previously on fear-based claims, or to otherwise address the respondent's evolving story regarding her encounters with (b)(6); (b)(7)(C). This is especially problematic where the respondent raised the 2011 rape by an unknown person in both her 2013 credible fear interview and in her 2017 proceeding. Exh. 2, Tab C at 8, n.3; Exh. 10.

Furthermore, the respondent was previously found to be incredible in her 2017 withholding-only proceeding. Yet the respondent denied that she had a hearing before

the Immigration Judge prior to being removed to Honduras in 2017. The record is clear that she did have a hearing as she previously applied for protection-related relief, and her testimony was taken prior to the Immigration. Exh. 2, Tabs C-D. The Immigration Judge failed to address the prior decision made in 2017 or the prior adverse credibility finding. Likewise, the Immigration Judge did not address the respondent's assertion that she never had a hearing in 2017. Again, this failure was critical as the respondent thereafter disputed portions of her testimony in 2017 despite it being part of the record. Exh. 2, Tab C.

The Immigration Judge erred in finding that the respondent established past persecution. I.J. at 6-7. In order to meet her burden of proof that she experienced past persecution, the alien must establish that (1) an incident or incidences rise to the level of persecution, (2) were committed on account of a protected ground, and (3) were committed by the government or forces the government could not or would not control. *Niang v. Gonzales*, 422 F.3d 1187, 1194-95 (10th Cir. 2005). Persecution is . . . "[t]he infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g. race, religion political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life." *Matter of Laipenieks*, 18 I&N Dec. 433, 456-57 (BIA 1983), *rev'd on other grounds*, 750 F.2d 1427 (9th Cir. 1985); *see also Wiransane v. Ashcroft*, 366 F.3d 889, 893 (10th Cir. 2004) ("Although persecution is not defined in the INA, we have held that a finding of persecution requires the infliction of suffering or harm upon those who differ (in race,

religion, or political opinion) in a way regarded as offensive and must entail more than just restrictions or threats to life and liberty"). The Immigration Judge found that the harm experienced by the respondent between October of 2017 to April of 2018[3] constituted past persecution. I.J. at 6. The respondent testified to two incidents involving (b)(6); after her last removal on October 31, 2017. Exh. 2, Tab. A. The first occurred on December 24, 2017, in which (b)(6); (b)(7)(C), while on weekend release from prison, chased her, drug her into an alley, and hit her with a gun. Neighbors intervened to stop anything further from occurring, but (b)(6); threatened to kill the respondent the next time he saw her. The respondent suffered a nose bleed and had bruises on her back and ribs. She did not require medical treatment.

The second incident occurred at a church fair on an unknown date sometime after the respondent filed a police report against (b)(6); on January 12, 2018. (b)(6); was following the respondent and her friend at the fair. After the respondent and her friend got on a Ferris wheel. The respondent saw (b)(6); (b)(7)(C) speaking with the ride operator, and the ride later sped up. The respondent and others suffered minor injuries, but the respondent needed no medical treatment. The respondent believes (b)(6); told the operator to try to kill her. In concluding that the respondent suffered past persecution, the Immigration Judge noted that the Ferris wheel incident constituted "attempted murder." I.J. Decision at 7. However, despite the respondent's suspicions that the ride was sped up at the request of (b)(6); (b)(7)(C) there is no evidence that this was an attempted murder of the respondent, and even if it was, the actor was the ride operator and not the alleged persecutor.

[3] The respondent left Honduras in February of 2018, and she did not seek asylum or other protection-related relief from any other country.

Moreover, the Immigration Judge concluded that the threats alone by (b)(6); (b)(6); (b)(7)(C) constituted persecution when taken in conjunction with the alleged rape in 2012. I.J. Decision at 6. However, threats alone do not generally constitute persecution, and the alleged rape in 2012 is not credible as noted above.

The Immigration Judge also erred in concluding that the reason the respondent was targeted was on account of a protected ground. To demonstrate that harm was "on account of" a protected ground, the applicant must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)). A finding of past persecution results in a rebuttable presumption of a well-founded fear on that same basis. *Woldemeskel v. INS*, 257 F.3d 1185, 1189 (10th Cir. 2001); 8 C.F.R. § 1208.13(b)(1). The Immigration Judge erred in concluding that the respondent had established that she would be singled out for harm because of her proposed PSG. The respondent testified that she suspected (b)(6); (b)(7)(C) threatened her in 2017 and raped her in 2012 because she was transgendered. However, there is no evidence that (b)(6); (b)(7)(C) was motivated based upon her gender identity. He never mentioned her identity as a woman. In fact, the respondent told the asylum office in her 2013 credible fear review that (b)(6); used to be a friend. Exh. 10. The

respondent's testimony in her 2017 proceeding and asylum application related to a problem with (b)(6); following the murder of a friend's nephew. "[R]ank speculation and conjecture 'cannot be substituted for objective and substantial evidence.'" *Matter of D-R-*, 25 I&N Dec. 445, 454 (BIA 2011) (internal citations omitted). Indeed, the record was so lacking regarding (b)(6); (b)(7)(C) motivation that the Immigration Judge had to resort to country condition evidence showing discrimination against transgendered individuals to found that (b)(6); was motivated by the respondent's gender identity. I.J. at 7-9. This was improperly as the respondent had a prior relationship with (b)(6); (b)(7)(C) and there is no evidence to support that the respondent's gender identity played any role in his harm of the respondent, let alone a central reason.

The Immigration Judge erred in concluding that the Honduran government was involved in the feared harm by private actors. I.J. Decision at 9-10. Specifically, the Immigration Judge erred in concluding that the Honduran government was not willing to assist the respondent regarding her problems with (b)(6);. The record established that (b)(6); was imprisoned due to an unrelated murder. Although the respondent testified to difficulty in obtaining a police report, she testified that an attorney at the Public Ministry provided her with an order[4] for the police to take her report. The respondent stated that she did not have difficulty getting this order from the Public Ministry, and the police thereafter complied and took her report. As stated by the Attorney General,

> An applicant seeking to establish persecution based on violent conduct of a private actor "must show more than 'difficulty . . . controlling' private behavior." *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005) (quoting *Matter of McMullen*, 17 I&N Dec. 542, 546 (BIA 1980)). The

[4] The respondent possessed this order, but she never provided it to the Court. Instead, she testified about the contents of the letter and how she obtained it from the Public Ministry.

> applicant must show that the government condoned the private actions "or at least demonstrated a complete helplessness to protect the victims." *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000); *see also Hor*, 400 F.3d at 485. 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. There may be many reasons why a particular crime is not successfully investigated and *338 prosecuted. Applicants must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it.

Matter of A-B-, 27 I&N Dec. 316, 337–38 (2018). The Immigration Judge's reasoning is incongruous with the fact that the Honduran Public Ministry, which investigates and prosecutes crimes against sexual minorities, offered assistance to the respondent. After the respondent obtained an order from the Public Ministry, the local police department took the respondent's report. This occurred on January 12, 2018, and the respondent left the country a couple of weeks later in February of 2018. Although the respondent stated nothing was done to investigate the threats by (b)(6); (b)(7)(C) in December of 2017, the respondent provided no evidence of this given that she left the country shortly after making the report. Given these errors, the Immigration Judge's conclusion that the government of Honduras condoned the threat of harm to the respondent cannot stand. *See generally Matter of A-B-*, 27 I&N Dec. at 320, 337.

The Department reserves the right to raise additional arguments upon receipt and review of the transcript.

EOIR-26 Continuation Page, Question #6

The Department of Homeland Security (Department) appeals the Immigration Judge's July 19, 2019 decision (b)(6); (b)(7)(C) pursuant to section 208 of the Immigration and Nationality Act (Act or INA).[1] The Immigration Judge erred in finding the facts established by the lead respondent met her burden of proof for protective relief.[2] Specifically, the respondent failed to demonstrate a nexus between the harm she suffered and a protected ground and failed to establish that the Salvadoran government is unable or unwilling to protect her from her from her former partner. Because the respondent failed to meet her burden in these regards, the Immigration Judge erred in shifting the burden to the Department on the issue of internal relocation. Even if the Department bore the burden of proof on the issue of relocation, the Immigration Judge erred in finding that the Department failed to question the respondent or meet its burden. The Department asks the Board to reverse the decision of the Immigration Judge.

The Immigration Judge erred in finding that the lead respondent suffered past persecution, as the respondent failed to meet her burden to establish that she was singled out for harm because of her membership in the particular social group of "Salvadoran women."[3] To demonstrate that harm was "on account of" a protected ground, an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *Matter of A-B-*, 27 I&N Dec. 316, 339 (A.G. 2018); *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)). As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *A-B-*, 27 I&N Dec. at 338-39.

Here, the respondent established that the abuse committed by her former partner was motivated by his personal relationship with her. The respondent did not establish a nexus between the group of which she claims to be a member – "Salvadoran women" – and the harm she suffered at the hands of her former partner.

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[1] Respondent (b)(6); (b)(7)(C) and respondent (b)(6); (b)(7)(C) are mother and daughter. The Court also (b)(6); (b)(7)(C) as a derivative on her mother's application.

[2] As the respondent failed to meet the lower burden of proof required for asylum, it follows that she also failed to satisfy the clear probability standard to establish eligibility for withholding of removal. *See INS v. Stevic*, 467 U.S. 407 (1984); *see also* 8 C.F.R. §§ 1208.13, 1208.16(b) (2008). Furthermore, she failed to provide evidence that it is more likely than not that she will be tortured if she is returned to El Salvador. *See* 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1) (2008); *see also Matter of J-R-G-P-*, 27 I&N Dec. 482 (BIA 2018); *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000).

[3] The Board need not address whether "Salvadoran women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds as asserted in this Notice of Appeal. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach).

Additionally, the Immigration Judge erred in finding that the lead respondent met her burden to prove that the Salvadoran government was and is unwilling and unable to protect her. I.J. at 8-9. Where the alleged persecutor is unaffiliated with the government, the applicant must show that the government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993); *A-B-*, 27 I&N Dec. at 319 (citing *Acosta*, 19 I&N Dec. at 222). In instances where the applicant is a victim of private criminal activity, "the analysis must also 'consider whether government protection is available.'" *A-B-*, 27 I&N Dec. at 320 (quoting *M-E-V-G-*, 26 I&N Dec. at 243). "'[V]iolence by private citizens . . . , absent proof that the government is unwilling or unable to address it, is not persecution[.]'" *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) (quoting *Butt v. Keisler*, 506 F.3d 86, 92 (1st Cir.2007)). Relevant factors include both "the government's response" to the claimed persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470, 476 (6th Cir. 2019).

Here, the respondent was not only able to avail herself to government resources that are specifically designed to assist women, but because of this resource, the respondent was able to initiate, and meaningfully participate in, judicial proceeding against her former partner. The respondent left El Salvador while this proceeding was pending.

Lastly, as the Immigration Judge erred in finding that the respondent established past persecution on account of a protected ground and shifting the burden on internal relocation to the Department. 8 C.F.R. § 1208.13(b)(3). Rather, the respondent bore the burden of establishing that internal relocation within El Salvador was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored.") (citing 8 C.F.R. § 1208.13(b)(3)(i)).

Even if the Department bore the burden of proof on this issue, however, the Immigration Judge erred in finding that the Department failed to question the respondent regarding internal relocation. I.J. at 10. As example, during cross-examination, the Department established that on a previous occasion the respondent had safely relocated within El Salvador to avoid her mother's abusive male partner. The Immigration Judge erred in concluding that the Department did not meet its burden on this issue.

The Department reserves the right to raise additional arguments upon receipt and review of the transcript.

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☒ DETAINED

☐ Not detained

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

In the Matter of

(b)(6); (b)(7)(C)

In Withholding-Only Proceedings

File No. A (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
BRIEF ON APPEAL

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(b)(6); (b)(7)(C)

INTRODUCTION

On January 31, 2019, the Immigration Judge granted the applicant withholding of removal, finding that the violence the applicant suffered at the hands of her former spouse was on account of the applicant's membership in the group "Mexican women who terminate the marriage without the consent of the husband." The Department of Homeland Security (Department) hereby submits its brief in support of its appeal of that decision granting the applicant withholding of removal pursuant to section 241(b)(3) of the Immigration and Nationality Act (INA or Act). The Department requests that the Board of Immigration Appeals (Board) reverse the decision of the Immigration Judge granting withholding.[1]

The Department respectfully requests three-member panel review due to the need to review a decision by an Immigration Judge that is not in conformity with the law or with applicable precedents and the need to review a clearly erroneous factual determination. *See* 8 C.F.R. § 1003.1(e)(6)(iii), (v) (2016).

ISSUES PRESENTED

I. Did the Immigration Judge err in concluding that the applicant's proposed particular social group— "Mexican women who terminate the marriage without the consent of the husband"—constituted a cognizable particular social group, where this group is not defined with particularity and is not socially distinct?

II. Did the Immigration Judge err in finding that the applicant's former spouse, a private actor, inflicted harm on the applicant in the past, when they were married, and would inflict harm on her in the future on account of her membership in this particular social group?

III. Did the Immigration Judge err in finding that the government of Mexico is unable or unwilling to control the applicant's former spouse, where the applicant never

[1] The Immigration Judge correctly denied the applicant's request for protection pursuant to the regulations implementing the U.S. obligation under Article 3 of the United Nations Convention Against Torture (CAT). The applicant has not filed a Notice of Appeal to challenge that denial before the Board. As such, that part of the Immigration Judge's decision is final.

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reported a crime to the police and there is no evidence that the police were unwilling to investigate any crimes committed against the applicant?

IV. Did the Immigration Judge err in shifting the burden to the Department to establish a fundamental change in circumstances or the ability to relocate within Mexico, and in not finding that the evidence demonstrates that there are changed circumstances and that the applicant could and should be expected to relocate within Mexico, as there is no evidence that her former husband could inflict harm on her no matter where she resides in Mexico and internal relocation is reasonable?

STANDARD OF REVIEW

The Board reviews findings of fact, including "predictive findings of what may or may not occur in the future" for clear error. *Matter of Z-Z-O-*, 26 I&N Dec. 586, 587, 590 (BIA 2015); 8 C.F.R. § 1003.1(d)(3)(i). On the other hand, the Board reviews de novo "questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges." *Z-Z-O-*, 26 I&N Dec. at 588; 8 C.F.R. § 1003.1(d)(3)(ii). This de novo review includes "whether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal." *Z-Z-O-*, 26 I&N Dec. at 591. Although the Board reviews the ultimate determination of whether a proposed particular social group is cognizable de novo, it reviews an Immigration Judge's factual findings underlying that determination for clear error. *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018). A persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by the Board for clear error. *See Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011). However, whether the facts, as found, establish persecution "on account of" a protected ground is a legal issue reviewed by the Board de novo. *Matter of S-E-G-*, 24 I&N Dec. 579, 588 n.5 (BIA 2008). Whether the applicant can internally relocate within Mexico is a mixed question of fact and law. *See Matter of M-Z-M-R-*, 26 I&N Dec. 28, 36 (BIA 2012).

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SUMMARY OF THE ARGUMENT

The applicant bears the burden of proof to establish that her life or freedom would be threatened in the country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 1208.16(b). The Immigration Judge erred in finding that "Mexican women who terminate the marriage without the consent of the husband" constitutes a particular social group under the Act. When an applicant seeks withholding, she must "establish that the group is composed of members who share a common immutable characteristic, defined with particularity, and socially distinct within the society in question. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014). The applicant's particular social group is not defined with particularity, and the record does not establish that this group is socially distinct within Mexico. Even if the particular social group were cognizable, the Immigration Judge erred in concluding that the applicant's particular social group was at least one central reason for the harm she fears from a private actor, her former husband. The record demonstrates that the applicant was subjected to spousal abuse in the 1990s. However, there is no evidence in the record that the applicant's former spouse targeted her on account of her inclusion in the group "Mexican women who terminate the marriage without the consent of the husband." Further, the Immigration Judge erred in finding that the Mexican government would be unable or unwilling to protect the applicant. The applicant never personally reported any harm to the police. Further, the Mexican legal system gave her the divorce she requested. Lastly, the Immigration Judge erred in finding past persecution on the basis of a protected ground, so erred in shifting the burden to the Department to show that there has been no fundamental change in circumstances and that internal relocation is not possible; even if there was past persecution, the

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Immigration Judge erred in finding that the Department had not established that there has been a fundamental change in circumstances and that internal relocation is possible and reasonable.

STATEMENT OF FACTS

The applicant is a forty-two-year-old native and citizen of Mexico. Tr. at 18-19. The applicant first came to the United States without authorization in 1999. Tr. at 22. She was apprehended by immigration authorities at that time; she testified, "They just caught me and returned me to Mexico." Tr. at 23. She did not, it appears, seek asylum at that time, though she claimed at her hearing before the Immigration Judge that she was then fleeing for her life. Tr. at 30. The applicant returned to the United States a week later. Tr. at 23. She did not testify about where she was during that week. Again, she did not seek asylum when she entered the United States. The applicant left the United States on July 4, 2005, returning to Mexico on her own volition. Tr. at 23. She was apprehended twice in 2005 and removed twice – on July 18, 2005, and on July 22, 2005, though her testimony is that she was caught the first time she attempted to return, but managed "to get through" the second time. Tr. at 24. Again, she did not seek asylum when she entered the United States in 2005. At no time prior to her most recent apprehension did she claim a fear of return to Mexico. Because the applicant had been previously removed from the United States, the Department reinstated the prior order of removal pursuant to section 241(b)(5) of the Act after finding her in the United States without authorization. Exh. 1.

Because the applicant claimed fear of persecution or torture if removed to Mexico, her case was referred to the Asylum Office pursuant to 8 C.F.R. § 208.31(b). Exh. 1. Following multiple preliminary hearings, the Immigration Judge provided the applicant with a Form I-589, Application for Asylum and Withholding of Removal, for consideration in withholding-only

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proceedings pursuant to 8 C.F.R. § 1208.31(g), and she filed her completed application. The applicant presented her case to the Immigration Judge at a merits hearing on January 28, 2019.

The applicant claimed physical abuse in Mexico by her now ex-husband. Tr. at 24. This included physical and sexual assaults during her marriage, from 1992 until 1999. Tr. at 24-31, 39. She stated that she was beaten at least three times a week, every week for seven years. Tr. at 49. In spite of her claim that she could never get away from her spouse, because he locked her in a room, she still managed to file for and obtain a divorce from him in 1999 from the civil authorities in Mexico. Tr. 22, 33, 40-41; I.J. at 7. In fact, she stated that she decided to leave him because she caught him with another woman after returning from the store. Tr. at 33, 40. When the Department asked, "You were able to leave?", she replied, "Yes, sir." Tr. at 40. She initially testified on direct examination that when the divorce was final, her former spouse got angry and started threatening her, but that all of the physical abuse happened before the divorce. Tr. at 41. However, she stated when questioned by the Immigration Judge that her former spouse attacked her and choked her the day the applicant signed the divorce decree. Tr. at 48. After that day, the day the divorce was finalized, the physical abuse stopped. Tr. at 41; I.J. at 7. After the divorce, the applicant resided with her mother in Mexico and received threats from her former spouse. I.J. at 7. The applicant moved to live with her uncle in Veracruz, approximately eighteen hours away from the applicant's hometown Chiapas; she continued to receive threats while living with her uncle. I.J. at 8. However, the applicant's former spouse, after the divorce in 1999, did not travel to Veracruz, did not seek her out in person, and did not commit any acts of violence against her. I.J. at 8.

The applicant admits that she never sought medical assistance at any time and that she never reported the abuse to the authorities in Mexico. Tr. at 30, 32, 49-50. She stated that she

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was "constantly locked in that room, how could I go?", though she managed to leave that room, go to the store, return to find her then-spouse having intercourse with another woman, separate from him, and file for and obtain her divorce, without providing any explanation for that contradiction. Tr. at 33. Though the applicant never attempted to report the abuse to the police, she testified very vaguely that the police do not "do anything." Tr. at 37. Her mother testified that she had made complaints to the police, but that nothing was done by them; the police purportedly told her that they could not do anything because there was no blood. Tr. at 59-62. The applicant's mother provided no documentary evidence of any reports filed; in fact, she could not even provide dates on which she went to the police. She did not inform the applicant of any reports or ask the applicant to assist in filing any reports with information regarding the crimes. Tr. at 44, 59-62.

The applicant returned to Mexico of her own volition in 2005, years after her divorce from her husband. Tr. at 44, 59-62. She stated that while she was in Mexico in 2005, she received one threatening call from her ex-husband. Tr. at 42-43. It is unclear whether this happened before or after she was caught and removed from the United States. He never made any attempt at physical contact with her and never physically harmed her while she was back in Mexico during that time. Tr. at 44. Though her mother stated that she sees the applicant's former spouse when she returns to Mexico periodically, and he makes vague threats about the applicant, the applicant stated that she does not know where her former spouse is now and that she has not personally received any threats from him since 2005. Tr. at 53-54. She believes he has children with another woman. Tr. at 54. The applicant's mother, siblings, and children reside in the United States lawfully; her father resides in Mexico. Tr. at 19-21. The applicant is in a "free union" relationship with her partner. Tr. at 21.

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In his written decision, the Immigration Judge granted the applicant's application for withholding of removal, finding that "the applicant's execution of the divorce without the consent of her husband was at least one central for the harm and threats she experienced." I.J. at 16. With respect to the applicant's particular social group, the Immigration Judge noted that the applicant defined her particular social group as "Mexican women who terminate the marriage without the consent of the husband." I.J. at 15.[2] The Immigration Judge found the group is "sufficiently socially distinct" because "Mexican women would generally understand their own affiliation in this group, based on socially construed categories such as nationality and gender." I.J. at 12. The Immigration Judge noted that membership in the group includes only woman who are Mexican and requires that they have terminated a marriage, and done so without the consent of their spouse.

Regarding the requisite nexus, the Immigration Judge stated that the applicant's execution of the divorce "was viewed as an act of defiance" and is particularly compelling given the former partner's "ability to control all aspects of the applicant's life." I.J. at 16. The Immigration Judge concluded that the former partner "still holds a vendetta against the applicant for divorcing him and would seek to harm her because of it." *Id.*

For those reasons, the Immigration Judge granted the applicant's application for withholding of removal pursuant to the Act. The Immigration Judge denied the applicant's request for protection under the regulations implementing the U.S. obligation under Article 3 of the United Nations Convention Against Torture (CAT). The Department filed a timely appeal.

[2] As the Immigration Judge notes, the applicant initially outlined six proposed particular social groups. I.J. at 10; I.J. at 10 n.3; Tr. at 15-16. It was not until the end of the hearing that the Immigration Judge and the applicant agreed to the newly formulated particular social group which the Immigration Judge then found to be cognizable. Tr. at 84.

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ARGUMENT

I. The Immigration Judge erred in concluding that the applicant's proposed particular social group— "Mexican women who terminate the marriage without the consent of the husband"—constitutes a cognizable particular social group under the Act.

The Immigration Judge articulated the applicant's particular social group as "Mexican women who terminate the marriage without the consent of the husband" and erroneously found that to be a cognizable group under the Act.[3] An applicant seeking withholding of removal must demonstrate that it is "more likely than not that, upon removal, [her] life or freedom would be threatened on account of [her] race, religion, nationality, political opinion, or membership in a particular social group. INA § 241(b)(3). When an applicant seeks withholding of removal under INA § 241(b)(3) as a member of a particular social group, the applicant "must establish that the group is composed of members who share a common immutable characteristic, defined with particularity, and socially distinct within the society in question." *M-E-V-G-*, 26 I&N Dec. at 237. If the applicant fails to establish a cognizable particular social group, the "immigration judge or Board need not examine the remaining elements of the [withholding] claim." *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018). It is the applicant's burden to clearly indicate on the record before the Immigration Judge the exact delineation of the proposed particular social group. *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018) (citing *Matter of W-G-R-*, 26 I&N Dec. at 209-10 (BIA 2014)). As the applicant failed to articulate a cognizable particular social group under the Act, the Board should, for the reasons stated below, reverse the Immigration Judge's decision. *Id.* at 191.

[3] Again, the applicant through counsel articulated a number of proposed particular social groups. The one the Immigration Judge found cognizable was articulated by the Immigration Judge at the conclusion of the hearing—the Immigration Judge proposed the group, telling the applicant's counsel, "I'm giving you a softball here." Tr. at 84. At that point, the applicant's counsel agreed with the Immigration Judge on the viability of the Immigration Judge's proposed particular social group.

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The Board has set out a three-pronged test for determining when a proposed particular social group is cognizable. The applicant must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *A-B-*, 27 I&N Dec. at 320 (citing *M-E-V-G-*, 26 I&N Dec. at 234, 237); *see also Matter of L-E-A-*, 27 I&N Dec. 40, 42 (BIA 2017); *Matter of W-G-R-*, 26 I&N Dec. 208, 210-12 (BIA 2014). To be cognizable, the particular social group must exist independently of the harm alleged in the application. *A-B-*, 27 I&N Dec. at 334-35. Social group determinations are made on a case-by-case basis. *L-E-A-*, 237 I&N Dec. at 42; *M-E-V-G-*, 26 I&N Dec. at 251; *Matter of Acosta*, 19 I&N 211, 233 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi,* 19 I&N Dec. 201 (BIA 1985).

As an initial matter, the proposed group lacks the necessary particularity. The particularity requirement addresses "the question of delineation," and "clarifies the point…that not every 'immutable characteristic' is sufficiently precise to define a particular social group." *W-G-R-*, 26 I&N Dec. at 214. Particularity requires that the "terms used to describe the group [must] have commonly accepted definitions in the society of which the group is a part." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2008)). The group must have "discrete and [] definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)). To meet the particularity requirement, the proposed group must "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." *Matter of E-A-G-*, 24 I&N Dec. 591, 594 (BIA 2008). The Board has found that the requirement that the group be socially distinct "considers where those with a common immutable characteristic are set apart, or distinct,

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from other persons within the society in some significant way" and that members "of a particular social group will generally understand their own affiliation with that group, as will other people in their country." *M-E-V-G-*, 26 I&N Dec. at 238, 240. The Attorney General found that social groups defined by their vulnerability to private criminal activity likely lack the particularity requirement under *Matter of M-E-V-G-*. *A-B-*, 27 I&N Dec. at 335.

The applicant failed to articulate her particular social group such that it has defined boundaries; therefore, it lacks particularity. More specifically, the applicant's particular social group— "Mexican women who terminate the marriage without the consent of the husband"— fails to describe "a discrete class of persons." *Matter of W-G-R-*, 26 I&N Dec. at 214. The Immigration Judge found the group is "sufficiently socially distinct," finding that "Mexican women would generally understand their own affiliation in this group, based on socially construed categories such as nationality and gender." The Immigration Judge noted that membership in the group is limited to only woman who are Mexican and requires that they have terminated a marriage without the consent of their spouse. The fact that the group includes divorced women whose spouses did not agree to the divorce and does not include men or single women does not establish that "Mexican women who terminate the marriage without the consent of the husband" is a group "with 'well defined boundaries' delineating who does and does not belong." I.J. at 13-14 (quoting *Matter of S-E-G-*, 24 I&N Dec. 579, 582 (BIA 2008)). Adding in the gender and nationality modifiers to the group gives only the illusion of particularity. The applicant's group does not sufficiently delineate who does and does not belong. Further, there is no evidence in the record that "Mexican women who terminate the marriage without the consent of the husband" has a commonly accepted definition in Mexican society or that Mexican society recognizes that group as set apart in any way. *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Matter of*

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A-M-E- & J-G-U-, 24 I&N at 76). Indeed, the applicant failed to submit any evidence in support of her application and fails to define the boundaries of the group beyond gender and marital status, emphasizing the amorphous nature of the applicant's proposed group. *See Rivera-Barrientos v. Holder*, 666 F.3d 641, 649 (10th Cir. 2012) ("The essence of the 'particularity requirement, therefore, is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." (quoting *Matter of S-E-G-*, 24 I&N Dec. at 584 (BIA 2008)). For these reasons, the Immigration Judge erred in concluding that the applicant's proposed group met the particularity requirement.

Additionally, the proposed group lacks social distinction. To have "social distinction," there must be "evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *W-G-R-*, 26 I&N Dec. at 217. The Board has held that social distinction "considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way." *M-E-V-G-*, 26 I&N Dec. at 238. "In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it." *Id.* The recognition of the group is "determined by the perception of the society in question, rather than by the perception of the persecutor." *Id.* at 242; *see also W-G-R-*, 26 I&N Dec. at 214 (noting there is some degree of overlap between the particularity and social distinction requirements because both take societal context into account).

With regard to whether the applicant's proposed group of "Mexican women who terminate the marriage without the consent of the husband" is socially distinct, the evidence of record lacks any indication that *Mexican society* would perceive the applicant's group as socially

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distinct. *See A-B-*, 27 I&N Dec. at 340 (stating that it is the applicant's burden to establish a cognizable particular social group). The Immigration Judge noted that "Mexican women" would generally understand their own affiliation in the proposed group, as to the gender and nationality portions, but this does not resolve the question—there must also be an understanding by other people in Mexico of the affiliations of the group. *M-E-V-G-*, 26 I&N Dec. at 240. As to the qualifications that the Mexican women in question must be divorced, while Mexican law provides the option of divorce, there is no evidence that Mexican society has any ability to recognize or discern who is divorced. There is no evidence that anyone passing the applicant on the street would have any ability to determine whether she was never married, married, married and widowed, or married and divorced—she wears no scarlet D. While certainly the applicant can "check the box" saying she is divorced, the knowledge of that fact is her possession – there is no widespread knowledge of it in society. Similarly, there is no evidence that Mexican society could or would perceive her as more specifically having obtained a divorce without the consent of her former husband. His purported lack of consent is a layer added to the articulation which springs solely from the perception of the alleged persecutor but has so social visibility. At the end of it all, the applicant has merely provided a description of individuals who share certain traits or experiences, instead of articulating a socially distinct group. *A-B-*, 27 I&N Dec. at 335-36.

Therefore, because the applicant failed to articulate a cognizable particular social group, the applicant failed to meet her burden of proof.

II. The applicant failed to establish that the harm she suffered and the harm she claims to fear were or will be inflicted by her former husband on account of

the particular social group of "Mexican women who terminate the marriage without the consent of the husband."

Simply because an individual may belong to a cognizable particular social group does not necessarily mean that any harm inflicted or threatened will be on account of, or because of, such a protected ground. Rather, the requisite nexus must be independently established. To demonstrate that harm was "on account of" a protected ground, the applicant must show that the protected characteristic was "one central reason" for the harm. *See* INA § 241(b)(3); *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F. 3d 641, 646 (10th Cir. 2012); *Matter of C-T-L-*, 25 I&N Dec. 341, 348 (BIA 2010). The protected ground cannot play a minor role in the persecution, nor can it be "incidental, tangential, superficial, or subordinate to another reason for the harm." *Karki v. Holder*, 715 F.3d 792, 800 (10th Cir. 2013) (citations omitted); *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007). A showing of severe harm is not enough; the harm inflicted or feared must be on account of a protected ground. *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997) ("Seriousness of conduct . . . is not dispositive in our analysis. Instead, the critical issue is whether a reasonable inference may be drawn from the evidence to find that the motivation for the conduct was to persecute the asylum applicant on account of race, religion, nationality, membership in a particular social group, or political opinion.").

Even if the applicant had defined a cognizable social group, she nevertheless failed to establish a nexus between the harm she fears and her status as a person with "Mexican women who terminate the marriage without the consent of the husband." The Immigration Judge found past persecution based on the harm inflicted on the applicant before she got divorced in 1999. [4]

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After the day of the divorce, the former spouse did not harm the applicant – he merely contacted her with vague threats, which were never acted upon. Threats alone do not generally constitute persecution. Any harm suffered by the applicant was at the hands of her now ex-husband at a time prior to her membership in the named group. She was not then a divorced woman, so none of the alleged harm was inflicted as a result of being in the group. After she returned to Mexico in 2005 (voluntarily once, by removal twice), the only incident involving her former husband was her receipt of a random telephone call, in which he made what she considered to be a threat, with no follow-up or action. This was approximately fourteen years ago, and six years after the physical abuse ceased.

Further, all of the harm committed against the applicant and feared by the applicant was committed by her former husband. "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27 I&N Dec. at 320. The same principle applies to withholding claims. The applicant provided no evidence that her former spouse was motivated by any other reason than the nature of their relationship or that he was generally hostile to Mexican women who terminate their marriages without the consent of their husbands as a group. *A-B-*, 27 I&N Dec. at 339. As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Id.* at 338-39. To be sure, the applicant may have been the victim of crimes committed by her former spouse when they were married and the day of the divorce,

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[4] The Immigration Judge found that the pre-divorce harm (the abuse and imprisonment) rose to the level of persecution and, in a footnote, found that the harm experienced after the divorce (the choking the day of the divorce and the threats after) also rose to the level of persecution since the applicant had been previously abused before the divorce. In so doing, the Immigration Judge acknowledged that the pre-divorce harm was not on account of the proposed particular social group, but still used the one to bootstrap the other.

but those relationship-based crimes are insufficient to establish eligibility for withholding. Because the applicant failed to establish that her former spouse was motivated by any reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the proposed particular social group.

III. The Immigration Judge erred in finding that the government of Mexico is unable or unwilling to control the applicant's former spouse, where the applicant never reported a crime to the police and there is no evidence that the police were unwilling to investigate any crimes committed against the applicant.

There is no evidence that the applicant made the Mexican authorities aware of the crimes or that the applicant cooperated with them or that they failed in any duty to investigate or prosecute the crimes. Even if the applicant's mother did make a report, the evidence is that the applicant was not involved in reporting, and thus the authorities would have lacked evidence of a crime from the victim.

Where, as here, the alleged persecutor is unaffiliated with the government, the applicant must show that the government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. I.N.S.*, 9 F.3d 819, 822 (10th Cir. 1993); *A-B-*, 27 I&N Dec. at 319 (citing *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985)).[5] In instances where the applicant is a victim of private criminal activity, "the analysis must also 'consider whether government protection is available.'" *A-B-*, 27 I&N Dec. at 320 (quoting *M-E-V-G-*, 26 I&N Dec. at 243). "[V]iolence by private citizens…absent proof that the government is unwilling or unable to address it, is not persecution[.]" *Khan v.* Holder, 727 F.3d 1, 7 (1st Cir. 2013) (quoting *Butt v. Keisler*, 506 F.3d

[5] *Acosta* was overruled in part on other grounds by *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

(b)(6); (b)(7)(C)

86, 92 (1st Cir. 2007)). Relevant factors include both "the government's response" to the claimed persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470, 476 (6th Cir. 2019). "No country provides its citizens with complete security from private criminal activity, and perfect protection is not required." *A-B-*, 27 I&N Dec. at 343. An applicant "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *Id.* at 338.

The record here does not establish that the police were unwilling to assist the applicant; at most it establishes that they did have enough evidence that a crime had been committed to prompt an investigation. The applicant herself never reported any crime to the authorities in Mexico. Tr. at 30, 32, 49-50. She stated that she was "constantly locked in that room, how could I go?", but she did leave that room, go to the store, return to find her then-spouse having intercourse with another woman, separate from him, and file for and obtain her divorce, without providing any explanation for that contradiction or for why she did not at any time during that period go to the police. Tr. at 33. Her only explanation for her failure to report her former spouse's abuse was that the police do not "do anything." Tr. at 37. While the applicant's mother testified that she had made complaints to the police, but that nothing was done by them; they police purportedly told her that they could not do anything because there was no blood; that is, there was no evidence of a crime. The applicant's mother provided no documentary evidence of any reports filed; in fact, she could not even provide dates on which she went to the police. She did not inform the applicant of any reports or ask the applicant to assist in filing any reports with information regarding the crimes. Tr. at 44, 59-62. This is insufficient for the applicant to meet her burden to show that the government of Mexico was or is unable or unwilling to assist the applicant. As such, the Immigration Judge erred in finding that she met her burden.

(b)(6); (b)(7)(C)

IV. The Immigration Judge erred shifting the burden to the Department to establish a fundamental change in circumstances or the ability to relocate within Mexico; additionally, the evidence demonstrates that there are changed circumstances and that the applicant could and should be expected to relocate within Mexico, as there is no evidence that her former husband could inflict harm on her no matter where she resides in Mexico and internal relocation is reasonable.

If an applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it is presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence that there has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. 8 C.F.R. §1208.16(b)(1)(i).

As the Immigration Judge erred in finding the applicant established past persecution on account of the proposed particular social group, shifting the burden on changed circumstances and internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.16(b)(ii). Rather, the applicant bore the burden of establishing that internal relocation within Mexico is unreasonable. Even if the Department bears the burden of proof on these issues, the Immigration

Judge erred in finding that the Department did not establish that there has been a fundamental change in circumstances or that internal relocation is reasonable.

The Immigration Judge held that the applicant faces a threat of persecution anywhere in Mexico even though her instances of harm were perpetrated by a single actor. He based this determination on the fact that, when the applicant resided with her uncle eighteen hours away from the town in which her former spouse lives, the former spouse was able to find her and make a threatening call to her. The Immigration Judge further found that the respondent's long-term illegal presence in the United States, after multiple removals, and her family in the United States made it unreasonable to expect her to relocate within Mexico. Though the Immigration Judge should "consider, among other things, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties," as the regulation provides, "these factors may or may not be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.16(b)(3). Mexico is a large and diverse country. The applicant's father resides in Mexico, so she is not without family support there. The applicant has been divorced from her former spouse for almost twenty years, does not currently know where he is, and believes he has children with another woman. There is no evidence that he remains interested in harming her after the passage of two decades, though there is evidence that he has moved on, having children with another woman; there is certainly no evidence that he would physically pursue her, after all this time, to other parts of Mexico. When the applicant lived with her uncle, her former spouse purportedly made threatening phone calls; he never, however, travelled to Veracruz to seek the

(b)(6); (b)(7)(C)

applicant out. The Attorney General notes that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)" and the applicant failed to meet her burden of proof on this issue. *A-B-*, 27 I&N Dec. at 345. Though the Immigration Judge found that "gender-based violence is country-wide," that is not the basis for the applicant's claim – the applicant's claim is specific to victimization by her former spouse; there is no evidence that the applicant would be subject to gender-based violence throughout the entirety of Mexico.

As to a change in circumstances, the significant passage of time since the applicant last purportedly suffered harm at the hands of her former spouse alone presents a fundamental change in circumstances. That passage of time, coupled with the evidence from the applicant that she believes her former spouse has children with another woman, demonstrating that he is no longer interested in a relationship with the applicant, establish that circumstances have changed such that the applicant no longer has a reasonable fear.

CONCLUSION

The applicant bears the burden of proof to establish that her life or freedom would be threatened in the country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 1208.16(b). The Immigration Judge erred in finding the applicant met her burden to establish eligibility for withholding of removal pursuant to the Act, because she failed to show that her life or freedom had been threatened in Mexico or would be threatened if removed to Mexico on account of a cognizable particular social group. Therefore, the Department asks the Board to sustain its appeal and reverse the

(b)(6); (b)(7)(C)

decision of the Immigration Judge granting the applicant protection in the form of withholding of removal pursuant to the Act.

DATE: May__, 2019

Respectfully submitted,

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Certificate of Service

I hereby certify that, on May __, 2019, I served a true copy of this DEPARTMENT OF HOMELAND SECURITY BRIEF ON APPEAL and any attached pages by placing it in the outgoing mail bin as first-class mail, postage prepaid and addressed to:

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EOIR-26 Continuation Page, Question #6

The Department appeals the Immigration Judge's February 28, 2020 decision granting the respondents asylum pursuant to section 208 of the Immigration and Nationality Act (Act or INA). The Immigration Judge erred in finding that the lead respondent (respondent) is credible and that the respondent met her burden to establish eligibility for asylum. Specifically, the Immigration Judge erred in finding (1) that the respondent was credible, (2) a a nexus between the harm the respondent fears and a protected ground, (3) that internal relocation is unreasonable, and (4) that the Honduran government is unable or unwilling to protect her from the private actor she fears.

I. The Respondent Failed to Establish that she is Credible

The Immigration judged erred in finding that the respondent established she was credible. When testimony is offered in support of an application, the Immigration Judge must make a credibility determination. INA § 240(c)(4)(B). For applications filed after May 11, 2005, the provisions of the REAL ID Act of 2005 govern the credibility analysis. In making a credibility determination, the Immigration Judge must consider the totality of the circumstances and all relevant factors. INA § 240(c)(4)(C); *Matter of J-Y-C-*, 24 I&N Dec. 260, 262 (BIA 2007). Generally, to be credible, testimony should satisfactorily explain any material discrepancies or omissions. INA § 240(c)(4)(C); *Matter of Y-I-M-,* 27 I&N Dec. 724, 724 (BIA 2019). The Immigration Court may base a credibility determination on the witnesses' demeanor, candor, or responsiveness, and the inherent plausibility of the testimony. INA § 240(c)(4)(C). Other factors include the consistency between written and oral statements, without regard to whether an inconsistency goes to the heart of a respondent's claim. INA § 240(c)(4)(C); *J-Y-C-*, 24 I&N Dec. at 263-66.

Adverse credibility findings are to be based on inconsistent statements, contradictory evidence, and inherently improbable testimony. *Matter of S-M-J-*, 21 I&N Dec. 722, 729 (BIA 1997). Moreover, "specific and cogent" reasons that go to the crux of one's claim must support an adverse credibility finding. *Matter of A-S-*, 21 I&N Dec. 1106, 1110 (BIA 1998). "[T]he existence of 'only a few' such issues can be sufficient to make an adverse credibility determination." *Matter of A-B*, 27 I&N Dec. 316, 342 (AG 2018) (citing *Djadjou v. Holder*, 662 F.3d 265, 273-74 (4th Cir. 2011)). An Immigration Judge may rely on inconsistencies to support an adverse credibility finding as long as either the Immigration Judge, the applicant, or the Department of Homeland Security has identified the discrepancies and the applicant has been given an opportunity to explain them during the hearing. *Y-I-M-,* 27 I&N Dec. at 724. Further, the Board has clarified that "[b]ecause the alien carries the burden of proof for relief under section 208(b)(1)(B) of the Act, it is incumbent upon [her] to directly raise and clarify information that is obviously consistent." *Y-I-M-*, 27 I&N Dec. at 728.

Here the Immigration Judge clearly erred in finding the respondent credible when her testimony and the corroborating evidence she submitted reflect an obvious inconsistency. After the conclusion of the merits hearing, the record was left open for the respondent to submit additional evidence. I.J. at 2. On or about December 17, 2019, the respondent submitted the following: 1) A news article titled "Matan a colegiala en cañeras de Villanueva" and it's uncertified English translation, 2) a letter from a parishioner from Villanueva who stated that the respondent had to flee because "criminal structures … persecuted her in her Study Center" and it's uncertified English translation, 3) an article titled "Muerta en cañera de San Manuel, Cortés, era una colegiala" and it's

uncertified English translation, 4) the respondent's certificate of enrollment and it's uncertified English translation, and 5) two photographs of young women or girls. Notably, in all of the documents submitted by the respondent, the victim's name was (b)(6); Exh. 3. However, the respondent had consistently testified in Immigration Court that the victim's name was (b)(6);

The Immigration Judge states in a footnote that she does not know why there is a discrepancy in the names, notes the Department did not request additional testimony, and then presumes—without any supporting evidence—that the respondent may have used (b)(6); ' as a nickname for '(b)(6); I.J. at 2 n.3. Based on this presumption, the Immigration Judge finds that the discrepancy does not undermine the respondent's claim. *Id*. The Immigration Judge is in clear error as she shifts the burden to the Department. The Department does not have the burden to establish that the respondent is or is not credible. Thus, the Department did not have to request a subsequent hearing based on the clearly contradictory evidence. Given that the discrepancy was "sufficiently conspicuous . . . as to be self-evident," *Y-I-M-*, 27 I&N Dec. at 728 (citing *Ming Shi Xue v. BIA*, 439 F.3d 111, 114 (2d Cir. 2006)), it was incumbent upon the respondent to provide an explanation by either submitting an affidavit with her supplementary documents or by requesting an opportunity to provide additional clarifying testimony in Immigration Court. She did neither. Moreover, the Immigration Judge has broad authority and could have set the case for a subsequent hearing sua sponte. As it is the respondent's burden to establish that she is credible, her submission of clearly contradictory evidence—without any explanation—undermines her testimony in its entirety. Furthermore, in the absence of an explanation from the respondent as to why she submitted documents regarding

someone named (b)(6); after testifying at length about someone named (b)(6); it is not the Immigration Judge's role to provide an explanation—particularly without any evidentiary basis for the presumption.

Regardless of whether the Department challenged the respondent's credibility or requested an additional hearing, it is the respondent's burden to establish that she is credible and the Immigration Judge is required to apply the law considering the totality of the circumstances and not presume facts not in the record. Accordingly, the Immigration Judge erred in finding the respondent credible.

II. The Respondent Failed to Establish a Nexus to a Protected Ground

The Immigration Judge erred in finding that the respondent met her burden to establish that she would be singled out for harm because of her membership in the particular social group of "Honduran women."[1] To demonstrate that harm was "on account of" a protected ground, an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)).

[1] The Board need not address whether "Honduran women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds as asserted in this Notice of Appeal. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach).

The respondent failed to establish a nexus between the group of which the Immigration Judge found her to be a member—"Honduran women"—and the harm she fears. Rather, the respondent established that she fears the harm threatened by a single individual who used to date her friend from school, Natalia.

The Immigration Judge erred by finding a nexus to "Honduran women" based on the respondent receiving threats from her school friend's ex-boyfriend being in line with the "machismo culture" and views on gender roles in Honduras. I.J. at 7. However, this reasoning does not bolster the Immigration Judge's finding that the respondent was harmed because she is a "Honduran woman," but rather supports a finding that she was harmed because of her association with her school friend and her ex-boyfriend.

The respondent's friend from school, (b)(6); told the respondent that her ex-boyfriend was threatening her. I.J. at 2. When the respondent's friend stopped attending school due to the threats, the respondent started to receive threats from (b)(6); (b)(7)(C) ex-boyfriend. *Id*. The respondent testified that (b)(6); ex-boyfriend knew they were friends and would say that the respondent knew where she was. *Id*. at 3. She also testified that (b)(6); (b)(7)(C) ex-boyfriend threatened her family. *Id*. After (b)(6); (b)(7)(C) death, the respondent stated that (b)(6); ex-boyfriend said the same thing would happen to the respondent and her daughter. *Id*. There was no evidence of general animosity towards women or any explanation as to why the respondent's school friend's ex-boyfriend decided to threaten the respondent after (b)(6); (b)(7)(C) death.

The respondent provided no evidence that her school friend's ex-boyfriend was motivated to threaten her by any other reason than the nature of their relationship, or that he was generally hostile to "Honduran women" as a group. *Matter of A-B-*, 27 I&N Dec.

316, 339 (A.G. 2018). Although not mentioned by the Immigration Judge, the respondent provided no evidence that (b)(6); was actually killed by her ex-boyfriend. She simply supposes he did it. The respondent also just thinks (b)(6); ex-boyfriend is in a gang because he has tattoos and (b)(6); mentioned that he might be in a gang. However, the respondent does not know what gang he could be a member of and in fact does not know (b)(6); ex-boyfriend's name.

As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *A-B-*, 27 I&N Dec. at 338-39. To be sure, the respondent did testify that she was threatened by Natalia's ex-boyfriend, but such relationship-based crimes are insufficient to establish eligibility for asylum. Because the respondent failed to establish that her friend from school's ex-boyfriend was motivated by any other reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the stated particular social group of "Honduran women."

III. The Immigration Judge Erred in Concluding That the Government of El Salvador Is Unable or Unwilling to Protect the Respondent

Additionally, the Immigration Judge erred in concluding that the Honduran government was involved in the feared harm by the sole private actor. I.J. at 8. Where the alleged persecutor is unaffiliated with the government, the applicant must show that the government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993); *A-B-*, 27 I&N Dec. at 319 (citing *Acosta*, 19 I&N Dec. at 222). In instances where the applicant is a victim of private criminal activity, "the analysis must also 'consider whether government protection is available.'" *A-B-*, 27

I&N Dec. at 320 (quoting *M-E-V-G-*, 26 I&N Dec. at 243). "'[V]iolence by private citizens . . . , absent proof that the government is unwilling or unable to address it, is not persecution[.]'" *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) (quoting *Butt v. Keisler*, 506 F.3d 86, 92 (1st Cir.2007)). Relevant factors include both "the government's response" to the claimed persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470, 476 (6th Cir. 2019).

"No country provides its citizens with complete security from private criminal activity, and perfect protection is not required." *A-B-*, 27 I&N Dec. at 343. Rather "[a] government's steps 'to punish the persons responsible for the violence' supports a conclusion that it is not unwilling or unable to protect individuals who have been the victims of ethnic attacks." *Bitsin v. Holder*, 719 F.3d 619, 630 (7th Cir. 2013) (quoting *Vahora v. Holder*, 707 F.3d 904, 908 (7th Cir.2013)). As such, an applicant "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *Matter of A-B-*, 27 I&N Dec. at 338.

Although the government of Honduras may at times have difficulty controlling interpersonal violence, "where a government is 'making every effort to combat' violence by private actors, and its 'inability to stop the problem' is not distinguishable 'from any other government's struggles,' the private violence has no government nexus and does not constitute persecution." *Khan*, 727 F.3d at 7 (quoting *Burbiene v. Holder*, 568 F.3d 251 (1st Cir. 2009)).

Here, the respondent failed to establish that the Honduran government is unable or unwilling to protect her from the private actor she fears. The respondent never reported to government authorities the threats made by her school friend's ex-boyfriend.

Country condition evidence shows ongoing attempts by the Honduran government to improve its resources for women by setting up 298 government-operated women's offices focusing on education, personal finance, health, social and political participate, environmental stewardship, and prevention of gender-based violence. DOS 2018 at 18. Moreover, the respondent's own evidence indicates that the National Police and the Police Directorate of Investigation arrived at the scene and a forensic exam was conducted and a Forensic Medical report was completed. Ex. 3 at 6, 8. This evidence does not demonstrate an unwilling or unable government, especially where the respondent never herself sought the government's assistance in protecting her from her school friend's ex-boyfriend.

IV. The Respondent Can Reasonably Relocate Within El Salvador

Based on the Immigration Judge's correct finding that the respondent failed to establish past persecution, the respondent bears the burden of establishing that internal relocation within Honduras is unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("[W]here past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored.") (citing 8 C.F.R. § 1208.13(b)(3)(i)).

The Immigration Judge erred in finding internal relocation unreasonable. I.J. at 8-9. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id.*

The Immigration Judge held that respondent faced a threat of persecution anywhere in Honduras as a Honduran woman even though the harm she fears is related to a single private actor. This finding is contrary to the U.S. Department of State, Country Reports on Human Rights Practices for 2016 and 2018 for Honduras made part of the record by the Immigration Judge. Additionally, the 2019 State Department Crime and Safety Report for Honduras referenced by the Immigration Judge is for U.S. citizens traveling to Honduras, does not mention crimes specifically against women, and notes that the Honduran Government has established a police unit dedicated to investigating violent crimes against the LGBTI and other vulnerable communities. Moreover, the bulletin cited by the Immigration Judge was last updated on July 28, 2014 and references data ending in 2012—over seven years ago. *See also A-B-*, 27 I&N Dec. at 320 (when the harm is by private actors, the analysis must also "consider whether government protection is available, internal relocation is possible, and persecution exists countrywide.") (quoting *Matter of M-E-V-G-*, 26 I&N Dec. 227, 243 (BIA 2014)).

The Immigration Judge further found that internal relocation would be unreasonable because of gang violence. I.J. at 9. However, the Attorney General has noted that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)." *A-B-*, 27 I&N Dec. at 345. The respondent failed to meet her burden of proof on this issue.

The Department reserves the right to raise additional arguments upon receipt and review of the transcript.

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:

(b)(6); (b)(7)(C)

In removal proceedings

File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY'S MOTION FOR SUMMARY AFFIRMANCE

COMES NOW the Department of Homeland Security ("DHS" or "Department"), by and through undersigned counsel, and requests that the Board of Immigration Appeals ("Board") summarily affirm the decision of the Immigration Judge dated October 2, 2018, pursuant to 8 C.F.R. § 1003.1(e)(4)(i).

The Immigration Judge reached the correct decision; therefore, any errors that do exist are harmless or immaterial, and the respondent's appellate arguments are not so substantial that the case warrants the issuance of a written opinion. *See* 8 C.F.R. § 1003.1(e)(4)(i)(B). The Immigration Judge's determination that the respondent failed to establish eligibility for asylum, withholding of removal, and CAT protection was heavily supported by the record and was a proper exercise of judicial discretion. The Immigration Judge correctly found that the respondent had not demonstrated past persecution or a well-founded fear of future persecution on account of her membership in a particular social group. Immigration Judge ("I.J.") Decision at 6, 7. The respondent, through counsel, proposed the following social groups: "El Salvadorian women who are not able to consent to sexual conduct," "El Salvadorian girls incapable of self-protection," and "El Salvadorian females." I.J. at 6. The respondent's appellate brief also refers to a proposed social group of "immediate family of her mother, who reported her conduct to the authorities" and claiming that the Immigration Judge did not address this group. *See* Respondent's Brief at 6.

A particular social group is legally cognizable under the Act, and therefore constitutes a protected ground, if the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society question. *See Matter of A-B-,* 27 I&N Dec. 316 (AG 2018); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008). A group meets the particularity

(b)(6); (b)(7)(C)

requirement if it is "discrete," has "definable boundaries," is not "amorphous, overbroad, diffuse, or subjective," and "provide[s] a clear benchmark for determining who falls within the group." *Matter of M-E-V-G-,* 26 I&N Dec. 227, 239 (BIA 2014). Further, a group is socially distinct if the society at matter perceives the proposed group as a group. *Matter of M-E-V-G,* 26 I&N Dec. at 238. While family ties can form the basis of a cognizable particular social group, there is no "categorical rule that any nuclear family could constitute a cognizable particular social group." *Matter of L-E-A-*, 27 I&N Dec. 581, 591 (AG 2019). In addition, not every threat that references a family member is made on account of family ties. *Hernandez-Avalos v. Lynch,* 784 F.3d 944 (4th Cir. 2015).

Here, the Immigration Judge correctly found that the group "El Salvadorian females" is overly broad and therefore lacks particularity. I.J. at 6. The members of this group come from different lifestyles, social classes, ages, and different embedded cultures in El Salvador, which makes this group overbroad and not sufficiently defined. Further, widespread violence against women in general does not render this group as socially distinct.

The Immigration Judge also correctly found that the group "El Salvadorian women who are not able to consent to sexual conduct" is not a sufficiently distinct group. I.J. at 6. Similarly, the Immigration Judge correctly concluded that the proposed group of "El Salvadorian girls incapable of self-protection" is amorphous, not well-defined nor socially distinct. I.J. at 6. The feature of "incapable of self-protection" is unclear and is broad as to what would be considered "self-protection" or how "self-protection" could be measured to define who falls into the group.

In reference to the respondent's final proposed social group of being the daughter of her mother who had denounced her rapist to authorities, this group fails to meet the social distinction requirement. There is nothing in the record to demonstrate that this family is specifically

recognizable and that they are treated as a separate group within El Salvadorian society. *Matter of L-E-A-,* 27 I&N Dec. 591 (AG 2019).

Even considering any of the proposed groups, an applicant for asylum "must establish membership in a particular and socially distinct group that exists independently of the alleged underlying harm, demonstrate that their persecutors harmed them on account of their membership in that group rather than for personal reasons, and establish that the government protection from such harm in their home country is lacking that their persecutors' actions can be attributed to the government." *Matter of A-B-,* 27 I&N Dec. at 317. Further, "[g]enerally, claims by aliens pertaining to domestic violence…will not qualify for asylum." *Id.* at 320.

Here, the respondent was harmed by a private actor who was motivated by his own perverse sexual desires. The individual, private actor, was an intimate friend of the respondent's father, and the whole family, and upon making a home delivery and learning that the respondent's parents were not around, took advantage of the respondent. Tr. 38, 40-41. The respondent was not targeted because of her membership to any of the proposed social groups. The one and only central reason for the individual's motivation and actions was his own perverted sexual desires. There is no indication that the conduct occurred because of the respondent's membership in any of the proposed groups.

Further, the Immigration Judge correctly found that the respondent failed to establish that any of the alleged harm by the private actor is condoned by the government of El Salvador or that the government of El Salvador is unable to help the respondent. I.J. at 7. It is clear from the respondent's testimony that the government of El Salvador did arrest and incarcerate the individual who harmed the respondent for at least one year, although it is unclear in the record

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when and the basis of his subsequent release. Tr. at 63. Accordingly, there is evidence that the government of El Salvador took steps to protect the respondent.

As the respondent did not demonstrate past persecution or a well-founded fear of future persecution on account of a protected ground, the Immigration Judge properly determined that the respondent did not meet the requirements for Asylum or Withholding of Removal. I.J. at 7. The Immigration Judge also correctly noted that the respondent did not meet the requirements for Humanitarian Asylum. I.J. at 8. The Immigration Judge also correctly denied the respondent's CAT application as she had not demonstrated that she would be subject to torture by or with the consent or acquiescence of the government of El Salvador. I.J. at 7-8. The Department respectfully requests that the Board affirm these findings and dismiss the respondent's appeal.

Respectfully submitted,

(b)(6); (b)(7)(C)
Assistant Chief Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this date, I caused to be served the foregoing document:

Department of Homeland Security's Motion for Summary Affirmance

__X__ via mail to (b)(6); (b)(7)(C) Law Office of Alison J. Brown, 6930 Carroll Avenue, Suite 434, Takoma Park, MD 20912

Signed under penalty of perjury at Baltimore, Maryland on _____.

_____

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	(b)(6); (b)(7)(C)
In Removal Proceedings	)	

DEPARTMENT OF HOMELAND SECURITY'S
BRIEF ON APPEAL

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INTRODUCTION

The Department of Homeland Security (Department) files this brief and requests that the Board of Immigration Appeals (Board) dismiss the respondents' appeal of the Immigration Judge's decision, dated December 9, 2019.[1]

The Immigration Judge otherwise reached the correct decision. The Immigration Judge correctly determined that the lead respondent failed to establish a nexus to the proposed particular social groups and that the lead respondent did not meet her burden for protection under the regulations implementing the United States obligation under Article 3 of the Convention Against Torture ("CAT").[2] Accordingly, the Department requests that the Board dismiss the respondents' appeal.

ISSUES PRESENTED

I. Did the Immigration Judge correctly determine that there was no nexus between the harm received and a protected ground as lead respondent's brother-in-law is a troubled and appalling individual who targets girls and young women for his own sexual gratification?

II. Did the Immigration Judge properly deny the lead respondent's request for protection under the CAT as she failed to carry her burden of proof?

STANDARD OF REVIEW

The Board reviews findings of fact by an Immigration Judge under the "clearly erroneous" standard of review. 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews questions of law, discretion, and judgement and all other issues on appeal from the decision of the Immigration Judge *de novo.* 8 C.F.R. §1003.1(d)(3)(iii); *Matter of Z-Z-O-,* 26 I&N Dec. 586, 588 (BIA

[1] Please note that the Department has not received respondents' brief which was due July 13, 2021.
[2] 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).

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2015). Nexus involves a question of fact, and an Immigration Judge's findings in this regard are reviewed by the Board for clear error. *See Matter of N-M,* 25 I&N Dec. 526, 532 (BIA 2011).

SUMMARY OF ARGUMENT

The Immigration Judge properly denied the lead respondent's application for asylum and statutory withholding of removal. The lead respondent proposed the particular social groups of "immediate family member of her sister" and "woman in El Salvador." I.J. at 5. Assuming, arguendo, the cognizability of the proposed particular social groups, the lead respondent failed to demonstrate that any past or future fear of harm was based upon membership in the social groups. The record was likewise insufficient to establish protection under the CAT. The respondents' appeal should be dismissed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The lead respondent, (b)(6); (b)(7)(C) and rider respondents, (b)(6); (b)(6); (b)(7)(C) and (b)(6); (b)(7)(C) are natives and citizens of El Salvador. Oral Decision of the Immigration Judge ("I.J.") at 1. The lead respondent filed an application for asylum, withholding of removal, and protection under CAT. The application included rider respondents.[3]

At her individual hearing, the lead respondent testified that she began living with her sister and brother-in-law in El Salvador at the age of seven. Tr. at 24. The lead respondent was sexually abused and raped by her brother-in-law while she was a minor and the lead respondent became pregnant because of the rape. Tr. at 25; I.J. at 2. The lead respondent also indicated that her sister was likewise abused by her brother-in-law. Tr. 40.

[3] The rider respondents did not file separate applications and therefore, are derivatives of their mother's, lead respondent, application. I.J. at 2.

(b)(6); (b)(7)(C)

After lead respondent's son was born, she left her sister's home and lived with her mother again for a little while before coming to the United States. Tr. at 25, 26; I.J. at 3. The lead respondent returned to El Salvador after five years to try to get her son back from her sister and brother-in-law but she was unsuccessful. Tr. at 27, 44. The lead respondent's son currently lives with his father, lead respondent's brother-in-law, and has also been mistreated by his father. Tr. 46.

The lead respondent's brother-in-law works as a jeweler who has female coworkers that are minors. Tr. at 35, 55. The female coworkers lived with lead respondent's brother-in-law and subjected to the same abuse as lead respondent. Tr. 35, 55. One of the female coworkers reported the abuse and lead respondent's brother-in-law was arrested and released after two months. Tr. 56.

In 2016, unknown individuals entered the lead respondent's home and essentially robbed the home and told her not to say anything or they will take her child from her. Tr. at 28, 31, 32. I.J. 4.

The lead respondent fears she will be harmed by her brother-in-law if forced to return to El Salvador. Tr. 50.

The Immigration Judge determined that the lead respondent's proposed social groups were not cognizable. I.J. at 6. In addition, Immigration Judge determined that even if the lead respondent formulated a cognizable particular social group, the harm was not on account of a particular social group. I.J. at 7. The Immigration Judge also concluded that the lead respondent had not established that she could not relocate within El Salvador and that the government of El Salvador was unwilling or unable to help. I.J. at 9, 10. Finally, the Immigration Judge determined that the lead respondent did not demonstrate that she is more likely than not to suffer

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torture by or with the consent or acquiescence of officials in El Salvador. I.J. at 11. Accordingly, the Immigration Judge denied all relief. This appeal followed.

ARGUMENT

I. THE IMMIGRATION JUDGE CORRECTLY DETERMINED THAT THERE WAS NO NEXUS BETWEEN THE HARM RECEIVED AND A PROTECTED GROUND AS LEAD RESPONDENT'S BROTHER-IN-LAW IS A TROUBLED AND APPALLING INDIVIDUAL WHO TARGETS GIRLS AND YOUNG WOMEN FOR HIS OWN SEXUALGRATIFICATION

An asylum applicant must show that he or she is unable or unwilling to return to his or her country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. *See* INA § 101(a)(42)(A); *INS v. Cardoza-Fonseca,* 480 U.S. 421 (1987); *Matter of S-M-J-,* 21 I&N Dec. 722 (BIA 1997). "Persecution occurs 'on account of' a protected ground if that ground serves 'at least one central reason for' the feared persecution." *Crespin-Valladares v. Holder*, 632 F.3d 117, 127 (4th Cir. 2011); *see also Hernandez-Cartagena v. Barr*, No. 19-1823, 9 (4th Cir. 2020) ("The question is whether Petitioner's membership is a "central reason why *she, and not some other person"* was targeted." Citing *Alvarez Lagos v. Barr,* 927 F.3d 236, 249 (4th Cir. 2019)).

In this case, there is insufficient evidence in the record to suggest that the lead respondent's relationship to her sister was at least one central reason for the past or any future persecution. The lead respondent testified that her brother-in-law is "a really dangerous person." Tr. at 30, 34. Aside from herself, the lead respondent testified that her sister and her son have also been mistreated by her brother-in-law. Tr. at 40, 46. She testified that her brother-in-law "would look for underage girls that were threatened by the gangs, take them home, and offer them jobs and board there, and… he would tell them that he would protect them." Tr. at 55. She testified that the girls are afraid of him and that they are subject to the same abuse she sustained

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at the hands of her brother-in-law. Tr. 35. The record does not show that lead respondent's brother-in-law harmed her or seeks to harm her because of her relationship to her sister. Rather, it is evident that her brother-in-law is a troubled and appalling individual who targets girls and young women for his own sexual gratification.

Similarly, there is no indication in the record that lead respondent was targeted or will be targeted by her brother-in-law merely because she is a woman in El Salvador. The harm to the lead respondent was because her brother-in-law is an awful individual who focused on his own sexual gratification as opposed to harming her on account of her race, religion, nationality, political opinion or membership in a particular social group.

In addition, the record is insufficient to establish that the robbery in 2016 was connected to any protected ground rather than being an isolated incident of crime.

II. THE IMMIGRATION JUDGE PROPERLY DENIED THE LEAD RESPONDENT'S REQUEST FOR PROTECTION UNDER CAT AS SHE FAILED TO CARRY HER BURDEN OF PROOF

The Immigration Judge's denial of the lead respondent's claim for protection under CAT was proper and supported by the law. There is no indication in the record that the lead respondent was or will be targeted by an official. Further, the governmental officials are taking steps to address the issues faced by the lead respondent. The lead respondent testified that one of the underage girls that her brother-in-law abused made some type of accusation and apparently, he was detained in some fashion before being released after two months. Tr. at 56. The Immigration Judge properly considered the record and the general country condition information and concluded that the Salvadoran government are taking efforts combat domestic violence as well as crime. I.J. at 11. Such a determination was not clearly erroneous.

(b)(6); (b)(7)(C)

CONCLUSION

Based on the foregoing, the Department moves this Board to dismiss the respondents' appeal.

Respectfully submitted,

(b)(6); (b)(7)(C)
Assistant Chief Counsel

Date: July 23, 2021

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

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(b)(6); (b)(7)(C)
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NON-DETAINED

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

In the Matter of:

(b)(6); (b)(7)(C)
Riders

In Removal proceedings

File Nos.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
MOTION TO WITHDRAW APPEAL

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

IN THE MATTER OF	IN REMOVAL PROCEEDINGS
(b)(6); (b)(7)(C) **(RESPONDENT)**	**CASE #** (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)	(b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
MOTION TO WITHDRAW APPEAL

Pursuant to 8 C.F.R. § 1003.4, DHS respectfully seeks to withdraw its appeal in the above referenced cases.

Respectfully submitted,

(b)(6); (b)(7)(C)

Assistant Chief Counsel
31 Hopkins Plaza, (b)(6);
Baltimore, Maryland 21201

DATE: August 20, 2021

CERTIFICATE OF SERVICE

(b)(6); (b)(7)(C) **Riders**	) File Nos.:))	(b)(6); (b)(7)(C)

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DEPARTMENT OF HOMELAND SECURITY MOTION TO WITHDRAW APPEAL

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Arlington, VA 22216

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 20, 2021.

(b)(6); (b)(7)(C)

Assistant Chief Counsel

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:

(b)(6); (b)(7)(C)

In removal proceedings

File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY'S
MOTION TO WITHDRAW APPEAL

The Department of Homeland Security hereby moves to withdraw the appeal filed with the Board of Immigration Appeals on April 26, 2019.

Submitted this 2nd day of November, 2020.

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel
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Proof of Service

On November 2, 2020, the undersigned attorney mailed or delivered a copy of this DEPARTMENT OF HOMELAND SECURITY MOTION and any attached pages to the respondent's counsel:

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University of Baltimore School of Law
School of Law Clinical Program
1420 N. Charles Street
Baltimore, MD 21201

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(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel

November 2, 2020

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Chief Counsel
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Baltimore, MD 21201

NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:

(b)(6); (b)(7)(C)

File No.: (b)(6);

In removal Proceedings

DEPARTMENT OF HOMELAND SECURITY'S
MOTION FOR SUMMARY AFFIRMANCE

COMES NOW the Department of Homeland Security ("DHS"), by and through undersigned counsel, and requests that the Board of Immigration Appeals ("BIA") summarily affirm the decision of the Immigration Judge dated October 10, 2019, pursuant to 8 C.F.R. § 1003.1(e)(4)(i).

The Immigration Judge (IJ) reached the correct decision; therefore, any errors that do exist are harmless or immaterial, and the respondent's appellate arguments are not so substantial that the case warrants the issuance of a written opinion. *See* 8 C.F.R. § 1003.1(e)(4)(i)(B).

The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation. *See Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987); *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997); *Matter of O-D-*, 21 I&N Dec. 1079 (BIA 1998); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *INS v. Elias-Zacharias*, 502 U.S. 478 (1992); *Gandziami-Mickhou v. Gonzales*, 445 F.3d 351 (4th Cir. 2006).

The IJ correctly determined that the asserted particular social group (PSG) of immediate family member id (b)(6); and (b)(6); lacked social distinction. *See Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019). The IJ correctly determined that the asserted PSG was not viable in this case as there was no evidence that the respondent was persecuted on account of being a woman in Honduras. *See Matter of M-E-V-G,* 26 I&N Dec. 227 (BIA 2014). The IJ correctly determined that the respondent failed to demonstrate through the testimony and the evidence in the record of proceedings that she was persecuted on account of her religion, as well as extortion. *See Matter of T-M-B-,* I&N 21 Dec. 775 (BIA 1997). The IJ correctly determined that the respondent failed to meet her very high burden to be offered protection under Article III of the Convention against torture.

Because the factual and legal issues raised on appeal have been resolved in the aforementioned precedent decisions, disposal of the appeal through the mechanism of summary affirmance is

appropriate. Accordingly, the DHS moves the BIA to summarily dismiss the respondent's appeal and affirm the decision of the IJ. In the alternative, should the BIA determine that summary affirmance of the IJ's decision is not appropriate, the DHS submits that none of the six circumstances warranting review by a three-member panel are present in this case, and that the IJ's decision should otherwise be affirmed by means of a brief order. 8 C.F.R. § 1003.1(e)(5).

(b)(6); (b)(7)(C)

U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

Date: June 15, 2021

(b)(6); (b)(7)(C)

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Motion for Summary Affirmance

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817 Silver Spring Avenue, Suite 207
Silver Spring, MD 20910

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(b)(6); (b)(7)(C)

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Baltimore, Maryland 21201

Non-Detained

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BALTIMORE, MARYLAND

In the Matter of:

(b)(6); (b)(7)(C)

File No.: (b)(6); (b)(7)(C)

In Removal proceedings

Immigration Judge: David W. Crosland

Next Hearing: None

DEPARTMENT OF HOMELAND SECURITY'S WRITTEN BRIEF and CLOSING ARGUMENT

COMES NOW the Department of Homeland Security (DHS), by and through undersigned counsel, and states the following:

The lead respondent is a citizen of Peru who first entered the United States on or around September 25, 2018. The respondent filed an Application for Asylum and Withholding of Removal (Form I-589) on August 8, 2019. The respondent's individual hearing was held on December 4, 2019. At this hearing all evidence was accepted into the record as credible and not additional testimony was taken. DHS notes that the Immigration Judge had not received a substantial body of evidence submitted by the respondent on October 11, 2019 containing tabs A through AS. DHS will refer to this as it is titled on its cover page, namely "Respondent's Evidence Index". The Immigration Judge requested written closing arguments from each party.

The respondent asserts nexus to her race (namely being indigenous), her political opinion, and her membership in a particular social group of Quechua Indigenous Women. DHS believes the proposed particular social group of Quechua Indigenous Women is effectively incorporated into the broader analysis of nexus to race and therefore will not oppose its viability. DHS argues the respondent is ineligible for asylum and withholding of removal pursuant to INA § 241(b)(3) for failure to establish a nexus to a protected ground.

An alien seeking asylum bears the burden of establishing a nexus between the alleged persecution and one of the five statutory grounds for asylum. *Matter of A-B-*, 27 I&N Dec. 316, 338 (A.G. 2018). The respondent must establish that a statutory ground was or will be at least one central reason for her persecution. *Velasquez v. Sessions*, 866 F. 3d 188 (4th Cir. 2017). Reasons incidental, tangential, or subordinate to the persecutor's motivation will not suffice. *A-B-*, 27 I&N at 338. 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. *Id.*

As a preliminary matter, and despite the unfortunate nature of the respondent's circumstances, none of the five protected grounds were one central reason for the actions of her ex-partner. The record does not support the respondent's characteristic of being an indigenous woman who feels entitled to assert her rights to child support constitutes a political opinion. The respondent instead appears to have taken advantage of a civil process in Peru available to all people for personal reasons. *See Matter of N-M-*, 25 I&N Dec. 526, 528 n.1 (BIA 2011) (stating that an alien may be motivated to engage in activities for nonpolitical reasons and these motives would not, subjectively, constitute the expression of a political opinion); *see also Saldarriaga v. Gonzalez*, 402 F.3d 461, 466 (4th Cir. 2005) (whatever behavior an applicant seeks to advance as political, it must be motivated by an ideal or conviction of sorts before it will constitute grounds for asylum). There is additionally no indication from country conditions information that the respondent, in seeking child support, was taking an action that would be perceived differently than anyone else in Peru, let alone symbolic, whether indigenous or not. The common nature of seeking child support is especially apparent given multiple women had sought child support against the respondent's ex-partner. Respondent's Evidence Index, Tab A., p. 4, ¶ 21. Accordingly, the respondent has failed to establish a nexus to a political opinion.

Any references to the respondent as indigenous are merely incidental, tangential, or subordinate to her ex-partner's motivations to harm her.[1] While DHS understands the

[1] The underlying motivation for the respondent's ex-partner's actions is addressed in the respondent's affidavit wherein she states "his entire goal had been to get the money from me." Respondent's Evidence Index, Tab A., p. 3, ¶ 17. The respondent also noted later in her affidavit that following the process to obtain child support, if her ex-partner had stayed in Lima "he would have kept asking for money". Respondent's Evidence Index, Tab A., p. 4, ¶ 24.

respondent doesn't remember the event in its entirety, there is no evidence that the respondent's race or being Quechua played a role in being raped in 2007. The event, unfortunately, appears to be an act of private criminal activity. *See Velasquez*, 866 F. 3d at 194 (stating evidence consistent with acts of private violence or that merely shows that an individual has been the victim of criminal activity does not constitute evidence of persecution on a statutorily protected ground).

The next threat to the respondent occurred after the respondent loaned money to her ex-partner to buy a car and was in response to the respondent asking her ex-partner to reimburse that money lent to him and for financial support for their child. The respondent states in her affidavit that "[h]e began threatening me and told me that he would disappear me if I kept threatening him about the money". Respondent's Evidence Index, Tab A., p. 3, ¶ 18. While the respondent's ex-partner invoked her indigenous race in making a disparaging comment, the central reason for the threat was his unwillingness to reimburse the respondent for the loan she gave him and provide financial support for their daughter.

The next threat to the respondent involves the ex-partner's response to the respondent filing a claim for child support. The respondent states in her affidavit that "[h]e refused to pay me and said he wasn't going to court. He threatened that I better get rid of the demand or otherwise things were going to go badly for me, that he would disappear me." Respondent's Evidence Index, Tab A., p. 4, ¶ 20. The central reason for this threat again appears to be related to personal financial issues between the respondent and her ex-partner. The respondent later notes that her ex-partner was similarly failing to support other women with whom he fathered children. Respondent's Evidence Index, Tab A., p. 4, ¶ 21. This indicates the respondent's ex-

partner was indiscriminate about his failure to provide support. The respondent's race is unrelated to her ex-partner's refusal to provide financial assistance.

The respondent's next two encounters with the respondent both invoke financial considerations. During the May 5, 2018 encounter, the respondent's ex-partner stated, "...I can see you have money...". Respondent's Evidence Index, Tab A., p. 5 ¶ 25. During the June 6, 2018 encounter, the respondent states her ex-partner again asked for money and said he wouldn't leave unless she gave it to him. Respondent's Evidence Index, Tab A., p. 5 ¶ 27. Again, while her ex-partner invoked the respondent's indigenous race in making a disparaging comments, the central reason for the encounter appears to be the ex-partner's belief that he could get money from the respondent and her refusal to provide it. Reference to the respondent's race was incidental, tangential, or subordinate to the aforementioned basis.

The respondent's final encounter with her ex-partner does not contain any direct or indirect evidence that the respondent's race. Respondent's Evidence Index, Tab A., p. 5 ¶ 29. Accordingly, the respondent has failed to establish her race was the central reason for any of her ex-partner's acts of violence.

The respondent has failed to establish the government would acquiesce to the harm she fears. The respondent declined to contact the police throughout the entirety of her relationship with her ex-partner and she was not impeded in taking advantage of the courts in Peru for her claim of child support. Accordingly, there is no direct evidence that the government is acquiescing to circumstances faced by the respondent. Evidence provided by the respondent indicates the government follows through with child support orders. Respondent's Evidence Index, Tab H, I, J. The 2018 Human Rights Report for Peru states that "[t]he Ministry of Interior and the Ministry of Women and Vulnerable Populations also have significant human rights roles...[t]hese

government bodies were generally considered independent and effective. Respondent's Evidence Index, Tab T, p. 117. The same report states "[t]he Ministry of Women and Vulnerable Populations continued to operate service centers with police, prosecutors, counselors, and public welfare agents to help victims". *Id* at 118. It is notable that Peru has an entire ministry dedicated to issues faced by women. DHS notes the same report indicates enforcement of laws are often ineffective or law, however, while the government may not be able to protect the respondent from every incident of harm, the mere fact that a country may have problems effectively policing certain crimes does not establish the police are unable and unwilling to protect the respondent. *Matter of A-B-*, 27 I&N Dec. 316, 320 (BIA 2018). For similar reasons, problems effectively policing crime does not establish the police are acquiescing to the harm the respondent fears.

WHERFORE, the DHS respectfully requests that this Court find the respondent ineligible for relief.

Respectfully submitted,

U.S. DEPARTMENT OF HOMELAND SECURITY

by: (b)(6); (b)(7)(C)

Assistant Chief Counsel
31 Hopkins Plaza, (b)(6);
Baltimore, Maryland 21201

Dated: December 20, 2019

CERTIFICATE OF SERVICE

(b)(6); (b)(7)(C)

File No.: (b)(6); (b)(7)(C)

I HEREBY CERTIFY that, on December 20, 2019, I caused to be served the foregoing documents:

DEPARTMENT OF HOMELAND SECURITY'S WRITTEN BRIEF and CLOSING ARGUMENT

X by placing said copy in an envelope and placing said envelope in my office's receptacle designated for official "out-going" regular mail, said envelope having been addressed to the name and address indicated below;

__ by causing to be personally delivered a true copy thereof to the person at the address set forth below;

__ by FEDERAL EXPRESS / AIRBORNE EXPRESS to the person at the address set forth below;

__ by telefaxing with acknowledgment of receipt to the person at the address set forth below:

Ayuda
Attn: (b)(6); (b)(7)(C)
8757 Georiga Avenue, Suite 800
Silver Spring, MD 20910

I declare under penalty of perjury that the foregoing is true and correct.
Executed on December 20, 2019.

(b)(6); (b)(7)(C)

Assistant Chief Counsel

(b)(6); (b)(7)(C)
Deputy Chief Counsel
Department of Homeland Security
U.S. Immigration and Customs Enforcement
Fallon Federal Building, (b)(6);
31 Hopkins Plaza
Baltimore, MD 21201

NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE

EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

IMMIGRATION COURT

BALTIMORE, MARYLAND

In the Matter of

(b)(6); (b)(7)(C)	)	(b)(6); (b)(7)(C)
	)	
	)	

In Removal Proceedings

Immigration Judge Crosland

Next Hearing: February 16, 2021

DHS WRITTEN CLOSING ARGUMENT

PROCEDURAL HISTORY

The lead respondent, (b)(6); (b)(7)(C) and her son, rider respondent, (b)(6); (b)(6); (b)(7)(C) are natives and citizens of Guatemala. Respondent (b)(6); (b)(7)(C) (b)(6); (hereinafter "Respondent") entered the United States on or about January 6, 2003. Rider respondent, (b)(6); (b)(7)(C) (hereinafter "Respondent (b)(6);), entered the United States on or about May 3, 2015. He along with Respondent's husband are listed as derivatives on Respondent's application for asylum that was filed on August 10, 2015. All respondents are seeking asylum, withholding, and protection under the Convention Against Torture proffering to this court their eligibility on account of the Lead's membership in four particular social groups.

SUMMARY OF RELEVANT EVIDENCE

Respondent indicated in her sworn affidavit she entered into a romantic relationship with her first husband, (b)(6); (b)(7)(C) in Guatemala in 1994. Ultimately, respondent married (b)(6); on June 16, 2000. Initially, the respondent stated, he was kind and attentive. He was employed as a police officer and for approximately the first two years of their relationship they were happy. In 1997 they had their first child, the Respondent (b)(6) and shortly thereafter in 1998 the Respondent's sister moved in with them. The respondent stated that after her sister moved in, (b)(6); began to change, and she found out that he was interested in her sister. After confronting him, the respondent states (b)(6); became violent and this began a period of domestic violence that continued until the Respondent fled Guatemala on December 15, 2002.

Respondent stated that in 2002 she filed a police report for an incident of domestic violence. The respondent represented in her affidavit that the police refused to do anything for her. Moreover that the

government of Guatemala did nothing for her. Yet as provided in the Forensic Evaluation, (see Exhibit A filed on December 12, 2020, at page 11) Respondent reported that a Judge ordered a six month stay away be imposed on (b)(6); to stay away from the respondent. Then on November 27, 2002, after a second violent assault by (b)(6); the respondent filed a second police report. The respondent indicates that even after this assault the government did nothing to protect her and she believed her only choice was to flee Guatemala for the United States, which she did, entering the United States on January 6, 2003. Respondent left behind her son, the Respondent (b)(6), and her daughter to live and be raised by her parents. On May 3, 2015, Respondent (b)(6 entered the United States, and he claims that it was due to the ongoing harassment and threats perpetrated by his father (b)(6);

While living and working in the United States, Respondent met her to be second husband, (b)(6); (b)(6); (b)(7)(C) They moved in together in 2005. They have had two children together and married sometime after Respondent indicates she obtaining a divorce from (b)(6); sometime after 2011. It was only in August of 2015, after her son, Respondent (b)(6 had entered the United States that the respondent filed for asylum, withholding, and protection under the convention against torture.

LEGAL ARGUMENT

One Year Bar

An alien can demonstrate eligibility for asylum even if they file after one year of arriving in the United States if the alien can demonstrate changed circumstances that materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in applying, INA §208 (a) (2) (D); 8 C.F.R. §208 4(a).

In the instance case, respondent argues she is eligible for asylum due to extraordinary circumstances that impacted her from filing for asylum for over twelve years. Specifically, the

respondent states that she suffers from post trauma involving the abuse she suffered from, (b)(6); Respondent argues that it wasn't until her son, "Respondent (b)(6)" entered the United States in May of 2015, that the trauma resurfaced, and she realized she should apply for asylum. This is unsupported by the evidence submitted by the respondent.

The respondent testified that while in the United States from January 2003 until May 2015, she had communication with her children in Guatemala. She indicated that she was aware her son was being harassed by his father, "(b)(6);" Furthermore, respondent's application evidence reflects that an incident, sometime between her entry into the United States in 2003 and prior to 2005, brought back the trauma of abuse. (See Exhibit A, filed on December 12, 2020, at page 14). The respondent also submitted evidence that contains information that she and her husband, (b)(6); discussed the trauma and the need to seek out counseling as early as 2007 (See Exhibit A, filed on December 12, 2020, at page 14). It is not until 2015 when her son, "Respondent (b)(6);" arrives in the United States, and after consulting with an immigration attorney, that the respondent decides to seek out a psychologist to discuss her past domestic violence experiences.

"Respondent (b)(6); indicates that his mother did not pursue asylum because she feared that she would receive not assistance from the United States government, similar to her experience with the Guatemalan government when she reported the domestic abuse to the police. This however simply does not make any sense. Respondent received assistance from the Guatemalan government in November 2002 as a result of filing a report against, (b)(6); In fact, contained in the evidence submitted by the respondent, the government of Guatemala recommended Respondent and her children receive counseling services, and the prosecutor filed attempted murder charges against (b)(6); It was the respondent who left Guatemala prior to the case against (b)(6); coming to a

conclusion through the justice system. Respondent filed the report, met with prosecutors, evidence was gathered, and on November 27, 2002 or thereabouts, attempted murder charges were filed against (b)(6); Respondent then leaves Guatemala on December 15, 2002. (See Exhibit B, filed on December 12, 2020, pages 31 through 68).

Respondent has not met her burden in demonstrating that extraordinary circumstances exist in her case, nor has the respondent provided adequate evidence to justify the delay of over twelve years before filing for asylum in the United States.

Asylum

Should this court believe that Respondent has met her burden, DHS asserts that the Respondent has not met her burden to qualify for asylum. Asylum may be granted to a person unwilling or unable to return to his or her native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (A); 8 U.S.C. § 1158(b); *see also Naizgi v. Gonzales*, 455 F.3d 484, 486 (4th Cir. 2006). The respondent bears the burden of establishing his or her eligibility for protection. If an applicant for asylum shows past persecution, he or she receives the benefit of a presumption of a well-founded fear of future persecution. This presumption, however, can be rebutted if the DHS proves a fundamental change in conditions such that the fear is no longer well-founded. See 8 C.F.R. § 1208.13(b)(1); *Naizgi*, 455 F.3d at 488. The respondent must also establish that the persecution was afflicted (or there is a reasonable possibility that it will be afflicted) by the government or by persons or an organization that the government was unable or unwilling to control. *Matter of Acosta,* 19 I&N Dec. 211, 222 (BIA 1985). Evidence reflecting difficulty controlling a private actor does not necessarily demonstrate that the government would not be able to protect the respondent. *See Matter of McMullen,*

17 I&N Dec. 542, 546-47 (BIA 1980); *see also Khilan v. Holder*, 557 F.3d 583 (8th Cir. 2009) ("Evidence of general problems of ineffectiveness and corruption do not, alone, require finding that the government is "unable or unwilling" where the evidence specific to the petitioner indicates the contrary to be true."). In the instant case Respondent asserts eligibility for asylum based on membership in the following particular social groups;, Guatemalan women, Guatemalan women who violate social norms, Guatemalan prosecutorial cooperators, and Whistleblower.

Guatemalan women and Guatemalan women who violate social norms

Respondent asserts membership in the particular social group, "Guatemalan women," and "Guatemalan women who violate social norms." Neither of these are cognizable, they are overly broad and amorphous, providing for the inclusion of practically every Guatemalan woman in Guatemala. In terms of violating social norms, this is not defined with any particularity. This court is bound to make a meaningful analysis as to the harm inflicted by (b)(6); Moreover, an analysis must be made of whether that harm inflicted was on account of the respondent's membership in asserted particular social groups, and if they were the central reason for the abuse. This honorable court can draw no such conclusion. There is no evidence to suggest that (b)(6); was aware of the existence of either particular social group and abused the respondent because of her membership therein. Rather the evidence quite clearly depicts the abuse was perpetrated because of the personal nature of their relationship. *Matter of A-B-*, 27 I&N Dec. at 338–39; (A.G. 2018).

Respondent's testimony along with submitted evidence portray an abuser interested in inflicting harm on the respondent solely because of his ability to do so, acting as a private actor. There has been no showing that (b)(6); abused or had any animus towards other Guatemalan women. In fact, by

virtue of his actions over the years during the course of their relationship it is apparent that he abused the respondent simply because he could.

Guatemalan prosecutorial cooperators and Whistleblowers

Guatemalan prosecutorial cooperators and Whistleblowers are likewise not cognizable particular social groups. At the outset they are both overly broad and amorphous, and lacking particularity. The question before this court would most assuredly be, who does this group encompass? There must be a determination made as to this particular social group of "Guatemalan prosecutorial cooperators," and a nexus between the respondent's membership in that group and the asserted persecution. *Matter of A-C-A-A*, 28 I&N Dec. at 84, (A.G. 2020).

The evidence in the instant case if the court finds this particular social group to be viable, as amorphous as it is, reflects that the initial abuse began after the respondent confronted her husband regarding a perceived interest in the respondent's sister. This abuse then continued over the years, not because the husband was attempting to overcome the respondent's membership in a particular social group, rather the harm was inflicted on account of their personal relationship. The inflicted abuse was not on account of the respondent's membership in this particular social group and was not the central reason for the persecution. *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009).

Of equal or greater importance in the analysis of nexus is the fact that the respondent, after making the complaint and providing a statement to the prosecutor's office in November of 2002, fled Guatemala in December of 2002 for the United States. Respondent cannot in all good faith represent that she was a cooperating witness. Respondent failed to avail herself of offered services and failed to remain as a government witness to the attempted murder charges filed against her husband by the government of Guatemala. (See Exhibit B, filed on December 12, 2020, pages 31 through 68).

After reporting the abuse, there is still no evidence to suggest that (b)(6); would have treated her any differently had she not reported the abuse. *Matter of L-E-A-*, 27 I&N Dec. at 43–44 (A.G. 2020).

> " "Asylum is not available to an alien who fears retribution solely over personal matters.". The reasoning for this is straightforward: "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. *Matter of A-B-*, 27 I&N Dec. at 338–39 (A.G. 2018)"

Respondent (b)(6); Eligibility

Respondent (b)(6) entered the United States on May 3, 2015 at the age of 17 years of age. He had his asylum case consolidated with that of the lead respondent, his mother. Respondent (b)(6) has not asserted a particular social group, rather he is seeking eligibility as a derivative on his mother's application.

Should this Honorable court evaluate the claims for asylum, DHS would request that asylum be denied for the respondent (b)(6) as well. Respondent (b)(6) has provided an affidavit arguing that he fears persecution by his father, (b)(6); the same private actor his mother suffered abuse from. Respondent (b)(6) states that his father harassed him from the time his mother left Guatemala in 2002 until he fled in 2015, and that shortly before the time he decided to leave, his father began calling him and sending threatening text messages. There is no indication that Respondent (b)(6); sister has a similar experience, in fact there is no affidavit from his sister to corroborate the allegations of persistent harassment or threats. Nor is there any indication that Respondent (b)(6) made an attempt to change his phone number, or to seek out protection from law enforcement. It should be noted that Respondent (b)(6) lived in the same home with his grandparents from December 2002 until he left Guatemala in 2015. He indicated during his testimony that

he had contact with his father over the years and his father visited him and his sister at his grandparents' home, albeit visits were chaperoned.

Moreover, there has been no evidence that respondent (b)(6); father threatened or harassed him in his capacity as a police officer. There was no testimony presented that (b)(6); while acting in his official capacity as a police officer perpetrated torturous conduct upon Respondent (b)(6), or that he was threatening and harassing his son only because he was a police officer. As this court is aware, the analysis has to be, could (b)(6); commit the harassment independent of his role and employment as a police officer? Most assuredly he could. He, by way of Respondent (b)(6); testimony, visited his son over the years at the grandparents' home. In fact, again, all evidence suggests that the conduct of (b)(6); was in his capacity as an angry jilted ex-husband.

CONCLUSION

Under Fourth Circuit case law the respondents have failed to meet their burden to establish eligibility for asylum, withholding, or protection under the convention against torture. Respondents have not established harm suffered on account of a protected ground.

The argument has been made that because the respondent's husband, (b)(6); was a police officer and fired his gun towards the respondent, he was acting not as a private actor, rather he was acting in his official capacity as a governmental actor. However, as the court addressed in *Amaya-De Sicaran v. Barr*, 948 F.3d 649, 657 (4th Cir. 2020), "the simple fact that Sicaran's husband is a member of the military does not automatically render the government complicit." Additionally, there is no indication that (b)(6); was acting in his capacity as a police officer when he pulled his service weapon, off duty, and in his home, while perpetrating the domestic abuse. *Matter of OFSA*, 27 I&N Dec. 709 (BIA 2019).

Respondent indicates that because the government of Guatemala is unwilling and unable to protect her, she is eligible for protection under the convention against torture. However, the evidence clearly establishes otherwise. The respondent's own evidence demonstrates that the government of Guatemala took the complaint filed the by the Respondent very seriously. Based on their investigation, attempted murder charges were lodged against the abuser, (b)(6); As recently, articulated in *Matter of A-B*, 28 I&N Dec. 199 (A.G. 2021), unwilling and unable does not mean that the Government is required to have a "crime-free" society. The private actor is not always able to be controlled to a quantifiable degree of certainty, as even countries with well-funded criminal justice systems sometimes fail an innocent victim.

There is simply no showing in the instant case that the government of Guatemala was "unwilling or unable" to control or prevent the harm inflicted upon the respondent. In fact, quite the contrary is evidenced in the instant case before the court. Domestic abuse exists on a distressingly large scale in almost every country, but the government's difficulty in controlling or eliminating it does not mean that the government of Guatemala condones it. Finally, "'[e]vidence consistent with acts of private violence or that merely shows that an individual has been the victim of criminal activity does not constitute evidence of persecution on a statutorily protected ground.'" *Velasquez v. Sessions*, 866 F. 3d. 188 (4th Cir. 2017).

Wherefore it is most respectfully requested that this Honorable Court deny all Respondents applications for asylum, withholding, and protection under the convention against torture.

Respectfully submitted,

_____

(b)(6); (b)(7)(C)
Assistant Chief Counsel

CERTIFICATE OF SEVICE

CASE NAME:

(b)(6); (b)(7)(C)

CASE NO.'s:

(b)(6); (b)(7)(C)

I HEREBY CERTIFY that, on January 21, 2020, I caused to be served the foregoing document:

Department of Homeland Security Closing Argument

X by placing a true copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process and causing the same to be mailed by first class mail to the person at the address set forth below;

(b)(6); (b)(7)(C)
79-09 Roosevelt Ave, 2nd Fl
Jackson Heights, NY 11372

X By eservice delivery

by causing to be personally delivered a true copy thereof to the person at the address set forth below;

__ by FEDERAL EXPRESS / AIRBORNE EXPRESS to the person at the address set forth below;

_ by telefaxing with acknowledgment of receipt to the person at the address set forth below:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 21, 2021

_____

(b)(6); (b)(7)(C)
Assistant Chief Counsel

(b)(6); (b)(7)(C)
Chief Counsel
(b)(6); (b)(7)(C)
Assistant Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
Fallon Federal Building, (b)(6);
31 Hopkins Plaza
Baltimore, MD 21201

NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
BALTIMORE, MARYLAND

In the Matter of

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

In Removal Proceedings

Judge: David W. Crosland

Next Hearing: 11/1/2021 10:30 AM

DEPARTMENT OF HOMELAND SECURITY'S
CLOSING ARGUMENT

The Department of Homeland Security ("DHS"), by and through undersigned counsel, respectfully submits this closing argument in opposition to the Respondent's applications for asylum, withholding and withholding under the United Nations Convention Against Torture ("CAT"). The DHS requests that all applications be denied and that the Court issue a removal order in this matter.

ARGUMENT

As an initial matter, the Respondent bears the burden of proof in demonstrating eligibility for relief from removal. In the present case, the Respondent has failed to meet that burden as she fails to demonstrate that she is a member of any protected class that forms the basis of one central reason as to why she suffered harm from an abuser in her home country of Guatemala. To eligible for asylum or withholding under the Immigration and Nationalities Act ("INA"), respondent must show that she was harmed in the past or that she will be harmed in the future on account of her membership in one of five protected classes: race, religion, nationality, membership in a particular social group ("PSG") or political opinion. The Respondent posits three PSGs and also claims political opinion as the protected grounds and therefore the immutable characteristics that her abuser is trying to overcome.

Guatemalan women

The first PSG the Respondent provides is simply "Guatemalan women". For a PSG to be a viable basis for a protection claim, it must be cognizable, immutable and socially distinct among many attributes. "Guatemalan women" fails to meet the socially distinct standard. "Guatemalan women" comprises approximately 50% of Guatemalan society and contains women who are young and old, rich and poor, married and unmarried, etc. There

is no social distinction to this PSG and it is overbroad. Therefore, "Guatemalan women" fails as a PSG.

Guatemalan women unable to leave their relationship

Much ink has been spilled by both the administrative and judicial court systems in their ongoing attempts to discern whether a group of people is a PSG for immigration law purposes. Everyone agrees however, that an individual must actually be a member of the proposed PSG as a preliminary matter before any further analysis is required. In this instance, the Respondent fails to demonstrate that she is in fact a "Guatemalan woman unable to leave her relationship". As the Court is aware, the parties in this matter stipulated that should the Respondent testify, she would testify consistently with her written affidavit. Therefore, the was no in court testimony and the affidavit in the record is considered as the Respondent's testimony.

DHS asks that the Court's attention be directed to paragraph 16 of the affidavit which reads as follows:

> (b)(6); and I broke up lots of times and I would move back in with my father. The longest time we ever broke up was about two weeks. But we always got back together. (b)(6); would tell me he would change, and things would be different if I went back to him. I believed him at the time because I loved him, and I wanted things to work. Instead, things only got worse.

The Respondent's own testimony eliminates her from membership in the proposed PSG of "Guatemalan women unable to leave their relationship". No further ink spillage needs to happen. The analysis ends before it even begins. The Respondent simply fails to show membership in the proposed PSG. The Respondent left "lots of times" but went back to her alleged abuser. Each and every time, she had a choice to either stay with her father or go back to (b)(6); The respondent made a choice to return to the alleged abuser. As a

point of emphasis, we repeat…the Respondent made a choice to return. Women who are unable to leave their relationship do not have the choice this Respondent had and frequently made. The ability to choose is what eliminates her from membership. The reason why she kept making the decision to return after she left is not a relevant factor in this foundational issue of membership.

Undersigned counsel would be remiss to completely gloss over a legal analysis of this proposed PSG. In other words, just a few drops of ink need to be used. PSGs cannot be defined by the harm since that would negate the need to find persecution. The Fourth Circuit in *Del Carmen Amaya De Sicaran v. Barr*, 979 F.3d 210 (4th Cir. 2020) specifically reaffirmed that principle in dealing with the PSG "married El Salvadoran women in a controlling and abusive domestic relationship" and found that "controlling" and "abusive" was the harm. In other words, "Guatemalan women unable to leave their relationship" is circular in that the harm of being unable to leave is impermissibly contained in the proposed PSG. If the Court were to find that the Respondent is a member of the PSG, it is the position of the DHS that the PSG is not viable and therefore, we have the same result, the failure of the Respondent to meet her burden. See, *Hernandez-Cabrera v. Barr*, 837 F. App'x 148 (4th Cir. 2020).

Guatemalan women viewed as property and Political Opinion

The Respondent through counsel's argument merges these two alleged protected grounds. In essence, the argument is that Guatemalan society allows men to view women as property and that the Respondent has an opinion contrary to that of this alleged societal norm.

> He abused Hernandez-Cabrera because of her relationship with *him* and his vile belief that she was *his* property. (Arguing that "[Garcia] abused Hernandez-Cabrera on account of her status as a woman unable to leave *their* relationship and a woman whom he viewed as *his* personal property. Garcia's jealousy stemmed from his belief that Hernandez-Cabrera is '*his* woman' and that she should not be able to leave *him* or to live autonomously.")

Id. at 154.

The present case presents an identical situation to that found in *Hernandez-Cabrera*. The record is devoid of evidence that (b)(6); was aware of either of the groups the Respondent defines or that he persecuted her on account of her membership in any group. There is also no evidence in the record that points to the Respondent having any political opinion or that (b)(6); imputed any opinion on to her or that he was trying to overcome that opinion.

CONCLUSION

In sum, the Respondent has failed to show that her alleged abuse while living in Guatemala at the hands of a single non-governmental actor was on account of any one of the five protected grounds even if the Court is to view the Respondent's affidavit as credible testimony. The Respondent fails to present a viable case for either asylum or withholding under the INA.

At this point, DHS will make a brief point as to the CAT claim. The Respondent again has the burden of proof to demonstrate for this application, that the government of Guatemala is unable or unwilling to protect her. The respondent has failed to do so. The evidence is that the Respondent had an on and off relationship with a man named (b)(6); During the course of that relationship, the Respondent left the relationship multiple times, then made the conscious decision to return to that relationship. The Government provided

a protective order to the Respondent against (b)(6); that THE RESPONDENT violated by returning to the relationship. Furthermore, when called in June 2016, the police arrested (b)(6); but the Respondent fled shortly thereafter and therefore does not know what happened to the case or what would have happened had she remained.

The Respondent fails to demonstrate eligibility for any form of relief. DHS requests that the Court deny all applications and order the respondent removed to Guatemala.

Respectfully submitted,

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel
(b)(6); (b)(7)(C)
Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

Date: September 30, 2021

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

On September 30, 2021, I caused to be served a true and correct copy of this

Closing Argument

and any attached pages to:

(b)(6); (b)(7)(C)
HIAS
1300 Spring Street, Suite 500
Silver Spring, MD 20910

_X_ by initiating the normal government process for it to be placed in an envelope duly addressed and that envelope deposited in my office's outgoing system for first class mail.

___ by emailing the document to **[insert email address used]** via ICE eService.

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No.: (b)(6); (b)(7)(C)
Respondent	)	
In removal proceedings	)	

DEPARTMENT OF HOMELAND SECURITY'S
MOTION FOR SUMMARY AFFIRMANCE AND BRIEF IN OPPOSITION TO RESPONDENT'S APPEAL

(b)(6); (b)(7)(C)
Assistant Chief Counsel

Department of Homeland Security
U.S. Immigration and Customs Enforcement
Office of Chief Counsel
Fallon Federal Building
31 Hopkins Plaza, (b)(6);
Baltimore, Maryland 21201

COMES NOW the Department of Homeland Security ("DHS"), by and through undersigned counsel, and requests the Board of Immigration Appeals ("BIA") summarily affirm the decision of the Immigration Judge dated May 3, 2019 pursuant to 8 C.F.R. § 1003.1(e)(4)(i).

The Immigration Judge (IJ) reached the correct decision; therefore, any errors that do exist are harmless or immaterial, and the respondent's appellate arguments are not so substantial that the case warrants the issuance of a written opinion. *See* 8 C.F.R. § 1003.1(e)(4)(i)(B).

The IJ correctly found that the respondent's past harm was not on account of any of the particular social groups she proposed.

The respondent was not harmed because she is a Honduran female. There is nothing in the record to show that the gang members who demanded extortion from her, or those who raped her, did so because they held some animosity towards, or wanted to target, Honduran females. Being a Honduran female is not why these individuals chose her, as opposed to another person in her society, to harm.

The IJ's finding that the second particular social group proposed by the respondent, Honduran women perceived to be without male protection, lacks particularity and social distinction is supported by this record. The respondent's testimony and submitted evidence do not show that within her society, women perceived to be without male protection is a socially distinct group. She provided no evidence to show that those persecuting her viewed women without male protection as a group set apart or distinct from others within Honduran society. None of the statements by the people who extorted her or those who raped her gave any indication that they were motivated by her being a

(b)(6); (b)(7)(C)

woman without male protection. The groups lack of particularity is clear when trying to determine if the respondent fits into it. The respondent had a partner who provided for her financially. The respondent has four brothers living in Honduras. Her father lives in Honduras. Yet, according to the respondent's argument, these male figures in her life would not make her a woman with male protection. The group lacks particularity because it does not have clearly defined boundaries. Does having male family members give one the perception of male protection? Does one have to live with a male to have their protection? It is unclear from this record who would fall into this group and whether the persecutors viewed this as a particular group within Honduran society.

In the respondent's brief she attempts to add an additional ground of an imputed political opinion. She does not specify what that imputed political opinion is, but that it is connected to failure to comply with gang demands. During her hearing, she proposed the particular social group of "women from Honduras who fail to comply with demands made from criminal gangs". Transcript at 50. She did not make an argument for imputed political opinion. In her brief to the Board, she attempts to add on an imputed political opinion argument, saying it was "poorly articulated by all parties", when in fact it was not articulated by the respondent at trial as a political opinion, rather it was put forth as a particular social group. The IJ and DHS both addressed the particular social group as put forth by the respondent. The IJ correctly ruled there was no nexus between the harm the respondent suffered and her membership in the group of women from Honduras who fail to comply with demands made from criminal gangs. The IJ also was correct in his determination that "women from Honduras who fail to comply with demands made from

(b)(6); (b)(7)(C)

criminal gangs" would fail as a particular social group for lacking particularity and social distinction.

The respondent has the burden to show that the gang believed she held a political opinion. *Alvarez Lagos v. Barr*, 927 F.3d 236 (4th Cir. 2019). She has failed to point to any facts in this case that would lead the trier of fact to find the gang imputed a political opinion onto her. There are no statements or actions by the gang in the record to support this assertion.

The IJ's determination that the respondents failed to establish eligibility for asylum, withholding of removal, and protection under the Convention Against Torture was supported by the record. Further, the respondent does not appear to challenge the IJs denial of relief under the Convention Against Torture and has therefore waived this issue.

DHS moves the Board to summarily dismiss the respondent's appeal and affirm the decision of the IJ. In the alternative, should the Board determine that summary affirmance of the IJ's decision is not appropriate, the DHS submits that none of the six circumstances warranting review by a three-member panel are present in this case, and that the IJ's decision should otherwise be affirmed by means of a brief order.

Respectfully submitted,
DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
OFFICE OF CHIEF COUNSEL
(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this date, I caused to be served the foregoing document:

Department of Homeland Security's Motion for Summary Affirmance and Brief Opposing the Respondent's Appeal

__X__ by initiating the normal government process for it to be placed in an envelope duly addressed and that envelope deposited in my office's outgoing system for first class mail.

(b)(6); (b)(7)(C)
2751 Prosperity Ave.
Suite 500
Fairfax, VA 22031

Signed under penalty of perjury at Baltimore, Maryland on February, 19 2021.

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel

(b)(6); (b)(7)(C)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No.: (b)(6); (b)(7)(C)
Respondent	)	
In removal proceedings	)	

DEPARTMENT OF HOMELAND SECURITY'S
MOTION FOR SUMMARY AFFIRMANCE AND BRIEF IN OPPOSITION TO RESPONDENT'S APPEAL

(b)(6); (b)(7)(C)
Assistant Chief Counsel

Department of Homeland Security
U.S. Immigration and Customs Enforcement
Office of Chief Counsel
Fallon Federal Building
31 Hopkins Plaza, (b)(6); (b)(7)(C)
Baltimore, Maryland 21201

COMES NOW the Department of Homeland Security ("DHS"), by and through undersigned counsel, and requests the Board of Immigration Appeals ("BIA") summarily affirm the decision of the Immigration Judge dated November 26, 2018 pursuant to 8 C.F.R. § 1003.1(e)(4)(i).

The Immigration Judge (IJ) reached the correct decision; therefore, any errors that do exist are harmless or immaterial, and the respondent's appellate arguments are not so substantial that the case warrants the issuance of a written opinion. *See* 8 C.F.R. § 1003.1(e)(4)(i)(B).

The Immigration Judge denied the respondent's claims because she failed to show a nexus between the extortion demands she received and a cognizable particular social group. IJ decision at 10. The IJ correctly determined that the extortion demanded of the respondent for operating a clothing store was to further the gang's illegal enterprise, and not on account of her membership in either of her proposed particular social groups, Honduran women, or Honduran women who oppose gang control. The gang did not demand money from her for being a Honduran women or for opposing their control, nor was it one of the central reasons for extorting her. Rather, her testimony is clear that she was extorted because she ran a business. She testified the gang extorted the majority of the people in her community. Transcript at 30. They went after those who had businesses. Transcript at 31.

The IJ also found that the respondent did not meet her burden to show the government of Honduras was unable or unwilling to protect her from the private actors doing the extorting. IJ decision at 11. The IJ correctly relied on *Matter of A-B-,* 27 I& N Dec. 316 (AG 2018) in finding that the respondent did not establish that the government

(b)(6); (b)(7)(C)

condoned the conduct of the private individuals harming the respondent. The respondent reported the extortion to the police. Transcript at 23. The police took her report and told her they would look into the situation. *Id.* The record before the court in this case does not show that the government of Honduras was unable or unwilling to control individuals from demanding money from the respondent. The police showed this by taking a report and telling the respondent they would investigate. Further, the country conditions show the police and military are taking an active role to combat gang violence. IJ decision at 11.

As the respondent failed to show the government were unable or unwilling to control the individuals extorting the respondent, she also failed to show the government would acquiesce to her torture by private actors upon her return to Honduras, as required for relief under the Convention Against Torture.

The IJ's determination that the respondents failed to establish eligibility for asylum, withholding of removal, and protection under the Convention Against Torture was supported by the respondent's testimony and evidentiary submissions.

DHS moves the Board to summarily dismiss the respondent's appeal and affirm the decision of the IJ. In the alternative, should the Board determine that summary affirmance of the IJ's decision is not appropriate, the DHS submits that none of the six circumstances warranting review by a three-member panel are present in this case, and that the IJ's decision should otherwise be affirmed by means of a brief order.

Respectfully submitted,
DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
OFFICE OF CHIEF COUNSEL

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this date, I caused to be served the foregoing document:

Department of Homeland Security's Motion for Summary Affirmance and Brief Opposing the Respondent's Appeal

__X__ by initiating the normal government process for it to be placed in an envelope duly addressed and that envelope deposited in my office's outgoing system for first class mail.

(b)(6); (b)(7)(C)
Law Office of Viviana Medina
3349 N. University Dr. Suite 6
Hollywood, FL 33024

Signed under penalty of perjury at Baltimore, Maryland on August 21, 2020.

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel

(b)(6); (b)(7)(C)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No.: (b)(6); (b)(7)(C)
Respondent	)	
In removal proceedings	)	

DEPARTMENT OF HOMELAND SECURITY'S
MOTION FOR SUMMARY AFFIRMANCE AND BRIEF IN OPPOSITION TO RESPONDENT'S APPEAL

(b)(6); (b)(7)(C)
Assistant Chief Counsel

Department of Homeland Security
U.S. Immigration and Customs Enforcement
Office of Chief Counsel
Fallon Federal Building
31 Hopkins Plaza, (b)(6);
Baltimore, Maryland 21201

COMES NOW the Department of Homeland Security ("DHS"), by and through undersigned counsel, and requests the Board of Immigration Appeals ("BIA") summarily affirm the decision of the Immigration Judge dated December 4, 2018 pursuant to 8 C.F.R. § 1003.1(e)(4)(i).

The Immigration Judge (IJ) reached the correct decision; therefore, any errors that do exist are harmless or immaterial, and the respondent's appellate arguments are not so substantial that the case warrants the issuance of a written opinion. *See* 8 C.F.R. § 1003.1(e)(4)(i)(B).

The IJ correctly found that there was no nexus between the alleged harm suffered by the respondent and a protected ground. IJ decision at 3. The respondent purported to be harmed because of her membership in the particular social groups of single women in El Salvador, and family of (b)(6); (b)(7)(C) . *Id.* The respondent's harm was that the gang attempted to extort her. *Id.* She was never actually extorted. *Id.* The gang never bothered her again. *Id.* The gang did not demand money of her because she was a single woman in El Salvador or because she is the family of (b)(6); (b)(7)(C) They attempted to extort her to further their criminal enterprise.

The respondent did not show that the government of El Salvador was unwilling or unable to protect her from harm. The respondent never went to the police. *Id* at 4. There is no evidence in the record that the government knew or should have known of her harm and failed to act. Nor is there evidence that going to the police would have been futile for this respondent.

The respondent failed to show any likelihood of future risk of torture if she were to return to El Salvador. She presented no evidence that the government of El Salvador

would want to torture her or that a private actor would want to do so. The respondent failed to meet her burden to show that any harm done to her now or in the future would be with the consent or acquiescence of the government of El Salvador.

The IJ's determination that the respondents failed to establish eligibility for asylum, withholding of removal, and protection under the Convention Against Torture was supported by the respondent's testimony and evidentiary submissions.

DHS moves the Board to summarily dismiss the respondent's appeal and affirm the decision of the IJ. In the alternative, should the Board determine that summary affirmance of the IJ's decision is not appropriate, the DHS submits that none of the six circumstances warranting review by a three-member panel are present in this case, and that the IJ's decision should otherwise be affirmed by means of a brief order.

Respectfully submitted,
DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
OFFICE OF CHIEF COUNSEL
(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this date, I caused to be served the foregoing document:

Department of Homeland Security's Motion for Summary Affirmance and Brief Opposing the Respondent's Appeal

__X__ by initiating the normal government process for it to be placed in an envelope duly addressed and that envelope deposited in my office's outgoing system for first class mail.

(b)(6); (b)(7)(C)
Jaime Winthuysen Aparisi & Associates
8630 Fenton St.
Suite 925
Silver Spring, MD 20910

Signed under penalty of perjury at Baltimore, Maryland on September 28, 2020.

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Chief Counsel
(b)(6); (b)(7)(C)
Assistant Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
Fallon Federal Building, (b)(6);
31 Hopkins Plaza
Baltimore, MD 21201

NON-DETAINED

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

In the Matter of	)	
(b)(6); (b)(7)(C)	)	File: (b)(6); (b)(7)(C)
In Removal Proceedings	)	

DEPARTMENT OF HOMELAND SECURITY
WITHDRAW OF APPEAL

COMES NOW, the Department of Homeland Security ("DHS"), by and through undersigned counsel, respectfully requests a withdraw of the appeal filed in this case.

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel
(b)(6); (b)(7)(C)
Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

CERTIFICATE OF SERVICE

CASE NAME: (b)(6); (b)(7)(C)

CASE NO.: (b)(6); (b)(7)(C)

I HEREBY CERTIFY that, on October 15, 2020, I caused to be served the foregoing document:

Department of Homeland Security Withdraw of Appeal

X by placing a true copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process and causing the same to be mailed by first class mail to the person at the address set forth below;

__ by causing to be personally delivered a true copy thereof to the person at the address set forth below;

__ by FEDERAL EXPRESS / AIRBORNE EXPRESS to the person at the address set forth below;

__ by telefaxing with acknowledgment of receipt to the person at the address set forth below:

(b)(6); (b)(7)(C)
Law Office of Alison J. Brown
6930 Carroll Ave.
Takoma Park, MD 20912

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 15, 2020.

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel

(b)(6); (b)(7)(C)
Chief Counsel
(b)(6); (b)(7)(C)
Assistant Chief Counsel
Department of Homeland Security
U.S. Immigration and Customs Enforcement
Fallon Federal Building (b)(6);
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Baltimore, MD 21201

NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

IN THE MATTER OF	**IN REMOVAL PROCEEDINGS**
(b)(6); (b)(7)(C)	**File** (b)(6); (b)(7)(C)
Appellant	

Immigration Judge: Williams

Last Hearing: October 18, 2019

DHS MOTION FOR SUMMARY AFFIRMANCE

The United States Immigration and Customs Enforcement ("ICE"), by and through undersigned counsel, requests that the Board of Immigration Appeals ("BIA") summarily affirm the decision of the Immigration Judge pursuant to 8 C.F.R. § 1003.1(e)(4)(i).

1. The Immigration Judge reached the correct decision; therefore, any errors that do exist are harmless or immaterial, and the respondent's appellate arguments are not so substantial that the case warrants the issuance of a written opinion. 8 C.F.R. § 1003.1(e)(4)(i)(B).

   The respondent, a native and citizen of Guatemala left with her two children on November 15, 2015. The respondent testified that she left Guatemala because she and her children were threatened with death by gang members. Specifically, she indicated the death threats arose from a demand that she pay 150,000 quetzales or face death. The demand was made, according to the respondent's testimony, because the gang members knew that her husband was in the United States, information that they acquired through watching people in the neighborhood. She states that they, thereafter, started demanding that the respondent pay money, threatening that she and her children would be killed if they did not pay. The respondent also testified that she believed that the gangs were responsible for killing one of her cousins and a neighbor. She further stated that she was unable to move to another area within Guatemala, because gangs are active throughout the Country and one gang in another remote area may be connected to the gangs in another area. The Court correctly found that based on the record, the respondent failed to propose a cognizable particular social group and even if one of the prosed groups was viable to show nexus of harm.

   The respondent proposed the particular social group of 'Women in Guatemala" which is clearly impermissibly overbroad with no defined parameters, except the status as a woman. Due to its overbroad nature, it is not cognizable for purposes of relief under Section 208

of Immigration and Nationality Act. In addition, the respondent offered no evidence to show that women in Guatemala, generally, are subjected to mistreatment at the hands of gang members because of their status as women. The respondent next offered "Women in Guatemala Without Their Husbands Who are Unable to Protect their Children from Gang Violence", which is equally impermissible as it is overbroad, amorphous and lacking any social distinction or social visibility within the society in question. The respondent next offered the particular social group of "Internally Displaced Persons in Guatemala" which was also equally impermissible in that it does not have any social distinction. Finally, the respondent proposed the particular social group of immediate Family Members of (b)(6); (b)(7)(C) The Court properly found that although family membership can potentially be a viable social group, the respondent failed to show in this record that the family referenced is a separate and distinct group within the society in question. There was nothing in the record to otherwise show any social visibility or distinction of the (b)(6); (b)(7)(C) family. Additionally, the respondent failed to that even if the particular social groups previously referenced were cognizable, including the family group, that there was harm on account of any of the proposed groups. The respondent was the victim of random extortion attempts from gangs which, unfortunately based on the country condition information provided, is a widespread problem impacting all types of citizens. She was targeted as part of the gang's attempt to further its criminal enterprise with extortion demands and not on account of the fact, she was a member of any particular family. The respondent produced insufficient evidence to show that her fear of harm is country-wide, and that internal relocation is not a reasonable possibility. Finally, the respondent further failed to show that the governmental authorities would be unwilling

or unable to assist her in her efforts to address the issue of extortion, a criminal act by gang members in Guatemala. The only evidence to support this claim was the respondent's testimony that she was afraid to go to the police; however, that in and of itself does not establish that authorities were unwilling or unable to assist.

2. Assuming *arguendo* any errors do exist in the decision, such errors are harmless or immaterial.
3. The issues on appeal are squarely controlled by existing BIA or federal court precedent and do not involve the application of precedent to a novel factual situation.
4. The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in this case. Similarly, the Immigration Judge's factual determinations were not clearly erroneous. See 8 C.F.R. § 1003(d)(3)(i).

ACCORDINGLY, ICE moves the BIA to summarily affirm the decision of the Immigration Judge.

IN THE ALTERNATIVE, should the BIA determine that summary affirmance of the Immigration Judge's decision is not appropriate, ICE submits that none of the six circumstances warranting review by a three-member panel are present in this case, and that the Immigration Judge's decision should otherwise be affirmed by means of a brief order. 8 C.F.R. § 1003.1(e)(5).

Respectfully submitted,

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel
Immigration & Customs Enforcement
31 Hopkins Plaza
(b)(6);
Baltimore, Maryland 21201

DATE: 5/18/2021

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on May 18, 2021, I caused to be served the foregoing document:

DEPARTMENT OF HOMELAND SECURITY MOTION FOR SUMMARY AFFIRMANCE

X by initiating the normal government process for it to be placed in an envelope duly addressed and that envelope deposited in my office's outgoing system for first class mail to

(b)(6); (b)(7)(C)
Griffin and Griffin LLP
645 Baltimore- Annapolis Blvd
Suite 212
Severna Park, Maryland 21146

Executed on May 18, 2021
(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel

(b)(6); (b)(7)(C)

The Department appeals the Immigration Judge's March 28, 2019 decision granting the respondent asylum pursuant to section 208 of the Immigration and Nationality Act (Act or INA). The Immigration Judge erred in finding the facts established by the respondent met her burden of proof for protective relief.[1] Specifically, the respondent failed to establish past persecution, failed to demonstrate a nexus between the harm she suffered and a protected ground, failed to demonstrate that there were not serious reasons to believe that she had committed a serious nonpolitical crime, and failed to demonstrate that internal relocation is unreasonable. (b)(6); (b)(6); claimed to have suffered persecution in the form of sexual and physical abuse on account of membership in the particular social group of "Honduran females." At age ten, she was recruited by the 18th Street gang. In an attempt to relocate, (b)(6); (b)(7)(C) moved to Tegucigalpa, where she was raped. Although she reported the rape to the police, they claimed she had no evidence. She returned to her hometown and joined the 18th Street gang and participated in the torture of other gang members by threatening their family, cutting parts of their body, and administering electric shock. The purpose of the torture was to protect the criminal organization and was nonpolitical in nature. She claimed to have done this under threat of death and rape by other gang members. (b)(6); (b)(7)(C) was a gang member for four years before she came to the United States. The Department asks the Board to reverse the decision below and remand the matter to the Immigration Judge to consider protection pursuant to the regulations implementing the U.S. obligation under Article 3 of the United Nations Convention Against Torture (CAT).

To establish past persecution, the respondent must not only prove a sufficiently serious level of harm, but also, as pertinent here, that the harm was inflicted by "persons or an organization that the government was unable or unwilling to control." *See, e.g., Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The Immigration Judge erred in finding that the Honduran government was unwilling or unable to control the respondent's former partner. (I.J. at 15). "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018). The respondent must establish that her government is unwilling or unable to control the perpetrator which requires the respondent to show more than that the government had "difficulty controlling" the private criminality; rather, the government must have either "condoned" the criminality or "at least demonstrated a complete helplessness to protect the victims." *Id*. at 337. Here, the respondent only ever reported one instance of sexual assault perpetrated against her and never reported any other instances of abuse or mistreatment at the hands of relatives or gang members to any governmental authorities. (I.J. at 19). Instead, the respondent decided to leave the country to come to the United States rather than attempt to seek protection from her own government. (I.J. at 15). Based on the finding of facts, the Immigration Judge's conclusion that

[1] As the respondent failed to meet the lower burden of proof required for asylum, it follows that she also failed to satisfy the clear probability standard to establish eligibility for withholding of removal. *See INS v. Stevic*, 467 U.S. 407 (1984); *see also* 8 C.F.R. §§ 1208.13, 1208.16(b) (2008).

the government of Honduras was and is unwilling or unable to protect the respondent is erroneous. *Matter of A-B*, 27 I&N Dec. at 337.

Even if the respondent suffered past persecution, the Immigration Judge erred in finding that the respondent met her burden to establish that she was singled out for harm because of her membership in the particular social group of "Honduran females."[2] To demonstrate that harm was "on account of" a protected ground, an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *See Salgado-Sosa v. Sessions,* 882 F.3d 451 (4th Cir. 2018); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). The respondent failed to establish a nexus between the group of which she claims to be a member – "Honduran females" – and the harm she suffered. Rather, the respondent established that she was the victim of crimes committed by her family members, some of whom were also Honduran females. The crimes were motivated by the nature of their personal relationship and were also perpetrated as crimes of opportunity. The respondent provided no evidence that her family members motivated by any other reason than the nature of their relationship. (I.J. at 14-15). As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Matter of A-B-*, 27 I&N Dec. at 338-39. To be sure, the respondent was the victim of crimes committed by her relatives, acquaintances, and gang members, but those relationship-based crimes are insufficient to establish eligibility for asylum. Because the respondent failed to establish that her family members and gang associates as well as random actors were motivated by any other reason aside from their personal relationship or crimes of opportunity, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the stated particular social group of "Honduran females."

As the Immigration Judge erred in finding the respondent established past persecution, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the respondent bore the burden of establishing that internal relocation within Honduras was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored." (citing 8 C.F.R. § 1208.13(b)(3)(i))). Even if the Department bears the burden of proof on this issue, the Immigration Judge erred in finding internal relocation unreasonable. (I.J. at 19). "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *Matter of M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id.*

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[2]DHS reserves the right to argue that the particular social group of "Honduran females" is not cognizable under the facts presented in this case. However, the Board need not address whether "Honduran females" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds as asserted in this Notice of Appeal. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach).

The Immigration Judge held that respondent faced a threat of persecution anywhere in Honduras as a female even though her instances of harm were perpetrated by male and female relatives as well as gang associates. This finding is not supported by the record, which indicates that the respondent was able to escape the abuse of her family and was also able to escape the gang for a period of time before rejoining the gang. The Attorney General noted that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)" and respondent failed to meet her burden of proof on this issue. *Matter of A-B-*, 27 I&N Dec. at 345.

The Immigration Judge also erred in finding that the respondent had demonstrated there were not serious reasons to believe that the respondent had committed a serious nonpolitical crime outside the United State prior to her arrival. 8 C.F.R. § 1208.13(c)(1). The record establishes that the respondent threatened the family of other gang members, cut parts of their bodies, and administered electrical shocks to them. (I.J. at 16). The respondent did not assert that her actions were politically motivated, nor that her conduct was not both atrocious and criminal in nature. Rather the Immigration Judge found (b)(6); (b)(7)(C) was not barred from asylum due to the commission of a serious nonpolitical crime outside the United States because she was a minor at the time of the criminal activity, she acted under extreme duress, and suffered from numerous psychological impediments, and had no reasonable opportunity to escape. The finding that her commission of atrocious acts, including torturing other gang members, was not a serious non-political crime based on this analysis was in error. *Matter of E-A-,* 26 I&N Dec. 1 (BIA 2012); *Matter of McMullen*, 19 I&N Dec. 90 (BIA 1984).

The Department reserves the right to raise any other issues on appeal upon receipt of the transcript.

(b)(6); (b)(7)(C)

The Department appeals the Immigration Judge's April 4, 2019 decision granting the respondent asylum pursuant to section 208 of the Immigration and Nationality Act (Act or INA) which also conferred asylum to the rider respondent as a derivative. The Immigration Judge erred in finding the facts established by the respondent met her burden of proof for protective relief.[1] Specifically, the respondent failed to demonstrate a nexus between the harm she suffered and a protected ground and failed to demonstrate that internal relocation is unreasonable. The Department asks the Board to reverse the decision below and remand the matter to the Immigration Judge to consider protection pursuant to the regulations implementing the U.S. obligation under Article 3 of the United Nations Convention Against Torture (CAT).

"Generally, claims by aliens pertaining to…violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018). The Immigration Judge erred in finding that the respondent met her burden to establish that she suffered persecution because of her membership in the particular social group of "Honduran women."[2] To demonstrate that harm was "on account of" a protected ground, an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *See Salgado-Sosa v. Sessions,* 882 F.3d 451 (4th Cir. 2018); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). The respondent failed to establish a nexus between the proposed group – "Honduran women" – and the harm she suffered. Rather, the respondent established that she was the victim of crime committed by private actors and provided no evidence that these private actors were motivated by any other reason than their own criminal intent. I.J. at 15-16. As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Matter of A-B-*, 27 I&N Dec. at 338-39. To be sure, the respondent was the victim of crimes committed by her attackers, who were private actors, but those crimes are insufficient to establish eligibility for asylum. Because the respondent failed to establish that her attackers was motivated by any other reason aside from their own criminal motivation, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the stated particular social group of "Honduran women."

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[1] As the respondent failed to meet the lower burden of proof required for asylum, it follows that she also failed to satisfy the clear probability standard to establish eligibility for withholding of removal. *See INS v. Stevic*, 467 U.S. 407 (1984); *see also* 8 C.F.R. §§ 1208.13, 1208.16(b) (2008).

[2] DHS reserves the right to argue that the particular social group of "Honduran women" is not cognizable under the facts presented in this case. However, the Board need not address whether "Honduran women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds as asserted in this Notice of Appeal. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach). The Department concurs with the Immigration Judge's holdings that the respondent's two additional proposed particular social groups are not cognizable and that the respondent failed to show a nexus to her political opinion, imputed or actual. I.J. at 11-12.

As the Immigration Judge erred in finding the respondent established past persecution, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the respondent bore the burden of establishing that internal relocation within Honduras was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored." (citing 8 C.F.R. § 1208.13(b)(3)(i))). Even if the Department bears the burden of proof on this issue, the Immigration Judge erred in finding internal relocation unreasonable. I.J. at 16. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *Matter of M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id.*

The Immigration Judge held that respondent faced a threat of persecution anywhere in Honduras as a Honduran woman even though her instances of harm were perpetrated by a single group of criminal actors. This finding is not supported by the record, which indicates that the respondent did safely relocate for a time, that she had family ties throughout the country, was educated and gainfully employed in Honduras. I.J. at 3-4. The Immigration Judge's finding that because four unknown people were asking about "a teacher named Fanny" indicates that the perpetrators "nearly found her again" is clearly erroneous. The Attorney General noted that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)" and respondent failed to meet her burden of proof on this issue. *Matter of A-B-*, 27 I&N Dec. at 345.

The Department reserves the right to raise any other issues on appeal upon receipt of the transcript.

(b)(6); (b)(7)(C)
Chief Counsel

NON-DETAINED

(b)(6); (b)(7)(C)
Assistant Chief Counsel
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:		
(b)(6); (b)(7)(C) **Rider**	File Nos.:	(b)(6); (b)(7)(C)
In Removal proceedings		

DEPARTMENT OF HOMELAND SECURITY
MOTION TO WITHDRAW APPEAL

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

IN THE MATTER OF	IN REMOVAL PROCEEDINGS
(b)(6); (b)(7)(C) **(RESPONDENT)**	**CASE #** (b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)	(b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
MOTION TO WITHDRAW APPEAL

Pursuant to 8 C.F.R. § 1003.4, DHS respectfully seeks to withdraw its appeal in the above referenced case.

Respectfully submitted,

(b)(6); (b)(7)(C)

Assistant Chief Counsel
31 Hopkins Plaza, (b)(6);
Baltimore, Maryland 21201

DATE: July 21, 2021

CERTIFICATE OF SERVICE

CASE NAME: (b)(6); (b)(7)(C)

CASE NUMBER: (b)(6); (b)(7)(C)

I HEREBY CERTIFY that, on July 21, 2021, I caused to be served the foregoing document:

DEPARTMENT OF HOMELAND SECURITY MOTION TO WITHDRAW APPEAL

X by placing said copy in an envelope and placing said envelope in my office's receptacle designated for official "out-going" regular mail, said envelope having been addressed to the name and address indicated above;

__ by causing to be personally delivered a true copy thereof to the person at the address set forth below;

__ by FEDERAL EXPRESS / AIRBORNE EXPRESS to the person at the address set forth below;

__ by telefaxing with acknowledgment of receipt to the person at the address set forth below:

(b)(6); (b)(7)(C)
3346 E Baltimore Street, Rear Building
Baltimore, MD 21224

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 21, 2021.

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel

NON-DETAINED

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Pro Bono Attorneys for Respondents

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:

(b)(6); (b)(7)(C)

In Removal Proceedings

File Nos.: (b)(6); (b)(7)(C) **(Rider)**

JOINT MOTION TO REMAND

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of: (b)(6); (b)(7)(C)	**File Nos.:** (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) **(Rider)**
In Removal Proceedings	

JOINT MOTION TO REMAND

The parties in this action, Respondents (b)(6); (b)(7)(C) and (b)(6); (b)(6); with the Department of Homeland Security and U.S. Immigration and Customs Enforcement (DHS), hereby jointly move the Board to vacate the August 5, 2019 Oral Decision of the Immigration Judge (hereinafter "Oral Decision"), and the Order of the Immigration Judge entered separately in each of Respondents' cases on August 5, 2019, ordering the removal of Respondents (hereinafter "Removal Orders"), and to remand this matter to the Baltimore Immigration Court for further administrative proceedings. The basis for this joint request is the recent, significant changes in controlling law that have occurred since the Immigration Judge rendered his Oral Decision and entered the Removal Orders, and since Respondents filed their appeal brief with the Board.

On August 5, 2019, Immigration Judge Nelson Vargas-Padilla entered the Oral Decision and Removal Orders against Respondents, denying their applications for asylum and other requested relief. The Immigration Judge found Respondents' claims of domestic abuse and other persecution credible, but he nevertheless determined Respondents' applications were foreclosed by the decisions in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) ("*A-B- I*"), and *Matter of L-E-*

A-, 27 I&N Dec. 581 (A.G. 2019) ("*L-E-A- II*"). *See* I.J. at 5-6; Tr. 17, 51-52.

On June 8, 2021, Respondents filed their brief with the Board seeking reversal of the August 5, 2019 Oral Decision and Removal Orders entered by the Immigration Court, or remand. The following week, on June 16, 2021, the Attorney General vacated the prior decisions in *L-E-A- II, A-B-I,* and also in *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021) ("*A-B- II*"). *See Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021) and *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021). In both of the most recent decisions in *Matter of A-B- and Matter of L-E-A-* the Attorney General directed that "[i]mmigration judges and the Board should no longer follow [*A-B- I, A-B- II or L-E-A- II*] when adjudicating pending and future cases." *Matter of L-E-A-*, 28 I&N Dec. at 305; *Matter of A-B-*, 28 I&N Dec. at 309.

Given the Immigration Judge's reliance upon case law that has since been vacated by the Attorney General, Respondents and the DHS jointly request that the Board vacate the Immigration Judge's Oral Decision and Removal Orders and remand the matter to the Immigration Court for further consideration of Respondents' applications for requested relief in light of the Attorney General's decisions in *Matter of A-B-*, 28 I&N Dec. 307 (A.G. 2021), *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021), and any other relevant precedent or potential future rulemaking.

Dated: August 17, 2021

(b)(6); (b)(7)(C)

Respectfully submitted,

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
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(b)(6); (b)(7)(C)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	
(b)(6); (b)(7)(C)	**File Nos.:** (b)(6); (b)(7)(C) **(Rider)**
In Removal Proceedings	

CERTIFICATE OF SERVICE

On August 17, 2021, I, Eric A. Kuhl, mailed a copy of the foregoing Joint Motion to Remand and any attached pages to DHS/ICE Office of Chief Counsel by first class mail at the following address:

DHS/Office of the Chief Counsel
Fallon Federal Building
31 Hopkins Plaza, (b)(6);
Baltimore, Maryland 21201

(b)(6); (b)(7)(C)

August 17, 2021

(b)(6); (b)(7)(C)
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(b)(6); (b)(7)(C)
Assistant Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security
Fallon Federal Building, (b)(6);
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Baltimore, MD 21201

NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:

(b)(6); (b)(7)(C)

In removal proceedings

File No: (b)(6); (b)(7)(C)

DHS MOTION TO WITHDRAW APPEAL

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

IN THE MATTER OF	**IN REMOVAL PROCEEDINGS**
(b)(6); (b)(7)(C)	**CASE #** (b)(6); (b)(7)(C)
(RESPONDENT)	

DHS MOTION TO WITHDRAW APPEAL

The United States Department of Homeland Security (Department) hereby moves to withdraw its appeal pursuant to 8 C.F.R. §1003.4 and in support thereof states the following:

After further consideration and review of the proceedings, the Department seeks to withdraw its appeal.

ACCORDINGLY, the Department moves the BIA to dismiss its appeal.

Respectfully submitted,

DEPARTMENT OF HOMELAND SECURITY
U.S. IMMMIGRATION AND CUSTOMS ENFORCEMENT
OFFICE OF CHIEF COUNSEL
(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)
Assistant Chief Counsel
31 Hopkins Plaza, (b)(6);
Baltimore, Maryland 21201

Dated: October 6, 2020

CERTIFICATE OF SERVICE

IN THE MATTER OF	IN REMOVAL PROCEEDINGS
(b)(6); (b)(7)(C) **(RESPONDENT)**	**CASE #** (b)(6); (b)(7)(C)

I HEREBY CERTIFY that, on this date, I caused to be served the foregoing document:

DHS REQUEST FOR BRIEFING EXTENSION

X by placing a true copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process and causing the same to be mailed to (b)(6); (b)(7)(C), 13-15 East Deer Park Drive, Suite 201, Gaithersburg, MD 20877

Signed under penalty of perjury at Baltimore, Maryland on October 6, 2020.

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel

(b)(6); (b)(7)(C)
Assistant Chief Counsel
U.S. Department of Homeland Security
U.S. Immigration and Customs Enforcement
Office of the Principal Legal Advisor
Fallon Federal Building
31 Hopkins Plaza, (b)(6);
Baltimore, Maryland 21201

NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:		
(b)(6); (b)(7)(C) **Riders**	File No.:	(b)(6); (b)(7)(C)
Respondents		
In removal proceedings		

DEPARTMENT OF HOMELAND SECURITY'S RESPONSIVE BRIEF

COMES NOW the Department of Homeland Security (DHS), by and through undersigned counsel, and requests that the Board of Immigration Appeals ("Board") dismiss the respondents' Appeal.

The Immigration Judge reached the correct decision. The Immigration Judge determined that the respondents did not suffer harm rising to the level of persecution. The respondent does not raise this issue on appeal and the issue can be deemed waived by the respondent. *See Matter of R-A-M-*, 25 I&N at 658 n.2. The case is therefore appropriate framed as a well-founded fear case.

The Immigration Judge determined that the respondents proposed particular social groups were not cognizable. I.J. at 5. Whether a proposed particular social group is cognizable is a question of law that the Board reviews de novo.[1] The Immigration Judge correctly found that the respondent's family-based groups lacked social distinction. To be socially distinct, a group need not be seen by society; rather, it must be perceived as a group by society. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 240 (BIA 2014). A family ground must set apart, or distinct, from other persons within the society in some significant way. *Id.* at 238. Thus the respondent's argument that "the persecution was performed publicly, it is evident that the Respondents' family was socially distinct and visible" does not establish that society perceived the respondent's family as a group in any significant way. Furthermore, The Fourth Circuit has adopted a case-by-case approach to particular social group analysis, including reference to the analysis in *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014) and the need to interpret the statutory provisions on a case-by-case basis. *See Amaya v. Rosen*, 986 F.3d 424, 434 (4th Cir. 2021) (citing *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) (holding that social distinction requires a case-by-

[1] *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018).

case evidentiary inquiry). The respondent's general argument that "family units are a universal and fundamental building block of society and are thus socially distinct" fails to offer any case-by-case analysis or reference to any evidence that the respondent's family would be perceived as a group in a significant way. The Immigration Judge concluded that there was insufficient evidence to establish Guatemalan society view the respondent's family as socially distinct and this was the correct decision.

Next the Immigration Judge determined that "women in Guatemala" lacked particularlity because such a group is amorphous and overbroad. While the respondent offers examples of several other groups that were not found to be overbroad, one cannot simply conclude that because one large group might be particular that another group must be as well. Such an argument disregards the need for a case-by-case analysis. The Board has held that major segments of the population will rarely, if ever, constitute a distinct social group. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014). The Fourth Circuit has similarly endorsed the notion that a proposed group must not be overbroad. *Amaya v. Rosen*, 986 F.3d 424, 427 (4th Cir. 2021) (Particularity, which is the focus of this appeal, requires that a PSG has "discrete" and "definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective). In this case, the respondent fails to establish "women in Guatemala" is not overbroad.

The Immigration Judge determined that even if the proposed particular social groups were cognizable, the respondents failed to establish that any harm suffered or that would be suffered was on account of the proposed groups. I.J. at 6, 7. The Immigration Judge further found no nexus to any imputed political opinion. *Id.* Whether the respondents have established that any past or future harm was or would be on account of a protected ground is a factual

question that the Board reviews for clear error.[2] Both the Board and Fourth Circuit have held that fears related to personal matters are not a basis for asylum. *See Blanco del Belbruno*, 362 F.3d 272, 284 (4th Cir. 2004) (purely personal matters do not constitute cognizable bases for granting asylum); *Velasquez v. Sessions*, 866 F.3d 188 (4th Cir. 2017) (personal conflict among family members is not a basis for asylum); *Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011) (those who act solely out of personal revenge is not a basis for asylum). The Immigration Judge's determination that the respondent failed to establish a nexus to the proposed family groups was thus not clearly erroneous. While the Immigration Judge found a lack of nexus to the group "women in Guatemala" because it was not cognizable, even if the group were cognizable, such a decision by the Immigration was not clearly erroneous. *See Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020) (persecution that results from personal animus generally does not establish the necessary nexus). The Immigration Judge correctly found that the respondent failed to establish an imputed political opinion was the basis for the threats she received. Both the Board and Fourth Circuit have held that fears related to personal matters are not a basis for asylum. *See Blanco del Belbruno*, 362 F.3d 272, 284 (4th Cir. 2004) ([f]ears of retribution over purely personal matters do not constitute cognizable bases for granting asylum); *Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011) (those who act solely out of personal revenge or a desire to avoid the exposure of criminal activity may do so without a significant concern about the alien's political beliefs, perceived or otherwise).

The Immigration Judge found that it was reasonable for the respondent relocate in Guatemala to avoid future persecution. I.J. at 8. Whether the respondent can internally relocate

[2] *See Matter of M-A-M-Z-*, 28 I&N Dec. 173, 176 (BIA 2020).

is a mixed question of fact and law.[3] The Immigration Judge correctly found that the respondent was able to relocate to Guatemala City. The respondent failed to meet her burden that such relocation was unreasonable. *See* 8 C.F.R. § 1208.13(b)(3)(i).

The Immigration Judge found that the government of Guatemala was able and willing to protect the respondent. I.J. at 9. Whether a government is 'unable or unwilling to control' a private actor is a factual question that the Board reviews for clear error.[4] The Immigration Judge cited several sources for determining that the Government was able and willing to protect the respondent including placing her father under house arrest, issuance of a restraining order, and the requirement that police check with the respondent for compliance with the restraining order. While there are general country conditions that might support a contrary conclusion, the determination that the government was able and willing to control the respondent's father based on the specific circumstances of this case was not clearly erroneous.

The Immigration Judge found that the government of Guatemala would not acquiesce in the torture feared by the respondent. I.J. at 10. Whether the respondents have established the government of El Salvador would not acquiesce to torture is a legal question the Board reviews de novo.[5] The Immigration Judge relied on the same factual bases as above to determine the government would not acquiesce to the harm feared by the respondent, namely that the government placed the father under house arrest, issued a restraining order, and provided police oversight. The respondent's appeal references the country conditions that might support a contrary conclusion, however, the specific acts by the government of Guatemala in this case establish that the government is not acquiescing to the harm feared by the respondent.

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[3] *See Matter of M-Z-M-R-*, 26 I&N Dec. 28, 36 (BIA 2012)
[4] *See Portillo-Flores v. Barr*, 973 F.3d 230, 240 (4th Cir. 2020)
[5] *Cruz-Quintanilla v. Whitaker*, 914 F.3d 884, 889 (4th Cir. 2019)

DHS submits that none of the six circumstances warranting review by a three-member panel are present in this case, and that the IJ's decision should be affirmed by means of a brief order. 8 C.F.R. § 1003.1(e)(5).

WHEREFORE, the DHS respectfully requests the Board dismiss the respondent's appeal.

Respectfully submitted,

DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT
OFFICE OF THE PRINCIPAL LEGAL ADVISOR

(b)(6); (b)(7)(C)

Dated: June 15, 2021

(b)(6); (b)(7)(C)
Assistant Chief Counsel
31 Hopkins Plaza, (b)(6);
Baltimore, Maryland 21201

CERTIFICATE OF SERVICE

(b)(6); (b)(7)(C)	)	File No.:	(b)(6); (b)(7)(C)
Riders	)		
	)		

I HEREBY CERTIFY that, on June 15, 2021, I caused to be served the foregoing document:

DEPARTMENT OF HOMELAND SECURITY'S RESPONSIVE BRIEF

X by initiating the normal government process for it to be placed in an envelope duly addressed to the address below and that envelope deposited in my office's outgoing system for first class mail.

Law Office of Jay S. Marks, LLC
Attn: (b)(6); (b)(7)(C)
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Silver Spring, MD 20901

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 15, 2021

(b)(6); (b)(7)(C)

Assistant Chief Counsel

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No.: (b)(6); (b)(7)(C)
Respondents	)	
In removal proceedings	)	

DHS MOTION TO WITHDRAW APPEAL

(b)(6); (b)(7)(C)
Senior Attorney
(b)(6); (b)(7)(C)
Chief Counsel
Department of Homeland Security
U.S. Immigration and Customs Enforcement
Office of Chief Counsel
Fallon Federal Building
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Baltimore, Maryland 21201

COMES NOW the Department of Homeland Security ("DHS"), by and through undersigned counsel, and files the following motion.

DHS hereby moves to withdraw its appeal of the Immigration Judge's decision dated April 4, 2019 granting the respondent's application for asylum.

Respectfully submitted,

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Senior Attorney

CERTIFICATE OF SERVICE

On November 10, 2020, I caused to be served a true and correct copy of this DHS MOTION TO WITHDRAW APPEAL to:

(b)(6); (b)(7)(C)

by initiating the normal government process for it to be placed in an envelope duly addressed and that envelope deposited in my office's outgoing system for first class mail.

Signed under penalty of perjury at Baltimore, Maryland on November 10, 2020.

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
CHARLOTTE, NORTH CAROLINA

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File Nos.: (b)(6); (b)(7)(C)
In Removal Proceedings	)	

Immigration Judge: ACIJ Holmes-Simmons Call-Up Date: October 1, 2020

DEPARTMENT OF HOMELAND SECURITY MOTION TO REMAND AND BRIEF FOLLOWING REMAND BY THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

(b)(6); (b)(7)(C)

TABLE OF CONTENTS

(b)(6); (b)(7)(C)

INTRODUCTION

The U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS) now files this brief and accompanying evidence for the court's consideration following the Board of Immigration Appeals (Board) remand. The Board's remand was precipitated by the June 14, 2019 remand by the United States Court of Appeals for the Fourth Circuit (Fourth Circuit). *See Alvarez-Lagos v. Barr*, 927 F.3d 236 (4th Cir. 2019). The matter was remanded for consideration by this court of several outstanding issues, including:

1. whether the respondent's[1] putative social group is legally cognizable,
2. whether the respondent established an imputed political opinion, and
3. whether, as to the respondent's request for protection under the regulations implementing Article 3 of the Convention Against Torture (CAT), internal relocation is possible.[2]

As to each of these issues, new evidence only further supports the prior court and Board decisions denying relief and protection and will allow this Court to provide a fulsome and detailed analysis. Thus, for the reasons stated herein, DHS respectfully urges the court to deny the respondents' requests for relief.

ISSUES PRESENTED

In order for the respondent's case to be properly resolved on remand, the court must address the following issues:

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[1] The respondents are mother and minor child. The minor child is a derivative beneficiary of her mother's asylum application, and for ease of reference, all references to "the respondent" refer to the lead respondent.

[2] 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). Because the CAT is a non-self-executing treaty, *see*, *e.g., Pierre v. Gonzales*, 502 F.3d 109, 119-20 (2d Cir. 2007), adjudicators do not apply the CAT itself, but rather, the implementing regulations, *see generally* 8 C.F.R. § 1208.16(c), 1207.17, 1208.18. The references to the CAT in this motion and brief serve as a convenient shorthand for the regulations implementing Article 3 of the CAT.

(b)(6); (b)(7)(C)

1. Whether the court should accept new evidence for consideration of this case where the Board's remand did not limit the record, and new evidence is available and material to the court's consideration.

2. Whether the putative particular social group proposed by the respondent is legally cognizable where it lacks particularity and is impermissibly circular.[3]

3. Whether the respondent met her burden of proof to demonstrate an imputed political opinion as a proposed protected ground where, at best, the evidence showed only a generalized political motive.

4. Whether, notwithstanding deficiencies in the respondent's particular social group and imputed political opinion claims, the respondent met her burden of proof where she failed to demonstrate that the government of Honduras is unable and unwilling to control her persecutors.

5. Whether the Department rebutted the presumption of a well-founded fear of persecution where the evidence demonstrates that the respondent could avoid future persecution by relocating within Honduras.

6. Whether the respondent met her burden of proof for protection under the regulations implementing the CAT where she failed to demonstrate acquiescence or an inability to relocate.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On April 2, 2015, the respondent testified in support of her applications for asylum, statutory withholding of removal, and protection under the regulations implementing the CAT. Tr. at 22, 25-71. Her claim centered around two extortion demands by a gang member, named (b)(6); rendered approximately eighteen months after her divorce. Tr. at 35-36, 38; I.J. at 4-5; 927 F.3d at 244. She testified that the gangs extorted everyone in the town, that they imposed "taxes to everybody." Tr. at 62. The demands for extortion occurred in April and May of 2014. Tr. at 63, 66. In addition to the respondent's testimony, she proffered the testimony of (b)(6);

[3] The respondent's putative particular social group has consistently been defined as "unmarried mothers in Honduras living under the control of gangs." 927 F.3d at 245; Respondent Brief on Appeal at 7 (Dec. 28 2015); Respondent Closing Argument at 5 (May 4, 2015); I.J. at 13; Respondent Brief on Remand at 3 (Aug. 18, 2017); Respondent Brief on Remand at 2 (Nov. 6, 2019). In the event that the respondent advances a different putative particular social group in her brief to this court, and given the concurrent scheduling set by the court, the Department respectfully requests the opportunity to provide a response.

(b)(6); (b)(7)(C) a consultant specializing in the development of gang strategies in Central America. Tr. at 76-114. He described the absence of a protective male presence as a risk factor that "predicts violence against women." Tr. at 96-96. In his opinion, "the criminal agenda [of the gang] would be organized around profit." Tr. at 111. Ultimately, he testified that it is "difficult to differentiate between the criminal victimization she [the respondent] experienced and her status as an unprotected female." Tr. at 96. The court denied the respondents' applications for relief and ordered them removed.

On March 15, 2016 the Board dismissed the respondent's appeal. (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) (BIA Mar. 15, 2016) at 1. The respondent thereafter filed a Petition for Review with the Fourth Circuit. The matter was remanded to the Board, and on October 17, 2017, the Board again dismissed the respondent's appeal. The Board's decision focused solely on nexus and did not address the viability of the putative particular social group, the respondent's imputed political opinion claim, or the respondent's request for CAT protection. *See generally* (b)(6); (b)(6); (b)(7)(C) (BIA Oct. 17, 2017). The respondent again filed a Petition for Review with the Fourth Circuit.

On June 14, 2019 the Fourth Circuit again remanded the case to the Board. In its decision, the Fourth Circuit found that the record compelled the conclusion that the respondent met her burden of proof to demonstrate nexus to her putative protected grounds, i.e., membership in the proposed particular social group, "unmarried mothers in Honduras living under the control of the gangs," and imputed anti-gang political opinion. *Alvarez Lagos*, 927 F.3d at 249-252. Consequently, the court reversed the Board on this issue and found no reason to remand for further analysis of nexus. However, the court identified several deficiencies in the decisions issued by the Immigration Judge and the Board that did warrant remand for further fact finding and analysis. *Id.*

In particular, the Fourth Circuit noted additional analysis of the viability of the particular social group is necessary, acknowledging that "developments in the law since the Board issued its second decision might affect the Board's reasoning on remand" and pointed to *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018). The Fourth Circuit likewise noted that the respondent's claim of an imputed political opinion needed further evaluation on remand. *Id.* at 254-55. Finally, the Fourth Circuit remanded for consideration of the respondent's claim for protection under the regulations implementing the CAT. *Id.* at 255. In this regard, the Fourth Circuit observed that the court must make "initial findings regarding a third relevant consideration for CAT relief: whether (b)(6); could safely relocate in another part of Honduras." *Id.* at 255 n.4. The Fourth Circuit remanded the case for the Board to address each deficiency in the prior decisions. *Id.* at 257. However, acknowledging that new, proper, factual findings pertaining to the core requirements cannot be performed by the Board for the first time on appeal, the Board remanded this case to the Immigration Judge for this purpose. Board June 22, 2020 Dec. at 2; 8 C.F.R. § 1003.1(d)(3)(iv). This brief and the accompanying evidence followed.

ARGUMENT

I. BOTH THE BOARD'S REMAND AND CASE LAW SUPPORT CONSIDERATION OF NEW EVIDENCE THAT IS MATERIAL TO THE RESPONDENT'S CLAIMS

Both the law and the Board's remand support the consideration of new evidence in this case. The Department respectfully disagrees with the scope of remand alleged in the respondent's Notice of No Request for Additional Testimony filed on or about September 1, 2020. In her briefing, the respondent alleges that new evidence is beyond the scope of remand. R. Notice at 5. This court last considered the respondent's claims in a written decision on August 31, 2015. Notably, the Board's remand to this court did not limit the scope of remand to the record as it stood in 2015.

As a general rule, when the Board remands a case to an Immigration Judge, the remand is effective for the stated purpose and for consideration of any and all other appropriate matters, unless the Board qualifies or limits the remand for a specific purpose. *See Matter of Patel*, 16 I&N Dec. 600, 601 (BIA 1978). Here, the Board remanded the case "for the Immigration Judge to make additional findings of fact and reassess the cognizability of the lead respondent's proposed particular social group, imputed political opinion, and eligibility for protection under the Convention Against Torture." Board June 22, 2020 Dec. at 2. Although the Board remanded the matter for a specific purpose, nothing in the remand or stated purpose limited the court to the record as it stood in 2015. Moreover, the situation here is akin to that which the Board considered in *Matter of M-D-,* 24 I&N Dec. 138 (BIA 2007). In that case, the Board held that even when a case is remanded for the specific and limited purpose of conducting background checks, the Immigration Judge reacquires jurisdiction over the proceedings and may consider additional evidence if it is material, was not previously available, and could not have been discovered or presented at the former hearing. *Id.* at 141-42; *see also* 8 C.F.R. §§ 1003.2(c)(1) and 1003.23(b)(3).

In the instant case, the Department filed substantial evidence with this brief. Indeed, consideration of current country conditions and events – made available since the prior merits hearing—is vital to the court's consideration of the respondent's claims. Further, the respondent's insistence that the court must rely on a stale five-year-old record defies logic and the law. In point of fact, all of the news articles and country conditions evidence are material, especially in light of the "rigorous" analysis required by the court "to determine whether those facts satisfy all of the legal requirements" for the respondent's applications. *A-B-*, 27 I&N Dec. at 340. Notably, one of the court's required considerations on remand is whether respondent has satisfied her burden of

proof for protection under the regulations implementing the CAT. Board June 22, 2020 Dec. at 2. In this regard, immigration judges are directed to consider "[e]vidence that the applicant could relocate" within her native country, and "relevant information regarding conditions in the country of removal." 8 C.F.R. § 1208.16(c)(3). Current conditions within Honduras are therefore an important and material aspect of the court's review. Furthermore, none of the articles submitted by the Department were available at the time of the court's 2015 decision, and thus they could not have been discovered or presented at the former hearing. Thus, the Department's additional evidentiary filing is properly before the court for consideration.

II. THE PARTICULAR SOCIAL GROUP "UNMARRIED MOTHERS IN HONDURAS LIVING UNDER THE CONTROL OF GANGS" LACKS PARTICULARITY AND IMMUTABILTY, AND IS IMPERMISSIBLE CIRCULAR; THEREFORE IT IS NOT LEGALLY CONGNIZABLE

The first question this Court must address is whether the particular social group "unmarried mothers living in Honduras under the control of gangs" is legally cognizable. As is shown infra, it is not.

The Immigration and Nationality Act (Act) authorizes any alien who is physically present in the United States or who arrives in the United States to apply for asylum. INA § 208(a)(1). An applicant is eligible for asylum if she is able to demonstrate "that it is more likely than not that her life or freedom would be threatened in the proposed country of removal because of her race, religion, nationality, membership in a particular social group, or political opinion." *Niang v. Gonzales*, 492 F.3d 505, 510 (4th Cir. 2007); *see also* 8 U.S.C. § 1158(a)(2)(A). An asylum applicant must also demonstrate that the persecution was or will be "inflicted by the government or by others whom the government is unable or unwilling to control." *See Mulyani v. Holder*, 771 F.3d 190, 197–98 (4th Cir. 2014).

Over the last several decades the Board has "articulated and refined the standard for persecution on account of membership in a 'particular social group' so that this category is not boundless." *A-B-*, 27 I&N Dec. at 327. Among other criteria, persons in the particular social group must be linked by some common, immutable characteristic which is set apart, or socially distinct, in some way. *Id.* at 328, 330. In addition, the Board's "case-by-case" review requires courts to analyze particularity in terms of "whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." *Id.* at 329-30 (internal citations omitted). Particularity therefore requires that the group "must not be amorphous, overbroad, diffuse, or subjective." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014).

"When a former association is the immutable characteristic that defines a proposed group, the group will often need to be further defined with respect to the duration or strength of the members' active participation in the activity and the recency of their active participation" in order to satisfy the particularity requirement. *Matter of W-G-R-*, 26 I&N Dec. 208, 222 (BIA 2014). "Persecutory conduct aimed at a social group cannot alone define the group, which must exist independently of the persecution." *W-G-R-*, 26 I&N Dec. at 215. In *A-B-*, the Attorney General reiterated that, "[t]o be cognizable, a particular social group *must* 'exist independently' of the harm asserted." 27 I&N Dec. at 334 (citing, *inter alia*, *M-E-V-G-*, 26 I&N Dec. at 237 n.11, 243). "If a group is defined by the persecution of its members, then the definition of the group moots the need to establish actual persecution. For this reason, [t]he individuals in the group must share a narrowing characteristic other than their risk of being persecuted." *A-B-*, 27 I&N Dec. at 335 (internal citation omitted).

"To have the 'social distinction' necessary to establish a particular social group, there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *W-G-R-*, 26 I&N Dec. at 217. "Evidence that persecutors target an entire population indiscriminately can be evidence of no social visibility. In that situation, the fact that members of a particular social group get caught in the same net is irrelevant." *Temu v. Holder*, 740 F.3d 887, 894 (4th Cir. 2014) (analyzing "social visibility" which was later renamed as "social distinction" as explained in *M-E-V-G-*, 26 I&N Dec. at 236). Moreover, "one highly relevant factor is if the applicant's group is singled out for greater persecution than the population as a whole." *Id.* at 894. As emphasized by the Attorney General, a determination whether a social group is cognizable is a fact-based inquiry, evaluated on a case-by-case basis, and depending on whether the group is immutable and is recognized as particular and socially distinct. *See Matter of L-E-A-*, 27 I&N Dec. 581, 584 (A.G. 2019).

The respondent's particular social group claim is based on her alleged membership in a group defined as "unmarried mothers in Honduras living under the control of gangs." (b)(6); (b)(6); 927 F.3d at 245. This group fails the cognizability review on multiple levels. First, the respondent fails to demonstrate that the group is sufficiently particular. Key aspects of the particular social group formulation are simply "too subjective" to provide an adequate benchmark for defining a particular social group. *See M-E-V-G-*, 26 I&N Dec. at 239. For example, would "unmarried mothers" include mothers who never married in a formal religious or legal ceremony but are deemed to be in a "common law" marital relationship consistent with any applicable Honduran customs? Similarly, it is unclear if this group includes or excludes "unmarried mothers" involved in a relationship but who fail to identify the relationship beyond that of a partner or boyfriend. Likewise, it is not clear if this proposed group includes or excludes mothers who were

married and are now widowers. More importantly, it is unclear whether the term includes only mothers who were *never* married, or includes both this subset and mothers who, like the respondent were once married, but then divorced. As a result of this vague definition, the putative particular social group could encompass unmarried mothers "of varying backgrounds, circumstances, and motivations," resulting in a particular social group that is amorphous and lacks particularity. *Matter of E-R-A-L-*, 27 I&N Dec. 767, 771 (BIA 2020).

Relatedly, the respondent's particular social group lacks cognizability where it is impermissibly circular. The respondent is unable to separate the putative particular social group from her vulnerability—indeed it is the respondent's status of living "under the control of the gangs" upon which she claims eligibility for relief. (b)(6); (b)(7)(C) 927 F.3d at 251-252. But as the Attorney General has observed, "[s]ocial groups defined by their vulnerability to private criminal activity likely lack the particularity required … given that broad swaths of society may be susceptible to victimization." *A-B-*, 27 I&N Dec. at 335. That is precisely the flaw with respondent's definition. And this flaw is exacerbated by the fact that large swaths of Honduran society – having nothing to do with unmarried women—are susceptible to gang violence. *See e.g. Lizama v. Holder*, 629 F.3d 440, 447 (4th Cir. 2011) (rejecting a particular social group defined as "young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs"); *Zelaya v. Holder*, 668 F.3d 159 (4th Cir. 2012) (rejecting a particular social group premised on refused recruitment); *A-B-*, 27 I&N Dec. at 335 ("Victims of gang violence often come from all segments of society"). Groups defined by their "susceptib[ility] to violence from gang members … are too diffuse to be recognized as a particular social group." *A-B-*, 27 I&N Dec. at 335 (internal quotations and citations omitted). Moreover, what it means to "live under the rule of gangs" is highly subjective, ranging from the total substitution of gang authority for

that of the Honduran state, versus more limited scenarios of gang influence. Taking all these considerations together, the respondent's particular social group fails the particularity requirement, and her claim necessarily fails. "Of course, if an alien's [] application is fatally flawed in one respect . . . an immigration judge . . . need not examine the remaining elements of the [] claim." *A-B-*, 27 I&N Dec. at 340. This notwithstanding, the Department will analyze pertinent remaining aspects of the respondent's claim relating to particular social group.[4]

Notably, in the first decision, the Immigration Judge assumed, without deciding, that the respondent's particular social group was immutable. I.J. Aug. 31, 2015 Dec. at 13. Immutability therefore remains unresolved and presents an additional defect to explore on remand. Specifically, the respondent's putative group is premised in part on living "under the control of gangs." In order for this putative group to meet the immutability requirement, the court would have to find that living "under the control of gangs" is "beyond the [applicant's] power … to change or is so fundamental to her identity or conscience that it ought not to be required to be changed." *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439, 441 (BIA 1987). The Department acknowledges that the respondent testified the gang could find her anywhere in Honduras, implying that the gang operates some level of control throughout the country. Tr. at 67. But certainly, the respondent cannot allege that living "under the control of gangs" is fundamental to her identity, or that she should be required to remain in her community, if it is so affected. Nor does the evidence demonstrate living in such a community is beyond the respondent's power to change. In order to find that it was beyond the respondent's power to change, the court would have to impermissibly find that *every* community

[4] Because withholding of removal likewise requires that the respondent demonstrate a protected ground, if the respondent's particular social group or imputed political opinion claims fails for purposes of asylum, they likewise necessarily fail for withholding of removal. *Salgado-Sosa v. Sessions*, 882 F.3d 451, 456-7 (4th Cir. 2018).

in Honduras is "living under the control of gangs" despite the Department's new evidence that Honduras retains governmental control over some areas. The Department's evidence effectively nullifies the respondent's immutability argument. For example, Honduras has begun building massive police complexes in several locations, including Comayagua, Santa Barbara, and Lepaterique, which house hundreds of police trained to combat crime and violence. DHS NOF, Tab M at 59-63, Tab S at 85-89. The complexes provide support to the community on a variety of levels—increasing the number of police available to the public, as well as increasing police resources to be able to serve the public more efficiently. DHS NOF, Tab M at 60-62. The Honduran government has also gone so far as to grant property titles to residents—more than 1,100 property titles benefiting nearly 6,000 residents in 65 different colonies in Honduras. DHS NOF, Tab W at 130-133. By granting the legal title to these properties, the government ensured that the participants are provided "access [to] various social benefits, such as paving streets, drinking water and sewerage." *Id.* at 133. The government's involvement in strengthening police presence and capabilities, as well as in the regulation of property titles and providing social services, demonstrates their control over those areas—not the gangs. Thus, not every community in Honduras is functionally controlled by the gangs, nor is living "under the control of gangs" beyond the respondent's control to change. As a result, the respondent's proposed particular social group fails the immutability test.

Thus, under the "rigorous analysis" required of the court to determine asylum eligibility, the putative particular social group fails to meet the particularity and immutability requirements, is not legally cognizable, and the respondent's claim based on particular social group must be denied. *A-B-*, 27 I&N Dec. at 340.

III. THE RESPONDENT FAILED TO DEMONSTRATE THAT THE GANG ACTUALLY IMPUTED A POLITICAL OPINION TO HER

This Court is also directed to consider whether (b)(6); and his gang imputed a political opinion to the respondent. The record fails to support the respondent's claim of an imputed political opinion.

As noted above, political opinion is one potential protected ground upon which asylum can be granted if, *inter alia*, an applicant demonstrates that past or future harm has the appropriate nexus to such. *Niang*, 492 F.3d at 510; *see also* 8 U.S.C. § 1158(a)(2)(A). However, an applicant may demonstrate imputed, rather than actual, political opinion. *See Matter of S-P-*, 21 I&N Dec. 486, 489 (BIA 1996) ("Persecution for 'imputed' grounds (e.g., where one is erroneously thought to hold particular political opinions or mistakenly believed to be a member of a religious sect) can satisfy the 'refugee' definition."). In this case, the respondent alleges that she will be persecuted on account of an imputed anti-gang political opinion. (b)(6); (b)(7)(C) 927 F.3d at 254. As a result, it is the respondent's burden to show that the "persecutors actually imputed a political opinion" to her. *Abdel-Rahman v. Gonzales*, 493 F.3d 444, 450-451 (4th Cir. 444) (internal quotation marks and citations omitted).

In support of this theory, (b)(6); (b)(7)(C) testified that "there is no such thing as defiance of a gang that doesn't take on a political quality." Tr. at 100. This is a gross oversimplification of the facts and the law. We know this because in case after case, the Board and Courts of Appeals have held that resisting gang recruitment – perhaps the purest form of "defiance of a gang," fails to qualify for asylum under any basis.[5] If (b)(6); (b)(7)(C) broad-brush view of the law were

[5] "We do not doubt, as the respondents' expert witness testified, that gangs such as the MS-13 retaliate against those who refuse to join their ranks. However, such gangs have directed harm against anyone and everyone perceived to have interfered with, or who might present a threat to, their criminal enterprises and territorial power. The respondents are therefore not in a substantially different situation from anyone who has crossed the gang, or who is perceived to be a threat to the gang's interests."

Matter of S-E-G-, 24 I&N Dec. 579, 587 (BIA 2008); *Matter of E-A-G-*, 24 I&N Dec. 591, 594 (BIA 2008) ("individuals who resist gang recruitment may face the risk of harm from the reject gang" as an "individualized

(b)(6); (b)(7)(C)

controlling, the well-established jurisprudence holding that resistance to gang recruitment is not political opinion would simply not exist.

Thus, in order to meet her burden of proof to show that the opinion was imputed to her, it is not sufficient that the persecutor act from "a generalized 'political' motive." *INS v. Elias-Zacarias,* 502 U.S. 478, 482 (1992). Put another way, "simply demonstrating resistance to pressure to engage in certain acts and consequent retaliation for this resistance is insufficient" for the respondent to meet her burden of proof related to an imputed political opinion. *Matter of N-M-*, 25 I&N Dec. 526, 529 (BIA 1997). As the Fourth Circuit acknowledged in its decision, "the relevant inquiry is …the persecutor's subjective perception of the victim's views." (b)(6); (b)(7)(C) 927 F.3d at 254 citing *Haile v. Holder*, 456 F. App'x 275, 282-83 (4th Cir. 2011). Again, it is only "if, as (b)(6); (b)(7)(C) alleges (b)(6); (b)(7)(C) has imputed to her an anti-gang political opinion" that the respondent is able to demonstrate imputed political opinion as a protected ground. 927 F.3d at 251.

Undeniably, the actual persecutor's statements and actions in this case are the best evidence of his subjective perception of the respondent and whether he actually imputed the anti-gang political opinion to her. And yet, considering this specific set of facts, the Fourth Circuit found that "the nature of his threats showed that (b)(6); deliberately preyed on (b)(6); (b)(7)(C) status as a mother…, as an unmarried mother…, and as a female." (b)(6); (b)(7)(C) 927 F.3d at 250. (b)(6); mentioned nothing about political opinion or political control in his interactions with the respondent. *C.f.* Tr. at 36-8 ("he told me that I knew what they do to women"). (b)(6); threats were a means to an end—obtaining money from the respondent. Tr. at 38 ("He told me that if I

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reaction of the gang to the specific behavior of the prospective recruit"); *Zelaya v. Holder*, 668 F.3d 159 (4th Cir. 2012).

didn't give him the money, he will do whatever he would like to do to my daughter in front of me, and that he will kill her"). Contrary to (b)(6); actually stated motivations, there is no evidence that the anti-gang political opinion was actually imputed to the respondent in this case. Notwithstanding (b)(6); (b)(7)(C) oversimplified testimony, the record here does support an imputed political opinion in this case. Instead, given the respondent's generalized evidence, rather than specific facts demonstrating the subjective perception of (b)(6); the record is insufficient to meet her burden of proof that the anti-gang political opinion was imputed to the respondent.

IV. HONDURAS' RECENT EFFORTS TO COMBAT GANG VIOLENCE FURTHER UNDERMINE THE RESPONDENT'S OUTDATED ASSERTIONS THAT HONDURAS IS UNWILLING OR UNABLE TO CONTROL HER ALLEGED PERSECUTORS

This Court must also consider whether Honduras is unwilling or unable to protect the respondent from the gang. The respondent testified that she did not report the threats to the police due to lack of trust in the local police and a belief that the police and government would not protect her neighborhood. Tr. at 38, 54. Here, too, based on the new evidence presented, the respondent fails to meet her burden, where the evidence demonstrates that police and government control has improved throughout Honduras, and in her town specifically.

In addition to the other requirements outlined above, an alien seeking asylum must demonstrate that the persecution is or will be perpetrated by an organization which the Honduran government is unable or unwilling to control. *Acosta*, 19 I&N Dec. at 222. Moreover, "an applicant alleging past persecution *must* establish either that the government was responsible for the persecution or that it was unable or unwilling to control the persecutors." *Mulyani*, 771 F.3d at 198 (emphasis added). "'Whether a government is unable or unwilling to control private actors ... is a factual question that must be resolved based on the record in each case.'" *Crespin–Valladares v. Holder,* 632 F.3d 117, 128 (4th Cir. 2011) (*quoting Menjivar v. Gonzales,* 416 F.3d 918, 921

(8th Cir. 2005)). "An applicant seeking to establish persecution based on violent conduct of a private actor 'must show more than difficulty . . . controlling private behavior." *A-B-*, 27 I&N Dec. at 337 (quoting *Menjivar*, 416 F.3d at 921). When, as here, the alleged persecutor is someone unaffiliated with the government, the applicant must show that flight from her country is necessary because her home government is unwilling or unable to protect him. *A-B-*, 27 I&N Dec. at 318, 337. Notably, this court did not make any findings of fact on this issue in its original decision, and thus the Fourth Circuit could not make any findings pertaining to the issue of whether the Honduran government is unable or unwilling to control the respondent's persecutors. The court must now make findings on this issue to resolve the respondent's claim.

In evaluating the record before her, "an IJ is not entitled to base a decision on only isolated snippets of the record while disregarding the rest." *Tassi v. Holder*, 660 F.3d 710, 719 (4th Cir. 2011) (internal citations and quotation marks omitted). Here, the respondent failed to demonstrate that the Honduran government was unwilling or unable to control the private criminal actors. Indeed, the respondent never reported any of her interactions with the gang to the police. (b)(6); (b)(7)(C) (b)(6); 927 F.3d at 244. The respondent claimed that she did not call the police because she feared that they are corrupt and aligned with the gang. *Id.* Notably, perceived corruption is not the same as actual corruption—the respondent's subjective belief does not establish objective facts. Moreover, the respondent acknowledged that (b)(6); warned her not to call the police—indicating that the gangs feared police intervention. *Id.* The respondent's own testimony therefore demonstrates that her alleged persecutors "did not consider themselves free to assault her with impunity" such that "the very people persecuting [the respondent] believed the government was indeed willing and able to crack down on…violence." *Mulyani*, 771 F.3d at 199. Plainly stated,

the gang member's directive to not call the police is evidence that police intervention would have a chilling effect on the criminal actors.

Moreover, while crime remains an ongoing challenge in Honduras, the record demonstrates that the Honduran government is willing to control the alleged persecutors. For example, over the last several years, Honduras has reduced the rate of violence, including homicide, kidnapping, and extortion. DHS NOF, Tab B at 5; Tab J at 36; Tab K at 39; Tab L at 42; Tab M at 46; Tab U at 112. In addition, Honduras has taken strides to eliminate corruption in the National Police Force, creating a commission to review thousands of police personnel. DHS NOF, Tab B at 5, Tab E at 19-20. After working to reduce corruption, Honduras invested significant amounts of money in building the resources for its police force to increase and improve efficacy. DHS NOF, Tab M at 59-63, Tab S at 85-89. The government of Honduras has made other efforts to foster public trust in the police force, hosting fairs to engage with the people in some of the most violent neighborhoods. DHS NOF, Tab E at 19. "Indicators of increased public trust include the huge attendance at these events, positive polling results, and the increase in calls to 911 and local police 'tip' lines." *Id.* The Honduran government has deployed military police to occupy and protect a neighborhood threatened by the same gang implicated in this case—Barrio 18. DHS NOF, Tab H at 33. But the Honduran government is not simply fighting fire with fire, i.e. using force to control the gangs—the government is also investing in and emphasizing infrastructure to reduce poverty and create stability. DHS NOF, Tab O at 55; Tab Q at 69-71 (noting plans for increasing police effectiveness, prevention of violence, and crime control). Additionally, since the respondent's departure, the Honduran government has granted property titles to residents in 65 different colonies, providing stability and access to resources. DHS NOF, Tab W at 130-133. Notably, the government's investment and development is occurring in the respondent's very own

neighborhood—Altos Del Divino Paraiso. *Id.* at 133. The fact that the government is providing "legal certainty" and thus stability and access to government provided social benefits in the respondent's own neighborhood reflects the government's willingness and ability to aid the respondent. *Id.* And, as argued above, this certainly undermines respondent's and (b)(6); (b)(7)(C) assertion that the respondent lives "under the control of gangs."

Importantly, in a recent decision, the Fourth Circuit found that an alien's subjective fear of going to the police "does not eliminate the evidence in the record" demonstrating government efforts to control and combat gang violence. *Portillo-Flores v. Barr*, --- F.3d ---, 2020 WL 5224452 (4th Cir. 2020). Thus, notwithstanding the respondent's subjective fear of reporting her problems to the police, the court should acknowledge the evidence that the Honduran government is actively combatting gang violence. To find otherwise would impermissibly demonstrate the court's reliance on "isolated snippets of the record while disregarding" ample evidence of the Honduran governments efforts to combat gang violence. *Tassi*, 660 F.3d at 719. Under the circumstances presented, the court should find that the respondent did not establish that the government was or would be unable or unwilling to protect her. *See Matter of A-B-*, 27 I&N Dec. at 320 ("The mere fact that a country may have problems effectively policing certain crimes-such as domestic violence or gang violence-or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim."). As a result, the respondent's claims for protection—both as to the putative particular social group and imputed political opinion—necessarily fail and should be denied.

V. THE DEPARTMENT REBUTTED ANY PRESUMPTION OF A WELL-FOUNDED FEAR OF FUTURE PERSECUTION WHERE THE EVIDENCE SHOWS THAT THE RESPONDENT COULD RELOCATE WITHIN HONDURAS

Even if the respondent has shown past persecution—which she has not for the reasons stated—she cannot show a well-founded fear of future persecution because she cannot show that she cannot relocate within Honduras.

To establish asylum eligibility under the Act, an applicant must show either that she was subjected to past persecution or that she has a "well-founded" fear of future persecution on account of one of the protected grounds. 8 C.F.R. § 1208.13(b)(1). An alien who establishes past persecution is entitled to a rebuttable presumption that she has a well-founded fear of future persecution. *Id.* This presumption can be rebutted if the Immigration Judge finds by a preponderance of the evidence that "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution" or that the applicant could avoid future persecution by relocating to a different region of that country and it would be reasonable to expect the applicant to do so. *Id.* § 1208.13(b)(1)(i).

Persecution is undefined in the Act, but courts have defined the legal concept of persecution as one that encompasses the nexus, level of harm, and the government's inability/unwillingness to protect the victim; not just the harm aspect. *See A-B-*, 27 I&N Dec. at 337 (observing that BIA precedents have defined the concept of "persecution" as including three specific elements: (1) an intent to target a belief or characteristic, i.e., an intent to "overcome" the protected characteristic of the victim; (2) the level of harm must be "severe;" and (3) the harm or suffering must be inflicted either by the government of a country or by private actors the government is "unable or unwilling to control"). Even treatment that is repugnant and which rises to the requisite level of harm—to include threats of death—may not be sufficient to meet the respondent's burden of proof if the other criteria are not met. *See e.g., Abdel-Rahman*, 493 F.3d at 453 (observing that "even treatment that is regarded as 'morally reprehensible' does not constitute 'persecution' qualifying for

protection under the INA unless it occurs on account of one of the protected grounds"). Here, the Fourth Circuit found that the extortion and death threats directed at the respondent rose to a sufficient level of harm to constitute persecution. (b)(6); (b)(7)(C) 927 F.3d at 248, n1. But as set forth above, the respondent failed to demonstrate the intent to "overcome" the protected characteristic or that the government was unable and unwilling to protect her. Because she failed to meet her burden of proof in these areas, she necessarily failed to demonstrate past persecution, notwithstanding the level of harm acknowledged by the Fourth Circuit.

Even assuming *arguendo* that the respondent established past persecution, the Department rebutted the presumption of a well-founded fear of future persecution by establishing, by a preponderance of the evidence, that the respondent "could avoid future persecution by relocating to another part of his country of nationality" and that "under all the circumstances, it would be reasonable to expect her to do so" pursuant to 8 C.F.R. § 1208.13(b)(l)(i)(B). *See Matter of C-A-L-*, 21 I&N Dec. 754, 757 (BIA 1997) (finding that the threat of persecution must exist country-wide); *Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012); *see also Lin v. Mukasey*, 517 F.3d 685, 693 (4th Cir. 2008).

Prior to coming to the United States, the respondent lived in several neighborhoods within Tegucigalpa, including Altos del Divino Paraiso. (b)(6); (b)(7)(C) 927 F.3d at 243-4. The respondent testified that if she relocated to live with another family member, she believed the gang would locate her. Tr. at 60. As demonstrated in the attached filing, however, there are areas outside of Altos del Divino Paraiso which offer increased security. For example, the cities of Comayagua, Santa Barbara, and Lepaterique all offer increased police presence as a result of state-of-the-art police complexes built to improve security and combat gangs. DHS NOF, Tab M at 59-63, Tab S at 85-89. Alternatively, the respondent testified that she could not live on her own in

Honduras, citing difficulty in obtaining a job and paying bills. Tr. At 60. The inconvenience in relocating to a new area of Honduras alone, however, does not obviate the reasonableness of relocating. *See* 8 C.F.R. § 1208.13(b)(3) (noting a variety of factors to be considered "depending on all the circumstances of the case"). More importantly, the evidence shows that the government of Honduras is taking steps to provide stability and housing—particularly benefiting "female" heads of household. DHS NOF, Tab W at 133. Thus taking all the factors into account, including the evidence that Honduras is making the whole country safer—in particular for unmarried women—the court should find that the Department rebutted any presumption by demonstrating that the respondent could safely and reasonably relocate.

Once the Department rebuts the presumption, the respondent holds the burden to demonstrate both a subjectively genuine and objectively reasonable fear of future persecution. *Mirisawo v. Holder*, 599 F.3d 391, 396 (4th Cir. 2010). To meet her burden of proof, the respondent is required to demonstrate a reasonable possibility that she would be singled out individually for persecution or that there is a pattern or practice of persecuting similarly situated individuals. 8 C.F.R. § 1208.13(b)(2)(iii); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 449-50, 107 S. Ct. 1207 (1987). As argued above, the respondent failed to demonstrate either a viable particular social group, an imputed political opinion, or that the government of Honduras is unable or unwilling to protect her. Given the substantial improvements that Honduras has made in providing security, particularly since the respondent departed, the respondent is unable to carry her burden demonstrating an objectively reasonable fear of return.

Even if the respondent suffered harm that might rise to the level of mistreatment to constitute "persecution," because she didn't meet her burden of proof to demonstrate a protected ground, or that the government was unable and unwilling to protect her, this court should not find

that she suffered past persecution as a matter of law. *Cf. A-B-*, 27 I&N Dec. at 337. Assuming, *arguendo*, that she did suffer past persecution, this court should find that the Department rebutted the presumption of a well-founded fear of future persecution because the Department established, through ample evidence of the Honduran government's efforts to combat crime throughout the country, that the respondent could relocate within the country and that it would be reasonable to do so.

VI. THE RESPONDENT FAILED TO DEMONSTRATE EITHER ACQUIESCENCE OR AN INABILITY TO RELOCATE SUCH THAT SHE FAILS TO MEET HER BURDEN OF PROOF FOR CAT PROTECTION.

Finally, the Court must make findings of fact and determine whether the respondent can relocate to avoid torture. Here again, record evidence shows that she can and thus, is ineligible for CAT protection.

When making a request for protection under the regulations implementing the CAT, the alien seeking relief has the burden to show that "it is more likely than not that he or she would be tortured" in the country of removal. *Rodriguez-Arias v. Whitaker*, 915 F.3d 968 (4th Cir. 2019) (quoting 8 C.F.R. § 1208.16(c)(2)). Satisfaction of her burden of proof requires that the respondent to meet two criteria. *Turkson v. Holder*, 667 F.3d 523, 526 (4th Cir. 2012). First, the respondent must demonstrate "likely future mistreatment." *Id.* at 530. More specifically, the respondent must prove that it is more likely than not that, if removed, she will endure "severe pain or suffering" that is "intentionally inflicted." 8 C.F.R. § 1208.18(a)(1). Second, the respondent must separately demonstrate that this "likely future mistreatment" "will occur at the hands of government or with the consent or acquiescence of government." *Turkson*, 667 F.3d at 526. Acquiescence occurs when "prior to the activity constituting torture, [they] have awareness of such activity and thereafter breach [their] legal responsibility to intervene to prevent such activity." 8 C.F.R. §

1208.18(a)(7). However, even crime and gang violence identified as "pervasive" is insufficient to demonstrate eligibility for protection under the regulations implementing the CAT where the record demonstrates a government focus on improving security and protecting the public from gang violence. *Lizama*, 629 F.3d at 449; *see also Escobar-Hernandez v. Barr*, 940 F.3 1358, 1362 (10th Cir. 2019) ("pervasive violence in an applicant's country generally is insufficient to demonstrate the applicant is more likely than not to be tortured upon returning there").

At her hearing, the respondent testified that she believed the police worked with the gangs. Tr. at 54. The Fourth Circuit cited the respondent's testimony and acknowledged its significance to the question of acquiescence. 927 F.3d at 256. But a mere subjective belief does not establish a fact. Moreover, time did not stop in 2014 when the respondent left Honduras or in 2015 when the court last considered this case. Since the respondent's departure, Honduras has made great efforts to eliminate corruption in the National Police Force, creating a commission to review thousands of police personnel. DHS NOF, Tab B at 5, Tab E at 19-20. After working to reduce corruption, Honduras invested significant amounts of money in building the resources for its police force to increase and improve efficacy. DHS NOF, Tab M at 59-63, Tab S at 85-89. The Honduran government has also deployed military police to occupy and protect a neighborhood threatened by the same gang implicated in this case—Barrio 18. DHS NOF, Tab H at 33. Moreover, the Honduran government granted property titles to provide security for thousands of residents in Honduras—including in the respondent's specific neighborhood, Altos Del Divino Paraiso. DHS NOF, Tab W at 133. As a result, the evidence not only shows that the Honduran government is actively providing security throughout the country, but it is doing so in the respondent's former neighborhood. Those efforts have included similarly situated women—described as "female heads of household." *Id.* Thus, assuming *arguendo* that Altos Del Divino Paraiso lacked effective

government involvement when the respondent departed in 2014, the situation there has changed. The evidence therefore demonstrates that, contrary to the respondent's testimony, the Honduran government and the police are working to combat gang violence, rather than working with the gangs. There is no basis, given the current conditions, upon which to find that the Honduran government will "breach [their] legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7). Her claim for protection therefore fails to demonstrate acquiescence and should be denied.

Importantly, however, the respondent's evidence of cooperation/collusion between local police and gang members demonstrates, at best, a localized danger relating to her ability to relocate. Herein lies another hurdle for the respondent, one which she cannot overcome. The Fourth Circuit specifically noted that prior decisions in this case lacked findings of fact pertaining to this relevant consideration—whether the respondent could safely relocate in another part of Honduras. (b)(6); (b)(7)(C) 927 F.3d at 255 n4, citing 8 C.F.R. § 1208.16(c)(3)(ii) (requiring consideration of all relevant evidence including "[e]vidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured"). The Fourth Circuit has acknowledged that "country conditions alone can play a decisive role in granting relief under the [CAT]." *Rodriguez-Arias*, 915 F.3d at 975 (internal citations omitted). The same is true when considered in the reverse—the current country conditions can play a decisive role in this court's denial of the respondent's request for protection under the regulations implementing the CAT. That is precisely the issue here. As demonstrated in the attached filing, there are areas outside of Altos del Divino Paraiso which offer increased security to the respondent. The cities of Comayagua, Santa Barbara, and Lepaterique all offer increased police presence as a result of police complexes built to improve security and combat gangs. DHS NOF, Tab M at 59-63, Tab S at 85-

89. Residents near the complex in Comayagua noted that the complex helped improve the local economy, as well as providing improved protection and service to the community. DHS NOF, Tab M at 62. In addition, Honduras is investing millions of dollars in improving security in Tegucigalpa and San Pedro Sula. DHS NOF, Tab Q at 70. Plans include improving both violence prevention programs and victim assistance services. *Id.* These programs target, in part, "women at risk". *Id.* Thus, contrary to the respondent's claims otherwise, there are government sponsored programs and protections available to her in various locations outside of Altos Del Divino Paraiso, and the evidence demonstrates that the respondent could relocate to a part of Honduras where she is unlikely to be tortured. 8 C.F.R. § 1208.16(c)(3)(ii).

Given the evidence of record, the respondent is unable to meet her burden of proof to show that it is more likely than not that she will be tortured with government acquiescence, and the record demonstrates that the respondent could relocate to a part of Honduras where she is unlikely to be tortured. Considering the record as a whole, this court should deny the respondent's request for protection under the regulations implementing the CAT. *Matter of M-B-A-*, 23 I&N Dec. 474, 479-80 (BIA 2002) (rejecting a claim based on "a chain of assumptions and a fear of what might happen, rather than evidence that meets [the] burden of demonstrating that it is *more likely than not* that [the respondent] will be subjected to torture").

CONCLUSION

As emphasized by the Attorney General, a respondent "must present facts that undergird each of the[] elements" of an application for protection, and this court, via "rigorous" analysis, has "the duty to determine whether those facts satisfy all of the legal requirements." *A-B-*, 27 I&N Dec. at 340. Upon "rigorous" analysis of the record, including the properly submitted new evidence which is material to the court's consideration, the respondent fails to meet her burden of

proof and her application must be denied. The respondent's claim fails where she fails to demonstrate a legally cognizable particular social group, sufficient evidence of imputed political opinion, or that the government of Honduras is unable and unwilling to protect her. Moreover, the respondent's claim should be denied where ample evidence refutes her claim of government acquiescence and demonstrates that she can relocate within Honduras. The Department respectfully requests that the court deny the respondents' applications and order them removed.

Respectfully submitted on this 24th day of September 2020,

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
CHARLOTTE, NORTH CAROLINA

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File Nos.: (b)(6); (b)(7)(C)
In Removal Proceedings	)	

Immigration Judge: ACIJ Holmes-Simmons Call-Up Date: October 1, 2020

DEPARTMENT OF HOMELAND SECURITY
BRIEF FOLLOWING REMAND BY THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
CHARLOTTE, NORTH CAROLINA

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File Nos.: (b)(6); (b)(7)(C)
In Removal Proceedings	)	

Immigration Judge: ACIJ Holmes-Simmons
Next Hearing: February 26, 2021

DEPARTMENT OF HOMELAND SECURITY
RESPONSE TO RESPONDENT'S SUPPLEMENTAL BRIEF

In the Matters of:	)	
(b)(6); (b)(7)(C)	)	File Nos.: (b)(6); (b)(7)(C)
In Removal Proceedings	)	

COMES NOW the U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), by and through undersigned counsel, and hereby responds to the respondent's supplemental brief on new authority.

On or about January 29, 2021, the respondent filed a supplemental brief on new authority citing *Amaya v. Rosen*, No. 19-1619, 2021 WL 232554 (4th Cir. Jan 25, 2021), stating that "*Amaya* supports the particularity of (b)(6); (b)(7)(C) particular social group." Respondent Brief (Jan 25, 2021) at 1. The Department respectfully disagrees with the respondent's claim as to the significance of *Amaya.* Notably, in *Amaya* the Fourth Circuit Court of Appeals (Fourth Circuit) expressly stated that the only issue before the court was whether the stated particular social group (PSG) lacks particularity and acknowledged that "[t]here may be other legal problems with the proposed PSG." *Amaya*, 2021 WL 232554 at *10. Unlike *Amaya*, particularity is not the only issue in the instant case. As previously explained, the respondent's putative PSG, "unmarried mothers living under the rule of gangs" also lacks immutability and is impermissibly circular. Department Brief (Sept. 24, 2020) at 6-11. Thus, *Amaya* is easily distinguished from the instant case.

Importantly, the respondent's brief fails to acknowledge other significant and recent controlling new authority. Specifically, on January 14, 2021, the Attorney General (A.G). issued

a new decision in *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021) (*A-B-* II) which clarified issues in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). The respondent's failure to acknowledge this controlling precedent is curious at best and disingenuous at worst, given the specific relevance to the instant case. In *A-B-* II, the A.G. addressed and provided guidance on the unwilling/unable to protect standard and relocation—which are issues this court must resolve in the instant case. 28 I&N Dec. at 203-208; *see also* Department Brief (September 24, 2020) at 14-24. The A.G. acknowledged that "[a]bsolute prevention of private criminal acts is a standard that any country—including our own—would fail." *A-B-*II, 28 I&N Dec. at 206. "The level of inaction or ineffectiveness required to rise to the level of persecution should, accordingly, be high." *Id.* at 204. The A.G. further explained that

> The word "persecution" therefore should be read to require that the government in the home country has fallen so far short of adequate protection as to have breached its basic duty to protect its citizens, or else to have actively harmed them or condoned such harm. Where the government is actively engaged in protecting its citizens, failures in particular cases or high levels of crime do not establish a breach of the government's duty to protect its citizenry.

Id. The A.G.'s clarifications demonstrate why the question of whether the Honduran government is unable/unwilling to protect the respondent is fatal to her claim. As the respondent concedes in her opposition to the Department's recent evidentiary filing, there is no factual dispute that Honduras arrests gang members and corrupt police officers. Respondent Opposition (Jan. 29, 2021) at 3. The record therefore demonstrates that the government of Honduras "is actively engaged in protecting its citizens" and, as a result, "failures in particular cases or high levels of crime do not establish a breach of the government's duty to protect its citizenry." *A-B-* II, 28 I&N Dec. at 204. As a result, the respondent has failed to demonstrate that the Honduran government is unable/unwilling to protect her, and her claims must be denied.

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Respectfully submitted on this 2nd day of February, 2021,

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
U.S. IMMIGRATION COURT
CHARLOTTE, NORTH CAROLINA

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File Nos.: (b)(6); (b)(7)(C)
In Removal Proceedings	)	

Immigration Judge: ACIJ Holmes-Simmons

DEPARTMENT OF HOMELAND SECURITY
SUPPLEMENTAL BRIEF BASED ON NEW AUTHORITY

(b)(6); (b)(7)(C)

In the Matters of:	)	
(b)(6); (b)(7)(C)	)	File Nos.: (b)(6); (b)(7)(C)
In Removal Proceedings	)	

COMES NOW the U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), by and through undersigned counsel, and hereby provides this supplemental brief on new authority. The submission of this supplemental brief is an effort to augment the Department's previously filed brief and update the court relating to new controlling authority; the Department incorporates and affirms all arguments made in the Department's brief filed on or about September 24, 2020.

The United States Court of Appeals for the Fourth Circuit (Fourth Circuit) remanded this case for several considerations and for the court to make additional findings of fact. *See* (b)(6); (b)(6); *v. Barr*, 927 F.3d 236 (4th Cir. 2019). While evidencing on the need for additional analysis of the viability of the respondent's particular social group, the Fourth Circuit commented that "developments in the law since the Board issued its second decision might affect the Board's reasoning on remand" and pointed to *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018). (b)(6); (b)(6); 927 F.3d at 252. Significantly, on October 30, 2020, the Fourth Circuit issued a published decision in *Del Carmen Amaya-De Sicaran v. Barr*, --- F.3d. ---, 2020 WL 6373124 (4th Cir. 2020). In *Del Carmen* the Fourth Circuit specifically considers particular social groups analogous to the one raised by the instant respondent, defined by gender plus an alleged immutable characteristic. The Fourth Circuit's binding precedent, and the reasoning behind it, are therefore directly relevant to the issues before this court.

Importantly, the Fourth Circuit gave deference to the Attorney General's (A.G.) decision in *A-B-* and held that the decision "is not arbitrary and capricious." *Del Carmen Amaya-De Sicaran*, 2020 WL 6373124 at 6. Moreover, the Fourth Circuit affirmed the application of the anti-circularity principle in the analysis of particular social groups. *Id.* at 5-6. Their reasoning was that

> the issue is not the gravity of petitioner's circumstances, but rather that the abuse Sicaran seeks to escape via asylum protection defines her claimed group. *The words "controlling" and "abusive" cannot be understood in any way other than harm.* And Sicaran's testimony made clear that she sought to flee no other persecutorial acts than those of her husband. As we note above, if her group is defined by the abuse she suffered in her relationship, the nexus requirement is unacceptably reduced to a mere tautology. *See* 8 U.S.C. § 1101(a)(42)(A). To recognize the proposed particular social group as cognizable would be to undermine the core requirement of *Matter of A-B-*, which we have no power to do.

Id. at 6 (emphasis added).

The application of this reasoning to the instant respondent's case must result in rejection of the respondent's particular social group. The respondent's particular social group claim is based on her alleged membership in a group defined as "unmarried mothers in Honduras living under the control of gangs." (b)(6); (b)(7)(C) 927 F.3d at 245. As the Fourth Circuit expressly stated in *Del Carmen Amaya-De Sicaran*, the use of the word control "cannot be understood in any way other than harm." *Del Carmen Amaya-De Sicaran*, 2020 WL 6373124 at 6. Just as the respondent in *Del Carmen Amaya-De Sicaran* defined her particular social group on her desire to escape the control and abuse of her alleged persecutor, the instant respondent also defines her particular social group on her desire to escape the control of her alleged persecutor—the gangs. As a result, the instant respondent's particular social group "runs afoul of the anti-circularity requirement…[and] is a clear example of impermissibly defining the group by the underlying persecution." *Id.* The

respondent's claim based on the particular social group of "unmarried mothers in Honduras living under the control of gangs" necessarily fails and must be denied.

Respectfully submitted on this 9th day of November 2020,

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHARLOTTE, NORTH CAROLINA

In the Matter of:	
(b)(6); (b)(7)(C)	**File No.:** (b)(6); (b)(7)(C)
In Removal Proceedings	

THE DEPARTMENT OF HOMELAND SECURITY'S
BRIEF ON REMAND

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
CHARLOTTE, NORTH CAROLINA

In the Matter of:	)	
	)	
(b)(6); (b)(7)(C)	)	**File No.:** (b)(6); (b)(7)(C)
	)	
	)	
	)	
Respondent	)	**Charlotte, North Carolina**
	)	
In Removal Proceedings	)	
	)	

THE DEPARTMENT OF HOMELAND SECURITY'S BRIEF ON REMAND

The Department of Homeland Security, Immigration and Customs Enforcement (Department) respectfully submits the following brief on remand from the Attorney General's decision, *Matter of A-B,* 27 I&N Dec. 316 (A.G. 2018). For the reasons contained herein, the respondent has not demonstrated her eligibility for asylum under Section 208 of the Immigration and Nationality Act (INA) or statutory withholding of removal under INA § 241(b)(3).

I. PROCEDURAL HISTORY

On December 1, 2015, the Immigration Judge issued a written decision denying the respondent's applications for asylum, statutory withholding of removal of removal and protection under the regulations implementing the U.S. obligations pursuant to Article III of the Convention

Against Torture (CAT). *See* I.J. decision dated December 1, 2015. In his decision, the Immigration Judge found the respondent not credible. *Id.* at 5. On December 8, 2016, the Board of Immigration Appeals (Board) vacated the Immigration Judge's decision finding the Immigration Judge's credibility determination clearly erroneous, determined that the respondent was otherwise eligible for asylum, relying, in part, on *Matter of A-R-C-G,* 26 I&N Dec. 338 (BIA 2014), and remanded to the Immigration Judge for background checks. *See* Board decision dated December 8, 2016. On August 8, 2017, the Immigration Judge issued an order certifying the case back to the Board.[1] *See* I.J. decision dated August 8, 2017. After referring the case to himself,[2] in a published decision, on June 11, 2018, the Attorney General vacated the December 6, 2016[3] decision of the Board and overruled *A-R-C-G. A-B,* 27 I&N Dec. 316. The Attorney General determined the Board "erred in finding the immigration judge's factual and credibility determinations to be 'clearly erroneous.' *Id.* at 340. The Attorney General found that "[t]he Board further erred in concluding that the immigration judge's factual finding concerning the respondent's ability to leave her relationship and El Salvador's ability to protect her were clearly erroneous." *Id.* at 342. The Attorney General remanded the case to the Immigration Judge. On July 9, 2018, the Immigration Judge issued a scheduling order.[4]

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[1] The Attorney General determined that the Immigration Judge's certification order was procedurally defective. *See Matter of A-B-*, 27 I&N Dec. 247, 248–49 (A.G. 2018); *A-B-*, 27 I&N at 321-22 n.2.

[2] *Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018).

[3] The published decision uses the date of December 6, 2016, however, the Board decision is actually dated December 8, 2016.

[4] In this Court's scheduling order, the Court noted the respondent failed to appeal the Immigration Judge's denial of CAT protection and this claim was deemed waived or abandoned. *See* I.J. order dated July 9, 2018 and EOIR-26 dated December 16, 2016. Counsel in its brief on appeal to the Board, dated February 25, 2016, did not brief the CAT claim. Therefore, the Department is not addressing the CAT denial in this brief in substantive detail. The Department avers, however, that the Court's initial denial of CAT protection was correctly decided as the respondent provided no credible evidence establishing that she would suffer severe pain or suffering by, or at the instigation of, or with the consent or acquiescence of, a Salvadoran public official. I.J. at 16.

II. ASYLUM AND STATUTORY WITHHOLDING OF REMOVAL

The respondent bears the burden of proving eligibility for asylum. *Naizgi v. Gonzales*, 455 F.3d 484, 486 (4th Cir. 2006); 8 C.F.R. § 1208.13(a).[5] To meet their burden, respondents may show, in part, that they have a well-founded fear of future persecution, or that they suffered past persecution. *Naizgi*, 455 F.3d at 486; 8 C.F.R. § 1208.13(b). A respondent who demonstrate past persecution is presumed to have a well-founded fear of future persecution. *Naizgi*, 455 F.3d at 486; 8 C.F.R. § 1208.13(b)(1). An independently established well-founded fear of persecution requires both a genuine subjective fear of persecution and that "a reasonable person in like circumstances would fear persecution." *Chen v. INS,* 195 F.3d 198, 201–02 (4th Cir.1999).

Isolated incidents that result in minimal harm do not rise to the level of persecution. *Li v. Gonzalez*, 405 F.3d 171, 177 (4th Cir. 2005). As the Attorney General reiterated in *A-B-*, persecution has three specific elements. "First, 'persecution' involves an intent to target a belief or characteristic…Second, the level of harm must be 'severe.'… Third, the harm or suffering 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." 27 I&N Dec. at 337. The "threat of death qualifies as persecution." *Crespin–Valladares v. Holder,* 632 F.3d 117, 126 (4th Cir.2011) (*citing Li,* 405 F.3d at 177). Violence or threats to one's close relatives is an important factor in deciding whether mistreatment sinks to the level of persecution. *Baharon*, 588 F.3d at 232.

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[5] An alien seeking statutory withholding of removal bears the higher burden of showing that it is "more likely than not" that, if removed to a particular country, his life or freedom would be threatened on account of one of the enumerated grounds. *Camara v. Ashcroft,* 378 F.3d 361, 367 (4th Cir. 2004). Since the respondent has not met his burden of establishing eligibility for asylum, he would not meet his burden of establishing eligibility for statutory withholding. *See Matter of J-Y-C-*, 24 I&N Dec. 260, 266 (BIA 2007) ("Inasmuch as the respondent has not met the lower burden of proof required for asylum, it follows that he has also failed to satisfy the clear probability standard required to establish eligibility for withholding of removal.").

"Although the term 'persecution' includes actions less severe than threats to life or freedom, actions must rise above the level of mere harassment to constitute persecution." *Dandan v. Ashcroft,* 339 F.3d 567, 573 (7th Cir.2003) (internal quotation marks omitted).

Generally, status as a victim of violence by a private actor is insufficient to establish eligibility for asylum or statutory withholding or removal. *See Matter of A-B-,* 27 I&N Dec. at 320; *see also Matter of M-E-V-G-, 26* I&N Dec. 227, 235 (BIA 2014). However, victims of private criminal acts are not precluded from establishing eligibility for asylum if they can establish the statutory requirements, including persecution on account of a protected ground.

a. Credibility

The respondent's application was filed after May 11, 2005; thus her case is governed by the Real ID Act amendments and the standard applicable to credibility determinations contained therein[6]:

> Considering the totality of the circumstances and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the application or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of such statement, the consistency of such statements with other evidence of record… *and any inaccuracies or falsehoods in such statements, without regard to whether the inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.* There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

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[6] *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

INA § 208(b)(1)(B)(iii) (emphasis added).

The Fourth Circuit Court of Appeals has recognized that "omissions, inconsistent statements, contradictory evidence, and inherently improbable testimony are appropriate bases for making an adverse credibility determination." *Djadjou v. Holder,* 662 F.3d 265 (4th Cir. 2011). In *A-B-,* the Attorney General, cited with approval from the *Djadjou* decision that "the existence of 'only a few' such issues can be sufficient to make an adverse credibility determination as to the applicant's entire testimony regarding past persecution." *A-B-,* 27 I&N Dec. at 342 (quoting *Djadjou,* 662 F. 3d at 273-274.). In *A-B-,* the Attorney General discussed that "identified inconsistencies do not have to be related to an applicant's core asylum claim to support an adverse credibility determination." 27 I&N Dec. at 342.

As a preliminary matter, the Court's initial credibility determination was correctly decided and persuasively supported by the evidence. I.J. decision dated December 1, 2015 at 5. The Court's determination was correct where the respondent's testimony was inconsistent with previous testimony and her declaration. *Id.*[7] On remand the respondent's credibility is further undermined by the declaration submitted in briefing before the Attorney General.

i. <u>Date the Abuse Began</u>

During a credible fear interview in August 2014, where the respondent was represented by an attorney and made use of a Spanish interpreter, the respondent stated the violence began "about five years back", so approximately August of 2009. *See* Exh. 1, Form I-870 at 1, 4; Tr. at 48-49. However, at the individual hearing on September 1, 2015 the respondent testified the violence began in 1999; 10 years prior the time stated during her interview. Tr. at 48-49. When

confronted with this discrepancy, the respondent failed to adequately explain, simply stating that she was providing a summary of her testimony. Tr. at 48-50. This ten-year difference as to when the abuse began is a major discrepancy, and the Court correctly relied on it in making an adverse credibility finding. *See e.g. Camara v. Ashcroft,* 378 F.3d 361 (4th Cir. 2004) (substantial evidence upon which IJ could support adverse credibility determination based upon initial asylum application claiming no children where applicant had two children and a three year discrepancy relating to a miscarriage).

ii. Rape in January/February 2014

During cross-examination, the respondent testified she was raped by her ex-husband in January or February 2014 and that she did not report this to the police. Tr. at 51. This incident was not in the sworn statement submitted with her initial asylum application nor revealed during her credible fear interview. *Compare* Exh. 2, Tab C, page 14, *with* Exh. 1, Form I-870, *with* Tr. at 51. The respondent's explanation during her individual hearing for this omission was that it "slipped her mind." Tr. at 52. This material omission and explanation is another major discrepancy the Court correctly relied upon to determine the respondent was not credible. *See e.g. Djadjou v. Holder,* 662 F. 3d 265 (4th Cir. 2011) ("[t]he existence of only a few such inconsistencies, omission, or contradictions can be sufficient for the agency to make an adverse credibility determination as to the applicant's entire testimony regarding past persecution.")

In briefing before the Attorney General, the respondent submitted a fifty-one-paragraph supplemental declaration dated March 30, 2018. *See* Respondent's Appendix: Supplemental Documents to Attorney General, Tab. A. at 2-11. In it, the respondent discusses her life in great

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[7] The inconsistency in age difference between the respondent and her ex-husband previously cited by the Court should not form a basis for any new adverse credibility determination as it apparently was based on a translation

detail to the point of mentioning extensive childhood memories. Notably, this detailed declaration, again fails to specifically mention that the respondent's ex-husband raped her in January/February 2014, thus calling into question the veracity of her testimony during the individual hearing regarding this incident. *Compare* Respondent's Appendix: Supplemental Documents to Attorney General, Tab. A[8] at 2-11, *and* Exh. 2, Tab C at 14, *and* Exh. 1, Form I-870, *with* Tr. at 51. The omission of this fact from her supplemental declaration further undermines the credibility of her claim.

iii. Reason 2001 charges not pursued

The respondent testified during her individual hearing that her husband was arrested in 2001. Tr. at 56. Ultimately, after extensive questioning and the Court finding the respondent non-responsive, the following exchange occurred:

Judge to (b)(6); (b)(7)(C).. Did you pursue the charges with the police after he was released from jail or not? Yes or no?

(b)(6); **to Judge:** No

Judge to (b)(6); Okay. Why not?

(b)(6); (b)(7)(C) Because he had promised me that he was going to change, that he wanted to have a home with me.

Tr. at 58.

In the respondent's supplemental declaration, she now submits an entirely different explanation, stating:

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error.

[8] The respondent's filing to the Attorney General labels these documents as exhibits. However, as there has been evidence marked as actual exhibits by the Court, the Department will refer to them as tabs so as not to confuse documentation marked into evidence by the Court versus documents submitted to the Attorney General on appeal.

> "[w]hile my husband was in the cell, some of his friends came to the house and threatened that if I didn't drop the complaint, I would be a dead woman. Two men also came to the house during this time and pressured me to sign something that would let my husband go free. I think these men were private detectives or somehow affiliated with the police because they had badges. Because of the threats from his friends and because I knew my husband's brother (b)(6); was a police officer, I was afraid I would be killed if I didn't cooperate. I signed the papers and they released him."

See Respondent's Appendix: Supplemental Documents to Attorney General, Tab. A. at 6, para. 25.

The respondent has now provided a completely different explanation about why the 2001 charges against her ex-husband were not pursued. In her supplemental declaration she is alleging that she was threatened and that is why she dropped the charges. Whereas, during her individual hearing the respondent testified that charges were dropped because her ex-husband promised he would change. Tr. at 58. This change in her story demonstrates that the respondent failed to provide consistent and credible testimony in support of her claim for relief and protection.

Although, the Board determined this Court's credibility assessment was clearly erroneous, the Attorney General found the Board "failed to give adequate deference to the credibility determinations and improperly substituted its own assessment of the evidence." *A-B,* 27 I&N at 341.

The respondent has attempted to counteract her lack of credibility by submitting evidence before the Court and again before the Attorney General that she has been diagnosed with "ongoing" Posttraumatic Stress Disorder (PTSD). *See* Respondent's Appendix: Supplemental

Documents to Attorney General, Tab. F, G.[9] There are two reports: one from psychotherapist (b)(6); (b)(7)(C) and (b)(6); (b)(7)(C) (b)(6); appears to have never personally evaluated the respondent herself merely reviewing (b)(6); (b)(7)(C) evaluation. *See* Respondent's Appendix: Supplemental Documents to Attorney General, Tab. G page 122, para. 4 These reports attempt to attribute ongoing PTSD with her inability to recall instances of mistreatment. However, this does not explain why the respondent would be able to recall a rape by her ex-husband during her individual hearing but not before or after, omitting the event from her credible fear interview, initial asylum application, and supplemental declaration before the Attorney General. Likewise, the diagnosis does not adequately account for the glaring inconsistencies in her testimony regarding when the abuse began and why she did not pursue criminal charges against her husband in 2001. *See* Respondent's Appendix: Supplemental Documents to Attorney General, Tab F, G. Moreover, there are concerns with the reports themselves. For example, (b)(6); never personally evaluated the respondent. *Id.* at Tab G.

With the addition of the respondent's supplemental declaration to the Attorney General, the respondent has further undermined her credibility.

b. Lack of Corroboration

The respondent's claim rests in part that she fears returning to El Salvador because her ex-brother in law was member of the police, so the police would not protect her from her abusive ex-husband. *See* Exh. 2, at 1, para. 7, 13. However, the respondent failed to corroborate the simple fact that her ex-brother in law was in fact a policeman, admitting she had no proof that

[9] It should be noted that in Tab G, (b)(6); evaluation, in both the electronic version and hard copy version that the Department received, there is a missing part. While the document is paginated correctly at pages 126 to 127, the evaluation skips from paragraph 12 to 16 with paragraphs 13 to 15 missing. Therefore, the Department does not appear to have been properly served with a complete copy this document. The undersigned emailed counsel on

her ex-brother in law was a policeman. Tr. at 54. She did not otherwise explain why such evidence would not have been reasonably available. She also admitted she never reported her ex-brother in law to the police for any threats he may have made to her. Tr. at 55.

Therefore, the respondent has not adequately corroborated a key element of her claim for asylum.

c. Membership in a Particular Social Group

> Are "El Salvadoran women who are unable to leave their *domestic relationships* where they have children in common" with their partners;" "Salvadoran women in *domestic relationships* they are unable to leave where they have children in common;" "Salvadoran women viewed as property by virtue of their status in a *domestic relationship*" cognizable social groups?

Before the Court, the respondent sets forth the particular social group "'El Salvadoran women who are unable to leave their domestic relationships where they have children in common' with their partners." I.J. at 8. However, in briefing before the Attorney General, the respondent set forth alternate formulations of "Salvadoran women in domestic relationships they are unable to leave where they have children in common," "Salvadoran women viewed as property by virtue of their status in a domestic relationship," or "Salvadoran women."[10] Respondent's brief to Attorney General at 32. The Attorney General in *A-B-* focused on the particular social group at issue before the Immigration Judge and the Board, i.e., "El Salvadoran women who are unable to leave their domestic relationships where they have children in

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August 9, 2018 to advise them. Therefore, it is unknown to the undersigned what is contained in the missing paragraphs and pages.

[10] This latter particular social group formulation will be addressed separately in this brief.

common' with their partners." *A-B-*, 27 I&N Dec. at 326. The respondent's feared persecutor is her ex-husband, a private actor. *See* Exh. 2.

Specifically, to establish a cognizable particular social group, the respondent must show that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *See Matter of M-E-V-G-*, 26 I&N Dec. at 237; *see also Matter of W-G-R-*, 26 I&N Dec. 208, 210-12 (BIA 2014). Further, as an important corollary principle, the group must "exist independently" of the harm asserted in an application for asylum or statutory withholding of removal and must have existed prior to the alleged persecution. *Matter of A-B-,* 27 I&N at 334-35; *see also Temu v.* Holder, 740 F.3d 887, 894 (4th Cir. 2014). Whether a proposed social group exists independently of the harm is a question that must be carefully analyzed on a case-by-case basis, but groups defined because of the "inability to leave a relationship" in the domestic violence context are impermissibly defined by the persecution suffered or feared if the inability to leave was created by harm or threatened harm by the abusive partner. *Matter of A-B-,* 27 I&N at 335-36.

The respondent has not shown that three of particular social groups formulations exist fully independently of the persecution suffered or feared.

> "El Salvadoran women who are unable to leave their *domestic relationships* where they have children in common" with their partners." "Salvadoran women in *domestic relationships* they are unable to leave where they have children in common." "Salvadoran women viewed as property by virtue of their status in a *domestic relationship*."

These three social group definitions fail because the respondent has not established that they exist independent of the harm suffered or feared. For example, the harm of being viewed, and thus, logically, treated "as property." The other two definitions also suffer from the fatal

flaw of being "unable to leave the relationship," when the respondent has failed to persuasively establish that such a trait exists independently of the harm and threats from abusive partners. *See A-B-*, 27 I&N Dec. at 335 ("*A-R-C-G-* never considered that 'married women in Guatemala who are unable to leave their relationship' was effectively defined to consist of women in Guatemala who are victims of domestic abuse because the inability 'to leave' was created by harm or threatened harm."). Therefore, none of these three groups exist independently of the alleged persecution they claim to be suffering and would not have existed prior to the alleged harm. Thereby, all three groups are impermissibly defined and are not cognizable social groups.

Because the respondent has failed to establish membership in a cognizable particular social group with respect to these three formulations, she cannot establish nexus to a protected ground on these bases to support her application for asylum and statutory withholding or removal.

d. Nexus

> Has the respondent established a nexus to a statutorily protected ground?

Assuming *arguendo* the respondent established membership in a cognizable particular social group, the respondent failed to establish a nexus between any harm and a statutorily protected ground. To establish eligibility for asylum the respondent must establish she is a refugee, within the meaning of INA § 101(a)(42)(A). INA § 208(b)(1)(A).

To establish that the respondent is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be "at least one central reason for persecuting the applicant." INA § 208(b)(1)(B)(i); *see also Crespin–Valladares v. Holder,* 632 F.3d 117, 127 (4th Cir. 2011); *see also Oliva v. Lynch*, 807 F.3d 53, 59 (4th Cir. 2015). The respondent need not demonstrate that an enumerated ground is "'*the* central reason or even a dominant central reason' for his persecution, [but] he must demonstrate that these ties are more than 'an incidental, tangential, superficial, or subordinate reason' for his persecution." *Crespin–Valladares,* 632 F.3d at 127 (*quoting Quinteros–Mendoza v. Holder,* 556 F.3d 159, 164 (4th Cir.2009)) (emphasis in original). Among the protected grounds listed in the asylum statute is "membership in a particular social group." INA § 208(b)(1)(B)(i).

> Unless an applicant has been targeted on the basis of an enumerated ground, he or she cannot establish a claim for asylum. *Saldarriaga v. Gonzales*, 402 F.3d 461, 467 (4th Cir. 2005) ("[T]he asylum statute was not intended as a panacea for the numerous personal altercations that invariably characterize economic and social relationships."). "Evidence consistent with acts of private violence or that merely shows that an individual has been the victim of criminal activity does not constitute evidence of persecution on a statutorily protected ground." *Velasquez v. Sessions*, 866 F.3d 188, 194 (4th Cir. 2017) (quoting *Sanchez v. U.S. Att'y General*, 392 F.3d 434, 438 (11th Cir. 2004)). As the Attorney General has observed: The nexus requirement is critically important in determining whether an alien established an asylum claim. That requirement is "where the rubber meets the road" because the "importance of the 'on account of' language must not be overlooked." *Cece*, 733 F.3d at 673. "Although the category of protected persons [within a particular group] may be large, the number of those who can demonstrate the required nexus likely is not." *Id.* Indeed, a "safeguard against potentially innumerable asylum claims" may be found "in the stringent statutory requirements for all asylum seekers." *Id.* at 675.
>
> 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. *See, e.g., Zoarab*, 524 F.3d at 781 ("Courts have routinely rejected asylum applications grounded in personal disputes."). A criminal gang may target people because they have money or property within the

> area where the gang operates, or simply because the gang inflicts violence on those who are nearby. *See, e.g.*, *Constanza*, 647 F.3d at 754. That does not make the gang's victims persons who have been targeted "on account of" their membership in any social group.
>
> Similarly, in domestic violence cases, like *A-R-C-G-*, the Board cited no evidence that her ex-husband attacked her because he was aware of, and hostile to, "married women in Guatemala who are unable to leave their relationship." Rather, he attacked her because of his preexisting personal relationship with the victim. *See R-A-*, 22 I&N Dec. at 921 ("the record does not reflect that [R-A-'s] husband bore any particular animosity toward women who were intimate with abusive partners, women who had previously suffered abuse, or women who happened to have been born in, or were actually living in, Guatemala"). When "the alleged persecutor is not even aware of the group's existence, it becomes harder to understand how the persecutor may have been motivated by the victim's 'membership' in the group to inflict the harm on the victim." *Id.* at 919.

A-B-, 27 I&N Dec. at 338-39.

As a result, "even aliens with a 'well-founded fear' of persecution supported by concrete facts are not eligible for asylum if those facts indicate only that the alien fears retribution over purely personal matters or general conditions of upheaval and unrest." *See Huaman-Cornelio v. Board of Immigration Appeals*, 979 F.2d 995, 1000 (4th Cir. 1992) (citing *Matter of Maldonado-Cruz,* 19 I&N Dec. 509, 512 (BIA 1988), *rev'd on other grounds,* 883 F.2d 788 (9th Cir.1989)); *see also Al Fara v. Gonzales*, 404 F.3d 733, 740 (3d Cir. 2005) ("'[G]enerally harsh conditions shared by many other persons do not amount to persecution.' . . . [H]arm resulting from country-wide civil strife is not persecution 'on account of' an enumerated statutory factor").

In this case, the respondent claims she was targeted by her ex-husband based on her membership in a particular social group. The Court previously found that the respondent had failed to demonstrate a nexus between the harm she suffered in El Salvador and a statutorily

protected ground because it was "related to the violent and criminal tendencies of her abusive former spouse" I.J. at 13.

The respondent claims, that since her departure from El Salvador the respondent's ex-husband has been violent with their children in common, beating her daughter and two sons. *See* Respondent's Appendix: Supplemental Documents to Attorney General, Tab. A. at 11, para. 49. This claim, that the respondent's ex-husband, a private actor, is harming individuals outside of the respondent's proposed social group undermines the respondent's claim that one central reason she was targeted was on account of her membership in a particular social group. Instead it suggests it is more likely the respondent's ex-husband was motivated because of their private relationship. *A-B-,* 27 I&N Dec. at 338-39 ("[w]hen 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."). *Assuming arguendo,* that the respondent is credible, she has not persuasively established that anything that happened to her is other than strictly private violence unrelated to a protected ground. Therefore, the respondent has failed to establish a nexus between any alleged harm and any membership in a particular social group.

Because the respondent failed to establish past persecution on account of an enumerated ground she is not entitled to the presumption of a well-founded fear of future persecution. *Marynenka v. Holder,* 592 F.3d 594 (4th Cir. 2010).

e. <u>"Salvadoran women" as a Particular Social Group</u>

Before the Attorney General, the respondent added another particular social group of "Salvadoran women." At this time, the Department does not have a formal position on whether "Salvadoran women" comprises a legally cognizable particular social group.[11] As the Attorney General stated in *A-B-*, however, "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." *A-B-*, 27 I&N Dec. at 340. *Assuming arguendo* it is cognizable, the claim still fails because the respondent is not credible and the respondent failed to show any nexus between any harm suffered from her alleged persecutor and her membership in any proposed social group. Therefore, the Department asserts the respondent failed to establish eligibility for asylum on this basis.

f. Statutory Withholding of Removal

As the respondent fails to meet the lower burden to establish eligibility for asylum, the respondent fails to meet the higher burden to establish eligibility for withholding of removal under INA § 241(b)(3). *See Mulanyi v. Holder,* 771 F.3d 190, 198 (4th Cir. 2014).

[11] As noted by the Department in its briefing to the Attorney General in this case, even a minimal assessment of this issue likely would require closer examination of the Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 197; the 1967 Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 19 U.S.T. 6223; and the 1951 Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, likely including any relevant legislative, ratification, and negotiation history. Such material, along with the statutory text and scheme of the INA, subsequent amendments to the immigration laws relating to gender-based harm (e.g., INA § 204(a)(1)(A)(iii), (B)(ii)), and the pre-existence and emergence of international human rights instruments specifically addressing gender-related issues (e.g., Convention on the Political Rights of Women, Mar. 31, 1953, 27 U.S.T. 1909), and relevant case law would have to be carefully considered.

CONCLUSION

WHEREFORE, based upon the foregoing, the Department submits that the respondent has failed to meet her burden to establish a claim for asylum. The respondent failed to present a credible claim for relief and protection. In addition, the respondent failed to establish any harm suffered or feared is on account of her membership in any particular social group. Finally, the respondent failing to meet the lower burden for asylum fails to meet the higher burden to establish eligibility for statutory withholding of removal. The Department respectfully requests that these applications for relief and protection be denied, and that the respondent be ordered removed to El Salvador.

8/20/18
Dated:

Respectfully submitted,

(b)(6); (b)(7)(C)

Assistant Chief Counsel
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PROOF OF SERVICE

On 8/20/18, I, (b)(6); , Assistant Chief Counsel, mailed or delivered a copy of **The Department of Homeland Security Brief on Remand** to:

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by placing said copy in an envelope and placing said envelope in my office's designated area for official "out-going" regular U.S. mail, said envelope having been addressed to the name and address indicated.

(b)(6); (b)(7)(C)
(signature)

8/20/18
(date)

The Department appeals the Immigration Judge's May 9, 2019 decision granting the respondent asylum pursuant to section 208 of the Immigration and Nationality Act (Act or INA). The Immigration Judge erred in finding the facts established by the respondent met her burden of proof for protective relief.[1] Specifically, the respondent failed to demonstrate a nexus between the harm she suffered and a protected ground, failed to demonstrate that internal relocation is unreasonable, and failed to establish that the Salvadoran government is unable or unwilling to protect her from the private actors she fears. The Department asks the Board to reverse the decision of the Immigration Judge and remand the matter for consideration of the alternatively-proposed particular social groups and protection pursuant to the regulations implementing the U.S. obligation under Article 3 of the United Nations Convention Against Torture (CAT).

I. The Respondent Failed to Establish a Nexus to a Protected Ground

The Immigration Judge erred in finding that the respondent met her burden to establish that she was singled out for harm[2] because of her membership in the particular social group of "Salvadoran women."[3] To demonstrate that harm was "on account of" a

[1] As the respondent failed to meet the lower burden of proof required for asylum, it follows that she also failed to satisfy the clear probability standard to establish eligibility for withholding of removal. *See INS v. Stevic*, 467 U.S. 407 (1984); *see also* 8 C.F.R. §§ 1208.13, 1208.16(b) (2008). Furthermore, she failed to prove that it is more likely than not that she will be tortured if she is returned to El Salvador. *See* 8 C.F.R. § 1208.16(c)(2). The respondent has not provided evidence that she was tortured in El Salvador or that a Government official either seeks to torture her or will acquiesce in her torture if she is returned to that country. *See* 8 C.F.R. § 1208.18(a)(1) (2008); *see also Matter of J-R-G-P-*, 27 I&N Dec. 482 (BIA 2018); *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000).

[2] Due to the lack of any nexus to the harm the respondent suffered, she has likewise failed to establish past persecution such that she is not entitled to a presumption of a well-founded fear. *See* 8 C.F.R. § 1208.13(b)(1) (noting that an applicant must establish that the persecution was "on account of" a protected ground.

[3] The Board need not address whether "Salvadoran women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds as asserted in this Notice of Appeal. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach). However, the Immigration Judge declined to analyze the other proposed particular social groups. I.J. at 7, n.2.

protected ground, an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)).

The respondent failed to establish a nexus between the group of which she claims to be a member – "Salvadoran women" – and the harm she suffered. Rather, the respondent established that she was the victim of crimes committed by two separate individuals who were motivated by the nature of their personal relationship with the respondent.

This fact was underscored by the Immigration Judge, who emphasized and relied on the existence and nature of respondent's personal relationship with her prior partner to find a nexus to the stated particular social group. *See* I.J. at 2-4. The Immigration Judge erred by finding a nexus to "Salvadoran women" based on the court's determination that the harm suffered by respondent was because the respondent experienced violence at the hands of her former partners, which is in line with information about the "machismo culture" and views on gender roles in El Salvador. I.J. at 9-10. However, this reasoning does not bolster the Immigration Judge's finding that the respondent was harmed because

she is a "Salvadoran woman," but rather supports a finding that she was harmed because of her relationship with her prior partners.

The respondent's former husband married her at age 14. She testified that when she was 15 in 1984, her former husband started to abuse her, and the abuse continued until 2001, when her husband left her and their ten children. She testified that he does not want any further relationship with her. The respondent did not testify that her former husband engaged in any other acts of violence towards women; indeed, he was responsible for providing care to his own mother. There was no evidence of general animosity towards women or any explanation as to why the respondent's husband began abusing her approximately a year into their marriage. He ended the relationship and has not attempted any additional harm to the respondent in nearly twenty years. After her husband left, the respondent experienced approximately 11 years without any harm or abuse.

In 2012, the respondent began another relationship with (b)(6); (b)(7)(C) which lasted until 2014. The relationship was apparently fine until her partner was twice detained by Salvadoran police on a charge of attempted murder. He was released after six to eight months in jail when no witnesses came forward at his trial. I.J. at 2. Following his release from jail, he was "different." I.J. at 3. He became more violent, abused alcohol and drugs, and began to threaten the respondent. *Id.* Ultimately, he kicked her out of the home, but he continued to threaten her with a machete. He later lost a hand to a machete attack, and he blamed the respondent for it. *Id.* Both the respondent and her son testified that (b)(6); (b)(7)(C) was in a new relationship; the respondent acknowledged he did not seek to rekindle any relationship with her. The respondent's

son was not aware of any violent acts committed by (b)(6); (b)(7)(C) against his new partner.

The respondent provided no evidence that her former husband or partner were motivated by any other reason than the nature of their relationship, or that they were generally hostile to "Salvadoran women" as a group. *Matter of A-B-*, 27 I&N Dec. 316, 339 (A.G. 2018). For example, the respondent testified to interactions between her former partner and the respondent's daughters during and after the time he was in a relationship with the respondent that did not involve violence towards them. However, after her former partner lost his hand in a machete attack, he twice threatened to cut off the hand of one of the respondent's daughters who live in El Salvador. I.J. at 3. The respondent's testimony demonstrates that her former partner held no generalized animosity towards the other "Salvadoran women" in his life and is simply motivated by his anger over losing his own hand.

As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *A-B-*, 27 I&N Dec. at 338-39. To be sure, the respondent was the victim of crimes committed by her former husband and her former partner, but those relationship-based crimes are insufficient to establish eligibility for asylum. Because the respondent failed to establish that her former husband or former partner were motivated by any other reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the stated particular social group of "Salvadoran women."

Because the Immigration Judge erred in finding a nexus to a protected ground, the respondent has failed to establish past persecution such that she is not entitled to a presumption of well-founded fear and the burden remained on the respondent to establish both a well-founded fear and that internal relocation was not reasonable.

II. The Immigration Judge Erred in Concluding That the Government of El Salvador Is Unable or Unwilling to Protect the Respondent

Additionally, the Immigration Judge erred in concluding that the Salvadoran government was involved in the feared harm by private actors. I.J. at 11-12. Where the alleged persecutor is unaffiliated with the government, the applicant must show that the government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993); *A-B-*, 27 I&N Dec. at 319 (citing *Acosta*, 19 I&N Dec. at 222). In instances where the applicant is a victim of private criminal activity, "the analysis must also 'consider whether government protection is available.'" *A-B-*, 27 I&N Dec. at 320 (quoting *M-E-V-G-*, 26 I&N Dec. at 243). "'[V]iolence by private citizens . . . , absent proof that the government is unwilling or unable to address it, is not persecution[.]'" *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) (quoting *Butt v. Keisler*, 506 F.3d 86, 92 (1st Cir.2007)). Relevant factors include both "the government's response" to the claimed persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470 (6th Cir. 2019).[4]

"No country provides its citizens with complete security from private criminal activity, and perfect protection is not required." *A-B-*, 27 I&N Dec. at 343. Rather "[a] government's steps 'to punish the persons responsible for the violence' supports a conclusion that it is not unwilling or unable to protect individuals who have been the

[4] As of May 3, 2019, Westlaw does not provide pin cites for *K.H.* The quoted text appears on page seven of the slip opinion, available at http://www.opn.ca6.uscourts.gov/opinions.pdf/19a0065p-06.pdf.

victims of ethnic attacks." *Bitsin v. Holder*, 719 F.3d 619, 630 (7th Cir. 2013) (quoting *Vahora v. Holder*, 707 F.3d 904, 908 (7th Cir.2013)). As such, an applicant "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *Matter of A-B-*, 27 I&N Dec. at 338.

Although the government of El Salvador may at times have difficulty controlling interpersonal violence, "where a government is 'making every effort to combat' violence by private actors, and its "inability to stop the problem" is not distinguishable "from any other government's struggles," the private violence has no government nexus and does not constitute persecution." *Khan*, 727 F.3d at 7 (quoting *Burbiene v. Holder*, 568 F.3d 251 (1st Cir. 2009)).

Here, the respondent failed to establish that the Salvadoran government is unable or unwilling to protect her from either private actor she fears. The respondent never reported to government authorities any abuse by either her former husband or her former partner. Although there are difficulties addressing domestic violence, the country condition evidence shows ongoing attempts by the Salvadoran government to improve its response by setting up domestic violence courts, adding shelters for women, and removing a police chief for violating a protection order. Exh. 11. Furthermore, the Salvadoran government attempted to prosecute (b)(6); (b)(7)(C) for attempted murder, but the case fell apart due to a lack of witnesses. This evidence does not demonstrate an unwilling or unable government, especially where the respondent never sought the government's assistance in protecting her from either abuser.

III. The Respondent Can Reasonably Relocate Within El Salvador

As the Immigration Judge erred in finding the respondent established past persecution on account of a protected ground, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the respondent bore the burden of establishing that internal relocation within El Salvador was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored.") (citing 8 C.F.R. § 1208.13(b)(3)(i)).

Even if the Department bears the burden of proof on this issue, however, the Immigration Judge erred in finding internal relocation unreasonable. I.J. at 12-13. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id.*

The Immigration Judge held that respondent faced a threat of persecution anywhere in El Salvador as a Salvadoran woman even though the harm she received was perpetrated by two private actors. This finding is contrary to the U.S. Department of State, Country Reports on Human Rights Practices for 2016 through 2018 for El Salvador submitted into evidence by the Department. Exh. 11; *see also A-B-*, 27 I&N Dec. at 320 (when the harm is by private actors, the analysis must also "consider whether government protection is available, internal relocation is possible, and persecution exists countrywide.") (quoting *Matter of M-E-V-G-*, 26 I&N Dec. 227, 243 (BIA 2014)).

The Immigration Judge further found that internal relocation would be unreasonable because of gang violence, financial difficulties due to living away from the respondent's family, and the inability to live with her children because (b)(6); (b)(6); knows where those children live. I.J. at 13. However, having challenges in life is not the equivalent of an unreasonable life. The Attorney General has noted that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)." *A-B-*, 27 I&N Dec. at 345. The respondent failed to meet her burden of proof on this issue.

The Department reserves the right to raise additional arguments upon receipt and review of the transcript.

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NON-DETAINED

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

In The Matter Of:		
(b)(6); (b)(7)(C)	File Nos.	(b)(6); (b)(7)(C)
In Removal Proceedings		

DEPARTMENT OF HOMELAND SECURITY
BRIEF ON APPEAL

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INTRODUCTION

The respondent failed to establish past persecution, failed to demonstrate a nexus between the harm she suffered and a protected ground, failed to demonstrate that internal relocation is unreasonable, and failed to establish that she merited relief from removal as a matter of discretion. Nevertheless, the Immigration Judge found she met her burden of proof and granted asylum. The Department of Homeland Security (Department) appeals the Immigration Judge's March 8, 2019 decision granting the lead respondent (respondent) asylum pursuant to section 208 of the Immigration and Nationality Act (Act or INA), which also conferred asylum to the two riding respondents as derivatives. The Department asks the Board of Immigration Appeals (Board) to find that the respondent has not met her burden for asylum and reverse the decision of the Immigration Judge. As the respondent cannot meet her burden for asylum under section 208 of the Act, she similarly cannot meet the higher burden of proof for a grant of withholding removal under INA § 241(b)(3), so the Board should also find that her application for withholding of removal under the Act must be denied. Lastly, the Board should remand the matter to the Immigration Judge to consider protection pursuant to the regulations implementing the United States government's obligations under Article 3 of the United Nations Convention Against Torture (CAT).

The Department respectfully requests three-member panel review due to the need to review a decision by an Immigration Judge that is not in conformity with the law or with applicable precedents and the need to review a clearly erroneous factual determination. *See* 8 C.F.R. § 1003.1(e)(6)(iii), (v) (2016).

.ISSUES PRESENTED

I. Did the Immigration Judge err in concluding that the respondent established past persecution, as any harm inflicted on her in the past was committed by a private actor and she failed to establish that the government of Mexico was unwilling or unable to protect her?

II. Did the Immigration Judge err in finding that the respondent established a nexus to a protected ground, as the respondent failed to establish that the harm (b)(6); inflicted was on account of the respondent's membership in a particular social group?

III. Did the Immigration Judge, having erred in finding the respondent established past persecution, further err in shifting the burden to the Department on internal relocation and in finding that the respondent could not reasonably relocate within Mexico?

IV. Did the Immigration Judge err in finding that the respondent met her burden of demonstrating that a favorable exercise of discretion should be granted**?**

STANDARD OF REVIEW

The Board reviews findings of fact, including "predictive findings of what may or may not occur in the future" for clear error. *Matter of Z-Z-O-*, 26 I&N Dec. 586, 587, 590 (BIA 2015); 8 C.F.R. § 1003.1(d)(3)(i). On the other hand, the Board reviews de novo "questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges." *Z-Z-O-*, 26 I&N Dec. at 588; 8 C.F.R. § 1003.1(d)(3)(ii). This de novo review includes "whether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal…." *Z-Z-O-*, 26 I&N Dec. at 591. Whether a respondent has met her burden of proof is a question of law. *Matter of Vides-Casanova*, 26 I&N Dec. 494, 498 (BIA 2015). Whether the facts, as found, establish persecution "on account of" a protected ground is a legal issue reviewed by the Board de novo. *Matter of S-E-G-*, 24 I&N Dec. 579, 588 n.5 (BIA 2008). A persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by the Board for clear error. *See Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011). Whether the applicant can internally relocate within Mexico is a mixed question of fact and law. *See Matter*

of M-Z-M-R-, 26 I&N Dec. 28, 36 (BIA 2012). Whether an individual merits a favorable exercise of discretion is subject to de novo review.

SUMMARY OF THE ARGUMENT

In granting the respondent asylum pursuant to INA § 208, which also conferred asylum to the two riding respondents as derivatives, the Immigration Judge erred in finding the facts established by the respondent met her burden of proof for protective relief. Specifically, the respondent failed to establish past persecution, failed to demonstrate a nexus between the harm she suffered and a protected ground, and failed to establish that the government of Mexico was and is unwilling or unable to protect her. Given that the Immigration Judge erred in finding past persecution, the Immigration Judge further erred in shifting the burden to the Department regarding internal relocation. Additionally, the respondent failed to establish that she merited relief from removal as a matter of discretion.

STATEMENT OF FACTS

There are three respondents in this matter, a mother and her two minor children. *See* Tr. at 14; Exh. 5 (I-589). The respondent was 32 years old and unmarried at the time of the hearing. Tr. at 15, 21. Her mother is a lawful permanent resident. Tr. at 24. Her father is deceased; he was a citizen of Mexico. Tr. at 24. The respondent was born and grew up in Chihuahua, Mexico. Tr. at 22. In 2001, she entered the United States, purportedly with a visa. Tr. at 22. The respondent claimed that, when she was in the United States, she was on a valid multiple entry visa. *See* Tr. at 22-23. She travelled in and out of the United States, using this visa, until 2006; she attended and graduated from high school in Colorado. Tr. at 22-23. She gave birth to two children in the United States. *See* Tr. at 21-22. After the respondent graduated high school, she returned to Mexico, where she attended college online for six months. Tr. at 26. She stopped attending

online college when her son became very ill at the age of 6 or 8 months; she stated that she could no longer afford to pay her tuition. Tr. at 26; I.J. at 2.

The respondent has four children— the two in the instant removal proceedings with her and two born in the United States. Tr. at 21-22. (b)(6); (b)(7)(C) is the father of the respondent's children (b)(6); (b)(7)(C), both born in the United States. Tr. at 26. The father of her daughters is (b)(6); (b)(7)(C) Tr. at 26. (b)(6); resides in Mexico. Tr. at 16.

In 2008, two years after she returned to Mexico from the United States, the respondent met (b)(6); and began a romantic relationship with him; they began living together on March 1, 2009. Tr. at 27. The respondent described (b)(6); at that time as respectful and kind and stated that they had a good relationship. Tr. at 27. Shortly after they began living together, the respondent learned that she was pregnant with their daughter, (b)(6); Tr. at 27. The respondent testified that (b)(6); cared for her well and was glad that she was pregnant; suggesting that (b)(6); was glad they were having a daughter, she stated, "It was his first girl." Tr. at 27. The respondent did not continue with college as she was pregnant, though she also noted that (b)(6); "mentioned" it was no longer necessary for her to attend school. Tr. at 27.

After their first daughter, (b)(6) was born on (b)(6); (b)(7)(C) the respondent and (b)(6); lived for some time with the respondent's parents. Tr. at 27. They moved back to their own home, but three days later, that home burned down; they then returned to the respondent's parents' home. *Id.* After neighbors helped them rebuild their own house, (b)(6); asked the respondent "in an angry way" to return to that house. *Id.* The respondent did not want to reside in that house, however, because it "was very uncomfortable." Tr. at 28. The respondent testified that (b)(6); would get angry because the respondent's parents would give them things that he himself wanted to provide but could not afford. *Id.*

When their daughter (b)(6); was approximately nine months old, the respondent was physically assaulted by (b)(6) for the first time. Tr. at 28. During this incident, a female neighbor attempted to end the assault, asking (b)(6); to stop, but he would not. The respondent asked the neighbor to take the baby and to call (b)(6); mother – "maybe call his mother over because she might be able to calm him down." Tr. at 28-29. (b)(6); mother arrived and was able to stop the assault by telling (b)(6); that he was not only hurting the respondent, but that he was hurting her (his mother) as well. Tr. at 29. The respondent stated that she called the police when (b)(6); assaulted her – "Every time I called them they'd come." Tr. at 30. However, by the time the police would arrive, (b)(6); would be gone, so the police would tell the respondent to "call us when he's back." *Id.* The respondent testified that they police would never return.

After this incident, in July of 2011, the respondent took (b)(6) and moved to another town, Meoqui, so that (b)(6); could not find her. Tr. at 30-31. She lived there for three months with an uncle, working in the town. (b)(6); knew that she had family in Meoqui, however, so was able to find the respondent, in part because he located a picture of her on one of her co-workers social media; he and his brother and brother-in-law assaulted the respondent's brother and threatened the respondent's family, so she and the child returned to Chihuahua with him. Tr. at 31.

Sometime thereafter ("a few weeks"), the respondent's father became ill. The respondent was working at a textile factory at the time. Tr. at 32. She went to care for her father, but (b)(6); mother contacted her and advised her to return home, to avoid angering (b)(6); *Id.* The respondent's father died on December 15, 2011. The respondent testified that (b)(6); would not let her "get around" by herself, and prevented her from attending funeral services when her father died, because he could not get time off from his work; notably, however, (b)(6); worked as a truck driver and travelled often, according to the respondent's testimony. Tr. at 31, 52; Exh. 13

at 1. After the respondent's father died, she, (b)(6); , and (b)(6); moved to Meoqui. Tr. at 32. Around the time of her father's death, the respondent found out she was pregnant. Tr. at 33. When the respondent told her mother about this pregnancy, her mother told her that she did not have to live with (b)(6); if she did not want to. Tr. at 33.

Though she had previously stated that she was prevented by (b)(6); from attending funeral services for her father, the respondent testified that a month after his death, she and her baby were with her family celebrating a mass in her father's memory. Tr. at 33. The respondent's testimony suggests that, contrary to the respondent's assertions that (b)(6); never allowed her to go anywhere without him, the respondent was able to go to mass with her family in January of 2012; the respondent's written statement indicates that (b)(6); did not know where she had been. Exh. 13 at 2. At this mass, the respondent asked her mother if she could borrow her mother's car, so she could go get her things from the house she shared with (b)(6); on the outskirts of Chihuahua. Tr. at 33-34. Instead of loaning her the car, the respondent's mother went with her to the house. Tr. at 33. When they arrived, (b)(6); , his aunt, and his brother were already there. (b)(6); told the respondent she was not leaving, pushed her down, took the baby from the respondent's mother, and fled two blocks away to his brother's house. Tr. at 34. The respondent's mother called the police; two local officers arrived, one of whom was (b)(6); cousin. Tr. at 34-35. Though these officers were not initially helpful, the respondent's mother threatened to call the capital police from Chihuahua; this threat induced the officers on the scene to convince (b)(6); to return the baby to the respondent. Tr. at 35; Exh. 13 at 2. The respondent and the baby went to the respondent's mother's house after this incident, where the respondent remained for three months, until her mother left for the United States with two of the

respondent's children, the respondent went into the hospital due to complications with her pregnancy, and (b)(6) went to live with (b)(6); mother. Tr. at 35-36.

The respondent stated that she was working but that for the last five months of her pregnancy she was in and out of the hospital due to a blood clot in her uterus she claims was caused when (b)(6); pushed her and she fell. Tr. at 36. Her her second daughter was born on (b)(6); (b)(7)(C) *Id.* The respondent did not testify as to where she was living during this time; when asked if she had contact with (b)(6); during this time (January to August 2012), she replied, "No, not really. It was very little." *Id.* She did have contact, however, with (b)(6); mother, who was caring for the respondent's older daughter. *Id.*

After their second daughter was born on (b)(6); (b)(7)(C), (b)(6); "demanded" that the respondent return to live with him, because "he needed to live with [h]is daughters." Tr. at 37. So, the respondent returned to (b)(6); She testified that everything was better until the beginning of the following year, when (b)(6); beat her again and she ran away again, this time to live with an aunt in Juarez. (b)(6); found the respondent and the children at a shopping mall in Juarez about a week later and made them return back home. Tr. at 37-38. The respondent stated things were better for about a week, until she discovered messages (b)(6); had received from other women – messages of which (b)(6); was proud, because they made him appear to be a "ladies' man." Tr. at 38. The respondent confronted (b)(6); and he stopped communicating with this woman, it seems, until December of 2014 or January of 2015. Tr. at 38.

In January of 2015, the respondent again confronted (b)(6); about his involvement with another woman, after finding messages on (b)(6); phone while going to a party. Tr. at 39. The respondent told (b)(6); that she was finished pretending they were a happy family and that she was leaving. (b)(6); in turn told her she was not going to leave, that he would not leave her alone

"because his daughters are not going to be away from him." Tr. at 40. (b)(6); assaulted the respondent again, stopping when (b)(6 woke up, grabbed his hand, and "took him off" of the respondent. Tr. at 40. The respondent ran from the house, but (b)(6); caught her; she managed to escape from him again and ran with two of her children to a neighbor's house. Tr. at 41. The neighbor allowed the respondent and the children to stay at the house. The respondent was afraid that (b)(6); would come and try to take (b)(6) who was with her, away again, as he had done in the past, but the neighbors intervened and eventually one of the neighbors brought the respondent's baby to her. Tr. at 41. The respondent stayed at the neighbor's house "for a while because I knew he had to go to a small town." *Id.* Once (b)(6); left their house to go to this small town, the respondent returned to the house to try to locate her cell phone; she could not, so she took his. Tr. at 41-42. The respondent then travelled by either taxi or bus to Juarez with her daughter (b)(6); Tr. at 42.

Upon arrival at Juarez, the respondent's aunt met the respondent. They went to make a police report, but the respondent claims "my report was never processed because they lacked the personnel." Tr. at 43. The respondent testified that the police advised her to return the next morning for examination and evaluation by a doctor and a psychologist. *Id.* The respondent did not, however, return to finalize matters with the police – instead, she went with both daughters to the port of entry to enter the United States, on January 12, 2015. *Id.*

The respondent claimed that since her arrival in the United States, she and her family members have been threatened by (b)(6); through various means, including on social media. Tr. at 47 *et seq*; Exh. 13. The respondent stated that (b)(6); is "enraged that I have taken the daughters – the girls away from him." Tr. at 56.

The respondent's mother testified in support of the respondent's case. She testified that (b)(6); assaulted her when she was with the respondent picking up the respondent's clothing. Tr. at 65. (b)(6); cousin, who is a police officer, told (b)(6); to return the respondent's daughter to the respondent and he did. Tr. at 65, 67. The respondent's mother testified that the respondent made police reports many times. Tr. at 65. She did not see the police respond to the respondent's complaints. Tr. at 65. However, she confirmed that her own threat to contact the Chihuahua police was compelling. Tr. at 66.

The respondent testified very briefly about an "incident" – "a huge mistake" – in which she left her children alone "for some time" and at least one of them was found outside without shoes or a jacket. Tr. at 54-55. On September 28, 2018, the respondent was convicted of Wrongs to Minors pursuant to Denver Revised Municipal Code section 34-46 for injuring or endangering a child. *See* Exh. 13 at 170-73. She was sentenced to a twelve-month deferred judgement and ordered to attend parenting classes. The respondent did not provide a copy of the police report or any other documentation to corroborate her version of the events.

ARGUMENT

I. The Immigration Judge erred in concluding that the respondent established past persecution, as any harm inflicted on her in the past was committed by a private actor and she failed to establish that the government of Mexico was unwilling or unable to protect her.

To establish past persecution, the respondent must not only prove a sufficiently serious level of harm, but also, as pertinent here, that the harm was inflicted by "persons or an organization that the government was unable or unwilling to control." *See, e.g., Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The Immigration Judge found that the respondent "suffered harm

at the hands of her domestic partner." I.J. at 15. While acknowledging the applicable case law and the respondent's resulting high burden, the Immigration Judge nevertheless found that the respondent met that burden to show that the Mexican government was unwilling or unable to control the respondent's former partner. I.J. at 16. This finding was erroneous.

"Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018). The respondent must establish that her government is unwilling or unable to control the perpetrator, which requires the respondent to show more than that the government had "difficulty controlling" the private criminality; rather, the government must have either "condoned" the criminality or "at least demonstrated a complete helplessness to protect the victims." *Id.* at 337. Simply because a government has not acted on a reported crime, successfully investigated it, or punished the perpetrator, does not necessarily establish an inability or unwillingness to control the crime "any more than it would in the United States." *Id.* at 343-44.

Here, the respondent testified that her husband's cousin was a member of the police, and when he intervened it altered her partner's behavior. *See* Tr. at 65, 67. The record establishes that the local police responded when the respondent contacted them. *See* Tr at. 58. In fact, the police in Juarez requested that the respondent report to their precinct after she filed a report against her former partner, so they could take pictures and conduct a medical and psychological exam; however, the respondent decided to cross the border into the United States rather than engage in the protection and assistance offered by the Mexican government. *See* Tr. at 43, 57. The Immigration Judge erroneously found that the police "only helped her on one occasion" – the time when (b)(6); cousin persuaded (b)(6) to return the baby to the respondent. I.J. at 16.

This ignores the respondent's report to the police in Juarez and their request that she return the next day for additional evaluation, an offer that the respondent discarded in favor of going to the port of entry. And although she found that (b)(6); cousin acted as he did because the respondent's mother "threatened to involve an external police force," the Immigration Judge erroneously dismissed the importance of this threat and its resulting action, declining to "speculate what a different police force might have done." I.J. at 16. The Immigration Judge cannot, however, decline to consider the evidence before her – she cannot ignore evidence that establishes that the respondent could have effectively availed herself of the protection of the capital police; she cannot pick one ineffective police department out of the many from which the respondent might have sought assistance and find the respondent has met her burden.

The Immigration Judge said she "would not speculate what a different police force might have done" had the respondent sought their assistance. I.J. at 17. Instead, rather than considering how other available police departments might have acted with regard to a call for help from the respondent, the Immigration Judge relied heavily on country conditions reports to find that a generic Mexican "police force" is incompetent, lacking in resources, corrupt, and plagued by a culture of machismo. I.J. at 16. Though she briefly gave it lip service, the Immigration Judge failed to recognize adequately the evidence that Mexican law protects domestic violence victims and that the Mexican government offers assistance to such victims. *See* Exh. 6 at 26 (U.S. Department of State Country Report on Human Rights); I.J. at 17. Further, this paints some singular Mexican "police force" with too broad a brush and is insufficient for the respondent to meet her burden. The Juarez police response alone undermines the Immigration Judge's conclusions, as does the fact that the threat of calling the Chihuahua police changed the course of the incident involving (b)(6); police officer cousin. Additionally,

incompetence and a lack of resources are not enough to establish that the government is unwilling and unable to protect anyone from crime. *Matter of A-B-*, 27 I&N Dec. at 343; *see also Matter of O-F-A-S-*, 27 I&N Dec. 709, 722-23 (BIA 2019) (vacated on other grounds). That (b)(6); may remain unpunished is not enough for the respondent to meet her burden – "perfect protection" is not required. *Matter of A-B-*, 27 I&N Dec. at 338, 343. The Immigration Judge's conclusion that the government of Mexico was and is unwilling or unable to protect the respondent was erroneous.

II. The Immigration Judge erred in find that the respondent established a nexus to a protected ground, as the respondent failed to establish that the harm (b)(6); inflicted was on account of the respondent's membership in a particular social group.

Even if the respondent suffered past harm, the Immigration Judge erred in finding that the respondent met her burden to establish that she was singled out for such harm because of her membership in the particular social group of "Mexican women."[1] To demonstrate that harm was "on account of" a protected ground, an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to

[1] The Board need not address whether "Mexican women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds as asserted in this appeal. *See Matter of A-B-,* 27 I&N Dec. at 340 (if an alien's asylum application is fatally flawed in one respect, the Board need not examine the remaining elements of the asylum claim); *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach). The respondent proposed three other particular social groups before the Immigration Judge: "Mexican mothers," "Mexican women or mothers unable to leave domestic relationships," and "Mexican women who believe in women's rights." The Immigration Judge found that none of these three proposed groups was cognizable. I.J. at 13-14. The Department concurs with the Immigration Judge's holdings that the respondent's three additional proposed particular social groups are not cognizable. The respondents did not file an appeal to challenge the Immigration Judge's holdings with regard to those three groups, so those holdings are final and those issues are not before the Board.

withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)).

As recently noted by the Attorney General in determining whether an individual asserting "Salvadoran female" as the basis for the inflicted harm, "Even if an applicant is a member of a cognizable particular social group and has suffered persecution, an asylum claim should be denied if the harm inflicted or threatened by the persecutor is not 'on account of' the alien's membership in that group. That requirement is especially important to scrutinize when, as here, the asserted particular social group encompasses millions of Salvadorans." *Matter of A-C-A-A-*, 28 I&N Dec. 84, 92 (A.G. 2020).[2] The Attorney General emphasized that "if the persecutor has neither targeted nor manifested any animus toward any member of the particular social group other than the applicant, the applicant may not satisfy the nexus requirement." *Id.* In so finding, the Attorney General noted the Board's 1999 decision of *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999), in which the Board stated that the harm was not inflicted because the alien "was a member of some broader collection of women" whom the perpetrator "believed warranted the infliction of harm." *Matter of R-A-*, 22 I&N Dec. at 921.

The respondent failed to establish a nexus between the group of which she claims to be a member – "Mexican women" – and the harm she suffered. Rather, the respondent established that she was the victim of crimes committed by her former partner that were motivated by the nature of their personal relationship. This fact was underscored by the Immigration Judge, who

[2] The Department acknowledges that the Attorney General rendered this decision well after the Immigration Judge rendered hers in the respondents' case; however the analysis is relevant to this appeal, particularly as the Attorney General references the Board's decision in *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999), which was issued far in advance of the Immigration Judge's decision.

emphasized and relied on the existence and nature of respondent's personal relationship with her prior partner to find a nexus to the stated particular social group. I.J. at 3. The Immigration Judge erred by finding a nexus to "Mexican women" based on the court's determination that the harm suffered by respondent was because the respondent and her prior partner shared a home together, had defined gender roles vis-à-vis each other, and that the respondent was harmed "whenever she attempted to leave" the home.[3] I.J. at 15. This reasoning does not bolster the Immigration Judge's finding that the respondent was harmed because she is a "Mexican woman," but rather supports a finding that she was harmed solely because of her relationship with her prior partner.

The respondent provided no evidence that her former partner was motivated by any other reason than the nature of their relationship, or that he was generally hostile to "Mexican women" as a group or targeted any other Mexican woman for harm. *Matter of A-B-*, 27 I&N Dec. at 339; *Matter of A-C-A-A-*, 28 I&N Dec. at 92. For example, the respondent testified to interactions between her former partner and the respondent's daughters, his own mother, other female relatives, and a female neighbor during and after the time he was in a relationship with the respondent and these interactions did not involve violence or the threat of violence towards them. I.J. at 3-4. The respondent's testimony demonstrates that her former partner held no generalized animosity towards the other "Mexican women" in his life. In fact, her testimony demonstrates instead that her former partner deferred to other "Mexican women," including his mother, who successfully intervened on the respondent's behalf on at least one occasion, and her female neighbor, who also interacted with the respondent's former partner during a domestic incident

[3] This finding that the respondent was harmed "whenever she attempted to leave" the home was clearly erroneous, as there were times when she stated she left and was not harmed, such as when she went to work or when she went to the mass with her mother after her father's death (an occasion where she indicated in her written statement that (b)(6) did not know where she had even been).

and was not threatened or harmed in any manner. Tr. at 28. The evidence further demonstrates that the respondent's former partner was happy to have daughters and was angered by the respondent's attempts to take his daughters away from him; there is certainly no evidence that he had any animosity toward his daughters.

As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Matter of A-B-*, 27 I&N Dec. at 338-39. To be sure, the respondent was the victim of crimes committed by her former partner, but those relationship-based crimes are insufficient to establish eligibility for asylum. Because the respondent failed to establish that her former partner was motivated by any other reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the stated particular social group of "Mexican women."

III. Because the Immigration Judge erred in finding the respondent established past persecution on account of a protected ground, she further erred in shifting the burden to the Department on internal relocation and in finding that the respondent could not reasonably relocate within Mexico.

As the Immigration Judge erred in finding the respondent established past persecution on account of a protected ground, shifting the burden to the Department to rebut the presumption of a well-founded fear by showing that the respondent could internally relocate was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the respondent bears the burden of establishing that internal relocation within Mexico was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored." (citing 8 C.F.R. § 1208.13(b)(3)(i))). Even if the

Department bears the burden of proof on this issue, the Immigration Judge erred in finding internal relocation unreasonable. I.J. at 19. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *Matter of M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id.*

The Immigration Judge held that respondent faced a threat of persecution anywhere in Mexico as a Mexican woman even though her instances of harm were perpetrated by a single actor. This finding is contrary to the U.S. Department of State, Country Reports on Human Rights Practices for 2017 for Mexico submitted into evidence by the Department. *See* Exh. 6 at 26-27 (U.S. Department of State Country Report on Human Rights) (outlining the numerous protections provided to women under Mexican law, including criminalizing rape, domestic violence and femicide and providing women equal pay for equal work). The Immigration Judge further found that internal relocation would be unreasonable because the respondent only has a high school education, has never had a successful job in Mexico, and would not have family to assist with childcare. I.J. at 19. In reaching this decision, the Immigration Judge did not consider the facts that the respondent was educated through high school in the United States, obtained at least some collegiate education in Mexico, and for a time did have jobs in Mexico; additionally, the father of two of the respondent's children lives in Mexico. Tr. at 22-26, 51. Having challenges in life is not the equivalent of having an unreasonable life. The Immigration Judge additionally relied on the respondent's testimony that her former partner is a truck driver, and therefore travels extensively[4], but there is no evidence demonstrating that he has any reach

[4] Of course, his extensive travels during their relationship undermines the Immigration Judge's findings that the respondent's movements were always controlled by him.

beyond the locations the respondent identified within the state of Chihuahua: the city of Chihuahua, the municipality of Meoqui, and the city of Juarez. Simply put, Mexico is a big place. The respondent is not restricted to these three locations in Chihuahua, and there is no evidence to support a finding that the respondent cannot relocate somewhere else in Mexico. The Attorney General noted that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)" and respondent failed to meet her burden of proof on this issue. *Matter of A-B-*, 27 I&N Dec. at 345.

IV. The Immigration Judge erred in finding that the respondent met her burden of demonstrating that a favorable exercise of discretion should be granted.

The Immigration Judge found, without analysis, that the respondent "merits a favorable exercise of discretion." I.J. at 20. In so doing, the Immigration Judge erred in failing to properly consider whether the respondent merits asylum as a matter of discretion. Asylum is a discretionary form of relief from removal, and the applicant bears the burden of proving that she merits asylum as a matter of discretion. INA § 208(b)(1); INA § 240(c)(4)(A)(ii); *Matter of A-B,* 27 I&N Dec. at 345 n.12.

On September 28, 2018, the respondent was convicted of Wrongs to Minors pursuant to Denver Revised Municipal Code section 34-46 for injuring or endangering a child. *See* Exh. 5 at 170-173. She was sentenced to a twelve-month deferred judgement and ordered to attend parenting classes. The respondent testified that she left the children alone for some time and that a neighbor found one of them outside without shoes or a coat. The statute of conviction, as provided by the respondent in Exhibit 13, pages 173-174, criminalizes a variety of harms: endangering the life of a minor; injuring or endangering the health or physical well-being of a

minor; punishing or tormenting a minor not in the person's legal care, custody, or control; endangering or impairing the morals of a minor; abandoning a minor; torturing, tormenting, or cruelly punishing a minor; depriving a minor of food, clothing, shelter; injuring a minor unnecessarily; or providing a minor with a weapon or failing to take a weapon from a minor. Given the serious nature of these crimes, the respondent's explanation of her conduct on the day in question leaves much unanswered and serves only to attempt to excuse and minimize her unlawful behaviors, whatever they may have actually been, by asserting she left all the children in the care of the oldest so she could work and go to the grocery store. The Immigration Judge failed to address the respondent's 2018 Denver County Court conviction for Wrongs to Minors, a crime which should be considered in any adequate discretionary finding, and addressed the issue of discretion with one summary sentence, providing no analysis. The Immigration Judge did not properly balance the factors in this case and erred in failing to require the respondent to produce additional information, particularly police reports, with regard to this incident – this is information that was readily available to the respondent and which she had the burden to produce. Just as an alien produces evidence supporting a favorable exercise of discretion, so must she, who bears the burden, present all available evidence of unfavorable factors. *See generally Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009) (in the context of a cancellation application; an alien has the burden to prove that she satisfies applicable eligibility requirements and merits a favorable exercise of discretion and must provide corroborating evidence requested by the Immigration Judge unless it cannot be reasonably obtained). The Immigration Judge erred in finding that the respondent met her burden of establishing she merits a favorable exercise of discretion.

CONCLUSION

The respondent bears the burden of proof to establish that she has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The Immigration Judge erred in finding the respondent met her burden to establish eligibility for asylum pursuant to the Act, because the respondent failed to show past persecution or a well-founded fear in Mexico on account of a protected ground, failed to show that the government of Mexico is unwilling or unable to protect her, and failed to show that she merits a favorable exercise of discretion. Because the Immigration Judge erroneously found past persecution, the Immigration Judge erroneously shifted the burden to the Department to rebut the presumption of a well-founded fear of persecution by showing that the respondent could avoid future persecution by relocating. Moreover, inasmuch as the respondent has failed to establish that she meets the well-founded fear of persecution needed for asylum, she necessarily is unable to meet the higher standard required for a grant of withholding of removal under section 241(b)(3) of the INA. *See Uanreroro v. Gonzales*, 443 F.3d 1197, 1202 (10th Cir. 2006).

Therefore, the Department asks the Board to sustain its appeal, find that the respondent failed to establish her statutory eligibility for asylum or withholding of removal, find that the respondent does not merit a grant of asylum in the exercise of discretion, and remand the matter to the Immigration Judge to consider her request for protection under CAT.

DATE: November 2, 2020

Respectfully submitted,

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Certificate of Service

I hereby certify that on November 2, 2020, I served a true copy of this DEPARTMENT OF HOMELAND SECURITY BRIEF ON APPEAL and any attached pages by routing it to administrative staff to mail by first-class mail, postage prepaid and addressed to:

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NON-DETAINED

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

In the Matter of:	)	
	)	
(b)(6); (b)(7)(C)	)	**File No.:** (b)(6); (b)(7)(C)
	)	
	)	
In removal proceedings	)	

DEPARTMENT OF HOMELAND SECURITY'S
OPPOSITION TO MOTION TO REOPEN

The U.S. Department of Homeland Security, U.S. Immigration and Customs Enforcement opposes the respondent's motion to reopen.

The respondent seeks reopening more than six years after the Immigration Judge's decision denying her protection-related relief applications, four-and-a-half years after the Board of Immigration Appeals (Board) affirmed the Immigration Judge's decision, and three-and-a-half years after the Tenth Circuit Court of Appeals dismissed her Petition for Review. The respondent's motion is untimely as it was not filed within 90 days of the date of entry of the final administrative order of removal. 8 C.F.R. §1003.23(b). The respondent requests that the Board of Immigration Appeals (Board) reopen the proceedings, arguing that there has been a material change in circumstances relating to protection-based relief such that reopening is appropriate, that there is evidence to be offered that is material and was not available and could not have been discovered or presented at the former hearing, and the 90-day limitation on a motion to reopen on that basis should be equitably tolled or, alternatively, that the court should exercise its *sua sponte* authority. The respondent has also asked that the matter be reopened due to the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018). The Department requests that the Board deny the motion to reopen, regardless of the regulatory provision or theory under which the motion is sought.

The respondent bears the very heavy burden of establishing that her case should be reopened. *Matter of S-Y-G-*, 24 I&N Dec. 247, 254 (BIA 2007). Motions to reopen are "plainly disfavored." *Maatougui v. Holder*, 738 F.3d 1230, 1239 (10th Cir. 2013); *Matter of Coelho*, 20 I&N Dec. 464, 472 (BIA 1992). Motions to reopen "are particularly disfavored in immigration matters." *Gurung v. Ashcroft*, 371 F.3d. 718, 722

(10th Cir. 2004); *S-Y-G-* 24 I&N Dec. at 252. "There is a strong public interest in bringing litigation to a close as promptly as is consistent with the interest in giving the adversaries a fair opportunity to develop and present their respective cases…." *See Maatougui,* 738 F.3d at 1239 (quoting *INS v. Abudu,* 485 U.S. 94 (1988) (internal citations and quotations omitted)). Motions to reopen are especially disfavored in immigration matters where "every delay works to the advantage of the deportable alien." *INS v. Doherty,* 502 U.S. 314, 323 (1992). The Respondent has failed to meet this heavy burden.

I. The respondent's motion is untimely, and she has not established that the time limitation should be equitably tolled.

A motion to reopen must generally be filed with the Board within ninety days of its decision for which reopening is sought. 8 C.F.R. § 1003.2(c)(2). The respondent failed to file within ninety days.

The respondent's motion comes four-and-a-half years after the 90-day period for the filing of a motion to reopen ended. As such, it is untimely and should be denied. She seeks to have that time period equitably tolled; however, she does not meet the requirements for such.

In order for the 90-day filing deadline to be equitably tolled, the respondent must establish that: (1) she exercised due diligence in filing her motion, and that; (2) she attempted to comply with *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). *Riley v. INS*, 310 F.3d 1253, 1258 (10th Cir. 2002). Tolling is only appropriate up to the point at which a respondent knows or should have known about prior counsel's ineffective

assistance, and the respondent bears the burden of persuasion with regard to equitable tolling. *Galvez Pineda v. Gonzales*, 427 F.3d 1833 (10th Cir. 2005).

Here, the respondent did not exercise due diligence. In her motion, she argues equitable tolling should apply as she spoke to an attorney and to a therapist, with whom she developed a close relationship and through whom she discovered her current diagnosis in November of 2017. The combination of this subsequent legal advice and medical diagnosis are the catalyst for the instant motion to reopen. The respondent, however, waited until April of 2019, a significant amount of time after this catalyst, to file the instant motion to reopen; this does not constitute due diligence. Further, tolling is only appropriate up to the point the respondent knew or should have known prior counsel was ineffective. The respondent's own accounting marks that point of time as around April of 2017. In general, a motion to reopen must be filed within 90 days, yet the respondent waited an additional eight months to file. As the Tenth Circuit has stated and as the facts as asserted by the respondent show, any argument for equitable tolling is misplaced as, at best, it would have tolled the filing period to November 2017.

Further, although the respondent does not squarely assert that the instant motion is based on ineffective assistance of prior counsel, she does highlight purported failures of various attorneys to provide her appropriate legal advice over the years. Because of this line of argument, it is significant for equitable tolling purposes that the respondent has not has complied with the requirements outlined in *Matter of Lozada*. In her motion, the respondent laments that her prior attorneys did not recognize that she suffered from PTSD and was dissociative at the time of her hearing; she opines that her case should have been handled differently before the Immigration Judge. She also notes that she

consulted with an attorney after seeking sanctuary in a local church and working with a therapist, but that "multiple months" passed without action by that attorney; she makes several allegations against that attorney in her affidavit. Motion at 11; Exh. C. This characterization requires the respondent, who seeks equitable tolling in the Tenth Circuit, to pursue a complaint against any attorney who provided inadequate legal services. However, there is no indication that any prior counsel was informed of the allegations against him or her regarding the respondent's case and provided an opportunity to respond. There is no evidence that any complaints were filed regarding the respondent's case with the appropriate disciplinary authorities. The "high standard" announced by the Board in *Matter of Lozada* is intended to allow the Board and the Immigration Courts to evaluate the substance of the claim properly; further "[t]he requirement that disciplinary authorities be notified of breaches of professional conduct not only serves to deter meritless claims of ineffective representation but also highlights the standards which should be expected of attorneys who represent persons in immigration proceedings." *Lozada*, 19 I&N Dec. at 639; *Matter of Rivera*, 21 I&N Dec. 599, 605 (BIA 1996)(outlining the numerous important purposes served by the requirement that a bar complaint be filed); *see also Infanzon v. Ashcroft,* 386 F.3d 1359, 1363 (10th Cir. 2004)(rejecting the petitioner's argument that *Lozada* does not always require the filing of a complaint against former counsel); *Mickeviciute v. INS*, 327 F.3d 1159, 1161 n. 2 (10th Cir. 2003) (noting that a motion based on a claim of ineffective assistance of counsel must be supported as outlined in *Lozada*); *Tang v. Ashcroft*, 354 F.3d 1192, 1196-97 (10th Cir. 2003) (noting no abuse of discretion by the Board in denying a motion to reopen where the respondent failed to comply with *Lozada*). If any prior attorney's

advice or assistance was incorrect, in order to equitably toll the 90-day filing period or any other filing period, the respondent must be expected to comply fully with *Matter of Lozada*; her failure to do so blights the motion.

II. Even if the respondent has established that the 90-day limitation on motions to reopen should be equitably tolled, she has failed to establish that the matter should be reopened under 8 C.F.R. § 1003.2(c).

Even if the respondent has established that she meets the requirements for equitable tolling of the 90-day time limitation on motions to reopen, she has not established that there is evidence to be offered that is material and was not available and could not have been discovered or presented at the former hearing. Additionally, no motion to reopen for the purpose of affording an alien the opportunity to apply for any form of discretionary relief, such as asylum, should be granted "if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afformed at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing." 8 C.F.R. § 1003.2(c) The respondent has failed to meet her burden in this regard.

The evidence she proposes relates primarily to her diagnosis since the close of proceedings of Post-Traumatic Stress Disorder (PTSD) and dissociative symptoms. However, in her motion, the respondent asserts that she has suffered these conditions since before coming to the United States. If this is true, then this is evidence that could have been discovered or presented at the prior hearing. If it was not, due to prior counsel's ineffective assistance of counsel, then there must be *Lozada* compliance. In

support of her request for reopening, the respondent asserts that she is not mentally competent, was not mentally competent during the course of her removal proceedings, and was not provided proper safeguards before the Immigration Judge in light of her lack of competency. However, the respondent has not suggested any safeguards that would alter the outcome of the proceedings. The respondent has presented newly obtained documents showing a diagnosis of post-traumatic stress disorder, which she suggests would cure her credibility problems previously leading to a denial of her applications for asylum, withholding of removal and protection under the Convention Against Torture by the Immigration Judge, which was affirmed by the Board and the Tenth Circuit. The respondent's counsel claims that due to the respondent's post-traumatic stress disorder, she was not able to fully present her testimony to the Immigration Judge. Her attorney claims that the respondent "was suffering from disassociations that prohibited her from cogently and accurately describing her abuse." *See* Motion at 13.

Even if the respondent has and does suffer from post-traumatic stress disorder and disassociations, that does not mean that she was not competent at the time of her Immigration Court hearing such that safeguards needed to be put in place. The "test for determining whether an alien is competent to participate in immigration proceedings is whether he or she has a rational and factual understanding of the object of proceedings, can consult with his or her representative, and has a reasonable opportunity to examine and present evidence and cross examine witnesses." *Matter of M-A-M-,* 25 I&N Dec. 474, 477 (BIA 2011). The respondent was present at her removal proceedings and testified. She was represented by an attorney and through that attorney presented evidence. Her latest attorney properly notes that the respondent, "often appeared normal

and rational… Thus, neither the judge, nor government counsel, nor the credible fear interviewer, nor her own attorney identified the fact that she was unable to competently and cogently discuss the details of her case or testify." Motion at 13. Indeed, the respondent appeared to all parties to be competent at her Immigration Court hearing and thus was treated as such. There were no indicia she lacked competency at the time of the hearing, while her case was on appeal to the Board, while her case was on review at the Tenth Circuit, or now, and "[a]bsent indicia of mental incompetency, an Immigration Judge is under no obligation to analyze an alien's competency." *M-A-M-*, at 477. Moreover, there is no evidence that any lack of competency affected her due process rights or impacted the results in removal proceedings. Respondent has not offered any possible safeguards that would have altered the result or on remand would impact the result in this case. Though the motion repeatedly asserts that the outcome would be different with "appropriate safeguards," the motion fails to propose any safeguards or explain how those safeguards would alter the result when the Immigration Judge found the respondent not credible *and* found that she had not established she was persecuted or would be persecuted based on a nexus to a protected ground. I.J. Dec. at 16. Further, the respondent was provided the opportunity to apply for discretionary relief at the prior hearing and did, in fact, make such an application. In her motion, she has failed to show sufficient circumstances arising after her hearing that would warrant reopening. As such, the respondent has not demonstrated eligibility for relief.

III. The respondent has failed to establish that her case should be reopened for her to reapply for protection-based relief based on changed circumstances arising in El Salvador; she has failed to establish that the evidence she presents with her motion is material

and was not available and could not have been discovered or presented at the previous hearing.

The respondent's motion is untimely. However, she can avoid the time limitation if she can demonstrate, "changed circumstances arising in the country of nationality or in the country to which deportation has been ordered." 8 C.F.R. § 1003.2(c)(3)(ii). A motion to reopen filed outside of the 90 day filing deadline for purposes of applying for relief under sections 208 or 241(b)(3) of the Act must be "based on changed country conditions arising in the country of nationality or the country to which removal has been ordered, if such evidence is material and was not available and would not have been discovered or presented at the previous proceeding" INA § 240(c)(7)(C)(ii). To determine whether evidence submitted in conjunction with a motion to reopen establishes a material change in country conditions, the Board compares the evidence of country conditions submitted at the time of the merits hearing to the evidence of country conditions filed along with the motion to reopen. *S-Y-G,* 24 I&N Dec. at 253. "Any motion to reopen for the purpose of acting on an application for relief must be accompanied by the appropriate application for relief and all supporting documents." 8 C.F.R § 1003.23(b)(3). "And not just any new facts will do." *Maatougui,* 738 F.3d at 1240. The respondent must demonstrate that "the new evidence would likely change the result in the case." *Id.* (internal citations and quotations omitted). A change in personal circumstances is insufficient. *Wei v. Mukasey*, 545 F.3d 1248 (10th Cir. 2008) (the respondent's fourth pregnancy was a changed personal circumstance, not a changed country condition).

The respondent has not demonstrated changed circumstances in El Salvador, her country of nationality and the country to which removal has been ordered, relevant to her relief claim. The respondent's initial application for asylum, withholding of removal and protection under the Convention Against Torture was based on the respondent's alleged past persecution and feared future persecution at the hands of her former domestic abuser, who allegedly was then and is now still a gang member. In her application and before the Immigration Judge, she claimed she fled to escape an abusive domestic relationship and was afraid that he would harm or kill her if she returns to El Salvador; she claimed that he abused her verbally, physically, and sexually, locking her in the home, controlling her movements, preventing her from seeing her family and friends, and preventing her from seeking medical help. I.J. Dec. at 4. Her current request is for reopening for consideration of that very same set of facts. The respondent argues through counsel that "since her initial removal proceedings, [her] abuser has ascended to an even higher position in MS-13... His reach throughout the country is therefore greater, and his power broader." Motion to Reopen at 9. She argues that she "would be in even greater danger if she were forced to return to El Salvador, as he would use his connections to quickly locate her… The repercussions for having fled and hid in the United States for nine years would be swift and brutal…" *Id.* The respondent's counsel also argues that the rate of female homicides and female disappearances has increased in El Salvador since the time of her hearing. *Id.* at 10. However, an increase in violence is not sufficient to justify reopening. The Tenth Circuit has held that, "greater lawlessness in general does not show persecution of a protected class." *Maatougui*, 738 F.3d at 1241. Even so, the respondent's initial claim was based on fear of homicide or disappearance by the same

domestic abuser that she fears today. Accordingly, the respondent's fear is based on continuing conditions rather than a clear change in conditions. Like the alien unsuccessfully seeking review from the Tenth Circuit of the Board's denial of reopening in *Wei v. Mukasey,* while the respondent has presented some "new" documents, the respondent has not provided new material *evidence* regarding changed country conditions that if presented would change the result of the case. 545 F.3d at 1254. Accordingly, the Board must deny the respondent's motion to reopen based on changed country conditions.

The respondent also failed to demonstrate that she is prima facie eligible for the relief or protection she now seeks. The Immigration Judge found at the conclusion of the merits hearing that the respondent lacked credibility. The respondent's contention is that she was unable to tell her full story before the Immigration Judge due to her PTSD and dissociations. However, the credibility determination was based on a number of factors, not just on the failure of the respondent to provide sufficient detail about her alleged captivity and abuse. Indeed, the respondent did provide detailed testimony, including describing beatings and verbal abuse, imprisonment, regular physical and sexual assaults, isolation from family and friends, and refusal to allow medical care. I.J. Dec. at 4. And as noted in the Tenth Circuit's petition denial, the Immigration Judge's credibility finding was based not only on testimony characterized as inconsistent, vague, and evasive, which could be explained away by her current diagnosis, but also on testimony that was decidedly and purposefully embellished. *See* Order and Judgment, October 7, 2015, at 7. As to the pivotal matter of when and how the respondent acquired a passport, her testimony before the Immigration Judge was not merely incomplete – she gave a variety

of accounts regarding the passport. The respondent's current efforts to rehabilitate herself as a witness based on a new diagnosis of PTSD do not impact the heart of the Immigration Judge's credibility finding, which was affirmed by the Board and the Tenth Circuit.

In addition, though the respondent has now provided a new list of proposed particular social groups[1], she has failed to establish that any of those groups are cognizable. She relies on proposed particular social groups all tied to her gender, the relationship between herself and her alleged abuser, and the harm caused to her by her abuser. However, none of these is cognizable. Moreover, what the respondent seeks here is an opportunity to reformulate her proposed particular social groups after the Immigration Judge previously rejected those articulated by the respondent and her prior counsel. I.J. Dec. at 16.

To establish past persecution, the respondent must not only prove a sufficiently serious level of harm, but also, as pertinent here, that the harm was inflicted by "persons or an organization that the government was unable or unwilling to control." *See, e.g., Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The respondent has not established that the government of El Salvador was or is unwilling or unable to control the respondent's abuser. "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27

[1] The respondent proposes the following particular social groups: El Salvadoran women who have refused the romantic advances of a gang member; El Salvadoran women who have refused to become romantically involved with a gang member; El Salvadoran women who defy the orders of a gang member; El Salvadoran females; El Salvadoran women; El Salvadoran women who are viewed as property: El Salvadoran women who are viewed as objects; El Salvadoran women who are viewed as property due to patriarchal social norms; and El Salvadoran women who are viewed as property due to gang norms.

I&N Dec. 316, 320 (A.G. 2018). The respondent must establish that her government is unwilling or unable to control the perpetrator, which requires the respondent to show more than that the government had "difficulty controlling" the private criminality; rather, the government must have either "condoned" the criminality or "at least demonstrated a complete helplessness to protect the victims." *Id.* at 337. Simply because a government has not acted on a reported crime, successfully investigated it, or punished the perpetrator, does not necessarily establish an inability or unwillingness to control the crime any more than it would in the United States. *Id.* at 343-44.

The respondent also has not met her burden to establish that she was or would be singled out for harm because of her membership in any of the proposed particular social groups. To demonstrate that harm was "on account of" a protected ground, an applicant for asylum must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)). The respondent has failed to establish a nexus between the groups of which she claims to be a member and the harm she allegedly suffered or fears. Rather, the respondent at most establishes that she was the victim of crimes committed by a single actor that were motivated by his own criminal character and their personal relationship. Certainly, the

respondent has provided no evidence that her alleged abuser was motivated by any other reason than the nature of their relationship or his criminal proclivities, or that he was generally hostile to any other women who might sweep into the proposed groups. *A-B-*, 27 I&N Dec. at 339.

As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *A-B-*, 27 I&N Dec. at 338-39. Acts "of common criminality or personal hostility that do not implicate asylum eligibility." *Vatulev v.* Ashcroft, 354 F.3d 1207, 1209 (10th Cir. 2003). Because the respondent failed to establish the motivation of her alleged abuser, she has not established prima facie eligibility for asylum or withholding of removal.

The respondent has not asserted that her fairly recent diagnosis regarding her mental condition provides a new basis for a protection-based claim. Even so, her medical and mental health issues would be a change of personal circumstances, not a change of circumstances in El Salvador, so would not support a motion to reopen under 8 C.F.R. § 1003.2(c)(3)(ii).

Moreover, the respondent has failed to present any evidence that she qualifies for deferral under CAT. The respondent has failed to show that it is more likely than not that she will be tortured in El Salvador, a burden which she bears. *Elzour v. Ashcroft*, 378 F.3d 1143 (10th Cir. 2004). Torture is an "extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that does not amount to torture." 8 C.F.R. § 1208.18(a)(2). Conduct constitutes torture only if it is "specifically intended to inflict severe physical or mental

pain or suffering." 8 C.F.R. §1208.18(a)(5). Such treatment must be inflicted "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.8(a)(1). Willful blindness is sufficient to establish acquiescence. *Karki v. Holder*, 715 F.3d 792 (10th Cir. 2013). And the persecution involved must be severe; as the Board has stated, "The severity of the pain and suffering inflicted is a distinguishing characteristic of torture." *Matter of J-E-*, 23 I&N Dec. 291, 295 (BIA 2002) (the possible indefinite detention in Haitian prison under inhumane and substandard conditions does not constitute torture as required by the CAT); *see also Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005); *Ritonga v. Holder*, 633 F.3d 971 (10th Cir. 2011). In her motion, the respondent does not articulate how she will be subject to torture at the hands of the government or with the government's acquiescence. Any claims she has stated are far too speculative to support a claim for protection under the CAT. *Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000). Notably, a pattern of human rights violations and general conditions of violence alone are not sufficient to show that a particular person would be in danger of being tortured – specific grounds must exist to indicate that the applicant would personally be at risk. *S-V-*, 22 I&N Dec. at 1313.

Finally, the respondent cannot demonstrate that the outcome of proceedings would be different. As noted above, the Immigration Judge determined that the respondent lacked credibility. The respondent has not established that there is as basis for this credibility finding to be disregarded. She has also not established that she is eligible for any protection-related relief, even if the story she proposes now is taken to be true in its entirety. Once again, the respondent failed to meet her "heavy burden" to justify reopening of her removal proceedings.

IV. The respondent has not established that she merits sua sponte reopening of her removal proceedings.

The respondent also requests the Board reopen her case sua sponte. While the Board has the discretion to reopen or reconsider cases sua sponte, the Board has stated that this authority should be invoked "sparingly, treating it not as a general remedy for any hardships created by enforcement of the time and number limits in the motions regulations, but as an extraordinary remedy reserved for truly exceptional situations." *Matter of G-D-,* 22 I&N Dec. 1132, 1133-1134 (BIA 1999); *see also Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997) ("the Board retains limited discretionary powers under the regulations to reopen or reconsider cases on our own motion" in exceptional situations). The Board has further emphasized that it would be "inappropriate to expansively employ this authority in a manner that contravened the intentions of Congress or failed to give effect to the comprehensive regulatory structure in which it exists." *G-D-,* 22 I&N Dec. at 1134. Sua sponte authority should not be used to circumvent this regulatory scheme simply because the respondent may suffer some hardship by its enforcement or because the respondent has developed equities while evading the immigration authorities. *J-J-*, 21 I&N Dec. at 984; *Matter of L-V-K-,* 22 I&N Dec. 965, 980 (BIA 1999).

The respondent produced insufficient evidence in support of her motion that would support a decision that she merits an "extraordinary remedy reserved for truly exceptional situations," because the respondent did not exercise due diligence in this matter; her failure to do so should doom her request for such an extraordinary remedy. *Compare Maatougui*, 738 F.3d at 1243-45 (discussing a lack of diligence to be a factor in

analyzing whether evidence sought to be offered was previously available or discoverable), *and Matter of J-P-*, 22 I&N Dec. 33, 36 (BIA 1998) (finding a lack of diligence to be a factor in an exceptional circumstance analysis). This motion comes over six years after the Immigration Judge's order, over four since the Board dismissed her appeal, and over three years since the Tenth Circuit dismissed her Petition for Review. Consulting with various lawyers over the years, living without lawful status in the United States for a long period of time, and seeking to avoid apprehension by entering a church are insufficient to establish due diligence. Even by her own favorable account, it has been some time since she was diagnosed with her current mental condition and realized that she could argue it impacted her removal proceedings. *See, e.g.*, Motion at 11. Timeliness is "critical" in immigration proceedings, and to avoid unnecessary delays, motions to reopen must be brought promptly. *Galvez Pineda*, 427 F.3d at 838. Motions limits "are specifically designed to expedite judicial review and to bring finality to immigration proceedings." *G-D-*, 22 I&N Dec. at 1134. As the Board has stated,

> The motions rules respond directly to the legislative interest in setting meaningful and effective limits on motions and ultimately in achieving finality in immigration case adjudications. Accordingly, we may not casually set those limits aside or otherwise undermine them through the exercise of our independent regulatory power to reopen or reconsider cases.

Id.

Requiring a respondent to exercise due diligence in bringing a motion to reopen preserves the legislative intent that unnecessary delay in immigration proceedings must be avoided.

Further, the respondent has failed to demonstrate that there was any "gross miscarriage of justice" in the prior removal proceedings—the one completed by the

Immigration Judge in 2013 —and the order that resulted from those proceedings. *Matter of La Grotta*, 14 I&N Dec. 110, 112 (BIA 1972) (a collateral attack on a prior deportation proceeding cannot be made unless there was a gross miscarriage of justice). The Third Circuit has observed that "a gross miscarriage of justice has been found only when the individual should not have been deported based on the law as it existed at the time of the original deportation." *See Debeato v. Att'y Gen. of U.S.,* 505 F.3d 231, 236 (3rd Cir. 2007) (adopting a standard which finds a gross miscarriage of justice "only when the individual should not have been deported based on the law as it existed at the time of the original deportation") (quoting *Robledo-Gonzales v. Ashcroft*, 342 F.3d 667, 682 n.13 (7th Cir. 2003) (internal quotation marks omitted)). The Fifth Circuit has observed that any collateral attack on an underlying order of removal including constitutional or legal questions may be considered only if the alien demonstrates that administrative remedies have been exhausted or the initial removal proceedings constituted a gross miscarriage of justice.

The respondent has not established that there was any gross miscarriage of justice in the initial removal proceedings in which the deportation order was issued. The respondent has not shown that the Immigration Judge's finding of deportability was not in accord with the law. *Matter of Beckford*, 22 I&N Dec. 1216, 1220 (BIA 2000). The respondent has also not established that she was denied a full and fair hearing which provided her a meaningful opportunity to be heard. *Wei*, 545 F.3d at 1257. The respondent exercised her right to appeal the Immigration Judge's decision and fully litigated the matter before the Board. After the Board affirmed the Immigration Judge's

decision, the respondent exercised her right to petition for review with the Tenth Circuit Court of Appeals, which dismissed her petition.

The respondent also has failed to establish that she has substantial equities which would justify sua sponte reopening. The respondent has a spouse and children and support in the community. However, there is nothing unusual about the development of these types of equities as aliens remain in the United States pending removal proceedings and after removal has been ordered. The primary distinctions between the respondent and countless other individuals who have developed equities while in removal proceedings and after are that the respondent has taken extraordinary steps to avoid apprehension and the respondent alleges that she was and is not mentally. As noted above, even if the respondent has suffered from post-traumatic stress disorder and disassociations, that does not mean that she was not competent at the time of her removal proceedings such that safeguards needed to be put in place. The "test for determining whether an alien is competent to participate in immigration proceedings is whether he or she has a rational and factual understanding of the object of proceedings, can consult with his or her representative, and has a reasonable opportunity to examine and present evidence and cross examine witnesses. *M-A-M-,* 25 I&N Dec. at 477. The respondent was present at her removal proceedings and testified. She was represented by a competent attorney and through that attorney presented evidence. Her current attorney properly notes that the respondent, "often appeared normal and rational… Thus, neither the judge, nor government counsel, nor the credible fear interviewer, nor her own attorney identified the fact that she was unable to competently and cogently discuss the

details of her case or testify." *Id.* [2] Indeed, the respondent appeared to all parties to be competent at her Immigration Court hearing and thus was treated as such. There is insufficient evidence that she lacked competency at the time of the hearing, while her case was on appeal to the Board and on petition to the Tenth Circuit, or now. Moreover, there is no evidence that any lack of competency impacted the results in removal proceedings and there is no suggestion of any safeguards that would have altered the result or on remand would impact the result in this case.[3]

V. The respondent's case should not be reopened under *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), as the removal proceedings were properly initiated with the Immigration Court and the Immigration Judge had jurisdiction.

The respondent contends that her removal proceedings were not initiated properly as her Notice to Appear does not include a time and date for her first hearing before the Immigration Judge. The record makes clear that the respondent was provided a Notice to Appear and several hearing notices, that she appeared numerous times before the Immigration Judge, at times with counsel, and that she had a full and fair opportunity to litigate her case before the Immigration Court, the Board, and the Tenth Circuit. A Notice to Appear that does not specific the time and place of hearing vests jurisdiction with the Immigration Judge over removal proceedings so long as a notice of hearing is afterward sent to the alien. *Matter of Bermudez-Cota*, 27 I&N Dec. 441 (BIA 2018). As such, there is no basis to reopen proceedings to address the Immigration Judge's jurisdiction.

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[2] Indeed, the respondent has functioned well in society since coming to the United States – she has married, she has worked, she has had children and taken care of them, she has done volunteer work, she has taken classes. Her ability to do these day-to-day activities without issue calls into question her attorney's assertion that the respondent is not competent.

[3] The respondent's motion does not identify any proposed safeguards. The motion repeatedly asserts that the outcome would be different "if given appropriate safeguards," but does not clearly identify what those safeguards should be.

In light of the foregoing, the respondent's motion to reopen must be denied, regardless of the statutory or regulatory provisions on which it is based. The respondent had a full and fair hearing before the Immigration Judge. She exercised her right to appeal to the Board. She then exercised her right to petition the circuit court for review. She was represented by competent counsel during this time. She was unsuccessful at all turns and, no doubt, has been unhappy with those decisions. However, her desire to remain in the United States alone is not a basis for reopening. She has not met her heavy burden to establish that her case should be reopened, four years after the Tenth Circuit dismissed her petition for review. As such, the Department asks the Board to deny the motion to reopen.

Respectfully submitted,

(b)(6); (b)(7)(C)
Senior Attorney

Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Department of Homeland Security's Opposition to Motion to Reopen was served on April 29, 2019, by placing it in the outgoing mail bin, to be sent prepaid, first-class mail as follows:

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NON-DETAINED

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

In the Matter of	
(b)(6); (b)(7)(C)	File No.: (b)(6); (b)(7)(C)
In Removal Proceedings	

DEPARTMENT OF HOMELAND SECURITY
MOTION TO ACCEPT LATE-FILED
BRIEF ON APPEAL IN SUPPORT OF
IMMIGRATION COURT DECISION

The Department of Homeland Security (Department) respectfully moves the Board of Immigration Appeals (Board) to accept the accompanying late-filed brief on appeal in support of Immigration Court decision. The Department's appellate response was due April 2, 2020. Unfortunately, as of March 23, 2020, undersigned counsel had to start staying home to watch her children because her children's daycare center closed down due to concerns over Covid-19. Because of childcare issues, undersigned counsel's ability to review these respondents' A-files and prepare a response has been delayed.

The Department does not believe there will be any prejudice to the respondents due to the Department serving this brief on April 3, 2020—only one day after the filing deadline. As such, the Department respectfully requests that the Board consider the late-filed brief on appeal in support of Immigration Court decision, which is filed along with this motion.

Respectfully submitted on this April 3, 2020.

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CASE NAME:

(b)(6); (b)(7)(C)

CASE NO.:

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the date indicated below, I served a copy of this **DEPARTMENT OF HOMELAND SECURITY MOTION TO ACCEPT LATE-FILED BRIEF ON APPEAL IN SUPPORT OF IMMIGRATION COURT DECISION** and any attached pages by placing a true copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process, and causing the same to be mailed by first class mail to the person(s) listed below, at the following address:

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Date: April 3, 2020

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

In the Matter of (b)(6); (b)(7)(C) **In Removal Proceedings**	File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY BRIEF ON APPEAL IN SUPPORT OF IMMIGRATION COURT DECISION

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(b)(6); (b)(7)(C)

INTRODUCTION

On October 17, 2018, the Immigration Court denied the respondents' applications for asylum, withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (INA), and withholding of removal under the regulations implementing the U.S. obligations pursuant to Article 3 of the United Nations Convention Against Torture.[1] The respondents appealed this decision to the Board of Immigration Appeals (Board). The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department) files this brief in support of the Immigration Court's decision.

ISSUE PRESENTED

The respondents make numerous appellate arguments related to the lead respondent's: (1) purported particular social group (PSG) of Mexican women in relationships with men who believe that women are to live under male dominion, and (2) political opinion that men and women are equal, that women have the rights to bodily integrity, decline sexual advances, privacy, work, and be free from male domination.

In this brief, the Department only addresses the respondents' appellate argument that the Mexican government is unable or unwilling to control the lead respondent's alleged persecutor, who is a private actor, because the respondent testified reporting would be futile and State Department and media reports establish the Mexican government fails to protect individuals with the lead respondent's PSG and political opinion. Petitioner's brief on appeal at 17-20.

[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).

STANDARD OF REVIEW

Questions of law, discretion, judgment, and all other issues—including whether respondents have met their burdens of proof—are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of Vides-Casanova*, 26 I&N Dec. 494, 498 (BIA 2015). Likewise, "[w]hether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal" is reviewed under the de novo standard. *Matter of Z-Z-O-*, 26 I&N Dec. at 591. The Board utilizes a clearly erroneous standard when reviewing underlying factual findings of an Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O*, 26 I&N Dec. 586, 591 (BIA 2015).

ARGUMENT

I. THE IMMIGRATION JUDGE CORRECTLY CONCLUDED THAT THE LEAD RESPONDENT FAILED TO SHOW THAT THE MEXICAN GOVERNMENT IS UNABLE OR UNWILLING TO CONTROL THE PRIVATE ACTOR WHO ABUSED HER BECAUSE MEXICO HAS ENACTED DOMESTIC VIOLENCE LAWS.

On appeal, the lead respondent argues her failure to report abuse to authorities is not required to establish the Mexican government is unable or unwilling to protect her because her credible testimony and country condition reports show an insufficient government response to domestic violence. *See generally* Petitioner's brief on appeal at 17-20.

The Immigration Court acknowledged that the respondent's failure to report abuse to authorities was "not dispositive" but correctly reasoned that "because she did not even give them [the government] the opportunity to intervene," the Court "ha[d] no evidence upon which to find the government . . . ignored [the respondent's] complaints or told her that they could not help her . . . ." I.J. at 7. *See Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1066, 1069-70 (9th Cir. 2017) (recognizing that "reporting persecution to government authorities is not essential to

(b)(6); (b)(7)(C)

demonstrating that the government is unable or unwilling" to control a private actor but "[w]hether a victim has reported or attempted to report violence or abuse to the authorities is a factor that may be considered, as is credible testimony or documentary evidence explaining why a victim did not report.").

The respondent's testimony that the Mexican government is corrupt, the law only helps people with money, and her abuser threatened to pay the police off if she reported him to authorities, Petitioner's brief on appeal at 17, captures her subjective belief about government responsiveness and corruptibility. However, contrary to the respondent's argument that she has "personal knowledge" about the government's ability to protect her, *id.* at 18, the respondent lacks personal knowledge about how authorities would respond to her situation because she never contacted them. As such, her testimony is insufficient to show the Mexican government is corrupt and therefore unable or unwilling to assist her. *See Maroufi v. INS*, 772 F.3d 597, 599 (9th Cir. 1985) (finding no prima facie case where "affidavit and application for asylum consisted solely of conclusory and speculative inferences drawn from generalized events").

Turning to country condition reports, the Immigration Court acknowledged that "there is evidence in the record that domestic violence is not affectively addressed in Mexico," and "like the United States, the response from police or the government is not always effective." I.J. at 7. *See also* Respondents' Prehearing Statement, Attach. at 53 (consisting of 2018 Human Rights Watch World Report that notes "Mexican laws do not adequately protect women and girls against domestic and sexual violence."); *id.* at 189 (consisting of Domestic Violence Expert's declaration that "notes omnipresence of domestic violence" and indicates that femicide victims unsuccessfully sought government protection prior to their murders).

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However, the Immigration Court correctly concluded that "evidence of the vulnerability of women in Mexico to domestic violence does not equate to a finding that the government . . . is unable or unwilling to protect women" where the government "has enacted domestic violence laws." I.J. at 7. As noted by the Attorney General, "[f]or many reasons, domestic violence is a particularly difficult crime to prevent and prosecute, even in the United States, which dedicates significant resources to combating domestic violence." *Matter of A-B-*, 27 I&N Dec. 316, 343-44 (A.G. 2018). That is why the respondent, who seeks "to establish persecution based on violent conduct of a private actor must show more than the government's difficulty controlling private behavior." *Id.* at 316; *see also id.* at 320 ([T]he mere fact that a country may have problems effectively policing certain crimes—such as domestic violence . . . or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim.").

The Immigration Judge's conclusion that the Mexican government is not unable or unwilling to protect the respondent is also supported by country condition evidence in the record. The 2015 Department of State Human Rights Report for Mexico documents that femicide is a federal offense as well as an offense in every Mexican sate punishable by 40 to 60 years in prison, "federal law criminalizes rape, including spousal rape, and imposes penalties of up to 20 years' imprisonment," and "[t]wenty-three states and the Federal District have laws criminalizing spousal rape." Respondents' prehearing statement, Attach. at 151. Similarly, "[t]he federal penal code prohibits domestic violence and stipulates penalties between six months and four years' imprisonment, and "[t]wenty-eight states and the Federal District stipulate similar penalties." *Id.* Federal law and 15 states criminalize sexual harassment. *Id.*

While the report concedes that, in 2015, federal law did "not criminalize spousal abuse," and "state and municipal laws addressing domestic violence largely failed to meet the required

(b)(6); (b)(7)(C)

federal standards and were unenforced," the report also notes "states and municipalities, especially in the north were beginning to prioritize training on domestic violence." Respondents' prehearing statement, Attach. at 151. Indeed, Mexico has a "Special Prosecutor's Office for Violence against Women and Trafficking . . . responsible for leading government programs to combat domestic violence," and this office has "40 federal prosecutors dedicated to federal cases of violence against women . . . ." *Id.* Mexico also established a gender alert system to gather information for gender-based violence investigations, and the country has 72 federal shelters. *Id.*

Given the Mexican government's aforementioned efforts to combat domestic violence, the respondent cannot show that the government "condoned the private actions [of her abuser] or demonstrated an inability to protect [her as one of] the victims" of such abuse. *Matter of A-B-*, 27 I&N Dec. at 316, *see also id.* at 337 ("The applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims.") (citation omitted).

CONCLUSION

For all the foregoing reasons, the Department respectfully requests that the Board dismiss the respondents' appeal from the Immigration Judge's decision denying relief.

Respectfully submitted on this April 3, 2020. (b)(6); (b)(7)(C)

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(b)(6); (b)(7)(C)

CASE NO.:

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the date indicated below, I served a copy of this **DEPARTMENT OF HOMELAND SECURITY BRIEF ON APPEAL IN SUPPORT OF IMMIGRATION COURT DECISION** and any attached pages by placing a true copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process, and causing the same to be mailed by first class mail to the person(s) listed below, at the following address:

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

In the Matter of:

(b)(6); (b)(7)(C)

In removal proceedings

File Nos.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY'S BRIEF ON APPEAL

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(b)(6); (b)(7)(C)

INTRODUCTION

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), submits this brief in support of the Immigration Judge's May 21, 2018 decision denying the respondents'[1] applications for asylum and withholding of removal under the Immigration and Nationality Act (INA).

ISSUE PRESENTED

While the respondents raise several issues on appeal, the issue the Department addresses in this brief is whether the Immigration Judge correctly concluded that the respondents could reasonably relocate within El Salvador to avoid the gang member who threatened the lead respondent.[2]

STANDARD OF REVIEW

Whether a respondent can internally relocate requires findings of both fact and law. *See Matter of M-Z-M-R-*, 26 I&N Dec. 28, 36 (BIA 2012).

The Board utilizes a clearly erroneous standard when reviewing underlying factual findings of an Immigration Judge, including findings as to the credibility of testimony and predictive findings of what may or may not occur in the future. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O*, 26 I&N Dec. 586, 591 (BIA 2015).

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[1] The respondents are related. The lead respondent is the mother (b)(6); (b)(7)(C) and the derivative respondent on her asylum application (Form I-589) is her child (b)(6); (b)(7)(C) Insofar as the derivative respondent did not testify in support of the lead respondent's Form I-589, references hereinafter to the "lead respondent" or "the respondent" will relate to (b)(6); (b)(7)(C)

[2] The Board need not address the respondents' other appeal arguments if the Board finds that the respondents failed to meet their burden on relocation as asserted by the Immigration Judge. *See Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach).

(b)(6); (b)(7)(C)

Questions of law, discretion, judgment, and all other issues—including whether respondents have met their burdens of proof—are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of Vides-Casanova*, 26 I&N Dec. 494, 498 (BIA 2015). Likewise, "[w]hether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal" is reviewed under the de novo standard. *Matter of Z-Z-O-*, 26 I&N Dec. at 591.

SUMMARY OF THE ARGUMENT

The Immigration Judge correctly concluded that it was reasonable for the respondents to internally relocate within El Salvador where the gang member who threatened the lead respondent only did so in the city of San Salvador.

STATEMENT OF RELEVANT FACTS

The lead respondent, (b)(6); (b)(7)(C) native and citizen of El Salvador. Exh. 1. The rider respondent, (b)(6); (b)(7)(C) native and citizen of El Salvador. Exh. 1a. On or about February 12, 2016, the respondents were placed into removal proceedings through the issuance of Notices to Appear (NTAs) that charged them with removability under INA section 212(a)(7)(A)(i)(I) for not being in possession of valid immigration documents at the time of application for admission to the United States. Exhs. 1-1a.

On or about November 25, 2016, the lead respondent filed an application for asylum and withholding of removal under the INA (Form I-589). Exh. 2. The Form I-589 listed the rider respondent as a derivative beneficiary. *Id.*

At an October 4, 2017 master calendar hearing, the respondents, through counsel, admitted the allegations and conceded the removal charge on their NTAs. Tr. at 7-10.

(b)(6); (b)(7)(C)

At a May 21, 2018 merits hearing, the lead respondent testified. The following facts come from the lead respondent's testimony. She was raised in San Lorenzo, El Salvador. Tr. at 39. Until March of 2014, she lived in San Lorenzo. *Id.* at 45.

In or about March of 2014, the lead respondent moved in with her aunt in San Salvador, El Salvador to attend a nursing program at a university in San Salvador. Tr. at 29-30, 34-35. One day, while the respondent stood at a bus stop close to her university, a gang member approached her, asked her who she was, where she was from, wanted her to be part of their gang, and wanted her to be his girlfriend. *Id.* at 35-36. The bus arrived so the respondent boarded the bus to get away from the gang member. *Id.* at 38.

As a result of this encounter, the respondent feared returning to the university in San Salvador and instead transferred to a new school closer to her hometown of San Lorenzo, El Salvador. Tr. at 38-39.

In October 2015, the respondent returned to the university in San Salvador to obtain some documentation. *Id.* at 39. The same gang member approached her and asked her where she had been, told her he knew she was from San Lorenzo and that she had a son, and threatened to kill her and her son if she did not join the gang and have a relationship with him. *Id.* at 39-40. When one of the respondent's friends approached her, the gang member left her alone. *Id.* at 41.

The respondent never reported the two incidents with the gang member to police due to fear that the gang member would discover she reported him to police. Tr. at 42.

From October 2015 to December 2015, the respondents lived in the lead respondent's parents' home in San Lorenzo. *Id.* at 43. The respondents were never threatened by a gang member in San Lorenzo. *Id.* at 45. Nevertheless, in December of 2015, the respondents fled El Salvador and came to the United States on December 27, 2015. *Id.* at 32. The respondents never

(b)(6); (b)(7)(C)

tried relocating elsewhere in El Salvador because they had no family elsewhere, and the lead respondent feared the gang member would find her. Tr. at 44. Since coming to the United States, the gang member who threatened the lead respondent has not come to the respondent's parents' house in San Lorenzo to look for her, and she has not heard from him. *Id.* at 46.

At the May 21, 2018 merits hearing, the Immigration Judge denied the respondents' applications, in part because, he concluded that they could internally relocate to avoid the gang member who threatened the lead respondent. I.J. at 8-9.

ARGUMENT

I. THE IMMIGRATION JUDGE CORRECTLY CONCLUDED THAT IT WAS REASONABLE FOR THE RESPONDENTS TO INTERNALLY RELOCATE WITHIN EL SALVADOR WHERE THE GANG MEMBER ONLY THREATENED THE LEAD RESPONDENT IN SAN SALVADOR.

Even assuming, arguendo, that the Immigration Judge had found the lead respondent demonstrated past persecution, thus creating a rebuttable presumption of a well-founded fear of future persecution for asylum purposes, 8 C.F.R. § 1208.13(b)(1), and a rebuttable presumption that her "life or freedom would be threatened in the future" for withholding purposes, 8 C.F.R. § 1208.16(b)(1), this presumption was rebutted by a "preponderance of the evidence" because the respondent "could avoid future persecution by relocating to another part of" El Salvador, and "under all the circumstances it would be reasonable to expect" the respondent "to do so." 8 C.F.R. §§ 1208.13(b)(1)(i)(B), (b)(1)(ii); 1208.16(b)(1)(i)(B), (b)(1)(ii). As such, the Immigration Judge's ultimate conclusion that "internal relocation in El Salvador [was] a viable option for the respondent[s]," I.J. at 9, was factually and legally accurate. *See Matter of A-B-*, 27 I&N Dec. 316, 316 (A.G. 2018) ("[I]mmigration judges . . . must consider, consistent with the

(b)(6); (b)(7)(C)

regulations, whether internal relocation in the alien's home country presents a reasonable alternative before granting asylum.").

The respondent argues that the Immigration Judge erred in his relocation determination because the MS-13 gang is "omnipresent in El Salvador," the gang member who threatened the respondent knew where she lived in San Lorenzo, the respondent avoided going out in San Lorenzo to avoid the gang member, and the respondent "would have no familiar support" to move elsewhere in El Salvador. Respondents' brief on appeal at 21-22.

However, a preponderance of the evidence supports the Immigration Judge's factual and legal conclusion that internal relocation, including remaining in San Lorenzo, was reasonable. The Immigration Judge correctly noted that the gang member only approached the lead respondent twice in San Salvador, "a place that was not her normal home." I.J. at 8. Despite allegedly knowing where the respondent lived, the gang member "never approached or threatened" the respondent in her hometown of San Lorenzo, "which was approximately two and a half hours away from [ ] San Salvador . . . ." *Id.* The Immigration Judge also rightly found that there was "no evidence that the gang member looked for [the respondent] outside of the neighborhood in San Salvador where he pursued her," or that "anyone ever visited the respondent's home or conducted any drive-by or did anything threatening that would enable the respondent or her family to know that she was being pursued wherever she went in El Salvador." *Id.* at 9. Indeed, neither the respondent nor her family have heard from the gang member since the respondent's last encounter with him in 2015. Tr. at 46. Based on these facts, the Immigration Judge did not err in finding relocation was available to the respondents.

CONCLUSION

Based on the foregoing, the Board should dismiss the respondents' appeal and affirm the Immigration Judge's decision denying the respondents' applications for asylum and withholding of removal under the INA.

Respectfully submitted on this 29th day of October, 2019,

(b)(6); (b)(7)(C)

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CASE NAMES:

(b)(6); (b)(7)(C)

FILE NOS.:

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the date indicated below, I served a copy of this **DEPARTMENT OF HOMELAND SECURITY'S BRIEF ON APPEAL** and any attached pages by placing a true copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process, and causing the same to be mailed by first class mail to the respondent's counsel, at the following address:

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Date: October 29, 2019

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NON-DETAINED

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

In the Matter of:

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

In removal proceedings

File Nos.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY'S BRIEF ON APPEAL

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(b)(6); (b)(7)(C)

INTRODUCTION

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), submits this brief in support of the Immigration Judge's June 5, 2018 decision denying the respondents'[1] applications for asylum, withholding of removal under the Immigration and Nationality Act (INA), and withholding of removal under the regulations implementing the U.S. obligations pursuant to Article 3 of the United Nations Convention Against Torture (CAT).[2]

ISSUE PRESENTED

While the respondents raise several issues on appeal, the issue the Department addresses in this brief is whether the Immigration Judge correctly concluded that there was no nexus between the lead respondent's purported particular social group (PSG) of "Salvadoran women" and the past harm she suffered.[3]

STANDARD OF REVIEW

The Board utilizes a clearly erroneous standard when reviewing underlying factual findings of an Immigration Judge, including findings as to the credibility of testimony and predictive findings of what may or may not occur in the future. 8 C.F.R. § 1003.1(d)(3)(i);

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[1] The respondents are related. The lead respondent is the mother (b)(6); and the derivative respondent on her asylum application (Form I-589) is her child (b)(6); Insofar as the derivative respondent did not testify in support of the lead respondent's Form I-589, references hereinafter to the "lead respondent" or "the respondent" will relate to Ms. Navarro-de Landaverde, A209 425 369.

[2] 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).

[3] For purposes of this appeal brief, the Department assumes arguendo that "Salvadoran women" constitute a cognizable PSG. However, the Board need not address whether "Salvadoran women" constitute a cognizable particular social group as it may find that the respondent failed to meet her burden on other grounds as asserted by the Immigration Judge. *See Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach).

(b)(6); (b)(7)(C)

Matter of Z-Z-O, 26 I&N Dec. 586, 591 (BIA 2015). "A persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by [the Board] for clear error." *Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011).

Questions of law, discretion, judgment, and all other issues—including whether respondents have met their burdens of proof—are reviewed de novo. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of Vides-Casanova*, 26 I&N Dec. 494, 498 (BIA 2015). Likewise, "[w]hether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal" is reviewed under the de novo standard. *Matter of Z-Z-O-*, 26 I&N Dec. at 591.

SUMMARY OF THE ARGUMENT

The Immigration Court correctly concluded that the lead respondent failed to demonstrate a nexus between her membership in the purported PSG of "Salvadoran women" and the past harm she suffered where no reliable evidence demonstrated that the respondent's husband and the Mara 18 street gang harmed her due to her status as a Salvadoran woman.

STATEMENT OF RELEVANT FACTS

The lead respondent, (b)(6); (b)(7)(C) native and citizen of El Salvador. Exh. 1. The rider respondent is (b)(6); (b)(7)(C) (b)(6); native and citizen of El Salvador. Exh. 1a. On or about September 22, 2016, the respondents were placed into removal proceedings through the issuance of Notices to Appear (NTAs) that charged them with removability under INA section 212(a)(7)(A)(i)(I) for not being in possession of valid immigration documents at the time of application for admission to the United States. Exhs. 1-1a.

On May 31, 2017, the lead respondent filed an application for asylum, withholding of removal under the Act, and protection under the regulations implementing the U.S. obligations

(b)(6); (b)(7)(C)

pursuant to Article 3 of the CAT (Form I-589). Exh. 2. The Form I-589 listed the rider respondent as a derivative beneficiary. *Id.* At a September 7, 2017 master calendar hearing, the respondents, through counsel, admitted the allegations and conceded the removal charge on their NTAs. Tr. at 13. At a June 5, 2018 merits hearing, the lead respondent testified.

According to the lead respondent's affidavit and testimony, she began a relationship with her husband, (b)(6); when she was about 15 or 16-years-old, and they married in about 2011. Exh. 4, Tab A at 2; Tr. at 28, 45. After they moved in together, (b)(6); "was very controlling, and he constantly wanted to know what [she] was doing and who [she] was with." Exh. 4, Tab A at 2. He "regularly use[d] drugs and alcohol, and when he did he was often violent." *Id.* He would sometimes push and shove her. *Id.*; Tr. at 28. During their marriage, (b)(6); (b)(7)(C) was also involved with criminals, specifically he helped the Mara 18 street gang commit crimes. Exh. 4, Tab A at 2; Tr. at 30.

In January 2012, (b)(6); (b)(7)(C) moved to the United States for economic reasons, and the respondent has not seen him since. Exh. 4, Tab A at 3; Tr. at 30, 43-45. About a year after he moved to the United States, (b)(6); "started becoming very controlling and jealous with" the respondent by calling her and asking her whom she was speaking with as well as prohibiting her from speaking with her family. Exh. 4, Tab A at 3. He often called her on the phone from the United States and told her not to leave the house or to leave him, and he threatened her and her family with death if she failed to comply with his instructions. Tr. at 32, 36.

The respondent testified she believed (b)(6); "reasons for wanting to control" her were "jealousy," possessiveness, that he believed she was "cheating on him," and "[b]ecause of the male chauvinisms that exist in El Salvador . . . ." Tr. at 32-33.

(b)(6); (b)(7)(C)

In 2016, the respondent told (b)(6); she wanted to end their relationship. Exh. 4, Tab A at 4; Tr. at 37-38, 47. Two days later, two Mara 18 gang members came to her home, held a gun to her head, and told her she had to remain with (b)(6); or she and her family would be killed. Tr. at 37-38. The respondent testified she believed the gang members targeted her "[b]ecause of the male chauvinism that is predominate in El Salvador." *Id.* at 39. However, the respondent also testified that the gang members would benefit from threatening her because (b)(6); "was going to pay them." *Id.* These threats spurred the respondent to flee to the United States, and since coming to the United States in 2016, (b)(6); has not tried to contact her, despite knowing she is in the United States. *Id.* at 45-46.

At the June 5, 2018 merits hearing, the Immigration Judge denied the respondents' applications, in part because he concluded that, even if the PSG of "Salvadoran women" were a cognizable PSG, the lead respondent "ha[d] not established a nexus between the claimed harm and her membership" in this PSG. I.J. at 7.

ARGUMENT

I. THE IMMIGRATION JUDGE CORRECTLY CONCLUDED THAT THERE WAS NO NEXUS BETWEEN THE LEAD RESPONDENT'S MEMBERSHIP IN THE PSG OF "SALVADORAN WOMEN" AND THE PAST HARM SHE SUFFERED.

A. The Immigration Judge Correctly Applied the "One Central Reason" Nexus Standard to the Respondent's Asylum Claim.

For asylum purposes, the respondent must establish that her PSG is "at least one central reason" for the feared persecution. INA § 208(b)(1)(B)(i); *Matter of A-B-*, 27 I&N Dec. 316, 338 (A.G. 2018) ("Establishing the required nexus between . . . persecution and membership in a particular social group is a critical step for victims of private crime who seek asylum.").

(b)(6); (b)(7)(C)

On appeal, the respondent implies that the Immigration Judge erred because he failed to apply the "one central reason" nexus standard to the respondent's asylum claim. *See* Respondent's brief on appeal at 6-7. However, the Immigration Judge had no need to overtly reference this nexus standard where he "was not convinced that (b)(6); controlling behavior . . . was because of [the respondent's] gender . . . ." I.J. at 7. In other words, the Immigration Judge found the respondent's gender was not a reason for (b)(6); behavior, much less a central reason. Similarly, where the Immigration Judge concluded that there was "*no evidence*" the Mara 18 gang members who threatened the respondent were "motivated by" her status as a Salvadoran woman, I.J. at 9 (emphasis added), he had no need to specify that the respondent's PSG was not "one central reason" for the gang's harm.

The respondent also argues that the Immigration Judge erred because he "did not properly determine if [R]espondent's membership" in the PSG of "Salvadoran women" was a central reason for her harm. Respondent's brief on appeal at 6. To support this argument, the respondent references the Immigration Judge's conclusion that he "was not convinced that (b)(6); controlling behavior . . . was because of [the respondent's] gender *or* inability to overcome her gender." *Id.* (citing I.J. at 7) (emphasis added). Specifically, the respondent argues that nexus "does not exclusively look to whether the persecution is because of an inability of overcoming the PSG." Respondent's brief on appeal at 6.

The Immigration Judge's conclusion that (b)(6); behavior was not motivated by the respondent's inability to overcome her gender is immaterial because the Immigration Judge also separately concluded that (b)(6); behavior was not motivated by the respondent's gender, *i.e.*, the respondent's PSG of "Salvadoran women."

(b)(6); (b)(7)(C)

B. The Immigration Judge Correctly Concluded that the Respondent's Testimony and Documentary Evidence Failed to Establish a Nexus Between her Past Harm and her PSG of "Salvadoran Women."

"Generally, claims by aliens pertaining to . . . violence perpetrated by non-governmental actors will not qualify for asylum" because "[a]n alien may suffer threats and violence . . . for any number of reasons," and "private criminals are motived more often by greed or vendettas" than a protected nexus. *Matter of A-B-*, 27 I&N Dec. at 316, 318, 320, 337.

On appeal, the respondent argues the Immigration Judge "misapplied the facts in this case" when he found no nexus between the respondent's PSG of Salvadoran women and the harm (b)(6); and the Mara 18, both private actors, inflicted upon her. Respondent's brief on appeal at 7. The respondent supports this argument by citing her testimony that (b)(6); harmed her "because of the strong culture of Machismo that exists in El Salvador," as well as citing numerous country reports and news articles that demonstrate Salvadoran women "often face extreme violence, especially at the hands of their domestic partners." *Id.*

The Immigration Judge correctly applied the facts in the case when assessing the respondent's documentary evidence about domestic violence in El Salvador. The Immigration acknowledged "high levels of violence against women and the fact that culturally there is a culture of violence against women and that crimes against women are not prosecuted as they should be." I.J. at 7. The Immigration Judge did not err when, after reviewing such evidence, he reasonably concluded that "simply being a victim of this type of behavior would [not] lead to a finding that this behavior was on account of" the victim being a Salvadoran woman. *Id. See Matter of L-A-C-*, 26 I&N Dec. 516, 524-25 (BIA 2015) (noting that providing the Department of State country condition report with general country conditions not tied to the specific facts underlying the alien's claim will not suffice).

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The Immigration Judge also correctly applied the facts in this case when he concluded that the respondent's testimony about the "machismo and chauvinistic culture of El Salvador" was a "self-serving statement" because there was "no evidence that this is what" motivated the Mara 18's actions, and by inference, (b)(6); actions. I.J. at 9.

Beyond the respondent's self-serving testimony, there is insufficient evidence that (b)(6); or the Mara 18 members who threatened the respondent possessed or expressed a Machismo opinion or that they harmed the respondent or any other Salvadoran woman for being female.

Instead, the respondent's affidavit and remaining testimony demonstrate that (b)(6); motivations for harming the respondent related to the nature of their personal relationship—specifically—jealousy, possessiveness, suspicion that the respondent was cheating, and his own alcohol and drug use. Exh. 4, Tab A at 2; Tr. at 32-33. As such, the Immigration Judge reasonably concluded that, for instance, (b)(6); long-distance harassment was "motivated out of his own jealousy and selfish interests." I.J. at 9. *See Matter of A-B-*, 27 I&N Dec at 338-39 (finding that the evidence in *A-B* demonstrated the alien's husband "attacked her because of his preexisting personal relationship with the victim" as there was no evidence he attacked her "because he was aware of, and hostile to, 'married women in Guatemala who are unable to leave their relationship' . . . .").

Likewise, the evidence fails to demonstrate that the Mara 18's motivation for harming the respondent was her status as a Salvadoran woman rather than (b)(6); ability to pay them for their actions. Tr. at 39. As such, the Immigration Judge reasonably concluded that the gang members who threatened the respondent "were motivated by gang ties and by money . . . ." I.J.

(b)(6); (b)(7)(C)

at 9. *See Molina-Morales v. INS*, 237 F.3d 1048, 1052 (9th Cir. 2001) (indicating that neither "personal vendetta" nor "purely personal retribution" constitutes a protected ground for asylum).

CONCLUSION

Based on the foregoing, the Board should dismiss the respondents' appeal and affirm the Immigration Judge's decision denying the respondents' applications for asylum, withholding of removal under the INA, and withholding of removal under the regulations implementing the U.S. obligations pursuant to Article 3 of the CAT.

Respectfully submitted on this 16th day of October, 2019,

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(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the date indicated below, I served a copy of this **DEPARTMENT OF HOMELAND SECURITY'S BRIEF ON APPEAL** and any attached pages by placing a true copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process, and causing the same to be mailed by first class mail to the respondent's counsel, at the following address:

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NON-DETAINED

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

In the Matter of (b)(6); (b)(7)(C) **In Removal Proceedings**	File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY BRIEF ON APPEAL IN SUPPORT OF IMMIGRATION COURT DECISION

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(b)(6); (b)(7)(C)

INTRODUCTION

On September 5, 2019, the Immigration Judge denied the respondents' applications for asylum and withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (INA), and their applications for withholding of removal under the regulations implementing the U.S. obligations pursuant to Article 3 of the United Nations Convention Against Torture.[1] The respondents appealed this decision to the Board of Immigration Appeals (Board). The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department), files this brief in support of the Immigration Judge's decision.

ISSUE PRESENTED

The respondents make numerous appellate arguments, but in this brief, the Department addresses whether the Immigration Judge erred in: (1) failing to find a nexus between the harm the lead respondent suffered and fears in the future and her purported particular social groups (PSGs); and (2) finding the respondent failed to show she would suffer torture in Guatemala for CAT purposes.[2]

STANDARD OF REVIEW

The Board utilizes a clearly erroneous standard when reviewing underlying factual findings of an Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of Z-Z-O*, 26 I&N Dec. 586, 591 (BIA 2015). "Whether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal" is reviewed under the de novo standard. *Matter of Z-Z-O-*, 26 I&N Dec. at 591. The Board also reviews de novo whether a nexus exists between a

[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).

[2] For ease of reference, the Department refers to the lead respondent as "the respondent" for the remainder of this brief.

(b)(6); (b)(7)(C)

protected ground and "the asserted persecution." *Matter of A-C-A-A-*, 28 I&N Dec. 84, 91 (A.G. 2020).

ARGUMENT

I. The Immigration Judge did not err in failing to find a nexus between the respondent's purported PSGs and past harm or future feared harm.

On appeal, the respondent argues the Immigration Judge erred when he found no nexus between the past harm the respondent suffered from her domestic partner and her purported PSGs of "Guatemalan females," "Guatemalan women in a domestic relationship who are unable to leave," and "women viewed as property of their partner in Guatemala." Resp'ts' Opening Br. at 11-14. Specifically, the respondent argues a nexus exists between her PSGs and the domestic violence she suffered because she "would not have been harmed" but for her gender, and "expert reports" show "there is a culture of machismo in Guatemala, where women are harmed and treated as less *because* they are women." Resp'ts' Opening Br. at 12.

Even assuming, without taking a position, that the respondent's purported PSGs are cognizable, the Immigration Judge did not err when he denied asylum and statutory withholding due to a lack of nexus between the harm the respondent suffered and fears and these PSGs. The Immigration Judge correctly observed that "there was insufficient evidence that the abuser attacked the [respondent] because he was aware of and hostile to . . . or motivated by the fact" that the respondent belonged to her PSGs. I.J. at 7. The Immigration Judge did not err when he concluded that the abuser's "motivation to harm the respondent appears to be born out of the fact that he is an abusive person generally and a generally violent man" who had "a pre-existing personal relationship with the" respondent. I.J. at 8. *See also Matter of A-B-*, 27 I&N Dec. 316, 336 n.9, 339 (A.G. 2018) (stating that, "in domestic violence cases, like *A-R-C-G-*," there was no evidence that the alien's ex-husband "attacked her because he was aware of, and hostile to,

(b)(6); (b)(7)(C)

'married women in Guatemala who are unable to leave their relationship,'" and noting that "conclusory assertions of countrywide negative cultural stereotypes" do not "constitute appropriate evidence to support such asylum determinations.").

II. The Immigration Judge did not err in concluding the respondent failed to meet her burden for withholding under CAT.

The respondent argues that the Immigration Judge erred in denying withholding under CAT because he "failed to acknowledge the Guatemalan government's long history of failing to protect women in Guatemala . . . and the IJ completely omitted any mention of this in his analysis for eligibility under CAT." Respt's' Opening Br. at 18.

While the Immigration Judge may have failed to explicitly reference the Guatemalan government's response to domestic violence, government failure to protect a victim from crime committed by a private actor is insufficient to show that a public official would consent or acquiesce to the respondent's torture by her ex-domestic partner. *See Matter of J-E-*, 23 I&N Dec. 291, 299 (BIA 2002) ("[T]orture covers intentional government acts, not negligent acts or acts by private individuals not acting on behalf of the government."); *Matter of Y-L-*, 23 I&N Dec. 270, 280 (BIA 2002) ("Violence committed by individuals over whom the government has no reasonable control does not implicate the [CAT] treaty."). Therefore, the Immigration Judge did not err when he denied withholding under CAT because there was "no evidence that public officials joined in what [the abuser] was doing or agreed with what he was doing to the respondent," and there was no evidence that public officials "have or would instigate torture . . . or consent or acquiesce to torture of the respondent." I.J. at 9.

CONCLUSION

(b)(6); (b)(7)(C)

For all the foregoing reasons, the Department respectfully requests that the Board dismiss the respondents' appeal from the Immigration Judge's decision denying asylum and withholding of removal under the Act and under CAT.

Respectfully submitted on this March 3, 2021.

(b)(6); (b)(7)(C)

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(b)(6); (b)(7)(C)

CASE NO.:

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the date indicated below, I served a copy of this **DEPARTMENT OF HOMELAND SECURITY BRIEF ON APPEAL IN SUPPORT OF IMMIGRATION COURT DECISION** and any attached pages by causing the same to be served via first class mail to the person(s) listed below, at the following address:

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Date: March 3, 2021

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

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No.: (b)(6); (b)(7)(C)
In removal proceedings	)	

DEPARTMENT OF HOMELAND SECURITY'S
MOTION FOR SUMMARY AFFIRMANCE

The Department of Homeland Security (hereinafter "Department") hereby files its Motion for Summary Affirmance. The respondent appealed the decision of the Immigration Judge dated May 7, 2019,[1] denying her application for asylum, withholding of removal, and protection under the regulations implementing Article 3 of the Convention Against Torture ("CAT"). The respondent was ordered removed to El Salvador. The respondent filed a timely appeal.

The Department moves the Board to summary affirm the decision of the Immigration Judge dated May 7, 2019. 8 C.F.R. § 1003.1(e)(4)(i). The Department submits that the Immigration Judge reached the correct decision, as noted above, such that any errors that may exist are harmless or immaterial, and that the respondent's appellate arguments are not so substantial that the case warrants the issuance of a written opinion. 8 C.F.R. § 1003.1(e)(4)(i)(B).

I. EXPERT WITNESSES

The Immigration Judge did not err in affording reduced weight to the testimony and declaration of the respondent's proposed expert witness, (b)(6); (b)(7)(C), an assistant professor. An expert witness is one who has specialized "knowledge, skill, experience, training, or education." *Matter of D-R-*, 25 I&N 445, 459 (BIA 2011) (internal citations omitted). The purpose of an expert is to assist the adjudicator "to understand the evidence or to determine a fact in issue." *Id.* (citing Fed. R. Evid. 702); *see also Matter of Marcal Neto*, 25 I&N Dec. 169, 176 (BIA 2010) (stating that Immigration Judges may rely on experts "regarding matters on which [the Immigration Judges] possess little or no knowledge or substantive expertise"). When

[1] Although the decision is dated May 7, 2019, the decision was not served until May 8, 2019.

assessing whether to admit the evidence from a proposed expert witness, the Immigration Judge should consider both the reliability and relevance of the evidence and the weight that should be afforded that evidence, paying particular attention to the reliability and relevance to the issue of dispute. *Matter of J-G-T-*, 28 I&N Dec. 97, 103 (BIA 2020).

In this case, the respondent sought to establish that (b)(6); (b)(7)(C) was qualified to present expert testimony about general country conditions, government security, and issues for women in El Salvador. I.J. at 2. However, (b)(6); (b)(7)(C) curriculum vitae, declaration, and testimony failed to establish that she was qualified as an expert regarding women in El Salvador. *Id.* Instead, her testimony established that she had minimal expertise addressing any issue pertaining to women generally outside of dated interviews with female textile workers discussing working conditions. *Id.* Given the lack of any reliable evidence that (b)(6); (b)(7)(C) was qualified as an expert on gender-related issues in El Salvador, the Immigration Judge did not err in concluding that she was not an expert in that area and affording her testimony regarding those issues minimal weight.

II. ASYLUM

a. The Immigration Judge Did Not Err in Finding that the Respondent Failed to Establish Past Persecution

In order to meet his burden of proof for past persecution, the respondent must establish that (1) an incident or incidents that rise to the level of persecution, (2) were committed on account of a protected ground, and (3) were committed by the government or forces the government could not or would not control. *Niang v. Gonzales*, 422 F.3d 1187, 1194-95 (10th Cir. 2005).

b. The Immigration Judge Did Not Err in Concluding, Regardless of Whether the Proposed Particular Social Group Is Cognizable, that There Was No Nexus Between the Experiences of the Respondent and a Protected Ground

With regard to the protected grounds, the respondent advanced two PSGs: (1) Salvadoran women, and (2) young, single Salvadoran women. I.J. at 4. Without expressly addressing whether the Immigration Judge found either proposed group to be legally cognizable,[2] the Immigration Judge properly concluded that the proposed protected basis was not a primary motivating factor for the issues the respondent experiences or fears. *Id.*

An applicant for asylum must show that her race, religion, nationality, political opinion, or membership in a PSG is "one central reason" for the persecution. INA § 208(b)(1)(B)(i); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211–12 (BIA 2007); *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *J-B-N- & S-M-*, 24 I&N Dec. at 214). For persecution to be on account of membership in a particular social group, the respondent's "protected characteristic must be central to the persecutor's decision to act against" her. *See Niang*, 422 F.3d at 1201; *Matter of N-M-*, 25 I&N Dec. 526, 529, 532 (BIA 2011) (noting that persecution must be "because of" the protected characteristic even if other

[2] Where a claim is fatally flawed as to any element, the Immigration Judge need not consider the other elements in order to deny. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018).

motivations to harm exist, which is a finding of fact) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)). As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Matter of A-B-*, 27 I&N Dec. 316, 338-39 (A.G. 2018).

The Immigration Judge did not err in concluding that the various individuals who harassed the respondent were not motivated by her gender, age, or relationship status. Although the events were unfortunate, these were individuals motivated by criminal or prurient interests. I.J. at 4-5. The respondent currently fears only one individual, a bus driver, who she believes is obsessed with her and not motivated by animosity towards the female gender. I.J. at 4; *Matter of T-M-B-*, 21 I&N Dec. 775, 777 (BIA 1997) (regardless of how disturbing the conduct, the critical issue remains the motivation for such behavior). As the respondent failed to establish that her gender or other portions of her proposed PSGs were a central reason for her experiences in El Salvador or her ongoing fear of the bus driver, the Immigration Judge did not err in denying her application for asylum.

c. The Immigration Judge Did Not Err in Finding that the Respondent Failed to Establish that Her Government Was Unable or Unwilling to Protect Her

Where the alleged persecutor is unaffiliated with the government, the applicant must show that the government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993); *A-B-*, 27 I&N Dec. at 319 (citing *Acosta*, 19 I&N Dec. at 222). In instances where the applicant is a victim of private criminal activity, "the analysis must also 'consider whether government protection is available.'" *A-B-*, 27 I&N Dec. at 320 (quoting

M-E-V-G-, 26 I&N Dec. at 243). "'[V]iolence by private citizens . . . , absent proof that the government is unwilling or unable to address it, is not persecution[.]'" *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) (quoting *Butt v. Keisler*, 506 F.3d 86, 92 (1st Cir.2007)). Relevant factors include both "the government's response" to the claimed persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470, 476 (6th Cir. 2019).

"No country provides its citizens with complete security from private criminal activity, and perfect protection is not required." *A-B-*, 27 I&N Dec. at 343. Rather "[a] government's steps 'to punish the persons responsible for the violence' supports a conclusion that it is not unwilling or unable to protect individuals who have been the victims of . . . attacks." *Bitsin v. Holder*, 719 F.3d 619, 630 (7th Cir. 2013) (quoting *Vahora v. Holder*, 707 F.3d 904, 908 (7th Cir.2013)). As such, an applicant "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *A-B-*, 27 I&N Dec. at 338.

Although the government of El Salvador may at times have difficulty controlling interpersonal violence, "where a government is 'making every effort to combat' violence by private actors, and its "inability to stop the problem" is not distinguishable "from any other government's struggles," the private violence has no government nexus and does not constitute persecution." *Khan*, 727 F.3d at 7 (quoting *Burbiene v. Holder*, 568 F.3d 251 (1st Cir. 2009)).

Despite the various issues that the respondent experienced in El Salvador, she declined to tell anyone of the harassment she experienced. I.J. at 3. The respondent did report the bus driver who was harassing her right before departing for the United States; however, as reflected in the report, she declined to pursue the matter formally as she told the police that she was readying her

departure for the United States. Exh. 9 at 13-14. There is no evidence in the record that would support her assertion that the government was unable or unwilling to assist her. Instead, the evidence shows that she was offered assistance when she did report the issue with the bus driver to police but declined to have the case pursued. Therefore, the Immigration Judge correctly found that the respondent failed to establish this element of her claim. I.J. at 5.

III. WITHHOLDING OF REMOVAL

To establish eligibility for withholding of removal, an alien must show that she is unwilling to return to her country or is unable to avail himself of that country's protection because she has suffered past persecution or has a well-founded fear of future persecution on account of one of five protected grounds. INA § 241(b)(3). The respondent must establish a "clear probability" of persecution, meaning that it is "more likely than not" that she will be subject to persecution on account of a protected ground if returned to the country from which she seeks withholding of removal. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987). As the respondent failed to meet her burden of proof for asylum, which is a lower evidentiary standard, she cannot establish eligibility for withholding of removal.

IV. PROTECTION UNDER THE REGULATIONS IMPLEMENTING THE UNITED STATES' OBLIGATIONS UNDER THE CONVENTION AGAINST TORTURE[3]

The Immigration Judge did not err in concluding that the respondent failed to meet her burden of proof to establish that it is more likely than not that she would be tortured if she returns to

[3] 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

El Salvador. To be eligible for deferral under the Convention Against Torture, the respondent must establish "that it is more likely than not that [he] will be subject to torture by a public official, or at the instigation or with the acquiescence of such an official." *Matter of M-B-A-*, 23 I&N Dec. 474, 477 (BIA 2002); 8 C.F.R. § 1208.16(c)(2). In seeking withholding or deferral of removal under the Convention Against Torture, the burden of proof is squarely on the applicant; if the evidence is inconclusive, the applicant has not met his burden. *Matter of J-F-F-*, 23 I&N Dec. 912, 917 (A.G. 2006) (citing 8 C.F.R. § 1208.16(c)(2)).

To determine whether the respondent has met her burden of proof of more likely than not, the court can consider (1) evidence of past torture, (2) whether an individual can relocate to avoid torture, (3) evidence of gross, flagrant, or mass human rights violations in the country of return, and (4) other relevant country condition information for the country of return. 8 C.F.R. §§ 1208.16(c)(3), 1208.17(a). To meet the burden of proof when stringing a series of suppositions together for deferral, the alien must establish that *each link* in the "hypothetical chain of events" in support of the claim is more likely than not to occur. *J-F-F-*, 23 I&N Dec. at 917-18 (emphasis added). If even one link is not proven to be more likely than not, the alien cannot meet her burden. *Id.* at 918 n.4.

Torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted" to obtain information or a confession, or punish, or to intimidate or coerce the victim or another party. 8 C.F.R. § 1208.18(a)(1)-(2). However, it does not include "lesser forms of cruel, inhuman, or degrading treatment or punishment." *Id.* "For an

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removal context in principal part at 8 C.F.R. § 1208.16(c) - .18).

act to constitute torture it must be: (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions." *Matter of J-E-*, 23 I&N Dec. 291, 297 (BIA 2002) (citing 8 C.F.R. § 208.18(a)), *overruled on other grounds by Azanov v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004). An alien also must show the torture would be inflicted by or at the instigation of a public official or a person acting in an official capacity. 8 C.F.R. § 208.17(a)(1). The torturous act must have an "illicit purpose." *J-E-*, 23 I&N Dec. at 298. It must be an intentional act directed against a person in the offender's custody or control. *Id.* at 298-99. "[N]egligent acts or acts by private individuals not acting on behalf of the government" are not protected. *Id.* at 299. "In order to constitute torture, the act must be *specifically intended* to inflict severe pain or suffering." *Id.* at 300-01 (emphasis in original).

Torture must be inflicted by or with the acquiescence of the government in the country of return. 8 C.F.R. § 1208.18(a)(1). Acquiescence requires a public official to have prior awareness of the activity and "thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7). In the Tenth Circuit, acquiescence can be established by "willful blindness," in which government officials have actual knowledge of or "turn a blind eye to torture." *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1192 (10th Cir. 2005) (citing *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354 (5th Cir. 2002)). The respondent can establish willful blindness by showing that government officials are generally aware of torture but do nothing to prevent it. *Karki v. Holder*, 715 F.3d 792, 806-07 (10th Cir. 2013) (holding

that actual knowledge is not required where the evidence establishes "that the government regularly fails to take action to prevent or punish Maoist acts of torture"). Notwithstanding the willful blindness standard, evidence of government corruption or ineffectiveness alone remains insufficient to demonstrate acquiescence. *Matter of Y-L-*, 23 I&N Dec. 270, 283 (A.G. 2002); *see also Matter of O-F-A-S-*, 28 I&N Dec. 35, 40-41 (A.G. 2020) (noting that there is no separate rogue official exception to torture, and torture requires a government official acting in his official capacity regardless of rank within the power hierarchy).

The Immigration Judge did not err in concluding that the respondent failed to establish her eligibility for this form of protection from removal. I.J. at 6-7. Not only has the respondent never been tortured or harmed to a level arising to that of persecution, she did not present any evidence of a likelihood that she would be tortured by the government or with its willful blindness, as the police were apparently willing to investigate her claim against the bus driver prior to her declination of the offer to file a formal complaint. Exh. 9 at 13-14. As the respondent failed to establish multiple critical links in her hypothetical chain, the Immigration Judge correctly denied this form of protection. I.J. at 7; *J-F-F-*, 23 I&N Dec. at 917-18.

V. CONCLUSION

The respondent failed to meet her burden of proof for asylum, withholding of removal, and CAT. She failed to establish any protected ground or that any harm (experienced or feared) was on account of a protected ground. As such, the Immigration Judge correctly denied the application based upon the respondent's inability to establish that she was a refugee or likely to be tortured.

(b)(6); (b)(7)(C)

In the alternative, should the Board determine that summary affirmance of the Immigration Judge's decision is not appropriate, the Department submits that none of the six circumstances warranting review by a three-member panel are present in this case, and that the Immigration Judge's decision should otherwise be affirmed by means of a brief order. 8 C.F.R. § 1003.1(e)(5) & (6).

Respectfully submitted on this 17th day of December, 2020,

(b)(6); (b)(7)(C)

Assistant Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

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PROOF OF SERVICE

On December 17, 2020, I, (b)(6); Assistant Chief Counsel, mailed or delivered a copy of this **DEPARTMENT OF HOMELAND SECURITY'S MOTION FOR SUMMARY AFFIRMANCE** and any attached pages to:

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By placing it in the designated bin for service on respondent's counsel at the above address by the U.S. Postal Service, postage prepaid.

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

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No.: (b)(6); (b)(7)(C)
In removal proceedings	)	

DEPARTMENT OF HOMELAND SECURITY'S
MOTION FOR SUMMARY AFFIRMANCE

The Department of Homeland Security (hereinafter "Department") hereby files its Motion for Summary Affirmance. The respondent appealed the decision of the Immigration Judge dated February 15, 2019, denying her applications for asylum, withholding of removal, and protection under the regulations implementing Article 3 of the Convention Against Torture ("CAT"). The respondent was ordered removed to El Salvador. The respondent filed a timely appeal.

The Department moves the Board to summary affirm the decision of the Immigration Judge dated February 15, 2019. 8 C.F.R. § 1003.1(e)(4)(i). The Department submits that the Immigration Judge reached the correct decision, as noted above, such that any errors that may exist are harmless or immaterial, and that the respondent's appellate arguments are not so substantial that the case warrants the issuance of a written opinion. 8 C.F.R. § 1003.1(e)(4)(i)(B).

I. Asylum

The Immigration Judge properly determined that the respondent failed to meet her burden of proof for asylum, withholding of removal, and protection under the implementing regulations for CAT protection. An applicant for asylum bears the burden of demonstrating eligibility for relief. INA § 240(c)(4)(A)(i). To establish eligibility for relief under section 208(a) of the Act, an alien must show that he or she is unwilling to return to his or her country or is unable to avail him or herself of that country's protection because he or she has suffered past persecution or has a well-founded fear of future persecution on account of one of five protected grounds. INA § 208(b)(1); 8 C.F.R. § 1208.13(a); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 230 (BIA 2014).

a. <u>The Immigration Judge Correctly Determined That the Respondent Failed to</u>

Demonstrate That The Harm She Experienced or Fears Was on Account of a Protected Ground

In order to meet their burden of proof for past persecution, the respondent must establish that (1) an incident or incidents that rise to the level of persecution, (2) were committed on account of a protected ground, and (3) were committed by the government or forces the government could not or would not control. *Niang v. Gonzales*, 422 F.3d 1187, 1194-95 (10th Cir. 2005).

The respondent asserted that she was harmed on account of membership in three separate social groups. She defined her groups as: (1) Salvadoran women; (2) Salvadoran women who refuse to be subservient in domestic relationships; and (3) Salvadoran women who are viewed as property by virtue of their status in a domestic relationship and Salvadoran women who are unable to leave their domestic relationships. I.J. at 6.

When the basis of seeking protection from removal is as a member of a particular social group, the applicant "must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *M-E-V-G-*, 26 I&N Dec. at 237. As to particularity, the "terms used to describe the group [must] have commonly accepted definitions in the society of which the group is a part." *Id.* at 239 (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2008)). The group must have "discrete and . . . definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)); *see also Matter of A-B-*, 27 I&N Dec. 316, 326 (A.G. 2018) (holding that particular social groups must avoid "being too broad to have definable boundaries

and too narrow to have larger significance in society").

The Immigration Judge properly concluded that the second and third groups were not defined with sufficiently particular or that the evidence established the groups as socially distinct within Salvadoran society. I.J. at 6. The Immigration Judge did not expressly rule on the respondent's first group, Salvadoran women, as he noted that it was not a central reason for the harm regardless of whether it is a cognizable group. I.J. at 6 n.2.

b. The Immigration Judge Correctly Found That The Proposed Social Group of "Salvadoran Women" Was Not a Central Reason For Her Ex-Partner's Actions

An applicant for asylum must show that his or her race, religion, nationality, political opinion, or membership in a PSG is "one central reason" for the persecution. INA § 208(b)(1)(B)(i); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211–12 (BIA 2007); *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *J-B-N- & S-M-*, 24 I&N Dec. at 214). For persecution to be on account of membership in a particular social group, the respondent's "protected characteristic must be central to the persecutor's decision to act against" him. *See Niang*, 422 F.3d at 1201.

In this case, the Immigration Judge found that the proposed groups, even if cognizable, were not a central reason why the respondent was targeted. While acknowledging that El Salvador faces issues relating to the treatment of women generally, the Immigration Judge concluded that the respondent's evidence failed to establish that her persecutor, her ex-partner,

was motivated to harm the respondent due to any of her gender-related social groups versus a personal, criminal motivation. I.J. at 6-7.

c. The Immigration Judge Did Not Err in Concluding that the Respondent Failed to Establish that the Salvadoran Government is Unable or Unwilling to Protect the Respondent from the Private Actor She Fears

Where the alleged persecutor is unaffiliated with the government, the applicant must show that the government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993); *Matter of A-B-*, 27 I&N Dec. 316, 319 (A.G. 2018) (citing *Acosta*, 19 I&N Dec. at 222), *clarified by*, *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021). In instances where the applicant is a victim of private criminal activity, "the analysis must also 'consider whether government protection is available.'" *A-B-*, 27 I&N Dec. at 320 (quoting *M-E-V-G-*, 26 I&N Dec. at 243). "'[V]iolence by private citizens . . . , absent proof that the government is unwilling or unable to address it, is not persecution[.]'" *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) (quoting *Butt v. Keisler*, 506 F.3d 86, 92 (1st Cir.2007)). Relevant factors include both "the government's response" to the claimed persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470, 476 (6th Cir. 2019).

"No country provides its citizens with complete security from private criminal activity, and perfect protection is not required." *A-B-*, 27 I&N Dec. at 343. Rather "[a] government's steps 'to punish the persons responsible for the violence' supports a conclusion that it is not unwilling or unable to protect individuals who have been the victims of . . . attacks." *Bitsin v. Holder*, 719 F.3d 619, 630 (7th Cir. 2013) (quoting *Vahora v. Holder*, 707 F.3d 904, 908 (7th

Cir.2013)). As such, an applicant "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *A-B-*, 27 I&N Dec. at 338.

Although the government of El Salvador may at times have difficulty controlling interpersonal violence, "where a government is 'making every effort to combat' violence by private actors, and its "inability to stop the problem" is not distinguishable "from any other government's struggles," the private violence has no government nexus and does not constitute persecution." *Khan*, 727 F.3d at 7 (quoting *Burbiene v. Holder*, 568 F.3d 251 (1st Cir. 2009)).

Here, the Immigration Judge correctly determined that the respondent, who never reported any abuse by her ex-partner, failed to establish that the Salvadoran government was unable or unwilling to protect her. I.J. at 8. Although a neighbor once called the police, there was no evidence that the respondent cooperated or sought any assistance when the police responded to the call. *Id.* Moreover, the country condition evidence demonstrates the myriad of legal protections available to women who experience domestic and sexual violence, albeit imperfectly applied within El Salvador. *Id.*; *A-B-*, 28 I&N Dec. at 205-06 (noting that "[a]bsolute prevention of private criminal acts" is not the standard for being unable or unwilling as every country in the world would fail such a test).

Moreover, as the respondent failed to meet the lower burden for asylum, she necessarily failed to establish her eligibility for withholding of removal. I.J. at 9.

II. Protection Under the Regulations Implementing the United States' Obligations under Article 3 of the Convention Against Torture

The Immigration Judge correctly found that the respondent failed to meet her burden of proof for protection under the implementing regulations for CAT protection. To be eligible for

deferral under the Convention Against Torture, the respondent must establish "that it is more likely than not that she will be subject to torture by a public official, or at the instigation or with the acquiescence of such an official." *Matter of M-B-A-*, 23 I&N Dec. 474, 477 (BIA 2002); 8 C.F.R. § 1208.16(c)(2). To determine whether a respondent has met her burden of proof of more likely than not, the Court can consider (1) evidence of past torture, (2) whether an individual can relocate to avoid torture, (3) evidence of gross, flagrant, or mass human rights violations in the country of return, and (4) other relevant country condition information for the country of return. 8 C.F.R. §§ 1208.16(c)(3), 1208.17(a). However, one cannot demonstrate eligibility based upon a string of suppositions unless each step in the hypothetical chain of events is more likely than not to occur. *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006).

Torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted" to obtain information or a confession, or punish, or to intimidate or coerce the victim or another party. 8 C.F.R. § 1208.18(a)(1)-(2). However, it does not include "lesser forms of cruel, inhuman, or degrading treatment or punishment." *Id.*; *see also Witjaksono v. Holder,* 573 F.3d 968, 977 (10th Cir. 2009) (holding that physical assaults did not rise to the level of persecution where they did not "requir[e] medical attention").

Torture must be inflicted by or with the acquiescence of the government in the country of return. 8 C.F.R. § 1208.18(a)(1). Acquiescence requires a public official to have prior awareness of the activity and "thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7). In the Tenth Circuit, acquiescence can be established by "willful blindness," in which government officials have actual knowledge of or

"turn a blind eye to torture." *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1192 (10th Cir. 2005) (citing *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354 (5th Cir. 2002)). The respondent can establish willful blindness by showing that government officials are generally aware of torture but do nothing to prevent it. *Karki v. Holder*, 715 F.3d 792, 806-07 (10th Cir. 2013) (holding that actual knowledge is not required where the evidence establishes "that the government regularly fails to take action to prevent or punish Maoist acts of torture"). Notwithstanding the willful blindness standard, evidence of government corruption or ineffectiveness alone remains insufficient to demonstrate acquiescence. *Matter of Y-L-*, 23 I&N Dec. 270, 283 (A.G. 2002) ("To suggest that this standard can be met by evidence of isolated rogue agents engaging in extrajudicial acts of brutality, which are not only in contravention of the jurisdiction's laws and policies, but are committed despite authorities' best efforts to root out such misconduct, is to empty the Convention's volitional requirement of all rational meaning."); *see also Matter of O-F-A-S-*, 28 I&N Dec. 35, 40-41 (A.G. 2020) (noting that there is no separate rogue official exception to torture, and torture requires a government official acting in his official capacity regardless of rank within the power hierarchy).

Fear of generalized crime is not sufficient to meet the burden for Convention Against Torture. *Matter of S-V-*, 22 I&N Dec. 1306, 1313 (BIA 2000) (holding that mass violations of human rights are insufficient to prove a particular individual is more likely than not to be subjected to torture); *Matter of G-K-*, 26 I&N Dec. 88, 97 (BIA 2013).

In the respondent's case, the Salvadoran government did not turn a blind eye. Indeed, they were not aware of the problems as the respondent did not report the abuse by her ex-partner.

I.J. at 8. Additionally, the respondent was able to leave her ex-partner in 2012 and avoid further harm from him. I.J. at 9-10. As the respondent was able to relocate to avoid further harm and her claim was based upon a series of unsupported suppositions that her ex-partner would continue to seek her out, the Immigration Judge did not err in concluding that the she failed to meet her burden of proof for CAT protection.

III. Conclusion

The respondent failed to meet her burden of proof for asylum, withholding of removal, and CAT. She failed to establish any protected ground or that any harm (experienced or feared) was on account of a protected ground. The Immigration Judge likewise did not err in denying CAT as the respondent failed to establish that the Salvadoran government would be willfully blind to any harmful action by her ex-partner or that he would seek her out for torture given that he never harmed her after she left him in 2012.

In the alternative, should the Board determine that summary affirmance of the Immigration Judge's decision is not appropriate, the Department submits that none of the six circumstances warranting review by a three-member panel are present in this case, and that the Immigration Judge's decision should otherwise be affirmed by means of a brief order. 8 C.F.R. § 1003.1(e)(5) & (6).

Respectfully submitted on this 23rd day of February, 2021,

(b)(6); (b)(7)(C)

Assistant Chief Counsel
U.S. Immigration and Customs Enforcement

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

PROOF OF SERVICE

On February 23, 2021, I, (b)(6); (b)(7)(C) Assistant Chief Counsel, mailed or delivered a copy of this **DEPARTMENT OF HOMELAND SECURITY'S MOTION FOR SUMMARY AFFIRMANCE** and any attached pages to:

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_____ 2/23/2021

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

In the Matters of:	File Nos.:	(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)		
In removal proceedings		

DEPARTMENT OF HOMELAND SECURITY'S
MOTION FOR SUMMARY AFFIRMANCE

The Department of Homeland Security (hereinafter "Department") hereby files its Motion for Summary Affirmance. The respondents appealed the decision of the Immigration Judge dated December 12, 2018, denying their applications for asylum, withholding of removal, and protection under the regulations implementing Article 3 of the Convention Against Torture ("CAT"). The respondents were ordered removed to El Salvador. The respondents filed a timely appeal.

The Department moves the Board to summary affirm the decision of the Immigration Judge dated December 12, 2018. 8 C.F.R. § 1003.1(e)(4)(i). The Department submits that the Immigration Judge reached the correct decision, as noted above, such that any errors that may exist are harmless or immaterial, and that the respondents' appellate arguments are not so substantial that the case warrants the issuance of a written opinion. 8 C.F.R. § 1003.1(e)(4)(i)(B).

I. Asylum

The Immigration Judge properly determined that the respondents failed to meet their burden of proof for asylum, withholding of removal, and protection under the implementing regulations for CAT protection. An applicant for asylum bears the burden of demonstrating eligibility for relief. INA § 240(c)(4)(A)(i). To establish eligibility for relief under section 208(a) of the Act, an alien must show that he or she is unwilling to return to his or her country or is unable to avail him or herself of that country's protection because he or she has suffered past persecution or has a well-founded fear of future persecution on account of one of five protected grounds. INA § 208(b)(1); 8 C.F.R. § 1208.13(a); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 230 (BIA 2014).

a. <u>The Immigration Judge Correctly Determined That the Respondents Failed to</u>

Demonstrate That The Harm They Experienced or Fear Was on Account of a Protected Ground

In order to meet their burden of proof for past persecution, the respondents must establish that (1) an incident or incidents that rise to the level of persecution, (2) were committed on account of a protected ground, and (3) were committed by the government or forces the government could not or would not control. *Niang v. Gonzales*, 422 F.3d 1187, 1194-95 (10th Cir. 2005).

The Immigration Judge found that the respondents had not suffered past persecution based upon the extortionistic threats. I.J. at 6. Regarding their ongoing fear of return due to extortion and concerns about future gang recruitment, the respondents failed to establish that the harm was on account of a protected ground. The respondents based their application upon two proposed particular social groups defined as: (1) "single mother (woman) of lower socio-economic status, immutable trait of being a woman (single mother) within the poor class of El Salvador," and (2) "family that has resisted recruitment by the Mara in El Salvador." *Id.*

When the basis of seeking protection from removal is as a member of a particular social group, the applicant "must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *M-E-V-G-*, 26 I&N Dec. at 237. As to particularity, the "terms used to describe the group [must] have commonly accepted definitions in the society of which the group is a part." *Id.* at 239 (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2008)). The group must have "discrete and . . . definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Ochoa v. Gonzales*, 406 F.3d

1166, 1170-71 (9th Cir. 2005)); *see also Matter of A-B-*, 27 I&N Dec. 316, 326 (A.G. 2018) (holding that particular social groups must avoid "being too broad to have definable boundaries and too narrow to have larger significance in society").

The Immigration Judge properly concluded that such groups as defined are not sufficiently particular or socially distinct within Salvadoran society. I.J. at 7-9. Not only was the group overbroad, the respondents did not appear to actually be members of either group. I.J. at 7, 9. Due to the failure to present a cognizable PSG, the Immigration Judge did not err in denying the application.[1]

b. The Immigration Judge Correctly Found That The Proposed Social Group Was Not a Central Reason For The Cartel's Actions

With regard to the protected grounds, the respondents advanced two PSGs as noted above. I.J. at 6. An applicant for asylum must show that his or her race, religion, nationality, political opinion, or membership in a PSG is "one central reason" for the persecution. INA § 208(b)(1)(B)(i); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211–12 (BIA 2007); *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *J-B-N- & S-M-*, 24 I&N Dec. at 214). For persecution to be on account of

[1] As to the respondents' assertion that past persecution alone satisfies the definition of a refugee, that claim is legally incorrect. *Compare* Resp. Br. at 6-7, *with* INA §§ 101(a)(42)(A) (defining a refugee), 208 (providing the requirements to establish eligibility for asylum). Moreover, the Immigration Judge determined that they did not suffer past persecution. I.J. at 6.

membership in a particular social group, the respondent's "protected characteristic must be central to the persecutor's decision to act against" him. *See Niang*, 422 F.3d at 1201.

In this case, the Immigration Judge found that the proposed group was not a central reason why the respondents were targeted. Instead, the record is clear that the cartel was seeking to improve its own financial assets by extorting the respondents as they had access to money. I.J. at 9-11; Exh. 4 (noting the indiscriminate nature of gang violence and extortion). As the Immigration Judge correctly noted, the evidence establishes that this was a personal criminal motivation, as even the respondent's testimony was that gangs target anyone who has access to money. I.J. at 10; *M-E-V-G-*, 26 I&N Dec. at 250-51 (noting that although certain segments of a particular society may be more susceptible to gang violence, that is insufficient to create a PSG); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008) (the existence of prevalent gang violence is insufficient to establish a well-founded fear of persecution).

II. Protection Under the Regulations Implementing the United States' Obligations under Article 3 of the Convention Against Torture

The Immigration Judge correctly found that the respondents failed to meet their burden of proof for protection under the implementing regulations for CAT protection. To be eligible for deferral under the Convention Against Torture, the respondent must establish "that it is more likely than not that [he] will be subject to torture by a public official, or at the instigation or with the acquiescence of such an official." *Matter of M-B-A-*, 23 I&N Dec. 474, 477 (BIA 2002); 8 C.F.R. § 1208.16(c)(2). To determine whether a respondent has met his burden of proof of more likely than not, the Court can consider (1) evidence of past torture, (2) whether an individual can relocate to avoid torture, (3) evidence of gross, flagrant, or mass human rights violations in the

country of return, and (4) other relevant country condition information for the country of return. 8 C.F.R. §§ 1208.16(c)(3), 1208.17(a). However, one cannot demonstrate eligibility based upon a string of suppositions unless each step in the hypothetical chain of events is more likely than not to occur. *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006).

Torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted" to obtain information or a confession, or punish, or to intimidate or coerce the victim or another party. 8 C.F.R. § 1208.18(a)(1)-(2). However, it does not include "lesser forms of cruel, inhuman, or degrading treatment or punishment." *Id.*; *see also Witjaksono v. Holder,* 573 F.3d 968, 977 (10th Cir. 2009) (holding that physical assaults did not rise to the level of persecution where they did not "requir[e] medical attention").

Torture must be inflicted by or with the acquiescence of the government in the country of return. 8 C.F.R. § 1208.18(a)(1). Acquiescence requires a public official to have prior awareness of the activity and "thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7). In the Tenth Circuit, acquiescence can be established by "willful blindness," in which government officials have actual knowledge of or "turn a blind eye to torture." *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1192 (10th Cir. 2005) (citing *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354 (5th Cir. 2002)). The respondent can establish willful blindness by showing that government officials are generally aware of torture but do nothing to prevent it. *Karki v. Holder*, 715 F.3d 792, 806-07 (10th Cir. 2013) (holding that actual knowledge is not required where the evidence establishes "that the government regularly fails to take action to prevent or punish Maoist acts of torture"). Notwithstanding the

willful blindness standard, evidence of government corruption or ineffectiveness alone remains insufficient to demonstrate acquiescence. *Matter of Y-L-*, 23 I&N Dec. 270, 283 (A.G. 2002) ("To suggest that this standard can be met by evidence of isolated rogue agents engaging in extrajudicial acts of brutality, which are not only in contravention of the jurisdiction's laws and policies, but are committed despite authorities' best efforts to root out such misconduct, is to empty the Convention's volitional requirement of all rational meaning."); *see also Matter of O-F-A-S-*, 28 I&N Dec. 35, 40-41 (A.G. 2020) (noting that there is no separate rogue official exception to torture, and torture requires a government official acting in his official capacity regardless of rank within the power hierarchy).

Fear of generalized crime is not sufficient to meet the burden for Convention Against Torture. *Matter of S-V-*, 22 I&N Dec. 1306, 1313 (BIA 2000) (holding that mass violations of human rights are insufficient to prove a particular individual is more likely than not to be subjected to torture); *Matter of G-K-*, 26 I&N Dec. 88, 97 (BIA 2013).

In the respondents' case, the Salvadoran government did not turn a blind eye. Indeed, they were not aware of any problems as the respondents did not report the extortion by the gang. I.J. at 12-13. Despite evidence of corruption, the evidence also shows that the Salvadoran government makes efforts to control the gang, albeit without complete success. Exh. 4. Therefore, the Immigration Judge did not err in concluding that the respondents failed to meet their burden of proof for CAT protection.

III. Conclusion

The respondents failed to meet their burden of proof for asylum, withholding of removal,

and CAT. They failed to establish any protected ground or that any harm (experienced or feared) was on account of a protected ground. The Immigration Judge likewise did not err in denying CAT as the respondents failed to establish that the Salvadoran government would be willfully blind to any harmful action by the gang.

In the alternative, should the Board determine that summary affirmance of the Immigration Judge's decision is not appropriate, the Department submits that none of the six circumstances warranting review by a three-member panel are present in this case, and that the Immigration Judge's decision should otherwise be affirmed by means of a brief order. 8 C.F.R. § 1003.1(e)(5) & (6).

Respectfully submitted on this 21st day of January, 2021,

(b)(6); (b)(7)(C)
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U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

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PROOF OF SERVICE

On January 21, 2021, I, (b)(6); , Assistant Chief Counsel, mailed or delivered a copy of this **DEPARTMENT OF HOMELAND SECURITY'S MOTION FOR SUMMARY AFFIRMANCE** and any attached pages to:

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By placing it in the designated bin for service on respondent's counsel at the above address by the U.S. Postal Service, postage prepaid.

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NONDETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
DENVER, COLORADO

In the Matters of:

(b)(6); (b)(7)(C)

In removal proceedings

File Nos.: (b)(6); (b)(7)(C)

Immigration Judge: Melanie Corrin Next Hearing: N/A

DEPARTMENT OF HOMELAND SECURITY'S
WRITTEN CLOSING

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), through the undersigned, hereby submits to the Immigration Court the following written closing. The respondents bore the burden to satisfy this court they qualified as refugees under INA § 101(a)(42)(A). In short, the respondents had to prove that they "experienced persecution or has a well-founded fear of persecution in [their] home country on account of [their] race, religion, nationality, membership in a particular social group, or political opinion." *Matter of A-E-M*, 21 I&N Dec. 1157, 1159 (BIA 1998). A fear is well founded when it is genuine and where "a reasonable person in the applicant's circumstances would fear persecution." *Id.* The respondents failed to meet their burden in this case. Here, the harm the respondents claim to have suffered in Honduras was not on account of a protected ground.

The respondents claimed to have suffered persecution based on membership in various alleged particular social groups. As the claim turned on membership in a particular social group, the respondents needed to show membership in a group that 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 M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014).

Here, the respondents' asserted particular social groups were:

1. Honduran women in a domestic relationship;
2. Honduran women;
3. Immediate family members of (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

4. Immediate family members of (b)(6); (b)(7)(C)
5. Immediate family members of (b)(6); (b)(7)(C)

None of the three particular social groups alleged entitled the respondents to relief.

To be eligible for asylum, an applicant "must establish membership in a particular and socially distinct group that exists independently of the alleged underlying harm, demonstrate that their persecutors harmed them on account of their membership in that group rather than for personal reasons, and establish that the government protection from such harm in their home country is so lacking that their persecutors' actions can be attributed to the government." *Matter of A-B-*, 27 I&N Dec. 316, 317 (BIA 2018). Relevant here, "[g]enerally, claims by aliens pertaining to domestic violence. . . will not qualify for asylum." *Id*. at 320.

"If an asylum application is fatally flawed in one respect, an immigration judge or the Board need not examine the remaining elements of the asylum claim." *Id.* at 316. In this case, the evidence shows that the lead respondent was the victim of domestic violence by her former domestic partner, (b)(6); She testified that no one other than (b)(6); had harmed her. And given the evidence, it appears that he harmed her because of her personal relationship with him. Indeed, the evidence did not establish, for instance, that (b)(6); targeted "Honduran women" in general; to be sure, (b)(6); had a sister, and the respondent was not aware that (b)(6); had ever harmed her. Moreover, there was no evidence in the case that (b)(6); generally targeted other "Honduran women in a domestic relationships" or that he otherwise had some animosity towards

(b)(6); (b)(7)(C)

women in domestic relationships.[1] Likewise, rather than a nexus to a protected ground, the respondent was harmed for "personal reasons," which does not entitle her to asylum. *Matter of A-B-*, 27 I&N Dec. at 317.

As to the other asserted PSGs related to immediate family members, rather than three distinct groups, it appear there is one group composed of three specific people: (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) and (b)(6); (b)(7)(C) (Respondent's Written Closing at 9.) And the violence here occurred within that group. The record contains no evidence, for instance, that (b)(6); harmed anyone other than (b)(6); and (b)(6); The record also does not suggest that (b)(6); targeted the respondent's siblings, his own siblings, or any parent. Moreover, there was no evidence that anyone other than (b)(6); targeted any individual in these asserted groups. In other words, rather than harm on account of a family social group, the evidence here indicated that (b)(6); harmed the respondents based his own personal relationship with them. Again, as stated in *Matter of A-B-*, asylum law does not generally provide relief to victims of domestic violence. *Id.* at 320.

Notably, "a particular social group must exist independently of the harm asserted in an application for asylum." *Id.* at 316. And the social group cannot be defined from the perspective of the persecutor. *Id.* at 330. The immediate family group asserted here was based on the perspective of (b)(6); (b)(7)(C There was no evidence showing that society in general recognized the family unit—the respondent and Elmer were not married, and the respondent and (b)(6); (b)(7)(did not

[1] The respondent thought that, perhaps (b)(6); may have harmed other girlfriends. But again, if he did, it seems that harm would similarly have been for personal reasons relating to domestic violence.

(b)(6); (b)(7)(C)

consistently live together. In fact, (b)(6); had other girlfriends, and he even a child with at least one other woman. There was no evidence that society viewed the group of (b)(6); and the respondents as particularly distinct from the group of (b)(6); and his other ex-domestic partner and child. Likewise, to the extent there was an immediate family unit in this case, it would arise from (b)(6); perspective alone and thus not amount to a particular social group.

Furthermore, even assuming the respondents belonged to a cognizable particular social group and that there was harm on account of membership in that group, the respondents failed to establish that the government was unable or unwilling to protect them. *See* INA § 101(A)(42) (a refugee is a person whom the government is unable or unwilling to protect); *Matter of A-B-*, 27 I&N Dec. at 326, 337. "An applicant seeking to establish persecution based on violent conduct of a private actor must show more than the government's difficulty controlling private behavior. The applicant must show that the government condoned the private actions or demonstrated an inability to protect the victim." *Matter of A-B-*, 27 I&N Dec. at 316. Here, the Honduras Human Rights Report indicated that there were laws criminalizing domestic violence and facilities established to assist victims. The respondent never sought to utilize those resources. Likewise, while there was violence by a private actor, the respondent failed to establish that the government was unable or unwilling to control it.

In conclusion, the Department requests that the court deny the respondent's applications for asylum, withholding of removal, and CAT because the respondent failed in her burden to establish that she was persecuted, or that she feared future persecution, on account of a protected ground.

(b)(6); (b)(7)(C)

Respectfully submitted on this 10th day of June, 2018.

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Proof of Service

On July 10, 2018, the undersigned attorney mailed or delivered a copy of this document and any attached pages to the respondent at the following address:

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by placing such copy in an envelope and placing said envelope, having been addressed to the name and address indicated, in my office's receptacle designated for official "out-going" regular mail.

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

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No.: (b)(6); (b)(7)(C)
In removal proceedings	)	

DEPARTMENT OF HOMELAND SECURITY'S
MOTION FOR SUMMARY AFFIRMANCE

The Department of Homeland Security (hereinafter "Department") hereby files its Motion for Summary Affirmance. The respondent appealed the decision of the Immigration Judge dated February 4, 2019, denying her application for asylum, withholding of removal, and protection under the regulations implementing Article 3 of the Convention Against Torture ("CAT"). The respondent was ordered removed to Guatemala. The respondent filed a timely appeal.

The Department moves the Board to summary affirm the decision of the Immigration Judge dated February 4, 2019. 8 C.F.R. § 1003.1(e)(4)(i). The Department submits that the Immigration Judge reached the correct decision, as noted above, such that any errors that may exist are harmless or immaterial, and that the respondent's appellate arguments are not so substantial that the case warrants the issuance of a written opinion. 8 C.F.R. § 1003.1(e)(4)(i)(B).

I. Asylum[1]

The Immigration Judge properly determined that the respondent failed to meet her burden of proof for asylum, withholding of removal, and protection under the implementing regulations for CAT protection. An applicant for asylum bears the burden of demonstrating eligibility for relief. INA § 240(c)(4)(A)(i). To establish eligibility for relief under section 208(a) of the Act, an alien must show that he or she is unwilling to return to his or her country or is unable to avail him or herself of that country's protection because he or she has suffered past persecution or has a well-founded fear of future persecution on account of one of five protected grounds. INA §

[1] The respondent does not articulate any argument challenging the Immigration Judge's decision to deny withholding of removal or CAT. As such, the Department requests that the Board find any challenge to the denial of those claims waived. *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 190 (BIA 2018) (claims not raised on appeal may be deemed waived). The respondent did not request voluntary departure. Tr. at 46.

208(b)(1); 8 C.F.R. § 1208.13(a); *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 230 (BIA 2014).

a. The Immigration Judge Correctly Determined that the Respondent Failed to Establish that a Protected Ground Was at Least "One Central Reason" for the Harm She Experienced

An applicant for asylum must show that her race, religion, nationality, political opinion, or membership in a particular social group (PSG) is "one central reason" for the persecution. INA § 208(b)(1)(B)(i); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211–12 (BIA 2007); *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *J-B-N- & S-M-*, 24 I&N Dec. at 214). For persecution to be on account of membership in a particular social group, the respondent's "protected characteristic must be central to the persecutor's decision to act against" him. *See Niang v. Gonzales*, 422 F.3d 1187, 1201 (10th Cir. 2005).

The respondent advanced multiple PSGs in her attempt to establish why her ex-husband was abusive to her during their relationship. Her prehearing brief listed the following PSGs as the protected ground: (1) Guatemalan women viewed as property by virtue of their status in a relationship, (2) Guatemalan women, (3) Guatemalan women in domestic relationships who are unable to leave, and (4) Guatemalan women who have or are perceived to have challenged traditional gender norms. However, the Immigration Judge concluded that, despite this myriad

of proposed PSGs, that the respondent failed to establish that her abuser, a private actor, was motivated by any of these grounds. I.J. at 5-8. Instead, the Immigration Judge concluded that the primary evidence supported the criminal nature of the abuse was motivated by jealousy and the anger by her abuser when she questioned him about his infidelity. I.J. at 3, 5-6. Moreover, the Immigration Judge that there was no evidence of general animosity towards Guatemalan women by the respondent's abuser. *Matter of A-B-*, 27 I&N Dec. 316, 339 (A.G. 2018). As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *A-B-*, 27 I&N Dec. at 338-39. The Immigration Judge concluded that the evidence did not support the respondent's assertion that a protected ground was at least a central reason for the harm, and that conclusion was not erroneous.[2]

b. The Immigration Judge Correctly Determined That The Respondents Failed To Establish That The Honduran Government Was Unable Or Unwilling To Protect Them From Private Actors

Where the alleged persecutor is unaffiliated with the government, the applicant must show that the government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993); *A-B-*, 27 I&N Dec. at 319 (citing *Acosta*, 19 I&N Dec. at 222). In instances where the applicant is a victim of private criminal activity, "the analysis must also 'consider whether government protection is available.'" *A-B-*, 27 I&N Dec. at 320 (quoting *M-E-*

[2] To the extent that the respondent asserts the IJ erred in not analyzing in detail each of her four proposed PSGs, he was not required to do so. *A-B-*, 27 I&N Dec. at 340 (if any element for relief is "fatally flawed," the application may be denied without specifically analyzing all remaining elements).

V-G-, 26 I&N Dec. at 243). "'[V]iolence by private citizens . . . , absent proof that the government is unwilling or unable to address it, is not persecution[.]'" *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) (quoting *Butt v. Keisler*, 506 F.3d 86, 92 (1st Cir.2007)). Relevant factors include both "the government's response" to the claimed persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470, 476 (6th Cir. 2019).

"No country provides its citizens with complete security from private criminal activity, and perfect protection is not required." *A-B-*, 27 I&N Dec. at 343. Rather "[a] government's steps 'to punish the persons responsible for the violence' supports a conclusion that it is not unwilling or unable to protect individuals who have been the victims of ethnic attacks." *Bitsin v. Holder*, 719 F.3d 619, 630 (7th Cir. 2013) (quoting *Vahora v. Holder*, 707 F.3d 904, 908 (7th Cir.2013)). As such, an applicant "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *Matter of A-B-*, 27 I&N Dec. at 338.

Although the government of El Salvador may at times have difficulty controlling interpersonal violence, "where a government is 'making every effort to combat' violence by private actors, and its "inability to stop the problem" is not distinguishable "from any other government's struggles," the private violence has no government nexus and does not constitute persecution." *Khan*, 727 F.3d at 7 (quoting *Burbiene v. Holder*, 568 F.3d 251 (1st Cir. 2009)).

The respondent failed to establish that the Guatemalan government is unable or unwilling to protect her from further abuse by a private actor. When the respondent did report the abuse and threats, a court issued orders of protection. Tr. at 14, 17. These orders prevented her abuser from coming near or harassing the respondent. Tr. at 15. The order likewise informed the

respondent that she could immediately report any violations to the court, and it also specified that the protection orders would be provided to the national police for enforcement. *Id.* Although the respondent asserts that her abuser violated those orders, she did not report those violations. Tr. at 17-19. Despite her complaint about the nature of the protection offered, what is clear is that the Guatemalan government offered the respondent protection through a legal process when she sought help. This evidence is not indicative of a government that is unable or unwilling to protect the respondent from her abuser. As such, the Immigration Judge did not err in finding that the respondent failed to meet her burden. I.J. at 8.

c. The Immigration Judge Correctly Found That the Respondent Could Avoid Future Problems by Internally Relocating[3]

The respondent has already demonstrated that she can reasonably internally relocate to another part of Guatemala. 8 C.F.R. § 1208.13(b)(3) (noting that where the applicant fails to establish past persecution on account of a protected ground, it is her burden to demonstrate that she cannot reasonably relocate with the country of return). The respondent fears the father of her children. Yet the evidence establishes that she was able to separate from him, obtain protection orders, and mostly avoid contact with him for years prior to coming to the United States. As such, the Immigration Judge's findings that relocation is not only possible but reasonable is not in error. As the Immigration Judge noted, the respondent can again seek assistance from the legal system in Guatemala regarding her concerns about custody of her children, and it would be

[3] The Immigration Judge's analysis regarding relocation was noted in the discussion of protection against torture. Although the respondent does not challenge the denial of protection under the regulations implementing the United States' obligations pursuant to Article 3 of the

(b)(6); (b)(7)(C)

reasonable for her to do so.

II. Conclusion

The respondent failed to meet her burden of proof for asylum. She failed to establish that any harm (experienced or feared) was on account of a protected ground. Moreover, she failed to establish that the Guatemalan government is unable or unwilling to protect her or that she could not reasonably relocate in Guatemala to avoid the threats and criminal activities by the private actor. As such, the Immigration Judge correctly denied asylum based upon the respondent's inability to establish that she was eligible for such relief.

In the alternative, should the Board determine that summary affirmance of the Immigration Judge's decision is not appropriate, the Department submits that none of the six circumstances warranting review by a three-member panel are present in this case, and that the Immigration Judge's decision should otherwise be affirmed by means of a brief order. 8 C.F.R. § 1003.1(e)(5) & (6).

Respectfully submitted on this 12th day of November, 2020,

(b)(6); (b)(7)(C)

Assistant Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

Convention Against Torture, she does challenge his relocation analysis.

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

PROOF OF SERVICE

On November 12, 2020, I, (b)(6); Assistant Chief Counsel, mailed or delivered a copy of this **DEPARTMENT OF HOMELAND SECURITY'S MOTION FOR SUMMARY AFFIRMANCE** and any attached pages to:

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(b)(6);@mckinleylegal.com

By electronic service.

(b)(6); (b)(7)(C)

(signature) (date)

11/12/2020

(Notice of Appeal- Continuation of Item #6)

(b)(6); (b)(7)(C)

The Department of Homeland Security (Department) appeals from the order of the Immigration Judge, dated February 18, 2020, granting asylum pursuant to section 208 of the Immigration and Nationality Act (Act or INA).

The Immigration Judge further erred in finding the lead respondent to be a credible witness. An Immigration Judge, in making a credibility analysis, should "consider[] the totality of the circumstances and all the relevant factors," and may base the finding on a number of considerations, including "the demeanor, candor, or responsiveness of the applicant or witness" and "the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made)." INA § 208(b)(1)(B)(iii); *see also Matter of J-Y-C-*, 24 I&N Dec. 260, 262-63 (BIA 2007). Inconsistencies between an alien's written submissions and oral testimony, coupled with events that are omitted from the former and asserted only in the latter, will be sufficient for a finding of adverse credibility, even where the applicant's manner, demeanor, and candor during testimony do not supply additional grounds for that finding. *Matter of A-S-*, 21 I&N Dec. 1106, 1109, 1111 (BIA 1998). As the Board recently reiterated, "[C]onsideration of inconsistencies, whether occurring in testimony or between testimony and other evidence, is a fundamental component of an adverse credibility determination." *Matter of Y-I-M-*, 27 I&N Dec. 724, 726 (BIA 2019). In evaluating inconsistencies or omissions between oral and written testimony, an Immigration Judge should take into account whether the alien has provided a convincing explanation for the variation. *Matter of J-Y-C-*, 24 I&N Dec. 260, 264 (BIA 2007); *Matter of S-A-*, 22 I&N Dec. 1328, 1331 (2000); *A-S-*, 21 I&N Dec. at 1109, 1111-12. Here, the lead respondent's oral and written testimony contained a number of inconsistencies for which the lead respondent did not supply adequate explanations. The Immigration Judge's decision fails to mention or analyze these inconsistencies or purported explanations in evaluating the lead respondent's credibility, which constitutes clear error.

The Immigration Judge further erred in finding a nexus between the past harm the lead respondent claims to have suffered in Guatemala and a protected ground enumerated in the statute. INA § 101(a)(42)(A). Specifically, the Immigration Judge erred by finding that the lead respondent met her burden to show that she was harmed on account of her ethnicity and on account of her membership in the particular social group "Guatemalan women." As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Matter of A-B-*, 27 I&N Dec. 316, 338-39 (A.G. 2018). The lead respondent provided no evidence that her claimed persecutors were motivated by any other reason than the nature of their

relationship, or that they were generally hostile to members of the Popti tribe or to "Guatemalan women" as a group. *A-B-*, 27 I&N Dec. at 339. These relationship-based crimes are insufficient to establish eligibility for asylum. Because the lead respondent failed to meet her burden in this regard, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and either the lead respondent's ethnicity or her membership in the particular social group of "Guatemalan women."

As the Immigration Judge erred in finding the respondent established past persecution on account of a protected ground, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the respondent bore the burden of establishing that internal relocation within Guatemala was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 35–36 (BIA 2012) ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored.") (citing 8 C.F.R. § 1208.13(b)(3)(i)). The lead respondent failed to meet that burden with her testimony, which was inconsistent and uncorroborated on the issue of her efforts to relocate to escape her claimed persecutors.

Because the lead respondent failed to meet her burden to show she is eligible for asylum, it was error for the Immigration Judge to find that she is eligible for withholding of removal under section 241(b)(3) of the Act, as the standard for eligibility for withholding of removal is higher than that required for asylum under section 208 of the Act. *INS v. Stevic*, 467 U.S. 407 (1984).

Finally, the Immigration Judge erred in granting the lead respondent protection under the Convention Against Torture, as the respondent failed to demonstrate that any harm she experienced in the past, or is more likely than not to experience in the future, occurred with the acquiescence of a public official. 8 C.F.R. § 1208.18(a). The lead respondent's testimony regarding past harm she experienced in Guatemala was at the hand of private individuals, and the lead respondent did not demonstrate the requisite link between their actions and the Guatemalan government.

The Department reserves the right to raise additional issues or claims of error in its brief on appeal.

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NON-DETAINED

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

In the Matters of:	File Nos.:	(b)(6); (b)(7)(C)
(b)(6); (b)(7)(C)		
In removal proceedings		

DEPARTMENT OF HOMELAND SECURITY'S
MOTION FOR SUMMARY AFFIRMANCE

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), through undersigned counsel, respectfully moves the Board of Immigration Appeals (Board) to summarily affirm the decision of the Immigration Judge issued in this matter on May 8, 2020, pursuant to 8 C.F.R. § 1003.1(e)(4)(i). The Department submits that the Immigration Judge reached the correct decision, such that any errors which may exist are harmless or immaterial, and "the factual and legal issues raised on appeal are no so substantial that the case warrants the issuance of a written decision." 8 C.F.R. § 1003.1(e)(4)(i)(B). Specifically, the Immigration Judge correctly found that the respondents failed to establish that they would be harmed on account of a protected ground such that they would be eligible for asylum under section 208 of the Immigration and Nationality Act (Act) or withholding of removal under section 241 of the Act. I.J. at 4-6. The Immigration Judge also correctly concluded that the respondent did not establish eligibility for protection under the regulations implementing the United States' obligations under the United Nations Convention Against Torture because the record lacked evidence that it is more likely than not the respondent would be tortured in Guatemala with the consent or acquiescence of the government of Guatemala. I.J. at 6-7.

In the alternative, if the Board determines that a summary affirmance is not appropriate, the Department submits that none of the six circumstances warranting review by a three-member panel set forth in 8 C.F.R. § 1003.1(e)(6) are present in this case and that the Board should affirm the Judge's decision by means of a brief order. *See* 8 C.F.R. § 1003.1(e)(5).

(b)(6); (b)(7)(C)

Respectfully submitted on this 9th day of June, 2021,

(b)(6); (b)(7)(C)

Assistant Chief Counsel
U.S. Department of Homeland Security

(b)(6); (b)(7)(C)

Name: (b)(6); (b)(7)(C) File Nos.: (b)(6); (b)(7)(C)

PROOF OF SERVICE

I, the undersigned, served a copy of the U.S. Department of Homeland Security's Motion for Summary Affirmance and any attachments to the following:

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by:

☒ forwarding an electronic copy via e-mail to a DHS employee for printing, placement in an envelope addressed to the name and address indicated above, and placement in my office's receptacle designated for official "outgoing" regular U.S. mail.

☐ electronically serving a copy via OPLA eService to the name indicated above.

June 9, 2021

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
DENVER, COLORADO

In the Matter of:

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

In Removal Proceedings.

Immigration Judge Calcador

Next Hearing None

DEPARTMENT OF HOMELAND SECURITY'S
CLOSING STATEMENT

The Department of Homeland Security (Department or DHS), through the undersigned Assistant Chief Counsel, files the herein Closing Statement, in response to the respondents' application for asylum, withholding of removal and protection under the Convention Against Torture (CAT). The respondents' application for relief should be denied.

The respondents are a family unit consisting of the lead respondent (mother) and riders (her children). The lead respondent is a native and citizen of Mexico who entered the United States without admission or parole after inspection on or about September 27, 2018. See Notice to Appear (NTA). The respondents were encountered by immigration authorities and issued a NTA wherein they were charged with removability pursuant to Immigration and Nationality Act (INA or Act) section 212(a)(6)(A)(i) (present without admission or parole). The respondents subsequently admitted the allegations and conceded the charge of removal and sought relief in the form of asylum, withholding and protection under the Convention Against Torture.

On September 3, 2021 a merits hearing was held on the respondents application for relief. The lead respondent alleged that fear of return was based on her membership in the particular social group of "Mexican Women." The lead respondent's testimony established that the was subject to abuse by her partner (b)(6); (b)(7)(C) Specifically, the lead respondent discussed that (b)(6); prevented her from working outside the home, had control over the money and wanted to control her physical appearance. Further, the lead respondent testified that (b)(6); kept her from having a phone and would monitor calls with her family.

The Department however does not believe the respondent established a nexus between the defined social group and the harm suffered. In order to establish a nexus to a protected ground, the applicant has the burden to establish that a protected ground was or will be *one central reason* for the persecution. INA § 208(b)(1)(B)(i). The Board explained that the one central reason standard does not require proof that the protected ground is *the* central reason, but the applicant must show that the protected ground is not "incidental, tangential, superficial, or subordinate" to another reason for the harm. *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007).

In this case, the respondent alleges that she was harmed on account of her being a "Mexican woman." However, the testimony does not clearly establish that the (b)(6); targeted the lead respondent based on a belief that she was a "Mexican woman." There was no testimony that established that (b)(6); held this belief that he could harm or control "Mexican women" rather the testimony established this was his conduct with the respondent. Although there was some testimony that the lead respondent spoke with (b)(6); mother who advised he had been physical in a prior relationship, the record does not establish that (b)(6); treated "Mexican women" this way in general nor held any particular view or opinion of Mexican women. The respondent has not shown that (b)(6); was motivated, at least in part, to harm her on account of her proposed social group.

Additionally, the evidence in the form of the respondent's testimony established she successful left her abusive relationship with (b)(6); and was residing with a family member at one point but chose to return to the respondent. There was no indication from the testimony that (b)(6); forcibly made the respondent return to

the residence they shared. The lead respondent's ability to leave the relationship and reside elsewhere militates in favor of her being able to relocate safely within Mexico.

Wherefore it is the Department's position that the respondent has not met her burden and as such her application should be denied.

Respectfully submitted this 8th day of October 2021.

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)
Assistant Chief Counsel
DHS/ICE

CERTIFICATE OF SERVICE

CASE NAME: (b)(6); (b)(7)(C)

I hereby certify that, on October 8, 2021, I served a true copy of this U.S. DEPARTMENT OF HOMELAND SECURITY'S CLOSING ARGUMENT and any attached pages to respondent's attorney, (b)(6); (b)(7)(C) Murad & Murad, P.C., 1790 30th Street, Suite 200, Boulder, CO 80301, by:

☐ placing a true copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process and causing the same to be mailed by first class mail to the person at the address set forth above.

☐ causing to be personally delivered a true copy thereof to the person set forth above.

☒ electronic service, in accordance with applicable office procedure and DHS polices, to the E-service addressee set forth above.

☐ Courier Service (☐ FedEx / ☐ UPS) to the person at the address set forth above.

☐ telefaxing with acknowledgment of receipt to the person at the address set forth above.

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
DENVER, COLORADO

In the Matter of

(b)(6); (b)(7)(C)

In Removal Proceedings.

File No.: (b)(6); (b)(7)(C)

IJ: **Brea Burgie**

Next Hearing: **N/A**

DEPARTMENT OF HOMELAND SECURITY'S CLOSING REMARKS

Pursuant to the order of the Immigration Judge at the September 24, 2021 hearing on the individual merits of the respondent's Form I-589 Application for Asylum and Withholding of Removal, the Department submits the following closing remarks.

The medical report submitted by the respondent establishes that she suffered past persecution in the form of subjection to Type II female genital mutilation (FGM).[1] The evidence shows that this harm occurred on account of the respondent's membership in the particular social group of "women in the Tigrinye ethnic group."

As such, the Department submits the respondent's Application as ready for adjudication by the Immigration Judge.

Respectfully submitted on this 12th day of October, 2021,

(b)(6); (b)(7)(C)

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[1] This evidence was submitted over the Department's objection that the expert author of the report had not been made available for cross-examination.

Certificate of Service

I hereby certify that, on October 12, 2021, I served a true copy of this **DEPARTMENT OF HOMELAND SECURITY'S CLOSING REMARKS** and any attached pages by sending an encrypted version by email to (b)(6); @gmail.com.

(b)(6); (b)(7)(C)

Assistant Chief Counsel

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☒ DETAINED

☐ Not detained

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

In the Matter of

(b)(6); (b)(7)(C)

In Withholding-Only Proceedings

File No. (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
BRIEF ON APPEAL

TABLE OF CONTENTS

(b)(6); (b)(7)(C)

INTRODUCTION

On January 31, 2019, the Immigration Judge granted the applicant withholding of removal, finding that the violence the applicant suffered at the hands of her former spouse was on account of the applicant's membership in the group "Mexican women who terminate the marriage without the consent of the husband." The Department of Homeland Security (Department) hereby submits its brief in support of its appeal of that decision granting the applicant withholding of removal pursuant to section 241(b)(3) of the Immigration and Nationality Act (INA or Act). The Department requests that the Board of Immigration Appeals (Board) reverse the decision of the Immigration Judge granting withholding.[1]

The Department respectfully requests three-member panel review due to the need to review a decision by an Immigration Judge that is not in conformity with the law or with applicable precedents and the need to review a clearly erroneous factual determination. *See* 8 C.F.R. § 1003.1(e)(6)(iii), (v) (2016).

ISSUES PRESENTED

I. Did the Immigration Judge err in concluding that the applicant's proposed particular social group— "Mexican women who terminate the marriage without the consent of the husband"—constituted a cognizable particular social group, where this group is not defined with particularity and is not socially distinct?

II. Did the Immigration Judge err in finding that the applicant's former spouse, a private actor, inflicted harm on the applicant in the past, when they were married, and would inflict harm on her in the future on account of her membership in this particular social group?

III. Did the Immigration Judge err in finding that the government of Mexico is unable or unwilling to control the applicant's former spouse, where the applicant never

[1] The Immigration Judge correctly denied the applicant's request for protection pursuant to the regulations implementing the U.S. obligation under Article 3 of the United Nations Convention Against Torture (CAT). The applicant has not filed a Notice of Appeal to challenge that denial before the Board. As such, that part of the Immigration Judge's decision is final.

reported a crime to the police and there is no evidence that the police were unwilling to investigate any crimes committed against the applicant?

IV. Did the Immigration Judge err in shifting the burden to the Department to establish a fundamental change in circumstances or the ability to relocate within Mexico, and in not finding that the evidence demonstrates that there are changed circumstances and that the applicant could and should be expected to relocate within Mexico, as there is no evidence that her former husband could inflict harm on her no matter where she resides in Mexico and internal relocation is reasonable?

STANDARD OF REVIEW

The Board reviews findings of fact, including "predictive findings of what may or may not occur in the future" for clear error. *Matter of Z-Z-O-*, 26 I&N Dec. 586, 587, 590 (BIA 2015); 8 C.F.R. § 1003.1(d)(3)(i). On the other hand, the Board reviews de novo "questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges." *Z-Z-O-*, 26 I&N Dec. at 588; 8 C.F.R. § 1003.1(d)(3)(ii). This de novo review includes "whether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal." *Z-Z-O-*, 26 I&N Dec. at 591. Although the Board reviews the ultimate determination of whether a proposed particular social group is cognizable de novo, it reviews an Immigration Judge's factual findings underlying that determination for clear error. *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018). A persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by the Board for clear error. *See Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011). However, whether the facts, as found, establish persecution "on account of" a protected ground is a legal issue reviewed by the Board de novo. *Matter of S-E-G-*, 24 I&N Dec. 579, 588 n.5 (BIA 2008). Whether the applicant can internally relocate within Mexico is a mixed question of fact and law. *See Matter of M-Z-M-R-*, 26 I&N Dec. 28, 36 (BIA 2012).

(b)(6); (b)(7)(C)

SUMMARY OF THE ARGUMENT

The applicant bears the burden of proof to establish that her life or freedom would be threatened in the country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 1208.16(b). The Immigration Judge erred in finding that "Mexican women who terminate the marriage without the consent of the husband" constitutes a particular social group under the Act. When an applicant seeks withholding, she must "establish that the group is composed of members who share a common immutable characteristic, defined with particularity, and socially distinct within the society in question. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014). The applicant's particular social group is not defined with particularity, and the record does not establish that this group is socially distinct within Mexico. Even if the particular social group were cognizable, the Immigration Judge erred in concluding that the applicant's particular social group was at least one central reason for the harm she fears from a private actor, her former husband. The record demonstrates that the applicant was subjected to spousal abuse in the 1990s. However, there is no evidence in the record that the applicant's former spouse targeted her on account of her inclusion in the group "Mexican women who terminate the marriage without the consent of the husband." Further, the Immigration Judge erred in finding that the Mexican government would be unable or unwilling to protect the applicant. The applicant never personally reported any harm to the police. Further, the Mexican legal system gave her the divorce she requested. Lastly, the Immigration Judge erred in finding past persecution on the basis of a protected ground, so erred in shifting the burden to the Department to show that there has been no fundamental change in circumstances and that internal relocation is not possible; even if there was past persecution, the

Immigration Judge erred in finding that the Department had not established that there has been a fundamental change in circumstances and that internal relocation is possible and reasonable.

STATEMENT OF FACTS

The applicant is a (b)(6); (b)(7)(C) native and citizen of Mexico. Tr. at 18-19. The applicant first came to the United States without authorization in 1999. Tr. at 22. She was apprehended by immigration authorities at that time; she testified, "They just caught me and returned me to Mexico." Tr. at 23. She did not, it appears, seek asylum at that time, though she claimed at her hearing before the Immigration Judge that she was then fleeing for her life. Tr. at 30. The applicant returned to the United States a week later. Tr. at 23. She did not testify about where she was during that week. Again, she did not seek asylum when she entered the United States. The applicant left the United States on July 4, 2005, returning to Mexico on her own volition. Tr. at 23. She was apprehended twice in 2005 and removed twice – on July 18, 2005, and on July 22, 2005, though her testimony is that she was caught the first time she attempted to return, but managed "to get through" the second time. Tr. at 24. Again, she did not seek asylum when she entered the United States in 2005. At no time prior to her most recent apprehension did she claim a fear of return to Mexico. Because the applicant had been previously removed from the United States, the Department reinstated the prior order of removal pursuant to section 241(b)(5) of the Act after finding her in the United States without authorization. Exh. 1.

Because the applicant claimed fear of persecution or torture if removed to Mexico, her case was referred to the Asylum Office pursuant to 8 C.F.R. § 208.31(b). Exh. 1. Following multiple preliminary hearings, the Immigration Judge provided the applicant with a Form I-589, Application for Asylum and Withholding of Removal, for consideration in withholding-only

proceedings pursuant to 8 C.F.R. § 1208.31(g), and she filed her completed application. The applicant presented her case to the Immigration Judge at a merits hearing on January 28, 2019.

The applicant claimed physical abuse in Mexico by her now ex-husband. Tr. at 24. This included physical and sexual assaults during her marriage, from 1992 until 1999. Tr. at 24-31, 39. She stated that she was beaten at least three times a week, every week for seven years. Tr. at 49. In spite of her claim that she could never get away from her spouse, because he locked her in a room, she still managed to file for and obtain a divorce from him in 1999 from the civil authorities in Mexico. Tr. 22, 33, 40-41; I.J. at 7. In fact, she stated that she decided to leave him because she caught him with another woman after returning from the store. Tr. at 33, 40. When the Department asked, "You were able to leave?", she replied, "Yes, sir." Tr. at 40. She initially testified on direct examination that when the divorce was final, her former spouse got angry and started threatening her, but that all of the physical abuse happened before the divorce. Tr. at 41. However, she stated when questioned by the Immigration Judge that her former spouse attacked her and choked her the day the applicant signed the divorce decree. Tr. at 48. After that day, the day the divorce was finalized, the physical abuse stopped. Tr. at 41; I.J. at 7. After the divorce, the applicant resided with her mother in Mexico and received threats from her former spouse. I.J. at 7. The applicant moved to live with her uncle in Veracruz, approximately eighteen hours away from the applicant's hometown Chiapas; she continued to receive threats while living with her uncle. I.J. at 8. However, the applicant's former spouse, after the divorce in 1999, did not travel to Veracruz, did not seek her out in person, and did not commit any acts of violence against her. I.J. at 8.

The applicant admits that she never sought medical assistance at any time and that she never reported the abuse to the authorities in Mexico. Tr. at 30, 32, 49-50. She stated that she

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was "constantly locked in that room, how could I go?", though she managed to leave that room, go to the store, return to find her then-spouse having intercourse with another woman, separate from him, and file for and obtain her divorce, without providing any explanation for that contradiction. Tr. at 33. Though the applicant never attempted to report the abuse to the police, she testified very vaguely that the police do not "do anything." Tr. at 37. Her mother testified that she had made complaints to the police, but that nothing was done by them; the police purportedly told her that they could not do anything because there was no blood. Tr. at 59-62. The applicant's mother provided no documentary evidence of any reports filed; in fact, she could not even provide dates on which she went to the police. She did not inform the applicant of any reports or ask the applicant to assist in filing any reports with information regarding the crimes. Tr. at 44, 59-62.

The applicant returned to Mexico of her own volition in 2005, years after her divorce from her husband. Tr. at 44, 59-62. She stated that while she was in Mexico in 2005, she received one threatening call from her ex-husband. Tr. at 42-43. It is unclear whether this happened before or after she was caught and removed from the United States. He never made any attempt at physical contact with her and never physically harmed her while she was back in Mexico during that time. Tr. at 44. Though her mother stated that she sees the applicant's former spouse when she returns to Mexico periodically, and he makes vague threats about the applicant, the applicant stated that she does not know where her former spouse is now and that she has not personally received any threats from him since 2005. Tr. at 53-54. She believes he has children with another woman. Tr. at 54. The applicant's mother, siblings, and children reside in the United States lawfully; her father resides in Mexico. Tr. at 19-21. The applicant is in a "free union" relationship with her partner. Tr. at 21.

In his written decision, the Immigration Judge granted the applicant's application for withholding of removal, finding that "the applicant's execution of the divorce without the consent of her husband was at least one central for the harm and threats she experienced." I.J. at 16. With respect to the applicant's particular social group, the Immigration Judge noted that the applicant defined her particular social group as "Mexican women who terminate the marriage without the consent of the husband." I.J. at 15.[2] The Immigration Judge found the group is "sufficiently socially distinct" because "Mexican women would generally understand their own affiliation in this group, based on socially construed categories such as nationality and gender." I.J. at 12. The Immigration Judge noted that membership in the group includes only woman who are Mexican and requires that they have terminated a marriage, and done so without the consent of their spouse.

Regarding the requisite nexus, the Immigration Judge stated that the applicant's execution of the divorce "was viewed as an act of defiance" and is particularly compelling given the former partner's "ability to control all aspects of the applicant's life." I.J. at 16. The Immigration Judge concluded that the former partner "still holds a vendetta against the applicant for divorcing him and would seek to harm her because of it." *Id.*

For those reasons, the Immigration Judge granted the applicant's application for withholding of removal pursuant to the Act. The Immigration Judge denied the applicant's request for protection under the regulations implementing the U.S. obligation under Article 3 of the United Nations Convention Against Torture (CAT). The Department filed a timely appeal.

[2] As the Immigration Judge notes, the applicant initially outlined six proposed particular social groups. I.J. at 10; I.J. at 10 n.3; Tr. at 15-16. It was not until the end of the hearing that the Immigration Judge and the applicant agreed to the newly formulated particular social group which the Immigration Judge then found to be cognizable. Tr. at 84.

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ARGUMENT

I. The Immigration Judge erred in concluding that the applicant's proposed particular social group— "Mexican women who terminate the marriage without the consent of the husband"—constitutes a cognizable particular social group under the Act.

The Immigration Judge articulated the applicant's particular social group as "Mexican women who terminate the marriage without the consent of the husband" and erroneously found that to be a cognizable group under the Act.[3] An applicant seeking withholding of removal must demonstrate that it is "more likely than not that, upon removal, [her] life or freedom would be threatened on account of [her] race, religion, nationality, political opinion, or membership in a particular social group. INA § 241(b)(3). When an applicant seeks withholding of removal under INA § 241(b)(3) as a member of a particular social group, the applicant "must establish that the group is composed of members who share a common immutable characteristic, defined with particularity, and socially distinct within the society in question." *M-E-V-G-*, 26 I&N Dec. at 237. If the applicant fails to establish a cognizable particular social group, the "immigration judge or Board need not examine the remaining elements of the [withholding] claim." *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018). It is the applicant's burden to clearly indicate on the record before the Immigration Judge the exact delineation of the proposed particular social group. *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018) (citing *Matter of W-G-R-*, 26 I&N Dec. at 209-10 (BIA 2014)). As the applicant failed to articulate a cognizable particular social group under the Act, the Board should, for the reasons stated below, reverse the Immigration Judge's decision. *Id.* at 191.

[3] Again, the applicant through counsel articulated a number of proposed particular social groups. The one the Immigration Judge found cognizable was articulated by the Immigration Judge at the conclusion of the hearing—the Immigration Judge proposed the group, telling the applicant's counsel, "I'm giving you a softball here." Tr. at 84. At that point, the applicant's counsel agreed with the Immigration Judge on the viability of the Immigration Judge's proposed particular social group.

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The Board has set out a three-pronged test for determining when a proposed particular social group is cognizable. The applicant must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *A-B-*, 27 I&N Dec. at 320 (citing *M-E-V-G-*, 26 I&N Dec. at 234, 237); *see also Matter of L-E-A-*, 27 I&N Dec. 40, 42 (BIA 2017); *Matter of W-G-R-*, 26 I&N Dec. 208, 210-12 (BIA 2014). To be cognizable, the particular social group must exist independently of the harm alleged in the application. *A-B-*, 27 I&N Dec. at 334-35. Social group determinations are made on a case-by-case basis. *L-E-A-*, 237 I&N Dec. at 42; *M-E-V-G-*, 26 I&N Dec. at 251; *Matter of Acosta*, 19 I&N 211, 233 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi,* 19 I&N Dec. 201 (BIA 1985).

As an initial matter, the proposed group lacks the necessary particularity. The particularity requirement addresses "the question of delineation," and "clarifies the point…that not every 'immutable characteristic' is sufficiently precise to define a particular social group." *W-G-R-*, 26 I&N Dec. at 214. Particularity requires that the "terms used to describe the group [must] have commonly accepted definitions in the society of which the group is a part." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2008)). The group must have "discrete and [] definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)). To meet the particularity requirement, the proposed group must "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." *Matter of E-A-G-*, 24 I&N Dec. 591, 594 (BIA 2008). The Board has found that the requirement that the group be socially distinct "considers where those with a common immutable characteristic are set apart, or distinct,

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from other persons within the society in some significant way" and that members "of a particular social group will generally understand their own affiliation with that group, as will other people in their country." *M-E-V-G-*, 26 I&N Dec. at 238, 240. The Attorney General found that social groups defined by their vulnerability to private criminal activity likely lack the particularity requirement under *Matter of M-E-V-G-*. *A-B-*, 27 I&N Dec. at 335.

The applicant failed to articulate her particular social group such that it has defined boundaries; therefore, it lacks particularity. More specifically, the applicant's particular social group— "Mexican women who terminate the marriage without the consent of the husband"— fails to describe "a discrete class of persons." *Matter of W-G-R-*, 26 I&N Dec. at 214. The Immigration Judge found the group is "sufficiently socially distinct," finding that "Mexican women would generally understand their own affiliation in this group, based on socially construed categories such as nationality and gender." The Immigration Judge noted that membership in the group is limited to only woman who are Mexican and requires that they have terminated a marriage without the consent of their spouse. The fact that the group includes divorced women whose spouses did not agree to the divorce and does not include men or single women does not establish that "Mexican women who terminate the marriage without the consent of the husband" is a group "with 'well defined boundaries' delineating who does and does not belong." I.J. at 13-14 (quoting *Matter of S-E-G-*, 24 I&N Dec. 579, 582 (BIA 2008)). Adding in the gender and nationality modifiers to the group gives only the illusion of particularity. The applicant's group does not sufficiently delineate who does and does not belong. Further, there is no evidence in the record that "Mexican women who terminate the marriage without the consent of the husband" has a commonly accepted definition in Mexican society or that Mexican society recognizes that group as set apart in any way. *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Matter of*

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A-M-E- & J-G-U-, 24 I&N at 76). Indeed, the applicant failed to submit any evidence in support of her application and fails to define the boundaries of the group beyond gender and marital status, emphasizing the amorphous nature of the applicant's proposed group. *See Rivera-Barrientos v. Holder*, 666 F.3d 641, 649 (10th Cir. 2012) ("The essence of the 'particularity requirement, therefore, is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." (quoting *Matter of S-E-G-*, 24 I&N Dec. at 584 (BIA 2008)). For these reasons, the Immigration Judge erred in concluding that the applicant's proposed group met the particularity requirement.

Additionally, the proposed group lacks social distinction. To have "social distinction," there must be "evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *W-G-R-*, 26 I&N Dec. at 217. The Board has held that social distinction "considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way." *M-E-V-G-*, 26 I&N Dec. at 238. "In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it." *Id.* The recognition of the group is "determined by the perception of the society in question, rather than by the perception of the persecutor." *Id.* at 242; *see also W-G-R-*, 26 I&N Dec. at 214 (noting there is some degree of overlap between the particularity and social distinction requirements because both take societal context into account).

With regard to whether the applicant's proposed group of "Mexican women who terminate the marriage without the consent of the husband" is socially distinct, the evidence of record lacks any indication that *Mexican society* would perceive the applicant's group as socially

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distinct. *See A-B-*, 27 I&N Dec. at 340 (stating that it is the applicant's burden to establish a cognizable particular social group). The Immigration Judge noted that "Mexican women" would generally understand their own affiliation in the proposed group, as to the gender and nationality portions, but this does not resolve the question—there must also be an understanding by other people in Mexico of the affiliations of the group. *M-E-V-G-*, 26 I&N Dec. at 240. As to the qualifications that the Mexican women in question must be divorced, while Mexican law provides the option of divorce, there is no evidence that Mexican society has any ability to recognize or discern who is divorced. There is no evidence that anyone passing the applicant on the street would have any ability to determine whether she was never married, married, married and widowed, or married and divorced—she wears no scarlet D. While certainly the applicant can "check the box" saying she is divorced, the knowledge of that fact is her possession – there is no widespread knowledge of it in society. Similarly, there is no evidence that Mexican society could or would perceive her as more specifically having obtained a divorce without the consent of her former husband. His purported lack of consent is a layer added to the articulation which springs solely from the perception of the alleged persecutor but has so social visibility. At the end of it all, the applicant has merely provided a description of individuals who share certain traits or experiences, instead of articulating a socially distinct group. *A-B-*, 27 I&N Dec. at 335-36.

Therefore, because the applicant failed to articulate a cognizable particular social group, the applicant failed to meet her burden of proof.

II. The applicant failed to establish that the harm she suffered and the harm she claims to fear were or will be inflicted by her former husband on account of

the particular social group of "Mexican women who terminate the marriage without the consent of the husband."

Simply because an individual may belong to a cognizable particular social group does not necessarily mean that any harm inflicted or threatened will be on account of, or because of, such a protected ground. Rather, the requisite nexus must be independently established. To demonstrate that harm was "on account of" a protected ground, the applicant must show that the protected characteristic was "one central reason" for the harm. *See* INA § 241(b)(3); *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F. 3d 641, 646 (10th Cir. 2012); *Matter of C-T-L-*, 25 I&N Dec. 341, 348 (BIA 2010). The protected ground cannot play a minor role in the persecution, nor can it be "incidental, tangential, superficial, or subordinate to another reason for the harm." *Karki v. Holder*, 715 F.3d 792, 800 (10th Cir. 2013) (citations omitted); *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007). A showing of severe harm is not enough; the harm inflicted or feared must be on account of a protected ground. *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997) ("Seriousness of conduct . . . is not dispositive in our analysis. Instead, the critical issue is whether a reasonable inference may be drawn from the evidence to find that the motivation for the conduct was to persecute the asylum applicant on account of race, religion, nationality, membership in a particular social group, or political opinion.").

Even if the applicant had defined a cognizable social group, she nevertheless failed to establish a nexus between the harm she fears and her status as a person with "Mexican women who terminate the marriage without the consent of the husband." The Immigration Judge found

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past persecution based on the harm inflicted on the applicant before she got divorced in 1999.[4] After the day of the divorce, the former spouse did not harm the applicant – he merely contacted her with vague threats, which were never acted upon. Threats alone do not generally constitute persecution. Any harm suffered by the applicant was at the hands of her now ex-husband at a time prior to her membership in the named group. She was not then a divorced woman, so none of the alleged harm was inflicted as a result of being in the group. After she returned to Mexico in 2005 (voluntarily once, by removal twice), the only incident involving her former husband was her receipt of a random telephone call, in which he made what she considered to be a threat, with no follow-up or action. This was approximately fourteen years ago, and six years after the physical abuse ceased.

Further, all of the harm committed against the applicant and feared by the applicant was committed by her former husband. "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27 I&N Dec. at 320. The same principle applies to withholding claims. The applicant provided no evidence that her former spouse was motivated by any other reason than the nature of their relationship or that he was generally hostile to Mexican women who terminate their marriages without the consent of their husbands as a group. *A-B-*, 27 I&N Dec. at 339. As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Id.* at 338-39. To be sure, the applicant may have been the victim

[4] The Immigration Judge found that the pre-divorce harm (the abuse and imprisonment) rose to the level of persecution and, in a footnote, found that the harm experienced after the divorce (the choking the day of the divorce and the threats after) also rose to the level of persecution since the applicant had been previously abused before the divorce. In so doing, the Immigration Judge acknowledged that the pre-divorce harm was not on account of the proposed particular social group, but still used the one to bootstrap the other.

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of crimes committed by her former spouse when they were married and the day of the divorce, but those relationship-based crimes are insufficient to establish eligibility for withholding. Because the applicant failed to establish that her former spouse was motivated by any reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the proposed particular social group.

III. The Immigration Judge erred in finding that the government of Mexico is unable or unwilling to control the applicant's former spouse, where the applicant never reported a crime to the police and there is no evidence that the police were unwilling to investigate any crimes committed against the applicant.

There is no evidence that the applicant made the Mexican authorities aware of the crimes or that the applicant cooperated with them or that they failed in any duty to investigate or prosecute the crimes. Even if the applicant's mother did make a report, the evidence is that the applicant was not involved in reporting, and thus the authorities would have lacked evidence of a crime from the victim.

Where, as here, the alleged persecutor is unaffiliated with the government, the applicant must show that the government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. I.N.S.*, 9 F.3d 819, 822 (10th Cir. 1993); *A-B-*, 27 I&N Dec. at 319 (citing *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985)).[5] In instances where the applicant is a victim of private criminal activity, "the analysis must also 'consider whether government protection is available.'" *A-B-*, 27 I&N Dec. at 320 (quoting *M-E-V-G-*, 26 I&N Dec. at 243). "[V]iolence by private citizens…absent proof that the government is unwilling or unable to address it, is not

[5] *Acosta* was overruled in part on other grounds by *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

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persecution[.]" *Khan v.* Holder, 727 F.3d 1, 7 (1st Cir. 2013) (quoting *Butt v. Keisler*, 506 F.3d 86, 92 (1st Cir. 2007)). Relevant factors include both "the government's response" to the claimed persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470, 476 (6th Cir. 2019). "No country provides its citizens with complete security from private criminal activity, and perfect protection is not required." *A-B-*, 27 I&N Dec. at 343. An applicant "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *Id.* at 338.

The record here does not establish that the police were unwilling to assist the applicant; at most it establishes that they did have enough evidence that a crime had been committed to prompt an investigation. The applicant herself never reported any crime to the authorities in Mexico. Tr. at 30, 32, 49-50. She stated that she was "constantly locked in that room, how could I go?", but she did leave that room, go to the store, return to find her then-spouse having intercourse with another woman, separate from him, and file for and obtain her divorce, without providing any explanation for that contradiction or for why she did not at any time during that period go to the police. Tr. at 33. Her only explanation for her failure to report her former spouse's abuse was that the police do not "do anything." Tr. at 37. While the applicant's mother testified that she had made complaints to the police, but that nothing was done by them; they police purportedly told her that they could not do anything because there was no blood; that is, there was no evidence of a crime. The applicant's mother provided no documentary evidence of any reports filed; in fact, she could not even provide dates on which she went to the police. She did not inform the applicant of any reports or ask the applicant to assist in filing any reports with information regarding the crimes. Tr. at 44, 59-62. This is insufficient for the applicant to meet

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her burden to show that the government of Mexico was or is unable or unwilling to assist the applicant. As such, the Immigration Judge erred in finding that she met her burden.

IV. The Immigration Judge erred shifting the burden to the Department to establish a fundamental change in circumstances or the ability to relocate within Mexico; additionally, the evidence demonstrates that there are changed circumstances and that the applicant could and should be expected to relocate within Mexico, as there is no evidence that her former husband could inflict harm on her no matter where she resides in Mexico and internal relocation is reasonable.

If an applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it is presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence that there has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. 8 C.F.R. §1208.16(b)(1)(i).

As the Immigration Judge erred in finding the applicant established past persecution on account of the proposed particular social group, shifting the burden on changed circumstances and internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.16(b)(ii). Rather, the applicant bore the burden of establishing that internal relocation within Mexico is

unreasonable. Even if the Department bears the burden of proof on these issues, the Immigration Judge erred in finding that the Department did not establish that there has been a fundamental change in circumstances or that internal relocation is reasonable.

The Immigration Judge held that the applicant faces a threat of persecution anywhere in Mexico even though her instances of harm were perpetrated by a single actor. He based this determination on the fact that, when the applicant resided with her uncle eighteen hours away from the town in which her former spouse lives, the former spouse was able to find her and make a threatening call to her. The Immigration Judge further found that the respondent's long-term illegal presence in the United States, after multiple removals, and her family in the United States made it unreasonable to expect her to relocate within Mexico. Though the Immigration Judge should "consider, among other things, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties," as the regulation provides, "these factors may or may not be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.16(b)(3). Mexico is a large and diverse country. The applicant's father resides in Mexico, so she is not without family support there. The applicant has been divorced from her former spouse for almost twenty years, does not currently know where he is, and believes he has children with another woman. There is no evidence that he remains interested in harming her after the passage of two decades, though there is evidence that he has moved on, having children with another woman; there is certainly no evidence that he would physically pursue her, after all this time, to other parts of Mexico. When the applicant lived with her uncle, her former spouse

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purportedly made threatening phone calls; he never, however, travelled to Veracruz to seek the applicant out. The Attorney General notes that victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)" and the applicant failed to meet her burden of proof on this issue. *A-B-*, 27 I&N Dec. at 345. Though the Immigration Judge found that "gender-based violence is country-wide," that is not the basis for the applicant's claim – the applicant's claim is specific to victimization by her former spouse; there is no evidence that the applicant would be subject to gender-based violence throughout the entirety of Mexico.

As to a change in circumstances, the significant passage of time since the applicant last purportedly suffered harm at the hands of her former spouse alone presents a fundamental change in circumstances. That passage of time, coupled with the evidence from the applicant that she believes her former spouse has children with another woman, demonstrating that he is no longer interested in a relationship with the applicant, establish that circumstances have changed such that the applicant no longer has a reasonable fear.

CONCLUSION

The applicant bears the burden of proof to establish that her life or freedom would be threatened in the country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 1208.16(b). The Immigration Judge erred in finding the applicant met her burden to establish eligibility for withholding of removal pursuant to the Act, because she failed to show that her life or freedom had been threatened in Mexico or would be threatened if removed to Mexico on account of a cognizable particular

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social group. Therefore, the Department asks the Board to sustain its appeal and reverse the decision of the Immigration Judge granting the applicant protection in the form of withholding of removal pursuant to the Act.

DATE: May__, 2019

Respectfully submitted,

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Certificate of Service

I hereby certify that, on May __, 2019, I served a true copy of this DEPARTMENT OF HOMELAND SECURITY BRIEF ON APPEAL and any attached pages by placing it in the outgoing mail bin as first-class mail, postage prepaid and addressed to:

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DETAINED

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

In the Matter of:

(b)(6); (b)(7)(C)

In removal proceedings

File No: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
BRIEF ON APPEAL

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(b)(6); (b)(7)(C)

INTRODUCTION

The Department of Homeland Security (Department or DHS) appeals the decision of the Immigration Judge granting the respondent's application for asylum pursuant to section 208 of the Immigration and Nationality Act (INA or Act). The Immigration Judge erred in finding that the respondent provided credible testimony as her testimony was inconsistent with her declaration and her statements in two prior immigration proceedings, one of which resulted in an adverse credibility finding. The Immigration Judge also erred in finding that the respondent's testimony and country condition evidence established a nexus between the harm the respondent experienced in 2017 at the hands of a private actor and a protected ground. Finally, the Immigration Judge erred in finding that the Honduran government was unable or unwilling to protect the respondent as an attorney with the Honduran Public Ministry provided the respondent was a signed and sealed letter ordering the local police to take her report regarding problems with the private actor while he was on weekend furlough while serving a prison sentence for murder. Given these errors, the Immigration Judge's grant of asylum must be reversed.

The DHS requests that this case be reviewed by a three-member panel given the need to review a decision by an Immigration Judge not in conformity with existing law or applicable precedent, the need to review clearly erroneous factual determinations, and the need to reverse a decision of an Immigration Judge not arising under 8 C.F.R. § 1003.1(e)(6).

ISSUES PRESENTED

In order to resolve this appeal, the Board must address four issues:

1. Did the Immigration Judge err in finding that the respondent was credible in light of her inconsistent claims of fear in three separate immigration proceedings, material omissions of harm, and evolving testimony?

2. Did the Immigration Judge err in finding that the respondent established past persecution where she testified to minimal harm of a bloody nose and bruises after her 2017 removal and the other claims of harm were not credible or supported by any independent evidence?

3. Did the Immigration Judge err in finding that the respondent established a nexus to the harm by a private actor where the Immigration Judge relied on county condition evidence pertaining to hostility toward transgender individuals instead of addressing the motivation of the attacker, with whom the respondent has a lengthy history?

4. Did the Immigration Judge err in finding that the Honduran government was not able to protect the respondent from a private actor where her attacker was imprisoned for an unrelated murder and the Public Ministry interceded upon the respondent's request regarding her report of an attack in December of 2017?

STANDARD OF REVIEW

The Board reviews findings of fact, including "predictive findings of what may or may not occur in the future," for clear error. *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015); 8 C.F.R. § 1003.1(d)(3)(i). On the other hand, the Board reviews de novo "questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges." *Z-Z-O-*, 26 I&N Dec. at 588; 8 C.F.R. § 1003.1(d)(3)(ii). This de novo review includes "whether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal." *Z-Z-O-*, 26 I&N Dec. at 591.

Although the Board reviews the ultimate determination of whether a proposed particular social group is cognizable de novo, it reviews an Immigration Judge's factual findings underlying that determination for clear error. *See Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018). A persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by the Board for clear error. *See Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011). Whether the facts, as found, establish persecution "on account of" a

protected ground is a legal issue reviewed by the Board de novo. *Matter of S-E-G-*, 24 I&N Dec. 579, 588 n.5 (BIA 2008). As further factfinding is necessary, the Department seeks remand. *See* 8 C.F.R. § 1003.1(d)(3)(iv) ("If further *factfinding* is needed in a particular case, the Board may remand the proceeding to the Immigration Judge . . . .") (emphasis added).

SUMMARY OF THE ARGUMENT

In this third immigration proceeding, the respondent provided a vastly different claim than in either of her two prior proceedings that resulted in removal orders. In the respondent's withholding-only proceeding in 2017, the Immigration Judge determined that the respondent was not credible. Nonetheless, the Immigration Judge in this matter concluded that the respondent was credible and established that the respondent's gender identity was the reason for the harm she experienced by a private actor. Additionally, the Immigration Judge concluded that the Honduran government would not protect the respondent from this private actor. However, the evidence of record indicates that this private actor was imprisoned for an unrelated murder, and the Honduran Public Ministry offered assistance to the respondent when she requested it. As the Immigration Judge erred in concluding that the respondent was credible and otherwise established eligibility for asylum, the decision cannot stand. Given that the Immigration Judge expressly declined to address the respondent's alternate requests for protection from removal, the Department moves to remand for further proceedings.

STATEMENT OF FACTS

The respondent[1] is a (b)(6); (b)(7)(C) native and citizen of Honduras. I.J. at 1; Tr. at 75–76. She identifies as a woman and began dressing in conformity with her gender identity in

[1] The respondent identifies as a transgender female, and the Department's pronoun use will reflect the respondent's identity as a female.

2010. Tr. at 149. She was previously in removal proceedings in 2013 and ordered removed in absentia. Tr. at 8, 10, 77; Ex. 10 (credible fear notes pertaining to the 2013 proceeding). She was deported in 2016 and returned to the United States in 2017. Tr. at 12. She was placed in withholding-only proceedings, and after a hearing on the merits, her application for protection from removal was denied due to lack of credibility and failure to meet her burden of proof. Exh. 2, Tabs C-D; Tr. at 12, 45. After being removed to Honduras a second time on October 31, 2017, the respondent applied for admission into the United States on or about April 23, 2018, and was placed in these proceedings. Exh. 1; Exh. 2, Tab A.

The respondent applied for asylum[2] and provided a minimal declaration in support of her claim alleging only one incident of harm after her 2017 removal, which was an assault by (b)(6); (b)(6); (b)(7)(C) on December 24, 2017. Exhs. 3, 8. However, at the respondent's merits hearing[3] on August 27, 2018, the respondent began adding other instances of harm, both pre- and post-dating her last removal.

The respondent testified about the incident with (b)(6); on December 24, 2017. Tr. at 81. The respondent stated that (b)(6); "had just left jail for the killing of my friend's nephew" when she encountered him. Tr. at 81. The respondent was traveling home on her bicycle when she encountered (b)(6); Tr. at 82. (b)(6); told the respondent to get off the bicycle; when the respondent refused, (b)(6); produced a gun and chased her down. *Id.* (b)(6); grabbed the respondent by the hair, began hitting her, and put "his firearm on my head." *Id.* (b)(6); then

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[2] The respondent also sought protection due to ongoing problems with the Los Rebos gang. Exh. 2, Tab C; Exh. 3. However, as the Immigration Judge expressly declined to rule on this claim, I.J. at 7, n.4, the Department does not rely upon the respondent's testimony about the gang problems as it was not relevant to the Immigration Judge's decision.

[3] Prior to the respondent testifying, her counsel attempted to argue that the respondent's mental health might explain any potential recollection issues "based upon the prior quagmires of credibility" during her prior proceeding. Tr. at 66. The respondent declined an opportunity to get a mental health evaluation addressing credibility. Tr. at 69. At the Department's request, the Immigration Judge conducted a competency review pursuant to *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011), and concluded the respondent was competent. Tr. at 127-35. The respondent agreed with the competency determination, Tr. at 135, and she has not appealed that finding.

removed the respondent from her bicycle and began dragging her to an alley. *Id.* However, "a couple people" who were neighbors noticed the situation and told (b)(6); to let the respondent go. Tr. at 82, 151. He complied with the request but threatened to kill the respondent next time. Tr. at 82. The respondent did not seek medical attention for her bloody nose or the bruises on her back. Tr. at 82-83.

Following this incident, the respondent attempted to report (b)(6); to the police on December 25, 2017, and January 1, 2018. Tr. at 83. The police told her to return on January 8, 2018, in light of the Christmas holiday. *Id.* When she returned on January 8, 2018, the officer did not want to her help; however, the respondent acknowledged being able to file the report on January 12, 2018, regarding the incident with (b)(6); on Christmas Eve. Tr. at 84. Although the respondent was not responsive when asked if she followed up with the police after making the report, she claimed that the police did not contact her further. *Id.*

The respondent provided a copy of the police report she obtained on January 12, 2018, regarding the December 24, 2017 incident. Exh. 9. According to the report, the attack by (b)(6); occurred while he was on weekend furlough from prison. *Id.* The respondent acknowledged that he was still serving his sentence, but she claimed she had heard from her friend (b)(6); that (b)(6); was released from prison after the respondent left Honduras in 2018. Tr. at 143. As the respondent had no personal knowledge of whether (b)(6); remained in prison, the respondent was asked if there was any reason this friend did not write a letter about (b)(6); status. *Id.* The respondent provided no reason and simply stated the friend did not write a letter. *Id.* When asked if the respondent reported (b)(6); conduct on weekend leave to officials at the prison, the respondent stated, "[w]hy would I even tell the people from the prison when not even the police wanted to help me?" *Id.*

The respondent was asked on cross-examination how she finally got this report given the hesitancy of police to issue one and telling her that she had no rights. Tr. at 137. In response, the respondent finally acknowledged that she obtained a letter[4] from the Public Ministry ordering the police to take her report. *Id.* The respondent acknowledged that she went to the Public Ministry on January 12, 2018, to address her anger that the police would not take her report about "death threats" from (b)(6); Tr. at 137-38. The respondent's counsel interjected that the letter was "drafted by [ ] private security" and was "not an official government document." Tr. at 139. However, the respondent stated that she received a pink paper from an attorney employed by the Public Ministry. Tr. at 141. The letter contained a seal and the signature of the Public Ministry attorney and ordered the local police to take the respondent's report about the death threat. *Id.* She also acknowledged telling the Public Ministry that this threat occurred while (b)(6); was on weekend leave from prison. Tr. at 143-44. When the respondent took this order to the police, they issued the police report. Tr. at 141-42. Despite receiving assistance from an attorney at the Public Ministry, the respondent admitted that she never returned to report her concerns that the police were not taking her report seriously and threatened to arrest her. Tr. at 142.

When asked if she had contact with (b)(6); "after that [December 24, 2017] incident," the respondent answered affirmatively and mentioned for the first time another contact with (b)(6); Tr. at 85. The respondent and a friend named (b)(6); were riding the Ferris wheel. Tr. at 85,

[4] The respondent had this document but did not provide. Tr. at 138. The Immigration Judge did not order her to produce it. However, the Immigration Judge previously gave the respondent a continuance to submit the police report and a letter from her brother noting the respondent's burden under the REAL ID Act. Tr. at 106, 110; *but see* Tr. at 138-39 (the Immigration Judge noting the document is relevant and corroborative to the respondent's testimony about how she obtained the police report and expressing concern that "documents keep coming up in cross-examination that have never been provided"); *see generally Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015) (addressing corroborating evidence for asylum applicants and consideration of continuances to obtain that evidence).
[5] The respondent did not state whether this is the same (b)(6); who told her (b)(6); was released from prison. Tr. at 143-44.

144. While on the Ferris wheel, the respondent saw (b)(6); (b)(7)(C) talking to the ride's operator. *Id.* She claimed (b)(6); was telling the operator to speed up the right so that she would fall; however, she never explained how she heard (b)(6); conversation over the noise of the church fair. Tr. at 85-86. Thereafter, the ride sped up, and the respondent injured her hand; her friend, who was pregnant, "bumped her belly." Tr. at 86. The respondent testified that she reported this incident to the police, but that the police took no action and threatened to arrest her. Tr. at 87-88.

Although the respondent initially indicated the Ferris wheel incident occurred after the Christmas Eve incident, Tr. at 85, she was unable to provide a date and could not remember if it was before or after the attack in the alley on cross-examination. Tr. at 144. The respondent was asked why the Ferris wheel incident, as well as other incidents with the Los Rebos gang, were not mentioned in her declaration in support of asylum. Tr. at 144. The respondent replied that the told "the officer" about it but "the office just wrote whatever he wanted to write." *Id.* The respondent did not explain what she meant by that. When asked why the Ferris wheel incident was not mentioned in her asylum application, the respondent stated it was because she told an officer about it at a checkpoint. Tr. at 144-45.

Following the Ferris wheel incident, the respondent claimed (b)(6); came to her house "a few times" looking for her, but they apparently had no direct contact. Tr. at 88. She testified that she left Honduras about two weeks after she was last "contacted by (b)(6); Tr. at 90. Prior to leaving Honduras, the respondent relocated to Tegucigalpa "for a few days," which was about four to five hours from her hometown by car. Tr. at 151. The respondent testified that she stayed with a friend, but she could not remember that friend's name despite living with her in both 2017 and 2018. Tr. at 151-53.

For the first time in any of her three immigration proceedings, the respondent claimed that (b)(6); had raped her in 2012. Tr. at 81-82, 145; *see also* Exh. 2, Tab C (Immigration Judge decision discussing her 2017 about (b)(6); Exh. 10 (credible fear interview notes from 2013 addressing a rape in 2011 by an unknown attacker). As the respondent acknowledged knowing (b)(6); her entire life, she was questioned why her problems with (b)(6); began only in 2012. Tr. at 146. The respondent stated it was because he tried to abuse and rape her. *Id.* When asked why he tried to do this, she stated it was because of her sexual identity and that (b)(6); said that. *Id.* When asked to describe the 2012 incident, the respondent mentioned that (b)(6); held a knife to her neck, but she never testified as to what (b)(6); said. Tr. at 149. Later, she testified that the knife was to her stomach and resulted in a scar. Tr. at 155. She claimed the rape occurred prior to (b)(6); killing the nephew of one of the respondent's friends. Tr. at 149.

She never explained why she had previously testified about (b)(6); murdering her friend's nephew but did not mention that he had raped her in either of her two prior immigration proceedings. Instead, the respondent inexplicably claimed that she was deported in 2017 "without any hearing, without seeing a judge." Tr. at 77. When confronted on cross-examination with contradictory testimony from her 2017 proceeding, the respondent denied that the testimony occurred. Tr. at 98 (expressly denying that she told the prior Immigration Judge about problems her mother had with the Los Rebos gang). Likewise, the respondent denied telling an asylum officer in 2013 that she and (b)(6); used to be friends. Tr. at 145-46. Instead, the respondent described her relationship with (b)(6); as "[a]ll I know is that (b)(6); is a person from the place that I am from." Tr. at 145.

On October 9, 2018, the Immigration Judge issued a written decision[6] granting asylum to the respondent after finding that the respondent (1) was credible, (2) suffered past persecution by (b)(6); because of the respondent's gender identity, and (3) could not obtain the Honduran government's protection to stop Walter. The Department timely appealed.

ARGUMENT

I. THE IMMIGRATION JUDGE ERRED IN FINDING THAT THE RESPONDENT WAS CREDIBLE.

Applications for relief filed on or after May 11, 2005, are governed by the credibility provisions of the REAL ID Act of 2005. INA § 240(c)(4)(B). In reaching a credibility determination, the Immigration Judge should consider the totality of the circumstances and all relevant factors. INA § 240(c)(4)(C); *Matter of J-Y-C-*, 24 I&N Dec. 260, 262 (BIA 2007). In asylum claims, the respondent's testimony is of utmost importance. *Wiransane v. Ashcroft*, 366 F.3d 889, 897 (10th Cir. 2004). Where there are inconsistencies in events that are central to the applicant's claim, an adverse credibility finding is justified. *Matter of A-S-*, 21 I&N Dec. 1106, 1109–10 (BIA 1998). "If [a] person cannot tell substantially the same story twice in substantially the same way, that suggests a likelihood that the story is false." *Singh v. Holder*, 638 F.3d 1264, 1270 (9th Cir. 2011).

The Immigration Judge erred in concluding that the respondent was credible. "When an asylum applicant makes inconsistent statements, the immigration judge is uniquely advantaged to determine the applicant's credibility, and the Board may not substitute its own view of the evidence on appeal." *Matter of A-B-*, 27 I&N Dec. 316, 341 (A.G. 2018). However, in this case, the Immigration Judge made cursory factual findings and failed to address the inconsistencies in

[6] In that decision, the Immigration Judge expressly declined to address the respondent's gang claim, I.J. at 7, n.4, or to alternately address the respondent's withholding of removal and Torture Convention claims. I.J. at 12, n.5.

the record. Instead of meaningfully addressing the respondent's testimony, the Immigration Judge simply noted that the respondent's testimony "generally conformed to the information provided in her application for relief and her answers were consistent with other evidence of record." I.J. at 5. Yet the record establishes numerous inconsistencies that the Immigration Judge's decision does not mention or attempt to resolve.

A crucial inconsistency pertains to the harm the respondent asserts she experienced at the hands of her alleged persecutor, (b)(6); The respondent's application and declaration describe generalized fear of the Los Rebos gang[7] and a problem with (b)(6); in which he tried to kill the respondent in 2017. However, the respondent's declaration described this event as an attempted kidnapping and rape by (b)(6); on December 24, 2017, although she was not seriously harmed. She reported this to the police and obtained a police report on January 12, 2018. Then in her testimony, the respondent added harm not previously mentioned in her application or declaration. The respondent vaguely testified (b)(6); tried to kill her while on a Ferris wheel. She stated that she believed he asked the operator of the ride to speed it up, and she and other passengers suffered some minor injuries. The respondent was unable to explain when this occurred. At no point in her declaration or her application did the respondent mention any harm or contact with (b)(6); other than the December 24, 2017 incident. Yet the Immigration Judge found that this previously unclaimed incident constituted an "attempted murder." I.J. at 7. However, the Immigration Judge failed to address the credibility of the this "attempted murder" where the respondent never raised it prior to her hearing and was extremely vague in her testimony about the event, including being unable to explain when it occurred. Omission of a key event from the asylum application, "determined by context," can support a finding that the applicant was not

[7] The Court expressly declined to consider the other bases upon which the respondent requested asylum, namely political opinion and her familial relationship to her brother Carlos. I.J. at 7 n.4.

credible. *Ismaiel v. Mukasey*, 516 F.3d 1198, 1205 (10th Cir. 2008) (holding that an applicant's failure to mention torture on his asylum application and on supplemental letters submitted two weeks before hearing could form basis for adverse credibility determination in denying restriction on removal, particularly where application explicitly asked for such information and alien had assistance of counsel).

The respondent further testified that (b)(6); attempted to rape her in 2012; however, the respondent never previously claimed that he raped her. Indeed, in her 2013 credible fear interview the respondent generally stated that (b)(6); (b)(7)(C) was one of the people who had "abused" her since she was seven years old. *See* Exh. 10. She never explained what she meant by that and instead focused much of the claim on a man named (b)(6);. *Id*. She then went on to mention a 2011 rape by an unknown male. She never mentioned any problem in 2012, whether by (b)(6); or anyone else. Subsequently, in her 2017 asylum application filed while in withholding-only proceedings, she mentioned a problem with (b)(6); in 2012 in which he threatened to kill her and asserted that he was a leader of the Ultrafiel gang. Exh. 2, Tab D. She claimed he killed the nephew of her friend because (b)(6); believed that the nephew was a member of a rival gang and also because the nephew's aunt was transgender. She vaguely claimed (b)(6); threatened her while he was in jail after being convicted of the murder, which prompted her to flee to Mexico. Likewise, in her testimony in that proceeding, she did not claim that (b)(6); ever raped her. Exh. 2, Tab C. In her third immigration proceeding, she mentioned an attempted murder by (b)(6); in 2017. Only during her most recent testimony did the respondent add that (b)(6); raped her in 2012. This rape was a critical factor in the Immigration Judge's decision, including as to whether the threats she received following her second removal constituted past persecution. I.J. at 6. The Immigration Judge never addressed the respondent's

failure to raise the alleged rape, despite being in immigration proceedings twice previously on fear-based claims, or to otherwise address the respondent's evolving story regarding her encounters with (b)(6); This is especially problematic where the respondent previously claimed a rape in 2011 by *an unknown person* in both her 2013 credible fear interview and in her 2017 proceeding. Exh. 2, Tab C at 8, n.3; Exh. 10. While addressing rape can be difficult, the respondent has also asserted being raped in her immigration proceedings. Yet she never claimed a rape in 2012 or any rape by (b)(6); until 2018.

Likewise, it remains unclear who (b)(6); s or what relationship he and the respondent have. The respondent initially claimed in 2013 that he was a friend. Exh. 10. However, in her 2017 proceeding, she claimed he was a gang leader. Exh. 2, Tab C. In her 2018 testimony, she never testified that he was a gang leader, and she denied ever stating that he was a friend. Tr. at 145-46. Instead, she claimed (b)(6); was some vague acquaintance when pressed after her prior statements about him. *Id.*

Further, the respondent was previously found to be incredible in her 2017 withholding-only proceeding. *See* Exh. 2, Tab C. Strikingly, the respondent denied that she had a hearing before the Immigration Judge prior to being removed to Honduras in 2017. Tr. at 77. The record is clear that she did have a hearing as she previously applied for protection-related relief. Exh. 2, Tabs C-D. The Immigration Judge failed to address the prior decision or the prior adverse credibility finding in rending her decision, despite noting it at an earlier hearing. Tr. at 45. Likewise, the Immigration Judge did not address the respondent's assertion that she never had a hearing in 2017. Again, this failure was critical as the respondent thereafter disputed portions of her testimony in 2017, despite it being part of the record. Exh. 2, Tab C; Tr. at 98.

Given the insufficiency of the Immigration Judge's credibility analysis, the prior incredibility finding, and the inconsistencies throughout the respondent's immigration proceedings, the Immigration Judge's credibility determination was clearly erroneous and must be reversed.

II. THE IMMIGRATION JUDGE ERRED IN FINDING THAT THE RESPONDENT ESTABLISHED PAST PERSECUTION IN LIGHT OF HER INCREDIBLE TESTIMONY.

The respondent bears the burden of establishing that she is a "refugee" as defined in the Act. *Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1335 (10th Cir. 2008) ("in order to be eligible for asylum, an alien must demonstrate by a preponderance of the evidence that she is a refugee"); *Woldemeskel v. INS*, 257 F.3d 1185, 1189 (10th Cir. 2001); INA § 208(b)(1)(B)(i); 8 C.F.R. § 208.13(a); *see also* INA § 240(c)(4)(A)(i). A "refugee" is defined as any person outside of their country of nationality, or if he has no nationality, is outside of the country where he habitually resided, who is unable or unwilling to avail himself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A); 8 C.F.R. § 1208.13(b)(1)-(2). A refugee can show three types of persecution to satisfy the statutory requirement: (1) "a well-founded fear of future persecution," (2) "past persecution sufficient to give rise to a presumption of future persecution," or (3) "past persecution so severe it supports an unwillingness on the applicant's part to return to that country." *Chaib v. Ashcroft*, 397 F.3d 1273, 1277 (10th Cir. 2005).

The Immigration Judge erred in finding that the respondent established past persecution. I.J. at 6-7. In order to meet her burden of proof that she experienced past persecution, the alien must establish that (1) an incident or incidences rise to the level of persecution, (2) were committed on account of a protected ground, and (3) were committed by the government or forces the government could not or would not control. *Niang v. Gonzales*, 422 F.3d 1187, 1194-

95 (10th Cir. 2005). Persecution is . . . "[t]he infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g. race, religion political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life." *Matter of Laipenieks*, 18 I&N Dec. 433, 456-57 (BIA 1983), *rev'd on other grounds*, 750 F.2d 1427 (9th Cir. 1985); *see also Wiransane v. Ashcroft*, 366 F.3d 889, 893 (10th Cir. 2004) ("Although persecution is not defined in the INA, we have held that a finding of persecution requires the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive and must entail more than just restrictions or threats to life and liberty"). The Immigration Judge found that the harm experienced by the respondent between October of 2017 to April of 2018[8] constituted past persecution. I.J. at 6. The respondent testified to two incidents involving (b)(6); after her last removal on October 31, 2017. Exh. 2, Tab. A. The first occurred on December 24, 2017, in which (b)(6); while on weekend release from prison, chased her, drug her into an alley, and hit her with a gun. Neighbors intervened to stop anything further from occurring, but (b)(6); threatened to kill the respondent the next time he saw her. The respondent suffered a bloody nose and had bruises on her back and ribs, but she did not require medical treatment.

The second incident occurred at a church fair on an unknown date. (b)(6); was following the respondent and her friend at the fair. After the respondent and her friend got on a Ferris wheel. The respondent saw (b)(6); speaking with the ride operator, and the ride later sped up.

[8] The respondent left Honduras in February of 2018, and she did not seek asylum or other protection-related relief from any other country.

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The respondent and her friend suffered minor injuries, but the respondent needed no medical treatment. The respondent believes (b)(6); told the operator to try to kill her. In concluding that the respondent suffered past persecution, the Immigration Judge noted that the Ferris wheel incident constituted "attempted murder." I.J. Decision at 7. However, despite the respondent's suspicions that the ride was sped up at the request of (b)(6); there is no evidence that this was an attempted murder of the respondent, and even if it was, the actor was the ride operator and not the alleged persecutor.

Moreover, the Immigration Judge concluded that the threats alone by (b)(6); constituted persecution when taken in conjunction with the alleged rape in 2012. I.J. Decision at 6. However, threats alone do not generally constitute persecution, and the alleged rape in 2012 is not credible as previously explained. As such, the Immigration Judge's conclusion that the respondent established past persecution by (b)(6); was in error. Therefore, the respondent was not entitled to any presumption of a well-founded fear. *Woldemeskel*, 257 F.3d at 1189 (holding that a finding of past persecution results in a rebuttable presumption of well-founded fear on the same basis); 8 C.F.R. § 1208.13(b)(1).

Likewise, the Immigration Judge's alternate finding regarding a "pattern or practice" of persecution was erroneous. The Immigration Judge relied upon the percentage of LGBTI asylum seekers from the Northern Triangle who claimed experiencing harm to establish persecution of transgender individuals in Honduras. I.J. at 12. The Immigration Judge's assumption that harm to people seeking protection outside of their country is somehow representative of an entire population in not supported in the evidence. The Immigration Judge likewise relied upon discrimination to also finding a pattern or practice of persecution; however, discrimination is not

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persecution. *Vatulev v. Ashcroft*, 354 F.3d 1207, 1210 (10th Cir. 2003). Finally, although the Immigration Judge addressed unreporting of crimes by transgender individuals, the respondent in this case did report her assault and received the assistance of the Public Ministry in obtaining a police report. The respondent did not testify to any harm by the police, and indeed she did receive help from her government. Therefore, the Immigration Judge's conclusion that there is a pattern or practice of persecution in Honduras for transgender women was erroneous.

III. THE IMMIGRATION JUDGE ERRED IN FINDING THAT THE RESPONDENT ESTABLISHED A NEXUS BETWEEN THE HARM SHE FEARS BY A PRIVATE ACTOR AND A PROTECTED GROUND.

Unless the applicant has been targeted on a protected basis, she is ineligible for asylum. *Matter of M-E-V-G-*, 26 I&N Dec. at 235. A showing of severe harm is not enough; the harm inflicted or feared must be on account of a protected ground. *Matter of V-T-S-*, 21 I&N Dec. 792, 798 (BIA 1997) ("Seriousness of conduct . . . is not dispositive in our analysis. Instead, the critical issue is whether a reasonable inference may be drawn from the evidence to find that the motivation for the conduct was to persecute the asylum applicant on account of race, religion, nationality, membership in a particular social group, or political opinion."). To demonstrate that harm was "on account of" a protected ground, the applicant must show that the protected characteristic was "one central reason" for the harm. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d at 646; *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) ("one central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment or fears of further mistreatment" and "cannot by incidental, tangential, superficial, or subordinate to another reason for harm" (quotations omitted)). For the respondent to meet her burden to show that she was persecuted on account of

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a protected ground, she "must demonstrate that the persecutor would not have harmed the applicant if the protected trait did not exist." *Matter of N-M-*, 25 I&N Dec. 526, 531 (2011).

The Immigration Judge erred in concluding that the respondent had established that she would be singled out for harm because of her gender identity. The respondent testified that she suspected (b)(6); threatened her in 2017 and raped her in 2012 because she was transgendered. However, there is no evidence that (b)(6); was motivated based upon her gender identity. He made no mention of her gender identity in 2017. The only claim that he mentioned her gender was during a rape in 2012, an event that the respondent never previously disclosed during either of her two prior immigration proceedings. The rape in 2012 was not mentioned in the respondent's present asylum application or her declaration. The rape was only raised for the first time during her testimony in 2018, and that testimony was not credible in light of the evidence from her prior proceedings as well as her evolving claims of harm during her hearing. The respondent previously told the asylum office in her 2013 credible fear review that (b)(6); used to be a friend. Exh. 10. The respondent's testimony in her 2017 proceeding and asylum application related only to a problem with (b)(6); following the murder of a friend's nephew. "[R]ank speculation and conjecture 'cannot be substituted for objective and substantial evidence.'" *Matter of D-R-*, 25 I&N Dec. 445, 454 (BIA 2011) (internal citations omitted). Indeed, the record was so lacking regarding Walter motivation that the Immigration Judge had to resort to country condition evidence showing discrimination against transgendered individuals to find that the private actor was motivated by the respondent's gender identity. I.J. at 7-9. This was improper as the respondent had a prior relationship with (b)(6); and there is no evidence to support that the respondent's gender identity played any role in the harm of the respondent, let

alone a central reason. As such, the Immigration Judge's findings as to (b)(6); motivation were clearly erroneous.

IV. THE IMMIGRATION JUDGE ERRED IN CONCLUDING THAT THE HONDURAN GOVERNMENT IS UNABLE OR UNWILLING TO PROTECT THE RESPONDENT FROM A PRIVATE ACTOR WHERE THE PUBLIC MINISTRY ASSISTED THE RESPONDENT.

The Immigration Judge erred in concluding that the Honduran government was involved in the feared harm by private actors. I.J. Decision at 9-10. Specifically, the Immigration Judge erred in concluding that the Honduran government was not willing to assist the respondent regarding her problems with (b)(6); The record established that (b)(6); was imprisoned due to an unrelated murder. Although the respondent testified to difficulty in obtaining a police report, she testified that an attorney at the Public Ministry provided her with an order for the police to take her report. The respondent stated that she did not have difficulty getting this order from the Public Ministry, and the police thereafter complied and took her report. As stated by the Attorney General,

> [a]n applicant seeking to establish persecution based on violent conduct of a private actor "must show more than 'difficulty . . . controlling' private behavior." *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005) (quoting *Matter of McMullen*, 17 I&N Dec. 542, 546 (BIA 1980)). The applicant must show that the government condoned the private actions "or at least demonstrated a complete helplessness to protect the victims." *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000); *see also Hor*, 400 F.3d at 485. 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. There may be many reasons why a particular crime is not successfully investigated and prosecuted. Applicants must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it.

Matter of A-B-, 27 I&N Dec. 316, 337–38 (2018). The Immigration Judge's reasoning is incongruous with the fact that the Honduran Public Ministry, which investigates and prosecutes

crimes against sexual minorities, offered assistance to the respondent. After the respondent obtained an order from the Public Ministry, the local police department took the respondent's report. This occurred on January 12, 2018, and the respondent left the country a couple of weeks later in February of 2018. Although the respondent stated nothing was done to investigate the threats by (b)(6); (b)(7)(C) in December of 2017, the respondent provided no evidence of this given that she left the country shortly after making the report. Additionally, the respondent never returned to the Public Ministry to allege any additional issues with the police department, and she never reported to officials at the prison where (b)(6); was serving a sentence for murder that he was threatening her while on weekend leave. What is clear is that the respondent received assistance from the Public Ministry when she sought it, and the order from a Public Ministry attorney to the local police to take the respondent's report about (b)(6); was effective. Therefore, the Immigration Judge's conclusion that the government of Honduras condoned the threat of harm to the respondent cannot stand. *See generally Matter of A-B-*, 27 I&N Dec. at 320, 337.

Finally, because the respondent has not satisfied the lower burden of proof for asylum on this claim, she necessarily has not met the higher burden for withholding of removal under section 241(b)(3) of the INA. *Matter of H-L-H- & Z-Y-Z-*, 25 I&N Dec. 209, 218 (BIA 2010); *see Ustyan v. Ashcroft*, 367 F.3d 1215, 1218 (10th Cir. 2004). Therefore, the Board should reverse the Immigration Judge's decision granting asylum. As the Immigration Judge expressly declined to address the respondent's alternate theory for asylum and withholding of removal pertaining to issues with the gangs or her application for protection under the Convention Against Torture, the Department respectfully requests that this case be remanded for further factfinding.

CONCLUSION

The Immigration Judge erred in finding that the respondent was credible and otherwise satisfied her burden of proof for asylum based upon harm by a private actor, especially in light of the intervention on the respondent's behalf by the Honduran Public Ministry. The Department respectfully requests that the Board reverse and vacate the decision of the Immigration Judge granting asylum and remand for the Immigration Judge to adjudicate the respondent's request for CAT protection and her alternate asylum theory regarding the Los Rebos gang.

Respectfully submitted on this 15th day of February, 2019,

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Proof of Service

On , 20 , I, (b)(6); Assistant Chief Counsel, mailed or delivered a copy of this DEPARTMENT OF HOMELAND SECURITY BRIEF ON APPEAL and any attached pages to (b)(6); (b)(7)(C) 208 S. LaSalle St., Ste. 1300, Chicago, IL 60604, by placing such copy in an envelope and placing said envelope, having been addressed to the name and address indicated, in my office's receptacle designated for official "out-going" regular mail.

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(date)

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NON-DETAINED[1]

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

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No.: (b)(6); (b)(7)(C)
In withholding-only proceedings	)	

DEPARTMENT OF HOMELAND SECURITY
BRIEF ON REMAND

[1] The applicant was removed from the United States on or about August 5, 2019.

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INTRODUCTION

On January 31, 2019, the Immigration Judge granted the applicant withholding of removal, finding that the violence the applicant suffered at the hands of her former spouse was on account of the applicant's membership in the group "Mexican women who terminate the marriage without the consent of the husband." The Department of Homeland Security (Department) timely appealed the Immigration Judge's decision and, on July 25, 2019, the Board of Immigration Appeals (Board) sustained the Department's appeal and vacated the Immigration Judge's decision. While the applicant did not file an appeal of the Immigration Judge's decision, she did file a petition for review of the Board's decision with the United States Court of Appeals for the Tenth Circuit (Tenth Circuit). *See* (b)(6); (b)(7)(C) *v. Barr*, No. 19-9559 (10th Cir. remanded Feb. 6, 2020). On February 6, 2020, the United States government moved to remand the case from the Tenth Circuit to the Board. *Id.*

The Department hereby submits its brief on remand in support of its appeal of the Immigration Judge's decision granting the applicant withholding of removal pursuant to section 241(b)(3) of the Immigration and Nationality Act (INA or Act). On remand, the Board should find that the applicant has waived her opportunity to challenge any aspect of the Immigration Judge's decision and, alternatively, the Board should uphold the Immigration Judge's decision to the extent it rejects the applicant's initial six proposed particular social groups. However, the Board should again reverse the decision of the Immigration Judge granting withholding. The Board should, finally, find that the Immigration Judge correctly denied the applicant's request for protection pursuant to the regulations implementing the United States government's obligation under Article 3 of the United Nations Convention Against Torture (CAT).

The Department requests that this case be reviewed by a three-member panel given the need to review a decision by an Immigration Judge not in conformity with existing law or applicable precedent, the need to review clearly erroneous factual determinations, and the need to reverse a decision of an Immigration Judge not arising under 8 C.F.R. § 1003.1(e)(5). *See* 8 C.F.R. § 1003.1(e)(6)(iii), (v), (vi).

ISSUES PRESENTED

- Whether the applicant, who did not file a separate appeal and who moved to summarily affirm the Immigration Judge's decision, waived her right to challenge any aspect of the underlying order?

- Whether the applicant failed to show that she was harmed on account of her membership in the particular social group, "Mexican women," where she did not present evidence that her former spouse targeted her in order to overcome her membership in that group?

- Whether the Immigration Judge erred in determining that the applicant's proposed social group, "Mexican women who terminate the marriage without the consent of the husband," was cognizable where the applicant did not present any evidence that the group was recognized throughout Mexican society?

- Whether the Immigration Judge erred in determining that the applicant was harmed on account of her membership in the particular social group, "Mexican women who terminate the marriage without the consent of the husband," where she did not present evidence that her former spouse targeted her in order to overcome her membership in that group?

- Whether the Immigration Judge erred in finding that the government of Mexico was unable or unwilling to protect the applicant, despite the applicant being afforded a civil divorce?

- Whether the Immigration Judge erred in shifting the burden to the Department to show a change in country conditions, despite the applicant not showing past persecution?

STANDARD OF REVIEW

The Board reviews findings of fact, including "predictive findings of what may or may not occur in the future," for clear error. *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015); 8

C.F.R. § 1003.1(d)(3)(i). The Board reviews de novo "questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges." *Z-Z-O-*, 26 I&N Dec. at 588; 8 C.F.R. § 1003.1(d)(3)(ii). The Board's de novo review authority includes "whether the underlying facts found by the [i]mmigration [j]udge meet the legal requirements for relief from removal . . . ." *Z-Z-O-*, 26 I&N Dec. at 591. The Board also reviews de novo the questions of whether a group is a particular social group within the meaning of the Act, *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018), and "whether . . . respondents were persecuted 'on account of a protected ground,'" *see Matter of S-E-G-*, 24 I&N Dec. 579, 588 n.5 (BIA 2008).

Whether an applicant is a member of a particular social group, as well as the underlying requirements to establish a cognizable particular social group, such as social distinction, necessarily involve fact-finding. *Id.* at 192. Similarly, a persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by the Board for clear error. *See Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011).

Finally, whether the applicant can internally relocate within his or her home country is a mixed question of fact and law. *See Matter of M-Z-M-R-*, 26 I&N Dec. 28, 36 (BIA 2012).

SUMMARY OF THE ARGUMENT

The applicant bears the burden of proof to establish that her life or freedom would be threatened in the country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 1208.16(b).

In this case, the applicant waived her opportunity to challenge any aspect of the Immigration Judge's decision, first by electing not to file an appeal and, second, by moving to summarily affirm the Immigration Judge's decision. However, even if the applicant did not waive her right to challenge the Immigration Judge's decision, the applicant has not met her

(b)(6); (b)(7)(C)

burden of showing that her membership in the proposed particular social group of "Mexican women" was one central reason for the harm she experienced at the hands of her husband over twenty years ago.

The Immigration Judge, however, did err in finding that "Mexican women who terminate the marriage without the consent of the husband" constitutes a cognizable particular social group under the Act. When an applicant seeks withholding, she must "establish that the group is composed of members who share a common immutable characteristic, defined with particularity, and socially distinct within the society in question." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014). The applicant's particular social group is not defined with particularity, and the record does not establish that this group is socially distinct within Mexico. Further, even if the particular social group is cognizable, the Immigration Judge erred in concluding that the applicant's particular social group was at least one central reason for the harm she fears from a private actor, her former husband. The record demonstrates that the applicant was subjected to spousal abuse in the 1990s. However, there is no evidence in the record that the applicant's former spouse targeted her on account of her inclusion in the group "Mexican women who terminate the marriage without the consent of the husband."

Moreover, the Immigration Judge erred in finding that the Mexican government would be unable or unwilling to protect the applicant. The applicant never personally reported any harm to the police. And, when the applicant did civilly seek assistance from the Mexican government, the Mexican legal system gave her the divorce she requested.

Finally, the Immigration Judge erred in finding past persecution on the basis of a protected ground, and so erred in shifting the burden to the Department to show that there has been no fundamental change in circumstances and that internal relocation is not possible.

Further, even if there was past persecution, the Immigration Judge erred in finding that the Department had not established that there has been a fundamental change in circumstances and that internal relocation is possible and reasonable.

STATEMENT OF FACTS

The applicant is a (b)(6); (b)(7)(C) native and citizen of Mexico. Tr. at 18–19. She first came to the United States without authorization in 1999 but was apprehended by immigration authorities and returned to Mexico. Tr. at 22–23. She did not seek asylum at that time, though she claimed at her hearing before the Immigration Judge that she was then fleeing for her life. Tr. at 34. The applicant returned to the United States a week later. Tr. at 23. She did not testify about where in Mexico she was during that week. Again, she did not seek asylum when she entered the United States. Instead, she remained in the United States until July 4, 2005, returning to Mexico on her own volition to see her grandmother. Tr. at 23. She then remained in Mexico for approximately two weeks before returning to the United States. Tr. at 42.

The applicant testified that she attempted to enter the United States twice in 2005. Tr. at 24; Exh. 1.[2] According to the applicant, "The first time I came, I was caught, and the second time I came, I managed to get through." Tr. at 24. Again, she did not seek asylum when she entered the United States in 2005. Department officers most recently encountered the applicant in the United States on July 27, 2018. Exh. 1. The Department determined that the applicant had illegally entered the United States and, accordingly, reinstated the prior order of removal pursuant to section 241(b)(5) of the Act. *Id*. The applicant claimed fear of persecution or torture if removed to Mexico and her case was referred to the Asylum Office pursuant to 8 C.F.R. §

[2] According to Department records, the applicant unsuccessfully attempted to enter the United States twice in 2005—once on July 18, 2005, and again on July 22, 2005. *See* Exh. 1.

208.31(b). Exh. 1; I.J. at 1. On October 22, 2019, the applicant submitted Form I-589, Application for Asylum and Withholding of Removal, for consideration in withholding-only proceedings pursuant to 8 C.F.R. § 1208.31(g). Tr. at 7–9; I.J. at 2.

On January 28, 2019, the applicant appeared for her individual merits hearing where the applicant and her mother both testified. Tr. at 10–89; I.J. at 2. The applicant testified that she was physically abused in Mexico by her now ex-husband from approximately 1992 until their divorce in 1999. Tr. at 24–31, 39. The abuse included physical and sexual assaults. Tr. at 24–31, 39. She stated that she was beaten at least three times a week, every week for seven years. Tr. at 49. She further stated he would lock her in a room when he was not home. Tr. at 22. The applicant admitted that she never sought medical assistance at any time and that she never reported the abuse to the authorities in Mexico. Tr. at 30, 32, 49–50. The applicant never attempted to report the abuse to the police, testifying vaguely that the police do not "do anything." Tr. at 37. Her mother testified that she had made complaints to the police, but that nothing was done by them; the police purportedly told her that they could not do anything because there was "no blood." Tr. at 59–62. The applicant's mother did not provide any documentary evidence of any reports filed and could not provide dates on which she went to the police. She did not inform the applicant of any reports or ask the applicant to assist in filing any reports with information regarding the crimes. Tr. at 44, 59–62.

In 1999, the applicant was able to obtain a divorce from her husband from the civil authorities in Mexico. Tr. 22, 33, 40–41; I.J. at 7. She stated that she decided to leave him because she caught him with another woman after returning from the store. Tr. at 33, 40. When the Department asked, "You were able to leave?", she replied, "Yes, sir." Tr. at 40. She initially testified on direct examination that when the divorce was final, her former spouse got angry and

started threatening her, but that the physical abuse all happened before the divorce. Tr. at 41. However, when questioned by the Immigration Judge, she stated that her former spouse attacked her and choked her the day she signed the divorce decree. Tr. at 48. Once the divorce was finalized, the physical abuse stopped. Tr. at 41; I.J. at 7. After the divorce, the applicant resided with her mother in Mexico and allegedly received threats from her former spouse. I.J. at 7. The applicant moved to live with her uncle in Veracruz, approximately eighteen hours away from the applicant's hometown Chiapas; but allegedly she continued to receive threats while living with her uncle. I.J. at 8. However, the applicant's former spouse did not travel to Veracruz and did not commit any acts of violence against her. I.J. at 8.

The applicant returned to Mexico of her own volition in 2005. Tr. at 44, 59–62. She stated that while she was in Mexico in 2005, she received one threatening call from her ex-husband. Tr. at 42–43. He never made any attempt at physical contact with her and never physically harmed her while she was back in Mexico during that time. Tr. at 44. The applicant stated that she does not know where her former spouse is now and that she has not personally received any threats from him since 2005. Tr. at 53–54. She believes he has children with another woman. Tr. at 54. The applicant's mother, siblings, and children reside in the United States lawfully; her father resides in Mexico. Tr. at 19–21. The applicant's mother testified that, between 2014 and 2018, the mother would return once a year to Mexico to see friends. Tr. at 72–72. During these trips, the applicant's former spouse would make makes vague threats about the applicant. Tr. at 72.

In his written decision, the Immigration Judge granted the applicant's application for withholding of removal and denied applicant's request for protection under the CAT. The Immigration Judge held that "the applicant's execution of the divorce without the consent of her

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husband was at least one central for the harm and threats she experienced." I.J. at 16. The Immigration Judge noted that the applicant defined her particular social group as "Mexican women who terminate the marriage without the consent of the husband." I.J. at 15.[3] The Immigration Judge found the group is "sufficiently socially distinct" because "Mexican women would generally understand their own affiliation in this group, based on socially construed categories such as nationality and gender." I.J. at 12. The Immigration Judge noted that membership in the group includes only woman who are Mexican and requires that they have terminated a marriage without the consent of their spouse. The Immigration Judge further found that the applicant's execution of the divorce "was viewed as an act of defiance" and is particularly compelling given the former partner's "ability to control all aspects of the applicant's life." I.J. at 16. The Immigration Judge concluded that the former partner "still holds a vendetta against the applicant for divorcing him and would seek to harm her because of it." *Id.* The Department filed a timely appeal of the Immigration Judge's decision. The applicant did not appeal.

On July 25, 2019, the Board sustained the Department's appeal. *See* Dec. of the Board of Immigration Appeals at 4 (July 25, 2019). The Board noted, "The applicant did not file an appeal of the Immigration Judge's decision denying her application for protection under the Convention Against Torture" or "challenging the Immigration Judge's findings and conclusions with regard to other proposed social group definitions and her claim of political persecution" and that those issues were, therefore, waived. *Id.* at 1 n. 1, 2. Therefore, the Board limited its review to the Immigration Judge's analysis of the proposed social group consisting of "Mexican women

[3] As the Immigration Judge noted, the applicant initially outlined six proposed particular social groups. I.J. at 10; I.J. at 10 n.3; Tr. at 15–16. It was not until the end of the hearing that the Immigration Judge and the applicant agreed to the newly formulated particular social group which the Immigration Judge then found to be cognizable. Tr. at 84.

who terminate the marriage without the consent of the husband." *Id.* at 1. The Board first found that the proposed social group of "Mexican women who terminate the marriage without the consent of the husband" was not a cognizable particular social group for purposes of withholding of removal under the Act. *Id.* at 2–3. The Board, further, found "the Immigration Judge clearly erred in finding that the applicant suffered persecution, and faces a clear probability of future persecution, on account of her membership in a group of 'Mexican women who terminate the marriage without the consent of the husband.'" *Id.* at 3.

On August 16, 2019, the applicant filed a petition for review with the Tenth Circuit. (b)(6); (b)(7)(C) No. 19-9559. On February 6, 2020, the Tenth Circuit granted the United States government's motion to remand the case to the Board. *Id.*; *see also* Order, No. 19-9559 (10th Cir. Feb. 6, 2020) ECF No. 30. In granting the motion for remand, the Tenth Circuit noted, "This matter is remanded fully to the [Board] to conduct any and all additional proceedings it deems necessary and appropriate to address the matters raised in the Motion." *Id.*

ARGUMENT

I. THE APPLICANT WAIVED HER RIGHT TO CHALLENGE ANY FINDING IN THE IMMIGRATION JUDGE'S DECISION

"The Board is an appellate body whose function is to review, not to create a record." *Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984). In its role as an appellate body, the Board relies on the parties to advance arguments both before the immigration judge in the first instance, and before the Board where the parties disagree with the ultimate findings of the immigration judge.

In this case, the applicant did not appeal any aspect of the Immigration Judge's decision in her case. The applicant did not, for instance, appeal the Immigration Judge's finding that "[t]he applicant has provided *one viable protected ground*, which is the particular social group

(b)(6); (b)(7)(C)

defined as: 'Mexican women who terminate the marriage without the consent of the husband,'" I.J. at 10 (emphasis added), or that "the applicant has failed to propose *any other* cognizable group or protected ground," I.J. at 12 (emphasis added). The Immigration Judge reached this conclusion after listing each of the applicant's six other proposed social groups, including, "Mexican women." I.J. at 2; *see also* I.J. at 12–14 (discussing the applicant's other proposed social groups and the applicant's political opinion). Nor did the applicant challenge the Immigration Judge's decision to "decline[] to address whether the applicant's proposed particular social group defined as, 'Mexican women,' is a valid particular social group" or the conclusion that "the harm the applicant experienced was on account of the applicant's alternative group: 'Mexican women who terminate the marriage without the consent of the husband.'" I.J. at 15 n. 4. The applicant, likewise, did not appeal the Immigration Judge's finding that she was ineligible for protection under the CAT. I.J. at 25.

Rather, on May 10, 2019, the applicant moved for summary affirmance of the Immigration Judge's decision. *See* Motion for Summary Affirmance and Brief in Opposition to DHS Appeal (May 10, 2019) (Mot. for Sum. Aff.). The regulations permit a Board member to summarily affirm the decision of an immigration judge where the "issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation" and the "factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case." 8 C.F.R. §§ 1003.1(e)(4)(i)(A)–(B). Where the Board summarily affirms the decision of an immigration judge, the immigration judge's decision becomes the final agency determination. *Id.* § (e)(4)(ii). Accordingly, where a party on appeal moves to summarily affirm the decision of an immigration judge, the moving party is necessarily agreeing that the immigration judge reached the correct

(b)(6); (b)(7)(C)

decision "such that any errors in the decision of the immigration judge . . . were harmless or nonmaterial." *Id.*

While the Board ultimately denied the applicant's motion for summary affirmance and sustained the Department's appeal, in moving for summary affirmance of the Immigration Judge's decision, the applicant was necessarily requesting that the Board affirm the Immigration Judge's conclusions, including the conclusion that"[t]he applicant has provided one viable protected ground, which is the particular social group defined as: 'Mexican women who terminate the marriage without the consent of the husband," I.J. at 10, and "the applicant has failed to propose any other cognizable group or protected ground," I.J. at 12. Thus, the applicant cannot now resuscitate a particular social group consisting of "Mexican women" simply because she received an adverse decision from the Board.

Indeed, in her motion for summary affirmance, the applicant "note[d] that the [Immigration Judge] did not reach a finding as to whether [applicant's] proposed PSG, 'Mexican women' is a cognizable PSG." Mot. for Sum. Aff. at 9. The applicant, however, did not expand on this note and, instead, returned to arguments regarding the alternative PSG, "Mexican women who terminate the marriage without consent of the husband." *See, generally, id.*

Having failed to appeal the Immigration Judge's decision or to raise these arguments before the Board in her motion for summary affirmance, the respondent's arguments should be deemed waived. *See, e.g., Matter of J-Y-C-*, 24 I&N Dec. 260, 261 n.1 (BIA 2007) (matters not raised before the Immigration Judge are waived on appeal); *Matter of R-S-H-*, 23 I&N Dec. 629, 638 (BIA 2003) (same); *see also* INA § 242(d) (requiring exhaustion of administrative remedies for federal court review of final orders); *United States v. Black*, 369 F.3d 1171, 1176 (10th Cir.

2004) (legal issues not raised in opening brief are deemed waived). The applicant, therefore, is precluded from arguing on remand that the PSG, "Mexican women," is legally cognizable.

II. THE APPLICANT HAS NOT SHOWN THAT SHE WAS PERSECUTED ON ACCOUNT OF HER MEMBERSHIP IN A PARTICULAR SOCIAL GROUP CONSISTING OF "MEXICAN WOMEN."

Assuming, *arguendo*, the Board finds that the applicant has not waived her opportunity to challenge the Immigration Judge's decision, the applicant has not met her burden of showing that she was harmed on account of her membership in the PSG "Mexican women."

A. The Board does not need to remand this case to the Immigration Judge.

A persecutor's actual motive is a matter of fact to be determined by the immigration judge and reviewed by the Board for clear error. *See N-M-*, 25 I&N Dec. at 532. However, the Board's de novo review authority includes "whether . . . respondents were persecuted 'on account of a protected ground.'" *S-E-G-*, 24 I&N Dec. at 588 n.5.

In this case, the Immigration Judge reached a factual conclusion that the applicant's ex-husband harmed her on account of her membership in a particular social group consisting of "Mexican women who terminate the marriage without the consent of the husband." I.J. at 10, 15–17. The Immigration Judge acknowledged that "the majority of the emotional and physical abuse that the applicant endured was prior to her divorce, *and therefore has no nexus to a protected ground*." I.J. at 15 (emphasis added).[4] However, the Immigration Judge went on to find that the "applicant's execution of the divorce without the consent of her husband was at least 'one central reason' for the harm and threats she experienced." I.J. at 16. Thus, the Immigration Judge has reached a factual conclusion regarding the purported persecutor's actual motive, which the Board can review for clear error. The Board, further, can review de novo whether the

[4] Again, as noted above, the applicant did not appeal this finding by the Immigration Judge.

(b)(6); (b)(7)(C)

Immigration Judge erred in concluding that the applicant was harmed on account of the particular social group.

Accordingly, the record in this case is complete, no additional fact-finding is necessary, and the Board can review the Immigration Judge's factual and legal conclusions based upon the record before it.

B. The applicant did not meet her burden of showing that she was harmed "on account of" her membership in the proposed social group, "Mexican women."

An applicant seeking withholding of removal must demonstrate that it is more likely than not that, upon removal, his or her life or freedom would be threatened on account of his or her race, religion, nationality, political opinion, or membership in a particular social group. INA § 241(b)(3). To demonstrate that harm was "on account of" a protected ground, the applicant must show that the protected characteristic was "one central reason" for the harm. *See* INA § 241(b)(3); *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F. 3d 641, 646 (10th Cir. 2012); *Matter of C-T-L-*, 25 I&N Dec. 341, 348 (BIA 2010). The protected ground cannot play a minor role in the persecution, nor can it be "incidental, tangential, superficial, or subordinate to another reason for the harm." *Karki v. Holder*, 715 F.3d 792, 800 (10th Cir. 2013) (citations omitted); *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010). The applicant must show that the persecutor sought to "overcome" the protected characteristic. *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985); *cf. Matter of E-R-A-L-*, 27 I&N Dec. 767, 774 (BIA 2020) (affirming the continued focus on a persecutor's attempt to "overcome" the protected characteristic).

Private criminal victimization, including domestic violence, even when widespread in nature, is insufficient to establish eligibility statutory withholding of removal. *See, e.g.*, *Matter*

(b)(6); (b)(7)(C)

of A-B-, I&N Dec. 316, 320 (A.G. 2018) ("The mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim"); *M-E-V-G-*, 26 I&N Dec. at 235 ("asylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions"); *see generally Matter of Mogharrabi*, 19 I&N Dec. 439, 447 (BIA 1987) ("aliens fearing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval in their countries, would not qualify for asylum."). Thus, "claims by aliens pertaining to domestic violence . . . perpetrated by non-governmental actors will," generally, "not qualify for asylum" or statutory withholding of removal. *A-B-*, 27 I&N Dec. at 320.

In this case, while the applicant testified at length about the abuse she suffered at the hands of her former husband, *see* Tr. at 26–31, she did not present evidence that he was attempting to overcome her membership in a social group composed of "Mexican women."[5] For instance, the applicant testified that, when she and her ex-husband were first married, they lived together as a couple with the applicant's mother. Tr. at 25–27. However, the applicant did not testify that her former husband was abusive toward the applicant's mother, who was also a woman living in Mexico. She and her mother testified to one incident where the applicant's mother witnessed a physical altercation between the applicant and her ex-husband. Tr. at 27 (applicant's testimony), 58 (applicant's mother's testimony). The applicant's mother attempted to intervene, but the applicant's ex-husband "closed the door on [the applicant's mother] with his foot, and [she] tried to put [her] hand in, and he ended up smashing [her] finger." Tr. at 57.

[5] The Board need not address whether "Mexican women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds. *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach).

However, neither the applicant nor her mother insinuated that her mother was harmed for any particular reason, and the testimony strongly suggests the applicant's former husband was attempting to prevent her mother's entry to the room.

Similarly, the applicant testified that when her ex-husband "was in a good mood" he would "coddle" their daughter. Tr. at 32. And, while she also testified that he would tell the applicant to "get [their daughter] away from here, remove her," Tr. at 32, she did not testify that he harmed their daughter. Indeed, when asked by the Immigration Judge, "despite him not wanting you to have your daughter, he still cared about your daughter, is that right?" the applicant responded, "That's what he would say." Tr. at 51–52. Further, both the applicant and her mother testified that the applicant's former husband was incensed that the applicant was awarded custody of their daughter. The applicant explained: "When I was awarded the custody of my daughter. He said that he was going to make sure that my daughter didn't stay with me . . .." Tr. at 48. Similarly, when asked what she thought was the reason for her ex-husband's threatening and harmful conduct post-divorce, the applicant indicated that it was because her ex-husband was and always will be violent and abusive, and he wants to take revenge because she took their daughter. Tr. at 36–38, 48.

Thus, the applicant did not show that her spouse held generalized animosity toward other "Mexican women." Nor did she show that her former husband was attempting to overcome the applicant's status as a "Mexican woman." Therefore, the applicant did not meet her burden of showing a nexus between her husband's deplorable conduct and her membership in the particular social group.

III. THE IMMIGRATION JUDGE ERRED IN FINDING THAT THE APPLICANT'S PROPOSED SOCIAL GROUP OF "MEXICAN WOMEN WHO TERMINATE THE MARRIAGE WITHOUT THE CONSENT OF THE HUSBAND" WAS A COGNIZABLE PARTICULAR SOCIAL GROUP UNDER THE ACT.

Where an applicant seeks withholding of removal under INA § 241(b)(3) as a member of a particular social group, the applicant "must establish that the group is composed of members who share a common immutable characteristic, defined with particularity, and socially distinct within the society in question." *M-E-V-G-*, 26 I&N Dec. at 237. If the applicant fails to establish a cognizable particular social group, the "immigration judge or Board need not examine the remaining elements of the [withholding] claim." *A-B-*, 27 I&N Dec.at 340. It is the applicant's burden to clearly indicate on the record before the Immigration Judge the exact delineation of the proposed particular social group. *See W-Y-C- & H-O-B-*, 27 I&N Dec. at 191 (citing *Matter of W-G-R-*, 26 I&N Dec. at 209-10 (BIA 2014)).

The Board has established a three-pronged test for determining when a proposed particular social group is cognizable. The applicant must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *A-B-*, 27 I&N Dec. at 320 (citing *M-E-V-G-*, 26 I&N Dec. at 234, 237); *see also Matter of L-E-A-*, 27 I&N Dec. 40, 42 (BIA 2017), *overruled on other grounds by Matter of L-E-A-*, 27 I&N Dec. 581, 596–97 (A.G. 2019); *W-G-R-*, 26 I&N Dec. at 210–12. To be cognizable, the particular social group must exist independently of the harm alleged in the application. *A-B-*, 27 I&N Dec. at 334-35. Social group determinations are made on a case-by-case basis. *L-E-A-*, 27 I&N Dec. at 42 (BIA 2017); *M-E-V-G-*, 26 I&N Dec. at 251; *Acosta*, 19 I&N at 233. The applicant's proposed particular social group, "Mexican women who terminate the marriage without the consent of the husband" fails under this test.

First, the proposed group lacks particularity. The particularity requirement addresses "the question of delineation," and "clarifies the point . . . that not every 'immutable

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characteristic' is sufficiently precise to define a particular social group." *W-G-R-*, 26 I&N Dec. at 214. Particularity requires that the "terms used to describe the group [must] have commonly accepted definitions in the society of which the group is a part." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2008)). The group must have "discrete and [] definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." *M-E-V-G-*, 26 I&N Dec. at 239 (citations omitted). To meet the particularity requirement, the proposed group must "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." *Matter of E-A-G-*, 24 I&N Dec. 591, 594 (BIA 2008). Further, social groups defined by their vulnerability to private criminal activity likely lack the particularity requirement under *M-E-V-G-*. *A-B-*, 27 I&N Dec. at 335.

The applicant failed to articulate her particular social group such that it has defined boundaries; therefore, it lacks particularity. More specifically, the applicant's particular social group—"Mexican women who terminate the marriage without the consent of the husband"—fails to describe "a discrete class of persons." *W-G-R-*, 26 I&N Dec. at 214. The Immigration Judge noted that membership in the group is limited to only woman who are Mexican and requires that they have terminated a marriage without the consent of their spouse. The fact that the group includes divorced women whose spouses did not agree to the divorce and does not include men or single women does not establish that "Mexican women who terminate the marriage without the consent of the husband" is a group "with 'well defined boundaries' delineating who does and does not belong." I.J. at 13–14 (quoting *S-E-G-*, 24 I&N Dec. at 582). Adding gender and nationality modifiers to the group gives only the illusion of particularity. The applicant's group does not sufficiently delineate who does and does not belong.

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Second, there is no evidence in the record that "Mexican women who terminate the marriage without the consent of the husband" has a commonly accepted definition in Mexican society or that Mexican society recognizes that group as set apart in any way and it is, therefore, not socially distinct. *See M-E-V-G-*, 26 I&N Dec. at 239. Social distinction "considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way." *M-E-V-G-*, 26 I&N Dec. at 238. "In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it." *Id.* The recognition of the group is "determined by the perception of the society in question, rather than by the perception of the persecutor." *Id.* at 242; *see also W-G-R-*, 26 I&N Dec. at 214 (noting there is some degree of overlap between the particularity and social distinction requirements because both take societal context into account).

The Immigration Judge found the group is "sufficiently socially distinct," finding that "Mexican women would generally understand their own affiliation in this group, based on socially construed categories such as nationality and gender." However, again, the inclusion of nationality and gender only give the illusion of social distinction. The applicant did not provide any evidence that Mexican society, in general, recognizes the proposed group or would be able to identify her as a member of the proposed group.

Therefore, because the applicant failed to articulate a cognizable particular social group, the applicant failed to meet her burden of proof.

IV. THE IMMIGRATION JUDGE ERRED IN FINDING THAT THE HARM THE APPLICANT SUFFERED BY HER FORMER HUSBAND WAS ON ACCOUNT OF THE PARTICULAR SOCIAL GROUP OF "MEXICAN WOMEN WHO TERMINATE THE MARRIAGE WITHOUT THE CONSENT OF THE HUSBAND."

To demonstrate that harm was "on account of" a protected ground, the applicant must show that the protected characteristic was "one central reason" for the harm. *See* INA § 241(b)(3). The applicant must show that the persecutor sought to "overcome" the protected characteristic. *Acosta*, 19 I&N Dec. at 222. "[C]laims by aliens pertaining to domestic violence . . . perpetrated by non-governmental actors will," generally, "not qualify for asylum" or statutory withholding of removal. *A-B-*, 27 I&N Dec. at 320.

The applicant failed to establish a nexus between the harm she fears and her status as a member of the particular social group consisting of "Mexican women who terminate the marriage without the consent of the husband." The Immigration Judge found past persecution based on the harm inflicted on the applicant before she got divorced in 1999. After the day of the divorce, however, the former spouse did not harm the applicant—he merely contacted her with vague threats, which were never acted upon. Threats alone do not generally constitute persecution. *Vatulev v.* Ashcroft, 354 F.3d 1207, 1209–10 (10th Cir. 2003). Rather, the Immigration Judge found that the pre-divorce harm (the abuse and imprisonment) rose to the level of persecution and, in a footnote, found that the harm experienced after the divorce (the choking the day of the divorce and the threats after) also rose to the level of persecution since the applicant had been previously abused before the divorce. In so doing, the Immigration Judge acknowledged that the pre-divorce harm was not on account of the proposed particular social group, but still used the one to bootstrap the other. However, any harm suffered by the applicant was at the hands of her now ex-husband at a time prior to her membership in the named group. After she returned to Mexico in 2005 (voluntarily once and by removal twice), the only incident involving her former husband was her receipt of a telephone call, in which he made what she

considered to be a threat, with no follow-up or action. This was approximately fourteen years ago, and six years after the physical abuse ceased.

Further, all of the harm committed against the applicant and feared by the applicant was committed by her former husband. "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *A-B-*, 27 I&N Dec. at 320. The same principle applies to withholding claims. The applicant provided no evidence that her former spouse was motivated by any other reason than the nature of their relationship or that he was generally hostile to Mexican women who terminate their marriages without the consent of their husbands as a group. *A-B-*, 27 I&N Dec. at 339. To be sure, the applicant may have been the victim of crimes committed by her former spouse when they were married and the day of the divorce, but those relationship-based crimes are insufficient to establish eligibility for withholding.

Because the applicant failed to establish that her former spouse was motivated by any reason aside from their personal relationship, the Immigration Judge erred in concluding that a nexus was established between the harm suffered and the proposed particular social group.

V. THE IMMIGRATION JUDGE ERRED IN FINDING THAT THE GOVERNMENT OF MEXICO IS UNABLE OR UNWILLING TO CONTROL THE APPLICANT'S FORMER SPOUSE

Where the alleged persecutor is unaffiliated with the government, the applicant must show that the government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993); *A-B-*, 27 I&N Dec. at 319. In instances where the applicant is a victim of private criminal activity, "the analysis must also 'consider whether government protection is available.'" *A-B-*, 27 I&N Dec. at 320 (quoting *M-E-V-G-*, 26 I&N Dec. at 243). Relevant factors include both "the government's response" to the claimed

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persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470, 476 (6th Cir. 2019). "No country provides its citizens with complete security from private criminal activity, and perfect protection is not required." *A-B-*, 27 I&N Dec. at 343. An applicant "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *Id.* at 338; *see also Matter of O-F-A-S-*, 27 I&N Dec. 709, 722 (BIA 2019) (a failure to report to the police is generally fatal to a persecution claim "unless the alien can show it would be futile to make a report").

The record here does not establish that the police were unwilling to assist the applicant; at most it establishes that they did have enough evidence that a crime had been committed to prompt an investigation. The applicant herself never reported any crime to the authorities in Mexico. Tr. at 30, 32, 49–50. She stated that she was "constantly locked in that room, how could I go?" But she did leave that room, go to the store, return to discover her then-spouse involved in extramarital relations with another woman, separate from him, and file for and obtain her divorce, all without providing any explanation for that contradiction or for why she did not at any time during that period go to the police. Tr. at 33. Her only explanation for her failure to report her former spouse's abuse was that the police do not "do anything." Tr. at 37.

While the applicant's mother testified that she had made complaints to the police, but that nothing was done by them; they police purportedly told her that they could not do anything because there was "no blood"; that is, there was no evidence of a crime. Tr. at 62. The applicant's mother provided no documentary evidence of any reports filed; in fact, she could not even provide dates on which she went to the police. She did not inform the applicant of any reports or ask the applicant to assist in filing any reports with information regarding the crimes. Tr. at 44, 59–62.

This is insufficient for the applicant to meet her burden to show that the government of Mexico was or is unable or unwilling to assist the applicant. As such, the Immigration Judge erred in finding that she met her burden.

VI. THE IMMIGRATION JUDGE ERRED SHIFTING THE BURDEN TO THE DEPARTMENT TO ESTABLISH A FUNDAMENTAL CHANGE IN CIRCUMSTANCES OR THE ABILITY TO RELOCATE WITHIN MEXICO.

If an applicant is determined to have suffered past persecution in the proposed country of removal on account of one of the five protected grounds, it is presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. 8 C.F.R. § 1208.16(b)(1)(i). This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence that there has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of a protected ground; or that the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so. *Id.* § (b)(1)(i)(A)–(B).

As the Immigration Judge erred in finding the applicant established past persecution, shifting the burden on internal relocation to the Department was also erroneous. 8 C.F.R. § 1208.13(b)(3). Rather, the applicant bears the burden of establishing that internal relocation within Mexico was unreasonable. *M-Z-M-R-*, 26 I&N Dec. at 35–36 ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored." (citing 8 C.F.R. § 1208.13(b)(3)(i))). Further, even if the Department bears the burden of proof on these issues, the Immigration Judge erred in finding that the Department did

not establish that there has been a fundamental change in circumstances or that internal relocation is reasonable.

The Immigration Judge held that the applicant faces a threat of persecution anywhere in Mexico even though a single actor perpetrated her harm. The Immigration Judge based this determination on the fact that, when the applicant resided with her uncle eighteen hours away from the town in which her former spouse lives, the former spouse was able to find her and make a threatening call to her. The Immigration Judge further found that the applicant's long-term illegal presence in the United States, after multiple removals, and her family in the United States made it unreasonable to expect her to relocate within Mexico. Though the Immigration Judge should "consider, among other things, whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties," "these factors may or may not be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate." 8 C.F.R. § 1208.16(b)(3). This is particularly true for victims of private violence, who "face the additional challenge of showing that internal relocation is not an option . . .." *A-B-*, 27 I&N Dec. at 345.

Mexico is a large and diverse country. The applicant's father resides in Mexico, so she is not without family support there. The applicant has been divorced from her former spouse for almost twenty years, does not currently know where he is, and believes he has children with another woman. There is no evidence that he remains interested in harming her after the passage of two decades, though there is evidence that he has moved on, having children with another woman; there is certainly no evidence that he would physically pursue her, after all this time, to

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other parts of Mexico. When the applicant lived with her uncle, her former spouse purportedly made threatening phone calls; he never, however, travelled to Veracruz to seek the applicant out. Though the Immigration Judge found that "gender-based violence is country-wide," that is not the basis for the applicant's claim. The applicant's claim is specific to victimization by her former spouse and there is no evidence that the applicant would be subject to gender-based violence throughout the entirety of Mexico.

Finally, even if the Immigration Judge did not err in shifting the burden to the Department, the significant passage of time since the applicant last purportedly suffered harm at the hands of her former spouse alone presents a fundamental change in circumstances. That passage of time, coupled with the evidence from the applicant that she believes her former spouse has children with another woman, demonstrating that he is no longer interested in a relationship with the applicant, establish that circumstances have changed such that the applicant no longer has a reasonable fear.

Even if the Department bears the burden of proof on this issue, the Immigration Judge erred in finding internal relocation unreasonable. I.J. at 19. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id.*

CONCLUSION

The applicant waived her right to appeal the Immigration Judge's decision. First, the applicant did not file a separate appeal of any aspect of the Immigration Judge's decision. Second, she filed a motion for summary affirmance under 8 C.F.R. § 1003.1(e)(4), in which she

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necessarily moved the Board to adopt the decision of the Immigration Judge as the final agency interpretation, including the Immigration Judge's conclusions that "[t]he applicant has provided one viable protected ground, which is the particular social group defined as: 'Mexican women who terminate the marriage without the consent of the husband," I.J. at 10, and that "the applicant has failed to propose any other cognizable group or protected ground," I.J. at 12.

Assuming, *arguendo*, the applicant has not waived these issues, the applicant did not meet her burden of showing that she was harmed on account of her membership in a particular social group consisting of "Mexican women." Similarly, the applicant did not meet her burden of showing that her proposed social group—"Mexican women who terminate the marriage without the consent of the husband"—is legally cognizable or that she was harmed on account of her membership in that group. Further, the applicant, who was able to obtain a civil divorce from her husband, did not meet her burden of showing that the government of Mexico was unable or unwilling to assist her. Accordingly, the Board should sustain the Department's appeal.

Respectfully submitted on this 14th day of April 2020,

(b)(6); (b)(7)(C)

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CERTIFICATE OF SERVICE

On April 14, 2020, I electronically served a copy of this Department of Homeland Security Amended Brief on Appeal and any attached pages normal government process to:

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NON-DETAINED

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

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No.: (b)(6); (b)(7)(C)
In removal proceedings	)	

DEPARTMENT OF HOMELAND SECURITY
BRIEF ON APPEAL

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INTRODUCTION

The Immigration Judge correctly denied the respondent's claim for asylum under section 208 of the Immigration and Nationality Act (Act) finding that the respondent failed to meet her burden to establish that she was persecuted on account of a protected ground and that the respondent failed to establish that Honduran government is unable or unwilling to protect the respondent from her abuser. Additionally, the Immigration Judge correctly concluded that the respondent failed to establish that it is more likely than not that she will be tortured in Honduras such that she failed to meet her burden to establish eligibility for protection under the regulations implementing the United Nations Convention Against Torture (CAT).

The Department of Homeland Security (Department) requests that the Board of Immigration Appeals (Board) affirm the Immigration Judge's decision to deny the respondent's applications for asylum, withholding of removal pursuant to section 241(b)(3) of the Act, and withholding of removal under the regulations implementing the CAT.

STANDARD OF REVIEW

The Board reviews findings of fact, including "predictive findings of what may or may not occur in the future," for clear error. *Matter of Z-Z-O-*, 26 I&N Dec. 586, 587, 590 (BIA 2015); 8 C.F.R. § 1003.1(d)(3)(i). The Immigration Judge's findings regarding whether the respondent is a member of a particular social group and whether the Honduran government is unable or unwilling to control her persecutor are findings of fact, reviewed for clear error. On the other hand, the Board reviews de novo "questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges." *Z-Z-O-*, 26 I&N Dec. at 588; 8 C.F.R. §

1003.1(d)(3)(ii). Whether a particular social group is cognizable and whether the respondent's claim meets the legal requirements for relief, should be reviewed *de novo*.

No additional factfinding is required to address the issues raised in this appeal. *See* 8 C.F.R. § 1003.1(d)(3)(iv) ("If further *factfinding* is needed in a particular case, the Board may remand the proceeding to the Immigration Judge . . . .") (emphasis added).

ARGUMENT

I. THE RESPONDENT FAILED TO ESTABLISH THAT THE HARM SHE SUFFERED AND FEARS IN HONDURAS IS ON ACCOUNT OF A PROTECTED GROUND.

The respondent bears the burden of establishing that she is a "refugee" as defined in the Act. INA § 208(b)(1)(B)(i); 8 C.F.R. § 208.13(a); see also INA § 240(c)(4)(A)(i); *Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1335 (10th Cir. 2008) ("in order to be eligible for asylum, an alien must demonstrate by a preponderance of the evidence that she is a refugee"); *Woldemeskel v. INS*, 257 F.3d 1185, 1189 (10th Cir. 2001). An asylum applicant "must present facts that undergird each of the [] elements" required for relief to be granted. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018). A "refugee" is defined as any person outside of his country of nationality, or if he has no nationality, is outside of the country where he habitually resided, who is unable or unwilling to avail himself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A); 8 C.F.R. § 1208.13(b)(1)-(2). An applicant who asserts membership in a particular social group must show that the applicant is a "member of a particular group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question." *Matter of A-B-*, 27 I&N Dec. at 320. A refugee can show three types of persecution to satisfy the statutory requirement: (1) "a well-founded fear of future persecution," (2) "past

persecution sufficient to give rise to a presumption of future persecution," or (3) "past persecution so severe it supports an unwillingness on the applicant's' part to return to that country." *Chaib v. Ashcroft*, 397 F.3d 1273, 1277 (10th Cir. 2005).

In this case, the respondent's proffered social group of "Honduran women in domestic relationships who are unable to leave" is not cognizable under the Act.[1] In *Matter of A-B-*, the Attorney General analyzed the particular social group "married women in Guatemala unable to leave their relationship" and found that the group was "effectively defined to consist of women in Guatemala who are victims of domestic abuse because the inability 'to leave' was created by harm or threatened harm." 27 I&N at 335. Thus, the group was impermissibly defined by the asserted persecution itself. The same holds true in this case.

The respondent also claims she was harmed on account of her membership in a particular social group of "Honduran women." Regardless of whether this group is cognizable under the Act, the record does not contain sufficient evidence to establish that the respondent's former partner targeted her because she was a woman. The record does not contain evidence that the respondent's former partner possessed an animus against women and sought to harm women because of their gender. Rather, her former partner was jealous man who mistreated many people, including his parents, hit their eight-month old child because when she would cry, and continues to mistreat both of their children psychologically and physically. Tr. at 19, 23, 28, 29.

Accordingly, the Board should find that the respondent failed to meet her burden to establish that the harm she suffered and fears in Honduras is on account of a protected ground.

[1] The Immigration Judge's analysis of the group "Honduran women in abusive domestic relationships who are unable to leave" is harmless error as the descriptor of "abusive" would not change the analysis under the Attorney General's decision in *Matter of A-B-*. *See* Tr. at 89; I.J. Dec. at 5.

II. THE RESPONDENT FAILED TO ESTABLISH THAT THE HONDURAN GOVERNMENT IS UNABLE OR UNWILLING TO PROTECT THE RESPONDENT.

When the alleged persecutor is someone unaffiliated with the government, the applicant must also show that her home government is unwilling or unable to protect her. *Matter of A-B-,* 27 I&N at 317. It is the respondent's burden to establish that government protection in her home country is "so lacking that [her] persecutors' actions can be attributed to the government." *Id.*

Here, the Immigration Judge correctly found that the record does not support the conclusion that Honduran government is unable or unwilling to protect the respondent from her former partner. I.J. Dec. at 7. The respondent did not report any of the incidents of harm she suffered from her former partner to the police for fear of retaliation from her former partner and the belief that the police would not get involved. Tr. at 22. The respondent, however, did admit that she went to a government office that deals in protecting women to request financial support only. Tr. at 67. At that office, the respondent was advised how she could report an incident of domestic abuse. Tr. at 69-70. Futhermore, the documentary evidence does not establish that the Honduran government is unable or unwilling to protect the respondent from her former partner. *See generally* Exhibits 4-6. Accordingly, as the evidence does not establish that the government protection in Honduras is "so lacking that [her] persecutors' actions can be attributed to the government," the Immigration Judge correctly denied the respondent's application for asylum.[2] *Matter of A-B-*, 27 I&N Dec. at 317.

[2] As the respondent failed to establish eligibility for asylum, it necessarily follows that she is not eligible for withholding of removal under section 241(b)(3) of the Act. *See INS v. Stevic*, 467 U.S. 407 (1984).

III. THE RESPONDENT FAILED TO MEET HER BURDEN TO ESTABLISH THAT IT IS MORE LIKELY THAN NOT THAT SHE WOULD BE TORTURED UPON REMOVAL TO HONDURAS.

To prevail on a claim of withholding of removal pursuant to the regulations implenenting the CAT, the respondent bears the burden of proof to show it is more likely than not that she would be tortured upon her removal to Honduras. 8 C.F.R. § 1208.16(c). To constitute torture, an act must satisfy each of the following five elements: 1) the act must cause severe physical or mental pain or suffering, 2) the act must be intentionally inflicted, 3) the act must be inflicted for a proscribed purpose, 4) the act must be inflicted by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim, and 5) the act cannot arise from lawful sanction. 8 C.F.R. § 1208.18(a); *see also Matter of J-E-*, 23 I&N Dec. 291, 297 (BIA 2002). The record in this case lacks any evidence that the government of Honduras would consent to or acquiesce in the harm the respondent fears if she returns to Honduras. For this reason, the Immigration Judge properly denied the respondent's application for withholding of removal pursuant to the regulations implementing thee CAT. As such, the Immigration Judge's decision was correct and the Board should dismiss the respondent's appeal.

CONCLUSION

As the respondent has failed to meet her burden to establish the harm she suffered and fears is on account of a protected ground, she has failed to establish eligibility for asylum and for withholding of removal under the Act. Moreover, as the evidence does not support the conclusion that it is more likely than not that the respondent will be tortured in Honduras by or at the consent or acquiescence of a public official, the respondent has also failed to establish eligilbity for withholding of removal pursuant to the regulations implementing thee CAT.

Accordingly, the Department respectfully requests that the Board affirm the Immigration Judge's decision to deny the respondent's applications.

DATE: November 27, 2019

Respectfully submitted,

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PROOF OF SERVICE

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NON-DETAINED

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

In the Matter of:

(b)(6); (b)(7)(C)

In removal proceedings

File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
BRIEF ON APPEAL

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(b)(6); (b)(7)(C)

INTRODUCTION

The respondent experienced criminal acts while living in her native Guatemala by an individual who targeted her for extortion as well as her husband. Though the respondent faced incidents of violence, these acts were not persecutory. The respondent filed an I-589 application for relief, seeking asylum, withholding of removal, and protection under the regulations implementing the United States government's obligations under Article 3 of the Convention Against Torture (CAT).[1] Having correctly found the respondent failed to meet her burden to show eligibility for asylum and withholding of removal, the Immigration Judge determined that she met her burden of proof for CAT deferral and granted her that protection from removal.[2] The Department of Homeland Security (the Department), requests that the Board of Immigration Appeals (the Board) sustain this appeal and vacate the Immigration Judge's January 17, 2020 decision granting CAT deferral.

The Department requests that this case be reviewed by a three-member panel given the need to review a decision by an Immigration Judge not in conformity with existing law or applicable precedent, the need to review clearly erroneous factual determinations, and the need to reverse a decision of an Immigration Judge not arising under 8 C.F.R. § 1003.1(e)(5).

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[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).

The CAT is a non-self-executing treaty. *See, e.g.*, *Efe v. Ashcroft*, 293 F.3d 899, 907 (5th Cir. 2002); *Matter of H-M-V-*, 22 I&N Dec. 256, 259-60 (BIA 1998). Adjudicators do not apply the CAT itself, but rather the implementing regulations. The latter, for example, contain important United States ratification "reservations, understandings, declarations, and provis[ions]" with respect to the definition of "torture" not contained in the text of the Convention Against Torture itself. *See* 8 C.F.R. § 1208.18(a); *see also* 8 C.F.R. § 1208.16(c)(1) ("The definition of torture contained in § 1208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture."). For ease of reference, however, DHS will use short reference, CAT, to refer to the implementing regulations.

[2] The respondent has appealed the Immigration Judge's denial of asylum and statutory withholding of removal. This brief will also address those decisions.

ISSUE PRESENTED

I.DID THE IMMIGRATION JUDGE CORRECTLY DENY THE RESPONDENT'S APPLICATION FOR ASYLUM WHERE THE RESPONDENT FAILED TO DEMONSTRATE A WELL-FOUNDED FEAR OF FUTURE PERSECUTION?

II. DID THE IMMIGRATION JUDGE CORRECTLY DENY STATUTORY WITHHOLDING OF REMOVAL PURSUANT TO INA § 241(b)(3)?

III. DID THE IMMIGRATION JUDGE INCORRECTLY FIND THAT THE RESPONDENT MET HER BURDEN TO SHOW ELIGIBILITY FOR DEFERRAL OF REMOVAL UNDER THE REGULATIONS IMPLEMENTING THE CONVENTION AGAINST TORTURE?

STANDARD OF REVIEW

Although the Board of Immigration Appeals (Board) reviews an immigration judge's factual findings for clear error, it reviews *de novo* "questions of law, discretion, and judgment and all other issues in appeals," including the application of law to fact. *Matter of R-A-F-*, 27 I&N Dec. 778, 779 (A.G. 2020); *Matter of Z-Z-O-*, 26 I&N Dec. 586, 591 (BIA 2015) ("[W]e will review *de novo* whether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal or resolve any other legal issues that are raised."); 8 C.F.R. § 1003.1(d)(3)(i)-(ii). This de novo review includes "whether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal." *Z-Z-O-*, 26 I&N Dec. at 591; *see also Matter of A-C-A-A-*, 28 I&N Dec. 84, 87-88 (A.G. 2020) (in reviewing protection law claims, the Board must examine de novo whether the facts found by the Immigration Judge satisfy all the statutory elements as a matter of law, including de novo review of the Immigration Judge's conclusions as to nexus). Whether a respondent has met her burden of proof is a question of law. *Matter of Vides-Casanova*, 26 I&N Dec. 494, 498 (BIA 2015).

A persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by the Board for clear error. *See Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011). Whether the facts, as found, establish persecution "on account of" a protected

ground is a legal issue reviewed by the Board de novo. *Matter of S-E-G-*, 24 I&N Dec. 579, 588 n.5 (BIA 2008). Whether the respondent can internally relocate within Guatemala is a mixed question of fact and law. *See Matter of M-Z-M-R-*, 26 I&N Dec. 28, 36 (BIA 2012).

Whether a public official would acquiesce to severe pain or suffering that is intentionally inflicted is a mixed question of fact and law. *R-A-F-*, 27 I&N Dec. at 779-80. Whether an alien faces future torture presents a mixed question of fact and law, where the likelihood of future events is a factual question reviewed for clear error, and whether those events rise to the level of torture is a legal question reviewed *de novo*. *Id.* ("the Board should consider *de novo* whether the [harm] that the immigration judge found the [alien] likely to experience upon return to [her native country] would rise to the level of torture"). Whether an alien experienced past harm that rises to the level of "torture" is a question of law reviewed *de novo*. *See Z-Z-O-*, 26 I&N Dec. at 591.

SUMMARY OF THE ARGUMENT

The Immigration Judge correctly denied the respondent's application for asylum and statutory withholding of removal. The Immigration Judge properly found the respondent did not present any legally recognized particular social groups and, as such, could not show a nexus between the harm she experienced and a protected ground. While not addressed by the Immigration Judge, the respondent also failed to show that she could not reasonably relocate within Guatemala. Indeed, the respondent's testimony demonstrated that relocation—such as at her sister's home near the capitol—would successfully prevent future persecution.

The Immigration Judge erred in granting the respondent CAT deferral. Specifically, the Immigration Judge incorrectly found that it is more likely than not that the respondent would experience severe pain or suffering by, or with the acquiescence of, a Guatemalan public official

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or other person acting in an official capacity. The respondent testified to only a single incident that constitutes severe pain or suffering, this coming at the hands of a criminal individual intent on extortion. The respondent did not report this incident to law enforcement. The Immigration Judge also erred in failing again to address relocation within Guatemala, which the respondent's testimony showed to be a reasonable possibility.

STATEMENT OF FACTS

The respondent is a (b)(6); (b)(7)(C) native and citizen of Guatemala who last entered the United States without inspection and admission or parole at or near Hidalgo, Texas on Christmas Day of 2018. Ex. 1. The Department charged the respondent as inadmissible under INA § 212(a)(6)(A)(i), and the Immigration Judge sustained the charge on July 8, 2019. Ex. 1. The respondent timely filed her I-589 application on July 8, 2019. The court held a merits hearing in this case on January 17, 2020.

The respondent, through her pre-hearing evidence and testimony, described the harm she faced in Guatemala. Ex. 6, 8. The respondent discussed her youth in Guatemala, including her limited education. The respondent described how she was approached by an individual who wished to extort her for regular money payments. Tr. at 30-34. The respondent told how the individual, to enforce the extortion against the respondent, sexually assaulted her. Tr. at 30. Before and after this incident, this criminal individual—whom the respondent did not know—made threats also aimed at ensuring the respondent paid him money regularly, though he did not physically harm her again. Tr. at 33-38. The respondent testified that this man targeted her because her husband lived and worked in the United States, thus implying that the family had disposable income. Tr. at 34. The respondent stated she does not know if the threats would

resume if she returned to Guatemala, though she believes people would assume she had money because of her time in the United States. Tr. at 40. The respondent's affidavit, written just four months before her merits hearing, also describes this extortion scheme but notably does not mention the sexual assault. Ex. 6 at Tab G. The respondent never called police about the extortion, the threats, or the sexual assault incident. Tr. at 42. When asked why she did not reach out to police, the respondent claimed that she felt she could resolve these issues by making the payments. Tr. at 53-54. The respondent never attempted to relocate in response to these issues. Tr. at 49.

The respondent next testified to the domestic abuse she experienced with her husband in Guatemala, who at the time of the merits hearing was also in the United States and to whom the respondent remains married. Tr. at 43-44. The respondent first described in an incident from the beginning of their relationship, at least 14 years before the merits hearing, when her husband attempted to hit her with a machete. Tr. at 44. The respondent stated he struck out at her because she challenged his excessive drinking. Tr. at 45. Others in the home stopped the attack before it caused the respondent any physical harm. *Id*. The respondent testified to another incident when her husband hit her in the face as they argued over going to the store. *Id*. Again, this was around 14 years before the merits hearing, as she was pregnant with her son at the time, who was born in 2007. *Id*; Ex. 2C. The respondent did not call the police in response to these incidents. Tr. at 46.

After her husband returned from a stint working in the United States, there was another incident between them, again while he was drunk, according to the respondent. *Id*. On this occasion, her husband grabbed the respondent and attempted to hit her head into a concrete column. Tr. at 47. The respondent testified that she was able to escape his grasp before

suffering physical harm, prompting her husband to grab a knife and threaten suicide. *Id.* As a result of her husband's volatility, and at the urging of family members, the respondent called the police. *Id.* The respondent stated she told police "that [she] needed help because he was going to maybe kill himself." *Id.* According to the respondent, the police refused to respond, citing the rainy weather. *Id.* The respondent acknowledged her marriage in her September 2019 affidavit, even suggesting that she decided together with her husband to leave Guatemala for the United States, but once again, the affidavit includes no mention of domestic abuse. Ex. 6 at Tab G.

The respondent testified that when her husband again left Guatemala for the United States, she moved to her sister's home near the capitol. Tr. at 49. The respondent stated her sister warned her the area was dangerous on account of active criminal groups in the area. *Id.* However, the respondent testified her sister had never experienced physical harm, and the respondent herself, during her month at this location, also never experienced physical harm. Tr. at 50-51. The respondent stated her sister did pay extortion-related fees regularly but never reported this activity to law enforcement. Tr. at 50. Around this time, the respondent left for the United States. When asked about returning to Guatemala, the respondent stated she will have a hard time paying extortion fees and expressed concerns about her children not having a good school close to her village. Tr. at 54-55.

The respondent identified five particular social groups: Guatemalan women, Guatemalan mothers, Guatemalan women without male protection, women from Guatemala who are seen as property by virtue of the patriarchal society they live in, and underprivileged and vulnerable women from Guatemala who lack protection from the government. IJ at 5. The Immigration Judge denied protective relief in the forms of asylum and statutory withholding of removal. Despite limited incidents of harm (at the hands of private individuals), the lack of engagement

with law enforcement, and the respondent's successful relocation within the country, the Immigration Judge found that the Guatemalan government would more likely than not participate or exhibit a willful blindness to intentional acts causing severe pain or suffering against the respondent. I.J. at 9-10. Based on these erroneous findings, the Immigration Judge granted CAT deferral. I.J. at 10. The Department's timely appeal followed.

ARGUMENT

I. THE IMMIGRATION JUDGE CORRECTLY DENIED THE RESPONDENT'S APPLICATION FOR ASYLUM

The respondent bears the burden of establishing that she is a "refugee" as defined in the Act. INA § 208(b)(1)(B)(i); 8 C.F.R. § 1208.13(a); see also INA § 240(c)(4)(A)(i); *Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1335 (10th Cir. 2008) ("in order to be eligible for asylum, an alien must demonstrate by a preponderance of the evidence that she is a refugee"); *Woldemeskel v. INS*, 257 F.3d 1185, 1189 (10th Cir. 2001). An asylum applicant "must present facts that undergird each of the [] elements" required for relief to be granted. *Matter of A-B- (A-B- I)*, 27 I&N Dec. 316, 340 (A.G. 2018). A "refugee" is defined as any person outside of his country of nationality, or if she has no nationality, is outside of the country where she habitually resided, who is unable or unwilling to avail herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A); 8 C.F.R. § 1208.13(b)(1)-(2). A refugee can show three types of persecution to satisfy the statutory requirement: (1) "a well-founded fear of future persecution," (2) "past persecution sufficient to give rise to a presumption of future persecution," or (3) "past persecution so severe it supports an unwillingness on the applicant's' part to return to that country." *Chaib v. Ashcroft*, 397 F.3d 1273, 1277 (10th Cir. 2005).

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A. The respondent failed to demonstrate past persecution and a well-founded fear of future persecution

In correctly denying the respondent's application for asylum, the Immigration Judge nonetheless erred in finding that the respondent had demonstrated that the harm she suffered in the past constituted persecution. Ultimately, the Immigration Judge correctly found that the respondent did not establish a well-founded fear of future persecution, though the Immigration Judge based this finding solely on the lack of a legally recognized protected ground. Persecution constitutes the "'infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive' and requires 'more than just restrictions or threats to life and liberty.'" *Woldemeskel v. INS*, 257 F.3d 1185, 1188 (10th Cir. 2001) (*citing Baka v. INS*, 963 F.2d 1376, 1379 (10th Cir. 1992)). The respondent must establish that her fear of future persecution is well-founded both subjectively and objectively. *Yan v. Gonzales*, 438 F.3d 1249, 1251 (10th Cir. 2006); *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987) (holding that courts should use a reasonable person standard in well-founded fear determinations). The respondent must prove through "credible, direct, and specific" evidence that her fear is objectively reasonable. *Yan*, 438 F.3d at 1251.

In this case, the respondent described only two incidents of actual physical harm (and two failed attempts, both by her husband) in a span of at least the 14 years preceding the merits hearing. Despite the limited instances of physical harm, the Immigration Judge provided almost no analysis on the issue, simply stating: "[t]he respondent has alleged that she suffered threats, extortion, and rape. Accordingly, the court finds the respondent has established that the harm suffered rises to a level of persecution." This lack of fact-finding regarding the respondent's claims underlies the Immigration Judge's error in finding that the respondent mer her burden to

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show past persecution. *See* 8 C.F.R. § 1208.13(a).

The respondent testified that the criminal individual who extorted her for money sexually assaulted her on one occasion. While clearly an incident involving great pain and suffering, the respondent is not able to show objectively that there is a well-founded fear of this conduct in the future. After the assault, the individual continued to extort her without additional physical violence (only threats). The individual has not contacted the respondent for multiple years, including a period of time when the respondent was still in Guatemala. The respondent testified that she never knew the identity of this individual. Tr. at 31. She did not provide any evidence, such as recent communication attempts by this individual, to support a well-founded fear of persecution by this person if the respondent returned to Guatemala. Indeed, when asked whether this person would stop threatening her if she had to return to Guatemala, the respondent stated, "No, no. I don't know. I wouldn't know." Tr. at 40.

The respondent also cannot show a well-founded fear of persecution at the hands of her husband, to whom she remained married (as of the merits hearing) as they continued their relationship, with both parties now in the United States. The respondent testified that her husband attempted to hit her three times, succeeded once. The respondent did not seek medical treatment when she was struck by her husband. On the other occasions, bystanders intervened to protect the respondent. The incident of domestic abuse occurred 14 years before the merits hearing, and there was no evidence of recent, ongoing abuse that would support a finding of an objectively reasonable well-founded fear of future persecution on this ground. Thus, the Immigration Judge erred in her conclusory finding that the respondent established past persecution. And, in the absence of sufficient evidence demonstrating "credible, direct, and

specific" evidence, the respondent has not met her burden of proof, pursuant to 8 C.F.R. § 1208.13(a), to establish a reasonably well-founded fear of future persecution.

B. The respondent failed to show the harm she suffered was on account of her membership in a legally recognized particular social group

Having improperly found that the respondent suffered past persecution, the Immigration Judge correctly held that the harm suffered by the respondent was not on account of her membership in a legally recognized particular social group. The respondent first claimed persecution on account of a political opinion. However, as the Immigration Judge recognized, there was no evidence, testimony or otherwise, that the respondent has ever expressed or even held any political opinion. I.J. at 5. The respondent next proposed five particular social groups: Guatemalan women, Guatemalan mothers, Guatemalan women without male protection, women from Guatemala who are seen as property by virtue of the patriarchal society they live in, and underprivileged and vulnerable women from Guatemala who lack protection from the government. IJ at 5. The Immigration Judge found that the respondent's proposed particular social groups were themselves not legally recognized. I.J. at 6-7. As such, the immigration Judge did not analyze whether—legally recognized or not—the particular social groups had any nexus to the harm experienced by the respondent.[3] The Department looks next, in the absence of the Immigration Judge's analysis on the issue, to whether the respondent established a nexus between her proposed particular social groups and the harm she experienced.

In order to establish eligibility for asylum, the respondent bears the burden of showing a

[3] The Board need not address whether "Guatemalan women" constitutes a cognizable particular social group, as it may find that the respondent failed to meet her burden on other grounds as asserted in this appeal. *See Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018) ("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").

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nexus between past persecution or her well-founded fear of future persecution and a protected ground (i.e., race, religion, nationality, political opinion, or membership in a particular social group). *See* INA § 208(b)(1)(A); *see also* INA § 101(a)(42). Furthermore, to demonstrate that persecution is on account of a protected ground, the respondent must show that the protected characteristic is "one central reason" for the harm suffered or feared. *Rodas-Orellana v. Holder*, 780 F. 3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F. 3d 642, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)). For persecution to be on account of membership in a particular social group, the respondent's "protected characteristic must be central to the persecutor's decision to act against" her. *See Niang v. Gonzales*, 422 F.3d 1187, 1201 (10th Cir. 2005).

In *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020), the Attorney General analyzed whether the respondent's claimed particular social group of "Salvadoran females" was one central reason for the persecution she suffered. According to the Attorney General:

> Even if an applicant is a member of a cognizable particular social group and has suffered persecution, an asylum claim should be denied if the harm inflicted or threatened by the persecutor is not "on account of" the alien's membership in that group. That requirement is especially important to scrutinize when, as here, the asserted particular social group encompasses millions of Salvadorans. "Although the category of protected persons [within a particular group] may be large, the number of those who can demonstrate the required nexus is likely not."
> *Matter of A-C-A-A-*, 28 I&N Dec. at 91-92 (citing *Cece v. Holder*, 733 F. 3d 662, 673 (7th Cir. 2013).

The Attorney General emphasized that "if the persecutor has neither targeted

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nor manifested any animus toward any member of the particular social group other than the applicant, the applicant may not satisfy the nexus requirement." *Matter of A-C-A-A-*, 28 I&N Dec. at 92. In so finding, the Attorney General noted the Board's 1999 decision in *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999) wherein the Board stated that the harm was not inflicted because the alien "was a member of some broader collection of women" whom the perpetrator "believed warranted the infliction of harm." *Matter of R-A-*, 22 I&N Dec. at 921. "[O]ne central reason" means that "the protected ground cannot play a minor role in the alien's past mistreatment or fears of future mistreatment . . . [and] cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F. 3d 1264, 1268 (10th Cir. 2010) (quoting *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)). Furthermore, the Attorney General recently expressed approval of the Board's two-pronged test for determining whether nexus exists in a particular claim: "the applicant's protected status must be *both* a but-for cause of her persecution *and* it must play more than a minor role that is neither incidental nor tangential to another reason for the harm or a means to a non-protected end." *Matter of A-B-*, 28 I&N Dec. 199, 211 (A.G. 2021) (citing *Matter of L-E-A-*, 27 I&N Dec. 40, 43-44 (BIA 2017)).

In the instant case, the respondent failed to establish a nexus between her five stated particular social groups and the harm she suffered. Rather, the respondent established that she was the victim of crimes committed by, first, a criminal individual with the intention to extort the respondent and, second, her husband who physically attacked her three times (succeeding in striking her only once) during arguments when he was intoxicated. Regarding the criminal individual, the respondent credibly tesetified that he coerced her into a scheme where he would extort money from the respondent in return for not harming the respondent or her family. Tr. at

30-31. The respondent stated she did not know why this person threatened her and hurt her, outside of his intention to get money from her. Indeed, the only explanation given by the criminal individual, according to the respondent, was that he targeted the respondent because "[her] husband was in the United States and he was making a lot of money." Tr. at 34. There is no evidence on the record to suggest that this individual hurt her simply because of her identity has a Guatemalan woman or any of the other four related proposed particular social groups.

Similarly, there is no evidence that the respondent's husband harmed the respondent because of her identity in one of the five proposed particular social groups. As a starting point, the respondent has stated that she made the decision in conjunction with her husband to leave Guatemala for the United States. Ex. G at 14. The instances of abuse, most around 14 years before the merits hearing, often occurred when arguments escalated when the husband would be intoxicated. In two of the three instances of violence or attempted violence, the respondent's husband became angry when the respondent challenged him over his alcohol consumption. Tr. at 45-46. When the husband acted this way, bystanders—men and women—would come to the respondent's defense, prevening a potential assault. Tr. at 46-47. On the third occasion, when the husband did strike the respondent, the parties were arguing over the fact that the husband abandoned her at a store to talk to his friends. Tr. at 45. The respondent did not provide any evidence that her husband's motive for causing her harm aligned with any proposed protected ground. The respondent, therefore, is unable to show that the harm she suffered—at the hands of

a private criminal extortionist and an abusive domestic partner—had any nexus to her particular social groups, much less a political opinion. *Matter of A-B-*, 28 I&N Dec. at 211.

C. The respondent failed to establish that the Guatemalan government is unable or unwilling to protect the respondent

While the Immigration Judge properly denied the respondent's application for asylum, the Immigration Judge also did not address the issue of whether the Guatemalan government is unable or unwilling to protect the respondent (in the context of asylum and withholding of removal). Because the respondent again did not meet her burden of proof for this element, she has not shown her eligibility for this protective relief.

To prove her eligibility for asylum, the respondent must show that the harm she experienced was inflicted by "persons or an organization that the government was unable or unwilling to control." *See, e.g., Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds, Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). "Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Matter of A-B-*, 27 I&N Dec. at 320. The respondent must establish that his or her government is unwilling or unable to control the perpetrator which requires the respondent to show more than that the government had "difficulty controlling" the private criminality; rather, the government must have either "condoned" the criminality or "at least demonstrated a complete helplessness to protect the victims." *Id.* at 337. Simply because a government has not acted on a reported crime, successfully investigated it, or punished the perpetrator, does not necessarily establish an inability or unwillingness to control the crime "any more than it would in the United States." *Id.* at 343-44. In *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021), the Attorney General concluded that *Matter of A-B-* did not alter the "unable or unwilling" standard and only served to

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clarify the "government's role in relation to persecution by private actors for purposes of establishing refugee status." *Id.* at 201-02. The Attorney General reasoned that "every civilized state seeks to protect its citizens from harm" yet "no government can provide a 'crime-free society.'" *Id.* at 204 (citing *Saldana v. Lynch*, 820 F. 3d 970, 977 (8th Cir. 2016)). Consequently, "the level of inaction or ineffectiveness required to rise to the level of persecution should, accordingly, be high." *Id.*

In this case, the respondent filed several background articles regarding gender-based and gang-based violence in Guatemala. However, the respondent also testified that she had very limited engagement with police in Guatemala. She never called in response to her interactions with the criminal individual who perpetrated sexual assault and extortion on her. The respondent did call police one time during a fight with her husband, yet she testified that it was mainly at the urging of other family members because her husband was suicidal. Tr. at 47. The police did not respond on this occasion.

While issues regarding violent crime and gender-based crime are certainly present in Guatemala, the evidence does not demonstrate the government's inability or unwillingness to confront them. In fact, reports such as the Department of State 2018 Guatemala Human Rights Report state directly that the Guatemalan government "took steps to combat femicide and violence against women." Ex. 6, Tab Q at 145. The Report goes on to list these concrete steps, which include the fact the "judiciary maintained a 24-hour court in Guatemala City to offer services related to violence directed toward women" and that the "judiciary also operated specialized courts for violence against women throughout the country." In 2018, the "Public Ministry established a 24-hour victim service center" that included help getting "restraining orders for their immediate protection." Ex. 6, Tab Q at 145.

Meanwhile, though gang activity continues to impact Guatemala, the evidentiary record indicates that the government does take steps to combat gang activities. As an example, the Human Rights Report describes some law enforcement abuses connected to gang-related operations, including "indiscriminate and illegal detentions when conducting antigang operations" and reports of "illegal detention, particularly during neighborhood antigang operations." *Id.* at 135-136. While these descriptions perhaps suggest a law enforcement apparatus that has had "difficulty controlling" organized criminal groups, it does not indicate, regrettable as it may be, that that Guatemalan government has either "condoned" the criminality or "at least demonstrated a complete helplessness to protect the victims." *Matter of A-B-*, 28 I&N Dec at 337. Because the country conditions show clearly that Guatemala is willing and, at various degrees, able to address the issues presented by the respondent's claim, the respondent cannot meet her burden of proof for this element.

D. The respondented failed to establish that she could not reasonably relocate within Guatemala

The respondent bore the burden of establishing that internal relocation within Guatemala was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. at 35–36 ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored." (citing 8 C.F.R. § 1208.13(b)(3)(i))). Even if the Department bears the burden of proof on this issue, the Immigration Judge erred in finding (implicitly, as the Immigration Judge did not address the issue) internal relocation unreasonable. I.J. at 9-10. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *Matter of M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present

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circumstances that are substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id*. As the Attorney General noted, the victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)" and respondent failed to meet her burden of proof on this issue. *Matter of A-B-*, 27 I&N Dec. at 345.

The respondent has not met her burden in establishing that relocation would not be reasonable. Most importantly, the evidence demonstrates that the respondent has already relocated successfully once—to her sister's home in Guatemala City—and there is nothing in the record to suggest any hurdles for the respondent to relocate again. While she faced general crime there, she reported not physical harm nor any continued threats from the private individual who had assaulted her in the past. *See* 8 C.F.R. § 1208.16(c)(3)(ii).

II. THE IMMIGRATION JUDGE CORRECTLY DENIED STATUTORY WITHHOLDING OF REMOVAL PURSUANT TO INA § 241(b)(3)

Having failed to establish past persecution, a well-founded fear of future persecution, and a nexus between the harm she faced and a legally recognized protected ground, it necessarily follows that the respondent has not met her elevated burden of proof to show eligibility for witholding of removal pursuant to INA § 241(b)(3). Even if the respondent had proposed a valid particular social group and a nexus to that protected ground, she was unable to present evidence that there is an ongoing threat to her in Guatemala. As such, she is unable to meet the higher

evidentiary burden to show that it is more likely than not that her life or freedom would be threatened if she returned to Guatemala. *Id*.

III. THE IMMIGRATION JUDGE INCORRECTLY FOUND THAT THE RESPONDENT MET HER BURDEN TO SHOW ELIGIBILITY FOR DEFERRAL OF REMOVAL UNDER THE REGULATIONS IMPLEMENTING THE CONVENTION AGAINST TORTURE

The Immigration Judge incorrectly found that the respondent met her burden to show a particularized threat of severe pain or suffering by or with the acquiescence of public officials or persons acting in an official capacity. Specifically, the Immigration Judge failed to properly consider the evidence in the record that demonstrates the respondent only suffered severe pain or suffering on one occasion and at the hands of a private criminal individual. The Immigration Judge failed to properly consider the respondent's lack of engagement with law enforcement and country condition evidence showing that the Guatemalan government would not torture, instigate torture, or acquiesce to such acts. Finally, the Immigration Judge failed to consider any evidence whatsoever of the respondent's successful relocation near Guatemala City.

In seeking CAT deferral, the burden of proof is squarely on the applicant; if the evidence is inconclusive, the applicant has not met her burden. *Matter of J-F-F-*, 23 I&N Dec. 912, 917 (A.G. 2006) (citing 8 C.F.R. § 1208.16(c)(2)). To be eligible for CAT deferral, the respondent must establish "that it is more likely than not that she will be subject to torture by a public official [or person acting in an official capacity], or at the instigation or with the acquiescence of such an official [or person]." *Matter of M-B-A-*, 23 I&N Dec. 474, 477 (BIA 2002); 8 C.F.R. § 1208.16(c)(2).

To determine whether the respondent has met her burden of proof, a court can consider (1) evidence of past torture, (2) whether an individual can relocate to avoid torture, (3) evidence

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of gross, flagrant, or mass human rights violations in the country of return, and (4) other relevant country condition information for the country of return. 8 C.F.R. §§ 1208.16(c)(3), 1208.17(a). To meet the burden of proof when stringing a series of suppositions together for CAT deferral, the applicant must establish that each link in the "hypothetical chain of events" in support of the claim is more likely than not to occur. *J-F-F-*, 23 I&N Dec. at 917-18. If even one link is not proven to be more likely than not, the applicant cannot meet her burden. *Id.* at 918 n.4.

Torture requires "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted" to obtain information or a confession, or punish, or to intimidate or coerce the victim or another party. 8 C.F.R. § 1208.18(a)(1)-(2). It does not include "lesser forms of cruel, inhuman, or degrading treatment or punishment." 8 C.F.R. § 1208.18(a)(1)-(2); *see also Witjaksono v. Holder,* 573 F.3d 968, 977 (10th Cir. 2009) (holding that physical assaults did not rise to the level of persecution where they did not "requir[e] medical attention"). "For an act to constitute torture it must be: (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions." *Matter of J-E-*, 23 I&N Dec. 291, 297 (BIA 2002) (citing 8 C.F.R. § 208.18(a)), *overruled on other grounds by Azanov v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004). It must be an intentional act directed against a person in the offender's custody or control. *Id.* at 298-99. "[N]egligent acts or acts by private individuals not acting on behalf of the government" are not protected. *Id.* at 299.

A. The respondent did not establish that it is more likely than not that she will suffer severe pain or suffering that is intentionally inflicted.

The respondent must establish a particularized threat of future severe pain or suffering by or with the acquiescence of a government official in Guatemala. *Matter of S-V-*, 22 I&N Dec. 1306, 1313 (BIA 2000) (holding that mass violations of human rights are insufficient to prove a particular individual is more likely than not to be subjected to torture, and an alien must present specific evidence that she will be personally at risk for torture), *overruled on other grounds by Zheng v. Ashcroft*, 332 F.3d 1186, 1196 (9th Cir. 2003). Generalized evidence of violence in the country of return "is insufficient to demonstrate the applicant is more likely than not to be tortured upon returning there." *Escobar-Hernandez v. Barr*, 940 F.3d 1358, 1362 (10th Cir. 2019); *Matter of G-K-*, 26 I&N Dec. 88, 97-98 (BIA 2013) (generalized threats and evidence of government corruption were insufficient to show a particularized threat or acquiescence by the government to torture). Additionally, it is reasonable and rational to consider whether evidence of "isolated acts of violence" in a populous country has probative value. *Neri-Garcia v. Holder*, 696 F.3d 1003, 1011 (10th Cir. 2012); *See* Ex. 6 at Tab P at 112 (noting Guatemala is "most populous country in Central America"). Even if one has experienced past torture, there is no presumption of future torture. *Niang v. Gonzales*, 422 F.3d 1187, 1202 (10th Cir. 2005) ("[A] petitioner is not entitled to a presumption of future torture based on evidence of past torture; nor does a showing of past torture automatically render [one eligible for protection under CAT]").

While the record provides evidence of high levels of general criminality and violence in Guatemala, including high rates of gang-based violence and domestic abuse, it also illustrates that these rates—while unfortunate—fall well below a prevalence contemplated by CAT. *See* Ex. 6 at Tab Q at 130. As applied here, the Immigration Judge noted the rates of femicide within Guatemala. I.J. at 10. Yet, the Immigration Judge failed to scrutinize properly the actual number of estimated femicides in the country and place it in the context of the respondent's high

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burden to show CAT deferral eligibility. As the respondent's exhibits demonstrate, there were approximately 2,200 women killed in Guatemala between 2001-2006—within a nation that (in 2018) had a total population of 16,581,273 (CAN I HAVE BOARD TAKE JUDICIAL NOTICE OF THE READILY AVAILABLE TOTAL POPULATION STATS FROM 2006???????????). Ex. 6 at Tab P at 112; Ex. 6 at Tab I; See *Neri-Garcia*, 696 F.3d at 1011 (suggesting isolated acts of violence in populous country lacks probative value).

. The evidence in this case does not demonstrate that the respondent would more likely than not be subjected to the severe pain or suffering required to meet the definition of "torture," which requires more than discrimination, marginalization, stigmatization, and even violent conduct such as physical assaults. *See* 8 C.F.R. § 1208.18(a)(1). "Torture" must involve severe pain or suffering, whether physical or mental, that is intentionally inflicted for a specific purpose, and does not include "lesser forms of cruel, inhuman, or degrading treatment or punishment." 8 C.F.R. § 1208.18(a)(1); *Witjaksono v. Holder,* 573 F.3d at 977. The respondent testified to one instance of severe pain or suffering and one instance of a non-severe strike from her husband that did not necessitate medical treatment. Tr. at 33, 45; *See Witjaksono*, 573 F.3d at 977 (holding that physical assaults did not rise to the level of *persecution* where they did not "requir[e] medical attention") (emphasis added). All other incidents described by the respondent rose only to the level of attempted assaults (two, by her husband) and threats.

Additionally, the respondent failed to establish that it is more likely than not that she would face a threat of future torture, as she failed to establish that she herself would specifically be subjected to severe pain or suffering that was intentionally inflicted. *See* 8 C.F.R. § 1208.18(a)(1). The respondent testified that she fears a resumption of extortion threats if she returns to Guatemala, though she has had no contact with this private criminal individual since

before leaving the country. Tr. at 39. She is also unable to show that this person would have the ability to know if the respondent had returned to Guatemala, the ability to know where the respondent lived, and ability to again inflict severe pain and suffering. *J-F-F-*, 23 I&N Dec. at 917-18 (holding that to meet the burden of proof when stringing a series of suppositions together for CAT deferral, the applicant must establish that each link in the "hypothetical chain of events" in support of the claim is more likely than not to occur). As the respondent failed to meet her high burden, the Immigration Judge incorrectly found the respondent eligible for CAT deferral.

B. The respondent did not establish that it is more likely than not that the harm she fears will be by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Severe pain or suffering must be inflicted by or with the acquiescence of the government in the country of return. 8 C.F.R. § 1208.18(a)(1). Acquiescence requires a public official to have prior awareness of the activity and "thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7). In the U.S. Court of Appeals for the Tenth Circuit, acquiescence can be established by "willful blindness," in which government officials have actual knowledge of or "turn a blind eye to torture." *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1192 (10th Cir. 2005) (citing *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354 (5th Cir. 2002)). A respondent can establish willful blindness by showing that government officials are generally aware of torture but do nothing to prevent it. *Karki v. Holder*, 715 F.3d 792, 806-07 (10th Cir. 2013) (holding that actual knowledge is not required where the evidence establishes "that the government regularly fails to take action to prevent or punish Maoist acts of torture"). Notwithstanding the willful blindness standard, evidence of government corruption or

ineffectiveness alone remains insufficient to demonstrate acquiescence. *Matter of Y-L-*, 23 I&N Dec. 270, 283 (A.G. 2002).

Several reports submitted by the respondent discussed the incidents of violence that exist towards Guatemalan women as well as generalized gang-based violence. These reports also show a government and law enforcement apparatus that—far from condoning acts of severe suffering and pain—have taken steps towards improving safety in Guatemala. For example, the Human Rights Report stated Guatemala

> took steps to combat femicide and violence against women. The judiciary maintained a 24-hour court in Guatemala City to offer services related to violence directed toward women, including sexual assault, exploitation, and trafficking of women and children. The judiciary also operated specialized courts for violence against women throughout the country, but not in every department. In March the Public Ministry established a 24-hour victim service center to provide medical, psychosocial, and legal support to victims, including restraining orders for their immediate protection. On August 6, in compliance with a finding from the InterAmerican Court on Human Rights, the Public Ministry launched the IsabelClaudina Alert, a national alert system for finding disappeared women. According to the Public Ministry, 428 women were reported missing' via the alert through November 26, with 294 women found, and 134 alerts remaining active.

Ex. 6, Tab Q at 145. Further, all new National Civil Police officers "receive training in human rights and professional ethics." *Id.* at 135. And, as of August 31, 2018, "the

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Public Ministry as well as the National Civil Police (PNC) and its Office of Professional Responsibility (ORP), the mechanism for investigating security force abuses, reported no complaints of homicide by police." *Id.* at 130. The Department of State's Human Rights Report also notes that "the constitution and law prohibit torture and other cruel, inhuman, or degrading treatment or punishment." Ex. 6 at Tab Q at 132. It stated, "reports alleging government workers ' employed [cruel, inhuman, or degrading treatment or punishment] at the Federico Mora National Hospital for Mental Health." *Id.*

While obviously unfortunate, these instances of severe suffering or pain by a government official clearly do not rise to a level contemplated by CAT deferral. *J-F-F-*, 23 I&N Dec. at 917 ("If the evidence is inconclusive, the applicant has failed to carry [her] burden."). Even if the respondent's tendered evidence demonstrates a level of generalized violence in Guatemala, this "is insufficient to demonstrate the applicant is more likely than not to be tortured upon returning there." *Escobar-Hernandez*, 940 F.3d at 1362; *G-K-*, 26 I&N at 97-98 (generalized threats and evidence of government corruption were insufficient to show a particularized threat or acquiescence by the government to torture). As the respondent failed to demonstrate that Guatemalan officials would engage in her severe pain or suffering or acquiesce to the same, she has failed to establish that she is eligible for CAT deferral.

C. The respondent did not establish that she could not reasonably relocate within Guatemala.

The respondent bore the burden of establishing that internal relocation within Guatemala was unreasonable. *Matter of M-Z-M-R-*, 26 I&N Dec. at 35–36 ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not

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be reasonable, unless the persecution is by a government or is government sponsored." (citing 8 C.F.R. § 1208.13(b)(3)(i))). Even if the Department bears the burden of proof on this issue, the Immigration Judge erred in finding (implicitly, as the Immigration Judge did not address the issue) internal relocation unreasonable. I.J. at 9-10. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *Matter of M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id*. As the Attorney General noted, the victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering DHS's evidence that relocation is possible)" and respondent failed to meet her burden of proof on this issue. *Matter of A-B-*, 27 I&N Dec. at 345.

The respondent has not met her burden in establishing that relocation would not be reasonable. Most importantly, the evidence demonstrates that the respondent has already relocated successfully once—to her sister's home in Guatemala City—and there is nothing in the record to suggest any hurdles for the respondent to relocate again. While she faced general crime there, she reported not physical harm nor any continued threats from the private individual who had assaulted her in the past. *See* 8 C.F.R. § 1208.16(c)(3)(ii).

CONCLUSION

For the foregoing reasons, the Department requests that the Board sustain its appeal, affirm the Immigration Judge's January 17, 2020 decision denying the respondent's application

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for asylum and statutory withholding of removal, and vacate the Immigration Judge's January 17, 2020 decision granting CAT deferral.

Respectfully submitted on
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_____
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(b)(6); (b)(7)(C)

PROOF OF SERVICE

On __??????????????????????????????????????_____, I, (b)(6); (b)(7)(C) Assistant Chief Counsel, electronically served a copy of this **Department of Homeland Security Brief on Appeal** and any attached pages to (b)(6); (b)(7)(C) counsel for the respondent, via the ICE E-Service Portal.

(b)(6); (b)(7)(C) _____

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NON-DETAINED

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

In the Matter of: (b)(6); (b)(7)(C) In Removal Proceedings	File No. (b)(6); (b)(7)(C)

U.S. DEPARTMENT OF HOMELAND SECURITY'S BRIEF ON APPEAL

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INTRODUCTION

The Department of Homeland Security (Department) appeals the decision of the Immigration Judge, dated May 23, 2019, granting the respondent's application for asylum under section 208 of the Immigration and Nationality Act (Act or INA). As the respondent failed to meet her burden of proof for asylum, she similarly cannot meet the higher standard for a grant of withholding of removal under section 241(b)(3) of the Act. The Department respectfully requests that the Board of Immigration Appeals (Board) sustain this appeal and vacate the decision of the Immigration Judge granting the respondent's asylum application. The Department also requests that this case be reviewed by a three-member panel given the need to review a decision by an Immigration Judge not in conformity with existing law or applicable precedent, the need to review clearly erroneous factual determinations, and the need to vacate a decision of an Immigration Judge not arising under 8 C.F.R. § 1003.1(e)(6).

ISSUES PRESENTED

1. Whether the Immigration Judge erred in finding that the respondent established a nexus between a protected ground and past harm where the respondent failed to show that her former intimate partner harmed her on account of her membership in the particular social group defined as "Guatemalan women."

2. Whether the Immigration Judge erred in finding that the respondent established past persecution where the alleged harm was committed by her former intimate partner, a private actor, and the respondent failed to show that the government of Guatemala was unwilling or unable to protect her.

3. Whether the Immigration Judge incorrectly shifted the burden to the Department to establish the reasonableness of internal relocation where the respondent failed to establish past persecution on account of a protected ground.

STANDARD OF REVIEW

The Board reviews findings of fact, including "predictive findings of what may or may not occur in the future" for clear error. *Matter of Z-Z-O-*, 26 I&N Dec. 586, 587, 590 (BIA 2015); 8

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C.F.R. § 1003.1(d)(3)(i). On the other hand, the Board reviews de novo "questions of law, discretion, judgment, and all other issues in appeals from decisions of Immigration Judges." *Z-Z-O-*, 26 I&N Dec. at 588; 8 C.F.R. § 1003.1(d)(3)(ii). This de novo review includes "whether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal." *Z-Z-O-*, 26 I&N Dec. at 591; *see also Matter of A-C-A-A-*, 28 I&N Dec. 84, 87-88 (A.G. 2020) (in reviewing protection law claims, the Board must examine de novo whether the facts found by the Immigration Judge satisfy all the statutory elements as a matter of law, including de novo review of the Immigration Judge's conclusions as to nexus). Whether a respondent has met her burden of proof is a question of law. *Matter of Vides-Casanova*, 26 I&N Dec. 494, 498 (BIA 2015).

A persecutor's actual motive is a matter of fact to be determined by the Immigration Judge and reviewed by the Board for clear error. *See Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011). Whether the facts, as found, establish persecution "on account of" a protected ground is a legal issue reviewed by the Board de novo. *Matter of S-E-G-*, 24 I&N Dec. 579, 588 n.5 (BIA 2008). Whether the respondent can internally relocate within Guatemala is a mixed question of fact and law. *See Matter of M-Z-M-R-*, 26 I&N Dec. 28, 36 (BIA 2012).

SUMMARY OF THE ARGUMENT

The respondent was victimized by an intimate partner in Guatemala. This was criminal. However, it was not persecutory. As such, the respondent did not establish eligibility for asylum where she failed to establish past persecution on account of a protected ground. The respondent did not establish a nexus between the harm she suffered and her membership in the particular social group she defined as "Guatemalan women." Additionally, the respondent failed to establish that the government of Guatemala was unable or unwilling to protect her. Moreover, the Immigration Judge erred in shifting the burden to the Department to show that internal relocation was

reasonable given that the respondent failed to establish past persecution on account of a protected ground.

In granting the respondent asylum pursuant to section 208 of the Act, the Immigration Judge incorrectly found the facts established by the respondent met her burden of proof for protective relief. Specifically, the respondent failed to establish past persecution because she failed to establish a nexus between the harm she suffered on a protected ground, and she failed to establish that the government of Guatemala was unable or unwilling to protect her. Given that the Immigration Judge incorrectly found the respondent established past persecution, she also incorrectly found that the burden shifted to the Department to establish the reasonableness of internal relocation.

STATEMENT OF FACTS

The respondent is a native and citizen of Guatemala who, on or about August 31, 2016, entered the United States without being admitted or paroled after inspection. Exhs. 1-3; Tr. at 21. U.S. Citizenship and Immigration Services (USCIS) interviewed the respondent and determined that she had a credible fear of returning to Guatemala. Exh. 1. Thereafter, the Department issued a Notice to Appear (NTA) against the respondent and charged her with being inadmissible to the United States pursuant to section 212(a)(7)(A)(i)(I) of the Act. *Id.* Before the immigration court, the respondent admitted the allegations and charge in the NTA, and the Immigration Judge sustained the charge of inadmissibility. Exh. 2; Tr. at 2. The respondent timely filed a Form I-589, Application for Asylum and for Withholding of Removal, and on May 13, 2019, the Immigration Judge conducted an individual hearing on the merits of the respondent's applications. Exh. 3; Tr. at 9-72.

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The respondent testified that she was born in Aldea Mal Paso, Guatemala, and is the mother of three children – (b)(6); (b)(7)(C) Exh. 3; Tr. at 21, 26-27. (b)(6); (b)(7)(C) is her estranged husband and the father of (b)(6); (b)(7)(C) Tr. at 26-27. The youngest child, (b)(6); was born of her relationship with a different partner. *Id.* at 27. The respondent did not provide any additional information on this former partner other than she was not married to him. *Id.* On January 4, 2015, the respondent met (b)(6); (b)(7)(C) at a party, and she and her children soon began living with him in his home in Aldea Mal Paso. *Id.* at 25-27. However, on August 5, 2016, at the age of 30, she decided to leave their home and travel to the United States because she "wanted to protect [her] life," claiming that (b)(6); (b)(7)(C) had harmed her. *Id.* at 21-22, 25-26, 38.

The respondent stated that (b)(6); initially treated her well, but eventually started to mistreat her. *Id.* at 27. She claimed that he would tell her that she was "worthless," "trash," and "had no value." *Id.* at 28. He also told her that he had many lovers and accused her of cheating on him. *Id.* at 27-28. She testified that she would prepare food for him and he would come home "look at that food and [say] that the food wasn't good." *Id.* at 29. She further testified that he would then get angry and throw the food at her feet, drag her across the floor, hit her, and "kick [her] on my womb," which caused bleeding. *Id.* She described that as a result of (b)(6); mistreatment, her face and body would be bruised, and her memory was faulty. *Id.* at 30-31. She added that he once came home drunk and hit her in the face with such force that she almost lost an eye. *Id.* She also testified that he abused her when he was sober. *Id.* at 31. She went on to describe that he would threaten her and rape her to the point that she would bleed from her vagina. *Id.* She testified that (b)(6); impregnated her twice, but he denied with each pregnancy that it was his child. *Id.* at 32, 35. She added that during the first pregnancy, he grabbed her hair, threw her

to the floor, and kicked her in the stomach, which led to a miscarriage. *Id.* at 32. She testified that her mother came to the house and found her bleeding on the floor; however, she did not go to a doctor out of fear, so her mother and grandmother, who also lived in Aldea Mal Paso, helped her instead. *Id.* at 33, 39, 52. She stated that she then went to stay with her mother for a month, and during that time, she could not remember the abusive incident and her grandmother told her that they found her bleeding on the floor and she miscarried. *Id.* at 34. She further testified that after a month, (b)(6); came to her mother's house and insisted that the respondent return home with him. *Id.* She claimed that he threatened to kill her or hurt her mother if she did not go with him. *Id.* at 35. She alleged that he beat her again the second time she became pregnant, and she eventually miscarried. *Id.* However, she again did not go to a hospital because he threatened her, so she again relied on her mother and grandmother to treat her. *Id.* at 35-36. Additionally, she testified that she believed that (b)(6); would kill her or harm her family due to his violent behavior towards her. *Id.* at 36.

Regarding (b)(6); background, the respondent testified that he was born in Aldea Mal Paso and still lives there. *Id.* at 39. She testified that he always claimed to have a lot of money and he owned cattle "far away," although she never visited his workplace. *Id.* at 36-37. She clarified that he would go away for three weeks at a time to work, then he would return to their home in the village. *Id.* at 36. She testified that she called the police and told them that (b)(6); beat her after her first miscarriage. *Id.* at 37. She claimed, however, that the police told her that they could not help her as this incident was a family matter. *Id.* She also testified that (b)(6); would dissuade her from calling the police by telling her that they would not harm him because he has a lot of money and the police are corrupt. *Id.* She further testified to having no memory of

when the miscarriages occurred because she "was left unconscious and . . . [she does not] remember." *Id.* at 38.

The respondent testified that her children now live partly with her mother and other times with (b)(6); (b)(7)(C) mother. *Id.* at 39. Both women live in Aldea Mal Paso. *Id.* She added that, since her departure, (b)(6); "always asked about me, whether I'm coming back soon." *Id.* She testified that she completed the fourth grade and was never employed in Guatemala. *Id.* at 40. Additionally, she testified that she had never travelled to other locations in Guatemala, does not know any other parts of Guatemala, and all her family reside in Aldea Mal Paso. *Id.* at 40-41. She testified that she is unaware of any resources for abused women in Guatemala and is afraid to return there for fear of (b)(6); forcing her to be with him and mistreating her. *Id.* at 40.

On cross-examination, the respondent stated that she lived with (b)(6); (b)(7)(C) in his home in Aldea Mal Paso during their relationship; however, she admitted that she also lived with him for approximately three months in the village of El Zarzal about 30 minutes away from Aldea Mal Paso. *Id.* at 42. She admitted that she took her children with her when she left her mother's house and returned to (b)(6); after the first miscarriage. *Id.* at 44. Additionally, she admitted that she travelled from Guatemala to the United States with the assistance of some neighbors who were also making the journey. *Id.* at 45. She also admitted that her uncle, who knew about the abuse she suffered, sold some land and gave her the money for her to use to travel to the United States. *Id.* She testified that she was on the floor, retrieved her phone, and called the police after the beating that led to the first miscarriage. *Id.* at 47. When confronted that she previously testified to being left unconscious after that beating, she then altered the story and claimed that her mother arrived, retrieved and gave the telephone to her, at which time she called the police (who advised that the incident was a domestic matter), and then she fainted. *Id.* She also admitted that she never

called the police at any other time. *Id.* at 48. When asked if she knew to whom she spoke during the telephone call, the respondent answered that she "spoke to the police but they told [her] that it was normal . . . so [she did not] insist anymore." *Id.* She further admitted that she called a general or national number for the police and did not know the name of the person with whom she spoke. *Id.* at 48-49. The respondent then admitted that despite calling the police, she did not remember what she told them. *Id.* at 49.

Additionally, she testified that she did not remember telling the immigration officer during her credible fear interview that the police actually came to her house when she called, and that they did not do anything after she saw (b)(6); give them money. *Id.* at 50, 55. She then confirmed that (b)(6); house is on the same road as her mother's house, and it is separated by a very short distance. *Id.* at 52. Additionally, the home of (b)(6); (b)(7)(C) mother is only a ten-minute walk from (b)(6); home. *Id.* The respondent also testified that her grandmother, uncles, and aunts all live in Aldea Mal Paso. *Id.* She then admitted that (b)(6); has not physically harmed any of her family members. *Id.* She testified that (b)(6); hit her eye and threatened to harm her mother if she did not return home with him after having left his house subsequent to the first miscarriage. *Id.* at 53. The respondent further acknowledged that she never attempted to live elsewhere in Guatemala and she never physically went to a police station or prosecutor's office as (b)(6); had said the police would not help. *Id.* at 54-55. The respondent's children lived with her and (b)(6); throughout her relationship with him. *Id.* at 27, 43-45. (b)(6); never physically harmed her children or any other member of her family. *Id.* at 52.

Upon questioning by the Immigration Judge, the respondent testified that there is no police station in Aldea Mal Paso with the closest one being an hour away by car. *Id.* at 56. She further clarified that she never saw (b)(6); give money to the police; rather, he would only say that he

had done so. *Id.* She again stated that she did not remember telling the immigration officer that she saw (b)(6); give money to the police and on the day of the hearing only remembered him saying that he would give them money. *Id.* at 56-57. She also admitted that her mother, grandmother, and neighbors never reported the abuse to the police, but claimed this was because they were afraid that (b)(6); would hurt them if he found out they filed a police report. *Id.* at 58. The respondent confirmed she had no knowledge of (b)(6); ever hurting any other women, including those with whom he had been in a relationship. *Id.* In response to why she thought (b)(6); mistreated her, the respondent testified that "[h]e would say that he would not . . . love a woman because the more love that you gave a woman, a woman would not deserve it. If you loved a woman, she would pay you back by not being loyal to you." *Id.*

In Guatemala, the law criminalizes discrimination and promotes gender equality as an important principle. Exh. 5 at 17. The documentary evidence shows that "[t]he government took steps to combat femicide and violence against women. The judiciary maintained a 24-hour court in Guatemala City to offer services related to violence directed toward women, including sexual assault, exploitation, and trafficking of women and children." Exh. 5 at 16. There are also courts throughout the country that specialize in violence against women. *Id.* Additionally, "the Public Ministry established a 24-hour victim service center to provide medical, psychosocial, and legal support to victims, including restraining orders for their immediate protection." *Id.* The Public Ministry also inaugurated a national alert system specific to finding women who have disappeared. *Id.*

On May 23, 2019, the Immigration Judge issued a written decision granting the respondent's application for asylum pursuant to INA § 208.[1] The Immigration Judge evaluated

[1] The Immigration Judge declined to analyze the respondent's eligibility for withholding of removal under section 241(b)(3) of the Act as well as the respondent's request for protection under the regulations implementing the

the respondent's credibility and found her credible. I.J. at 2-3. In granting the respondent's application for asylum, the Immigration Judge found that the respondent established past persecution and was entitled to the presumption of a well-founded fear of persecution in the future should she return to Guatemala. I.J. at 4-10.

As to past persecution, the Immigration Judge found that (b)(6); threats to kill the respondent and harm her mother, as well as the physical abuse that included rape and beatings, which led to two miscarriages, cumulatively rise to the level of severe harm that constitutes persecution under the Act. I.J. at 4-5. The Immigration Judge also found that the respondent suffered persecution on account of her membership in a particular social group – "Guatemalan women."[2] I.J. at 5-6. The Immigration Judge determined that the proposed group "Guatemalan women" is "(1) composed of members who share a common immutable characteristic; (2) socially distinct within the society in question; and (3) defined with particularity." I.J. at 5 (*citing Matter of M-E-V-G*, 26 I&N Dec. 227, 237 (BIA 2014)). Furthermore, the Immigration Judge found that nationality is an immutable characteristic and could find "no rational argument" that gender or sex should not be considered a particular social group as it is an immutable, particular, and socially distinct characteristic." I.J. at 5-6. Moreover, the Immigration Judge found that the respondent's gender was one central reason for the harm she suffered, and the Guatemalan government was unwilling or unable to protect her. I.J. at 6. The Immigration Judge reasoned that (b)(6);

United States government's obligations under Article III of the Convention Against Torture (CAT). I.J. at 10; Tr. at 60-61; 71. Also, the Immigration Judge determined that the respondent was ineligible for voluntary departure under INA § 240B(b) and respondent's counsel decided not to qualify the respondent for that form of relief. Tr. at 71.

[2] Although the respondent posited other particular social groups – "Guatemalan women viewed as property" and "Guatemalan women unable to leave a domestic cohabitating relationship" – the Immigration Judge declined to analyze the cognizability of these other proposed groups as she found that the respondent had suffered past persecution on account of her membership in a cognizable group – "Guatemalan women." Additionally, the respondent indicated in her application that her political opinion was also a basis for her claim to asylum and withholding of removal. Exh. 3. However, the respondent did not present testimony in support of past persecution or a well-founded fear of persecution based on her political opinion and made no argument in that regard. Tr. at 67.

statements toward respondent demonstrate that respondent's status as a woman served as a central reason for the persecution she suffered in Guatemala." *Id.* Specifically, "he viewed respondent – and women more broadly – as 'worthless,' 'trash,' and having 'no value" to society.'" *Id.* The Immigration Judge also found that the respondent's intimate relationship with (b)(6); was "merely an ancillary element to the abuse she experienced," and their relationship "may have been *one central reason* for respondent's persecution, as in it gave him the opportunity to abuse her, it was certainly not the *only reason* for the persecution respondent suffered in Guatemala." I.J. at 7 (emphasis added).

Furthermore, the country conditions indicate that men abusing women based on their gender is a common occurrence in Guatemala. I.J. at 6-7. The Immigration Judge also found that the Guatemalan government was unwilling or unable to protect the respondent based on the country conditions and respondent's testimony. I.J. at 7-8. The Immigration Judge conceded that "Guatemala is neither a country where women are broadly, as a class, relegated to second-class citizen status by law, nor a country lacking laws to protect women as a class from gender-based violence." I.J. at 8. However, the Immigration Judge found that that the Guatemalan government does not afford sufficient resources for the protection of women and victims from violence. *Id.* The Immigration Judge also reasoned that the respondent lived about an hour away from the nearest police station; the respondent had attempted to seek help from the police on one occasion but they failed to provide her with help; and (b)(6); claimed to have the ability to bribe the police. *Id.*

Having found that the respondent established past persecution on account of a protected ground, the Immigration Judge found that the respondent had a presumption of a well-founded fear of future persecution if returned to Guatemala and shifted the burden to the Department to rebut

that presumption. The Immigration Judge found that the Department had failed to establish changed country conditions such that the respondent no longer has a well-founded fear of persecution or that the respondent could avoid harm by relocating to another part of Guatemala. I.J. at 9. The Immigration Judge then ruled that the respondent merits relief as a favorable exercise of discretion. I.J. at 10. The Department filed a timely appeal of the Immigration Judge's decision.

ARGUMENT

I. THE IMMIGRATION JUDGE INCORRECTLY FOUND THAT THE RESPONDENT ESTABLISHED A NEXUS BETWEEN A PROTECTED GROUND AND PAST HARM BECAUSE THE RESPONDENT FAILED TO SHOW THAT (b)(6); HARMED HER ON ACCOUNT OF HER MEMBERSHIP IN THE PARTICULAR SOCIAL GROUP DEFINED AS "GUATEMALAN WOMEN."

The Immigration Judge incorrectly found that the respondent met her burden to establish that (b)(6); harmed her on account of her membership in the particular social group defined as "Guatemalan women."[3] In order to establish eligibility for asylum, the respondent bears the burden of showing a nexus between past persecution or her well-founded fear of future persecution and a protected ground (i.e., race, religion, nationality, political opinion, or membership in a particular social group). *See* INA §§ 208(b)(1)(A), 240(c)(4)(A); *see also* INA § 101(a)(42). To demonstrate such a nexus, the respondent must show that the protected characteristic is "one central reason" for the harm suffered or feared. *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 642, 646 (10th Cir. 2012); *see also Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (applying the "one central reason" standard to withholding

[3] The Board need not address whether "Guatemalan women viewed as property" and "Guatemalan women unable to leave a domestic cohabitating relationship" constitute cognizable particular social groups, as it may find that the respondent failed to meet her burden on other grounds as asserted in this appeal. *See Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018) (*A-B- I*) ("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"); *Matter of J-G-*, 26 I&N Dec. 161, 170 (BIA 2013) (courts and agencies are not required to make findings on issues that are unnecessary to the results reached in the decision). The Department asserts that the respondent's two additional proposed particular social groups are not cognizable. The respondent did not file an appeal to challenge the Immigration Judge's decision with regard to those groups, so that decision is final and those issues are not before the Board.

(b)(6); (b)(7)(C)

of removal). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007)); *Niang v. Gonzales*, 422 F.3d 1187, 1201 (10th Cir. 2005) (finding that for persecution to be on account of membership in a particular social group, the respondent's "protected characteristic must be central to the persecutor's decision to act against" her).

In *A-C-A-A-*, the Attorney General analyzed whether the respondent's claimed particular social group of "Salvadoran females" was one central reason for the persecution she suffered. 28 I&N Dec. 84. According to the Attorney General:

> Even if an applicant is a member of a cognizable particular social group and has suffered persecution, an asylum claim should be denied if the harm inflicted or threatened by the persecutor is not "on account of" the alien's membership in that group. That requirement is especially important to scrutinize when, as here, the asserted particular social group encompasses millions of Salvadorans. "Although the category of protected persons [within a particular group] may be large, the number of those who can demonstrate the required nexus is likely not."

A-C-A-A-, 28 I&N Dec. at 91-92 (*citing Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013)). The Attorney General emphasized that "if the persecutor has neither targeted nor manifested any animus toward any member of the particular social group other than the applicant, the applicant may not satisfy the nexus requirement." *A-C-A-A-*, 28 I&N Dec. at 92. In so finding, the Attorney General noted the Board's 1999 decision in *Matter of R-A-*, wherein the Board stated that the harm was not inflicted because the alien "was a member of some broader collection of women" whom the perpetrator "believed warranted the infliction of harm." 22 I&N Dec. 906, 921 (BIA 1999). Furthermore, the Attorney General recently expressed approval of the Board's two-pronged test for determining whether nexus exists in a particular claim: "the applicant's protected status must

(b)(6); (b)(7)(C)

be *both* a but-for cause of her persecution *and* it must play more than a minor role that is neither incidental nor tangential to another reason for the harm or a means to a non-protected end." *Matter of A-B-*, 28 I&N Dec. 199, 211 (A.G. 2021) (*A-B- II*) (*citing Matter of L-E-A-*, 27 I&N Dec. 40, 43-44 (BIA 2017) (*L-E-A- I*) *aff'd in relevant part*, 27 I&N Dec. 581, 584-85 (A.G. 2019)).

In the instant case, the respondent failed to establish a nexus between her stated particular social group of "Guatemalan women" and the harm she suffered. Rather, the respondent established that she was the victim of crimes committed by her former partner, (b)(6); (b)(7)(C) who was motivated to commit these crimes due to the nature of their personal relationship. *See L-E-A- I*, 27 I&N Dec. at 43-44 ("If the persecutor would have treated the applicant the same if the protected characteristic . . . did not exist, then the applicant has not established a claim on this ground."). The Immigration Judge found that (b)(6); made it clear that he viewed respondent – and women more broadly – as "worthless," "trash," and having "no value" to society." I.J. at 6. However, the respondent specifically testified that (b)(6); told her that "*I* was worthless. That *I* was trash. That *I* [] had no value," making it clear that (b)(6); focus was on the respondent because she was his domestic partner, not because she was a member of a broader collection of women. Tr. at 28 (emphasis added); *see also R-A-*, 22 I&N Dec. at 921.

The Immigration Judge also noted that (b)(6); told the respondent that "men are 'better than' women." I.J. at 6. However, in fact, the respondent testified that (b)(6); said *he* was "better than a woman." Tr. at 28. The respondent went on to clarify that (b)(6); said he could never truly love a woman because she would "pay you back by not being loyal to you." Tr. at 28, 58. Rather than showing animus toward "Guatemalan women" generally, the evidence more reasonably shows, at best, that (b)(6); may have held an unexplained distrust and/or disrespect toward women with whom he was interested in having a romantic relationship. Additionally, (b)(6); carried on

relationships with other women while he was in a relationship with the respondent. Tr. at 28. Yet, the respondent testified that she never heard of him hurting any of those women, nor any other woman, further indicating that the nexus requirement was not satisfied. Tr. at 58; *see also A-C-A-A-*, 28 I&N Dec. at 92. Similarly, (b)(6); never hurt the respondent's children (two of whom are female Guatemalans), and he never hurt the respondent's grandmother or mother, who are also "Guatemalan women," despite residing near them all. Tr. at 27, 52-53; *see also A-C-A-A-*, 28 I&N Dec. at 92.

Consequently, for the aforementioned reasons, the respondent failed to establish that her membership in the group "Guatemalan women" was a but-for cause of (b)(6); acts. *A-B II*, 28 I&N Dec. at 211 (citing *L-E-A- I*, 27 I&N Dec. 43-44). Even if, *arguendo*, her membership in the larger group was a but-for cause of (b)(6); acts, the evidence fails to demonstrate that the membership played anything other than a "minor role" in (b)(6); motivation. *Id.* Thus, the Immigration Judge incorrectly concluded that a nexus was established between the harm suffered and the stated particular social group of "Guatemalan women." *A-B- I*, 27 I&N Dec. at 339; *see also A-C-A-A-*, 28 I&N Dec. 91-93. Accordingly, the Department respectfully requests that the Board vacate the Immigration Judge's decision.

II. THE IMMIGRATION JUDGE ERRED IN FINDING THAT THE RESPONDENT ESTABLISHED PAST PERSECUTION BECAUSE THE RESPONDENT FAILED TO SHOW THE GOVERNMENT OF GUATEMALA WAS UNWILLING OR UNABLE TO PROTECT HER FROM HER FORMER INTIMATE PARTNER.

To establish past persecution, the respondent must also demonstrate that the harm was inflicted by "persons or an organization that the government was unable or unwilling to control." *See, e.g.*, *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), *modified on other grounds*, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987). The Immigration Judge erred in finding that the

Guatemalan government was unwilling or unable to protect the respondent from persecution. I.J. at 7-8.

"Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *A-B- I*, 27 I&N Dec. at 320. The respondent must establish that his or her government is unwilling or unable to control the perpetrator. *Id.* at 337. This requires the respondent to show more than that the government had "difficulty controlling" the private criminality; rather, the government must have either "condoned" the criminality or "at least demonstrated a complete helplessness to protect the victims." *Id.* Simply because a government has not acted on a reported crime, successfully investigated it, or punished the perpetrator, does not necessarily establish an inability or unwillingness to control the crime "any more than it would in the United States." *Id.* at 343-44. In *A-B- II*, the Attorney General concluded that *A-B- I* did not alter the "unable or unwilling" standard and only served to clarify the "government's role in relation to persecution by private actors for purposes of establishing refugee status." *Id.* at 201-02. The Attorney General reasoned that "every civilized state seeks to protect its citizens from harm" yet "no government can provide a 'crime-free society.'" *Id.* at 204 (citing *Saldana v. Lynch*, 820 F. 3d 970, 977 (8th Cir. 2016)). Consequently, "the level of inaction or ineffectiveness required to rise to the level of persecution should, accordingly, be high." *Id.*

In the instant case, the Immigration Judge found that "Guatemala is neither a country where women are broadly, as a class, relegated to second-class citizen status by law, nor a country lacking laws to protect women as a class form gender-based violence." I.J. at 7-8. The Immigration Judge acknowledged the courts located throughout Guatemala that specialize in matters of violence against women. I.J. at 8. Nevertheless, the Immigration Judge determined that "despite these

protections, significant failures persist throughout the country to provide government protection for victims of gender-based violence." *Id.* However, "persecution . . . should be read to require that the government in the home country has fallen so short of adequate protection as to have breached its basic duty to protect its citizens or else to have actively harmed them or condoned such harm." *A-B- II*, 28 I&N Dec. at 204. Moreover, "[w]here the government is actively engaged in protecting its citizens, failures in particular cases or high levels of crime do not establish a breach of the government's duty to protect its citizenry." *Id.*

Here, the respondent testified that, throughout the abuse she suffered, she only once contacted the police, at which time they declined to help her in what they termed a "family issue." Tr. at 37. However, the respondent went on to testify that the number she called for the police was a general or national number for the police. Tr. at 48-49. She further testified that she remembered calling, but did not remember what she said. Tr. at 49. The Immigration Judge notes the respondent's original testimony regarding the dismissive attitude of the police when she called for assistance. I.J. at 8. However, the Immigration Judge does not address the fact that the respondent ultimately admitted that she could not remember what she told the police. Consequently, the evidence does not support the Immigration Judge's conclusion that there is a "lack of political will to protect victims of gender-based violence [as] is apparent in the respondent's case." *Id.* First, an instance of the respondent calling the police cannot reasonably be described as equating to such a high level of inaction or ineffectiveness as to be described as persecution. *See A-B- II*, 28 I&N Dec. at 204. Second, the respondent admitted that she could not remember what she told the police, so it is reasonable to question whether she conveyed the detailed information necessary for law enforcement to actively and effectively try to assist her.

(b)(6); (b)(7)(C)

Furthermore, neither the country conditions evidence, nor the respondent's testimony support a finding that the government is unable or unwilling to protect the respondent. The government of Guatemala has ratified several treaties related to the prevention and punishment of violent acts against women. Exh. 4 at 326. There are also several agencies devoted to enforcing the criminal code as it relates to violent acts against women as well as the 2008 Law Against Femicide. Exh. 4 at 248, 327. That (b)(6); may remain unpunished is not enough for the respondent to meet her burden – "perfect protection" is not required. *A-B- I*, 27 I&N Dec. at 338, 343. Accordingly, the Immigration Judge's conclusion that the government of Guatemala was and is unwilling or unable to protect the respondent was erroneous, and the Department respectfully requests that the Board vacate her decision.

III. THE IMMIGRATION JUDGE INCORRECTLY SHIFTED THE BURDEN TO THE DEPARTMENT TO ESTABLISH THAT THE RESPONDENT COULD INTERNALLY RELOCATE AND IT WOULD BE REASONABLE TO EXPECT HER TO DO SO.

As the Immigration Judge incorrectly found that the respondent established past persecution, shifting the burden to the Department to establish the reasonableness of internal relocation was also incorrect. 8 C.F.R. § 1208.13(b)(3). Rather, the respondent bore the burden of establishing that internal relocation within Guatemala was unreasonable. *M-Z-M-R-*, 26 I&N Dec. at 35-36 ("By contrast, where past persecution has not been established, the applicant bears the burden of establishing that relocation would not be reasonable, unless the persecution is by a government or is government sponsored.") (citing 8 C.F.R. § 1208.13(b)(3)(i)). Even if the Department bears the burden of proof on this issue, the Immigration Judge incorrectly found internal relocation unreasonable. I.J. at 9. "For an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of future persecution." *M-Z-M-R-*, 26 I&N Dec. at 33. "[T]hat location must present circumstances that are

substantially better than those giving rise to a well-founded fear of future persecution on the basis of the original claim." *Id.*

The Immigration Judge incorrectly held that the respondent faced a threat of persecution anywhere in Guatemala because of her lack of friends or contacts in other areas of the country and because her partner would look for her wherever she went. I.J. at 9. However, the Immigration Judge failed to consider the respondent's resourcefulness and her network of family and friends in Guatemala. Exh. 4 at 36-55; Tr. at 52. Despite a lack of her own money, her limited education, lack of travel experience, lack of employment history, and inability to speak English, the respondent was able to rely on the assistance of her friends and family in order to travel the approximately 2,000 miles from Guatemala to the United States, where presumably she has significantly fewer family and friends. Exh. 3; Tr. at 39-40; 45-46.

Consequently, it is not unreasonable that the respondent could rely on the help of her family and friends to relocate elsewhere within Guatemala. Although the respondent testified that (b)(6); had his own cattle and travelled for work, there is no evidence as to where he travelled and, other than his declarations about having a lot of money, no evidence to suggest that his influence was or is so far-reaching that he would or could find the respondent if she relocated internally. Tr. at 36. Moreover, the claim that (b)(6); still asks about her and whether she will return soon is not adequate evidence of a threat of serious harm that would reasonably prevent her from internally relocating. *See M-Z-M-R-* at 34-35.

As the Attorney General noted, the victims of private violence "face the additional challenge of showing that internal relocation is not an option (or in answering [the Department's] evidence that relocation is possible)," and the respondent failed to meet her burden of proof on this

issue. *A-B- I*, 27 I&N Dec. at 345. Therefore, the Department respectfully requests that the Board vacate the Immigration Judge's decision.

CONCLUSION

The Immigration Judge incorrectly found that the respondent met her burden to establish eligibility for asylum under the Act. The respondent failed to show past persecution or a well-founded fear of persecution on account of her membership in a particular social group of "Guatemalan women" and failed to show that the government of Guatemala was unwilling or unable to protect her from the single private actor who previously harmed her. Consequently, the Immigration Judge incorrectly shifted the burden to the Department to rebut the presumption of a well-founded fear of persecution by showing that the respondent could avoid persecution by relocating elsewhere within Guatemala, and that it would be reasonable for her to do so. Moreover, in as much as the respondent has failed to establish that she meets the well-founded fear of persecution standard for asylum, she necessarily fails to meet the much higher burden of proof required for a grant of withholding of removal under section 241(b)(3) of the Act. *See Uanreroro v. Gonzales*, 443 F. 3d 1197, 1202 (10th Cir. 2006).

Therefore, the Department respectfully requests that the Board sustain this appeal, vacate the decision of the Immigration Judge granting asylum, and remand the matter for the Immigration Judge to consider the respondent's request for protection under the federal regulations implementing CAT.

(b)(6); (b)(7)(C)

Date: February 11, 2021

Respectfully submitted,

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(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

On February 11, 2021, I, (b)(6); (b)(7)(C) Assistant Chief Counsel, mailed or delivered a copy of this U.S. Department of Homeland Security's Brief on Appeal and any attachments by placing said copy in an envelope and placing said envelope in the receptacle designated for official "outgoing" mail, said envelope having been addressed to the name and address indicated:

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
DENVER, CO

In the Matter of

(b)(6); (b)(7)(C)

In Removal Proceedings.

File No.: (b)(6); (b)(7)(C)

Immigration Judge: Alison R. Kane **Next Hearing: N/A**

DEPARTMENT OF HOMELAND SECURITY'S CLOSING STATEMENT

The Department of Homeland Security, Immigration and Customs Enforcement ("Department"), submits the following statement for consideration in determining whether the respondents have met their burden in establishing they warrant a grant of asylum, or in the alternative, withholding of removal or protection under the Convention Against Torture. It is the Department's position that the respondents have not met their burden and do not warrant relief from removal.

As a preliminary manner, the respondents did not articulate a cognizable particular social group, as directed by the court, prior to their individual hearing. Rather, the respondents submitted a brief which indicated that the respondents' proposed social group is "immediate family." The brief did not elaborate upon which immediate family member the respondents were basing their claim upon. Due to the lack of clarity in the respondents' proposed social group, the Court appropriately asked the respondents to articulate the particular social group prior to direct testimony. The respondents suggested several legal theories for the case. Several delineations of social groups were proposed including some akin to immediate family members of Juan Emerson Fuentes, women who are unable to leave their domestic relationship, and immediate family members of someone who challenges gangs. Digital Audio Recording, May 11, 2018 ("DAR"). At the end of the direct testimony, the Department sought clarification on the proposed social groups and the Court directed the respondents' counsel to include the proposed social groups in his written closing arguments to the Court. Nonetheless, the respondents had over ten months to formulate a particular social group to present to the court prior to the their individual hearing on April 9, 2018. [1] Moreover, the respondent's counsel was given the

[1] The Court requested, at respondent's master calendar hearing on June 28, 2017 that the respondent provide a brief statement articulating the particular social group.

(b)(6);
(b)(7)(C)

opportunity to articulate the particular social group at the individual hearing. The respondents, prior to the submission of their written closing, should have clearly indicated before the immigration judge, the exact delineation of their proposed social groups. *Matter of A-B,* 27 I&N Dec. 316, 344 (A.G. 2018)(*citing Matter of W-Y-C & H-O-B*, 27 I&N Dec. 197, 190-91 (BIA 2018). Nonetheless, even taking the newly proposed social groups into account, the respondents have not met their burden in establishing eligibility for the relief sought.

I. Asylum

The respondents have not demonstrated that they suffered past persecution on account of any protected ground, and as such, should not be granted asylum. The lead respondent believes that members of MS-13 will kill her because her daughter[2] refused to succumb to the advances of (b)(6); (b)(7)(C) an individual the respondent claims is a boss for MS-13 members. The respondent claims that (b)(6); (b)(7)(C) will find her, along with her daughters, anywhere in El Salvador. Because of the threats her daughter received, the respondent along with two of her daughters, fled from El Salvador.[3]

The respondent testified at her merits hearing that while living in El Salvador, she was never physically harmed by (b)(6); (b)(7)(C) DAR. However, she did testify that (b)(6); (b)(7)(C) her deceased husband, insulted her, and pushed her, but did not hit her because she would threaten to call the police. DAR. The respondent testified that her deceased husband attempted to molest her daughters. The respondent further testified that one night in 2013, her deceased husband attempted to rape her daughter (b)(6); and the respondent kicked him out of the house. The respondent claims that the following morning, he returned to the home and committed suicide. The respondent further claims that as a result, the family of her deceased husband

[2] Rider respondent, (b)(6); (b)(7)(C)
[3] Both rider respondents (b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

blamed her and her daughters for his suicide. Exhibit ("Exh.") 4 at p. 10. Approximately two years after the death of her deceased husband, the lead respondent obtained a protection order against her brother-in-law. Exh. 4 at p. 20-24.[4] The lead respondent did not request an extension of the protection order and testified that (b)(6); , her brother-in-law, did not violate the protection order. DAR. However, the lead respondent claims that (b)(6); was friends with a boss of the MS-13 named (b)(6); (b)(7)(C) then fell in love with her daughter (b)(6); and wanted her to be "his property" and deliver drugs for him. Exh. 4 at p. 10. The lead respondent claims that as a result of her daughter's refusal, the family received a death threat. The lead respondent's daughter testified that she received the threat after her refusal to sell drugs in October of 2015. The lead respondent's daughter claims she stopped going to school after that threat. The lead respondent's daughter further claims that she told her mom about the threat after she got home from school that night. Exh. 4 at p. 15. Neither the lead or rider respondents were ever physically harmed by the MS-13. The lead respondent testified (b)(6); (b)(7)(C) came to her home and did not harm her or personally threaten her while she was living in El Salvador. DAR. The respondent's eldest daughter continues to live in El Salvador and the respondent does not have knowledge of her daughter being threatened or physically harmed.

In sum, the respondent's testimony demonstrates that her daughter was pursued by an individual she claims was associated with the MS-13. The individual wanted to recruit her and upon refusal, the family was threatened. The respondent fears returning to El Salvador because of her daughter's refusal to comply with (b)(6); (b)(7)(C) demands. The respondents have not suffered past persecution on account of a protected ground and failed to meet their burden of establishing well -founded fear of future persecution on account of a protected ground.

[4] It is unclear exactly how much time elapsed as the respondents did not submit the death certificate of the lead respondent's deceased husband as evidence in support of the claim.

(b)(6);
(b)(7)(C)

A. Particular Social Group

The respondents failed to demonstrate that any harm they endured was on account of a protected ground. The respondents bear the burden of establishing that they are refugees as defined in the Act. INA § 208(b)(1)(B)(i); 8 C.F.R. § 208.13(a); *see also* INA § 240(c)(4)(A)(i); *Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1335 (10th Cir. 2008) ("in order to be eligible for asylum, an alien must demonstrate by a preponderance of the evidence that she is a refugee"); *Woldemeskel v. INS*, 257 F.3d 1185, 1189 (10th Cir. 2001). A "refugee" is defined as any person outside of their country of nationality, or if she has no nationality, is outside of the country where she habitually resided, who is unable or unwilling to avail herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A); 8 C.F.R. § 1208.13(b)(1)-(2). A refugee can show three types of persecution to satisfy the statutory requirement: (1) "a well-founded fear of future persecution," (2) "past persecution sufficient to give rise to a presumption of future persecution," or (3) "past persecution so severe it supports an unwillingness on the applicant's part to return to that country." *Chaib v. Ashcroft*, 397 F.3d 1273, 1277 (10th Cir. 2005).

When the basis of seeking asylum is as a member of a particular social group, the applicant "must establish that the group is (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 M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014). As to particularity, the "terms used to describe the group [must] have commonly accepted definitions in the society of which the group is a part." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Matter of A-*

(b)(6);
(b)(7)(C)

M-E- & J-G-U-, 24 I&N Dec. 69, 76 (BIA 2008)). The group must have "discrete and [] definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)).

The respondents, in their written closing, have articulated four particular social groups. As it pertains to the lead respondent's oldest daughter (b)(6); the respondents have proposed the following two groups: 1) "women treated as property by virtue of their imputed status in a relationship"; and 2) "immediate familial relationship to her mother (b)(6); (b)(7)(C) who testified in court against a known gang member." For the lead respondent, and youngest rider, the proposed social groups were delineated as follows: 1) "immediate family of (b)(6); (b)(7)(C) (b)(6); and 2) "persons who have testified against gang members in court." Respondent's Written Closing at 1-2. The respondents have not demonstrated that they have suffered past persecution on account of protected ground, nor have they established a well-founded fear of future persecution on account of a protected ground.

i. Women treated as property by virtue of their imputed status in a relationship is not a cognizable particular social group.

The respondents argue that (b)(6); the oldest rider respondent, has a well-founded fear of persecution as "a woman treated as property by virtue of her imputed status in a relationship." Respondent's Written Closing at 5. The respondent testified that (b)(6); (b)(7)(C) was in love with her and wanted her to be his wife. DAR. The respondent further testified that (b)(6); (b)(7)(C) wanted her to transport drugs, and she refused so he threatened to kill her mom and sister.[5] DAR.

[5] The respondent's affidavit states, ". . .they forced me to take drugs to an unknown place." Exh. 4 at p. 15. Nonetheless, the respondent testified she did not take the drugs. The respondent also testified that this incident occurred one day after school and she told her mother about it. The respondent also testified that a month and a half after telling her mother, they made the journey to the United States. DAR. On cross examination, the respondent indicating she stopped going to school in October 2015. DAR. The respondents left El Salvador in November 2016. The respondent's timeline for when she claims she was threatened and when the family left El Salvador is

(b)(6);
(b)(7)(C)

Because of this, the respondent claims she fled El Salvador. The respondent fears harm if she returns to El Salvador.

The respondent's proposed particular social group is defined by the harm and as such is circular and not cognizable. The proposed social group does not exist independently of the harm feared, and as such it is not cognizable. *Matter of A-B*, 27 I&N Dec. 216, 224 (A.G. 2018)(citing *Matter of M-E-V-G*, 26 I&N Dec. 227, 236 n.11, 243 (BIA 2014)). This proposed group lacks particularity as it is defined by the harm feared. Being treated as property essentially is a form of harm defining the proposed group. As such, the proposed group fails. *Matter of M-E-V-G*, 26 I&N Dec. 227, 239 (BIA 2014). Not only does the group lack particularity, it lacks social distinction as there is no evidence in the record to suggest that El Salvadoran society consider or recognized this proposed group as a distinct social group.[6] There is no evidence to suggest that this group is recognized by society at large. Rather, the evidence suggests that there are victims of gang violence in El Salvador. Respondent's Written Closing at 7. Being susceptible to gang violence does not render an individual a member of a cognizable particular social group. *Matter of S-E-G-* , 24 I&N Dec. 579, 588 (BIA 2008).

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inconsistent. Nonetheless, based on the testimony, the respondent was in El Salvador for over a year without incident after she claims (b)(6): threatened to harm her mother and sister.

[6] The group also fails because being viewed as property is not an immutable characteristic. *Matter of A-B*, 27 I&N Dec. 316, n. 7 333 (A.G. 2018).

(b)(6); (b)(7)(C)

ii. Immediate Family Relationship

a. Rider Respondent- (b)(6); (b)(7)(C)

The respondent has not demonstrated that she has a well-founded fear of persecution because of her familial relationship with her mother.[7] The respondent claims that because her mother testified in court, the family is now a target of gang activity. The lead respondent went to a hearing in El Salvador and obtained a protection order against (b)(6); (b)(7)(C) DAR. She testified that the hearing was not public and that members of the community did not know she testified. DAR.

(b)(6); the rider respondent, testified that she fears (b)(6); (b)(7)(C) (b)(6); (b)(7)(C) was in love with her. Her relationship with her mother is not the central reason for the harm she fears. Her testimony reveals that she fears harm because she is being pursued by an individual she believes is associated with a gang. Her relationship to her mother is tangential. The feared harm articulated by the respondent is from (b)(6); (b)(7)(C) and her refusal to succumb to his demands. There simply is no animus to overcome family ties, as such there is no nexus and the respondent has not demonstrated a well-founded fear of persecution on account of a protected ground. *Matter of L-E-A-*, 27 I&N Dec. 40, 44 (BIA 2017).

b. Lead Respondent and Rider Respondent (b)(6); (b)(7)(C)

The lead respondent, along with the youngest rider respondent, claim they have a well-founded fear of persecution on account of their familial relationship with (b)(6); (b)(7)(C) The evidence does not indicate that the respondents were physically harmed because of their

[7] Arguably it is unclear that the immediate family relationship articulated by the respondent is a cognizable particular social group. *Matter of A-B*, 27 I&N Dec. 316, n. 8 333 (A.G.2018)

familial relationship. In fact, the lead respondent testified that (b)(6); (b)(7)(C) came to her home and she was not threatened or harmed. DAR. The lead respondent testified she has not been directly threatened by (b)(6); (b)(7)(C) The threat that was allegedly made towards the lead respondent was simply a means to an end. *Matter of L-E-A-*, 27 I&N Dec. 40, 45 (BIA 2017). The respondents testified that (b)(6); (b)(7)(C) wanted the rider respondent (b)(6); to be his wife. Family was not the central reason that the lead respondent was threatened. As such, there is no nexus to a protected ground and the respondents have not met their burden to establish eligibility for the relief sought. *See* 8 U.S.C. § 1158(b)(1)(B)(i); *see also Matter of J-B-N & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007).

iii. Persons who have Testified against Gang Members in Court

The respondents argue that because the lead respondent testified in court, she has a well-founded fear of persecution. However, there is no evidence that the proposed group would be recognized as a discrete class of persons and thus it fails to meet the particularity requirement. *Matter of S-E-G* 24 I&N Dec. 579, 584 (BIA 2008). The respondent's reliance on *Henriquez-Rivas v. Holder*[8] is misplaced as this case is distinguishable.

The lead respondent testified that the hearing was not public. DAR. She also testified that the community did not know she testified. DAR. The lead respondent did not testify in open court. She claimed she went to a hearing because of the abuse her sister suffered. There is no evidence to suggest that the lead respondent is actually a member of the proposed group. Rather, it appears as though the proposed group is being defined by the perception of the alleged persecutor. As such, the group cannot be recognized for purposes of asylum. *Matter of M-E-V-G* 26 I&N Dec. 227, 242 (BIA 2014).

[8] 707 F.3d 1081 (9th Cir. 2013).

(b)(6);
(b)(7)(C)

B. Political Opinion

(b)(6); (b)(7)(C) the oldest rider respondent, also claims a well-founded fear of persecution based on her "imputed political opinion challenging the authority of the gangs." Respondent's Written Closing at 1. The rider respondent testified she refused the advances of a gang member and refused to sell drugs. Her resistance to the gang's recruitment is not a political opinion. Being opposed to gang activity does not necessarily mean an individual has a political opinion. *See I.N.S v. Elias Zacarias*, 502 U.S. 478, 482 (finding that forced recruitment is not persecution on account of political opinion) (1992); *see also Rivera-Barrientos v. Holder*, 666 F. 3d 641, 646-47 (10th Cir. 2012) (finding that one central reason for the attack on the alien was resistance to gang recruitment and not political opposition to the gang's agenda). Moreover, there is no evidence that (b)(6); (b)(7)(C) or MS-13 members would impute a political opinion to the respondent. Rather, the evidence shows (b)(6); (b)(7)(C) wanted the respondent to be a part of his gang. The motivation behind his actions was to recruit the respondent. As such, the respondent has failed to demonstrate a well-founded fear of persecution on account of a political opinion. *Matter of S-E-G-*, 24 I&N Dec. 579, 589 (BIA 2008) (finding that respondents who showed resistance to recruitment efforts failed to demonstrate a well-founded fear of persecution on account of their political opinion).

C. Unwilling and Unable

Assuming *arguendo*, that the Court finds well-founded fear of persecution on account of a protected ground, the respondents have not met their burden in demonstrating that the government is unwilling or unable to control (b)(6); (b)(7)(C) or people associated with him. As a

(b)(6);
(b)(7)(C)

threshold issue, the respondents did not testify or present evidence indicating that they were harmed or will be harmed by the government of El Salvador. Rather, the respondents claim that the government is unwilling and unable to protect them. Both respondents testified that they did not go to the police after they were threatened because they were scared of retaliation. However, the lead respondent did testify she went to the police to report the harm her sister was enduring and they were able to obtain a protection order. For the six months the order was in place, no one was harmed or threatened.

The respondents fear harm from a private actor. Generally speaking, claims for asylum pertaining to domestic violence or gang violence in which the perpetrator is a non-government actor are not viable. *Matter of A-B-* 27 I&N dec. 316, 320 (A.G. 2018). The evidence submitted does not demonstrate that the government condoned the actions of (b)(6); (b)(7)(C) or showed complete helplessness. *Id.* at 337. Rather, the evidence shows that the government has arrested (b)(6); (b)(7)(C) The respondents do not dispute that fact. The evidence also shows that the lead respondent sought, and received, help from the government. There is insufficient evidence to demonstrate that the government is unwilling or unable to prevent the harm the respondents fear.

II. Humanitarian Asylum

A grant of asylum based on humanitarian grounds under 8 C.F.R. §1208.13(b)(1)(iii)(A) or (B) requires a number of sequential and interdependent findings of fact and of law. In a case where the asylum claim is based upon membership in a particular social group, these findings must include a determination that the group is cognizable under the law. Its members must share one or more immutable characteristic that they cannot or should not be required to change, that the definition of the group is particular such that it "provide[s] a clear benchmark for determining who falls within" it, and that the group is distinct to the degree that "society in

(b)(6);
(b)(7)(C)

general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *See generally Matter of W-G-R-*, 26 I&N Dec. 208, 212-217 (BIA 2014) (citing *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 201 (BIA 1985); *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007)). Moreover, the existence of a cognizable social group is not the end of the inquiry, as the alien "must establish her 'membership in that group, and persecution or fear of persecution on account of [her] membership in that group'" to merit relief. *Matter of W-Y-C- & H-O-B-,* 27 I&N Dec. 189, 191 (BIA 2018) (*citing Matter of L-E-A-*, 27 I&N Dec. 40, 44 (BIA 2017) (citing *Matter of N-M-,* 25 I&N Dec. 526, 532 (BIA 2011))).

Here, the respondents argue that they were subjected to severe past persecution by the lead respondent's deceased husband. However, the respondents do not articulate on account of what protected ground that past harm was inflicted. In order to demonstrate eligibility for humanitarian asylum, the respondents must demonstrate past persecution. 8 C.F.R. § 1208.13(b)(1)(iii). Because the respondents have not articulated a protected ground for the harm endured, the respondent have failed to demonstrate past persecution.

Nonetheless, assuming *arguendo*, that there was a particular social group articulated, the harm does not rise to the level of severity required for a grant of humanitarian asylum. The respondents cite to *Matter of L-S*[9] and *Matter of Chen*[10] in support of the request for humanitarian asylum. Those cases are distinguishable.

In *Matter of L-S-*, the Respondent spent a year in an internment camp where he was subjected to vigorous labor and with poor quality drinking water. *Matter of L-S-*, 25 I&N Dec. 705, 707-08 (BIA 2012). In addition to the internment, the Respondent was also beaten

[9] 25 I&N Dec. 705 (BIA 2012).
[10] 20 I&N Dec/ 16 (BIA 1989).

(b)(6); (b)(7)(C)

unconscious because of his political activity. *Id.* at 708. After being beaten unconscious the respondent was beaten again the following month. The Respondent's brother's house was bombed along with his store. The Respondent's home was also shot at with machine guns and his son was wounded. *Id.* This harm all occurred over the course of 20 years. *Id.*

In *Matter of Chen*, the Respondent was locked in a room for six months, he was beaten, and was deprived of an education and of food. 20 I&N Dec. 16, 20 (BIA 1989). Following his release, he was injured at school after rocks were thrown at him and he had to endure a month of intensive treatment. *Id.* The respondent subsequently suffered from a deprivation of medical care from a leg injury and was subjected to social isolation for four years resulting in physical debilitation, loss of hearing, anxiousness, and suicidal ideations. *Id.* This harm all occurred over the course of 14 years. *Id.*

Here, the lead respondent argues she was abused psychologically and physically. However, the lead respondent testified she was pushed by her ex-husband. DAR. She testified she would threaten call the police so that the violence did not escalate. DAR. While the verbal abuse is unfortunate, that alone does not rise to persecution. As it relates to the respondent's claim of psychological harm, the respondents claim that the lead respondent's ex-husband would leave nooses tied around the house. The respondent testified this happened on one occasion. DAR. The respondents also argue that the lead respondent's deceased husband's inappropriate behavior with (b)(6); the rider respondent, is severe persecution. While what the respondents testified happened is unfortunate, it does not rise to the requisite level of severity for humanitarian asylum.

As there is no severe past persecution, the inquiry as to other serious harm is not necessary. Nonetheless, it is unclear what other serious harm the respondents would be subjected to. The

(b)(6);
(b)(7)(C)

respondent's other daughter, who was also treated inappropriately by the lead respondent's deceased husband lives in El Salvador and has not been threatened or harmed. Arguably, the respondents resided in El Salvador for a year after (b)(6); (b)(7)(C) threatened to harm the lead respondent and her daughter and were not harmed. To meet their burden, the respondents must demonstrate that other serious harm would equal the severity of persecution. *Matter of L-S-* 25 I&N Dec. 705, 714 (BIA 2012). The evidence in the record is simply insufficient to support such a finding.

III. Withholding of Removal

Because the respondents have not met their burden in establishing that they merit a grant of asylum, it cannot be deemed that they can meet the higher threshold required for a grant of withholding. The respondents have not demonstrated that it is more likely than not that they would be harmed on account of a protected ground if they return to El Salvador.

IV. Convention Against Torture

The respondents have also not met their burden in demonstrating that it is more likely than not that they will be tortured by the El Salvadoran government or with the acquiescence of the El Salvadoran government if they are ordered removed to El Salvador. In determining whether it is more likely than not that the respondents would be tortured if returned to El Salvador, the immigration judge should consider all relevant evidence of future torture including past torture and whether the respondents could relocate to another part of the country where they are not likely to be tortured. *See Matter of J*-E, 23 I&N Dec. 291, 303 (BIA 2002)(citing 8 C.F. R. § 280.16(c)(3). The respondents have not been tortured in the past. The respondents have also made no attempts to relocate. There is simply insufficient evidence in the record to demonstrate

(b)(6);
(b)(7)(C)

that it is more likely than not that the respondents would be tortured if they are removed to El Salvador.

V. Conclusion

Because of the aforementioned reasons, it is the Department's position that the respondents have not met their burden in establishing relief from removal in the form of asylum, withholding of removal, or protection under the Convention Against Torture.

Respectfully submitted on this 15th day of June 2018,

(b)(6); (b)(7)(C)
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Certificate of Service

I hereby certify that, on June 15, 2018 I served a true copy of this DEPARTMENT OF HOMELAND SECURITY'S CLOSING STATEMENT and any attached pages by placing it in the outgoing USPS mail for service on:

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

In the Matter of:	)	
(b)(6); (b)(7)(C)	)	File No.: (b)(6); (b)(7)(C)
In removal proceedings	)	

DEPARTMENT OF HOMELAND SECURITY'S
MOTION FOR SUMMARY AFFIRMANCE

The Department of Homeland Security (hereinafter "Department") hereby files its Motion for Summary Affirmance. The respondent appealed the decision of the Immigration Judge dated May 7, 2019,[1] denying her application for asylum, withholding of removal, and protection under the regulations implementing Article 3 of the Convention Against Torture ("CAT"). The respondent was ordered removed to El Salvador. The respondent filed a timely appeal.

The Department moves the Board to summary affirm the decision of the Immigration Judge dated May 7, 2019. 8 C.F.R. § 1003.1(e)(4)(i). The Department submits that the Immigration Judge reached the correct decision, as noted above, such that any errors that may exist are harmless or immaterial, and that the respondent's appellate arguments are not so substantial that the case warrants the issuance of a written opinion. 8 C.F.R. § 1003.1(e)(4)(i)(B).

I. EXPERT WITNESSES

The Immigration Judge did not err in affording reduced weight to the testimony and declaration of the respondent's proposed expert witness (b)(6); (b)(7)(C) an assistant professor. An expert witness is one who has specialized "knowledge, skill, experience, training, or education." *Matter of D-R-*, 25 I&N 445, 459 (BIA 2011) (internal citations omitted). The purpose of an expert is to assist the adjudicator "to understand the evidence or to determine a fact in issue." *Id.* (citing Fed. R. Evid. 702); *see also Matter of Marcal Neto*, 25 I&N Dec. 169, 176 (BIA 2010) (stating that Immigration Judges may rely on experts "regarding matters on which [the Immigration Judges] possess little or no knowledge or substantive expertise"). When

[1] Although the decision is dated May 7, 2019, the decision was not served until May 8, 2019.

assessing whether to admit the evidence from a proposed expert witness, the Immigration Judge should consider both the reliability and relevance of the evidence and the weight that should be afforded that evidence, paying particular attention to the reliability and relevance to the issue of dispute. *Matter of J-G-T-*, 28 I&N Dec. 97, 103 (BIA 2020).

In this case, the respondent sought to establish that (b)(6); was qualified to present expert testimony about general country conditions, government security, and issues for women in El Salvador. I.J. at 2. However, (b)(6); curriculum vitae, declaration, and testimony failed to establish that she was qualified as an expert regarding women in El Salvador. *Id.* Instead, her testimony established that she had minimal expertise addressing any issue pertaining to women generally outside of dated interviews with female textile workers discussing working conditions. *Id.* Given the lack of any reliable evidence that (b)(6); was qualified as an expert on gender-related issues in El Salvador, the Immigration Judge did not err in concluding that she was not an expert in that area and affording her testimony regarding those issues minimal weight.

II. ASYLUM

a. The Immigration Judge Did Not Err in Finding that the Respondent Failed to Establish Past Persecution

In order to meet his burden of proof for past persecution, the respondent must establish that (1) an incident or incidents that rise to the level of persecution, (2) were committed on account of a protected ground, and (3) were committed by the government or forces the government could not or would not control. *Niang v. Gonzales*, 422 F.3d 1187, 1194-95 (10th Cir. 2005).

b. The Immigration Judge Did Not Err in Concluding, Regardless of Whether the Proposed Particular Social Group Is Cognizable, that There Was No Nexus Between the Experiences of the Respondent and a Protected Ground

With regard to the protected grounds, the respondent advanced two PSGs: (1) Salvadoran women, and (2) young, single Salvadoran women. I.J. at 4. Without expressly addressing whether the Immigration Judge found either proposed group to be legally cognizable,[2] the Immigration Judge properly concluded that the proposed protected basis was not a primary motivating factor for the issues the respondent experiences or fears. *Id.*

An applicant for asylum must show that her race, religion, nationality, political opinion, or membership in a PSG is "one central reason" for the persecution. INA § 208(b)(1)(B)(i); *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211–12 (BIA 2007); *Rodas-Orellana v. Holder*, 780 F.3d 982, 996 (10th Cir. 2015); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646 (10th Cir. 2012). "[O]ne central reason" means "the protected ground cannot play a minor role in the alien's past mistreatment" and "cannot be incidental, tangential, superficial, or subordinate to another reason for harm." *Dallakoti v. Holder*, 619 F.3d 1264, 1268 (10th Cir. 2010) (quoting *J-B-N- & S-M-*, 24 I&N Dec. at 214). For persecution to be on account of membership in a particular social group, the respondent's "protected characteristic must be central to the persecutor's decision to act against" her. *See Niang*, 422 F.3d at 1201; *Matter of N-M-*, 25 I&N Dec. 526, 529, 532 (BIA 2011) (noting that persecution must be "because of" the protected characteristic even if other

[2] Where a claim is fatally flawed as to any element, the Immigration Judge need not consider the other elements in order to deny. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018).

motivations to harm exist, which is a finding of fact) (quoting *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)). As the Attorney General has emphasized, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the harm. *Matter of A-B-*, 27 I&N Dec. 316, 338-39 (A.G. 2018).

The Immigration Judge did not err in concluding that the various individuals who harassed the respondent were not motivated by her gender, age, or relationship status. Although the events were unfortunate, these were individuals motivated by criminal or prurient interests. I.J. at 4-5. The respondent currently fears only one individual, a bus driver, who she believes is obsessed with her and not motivated by animosity towards the female gender. I.J. at 4; *Matter of T-M-B-*, 21 I&N Dec. 775, 777 (BIA 1997) (regardless of how disturbing the conduct, the critical issue remains the motivation for such behavior). As the respondent failed to establish that her gender or other portions of her proposed PSGs were a central reason for her experiences in El Salvador or her ongoing fear of the bus driver, the Immigration Judge did not err in denying her application for asylum.

c. The Immigration Judge Did Not Err in Finding that the Respondent Failed to Establish that Her Government Was Unable or Unwilling to Protect Her

Where the alleged persecutor is unaffiliated with the government, the applicant must show that the government is unable or unwilling to control the private actor. *Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993); *A-B-*, 27 I&N Dec. at 319 (citing *Acosta*, 19 I&N Dec. at 222). In instances where the applicant is a victim of private criminal activity, "the analysis must also 'consider whether government protection is available.'" *A-B-*, 27 I&N Dec. at 320 (quoting

M-E-V-G-, 26 I&N Dec. at 243). "'[V]iolence by private citizens . . . , absent proof that the government is unwilling or unable to address it, is not persecution[.]'" *Khan v. Holder*, 727 F.3d 1, 7 (1st Cir. 2013) (quoting *Butt v. Keisler*, 506 F.3d 86, 92 (1st Cir.2007)). Relevant factors include both "the government's response" to the claimed persecution and "general evidence of country conditions." *K.H. v. Barr*, 920 F.3d 470, 476 (6th Cir. 2019).

"No country provides its citizens with complete security from private criminal activity, and perfect protection is not required." *A-B-*, 27 I&N Dec. at 343. Rather "[a] government's steps 'to punish the persons responsible for the violence' supports a conclusion that it is not unwilling or unable to protect individuals who have been the victims of . . . attacks." *Bitsin v. Holder*, 719 F.3d 619, 630 (7th Cir. 2013) (quoting *Vahora v. Holder*, 707 F.3d 904, 908 (7th Cir.2013)). As such, an applicant "must show not just that the crime has gone unpunished, but that the government is unwilling or unable to prevent it." *A-B-*, 27 I&N Dec. at 338.

Although the government of El Salvador may at times have difficulty controlling interpersonal violence, "where a government is 'making every effort to combat' violence by private actors, and its "inability to stop the problem" is not distinguishable "from any other government's struggles," the private violence has no government nexus and does not constitute persecution." *Khan*, 727 F.3d at 7 (quoting *Burbiene v. Holder*, 568 F.3d 251 (1st Cir. 2009)).

Despite the various issues that the respondent experienced in El Salvador, she declined to tell anyone of the harassment she experienced. I.J. at 3. The respondent did report the bus driver who was harassing her right before departing for the United States; however, as reflected in the report, she declined to pursue the matter formally as she told the police that she was readying her

departure for the United States. Exh. 9 at 13-14. There is no evidence in the record that would support her assertion that the government was unable or unwilling to assist her. Instead, the evidence shows that she was offered assistance when she did report the issue with the bus driver to police but declined to have the case pursued. Therefore, the Immigration Judge correctly found that the respondent failed to establish this element of her claim. I.J. at 5.

III. WITHHOLDING OF REMOVAL

To establish eligibility for withholding of removal, an alien must show that she is unwilling to return to her country or is unable to avail himself of that country's protection because she has suffered past persecution or has a well-founded fear of future persecution on account of one of five protected grounds. INA § 241(b)(3). The respondent must establish a "clear probability" of persecution, meaning that it is "more likely than not" that she will be subject to persecution on account of a protected ground if returned to the country from which she seeks withholding of removal. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987). As the respondent failed to meet her burden of proof for asylum, which is a lower evidentiary standard, she cannot establish eligibility for withholding of removal.

IV. PROTECTION UNDER THE REGULATIONS IMPLEMENTING THE UNITED STATES' OBLIGATIONS UNDER THE CONVENTION AGAINST TORTURE[3]

The Immigration Judge did not err in concluding that the respondent failed to meet her burden of proof to establish that it is more likely than not that she would be tortured if she returns to

[3] 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

El Salvador. To be eligible for deferral under the Convention Against Torture, the respondent must establish "that it is more likely than not that [he] will be subject to torture by a public official, or at the instigation or with the acquiescence of such an official." *Matter of M-B-A-*, 23 I&N Dec. 474, 477 (BIA 2002); 8 C.F.R. § 1208.16(c)(2). In seeking withholding or deferral of removal under the Convention Against Torture, the burden of proof is squarely on the applicant; if the evidence is inconclusive, the applicant has not met his burden. *Matter of J-F-F-*, 23 I&N Dec. 912, 917 (A.G. 2006) (citing 8 C.F.R. § 1208.16(c)(2)).

To determine whether the respondent has met her burden of proof of more likely than not, the court can consider (1) evidence of past torture, (2) whether an individual can relocate to avoid torture, (3) evidence of gross, flagrant, or mass human rights violations in the country of return, and (4) other relevant country condition information for the country of return. 8 C.F.R. §§ 1208.16(c)(3), 1208.17(a). To meet the burden of proof when stringing a series of suppositions together for deferral, the alien must establish that *each link* in the "hypothetical chain of events" in support of the claim is more likely than not to occur. *J-F-F-*, 23 I&N Dec. at 917-18 (emphasis added). If even one link is not proven to be more likely than not, the alien cannot meet her burden. *Id.* at 918 n.4.

Torture is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted" to obtain information or a confession, or punish, or to intimidate or coerce the victim or another party. 8 C.F.R. § 1208.18(a)(1)-(2). However, it does not include "lesser forms of cruel, inhuman, or degrading treatment or punishment." *Id.* "For an

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removal context in principal part at 8 C.F.R. § 1208.16(c) - .18).

act to constitute torture it must be: (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions." *Matter of J-E-*, 23 I&N Dec. 291, 297 (BIA 2002) (citing 8 C.F.R. § 208.18(a)), *overruled on other grounds by Azanov v. Ashcroft*, 364 F.3d 1013 (9th Cir. 2004). An alien also must show the torture would be inflicted by or at the instigation of a public official or a person acting in an official capacity. 8 C.F.R. § 208.17(a)(1). The torturous act must have an "illicit purpose." *J-E-*, 23 I&N Dec. at 298. It must be an intentional act directed against a person in the offender's custody or control. *Id.* at 298-99. "[N]egligent acts or acts by private individuals not acting on behalf of the government" are not protected. *Id.* at 299. "In order to constitute torture, the act must be *specifically intended* to inflict severe pain or suffering." *Id.* at 300-01 (emphasis in original).

Torture must be inflicted by or with the acquiescence of the government in the country of return. 8 C.F.R. § 1208.18(a)(1). Acquiescence requires a public official to have prior awareness of the activity and "thereafter breach his or her legal responsibility to intervene to prevent such activity." 8 C.F.R. § 1208.18(a)(7). In the Tenth Circuit, acquiescence can be established by "willful blindness," in which government officials have actual knowledge of or "turn a blind eye to torture." *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1192 (10th Cir. 2005) (citing *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 354 (5th Cir. 2002)). The respondent can establish willful blindness by showing that government officials are generally aware of torture but do nothing to prevent it. *Karki v. Holder*, 715 F.3d 792, 806-07 (10th Cir. 2013) (holding

that actual knowledge is not required where the evidence establishes "that the government regularly fails to take action to prevent or punish Maoist acts of torture"). Notwithstanding the willful blindness standard, evidence of government corruption or ineffectiveness alone remains insufficient to demonstrate acquiescence. *Matter of Y-L-*, 23 I&N Dec. 270, 283 (A.G. 2002); *see also Matter of O-F-A-S-*, 28 I&N Dec. 35, 40-41 (A.G. 2020) (noting that there is no separate rogue official exception to torture, and torture requires a government official acting in his official capacity regardless of rank within the power hierarchy).

The Immigration Judge did not err in concluding that the respondent failed to establish her eligibility for this form of protection from removal. I.J. at 6-7. Not only has the respondent never been tortured or harmed to a level arising to that of persecution, she did not present any evidence of a likelihood that she would be tortured by the government or with its willful blindness, as the police were apparently willing to investigate her claim against the bus driver prior to her declination of the offer to file a formal complaint. Exh. 9 at 13-14. As the respondent failed to establish multiple critical links in her hypothetical chain, the Immigration Judge correctly denied this form of protection. I.J. at 7; *J-F-F-*, 23 I&N Dec. at 917-18.

V. CONCLUSION

The respondent failed to meet her burden of proof for asylum, withholding of removal, and CAT. She failed to establish any protected ground or that any harm (experienced or feared) was on account of a protected ground. As such, the Immigration Judge correctly denied the application based upon the respondent's inability to establish that she was a refugee or likely to be tortured.

(b)(6); (b)(7)(C)

In the alternative, should the Board determine that summary affirmance of the Immigration Judge's decision is not appropriate, the Department submits that none of the six circumstances warranting review by a three-member panel are present in this case, and that the Immigration Judge's decision should otherwise be affirmed by means of a brief order. 8 C.F.R. § 1003.1(e)(5) & (6).

Respectfully submitted on this 17th day of December, 2020,

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Assistant Chief Counsel
U.S. Immigration and Customs Enforcement
U.S. Department of Homeland Security

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PROOF OF SERVICE

On December 17, 2020, I, (b)(6); , Assistant Chief Counsel, mailed or delivered a copy of this **DEPARTMENT OF HOMELAND SECURITY'S MOTION FOR SUMMARY AFFIRMANCE** and any attached pages to:

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By placing it in the designated bin for service on respondent's counsel at the above address by the U.S. Postal Service, postage prepaid.

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:

(b)(6); (b)(7)(C)

In removal proceedings

File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
MOTION FOR SUMMARY AFFIRMANCE

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), through the undersigned, respectfully moves the Board of Immigration Appeals (Board) to summarily affirm the decision of the Immigration Judge issued in this matter on June 3, 2019, pursuant to 8 C.F.R. § 1003.1(e)(4)(i). The Department submits that the Immigration Judge reached the correct decision, such that any errors which may exist are harmless or immaterial, and that the applicant's appellate arguments are not so substantial that the case warrants the issuance of a written opinion. 8 C.F.R. § 1003.1(e)(4)(i)(B).

Specifically, the Immigration Judge did conduct a full and fair hearing. As determined by the Immigration Judge, the applicant failed to meet her burden to establish eligibility for the relief sought. The Immigration Judge's decision is thorough and well-reasoned, addressing the relevant issues and correctly determining that the applicant did not establish eligibility for asylum, withholding of removal, or protection under the Convention Against Torture (CAT).

The applicant failed to meet her burden to establish eligibility for asylum and withholding of removal. The applicant failed to establish that she was or would be persecuted in Guatemala based upon a protected ground. In short, the applicant failed to establish that she suffered past persecution or a well-founded fear of future persecution based on a protected ground. I.J. at 15. She further failed to establish that any potential harm would have the required nexus to a protected ground. I.J. at 13. Finally, she failed to establish that she belongs to a cognizable particular social group. I.J. at 11-13.

When an applicant seeks asylum or withholding of removal as a member of a particular social group, the applicant "must establish that the group is (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 M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014). As to

particularity, the "terms used to describe the group [must] have commonly accepted definitions in the society of which the group is a part." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec 69, 76 (BIA 2008)). The group must have "discrete and [] definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective." *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Ochoa v. Gonzalez*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)). "To be socially distinct, a group need not be seen by society; rather it must be perceived as a group by society." *M-E-V-G-*, 26 I&N Dec. at 240. In order to demonstrate social distinction, there must be "evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *Matter of W-G-R-*, 26 I&N Dec. at 217. Social distinction "considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it." *M-E-V-G-*, 26 I&N Dec. at 238.

Here, the applicant's purported particular social group is "Respondent's nuclear family defined by kinship[1]. . ." Applicant's Brief at 7. The Immigration Judge correctly determined that the group is not discrete and defined so narrowly to only include her, her nephew, and her husband's wife. I.J. at 12. As noted by the Immigration Judge, such narrowly defined groups are not considered cognizable under applicable precedent. *Id*. In addition, other members of the purported group have not faced any harm or threats. Tr. at 65. Even assuming *in arguendo* that the group were cognizable, the Immigration Judge correctly determined that any harm to the

[1] There was also some indication in the applicant's brief that the applicant articulated groups based on her statuses as an indigenous woman and because of her gender. The Immigration Judge properly determined not to evaluate these two purported groups as no evidence or testimony was provided which indicated any past harm or fear of future harm on account of membership in the purported groups. I.J. at 10.

applicant or her family is based on criminal activity because her brother engaged in the murder of one of their family members. I.J. at 13. As noted by the Immigration Judge, "Quite simply revenge or retaliation for criminal activity differ fundamentally from attempting to overcome a protected characteristic." *Id.* Therefore, the applicant failed to establish the required nexus to a protected ground.

The Immigration Judge also correctly determined that the harm suffered by the applicant in Guatemala does not rise to the level of past persecution under he Act. I.J. at 6. Specifically, the applicant was never physically harmed in Guatemala. I.J. at 10. The applicant testified that she was threatened once in person when she accompanied her nephew to visit his mother. Tr. at 35-36. The applicant also testified that she received threats by phone. Tr. at 36, 38-39. The applicant further testified to an incident where individuals came to her home, however she and her daughter were able to escape out of a back window. Tr. at 40. Mere threats, such as the applicant suffered here, will rarely constitute actual persecution. *Valtulev v. Ashcroft*, 354 F.3d 1207 (10th Cir. 2003). Even were the harm sufficient to establish past persecution, the Immigration Judge correctly determined that the applicant could reasonably relocate in Guatemala to avoid any such persecution because her family, including many of her siblings, live safely in another area of Guatemala with no issues at all. Tr. at 66.

In conclusion, the Immigration Judge correctly determined that the applicant had failed to establish a cognizable particular social group, or any other protected ground. The Immigration Judge correctly found that the applicant had not suffered past persecution under the act and had not met her burden to establish the required nexus to a protected ground. Therefore, the decision should be summarily affirmed. In the alternative, should the Board determine that summary affirmance of the Immigration Judge's decision is not appropriate, the Department submits that

none of the six circumstances warranting review by a three-member panel are present in this case, and that the Immigration Judge's decision should otherwise be affirmed by means of a brief order. 8 C.F.R. §§ 1003.1(e)(5) and (6).

WHEREFORE, the Department respectfully moves the Board to dismiss the appeal in its entirety.

Respectfully submitted on this 17th day of December, 2020,

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Proof of Service

On December 17, 2020 the undersigned attorney mailed or delivered a copy of this DEPARTMENT OF HOMELAND SECURITY MOTION FOR SUMMARY AFFIRMANCE and any attached pages to:

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NON-DETAINED

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

In the Matter of:

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

In removal proceedings

DEPARTMENT OF HOMELAND SECURITY'S MOTION FOR SUMMARY AFFIRMANCE

The Department of Homeland Security, U.S. Immigration and Customs Enforcement ("Department" or "DHS"), through undersigned counsel, respectfully moves the Board of Immigration Appeals ("Board") to summarily affirm the decision of the Immigration Judge issued in this matter on July 12, 2019, pursuant to 8 C.F.R. § 1003.1(e)(4)(i). The Department submits that the Immigration Judge reached the correct decision, such that any errors which may exist are harmless or immaterial, and that the respondent's appellate arguments are not so substantial that the case warrants the issuance of a written opinion. 8 C.F.R. § 1003.1(e)(4)(i)(B).

Specifically, the Immigration Judge correctly determined that the respondent failed to establish eligibility for asylum, withholding of removal, or protection pursuant to the Convention Against Torture. *See* Oral Decision of the Immigration Judge at 11.

The respondent claimed she was threatened and fears harm from the criminal organizations active within El Salvador and that she is particularly at risk from these groups on account of her gender. I.J. at 4-6. The Immigration Judge correctly found that the threats that the respondent and her daughter received did not rise to the level of persecution. I.J. at 5. The Immigration also properly found that any alleged harm faced by the respondent was not on account of a protected ground and that the respondent did not face persecution on account of her gender. I.J. at 5-6. For these same reasons, the Immigration held that the respondent also could not meet the heightened burden for withholding of removal. I.J. at 9. Finding that the respondent had not faced persecution and that the government of El Salvador was willing to

(b)(6); (b)(7)(C)

respond to gang violence, the Immigration Judge denied the respondent's request for protection pursuant to the Convention Against Torture. I.J. at 9-10.

Accordingly, the Department moves the Board to affirm summarily the decision of the Immigration Judge.

In the alternative, if the Board determines that a summary affirmance is not appropriate, the Department submits that none of the six circumstances warranting review by a three-member panel set forth in 8 C.F.R. § 1003.1(e)(6) are present in this case and that the Board should affirm the Judge's decision by means of a brief order. See 8 C.F.R. § 1003.1(e)(5).

Respectfully submitted on January 21, 2021,

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Certificate of Service

I hereby certify that, on January 20, 2021, I served true copies of this DEPARTMENT OF HOMELAND SECURITY MOTION FOR SUMMARY AFFIRMANCE and any attached pages by regular mail, addressed as follows:

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NON-DETAINED

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

In the Matter of:

(b)(6); (b)(7)(C)

In removal proceedings

File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY'S MOTION FOR SUMMARY AFFIRMANCE

Pursuant to 8 C.F.R. § 1003.1(e)(4)(i), the Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), through the undersigned, moves the Board to issue a summary affirmance of the Immigration Judge's June 4, 2019 decision in this matter.[1] The decision constitutes the legally correct result in this case, contains no error that is not harmless or immaterial, is limited to issues squarely controlled by existing precedent, and is subject to appellate arguments insufficiently substantial to warrant the issuance of a written opinion. In the alternative, should the Board determine that summary affirmance is not appropriate, the Department submits that none of the six circumstances warranting review by a three-member panel are present in this case, and that the Board should affirm the Immigration Judge's decision by means of a short order. 8 C.F.R. §§ 1003.1(e)(5) and (6).

Respectfully submitted on this 2nd day of February, 2021,

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[1] The Department takes no position on the Immigration Judge's finding that "women in Guatemala" is not a legally viable particular social group.

(b)(6); (b)(7)(C)

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

On February 2, 2021, I, (b)(6); (b)(7)(C) caused a true copy of this **DEPARTMENT OF HOMELAND SECURITY'S MOTION FOR SUMMARY AFFIRMANCE** and any attached pages to be delivered to the respondent by placing a copy in the out-going mail bin as first class mail, postage prepaid and addressed as follows:

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(signature) (date)

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Not Detained

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

In the Matter of:

(b)(6); (b)(7)(C)

In Removal Proceedings

File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY'S OPPOSITION TO RESPONDENT'S MOTION TO REMAND

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), through the undersigned, respectfully opposes remand of the above captioned case at this time, as requested by the respondent in her recently filed motion. Instead, the Department respectfully requests the Board hold its decision in abeyance, pending the Supreme Court's decision in *Niz-Chavez v. Barr*, cert. granted, No. 19-863 (oral argument held Nov. 9, 2020). If the Supreme Court's findings and analysis in that decision contradict the Tenth Circuit regarding the application of the stop-time rule for cancellation of removal purposes, then the respondent would clearly not be eligible for relief. Thus, it is in the interest of judicial economy for the Board to hold its decision on this motion in abeyance.

Furthermore, should remand be granted, the Department respectfully requests the Board qualify or limit the scope or purpose of the remand order such that only the respondent's application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act (INA or the Act) may be considered. 8 C.F.R. § 1003.1(d)(7)(iii). While the Immigration Judge's denial of the respondent's Form I-589 is currently pending appeal, the Immigration Judge did not err in denying that application. [1]

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[1] The Board reviews factual determinations of the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); see Matter of R-S-H-, 23 I&N Dec. 625, 637 (BIA 2003) (discussing the "clearly erroneous" standard of review). The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of the Immigration Judge de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The Immigration Judge did not err in denying the respondent's applications asylum and withholding of removal under the Act as the application was filed approximately eight years after the respondent's entry to the United States, I.J. at 6, and the circumstances which respondent claimed led to her delay in filing were not extraordinary as required by the Act. I.J. at 6; INA §208(a)(2)(B). There was also no evidence of a material change in circumstances impacting her eligibility to apply for relief or that she filed her application within a reasonable time of any such alleged change. INA § 208(a)(2)(D); 8 C.F.R. § 1208.4(a)(4)(ii). Alternatively, the Immigration Judge did not err in finding that there was no nexus to a protected ground. I.J. at 7-9; INA §§ 208(b)(1)(B)(i), 241(b)(3)(A).

(b)(6); (b)(7)(C)

As a result, the Board of Immigration Appeals (Board) should affirm the decision of the Immigration Judge with regard to the respondent's Form I-589, and limit the scope of any remand that may be granted. 8 C.F.R. § 1003.1(d)(7)(iii).

WHEREFORE, the Department respectfully moves the Board to hold its decision on the respondent's motion to remand in abeyance pending the Supreme Court's decision in *Niz-Chavez*. In the alternative, the Department respectfully requests the Board qualify or limit the scope or purpose of its remand order to the respondent's application for relief under section 240A(b)(1) of the Act, as the Immigradtion Judge's denial of the respondent's Form I-589 was current and that decision should be affirmed.

DATE: February 5, 2021

Respectfully submitted,

(b)(6); (b)(7)(C)

Assistant Chief Counsel

The Immigration Judge also did not err in denying the respondent's request for protection under the regulations implementing the United States Government's obligations under the Convention Against Torture (CAT). As found by the Immigration Judge, the record contains insufficient evidence to conclude that the respondent would be tortured or that the Mexican government would acquiesce to any harm inflicted by private actors. I.J. at 10-11; see, e.g., *Escobar-Hernandez v. Barr*, 940 F.3d 1358, 1362 (10th Cir. 2019) (generalized evidence of violence in the country of return is insufficient); *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006) (if the evidence is inconclusive then the respondent has not met her burden and a CAT claim cannot be granted by stringing together a series of suppositions unless the evidence establishes that each step in the hypothetical chain of events is more likely than not to happen); *Matter of Y-L-*, 23 I&N Dec. 270, 282-83 (A.G. 2002) (evidence of government corruption or ineffectiveness alone remains insufficient to demonstrate acquiescence). Thus, the respondent did not meet her burden to established eligibility for protection. *Matter of R-A-F-*, 27 I&N Dec. at 779; 8 C.F.R. §§ 1208.16(c)(2), 1208.17(a).

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

CASE NAME: (b)(6); (b)(7)(C)

CASE NO.: (b)(6); (b)(7)(C)

I hereby certify that, on February 5, 2021, I served a true copy of this **Department of Homeland Security's Opposition to Respondent's Motion to Remand** and any attached pages by placing it in the out-going mail bin as first-class mail, postage prepaid and addressed as follows:

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matters of:

(b)(6); (b)(7)(C)

In removal proceedings

File Nos.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
RESPONSE TO RESPONDENTS' APPEAL

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), through the undersigned, respectfully moves the Board of Immigration Appeals (Board) to affirm the decision of the Immigration Judge denying asylum, withholding of removal, and protection under the Convention Against Torture. As to the portion of the Immigration Judge's decision, dated June 24, 2019, in which post-conclusion voluntary departure was denied, the Department asserts that remand is not necessary for a determination as to whether the respondent warrants post-conclusion voluntary departure. As the Immigration Judge solely denied post-conclusion voluntary departure because the respondent[1] did not have the requisite continued physical presence, remand is not necessary as the issue was resolved in intervening case law rendered by the Tenth Circuit. I.J. at 15. Given the Tenth Circuit's decision in *Banuelos-Galviz v. Barr*, it appears as though the respondent is now eligible for post-conclusion voluntary departure. *Banuelos-Galviz v. Barr*, 953 F.3d 1176, 1184 (10th Cir. 2020) ("[T]he stop-time rule is not triggered by the combination of an incomplete notice to appear and a notice of hearing.") Nonetheless, all other aspects of the Immigration Judge's decision should be affirmed.

The Immigration Judge correctly found that the respondent did not meet her burden in demonstrating she merits a grant of asylum, withholding of removal, or protection under the Convention Against Torture. The respondent testified that she fears returning to El Salvador because she could get killed and her daughter would be alone, with no one to protect her. Tr. at 37. The respondent testified she fled from El Salvador because she witnessed a murder and

[1] As only the lead respondent testified at the individual hearing, the Department's brief will only refer to the lead respondent.

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members of the Mara Salvatrucha gang thought she may have a recording of the murder on a camera. Tr. at 32. The respondent further testified gang members threatened her not tell anyone what happened. Tr. at 35. The respondent further alleged that because she worked in a different town, gang members believe she was giving information about the gang to a different gang. Tr. at 36.

On appeal, the respondent does not appear to meaningfully contest the Immigration Judge's determination regarding the denial of asylum or withholding of removal. Respondent's brief at 8. As correctly noted by the Immigration Judge, the respondent's proposed group is not cognizable. I.J. at 9. The groups lack immutability, is not defined by commonly understood terms, and lack social distinction. While "unprotected" is not clearly defined, it is not immutable. One could obtain protection on any given day and would therefore no longer be unprotected. Moreover, the term "unprotected" is not commonly defined. What renders an individual "unprotected" is not evident in the record nor is it explained by the respondent's testimony. Moreover, there is no indication that "unprotected women" is a socially distinct group in El Salvador. Given these factors, there is no error in the Immigration Judge's decision finding that the respondent was not a member of a cognizable social group. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 232-33 (BIA 2014).

Despite making the correct determination that the respondent's proposed social group is not cognizable, the Immigration Judge proceeded to make alternative findings, concluding that the harm the respondent fears is not on account of a protected ground. I.J. at 11. The Immigration Judge properly concluded that gang members threatened the respondent because she witnessed a

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crime. I.J. at 11. The gang had a personal animus against the respondent—they were not attempting overcome a protected ground. The respondent's harm was result of a personal animus which is generally insufficient to establish the requisite nexus for asylum. *Matter of A-C-A-A-*, 28 I&N Dec. 84, 91 (A.G. 2020) ("Accordingly, persecution that results from personal animus or retribution generally does not establish the necessary nexus."). The respondent's own testimony suggests that she did not live alone. Tr. at. 38. The respondent did not identify any other reason gang members bothered her besides that she witnessed a murder. The respondent did not testify in open court about what she witnessed, nor did she proffer a particular social group premised on being a witness. *Matter of H-L-S-A-*, 28 I&N Dec. 228, 237 (BIA 2021). In any event, the Immigration Judge correctly concluded that the respondent's concerns about being seen as informant is insufficient to demonstrate that she is a member of a cognizable particular social group and that she was harmed on account of that protected ground. I.J. at 8, 11. Given that the harm the respondent endured was not on account of a protected ground, there is no error in the Immigration Judge's decision finding that even if the respondent was a member of a cognizable particular social group, she failed to demonstrate a nexus in order to meet her burden of proof for asylum. I.J. at 11.

Furthermore, the Immigration Judge correctly determined that the respondent failed to meet her burden to establish that it is more likely than not that she would be subjected to persecution if she returns to El Salvador. I.J. at 12. Because the respondent failed to meet her burden of proof for asylum, the Immigration Judge did not err in denying her application for relief for withholding of removal which also requires the respondent demonstrate harm on

(b)(6); (b)(7)(C)

account of a protected, but carries a greater burden of proof. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987); *see also Matter of Mogharabbi*, 19 I&N Dec. 439, 447 (BIA 1987).

The respondent also failed to meet her burden in establishing that it is more likely than not that she would be subject to torture in El Salvador—a burden which she bears. *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004). On appeal, the respondent asserts that the Immigration Judge failed to consider all evidence in the record. Respondent's brief at 9. Nonetheless, as noted by the respondent, the Immigration Judge expressly stated all evidence in the record was in fact considered. I.J. at 3. In determining whether it is more likely than not that the respondent would be tortured if returned to El Salvador, the Immigration Judge properly considered all relevant evidence of future torture including past torture and whether the respondent could relocate to another part of the country where he is not likely to be tortured. *See Matter of J-E-*, 23 I&N Dec. 291, 303 (BIA 2002) (citing 8 C.F. R. § 280.16(c)(3)). The respondent did not testify to any past harm inflicted by a government actor. Nor did she testify to any past torture. The respondent fears if returned to El Salvador she would be killed. It is unclear who exactly would harm the respondent, but seemingly she fears that the Mara Salvatrucha would know she returned to El Salvador, would think she told someone about what she witnessed, and then would track her down and harm her. The respondent has failed to demonstrate that it is more likely than not that each step in the "hypothetical chain of events" will occur, therefore, she has not met her burden to establish that, more likely than not, she will be tortured if she returns to El Salvador. *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G.

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2006). As such, there is no error in Immigration Judge's decision denying protection under the CAT. I.J. at 9.

CONCLUSION

The Immigration Judge correctly denied the respondent's application for asylum, withholding of removal, and protection under the CAT. Given the intervening case law in the Tenth Circuit, it appears as though the respondent no longer lacks the requisite continued physical presence for post-conclusion voluntary departure. As continued physical presence was the sole apparent issue barring the respondent from post-conclusion voluntary departure relief—and that issue has now been addressed by the Tenth Circuit—remand does not appear to be necessary for the sole purpose of granting post-conclusion voluntary departure. As such, the Department requests the Board affirm all other aspects of the Immigration Judge's decision and dismiss the respondent's appeal as it pertains to her appeal of the denial of asylum, withholding of removal and protection under the CAT.

Respectfully submitted on this 11th day of February 2021,

(b)(6); (b)(7)(C)

Assistant Chief Counsel
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

I hereby certify that on 02/11/2021, I served this DEPARTMENT OF HOMELAND SECURITY RESPONSE TO RESPONDENT'S APPEAL any attached pages by placing a copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process, and causing the same to be mailed by first class mail to:

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NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:

(b)(6); (b)(7)(C)

In removal proceedings

File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY RESPONSE TO RESPONDENT'S BRIEF AND MOTION TO REMAND

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INTRODUCTION

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), through the undersigned, respectfully moves the Board of Immigration Appeals (Board) to affirm the decision of the Immigration Judge issued in this matter on January 10, 2018 and dismiss the respondent's appeal.

Specifically, the Immigration Judge did conduct a full and fair hearing. As determined by the Immigration Judge, the respondent failed to meet her burden to establish eligibility for the relief sought.[1] The Immigration Judge's decision is thorough and well-reasoned, addressing the relevant issues and correctly determining that the respondent did not establish eligibility for asylum, withholding of removal, or protection under the Convention Against Torture (CAT).

ISSUES PRESENTED

1) Did the Immigration Judge err in finding that the respondent was not a credible witness when her testimony included omissions and inconsistencies with the record of proceedings, including sworn testimony provided to the asylum officer?

2) Does the respondent's additional documentation, which could have been obtained prior to her individual hearing, warrant reopening of these instant proceedings?

3) Did the Immigration Judge err in finding that the respondent was not a member of a cognizable particular social group, when she failed to articulate a particular social group that is socially distinct with defined boundaries?

4) Did the Immigration Judge err in finding that because the respondent failed to meet the lower threshold for asylum eligibility that she failed to meet her burden in establishing relief in the form of withholding of removal and that she also failed to meet her burden for protection under the Convention Against Torture when the respondent has not endured past torture and failed to demonstrate it is more likely than not that she would be tortured with the acquiescence of the Honduran government?

[1] While there is a rider respondent in this case, the rider respondent did not testify at her individual hearing. Rather, she filed an independent form I-589 to ensure consideration for withholding of removal under the Convention Against Torture. The lead respondent testified in support of her claim and the rider's claim. Given these circumstances, the Department will refer solely to the lead respondent throughout its response brief.

STANDARD OF REVIEW

The Board reviews findings of fact, including findings as to the credibility of testimony and "predictive findings of what may or may not occur in the future," for clear error. *Matter of Z-Z-O-*, 26 I&N Dec. 586, 590 (BIA 2015); 8 C.F.R. § 1003.1(d)(3)(i). The Board reviews questions of law, discretion, and judgment, and all other issues on appeal from the decision of the Immigration Judge de novo. 8 C.F.R. § 1003.l(d)(3)(ii); *Matter of Z-Z-O-*, 26 I&N Dec. 586, 588 (BIA 2015). This de novo review includes "whether the underlying facts found by the Immigration Judge meet the legal requirements for relief from removal . . . ." *Z-Z-O-*, 26 I&N Dec. at 591. Whether respondents have met their burden of proof is a question of law. *Matter of Vides-Casanova*, 26 I&N Dec. 494, 498 (BIA 2015). Whether a group is a particular social group within the meaning of the INA is a question of law that the Board reviews de novo. *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 191 (BIA 2018). However, whether the respondent is a member of a particular social group, as well as the underlying requirements to establish a cognizable particular social group, such as social distinction, necessarily involve fact-finding. *Id.* at 192.

SUMMARY OF THE ARGUMENT

The respondent's appeal should be dismissed in its entirety as the Immigration Judge correctly found that the respondent failed to meet her burden of proof in establishing eligibility for the relief sought. Moreover, the Department asserts that a remand is not appropriate to consider the documentation provided by the respondent in her brief on appeal. The medical

records submitted with the respondent's brief pertain to an intake conducted after the respondent's merits hearing and pertain to a diagnosis in which the symptoms existed two years ago. The fact that the respondent did not complete an intake until after her merits hearing does not justify a remand. Moreover, the respondent appears to have completed a mental health intake in an attempt to rebut the Immigration Judge's adverse credibility finding. The fact remains that the respondent was found to be a witness that lacked credibility. Nonetheless, the Immigration Judge entered an alternate finding, and even if the respondent was deemed credible, she still failed to meet her burden in establishing eligibility for asylum, withholding of removal, and protection under the Convention Against Torture.

STATEMENT OF THE FACTS

The respondent is a native and citizen of Honduras. The respondent entered the United States, without being inspected, admitted, or paroled, on March 25, 2016. On April 1, 2016, the respondent was interviewed, under oath, by an asylum officer. Exhibit 6. At the conclusion of the interview, the officer read a summary of the testimony to the respondent. When the officer asked the respondent if the summary was accurate, the respondent responded in the affirmative. When asked if she had anything to add to the summary of her testimony, the respondent responded "No." Exhibit 6 at 27.

On January 10, 2018 the respondent, along with Counsel, attended her individual hearing in which she testified that she was in an abusive relationship with the father of her child, but has not seen him in ten years. The respondent also testified that she fears returning to Honduras because she was threatened and harmed by an individual named (b)(6); and that he is

associated with a criminal organization named Los Rivera. The respondent testified she never called the police after she was harmed or threatened. The details of her experiences with (b)(6); (b)(6); raised concerns with the Immigration Judge who highlighted the inconsistences between the respondent's testimony before the Court, her interview with the asylum officer, and her personal statement. At the end of the respondent's merits hearing, the Immigration Judge found that the respondent was not a credible witness and denied the respondent's relief applications. In the alternative, the Immigration Judge found that even if the respondent was credible, she failed to meet her burden in establishing relief from removal. The respondent filed an appeal from the Immigration Judge's decision, this timely response follows.

ARGUMENT

I. THE RESPONDENT'S TESTIMONY WAS MATERIALLY INCONSISTENT WITH THE RECORD OF PROCEEDINGS, AS SUCH, SHE IS NOT A CREDIBLE WITNESS

As a threshold eligibility issue, the Immigration Judge correctly found that the respondent was not credible. Oral Decision of the Immigration Judge (IJ Dec.) at 11. The Board generally defers to the Immigration Judge's findings concerning credibility and credibility-related issues. *Matter of A-S-*, 21 I. & N. Dec. 1106, 1109 (BIA 1998). An applicant for asylum bears the evidentiary burden of proof of eligibility. *Id.* at 1112 (citing to *Matter of V-T-S*, 21 I&N Dec. 792 (BIA 1997)). Significant weight is given to the credibility of an applicant. *Matter of O-D-*, 21 I&N Dec. 1079, 1081 (BIA 1998). Lack of credibility undermines a respondent's claim for eligibility for asylum. The Immigration Judge did not err in finding that the respondent was not

credible as there were material inconsistencies between her testimony before the Court and the record of proceedings, which includes her sworn testimony to an asylum officer.

The Immigration Judge appropriately noted the material inconsistencies in the respondent's testimony and in the record of proceedings which solidify concerns with the respondent's credibility. At her individual hearing, the respondent testified she met (b)(6); (b)(7)(C) the individual she fears in Honduras, for the first time on September 15, 2015. Tr. at 20-21. The respondent further testified that while she did not know him personally, she "had heard talk of him in the Maras" prior to meeting him on September 15, 2015. Tr. at 22. The respondent claimed he asked for her phone number after she first met him, and she declined. Tr. 23. The respondent testified he did not hit her or threaten her with a gun after she did not give him her phone number. *Id.* The respondent testified she had another encounter with (b)(6); a month later at a park in which he told her to deliver a suitcase to an individual named (b)(6); (b)(7)(C). Tr. at 24. The respondent testified she took the suitcase to a house and ran. Tr. at 25. She was not physically harmed.

Following that incident, the respondent testified that, on December 31, 2015, (b)(6); came to her parents' home where she lived. She testified that he "fired some shots" and beat her. Tr. at 26. The respondent testified her parents, but not any of her 13 siblings, were home when (b)(6); (b)(6); came to the house. Tr. at 27. The respondent claims her daughter was also beaten. *Id.* The respondent then claimed that (b)(6); (b)(7)(C) ran away after the beatings. The respondent reaffirmed that none of her siblings were "there" to help her during the incident. *Id.* When asked why (b)(6); (b)(6); (b)(7)(came to her home, the respondent testified she did not know, but that she knew he was in

love with her. Tr. at 30. The respondent stated, following the December 31, 2015 incident, she had one more encounter with (b)(6); in Honduras in which he knew she planned on leaving Honduras and told her if she returned she would be a "dead woman." Tr. at 29.

Apart from the incidents she described with (b)(6); (b)(7)(C), the respondent also testified that she was in an abusive relationship with the father of her daughter. The respondent testified she went to live with the father of her child and ultimately left the home on her own accord. Tr. 68. After leaving the relationship, the respondent lived in Honduras for ten years and did not ever see the father of her child again. Tr. at 67-68.

The Immigration Judge correctly highlighted the respondent's material inconsistencies and properly determined that the respondent was not a credible witness. The Immigration Judge correctly noted that the respondent testified she was not harmed on September 15, 2015, after refusing to give (b)(6); (b)(7)(C) her phone number, but told the asylum officer he hit her and her little girl after she refused to give him her phone number. IJ Dec. at 7; Exhibit 6 at 9. Furthermore, as articulated by the Immigration Judge, the respondent did not mention to the asylum officer that (b)(6); (b)(7)(C) fired shots at her home on December 31, 2015. IJ Dec. at 7, Exhibit 6 at 10.

The respondent raised further concerns about her credibility as she testified her siblings were not home at the time of the incident, on December 31, 2015, but told the asylum officer that her father and brother tried to help her. Tr. 51; Exhibit 6 at 10. The respondent did not adequately explain these inconsistencies, nor did she provide a sufficient explanation as to why she testified she first personally met (b)(6); (b)(7)(C) on September 15, 2015 and heard of him through Maras, but also testified he killed her uncle in 2010 in front of her home, and she knew he was

the individual who killed her uncle. Tr. 20-22; Tr. 69; IJ Dec. at 8. These material inconsistences render her claim regarding her fear of harm of (b)(6); (b)(7)(C) incredulous.

The respondent further lacked credibility regarding her fear of harm of the father of her child. The respondent testified that he threatened her with a knife while she was pregnant. This incident was not mentioned to the asylum officer. Exhibit 6 at 12. The respondent only mentioned that he hit her once. *Id.* The respondent also told the asylum officer that he lives in Florida and came to the United States when her daughter was one-month old. *Id.* It is unclear why when asked general questions regarding his treatment of her, and if she was scared of him, why the respondent omitted such a material event in her sworn testimony to the asylum officer. The respondent claims she told the asylum officer, but the account is not recorded in the question and answer format, nor is it in the summary that was read back to the respondent. The notes from the interview are inherently reliable. *See Matter of J-C-H-F*, 27 I&N Dec. 211, 212 (BIA 2018). The Board has found that when ". . . the alien's statements from the interview are being contrasted with his or her subsequent testimony, it is important to have a detailed and reliable recitation of the questions and answers from the interview." *Id.* at 214. Here, the notes are in question and answer format and a summary was read to the respondent. If the respondent believed that information was omitted, she did not offer an explanation as to why she did not inquire about the missing information after she was read a summary of her claim.

The respondent alleges in her brief that the Immigration Judge erred in finding she was not a credible witness. The respondent argues that "[k]nowing someone on a personal level and identifying them as the murderer of a family member are two different things." Respondent's

Brief at 8. The respondent further argues that the Immigration judge did not address the respondent's personal statement. Nonetheless, the Immigration Judge did address the respondent's personal statement. IJ Dec. at 8, 10; Tr. 61, 65-66. Moreover, the respondent's reference to her personal statement in her brief is also at odds with her testimony. The respondent argues that her personal statement indicates (b)(6); (b)(7)(C) associates killer her uncle. However, the respondent asserted, on more than one occasion, that (b)(6); (b)(7)(C) killed her uncle. Tr. 69, 71. She did not mention that it was an associate. Moreover, the respondent's one-page personal statement also calls into question the testimony regarding shots being fired on December 31, 2015 that was not mentioned to the asylum officer or in the respondent's personal statement. Exhibit 8 at 48. In sum, the omissions and inconsistencies in the respondent testimony are pervasive throughout the entire record of proceedings, as such, the Immigration Judge correctly found that the respondent is not a credible witness.

II. DOCUMENTATION PERTAINING TO THE RESPONDENT'S MENTAL HEALTH IS NOT NEW, UNAVAILABLE EVIDENCE THAT JUSTIFIES A REMAND OF THE PROCEEDINGS

The respondent further alleges that the respondent's inconsistencies are a result of her mental health. The respondent requests a remand because (b)(6); (b)(7)(C) medical diagnosis not available at the time of her hearing." Respondent's Brief at 10. The respondent has attached several documents to her appeal brief. The Department objects to medical records submitted in support of the brief and asserts that the evidence could have been presented at the time of the respondent's hearing. The documents should not be admitted into evidence as they were not

submitted in proceeding below. *See Matter of Fedorenko*, 19 I&N Dec. 57, 73-74 & n.10 (BIA 1984); *Matter of Maim*, 19 I&N Dec. 641 (BIA 1988); 8 C.F.R. § 1003.1(d)(3)(iv).

The documents clearly indicate that the respondent presented for an intake on February 9, 2018 which was *after* her individual hearing. The documents also evidence that the duration of the diagnosis and symptoms is two years. *See* Respondent's Brief, Outpatient Evaluation at p. 7. Moreover, it appears as though the respondent was aware of her symptoms one year ago. Respondent's Brief, Outpatient Evaluation at p. 2. The respondent does not provide an explanation as to why she did not report for an intake until after her individual hearing. The fact that the respondent did not find it necessary to do so until after her hearing does not necessitate a remand in this matter. *See Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992) (the respondent who seeks a remand bears a "heavy burden" of proving the new evidence would likely change the result in the case). The respondent's lack of diligence, while represented by Counsel, should not be excused by affording the respondent the opportunity to now submit additional evidence that could have been obtained prior to the hearing. As such, the respondent's motion to remand should be denied and the medical records should not be admitted as additional evidence in her case.

III. THE RESPONDENT IS NOT A MEMBER OF COGNIZABLE PARTICULAR SOCIAL GROUP

Despite correctly finding that the respondent was not credible, the Immigration Judge issued an alternative finding in the case. The Immigration Judge correctly found that the respondent did not meet her burden in demonstrating she merits a grant of asylum, withholding

of removal, or protection under the Convention Against Torture. The Department asserts that the Immigration Judge's finding should be affirmed. To the extent that the Immigration Judge relied upon *Matter of A-R-C-G-*[2] in her decision, the Department notes that the case is no longer binding precedent. *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). As such, the respondent's proposed social group of "women in Honduras who are unable to leave their abusive relationships" is not a cognizable particular social group. *Id.* at 334 (finding that the particular social group of "married women in Guatemala who are unable to leave their relationship" is not a cognizable particular social group). Nonetheless, despite her reference to case law that is no longer binding precedent, the Immigration Judge did not err in finding that the respondent failed to meet her burden in establishing eligibility for asylum, withholding of removal, and protection under the Convention Against Torture.

The Immigration Judge correctly determined that the respondent is not a member of a particular social group. To the extent that the Immigration Judge found past persecution based on the respondent's relationship with the father of her child, the harm the respondent claims she endured was not on account of a protected ground and thus the respondent did not meet her burden in establishing she merits relief. *See Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Rivera-Barrientos v. Holder*, 658 F.3d 1222 (10th Cir. 2011); *Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997); *Matter of Mogharrabi*, 19 I&N Dec. 139 (BIA 1987). As the respondent is not a member of a cognizable particular social group, the additional elements of the claim need not be analyzed. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018).

[2] 26 I&N Dec. 388 (BIA 2014).

IV. THE RESPONDENT FAILED TO MEET HER BURDEN IN ESTABLISHING SHE WARRANTS A GRANT OF WITHHOLDING OF REMOVAL OR PROTECTION UNDER THE CONVENTION AGAINST TORTURE

The Immigration Judge correctly concluded that because the respondent failed to meet the lower threshold eligibility for asylum, she also failed to meet her burden for withholding of removal. Moreover, the respondent further failed to establish that it is more likely than not that she would be subject to torture in Honduras, a burden which she bears. *Elzour v. Ashcroft*, 378 F.3d 1143 (10th Cir. 2004). The respondent did not testify to any past harm inflicted by a government actor. Furthermore, the respondent did not report any of her concerns to the police. The harm she fears is too speculative to support withholding or deferral under the CAT. *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006). Additionally, when deciding whether an applicant may be tortured in a country of removal, the Immigration Judge must consider evidence related to whether the applicant "could relocate to a part of the country of removal where he or she is not likely to be tortured." 8 C.F.R. § 1208.16(c)(3)(ii). The respondent failed to present sufficient evidence to establish that she cannot internally relocate within Honduras to escape harm. In fact, she testified she does not have personal knowledge of the criminal organization she fears having a presence outside of her community. Tr. at 55-56. As such, there is no error in the Immigration Judge's decision and the decision should be affirmed.

CONCLUSION

The Immigration Judge correctly found that the respondent is not a credible witness. Given the respondent's lack of credibility, the Immigration Judge correctly denied her applications for relief. Even if the respondent had provided credible testimony, which she did

not, the respondent still did not meet her burden in establishing eligibility for asylum, withholding of removal, or protection under the Convention Against Torture. The respondent is not a member of a cognizable particular social and has not been tortured, nor is it more likely than not, that she would be tortured if she returns to Honduras. As such, the Board should affirm the Immigration Judge's decision and dismiss the respondent's appeal, and motion, in its entirety.

Respectfully submitted on this 7th day of November 2018,

(b)(6); (b)(7)(C)

Assistant Chief Counsel
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

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CERTIFICATE OF SERVICE

I hereby certify that on 11/7/2018, I served this DEPARTMENT OF HOMELAND SECURITY RESPONSE TO RESPONDENT'S BRIEF AND MOTION TO REMAND any attached pages by placing a true copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process, and causing the same to be mailed by first class mail to:

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NON-DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:
(b)(6); (b)(7)(C)

In Withholding Only Proceedings

File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY'S RESPONSE TO APPLICANT'S BRIEF ON APPEAL

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), through the undersigned, respectfully moves the Board of Immigration Appeals (Board) to affirm the decision of the Immigration Judge issued in this matter, on March 22, 2018, and dismiss the applicant's appeal in its entirety.

The Immigration Judge conducted a full and fair hearing. The applicant bears the burden of demonstrating her eligibility for withholding of removal or protection under the Convention Against Torture. *See* 8 C.F.R. § 1240.8(d). As determined by the Immigration Judge, the applicant failed to meet her burden to establish eligibility for the protection-related relief sought. The Immigration Judge's decision is thorough and well-reasoned. The Immigration Judge addressed the relevant issues and correctly determined that the applicant did not establish eligibility for withholding of removal or protection under the Convention Against Torture (CAT). I.J. at 10.

As a threshold issue, several of the applicant's arguments on appeal were not advanced before the Immigration Judge and should not be considered by the Board in the first instance. *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 190 (BIA 2018) (collecting cases). First, the applicant asserts that the Immigration Judge erred "by failing to comply with the safeguards articulated in *M-A-M-*." Applicant's brief at 12. The applicant was represented by counsel and counsel conceded that the safeguard of representation was sufficient. Tr. at 13. Over three years elapsed from the time the applicant's counsel informed the Immigration Judge that representation would be a sufficient safeguard to when the applicant had her individual hearing. Tr. at 32. Applicant's current counsel was present at the individual and did not raise any competency concerns, nor did she request any additional safeguards. Rather, she raises this issue—for the

first time—on appeal. Applicant's brief at 12. Nonetheless, there is no evidence in the record to suggest the applicant lacked "a rational and factual understanding of the nature and object of the proceedings." *Matter of M-A-M*, 25 I&N 474, 479 (BIA 2011). Moreover, the applicant was able to consult with her attorney and presented evidence in support of her case. A diagnosis of a mental illness alone does not evidence a lack of competency. *Id.* While the applicant may assert depression, she demonstrated she understood the nature and object of her proceedings, was represented by counsel, and presented evidence in support of her case. Therefore, she seems to have satisfied the test for competency outlined by the Board. *Id.* The applicant was represented by counsel at her individual hearing, if there were concerns with competency, counsel should have advanced them before the Immigration Judge. She failed to do so. Counsel's failure to raise this issue, does not equate to a deprivation of due process when the applicant had a full and fair hearing and has not demonstrated prejudice. *See Michelson v. INS*, 897 F.2d 465, 468 (10th Cir. 1990); *Matter of Sibrun*, 18 I&N Dec. 354, 356-57 (BIA 1983); *Matter of Ponce-Hernandez*, 22 I&N 784, 785 (BIA 1999).

Additionally, the applicant raises the issue of "the interpreter's problematic interpretation" for the first time on appeal. Applicant's brief at 14. The applicant did not object to interpretation during the course of her individual hearing. The applicant again asserts a due process violation, but fails to articulate how her proceedings were unfair, beyond noting that corrections were made to the interpretation and that there were instances where clarification of the interpretation was requested. Applicant's brief at 14. Presumably, by the applicant's own admission, issues with interpretation were corrected and clarified. As such, there is no evidence of prejudice justifying the applicant's due process claim.

The applicant, also in the first instance, asserts that the "the reinstatement order of removal should be rescinded or vacated and warrants a remand in order for the applicant to be provided an opportunity to claim asylum for which she is eligible." Applicant's brief at 16. The applicant seemingly contests the validity of the reinstatement order, but neither the Immigration Judge nor the Board have the authority to review the challenges to the order. *Matter of G-N-C-* 22 I&N Dec. 281, 287 (BIA 1998) ("The threshold question is whether we have jurisdiction to consider the challenges to the reinstated order. We conclude that we do not have authority to review the Service officer's findings. The plain language of the statute and the regulation preclude a hearing by the Immigration Judge, and consequently this Board."). Unlike her arguments regarding the validity of the reinstatement order, the applicant's argument that she is eligible for asylum was preserved before the Immigration Judge. Tr. at 27. Nonetheless, because the applicant is subject to reinstated removal order, she is not eligible for asylum. *Matter of L-M-P-*, 27 I&N Dec. 265, 269-70 (BIA 2018). As such, the applicant's argument is foreclosed by Board precedent.

As to the merits of the applicant's withholding of removal claim, the Immigration Judge did not err in the denying the applicant's application for relief. The applicant's claim is premised on the protected ground of a particular social group. The applicant defined her particular social group as "Guatemalan Mayan Indigenous women who have been subjected to domestic violence, who have fled from a former domestic partner, and who the government is unable and unwilling to control." I.J. at 5; Tr. at 52-53. The Immigration Judge did not err in finding that the applicant's proposed group is not cognizable. I.J. at 5-7. The applicant's particular social group is circular and defined by its vulnerability, as such, it is not cognizable. *Matter of A-B-*, 27 I&N

particular social groups. Applicant's brief at 8. The applicant's new groups should not be considered on appeal. *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 192-93 (BIA 2018). Nonetheless, the proposed groups appear to be variations of her original proposed group which was already considered by the Immigration Judge. I.J. at 5-7. One of the proposed groups—"Guatemalan women who are unable to leave their domestic relationship"—mirrors the proposed group in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014) which is overruled. *Matter of A-B-*, 27 I&N Dec. 316, 317 (A.G. 2018) ("Because *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), recognized a new particular social group without correctly applying these standards, I overrule that case and any other Board precedent to the extent those other decisions are inconsistent with the legal conclusions set forth in this opinion."). As to the proposed group of "Guatemalan women who reject their former relationship" that group is also not cognizable. The Immigration Judge addressed the terms of this proposed group and correctly determined it lacked particularity and social distinction. I.J. at 6-7. Moreover, the applicant testified she was not in a relationship with (b)(6); (b)(7)(C)—her alleged persecutor. Tr. at 100 ("Well, since we didn't get along, and we never were like that, like a couple."). The Immigration Judge, although not necessary, addressed the viability of "Guatemalan Mayan indigenous women." I.J. at 7. The Immigration Judge's findings that the applicant did not meet her burden to demonstrate she was harmed—or would be harmed—on account of being a Guatemalan indigenous woman is not erroneous. I.J. at 7. The applicant was asked if the man she fears threatened her because she is indigenous, and she indicated "[n]o because we're all indigenous there." Tr. at 87. The threats and harm the applicant endured in Guatemala were on account of personal animus and retribution, not on account of a protected ground. As such there is no error in the Immigration Judge's finding. *Matter of A-C-A-*

A-, 28 I&N Dec. 84, 92 (A.G. 2020). As the applicant's claim is fatally flawed in more than one aspect, there is no need to analyze the remaining elements of the applicant's claim. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018).

As to the applicant's claim for protection under the CAT, the Immigration Judge correctly determined the applicant did not establish it is more likely than not she would be tortured if she returns to Guatemala. I.J. at 9. The applicant did not testify to any past torture inflicted by a government actor. She fears two private actors in Guatemala, and she failed to demonstrate she could not relocate to Guatemala to avoid the harm she fears. The applicant has not lived in Guatemala since 2013. The harm she fears is too speculative to support a grant of protection under CAT. *Matter of S-V-*, 22 I&N Dec. 1306, 1313 (BIA 2000). As such there is no error in the Immigration Judge's decision.

WHEREFORE, the Department respectfully moves the Board to dismiss the appeal in its entirety.

Respectfully submitted on this 1st day of October 2020,

(b)(6); (b)(7)(C)

Assistant Chief Counsel

(b)(6); (b)(7)(C)

Certificate of Service

The undersigned attorney served a copy of the foregoing **Response** by causing a copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process, to be mailed by first class mail to the following address:

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NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matters of:

(b)(6); (b)(7)(C)

In removal proceedings

File Nos.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
RESPONSE TO RESPONDENT'S BRIEF
IN SUPPORT OF APPEAL

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department of DHS), through the undersigned, hereby files its response to the "Respondent's Brief in Support of Appeal." The Department respectfully moves the Board of Immigration Appeals (the Board) to affirm the decision of the Immigration Judge issued in this matter, on March 17, 2020, and to dismiss the respondents' appeal.

The respondent[1] bears the burden of demonstrating eligibility for asylum. 8 C.F.R. § 208.13(a). As determined by the Immigration Judge, the respondent failed to meet this burden to establish eligibility for the protection-related relief sought. The Immigration Judge addressed the relevant issues and correctly determined that the respondent did not establish eligibility for asylum, withholding of removal, or protection under the Convention Against Torture (the CAT). I.J. at 14.

As an initial matter, the Immigration Judge properly concluded that the individual incidents, considered cumulatively, do not rise to a level of harm that could be considered persecution. I.J. at 6. The respondent testified to two incidents which she characterized as threats. I.J. at 5. In the first, an unknown man approached the respondent in a store, asked her if she knew anything about her husband's death. Tr. at 51. When the respondent answered "no", this individual departed, before returning and stating, "it was better that way" and "or else you were going to get hurt". Tr. at 51. After this incident, the respondent was never directly threatened again, but her son was approached six years later by a man who asked, "do you know how your father died"? Tr. at 36. Upon responding "no", this individual responded "fine" and departed. *Id*. The court properly concluded that these two incidents—in the aggregate—did not rise to a level that could be considered persecution. I.J. at 5-6; *Woldemeskel v. I.N.S.*, 257 F.3d 1185, 1188 (10th Cir. 2001);

[1] As only the lead respondent testified in support of relief from removal, for ease of readership, the Department will only refer to the lead respondent in this response.

(b)(6); (b)(7)(C)

see also Sidabutar v. Gonzales, 503 F.3d 1116, 1124 (10th Cir. 2007) (finding no past persecution for Indonesian Christian who was beaten repeatedly and robbed by Muslims classmates); *Tulengkey v. Gonzales*, 425 F.3d 1277, 1281 (10th Cir. 2005) (finding no past persecution where alien was robbed, fondled, and suffered a minor head injury); *Kapcia v. INS*, 944 F.2d 702, 704-05, 708 (10th Cir. 1991) (holding no past persecution where alien had twice been detained for two day periods during which he was beaten and interrogated, whose parents' home had been searched, whose work locker had been repeatedly broken into, and who had been assigned poor work tasks, denied bonuses, and conscripted into the army, where he was constantly harassed).

Further, the Immigration Judge properly concluded that both past threats were not on account of the respondent's political opinion or membership in a proposed social group. I.J. at 7, 9. The respondent's proposed social groups were "Honduran women", "Honduran female heads of households", "immediate family members of (b)(6); (b)(7)(C)", and "family members of police officers in Honduras." Respondent's brief at 9, 19. The Immigration Judge properly concluded that Mara gang members did not threaten the respondent to overcome a protected ground. I.J. at 7, 11. Specifically, the respondent indicated that the threats directed at her and her son were the result of gang activity which sought to prevent police investigation rather than an effort to harm the respondent on account of an underlying protected ground. Tr. at 53. The respondent's testimony indicates that the gang sought to threaten the respondent and her son because of a fear that they will investigate the respondent's husband's death and perhaps seek retribution against the gang. I.J. at 8. On appeal, the respondent contends persecution both on account of her membership in a particular social group and due to her political opinion. Respondent's brief at 9, 19. The Immigration Judge—relying on binding precedent at the time of

(b)(6); (b)(7)(C)

the hearing—properly concluded that three of the respondent's proposed social groups fail to satisfy the requirements outlined under *Matter of M-E-V-G-*, 27 I&N Dec. 227, 388 (2014). I.J. at 8-9.[2] While the Immigration Judge did find the respondent's proposed social group of Honduran women as cognizable, the respondent failed to demonstrate that being a Honduran women would be one central reason she would be harmed if she were to return to Honduras. *Matter of A-C-A-A-*, 28 I&N Dec. 84, 85 (A.G. 2020).

Similarly, the respondent has not met her burden to establish that the persecution she fears is on account of her political opinion. I.J. at 6-7. Specifically, there is no evidence in the record that the respondent was politically active or ever made any anti-gang or anti-governmental political statements. *See INS v Elias-Zacarias*, 502 U.S. 478, 481–83 (1992) (a group's attempt to coercively recruit an individual is not necessarily persecution on account of political opinion); *Rivera-Barrientos v. Holder*, 658 F.3d 1222, 1228 (10th Cir. 2011) (finding that an applicant's possession of a political opinion cannot play a minor role in the alien's past mistreatment or fears of future mistreatment and it cannot be incidental, tangential, superficial, or subordinate to another reason for harm); *Matter of S-E-G-*, 24 I&N Dec. 579, 589 (BIA 2008) (finding that the respondents had not established that the gang persecuted or would persecute them on account of political opinion where the respondent provided no evidence, direct or circumstantial, that the MS-13 gang imputed or would impute an anti-gang political opinion). While the respondent fears persecution on account of her membership in a particular social group or due to her political opinion, she has indicated that gang members have also approached and threatened her son, who

[2] Even if the Board were to apply the Attorney's General decision in *Matter of L-E-A-*, 28 I&N Dec. 304 (A.G. 2021) to this case, the respondent failed to demonstrate that being an immediate family member is one central reason why individuals would seek to harm her. *Orellana-Recinos v. Garland*, 993 F.3d 851, 858 (10th Cir. 2021).

(b)(6); (b)(7)(C)

is a male and whose political opinion is unknown. Tr. at 36. While the respondent may have an opinion regarding corruption in Honduras, proffered no evidence that this opinion, and any threats to her and her son, were on account of this opinion. I.J. at 6. Given the respondent's testimony, the Immigration Judge properly concluded that the respondent did not meet her burden to demonstrate that the gang, to the extent they threatened the respondent or her child, were motivated by the respondent's membership in a particular social group or by her political opinion. I.J. at 6, 8-9.

Furthermore, the Immigration Judge correctly determined that the respondent failed to meet her burden to establish a well-founded fear of persecution should she return to Honduras. I.J. at 13. The Immigration Judge properly concluded that the respondent failed to meet her burden to establish that any harm resulting from her return to Honduras would be on account of a protected ground. *Id*. The respondent fears that gang members will target her son because he is growing and may now pose a threat. Tr. at 37, 40-41. The respondent testified that these gang members would take her son and get him into selling drugs so he would not be able to talk about his father. Tr. at 41. While the respondent testified that her son will be unable to go to school should they be removed to Honduras, the respondent's son did go to school for six years following the initial threat and remained in Honduras without incident from 2018 until 2019. Tr. at 40, 36, 39. The Immigration Judge also considered testimony by the respondent that she has numerous other family members who have remained in Honduras without harm or retribution by the same gang members that she fears. I.J. at 13. As such, the Immigration Judge properly concluded that the respondent did not meet her burden to establish a well-founded fear of persecution on account of a protected ground.

(b)(6); (b)(7)(C)

The respondent further alleges that the Immigration Judge failed to consider whether there was a pattern or practice of persecution of women in Honduras. Respondent's brief at 12-14. The respondent need not demonstrate that she would be singled out individually for persecution *only if* she can show that a "pattern or practice" of persecution exists in the country of removal for persons similarly situated. 8 C.F.R. § 1208.13(b)(2)(iii). To do so, the respondent must prove that there is a "systemic or pervasive" effort to harm a group on account of one of the five protected statutory grounds. *Matter of A-M-,* 23 I&N Dec. 737, 741 (BIA 2005); see also *Woldemeskel v. INS*, 257 F.3d 1185, 1191 (10th Cir. 2001). In *Woldemeskel*, the Tenth Circuit examined the "pattern or practice" standard and concluded that, in order to meet the burden under 8 C.F.R. § 1208.13(b)(2)(iii)(A) the respondent must demonstrate "something on the order of organized or systematic or pervasive persecution." *Woldemeskel*, 257 at 1191 (citing *Makonnen v. INS*, 44 F.3d 1378, 1383 (8th Cir. 1995)). Further, the Board has adopted the definition of "pattern or practice" of persecution as needing to be "systemic, pervasive, or organized", and has routinely found a lack of pattern or practice where the record contains evidence that the involved persecution either is not systemic or does not involve the government. *See Matter of A-M-*, 23 I&N Dec. 737, 740-741 (BIA 2005) (regarding Chinese Christians in Indonesia, a Department of State report indicated that "incidents of harm related to religious or ethnic strife generally involved fellow citizens rather than the Government or Government agents, and that Government acquiescence is not the norm".)

In the instant case, the respondent has failed to prove that there is a systemic or pervasive effort to harm a group on account of one of the five protected grounds, that she is similarly situated to individuals currently targeted for harassment or discrimination, and that such harm is conducted by forces which the government is unable or unwilling to control. The respondent references a

(b)(6); (b)(7)(C)

Department of State report which indicates that women are one of the primary targets of criminal activities in Honduras. Respondent's brief at 13. While women in Honduras may be victim to criminal activity, the criminal activity in Honduras is not systemically or pervasively inflicted upon individuals because they are women. Moreover, the respondent testified to only one isolated threat, and has not demonstrated that she is similarly situated to other women she claims are targeted for persecution in Honduras.

Additionally, the respondent failed to meet her burden to establish that the pattern or practice of persecution is one which the government of Honduras is unable or unwilling to control. As noted by the Immigration Judge, the respondent failed to demonstrate that the government of Honduras would be unwilling or unable to protect her from the harm she fears. I.J. at 11. Despite the respondent's concern surrounding police impunity, the record indicates that following her husband's death the police conducted a thoughtful and thorough investigation. I.J. at 11; Tr. at 45. Moreover, the Department of State report evidences government efforts to investigate and prosecute organized crime groups. Exh. 6 at 1-2 ("Organized criminal elements, including local and transnational gangs and narcotics traffickers, were significant perpetrators of violent crimes . . . [t]he government investigated and prosecuted many of these crimes, particularly through the HNP's Violent Crimes Task Force."). Furthermore, as it relates to violence against women, the evidence indicates the government of Honduras criminalizes violence against women and has set up centers throughout the country to provide services to women. Exh. 6 at 15-16 ("In cooperation with the UN Development Program, the government operated consolidated reporting centers in Tegucigalpa and San Pedro Sula where women could report crimes, seek medical and psychological attention, and receive other services. These reporting centers were in addition to the

298 government-operated women's offices--one in each municipality--that provided a wide array of services to women, focusing on education, personal finance, health, social and political participation, environmental stewardship, and prevention of gender-based violence."). Accordingly, the respondent failed to satisfy her burden of proof, and the Immigration Judge properly determined that the respondent failed to demonstrate eligibility for asylum. I.J. at 13.

Although the respondent's claim was fatally flawed in more than one aspect, the Immigration Judge proceeded to make additional findings, properly concluding that there is insufficient evidence in the record that the respondent could not relocate within Honduras to avoid any future harm. I.J. at 11-12. There is no error in the Immigration Judge's determination that there is insufficient evidence that gang members would be able to find her if she were to relocate, and that they would have reasons to seek her out and harm her. *Id.* The respondent testified to having family members who never left Honduras and were never threatened or harmed despite the prior threat to the respondent and despite living only six blocks away from the respondent. Tr. at 52. Notably, the respondent lived in the same home for six years before coming to the United States and was not threatened or harmed. Tr.at 52. Lastly, the Immigration Judge properly noted that the respondent had the resources to relocate to the United States and that this capability further weighs in favor of finding that relocation would be reasonable in the present case. I.J. at 12. Given the respondent's testimony and the evidence of record, the Immigration Judge properly concluded that the respondent has failed to meet her burden to demonstrate that internal relocation would be unreasonable. *Ritonga v. Holder*, 633 F.3d 971, 976-77 (10th Cir. 2011).

Furthermore, the Immigration Judge correctly determined that the respondent failed to meet her burden to establish that it is more likely than not that she would be subjected to

(b)(6); (b)(7)(C)

persecution if she returns to Honduras. I.J. at 13. Because the respondent failed to meet her burden of proof for asylum, the Immigration Judge did not err in denying her application for relief for withholding of removal which also requires the respondent demonstrate harm on account of a protected, but carries a greater burden of proof. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987); *see also Matter of Mogharabbi*, 19 I&N Dec. 439, 447 (BIA 1987).

Lastly, the respondent failed to meet her burden in establishing that it is more likely than not that she would be subjected to torture in Honduras. *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004). In determining whether it is more likely than not that the respondent would be tortured if returned to Honduras, the Immigration Judge should consider all relevant evidence of future torture including past torture and whether the respondent could relocate to another part of the country where she is not likely to be tortured. *See Matter of J-E-*, 23 I&N Dec. 291, 303 (BIA 2002) (citing C.F.R. § 280.16(c)(3)). The respondent did not testify to any past harm inflicted by a government actor. Nor did she testify to any past torture. The respondent fears that if she were returned to Honduras, gang members will know she returned to Honduras, they will have a continued interest in the respondent's whereabouts, and they will then track down and physically harm the respondent with the acquiescence of the government. The respondent has failed to demonstrate that it is more likely than not that each step in the "hypothetical chain of events" will occur, and as such, has not met her burden to establish that, more likely than not, she will be tortured if she returns to Honduras. *Matter of J-F-F-*, 23 I&N Dec. 8912, 917-18 (A.G. 2006).

Conclusion

The Immigration Judge correctly denied the respondent's application for asylum, withholding of removal, and protection under the CAT. As such, the Department respectfully

(b)(6); (b)(7)(C)

requests that the Board affirm the decision of the Immigration Judge in this matter and dismiss the respondent's appeal in its entirety.

Respectfully submitted on this 16th day of June 2021,

(b)(6); (b)(7)(C)

Assistant Chief Counsel

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

I hereby certify that on, June 16, 2021, I served this **Response** and any attached pages by placing a copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process, and causing the same to be mailed by first class mail to:

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matters of:

(b)(6); (b)(7)(C)

In removal proceedings

File Nos. (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
RESPONSE TO RESPONDENT'S APPEAL BRIEF

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department of DHS), through the undersigned, hereby files its response to the "Respondent's Appeal Brief." The Department respectfully moves the Board of Immigration Appeals ("Board") to affirm the decision of the Immigration Judge issued in this matter, on July 8, 2020, and to dismiss the respondent's[1] appeal.

The respondent bears the burden of demonstrating eligibility for asylum. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018). As determined by the Immigration Judge, the respondent failed to meet her burden to establish eligibility for the protection-related relief sought. The Immigration Judge addressed the relevant issues and correctly determined that the respondent did not establish eligibility for asylum, withholding of removal, or protection under the Convention Against Torture (CAT). I.J. at 9.

The Immigration Judge properly concluded that the respondent is ineligible for asylum because she did not suffer past persecution on account of a protected ground. I.J. at 5-6. The respondent claimed past persecution at the hands of her partner,[2] (b)(6); (b)(7)(C) , in addition to fear of harm by members of the MS-13 group due to her partner's speculative association with this group. I.J. at 6. The respondent's proposed social groups were articulated as "Salvadoran women", "Salvadoran women unable to leave a domestic relationship", and "Salvadoran women who have fled a domestic relationship". I.J. at 5. The Immigration Judge did not err in finding that none of

[1]As only the lead respondent testified in support of relief from removal, for ease of readership, the Department will refer only to the lead respondent in this instant response.

[2] The respondent testified she was not married to (b)(6); Tr. at 46. He is the father of her two children. Tr. at 46. For ease of readership, the Department will refer to him as the respondent's partner throughout its response brief.

(b)(6); (b)(7)(C)

the harm the respondent endured, or fears she will endure, was or would be on account of a protected ground. *Id.*

The Immigration Judge properly concluded that the respondent's partner did not harm her to "overcome a protected ground". I.J. at 6. The respondent's harm was the result of "personal reasons" rather than an underlying protected ground which could serve as a basis for asylum. *Id*; *See Matter of A-C-A-A-*, 28 I&N Dec. 84, 91 (A.G. 2020) ("Accordingly, persecution that results from personal animus or retribution generally does not establish the necessary nexus."). The respondent alleges that the harm she endured was on account of her membership in a particular social group defined by her nationality and gender. I.J. at 5.[3] The Immigration Judge properly relied upon testimony by the respondent to conclude that the harm the respondent endured was not on account of membership in this articulated social group, rather it was violent criminal activity directed against both the respondent and others regardless of gender. I.J. at 5. Specifically, the respondent believes that her partner would harm anyone who did not do anything that he wanted them to do. Tr. at 77. The respondent testified that her partner harmed many people, not just women; he harmed her son and a male cousin. Tr. at 76-77. Notably, he did not harm the respondent's daughter. Tr. at 76. The respondent herself implied that the harm she endured was not on account of her membership in a particular social group, but was because of her partner's violent and threatening nature. Tr. at 47. Given that the harm the respondent endured was not on

[3] On appeal, the respondent does not challenge the Immigration Judge's finding that respondent's second and third articulated social groups do not meet the necessary particularity or social distinct requirements. I.J. at 5. Instead, regarding the first proposed social group "Salvadoran Women", respondent opines "…that it appears that the Immigration Judge accepted that this group meets the immutability, particularity and social distinction requirements." Respondent's brief at 3-4. Conversely, the Immigration Judge expressly notes that the Court "need not reach a decision on whether Respondent's first group, Salvadoran women, is cognizable, because as explained within this decision, the evidence does not establish that her gender is one central reason for the harm she endured in the past or the harm she fears in the future." I.J. at 5 n.5.

(b)(6); (b)(7)(C)

account of a protected ground, but rather was the result of personal reasons, there is no error in the Immigration Judge's decision finding that even if the respondent was a member of a cognizable particular social group, she was not harmed "on account" of her membership in any potential group. I.J. at 5-6.

Furthermore, the Immigration Judge correctly determined that the respondent failed to meet her burden to establish a well-founded fear of persecution should she return to El Salvador. I.J. at 7. The Immigration Judge correctly relied upon testimony that the respondent's partner was no longer in El-Salvador, coupled with lack of sufficient evidence to definitively establish gang affiliation and that he could utilize gang resources or abilities to look for the respondent anywhere in El Salvador, to determine the respondent failed to establish a well-founded fear of future persecution. *Id*. The Immigration Judge properly concluded that even if the respondent had established past persecution on account of a protected ground, changed circumstances and the respondent's ability to internally relocate, rebut the presumption of a well-founded fear of future persecution. *Id*. The respondent believes her partner could find her anywhere in El Salvador because she believes he is associated with the MS-13 gang. Tr. at 75. Nonetheless, the respondent's belief is premised on pure speculation. She was never told he was a member of the MS-13, nor did she ask. Tr. at 75. However, even if the respondent's partner was a member of the MS-13, there is no evidence that he continues to be associated with this group or that he even resides in El Salvador anymore. As astutely noted by the Immigration Judge, the respondent's partner currently is in Mexico. I.J. at 7; Tr. at 64, 78-79. The respondent's partner has not contacted her since she departed El Salvador and has not demonstrated the capability to discover her phone number. Tr. at 66. Moreover, he has not contacted her family to seek her out for future harm. Tr. at 65. As such,

(b)(6); (b)(7)(C)

there is no error in the Immigration Judge's decision finding the respondent failed to demonstrate a well-founded fear of future persecution. I.J. at 7-8.

On appeal, the respondent does not contest the Immigration Judge's determination that she failed to meet her burden to establish that it is more likely than not that she would be subjected to persecution if she returns to El Salvador. I.J. at 8. Nonetheless, because the respondent failed to meet her burden of proof for asylum, the Immigration Judge did not err in denying her application for withholding of removal which also requires the respondent demonstrate harm on account of a protected ground, but carries a greater burden of proof. *See INS v. Cardoza*, U.S. 421, 450 (1987); *see also Matter of Mogharabbi*, 19 I&N Dec. 439, 447 (BIA 1987).

Similarly, the respondent does not contest the Immigration Judge's determination that she failed to meet her burden in establishing that it is more likely than not that she would be subject to torture in El Salvador, a burden which she bears. *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004). Nonetheless, there is no error in the Immigration Judge's findings on protection under the CAT. In determining whether it is more likely than not that the respondent would be tortured if returned to El Salvador, the Immigration Judge should consider all relevant evidence of future torture including past torture and whether the respondent could relocate to another part of the country where she is not likely to be tortured. *See Matter of J-E-*, 23 I&N Dec. 291, 303 (BIA 2002) (citing 8 C.F.R. § 280.16(c)(3)). The respondent fears, if returned to El Salvador, her partner would return to the country, seek her out and be able to locate her anywhere in the country, and inflict harm upon her amounting to torture—with the acquiescence of the government. The Immigration Judge properly determined that the respondent failed to demonstrate that it is more likely than not that each step in the "hypothetical chain of events" will occur, therefore, she failed to meet her burden to establish that, more likely than not, she will be tortured if she returns to El

(b)(6); (b)(7)(C)

Salvador. *Matter of J-F-F-*, I&N Dec. 912, 917-18 (A.G. 2006). As such, there is no error in the Immigration Judge's decision denying protection under the CAT. I.J. at 9.

In sum, the Immigration Judge correctly denied the respondent's application for asylum, withholding of removal, and protection under the CAT. Therefore, the Department respectfully requests that the Board affirm the decision of the Immigration Judge in this matter and dismiss the respondent's appeal.[4]

Respectfully submitted on this 15th day of June 2021,

(b)(6); (b)(7)(C)

Assistant Chief Counsel
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

[4] The Department did not file an opposition to the rider respondents' (b)(6); (b)(7)(C) motion to sever and remand.

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2021, I served this **Response** and any attached pages by placing a copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process, and causing the same to be mailed by first class mail to:

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NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matters of:

(b)(6); (b)(7)(C)

In removal proceedings

File Nos.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY RESPONSE TO RESPONDENT'S BRIEF ON APPEAL

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department of DHS), through the undersigned, hereby files its response to the "Respondent's Brief on Appeal in Support of Asylum, Withholding of Removal and CAT." The Department respectfully moves the Board of Immigration Appeals (Board) to affirm the decision of the Immigration Judge issued in this matter, on March 3, 2020, and dismiss the respondent's appeal.

The respondent[1] bears the burden of demonstrating eligibility for asylum. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018). As determined by the Immigration Judge, the respondent failed to meet her burden to establish eligibility for the protection-related relief sought. The Immigration Judge addressed the relevant issues and correctly determined that the respondent did not establish eligibility for asylum, withholding of removal, or protection under the Convention Against Torture (CAT). I.J. at 6-7.

First, the Immigration Judge correctly concluded that the respondent is not eligible for asylum because she did not suffer past persecution on account of a protected ground. I.J. at 5. On appeal, the respondent argues that the harm she endured in Guatemala amounts to persecution. Respondent's brief at 6. Nonetheless, the Immigration Judge appropriately determined that the harm the respondent endured, in the aggregate, did not amount to persecution. I.J. at 2. The respondent testified that the father of her child "mistreated" her and further testified that as a child her father hit her with branches. Tr. at 67. The respondent would work with her father and testified that when she was not working fast enough, he would hit her. Tr.at 67. She also claimed that the family of the father of her child mistreated her while she was living with them. Tr. at 68.

[1] As only the lead respondent testified in support of relief from removal, for ease of readership, the Department's brief will refer only to the lead respondent.

(b)(6); (b)(7)(C)

The respondent also testified to an attempted rape and threat from an individual named (b)(6); (b)(7)(C) Tr.at 72, 74-75. Lastly, the respondent testified that her "daughter's uncle" hit her several times. Tr.at 79. These incidents, in the aggregate, do not amount to persecution. *Woldemeskel v. I.N.S.*, 257 F.3d 1185, 1188 (10th Cir. 2001); *see also Sidabutar v. Gonzales*, 503 F.3d 1116, 1124 (10th Cir. 2007) (finding no past persecution for Indonesian Christian who was beaten repeatedly and robbed by Muslims classmates); *Tulengkey v. Gonzales*, 425 F.3d 1277, 1281 (10th Cir. 2005) (finding no past persecution where noncitizen was robbed, fondled, and suffered a minor head injury); *Kapcia v. I.N.S.,* 944 F.2d 702, 704-05, 708 (10th Cir. 1991) (holding no past persecution where the noncitizen had twice been detained for two day periods during which he was beaten and interrogated, whose parents' home had been searched, whose work locker had been repeatedly broken into, and who had been assigned poor work tasks, denied bonuses, and conscripted into the army, where he was constantly harassed).

Assuming *arguendo*, that the harm the respondent endured is deemed past persecution, there is no error in the Immigration Judge's decision finding that the harm was not on account of a protected ground. I.J. at 5. The respondent's proposed social groups[2] were articulated as "indigenous women from Guatemala who are forced into slavery by virtue of the patriarchal society they live in", "indigenous women viewed as property by virtue of the patriarchal society they live in", individuals from Guatemala who survived a violent crime that was not prosecuted by authorities", "indigenous women from Guatemala." I.J. at 4, Tr. at 57-58. The Immigration

[2] The respondent also claimed political opinion and race as a protected ground. Nonetheless, the respondent does not address those protected grounds on appeal. The Department asserts the respondent failed to demonstrate she would be persecuted on account of a political opinion—actual or imputed—or that she would be persecuted on account of her race.

(b)(6); (b)(7)(C)

Judge did not err in finding that none of the harm the respondent endured – or fears she will endure – would be on account of a protected ground. I.J. at 5. As correctly noted by the Immigration Judge, the first three groups are defined by their harm, and as such, fail. I.J. at 4; *see Matter of A-B-*, 27 I&N Dec. 316, 335 (A.G. 2019).

The Immigration Judge also did not err in finding that indigenous women from Guatemala may be a cognizable particular social group, but the respondent failed to demonstrate the harm she endured was on account of being an indigenous Guatemalan woman. I.J. at 4. The respondent's father did not harm her because of her gender, he harmed her because of his displeasure with her work ethic. Tr. at 67. The respondent's father treated her siblings, including her brother, in a similar fashion. Tr. at 86, 89. The respondent also testified that her child's father was Mayan and did not harm his sister or mother Tr. at 87-88. As to the family of her child's father, the respondent testified they were upset with her because they had to provide for her. Tr. at 93. She further testified her daughter's uncle pulled her hair and kicked her, but he never did that his mother or sister. Tr. at 96. The respondent's harm was result of a personal animus which is generally insufficient to establish the requisite nexus for asylum. *Matter of A-C-A-A-*, 28 I&N Dec. 84, 91 (A.G. 2020) ("Accordingly, persecution that results from personal animus or retribution generally does not establish the necessary nexus."). Lastly, the respondent testified (b)(6); (b)(7)(C) was a violent person that would be violent towards anyone that got in his way. Tr. at 102. The respondent failed to demonstrate that being an indigenous woman from Guatemala was one central reason for (b)(6); (b)(7)(C) attempt to rape her—nor was it one central reason for his threats. Given that the respondent's case is fatally flawed in one respect, the Immigration Judge

(b)(6); (b)(7)(C)

did not need to address the remaining elements of the respondent's claim. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018).

Furthermore, the Immigration Judge correctly determined that the respondent failed to meet her burden to establish that it is more likely than not that she would be subjected to persecution if she returns to Guatemala. I.J. at 7. Because the respondent failed to meet her burden of proof for asylum, the Immigration Judge did not err in denying her application for relief for withholding of removal which also requires the respondent demonstrate harm on account of a protected, but carries a greater burden of proof. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987); *see also Matter of Mogharabbi*, 19 I&N Dec. 439, 447 (BIA 1987).

Additionally, the respondent failed to meet her burden in establishing that it is more likely than not that she would be subject to torture in Guatemala, a burden which she bears. *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004). In determining whether it is more likely than not that the respondent would be tortured if returned to Guatemala, the immigration judge should consider all relevant evidence of future torture including past torture and whether the respondent could relocate to another part of the country where she is not likely to be tortured. See *Matter of J-E-*, 23 I&N Dec. 291, 303 (BIA 2002) (Citing 8 C.F.R. § 208.16(c)(3)). The respondent did not testify to any past harm inflicted by a government actor. Nor did she testify to any past torture. The respondent fears general violence and poverty. Tr. at 107. Her CAT claim rests on fear that if she returns to Guatemala (b)(6); (b)(7)(C) or other family members would seek her out anywhere in Guatemala and torture her with the acquiescence of the government of Guatemala. The respondent failed to demonstrate that it is more likely than not that each step in

(b)(6); (b)(7)(C)

the "hypothetical chain of events" will occur, and as such, has not met her burden to establish that, more likely than not, she will be tortured if she returns to Guatemala. *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006).

WHEREFORE, the Department respectfully moves the Board to dismiss the respondent's appeal in its entirety.

Respectfully submitted on this 15th day of June 2021,

(b)(6); (b)(7)(C)

Assistant Chief Counsel
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

(b)(6); (b)(7)(C)

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NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matters of:

(b)(6); (b)(7)(C)

In removal proceedings

File Nos.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
RESPONSE TO RESPONDENT'S BRIEF
ON APPEAL

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department of DHS), through the undersigned, hereby files its response to the "Brief Demonstrating (b)(6); (b)(7)(C) Eligibility for Asylum." The Department respectfully moves the Board of Immigration Appeals (Board) to affirm the decision of the Immigration Judge issued in this matter, on April 2, 2020, and dismiss the respondent's appeal.

The respondent[1] bears the burden of demonstrating eligibility for asylum. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018). As determined by the Immigration Judge, the respondent failed to meet her burden to establish eligibility for the protection-related relief sought. The Immigration Judge addressed the relevant issues and correctly determined that the respondent did not establish eligibility for asylum, withholding of removal, or protection under the Convention Against Torture (CAT). I.J. at 11.

First, the Immigration Judge correctly concluded that the respondent is not eligible for asylum because she did not suffer past persecution. I.J. at 4. On appeal, the respondent argues that the harm she endured in Guatemala amounts to persecution. Respondent's brief at 6. Nonetheless, the Immigration Judge appropriately determined that the harm the respondent endured, in the aggregate, did not amount to persecution. I.J. at 4. The respondent testified that her uncle sexually assaulted her mother and threatened to "do the same thing" to her daughter. Tr. at 59. The respondent testified that her uncle solicited her for sex on one occasion and when she refused, he "used bad words." Tr. at 77. The respondent further testified that due to a family dispute over land, when the respondent constructed a fence on the land her mother acquired, her

[1] As only the lead respondent testified in support of relief from removal, for ease of readership, the Department's brief will refer only to the lead respondent.

(b)(6); (b)(7)(C)

life was threatened. Tr. at 72. These incidents, in the aggregate, do not amount to persecution. *See Woldemeskel v. INS*, 257 F.3d 1185, 1188 (10th Cir. 2001); *see also Sidabutar v. Gonzales*, 503 F.3d 1116, 1124 (10th Cir. 2007) (finding no past persecution for Indonesian Christian who was beaten repeatedly and robbed by Muslims classmates); *Tulengkey v. Gonzales*, 425 F.3d 1277, 1281 (10th Cir. 2005) (finding no past persecution where noncitizen was robbed, fondled, and suffered a minor head injury); *Kapcia v. INS*, 944 F.2d 702, 704-05, 708 (10th Cir. 1991) (holding no past persecution where the noncitizen had twice been detained for two day periods during which he was beaten and interrogated, whose parents' home had been searched, whose work locker had been repeatedly broken into, and who had been assigned poor work tasks, denied bonuses, and conscripted into the army, where he was constantly harassed).

Assuming *arguendo*, that the harm the respondent endured is deemed past persecution, there is no error in the Immigration Judge's decision finding that the harm was not on account of a protected ground. I.J. at 5. The respondent's proposed social groups[2] were articulated as "Victims of sexual assault without male protection in Guatemala" and "landowners where others are trying to by force or violence take that property away." Tr.at 98-99. The respondent, in the first instance—on appeal—is proposing new particular social groups. The respondent proffers "Guatemala women", "Guatemalan mothers", "mother of Milargo Arcon", "Guatemalan women who refuse to conform to societal norms" and "Guatemalan women who favor women's rights and autonomy." Respondents brief at 9. The respondent's new proposed groups should not be

[2] The respondent also claimed political opinion as a protected ground. I.J. at 5 n.3. Nonetheless, the respondent does not address that protected ground on appeal. The Department asserts the respondent failed to demonstrate she would be persecuted on account of a political opinion—actual or imputed.

(b)(6); (b)(7)(C)

considered on appeal. *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 192-93 (BIA 2018). The Immigration Judge did not err in finding that none of the harm the respondent endured – or fears she will endure – would be on account of a protected ground as neither proposed group offered at the respondent's individual hearing is cognizable. I.J. at 5. As correctly noted by the Immigration Judge, the two groups are defined by their harm, and as such, each group fails. I.J. at 5-6. *See Matter of A-B-*, 316, 335 (A.G. 2019). Moreover, as astutely noted by the Immigration Judge, the respondent was never a landowner. I.J. at 6, Tr. at 105. Therefore, even if her circular proposed group of being a landowner was impermissibly deemed cognizable, the respondent is not a member of the proposed group.

The Immigration Judge also did not err in finding that even if the respondent proposed a cognizable particular social group, the respondent failed to demonstrate the harm she endured was on account of any of the proposed group. The harm she endured was a result of family disputes. Tr. at 62. Personal animus is generally insufficient to establish the requisite nexus for asylum. *Matter of A-C-A-A-*, 28 I&N Dec. 84, 91 (A.G. 2020) ("Accordingly, persecution that results from personal animus or retribution generally does not establish the necessary nexus.). Because the respondent's case is fatally flawed in one respect, the Immigration Judge did not need to address the remaining elements of the respondent's claim. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018).

Furthermore, the Immigration Judge correctly determined that the respondent failed to meet her burden to establish that it is more likely than not that she would be subjected to persecution if she returns to Guatemala. I.J. at 8. Because the respondent failed to meet her

(b)(6); (b)(7)(C)

burden of proof for asylum, the Immigration Judge did not err in denying her application for relief for withholding of removal which also requires the respondent demonstrate harm on account of a protected, but carries a greater burden of proof. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987); *see also Matter of Mogharabbi*, 19 I&N Dec. 439, 447 (BIA 1987).

Additionally, the respondent failed to meet her burden in establishing that it is more likely than not that she would be subject to torture in Guatemala, a burden which she bears. *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004). In determining whether it is more likely than not that the respondent would be tortured if returned to Guatemala, the immigration judge should consider all relevant evidence of future torture including past torture and whether the respondent could relocate to another part of the country where she is not likely to be tortured. *See Matter of J-E-*, 23 I&N Dec. 291, 303 (BIA 2002) (citing 8 C.F.R. § 208.16(c)(3)). The respondent did not testify to any past harm inflicted by a government actor. Nor did she testify to any past torture. Her CAT claim rests on fear that if she returns to Guatemala, her uncle or other family members would seek her out anywhere in Guatemala and torture her with the acquiescence of the government of Guatemala. The respondent failed to demonstrate that it is more likely than not that each step in the "hypothetical chain of events" will occur, and as such, has not met her burden to establish that, more likely than not, she will be tortured if she returns to Guatemala. *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006).

WHEREFORE, the Department respectfully moves the Board to dismiss the respondent's appeal in its entirety.

(b)(6); (b)(7)(C)

Respectfully submitted on this 15th day of June 2021,

(b)(6); (b)(7)(C)

Assistant Chief Counsel
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

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NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matters of:

(b)(6); (b)(7)(C)

In removal proceedings

File Nos.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
RESPONSE TO RESPONDENTS' BRIEF
IN SUPPORT OF APPEAL

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department of DHS), through the undersigned, hereby files its response to the respondents' "Brief in Support of Appeal." The Department respectfully moves the Board of Immigration Appeals (Board) to affirm the decision of the Immigration Judge issued in this matter, on March 2, 2020, and dismiss the respondents' appeal.

The respondent[1] bears the burden of demonstrating eligibility for asylum. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018). The Immigration Judge conducted a full and fair hearing. On appeal, the respondent argues, that the "Immigration Judge made clear errors of fact and law and violated the Respondents' rights to due process of law when he denied their applications for asylum and withholding of removal." Respondent's brief at 18. As to the respondent's due process claims, in *Mathews v. Eldridge*, the Supreme Court recognized that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). As the Court in *Mathews* acknowledged, what constitutes being heard at "a meaningful time and in a meaningful manner" will have different meanings in different circumstances, and due process only "calls for such procedural protections as the particular situation demands." *Id.* at 334. Here, respondent's assertion that a denial of relief is a violation of her due process is void of specifics as to how she was deprived of a full and fair hearing. The fact remains, that the Immigration Judge conducted a full and fair hearing and properly determined that the respondent failed to meet her burden to establish eligibility for the protection-related relief sought. The Immigration Judge addressed the

[1] As only the lead respondent testified in support of relief from removal, for ease of readership, the Department's brief will refer only to the lead respondent.

(b)(6); (b)(7)(C)

relevant issues and correctly determined that the respondent did not establish eligibility for asylum or withholding of removal.[2]

First, the Immigration Judge correctly concluded that the respondent is not eligible for asylum because she did not suffer past persecution on account of a protected ground. I.J. at 4. While the Immigration Judge did find that the domestic violence and sexual assault the respondent suffered did amount to persecution, a protected ground was not one central reason for the harm inflicted upon her in Guatemala. I.J. at 5. The respondent's proposed particular social groups are "women in Guatemala" and "indigenous women in Guatemala." I.J. at 5. The respondent testified that her partner was abusive and would think she was speaking with other men. Tr. at 51. The respondent testified he would get upset when she talked about wanting to work because he believed that she was actually looking for "another man." Tr. at 56. The respondent never reported any of the harm she endured at the hands of her partner to the police. Tr. at 57. As astutely noted by the Immigration Judge, the harm the respondent endured from her partner was personal in nature. I.J. at 5. The respondent's harm was result of a personal animus which is generally insufficient to establish the requisite nexus for asylum. *Matter of A-C-A-A-*, 28 I&N Dec. 84, 91 (A.G. 2020) ("Accordingly, persecution that results from personal animus or retribution generally does not establish the necessary nexus.").

The respondent also argues that the discrimination and racism in Guatemala is "so pervasive as to threaten the life" of her son along with her own life. Respondent's brief at 16. While the record does evidence discrimination, the Immigration did not err in finding that the discrimination does not amount to persecution. I.J. at 6. The respondent completed eleven years

[2] The respondent withdrew her application for protection under the Convention Against Torture. Tr. at 76; I.J. at 7.

(b)(6); (b)(7)(C)

of schooling in Guatemala. Tr. at 40. She was also able to obtain employment in Guatemala. Tr.at 53, 61. The respondent also received financial support from her father in the United States which helped with her son's medical ailments. Tr. at 60. Taking all these facts into account, the respondent did not demonstrate her life was threatened by societal discrimination and economic disadvantage. *Vicente-Elias v. Mukasey*, 523 F.3d 1086, 1092 (10th Cir. 2008). As such, there is no error in Immigration Judge's decision denying asylum. I.J. at 7.

Furthermore, the Immigration Judge correctly determined that the respondent failed to meet her burden to establish that it is more likely than not that she would be subjected to persecution if she returns to Guatemala. I.J. at 7. Because the respondent failed to meet her burden of proof for asylum, the Immigration Judge did not err in denying her application for relief for withholding of removal which also requires the respondent demonstrate harm on account of a protected, but carries a greater burden of proof. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987); *see also Matter of Mogharabbi*, 19 I&N Dec. 439, 447 (BIA 1987).

WHEREFORE, the Department respectfully moves the Board to dismiss the respondents' appeal in its entirety.

Respectfully submitted on this 15th day of June 2021,

(b)(6); (b)(7)(C)

Assistant Chief Counsel

(b)(6); (b)(7)(C)

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I hereby certify that on, June 15, 2021, I served this **Response** and any attached pages by placing a copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process, and causing the same to be mailed by first class mail to:

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NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matters of:

(b)(6); (b)(7)(C)

In removal proceedings

File Nos.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY
RESPONSE TO RESPONDENT'S BRIEF
ON APPEAL

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department of DHS), through the undersigned, hereby files its response to the "Respondents' Brief on Appeal in Support of Asylum, Withholding of Removal and CAT." The Department respectfully moves the Board of Immigration Appeals (Board) to affirm the decision of the Immigration Judge issued in this matter, on September 12, 2019, and dismiss the respondent's appeal.

The respondent[1] bears the burden of demonstrating eligibility for asylum. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018). As determined by the Immigration Judge, the respondent failed to meet her burden to establish eligibility for the protection-related relief sought. The Immigration Judge addressed the relevant issues and correctly determined that the respondent did not establish eligibility for asylum, withholding of removal, or protection under the Convention Against Torture (CAT). I.J. at 9.

First, the Immigration Judge correctly concluded that the respondent is not eligible for asylum because she did not suffer past persecution on account of a protected ground. I.J. at 6-7. On appeal, the respondent argues that the harm she endured from her husband, coupled with the encounter of men arriving at her home with weapons, amounts to persecution. Respondent's brief at 6. Nonetheless, the respondent testified to one instance of harm from her husband in which the respondent's husband pushed her against the wall and she hit her head. Tr. at 30. The respondent separated from her husband after that incident. Tr.at 31. The respondent believes the

[1] As only the lead respondent testified in support of relief from removal, for ease of readership, the Department's brief will refer only to the lead respondent.

(b)(6); (b)(7)(C)

men that came to her home were members of Los Caballeros Templarios; however, the respondent did not testify she was physically harmed by the men. Tr. at 34-35. Rather, she testified the men wanted information about her husband's whereabouts and threatened that if she did not give them information about her husband "they were going to disappear with her two kids." Tr. at 35. These incidents, in the aggregate, do not amount to persecution. *Woldemeskel v. INS*, 257 F.3d 1185, 1188 (10th Circuit 2001); *see also Sidabutar v. Gonzales*, 503 F.3d 1116, 1124 (10th Cir. 2007) (finding no past persecution for Indonesian Christian who was beaten repeatedly and robbed by Muslims classmates); *Tulengkey v. Gonzales*, 425 F.3d 1277, 1281 (10th Cir. 2005) (finding no past persecution where noncitizen was robbed, fondled, and suffered a minor head injury); *Kapcia v. INS*, 944 F.2d 702, 704-05, 708 (10th Cir. 1991) (holding no past persecution where the noncitizen had twice been detained for two day periods during which he was beaten and interrogated, whose parents' home had been searched, whose work locker had been repeatedly broken into, and who had been assigned poor work tasks, denied bonuses, and conscripted into the army, where he was constantly harassed).

Assuming *arguendo*, that the harm the respondent endured is deemed past persecution, there is no error in the Immigration Judge's decision finding that the harm was not on account of a protected ground. I.J. at 4. The respondent claimed past persecution at the hands of her husband, (b)(6); (b)(7)(C) in addition to fear of harm by members of the Los Caballeros Templarios group due to her relationship with her husband and his apparent problems with this group. I.J. at 5. The respondent's proposed social groups were articulated as "separated or estranged women from Mexico", "single mothers from Mexico", "Mexican women separated or estranged from a

(b)(6); (b)(7)(C)

possible gang-member", "members of the (b)(6); (b)(7)(C) family", and "separated or estranged mothers from Mexico". I.J. at 5. The Immigration Judge did not err in finding that none of the harm the respondent endured – or fears she will endure – would be on account of a protected ground. I.J. at 7. As correctly noted by the Immigration Judge, when the respondent was harmed by her husband, she was not a "separated or estranged" woman from Mexico, nor was she a single mother; as such, the respondent failed to demonstrate she was a member of any of those proposed groups. I.J. at 5. As she is not a member of those proposed groups, there is no need to address whether the proposed groups defined by being a single or estranged woman, or mother are cognizable.[2] Additionally, the threat the respondent received from the Los Caballeros Templarios was not on account of her membership in any particular social group. Rather, threatening the respondent was a means to an end such that she failed to demonstrate nexus. *Matter of L-E-A-*, 27 I&N Dec. 581, 584 (A.G. 2019). As the respondent hypothesized, Los Caballeros Templarios may have been looking for her husband because he worked with them, such that any threat was not inflicted based on the respondent's single or estranged status, nor was it inflicted upon her because of her family membership.[3] As such, there is no error in the Immigration Judge's finding that the respondent failed to demonstrate any harm the respondent

[2] The Department further asserts that the groups lack immutability, particularity, and social distinction. Like the respondent, one's status from single or estranged, can change such that it lacks immutability. Moreover, the term estranged is not particular as the record does not evidence that the word estranged is commonly understood such that the group has clearly defined boundaries. Lastly, there is insufficient evidence in the record to demonstrate those groups are socially distinct. As such, all the proposed groups premised on being single or estranged, fail. *Matter of M-E-V-G*, I&N Dec. 227, 252 (BIA 2014).

[3] The respondent's proposed group of the "(b)(6); (b)(7)(C) family" also fails. While the Immigration Judge, interpreted the boundaries of the group to include immediate family members of the respondent's husband, the respondent failed to demonstrate the family is socially distinct in Mexico. *Matter of L-E-A-*, 27 I&N Dec. 581, 593 (A.G. 2019).

(b)(6); (b)(7)(C)

endured, or fears would be inflicted on account of a protected ground. I.J. at 4. Given that the respondent's case is fatally flawed in one respect, the Immigration Judge did not need to address the remaining elements of the respondent's claim. *Matter of A-B-*, 27 I&N Dec. 316, 340 (A.G. 2018).

Furthermore, the Immigration Judge correctly determined that the respondent failed to meet her burden to establish that it is more likely than not that she would be subjected to persecution if she returns to Mexico. I.J. at 7. Because the respondent failed to meet her burden of proof for asylum, the Immigration Judge did not err in denying her application for relief for withholding of removal which also requires the respondent demonstrate harm on account of a protected, but carries a greater burden of proof. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987); *see also Matter of Mogharabbi*, 19 I&N Dec. 439, 447 (BIA 1987).

Additionally, the respondent failed to meet her burden in establishing that it is more likely than not that she would be subject to torture in Mexico, a burden which she bears. *Elzour v. Ashcroft*, 378 F.3d 1143, 1150 (10th Cir. 2004). In determining whether it is more likely than not that the respondent would be tortured if returned to Mexico, the immigration judge should consider all relevant evidence of future torture including past torture and whether the respondent could relocate to another part of the country where she is not likely to be tortured. See *Matter of J-E-*, 23 I&N Dec. 291, 303 (BIA 2002) (Citing 8 C.F.R. § 208.16(c)(3)). The respondent did not testify to any past harm inflicted by a government actor. Nor did she testify to any past torture. The respondent fears that if she were returned to Mexico, Los Caballeros Templarios will know she returned to Mexico, they will have a continued interest in her husband's whereabouts, and

(b)(6); (b)(7)(C)

they will then track her down and physically harm her with the acquiescence of the government. The respondent failed to demonstrate that it is more likely than not that each step in the "hypothetical chain of events" will occur, and as such, has not met her burden to establish that, more likely than not, she will be tortured if she returns to Mexico. *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006).

WHEREFORE, the Department respectfully moves the Board to dismiss the respondents appeal in its entirety.

Respectfully submitted on this 1st day of June 2021,

(b)(6); (b)(7)(C)

Assistant Chief Counsel
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2021, I served this **Response** and any attached pages by placing a copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process, and causing the same to be mailed by first class mail to:

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NOT DETAINED

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

In the Matter of:

(b)(6); (b)(7)(C)

In removal proceedings

File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY RESPONSE TO RESPONDENT'S BRIEF IN SUPPORT OF APPEAL

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), through the undersigned, respectfully moves the Board of Immigration Appeals (Board) to affirm the decision of the Immigration Judge denying asylum, withholding of removal, and protection under the Convention Against Torture. As to the portion of the Immigration Judge's decision, dated June 5, 2019, in which post-conclusion voluntary departure was denied, the Department asserts that remand is not necessary for a determination as to whether the respondent warrants post-conclusion voluntary departure. As the Immigration Judge solely denied post-conclusion voluntary departure because the respondent did not have the requisite continued physical presence, remand is not necessary as the issue was resolved in intervening case law rendered by the Tenth Circuit. I.J. at 9. Given the Tenth Circuit's decision in *BanuelosGalviz v. Barr*, it appears as though the respondent is now eligible for post-conclusion voluntary departure. *Banuelos-Galviz v. Barr*, 953 F.3d 1176, 1184 (10th Cir. 2020) ("[T]he stop-time rule is not triggered by the combination of an incomplete notice to appear and a notice of hearing.") Nonetheless, all other aspects of the Immigration Judge's decision should be affirmed.

The Immigration Judge correctly found that the respondent did not meet her burden in demonstrating she merits a grant of asylum, withholding of removal, or protection under the Convention Against Torture. As a threshold matter, the respondent did not file her asylum application within one year of her entry into the United States, nor does she argue any exceptions to the one-year filing deadline on appeal. Therefore, the respondent did not meet her burden to establish she is eligible for asylum. I.J. at 4 n.3. On appeal, the respondent argues that the respondent is a member of a particular social group comprised of "Honduran women who are

(b)(6); (b)(7)(C)

viewed as property by virtue of their positions within a domestic relationship.[1]" Respondent's brief at 4. The respondent's proposed social group is akin to the group proposed in *Matter of A-R-C-G-* which was overruled. *Matter of A-B-*, 27 I&N Dec. 316, 334 (A.G. 201) (finding that the particular social group of "married women in Guatemala who are unable to leave their relationship" is not a cognizable particular social group). As correctly noted by the Immigration Judge, the respondent's proposed group on appeal is defined by the harm she has endured and the inability to leave the relationship. I.J. at 6. Given that the respondent's social group is defined by its vulnerability, there is no error in the Immigration Judge's determination finding that the group is not cognizable. *Matter of A-B-*, 27 I&N Dec. 316, 335 (A.G. 2018).

Despite making the correct determination that the respondent's proposed social group is not cognizable, the Immigration Judge proceeded to make alternative findings, concluding that the harm the respondent fears is not on account of a protected ground. I.J. at 6. The Immigration Judge properly concluded that the respondent's ex-husband did not harm her to "overcome a protected characteristic." I.J. at 6. The respondent's harm was result of a personal animus which is generally insufficient to establish the requisite nexus for asylum. *Matter of A-C-A-A-*, 28 I&N Dec. 84, 91 (A.G. 2020) ("Accordingly, persecution that results from personal animus or retribution generally does not establish the necessary nexus."). The harm the respondent endured was not on account of a protected ground, rather it was deplorable criminal activity inflicted

[1] As noted by the Immigration Judge, the respondent's asylum claim was premised on the protected grounds of her political opinion and alleged membership in twenty-two separate particular social groups. I.J. at 5. On appeal, the respondent's arguments are in support of the proposed particular social group of "Honduran women who are viewed as property by virtue of their positions within a domestic relationship." Respondent's brief at 4. The respondent does not address the other twenty-one proposed particular social groups or her alleged political opinion. As such, the Department will not address the other particular social groups or the respondent's alleged political opinion in this instant response to the respondent's appeal brief.

(b)(6); (b)(7)(C)

upon her triggered by incidents that arguably unjustifiably displeased her ex-husband. Tr.at 34 ("[H]e became very upset about my dress."); Tr. at 39 ("It was because I had been cooking and I accidently let a pan or an iron fall on the floor . . .[a]nd that time, I remember being beaten on my back because I had caused my daughter to—I had startled my daughter by accident."); Tr. at 40 ("I had told my grandmother that he had no right or no reason to insult me or offend me when all I was doing was staying home taking care of my kids, my daughter. He became so angry that I couldn't even finish talking to my grandmother. And he took me to the bedroom to beat me."); Tr. at 42 ("That time he became very angry because they had taken away all his privileges at church. He came straight to beat me, grab me by the hair."). Given that the harm the respondent endured was not on account of a protected ground, there is no error in the Immigration Judge's decision finding that even if the respondent was a member of a cognizable particular social group, she "failed to demonstrate a nexus" in order to meet her burden of proof for asylum. I.J. at 7.

Furthermore, the Immigration Judge correctly determined that the respondent failed to meet her burden to establish that it is more likely than not that she would be subjected to persecution if she returns to Honduras. I.J. at 7. Because the respondent failed to meet her burden of proof for asylum, the Immigration Judge did not err in denying her application for relief for withholding of removal which also requires the respondent demonstrate harm on account of a protected, but carries a greater burden of proof. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987); *see also Matter of Mogharabbi*, 19 I&N Dec. 439, 447 (BIA 1987).

The respondent also failed to meet her burden in establishing that it is more likely than not that she would be subject to torture in Honduras, a burden which she bears. *Elzour v.*

(b)(6); (b)(7)(C)

Ashcroft, 378 F.3d 1143, 1150 (10th Cir. 2004). In determining whether it is more likely than not that the respondent would be tortured if returned to Honduras the immigration judge should consider all relevant evidence of future torture including past torture and whether the respondent could relocate to another part of the country where he is not likely to be tortured. *See Matter of J-E-*, 23 I&N Dec. 291, 303 (BIA 2002) (citing 8 C.F. R. § 280.16(c)(3)). The respondent did not testify to any past harm inflicted by a government actor. Nor did she testify to any past torture. The respondent fears if returned to Honduras, her ex-husband would seek "revenge" against her. Tr. at 70. The respondent claims her ex-husband "has a lot of friends, political and police." Tr. at 66. Thus, if returned to Honduras, the respondent's CAT claim is essentially premised on the respondent's "friends" somehow finding out she is in Honduras, then telling her ex-husband, who will then track her down and torture her with the acquiescence of the government of Honduras. The respondent has failed to demonstrate that it is more likely than not that each step in the "hypothetical chain of events" will occur, therefore, she has not met her burden to establish that, more likely than not, she will be tortured if she returns to Honduras. *Matter of J-F-F-*, 23 I&N Dec. 912, 917-18 (A.G. 2006). As such, there is no error in Immigration Judge's decision denying protection under the CAT. I.J. at 9.

CONCLUSION

The Immigration Judge correctly denied the respondent's application for asylum, withholding of removal, and protection under the CAT. Given the intervening case law in the Tenth Circuit, it appears as though the respondent no longer lacks the requisite continued physical presence for post-conclusion voluntary departure. As continued physical presence was the sole apparent issue barring the respondent from post-conclusion voluntary departure relief—

(b)(6); (b)(7)(C)

and that issue has now been addressed by the Tenth Circuit—remand does not appear to be necessary for the sole purpose of granting post-conclusion voluntary departure. As such, the Department requests the Board affirm all other aspects of the Immigration Judge's decision and dismiss the respondent's appeal as it pertains to her appeal of the denial of asylum, withholding of removal and protection under the CAT.

Respectfully submitted on this 29th day of December 2020,

(b)(6); (b)(7)(C)

Assistant Chief Counsel
U.S. Immigration & Customs Enforcement
U.S. Department of Homeland Security

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

I hereby certify that on 12/29/2020, I served this DEPARTMENT OF HOMELAND SECURITY RESPONSE TO RESPONDENT'S BRIEF AND MOTION TO REMAND any attached pages by placing a copy thereof in a sealed envelope, with postage thereon to be fully prepaid by normal government process, and causing the same to be mailed by first class mail to:

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Not Detained

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

In the Matter of:

(b)(6); (b)(7)(C)

In Removal Proceedings

File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY'S BRIEF ON APPEAL

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), through the undersigned, respectfully moves the Board of Immigration Appeals (Board) to affirm the decision of the Immigration Judge by means of a brief order. 8 C.F.R. §§ 1003.1(e)(5). The Department also submits that none of the six circumstances warranting review by a three-member panel are present in this case. 8 C.F.R. §§ 1003.1(e)(6).

The Board reviews factual determinations of the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); *see Matter of R-S-H-*, 23 I&N Dec. 625, 637 (BIA 2003) (discussing the "clearly erroneous" standard of review). The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of the Immigration Judge de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

Here, the Immigration Judge did not err in denying the respondents' applications for asylum and related protection from removal to El Salvador. The respondents' fear returning to El Salvador because of widespread criminal violence and a belief that the Salvadorian government will not protect them. I.J. at 4. This fear stems from several incidents wherein the lead respondent was threatened by unknown members of the MS-13 gang. *Id.* However, as found by the immigration judge, the threats experienced and the harm feared are criminal acts by private, not state, actors, which lacks a nexus to a protected ground. *Id.* at 5, 8. Because the harm arises out of "pure criminal incentives," the respondents have not met their burden to show that they are eligible for asylum or withholding of removal under the Act. I.J. at 8-10; *see Matter of A-B-*, 27 I&N Dec. 316, 322 (A.G. 2018); *Matter of M-E-V-G-*, 26 I&N Dec. 227, 235 (BIA 2014); *Matter of S-E-G-*, 24 I&N Dec. 579, 589 (BIA 208).

(b)(6); (b)(7)(C)

Furthermore, the respondents failed to show that the government of El Salvador would be unwilling or unable to protect them from harm, which is also required to establish eligibility for protection under the Act. I.J. at 9. Similarly, the record also does not support that the respondents would be tortured in El Salvador with the acquiesce of the Salvadorian authorities, as required for protection under the regulations implementing the Convention Against Torture. Notably, the Immigration Judge considered evidence in record regarding the shortcomings of law enforcement in El Salvador, but correctly found that the evidence did not support a finding that Salvadorian officials would turn a blind eye to the respondents' torture. I.J. at 10-11.

After thoroughly considering all evidence in record, including the respondents' testimony, the Immigration Judge correctly found that the respondents did not establish eligibility for their requested relief. Thus, the Department respectfully moves the Board to dismiss the respondent's appeal in its entirety and affirm the decision of the Immigration Judge.

DATE: June 15, 2021 Respectfully submitted,

(b)(6); (b)(7)(C)

Assistant Chief Counsel

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

CASE NAME: (b)(6); (b)(7)(C)

CASE NO.: (b)(6); (b)(7)(C)

I hereby certify that, on June 16, 2021, I served a true copy of this **Department of Homeland Security's Brief on Appeal** and any attached pages by regular mail, postage pre-paid, addressed as follows:

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Not Detained

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

In the Matter of:

(b)(6); (b)(7)(C)

In Removal Proceedings

File No.: (b)(6); (b)(7)(C)

DEPARTMENT OF HOMELAND SECURITY'S BRIEF ON APPEAL

The Department of Homeland Security, U.S. Immigration and Customs Enforcement (Department or DHS), through the undersigned, respectfully moves the Board of Immigration Appeals (Board) to affirm the decision of the Immigration Judge by means of a brief order. 8 C.F.R. §§ 1003.1(e)(5). The Department also submits that none of the six circumstances warranting review by a three-member panel are present in this case. 8 C.F.R. §§ 1003.1(e)(6).

The Board reviews factual determinations of the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i); see Matter of R-S-H-, 23 I&N Dec. 625, 637 (BIA 2003) (discussing the "clearly erroneous" standard of review). The Board reviews questions of law, discretion, and judgment and all other issues in appeals from decisions of the Immigration Judge de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

Here, the Immigration Judge did not err in denying the respondent's applications for relief and protection from removal. The Immigration Judge correctly applied applicable law to the facts in this matter to reach the correct conclusion that the respondent had not met her burden of proof. The Department also respectfully requests the Board rule on the respondent's eligibility for post-conclusion voluntary departure. While the Immigration Judge's denial of this limited form of relief was not in error at the time of the decision, the Court of Appeals for the Tenth Circuit has since issued it precedential decision in *Banuelos-Galviz v. Barr*, 953 F.3d 1176, 1184 (10th Cir. 2020). Because this is a question of law, not fact, remand is not necessary and the Board may consider, as a matter of law, whether the Immigration Judge's denial of the respondent's application for post-conclusion voluntary departure should be affirmed. *See* 8 C.F.R. § 1003.1(d)(3).

DATE: May 3, 2021

Respectfully submitted,

(b)(6); (b)(7)(C)

Assistant Chief Counsel

(b)(6); (b)(7)(C)

CERTIFICATE OF SERVICE

CASE NAME: (b)(6); (b)(7)(C)

CASE NO.: (b)(6); (b)(7)(C)

I hereby certify that, on May 3, 2021, I served a true copy of this **Department of Homeland Security's Brief on Appeal** and any attached pages by electronic service on the respondent's counsel of record, (b)(6); (b)(7)(C) via the (b)(7)(E) as agreed to when opposing counsel served the Department via the Portal in this case.

(b)(6); (b)(7)(C)

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NONDETAINED

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

In the Matters of:

(b)(6); (b)(7)(C)

File No.: (b)(6); (b)(7)(C)

In removal proceedings.

DEPARTMENT OF HOMELAND SECURITY
MOTION FOR SUMMARY AFFIRMANCE

The Department of Homeland Security, U.S. Immigration and Customs Enforcement ("Department" or "DHS"), through the undersigned, respectfully moves the Board of Immigration Appeals ("Board") to summarily affirm the decision of the Immigration Judge issued in this matter on September 12, 2018, pursuant to 8 C.F.R. § 1003.1(e)(4)(i) (2016). In denying the respondents' applications for asylum, withholding of removal, and applications for relief under the Convention Against Torture, the Department submits that the Immigration Judge reached the correct decision. Errors, if any, are harmless or immaterial and the applicants' appellate arguments are not so substantial that the case warrants the issuance of a written opinion. 8 C.F.R. § 1003.1(e)(4)(i)(B). Alternatively, if the Board determines that summary affirmance of the Immigration Judge's decision is not appropriate, none of the six circumstances warranting review by a three-member panel are present in this case. Likewise, a brief order would suffice to affirm the Immigration Judge's decision. 8 C.F.R. §§ 1003.1(e)(5) and (6).

The Immigration Judge properly concluded that the respondents failed to establish eligibility for asylum, withholding, and relief under the Convention Against Torture because the respondents were not harmed on account of a protected ground. I.J. at 5-7. The Immigration Judge explained her findings that while the respondent did credibly testify to harm, the harm was due to a private act of violence. I.J. at 7. Moreover, the respondent did not establish that the government of Honduras was unable or unwilling to protect her. I.J. at 8. Likewise, the Immigration Judge correctly concluded that the record as a whole failed to establish that the respondent was eligible for asylum, withholding of removal, and protection under the Convention Against Torture. Because the Immigration Judge reached the correct decision, the Board should dismiss the appeal in its entirety.

WHEREFORE, the Department respectfully moves the Board to dismiss the appeal in its entirety.

Respectfully submitted on this 25th day of August 2020,

(b)(6); (b)(7)(C)

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CERTIFICATE OF SERVICE

CASE NAME: (b)(6); (b)(7)(C)

CASE NOs.: (b)(6); (b)(7)(C)

On August 25, 2020, I served true copies of **DEPARTMENT OF HOMELAND SECURITY MOTION FOR SUMMARY AFFIRMANCE** and any attached pages by placing them in the out-going mail bin for delivery to the respondent at the following address:

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ICE Chief Counsel's Office