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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

IN THE MATTER OF:	)	
[redacted]	)	IN REMOVAL PROCEEDINGS
RESPONDENTS	)	

DEPARTMENT OF HOMELAND SECURITY'S SUPPLEMENTAL BRIEF

In timely response to the Board of Immigration Appeals' ("BIA" or "Board") December 23, 2008, supplemental briefing schedule, as extended to permit filing on April 13, 2009, the Department of Homeland Security ("DHS" or "Department") respectfully submits the following brief for the Board's consideration.

I. Procedural History

The respondents, [redacted] (hereinafter the "female respondent") and her two children, [redacted], [redacted] and [redacted], [redacted] (hereinafter the "male respondents"), are natives and citizens of Mexico who came to the United States in 2004 without being admitted or paroled.[1] They each alleged past harm and a fear of future harm at the hands of one [redacted] ('[redacted]'), who is the father of the female respondent's children.[2] The female respondent applied 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, and protection under the regulations implementing the Convention Against Torture ("CAT").[3] The male respondents were included as derivative beneficiaries in the female respondent's asylum application, and also filed their own independent applications for section 241(b)(3) withholding and CAT protection. *See* I.J. at 2; Tr. at 35, 44-45, 47-48.[4] In a decision dated October 15, 2007, the Immigration Judge denied the respondents' applications for protection, but granted them voluntary departure. The respondents timely appealed from that decision to the

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1 [redacted]

2 In the interest of brevity and in order to comply with the Board's 30-page supplemental briefing limit, the Department will not set out a separate fact section, but will simply incorporate pertinent record facts into its analysis. The Department does not dispute the Immigration Judge's finding that the respondents were credible witnesses. I.J. at 11-12. In addition, except where otherwise specifically indicated, the Department will focus on the particular social group issue pertaining to the female respondent, as the claims of the male respondents are generally dependent on that of their mother.

3 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 (codified at, *inter alia*, 8 C.F.R. §§ 1208.16(c) – .18).

4 All of the respondents filed their applications for protection on or after May 11, 2005. *See* Exhs. 2, 3A, 3B. Consequently, they are governed by the amendments to the INA brought about by the passage of the REAL ID Act of 2005, Div. B of Pub. L. No. 109-13, 119 Stat. 302 ("REAL ID Act"). *See Matter of J-Y-C-*, 24 I&N Dec. 260, 262 (BIA 2007).

Board. Pursuant to the Board's initial appellate briefing schedule, the parties filed briefs in early 2008. On December 23, 2008, the Board requested supplemental briefing from the parties.

II. Supplemental Briefing Notice And Pertinent Issue History

The Board specifically has requested supplemental briefing in this matter "in view of" the Attorney General's recent decision in *Matter of R-A-*, 24 I&N Dec. 629 (A.G. 2008), as both cases involve "asylum claims based on domestic violence." BIA Supplemental Briefing Notice (Dec. 23, 2008). The Board specifically requested that the parties address the following issue in light of pertinent case law developments since 2001: "Whether the respondents are members of a particular social group within the meaning of the Immigration and Nationality Act, and can otherwise establish eligibility for asylum."

As the Board is aware, its only precedent decision to analyze this type of claim was *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999), *vacated,* 22 I&N Dec. 906 (A.G. 2001), *remanded*, 23 I&N Dec. 694 (A.G. 2005), *remanded,* 24 I&N Dec. 629 (A.G. 2008). Following the Board's original 1999 decision in *Matter of R-A-*, the Acting Commissioner of the former Immigration and Naturalization Service ("INS") referred the decision to the Attorney General for review. In 2001, Attorney General Reno vacated the Board's decision and directed the Board on remand to stay reconsideration of the matter pending the publication in final form of the INS proposed rule *Asylum and Withholding Definitions*, 65 Fed. Reg. 76,588 (Dec. 7, 2000). In 2003, Attorney General Ashcroft referred *Matter of R-A-* back to himself for review and provided an opportunity for additional briefing. In response, the Department filed a brief positing a number of

alternative positions, including that a cognizable particular social group in the case could be defined as "married women in Guatemala who are unable to leave the relationship." *See* 2004 DHS Brief at 26, *available at* http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf (last visited Apr. 13, 2009). However, Attorney General Ashcroft ultimately remanded *Matter of R-A-* back to the Board in 2005 and directed it to reconsider its decision once the proposed rule was finalized. In 2008, in the absence of a final rule, Attorney General Mukasey referred *Matter of R-A-* back to himself for review, lifted the stay previously imposed on the Board, and remanded the matter for reconsideration of the issues presented with respect to asylum claims based on domestic violence. In this regard, Attorney General Mukasey emphasized that since 2001 "both the Board and courts of appeals have issued numerous decisions" which may be relevant to the questions presented. *See Matter of R-A-*, 24 I&N Dec. at 630.

As requested by the Board, the instant supplemental brief represents the Department's current position as to whether victims of domestic violence, in circumstances like those faced by the respondents, are members of a particular social group within the meaning of the Act, and can otherwise establish eligibility for asylum. We note that the application of the provisions for asylum and withholding of removal in the domestic violence setting raises difficult issues and presents significant challenges, as reflected in the delay of over nine years in producing either regulations[5] or an authoritative administrative precedent governing the issues first addressed by the Board in its vacated decision in *Matter of R-A-*, despite direct involvement by a series of Attorneys General. Accordingly, the Department in this brief departs from normal

[5] The Department has not abandoned the effort to produce regulations that address the issues covered by the December 7, 2000, notice of proposed rulemaking; its new leadership is considering the best way forward in view of administrative and case law developments during the intervening years.

practice and does not focus only on critiquing the "particular social group" formulations advanced by the respondents, although we believe them to be flawed in certain respects. Although ordinarily a respondent is solely responsible for defining the contours of his or her asylum claim, some uncertainty in that endeavor in domestic violence cases has not been surprising, given the long-unsettled state of U.S. law as it applies to such claims. Therefore, in response to the Board's specific request for supplemental briefing, and in order to contribute to a process leading to the creation of better guidance to both adjudicators and litigants, the Department will offer here alternative formulations of "particular social group" that could, in appropriate cases, qualify aliens for asylum or withholding of removal.[6] These are formulations that might well be applicable to the facts of this specific case, but the Department recommends a remand for additional pertinent factfinding, once the Board has issued its ruling and clarified the governing doctrine.

III. Discussion

A. Analysis of the Respondents' Particular Social Groups

1. Summary of the Department's Position

Before the Immigration Court, the female respondent's particular social group was articulated as "Mexican women in an abusive domestic relationship who are unable to leave." I.J. at 15, Tr. at 59. In much the same vein, the male respondents' particular social group was articulated as "children of women in abusive relationships in Mexico

[6] For the purposes of whether the respondents can establish membership in a particular social group and a nexus between the group and the harm suffered and feared, this supplemental brief supersedes the Department's "Reply Brief in Support of the Immigration Judge's Decision," filed April 1, 2008. As discussed below in Section III.C., however, the Department reasserts its prior arguments with respect to collateral issues that do not relate directly to the particular social group analysis, but that do bear on whether the respondents have met all the requirements for the protection they seek, such as satisfaction of the one-year filing requirement for asylum.

who are unable to leave." I.J. at 16; Supplemental Brief in Support of Respondents [redacted] and [redacted] Applications for Withholding of Removal at 6 (Jan. 3, 2007).

As will be discussed in greater detail below, the Department avers that the respondents have failed to establish their eligibility for asylum or withholding of removal based on their submissions to date. Important decisions issued by the Board and the circuit courts since 2001 have held that a particular social group cannot be significantly defined by the persecution suffered or feared. Guidelines issued by the United Nations High Commissioner for Refugees (UNHCR) are in agreement. To allow such circularity in defining a particular social group – individuals are targeted for persecution because they belong to a group of individuals who are targeted for persecution – would not be true to the refugee definition in U.S. law and the treaties on which it is based: the refugee definition recognizes not all persecution, but only persecution based on one or more of five specified grounds.

The respondents' claimed particular social groups – centrally defined by the existence of the abuse they fear – are impermissibly circular. There may be other closely related conceptualizations, however, that would not suffer from this flaw and could possibly fit the facts of cases of the general type presented here. As indicated, the Department recommends remand to consider whether such an alternative would be appropriate in this case. If so, the Immigration Judge should also consider closely whether the claim should still be denied because of other relevant factors, such as the availability of sufficient protection elsewhere within the claimant's home country.

2. Particular Social Group In General – Seminal Case Law

Of the five protected grounds, "particular social group" is perhaps the least well-defined and understood. As observed by then-Judge Samuel Alito in *Fatin v. INS*, 12 F.3d 1233, 1238-39 (3d Cir. 1993) (internal quotations and citations omitted): "Both courts and commentators have struggled to define 'particular social group.' Read in its broadest literal sense, the phrase is almost completely open-ended. Virtually any set including more than one person could be described as a 'particular social group.' Thus, the statutory language standing alone is not very instructive . . . Nor is there any clear evidence of legislative intent." *See also* United Nations High Commissioner for Refugees (UNHCR), Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (hereinafter UNHCR Guidelines), ¶ I(2), U.N. Doc. HCR/GIP/02/02 (May 7, 2002) (noting that particular social group "category cannot be interpreted as a 'catch all' that applies to all persons fleeing persecution"), *available at http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=3d58de2da.*

The seminal decision interpreting the term "particular social group" remains *Matter of Acosta*, 19 I&N Dec. 211, 232 (BIA 1985), *modified*, *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987), in which the Board stated that it deems the phrase "'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic . . . . The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that

the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *See Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1197 (11th Cir. 2006) ("*Acosta* strikes an acceptable balance between (1) rendering 'particular social group' a catch-all for all groups who might claim persecution, which would render the other four categories meaningless, and (2) rendering 'particular social group' a nullity by making its requirements too stringent or too specific."), *cert. denied sub nom. Castillo-Arias v. Gonzales*, 127 S. Ct. 977 (2007).[7]

Subsequent to *Acosta*, the Board has identified two additional important considerations applicable to particular social group claims. In *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), *aff'd*, *Castillo-Arias*, *supra*, the Board clarified *Matter of Acosta* by holding that not all groups sharing an "immutable or fundamental characteristic" are cognizable as particular social groups. 23 I&N Dec. at 958. In addition to its "immutable or fundamental characteristic" approach, observed the Board, its prior cases had also "considered the recognizability, i.e., the social visibility, of the group in question. Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups." 23 I&N Dec. at 959. Thus, the Board rejected a particular social group composed of confidential informants, noting: "When considering the visibility of groups of

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[7] Applying *Acosta*, the Board has found a number of "particular social groups" to be cognizable for asylum purposes: Filipinos of mixed Filipino-Chinese ancestry, *see Matter of V-T-S-*, 21 I&N Dec. 792 (BIA 1997), young women of the Tchamba-Kunsuntu tribe of northern Togo who had not undergone female genital mutilation (FGM) as practiced by that tribe and who opposed the practice, *see Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), members of the Marehan subclan of Somalia who share ties of kinship and linguistic commonalities, *see Matter of H-*, 21 I&N Dec. 337 (BIA 1996), persons identified as homosexuals by the Cuban Government, *see Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990), and former members of the national police of El Salvador, *see Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988).

confidential informants, the very nature of the conduct at issue is such that it is generally out of the public view. In the normal course of events, an informant against the Cali cartel intends to remain unknown and undiscovered. Recognizability or visibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members." 23 I&N Dec. at 960. *Compare Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) (finding, *inter alia*, that the group Cameroonian widows satisfies the social visibility requirement, citing to background authority describing the rituals and societal treatment associated with such individuals).

Building upon these concepts of "immutability" and "visibility," in *Matter of S-E-G-*, 24 I&N Dec. 579, 584 (BIA 2008), the Board explained that particular social groups also, necessarily, have "particularity." The "essence" of particularity, reasoned the Board, 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." While the proposed group's size may be an important factor in determining its recognizability, "the key question is whether the proposed description is sufficiently particular, or is too amorphous . . . to create a benchmark for determining group membership." 24 I&N Dec. at 584 (internal quotations and citations omitted). For example, the Board found that a proposed group comprised of male children who lack stable families and meaningful protection, who are from middle and low income classes, who live in the territories controlled by gangs, and who refuse recruitment, was premised on characteristics that "remain amorphous because people's ideas of what those terms mean can vary." 24 I&N Dec. at 585 (internal quotations and citations omitted).

Similarly, the Board found that a proposed group that included "family members" of Salvadoran youth who have been subjected to gang recruitment and who have rejected or resisted gang membership "also is too amorphous" because "[t]he proposed group of 'family members'...could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others." 24 I&N Dec. at 585.

3. The Female Respondent Has Posited An Impermissibly "Circular" Particular Social Group

In elucidating these basic requirements, both the Board and the circuit courts since 2001 have emphasized that a particular social group cannot be significantly defined by the persecution suffered or feared. To do otherwise would sanction an illogical, circular "nexus" construct, i.e., individuals are targeted for persecution because they belong to a group of individuals who are targeted for persecution. *See, e.g., Lukwago v Ashcroft*, 329 F3d 157, 171-72 (3d Cir 2003); *Escobar v. Gonzales*, 417 F.3d 363, 367 (3d Cir. 2005); *Rreshpja v. Gonzales*, 420 F.3d 551, 555 (6th Cir. 2005); *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007); UNHCR Guidelines at ¶ II(B)(11) (defining particular social group to include, *inter alia*, "a group of persons who share a common characteristic *other than their risk of being persecuted*") (emphasis added); *Islam v. Secretary of State for the Home Department, and Regina v. Immigration Appeal Tribunal, ex parte Shah* [1999] 2 A.C. 629, 640 (House of Lords) (Lord Steyn, noting that "relying on persecution to prove the existence of the group would involve circular reasoning"). The female respondent's particular social group ultimately set forth before the Immigration Court suffers from this fatal flaw: "Mexican women in an *abusive* domestic relationship who are unable to leave." I.J. at 15 (emphasis added). That is, the

central common characteristic is the fact or risk of the treatment that also constitutes the claimed persecution.[8]

B. The Department's Alternative Particular Social Group Formulations

Although DHS believes that the particular social group formulations advanced by the respondents below fail under governing legal principles, it is possible that they or other applicants who have experienced domestic violence could qualify for asylum or withholding of removal based on alternative particular social group formulations. Below, the Department proposes two such formulations which outline a framework under which victims of domestic violence might be able to advance cognizable asylum claims.[9] In the normal course, we acknowledge, particular social group formulations not raised below in the Immigration Court should not generally be entertained by the Board on appeal. *See Matter of J-Y-C-*, 24 I&N Dec. 260, 261 n.1 (BIA 2007) ("not appropriate" for BIA to review asylum claim not raised below). Where significant legal developments intervene, however, remand may be an appropriate mechanism to allow for full development of an applicant's eligibility for asylum or withholding on alternative theories. *Cf. Matter of R-A-*, 24 I&N Dec. 629, 630-31 (A.G. 2008) (observing that "both the Board and courts of appeals have issued numerous decisions relating to various aspects of asylum law under the existing statutory and regulatory provisions" and that, "[g]iven the passage of time,

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[8] In addition to this problem of circularity, the female respondent's asserted particular social group may be deficient under post-2001 case law because it lacks "particularity." As noted, the female respondent's particular social group is "Mexican women in an *abusive* domestic relationship who are unable to leave." I.J. at 15 (emphasis added). The female respondent has not shown that there exists in Mexican society a sufficient general consensus as to what constitutes an "abusive" domestic relationship, a term which is subjective and thus amorphous. *See Webster's Third New International Dictionary* 8 (2002) (unabridged) (meanings of the term "abusive" include "characterized by wrong or improper use or action," "employing harsh insulting language," and "physically injurious").

[9] These suggestions do not necessarily exhaust the range of possible particular social groups in domestic violence cases. As the Board has emphasized in *Matter of Acosta*, 19 I&N Dec. at 233, "[t]he particular kind of group characteristic that will qualify...remains to be determined on a case-by-case basis."

the Board may choose to . . . *remand cases to Immigration Judges for further factual development*") (emphasis added). Accordingly, if the Board agrees that either or both of the formulations posited below might serve as a cognizable basis for asylum or withholding of removal on particular social group grounds, the Department favors remand to the Immigration Judge for corresponding development of the record.

For the reasons set out above, the social group defined by the Immigration Judge in this case does not qualify as a particular social group. Nevertheless, DHS accepts that in some cases, a victim of domestic violence may be a member of a cognizable particular social group and may be able to show that her abuse was or would be persecution on account of such membership. This does not mean, however, that every victim of domestic violence would be eligible for asylum. As with any asylum claim, the full range of generally applicable requirements for asylum must be satisfied. *See Matter of Acosta*, 19 I&N Dec. at 219 (identifying the "separate elements that must be satisfied" for an applicant to meet the refugee definition and establish asylum eligibility); *cf. Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc) (characterizing an asylum seeker's evidentiary burden on appeal as a "heavy one"). For example, the harm feared must be serious enough to constitute persecution, and the fear of future harm must be well-founded, *see generally INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (discussing and clarifying well-founded fear standard). Asylum may be denied where the applicant has the reasonable option of avoiding abuse by relocating within the home country. *See, e.g., Cardenas v. INS*, 294 F.3d 1062, 1066 (9th Cir. 2002); 8 C.F.R. §§ 208.13(b)(1)(i)(B), (b)(2)(ii) and (b)(3). Further, as in any asylum case in which the persecutor is not the state itself, the applicant would have to show that the state is unwilling or unable to

protect her. *See Llana-Castellon v. INS*, 16 F.3d 1093, 1097-98 (10th Cir. 1994); *Navas v. INS*, 217 F.3d 646, 655-56 (9th Cir. 2000). The latter two considerations are likely to be of particular significance in domestic violence asylum cases. To the extent that combined private and public efforts provide reasonable possibilities for protection within the territory of the asylum applicant's home state, even if not in the immediate town or region where the respondent had been living, applicants may appropriately be expected to avail themselves of such options rather than claiming asylum in a foreign country. *See Matter of Fuentes*, 19 I&N Dec. 658, 663 (BIA 1988) ("we do not find an asylum claim based on nongovernmental action adequately established where the evidence is directed to so local an area of his country of nationality"); *Quintanilla-Ticas v. INS*, 783 F.2d 955, 957 (9th Cir. 1986) ("deportation . . . does not require petitioners to return to the area of the country where they formerly lived").[10]

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[10] To the extent that there may be concern that the availability of asylum to victims of domestic violence would result in an overwhelming number of applications, several factors should allay these concerns. Although domestic violence is a problem in a substantial number of countries worldwide, most victims of domestic violence abroad would not have the resources or ability to leave their situations and come to the United States. It is useful to consider the experience of Canada. Canada has recognized claims based on domestic violence since at least 1993. *See* Canadian Immigration and Refugee Board, *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution, available at* http://www.irb-cisr.gc.ca/Eng/media/bckinfo/Pages/back_women2.aspx (last visited Apr. 13, 2009). According to Canadian authorities, Canada has not experienced a surge of such cases. Canada received a total of 315 gender-related asylum claims in 1995 (including all other types of gender-related claims as well as those involving domestic violence), 270 such claims in 1996, 182 in 1997, 218 in 1998, and 175 in 1999. (To the Department's knowledge, the 1999 Canadian statistics are the most recent publicly available.)

In addition, U.S. Citizenship and Immigration Services (USCIS) has granted asylum to victims of domestic violence under the DHS interpretation advanced in the DHS brief submitted to the Attorney General in *Matter of R-A-* in 2004, *see supra* sec. II, and this has not resulted in any notable increase in claims. In fact, the overall number of asylum applications filed with USCIS has remained steady over the last five years:

FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
27,908	24,260	24,288	25,674	25,505

Source: USCIS Asylum Division

Whether or not the respondents are able to meet their burden of proof on all these issues requires remand to the fact finder for further development of the record. DHS believes, however, that, especially given the uneven development of the standards governing cases like this one, it is important to articulate how a social group in such cases might be defined. DHS suggests that the particular social group in asylum and withholding of removal claims based on domestic violence is best defined in light of the evidence about how the respondent's abuser and her society perceive her role within the domestic relationship. The evidence in this case at least raises the possibility that [redacted] believes that women should occupy a subordinate position within a domestic relationship and that, in his eyes, the female respondent remains in this subordinate position in the relationship even though she has physically separated from [redacted] The evidence further suggests that [redacted] believes that abuse of women within such a relationship can therefore be tolerated, and that social expectations in Mexico reinforce this view. A group defined in light of this evidence might be articulated as "Mexican women in domestic relationships who are unable to leave" or as "Mexican women who are viewed as property by virtue of their positions within a domestic relationship." DHS believes

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An additional indicator may be found in the U.S. statistics for credible fear determinations – a form of screening applied to persons in the expedited removal process who ask for asylum or express a fear of return to the country of nationality. Since 2000, USCIS has made positive credible fear determinations for aliens in expedited removal where there is a "significant possibility" that they can establish that the domestic violence suffered was on account of their membership in a particular social group consistent with the interpretation articulated here. Considering that the top nationalities encountered in the credible fear context are countries in close proximity to the United States and that a lower screening standard is applied to these cases (i.e., a standard far less demanding than the test applied to decide an asylum claim on the merits), it is notable that credible fear receipts have also remained steady over the last several years:

FY 2005	FY 2006	FY 2007	FY 2008
4,539	5,307	5,252	4,995

Source: USCIS Asylum Division

that groups understood in these ways, if adequately established in the record in any given case, would meet the requirements for a particular social group and that they may (depending on further inquiry to be accomplished on remand) both accurately identify the reason why [redacted] chose the female respondent as his victim and continued to mistreat her.

In assessing the existence of a particular social group, it is first appropriate to identify the specific characteristic that the persecutor targets in choosing his victim. Here, it seems clear that an integral part of the answer to this inquiry in this case hinges on the status the female respondent acquired when she entered into the domestic relationship with [redacted]. The evidence of record shows that [redacted] abused the female respondent because of his perception of the subordinate status she occupies within that domestic relationship. As noted in the Immigration Judge's decision, for example, "[r]espondent testified that [redacted] used to tell her that he could do anything he wanted to her because she belonged to him." I.J. at pp. 3-4. [redacted] belief that the female respondent cannot relieve herself of this status, even when she has physically separated from him, also reinforces his confidence that he may abuse her without interference or reprisal. Further, it is conceivably the case (though this issue merits further focused inquiry on remand) that social expectations in Mexico do little to disabuse [redacted] of his views in this regard, which would consequently bolster his belief that he has the right to abuse the female respondent. Such factors would work in concert to create the trait which accounts for [redacted] inclination to target her for abuse, whether that trait is interpreted as relating to her being perceived as property by virtue of her status in the domestic relationship, or as relating to her presence in a domestic relationship that she is

unable to leave.[11] As posited above, DHS believes that it may be possible to define a social group of individuals who share such a trait in either of these ways.

Either of these formulations may meet the requirements for a particular social group. As set out above, members of a particular social group must share a common immutable or fundamental trait, must be socially distinct or "visible," and must be defined with sufficient particularity to allow reliable determinations about who comes within the group definition.

DHS believes that there are circumstances in which an applicant's status within a domestic relationship is immutable, within the meaning of *Acosta,* for purposes of particular social group analysis. In a claim dealing with past persecution, this might be the case where economic, social, physical or other constraints made it impossible for the applicant to leave the relationship during the period when the persecution was inflicted. It could also be the case in a claim that involves a fear of future persecution on return to the home country if the abuser would not recognize a divorce or separation as ending the abuser's right to abuse the victim. In this case, for example, the female respondent testified about many instances of repeated abuse even after she had left [redacted] All asylum claims must be considered within the context of the social, political, and historical conditions of the country. In determining whether an applicant cannot change, or should not be expected to change, the shared characteristic, all relevant evidence

[11] It might also be possible in some cases for a victim of abuse to show that she is a member of a particular social group consisting of her nuclear family. U.S. jurisprudence has interpreted the Board's holding in *Matter of Acosta* as recognizing family as a particular social group. For instance, the First Circuit has held, "there can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family." *Gebremichael v. INS,* 10 F.3d at 28, 36 (1st Cir. 1993); *see also Iliev v. INS,* 127 F.3d 638, 642 (7th Cir. 1997); *Sanchez-Trujillo v. INS,* 801 F.2d 1571,1576 (9th Cir. 1986). This particular social group formulation, however, may not be directly apposite to this case, however, because [redacted] motivation in targeting the female respondent is not her membership in her family, but rather her status as the female partner in a domestic relationship.

should be considered including the applicant's individual circumstances and country conditions information about the applicant's society.

As explained *supra*, under governing precedents, a cognizable particular social group must reflect social perceptions or distinctions (i.e., be "visible"). DHS believes that, under the best understanding of this requirement applied to the facts of this case, the alternative social group formulations posited by DHS above could meet this requirement. Following the Board's clarification of applicable doctrine, the respondents should be given an opportunity to develop their claims, with their own articulation of the applicable social group and any necessary further factual inquiry. The female respondent testified about seeking help from the police multiple times. "She would show the police her bruises and injuries, but the police told her that her problems were private and that her life was not in danger." I.J. at 4. Respondent's son, [redacted] further testified that "his mother was never able to obtain help from the police." I.J. at 9. There is also country conditions evidence in the record relating to the social perception in Mexico of domestic violence. The Immigration Judge, for example, discussed reporting by the United Nations Special Rapporteur on Violence Against Women indicating that Mexican authorities have taken numerous steps to address the problem, but "police and prosecutors are reluctant to take action when they receive a domestic violence complaint." The Immigration Judge also discusses the Bureau of Democracy, Human Rights and Labor, U.S. Dep't of State, *Mexico Country Report on Human Rights Practices for Mexico – 2006* (Mar. 2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78898.htm, which notes that while there is law that "prohibits domestic violence[;] ... actual sentences were normally lenient" and that "seven states have not yet

criminalized domestic violence, and 15 states sanction family violence only when it is a repeated offence." I.J. at 9. This evidence may reflect a societal view, applicable at least in parts of Mexico, that the status of a woman in a domestic relationship places the woman into a segment of society that will not be accorded protection from harm inflicted by a domestic partner. In this light, the female respondent's status by virtue of her relationship to [redacted] could indeed be the kind of important characteristic that results in a significant social distinction being drawn in terms of who will receive protection from serious physical harm. Ultimately, however, the record evidence is inconclusive on this point, as the female respondent's experiences were limited to a small town in Mexico where, in fact, she was eventually able, on at least one occasion, to obtain state protection on a significant matter relating to the abusive relationship with [redacted] namely a court order affirming and enforcing her parental rights. Exh. 2-4, ¶¶ 36-37, 44-45. In short, the respondents may be able to demonstrate the requisite "social distinction" or "social perception" if this matter is remanded for the record to be supplemented in that regard, but this is a specific factual question that requires further inquiry.[12]

Finally, as also set out above, a particular social group must be defined with sufficient particularity that it clearly delineates who is in the group and accurately identifies the shared trait on account of which the applicant is targeted by the persecutor

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[12] That is not to say that disparate treatment of women in domestic relationships by the Mexican government would then necessarily compel the conclusion that the Mexican government is "unable or unwilling" to protect the respondents for purposes of the "state action" element of asylum adjudication, *see Arteaga v. INS*, 836 F.2d 1227, 1231 (9th Cir.1988). Rather, the fact that Mexican government action may deliberately vary based on whether mistreatment is inflicted on a stranger or in one's home supports the view that sufficient social distinction exists to support a cognizable particular social group premised on certain domestic relationships. Remanding this case to the Immigration Judge will also allow the respondents to present further evidence addressing the Immigration Judge's finding that non-marital relationships do not entail an inability to leave. On remand, respondents may also be able to provide additional evidence to demonstrate that respondent's non-marital status in the relationship does not defeat her membership in the Department's alternative particular social group formulations or her ability to show the required nexus to [redacted] abuse.

for harm. DHS believes that, subject to proof, the alternate particular social group formulations posited above satisfy "particularity." While it may require complex and subtle fact inquiries in each case to determine whether an applicant in fact possesses the traits advanced as defining these groups, the definitions are capable of application in a manner that allows the fact finder to determine with clarity whether an applicant is or is not a member of the group. We recognize that there may be concerns that the term "domestic relationship," which is integral to both of the group formulations DHS has posited, is "amorphous" such that the particularity requirement would not be satisfied. DHS believes, however, that it is possible to interpret the term in a manner that entails considerable particularity. For instance, under U.S. immigration law, a detailed framework exists for conceptualizing domestic relationships. Section 237(a)(2)(E)(I) of the Act defines "crime of domestic violence" to include offenses "against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs." DHS believes, for purposes of particular social group assessments, it would be appropriate to expect the term to have a similar level of specificity, albeit tailored to the unique situation of an asylum applicant's own society,[13] in order to satisfy the particularity requirement.

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[13] *Cf. Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007) (noting that "[w]hether a proposed group has a shared characteristic with the requisite 'social visibility' must be considered in the context of the country of concern..."); *Mezvrishvili v. U.S. Att'y Gen.*, 467 F.3d 1292, 1296 (11th Cir. 2006) (noting that one should not impose "western standards" in assessing a persecution claim).

DHS also recognizes that reference to a victim's inability to leave a domestic relationship as an element of the social group definition could also raise concerns about particularity. The words in the group definition do not themselves convey exactly how an applicant's ability to leave a relationship would be assessed. Nevertheless, DHS believes that, if the Board were to adopt such an approach, the process of applying the standard articulated in the group definition to the facts of individual cases would enable these assessments to be made with sufficient particularity.[14] Similar to the determinations made under the regulatory provisions that require fact finders to determine whether an applicant could avoid persecution by relocating to another part of the home country, DHS suggests that assessments of a victim's ability to leave a domestic relationship would involve case-by-case, fact-specific examinations of whether it would be reasonable to expect the victim to do so under all the circumstances. 8 CFR § 208.13(b)(1)((i)(B).

Further, as discussed above, DHS believes that such a group definition may well most accurately identify the reason for which a victim of domestic violence was chosen by the abuser as the target for harm. DHS recognizes that there can be serious debate

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[14] In this case, for example, there are some statements in the Immigration Judge's decision indicating that the female respondent may have been unable to leave the relationship in any real, enduring sense. She testified that she attempted to escape [redacted] when she was pregnant with her first son, but that [redacted] found her at the bus stop, hit her, and forced her back into the house. I.J. at 4. [redacted] when she was pregnant, [redacted] followed her and abused her. I.J. at 4. Respondent's testimony also indicates that she may have felt compelled to remain near her children and [redacted] in Mexico in order to protect them from his abuse, and that she consequently continued to be perceived by [redacted], the police, and the community as in a personal relationship to [redacted] that she could not reasonably leave when her children were at risk. *See* I.J. at 5-7. Even when respondent did physically leave the relationship temporarily, [redacted] apparently continued to believe she belonged to him and to tell her that "she 'shouldn't forget that he could do whatever he wanted' with her." I.J. at 6. On the other hand however, record evidence also suggests that [redacted] ultimately elected to abandon the female respondent, actually seeking to keep her from her children and out of his household. Exh. 2-4, ¶ 33. Thus, while the Department is not asserting that this evidence is necessarily conclusive as to respondent's inability to leave the relationship, the Department believes that remand is appropriate for development of further evidence on this issue.

about which aspects of the factual setting that create a victim's vulnerability to domestic violence should be included in the particular social group definition as opposed to being assessed in the context of other elements of the refugee definition. For example, a victim's inability to leave the domestic relationship could be analyzed in determining whether a fear of future abuse is well-founded. Inability to leave the relationship could also be relevant to the determination that the harm amounts to persecution. Certainly, if a victim is seriously harmed when she tries to leave a relationship, those facts would relate both to the persecution analysis and to the assessment of her ability to leave. Nevertheless, DHS posits that, in some cases, the persecutor's perception that his victim cannot leave the relationship can play a central role in that persecutor's choice of the domestic partner as his victim. In such cases, DHS believes that it may be appropriate to include this factor in the social group analysis.

C. Non-Particular Social Group Appellate Issues

As stated, the Department believes remand of this matter is appropriate, so that the respondents' claims can be considered under intervening case law and in light of the alternative particular social group formulations suggested above. But because the Board's supplemental briefing notice to the parties directed them to address the question of whether the respondents "can otherwise establish eligibility for asylum," the Department will comment briefly on additional issues unrelated to the particular social group aspects of their case.[15] Also, as noted above, the Department believes that the third and fourth factors addressed in this section are likely to be central issues in most domestic violence

[15] As noted, the Department's Reply Brief in Support of the Immigration Judge's Decision, filed April 1, 2008, addresses many of these collateral issues, and the Department reasserts its arguments on these issues. The following discussion is merely intended to supplement the Department's prior filing on these collateral issues, in light of Board's supplemental briefing notice.

asylum and withholding cases, namely: a careful determination whether the government of the country of origin is unwilling or unable to provide protection, and an assessment of the availability of a reasonable internal relocation alternative for the specific asylum applicants involved.

1. The Female Respondent Failed To Establish That She Suffered And/Or Will Be Persecuted In The Future On Account Of Her "Feminist" Political Opinion

The female respondent asserts that [redacted] also persecuted her on account of her "feminist" political opinion, including her "defiance of his domination." Exh. 2 (Form I-589, Part B, Question 1A). The Department avers, however, that the there is no record evidence to reflect that, even if [redacted] was aware of the female respondent's feminist views and opposition to dominance, his abuse was related to her opinions on this matter. Rather, it appears that he continued to abuse her regardless of what she said or did. The Department's position in this regard is consistent with the Supreme Court's reasoning in *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). There is no record evidence that the female respondent was politically active or made feminist / anti-male domination political statements. *See Matter of S-E-G-*, 24 I&N Dec. at 589. The Department's position in this regard is also consistent with the Board's long-standing approach that harm is not on account of political opinion when it is inflicted *regardless* of the victim's opinion rather than *because of* that opinion. *Matter of Chang*, 20 I&N Dec. 38 (BIA 1989), *superseded on other grounds*, *Matter of X-P-T-*, 21 I&N Dec. 634 (BIA 1996).

With respect to the male respondents, the Department notes that they did not raise the protected ground of political opinion in their withholding of removal application forms, but, rather, only mentioned particular social group as a basis for their claim. *See*

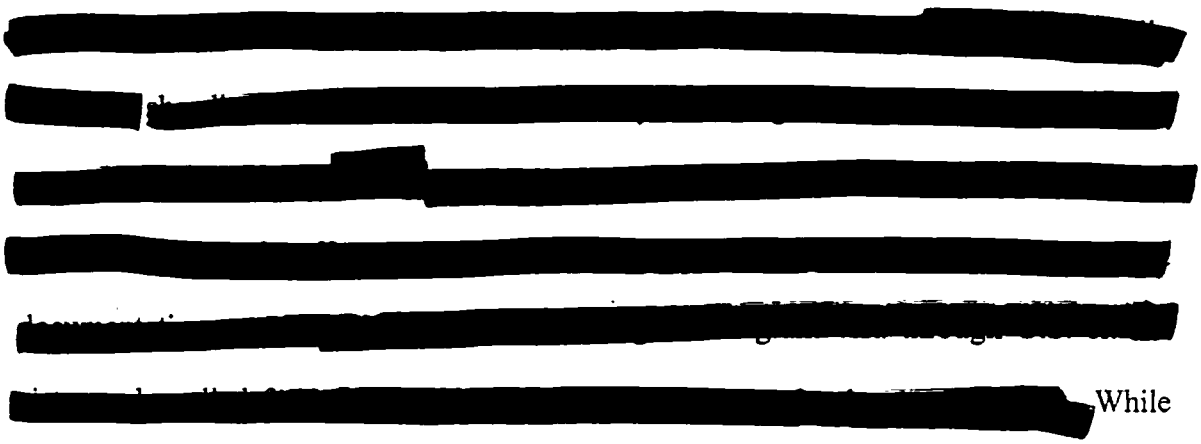
Exhs. 3A and 3B (Form I-589, Part B, Question 1). Further, in their initial brief to the Immigration Judge, the male respondents did not affirmatively raise the protected ground of political opinion. *See* Amended Brief In Support Of Respondents' Application For Asylum, Withholding Or Removal And Relief Under The Convention Against Torture at 34-35 (Sept. 12, 2006). Rather, the male respondents only affirmatively raised political opinion in a supplemental brief to the Immigration Judge in which their counsel argues: "By choosing to escape [redacted] control and fleeing to the United States with their mother . . . the boys implicitly expressed their political belief that they do not have to accept [redacted] abuse and control for the rest of their lives" and that, in the past, the male respondents had been abused because [redacted] "perceived their conduct as an expression of the political belief that they do not have to accept his control and abuse." *See* Supplemental Brief In Support Of Respondents [redacted] And [redacted] Application For Withholding Of Removal at 7-8 (Jan. 3, 2007). As noted by the Immigration Judge, however, their brief is "not evidence." Tr. at 75; *see also Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (noting that the arguments of counsel are not evidence). The male respondents never provided any testimony or sworn statements as to the political opinion basis of their withholding of removal claim. *See* Tr. at 235-47; *see generally Matter of Fefe*, 20 I&N Dec. 116, 118 (BIA 1989) (holding that, "[a]t a minimum . . . the regulations require that an applicant for asylum and withholding take the stand, be placed under oath, and be questioned as to whether the information in the written application is complete and correct."). In fact, only [redacted], provided specific testimony in support of his withholding of removal application, and simply noted that, "most of the time," [redacted] abused him

"because of my mother," Tr. at 239-40, and that sometimes [redacted] abused him for reasons unrelated to his mother, "[b]ecause I didn't do what he want me to do," Tr. at 246-47.

Consequently, the Board should refuse to consider this political opinion aspect of the male respondents' withholding of removal claims. Concomitantly, to the extent that the male respondents claim that [redacted] will be motivated to harm them not on the basis of their *own* political opinions, but, rather, "because he imputed their mother's political opinion to them," I.J. at 16; Respondents' Brief In Support Of Appeal Of Immigration Judge's Decision at 32 (Feb. 14, 2008), such a claim is deficient insofar as the foundational "non-imputed" political opinion claim of the female respondent is deficient.

2. The Female Respondent Failed To Establish That "Extraordinary Circumstances" Prevented Her From Filing Her Application For Asylum Within One Year Of Arrival

Like the Immigration Judge, I.J. at 12-13, the Department does not believe that the female respondent has established extraordinary circumstances to excuse the untimely filing of her asylum application. *See* INA § 208(a)(2)(A); 8 C.F.R. § 1208.4(a)(5). In taking this position, the Department does not seek to trivialize the severe abuse the female respondent suffered at the hands of [redacted] or the lasting impact that such abuse may have. Rather, the Department simply avers that, based upon the record evidence, the female respondent has not established by clear and convincing evidence that extraordinary circumstances prevented her from applying for asylum within one year of her arrival so as to gain protection from [redacted] In addition to proving a conscientious caregiver to her children, *see, e.g.*, Exh. 2-4, ¶¶ 50-51, 62-65 [redacted]



While suffering from Post Traumatic Stress Disorder (PTSD) could certainly constitute "extraordinary circumstances" excusing the untimely filing of an asylum application, it does not appear that the female respondent's untimely filing is "directly related," 8 C.F.R. § 1208.4(a)(5), to her PTSD. Indeed, the female respondent testified that, in spite of being "stressed out" and "depressed," Tr. at 153, she applied for asylum within months of learning about asylum in June 2005. *Id.* Thus, while the record evidence reflects that the female respondent faced challenges relating to her past abuse, she consistently overcame these challenges, including upon learning of the availability of asylum. It is clear, then, that the only thing keeping the female respondent from seeking asylum was her unfamiliarity with this form of immigration relief. However, because ignorance of legal requirements does not excuse noncompliance therewith, *see, e.g., Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384-85 (1947); *Antonio-Martinez v. INS*, 317 F.3d 1089, 1093 (9th Cir. 2003) (applying the general rule that "ignorance of the law is no excuse" to the immigration context); *Kay v. Ashcroft*, 387 F.3d 664, 671 (7th Cir. 2004) (noting that an alien who alleged PTSD and further claimed that ignorance of the law had led to his mistaken belief that providing the Immigration Court with a change of address form would change the venue of his removal proceedings, did not establish exceptional

circumstances justifying rescission of his in absentia removal order to permit him to pursue asylum), the respondents are not eligible for asylum. (Nonetheless, of course, the delay does not prevent eligibility for withholding of removal; hence the issues addressed above having to do with "particular social group," nexus, internal relocation alternatives, and the extent of effective state protection, all remain germane.)

3. The Respondents Have Not Provided Evidence Sufficient to Establish That The Mexican Government Is Unwilling Or Unable To Protect Them

The respondents did not convincingly establish that reporting [redacted] crimes and abuse was or would have been futile, or would have subjected her to further abuse. *See Ornelas-Chavez v. Gonzales*, 458 F.3d 1052, 1058 (9th Cir. 2006). For example, although the female respondent testified that the local police did not take effective action when she reported domestic abuse "a handful of times," Exh. 2-4, ¶ 24, these incidents were limited to one small town in Mexico. In addition, she claimed to have been kidnapped by [redacted] and held against her will, but never reported these serious crimes to the police. Furthermore, even though the female respondent's pleas for assistance were rebuffed by two judges, one of whom was corrupt, the record reflects that a Mexican court eventually saw fit to grant the female respondent custody of two of her children[16] as well as a protection order against [redacted] even though she apparently never discussed her abuse at the hands of [redacted] Exh. 2-4, ¶¶ 36-37, 44-45. Subsequently, a Mexican court, in a child support action, also awarded the female respondent use of a home owned by [redacted]. Tr. at 208; Exh. 2-4, ¶¶ 55-57.

[16] The female respondent stated that her oldest son, [redacted] "wanted to live with his father because [redacted] was showering him with toys and money." Exh. 2-4, ¶ 44-45.

Under these circumstances, there remains considerable doubt whether the female respondent has established that the Mexican authorities were unwilling or unable to protect her from [redacted] *See Castro-Perez v. Gonzales*, 409 F.3d 1069, 1072 (9th Cir. 2005) (finding that the Honduran government did not bear responsibility for rapes suffered by applicant because it is either unable or unwilling to control rape in that country, where she failed to report alleged persecution because she believed police would do nothing). No country, not even the United States, can provide complete protection to targets of violence at all times and in all cases. If the Board agrees that this case is appropriate for remand, the respondents could further develop the evidentiary record on this point.

4. <u>On the Current Record, the Evidence Suggests that the Respondents Could Avoid Future Harm By Relocating Within Mexico</u>

The asylum and withholding regulations explicitly provide that the ability to avoid persecution by relocating to another part of the home country will negate an asylum or withholding of removal claim when "under all the circumstances, it would be reasonable to expect the applicant" to do so. 8 C.F.R. §§ 1208.13(b)(1)(i)(B), 1208.16(b)(1)(B). The regulations list a variety of humanitarian factors, such as social and cultural constraints, age and health, and social and familial ties that should be taken into account in assessing the reasonableness of internal relocation. 8 C.F.R. §§ 1208.13(b)(3), 1208.16(b)(3).

On balance, the record suggests that it is reasonable to expect the respondents to relocate within Mexico to avoid future harm by [redacted] Although the female respondent noted that [redacted] curried favor with the authorities in his locality and that, in addition, he had two friends of influence, the [redacted]

[redacted] Exh. 2-4, ¶ 71, Tr. at 232, the willingness and ability of these individuals to assist [redacted] in tracking her down should she relocate within Mexico is entirely speculative. [redacted] apparent influence appeared to be limited to the locality of [redacted] and, as noted, any influence he had did not ultimately prevent Mexican courts from awarding the female respondent custody of two of their children, entering a *sua sponte* protective order against him, and awarding the female respondent the use of one of his homes. Mexico is a vast country composed of thirty-one states and a federal district. Exh. 6-1 (Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, *Mexico, Country Report on Human Rights Practices* – 2003 (Feb. 2004)), at 1. The female respondent testified that she is a [redacted] Tr. at 157. Further, she has family members in [redacted] who, despite threats from [redacted] apparently have not been harmed. Tr. at 166-67. While one of the respondents' witnesses, Dr. Flores, referenced "documented" cases where male abusers had "hunted down their wives after the women have left them" and testified that "there was no guarantee that [the female respondent] would be safe anywhere in Mexico," Tr. at 301, Dr. Flores's testimony contained no details on these "documented" cases, failed to specify whether these cases were isolated or widespread, and conceded the inability to "scientific[ally]" predict [redacted] behavior, Tr. at 309-10.

If the Board agrees that this case is appropriate for remand, the respondents and DHS could further develop the evidentiary record on this point as appropriate and the Immigration Judge could apply the appropriate standards and burden of proof to this issue. Clearly, the Immigration Judge's framework for analyzing this question would

depend upon the determinations made on remand regarding the respondent's claim of past persecution. If the Immigration Judge were to determine that the respondent has established past persecution on account of a protected ground, then she would be accorded a presumption of a well-founded fear of future persecution on the basis of the original claim and it would be DHS's burden to rebut this presumption with evidence that she could reasonably be expected to avoid future persecution by relocating within Mexico (or other proof). 8 C.F.R. § 208.13(b)(1).

IV. Conclusion

Accordingly, as discussed above and in response to the Board's Supplemental Briefing Notice, the Department respectfully avers that the respondents have failed to articulate a cognizable particular social group in the first instance. However, owing to the unique complexities in this area of law, the Department contends that remand is warranted so that the respondents may refine their claims and evidentiary presentations in light of the alternative particular social group formulations described above.

Respectfully submitted on April 13, 2009,[17]

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[17] The Department also respectfully requests that any decision in this matter be directed, in the first instance, to the local U.S. Immigration and Customs Enforcement (ICE) Office of Chief Counsel in San Francisco, with copies to the DHS Principal Deputy General Counsel and the ICE Chief Appellate Counsel.

CERTIFICATE OF SERVICE	
Respondent's Counsel: [redacted] Kirkland & Ellis LLP 555 California Street, Suite 2700 San Francisco, CA 94104	I George R. Martin certify under penalty of perjury that a copy of this brief was served by Federal Express, on the opposing party's counsel, named at left, on the date indicated below. _____ Date: 4/13/09 Department of Homeland Security