

---

**BEFORE THE  
UNITED STATES DEPARTMENT OF JUSTICE  
ATTORNEY GENERAL JANET RENO**

---

**BRIEF ON BEHALF OF RODI ALVARADO PEÑA  
IN SUPPORT OF  
REQUEST FOR CERTIFICATION AND REVERSAL  
OF THE  
DECISION OF THE BOARD OF IMMIGRATION APPEALS  
IN RE R-A- (INTERIM DECISION #3403)**

---

Jane B. Kroesche, Esq.  
Gregory N. Mandel, Esq.  
Four Embarcadero Center, Suite 3800  
San Francisco, CA 94111  
(415) 984-6400

Karen Musalo  
Resident Scholar  
University of California  
Hastings College of Law  
200 McAllister Street  
San Francisco, CA 94102  
(415) 565-4720

Attorneys for Petitioner  
Rodi Alvarado Peña

## TABLE OF CONTENTS

I. INTRODUCTION .....	1
II. STATEMENT OF FACTS .....	3
III. PROCEDURAL HISTORY .....	9
IV. ARGUMENT .....	10
A. IT IS UNDISPUTED THAT MS. ALVARADO HAS BEEN PERSECUTED AND HAS A WELL-FOUNDED FEAR OF FUTURE PERSECUTION .....	10
1. Ms. Alvarado Has Suffered Past Persecution .....	11
2. Ms. Alvarado Has Established A Well-Founded Fear Of Future Persecution .....	11
B. MS. ALVARADO WAS PERSECUTED ON ACCOUNT OF HER MEMBERSHIP IN A PARTICULAR SOCIAL GROUP ...	13
1. Prior Board Precedent Demonstrates That Ms. Alvarado Is A Member Of A Cognizable And Particular Social Group .....	13
2. Federal Court Precedent Demonstrates That Ms. Alvarado Is A Member Of A Cognizable And Particular Social Group .....	21
3. Ms. Alvarado Was Persecuted On Account Of Her Membership In A Particular Social Group .....	24
C. MS. ALVARADO WAS PERSECUTED ON ACCOUNT OF HER ACTUAL AND IMPUTED POLITICAL OPINION .....	29
1. Ms. Alvarado Held And Expressed A Political Opinion Against Domestic Violence In Guatemala .....	30

2.	Ms. Alvarado Was Persecuted On Account of Her Political Opinion .....	35
V.	CONCLUSION .....	37

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<u>Abankwah v. INS</u> , 185 F.3d 18 (2d Cir. 1999) .....	21, 37
<u>Acewicz v. INS</u> , 984 F.2d 1056 (9th Cir. 1993) .....	11
<u>In re Acosta</u> , 19 I. & N. Dec. 211, 1985 LEXIS 2 (B.I.A. June 13, 1985).....	2, 11, 13, 14
<u>Ananeh-Firempong v. INS</u> , 766 F.2d 621 (1st Cir. 1985) .....	21
<u>Angoucheva v. INS</u> , 106 F.3d 781 (7th Cir. 1997) .....	35
<u>Aruta v. INS</u> , 80 F.3d 1395 (9th Cir. 1996) .....	23
<u>Canada (Attorney General) v. Ward</u> [1993] 2 S.C.R. 689, 739 .....	14
<u>Desir v. Ilchert</u> , 840 F.2d 723 (9th Cir. 1988) .....	30, 31
<u>Fatin v. INS</u> , 12 F.3d 1233 (3d Cir. 1993) .....	15, 21, 34
<u>Fisher</u> , 79 F.3d 955 (9th Cir. 1996) .....	22
<u>In re Fuentes</u> , 19 I. & N. Dec. 658, 1988 BIA LEXIS 24 (B.I.A. Apr. 18, 1988) .....	14, 17
<u>In re H-</u> , Interim Decision No. 3276, 1996 BIA LEXIS 31 (B.I.A. May 30, 1996) .....	12, 15, 18
<u>INS v. Elias-Zacarias</u> , 502 U.S. 478 (1992) .....	24, 33
<u>Islam (A.P.) v. Secretary of State for the Home Dep't, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)</u> , 2 All ER 545 (H.L. 1999) .....	14
<u>In re Kasinga</u> , Interim Decision No. 3278, 1996 BIA LEXIS 15 (B.I.A. June 13, 1996) .....	2, 8

<u>Lazo-Majano v. INS</u> , 813 F.2d 1432 (9th Cir. 1987) .....	32, 33
<u>Lwin v. INS</u> , 144 F.3d 505 (7th Cir. 1998) .....	21
<u>Montoya-Ulloa v. INS</u> , 79 F.3d 930 (9th Cir. 1996) .....	11
<u>Osorio v. INS</u> , 18 F.3d 1017 (2d Cir. 1994) .....	25, 30
<u>Peña v. INS</u> , No. 99-70823 (9th Cir. Aug. 13, 1999) .....	10
<u>Peña v. INS</u> , No. 99-70823 (9th Cir. Sept. 30, 1999) .....	10
<u>In re R-A-</u> , Interim Decision No. 3403, 1999 BIA LEXIS 31 (B.I.A. June 11, 1999) .....	1, 38
<u>Rodriguez-Roman v. INS</u> , 98 F.3d 416 (9th Cir. 1996) .....	25
<u>In re S-P-</u> , Interim Decision No. 3287, 1996 BIA LEXIS 25 (B.I.A. June 18, 1996) .....	25
<u>Safaie v. INS</u> , 25 F.3d 636 (8th Cir. 1994) .....	15, 17
<u>Sanchez-Trujillo v. INS</u> , 801 F.2d 1571 (9th Cir. 1986) .....	22
<u>Singh v. INS</u> , 94 F.3d 1353 (9th Cir. 1996) .....	11
<u>Singh v. Ilchert</u> , 63 F.3d 1501 (9th Cir. 1995) .....	25
<u>Tarubac v. INS</u> , 182 F.3d 1114 (9th Cir. 1999) .....	25
<u>In re Toboso-Alfonso</u> , 20 I. & N. Dec. 819, 1990 BIA LEXIS 23 (B.I.A. Mar. 12, 1990) .....	14, 17
<u>In re V-T-S-</u> , Interim Decision No. 3308, 1997 BIA LEXIS 9 (B.I.A. Mar. 6, 1997) .....	15
<u>Velarde v. INS</u> , 140 F.3d 1305 (9th Cir. 1998) .....	22

<u>STATUTES</u>	<u>PAGE(S)</u>
8 C.F.R. 208.13(b)(1)(i) (1999) .....	12
8 U.S.C. § 1101(a)(42)(A) (1999) .....	10
8 U.S.C. § 1158(a) (1999) .....	9
<u>OTHER AUTHORITIES</u>	<u>PAGE(S)</u>
U.N. Doc. A/Res/48/104 (1994) .....	34
Phyllis Coven, <u>Considerations for Asylum Officers Adjudicating Claims from Women</u> (May 26, 1995) .....	3
Rhonda Copelon, <u>Recognizing the Egregious in the Everyday: Domestic Violence as Torture</u> , 25 Colum. Hum. Rts. L. Rev. 291 (1994) .....	27
Katherine M. Culliton, <u>Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas</u> , 34 Harv. Int'l L.J. 507 (1993) .....	36
James C. Hathaway, <u>The Law of Refugee Status</u> (1991) .....	14
Dorothy Q. Tomas & Michele E. Beasley, <u>Domestic Violence as a Human Rights Issue</u> , 58 Alb. L. Rev. 1119 (1995) .....	26

## I. INTRODUCTION

On June 11, 1999, the Board of Immigration Appeals ("Board") issued a decision that stunned the legal and immigration rights communities. In In re R-A-, Interim Decision No. 3403, 1999 BIA LEXIS 31 (B.I.A. June 11, 1999), the Board reversed an Immigration Judge's grant of asylum to Rodi Alvarado Peña, the victim of brutal, governmentally-condoned spousal abuse over a ten-year period in her home country of Guatemala.

The Immigration Judge found, and it is undisputed that, Ms. Alvarado suffered horrific persecution, that she has a well-founded fear of future persecution, and that her government failed, indeed refused, to protect or help her. The Immigration Judge further found, following careful analysis of Board and federal court precedent, that Ms. Alvarado was persecuted on account of her membership in a particular social group and on account of her political opinion.

While the Board endorsed the Immigration Judge's findings on persecution and the government's failure to act, it reversed the Immigration Judge's grant of asylum, holding that Ms. Alvarado does not belong to an identifiable social group and that her protestations against the abuse, both to her husband and to her government, do not constitute political opinion. Moreover, the Board found that Ms. Alvarado's husband did not persecute her on account of either her social group or her actual or imputed political opinion. In doing so, the Board ignored its own

precedent, federal court decisions, and growing international consensus which recognizes women who face gender-related persecution as refugees.

The Board's decision is devastating, not only to Ms. Alvarado, but also as an express refusal to abide by the Board's own precedent and its failure to recognize the unique and terrible realities faced by victims of domestic violence in other countries. Prior to its decision in In re R-A-, the Board had long held that social groups are to be defined by "immutable" and "fundamental" characteristics, such as gender, and that women who suffer gender-based persecution may be considered members of a particular social group entitled to protection. See In re Acosta, 19 I. & N. Dec. 211, 233-34, 1985 LEXIS 2, \*53-55 (B.I.A. June 13, 1985); In re Kasinga, Interim Decision No. 3278, 1996 BIA LEXIS 15, \*21-22 (B.I.A. June 13, 1996). The Board's decision in In re R-A- contradicts this precedent.

Since the Board's decision in In re R-A-, numerous federal legislators, national and international organizations, legal scholars and experts in the fields of immigration and asylum law, and other individuals have petitioned the Attorney General to review and reverse the Board's decision. The appeals to the Attorney General have been based predominantly on the fact that the Board's decision is inconsistent with the controlling law, and with the Immigration and Naturalization Service's ("INS") own policy.<sup>1</sup> Most importantly, the objections criticize the fact that

---

<sup>1</sup> The INS has issued a significant policy in support of considering gender-  
(continued...)



the Board's decision rewrites existing Board and judicial precedent, and effectively forecloses asylum to a distinct and deserving class of claimants.

Because the Board's decision is factually and legally erroneous, we respectfully request that the Attorney General certify and reverse the Board's decision.<sup>2</sup>

## II. STATEMENT OF FACTS

Ms. Alvarado was born on August 8, 1967, and raised in the town of Jutiapa, Pasaco province, Guatemala. (Record at 187, 217, 692.)<sup>3</sup> On April 15, 1984, at the age of 16, she was married to Francisco Osorio. (Record at 217.) Their daughter, Damaris, was born in 1987. (Id. at 187, 219, 692.) Their son, Carlos, was born in 1992. (Id. at 187, 219, 692.)

Ms. Alvarado's husband was a soldier in the Guatemalan army. (Id. at 187, 219-20, 692.) Early in their marriage, Ms. Alvarado's husband would boast of the

---

<sup>1</sup>(...continued)

based asylum claims. Considerations for Asylum Officers Adjudicating Claims from Women, Phyllis Coven, Dept. of Justice, Office of Int'l Affairs, to All INS Asylum Office/rs and HQASM Coordinators, at 12-15 (May 26, 1995) (Record at 649-52) (hereinafter "INS Gender Considerations").

<sup>2</sup> The Board's decision in In re R-A- has been appealed to the Court of Appeals for the Ninth Circuit (Case No. 99-70823, filed July 9, 1999); however, a reversal in that Circuit will leave the Board's decision in effect in the remainder of the United States, with unfortunate results for both individual asylum seekers and national jurisprudence.

<sup>3</sup> Citations to "Record" are to the Certified Administrative Record, as filed by the Office of Immigration Litigation with the Ninth Circuit Court of Appeals on August 17, 1999, in the appeal of this case to that court (Case No. 99-70823).

power and authority of the military in Guatemala, including the power to kill people at will and to carry weapons at all times. (Id. at 187.) Her husband would tell her of the tremendous force of the military, and he would brag about his brutal exploits and the ability to get anything he wanted at any time solely by virtue of being in the army. (Id. at 187, 692.) He proudly described in detail how the army killed people, including infants and the elderly, and he threatened to do the same to her. (Id. at 187, 221-24, 692-93.) As a result of her husband's stories and his threats against her, Ms. Alvarado was terrified of her husband from the beginning of their marriage. (Id. at 187, 693.)

Ms. Alvarado's husband beat Ms. Alvarado often, frequently inflicting serious injury. (Id. at 187.) He dislocated her jaw, nearly pushed out her eye, tried to cut off her hands with his machete, kicked her in the abdomen and vagina, and tried to force her to abort when she was pregnant with her second child by severely kicking her in the spine. (Id. at 4, 187, 191-92, 694.) He would drag her by her hair, use her head to break windows and mirrors, pistol-whip her, whip her with electrical cords, and threaten her with knives. (Id. at 5, 187, 224, 227-29, 694, 697-98.) A number of the beatings occurred in public; however, no one, including the police, assisted Ms. Alvarado or interfered to stem the beatings. (Id. at 187, 241-42, 245.) Due to shame and prevailing Guatemalan cultural mores that require a wife to submit to her husband, Ms. Alvarado sought medical or other assistance only when absolutely necessary, such as when she feared broken bones or damage to her internal organs.

(Id. at 187, 234, 247, 695-96.) Even then, however, the doctors she saw provided only triage; they did not attempt to intervene. (Id. at 235.)

Ms. Alvarado's husband exerted complete control over her. When Ms. Alvarado objected to her husband's abuse and dominance over her, he would hit her and tell her, "You don't order me." (Id. at 694.) When she questioned his right to beat her, or the right of any husband to treat his wife as he did, he berated her for her impudence and the abuse worsened. (Id. at 697-98.)

Ms. Alvarado's husband severely sexually abused her, both vaginally and anally, almost on a daily basis. (Id. at 4, 188, 230-32, 694-95.) The children usually were at home when the rapes occurred; Ms. Alvarado's husband simply put them outside while he raped her. (Id. at 188, 231, 695.) When Ms. Alvarado protested the rapes, her husband would respond by saying, "I can do it any time I want. You're my woman and I can do whatever I want." (Id. at 188, 695.) Then he would force himself on her by holding her down by her hair so that she could not move. (Id. at 694.) The sexual abuse severely injured Ms. Alvarado, causing extensive hemorrhaging, excruciating abdominal pain and disease. (Id. at 4, 188, 236-37, 694-96.)

If Ms. Alvarado tried to refuse sex, her husband would accuse her of seeing other men and then he would force sex on her, telling her, "Just do it, or I'll finish you off." (Id. at 188, 694-95.) Ms. Alvarado's husband saw her continued protests and attempts to leave him as an affront to his authority over her. (Id. at 188.) As he

promised, each time she protested or tried to leave or get help, the beatings worsened. (Id. at 188, 234-40, 246-47.)

Ms. Alvarado knew that she could not leave or divorce her husband. (Id. at 188.) He would not have allowed it, and the Guatemalan courts would not grant her a divorce without her husband's permission. (Id. at 180-89, 192.) Once, in response to her statement that she wanted to go somewhere where he would not find her, he warned her not to attempt it, and that he would find her. (Id. at 243-44, 698.) He promised, "Just you wait, you can't hide, even if you are buried underground, you can't hide from me. I don't care what you do, you can't get away. Go ahead, try to disappear and I will cut off your legs so you can't get away any more." (Id. at 698; see also id. at 243-44.)

Ms. Alvarado knew that, with his connections in the military and the security forces, and his superior knowledge of the countryside, he could and would find her. (Id. at 188.) He told her, "If you ever try to leave, I will come find you. I will break your legs. I will cripple you so that you will be in a wheelchair for the rest of your life. I will mark your face so it will be scarred forever, it will be twisted and deformed." (Id. at 188; see also id. at 244.) Other times, he told her that if she left him, he would find her and kill her. (Id. at 188, 704.) He always promised to find her. (Id. at 188, 244, 704.)

Nonetheless, Ms. Alvarado did attempt to leave her husband and seek the assistance of the police and the courts. She tried several times to leave him and

return to her family, but each time he tracked her down and forced her to return. (Id. at 188, 238.) Her family could not keep her from her husband, because in the Guatemalan culture a woman's place is with her husband. (Id. at 188.) Ms. Alvarado knew of no shelters in Guatemala for women who are beaten by their husbands. (Id. at 6, 188, 243, 701-02.) She went into hiding for two months with her two small children, but he ultimately found them. (Id. at 239-40, 696-97.) When he did, he beat and kicked Ms. Alvarado in front of the children until she lost consciousness. (Id. at 5, 188, 240, 696.)

Several times Ms. Alvarado went to the police seeking protection from her husband. (Id. at 241.) Usually, the police either did not respond at all to her requests for help or told her that they would not get involved. (Id. at 188, 700.) On the rare occasion that the police issued a citation, her husband simply ignored it, and the police never questioned or arrested him. (Id. at 188, 241.) When Ms. Alvarado went to court to seek protection and request a divorce, the judge was inattentive and never issued a ruling in the case or even ordered her husband to appear. (Id. at 189.) The judge stated that he would not get involved in domestic issues. (Id. at 6, 243.)

Because her husband was in the military, Ms. Alvarado believed that the police and the courts would not sanction him. (Id. at 189, 700.) She believed that they would support him against her. (Id. at 189, 242.) Her husband confirmed this by telling her that he had contacts throughout the military, police and private security forces, and that if she went to the police they would side with him. (Id. at 189, 242,

700.) He also promised that it would be worse for her if she did. (Id.) Her futile experience in seeking assistance bore out her beliefs and his assurances. (Id.)

With his connections in the military and the security forces, and his knowledge of the country, Ms. Alvarado knew her only chance of escaping her husband was to flee Guatemala or to die. (Id. at 188, 700.) In May 1995, after a particularly brutal incident in which Ms. Alvarado's husband chased her out of their house and dragged her by her hair out of a truck in which she was hiding and down the street, Ms. Alvarado fled. Her children were safely away on holiday with their grandparents, so, after her husband left her at work, she returned home quickly, gathered a few clothes and left, with no money and no idea where she would go. (Id. at 189, 702.) She happened on "Good Samaritans" who offered her passage and paid her way out of Guatemala that same night. (Id. at 6, 189, 702.)

Ms. Alvarado did not know where she was heading; she only knew she had to flee in order to survive. (Id. at 245.) In fleeing, she left behind her two young children and her family. (Id. at 705.) She knew she would get no protection in Guatemala and that she had to leave the country to escape her husband; otherwise, she knew that he would find her and beat her worse than he had ever beaten her before; more likely, he would kill her. (Id. at 704.) Ms. Alvarado's husband subsequently has promised to kill her if she ever returns to Guatemala. (Id. at 342.)

### III. PROCEDURAL HISTORY

After fleeing Guatemala, Ms. Alvarado ultimately arrived in San Francisco, California. On September 20, 1996, after extensive hearings and briefings, an Immigration Judge in San Francisco granted Ms. Alvarado's application for asylum under Section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a) (1999) (the "Refugee Act"), finding that Ms. Alvarado's testimony was fully credible, and holding that she had been persecuted, that the government of Guatemala was unwilling to protect her from her persecutor, and that the persecution was both on account of her membership in a particular social group, and on account of her actual and imputed political opinion. (Record at 193-96.)

The INS appealed the Immigration Judge's grant of asylum to the Board. On June 11, 1999, the Board, in a 10-5 decision, vacated the decision of the Immigration Judge. (Id. at 26.) The Board held, as had the Immigration Judge, that Ms. Alvarado's testimony and declarations were fully credible,<sup>4</sup> that she was persecuted within the meaning of the Refugee Act, and that the government of Guatemala had failed to protect her. (Id. at 8, 11, 192.) Nonetheless, the Board held that Ms. Alvarado is not entitled to asylum because her persecution was not on account of her membership in a social group or due to any actual or imputed political opinion. (Id. at 26.) On that basis, the Board ordered that Ms. Alvarado be deported to

---

<sup>4</sup> Like the Immigration Judge and the Board, the INS has not disputed Ms. Alvarado's credibility at any time during these proceedings.

Guatemala. (Id. at 26-27.) The dissenting members of the Board issued a strongly worded and well-reasoned opinion, decrying the majority's decision on the basis that it ignored legal precedent and distorted the facts in reaching its conclusion. (Id. at 46.)

Ms. Alvarado timely petitioned the Court of Appeals for the Ninth Circuit for review of the Board's decision and filed a motion for stay of the Board's deportation order. The Ninth Circuit granted Ms. Alvarado's motion to stay deportation on August 13, 1999. Peña v. INS, No. 99-70823 (9th Cir. Aug. 13, 1999) (Order Granting Motion to Stay Deportation). The Ninth Circuit subsequently granted a stay of briefing, deferring its proceedings pending the Attorney General's consideration of this case. Peña v. INS, No. 99-70823 (9th Cir. Sept. 30, 1999) (Order Granting Four Month Stay of Proceedings).

#### **IV. ARGUMENT**

A. IT IS UNDISPUTED THAT MS. ALVARADO HAS BEEN PERSECUTED AND HAS A WELL-FOUNDED FEAR OF FUTURE PERSECUTION

Political asylum is a discretionary remedy which may be granted to an individual who meets the statutory definition of "refugee". A refugee is defined as a person who has suffered past persecution or who has a well-founded fear of future persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1101(a)(42)(A) (1999). It is undisputed that



Ms. Alvarado has been persecuted and has a well-founded fear of future persecution if she returns to Guatemala.

1. Ms. Alvarado Has Suffered Past Persecution

Courts have long held that threats to life or freedom, or other egregious physical and psychological harms, inflicted by the government or by persons the government is unable or unwilling to control, constitute persecution. See Montoya-Ulloa v. INS, 79 F.3d 930, 931 (9th Cir. 1996); Singh v. INS, 94 F.3d 1353, 1360 (9th Cir. 1996); Acosta, 19 I. & N. Dec. at 222, 1985 BIA LEXIS 2, at \*28. In the instant case, the Board agreed with the Immigration Judge and held that Ms. Alvarado unquestionably suffered persecution and that she was unable to avail herself of any assistance from her government:

[W]e agree with the Immigration Judge that the severe injuries sustained by the respondent rise to the level of harm sufficient (and more than sufficient) to constitute "persecutions." We also credit the respondent's testimony in general and specifically her account of being unsuccessful in obtaining meaningful assistance from the authorities in Guatemala.

(Record at 11.) Thus, it is undisputed that Ms. Alvarado suffered egregious physical and psychological harm constituting persecution under the Refugee Act and that the harm she suffered was inflicted by a person that the government was unable or unwilling to control. Singh, 94 F.3d at 1360; Montoya-Ulloa, 79 F.3d at 931; Acosta, 19 I. & N. Dec. at 222-23, 1985 BIA LEXIS 2, at \*28.

2. Ms. Alvarado Has Established A Well-Founded Fear Of Future Persecution

A well-founded fear of future persecution constitutes an alternate basis for asylum under the Refugee Act. Acewicz v. INS, 984 F.2d 1056, 1061-62 (9th Cir. 1993). Where, as here, there has been past persecution, there is a regulatory presumption that the applicant has a well-founded fear of future persecution. 8 C.F.R. 208.13(b)(1)(i) (1999). The presumption of a well-founded fear may be rebutted only by a preponderance of evidence that conditions have changed in the country of persecution, such that the individual would no longer have a well-founded fear. Id.; In re H-, Interim Decision No. 3276, 1996 BIA LEXIS 31, at \*24 (B.I.A. May 30, 1996).

The undisputed facts in this case, as well as the findings of both the Immigration Judge and the Board, establish that Ms. Alvarado's husband has declared that he will "hunt her down and kill her if she comes back to Guatemala." (Record at 343.) As the Immigration Judge and the Board both found, there is no evidence that Ms. Alvarado will be protected from persecution if she is returned to Guatemala. (Id. at 7, 10, 11, 192.) The evidence in the record confirms the atrocious realities which face women such as Ms. Alvarado in Guatemala. (Id. at 6-7, 189-90, 389-637 (Exhibits 2h-2z), 715-44 (Exhibits 2-1 to 2-8).) There is no evidence that such conditions have changed, and certainly not to the extent that could assuage Ms. Alvarado's well-founded fear of future persecution. As the Board itself concluded, Ms. Alvarado "has been terribly abused and has a genuine and reasonable fear of returning to Guatemala." (Id. at 26.)



B. MS. ALVARADO WAS PERSECUTED ON ACCOUNT OF HER MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

Because Ms. Alvarado has suffered past persecution and has a well-founded fear of future persecution, she is eligible for asylum if her persecution was "on account of" her membership in a particular social group or her political opinion. Both Board and federal court precedent dictates, as the Immigration Judge in this case held and the Board dissent asserts, that Ms. Alvarado's persecution was inflicted on account of her social group membership and on account of her actual and imputed political opinion.

1. Prior Board Precedent Demonstrates That Ms. Alvarado Is A Member Of A Cognizable And Particular Social Group

The Board has held that the term "persecution on account of 'membership in a particular social group'" is to be interpreted consistently with persecution on account of each of the other enumerated statutory grounds, namely, race, religion, nationality and political opinion. Acosta, 19 I. & N. Dec. at 232-34, 1985 BIA LEXIS 2, at \*51-53. The consistent factor among each of these grounds is that each one "describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed." Id., 19 I. & N. Dec. at 233, 1985 BIA LEXIS 2, at \*53. Thus, the Board held in Acosta that "social group" encompasses groups which share common characteristics or experiences:

[W]e interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership . . . . 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 so fundamental to their individual identities or consciences.

Id., 19 I. & N. Dec. at 233, 1985 BIA LEXIS 2, at \*54.<sup>5</sup>

Subsequent to Acosta, the Board has consistently recognized social groups based both on immutable trait and shared past experience. The Board has held that the shared past experience of former members of the national police force in El Salvador is an immutable characteristic which makes such individuals members of a particular social group for asylum purposes. In re Fuentes, 19 I. & N. Dec. 658, 661-62, 1988 BIA LEXIS 24, at \*8-9 (B.I.A. Apr. 18, 1988). Similarly, gay men and lesbians in Cuba have been found to constitute a particular social group. In re Toboso-Alfonso, 20 I. & N. Dec. 819, 822, 1990 BIA LEXIS 23, \*7 (B.I.A. Mar. 12, 1990). Members of the Darood clan and Marehan subclan in Somalia have been found to share immutable characteristics required for social group recognition, In re

---

<sup>5</sup> The Board's determination in Acosta of what constitutes "persecution on account of membership in a particular social group" has been cited with approval and followed by international tribunals. See, e.g., Islam (A.P.) v. Secretary of State for the Home Dep't, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.), 2 All ER 545 (H.L. 1999); Canada (Attorney General) v. Ward [1993] 2 S.C.R. 689, 739; see generally James C. Hathaway, The Law of Refugee Status 160-61 (1991).

H-, 1996 BIA LEXIS 31, at \*12, as have Filipinos of Chinese ancestry, In re V-T-S-, Interim Decision No. 3308, 1997 BIA LEXIS 9, \*15 (B.I.A. Mar. 6, 1997).

Importantly, the Board confirmed the applicability of the Acosta social group definition to cases involving gender in Kasinga, its seminal decision regarding female genital mutilation ("FGM"). In Kasinga, the Board held that a young Togolese woman who fled FGM belonged to a social group defined by gender, ethnicity, intact genitalia and opposition to the ritual practice of FGM. Kasinga, 1996 BIA LEXIS 15, at \*20-22. Notably, prior to the Board's decision in Kasinga, the INS itself recognized that the Acosta formulation of social group supported the cognizability of a social group based on "gender, either alone or as part of a combination[.]" INS Gender Considerations at 12-15 (Record at 649-52).<sup>6</sup>

Relying on this precedent, the Immigration Judge in this case held that Ms. Alvarado was a member of a particular social group defined by gender, nationality, and prior experience. Specifically, the Immigration Judge held that Ms. Alvarado was a member of the social group of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination." (Record at 193.) The Immigration Judge concluded that

---

<sup>6</sup> The INS recognized that "gender, either alone or as part of a combination [is] a characteristic that could define a particular social group" was "consistent with the statement of the Board in Acosta that 'sex' might be the sort of shared characteristic that could define a particular social group", and relied on two federal court decisions for its proposition. INS Gender Considerations at 14 (Record at 651); see Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993); Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994).

Ms. Alvarado's gender is a fundamental characteristic which she should not be expected to change, and that her prior relationship with her husband was a historical reality which she could not change. (Id. at 7, 194.) Therefore, pursuant to Acosta, women sharing these characteristics constitute a social group. (See id. at 29-31.) The Immigration Judge further held that Ms. Alvarado had been persecuted on account of her social group, finding that Ms. Alvarado "and others like her, are targeted for persecution specifically because they are women who have been involved intimately with their male companions, who believe in male domination." (Id. at 194.)

In rejecting the Immigration Judge's ruling, the Board abruptly departed from settled jurisprudence. The Board held that proof of the immutable or fundamental nature of the characteristics relied on by the Immigration Judge is only a threshold requirement. The Board then imposed two fundamentally new, additional requirements for establishing the existence of a cognizable social group: (1) that the members of the proposed group "understand their own affiliation with the grouping, as do other persons in the particular society"; and (2) that the harm suffered (spousal abuse) "is itself an important societal attribute, or in other words, that the characteristic of being abused is one that is important within Guatemalan society." (Id. at 16.)<sup>7</sup>

---

<sup>7</sup> The Board also dismissed out of hand several other proposed social group characterizations in addition to that specifically adopted by the Immigration Judge. (continued...)

Although the Board asserted that both of these factors were compelled by controlling jurisprudence, never before has the Board even mentioned — much less required — these additional criteria in its social group decisions. For example, the Board has recognized former members of the El Salvadoran national police to constitute a particular social group, because their former membership was "in fact an immutable characteristic, as it is one beyond the capacity of the respondent to change." Fuentes, 19 I. & N. Dec. at 662, 1998 BIA LEXIS 24, at \*9. Similarly, in a decision designated as precedent by the Attorney General, the Board ruled that homosexuals in Cuba constituted a particular social group on the basis of their status as homosexuals. Toboso-Alfonso, 20 I. & N. Dec. at 822, 1990 BIA LEXIS 23, at \*7-8. Nowhere in Fuentes or Toboso-Alfonso is there any mention of the additional requirements of showing that the members of the group "understand their affiliation within the grouping" or that the characteristic of being abused has to be one which is important within the society.

---

<sup>7</sup>(...continued)

Judge. (Record at 15-17.) These categorizations included: (1) Guatemalan women; (2) battered spouses; (3) women who have been companions to men who believe in male domination and desire to keep women subservient to them; and (4) women who have been involved intimately with male companions who believe in male domination. (Id.) In rejecting all of these proposed categorizations, the Board effectively ruled that, under its new formulation of what constitutes a "cognizable social group," not only was the Immigration Judge's group unacceptable, but any group that reasonably could be identified to fit these circumstances would be found lacking. In other words, no group of women in Ms. Alvarado's circumstances, no matter how egregious the abuse or how extreme the failure of state protection, would be recognized.



In addition, the Board previously has held that a particular social group could be defined by the immutable characteristic of subclan identity, In re H-, 1996 BIA LEXIS 31, at \*8, and that Filipinos of mixed Filipino-Chinese ancestry constituted a particular social group because these characteristics "cannot be changed and are therefore immutable," In re V-T-S-, 1997 BIA LEXIS 9, at \*15. Thus, in previously applying the Acosta "immutable" and "fundamental" test, the Board never indicated that this test was simply a "threshold requirement" to establishing a social group.

The Board's decision in Kasinga most clearly and appropriately illustrates the error of the Board's ruling in In re R-A-. Both Kasinga and In re R-A- address social group membership where the group is defined by gender in combination with other identifying factors. In Kasinga, the additional factors were: ethnicity (member of the Tchamba-Kunsuntu tribe), bodily integrity ("having intact genitalia"), and opposition to the practice of FGM. Kasinga, 1996 BIA LEXIS 15, at \*21-22. In In re R-A-, the additional factors are: nationality (Guatemalan) and prior relationship with an abusive intimate partner.

In Kasinga the Board clearly and simply declared:

In accordance with Acosta, the particular social group is defined by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities. The characteristics of being a "young woman" and a "member of the Tchamba-Kunsuntu Tribe" cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.

Kasinga, 1996 BIA LEXIS 15, at \*21-22.

There is no mention in Kasinga that the Acosta "immutable and fundamental" formulation is simply a threshold for establishing a cognizable social group, or that additional criteria must be met. There also is no mention that Ms. Kasinga understood her affiliation with her social group or that the potential harm was an important social attribute. The characteristics which define the social group in In re R-A- (gender, nationality, prior relationship) are no less immutable or fundamental than those accepted by the Board in Kasinga, or in the unbroken line of Board cases beginning with Acosta. The Board's attempt to spontaneously erect new hurdles to establishing membership in a social group must be rejected.

The Board dissent in In re R-A- accurately explains why the majority decision is severely flawed. The majority distinction between Kasinga and In re R-A- rests on the incorrect assumption that Ms. Kasinga deserved protection because FGM was more pervasive and socially important in Togo than domestic violence is in Guatemala. (Record at 32.) As the dissent points out, this assumption is factually incorrect and based on a revisionist interpretation of Kasinga. First, the records in Kasinga and In re R-A- do not demonstrate that the pervasiveness of FGM in Togo is significantly different from the pervasiveness of domestic violence in Guatemala. (Id. at 32.) In fact, the respective records show that 50% of Togolese females may have been mutilated, while 48% of the women in Guatemala have been battered by

their partners. Kasinga, 1996 BIA LEXIS 15, at \*12; (Record at 423). Second, the facts in Kasinga did not demonstrate that Ms. Kasinga would be socially ostracized for refusing to submit to the harm.<sup>8</sup> (Id. at 32.) As the Board dissent states, "there are no meaningful distinctions that justify recognizing the social group claim in Kasinga while refusing to recognize such a social group claim in [In re R-A-]." (Id. at 33.)

---

<sup>8</sup> The societal importance of FGM was a factor in Kasinga; however, this point undercuts rather than supports the Board majority's position. In Kasinga, the societal importance of FGM was not a factor which helped establish the cognizability of the social group, but instead was a fact which helped establish the motivation of the persecutor. Kasinga, 1996 BIA LEXIS 15, at \*23-24. A proper comparison of Kasinga to the facts of In re R-A- would have led to a similar conclusion. Instead, the Board in In re R-A- has turned the Kasinga holding on its head, ruling that, while societal factors are necessary to prove social group cognizability, such factors -- including discrimination against women -- cannot be used to prove the motivation of the persecutor. (Record at 24-26.)

2. Federal Court Precedent Demonstrates That Ms. Alvarado Is A Member Of A Cognizable And Particular Social Group

The Board's Acosta formulation has been broadly adopted and applied by the federal circuit courts,<sup>9</sup> and has been applied in particular to cases involving gender persecution. For example, in Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993), the Third Circuit considered a case involving an Iranian woman who alleged that she would suffer persecution as a result of restrictive Iranian laws. The court held, based on Acosta, that gender is sufficient to define a social group:

the Board specifically mentioned "sex" as an innate characteristic that could link the members of a "particular social group". Thus, to the extent that the petitioner in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has [satisfactorily identified a group that constitutes a "particular social group"].

Id. at 1240.

Similarly, the Second Circuit has affirmed the Board's formulation of a social group defined as "women of the Nkumssa tribe [in Ghana] who did not remain virgins until marriage." Abankwah v. INS, 185 F.3d 18, 21 (2d Cir. 1999).

---

<sup>9</sup> See, e.g., Lwin v. INS, 144 F.3d 505, 512 (7th Cir. 1998) (finding that parents of Burmese student dissidents do share common, immutable characteristics, and stating that: "the best approach is to accept the formulation proposed by the BIA in Acosta, and adopted by the First and Third Circuits"); Ananeh-Firemping v. INS, 766 F.2d 621, 626 (1st Cir. 1985) (accepting that professionals and other highly educated persons who were members of the Ashanti tribe and had been associated with the former government, constituted a particular social group because these characteristics were "beyond the petitioner's power to change").

The Ninth Circuit has not yet addressed directly whether gender alone may constitute a social group. Fisher, 79 F.3d 955, 966 (9th Cir. 1996) (Canby J., concurring). However, it has been recognized in that Circuit that issues particular to female asylee applicants deserve special consideration. Id. at 968 (Noonan, J., dissenting) (issuance by the INS of INS Gender Considerations should inform the court's decisionmaking, and are an "invitation to develop asylum law with special attention to the problems of women . . .").

Finally, the Board's interpretation of Ninth Circuit law regarding social group formulation as requiring "voluntary association", based on Sanchez-Trujillo v. INS, 801 F.2d 1571, 1576 (9th Cir. 1986), is overstated. Subsequent Ninth Circuit decisions demonstrate that the Ninth Circuit does not in all cases require "voluntary association" in order to establish a social group. In fact, Sanchez-Trujillo provided two examples of prototypical social groups that are not premised upon voluntary associational relationships: Jews fleeing Nazi Germany in the 1930's and 1940's, and immediate family members. Id. at 1574, 1576. Furthermore, subsequent to Sanchez-Trujillo, the Ninth Circuit has recognized "former bodyguard to the Presidential family" in Peru as a social group without discussion of any voluntariness requirement, Velarde v. INS, 140 F.3d 1305, 1313 (9th Cir. 1998), and has accepted that family members of former military police officers could constitute a particular

social group without reference to voluntary association, Aruta v. INS, 80 F.3d 1395, 1389 (9th Cir. 1996).

As the Board dissent correctly states, to the extent the Ninth Circuit has alluded to the voluntariness requirement, it has been invoked only where the "basis for the asylum claim is 'mere membership' in a sweeping demographic wedge of the general population" and where there has been "neither past harm nor an individual targeting" of the applicant. (Record at 34.) In this case, it is undisputed that there has been past persecution and individual targeting of Ms. Alvarado, rendering the voluntariness requirement inapplicable.

In summary, both federal court and Board precedent make evident that a cognizable social group may be based on gender, or gender in combination with other immutable or fundamental criteria. Hence, cognizable social groups certainly can include, as the Immigration Judge found, "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination," or any of the other plausible categorizations for women in Ms. Alvarado's circumstance before the Board for its consideration.

3. Ms. Alvarado Was Persecuted On Account Of Her Membership In A Particular Social Group

The statutory language "on account of" requires that there be a causal connection, or nexus, between the persecution and one of the enumerated grounds. The Supreme Court has held that persecution is "on account of" an enumerated ground where the persecutor is motivated to act because of the victim's status or beliefs. INS v. Elias-Zacarias, 502 U.S. 478, 482 (1992). The motivation of the persecutor may be established either by direct or circumstantial evidence. Id. at 483.

The Board has held that an applicant need not establish the exact motive behind the persecution in order to establish the required nexus, only that a reasonable person would fear that the persecution is based on an enumerated ground:

Persecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected under the Act and others not. Proving the actual, exact reason for persecution or feared persecution may be impossible in many cases. An asylum applicant is not obliged to show conclusively why persecution has occurred or may occur. Such a rigorous standard would largely render nugatory the Supreme Court's decision in INS v. Cardoza-Fonseca . . . , and would be inconsistent with the "well-founded fear" standard embodied in the "refugee definition."

The Board, recognizing the "well-founded fear" standard and the fact that an applicant for asylum may face difficulty in showing the exact motivation for an act or feared act of persecution, has held that "an applicant does not bear the unreasonable burden of establishing the exact motivation of a 'persecutor' where different reasons for actions are possible." Rather, an asylum applicant "bear[s] the burden of establishing facts on which a reasonable person would fear that the danger arises on account of his race, religion, nationality, membership in a particular social group, or political opinion."

In re S-P-, Interim Decision No. 3287, 1996 BIA LEXIS 25, \*9 (B.I.A. June 18, 1996) (internal citations omitted).

Significantly, both the Board and the federal courts have held that, where the persecutory conduct has multiple motives, "so long as one motive is one of the persecutory grounds, the requirements [as to grounds] have been satisfied." Id. at \*12; see also Tarubac v. INS, 182 F.3d 1114, 1119 (9th Cir. 1999); Rodriguez-Roman v. INS, 98 F.3d 416, 430 (9th Cir. 1996); Singh v. Ilchert, 63 F.3d 1501, 1509 (9th Cir. 1995); Osorio v. INS, 18 F.3d 1017, 1028 (2d Cir. 1994). In addition, the courts have made clear that the presence of a non-statutory motivation for persecution may not be taken as proof that there is not also a statutory motivation. Tarubac, 182 F.3d at 1118 ("[T]he BIA apparently treated the presence of a non-political motive as evidence of the absence of a political motive. This was an error of law."). Thus, in order to establish a nexus, Ms. Alvarado need only show that her husband was motivated to harm her in part because of her membership in a social group or her political opinion.

As the Immigration Judge found here, Ms. Alvarado's husband brutalized her because she is a woman, because she is his wife, to dominate and control her, and to force her to accept his will. (Record at 192.) This finding is compelled by Ms. Alvarado's husband's numerous statements that he could abuse her because she was a woman and his wife. For example, when Ms. Alvarado protested her husband's



rapes, her husband would respond by saying, "I can do it any time I want. You're my woman and I can do whatever I want" (Id. at 188, 695.) When Ms. Alvarado objected to her husband's abuse and dominance, he would hit her and tell her, "You don't order me." (Id. at 694.) When she questioned his right to beat her, he berated her for her impudence and the abuse would worsen. (Id. at 696-98.) Persecution inflicted under any of these circumstances constitutes persecution on account of membership in a particular social group defined at least in part by gender. (Id. at 192-93.)

As in Kasinga, where the Board recognized that FGM is inflicted upon women to assure male domination and control, domestic violence is inflicted to assure male domination and control. The acceptance of spousal abuse in Guatemala<sup>10</sup> assures male dominance and exploitation by enabling men to exert control over their female companions through threats or acts of violence:

[D]omestic violence is not random, that is, it is directed at women because they are women and is committed to impede women from exercising their rights. As such, it is an essential factor in maintaining women's subordinate status . . .

Dorothy Q. Tomas & Michele E. Beasley, Domestic Violence as a Human Rights Issue, 58 Alb. L. Rev. 1119, 1144 (1995) (Record at 474) (emphasis added).

Treating domestic violence "as simply an individual problem of personal or family

---

<sup>10</sup> The evidence in the record of the acceptance of spousal abuse in Guatemala is extensive. (Record at 6-7, 189-90, 389-656 (Exhibits 2h-2z), 715-44 (Exhibits 2-1 to 2-8).)

dynamics, obscures the underlying and purposive gender dynamic of domination and subordination." Rhonda Copelon, Recognizing the Egregious in the Everyday: Domestic Violence as Torture, 25 Colum. Hum. Rts. L. Rev. 291, 328-29 (1994) (Record at 569-70).

Just as the Board in Kasinga held that the infliction of FGM in part to assure male domination and control satisfied the "on account of" element, Ms. Alvarado's persecution in this case satisfies this criterion as well. Ms. Alvarado's husband persecuted her, at least in part, to assert his dominance and control as a male and as her husband. Because this assertion of power is inherent to the macho and paternalistic culture in Latin American countries, particularly in Guatemala (Record at 297-317), the Guatemalan officials from whom Ms. Alvarado sought help allowed the domestic violence by her husband to continue without any interference. Such unsanctioned persecution occurred and was permitted, at least in part, on account of Ms. Alvarado's social group membership.

The Board concluded that Ms. Alvarado had not been persecuted on account of her social group because her husband targeted only his wife and not all women in her social group. This conclusion is contrary to the Board's decision in Kasinga. There, it was Ms. Kasinga's aunt and prospective husband who required that Ms. Kasinga submit to FGM as part of the marriage arrangement. Ms. Kasinga's relatives did not target all women, only Ms. Kasinga on the eve of her marriage.

Similarly, Ms. Alvarado's husband targeted only Ms. Alvarado because she is a woman and she was his wife. In short, the dispositive factor is whether, as in both Kasinga and In re R-A-, the individual persecutor was motivated to persecute because of an immutable or fundamental characteristic of the victim, not whether the persecutor persecuted multiple victims.

The Board in In re R-A- also reasoned that proof of societal discrimination against women in Guatemala cannot substitute for proof of Ms. Alvarado's husband's individual motivation to persecute Ms. Alvarado because of her gender and relationship to him. (Record at 22.) Once again, the Board's assertion contradicts its own precedent. Kasinga explicitly accepted that the "on account of" element could be established by proof of societal context and motivation. In Kasinga, the Board acknowledged that the actual "persecutors," Ms. Kasinga's family and the women who performed the FGM ritual, had no punitive intent. Kasinga, 1996 BIA LEXIS 15, at \*20. In fact, Ms. Kasinga's persecutors all believed that the practice of FGM was beneficial to the women who underwent it. Kasinga, 1996 BIA LEXIS 15, at \*20. The Board found, however, that FGM was inflicted to overcome the defined social group characteristics. See Kasinga, 1996 BIA LEXIS 15, at \*24 ("FGM is practiced, at least in some significant part, to overcome sexual characteristics of young women of the tribe who have not been, and do not wish to be, subjected to

FGM.") Thus, the Board reached its conclusion in Kasinga, by basing its nexus analysis on societal factors, rather than individual motivations.

In this case, the proof of nexus is even greater than in Kasinga because the actual persecutor (Ms. Alvarado's husband) intended to punish Ms. Alvarado because of her social group membership as a woman (his wife) who should submit to his total domination and control. In other words, Ms. Alvarado's husband was at least partially motivated to abuse Ms. Alvarado precisely because of her gender and relationship to him, and his actions were bolstered by a society that endorsed, condoned, and supported his domination over her. (Record at 6-7, 189-90, 389-656 (Exhibits 2h-2z), 715-44 (Exhibits 2-1 to 2-8).) Therefore, there is a nexus between the persecution and Ms. Alvarado's social group, and Ms. Alvarado is eligible for asylum.

C. MS. ALVARADO WAS PERSECUTED ON ACCOUNT OF HER ACTUAL AND IMPUTED POLITICAL OPINION

Ms. Alvarado also was persecuted on account of her actual and imputed political opinion, each an independent basis for relief under the Refugee Act. Ms. Alvarado possessed the actual political opinion that men do not have the right to dominate women, and she expressed this opinion through her resistance to her husband and her protests that a man should not beat his wife. (Record at 196-97.) In addition, Ms. Alvarado's husband imputed this opinion to her and persecuted her for it. (Id. at 196-97.)

1. Ms. Alvarado Held And Expressed A Political Opinion Against Domestic Violence In Guatemala

It has long been recognized that the term "political opinion" under the Refugee Act comprises more than basic notions regarding political parties and philosophies. For example, the Second Circuit, in rejecting the Board's ruling that a union activist in Guatemala was engaged in an economic dispute rather than a political conflict, made clear that "political opinion" encompasses a wide variety of beliefs:

We agree with Osorio that the Government's argument betrays an impoverished view of what political opinions are, especially in a country like Guatemala where certain democratic rights have only a tenuous hold . . . . Osorio is not a politician in the tradition of those who run for office in the twentieth-century United States . . . . Refugee law does not require that Osorio be a politician, only that he is persecuted in his home country for his political beliefs.

Osorio v. INS, 18 F.3d at 1030. The Second Circuit held that beliefs regarding workers' rights constitute political opinion within the meaning of the Refugee Act. Id. at 1030-31.

The Ninth Circuit also has broadly interpreted the meaning of the term "political opinion." See Desir v. Ilchert, 840 F.2d 723, 726-29 (9th Cir. 1988). In Desir, the applicant had been beaten on numerous occasions for resisting extortion by the Ton Ton Macoutes. Id. at 725-26. The Board ruled that this harm was not because of Desir's "political opinion, but instead, because [the Ton Ton Macoutes] wished to extort money from him for personal reasons." Id. at 725. The Ninth

Circuit reversed the Board, finding that Desir's refusal to comply had resulted in politically motivated persecution. Id. at 730. The court held that, because the "Haitian government under Duvalier operated as a 'kleptocracy,' or government by thievery, from the highest to the lowest level" and is a political system "founded on extortion," the refusal to comply may be interpreted as the expression of a political opinion, and punished as such. Id. at 727.

Based on this precedent, it is evident that Ms. Alvarado expressed a political opinion when she objected to the beatings and rapes by her husband, when she protested that a husband should not treat his wife as he did and objected to his right to beat her, and when she repeatedly protested to her governmental officials for redress and protection. (Record at 188-89, 196.) Ms. Alvarado was not merely seeking to stop the pain of the beatings or simply expressing a "human desire not to be harmed" (Record at 12); rather, she was stating and acting on her belief that it was wrong and must be stopped. (Id. at 188-89, 700-02.) This belief is a political opinion under the Refugee Act.<sup>11</sup>

---

<sup>11</sup> As clear evidence of Ms. Alvarado's political views, the following dialogue is from her own testimony at the hearing before the Immigration Judge:  
Q. Do you have an opinion of how a man should treat his wife?"  
A. He [sic] supposed to treat her well.  
Q. Do you have an opinion on what the governmental should do when a wife is abused by her husband?  
A. The government should help her because abuses are, shouldn't, shouldn't occur in any country at any time.  
(Record at 247.)

(continued...)

Ninth Circuit precedent itself compels the conclusion that Ms. Alvarado expressed a political opinion within the meaning of the Refugee Act. See Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987). Lazo-Majano involved the claim of a Salvadoran woman who suffered sexual violence and beatings in a forced relationship with an army sergeant. Id. at 1433. The Ninth Circuit held that the applicant had been persecuted "on account of" her political opinion on three independent legal bases. Id. at 1435. The first of these independent holdings was that the persecutor held the political opinion that he had a right to dominate and he persecuted the victim to force her to accept this opinion. Id.<sup>12</sup>

This basis is entirely consistent with the Immigration Judge's ruling in In re R-A-. As the Immigration Judge here held, "Like [the sergeant] in Lazo-Majano, [Ms. Alvarado's husband] asserted a political opinion that he has a right to dominate Alvarado because he is a man and she is 'his woman.' By resisting his abuse and seeking help, Alvarado expressed an opinion to the contrary." (Record at 197.)

The Board itself recognized that Ms. Alvarado's circumstances parallel the first holding of Lazo-Majano. (Record at 12-13.) Illogically, however, the Board disregarded this holding, despite the fact that the Ninth Circuit made clear that each

---

<sup>11</sup>(...continued)

<sup>12</sup> The court's other two bases for finding persecution on account of political opinion in Lazo-Majano are inapposite to this case.

of the bases in Lazo-Majano independently identified a political opinion. See Lazo-Majano, 813 F.2d at 1435. The Board attempted to substantiate its revisionist reading of the Ninth Circuit's decision by stating that it could find no Ninth Circuit case relying on the first basis of Lazo-Majano subsequent to the Supreme Court's decision in Elias-Zacarias. (Record at 13.) The Board, however, did not contend that Elias-Zacarias overruled Lazo-Majano, and made no effort to analyze Ms. Alvarado's case under Lazo-Majano or in light of Elias-Zacarias.

In fact, nothing in Elias-Zacarias suggests that the first holding of Lazo-Majano has been overruled. The central holding of Elias-Zacarias is that persecution is "on account of" an enumerated ground where the persecutor is motivated to impose the harm because of the victim's status or beliefs. Elias-Zacarias, 502 U.S. at 482-83. A persecutor such as Ms. Alvarado's husband believes he has the right to dominate his female partner, and punishes her for holding an opinion opposing that notion. These actions demonstrate a motivation to cause harm on account of the victim's beliefs or political opinion. Elias-Zacarias is therefore consistent with the first holding of Lazo-Majano, and each case demands the conclusion that Ms. Alvarado expressed a political opinion against the abuse she suffered and was persecuted for the expression of that opinion.

Protestations against domestic abuse in this country have long been held to constitute political opinion. A woman's opinion that her husband does not have the



right to violate her physical and psychological integrity is, among other expressions of political opinion, a fundamental expression of feminism, as freedom from domestic violence is a necessary condition for political, economic and social equality.<sup>13</sup> Feminism has been recognized as constituting a political opinion within the meaning of the Refugee Act. See, e.g., Fatin, 12 F.3d at 1242 ("In this case, if the petitioner's political opinion is defined simply as 'feminism,' she would presumably satisfy the first element [establishing a political opinion], for we have little doubt that feminism qualifies as a political opinion within the meaning of the relevant statutes." (emphasis added)).

Ms. Alvarado's opposition to her husband's belief that he has the right to brutalize her is a political opinion and, in this country, in fact would be considered an expression of feminism. Ms. Alvarado believes in the right to be free from abuse, and the fact that she expressed it in a humble manner or in the context of self-protection does not make it any less the expression of a political opinion. (Record at 188, 189, 196-97, 693-703.)

2. Ms. Alvarado Was Persecuted On Account of Her Political Opinion

---

<sup>13</sup> The United Nations' Declaration on the Elimination of Violence Against Women recognizes that violence against women is "one of the crucial social mechanisms by which women are forced into a subordinate position compared to men." G.A. Res. 48/104, U.N. GAOR, 48th Sess., Agenda Item 111, U.N. Doc. A/Res/48/104 (1994).

As discussed above, persecution is "on account of" an enumerated ground where the persecutor is motivated in part by one of the enumerated grounds. As the Immigration Judge held, Ms. Alvarado's husband persecuted her on account of her opinion, as well as on account of the opinion he imputed to her:

Alvarado's resistance to [her husband's] acts of domination, constituted a challenge to his opinion that women are to be subordinate to men. The resistance can be characterized as Alvarado's expression of a political opinion against this notion of male domination. And even if it were not characterized as an expression, it can be inferred from his increased violent behavior that he imputed this opinion to her.

(Record at 196.)

The Board, however, held that Ms. Alvarado was not persecuted on account of her political opinion because Ms. Alvarado's husband did not care what her opinions were and, in any event, her husband's "senseless actions started at the beginning of their marriage and continued whether or not the respondent acquiesced in his demands." (Id. at 12.) The Board's refusal to acknowledge the link between Ms. Alvarado's husband's violence and Ms. Alvarado's resistance is contrary to the record and displays an unfortunate ignorance regarding domestic violence.<sup>14</sup>

---

<sup>14</sup> The Seventh Circuit has remarked upon the power dynamic inherent in acts of sexual aggression: "Rape and sexual assault are generally understood today not as sexual acts borne of attraction, but as acts of violent aggression that stem from the perpetrator's power over and desire to harm his victim." Angoucheva v. INS, 106 F.3d 781, 793 (7th Cir. 1997).

The record in this case establishes that the "fundamental purpose of domestic violence is to punish, humiliate, and exercise power over the victim on account of her gender[.]" (Id. at 39; see id. at 412-636, 721-31, 734-37, 739-40, 742-44.)

At its most complex, domestic violence exists as a powerful tool of oppression. Violence against women in general, and domestic violence in particular, serve as essential components in societies which oppress women, since violence against women not only derives from but also sustains the dominant gender stereotypes and is used to control women in the one space traditionally dominated by women, the home.

(Id. at 39.) In other words, the central purpose of domestic violence is to extinguish any actual or perceived dissent.

The evidence in this case demonstrates that Ms. Alvarado's husband's threats and abuse were intended to force Ms. Alvarado to accept his will. (Id. at 187-88, 693, 694, 695, 697-98.) His violence escalated on those occasions when she resisted. (Id. at 188, 234-40, 246-47.) An example of this is the brutal manner in which he beat her unconscious when he tracked her down after she went into hiding with her children in an attempt to escape him. (Id. at 5, 188, 239-40, 696-97.) Ms. Alvarado's husband had repeatedly told her that she would never get away from him and that she would regret it if she tried. (Id. at 188, 244, 704.) In this respect, his behavior was consistent with well-recognized patterns of domestic violence, which correlate escalating violence with a woman's attempts to obtain self-protection.<sup>15</sup>

---

<sup>15</sup> See, e.g., Katherine M. Culliton, Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas, 34 Harv. (continued...)



These facts show that Ms. Alvarado's husband was motivated, at least in part, to punish her for her actual or perceived resistance. As the Board dissent observed, the record compels such a conclusion:

The record reflects that the respondent not only holds an actual opinion opposing her husband's violence, but it is apparent that her husband believed that her resistance to his domination and abuse, particularly as reflected in her seeking assistance from governmental authorities, constituted an opinion opposing his male dominance. Imputing this opinion to her, he sought to overcome her opposition by escalating his abuse of her.

(Id. at 43.)<sup>16</sup> Thus, because Ms. Alvarado was persecuted on account of her actual and imputed political opinion, she is eligible for asylum.

## V. CONCLUSION

It is undisputed that Ms. Alvarado was horribly persecuted in Guatemala, that Ms. Alvarado repeatedly tried to escape her persecutor and was unable to do so, and that Ms. Alvarado repeatedly sought help from the Guatemalan police and courts to no avail. If Ms. Alvarado is not found to have been persecuted on account of her

---

<sup>15</sup>(...continued)

Int'l L.J. 507, 519 n. 56 (1993) (discussing the factors which protect women complainants, and increased danger due to the fact that "violence escalated after complaints [were] made").

<sup>16</sup> The Board's review and analysis of the record here is reminiscent of the Board's decision in Abankwah, 185 F.3d at 24, where the Second Circuit faulted the Board for its evaluation of the record in a gender asylum case involving FGM, criticizing the Board for being "too exacting both in the quantity and quality of evidence that it required[.]" Id. Here, Ms. Alvarado amply has demonstrated that her husband persecuted her because of her political opinion and because of the political opinion which he imputed to her.

membership in a social group, or on account of her actual or imputed political opinion, and therefore is not eligible for asylum protection, then it must be concluded that no victim of egregious, governmentally-condoned domestic violence can be. As discussed above, such a conclusion cannot be supported.

For the foregoing reasons, we respectfully request that the Attorney General review and reverse the Board's decision in In re R-A-, Interim Decision No. 3403, 1999 BIA LEXIS 31 (B.I.A. June 11, 1999).

Dated: January 3, 2000

Respectfully submitted,

---

Jane B. Kroesche, Esq.  
Gregory N. Mandel, Esq.  
Four Embarcadero Center, Suite 3800  
San Francisco, CA 94111  
(415) 984-6400

Karen Musalo  
Resident Scholar  
University of California  
Hastings College of Law  
200 McAllister Street  
San Francisco, CA 94102  
(415) 565-4720

Attorneys for Petitioner  
Rodi Alvarado Peña