Amanda Baran
Chief, Office of Policy and Strategy (OP&S)
United States Citizenship and Immigration Services (USCIS)

Jean King
Acting Director, Executive Office for Immigration Review (EOIR)

VIA electronic mail: amanda.baran@uscis.dhs.gov; jean.king@usdoj.gov

May 6, 2021

RE: Promulgation of Regulations relating to the Particular Social Group ground of Asylum

Dear Chief Baran and Acting Director King:

The undersigned advocacy and direct service organizations, law school clinics, and professors welcome the Administration's February 2, 2021 Executive Order (the Order) directing the Department of Homeland Security and Department of Justice (the Departments) to promulgate joint regulations addressing the circumstances in which an asylum applicant should be considered a member of a "particular social group" (PSG, *see* 8 U.S.C. § 1101(a)(42)). While the Order specifies the PSG ground of asylum as the focus of the regulations, we hope that they will also address other necessary elements of an asylum claim including how to establish a "nexus" between persecution and one of the five recognized grounds for persecution, the standard for internal relocation, and whether a government is unwilling or unable to control non-state actor persecutors. In the course of developing the regulations, we appreciate your careful consideration of our non-exhaustive recommendations below in light of our extensive expertise and experience serving asylum seekers who will directly feel their impact. We look forward to further engagement on these and other issues relevant to this process.

I. Introduction

As noted in the Order, United States (U.S.) asylum policies and procedures must comply with the United Nations 1951 Convention and 1967 Protocol Relating to the Status of Refugees (Refugee Convention). In the exercise of its supervisory function, the Office of the United Nations High Commissioner for Refugees (UNHCR) has issued various guidance documents interpreting the Convention, and our laws and policies should conform to that guidance. In recent years, however, the Departments have undermined the legal standards relating to elements of asylum--including membership in a PSG and "nexus"--through rulemaking and Attorney General (AG) case certifications. For example, former AGs' decisions in *Matter of A-B-* (*I* and *II*), *Matter of A-C-A-A-*, and *Matter of L-E-A-* have led many immigration judges to conflate the PSG and nexus analyses, to restrict beyond recognition the standards for establishing when a state is unable or unwilling to protect an individual from non-state actors, and to impose unrealistic standards for whether an individual was able to safely relocate within their home country. This conflation of elements has especially compounded challenges for those fleeing persecution inflicted with

impunity by non-state actors such as family members, in countries with entrenched cultural prohibitions against reporting such abuses, and in cases involving criminal organizations that have corrupted local law enforcement. As a result of these convoluted and impermissibly narrow legal standards, meritorious asylum seekers' claims have been arbitrarily denied in violation of the Convention and the United States Refugee Act of 1980.

If adopted, the recommendations below will promote clarity and fairness, particularly for *pro se* and detained asylum seekers who cannot access or afford counsel to help them navigate the complexities of U.S. asylum law. Clarity also promotes efficiency for all stakeholders by minimizing unnecessary, lengthy, and financially burdensome appeals, and helping to streamline screening processes for those applying for asylum at our borders. The recommendations also align with UNHCR guidance, which we urge you to consult closely in developing the regulations.

II. PSG

The landmark 1985 BIA decision in *Matter of Acosta* held that a PSG is a group comprising individuals who share a common characteristic like sex or kinship ties that they either cannot change because it is innate, or should not be required to change because the characteristic is fundamental to their identity or conscience. The decision was hailed by UNHCR and followed in many other countries for the clarity of its analysis and its consistency with international law, which now includes both the *Acosta* test and—as an alternative—the social perception test (see below). However, between 2006 and 2014, the BIA published several decisions, inventing and then imposing two additional requirements for cognizability of a PSG: (1) that it be defined with particularity and (2) that the group in question be socially distinct. Neither of these additional requirements has since been well-defined, leaving a great deal of confusion in their wake about how to apply them and making it extremely difficult to establish the cognizability of any new PSG, as well as prompting sharply divergent case law across the federal circuit courts of appeals reviewing the Departments' incoherent and inconsistent application of these new elements.

Then, in 2018 as noted above, the former AG in *Matter of A-B-* reversed the BIA's grant of asylum to a woman from El Salvador who had survived over 15 years of horrific physical, sexual, and emotional violence at the hands of her husband. In doing so, the AG vacated an existing precedent decision that had correctly determined that survivors of domestic violence could qualify for asylum, instead finding, among other things, that such social groups generally lacked particularity and social distinction. He declared that, "Generally, claims by aliens pertaining to domestic violence or gang violence . . . will not qualify for asylum." The consequences of this decision have included increased denials of valid asylum claims, removal of legitimate asylum seekers back to persecution, and needless appeals that drain government resources and perpetuate backlogs and other inefficiencies. Similarly, in 2019, the former AG in *Matter of L-E-A-* rolled back long-standing protections for individuals targeted because of their family membership, deciding that "most nuclear families are not inherently socially distinct." In this case, a Mexican drug cartel retaliated against a son because his father would not sell drugs for the cartel. The AG made his sweeping proclamation even though he acknowledged that the decision goes against "a number of courts of appeals [that] have issued opinions that recognize

a family-based social group as a 'PSG.'" In fact, from 1993 through 2019, all circuits that have considered the issue have issued published decisions specifically finding that a family unit can constitute a PSG; prior to *Matter of L-E-A-*, no appellate court had found that as a rule, a family could not form a PSG. In addition, in *L-E-A- II*, AG Barr adopted the BIA's flawed approach to nexus in its previous decision in *L-E-A- I* that also diverges from the statutory text and case law.

Finally, on December 11, 2020, the former administration issued a final rule (the Asylum Rule) further contorting the PSG definition. The rule was preliminarily enjoined and is now in the hands of the Administration and the courts.

Codifying the clear PSG definition from *Acosta* that conforms to UNHCR's interpretation of the Refugee Convention will ultimately lead to more effective, efficient, and fair adjudication of asylum claims. We therefore recommend that the new regulations define a PSG as follows:

A PSG, without any additional requirements, is a group whose members:

1. Share a characteristic that is immutable or fundamental to identity, conscience, or the exercise of human rights; or

2. Share a past experience or voluntary association, that due to its historical nature cannot be changed; or

3. Are perceived as a group by society.

The regulation should further clarify that a PSG can be cognizable regardless of the number of members who belong to it, per UNHCR guidance.

III. Nexus

The REAL ID Act of 2005 (REAL ID) arbitrarily heightened the standard for asylum seekers to prove a "nexus" between persecution and a statutorily protected ground. Under REAL ID, individuals must now show that one of the five grounds was "at least one central reason" for their persecution. Prior to REAL ID, the standard for nexus was that persecution had to be on account of one of the five grounds. U.S. law has long recognized that persecutors may have coexisting mixed motives for harming their victims. Examples include economic status, family status, gender, restoration of family honor, and compliance with broader societal expectations. *Gao v. Gonzales* importantly held, as characterized by the Sixth Circuit Court of Appeals, that "the simultaneous existence of a personal dispute" does not eliminate a nexus that is otherwise established between persecution and a protected ground. The intent of asylum law is to protect refugees who fear persecution on account of who they are or their fundamental beliefs. While "persecution may be caused by more than one central reason...an asylum applicant need not prove which reason was dominant."

In the wake of REAL ID, however, some adjudicators have misapplied the changed "nexus" standard, resulting in wrongful denials of valid claims and needless appeals as in the case of *Matter of A-B-* described above. In *Matter of L-E-A-*, the BIA erroneously concluded that because the persecutor had one non-protected motive (seeking access to the applicant's store) to harm him, he had not proved his family membership was one central reason for the harm, even though he clearly would not have been threatened but for his relationship to his father. A recent example is *Matter of E-R-A-L*, where the BIA minimized protected grounds such as the close family relationships among several people killed by a cartel and over-emphasized non-protected grounds such as desire for land as a basis for the persecution, thus erroneously finding there was no nexus.

Significantly, the language of REAL ID only addresses asylum claims, not protection claims pursuant to 8 U.S.C. 1231(b)(3) for withholding of removal. Ignoring its plain language, however, in *Matter of C-T-L-*, the BIA read into the statute that the "one central reason" test also applies to claims for withholding of removal. There is a split among Courts of Appeals regarding the BIA's approach, with both the Ninth and Sixth Circuits specifically rejecting it. For example, the Ninth Circuit in *Barajas-Romera v. Lynch* explained that Congress had intentionally added the "one central reason" language to asylum claims but not to claims for withholding of removal as "the product of a deliberate choice, rather than a mere drafting oversight."

Then, in September 2020, the standard for establishing "nexus" was further narrowed in *Matter of A-C-A-A-*, 28 I. & N. Dec. 84 (A.G. 2020), which made sweeping statements, seeming to require heightened scrutiny for nexus in cases involving potentially numerous social groups (such as women in a particular country) and stating that "persecution that results from personal animus or retribution generally does not establish the necessary nexus" without accounting for the settled mixed-motives interpretation. *Id.* at 92.

To address inconsistent and erroneous applications of REAL ID to both asylum and withholding of removal claims, this proposal recommends clarifying the "nexus" requirement as follows:

> *1. For purposes of asylum eligibility, persecution shall be considered to be on account of a protected ground if a protected ground is at least one central reason for the applicant's persecution or fear of future persecution. Where it appears that the applicant suffered or fears persecution based on more than one central reason, the adjudicator must engage in a "mixed motives" analysis to determine if the protected characteristic constitutes at least one central reason. The fact that a persecutor has another central reason for persecuting an applicant other than the protected characteristic is not a reason to deny asylum.*
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> *2. For purposes of withholding of removal eligibility pursuant to INA § 241(b)(3), the applicant need only establish that a protected ground is "a reason" for the persecution.*

3. Persecution can be considered on account of a protected ground if persecution or feared persecution would not have occurred or would not occur in the future but for a protected ground.

4. Persecution can be considered on account of a protected ground if the persecution or feared persecution had or will have the effect of harming the person because of a protected ground.

5. Persecution can be considered on account of a protected ground regardless of the number of individuals the persecutor targets on account of the protected ground.

IV. Unwilling or Unable to Control

On January 14, 2021, a former Acting Attorney General doubled down on *A-B-*, again attempting to raise the bar for proving, among other things, failure of state protection from non-state actors. He issued a new decision upholding *A-B-'s* requirement that a government "condone" or be "completely helpless" to control a non-state persecutor, and concluding that failures in particular cases or high levels of crime do not constitute a breach of protection. The decision concluded that "'persecution' . . . should be read to require that the government in the home country has fallen so far short of adequate protection as to have breached its basic duty to protect its citizens, or else to have actively harmed them or condoned such harm. . . . " *Id.* at 204. This standard attempts to preclude claims where a government makes a minimal gesture to prevent persecution by non-state actors, but effectively turns a blind eye toward it. It is also a significant departure from the statutory language that an asylum seeker "is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country. . ." INA 101 (a) (42). While a few circuits have rejected the AG's attempt to change the "unable or unwilling" standard, others have accepted the new restrictive standard wholesale and many courts continue to erroneously reject asylum claims on this basis.

A similar standard was then codified in the Asylum Rule, which perversely may require victims of persecution to risk their lives by reporting persecution in order to qualify for asylum. To clarify the appropriate standard, we recommend that the regulations include the following provisions:

1. A government need not have direct knowledge of or involvement in persecution to be deemed unwilling or unable to control a non-state persecutor.

2. An applicant is not required to have reported persecution to their government in order to establish its unwillingness or inability to control a non-state actor. Where applicable, the agency shall consider evidence supporting an applicant's inability to report or decision not to report the persecution to their government in order to help establish the state's unwillingness or inability to control a non-state actor.

Furthermore, applicants should not be required to attempt to relocate internally to prove that the government was unable to protect them, since relocation can also increase the risk of persecution, such as for applicants who would lose protective social networks or shelter upon relocation.

V. Conclusion

We are grateful for this opportunity to provide input as you develop the regulations. We believe that if our recommendations are adopted, the regulations will best serve both the Convention's purpose and congressional intent in enacting the Refugee Act – to protect those whose own country cannot or will not protect them from harm on account of a protected ground. Please contact Irena Sullivan at irenas@tahirih.org or Kate Jastram at jastramkate@uchastings.edu if you have any questions.

Respectfully,

The Advocates for Human Rights
Aldea - The People's Justice Center
American Immigration Lawyers Association
AsylumWorks
Bellevue Program for Survivors of Torture
Black Alliance for Just Immigration (BAJI)
Catholic Legal Immigration Network, Inc *(CLINIC represents the respondent in Matter of L-E-A- and E-R-A-L-)*
Center for Gender & Refugee Studies (*CGRS represents the respondents in Matter of A-B- and A-C-A-A-)*
Church World Service
Elora Mukherjee, Jerome L. Greene Clinical Professor of Law & Director, Immigrants' Rights Clinic, Columbia Law School
Florence Immigrant & Refugee Rights Project
HIAS
Human Rights First
Human Rights Initiative of North Texas
Immigration Equality
International Refugee Assistance Project
Kids in Need of Defense (KIND)
Lindsay M. Harris, Associate Professor & Director, Immigration & Human Rights Clinic, UDC Law
Mississippi Center for Justice
Mississippi College School of Law Immigration Clinic
National Immigrant Justice Center
Oxfam America
Physicians for Human Rights
Project Lifeline
Refugee Action Network Illinois

Rocky Mountain Immigrant Advocacy Network
Tahirih Justice Center
Yael Schacher, Refugees International

CC: Maureen Dunn, Division Chief, Humanitarian Affairs Division, USCIS OP&S
Rena Cutlip-Mason, Branch Chief, Humanitarian Affairs Division, International and Humanitarian Affairs Branch, USCIS OP&S
A. Ashley Tabaddor, Chief Counsel, USCIS Office of Chief Counsel
Colleen Renk-Zengotitabengoa, Division Chief, Refugee and Asylum Law Division, USCIS OCC
Lauren Alder Reid, Assistant Director, Office of Policy, EOIR
Margy O'Herron, Senior Counsel, Office of the Deputy Attorney General, U.S. Department of Justice