NON-DETAINED

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

In the Matter of: [redacted]	)	
	)	**File No: A** [redacted]
In removal proceedings	)	

PROPOSED BRIEF OF *AMICUS CURIAE* THE HARVARD IMMIGRATION AND REFUGEE CLINICAL PROGRAM IN SUPPORT OF RESPONDENT

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INTRODUCTION

The Board of Immigration Appeals ("Board") erred in summarily rejecting [redacted]'s proposed particular social group of "Guatemalan women" as not cognizable in light of *Matter of A-B-*, 27 I&N Dec. 316, 328 (A.G. 2018). The Board's conclusion is inconsistent both with longstanding precedent and with the narrow holding in *Matter of A-B-*, which is not applicable to Ms. [redacted]'s case. Since *Matter of A-B-*, the Board itself has repeatedly reaffirmed that gender or gender along with another immutable characteristic, such as nationality, can constitute a cognizable social group, depending on the evidence presented in a given case.

Matter of A-B- affirmed the reasoning of *Matter of Acosta*, the seminal decision in which the Board explicitly recognized "sex" as a quintessential example of a cognizable particular social group ("PSG"). *See Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). The Attorney General in *A-B-* reiterated a key aspect of *Acosta*'s holding, emphasizing that "persecution . . . directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic" constitutes "persecution on account of membership in a particular social group." *A-B-*, 27 I&N Dec. at 328. The Attorney General's endorsement of *Acosta* in *A-B-* is hardly surprising: *Acosta*'s conclusion that a PSG can be defined by gender comports with the Immigration and Nationality Act ("INA") and the *ejusdem generis* canon of statutory interpretation.

Gender-based particular social groups, including gender itself or gender along with nationality, also satisfy the additional requirements of particularity and social distinction announced in Board decisions since *Acosta*. Indeed, after *A-B-*, numerous court and Board decisions have recognized that such groups can satisfy both requirements. In failing to recognize

that Ms. [redacted] proposed a cognizable particular social group under *Acosta* and more recent decisions, the Board in this case overlooked what has long been recognized both nationally and internationally: the Refugee Convention provides protection to survivors of gender-based violence on account of their gender.

For these reasons, the Board erred when it categorically rejected as non-cognizable the particular social groups set forth by Ms. [redacted], including the social group of Guatemalan women. On remand, the Board should find Ms. [redacted]'s particular social groups to be cognizable.

ARGUMENT

I. MEMBERSHIP IN A COGNIZABLE PARTICULAR SOCIAL GROUP MAY BE SHOWN BASED ON GENDER ALONE

Since *Matter of A-B-*, the Board and several circuit courts of appeal have all recognized that gender or gender plus nationality can form the basis of a cognizable social group. In *Silvestre-Mendoza v. Sessions*, for example, the Ninth Circuit identified "Guatemalan women" as cognizable, emphasizing that gender was "the gravamen of [the petitioner's] complaint." *Silvestre-Mendoza v. Sessions*, 729 F. App'x 597, 598 (9th Cir. 2018); *see also Ticas-Guillen v. Whitaker*, 744 F. App'x 410, 410 (9th Cir. 2018) (finding that "gender and nationality can form a particular social group"). So too here. Indeed, as the First Circuit recently explained sex is an immutable characteristic and it is "difficult to think of a country in which women do not form a "particular" and "well-defined" group of persons." *De Pena-Paniagua v. Barr*, 957 F.3d 88, 96 (1st Cir. 2020) (recognizing the cognizability of "women" or "women in country X" as a PSG); *see also Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1077–80 (9th Cir. 2020) (remanding for further consideration of

whether "Guatemalan indigenous women who are unable to leave their relationship" is cognizable). Guatemala is certainly no exception.

The Board has also continued to recognize the cognizability of gender-based social groups, including Guatemalan women, since *Matter of A-B-*, and has remanded asylum claims on that basis. *See, e.g.*, T-S-M-, (BIA, Apr. 16, 2019) (unpublished) (remanding for the immigration judge to consider Guatemalan women as a PSG, because "being a woman is an immutable characteristic . . . as gender is fundamental to one's individual identity or conscience"), Add. 2.[1]

The Board thus erred in categorically rejecting Ms. [redacted]'s claim based on *Matter of A-B-* without conducting a case-specific analysis, and the Board should therefore vacate its decision and recognize the social group "Guatemalan women" is cognizable in this case. *See, e.g.*, *Diaz-Reynoso*, 968 F.3d at 1079–80 (holding that *A-B-* did not create a general rule against claims involving domestic violence, and emphasizing the need for a case-by-case approach); *Grace v. Barr*, 965 F.3d 883, 905–06 (D.C. Cir. 2020) (same); *Juan Antonio v. Barr*, 959 F.3d 778, 790 n.3 (6th Cir. 2020) (emphasizing there can be "no general rule against claims involving domestic violence as a basis for membership in a particular social group"); *see also* A-M-R-, AXXX XXX 198 (BIA, Dec. 18, 2020) (unpublished) (remanding for further consideration of asylum application in light of *Juan Antonio* where the IJ solely relied on *Matter of A-B-* to reject the applicant's social groups), Add. 5; sec. II, *infra*, (explaining why "Guatemalan women" is particular and socially distinct on the record presented).

At a minimum, the Board should remand Ms. [redacted] case to permit the immigration judge to make a determination regarding the cognizability of "Guatemalan women" in the first instance. The Board has followed that approach in several cases post-dating *Matter of*

[1] All unpublished decisions cited here have been included in the Addendum.

A-B-. *See, e.g.*, Y-M-L-, (BIA, Sept. 10, 2019) (unpublished) (remanding for consideration of claim based on "Guatemalan women"), Add. 9; *see also* S-D-C-A-, AXXX-XXX-373 (BIA, Oct. 15, 2020) (unpublished) (remanding for consideration of whether "Mexican women" constitutes a cognizable PSG), Add. 12; N-P-S-, AXXX-XXX-777 (BIA, July 27, 2020) (unpublished) (same), Add. 14; S-R-P-O-, AXXX XXX 056 (BIA, Dec. 20, 2018) (unpublished) (same), Add. 16; X-Q-C-D-, (BIA, Dec. 11, 2018) (unpublished) (same), Add. 20; M-D-A-, (BIA, Feb. 14, 2019) (unpublished) (remanding for further consideration of whether "women in El Salvador" constituted a cognizable particular social group), Add. 26.

II. THE CONCLUSION THAT GENDER ITSELF IS SUFFICIENT TO ESTABLISH MEMBERSHIP IN A PARTICULAR SOCIAL GROUP IS FAITHFUL TO THE INA, AS RECOGNIZED IN *ACOSTA*

The recognition that gender itself, or gender along with nationality, is sufficient to establish membership in a cognizable social group dates back to the Board's seminal 1985 decision in *Matter of Acosta*. In that case, the Board drew on the *ejusdem generis* canon of statutory construction, which "holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words," in order to clarify the meaning of the "membership in a particular social group" ground for asylum. *Acosta*, 19 I&N Dec. at 233. Looking to the other four protected grounds—race, religion, nationality, and political opinion—the Board found that each "describes persecution aimed at an immutable 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.* Based on that understanding, the Board determined that "membership in a particular social group" should be read to encompass "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic." *Id.* The Board then recognized that "[t]he

shared characteristic" for purposes of establishing asylum eligibility "might be . . . *sex*, color, or kinship ties." *Id.* (emphasis added).

Circuit courts have long accepted the *Acosta* framework and recognized gender as an immutable characteristic. Reasoning from *Acosta*, the Ninth Circuit observed that "the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application . . . [of the conclusion that] a 'particular social group' is one united by . . . an innate characteristic[.]" *Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005); *see also Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (remanding the Board's decision that "women in Guatemala" could not constitute a particular social group because it was "inconsistent with . . . *Acosta*"); *Silvestre-Mendoza*, 729 F. App'x at 598 (finding "Guatemalan women" cognizable); T-S-M-, (BIA, Apr. 16, 2019) (unpublished) (remanding for the immigration judge to consider Guatemalan women as a PSG, because "being a woman is an immutable characteristic . . . as gender is fundamental to one's individual identity or conscience"), Add. 2. The First Circuit has also reiterated that gender is an immutable characteristic and that a PSG united by gender or gender-plus-nationality is cognizable. *See De Pena-Paniagua*, 957 F.3d at 95–96. In *Niang v. Gonzales*, the Tenth Circuit "[a]ppl[ied] the *Acosta* definition" to find that "female members of a tribe" qualified as a PSG, observing that "[b]oth gender and tribal membership are immutable characteristics." 422 F.3d 1187, 1199 (10th Cir. 2005). In *Hassan v. Gonzales*, the Eighth Circuit recognized the PSG of "Somali women" based on the applicant's "possession of the immutable trait of being female." 484 F.3d 513, 518 (8th Cir. 2007); *see also Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) (holding that "Cameroonian widows" is a cognizable PSG). In *Juan Antonio v Barr*, the Sixth Circuit found gender and marital status to be immutable characteristics. 959 F.3d at 790–91. And, then-Judge Alito of the Third Circuit cited *Acosta* approvingly in *Fatin v. INS*, and recognized that *Acosta*

"specifically mentioned 'sex' as an innate characteristic that could link the members of a [PSG]." 12 F.3d 1233, 1240 (3d Cir. 1993) (noting that Fatin had satisfied that requirement "to the extent that . . . she would be persecuted . . . simply because she is a woman").[2]

Importantly, recognizing that gender or gender plus nationality may define a particular social group does not mean that all women around the globe are entitled to protection under the Refugee Act. The other elements of the refugee definition, including the requirement that an applicant demonstrate that the persecution suffered or feared is on account of her protected status, play an important limiting role in gender-based claims. As is true in cases based on the other protected grounds (such as race or religion), the applicant must demonstrate that she meets all elements of the refugee definition. *See* 8 U.S.C. § 1101(a)(42); *see also Niang*, 422 F.3d at 1199–200 ("[T]he focus with respect to [gender based asylum] claims should be not on whether either gender constitutes a social group (which both certainly do) but on *whether the members of that group are sufficiently likely to be persecuted . . . 'on account of' their membership*." (emphasis added)).[3]

[2] *Acosta* also provided the framework for federal guidelines issued in 1995 regarding "asylum claims by women." *See generally* Memorandum from Phyllis Coven, INS Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators, *Consideration for Asylum Officers Adjudicating Asylum Claims from Women* 9 (May 26, 1995) (describing *Fatin* as 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"); *see also Matter of Kasinga*, 21 I&N Dec. 357, 377 (BIA 1996) (*en banc*) (Rosenberg, concurring) ("Our recognition of a particular social group based upon tribal affiliation and gender is also in harmony with the guidelines for adjudicating women's asylum claims issued by [INS].").

[3] The record evidence of pervasive violence against women in Guatemala and impunity for perpetrators of gender-based violence, as well as the physical and sexual abuse Ms. [redacted] suffered at the hands of her husband because of her gender, support a finding that the persecution Ms. [redacted] suffered and fears was on account of her gender. *See* Transcript of Immigration Hearing ("Tr.") (describing the harm Ms. [redacted] suffered because her husband viewed women as markers of "status" and Ms. [redacted] as "his own property").

III. GENDER MEETS THE CRITERIA THE BOARD HAS ADDED TO DEFINE MEMBERSHIP IN A PARTICULAR SOCIAL GROUP SINCE *ACOSTA*

In recent years, the Board has "expanded the [particular social group] analysis beyond the *Acosta* test," requiring that the social group also be "particular" and "socially distinct." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 232 (BIA 2014). With respect to social distinction, the Board has explained that asylum seekers must offer evidence that "society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group." *Matter of W-G-R-*, 26 I&N Dec. 208, 217 (BIA 2014). With respect to particularity, the Board has emphasized that the group "must be defined by characteristics that provide a clear benchmark for determining who falls within [it]." *Id.* at 214.

Matter of A-B- did not alter the Board's approach to particularity and social distinction, both of which the Board has characterized as "fact-specific" inquiries that require case-by-case analysis. *See M-E-V-G-*, 26 I&N Dec. at 241. The social group of Guatemalan women proffered by Ms. [redacted] satisfies these requirements.

Gender meets the requirement of particularity. *See Perdomo*, 611 F.3d at 669 (determining that the group of "women in Guatemala" can be sufficiently particular to be cognizable). A PSG must have "definable boundaries" that are not "amorphous, overbroad, diffuse, or subjective." *See M-E-V-G-*, 16 I&N Dec. at 239. Guatemalan women, like Ms. [redacted] are "recognized in the society in question as a discrete class of persons." *See id*. at 249. There are well-established benchmarks for determining who is a woman and who is not, and the Guatemalan government and society frequently make such determinations. The government, for example, lists gender on Guatemalan identification documents, including that of Ms. [redacted] *See* Exh. 3, Ms. [redacted] Guatemalan passport.

Courts have rightfully "rejected the notion that a persecuted group may simply represent too large a portion of the population to allow its members to qualify for asylum." *See Perdomo*, 611 F.3d at 669; *see also Alvarez Lagos v. Barr*, 927 F.3d 236, 253 (4th Cir. 2019) (noting that a PSG need not be small to satisfy the particularity requirement); *see also* M-D-A-, (BIA, Feb. 14, 2019) (rejecting notion that a persecuted group may be too large and remanding claim based on membership in "women in El Salvador"), Add. 136. A particular social group defined by gender has well-defined boundaries and therefore meets the particularity requirement established by the Board.

"Guatemalan women" also satisfies the social distinction requirement. The Board has explained that "social distinction considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way." *M-E-V-G-*, 26 I&N Dec. at 238. And, as the First Circuit recently noted, there is "no clear reason" why gender would not be a socially distinct group. *De Pena-Paniagua*, 957 F.3d at 96.

Additionally, the Board has recognized that legislation addressing a specific group is among the best evidence that a society recognizes a particular class of individuals as uniquely vulnerable. In another case decided after *A-B-*, the Board considered the PSG of "Guatemalan women" and reversed the immigration judge's denial of asylum, remanding for the immigration judge to conduct "a detailed review of the background evidence, laws addressing crimes against women in Guatemala, and the enforcement of those laws" in order to determine "whether [Guatemalan women] is cognizable." Y-M-L-, (BIA, Sept. 10, 2019), Add. 8–9. The Board and immigration judge engaged in no such initial analysis here.

Numerous laws and government programs aimed at, but failing to combat, violence against women illustrate Guatemalan society's conception of "Guatemalan women" as a

vulnerable and socially distinct class. *See, e.g.*, Exh. 4, 241–47, Piette, Where women are killed by their own families, BBC News (Dec. 5, 2015) (discussing the high rates of femicide and domestic violence in Guatemala, the government's requests that victims and witnesses come forward with evidence, and the dismally low number of cases that make it to a sentencing trial); Exh. 4, 297–305, Immigration and Refugee Board of Canada, Guatemala (May 14, 2010) (noting that "the judicial system fails to provide adequate protection" for victims of domestic violence, despite protocols in place meant to protect women); *see also* Guatemala's Constitution of 1985 with Amendments through 1993, Art. XVII ("The death penalty may not be imposed . . . on women."), *available at* https://www.constituteproject.org/constitution/Guatemala_1993.pdf.

As documented in the administrative record, Guatemalan laws and culture reflect both the fact that women are "uniquely vulnerable" and the fact that women are "set apart." Domestic violence is "commonplace" in Guatemala, and pervasively underreported, due in large part to authorities' failure to help survivors. *See* Exh. 4, 100–155, United Nations High Commissioner for Refugees, Women on the Run (Oct. 2015). Human rights advocates and scholars alike have described an "epidemic" of gender-based violence in Guatemala, with "widespread" rape and sexual violence. Exh. 4, 160–67, The Advocates for Human Rights, Guatemala, Submission to UNHCR (Oct. 19, 2015). These high rates of domestic violence and femicide, along with domestic violence laws that—at least on paper—address the needs of women as a class constitute evidence that women are viewed as distinct in Guatemalan society.

IV. OTHER SIGNATORIES TO THE REFUGEE CONVENTION AND INTERNATIONAL BODIES HAVE ALSO RECOGNIZED GENDER AS A COGNIZABLE SOCIAL GROUP

Both the *Acosta* framework and the conclusion that gender may define a particular social group are firmly established within the jurisprudence of other signatories to the Refugee

Convention and 1967 Protocol to the Convention.[4] The views of other signatories are directly relevant to the proper interpretation of the INA, given that "the definition of 'refugee' that Congress adopted is virtually identical to the one" in the Refugee Convention. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987) (noting that "one of Congress' primary purposes [in passing the Refugee Act of 1980] was to bring United States refugee law into conformance with the [1967 Protocol relating to the Status of Refugees]" (internal quotation marks omitted)); *see also Negusie v. Holder*, 555 U.S. 511, 537 (2009) ("When we interpret treaties, we consider the interpretations of the courts of other nations, and we should do the same when Congress asks us to interpret a statute in light of a treaty's language.") (Stevens, J., concurring in part and dissenting in part)).

The Supreme Court of Canada, for example, relied upon *Acosta* in its seminal decision *Canada (Attorney General) v. Ward*, finding that particular social group "would embrace individuals fearing persecution on such bases as gender," which it recognized as an "immutable characteristic." [1993] 2 S.C.R. 689, 75, 79 (Can., S.C.C.); *see also Josile v. Canada (Minister of Citizenship & Immigration)*, [2011] 382 FTR 188 (Can. FC, Jan. 17, 2011), at [10], [28]-[30] ("Haitian women"); *Kn v. Canada (Minister of Citizenship & Immigration)*, (2011) 391 FTR 108 (Can. FC, June 13, 2011), at [30] ("women in the [Democratic Republic of Congo]"), *cited in* James C. Hathaway & Michelle Foster, The Law of Refugee Status § 5.9.1 (2d ed. 2014) (collecting these and other cases). Canada also adopted gender asylum guidelines in 1993, updated in 1996, which recognized that gender is the type of innate characteristic that may define a particular social group. Immigration and Refugee Board of Canada, *Women Refugee Claimants*

[4] The United States is a signatory to the 1967 Protocol relating to the Status of Refugees, which incorporated most of the provisions of the 1951 Convention, while removing certain temporal and geographical limitations. *See* Protocol relating to the Status of Refugees, adopted Jan. 31, 1967, entered into force Oct. 4, 1967, 606 UNTS 267; Convention relating to the Status of Refugees, adopted July 28, 1951, entered into force Apr. 22, 1954, 189 UNTS 137.

Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act (Mar. 9, 1993) (updated on Nov. 13, 1996).

The United Kingdom House of Lords similarly relied on *Acosta* to recognize "women in Pakistan" as a particular social group, observing that its conclusion was "neither novel nor heterodox," but "simply logical application of the seminal reasoning in *Acosta*." *Islam & Shah v. Sec'y of State Home Dep't*, [1999] 2 AC 629, 644–45 (U.K.); *see Fornah (FC) v. Sec'y of State for Home Dep't*, [2006] UKHL 46, para. 31 (Lord Cornhill) (identifying "women in Sierra Leone" as "a group of persons sharing a common characteristic which, without a fundamental change in social mores is unchangeable, namely a position of social inferiority compared with men"); *see also* Immigration Appellate Authority of the United Kingdom, *Asylum Gender Guidelines* 41 (Nov. 2000) ("Particular social groups can be identified by reference to innate or unchangeable characteristics or characteristics that a woman should not be expected to change," including "gender.").

Tribunals in New Zealand and Australia have similarly noted that "it is indisputable that sex and gender can be the defining characteristic of a social group and that 'women' may be a particular social group." *Refugee Appeal No. 76044* para. 92 (NZ RSAA, 2008); *accord Minister for Immigration & Multicultural Affairs v. Khawar* (2002) 76 A.L.J.R. 667 (Aust.) (recognizing "women in Pakistan" as a cognizable social group). Australia has also adopted guidelines recognizing that "whilst being a broad category, women nonetheless have both immutable characteristics and shared common social characteristics which may make them cognizable as a group and which may attract persecution." Australian Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* § 4.33 (July 1996).

The United Nations High Commissioner for Refugees ("UNHCR") provides further support for the view that gender may establish membership in a particular social group. As part of its supervisory responsibilities, UNHCR issues interpretive guidance on the provisions of the 1951 Convention and 1967 Protocol relating to the Status of Refugees. In 2002, for example, the UNHCR published gender guidelines, adopting *Acosta*'s *ejusdem generis* analysis and finding that "sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics." Office of the United Nations High Commissioner for Refugees, *Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/01 (May 7, 2002); *see also* Office of the United Nations High Commissioner for Refugees, *Guidelines on International Protection: Membership of a Particular Social Group within the context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02 at 4 (May 7, 2002) ("[W]omen may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic."). This UNHCR guidance, while not binding, remains a "useful interpretative aid," *M-E-V-G-* at 248, and has been held by circuits to constitute "persuasive authority in interpreting the scope of refugee status under domestic asylum law." *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007).

CONCLUSION

The Board thus erred when it categorically rejected the gender-based social groups set forth by Ms. [redacted] including the social group of Guatemalan women. The Board should

recognize Ms. [redacted] social groups as cognizable and grant her asylum, or, at minimum, remand for further consideration of her asylum claim.

Dated: April 5, 2021

Respectfully submitted,
/s/ Sabrineh Ardalan

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CERTIFICATE OF SERVICE

I, Sabrineh Ardalan, hereby certify on April 5, 2021, I caused to be served via FedEx copies of the foregoing brief and enclosed addendum upon the following parties:

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Dated: April 5, 2021

Respectfully submitted,

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ADDENDUM

Please find enclosed the following unpublished decisions that are relevant to the issues under review:

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Name: S[redacted]-M[redacted], T[redacted] **A[redacted]-911**
Riders:[redacted]

Date of this notice: 4/16/2019

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
O'Connor, Blair

Userteam: Docket

Files: A[redacted]-911 – Los Angeles, CA
A[redacted]

Date: APR 16 2019

In re: T[redacted] S[redacted]-M[redacted]
[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Violeta Delgado, Esquire

APPLICATION: Asylum; withholding of removal

This matter was last before the Board on May 29, 2015, when we dismissed the lead respondent's [1] appeal from an Immigration Judge's decision denying her application for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3). [2] On July 3, 2018, the United States Court of Appeals for the Ninth Circuit remanded proceedings for the Board to consider in the first instance whether "Guatemalan women" constitutes a particular social group. [3]

To establish that a group defined as "Guatemalan women" is cognizable under the asylum and withholding of removal statutes, the respondent must prove that the group is: "'(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within [Guatemalan] society . . . .'" *Matter of A-B-*, 27 I&N Dec. 316, 319 (A.G. 2018) (quoting *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014)); *see also Matter of W-G-R-*, 26 I&N Dec. 208, 212-18 (BIA 2014), *aff'd in pertinent part and vacated and remanded in part on other grounds sub nom. by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied sub nom. Reyes v. Sessions*, 138 S. Ct. 736 (2018).

We agree with the respondent's position on remand[4] that being a woman is an immutable characteristic (Respondent's Br. at 2, 4), as gender is fundamental to one's individual identity or conscience. *See Matter of A-B-*, 27 I&N Dec. at 316, 318. However, we are unable to determine

[1] The lead respondent's son is a derivative of her asylum application. Hereafter, references to "the respondent" will refer to the lead respondent.

[2] The respondent did not challenge on appeal the denial of her request for protection under the Convention Against Torture and it is not implicated in the Ninth Circuit's remand.

[3] The court agreed with our determination that "young Guatemalan females who have suffered violence due to female gender" is not a particular social group.

[4] The Department of Homeland Security did not submit a brief on remand.

from the record before us whether the social group of "Guatemalan women" satisfies the foregoing "particularity" and "social distinction" requirements. As the requirements of particularity and social distinction involve fact-finding that we cannot do in the first instance, remand to the Immigration Judge is necessary. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *Matter of D-I-M-*, 24 I&N Dec. 448, 451 (BIA 2008); *see also Matter of A-B-*, 27 I&N Dec. at 340-41 (emphasizing the importance of Immigration Judges as fact-finders). In evaluating the particularity and social distinction of the claimed group of "Guatemalan women," the Immigration Judge should consider the Ninth Circuit's decision in *Perdomo v. Holder* 611 F.3d 662, 669 (9th Cir. 2010), and its rejection of the "notion that a persecuted group may simply represent too large a portion of a population to allow its members to qualify for asylum." *See also Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) ("[T]he recognition that girls or women of a particular clan or nationality[,] or even in some circumstances females in general[,] may constitute a social group is simply a logical application of our law.") (internal parentheses omitted); *accord Ticas-Guillen v. Whitaker*, 744 F. App'x 410 (9th Cir. Nov. 30, 2018).

Remand will allow the Immigration Judge to conduct additional fact-finding that may be necessary for the required "evidence-based inquiry" as to whether the social group of "Guatemalan women" meets the requirements of particularity and whether that group is perceived as "distinct" in Guatemalan society. *See Matter of M-E-V-G-*, 26 I&N Dec. at 241-44; *Matter of W-G-R-*, 26 I&N Dec. at 221; *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014). If the social group is found to be cognizable under the Act, the Immigration Judge should consider whether the respondent has demonstrated a nexus between the social group of "Guatemalan women" and the past harm she suffered or future harm she fears. Additionally, per the Ninth Circuit's order, the Immigration Judge should reevaluate whether the respondent's failure to report her abuse to the Guatemalan police precludes her from showing that the Guatemalan government is unwilling or unable to protect her. *See Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1069-70 (9th Cir. 2017) (en banc); *see also Matter of A-B-*, 27 I&N Dec.at 337-38 (an applicant seeking to establish persecution based on violent conduct of a private actor must show the government condoned the private actions or demonstrated an inability to protect the victims). We express no opinion regarding the ultimate outcome of the respondent's case.

ORDER: The record is remanded for further proceedings consistent with this decision.

FOR THE BOARD

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Mainord, Russell Shane
The Law Offices of Russell S. Mainord
5397 Wilbanks Drive
Suite A
Hixson, TN 37343

DHS/ICE Office of Chief Counsel - MEM
80 Monroe Ave., Ste 502
Memphis, TN 38103

Name: M[redacted]-R[redacted], A[redacted]

A [redacted]-198

Date of this notice: 12/18/2020

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
NOFERI, MARK

MalikAr
Userteam: Docket

File: A[redacted]-198 – Memphis, TN

Date: DEC 18 2020

In re: A[redacted] M[redacted]-R[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Russell S. Mainord, Esquire

APPLICATION: Withholding of removal under the Act

The respondent, a native and citizen of Guatemala, has appealed from the Immigration Judge's decision dated December 14, 2018. The Immigration Judge found the respondent removable, denied his application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1231(b)(3), and ordered him removed. The record will be remanded.

This Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.1(d)(3)(i). This Board reviews questions of law, discretion, and judgment, and all other issues raised in an appeal of an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

On appeal, the respondent challenges the denial of asylum and withholding of removal under the Act.[1] In his decision, the Immigration Judge solely cited *Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018), in finding the respondent's proffered particular social group not cognizable and denying withholding of removal under the Act. Subsequent to the rendering of the Immigration Judge's decision, the Sixth Circuit Court of Appeals, under whose jurisdiction this matter arises, found persuasive a decision that had abrogated *Matter of A-B-*, and remanded to the Board to consider the impact of the decision on particular social group analysis. *See Juan Antonio v. Barr*, 959 F.3d 778, 790 n. 3 (6th Cir. 2020). Consequently, we find it appropriate to remand the record to the Immigration Judge to reconsider this matter in light of this intervening precedent. *See Juan Antonio v. Barr*, 959 F.3d at 790 n. 3.

[1] The respondent did not request asylum under section 208 of the Act, 8 U.S.C. § 1158, or protection under the regulations implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100–20, 1465 U.N.T.S. 85 (entered into force for United States Nov. 20, 1994) (CAT) (IJ at 2; Tr. at 9; Exh. 2 at 1, 5). Accordingly, although respondent's brief on appeal challenges the denial of asylum, we consider the denial waived on appeal. *See Matter of Edwards*, 20 I&N Dec. 191, 196-197 n.4 (BIA 1990) (where an alien does not raise an issue before the Immigration Judge, he may not raise it for the first time on appeal). The respondent's brief does not challenge CAT on appeal.

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and entry of a new decision.

FOR THE BOARD

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
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Goodwin Procter LLP
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DHS/ICE Office of Chief Counsel - EAZ
Eloy Detention Ctr,1705 E. Hanna Rd
Eloy, AZ 85131

Name: L[redacted], Y[redacted] M[redacted]

A [redacted]-294

Date of this notice: 9/10/2019

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Wendtland, Linda S.

Userteam: Docket

File: A[redacted]-294 – Eloy, AZ Date: SEP 10 2019

In re: Y[redacted] M[redacted] L[redacted] a.k.a.[redacted]

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: David L. Permut, Esquire

APPLICATION: Withholding of removal; Convention Against Torture

This case is before us pursuant to the March 19, 2019, decision of the United States Court of Appeals for the Ninth Circuit granting the government's motion to remand. The record will be remanded to the Immigration Court for further findings consistent with this decision.

On August 8, 2017, this Board dismissed the applicant's appeal from the Immigration Judge's October 11, 2016, decision denying the applicant's applications for withholding of removal pursuant to section 241(b)(3) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1231(b)(3), and protection under the Convention Against Torture pursuant to 8 C.F.R. § 1208.16(c)(2), and ordering the applicant removed to Guatemala.[1] One of the primary issues on appeal was whether the applicant proposed a cognizable particular social group. In our decision, we agreed with the Immigration Judge's conclusion that the applicant did not establish membership in a cognizable particular social group.

In the government's motion to remand before the Ninth Circuit, the government requested, inter alia, that this Board consider the applicant's proposed particular social group consisting of "Guatemalan women." The applicant's proposed group was not previously considered.[2] Determining whether the applicant's proposed particular social group is cognizable requires a detailed review of the background evidence, laws addressing crimes against women in Guatemala, and the enforcement of those laws (Applicant's Br. at 23-26). *See Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010) (providing that Guatemalan women may be a cognizable particular social group and reversing the Board's finding that "all women in Guatemala" is an overly broad and internally diverse group); *see also Silvestre-Mendoza v. Sessions*, 729 F. App'x 597 (9th Cir. 2018) (finding that laws addressing femicide provide support for social distinction); *Ticas-Guillen v. Whitaker*, 744 F. App'x 410 (9th Cir. 2018) (stating that gender and nationality can define a particular social group and remanding for Board to further consider whether women in El Salvador can be considered a particular social group); *Matter of A-B-*, 27 I&N Dec. 316, 335 (A.G. 2018)

[1] The case was previously before this Board on May 21, 2015, when we remanded the record for the Immigration Judge to apply controlling case law and reach further factual and legal findings.

[2] The Immigration Judge noted that the applicant asserted that her proposed particular social group consisted of Guatemalan women, but the decision addresses only subsets of that group, e.g., Guatemalan women in domestic relationships and female children of Guatemalan women in domestic relationships (IJ at 11 (October 11, 2016)).

(stating that social groups defined by their vulnerability to private criminal activity likely lack the particularity requirement). Inasmuch as this Board cannot make such findings of fact, we find it necessary to remand the record for the Immigration Judge to address this issue in the first instance. 8 C.F.R. § 1003.1(d)(3)(iv).

If the Immigration Judge determines that the applicant has not established membership in a cognizable particular social group, then the Immigration Judge need not address any remaining issues as the applicant has not met her burden of proof for withholding of removal. *See Matter of A-B-*, 27 I&N Dec. at 340 (providing that if an asylum application is fatally flawed in one respect, an immigration judge or the Board need not examine the remaining elements of the asylum claim). If the Immigration Judge determines that "Guatemalan women" is a cognizable particular social group, the Immigration Judge should address all other issues noted in the circuit court remand (i.e., nexus and internal relocation).[3]

In regard to the applicant's credibility, the Immigration Judge explicitly found that the applicant testified credibly (IJ at 7-8 (October 11, 2016)). The Immigration Judge additionally described inconsistencies between the applicant's testimony and evidence in the record (IJ at 7-8). The Immigration Judge concluded that although the applicant's testimony was credible, discrepancies in the record warranted affording her testimony less weight (IJ at 7-8). Regardless of the weight afforded to different details of the applicant's claim, we can decipher from the Immigration Judge's decision that the material facts were found credible. For example, the Immigration Judge did not question that the applicant was raped on multiple occasions or that her parents beat her. Consequently, the issue of credibility need not be further addressed. On remand, the Immigration Judge should address the legal issues outlined in this decision and treat the applicant's claim as credible.

Finally, the applicant argues that she should be granted protection under the Convention Against Torture. That issue is not currently before us. We previously found no clear error in the Immigration Judge's finding that the applicant did not establish that it is more likely than not she will be subject to torture upon return to Guatemala. The Ninth Circuit did not request reconsideration of the applicant's application for protection under the Convention Against Torture. Based on the foregoing, the following order will be entered.

ORDER: The record is remanded to the Immigration Court for further findings consistent with this decision.

Linda J. Wendtland

FOR THE BOARD

[3] The applicant asserts that the Department of Homeland Security conceded that the harm she suffered rises to the level of past persecution (Tr. at 82 (June 13, 2014); Applicant's Br. at 23). If the Immigration Judge determines that "Guatemalan women" is a cognizable particular social group, the Immigration Judge should address this issue and apply the presumption of future persecution, if necessary. 8 C.F.R. § 1208.16(b)(1).

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Cozen O'Connor
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DHS/ICE Office of Chief Counsel - SEA
1000 Second Avenue, Suite 2900
Seattle, WA 98104

Name: C[redacted] A[redacted], S[redacted]... **A [redacted]-373**
Riders:[redacted]

Date of this notice: 10/15/2020

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Wilson, Earle B.

Userteam: Docket

Files: [redacted]-373 – Seattle, WA

Date: OCT 15 2020

In re: S[redacted] D[redacted] C[redacted] A[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Anusha E. Jones, Esquire

APPLICATION: Asylum; withholding of removal

The respondent is a native and citizen of Mexico. [1] In a decision entered on December 21, 2017, an Immigration Judge denied the respondent's applications for asylum pursuant to section 208 of the Immigration and Nationality Act, 8 U.S.C. § 1158; withholding of removal under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3); and protection pursuant to the Convention Against Torture, 8 C.F.R. §§ 1208.16(c)-1208.18. This case was last before us on June 12, 2019, when we dismissed the respondent's appeal of the Immigration Judge's decision. This case is now before us pursuant to a March 6, 2020, order of the United States Court of Appeals for the Ninth Circuit granting the Government's unopposed motion to remand this matter for further proceedings to address the respondent's applications for asylum and withholding of removal under the Act.[2]

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent sought asylum and related relief from removal before the Immigration Judge based on her status as a domestic violence victim. In its unopposed motion, the Government requested remand for further analysis regarding the motivation of the respondent's ex-husband in harming her, including whether more than one motive existed. The Government further noted that if the ex-husband had more than one motive, remand was warranted to determine whether membership in a particular social group comprised of "Mexican women" was a "central reason"

[1] The lead respondent is an adult female (A208-302-373) and the co-respondents are her minor children. References hereafter to "the respondent" refer to the lead respondent.

[2] The Government's motion to remand and order of the United States Court for the Ninth Circuit does not direct remand of the respondent's application for protection under the Convention Against Torture.

for the application for asylum or "a reason" for the application for withholding of removal. *See Barajas-Romero v. Lynch*, 846 F.3d 351, 359 (9th Cir. 2017). The Government's motion to remand also notes the Immigration Judge and the Board assumed, without deciding, the particular social group "Mexican women" was cognizable.

We will remand the record to allow the Immigration Judge to reassess the nexus questions at issue, which necessarily involve factual determinations. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *Matter of D-I-M-*, 24 I&N Dec. 448, 451 (BIA 2008) (the Board has limited fact finding abilities on appeal); *Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011) (the motive of a persecutor is a finding of fact). On remand, the Immigration Judge may also determine in the first instance whether the proposed group of "Mexican women" is cognizable on this record, which necessarily includes factual questions regarding, for example, social distinction. Accordingly, the following order is entered.

ORDER: The record is remanded to the Immigration Judge for further Action consistent with the foregoing opinion and for entry of a new decision.

FOR THE BOARD

File: A[redacted]-777 – Chicago, IL

Date: JUL 27 2020

In re: N[redacted] P[redacted]-S[redacted]

IN ASYLUM AND/OR WITHHOLDING PROCEEDINGS

APPEAL

ON BEHALF OF APPLICANT: Diana Rashid, Esquire

ON BEHALF OF DHS: Caitlin A. Corcoran
Assistant Chief Counsel

APPLICATION: Withholding of removal

The applicant, a native and citizen of Mexico, appeals from the Immigration Judge's September 16, 2019 decision denying her application for withholding of removal from Mexico under section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3). The Department of Homeland Security ("DHS") opposes the appeal, but does not challenge the Immigration Judge's decision insofar as it grants the applicant withholding of removal from Mexico pursuant to the Convention Against Torture, 8 C.F.R. §§ 1208.16(c)-1208.18. The record will be remanded.

This Board reviews the findings of fact, including the determination of credibility, made by the Immigration Judge under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under the de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The applicant claims past persecution and a well-founded fear of future persecution in her native Mexico on account of her membership in the following particular social groups: 1) "Mexican women"; 2) "Mexican women in intimate relationship they are unable to leave"; 3) Mexican women who disobey or oppose patriarchal societal norms; 4) "Nuclear family members of Josue Morales de Leon" (IJ at 7; Applicant's Pre-hearing Br. at 13-20). The Immigration Judge noted the similarity between the first three proposed social groups and found they were restatements of the core particular social group, "Mexican women in Chiapas in intimate relationships they are unable to leave because of patriarchal societal norms" (IJ at 7). The Immigration Judge found the applicant credible, but denied her application for withholding of removal under section 241(b)(3) of the Act after she failed to establish membership in a legally cognizable social group under *Matter of A-B-*, 27 I&N Dec. 316 (A.G 2018) (IJ at 9).

The Attorney General determined that "[s]ocial groups defined by their vulnerability to private criminal activity likely lack the particularity required [for a social group to be cognizable], given that broad swaths of society may be susceptible to victimization." *Matter of A-B-*, 27 I&N Dec. 316, 320, 333, *overruling Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014). However, the Attorney General's decision does not preclude all domestic violence claims without exception in the asylum context and adjudicators are required to conduct a case-by-case analysis of each asylum claim. *Matter of A-B-*, 27 I&N Dec. at 320, 340. Thus, we will remand the record to the

Immigration Judge to make additional, relevant findings of fact pursuant to *Matter of A-B-*, 27 I&N Dec. at 332, and to reassess the applicant's eligibility for relief. Because we are remanding the record for further proceedings, we need not address additional arguments the applicant raises in her brief on remand.

On remand, the Immigration Judge should reassess the legal cognizability of each of the applicant's proposed gender-based particular social groups. *Matter of A-B-*, should be applied to each of the proposed particular social groups. If, on remand, the Immigration Judge concludes that the applicant established membership in a legally cognizable particular social group, the Immigration Judge should next assess whether the applicant established past persecution or a well-founded fear of future persecution on account of her membership in that particular social group, determine if the Mexican government was unable or unwilling to control her feared persecutor, and whether she can internally relocate within Mexico.

If the applicant succeeds in establishing that she suffered past persecution on account of a protected ground by a perpetrator whom the government was unable or unwilling to control, she would be entitled to a presumption of a well-founded fear of persecution on this basis. 8 C.F.R. §1208.13(b)(1). This presumption could be rebutted upon a showing by the DHS that there has been a "fundamental change in circumstances such that applicant no longer has a well-founded fear of persecution" in Mexico, or that "the applicant could avoid future persecution by relocating to another part of the applicant's country of nationality." 8 C.F.R. §§ 1208.13(b)(1)(i)(A)-(B), (ii). We make no determination as to the outcome of the case.

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

Teresa L. Dorn

FOR THE BOARD

Board Member Anne J. Greer respectfully dissents without opinion.

File: A[redacted]-056 – Tucson, AZ

Date: DEC 20 2018

In re: S[redacted] R[redacted] P[redacted] O[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rachel Wilson, Esquire

ON BEHALF OF DHS: Gilda M. Terrazas
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's decision dated August 2, 2017, denying her applications for asylum, withholding of removal, and protection under the Convention Against Torture. Sections 208(b)(1)(A) and 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(b)(1)(A) and 1231(b)(3)(A); 8 C.F.R. §§ 1208.13(b)(1), 1208.16(a), 1208.18. The Department of Homeland Security has submitted a brief in opposition to the appeal. The record will be remanded to the Immigration Judge for further proceedings consistent with this opinion.

We review the findings of fact made by the Immigration Judge, including the determination of credibility, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent's removability is undisputed. Therefore, the issue on appeal is whether the Immigration Judge properly denied her applications for asylum, withholding of removal, and protection under the Convention Against Torture. In support of those applications, the respondent credibly testified that on August 18, 2016, she was abducted and blindfolded in Mexico by unknown individuals, and then held for 2 or 3 days in an unknown location where she was repeatedly raped (IJ at 2-3, 9; Tr. at 124, 127-34). The respondent further testified that immediately following this incident, she went to a hospital where she obtained medical treatment for her injuries, and also went to the police, but a report was not filed because the respondent believes that the authorities were not taking her seriously (IJ at 3; Tr. at 139-43).

Based on the foregoing facts, the respondent argues that she suffered past persecution in Mexico, and also has a well-founded fear of future persecution there, on account of her membership in either of two "particular social groups," which she defines as "Mexican women" and "Mexican women who are victims or potential victims of gender-motivated violence." Although the Immigration Judge agreed with the respondent that the harm she experienced in Mexico was severe enough to rise to the level of past "persecution" (IJ at 13), he determined that the respondent was not eligible for asylum or withholding of removal because neither of her claimed "particular social groups" was cognizable (IJ at 11-13). The respondent challenges that determination on appeal (Respondent's Br. at 4-7).

As previously stated, the respondent asserts that she belongs to two particular social groups, comprised of "Mexican women" and "Mexican women who are victims or potential victims of gender-motivated violence." To establish that these groups are cognizable under the asylum and withholding of removal statutes, the respondent must prove that the groups are: "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within [Mexican] society...." *Matter of A-B-*, 27 I&N Dec. 316, 319 (A.G. 2018) (quoting *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014)); *see also Matter of W-G-R-*, 26 I&N Dec. 208, 212-18 (BIA 2014), *aff'd in pertinent part and vacated and remanded in part on other grounds sub nom. Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied sub nom. Reyes v. Sessions*, 138 S. Ct. 736 (2018).

The Immigration Judge found that although "Mexican women" satisfies the foregoing immutability and social distinction requirements, it lacks "particularity" because it defines a "demographic unit" of great diversity rather than a discrete group, and is "exceedingly broad because it would conceivably include a majority of the population of Mexico" (IJ at 12). The Immigration Judge also found that the group "Mexican women who are victims or potential victims of gender-motivated violence" is not cognizable because it is circular (IJ at 12-13).

We agree with the Immigration Judge's decision as it relates to "Mexican women who are victims or potential victims of gender-motivated violence." To be cognizable, a particular social group must exist independently of the harm claimed by its members. *Matter of A-B-*, 27 I&N Dec. at 317, 334-35; *Matter of W-G-R-*, 26 I&N Dec. at 215; *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007). The respondent's alternative group does not satisfy that requirement because it is defined by reference to the persecution (i.e., "gender-motivated violence") its members claim to suffer (or fear).

Following the Immigration Judge's decision and during the pendency of this appeal, the Attorney General issued a precedential decision *in Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), clarifying the criteria required to establish an asylum claim based on membership in a particular social group. In light of this intervening precedent decision, we will remand the record to allow the Immigration Judge to supplement his decision and reconsider the respondent's asylum and withholding of removal claims insofar as they are based on her claimed membership in a particular social group comprised of "Mexican women." In evaluating the "particularity" of the claimed group, the Immigration Judge should consider *Matter of A-B-* as well as pertinent portions of *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1093–94 (9th Cir. 2013), and *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010). *Accord Ticas-Guillen v. Whitaker*, --- F. App'x ----, No. 16-72981 (9th Cir. Nov. 30, 2018), *available at* 2018 WL 6266766. On remand, the Immigration Judge should also consider whether the respondent has demonstrated a nexus between her proposed particular social group and the past harm she suffered or future harm she fears and whether the Mexican government was (or will be) unable or unwilling to control her persecutors. *See Matter of A-B-*, 27 I&N Dec. at 320, 343-44; *see also Ochoa v. Gonzales*, 406 F.3d 1166, 1170 (9th Cir. 2005) (explaining that asylum and withholding of removal require proof of persecution

by a "government official or persons the government is unable or unwilling to control"). We express no opinion regarding the ultimate outcome of the respondent's case.[1]

Accordingly, the following order will be entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

FOR THE BOARD

[1] Our present order contemplates further consideration of the respondent's applications for asylum and withholding of removal. To avoid piecemeal review, we reserve judgment at this time with respect to the respondent's eligibility for protection under the Convention Against Torture.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - SEA
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Seattle, WA 98104

Name: C[redacted]-D[redacted], X[redacted] C[redacted]... **A [redacted]-474**

Date of this notice: 12/11/2018

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
O'Connor, Blair
Crossett, John P.

Userteam: Docket

File: A[redacted]-474 - Seattle, WA

Date: DEC 1 1 2018

In re: X[redacted] Q[redacted] C[redacted]-D[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: James J. Stratton, Esquire

ON BEHALF OF DHS: Mark Hardy
Assistant Chief Counsel

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent, a native and citizen of Mexico, appeals from the decision of the Immigration Judge, dated August 16, 2017, denying her applications for asylum and withholding of removal pursuant to sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3), and protection under the Convention Against Torture. *See* 8 C.F.R. §§ 1208.16-.18. The Department of Homeland Security has submitted a brief in opposition to the appeal. The record will be remanded.

We review the findings of fact made by the Immigration Judge, including determinations as to credibility and the likelihood of future events, for clear error. 8 C.F.R. § 1003.1(d)(3)(i*); see also Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012); *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015). We review all other issues, including questions of judgment, discretion, and law, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent's removability is undisputed. Therefore, the issue on appeal is whether the Immigration Judge properly denied her applications for asylum, withholding of removal, and protection under the Convention Against Torture. The respondent claims that she experienced two types of harm prior to departing Mexico. First, she claims that she was sexually abused on five occasions (IJ at 4-5). The respondent testified that she was twice assaulted by her uncle as a child, once by her manager at her place of employment, and once by a romantic partner of her mother, and lastly by another uncle just prior to leaving Mexico (IJ at 4-5). The respondent claims that she experienced this harm on account of her membership in a particular social group of "women in Mexico." Second, she claims to have been extorted by a criminal gang in relation to her employment at a furniture store (IJ at 3-4). The respondent asserts that she experienced this harm on account of her membership in a particular social group of "imputed business owners." She fears she will be subjected to additional harm if she returns to Mexico. The respondent also asserts that she is eligible for protection under the Convention Against Torture.

The Immigration Judge concluded that the respondent did not establish eligibility for asylum or withholding of removal under the Act because she did not establish a nexus between the harm she experienced and fears and a ground protected under the Act (IJ at 5-6). With regard to protection under the Convention Against Torture, the Immigration Judge concluded that the

respondent did not establish that any public official has or will acquiesce in the harm she experienced and fears in Mexico (IJ at 6).

As previously stated, the respondent asserts that she belongs to two particular social groups, comprised of "women in Mexico" and "imputed business owners." To establish that these groups are cognizable under the asylum and withholding of removal statutes, the respondent must prove that the groups are: "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within [Mexican] society...." *Matter of A-B-*, 27 I&N Dec. 316, 319 (A.G. 2018) (quoting *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014)); *see also Matter of W-G-R-*, 26 I&N Dec. 208, 212-18 (BIA 2014), *aff'd in pertinent part and vacated and remanded in part on other grounds sub nom. Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied sub nom. Reyes v. Sessions*, 138 S. Ct. 736 (2018).

We first affirm, as not clearly erroneous, the Immigration Judge's determination that, even assuming "imputed business owners" is a cognizable particular social group, the respondent has not established a nexus between the harm she experienced and fears and that membership (IJ at 5). *See Matter of N M-*, 25 I&N 526, 529 (BIA 2011) (holding that the motive of a persecutor is a finding of fact to be determined by the Immigration Judge and reviewed for clear error); *see also Ayala v. Holder*, 640 F.3d 1095, 1097 (9th Cir. 2011) (even if membership in a particular social group is established, an applicant must still show that "persecution was or will be on account of his membership in such group"). The respondent's statement on appeal does not convince us of clear error in the Immigration Judge's finding that the perpetrators of the extortion and other related crimes were motivated by a desire to obtain money, rather than a desire to overcome a protected characteristic, such as membership in the particular social group of "imputed business owners" or any other basis protected under the Act. *See Ayala v. Sessions*, 855 F.3d 1012, 1020-21 (9th Cir. 2017) (noting that extortion qualifies as past persecution only when the extortion is motivated by a protected ground); *Zetino v. Holder*, 622 F.3d 1007 (9th Cir. 2010) ("An alien's desire to be free from harassment by criminals motivated by theft or random violence by gang members bears no nexus to a protected ground"); *see also Matter of M-E-V-G-*, 26 I&N Dec. at 235 ("[A]sylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions.").

However, we conclude that remand is warranted for additional consideration of the respondent's claim based on her asserted membership in the particular social group of "women in Mexico." Specifically, we conclude that remand is warranted for the Immigration Judge to (1) determine whether "women in Mexico" is a cognizable particular social group under the pertinent legal authority in light of the record presented here;[1] (2) determine whether the record establishes

[1] Following the Immigration Judge's decision and during the pendency of this appeal, the Attorney General issued a precedential decision in *Matter of A-B-*, 27 I&N Dec. 316, clarifying the criteria required to establish an asylum claim based on membership in a particular social group. Moreover, the Immigration Judge should specifically apply the analytical framework set forth by the Board in *Matter of M-E-V-G-*, 26 I&N Dec. 227 and *Matter of W-G-R-*, 26 I&N Dec. 208, and reaffirmed in *Matter of A-B-*. Finally, the Immigration Judge should also consider the guidance provided in *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010) (holding Guatemalan women may

that the harm the respondent experienced and fears has a nexus to her actual (or assumed) membership in the social group of "women in Mexico;"[2] (3) make sufficient findings of fact regarding the nature of the sexual abuse (and other gender-based harm) the respondent claims to have experienced in Mexico and assess whether this harm is of sufficient severity to constitute persecution; and (4) consider whether the respondent has demonstrated the Mexican government was or is unable or unwilling to control the people who have harmed or may harm her. *See Matter of A-B-*, 27 I&N Dec. at 320, 343-44; *see also Ochoa v. Gonzales,* 406 F.3d 1166, 1170 (9th Cir. 2005) (explaining that asylum and withholding of removal require proof of persecution by a "government official or persons the government is unable or unwilling to control").

We also conclude that the Immigration Judge's consideration of the respondent's application for protection under the Convention Against Torture is insufficient and legally incorrect. The Immigration Judge concluded that the respondent did not establish eligibility for protection under the Convention Against Torture solely on the basis that she did not show that the government of Mexico would acquiesce in the harm she fears by private actors (IJ at 6). 8 C.F.R. §§ 1208.18(a)(1), (7).

In arriving at this conclusion, the Immigration Judge relied on two factors. First, the Immigration Judge noted that there is no evidence that collusion between government officials and private actors engaging in extortion schemes is a government policy (IJ at 6). Second, the Immigration Judge reasoned that the fact that local police refused to investigate the respondent's report of being sexually assaulted does not establish that the entire government acquiesces to this harm (IJ at 6).

Both aspects of the Immigration Judge's analysis are legally incorrect. An applicant for protection under the Convention Against Torture does not need to establish that a government official who engages in torture or acquiesces to torture is doing so in furtherance of official governmental policy. *Barajas-Romero v. Lynch*, 846 F.3d at 360-65. Additionally, an applicant for protection under the Convention Against Torture does not need to show that the entire foreign government would consent to or acquiesce in her torture. *Tapia-Madrigal v. Holder*, 716 F.3d 499, 509-10 (9th Cir. 2013).

In light of the foregoing, we conclude that remand for additional consideration of the respondent's application for protection under the Convention Against Torture is warranted. In the remanded proceedings, the Immigration Judge should: (1) clearly articulate what harm, if any, the respondent is likely to experience upon her return to Mexico; (2) how likely the respondent is to

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constitute a cognizable social group). *Accord Ticas-Guillen v. Whitaker*, No. 16-72981, -- F. App'x – (9th Cir., Nov. 30, 2018), *available at* 2018 WL 6266766.

[2] In considering this issue, the Immigration Judge should apply the appropriate standard applicable to the respective forms of relief. *See Parussimova v. Mukasey*, 555 F.3d 734, 740 41 (9th Cir. 2009) (stating that the REAL ID Act requires that a protected ground represent "one central reason" for an asylum applicant's persecution); *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017) (holding that a ground protected under the Act must be "a reason" for the persecution in order to establish a nexus for purposes of withholding of removal under section 241(b)(3) of the Act).

experience such harm; (3) whether the respondent could avoid being harmed by internally relocating in Mexico; (4) whether any harm the respondent is likely to experience is "torture" as a matter of law; and (5) whether any public official would commit or acquiesce to the harm under the pertinent legal standards. 8 C.F.R. §§ 1208.16(b)(2), 1208.18(a); *see also Ridore v. Holder*, 696 F.3d 907 (9th Cir. 2012) (holding that what is likely to happen to an alien upon removal is a question of fact but whether that harm is torture is a question of law). We express no opinion on the ultimate outcome of these proceedings.

Accordingly, the following order will be entered.

ORDER: The record is remanded for further proceeding consistent with the forgoing opinion and for the issuance of a new decision.

FOR THE BOARD

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: A[redacted], M[redacted] D... **A [redacted]-053**
Riders:[redacted]

Date of this notice: 2/14/2019

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
O'Connor, Blair

[illegible]
Userteam: Docket

Files: A[redacted]-053 – Los Angeles, CA

Date: FEB 14 2019

In re: M[redacted] D[redacted] A[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Eloy A. Aguirre, Esquire

APPLICATION: Asylum; withholding of removal: Convention Against Torture

The lead respondent, a native and citizen of El Salvador, appeals from the Immigration Judge's September 14, 2017, decision denying her application for asylum and withholding of removal, and her request for protection under the Convention Against Torture.[1] *See* sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1231(b)(3); 8 C.F.R. §§ 1208.13, 1208.16-.18. The record will be remanded to the Immigration Judge for further proceedings consistent with this opinion.

The respondent's removability is undisputed. Therefore, the issue on appeal is whether the Immigration Judge properly denied her applications for asylum, withholding of removal, and protection under the Convention Against Torture. In support of those applications, the respondent credibly testified that she suffered abuse at the hands of a step grandmother, and the sons of a family friend that she lived with from the age of 7 years until she married at the age of 22 (IJ at 3-4; Tr. at 29-46). Her husband physically and mentally abused her (IJ at 4-5; Tr. at 48-61). After her husband died in 2015, gang members came to her house to continue the extortion that they began with her husband, threatening the lives of her and her children if she did not pay the $10,000 they claimed was owed to them by her husband (IJ at 5; Tr. at 66-70). Based on the foregoing facts, the respondent argues that she suffered past persecution and has a well-founded fear of persecution in El Salvador on account of her membership in the particular social groups she defines as "the family of her deceased husband" and "women in El Salvador" (IJ at 6-7; Respondent's Br. at 6-10).[2]

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[1] The respondent's children are derivatives of her asylum application. Hereinafter references to "the respondent" will refer to the adult respondent.

[2] The respondent on appeal does not challenge the Immigration Judge's determinations that she did not establish that the proposed particular social group defined as "domestic familial relationships in the homes in which she lived as a child" is cognizable under the Act, and that she did not establish membership in the group she defines as "married El Salvadoran women who could not leave their domestic relationship" (IJ at 6-9).

This Board must defer to the Immigration Judge's factual findings, including findings as to the credibility of testimony, unless they are clearly erroneous. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

First, even assuming that the respondent established membership in a legally cognizable particular social group defined by her husband's family, the Immigration Judge correctly determined that the single threat she received from gang members about the monies her husband owed them was not sufficiently egregious to constitute past persecution (IJ at 10). *See Hoxha v. Ashcroft*, 319 F.3d 1179, 1182 (9th Cir. 2003) (unfulfilled threats "constitute[d] harassment rather than persecution"); *Lim v. INS*, 224 F.3d 929, 936 (9th Cir. 2000) ("Threats standing alone constitute past persecution in only a small category of cases, and 'only when the threats are so menacing as to cause significant actual suffering or harm.'") (citing *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997)). The respondent's appellate arguments to the contrary do not persuade us that the Immigration Judge's decision was erroneous in this respect (Respondents' Br. at 4-6).[3]

Moreover, we agree with the Immigration Judge that the respondent's fear of future persecution on account of her particular social group, defined as "the family of her deceased husband," is not objectively reasonable (IJ at 11-12). The Immigration Judge found, without clear error, that there is no evidence that the gang members have made any inquiries about the respondent since her departure, and that the respondent's mother and son remain in El Salvador (IJ at 12). On appeal, the respondent has not identified clear error in those findings. *See Mondaca-Vega v. Lynch*, 808 F.3d 413, 426 (9th Cir. 2015) (en banc) (determining that a finding is not clearly erroneous unless, based on the entire evidence, the reviewing court is "'left with the definite and firm conviction that a mistake has been committed'" (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573-74 (1985)).

The Immigration Judge also found that the respondent did not establish that the particular social group defined as "women in El Salvador" was cognizable under the Act (IJ at 7-8). To establish that this group is cognizable under the asylum and withholding of removal statutes, the respondent must prove that the group is: "'(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within [Salvadoran] society....'" *Matter of A-B-*, 27 I&N Dec. 316, 319 (A.G. 2018) (quoting *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014)); *see also Matter of W-G-R-*, 26 I&N Dec. 208, 212-18 (BIA 2014), *aff'd in pertinent part and vacated and remanded in part on other grounds sub nom. by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), *cert. denied sub nom. Reyes v. Sessions*, 138 S. Ct. 736 (2018).

The Immigration Judge found that, although "women in El Salvador" satisfies the foregoing immutability requirement, it lacks "particularity" as it does not have defining characteristics and it would "entail more than 50 percent of the population of a particular country" (IJ at 7-8). The

[3] We note that the cases the respondent relies upon to argue that death threats made in the presence of weapons can constitute past persecution involve significantly more egregious facts than those present in her case. *See* Respondents' Br. at 5 (citing *Boer-Sedano v. Gonzales*, 418 F.3d 1082 (9th Cir. 2005); *Ruano v. Ashcroft*, 301 F.3d 1155 (9th Cir. 2002).

Immigration Judge also found there is insufficient evidence that Salvadoran society perceives women as a socially distinct group (IJ at 8). However, in rejecting the respondent's proposed social group as too broad to satisfy the particularity requirement, the Immigration Judge failed to recognize the Ninth Circuit's decision in *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010), and its rejection of the "notion that a persecuted group may simply represent too large a portion of a population to allow its members to qualify for asylum." *See also Mohammed v. Gonzales*, 400 F.3d 785, 797 (9th Cir. 2005) ("[T]he recognition that girls or women of a particular clan or nationality[,] or even in some circumstances females in general[,] may constitute a social group is simply a logical application of our law.") (internal parentheses omitted).

As the requirements of particularity and social distinction involve fact-finding that we cannot do in the first instance, remand to the Immigration Judge is necessary. *See* 8 C.F.R. § 1003.1(d)(3)(iv); *Matter of D-I-M-*, 24 I&N Dec. 448, 451 (BIA 2008). In evaluating the particularity and social distinction of the claimed group of "women in El Salvador," the Immigration Judge should consider *Perdomo v. Holder* and similar Ninth Circuit cases. *See Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc). *Accord Ticas-Guillen v. Whitaker*, 744 F. App'x 410 (9th Cir. Nov. 30, 2018). Remand will allow the Immigration Judge to conduct additional fact-finding that may be necessary for the required "evidence-based inquiry" as to whether the social group of women in El Salvador meets the requirements of particularity and whether Salvadoran society recognizes the respondent's proposed social group. *See Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014). If the respondent's proposed social group is found to be cognizable under the Act, the Immigration Judge should consider whether the respondent has demonstrated a nexus between her particular social group and the past harm she suffered or future harm she fears. We express no opinion regarding the ultimate outcome of the respondent's case.[4]

Accordingly, the following order is entered.

ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

[4] Our present order contemplates further consideration of the respondent's applications for asylum and withholding of removal. To avoid piecemeal review, we reserve judgment at this time with respect to the respondent's eligibility for protection under the Convention Against Torture.