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

In the Matter of

C-T-L-

Respondent

In Removal Proceedings

File No. Not Provided

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**BRIEF OF AMICUS CURIAE,  
AMERICAN IMMIGRATION LAWYERS  
ASSOCIATION**

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The 1951 Convention on the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees protect persons who were harmed or fear harm "for reasons of" race, religion, nationality, membership in a particular social group, or political opinion, in their country of nationality or habitual residence. *See* Article I(A)(2) of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259. Domestically, the United States obligation was enacted into legislation as the Refugee Act of 1980 and codified at various places in the Immigration and Nationality Act (the Act) to provide that persons persecuted "on account of" one of the enumerated grounds may be accorded protection. In 2005, the REAL ID Act, Div. B of Pub. L. No. 109-13, § 101(a)(3)(B)(i), 119 Stat. 302, 303, prescribed that "on account of" must be understood to mean that an enumerated ground is "at least one central reason" for the fear of persecution. The REAL ID Act clearly applies to persons seeking asylum under § 208 of the Immigration and Nationality Act, but nothing so specific was provided for under the related provision of withholding of removal. at § 241 of the Act.

In *Matter of C-T-L*- the Board queried AILA as to whether the "at least one central reason" requirement of the REAL ID Act also applies to withholding adjudications as it does to asylum adjudications. In this brief, AILA sets forth its understanding of the statute and the modifications made by the REAL ID Act and by applying traditional rules of statutory construction, informed by the international obligations inherent in administering domestic legislation implementing Convention principles, concludes that the "at least one central reason" requirement applies to withholding claims.

The Board's interpretation of "at least one central reason" in *Matter of J-B-N*, 24 I&N Dec. 208 (2009) informs the resolution here, however, it is inaccurate because it unlawfully narrows the meaning of the statute and ought to be remedied to accord with the plain language of the statute and applied nationwide. AILA takes no position on the merits of the claim or the result of the application of the statutory framework outlined herein to any party in this matter.

### **Statement of Interest**

AILA is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts and the Board of Immigration Appeals), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

### **Argument**

The substantive law of asylum in the United States, though controlled by domestic legislation, is founded and originates in the 1951 United Nations Convention

Relating to the Status of Refugees and the companion Protocol.

The Convention defines a "refugee" as a person who is unable or unwilling to return to his or her country of nationality or habitual residence because of a well-founded fear of persecution "for reasons of" race, religion, nationality, political opinion, or membership in a particular social group. *See* U.N. Refugee Convention art. 1(A)(2). Our nation's domestic law is identical. *See* § 101(a)(42)(A) of the Act (providing protection for persons harmed or fearing harm "on account of"). The Convention and our nation's implementation of it are intended to give shape to the principle of non-refoulement. The § 101(a)(42) of the Act's definition of "refugee" also governs asylum adjudications for persons within the jurisdiction of the United States. *See* § 208 of the Act (implementing asylum provisions).

In addition to asylee and refugee status, there is a third type of protection against refoulement known as withholding of removal. Section 241 of the Act provides that the U.S. "may not" remove a person to a country where he or she is likely to be persecuted on account of one of the protected grounds set forth in the Protocol. The text of the statute is as follows:

[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1231(b)(3). This language mirrors the statutory definition of refugee at § 101(a)(42)(A) of the Act that in turn mirrors the language of the Convention.

Withholding of removal under § 241 is founded on Article 33 of the Convention.

As the Supreme Court explained, withholding is considered mandatory for domestic law in order to comply with the United States non-refoulement obligation under the Convention. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 n25 (1987). It prohibits the removal to a persecuting country of any refugee-qualified individual unless certain conditions are satisfied. *See* U.N. Refugee Convention Art. 33(2) (barring refoulement in all cases except for individuals who are convicted of particular serious crimes who constitute a danger to the community). The mandatory nature of withholding operates as a refugee-remedy for people who are ineligible for asylum by operation of the time-bar at § 208(a)(2)(B) of the Act, because there may be other ineligibilities or an individual might not merit a favorable exercise of discretion.

The substantive difference between the two forms of relief relates to the standard of proof as to the likelihood of persecution. Asylum may be granted to an alien who can show a well-founded fear of persecution on account of a protected ground; this is widely accepted as equating to a reasonable fear of persecution, or a one-in-ten chance of persecution; however, even if that showing is made, asylum may still be denied in the exercise of discretion. *See Cardoza-Fonseca*, 480 U.S. at 440. Withholding of removal, by contrast, requires a showing that it is more likely than not that the applicant will be persecuted on his or her return, and if this standard is met and the applicant is not otherwise statutorily ineligible, withholding of removal is mandatory. *Stevic*, 467 U.S. at 429-30. Both remedies require demonstration of a fear of persecution for an enumerated ground. The central analysis here is that both asylum and withholding require a nexus

to demonstrate eligibility.

In the REAL ID Act, Congress made three statutory changes to the Convention-related provisions of the INA for asylum applications filed on or after May 11, 2005. First, it prescribed that the nexus element at § 101(a)(42) means that “race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.” *See* § 208(b)(1)(B)(i) of the Act.

Second, it codified already-existing corroboration requirements to provide that an applicant may be required to corroborate testimony with other evidence unless “the applicant does not have the evidence and cannot reasonably obtain the evidence.” *See* § 208(b)(1)(B)(ii) of the Act.

Third, it specified that a finder of fact could base an adverse credibility finding on a variety of factors, including inconsistencies “without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.” *See* § 208(b)(1)(B)(iii) of the Act.

The ostensible anomaly queried in this case is that Congress directly incorporated the corroboration and credibility amendments into the withholding of removal provision, *see* § 241(b)(3)(C) of the Act, but did not so address the “one central reason” amendment. Accordingly, the question presented is whether the “at least one central reason” amendment applies to § 241 withholding adjudications as it does to § 208 asylum adjudications?

Traditional rules of statutory construction as informed by the goals of the statute

in implementing the Convention indicate that the "one central reason" standard is likewise applicable to withholding claims. The essence of the REAL ID Act amendment was not to alter the standard or threshold for Convention-related eligibility, except to the extent that such eligibility is premised on meeting the *definition* of refugee. Instead, the amendment modifies the nexus element of the statutory definition of refugee, which, in turn, is the predicate for establishing eligibility for withholding of removal. *E.g., Stevic*, 467 U.S. at 421 ("Section 203(e) of the Refugee Act of 1980 amended the language of § 243(h) [now 241(b)(3)], basically conforming it to the language of Article 33 of the United Nations Protocol.").

Applying the traditional tools of statutory construction, we start first with the plain language of the statute. *Williams v. Taylor*, 529 U.S. 420, 431 (2000). Under this "plain language" analysis, it is clear that the "one central reason" standard applies to claims for withholding of removal as well as to claims for asylum. The REAL ID Act amended the *definition* of refugee by particularizing the nexus element of what it means to be "on account of" an enumerated ground. Although it is not a uniform interpretation of the Convention's nexus among signatories to the Convention, domestically, the United States views the nexus element as one of motivation: what is the motivation of the persecutor?

We note that the effective date provision of the statute explicitly states that the amendments made by the REAL ID Act "shall apply to applications for asylum, *withholding*, or other relief from removal made on or after [the effective date]." *See REAL*

ID Act § 101(h)(2) (emphasis added). This effective date provision *alone* would not be sufficient to alter the nexus element of the withholding statute because certain portions of the amendments need not necessarily apply statute-wide. However, reading the Act as a whole, we believe that the nexus element in withholding, to maintain uniformity with the nexus element for asylum, was modified.

The absence of a direct cross-reference in the REAL ID Act to the withholding provisions for the nexus element such as there were for the corroboration and credibility requirements is unremarkable. The corroboration and credibility amendments do not affect whether or not an individual meets the statutory definition of refugee; they merely circumscribe the procedure - the rules - by which that statutory definition is met. The "one central reason" amendment, by contrast directs itself to a substantive aspect of the statutory definition of refugee - the nexus element.

In addition to its plain language, the legislative history of the REAL ID Act supports the conclusion that the "one central reason" standard is applicable to withholding of removal as well as asylum applications. Prior to the REAL ID Act, mixed motive asylum and withholding of removal cases were evaluated under an "at least in part" standard - i.e., in a mixed motive case, the applicant had to show that the persecutor was motivated "at least in part" by a protected ground. *Matter of S-P-*, 21 I&N Dec. 486, 489 (BIA 1996). This evaluation was completely in alignment with other countries' interpretations of the nexus element under the Convention. With the REAL ID Act, Congress acted in response to the perceived lack of a uniform standard

nationwide for adjudicating Convention-based claims and it sought to clarify that the protected ground had to be a significant motivating factor in the persecution, a standard that Congress acknowledged was already in existence.<sup>1</sup>

Because the nexus element has “not been radically altered” by the REAL ID Act, *Matter of J-B-N-*, 24 I&N Dec. at 214, there ought to be no meaningful analytical distinction for withholding claims in practical terms. “Persecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected under the Act and others not. Proving the actual, exact reason for persecution or feared persecution would be inconsistent with the “well-founded fear” standard embodied in the “refugee” definition.” *Matter of S-P-*, 21 I. & N. Dec. at 489. However, a persecutor who is motivated to harm for reasons that are “incidental, tangential, or superficial” to a protected ground is not recognized under the Act for protection. *Matter of J-B-N-*, 24 I. & N. Dec. at 214.

However, the statute does not provide for a hierarchy of motivations and a persecutor may act to harm for a variety of reasons. In *Matter of J-B-N-*, the Board unlawfully narrowed the nexus element by requiring that the motivation not be

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<sup>1</sup> AILA notes but does not here address our concerns that pre-REAL ID, the law governing Convention-based claims before the various United States Courts of Appeals was consistent with the predominant international interpretation of the nexus element. The amendments made by REAL ID may have the effect of pushing the United States adjudications out of alignment with the Convention drafters’ intent and the language of the Convention itself. The REAL ID Act was based on an incomplete and incorrect understanding of the Convention framework. See *The Real ID Act: A Real Threat to Due Process and Civil Liberties* (AILA Issue Packet), available at AILA InfoNet Doc. No. 05031062 (posted Mar. 9, 2005).

"subordinate" to another motivation. *Id.* This is incorrect and ought to be corrected by the Board through published precedent. The United States Court of Appeals for the Third Circuit, on direct review of *Matter of J-B-N-*, disapproved of the decision in part. The Third Circuit held that, as applied in the asylum context, the statutory language of § 208 of the Act after the REAL ID Act was plain. *Ndayshimine v. Atty Gen'l.*, 557 F.3d 124, 129-31 (CA3 2009). The Third Circuit found that if a persecutor's motivation was tangential, incidental, or superficial that it could not satisfy the "at least one central reason" standard. The Third Circuit explained that "once the term 'subordinate' is removed, the BIA's interpretation constitutes a reasonable, valid construction of § 208's 'one central reason' standard." *Id.* The Board ought to modify its holding in *Matter of N-J-B-* because such modification is, as the Third Circuit held, mandated by the plain language of the statute after the REAL ID Act.

We wish to be clear that although AILA agrees that as a matter of statutory construction the "at least one central reason" nexus standard applies uniformly to withholding claims it is not at all clear to AILA that the REAL ID Act promotes the correct standard on the nexus element *vis à vis* our international obligations and we continue to advocate for legislative corrections as necessary. For example, section 5(b) of the recently introduced Leahy-Levin Refugee Protection Act of 2010 amends the "at least one central reason" standard to mean that a persecutor's motivation "was or will be a factor in the applicant's persecution or fear of persecution" -- a standard in accord with the actual text of the Convention. See AILA InfoNet Doc. No. 10031666 (posted

Mar. 16, 2010) (providing section by section analysis); *see also* AILA *Applauds Sen. Patrick Leahy's Introduction of the Refugee Protection Act of 2010*, available at AILA InfoNet Doc. No. 10031510 (posted Mar. 15, 2010) (explaining that "[t]his is a significant piece of legislation that comes at the right time given the global unrest that troubles our world.").

### Conclusion

Though Congress was mistaken in its perception about the REAL ID Act and though the modifications made by the REAL ID Act are unnecessary, the nexus element of "at least one central reason" applies uniformly throughout the Convention-related relief provisions of the Immigration and Nationality Act. *Matter of J-B-N-* was incorrectly decided in part and ought to be modified to accord with the plain language of the statute as explained above.

Respectfully submitted,

  
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CERTIFICATE OF SERVICE

I certify that a copy of this brief was served on the parties listed below. The address for Respondent or Respondent's counsel was not provided to AILA.

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