



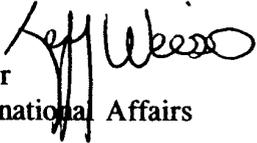
**U.S. Department of Justice
Immigration and Naturalization Service**

425 I Street N.W.
Washington, D.C. 20536

File: 120/11.26

December 10, 1998
Human Rights Day

MEMORANDUM FOR: Asylum Officers
Immigration Officers
Headquarters Coordinators (Asylum and Refugees)

FROM: **Jeff Weiss** 
Acting Director
Office of International Affairs

SUBJECT: **Guidelines For Children's Asylum Claims**

This memorandum is written to provide the Asylum Officer Corps (AOC) with background and guidance on adjudicating children's asylum claims. This guidance applies primarily to children under the age of 18 who apply for asylum independently rather than as a derivative applicant by submitting a Form I-589 asylum application in their own name. Many of these issues will also be relevant to overseas Immigration Officers in processing the refugee applications of children.

It should be noted that the United Nations and generally accepted international definition of "child" is every person under the age of 18. These Guidelines take the same approach, except (as noted below) that they also apply to those individuals between 18 and 21 for purposes of scheduling and derivative determinations for asylum claims only.

During the last 10 years, the topic of child asylum seekers has received increasing attention from the international community. Human rights violations against children can take a number of forms, such as abusive child labor practices, trafficking in children, rape, and forced prostitution. In violation of current international standards that establish age 15 as the minimum age for participation in armed conflicts, children under age 15 in some countries are forcibly recruited by regular or irregular armies to participate directly in military conflicts. Children who have had such experiences are referred to as "child soldiers" throughout this text. The protection needs of these and other children have commanded much international and domestic attention.

**Non-Citizen Children on Their Own:
Binational Conference on Procedures, Protections and Due Process for
Unaccompanied Children**

Winning Asylum or CAT Relief for Persecuted Children

The Children and Family Justice Center at Northwestern Law School

The Children and Family Justice Center (CFJC) is a comprehensive children's law center where law students, under the supervision of attorneys and clinical professors, represent young people on matters of delinquency and crime, family violence, school discipline, health and disability, and immigration and asylum. We collaborate with communities and child welfare, educational, mental health and juvenile justice systems to develop fair and effective policies and solutions for reform.

We work with neighborhoods, law enforcement, and youth-serving organizations to create community programs that keep children out of the juvenile justice system, reduce confinement and incarceration of children, develop and teach educational programs that inform adolescents of their rights and responsibilities under the law, seek greater protections for children during pre-court police interrogations, improve conditions of confinement for children deprived of their liberty, and challenge the disproportionate presence of children of color in the public justice system.

Immigration and Children

The CFJC offers legal representation to children and youth seeking asylum in immigration proceedings, advocacy in state abuse and neglect proceedings, and assistance in filing applications for Special Immigrant Juvenile Status relief and lawful immigration status pursuant to the Violence Against Women Act.

The center is particularly concerned with the status of unaccompanied child refugees. Some 5,000 unaccompanied children enter the U.S. each year and are detained by the Department of Homeland Security. They rarely have access to lawyers, and they have frequently been traumatized by war and civil strife, torture, and violence. The center has been involved in training attorneys, developing policy, speaking and writing and working with national advocates to improve the treatment and legal rights of these child refugees, including hosting training sessions like one held in the summer of 2001 at the Law School in which nearly 300 volunteer attorneys were certified to represent unaccompanied children.

Through a fellowship sponsored by Equal Justice Works, the center also focuses on Convention Against Torture relief for children. In conjunction with this project, a Web site has been created to assist advocates representing children seeking asylum and CAT relief.

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Resources

- **Northwestern Law School Bluhm Legal Clinic – Children and Family Justice Ctr.**

Children and the Convention Against Torture: Resources for Advocates

Website: <http://www.law.northwestern.edu/cfjc/catresources/>

This Web site provides resources for attorneys and advocates representing child survivors of torture, including former street children, child soldiers, and children fleeing street gangs in Central America.

The website contains links to: Briefs, Published Decisions, Unpublished Decisions, International Case Law, Citations to CAT Articles, Country Condition Information, Psychological Effects of Torture on Children, Child Soldiers, Gangs in Central America, Street Children, Unaccompanied Minors and more.

This project was created as part of an [Equal Justice Works](#) fellowship project funded by the law firm Greenberg Traurig. Contact Anita Ortiz, Equal Justice Works Attorney, by [e-mail](#) or call (312) 503-0117 for more information.

- **Casa Alianza**

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- **Jovenes Hondurenos Adelante – Junto Avancemos, a.c.**

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JHA-JA is an organization that seeks to support human development in the children and youth of Honduras with a special focus on gang members. The focus of the organization is rehabilitation. The group works with local companies to help former gang members find work trained by JHA-JA. Mr. Bardales has been advisor on Youth Gangs for the municipality of San Pedro Sula.

- **APREDE (Asociacion para la prevencion del delito)**

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APREDE is a leading practitioner-organization for youth at risk prevention and reintegration programs.

- **Instituto Universitario de Opinión Pública
Universidad Centroamericana "José Simeón Cañas"**

Website: <http://www.uca.edu.sv/publica/iudop/entrada.htm>

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Jose Miguel Cruz has studied the issue of violence in El Salvador and Central America since 1996, the year he completed one of the first investigations on the problem of gangs. Since 1998, he has coordinated a Central American study on gangs and in 2001 headed an investigative research project on firearms in El Salvador.

- **Homies Unidos**

Website: <http://www.homiesunidos.org/>

Background Reading

- **Maras y pandillas en Centroamerica (Spanish series)**

Maras and Gangs in Central America

UCA – Universidad Centroamericana “Jose Simeon Canas”

www.ucaeditores.com.sv

Five-year research study on youth violence and gangs in Central America.

Volume I (2001)

Volume II (2004): Pandillas y capital social (*Gangs and Social Capital*)

Volume III (2004): Politicas Juveniles y rehabilitacion (*Youth Policy and Rehabilitation*)

- **Barrio Adentro: La Solidaridad violenta de las pandillas (Spanish)**

Inside the Hood: The violent solidarity of gangs

Instituto Universitario de Opinion Publica, UCA

Pan American Health Organization

Homies Unidos

(2001) Maria L. Santacruz Giralt, Principal Investigator

- **Street Wars: Gangs and the Future of Violence**

Tom Hayden (2005)

CFJC Assistance by Request: Please email your inquiries or request for documents to any attorney at our program. We will respond as soon as possible. The following are documents available upon request.

- Visit our Convention Against Torture website (see above).
- Sample Briefs

Guatemala

Juvenile persecuted by father (Child Abuse)

Granted by IJ – February 2006

Written decision also available.

Honduras

Juvenile persecuted by gang for failure to follow orders and on account of religion

Granted by IJ – June 2004

Oral decision – religion grounds

China

Juvenile persecuted by family (Forced Smuggling) and fear of government due to exit visa violation.

Granted by IJ – November 2004 – Oral decision

El Salvador

Juvenile fleeing persecution by gang

Granted by IJ – 2000

Religion grounds – oral decision

Peru

Adult male granted asylum due to persecution during childhood on account of his sexual orientation.

Granted by Asylum Office – September 2004

Criminal Bars and Juveniles

Draft Brief – for discussion only

- Unpublished IJ decisions involving children. Please specify what type of case you are handling.
- Please see attached samples of Tables of Contents for Juvenile Asylum claims.

Because of the unique vulnerability and circumstances of children, the Immigration and Naturalization Service (INS) considers it appropriate to issue guidance relating to our youngest asylum seekers. These "Guidelines For Children's Asylum Claims" provide Asylum Officers with child-sensitive interview procedures and analysis regarding the most common issues that may arise in these cases. This guidance is similar in approach to the "Considerations For Asylum Officers Adjudicating Asylum Claims From Women" (the "*Gender Guidelines*") memorandum issued on May 26, 1995. Like the *Gender Guidelines*, these Guidelines are designed to enhance the ability of INS Asylum Officers to address more responsively the substantive and procedural aspects of claims, irrespective of the child's country of origin. Increasing the understanding of and sensitivity to children's issues will improve U.S. asylum adjudications. In-Service training at all Offices will be critical to using this guidance effectively.

Background and International Guidance

Children and women represent approximately 80 percent of the world's refugee population. This section reviews the historical and human rights context in which guidance on children's refugee issues has evolved internationally.

Asylum and refugee status determinations are governed by United States law and regulations. Certain international instruments can provide helpful guidance and context on human rights norms.¹ For example, the internationally recognized "best interests of the child" principle is a useful measure for determining appropriate interview procedures for child asylum seekers, although it does not play a role in determining substantive eligibility under the U.S. refugee definition.

The following international instruments and documents contain provisions specifically relating to children. They recognize and promote the principle that children's rights are human rights, and that children's rights are universal:

- **UDHR:** The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly on December 10, 1948. The Declaration is an authoritative statement by the U.N. General Assembly, reflecting a collective understanding of the rights which are fundamental to the dignity and development of every human being. Article 14 of the UDHR provides for the right to apply for asylum, and Article 25(2) refers to the special care and assistance required for children. The rights contained in the UDHR have been expanded upon in international covenants and elsewhere, including the International Covenant on Civil and Political Rights, to which the United States is a Party.²

¹ These instruments need not be ratified by the United States to provide guidance as a source of human rights norms. See, Asylum Officer Basic Training Course (AOBTC, August, 1998), Lesson: International Human Rights Law.

² Many of the components of international policy regarding refugee children also derive from the United Nations *Convention on the Rights of the Child* (CRC). Adopted by the United Nations in November 1989, the CRC codifies standards for the rights of all children, including those who are refugees. Article 3(1) of the CRC provides that the "best interests of the child" should be the primary consideration in decisions involving children. Because the United States has signed but not ratified the CRC, its provisions, as noted above, provide guidance only and are not binding on adjudicators. Having signed the CRC, however, the United States is obliged under international treaty law to refrain from acts which would defeat the object and purpose of the Convention.

- **UNHCR ExComm Conclusion No. 47:** Over the years, the Executive Committee of the Office of the United Nations High Commissioner for Refugees (UNHCR) has adopted a number of conclusions concerning refugee children. Safeguarding the well-being of refugee children has long been a high priority of the UNHCR Executive Committee and the United States. The Executive Committee issued its first conclusion in 1987 devoted exclusively to young people (Conclusion No. 47).³ This Conclusion urged action aimed at addressing the human rights and needs of children who are refugees, and highlighted the particular vulnerability of unaccompanied and disabled refugee children, as well as the need for action by UNHCR to protect and assist them. Conclusion No. 47 condemned the exposure of refugee children to physical violence and other violations of their basic rights, including sexual abuse, trade in children, acts of piracy, military or armed attacks, forced recruitment, political exploitation, or arbitrary detention. The document also called for national and international action to prevent such violations and assist the victims. It emphasized that all action taken on behalf of refugee children must be guided by the principle of the "best interests of the child."
- **UNHCR ExComm Conclusion No. 59:** In 1989, in Conclusion No. 59,⁴ the Executive Committee reaffirmed and expanded upon the need for particular attention to the needs of refugee children; gave examples of how these needs could be assessed, monitored, and met; drew special attention to the UNHCR's particular need to endeavor to ensure the right of refugee children to education, as well as their protection from forced recruitment into armed forces and irregular adoption⁵
- **UNHCR Policies and Guidelines:** The UNHCR issued several sets of child-related guidelines in recent years.
 - ▶ The UNHCR "Policy on Refugee Children"⁶ issued in 1993 points out that governmental actions relating to children must be "tailored to the different needs and potentials of refugee children," to avoid the tendency to think of refugees as a uniform group. The UNHCR stated that children and adolescents are entitled to special attention because their needs, and their legal and social status, can be

The internationally recognized guiding principle for refugee children is "best interests of the child." It is a useful measure for determining appropriate interview procedures for child asylum seekers, but does not play a role in determining substantive eligibility under the U.S. refugee definition.

³ Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, No. 47 (XXXVIII) on Refugee Children (1987).

⁴ Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, No. 59 (XL) on Refugee Children (1989). See also, Conclusions on the International Protection of Refugees adopted by the Executive Committee of the UNHCR Programme, No. 84 (XLVIII) on Refugee Children And Adolescents (1997) reaffirming the "best interests of the child" principle and Conclusions Nos. 47 and 59.

⁵ Reflecting a more concerted effort to ensure the well-being of refugee children, the UNHCR established the position of a Senior Coordinator for Refugee Children in 1992. This was seen as a significant step toward improving UNHCR's protection of and assistance to minors.

⁶ UNHCR Policy on Refugee Children, EC/SCP/82 (August 6, 1993).

significantly different from those of adults, and from each other as well, due to age-related developmental differences.

- ▶ In 1994, UNHCR issued "Refugee Children: Guidelines on Protection and Care,"⁷ incorporating international norms relevant to the protection and care of refugee children. The Guidelines adopt a human rights perspective using the articles in the CRC to set UNHCR's standards. In the introduction to the revised Guidelines, the High Commissioner wrote: "The ultimate value of the UNHCR Policy and Guidelines on Refugee Children will lie in their translation from words to concrete action." At the request of the General Assembly, UNHCR submitted a report on unaccompanied minors in 1996.⁸
- ▶ The UNHCR published in 1997 the "Guidelines on Policies and Procedures in Dealing With Unaccompanied Children Seeking Asylum."⁹ The purpose of the Guidelines is threefold: 1) to increase awareness of the special needs of unaccompanied children and the rights reflected in the CRC; 2) to highlight the importance of a comprehensive approach to child refugee issues; and 3) to stimulate internal discussion in each country on how to develop principles and practices that will ensure that the needs of unaccompanied children are being met.
- **Canadian Guidelines:** On September 30, 1996, the Canadian Immigration and Refugee Board (IRB) issued the ground-breaking "Child Refugee Claimants: Procedural and Evidentiary Issues," the first document of its kind issued by a country operating a refugee determination system. The Canadian Guidelines recognize that refugee claims of children pose a special challenge since they represent a particularly vulnerable group. The Guidelines acknowledge that children may not be able to articulate their claims to refugee status in the same way as adults, establish special procedures for adjudicating children's claims, and adopt the best interests of the child as the relevant standard for assessing a child's claim. The IRB developed the Guidelines after consultation with international, national, local, and legal organizations involved with refugee children.

Like the Canadian Guidelines, the INS Guidelines for Children's Asylum Claims are a collaborative effort developed after consultations with interested U.S. governmental and non-governmental organizations (NGOs) and individuals, as well as with the UNHCR. The Women's Commission for Refugee Women and Children initially raised these concerns with the INS and was instrumental in the development of this guidance.

⁷ UNHCR Refugee Children: Guidelines on Protection and Care (1994).

⁸ Assistance to Unaccompanied Refugee Minors, A/51/329, September 5, 1996.

⁹ UNHCR Guidelines on Policies and Procedures in Dealing With Unaccompanied Children Seeking Asylum (1997).

II. Procedural Considerations for Asylum Officers

The INS recognizes the particular needs of children in various contexts.¹⁰ The purpose of this section is to emphasize the importance of creating a "child-friendly" asylum interview environment that allows a child to discuss freely the elements and details of his or her claim.

As noted above, this guidance applies primarily to children under the age of 18 who apply for asylum independently rather than as a derivative applicant by submitting a Form I-589 asylum application in their own name. If the child does not appear at the interview with a parent or guardian, the Asylum Officer should routinely inquire into the location of the child's parents, whether the parents are aware of the child's whereabouts, and that the child has applied for asylum.¹¹ The majority of children who apply for asylum do so riding along with a parent's ("principal") application.

While these Guidelines are particularly relevant for children who raise independent asylum claims, the procedural sections may be useful for children's cases generally. These Guidelines will also apply to those individuals between the ages of 18 and 21 for purposes of interview scheduling and derivative determinations only. Asylum Officers should bear in mind that an applicant who is above the age of 18 at the time of the asylum interview, but whose claim is based on experiences that occurred while under the age of 18, may exhibit a minor's recollection of the past experiences and events.

Child asylum applicants may be less forthcoming than adults, and may hesitate to talk about past experiences in order not to relive their trauma. This section recognizes that children may not present their cases in the same way as adults, and suggests child-sensitive procedures intended to help Asylum Officers to interact more meaningfully with the child during the asylum interview. Many of the techniques are also applicable to interviews with adults, and in all cases Asylum Officers should seek to ensure that the applicant feels comfortable and free to discuss the claim.

(a) Presence of Trusted Adult

It is generally in the child's best interests for Asylum Officers to allow a trusted adult to attend an asylum interview with the child asylum applicant.¹² A trusted adult is a support

¹⁰ For example, most unaccompanied minors (children under the age of 18 who seek admission to the United States and who are not accompanied by a parent or guardian) are exempted from the expedited removal process. See, Memorandum, "Unaccompanied Minors Subject to Expedited Removal" (INS Office of Programs), August 21, 1997.

¹¹ Because the circumstances under which an unaccompanied minor may reach the United States can vary greatly, it is necessary to determine, if possible, the location of the child's parents. Children may have been separated from parents during their flight to the United States. Both children and parents may wish to know the location of relatives and whether they are safe. It may be in the child's best interests for the Asylum Officer to notify parents that their child has applied for asylum, provided that the child requests such parental notification in writing. 8 CFR 208.6(a).

¹² "Some applicants may request that a relative or friend be present at the interview for 'moral support.' There is no prohibition against this and the Asylum Officer, in his or her discretion, may allow such individual to remain during the interview." AOBTC (August, 1998) Lesson: Part I: Overview of Nonadversarial Interview, at pg. 23. At the same time, there is no requirement that a child bring an adult to the interview either to serve as a support person, attorney, or accredited representative.

person who may help to bridge the gap between the child's culture and the U.S. asylum interview. Testifying can be difficult for a child, and the presence of a trusted adult may help the child psychologically. The function of the support person is not to interfere with the interview process or coach the child during the interview, but to serve as a familiar and trusted source of comfort. The Asylum Officer may allow the adult to help the child explain his or her claim, but the Asylum Officer should at the same time ensure that the child is able to speak for him\herself and is given an opportunity to present the claim in his or her own words. The INS is not suggesting that the trusted adult necessarily serve as a substitute for an attorney or representative at the asylum interview, and the child may be accompanied to the interview by a support person in addition to an attorney or representative.

In many cases, the child's parent or other relative is a logical and appropriate support person. When the child arrives at an interview without a relative, however, the Asylum Officer in his or her discretion may allow another trusted adult to serve as the support person.¹³ If the Asylum Officer determines during the course of the interview that the child is not comfortable because of the support person or is afraid of the person (for example, the support person appears to be a smuggler or some other adult who may put the child in danger), the Asylum Officer should continue the interview without that person.

This is not a new practice. Asylum Officers have the discretion to admit to an interview an individual who can offer moral support to an asylum applicant. We will continue to work closely with the Asylum Offices, NGOs, and the UNHCR on the topic of support persons for children's cases. Additional guidance on the role of support persons will be issued as required.

(b) Asylum Officers

All INS Asylum Officers will be trained on child refugee issues, and may be called upon to conduct interviews of child asylum seekers. It is in the best interests of the child to be interviewed by an official who has specialized training in child refugee issues.

There may be some Asylum Officers who have unique backgrounds or experience dealing with children. Other Officers may share the culture or language of the child. To the extent that personnel resources permit, Asylum Offices should attempt to assign Asylum Officers with the relevant background or experience to interview children's cases.

(c) Interview Scheduling

Virtually all applicants who filed their asylum applications after January 4, 1995, have their cases decided within 60 days. This is one of the important results of the asylum reform regulations. Reform applicants normally do not have to file a request for an interview. They are automatically scheduled for interviews and sent interview notices after the filing of asylum applications.

¹³ The UNHCR document "Refugee Children - Guidelines on Protection and Care" (see, Section I, Background and International Guidance, supra) states that children should "have a trusted adult accompany the child during the interviewing process, either a family member of the child, a friend or an appointed independent person" (pg. 102).

For pre-reform cases in our backlog of unadjudicated asylum applications, the INS has long had a policy permitting any applicant to request in writing an asylum interview if one has not been scheduled. If a principal asylum applicant has a child who is close to reaching his or her 21st birthday, or if the child has filed a separate asylum application, a request for an asylum interview may be sent to the Asylum Office. Such requests should be given high priority in scheduling. For the sake of continuity, siblings of minor age should be interviewed as closely in time as possible and, to the extent that personnel resources permit, interviewed by the same Asylum Officer.

(d) General Interview Considerations

The atmosphere created during the non-adversarial asylum interview should allow the child to testify at a comfortable speed and should promote a full discussion of the child's past experiences. 8 CFR 208.9(b).

Interpreters play a critical role in ensuring clear communication between the child and Asylum Officer. Asylum Officers should confirm that the child and interpreter fully understand each other. Children who have been victims of sexual violence may feel more comfortable recounting their experiences to an interpreter and interviewer of the same gender. For example, it is not difficult to imagine the reluctance of a girl to testify about a sexual assault through a male interpreter, particularly if the interpreter is a family member or friend.¹⁴

Girls and young women, in many cases, may be more comfortable discussing their experiences with women Asylum Officers, particularly in cases involving rape, sexual abuse, prostitution, and female genital mutilation (FGM). To the extent that personnel resources permit, Asylum Offices may have women Asylum Officers interview these cases. See, Gender Guidelines, at pg. 5.

The child may be reluctant to talk to a stranger due to embarrassment or emotional upset and past trauma. Asylum Officers may have to build a rapport with the child to elicit claims and to enable the child to recount his or her fears and/or past experiences.¹⁵ Several steps described below may be helpful in building rapport with a child and encouraging communication. Keep in mind that, from the point of view of most applicants -- including children -- Asylum Officers are authority figures and foreign government officials. Officers must also be culturally sensitive to the fact that every asylum applicant is testifying in a foreign environment and may have had experiences which give him or her good reason to distrust persons in authority. A fear of encounters with government officials in countries of origin may carry over to countries of reception. This fear may cause some children to be initially timid or unable to fully tell their story.¹⁶

¹⁴ See, Gender Guidelines, at pg. 5; AOBTC (August, 1998) Lesson: Interviewing Part VI: Working with an Interpreter.

¹⁵ See, AOBTC (August, 1998) Lesson: Part I: Overview of Nonadversarial Interview; AOBTC (August, 1998) Lesson: Interviewing Part III: Eliciting Testimony.

¹⁶ "A person who, because of his experiences, was in fear of the authorities in his [or her] own country may still feel apprehensive vis-a-vis any authority. He [or she] may therefore be afraid to speak freely and give a full and accurate account of his [or her] case." United Nations High Commissioner for Refugees, Handbook on Procedures and

Asylum Officers may be able to overcome much of a child's timidity or nervousness with a brief rapport-building phase during which time neutral topics are discussed (such as general interests, future career goals, school, pets, hobbies). Once the child appears comfortable, the Asylum Officer should make a brief "Opening Statement" before beginning the formal interview.¹⁷ Asylum Officers can explain in very simple terms in the Opening Statement what will happen during the asylum interview.

Child Asylum Applicant:

- ***Build Rapport With The Child***
- ***Use Opening Statement***

OPENING STATEMENT FOR CHILDREN (Example¹⁸)

I am glad that you are here today, and that your friend Mr. (Ms.) [name of support person, if any] is here with you. Do you know what we are going to do today? We are going to talk about why you left [name of country of origin], and why you may not want to go back there. As we talk, we will both have jobs. My job is to understand what happened to you. But I need your help. Your job is to help me to understand by telling me as much as you can remember, even the little things.

I will be asking you a few questions today. Some questions will be easy, but other questions you might not understand. It is OK if you do not understand a question. Just tell me that you do not understand and I will ask the question some other way. But please do not guess or make anything up. If you do not know the answer to the question, that is OK too. Just tell me that. No one can remember everything. There are no "right" or "wrong" answers to any of my questions.

As we talk today, I will write down what we say because what you tell me is important. Do not get nervous about my taking notes. Later, if I forget what we said, I can look it up.

I understand that you may be nervous or scared to tell me about what happened to you. I will not tell anyone in [name of country of origin] about what you tell me today. Also, none of your friends or, if you want, family here in the United States will know anything about what you tell me.

Before we start, do you have any questions that you would like to ask me? Or is there anything that you want to tell me? If you think of something while we are talking, let me know. If you have to go to the bathroom or want to stop for a while, also let me know.

The tone of the Opening Statement is intended to build trust and to assure the child that the Asylum Officer will be asking questions to help understand the claim. Note from a reading of the sample Opening Statement that a number of important points are made. The Statement clearly gives the child permission to tell the Asylum Officer when the child does not understand a question. Children need to know that it is permissible for them to tell adults when they either do not understand a question or do not know an answer. Children also need to be reassured that

Criteria for Determining Refugee Status (1992) ("UNHCR Handbook ") at ¶ 198.

¹⁷ If the principal on the case is an adult, an "Opening Statement" for adults should be used. See, Asylum Officer Corps Training, Interviewing Summary Of Techniques, HQ (July 14, 1994). See also, AOBTC (August, 1998) Lessons: Interviewing Part I: Overview of Non-Adversarial Interview; Part II: Notetaking; Interviewing Part III: Eliciting Testimony; Interviewing Part IV: Cross-Cultural Communication and Other Factors That May Impede Communication at an Asylum Interview; Interviewing Part VI: Working With an Interpreter; Interviewing Part V: Interviewing Survivors: Physical Abuse, Torture, and Trauma-Related Conditions.

¹⁸ The sample Opening Statement is intended for young children, and may be modified for older children, depending on their developmental stage and level of sophistication. See, Working with Refugee and Immigrant Children, infra at note 21, pgs. 6-12, summarizing and reviewing the characteristics of children's developmental stages.

embarrassing or traumatic experiences from the past will not be shared with their friends or family members, if they wish, from their home country.

During the interview Asylum Officers must take the initiative in actively considering whether the child understands the process and the particular questions. The Asylum Officer should watch for non-verbal cues, such as a puzzled look, knitted eyebrows, downcast eyes, long pauses, and irrelevant responses. These behaviors may signal something other than lack of comprehension, of course, but they may also serve as signals that a child is confused. In such circumstances, the Asylum Officer should pause, and if no appropriate response is forthcoming, rephrase the question.

The Opening Statement is a rapport-building activity intended to create a relaxing atmosphere, to make the child feel secure and confident, and to provide the child with general information about the asylum interview.

Children in some cultures are taught to listen to adults but not to speak in their presence at all. Other children may have spent time in school or other environments where providing answers to questions is expected and saying "I don't know" is typically discouraged. If necessary, an Asylum Officer may explain to the child how to use the "don't know" response. An Asylum Officer might say, "If I ask you the question, 'How many windows are in this building?' and you don't know the answer to that question, you should say, 'I don't know.' Let's practice that. 'How many windows are in this building?' [Child responds, 'I don't know.']" This approach helps to ensure that the child understands when to provide a "don't know" response.

If at any time during the course of the interview the child begins to feel uncomfortable or embarrassed, the Asylum Officer should offer verbal reassurances. The Asylum Officer may empathize with the child by saying, "I know that it's difficult to talk about this, but it is important for me to hear your story." Or, "I know that this may make you feel uncomfortable or sad. That's OK. I understand." Additionally, a simple expression of interest (e.g., "I see" or "uh huh") may be enough for the child to continue. The Asylum Officer may also shift the focus of the questioning to a non-threatening subject until the child regains his or her confidence. Reassurance, empathic support, carefully framed questions, encouragement, and topic-shifting are important techniques for these cases.

Reassurance, empathic support, carefully-framed questions, encouragement, and topic-shifting are important techniques for children's cases.

Asylum Officers should also take the initiative when it comes to situations where a brief recess may be needed. Sometimes a child's way of coping with frustration or emotion is to shut down during the interview, to fall into silence or into a series of "I don't know" and "I don't remember" responses. Many children may not take the initiative to request a recess. A young child, for example, may stop answering questions or cry rather than interrupt the Asylum Officer with a request to go to the bathroom or rest. The responsibility may fall to the Asylum Officer to monitor the child's needs and best interests during the asylum interview, and to be proactive if a recess is needed.

As the interview draws to a close, the Asylum Officer should return to a discussion of the neutral topics with which the interview began. This approach will help to restore the child's sense of security at the conclusion of the interview. The Asylum Officer should ask the child if he or she has any final questions, and inform the child of the next steps in the application process.

(e) Child-Sensitive Questioning -- And Active Listening -- Techniques

This subsection reviews general child-sensitive questioning and active listening techniques. Children may not understand questions and statements about their past because their cognitive and conceptual skills are not sufficiently developed. An Asylum Officer's questions during the interview should be tailored to the child's age, stage of language development, background, and level of sophistication.¹⁹ In order to communicate effectively with a child asylum applicant, an Asylum Officer must ensure that the Officer's questions -- and the child's answers -- are clearly understood.

Asylum Officers should take care to evaluate the child's words from a child's point of view. Children cannot give adult-like accounts of their experiences and memories, and Asylum Officers may have to bridge the gap through an understanding of age-related or culturally related reasons for a child's choice of words. For example, "staying up late" may mean early evening for a child. Similarly, instead of saying that a relative died or was killed, a child may state that the individual "went away" or "disappeared" implying reversibility; that the individual may return. Children may not know what happened or feel betrayed by the adult who has died, and may not understand the permanence of death. Even older children may not fully appreciate the finality of death until months or years after the event.

Asylum Officers should take care to evaluate the child's words from a child's point of view.

Proper questioning and listening techniques will result in case assessments that are more complete and accurate. The Asylum Officer controls the number and content of the questions during the interview process and, as such, needs to be familiar with the following techniques in order to elicit the most information:

- As a general rule, use short, clear, age-appropriate questions and sentences, avoiding long or compound questions. Use one or two syllable words in questions and avoid three or four syllable words. For example, it is better to ask "Who was the person?" rather than "Identify the person." Use simple, straight-forward questions: "What happened?" Avoid multi-word verbs: "Might it have been the case...?" Ask the child to define the use of a term or phrase in the question posed in order to check the child's understanding.

¹⁹ A child's "mental development and maturity" are important considerations when determining whether a child may qualify for refugee status. UNHCR *Handbook* at ¶214. See also, the summary of developmental stages in *Working with Refugee and Immigrant Children*, *infra* at note 21, pgs. 6-12.

- Choose easy words over hard ones: use expressions like "show," "tell me about," or "said" instead of complex words like "depict," "describe," or "indicate."
- Tolerate pauses, even if they are long.
- Ask the child to describe the concrete and observable, not the hypothetical or abstract. Use visualizable terms (e.g., gun), instead of categorical terms (e.g., weapon). Reduce questions to their most basic and concrete terms.
- Avoid the use of legalistic terms in questions, such as "persecuted" or "persecution." Instead of "Were you persecuted?", ask "Were you hurt?"
- Use the active voice when asking a question (e.g., "Did the man hit your father?"). Avoid the passive voice (e.g., "Was your father hit by the man?").
- Avoid "front-loading" questions. Front-loading involves using a number of qualifying phrases before asking the crucial part of the question (i.e., questions that list several previously established facts before asking the question at hand). For example, "when you were in the house, on Sunday the third, and the man with the gun entered, did the man say ...?" should be avoided.
- Keep each question simple and separate. For example, a question like "Was your mother killed when you were 12?" should be avoided. The question asks about the child's mother and child's age at the same time.
- Generally avoid leading questions whenever possible. Research reveals that children may be more highly suggestible than adults. Leading questions may influence them to respond inaccurately.
- Use open-ended questions to encourage narrative responses. Children's spontaneous answers, although typically less detailed than those elicited by specific questioning, can be helpful in understanding the child's background. Try not to interrupt the child in the middle of a narrative response.
- If you are asking questions more than once, explain to the child why you are doing so. Make clear to the child that he or she should not change or embellish earlier answers and explain that you are asking repeated questions to make sure you understand the story correctly. Repeated questioning is often interpreted (by adults as well as children) to mean that the first answer was regarded as a lie or wasn't the answer that was desired.
- Coercion has no place in any interview. Children are never to be coerced into answering questions during the interview. For example, telling a child that she cannot leave the interview until she answers the Asylum Officer's questions should never occur.

- Do not expect children to be immediately forthcoming about events which have caused great pain.

Children may not know the specific details or circumstances that led to their departure from their home countries. Children may also have limited knowledge of conditions in the home country, as well as their vulnerability in that country.

Asylum Officers should determine the child's ability to count before asking how many times something happened. Children may try to answer without the requisite skill, resulting in erroneous responses. Even older children may not have mastered many of the concepts relating to conventional systems of measurement for telling time (minutes, hours, calendar dates). Imprecise time and date recollection may be a common problem for children, and is often a product of their culture.²⁰ The western mind typically measures time linearly, in terms of successive - and precise - named days, months, and years. Many cultures, however, note events not by specific date but by reference to cyclical (rainy season, planting season, etc.) or relational (earthquakes, typhoons, religious celebrations, etc.) events. In response to the question "When were you hurt?", it may not be uncommon for a child to state "During harvest season two seasons ago" or "shortly after the hurricane." To be sure, these answers may appear vague and not conform to western notions of precise time and named dates, but they may be the best and most honest replies the child can offer.

Even in those cultures where time is measured by a calendar, it may not comport to our Gregorian calendar. Many Guatemalan Indians, for example, still use the Mayan calendar of 20-day months. In certain Asian cultures, a baby is considered to be "1" on his or her date of birth thereby causing, to the western mind at least, a 1-year discrepancy between the child's age and date of birth. In many Latin cultures, 2 weeks is often "15 days" because the first and last days are counted. Certain Asian cultures also count the first day or year, adding 1 day or year to the time of the event.

In certain cultures, "I don't know" is used when an individual has no absolute knowledge but has an opinion about the truth of the matter in question. For example, a child may respond "I don't know" when asked who killed his or her parents, but upon further inquiry may state, for example, that everyone in his or her home village believes that it was government forces. Asylum Officers should generally probe further regarding these opinions. The child's awareness of community opinion may provide information about the issue in question even though the child may initially state "I don't know."

²⁰ "Asylum Officers should recognize and take into account...barriers (linguistic, cultural, time, fear of authorities, ignorance . . ." during interviews). Basic Law Manual, Second Edition (BLM, 1995) at pg. 63. See also, AOBTC (August, 1998), Interviewing Part IV: Cross-Cultural Communication and Other Factors That May Impede Communication at an Asylum Interview.

For both developmental and cultural reasons, children cannot be expected to present testimony with the same degree of precision as adults.²¹ This may require more probing and creative questioning. For example, the child may not know whether any family members belonged to a political party. The Asylum Officer should probe further and ask the child whether his or her parents attended any meetings and when the meetings were held. Asylum Officers should also make an inquiry into the location of the meetings, other people who attended the meetings, and whether the people had any problems. The child's knowledge of these matters may support a conclusion regarding the family's political association, despite the fact that the child may not know the details of the association.

(f) Other Evidence

Apart from the child's verbal testimony, the Asylum Officer may consider other evidence where available, including:

- evidence from family members;
- evidence from members of the child's community;
- evidence from medical personnel, teachers, social workers, community workers, child psychologists,²² and others who have dealt with the child; and,
- documentary evidence of persons similarly situated to the child, or his or her group, physical evidence, and general country conditions information (see, INS Resource Information Center, subsection (i), *infra*).

(g) Credibility Issues

Inasmuch as Asylum Officers may deal with child and adult applicants from a diverse array of countries, cultures and backgrounds, cross-cultural sensitivity is required of all Asylum Officers irrespective of whether the applicant is a child or an adult. Nowhere is this sensitivity more

²¹ See generally, Karen J. Saywitz, Children in Court: Principles of Child Development for Judicial Application, in *A Judicial Primer on Child Abuse* (ABA Center on Children and the Law 1994); *Symposium: Child Abuse, Psychological Research On Children As Witnesses: Practical Implications Forensic Interviews And Courtroom Testimony*, 28 PAC. L.J. 3 (1996); Perry & Teply, "Interviewing, Counseling, and In-Court Examination of children: Practical Approaches for Attorneys," 18 Creighton L. Rev. 1369 (1985); Note, "The Problem of the Child Witness," 10 Wyo. L.J. 214, 220 (1986); Jean Koh Peters, "Representing Children in Child Protective Proceedings: Ethical and Practical Dimensions" (1997); Jacqueline Bhabha and Wendy A. Young, *Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 *Interpreter Releases* 757 (June 1, 1998); *Working with Refugee and Immigrant Children, Issues of Culture Law & Development* (Lutheran Immigration and Refugee Service, 1998); Anne Graffam Walker, *Handbook on Questioning Children: A Linguistic Perspective*. Washington, D.C.: ABA Center on Children and the Law, 1994, pp. 95-98.

²² For example, a report from a child psychologist who has interviewed the child may indicate post-traumatic stress, a conclusion that could support an Asylum Officer's determination regarding past or future persecution.

needed than in assessing credibility and "demeanor." "Demeanor" refers to how a person handles himself or herself physically; for example, maintaining eye contact, shifts in posture, and hesitations in speech. Some children can appear uncooperative for reasons having nothing to do with the reliability of their testimony. For example, there may be cultural reasons why a child will not maintain eye contact with an Asylum Officer during an interview. In Anglo-American cultures, people who avert their gaze when answering a question, or seem nervous, are perceived as untruthful. In other cultures, however, body language does not convey the same message. In certain Asian cultures, for example, people will avert their eyes when speaking to an authority figure as a sign of respect. This is a product of culture, not necessarily of credibility.²³

From the child's point of view, INS Asylum Officers are authority figures and foreign government officials -- Children may have had experiences which give them good reason to distrust persons in authority.

Poor interview techniques or weak cross-cultural skills may affect the Asylum Officer's credibility finding. Officers should avoid misinterpreting certain emotional reactions or psychiatric symptoms as indicators of reliability. Children who have been subject to extreme abuse may be psychologically traumatized. Talking about such events generally does not come easily to anyone. Lengthy confinement in refugee camps or stays in first asylum countries can also greatly endanger the psychological well-being of children. Children who are separated from their families due to war or other refugee-producing circumstances are placed at greater psychological risk.

Questionable demeanor can be the product of culture or trauma rather than a lack of credibility.

Trauma can be suffered by any applicant, regardless of age, and may have a significant impact on the ability to present testimony. Symptoms of trauma can include depression, indecisiveness, indifference, poor concentration, long pauses before answering, as well as avoidance or disassociation. Some children may appear numb or show emotional passivity when recounting past events of mistreatment. Other children may give matter-of-fact recitations of serious instances of mistreatment. Trauma may also cause memory loss or distortion, and may cause applicants to block certain experiences from their minds in order not to relive their horror by the retelling. Inappropriate laughter can also be a sign of trauma or embarrassment. These symptoms can be mistaken as indicators of fabrication or insincerity.²⁴

In reviewing the child's testimony, the Asylum Officers should consider the child's age and development at the time of the event and the time of the retelling, the impact of the lapse of time between the event and the retelling; a child's ability to recall/communicate; the needs of children

²³ See, AOBTC (August, 1998) Lesson: Interviewing Part IV: Cross-Cultural Communication and Other Factors That May Impede Communication at an Asylum Interview.

²⁴ See, AOBTC (August, 1998) Lesson: Interviewing Part V: Interviewing Survivors: Physical Abuse, Torture, and Trauma-Related Conditions.

with special mental, emotional, or developmental needs; and the possibility that a child has been protected by his or her parents/family and may not know all the relevant details.

When evaluating a child's testimony, the Asylum Officer may encounter gaps or inconsistencies. For example, a child may not know the political views of his or her family. The child may, due to age, gender, cultural background, or other circumstances, be unable to present testimony concerning every fact in support of the claim. Because vagueness and inconsistencies are likely to occur during the interview of a child, Asylum Officers must remember the possible developmental or cultural reasons for a child's vagueness or inconsistency, and not assume that it is an indicator of unreliability.²⁵

Some children may have been coached by adults to tell a particular story at the interview, which the child repeats in order not to anger the adult. The fact that a child begins to tell a fabricated story at the interview should not foreclose further inquiry, and the Asylum Officer should undertake a careful and searching examination of the underlying merits of the child's case.²⁶

(h) Derivative Status or Independent Claim

The UNHCR Senior Coordinator for Refugee Children has noted that there is a tendency in some countries to think of children simply or only as dependents of adults.²⁷ The UNHCR believes that "invisibility" is a common problem for refugee children. In recognition of this problem, Asylum Officers should not assume that a child cannot have an asylum claim independent of the parents. When a parent or parents do not appear to have an approvable claim, an Asylum Officer should routinely make an inquiry into the child's case even though the child may be listed merely as a derivative on a parent's application and may not have filed a separate Form I-589 asylum application. As importantly, the fears and experiences of the child may help to enhance the strength of the parents' claim.

The UNHCR points out that invisibility is a common problem for refugee children

²⁵ See, AOBTC (August, 1998) Lesson: Credibility. See also, Jacqueline Bhabha and Wendy A. Young, *Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 Interpreter Releases 757 (June 1, 1998).

²⁶ Compare, "The fact that an applicant attempts to give a boilerplate story at an affirmative asylum interview should not foreclose further inquiry by the Asylum Officer. Many applicants have been the victims of unscrupulous preparers, of bad advice, and, commonly, of fear. It is this type of applicant who above all may require the careful and searching examination of the underlying merits of his/her case." Asylum Officer Corp Training, *Interviewing Summary of Techniques* (July 14, 1994).

²⁷ Progress Report on Refugee Children and Adolescents, including UNHCR's Strategy for Follow-Up to the Report on the Impact of Armed Conflict on Children (EC/47/SC/CRP.19), April 9, 1997.

(i) INS Resource Information Center

The INS Resource Information Center (RIC) regularly distributes to the Asylum Offices a wide variety of country conditions information in the following formats: profile series, perspective series, query series, information packet series, master exhibit series, and a bi-weekly news summary.²⁸ Asylum Officers also have access to the electronic CD-ROM database "Refworld" produced by the Center for Documentation and Research at the UNHCR in Geneva. Additionally, the UNHCR's website at www.unhcr.ch often contains updated information not yet available on the Refworld CD-ROM.

Asylum Officers must be able to rely on objective and current information on the legal and cultural situation of children in their countries of origin, on the incidence of exploitation, victimization, and other human rights violations against children, and on the adequacy of state protection afforded to them.²⁹ To this end, the RIC will continue to issue periodic papers and other documentation, including U. N. documents and State Department and non-governmental reports addressing human rights, including children's rights and country practices. Asylum Officers should consult all available hard copy and database information as needed.

The RIC will continue to ensure that comprehensive information concerning child-specific persecution and violations of the rights of children is distributed regularly and systematically to all Asylum Offices³⁰

III. Legal Analysis Of Claims

(a) Introduction

This section will focus on the particular legal issues an Asylum Officer may encounter when adjudicating the claim of a child who has filed a separate asylum application.³¹ Unlike the child

²⁸ See, AOBTC (August, 1998), Lesson: Country Conditions Research and the Resource Information Center (RIC).

²⁹ The INS will continue to work with attorneys, advocacy groups, academic institutions, NGOs, and other interested organizations and members of the public in developing appropriate human rights documentation resources. Individuals or organizations who wish to contribute information or documentation on children's or other refugee issues may mail it to: INS Resource Information Center, 425 I St., N.W., Washington, D.C. 20536 (Attn: ULLICO Bldg., 3rd Floor). Information available in electronic format may also be sent by e-mail to John.D.Evans@justice.usdoj.gov.

³⁰ RIC has distributed to all 8 Asylum Offices a number of documents relating to abuses against children, including Amnesty International USA. *Iraq: Children - Innocent Victims of Political Repression* (New York, NY: Amnesty International USA, April 1989), 71 pgs.; Amnesty International. *Argentina: Missing Children Update* (London, UK: AI index: AMR 13/05/90 DISTR: SC/CO/GR/PG, 13 May 1990). 9 pgs.; Amnesty International. *Brazil: Extrajudicial Execution of Street Children in Sergipe* (London, UK: AMR 19/19/92, July 1992). 4 pgs.; Human Rights Watch. *Guatemala's Forgotten Children: Police Violence and Abuses in Detention* (New York: Human Rights Watch/Americas. July 1997). 132 pgs.

³¹ Although the discussion focuses on children who have filed separate asylum applications, the same issues are applicable in the case of a derivative applicant when the principal applicant is not granted asylum. UNHCR Handbook, ¶ 184.

who is a derivative applicant under the parent's application,³² the child who has filed a separate asylum application must recount his or her own story, frequently without the support of familiar adults. The child may not even fully understand why or how the events leading to his or her arrival in the United States came about.

Consequently, the age, relative maturity, ability to recall events, and psychological make-up of the child will affect the quality of the answers an Asylum Officer is able to elicit from that child. While the burden of proof remains on the child to establish his or her claim for asylum, an Asylum Officer must take these and other factors into account when assessing the credibility of a claim and must also attempt to gather as much objective evidence as possible to evaluate the child's claim. Given the non-adversarial nature of the affirmative asylum adjudication, the special considerations associated with adjudicating a child's claim may require a closer working relationship with the child's representative and support person, if any, to ensure that the child's claim is fully explored.

This section does not create new law or alter existing law. Nor does it attempt to address all the legal issues that may arise in adjudicating a child's asylum claim.³³ Instead, it identifies particular issues relevant to children that an Asylum Officer may encounter and places those issues within the context of United States law and UNHCR guidance.³⁴

(b) Children as Refugees

The standards governing claims of persons seeking asylum are set forth in statute and regulation, and are not expanded by the force of customary international law. Matter of Medina, 19 I&N Dec. 734 (BIA 1988); Matter of A-E-M-, Int. Dec. 3338 (BIA 1998). In order to be granted asylum in the United States, the child applicant must establish that he or she meets the definition of refugee contained at Section 101(a)(42)(A) of the Immigration and Nationality Act

³² Under INS regulations, the child of a refugee or asylee is usually afforded the same status as his or her parent. See, 8 CFR 207.1(e) (refugee status), 208.21(a) (asylee status). With respect to firm resettlement, for example, the courts have reasoned that "children are, legally speaking, incapable of forming the necessary intent to remain indefinitely in a particular place." Lepe-Guitron v. INS, 16 F.3d 1021, 1025 (9th Cir. 1994). See also, Vang v. INS, 1998 WL 334183 (9th Cir. 1998) (looking "to whether the minor's parents have firmly resettled in a foreign country before coming to me United States, and then derivatively attribut[ing] the parents' status to the minor").

³³ For further discussion of the basic framework of asylum adjudication, Asylum Officers should refer to the AOBTC training materials and *Gender Guidelines*. The *Gender Guidelines* provide a useful overview, and many of its points relating to gender may be useful in analogizing to claims based on youth.

³⁴ Where appropriate, the following discussion will incorporate relevant sections of the UNHCR Handbook. While the UNHCR Handbook does not have the force of law and does not bind the INS with respect to interpretations of Section 208 of the INA, the Supreme Court has noted that the Handbook provides significant guidance in construing the 1967 Protocol, to which Congress sought to conform in adopting the Refugee Act of 1980. INS v. Cardoza-Fonseca, 480 U.S. 421, 439 n.22 (1987).

(INA), as interpreted by Board and Federal court precedent.³⁵ Regardless of how sympathetic the child's claim may be, he or she cannot be granted asylum unless this standard is met. Consequently, the "best interests of the child" principle, while useful to the interview process, does not replace or change the refugee definition in determining substantive eligibility.

In discussing the treatment of unaccompanied minors, the UNHCR Handbook notes that, "[t]he same definition of a refugee applies to all individuals, regardless of their age."³⁶ Sensitivity to the age of the child, however, may affect the analysis of his or her refugee status:

Although the same definition of a refugee applies to all individuals regardless of their age, in the examination of the factual elements of the claim of an unaccompanied child, particular regard should be given to circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability.³⁷

Thus, while a child's claim must contain all the necessary components of a claim to refugee status, the evidence a child is able to present regarding each component should be carefully evaluated on a case-by-case basis.

(c) Persecution

In assessing a child's claim of persecution, asylum adjudicators should follow the procedural considerations outlined above. As in all asylum cases, the Asylum Officer must assess whether the harm that the child fears or has suffered is serious enough to constitute "persecution" as that term is understood under the relevant international and domestic law.³⁸ The Board of

³⁵ Under the INA, a refugee is: any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, ... The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this Act, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of Political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion. 8 U.S.C. 1101(a)(42).

³⁶ UNHCR Handbook, supra note 16, at 213

³⁷ United Nations High Commissioner for Refugees Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum, p. 10 (1997).

³⁸ See, BLM; Asylum p. 23-27; See also, AOBTC (August, 1998). Lesson: Asylum Eligibility Part I: Definition of Refugee: Definition of Persecution; Eligibility Based on Past Persecution.

Immigration Appeals (BIA) has interpreted persecution to include threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom. Matter of Acosta, 19 I&N Dec. 211, 222 (BIA 1985), overruled on other grounds by Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).³⁹ Physical or mental harm, including rape, has been considered persecution. Matter of D-V-, Int. Dec. #3252 (BIA 1993). In addition, though discriminatory practices and experiences are not generally regarded by themselves as persecution, they "can accumulate over time or increase in intensity so that they may rise to the level of persecution."⁴⁰ However, "'persecution' within the Act does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional." Matter of V-T-S-, Int. Dec. 3308 (BIA 1997) citing Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993). The Board has further found that, "[g]enerally harsh conditions shared by many other persons" do not amount to persecution. Acosta, 19 I&N Dec. at 222.

The harm a child fears or has suffered, however, may be relatively less than that of an adult and still qualify as persecution. Given the "variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary." UNHCR Handbook, supra note 18, at ¶ 52. The types of harm that may befall children are varied. In addition to the many forms of persecution an adult may suffer, children may be particularly vulnerable to sexual assault, forced labor, forced prostitution, infanticide, and other forms of human rights violations such as the deprivation of food and medical treatment. Cultural practices, such as FGM, may under certain circumstances constitute persecution. Matter of Kasinga, Int. Dec. 3278 (BIA 1996).

These issues are also relevant to a determination that a child has a well-founded fear of persecution. A well-founded fear of persecution involves both subjective and objective elements such that an applicant is found to have a genuine fear of persecution and that fear is objectively reasonable. Acosta, 19 I&N Dec. at 224; Mogharrabi, 19 I&N Dec. at 446.⁴¹ For child asylum seekers, however, the balance between subjective fear and objective circumstances may be more difficult for an adjudicator to assess. Although there are no bright line tests, the UNHCR Handbook suggests that children under the age of 16 may lack the maturity to form a well-founded fear of persecution, thus requiring the adjudicator to give more weight to objective factors. UNHCR Handbook, supra note 1, at ¶ 215, 217. "Minors under 16 years of age. . . may have fear and a will of their own, but these may not have the same significance as in the case of an adult." Id. at 215. There is, of course, no hard and fast rule; "a minor's mental maturity must normally be determined in the light of his [or her] personal, family and cultural background." Id. at ¶ 216.

³⁹ See, Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969) (persecution involves "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive"); Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985) (persecution can occur where "there is a difference between the persecutor's views or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate").

⁴⁰ BLM, at p. 22. See also, AOBTC (August, 1998). Lesson: Asylum Eligibility Part I.

⁴¹ See, AOBTC (August, 1998) Lesson: Asylum Eligibility Part II: Well-Founded Fear.

The adjudicator may also have to look to the circumstances of the parents and other family members, including their situation in the child's country of origin. See id. at ¶ 218. The treatment of a child's family, for example, can support a well-founded fear. See Ananeh-Firempong v. INS, 766 F.2d 621 (1st Cir. 1985)(concluding that evidence of mistreatment of one's family is probative of a threat to the applicant); UNHCR Handbook, supra note 18, at ¶ 43 (stating that an applicant need not show a threat of persecution based on personal experience, as evidence concerning relatives may support the conclusion that fear is well-founded). In certain cases, the reasonableness of an applicant's fear of persecution can be reduced when his or her family remains in the home country unharmed for a long period of time after the applicant's departure. Matter of A-E-M-, Int. Dec. 3338 (BIA 1998); Cuadras v. INS, 910 F.2d 567 (9th Cir. 1990).

If the child was sent abroad by his or her parents or family members, the circumstances of that departure are also relevant to the child's asylum application. "If there is reason to believe that the parents wish their child to be outside the country of origin on grounds of well-founded fear of persecution. . ." that may suggest that the child has such a fear as well, according to the UNHCR Handbook, supra note 18 at para. 218. Thus, if it can be determined that the parent had an objectively reasonable fear of persecution, this might be important to the analysis of the well-foundedness of the child's claim. When this information is unavailable, or it appears that the will of the parents and that of the child are in conflict, the adjudicator "will have to come to a decision as to the well-foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt." Id. at ¶ 219.

An adjudicator should attempt, in the course of the interview, to evaluate the child's level of maturity in order to determine the weight to give to the child's expressed fear. It is also incumbent on the adjudicator to evaluate the circumstances under which the child has raised a claim for asylum. For example, the circumstances of a child's arrival in the United States may provide clues to whether the child has a well-founded fear of persecution. If the child arrives in the company of other asylum seekers who have been found to have a well-founded fear of persecution, this may, depending on the circumstances, help to establish that the child's fear is well-founded. See id. at ¶ 217. 8 CFR 208.13(b)(2).

Assessing the coherence and credibility of any applicant's account of events is a difficult and challenging responsibility for the adjudicator. Assessing a child's account of harm and possible persecution presents even greater challenges. Asylum Officers are encouraged to consult the Headquarters Asylum Office where necessary to resolve these issues.

(d) Nexus: the "On Account of" Requirement

(1) General Factors to Be Considered

One of the more complex analytical decisions an asylum adjudicator may face is the determination of whether a child's asylum claim involves persecution "on account of" one of the five protected grounds of race, religion, nationality, political opinion, or membership in a particular social group. See 8 U.S.C. 1101(a)(42)(A). The "on account of" component is a critical part of the analysis under United States law, requiring the applicant to provide some

evidence, either direct or circumstantial, that the harm he or she suffered is connected to the persecutor's intention to harm the applicant, based on the applicant's race, religion, nationality, political opinion, or membership in a particular social group. INS v. Elias-Zacarias, 502 U.S. 478, 482 (1991).

In considering the asylum claim of a child who has filed a separate asylum application, the nexus requirement may be particularly difficult to determine because a child may express fear or have experienced harm without understanding the persecutor's intent. A child's incomplete understanding of the situation does not necessarily mean that a nexus between the harm and a protected ground does not exist. The Board has acknowledged that a persecutor may have mixed motives for inflicting harm. Matter of Fuentes, 19 I&N Dec. 658, 662 (BIA 1988); Matter of S-P-, Int. Dec. 3287 (BIA 1996) ("Proving the actual, exact reason for persecution or feared persecution may be impossible in many cases. "); Matter of V-T-S-, Int. Dec. 3308 (BIA 1997) ("An asylum applicant is not obliged to show conclusively why persecution has occurred or may occur. "). Consequently, because more than one factor may motivate a persecutor to inflict harm, an applicant is not required to establish that the persecutor is motivated solely by a desire to overcome the protected characteristic. Fuentes, 19 I&N Dec. at 662. When a child applicant is involved, the child may be unable to identify all relevant motives, but a nexus can still be found if the objective circumstances support the child's claim that the persecutor targeted the child based on one of the protected grounds.

Similarly, the inherent vulnerability of children often places them at the mercy of adults who may inflict harm without viewing it as such, sometimes to such a degree of severity that it may constitute persecution. In that context, it is important to remember that the Board of Immigration Appeals has held that a punitive or malignant intent is not required for a harm to constitute persecution on the basis of a protected ground. A persecutor may believe that he or she is helping the applicant by attempting to overcome the protected characteristic. Kasinga, Int. Dec. 3278 (involving persecution based on FGM); Pitcherskaia v. INS, 118 F.3d 641 (9th Cir. 1997) (involving the use of psychiatric treatments to overcome homosexuality). Consequently, it is possible that a child's claimed harm may arise from a culturally accepted practice within his or her community. In such cases, an adjudicator must look carefully at both the degree of harm and whether any of the reasons for inflicting the harm involve a protected ground.

(2) Issues of Particular Relevance to Children

Regardless of the nature or degree of harm the child fears or has suffered, that harm must nonetheless be tied to a protected ground. For purposes of these Guidelines, this discussion focuses briefly on the protected grounds in general and then turns to an analysis of "membership in a particular social group, " because claims based on this ground are frequently difficult, novel, and analytically complicated.

Children, like adults, may raise one or more protected grounds as the basis for an asylum claim. The Asylum Officer must explore all possible grounds for asylum and should take into account the age and relative maturity of the child in assessing the child's ability to articulate his

or her claims. Nonetheless, when a child asserts a claim based on race, nationality, or religion, the burden remains on the child to establish that he or she falls within the described category or is perceived as belonging to that category. Because children who have filed separate asylum applications may lack the necessary documents to establish their race, nationality, or religion, and may have more limited access to these documents than a similarly situated adult, the Asylum Officer may have to rely solely on testimony of the child to establish these elements. Although the Board has recently issued several opinions that emphasize an applicant's burden to produce all accessible documents, testimony alone can still be sufficient to establish a claim where the applicant credibly testifies that he or she is unable to procure documents. 8 CFR 208.13(a). See, Evidentiary Issues, subsection (f), *infra*.⁴² This distinction may be particularly important in analyzing a child's claim, particularly if the child is unrepresented.

When the child claims asylum on the basis of political opinion, the age and maturity of the child must also be taken into account. Just as a younger child may have difficulty forming a well-founded fear of persecution, the ability to form a political opinion for which one may be persecuted may be more difficult for a young child to establish. Because the level of children's political activity varies widely among countries, however, Asylum Officers should not assume that age alone prevents a child from holding political opinions for which he or she may be persecuted. See Civil v. INS, 140 F.3d 52 (1st Cir. 1998). In Civil, the First Circuit affirmed the Board's holding that the young applicant failed to establish a well-founded fear of persecution based on either political opinion or membership in a social group consisting of "Haitian youth who possess pro-Aristide political views." Id. at 56. Although the Court found sufficient grounds to affirm the underlying decision, it criticized the Immigration Judge's conclusion that "it is almost inconceivable to believe that the Ton Ton Macoutes could be fearful of the conversations of 15-year-old children," noting that the evidence submitted by petitioner cast serious doubts on "the contention that '15-year-old children' are unlikely targets of political violence in Haiti." Id. at 56. This serves to remind adjudicators that a child's assertion of persecution based on political opinion cannot be rejected on the basis of age alone.

It may also be possible for a child's claim to be based on imputed political opinion. See, e.g., Matter of S-P-, Int. Dec. 3287. The adjudicator should carefully review the family history of the child and should explore as much as possible the child's understanding of his or her family's activities to determine whether the child may face persecution based on the imputed political beliefs of family members or some other group with which the child is identified.

(e) Membership in a Particular Social Group

(1) General Considerations

In order to establish eligibility for relief based on membership in a particular social group, an applicant must establish that the group is cognizable as a particular social group under the Act and

⁴² See also, AOBTC (August, 1998). Lesson: Asylum Eligibility Part IV, Burden of Proof and Evidence.

the individual possesses the traits that make the group cognizable. Matter of V-T-S-, Int. Dec. 3308 (BIA 1997)(citing Sanchez-Trujillo, 801 F.2d at 1573-75). The type of harm a child may suffer cannot serve to define the particular social group on account of which that particular harm was suffered. Persecution on account of membership in a particular social group encompasses persecution that is directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic. Acosta, 19 I&N Dec. at 233. The Board of Immigration Appeals noted:

The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

Id.

The First, Third, and Seventh Circuits have adopted the Acosta analysis, endorsing "Acosta's 'immutable characteristics' definition as central to the determination of what constitutes a particular social group." Lwin v. INS, 144 F.3d 505, at 511 (7th Cir. 1998); See also, Fatin, 12 F.3d at 1239-41; Meguenine v. INS, 139 F.3d 25, 28 n. 2 (1st Cir. 1998).⁴³ Unlike the other Circuits, the Ninth Circuit emphasizes the "voluntary associational relationship" of persons who share a common bond. Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir. 1986). The Second Circuit has defined a particular social group as a group "comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of the persecutor or in the eyes of the outside world in general." Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991).

Even in those jurisdictions where the relevant standard is a variation on Acosta, the determination that a particular social group exists requires that the group must have some fundamental characteristic or bond that makes it sufficiently distinct from the general population. Identifying the group is only the first step, however, as the applicant must also establish that he or she is a member of the particular social group, and that persecution or a well-founded fear of persecution is based on membership in that group. Lwin, 144 F.3d at 642 n. 3; Fatin, 12 F.3d at 1240.

⁴³ See also, AOBTC (August, 1998), Lesson: Asylum Eligibility Part III, Nexus and the Five Protected Grounds.

(2) Social Group Defined by Family Membership

Asylum seekers often claim to have suffered harm or to face the risk of harm because of a family relationship. See, Legal Opinion, Office of the INS General Counsel, "Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA" (December 9, 1993). In Gebremichael v. INS, 10 F.3d 28, 36 (1st Cir. 1993), the court concluded: "[t]here can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of a nuclear family." This appears to follow the pronouncement of the BIA in Acosta that "kinship ties" could be the shared characteristic defining a particular social group. Gebremichael concerned an Ethiopian applicant who had been imprisoned and tortured by Dergue Government officials seeking information about the applicant's brother. The court found that:

the link between family membership and persecution is manifest: as the record makes clear and the INS itself concedes, the Ethiopian security forces applied to petitioner the "time-honored theory of *cherchez la famille* ('look for the family')," the terrorization of one family member to extract information about the location of another family member or to force the family member to come forward. As a result, we are compelled to conclude that no reasonable fact finder could fail to find that petitioner was singled out for mistreatment because of his relationship to his brother. Thus, this is a clear case of "[past] persecution on account of . . . membership in a particular social group."

10 F.3d at 36. See also Ravindran v. INS, 976 F.2d 754, 761 n.5 (1st Cir. 1992), quoting Sanchez-Trujillo, 801 F.2d at 1576 ("a prototypical example of a 'particular social group' would consist of the immediate members of a certain family, the family being the focus of fundamental affiliational concerns and common interests for most people"). Without mentioning Sanchez-Trujillo, however, or exploring the question in depth, the Ninth Circuit later held that the concept of persecution on account of membership in a particular social group does not extend to the persecution of a family. Estrada-Posadas v. INS, 924 F.2d 916, 919 (9th Cir. 1991). It should be noted that the facts of Estrada may impose some limits on its application, as the asserted group membership was broader than that of the applicant's immediate family.

While the state of the law is therefore uncertain in the Ninth Circuit, there is nevertheless Board and Federal court support for the principle that family membership could define a "particular social group" under the asylum laws. Obviously all other elements of the definition must be satisfied for this to be the basis of eligibility as a refugee. There must be past persecution or a well-founded fear of future persecution, and the harm must be threatened or inflicted on account of the applicant's membership in the group.

(3) Social Groups Defined in Whole or in Part by Age

Domestic law with respect to age-based claims is scarce. The Second Circuit has noted that "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow

individuals with membership in a particular group." Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991). With respect to gender, Federal courts have taken different legal approaches regarding the possible breadth of a gender-based claim, but have yet to find as a factual matter that an applicant has established that a persecutor sought to harm the individual on the basis of gender alone. See, Gender Guidelines and cases cited therein. More often, while acknowledging the possibility of a broadly defined social group based on gender, courts have looked to narrowly defined subgroups in which gender is one of several factors used to determine the parameters of the particular social group. Id. See also Kasinga, Int. Dec. 3278; Fatin, *supra*.

By analogy, an age-based claim grounded solely in the applicant's status as a child or a child from a particular country is unlikely to be sufficiently discrete to establish persecution on account of that status. The Board and Federal courts have rejected claims based primarily or exclusively on age. For example, in Matter of Sanchez and Escobar, 19 I&N Dec. 276 (BIA 1985), the Board rejected as overly broad claims that young Salvadoran men, ages 18 to 30, who were urban, working class males of military age constituted a particular social group. The Board noted:

Historically, it has been the young who have primarily been involved in both the internal and external armed conflicts of a country. Although it may be an element of the proof, a purely statistical showing is not by itself sufficient proof of the existence of a persecuted group. It is not enough to simply identify the common characteristics of a statistical grouping of a portion of the population at risk. In the context of the asylum and withholding provisions related to "membership in a particular social group" under the Act, there must be a showing that the claimed persecution is on account of the group's identifying characteristics.

Id. at 285-86.

On appeal, the Ninth Circuit affirmed, reiterating that the term "particular social group" does not "encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance." Sanchez-Trujillo, 801 F.2d at 1576. See also Civil 140 F.3d at 56 (rejecting "Haitian youth who possess pro-Aristide political views" as overly broad);⁴⁴ Ravindran v. INS, 976 F.2d 754, 761 n.5 (1st Cir. 1991) (rejecting argument that Tamil males between the ages of 15 and 45 were targeted for persecution on the basis of age and gender); Matter of Vigil, 19 I&N Dec. 572 (BIA 1988).

(4) Private versus Public Actors

As the preceding discussion suggests, the claims of child asylum seekers may often involve forms of harm that have not traditionally been associated with government actors. Non-state actors generally inflict harms such as child abuse, forced labor, or criminal exploitation of children which

⁴⁴ The First Circuit, in Civil, found that "[p]etitioner presented ample documentary evidence that young people in Haiti were not exempted from the general violence and unrest that occurred in the aftermath of Haiti's military coup. but she presented no evidence that such persons constitute anything other than a general demographic segment of the troubled Haitian population. We thus reject petitioner's suggestion that the Board erred by not finding her eligible for asylum based on her status as a Haitian youth who supported Aristide."

may or may not be linked to one of the five protected grounds. Where such a nexus can be established, however, the applicant must still demonstrate both that the private persecutor has the requisite intent and that the government is unable or unwilling to protect the child from the alleged persecutor. See Matter of Villalta 20 I&N Dec. 142 (BIA 1990) (finding that "[t]he Salvadoran Government appears, at a minimum, to have been unable to control the paramilitary 'Death Squad'"); Matter of V-T-S-, Int. Dec. 3308 (BIA 1997).⁴⁵ The fact that a child did not specifically seek protection does not necessarily undermine his or her case, but instead the adjudicator must explore what, if any, means the child had of seeking protection. Depending on the age and maturity of the child, he or she may be able to contribute some personal knowledge of the government's ability to offer protection, but it is far more likely that the adjudicator will have to rely on objective evidence of government laws and enforcement. Special attention should be paid to government efforts to address criminal activities relating to children.

When a non-state actor is involved, the question of internal relocation may also take on greater significance in assessing a well-founded fear of persecution. A determination that a government is unable or unwilling to protect a child should include an assessment of whether or not the lack of protection is limited to a specific geographic area or extends nationwide. Matter of A-E-M-, Int. Dec. 3338 (BIA 1998) (noting that "the respondents have not provided any evidence to suggest that their fear of persecution from the Shining Path would exist throughout that country"). An adjudicator should also take into account whether or not it is reasonable for the child to relocate by himself or herself,⁴⁶ as well as the possibility of return to protection of the state, as opposed to the protection of the parents.

(f) Evidentiary Issues

In evaluating the evidence submitted to support the application of a child seeking asylum, adjudicators should take into account the child's ability to express his or her recollections and fears, and should recognize that it is generally unrealistic to expect a child to testify with the precision expected of an adult. The UNHCR Handbook advises that children's testimony should be given a liberal "benefit of the doubt" with respect to evaluating a child's alleged fear of persecution. UNHCR Handbook, supra note 18, at ¶ 219. See, Matter of S-M-J-, supra, for a discussion of the benefit of the doubt doctrine.

A child, like an adult, is not required to provide corroborating evidence in all cases, and may rely solely on testimony when that testimony is credible, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of the child's alleged fear. See Matter of M-D-, Int. Dec. 3339 (BIA 1998); Matter of S-M-J-, Int. Dec. 3303 (BIA 1997); Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989); 8 CFR 208.13(a). The level of detail and consistency required of a child, however, should be appropriate to the child's age and maturity level. An adjudicator should also consider the child's emotional state in assessing testimony. For example, the Board

⁴⁵ See also, AOBTC (August, 1998). Lesson: Asylum Eligibility Part I.

⁴⁶ See, supra note 32.

has recognized that it may be appropriate to discount certain inconsistencies based on the trauma associated with persecution. Matter of A-S-, Int. Dec. 3336 (BIA 1998) (noting that an individual fleeing persecution may have difficulty "remembering exact dates when testifying before an Immigration Judge").

Certain elements of a child's claim, however, such as those relating to identity or verifiable incidents of persecution, may require corroborating evidence. A child, through his advocate or support person, should be expected to produce the relevant documents "where it is reasonable to expect corroborating evidence" or should be expected to offer an explanation as to why those documents cannot be produced. See, e.g., Matter of M-D-, Int. Dec. 3339; Matter of S-M-J-, Int. Dec. 3303. What is reasonable will, of course, depend on the child's individual circumstances, including whether or not the child is represented. A child who has been in contact with his or her family may have greater access to documentation than a child who has had no contact with family members. The adjudicator should carefully explore these issues with the applicant in assessing the strength of the evidence presented.

Given the additional difficulties associated with evaluating a child's claim, the adjudicator should carefully review relevant country conditions information. While the child, through his or her advocate or support person, has an obligation to produce relevant supporting material, the adjudicator should also supplement the record as necessary to ensure a full analysis of the claim. Matter of S-M-J-, Int. Dec. 3303 ("The more background information the Service has about the applicant's country, the more thorough and intelligent the examination will be.").

As with the substantive legal standard, evidentiary questions relating to child asylum seekers will pose special challenges for the adjudicator. Adjudicators are encouraged to seek assistance from the Headquarters Asylum Office to resolve difficult problems.

IV. Aged-Out Children

This section reviews the issue of children who reach the age of 21 ("age out") before the asylum interview, or who turn 21 after the interview but before adjustment of status.

(a) Children Who Age-Out Before Asylum Interview

Children who are included in their parents' asylum application age out of derivative status upon reaching their 21st birthdays, even though they may have been under 21 at the time of the filing of their parents' asylum application. INA 208(b)(3) and 8 CFR 208.19(a). If a child who is listed on an asylum application as a derivative reaches his or her 21st birthday before the asylum interview, he or she must be considered a principal applicant, and must file a separate Form I-589 asylum application.

When a child has aged out of derivative status by the time of the asylum interview, a photocopy should be made of the parent's case assessment for inclusion in the non-record side of the former derivative's A-file. The former derivative may not have as much information as the parent regarding why the family left their home country. By placing a copy of the parent's case assessment in the aged-out child's A-file, we ensure that the interviewing Asylum Officer has the parent's case assessment -- before the interview -- to make a fuller evaluation of the aged-out child's case.⁴⁷ The parent's case assessment will help the later interviewing Asylum Officer by providing more details of the family's background and experiences.

The Asylum Officer should inform the family that:

1. A separate Form I-589 asylum application should be filed now -- by the aged-out child;⁴⁸ and,
2. If the parent of an aged-out child is granted asylum, a Form I-130 relative petition can be filed for the aged-out child later -- by the parent after adjustment.

In situations such as this, the family may not understand how a child becomes disqualified from derivative asylum eligibility by operation of law (by reaching his or her 21st birthday); and also may not understand the Form I-130 option (in which reaching one's 21st birthday is not disqualifying). This approach will help to prevent the separation of a family.

(b) Children Who Age-Out Before Adjustment

If a child is granted asylum as a derivative, but the child turns 21 years of age before an application for adjustment to permanent residence is filed, a *nunc pro tunc* (retroactive approval) procedure is permitted.

To adjust to permanent residence as a derivative child of an asylee, the child must be under 21

Aged-Out Children:

- ▶ **Copy of parent's case assessment in non-record side of former derivative's A-File.**
- ▶ **Inform the family that an asylum application should be separately filed now by the aged-out child, and if asylum is granted to the parent a Form I-130 can be filed for the aged-out child by the parent after adjustment.**

⁴⁷ Since the applicant had been previously included in the parent's application, there is no confidentiality issue in using the parent's application to explore the child's claim.

⁴⁸ Aging-out of derivative status can materially affect eligibility for asylum and may qualify as a changed circumstances exception to the 1-year deadline for filing asylum applications. See, 8 CFR 208.4(a)(4)(i)(B); AOBTC, Lesson: Once Year Filing Deadline, pgs. 9-10 (November, 1998).

years of age. The relevant date for determining status as a minor is the date the application for adjustment is adjudicated. The INS has developed specific procedures for asylees applying for adjustment who no longer qualify as derivative children. Such aged-out derivatives must file a Form I-589 asylum application on their own. Provided that the aged-out child remains unmarried, the asylum application can then be approved by the Asylum Office, *nunc pro tunc*, to the date of receipt of the original derivative status.⁴⁹ The aged-out child does not have to independently meet the refugee definition of 101(a)(42), but he or she must still be interviewed by an Asylum Officer to confirm identity and to ensure that there are no disqualifications (e.g., a mandatory bar). A fingerprint check must be completed if the original fingerprint check is more than 15 months old.

V. Conclusions: Training and Monitoring/Follow-up

(a) Training

The INS Guidelines For Children's Asylum Claims are required reading for all interviewing and supervising Asylum Officers and overseas Immigration Officers adjudicating child refugee applications. Photocopies should be made for the fullest possible distribution among these Officers. Upon receipt of this guidance each Asylum Office must initiate a minimum of 4 hours of in-Service training designed to help Officers to use this guidance, and reinforce their awareness of and sensitivity to children's and cross-cultural issues. Training on these Guidelines will also be incorporated into future refugee training sessions for overseas Immigration Officers adjudicating child refugee applications. Training materials will be provided by Headquarters and, in certain instances, trainers may be drawn from the ranks of experienced NGOs and the UNHCR.

This guidance will be included in all future training sessions as a separate module. These training activities, and the information being gathered by the RIC, will enhance the ability of all Officers to make informed, consistent, and fair decisions.

Headquarters will continue to keep Officers abreast of the latest information on child refugee issues. Further training on these and related topics will take place as required. Training is critical to using this guidance effectively.

(b) Public Liaison

An important follow-up activity is public liaison. During their regular meetings with the NGO community, Asylum Office Directors should inform the public of this new initiative for children with asylum claims. The INS can benefit greatly from the help of the public and the NGO community. For example, pro bono representatives and qualified interpreters are always needed for asylum cases. Many volunteers may not have experience working with children. Representatives and interpreters with training or experience with children can be of great assistance during asylum interviews.

⁴⁹ See, *INS Discusses Adjustment of Status Issues For children of Asylees*, 69 Interpreter Releases 847 (1992).

There are excellent community organizations and university law clinics that offer specialized training to lawyers who are willing to provide pro bono representation for child asylum applicants. Children also benefit greatly from the work of church, synagogue, and community-based groups. Volunteers without legal training are always welcome in these organizations, and can make a tremendous difference to children whose lives are affected by violence. Information-sharing, cooperation, and networking among these organizations, individuals, and INS may help to ensure that children have qualified representatives and interpreters at their asylum interviews.

(c) Monitoring

The ultimate value of the INS Guidelines For Children's Asylum Claims will lie in their translation from words to concrete action.⁵⁰ Asylum Officer interviewing and decision making should be monitored systematically by Asylum Office Directors and Supervisory Asylum Officers. The latter will be held accountable for ensuring that Asylum Officers fully implement this guidance.

As caselaw on child refugee issues evolves, this guidance will be revised from time-to-time. Headquarters will keep track of all developments in international and domestic policies relating to child refugees. At the same time, procedures will be established to ensure collection of statistics on various aspects of children's asylum claims adjudicated by the AOC.

The INS Guidelines for Children's Asylum Claims is a public document and may be distributed outside INS.



⁵⁰ Compare, U.N. High Commissioner For Refugees Ogata's remarks upon release of the UNHCR Policy and Guidelines on Refugee Children, supra at pg. 4.

Index of Documentation
Supporting the Asylum Application
Of Juvenile Seeking Asylum due to persecution
by gang on PSG and Religion Grounds
(In Order of Memorandum Reference)

Exhibit 1 WBC's Affidavit in Support of Application for Asylum and/or Withholding of Removal.

This statement provides a personal and comprehensive account of the fear and trauma of WBC's life as a child member of a street gang in Honduras, and specifically his persecution by the *Mara Salvatrucha*.

Exhibit 2 Birth Certificate of WBC (certified translation attached).

Exhibit 3 Death Certificate of JAB (certified translation attached).

Group
Exhibit 4 Photographs of WBC.

Exhibit 5 Letter of Ms. T.N. and Ms. E.C., Case Workers, dated May 16, 2004.

Statement regarding WBC's efforts and progress while in government custody in Chicago, Illinois.

Exhibit 6 Copy of WBC's current school identification card from Truman Community College in Chicago, Illinois.

Exhibit 7 Letter of M.L.C., Clinical Director, NEON Street Program.

Statement regarding WBC's efforts and progress after his release from government custody in late January 2003 and during his stay at this group home for homeless youth in Chicago, Illinois.

Group
Exhibit 8

- A. Letter from OMC, Respondent's mother, received by Respondent in November of 2003 (envelope and certified translation attached).
- B. Letter from OMC, Respondent's mother, received by Respondent in May of 2004 (envelope and certified translation attached).

These statements provide verification of the threats upon the life of WBC and his family by the *Mara Salvatrucha*.

- Exhibit 9** Affidavit of OMC, Respondent's mother, dated May 26, 2004 (certified translation attached).
- This sworn statement provides verification of the recent threats upon the life of WBC and their continued intimidation of his family by the *Mara Salvatrucha*.
- Exhibit 10** U.S. DEP'T OF JUSTICE, OFFICE OF INTERNATIONAL AFFAIRS, IMMIGRATION AND NATURALIZATION SERVICE, "GUIDELINES FOR CHILDREN'S ASYLUM CLAIMS," December 10, 1998 (File 120/11.26).
- Exhibit 11** *In the Matter of E.S.A.M.*, U.S. Immigration Court, Phoenix, AZ (March 20, 2003).
- Exhibit 12** *History of Honduras* (2003).
- Exhibit 13** Freddy Cuevas, *Report: Death Squads Revived in Honduras to Target Criminals*, A.P., Jan. 15, 1998.
- Exhibit 14** U.S. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK, HONDURAS (2003).
- Exhibit 15** Victor Ruiz Caballero, *War on Central American street gangs brings violence to Mexico*, USA TODAY, Dec. 10, 2003.
- Exhibit 16** Catherine Elton, *Honduran president takes tough stance on fighting gangs; Controversial new law can punish young offenders with long prison terms*, SAN FRANCISCO CHRONICLE, Sept. 28, 2003.
- Exhibit 17** Casa Alianza, *Fifty-Nine Youth Murdered in Honduran Jails and Detention Centers During the Maduro Administration*, (April 2, 2004).
- Exhibit 18** Amnesty International USA, *El Salvador Open Letter on the Anti-Maras Act*, date accessed May 25, 2004.
- Exhibit 19** U.N. ESCOR, Extrajudicial, Summary, or Arbitrary Executions, Report of the Special Rapporteur, Ms. Asma Jahangir, Addendum: Mission to Honduras ¶ 29, U.N. Doc. E/CN.4/2003/3/Add.2 (June 14, 2002).
- Exhibit 20** Eduardo Arboleda, Deputy Regional Representative, UNITED NATIONS HIGH COMMISSIONER ON REFUGEES, *Re: Matter of Rodi Alvarado Peña Advisory Opinion on International Norms: Gender-Related Persecution and Relevance to "Membership of a Particular Social Group" and "Political Opinion"*, Jan 9, 2004.

- Exhibit 21** I.N.S. RESOURCE INFORMATION CENTER, Douglas Payne (independent consultant), "Perspective Series: Honduras Update on Human Rights Conditions," (September 2000).
- Exhibit 22** Ana Arana, "The New Battle for Central America," FOREIGN AFFAIRS (November 1, 2001).
- Exhibit 23** *103 Dead in Honduras Prison Fire*, A.P., May 17, 2004.
- Exhibit 24** Diego Cevallos, *Honduras: More than 100 Youths Die in a "Prison Tragedy Foretold,"* May 17, 2004.
- Exhibit 25** U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, HONDURAS: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2 (1999) (released February 25, 2000).
- Exhibit 26** *In re B-F-O*, unpublished BIA Decision (Nov. 6, 2002).
- Exhibit 27** Casa Alianza, *Honduras: International and National Legal Framework 9*, date accessed May 25, 2004.
- Exhibit 28** COMMITTEE ON THE RIGHTS OF THE CHILD, CONCLUDING OBSERVATIONS: HONDURAS, CRC/C/15/ADD.105, August 24, 1999.
- Exhibit 29** Caroline Moser & Alisa Winton, "Agency, Identity and Youth Violence: the Gang Phenomenon," *in* OVERSEAS DEVELOPMENT INSTITUTE, VIOLENCE IN THE CENTRAL AMERICAN REGION, Working Paper 171, 26 (2002).
- Exhibit 30** Psychiatric Evaluation of WBC, prepared by Dr. M.T., M.D., dated June 15, 2004.
- Dr. T is a psychiatrist in private practice and an Assistant Professor of Clinical Psychiatry at Northwestern University Medical School. Dr. T. met with WBC on three separate occasions to conduct a Psychiatric Interview and will testify as to his current psychiatric condition, as well as to the developmental pathways and risk factors which have influenced Respondent's past. Dr. T's Curriculum Vitae is attached.
- Exhibit 31** Asylum and Withholding Definitions, 65 Fed. Reg. 236 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).
- Exhibit 32** Affidavit of Luis Rodriguez dated May 2, 2000.

Mr. Rodriguez is an ex-gang member, poet, and author with extensive knowledge of the inner workings of street gangs in El Salvador. Mr. Rodriguez's Resume is attached.

Exhibit 33 IMMIGRATION AND REFUGEE BOARD RESEARCH, DIRECTORATE, EL SALVADOR: ACTIVITIES OF THE 18TH STREET/DIECIOCHO GANG: GANG RECRUITMENT; TREATMENT OF PEOPLE WHO REFUSE TO JOIN THE GANG (Nov. 2002).

Exhibit 34 T. Christian Miller, *Dying Young in Honduras*, L.A. TIMES, Nov. 25, 2002.

Group

Exhibit 35 A. Bruce Finley, *Death of a Deportee: Back in Guatemala, teen slain by gang he tried to escape*, THE DENVER POST, April 5, 2004

B. Bruce Finley, *Deportee's slaying spurs reform push: Advocates say teen's fear of gangs unheeded*, THE DENVER POST, April 8, 2004.

Exhibit 36 [Intentionally left blank.]

Exhibit 37 Mark Stevenson, *Crackdown on Gangs Brings Mexico Violence*, A.P., December 10, 2003.

Exhibit 38 Mennonite Central Committee, Press Release, March 9, 2001.

Exhibit 39 W.E. Gutman, *Gangs: The Fatal Compulsion to Belong*, Apr. 29, 2004.

Exhibit 40 Jose Manuel Capellin, et al., *Honduras: Extrajudicial and Summary Executions of Children and Adolescents 7*, Casa Alianza, Feb. 2003.

Exhibit 41 U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, HONDURAS: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2 (2002) (released March 31, 2003).

Exhibit 42 Sergio de Leon, "Teen who was deported to Guatemala is slain," AP, May 5, 2004.

Exhibit 43 Amnesty Int'l, *Zero Tolerance... for Impunity: Extrajudicial Executions of Children and Youths since 1998*, February 25, 2003.

Exhibit 44 Casa Alianza, "Two Youth Shot on Casa Alianza Steps in Honduras," March 18, 2003.

- Exhibit 45** Margaret Swedish, *Gang Violence Spreads Through Central America*, BIMONTHLY JOURNAL OF THE RELIGIOUS TASKFORCE ON CENTRAL AMERICA AND MEXICO (Nov./Dec. 2003).
- Exhibit 46** Kevin Sullivan, “Spreading Gang Violence Alarms Central Americans,” WASHINGTON POST, Dec. 1, 2003.
- Exhibit 47** “Honduras President-Elect Pledges War on Crime,” AP, Nov. 6, 2001.
- Exhibit 48** Bruce Harris, Casa Alianza, *The Murder of Children in Honduras is a Crime against Humanity*, September 20, 1999.
- Exhibit 49** U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, HONDURAS: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2 (2003) (released February 25, 2004).
- Exhibit 50** Casa Alianza, *Another 50 Honduran Children and Youth Killed in March*, Apr. 21, 2004.
- Exhibit 51** Shravanti Reddy, Digital Freedom Network, *Honduran Government Complicit in the Murder of Street Children*, Dec. 17, 2002.
- Exhibit 52** W.E. Gutman, *The Dreaded Death Squads: Are They Back?—Human Rights Group Accuses Security Forces of Recent Executions*, Apr. 4, 2004.
- Exhibit 53** Casa Alianza, *Testimony to the United Nations Commission on Human Rights on the Murders of Honduran Children and Youth*, Mar. 17, 2003.
- Exhibit 54** Letta Tayler, *Victims of Honduras’ Gang War*, Dec. 17, 2003.
- Exhibit 55** Silio Boccanera, *From Guerillas to Gang Children in Organized Violence* (last accessed May 25, 2004).
- Exhibit 56** Gaelle Sevenier, *Politics of Toleration Toward Youths Extermination in Honduras*, Apr. 27, 2003.
- Exhibit 57** Proceso, *The Difficult Problems of Gangs* (last accessed Mar. 5, 2004).
- Exhibit 58** Justice Studies Center of the Americas, Highlights of the Judicial Systems of the Americas 2002-2003, Justice Studies Center of the Americas (2003).
- Exhibit 59** Declaration of Jose Gustavo Zelaya Mendoza in Support of Mr. WBC’s Application for Asylum (certified translation attached).

Mr. Zelaya Mendoza is an attorney who currently heads the Legal Assistance Program at *Casa Alianza* in Honduras. He will testify as an expert on the various human rights violations existent in Honduras, particularly in as they affect children and youth at risk, including street children and youth involved in street gangs. Mr. Zelaya Mendoza's Curriculum Vitae is attached with certified translation.

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- Exhibit 1** Affidavit of John Doe in Support of His Application for Asylum and/or Withholding of Removal, dated July 7, 2005.
- Exhibit 2** Affidavit of Jamie Doe, sister of John Doe, dated May 13, 2005 (original in Spanish, certified English translation provided)
- Exhibit 3** Affidavit of Marie Smith, maternal aunt of John Doe, dated May 13, 2005 (original in Spanish, certified English translation provided)
- Exhibit 4** Birth Certificate of John Doe (original in Spanish, certified English translation provided)
- Exhibit 5** Form I-589 Application for Asylum and for Withholding of Removal originally filed with the Court on September 20, 2002.
- Exhibit 6** Map of Guatemala
- Exhibit 7** Affidavit of N.H., therapist of John Doe with Curriculum Vitae attached
- Reporting that John Doe has a long history of child abuse by his father resulting in symptoms consistent with Post-Traumatic Stress Disorder (PTSD) and Depression.
 - At the outset of therapy in 2003 and through 2004, John Doe presented as severely depressed with feelings of anger, sadness and confusion. Symptoms of PTSD included: intense fear and helplessness, recurrent and intrusive thoughts, memory lapses, flat affect and crying spells, among others.
 - John Doe has made progress due to long-term therapy and needs continued access to this support and a safe environment to complete the healing process.
 - Stating that John Doe is still “truly scared” of his father and what he would do if he were to return to Guatemala.
- Exhibit 8** Inforpress Centroamericana, *Domestic Violence in Guatemala* (Aug 1998)

Exhibit 9 *In the Matter of E.S.A.M.* (EOIR, Phoenix, AZ, Mar. 20, 2003)

- Granting asylum to a Guatemalan youth who had been abused by her mother and stepfather and holding that the applicant had been persecuted due to her membership in the social group comprised by her “immediate family.” The immigration court reasoned the applicant was targeted simply due to her familial association as there was “no evidence [she] would have been abused by her mother or stepfather if she were not part of her family.”

Exhibit 10 *In re Jose* (EOIR, San Francisco, CA, Feb. 12, 2003)

- Respondent was an adolescent from El Salvador who had suffered child abuse at the hands of his own father. He was beaten, starved, forced to quit school and forced to work for money. The physical, emotional and verbal abuse against him was recognized as persecution. Asylum granted on account of his membership in the social group “made up of himself and of members of his family, specifically his siblings and mother.”

Exhibit 11 *In re C.E.L.T et al* (EOIR, Memphis, TN, Oct. 7, 2004)

- Granting asylum to two Guatemalan sisters, the eldest of whom had been sexually abused and who belonged to the social group of “daughters of [father] who have been or are at risk of being sexually molested by him,” reasoning that kinship ties are immutable and thus a nuclear family can be a particular social group.

Exhibit 12 *In the Matter of Dennis Reyes-Diaz* (EOIR Los Angeles, CA, Aug. 2, 2001)

- Asylum was granted to a Honduran street child who was beaten, struck with electric cords, and prevented from going to school by an aunt. The physical abuse was found to be persecution on account of his status as an “immediate family member.” Similarly, John Doe’s repeated beatings (which included slaps, punches, whippings with a belt and kicks), forced labor and denial of schooling were persecution.

Exhibit 13 *In the Matter of D- S-* (EOIR, York, PA Dec. 28, 2001)

- Asylum granted to Indian adolescent who was subjected to years of beatings, food deprivation and inferior schooling. The court reasoned that the child had no realistic access to government protection from the abuse mainly because it was *parental* abuse and therefore it was persecution. Similarly, John Doe suffered for years the abusive domination of his father without the possibility of government protection, thus he should be granted asylum.

Exhibit 14 Affidavit of Professor C.B.W., L.C.S.W., Expert on child welfare in the United States and Guatemala.

- Confirming that the situation in Guatemala regarding child abuse is “dismal,” and that Guatemala has ignored its international obligation by failing to enact legislation that truly protects children.
- Reporting that child abuse is seldom prosecuted despite the common incidence of physical, sexual and emotional abuse of minors and the “routine” abandonment of children – facts acknowledged by government officials.
- Stating that Guatemala lacks all necessary systems to offer protection to children victims of abuse and that the primary responsibility for reporting such abuse belongs to adults in the child’s life. Moreover, in Professor W’s professional opinion, “[i]n Guatemala it is inconceivable that a complaint by a child would occur or be accepted by authorities as most children are subject to physical punishments and are considered the property of adults.”
- Providing her professional opinion that John Doe, as a victim of child abuse, has “very little chance of escaping” future violence at the hands of his father.

Exhibit 15 Asylum and Withholding Definitions, 65 Federal Registrar 76,588 (Dec. 7, 2000)

Exhibit 16 Dane Holbrook, *Protecting Immigrant Child Victims Through U.S. Asylum Law*, Kansas Journal of Law and Public Policy, (Winter 2003)

Exhibit 17 *In re M- T-* (EOIR, San Francisco, CA Dec. 19, 2002)

- Granting asylum to respondent who had been brutalized by her husband because she was a Mexican woman, and the government of Mexico did little to deter domestic violence against Mexican women. In its decision the court linked the state’s inability or unwillingness to control a private actor with the latter’s motives to persecute the asylum seeker, reasoning “that the state’s failure to address and deter domestic violence is a contributing or substantial factor in that violence.”

Exhibit 18 UNHCR, *Advisory Opinion on International Norms: Gender-Related Persecution and Relevance to “Membership of a Particular Social Group” and “Political Opinion”* (Jan. 9, 2004)

Exhibit 19 Amnesty International, *Guatemala: No Protection, No Justice, Killing of Women in Guatemala* (2005)

Exhibit 20 Covenant House, *Guatemala Congress Declares “Day of No Violence Against Children and Adolescents in Memory of Nahaman Carmona”* (June 2005)

- Exhibit 21** U.S. Department of State, *Guatemala: Country Reports on Human Rights Practices—2004* (Feb. 2005)
- Exhibit 22** Guatemala Human Rights Update, *Two Children Killed Daily* (July 2004)
- Exhibit 23** Peter Katel, *Children Abandoned: Guatemala's Young People and Their Search for a Future* (2003)
- Exhibit 24** UN Commission on Human Rights, *Civil and Political Rights Including Questions of Independence of the Judiciary, Administration of Justice, Impunity: Report of the UN Special Rapporteur, Mission to Guatemala* (2001)
- Exhibit 25** UN Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child* (2001)
- Exhibit 26** U.S. Department of State, *Guatemala: Country Reports on Human Rights Practices—2002* (Mar. 2003)
- Exhibit 27** Country Facts, Guatemala
- Exhibit 28** Consortium for Street Children, *Violence Against Children Within the Family* (Sept. 2001)
- Exhibit 29** National Clearinghouse on Child Abuse and Neglect Information, *State Statute Series 2005 – Definitions of Abuse and Neglect*
- Exhibit 30** *Matter of Juan* (EOIR Harlingen, TX Mar. 12, 1998), *aff'd by In re Juan* (BIA January 20, 1999)
- Asylum granted to a Honduran adolescent who suffered child abuse. The respondent was forced to do strenuous work at the family farm and was frequently beaten by his stepfather. The child abuse was recognized as persecution. The Immigration Court's decision was affirmed by the Board of Immigration Appeals. Similarly, John Doe's labor exploitation and physical assaults by his father were persecution.

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- Exhibit 31** Memorandum from Jeff Weis, Acting Director Office of International Affairs U.S. Department of Justice, Immigration and Naturalization Service, *Guidelines For Children’s Asylum Claims* (Dec. 10, 1998)
- Exhibit 32** Caroline Moser & Cathy McIlwaine, *Violence in a Post-Conflict Context: Urban Poor Perceptions from Guatemala* (Dec. 2001) (sections cited, full document on file with Respondent’s counsel)
- Exhibit 33** Guatemala Human Rights Update, *Rights of the Child* (Oct. 2002)
- Exhibit 34** U.S. Department of State, *Guatemala: Country Reports on Human Rights Practices—2003* (Feb. 2004)
- Exhibit 35** U.S. Department of State, *Guatemala: Country Reports on Human Rights Practices—2001* (Mar. 2002)
- Exhibit 36** U.S. Department of State, *Guatemala: Country Reports on Human Rights Practices—2000* (Feb. 2001)
- Exhibit 37** U.S. Department of State, *Guatemala: Country Reports on Human Rights Practices—1999* (Feb. 2000)
- Exhibit 38** Immigration and Refugee Board of Canada, *Guatemala: In instances of familial child abuse (physical and sexual): services available (government, NGO’s, Church): police intervention, arrests, charges; government authority to intervene; if interventions occur; variances between rural and urban cases* (Nov. 2001)
- Exhibit 39** National Council of Juvenile & Family Court Judges Family Violence Department, *Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice* (1998) (sections cited, full document on file with Respondent’s counsel)
- Exhibit 40** The National Clearinghouse on Family Violence, *Wife Abuse—The Impact on Children*

- Exhibit 41** U.S. Department of Labor, *Guatemala* (May 2005)
- Exhibit 42** EFE News Service, *Two Million Children Work in Guatemala* (Sept. 2000)
- Exhibit 43** Tea and Coffee Trade Journal, *The Plight of Coffee's Children* (Jan./Feb. 2002)
- Exhibit 44** C.B.W., *Survey of the Literature—Guatemala* (Jan. 2003)
- Exhibit 45** Nefer Munoz, *Central America: More Than 1.9 Million Child Workers* (Apr. 2003)
- Exhibit 46** Nefer Munoz and Abraham Lama, *Every Day More Children Go to Work* (Dec. 2002)
- Exhibit 47** Caribbean Update, *Child Labor Rate Triples* (June 2003)
- Exhibit 48** The World Organization Against Torture, *Rights of the Child in Guatemala* (2001)
- Exhibit 49** *In the Matter of D- C- G-* (EOIR, San Francisco, CA, Jan. 29, 2003)
- Granting asylum to a Guatemalan victim of domestic violence where evidence demonstrated it was reasonable for the applicant to believe that seeking protection from the government would have been futile. Similarly, John Doe should be granted asylum because law enforcement authorities in Guatemala would not have provided him any effective protection against his father's abuse.
- Exhibit 50** New York State Office for the Prevention of Domestic Violence, OPDV Bulletin, Power and Control Wheel (1994)
- Exhibit 51** Carole Warshaw & Anne L. Ganley, *Improving the Health Care Response to Domestic Violence: A Resource Manual for Health Care Providers* (2d ed. 1996) (sections cited, full document on file with Respondent's counsel)
- Exhibit 52** Office of the General Counsel, U.S. Immigration and Naturalization Service, *Considerations for Asylum Officers Adjudicating Claims from Women* (May 1995)
- Exhibit 53** Interpreter Releases, *IJ Grants Asylum to Woman Based on Spousal Abuse, INS Guidelines Imminent* (Apr. 1995)
- Exhibit 54** Celina Zubieta, IPS, *UNICEF Rates Guatemala Last in Region* (Dec. 1999)

- Exhibit 55** Mary Jordan, *Pit Stop on the Cocaine Highway: Guatemala Becomes Favored Link for U.S.-Bound Drugs*
- Exhibit 56** Guatemala Human Rights Update, *747 Youths Murdered in 2003* (April 2004)
- Exhibit 57** Kevin Sullivan, *Spreading Gang Violence Alarms Central Americans*, Washington Post (Dec. 2003)
- Exhibit 58** Human Rights Watch, *Children in Conflict with the Law* (2001)
- Exhibit 59** Oxfam Netherlands, *747 Children and Youth Murdered in Guatemala in 2003*
- Exhibit 60** Treehouse, *Strategies for Feeling Safe*

Non-Citizen Children on Their Own:
Binational Conference on Procedures, Protections & Due Process for
Unaccompanied Children

Winning Asylum or CAT Relief for Persecuted Children

Materials from Stephen Knight, Center for Gender & Refugee Studies

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1) Excerpt of brief from Ninth Circuit parent/child female genital cutting victory in <i>Abebe v. Gonzales</i> , 432 F.3d 1037 (9 th Cir. 2005)	2-13
2) Excerpt of brief from Second Circuit trafficking / one year deadline asylum case of “Ann,” recently remanded by agreement of the parties	14-36
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4) <i>Gao v. Gonzales</i> , recent positive Second Circuit decision involving forced marriage in China, No. 04-1874, 2006 WL 509429 (2d. Cir 2006)	50-56

The Center for Gender & Refugee Studies has an extensive searchable web site as well as off-line database of sample briefs, country conditions, exhibit lists and other materials.

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<http://cgrs.uchastings.edu/assistance/>

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social ostracization for refusing to undergo this . . . practice”) (quoting an alert on female genital cutting issued by the INS Resource Information Center).

When viewed in the context of the status of women in Ethiopian society, and the cultural, religious and social importance attached to genital cutting, the petitioners’ testimony compels the conclusion that the ostracism that their daughter faces if they are able to prevent her genital cutting constitutes persecution, and that their fear is well-founded.

(c) Mr. M-- and Ms. A-- Have a Well-Founded Fear of Persecution on Account of Their Membership in a Particular Social Group of Parents of Ethiopian Females of Ethnic Groups Which Practice Genital Cutting, or Parents of Ethiopian Females

Since the IJ found that Mr. M-- and Ms. A-- did not have a well-founded fear of persecution, he did not consider the issue of whether the feared harm was on account of an enumerated ground. As detailed below, Mr. M-- and Ms. A-- have a well-founded fear of persecution on account of their membership in a particular social group of parents of Ethiopian females of ethnic groups which practice genital cutting, or parents of Ethiopian females.

i. *Mr. M-- and Ms. A-- Can Establish Their Eligibility for Asylum on the Basis of the Harms Faced by Their Daughter*

Aa-- is nine years old, and even though, as a United States citizen, she has

the legal right to remain here, the deportation of her parents will effectively result in her return to Ethiopia. Devoted parents cannot be expected to abandon their nine-year-old child. In Ethiopia, Aa-- faces the prospect of being subjected to genital cutting or being ostracized, ridiculed and found unmarriageable for not undergoing the ritual, either of which constitutes persecution. Although she would be the direct victim of those harms, they would affect the family as a unit and are therefore directly relevant to Mr. M--'s and Ms. A--'s asylum claim. *See Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1190 (9th Cir. 2005); *Abay v. Ashcroft*, 368 F.3d 634, 642 (6th Cir. 2004).

In *Tchoukhrova*, this Court considered the question of whether Victoria and Dmitri Tchoukhrova, the parents of Evgueni, a disabled child, could have an asylum claim on the basis of the harms suffered by their child, and concluded that viewing the family “as a whole” was a logical application of the law. It noted:

When confronting cases involving persecution of multiple family members, we have not formalistically divided the claims between “principal” and “derivative” applicants but instead, without discussion, have simply viewed the family as a whole. . . . Following that practice here, we hold that a parent of a disabled child may file as a principal applicant in order to prevent the child’s forced return to the family’s home country and may establish her asylum claim on the basis of the persecution inflicted on or feared by the child.

404 F.3d at 1192.

The reasoning put forth in *Tchoukhrova* applies directly to the instant case, even though Aa-- , in contrast to Evgueni, is a citizen and has the legal right to remain in the United States. The reason that this distinction does not mandate a different outcome is because the underlying rationale in both cases is that parents should not be forced to make a “devastating” choice between leaving their child behind or taking the child to a country where she would face persecution. *Id.* at 1191.

In *Tchoukhrova*, Evgueni could clearly have qualified for asylum himself, and secured the right to remain in the United States – just as Aa-- as a citizen has the right to remain here. However, as this Court held, the family should not be forced to abandon their child in order to protect him or her from persecution.³ The court’s approach in *Tchoukhrova*, which recognizes that the persecution of an applicant’s

³ The Court reasoned that immigration law “has always had a purpose of protecting families and, where possible, keeping them united.” *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1190 (9th Cir. 2005). The Court also noted that within American law, the family is treated as a “unique and important social unit entitled to legal protection.” *Id.* at 1191. Additionally, it found that taking care of the family “is consistent with our international obligations,” citing as an example, the International Covenant on Civil and Political Rights. *Id.* It concluded, therefore, that cases where the child is the only “direct victim” should, like cases involving persecution of multiple family members, be considered by viewing the family as a single unit, in order to prevent the “devastating” effect of forcing parents “to make a choice between abandoning their child in the United States or taking him to a country where it is likely that he will be persecuted.” *Id.*

family members can constitute persecution as to the applicant herself, is entirely consistent with well-established asylum jurisprudence.⁴

The principle that persecution inflicted upon an applicant's loved one can be tantamount to persecution as to the applicant herself is all the more true where the applicant fully comprehends the nature and dimension of the harm. Ms. A-- herself

⁴ The INS directly addressed this issue in a 1997 Memorandum to asylum officers, explaining that “[a]n individual may suffer harm from the knowledge that another individual is harmed, particularly if that other individual is a family member. The harm may manifest itself as emotional pain from knowing that a loved-one has been harmed. The harm may be intensified if . . . the applicant witnessed the harm to the family member.” Memorandum from Joseph Langlois, Office of International Affairs, Asylum Division, Immigration and Naturalization Service, *Persecution of Family Members* 1 (June 30, 1997).

The BIA has recognized this principal in the context of coercive population control cases. *See Matter of C-Y-Z-*, 21 I. & N. Dec. 915, 917-18 (BIA 1997) (in a claim based on the statutorily protected infliction of coercive population, “the husband of a sterilized wife can essentially stand in her shoes and make a bona fide and non-frivolous application for asylum based on problems impacting more intimately on her than on him”) (quoting INS brief). Later, in *Abay v. Ashcroft*, the Sixth Circuit explicitly held that a mother who feared that her daughter would be subjected to genital cutting was a refugee because her fear of experiencing the cutting of her daughter's genitalia amounted to a well-founded fear of persecution as to her. 368 F.3d 634, 642 (6th Cir. 2004).

Finally, the UNHCR has also stated that “a woman can be considered a refugee if she or her daughter/daughters fear being compelled to undergo genital cutting against their will; or, she fears persecution for refusing to undergo or allow her daughters to undergo the practice.” Heaven Crawley, *Women as Asylum Seekers - A Legal Handbook* 71 (Immigration Law Practitioners' Association and Refugee Action 1997). For a thorough and comprehensive analysis of these issues, *see* Marcelle Rice, *Protecting Parents; Why Mothers and Fathers Who Oppose Female Genital Cutting Qualify for Asylum*, 04-11 Immigration Briefings 1 (2004).

underwent female genital cutting as a child. The experience was searing, and continues to cause her emotional and physical distress: when questioned on the issue during the hearing, she became visibly upset and her testimony was very tentative and often indiscernible, revealing her acute embarrassment in talking about it. AR 164-65. She ultimately was able to respond to a question regarding the problems that she has experienced as a result of cutting – testifying that the genital cutting had adversely affected her ability to have sexual pleasure within her marriage. AR 165-68.

It is clear that Aa-- faces the prospect of being subjected to genital cutting⁵ or being rejected by her society, including being potentially unable to marry in Ethiopia, either of which constitute persecution. Under *Tchoukhrova*, those harms can form the basis for Mr. M--'s and Ms. A--'s asylum claim.

ii. *Mr. M-- and Ms. A-- Are Members of a Cognizable Social Group*

⁵ It should also be noted that Congress has criminalized the performance of female genital cutting on girls under the age of eighteen. 18 U.S.C. § 116 (2004). In *Tchoukhrova v. Gonzales*, this Court held that recognizing persons with disabilities as a social group was consistent with the Americans with Disabilities Act and its underlying policy of protecting this vulnerable and “powerless[]” group. 404 F.3d 1181, 1189 (9th Cir. 2005). A failure to apply the principal recognized in *Tchoukhrova* to cases involving genital cutting would be inconsistent with the underlying public policy of our genital cutting statute, which is to protect young girls from that harmful and permanently scarring practice.

In *Tchoukhrova v. Gonzales*, this Court first asked whether the direct victim of the harm was a member of a cognizable social group, and then considered whether the parents of such children could also be recognized as members of a particular social group. After ruling that the direct victim was a member of a social group of “[d]isabled children in Russia,” this Court held that the parents of such children belonged to a second group that included their child, and defined it as “Russian disabled children and their parents who help care for them.” 404 F.3d 1181, 1189-90 (9th Cir. 2005).

In concluding that parents who care for their disabled children “are properly included in the particular social group” of their child, *Tchoukhrova* reasoned that parents act out of “love and devotion for their children,” and that such nurturing is fundamental to their identities such that they “should not be required to change.” *Id.* at 1189.

Moreover, a parent’s relationship with a disabled child is “immutable,” making it “appropriate to combine family members into a single social group.” *Id.* at 1190. Finally, as a result of the “family interest in preserving the rights and protecting the welfare of a disabled child,” parents and their disabled child also constitute a “collection of people closely affiliated with each other, who are actuated by some common impulse or interest.” *Id.* (quoting *Sanchez-Trujillo v.*

INS, 801 F.2d 1571, 1576 (9th Cir. 1986)).

Under *Tchoukhrova*, therefore, parents of a child who faces persecution on account of their membership in a particular social group can be included in a group defined as parents of the members of a social group to which the child belongs. The application of this Court's analysis in *Tchoukhrova* to the instant case leads to the conclusion that Mr. M-- and Ms. A-- are members of a cognizable social group.

Aa-- , the direct victim of the harm, belongs to a particular social group of Ethiopian females of ethnic groups which practice genital cutting, or, alternatively, Ethiopian females. This is a group that is clearly cognizable under asylum jurisprudence.⁶ And Mr. M-- and Ms. A-- are members of the particular social group defined as parents of Ethiopian females of ethnic groups which practice genital

⁶ In its seminal decision in *Matter of Acosta*, the BIA ruled that a social group should be defined by a "common, immutable characteristic" that the members "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." 19 I. & N. Dec. 211, 233 (BIA 1985). Pursuant to *Acosta*, women who face genital cutting have been recognized as members of a particular social group defined by gender alone, or gender in combination with other characteristics. *See Matter of Kasinga*, 21 I. & N. Dec. 357, 365 (BIA 1996) ("young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice").

In *Mohammed v. Gonzales*, this Court reaffirmed that analysis, defining the social group as "young girls in the Benadiri clan." 400 F.3d 785, 797 (9th Cir. 2005). Alternatively, it held, the social group could also be defined as "Somalian females," because nearly all women in Somalia are subjected to it and the practice is "deeply imbedded in the culture throughout the nation." *Id.*

cutting or, alternatively, as parents of Ethiopian females. AR 254.

Their resistance to genital cutting arises from their love and devotion to their daughter and their desire to protect her from the devastating effects of genital cutting, and this parental bond is “fundamental” to their identities.⁷ *Tchoukhrova*, 404 F.3d at 1189. Their relationship with their daughter is also “immutable,” such that any harm faced by their daughter necessarily affects them. *Id.* at 1190. Finally, the family interest in protecting Aa--’s rights and welfare “qualifies all of them as members of a social group.” *Id.*

- iii. *Mr. M-- and Ms. A-- Will be Targeted on Account of Their Membership in a Particular Social Group of Parents of Ethiopian Females of Ethnic Groups Which Practice Genital Cutting, or Parents of Ethiopian Females*

After establishing membership in a particular social group, an individual seeking asylum must show a causal relationship or “nexus” between the persecution and one of the five enumerated grounds. A showing of nexus requires evidence that the persecutor is motivated at least in part by one of the statutory grounds in inflicting the harm, or that the harm is directed at the applicant because of her protected characteristics. *See INS v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992);

⁷ As discussed in section 4, *infra*, Mr. M--’s and Ms. A--’s resistance to genital cutting is also based on their own personal belief that a woman should not be forced to undergo it, which forms the basis of their political opinion.

Gafoor v. INS, 231 F.3d 645, 650–51 (9th Cir. 2000); *Sangha v. INS*, 103 F.3d 1482, 1486-87 (9th Cir. 1997).

In *Mohammed v. Gonzales*, this Court found that a Somali female was targeted for genital cutting because of her “sex and her clan membership and/or nationality.” 400 F.3d 785, 797 n.16 (9th Cir. 2005). The Court held that where “the immutable trait of being female is a motivating factor – if not a but-for cause – of the persecution,” the nexus requirement is met. *Id.* at 798; *Matter of Kasinga*, 21 I. & N. Dec. 357, 366-67 (BIA 1996).

The country conditions evidence on Ethiopia leads inexorably to the conclusion that Aa-- will be subjected to genital cutting or both she and her parents will be ostracized for their resistance simply because she is a female in a culture where the practice of genital cutting is deeply embedded and societally mandated. Since Aa-- has established a direct link between the harms she faces and her social group membership, under *Tchoukhrova*, the nexus requirement for her parents is also met. *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1190 (9th Cir. 2005).

2. **Mr. M-- and Ms. A-- Have a Well-Founded Fear of Persecution on Account of Their Membership in a Particular Social Group of Ethiopian Parents Who Oppose the Genital Cutting of Their Daughter**

In addition to basing their claim on the harms faced by Aa-- , Mr. M-- and Ms. A-- are eligible for asylum on the basis of the severe social and familial

ostracism that they themselves face for their resistance to genital cutting. As Ms. A-- testified: "I will be rejected by my family, my husband's family and my society too." AR 164. Mr. M-- testified that if he and his wife and children were forced to return to Ethiopia, they would try to live close to their families in or near Addis Ababa. AR 294. One can easily imagine the harsh isolation they would suffer should their families and the larger community repudiate them.

Mr. M-- also expressed his deep commitment to his children, and a desire to do what is best for them, and it would be particularly difficult for him to take his daughter to a country where she would be rejected by their family and society. AR 141; *see also* AR 416 (letter from Reverend Tate, describing Mr. M-- as a "devoted father and husband").

Given the cultural and societal importance attached to cutting in Ethiopia's traditional society, people who oppose or resist it are likely to be completely shunned, and this ostracism constitutes persecution. *See INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984) (persecution is a broader concept than "threats to 'life or freedom'") (citation omitted); *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004) (social ostracism for resistance to genital cutting constitutes persecution).

Further, Mr. M--'s and Ms. A--'s particular social group of Ethiopian parents who oppose the cutting of their daughter is cognizable. Their nationality and status

as parents is immutable, and their opposition to genital cutting is so fundamental to their identities that they should not be required to change it. *Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985); *Matter of Kasinga*, 21 I. & N. Dec. 357, 366 (BIA 1996). Because they would suffer ostracism as a result of their membership in this social group, the nexus requirement has been met. *Mohammed*, 400 F.3d 785, 798 (9th Cir. 2005).

3. **Mr. M-- and Ms. A-- Have a Well-Founded Fear of Persecution on Account of Their Political Opinion of Opposition to Genital Cutting**

A political opinion encompasses more than electoral politics or formal political ideology or action. *See Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1189 (9th Cir. 2005) (“Parents who resist the harms inflicted by the Russian government upon their children often express a political opinion”); *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (Salvadoran woman’s resistance to rape and beating constituted assertion of a political opinion opposing forced sexual subjugation), *overruled in part on judicial notice grounds by, Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (*en banc*).

Mr. M-- and Ms. A-- are strongly opposed to genital cutting; their abhorrence of genital cutting and their resistance to subjecting their daughter to it constitutes a

political opinion. Because they will be rejected by their families and societies on account of their resistance to female genital cutting, they have established persecution on account of their political opinion.

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Amicus Curiae in Support of Respondent Ann's Appeal

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

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In the Matter of:)
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Ann)
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In Removal Proceedings)
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FILE No.: A XXXX

**BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT Ann'S APPEAL FROM
THE JUDGMENT OF THE IMMIGRATION JUDGE**

FACTS OF THE CASE

REDACTED

8 C.F.R. § 208.16(b)(2). The government has not carried its burden of overcoming this presumption. *Id.*

ARGUMENT

The IJ Erred in Ruling That Ann's Asylum Claim Was Time-Barred

An applicant must file her asylum application within one year of her arrival in the U.S. 8 U.S.C. § 1158(a)(2)(B) (2000). However, the limitation period is tolled if the applicant can show that the delay in filing was caused by “extraordinary circumstances” directly related to her failure to file, and that the delay was reasonable under the circumstances. *Id.* § 1158(a)(2)(D); 8 C.F.R. § 208.4(a)(5) (2005). Those circumstances include: “Serious illness or mental or physical disability, including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival;” or “Legal disability (e.g., the applicant was an unaccompanied minor . . .) during the 1-year period after arrival.” *Id.* The Board of Immigration Appeals (BIA) has held that determining whether an applicant is eligible for the extraordinary circumstances exception requires an “individualized analysis of the facts of the particular case” to determine whether an extraordinary circumstance exists, whether the delay was directly related to those circumstances and whether it was reasonable. *Matter of Y-C-*, 23 I&N Dec. 286, 288 (BIA 2002).

Ann arrived in the U.S. on January 5, 2001, unaccompanied by her parents or a guardian, and submitted her application on February 6, 2002, when she was still a minor. In January 2003, she was diagnosed with Post Traumatic Stress Disorder (PTSD)¹ and Major Depressive Episode (MDE),² caused by the traumatic incidents she had experienced in

¹ Dr. Schwartz defined PTSD as a “psychiatric disorder that can have pervasive effects in a variety of different areas as a consequence of some kind of overwhelming trauma in their past.” (Tr. at 95.)

² Dr. Schwartz defined MDE as “a depressive process where the individual has a low mood, and has a variety of emotional and cognitive functions impaired by the state of their mood.” (*Id.* at 95.)

Albania. Therefore, she has shown that she was suffering from a mental and legal disability throughout the one-year period after her arrival. She has also shown that these factors directly caused the one month delay in filing, which was perfectly reasonable under those circumstances. The IJ's ruling that none of the extraordinary circumstances exceptions were applicable to her is clearly erroneous and must be reversed. 8 C.F.R. § 1003.1(d)(3) (2005) (Factual findings by the IJ are reviewed to determine if they are "clearly erroneous.").

1. Ann's One-Month Filing Delay Should Be Excused Because She Was Suffering from a Mental Disability as Result of Her Persecution in Albania

Ann arrived in the U.S. at the age of XXXXX on XXXXX, 2001, shortly after she had been stalked, violently kidnapped, repeatedly beaten and raped over a one-month period, nearly sold into prostitution in Italy, and forced to undergo an abortion because she became pregnant as a result of the rapes. The trauma and shame resulting from this brutal episode can hardly be overstated. REDACTED (Ann Aff. ¶ 30.) In Albania's conservative society, women who are victims of rape and trafficking victims are made to feel ashamed of themselves and are ostracized by their families and the larger community. (Fisher Aff. at 3.)

Ann continues to suffer from the psychological effects of those incidents REDACTED (Ann Aff. ¶¶ 39, 41.) In January 2003, she was evaluated by REDACTED an experienced clinical psychiatrist, who diagnosed her as having PTSD and MDE caused by the events that had befallen her in Albania. (Tr. at 95.) He found those incidents were "something that she lives with constantly," causing her shame, anxiety, guilt and feelings of worthlessness. (Tr. at 98.) Those feelings made it very difficult for her to talk about her experiences, even to people who might have been able to help her. They also affected her memory and concentration, and impeded her ability to interact with people. (*Id.* at 98.) When Ann was finally able to talk about her experiences, she chose to tell her cousin's

wife, indicating how difficult it was for her to discuss those matters with a man. Indeed, as Dr. Schwartz observed, Ann had found it extremely difficult to talk to him during their first meeting, but was better able to do so in their second meeting. (*Id.* at 101.)

The IJ's finding that Ann should have found out about the asylum process because she lived in New York City, which is "prolific with non-profit organizations," and that her feelings of shame "could easily have been rectified by going to an attorney," also shows surprising insensitivity. (I.J. at 13.) In the first place, it ignores the well-documented under-reporting of sexual assault, largely because of its stigmatizing nature and the reluctance of women to discuss these intimate matters with strangers. *See, e.g.*, H.R. Conf. Rep. No. 711, 103d Cong., 2d Sess. 380 (1994), reprinted in 1994 U.S.C.A.N. 1839, 1854 ("[r]ape ... is severely underreported to law enforcement authorities because of its stigmatizing nature."); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 *J. Crim. L. & Criminology* 1194, 1221 (1997) ("Some rape victims are too upset, or too embarrassed at the prospect of answering a stranger's intimate questions about the incident, or so ashamed that they do not want anyone, even their friends, to know about it."). Given how difficult it was for Ann to speak to a family member, it is clear just how anguished she would have been sharing this information with an attorney, who would have been a complete stranger. Moreover, the IJ's conclusion overlooks the fact that Ann understandably saw no further need to consult a non-profit organization or an attorney because she had already been told that she could not extend her visa, and until she discussed her experiences with her cousin's wife, she was unaware of asylum as a potential remedy for her.

2. Ann's One Month Filing Delay Should Also Be Excused Because She Was Suffering From a Legal Disability as an Unaccompanied Minor Throughout the One-Year Period After Her Arrival in the U.S.

Ann's one month filing delay was also caused by the fact that she was only 16 years old when she arrived in the U.S., unaccompanied by her parents or a guardian, and

remained a minor for more than a year after her arrival. Over the course of the year,
REDACTED

In rejecting Ann's asylum application as untimely, the IJ focused on the fact that Ann participated in a competitive program to come to the U.S., spoke English well, was able to work and attend school. (I.J. at 12-13.) In doing so, however, he completely overlooked the most relevant facts: that Ann was merely 16 years old, had been forced to flee her home and family after a series of extremely traumatic and violent incidents, and, upon arriving in the U.S., had moved from home to home four times over a one-year period. It is not difficult to imagine the challenges faced by a person who, after enduring so much at such a young age, found herself in a new country amidst strangers, without the protection of her parents. The government itself has recognized the particular vulnerability of unaccompanied children, and suggests that "in the examination of the factual elements of the claim of an unaccompanied child, particular regard should be given to . . . his/her special vulnerability." Jeff Weiss, U.S. Dep't of Justice, *Guidelines for Children's Asylum Claims* 18 (Dec. 10, 1998). In this case, however, the IJ paid no heed to any of the factors that resulted in her "special vulnerability."

In sum, the IJ's finding that Ann's asylum application was time barred because it was one month late and no extraordinary circumstances were applicable to her is clearly erroneous, and must be reversed.

3. The IJ Erred in Ruling That Ann Had Not Faced Past Persecution

To establish eligibility for asylum based on past persecution, an applicant must show: "(1) an incident, or incidents, that rise to the level of persecution; (2) that is 'on account of' one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either 'unable or unwilling' to control." *Navas v. INS*, 217 F.3d 646, 655-656 (9th Cir. 2000); *Chen Yun Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir.

2002); *Matter of S-A-*, 22 I&N Dec. 1328, 1334-35 (BIA 2000). Ann has shown that her kidnapping, repeated rapes and beatings, and narrow escape from trafficking, constitute harms that rise to the level of persecution; that she was persecuted on account of her membership in a social group of young Albanian women who are members of the DP and on account of her political opinion; and that the government is unable and unwilling to control her persecutor. The IJ's contrary rulings on these issues are erroneous and must be reversed.

4. The IJ Made a Legal Error in Finding That Ann “Has Not Established Persecution”

Despite finding Ann to be completely credible and consistent in her testimony regarding her kidnapping, forced imprisonment, repeated rapes and beatings over a one-month period, the IJ held that Ann “has not established persecution.” (I.J. at 19.) In doing so, he conflated the issue of whether a harm constitutes persecution with the question of whether a nexus between that harm and a statutorily protected ground has been established. This analysis is legally erroneous, and must be reviewed *de novo*, because it is well-established that assessing whether a harm rises to the level of persecution is a separate and distinct inquiry from whether the harm is perpetrated on account of a statutorily protected ground. *See* 8 C.F.R. § 1003.1(d)(3) (the BIA reviews questions of law *de novo*); *Matter of Acosta*, 19 I&N Dec. 211, 219 (BIA 1985), *rev'd on other grounds*, by *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) (INA § 101(a)(42)(A) “creates four separate elements that must be satisfied before an alien qualifies as a refugee.”); *Matter of C-A-L-*, 21 I&N Dec. 754, 756 (BIA 1997) (an asylum applicant must first establish that a “reasonable person” in his circumstances would fear persecution, and in addition, prove that his well-founded fear of persecution is “on account of” one of the five statutory grounds).

By employing an improper analysis, the IJ reached the erroneous conclusion that Ann has not established persecution. In fact, courts have repeatedly found harms of the type that Ann faced to constitute persecution. *See Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1071 (9th Cir. 2004) (gang-rape and beatings by military soldiers); *Shoaferra v. INS*, 228 F.3d 1070, 1075 (9th Cir. 2000) (rape); *Tarubac v. INS*, 182 F.3d 1114, 1118 (9th Cir. 1999) (kidnapping, beatings, imprisonment for a period of days, and threats of more violence); *Matter of D-V-*, 21 I&N Dec. 77, 78-79 (BIA 1993) (gang-rape and beatings by government soldiers).

Therefore, the IJ made a legal error in holding that Ann did not suffer persecution.

5. Ann Suffered Past Persecution on Account of Her Membership in a Particular Social Group of Young Albanian Women Who Are Members of the Democratic Party

6. Ann Belongs to a Particular Social Group of Young Albanian Women Who Are Members of the Democratic Party

In its seminal decision in *Acosta*, the BIA ruled that a social group should be defined by a “common, immutable characteristic” that the members “either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience.” 19 I&N Dec. at 233. *Acosta* has been adopted by numerous federal circuits³ the BIA,⁴ and has even been favorably cited by the highest courts of the United Kingdom and Canada.⁵ The DHS has recently restated its position that the *Acosta* test is “sound and

³ *See, e.g.*, (in order of circuits) *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993); *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002); *Castellano-Chacon v. Ashcroft*, 341 F.3d 533, 546 (6th Cir. 2003); *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1087 (9th Cir. 2000);.

⁴ *See, e.g.*, *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Matter of H-*, 21 I&N Dec. 337, 349 n.7 (BIA 1996).

⁵ *See, e.g.*, *Islam (A.P.) v. Secretary of State for the Home Department*, *Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah*, 2 A11 E.R. 545 (H.L. 1999); *Canada (Att’y Gen’l)*

well supported.”⁶ Ann’s social group of young Albanian women who are members of the DP, defined by her gender, nationality and political affiliation, meets the standards set out in *Acosta* and its progeny.⁷

According to *Acosta*, sex can be a basis for identifying a particular social group. 19 I&N Dec. at 214. Following that logic, some courts have found that gender alone can define a social group. *See Mohammed v. Gonzales*, 2005 WL 553229, at *7 (9th Cir. Mar. 10, 2005) (females in general may constitute a social group); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (same). Courts have also recognized that gender can form the defining characteristic of a social group along with other factors, including nationality. *Gonzales*, 2005 WL 553229, at *7 (social group could be defined as “Somalian females” or “young girls in the Benadiri clan”); *Fatin*, 12 F.3d at 1240-41 (“Iranian women who refuse to conform to the government’s gender-specific laws and norms”); *Matter of*

v. Ward, [1993] 2 S.C.R. 689.

6 Brief of the Department of Homeland Security at 19-20, *In re R-A-*, A #: 73-753-922, (DOJ, Feb. 19, 2004) (hereinafter DHS Brief). The DHS brief criticizes the ambiguity created by *Sanchez-Trujillo*, and explains that it should not read as diluting the *Acosta* test. *Id.* at 24. *See also* U.S. Dep’t of Justice, Proposed Asylum Rule, 65 Fed. Reg. 76588, 76598 (Dec. 7, 2000) (noting that factors other than the “immutable characteristic test” may be considered but are not determinative of whether a cognizable social group exists).

7 In *Gomez v. INS*, the Second Circuit denied asylum to a young Salvadoran woman who had been repeatedly raped by the armed opposition. 947 F.2d 660, 662 (2d Cir. 1991). The court was presented with a social group defined as “women who have previously been battered and raped by Salvadoran guerillas.” *Id.* at 663. It ruled that this group was not viable because the fact that Gomez had been raped in the past did not make it more likely for her to be targeted for persecution: “Gomez failed to produce evidence that women who have previously been abused by the guerillas possess common characteristics – other than gender and youth – such that would-be persecutors could identify them as members of the purported group.” *Id.* at 664. *Gomez* did not hold that gender cannot form the basis for a particular social group. On the contrary, it stands for the well-established proposition that a social group must be defined by characteristics that cause the individual to be targeted for persecution. In *Gomez*, the court found that being a young Salvadoran woman who had been raped in the past was insufficient to distinguish her for future persecution. The instant case is materially different. As discussed below, Ann has already been persecuted by L-- because of her social group, and has a well-founded fear of further persecution if she is sent back.

Kasinga, 21 I&N Dec. 357, 365-66 (BIA 1996) (“young women of the Tchamba-Kunsuntu Tribe who have not had FGM [Female Genital Mutilation], as practiced by that tribe, and who oppose the practice”). Therefore, it is clear that Ann’s gender and nationality are valid characteristics by which a particular social group may be defined.

Finally, Ann’s affiliation with the DP also meets the *Acosta* test because it is an expression of her political opinion, which has been accepted as an “immutable or fundamental characteristic.” *Acosta*, 19 I&N Dec. at 233 (noting that each of the four asylum grounds in the refugee definition, race, religion, nationality, and political opinion, “describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”).

In sum, Ann’s particular social group of young Albanian women who are members of the DP is cognizable under the law.

1. Ann Was Persecuted on Account of Her Membership in a Particular Social Group

In addition to establishing membership in a particular social group, an individual seeking asylum must show a causal relationship or “nexus” between the persecution and one of the statutory asylum grounds. A showing of nexus requires evidence that the persecutor is motivated at least in part by a statutory ground in inflicting the harm. *See INS v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992). The IJ denied Ann asylum because he found no nexus between the persecution and either her social group membership or her political opinion. (I.J. at 21-22.) Instead, he concluded that the harm that Ann faced was a “purely personal” and “criminal” matter. (*Id.* at 20.) However, this finding is both legally and factually erroneous and must be reversed.

*(1)Ann Was Persecuted Because She Is a Young
Albanian Woman Who Is a Member of the
Democratic Party*

In *Kasinga*, in analyzing nexus, the Board inquired into the reasons that Ms. Kasinga was targeted for FGM, and found it had happened because of her gender, nationality and opposition to FGM. 21 I&N Dec. at 366-67. In other words, had she not been a young woman from the Tchamba-Kunsuntu Tribe, her persecutors would not have been motivated to threaten her with FGM; therefore a nexus was established between the persecution and a social group defined by these characteristics. The Ninth Circuit reaffirmed that analysis by concluding that “where the immutable trait of being female is a motivating factor – if not a but-for cause of the persecution,” the nexus requirement is met. *Mohammed*, 2005 WL 553229, at *8.

The country conditions and expert testimony that Ann submitted leads inexorably to the conclusion that she was subjected to rapes, beatings, kidnapping and only narrowly escaped being trafficked by L-- because of her gender, nationality and political affiliation. *See, e.g., Trafficking in Human Beings in Southeastern Europe* at 125 (Over the past ten years, approximately 100,000 Albanian women and girls have been trafficked to Western Europe and other Balkan countries. Many have been kidnapped through false promises of marriage, coercion, and kidnapping. Up to 80% of the girls are under the age of eighteen); *Fisher Aff.* at 7 (Since Ann’s family is connected with the DP, she would have “little hope of receiving protection from the police.”). Therefore, she has shown that she was persecuted on account of her social group membership.

Nexus can also be established by circumstantial evidence of the persecutor’s motives, including the socio-cultural, legal, political or judicial context in which the harm takes place. *Elias-Zacarias*, 502 U.S. at 483-84; *Kasinga*, 21 I&N Dec at 366-67; U.S. Dep’t of Justice, Proposed Asylum Rule, 65 Fed. Reg. 76588, 76593 (Dec. 7, 2000) (evidence of

“patterns of violence [that] are (1) supported by the legal system or social norms in the country in question, and (2) reflect a prevalent belief within society, or within relevant segments of society” are relevant to determining whether the persecution is “on account of” a protected characteristic); Brief of the Department of Homeland Security at 35-36, 36 n.11, *In re R-A-*, A #: 73-753-922, (DOJ, Feb. 19, 2004).

The record establishes that trafficking is prevalent in Albania because of the failure of the government to protect young girls and women from such harms. *See, e.g., 2002 Albania Country Reports* (The police are often involved in or assist the trafficking. Lawyers and judges can also be manipulated and bribed, allowing traffickers to buy their way out of being punished.). Moreover, as a member of the DP she was even more vulnerable because the Socialist controlled police would be unwilling to protect her.⁸ As Dr. Fisher testified, “if you are not a member of the Socialist Party, it is very unlikely that you will be able to avail yourself of . . . governmental protection.” (Tr. at 77.) This evidence further establishes that L-- acted as he did because of Ann’s social group membership. In the context of this lack of protection, L-- knew that he would succeed in selling Ann into prostitution with impunity. His actions were supported by the legal, political and judicial system in Albania that fails to protect women. Proposed Asylum Rule, 65 Fed. Reg. at 76593.

(2)The IJ Erred in Dismissing Ann as the Victim of a Personal and Criminal Action by L-- Directed Towards Her “Solely Due to His Personal Reasons”

⁸ The IJ conceded that trafficking remains a problem in Albania but noted that it was also prevalent when the DP was in power from 1992-1997. While trafficking may be an ongoing problem however, the record establishes that at present, the legal and judicial systems in Albania are largely controlled by the SP, which provides no protection to members of the opposition party.

The IJ's conclusion that Ann was merely the victim of a personal and criminal action by L-- "directed toward respondent solely due to his personal reasons," is clearly erroneous and must be reversed. (I.J. at 19.) In the first place, it overlooks the growing recognition that women and girls who face serious harms, even when perpetrated by community members, family members or other private actors, rather than directly by the government or its agents, are refugees within 8 U.S.C. § 1101(a)(42)(A) (2000). *See, e.g., Mohammed*, 2005 WL 553229 (imposition of female genital cutting (FGC) by applicant's clan); *Shoaferra v. INS*, 228 F.3d 1070 (rape by high-ranking person within applicant's local neighborhood authority); *Matter of S-A-*, 22 I&N Dec. 1328 (frequent physical assaults, imposed isolation and deprivation of education by applicant's father); *Kasinga*, 21 I&N Dec. 357 (imposition of FGC by applicant's tribe). This understanding is also reflected in the Proposed Asylum Rule, which recognizes that patterns of gender-based violence, even when perpetrated by non-state actors, can constitute persecution when they are supported by a legal system or social norms that condone or perpetuate such harms. 65 Fed. Reg. at 76593.⁹ The record in this case clearly shows that L-- acted as he did because he knew that the legal, political and judicial system within Albania offers no protection or recourse for young women like Ann, particularly those who are affiliated with the DP.

Second, despite noting that Ann's testimony was consistent with the country conditions evidence she had provided, the IJ dismissed Ann's kidnapping, rapes and beatings as the result of the vengefulness of a rejected and wounded suitor, and found no nexus between those harms and the trafficking. (I.J. at 20.) In doing so, he overlooked overwhelming

⁹ These developments in refugee law reflect the acceptance within the international human rights movement that gender-based violence, irrespective of whether it is perpetrated by state or private actors, is a violation of women's fundamental rights. *See, e.g., Beijing Declaration and Platform for Action*, Fourth World Conference on Women, Sept. 15, 1995, para. 113, U.N. Doc. A/CONF.177/20/Add.1 (1995) (defining "violence against women" as "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."); UNHCR, *Elimination of Violence Against Women*, Commission on Human Rights Resolution 2001/49, para. 3 (2001).

evidence establishing that L--'s actions towards Ann, including his offer of marriage, kidnapping, repeated rapes and beatings, are completely consistent with the manner in which girls are forced into trafficking. *See Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1075 (9th Cir. 2004) (admonishing the IJ for considering the repeated rapes of a woman by the Guatemalan military “as if they had occurred in a vacuum” without considering the societal context in which they had occurred, and rejecting the conclusion that they were merely a random criminal act).

As Mr. Keith Sherper stated in his affidavit, Ann's experience was consistent with the “traffickers' plan of breaking down their victim and preparing her for prostitution.” (Sherper Aff. at 5.) He explained that marriage was often a common enticement to lure young girls into trafficking. (*Id.* at 4.) Sometimes, girls are kidnapped by gangs, often during the day. (*Id.* at 5.) Girls are usually “held in houses, repeatedly raped, and beaten into submission to ‘prepare’ them for prostitution. (*Id.*; *see also* Fisher Aff. at 9 (“[Kidnapping] is one of the principal methods by which many of these women end up in the slave sex trade.”)) This evidence, which exactly mirrors Ann's experiences, compels the conclusion that Ann was the subject of an elaborate scheme to sell her into forced prostitution and not the victim of a rejected suitor's wrath.¹⁰

Further, the IJ's finding that since L--'s actions “were personal and criminal toward the respondent” there was no nexus, is both legally and factually erroneous and must be reversed. (I.J. at 20.)¹¹ In the first place, it is well established that many acts of

¹⁰ In finding that mutual acts of persecution to which Ann was subjected were merely personal and criminal, the IJ relied on a series of erroneous findings, each of which compels a contrary conclusion. REDACTED.

¹¹ The IJ's decision is confusing as to whether he really believed that L-- was a criminal. On the one hand, he concluded that L--'s actions were “personal and criminal toward the defendant,” and made that the basis for his ruling that there was no nexus between the harms she suffered and her social group membership. (I.J. at 20.) Yet, a few sentences later, he stated that “[t]here was no objective evidence shown by the respondent that Mr. L-- was a trafficker, or a criminal.” (*Id.*) Either of those findings, however, is irrelevant to the ultimate conclusion compelled by these

persecution are also criminal. Acts of persecution have been held to include torture, destruction of personal property, death threats, physical violence, rape and sexual assault, to name just a few, all of which are also criminal in nature. *See, e.g., Rios v. Ashcroft*, 287 F.3d 895, 900 (9th Cir. 2002) (death threats); *Shoafera v. INS*, 228 F.3d at 1074 (rape, sexual assault); *Chang v. INS*, 119 F.3d 1055, 1066 (3d Cir. 1997) (threats to life, confinement and torture); *Montoya-Ulloa v. INS*, 79 F.3d 930 (9th Cir. 1996) (beatings); *Surita v. INS*, 95 F.3d 814 (9th Cir. 1996) (multiple robberies, home invasions, threats of rape and murder). Moreover, the IJ's finding is also factually erroneous because it flies in the face of the "clearly demonstrated tight relationship [in trafficking] between . . . criminal organizations and people at the highest levels of the government." (Fisher Aff. at 80.)

*(3)The IJ Erred in Ruling That There Was
Insufficient Evidence to Establish That L-- Was a
Trafficker*

Despite finding Ann to be credible, the IJ concluded that there was insufficient evidence to establish that L-- was a trafficker: "Respondent simply testified as to what she had heard from others, but she had no information or knowledge that Mr. L-- was a trafficker . . . other than what had been informed to the respondent by her father." (I.J. at 21.) He also found that there was no "objective" evidence to establish that L-- was a trafficker. (*Id.* at 20.) This finding is both factually and legally erroneous, and must be reversed.

The IJ's finding that Ann had no information or knowledge that L-- was a trafficker other than what she had heard from her father is factually erroneous because Ann credibly testified that she personally overheard him talk about selling and transporting her as well as other girls to Italy for sexual slavery. (Tr. at 35-35.)

facts; that L-- targeted Ann for trafficking because he was confident that the government would be unwilling to protect her.

Having overlooked Ann's credible testimony, the IJ further made a legal error by rejecting her claim because she had failed to produce any "objective" evidence that L-- was a trafficker. (Tr. at 20.) It is well established that an applicant's credible testimony is sufficient in situations where other corroborating evidence cannot reasonably be produced. In *Diallo v. INS*, the court held that where the applicant had produced sufficient country conditions evidence which closely paralleled his own personal experiences, it was not reasonable to require additional corroboration. 232 F.3d 279, 288 (2d Cir. 2000). As discussed above, Ann has provided ample supporting evidence, including expert affidavits and country conditions evidence, all of which demonstrate that her personal experiences were entirely consistent with the pattern of trafficking in Albania. In *Diallo*, the court further held that additional corroborating evidence of the applicant's personal experiences may be required only if it "is of the type that would normally be created or available in the particular country and is accessible to the alien, such as through friends, relatives, or co-workers." *Id.* at 288-289. Given that L-- is a member of the ruling SP and REDACTED, it is unlikely that there are any police records against him, and even if there were, it is clear that Ann and her family would not have access to them. Therefore, the IJ erred in placing on Ms Ann the unreasonable burden of providing any additional evidence to show that L-- was a trafficker.

7. Ann Faced Past Persecution on Account of Her Political Opinion

1. Ann and Her Family's Membership and Involvement in the Democratic Party Was the Expression of a Political Opinion

There can be no clearer expression of political opinion than manifested by membership or participation in an organization with political purposes or goals. *See, e.g., Montoya-Ulloa v. INS*, 79 F.3d 930, 931 (9th Cir. 1996) (membership in political group opposing the Sandinistas); *Mendoza Perez v. INS*, 902 F.2d 760 (9th Cir. 1990) (involvement with Salvadoran land reform organization); *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374 (9th Cir. 1985) (active member of anti-government political organization in El Salvador).

REDACTED. (Ann Aff. ¶ 13.) Therefore, it is clear that Ann and her family had expressed a strong political opinion.

2. Ann Suffered Past Persecution on Account of Her Political Opinion

The facts in Ann's case provide strong direct evidence that L--, a SP member, targeted Ann at least in part because she and her family are active supporters of the DP.¹²

REDACTED

Moreover, Ann's claim is also supported by ample evidence of the political situation in Albania. As Dr. Fisher explained, trafficking in Albania is not just a commercial enterprise, but there is also a "fairly strong political connection," with some of the money from trafficking actually being returned to "Socialist Party coffers." (Tr. at 84-85.) Moreover, Dr. Fisher also described the growing tension between the Democratic and Socialist Parties in the aftermath of the October 2000 election, and increase in violence against DP supporters. (Fisher Aff. at 7.) This evidence clearly establishes that L-- was at least partly motivated to persecute Ann because of her and her family's political affiliation. *See Jahed v. INS*, 356 F.3d 991, 999 (9th Cir. 2004) (former member of a banned opposition organization was targeted by a soldier of the Iranian Revolutionary Guard, who threatened to turn him in to the government if he refused to pay the soldier; the court held that while the soldier may have intended to extort money his own gain, his motive in doing so was "inextricably intertwined with the Petitioner's past political affiliation."); *De Brenner v. Ashcroft*, 388 F.3d 629 (8th Cir. 2004) (where the applicant and her family was targeted by the Shining Path for money and material support, and on

¹² As the evidence strongly suggests, L-- was a trafficker, and therefore, in addition to persecuting Ann for her political opinion, he also wanted to sell Ann into prostitution for his commercial gain. However, mixed motives do not defeat Ann's claim. *Matter of S-P-*, 21 I&N Dec. 486, 492-93 (BIA 1996).

their refusal to pay, received politically loaded threats, such as “death to the traitors,” the applicant had established persecution on account of political opinion).

3. The IJ Erred in Finding No Nexus Between L--'s Actions and Ann's Political Opinion

In finding no nexus between L--'s actions and Ann's political opinion, the IJ made a series of legal and factual errors. First, the IJ concluded that L--'s actions were not of a “political nature.” (I.J. at 21.) However, there is no such legal requirement to establish persecution based on political opinion. On the contrary, it is a long-standing principal that an applicant is merely required to show that she was persecuted on account of *her own* political opinion, and not her persecutor's. See *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (U.S. 1992) (“The ordinary meaning of the phrase ‘persecution on account of ... political opinion’ in § 101(a)(42) is persecution on account of the *victim's* political opinion, not the persecutor's.”) (emphasis in original).

Next, despite acknowledging that Ann and her father were supporters and members of the DP, the IJ concluded that she was not persecuted on account of her political opinion because neither she nor her father were officers or leaders of the DP. (I.J. at 17.) This finding is legally erroneous because a person does not have to be a leader or an officer in order to suffer persecution on account of political opinion; mere membership can suffice, as long as the persecutor was aware of that person's political opinion and persecuted her because of that opinion. *Garcia-Ramos*, 775 F.2d 1370 (membership in leftist political group that opposed the government); *Akinmade v. INS*, 196 F.3d 951 (9th Cir. 1999) (membership in a student union that opposed the military government). The record makes clear that L-- persecuted Ann at least in part so that he could force her father to stop his involvement in the DP, thereby establishing a strong link between his actions and the Ann's political opinion.

Additionally, in denying Ann's claim based on her political opinion, he noted that the DP is a "visible, legal and open" political party and has had electoral success in several districts. (I.J. at 17.) However, the status of the DP was never disputed, and is in fact irrelevant to Ann's claim, because the fact that a political party has legal status does not lead to the conclusion that its members are not persecuted. In fact, as Ann explained, the SP margin prior to the October 2000 elections was quite narrow, and one of the ways it protected that margin was by persecuting DP members, especially those who, like Ann's father, were involved in the elections. (Ann Aff. ¶¶ 6-7; Fisher Aff. at 9.) This evidence establishes that DP members faced persecution from SP supporters.

Finally, the IJ erred in ruling that Ann had not been persecuted on account of her political opinion because she had never been arrested, detained or otherwise mistreated by the government. (I.J. at 17.) As discussed in section 2(e), *infra*, this finding is legally erroneous because an applicant may be eligible for asylum even where the persecutor is a non-state actor, as long as it is shown that the government was unable or unwilling to control the persecutor.

8. The Government Has Failed to Demonstrate that Ann Does Not Have a Well-Founded Fear of Persecution

Having established past persecution on account of her membership in a particular social group and political opinion, Ann is entitled to a presumption of a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1). The government bears the burden of overcoming the presumption of well-founded fear by proving by a preponderance of the evidence that the circumstances in an applicant's country have changed so substantially that the applicant no longer has such fear, or that the applicant could avoid future persecution by relocating, and that it would be reasonable to require her to do so. 8 C.F.R. §§ 208.13(b)(1)(i)(A)-(B).

Here, the government cannot overcome the presumption of well founded fear. First, there is simply no evidence in the record of changed circumstances. To the contrary, Ann stated that the situation in Albania has become worse, with SP supporters killing members of the DP. (Ann Aff. ¶ 28.) Second, it is clear that Ann could not avoid persecution by relocating. As Dr. Fisher explained, Albanians “don’t simply pick up and move somewhere,” and when they do, they tend to congregate with their clan members and are suspicious and inquisitive of outsiders. Therefore, “it is very difficult . . . for anyone to remain anonymous.” (Tr. at 81.)

Even if the BIA were to find that the presumption of future persecution was rebutted, Ann still merits a grant of asylum because the past persecution she suffered was so severe and atrocious. 8 C.F.R. § 208.13(b)(1)(iii)(A) (2005); *Lopez-Galarza v. INS*, 99 F.3d 954, 962 (9th Cir. 1996); *Matter of Chen*, 20 I&N Dec. 16, 19 (BIA 1989). Having been repeatedly stalked and threatened by L--, then kidnapped and held in an abandoned house for a whole month, where she was mostly kept tied to a bed and was repeatedly beaten and raped, and having only narrowly escaped being trafficked for prostitution into Italy, Ann clearly has suffered extreme, severe and atrocious persecution. Moreover, given that L-- has threatened to kill her if he finds her, and country conditions in Albania enable him to carry out his threat, Ann is also entitled to asylum because she faces “other serious harm” if she is sent back to Albania. 8 C.F.R. § 208.13(b)(1)(iii)(B); *Mohammed*, 2005 WL 553229, at *10 (serious human rights abuses and killings of civilians in factional fighting in home country constitutes “other serious harm” that may entitle applicant to asylum in the absence of a well-founded fear).

9. The Government Was Unable or Unwilling to Control Ann’s Persecutor

In order to be eligible for asylum, an applicant needs to show some level of state action. Even when the persecutor is a non-state actor, however, the state action requirement can

be met if it is shown that the government is unable or unwilling to control the persecutor. *Sotelo-Aquije v. Slattery*, 17 F.3d 33, 37 (2d Cir. 1994) (“the [asylum] statute protects against persecution not only by government forces but also by nongovernmental groups that the government cannot control”). Ann submitted ample evidence to show that the government was unable or unwilling to control traffickers like L--. According to Dr. Fisher, the Socialist “police have a well-deserved reputation for brutality,” and Ann would have “little hope of receiving protection from the police.” (Fisher Aff. at 7.¹³) In the instant case, Ann’s hopes of getting police protection were further dimmed by the fact that L-- is a SP supporter, many of his family members held government posts, and REDACTED. (Tr. at 39.) Therefore, it is clear that seeking police protection would have been futile and, in all likelihood even dangerous, for Ann.

10. Ann Has an Independent Well-Founded Fear of Persecution on Account of Her Membership in a Particular Social Group of Albanian Women Who Have Been Raped and Undergone an Abortion

In addition to Ann’s asylum claim based on past persecution, she also has an independent well-founded fear of being persecuted on account of her membership in a social group of Albanian women who have been raped and undergone an abortion.

The severe ostracism and stigmatization that she faces in Albania’s conservative society as a result of the rapes and abortion constitutes persecution. *See INS v. Stevic*, 467 U.S.

¹³ Dr. Fisher also explained that the State Department reports concerning Albania contained “serious problems” that downplayed the treatment of political opponents by the SP. (Fisher Aff. at 11.) He explained that the 2000 State Department report ignored the arrests of nearly 1000 DP supporters, some of whom were tortured in police custody. (*Id.*) He also noted that a statement in the 2001 Profile of Asylum Claims and Country Conditions report about there being “virtually no evidence that individuals are targeted for mistreatment on political grounds,” was completely inaccurate and contradictory. (*Id.* at 10-11.) *See Tian-Young Chen v. U.S. INS*, 359 F.3d 121, 130 (2d Cir. 2004) (“We note the widely held view that the State Department’s reports are sometimes skewed toward the governing administration’s foreign-policy goals and concerns.”)

407, 428 n.22 (1984) (persecution is a broader concept than “threats to life and freedom”); *Abay v. Ashcroft*, 368 F.3d 634, 640 (6th Cir. 2004) (social ostracism for resistance to FGC constitutes persecution).

Further, under *Acosta* and its progeny, her social group, defined by her gender, nationality, and the characteristic of having been raped and undergoing an abortion, is cognizable. As discussed in section 2(b)(i), *supra*, gender and nationality are well-accepted as defining characteristics of a particular social group. Also, Ann cannot change the fact that she was raped and underwent an abortion. *See Acosta*, 19 I&N Dec. at 233 (past experiences can define a social group).¹⁴

Ann has also shown that she faces ostracism on account of her membership in a social group of Albanian women who have been raped and undergone an abortion. As Dr. Fisher explained, women who have been raped or undergone abortions are “considered to be . . . immoral and are ostracized by society.” (Tr. at 82). *See also* Phyllis Coven, U.S. Dep’t of Justice, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* 5 (1995) (women who have been raped or otherwise sexually abused “may be seriously stigmatized and ostracized in their societies. They may also be subject to additional violence, abuse or discrimination because they are viewed as having brought shame and dishonor on themselves, their families, and their communities.”). There is no doubt that the harm that Ann faces is inextricably linked to her social group characteristics; were she not an Albanian woman who had been raped and had an abortion, she would not be rejected by Albania’s conservative society. *See Mohammed*, 2005 WL 553229, at *8.

14 The instant case can be distinguished from *Gomez*, where the Second Circuit denied asylum to a young Salvadoran woman who had been repeatedly raped by the armed opposition. 947 F.2d at 662. The court ruled that a group defined as “women who have previously been battered and raped by Salvadoran guerillas” was not viable because the fact that Gomez had been raped in the past did not make it more likely for her to be targeted for persecution. *Id.* at 663-664. The instant case is materially different. Ann has submitted ample evidence to show she will be unable to conceal the fact that she was raped and had an abortion, and that these events will cause her to be ostracized and stigmatized by Albanian society.

Finally, Ann's fear of persecution is well-founded. A fear of persecution is well-founded if it is subjectively genuine and objectively reasonable, *Guan Shan Liao v. United States DOJ*, 293 F.3d 61,68 (2d Cir. 2002), or if "persecution is a reasonable possibility." *Cardoza Fonseca v. INS*, 480 U.S. 421, 440 (1987). Through her own credible testimony, Ann has established that everyone in her community will find out about her rapes and abortion and will ostracize her as "someone who did something bad." (Ann Aff. ¶ 30.) Moreover, as Dr. Fisher explained, "Albania is a country with few secrets," and people would certainly find out about her experiences and stigmatize her for them. (Fisher Aff. at 11.) Therefore, it is clear that Ann has an independent well-founded fear of persecution on account of having been raped and undergone an abortion.

11.1. **Ann Is Eligible for Withholding of Removal**

To qualify for withholding of removal, an applicant must demonstrate that it is more likely than not that her life or freedom would be threatened on account of one of the statutory grounds, a higher standard than that required to establish a well-founded fear. 8 C.F.R. § 208.16(b)(2). Having established past persecution on account of her membership in a particular social group and political opinion, Ann is entitled to a presumption of eligibility for withholding of removal. *Id.* The government has not carried its burden of overcoming that presumption by demonstrating by a preponderance of the evidence that Ann could relocate within Albania or that circumstances there have changed to such an extent that it is no longer more likely than not that Ann would face a threat to her life or freedom. *Id.*; *Secaida-Rosales v. INS*, 331 F.3d 297, 306 (2d Cir. 2003), ("If the applicant shows that he or she has suffered past persecution such that the applicant's life or freedom was threatened, a rebuttable presumption arises that there is a clear probability of a future threat should the applicant be returned.").

CONCLUSION

For the foregoing reasons, Ann has met the statutory requirements for asylum because she suffered past persecution and has a well-founded fear of persecution on account of her membership in a particular social group and political opinion. Furthermore, there are no negative discretionary factors that would result in a denial of relief.

In addition, Ann has met the standard for Withholding of Removal, and since no statutory bars are applicable to her, she must be granted this form of relief.

Dated: March 29, 2005

San Francisco, CA

Respectfully submitted,

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No. 02-71656

**IN THE UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT**

**MICHELLE THOMAS (A75-597-033)
DAVID GEORGE THOMAS (A75-597-034)
TYNEAL MICHELLE THOMAS (A75-597-035)
SHALDON WAIDE THOMAS (A75-596-036)
Petitioners,**

v.

**JOHN ASHCROFT, Attorney General
Respondent.**

**IN SUPPORT OF PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS**

**AMICUS CURIAE BRIEF
ON REHEARING *EN BANC***

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**IN SUPPORT OF PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS**

**AMICUS CURIAE BRIEF
ON REHEARING *EN BANC***

The attached motion and this brief of amicus curiae, Women Refugeess Project, Harvard Immigration and Refugee Clinic, are submitted in support of the Petitioners (Michelle, David, Tyneal and Shaldon Thomas) and in connection with this Court's rehearing en banc of the panel's decision in *Thomas v. Ashcroft*, 359 F.3d 1169 (9th Cir 2004). Amicus curiae maintain that the decision of the Board of Immigration Appeals, denying the Thomases asylum protection under U.S. law,

should be overturned. Petitioners amply satisfy the criteria for “refugee” status pursuant to 8 U.S.C. § 1101(a)(42(A) and thus are eligible for asylum.

In this rehearing en banc, the Court has directed the parties to address two specific issues:

1. May a family constitute a “particular social group” within the meaning of 8 U.S.C. § 1101(a)(42(A)?

2. If a family can be a particular social group, were the Petitioners for asylum in this case persecuted on account of their membership in their family?

Due to limitations of time and the scope of this amicus briefing, we will primarily address the first question posed by this Court: whether a family constitutes a “particular social group.” Amicus, with limited exception,¹ adopt the position of

¹ Petitioners argue they suffered and will face persecution solely on account of their membership in the Thomas family. We agree with this position, but wish to emphasize that to establish a “nexus,” the applicant need not prove that the protected ground is the exclusive reason that she faces persecution. The Board, this circuit and other courts have long recognized that there may be mixed motivations for persecution. *In re S-P-*, 21 I&N Dec. 486, 495 (BIA 1996); *Chen v. Ashcroft* 289 F.3d 1113, 1116 (9th Cir. 2002), *vacated on other grounds by Chen v. Ashcroft*, 314 F.3d 995 (9th Cir. 2002) (“It is not necessary that persecution be solely on account of one of the forbidden grounds for an asylum applicant to secure asylum. It is enough that a principal reason for the persecution be on account of a statutory ground”); *Lopez-Soto v. INS* 383 F.3d 228, 236 (4th Cir. 2004) (“[T]o qualify for asylum, the persecution feared falls within the statute so long as the illicit motive was *a* cause – not necessarily the *sole* cause – of the persecution.”); *Agbuya v. INS*, 241 F.3d 1224, 1228 (9th Cir.2001); *Borja v. INS*, 175 F.3d 732, 735 (9th Cir.1999) (en banc) (holding that proof of persecution “solely” on account of protected status is not required); *Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir.1995); *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir.2003) (“A persecutor may have multiple

Petitioners as to the second question, agreeing that Petitioners have established that the persecution they fear is on account of the particular social group constituted by their family.

motivations for his or her conduct, but the persecutor must be motivated, at least in part, by one of the enumerated grounds”) (citing *Chang v. INS*, 119 F.3d 1055, 1065 (3d Cir.1997)); *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir.1994) (holding that "persecution on account of" does not mean "persecution *solely* on account of"); *see also Girma v. INS*, 283 F.3d 664, 667-68 (5th Cir.2002) (per curiam) (adopting the "mixed motive" analysis of the nexus requirement, following the reasoning in *Borja* and *Osorio*).

We agree with Petitioners there is more than ample evidence in the record that Petitioners' persecution is on account of their family membership. Indeed, there is virtually no evidence of other motivation. *Cf* *Chen v. Ashcroft*, *supra* at 1116 (finding that feared persecution was on account of family membership even where other motives, repayment of debt and prosecution under Chinese law, were present); *In re Sukhrajkaur Harbhajan Heer* (Los Angeles, Cal., BIA Apr 1, 2003, A75 734 367) (27 Immig. Rptr. B1-112 APR 1 2003) *available at* <http://web.lexis.com/xchange/practiceareas/immigration/default.asp> in BIA & AAU Non-Precedent Decisions (finding that feared persecution was on account of family membership even though government agents also motivated by revenge for mistaken belief that husband was a member of militant group). In some cases based on particular social group/family membership, courts have found the "on account of" evidence too attenuated. *See Lopez-Soto v. Ashcroft*, 383 F.3d 228 *supra* at 238 where the court held that it was not "compelled" to overrule the Immigration Judge's and Board's finding of no connection between the threats the Petitioner received from the "Mara 18" gang in Guatemala and his family membership (largely, the killing of his brother by the same gang, many years earlier); that he was threatened with recruitment simply because he was a young male living in the particular area where the gang was recruiting). The Thomases case is distinguishable, since the connection between the violence against Michelle Thomas and her father-in-law's actions and beliefs is hardly attenuated; indeed, the record is virtually uncontroverted that the actions against Ms. Thomas were because of her relationship with her father-in-law.

Statement of Interest of the Amicus Curiae

The Women Refugees Project of the Harvard Law School Immigration and Refugee Clinic has worked with hundreds of women from around the world since its founding in 1992. It combines representation of individual women asylum applicants with the development of theories, policy and national advocacy. The Project participated in developing the *Considerations for Asylum Officers Adjudicating the Asylum Claims of Women* issued by the Immigration and Naturalization Service (INS) in May 1995, and has been engaged by the Justice Department in the training of immigration judges, asylum officers and supervisors on issues related to women's asylum claims. In addition the Project provides advice, support, and supplemental services to advocates around the United States representing women seeking asylum.

The Project has an interest in the proper application and development of the law in this area, so that claims by women for asylum protection receive fair and proper consideration under existing standards of law. The Project has submitted amicus curiae briefs in several asylum and immigration-related cases in the past including such major cases involving gender persecution as *Fatin v. INS*, 12 F.3d 1233, 1240 (3rd Cir.1993) and *In re R-A-*, Int. Dec. 3403 (BIA 1999), *vacated* (A.G. 2001), now pending before Attorney General.

ARGUMENT

1. Gender Persecution and Family Group Membership

Amicus present this brief based on its long-standing interest in U.S. asylum law, and in particular in the protection and fair treatment of women in applications for asylum and related protections. Family-based persecution is particularly relevant to women. Especially for women, the family is “a focus of fundamental affiliational concerns and common interests” *Sanchez-Trujillo v. INS*, 801 F. 2d 1571, 1576 (9th Cir. 1986). Women are often persecuted because of family association or affiliations.

In many cases of women applying for asylum protection, family membership is the reason for the feared persecution. *See* Heaven Crawley, *Refugees and Gender: Law and Process* 86 (noting that many women asylum seekers are persecuted or face future persecution due to the status, activities or view of family members, including spouses, parents, siblings; decision makers have often failed to recognize the significance of family relationships in shaping women’s experience of persecution); United Nations High Commissioner for Refugees, *Guidelines on International Protection No. 1, HCR/GIP/02/01, 7 May 2002* (noting important role of family membership in claims of Women Refugees to protection, and that such claims for protection may be based on particular social group/family membership)

Gender is implicated in asylum cases, not only when the persecution is on account of gender per se, but also where the type of harm inflicted by a persecutor (or feared) is “gendered” in that it targets a female applicant's vulnerability as a woman or as a mother. Women are especially vulnerable to such “gendered” violence when they are alone (that is, without male protection), and when they are mothers (because of their consequent role as protectors and caretakers, and because of a mother’s special relationship – and attachment – to her children).

The instant case illustrates the particularly gendered way in which women face persecution, especially as a result of their family membership. Petitioner Michelle Thomas suffered many instances of threats and persecution, including a kind of persecution, that is gendered – violence that she was vulnerable to because she is a woman and a mother. Thus she testified as to one major incident of persecution in which she was alone at her house on her veranda, with her children playing in the yard. In front of her children, a black man from her father-in-law’s company threatened to cut her throat. (AR 159). In another instance, Michelle Thomas was again alone with her daughter Tyneal, going to a store when she was viciously attacked, as a woman and as a mother – her young daughter almost snatched from her arms.

[I] had Tyneal in my arms and the next thing I knew that four Black men had approached me and were trying to take Tyneal out of my arms. . . . There they walked up to me, they surrounded me and the next thing I knew is that they were trying to get Tyneal out of my arms. I held her tight and fell to the

ground with her and the next thing I know is that my neighbor had come out of the house because he had heard me screaming and shouting and they ran off. . . . [T]he only thing I recognized was that Strong Shore overall again.” (AR 194).

After this incident, Mrs. Thomas felt she had to leave South Africa, out of fear, among other harms, that the men would return and “take one of my children.” (AR 196).

As Petitioners note in their supplemental brief, the Board – along with every circuit that has addressed the question – has consistently reaffirmed its long-standing doctrine that family constitutes, indeed is the quintessential example of, “particular social group.” The Board has specifically granted asylum based on family membership to a woman applicant who suffered gender-based persecution, as a result of her family membership. In *In Re Sukhrajkaur Harbhajan Heer* (Los Angeles, Cal., BIA Apr 1, 2003, A75 734 367) (27 Immig. Rptr. B1-112 APR 1 2003)², the Board found the woman applicant, who had been subjected to sexual and other violence because of her father’s suspected affiliation with militant groups, suffered persecution on account of her membership in a particular social group, i.e. her family. In that case, Sikh militants had abducted the applicant’s father, but the police believed he had voluntarily joined the Sikhs and was training militants. Slip

² available at:

<http://web.lexis.com/xchange/practiceareas/immigration/default.asp>
(in BIA & AAU Non-Precedent Decisions)

Op. at 2. The applicant testified that she was arrested twice, during which time police attempted to force her to tell them her father's whereabouts. While detained, she was beaten, sexually groped, and had her feet frozen on ice. The BIA found that respondent was persecuted – suffered gender-based violence – on account of a protected ground, specifically her membership in a particular social group, that being her family. *Id.*, Slip Op. at 2.

2. Family as a Particular Social Group: Consistency In Board Decision-making

“Under U.S. case law, one widely accepted type of particular social group is the family . . . “ Deborah E. Anker, Law of Asylum in the United States 386 (3d ed. 1999). This doctrine has been repeated affirmed by the Board, which first established the principle in *Matter of Acosta*, 19 I. & N. Dec. 211, 232, (BIA 1985), *overruled on other grounds by In Re Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).³ The Board has specifically granted asylum based on the applicant's membership in the particular social group of her family. *See In re Sukhrajkaur Harbhajan Heer, supra; see also Chen v. Ashcroft*, 289 F.3d 1113, 1116 (9th Cir. 2002) *vacated on*

³ *See also* Anker, *supra* 387 (“clan . . . is a characteristic also generally based on kinship that, similarly, cannot be changed and can provide the basis for particular social group membership; citing *In re H-*, 21 I&N Dec. 337, 342 (BIA 1996) Interim Dec. 3276, at 10 (BIA 1996) (noting that clan membership is a “highly recognizable, immutable characteristic...acquired at birth and...inextricably linked to family ties.”)

other grounds by Chen v. Ashcroft, 314 F.3d 995 (9th Cir. 2002) (citing Board decision in which it specifically overruled the Immigration Judge and quoting Board’s clear position that, “[t]he family has been recognized as a social group, such that persecution on account of family membership can serve as a basis for asylum”).

This circuit has similar, long-standing doctrine. In its seminal 1986 *Sanchez-Trujillo* decision, the court emphatically noted that family membership is the prototype of a “particular social group.” *Sanchez-Trujillo, supra* at 1576. *See also Pedro-Mateo v. INS*, 224 F.3d 1147, 1151 (9th Cir. 2000) (noting 9th Circuit “rule” that family qualifies as a particular social group).⁴ Every other circuit that has subsequently addressed the issue has affirmed the principle that family constitutes a particular social group, including most recently the Court of Appeals for the Fourth Circuit. *See Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004) (“We join our sister circuits in holding that ‘family’ constitutes a “particular social group” and noting that every circuit court that has addressed the issue, has found that family constitutes a particular social group (citing *Iliev v. INS*, 127 F.3d 638, 642 & n. 4 (7th Cir.1997)); *Fatin v. INS*, 12 F.3d 1233, 1239- 40 (3d Cir. 1993) (accepting BIA

⁴ The only possible contrary decision is *Estrada-Posadas v. INS*, 924 F.2d 916, 919 (9th Cir 1991) (denying asylum based on family membership where the applicant’s testimony was less than credible, where the applicant failed to establish a well-founded fear of persecution, and where the applicant presented little evidence that she was associated or identified with her family).

ruling in *Acosta, supra*, that “kinship ties” qualify as a particular social group); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir.1993) (“There can, in fact, be no plainer example of a social group based on common identifiable and immutable characteristics than that of the nuclear family”).

“Certainly one’s family membership is an affiliation that ordinarily cannot be changed; it also is a protected characteristic that a person should not be required to change.” Anker, *supra* at 386. This “immutable characteristic” formulation for analyzing the particular social group category also is grounded in firm Board precedent and increasingly has been accepted by many circuits, deferring as they should to a reasonable interpretation of the law by the relevant administrative agency. *See, e.g., Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) (a particular social group includes a group united either by a voluntary association, or “by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or would not be required to change it”). The Department of Homeland Security has specifically endorsed the immutable characteristic formulation for analyzing the “particular social group” ground. *See In Re Rodi Alvarado-Pena*, Department of Homeland Security’s Position on Respondent’s Eligibility for Relief (2003) available at http://www.gbls.org/immigration/dhs_brief_ra.pdf.

CONCLUSION

This long-standing and consistently stated position of the Board of Immigration Appeals (“Board” or “BIA”) and the Department of Justice (DOJ) should be the law of the land. The DOJ has underscored the importance of the Board’s internally consistent decision making, for the proper management and fair administration of justice. “The Board’s principal mission is to ensure that the immigration laws receive fair and uniform application.” *See* The DOJ Fact Sheet on the Board *available at* <http://www.usdoj.gov/eoir/fs/biabios.htm>.

Circuit courts also have emphasized the fundamental rule-of-law principle, that Board rulings must be internally consistent. *Rodriguez-Roman v. I.N.S.*, 98 F.3d 416, 427 (9th Cir. 1996) (finding that the BIA erred in determining that punishment for illegal departure could not constitute persecution, when previous court and BIA decisions held that punishment for the crime of illegal departure could constitute persecution); *Amanfi v. Ashcroft*, 328 F.3d 719, 729 (3d Cir. 2003) (finding that BIA erred in ruling that imputed membership in a particular social group could not support a grant of asylum relief, when at least two previous BIA decisions had held that persecution for imputed grounds could satisfy the definition of “refugee”); *Salameda v. I.N.S.*, 70 F.3d 447, 452 (7th Cir. 1995) (holding that the

BIA erred in deeming community service irrelevant in deciding whether non-citizen had shown extreme hardship, when court and BIA precedent clearly established that the BIA must consider community service in considering whether extreme hardship had been shown); *Davila-Bardales*, 27 F.3d 1, 4, 5((1st Cir. 1994) (finding that the BIA erred in relying exclusively on the admissions of an unrepresented respondent under the age of 16 who was not accompanied by a guardian, relative, or friend, when previous cases indicated that admissions allegedly made by such a minor would be treated as inherently suspect); *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996) (finding Board must consistently apply same basic rules to all similarly situated applicants; BIA cannot “flit like a bee” from decision to decision).

This case, which raises issues of particular concern to Women Refugees, must follow the long-established doctrine of the Board and this circuit, recognizing family as a particular social group. For these reasons, we respectfully request this Court to reverse the Board decision below, and grant the Thomases’ appeal.

Dated: November 24, 2004

Respectfully submitted,

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Women Refugees Project
Harvard Immigration and Refugee Clinic

On Brief (Harvard Law School students)
Alexandra Chirinos, Nicole Diaz, Natalie Fleming, Terry Lawson, Michelle Nyein

United States Court of Appeals, Second Circuit.

Hong Ying GAO Petitioner,

v.

Alberto GONZALES, [\[FN1\]](#) Respondent.

Docket No. 04-1874AG.

Argued: Jan. 30, 2006. Decided: March 3, 2006.

Hong Ying Gao, pro se.

Sandra Henson Kinney, Assistant United States Attorney (Kasey Warner, United States Attorney for the District of West Virginia, on the brief), Charleston, West Virginia for Respondent.

Before: [CALABRESI](#), [STRAUB](#), and [WESLEY](#), Circuit Judges.

[STRAUB](#), Circuit Judge.

*1 Petitioner Hong Ying Gao ("Gao") petitions for review of a Board of Immigration Appeals ("BIA") decision summarily affirming an Immigration Judge's ("IJ") denial of her claims for asylum, withholding of removal, and protection under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85. Gao argues that the IJ erred in finding that she did not have a well-founded fear of forced marriage and in finding that a forced marriage, even were it to occur, would not constitute persecution under paragraph 1101(a)(42) of Title 8 of the United States Code, which sets forth the grounds for establishing asylum eligibility.

We agree with Gao that the IJ, in finding that Gao's problems were not "on account of" a legally protected ground, failed to apply the correct definition of the "particular social group" ground as established by BIA and judicial precedent. As this precedent makes clear, the statutory term "particular social group" is broad enough to encompass groups whose main shared trait is a common one, such as gender, at least so long as the group shares a further characteristic that is identifiable to would-be persecutors and is immutable or fundamental. We further find that the IJ's decision was based, in part, on certain factual conclusions reached without substantial evidence: namely, that the government might be willing and able to protect Gao and that Gao could internally relocate within China. Accordingly, we remand for further proceedings.

BACKGROUND

I. Factual History

Because the IJ found Gao to be credible, we take as true the facts Gao presented to the IJ. *See Bocova v. Gonzales*, [412 F.3d 257, 262-63 \(1st Cir.2005\)](#). Gao, who was twenty years old when she left China, grew up in a rural village in the Fujian Province. In this region of China, parents routinely sell their daughters into marriage, and this practice is sanctioned by society and by the local authorities.

When Gao was nineteen years old, her parents, through a broker, sold Gao to a man named Chen Zhi; in return for an up-front payment of 18,800 RBM, Gao's parents promised that Gao would marry Zhi when she turned twenty-one. Gao's parents used this money to pay off previous debts. At first, Gao acquiesced in the arrangement under pressure from her parents. However, because Zhi soon proved to be bad-tempered, and gambled, and beat her when she refused to give him money, Gao decided that she did not want to marry Zhi. When Gao tried to break their engagement, Zhi threatened her. He also threatened that, if she refused to marry him, his uncle, a powerful local official, would arrest her. Gao had heard that Zhi's uncle had arrested other individuals for personal reasons, and so she was afraid the same would happen to her.

To escape Zhi, Gao moved an hour away by boat and took a job in the Mawei district of Fuchou. Zhi continued to visit Gao's family and demand that she marry him, and when her parents refused to tell him where she had moved,

he vandalized their home. Zhi also figured out that Gao was living in Mawei by following her to her boat one night when she was returning from a visit with her family. About half a year later, Gao fled to the United States out of fear that, if she remained in China, she would be forced to marry Zhi. Since Gao left, Zhi and his cohorts have continued to harass her family, to the point where the family has had to move repeatedly.

II. Procedural History

*2 At her hearing, Gao testified to the events described above. In addition to Gao's testimony and a corroborating affidavit from her mother, the IJ had before her the 2001 State Department Country Report on Human Rights Practices in China ("Country Report"), which described widespread domestic violence and trafficking in brides and prostitutes. The Country Report explained that this problem is fueled by the gender imbalance that has resulted from selective abortions and infanticides of female offspring, and that the problem is worse in rural areas. The Country Report also stated that, although the central government has been trying to prevent trafficking in women, its efforts have been hampered by official corruption and by active resistance on the part of village authorities.

At the end of the hearing, the IJ issued an oral decision denying Gao asylum, withholding of removal, and CAT relief. The IJ found Gao credible, but concluded that Gao had not made out a claim for asylum or withholding of removal. Specifically, the IJ found that Gao's predicament did not arise from a protected ground such as membership in a particular social group, but was simply "a dispute between two families." The IJ also found that the record did not establish that the government would not protect her from Zhi. Finally, the IJ found that because Gao "was able to relocate safely to another city," she did not need asylum in the United States. The IJ also, without separate analysis, denied Gao's CAT claim. The BIA summarily affirmed.

DISCUSSION

I. Standard of Review

[1][2][3] We review *de novo* the IJ's determination of mixed questions of law and fact, as well as the IJ's application of law to facts. [Secaida-Rosales v. INS, 331 F.3d 297, 307 \(2d Cir.2003\)](#). We review BIA interpretations of ambiguous Immigration and Nationality Act language—such as the meaning of "particular social group"—with the deference described in [Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844, 104 S.Ct. 2778, 81 L.Ed.2d 694 \(1984\)](#). We do not, however, give *Chevron* deference to summary BIA affirmances of IJ interpretations. See [Shi Liang Lin v. U.S. Dep't of Justice, 416 F.3d 184, 190-91 \(2d Cir.2005\)](#). [FN2]

[4][5][6] By contrast, the scope of our review of an IJ's factual findings is narrow, and we uphold such findings so long as they are supported by "substantial evidence." [Jin Shui Qiu v. Ashcroft, 329 F.3d 140, 148 \(2d Cir.2003\)](#) (internal quotation marks omitted). The "substantial evidence" standard, however, is slightly stricter than the clear-error standard generally applied to a district court's factual findings. [Id. at 149](#). We require "more than a mere scintilla" of evidence, or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [Alvarado-Carillo v. INS, 251 F.3d 44, 49 \(2d Cir.2001\)](#) (internal quotation marks omitted). We also "require some indication that the IJ considered material evidence supporting a petitioner's claim." [Poradisova v. Gonzales, 420 F.3d 70, 77 \(2d Cir.2005\)](#); see also [Anderson v. McElroy, 953 F.2d 803, 806 \(2d Cir.1992\)](#) ("[W]e cannot assume that the BIA considered factors that it failed to mention in its decision." (internal quotation marks omitted)). It is not our role, moreover, to assume factual findings supporting denial "on the basis of record evidence not relied on by the BIA." [Jin Shui Qiu, 329 F.3d at 149](#).

*3 Applying these principles here, we review *de novo* the IJ's interpretation of the legal term "particular social group"; assume without deciding that the IJ's interpretation might be entitled to *Skidmore* deference based on its inherent persuasiveness; accord *Chevron* deference to relevant BIA precedent; and review under the "substantial evidence" standard the IJ's findings of fact as to whether Gao could have sought government protection and/or relocated within China.

II. The Governing Law

[7] To establish eligibility for the discretionary relief of asylum, a petitioner must show that she has suffered past persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion," or that she has a well-founded fear of future persecution on these grounds. See 8 U.S.C. § 1101(a)(42). "An alien's fear may be well-founded even if there is only a slight, though discernible, chance of persecution." *Diallo v. INS*, 232 F.3d 279, 284 (2d Cir.2000) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987)). If an applicant satisfies the higher burden of demonstrating that such persecution is more likely than not, she is automatically entitled to withholding of removal under 8 U.S.C. § 1231(b)(3). See *Diallo*, 232 F.3d at 284-85. An applicant is also entitled to CAT relief if she establishes that it is more likely than not that she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 1208.16(c)(2); see *Ramsameachire v. Ashcroft*, 357 F.3d 169, 184 (2d Cir.2004).

The three issues in this case, which we address in turn, are: 1) whether Gao established that she might be forced into marriage "on account of ... membership in a particular social group"; 2) whether the IJ had a substantial basis for finding insufficient evidence that the Chinese authorities would not protect Gao; and 3) whether the IJ had a substantial basis for finding that Gao could safely relocate within China. The government appears to concede, as it must, that forced marriage is a form of abuse that rises to the level of persecution. Moreover, as the IJ and BIA failed to address Gao's CAT claim, we simply remand that claim for consideration by an IJ or the BIA in the first instance.

A. Particular Social Group

[8] The five grounds protected under paragraph 1101(a)(42)-race, religion, nationality, membership in a particular social group, and political opinion-derive verbatim from the United Nations Protocol Relating to the Status of Refugees ("Protocol"), Jan. 31, 1967, 19 U.S.T. 6223 (entered into force Nov. 1, 1968); Congress expressly modeled its law on the Protocol so that the two would be "consistent." H.R.Rep. No. 781, at 20 (1980) (Conf.Rep.), as reprinted in 1980 U.S.C.C.A.N. 160, 161. Of the various categories, "particular social group" is the least well-defined on its face, and the diplomatic and legislative histories shed no light on how it was understood by the parties to the Protocol or by Congress. There is, fortunately, a substantial body of case law, although its value as precedent is somewhat limited by the fact-specific nature of asylum cases.

*4 The landmark BIA case for what can constitute a social group is *Matter of Acosta*, which, in the context of holding that Salvadoran taxi drivers were not a cognizable social group because they could change professions, set forth the following standard:

[W]e interpret the phrase "persecution on account of membership in a particular social group" to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

19 I. & N. Dec. 211, 233-34 (BIA 1985) (emphasis added), overruled in part on other grounds by *Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987); see also *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 358 (BIA 1996) (recognizing as a particular social group "young women of the Tchamba-Kunsuntu Tribe who have not had [female genital mutilation], as practiced by that tribe, and who oppose the practice"); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (BIA 1990) (recognizing Cuban homosexuals as a particular social group); cf. *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988) (recognizing that former members of the Salvadoran national police could comprise a particular social group, but finding insufficient evidence of future danger).

Courts of Appeals have deferred to *Matter of Acosta*'s broad interpretation of "particular social group" as encompassing any group, however populous, persecuted because of shared characteristics that are either immutable or fundamental. In *Fatin v. INS*, 12 F.3d 1233 (3d Cir.1993), for example, then-Judge Alito writing for the Third Circuit considered and rejected a petition by an Iranian woman who had been living in Iran since before the

Islamic revolution and who claimed that, if she were removed to Iran, she would be forced to conform to fundamentalist Islamic norms. [Id. at 1235-36](#). The court reasoned thus:

We believe that there are three [elements that an alien must establish in order to qualify for withholding of deportation or asylum based on membership in such a group]. The alien must (1) identify a group that constitutes a "particular social group" within the interpretation just discussed, (2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership.

In the excerpt from *Acosta* quoted above, the Board specifically mentioned "sex" as an innate characteristic that could link the members of a "particular social group." Thus, to the extent that the petitioner in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied the first of the three elements that we have noted. She has not, however, satisfied the third element; that is, she has not shown that she would suffer or that she has a well-founded fear of suffering "persecution" based solely on her gender.

*5 [Id. at 1240](#). The court reached this last conclusion because there was no record evidence that women in Iran were systematically persecuted *for being women*. [Id. at 1241](#).

The *Fatin* court went on to consider Fatin's suggestion that her social group was "those Iranian women who find those laws so abhorrent that they refuse to conform—even though, according to the petitioners' brief, the routine penalty for noncompliance is 74 lashes, a year's imprisonment, and in many cases brutal rapes and death." [Id.](#) (internal quotation marks omitted). The court agreed that this "may well" be a cognizable social group under the asylum law but found that Fatin had not demonstrated that she was part of such a social group because she was not politically active here, testified that she would try to avoid complying with the government's dress code and other norms but not that she would take any risk necessary, and failed to establish that the new Iranian norms were abhorrent to her, as opposed to merely objectionable. [Id. at 1241-42](#).

The reasoning in *Fatin* may be taken to suggest that the proper balance to strike is to interpret "particular social group" broadly (requiring only one or more shared characteristics that are either immutable or fundamental) while interpreting "on account of" strictly (such that an applicant must prove that these characteristics are a central reason why she has been, or may be, targeted for persecution). As the Tenth Circuit explained in [Niang v. Gonzales](#), "the focus with respect to [gender-related] 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 that one could say that they are persecuted 'on account of' their membership." [422 F.3d 1187, 1199-1200 \(10th Cir.2005\)](#) (quoting [8 U.S.C. § 1101\(a\) 42\(A\)](#)).

Other circuits have also deferred to *Matter of Acosta*'s broad definition of "particular social group." See [Hernandez-Montiel v. INS](#), [225 F.3d 1084, 1093 \(9th Cir.2000\)](#) (recognizing as a "particular social group" in Mexico gay men with female sexual identities, and holding "that a 'particular social group' is one united by a voluntary association, including a former association, *or* by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it"); [Lwin v. INS](#), [144 F.3d 505, 512 \(7th Cir.1998\)](#) (recognizing parents of political dissidents as "particular social group" under *Matter of Acosta*'s immutability test); [Ananeh-Firempong v. INS](#), [766 F.2d 621, 626 \(1st Cir.1985\)](#) (recognizing petitioner's family as a "particular social group"). [FN3] Courts of Appeals have also followed the BIA's holding in *In re Fauziya Kasinga*, [21 I. & N. Dec. at 358](#), that young women who reasonably fear customary genital mutilation are eligible for asylum under the "particular social group" rubric. See [Mohammed v. Gonzales](#), [400 F.3d 785, 796-98 \(9th Cir.2005\)](#); [Niang](#), [422 F.3d at 1199-1200](#); [Abay v. Ashcroft](#), [368 F.3d 634, 638 \(6th Cir.2004\)](#). Although this Court has not had occasion to consider *de novo* whether women facing genital mutilation could comprise a "particular social group," we did find an applicant eligible for asylum based on her fear of genital mutilation in a case where the BIA *conceded* that the alleged harm was on account of Abankwah's social group but found that she had not presented sufficient proof of past or future harm. See [Abankwah v. INS](#), [185 F.3d 18, 21 \(2d Cir.1999\)](#); accord [Balogun v. Ashcroft](#), [374 F.3d 492, 499 \(7th Cir.2004\)](#) (noting agency concession).

*6 The general law in our own Circuit on particular social groups is less clear. In [Gomez v. INS](#), we denied the petition of a woman whose asylum claim was based on the fact that she had been raped and beaten by guerilla

forces on five different occasions between the ages of twelve and fourteen. [947 F.2d 660, 664 \(2d Cir.1991\)](#). Gomez argued that, because of her past, she belonged to a particular social group-"women who have been previously battered and raped by Salvadoran guerillas"-that was likely to be singled out for further persecution. [Id. at 663-64](#). In rejecting this argument, we used broad language that could (and has) been read as conflicting with [Matter of Acosta](#), see, e.g., [Niang, 422 F.3d at 1199](#). In particular, in our general statement of law, we wrote that "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group." [Gomez, 947 F.2d at 664](#); [\[FN4\]](#) see also [Saleh v. U.S. Dept. of Justice, 962 F.2d 234, 240 \(2d Cir.1992\)](#) (citing [Gomez](#), and rejecting as potential social groups "Yemeni Moslems residing outside of Yemen" and "poor Yemenis who could not afford to pay 'blood money' to buy their way out of a death sentence [for murder]")).

[\[9\]](#) However, in the analysis portion of [Gomez](#), this Court rejected Gomez's claim not because the social group she defined was too "broadly-based" but rather because "there is no [indication] that Gomez *will be singled out* for further brutalization on [the basis of her past victimization]." [947 F.2d at 664](#) (emphasis added). In other words, [Gomez](#) can reasonably be read as limited to situations in which an applicant fails to show a *risk* of future persecution on the basis of the "particular social group" claimed, rather than as setting an *a priori* rule for which social groups are cognizable. Indeed, the former reading would appear to conform better to the BIA's reasonable interpretation of [8 U.S.C. § 1101\(a\)\(42\)](#) in [Matter of Acosta](#) and the consensus among the other circuits. [\[FN5\]](#)

[\[10\]](#) We need not decide the exact scope of [Gomez](#) here because Gao belongs to a particular social group that shares more than a common gender. Gao's social group consists of women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable. [\[FN6\]](#) Clearly, these common characteristics satisfy the [Matter of Acosta](#) test. Moreover, Gao's testimony, which the IJ credited, also establishes that she might well be persecuted in China-in the form of lifelong, involuntary marriage-"on account of" her membership in this group.

The IJ's reasons for reaching the opposite conclusion are unclear. The IJ recited the requirement that persecution be on account of "some immutable characteristic," yet failed to analyze whether such was the case here. The IJ appears to have concluded that Gao did not face persecution on account of an immutable characteristic because her situation arose from "a dispute between two families," but the logical connection between the IJ's premise and conclusion is not evident, nor is it explained in the IJ's opinion. The IJ also wrote that "[t]he other reason that [Gao] does not establish that she is a member of a particularly persecuted social group of female [sic] is because her mother violated the oral [marriage] contract that she had with this go-between, and that is what caused the anger by the boyfriend in this situation" To the extent the IJ might have reasoned that the financial arrangement between the *families* somehow precluded a finding that Zhi's motive in targeting *Gao* was discriminatory, we reject this logic as antithetical to the very notion of individual rights on which asylum law is based. While Zhi may have a legitimate *financial* claim against Gao's parents, the possibility remains that if they continue to be unable to repay his money, Zhi will force Gao to marry him. [\[FN7\]](#)

*7 Because the IJ's analysis of the "particular social group" issue is (to say the least) sparse, we need not reach the issue of whether [Skidmore](#) deference to IJ interpretations is appropriate. Even if [Skidmore](#) deference is appropriate, the [Skidmore](#) factors-"the thoroughness evident in [an official interpretation], the validity of its reasoning, [and] its consistency with earlier and later pronouncements"-do not counsel deference here. [Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 \(1944\)](#).

For the reasons stated above, we hold that Gao has established a nexus between the persecution she fears and the "particular social group" to which she belongs. The only remaining questions, therefore, are whether the IJ had a substantial basis for finding that the government was willing and able to protect Gao or that Gao could reasonably relocate within China. We address these in turn.

B. Government Protection

[\[11\]](#) The IJ found that Gao had not met her burden of establishing that the Chinese government would not protect

her. In so finding, the IJ dismissed as "mere speculation" Gao's assertion that the government would not protect her from Zhi. We agree with Gao that this finding of fact was without substantial basis. The Country Report, which was included in the record before the IJ but which the IJ failed to mention in her opinion, states that trafficking in women, for marriage and prostitution, is widespread, and that official efforts to combat the problem have been hampered by corruption and by active resistance by village leaders. Given this evidence, together with the testimony that Zhi threatened to have his uncle, a powerful government official, arrest Gao and with the lack of any evidence that the local officials in Gao's village *would* protect her, Gao's contention was not the least bit speculative. See [Ivanishvili v. U.S. Dep't of Justice](#), 433 F.3d 332, 342 (2d Cir.2006) ("[I]t is well established that private acts may be persecution if the government has proved unwilling to control such actions."). We therefore vacate this finding of fact.

C. Relocation Within China

[12] The IJ also found, although it is unclear whether she gave this finding significant weight, that Gao could have relocated within China because she "was able to relocate safely to another city." This finding is contradicted by the record. As set forth above, Gao testified that, six months before she fled China, she attempted to escape Zhi by moving an hour away. She further testified that Zhi continued to harass her family, vandalized their home, and even followed her when she returned home to visit and thereby succeeded in figuring out that she had moved to Mawei. Given that Gao fled China soon after Zhi made this discovery and that Zhi continued to harass Gao's parents thereafter, the record in no way suggests that Gao "was able to relocate safely." We therefore vacate this finding and remand for further consideration of this issue (should the BIA deem it a significant one).

*8 We remind the BIA that to deny a claim based on the availability of internal refuge, the BIA must find not only that Gao could avoid persecution by relocating, but *also* that "under all the circumstances it would be reasonable to expect the applicant to do so," [8 C.F.R. § 208.13\(b\)\(2\)\(ii\)](#). The regulations, further, direct the BIA to consider, among other things, "whether the applicant would face other serious harm in the place of suggested relocation; ... administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." *Id.* [§ 208.13\(b\)\(3\)](#).

CONCLUSION

For the foregoing reasons the petition for review is GRANTED, the decision of the BIA is VACATED, and the case is REMANDED to the BIA for further proceedings consistent with this opinion. The motion for a stay of removal, previously granted, shall expire upon issuance of the mandate.

[FN1.](#) United States Attorney General Alberto Gonzales is substituted as Respondent. See [Fed. R.App. P. 43\(c\)\(2\)](#).

[FN2.](#) This Court has not yet decided whether IJ decisions are ever entitled to a lesser form of deference: "*Skidmore* deference." See [Shi Liang Lin](#), 416 F.3d at 191 (noting this open question). Under [Skidmore v. Swift & Co.](#), 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944), individual agency interpretations carry persuasive power based on "the thoroughness evident in [their] consideration, the validity of [their] reasoning, [and their] consistency with earlier and later pronouncements." As explained below, the present case does not require us to resolve this issue because the *Skidmore* factors would not counsel deference to the particular IJ decision at issue.

[FN3.](#) We also note that the Department of Homeland Security ("DHS") has recently taken a similar stance in [Matter of R-A-](#). Initially, the BIA held, reversing an IJ, that a Guatemalan woman facing domestic abuse was not facing persecution on account of social group membership. [22 I. & N. Dec. 906 \(BIA 1999\)](#). Then-Attorney General Janet Reno overturned the decision, proposed new regulations for gender-related asylum claims (affirming that gender can be a sufficiently unifying characteristic), and ordered the BIA to reconsider the case after these regulations were finalized. While these regulations have not yet been finalized, DHS has since argued in a brief to the Attorney General that he should grant [R-A-](#) asylum under the [Matter of Acosta](#) standard. See Department of Homeland Security's Position on

Respondent's Eligibility for Relief, Feb. 19, 2004, *available at* http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf (visited Feb. 10, 2006). Specifically, the DHS now takes the position that "married women in Guatemala who are unable to leave the relationship" are a particular social group under the law. *Id.* at 27-28. The Attorney General remanded the case to the BIA in January 2005, *see Matter of R-A-, 23 I. & N. Dec. 694 (AG 2005)*, where it is currently pending.

FN4. We based this statement on a formulation from the Ninth Circuit which that court has since disavowed as dicta and as inconsistent with BIA and other circuit precedent. *See Gomez, 947 F.2d at 664* (citing *Sanchez-Trujillo v. INS, 801 F.2d 1571 (9th Cir.1986)*); *Hernandez-Montiel, 225 F.3d at 1092-93 & n. 5* (disavowing *Sanchez-Trujillo*).

FN5. The fear of future persecution, both subjective and objective, is evaluated with respect to the specific individual who asserts that fear. To the extent that the social group of which the petitioner claims to be a member is exceptionally broad, the need for the individual to prove that he, in particular, reasonably fears being persecuted is certainly greater. This can be done either by showing that a significant portion of even the very broad group will be persecuted, or by establishing that there are good reasons for thinking that the particular alien will be singled out for persecution. The need for such proof will depend, of course, on the nature as well as the breadth of the social group, e.g., it may be readily assumed in the circumstances of a particular country that virtually every individual in a racial or ethnic group may reasonably fear future persecution, even though the group is very large.

FN6. To avoid unnecessary circularity or complexity, we choose this definition of Gao's group, rather than one that includes as an additional element that the individuals in question object to their compulsory marriage. Needless to say, however, if a victim ceases to object to her forced marriage and seeks United States residence purely for other reasons, then she is not, as the statute requires, "unable or unwilling to avail ... herself of the *protection* of ... [her country of origin] *because of* persecution or a well-founded fear of persecution." 8 U.S.C. § 1101(a)(42) (emphasis added).

We note, additionally, that our definition of Gao's social group is tailored to the facts of this case and does not reflect any outer limit of cognizable social groups. We do not here reach, for example, whether young, unmarried women in rural China comprise a "particular social group" under asylum law such that, if they have a well-founded fear of being forced into marriage, they are eligible for asylum.

FN7. Nor does it make any difference that Zhi is the only person likely to claim Gao as his property. The law does not distinguish between single persecutors and mobs, provided that the persecution is based on a specified ground and that the government is unable or unwilling to protect the victim(s).