

## **Matter of L-E-A-, Respondent**

*Decided by Attorney General March 1, 2019*

U.S. Department of Justice  
Office of the Attorney General

### **BEFORE THE ATTORNEY GENERAL**

On December 3, 2018, pursuant to 8 C.F.R. § 1003.1(h)(1)(i), Acting Attorney General Matthew G. Whitaker directed the Board of Immigration Appeals to refer this case to the Attorney General for review of the Board's decision. *See* Att'y Gen. Order No. 4339-2018. To assist that review, Acting Attorney General Whitaker directed that opening briefs from the parties be filed on or before January 4, 2019, that reply briefs be filed on or before January 18, 2019, and that briefs from amici be filed on or before January 18, 2019. *Id.*

On December 22, 2018, appropriations for the Departments of Justice and Homeland Security lapsed. Following a series of requests to suspend and extend the briefing schedule, on February 7, 2019, Acting Attorney General Whitaker directed that the parties' briefs shall be filed on or before February 18, 2019, that reply briefs from the parties be filed on or before March 4, 2019, and that briefs from amici be filed on or before March 4, 2019. *See* Att'y Gen. Order No. 4373-2018. Counsel for respondent subsequently requested an extension of the briefing schedule for reply and amicus briefs. Considering that request, I set the following scheduling order:

Interested amici may submit briefs not exceeding 9,000 words on or before March 13, 2019. The parties may submit reply briefs not exceeding 6,000 words on or before March 13, 2019.

All filings shall be accompanied by proof of service and shall be submitted electronically to [AGCertification@usdoj.gov](mailto:AGCertification@usdoj.gov), and in triplicate to:

United States Department of Justice  
950 Pennsylvania Avenue, NW  
Office of the Attorney General, Room 5114  
Washington, DC 20530

All briefs must be both submitted electronically and postmarked on or before the pertinent deadlines. No other deadlines in this matter are modified by this order.

Ronald A.A. Lapid  
Acting Chief  
Rhonda M. Dent  
Deputy Chief  
**Cathy Ng**  
Associate Legal Advisor  
**Natalie Salvaggio**  
Associate Legal Advisor  
Immigration Law and Practice Division  
U.S. Immigration and Customs Enforcement  
U.S. Department of Homeland Security  
500 12th Street, SW  
Mail Stop 5900  
Washington, DC 20536  
(202) 732-5000

**NON-DETAINED**

**UNITED STATES DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL**

\_\_\_\_\_  
In the Matter of )  
)  
)  
)  
)  
)  
)  
In Removal Proceedings )  
\_\_\_\_\_ )

File No.: \_\_\_\_\_

**U.S. DEPARTMENT OF HOMELAND SECURITY  
REPLY BRIEF ON REFERRAL TO THE ATTORNEY GENERAL**

**Table of Contents**

ARGUMENT ..... 1

I. THE ATTORNEY GENERAL PROPERLY DIRECTED THE BOARD OF IMMIGRATION APPEALS TO REFER THE CASE TO HIMSELF. .... 1

    A. Jurisdiction Over the Respondent’s Case Properly Vested With the Immigration Court, and the Attorney General Presently Has Jurisdiction Over the Case..... 1

    B. The Regulation at 8 C.F.R. § 1003.1(h) Preserves the Attorney General’s Plenary Authority Over Immigration Cases..... 3

II. *MATTER OF A-B-*, REQUIRING A CASE-BY-CASE REVIEW OF PARTICULAR SOCIAL GROUP CLAIMS, REITERATES THE PROPER FRAMEWORK TO ANALYZE ALL SUCH PROTECTION CLAIMS. .... 5

    A. There Is No *Per Se* Cognizable Particular Social Group Based on Kinship Ties; Likewise, There Is No Protected Ground Based Solely on Kinship Ties..... 5

    B. A Family Unit Is Not *Per Se* a Cognizable Particular Social Group. .... 6

    C. Circuit Courts Are Not Unanimous in Finding Families Are *Per Se* Cognizable Particular Social Groups Under the Board’s Rigorous Three-Prong Approach..... 7

    D. A Proper Nexus Analysis in Mixed Motive Cases Focuses on the Protected Ground and Whether a Protected Ground Is at Least One Central Reason for Harm. .... 13

III. THE DEPARTMENT’S ANSWER TO THE ATTORNEY GENERAL’S QUESTION, EMPHASIZING A CASE-BY-CASE, SOCIETY-SPECIFIC ANALYSIS OF FAMILY UNIT-BASED PARTICULAR SOCIAL GROUP CLAIMS, IS CONSISTENT WITH DECADES OF PRECEDENT..... 15

    A. There Is No Change or Break in Precedent Regarding Particular Social Group Claims.. 15

    B. Any Decision Issued by the Attorney General in This Case Applies to the Respondent, as the Attorney General Has the Authority to Vacate the Board’s Decision and to Determine the Respondent’s Claim *De Novo*. .... 16

IV. CONCLUSION..... 18

## ARGUMENT

Pursuant to the Attorney General's decision in *Matter of L-E-A-*, 27 I&N Dec. 494 (A.G. 2018), the Department of Homeland Security (Department) timely submitted its opening brief (Department's Brief) on February 19, 2019. The Department received the respondent's opening brief (Respondent's Brief) on February 27, 2019. The Department respectfully submits this brief in reply to the Respondent's Brief.

I. THE ATTORNEY GENERAL PROPERLY DIRECTED THE BOARD OF IMMIGRATION APPEALS TO REFER THE CASE TO HIMSELF.

A. **Jurisdiction Over the Respondent's Case Properly Vested With the Immigration Court, and the Attorney General Presently Has Jurisdiction Over the Case.**

Contrary to the respondent's arguments, jurisdiction over his case properly vested with the immigration court at the time the notice to appear was filed, and the Attorney General presently has jurisdiction over the case. "Jurisdiction vests, and proceedings before an Immigration Judge commence, when a charging document is filed with the Immigration Court by the [Department]." 8 C.F.R. § 1003.14(a). However, "[t]he regulation does not specify what information must be contained in a 'charging document' at the time it is filed with an Immigration Court, nor does it mandate that the document specify the time and date of the initial hearing before jurisdiction will vest. Notably, 8 C.F.R. § 1003.15(b) (2018), which lists the information that must be contained in a notice to appear, does not mandate that the time and date of the initial hearing must be included in that document." *Matter of Bermudez-Cota*, 27 I&N Dec. 441, 445 (BIA 2018).

The respondent's assertion that the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), supports termination of the respondent's proceedings because his notice to appear does not specify a date, time, or place of hearing, *see* Respondent's Brief at 27-30,

misconstrues that holding, *see* 138 S. Ct. at 2113-14 (narrowly ruling that a “notice to appear that fails to designate the specific time or place of the noncitizen’s removal proceedings is not a ‘notice to appear under section [240 of the Immigration and Nationality Act],’ and so does not trigger the stop-time rule” for cancellation of removal eligibility). Since *Pereira*, the Board of Immigration Appeals (Board) has clarified that “a notice to appear that does not specify the time and place of an alien’s initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of section 239(a) of the [Immigration and Nationality] Act, so long as a notice of hearing specifying this information is later sent to the alien.” *Matter of Bermudez-Cota*, 27 I&N Dec. at 447. Thus, where a notice to appear does not specify a time and place but is followed by a properly issued notice of hearing, termination of removal proceedings is inappropriate. *See id.* at 444, 447. In *Bermudez-Cota*, the immigration court issued a notice of hearing, specifying the time and place of hearing, after the Department’s filing of the notice to appear, and the respondent attended his hearings. *Id.* at 443. The same is true in this case: the immigration court issued a notice of hearing following the filing of the notice to appear, *see* Notice of Hearing (Aug. 18, 2011) (personally served on the respondent that day), and the respondent attended his immigration hearings, *see, e.g.*, Tr. at 1 (noting the respondent’s appearance at the first hearing on August 18, 2011). More importantly, *Pereira* is distinguishable because the “stop-time” rule for cancellation of removal is not at issue. *See* 27 I&N Dec. at 443.

The Ninth Circuit, in whose jurisdiction in which this case arises, has deferred to the Board’s decision in *Bermudez-Cota*. *See Karingithi v. Whitaker*, 913 F.3d 1158, 1160-61 (9th Cir. 2019) (distinguishing the jurisdictional issue in *Bermudez-Cota* from the eligibility for relief issue in *Pereira*); *see also Hernandez-Perez v. Whitaker*, 911 F.3d 305, 314-15 (6th Cir. 2018)

(agreeing with the Board in *Bermudez-Cota* that “*Pereira* is an imperfect fit in the jurisdictional context” and that “jurisdiction vests with the immigration court where, as here, the mandatory information about time of the hearing . . . is provided in a Notice of Hearing issued after the [Notice to Appear]”). Consequently, pursuant to Board and Ninth Circuit precedent, jurisdiction properly vested with the immigration court, and the Attorney General, by virtue of his plenary review over immigration matters, *see* Argument *infra* Part I.B, presently has jurisdiction over the respondent’s case.

**B. The Regulation at 8 C.F.R. § 1003.1(h) Preserves the Attorney General’s Plenary Authority Over Immigration Cases.**

The Attorney General has broad authority to administer and enforce the immigration laws, and he has delegated authority to the Board and immigration judges to adjudicate immigration cases. *See* Immigration and Nationality Act (INA or Act) § 103(g)(1)-(2) (describing the authorities and functions of the Attorney General regarding immigration matters, including delegation of authority and the review of administrative cases); *see also* *Matter of Castro-Tum*, 27 I&N Dec. 271, 281 (A.G. 2018) (discussing the Attorney General’s authority to supervise immigration proceedings). While the Board and immigration judges have been delegated certain authorities to administer the immigration laws, *see* *Castro-Tum*, 27 I&N Dec. at 281-82, the Attorney General has reserved his broad decision-making authority by specifying that certain cases may be referred to him, including those that he directs the Board to refer. *See* 8 C.F.R. § 1003.1(h)(1); *see also* *Matter of J-F-F-*, 23 I&N Dec. 912, 913 (A.G. 2006) (recognizing that “[w]hile Attorneys General have delegated their authority to the Board and Immigration Judges in the first instance, [the Attorney General] retain[s] the power to exercise full decisionmaking upon review”).

The regulation at 8 C.F.R. § 1003.1(h)(1) does not further limit what decisions the Attorney General may direct the Board to refer to him for review. It requires only that there be a decision from the Board; it does not, contrary to the respondent's argument, *see* Respondent's Brief at 23-24, require that the case remain pending before the Board at the time of the order directing referral. The interpretation advocated by the respondent would preclude the Attorney General from reviewing any Board decision which includes a remand for further proceedings. Such a limitation would be inconsistent with the Attorney General's plenary authority over immigration cases and his supervisory authority over the Board and immigration judges. *See Matter of J-F-F-*, 23 I&N Dec. at 913 & n.3 (explaining that the Board and immigration judges are subject to the direction and regulation of the Attorney General); *Matter of D-J-*, 23 I&N Dec. 572, 575 (A.G. 2003) (explaining that when the Attorney General reviews decisions pursuant to 8 C.F.R. § 1003.1(h), the delegated authorities of the immigration judges and the Board are superseded, and he may make determinations based on his own conclusions).

Here, the Board considered the respondent's appeal and issued a decision in *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017), and the Attorney General properly referred that decision to himself for plenary review. "Nothing in the INA or the implementing regulations precludes the Attorney General from referring a case for review simply because the Board has remanded the case for further proceedings before an immigration judge."<sup>1</sup> *Matter of A-B-*, 27 I&N Dec. 316, 324 (A.G. 2018).

---

<sup>1</sup> The respondent contends that the referral of this case to the Attorney General should be vacated because Matthew G. Whitaker was not properly appointed as Acting Attorney General. *See* Respondent's Brief at 24-25. The Department of Justice's Office of Legal Counsel determined that the President's designation of Mr. Whitaker as Acting Attorney General was expressly authorized by 5 U.S.C. § 3345(a)(3) and was lawful under Supreme Court precedent, prior opinions of the Department of Justice, and two centuries of executive practice. *See Designating an Acting Attorney General*, 2018 WL 6131923 Op. O.L.C. (2018). Regardless, on February 14, 2019, William P. Barr was sworn in as Attorney General.

II. *MATTER OF A-B-*, REQUIRING A CASE-BY-CASE REVIEW OF PARTICULAR SOCIAL GROUP CLAIMS, REITERATES THE PROPER FRAMEWORK TO ANALYZE ALL SUCH PROTECTION CLAIMS.

**A. There Is No *Per Se* Cognizable Particular Social Group Based on Kinship Ties; Likewise, There Is No Protected Ground Based Solely on Kinship Ties.**

Contrary to the respondent's assertions, *see* Respondent's Brief at 10-11, the Board in *Matter of Acosta*, did not hold that the existence of kinship ties alone was sufficient to establish "membership in a particular social group." 19 I&N Dec. 211 (BIA 1985), *overruled in part on other grounds in Matter of Mogharrabi*, 19 I&N Dec. 439 (1987). Nor did the Board hold that kinship ties between individuals by themselves denote a cognizable particular social group. Instead, the Board referred to kinship ties as just one example of a shared innate characteristic that might potentially help define a group. *See* 19 I&N Dec. at 233. The Board also made clear that while a shared characteristic like kinship ties may define a group, whether it is enough to establish a cognizable particular social group "remains to be determined on a case-by-case basis." *Id.*; *see Matter of M-E-V-G-*, 26 I&N Dec. 227, 230-31, 251 (BIA 2014) (referencing *Acosta* and declaring that "[s]ocial group determinations are made on a case-by-case basis"); *cf. Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006) (observing, in *Matter of H-*, 21 I&N Dec. 337 (BIA 1996), where the Board found the Somalian Marehan subclan to be a particular social group, the Board "did not rule categorically that membership in any clan would suffice"), *aff'd, Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006). Moreover, the Board's decision in *Acosta* predates its decisions further clarifying the requirements of a cognizable particular social group, namely, that it must be sufficiently particular, and that it must be socially distinct in the applicant's specific society. *See Matter of M-E-V-G-*, 26 I&N Dec. at 230-32, 237-38 (explaining the necessary evolution of the particular social group analysis from *Acosta's* sole requirement that group members share an immutable or fundamental characteristic to

include social distinction—formerly social visibility—and particularity); *Matter of W-G-R-*, 26 I&N Dec. 208, 210 (BIA 2014) (same), *vacated in part and remanded on other grounds by Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016).

As the Department previously explained, there is no universal definition for “family” or “family units” in the context of protection claims. *See* Department’s Brief at 13-16. Every family unit-based particular social group claim requires an individualized analysis dependent on an applicant’s fact- and society-specific case. *See id.* at 16-22. Because a case-by-case analysis is required for protection claims—an approach inherent in the requirement that a putative group must be sufficiently particular and socially distinct—there has never been, and cannot be, a rule that kinship ties or specific familial relationships by themselves establish cognizable particular social groups *per se*. *See id.* at 16-22.

**B. A Family Unit Is Not *Per Se* a Cognizable Particular Social Group.**

Pursuant to precedent, “family” is not a *per se* cognizable particular social group. *See* Argument *supra* Part II.A.; Department’s Brief at 16-22. “Social group determinations are made on a case-by-case basis.” *Matter of M-E-V-G-*, 26 I&N Dec. at 251. Indeed, while the respondent argues that an immediate family is considered by “every society in the world” to be sufficiently discrete and socially distinct, *see* Respondent’s Brief at 14, the respondent concedes that an adjudicator must assess each putative particular social group claim on a case-by-case basis, *see id.* at 14 n.4. The respondent’s presumption that an immediate family *per se* meets the requirements of immutability, particularity, and social distinction fails to apply the “rigorous analysis” required for particular social group claims as reiterated in *Matter of A-B-*, 27 I&N Dec. at 340; this lack of a proper analysis is exactly what the Attorney General found at issue with the Board’s decision in *Matter of L-E-A-*, 27 I&N Dec. 40. *See Matter of A-B-*, 27 I&N Dec. at 333

n.8 (faulting the Board in *Matter of L-E-A-* for failing to exercise the appropriate legal analysis, relying instead on the parties' stipulations regarding the cognizability of the particular social group). The meaning of a "family unit" must be determined based on the legal, social, and cultural norms of the society in question. *See* Department's Brief at 16-22. Under this fact-based inquiry, a given family unit may or may not be sufficiently particular or socially distinct, depending on the pertinent facts and circumstances.<sup>2</sup> *See generally Matter of M-E-V-G-*, 26 I&N Dec. at 237-41, 244 (discussing particularity and social distinction, their interplay, and the relevant evidentiary burden).

**C. Circuit Courts Are Not Unanimous in Finding Families Are *Per Se* Cognizable Particular Social Groups Under the Board's Rigorous Three-Prong Approach.**

The respondent asserts that the circuit courts have "uniformly approved of" and "are unanimous in holding" that family is a cognizable particular social group. *See* Respondent's Brief at 11-12. However, most of the decisions the respondent cites predate the Board's clarification of the requirements for cognizable particular social groups. *See id.* at 11-12 (citing, with one exception, circuit court decisions rendered before 2014, the year the Board issued *Matter of M-E-V-G-*, 26 I&N Dec. 227, and *Matter of W-G-R-*, 26 I&N Dec. 208); *see generally Matter of A-B-*, 27 I&N Dec. at 340 (holding that a putative particular social group must undergo the rigorous analysis pursuant to *Matter of M-E-V-G-*, 26 I&N Dec. 227, and *Matter of W-G-R-*, 26 I&N Dec. 208). Concomitantly, the respondent does not discuss these decisions in

---

<sup>2</sup> For example, vis-à-vis U.S. society, the "Smith family," without any additional context or limitation, is not a cognizable particular social group because, at a minimum, it *per se* lacks "particularity." "Particularity" necessitates review of at least the degree of attenuation of the familial relationships involved; without additional information, is unknown whether the "Smith family" includes grandparents, uncles, aunts, and cousins of any degree who may or may not share the name "Smith." *See generally Matter of M-E-V-G-*, 26 I&N Dec. at 238-39 ("The 'particularity' requirement relates to the group's boundaries.").

the context of the Supreme Court's summary reversal of the Ninth Circuit for ruling on the cognizability of a family-based particular social group when the Board had not had the opportunity to do so in the first instance, in violation of the principles enunciated in *INS v. Orlando Ventura*, 537 U.S. 12, 18 (2002) (per curiam). See *Gonzales v. Thomas*, 547 U.S. 183, 185-87 (2006) (summarily reversing the Ninth Circuit under *Ventura*, because "[t]he agency ha[d] not yet considered whether Boss Ronnie's family presents the kind of 'kinship ties' that constitute a 'particular social group'").

In this regard, some of the circuit court decisions cited by the respondent predate the 2006 decision in *Thomas*, see Respondent's Brief at 11-12 (citing *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 362 (5th Cir. 2002); *Fatin v. INS*, 12 F.3d 1233, 1239-40 (3d Cir. 1993); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986)), while others fail to acknowledge the Supreme Court's decision, see *id.* at 11-12 (citing *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011); *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009)). Two decisions discussed by the respondent, see *id.* at 11 (citing *Vumi v. Gonzales*, 502 F.3d 150, 155 (2d Cir. 2007), and *Ayele v. Holder*, 564 F.3d 862, 869 (7th Cir. 2009)), explicitly follow *Thomas*, remanding to the Board for consideration of the alien's family-based asylum claim in the first instance, see *Vumi*, 502 F.3d at 155-56 ("Because the agency failed to consider whether [the petitioner]'s *individual family* constitutes a particular social group under the INA, we must remand this case to the B[oard] so that it may . . . make the initial determination" (citing *Ventura*, 537 U.S. 12, and *Thomas*, 547 U.S. 183)); *Ayele v. Holder*, 564 F.3d at 872 ("[T]he I[mmigration] J[udge] did not specifically address whether [the petitioner]'s family is a particular social group. Because of this omission, a remand for the B[oard] . . . is necessary" (citing *Thomas*, 547 U.S. 183)).

And while one other decision referenced by the respondent likewise cites to *Thomas*, see Respondent's Brief at 12 (discussing *Rivera-Barrientos v. Holder*, 666 F.3d 641, 648 (10th Cir. 2012)), the citation is made only to support the rule that the court generally defers to the Board's reasonable interpretation of "particular social group," not to hold that family is a cognizable particular social group, see *Rivera-Barrientos*, 666 F.3d at 648. Indeed, the particular social group at issue in *Rivera-Barrientos* was not even a family unit. See 666 F.3d at 647.

Since *Matter of M-E-V-G-*, 26 I&N Dec. 227, and *Matter of W-G-R-*, 26 I&N Dec. 208, a majority of circuit courts have deferred to the Board's interpretation of "particular social group" and the requisite case-by-case analysis for particular social group claims.<sup>3</sup> One circuit, however, has not adopted the three-prong test, asserting that "[w]hether the Board's particularity and social distinction requirements are entitled to *Chevron* deference remains an open question in this circuit." *W.G.A. v. Sessions*, 900 F.3d 957, 964 (7th Cir. 2018); see also *Melnik v. Sessions*, 891 F.3d 278, 286 n.22 (7th Cir. 2018) (noting the court previously rejected the Board's particularity and social visibility requirements for a particular social group, but the court "ha[s] not had the occasion to consider the Board's most recent efforts in this regard" since *Matter of M-E-V-G-*). Thus, it cannot even be said that all circuits have uniformly

---

<sup>3</sup> See, e.g., *Perez-Zenteno v. U.S. Att'y Gen.*, 913 F.3d 1301, 1307-08 (11th Cir. 2019) (deferring to the Board's interpretation of the ambiguous term "membership in a particular social group" "through a process of case-by-case adjudication" pursuant to *Matter of M-E-V-G-*); *Perez-Rabanales v. Sessions*, 881 F.3d 61, 65 (1st Cir. 2018) (holding that "[o]ur cases have consistently employed this tripartite formulation in passing upon the cognizability of social groups"); *Reyes v. Lynch*, 842 F.3d 1125, 1135 (9th Cir. 2016) (deferring to the Board's decisions in *Matter of M-E-V-G-* and *Matter of W-G-R-*); *Ngugi v. Lynch*, 826 F.3d 1132, 1137-38 (8th Cir. 2016) (same); *Hernandez-De La Cruz v. Lynch*, 819 F.3d 784, 786-87 & n.1 (5th Cir. 2016) (agreeing "with the Board's framework for determining whether a particular social group exists" pursuant to *Matter of M-E-V-G-*); *Zaldana Menijar v. Lynch*, 812 F.3d 491, 498 & n.3 (6th Cir. 2015) (affirming its deference to the Board's interpretation of "particular social group" in *Matter of W-G-R-* and *Matter of M-E-V-G-*); *Oliva v. Lynch*, 807 F.3d 53, 61 (4th Cir. 2015) (citing *Matter of M-E-V-G-* for the three-prong test); *Rodas-Orellana v. Holder*, 780 F.3d 982, 990-91 (10th Cir. 2015) (deferring to the Board's decisions in *Matter of W-G-R-* and *Matter of M-E-V-G-*); *Paloka v. Holder*, 762 F.3d 191, 195-96 (2d Cir. 2014) (same).

employed the Board's current three-prong approach to address the issue of whether a family unit may be a cognizable particular social group.

Further, despite the respondent's claims regarding circuit court uniformity, *see* Respondent's Brief at 11-12, the Department is aware of only one circuit, the Third Circuit, that has applied the rigorous three-prong analysis to a family unit-based particular social group claim in a published decision. *See S.E.R.L. v. U.S. Att'y Gen.*, 894 F.3d 535, 555 (3d Cir. 2018) (applying *Chevron* deference to the Board's clarification of the three-prong analysis of "membership in a particular group" in *Matter of M-E-V-G-*, 26 I&N Dec. 227). And in doing so, the Third Circuit found no reason to disturb the determination that the petitioners' putative group of "immediate family members of Honduran women unable to leave a domestic relationship" failed to satisfy the social distinction requirement, affirming the Board's case-by-case approach. *See id.* at 555-56. The Fifth Circuit has deferred to the three-prong analysis in *Matter of M-E-V-G-*, 26 I&N Dec. 227, *see Hernandez-De La Cruz*, 819 F.3d 784, 786-87 (5th Cir. 2016), but has not yet addressed whether an immediate family may constitute a particular social group pursuant to those requirements, *see Morales v. Sessions*, 860 F.3d 812, 818 n.31 (5th Cir. 2017). These cases hardly reflect any definitive consensus among the circuit courts on whether any specific family unit universally satisfies the requirements of immutability, particularity, and social distinction.

Moreover, a number of circuits that have made affirmative statements about the cognizability of family-based particular social groups have done so without the requisite fulsome analysis. For example, in *Rivas v. Sessions*, the Eighth Circuit referenced the fact that "the Board has acknowledged that 'members of an immediate family *may* constitute a particular social group,'" 899 F.3d 537, 542 (8th Cir. 2018) (quoting *Matter of L-E-A-*, 27 I&N Dec. at 42

(emphasis added)). The court, however, did not apply the Board’s three-prong analysis to the petitioner’s putative family-based group, *see id.* (focusing on nexus, rather than cognizability), notwithstanding the court’s prior deference to that analysis, *see supra* note 1 (citing, *inter alia*, *Ngugi v. Lynch*, 826 F.3d 1132). In *W.G.A. v. Sessions*, the Seventh Circuit considered the proposed group of the petitioner’s nuclear family, but simply acknowledged that the immigration judge and the Board had agreed on the group’s cognizability without conducting further analysis. *See* 900 F.3d at 965. Though the Seventh Circuit cited to its own precedent that the court considers “family” to be a cognizable social group,<sup>4</sup> this conclusion within the circuit historically has not been the result of a full analysis under current standards for a particular social group, which requires a finding of immutability, particularity, and social distinction. *See id.*

Similarly, the Fourth Circuit stated that a nuclear family is a particular social group but failed to apply the three-prong test to such a group, simply relying on its decisions predating *Matter of M-E-V-G-*. *See Velasquez v. Sessions*, 866 F.3d 188, 194 (4th Cir. 2017) (noting, without analysis, the court’s history of recognizing that nuclear families are particular social groups); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) (assuming without analysis that a nuclear family is a particular social group without applying the Board’s particular social group test as clarified in *Matter of M-E-V-G-*). Likewise, the Ninth Circuit failed to apply the *Matter of M-E-V-G-* framework to the putative group defined by the petitioner’s

---

<sup>4</sup> Prior to the Board’s decision in *Matter of M-E-V-G-*, the Seventh Circuit had stated that its “case law *has suggested*, with some certainty, that a family constitutes a cognizable ‘particular social group’ within the meaning of the law.” *Iliev v. INS*, 127 F.3d 638, 642 (7th Cir. 1997) (emphasis added). The Seventh Circuit has since misconstrued the import of that decision, moving from a mere “suggest[ion]” to a finding that court precedent considers family to be a cognizable social group. *See Torres v. Mukasey*, 551 F.3d 616, 629 (7th Cir. 2008) (in a decision predating *Matter of M-E-V-G-*, citing to *Iliev* for the proposition that the court historically considered family to be a cognizable particular social group without any analysis); *see also Ayele*, 564 F.3d at 869 (citing *Torres*, 551 F.3d at 629, to assert that “[o]ur circuit recognizes a family as a cognizable social group under the INA”).

family's opposition to a Guatemalan gang. *See Rios v. Lynch*, 807 F.3d 1123, 1127-28 (9th Cir. 2016) (quoting *Thomas*, 409 F.3d at 1180 (internal quotations omitted)). Instead, the court summarily concluded that “the family remains the quintessential particular social group” under *Matter of M-E-V-G-* by relying on its prior vacated decision in *Thomas v. Gonzales*, where the court held “that family membership may constitute membership in a ‘particular social group,’ and thus confer refugee status on a family member who has been persecuted or who has a well-founded fear of future persecution on account of that familial relationship.” *See Rios*, 807 F.3d at 1128 (quoting *Thomas v. Gonzales*, 409 F.3d 1177, 1180 (9th Cir. 2005) (en banc), cert. granted and judgment vacated by 547 U.S. 183 (internal quotations omitted)); *see also Parada v. Sessions*, 902 F.3d 901, 910 (9th Cir. 2018) (failing to apply an individualized analysis to a family-based particular social group by citing *Rios* and stating without analysis that “we recently reiterated” that “family remains the quintessential particular social group”).

Thus, the assertion that circuit courts have “uniformly approved of” and “are unanimous in holding” that family is *per se* a cognizable particular social group overlooks the fact that many courts have not conducted the necessary analysis to come to that conclusion. Moreover, the circuit courts could not have held, unanimously or otherwise, that a family is *per se* a cognizable particular social group as construed by the Board, because the Board's decision in *Matter of L-E-A-*, 27 I&N Dec. 40, was the first Board precedent to address that very issue. In fact, the Supreme Court admonished the Ninth Circuit for deciding the issue of a family-based particular social group in the first instance. *See Thomas*, 547 U.S. at 185-87. In its opinion, the Ninth Circuit had stated: “[C]onsistent with the views of the B[oard] and our sister circuits, we hold that a family may constitute a social group for the purposes of the refugee statutes.” *Thomas*, 409 F.3d at 1187. The Supreme Court's subsequent opinion made clear that, whatever

views the Board may have previously held, the Board had yet, at the time of its decision in *Thomas*, to issue a precedent squarely addressing whether a family unit may constitute a particular social group. See *Thomas*, 547 U.S. at 187. And the first Board precedent to do so, *Matter of L-E-A-*, 27 I&N Dec. 40, is now the subject of the Attorney General's present referral. See *Matter of L-E-A-*, 27 I&N Dec. 494 (A.G. 2018).

**D. A Proper Nexus Analysis in Mixed Motive Cases Focuses on the Protected Ground and Whether a Protected Ground Is at Least One Central Reason for Harm.<sup>5</sup>**

As discussed previously, “kinship ties” and “family” do not *per se* denote a cognizable particular social group or protected ground. See Argument *supra* Parts II.A and II.B. Further, the Department reiterates two points from its opening brief regarding nexus. See generally Department's Brief at 22-27. First, an alleged persecutor's motivation must be based on a “protected ground,” and with regards to the protected ground of “membership in a particular social group,” one person does not make a cognizable “particular social group.” See, e.g., *Acosta*, 19 I&N Dec. at 233 (holding that a “particular social group” is a “group of persons”). The protected ground of “membership in a particular social group” requires a society-specific, case-specific determination of the concepts of “family” and “family unit.” See Department's Brief at 16-22; see also Argument *supra* Parts II.A. and II.B. Moreover, a cognizable particular social group “must be [a] class[] recognizable by society at large.” *Matter of A-B-*, 27 I&N Dec. at 336. Further, with regard to nexus and the protected ground of membership in a family unit-based particular social group, an alleged persecutor's motivation must be based on an applicant's membership in a family unit as a whole, not merely on an applicant's distinct relationship to a

---

<sup>5</sup> See *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010) (holding that the “one central reason” standard applies to applications for both asylum and statutory withholding of removal); but see *Barajas-Romero v. Lynch*, 846 F.3d 351, 358-59 (9th Cir. 2017) (holding that, only in the Ninth Circuit, the “one central reason” standard applies solely to applications for asylum, and “a reason” standard applies to applications for statutory withholding of removal).

specific individual within a family unit. *See* Department’s Brief at 24-27. Thus, an applicant’s mere claim to membership in a family unit-based particular social group—cognizable or otherwise—is insufficient for the applicant to meet his or her burden of satisfying the nexus requirement. *See id.* at 24.

Second, in mixed motive cases, a proper nexus analysis requires that an alleged persecutor’s motivation based on a protected ground be “at least one central reason” for the alleged harm. INA § 208(b)(1)(B)(i); *see* Department’s Brief at 23-24. In mixed motive cases, an applicant may claim to be targeted due to his or her familial relationship, but the alleged persecution often involves the following circumstances: (1) a dispute between members of different families; (2) disputes between members of the same family; (3) domestic violence; (4) a vendetta or act of retaliation; and/or (5) an act of extortion or exploitative conduct. *See* Department’s Brief at 27-32. When any or some of these five circumstances are present, in the Department’s experience, an applicant’s putative membership in a family unit-based particular social group is generally incidental to the larger motivations involving, for example, private disputes, personal retaliation, or purely criminal acts, and does not satisfy the requisite nexus standard of being “at least one central reason” for the alleged harm. *See id.* at 27-32. Where these motives exist, any motivation of the persecutor concerning membership in a family unit is often incidental and is not at least one central reason for the harm. *See id.* at 27-32.

Indeed, in this case, as the Board explained, cartel members did not seek out the respondent’s father because of his membership in a family unit; the cartel members sought the respondent’s father due to a desire to increase the cartel’s criminal smuggling profits by using the family’s store in its criminal enterprise. *See* 27 I&N Dec. at 46-47 (affirming the immigration judge’s finding that the cartel’s motive was to increase its profits by selling

contraband in the respondent's father's store, not because of a family relationship); I.J. at 8-9.

Likewise, the cartel members approached the respondent not because the cartel was motivated by his membership in the same family unit, but because the cartel was motivated by criminal, retaliatory, and economic motives. I.J. at 8-9.

III. THE DEPARTMENT'S ANSWER TO THE ATTORNEY GENERAL'S QUESTION, EMPHASIZING A CASE-BY-CASE, SOCIETY-SPECIFIC ANALYSIS OF FAMILY UNIT-BASED PARTICULAR SOCIAL GROUP CLAIMS, IS CONSISTENT WITH DECADES OF PRECEDENT.

**A. There Is No Change or Break in Precedent Regarding Particular Social Group Claims.**

Contrary to what the respondent suggests, *see* Respondent's Brief at 21-23, the Department seeks no "change" or "break" in precedent governing protection claims, and the Attorney General's decision in *Matter of A-B-* does not set forth a "change" or a "break" in established law. In fact, as stated previously, *see* Argument *supra* Part II.C, the Supreme Court reversed the Ninth Circuit because it found that the agency, not the court of appeals, must decide in the first instance the question of whether a family unit may be a cognizable particular social group, *see Thomas*, 547 U.S. at 185-87. Given that the Board's first precedent discussing a family unit as a particular social group is its presently-stayed decision in *Matter of L-E-A-*, 27 I&N Dec. 40, any decision by the Attorney General in this case would not change or break longstanding precedent regarding family-based particular social group claims, but rather clarify the applicable law. At bottom, the Department seeks no change to the rigorous case- and society-specific analysis already applicable to protection claims, but simply emphasizes the necessity of going through that analysis in the respondent's case, without any presumptions or pre-conceived notions about family units in general. *Cf. Matter of A-B-*, 27 I&N Dec. at 334

(finding fault with the Board for not approaching the protection claim in the way that it has done in the past and directing that it must conduct a case-by-case analysis in the future).

**B. Any Decision Issued by the Attorney General in This Case Applies to the Respondent, as the Attorney General Has the Authority to Vacate the Board's Decision and to Determine the Respondent's Claim *De Novo*.**

Because, contrary to the respondent's argument, there is no "longstanding recognition of family units as particular social groups" by the Department of Justice, Respondent's Brief at 21-22, any determination by the Attorney General to emphasize application of the rigorous case- and society-specific analysis required by prior precedent in this case would not run counter to Ninth Circuit retroactivity principles. *See, e.g., Garfias-Rodriguez v. Holder*, 702 F.3d 504, 518-20 (9th Cir. 2012) (en banc) (applying *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1328, 1333 (9th Cir. 1982) (positing a framework to balance an agency's interest and an affected party's interest in retroactive application of an administrative agency decision that announces "a new administrative policy")). Again, the Department is not seeking a new legal rule for protection cases, but simply clarification and application of current law. *See* Argument *supra* Part III.A.

Further, the Attorney General has the authority to review the Board's decision in this case *de novo* and thus to adjudicate the respondent's claim based on his own factual and legal conclusions. *See Matter of D-J-*, 23 I&N Dec. at 575. Contrary to the respondent's assertion, *see* Respondent's Brief at 21-23, any future decision by the Attorney General in this case would not apply "retroactively" to the respondent, because the respondent's case is precisely what is pending before the Attorney General. *See generally James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534 (1991) (plurality op.) ("In the ordinary case, no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and

precedents of law to the disputes that come to bar. Where those principles and precedents antedate the events on which the dispute turns, the court merely applies legal rules already decided, and the litigant has no basis on which to claim exemption from those rules.” (citation omitted)).

The respondent likewise incorrectly suggests that the Attorney General’s decision in this case should not apply retroactively to “any person who entered the United States before [the decision].” Respondent’s Brief at 23. Generally, however, new precedent decisions apply to all pending cases. As the Supreme Court explained about its precedents vis-à-vis lower courts, “[w]hen [the] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases *still open on direct review* and as to all events, regardless of whether such events predate or postdate our announcement of the rule.” *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 97 (1993) (emphasis added). Similarly, a decision by the Attorney General in this case will apply to the respondent and, if designated as precedential, to any pending or future cases. It would not ordinarily be a sufficient reason to revisit closed cases, given the strong public interest in finality of litigation. *Cf. Gonzalez v. Crosby*, 545 U.S. 524, 536-37 (2005) (disallowing reopening of the district court’s judgment, which was based on an interpretation later found to be incorrect by the Supreme Court, and explaining that, if new Court decisions justified “reopening long-ago dismissals” where the Government had won, it “would justify reopening long-ago grants” where the Government had lost); *Matter of G-D-*, 22 I&N Dec. 1132, 1136-37 (BIA 1999) (denying *sua sponte* reopening where “[t]he respondent ha[d] already enjoyed a full adjudication on the merits, first by an Immigration Judge and then by th[e] Board, and . . . also had the opportunity to seek judicial review of [the] prior adjudication”). *See generally Nken v. Holder*, 556 U.S. 418, 436

(2009) (underscoring that “[t]here is always a public interest in prompt execution of removal orders”); *INS v. Abudu*, 485 U.S. 94, 107 (1988) (recognizing the important public interest in achieving finality in immigration proceedings).

IV. CONCLUSION.

Pursuant to the Department’s arguments in its brief and this reply, the respondent has failed to meet his evidentiary burdens, and his applications for asylum and statutory withholding of removal should therefore be denied. In denying these applications, the Department reiterates its request that the Attorney General issue a decision setting forth the rulings specified at the conclusion of the Department’s brief. *See* Department’s Brief at 43.

Respectfully submitted this 13th day of March, 2019.



Cathy Ng  
Associate Legal Advisor  
Natalie Salvaggio  
Associate Legal Advisor  
Immigration Law and Practice Division  
U.S. Immigration and Customs Enforcement  
U.S. Department of Homeland Security

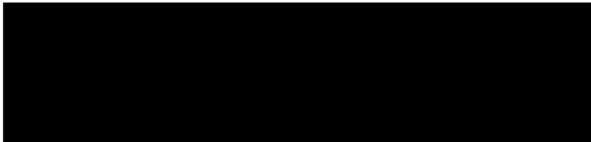
**PROOF OF SERVICE**

On March 13, 2019, I, Natalie Salvaggio, Associate Legal Advisor, mailed and e-mailed a copy of the U.S. Department of Homeland Security Reply Brief on Referral to the Attorney General to:

Mei F. Chen, Esq.  
Law Office of Mei F. Chen  
PO Box 5105  
Canton, GA 30114  
[chenpknlaw@gmail.com](mailto:chenpknlaw@gmail.com)

Bradley Jenkins  
Victoria F. Neilson  
Catholic Legal Immigration Network, Inc.  
8757 Georgia Avenue, Suite 850  
Silver Spring, MD 20910  
[bjenkins@cliniclegal.org](mailto:bjenkins@cliniclegal.org)  
[vneilson@cliniclegal.org](mailto:vneilson@cliniclegal.org)

Via UPS Next Day Delivery Service.



(signature)



(date)