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Name: R[redacted]-C[redacted] A[redacted] A[redacted]... **A [redacted]-901**
Riders: [redacted]-902

Date of this notice: 11/15/2019

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Grant, Edward R.
Guendelsberger, John
Kendall Clark, Molly

Userteam: Docket

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Files: [redacted]-901 – Arlington, VA

Date: NOV 15 2019

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

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Faiz E. Rasul, Esquire

ON BEHALF OF DHS: Laticia Bobongi
Assistant Chief Counsel

APPLICATION: Asylum, withholding of removal

The respondents, a mother and son, are natives and citizens of El Salvador. They have appealed from an Immigration Judge's November 5, 2017, decision denying their applications for asylum and withholding of removal.[1] The Department of Homeland Security (DHS) has moved for summary affirmance. The respondents' appeal will be sustained, and the record will be remanded to the Immigration Judge for further proceedings consistent with this order.

We review the Immigration Judge's findings of fact for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion and judgment, and all other issues in appeals, de novo. 8 C.F.R. § 1003.1(d)(3)(ii); *see also Turkson v. Holder*, 667 F.3d 523, 527-28 (4th Cir. 2012).

On appeal, the respondents argue that the Immigration Judge did not consider whether the lead respondent was persecuted or whether she had a well-founded fear of being persecuted in El Salvador on account of membership in one of the particular social groups she identified during her hearing. Specifically, the respondents contend that the Immigration Judge did not consider whether the lead respondent had been persecuted on account of her membership in the group "family members of her son." The respondents maintain that the lead respondent received a death threat right before she left El Salvador on account of her relationship to her son and that this threat rises to the level of persecution. The respondents further contend that the Immigration Judge erred when he concluded that there was insufficient evidence regarding who made the threatening phone call.

[1] The lead respondent has not challenged the Immigration Judge's denial of her application for protection under the Convention Against Torture, and the minor respondent did not file an application for this form of relief. We therefore deem any issues related to this form of relief waived. *See Matter of R-A-M*, 25 I&N Dec. 657, 658 n.2 (BIA 2012).

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The respondents also argue that the lead respondent established that she experienced treatment rising to the level of persecution in El Salvador on account of her membership in the particular social group of "family members of her sister." The respondents claim that, when the facts of the case are considered together, it is clear that the lead respondent's relationship to her sister provided at least one central reason for MS-13's threats and mistreatment. The respondents further contend that the mistreatment, considered together, rises to the level of persecution. The respondents therefore assert that their asylum application should be granted, or, in the alternative, the record should be remanded for further proceedings.

I. FACTUAL ERRORS

The Immigration Judge's findings regarding what happened to the respondents and what motivated their persecutors are factual findings that we review for clear error. 8 C.F.R. § 1003.1(d)(3)(i); *Matter of N-M-*, 25 I&N Dec. 526, 532 (BIA 2011) (noting a persecutor's motive for inflicting harm on an alien is a finding of fact). The respondents assert that the Immigration Judge overlooked key testimony in making these findings. The record supports the respondents' assertions.

A. Death Threat to Lead Respondent

First, the Immigration Judge made factual errors in discussing the threats to the lead respondent (IJ at 5). The Immigration Judge stated that the lead respondent received two separate threatening phone calls in 2015 shortly before she left El Salvador and that the second, anonymous call was the only call that included a death threat to her (IJ at 5). The lead respondent's testimony, her written statement, and the timeline she submitted, however, show that she received only one threatening phone call in April 2015 (Tr. at 53-55; Exh. 3, Tab A; Exh. 5).[2] The lead respondent's statements also establish that this phone call was from MS-13 members who had been threatening her son and had taken his cell phone. Finally, contrary to the Immigration Judge's statements, the lead respondent's testimony and statements indicate that, during the call, the gang members threatened the lead respondent with death (IJ at 5; Tr. at 53-55; Exh. 3, Tab A; Exh. 5).

After discussing the phone calls and threats to the lead respondent, the Immigration Judge concluded that "there is not sufficient evidence to identify who made the [death] threat and whether they would follow through with it" (IJ at 5). As noted above, however, the respondents' evidence does contain sufficient information to establish that the death threat to the lead respondent was

[2] In their brief on appeal, the respondents include a reference to a second threatening phone call allegedly received by the lead respondent shortly before she and the minor respondent left El Salvador. The respondents, however, have not included a citation to any testimony or evidence in support of this reference (Respondent's Br. at 2, 6). The lead respondent's testimony and written statement refer only to a phone call from Giovanni received in 2010 (Tr. at 38-42) and the phone call received from the minor respondent's cell phone in April 2015 (Tr. at 53-55; Exh. 3, Tab A). We therefore find no support in the record for either the Immigration Judge's or the respondents' reference to a second threatening call in 2015.

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made by the gang members who had been harassing, threatening, and beating the lead respondent's children (Tr. at 54; Exh. 3, Tab A). The respondents' evidence also establishes that these gang members had harmed the lead respondent's children and other relatives in the past (Tr. at 33-54; Exh 3, Tabs A-D). The evidence therefore is sufficient to indicate that the gang members would be likely to follow through with the threat.[3] Accordingly, the Immigration Judge's factual findings relating to the death threat to the lead respondent are clearly erroneous.

B. Connection Between Incidents

The Immigration Judge's conclusion that MS-13's acts against the lead respondent's family over the years were not connected also is clearly erroneous (IJ at 7-8). In reaching this conclusion, the Immigration Judge overlooked key portions of the lead respondent's testimony linking the gang's targeting of her sister and the respondent's children (IJ at 7-8). The lead respondent testified that her sons became targets of the gang for recruitment because "they have always targeted my family. They have always persecuted my family ever since all those things happened to my sister" (Tr. at 49).

The lead respondent's account of the gang's threats and actions against her and her family members supports this testimony. In particular, the lead respondent testified that a specific gang member in her locality threatened her and her sons immediately after she returned from her sister's home (Tr. at 45). The gang member told them not to help or support the lead respondent's sister or the gang would take one of the lead respondent's children (Tr. at 45). The lead respondent then explained that members of this gang singled out her sons and harassed and threatened them at school (Tr. at 49-54).

Under the current law of the United States Court of Appeals for the Fourth Circuit, the circuit in which the respondents' case arises, the lead respondent's testimony is sufficient to show that her relationship to her sister was at least one central reason for MS-13's targeting of both herself and her children even in 2015 when the gang was attempting to recruit her sons. *See Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949-50 (4th Cir. 2015); *Alvarez Lagos v. Barr*, 927 F.3d 236, 250 (4th Cir. 2019) (emphasizing that it is enough if the particular social group it is at least one central reason, perhaps intertwined with other central reasons, why the alien, and not another person, was targeted).

The lead respondent's testimony also is sufficient to show that her relationship to the minor respondent was at least one central reason for the death threat she received in April 2015 (IJ at 8). *Hernandez-Avalos v. Lynch*, 784 F.3d at 949-50 (finding that alien's relationship to her son was why she, and not another person, was targeted by the gang); *see also Alvarez Lagos v. Barr*,

[3] While the Immigration Judge's misunderstanding regarding who delivered a death threat to the lead respondent and when this threat was made caused him to conclude that the respondents' evidence was not sufficient to establish that the individuals making the threat were likely to carry through with it, the Immigration Judge did, later in his decision, conclude that the lead respondent had a well-founded fear of facing persecution in El Salvador (IJ at 5-6). The correct account of the 2015 phone call further supports this conclusion.

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927 F.3d at 250 (reiterating that the protected ground need not be the only reason or even the dominant or primary reason). To the extent that the Immigration Judge made contrary factual findings, the Immigration Judge's findings are clearly erroneous.

II. COGNIZABLE PARTICULAR SOCIAL GROUP

Having concluded that the lead respondent's evidence is sufficient to show that she was targeted on account of her relationship to both her sister and her son, the key issue in her case becomes whether "family members of her sister" and "family members of her son" are cognizable particular social groups.

During her closing arguments, the lead respondent claimed that she was persecuted in El Salvador on account of her membership in the particular social group of her family. The lead respondent defined this group to include her children, her sister, who was like a mother to her, and her sister's grandchildren (Tr. at 88). In his decision, the Immigration Judge separated this group into two particular social groups: "family members of the lead respondent's sister" and "family members of the lead respondent's son" (IJ at 6-7). The Immigration Judge found both groups qualified as cognizable particular social groups (IJ at 7).

The Fourth Circuit has long held that a family provides "a prototypical example of a 'particular social group.'" *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011); *see also Hernandez-Avalos v. Lynch*, 784 F.3d at 949 (stating that membership in a nuclear family qualifies as a protected ground for asylum purposes). The Immigration Judge's decision therefore was consistent with controlling Fourth Circuit law. The Immigration Judge's decision also was consistent with our precedent at that time. *Matter of L-E-A-*, 27 I&N Dec, 40, 42-43 (BIA 2017).

On July 29, 2019, however, while the respondents' appeal was pending, the Attorney General published his decision in *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019). The decision overruled our earlier recognition of L-E-A-'s immediate family as a cognizable particular social group. *Matter of L-E-A-*, 27 I&N Dec. at 586-97. In doing so, the Attorney General stated that an asylum applicant "must establish that his specific family group is defined with sufficient particularity and is socially distinct in his society." The Attorney General noted that "[i]n the ordinary case, a family group will not meet that standard, because it will not have the kind of identifying characteristics that render the family socially distinct within the society in question." *Id* at 586.

The Attorney General's opinion represents a fundamental change in asylum law. Given the facts and circumstances of this case, the parties therefore should be given an opportunity to address whether *Matter of L-E-A-*, 27 I&N Dec. at 589-92, effectively supersedes the Fourth Circuit's settled precedents regarding family as a particular social group; and, if so, whether any of the family groups identified by the lead respondent still qualify as particular social groups under the new legal framework. Accordingly, we remand the record to the Immigration Judge for further proceedings.

In doing so, we note that we have not reached the respondents' arguments regarding past persecution. When the correct facts regarding the death threat to the lead respondent are considered, the lead respondent's past experiences appear to qualify as persecution under Fourth

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Circuit law. *See Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (noting that the threat of death qualifies as persecution); *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 245 and 247 (4th Cir. 2017) (finding past persecution where MS–13 threatened and extorted alien after her father left El Salvador; MS–13 threatened to kill her children if she did not meet the gang's demands; and she felt terrorized by the threats and fears for her safety and the safety of children). The Immigration Judge, however, should revisit this issue if he determines that the respondents have identified a cognizable particular social group. The Immigration Judge also, at that time, should address whether the respondents have met their burden of establishing that the government of El Salvador is unwilling or unable to protect them.[4] *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018) (indicating that, to establish that a government is unwilling and unable to provide protection, an asylum applicant must show that the government condoned the private actions "or at least demonstrated a complete helplessness to protect the victims").

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

FOR THE BOARD

[4] As we noted earlier, the Immigration Judge has already concluded that the lead respondent has a well-founded fear of persecution in El Salvador (IJ at 5-6).

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