
Protecting Immigrant Child Victims of Domestic Violence Through U.S. Asylum Law

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I. INTRODUCTION

Domestic violence against children is a pervasive world problem. Many countries do not adequately protect children from their batterers either because local laws do not recognize domestic abuse as a crime or because the police and the judicial systems do not enforce existing laws. Although an increasing number of refugees, including children, who seek asylum come to the United States,¹ the United States fails to provide a safe haven on a consistent basis for children who are victims of domestic violence.

Recently, however, notable advances have been made for the asylum claims of abused children. For instance, on December 10, 1998, the Immigration and Naturalization Service (INS) issued guidelines to aid asylum officers in adjudicating asylum claims from children (the *Children's Guidelines*), which overtly recognize "child abuse" as a ground for persecution where the foreign government cannot or does not offer adequate protection or redress.² Most significantly, the INS has circulated for comments proposed federal regulations that introduce domestic violence as a possible ground for asylum.³ This article posits that proposed federal regulations, current case law, recent INS guidelines, and public policy provide an adequate framework for courts to recognize asylum claims from battered or otherwise abused children.

Part I of this Article outlines the general asylum application requirements in the United States. Part II asserts a momentous point—child victims of domestic violence are refugees under immigration law. This Part shows that there is no doubt that pervasive child abuse rises to the level of "persecution" necessary to evoke the protections of United States'

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asylum laws. Part III asserts that where the government ignores the importunate abuse of a child, in deference to parental control over what it considers to be a “domestic matter,” U.S. immigration courts should recognize that child’s right to asylum. Finally, Part IV of this Article establishes that children are targets of persecution, on account of their family membership and their membership in a group of children who suffer violent persecution at the hands of a custodial parent, and who lack the protection of the relevant government and the resources to escape.

II. FUNDAMENTALS OF AN ASYLUM CLAIM IN THE UNITED STATES

Asylum is a much-needed sanctuary to protect children from domestic abuse when adequate protection is unavailable within a victim's home country. In order to examine the potential of such claims in the United States, it is first necessary to understand the components of an asylum claim.

Under the Immigration and Nationality Act (INA), an asylum applicant must demonstrate that he is a “refugee.”⁴ The INA defines “refugee” as one who is outside of his country of nationality, and who is unable or unwilling to return to, or to avail himself of the protection of, his country of nationality “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.”⁵

According to this definition, an asylum applicant must demonstrate a “well-founded fear of persecution” in order to be eligible for asylum.⁶ “Persecution” must be inflicted either by the government or by persons the government is unwilling or unable to control.⁷ Moreover “persecution entails a subjective intent on the part of the persecutor to ‘inflict harm’ or ‘punish’ the victim.”⁸ Physical violence, such as beatings, whippings, and attacks, constitute persecution.⁹ In *In re Acosta*, the Board of Immigration Appeals (BIA or Board) interpreted persecution as “threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.”¹⁰ In many cases, cruel physical maltreatment is coupled with severe emotional abuse, which can also constitute persecution.¹¹

A “well-founded fear of persecution”¹² may be based on past persecution or a fear of future persecution. Thus, although asylum can be established on a finding of past persecution alone, an applicant may also demonstrate that he qualifies for asylum on the alternate ground of having a well-founded fear of future persecution if he is returned home.¹³ An asylum applicant establishes a well-founded fear when he shows that a reasonable person in his circumstances would fear persecution.¹⁴ The applicant must objectively show a reasonable possibility of persecution, and then subjectively show that his fear is genuine.¹⁵ “Several factors, including an applicant's credibility, determine whether the individual holds a genuine fear of persecution,” wrote one

commentator.¹⁶ The objective element can be satisfied through testimonies of corroborating witnesses and documentary evidence concerning the oppressive conditions of the country.

To successfully argue asylum, the relevant government must be “unable or unwilling” to control the infliction of harm or suffering that abusive parents deliver to their child victims.¹⁷ Two cases are illustrative. In *In re Kasinga*, the Board held that Togo failed to provide meaningful protection of laws and enforcement against the customary practice of female genital mutilation when the agent of persecution was within the applicant’s own tribal community.¹⁸ Similarly, in *Mgoian v. INS*, the Ninth Circuit held that when the government of Armenia failed to investigate the murder of the applicant’s uncle, and Amnesty International indicated that the government was unresponsive to violence towards persecution of religious minorities, the government was unable or unwilling to control persecutors.¹⁹ Like the complacent states in *Kasinga* and *Mgoian*, which were unresponsive as a matter of statutory policy or general law enforcement to private persecutors, certain governments have a policy of non-intervention regarding domestic violence.

In addition to proving the home government will not control the persecution, the applicant must also prove that the alleged persecution is on account of one of five categories: race, religion, nationality, membership in a particular social group, or political opinion. Child applicants for asylum most often base their claims on membership in a particular social group. The Board of Immigration Appeals has defined membership in a particular social group as an immutable characteristic that “either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”²⁰ Qualifying group characteristics need to be determined on a case-by-case basis.²¹ As one commentator wrote, “One of the inherent difficulties in the classification of social groups lies in the fear that a social group would be too broadly defined and would therefore result in a large number of asylum applicants from that particular social group.”²² This fear is of particular concern for asylum claims based on domestic violence.²³

Three requirements for establishing an asylum claim give children the most difficulty: (1) establishing that the abuse suffered is a form of persecution, (2) establishing that the government is “unwilling or unable” to control the persecutor, and (3) establishing that this abuse is on account of one of the five enumerated grounds. These difficulties are discussed below in Parts III through IV, respectively.

III. DOMESTIC CHILD ABUSE AS PERSECUTION

Child abuse, at the hand of the child’s custodial parent, is serious enough to constitute “persecution,” as the term is defined by immigration law. “[D]iscriminatory

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practices and experiences . . . can accumulate over time or increase in intensity so that they may rise to the level of persecution,” said Jeff Weiss, former acting director of the Office of International Affairs.²⁴ Accordingly, continual, unrelenting physical abuse a child suffers actually rises to the level of persecution. “When a child is deprived of the trust of those who he views as his caretakers . . . and that trust is abused not in minor ways and not infrequently but with physical abuse over a long period of time, then that harm is serious.”²⁵

Proposed federal regulations support the conclusion that domestic abuse constitutes persecution.²⁶ The proposed social group regulations conclude that victims of domestic violence share immutable characteristics as members of a particular social group.²⁷ Furthermore, these rules do not attempt to specify characteristics of a particular social group because the Department of Justice recognizes that victims of domestic violence may belong to social groups that vary according to the social context of the applicant’s country.²⁸ These proposed regulations explicitly vacate the barriers that the *In re R-A-* decision³⁰ posed to claims of domestic violence, by holding that domestic violence rises to the level of persecution where a “government is either unwilling or unable to provide protection.”³¹ Significantly, the Board has already ruled as a matter of law that the forthcoming regulations are sufficient to govern claims of domestic child abuse as a ground for asylum in *In re D-S*.³²

Current case law also supports the conclusion that domestic violence is a form of persecution for asylum considerations. Certainly, applying the general *Acosta* interpretation of persecution, instances of domestic violence are so severe that they constitute a threat to an individual’s life or freedom!³³ Even more specifically, the Board of Immigration Appeals has already recognized social group persecution where domestic violence is the centerpiece.³⁴ In *In re Martinez*, the Board upheld, over the vehement arguments of the INS, a grant of asylum based on persecution of a social group defined as “minors without resources who have been abused by a custodial parent.”³⁵ In *Martinez*, the severe abuse of a child coupled with a lack of government protection was a sufficient ground for discretionary asylum.³⁶

Like rape and female genital mutilation, which were both held by the Board to constitute persecution, and both traditionally considered to occur in the private sphere, domestic violence is a form of abuse that constitutes persecution. In *In re D-V-*, the Board granted asylum to a Haitian woman who was gang raped and severely beaten because of her political and religious opinions, finding that rape was a form of violent persecution.³⁷ The Board’s recognition that rape was a form of violent persecution establishes precedent for finding that other forms of violence, including domestic violence, are societal problems that the victim’s home government should prevent. Additionally, in *In re Kasinga*, the Board granted a woman from Togo asylum where the police and government would not protect her from her husband’s attempts to force her to undergo female genital mutilation.³⁸ The implication of this case for domestic

violence is that intra-family abuse was recognized as persecution, implying that it was not merely a private matter of the tribe and the family.³⁹

In addition, the INS' *Children's Guidelines* support the proposition that inflicting frequent demoralizing harm on a child, merely because he or she is a child, or merely as a show of parental domination or power, qualifies as offensive persecution.⁴⁰ The *Children's Guidelines* explicitly recognize "child abuse" as a ground for persecution where the foreign government cannot or does not offer adequate protection or redress.⁴¹ Similarly, the *Gender Guidelines*, an analogous counterpart to the *Children's Guidelines*, suggest that domestic violence "may serve as evidence of past persecution" in order to establish eligibility for asylum.⁴²

Granting children asylum on the basis of domestic violence will NOT result in a flood of similar claims. Each asylum case is necessarily dependent on the narrow circumstances of that case. The INS itself has characterized the fear of opening the domestic violence floodgate as unwarranted.⁴³ Supporting this idea, one commentator found that "[s]ince the promulgation of INS's *Gender Guidelines*, there has been no real increase in the gender-based asylum claims in the United States."⁴⁴ Finally, circumstantial considerations work against the notion of a massive immigration of domestically abused children. Children have limited means and mobility, as well as deep psychological ties to their homes, all of which are obstacles for children seeking asylum and mitigates fears of a substantial increase of asylum claims.

Therefore, as a matter of policy supported by proposed federal regulations, Board of Immigration Appeals case law, and the INS itself, where the government fails to effectively safeguard a child from persistent domestic violence, immigration courts should recognize that child's right to asylum.

IV. GOVERNMENT OVERSIGHT AND GOVERNMENT PERSECUTION

Vulnerable children have a heightened need for the protection of their governments. The *Children's Guidelines* recognize that children's asylum claims need to be treated differently than adult asylum claims because their needs, and their legal and social status, can be significantly different from those of adults due to age related developmental differences.⁴⁵ The *Children's Guidelines* state, "The harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution."⁴⁶ Government oversight ignores the inherent vulnerability of children, placing them at the mercy of adults who may inflict harm.

Applying the standards articulated in the proposed regulation, foreign governments must take "reasonable steps" to control the harm and suffering of their children subject to domestic abuse.⁴⁷ However, traditional norms of certain countries condone family violence, making those countries loathe to acknowledge domestic

violence toward children even though it is prevalent in all parts of the country. Exacerbating the problem, laws governing child abuse may be rarely enforced because of ineffectual mechanisms of implementation and absence of any child welfare orientation by officials, including police and the judiciary. Moreover, child victims likely do not have reasonable access to any state protection that may exist.⁴⁸ In such situations, any attempt by a child victim to seek the protection of the relevant government would be undermined by his or her status as a child and the pervasive social attitude of deferring to parents.

A child whose government ignores parental abuse is also persecuted by the relevant government. "When a government is not willing or able to intervene in institutionalized inequality and, as a result, violence against women [children] pervades society—domestic violence becomes de facto public persecution," said one commentator.⁴⁹ In other words, the foreign government itself has persecuted the victim because the government legitimizes the domination of the parent, deprives the child of effective protection or escape through the system of justice, and denies the child the vindication of public recognition that it is he or she, not the abusive parent, who has been deeply and horribly wronged.⁵⁰ Underscoring this idea, the immigration judge in *In re D-S-* held that if a respondent has no government recourse against abuse "by anyone in society but especially his family [because he is] 'merely' a child . . . then that child lacks protection of his own state precisely because he is a child, and perhaps even more definitively because he is a child of people abusing him."⁵¹ In summary, where the foreign government ignores the importunate abuse of a child, in deference to parental control over what it considers to be a "domestic matter," immigration courts should recognize that child's right to asylum.

V. CHILD VICTIMS AND THEIR SOCIAL GROUP MEMBERSHIP

Another obstacle for domestic child abuse asylum claims has been establishing that the child applicant was a member of "a particular social group" for purposes of meeting the asylum requirements. The *Children's Guidelines* and subsequent case law, however, provide a construct for successfully establishing social group membership. Remember, social group formulation is highly contextual,⁵² dependent upon the facts and circumstances of a particular case, including family construct and government policy and enforcement. Offering alternative formulations of the particular social groups to which a child belongs does not invalidate his or her claims.⁵³ Children, like adults, may raise one or more protected grounds as the basis for an asylum claim.⁵⁴

Child victims can demonstrate persecution on account of membership in at least two distinct social groups. First, a child may suffer persecution on account of his membership in a group of child victims who are domestically abused by a custodial parent and whom the particular government fails to protect.⁵⁵ Second, a child may

suffer persecution at the hands of his parents on account of his family membership, when the government has failed to protect him. While these two social groups operate separately for asylum considerations, the facts and case law supporting both claims are substantially interrelated. Domestic violence, by definition, occurs in a family where one member perpetrates violence against another member. Accordingly, the concept of family is inextricably linked to any articulation of a social group encompassing victims of domestic violence.

To begin, children can be persecuted on account of their membership in a group of similarly situated children subject to domestic abuse who have no recourse for state protection.⁵⁶ In *In re Martinez*, the Immigration Judge found, and the Board of Immigration Appeals upheld, that being a domestically abused child applicant, with no resources and lacking government protection, was a situation or characteristic that the applicant was powerless to change—therefore, the minor applicant was a member of a group abused children.⁵⁷ Similarly, any minor child without resources or state protection is a situation or characteristic that he or she is powerless to change.⁵⁸ All domestically abused children share an innate characteristic that is fundamental to their identities or consciences—each has been born into a home with an abusive parent, being too young to revolt or leave, assuming each lacks the competent protection of the relevant government.⁵⁹

Similarly, children can be persecuted on account of their family membership. A family is a cognizable social group. For example, in *Aguirre-Cervantes v. INS*, a young woman from Mexico was granted relief on the basis that the persecution she suffered (extreme physical abuse perpetrated by her father) was "on account of" her membership in the "particular social group" of her own family of origin.⁶⁰ Similarly, the *Children's Guidelines*, after summarizing and considering the state of the law on this issue, concluded that there is "Board and Federal court support for the principle that family membership could define a 'particular social group' under the asylum laws."⁶¹ In fact, the First, Seventh, and Ninth Circuits have each held that the immediate members of a family are a "prototypical" example of a "particular social group."⁶² These circuits appear to have followed the pronouncement of the Board of Immigration Appeals in *Acosta*, that "kinship ties" could be the shared characteristic defining a particular social group.⁶³ Importantly, federal regulations state that "[a]ny intimate relationship . . . [could be] immutable if the evidence indicates that the relationship is one that the victim could not be reasonably expected to leave."⁶⁴ Applying this standard, children have an involuntary, biological relationship with other members of their family that the children cannot reasonably be expected to change.

An immigrant child may present, and a court may accept, clear direct and circumstantial evidence, indicating that he was harmed by his parent *at least partly* because of his family membership or membership in a group of abused children who lack government protection.⁶⁵ A child's (or a court's) understanding of the family

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situation, or the reasons underlying a parent's persecution of his or her own child, is not dispositive.⁶⁶ Indeed, the Board has acknowledged that a persecutor may have mixed motives for inflicting harm.⁶⁷ Because more than one factor may motivate a parent to inflict harm, that child is not required to establish that his or her parent was motivated solely by a desire to overcome a protected characteristic.⁶⁸

Even though a parent does not act violently against every other family member, the abused child may still be considered a member of a social group. The proposed federal regulations find that a victim is not required to show as a matter of law that the persecutor harmed or threatened others who share the targeted characteristic, such as other members of the abused child's family.⁶⁹ The proposed regulation offers an example of this principle that is highly analogous to children facing an abusive situation:

[I]n some cases involving domestic violence, an applicant may be able to establish that the abuser is motivated to harm her because of . . . her status in a domestic relationship. This may be a characteristic she shares with other women in her society, some of whom are also at risk of harm from their partners on account of this shared characteristic. Thus, it may be possible in some cases for a victim of domestic violence to satisfy the 'on account of' requirement, even though social limitations and other factors result in the abuser having the opportunity, and indeed the motivation, to harm only one of the women who share this characteristic, because only one of these women is in a relationship with the domestic abuser.⁷⁰

Social limitations or personal motivation or circumstances may explain why a parent does not persecute his or her other family members in the same way a targeted child is persecuted. For instance, in *In re D-S-*, applicant Jimmy was the only "bastard" child in his household; thus, his mother may have been motivated by a pervasive public attitude in India that such children are unwanted, and persecuted only her unwanted child.⁷¹ However, Jimmy is certainly not the only "bastard" child in India abused by his parents. Indian parents with unwanted children act in similar ways, selectively abusing only their unwanted children.

In sum, a child who lacks the protection of the relevant government and the resources to escape can establish that he has been the target of persecution because of his family membership or his membership in a group of children who suffer violent persecution at the hands of a custodial parent.

VI. CONCLUSION

Domestic violence against children, in all of its hideous forms, is a pervasive problem in many countries. These countries may exacerbate the problem by deferring to abusive parents and providing inadequate safeguards for children. Children, who

cannot find refuge within the walls of their own homes or within the borders of their nation, should be permitted find refuge in the United States.

Still, children face many obstacles when seeking asylum in the United States. Because the standards of persecution and social group membership are rigidly defined, children have particular difficulty establishing asylum when their claim is based on domestic abuse. Nevertheless, the INS, the federal government, and the courts have recognized these difficulties in articulating administrative policy, proposed federal statutes, and common law. For children capable of escaping oppression, the recent advances in the law regarding abused children's asylum claims imbue hope. Nevertheless, adjudicators and policy makers have a great opportunity to develop law and policy that continue to promote the best interests of immigrant children exposed to domestic violence.

Notes

1. See Peter Koehn, *Persistent Problems and Political Issues in U.S. Immigration Law and Policy*, in REFUGEE L. & POL'Y 67-70, (Ved P. Nanda ed., 1989).
2. Memorandum from Jeff Weiss, Acting Director, Office of International Affairs, to Asylum Officers, Immigration officers, and Headquarters Coordinators 19 (Dec. 10, 1998) (on file with U.S. Dept. of Justice).
3. See 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. § 208.15(c)).
4. 8 U.S.C. § 1158(b)(1) (2002).
5. *Id.* at § 1101(a)(42)(A) (2002); 8 C.F.R. § 208.13(b)(1)-(2) (2002).
6. *Id.*
7. In re Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985).
8. 65 Fed. Reg. 76, 590.
9. See Acosta, 19 I. & N. Dec. at 222.
10. *Id.*; accord Fatin v. I.N.S., 12 F.3d 1233, 1240 n.10 (3rd Cir. 1993) (adopting the Board of Immigration Appeals' construction and noting, "persecution denotes extreme conduct").
11. See In re D-V-, 21 I. & N. Dec. 77 (B.I.A. 1993) (noting that both physical and mental harm can be aspects of or constitute persecution).
12. See *supra* note 5.
13. See, e.g., Surita v. I.N.S., 95 F.3d 814, 821 (9th Cir. 1996) (holding that a finding of past persecution creates a rebuttable presumption that the applicant has a well-founded fear of future persecution).
14. In re Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987); In re Pula, 19 I. & N. Dec. 467, 471 (B.I.A. 1987).
15. See I.N.S. v. Cardoza-Fonesca, 480 U.S. 421, 430-433 (1987).
16. Patricia A. Seith, Note, *Escaping Domestic Violence: Asylum As A Means Of Protection For Battered Women*, 97 COLUM. L. REV. 1804, 1818 (1997).
17. See Navas v. I.N.S., 217 F.3d 646, 656 n.10 (9th Cir. 2000) ("Government action is not

- necessarily required; instead, police inaction in the face of . . . persecution [by nongovernmental groups] can suffice to make out a claim”). *See also Surita v. I.N.S.*, 95 F.3d 814, 819-20 (9th Cir. 1996) (finding persecution where the police refused to respond to the applicant’s request for assistance or provide a reasonable explanation for their failure to respond).
18. *In re Fauziya Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).
 19. 184 F.3d 1029, 1036-37 (9th Cir. 1999).
 20. *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).
 21. *Id.*
 22. Seith, *supra* note 16, at 1819.
 23. *Id.* at 1820.
 24. Weiss, *supra* note 2, at 19. *See also* UNITED NATIONS HIGH COMMISSIONER’S FOR REFUGEES (UNHCR), HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS § 53 (1992) (reporting that a combination of minor actions taken against an individual may amount to persecution even where each individual incident in and of itself might not; also providing that a series of smaller incidents may, if taken together, produce an effect in the mind of the applicant which would reasonably justify a claim to a well-founded fear of persecution on cumulative grounds).
 25. *In re D-S-*, File A77-954-451 (2001) (remanded on procedural grounds in July, 2002) (on file with author), Oral Decision of Immigration Judge at 40 (on file with author).
 26. 65 Fed. Reg. 76,588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. § 208.15(c)).
 27. *Id.*
 28. *Id.*
 29. *In re D-S-*, File A77-954-451 (2001), Oral Decision of Immigration Judge at 6; Motion to Reopen at 4, 5 (on file with author) (remanding a motion to reopen proceeding on the ground that child’s claim could come within regulations dealing with domestic abuse).
 30. 22 I. & N. Dec. 906 (B.I.A. 1999). In January 2001, in light of these proposed regulations, the Attorney General vacated *In re R-A*, a 1999 decision denying asylum to a Guatemalan woman who had suffered years of persecution in Guatemala at the hands of her husband. By vacating and remanding the Board’s decision, the Attorney General exemplified the United States’ intent and obligation to protect victims of persecution, including victims of domestic violence.
 31. *See* Asylum and Withholding Definitions, 65 Fed. Reg. 76,589.
 32. *In re D-S-*, File A77-954-451 (2001), Oral Decision of Immigration Judge at 6; Motion to Reopen at 4, 5 (on file with author) (remanding a motion to reopen proceeding on the ground that child’s claim could come within regulations dealing with domestic abuse).
 33. *See In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (interpreting “persecution” as the infliction of suffering or harm upon those who differ in ways regarded as offensive (e.g., in race, religion, political opinion, etc.)).
 34. *In re Martinez*, File A76-312-250 (B.I.A. 1999).
 35. *Id.*
 36. *Id.*
 37. *In re D-V-*, 21 I. & N. Dec. 77 (B.I.A. 1993).
 38. *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996).
 39. *See* Seith, *supra* note 16, at 1836.
 40. Weiss, *supra* note 2, at 19.
 41. *Id.* at 25, 26.

42. *See Considerations For Asylum Officers Adjudicating Asylum Claims From Women* (“Gender Guidelines”), Memorandum from Office of Int’l Affairs, to all INS Asylum Officers and HQASM Coordinators (May 26, 1995). The text of the Gender Guidelines Memorandum is available at <http://www.uchastings.edu/cgrs/law/guidelines/us.pdf>.
43. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (“INS does not anticipate a large number of claims based on domestic violence.”)
44. John Limarelli, *Violence Against Women and the Asylum Process*, 60 ALB. L. REV. 977, 984 (1997).
45. Weiss, *supra* note 2, at 3 (*citing* UNHCR, Policy on Refugee Children, EC/SCP/82 (Aug. 6, 1993)).
46. *Id.* at 19.
47. *See* Asylum and Withholding Definition, 65 Fed. Reg. 76,591.
48. *Id.*; *In re S-A-*, 21 I. & N. Dec. 1328 (B.I.A. 2000) (concluding that any attempts by the applicant to seek protection would be futile and potentially dangerous).
49. Seith, *supra* note 16, at 1810.
50. *See generally* Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 344 (1994).
51. *In re D-S-*, File A77-954-451 (2001), Oral Decision of Immigration Judge at 8.
52. *See* 65 Fed. Reg. 76,589.
53. *See In re Fauzia Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (recognizing that both the INS and the applicant “advanced several formulations of the ‘particular social group’ at issue” and creating a slightly different formulation).
54. *See* Weiss, *supra* note 2, at 21.
55. Notably, the proposed regulation states that a “particular social group in which an applicant claims membership cannot be defined by the harm which the applicant claims as persecution.” 65 Fed. Reg. 76,594. Thus, the persecution must exist independently of the harm. *See Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) (rejecting the applicant’s claim to membership in a particular social group of women who had previously been battered and raped by Salvadoran guerillas). There are many creative methods for addressing this rule. For instance, a Kasinga-like formulation should suffice, which may include children from a particular country, who are subject to an oppressive parent and unprotected by the relevant government.
56. *See In re Martinez*, File A76-312-250 (B.I.A. 1999).
57. *Id.*
58. *See generally Hernandez-Montiel v. INS*, 225 F.3d 1084, 1091 (9th Cir. 2000) (reasoning that male petitioner’s female sexual identity was immutable because it was inherent in his identity and that he should not be required to change it).
59. *See generally In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (finding that a particular social group is composed of members who share a common immutable characteristic).
60. *Aguirre-Cervantes v. INS*, 242 F.3d 1169 (9th Cir. 2001), *vacated and remanded by* 273 F.3d 1220 (9th Cir. 2001).
61. *See* Weiss, *supra* note 2, at 24.
62. *Sanchez-Trullio v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986); *See Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (stating that “[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”); *See also Iliev v. INS*, 127 F.3d 638, 642, 642 n.4 (7th Cir. 1997) (stating that its “case law has

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- suggested, with some certainty, that a family constitutes a cognizable ‘particular social group’ within the meaning of the law”).
63. 19 I. & N. Dec. at 233.
 64. 65 Fed. Reg. at 76,593.
 65. *See, e.g.*, In re T-M-B-, 21 I. & N. Dec. 775 (BIA 1997) (overruled on other grounds sub nom); *Borja v. INS*, 175 F.3d 732 (9th Cir. 1999) (en banc). *See also* *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (finding that the applicant must provide “some” direct or circumstantial proof of his persecutors' motives); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1096 (9th Cir. 2000) (finding that the applicant’s sexual identity was a “significant motivation” for the violence and abuse he endured).
 66. *See* Weiss, *supra* note 2, at 21. (“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”).
 67. *See* In re Fuentes, 19 I. & N. Dec. 658, 662 (B.I.A. 1988); *See also* In re S-P-, 21 I. & N. Dec. 486, 489 (B.I.A. 1996) (“Proving the actual, exact reason for persecution or feared persecution may be impossible in many cases.”); In re V-T-S-, 22 I. & N. Dec. 792, 796 (B.I.A. 1997) (“An asylum applicant is not obliged to show conclusively why persecution has occurred or may occur”).
 68. *See Fuentes*, 19 I. & N. Dec. at 662.
 69. *See* 65 Fed. Reg. 76,592.
 70. *Id.* at 76,593.
 71. In re D-S-, File A77-954-451 (2001), Oral Decision of Immigration Judge at 11.