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The Honorable Michael Chertoff
Secretary
U.S. Department of Homeland Security
Washington, D.C. 20528

Re: Proposed Asylum and Withholding Definitions Regulations, "Membership in a Particular Social Group"

Dear Secretary Chertoff:

As professors and teachers of immigration and asylum law, we are concerned that the rule of law prevail in the field of asylum protection. (As you will note, some organizations and other individuals have signed onto this letter.)

We welcome the recent announcement of your decision to create the position of Senior Asylum Officer, under a new undersecretary of Policy, Directorate of Policy within the Department of Homeland Security. We hope that you will appoint an experienced refugee legal expert to that position, as we believe the need for intelligent and informed coordination on legal and policy issues related to asylum has been evident for some time. We would like to take this opportunity to raise a critical legal issue, in particular to urge you to consider final promulgation of the proposed Asylum and Withholding Definition regulations, which have been pending since December 2000.¹

Several organizations, law school instructors and legal clinics presented comments on the proposed Asylum and Withholding regulations in January of 2001, and we refer you to those comments for detailed elaboration of legal issues addressed by the regulations.² A major component of the proposed regulations is the definition of "membership in a particular social group," one of the five grounds for obtaining asylum status under U.S. and international law. Under asylum law, a person may not be returned to face serious harm (from which her government fails to protect her), where her particularized, individualized fear is on account of one of five grounds that are immutable or protected, one of which is "membership in a particular

¹ Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

² For comments on these proposed regulations, see www.humanrightsfirst.org/asylum/gender_comments.pdf; http://www.gbls.org/immigration/HIRC_and_Coalition_Comments_-_2001_Gender_and_Social_Group_Proposed_Regulations.pdf.

social group.”

We urge that the regulations be issued, along the lines of the Department’s own clear and well-thought out position, outlined in its February 2004 brief in the case of Rodi Alvarado.³ That brief reflects the long-standing principle in U.S. law that the “membership in a particular social group” category is based on an immutable characteristic, such as gender or family membership. The DHS position, embodied back in the 1995 then-Immigration and Naturalization Service’s Gender Asylum Guidelines,⁴ states core principles and doctrine that have defined and guided the development of law in this area.

The analysis of the “particular social group” category that has been basic to U.S. law for 20 years is that the “particular social group” category is defined by a fundamental, immutable or unchangeable characteristic. The Department’s position, stated in detail in its brief, reflects long-standing precedent and policy.

Not only DHS and legacy INS, but the Board of Immigration Appeals, the highest administrative appeals body in the Justice Department, (going back to its seminal decision in *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), *rev’d in part on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987)) and now most federal circuit courts of appeal that have addressed the issue have adopted this “immutable characteristics” formulation.⁵ Most recently, the Ninth Circuit Court of Appeals joined other circuit courts in upholding this formulation and core family values, finding, as the Board did 20 years ago, that “family” constitutes a particular social group for asylum purposes.⁶ *Acosta*’s immutable characteristics

³ See Department of Homeland Security’s Position on Respondent’s Eligibility for Relief at 19-26 (2004), *Matter of R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999) (en banc) *vacated* (A.G. Jan. 19. 2001).

⁴ Memorandum from Phyllis Coven, Office of International Affairs, to All INS Asylum Officers and HQASM Coordinators, Considerations For Asylum Officers Adjudicating Asylum Claims From Women (May 26, 1995).

⁵ See, e.g., especially on the issue of immutable characteristics and family membership, *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (“[t]here can, in fact, be no plainer example of a social group based on common identifiable and immutable characteristics than that of the nuclear family”); *Iliev v. INS*, 127 F.3d 638, 642 & n. 4 (7th Cir. 1997); *Fatin v. INS*, 12 F.3d 1233, 1239- 40 (3d Cir. 1993) (accepting BIA ruling in *Acosta*, *supra*, that “kinship ties” qualify as a particular social group); *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004) (“[w]e join our sister circuits in holding that ‘family’ constitutes a ‘particular social group’” and noting that every circuit court that has addressed the issue has found that family constitutes a particular social group) (citations omitted).

⁶ *Thomas V. Gonzalez*, 409 F.3d 1177 (9th Cir. 2005) (stating that the BIA “has long and consistently held that ‘kinship ties’ are the sort of common and immutable characteristic that give rise to a ‘particular social group’”). It is worth noting that the “immutable characteristics” formulation applied in this and other cases involving kinship ties certainly does not recognize every person who is a “family member” as eligible for asylum. It encompasses only those individuals who face a well-founded fear of persecution on account of their kinship ties, an immutable characteristic that cannot be changed at will and which serves to “restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.” *Matter of Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985), *rev’d in part on other grounds by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). In addition to establishing membership in a particular social group, an individual must still demonstrate that he or she faces an individualized, well-founded fear and that the harm he or she faces is encompassed within the term “persecution”, which also requires a showing of failure of state protection.

analysis also has set an international standard, and the United States should be proud of its leadership in this area.⁷

As the DHS, the Board of Immigration Appeals and the federal courts have made clear, the “immutable characteristics” formulation of the particular social group category is critical for the protection of vulnerable women, children and families. We urge you to uphold and make clear your position on this question, by promulgation of the regulations, in line with the Department’s position in its brief issued in January of 2004.

Such a clear articulation of policy is particularly important in light of recent developments involving asylum claims based on religion⁸ and especially family “particular social group” membership. The attached memorandum addresses the recent case of *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005), regarding family-based persecution.

We thank you in advance for your consideration and for continued DHS leadership on this issue.

Sincerely,

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⁷ See JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 157-161 (1991); Deborah E. Anker, *Refugee Law, Gender and the Human Rights Paradigm*, 15 HARV. HUM. RTS. L. J. 133 (2002); UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *GUIDELINES ON INTERNATIONAL PROTECTION: “MEMBERSHIP OF A PARTICULAR SOCIAL GROUP” WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES* (2002), available at http://www.unhcr.bg/coi/files/02_en.pdf.

⁸ See *Mkrtchyan v. Gonzales*, 2005 U.S. App. LEXIS 13535, No. 03-72461, *3-*4 (9th Circuit 2005) (in which the DOJ litigants argued that individuals persecuted for religious proselytizing are not persecuted “on account of” religion where such proselytizing is not mandated by their religion).

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