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# AILA

## Law Journal

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Volume 1, Number 1, April 2019

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# Americans, But Not Citizens

## An Argument for Nationality-Based Asylum Protection

Jillian Blake\*

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**Abstract:** Since 2017 the Trump administration has been undoing immigration protections for hundreds of thousands of longtime U.S. residents, including those with Deferred Action for Childhood Arrivals (DACA) and Temporary Protected Status (TPS). Many of the people affected by these changes have lived in the United States for decades and have become culturally American, even though they are not U.S. citizens. Furthermore, many of the countries these individuals could be removed to are among the most dangerous in the world and Americanized deportees are often targeted for persecution upon return. This article argues that those who are ethnically American and fear persecution on that basis should be able to seek asylum in the United States under the protected ground of “nationality.” The article outlines the legal basis for such a claim, including nationality as a ground for asylum, the feared persecution’s nexus to the protected ground, and the lack of state protection.

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### Introduction

During the 1930s President Herbert Hoover carried out a massive deportation campaign against Mexicans and Mexican-Americans in response to nativist resentment and scapegoating of immigrants. The campaign, known as the “Mexican Repatriation,” was executed in a brutal, racist, and illegal manner, and led to the expulsion of more than a million people from the United States. Many people who had lived most of their lives in the United States “found themselves in Mexico dealing with process of socialization, of learning the language, [while] they maintained an American identity.”<sup>1</sup> Almost a century later, another repatriation crisis is looming in the United States.

Since 2017, President Donald Trump’s administration has been systematically undoing legal protections for law-abiding, longtime U.S. residents. The administration announced an end to Temporary Protected Status (TPS)<sup>2</sup> and Deferred Action for Childhood Arrivals (DACA)<sup>3</sup> programs, which will subject more than a million people to removal from the United States in the coming years.<sup>4</sup> Many of the people affected by these changes speak English, were educated in the United States, have lived in the United States for decades, and have U.S. citizen family members. For all intents and purposes these people are Americans yet are now facing forcible removal to places foreign to them.

In addition to the harm of having to leave behind the lives they built and start again in a place they do not know, many will also face persecution in the countries they are removed to. The top countries of origin for DACA recipients are Mexico, El Salvador, Guatemala, and Honduras,<sup>5</sup> which are among the most dangerous countries in the world.<sup>6</sup> Similarly, the top countries of origin for TPS recipients are El Salvador, Haiti, and Honduras.<sup>7</sup> Violent criminal gangs are prevalent in these countries and “Americanized” deportees are often targeted for persecution soon after they return.<sup>8</sup>

U.S. deportees to Central America are considered “naïve, vulnerable, and particularly wealthy . . .” and are “prime targets for gangs.”<sup>9</sup> Their “attachment to America and relative unfamiliarity with their homeland lead to extreme challenges in reintegration in a nation dominated by criminal gangs.”<sup>10</sup> In the past five years at least 70 deportees have been murdered in El Salvador alone, 20 of them since 2016.<sup>11</sup>

This article argues that many of the people who will face removal in the coming years are ethnically American (but not U.S. citizens) and will have legitimate asylum claims based on the protected asylum ground of “nationality.” In order to qualify for asylum, the applicant will first have to demonstrate that his or her nationality or ethnicity is American<sup>12</sup> even though he or she is not a U.S. citizen. This can be accomplished by presenting evidence of the common elements of nationality and ethnicity, including long-term residence, education, language, culture, political allegiance, and interests.

Next, the applicant must demonstrate that he or she has a well-founded fear of persecution in the proposed country of removal based on his or her nationality. This can be accomplished by presenting credible evidence that those with U.S. nationality characteristics face persecution and are targeted on that basis in the proposed country of removal or that the person has already been threatened or persecuted on that basis. Importantly, the applicant need not show that the nationality characteristic was or will be the sole reason for persecution, but only one central reason. Finally, these asylum applicants will have to show that their birth country will not be able to protect them from the persecution they will face because of ineffective security forces.

## **American Nationality as a Ground for Asylum**

Those who meet the legal definition of “refugee” can be granted asylum in the United States. Under U.S. and international law, a refugee is a person who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”<sup>13</sup> Under United Nations High Commissioner for Refugees (UNHCR) guidelines, the nationality ground for asylum is “not to be understood only as ‘citizenship.’”<sup>14</sup> Instead, “[p]ersecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic)

minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution.”

“Ethnic group” is defined by sociologists as:

individuals who consider themselves, or are considered by others, to share common characteristics that differentiate them other collectives in society, and from which they develop distinctive cultural behavior. . . . Members of that ethnic group may be identifiable in terms of racial attributes, but they may also share other cultural characteristics such as religion, occupation, language, or politics. Ethnic groups should also be distinguished from social classes, since membership generally cross-cuts the socio-economic stratification within society, encompassing individuals who share (or are perceived to share) characteristics that supersede class.<sup>15</sup>

Courts in the United States have recognized racial and ethnic minorities as refugees under the nationality ground. In *Siserba v. Holder*,<sup>16</sup> the Sixth Circuit found that an asylum applicant who was a citizen of Estonia but ethnically Russian was persecuted based on her Russian ethnicity because she was stripped of her Estonian citizenship for two years and had her medical degree from Russia invalidated. Similarly, in *Mengstu v. Holder*,<sup>17</sup> the Ninth Circuit found that an asylum applicant who was born in Ethiopia but ethnically Eritrean faced persecution when she was expelled from Ethiopia due to her Eritrean ethnicity. In *Perkovic v. INS*,<sup>18</sup> the Sixth Circuit also found that two asylum applicants were persecuted in the former Yugoslavia because of their Albanian ethnicity. Other examples of ethnicities granted asylum protection in the United States include Mayans from Guatemala,<sup>19</sup> Amhara from Ethiopia,<sup>20</sup> Tibetans from China, and Roma from Bulgaria.<sup>21</sup>

These examples demonstrate that nationality-based asylum protection is not usually linked to the applicant’s citizenship but rather his or her ethnic or racial identity. Furthermore, this ethnic identity can be one that has its own nation-state (Russia, Eritrea, Albania) or one that does not have its own nation-state (Mayan, Amhara, Roma, Tibetan).

There is a distinct American nationality rooted in American culture, politics, and history that those who have lived a significant time in the United States share, whether or not they are citizens. Many noncitizens deportees identify as American, and others also perceive them as such through their culture, mannerisms, or accents.

As a Honduran deportee who lived decades in the United States explained, “I feel like I’m more American than I am *Hondureñan* because everything that I do is American, you know. . . . The stuff I buy to eat, the movies I watch, the music I listen to—it’s like it’s tattooed in me to be an American.”<sup>22</sup>

Another deportee from the United States stated, “My whole world was there . . . first language was English.”<sup>23</sup> A journalist chronicling the lives of U.S. deportees in El Salvador describes:

[G]ame-day tailgating is a part of preserving their adopted American traditions in a country where the word *fútbol* is universally understood to mean soccer. When the first notes of ‘The Star-Spangled Banner’ sounded, Reyes and the other deportees rose to their feet. It was the national anthem they knew best.<sup>24</sup>

According to another article based on interviews with more than 200 deportees in Mexico, the U.S. deportees “stand out. They dress differently, they think differently, they speak broken Spanish and they dream in English. They miss everyday American life and its special occasions. They long for American food. . . .” When asked what they missed most about the United States, many responded “everything. . . . I feel American.”<sup>25</sup>

Deportees who have lived a long time in the United States have adopted American language, culture, and even political allegiance but are not U.S. citizens. The most common age of arrival for those in the United States who have DACA is eight, and 31 percent of DACA recipients arrived in the United States when they were five years old or younger.<sup>26</sup> Those with TPS from El Salvador and Honduras have resided in the United States since 2001 and 1999, respectively. When these longtime U.S. residents return to their birth countries, many will still identify with the American nationality, and be a distinct and visible minority within the countries they are removed to.

## Nexus

The most difficult aspect of a nationality-based asylum claim will be showing nexus—that an American deportee will face persecution *on account* of his or her nationality and not just due to generalized violence. The U.S. Supreme Court has found that direct proof of a persecutor’s motives is not required, but that “[the applicant] must provide some evidence of it, direct or circumstantial.” Under the REAL ID Act, passed by the U.S. Congress in 2005, an enumerated Convention ground must be “at least one central reason” for the persecution suffered by the applicant, but it need not be the only reason.<sup>27</sup> Explaining the REAL ID Act’s “one central reason standard,” the Board of Immigration Appeals (BIA) held that “the protected ground . . . cannot be incidental, tangential, superficial, or subordinate to another reason for harm.”<sup>28</sup>

In *Matter of Kasinga*, a seminal asylum case that established asylum protection for women who fear female genital mutilation the BIA held that “a subjective ‘punitive’ or ‘malignant’ intent [of a persecutor] is not required for harm to constitute persecution.”<sup>29</sup> The *Kasinga* nexus holding is important because it establishes that nationality-based asylum applicants need not show that persecutors hate Americans (although this may also be the case), but only that the asylum applicant faces persecution because of his or her nationality traits.

Certain factual scenarios would establish nexus in a clear-cut manner. A common scenario is this one: a family in El Salvador is threatened because a criminal gang knows they have an “American” relative (someone who has lived in the United States for a long period of time who may or may not be a citizen). They target that person in the United States by calling him and extorting him, telling him that he will be killed if he ever returns to El Salvador. This person could claim asylum under nationality grounds, as one of the central reasons he was targeted is that he is American or perceived to be American.

Consider another factual scenario that could establish nexus: a person returns to Honduras after decades in the United States and clearly has American characteristics (dress, language, mannerisms, culture, etc.). She is immediately identified by gang members as American and threatened with kidnapping and insults about her nationality. This person also has no social network in Honduras to provide protection or support in that country, and the police will not protect her because she cannot speak Spanish and they view her as American. This person could also claim asylum based on her nationality.

Both of the scenarios presented above establish past persecution and therefore a presumption of future persecution.<sup>30</sup> Nexus can be more difficult to establish when there has not been past persecution, but these claims are still viable, as an asylum applicant need only establish a “well-founded fear” of persecution.<sup>31</sup> In these situations, the applicant must rely on country conditions and circumstantial evidence to demonstrate the danger he or she will face if removed from the United States.

Country conditions demonstrate that deportees from the United States face discrimination in Mexico and Central America. According to one U.S. deportee to Mexico, “People criticize me because of how I dress, because of how I talk. They look [at me] like I’m not from here. Most think, ‘Go back to America.’”<sup>32</sup> In El Salvador “deportees can be branded traitors for daring leave El Salvador to set up home in America—[Many deportees] are given radical makeovers; new haircuts and new clothes along with sunglasses that are rarely removed. Then they learn to talk differently, walk differently. . . .”<sup>33</sup> According to César Ríos, director of the Institute of the Migrant in El Salvador, “[F]or those who have been abroad for more than five years, the situation is [the] worst.” These individuals are vulnerable and “condemned by society.” Furthermore, according to Ríos, those “over 35 [years old] cannot find jobs.”<sup>34</sup>

In addition to facing discrimination and challenges reintegrating into society, deportees are also targeted for extortion, kidnapping, and sexual violence. As explained in one article, “[Deportees from the United States] are often marked upon their return for retribution, shaken down, even kidnapped for ransom, by gang members.” In El Salvador, returning to Central America after having lived in the United States for many years is like “having a tattoo on [your] forehead.” Deportees “feel like marked men or women, unable to blend in. They often find themselves subject to both extortion and criminal paranoia.”<sup>35</sup> According to Salvadoran lawyer Laura Moran, “Deportees from

the U.S. face being killed or sexual violence. Most girls try to hide from the violence. The problem is that most don't have a place to go."<sup>36</sup>

## State Protection

The final element of an asylum claim that applicants will have to prove is that the state they are removed to will not protect them from the persecution they will face based on their nationality. Country conditions in Mexico and Central America demonstrate that the police and security forces are largely ineffective due to lack of resources and corruption.<sup>37</sup> In Mexico, many

don't trust the police, seeing them as, at best inefficient and at worst, corrupt and in the same as league as organised crime... Some do not have working patrol vehicles and many lack training. Despite years of talk of police reform, little has changed, even as the country's violence rises to unprecedented levels.<sup>38</sup>

In Central America "police lack[]equipment, human and other resources to provide sufficient protection, or often [are] in league with the racketeers themselves ... [T]he 'service' provided by protection rackets is sometimes tolerated and even reluctantly welcomed..."<sup>39</sup>

In addition to police forces in Mexico and Central America being generally ineffective and corrupt, those who are ethnically American will have a more difficult time accessing security services due to linguistic, social, and cultural barriers. They may not speak Spanish, which will make access to the police and the judicial system more difficult if not impossible. Furthermore, they may not have the support of a family network in Mexico or Central America, which will make it difficult to secure employment and housing and establish a safe home environment. Additionally, according to the Latin America Working Group:

[A]n increase in deportations from the United States could exacerbate the existing security situation, drive forced displacement, and overwhelm the Central American governments' and civil society's capacity to protect the rights of and provide basic services to deportees. A lack of programs and job opportunities—combined with threats from gangs, organized crime, and state security forces—**leaves returned migrants between a rock and a hard place: they can either turn around and migrate again or resign to living a life without dignity and safety in their home countries.**<sup>40</sup>

Although persecution "implies some connection to government action or inaction," it can involve the "government's inability or unwillingness to control private conduct,"<sup>41</sup> including harm from gangs and organized criminal organizations. Factors that could determine whether a government is unable or unwilling to control a private actor are evidence:

that the government condoned or was complicit in the private harm being inflicted; the alien's attempts, if any, to obtain government protection and the government's response to those attempts; government action that is perfunctory; repeated government unresponsiveness; general country conditions; the nature of the government's laws or policies with regard to the complained of harm; and the steps, if any, the government has taken to prevent the infliction of such harm.<sup>42</sup>

## **Particular Social Group Asylum Claims for U.S. Deportees and Imputed Wealthy Americans**

Asylum seekers from Mexico and Central America have advanced particular social group (PSG) asylum claims over the past several years due to the dangers they would face as U.S. deportees or imputed wealthy Americans. Particular social group is another one of the five grounds for asylum listed in the Refugee Convention, distinct from the nationality ground advanced in this article. PSG asylum claims for U.S. deportee groups have been unsuccessful to date, mostly because courts have found that the proposed groups do not meet one of the requirements for the PSG asylum ground—that a proposed social group be “particular,” meaning that it not be too “amorphous, overbroad, diffuse, or subjective.”<sup>43</sup> The BIA established two other factors in determining whether a PSG exists, including immutability (whether members of the group share common characteristics they cannot, or should not, have to change) and social distinction (whether society views members of the group as separate in a significant way).<sup>44</sup>

The Ninth Circuit considered asylum protection for the proposed particular social groups “returning Mexicans from the United States”<sup>45</sup> and “deportees from the United States to El Salvador”<sup>46</sup> and found that both groups were too broad and not particular enough to be cognizable particular social groups. The court found that “deportees from the United States to El Salvador” was “too amorphous, overbroad and diffuse because it included men, women, and children of all ages, regardless of the length of time they were in the United States, the reasons for their removal, or the recency of their removal.”<sup>47</sup>

The Ninth Circuit also considered the PSG “imputed wealthy Americans” in cases in which asylum applicants argued that because they were “light-skinned, fit, and have American mannerisms or accents, their family would be perceived as wealthy Americans in Mexico, and thus will become targets for kidnapping or torture.” The court held that those who appear to be Americans are not defined with particularity (it would be too hard to tell who was in the group) and the group was also not socially visible in Mexican society. The court also held that applicants in this case did not present evidence that they would be at more risk than any other person who could be subject to generalized violence in Mexico.<sup>48</sup>

In *Lizama v. Holder*, the Fourth Circuit considered the PSG “young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs.” Like the Ninth Circuit in the cases discussed above, the Fourth Circuit found that the group’s characteristics, including wealth, Americanization, opposition to gangs, and criminal histories, were all too amorphous and “not narrow or enduring enough to clearly delineate its membership or readily identify its members.”<sup>49</sup>

While the Ninth and Fourth Circuits focused on the lack of particularity in deportee and wealthy American PSG claims, the Seventh Circuit recently focused on the issue of nexus to deny asylum in a similar case. In *Orellana-Arias v. Sessions*, the court considered the group “Salvadorans who have lived in the United States for many years and who are perceived by drug cartels, criminal organizations, gangs, and corrupt government officials to have money upon their return to El Salvador.”<sup>50</sup> The court argued that “even if the [group is] cognizable as [a] social group[] under the Immigration and Nationality Act, Orellana-Arias has not provided sufficient evidence establishing that he was targeted on the basis of his membership in [the] social group.”<sup>51</sup>

The court reasoned that this was because even though the gang members who threatened him mentioned that he had returned from the United States before extorting him, he “provided no evidence that he was more of a target because he was deported from the United States than he would have been had he returned from, for example, Qatar, Luxembourg, Brunei, or any other country perceived to be wealthy, or had he won the lottery, inherited a large estate, secured a high-paying job, or discovered a diamond mine in his backyard.” The court therefore found that it was “Orellana-Arias’s perceived wealth alone that made [him] a target for the gang,” which is not a protected ground.<sup>52</sup>

Analysis of these PSG asylum claims with factual circumstances similar to potential nationality-based claims demonstrates why the nationality ground could be more successful. By claiming the nationality ground, asylum seekers can avoid having to meet particularity and social distinction requirements for PSG asylum. As long as the asylum applicant can show he or she is ethnically American, just as any other ethnicity would, he or she would satisfy the requirement of belonging to a group protected under the Refugee Convention. Furthermore, bringing nationality-based claims avoids relying on the characteristic of wealth or perceived wealth in a PSG claim, which has been found to be too amorphous by the BIA and courts in numerous cases.

The Seventh Circuit’s argument in *Orellana-Arias v. Sessions* that perceived wealth, and not nationality, is the true motivation for the persecution in “imputed wealthy American” cases will likely be raised in nationality-related cases as well. Advocates should preempt this argument by demonstrating that any kind of persecution based on nationality will likely involve some additional inference about the group. For example, indigenous Mayans may face persecution in Guatemala because they are viewed as poor and uneducated. While “poor and uneducated Guatemalans” may not be a protected group

under the Refugee Convention, just because the persecutor associates Mayans with those characteristics does not mean they should not receive protection as long as their nationality was one central reason for the persecution they face.

A concurrence in the Seventh Circuit case *Salgado-Gutierrez v. Lynch* also provides support for nationality-based asylum claims. In the case, the majority found the PSG “Mexican nationals who have lived in the United States for many years and who, upon being removed to Mexico, are perceived as having money” was not cognizable.<sup>53</sup> Judge Richard Posner disagreed with the majority’s reasoning in the case (although he agreed with its conclusion because he believed the applicant did not show that he could not relocate within Mexico). In his concurrence Judge Posner argues that

wealth does not often “stand alone” in these cases. In *Tapiero de Orejuela v. Gonzalez*, 423 F.3d 666, 672 (7th Cir. 2005), we said that Colombian cattle farmers were not defined merely by their wealth but also by their land, their profession, and their education. And similarly, Salgado-Gutierrez is defined by his having lived in the United States for twenty years—for being, as a consequence, to a degree American—a fact of his personal history that he can’t escape from.<sup>54</sup>

Posner argues that longtime U.S. residents could plausibly establish a claim to asylum because their American identity is an immutable, identifiable characteristic they cannot change, even if it also happens to be associated with wealth. Furthermore, Posner states that relocating within Mexico might be difficult for a U.S. deportee, as “he is bound to be asked questions about his origin, and his 20 years of living in the United States may make him recognizable as an alien and prevent his obtaining employment.”<sup>55</sup>

Advocates should also be aware that applicants bringing nationality-based asylum claims will have to show significantly more ties and allegiance to the United States than an applicant would presenting a PSG claim based on being a deportee or perceived wealthy American. For example, a person who lived in the United States for a short time and was then deported to Central America would be a “U.S. deportee” and maybe even a perceived “wealthy American,” but would not be ethnically American.

## Conclusion

A repatriation crisis is approaching with the Trump administration’s announced termination of DACA and TPS programs. Many longtime U.S. residents who have established strong national ties to the country should claim asylum protection if they fear persecution based on their American identity. Asylum applicants will need to demonstrate that they are culturally American, will be at increased risk for persecution because of their nationality, and that they will not receive protection from security forces in the country they are

removed to. While similar PSG claims have been brought in the past, the nationality ground offers a sounder basis to claim asylum and is more likely to be successful. Accepting nationality-based asylum claims may help to mitigate some of the harmful effects of the coming deportation crisis.

## Notes

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1. Alex Wagner, *America's Forgotten History of Illegal Deportations*, THE ATLANTIC (Mar. 6, 2017), [www.theatlantic.com/politics/archive/2017/03/americas-brutal-forgotten-history-of-illegal-deportations/517971/](http://www.theatlantic.com/politics/archive/2017/03/americas-brutal-forgotten-history-of-illegal-deportations/517971/).

2. The Trump administration announced the termination of TPS for El Salvador, Haiti, Nepal, Nicaragua, Sudan, and Honduras. On October 3, 2018, a federal district court enjoined the administration from implementing the termination of TPS for Sudan, Nicaragua, El Salvador, and Haiti. *Ramos v. Nielsen*, No. 18-cv-01554 (N.D. Cal. Oct. 3, 2018).

3. DACA was rescinded on September 5, 2017, by President Trump. However, USCIS is still accepting DACA renewals (but not new applications) due to injunctions issued by federal courts in the Eastern District of New York and the Northern District of California. <https://www.uscis.gov/humanitarian/deferred-action-childhood-arrivals-response-january-2018-preliminary-injunction>.

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9. Nick Paton Walsh, et al., *Torn from Their Families in the U.S., Salvadoran Deportees Return to a Gang-Ravaged Homeland*, CNN (June 7, 2018), [www.cnn.com/2018/06/07/americas/el-salvador-deportees-us-intl/index.html](http://www.cnn.com/2018/06/07/americas/el-salvador-deportees-us-intl/index.html).

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16. 646 F.3d 964 (6th Cir. 2011).

17. 560 F.3d 1055 (9th Cir. 2009).

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19. *See Mendoza-Pablo v. Holder*, 667 F.3d 1308 (9th Cir. 2012).

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27. INA §208(b)(1)(B)(i).

28. *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 214 (BIA 2007).

29. *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996).

30. 8 CFR §208.13(b)(1) (“An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.”).

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