



Practice Advisory

**ASYLUM BASED ON MEMBERSHIP IN A
PARTICULAR SOCIAL GROUP &
“VICTIMS OF PRIVATE CRIMINAL
ACTIVITY”**

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Practice Advisory Forward

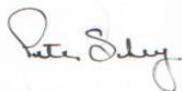
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This practice advisory outlines the process for applying for asylum based on membership in a particular social group. It also evaluates the impact of Attorney General Garland's June 2021 memo vacating Matter of L-E-A- and Matter of A-B.

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I. INTRODUCTION

One must be classified a “refugee” to qualify for asylum in the United States. Pursuant to the Immigration and Nationality Act, a refugee is “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country 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...” INA § 101(a)(42)(A); [8 U.S. Code § 1101\(a\)\(42\)](#) (emphasis added).

The first attempt at defining “particular social group” (“PSG”) came in [Matter of Acosta](#), [19 I&N Dec. 211 \(BIA 1985\)](#). In *Matter of Acosta*, the Board of Immigration Appeals (“BIA”) analogized PSG to the other grounds of persecution within the refugee definition (i.e. race, religion, nationality, and political opinion) to conclude that, like its counterparts, PSG “mean[s] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic.” *Id.* at 233. The Board further elaborated: “The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership...However, whatever the common characteristic that defines the group, it must be one that the members of the group either *cannot change*, or should not be required to change because it is *fundamental to their individual identities or consciences*.” *Id.* Numerous circuit courts have adopted the immutable or fundamental *Acosta* standard, including the Ninth Circuit in *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

In *Matter of M-E-V-G-*, the BIA formally promulgated the PSG test, as follows: “An applicant for asylum...based on ‘membership in a particular social group’ must establish that the

group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.” [Matter of M-E-V-G-, 26 I&N Dec. at 237.](#)

The first element (“common immutable characteristic”) takes its definition from the standard set forth in *Acosta*. The “particularity” requirement “relates to the group's boundaries or, as earlier court decisions described it, the need to put ‘outer limits’ on the definition of a ‘particular social group.’” *Id.* at 238 (citing *Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003)). In other words, “The group must also be discrete and have definable boundaries--it must not be amorphous, overbroad, diffuse, or subjective.” *Id.* at 239 ((citing [Ochoa v. Gonzales, 406 F.3d 1166, 1170-71 \(9th Cir. 2005\)](#) (stating that a particular social group must be narrowly defined and that major segments of the population will rarely, if ever, constitute a distinct social group)). “Social distinction,” the third and final element, “refers to social recognition...To be socially distinct, a group need not be seen by society; rather, it must be perceived as a group by society. *Matter of C-A-*, 23 I&N Dec. at 956-57 (citing UNHCR Guidelines, *supra*).” *Id.* at 240. According to USCIS, whose interpretation is consistent with BIA’s, “[t]his requirement can be met by showing that the society in question sets apart or differentiates between people who possess the shared belief or trait and people who do not, even if individual group members are not visibly recognized as group members.” USCIS, NEXUS - PARTICULAR SOCIAL GROUP TRAINING MODULE (July 20, 2021), [https://www.uscis.gov/sites/default/files/document/foia/Nexus - Particular Social Group PSG LP RAIO.pdf](https://www.uscis.gov/sites/default/files/document/foia/Nexus_-_Particular_Social_Group_PSG_LP_RAIO.pdf).

II. RELEVANT PSG CASE LAW & KEY HOLDINGS

a. *Matter of H-*, 21 I&N Dec. 337 (BIA 1996):

- i. Membership in a clan can constitute membership in a "particular social group" within the meaning of section 208(a) of the Immigration & Nationality Act, 8 U.S.C. Â§ 1158(a)(1994); the Marehan subclan of Somalia, the members of which share ties of kinship and linguistic commonalities, is such a "particular social group." USDOJ, BIA

PRECEDENT CHART AI-CA, <https://www.justice.gov/eoir/bia-precedent-chart-ai-ca> (last updated July 21, 2020).

- ii. While interclan violence may arise during the course of civil strife, such circumstances do not preclude the possibility that harm inflicted during the course of such strife may constitute persecution within the meaning of section 208(a) of the Act; and, persecution may occur irrespective of whether or not a national government exists. *Id.*
 - iii. An alien who has demonstrated past persecution is presumed to have a well-founded fear of future persecution unless it is demonstrated by a preponderance of the evidence that, since the time the persecution occurred, conditions in the applicant's country have changed to such an extent that the applicant no longer has a well-founded fear of persecution in that country. *Id.*
 - iv. In the consideration of whether a favorable exercise of discretion should be afforded an applicant who has established eligibility for asylum on the basis of past persecution, careful attention should be given to compelling, humanitarian considerations that would be involved if the refugee were to be forced to return to a country where he or she was persecuted in the past. *Id.*
- b. *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996):**
- i. The practice of female genital mutilation, which results in permanent disfigurement and poses a risk of serious, potentially life-threatening complications, can be the basis for a claim of persecution. *Id.*
 - ii. Young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a "particular social group" within the definition of the term "refugee" under section 101(a)(42)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(A) (1994). *Id.*
 - iii. The applicant has met her burden of proving through credible testimony and supporting documentary evidence (1) that a reasonable person in her circumstances would fear country-wide persecution in Togo on account of her membership in a recognized social group and (2) that a favorable exercise of discretion required for a grant of asylum is warranted. *Id.*
- c. *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006):**
- i. The members of a particular social group must share a common, immutable characteristic, which may be an innate one, such as sex, color, or kinship ties, or a shared past experience, such as former military leadership or land ownership, but it must be one that members of the group either cannot change, or should not be required to change, because it is fundamental to their individual identities or consciences. *Matter of Acosta*, 19 I&N Dec. 211(BIA 1985), followed. *Id.*
 - ii. The social visibility of the members of a claimed social group is an important consideration in identifying the existence of a "particular social group" for the purpose of determining whether a person qualifies as a refugee. *Id.*

- iii. The group of “former noncriminal drug informants working against the Cali drug cartel” does not have the requisite social visibility to constitute a “Particular Social Group.” *Id.*
- d. **Matter of A-M-E- & J-G-U-, 24 I&N Dec. 69 (BIA 2007):**
 - i. Factors to be considered in determining whether a particular social group exists include whether the group’s shared characteristic gives the members the requisite social visibility to make them readily identifiable in society and whether the group can be defined with sufficient particularity to delimit its membership. *Id.*
 - ii. The respondents failed to establish that their status as affluent Guatemalans gave them sufficient social visibility to be perceived as a group by society or that the group was defined with adequate particularity to constitute a Particular Social Group. *Id.*
- e. **Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008):**
 - i. Neither Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities nor the family members of such Salvadoran youth constitute a “Particular Social Group.” *Id.*
- f. **Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008):**
 - i. The respondent, a young Honduran male, failed to establish that he was a member of a particular social group of “persons resistant to gang membership,” as the evidence failed to establish that members of Honduran society, or even gang members themselves, would perceive those opposed to gang membership as members of a social group. *Id.*
 - ii. Because membership in a criminal gang cannot constitute membership in a particular social group, the respondent could not establish that he was a member of a particular social group of “young persons who are perceived to be affiliated with gangs” based on the incorrect perception by others that he is such a gang member. *Id.*
- g. **Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014):**
 - i. In order to clarify that the “social visibility” element required to establish a cognizable “particular social group” does not mean literal or “ocular” visibility, that element is renamed as “social distinction.” *Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008); Matter of S E G-, 24 I&N Dec. 579 (BIA 2008); Matter of A-M-E- & J G-U-, 24 I&N Dec. 69 (BIA 2007); and Matter of C-A-, 23 I&N Dec. 951 (BIA 2006), clarified. Id.*
 - ii. An applicant for asylum or withholding of removal seeking relief based on “membership in a particular social group” must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *Id.*
 - iii. An applicant has the burden of demonstrating not only the existence of a cognizable particular social group and his membership in that particular social group, but also a risk of persecution “on account of” his membership in that group. *Id.*
 - iv. The respondent did not establish that “former members of the Mara 18 gang in El Salvador who have renounced their gang membership”

constitute a “particular social group” or that there is a nexus between the harm he fears and his status as a former gang member. *Id.*

h. *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014):

- i. In order to clarify that the “social visibility” element required to establish a cognizable “particular social group” does not mean literal or “ocular” visibility, that element is renamed as “social distinction.” *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008); *Matter of S E G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of A-M-E- & J G-U-*, 24 I&N Dec. 69 (BIA 2007); and *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), clarified. *Id.*
- ii. An applicant for asylum or withholding of removal seeking relief based on “membership in a particular social group” must establish that the group is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. *Id.*
- iii. Whether a social group is recognized for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor. *Id.*

i. *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014):

- i. Depending on the facts and evidence in an individual case, “married women in Guatemala who are unable to leave their relationship” can constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal under sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158(a) and 1231(b)(3) (2012). *Id.*

j. *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017):

- i. Whether a particular social group based on family membership is cognizable depends on the nature and degree of the relationships involved and how those relationships are regarded by the society in question. *Id.*
- ii. To establish eligibility for asylum on the basis of membership in a particular social group composed of family members, an applicant must not only demonstrate that he or she is a member of the family but also that the family relationship is at least one central reason for the claimed harm. *Id.*

III. “VICTIMS OF PRIVATE CRIMINAL ACTIVITY”

On June 16, 2021, Attorney General Garland issued a memorandum “vacat[ing] the previous Attorney General decisions in *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) (‘L-E-A-11’), *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) (‘A-B- I’), and *Matter of A-B-*, 28 I&N Dec. 199 (A.G. 2021) (‘A-B- II’). USDOJ, IMPACT OF ATTORNEY GENERAL DECISIONS IN MATTER OF L-E-A- AND MATTER OF A-B (June 16, 2021),

<https://www.justice.gov/asp/page/file/1404826/download> (“June Memo”). “A-B- I broadly stated

that ‘victims of private criminal activity’--such as domestic violence or gang violence--will not qualify for asylum except perhaps in ‘exceptional circumstances.’ 27 I&N Dec. at 317.” *Id.*

Attorney General Garland’s memo came in response to President Biden’s Executive Order No. 14010, which directed the Attorney General and DHS Secretary to “promulgate joint regulations, consistent with applicable law, addressing the circumstances in which a person should be considered a member of a ‘particular social group,’ as that term is used in 8 U.S.C. 1101(a)(42)(A), as derived from the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.” Executive Order 14010, *Creating a Comprehensive Regional Framework To Address the Causes of Migration, To Manage Migration Throughout North and Central America, and To Provide Safe and Orderly Processing of Asylum Seekers at the United States Border*, 86 Fed. Reg. 8267 (Feb. 2, 2021), available at

<https://www.federalregister.gov/documents/2021/02/05/2021-02561/creating-a-comprehensive-regional-framework-toaddress-the-causes-of-migration-to-manage-migration>.

The June memo explains that Attorney General Garland is “vacating L-E-A- II, A-B- I, and A-B- II to return the law to its preexisting status pending the rulemaking process, which will allow these complex and important questions to be resolved with the benefit of full public comment. When the final rule is promulgated, it will govern these issues going forward.” DOJ, JUNE MEMO at 1.

As a result of Attorney General Garland’s memo, immigration judges once again have the authority to grant asylum to individuals based on threats of domestic abuse or violence from drug gangs.

a. Victims of Domestic Violence

In lieu of Attorney General Garland’s memo, “[p]ending rulemaking, adjudicators are directed to follow pre-A-B- I precedent, including *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA

2014), which had been overruled by the Attorney General in *A-B- I.*” USCIS, NEXUS - PARTICULAR SOCIAL GROUP TRAINING MODULE at 9.

In *Matter of A-R-C-G-*, the issue before the BIA was “whether domestic violence can, in some instances, form the basis for a claim of asylum.” *Matter of A-R-C-G-*, 26 I&N Dec. 388, 390 (BIA 2014). The asylum applicant married at 17 and suffered physical and sexual abuse by her husband. The BIA held: “[d]epending on the facts and evidence in an individual case, ‘married women in Guatemala who are unable to leave their relationship’ can constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal under sections 208(a) and 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a) and 1231(b)(3) (2012).” USDOJ, BIA PRECEDENT CHART AI-CA, <https://www.justice.gov/eoir/bia-precedent-chart-ai-ca> (last updated July 21, 2020).

The BIA concluded that the proposed group -- articulated as “married women in Guatemala who are unable to leave their relationship” -- satisfied the three PSG elements. “It was immutable because it involved gender and a marital status that the applicant could not change...[T]he group was defined with particularity, as the terms ‘married,’ ‘women,’ and ‘unable to leave the relationship’ have commonly accepted definitions within Guatemalan society. [] [E]vidence of social distinction for women in marriages they cannot leave would include ‘whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors.’” USCIS, NEXUS - PARTICULAR SOCIAL GROUP TRAINING MODULE at 30.

In a separate case, *Matter of L-R-*, which USCIS said “adjudicators also should follow” pending rulemaking, DHS’s brief “noted that the groups of women unable to leave a domestic relationship or women who are viewed as property by virtue of their positions within a domestic

relationship could be cognizable particular social groups.” [DHS’s Supplemental Brief in Matter of L-R-, April 13, 2009](#); USCIS, NEXUS - PARTICULAR SOCIAL GROUP TRAINING MODULE at 30.

b. Victims of Gang Violence

In *Matter of S-E-G-*, the BIA rejected a proposed PSG defined as “Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities,” because it lacked “well-defined boundaries” that make a group particular and, therefore, lacked social visibility. [Matter of S-E-G-, 24 I&N Dec. 579 \(BIA 2008\)](#).

Likewise, in *Matter of E-A-G-*, the BIA held that the applicant, “a young Honduran male, failed to establish that he was a member of a particular social group of ‘persons resistant to gang membership,’ as the evidence failed to establish that members of Honduran society, or even gang members themselves, would perceive those opposed to gang membership as members of a social group.” [Matter of E-A-G-, 24 I&N Dec. 591, 594-95 \(BIA 2008\)](#).

In *Matter of M-E-V-G-*, a Honduran gang “threatened to kill [the applicant] if he did not join the gang.” [Matter of M-E-V-G-, 26 I&N Dec. 227, 228 \(BIA 2014\)](#). The applicant claimed that he was persecuted ““on account of his membership in a particular social group, namely Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs.” *Id.* Though the case was remanded for further fact-finding, the BIA held that their prior “holdings in *Matter of S-E-G-* and *Matter of E-A-G-* should not be read as a blanket rejection of all factual scenarios involving gangs.” *Id.* at 251.

Following the BIA’s decision in *M-E-V-G-*, the Ninth Circuit, in *Pirir-Boc v. Holder*, held that a group characterized as individuals “taking concrete steps to oppose gang membership and gang authority” may be cognizable. [Pirir-Boc v. Holder, 750 F.3d 1077, 1084 \(9th Cir. 2014\)](#).

In the now-vacated *Matter of A-B-*, then-Attorney General Sessions held: “Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.” [*Matter of A-B-*, 27 I&N Dec. 316 \(A.G. 2018\) \(A-B-I\)](#).

IV. CONCLUSION

An asylum applicant must satisfy the three elements promulgated by the BIA in *Matter of M-E-V-G-* to have a successful asylum claim. Pursuant to Attorney General Garland’s June memo, claims by aliens pertaining to domestic violence or gang violence can qualify for asylum.