



Essential Elements of Successful Asylum Practice

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I. Asylum Framework

The framework for international protection in the United States is governed by three major provisions of statutory law. First is Section 101(a)(42) of the INA, which sets forth the definition of refugee. Second is the 1980 Refugee Act, which established asylum and refugee classification as a separate immigration status in U.S. immigration law. Third, and finally, Sections 207 to 208, as well as 241 of the INA cover both the process and eligibility requirements for seeking asylum and a subsidiary form of protection – withholding of removal.

INA § 101(a)(42)

“The term “refugee” means (A) 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, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person’s nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term “refugee” does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well founded fear of persecution on account of political opinion.”

Persons who meet this definition and who are physically present within the United States or at a point of entry may apply for asylum, either affirmatively before the Department of Homeland Security or defensively before the Department of Justice, pursuant to INA § 208, while persons not yet within the United States may be admitted if recognized as refugees through the Department of Homeland Security’s overseas processing, pursuant to INA § 207. This manual focuses on the application of refugee protection in the United States and thus focuses on INA §§ 208 and 241.

INA § 208

“(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States

(whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

(2) Exceptions

(A) Safe third country

Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.

(B) Time limit

Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

(C) Previous asylum applications

Subject to subparagraph (D), paragraph (1) shall not apply to an alien if the alien has previously applied for asylum and had such application denied.

(D) Changed circumstances

An application for asylum of an alien may be considered, notwithstanding subparagraphs (B) and (C), if the alien demonstrates to the satisfaction of the Attorney General either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing an application within the period specified in subparagraph (B).

(E) Applicability

Subparagraphs (A) and (B) shall not apply to an unaccompanied alien child (as defined in section 279(g) of title 6).

(3) Limitation on judicial review

No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2).

(b) Conditions for granting asylum

(1) In general

(A) Eligibility

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within

the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

(2) Exceptions

(A) In general Paragraph (1) shall not apply to an alien if the Attorney General determines that—

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) there are serious reasons for believing that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States;

(iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States;

(v) the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States; or

(vi) the alien was firmly resettled in another country prior to arriving in the United States.

(B) Special rules

(i) Conviction of aggravated felony

For purposes of clause (ii) of subparagraph (A), an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.

(ii) Offenses

The Attorney General may designate by regulation offenses that will be considered to be a crime described in clause (ii) or (iii) of subparagraph (A).

(C) Additional limitations

The Attorney General may by regulation establish additional limitations and conditions, consistent with this section, under which an alien shall be ineligible for asylum under paragraph (1).

(D) No judicial review

There shall be no judicial review of a determination of the Attorney General under subparagraph (A)(v).

(3) Treatment of spouse and children

(A) In general

A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under this subsection may, if not otherwise eligible for asylum under this section, be granted the same status as the alien if accompanying, or following to join, such alien.

(B) Continued classification of certain aliens as children

An unmarried alien who seeks to accompany, or follow to join, a parent granted asylum under this subsection, and who was under 21 years of age on the date on which such parent applied for asylum under this section, shall continue to be classified as a child for purposes of this paragraph and section 1159(b)(3) of this title, if the alien attained 21 years of age after such application was filed but while it was pending.

(C) Initial jurisdiction

An asylum officer (as defined in section 1225(b)(1)(E) of this title) shall have initial jurisdiction over any asylum application filed by an unaccompanied alien child (as defined in section 279(g) of title 6), regardless of whether filed in accordance with this section or section 1225(b) of this title.

(c) Asylum status

(1) In general. In the case of an alien granted asylum under subsection (b), the Attorney General—

(A) shall not remove or return the alien to the alien's country of nationality or, in the case of a person having no nationality, the country of the alien's last habitual residence;

(B) shall authorize the alien to engage in employment in the United States and provide the alien with appropriate endorsement of that authorization; and

(C) may allow the alien to travel abroad with the prior consent of the Attorney General.

(2) Termination of asylum. Asylum granted under subsection (b) does not convey a right to remain permanently in the United States, and may be terminated if the Attorney General determines that—

(A) the alien no longer meets the conditions described in subsection (b)(1) owing

to a fundamental change in circumstances;

(B) the alien meets a condition described in subsection (b)(2);

(C) the alien may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality or, in the case of an alien having no nationality, the country of the alien's last habitual residence) in which the alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien is eligible to receive asylum or equivalent temporary protection;

(D) the alien has voluntarily availed himself or herself of the protection of the alien's country of nationality or, in the case of an alien having no nationality, the alien's country of last habitual residence, by returning to such country with permanent resident status or the reasonable possibility of obtaining such status with the same rights and obligations pertaining to other permanent residents of that country; or

(E) the alien has acquired a new nationality and enjoys the protection of the country of his or her new nationality.

(3) Removal when asylum is terminated

An alien described in paragraph (2) is subject to any applicable grounds of inadmissibility or deportability under section [1] 1182(a) and 1227(a) of this title, and the alien's removal or return shall be directed by the Attorney General in accordance with sections 1229a and 1231 of this title.

(d) Asylum procedure

(1) Applications

The Attorney General shall establish a procedure for the consideration of asylum applications filed under subsection (a). The Attorney General may require applicants to submit fingerprints and a photograph at such time and in such manner to be determined by regulation by the Attorney General.

(2) Employment

An applicant for asylum is not entitled to employment authorization, but such authorization may be provided under regulation by the Attorney General. An applicant who is not otherwise eligible for employment authorization shall not be granted such authorization prior to 180 days after the date of filing of the application for asylum.

(3) Fees

The Attorney General may impose fees for the consideration of an application for asylum, for employment authorization under this section, and for adjustment of status under section 1159(b) of this title. Such fees shall not exceed the Attorney General's costs in adjudicating the applications. The Attorney General may provide for the assessment and payment of such fees over a period of time or by installments. Nothing in this paragraph shall be construed to require the Attorney General to charge fees for adjudication services provided to asylum applicants, or to limit the authority of the Attorney General to set adjudication and naturalization fees in accordance with section 1356(m) of this title.

(4) Notice of privilege of counsel and consequences of frivolous application. At the time of filing an application for asylum, the Attorney General shall—

(A) advise the alien of the privilege of being represented by counsel and of the consequences, under paragraph (6), of knowingly filing a frivolous application for asylum; and

(B) provide the alien a list of persons (updated not less often than quarterly) who have indicated their availability to represent aliens in asylum proceedings on a pro bono basis.

(5) Consideration of asylum applications

(A) Procedures. The procedure established under paragraph (1) shall provide that—

(i) asylum cannot be granted until the identity of the applicant has been checked against all appropriate records or databases maintained by the Attorney General and by the Secretary of State, including the Automated Visa Lookout System, to determine any grounds on which the alien may be inadmissible to or deportable from the United States, or ineligible to apply for or be granted asylum;

(ii) in the absence of exceptional circumstances, the initial interview or hearing on the asylum application shall commence not later than 45 days after the date an application is filed;

(iii) in the absence of exceptional circumstances, final administrative adjudication of the asylum application, not including administrative appeal, shall be completed within 180 days after the date an application is filed;

(iv) any administrative appeal shall be filed within 30 days of a decision granting or denying asylum, or within 30 days of the completion of removal proceedings before an immigration judge under *section 1229a of this title*, whichever is later; and

(v) in the case of an applicant for asylum who fails without prior authorization or in the absence of exceptional circumstances to appear for an interview or hearing, including a hearing under *section 1229a of this title*, the application may be dismissed or the applicant may be otherwise sanctioned for such failure.

(B) Additional regulatory conditions

The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum not inconsistent with this chapter.

(6) Frivolous applications

If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

(7) No private right of action

Nothing in this subsection shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person.

(e) Commonwealth of the Northern Mariana Islands

The provisions of this section and *section 1159(b) of this title* shall apply to persons physically present in the Commonwealth of the Northern Mariana Islands or arriving in the Commonwealth (whether or not at a designated port of arrival and including persons who are brought to the Commonwealth after having been interdicted in international or United States waters) only on or after January 1, 2014.”

INA § 241(b)(3)

“Restriction on removal to a country where alien's life or freedom would be threatened-

(A) In general.-Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

(B) Exception.-Subparagraph (A) does not apply to an alien deportable under section 237(a)(4)(D) or if the Attorney General decides that-

(i) the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

(ii) the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;

(iii) there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States; or

(iv) there are reasonable grounds to believe that the alien is a danger to the security of the United States.

(C) SUSTAINING BURDEN OF PROOF; CREDIBILITY DETERMINATIONS- In determining whether an alien has demonstrated that the alien's life or freedom would be threatened for a reason described in subparagraph (A), the trier of fact shall determine whether the alien has sustained the alien's burden of proof, and shall make credibility determinations, in the manner described in clauses (ii) and (iii) of section 208(b)(1)(B) .

For purposes of clause (ii), an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime. For purposes of clause (iv), an alien who is described in section 237(a)(4)(B) shall be considered to be an alien with respect to whom there are reasonable grounds for regarding as a danger to the security of the United States.”

II. Other Statutory Eligibility

Statutory eligibility to apply for asylum, as described at INA § 208 and the relevant implementing regulations, depends among other things on the timely filing of an application within one year of entry into the United States. Late filing, or other inadmissibility due to criminal history, past affiliations with groups considered to be engaged in “terrorist activity,” and

other grounds, renders an individual ineligible for asylum, but preserves their ability to apply for withholding of removal. Notably, asylum is a discretionary form of protection that may be granted if the DHS and/or Immigration Judge consider that a statutorily eligible individual warrants a favorable exercise of discretion. By contrast, withholding of removal is mandatory where the individual demonstrates statutory eligibility. Another important difference between the two forms of protection is the standard of proof: a grant of asylum requires a showing of a “well-founded fear”, or at a ten percent chance that persecution will occur, whereas withholding of removal requires an applicant to show that the harm feared is “more likely than not” to occur. Thus, the substantive requirements for demonstrating prima facie eligibility for asylum and withholding of removal are the same, despite the differing standards of proof and the bases for statutory ineligibility. These core elements are:

- (1) Fear of Persecution
- (2) Well-Foundedness of Fear
- (3) Nexus to a Protected Ground
- (4) Inability to Return to Home Country

a. Fear of Persecution

Within the statutory definition of a refugee at INA § 101(a)(42)(A), Congress has explicitly specified that “a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.”

Beyond these express examples, however, claims for recognition as a refugee and asylum or withholding protection are considered on a case-by-case basis to determine whether the particular applicant has suffered or is sufficiently likely to suffer a type of harm that is serious enough to be considered persecution.

The statute does not define persecution, although various Circuit Courts of Appeals have provided some guidance. The Seventh Circuit defined it as “punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.” *Mitev v. INS*, 67 F.3d 1325, 1300 (7th Cir. 1995). For its part, the Ninth Circuit has defined that persecution is “an extreme concept that does not include every sort of treatment our society regards as offensive.” *Ghaly v. INS*, 58 F. 3d 1425, 1431 (9th Cir. 1995). However, it specified that “discrimination can, in extraordinary cases, be so severe as to constitute ‘persecution’.” *Id.*

The most practical definition was provided by Judge Posner in *Osaghae v. INS*, 942 F.2d. 1160 (7th Cir. 1991), when he stated: “‘Persecution’ means, in immigration law, punishment for political, religious or other reasons our country does not recognize as legitimate.”

The level of harm required to constitute persecution is reduced in children's cases. According to the UNHCR and U.S. Guidelines, and as upheld by several U.S. Courts of Appeals, "[t]he harm a child fears or has suffered . . . may be relatively less than that of an adult and still qualify as persecution." U.S. Guidelines at 19; UNHCR 2009 Guidelines at ¶ 10; see also Hernandez-Ortiz, 496 F.3d 1042 (9th Cir. 2007); Jorge-Tzoc v. Gonzales, 435 F.3d 146, 150 (2d Cir. 2006); Liu v. Ashcroft, 380 F.3d 307, 314 (7th Cir. 2004); Abay v. Ashcroft, 369 F.3d 634, 640 (6th Cir. 2004) The applicable question is whether the harmful act(s) constitute persecution when considered from the perspective of a child. See, e.g., Jorge-Tzoc v. Gonzales, 435 F.3d 146, 150 (2d Cir. 2006). This is the case even if the applicant is no longer a child at the time of applying for asylum; the age of the applicant at the time the persecution occurred is what matters. Whether harm suffered or feared by the child constitutes persecution should be assessed with regard to the "individual circumstances of the child," including age, developmental stage, vulnerability, psychological factors, for example, inappropriate sexual touching, not involving rape, of an eight-year-old girl should rise to the level of persecution given her young age and any lasting psychological impact, even though such acts might not constitute persecution in the case of an adult. See UNHCR 2009 Guidelines at ¶ 15–16.

Generally, asylum claimants are required to demonstrate that the persecution they fear would be perpetrated by the government of their home country. See e.g. *Tagaga v. INS*, 217 F.3d. 646 (9th Cir. 2000), *INS v. Elias Zacarias, Chen v. Gonzales* 490 F.3d. 180 (2nd Cir. 2007). When a state agent is the agent of persecution, the analysis will be clear. In the case of a uniform national policy, such as that of China's controversial One Child Policy, the Board has previously found generalized evidence of mandatory policies to be insufficient to demonstrate asylum eligibility. *Matter of Cheng*, 20 I&N Dec. 38 (BIA 1989). This was resolved, however by a Congressional effort to produce the statutory amendment to the refugee definition cited at the beginning of this section. This has been widely understood as a reflection of Congressional intent that uniform national policies of this nature not be considered beyond the reach of asylum protection.

A more acute area of challenge for asylum applicants is the phenomenon of non-governmental actors. While persecution typically requires government involvement, there are two major exceptions to this rule. These are 1) when the home government is unwilling to take action stem persecution by private parties and 2) when the home government is unable to take such action. The most notorious instance in which an asylum claim was heard due to a government unwilling to take action against a prevailing social norm was in the *Kasinga* case that has been referenced earlier. The refusal of the government to take any action against the widespread custom of female genital mutilation constituted sufficient basis for the Board to find an exception to the non-governmental nature of the practice.

Unwillingness or inability to act by the government, specifically the state police fore forces was central to the cases *Matter of O-Z and I-Z* 22 I&N 23 (BIA 1998) as well as *Singh v. INS* 94 F.3d. 1353 (9th Cir. 1996). In *Matter of O-Z and I-Z*, the police's ignorance, refusal or simple inability to aid a Jewish man who had been subjected to numerous attacks by anti-Semitic groups was clear enough grounds of religious violence to constitute persecution. Similarly, in *Singh v. INS*, the Ninth Circuit asserted that the ubiquitous acts of violence by Native Fijians against Indians residing in Fiji was tantamount to persecution as the government seemed either unwilling or wholly incapable of maintaining order or even a sufficient police presence.

b. Well-Foundedness of Fear

As with persecution, “well-founded fear” is not defined within the statute. The Supreme Court has held that an applicant for withholding removal under Section 241 must establish a there is a clear probability that he or she would be singled out for persecution, thus requiring proof that the likelihood of harm is more than fifty percent. In *INS v. Cardoza-Fonseca*, the Supreme Court held that “well-founded fear” in asylum cases is more generous than the clear probability standard that governs restriction on removal. “There is obviously some ambiguity in a term like well-founded fear, which can only be given concrete meaning through a process of case-by-case adjudication.” See 480 U.S. 421(1987). Following *Cardoza-Fonseca*, it is generally understood that a ten percent probability is sufficient.

A well-founded fear of persecution must be both subjectively genuine and objectively reasonable. See *Cardoza-Fonseca*, 480 U.S. at 430-31. To demonstrate a subjective fear of persecution, an applicant must demonstrate a genuine apprehension of awareness of the risk of persecution. See *Matter of Acosta*, 19 I&N Dec. at 221. The objective component requires a showing by credible, direct, and specific evidence in the record that the alien’s fear of persecution is reasonable. See *DeValle v. INS*, 901 F.2d 787, 790 (9th Cir. 1990).

To meet the objective requirement, the applicant must show that:

- The applicant possess a characteristic or belief that a persecutor seeks to overcome in others by means of punishment
- The persecutor is already aware, or could become aware that the applicant possesses this belief or characteristic
- The persecutor has the capability of punishing the applicant
- The persecutor has the inclination to punish the applicant.

Matter of Mogharrabi, 19 I. & N. Dec. 439, 446 (BIA 1987). It is not necessary for the applicant to show that he or she has actually been persecuted; the applicant must only show that he or she is similarly situated to persons being persecuted.

The following approach has been codified in the regulations to prove well-founded fear:

- (1) there is a pattern or practice in the applicant’s country of origin to persecute groups of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group or political opinion
- (2) the applicant is included in, and identifies with such groups such that his or her fear is reasonable.

8 C.F.R. § 1208.13(b)(2)(iii). If the applicant establishes past persecution, there is a rebuttable presumption that she has a well-founded fear of persecution. 8 C.F.R. § 1208.13(b)(1). The DHS may rebut the presumption of well-founded fear by proving that circumstances in the home country have fundamentally changed or that there is a reasonable internal relocation alternative available that eliminates the individualized fear of persecution. 8 C.F.R. §§ 1208.13(b)(1)(i)(A)-(B). Notably, however, if the applicant has suffered past persecution on one ground, it will not establish a presumption of fear on a different ground under a new regime in one's home country. *Matter of N-M-A*, 22 I. & N. Dec. 312 (BIA 1998).

c. Nexus to a Protected Ground

An application for asylum will be prima facie eligible, only if the persecution is based on one of the five statutorily recognized protected grounds: race, religion, nationality, membership in a particular social group or political opinion. The REAL ID Act of 2005 requires the applicant for asylum to establish that a protected ground was or will be at least one central reason for persecution. The Ninth Circuit has interpreted a "central reason" as "a reason of primary importance to the persecutors, one that is essential to their decision to act." *Parussimova v. Mukasey*, 533 F.3d at 1134 (9th Cir. 2008). The fact that persecutors have a personal or criminal motive does not preclude nexus to a protected ground. *Tapia-Madrigal v. Holder*, 2013 WL 1983882 (9th Cir. May 15, 2013).

Case law provides more guidance on the parameters of the protected grounds. The persecution must be of an individualized nature regarding an immutable characteristic that makes you part of a particular social group so targeted for violence and oppression (*Matter of Kasinga* 21 I&N Dec. 357 (BIA 1996)). While a political opinion is not necessarily immutable, persecution for a political belief or the refusal to support a belief (for reasons other than the fear of harm) are nonetheless valid grounds for asylum (*INS v. Elias Zacarias* (302 U.S. 478 (1992), *INS v. Cardozo-Fonseca*, 480 U.S. 421 (1987))

Race

In order to meet the requirement of persecution on the basis of race, the applicant must be able to show that the government, of the applicant's country of origin, has in some manner participated in conduct that would cause the applicant to fear persecution because of his/her race.

This requirement can also be met by a showing that the government allowed others to engage in threatening actions on the basis of race. Although generally a rare ground for a successful application for asylum, in *Tagaga v. INS*, 217 F.3d. 646 (9th Cir. 2000), the Ninth Circuit further extended racial discrimination-based protection for refugees. Tagaga was a Fijian colonel who sought asylum because of his refusal to persecute the Indo-Fijian minority in his home country. Over the opposition and initial refusal of the INS, the Ninth Circuit found that this constituted valid grounds to seek asylum on the basis of race.

Religion

Applicants must show that they fear persecution because of their religious beliefs. However, this requirement includes several things, for example it could also be met if there is a restriction on a religious practice. Guidance from the Seventh Circuit is useful here: “There are degrees of persecution. If a person is forbidden to practice his religion, the fact that he is not imprisoned, tortured, or banished and is even allowed to attend school, does not mean that he is not a victim of religious persecution. If a government as part of an official campaign against some religious sect closed all the sect’s schools (but no other private schools) and forced their pupils to attend public school, this would be, we should think, although we need not decide, a form of religious persecution.” *Bucur v. INS*, 109 F.3d 399, 405 (7th Cir. 1997).

Nationality

In order for an applicant to be able to successfully prove that they have a fear of persecution based on nationality, they must show that the government has participated in hostile conduct against members of a certain nationality. It is not sufficient that there is violence against members of a nationality. The government must have participated in that violence. Discrimination based on nationality will not necessarily rise to the level of persecution, as discussed above.

Membership in a Particular Social Group

There have been many different definitions for a social group. The BIA has defined it as “persons all whom share a common, immutable characteristic. 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 military leadership or land ownership.” For its part, the Seventh Circuit recognized as a social group, “discrete, homogenous groups targeted for persecution because of assumed disloyalty to the regime.” *Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992). The First Circuit states that it is, “a characteristic that either is beyond the power of an individual to change or that it ought not be required to be changed.” *Ananeh-Firempong v. INS*, 766 F.2d 621, 626, (1st Cir. 1985).

A social group will rarely be found when it is applicable to a large section of the nation. For example, the Board of Immigration Appeals has frequently denied asylum application based on violence in El Salvador directed against the social group of working-class males of military age who had not demonstrated support for the government.

Children are considered a social group under immigration law, and their youth may be helpful in the application process. However, case law in this area has been mixed. For example, in *Matter of Kasinga*, the BIA found that the child had a well-founded fear of persecution because of the threat of female genital mutilation. The social group was found to be, young women of the tribe who had not undergone the mutilation and opposed the practice. However, in *Matter of Luna-Lorezano*, the court found that there was an identifiable social group of underage males forcibly recruited and illegally placed into the military who have been subjected to physical, social and emotional abuse.

Political Opinion

Persecution because of political opinion has been defined as, “the particular belief or characteristic a persecutor seeks to overcome in an individual is his political opinion. Thus [it] refers not to the ultimate political end that may be served by persecution, but to the belief held by an individual that causes him to be the object of persecution.”

Furthermore, political opinion has been considered valid grounds for obtaining asylum even when it is not the beliefs of the petitioner, but those of a family member, that make them likely targets for persecution. In *INS v. Cardozo-Fonseca*, the Supreme Court held that although the petitioner was not a political activist in her home country of Nicaragua, the knowledge that her brother was an activist would make her a target for the Sandinistas. As such, she could establish a well-founded fear of persecution on these grounds.

In addition to persecution for a particular political opinion or belief, case law has also asserted that political neutrality or refusal to follow a political belief can also be grounds for seeking asylum if it will lead or has led to similar persecution. However, the major ruling in this area, *INS v. Elias Zacarias*, 502 U.S. 478 (1992), made particular effort to note that political neutrality will not be considered viable grounds for persecution if it is being used as a means to avoid danger.

d. Inability to Return to Home Country

An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant’s country of nationality or, if stateless, another part of the applicant’s country of last habitual residence, if under all circumstances it would be reasonable to expect the applicant to do so. 8 C.F.R. § 1208.13(b)(2)(ii).

III. Recent Case-law: Particular Social Group

On February 7, 2014, the Board of Immigration Appeals (BIA) issued two precedential decisions pertaining to the “particular social group” ground for asylum. Both cases – Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014) and Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014) – were presented by Central American applicants articulating their fear of gangs in their respective countries. Generally, such gang-based asylum cases have fared poorly in asylum offices and immigration courts nationwide, particularly following a pair of 2008 BIA decisions announcing additional requirements in order for a particular social group to be legally cognizable. While case law prior to 2008 required only that a particular social group be based on a common immutable characteristic, the publication of Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008) and Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008) required applicants to demonstrate the “particularity” and “social visibility” of their claimed social groups. These further requirements, as interpreted by the BIA, led to the denial of many social group claims, including a large number of gang-based cases, on grounds that the applicant was not part of a sufficiently well-defined group within society or that the group in which he claimed membership was not generally recognizable as a group by others in the community. The imposition of these additional requirements was met with criticism from much of the advocacy community as well as from some circuit courts of appeal.

Indeed, the BIA issued its decision in Matter of M-E-V-G- following a second remand from the Third Circuit directing the BIA to provide a principled reason for the adoption of the new requirements.

Through its decisions in Matter of W-G-R- and Matter of M-E-V-G-, the BIA purports to have provided its reasoning and to have clarified the requirements for a particular social group, including specifically the contentious requirement of “social visibility.” The BIA explains that a particular social group need not have literal, ocular visibility, but rather must be recognized within the relevant society as a distinct entity. Consequently, the BIA renamed the requirement “social distinction,” directing that in order to establish a particular social group, the record must contain evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group. Thus, according to the BIA, following these recent decisions, an applicant for asylum or withholding of removal seeking relief based on his or her 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.

Notably, in Matter of W-G-R-, the BIA held that “former members of the Mara 18 gang in El Salvador who have renounced their gang members” do not constitute a particular social group for the lack of particularity. Since these 2014 cases, the BIA has continued to reject claims of resistance to gang recruitment, applying its ruling in S-E-G- that Salvadoran youth subjected to recruitment by the MS 13 who have rejected or resisted membership out of personal, moral and religious opposition do not constitute a particular social group for lack of visibility and particularity. The Ninth Circuit, in *Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014) accepted the BIA’s 2014 decisions as consistent with its own interpretation of the relevant standards in *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013). In *Henriquez*, the Ninth Circuit held that witnesses who had testified in open court against murderous gang members could be considered members of particular social groups, clarifying the social visibility requires that groups be “understood by others to constitute social groups” while particularity demands that a group “can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.” In *Pirir*, the Ninth Circuit noted the qualification that the persecutors’ perception is not itself enough to make a group socially distinct, and persecutory conduct alone cannot define the group. It explained that the persecutor’s perspective is one factor among others to be considered in determining a group’s social visibility. In particular, the panel at the Ninth Circuit noted that the distinction and particularity of a proposed group will vary according to the society in which the respondent claims to have suffered persecution or fear persecution. Accordingly, each claim must be assessed based on the relevant social context.

According to the National Immigrant Justice Center's Practice Advisory, issued following the publication of these two cases:

“The BIA claimed its intention in issuing the two decisions was to “provide guidance to courts and those seeking asylum,” M-E-V-G-, 26 I&N Dec. at 234, citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). The decisions, however, suffer from the same errors as S-E-G- and E-A-G-, and are made worse by the fact that M-E-V-

G- and *W-G-R-* seek to rationalize a legal test that is simply irreconcilable with existing domestic and international asylum law. These errors continued in the BIA's August 2014 decision, *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), in which it found that the group of "married women in Guatemala who are unable to leave their relationship" was socially distinct and sufficiently particular. While this decision provided much-needed recognition that domestic violence survivors can be eligible for asylum, the BIA's particular social group analysis remained inconsistent with prior BIA case law and extremely problematic.

According to the BIA, a PSG cannot be defined by language commonly used in society (such as "wealth" or "young") if the language would not define the group with precision. *W-G-R-*, 26 I&N Dec. at 221-22. For example, "young" does not say how young; "wealthy" does not say how wealthy. Even "former gang member" does not pass the particularity test – says the BIA – because a variety of people from different backgrounds and levels of gang involvement could be former gang members. *Id.* However, the BIA simultaneously requires the definition to capture a concept which is "distinct" in the eyes of the society from whence the claim arises. That is, if the group is defined as "18 to 25 year olds," the applicant would need to demonstrate that society views that group as distinct from, e.g., 26 year olds. Thus, the particularity requirement, as defined in *M-E-V-G-* and *W-G-R-*, effectively precludes the use of common parlance labels to describe a PSG, even as the social distinction test requires that a PSG be limited by parameters a society would recognize. Taken together, it's hard to see how any PSG-based claim can succeed, unless the BIA wants it to succeed.

In fact, after the BIA announced its social visibility and particularity requirements in 2008, it did not recognize a new particular social group for six years. In August 2014, the BIA issued the first published decision recognizing a particular social group since it created the social visibility and particularity requirements in the case of a woman who claimed asylum based on domestic violence. *A-R-C-G-*, 26 I&N Dec. 388. The BIA's new decision demonstrates how a group's viability now depends on the BIA's arbitrary policy determinations regarding the categories of individuals it believes deserve asylum, rather than the application of the BIA's own particular social group test. In *W-G-R-*, the BIA held that the group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" was not defined with sufficient particularity because it was "too diffuse" and "broad" since it could include persons of any age, sex, or background. 26 I&N Dec. at 221. In *A-R-C-G-*, the BIA found that the group of "married women in Guatemala who are unable to leave their relationship" was sufficiently particular even though this group, as in *W-G-R-*, could also include persons of any age or background, including women who had been married for 20 years or only two weeks. 26 I&N Dec. at 393. Thus, the BIA's test alone cannot purport to explain why one group allegedly met the test and another did not.

In *M-E-V-G-*, the BIA clarified that when determining whether a group is socially distinct, it is society's perspective – not the persecutor's – that is relevant. 26 I&N Dec. at 242. The BIA reasons that considering the persecutor's views would conflate the fact of the persecution with the reasons for it. *Id.*

As noted above, before *M-E-V-G-* and *W-G-R-*, the Seventh and Third Circuits had rejected the BIA's social visibility (now distinction) requirement, the Third Circuit had rejected the particularity requirement, and the Seventh and Ninth Circuits had issued decisions that appear to limit, if not reject, the particularity requirement.

For circuits that had already accepted the social visibility/distinction and/or particularity requirements, the BIA's decisions have a limited impact. However, even in those circuits, there may be slight differences in the interpretation and application of the BIA's decisions that conflict with *M-E-V-G-* and *W-G-R-*. For example, although *M-E-V-G-* determined that "the persecutors' perception is not itself enough to make a group socially distinct," *M-E-V-G-*, 26 I&N Dec. at 242, the Second Circuit has examined social visibility from the eyes of the persecutor. *See Ucelo- Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007) (deferring to the BIA's "social visibility" criterion with the understanding that a reasonable requirement of societal perception would protect groups "comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them *in the eyes of a persecutor*—or in the eyes of the outside world in general.") (emphasis added).

Likewise, even though the decisions do not purport to provide a new interpretation or clarification of "particularity," the BIA's determination in *W-G-R-* that a former membership-based PSG failed the particularity test may conflict with precedent in some circuits (not to mention, as described *supra*, with the BIA's own decisions in *C-A-* and *A-R-C-G-* regarding the homogeneity and diversity of group membership). For example, while the BIA rejected the former gang member PSG in *W-G-R-* as insufficiently particular, the Seventh Circuit explicitly found that the same PSG was "neither unspecific nor amorphous." *Benitez-Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009). Numerous other circuits have found that former-membership-based PSGs are viable under *Acosta*, although most of these decisions pre-date the social visibility/distinction and particularity requirements. *See e.g., Koudriachova v. Gonzales*, 490 F.3d 255, 263 (2d Cir. 2007) ("it is clear that a shared past experience, such as prior military leadership, can be the type of immutable characteristic that will characterize a particular social group. . . . There is no additional requirement that members of a group share an "element of 'cohesiveness' or homogeneity."); *Cruz-Navarro v. INS*, 232 F.3d 1024, 1029 (9th Cir. 2000) (explaining that former police or military officers may constitute a cognizable particular social group). The dicta in *W-G-R-* regarding former-membership-based PSGs and the particularity test provides a new reason for circuits to reexamine their position on the particularity test if they had previously found it reasonable, but had also recognized former-membership-based PSGs.

The BIA has a longstanding policy of following circuit precedent in any case arising within that circuit. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Where there is disagreement regarding an ambiguous statute, the BIA may invoke its authority to interpret the statute, and may in some cases decline to follow circuit precedent, even within that circuit. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). Under *Brand X* principles, it appears that the Courts of Appeals that have rejected social visibility/distinction may have to consider anew whether the BIA's

interpretation is reasonable. Because the BIA in *M-E-V-G-* and *W-G-R-* did not purport to clarify or issue a new interpretation of the particularity requirement, *Brand X* arguably does not require new analysis of particularity by circuits that previously issued decisions conflicting with the BIA's interpretation.

Significantly, since the BIA published *M-E-V-G-* and *W-G-R-*, the two circuits that most strongly criticized the social visibility/distinction and particularity tests – the Third and the Seventh – have yet to recognize the decisions as binding. In the year since the BIA issues *M-E-V-G-* and *W-G-R-*, the Seventh Circuit has published several decisions that have discussed the particular social group definition. See *Sibanda v. Holder*, 778 F.3d 676 (7th Cir. 2015); *R.R.D. v. Holder*, 746 F.3d 807 (7th Cir. 2014); *N.L.A. v. Holder*, 744 F.3d 425 (7th Cir. 2014). None of these decisions have referenced *M-E-V-G-* or *W-G-R-* and all have reaffirmed that the Seventh Circuit follows the *Acosta* definition of particular social group as established in *Cece*. Based on these decisions, it appears the Seventh Circuit does not believe the BIA decisions are binding on it.

The Third Circuit has not issued any precedential decisions that discuss the particular social group definition since the BIA published *M-E-V-G-* and *W-G-R-*. However, in an unpublished decision, *Sazo-Godinez v. Att'y Gen.*, No. 14-4832, 2015 WL 7274836 at *3 (3d Cir. 2015), the Third Circuit stated, “We have not yet decided whether the BIA's explanation of the term “particular social group” is sufficient to address the concerns we expressed in *Valdiviezo-Galdamez*.”

IV. Preparing a Strong Application for Relief

Preparing a strong application for relief on behalf of a Central American applicant for international protection requires more than simply filling out Form I-589 and printing out the latest Department of State Country Report on Human Rights Practices. A strong application will reflect a strong understanding of the facts, but also the applicable law, depending on the relevant Circuit Court of Appeals, as discussed below.

Indeed, the National Immigrant Justice Center advises:

1. Avoid creating PSGs with circular wording that include the persecution suffered as part of the PSG definition. A PSG can include the shared risk of harm as one of the characteristics defining the PSG, so long as it is not the only shared characteristic. See e.g., *C-A-*, 23 I&N Dec. 951; *Kante v. Holder*, 634 F.3d 321, 327 (6th Cir. 2011); *Rivera Barrientos v. Holder*, 658 F.3d 1222 (10th Cir. 2011). Many adjudicators, however, will reject a PSG on this basis, without conducting much analysis. Moreover, if the PSG for a past persecution claim references the past persecution suffered, the applicant will generally find it difficult to establish nexus, i.e. that she was persecuted on account of her membership in a PSG of people who have been persecuted. See e.g., *Lukwago v. Ashcroft*, 329 F.3d 157, (3d Cir. 2003) (“[T]he shared experience of enduring past persecution . . . does not support defining a “particular social group” for past persecution because the persecution must have been “on account of” a protected ground. . . . [T]he “particular social group” must have existed before the persecution began.”).

2. Keep in mind what “particularity” means in your circuit. As explained *supra*, the BIA has repeatedly contradicted itself when explaining particularity. At times, it has defined particularity as a requirement that a group be clearly defined, *S-E-G-*, 25 I&N Dec. at 584, while at other times, it has relied on “particularity” to reject PSGs that it believes include too broad or diverse a group of members, *W-G-R-*, 26 I&N Dec. at 221, even though *C-A-* has rejected homogeneity as a requirement for a PSG. 23 I&N Dec. at 956-57. Several circuits, however, have clearly rejected the requirement that a PSG be narrowly defined or made up of homogeneous members. *See Cece*, 733 F.3d at 674-75; *Henriquez- Rivas*, 707 F.3d at 1093-04; *Perdomo v. Holder*, 611 F.3d 662, 668 (9th Cir. 2010); *Gao v. Gonzales*, 440 F.3d 62, 67 (2d Cir. 2006); *vacated on other grounds sub nom.*, *Keisler v. Gao*, 552 U.S. 801 (2007). Nonetheless, adjudicators within these circuits still often express concern regarding the breadth and diversity of PSGs and may need to be reminded about circuit precedent and the conflicting BIA precedent.
3. A number of circuits have now rejected PSGs based on gang resistance. When defining a PSG based on gang-resistance, no matter the circuit, examine whether other, viable PSGs that involved resistance or opposition in a different context could be used to support the PSG (Kasinga, Escobar, etc). Keep in mind that in addition to establishing the viability of your PSG, you must also establish a nexus between the persecution suffered or feared and your PSG. While this may seem obvious, the BIA’s intense focus on the viability of PSGs has caused some attorneys to focus exclusively on finding a viable particular social group, while failing to connect that social group with evidence establishing a nexus to the persecution.
4. Affidavit and Testimony. If an adjudicator defers to the BIA’s social distinction requirement, attorneys must use their client’s affidavit and testimony to help establish that the proposed PSG is socially distinct. A client should provide examples of how her community viewed her group as a group. For example, in an asylum claim based on forced gang recruitment, the client’s affidavit and testimony should explain how the community viewed individuals who resisted recruitment. Descriptions of the way in which community members, including law enforcement, treated those pressured for recruitment differently from others in the community (perhaps by helping them escape from the gangs or ignoring their requests for assistance) can help establish the group’s “distinction.” Similarly, in a case involving forced marriage, the client’s affidavit and testimony should explain how the community viewed women who refused a marriage. Are they ostracized or punished within the society? In a domestic violence-based asylum claim, it may be useful in the affidavit and testimony to compare how the community responded to domestic violence as opposed to an assault by one man against another man. Showing that women who are harmed in the context of a relationship are treated differently than individuals harmed in other contexts can be useful to prove the group is socially distinct.
5. Expert Testimony. In *Oliva v. Lynch*, 807 F.3d 53, 58, 61 (4th Cir. 2015), the Fourth Circuit vacated the BIA’s decision and remanded the case because the BIA had failed to address evidence establishing that Oliva’s PSGs (“Salvadorans who are former members

of MS-13 and who left the gang, without its permission, for moral and religious reasons,” and “Salvadorans who were recruited to be members of MS-13 as children and who left the gang as minors, without its permission, for moral and religious reasons”) were socially distinct. The Court noted that the BIA should have considered evidence in the record regarding the group’s social distinction, such as “evidence of government-and-community-driven programs to help former gang members rehabilitate themselves” as well as “an affidavit from a community organization who stated that former gang members who leave the gang for religious reasons become seriously and visibly involved in churches.” To support the landowner-based PSGs and nexus in *Cordoba v. Holder*, 726 F.3d 1106, 1115-16 (9th Cir. 2013), the Ninth Circuit referenced country condition documents showing that the FARC targets wealthy landowners, a U.S. government report explaining that the FARC maintains archives of landowners to find victims for its extortion efforts, and expert testimony that noted the petitioner’s family had been established landowners in the region for decades.

As noted *supra*, in *M-E-V-G-* the BIA also provided a list of evidence that it believes could be used to establish that a group is socially distinct: “country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like.” *M-E-V-G-*, 26 I&N Dec. at 244. Similarly, in *A-R-C-G-*, the BIA provided examples of the type of evidence that could show the PSG of “married women in Guatemala who are unable to leave their relationship” was socially distinct, including “whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors.” 26 I&N Dec. at 394. The BIA further note that “the issue of social distinction will depend on the facts and evidence in each individual case,” and that such evidence includes documented country conditions, law enforcement statistics, expert witnesses, the respondent’s past experiences, and “other reliable and credible sources of information.” *Id* at 395.

All of these decisions reference expert testimony as crucial to establishing a viable PSG claim. Country condition experts have long been critical in asylum cases, but in light of the BIA’s new decisions, their importance has grown significantly. It is difficult to see how most PSGs could meet the social distinction test without the assistance of an expert witness. Therefore, whenever possible, attorneys representing clients with PSG-based claims should plan to provide an expert affidavit and in some cases, expert testimony to support their claim. Generally, country condition experts are most useful when they are truly experts, such as academics or professionals with substantial scholarly credentials, and when they are not overtly partisan. Individuals who are active in political or advocacy organizations with a pronounced point of view about a particular country may have their credentials as “experts” called into question by Immigration and Customs Enforcement (ICE) attorneys, asylum officers, and immigration judges.

Although generally it is not wise for an expert to make legal conclusions as to whether an individual meets the asylum elements, that rule does not apply to the social distinction requirement. Once a qualified expert is found, it will be important for the expert’s affidavit and testimony to specifically address the social distinction issue. Attorneys may

find it useful to review the evidentiary findings in *M-E-V-G-*, *W-G-R-*, and *A-R-C-G-* and ask the expert whether he or she can adopt similar language in the expert's affidavits. *See e.g.*, *M-E-V-G-*, 26 I&N Dec. at 246 (explaining that the group of young women of a certain tribe who had not been subjected to FGM was a socially distinct group based on objective evidence regarding the prevalence of FGM in the society and the expectation that women of the tribe would undergo FGM). In asylum claims arising out of countries in which civil strife or criminal violence is wide-spread, it will be particularly important that experts differentiate clients' PSGs from the rest of the population. *See id.* at 250-51; *W-G-R-*, 26 I&N Dec. at 222-23. Attorneys should also be sure to clarify that the question of whether the client fears persecution on account of her PSG membership (as opposed to random violence) is a separate question from whether the PSG is cognizable in the first place.

6. Briefing the issue. Because of the new BIA decisions, it is more important than ever that attorneys clearly separate the asylum elements in their briefs and when arguing their cases before the courts. Although the BIA in *M-E-V-G-* states that adjudicators must be sure to separate the assessment of whether the applicant has established a protected ground from the issue of nexus (the "on account of" prong), the rest of the BIA's analysis says otherwise. 26 I&N Dec at 242. As in *S-E-G-* and *E-A-G-*, the BIA's analysis of the PSGs in *M-E-V-G-* and *W-G-R-* frequently conflates the question of whether the PSG is cognizable with the question of whether the applicant was targeted on account of his PSG membership. *See e.g.*, *W-G-R-*, 26 I&N Dec. at 222 ("Other parts of the report also indicate that such discrimination and . . . harassment are directed at a broader swatch of people . . . even if they never had any affiliation with a gang. . . . This broader grouping suggests that former gang members are not considered to be a distinct group by Salvadorans.") Attorneys briefing PSG-based asylum claims must therefore clearly separate the PSG element from the nexus element in their briefs. Discussion of reasons why a client was targeted should remain within the nexus section of the brief, not the PSG section.
7. Merits Hearing. The merits hearing is generally the final opportunity the attorney will have to build the record for their client's asylum claim. It is therefore crucial that attorneys use this opportunity to elicit testimony from their clients that supports the PSG and nexus elements, and present the PSG test that they believe is binding in their circuit. However, due to the manner in which the BIA has attacked Central American gang-based asylum claims in its four decisions, many adjudicators may be reluctant to even consider the viability of a gang-based claim. Attorneys from certain parts of the United States have reported adjudicators stating that gang-based claims are no longer viable post-*M-E-V-G-/W-G-R-* (despite the BIA's requirement that claims be analyzed on a case-by-case basis). Other attorneys report that adjudicators have been hostile to Central American asylum claims, pressured clients to accept prosecutorial discretion or modify an asylum claim so it is not based on a PSG, and attempted to limit a line of questioning that they deemed irrelevant in light of the BIA's case law. When this occurs, attorneys must do their best to walk the fine line of showing deference to the court, while zealously advocating for their client by making the record necessary to establish the client's claim.

For additional information related to preparing an effective asylum application, please consult the following materials:

- [Basic Procedural Manual for Asylum Representation \(May 2016\)**](#) *Contains updated information regarding the fingerprint appointment process.*
- [Appendices to the Basic Procedural Manual for Asylum Representation](#)
- [Information for Attorneys Representing Detained Asylum Seekers](#)
- [EOIR Practice Manual](#)
- [Guidelines for Facilitating Pro Bono Legal Services](#)
- [Resources for Asylum Claims Based on Membership in a Particular Social Group](#)
- [Resources for Gender-Based Asylum Claims](#)