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BATTLEFIELD OF GENDERCIDE: FORCED MARRIAGES AND GENDER-BASED GROUNDS FOR ASYLUM AND RELATED RELIEF

by

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Nicholas Kristof and Sheryl WuDunn, in their book, *Half the Sky: Turning Oppression Into Opportunities for Women Worldwide*, claim that the paramount moral challenge in the 21st century "is the brutality inflicted on so many women and girls around the globe: sex trafficking, acid attacks, bride burnings and mass rape."[1] They point out that since women typically live longer than men, there are more females than males worldwide.[2] "Yet in places where girls have a deeply unequal status, they vanish."[3] This is because girls do not receive the same health care or food sustenance as do boys, and parents abort female fetuses. Based on estimates that between 60 and 107 million women have disappeared, Kristof and WuDunn make the chilling calculation that it "appears that more girls and women are now missing from the planet, precisely because they are female, than men were killed on the battlefield in all the wars of the 20th century."[4] The number of victims of this routine "gendercide" far exceeds the number of people who were slaughtered in all the genocides of the 20th century.[5]

Sweeping aside the silence of gendercide in recent years has been the systematic use of rape as a weapon of war. Amnesty International found that "rape and other forms of sexual violence in Darfur are being used as a weapon of war in order to humiliate, punish, control, inflict fear and displace women and their communities."[6] Mutilation frequently accompanies gang rapes "so as to leave a lasting and inerasable signal to others that the woman has been violated," according to

This Issue in Brief

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"Melanne Verveer, U.S. Ambassador-at-Large for Global Women's Issues.[7] The "rape capitol of the world" currently is in the eastern Congo, where in some areas three quarters of the women have been assaulted.[8] The phenomenon of "rape camps" is not confined to Africa but seen in Bosnia, Burma, Sri Lanka, and elsewhere. Such violence is viewed by military commanders as an effective weapon. It "destroys the fabric of societies from within," observed Verveer, "and does so more efficiently than do guns or bombs."[9]

Gendercide and the weapon of rape underscore the wide-spread nature of gender-based violence and its many forms. Another example is the estimated 12.3 million people who are engaged in forced labor, including sexual servitude. Fifty-six percent of all forced labor victims are women and girls.[10] The trafficking in people—predominately women and girls—is one of the five dominant expressions of violence against women; the other four are honor killings, forced abortion or sterilization, female genital mutilation (FGM), and domestic violence.

This *Briefing* reviews the response by the international community and the United States to prevent violence against women. It then highlights how the Immigration and Naturalization Service (INS), three separate Attorney Generals, the Board of Immigration Appeals, and the Department of Homeland Security (DHS) have grappled with the extent to which women fleeing gender-related violence should be provided refugee protection, if at all. It then focuses on one aspect of domestic violence—forced marriage—and outlines for practitioners the common factual situations, relevant case law, and legal argument on which to support an asylum claim based on forced marriage. The final portion of the *Briefing* is devoted to the law and practice of presenting a forced marriage asylum claim to an immigration court.

THE INTERNATIONAL EFFORTS TO STOP VIOLENCE AGAINST WOMEN

The international community responded to the use of rape as a weapon of war with the passage of a 2008 U.N. Security Council resolution. It found that "rape and other forms of sexual violence can constitute war crimes, crimes against humanity or a constitutive act with respect to genocide" and demanded the "immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians."[11] Designating rape as a war crime puts violators on notice that they could be taken to the International Criminal Court for prosecution and punishment. Women's rights groups and others hoped that the resolution would "strike a blow at the culture of impunity that surrounds sexual violence in conflict zones and allows rapists to walk without fear of punishment."[12] Other international efforts to address violence against women include:

- The *Convention on the Elimination of All Forms of Discrimination Against Women* (1979), the most comprehensive international human rights instrument for women, prohibiting actions by states which are discriminatory and requiring states to take affirmative steps to end discriminatory treatment of women.[13]
- The *Declaration on the Elimination of Violence Against Women*, adopted by the U.N. General Assembly Resolution (1993), recognizing violence against women as a violation of human rights and as an impediment to the enjoyment by women of other human rights.[14]
- The *Special Rapporteur on Violence Against Women*, including its causes and consequences, appointed by the United Nations Commissioner on Human Rights in 1994.[15]

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- The Convention on the Rights of the Child, adopted by the U.N. General Assembly in 1989 and entered into force in 1990.[16]
- The United Nations Secretary-General Ban Ki-moon's 2008 *UNiTE to End Violence against Women* campaign, a multi-year effort aimed at preventing and eliminating violence against women and girls in all parts of the world.[17]

The U.N. also established a variety of agencies and programs to further women's and children's rights and protections, including the Division for the Advancement of Women, the Children's Fund, the Development Fund for Women, and the Commission of the Status of Women.[18]

The Office of the U.N. High Commissioner on Refugees (UNHCR) added its important voice to the effort by placing violence against women squarely within the ambit of refugee protection. A groundbreaking 1993 report highlighted the extent to which rape and other forms of sexual violence against women and girls have been "employed as a method of persecution in systematic campaigns of terror and intimidation" against particular ethnic, cultural, or religious groups.[19] The report revealed that these refugees during their flight or following their arrival in countries where they were seeking asylum were sexually abused."[20] The report urged that pursuant to the refugee convention, signatory states adopt policies and establish practices to protect women and girls from sexual violence.[21] The UNHCR subsequently developed a series of recommendations and guidelines specific to asylum claims based on gender-related harm.[22]

UNITED STATES EFFORTS TO STOP VIOLENCE AGAINST WOMEN

The United States has sought to raise public awareness on issues around violence against women through a variety of public education and policy forums. The White House hosts a Counsel on Women and Girls, the State Department created the Office on Global Women's Issues, and in the U.S. Senate there is now a subcommittee of women's issues.

Legislation by the U.S. Congress was also enacted to fight against domestic violence. The Violence Against Women Act (VAWA), signed into law in 1994, was designed to end violence against women through criminal penalties, civil remedies, and federal grant assistance programs.[23] The VAWA included significant immigration-related legislation. It incorporated the establishment of:

- the T visa for victims of severe forms of trafficking and for individuals assisting in the prosecution of trafficking offenses
- the U visa for persons who have suffered substantial physical or mental abuse as a result of having been a victim of criminal activity
- self-petitioning for certain abused individuals, including suspension of deportation for battered spouses

The purpose of the VAWA provisions was to permit battered spouses to leave their abusers without fear of deportation or other immigration consequences.[24] The VAWA was amended with the "Battered Immigrant Women Protection Act of 2000" which enlarged the categories of battered aliens eligible to seek cancellation of removal.[25]

Congress provided protection for women suffering forced abortions in 1996 by amending the statutory definition of a "refugee" to include any person who has been forced, or fears that she would be forced, to abort a pregnancy or to undergo involuntary sterilization.[26] The definition also included any person possessing a well-founded fear of persecution for refusing, resisting, or failing to undergo a forced abortion or sterilization.[27] While the amendment never singled out any particular country of concern, it was written in opposition to China's harsh "one child" family planning laws and applicants seeking protection under its section have been exclusively from China.[28]

Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996), domestic violence-related provisions were added as grounds for removal. Section 237(a)(2)(E) of the Immigration and Nationality Act (INA) subjects to removal aliens convicted of crimes of domestic violence, [29]stalking,[30] violation of a protective order,[31] and child abuse.[32] Adding violation of a protective order was the first time a civil infraction was categorized as a ground for removal. While the domestic violence provision stands as a tool against violence against women, it may have had unintended consequences; critics claim that some abused women are reluctant to call the police in fear that their abuser, and the person the family relies upon for financial support will be deported.

The Victims of Trafficking and Violence Protection Act of 2000 (TVPA) created the Office to Combat Trafficking in Persons[33] which included an interagency task force including the Departments of State, Justice, Labor, Health and Human Services (HHS), and the CIA.[34] The Office issues an annual report entitled Trafficking in Persons[35] which identifies countries failing to meet minimal standards for the elimination of trafficking; countries grossly out of compliance could face a suspension of certain U.S. economic assistance. The Departments of Justice,[36] State,[37] HHS,[38] and the DHS[39] have established anti-human trafficking programs.

THE INS GENDER ASYLUM GUIDELINES, *MATTER OF KASINGA*, AND *MATTER OF R-A-*

The INS also joined in the effort to stop gender-based violence when it issued a guidance in 1995 on gender asylum for its asylum adjudicators. The memorandum largely adopted the suggestions set forth in the UNHCR's 1993 report on gender violence.[40] The INS guidelines elevated the United States to be "a leader in gender asylum," according to Karen Musalo, director of the Center for Gender & Refugee Studies at the Hastings College of Law.[41] Entitled "Considerations for Asylum Officers Adjudicating Asylum Claims From Women," the 19-page document offered strategies on how Asylum Officers could create an atmosphere conducive to allowing claimants to tell their stories and outlined factual and legal considerations.[42] Significantly, the memorandum recognized that an applicant's "beliefs about the role and status of women in society" could constitute political opinion or imputed political opinion and become the basis for possessing a well-founded fear of persecution.[43] Similarly, it speculated that "gender might be one characteristic that combines with others to define" membership in a particular social group.[44]

The INS guidelines were followed by the Board of Immigration Appeal's (BIA's or Board's) seminal decision, *Matter of Kasinga*,[45] which "was a milestone in recognizing the special circumstances faced by female asylum-seekers."[46] In *Kasinga*, the Board, sitting en banc, ruled that a woman's fear of suffering female genital mutilation (FGM) was a basis for claiming asylum.[47] Significantly, the INS General Counsel concurred with many of Kasinga's legal arguments and agreed that FGM's harm met the asylum standard.[48]

Progress on gender-based asylum claims, however, suffered a setback three years later when the Board, in a 10 to 5 decision, reversed a grant of asylum to a Guatemalan woman who had suffered severe domestic violence. In *Matter of R-A-*[49] the majority characterized the INS gender guidelines as only instructive and found that the applicant had failed to establish that she had been abused on account of her political opinion or membership in a particular social group.[50] The INS responded 18 months later by issuing proposed asylum regulations that reiterated its position that "gender can form the basis of a particular social group."[51] The proposed rule's background information specifically declared that the "rule removes certain barriers that the *Matter of R-A-* decision seems to pose to claims" based on domestic violence.[52] Within six weeks of issuing the proposed regulations, Attorney General Janet Reno invoked her authority to review *Matter of R-A-*, vacated the decision, and returned it to the Board with instructions to stay a decision until final publication of the pending asylum regulations.[53] After more than a two-year wait for the regulations to become final, Attorney General John Ashcroft in 2003 certified *Matter of R-A-* for his review but remanded the case to the Board in January 2005 with instructions that it reevaluate its decision "in light of the final rule" which had yet to be published.[54] It appeared that Attorney General Michael Mukasey was ready to resolve the case in 2008 when he certified the case to himself but he returned it again to the Board.[55] But this time, the Attorney General did not order the Board to stay a decision pending the final publication of the asylum regulations. Instead, he instructed the Board to "revisit the issues" in light of Board and Courts of Appeals decisions relating to asylum law that had been issued subsequent to Attorney General Reno's 2001 stay.[56] The Attorney General went out of his way to emphasis that the Board was free to exercise its own discretion and had Supreme Court authority to resolve ambiguous provisions of U.S. immigration laws.[57]

The contorted history of *Matter of R-A-* illustrates just how divisive the issue of domestic violence as a claim to asylum or related relief has been within the Office of the Attorney General, the INS, the Board, and among the immigration judges (IJs). Musalo characterizes the last 10 years of U.S. gender asylum policy as being one of "persistent ambivalence that has led to contradictory measures at the administrative level, and inconsistent decision-making."[58] She also argues that underlying the resistance to extending protection to victims of gender persecution is today's

anti-immigrant climate and xenophobia spurred by the 9/11 attacks, coupled with an undercurrent of misogyny.[59] The fact that "gender claims do not fit the traditional male paradigm of a refugee as a courageous political dissident" stands as an impediment to a consistent policy, as does the well-worn, but factually inaccurate, fear that recognizing domestic violence-based asylum claims would "open up the floodgates" of asylum applicants.[60] The INS brief in *Kasinga*, for example, fanned such fears by pointing out that over 80 million females have been subjected to FGM and noted the "unavoidable tension in both providing protection for those seriously in jeopardy and in maintaining broad overall governmental control over immigration."[61] Empirical evidence does not support the "floodgates" argument; nonetheless, advocates seeking to extend refugee protection to domestic violence victims continue to confront substantial obstacles in an area of law that remains as unsettled as it is obtuse.[62]

LITIGATING FORCED MARRIAGE ASYLUM CLAIMS

The Second Circuit is the only circuit that has determined that forced marriage was persecution and its authority is in doubt. In *Gao v. Gonzales* the Second Circuit found "lifelong, involuntary marriage" to be a form of persecution; but *Gao* was later vacated on procedural grounds.[63] Despite this procedural vacating, the Second Circuit has continued to recognize that women who are sold into a "lifelong, involuntary marriage" constitute membership in a particular social group.[64] Other circuits, when confronted with this issue, have not followed the Second Circuit. In *Berishaj v. Gonzales*, the Sixth Circuit acknowledged the Second Circuit's holding in *Gao*, but concluded that such decisions "are best left to an IJ to decide in the first instance on a case by case basis.'"[65] The Eighth Circuit subsequently concluded in *Ngengwe v. Mukasey*[66] that the "question of whether forced marriage constitutes persecution is an open issue" and remanded the case so the Board could make a determination. Briefs to the Board were filed in *Ngengwe* and a decision was given by the Board on December 1, 2009, granting the respondent asylum and remanding solely for the required security checks.[67] The Board found that the harm suffered cumulatively rose to the level of past persecution. Secondly, the Board found that the harm was inflicted on account of her membership in the particular social group and thirdly, that the presumption of future persecution had not been rebutted by the DHS.

The Board had not published a precedent opinion determining under what circumstances, if any, a forced marriage claim may be the basis for protection under the Refugee Act. But in *Matter of A-T-*, the Board came close when it held that an arranged marriage between adults generally would not be considered per se persecution.[68] Still, *Matter of A-T-* does not necessary predict how the Board will adjudicate forced marriage cases. Absent any definitive decision on the issue of forced marriages, practitioners will have to dissect relevant Board and Courts of Appeals decisions in shaping their legal strategy and argument to immigration courts. Most of the applicable cases will be either FGM- or domestic violence-related, and on the latter the Obama Administration has offered a helping hand. In April, attorneys for the DHS submitted a brief, signed by David Martin, Principal Deputy General Counsel for DHS, to the BIA conceding that "it is possible" that a Mexican woman severely battered by her common-law husband "and other applicants who have experienced domestic violence could qualify for asylum."[69] The brief offered the DHS' interpretation as to what would constitute a cognizable social group and other requirements for refugee protection and stands as guidance for practitioners formulating case strategy.

◆ The Principles: Asylum, Withholding of Removal, and CAT Protection

Embedded in each gender-based asylum claim are recognition of gender inequality and the dehumanization of women. But recognizing and articulating such harms are of little value unless it is placed in a legal framework supported by compelling facts to show that protected is warranted.

An asylum applicant bears the burden of proof and persuasion of showing that she[70] is a refugee within the meaning of INA § 101(a)(42)(A) [8 U.S.C.A. § 1101(a)(42)(A)] to be eligible for asylum under section INA § 208(a) [8 U.S.C.A. § 1158]. The term "refugee" refers to:

> any person who is outside any country of such person's nationality ... 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.[71]

Related relief is that of withholding of removal under the INA and protection under the Convention Against Torture ("CAT"). An applicant is qualified for withholding of removal under the INA upon a showing 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."[72] An applicant qualifies for CAT protection upon establishing that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal."[73] The applicant must establish that the torture would be "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[74]

The significant distinction between asylum and withholding is the burden of proof: the former requires the applicant to establish a "well-founded fear of persecution" while the latter needs to be establish by a "clear probability" or that it was "more likely that not" that she "would" be persecuted.[75] An asylum application requires the presentation of subjective and objective evidence while an application for withholding rests only on subjective evidence.[76] An applicant who fails to establish the lower burden required for asylum necessarily fails to meet the higher burden required for withholding.[77] But an applicant precluded from applying for asylum or denied as a matter of discretion may seek withholding of removal or CAT protection.[78] The grant of asylum is ultimately one of discretion; upon meeting the burden of proof for withholding or CAT, relief is mandatory.[79]

An applicant for asylum who establishes past persecution is presumed to possess a well-founded fear of future persecution.[80] The DHS may rebut that presumption upon a showing that there has been a "fundamental change in circumstances" so the applicant's fear is no longer well-founded or that the applicant could avoid future persecution by relocating to another part of her home country or country of last habitual residence.[81] An applicant who has established past persecution but no longer possesses a well-founded fear of future persecution may still be granted asylum if she demonstrates "compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution" or because "there is a reasonable possibility that he or she would suffer other serious harm upon removal to that country."[82]

◆ Forced Marriages, Arranged Marriages, and the Kind of Harm that Qualifies as Persecution

International law recognizes that a nonconsensual marriage is a human rights violation. The Universal Declaration of Human Rights states that "marriage shall be entered into only with the free and full consent of the declaring spouses."[83] The Supplementary Convention on the Abolition of Slavery includes forced marriage within its definition of slavery.[84] The United States' definition of forced marriage comports with international law but makes a distinction between arranged marriages and forced marriages.

Forced Marriage vs. Arranged Marriage. The Department of State recognizes forced marriages as a human rights violation under international law.[85] It defines a forced marriage as one where "at least one party does not consent or is unable to give informed consent to the marriage, and some element of duress is generally present." The Foreign Affairs Manual (FAM) considers the forced marriage of a minor child to be a form of child abuse and notes that most cases "involve young women and girls aged between 13 and 30 years, although there is evidence to suggest that as many as 15 per cent of victims are male."[86]

The State Department takes a more deferential attitude toward "arranged marriages," saying that it respects such practices which "have been a long-standing tradition in many cultures and countries." An arranged marriage is distinct from a forced marriage as in an arranged marriage, "the families of both spouses take a leading role in arranging the marriage but the choice whether to accept the arrangement remains with the individuals."[87]

The Board in *Matter of A-T-* relied on *Mansour v. Ashcroft* to hold that an arranged marriage between adults is not generally considered per se persecution.[88] But the Board relied more on dicta than on authority. At issue in *Mansour* was whether the abuse and discrimination suffered by the adult applicant when he was a child constituted past persecution.[89] The majority in *Mansour* concluded it did not. A single dissent thought otherwise.[90] The dissent reasoned that because children are more vulnerable and sensitive than adults, harm that would not constitute persecution to an adult would amount to persecution to a child.[91]

Included in the more than one dozen authorities cited by dissent in support of this distinction was a Canadian case mentioning that an arranged marriage involving a child would constitute persecution but not where an adult was a party.[92] This Canadian case is the foundation on which *A-T-'s* conclusion rests. It would be difficult to bestow compelling authority on this single reference in a lone dissenting opinion to sustain the wide ranging conclusion found in *A-T-*.

There are no published circuit court opinions adopting *A-T-'s* interpretation of arranged marriage.[93] A review of unpublished courts of appeals cases are contradictory on whether an arranged marriage may qualify as a ground of persecution.[94]

The reluctance in the FAM and *A-T-* to recognize arranged marriages as a ground for asylum relief out of respect for another country's "long-standing tradition[al]" practices is wholly without merit. The Special Rapporteur for the U.N. Commission on Human Rights on Women concluded that nonconsensual marriages are "a violation of international human rights standards and cannot be justified on religious or cultural grounds."[95] The reasoning of the argument is also contrary to recognized gender-based grounds for asylum. *Matter of Kasinga*, for example, clearly rebuked FGM despite its being based on long-held, traditional tribal customs. Permitting an exception for arranged marriages based on respect for indigenous customs threatens to undermine and reverse significant gains in gender protection.

Harm Constituting Persecution and the Question of Consent. Where arranged marriages may fall short of asylum eligibility is in determining the harm suffered by the applicant. "Persecution" means "a threat to the life or freedom of, or the infliction of suffering or harm."[96] But not every harm or threat of harm rises to the level of persecution. There is no "generic checklist" of bad acts amounting to persecution but the frequency and severity of the harm inflicted is considered.[97] A minor disadvantage or trivial inconvenience is not persecution;[98] it does not amount to "every sort of treatment our society regards as offensive;"[99] and "threats can constitute past persecution only in the most extreme circumstances, such as where they are of a most immediate or menacing nature or if the perpetrators attempt to follow through on the threat."[100]

In *A-T-*, the harm feared by the applicant was the unhappiness of being married to someone she did not love and her valid concern about possible birth defects resulting from a union with her first cousin.[101] The applicant failed to provide any evidence regarding the consequences she could face if she refused to marry her assigned suitor.[102] The Board found the harm feared did not rise to the level of persecution warranting the grant of withholding of removal. There is nothing in the record to suggest that the Board would have granted the applicant asylum had she been eligible for such relief.

Associated closely to the harm an applicant fears is the issue of consent. Despite an applicant's protests, there is an assumption that claimants acquiesce to arranged marriages. This belief is partly due to the FAM's judgment that individuals in such planning have a choice in the matter. But a further factor is the court's way of determining coercion. Rather than accepting the applicant's subjective reasons for why she would be unable to resist an arraigned marriage, the courts favor an objective standard based on the harm the applicant could or did suffer. In other words, consent often is measured by the harm that would befall the recalcitrant bride-to-be. Where the harm or threat of harm is not sufficiently serious to rise to the level of persecution, the applicant is viewed only as begrudging the marriage and unwilling to accommodate family expectations.

In *A-T-*, having found no evidence that the applicant would be harmed for not marrying her cousin, the Board explained that while it did "not discount the respondent's concerns," it did "not see how the reluctant acceptance of family tradition over personal preference can form the basis" for relief.[103] In other words, the consequences for not marrying were not so harmful that a reasonable applicant would be coerced to marry. Bypassed in this approach is any consideration of how robust family or societal traditions could coerce an applicant's acquiescence in an unwanted marriage. Courts of Appeals have mirrored this thinking.[104]

Practitioners litigating arraigned marriage claims will have to accentuate the often narrow wall separating forced and arranged marriages; and, where appropriate, establish the insurmountable duress to which the applicant was or would be subjected. Upon a showing that the applicant was or would be coerced into a marriage, all subsequent marital conduct presumably would be coerced, including sexual relations. Under the U.S. definition of war crimes, such conduct—"forcibly or with coercion or threat of force"—would constitute rape.[105] Rape has been recognized as a hu-

man rights violation amounting to torture.[106] The 1995 INS Gender Guidelines stated that rape constitutes persecution,[107] as did the BIA,[108] and the Seventh and Ninth Circuit Courts.[109]

In situations where there is no factual dispute that participation in the marriage was or would be forced, the harm suffered or feared typically would not be limited to rape. Persecution does not require the permanent or serious infliction of injury.[110] It may include non-life threatening violence.[111] Economic deprivation constitutes persecution when it rises to the level of "deliberate imposition of substantial economic disadvantage,"[112] and it may arise from the cumulative effect of a person's experience.[113] The UNHCR's 2002 Guidelines on Gender-Related Persecution specifically noted that a "pattern of discrimination or less favorable treatment could, on cumulative grounds, amount to persecution and warrant international protection."[114] Such treatment could include "serious restrictions on the right to earn one's livelihood, the right to practice one's religion, or access to available educational facilities."[115]

The Guidelines further note that, "[i]f the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution."[116]

In forced marriage cases, often the multiple forms of harm will constitute the persecution. In *Gao*, the court noted that the 19 year-old applicant was sold by her parents to her husband who beat her, and U.S. State Department country reports for China found widespread domestic violence and trafficking in brides and prostitutes.[117] In *Joseph v. Gonzalez*, an expert witness concluded that as punishment for dishonoring her family by refusing to marry an assigned husband, the applicant either would be killed or disowned which would make her particularly vulnerable to abuse, particularly for a Christian.[118] Christian women in Pakistan who are abandoned by their families in this way often face a life of prostitution, violence, and death. The applicant also provided country reports and news articles showing that women in Pakistan are frequently victims of domestic violence, that honor killings of women by family members are common, and that forced marriage is prevalent.[119]

In *Ngengwe*, following the death of the applicant's husband, her in-laws detained her for two months, shaved her dead with a broken bottle, forced her to sleep on the floor, confiscated her personal belonging, closed her bank account, and when she refused to marry her brother-in-law, beat her and threatened to take her children and kill her.[120] Following Ngengwe's remand to the Board, her advocates argued that the cumulative effect of the foregoing severe economic harm, indefinite and involuntary confinement, physical abuse, humiliating and degrading treatment, and threats of forced marriage and murder, in the aggregate, clearly rose to the level of objectively severe harm required for a finding of persecution under applicable case law.[121] The Board in their decision December 1, 2009, found Ngengwe eligible for asylum and found that the harm considered cumulatively was sufficient for past persecution. Substantial evidence was also found that the Cameroonian authorities could not or would not protect her from her in-laws.

◆ Identifying the Protected Characteristic

The refugee definition requires that harm or fear of harm be "on account of" at least one of the five characteristics set forth in the INA: race, religion, nationality, membership in a particular social group, or political opinion.[122]

In terms of gender-related claims, the UNHCR's Gender Guidelines point out that race, for purposes of the refugee definition, include ethnic groups and women may be attacked on account of their gender because they may "be viewed as propagating the ethnic or racial identity" that their persecutors wish to destroy.[123] The Guidelines also observe that often "religion assigns particular roles or behavioral codes to women and men respectively," and when a woman "does not fulfill her assigned role or refuses to abide by the codes, and is punished as a consequence, she may have a well-founded fear of being persecuted for religious reasons. Failure to abide by such codes may be perceived as evidence that a women holds unacceptable religious opinions regardless of what she actually believes."[124] With respect to nationality, the UNHCR stated that the term is not to be understood only as "citizenship" but also refers to membership in an ethnic or linguistic group and "in many instances the nature of the persecution takes a gender-specific form, most commonly that of sexual violence directed against women and girls."[125] The most common grounds for gender-related claims, including forced marriage applicants, are membership in a particular social group or political opinion.

Membership in a Particular Social Group. In the absence of a statutory definition of particular social group, federal and administrative case law has delineated its cognizable contours. The seminal case in defining a social group is the 1985 decision of *Matter of Acosta* where the Board set forth the rule that the group's members must share a "common, immutable characteristic ... that members of the group cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[126] 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."[127] In subsequent years, particularly in 2006 with the issuance of *Matter of C-A-*, the Board significantly altered the basic underpinnings of *Acosta*.

In *Matter of C-A-*, the Board refined the definition by considering "the extent to which members of a society perceive those with the characteristic in question as members of a social group."[128] *C-A-* held that a proposed social group must possess "recognizability" or "social visibility" to be cognizable.[129] The Board therefore held that "former noncriminal drug informants working against the Cali drug cartel" did not have the requisite social visibility to constitute a particular social group because the very nature of an informant was to remain unknown and undiscovered.[130]

Matter of A-M-E- & J-G-U- reiterated that "the shared characteristic of the group should generally be recognizable by others in community" and noted that this "requisite 'social visibility' must be considered in the context of the country of concern and the persecution faced."[131] The Board also took into consideration the need for "particularity" which excluded proposed social groups which were "too amorphous" and "too subjective, inchoate, and variable."[132] Thus rejected was a claim that "affluent Guatemalans" represented a social group because such a status failed to provide sufficient social visibility to be perceived as a group by society or that the group was defined with adequate particularity to qualify it as such.[133]

Based on *C-A-* and *A-M-E-*, the Board denied that a social group could consist of "persons resistant to gang membership" because such persons are not socially visible in Honduran society.[134] Likewise, in *Matter of S-E-G-*, the Board refused social group recognition of Salvadoran youth who were "subject to recruitment efforts of 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."[135] The Board found that such a group was too amorphous to have particularity because "people's ideas of what those terms mean can vary"[136] and because such youths would not be "'perceived as a group' by society."[137]

S-E-G- offered significant guidance as to what the Board meant by the term "particularity." The Board described the "essence of the 'particularity' requirement ... is whether the proposed 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."[138] The "key question" in determining whether a social group is sufficiently "particular" is whether it is "too amorphous ... to create a benchmark for determining group membership."[139]

Since *Acosta*, the Board has offered a complex and at times confusing and contradictory definition of what constitutes a particular social group. This has made the placement of domestic violence victims within a cognizable social group all the more vexing. The UNHCR's 2002 Gender Guidelines sought to shape the international discussion by stating that "women" is a "clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently by men."[140] The Guidelines rejected claims that the size of the social group could be a disqualification, saying that "[t]his argument has no basis in fact or reason, as the other grounds are not bound by this question of size."[141] It posited that there should be "no requirement that the social group be cohesive" or "that every member of the group be at risk of persecution."[142]

In *Acosta* the Board acknowledged that "sex" was an innate characteristic, but the Board and federal circuit courts have held that gender alone is insufficient to constitute a cognizable social group.[143] The Board's recent requirement that a social group must also exhibit "social visibility," coupled with its apprehension of opening up the "floodgates" to asylum applicants, shows the Board's aversion to adopting the UNCHR's claim that group size is irrelevant. It also underscores the tin ear the Board showed to the UNHCR's advice to adopt a "gender-sensitive" interpretation of the 1951 Refugee Convention to "ensure that proper consideration is given to women claimants ... and that the range of gender-related claims are recognized as such."[144]

The Board's decisions in *Kasinga*, *R-A-*, and *A-T-* illustrates how the Board's new-found insistence

on injecting "social visibility" into social group calculations threatens to shut the door to refugee relief for domestic violence and particularly forced marriage claimants. In *Kasinga*, the social group accepted by the BIA was "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice."[145] The Board explained that its decision was in accordance with *Acosta*, where the "characteristics of being a 'young woman' and a 'member of the Tchamba-Kunsuntu Tribe' cannot be changed.[146] The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it."[147]

In *R-A-*, the Board reversed the IJ's holding that "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" was a particular social group.[148] In foreshadowing its 2006 "social visibility" requirement, the Board explained that the group failed to establish how "anyone in Guatemala perceives this group" and failed to show "how the characteristic is understood in the alien's society..."[149]

In *A-T-*, the Board invoked "social visibility" in denying the applicant's proposed social group: "young female members of the Bambara tribe who oppose arranged marriage."[150] The fault, explained the Board, lay in its doubt "that young Bambara women who oppose arranged marriages have the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them."[151]

Just how the proposed social group in *A-T-* was distinguishable from that in *Kasinga* was never explained; but more disturbing, was the Board's construing *Kasinga* to be consistent with its social visibility requirement. In *C-A-*, the Board claimed that *Kasinga* was among the cases where the Board had recognized "particular social groups involved characteristics that were highly visible and recognizable by others in the country of question."[152] But as attorney Fatma Marouf points out, the Board misspoke; *Kasinga* and the other cases it cited all "turned on an *Acosta* analysis based on immutable characteristics, not social perception or visibility."[153] Marouf notes that it "seems doubtful that all the cases cited by the Board"—a young woman with intact genitalia, a homosexual, former members of the national police, and a Filipino of mixed race—"actually involved 'highly visible' traits ... one would be hard-pressed to argue that the members of these groups are socially visible, as required by *C-A-*."[154]

Marouf's insightful analysis found that the Board's "social visibility" requirement diverges from the international accepted approach of discerning a social group, undermines the principled framework of analysis set for in *Acosta*, and "will lead to incoherent, inconsistent decisions" that have no basis under international law.[155] She predicted that because social perceptions are so fluid, adjudicators "will be able to deny freely the existence of a particular social group, despite the existence of a protected characteristic, based on a finding that the group is not socially visible."[156]

Marouf's evaluation partly was affirmed by Judge Posner of the Seventh Circuit who, in a blistering critique in *Gatimi v. Holder*, rejected the "social visibility" requirement.[157] The applicant in *Gatimi* had defected from the Mungiki tribe, a violent political-religious group that compelled women, "including the wives of members and of defectors, to undergo clitoridectomy and excision."[158] After the applicant had defected, tribal members broke into his house in search of his wife who they wanted to circumcise, killed a servant, killed family pets, burnt two vehicles, threaten to gouge out the applicant's eyes, later kidnapped and tortured the applicant, and released him only when he promised to produce his wife for circumcision.[159] The immigration court's ruling that Gatimi was not persecuted but only "mistreated" was declared "absurd."[160] The Board's determination that Mungiki defectors failed to constitute a particular social group because they lacked social visibility "made no sense," concluded the court.[161] *Gatimi* pointed out that "the only way, in the Board's view," defectors could qualify as a particular social group "is by pinning a target on their backs with the legend 'I am a Mungiki defector'."[162] Judge Posner condemned the Board's social visibility requirement with the common-sense observation that women who underwent FGM look no different than those who did not, homosexuals in a homophobic society will pass as heterosexuals, and that a group targeted for assassination or torture would "take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be 'seen' by other people in the society 'as a segment of the population.'"[163]

Gatimi exposed the fallacy in the Board's social visibility theory: that groups marked for harm would expose themselves to their persecutors rather than conceal their identity. The fact that in domestic violence cases personal shame silences the victim and society often "looks the other way,"

is why Marouf feared that strict adherence to the social visibility hypothesis would be a serious setback for gender-based asylum claims.[164]

Advocates for forced marriage applicants must rely on *Gatimi* and other sources to minimize an IJ's focus on the social visibility factor and to emphasize valid competing factors to analyze a particular social group claim. One tool is the INS' 2000 proposed asylum regulations that addressed claims of persecution based on domestic violence. The proposed regulation specifically repudiated *R-A-'s* requirement that the asserted social group be socially recognized and declared instead that such a factor be considered but not be "determinative of the question of whether a particular social group exists."[165] The proposed regulation also concluded that rather than issue categorical rules concerning domestic violence qualifications, adjudicators should be guided by "broadly applicable principles" when "applying the refugee definition and other statutory and regulatory provisions generally."[166]

Advocates can also heed the DHS' brief in *Matter of L-R-* where it staked out its position on how Mexican women severely battered by their common-law husbands may constitute a cognizable social group.[167] The brief suggested that the particular social group "is best defined in light of the evidence about how the respondent's abuser and her society perceived her role within the domestic relationship."[168] The agency suggested that the applicant's proposed social group of "Mexican women in an abusive domestic relationship who are unable to leave" be replaced with "Mexican women in domestic relationships who are unable to leave" or "Mexican women who are viewed as property by virtue of their positions within a domestic relationship."[169] In identifying the characteristic that the persecutor targeted in *L-R-*, the DHS highlighted the importance of "the status the female respondent acquired when she entered into the domestic relationship" with her common-law husband, finding that he "abused the female respondent because of his perception of the subordinate status she occupies within that domestic relationship."[170]

At the heart of the 2000 proposed asylum regulations and the DHS' *L-R-* brief is acknowledgment that domestic violence-related asylum claims must be based on a social analysis of the customs and norms in which the female applicant may find herself. As the UNHCR put it, "to understand the nature of gender-related persecution, it is essential to define and distinguish between the terms "gender" and "sex:"

> Gender refers to the relationship between women and men based on socially or culturally constructed and defined identifies, status, roles and responsibilities that are assigned to one sex or another, which sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time.[171]

Practitioners must provide compelling documentation that convincingly portrays the derogatory social customs and norms that play upon the applicant. In the forced marriage claim in *Ngengwe*, advocates highlighted the significant inequality between women and men in terms of life expectancy, education, income, and professional standing in the applicant's home country of Cameroon.[172] Also shown was that women's rights were very poor in Cameroon, domestic violence was widespread, and neither criminal nor civil law protected women from assault and exploitation.[173] Noted was the practice of "breast ironing," an effort to protect prematurely well-developed young girls from predatory older men.[174] The record established that polygamy was allowed legally and culturally, and women were often forced to marry without their consent and wives could be considered the husband's property.[175] Also before the immigration court was a large amount of evidence that discussed the discriminatory and persecutorial treatment of widows in Cameroon arising out of the widespread social belief that widows often "charmed" their husband into marriage and then killed them.[176] *Ngengwe* illustrated that a woman can be taken hostage by in-laws the moment the death of the husband occurs and can be subject to physical, emotional, and financial harm.[177]

Ngengwe's attorney then focused on the individual suffering the client endured when her in-laws sought to force her to marry her late husband's brother who already had two wives. This included home confinement, shaving her head with a broken bottle, and severely beating her.[178] The evidence was sufficient for the Eighth Circuit to reverse the Board's finding that Cameroonian widows did not constitute a particular social group.[179] The case was remanded for the Board to consider whether the cumulative harm Ngengwe suffered constituted persecution[180] and the BIA this month found her eligible for asylum.

The strategy by Ngengwe's attorney was to place the individualized harm the applicant

suffered on account of her gender-related social group into the larger context of socially sanctioned gender-based discrimination and violence. The evidence showed that the social customs in Cameroon created and bolstered the in-laws' belief that they had that right to harm Ngengwe and target her for abuse because they perceived her as property by virtue of her status as a widow in the domestic relationship of their deceased son. In such a manner, Ngengwe was able to set forth a claim of past persecution as well as show that she possessed a well-founded fear of future persecution.

Arguing the social context of Ngengwe's predicament was in keeping with the many cases that have recognized the social roots of gender-related persecution. In *Hassan v. Gonzales*, the Eighth Circuit concluded that, based on evidence that 98% of all women in Somalia had undergone FGM, the applicant status as a Somali female constituted a particular social group.[181] The same circuit recognized that Iranian women who advocate women's rights or oppose Iranian customs relating to dress and behavior constituted a particular social group.[182] The Third Circuit decided likewise in the case of a similar applicant from Iran.[183] The Third Circuit also found the applicant eligible for relief in recognition that the payment of a "bride price" by the applicant's family created a binding contract permitting the husband to force his bride to undergo FGM. In *Haoua v. Gonzales*, the Fourth Circuit reversed the Board's denial of relief where the evidence showed the applicant's family had sold her to her chieftain husband and she faced a nearly 100% risk of undergoing FGM.[184] The court in *Fiadjoe v. Att'y Gen.* criticized the Board for ignoring evidence of the deep hold ritual had on substantial elements in Ghana when it held the applicant failed to show the government was unable or unwilling to control her father's ritualistic sexual abuse.[185] The Second Circuit granted relief in recognition that social customs were sufficiently strong in Ghana to show that the applicant's lack of virginity would be discovered because she was designated to become tribe's queen mother and that punishment for premarital sex was FGM.[186] The Board in *Matter of S-A-* held that under Muslim law in Morocco, where the father's power over his daughter was unfettered, the applicant suffered past persecution and had a fear of future persecution.[187]

Imputed Political Opinion. Imputed political opinion also stands as a protected characteristic on which a forced marriage case may rest. The Third Circuit in *Fatin* opened the door for political opinion in holding that in Iran there was "little doubt that feminism qualifies as a political opinion with the meaning of the [Act]."[188]

The UNHCR Gender Guidelines recommend that "[p]olitical opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged.[189] This may include an opinion as to gender roles. It would also include non-conformist behavior which leads the persecutor to impute a political opinion to him or her." [190]The UNHCR advised that the "image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experience of women in some societies," warning that a woman's decision not to engage in certain activities "may be interpreted by the persecutor(s) as holding a contrary political opinion."[191]

In *Matter of L-R-*, the domestic violence victim asserted persecution on account of her "feminist" political opinion, including her defiance of her abuser's domination.[192] The DHS' brief did not discount such direct or imputed opinion as a protected characteristic but argued it was baseless absent any evidence that any opinion was expressed in the case.[193]

◆ Determining the Nexus Requirement

Establishing that the persecution suffered or feared was "on account of" a particular social group—the "nexus" requirement—is perhaps the greatest hurdle to overcome in gender-based asylum claims. Failure to show a causal link between harm or fear of harm and the protected characteristic will result in a denial of the application, regardless of the harm your client suffered or how sympathetic the case may be. Success depends on producing sufficient evidence showing that the persecutor was aware or could become aware of he applicant's protected characteristic and had the ability and motivation for causing harm on account of that protected characteristic.

One obstacle that practitioners encountered that is unique to gender-related asylum claims is convincing the adjudicator that the harm suffered is not a consequence of a spousal dispute, a family conflict, or a disagreement between neighbors. Administrative and federal courts traditionally have viewed gender-related claims as falling within the ambit of a "private" sphere of influence

where state influence is nil and the government ought not to intrude. This perspective has caused societies to traditionally respond to domestic violence with apathy. It may also underpin the reluctance of the IJs and BIA to recognize gender-related harm as a new ground for relief. Attorney Marouf pointed out that the Board at times has intentionally avoided granting relief on account of a gender-related ground.[194] In *Matter of S-A-*, where a Moroccan father beat and scared his daughter as punishment for her social conduct despite the paucity of evidence on either of their religious beliefs, the Board insisted on finding that the persecution was on account of her religious beliefs, as they differed from those of her father concerning the proper role of women in Moroccan society.[195] Disregarded in the Board's consideration was any recognition that the daughter resisting a subservient role ascribed to women in Morocco's male dominated society.[196]

Because FGM and forced marriages arise often, but not exclusively, in Muslim majority countries, there is a tendency to attribute such harms to Islam "on account of religion."[197] Susan Akram convincingly has argued that such an interpretation fails to recognize that repressive social norms are not caused by Islam but are allied with a male dominated social structure and authoritative religious hierarchy.[198]

Another related issue that sometimes puzzles practitioners as well as adjudicators is recognizing that persecution does not require a "malignant" or "punitive" intent on the part of the persecutor.[199] The applicant is not obliged to prove that the persecutor was motivated by a desire to punish. In some circumstances, as in forced marriages, the persecutors often are not seeking to harm the intended bride; rather, they are seeking to enforce traditional social customs and gender relations. In other circumstances, the persecutor's intention may be to help the applicant-such as when a lesbian in the Soviet Union was forcibly institutionalized and subject to electric shock therapy and sedative drugs.[200] In that case, the Board held that she had not been persecuted because Soviet physicians did not wish to harm her but only to "cure" her. The Ninth Circuit reversed, explaining that the persecutor's motivation is relevant "only insofar as the alien must establish that the persecution is inflicted on him or her 'on account of' a characteristic or perceived characteristic of the alien."[201]

It is widely recognized that persecutors may have multiple motives, some of which are on account of a protected characteristic and some that are not. The applicant is not burdened to prove the single or principle motive of the persecutor. The applicant, the Supreme Court ruled, "must provide *some* evidence of it, direct or circumstantial."[202] (Emphasis in the original). The REAL ID Act amended the INA to require that the applicant establish that one of the five characteristics was "at least one central reason" for her persecution.[203]

A common error by practitioners is to define the social group by the harm suffered or feared. A social group cannot be significantly defined by the persecution suffered.[204] The Third Circuit in *Lukwago v. Ashcroft* explained that "'a particular social group' must exist independently of the persecution suffered by the applicant for asylum ... the 'particular social group' must have existed before the persecution began."[205] Otherwise, the "nexus" would be illogically circular: individuals are targeted for persecution because they are member of a social group who are targeted for persecution.[206]

Erroneously proposed social groups have included "young women threatened with imprisonment for failing to oblige the demands of a government official to marry his relations"[207] or women who have been forced or fear being forced into marriage.[208] That is why the DHS' *L-R-* brief replaced the social group defined by the IJ of "Mexican women in an abusive domestic relationship who are unable to leave" with "Mexican women in domestic relations who are unable to leave" or as "Mexican women who are viewed as property by virtue of their positions within a domestic relationship."[209]

But the Board in *Acosta* did recognize that "a shared past experience may be enough to link members of a 'particular social group'" because it may become part of a person's character, fundamental to her consciousness or identity."[210] In forced marriage cases and other gender-related claims, a women's act of escaping a marriage or domestic relationship where the abuser seeks retaliation may be grounds for finding a cognizable social group. The Third Circuit recognized a social group comprising "children from Northern Uganda who have escaped from involuntary servitude after being abducted and enslaved" by a rebel group.[211]

◆ A State's Failure to Protect and Internal Relocation

An applicant fleeing a forced marriage situation who produces sufficient evidence of harm to successfully convince an IJ that she possesses

a well-founded fear of persecution on account of membership in a particular social group and/or political opinion is not yet home-free. She still faces at least two more barriers: establishing that the home government is unwilling or unable to offer meaningful protection and showing that she could not escape future persecution by relocating somewhere safe in her home country. The DHS' *L-R-* brief cites these two factors as likely to be central issues in most gender-related asylum and withholding cases.[212]

A State's Failure to Protect. The harm suffered or feared by the applicant must be inflicted either by the government or by persons or organizations that government is unable or unwilling to control.[213] In forced marriage cases, as with most gender-related claim, the persecutor is a household member and not a government agent, although the abuser could be a soldier or person of influence in the local community. It is the applicant's burden to rebut the assumption that the state authority in the applicant's home country could and would offer sufficient protection to the applicant. In *Fiadjoe,* the fact that the abuser was her father who was also the tribe's priest was sufficient to rebut the assumption.[214] Background information on the applicant's home county detailing the attitude and conduct of law enforcement toward domestic family matters is crucial. The U.S. Department of State's country reports are of significant importance; in *Fiadjoe,* the report showed that seeking police protection would have been futile.[215]

An applicant's unsupported claims that she believed going to the police would be useless often is not sufficient to rebut the assumption. In the Sixth Circuit, an applicant fleeing in-laws seeking to force her to marry her deceased husband's cousin, and armed with supportive U.S. State Department reports was denied relief when she admitted she only thought seeking police protection would be hopeless.[216] The Court reasoned that despite the State Department report showing "police reluctance to enforce laws 'against domestic violence,' nothing compels the conclusion that the police would refuse to enforce the laws in a situation involving an alleged non-domestic persecutor."[217] The Third Circuit likewise denied a claim where "even assuming her distrust of local authorities was warranted, [the applicant] could have turned to police outside of the villages in which the alleged persecution took place, or national authorities."[218] The Seventh Circuit flatly stated that it was "disincline[ed]" to accept an asylum case "based on persecution by private persons where the applicant did not even attempt to seek police protection."[219]

Internal Relocation. An applicant successfully establishing that she possesses a well-founded fear of future persecution may still be denied relief if she "could avoid persecution by relocating to another part of the applicant's [home country] if under all the circumstances it would be reasonable to expect the applicant to do so."[220] Where an applicant has established past persecution, the regulation "presumes that internal relocation would not be reasonable, unless the Service establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate."[221] The regulation states that adjudicators should judge the reasonableness of internal relocation by considering a list of factors including geographic limitations or social and cultural constraints, such as age, gender, health, and social and family ties.[222]

Applicant's fleeing geographically large countries bear the difficult burden of showing that safety could not be found elsewhere in the country.[223] In such cases, practitioners must establish that relocation would not be reasonable. Relocation would not be required where there is a showing that the cultural practices complained of are nation-wide. In *Kasinga,* it was shown that FGM is widely practiced and most women cannot expect much protection from FGM.[224]

CONCLUSION

Asylum adjudicators dealing with "forced marriages" need to be aware of the complexities relating to gender based claims. Practitioners need to make all efforts in compiling a complete asylum case addressing all issues as defined in this *Briefing.* Due to the lack of any "bright line" rule, it is essential to properly define and explain in a legal argument the asserted social group. Affirmative asylum cases that level clearly defined social group, harm suffered, nexus, and relocation issues on a case-by-case basis align themselves for a grant of asylum rather than a denial. In addition, practitioners would be well advised to brief these issues in advance and to corroborate their claim with an abundance of supporting country condition documentation relating to gender. Combining the social group with a possible political or imputed opinion basis may also strength the case.

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57. *Id.*, at 631.
58. 14 Va. J. Soc. Pol'y & L. at 123. Musalo further observed that the "absence of clear guidance in the form of regulations, or a precedential decision in *Matter of R-A-* has left a vacuum, which has resulted in arbitrary decision-making, often notable for its confused misunderstanding of the status of the law." *Id.* at 126.
59. *Id.*, at 130-32.
60. *Id.*, at 131-33. Musalo adds that "women's fears of persecution are often intertwined with cultural and religious norms and practices" which opens up facetious claims that the harm suffered is not really serious or that gender-based protection is a form of cultural imperialism.
61. *Matter of Kasinga*, 21 I&N Dec. 357, at 370.
62. A December 2000 INS publication noted that the agency had not seen an appreciable increase in the number of FGM cases after the *Kasinga* decision and it did not anticipate a large number of domestic violence claims if the U.S. recognized such harm as a ground for asylum. Similarly, Canada, which in 1993 had qualified gender-related harm as a basis for refugee protection had not seen an increase of claims. See, 14 Va. J. Soc. Pol'y & L. at 132-33.
63. *Gao v. Gonzales*, 440 F.3d 62, 70 (2nd Cir.2006), vacated on procedural grounds by *Keisler v. Gao*, 552 U.S. 801 (2007).
64. *Tang v. Gonzales*, 200 Fed. Appx. 68, 70 (2d Cir. 2006). See also *Himanje v. Gonzales*, 184 Fed. Appx. 105, 107 (2dCir. 2006) (citing *Gao v. Gonzales* and finding that since the asylum-seeker belonged to a specific group of women from the Tonga tribe of Zambia, this constituted her membership in a particular social group).
65. *Berishaj v. Gonzales*, 238 Fed. Appx. 57, 62, FN 3 (6th Cir. 2007) (quoting *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985)).
66. *Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2008).
67. The author of this *Immigration Briefing* represented Ngengwe before the Eighth Circuit and the remand before the Board.
68. *Matter of A-T-*, 24 I&N Dec. 296, 302 (BIA 2007), vacated on other grounds, *Matter of A-T-*, 24 I&N Dec. 617 (A.G. 2008).
69. Department of Homeland Security's Supplemental Brief, *Matter of L-R-* available at AILA Doc. No. 09071664 at http://www.aila.org/content/default.aspx?docid=29560 and at the Center for Gender & Refugee Studies at the Hastings College of Law at http://cgrs.uchastings.edu/about/. See also, Julia Preston, "New Policy Permits Asylum for Battered Women," *New York Times*, July 16, 2009.
70. Because the vast majority of applicants seeking refugee protection on account of domestic violence, including forced marriage, are female, the pronoun "she" will be used throughout this *Briefing*.
71. INA § 101(a)(42)(A) [8 U.S.C.A. § 1101(a)(42)(A)].
72. INA § 241(b)(3) [8 U.S.C.A. § 1231(b)(3)].
73. 8 C.F.R. §§ 1208.16(c)(2), 1208.17(a).
74. 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1); *Ali v. Reno*, 237 F.3d 591, 596 (6th Cir.2001).

75. *Compare*, INA §101(a)(42)(A) [8 U.S.C.A. § 1101(a)(42)(A)], INA §241(b)(3)(A) [8 U.S.C.A. § 1231(b)(3)(A)]; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431, 440 (1987) (Held alien eligible for asylum upon a showing she possessed a "well-founded fear of persecution." The court went on to state that "[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place;" elsewhere, the court observed "[t]here is simply no room in the United Nations' definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he or she has no 'well-founded fear' of the event happening."); *INS v. Stevic*, 467 U.S. 407, 429-430 (1984) (alien entitled to withholding of removal upon a showing that "it is more likely than not that the alien would be subject to persecution.").
76. *Cardoza-Fonseca*, 480 U.S 421, at 430.
77. *Ghaly v. INS*, 58 F.3d 1425, 1429 (9th Cir.1995).
78. 8 C.F.R. § 1208.16(a). An applicant may be barred from applying for asylum due to a safe third country alternative pursuant to a treaty, INA § 208(a)(2)(A) [8 U.S.C.A. § 1158(a)(2)(A)]; failure to file within one year after arrival in the United States, INA § 208(a)(2)(B) [8 U.S.C.A. § 1158(a)(2)(B)]; having previously applied for asylum and the application was denied, INA §208(a)(2)(C) [8 U.S.C.A. § 1158(a)(2)(C)]; or having committed certain criminal offenses, INA 208(b)(2) [8 U.S.C.A. § 1158(b)(2)]. An applicant may be barred from applying for withholding of removal for having ordered, incited, assisted, or otherwise participated in the persecution of others, having been convicted of a particularly serious crime, there is reason to believe she committed a serious nonpolitical crime outside the United States, or reasonable grounds to believe she is a danger to the security of the United States, INA §241(b)(3)(B) [8 U.S.C.A. § 1131(b)(3)(B)].
79. *Cardoza-Fonseca*, 480 U.S. 421, at 428-30.
80. 8 C.F.R. §1208.13(b)(1).
81. 8 C.F.R. §1208.13(b)(1)(i).
82. 8 C.F.R. 1208.13(b)(1)(iii).
83. UDHR Dec. 10 1948, art. 16(2), G.A. Res. 217A, at 71, U.N. GAOR, 3d.
84. The Universal Declaration of Human Rights, Art. 16(2) (1948), available at http://www.un.org/en/documents/udhr/.
85. U.S. Dep't of State, Foreign Affairs Manual, Consular Affairs, *Forced and Arranged Marriage of Adults*, 7 FAM §1459(b)(c).
86. *Id.*
87. 7 FAM §1459, §1740, §1741.
88. *Matter of A-T-*, 24 I&N Dec. 296, at 302.
89. *Mansour v. Ashcroft*, 390 F.3d 667, 670 (9th Cir.2004).
90. *Id.*, at 679.
91. *Id.*, at 679-80.
92. *Id.*, at 680.
93. *Bah v. Mukasey*, 529 F.3d 99, 109 (2nd Cir.2008) (noting but not discussing *A-T-*); *Pan v. Gonzales*, 445 F.3d 60, 62 (1st Cir.2006) (implying that "an arrange marriage (or some other kind of involuntary sexual relationship)" could amount to persecution).
94. *Su Lin v. Holder*, 334 Fed. Appx. 411 (2d Cir. 2009) (upheld BIA determination that harm was not on an account of a protected characteristic when it was motivated by applicant's refusal to enter into proposed arranged marriage); *Yu Xiu Lin v. Mukasey*, 293 Fed.Appx. 32 (2nd Cir. 2008), ("unable to show the objective likelihood of persecution needed to make out an asylum claim based on her practice of Falun Gong or her arranged marriage"); *Li Qun Chen v. Gonzales*, 153 Fed.Appx. 49 (2nd Cir.), (upheld BIA decision holding that "neither the attempted forced marriage, nor the prospect of a successfully forced marriage upon her return" was "'on account' of any of the enumerated categories of protected classes.")
95. Commission on Human Rights, United Nations Economic and Social Council, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women: Report of the Special Rapporteur*, E/CN.4/2002/83 (January 31, 2002) ("UN Human Rights Report"), at ¶ 57, A.R. at 462. *See also*, Article 23(3) of the International Covenant on Civil and Political Rights, March 23, 1976, 999 U.N.T.S. 171, *available at http://www1.umn.edu/humanrts/instree/b3ccpr.htm*; Article 1(1) of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, Dec. 9, 1964, 521 U.N.T.S. 231, *available at* http://www1.umn.edu/humanrts/instree/o1ccmar.htm.
96. *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985).
97. *Liu v. Ashcroft*, 380 F.3d 307, 313 (7th Cir.2004).
98. *Kovac v. INS*, 407 F.2d 102, 107 (9th Cir.1969) .
99. *Fatin v. INS*, 12 F3d 1233, 1243 (3rd. Cir.1993).
100. *Bejko v. Gonzales*, 468 F.3d 482, 486 (7th Cir.2006).
101. *Matter of A-T-*, 24 I&N Dec. at 302.
102. *Id.*, at 303.
103. *Id.*, at 302-03.

104. *Syed v. Mukasey*, 288 Fed.Appx. 273, 276 (7th Cir.2008) (alien did not suffer past persecution to support his claim for withholding of removal when he admitted that he would have been happy in a different arranged marriage, and that his marriage was lacking because he was not attracted to his wife and he was sexually disgruntled); *Pan v. Gonzales*, 445 F.3d 60, 62 (1st Cir.2006) (even assuming an arranged marriage could be a ground for relief, there was no evidence that father sought to persecute the applicant following her escape from the hotel).
105. 18 U.S.C.A. §2441(d)(1)(G).
106. Special Rapporteur on Violence Against Women, Its Causes and Consequences, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences: Cultural Practices in the Family That Are Violent Toward Women, ¶57, U.N. Doc. E/CN.4/20002/83.
107. INS Guidelines, see footnote 28.
108. *Matter of D-V-*, 21 I&N Dec. 77 (BIA 1933) (gang rape in retaliation to political activities amounts to persecution).
109. *Angoucheva v. INA*, 106 F.3d 781, 790 (7th Cir.1997); *Lopez-Galarza v.* INS, 99 F.3d 954, 960 (9th Cir.1996).
110. *Canales-Vargas v.Gonzales*, 441 F.3d 739, 744-46 (9th Cir.2006) (death threats sufficient to constitute persecution in light of the "low standard").
111. *Tian-Yong Chen v. INS*, 359 F.3d 121, 128 (2nd Cir.2004) (persecution can include "non-life threatening violence and physical abuse"); *Begzatowski v. INS*, 278 F.3d 665, 669 (7th Cir. 2002) (same holding).
112. *Yong Hao Chen v. INS*, 195 F.3d 198, 204 (4th Cir.1999).
113. *Poradisova v. Gonzales*, 420 F.3d 70, 80 (2nd Cir.2005); See *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 35-26 (BIA 1998) (beating and threats "in the aggregate" could constitute persecution), *Kholyavskiy v. Mukasey*, 540 F.3d 555, 570-51 (7th Cir. 2008) (holding that the BIA erred in denying petitioner relief because it failed to examine the cumulative significance of the individual past threats against petitioner).
114. UNHCR, Guidelines on International Protection: Gender-Related Persecution with the context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, ¶14, U.N. Doc. HCR/GIP/02/01 7 May 2002, available at http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d58ddef4&query=Gender%20Guidelines.
115. *Id.*
116. *Id.* ¶15.
117. *Gao v. Gonzales*, 440 F.3d 62, 71 (2nd Cir.2006), vacated on procedural grounds by *Keisler v. Gao*, 552 U.S. 801 (2007).
118. *Joseph v. Gonzales*, 240 Fed. Appx. 726 (7th Cir. 2007).
119. *Joseph v. Holder*, 579 F.3d 827, 834 (7th Cir.2009); *Joseph v. Gonzales*, 240 Fed.Appx. 726 (7th Cir. 2007).
120. *Ngengwe v. Mukasey*, 543 F.3d 1029, at 1031-32.
121. *Id.*
122. 8 C.F.R. § 1208.13(a); INA § 101(a)(42) [8 U.S.C.A. § 1101(a)(42)].
123. UNHCR Gender Guidelines, ¶24.
124. *Id.* ¶25.
125. *Id.* ¶27.
126. *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).
127. *Id.*
128. *Matter of C-A-*, 23 I&N Dec. 951, 958-59 (BIA 2006), *affirmed, Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2nd Cir.2007).
129. *Id.*, at 959.
130. *Id.*, at 960.
131. *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74-76 (BIA 2007).
132. *Id.*, at 76.
133. *Id.*, at 74-77.
134. *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008).
135. *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).
136. *Id.*, at 585.
137. *Id.*, at 583-87.
138. *Id.*, at 584.
139. *Id.*, at 584.
140. UNHCR Gender Guidelines, ¶30.
141. *Id* .¶31.
142. *Id.*
143. *Gomez v. INS*, 947 F.2d 660 (2nd Cir.1991); *Matter of S-A-*, 22 I&N Dec. 1328, 1336 (BIA 2000).
144. UNHCR Gender Guidelines, ¶1-4.
145. *Kasinga*, 21 I&N Dec.357, at 365.
146. *Id.*, at 366.
147. *Id.*, at 366.
148. *Matter of R-A-*, 22 I&N Dec. 906, 917 (BIA 1999)
149. *Id.*, at 918,
150. *Matter of A-T-*, 24 I&N Dec. 296, at 303.
151. *Id.*
152. *Matter of C-A-*, 23 I&N Dec. 951, at 960.
153. Fatma E. Marouf, The Emerging Importance of "Social Visibility" in Defining a "Particu-

lar Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender," Yale Law and Policy Review, Fall 2008, pg. 64-65 ("The mere fact that these groups may be recognizable does not support the BIA's suggestion that it has always examined social viability or social perception in analyzing claims based on membership in a particular social group.").

154. *Id.*, at 65.
155. *Id.*, at 49.
156. *Id.*, at 106.
157. *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009).
158. *Id.*, at 613.
159. *Id.*, at 614.
160. *Id.*, at 614. The court also found that the IJ's reasoning "laps[ed] into incoherence."
161. *Id.*, at 614-15.
162. *Id.*, at 616.
163. *Id.*, at 615.
164. Yale L. & Pol'y Rev. at 106.
165. 65 Fed. Reg. 76588, 2000 WL 1783793, at 76594. See footnote 51.
166. *Id.*, at 76595.
167. *In Matter of L-R-, Department of Homeland Security's Supplemental Brief*, April 13, 2009 at 10-21, available at http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf
168. *Id.*, at. 14-15.
169. *Id.*, at 10, 14.
170. *Id.*, at 14.
171. UNHCR Gender Guidelines, ¶3.
172. *Ngengwe*, 543 F.3d 1029, at 1035.
173. *Id.*
174. U.S. Dep't of State, 2008 Human Rights Report: Cameroon, *available at:* http://www.state.gov/g/drl/rls/hrrpt/2008/af/118990.htm.
175. T.S. Twibell, The Development of Gender as a "Particular Social Group" (to be published in Georgetown Law Journal).
176. *Ngngwe*, 543 F.3d 1029, at 1035.
177. *Id.*, at 1037.
178. *Ngngwe*, 543 F.3d 1029, at 1031-32.
179. *Id.*, at 1034. The court upheld the IJ and BIA rejection of the proposed social group of "widowed Cameroonian female members of the Bamileke tribe, in the Southern region that belongs to a family or has in-laws from a different tribe and region, that Bikom tribe in the Northwest province, who have falsely accused her of causing her husband's death," as being too narrow because "people with those characteristics are not perceived by society as a particular social group." For further discussion on how Ngengwe's attorney before the IJ construed her social group, see Twibell, *Id.*
180. *Id.*, at 1038.
181. *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007).
182. *Safaie v. INS*, 25 F.3d 636, at 640 (8th Cir.1994). The court held that it would be unreasonable to conclude that all Iranian women feared persecution based solely on their gender and relief was denied because the applicant did not provide evidence that she advocated women's rights or opposed social customs.
183. *Fatin v. INS*, 12 F.3d 1233, at 1241 (1993). Noting the "sparse" evidence on how women are treated in Iran, the court could not conclude that if the applicant returned to Iran, she would face persecution on account of being a woman. The court also rejected a claim based on political opinion because she never testified that she would refuse to comply with the gender-specific laws and at most testified that she would not observe them if she could avoid doing so.
184. *Haoua v. Gonzales*, 472 F.3d 227 (4th Cir.2007) but see *Gomis v. Holder*, 571 F.3d 353, at 362 (4th Cir.2009), J. Gregory, dissent, where the court denied relief on facts similar to *Haoua*.
185. *Fiadjoe v. Attorney General of U.S.*, 411 F.3d 135, at 160-64 (3rd Cir.2005).
186. *Abankwah v. INS*, 185 F.3d 18, at 24-25 (2nd Cir.1999).
187. *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000).
188. *Fatin*, 12 F.3d 1233, at 1242.
189. UNHCR Gender Guidelines, ¶32.
190. UNHCR Gender Guidelines.
191. *Id.*, at ¶33-34.
192. While the case remains pending, the DHS made it clear in its brief that "it is possible" that Mexican woman "and other applicants who have experienced domestic violence could qualify for asylum."
193. In Matter of L-R-, Department of Homeland Security's Supplemental Brief.
194. Fatma E. Marouf, The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender," Yale Law and Policy Review, Fall 2008.
195. *Matter of S-A-* 22 I&N Dec. 1328, at 1329-30.
196. *Id.*, at 1329-31.
197. Susan Akram, *Orientalism in Asylum and Refugee Claims*, 12(1) Int'l J. Refugee L., 7 (2000). See

also, Bruce Dunne, Power and Sexuality in the Middle East," Middle East Report, Spring 1998 accessed at http://www.merip.org/mer/mer206/bruce.htm.

198. *Id.*
199. *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (en banc).
200. *Pitcherskaia v. INS*, 118 F.3d 641, at 644.
201. *Id.*, at 647 ("It is the characteristic of the **victim** (membership in a group, religious or political belief, racial characteristic, etc.), not that of the **persecutor**, which is the relevant factor.") (emphasis in original).
202. *Elias Zacarias*, 502 U.S. 478, at 483.
203. INA § 208(b)(1)(B)(i) [8 U.S.C.A. § 1158(b)(1)(B)(i)].
204. See, *Matter of A-M-E & J-G-U*, 24 I&N Dec. 69, at 74 (BIA 2007).
205. *Lukwago v. Ashcroft*, 329 F.3d 157, at 171-72 (3rd. Cir. 2003).
206. *Id.*
207. *Xiao Feng Lin v. Attorney General of U.S.*, 249 Fed.Appx.281 (3d Cir. 2007).
208. *Xiu Yun Chen v. Gonzales*, 229 Fed.Appx. 413 (7th Cir. 2007).
209. *In Matter of L-R-*, Department of Homeland Security's Supplemental Brief, pgs. 10-15.
210. *Matter of Acosta*, 19 I&N Dec. 211, at 233.
211. *Lukwago v. Ashcroft*, 329 F.3d 157, at 174.
212. *In Matter of L-R-*, Department of Homeland Security's Supplemental Brief pgs. 21-22.
213. *Sangha v. INS*, 103 F.3d 1482, at 1487 (9th Cir. 1997) ("Persecution may be inflicted by either the government or by persons or organizations which the government is unable or unwilling to control"), *quoting McMullen v. INS*, 658 F.2d 1312, 1315 (9th Cir. 1981).
214. *Fiadjoe v. Attorney General of the U.S.*, 411 F.3d 135, at 160-63 (3rd Cir.2005).
215. *Id.*, at 161.
216. *Kita v. Gonzales*, 175 Fed.Appx. 711 (6th Cir. 2006).
217. *Id.*
218. *Mann v. Attorney General*, 123 Fed.Appx. 514, at 517 (3rd Cir.2005).
219. *Lleshanaku v. Ashcroft*, 100 Fed.Appx. 546, at 549 (7th Cir.2004).
220. 8 C.F.R. § 1208.13(b)(2)(ii).
221. 8 C.F.R. § 1208.13(b)(3)(ii).
222. 8 C.F.R. § 1208.13(b)(3).
223. *Xiu Yun Chen v. Gonzales*, 229 Fed.Appx. 413 (7th Cir. 2007) (no evidence that applicant could not avoid forced marriage by relocating within China "at a greater distance from her former village").
224. *Matter of Kasinga*, 21 I&N Dec. 357, at 367.

Readers who are interested in contributing an article or ideas for a future Briefing,

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AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Practice Pointer

Completing Form I-589

Question-By-Question Guidance on Completing Form I-589, Application for Asylum and for Withholding of Removal

By AILA's Asylum & Refugee Committee
Updated April 2019

This practice pointer provides tips to help ensure proper completion of Form I-589, Application for Asylum and Withholding of Removal. This practice pointer was updated in April 2019 to reflect the current version of Form I-589 as well as recent changes in substantive asylum law. Note that the form's current version is set to expire on May 31, 2019, so if you use this practice pointer after that date, be sure the form has not changed. While the practice pointer offers an overview of each question on the I-589, it is not a substitute for conducting thorough research and fully investigating the facts of each individual case to determine how to best prepare the application.

GENERAL PRACTICE POINTERS

- The application should be typed (preferable) or handwritten in BLACK ink.

- What may appear to be a simple question could be critical to your client's eligibility for asylum. Do not assume that the answer to a question will be straightforward—you should explore all possible answers with your clients. Due to language barriers and cultural considerations, filling out the I-589 can often prove a long, meticulous process. Please plan accordingly; the I-589 should never be rushed and often will not be completed in one sitting.

- Ensure that ALL the information in the form is consistent with ALL the supporting documentation submitted, including your client's affidavit, witness affidavits, and country conditions evidence. It is critical to ensure that each supporting document is internally consistent and consistent with all other supporting documents. Review the credibility and corroboration requirements for establishing asylum eligibility. Credibility and corroboration are more essential than ever before. You may find it helpful to complete the longer answers on pages 5-8 of the I-589 after you and your client have completed a detailed declaration and the client has provided all supporting documentation; important details tend to emerge during the preparation of the case. If there are any inconsistencies, they should be explained or fixed.

- Generally, you should provide answers to all of the questions in the application. If the answer to a question is not simple and/or requires explanation, or your client is unsure of the information, place an asterisk by the answer along with a comment, "See Supplement

B" (handwritten is fine if you cannot type it in). You can then list explanations on the I-589 Supplement B form. It is usually advisable to include explanations, especially if there are unusual circumstances. See the discussion below for specific examples of where this issue might arise. It is fine to summarize the answers to the primary "essay" questions; the declaration should have the most complete information.

- Do not leave blank spaces, except in Part A. II. (Information About Spouse and Children) if you have checked the boxes "I am not married" or "I do not have any children." The service center may reject an I-589 if there are blank spaces. If the answer is none or does not apply, write "None" or "N/A" even if the questions say "if any" or "is applicable." There is never a downside to filling in a box with "N/A" even if the answer is obvious, but failure to complete the box could lead to the entire application being returned.

PART A.I. INFORMATION ABOUT YOU (This is information about the APPLICANT)

- An I-589 is automatically an application for both withholding of removal under INA §241(b)(3) ("withholding") and asylum under INA §208(a). Thus, there is no need to check a separate box to request withholding. However, relief under the Convention Against Torture ("CAT") must be separately requested by checking the box found above PART A.I. on the form in order to apply. Additionally, the "Torture Convention" box on Page 5, Part B, Question 1 should also be checked. Please note that U.S. Citizenship and Immigration Services ("USCIS") asylum offices only have jurisdiction to adjudicate asylum. They cannot adjudicate applications for withholding or CAT. However, even if your client is applying affirmatively for asylum, it is important to check the two CAT boxes, if warranted, in order to preserve that remedy in court. Furthermore, even if your client wins asylum at the asylum office, in a worst-case scenario, if they ever commit a crime that renders them eligible only for CAT deferral, it is better that they also sought this relief from the earliest point in their case.

- Question 1 – Alien Registration Number (*if any*):
    - The Alien Registration Number is also referred to as the "A" number. It is an 8 or 9 digit number preceded with an "A." If you are preparing an affirmative asylum application and your client has never had any contact with DHS, there is the possibility that they do not have an A number. If this is the case, enter "N/A." An A number will be generated upon filing the asylum application and will be noted on the receipt notice. The I-589 can then be amended at the interview to include the A number. If your client has had previous applications with DHS or is in removal proceedings, they should have an A number. You can find this number on most documentation from DHS.

- Question 2 – Social Security Number (*if any*):
    - The question simply asks for a U.S. social security number. It does not ask for any social security number ever <u>used.</u> Ask your client if they have a valid social security number. If they do not, list "N/A."

- Question 3 – USCIS Online Account Number (*if any*):
    - USCIS has implemented an online tracking system for applicants and their representatives to track applications that have been filed. If your client has filed a previous application with USCIS, you should inquire whether they set up an online account and include the information here. Many asylum seekers will not have a USCIS online account. If that is the case, write "N/A."

- Questions 4-6 – Biographical Information:
    - Ensure that your client's name matches their identity documents unless your client entered under a false name. If your client entered under a false name, use your client's legal name.
    - In some cultures/countries, people do not have first, middle, and/or last names. If your client does not have a first, middle, or last name, leave that spot blank. Do not write in "N/A" or "None" on the application, as USCIS might issue documents with "N/A" or "None" as part of the name. For applicants who do not have a first name, USCIS will "rename" the person as "FNU" (first name unknown). Your client either will have to prove that they do in fact have a first name or, if granted asylum and USCIS documents show the first name as "FNU," your client will have to complete a legal name change. Otherwise, they will be known as "FNU." There are many "FNUs" in the United States.
    - In some countries or cultures, the order of names can be confusing. Talk to your client to ensure that you are listing the order of their names correctly. Keep in mind, however, that the name must match the identity documents.
    - Sometimes your client's true name does not match the name on their identity documents. List their true name, and then list the name that is on their documentation under Question 7. Put an asterisk after their true name and fully explain the circumstances. In this instance, your client should attempt to produce identity documents to corroborate the true and correct name.
    - If your client's legal name does not match DHS documents, specify this in Question 6.

- Question 7 – Other Names Used:
    - List any names that your client has ever used. Ask your client about this specifically and in many different ways, as they may initially be inclined to state that they have not used other names. For example:
        - If the applicant has two last names, they easily could have used one or the other at some time. They also could have reversed the order. Include all variations, including and excluding hyphens if necessary.
        - Ask about nicknames.
        - Ask about aliases.
        - If they entered on a false name, list that name here.
        - Ask whether the applicant changed their name after getting married and/or divorced.

- Question 8 – Address in the U.S.:
  - "Address in the U.S." is where your client is physically residing and the telephone number associated with that residence. The mailing address is listed separately in Question 9.

- Question 9 – Mailing Address:
  - If your client's mailing address/phone number is the same as their physical residence, write "Same as above" in the first line of the address and phone number questions. Do not leave these blank.
  - If your client's name is not on the mailbox, be sure to include the relevant individual's name in the "c/o" space for mailing purposes.
  - If your client's physical address is not secure for receiving mail, either because they live in a space where mail is shared, because mail is not regularly delivered, or because your client lives with an abusive partner, you can put the representative's address here. But, of course, the client will then not receive notices about the case directly.

- Question 10 – Gender:
  - If your client's circumstances or asylum claim involves issues of gender identity, the client should check the gender with which they identify, not the gender on their identity documents (if they are different) and insert an asterisk in pen in this space and note "See Supplement B." Similarly, if the client does not identify as male or female, you should insert an asterisk in pen in this space and note "See Supplement B." Add your explanation to the Supplement B form in the back of the I-589 application.

- Question 11 – Marital Status:
  - Sometimes, the answer to Question 11 is not clear cut. Different cultures have different definitions of married, single, divorced, and widowed. For example, your client may consider themself married or divorced, even if there was never a legal ceremony or recording of a certificate. Under the laws of their home country (e.g. customary or common law), it still may be a viable marriage/divorce. In cases such as this, you will have to research to see what documentation is available to establish the marital status. The Department of State Reciprocity and Civil Documents Schedule (https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country.html) is a good starting place. Please note, though, that the Schedule is not always up-to-date and should be used as a starting point only. If this issue is germane to the asylum claim, additional research will be necessary. If it is not germane to the case, you can always add an asterisk with an explanation on the Supplement B form.
  - Your client may respond that they were single because they are not currently living with their spouse. In this situation, the correct answer may actually be "married" or "divorced," depending on the circumstances.
  - Overall, be sure to engage in detailed fact-finding on the question of marital status, and keep in mind that cultural differences may lead to different definitions

of these concepts. If a client states that they are "married" or mentions a "spouse," always follow up and ask whether they have a marriage certificate as many couples in long-term relationships and/or with children in common may consider themselves married but not be considered legally married under U.S. law or the law of their country of origin.

- Question 12 – Date of Birth:
  - If your client has supplied you with identity documents, make sure that the date of birth you write on the form is the same as the date on these documents. If there is a discrepancy between what your client is telling you and the date on the documents, or if there is a discrepancy within the documents themselves, put an asterisk with an explanation on the Supplement B form.
  - In some cultures and during certain periods of countries' histories, birthdays are not recorded and/or are unknown. If your client states January 1 of some year, this is usually an indication that they do not really know the exact date of their birth. DHS is aware of this issue. Again, you can include the client's best guess or choose to write unknown and, in either scenario, put an asterisk and explain in the Supplement B form.

- Question 13 – City and Country of Birth:
  - Ensure that this answer comports with the client's biographical documents that you are filing. If there are inconsistencies between documents or what your client is reporting, be sure to note with an asterisk and provide an explanation in the Supplement B form.
  - Clients may state that they are from the closest or biggest city/town to their village, rather than the actual village. It is not uncommon for birth certificates to list the town where the birth was recorded as the place of birth, rather than the actual place of birth. Be sure to probe your client in detail about this to determine the actual place of birth if they were in fact born in a village. Again, if there are discrepancies between what your client tells you and their biographical documents, add an asterisk and explain in the Supplement B form.

- Question 14 – Present Nationality (Citizenship):
  - The term "nationality" refers not only to citizenship or membership of an ethnic or linguistic group, but may occasionally overlap with the term "race." *See* UNHCR, *Handbook on Procedure and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the status of Refugees*, HCR/IP/4/Eng/Rev. 1, ¶ 74 (1979, rev. 1992).
  - In most cases, this is an easy question to answer because nationality and citizenship are the same. However, in some cases, nationality and citizenship will be different, or the country in which your client was a national or citizen no longer exists. Additionally, your client may have a nationality, but be stateless. In these situations, be sure to add an asterisk and explain in the Supplement B form.

- Question 15 – Nationality at Birth:
    - Question 14 is relatively straightforward, as the question asks for nationality only at the time of birth (as opposed to the nationality/citizenship query in Question 13). Note, however, that this may not be the same as the country of birth. Remember that some countries have changed their names or gained independence during your client's lifetime. For example, a client may have been born in the USSR, but since become a citizen of Belarus. In this situation, be sure to give the correct historical name of the country of nationality at birth. Clients may also consider their nationality to be different from their country of birth. For example, Jews from the former Soviet Union may consider their nationality as Jewish rather than USSR.
    - Note also that many countries do not have birthright citizenship. Do not assume that the client's country of birth is also their country of citizenship or nationality.

- Question 16 – Race, Ethnic, or Tribal Group:
    - If the case is based on one of these characteristics, it is critical that the correct information be listed. For example, do not write "Black" if the case is based on a tribal group. It is important to list the specific tribe.

- Question 17 – Religion:
    - If your client belongs to a specific denomination of a religion, be sure to list this. For example, if your client is an Evangelical Christian, do not simply list "Christian." Likewise many Muslim claims will hinge on whether your client is Sunni or Shia; be sure to accurately list the denomination.

- Question 18 – Procedural History:
    - It is critical that you understand the procedural posture of your client's case. Clients may be confused about this. The best practice is to ask this question in the simplest of terms and in a variety of ways. For example, you may want to ask the following: Have you ever been contacted by immigration? Have you ever seen an immigration judge? Have you ever been in jail? Have you ever been fingerprinted? etc.
    - If your client has an A#, you should always call the EOIR hotline, 1-800-898-7180 to see if your client has ever been in immigration proceedings.

- Question 19 – Exit of Home Country/Entry to U.S.:
    - If your client entered legally, be sure that the dates in this question match up with their passport stamps and I-94 card, if your client has one. If your client entered without inspection ("EWI") and is unsure of the exact date of entry, write their best guess, include an asterisk, and provide an explanation in the Supplement B form.
    - Keep in mind that this question addresses the statutory one-year filing deadline. When completing this question, ask if your client has documents to prove the entry date or to prove that they were outside the U.S. within one year of filing his/her application.

- If some of the answers are not applicable – for example, the I-94 number or the date status expires for someone who entered EWI – list "N/A."
- For the question "status" if your client EWI'ed consider writing "asylum seeker" if that is the reason they came to the United States.
- If your client is not sure of the exact date they left their country or the exact date they entered the United States, type in an estimate and hand-write in "ca." or "approximately" on the printed version of the form.
- If your client is in F-1 or J-1 status, and they were admitted for the duration of their status, list "D/S."
- Be sure to list all prior entries, even if they were in a passport your client no longer has.

- Questions 20-22 – Passport/Travel Document Information:
  - If your client does not have a passport, place "N/A" in all of the answer spaces. If your client entered on a false passport and still has that passport, list "N/A" with an asterisk and explain the entry with the false passport in the Supplement B form.

- Question 23 – Native Language:
  - Native language refers to the language the applicant spoke in their home while growing up. If relevant, the tribal language should be included here. The language of education should be listed in Question 24 (see below). Remember to include specific dialect(s), if relevant.

- Question 23 – Fluent in English?
  - Unless your client's first language is English or their English is perfect, check the "NO" box. This preserves their ability to have an interpreter present at an affirmative asylum interview.
  - In cases where your client is not a native English speaker, it is often advisable to bring an interpreter to the interview. Applicants get nervous at their interviews, which may affect their ability to communicate in English. Even seemingly fluent English speakers may find their ability compromised under the stressful circumstances of an asylum interview. On the other hand, whenever testimony is filtered through an interpreter, some immediacy of the testimony is lost. Some asylum officers will allow the applicant to bring an interpreter, testify in English, but make use of the interpreter if there is a question they don't understand. Whether or not to use an interpreter is a strategic decision that will vary from client to client.
  - Please note that, unlike an individual hearing in immigration court, USCIS will NOT provide an interpreter for an affirmative asylum interview. Instead, the applicant must provide their own interpreter. It is best practice for the client to prep for the interview using the same interpreter who will attend the interview so that the interpreter is familiar with the narrative and any specialized vocabulary. It is generally not advisable to have a family member of the applicant serve as the interpreter.

- USCIS will call an interpreter on the telephone to monitor the interview and ensure that the interpretation is correct.
- For defensive asylum applications in immigration court, request an interpreter for the individual hearing at the master calendar hearing. Be sure to request an interpreter in the client's best language, including the specific dialect. If possible, have a native speaker at the individual hearing to serve as a monitor to ensure that the court's interpreter is interpreting clearly and correctly.

- Question 25 – Other Languages Spoken:
  - List all other languages in which your client is fluent. See Question 24 above for a discussion of fluency.
  - If your client does not speak any languages other than the ones you have already listed, write "None" here. If this is left blank, the application will likely be rejected.

PART A. II INFORMATION ABOUT SPOUSE AND CHILDREN

SPOUSE:

- Please note that above Question 1, you must check the box "I am not married" if this is the case.

- As noted above, ask your client detailed questions about their marital status. If there are any doubts, include an asterisk and an explanation in the Supplement B form. You will have to prove marital status in order for the spouse to be granted asylum as a derivative.

- If you are in doubt about whether a marriage is legal, err on the side of including the spouse here and consider providing an explanation in the Supplement B form. Failure to do so may exclude the spouse from eligibility as the beneficiary of a Form I-730, Refugee/Asylee Relative Petition.

- Questions 1- 23 – Spouse's Biographical Information:
  - If your client is NOT married and you already checked the "I am not married" box, it is not necessary to put "None" or "N/A" in any of the questions in this section. You can simply leave these questions blank.
  - Please see comments in Part A.II. regarding how to fill out the corresponding biographical information for your client's spouse.
  - If your client has more than one spouse, you must list information for all the spouses. However, be sure to inform your client that even if the multiple marriages are valid in the country where they were entered into, DHS will NOT recognize any marriages after the first marriage as viable for purposes of the I-730 or for inclusion as a derivative applicant.

- Question 24 – Including Spouse in the Application:
    - If your client's spouse is not in the U.S., leave this blank. If the asylum application is approved, your client will need to file an I-730 for the spouse to come to the United States as a derivative.
    - If the spouse is already in the U.S. and wants to be eligible for derivative status, check the "YES" box; if your client is successful in obtaining affirmative asylum, the spouse will be considered a derivative (as long as you have proved the legal relationship) and will automatically be issued an I-94 card reflecting asylee status. If the principal applicant becomes eligible for work authorization while the case is pending, the spouse will also be eligible. Note, however, that the spouse must file a separate I-765 application. The client and spouse should be counseled carefully about including the spouse on the I-589. If the asylum applicant is referred to immigration court and the spouse is included, the spouse will also be placed in removal proceedings. If the "YES" box is not checked and the principal applicant wins, they will have to file an I-730 for their spouse.
    - If the principal is in removal proceedings, the court will only have jurisdiction to grant asylum to the spouse if the spouse has also been issued a Notice to Appear. Otherwise, upon being granted asylum by the court, the applicant must file an I-730 for the spouse.

CHILDREN:

- Please note that above Question 1, you must check the box "I do not have any children" or "I have children."

- If your client has adopted children, include them in the number of children listed. Note that if the children were customarily adopted, you will need to do research to determine if the adoption was legal under the laws of the country in which the adoption occurred. If you cannot make that assessment when filing the application, place an asterisk by the biographical information of the child who was customarily adopted and provide an explanation in the Supplement B form.

- You do not have to include deceased children or children who were legally adopted from the applicant into another family.

- Keep in mind that one purpose of this section is to ensure that children will be granted derivative asylum or that an I-730 will be granted if the applicant wins asylum. If a child is NOT listed on this section, and your client later applies for the unnamed child, this may pose a serious challenge. It is therefore better to list all children, regardless of age or marital status, and provide explanations in the Supplement B form.

- If possible, review each child's birth certificate to confirm their date of birth. This will avoid future issues with the consulate during the I-730 process.

- In an affirmative asylum approval, a derivative child will be automatically approved and issued an I-94 card, provided that you have proven the legal relationship.

- In removal proceedings, the court will only have jurisdiction to grant asylum to the child if the child has been issued a Notice to Appear. If the child is not in removal proceedings, you will have to file an I-730 on their behalf.

- Note that if there is not enough space to list all of the applicant's children on the I-589 form itself, the Supplement A form may be used to list any additional children.

- Question 21 – Include Children in the Application:
    - Please see the comments above in the Spouse section, Question 24.

PART A.III INFORMATION ABOUT YOUR BACKGROUND

- This section requests a lot of addresses and dates, which are often difficult for applicants to remember. If your client responds with a simple, "I don't know" or "I don't remember," ask more specific questions to get as much information as you can. For example, you can create a written or pictorial timeline for them to fill out. If there are gaps or the dates don't match up, clarify these with your client. This can be a lengthy process, but it is important. If your client can't remember the exact date, write in "ca." or "approximately." Likewise, if your client can't remember the exact address, they should at least try to recall the name of the street or the name of the town in which they resided.

- Be sure that all of the information is consistent with the supporting documentation and the client's declaration. For example, if your client states that she was involved at a political protest at her university in July of 2009, be sure that the information listed in this section shows that she was at that university during the period covering July of 2009.

- If your client simply cannot remember necessary information, list as much information as you can and provide any explanations in the Supplement B form. Remember that many asylum applicants are victims of trauma and may have difficulty remembering certain things as a result. If this is the case, be sure to obtain a psychological evaluation explaining these issues.

- Question 1 – Address Prior to Coming to U.S.:
    - Include the client's last address in the country in which persecution occurred, in addition to the applicant's last address abroad if your client lived in a different country before entering the U.S.

- Question 2 – Residence for Past 5 Years:
    - The answer to this may be a repeat of the information in Question 1. Be sure that the addresses are listed in reverse chronological order and that there are no gaps in the dates.

- Again, it is essential that all addresses are consistent with the applicant's affidavit and supporting documentation.

- Question 3 – Education:
  - In some countries, the "type of school" does not mirror the U.S. education system. List what your client tells you and then include an asterisk and an explanation in the Supplement B form.
  - You may want to do some preliminary research to ensure that the education system your client explains to you is consistent with stated country practices.
  - If your client has school records, be sure that the information in this section comports with those documents, as well as your client's affidavit. Note that all schools attended must be listed here, not just schools attended during the last five years.
  - Remember that in many countries school years do not run September through June as is common in the United States. Be sure to ask your client the month that school typically began and ended.

- Question 4 – Employment:
  - If your client disclosed unlawful employment to you, you must include it in this section. Your client may feel more comfortable being vague in supplying the answer to this question such as "delivery person, restaurant," rather than giving the complete address for the place of employment. You should counsel your client, however, that if the officer, DHS attorney, or judge asks for more information at the interview, the client must answer truthfully.
  - Remember, your client's credibility is one of the most important factors in the asylum adjudication. If the client hides something, such as unauthorized employment, and the officer or judge discovers it, this could negatively impact their credibility determination. Generally, it is better to err on the side of disclosure.

- Question 5 – Parents and Siblings:
  - As discussed in Part A.I. Question 12, be sure that your client tells you the actual place of birth of their parents or siblings, not simply the closest city.
  - If your client does not have any siblings, write "N/A" or "None." USCIS may return the application as incomplete if you leave these spaces blank.
  - Include step-parents, as well as half- and step-siblings.
  - For "current location" it should be sufficient to list the name of the town or city and country where the relative lives. All relatives and their location must be listed even if the relative is in the United States without lawful status.

PART B. INFORMATION ABOUT YOUR APPLICATION

- Initially, this section requires that you submit general country conditions evidence to corroborate the specific facts of the applicant's claim. If you cannot provide this information, you must explain why. Generally, State Department reports are what

asylum officers and immigration judges rely upon most for general country conditions. These can be located at http://www.state.gov/j/drl/rls/hrrpt/. However, keep in mind that State Department reports can be superficial and may not specifically address the issues involved in your client's case. Also be aware that these reports have faced criticism under the Trump administration as containing fewer details of mistreatment than in the past.[1] Do not despair if the State Department report does not support your client's claim. You can also file reports from experts or non-governmental organizations, such as Amnesty International or Human Rights Watch, to support your client's application. However, be prepared to explain how these additional reports prove that the State Department report is incomplete or incorrect if that is the case. You should also research to see if there are news or journal articles about the relevant country and events. Discuss your research with your client and revise your client's affidavit as you become more informed about your client's home country.

- In addition to general country conditions evidence, it is critical to file as many specific supporting documents as possible. These should verify the facts of your client's case and corroborate their claims. Make sure that all facts in these supporting documents are internally consistent, as well as consistent with your client's affidavit and other supporting documents The more documents you can provide which corroborate aspects of your client's claim, even documents such as proof of education or employment which may not go to the heart of the claim, the more credible the adjudicator may find the applicant overall.

- Question 1 – Why you are Applying:
    - As mentioned in the general comments above, check the "Torture Convention" box if your client wants to apply for CAT relief. Unless there is no theory of the case that potentially supports a CAT claim, it is generally best for the default to be to include a CAT claim.
    - You can and should check more than one box if there are multiple possible claims.
    - If you are unsure if a ground applies to your case, it is better to check too many boxes than to leave one off. Be prepared at the interview or master calendar hearing to explain how each protected ground applies to your client's case.
    - Cases based on particular social group have come under particular scrutiny in recent Attorney General decisions and certifications. If it is possible, based on the facts of the case, to also include a claim on another protected ground or grounds, it is prudent to do so.

- Questions from Part B.1.A. - Part C.6.:
    - These questions address the basis of your client's asylum application. It is recommended that the answers to all of these questions be addressed in detail in your client's affidavit. Preparing a detailed written affidavit with your client is essential to the fact-gathering process, ensures that your client's claims are clear,

[1] *See* Amnesty International, *Trump Administration Undermines State Department's Human Rights Report,* Mar. 13, 2019, https://www.amnestyusa.org/press-releases/trump-administration-undermines-state-departments-human-rights-report-2/.

allows your client to organize his/her story clearly in his/her own mind, provides the client with a tool to use to refresh his/her memory prior to an interview or hearing, and enables you to identify and address difficult issues.
    - After you have completed the affidavit, provide short summary answers on the I-589 for each question followed by the statement, "Please see sworn affidavit for additional details."
    - The answers to these questions on the I-589 form should be summaries of the most important points responsive to the questions asked. Be sure to respond to each of the numbered sub-questions asked under each lettered question in the space provided. Answering each of those sub-questions should provide the asylum officer or immigration judge with enough information to understand the basis of the case.
    - Again, be sure that all information provided in these answers is completely consistent with your client's affidavit and with the supporting documentation.
    - If your answer to a question here is "NO" and it does not require any explanation, write "N/A" in the answer space.
    - If your client is approaching the one-year filing deadline, or if an immigration judge requires submission of the I-589 before you can complete the affidavit with your client, it is okay to complete the I-589 first. But take care not to include too much detail here if you are only having a cursory meeting with your client. It can be very damaging the client's credibility if information in the I-589 is inconsistent with later written or oral testimony.

- Question 1.A. – Past Persecution:
    - The answer to this question must always be "YES" if you are relying on past persecution. As described above, provide summary answers for each of the four sub-questions listed, followed by "Please see sworn affidavit for additional details."
    - If your client (or family, friends, or colleagues) has not experienced past persecution and the case is based solely on future persecution, only then should you write "NO." Remember, however, that even if your case is based on a fear of future persecution, your client's fear is informed by what has happened to others, and any harm that has been inflicted on anyone who is similarly situated to your client should be included here.

- Question 1.B – Future Persecution:
    - The answer to this question must always be "YES," unless your case is based on the exceptions of humanitarian asylum or the "other harm doctrine" under 8 CFR §208.13. If your client does not fear future persecution and you cannot meet the exceptions listed in the regulations, your client cannot be granted asylum, withholding, or CAT (must meet future torture as opposed to future persecution standard).
    - As described above, provide summary answers for each of the three sub-questions listed, followed by "Please see sworn affidavit for additional details."

- Question 2 – Past Treatment:
    - This question asks about the applicant and the applicant's family members.
    - This question will give USCIS information on whether your client or their family members were persecuted in the past. If your client (or listed family members) were arrested, even under pretextual reasons, it is very important to answer yes as that arrest would form part of the past persecution.
    - Clients may not understand the legal terms mentioned in this question. It is important to educate your client and clearly explain these terms. If your client has experienced any of these in his or her home country as a result of persecution, you must check "Yes."
    - Additionally, the answer to this question can be used against your client's case as it will garner information regarding the "serious nonpolitical crime" bar to asylum codified at INA §208(a)(2)(A)(iii).
    - As described above, provide a summary answer addressing the relevant question, followed by "Please see sworn affidavit for additional details."

- Question 3.A – Membership in Groups:
    - In many cases, the answer to this question will be "YES." If your client's claim is based on membership in a certain group (religious organization, political party, etc.), be sure to include that group here, even if it is not a formally recognized group *(i.e.* social group). For example, for religious persecution, be sure to list the church the client belonged to. For political persecution, list the political party.
    - List all groups, even if they are not related to the claim of persecution.
    - Be sure to discuss each group with your client as this question also attempts to identify individuals who may be ineligible for asylum due to Terrorism-Related Inadmissibility Grounds (TRIG). For a general overview on TRIG, see the USCIS website. If your client has been in any type of army, militia, resistance, or guerrilla group, be sure to discuss these in great detail with your client so you can determine whether your client might be ineligible for asylum under INA §§212(a)(3)(B); 237(a)(4)(B).
    - As described above, provide summary answers for each piece of information requested, followed by "Please see sworn affidavit for additional details."

- Question 3.B – Current Participation:
    - In some cases where your client's claim is membership in a particular social group it will be important to answer "YES." For example, if your client's PSG is "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe," your client will still be a member of that group, however your client may not "participate" in that group. There are other possible PSGs, such as "Salvadoran police officers" where your client may have left the group when fleeing the country of harm. If your client's claim is based on the group(s) discussed in Question 3.A., but they no longer participate in the group(s), provide an explanation as to why there is still a risk of future persecution based on that group membership. For example, if your client stopped all political activity since coming to the United States., explain why there is still a risk of future persecution based on the client's political opinion or activities.

- As described above, provide summary answers for each piece of information requested, followed by "Please see sworn affidavit for additional details."

- Question 4 – Torture:
  - This question addresses the issue of CAT eligibility. If your client is applying for CAT, the answer to this question must be "YES," or your client will be found ineligible for CAT.
  - Refer to the definition of torture found at 8 CFR §208.18 and in applicable case law. When responding to this question, the harm you describe must rise to the level of "torture" and must have been committed by, at the instigation of, or with the acquiescence of a government official. The harm must also have been inflicted for one of the specific purposes under the definition of "torture" (to punish, threaten, intimidate, etc.).
  - A mentioned previously, although asylum offices lack jurisdiction to adjudicate CAT claims, these answers should be completed even if the applicant is applying affirmatively.
  - Remember that unlike asylum or statutory withholding of removal, CAT does not require a nexus to a protected characteristic. However, the client should be able to articulate, at least generally, how the government acquiesces to the torture. This definition varies from circuit to circuit, so it is important to research this legal term of art in the jurisdiction where you practice.
  - As described above, provide summary answers for each piece of information requested, followed by "Please see sworn affidavit for additional details."

PART C. ADDITIONAL INFORMATION ABOUT YOUR APPLICATION

- Part C provides the adjudicator with information about any bars to asylum eligibility that may be applicable in your client's case. Thus, these should be answered very carefully and precisely, with any exceptions or explanations clearly articulated.

- Question 1 – Previous Applications:
  - Pursuant to 8 CFR §208.4(a)(3), an applicant can reapply for asylum as long as the previous application was not denied by an immigration judge (IJ) or the BIA.
  - An applicant can also reapply for asylum if there has been a change in circumstances that materially affect the applicant's eligibility for asylum, regardless of the procedural history of the case. *See* INA §208 (a)(2)(D). Beware, however, that if your client's previous application was adjudicated by an IJ, the BIA, or a federal court, jurisdiction for a new application may lie with that tribunal through a motion to reopen, and an affirmative application to USCIS may be denied for lack of jurisdiction.
  - If family members have applied for asylum or refugee status in the U.S., give their names, A-numbers, dates of application, and results. Consider filing FOIA requests to obtain family members' A-files prior to submitting your client's I-589 to ensure that there are no inconsistencies or information that would be damaging to your client's claim. If your client is not in contact with their family members and is not sure whether the family member has filed, the client should explain

why they are unable to obtain this information. For example, the client may be estranged from a family member.
    - As described above, provide summary answers for each piece of information requested, followed by "Please see sworn affidavit for additional details."
- Questions 2.A. and 2.B – Firm Resettlement:
    - These questions address the issue of firm resettlement. Your client must disclose all pertinent information, even if it raises a potential issue. *See* INA §208(a)(2)(A)(vi) and 8 CFR §208.15 and relevant BIA and circuit court case law for the definition and parameters of firm resettlement.
    - If your client had legal status in another country prior to coming to the United States., it does not automatically mean that they were firmly resettled. Be sure to research the nature of the prior legal status (duration, rights accorded, etc.) and include that information as part of your evidence, along with any pertinent evidence of conditions in the country in which your client had status.
    - With regard to Question 2.A., asylum offices expect the client to disclose even transit stops in airports on the way to the U.S.
    - As described above, provide summary answers for each piece of information requested, followed by "Please see sworn affidavit for additional details."

- Question 3 – Persecution of Others:
    - This question addresses the bar to asylum and withholding of removal.
    - Review the statute, regulations, and relevant case law to assess the parameters of this bar, to determine whether this may pose an obstacle to your client being granted relief, and to inform your response to this question.
    - As described above, provide summary answers for each piece of information requested, followed by "Please see sworn affidavit for additional details."

- Question 4 – Return to Country of Persecution:
    - You must include ANY and ALL times your client returned to the country of persecution, no matter how short, whether the entry was legal or otherwise, and regardless of timing.
    - The answer to this question will be used in assessing your client's well-founded fear of returning to the country of claimed persecution. Frequent returns or lengthy returns to the country of persecution without any problems may result in the adjudicator deciding that your client no longer has a well-founded fear of persecution.
    - If your client returned to the country of persecution, it is important to discuss the return trip in the affidavit and to provide an explanation of how it does not compromise his/her fear. For example, if your client returned, but had to remain in hiding in order to remain safe, or if your client traveled in and out of the country before they were harmed but has not returned since the harm occurred, these facts may serve to mitigate the impact of the trip.
    - As described above, provide summary answers for each piece of information requested, followed by "Please see sworn affidavit for additional details."

- Question 5 – One-Year Filing Deadline:
    - This question addresses the one-year bar to asylum found at INA §208(a)(2)(B).
    - Your client must provide documentation to establish that their application was filed within one year of entry into the United States. An I-94 or entry stamp is the best evidence in this regard. However, if your client entered EWI, secondary evidence in the form of affidavits from the applicant and/or others or documents establishing that your client was outside the U.S. within the year preceding the filing of the application should be presented. The more evidence, the better. In removal proceedings, you may be able to rely on the I-94, date of the I-213, or date of the credible fear/reasonable fear interview to demonstrate timely filing. The burden of proof is on the applicant to show by clear and convincing evidence that the application is being filed within one year of entry into the United States.
    - If your client is filing outside the one-year deadline, you must clearly identify the exception to the one-year deadline that applies to your client's case and explain why it applies. The changed and extraordinary circumstances exceptions are found at 8 CFR §§208.4 (a)(4)-(5), 1208.4(a)(4)-(5).
    - As described above, provide summary answers for each piece of information requested, followed by "Please see sworn affidavit for additional details."

- Question 6 – Crimes in the U.S.:
    - This question addresses the issue of the "particularly serious crime" bar codified at INA §208(b)(2)(ii). It also addresses the exercise of discretion.
    - Review the statute, regulations, and relevant case law to assess the parameters of this bar, to determine whether the bar might pose an obstacle to relief for your client, and to help inform your response to this question.
    - If your client has ever been arrested for a crime, provide certified final dispositions and explain why each arrest does not meet the definition of a "particularly serious crime."
    - As described above, provide summary answers for each piece of information requested, followed by "Please see sworn affidavit for additional details."

PART D. SIGNATURE AND CERTIFICATIONS

- The applicant must sign the application in both English and in their native language, if the Roman alphabet is not used in the native language. If the client's native language uses the same alphabet as English, but spells the name differently or uses diacritical marks, the native manner of spelling the name should be used. For example – Ahmed Ali Mohamed in Somali is Axmed Cali Moxamed; Ho Chi Minh in Vietnamese is Hồ Chí Minh.

- The applicant must include their signature and date. If the applicant is illiterate, the client can sign with an X.

- If the applicant's spouse, parent, or child(ren) helped to prepare the application, you must check "YES" and include their name and relationship.

- You must check "YES" in response to the question, "Did someone else besides your spouse, parent or child(ren) prepare this application?" because you, as the attorney, assisted in the preparation of the application.

- Sometimes clients have received a notice of low/pro bono attorneys from the court or other agencies. If so, check the "YES" box.

PART E. DECLARATION OF PERSON PREPARING FORM, IF OTHER THAN APPLICANT, SPOUSE, PARENT OR CHILD

- You, as the attorney, must fill out this section and include a signed and dated Form G-28, Notice of Entry of Appearance with the I-589 application if filing the application with USCIS. If application with immigration court, it must be accompanied by form E-28, or a copy of the form if you have already appeared in court.

PART F AND G TO BE COMPLETED AT INTERVIEW OR REMOVAL HEARING

- Do not have your client complete this section until you are in front of the asylum officer or immigration judge and your client is asked to do so.

SUPPLEMENT FORMS

- If you are adding information on any of the supplement forms, your client must sign the top of each supplement form page.
- Be sure to write the exact letter and numeral that corresponds with each question.

NATIONAL IMMIGRANT JUSTICE CENTER
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Asylum Practice Advisory:
Applying for Asylum After *Matter of A-B-*

***Matter of A-B-* Changes the Complexion of Claims Involving Non-state Actors, but Asylum Fundamentals Remain Strong and Intact.**

On June 11, 2018, Attorney General Sessions issued a precedential decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018). The decision overrules a prior decision, *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014), which held that in some circumstances, domestic violence survivors could receive asylum protection. Additionally, *A-B-* attacks asylum claims involving harm by non-state actors. While the decision gives the impression that these claims are foreclosed, nearly all the damaging language is dicta, and the Refugee Convention, the Immigration and Nationality Act (INA), and precedential case law at the Courts of Appeals and Board of Immigration Appeals (BIA) continue to support much of what the BIA previously held in *A-R-C-G-*. In short, the holding in *A-B-* is narrow and much of the damage done is a matter of optics, not law. Nonetheless, attorneys must be prepared for adjudicators to view *A-B-* broadly and present their arguments accordingly.[1]

This practice advisory is geared towards lawyers practicing in the Seventh Circuit. It is intended to explain what *Matter of A-B-* does and *doesn't* change and equip attorneys to prevail in asylum claims based on harm by non-state actors, while preserving issues for litigation in case asylum is denied. **Part I** provides background regarding the case law leading up to the *A-R-C-G-* and *A-B-* decisions, **Part II** discusses the Seventh Circuit case law that developed parallel to the BIA's decisions, **Part III** discusses *A-B-* specifically, and **Part IV** provides detailed practice tips for attorneys representing asylum seekers with non-state actor claims after *A-B-*, particularly in the Seventh Circuit. Despite difficult case law and a challenging adjudicatory system, asylum matters involving domestic violence and/or gang-based claims remain winnable with proper case preparation and adept lawyering.

I. Background

These next two sections provide historical context leading up to the Attorney General's decision in A-B-, which NIJC believes is critical to understanding that decision. For those familiar with this background, Part III goes directly to A-B-.

[1] Attorneys practicing outside the Seventh Circuit are encouraged to utilize other resources specific to their jurisdiction in addition to this practice advisory.

To qualify for asylum, an individual must demonstrate 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). In *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), the BIA first defined the term "particular social group." Relying on the doctrine of *ejusdem generis*, "of the same kind," the BIA construed the term in comparison to the other protected grounds within the refugee definition (i.e. race, religion, nationality and political opinion). It concluded that the other four protected grounds all encompass innate characteristics (like race and nationality) or characteristics that one should not be required to change (like religion or political opinion). *Id*. at 233. To be a protected ground then, particular social group (PSG) membership can be based either on a shared characteristic members cannot change (like gender or sexual orientation) or a characteristic they should not be required to change (like being an uncircumcised woman). *See id*. (listing gender as an immutable characteristic); *see also Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990) (recognizing sexual orientation as an immutable characteristic); *Matter of Kasinga,* 21 I&N Dec. 357, 366 (BIA 1996) (recognizing the status of being an uncircumcised woman as a characteristic one should not be required to change).

Federal courts of appeals have endorsed the *Acosta* standard for discerning PSGs as a valid interpretation of the statute. The *Acosta* test – or a variation of it – has governed the analysis of PSG claims for decades. *See Niang v. Gonzales,* 422 F.3d 1187, 1199 (l0th Cir. 2005); *Castellano-Chacon v. INS,* 341 F.3d 533, 546-48 (6th Cir. 2003); *Lwin v. INS,* 144 F.3d 505, 511 (7th Cir. 1998); *Safaie v. INS,* 25 F.3d 636, 640 (8th Cir. 1994); *Fatin v. INS,* 12 F.3d 1233, 1240 (3d Cir. 1993); *Alvarez-Flares v. INS,* 909 F.2d 1, 7 (1st Cir. 1990). Under the *Acosta* test, gender alone should be sufficient to establish a particular social group.

A. The fight to obtain protection for survivors of domestic violence

Women often experience human rights abuses that are particular to their gender, such as rape, domestic violence, female genital mutilation, forced relationships, honor killing, and trafficking. Of the five protected grounds for asylum, women typically experience these forms of persecution because of their membership in a PSG related to their gender. Historically, adjudicators have rejected gender-based PSGs as being too broad and due to floodgates concerns. Other adjudicators have rejected these claims under the "on account of" or nexus element in the asylum test, finding that the asylum seeker was not persecuted due to her gender, but because of "personal" reasons (for example, because the persecutor found the asylum seeker attractive or because the persecutor was drunk). Though these decisions often misconstrue controlling legal precedent, it has been challenging to convince adjudicators to recognize these claims for these reasons.

In 1995, the Immigration and Naturalization Service (INS) (the predecessor to U.S. Citizenship and Immigration Services) adopted "Considerations for Asylum Officers Adjudicating Asylum Claims from Women." These guidelines acknowledge women often experience persecution that is different from persecution faced by men, and cite domestic violence as one form of gender-related

persecution that can be the basis of an asylum claim. Although these guidelines applied to asylum officers in particular, they had a persuasive impact on many immigration and federal court judges.

These guidelines, however, did not prompt all adjudicators to grant asylum in domestic violence claims and so for years, practitioners awaited a definitive ruling from the BIA on whether a situation of domestic violence could be the basis for asylum. When the BIA issued its precedential decision in *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999), advocates were sorely disappointed. The respondent, Ms. Alvarado, had fled Guatemala and applied for asylum after suffering years of horrific persecution by her husband, a Guatemalan Army soldier. Ms. Alvarado sought and was refused assistance from the Guatemalan police and the courts. Although the BIA found that Ms. Alvarado had been persecuted and her government had failed to provide adequate protection, it determined she was not persecuted on account of a protected ground.

In December 2000, Attorney General Janet Reno and the INS issued proposed rules for adjudicating asylum claims based on domestic violence that called into serious question much of the reasoning in *Matter of R-A-*. In January 2001, Attorney General Reno vacated *Matter of R-A-* and sent it back to the BIA for reconsideration in light of the proposed rules.

In March 2003, Attorney General John Ashcroft certified the case to himself and in February 2004, the Department of Homeland Security (DHS) submitted a brief to Attorney General Ashcroft, articulating its position on Ms. Alvarado's eligibility for relief. The brief conceded that "married women in Guatemala who are unable to leave the relationship" is a viable PSG. DHS subsequently announced that the brief represented DHS's official positon and should be followed.

In his last days as Attorney General, John Ashcroft remanded Ms. Alvarado's case back to the BIA and directed the BIA to reconsider its decision once the proposed DOJ rules were published. The rules, however, were never published and as a result, *Matter of R-A-* remained stayed at the BIA level. The majority of domestic violence-based claims that had reached the BIA level were stayed as well. On September 25, 2008, Attorney General Michael Mukasey certified the case to himself, lifted the stay and remanded the case back to the BIA. The BIA then remanded the case to the immigration judge and in December 2009, the judge granted Ms. Alvarado asylum, nearly 15 years after she applied. Significantly, even before Ms. Alvarado had been granted asylum and notwithstanding the lack of clarity from the BIA, many adjudicators granted asylum in domestic violence-based claims during this time, in part due to the DHS position brief.

B. The emergence of gang-based asylum claims

While the state of domestic violence-based asylum law remained unclear, other asylum claims based on PSG membership began to rise. Many of these claims involved individuals from Central America who had fled gang-related violence. Some claims involved children who feared persecution for having resisted gang recruitment; others had been harmed for having disobeyed a

gang's extortion demand or having been a witness to a gang crime. The claims of women and girls often involved threats of forced relationships with gang members or domestic violence by a partner who was a gang member.

In what seemed to be a direct response to the increase in Central American asylum seekers with gang-related claims, the BIA issued two precedential decisions in 2008 in cases involving gang-based asylum claims, both affecting the test for establishing membership in a PSG: *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). In these cases, for the first time, the BIA added two new requirements to the PSG test.[2] The BIA held that in order to establish a viable PSG, the group must be based on an immutable characteristic, *and* be socially visible and particularly defined. According to the BIA, "particularity" meant that a group is defined in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons. *S-E-G-*, 25 I&N Dec. at 584. To meet the particularity requirement, a group must not be "too amorphous . . . to create a benchmark for determining group membership." *Id*. The BIA went on to reject the respondent's proposed group in *S-E-G-* under the particularity requirement because the group was made up of "a potentially large and diffuse segment of society." *Id*. at 585. The BIA did not provide a definition of "social visibility" beyond stating that a PSG's shared characteristic "should generally be recognizable by others in the community." *Id*. at 586.

Immigrant advocates harshly criticized these decisions. The BIA's reasoning in *S-E-G-* and *E-A-G-* was often circular and frequently conflated social visibility and particularity with nexus (the "on account of" requirement), which is separate question from whether the PSG is viable. For example, in analyzing the *S-E-G-* respondents' proposed group of "Salvadoran youth who have resisted gang recruitment, or family members of such Salvadoran youth," the BIA held that the group (1) failed the particularity test because the gang could have had many different motives for targeting Salvadoran youth, and (2) failed the social visibility test because members of the group weren't targeted for harm more frequently than the rest of the population. These justifications relied on a finding that the asylum seekers were not harmed *because of* their status as gang resisters – a nexus issue – and not because the PSG suffers from legal infirmity. The decisions completely ignored the fact that PSGs the BIA had previously accepted, such as young women of a particular tribe who oppose female genital mutilation, or gay men from a particular country, no longer appeared viable under this new test. While many Circuits deferred to the BIA's addition of the two new PSG requirements under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), others Courts – specifically the Seventh and the Third Circuits (see Part II) – rejected the requirements and refused to find that they merited *Chevron* deference.

[2] Although the BIA had previously referenced the concepts of social visibility and particularity, *see e.g., 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), it never made them requirements.

In February 2014, the BIA doubled-down on its PSG test and issued two decisions, *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014)[3] and *Matter of W-G-R-*, 26 I&N Dec. 20 (BIA 2014), which restated and emphasized the BIA's decision in *S-E-G-*. In *M-E-V-G-*, the BIA clarified that social visibility does not mean literal visibility, but instead refers to whether the PSG is recognized within society as a distinct entity. 26 I&N Dec. at 240-41. The BIA therefore renamed the requirement "social distinction." The decisions did not clarify or interpret the "particularity" requirement, but did include troubling dicta. For example, in *W-G-R-*, the BIA applied the particularity test to a PSG composed of former gang members. The BIA held that such a group failed the "particularity" requirement because "the group could include persons of any age, sex, or background," despite having previously noted in *Matter of C-A-*, 23 I&N Dec. 951, 956-57 (BIA 2006), that homogeneity was *not* a requirement for a PSG. 26 I&N Dec. at 221. According to the BIA, such a group would need to be defined with additional specificity to be viable. *Id*. at 222. NIJC authored a practice advisory on these decisions, which is available on NIJC's website.

Later that year, the BIA issued *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), the case Attorney General Sessions has now overturned. There, the BIA found that the group of "married women in Guatemala who are unable to leave their relationship" was socially distinct and sufficiently particular.[4] While this decision provided the long-awaited recognition that domestic violence survivors can be eligible for asylum, the BIA's particular social group analysis remained inconsistent with prior BIA case law. Understanding the BIA's analysis in *A-R-C-G-* is critical to understanding the Attorney General's errors in *A-B-*.

In *A-R-C-G-*, DHS conceded that the respondent had established persecution on account of the PSG "married women in Guatemala who are unable to leave their relationship." Despite this concession, the BIA examined the PSG and found it to be particularly defined and socially distinct to satisfy both *M-E-V-G-* and *W-G-R-*. *A-R-C-G-*, 26 I&N Dec. at 393-94. In doing so, the BIA noted that "the issue of social distinction will depend on the facts and evidence in each individual case, including documented country conditions, law enforcement statistics, and expert witnesses, if proffered; the respondent's past experiences; and other reliable and credible sources of information." *Id*. at 394-95. The BIA further noted that although DHS had conceded to nexus in this case, in other cases, nexus would be determined on a case-by-case basis and would "depend on the facts and circumstances of the individual claim." *Id*. at 395.

After the BIA's decision, establishing asylum eligibility in domestic violence-based claims became more straightforward, but subject to different challenges like getting judges to understand that the logic applied to non-marital relationships and to circumstances involving "non-

[3] NIJC's amicus brief in support of the respondent in *M-E-V-G-* can be found at http://immigrantjustice.org/sites/immigrantjustice.org/files/Valdiviezo%20NIJC%20Amicus%20FINAL.pdf.
[4] NIJC's amicus brief in support of the respondent in *A-R-C-G-* can be found at http://immigrantjustice.org/press_releases/board-immigration-appeals-rules-guatemalan-mother-who-fled-domestic-violence-can-be-g

traditional" forms of domestic violence. Some judges still routinely denied claims involving non-consensual relationships, same-sex relationships, or non-marital relationships because they did not match the "A-R-C-G- group." With some exceptions and variance, Chicago Immigration Court judges generally applied *A-R-C-G-* accurately.

II. Seventh Circuit Law

While the Seventh Circuit has not had occasion to directly opine on *A-R-C-G-*, the Court has a strong body of case law exploring the parameters of PSG-based asylum claims and *A-B-* does not alter that precedent. In *Lwin*, the Seventh Circuit accorded *Chevron* deference to *Matter of Acosta*. 144 F.3d at 511–12. For approximately two decades, the Court applied *Acosta*'s immutable characteristic test to determine whether proposed PSGs were cognizable for asylum purposes. *E.g.*, *Sepulveda v. Gonzales*, 464 F.3d 770 (7th Cir. 2006).

When the BIA added "social visibility" and "particularity" to the PSG analysis in 2008, the Seventh Circuit declined to follow suit and instead rejected the social visibility requirement. *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009). The Court explained that social visibility "cannot be squared" with prior Seventh Circuit or BIA decisions and, "[m]ore important, [social visibility] makes no sense" because many characteristics that are well-recognized for asylum purposes, such as sexual orientation or female genital mutilation, are not outwardly visible or publicly known. *Id.* at 615–16*; see also Benitez Ramos v. Holder*, 589 F.3d 426, 429–31 (7th Cir. 2009) (rejecting any social visibility requirement and holding that the PSG of "tattooed, former Salvadoran gang members" was cognizable under *Acosta*).

In 2013, the Seventh Circuit issued an *en banc* decision in *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013). Against the backdrop of the *S-E-G-* line of cases, *Cece* reiterated that "[t]his Circuit has deferred to the Board's *Acosta* formulation of social group." *Id.* at 669. The Seventh Circuit recognized that it had "rejected a social visibility analysis," *Id.* at 668 n.1, and also refused to apply the BIA's particularity requirement because "breadth of category has never been a *per se* bar to protected status." *Id.* at 674, 676. Applying only the immutable characteristic test, the Court held that the proposed group of "young Albanian women living alone" was cognizable. *Id.* at 677.

Since the BIA issued *M-E-V-G-* and *W-G-R-* in 2014 – which relabeled "social visibility" as "social distinction" – the Seventh Circuit has continued to apply *Cece* and its predecessor cases in PSG asylum matters. No Seventh Circuit decision has relied on social distinction or particularity to reject a proposed PSG. Instead, the Court's decisions continue to apply *Acosta*'s immutable characteristics test and cite *Cece*. *See, e.g.*, *Orellana-Arias v. Sessions*, 865 F.3d 476, 485 (7th Cir. 2017); *Sibanda v. Holder*, 778 F.3d 676, 681 (7th Cir. 2015). Though the Court has not yet addressed the question of whether *Chevron* deference applies to *M-E-V-G-* and *W-G-R-*, it is NIJC's position that *Chevron* deference is unwarranted because the Court has already refused to defer to "social visibility" and rejected the BIA's description of particularity, and as the BIA made clear in *M-E-V-*

G- and *W-G-R-*, those decisions are simply new framing of the same issue. For more information, please see NIJC's Particular Social Group Practice Advisory.

In sum, despite some back and forth at the BIA, the unaltered *Acosta* test remains law in the Seventh Circuit. This means that all PSG asylum claims, including matters where the persecutor is a non-governmental actor, must pass the immutable characteristic test and whether those groups are socially distinct or particular is inconsequential.

III. *Matter of A-B-*

After the BIA instituted its two additional PSG requirements, *Matter of A-R-C-G-* was the only decision in which the BIA found a PSG viable (a fact that the government often relied upon during oral arguments before the Courts of Appeals as proof that the new PSG test was reasonable). *Matter of A-B-* eliminates *A-R-C-G-* as a precedential decision, but in terms of legal holdings, that is as far as it goes. The decision does not create any new asylum standards, nor does it say that the group identified in *A-R-C-G-* can never be viable. Instead, the Attorney General asserts that he is overruling *A-R-C-G-* because of the manner in which the BIA came to its decision. He otherwise merely restates the BIA's case law regarding the PSG definition and other asylum elements. That said, the decision contains extremely negative dicta that casts doubt on the viability of all asylum claims involving non-state actors. Attorneys must be prepared to counter this language, even while arguing it is non-binding dicta.

It is also important to understand the background behind *A-B-*. A-B-'s case was initially heard and denied by Immigration Judge Couch at the Charlotte Immigration Court, a court that is notorious for its harsh attitude towards asylum seekers. Judge Couch has a greater than 85 percent denial rate in asylum cases. In A-B-'s case, he made adverse findings in nearly all elements of her asylum case. On appeal, the BIA reversed on all grounds, found her claim similar to that of *A-R-C-G-*, determined she was eligible for asylum, and remanded the case for issuance of a decision after background checks were completed. On remand, Judge Couch did not follow the BIA's order, but instead attempted to certify the case to the BIA, asserting that *A-R-C-G-*'s viability was no longer clear[5]. At some point thereafter, Attorney General Sessions learned of the decision,[6] certified the case to himself, and issued a request for amicus briefing on the question of whether "being a victim of private criminal activity constitutes a cognizable "particular social group" for purposes of an application for asylum and withholding of removal." *Matter of A-B-*, 27 I&N Dec. 227 (A.G.

[5] The case IJ Couch relied on to express concern about the viability of *A-R-C-G-* did not dispute the viability of the underlying particular social group, but instead was decided based on nexus, whereas nexus was not at issue in *A-R-C-G-*. *See Velasquez v. Sessions*, 866 F.3d 188, 195 n.5 (4th Cir. 2017) ("The validity of the social group identified by Velasquez is not at issue in this case. Moreover, *A-R-C-G-* does not bear on our nexus analysis" because there the Government conceded to the nexus element).

[6] A Freedom of Information Act request is pending to obtain more insight into how the Attorney General learned of A-B-'s case.

2018) (*A-B-* I). NIJC submitted an amicus brief asserting that the amicus process was flawed and that the Attorney General's amicus invitation effectively asked the wrong question by inappropriately conflating separate inquiries in the asylum analysis.

A. Holding

Matter of A-B- unambiguously overrules the precedent established in *A-R-C-G-* because the Attorney General found that decision was the product of concessions by DHS, not applications of law by the BIA. The Attorney General held that in *A-R-C-G-*, the BIA's analysis establishing that "married women in Guatemala who are unable to leave their relationship" was a cognizable PSG was cursory and did not accurately apply the *M-E-V-G-* and *W-G-R-* precedents regarding social distinction and particularity. This does not mean that some variation of the *A-R-C-G-* PSG can never be a viable; only that such groups must clearly meet the PSG requirements of the jurisdiction where they are proposed.

After overruling *A-R-C-G-*, the Attorney General also found the PSG posited in *A-B-*, "El Salvadorian women who are unable to leave their domestic relationships where they have children in common," is likely not cognizable either, but remanded the case for a new analysis after finding that the BIA had erred in its review of A-B-'s case.

In many ways, more concerning than the narrow holding in *A-B-* is the copious, mean-spirited, non sequitur dicta the Attorney General peppers throughout the decision that casts doubt more broadly on the viability of domestic violence-based PSG claims and other claims involving violence by non-state actors. For example, while the Attorney General does not assert a new asylum standard, he also claims that "[g]enerally, claims . . . pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *A-B-*, 27 I&N Dec. at 320.[7] Compounding matters is the Attorney General's chronic conflation of asylum elements throughout the decision. By blending persecution with nexus, nexus with PSG, and PSG with persecution, the decision makes parsing the elements tricky and establishing asylum eligibility more daunting than the statute, regulations, and case law really requires the process to be. Below are examples of the troubling comments made by the Attorney General throughout the decision.

[7] The Attorney General claims via footnote that "few" gang- or domestic violence-based claims satisfy the lower credible fear standard. Preparing for credible fear interviews and contesting erroneous credible fear findings is beyond the scope of this practice advisory. However, the same arguments set forth here apply in the credible fear context.

B. Preliminary Dicta[8]

The AG's introductory commentary – which precedes the section titled "opinion" – goes further than the decision itself in restricting asylum. Since these statements are not part of the opinion, they should be considered at most, nonbinding dicta. If these statements were intended to create new law, many would be ultra vires to the regulations. For example, the introductory comments suggest that only in "exceptional circumstances" may victims of harm by non-state actors establish asylum claims. There has never been an "exceptional circumstances" requirement for asylum claims of this nature and the body of this opinion does not purport to introduce one. The commentary also suggests that where a persecutor is a non-state actor, the asylum seeker must establish that the persecutor's actions "can be attributed" to the government. *A-B-*, 27 I&N Dec. at 317. Neither the Refugee Convention nor the implementing laws as interpreted by every Circuit impose this requirement. And it is not even what *A-B-* itself requires. While this introduction appears to heighten an asylum seeker's burden in showing the government is unable or unwilling to control a non-state persecutor, nothing in the decision asserts a new standard requiring that the government order or sanction persecution to meet the "unable or unwilling to control" element.

C. Government unwillingness or inability to control the persecutor

U.S. asylum laws have always accounted for the fact that many bona fide refugees – women fleeing female genital mutilation, gay men escaping persecution on account of their sexual orientation; religious minorities who fear harm by members of the majority religion – fled or fear harm by non-state actors and cannot avail themselves of government protection. *See e.g.*, 8 C.F.R. §

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[8] One striking aspect of the Attorney General's decision is that that he opines generally about claims, without expressly making any categorical statement. For instance, in addition to his comment that domestic and gang-based violence "generally" cannot be the basis for asylum, 27 I&N Dec. at 320, in a footnote, he says that "few such claims would satisfy the legal standard to determine whether an alien has a credible fear of persecution." 27 I&N Dec. at 320 n.1. Some adjudicators will likely perceive them as requiring denials of claims.

The statute grants immigration judges the responsibility to "determine" whether an asylum applicant has met her burden. INA § 240(c)(4)(B). Moreover, by regulation, the BIA members "shall exercise their independent judgment and discretion" in deciding cases, subject to the Attorney General's legal rulings. 8 C.F.R. § 1003.1(d)(1)(ii). The Attorney General has no power to decide asylum eligibility for asylum seekers whose cases are not certified to himself, and it is highly unlikely that the Attorney General could order the BIA and immigration judges not to exercise their discretion and judgment in a given case. If *A-B-* is intended to tell the BIA and immigration judge what to do, the Attorney General would be attempting "precisely what the regulations forbid him to do: dictating the Board's decision." *United States ex rel. Accardi v. Shaugnessy*, 347 U.S. 260, 267 (1954). Nor is it required that an explicit order be given for the agency to violate the *Accardi* principle: "[i]t would be naive to expect such a heavy-handed way of doing things." *Id.*

It may be useful to remind adjudicators of the *Accardi* principle. The Attorney General cannot order asylum denials in these thousands of cases, unless he takes the responsibility to certify those cases to himself. Under *Accardi*, he can establish legal rules, but he cannot dictate the outcome of cases.

1208.13(b)(1); *Kasinga*, 21 I&N Dec. 357; *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073-74 (9th Cir. 2017). Despite this well-established principle, *Matter of A-B-* suggests that non-state actor asylum claims are outliers.

Citing Seventh Circuit case law, the Attorney General refers to the "unable or unwilling to control" prong in several different ways. *See e.g.*, *Hor v. Gonzales*, 400 F.3d 482 (7th Cir. 2005) (*Hor I*)[9]; *Galina v. INS*, 213 F.3d 955 (7th Cir. 2000). Initially, as noted above, the Attorney General's introductory commentary states that claims involving non-state actors need to show that "government protection from such harm is so lacking that their persecutors' actions can be attributed to the government," although no citation is provided for this assertion. *A-B-*, 27 I&N Dec. at 317. Later, he cites Seventh Circuit case law referring to a showing that the government "condones" or is helpless to protect victims. *Galina*, 213 F.3d at 958. Ultimately, however, while the decision uses different terms for "unable or unwilling," the Attorney General also repeatedly references "unable or unwilling to control" as the applicable standard and does not claim to change case law on this point.

D. Persecution

One of the Attorney General's primary errors in *A-B-* is his conflation of the different asylum elements. Nowhere is this more apparent than in his description of what is required to establish persecution. Confusingly, the Attorney General suggests that persecution comprises three elements, only one of which relates to whether the harm is sufficiently severe to constitute persecution. 27 I&N Dec. at 337. The other two elements relate to whether the persecution was inflicted on account of a protected ground and whether the persecution was by the government or an entity the government is unable or unwilling to control. *Id*. In reality, these are three separate elements that all asylum seekers must meet, no matter the type of claim. Combining them into the definition of "persecution" will only result in confused and erroneous decisions.

The source for this confusion seems to lie with the Attorney General's misunderstanding of the asylum definition and the sometimes-imprecise way the Courts of Appeals have used the term "persecution." The Courts have often referred to "past persecution" as shorthand for the question of whether an asylum seeker has established a presumed fear of future persecution based on "past persecution." 8 C.F.R. § 1208.13(b)(1). When used in that context, the phrase refers to whether the asylum seeker has established past persecution, on account of a protected ground, by the government or an entity the government is unable or unwilling to control – it is only when all of these elements are established as to past persecution that the presumed future fear arises. *See e.g.*,

[9] While language in *Hor I* could be misunderstood to suggest a government must have been directly involved in persecution in order to establish a viable claim, on rehearing, *Hor v. Gonzales*, 421 F.3d 497 (7th Cir. 2005) (*Hor II*), which the Attorney General did not cite, clarified that asylum claims are viable if the persecution "emanate[s] from sections of the population that do not accept the laws of the country at issue, sections that the government of that country is either unable or unwilling to control." *Hor II*, 421 F.3d at 501-02 (internal citations omitted).

Yasinskyy v. Holder, 724 F.3d 983, 989 (7th Cir. 2013) (determining that the harm petitioner suffered constituted persecution, "[b]ut that does not help Yasinskyy because he did not demonstrate that the beatings and threats were carried out by the Ukrainian government or by a group that the government was unable or unwilling to control – a necessary element for showing past persecution."). In other words, the regulations create the following standard: Persecution + Nexus + Protected Ground + Unable/Unwilling to Control/State Actor = Presumption of Future Persecution. In contrast, the Attorney General's confused wording would create the following circular standard: Persecution + Nexus + Protected Ground + Unable/Unwilling to Control/State Actor = Persecution.

Ultimately, while the Attorney General's explanation of persecution is a confusing conflation of three different asylum elements, his explanation of those elements does not create any new standard beyond that already established in the statute, regulations, and case law.

E. On account of

The Attorney General affirms that establishing the connection between the harm suffered or feared and the protected characteristic is critical to asylum and finds that the *A-R-C-G-* decision erred in insufficiently analyzing this element. *A-B-*, 27 I&N Dec. at 338. Again, *A-B-* does not announce a new nexus standard but instead criticizes *A-R-C-G-* for failing to adequately apply the existing one. *Id*. at 338. Inarguably, nexus is a critical component to asylum and, indeed, is where some claims fail. *A-B-* cites the well-worn quote from *Cece* that nexus is "where the rubber meets the road." *Id*. at 338 (citing *Cece*, 733 F.3d at 673). It is precisely because nexus is such an important stand-alone concept that it should not be meshed with other elements; an error the Attorney General (and the BIA) make repeatedly. In order to present and evaluate nexus appropriately, practitioners and adjudicators must treat it as a separate element.

The Attorney General also reaffirms the "one central reason" standard that the statute has established for determining nexus. *A-B-*, 27 I&N Dec. at 338. This means that while there may be multiple reasons a persecutor harms a victim, the protected characteristic must be one of the central reasons. The decision does not abrogate the BIA's prior holding that there can be multiple central reasons. *See Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007). The Attorney General gives an example of a reason harm may be not be on account of a protected ground: if a gang targets an individual for money. But that reason does not preclude *other* central reasons that are connected to a protected ground. A government official may target a political activist, in part, because he wants to take the activist's property, but that does not mean that the activist's anti-government political opinion cannot also be one central reason for the targeting.

The Attorney General frames domestic violence as "private" and related to a "personal relationship." *A-B-*, 27 I&N Dec. at 337-39. As discussed in greater detail in Part IV, this reflects a

completely inaccurate understanding of the cause and nature of domestic violence, which is not simply the result of "animosity" by the abuser towards his partner. *Id*. at 316.

Finally, the Attorney General implies (after citing the vacated *R-A-*) that asylum seekers should provide evidence that the persecutor is aware of the PSG's existence to prove nexus, rather than just evidence that the persecutor targeted the asylum seeker on account of the characteristics she shares with other group members. *A-B-*, 27 I&N Dec. at 339. This is problematic since it is difficult to know what evidence could be available to show the persecutor's views towards other individuals who share the protected characteristics with the asylum seeker. Critically, however, the Attorney General does not make this a requirement for establishing nexus and does not repudiate well-established case law finding that nexus can be proven through direct *and* circumstantial evidence. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992); *Martinez-Buendia v. Holder*, 616 F.3d 711, 715 (7th Cir. 2010).

F. Particular social group composition

The Attorney General restates the PSG test set out in *S-E-G-/E-A-G-* and clarified in *M-E-V-G-/W-G-R-*, demonstrating that he has not created a new PSG test. The Attorney General also cites recent BIA case law, *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018) for the requirement that an asylum seeker must clearly indicate "on the record and before the immigration judge, the exact delineation of any proposed particular social group" and that the BIA cannot consider new PSGs proposed on appeal. *A-B-*, 27 I&N Dec. at 344. This is a troubling requirement given the complexities of PSG case law, particularly for pro se asylum seekers, but it is not a new standard.[10]

The Attorney General also makes several critiques of the *A-R-C-G-* group, but the criticism falls flat. First, the Attorney General implies that Courts of Appeals have found *A-R-C-G-* difficult to implement when, in fact, Courts have demonstrated little trouble applying the PSG; which sets forth clear and straightforward membership requirements. The fact that in some cases, Courts have found an *A-R-C-G-*style PSG not viable based on the facts of the case, or that the asylum

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[10] By contrast, the en banc Seventh Circuit in *Cece* stated regarding Cece's particular social group:

> [W]e must first determine the contours of her social group. Both the parties and the immigration courts were inconsistent, and the description of her social group varied from one iteration to the next. The inconsistencies, however, do not upset the claim. . . . And in one form or another, both Cece and the immigration judge articulated the parameters of the relevant social group. On her application for asylum, Cece explains that she is a "perfect target" of forced prostitution because she is a "young Orthodox woman living alone in Albania." . . . . Cece testified at length that women do not live alone in Albania . . . that she did not know anyone who lived alone . . . that she was afraid to live alone, . . . and most importantly that she was targeted because she was living alone. . . . Similarly, the Albanian expert's testimony was focused on the risk of women who lived alone in Albania."

733 F.3d at 670-71.

seeker was not a member of her proposed group, does not mean that *A-R-C-G-* is not workable, but rather that it *is* a functioning legal tool.

Second, the Attorney General commits errors of logic by suggesting that the PSG in *A-R-C-G-* and other gender violence-based asylum claims fail because they are defined by the harm the group members suffered or feared and therefore do not exist independently of the persecution. First, groups defined in part by the persecution are not necessarily doomed. As noted in Part IV, a group can be defined by past harm suffered so long as that PSG is being used for a future fear claim (e.g., a group based on the characteristic of having been forcibly recruited as a child soldier includes the harm of forced recruitment as a part of its definition and so would fail as to past persecution if the asylum seeker was arguing he had been persecuted in the form of forced recruitment *because* of his status as a forcibly recruited child solder. But if vigilantes were targeting children who had been forced to be soldiers, the claim could prevail because the harm feared (e.g. attacks by vigilantes) is different from the harm that places one in the PSG (e.g. forced recruitment). *See e.g.*, *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003). This is an important, but often overlooked, conceptual point.

Additionally, defining a PSG based on being a woman who is "unable to leave" a relationship is not the same as defining the PSG based on being an "abused women." *A-B-* asserts these are functional equivalents, but that is incorrect. The inability to leave a relationship is not the harm suffered or feared. Moreover, there may be many reasons (economic, familial, cultural) why a woman is unable to leave a relationship, which in turn make her a target of persecution by her partner. Suggesting, as the Attorney General does, that this group is defined by the harm is seemingly a purposeful misreading of the PSG.[11]

G. *Chevron* and *Brand X*

The Attorney General cites to *Nat'l Cable & Telecomms Ass'n v. Brand X Internet Servc.*, 545 U.S. 967(2005) and *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) for the point that the Attorney General's reasonable construction of an ambiguous term in the INA, like "membership in a particular social group," is entitled to deference and may displace a prior court interpretation. *A-B-*, 27 I&N Dec. at 326-27. The Seventh Circuit has not had occasion to affirm a PSG based on *A-R-C-G-*. However, longstanding Seventh Circuit law has refused to defer to the particularity and social distinction requirements. NIJC does not see *A-B-* adding significantly to the BIA's prior defense of its three-part test, but it is likely the Seventh Circuit would consider the Attorney General's rationales if and when it addresses those questions. Since the Attorney General

[11] The Attorney General also devotes significant attention to the notion that the PSG in *A-R-C-G-* is not socially distinct. Since social distinction is not a recognized PSG requirement in the Seventh Circuit, this practice advisory will not address that part of the decision. See NIJC's Particular Social Group Practice Advisory for more information on this point. To the extent social distinction is relevant to the nexus or "on account of" element, it will be discussed in that section below.

did not explicitly state he was intending *A-B-* to overturn Circuit precedent, and he did not instruct adjudicators not to follow Seventh Circuit precedent, NIJC's position is that immigration judges within the Seventh Circuit continue to be bound by Seventh Circuit case law, at least pending some future BIA or Seventh Circuit decision. While NIJC encourages attorneys to have a working familiarity with *Chevron* and *Brand X* (and can review NIJC's Particular Social Group Practice Advisory for more information), attorneys should present their arguments based on the premise that *A-B-* does not alter the test for PSG claims within the Seventh Circuit.

IV. Presenting Asylum Claims In Light of *Matter of A-B-*

The Attorney General attacks asylum seekers on multiple grounds, but again, the actual legal holding of *A-B-* is quite narrow: it simply overturns the BIA's decisions in *A-R-C-G* and *A-B-*. Nonetheless, given the extensive, anti-immigrant dicta throughout the decision, and the likely possibility that adjudicators will rely on it, presenting the claims of individuals seeking asylum based on persecution by non-state actors will require additional preparation. While asserting and preserving arguments that *A-B-* does not overrule *Cece* and its progeny, practitioners should expect that adjudicators will closely scrutinize claims involving non-state actors, particularly when the claims involve domestic and gang violence. Lawyers representing asylum seekers with these claims must educate adjudicators regarding the actual holdings of the *A-B-* decision and its interplay with Court of Appeals case law, build robust records in support of each element in the claim, and preserve issues for appeal.

> Always preserve the argument that *Matter of A-B-* does not overrule *Cece v. Holder* and other Seventh Circuit precedent.

Finally, attorneys should remind adjudicator that, despite the Attorney General's rhetoric, it is well-established that adjudicators must evaluate asylum claims on a case-by-case basis, paying close attention to the particular facts end evidence of the individual case. *See e.g.*, *Acosta*, 19 I&N Dec. at 232-33 ("The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis"); *A-R-C-G-*, 26 I&N Dec. at 395 ("In particular, the issue of nexus will depend on the facts and circumstances of an individual claim"); *M-E-V-G-*, 26 I&N Dec. at 251 ("[W]e emphasize that our 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. . . . Social group determinations are made on a case-by-case basis"); *see also Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014) (remanding proceedings to the BIA because the BIA failed to make a case-by-case determination regarding the claim, in violation of its own precedent).

A. Corroboration

The one practice tip spanning all of the issues raised in *A-B-* is that importance of corroboration. Attorneys must attempt to extensively corroborate all aspects of the claim and

avoid relying solely on their client's affidavit and country condition reports. The statutory language regarding corroborating evidence is clear: if the adjudicator determines the asylum seeker should provide corroborating evidence, the asylum seeker must provide that evidence or explain why it is not reasonably obtainable. INA § 208(b)(1)(B)(ii). Adjudicators will rarely provide a continuance to obtain corroborating evidence; thus attorneys must corroborate all elements and facts of the client's claim (or show why such evidence is not reasonably obtainable) and submit the evidence with all other pre-hearing materials (while requesting a continuance, and making objections to denials, if any new corroboration angles emerge during the merits hearing).

Additionally, when considering corroboration, attorneys should be aware of the coordinated effect of *A-B-* and the Department of State's gutting of the 2017 Human Rights Reports it issued in May 2018. In these reports, the State Department dramatically minimized – and in some instances cut out entirely – human rights abuses that had been well documented in prior years. This was most obvious in sections of the reports discussing abuses related to sexual orientation and gender, and especially for countries considered allies of the United States.[12] NIJC has never recommended that attorneys rely heavily on the State Department Human Rights Reports as a source of country condition evidence, but in light of the 2017 reports, attorneys may now need to provide additional documentation to disprove the information contained in the State Department report.[13]

B. Persecution

The Attorney General did not dispute that the harm A-R-C-G- suffered was persecution. *A-B-*, 27 I&N Dec. at 336. Nonetheless, as noted above, his discussion conflates the definition of persecution with other elements in the asylum definition (the nexus and governmental action elements) in a way that may confuse adjudicators to the detriment of the asylum claim.[14]

Correct Formulation	Attorney General's Formulation
Persecution + Nexus, Protected Ground, Unable/Unwilling/State Actor Rebuttable Presumption of Future Persecution	Persecution + Nexus, Protected Ground, Unable/Unwilling/State Actor Persecution

[12] For a particularly vivid example, attorneys can compare the section on women in the Honduran report from 2017 to the 2015 and 2016 reports. *See also*, Robbie Gramer, "Human Rights Groups Bristling at State Department Report," *Foreign Policy* (April 21, 2018), available at https://foreignpolicy.com/2018/04/21/human-rights-groups-bristling-at-state-human-rights-report/.

[13] The Seventh Circuit has criticized adjudicators for over-reliance on the State Department reports and noted their political nature. *See e.g.*, *Koval v. Gonzales*, 418 F.3d 798, 807-08 (7th Cir. 2005).

[14] As explained in Part III, the Courts of Appeals have often referred to "past persecution" as shorthand for the question of whether an asylum seeker has established a presumed fear of future persecution based on "past persecution."

Practice Tips

When briefing the persecution element, attorneys should rely primarily on the *Stanojkova* definition, which states that "[p]ersecution involves . . . the use of *significant* physical force against a person's body, or the infliction of comparable physical harm without direct application of force . . . or nonphysical harm of equal gravity." *Stanojkova v. Holder*, 645 F.3d 943, 948 (7th Cir. 2011). NIJC encourages attorneys to include a brief footnote in response to the confusing description in *A-B-*, explaining the following:

> Although the Attorney General noted that the Board has provided three elements to the persecution definition (1. nexus or "intent to target;" 2. severe harm; and 3. inflicted by the government or an entity that the government "was unable or unwilling to control"), this description refers to the requirements for establishing the "past persecution" that gives rise to a presumed future fear of persecution. 8 C.F.R. § 1208.13(b)(1). Establishing that the prior harm suffered constitutes persecution – i.e. is sufficiently severe – is a separate question from the "nexus" and "unable or unwilling to control" elements. See e.g., *M-E-V-G-*, 26 I&N Dec. at 242; Cece; 733 F.3d at 673.

Past persecution, however, is not the only way to establish asylum eligibility. Thus, attorneys should be sure to present a clear, *independent* argument that the client has a well-founded fear of future persecution (meaning, a reasonable possibility of future persecution, on account of a protected ground, by the government or an entity the government is unable or unwilling to control). 8 C.F.R. § 1208.13(b)(2); *Ayele v. Holder*, 564 F.3d 862, 868 (7th Cir. 2009). Attorneys should be careful to present this claim independent of the past persecution claim in case the adjudicator does not accept the PSG or nexus argument regarding past persecution.

C. Particular Social Group Membership

The Attorney General does not say anything new regarding the BIA's PSG test or provide any new interpretation or rule. *See A-B-*, 27 I&N Dec. at 335 (reaffirming the three-part PSG test). In fact, as noted above, while the Attorney General overruled *A-R-C-G-*, he did not say the characteristics of gender, nationality, and relationship status could never form a PSG. Rather, he simply found the BIA's analysis of the group in *A-R-C-G-* insufficient. *A-B-*, 27 I&N Dec. at 334-36.

When presenting a PSG-based asylum claim within the Seventh Circuit, it continues to be important to remind adjudicators that the Seventh Circuit has rejected the BIA's social distinction and particularity tests as set out in *S-E-G-*; *E-A-G-*; *M-E-V-G-*, and *W-G-R-*, and affirmed a pure, *Acosta*-only approach; since the *A-B-* decision does not purport to modify the BIA's test, adjudicators within the Seventh Circuit must continue following an *Acosta*-only approach as well.[15]

[15] For further comparison and analysis of the Seventh Circuit and BIA's particular social group case law, please see NIJC's Particular Social Group Practice Advisory.

Because of the BIA's holding in *Matter of W-Y-C-*, 27 I&N Dec. 189, affirmed by the Attorney General in *A-B-*, that new social groups cannot be asserted on appeal, it is important that NIJC *pro bono* attorneys work closely with NIJC to ensure that they have preserved all social groups at the immigration court level because attorneys may be unable to assert new PSGs on appeal. This generally means that NIJC *pro bono* attorneys should forward their pre-hearing brief to their NIJC point-of-contact **no less than five business days before the filing deadline**.

Practice Tips

When determining the parameters of a PSG, attorneys should first follow these steps:

1) Explore why the persecutor targeted or will target your client and determine whether those reasons are characteristics, your client cannot change or should not be required to change.

2) Be sure to differentiate between the initial reason for targeting and the subsequent targeting based on an action by your client. For example, Central American gangs often target young men for recruitment and the population generally for extortion. But once an individual opposes recruitment or extortion, or takes steps such as reporting the gang to the police, the gang's persecution frequently shifts and becomes more severe. It is generally best to focus on that secondary reason – the act in opposition; the act of filing a police report; the resistance to gang activity – as the characteristic forming the social group, rather than the general socio-economic reasons the gang may have targeted the individual in the first place.

3) Do NOT define the PSG by the harm suffered or feared. Notwithstanding the Attorney General's assertion that PSGs must exist independently of the persecution, *A-B-*, 27 I&N Dec. at 334-35, referencing the harm suffered does not necessarily invalidate the social group, as explained in Part III.[16] However, it will make the nexus element almost impossible to prove because of the circularity problem – "young Salvadoran men who have been targeted by gangs" are not targeted by gangs because they "have been targeted by gangs" and "Guatemalan women who have suffered domestic violence" are not targeted with domestic violence because they "have suffered domestic violence." In many instances, young men in Central American are targeted after taking the irretrievable step of refusing the gang and that is what prompts the harm. Similarly, many women are abused because of their gender. These characteristics – having opposed the gang and/or being female – are immutable characteristics that exist independent of the persecution. Attorneys must clearly explain the

> Do not define the PSG by the harm your client suffered or fears.

[16] *See Cece*, 733 F.3d at 671 (Although a social group "cannot be defined merely by the fact of persecution" or "*solely* by the shared characteristic of facing danger" . . . . [t]hat shared trait, however, does not disqualify an otherwise valid group"); *see also Lukwago*, 329 F.3d 157.

difference and be prepared to respond to government attorneys who will assert the characteristic and the harm are one.

4) When looking for supportive case law, look to Seventh Circuit law first and then to BIA precedent that may have found viable social groups in cases with similar rationales, but different countries of origin; and then to other Circuits. For example, the Seventh Circuit has recognized the PSG of "former Salvadoran gang members," *Benitez Ramos,* 589 F.3d at 429; "the educated, landowning class of cattle farmers in Colombia," *Orejuela v. Gonzales*, 423 F.3d 666 (7th Cir. 2005); and "Jordanian women who have allegedly flouted moral norms," *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011). The Seventh Circuit has not yet recognized a group based on resistance to gangs, but it has recognized a group based on resistance to the FARC. *See Escobar v. Holder*, 657 F.3d 537 (7th Cir. 2011). Similarly, the Seventh Circuit had not previously had occasion to recognize a group that followed the *A-R-C-G-* definition, but it has recognized the group of "single women in Albania who live alone." *Cece*, 733 F.3d at 671. Significantly, the BIA has also recognized a particular social group related to gender and resistance to a particular activity. In *Matter of Kasinga*, (which the BIA has repeatedly asserted remains viable even under the BIA's new PSG test, *see M-E-V-G-*), the BIA found viable the PSG of "young women of the Tchamba-Kunsuntu tribe who had not been subjected to female genital mutilation and opposed the practice." 21 I&N Dec. 357.

To support the asylum claims of Central Americans and Mexicans, look to Seventh Circuit precedent involving asylum seekers from other countries.

Based on these guidelines, NIJC recommends that attorneys practicing in the Seventh Circuit utilize PSG formulations in gender and gang-based claims that generally follow these types of definitions (keeping in mind that PSGs are case-specific and must be the reason for the harm experienced and/or feared in order to satisfy the nexus requirement):

Domestic violence/forced relationships claims:

"Ms. X belongs to the particular social group of "Salvadoran women," or more narrowly "Salvadoran women in [domestic/intimate/marital] relationships they are unable to leave" or "women in the X family/immediate family members of Mr. X."

Gang-based claims:

"Mr. X belongs to the particular social group of "Salvadorans who have opposed or resisted the MS-13;" "Salvadoran small business owners who have opposed the MS-13;" "Salvadorans who have witnessed gang crimes and reported them to law enforcement;" "family members of MS-13 gang members," or more narrowly, "the immediate family members of Mr. X."

After consulting with NIJC and defining the PSGs (making sure to preserve all groups per *W-Y-C-*), NIJC *pro bono* attorneys must defend the PSGs in their legal brief under Seventh Circuit law and against the Attorney General's decision in *A-B-*. Depending on the case, the latter may need to be presented more aggressively or could be relegated to a footnote (for example, attorneys with domestic violence-based claims will likely want to clearly and substantially address the impact of *A-B-* on their client's claim). PSG defenses should generally contain the following information:

- **In domestic violence and related claims:** Although the Attorney General in *A-B-* overruled the BIA's decision in *Matter of A-R-C-G-*, the Attorney General simply focused on perceived analytical errors the BIA made when examining *A-R-C-G-*'s particular social group and remanded for a new analysis. He did not assert that the group as defined in *A-R-C-G-* could never be viable. Moreover, the analytical errors identified by the Attorney General focused exclusively on the social distinction and particularity requirements, which the Seventh Circuit has not recognized. Even if they were, the evidence demonstrates that Ms. X's groups are socially distinct and particularly defined, especially when viewed in light of other groups recognized by the Seventh Circuit. Furthermore, the group is not defined solely by the past harm suffered, which is the standard set by the Seventh Circuit. *Cece*, 733 F.3d at 671-72. While some women may be unable to leave a relationship due to a threat of violence, others may be unable to leave due to their economic situation; social stigma; other dangers not emanating from the abuser; or child custody concerns.[17]

- **In all PSG claims:** In February 2014, the BIA reaffirmed its particular social group definition as requiring "social distinction/visibility" and "particularity." *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 20 (BIA 2014). These new requirements are impermissible and unreasonable interpretations of "particular social group" and the Seventh Circuit has rejected them. *See Gatimi*, 578 F.3d 611 (rejecting the BIA's social visibility test); *Cece*, 733 F.3d at 674-75 (rejecting breadth (particularity) as a bar to a particular social group). Where the BIA declines to follow binding circuit precedent within a federal circuit, it explicitly says so in a published decision. *See, e.g.*, *Matter of Konan Waldo Douglas*, 26 I&N Dec 197 (BIA 2013). Since the BIA did not purport to overrule Seventh Circuit precedent in *M-E-V-G-* and *WGR-*, the Seventh Circuit's rejection of social distinction and particularity remains binding.

  Moreover, none of the Seventh Circuit's precedent decisions since *M-E-V-G-* and *W-G-R-* have addressed the BIA's additional requirements and all have reaffirmed the *Acosta* definition of particular social group, as reaffirmed in *Cece*. *See Salgado Gutierrez v. Lynch*, 834 F.3d 800, 805 (7th Cir. 2016) (rejecting breadth and homogeneity as requirements for establishing a particular social group); *Lozano-Zuniga v. Lynch*, 832 F.3d 822, 827 (7th Cir.

[17] Attorneys should document, via the client's affidavit, country condition documents, and other sources, some of the reasons why a woman in the client's community may be unable to leave a relationship outside of the threat of harm from the abuser.

2016) ("This circuit defines social group as a group "whose membership is defined by a characteristic that is either immutable or is so fundamental to individual identity or conscience that a person ought not be required to change."). These decisions make clear that the BIA's new particular social group requirements are not binding in the Seventh Circuit. Even if they were, the evidence demonstrates that Ms. X's groups are socially distinct and particularly defined.

Finally, the importance of asserting all applicable PSGs at the immigration court level cannot be overstated in light of *W-Y-C-*. Proposing more groups than necessary does post some risk that the strongest claims will be diluted or overshadowed by the others. Discussing PSGs with NIJC far in advance of briefing, and sending briefs to NIJC for review far in advance of the merits hearing will help ensure that attorneys are presenting all the necessary groups, without including too many unnecessary ones. Attorneys must also remember that for each social group presented, a full legal argument must be made (regarding whether persecution was or will be on account of that group).

D. Nexus

Context is critical.
Use all forms of evidence (affidavits, country reports, expert statements) to establish context.

The Attorney General examined the persecution A-R-C-G-'s husband inflicted on her as harm occurring exclusively within a relationship between two people. This analysis not only ignores established sociological evidence regarding domestic violence and country condition evidence regarding gender violence in Central America, but it also fails to consider the persecution in the context in which it occurred, in violation of circuit precedent. *See Sarhan*, 658 F.3d at 656 (rejecting the immigration judge's assertion that a threatened honor killing was due to a "personal dispute" and determining instead that the threat was due to a "widely-held social norm in Jordan" that makes such honor killings permissible); *Ndonyi v. Mukasey*, 541 F.3d 702, 711 (7th Cir. 2008) (vacating a removal order after finding that the immigration judge and BIA "utterly fail[ed] to consider the context of [the asylum seeker's] arrest."); *De Brenner v. Ashcroft*, 388 F.3d 629, 638 (8th Cir. 2004); *Osorio v. INS*, 18 F.3d 1017, 1029 (2d Cir. 1994).

<u>Practice Tips</u>

Attorneys presenting PSG-based asylum claims should be sure to heavily corroborate their arguments that their client was and will be persecuted on account of her PSG membership(s).

1) In response to the concerns raised by the Attorney General, this evidence should address whether the persecutor had some understanding of the client's PSG membership (i.e., in a domestic violence-based claim, whether he understood that the client could not leave him and whether he and/or other members of the community recognized the existence of other

women who could not leave relationships due to threats of harm; economic concerns, or other issues).[18]

2) Attorneys must present these claims within the broader context of gender violence generally and the country at issue specifically. For example, it is well-established that domestic violence is rooted in power and control, as opposed to attraction or desire. Attorneys should reference and include articles and/or affidavits from experts like Nancy K. D. Lemon, whose affidavit on domestic violence is available via the Center for Gender and Refugee Studies and explains that domestic violence stems from a desire to exercise power and control within a social and cultural construct that enforces men's entitlement to superiority and control over family members. Affidavits from country condition experts and other country condition resources should explain how domestic and sexual violence in the country at issue is based on deep-rooted machismo and the belief that women are subordinate to men and, significantly, is of a different level and severity than domestic violence in the United States. Depending on the case, attorneys may want to go further in explaining what machismo is to ensure the adjudicator understands how misplaced it is to view domestic violence as a "private matter."

Place the persecution within the context of a broader policy or practice.

Similarly, in cases involving gangs or cartels, attorneys must place the harm suffered or feared by the client within the context of the country at issue and the policies of the gang or cartel. The Seventh Circuit's analysis in *R.R.D. v. Holder*, 746 F.3d 807 (7th Cir. 2014), is instructive here. In that case, the Seventh Circuit rejected the BIA's determination that a former Mexican police officer could not establish a nexus between the persecution he feared from Mexican cartels and his status as a former police officer. The Court determined it erroneous for the BIA to have ignored evidence that cartels have *a policy* of targeting former police officers, which, the Court noted, is a "rational way to achieve deterrence" (from the perspective of the cartel). *Id*. at 810. Thus, in a claim involving a gay man from Honduras who was targeted by a gang, useful evidence could include an expert who can explain that gangs in Honduras are known to target LGBT people because the group is antithetical to the machismo views of the gangs.

3) Attorneys should focus on country condition documentation and expert affidavits that discuss violence against those who resist extortion or recruitment as part of an intentional policy that is vital to the gang's ability to control territory and maintain its financial stability. Attorneys should also remind adjudicators that while a gang or cartel may target many individuals for many reasons, the relevant question for the client's case is whether he was or will be targeted on account of his protected ground. It is not necessary to establish

[18] While the social distinction requirement is not binding in the Seventh Circuit, this form of "social distinction" is relevant to the nexus analysis.

that the gang targets all members of the group or that the gang does not target anyone but members of the group. *R.R.D.*, 746 F.3d at 809; *see Orejuela*, 423 F.3d at 673 ("While we are sure that FARC would be happy to take the opportunity to rob any Colombian (or foreigner for that matter) of his money, it is those who can be identified and targeted as the wealthy landowners that are at continued risk once they have been approached and refused to cooperate with the FARC's demands."). Similarly, *Sarhan* provides a useful response to the Attorney General's suggestion that an abuser's failure to abuse *other* women who are in relationships they are unable to leave undercuts the nexus element. *A-B-*, 27 I&N Dec. at 339. As the Seventh Circuit noted regarding honor killing:

> [T]he families are not taking this step [honor killing] to make a personal statement. They do it because their society tells them . . . their own social standing will suffer if they do nothing. The fact that Besem has not killed others says nothing about whether his persecution of Desi will be on account of her membership in a particular social group. Imagine the neo-Nazi who burns down the house of an African-American family. We would never say that this was a personal dispute because the neo-Nazi did not burn down all of the houses belonging to African–Americans in the town. The situation here is analogous.

658 F.3d at 657.

4) Finally, in gender-related claims, NIJC recommends that attorneys break their nexus argument into three sections.

Prove Nexus Through:
1) Statements made by the persecutor and others
2) Discussion of the type of harm itself and how it demonstrates nexus
3) Country condition evidence demonstrating the persecution occurs because the government has deemed it a permissible way to treat the people who share the protected ground.

First, provide the direct evidence (primarily, the specific statements made by the persecutor and others) demonstrating the client was persecuted on account of her social group membership. Second, demonstrate that the harm itself is evidence of the reason for the harm.[19] Third, establish that the country condition evidence provides circumstantial

[19] In *Kasinga*, 21 I&N Dec. at 366, the BIA recognized that female genital mutilation ("FGM") is a form of "sexual oppression that is based on the mutilation of women's sexuality in order to assure male dominance and exploitation." In an asylum claim based on a fear of FGM, it is therefore not required for the persecutor to state a desire to control the female victim's sexuality in order to establish the nexus element; the reason for the harm is

evidence of the reason for the harm, explaining that when there is governmental inaction in the face of overwhelming evidence of gender violence, the country condition evidence itself demonstrates persecution on account of a gender-based protected ground. *See Sarhan*, 658 F.3d at 656 ("[The asylum seeker's brother] is killing her because society has deemed that this is a permissible . . . course of action and the government has withdrawn its protection from the victims.").

E. Unable or Unwilling to Control

Matter of A-B- does not raise the standard for establishing the unable/unwilling to control element in claims based on non-state actor violence.

The Seventh Circuit has a long line of cases establishing the viability of asylum claims when the persecutor is a non-state actor the government is unable or unwilling to control. *See e.g.*, *Vahora v. Holder*, 707 F.3d 904, 908-09 (7th Cir. 2013) (explaining that asylum is only available if the persecution was inflicted by the government or "by private actors whom the government is unable or unwilling to control" and noting that reporting non-state violence to law enforcement isn't necessary to meet this requirement if doing so would have been futile); *Cece*, 733 F.3d at 675 ("T]he standard is not just whether the government of Albania was involved in the incident or interested in harming Cece . . . but also whether it was unable or unwilling to take steps to prevent the harm"); *Hor II*, 421 F.3d at 502 (explaining that where the government had effectively told the petitioner he would have to protect himself because they could not protect him, the individual would have a "solid claim for asylum"); *see also Tarraf v. Gonzales*, 495 F.3d 525, 527 n.2 (7th Cir. 2007) (explaining that while *Hor I*, could be read broadly to suggest "that when an alien has been targeted by an armed insurgency . . . he can never establish" asylum eligibility, *Hor II* clarified that "persecution by private actors *can* give rise to viable asylum claims" and so *Hor I* "should not be over-read").

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implicit in the act itself. *See Karouni v. Gonzales*, 399 F.3d 1163, 1174 (9th Cir. 2005) (finding that the shooting of the petitioner in the anus was "essentially *res ipsa loquitor* evidence" that he was shot because he was gay).

Rape, stalking, domestic violence, sexual assault, and femicide, similar to FGM, are particular types of harm inflicted on women and used to demonstrate and assert power over them. *See Angoucheva v. INS*, 106 F.3d 781, 793 n.2 (7th Cir. 1997) (Rovner, J., concurring) (stating that "[r]ape and sexual assault are generally understood today . . . as acts of violent aggression that stem from the perpetrator's power or and desire to harm his victim"); *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (asserting that "[r]ape is . . . about power and control") (citation omitted). The Department of Justice has described domestic violence as one of several "forms of mistreatment *primarily directed at girls and women*" that "may serve as evidence of past persecution on account of one or more of the five grounds." Phyllis Coven, U.S. Dep't of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims From Women, at 4 (May 26, 1995) (emphasis added) *available at* http://www.unhcr.org/refworld/docid/3ae6b31e7.html.

Notwithstanding the Attorney General's initial comment that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum . . . [because] such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is unable or unwilling to address," *A-B-*, 27 I&N Dec. at 320, this broad statement cannot take the place of an individualized analysis, based on the facts of the specific case, and under the established case law regarding the unable/unwilling to control standard. It is important that attorneys work to ensure adjudicators understand that the Attorney General did not change or re-interpret the standard for establishing the government is unable or unwilling to control a non-state persecutor.

Practice Tips

While the Attorney General did not establish a new law or standard for demonstrating the unable or unwilling to control element, NIJC anticipates that adjudicators will pay greater attention to this asylum element moving forward and in fact, post-*A-B-* Asylum Office guidance already focuses specifically on this element[20]. For this reason, it is more important now that attorneys provide sufficient evidence to demonstrate that the government is unable or unwilling to control their client's non-state persecutor and fully address this element in their legal brief. NIJC recommends that attorneys take the following steps in preparing their cases related to this particular element:

- Remind and be prepared to educator the adjudicator regarding the fact that the Attorney General's decision did not change the standard for establishing the "unable or unwilling to control" element; in fact, the Attorney General heavily cites Seventh Circuit case law when addressing this element in his decision.

  Some Seventh Circuit case law seems to establish a slightly higher standard for meeting this element. *See A-B-*, 27 I&N Dec. at 337 (citing *Galina*, 213 F.3d at 958, for the requirement that "the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims."). However, as noted above, a significant number of Seventh Circuit cases simply refer to the "unable or unwilling to control" standard and the Attorney General did so as well in his decision, providing no indication that he was changing the legal standard in any way. Moreover, the standard for "unable or unwilling to control" remains lower than the "willful blindness" standard for demonstrating governmental acquiescence in the Convention Against Torture (CAT) context. *See e.g.*, *Matter of S-V-*, 22 I&N Dec. 1306, 1312-13 (BIA 2000).[21]

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[20] Dara Lind, "Exclusive: how asylum officers are being told to implement Sessions's new rules," *Vox* (June 19, 2018), available at https://www.vox.com/platform/amp/policy-and-politics/2018/6/19/17476662/asylum-border-sessions?__twitter_impression=true.

[21] In the CAT context, where the "acquiescence" standard is higher than the "unable or unwilling to control" standard, the Seventh Circuit has held that an individual need not show that the entire government was complicit

- Consider whether there is any reasonable argument that the client's persecutor was a governmental entity, even an informal governmental entity like an "auxiliar," "magistrate," "alcalde," "community chief," or "elder." In some cases, attorneys may want to argue that a paramilitary, guerilla force, or gang has so extensively infiltrated or colluded with the government or obtained a parallel level of power and control that it is effectively operating as the government.

- If there is no reasonable argument that that the persecutor was a governmental entity, then carefully consider what evidence will specifically corroborate the argument that the government is unable or unwilling to control the persecutor and how to best present that evidence to the adjudicator.
  1. Evidence (police reports, judicial documents, affidavits) that the client attempted to seek protection in some way
  2. If the client did not seek protection, evidence that doing so would have been futile and would have placed her into greater danger. *Matter of S-A-*, 22 I&N Dec. 1328 (BIA 2000). If it is necessary to make this futility argument, be sure to include detailed information in the client's affidavit to explain why she believed this, and corroborate this belief with other direct and circumstantial evidence (other fact witnesses; mental health evaluations; country condition documentation)
  3. Evidence, including both country condition documentation and statements from the client and other witnesses, documenting the government's general inability/unwillingness to control the type of persecutor/persecution involved in the asylum seeker's claim (e.g., news reports, country condition reports, expert affidavits)

> Establish and corroborate all attempts to seek governmental protection and if no attempt was made, establish why doing so would have been unsafe and futile (and corroborate that claim).

- Given the Attorney General's attempt in *A-B-* to compare domestic violence in El Salvador to domestic violence in the United States, and the decisions of U.S. police officers not to act on certain reports, attorneys should spend some time in their brief documenting the difference in levels of violence and attitudes towards that violence (especially gender-based violence) in the United States and the country at issue, while also asserting that focusing on the United States is improper, particularly given the size of the United States and the freedom of movement within.

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or even that multiple government officials were complicit in order to establish relief. *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1138-39 (7th Cir. 2015).

F. Relocation

As noted above, the Attorney General instructed adjudicators to consider whether internal relocation "presents a reasonable alternative before granting asylum," although this is not a new test or standard, nor something that only applies to survivors of non-state violence. While the Attorney General did not make the burden shifting and presumptions related to the relocation standard clear in his decision, attorneys should remember (and remind adjudicators) that if an asylum seeker has established past persecution (on account of a protected ground, by the government or an entity the government is unable or unwilling to control), the burden is on DHS to rebut the presumed future fear of persecution that arises by demonstrating that the asylum seeker can safely and reasonably relocate to another part of her country of citizenship[22]. 8 C.F.R. § 1208.13(b)(1)(i). It is only if the asylum seeker has failed to establish the presumption of future fear, that the burden switches to the asylum seeker to demonstrate that relocation is not safe or reasonable in the first instance. 8 C.F.R. § 1208.13(b)(3)(i).[23] Moreover, when the persecutor is the government, relocation is presumed unreasonable. 8 C.F.R. § 1208.13(b)(3).

Remember: relocation must be both safe and reasonable.

Finally, both the regulations and Seventh Circuit law require that adjudicators analyze whether internal relocation would be safe *and* reasonable, creating a two-prong test for the relocation element. 8 C.F.R. § 1208.13(b)(1)(i)(B); *Oryakhil v. Mukasey*, 528 F.3d 993, 998 (7th Cir. 2008). The regulations provide a non-exhaustive list of the factors adjudicators should consider when determining the reasonableness of any internal relocation options, including "ongoing civil strife within the country; . . . economic . . . infrastructure; geographic limitations; and social and cultural constraints, such as age, gender, health, social and familial ties." 8 C.F.R. § 1208.13(b)(3).

<u>Practice Tips</u>

Attorneys should divide the relocation section of their briefs into two sections, making clear that relocation is neither a safe nor a reasonable option.

- **Regarding safety**: attorneys should address in their client's affidavit whether he attempted to relocate within the country of origin; the distance between the relocated destination and the location where the persecution occurred; and the outcome of that relocation attempt. Attorneys should corroborate this attempt with affidavits from fact witnesses or explain

[22] DHS can also rebut a presumed future fear of persecution by demonstrating a "fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution." 8 C.F.R. § 1208.13(b)(1)(i)(A).

[23] Notwithstanding this burden shifting and the fact that DHS frequently doesn't present evidence regarding relocation, immigration judges often analyze the relocation element without looking specifically to DHS's burden, so attorneys should affirmatively address relocation even if their client has a strong past persecution claim.

why such witness statements are not reasonably obtainable. If the asylum seeker did not attempt to relocate internally before fleeing, his affidavit should explain in detail why an attempt was not made.[24]

Whether or not relocation was attempted, the attorney should also address the "safety" prong by providing evidence to corroborate why relocation would not make the asylum seeker safe. In gang-based claims, the attorney should provide affidavits and country condition documentation establishing the nation-wide reach of the gangs and their ability to find a target throughout the country at issue. In gender violence cases, the attorney should look at any specific factors that may make it easier for the persecutor to find the asylum seeker, such as children or family in common.

- **Regarding reasonableness**: attorneys should provide evidence regarding other factors – aside for the persecutor – that would make relocation challenging to the point of unreasonableness. For example:
  - A single mother with children may be unable to secure housing and financially support her children if she moves to a location where she has no familial support. This should be established through the affidavit of the asylum seeker and other fact witnesses.

    Corroborate the unreasonableness of relocation.
  - In many countries with strong gang or criminal networks, it may be completely unfeasible to move to a different part of the country because the criminal organizations perceive strangers as spies or as affiliated with the rival gang or criminal group from their hometown. This fact should be established through affidavits and country condition documentation.
  - In some countries, locations of residence may be based on clan or ethnicity or it may be culturally unacceptable for a woman to live alone.
  - Pay attention to geographic limitations. If some parts of the country are uninhabitable jungles; have ongoing civil strife; or are so rural that the client and her children would be forced to live in extremely poor conditions, the attorney could establish that relocation is not reasonable.
  - The Seventh Circuit has held that living in hiding is not an acceptable form of relocation. *N.L.A. v. Holder*, 744 F.3d 425,435-36 (7th Cir. 2014). Likewise, attorneys

[24] An amicus brief submitted to the Fifth Circuit in an NIJC case helps explain why moving away from an abuser does not mean the domestic violence survivor is safe, and that the very act of leaving may place the survivor in a more dangerous position. A redacted version of the brief is available on NIJC's website: http://immigrantjustice.org/sites/immigrantjustice.org/files/Unable%20to%20Leave%20Amicus%20Brief-5COA-2016_0.pdf

should argue that restricting an asylum seeker to a small section of the country that might be safe is also not "reasonable."[25]

G. Discretion

One of the more disturbing parts of the Attorney General's decision was the blatant suggestion that adjudicators should consider denying asylum as a matter of discretion where government documents indicate that the asylum seeker failed to tell a border immigration official that she wanted asylum or where the asylum seeker entered the United States without inspection, rather than requesting asylum at a port of entry. *A-B-*. 27 I&N Dec. at 354. Attorneys often gloss over discretion when there are no obvious, negative discretionary factors in a case (such as a criminal history), but NIJC encourages attorneys to spend a little more time addressing discretion in light of the Attorney General 's decision.[26]

Practice Tips

As with the other asylum elements, there is well-established law regarding how adjudicators should make discretionary determinations in asylum cases and the Attorney General's decision does not purport to change this law. In addition, while NIJC does not recommend heavily relying on international law when addressing discretion, the UNCHR has made clear that an asylum seeker cannot be penalized based on her manner of entry into the United States. *See Garcia v. Sessions*, 856 F.3d 27, 57-59 (1st Cir. 2017) (Stahl, J., dissenting) (discussing Article 31's prohibition against penalizing asylum seekers based on manner of entry). Finally, there is substantial documentation and case law regarding the unreliability of immigration records related to border interviews and attorneys should address issues regarding border statements in the following way:

> Preserve arguments that documents regarding border interviews and border statements are not reliable.

- File a Freedom of Information Act (FOIA) request with USCIS to get copies of documents regarding border interviews and any other interaction with immigration. This is one of the

[25] In sexual orientation or gender identity-based claims, DHS or the adjudicator often assert that there is a "gay friendly" city where the asylum seeker could live, even the asylum seeker would face danger in the rest of the country.

[26] Attorneys should also note or be prepared to argue that to the extent the Attorney General is encouraging adjudicators to deny asylum as a matter of discretion because an asylum seeker entered the country without inspection or did not immediately express a desire to apply for asylum, doing so would be inconsistent with the BIA's decision in *Matter of Pula*, 19 I&N Dec. 467, 473 (BIA 1987), which holds that manner of entry is "only one of a number of factors which should be balanced in exercising discretion." In particular, the BIA noted that if an individual has established asylum eligibility, "the discretionary factors should be carefully evaluated . . . the danger of persecution should generally outweigh all but the most egregious adverse factors." *Id*. at 474.

first steps attorneys should take when beginning representation of an asylum seeker. Instructions for filing a USCIS FOIA can be found in NIJC's Asylum Manual.

- If any inconsistent statements are found, discuss these with the client to determine whether the border interview records are accurate and if they are, why the asylum seeker might not have immediately expressed a fear of return to immigration officials.

- Look to Seventh Circuit case law discussing the unreliability of records from border interviews. *See e.g.*, *Jimenez-Ferreira v. Lynch*, 831 F.3d 803 (7th Cir. 2016); *Moab v. Gonzales*, 500 F.3d 656 (7th Cir. 2007). Attorneys may also want to consider citing to other sources that have documented the long-standing issues with border interview records. *See e.g.*, "Barriers to Protection," U.S. Commission on Int'l Religious Freedom (Aug. 3, 2016), available at http://www.uscirf.gov/reports-briefs/special-reports/barriers-protection-the-treatment-asylum-seekers-in-expedited-removal; Elise Foley, "Infants and Toddlers are Coming to the U.S. to Work, According to Border Patrol," *HuffPost* (June 16, 2015), available at https://www.huffingtonpost.com/2015/06/16/border-patrol-babies_n_7594618.html.

- Be prepared to object in court to attempts by DHS to rely on these documents or offer them into evidence, particularly when DHS has not made the author of the documents available for cross-examination. *See e.g.*, INA § 240(b)(4)(B) ("[In proceedings] the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross-examine witnesses presented by the Government.").

H. Final thoughts

As described throughout this practice advisory, the holding in *Matter of A-B-* is narrow; the bigger concern is the impression created by the Attorney General's tone and dicta throughout the decision. For this reason, as noted in the introduction, NIJC emphasizes the importance of understanding this decision within the context of the Administration and Attorney General's broad-based attack on asylum generally and specifically on Central American and Mexican asylum seekers.

It will likely take some time before attorneys have a full picture of how adjudicators are responding to the *A-B-* decision and whether they are treating the pervasive, negative dicta in the decision as law. To that end, there are several arguments that NIJC recommends preserving in pre-hearing briefs through concise paragraphs or footnotes, even though the immigration judge may be unable to reach many of the points:

1) To the extent the Attorney General's statements regarding the asylum elements are intended to create new standards for establishing asylum eligibility, they would be ultra vires and impermissible and the Court should disregard them.

2) To the extent the Attorney General is attempting to decide the asylum eligibility of individual asylum seekers by dictating how adjudicators decide their cases, he would be violating the Accardi Principle (see n.8 above). *United States ex rel. Accardi v. Shaugnessy*, 347 U.S. 260, 267 (1954).
3) If the Attorney General intended his decision to be understood as rejecting wholesale the *A-R-C-G-* group in all cases, he would be violating well-established BIA and Circuit precedent requiring that adjudicators analyze asylum cases and particular social groups on a case-by-case basis (see above).
4) While the Attorney General has not asserted that *A-B-* creates any new law, assuming arguendo that new law has been created in cases involving domestic violence-based claims, that standard cannot be applied retroactively to asylum seekers who had filed for asylum prior to *A-B-*, relying on the particular social group established in *Matter of A-R-C-G-*. *See e.g., Montgomery Ward & Co., Inc. v. F.T.C.*, 691 F.2d 1322, 1333 (9th Cir. 1982); *Garfias-Rodriguez- v. Holder*, 702 F.3d 504, 520 (9th Cir. 2012).

* * *

Matter of A-B- is a disappointing and frustrating decision that walks back much of the progress advocates have made to secure recognition of persecution on account of gender as protected by U.S. asylum law. Nonetheless, through skilled lawyering and carefully developed records, survivors of gender violence were able to obtain protection before *A-R-C-G-* and through the same efforts, will continue being able to do so even without *A-R-C-G-*'s support.

For more information on representing asylum seekers, NIJC's asylum manual, a country conditions archive and sample briefs, please review the resources on NIJC's website at https://www.immigrantjustice.org/useful-documents-attorneys-representing-asylum-seekers. Attorneys representing asylum clients through NIJC are encouraged to consult with NIJC regarding any questions about their case.

Matter of M-S-, Respondent

Decided by Attorney General April 16, 2019

U.S. Department of Justice
Office of the Attorney General

(1) Matter of X-K-, 23 I&N Dec. 731 (BIA 2005), was wrongly decided and is overruled.

(2) An alien who is transferred from expedited removal proceedings to full removal proceedings after establishing a credible fear of persecution or torture is ineligible for release on bond. Such an alien must be detained until his removal proceedings conclude, unless he is granted parole.

BEFORE THE ATTORNEY GENERAL

The Immigration and Nationality Act ("INA" or "Act") provides for several types of removal proceedings, including "full" proceedings conducted by immigration judges and "expedited" proceedings conducted by the front-line immigration enforcement officers of the Department of Homeland Security ("DHS"). *Lara-Aguilar v. Sessions*, 889 F.3d 134, 137-38 (4th Cir. 2018); INA §§ 235(b)(1), 240, 8 U.S.C. §§ 1225(b)(1), 1229a. Generally, aliens placed in expedited proceedings must be detained until removed. INA § 235(b)(1)(B)(iii)(IV). But some aliens who start in expedited proceedings—namely, those who establish a credible fear of persecution or torture—are transferred to full proceedings. *Id.* § 235(b)(1)(B)(ii); 8 C.F.R. § 208.30(f). The question here is whether, under the Act, aliens transferred after establishing a credible fear are eligible for release on bond.[1]

In *Matter of X-K-*, the Board of Immigration Appeals ("Board") held that only some aliens transferred after establishing a credible fear are subject to mandatory detention. 23 I&N Dec. 731, 736 (BIA 2005). Specifically, the

[1] This opinion does not address whether detaining transferred aliens for the duration of their removal proceedings poses a constitutional problem, a question that Attorney General Sessions did not certify and that is the subject of ongoing litigation. *See Rodriguez v. Hayes*, No. 2:07-cv-3239 (C.D. Cal.). For the reasons stated in the Department of Justice's briefs in that case, aliens who have never been admitted into the United States do not have a presumptive constitutional entitlement to be released into the country. *See* Resp'ts-Appellants' Suppl. Br. 28–40, *Rodriguez v. Marin*, Nos. 13-56706 and 13-56755 (9th Cir. Aug. 10, 2018); Resp'ts-Appellants' Suppl. Reply Br. 20–26, *Rodriguez v. Marin*, Nos. 13-56706 and 13-56755 (9th Cir. Aug. 30, 2018).

Board concluded that "arriving" aliens—such as those "attempting to come into the United States at a port-of-entry," *see* 8 C.F.R. § 1001.1(q)—must be detained, but all other transferred aliens are eligible for bond. 23 I&N Dec. at 736.

Matter of X-K- was wrongly decided. The Act provides that, if an alien in expedited proceedings establishes a credible fear, he "shall be detained for further consideration of the application for asylum." INA § 235(b)(1)(B)(ii). The Act further provides that such an alien may be "parole[d] into the United States . . . for urgent humanitarian reasons or significant public benefit." *Id.* § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A). There is no way to apply those provisions except as they were written—unless paroled, an alien must be detained until his asylum claim is adjudicated. The Supreme Court recently held exactly that, concluding that section 235(b)(1) "mandate[s] detention throughout the completion of [removal] proceedings" unless the alien is paroled. *Jennings v. Rodriguez*, 138 S. Ct. 830, 844–45 (2018). The Act's implementing regulations support that interpretation.

The respondent here was transferred from expedited to full proceedings after establishing a credible fear, and an immigration judge ordered his release on bond. Because the respondent is ineligible for bond under the Act, I reverse the immigration judge's decision. I order that, unless DHS paroles the respondent under section 212(d)(5)(A) of the Act, he must be detained until his removal proceedings conclude.

I.

A.

Under section 235 of the Act, all aliens "arriv[ing] in the United States" or "present in the United States [without having] been admitted" are considered "applicants for admission," who "shall be inspected by immigration officers." INA § 235(a)(1), (3). In most cases, those inspections yield one of three outcomes. First, if an alien is "clearly and beyond a doubt entitled to be admitted," he will be permitted to enter, or remain in, the country without further proceedings. *Id.* § 235(b)(2)(A). Second, if the alien is not clearly admissible, then, generally, he will be placed in "proceeding[s] under section 240" of the Act—that is, full removal proceedings. *Id.* Third, if the alien is inadmissible on one of two specified grounds and meets certain additional criteria, DHS may place him in either expedited or full proceedings. *Id.* § 235(b)(1)(A)(i); *see Matter of E-R-M- & L-R-M-*, 25 I&N Dec. 520, 524 (BIA 2011).

This case concerns aliens subject to expedited removal. To qualify for expedited removal, an alien must either lack entry documentation or seek admission through fraud or misrepresentation. INA § 235(b)(1)(A)(i) (referring to *id*. § 212(a)(6)(C), (a)(7)).[2] In addition, the alien must either be "arriving in the United States" or within a class that the Secretary of Homeland Security ("Secretary") has designated for expedited removal. *Id*.[3] The Secretary may designate "any or all aliens" who have "not been admitted or paroled into the United States" and also have not "been physically present in the United States continuously for the 2-year period immediately prior to the date of the determination of inadmissibility." *Id*. § 235(b)(1)(A)(iii). To date, the Secretary (and previously the Attorney General) have designated only subsets of that class. *See* Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002); Designating Aliens for Expedited Removal, 69 Fed. Reg. 48,877 (Aug. 11, 2004) ("2004 Designation"). The designated group at issue here encompasses aliens who (i) "are physically present in the U.S. without having been admitted or paroled," (ii) "are encountered by an immigration officer within 100 air miles of any U.S. international land border," and (iii) cannot establish "that they have been physically present in the U.S. continuously for the 14-day period immediately prior to the date of encounter." 2004 Designation, 69 Fed. Reg. at 48,880.

For an alien originally placed in expedited proceedings, the removal process varies depending upon whether the alien indicates either "an intention to apply for asylum" or "a fear of persecution or torture." 8 C.F.R. §§ 235.3(b)(4), 1235.3(b)(4)(1); *see* INA § 235(b)(1)(A)(ii). If the alien does not so indicate, the inspecting officer "shall order the alien removed from the United States without further hearing or review." INA § 235(b)(1)(A)(i). If the alien does so indicate, however, the officer "shall refer the alien for an interview by an asylum officer." *Id*. § 235(b)(1)(A)(ii). That officer assesses

[2] Section 235(b)(1)(F) of the Act excepts from expedited removal any "native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry." For many years, that provision applied to Cuban nationals, but that is no longer the case. *See Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 4902, 4904 (Jan. 17, 2017) ("[T]he statutory provision categorically barring the use of expedited removal for certain aliens who arrive by aircraft at a U.S. port of entry no longer applies to Cuban nationals, as the United States and Cuba have reestablished full diplomatic relations.").

[3] Although the Act refers to the "Attorney General," Congress has since authorized the Secretary to exercise that power. *See* 6 U.S.C. § 202(3); 8 C.F.R. § 235.3(b)(1)(ii) (2002).

whether the alien has a "credible fear of persecution or torture," 8 C.F.R. § 208.30(d)—in other words, whether there is a "significant possibility" that the alien is eligible for "asylum under section 208 of the Act," "withholding of removal under section 241(b)(3) of the Act," or withholding or deferral of removal under the Convention Against Torture ("CAT"), [4] 8 C.F.R. § 208.30(e)(2)–(3). If the alien does not establish a credible fear, the asylum officer "shall order the alien removed from the United States without further hearing or review." INA § 235(b)(1)(B)(iii)(I). But if the alien does establish such a fear, he is entitled to "further consideration of the application for asylum." *Id*. § 235(b)(1)(B)(ii). [5] By regulation, that "further consideration" takes the form of full removal proceedings under section 240 of the Act. 8 C.F.R. §§ 208.30(f), 1208.30(g)(2)(iv)(B). Thus, if an alien originally placed in expedited removal establishes a credible fear, he receives a full hearing before an immigration judge.

Section 235 of the Act expressly provides for the detention of aliens originally placed in expedited removal. Such aliens "shall be detained pending a final determination of credible fear." INA § 235(b)(1)(B)(iii)(IV). Aliens found not to have a credible fear "shall be detained . . . until removed." *Id*. Aliens found to have such a fear, however, "shall be detained for further consideration of the application for asylum." *Id*. § 235(b)(1)(B)(ii). Like all aliens applying for admission, however, aliens detained for further consideration of an asylum claim may generally be "parole[d] into the United States . . . for urgent humanitarian reasons or significant public benefit." *Id*. § 212(d)(5)(A). Accordingly, the Act's implementing regulations assume that aliens in expedited proceedings will be detained, but provide that, if an alien establishes a credible fear, "[p]arole . . . may be considered . . . in accordance with section 212(d)(5) of the Act and [8 C.F.R.] § 212.5." 8 C.F.R. § 208.30(f).

Section 236 of the Act addresses, more generally, the detention of aliens in removal proceedings. Once an alien has been arrested pursuant to an immigration warrant, DHS "may continue to detain the arrested alien" or "may release the alien on" "bond of at least $1,500" or "conditional parole." INA § 236(a)(1)–(2), 8 U.S.C. § 1226(a)(1)–(2). DHS and Department of

[4] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

[5] Under DHS and Department of Justice regulations, "[a]n asylum application shall be deemed to constitute at the same time an application for [statutory] withholding of removal" and CAT relief. 8 C.F.R. §§ 208.3(b), 1208.3(b); *see also id.* §§ 208.16, 1208.16. This opinion employs the regulations' definition of "application for asylum." Relatedly, as used in this opinion, the term "asylum claim" encompasses a claim for asylum, statutory withholding of removal, or CAT relief.

Justice regulations provide that, when reviewing an "initial custody determination" made by DHS, an "immigration judge is authorized to exercise the authority in section 236 of the Act . . . to detain the alien in custody, release the alien, and determine the amount of bond, if any, under which the respondent may be released, as provided in [8 C.F.R.] § 1003.19." 8 C.F.R. §§ 236.1(d)(1), 1236.1(d)(1). Section 1003.19, in turn, expressly limits the availability of bond for certain enumerated classes of aliens. *Id.* § 1003.19(h)(2)(i). One of those classes is "[a]rriving aliens," *id.* § 1003.19(h)(2)(i)(B), which includes aliens "attempting to come into the United States at a port-of-entry," *id.* § 1001.1(q). But section 1003.19 does not mention the classes of aliens that have been designated for expedited removal.

B.

Against that statutory and regulatory backdrop, the Board held in *Matter of X-K-* that, except for arriving aliens, all aliens transferred from expedited to full proceedings after establishing a credible fear are eligible for bond. 23 I&N at 736. The Board assumed that the respondent there was covered by the Secretary's 2004 Designation and had been placed in expedited removal. *Id.* at 733 & n.3. After the respondent established a credible fear, DHS had transferred him to full proceedings for further consideration of his asylum claim, and determined that the respondent would be detained for the duration of those proceedings. The respondent appealed that custody determination to an immigration judge, who ordered that the respondent be released on bond. On appeal, DHS argued that aliens originally placed in expedited proceedings were not eligible for bond, even if they were later transferred to full proceedings.

The Board rejected DHS's argument. The Board observed that, with respect to aliens in expedited removal, "[t]he Act provides for . . . mandatory detention . . . '*pending* a final determination of credible fear.'" *Id.* at 734 (quoting INA § 235(b)(1)(B)(iii)(IV)) (emphasis in original). But with respect to detention *after* a credible-fear finding, the Board concluded that "[t]he Act is silent" and "provide[s] no specific guidance." *Id.* In reaching that conclusion, the Board did not mention section 235(b)(1)(B)(ii) of the Act, which expressly provides that an alien found to have a credible fear "shall be detained for further consideration of the application for asylum."

The Board then turned to the Act's implementing regulations. Those regulations, the Board noted, impose a "requirement that aliens who had initially been screened for expedited removal" and then had a "positive credible fear determination" be "placed in full section 240 removal

proceedings." 23 I&N Dec. at 734 (citing, *inter alia*, 8 C.F.R. § 1208.30(f) (2004)). The Board reasoned that immigration judges may "exercise the general custody authority of section 236 of the Act," including the authority to grant bond, "over aliens in section 240 removal proceedings." *Id*. (citing, *inter alia*, 8 C.F.R. § 1236.1(c)(11), (d)). The only exceptions are for "specified classes of aliens . . . specifically excluded from the custody jurisdiction of Immigration Judges by 8 C.F.R. § 1003.19(h)(2)(i)(B)." *Id*. at 735. That regulation expressly excludes "arriving aliens," but does not mention aliens who have been designated for expedited removal. *Id*. Drawing a negative inference from the regulation, the Board concluded that arriving aliens transferred from expedited to full proceedings after establishing a credible fear are ineligible for bond, but that all other aliens so transferred are eligible. *Id*.

C.

The respondent here is a citizen of India. He traveled to Mexico and crossed illegally into the United States. He was apprehended within hours about 50 miles north of the border. DHS placed him in expedited removal proceedings.

After the respondent claimed a fear of persecution in India, DHS referred him for an asylum interview. The asylum officer determined that the respondent lacked a credible fear, but, at the respondent's request, DHS reconsidered and reversed its determination. DHS then transferred the respondent to full proceedings. Upon his transfer, DHS issued the respondent a Notice to Appear (DHS Form I-862) and a Notice of Custody Determination (DHS Form I-286), the latter of which informed the respondent that, "pending a final administrative determination in your case, you will be . . . [d]etained by the Department of Homeland Security."

The respondent requested that an immigration judge review that custody determination. Without mentioning section 235(b)(1)(B)(ii), the immigration judge held that the respondent "is not subject to mandatory detention." *Matter of M-S-*, Order on Motion for Custody Redetermination at 2 (Immig. Ct. July 18, 2018). The immigration judge ordered that the respondent be released if he could produce a valid Indian passport and post a bond of $17,500. *Id*. at 3. The respondent appealed to the Board, arguing that his bond should be reduced.

While that appeal was pending, the respondent again requested immigration-judge review of his custody, as permitted by regulation. *See* 8 C.F.R. § 1003.19(e). The respondent argued that, because the Indian consulate had denied his request for a replacement passport, he should not be required to produce one. A different immigration judge agreed, but increased

the respondent's bond to $27,000. *Matter of M-S-*, Order on Motion for Custody Redetermination at 2 (Immig. Ct. Sept. 17, 2018). The respondent posted that amount and was released on September 27, 2018. The Board, apparently unaware of that development, decided the respondent's appeal the next day, affirming the first immigration judge's bond order. *Matter of M-S-*, slip. op. at 1 (BIA Sept. 28, 2018). Neither the respondent nor DHS appealed the second immigration judge's order. [6] The respondent's case remains pending.

II.

The question presented is whether aliens who are originally placed in expedited proceedings and then transferred to full proceedings after establishing a credible fear become eligible for bond upon transfer. I conclude that such aliens remain ineligible for bond, whether they are arriving at the border or are apprehended in the United States.

The text of the Act mandates that conclusion. Section 235(b)(1)(B)(ii) provides that, if an alien in expedited proceedings establishes a credible fear, he "shall be detained for further consideration of the application for asylum." "The word 'shall' generally imposes a nondiscretionary duty." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018). And the word "for" often means "with the object or purpose of" or "throughout." 6 Oxford English Dictionary 23, 26 (2d ed. 1989). Granted, "for" can also mean "in preparation for or anticipation of." *Id*. at 24. But that latter definition makes little sense in light of surrounding provisions of the Act. *See, e.g.*, *Rodriguez*, 138 S. Ct. at 844–45 (recognizing that defining "for" to mean "until the start of" "makes [no] sense in the context of the statutory scheme as a whole" (emphasis in original)). If section 235(b)(1)(B)(ii) governed detention only "in preparation for"—that is, until the beginning of—full proceedings, then another provision, section 236, would govern detention during those proceedings. Section 236, however, permits detention only on an arrest warrant issued by the Secretary. INA § 236(a). The result would be that, if an alien were placed in expedited proceedings, DHS could detain him

[6] All three decisions below—both bond orders and the Board's decision—pose the same threshold, legal question: whether the respondent became eligible for bond after establishing a credible fear and being transferred to full proceedings. I certified this case to answer that question, and I have authority to answer it by reviewing either the Board's decision or the second bond order. *See* 8 U.S.C. § 1103(g)(2) (authorizing the Attorney General to "review such administrative determinations in immigration proceedings . . . as [he] determines to be necessary for carrying out" the Act). My decision therefore has the effect of reversing the second bond order.

without a warrant, but, if the alien were then transferred to full proceedings, DHS would need to issue an arrest warrant to continue detention. That simply cannot be what the Act requires. Instead, I read section 235(b)(1)(B)(ii) to mandate detention (i) for the purpose of ensuring additional review of an asylum claim, and (ii) for so long as that review is ongoing. In other words, section 235(b)(1)(B)(ii) requires detention until removal proceedings conclude.

Several amici would read section 236 of the Act to render transferred aliens eligible for bond. That section provides that, once an alien is arrested pursuant to an immigration warrant, DHS "may continue to detain the arrested alien" or "may release [him] on" "bond of at least $1,500" or "conditional parole," unless he has committed certain crimes. INA § 236(a)(1)–(2), (c). The amici therefore read section 236 to render all non-criminal aliens eligible for bond. Yet section 235 (under which detention is mandatory) and section 236(a) (under which detention is permissive) can be reconciled only if they apply to different classes of aliens. *See Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1081 (9th Cir. 2015) (concluding that "permissive and mandatory [provisions] are in harmony, as they apply to different situations"). For purposes of the respondent's case, I need not identify the full universe of aliens covered by section 236(a). It suffices to find that section 236(a) provides an independent ground for detention that does not limit DHS's separate authority to detain aliens originally placed in expedited removal, who, after the credible-fear stage, "shall be detained" either for further adjudication of their asylum claims or for removal. *See* INA § 235(b)(1)(B)(ii) (an alien placed in expedited removal who demonstrates a credible fear "shall be detained for further consideration of the application for asylum"); *id.* § 235(b)(1)(B)(iii)(IV) (an alien placed in expedited removal who does not demonstrate a credible fear "shall be detained . . . until removed"). I do not read section 236(a) to authorize granting bond to aliens originally placed in expedited proceedings, even if they are later transferred to full proceedings after establishing a credible fear.

The conclusion that section 235 requires detention does not mean that every transferred alien must be detained from the moment of apprehension until the completion of removal proceedings. Section 212(d)(5)(A) of the Act separately provides that "any alien applying for admission" may be "parole[d] into the United States . . . for urgent humanitarian reasons or significant public benefit." Aliens with "serious medical conditions," for example, are generally eligible for parole. 8 C.F.R. § 212.5(b)(1). An alien's term of parole expires "when the purposes of such parole . . . have been served," at which point the alien must "return or be returned to . . . custody."

INA § 212(d)(5)(A). This provision grants the Secretary the discretion to parole aliens under its terms.

In light of that express exception to mandatory detention, the Act cannot be read to contain an implicit exception for bond. Under the negative-implication canon, "expressing one item of [an] associated group or series excludes another left unmentioned." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (alteration in original). Section 212(d)(5)(A) expressly states that aliens applying for admission—which includes aliens originally placed in expedited proceedings—may be released on parole. That suggests that those aliens may not be released on bond. And that suggestion is particularly strong here given that the Act expressly provides that aliens in the separate class covered by section 236(a) are eligible for both "bond of at least $1,500" *and* "conditional parole." INA § 236(a)(2)(A)–(B). *See, e.g.*, *Loughrin v. United States*, 573 U.S. 351, 358 (2014) ("We have often noted that when Congress includes particular language in one section of a statute but omits it in another—let alone in the very next provision—this Court presume[s] that Congress intended a difference in meaning." (alteration in original) (internal quotation marks omitted)).

The Supreme Court recently interpreted the Act in the exact same way. In *Jennings v. Rodriguez*, a class of aliens in removal proceedings—including aliens transferred from expedited to full proceedings after establishing a credible fear—argued that the Act did not permit their "prolonged detention in the absence of . . . individualized bond hearing[s]." 138 S. Ct. at 839 (internal quotation marks omitted). The class acknowledged that section 235(b)(1)(B)(ii) provides that a transferred alien "shall be detained for further consideration of the application for asylum." The class argued, however, that "the term 'for' . . . mandates detention only until the *start* of [full] proceedings." *Id*. at 844 (emphasis in original). Once those proceedings begin, the class continued, section 236 applies, under which transferred aliens are generally eligible for bond and thus entitled to bond hearings. *Id*. at 845. The Court rejected that argument as "incompatible with the rest of the statute." *Id*. If the class were right about when sections 235 and 236 apply, "then the Government could detain an alien without a warrant at the border, but once removal proceedings began, the [Secretary] would have to issue an arrest warrant in order to continue detaining the alien." *Id*. But "that makes little sense." *Id*. In evaluating whether transferred aliens are eligible for bond, the Court also considered section 212(d)(5)(A)'s parole exception. "That express exception to detention," the Court reasoned, "implies that there are no *other* circumstances under which aliens detained under [section 235(b)] may be released." *Id*. at 844 (emphasis in original). For those reasons, the *Rodriguez* Court held, as I do here, that

the Act renders aliens transferred from expedited to full proceedings after establishing a credible fear ineligible for bond.

Although *Rodriguez* did not address the Act's implementing regulations, those regulations support the conclusion that transferred aliens are ineligible for bond. First, 8 C.F.R. § 208.30(f) provides that, if an alien is either a "stowaway" or in expedited proceedings, and he establishes a credible fear, he must be transferred to, respectively, "proceedings under [8 C.F.R.] § 208.2(c)" or full removal proceedings. In either case, after the transfer, "[p]arole of the alien may be considered only in accordance with section 212(d)(5) of the Act and [8 C.F.R.] § 212.5." 8 C.F.R. § 208.30(f). The regulation makes no mention of bond.

In *Matter of X-K-*, the Board drew a negative inference based upon 8 C.F.R. § 1003.19's expressly rendering "arriving aliens" ineligible for bond but not addressing other categories of aliens who are subject to expedited removal. 23 I&N Dec. at 734–35. But as explained above, the Board did not discuss section 235's detention requirement at all and therefore overlooked the implications that provision has upon the appropriate interpretation of section 236. Section 1003.19(h)(2)(i) thus does not provide an exhaustive catalogue of the classes of aliens who are ineligible for bond. The Secretary recognized that very point in designating the class at issue here. The Secretary explained that, "[u]nder Department of Justice regulations, immigration judge review . . . is permitted only for bond and custody determinations pursuant to section 236." 69 Fed. Reg. at 48,879. And "[a]liens subject to expedited removal procedures . . . (including those aliens who are referred after a positive credible fear determination . . . for proceedings under section 240 of the Act)" are covered by section 235, not section 236. *Id*. Thus, the Secretary concluded, even without adding the designated aliens to section 1003.19's list of bond-ineligible classes, the designated aliens "are not eligible for bond [or] for a bond redetermination hearing before an immigration judge." *Id*. I agree with that interpretation, which ensures that the regulation remains consistent with the statute. [7]

In conclusion, the statutory text, the implementing regulations, and the Supreme Court's decision in *Rodriguez* all lead to the same conclusion: that

[7] In *Matter of X-K-*, the Board never suggested that, if an alien designated for expedited removal established a credible fear, then DHS could terminate his expedited proceedings and initiate full ones, thereby rendering him eligible for bond. And for good reason: DHS's authority under *Matter of E-R-M- & L-R-M-* expires once an asylum officer (or immigration judge) makes a final credible-fear determination, at which point the alien "shall be detained" either for further adjudication of his asylum claim or for removal. INA § 235(b)(1)(B)(ii), (b)(1)(B)(iii)(IV).

all aliens transferred from expedited to full proceedings after establishing a credible fear are ineligible for bond. *Matter of X-K-* is therefore overruled. [8]

III.

Here, despite the respondent being bond ineligible, the second immigration judge ordered DHS to release him on a bond of $27,000. The respondent posted that bond in September 2018, and was released from custody. I reverse the order granting bond to the respondent. I order that, unless DHS paroles the respondent under section 212(d)(5)(A) of the Act, he must be detained until his removal proceedings conclude.

[8] Because *Matter of X-K-* declared a sizable population of aliens to be eligible for bond, DHS indicates that my overruling that decision will have "an immediate and significant impact on [its] detention operations." DHS Br. 23 n.16. DHS accordingly requests that I delay the effective date of this decision "so that DHS may conduct necessary operational planning." *Id.* Federal circuit courts have discretion to delay the effective dates of their decisions, *see* Fed. R. App. P. 41(b), and I conclude that I have similar discretion. I will delay the effective date of this decision for 90 days so that DHS may conduct the necessary operational planning for additional detention and parole decisions.

NOTICE FOR ASYLUM SEEKERS
ABOUT THE FILING DEADLINE FOR ASYLUM APPLICATIONS[1]

If you are an asylum seeker who has filed, or will be filing, an asylum application more than one year after you arrived in the United States, you may benefit from a recent court decision. Under U.S. law, an asylum seeker generally must file an asylum application within one year of arriving in the United States or the application may be denied. Following a recent court decision in *Mendez Rojas v. Johnson*, 305 F. Supp. 3d 1176 (W.D. Wash. Mar. 29, 2018), the parties have entered into a joint stay agreement. Under this agreement, the government has agreed, on an interim basis, to treat pending or newly filed asylum applications by certain asylum applicants as though they were filed within the one-year deadline, if the application is adjudicated while the agreement is in effect. This means that while the agreement is in effect, Asylum Officers, Immigration Judges, and the Board of Immigration Appeals will not refer or deny certain asylum applications because the applicant did not file the application within one year of arriving in the United States. The agreement does not apply to asylum seekers whose asylum application has already received a final denial decision. This agreement will last until further notice.[2]

TO BENEFIT FROM THIS AGREEMENT, YOU MUST:

1. **Depending on where your application is pending, notify the USCIS asylum office, EOIR immigration judge, or the Board of Immigration Appeals (if your case is before the Board on appeal) that you are a *Mendez Rojas* class member.** For example, you can do this by filing a motion or notice of class membership. Information and samples provided by class counsel are available at: https://www.americanimmigrationcouncil.org/sites/default/files/mendez_rojas_v_johnson_faq.pdf.

2. **Be a member of one of the following classes of individuals:**

Class A.I Individuals who 1) have been or will be released from DHS custody after having been found to have a credible fear of persecution within the meaning of 8 U.S.C. § 1225(b)(1)(B)(v); 2) did not receive notice from DHS of the one-year filing deadline for asylum applications; 3) have not filed an asylum application, or filed an asylum application more than one year after their arrival in the United States; and 4) are not in removal proceedings.	**Class B.I** Individuals who 1) have been or will be detained by DHS upon their arrival into the country; 2) express a fear of return to their home country to a DHS official; 3) have been or will be released from DHS custody without a credible fear determination; 4) are issued a Notice to Appear; 5) did not receive notice from DHS of the one-year filing deadline for asylum applications; 6) have not filed an asylum application, or filed an asylum application more than one year after their arrival in the United States; and 7) are not in removal proceedings.
Class A.II Individuals who 1) have been or will be released from DHS custody after having been found to have a credible fear of persecution within the meaning of 8 U.S.C. § 1225(b)(1)(B)(v); 2) did not receive notice from DHS of the one-year filing deadline for asylum applications; 3) have not filed an asylum application, or filed an asylum application more than one year after their arrival in the United States; and 4) are in removal proceedings.	**Class B.II** Individuals who 1) have been or will be detained by DHS upon their arrival into the country; 2) express a fear of return to their home country to a DHS official; 3) have been or will be released from DHS custody without a credible fear determination; 4) are issued a Notice to Appear; 5) did not receive notice from DHS of the one-year filing deadline for asylum applications; 6) have not filed an asylum application, or filed an asylum application more than one year after their arrival in the United States; and 7) are in removal proceedings.

[1] The information contained in this notice is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.
[2] Further questions regarding this notice can be addressed to class counsel from the Northwest Immigrant Rights Project at mendezrojas@nwirp.org.