



Asylum and Related Protections for Aliens Who Fear Gang and Domestic Violence

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Update: On December 19, 2018, following publication of this Sidebar, the federal district court for the District of Columbia [ruled](#) that several of the policies set forth in the Attorney General’s decision in Matter of A-B- and U.S. Citizenship and Immigration Service’s (USCIS) policy memorandum issued in light of that decision – including their general conclusion that claims based on gang or domestic violence fail to establish a credible fear of persecution – conflicted with provisions of the Immigration and Nationality Act (INA) and “impermissibly heightened” the standards for credible fear screenings. Accordingly, the court granted the plaintiffs’ motion for a permanent injunction and [enjoined](#) USCIS from applying these policies with respect to credible fear determinations. The district court’s decision and any forthcoming decision on appeal will be subject to further analysis as the case develops.

The original post from October 25, 2018, follows below.

Over the past year, non-U.S. nationals (aliens) from Central America (primarily Honduras, El Salvador, and Guatemala) have comprised an [increasingly larger share](#) of [asylum applicants in the United States](#). And more recently, a “caravan” of thousands of individuals [from Honduras](#) has [been traveling](#) north across the Guatemala-Mexico border, with many [reportedly seeking to escape](#) widespread gang and domestic violence in Honduras. Previously, federal courts and immigration authorities have considered when such circumstances may raise a viable claim for asylum or other forms of relief from removal. In June 2018, Attorney General (AG) Jeff Sessions ruled in *Matter of A-B-* that aliens who fear gang or domestic violence in their home countries generally do not qualify for asylum based on those grounds—a ruling that is [binding upon immigration authorities](#) within both the Department of Justice (DOJ) and Department of Homeland Security (DHS). The decision may foreclose some claims of relief by asylum seekers, and subject more aliens apprehended along the border to [expedited removal](#) in lieu of the more formalized removal process available to aliens whose asylum claims are deemed sufficiently credible to [warrant further review](#). This Legal Sidebar examines asylum claims based on gang and domestic violence,

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the AG's decision in *Matter of A-B-*, and [recent guidance](#) from DHS's U.S. Citizenship and Immigration Services (USCIS) in light of that ruling.

Asylum and Other Humanitarian-Based Forms of Relief from Removal

Federal immigration law provides that certain aliens who might otherwise be removed from the United States may be granted relief because they would likely face persecution in their country of origin. [Asylum](#) is one of the most consequential avenues of relief for an alien, potentially affording the recipient with a [permanent foothold](#) in the United States. To qualify for asylum, an applicant has the [burden of proving](#) past persecution *or* a well-founded fear of future persecution [on account](#) of race, religion, nationality, membership in a particular social group, or political opinion. The applicant must show that one of these protected grounds “was or will be at least [one central reason](#) for persecuting the applicant.” In the absence of past persecution, an applicant can show a well-founded fear by presenting evidence of a [reasonable possibility](#) of future persecution. The applicant [must also show](#) persecution by the government or groups that the government is unable or unwilling to control; and, for purposes of showing a well-founded fear, that the applicant could not reasonably [relocate](#) within his country to avoid persecution. In addition, asylum is a [discretionary form of relief](#); consequently, an alien who establishes eligibility for asylum may be denied relief [as a matter of discretion](#).

The scope of the five enumerated grounds for which an alien may qualify for asylum has been the subject of dispute, and none more so than persecution based on membership in a “particular social group.” Immigration authorities have [described](#) it as “perhaps the most complex and difficult to understand” ground for asylum. In 2014, the Board of Immigration Appeals (BIA), the highest administrative body responsible for interpreting and applying federal immigration laws, [held that](#) a particular social group must have three characteristics. *First*, the group must be composed of members who share a common immutable characteristic. The [BIA has described a common immutable characteristic](#) as one “that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.” *Second*, the group must be defined with “particularity.” The BIA observed that “particularity” refers to [discrete and well-defined boundaries](#) that provide a “[clear benchmark for determining who falls within the group](#).” *Third*, the group must be socially distinct within the society in question. Social distinction means that the group is [perceived or recognized as a group by society](#), and “a social group [cannot be defined](#) exclusively by the fact that its members have been subjected to harm.”

Apart from asylum, there are other forms of relief available for aliens who fear persecution or other types of mistreatment in their home countries. For instance, in some cases, an alien may be [statutorily ineligible](#) for asylum (e.g., because of specified criminal activity, firm resettlement in another country, or an untimely application). However, the alien typically can pursue [withholding of removal](#), which carries a higher burden of [proving that](#) it is more likely than not the alien will be persecuted on account of one of the five protected grounds. In the alternative, the alien may apply for protection under the Convention Against Torture (CAT), which requires evidence that it is [more likely than not](#) that the alien will be [tortured](#) “by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”; the alien does not need to show that such torture would be predicated on one of the five enumerated grounds for which asylum or withholding of removal may be granted. Unlike asylum, withholding of removal and CAT protection are [mandatory forms of relief](#). Therefore, an alien who is eligible for withholding or CAT protection [cannot be removed](#) to the country where he will be persecuted or tortured.

Claims Based on Gang and Domestic Violence

In recent years, the BIA and federal courts have increasingly addressed claims for relief by aliens who expressed a fear of gang or domestic violence. In the case of asylum and withholding of removal,

applicants frequently have argued that such violence constitutes persecution based on their membership in a particular social group. With regard to CAT claims, applicants have argued that such violence constitutes “torture” committed with the consent or acquiescence of the controlling government.

Gang Violence

In several published decisions, the BIA has rejected asylum claims based on gang violence, citing the lack of evidence showing that the alleged persecution was tied to one of the protected grounds. In these cases, the BIA rejected the applicants’ contentions that they were targeted as members of particular social groups, variously described by applicants as consisting of persons subject to gang recruitment or violence, persons with perceived gang affiliations, or persons who have repudiated gangs. The BIA concluded that these categorizations were too broad to fit within the particular social group framework. The federal courts of appeals have also generally held that aliens who fear gang violence do not qualify for asylum or withholding of removal, and have rejected particular social group claims that are broadly defined by the group members’ general resistance or vulnerability to gangs. Some courts have also cited government efforts to control gang violence as factors that undermine such claims. On the other hand, a few courts have held that aliens subject to gang violence were eligible for asylum because they established a nexus between the alleged harm and their membership in a cognizable particular social group, such as “witnesses who testify against gang members.” With respect to CAT protection, the absence of evidence showing the government’s consent or acquiescence to gang activity has often resulted in the denial of those claims.

Domestic Violence

In 1999, the BIA in *Matter of R-A-* considered whether aliens subject to domestic violence are eligible for asylum. In that case, the applicant claimed that she suffered severe physical and sexual abuse from her husband on account of her membership in a particular social group described as “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.” The BIA determined that the applicant failed to show that her proposed social group is “a group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population” in Guatemala. In 2001, AG Janet Reno vacated the BIA’s decision pending final publication of proposed regulations that would have clarified the definitions of “persecution” and “membership in a particular social group,” but those regulations were never finalized.

More recently, in 2014, the BIA in *Matter of A-R-C-G-* held that “married women in Guatemala who are unable to leave their relationship” constitute a particular social group. The BIA determined that the group’s members “share the common immutable characteristic of gender,” and that “marital status can be an immutable characteristic where the individual is unable to leave the relationship.” The BIA also determined that the social group was sufficiently particular because the terms used to describe it (“married,” “women,” and “unable to leave the relationship”) “have commonly accepted definitions within Guatemalan society.” Further, the BIA concluded, the group “is also socially distinct” given evidence that Guatemala has a culture of “machismo and family violence.” Following *Matter of A-R-C-G-*, subsequent BIA decisions interpreted that ruling to mean that most Central American domestic violence victims fall within the definition of a particular social group.

Some federal courts of appeals, however, have upheld subsequent BIA decisions rejecting asylum and withholding claims based on domestic violence, which construed *Matter of A-R-C-G-* as applicable only to claims where the alien is forced to remain in the domestic relationship, and is thus in a “uniquely vulnerable” and “easily recognizable” social group. Reviewing courts have also rejected CAT claims based on domestic violence due to the lack of evidence in the considered cases that government authorities would consent or acquiesce to such violence.

The Attorney General's Decision in *Matter of A-B-*

Under DOJ regulations, the AG has the “unfettered” authority to direct the BIA to refer a case to him for review. In *Matter of A-B-*, AG Jeff Sessions reviewed a BIA decision that had reversed the denial of asylum to an applicant who alleged she suffered abuse from her husband in El Salvador. The AG exercised this authority in order to address whether being a victim of private criminal activity constitutes a particular social group for asylum and withholding of removal.

In a June 2018 opinion, the AG declared that “the asylum statute does not provide redress for all misfortune,” and ruled that the BIA in *Matter of A-R-C-G-* had erroneously “recognized an expansive new category of particular social groups based on private violence.” The AG determined that “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum,” or meet the “credible fear” standard to warrant consideration of an asylum application.

The AG stated that “[t]o be cognizable, a particular social group *must* ‘exist independently’ of the harm asserted,” or otherwise “the definition of the group moots the need to establish actual persecution.” The AG determined that “married women in Guatemala who are unable to leave their relationship,” the social group at issue in *Matter of A-R-C-G-*, failed to meet this standard because the inability to leave is essentially created by the alleged harm. The AG also disagreed with the BIA’s conclusion that this social group was sufficiently discrete, stating that “[s]ocial groups defined by their vulnerability to private criminal activity likely lack the particularity required . . . given that broad swaths of society may be susceptible to victimization.” Further, observing that “the key thread running through the particular social group framework is that social groups must be classes recognizable by society at large,” the AG questioned whether Guatemalan society views domestic violence victims as “a distinct group in society, rather than each as a victim of a particular abuser in highly individualized circumstances.” In short, the AG concluded that a particular social group ground must be construed in a manner that is not “too broad to have definable boundaries and too narrow to have larger significance in society.”

The AG, moreover, determined that private criminal actors often target people for personal or economic reasons that are unrelated to any particular social group, and that an applicant’s ability to relocate within a country “would seem more reasonable” when the alleged harm is “at the hands of only a few specific individuals.” The AG also ruled that an applicant alleging harm by private actors “must show more than the government’s difficulty controlling the private behavior.” Instead, the applicant “must show that the government condoned the private action ‘or at least demonstrated a complete helplessness to protect the victims.’”

Finally, the AG observed that “an applicant bears the burden of proving not only statutory eligibility for asylum but that she also merits asylum as a matter of discretion.” The AG determined that asylum adjudicators should thus consider “relevant discretionary factors,” even where the applicant otherwise demonstrates asylum eligibility, such as the alien’s ability to apply for asylum in other countries, and the length of time spent in a third country before coming to the United States.

USCIS’s Guidance for Adjudicating Credible Fear and Asylum Claims

In July 2018, USCIS issued guidance for determining whether a person is eligible for asylum in light of *Matter of A-B-*. The USCIS guidance instructs asylum officers to make “at least five basic inquiries” when an applicant raises a claim based on membership in a particular social group:

1. Whether the applicant is a member of “a clearly-defined particular social group, which is composed of members who share a common immutable characteristic, is defined with particularity, is socially distinct within the society in question, and is not defined by the persecution on which the claim is based”;

2. Whether the applicant has shown that his or her membership in the group is a central reason for the alleged persecution;
3. If the persecutor is not affiliated with the government, whether the applicant can show that the government is unable or unwilling to protect him or her;
4. Whether internal relocation is possible, would protect the applicant from the persecution, and presents a reasonable alternative to asylum; and
5. Whether the applicant merits relief as a matter of discretion.

The guidance also [instructs](#) asylum officers to apply these standards when evaluating whether an alien who might otherwise be subject to expedited removal has a credible fear of persecution that warrants further consideration of the alien's claim of relief. The USCIS guidance [concludes that](#) most particular social group claims defined by the members' vulnerability to gang or domestic violence by non-government actors would *not* warrant asylum or meet the [threshold](#) necessary to satisfy the credible fear assessment. Further, the USCIS guidance instructs asylum officers to consider the applicant's [credibility](#), which alone may warrant the denial of asylum or a negative credible fear finding.

Impact of *Matter of A-B-* and Legislative Options

The AG's ruling in *Matter of A-B-* restricts the availability of asylum for aliens who claim to be victims of gang or domestic violence in their home countries. This limitation may be most significant at the U.S.-Mexico border, where there has been an influx of aliens arriving from Central America and seeking asylum, withholding of removal, or CAT protection based on fears of gang or domestic violence. Before the AG's ruling, such aliens claiming persecution on those grounds [could potentially have had](#) their claims reviewed administratively, rather than being summarily removed from the United States via the expedited removal process. But the AG's decision clarifies that aliens who fear private criminal activity, such as gang and domestic violence, generally do not qualify for asylum, or [meet the credible fear threshold](#) to warrant formal adjudication of their claims. The USCIS [guidance](#) issued in the wake of that ruling reinforces that conclusion.

Despite these restrictions, aliens fearing gang or domestic violence may still qualify for asylum or withholding of removal if there is evidence that their alleged persecutors are centrally motivated by a protected ground, such as political opinion, religion, or membership in a particular social group that is not simply defined by the members' vulnerability to crime. For example, some courts have held that a particular social group may include [witnesses who testified against gang members](#), [family members of such witnesses](#), and, in some cases, [former gang members](#). Additionally, there may be [limited circumstances](#) where the alien could establish [eligibility for CAT](#) protection, which requires no nexus to a protected ground. The AG's ruling does not necessarily conflict with the general holdings of these cases.

Yet [some have argued](#) that *Matter of A-B-*'s strict interpretation of asylum law deprives domestic violence and gang victims of the opportunity to seek asylum and related protections, particularly at the credible fear screening stage, where they may not have the resources to fully present their claims. While there is no current official data regarding the impact of the AG's decision, there has [reportedly been an increase](#) in negative credible fear determinations by immigration authorities. Additionally, [statistical data](#) shows a sharp decline in immigration judge decisions finding a credible fear since the end of 2017, but that decline started months before the AG's decision.

In any event, by [regulation](#) the AG's decision is binding on all federal immigration authorities. In August 2018, a [federal lawsuit](#) was brought challenging USCIS's guidance implementing the AG's ruling on the grounds that the agency's new policies would essentially preclude any consideration of asylum claims predicated on a fear of gang or domestic violence regardless of the underlying merits of each case. A final decision has yet to be rendered by the district court.

While federal courts may ultimately determine the legality of the AG's decision and ensuing USCIS guidance, Congress has the power to clarify the scope of asylum protections for aliens fleeing gang and domestic violence. For example, Congress could clarify the meaning of a "particular social group," or expand or narrow the enumerated grounds for asylum to plainly cover or exclude victims of gang or domestic violence. In the alternative, Congress could create a separate form of discretionary relief for certain aliens fleeing gang or domestic violence. Additionally, Congress, through its spending power, could limit or prohibit the use of funds to implement any policy changes made pursuant to the AG's decision, as a recent [appropriations bill](#) would have done. Finally, given [some observers' concerns](#) about the AG's [power to certify](#) immigration cases for review, some legislators have [proposed legislation](#) to create a separate independent tribunal to review immigration cases.
