



# Asylum Eligibility for Applicants Fleeing Gang and Domestic Violence: Recent Developments

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Non-U.S. nationals (aliens, as the term is used in the [Immigration and Nationality Act](#)) from Central America have increasingly pursued asylum and related protections in the United States because of [gang and domestic violence](#) in their home countries. To qualify for protection, applicants typically must establish that the gang or domestic violence amounts to persecution because of one of five enumerated grounds, including membership in a “particular social group.” In *Matter of A-B-* and *Matter of L-E-A-*, former Attorneys General Jeff Sessions and William Barr issued rulings that made it more difficult for applicants to satisfy this requirement. Those rulings were [binding upon immigration authorities](#) within both the Department of Justice (DOJ) and Department of Homeland Security (DHS). In February 2021, President Biden [directed](#) the Attorney General (AG) and the Secretary of Homeland Security to review the availability of asylum for applicants fleeing gang or domestic violence, and to issue joint regulations that clarify the meaning of a “particular social group.” In June 2021, AG Merrick Garland [vacated the prior rulings](#) in *Matter of A-B-* and *Matter of L-E-A-* pending issuance of these regulations. This Legal Sidebar examines the AG decisions addressing the availability of asylum for applicants fearing nongovernmental persecution based on their membership in a particular social group, President Biden’s executive order, and legislative options for Congress. (A Legal Sidebar more specifically addressing AG Sessions’ 2018 decision in *Matter of A-B-* can be found [here](#).)

## Asylum and Related Protections from Removal

An applicant for asylum has the [burden of proving](#) past persecution or a well-founded fear of future persecution because 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,” and that the alleged persecution is from the government or groups that the government [is unable or unwilling to control](#). 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.” The Board of Immigration Appeals (BIA), the highest administrative body responsible for interpreting and applying federal immigration laws, has [held that](#) a

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particular social group must be (1) composed of members who share a [common immutable characteristic](#); (2) defined with “particularity” (i.e., with [discrete and well-defined boundaries](#)); and (3) [perceived or recognized as a group by society](#) (“socially distinct”).

An alien who is statutorily ineligible for asylum (e.g., because of specified criminal activity) 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. The alien may also seek protection under the Convention Against Torture (CAT), which requires evidence that it is [more likely than not](#) that the alien will be [tortured](#) by a public official or other person acting with the consent or acquiescence of that official (the alleged torture does not have to be predicated on one of the five enumerated grounds for which asylum or withholding of removal may be granted). Unlike asylum, which affords the recipient with an opportunity to [pursue lawful permanent resident status](#), a grant of withholding or CAT protection [only prevents removal to the country](#) where the applicant faces persecution or torture (but not necessarily to a third country).

## AG Sessions’ Decision in *Matter of A-B-*

Under [DOJ regulations](#), the AG may direct the BIA to refer a case to him for review. In *Matter of A-B-* (*A-B- I*) AG Jeff Sessions in 2018 reviewed a BIA decision that had reversed the denial of asylum to an applicant who [alleged](#) harm by her husband because of her membership in a particular social group of “El Salvadoran women who are unable to leave their domestic relationships where they have children in common.” The AG [exercised this authority](#) to address whether being a victim of private criminal activity constitutes a particular social group for asylum. AG Sessions ruled 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 determined that social groups defined by their vulnerability to private criminal activity lack sufficient particularity and social distinction to qualify as cognizable social groups. Citing the “one central reason” standard, the AG also determined that private criminal actors often target people for [personal or economic reasons](#) unrelated to any particular social group. The AG also [ruled](#) that, in showing that a government is “unable or unwilling” to control harm by private actors, an applicant “must show that the government condoned the private action ‘or at least demonstrated a complete helplessness to protect the victims.’”

DHS’s U.S. Citizenship and Immigration Services (USCIS) issued [guidance](#) applying *A-B- I* to determine whether a person is eligible for asylum or has shown a [credible fear of persecution](#) that warrants further consideration of the alien’s claim of relief. The USCIS guidance [concluded that](#) most particular social group claims defined by the members’ vulnerability to gang or domestic violence by nongovernment actors would not warrant asylum or meet the credible fear threshold.

Following a legal challenge, the U.S. District Court for the District of Columbia [ruled](#) that several of the USCIS policies issued after *A-B- I* were unlawful (e.g., requiring applicants to show that their home country’s government “condoned” or was “completely helpless” in responding to private acts of persecution), and [enjoined](#) the agency from applying these policies for credible fear determinations. In 2020, the U.S. Court of Appeals for the D.C. Circuit [affirmed](#) in part and reversed in part. As a result of that decision, USCIS remained barred from implementing certain policies adopted after *A-B- I*, but the agency’s asylum eligibility policies could still be informed by the conclusion that gang and domestic violence claims generally fail to show asylum eligibility.

## AG Barr’s Decisions in *Matter of L-E-A-*

In 2019, AG William Barr provided further guidance on the availability of asylum for victims of private criminal activity. The AG [reviewed](#) part of a BIA decision finding that a Mexican national who was

threatened by a drug cartel had established his membership in a particular social group defined as “his father’s immediate family.” AG Barr **held** in *Matter of L-E-A-* that a nuclear family ordinarily does not fall within the meaning of a “particular social group” because “it will not have the kind of identifying characteristics that render the family socially distinct within the society in question.” The AG **recognized** that some federal appellate courts have identified families as falling within the particular social group definition, but noted that they reached those conclusions without fully analyzing whether the family at issue shared a common immutable characteristic, was defined with particularity, and was socially distinct. In short, the AG **declared**, “categorically recognizing families as particular social groups would render virtually every alien a member of a particular social group,” but “[t]here is no evidence that Congress intended the term ‘particular social group’ to cast so wide a net.” Thus, the AG **held**, an asylum applicant must show that a family group satisfies each of the immutability, particularity, and social distinction components of the particular social group framework.

## Acting AG Rosen’s Opinion in *Matter of A-B-*

On January 14, 2021, then-Acting AG Jeffrey Rosen issued a **new opinion** in *Matter of A-B- (A-B- II)* to provide additional guidance about the availability of asylum for applicants fearing nongovernmental persecution. First, Acting AG Rosen **clarified** that AG Sessions’s adoption of the “complete helplessness” standard to determine whether the government is “unable or unwilling” to control private acts of violence **adhered to existing precedent** and appropriately set forth the requisite governmental role. Second, Acting AG Rosen **clarified** that, to establish that a protected ground is “one central reason” for persecution, an applicant must show not only that the protected ground is a “but-for cause” of the persecutor’s act, but that it also plays “more than a minor role” in the persecution.

In sum, the decisions in *A-B- I*, *L-E-A-*, and *A-B- II* restricted the availability of asylum based on persecution by nongovernment actors on account of membership in a particular social group, and clarified that aliens who fear private criminal activity, such as gang and domestic violence, seldom qualify for asylum or meet the credible fear threshold to warrant formal adjudication of their claims.

## President Biden’s Executive Order on Asylum

On February 2, 2021, President Biden **issued** an executive order addressing migration to the United States and the availability of asylum for aliens seeking to enter the country. The President **declared** that “[w]e cannot solve the humanitarian crisis at our border without addressing the violence, instability, and lack of opportunity that compel so many people to flee their homes.” The President **announced** a “multi-pronged approach” that would address the root causes of migration, work with organizations and governments to manage migration, expand opportunities for refugee resettlement in the United States, and restore and enhance asylum processing at the border. Among other initiatives, the President **directed** the AG and the Secretary of Homeland Security, within 180 days, to conduct a full review of current rules, regulations, precedential decisions, and internal guidance governing the adjudication of asylum claims to determine whether the United States provides adequate protection for those fleeing gang or domestic violence. The President also **ordered** the AG and the Secretary of Homeland Security, within 270 days, to issue regulations specifying when a person is considered a member of a “particular social group” for establishing asylum eligibility.

## AG Garland's Opinions in *Matter of A-B-* and *Matter of L-E-A-*

On June 16, 2021, AG Garland vacated the prior AG decisions in *Matter of A-B-* and *Matter of L-E-A-*. First, AG Garland **determined** that vacating *A-B- I* and *A-B- II* was warranted given President Biden's executive order directing issuance of regulations addressing the "particular social group" definition. According to the AG, vacating the prior decisions **serves** "to leave open the questions that those opinions sought to resolve and to ensure that the Departments have appropriate flexibility in the forthcoming rulemaking." Further, the AG **opined** that *A-B- I*'s "broad statement" that victims of private criminal activity generally will not qualify for asylum "could be read to create a strong presumption against asylum claims based on private conduct," and "threatens to create confusion and discourage careful case-by-case adjudication of asylum claims." The AG also **determined** that certain portions of *A-B- I* "have spawned confusion among courts" about the application of the "unable or unwilling" and "one central reason" standards for asylum. While recognizing that *A-B- II* sought to clarify these issues, the AG **declared** that any guidance on these standards "should instead be left to the forthcoming rulemaking, where they can be resolved with the benefit of a full record and public comment."

AG Garland **determined** that the President's executive order requiring new regulations on the meaning of "particular social group" similarly warranted vacating the AG's *Matter of L-E-A-* decision. The AG explained that *L-E-A-*'s conclusion that families generally do not constitute particular social groups conflicted with several **federal appellate court decisions**, and that the pending rulemaking over the "particular social group" definition "is the preferable administrative process for considering these issues."

Apart from these actions, AG Garland also **vacated** a **prior AG Barr decision** involving an asylum claim based on domestic violence that had required the BIA to consider all the elements of an applicant's asylum claim, including the existence of a particular social group, even if DHS decides not to dispute a particular element on appeal. AG Garland stated that AG Barr's ruling departed from the BIA's "longstanding practice" of relying on the parties' stipulations or DHS's failure to contest an issue in order to narrow the scope of issues to be decided on appeal.

## Considerations for Congress

The prior rulings in *Matter of A-B-* and *Matter of L-E-A-* had made it more difficult for aliens who feared private criminal activity in their home countries, including gang and domestic violence, to qualify for asylum or meet the credible fear threshold to warrant further consideration of their claims. Vacating those opinions, AG Garland **declared**, will "return the immigration system to the preexisting state of affairs pending completion of the ongoing rulemaking process." Thus, asylum adjudications are no longer informed by the conclusion that gang and domestic violence claims generally fail to show asylum eligibility. However, applicants raising such claims must still show their membership in a cognizable particular social group (including previously recognized social groups, such as **married women unable to leave a domestic relationship**, or potentially **members of an immediate family**), and that any claimed persecution is linked to that social group. AG Garland's opinions also make it more likely that aliens encountered at the border who claim persecution by private criminals can have their claims reviewed administratively rather than being removed from the United States via the **expedited removal process**. Whether the immediate consequences of vacating the earlier AG rulings in *Matter of A-B-* and *Matter of L-E-A-* have lasting effect is uncertain. The forthcoming regulations on the meaning of a "particular social group" may provide more guidance on the availability of asylum for applicants seeking protection from private criminal activity, though it remains to be seen whether these regulations will effectively codify prior practice or adopt a different approach.

Meanwhile, Congress has the power to clarify the scope of asylum protections for aliens fleeing gang and domestic violence. 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. Furthermore, some bills introduced in the 116<sup>th</sup> and 117<sup>th</sup> Congresses, such as the U.S. Citizenship Act (S. 348, H.R. 1177) and the Northern Triangle and Border Stabilization Act (H.R. 3524), would require the State Department to implement strategies to counter gang and domestic violence in Central American countries (e.g., assisting and training law enforcement), and strengthen the capacity of countries in the Western Hemisphere to adjudicate asylum claims or to process and accept refugees for resettlement.

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