

**NATIONAL
IMMIGRANT
JUSTICE CENTER**
A HEARTLAND ALLIANCE PROGRAM

**Representing Asylum Seekers
after *Matter of A-B***

Perkins Coie LLP
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www.immigrantjustice.org

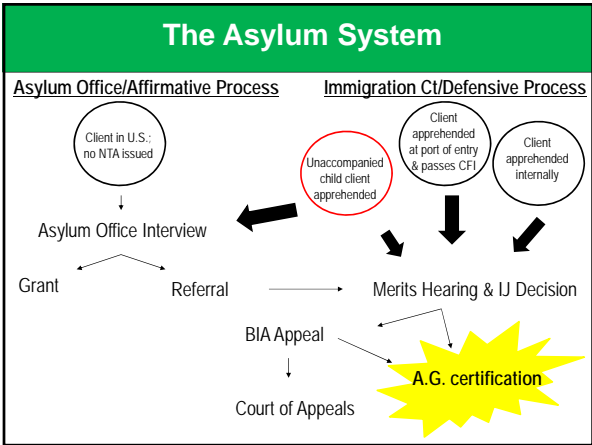
NIJC and *A-B*

- **Direct representation of > 600 asylum seekers/year:**
 - Unaccompanied children
 - Detained adult asylum seekers
 - Non-detained adult and family asylum seekers
 - Asylum seekers who identify as LGBT
- **Lead impact litigation across the CoAs to preserve asylum protections**
 - PSG definition
 - Gender and LGBT-based asylum
 - Corroboration and credibility standards
- **Participate as amicus (*A-B*; *L-E-A*; *A-R-C-G*; *M-E-V-G*; *Cece*; etc.)**
- **Advocate with and provide intel to members of Congress**

Training Overview

- **Takeaways:**
 - Narrow holding
 - Media narrative is wrong, but optics are bad
- **Roadmap:**
 - **How Did This Happen?**
 - **What Really Happened?**
 - **What Do I Do About My Case?**

How Did This Happen?
The history of domestic violence and particular social group-based asylum



Asylum: Elements

1. "Well-Founded Fear"
2. of "Persecution"
3. Perpetrated by the government or an entity the government cannot/will not control
4. "On account of"
5.
 - Race
 - Religion
 - Nationality
 - Political Opinion
 - Membership in a Particular Social Group

These elements are SEPARATE!

What is a Particular Social Group?

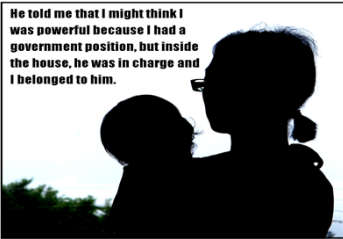
- *Acosta* definition: A group whose members share a “common, immutable characteristic” that “members of the group either cannot change, or should not be required to change.” *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985)
- Receives *Chevron* deference by all COAs.

Chevron

Congress delegates the administration of a statute to an agency → a statutory provision is ambiguous → the agency’s interpretation is based on a permissible construction of the statute = *Chevron* deference

The Convoluted History of DV-Based Asylum

- Floodgates fears
- INS guidelines
- *R-A-* (1999)
2000: proposed rules
2001: Reno vacates
2003: Ashcroft certifies
2004: DHS brief
2008: Ashcroft remands
2008: Mukasey certifies and remands
- Many AOs/IJs continue to issue positive decisions



Meanwhile, the BIA Targets Gang Violence-Based Claims

- **2008: *Matter of S-E-G-* and *Matter of E-A-G-***
 - New PSG test (social visibility/particularity)
 - Results-driven decisions
 - Incomprehensible test
 - 7COA and 3COA reject
- **2014: *Matter of M-E-V-G-* and *Matter of W-G-R-***
 - BIA doubles-down (social visibility = social distinction)
 - Claims previously accepted PSGs remain viable
 - Rejects demographically diverse groups

See NIJC’s PSG Practice Advisory

2014: Matter of A-R-C-G-

- **PSG:** married women in Guatemala who are unable to leave their relationship
- Based on DHS concessions regarding the PSG and nexus (but contained PSG analysis)
- Only PSG recognized by the BIA since 2008
- Conflicts with the BIA's demographic diversity concerns in *W-G-R-*
- Continues to set a high evidentiary burden

Developments at the Seventh Circuit

- Consistent application of a pure *Acosta* test
- No explicit *Chevron* analysis of *M-E-V-G/W-G-R-*
- Has not directly opined on *A-R-C-G-*

<i>Cece</i> (2013 - en banc)	PSG: young, Albanian women living alone
<i>Sarhan</i> (2011)	PSG: Jordanian women who have allegedly flouted moral norms
<i>Escobar</i> (2011)	PSG: truckers who have collaborated with law enforcement & refused to cooperate with the FARC
<i>Benitez Ramos</i> (2009)	PSG: former Salvadoran gang members
<i>Orejuela</i> (2005)	PSG: the educated, landowning class of cattle farmers in Colombia

Seventh Circuit vs BIA

BIA Case Law	Seventh Circuit Case Law
• Can't be overly broad	• Breadth is irrelevant
• Must be considered a group by society	• No social distinction test
• "Former" status/past experience is not enough	• "Former" status/past experience is enough
• Groups can't be overly diverse	• Diversity not an issue

What Really Happened?
Matter of A-B-: Holding and Dicta

Matter of A-B-: Holding

- **Matter of A-R-C-G- is overruled on procedural grounds**
 - The decision was based on DHS concessions
 - The legal analysis of social distinction, particularity, and nexus was insufficient
- **A-B-'s case is remanded**

Matter of A-B-: Dicta

- "Generally" these claims will not be viable
- Only in "exceptional circumstances" will claims by non-state actors be viable
- Various formulations of the "unable/unwilling to control" standard
- Gender-based PSGs are impermissibly circular
- Consider denying asylum based on manner of entry; border interviews, and travel through other countries

Matter of A-B-: Dicta

- Persecution:

Correct Formulation	A.G.'s Formulation
Persecution + Nexus, Protected Ground, <u>Unable/Unwilling/State Actor</u> Rebuttable Presumption of Future Persecution	Persecution + Nexus, Protected Ground, <u>Unable/Unwilling/State Actor</u> Persecution

- Nexus: DV is private and based on personal relationships; implies persecutor must be aware of PSGs existence to prove nexus

What Do I Do About My Case?
*Preparing and Presenting Asylum Cases After
Matter of A-B-*

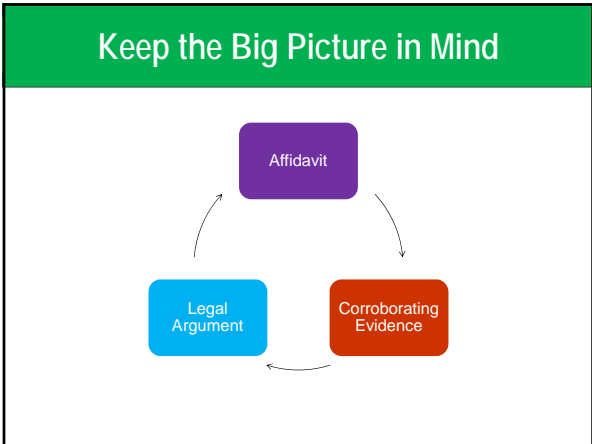
Hypo: Maritza and Edgar

When Maritza was a teenager in Honduras, a man abducted her and held her as his "wife" for two years. He regularly raped her and she had two children as a result. After her rescue, Maritza reported him to the police, but he escaped and abducted her children.

After Maritza returned to her family home, her father told her she would inherit his land. Furious, her brothers attacked their father and beat Maritza when she tried to intervene.

Later, Maritza began a relationship with Edgar. She moved in with him and soon became pregnant. One day, Edgar witnessed Mara 18 gang members murder a young woman. The gang members found him a few days later, beat him, and threatened to kill him if he ever talked about what he had seen.

Maritza and Edgar fled to the United States soon afterwards. Since then, Mara 18 gang members attacked the caretaker of Maritza and Edgar's home in Honduras with a machete and demanded information about them.



- Persecution**
- Rely on Stanjokova
 - Footnote the correct persecution formulation
 - Argue ALL prior harm as persecution
 - Rebuttable presumption
 - Humanitarian asylum
 - Different standard for kids
 - Spend significant time establishing context → threats are credible and harm will continue
 - Affidavits
 - Country condition evidence

- PSG**
- Present all viable PSGs (& argue w/all elements), per *Matter of W-Y-C*- BUT be strategic
 - Present narrower/broader versions of the same PSG
 - Consult with NIJC! (We need to review your brief)
 - Focus heavily on 7COA law and explain how it remains unchanged by *A-B-*
 - Fn that social distinction/particularity don't apply, but demonstrate how your PSG meets them anyways
 - See NIJC's PSG practice advisory
 - For DV-based claims, explain what *A-B-* actually holds and what it does not.

PSG Cont.

- Avoid circular definitions and consider affirmatively arguing that your PSGs are not circular
- Potential PSGs for Maritza and Edgar
 - “Honduran women, or more narrowly, Honduran women in relationships they are unable to leave” (*Cece*; DHS briefs; other COA gender case law)
 - “Hondurans [Honduran women] who have violated social norms regarding family hierarchies” (*Sarhan*)
 - “Immediate family members of the [X] family” (*Lwin*; *N.L.A.*; *Cece*; *L-E-A-* (BIA))
 - “Hondurans who have witnessed gang crimes” (*Sepulveda*; *Henriquez-Rivas* (9th); *Garcia* (3th))

Common Social Groups

- Child abuse/domestic violence claims:
 - Children in the X family/children of X
 - [Nationality] children who lack parental protection
 - [Nationality] women in intimate relationships they are unable to leave
- Gender violence claims:
 - [Nationality] females [women; girls]
 - [Nationality] females in relationships they are unable to leave
 - [Nationality] females who lack parental/male protection
- Gang-related claims:
 - [Nationality] youth who have opposed [resisted/disrespected] gangs
 - [Nationality] who have witnessed [and reported] gang activities

Nexus

- Use ALL evidence to establish context
 - Place harm into a broader context of a cultural norm, policy or modus operandi (R.R.D.)
 - Particularly critical with DV claims, but also important with gang-based claims
 - Gender violence is NOT a personal dispute
- Demonstrate the persecutor’s awareness of your client’s PSG or at least, the immutable characteristic she shares with others



Nexus cont.

- Follow the three-part nexus analysis for gender-based claims

Harm itself as evidence of nexus (*Kasinga*)

Direct evidence (words; actions)

Country evidence shows harm occurs because the govt has deemed it permissible and required (*Sarhan*)

Nexus cont.

- Maritza and Edgar:
 - Gender
 - Family
 - Witness
- Country condition evidence
- Background evidence placing the harm within context
- Affidavits from multiple witnesses
- Affidavits from Maritza and Edgar

Unable or Unwilling to Control

- Likely to be a key issue moving forward – SPEND SIGNIFICANT TIME HERE
- Footnote an explanation that *A-B-* did not change the 7COA's unable/unwilling to control standard (see Practice Advisory)
- Don't let the adjudicator consider this element in the abstract
- Consider affirmatively distinguishing from the United States
 - Comparison is inappropriate
 - Comparison cannot be made

Arguments to Preserve

1. *A-B-* doesn't establish new standards - doing so would be ultra vires
2. Accardi Principle
3. Case-by-case analysis is required
4. Assuming arguendo that a new standard has been created, it cannot be applied retroactively

(see Practice Advisory for details)

THANK YOU!

For more information contact
 Anna Sears
 312-660-1307
ansears@heartlandalliance.org

Other ways to support NIJC:

- NIJC Annual Appeal
- Twitter: @NIJC
- Facebook: facebook.com/immigrantjustice
