

**Practice Advisory: Applying for Asylum After *Matter of A-B-***  
*Updated August 2020*

**\*\*\* *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.

This practice advisory is geared towards lawyers practicing in the Seventh Circuit, but it discusses asylum law broadly and attorneys practicing in all circuits should find it useful.<sup>1</sup> It is intended to explain what *Matter of A-B-* does and *does not* 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, [Part IV](#) discusses post-*A-B-* legal developments and challenges, and [Part V](#) 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**

*The 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-.*

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<sup>1</sup> Attorneys practicing outside the Seventh Circuit are encouraged to use 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 (10th 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 human trafficking. 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, in the past, often been challenging to convince adjudicators to recognize these claims.

In 1995, the Immigration and Naturalization Service (INS) (the predecessor to U.S. Citizenship and Immigration Services) adopted guidelines known as “[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 in that matter, Ms. Alvarado, 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 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 its official position on domestic violence-based asylum claims.

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 increased. 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 involved asylum seekers who had been harmed for having disobeyed a gang's extortion demands or for 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.<sup>2</sup> 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 a 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 suffered 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 Circuit (see Part II) and the Third Circuit – rejected the requirements and declined to find that they merited *Chevron* deference.

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<sup>2</sup> 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)<sup>3</sup> 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 re-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.<sup>4</sup>

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.<sup>5</sup> While this decision provided the long-awaited recognition that domestic violence survivors could 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.

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<sup>3</sup> NIJC's submitted an amicus brief in support of the respondent in *M-E-V-G-*.

<sup>4</sup> Although this *Matter of A-B-* practice advisory now provides NIJC's current best practices and recommendations regarding particular social group-based claims, NIJC previously authored a practice advisory that focused on the BIA's social distinction and particularity tests as articulated in the *S-E-G-/E-A-G-* and *M-E-V-G-/W-G-R-* line of cases. That practice advisory, which is available on [NIJC's website](#), does not provide the most current overview of particular social group case law, but it does contain a more in-depth discussion of the problems inherent in the BIA's social distinction and particularity tests than will be found in this document.

<sup>5</sup> 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](http://immigrantjustice.org/press_releases/board-immigration-appeals-rules-guatemalan-mother-who-fled-domestic-violence-can-be-g)

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-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.

## II. Seventh Circuit Law

While the Seventh Circuit had not found occasion to opine directly 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 to *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-*<sup>6</sup>, the Attorney General has issued several decisions (post-dating *A-B-*), which affirm the Attorney General's understanding that in the Seventh Circuit, the social distinction and particularity requirements do not apply. See *Matter of L-E-A-*, 27 I&N Dec. 581, 590 (A.G. 2019) (“[T]he Seventh Circuit has declined to apply the particularity and social distinction requirements, requiring only that members of a particular social group share a common, immutable characteristic.”); *Matter of E-R-A-L-*, 27 I&N Dec. 767, 769 n.3 (BIA 2020) (same). Moreover, 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.<sup>7</sup>

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-*

*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 negative dicta that, if taken as law, 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 important to understand the backstory 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 had a greater than [85 percent denial rate](#) in asylum cases. In *A-B-*'s case, he made adverse findings on nearly all elements of her asylum claim. On appeal, the BIA reversed on all grounds, found *A-B-*'s claim similar to that of *A-R-C-G-*, determined she was eligible for asylum, and remanded the case for issuance of a decision

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<sup>6</sup> In a 2018 published decision, the Seventh Circuit noted that “[w]hether the Board’s particularity and social distinction requirements are entitled to *Chevron* deference remains an open question in this circuit.” *W.G.A. v. Sessions*, 900 F.3d 957, 964 (7th Cir. 2019). The Court “decline[d] to make the *Chevron* determination in this case,” *id.* at 965, but noted in a footnote that “W.G.A.’s arguments that the Board’s interpretation is unreasonable have some force.” *Id.* at 964 n.4.

<sup>7</sup> For more information on the problems inherent in the BIA’s social distinction and particularity tests, please see [NIJC’s Particular Social Group Practice Advisory](#).

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<sup>8</sup>. At some point thereafter, Attorney General Sessions learned of the decision,<sup>9</sup> 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. 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 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.<sup>10</sup> Compounding matters is the Attorney General's chronic conflation of asylum elements

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<sup>8</sup> The case IJ Couch relied on to express concern about the viability of *A-R-C-G-* does 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.").

<sup>9</sup> A Freedom of Information Act request was filed to uncover how the Attorney General learned of *A-B-*'s case.

<sup>10</sup> 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



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 require the process to be.

## B. Preliminary Dicta<sup>11</sup>

The Attorney General's introductory commentary – which precedes the section titled “opinion” – goes further than the decision itself in purporting to restrict 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 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.

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beyond the scope of this practice advisory. However, the same arguments set forth here apply in the credible fear context.

<sup>11</sup> 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 in cases he has 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 judges 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. Shaughnessy*, 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.

### 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. § 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 multiple ways. *See e.g.*, *Hor v. Gonzales*, 400 F.3d 482 (7th Cir. 2005) (*Hor I*)<sup>12</sup>; *Galina v. INS*, 213 F.3d 955 (7th Cir. 2000). Initially, his introductory commentary states that claims involving non-state actors must 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, the decision 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.” Courts have often referred to “past persecution” as shorthand for the question of

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<sup>12</sup> 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).

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., Yasinsky v. Holder*, 724 F.3d 983, 989 (7th Cir. 2013) (determining that the harm petitioner suffered constituted persecution, “[b]ut that does not help Yasinsky 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.

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 V, this reflects an 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 characteristic 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 another 2018 BIA decision, *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018), for the proposition 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.<sup>13</sup>

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

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<sup>13</sup> 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.

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 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 fear 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 and V, a group can be defined by past harm suffered so long as that PSG is being used for a future fear claim. For example, 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. For the claim to be viable, the forcible recruitment cannot be *both* the defining characteristic of the PSG and the harm group members experienced: that is circular. 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. The harm is typically physical beatings, rape, threats of harm, and/or psychological control. 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.<sup>14</sup>

### **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

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<sup>14</sup> 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.

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 will consider the Attorney General's rationales if and when it addresses those questions. Since the Attorney General 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. While NIJC encourages attorneys to have a working familiarity with *Chevron* and *Brand X* (and can review NIJC's [Particular Social Group Practice Advisory](#)<sup>15</sup> 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. Post-Matter of A-B- Developments

There have been significant developments in the legal challenges to *Matter of A-B-* in 2019 and 2020.

##### A. D.C. Circuit

One of the most in-depth analyses of the *A-B-* decision thus far can be found in *Grace v. Whitaker*, 344 F.Supp.3d 96 (D.D.C., 2018) and the subsequent appeal to the D.C. Circuit in *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020). *Grace* involved a challenge to the application of *Matter of A-B-* and the ensuing implementing USCIS Policy Memorandum to credible fear interviews (the initial asylum screening required for asylum seekers who request protection at a U.S. port of entry or are apprehended within a certain distance of the border). While much of the decision relates to the standards to be applied in credible fear interviews and is not necessarily relevant in the asylum context, the decision contains useful language that can and should be referenced in protection-based cases pending at all levels. For example:

- When comparing the “unwilling or unable to control” standard to the “condoned or completely helpless” standard presented in *A-B-* and the USCIS Policy Memorandum, the D.C. Circuit explained that “the two formulations are hardly interchangeable. A government that “condones” or is “completely helpless” in the face of persecution is obviously more culpable, or more incompetent, than one that is simply “unwilling or unable” to protect its citizens.” 965 F.3d at 898-99. Since USCIS did not acknowledge a policy change or provide an explanation for the change, the Court found the standard (as presented in the USCIS memorandum) arbitrary and capricious. *Id.*

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<sup>15</sup> As noted earlier, this practice advisory was last updated in 2016. Although it does not provide an overview of the most current particular social group case law, as this practice advisory does, it does provide an in-depth analysis of the problems inherent with the BIA's social distinction and particularity tests.

- Regarding the language in *A-B-* and the USCIS memorandum regarding circular particular social groups, the Court noted that “whether a group exists independently of the harm alleged is not always so apparent.” *Id.* at 903. The Court provided several examples of groups that could appear circularly defined if an adjudicator looked only to the specific words used to define the group, which, as the Court noted, an adjudicator should not do. Citing to the Seventh Circuit’s decision in *Cece*, the Court stated, “it is not fair to conclude that the group is defined by the harm or potential harm inflicted merely by the language used rather than determining what underlying characteristics account for the fear and vulnerability.” *Id.* at 904 (citing *Cece*, 733 F.3d at 672). The Court then provided examples of reasons – other than the abuse itself - why a woman fleeing domestic violence might be unable to leave a relationship. *Id.* at 904. If these reasons prevented the woman from leaving the relationship, then a particular social group based on an inability to leave would not be impermissibly circular. *Id.*
- Before both the D.C. Circuit and the D.C. District Court, the government repeatedly asserted that *A-B-* and the USCIS memorandum do not create any blanket rules against individual social groups or categories of claims. Instead, the government stated, a case-by-case analysis is always required. *Id.* at 905 (“[C]ounsel agreed that asylum officers must not apply the social-group requirements formulaically and instead must go case-by-case. . . . [C]ounsel acknowledged that [the unable to leave group] is not categorically barred . . . and that its validity would turn on the specific factual circumstances of an applicant’s claim.”); 906 (“[T]he only general rule that *Matter of A-B-* articulates,” counsel explained, is that “[asylum officers] have to go through the steps” for analyzing particular-social-group claims.”). *See also Grace v. Whitaker*, 344 F.Supp.3d at 125 (noting that the government has taken the position that *A-B-* makes “no such general rule against domestic violence or gang-related claims” and that “the only change to the law in *Matter of A-B-* is that *Matter of A-R-C-G-* was overruled;” the rest of the *A-B-* decision is simply “comment[ary].”).

## B. First Circuit

The First Circuit addressed the impact of *A-B-* head-on in *De Pena-Paniagua v. Barr*, 957 F.3d 88 (1st Cir. 2020). In that case, the BIA had affirmed the immigration judge’s denial of Ms. De Pena-Paniagua’s asylum claim after finding that her particular social groups were analogous to those of the asylum seeker in *A-R-C-G-* and that *A-B-* had determined that “the particular social group of ‘married women in Guatemala who are unable to leave their relationship’ did not meet the legal standards to qualify as a valid particular social group.” *Id.* at 91.

The Court disagreed and rejected the idea that *A-B-* categorically rejects any particular social group defined by an “inability to leave” the relationships in which they are being persecuted. *Id.* at 92-93. In reaching this conclusion, the Court criticized the BIA’s presumption that an inability to leave a relationship is always caused by the persecution suffered or feared and the presumption that persecution cannot do “double duty” by helping to define the social group *and* providing the

harm. *Id.* at 93. The Court discussed some of the many reasons a woman may be unable to leave a relationship and noted that the threatened abuse that prevents a woman from leaving the relationship may not always be the same as the harm inflicted on the woman in the relationship. *Id.* at 93-94. Finally, the Court considered the reasons why a particular social group defined only by gender or gender plus nationality might be the better particular social group for these kinds of cases and noted, “it is difficult to think of a country in which women are not viewed as “distinct” from other members of society. . . . It is equally difficult to think of a country in which women do not form a “particular” and “well-defined” group of persons.” *Id.* at 96. Ultimately, although the Court recognized that other circuits have looked favorably on gender-only social groups, the petitioner’s failure to raise the group below prevented the Court from ruling on it in the first instance. *Id.* at 97-98.<sup>16</sup>

### C. Second Circuit

As of this update, the Second Circuit has not directly addressed *A-B-* in a published decision in the context of domestic violence. It has, however, discussed *A-B-*’s condoned-or-completely-helpless-to-protect standard and found it interchangeable with the unable or unwilling standard. *Scarlett v. Barr*, 957 F.3d 316, 333-34 (2d Cir. 2020). In a separate decision, the Second Circuit reaffirmed that particular social group-based asylum claims require “a fact-intensive inquiry as to whether the group is recognized by the particular society in question” and cited to *Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014) for the point that “the BIA may not reject a group solely because it had previously found a similar group in a different society to lack . . . particularity.” *Ordonez Azmen v. Barr*, 965 F.3d 128, 135 (2d Cir. 2020).

### D. Third Circuit

While the Third Circuit referenced *Matter of A-B-* in a published decision that ultimately deferred to the BIA’s social distinction and particularity requirements, it provided no real analysis or discussion of the *A-B-* decision itself. *S.E.R.L. v. Att’y Gen.*, 894 F.3d 535 (3d Cir. 2018).<sup>17</sup>

### E. Fourth Circuit

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<sup>16</sup> Prior to *De Pena-Paniagua*, the First Circuit published a decision in which it noted, in a footnote, that the *A-B-* decision “interpreted the “causal connection” and “government nexus” prongs of [sic] persecution analysis to exclude most domestic violence harms from establishing that [persecution] definition.” *Martinez-Pérez v. Sessions*, 897 F.3d 33, 40 n.6 (1st Cir. 2018).

<sup>17</sup> One unpublished decision from the Third Circuit remanded the claim of a woman whose social group had been based on *A-R-C-G-* so that the immigration judge could determine whether her membership in the group of “Salvadoran women in domestic relationships who are unable to leave” is cognizable per the parameters of *A-B-*, noting that while the overruling of *A-R-C-G-* weakened the petitioner’s case, “it does not automatically defeat her claim that she is a member of a cognizable particular social group. *Padilla-Maldonado v. Att’y Gen.*, 751 Fed.Appx. 263, 268 (3d Cir. 2018).



Like the Third Circuit, the Fourth Circuit also has not engaged in a direct analysis of *Matter of A-B-*. However, the Court's decision in *Alvarez Lagos v. Barr*, 927 F.3d 236 (4th Cir. 2019) provides a useful reminder of what an adjudicator cannot do, even post-*A-B-*, when considering the viability of a particular social group. First, the Court found erroneous the immigration judge's determination that the particular social group (unmarried mothers living under the control of gangs in Honduras) was not small enough to meet the particularity requirement. As the Court explained, citing to the Ninth Circuit in *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2020), "[T]he size and breadth of a group alone does not preclude a group from qualifying as a [particular] social group." 927 F.3d at 253. The Court also rejected the immigration judge's determination that the proposed social group failed the social distinction test because a shared past experience "cannot defined the group." *Id.* Rather, as the Court reiterated, the BIA has confirmed that a shared past experience can form the basis of a particular social group "in some circumstances . . . to be determined on a case-by-case basis." *Id.* Finally, the Court rejected the immigration judge's reliance on his "observation" that gang violence is prevalent throughout Honduras to undercut the social distinction of the proposed particular social group, stating "As this court has made clear . . . the fact that "persecutors torture a wide swath of victims" is not enough to show that none of those victims are members of socially distinct groups." *Id.* at 253-54.

#### **F. Fifth Circuit**

The Fifth Circuit has taken what is probably the most deferential approach to *A-B-* thus far. In *Gonzales-Veliz v. Barr*, 938 F.3d 219 (5th Cir. 2019), the Court determined that *A-B-* "did not create a categorical ban against groups based on domestic violence," but found that in *Gonzales-Veliz's* case, the BIA "reasonably relied on the Attorney General's reasoning regarding the groups in *A-R-C-G-* and *A-B-* because *Gonzales-Veliz's* [unable to leave] group . . . is substantially similar to those groups." *Id.* at 232. According to the Fifth Circuit, "*A-B-*'s substantive reasoning happened to squarely foreclose *Gonzales-Veliz's* group." *Id.* In particular, the Fifth Circuit agreed with the BIA that per *A-B-*, *Gonzales-Veliz's* unable to leave group could not constitute a particular social group because – like the groups in *A-R-C-G-* and *A-B-* – it was impermissibly defined by the harm (the inability to leave); lacked particularity because large groups of society may be "susceptible to victimization" and because the group was too broad and diverse. *Id.*

The Court also disagreed with the petitioner's argument that even if the BIA had applied *A-B-* correctly, *A-B-* was an arbitrary and capricious change in policy because, without acknowledgement or explanation, it precluded groups of asylum seekers, raised the unable/unwilling standard, and asserted that violence based on a personal relationship may not meet the nexus standard for asylum. First, the Court found that *A-B-* did not constitute a change in policy because it "relied on the standards firmly established in BIA precedent." *Id.* at 233. Specifically as to the unable/unwilling standard, the Court held that *A-B-* did not raise the standard because that standard was "interchangeable" with the "complete helplessness" standard. *Id.* But even if *A-B-* could be considered a change in policy, the Court found that the Attorney

General has sufficiently explained the reasons for this change, which ultimately, were “to be more faithful to the statutory text.” *Id.* at 235.

### **G. Sixth Circuit**

Although the Sixth Circuit has not directly analyzed *A-B-* in a published decision, the Court’s analysis of a domestic violence claim with an “unable to leave” particular social group in *Juan Antonio v. Barr*, 959 F.3d 778 (6th Cir. 2020) stands in stark contrast to the Fifth Circuit’s analysis in *Gonzales-Veliz*. In *Juan Antonio*, the immigration judge and BIA had found the “unable to leave” particular social group cognizable, but determined that the asylum seeker was no longer a member of that group because she had physically left the relationship. In analyzing this conclusion, the Sixth Circuit noted the existence of *A-B-* in a footnote, but then stated “*Matter of A-B-* has since been abrogated,” citing to *Grace v. Whitaker* (the D.C. Circuit had not yet issued its decision in *Grace* at the time *Juan Antonio* was published). 959 F.3d at 790 n.3. While the Court recognized it was not bound by *Grace*, the Court found its reasoning “persuasive” and stated that since *A-B-* had been abrogated, *A-R-C-G-* “likely retains precedential value.” *Id.*

In examining the specific evidence in *Juan Antonio*’s case regarding her membership in the “unable to leave” group, the Court noted that “physical separation does not necessarily indicate that a relationship has ended.” *Id.* at 791. The Court also emphasized that in determining whether a married woman can leave a relationship, the adjudicator must consider “societal expectations” and “background country information” and in *Juan Antonio*’s case, the fact that “Mayan women have little societal capital.” *Id.*

As for the BIA’s determination that *Juan Antonio* had failed to show the Guatemalan government was unable or unwilling to control her persecutor, the Court noted that it was “more important to look at the numerous instances when the government failed to act or even respond as well as the harm the government failed to prevent” than to look at what Guatemala did. *Id.* at 794. The Court also rejected the BIA’s use of the word “helpless” to define the unable/unwilling standard, citing again to the D.C. District Court’s finding in *Grace* that a “complete helplessness” standard is “arbitrary, capricious, contrary to law, and “not a permissible construction.” *Id.* at 795.

### **H. Ninth Circuit**

The Ninth Circuit has also directly analyzed *A-B-*. In the published decision *Diaz-Reynoso v. Barr*, No. 18-72833 (9th Cir., Aug. 7, 2020), the Court first determined that while *A-B-* offers “general impressions” about asylum claims based on domestic violence, it “plainly does not endorse any sort of categorical exception.” \*6. More specifically, the Court determined that *A-B-* “underscored the need for an intensive case-by-case analysis.” *Id.* at \*7.

Second, the Court found that while *A-B-* did not announce a new rule concerning circularity, the BIA in Diaz-Reynoso’s case treated *A-B-* as prohibiting “any mention of feared harm within a proposed social group.” *Id.* at \*7. This was incorrect. As the Court explained, “if a group is otherwise cognizable, *Matter of A-B-* does not demand that it be devoid of any reference to an applicant’s claimed persecution.” *Id.* In other words, “[t]he idea that the inclusion of persecution is a sort of poison pill that dooms any group does not withstand scrutiny.” *Id.* at \*9.

To underscore this point, the Court referred to an example from the BIA’s decision in *M-E-V-G-* that comes from the Seventh Circuit’s decision in *Sepulveda v. Gonzales*, 464 F.3d 770, 771 (7th Cir. 2006). A particular social group made up of former employees of a country’s attorney general may not generally meet the social distinction test, but if the government began persecuting those individuals, then society might start to recognize them as a discrete group. *Id.* at \*9. Thus, the persecution creates the social distinction, but the immutability of the characteristic forming the basis of the group exists independent of the harm itself. *Id.*

In Diaz-Reynoso’s case, the BIA rejected her “unable to leave” particular social group with a citation to *A-B-* and “an assertion that Diaz-Reynoso’s group suffered from the same “circularity problem” identified in [*A-B-*].” *Id.* at \*12. The Court found that this conclusion was contrary to *A-B-*’s case-by-case analysis requirement and that it was based on an assumption that the domestic violence inflicted on Diaz-Reynoso was the only reason she was unable to leave her relationship. *Id.* In reality, Diaz-Reynoso identified numerous reasons unrelated to the domestic violence that prevented her from leaving her relationship with her husband. *Id.* at \*13. Because the BIA had simply rejected Diaz-Reynoso’s particular social group with a blanket citation to *A-B-*, rather than conducting the case-specific inquiry required by *A-B-*, the Court granted Diaz-Reynoso’s petition for review.

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

It bears repeating that the actual legal holding of *A-B-* is narrow: it simply overturns the BIA’s decisions in *A-R-C-G* and *A-B-*.<sup>18</sup> 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-*

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

<sup>18</sup> As noted above, this is the same argument made by the government in *Grace v. Whitaker*, 344 F.Supp.3d at 125, and *Grace v. Barr*, 965 F.3d at 905-06.

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.

Finally, attorneys should remind adjudicators 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 and evidence of the individual case. *See e.g., 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"); *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"); *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); *Ordonez Azmen v. Barr*, 965 F.3d 128, 135 (2d Cir. 2020) (same); *Diaz-Reynoso v. Barr*, No. 18-72833 (9th Cir., Aug. 7, 2020).

### A. Corroboration

The one practice tip spanning all of the issues raised in *A-B-* is the importance of corroboration. Attorneys must extensively corroborate all aspects of the claim and avoid relying solely on client affidavits and country condition reports. The statutory language on 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 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 Human Rights Reports. In many of these reports, beginning in 2018, 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.<sup>19</sup> NIJC has never recommended that attorneys rely heavily on the State Department Human Rights Reports as a

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<sup>19</sup> For a particularly vivid example, attorneys can compare the section on women in the 2017 Honduran report 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/>.

source of country condition evidence, but in light of the recent reports, attorneys may now need to provide additional documentation to disprove the information contained in the State Department report.<sup>20</sup>

## 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.<sup>21</sup>

Correct Formulation	Attorney General’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

### 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 in *Matter of A-B-* 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.

<sup>20</sup> 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).

<sup>21</sup> 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.”

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, and that the Attorney General himself has recognized this rejection in *L-E-A-*, 27 I&N Dec. at 590. 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.<sup>22</sup>

Finally, 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** (and ideally, much earlier).

### **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.

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<sup>22</sup> 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.

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 or violation of the gang's demands, rules, or norms – 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 and as multiple circuits have reiterated (as discussed in Part IV).

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

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 difference and be prepared to respond to government attorneys who will assert the characteristic and the harm are one. The First Circuit's decision in *De Pena-Paniagua* and the Ninth Circuit's decision in *Diaz-Reynoso*, while not binding in the Seventh Circuit, are particularly useful for strategizing on this point.

4) When looking for supportive case law, look to Seventh Circuit law first, then to BIA precedent that may have found viable social groups in cases with similar rationales, but

To support Central American and Mexican asylum claims, look to Seventh Circuit precedent involving asylum seekers from other countries.

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.

Based on these guidelines, NIJC recommends that attorneys practicing in the Seventh Circuit use 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” or “Salvadoran women who have flouted or resisted Salvadoran social norms.”

**Gang-based claims:**

“Mr. X belongs to the particular social group of “Salvadorans who have [violated/opposed/disobeyed] gang norms;” “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 briefs 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-*’s circularity language 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.<sup>23</sup> 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 these factors were applied in the Seventh Circuit, 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. As other courts have recognized, 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. *Grace*, 965 F.3d at 904; *De Pena-Paniagua*, 957 F.3d at 93-94; *Diaz-Reynoso*, No. 18-72833 \*13. In Ms. X's case, the evidence demonstrates the many reasons she could not leave her relationship.<sup>24</sup>

- **In all PSG claims:** In 2014, the BIA altered its particular social group definition to require “social distinction/visibility” and “particularity.” See *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, e.g., *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009) (rejecting the BIA’s social visibility test); *Cece*, at 674-75 (rejecting particularity as a bar to a particular social group status). None of the Seventh Circuit’s precedents since *M-E-V-G-* and *W-G-R-* have addressed the BIA’s additional requirements directly and all have reaffirmed that the Seventh Circuit follows a pure, *Acosta*-only definition of particular social group. See e.g., *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. 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.”); *W.G.A.*, 900 F.3d at 964, 294 n.4 (noting that the Court is declining to analyze the BIA’s particular social group requirements under *Chevron*, but that the petitioner’s arguments that these requirements are unreasonable “have some force.”).

Notably, where the BIA declines to follow binding circuit precedent, such as that within the Seventh Circuit, it explicitly says so in a published decision. See e.g., *Matter of Konan Waldo Douglas*, 26 I&N Dec 197 (BIA 2013). Neither the BIA nor the Attorney General have ever purported to overrule Seventh Circuit precedent in any of its decisions discussing social

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<sup>23</sup> In fact, in *Grace v. Whitaker*, the government asserted to the Court that the “only change to the law in *Matter of A-B-* is that *Matter of A-R-C-G-* was overruled” and that “*A-B-* only required the BIA to assess each element of an asylum claim and not rely on a party’s concession that an element is satisfied.” *Grace*, 344 F.Supp.3d 125.

<sup>24</sup> 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.

visibility/distinction and particularity. In fact, most recently, the Attorney General specifically recognized that the Seventh Circuit *has not* deferred to the BIA’s test. *See Matter of L-E-A-*, 27 I&N Dec. 581, 590 (A.G. 2019) (“[T]he Seventh Circuit has declined to apply the particularity and social distinction requirements, requiring only that members of particular social groups share a common, immutable characteristic.”). Even if those requirements were binding here, 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 pose 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

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

Context is critical. Use all forms of evidence (affidavits, country reports, expert statements) to establish context.
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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.”); *see also Hernandez-Chacon v. Barr*, 948 F.3d 94, 103-04 (2d Cir. 2020); *De Brenner v. Ashcroft*, 388 F.3d 629, 638 (8th Cir. 2004); *Osorio v. INS*, 18 F.3d 1017, 1029 (2d Cir. 1994).

#### Practice Tips

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 in *A-B-*, address whether the persecutor had some understanding of the client’s PSG membership (i.e., in a domestic violence-based claim, whether he understood 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).<sup>25</sup>

- 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 are based on deep-rooted beliefs that women are subordinate to men.<sup>26</sup> Attorneys should explain what “machismo” is to ensure the adjudicator understands how misplaced it is to view domestic violence as a “private matter.”

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. 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 was 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.

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

The Seventh Circuit has referenced the importance of a gang or cartel’s *modus operandi* as evidence of nexus in other cases as well. In *Gonzalez Ruano v. Barr*, 922 F.3d 346, 355 (7th Cir. 2019), the Court found that a Mexican cartel’s specific use of violence against particular parts of the community (specifically women) to terrorize the community into submission demonstrated that the violence inflicted on the petitioner and his family was not merely a personal dispute, but part of the cartel’s operational policy. Similarly, in *W.G.A.*, 900 F.3d at 966, the Court referenced country condition documentation demonstrating “widespread recognition that the Salvadoran gangs target nuclear family units to enforce their orders

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<sup>25</sup> While the social distinction requirement is not binding in the Seventh Circuit, this form of “social distinction” is relevant to the nexus analysis.

<sup>26</sup> Despite the gaps in some of the State Department Human Rights Reports, the 2019 report for Honduras, for example, refers specifically to “a pattern of male-dominant culture and norms” as one of many obstacles to the country’s response to domestic violence.

and to discourage defection” as evidence that the gang had targeted the petitioner on account of his family membership, as opposed to a personal dispute.

- 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 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, 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 of the persecutor’s operational policy and/or 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. See *W.G.A.*, 900 F.3d at 966 (explaining that the timing of the persecution demonstrates the reason for it and that “the gang’s own words reveal their motivation.”). Second, demonstrate that the harm itself is evidence of the reason for the harm.<sup>27</sup> Third, establish that the country condition evidence provides circumstantial evidence of the reason for the harm, explaining that the *modus operandi* of the persecutor and 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

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 *Tarraff 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

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<sup>27</sup> 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 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>.

“persecution by private actors *can* give rise to viable asylum claims” and so *Hor I* “should not be over-read”).

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

*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.

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. In fact, post-*A-B-* asylum office guidance focuses on this element, although some of that guidance has now been rejected by the court in *Grace*.<sup>28</sup> For this reason, it is important 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 educate 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 has seemed 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

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<sup>28</sup> “Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*,” USCIS, July 11, 2018, available at <https://www.uscis.gov/sites/default/files/document/memos/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.PDF> [last accessed August 17, 2020]; *Grace*, 965 F.3d at 898-99.

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).<sup>29</sup>

- Consider whether there is any reasonable argument that the client’s persecutor was a governmental entity, even an informal governmental entity like an auxiliary, 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 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 or unwillingness to control the type of persecutor/persecution involved in the asylum seeker’s claim (e.g., news reports, country condition reports, expert affidavits).
- 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 may want to spend a little time in their brief documenting the difference in levels of violence and attitudes towards that violence (especially gender-based

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).

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<sup>29</sup> 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 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).

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.

## F. Relocation

In *A-B-*, 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.<sup>30</sup> 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).<sup>31</sup> Moreover, when the persecutor is the government, relocation is presumed unreasonable. 8 C.F.R. § 1208.13(b)(3).

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).

Remember: relocation must be both safe and reasonable.
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### Practice Tips

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

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<sup>30</sup> 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).

<sup>31</sup> 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.



- **Regarding safety:** Attorneys should address in their client’s affidavit whether she 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 why such witness statements are not reasonably obtainable. If the asylum seeker did not attempt to relocate internally before fleeing, her affidavit should explain in detail why an attempt was not made.<sup>32</sup>

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 from 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.<sup>33</sup>
  - 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 rival gangs or criminal groups 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; have ongoing civil strife; or are so rural that the client and her children would be forced

Corroborate the unreasonableness of relocation.
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<sup>32</sup> 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 upon request.

<sup>33</sup> In *Juan Antonio*, 959 F.3d at 797, the Court referenced the petitioner’s status as an indigenous Mayan woman who wears Mayan clothes, has lived in the same village her entire life, has no formal education, cannot read or write, and has no friends, family, or job opportunities elsewhere in the country as evidence that the government could not show relocation would be reasonable.

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 should argue that restricting an asylum seeker to a small section of the country that might be safe is also not “reasonable.”<sup>34</sup>

## 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.<sup>35</sup>

### 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:

- 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

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<sup>34</sup> 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 if the asylum seeker would face danger in the rest of the country.

<sup>35</sup> 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 when questioned by 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](https://www.huffingtonpost.com/2015/06/16/border-patrol-babies_n_7594618.html).

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

## 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, NIJC emphasizes the importance of understanding this decision within the context of the administration's broad-based attack on asylum generally and specifically on Central American and Mexican asylum seekers.

In the two years since *A-B-* was issued, the case continues to be the sources of substantial litigation. For this reason, NIJC recommends preserving certain arguments 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.11 above). *United States ex rel. Accardi v. Shaughnessy*, 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 PSGs on a case-by-case basis (see Part IV 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).

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*Matter of A-B-* is a disappointing decision that seeks to walk 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, continue to do so even without A-R-C-G-’s support.

For more information on representing asylum seekers, including NIJC’s asylum manual, please review the resources [on NIJC’s website](#). Attorneys representing asylum clients through NIJC are encouraged to consult with NIJC regarding any questions about their case.