

Particular Social Group (PSG)

Formulating a successful PSG for asylum.

- Family MembershipLGBT

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PSG REGULATIONS

PSG REGULATIONS

8 CFR 208.1(c)

Particular social group. For purposes of adjudicating an application for asylum under section 208 of the Act or an application for withholding of removal under section 241(b)(3) of the Act, a particular social group is one that is based on an immutable or fundamental characteristic, is defined with particularity, and is recognized as socially distinct in the society at question. Such a particular social group cannot be defined exclusively by the alleged persecutory acts or harms and must also have existed independently of the alleged persecutory acts or harms that form the basis of the claim.

The Secretary, in general, will not favorably adjudicate claims of aliens who claim a fear of persecution on account of membership in a particular social group consisting of or defined by the following circumstances: Past or present criminal activity or association (including gang membership); presence in a country with generalized violence or a high crime rate; being the subject of a recruitment effort by criminal, terrorist, or persecutory groups; the targeting of the applicant for criminal activity for financial gain based on perceptions of wealth or affluence; interpersonal disputes of which governmental authorities were unaware or uninvolved; private criminal acts of which governmental authorities were unaware or uninvolved; past or present terrorist activity or association; past or present persecutory activity or association; or status as an alien returning from the United States. This

list is nonexhaustive, and the substance of the alleged particular social group, rather than the precise form of its delineation, shall be considered in determining whether the group falls within one of the categories on the list. No alien shall be found to be a refugee or have it decided that the alien's life or freedom would be threatened based on membership in a particular social group in any case unless that person articulates on the record, or provides a basis on the record for determining, the definition and boundaries of the alleged particular social group. A failure to define, or provide a basis for defining, a formulation of a particular social group before an immigration judge shall waive any such claim for all purposes under the Act, *including on appeal*. Any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel unless the alien complies with the procedural requirements for such a motion and demonstrates that counsel's failure to define, or provide a basis for defining, a formulation of a particular social group constituted egregious conduct.

THE PSG MUST BE ARTICULATED TO THE COURT ON THE RECORD

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appeal. **Any waived claim on this basis shall not serve as the basis for any motion to reopen or reconsider for any reason, including a claim of ineffective assistance of counsel unless the alien complies with the procedural requirements for such a motion and demonstrates that counsel's failure to define, or provide a basis for defining, a formulation of a particular social group constituted egregious conduct.**

Formulating a PSG

When trying to formulate your PSG, one can take into consideration:

- **Applicants Nationality and Gender Applicants Nationality and Child Status Applicants**

LGBT Particular Social Group Cases

LGBT Particular Social Group

The applicant must prove that the persecution they fear in the future is motivated by their actual or imputed membership in a PSG. Since 1994, when Attorney General Janet Reno designated *Matter of Toboso-Alfonso* as precedent, “homosexual men” has been recognized as a PSG under asylum law. More recently, the Ninth Circuit has ruled that “all alien homosexuals are members of a ‘particular social group.’” [~LINK~](#)

In the case *Amanfi v. Ashcroft*, the Third Circuit held that imputed membership in the PSG of gay men can also be grounds for an asylum claim. In *Amanfi*, the Court recognized that persecution on account of sexual orientation may be sufficient for an asylum claim even if the victim is actually not gay but is thought to be by the persecutor. In that case, a man from Ghana engaged in homosexual activity with another man in order to be spared from being ritually sacrificed, after which he was continuously beaten by police for his perceived homosexuality.

The Ninth Circuit has also found in the case of *Hernandez-Montiel* that “gay men with female sexual identities” constitute a PSG. The Court rejected the argument that *Hernandez-Montiel*’s female identity was volitional, concluding that his presentation as female was immutable and inherent in his identity

and that he could not be required to change it. The Court reaffirmed its holding in *Reyes-Reyes v. Ashcroft*. [\[link\]](#) Although transgender persons have not been explicitly found to constitute a PSG, there have been many successful non-precedential cases. [-link-](#)

Proving LGBT

An essential component of an asylum application for a lesbian, gay, or bisexual applicant will be proving that they are in fact lesbian, gay, or bisexual.

Relevant proof may include testimony or documentation by past partners or friends living in the United States.

The applicant must also provide evidence, either direct or circumstantial, that the persecution is on account of their sexual orientation, gender identity, or HIV status. In an unpublished decision, *Pena-Torres v. Gonzales*, the Ninth Circuit reversed an IJ's decision that a gay man from Mexico had suffered from police brutality rather than persecution on account of his sexual orientation. The Ninth Circuit remanded the case for a new determination regarding asylum eligibility because it found that an incident where the applicant was beaten to the point where he required medical attention and was threatened by the police after leaving a gay bar, did amount to past persecution on account of his sexual orientation. The Court reached this conclusion by citing evidence that the police had attacked the applicant only after they asked him whether he was gay.

Applicants Living With HIV

People living with HIV have not explicitly been found to constitute a PSG for the purposes of asylum. In 1996, the legacy INS Office of the General Counsel recommended that the PSG of people with HIV be recognized for the

purposes of asylum law. [~LINK~](#) Some IJs have found that HIV status can form the basis of a PSG membership. [~link~](#) The BIA has also recognized, in an unpublished opinion, that people living with AIDS can comprise a PSG*. Although these decisions are significant for applicants living with HIV, because the rulings are not precedential, such applicants will still need to individually establish that people living with HIV in their countries constitute a PSG.

Mixed Motives Doctrine

Unsupported block

Significantly, the BIA has consistently followed the doctrine of “mixed motives” which holds that there can be more than one motivation for the persecution, as long as the harm was motivated in part by an actual or imputed ground as shown by direct or circumstantial evidence produced by the applicant.

If an applicant does not clearly fit within a precedentially defined PSG, they must establish that they are a member of a PSG. The major case setting forth what constitutes membership in a PSG is *Matter of Acosta*.

‘Persecution on account of membership in a particular social group’ mean[s] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it

is fundamental to their individual identities or consciences.

PSGs should be defined in specific terms rather than in broad, generally applicable terms such as youth and gender. For instance, the following PSGs have met the requirements for asylum: young women of the Tchamba-Kunsuntu tribe who have not suffered FGM, as practiced by that tribe, and who oppose the practice, and HIV-positive individuals living in the Ivory Coast and Togo.

As noted, broad PSGs, such as gender, will not satisfy the membership requirement as it is currently construed. This exclusion long created difficulties for those who sought asylum in order to escape domestic violence or other forms of violence within the private sphere, before the BIA's precedential decision in *Matter of A-R-C-G-*. Even today, PSGs must be defined with sufficient particularity that its boundaries are discrete and definable. The group must also be socially distinct—that is, the society in question must distinguish individuals who share the defining characteristic of the PSG from those who do not. This “visibility” does not mean ocular or literal visibility, or explicit, outward identification by the applicant with the PSG.

Political opinion may be an additional ground that LGBTQ/H individuals can claim asylum. LGBTQ/H people who are involved with gay rights groups may use political opinion as a supplemental ground for asylum claims. In addition, the BIA has found that persecution can be based on an imputed political opinion.

Recognized PSG's TESTIFYING AGAINST GANG MEMBER OR OTHERWISE COOPERATING WITH LAW ENFORCEMENT

[Matter of H-L-S-A-](#), 28 I&N Dec. 228 (BIA 2021).

Summary of the Facts

Mr. H-L-S-A-, the applicant, a Salvadoran national, was removed from the United States pursuant to an in absentia removal order. Upon returning to El Salvador, he learned that a family member was murdered for failure to pay extortion to gang members and was warned that MS-13 was looking for him. Ten years after his reentry, he was arrested. While in detention, he began to be extorted and threatened by his cellmate, an MS-13 gang member. The cellmate warned him that if he complained to guards, he would be placed in protective custody, marking him as a snitch. The gang member at one point revealed to the applicant that he had a weapon. The applicant informed authorities, was placed in protective custody, and then transferred to another facility.

Mr. H-L-S-A- was transferred back for his hearing, detainees called him a “rat” and threatened to kill him. He was then transferred back to the second facility, where he later met with federal prosecutors and agents to discuss his knowledge of gang activity and to identify suspected gang members from a photo line-up. As a result, the gang members were convicted of and sentenced for various crimes. Because Mr. H-L-S-A had a prior removal order, he was placed in withholding-only proceedings. He expressed a fear that the gang members in the United States would inform gang members in El Salvador of the applicant’s cooperation and that his life would be in danger if he returned.

Holding

Individuals who cooperate with law enforcement may constitute a valid particular social group under the Immigration and Nationality Act if their cooperation is public in nature, particularly where testimony was given in public court proceedings, and the evidence in the record reflects that the society in question recognizes and provides protection for such cooperation.

BIA Analysis

In its analysis in H-L-S-A-, the BIA stated that victims of, or witnesses to crime, without more, cannot satisfy the particularity or social distinction requirements. The BIA likewise found that confidential informants lack social distinction due to their anonymity and their similarity in position to anyone who is merely “perceived to be a threat” to a cartel’s interests.

The BIA narrowly reviewed circuit law regarding witness PSGs and ultimately found that to satisfy both the social distinction and particularity requirements of the PSG analysis under M-E-V-G-, an applicant must satisfy two criteria: (1) they must formally or publicly cooperate with prosecution against their persecutors in their country of origin; and (2) that country must

recognize the members of the proposed PSG through legislation or other form of witness protection. The BIA distinguished between circumstances in which an individual testifies against his or her persecutors in court proceedings in a country that has enacted a special witness protection law and those where a person has filed a police report in a country where no law protects those who report criminal activity. In excluding the latter PSG, the BIA suggested that a lack of general community knowledge of an applicant making a police report is a significant factor against an immigration judge finding social distinction. The BIA stated that any retaliation.

Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013) (en banc).

- **Key Holding:** The Ninth Circuit held that the BIA had erred in its precedent after recognizing that witnesses who testify against gang members could be considered a particular social group with social visibility. The court identified a particular social group of "non-criminal informants" on the basis of their visibility to the public. The Ninth Circuit's ruling was based on the BIA's decision that individuals who testify against gang members are not socially visible as a member of such a group, especially in light of Salvadoran witness protection laws indicating societal recognition of such individuals' vulnerability. The court effectively opened the door for this group to be recognized.

Matter of C-A-, 23 I&N Dec. 951 (BIA 2006):

- **Holding:** The BIA found that a group of "noncriminal informants" providing information about a drug cartel in Colombia did not constitute a valid particular social group.

distinction") - the group was not sufficiently recognized as distinct within Colombian society. This case highlighted the importance of the *public* nature of the cooperation. **Link:**

<https://www.cliniclegal.org/resources/asylum-and-refugee-law/bia-rules-witnesses-eligibility-asylum-psg>

BOARD OF IMMIGRATION APPEALS

The Many Revisions of what a PSG is over the course of the past couple of decades: See *Matter of C-A-*, 23 I. & N. Dec. 951, 951 (BIA 2006); *Matter of A-M-E- & JG-U-*, 24 I. & N. Dec. 69, 69 (BIA 2007); *Matter of S-E-G-*, 24 I. & N. Dec. 597, 597 (BIA 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591, 591 (BIA 2008); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 227 (BIA 2014); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 208 (BIA 2014), aff'd in relevant part sub nom. *Garay-Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016), cert. denied, 138 S. Ct. 736 (2018); *Matter of A-R-C-G-*, 26 I. & N. Dec. 388, 388 (BIA 2014).

***Matter of H-L-S-A-*, 28 I&N Dec. 228 (BIA 2021)**

Individuals who cooperate with law enforcement may constitute a valid particular social group under the Immigration and Nationality Act if their cooperation is public in nature, particularly where testimony was given in public court proceedings, and the evidence in the record reflects that the society in question recognizes and provides protection for such cooperation.

SECOND CIRCUIT

Resistance to Female Subordination to Male Dominance in El Salvador

Hernandez Chacon v. Barr, No. (2d Cir. Jan. 23, 2020): “resistance to the norm of female subordination to male dominance that pervades El Salvador.”

- “There is ample evidence in the record to support her claim: Gangs control much of El Salvador, including the neighborhood in which Hernandez-Chacon lived. The law enforcement systems that would normally protect women -- police, prosecutors, judges, officials -- do not have the resources or desire to address the brutal treatment of women, and the Salvadoran justice system “favors aggressors and assassins” and “punish[es] victims of gender violence.”

OTHER CIRCUITS

Women of Country X

Miguelina De Pena-Paniagua v. Barr, (1st Cir. 2020)

It is not clear why a larger group defined as “women,” or “women in country X” -- without reference to additional limiting terms -- fails either the “particularity” or “social distinction” requirement. Certainly, 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.” It is unsurprising, then, that if race, religion, and nationality typically refer to large classes of persons, particular social groups -- which are equally

based on innate characteristics -- may sometimes do so as well. See *Perdomo v. Holder*.

Female Victims of Domestic Violence

• Garcia v. U.S. Att’y Gen., 665 F.3d 496 (3d Cir. 2011) (PSG: individuals who testify against gang members)v • Valdiviezo-Galdamez v. Holder, 663 F.3d 582 (3d Cir. 2011) (PSG: young men who have been actively recruited by gangs and who have refused to join the gangs” is a “particular social group) • Crespin-Valladares v. Holder, 632 F.3d 117 (4th Cir. 2011) (PSG: family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses) • Martinez v. Holder, 740 F.3d 902 (4th Cir. 2014) (PSG: former gang members) • Perdomo v. Holder, 611 F.3d 662 (9th Cir. 2010) (PSG: Guatemalan women) • Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013) (PSG: people who testify against gang members) • Cordoba v. Holder, 726 F.3d 1106 (9th Cir. 2013) (PSG: landowners in X country) • Niang v. Gonzales, 422 F.3d 1187 (10th Cir. 2005) (PSG: females within a particular tribe)

Formulating PSG's

Formulating a PSG

During the past decade, it has become increasingly important that attorneys formulate PSGs carefully and with a clear understanding of the current law in their jurisdictions. Moreover, since PSG claims are now more likely to result in federal litigation, it is important that the strongest PSG(s) possible be preserved at the IJ level since new PSG definitions cannot be introduced on appeal.

Practice Tips

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

“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.”

Family Membership

Family Membership as Particular Social Group

Practice Advisories on the Topic

[PSG practice advisory_final 7 19 21.pdf](#)

[Nexus - Particular Social Group PSG LP RAIO.pdf](#)

Case Law

**Matter of M-R-M-S-, 28 I&N Dec. 757 (BIA
2023)**

If a persecutor is targeting members of a certain family as a means of achieving some other ultimate goal unrelated to the protected ground, family membership is incidental or subordinate to that other ultimate goal and therefore not one central reason for the harm. Matter of L-E-A-, 27 I&N Dec. 40 (BIA 2017), reaffirmed.

Nexus

Regardless of whether an asylum applicant seeks protection on account of race, religion, nationality, political opinion, or membership in a particular social group, he or she must establish that the protected ground is “at least one central reason” for the feared harm. Id. at 758; INA 208(b)(1)(B)(i).

For nexus in Family Membership cases go to [Family Membership Nexus & Matter of M-R-M-S \(BIA 2023\)](#).

Female Victims of Sexual Violence & Abuse by a Family Member

Membership in a Particular Social Group for Victims of Sexual Violence & Abuse by a Family Member

Membership in a Particular Social Group (PSG) - PSGs cannot be circular and “must have existed independently of the alleged persecutory acts.”

FGM/C was recognized as a basis for asylum in *Matter of Kasinga*, in which the cognizable PSG was “Young women who are members of the TchambaKunsuntu Tribe of northern Togo who have not been subjected to FGM, and who oppose it.”

Subsequently, many cases involving IPV have been brought by members of PSGs defined in part by elements of domestic abuse itself; eg, *Matter of A-C-R-G*: “Married women in Guatemala who suffer domestic abuse but are unable

to leave their marriages due to cultural and legal constraints." Neither PSG would be acceptable under the rule.

Matter of W-Y-C & H-O-B was a PSG proposed as "single Honduran women age 14 to 30 who are victims of sexual abuse within the family and who cannot turn to the government."

- **Rationale:** While "Women who are in a family household, unable to leave, and who lack state protection for a PSG. This formulation attempts to narrow the group based on age, gender, the relationship to the abuser (male family member), and show the inability to escape the situation, which might speak to the "immutable" nature of their vulnerability and lack of state protection.

POTENTIAL PSG FORMULATIONS

Combined Family and Vulnerability Characteristics:

- **Rationale:** This formulation combines the vulnerability characteristics of the family membership with the specific vulnerability tied to age, gender, and the abuser's vulnerability.

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spec

Considerations for Any Proposed PSG:

- **Social Distinct:** Does this group have a distinct identity? • **Part**
• **Family:** Does this group have a family? • **Part**
• **Immigration:** Does this group have a common history? • **Part**

Particular Social Groups Generally

Matter of Acosta held that a particular social group is comprised of persons who hold a common, immutable characteristic. 19 I&N Dec. at 211. A particular social group must also be defined with particularity and be socially distinct. *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); see also *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). Immutability has been defined as a characteristic that one cannot change or is so fundamental that individual should not be required to change it. *Matter of Acosta*, 19 I&N Dec. at 211. Particularity means that the group cannot be indeterminate, too subjective, inchoate, or variable. *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007). Lastly, social distinction requires that the group be perceived as a group by the society in which it exists. *Matter of W-G-R-*, 26 I&N Dec. at 216.

**PSG: Individualizes
Who Have Testified
Against Criminals or
Otherwise Cooperated
With Law Enforcement**

**TESTIFYING AGAINST
GANG MEMBER OR
OTHERWISE**

**COOPERATING WITH
LAW ENFORCEMENT**

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***Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013) (en banc).**

- **Key holding in *Sotheby v. The Circuit Court of the District of Columbia*: That the BIA had found that a group of individuals who were not members of a gang could be considered a particular social group for asylum purposes. The court found that the individuals were socially visible to the community as a group, and that the BIA's decision to deny asylum to the group was not based on a failure to recognize the group's social visibility. The court found that the BIA's decision to deny asylum to the group was not based on a failure to recognize the group's social visibility. The court found that the BIA's decision to deny asylum to the group was not based on a failure to recognize the group's social visibility. The court found that the BIA's decision to deny asylum to the group was not based on a failure to recognize the group's social visibility.**

Matter of C-A-, 23 I&N Dec. 951 (BIA 2006)

- **Holding: The BIA found that a group of "noncriminal informants" providing information about a drug cartel in Colombia did not constitute a valid particular social group.**

- **Reasoning: The court found that the group was not socially visible to the community as a group, and that the BIA's decision to deny asylum to the group was based on a failure to recognize the group's social visibility.**

<https://www.cliniclegal.org/resources/asylum-and-refugee-law/bia-rules-witnesses-eligibility-asylum-psg>