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ASYLUM

Asylum Law

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Establishing Eligibility for Asylum

Establishing Eligibility For Asylum

Legal Authorities

- Statutes
 - Immigration and Nationality Act (INA)
 - INA §§ 101(a)(42)(A), 208(b)(1)
 - Title 8 of the U.S. Code
- Regulations
 - Title 8 of the Code of Federal Regulations (8 C.F.R.)
 - 8 C.F.R. § 1208.13
- Board of Immigration Appeals (BIA or the Board) precedent decisions
- Attorney General (AG) precedent decisions
- Federal court decisions
- Supreme Court decisions

ELIGIBILITY CHART

based on the law as of October 28, 2021

	A S Y L U M	W I T H H O L D I N G	C A T P R O T E C T I O N
T y p e o f H a r m	P e r s e c u t i o n	F u t u r e h a t t o l i f e o r f r e e d o m	T o r t u r e

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e	s	e	e
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i	n	i	i
h	a	k	k
o	b	e	e
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or

A non-government actor the government is unable or unwilling to control. | The government

or

A non-government actor the government is unable or unwilling to control. | A public official or person acting in an official capacity or any person acting at the instigation of or with the consent or acquiescence of a public official |

INA §208.13 Establishing asylum eligibility

See INA §208.13

(a) **Burden of proof.** The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

(b) **Eligibility.** The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

(1) **Past persecution.** An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original

claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) ***Discretionary referral or denial.*** Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

FUNDAMENTAL CHANGE IN CIRCUMSTANCES

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion; or

INTERNAL RELOCATION

(B) The applicant could avoid future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) ***Burden of proof.*** In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.

GRANT IN THE ABSENCE OF WELL-FOUNDED FEAR

(iii) ***Grant in the absence of well-founded fear of persecution.*** An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

WELL-FOUNDED FEAR

(2) ***Well-founded fear of persecution.***

(i) An applicant has a well-founded fear of persecution if:

(A) The applicant has a fear of persecution in his or her country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

WHEN EVIDENCE OF BEING SINGLED OUT IS NOT REQUIRED

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

(A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

REASONABLENESS OF INTERNAL RELOCATION

(3) ***Reasonableness of internal relocation.*** For purposes of determinations under paragraphs (b)(1)(i) and (ii) and (b)(2) of this section, adjudicators should consider the totality of the relevant circumstances regarding an applicant's prospects for relocation, including the size of the country of nationality or last habitual residence, the geographic locus of the alleged persecution, the size, reach, or numerosity of the alleged persecutor, and the applicant's demonstrated ability to relocate to the United States in order to apply for asylum.

(i) In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.

(ii) In cases in which the persecutor is a government or is government-sponsored, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

(iii) Regardless of whether an applicant has established persecution in the past, in cases in which the persecutor is not the government or a government-sponsored actor, or otherwise is a private actor, there shall be a presumption that internal relocation would be reasonable unless the applicant establishes, by a preponderance of the evidence, that it would be unreasonable to relocate.

(iv) For purposes of determinations under paragraphs (b)(3)(ii) and (iii) of this section, persecutors who are private actors—including persecutors who are gang members, officials acting outside their official capacity, family members who are not themselves government officials, or neighbors who are not themselves government officials—shall not be considered to be persecutors who are the government or government-sponsored absent evidence that the government sponsored the persecution.

Persecution

Particular Social Group

POINT TO ADDRESS IN CLOSING ARGUMENT

UNABLE OF UNWILLING TO CONTROL

BARS TO ASYLUM

DUAL NATIONALITY

Zepeda-Lopez, et al. v. Garland, No. 19-145 (2d Cir. 2022)

The Second Circuit granted Petitioners' petition for review and held that to qualify as a "refugee" under the INA, a dual national asylum applicant need only show persecution in any singular country of nationality. The court explained that to be eligible for asylum and withholding of removal, an individual must be a "refugee." 8 U.S.C. Section 1158(b)(1)(A).

Persecution

What is persecution?

1. Severe harm or suffering
 1. May involve physical violence
 2. Non-physical violence may also constitute persecution **Example:** deliberate imposition of severe economic disadvantage or deprivation of liberty, food, housing, employment, or education
2. Inflicted to punish a person for possessing a belief or characteristic that the persecutor seeks to overcome

References: • *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), (modified on other grounds by *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987)) • *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007)

How is alleged harm assessed?

- When considering whether alleged harm constitutes persecution, the Immigration Judge considers the harm in the aggregate.
- Threats of harm alone usually are not enough to constitute persecution. Actual harm is generally required.
- Multiple incidents, considered together, may constitute persecution, especially if escalating in nature.

References: • *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998) • *Matter of T-Z-*, 24 I&N Dec. 163 (BIA 2007)

WHAT IS **NOT** PERSECUTION

The following, without more, generally do NOT constitute persecution:

- Discrimination
- Generalized conditions of violence
- Generalized poverty or an unfavorable economic situation
- Damage to personal property
- Attempts by law enforcement to detain a person for legal reasons
- Military recruitment
- Anonymous, non-specific threats

This list is non-exhaustive—

Well-founded Fear of Persecution

Definition of Persecution

Although persecution is not specifically defined within the INA, the courts have held that “a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution.” 7 The United Nations High Commission on Refugees (UNHCR) has endorsed a similar standard in its Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees. 8 Persecution has also frequently been defined as “the infliction of suffering or harm upon those who differ in a way regarded as offensive.” 9 Persecution is usually physical but can also be emotional or psychological. 10

Recognizing persecution is extremely fact-dependent and fact-specific. Although asylum adjudicators will determine what constitutes persecution on a case-by-case basis, they have

consistently recognized certain types of behavior as persecution. The following five broad categories describe abuse that adjudicators may find rise to the level of persecution:

1. serious physical harm;
2. coercive medical or psychological treatment;
3. invidious prosecution or disproportionate punishment for a criminal offense;
4. severe discrimination and economic persecution, and
5. severe criminal extortion or robbery.

As explored below, successful applicants must demonstrate that the persecution was motivated by one of the five protected grounds (race, religion, nationality, membership in a PSG or political opinion).

Serious Physical Harm

The most recognized form of persecution is the infliction of serious physical harm, including confinement, kidnapping, torture, and beatings. 11 Rape, sexual assault and other forms of gender-based violence are also persecution. 12

The rape and beating of an LGBTQ/H person on account of their sexual orientation, gender identity, and/or HIV status constitutes persecution. Many LGBTQ individuals have been raped or sexually assaulted as “punishment” for their sexual orientation or gender identity. In the case of *Hernandez-Montiel*, the Ninth Circuit found that there was persecution when a “gay man with a female sexual identity” was detained, strip-searched, sexually assaulted, and raped by police officers on more than one occasion and sexually assaulted and attacked by a group of men. 13

Threats of violence will generally not be sufficient to establish past persecution unless the threats themselves cause significant harm. “Threats standing alone...constitute persecution in only a small category of cases and only when the threats are so menacing as to cause significant actual suffering or harm.” 14 Threats will be more likely to establish future persecution if the applicant can demonstrate that the group who is making the threats has the will and ability to carry them out. 15

Female genital mutilation (FGM) is also a form of persecution. 16 Although the threat of FGM in the future can demonstrate a well-founded fear of persecution, a recent Ninth Circuit case has held

that genital mutilation is an ongoing act of persecution “which cannot constitute a change in circumstances sufficient to rebut the presumption of a well-founded fear.” 17 Thus, both past FGM and the threat of having the procedure can be the basis for a well-founded fear of persecution.

Violence against an applicant’s family members can also support a case for asylum. 18

Coercive Medical and Psychological Treatment

Certain types of medical and psychological treatment will demonstrate a well-founded fear of persecution. The Board of Immigration Appeals has found that “forced institutionalization, electroshock treatments and drug injections could constitute persecution.” 19 The coercive family planning practiced by the Chinese government may also constitute persecution. 20

The most significant holding in this area is the Ninth Circuit decision in *Pitcherskaia v. INS*. 21 Pitcherskaia, a lesbian from Russia, was arrested and imprisoned on several occasions for protesting violence and discrimination against gays and lesbians in Russia. The militia threatened her with forced institutionalization and required her to attend therapy sessions. She was prescribed sedative medication which she successfully refused. In addition, an ex-girlfriend of hers was institutionalized against her will and was subjected to electric shock treatment and other treatments meant to ‘cure’ her of her sexual orientation. The Ninth Circuit ruled that it is not necessary for the persecutor to intend harm in order for unwanted medical or psychological treatment to amount to persecution, as long as the victim experiences the treatment as harmful. The proper test is whether or not a reasonable person would have found the suffering inflicted as offensive. 22

Lack of access to adequate medical treatment, however, is generally not considered persecution. HIV-positive asylum applicants will have difficulty securing asylum status on this basis. Nevertheless, at least two international human rights law tribunals have recognized that a country’s failure or inability to provide life-sustaining medical treatment can allow for protection under refugee law. 23 In addition, lack of adequate medical treatment for HIV/AIDS has been one of several factors that have been considered when a claim is made based on HIV status. 24 The discrepancy within the cases may be attributed to the difference between not receiving the best

quality medical care and government refusal to provide basic medical care to people with HIV/AIDS.

There have also been successful non-precedential Convention Against Torture claims for individuals living with HIV who were able to demonstrate that they would be incarcerated in sub-standard conditions if returned to their home countries. Finding that such incarceration would like lead to death, at least two Immigration Judges (IJs) have granted CAT under these circumstances. 25

Invidious Prosecution or Disproportionate Punishment for a Criminal Offense

Asylum status will not be granted for criminal prosecution as a result of a violation of a fairly administered law. 26 Prosecution may be considered persecution, however, if there is either severe punishment or pretextual prosecution. 27 Asylum adjudicators will focus on whether the punishment under a country's laws is disproportionately severe or whether the law or punishment is contrary to international human rights standards. 28 In determining whether a particular law is considered to be in violation of human rights standards, asylum adjudicators may use U.S. law as comparison. 29 Since *Lawrence v. Texas*, private consensual same-sex activity cannot be prohibited by law in the United States. 30 This ruling helps demonstrate that sodomy laws in other countries are in violation of rights explicitly recognized by the United States.

Many countries still prohibit homosexual acts in their criminal codes. The existence of such a law, however, may not be sufficient to demonstrate persecution. Several unpublished decisions emphasize the importance of evidence that the laws are actually enforced. 31

3.1.1.4 Economic Persecution and Other Forms of Severe Discrimination

Generally, harassment and discrimination will not constitute persecution. Persecution is regarded as an extreme concept that differs from general discrimination against minority groups, 32 which requires “more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty.” 33 Severe forms of discrimination may however amount to persecution in some instances. Discrimination will amount to persecution “if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practice his religion, or his access to normally available educational facilities.” 34 Cumulative discrimination that is increasing in severity will have a higher chance of being considered persecution. 35 For instance, the inability to travel safely within a country and forced expulsion from the country amount to persecution.³ 36

One form of severe discrimination recognized by the courts is in the form of economic persecution. Economic persecution requires a probability of deliberate imposition of substantial economic disadvantage based on a protected ground. 37 In a non-precedential case, the Ninth Circuit found that a lesbian from the Philippines had not experienced economic persecution when she could not continue working as a dentist because no patients would patronize her after they learned of her sexual orientation. The Court found that the inability to pursue one’s chosen profession, as opposed to the complete inability to find any livelihood, did not rise to the level of persecution, particularly considering that there was no showing that the government was unable or unwilling to address the problem. 38

Severe discrimination may be a ground for applicants living with HIV to claim asylum. The discrimination, however, must go beyond inadequate medical treatment. In one unpublished decision, an IJ found that a married woman living with HIV would be subject to persecution on account of severe discrimination. 39 In making this decision, the IJ considered documentary evidence that people living with HIV lost their jobs when employers learned of their status and that hospitals turned away HIV-positive patients. Additionally, the IJ determined that the woman could face criminal prosecution for being married despite a law barring people with HIV from marrying.

In another non-precedential case, a man living with HIV from Togo was granted asylum by an IJ. The IJ considered evidence that drugs for treating HIV/AIDS were scarce or nonexistent in Togo, that a cousin of the applicant had been sent home to die when he was sick from AIDS-related illnesses, and that the applicant would be ostracized by the community and would be unable to secure work. 40 In contrast, the BIA, in an unpublished decision, affirmed a denial of withholding of

removal based on future persecution based on HIV status. In the decision, the BIA suggested that the evidence needs to demonstrate social stigma and not just an increasing infection rate in a particular country. The BIA also noted the importance of showing that poor treatment of those suffering from AIDS is due to severe discrimination against those living with AIDS rather than a reflection of widespread poverty and unemployment. [41](#)

Severe Criminal Extortion or Robbery

Extortion can constitute persecution when the extortion clearly and selectively occurs on account of one of the five statutorily listed grounds (including PSG membership). [42](#) Threatening to disclose one's sexual orientation to a hostile community may constitute persecution if the applicant can put forth evidence that makes it reasonable to believe that the extortion was at least partially based on the fact that the individual is gay or imputed to be gay. [43](#)

Crime alone will most likely not reach the level of persecution. [44](#) If, however, the applicant can demonstrate that a robbery or assault was motivated by a protected characteristic and that the police failed to provide protection, it may constitute persecution. [45](#)

A gay man from Mexico failed to gain asylum because the BIA found that incidents where police had called him immoral and extorted money from him, thieves had robbed him while calling him gay, and a group of men had beat him up while yelling 'faggot' did not constitute persecution, but were rather only harassment and discrimination. [46](#) The case illustrates how robbery and extortion will generally have to reach a certain level of extremity in order to amount to persecution.

Proving that robbery and extortion amount to persecution will be difficult if the country in question is experiencing civil unrest and economic strife, conditions which greatly increase the incidence of both forms of crime against the general population. [47](#)

3.1.2 Establishing a Well-Founded Fear

In order to demonstrate a well-founded fear of return, an asylum applicant must establish that they have both a subjective and objective fear of returning to their country of origin. 48 The subjective component requires that the applicant demonstrate a genuine fear of persecution. 49 “An asylum applicant’s candid, credible, and sincere testimony demonstrating a genuine fear of persecution satisfies the subjective component of the well-founded fear standard.” 50 The UNHCR stated that “an evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions.” 51 Although not binding on U.S. asylum applications, the Handbook is persuasive authority.

The test for the objective component is whether a reasonable person in the applicant’s circumstances would fear persecution. The objective element requires credible, direct, and specific evidence that supports a reasonable fear of persecution. 52 According to the Supreme Court, a chance of persecution that is as low as ten percent may result in a well-founded fear sufficient for asylum. 53 54 As long as the objective component is established by the evidence, it need not be shown that the situation will probably result in persecution. It “is enough that persecution is a reasonable possibility.” 55

Past Persecution

An applicant may be granted asylum based on past persecution alone. If an applicant sufficiently demonstrates past persecution, they are presumed to have a well-founded fear of persecution. 56

The presumption of a well-founded fear of persecution, however, can be rebutted if a preponderance of the evidence demonstrates that there has been a fundamental change in circumstances or that the applicant could reasonably relocate to another part of the country of origin. 57

Even without a demonstration of a well-founded fear of persecution, the applicant may be granted asylum if there are compelling reasons that they are unwilling or unable to return based on the severity of the past persecution or if the applicant has established that there is a reasonable possibility that they may suffer other serious harm. 58

Making a case for a well-founded fear of persecution based on past persecution may be weakened if the applicant remained in their country of origin for a lengthy period of time after the initial

persecution without any additional incidents. 59 Adjudicators may also find it damaging to a case if the applicant has returned to the country of origin since arriving in the United States. 60 Return trips without incident may be one factor that can contribute to a rebuttal of the presumption of future persecution established by past persecution. 61 In one unpublished Ninth Circuit opinion, the Court found that return trips alone do not rebut a presumption of well-founded fear. 62 The case, *Pena-Torres v. Gonzales*, involved a gay applicant who took several trips back to his native Mexico after he was the victim of persecution by the police. The Court found that the return trips alone did not rebut the presumption of well-founded fear, particularly since the State Department report corroborated violence against gay men.

If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of demonstrating that the fear is well-founded. 63 Establishing past persecution generally provides the strongest case for an asylum claim because it puts the burden on DHS to demonstrate that the fear is not well-founded.

Pattern and Practice of Persecution against Similarly Situated Persons

An applicant can demonstrate a well-founded fear of persecution by showing that there is a pattern or practice in their country of persecution of LGBTQ/H individuals. The applicant must establish that they are LGBTQ/H and that their fear upon return is reasonable. 64 Persecution against a specific group must be systemic, pervasive, or organized in order to amount to a pattern or practice sufficient for establishing a fear of future persecution. 65 An applicant will not have a well-founded fear of persecution if it would be reasonable for them to relocate to another part of their country of origin. 66

Fear of future persecution tends to be the more difficult route for demonstrating asylum eligibility. The applicant will need to provide documentation from compelling, accurate, and clearly identified sources in order to establish a pattern of mistreatment. Helpful documents include reports by recognized and respected human rights and LGBTQ/H international rights organizations, such as

Amnesty International, Human Rights Watch, the OutRight Action Internatoinal, and the International Lesbian and Gay Association. The applicant should also include newspaper articles regarding violence against LGBTQ/H individuals in the country of origin. Testimony by experts on conditions in the country in question will also be considered. U.S. State Department Reports on country conditions will by highly influential in the absence of contradictory evidence. 67

Individualized Fear of Future Persecution

An individual who has not suffered persecution can nevertheless demonstrate a well-founded fear. In *Matter of Mogharrabi*, the BIA set forth the following four elements that an applicant for asylum must show in order to establish a well-founded fear of persecution:

1. the applicant possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort;
2. the persecutor is already aware, or could become aware, that the applicant possesses this belief or characteristic;
3. the persecutor has the capability of punishing the applicant; and
4. the persecutor has the inclination to punish the applicant. 68

Karouni v. Gonzales is a significant precedential case for sexual-orientation based asylum claims because it is based only on a finding of a well-founded fear of future persecution. Karouni, a gay man living with AIDS from Lebanon, had satisfied the requirements for both a subjective and objective fear based on future persecution by providing evidence that Hizballah militants frequently persecuted gay men, that his cousin had been killed on the basis of his sexual orientation, and that his own sexual orientation had been disclosed to the police by other gay men who had been beaten by authorities. 69

On Account of Membership in a 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.’” 70 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. 71 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. 72 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*. 73 Although transgender persons have not been explicitly found to constitute a PSG, there have been many successful non-precedential cases. 74

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. 75 Some IJs have found that HIV status can form the basis of a PSG membership. 76 The BIA has also recognized, in an unpublished opinion, that people living with AIDS can comprise a PSG. 77 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.

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. 78 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. 79 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.

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. 80

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*. 81

“ ‘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. 82

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.

Unable or Unwilling

Establishing that the Government is "Unable or Unwilling" to Protect the Respondent

REQUIREMENT

An applicant for asylum and withholding of removal has the burden to establish past persecution or fear of future persecution “on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42); see also 8 C.F.R. §§ 1208.13(a), 1208.16(b). Evidence of physical abuse and violence at the hands of government agents is relevant to whether the petitioner has experienced past persecution or has a well- founded fear of future persecution. See *Beskovic v. Gonzales*, 467 F.3d 223, 225–26

(2d Cir. 2006). “Private acts can also constitute persecution if the government is unable or unwilling to control such actions.” *Pan v. Holder*, 777 F.3d 540, 543 (2d Cir. 2015). Evidence of physical abuse and violence at the hands of government agents is relevant to whether the petitioner has experienced past persecution or has a well-founded fear of future persecution. See *Beskovic v. Gonzales*, 467 F.3d 223, 225–26 (2d Cir. 2006). “Private acts can also constitute persecution if the government is unable or unwilling to control such actions.” *Pan v. Holder*, 777 F.3d 540, 543 (2d Cir. 2015).

“Under the unwilling-or-unable standard, a finding of persecution ordinarily requires a determination that government authorities, if they did not actually perpetrate or incite the

persecution, condoned it or at least demonstrated a complete helplessness to protect the victims.” *Singh v. Garland*, 11 F.4th 106, 114–15 (2d Cir. 2021) (quotation marks omitted).

“[F]ailure to report harm is not necessarily fatal to a claim of persecution if the applicant can demonstrate that reporting private abuse to government authorities would have been futile or dangerous.” *Matter of C-G-T-*, 28 I. & N. Dec. 740, 743 (B.I.A. 2023) (quotation marks omitted); *cf. Quintanilla-Mejia v. Garland*, 3 F.4th 569, 593 (2d Cir. 2021) (“[F]ailure to ask for police help is not enough, by itself, to preclude a finding of acquiescence.”).

BIA CASE LAW

C-G-T, 28 I. & N. Dec. 740 (BIA 2023)

(1) Determining whether the government is or was unable or unwilling to protect the respondent from harm is a fact-specific inquiry based on consideration of all evidence.

(2) A respondent’s failure to report harm is not necessarily fatal to a claim of persecution if the respondent can demonstrate that reporting private abuse to government authorities would have been futile or dangerous.

(3) When considering future harm, adjudicators should not expect a respondent to hide his or her sexual orientation if removed to his or her native country.

the Immigration Judge should consider the reasonableness of the respondent’s failure to seek assistance from the authorities in his country as part of considering all evidence regarding whether the government was unable or unwilling to protect the respondent. See *id.* at 1069 (stating that whether or not a victim reports harm, and evidence explaining why not, are factors in the unable or unwilling analysis). This analysis should include the respondent’s testimony, available corroborating evidence, and country conditions reports. See, e.g., *Rosales Justo*, 895 F.3d at 166 (emphasizing the importance of reviewing the entire record); *Matter of S-A-*, 22 I&N Dec. at 1332–33, 1335 (evaluating record evidence). 5 For example, the record indicates the respondent testified that children do not make reports to the authorities in the Dominican Republic and they do what they are told. He testified that his father would have killed him if he reported the abuse to the authorities, that he did not report to a teacher because everyone knew his father, and that he reported the abuse to his grandmother but she did not take any action. The respondent also

testified that his access to government assistance was further limited because he lived in a small town far from the nearest city. Determining whether it was reasonable for the respondent not to seek help from the authorities in his own country is a fact-based inquiry. Cf. *Rosales Justo*, 895 F.3d at 161 n.6. A mere “subjective belief” that reporting would be futile is not sufficient to establish that a government is unable or unwilling to provide protection. *Morales-Morales*, 857 F.3d at 135. Rather, a respondent must demonstrate, based on the record as a whole, that the government is unable or unwilling to protect him or her from persecution. Compare *Morales-Morales*, 857 F.3d at 136 (concluding that the respondent did not satisfy his burden because he testified that if he had reported incidents, the perpetrators “would go to jail”), with *Doe v. Att’y Gen. of U.S.*,

SECOND CIRCUIT CASE LAW

Castellanos-Ventura v. Garland, No. 21-6293 (2d Cir. 2024)

<https://law.justia.com/cases/federal/appellate-courts/ca2/21-6293/21-6293-2024-09-13.html>

The United States Court of Appeals for the Second Circuit reviewed the case. The court found that the agency incorrectly applied the “unable or unwilling to control” standard. It noted the agency failed to consider whether it would have been futile or dangerous for Castellanos-Ventura, as an abused child, to seek protection. Additionally, the agency did not evaluate significant evidence indicating the Honduran government's inability to protect women and children from violence. The court granted the petition for review and remanded the case to the BIA for further proceedings consistent with its opinion.

Castellanos-Ventura v. Garland, 21-6293 (2d Cir. 2024)

<https://www.courtlistener.com/opinion/10116086/castellanos-ventura-v-garland/>

A woman was being victimized by members of her family and criminals in her community in Honduras. She *never went to the police or reported the abuse*. Nevertheless, the Second Circuit found that due to her being under 17 for most of the abuse and due to the country condition reports showing how difficult it is for women and children to report crime in Honduras, the BIA

erred by finding that she did not prove that the government of Honduras was unable or unwilling to protect her.

“Under the unwilling-or-unable standard, a finding of persecution ordinarily requires a determination that government authorities, if they did not actually perpetrate or incite the persecution, condoned it or at least demonstrated a complete helplessness to protect the victims.” *Singh v. Garland*, 11 F.4th 106, 114–15 (2d Cir. 2021) (quotation marks omitted). “[F]ailure to report harm is not necessarily fatal to a claim of persecution if the applicant can demonstrate that reporting private abuse to government authorities would have been futile or dangerous.” *Matter of C-G-T-*, 743 (B.I.A. 2023) (quotation marks omitted); cf. *Quintanilla-Mejia v. Garland*, 593 (2d Cir. 2021) (“[F]ailure to ask for police help is not enough, by itself, to preclude a finding of acquiescence.”).

Credibility

Credibility

Credibility

When applying for relief or protection from removal, an applicant has the burden of proof. INA § 240(c)(4)(A). In all applications for relief, the Court must first make a threshold determination of an applicant's credibility. INA § 241(b)(3)(C); *Matter of O-D-*, 21 I&N Dec. 1079, 1081 (BIA 1998). Applications for relief made on or after May 11, 2005, are subject to the credibility assessment standards articulated in the REAL ID Act. *Matter of S-B-*, 24 I&N Dec. 42, 45 (BIA 2006).

In making a credibility determination, the Court considers the totality of the circumstances and all relevant factors. INA § 240(c)(4)(C); *Matter of J-Y-C-*, 24 I&N Dec. 260, 266 (BIA 2007). A credibility determination may be based on the applicant's demeanor, candor, or responsiveness, and the inherent plausibility of his account. INA § 240(c)(4)(C). An applicant's own testimony, without corroborating evidence, may be sufficient proof to support a fear-based application if that testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear of persecution. 8 C.F.R. § 1208.13(a); *Matter of Mogharrabi*, 19 I&N Dec. 439, 445 (BIA 1987). However, "the weaker [a noncitizen's] testimony, the greater the need for corroborative evidence." *Matter of Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998).

CASE LAW

Matter of H-C-R-C-, 28 I&N Dec. 809 (BIA 2024)

(1) Applicants bear the burden of establishing their own credibility, and no statute or legal precedent compels an Immigration Judge to conclude that an applicant's testimony is credible.

(2) Rape is sufficiently severe to constitute torture and can never be a lawful sanction

under the Convention Against Torture.

Matter of B-, 21 I&N Dec. 66 (BIA 1995)

FULL DECISION

BIA Declines to Adopt Adverse Cred Finding

Under the circumstances of this case, where an asylum applicant's testimony was plausible, detailed, internally consistent, consistent with the asylum application, and unembellished during the applicant's repeated relating of events in a probing cross-examination, the Board declines to adopt the Immigration Judge's adverse credibility finding.

In Matter of B-Y-, 25 I&N Dec. 236 (BIA 2010)

([PDF](#))

(1) In making a frivolousness determination, an Immigration Judge may incorporate by reference any factual findings made in support of an adverse credibility finding, so long as the Immigration Judge makes explicit findings that the incredible aspects of the asylum application were material and were deliberately fabricated. *Matter of Y-L-*, 24 I&N Dec. 151 (BIA 2007), clarified.

(2) In considering an asylum applicant's explanations for inconsistencies or discrepancies, an Immigration Judge making a frivolousness determination must separately address the applicant's explanations in the context of how they may have a bearing on the materiality and deliberateness requirements unique to that determination.

(3) When the required frivolousness warnings have been given to an asylum applicant prior to the merits hearing, the Immigration Judge is not required to afford additional warnings or to seek further explanation in regard to inconsistencies that have become obvious during the course of the hearing.

Inconsistencies

Respondent provided inconsistent and implausible testimony regarding various aspects of his alleged harm. Additionally, when given the opportunity to explain these inconsistencies and implausible testimony, Respondent failed to provide reasonable and plausible explanations. See

INA § 240(c)(4)(C); *Tewabe*, 446 F.3d at 538. Respondent also failed to provide sufficient corroborative evidence to support his claims, particularly given the numerous inconsistencies in the record. See *Matter of Y-B-*, 21 I&N Dec. at 1139. See *Kourouma v. Holder*, 588 F.3d 234 (4th. Cir. 2009) (noting that “omissions and inconsistencies which go to the heart of an asylum seeker’s claim are greater cause for concern.”).

Fourth Circuit Case Law

Fourth Circuit Case Law on Credibility

When making an adverse credibility finding, the Court must provide “specific, cogent reason[s].” *Figeroa v. INS*, 886 F.2d 76, 78 (4th Cir. 1989). “Examples of specific and cogent reasons include inconsistent statements, contradictory evidence, and inherently improbable testimony.” *Tewabe v. Gonzales*, 446 F.3d 533, 538 (4th Cir. 2006). “The existence of only a few such inconsistencies, omissions, or contradictions can be sufficient for the agency to make an adverse credibility determination as to the applicant's entire testimony regarding past persecution.” *Djadjou v. Holder*, 662 F.3d 265, 273 (4th Cir. 2011); see also *Camara v. Ashcroft*, 378 F.3d 361, 369 (4th Cir. 2004) (upholding an immigration judge’s adverse credibility determination based on two inconsistencies).

Particular Social Group (PSG)

Formulating a successful PSG for asylum.

- Family Membership
- LGBT

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

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.

Formulating a PSG

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

- Applicants Nationality and Gender
- Applicants Nationality and Child Status

- Applicants Nationality, Gender and Marital Status
- Applicants Nationality, Gender and Race/Ethnicity/Tribe
- Applicants Nationality, Gender and Viewed as Property in the Society
- Applicants Gender and Family Membership
- Applicants Nationality, Gender and their Beliefs or Social Norms
- Applicants Nationality, Gender and Lack of Protection from native country
- Applicants Gender and Inability to Leave for or in the country

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

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:

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.
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. Although referencing the harm suffered does not necessarily invalidate the social group, 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 v. Barr*, 957 F.3d 88 (1st Cir. 2020) (discussing the reasons why a woman may be unable to leave a relationship other than the persecution itself) and the Ninth Circuit’s decision in *Diaz-Reynoso v. Barr*, 968 F.3d 1070 (9th Cir. 2020) (explaining why the mere reference to the feared persecution does not disqualify an otherwise valid group), 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 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,” *Tapiero de 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. *Escobar v. Holder*, 657 F.3d 537 (7th Cir. 2011). Similarly, the Seventh Circuit has not 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.

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.”

Particular Social Group (PSG)

Family Membership

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

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

[Family Membership Nexus & Matter of M-R-M-S](#)

[\(BIA 2023\).](#)

Safe Third Countries

Dual Citizens

Zepeda-Lopez, et al. v. Garland, No. 19-145 (2d Cir. 2022)

Case Summary

Petitioners sought review of a December 14, 2018, decision of the Board of Immigration Appeals (the "BIA") affirming a decision of an Immigration Judge (the "IJ") denying asylum, withholding of removal, and relief under the Convention Against Torture ("CAT").

The Second Circuit granted Petitioners' petition for review and held that to qualify as a "refugee" under the INA, a dual national asylum applicant need only show persecution in any singular country of nationality. The court explained that to be eligible for asylum and withholding of removal, an individual must be a "refugee." 8 U.S.C. Section 1158(b)(1)(A). But this is only one step in the asylum process. Even if an individual is a refugee, there are other bars to asylum, see 8 U.S.C. Sections 1158(a)(2) (exceptions to authority to apply for asylum), 1158(b)(2) (exceptions to eligibility for asylum), and even assuming all bars are overcome, the decision of whether to grant a particular asylum application is still a matter of discretion for the Attorney General. Further, the court held that to be considered a "refugee" under Section 1101(a)(42)(A), a dual national need only show persecution in any singular country of nationality. Accordingly, the court granted the petition for review, vacated the BIA's December 14, 2018, decision, and remanded to the BIA for further proceedings in accordance with the proper legal standard.

As a general matter, to be eligible for asylum and withholding of removal, an individual must be a "refugee." 8 U.S.C. § 1158(b)(1)(A). But this is only one step in the asylum process. Even if an individual is a refugee, there are other bars to asylum, see 8 U.S.C. §§ 1158(a)(2) (exceptions to authority to apply for asylum), 1158(b)(2) (exceptions to eligibility for asylum), and even assuming all bars are overcome, the decision whether to grant a particular asylum application is still a matter of discretion for the Attorney General. See, e.g., *Ojo v. Garland*, 25 F.4th 152, 163 (2d Cir. 2022).

Here, the IJ denied asylum and withholding of removal to all Petitioners at the initial step, concluding that they did not meet the definition of refugee. The IJ found that Petitioners did not meet the definition of refugee because of what it described as the "Dual Nationality Bar to Asylum." Cert. Admin. R. at 139. In doing so, the IJ relied on Matter of B-R-, which interpreted⁵ the INA to require that a dual national asylum applicant demonstrate persecution in both countries of nationality to qualify as a refugee. 26 I. & N. Dec. 119, 121 (B.I.A. 2013). The IJ found that Petitioners made the necessary showing as to Honduras -- but not as to Nicaragua -- and therefore were not "refugees" under 8 U.S.C. § 1101(a)(42)(A). The BIA dismissed Petitioners' appeal, which requested, in part, that the BIA overrule Matter of B-R-. We hold that to be considered a "refugee" under § 1101(a)(42)(A), a dual national need only show persecution in any singular country of nationality.

FULL DECISION

Nexus

Nexus between the PSG and the harm/persecution.

Family Membership Nexus & Matter of M-R-M-S (BIA 2023)

CANNOT BE TARGETING THE FAMILY FOR REASONS UNRELATED TO THEM BEING MEMBERS OF THE SAME FAMILY.

The persecution that is targeting a particular family can't be doing so as a means of achieving some other ultimate goal that is unrelated to the protected ground. If a Government is persecuting a family because that family lives on land that they want seize then the reason that they are persecuting them is more so related to their goal of taking the land not those people being the members of that particular family. If someone who wasn't a member of that family were to move onto that land they would be persecuted just the same.

Matter of L-E-A-

Recent Restrictions on Asylum

RECENT RESTRICTIONS ON ASYLUM THAT HAVE RECENTLY BEEN PUT IN PLACE

1. Circumvention of Lawful Pathways Final Rule
2. Title 42
3. Other Restrictions

Circumvention of Lawful Pathways Final Rule

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The rebuttable presumption will apply in expedited removal proceedings, as well as to asylum applications affirmatively filed with the Asylum Office or filed in immigration court proceedings as a defense to removal.

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<https://www.ilrc.org/sites/default/files/2023-10/How%20the%20%E2%80%9CLawful%20Pathways%E2%80%9D%20Asylum%20Ban%20Impacts%20Children%20%26%20Youth.pdf>

Failure to Report

The Second Circuit has remanded an asylum claim for a Honduran woman who had been the victim of family violence. “The agency reasonably relied in part on Castellanos-Ventura’s failure to report. But it failed to consider whether it would have been ‘futile or dangerous for an abused child,’ as Castellanos-Ventura was during much of her abuse, ‘to seek protection from the authorities.’”

The full text of *Castellanos-Ventura v. Garland* can be found here:

https://ww3.ca2.uscourts.gov/decisions/isysquery/ac1b6a99-f14d-423b-a6e6-c89990596c3c/4/doc/21-6293_opn.pdf