

APPENDIX M

ASYLUM MANUAL SUPPLEMENT/PRACTICE ALERT

Last updated: 9/27/2018

A. Introduction

In June 2018, U.S. Attorney General Jefferson Sessions (AG) issued *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), which threatens the viability of asylum claims by domestic violence survivors and others who have faced persecution by private actors. The asylum applicant in *Matter of A-B-* claimed eligibility for asylum based on her membership in the particular social group of “El Salvadoran women who are unable to leave their domestic relationships where they have children in common” with their partners.¹ In the decision, the AG both reversed the Board of Immigration Appeals’ (BIA) grant of asylum to Ms. A.B., and overruled the precedential decision of *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), upon which the BIA relied to grant the case.²

In addition to the harmful legal rhetoric in the decision about the nature of domestic violence, *Matter of A-B-* also highlights the Trump administration’s broad and unrelenting attacks on due process for asylum seekers. In this supplement, we provide a brief summary of the AG’s decision. In addition, we note how the U.S. Citizenship and Immigration Services (USCIS) and Immigration and Customs Enforcement (ICE) guidance published in the following weeks exacerbate the issues presented by the decision.³ We also share several due process concerns in light of this decision, and offer information about additional resources for advocates.

NOTE: On additional resources. This supplement only highlights the main issues addressed in *Matter of A-B-* and suggestions for case strategy in light of this decision. The Center for Gender and Refugee Studies (CGRS)⁴ and the National Immigrant Justice Center⁵ have prepared

¹ *Matter of A-B-*, 27 I&N Dec. 316, 321 (A.G. 2018).

² See *id.* at 319-20.

³ U.S. Immigration and Customs Enforcement, *Memorandum: Litigating Domestic Violence-Based Persecution Claims Following Matter of A-B-* [hereinafter ICE Memo] (July 11, 2018) available at <https://www.aila.org/infonet/ice-guidance-on-litigating-domestic-violence>; U.S. Citizenship and Immigration Services, *Policy Memorandum: Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of A-B-* [hereinafter USCIS Memo] (July 11, 2018) available at <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf>.

⁴ For more information about *Matter of A-B-* and related practice materials, see <https://cgrs.uchastings.edu/a-b-backgrounder>. The Center for Gender and Refugee Studies also seeks to identify cases to challenge *Matter of A-B-*, <https://www.aila.org/infonet/call-feedback-impact-matter-of-a-b-decision>.

⁵ National Immigrant Justice Center, *Asylum Practice Advisory: Applying for Asylum After Matter of A-B-*, (June 2018). <https://www.immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%20206.21.18.pdf>. This advisory is particularly helpful for advocates in the Seventh Circuit.

materials that discuss this decision in further depth and help guide practitioners in preparing asylum cases.

B. Summary of *Matter of A-B-*

It is important to emphasize at the outset that while *Matter of A-B-* creates numerous hurdles for individuals seeking asylum based on domestic violence, the underlying legal framework for asylum eligibility remains in place. Advocates have expressed concern that some adjudicators may interpret *Matter of A-B-* as providing a broad license for adjudicators to overly scrutinize and outright deny domestic violence and gang violence-based asylum applications without careful consideration. Additionally, the AG’s decision and related USCIS and ICE policy memoranda will likely alter how advocates should approach presenting asylum claims based on persecution from non-state actors. For those who are unrepresented, overcoming the adjudicator’s perception of legal barriers to such claims presents an almost insurmountable hurdle. For representatives, *Matter of A-B-* amplifies the need to clearly set out the legal standards for asylum and explain in detail how your client’s case meets that standard. This includes detailing how your client’s fear of harm is related to *any and all* protected grounds. Finally, for cases involving a social group, advocates must know how to clearly articulate social groups and zealously argue that the relevant social groups are cognizable and particular.

1. *Matter of A-R-C-G- overruled*

Matter of A-B- overruled *Matter of A-R-C-G-*, a 2014 precedential BIA decision that officially recognized domestic violence as a basis for asylum. In *Matter of A-R-C-G-*, the BIA found that “married women in Guatemala who are unable to leave their relationship” was a viable particular social group.⁶ Although *A-R-C-G-* narrowly focused on the social group analysis as an avenue to obtain asylum for domestic violence survivors, the decision formally recognized violence occurring within the home—not otherwise recognized as a gender- or family-based claim—as a basis for asylum after years of legal uncertainty. Please refer to **Chapter 3, § 3.7** of this manual for additional context regarding *A-R-C-G-* and other gender-related asylum claims.

Though *Matter of A-B-* overruled *A-R-C-G-*, the AG’s decision did not put forth a blanket rule that the specific group in *A-R-C-G-*, or similar groups, could never be accepted.⁷ Instead, it criticized the reasoning and analysis of *A-R-C-G-*.⁸ Indeed, the July 11, 2018 ICE Memorandum (ICE Memo) states as much: “[A]lthough the AG overruled *A-R-C-G-*, he did not conclude that particular social groups based on status as a victim of private violence could never be cognizable, or that applicants could never qualify for asylum or statutory withholding of removal based on domestic violence.”⁹

⁶ *Matter of A-R-G-C-*, 26 I&N Dec. 388 (BIA 2014).

⁷ See *Matter of A-B-*, 27 I&N Dec. at 317.

⁸ See *id.* at 319.

⁹ ICE Memo at 3.

2. *Matter of A-B- expresses uncertainty in recognizing persecution by non-government actors*

The overriding tenor of *Matter of A-B-* is the AG's deep skepticism of any form of persecution by a private actor as a valid basis for asylum. According to the AG, "private criminals are motivated more often by greed or vendettas than by an intent to 'overcome the protected characteristic of the victim.'"¹⁰ Although the AG eventually acknowledged the "vile abuse that [A.B.] reported she suffered at the hands of her ex-husband [and] the harrowing experiences of many other victims of domestic violence around the world," the AG nevertheless asserted that "the asylum statute is not a general hardship statute, [nor is it] some omnibus catch-all for solving every heart-rending situation."¹¹

The AG's decision not only attempts to eliminate domestic violence as harm connected to a nexus that qualifies for asylum, but also tries to foreclose gang violence as a basis for asylum.¹² The decision opines that both domestic violence and gang violence are merely examples of "private violence" against groups that "are often not exposed to more violence or human rights violations than other segments of society."¹³ Because the AG deemed persecution by any non-governmental actor suspect, *Matter of A-B-* may also endanger asylum applications based on other protected grounds if a private actor carried out the persecution. This language raises concerns about the likelihood of succeeding specifically with claims of persecution based on domestic violence and gang violence.

Much of the decision includes sweeping language that is technically dicta, and therefore does not by itself alter the legal framework underlying asylum claims. Yet, both ICE and USCIS incorporated this language into their respective policy memoranda, transforming dicta into actual policy. Specifically, ICE has instructed counsel that "[p]rivate criminal victimization per se (including domestic violence), even when widespread in nature, is insufficient to establish eligibility for asylum or statutory withholding of removal."¹⁴ Additionally, USCIS guidance states: "In general, ... claims based on membership in a putative particular social group defined by the members' vulnerability to harm of domestic violence or gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution."¹⁵ Because parts of *Matter of A-B-* are incorporated into these

¹⁰ *Matter of A-B-*, 27 I&N Dec. at 337 (citing *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996) (internal brackets omitted)); see also *Matter of R-A-*, 22 I&N Dec. 906, 920 (BIA 1999) (*en banc*), vacated, 22 I&N Dec. 906 (A.G. 2001), remanded, 23 I&N Dec. 694 (A.G. 2005); Center for Gender & Refugee Studies, *Matter of R-A-*, <https://cgrs.uchastings.edu/our-work/matter-r-a-> (last visited: Sept. 25, 2018).

¹¹ *Matter of A-B-*, 27 I&N Dec. at 346 (citing *Velasquez*, 866 F.3d at 199 (Wilkinson, J., concurring) (internal quotation marks omitted)).

¹² *Id.* at 320 ("Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum").

¹³ *Matter of A-B-* relies heavily on Judge Wilkinson's concurrence in *Velasquez v. Sessions*, in which the Fourth Circuit denied the petition for review of a case involving a woman who claimed persecution by her mother-in-law because of the petitioner's membership in her nuclear family. *Id.* at 322 (citing *Velasquez v. Sessions*, 866 F.3d 188, 198 (4th Cir. 2017) (Wilkinson, J., concurring)).

¹⁴ ICE Memo at 3.

¹⁵ USCIS Memo at 6.

policy memoranda, government officials tasked with evaluating asylum applications are now instructed to scrutinize asylum claims according to these stricter standards.

PRACTICE TIP: The AG’s decision did not establish a blanket rule foreclosing any domestic violence or gang violence-based asylum claim. Therefore, advocates should assert that any social group advanced must be analyzed on an individual case-by-case basis. Indeed, the ICE and USCIS memoranda instruct their respective officers to “look at each proposed group on a case-by-case basis and under the facts presented in a given case.”¹⁶ Additionally, domestic violence and gang-based claims may raise valid claims on account of other grounds, such as political opinion, religion, race or nationality. It is important to put forth multiple relevant social groups and/or statutorily protected bases.

3. *Persecution on account of a statutorily protected ground*

One of the requirements to establish asylum eligibility is that an applicant must show that the persecution they faced was because of at least one of the statutorily-protected grounds (i.e., race, religion, nationality, membership in a particular social group, or political opinion).¹⁷ **Chapter 3** of this manual extensively details how to establish a well-founded fear of persecution on account of one of the statutorily-protected grounds.

As you may recall from that discussion, we advise applicants to refrain from defining their social group solely by the harm they faced to avoid an accusation of circular reasoning. Although Ms. A.B. did not describe her social group by the harm she faced—intimate partner violence—the AG’s decision incorrectly characterizes her social group as “defined by the persecution of its members” because the group included the “inability to leave the relationship.”¹⁸ Advocates have long argued that the inability to leave an intimate relationship is not by itself the persecution a domestic violence victim faces, but rather the summation of social and cultural pressures that restrains their options.

Unfortunately, the USCIS memo references the AG’s accusation of circularity by adding, “[e]ven if ‘unable to leave’ were particular, the applicant must show something more than the danger of harm from an abuser if the applicant tried to leave, because that would amount to circularly defining the particular social group by the harm on which the asylum claim was based.”¹⁹ Given the government’s limited understanding of the social group used by Ms. A.B. and the applicant in *Matter of A-R-C-G-*, advocates should be especially careful to explain that the inability to leave a relationship is not solely tied to the harm that the applicant experienced or fears. For example, advocate can provide evidence of social norms that prevent a woman from severing legal or social ties with a husband or co-parent, unwillingness of government institutions or families to protect women through the police or court system or to provide assistance with relocation, or evidence of widespread and tolerated violence by male heads of household against their partners.

¹⁶ ICE Memo at 5; *see also* USCIS Memo at 3 (“Officers must analyze each case on its own merits in the context of the society where the claim arises.”).

¹⁷ *See* INA § 101(a)(42)(A).

¹⁸ *Matter of A-B-*, 27 I&N Dec. at 335.

¹⁹ USCIS memo at 5.

Advocates should also consider other applicable formulations of social groups, such as those suggested by the Center for Gender and Refugee Studies.²⁰

4. Government protection from persecution

Chapter 2 of this manual explains that an asylum applicant must also show that the persecution was “committed by the government or forces the government is either ‘unable or unwilling’ to control.”²¹ The AG in *Matter of A-B-* attempted to increase the difficulty of meeting this requirement in the context of harm by private actors, but he also continued to employ the “unable or unwilling standard.” This conflation of standards creates confusion around how adjudicators will evaluate this requirement, which is exacerbated by the lack of clarity of this muddled explanation in the ICE and USCIS memoranda.

Although the decision employs and cites the “unable or unwilling standard,” the AG also states that government inaction alone is insufficient to satisfy this element.²² Instead, the “applicant must show that the government *condoned* the private actions ‘or at least demonstrated a complete helplessness to protect the victims.’”²³ The USCIS and ICE memoranda again incorporate this problematic dicta from *Matter of A-B-*,²⁴ despite well-established Supreme Court precedent and related caselaw interpreting “unable and unwilling” more broadly and declining to require certainty or even a probability of persecution.²⁵ Advocates should argue that *Matter of A-B-*’s standard of “complete helplessness,” is legally incorrect and that asylum applicants should only be held to the proper “unable or unwilling” standard.

²⁰ For access to CGRS’s *Matter of A-B-* materials, see <https://cgrs.uchastings.edu/matter-b/background-and-briefing-matter-b>.

²¹ *Navas v. INS*, 217 F.3d 646, 656 (9th Cir. 2000); see also INA § 101(a)(42)(A).

²² See *Matter of A-B-*, 27 I&N Dec. at 320, 337-38, 343-44; see also *id.* at 320 n.1 (The AG also expressed doubt about claims of persecution by non-governmental actors succeeding even the credible fear stage of analysis. Advocates are concerned that this footnote provides a foundation to turn asylum seekers away at ports of entry for failing a credible fear interview simply because their persecutor was a non-governmental entity.).

²³ *Id.* at 337 (citing *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000)) (emphasis added); see also *id.* at 344 (“For many reasons, domestic violence is a particularly difficult crime to prevent and prosecute, even in the United States, which dedicates significant resources to combating domestic violence. The persistence of domestic violence in El Salvador, however, does not establish that El Salvador was unable or unwilling to protect A-B- from her husband, any more than the persistence of domestic violence in the United States....”).

²⁴ USCIS Memo at 6 (“The applicant must show the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim.”); ICE Memo at 2 (“The AG noted that, simply because a government has not acted on a reported crime, successfully investigated it, or punished the perpetrator, this does not necessarily establish an inability or unwillingness to control the crime any more than it would in the United States.”).

²⁵ See generally *INS v. Cardoza Fonseca*, 107 S.Ct. 1207 (1987); see also *Thomas v. Ashcroft*, 359 F.3d 1169, 1179 (9th Cir. 2004), vacated on other grounds by *Gonzales v. Thomas*, 547 U.S. 183 (2006) (noting that when a non-state actor is the persecutor, an applicant need not establish that the government “is sponsoring or promoting or condoning the violence”) (internal quotation marks and brackets omitted); *Hoxha v. Ashcroft*, 319 F.3d 1179, 1184 (9th Cir. 2003) (“A well-founded fear does not require certainty of persecution or even a probability of persecution.”).

5. Additional factors

At the end of *Matter of A-B-*, the AG addresses a number of ancillary factors related to asylum eligibility that were not dispositive in Ms. A.B.'s case. First, the decision emphasizes that the applicant “must clearly indicate, on the record and before the immigration judge, the exact delineation of any proposed particular social group” and cannot present a newly articulated social group on appeal.²⁶ The AG also opines that internal relocation “would seem more reasonable” when an applicant has suffered harm “at the hands of only a few specific individuals.”²⁷ However, the decision cites no factual evidence or legal arguments to support this statement, while also ignoring the regulations requiring that internal relocation be both safe *and* reasonable.²⁸

The AG also criticizes the BIA for failing to defer to the immigration judge's finding that Ms. A.B. provided incredible testimony based on “discrepancies and omissions in the respondent’s testimony.”²⁹ The decision emphasizes that “the existence of ‘only a few’ such issues can be sufficient to make an adverse credibility determination.”³⁰ This standard, however, fails to take into account voluminous circuit court cases interpreting the “totality of the circumstances” test in the credibility context.³¹ See **Chapter 4** for credibility and corroboration issues to consider when preparing and litigating asylum claims.

Finally, the AG’s decision includes a discussion on discretionary factors to consider in asylum adjudications. In doing so, he attempts to directly tie adjudication of asylum cases to his recently announced “zero tolerance” policy of prosecuting individuals who enter the United States without authorization. In a footnote, the AG declined to address the issue of discretion in Ms. A.B.'s case, but nevertheless opined that a discretionary analysis should consider, among other factors, “the circumvention of orderly refugee procedures” and factors related to an applicant's time spent in a third country.³²

C. Due process concerns for asylum cases

The reasoning in *Matter of A-B-* and other recent decisions by the AG and BIA illustrate how adjudicators have become increasingly resistant to ensuring due process for asylum seekers under this administration. The vacatur of *Matter of A-R-C-G-*, and *Matter of E-F-H-L-*, 27 I&N Dec. 266 (A.G. 2018), have emboldened government officials to dismiss outright asylum claims involving domestic violence, persecution by gangs, and harm based on particular social group generally. In recent months, attorneys have reported immigration judges pretermittting asylum

²⁶ See *Matter of A-B-*, 27 I&N Dec. at 344 (citing *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 190-91 (BIA 2018); *Matter of A-T-*, 25 I&N Dec. 4, 10 (BIA 2009)).

²⁷ See *Matter of A-B-*, 27 I&N Dec. at 345.

²⁸ See 8 C.F.R. § 1208.13(b)(1)(i)(B), (b)(1)(ii).

²⁹ See *Matter of A-B-*, 27 I&N Dec. at 341.

³⁰ *Id.* at 342.

³¹ See, e.g., *Shrestha v. Holder*, 590 F.3d 1034, 1040 (9th Cir. 2010); *Tang v. U.S. Att’y Gen.*, 578 F.3d 1270, 1280 (11th Cir. 2009); *Hanaj v. Gonzales*, 446 F.3d 694, 700 (7th Cir. 2006); *Shah v. U.S. Att’y Gen. of the U.S.*, 446 F.3d 429, 437 (3d Cir. 2006).

³² See *Matter of A-B-*, 27 I&N Dec. at 345 n.12.

cases or requesting additional briefing on the cognizability of the social group formulated in asylum claims related to domestic violence. Attorneys have also reported receiving notices to re-interview asylum applicants who had presented affirmative claims based on domestic violence, in light of the issuance of *Matter of A-B-*.

On July 11, 2018, USCIS and ICE each issued guidance memoranda on adjudicating and litigating claims related to domestic violence in light of *Matter of A-B-*. Each of these memos interpret *Matter of A-B-* to require the adjudicator of an asylum claim to “determine whether the facts of each case satisfy all the elements for asylum”³³ and stress “that any proffered particular social group is appropriately tested under the ‘rigorous analysis required by the Board’s precedents.’”³⁴ While each of the memoranda gives lip-service to the fact that asylum claims should be analyzed on a case-by-case basis, each of them expressed a presumption that “[i]n general, in light of the [*Matter of A-B-*] standards, claims based on membership in a putative particular social group defined by the members’ vulnerability to harm of domestic violence and gang violence committed by non-government actors will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution.”³⁵

Despite the statements in these memoranda, the law remains unchanged as to the viability of claims based on harm by private actors related to domestic violence and gang activity.

Thus, there is an increased need for representation to ensure successful outcomes due to the government’s legally questionable presumptions against granting such cases. Counsel will need to zealously advocate and litigate each element of an asylum case, such as submitting documents on country conditions and preparing an applicant to provide testimony on each of the elements of their claim.³⁶ Further, the Attorney General mandated, and the subsequent USCIS and ICE memos emphasized, the need to explicitly delineate the particular social group in each case, and that all adjudicators should conduct a “more fulsome analysis of the requirements for cognizable particular social group status.”³⁷ Finally, be prepared to brief at master calendar hearing or Asylum Office interview how the client’s case overcomes issues raised by Sessions’ decision. For practice tips and strategy, see the resources section above.

³³ USCIS Memo at 2.

³⁴ ICE Memo at 4.

³⁵ USCIS Memo at 6. *But see* ICE Memo at 6 (quoting *Pirir-Boc v. Holder*, 750 F.3d 1077, 1083-84 (9th Cir. 2014)). In *Pirir-Boc*, the Ninth Circuit put forth the rule: “To determine whether a group is a particular social group for the purposes of an asylum claim, the agency must make a *case-by-case determination* as to whether the group is recognized by the particular society in question. To be consistent with its own precedent, the BIA *may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity*, especially where, as here, it is presented with evidence showing that the proposed group may in fact be recognized by the relevant society” (emphasis added).

³⁶ See ICE Memo at 9-10 for a list of information that DHS attorneys intend to elicit from domestic violence survivors about their past and current domestic relationships. Attorneys should prepare their clients to testify to this information or to explain why they do not know the information requested. Attorneys should also be prepared to object to the relevance of such questioning specific to the facts of their client’s case.

³⁷ ICE Memo at 6.

Although the Attorney General's decision only speculated in a footnote about the viability of credible fear determinations involving particular social group claims, the July 11, 2018, USCIS memo instructs asylum officers to apply *Matter of A-B-* when making such determinations.³⁸ The ILRC and CGRS anticipate that this presumption against domestic violence and gang persecution claims will reinforce the overall attitude by DHS officers along the U.S.-Mexico border that asylum seekers should not be given due process required under federal and international law. Advocates have reported instances of Border Patrol agents physically preventing asylum seekers from crossing into U.S. territory to claim fear of return, as well as reports that Border Patrol agents regularly coerce asylum seekers into recanting their expressions of fear by threatening to separate them from their children.³⁹ Attorneys should be prepared to advocate zealously for their clients in credible fear proceedings and document in detail the country conditions that will support all the elements of your client's asylum claim.

³⁸ USCIS Memo at 8 (stating that asylum officers “should apply all applicable precedents of the Attorney General and BIA” and federal circuit cases in credible fear interviews “to the extent that those cases are not inconsistent with *Matter of A-B-*”).

³⁹ See Complaint at 18-28, *Al Otro Lado, Inc. v. Duke*, No. 2:17-cv-05111-JFW (JPRx) (C.D. Cal. filed July 12, 2017); Dara Lind, *Trump keeps making it harder for people to seek asylum legally*, Vox, <https://www.vox.com/policy-and-politics/2018/6/5/17428640/border-families-asylum-illegal> (last visited Sept. 25, 2018).