

Practice Pointer: The Impact of the new Attorney General Decisions in *Matter of A-B-* and *Matter of L-E-A- II*

AILA National Asylum/ Refugee Committee

On June 16, 2021, Attorney General (“AG”) Merrick Garland issued new precedential decisions in two major asylum cases from the Trump era, *Matter of A-B-*¹ and *Matter of L-E-A-*². In both cases, AG Garland vacated previous Attorney General decisions in those matters. The previous decisions in *Matter of A-B- I*, *Matter of A-B- II*, and *Matter of L-E-A- II* were vacated in their entirety and should not be followed by immigration judges or the Board of Immigration Appeals. For the time being, immigration judges and the Board should follow precedent that pre-dated *Matter of A-B- I* and *Matter of L-E-A- II*. For asylum claims based on past domestic violence, that means *Matter of A-R-C-G-* has regained its precedential status. For asylum claims based on harm due to family membership, *Matter of L-E-A- I* and preexisting decisions from the relevant U.S. Courts of Appeals now control.

In these decisions, AG Garland noted that the Departments of Justice and Homeland Security have been ordered to issue joint regulations “addressing the circumstances in which a person should be considered a member of a ‘particular social group.’”³ This rulemaking is expected to cover many of the issues addressed in *Matter of A-B-* and *Matter of L-E-A-*. Pending this forthcoming rulemaking regarding the meaning of a “particular social group”—which is expected to be proposed in the fall of 2021—AG Garland returned case law to its pre-existing state.

Matter of A-B- Case Background⁴

In *Matter of A-B-*, a Salvadoran woman sought asylum protection in the United States after enduring fifteen years of brutal abuse at the hands of her husband and receiving no protection from the Salvadoran authorities. After receiving a positive credible fear finding, an immigration judge issued an order denying asylum based on Ms. A-B-’s membership in a particular social group of “El Salvadoran women who are unable to leave their domestic relationships where they have children in common.” Ms. A-B- appealed the denial of asylum to the Board of Immigration Appeals.

The Board, in an unpublished 3-member panel opinion, reversed the immigration judge’s denial of asylum. The Board found, in part, that this group was substantially similar to the group “married women in Guatemala who are unable to leave their relationship,” which the Board had recognized as a cognizable particular social group in the precedential case *Matter of A-R-C-G-*⁵. The Board remanded Ms. A-B-’s case back to the Immigration Judge, with instructions to grant asylum after an updated background check was completed. On remand, the immigration judge

¹ [Matter of A-B-, 28 I&N Dec. 307 \(A.G. 2021\)](#) (A-B- III) (AILA Doc. No. 21061639)

² [Matter of L-E-A-, 28 I&N Dec. 304 \(A.G. 2021\)](#) (L-E-A- III) (AILA Doc. No. 21061640)

³ *L-E-A- III*, 28 I&N Dec. at 304-405; *A-B- III*, 28 I&N Dec. at 308.

⁴ For a complete account of the history and significance of this case, see Center for Gender & Refugee Studies, *Matter of A-B-* Practice Advisory, July 6, 2018 ([AILA Doc. No. 18101670](#)).

⁵ [Matter of A-R-C-G-, 26 I&N Dec. 388 \(BIA 2014\)](#) (AILA Doc No. 14082644).

refused to follow the Board's order. Instead, the immigration judge attempted to send the case back to the Board for further consideration, based upon his personal assessment that *A-R-C-G-* was wrongly decided and should be reconsidered.

Seven months later, Attorney General Jeff Sessions certified the decision to himself. On June 11, 2018, after extensive briefing by the parties and by a dozen advocacy organizations, AG Sessions issued *Matter of A-B-*⁶ as a precedential decision. In it, the AG overruled *Matter of A-R-C-G-* and vacated the Board's decision in Ms. A-B-'s case, finding that Board had not properly analyzed the proposed particular social group under existing case law. Most concerning, the AG attempted, through dicta, to drastically limit asylum eligibility for survivors of domestic violence (and also gang violence), based on an erroneous presumption that persecution by "private actors" generally does not merit asylum⁷. AG Sessions attempted to limit asylum to situations where a person fled, or fears, harm perpetrated by a government actor. This dicta was in direct contradiction to longstanding asylum caselaw, which provides asylum protection to any person who suffered or fears persecution, on account of one of the five protected grounds, at the hands of the government *or* an individual or group that the government is unable or unwilling to control.⁸

For the past three years, *Matter of A-B-* has been applied by immigration judges, the Board of Immigration Appeals, and USCIS to deny asylum to an increasing percentage of asylum claims based on domestic violence.⁹ Many adjudicators improperly read *Matter of A-B-* to create a blanket rule prohibition on the granting of asylum to applicants who fled domestic violence or gang-based persecution. Such a reading was erroneous, but it was also clearly what Attorney General Sessions hoped to do in issuing his decision in *A-B-*.

Matter of L-E-A- Case Background¹⁰

In *Matter of L-E-A-*, a Mexican citizen sought asylum in the U.S. after a notorious Mexican drug cartel shot at and attempted to kidnap him, in retaliation for him and his father refusing to allow the cartel to sell drugs from his store. In a 2017 precedential decision,¹¹ the Board of Immigration Appeals affirmed that an immediate family can be a particular social group. However, the BIA denied Mr. L-E-A-'s asylum claim, finding that he had not demonstrated a nexus between the harm he suffered and his membership in his family, because he did not prove that his family membership was at least one central reason for the harm. One and one-half years later, in December 2019, Acting Attorney General Matthew Whitaker certified the Board's decision to himself.

⁶ [Matter of A-B-, 27 I&N Dec. 316 \(A.G. 2018\) \(A-B- I\)](#) (AILA Doc. No. 18061133).

⁷ The decision, in dicta, also purported to enhance the role of discretion in denying asylum claims. See <https://www.aila.org/infonet/practice-pointer-matter-of-a-b-and-discretion>.

⁸ See *Matter of Acosta*, 19 I&N Dec. 211, 222 (B.I.A. 1985)

⁹ See e.g. <https://www.reuters.com/article/us-usa-immigration-trump-court-special-r/special-report-how-trump-administration-left-indelible-mark-on-u-s-immigration-courts-idUSKBN2B0179>

¹⁰ For a more detailed history of *Matter of L-E-A-* see CLINIC Practice Pointer: *Matter of L-E-A-*, August 2, 2019 (AILA Doc. No. 19080500).

¹¹ [27 I&N Dec. Dec. 40 \(BIA 2017\) \(L-E-A- I\)](#) (AILA Doc. No. 17052430)

On July 29, 2019, Attorney General William Barr issued *Matter of L-E-A- II*¹². The decision “overrule[s] the portion of *Matter of L-E-A-* discussing whether the proposed particular social group is cognizable.”¹³ The Attorney General alleged that the BIA had improperly relied upon “concessions” by DHS that L-E-A-’s immediate family constituted a particular social group, and had not performed a fact-based analysis as to whether the social group met the three-prong test in *Matter of M-E-V-G-* and *Matter of W-G-R-*.¹⁴ As in *A-B-*, the AG decision in *L-E-A- II* also included broad dicta purporting to hold that “ordinary” families will generally be unable to meet the particular social group test. The AG’s decision in *Matter of L-E-A- II* ignored and undermined years of precedent holding that immediate family units can constitute particular social groups for purposes of asylum eligibility.¹⁵

What Do the New AG Decisions Mean for Pending Asylum Claims?

The vacatur of *A-B- I*, *A-B- II*, and *L-E-A- II* is welcome news for asylum applicants and asylum practitioners. With these cases vacated, asylum applicants will again be afforded the opportunity to prove they meet all the elements of an asylum claim, without the perceived blanket prohibition on asylum for survivors of domestic violence and family-targeted violence that Trump’s attorneys general intended. However, the new decisions do not mean that winning asylum cases based upon domestic violence or family targeting will be easy. Arguing successful asylum claims has always been a rigorous and difficult process, especially when the claim is based on the applicant’s membership in a particular social group. Convincing an adjudicator that an asylum applicant is a member of a cognizable particular social group is only one of the essential elements of asylum. An asylum applicant must also prove they suffered, or fear, harm that rises to the level of persecution, that the persecution was or would be at the hands of the government or an individual or group the government is unable or unwilling to control, that there is a factual “nexus” between the past or feared harm and the applicant’s membership in a particular social group (or other protected ground), and that the fear of future harm on that ground is well-founded (except in certain circumstances).

In preparing asylum claims before USCIS, immigration judges, and the Board, practitioners should no longer cite to *Matter of A-B- I* or *II*, or to *Matter of L-E-A- II*. Instead, they should rely on caselaw that existed prior to the issuance of those decisions. Under pre-existing asylum caselaw, applications based upon membership in a particular social group must successfully demonstrate that they are members of their proposed social group *and* that the proposed social group is immutable, particular, and socially distinct. They must also prove that they were harmed (or would be harmed) on account of their membership in that cognizable social group. The vacatur of *A-B-* and *L-E-A- II* may ease the difficulty of proving that a particular social group is cognizable, but it does not relieve the burden to prove membership in that group or nexus.

Specifically, for domestic violence claims, the latest AG decision in *Matter of A-B-* means that practitioners can again rely upon *Matter of A-R-C-G-* and other pre-*A-B-* caselaw in arguing that

¹² [Matter of L-E-A-, 27 I&N Dec. 581 \(A.G. 2019\)](#) (*L-E-A- II*) (AILA Doc. No.19072902)

¹³ 27 I&N Dec. at 596-97.

¹⁴ *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014)

¹⁵ See *L-E-A- III*, 28 I&N Dec. at 305, listing U.S. Court of Appeals decisions finding family can be a particular social group.

their clients' proposed social groups are cognizable. Again, this will not necessarily be easy! Prior to *A-B-*, many immigration judges still denied asylum to survivors of domestic violence if their proposed social group did not exactly match the group as defined in *A-R-C-G-*. For example, if the applicant was not married to her abuser, many IJs found the social group to be incognizable, because the relationship status was not "immutable" or "socially distinct." Alternatively, immigration judges found that the applicant was not, factually, a member of a group of women who could not leave their domestic relationship, where she was unmarried and/or had divorced or physically separated from her abuser before seeking asylum in the U.S. Therefore, it will be important to continue to carefully brief, and support with documentary evidence, the cognizability of any proposed social group and the applicant's actual membership in that group. Of course, the applicant will also have to prove the other remaining elements of their asylum claim: nexus to the harm, harm that rises to the level of persecution, government unwilling or unable to control the harm, and well-founded fear.

For asylum claims based upon the targeting of an applicant's family, the vacatur of *L-E-A- II* removes a major barrier to a grant of asylum. It is again possible to prove that an asylum applicant is, in fact, a member of the particular social group of their own family. Of course, that alone will not merit asylum. After all, almost everyone is a member of a family. The difficult part will be proving a nexus between the past or feared harm and the applicant's membership in their family. An applicant must prove, through testimony and documentary evidence, that their membership in their family is at least one central reason for their persecution, as well as proving the other asylum elements.

Important Reminders for Asylum Claims based on Membership in a Particular Social Group

Asylum protection may be available to a person who suffered or reasonably fears persecution on account of one of the five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion. Claims based upon membership in a particular social group are often the most difficult to prove. When the claim is based on the applicant's membership in a particular social group, asylum practitioners spend a lot of time working with clients to craft the perfect social group. However, it is important to remember that the protected ground is only one element of a successful asylum claim. Below is a non-exhaustive list of issues¹⁶ to consider in preparing your asylum case in light of AG Garland's vacatur decisions:

1. Propose particular social groups (PSG) that **fit the facts** in your client's case. This will require numerous fact-gathering and affidavit-writing sessions with a client before a PSG(s) can be formulated.
2. Propose **more than one social group**, as the facts warrant.
 - a. For example, in a domestic violence claim where a female client felt trapped in the relationship, propose both "women in a relationship they are unable to leave" and "women viewed as property by virtue of their status in an intimate relationship."

¹⁶ Center for Gender and Refugee Studies, Ms. A-B-'s counsel, has indicated they will release an in-depth practice advisory in the coming weeks. Practitioners can check their website for further tips. <https://cgrs.uchastings.edu/>.

- b. E.g., in cases where a female client was called a prostitute by members of her community and by her abuser, because she had a child out-of-wedlock, propose both “women who violate dominant social norms surrounding marriage and having children” and “women viewed as prostitutes.”
 - c. Where the facts support it, also include a PSG of the country plus female, e.g. “Salvadoran females.”
- 3. Make sure each **proposed social group is cognizable**, by going through each prong of the *M-E-V-G*¹⁷ test.
 - a. It may be helpful to compare your proposed PSG(s) to *Matter of A-R-C-G-*, the Department’s brief in *Matter of L-R*¹⁸, *Matter of L-E-A-*, *Matter of H*¹⁹, and to relevant circuit caselaw.
 - b. However, do not assume that analogizing to a particular social group that has been recognized in a different case is sufficient, because adjudicators are required to perform a case-by-case analysis on each asylum claim.
- 4. Do not forget the **other protected grounds!!** Claim alternative grounds for asylum, by seeking asylum based on one or more of the other protected grounds (race, religion, nationality, or political opinion), where the facts warrant it.
 - a. For example, if the facts demonstrate an applicant expressed views related to women’s rights, or that such views were imputed to the applicant—and the persecutor knew about and was motivated by those views—claim asylum based on a feminist political opinion.
- 5. **Nexus:** Take a step back and ask if the **facts** show the harm was done (or would be done) “on account of” the particular social group or other protected ground you have proposed.
 - a. If not, start over and brainstorm a new social group (or other protected ground).
 - b. If they do, emphasize this is your brief or oral argument. Do not skimp on the nexus analysis, otherwise, the Board could overturn the IJ’s grant of asylum, under a different Trump-era AG decision *Matter of A-C-A-A*²⁰.
- 6. Where the persecutor is a **non-state actor**, include evidence of any attempts to seek government protection or intervention. Also, submit as much evidence as possible regarding the government’s inability *or* unwillingness to control the feared harm. Do not forget to include arguments based on this evidence in the asylum brief or oral argument.

Of course, these are just a few suggestions for building a strong asylum claim after the vacatur of *Matter of A-B-* and *Matter of L-E-A- II*. Asylum practice is a complex area of law, and it is constantly developing.

¹⁷ [Matter of M-E-V-G-, 26 I&N Dec. 227 \(BIA 2014\)](#).

¹⁸ DHS’s Supplemental Brief, *Matter of L-R-* (BIA Apr. 13, 2009), available at http://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf

¹⁹ [Matter of H-, 21 I&N Dec. 337 \(BIA 1996\)](#)

²⁰ [Matter of A-C-A-A-, 28 I&N Dec. 84 \(A.G. 2020\)](#) (*AILA Doc. No. 20092530*).