Office of the Principal Legal Advisor

U.S. Department of Homeland Security
500 12th St. SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

July 11, 2018

MEMORANDUM FOR: All OPLA Attorneys

FROM: for Tracy Short
Principal Legal Advisor

SUBJECT: Litigating Domestic Violence-Based Persecution Claims Following *Matter of A-B-*

Purpose

This memorandum provides guidance to U.S. Immigration and Customs Enforcement (ICE) attorneys litigating asylum and statutory withholding of removal claims in the wake of the Attorney General's (AG's) recent precedent decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).[1]

Background

On June 11, 2018, the AG issued a precedent decision in *A-B-*, 27 I&N Dec. 316, a protection law case that he had certified to himself from the Board of Immigration Appeals (BIA). *See Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018). The AG had invited the parties and interested amici curiae to submit briefs addressing whether, and under what circumstances, being a victim of private criminal activity constitutes a cognizable particular social group for purposes of applications for asylum and statutory withholding of removal. 27 I&N Dec. at 317.

Of primary importance, the AG overruled the BIA's precedent decision in *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), on which the BIA had relied in finding A-B- eligible for asylum. In *A-R-C-G-*, the BIA had held that, under the circumstances presented in that case (and in light of several concessions by the parties on material issues), women who are victims of domestic violence potentially could qualify for asylum and statutory withholding of removal based on particular social group status. In this regard, the BIA had found A-R-C-G-'s particular social group to be cognizable, i.e., "married women in Guatemala who are unable to leave their relationship." 26 I&N Dec. 388. In *A-B-*, the BIA concluded that A-B-'s particular social group, "El Salvadoran women who are unable to leave their domestic relationships where they have

[1] The memorandum issued by former Principal Legal Advisor Peter Vincent, *Updated Guidance for Litigating Domestic Violence-Based Persecution Claims* (May 31, 2011), and any related guidance, is hereby superseded to the extent inconsistent herewith.

children in common [with their partners]," was "substantially similar" to the group at issue in *A-R-C-G-* and was, thus, cognizable. 27 I&N Dec. at 321 (internal quotation marks omitted).

The AG found that, in analyzing the particular social group at issue in *A-R-C-G-*, the BIA had improperly relied upon the parties' stipulations and failed to correctly apply the legal standards set forth in *Matter of M-E-V-G*, 26 I&N Dec. 227 (BIA 2014), and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), i.e., that a cognizable particular social group is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question. *A-B-*, 27 I&N Dec. at 333-36. Because he overruled *A-R-C-G-*, the AG also found it necessary to vacate the BIA's decision in *A-B-*, given that the BIA's "cursory analysis" simply consisted of "general citation to *A-R-C-G-* and country condition reports." *Id.* at 340.

In addition to discussing persecution claims based on domestic violence, the AG more broadly addressed persecution claims based on private criminal victimization, including gang violence. He opined that, "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum" or statutory withholding of removal. *Id.* at 320. The AG's position in this regard tracks existing BIA case law. For example, the AG emphasized that, to establish the requisite "persecution" in the context of private criminality, an alien must establish that his or her government is unwilling or unable to control the perpetrator, which the AG explained to mean that an applicant must show more than that the government had "difficulty controlling" the private criminality; rather, the government must have either "condoned" the criminality or "at least demonstrated a complete helplessness to protect the victims." *Id.* at 337 (internal citations, quotation marks, and punctuation omitted). 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. *Id.*; *see also id.* at 343-44 (concerning the difficulty of preventing and prosecuting domestic violence even in the United States). Rather, there may be many reasons for such. *Id.* at 337-38.

Further, with respect to establishing the requisite nexus to a protected ground, such as particular social group membership, the AG stressed that, "[w]hen private actors inflict violence based on a personal relationship with a victim, the victim's membership in a larger group may well not be 'one central reason'" for the persecution. *Id.* at 338-39. In this regard, the AG cited with approval to the BIA's vacated precedent decision in *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999) (en banc), *vacated*, 22 I&N Dec. 906 (A.G. 2001), *remanded*, 23 I&N Dec. 694 (A.G. 2005), *remanded and stay lifted*, 24 I&N Dec. 629 (A.G. 2008),[2] in which the BIA originally had

[2] OPLA attorneys may rely on *R-A-* as persuasive authority. The AG, the Board, and federal circuit courts have recognized the importance of *R-A-*'s analysis. *See A-B-*, 27 I&N Dec. at 329 ("Despite its vacatur, both the Board and federal courts have continued to rely upon *R-A-*."); *see also M-E-V-G-*, 26 I&N Dec. at 231 n.7 (noting that *R-A-*'s "role in the progression of particular social group claims remains relevant"); *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1090, n.11 (9th Cir. 2013) (en banc) (observing that, although "*R-A-* was later vacated[,] . . . litigants and other courts have relied heavily upon its analysis"). OPLA attorneys should take care, however, not to misrepresent *R-A-* itself as a controlling, precedential decision, as the decision has been vacated. *Cf.* Model Rules of Prof'l Conduct R. 3.3 (2016). OPLA attorneys seeking to rely upon *R-A-* should either cite to precedential cases like *A-B-*, which approvingly cite to the portions of the analysis from *R-A-* upon which they seek to rely, or cite *R-A-* directly while noting that, although *R-A-* is not precedential, courts and the Board have continued to rely on its analysis. *See A-B-*, 27 I&N Dec. at 319 ("Despite the vacatur of R-A-, both

denied a domestic violence-based persecution claim due to, *inter alia*, a failure to establish nexus to a protected ground.

The AG otherwise emphasized that, in assessing asylum and statutory withholding of removal applications, including those premised on private criminal victimization, adjudicators must give due consideration to all of the other pertinent legal requirements and factors. For example, the AG stressed that adjudicators must consider, consistent with the appropriate regulatory assignment of the burden of proof, whether reasonable internal relocation is possible. *A-B-*, 27 I&N Dec. at 344. Further, with respect to asylum, the AG reminded adjudicators of the "discrete requirement" of meriting a favorable exercise of discretion. *Id.* at 345 n.12.

Finally, the AG found that, in adjudicating A-B-'s appeal from the immigration judge's (IJ) denial of her applications for protection, the BIA had failed to give sufficient deference to various factual findings of the IJ under the "clear error" standard of review, including with respect to credibility, state protection, and nexus. *Id.* at 340-44. Accordingly, the AG vacated the BIA's decision in A-B-'s case and remanded to the IJ for further proceedings consistent with his opinion. *Id.* at 346.

Discussion

In *A-B-*, the AG overruled *A-R-C-G-*, and provided substantial guidance to the BIA and IJs regarding various general requirements for asylum. The AG noted that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Id.* at 320. However, although 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. In addition to overruling *A-R-C-G-*, the AG mandated that IJs and the BIA assess protection applications in a fulsome way that covers all pertinent requirements. The AG reiterated the principle that an applicant for asylum has the burden to establish eligibility for asylum, and that he or she "must present facts that undergird *each* of the[] elements" required for relief to be granted. *Id.* at 340. Accordingly, OPLA attorneys should ensure that IJs and the BIA rigorously analyze each claim such that protection is only granted where the alien has met his or her burden with respect to each and every element. *Id.*

Domestic Violence-Based Particular Social Group Claims Post A-B-

Private criminal victimization per se (including domestic violence), even when widespread in nature, is insufficient to establish eligibility for asylum or statutory withholding of removal. *See, e.g.*, *A-B-*, 27 I&N Dec. at 320 (noting that "[t]he mere fact that a country may have problems effectively policing certain crimes—such as domestic violence or gang violence—or that certain populations are more likely to be victims of crime, cannot itself establish an asylum claim"); *M-E-V-G-*, 26 I&N Dec. at 235 (observing that, as a general matter, "asylum and refugee laws do not protect people from general conditions of strife, such as crime and other societal afflictions").

---

the Board and the federal courts have continued to treat its analysis as persuasive."). OPLA attorneys must exercise care to ensure that whatever approach they take is consistent with the contemporary state of the law in their relevant jurisdiction.

See generally Matter of Mogharrabi, 19 I&N Dec. 439, 447 (BIA 1987) (noting that "aliens fearing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval in their countries, would not qualify for asylum"). The overwhelming weight of federal circuit court case law holds the same.[3]

Additionally, the alien must establish that he or she is a member of a cognizable particular social group, considering conditions in the country of origin and the facts as they relate to the applicant. Consistent with *A-B-*, however, aliens must establish that any particular social group is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct based on the evidence in a particular case and the society in question. Office of the Principal Legal Advisor (OPLA) attorneys should ensure that any proffered particular social group is appropriately tested under the "rigorous analysis required by the Board's precedents." 27 I&N Dec. at 319.

In *A-B-*, the AG held that a particular social group must "exist independently" of the harm asserted in an application for asylum or statutory withholding of removal. *Id.* at 334-35.[4] Further, the AG indicated that, under the circumstances present in *Matter of A-R-C-G-*, the particular social group formulation in that case—"married women in Guatemala who are unable to leave their relationship"—was impermissibly defined because the inability to leave was created by harm or threatened harm. *Id.* at 335-36. Such a formulation would generally not share a "'narrowing characteristic other than their risk of being persecuted.'" *Id.* (quoting *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005)). As explained by the AG, in *Matter of A-R-C-G-* the Board "never considered" whether the proposed particular social group met this requirement. *Id.* Of course, while some particular social group formulations may be more overtly defined in whole or part by the harm at issue, e.g., "women who are *victims of domestic*

---

[3] *See, e.g.*, *Sosa-Perez v. Sessions*, 884 F.3d 74, 81 (1st Cir. 2018) (observing that the attacks on the alien were not shown to be on account of a protected ground but rather a "series of highly unfortunate criminal incidents occurring within a culture of widespread societal violence" (quotation marks omitted)); *Zaldana-Menijar v. Lynch*, 812 F.3d 491, 501 (6th Cir. 2015) ("[W]idespread crime and violence does not itself constitute persecution on account of a protected ground . . . ."); *Kanagu v. Holder*, 781 F.3d 912, 918 (8th Cir. 2015) (noting that "the evidence primarily showed the extortionate focus of the Mungiki's interactions with Kanagu and their record of widespread and indiscriminate criminality," and that "a reasonable fact finder could infer that the Mungiki harassed and kidnapped Kanagu for extortionate purposes" as opposed to persecution on account of a protected ground); *Silva v. U.S. Att'y Gen.*, 448 F.3d 1229, 1242 (11th Cir. 2006) ("We agree that Colombia is a place where the awful is ordinary, but we must state the obvious: if four out of every ten murders are on account of a protected ground, six out of ten are not. The majority of the violence in Colombia is not related to protected activity."); *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998) ("Mere generalized lawlessness and violence between diverse populations, of the sort which abounds in numerous countries and inflicts misery upon millions of innocent people daily around the world, generally is not sufficient to permit the Attorney General to grant asylum to everyone who wishes to improve his or her life by moving to the United States without an immigration visa."). *See generally Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) ("[T]he concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional. If persecution were defined that expansively, a significant percentage of the world's population would qualify for asylum in this country—and it seems most unlikely that Congress intended such a result.").

[4] This rule, however, allows for the unique possibility, as recognized by the Board in *M-E-V-G-*, that in some situations "[u]pon their maltreatment, [victims] would experience a sense of 'group,' and society would discern that this group of individuals, who share a common immutable characteristic, is distinct in some significant way." 26 I&N Dec. at 243.

abuse," etc., other particular social group formulations may be more subtly or less clearly defined in whole or in part by the harm at issue.[5] Whether a proposed particular social group exists independently of the harm asserted is a question that must be carefully analyzed on a case-by-case basis.

The analysis of whether a particular social group is cognizable must always be case-by-case and society-specific. In addition, even in those cases where the record evidence may establish the cognizability of a particular social group formulation, the applicant may not be able to establish all of the other requirements for asylum or statutory withholding of removal, such as the requisite nexus between the particular social group and the harm she suffered and/or feared.

The AG did "not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group." *A-B-*, 27 I&N Dec. at 320. Particular social groups premised on domestic or gang violence, or premised on private criminal activity more generally, may not be recognized after *A-B-* unless those asylum claims survive the "rigorous analysis required by the Board's precedents." *Id.* at 319. When analyzing whether a proffered particular social group is cognizable, the key issue for OPLA attorneys is to look at each proposed group on a case-by-case basis and under the facts presented in a given case, and to subject it to the rigorous scrutiny required by *A-B-* and other precedents.

Promoting Detailed and Rigorous Analysis

Much of the AG's decision in *A-B-* was dedicated to reminding adjudicators that they must rigorously analyze claims to ensure that each required element is satisfied by the applicant. The burden of proof is firmly on applicants for asylum and statutory withholding of removal, not only with respect to establishing the cognizability of their putative particular social groups, but with respect to all other requirements as well, including credibility, "persecution," nexus, internal relocation (consistent with the appropriate regulatory burden of proof), etc. *See* Immigration and Nationality Act (INA) §§ 208(b)(1)(B)(i) (asylum), 241(b)(3)(C) (statutory withholding of removal)

In terms of the cognizability of particular social groups, the AG has mandated a "detailed" and "rigorous" analysis in each individual case vis-à-vis the clarified requirements of common immutable characteristic, particularity, and social distinction set out in *M-E-V-G-* and *W-G-R-*. *A-B-*, 27 I&N Dec. at 332, 340. Particular social group analysis is a case-specific and society-specific exercise. Simply because a putative particular social group may be found cognizable in one case and as to one society, does *not* mean that a similar particular social group formulation

---

[5] Where a case involves a pro se applicant who raises a particular social group formulation that is clearly based on the harm suffered and/or feared, it is a best practice for an OPLA attorney to advise *the IJ* of this problem as early in proceedings as possible. (OPLA attorneys, of course, should not be providing legal advice to applicants.) Though adversarial, a "cooperative approach" in Immigration Court should not be eschewed. *See Matter of S-M-J-*, 21 I&N Dec. 722, 724 (BIA 1997). Then, as the IJ sees fit, *the IJ* can explain the situation to the applicant and provide her with an opportunity to revise her formulation. Such practice may ultimately help any agency decision denying asylum and statutory withholding of removal withstand judicial scrutiny.

automatically will be cognizable in other cases and as to other societies. *See, e.g.*, *M-E-V-G-*, 26 I&N Dec. at 241. *See generally Pirir-Boc v. Holder*, 750 F.3d 1077, 1083-84 (9th Cir. 2014) ("[T]he 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." (footnote omitted)). Indeed, even within the same society, material conditions may change over time.

Given that *A-R-C-G-* has now been overruled, with the AG mandating more fulsome analysis of the requirements for cognizable particular social group status in future cases, OPLA attorneys can expect to see an increase of voluminous, pre-packaged country/society-specific materials bearing on these requirements. To the extent that an OPLA attorney uncovers deficiencies in such materials, or Department of State reports or similarly available country condition evidence undercut such materials, this information should be submitted, as well as shared with other OPLA field offices. The Immigration Law and Practice Division's (ILPD) SharePoint Discussion Board is one platform for sharing such information. Additionally, OPLA attorneys should appropriately challenge and cross-examine aliens' witnesses, including expert witnesses.[6]

In addition, in terms of application materials concerning the prevalence of private criminal activity in a given country—whether in the form of domestic violence, gang violence, or otherwise—keep in mind that the BIA has observed that "a purely statistical showing" of who is being harmed "is not by itself sufficient proof of the existence of a persecuted group," and that "[i]t is not enough to simply identify the common characteristics of a statistical grouping of a portion of the population at risk." *Matter of Sanchez & Escobar*, 19 I&N Dec. 276, 285 (BIA 1985), *aff'd sub nom. Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986); *see also M-E-V-G-*, 26 I&N Dec. at 250-51 (while eschewing any "blanket rejection of all factual scenarios involving gangs," observing that "gangs may target one segment of the population for recruitment, another for extortion, and yet others for kidnapping, trafficking in drugs and people, and other crimes," and that although "certain segments of a population may be more susceptible to one type of criminal activity than another, the residents all generally suffer from the gang's criminal efforts," and "not all societal problems are bases for asylum"). Indeed, even in the United States, as late as 2000, almost 1 million women over the age of 12 had suffered some form of intimate-partner violence. *See* U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Intimate Partner Violence: Attributes of Victimization, 1993-2011 (Nov. 2013) at app. tbl. 3. Further, even in this country, a significant portion of violent crimes are never resolved. *See* John Gramlich, Most violent and property crimes in the U.S. go unsolved, Pew Research Center (Mar. 1, 2017) (citing official U.S. Government statistics).

While *A-R-C-G-* has now been overruled, existing circuit court case law distinguishing *A-R-C-G-* still may prove useful in any given case. For example, some circuit court decisions distinguished *A-R-C-G-* because the subject alien was never in a domestic relationship with her alleged abuser. *See Cardona v. Sessions*, 848 F.3d 519 (1st Cir. 2017). Others distinguished *A-R-C-G-* because

---

[6] *See, e.g.*, *Matter of D-R-*, 25 I&N Dec. 445, 459–60 (BIA 2011) (discussion of expert witnesses).

of the subject alien's ability to leave the relationship. *See Fuentes-Erazo v. Sessions*, 848 F.3d 847 (8th Cir. 2017); *Marikasi v. Lynch*, 840 F.3d 281 (6th Cir. 2016).[7]

Finally, the testimony of the applicant alone may be sufficient to sustain her burden of proof, *only if* she satisfies the adjudicator that her testimony: (i) is "credible," (ii) is "persuasive," and (iii) "refers to specific facts sufficient to demonstrate that the applicant is a refugee." INA §§ 208(b)(1)(B)(ii) (asylum); 241(b)(3)(C) (statutory withholding of removal). Even when an adjudicator determines that the applicant's testimony is "otherwise credible," the adjudicator can require the applicant to produce corroborating evidence unless the applicant establishes that she does not have the evidence and cannot reasonably obtain it.[8] *Id.* In the context of private criminal victimization due to domestic violence, an applicant presumably should have detailed knowledge of her abuser. The applicant's knowledge in this regard, or her failure to reasonably explain the lack thereof, is relevant to whether the applicant's testimony is credible, persuasive, and sufficiently detailed to satisfy her burden of proof. In addition, such information could help to better identify persecutors should they ever attempt to enter the United States or otherwise gain immigration benefits while present here.[9] Moreover, the applicant's current domestic

---

7 Both *Marikasi* and *Fuentes-Erazo* reinforce the point that a domestic relationship is not necessarily an immutable trait. DHS recognizes that an applicant's ability, per se, to obtain a legal divorce or separation—if legally married—and leave her country for the United States does not *automatically* mean that her domestic relationship is mutable. Her former husband may not recognize the legal termination of their relationship, the authorities may not enforce it, and the only way she may be free of the relationship is, in fact, to leave her country (as opposed to leaving her husband to reside in another part of her country). However, the ability to obtain a divorce or separation and to leave her country are relevant considerations as to whether that relationship is mutable, and serve as strong evidence of the viability of internal relocation. In this regard, it would be important for an adjudicator to consider whether the applicant actually sought the help of the authorities to enforce the legal termination of her relationship, and their response. In addition, an applicant's ability to marshal support and resources to travel to the United States has a weighty bearing on whether she could have availed herself of those same support networks and resources to reasonably internally relocate within her own country, as opposed to invoking the need for international protection—and, if not, why not. *See generally Silva v. Ashcroft*, 394 F.3d 1, 7 (1st Cir. 2005) (noting that "if a potentially troublesome state of affairs is sufficiently localized, an alien can avoid persecution by the simple expedient of relocating within his own country instead of fleeing to foreign soil").

8 *See Matter of L-A-C-*, 26 I&N Dec. 516 (BIA 2015). OPLA attorneys practicing in the jurisdiction of the Ninth Circuit should be mindful of *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011), which requires that, where an IJ concludes that corroborative evidence is necessary to support credible testimony, the alien must be given notice and an opportunity to obtain and submit the corroborative evidence or explain his or her failure to do so.

9 Accordingly, when such information is not provided, OPLA attorneys should consider questioning the applicant about the putative persecutor, such as: (i) full name, date of birth, and place of birth; (ii) full names of parents and siblings; (iii) last known address; (iv) last known telephone number (if any); (v) physical characteristics (e.g., race, height, weight, hair color, eye color, prominent scars or tattoos); (vi) copies of photographs (if any); (vii) name and location of last known employer or, if self-employed, name and location of business; (viii) any known criminal record, with approximate dates; (ix) any known military service, with approximate dates; (x) any known violent or otherwise abusive behavior towards other persons, and the identity of such victims; (xi) any known visits to the United States, with approximate dates; (xii) the most recent information as to health; (xiii) the most recent information as to any additional domestic or intimate relationships; and (xiv) any and all direct or indirect contact the applicant may have had with, or information received about, the putative persecutor following the applicant's arrival in the United States. While not all such information may necessarily be within the knowledge of any specific applicant, such does not mean that she should not be asked in the first instance, and to provide a reasonable explanation as to why she cannot provide specific information.

and/or intimate relationships also may have a bearing on her asylum and statutory withholding of removal applications.[10]

Pending Cases Where IJ Granted Asylum/Statutory Withholding Relying on A-R-C-G-

In a case where the IJ granted asylum and/or statutory withholding of removal relying on *A-R-C-G-*, DHS appealed, and the case currently remains pending before the BIA, OPLA field office should determine on a case-by-case basis whether to file a supplemental brief, along with a motion to accept the same, making new arguments based upon the AG's decision in *A-B-*, 27 I&N Dec. 316. *See generally* BIA Practice Manual Ch. 4.6(g)(ii) (rev. Mar. 23, 2018), https://www.justice.gov/sites/default/files/pages/attachments/2018/03/23/practicemanualfy2018.pdf#page=59. The value of filing such a supplemental brief would be dependent, for example, on the importance of the individual case, the available resources of the OPLA field office, whether the IJ provided a fulsome factual and legal analysis as opposed to simply summarily relying on *A-R-C-G-*, whether additional factfinding might be necessary, and the need to make nuanced arguments with respect to the application of *A-B-*. In the absence of such factors, however, it generally will not be necessary to file a "Statement of New Legal Authorities" simply citing to the AG's decision in *A-B-*. *See* BIA Practice Manual Ch. 4.6(g)(i), *supra*. The BIA will be fully aware of the decision.

"Gender Alone" Particular Social Groups

Given that *A-R-C-G-* has now been overruled, it is expected that DHS and the Executive Office for Immigration Review will be forced to address the issue of "gender alone"-based particular social group claims, e.g., "women of Country X." OPLA attorneys should not take a position on the cognizability of such "gender alone" formulations until further guidance is disseminated or without consulting with ILPD.

Matter of L-E-A-

Finally, while it is apparent that the AG has cast doubt on the viability of *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017), in which the BIA held that some particular social groups based on

---

[10] When such information is not provided, OPLA attorneys should consider questioning the applicant about: (i) her own current domestic or intimate relationships, if any; (ii) any children born in the United States (along with pertinent birth certificates); and (iii) whether she or her children, if any, have traveled abroad to a place where the putative persecutor could contact them since their arrival in the United States. *It is important that inquiries into an applicant's current domestic or intimate relationships be conducted with due care and appropriate sensitivity.* The legitimate purpose of such an inquiry is to develop the record with material information to better assist the adjudicator in making a fully informed decision. For example, the existence of a new domestic or intimate relationship may be pertinent to the putative persecutor's perception of his relationship with the applicant or to the putative persecutor's inclination to harm the applicant, whether negatively or positively. Additionally, if the applicant has a current domestic or intimate relationship, especially one that is legally recognized in the country of alleged persecution, this may be pertinent to issues of internal relocation and state protection in that country.

family membership may be cognizable,[11] the AG did not overrule that precedent, noting that it was beyond the scope of his opinion. *See A-B-*, 27 I&N Dec. at 333 n.8. Accordingly, unless and until there is a controlling ruling to the contrary, *L-E-A-* remains binding precedent. However, as discussed above, such claims should be rigorously tested and analyzed.

Questions

OPLA attorneys should address any questions they have about this memorandum, or the AG's ruling in *A-B-* in general, to ILPD via the pertinent ILPD-E or ILPD-W mailbox.

No Private Rights Created: This memorandum, which contains privileged attorney work product, is intended to provide internal guidance to ICE personnel and should not be released outside the agency without prior written authorization from the Office of the Principal Legal Advisor. This memorandum, which may be superseded or modified at any time with or without notice, does not, is not intended to, shall not be construed to, and may not be relied upon to, create any rights, substantive or procedural, enforceable at law by any person in any matter, administrative, criminal, or civil.

[11] Recall that in *L-E-A-*, the BIA found that an "immediate family" *may* constitute a cognizable particular social group. 27 I&N Dec. at 42. It cautioned, however, that the inquiry is a case-by-case and fact based, dependent on the nature and degree of the relationships involved and how those relationships are regarded by the society in question. *Id.* at 42-43. Simply inserting "family" into a particular social group formulation does not establish cognizability.