IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

S.A.P., a minor (by and through his father);

R.C.E.A., and her minor children, C.J.M.E., J.A.M.E. and L.J.O.E. (by and through their mother);

A.G.T. and her minor son, A.B.T. (by and through his mother);

K.G.J., and her minor son, J.G.J. (by and through his mother);

M.A.C., and her minor son, I.G.C. (by and through his mother);

L.R.Q. and her minor son, E.M.M.R. (by and through his mother;

Y.C.D., a minor (by and through his mother);

J.S.R., and her minor son, J.N.R.S. (by and through his mother);

S.G.F., and her minor children, L.O.G., T.O.G. and W.E.O.G. (by and through their mother);

J.I.H.R., a minor (by and through his mother);

D.A.M., and her minor daughter A.I.A. (by and through her mother); and

D.A.L.

Plaintiffs,

v.

WILLIAM BARR, Attorney General of the United States, in his official capacity;

CHAD WOLF, Acting Secretary for the Department of Homeland Security, in his official capacity;

Case:

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

KEN CUCCINELLI,
Acting Director of United States Citizenship and Immigration Services, in his official capacity;

JAMES MCHENRY, Director of the Executive Office for Immigration Review, in his official capacity,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. In September 2019, Defendants enacted new written policies designed to dismantle longstanding protections for asylum seekers who, like Plaintiffs, were targeted for persecution in their home countries because they are members of a particular family.

2. These new policies deprive noncitizens in expedited removal proceedings of a meaningful opportunity to obtain asylum or withholding of removal based on their membership in a family-based particular social group ("PSG").

3. The new policies purport to implement *Matter of L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019) ("*L-E-A- II*"), a legal opinion by the Attorney General which—in *dicta*—articulated new, erroneous, and unlawful standards for adjudicating asylum claims when applicants fear persecution because of their family membership.

4. The *dicta* in *L-E-A- II* broke from decades of past precedent by suggesting that families cannot meet the social distinction requirement for PSGs unless they "carr[y] greater societal import" than ordinary families and are "recognizable by society at large." *Id.* at 595.

5. The Attorney General's statements represent an unlawful change to our existing asylum laws that would preclude members of "ordinary" families from seeking protection from persecution based on their family membership, arbitrarily limiting asylum protections to members of well-known or famous families.

6. Relying on these new policies, asylum officers have unlawfully denied Plaintiffs' claims for asylum and withholding of removal and ordered them removed to countries where they face violent persecution.

7. This action seeks to enjoin these new policies to prevent Plaintiffs and countless other noncitizens with meritorious claims for asylum and withholding of removal from being deported to their country of origin, where they face serious risk of physical violence and death.

8. Pursuant to the Immigration and Nationality Act ("INA"), the United States has long offered protection to those who seek refuge from persecution directed at characteristics that are fundamental to a person's identity or conscience—characteristics including their race, religion, nationality, political opinion, or, as this case examines, their membership in a PSG.

9. By extending refugee protection to noncitizens possessing a well-founded fear of persecution on account of their membership in a PSG, Congress sought to implement the international human rights obligations adopted in the wake of the horrors of the Second World War.

10. Before appearing in the INA, the 1951 Refugee Convention introduced "particular social group" as a term of art. Both the conference that unanimously adopted the 1951 Refugee Convention and the Universal Declaration of Human Rights, which was passed just two years earlier, explicitly recognize the principle that "the family" is "the natural and fundamental group unit of society." *See Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, U.N. Doc. A/CONF.2/108/Rev.1 (articulating principle that "the family" is "the natural and fundamental group unit of society").

11. Administrative interpretations of the INA and Refugee Act of 1980 ("Refugee Act") have historically shared this observation. *See Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985) (citing "kinship ties" an innate characteristic comprising a PSG); *Matter of C-A-*, 23 I. & N. Dec. 951, 955 (BIA 2006) ("[s]ocial groups based on. . . family relationship are generally easily recognizable and understood by others to constitute social groups"); *Matter of H-*, 21 I. & N. Dec. 337, 342 (BIA 1996) (en banc); *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 240 (BIA 2014).

12. Federal courts of appeals, in their review of these administrative interpretations,

have repeatedly recognized the ordinary nuclear family as "the quintessential particular social group." *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015); *see also Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) ("the family provides a prototypical example of a particular social group"); *Villalta-Martinez v. Sessions*, 882 F.3d 20, 26 (1st Cir. 2018) ("[I]t is well established that the nuclear family constitutes a recognizable social group . . .").

13. Contrary to this clear precedent, the Attorney General's decision in *L-E-A- II* contains *dicta* suggesting a new legal standard and interpretation of the INA, which effectively precludes noncitizens from asserting family-based PSGs in all but the most extraordinary circumstances.

14. In September 2019, Defendants implemented two new written guidance documents (the "New PSG Guidance") directing asylum officers to apply this new legal standard in evaluating the claims of noncitizens in expedited removal proceedings. The implementation of this new policy guidance effects an unlawful change in law.

15. First, the New PSG Guidance violates the plain language of the INA and imposes an unlawful presumption against family-based PSGs, arbitrarily departing from decades of agency guidance requiring an individualized, fact-based, case-by-case social group analysis. The New PSG Guidance also unreasonably and unlawfully interprets the INA term "particular social group" to exclude most families, which is at odds with the statutory text, context, and legislative history, and contrary to a substantial body of federal courts of appeals and Board of Immigration Appeals ("BIA" or "Board") precedent. And the New PSG Guidance fails to adequately acknowledge, much less reasonably explain, its departure from settled law. Because it is arbitrary, capricious, and contrary to law, the New PSG Guidance should be vacated under the Administrative Procedure Act ("APA").

16. Second, the New PSG Guidance violates APA by explicitly prohibiting asylum officers from applying decades of controlling precedent from the courts of appeals and the BIA recognizing that ordinary families constitute quintessential PSGs. This Court recently issued a preliminary injunction against Defendants prohibiting them from applying a very similar guidance memorandum and holding that directing asylum officers to ignore favorable court of appeals precedent is "clearly unlawful." *Grace v. Whitaker*, 344 F. Supp. 3d 96, 137-38 (2018), *appeal filed sub nom. Grace v. Barr*, No. 19-5013 (D.C. Cir. filed Jan. 30, 2019).[1]

17. Plaintiffs are noncitizens who have been placed into expedited removal and who have credibly testified to having suffered horrific violence in their home countries or fearing such harm in the future.

18. Plaintiffs credibly testified that the reason they, and not some other person, experienced persecution and fear future persecution is because they share an identifiable family connection with a member of their family.

19. As a result of Defendants' new written policy directives, asylum officers denied Plaintiffs' claims for asylum and/or withholding of removal without a full hearing.

20. Plaintiffs seek a declaration that the New PSG Guidance violates the INA and the APA; an order enjoining the application of the New PSG Guidance to credible and reasonable fear interviews; and an order that Plaintiffs' expedited removal orders be vacated and that they be provided with new credible or reasonable fear interviews under the proper legal standard or, in the alternative, full immigration court removal proceedings pursuant to 8 U.S.C. § 1229a.

[1] The *Grace* litigation involves a similar procedural history and challenge to similar directive by Defendants that upends decades of precedent interpreting and applying key aspects of asylum law.

JURISDICTION AND VENUE

21. This case arises under the United States Constitution; the APA, 5 U.S.C. § 701 et seq.; and the INA, 8 U.S.C. § 1101 et seq. and its implementing regulations.

22. The Court has jurisdiction under 8 U.S.C. § 1252(e)(3). Section 1252(e)(3) is a provision of the INA that provides jurisdiction in the United States District Court for the District of Columbia over systemic challenges "to [the] validity of the [expedited removal] system," including regulations and "written" policies regarding expedited removal. The Court also has jurisdiction under 28 U.S.C. § 1331.

23. Venue is proper in this District because 8 U.S.C. § 1252(e)(3)(A) requires that all § 1252(e)(3) actions be brought in the United States District Court for the District of Columbia. In addition, venue is proper under 28 U.S.C. § 1391(e)(I) because a substantial part of the events or omissions giving rise to this action occurred in this District.

PARTIES

24. Plaintiff S.A.P., a minor child, is an asylum seeker from Guatemala who participated in a reasonable fear interview at the Karnes County Residential Center in Karnes City, Texas on October 23, 2019. At the interview, S.A.P.'s father testified that men associated with a powerful political figure threatened to kill S.A.P. because of S.A.P.'s relationship to his father. Specifically, while S.A.P.'s parents were walking in the street, masked men told them that because S.A.P.'s father had refused to join a political campaign, they would kill S.A.P.'s father "or someone from [his] family." After S.A.P. and his family left the village, men associated with the same political figure continued to look for his family. On October 29, 2019, an asylum officer served Plaintiff S.A.P. with a Form I-869A Record of Negative Credible/Reasonable Fear Finding and Request For Review by Immigration Judge for Aliens Barred From Asylum

Pursuant to 8 CFR 208.13(c)(4) which stated USCIS's finding that "[t]here is no reasonable possibility that the harm you experienced and/or the harm you fear is on account of your race, religion, nationality, political opinion, or membership in a particular social group." On the same day, Plaintiff S.A.P.'s father was found to have established a reasonable fear of persecution on account of his political opinion. In a checklist accompanying Plaintiff S.A.P.'s negative finding by USCIS, the asylum officer wrote "the applicant was not able to show that his family was distinct enough within his community to support [sic] the threats against him were on account of a protected ground."

25. Plaintiff R.C.E.A. and her minor children, Plaintiffs C.J.M.E., J.A.M.E., and L.J.O.E., are asylum seekers from Honduras who participated in reasonable fear interviews at the Berks County Residential Center in Leesport, PA on October 22, 2019, November 5, 2019 and November 8, 2019. At the interviews, Plaintiff REA testified that gang members threatened her and her children because of their familial relationship with her husband. Specifically, R.C.E.A.'s husband owned a business and gang members threatened to harm and kill him and his family if he did not pay war taxes. The gang members then beat R.C.E.A's husband while she and her children were present and also shot and killed the family dog. On November 13, 2019, an asylum officer served Plaintiff R.C.E.A and her children with a Form I-869A Record of Negative Credible/Reasonable Fear Finding and Request For Review by Immigration Judge for Aliens Barred From Asylum Pursuant to 8 CFR 208.13(c)(4) which stated the finding by the U.S. Citizenship and Immigration Services ("USCIS") that "[t]here is no reasonable possibility that the harm you experienced and/or the harm you fear is on account of your race, religion, nationality, political opinion, or membership in a particular social group." In a checklist accompanying Plaintiff R.C.E.A's negative finding by USCIS, the asylum officer wrote

"Applicant fears that she will be harmed on account of her membership in a proposed particular social group of immediate family members of her husband, [CMM]. The record does not establish that members of this group are set apart, or distinct, from other persons within the society in a significant way such that it forms a cognizable particular social group. See Matter of L-E-A-, 27 I. & N. Dec. 581, 594 (2019). Applicant [sic] testimony indicates that what distinguishes her family is the fact that they are one of two families that own businesses in their community. The evidence gleaned from the applicant's testimony regarding social distinction discusses facts that, while supporting the notion that the applicant's family was perceived as a family unit, do not support the conclusion that the applicant's family was perceived by her society as distinct from other family units in a significant way."

26. Plaintiff A.G.T. and her minor child, Plaintiff A.B.T., are asylum seekers from Brazil who participated in a reasonable fear interview at the South Texas Family Residential Center on October 18, 2019. At the interview, Plaintiff A.G.T. testified that gang members shot at her and her son A.B.T. because of their familial relationship with her brother and her husband. Specifically, gang members came into her home and shot at her, her son and her mother because her brother was in a rival gang. That same gang has shot at A.G.T. and her family multiple times. Additionally, A.G.T. was shot at by a loan shark because her husband had borrowed money from the loan shark. On November 7, 2019 an asylum officer served Plaintiff A.G.T. and her child with a Form I-869A Record of Negative Credible/Reasonable Fear Finding and Request For Review by Immigration Judge for Aliens Barred From Asylum Pursuant to 8 CFR 208.13(c)(4) which stated USCIS's finding that "[t]here is no reasonable possibility that the harm you experienced and/or the harm you fear is on account of your race, religion, nationality, political opinion, or membership in a particular social group." In a checklist accompanying Plaintiff

A.G.T.'s negative finding by USCIS, the asylum officer wrote "[t]he applicant testified that she was shot at by a rival gang of her brother's in Brazil. The applicant also testified that her home was shot at by a loan shark because her husband borrowed money and did not pay him back. The applicant also testified that another of her brothers was killed by the rival gang. The applicant's [sic] testified that her family was targeted because her brother was involved with a gang and because her husband borrowed money from a loan shark."

27. Plaintiff K.G.J. and her minor child, Plaintiff J.G.J., are asylum seekers from Guatemala who participated in reasonable fear interviews at the South Texas Family Residential Center on October 3, 2019, October 9, 2019 and October 11, 2019. At the interviews, Plaintiff K.G.J. testified that gang members threatened her and her child, J.G.J., because of their relationship with her partner. Specifically, gang members told her partner they would kill her if her partner did not work for the gang. Her partner subsequently fled the country and the gang members then told K.G.J. they would kidnap J.G.J. if K.G.J. did not tell the gang where her partner was. On October 18, 2019, an asylum officer served Plaintiff K.G.J. and her child with a Form I-869A Record of Negative Credible/Reasonable Fear Finding and Request For Review by Immigration Judge for Aliens Barred From Asylum Pursuant to 8 CFR 208.13(c)(4) which stated USCIS's finding that "[t]here is no reasonable possibility that the harm you experienced and/or the harm you fear is on account of your race, religion, nationality, political opinion, or membership in a particular social group." In a checklist accompanying Plaintiff J.G.J.'s negative finding by USCIS, the asylum officer wrote "[t]he applicant was threatened because the gang was looking for the applicant's mother's partner, and they threatened to kidnap him because of this. A family PSG was considered, but there is insufficient evidence to establish any degree of social distinction of the applicant's family." In a checklist accompanying Plaintiff K.G.J.'s

negative finding by USCIS, the asylum officer wrote "[t]he applicant testified that she was threatened because the gang wanted to know where her partner was[.]"

28. Plaintiff M.A.C. and her minor child, Plaintiff I.G.C., are asylum seekers from Guatemala who participated in a reasonable fear interview at the South Texas Family Residential Center on October 9, 2019. At the interview, Plaintiff M.A.C. testified that gang members threatened M.A.C. and her son I.G.C. because of their familial relationship to her husband. Specifically, gang members threatened to kidnap or kill M.A.C. and her son I.G.C. if she did not tell the gang where her husband, who refused to work for the gang, was. On October 30, 2019, an asylum officer served Plaintiff M.A.C. and her child with a Form I-869A Record of Negative Credible/Reasonable Fear Finding and Request For Review by Immigration Judge for Aliens Barred From Asylum Pursuant to 8 CFR 208.13(c)(4) which stated USCIS's finding that "[t]here is no reasonable possibility that the harm you experienced and/or the harm you fear is on account of your race, religion, nationality, political opinion, or membership in a particular social group." In a checklist accompanying Plaintiff M.A.C.'s negative finding by USCIS, the asylum officer wrote "[t]he applicant testified that she was threatened by gangs in her area because the applicant and her husband refused to join them and work for them." In a checklist accompanying Plaintiff M.A.C.'s negative finding by USCIS, the asylum officer wrote "[t]he applicant testified that she was threatened by the gangs in her area because the applicant and her husband refused to join and work for them."

29. Plaintiff L.R.Q. and her minor child, Plaintiff E.M.M.R., are asylum seekers from Guatemala who participated in a reasonable fear interview at the South Texas Family Residential Center on October 9, 2019. At the interview, L.R.Q. testified that gang members had threatened to murder E.M.M.R. because of his relationship to his older brother (L.R.Q.'s eldest son), who

had refused to join the gang. Specifically, L.R.Q. testified that "I was told by them that because my other son had left Guatemala that my son was going to pay the consequences" and L.R.Q. understood this to mean that her son E.M.M.R. was going to be killed. On October 16, 2019, an asylum officer served Plaintiff L.R.Q. and her child with Forms I-869A Record of Negative Credible/Reasonable Fear Finding and Request For Review by Immigration Judge for Aliens Barred From Asylum Pursuant to 8 CFR 208.13(c)(4) which stated USCIS's finding that "[t]here is no reasonable possibility that the harm you experienced and/or the harm you fear is on account of your race, religion, nationality, political opinion, or membership in a particular social group." In a checklist accompanying Plaintiff L.R.Q.'s negative finding by USCIS, the asylum officer wrote "The applicant did not establish that the harm she fears and has experienced would be on account of any protected grounds. The applicant stated the gang's motive to harm her was because her son refused to join the gang and left to go to the United States. The gang's desire for retribution is not on account of any protected ground, but rather a private criminal act of vengeance against the applicant."

30. Plaintiff Y.C.D., a minor child, is an asylum seeker from Honduras who participated in a reasonable fear interview at the South Texas Family Residential Center on October 18, 2019. At the interview, Y.C.D.'s mother testified that gang members threatened Y.C.D. because of his familial relationship to his mother. Specifically, a gang member told Y.C.D.'s mother that he would kill her and Y.C.D. unless she "became his." On November 6, 2019, an asylum officer served Plaintiff Y.C.D. with a Form I-869A Record of Negative Credible/Reasonable Fear Finding and Request For Review by Immigration Judge for Aliens Barred From Asylum Pursuant to 8 CFR 208.13(c)(4). In a checklist accompanying Plaintiff Y.C.D.'s negative finding by USCIS, the asylum officer wrote "[t]his gang member's statements

indicate that [Y.C.D.] was threatened because the gang member wanted to make the applicant's mother live with him. The threats [Y.C.D.] faced were not on account of a protected ground."

31. Plaintiff J.S.R. and her minor child, Plaintiff J.N.R.S., are asylum seekers from Honduras who participated in a reasonable fear interview at the South Texas Family Residential Center on October 28, 2019. At the interview, J.S.R. testified that men threatened her and her child because of her relationship to her brother. Specifically, J.S.R.'s brother, who is a police officer in Honduras, advised her to leave the country because gang members had told him that they will find out where his family lives and go after his family. On November 4, 2019, an asylum officer served Plaintiff J.S.R. and her child with a Form I-869A Record of Negative Credible/Reasonable Fear Finding and Request For Review by Immigration Judge for Aliens Barred From Asylum Pursuant to 8 CFR 208.13(c)(4) which stated USCIS's finding that "[t]here is no reasonable possibility that the harm you experienced and/or the harm you fear is on account of your race, religion, nationality, political opinion, or membership in a particular social group." In a checklist accompanying Plaintiff J.S.R.'s negative finding by USCIS, the asylum officer wrote "[t]he applicant's testimony reflects that she was not targeted on account of a protected ground," even though her brother was told "[the gang] will find out where his family lives and go after his family."

32. Plaintiff S.G.F., and her minor children Plaintiffs L.O.G., T.O.G. and W.E.O.G. are asylum seekers from Honduras who participated in a reasonable fear interview at the South Texas Family Residential Center on October 7, 2019. At the interview, Plaintiff S.G.F. testified that gang members threatened to kill S.G.F., L.O.G., T.O.G. and W.E.O.G. because of their familial relationship to her husband. Specifically, gang members threatened to kill S.G.F. and her children if she did not tell the gang members where S.G.F.'s husband was. S.G.F.'s husband fled

after he reported the gang members to the police for robbing his brother. On October 10, 2019, an asylum officer served Plaintiff S.G.F. and her children with a Form I-869A Record of Negative Credible/Reasonable Fear Finding and Request For Review by Immigration Judge for Aliens Barred From Asylum Pursuant to 8 CFR 208.13(c)(4) which stated USCIS's finding that "[t]here is no reasonable possibility that the harm you experienced and/or the harm you fear is on account of your race, religion, nationality, political opinion, or membership in a particular social group." In a checklist accompanying Plaintiff S.G.F.'s negative finding by USCIS, the asylum officer wrote "[t]here is no social distinction to the family."

33. Plaintiff J.I.H.R., a minor child, is an asylum seeker from Mexico who participated in a credible fear interview at the South Texas Family Residential Center on October 30, 2019. At the interview, Plaintiff's mother testified that Zetas threatened J.I.H.R. because of his familial relationship to her. Specifically, Zetas threatened Plaintiff's mother and her son to extort money from Plaintiff's mother. After Plaintiff's mother gave them money, the Zetas came back a second time and told Plaintiff's mother that if she did not continue to give them money, they would make her and her son, Plaintiff J.I.H.R., disappear. On November 1, 2019, an asylum officer served Plaintiff J.I.H.R. with a Form I-869 Record of Negative Credible Fear Finding and Request for Review by Immigration Judge which stated USCIS's finding that "[t]here is no significant possibility that you could establish in a full hearing that the harm you experienced and/or the harm you fear is on account of your race, religion, nationality, political opinion, or membership in a particular social group." In a checklist accompanying Plaintiff J.I.H.R.'s negative finding by USCIS, the asylum officer wrote "[t]he applicant seeks protection on a basis of membership in a particular group, immediate family members of his mother, [M.O.R.S.]. However, the applicant has failed to establish that this proposed group is a cognizable social

group. This particular social group is not cognizable because it lacks social distinction. The applicant's family is not 'set apart, or distinct, from other persons within the society in some significant way.' Matter of L-E-A-, 27 I&N Dec. 581, 594 (A.G. 2019). The applicant's testimony did not establish that the immediate family members of his mother [M.O.R.S.], are significant within society in some way."

34. Plaintiff D.A.M. and her minor child, Plaintiff A.I.A., are asylum seekers from Mexico who participated in a credible fear interview at the South Texas Family Residential Center on October 11, 2019. At the interview, Plaintiff D.A.M. testified that a cartel has followed and threatened her. Specifically, D.A.M.'s husband disappeared two years ago. Since then she has been followed by members of a powerful cartel. In March 2019, a man with a gun came to her house, asking if she was the wife of her husband and if A.I.A. was her daughter. She responded yes, and the armed man went to speak with other armed men. D.A.M. was terrified because she believed they were the men responsible for her husband disappearing. D.A.M. had heard from other family members that the cartel wanted to kill her and she feared seeking protection from the police because she believed the police worked together with the cartel. On October 23, 2019, an asylum officer served Plaintiff D.A.M. and her child with a Form I-869 Record of Negative Credible Fear Finding and Request for Review by Immigration Judge which stated USCIS's finding that "Though, the applicant's testimony indicates that she is a member of the particular social group 'Family members of 'JI' the evidence does not [sic] that indicate that her family is socially distinct in Mexican society. Therefore, the evidence does not indicate that the applicant would be harmed on account of a protected ground."

35. Plaintiff D.A.L. is an asylum seeker from El Salvador who participated in a reasonable fear interview in June 7, 2017. On May 29, 2019, Plaintiff D.A.L. attended a negative

credible fear review hearing before the Los Angeles Immigration Court, during which D.A.L. provided evidence regarding her persecutors' family-based motivations that was not available to the USCIS asylum officer. The Immigration Judge affirmed the USCIS's negative determination. On May 31, 2019, Plaintiff DAL submitted a request to USCIS to reconsider its negative determination. In response to Plaintiff D.A.L.'s request, USCIS scheduled an interview on September 24, 2019, to receive additional evidence regarding Plaintiff D.A.L.'s asylum claim. At that interview, the asylum officer asked several questions regarding the fame or notoriety of Plaintiff D.A.L.'s family within El Salvador. On October 2, 2019, USCIS found that no change was warranted in the disposition of Plaintiff D.A.L.'s credible fear interview.

36. Defendant William Barr is sued in his official capacity as the Attorney General of the United States. In this capacity, he is responsible for the administration of the immigration laws pursuant to 8 U.S.C. § 1103, oversees the Executive Office for Immigration Review ("EOIR") (the administrative immigration court system), and is empowered to grant asylum or other immigration relief.

37. Defendant Chad Wolf is sued in his official capacity as the Acting Secretary of DHS. In this capacity, he directs each of the component agencies within DHS, including USCIS, United States Immigration and Customs Enforcement ("ICE"), and United States Customs and Border Protection ("CBP"). In his official capacity, Defendant Wolf is responsible for the administration of the immigration laws pursuant to 8 U.S.C. § 1103, and is empowered to grant asylum or other immigration relief.

38. Defendant Ken Cuccinelli is sued in his official capacity as the Acting Director of USCIS, which is the agency that, through its asylum officers, conducts interviews of certain individuals placed in expedited removal to determine whether they have a credible and/or

reasonable fear of persecution and should be permitted to apply for asylum or withholding of removal before an immigration judge.

39. Defendant James McHenry is sued in his official capacity as the Director of EOIR, the agency within the Department of Justice that, through its immigration judges, conducts limited review of negative credible and reasonable fear determinations.

BACKGROUND

A. Asylum and Withholding of Removal Protections in the United States

40. Pursuant to 8 U.S.C. § 1158(a)(1), any noncitizen "who is physically present in the United States or who arrives in the United States. . . irrespective of such alien's status, may apply for asylum[.]" To be eligible for asylum, a noncitizen must establish that she is "a refugee within the meaning of [8 U.S.C.] section 1101(a)(42)(A)[.]" 8 U.S.C. § 1158(b)(l)(A); *see also* 8 U.S.C. § 1158(b)(1)(B)(i). A refugee is defined as:

> any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, **membership in a particular social group**, or political opinion[.]

8 U.S.C. § 1101(a)(42)(A) (emphasis added).

41. Congress enacted the current asylum system in 1980 in order to bring U.S. law into conformity with our obligations under the United Nations Convention Relating to the Status of Refugees and 1967 United Nations Protocol Relating to the Status of Refugees. *See* Refugee Act of 1980, Pub. 96-212, 94 Stat. 102.

42. Consistent with international law, the definition of "refugee" does not require a showing of certain harm. Instead, individuals can establish eligibility for asylum based on a "well-founded fear of persecution," which the Supreme Court has defined as at least a 1 in 10

chance of persecution. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 430, 440-41 (1987).

43. A noncitizen who is ineligible for asylum may apply for other forms of relief, including withholding of removal in cases in which the applicant can show "that it is more likely than not that he or she would be persecuted on account of" a protected ground if removed from the United States. 8 C.F.R. § 1208.16(b)(2); *see also* 8 U.S.C. § 1231(b)(3).

B. The Expedited Removal System

44. Prior to 1996, noncitizens seeking protection from deportation or exclusion from the United States were generally entitled to a full hearing in immigration court, appellate review before the BIA, and judicial review in federal court even if they were outside the United States seeking entry.

45. In 1996, Congress created a new removal mechanism called "expedited removal" that could be used for certain noncitizens seeking admission to the United States. *See* 8 U.S.C. § 1225(b)(1).

46. Through expedited removal, the government can summarily remove noncitizens after a preliminary inspection by an immigration officer, so long as the noncitizens do not express a fear of persecution in their country of origin.

47. If noncitizens indicate any fear of returning to their home country, they are entitled to receive a "credible fear interview" with an asylum officer, a non-adversarial process intended "to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture." 8 C.F.R. § 208.30(d).

48. The asylum officer must "consider whether the [applicant's] case presents novel or unique issues that merit consideration in a full hearing before an immigration judge." 8 C.F.R. § 208.30(e)(4).

49. If the asylum officer makes a negative credible fear determination, the officer

must issue a written decision documenting "the officer's analysis of why, in light of [the] facts, the alien has not established a credible fear of persecution." 8 U.S.C. § 1225(b)(l)(B)(iii)(II).

50. In the expedited removal system, abbreviated credible fear proceedings often occur within days of arrival, with little to no preparation or assistance by counsel, little to no knowledge of asylum law by the applicant, no opportunity to examine witnesses or gather evidence, and while the individual is detained. It is thus unrealistic for applicants in the expedited removal system to present a fully developed asylum claim.

51. A noncitizen who receives a negative credible fear determination is entitled to request a prompt review of that determination by an immigration judge. 8 U.S.C. § 1225(b)(l)(B)(iii)(III); *see also* 8 C.F.R. § 208.30(g)(1).

52. However, immigration judge review of a negative credible fear decision does not entitle a noncitizen to many rights available in full removal proceedings under section 240 of the INA. And once an immigration judge makes a negative credible fear review decision, it is administratively final. Noncitizens who receive a negative credible fear determination by an asylum officer or immigration judge receive expedited removal orders and, upon removal, are subject to a five-year bar on admission to the United States. 8 U.S.C. § 1182(a)(9)(A)(i).

53. Given the truncated removal process and serious consequence of expedited removal, Congress was careful to include crucial protections to avoid sending asylum seekers back to harm. One such protection was to establish a low threshold at the credible fear stage to ensure that asylum seekers could develop valid asylum claims properly in a full trial-type hearing before an immigration judge. Congress thus viewed the credible fear process as an essential safeguard to prevent summary removals of bona fide asylum seekers.

54. To obtain asylum in full immigration removal proceedings, a noncitizen need only establish that there is a 1 in 10 chance that he or she will be persecuted on account of one of the five protected grounds for asylum.

55. By contrast, "[t]o prevail at a credible fear interview, the alien need only show a 'significant possibility' of a one in ten chance of persecution, i.*e.*, a fraction of ten percent." *Grace,* 344 F. Supp. 3d at 127 (D.D.C. 2018) (citing 8 U.S.C. § 1225(b)(l)(B)(v)). The reason for the low threshold at the credible fear stage is straightforward. An asylum claim is highly fact-specific and often will take significant time, resources, and expertise to develop, including expert testimony and extensive evidence about country conditions. It may also involve complex legal questions.

56. If an asylum officer finds that a noncitizen has a "credible fear," the individual is no longer subject to expedited removal proceedings and is entitled to a full removal hearing under 8 USC § 1229 before an immigration judge. At that hearing, the asylum seeker has the opportunity to develop a full record before the immigration judge, and the asylum seeker may appeal an adverse decision to the BIA and federal court of appeals. 8 C.F.R. § 208.30 (f); *see also* 8 U.S.C. § 1225(b)(l)(B)(ii).

C. Changes to the Expedited Removal System for Certain Noncitizens

57. Notwithstanding Congress' stated intent to protect bona fide asylum seekers from summary removal, on July 16, 2019, the Department of Justice ("DOJ") and the DHS published a joint interim final rule, entitled "Asylum Eligibility and Procedural Modifications." 84 Fed. Reg. 33,829 (July 16, 2019) (codified at 8 C.F.R. pts. 208, 1003, 1208).[2] The Rule imposes "a new mandatory bar for asylum eligibility for [noncitizens] who enter or attempt to enter the

[2] *See East Bay Sanctuary Covenant v. Barr*, 385 F. Supp. 3d 922, 935 (N.D. Cal. 2019) injunction stayed *sub. nom Barr v. East Bay Sanctuary Covenant*, ___ S. Ct. ____, 2019 WL 4292781 (Sept. 11, 2019).

United States across the southern border after failing to apply for protection from persecution or torture in at least one third country through which they transited en route to the United States." *Id.* at 33,830.

58. These noncitizens are still subject to expedited removal proceedings and, while they are presumed to be ineligible to seek asylum, the government must still screen them for potential eligibility for withholding of removal and protection under the Convention against Torture (CAT). Noncitizens subject to this recently promulgated regulation are evaluated by the asylum officer under a higher "reasonable fear" standard described in 8 C.F.R. § 208.30(e)(5)(iii), rather than the intentionally low "credible fear" standard discussed above.

59. Regardless of which standard is applied, Defendants' newly enacted policies have the same effect: they unlawfully deny relief to noncitizens by imposing new legal standards for family-based PSG claims that are inconsistent with U.S. law and treaty obligations.

D. The Decision and *Dicta* in L-E-A- II

60. On July 29, 2019, Attorney General Barr issued Matter of L-E-A, 27 I. & N. Dec. 581 (A.G. 2019), which reversed part of a 2017 BIA decision discussing whether a Mexican man who fled extreme violence at the hands of a drug cartel had established a cognizable family-based PSG. The earlier decision acknowledged that "members of an immediate family may constitute a particular social group"—a determination that was conceded by the Government in that case—but proceeded to deny Mr. L-E-A's claims, finding that his feared persecution from the cartel had an insufficient nexus to his family membership.

61. Although the BIA had already denied Mr. L-E-A's claims on nexus grounds, Defendant Barr's predecessor, Acting Attorney General Whitaker, employed a procedural mechanism to "certify" the BIA's prior decision to the Attorney General for review.

62. Despite affirming the BIA's denial based on lack of nexus in the prior decision, Defendant Barr used this procedure as a vehicle to criticize the BIA and IJ below for accepting the Government's stipulation that Mr. L-E-A's family qualified as a PSG without undertaking an independent factual analysis.

63. In addressing this issue, Defendant Barr relied on a narrow and uncontroversial legal principle: to determine whether an applicant for asylum or withholding is a member of a family-based "particular social group," for purposes of the INA, courts must assess all three PSG criteria identified in prior cases—immutability, particularity, and social distinction—on a case-by-case basis. *See* 27 I. & N. Dec. at 582, 584.

64. In this respect, *L-E-A- II* broke no new ground; it simply reaffirmed settled law requiring adjudicators analyzing proposed particular social groups to conduct "a fact-specific inquiry based on the evidence in a particular case." *See* 27 I. & N. Dec. at 584.

65. Despite the Attorney General's stated adherence to the principle of case-by-case adjudication, he nonetheless made several statements in *dicta* suggesting that family-based groups *usually* will not meet the social distinction requirement for PSGs.

66. For example, he stated that "unless an immediate family carries greater societal import, it is unlikely that a proposed family-based group will be 'distinct' in the way required by the INA for purposes of asylum." *Id.* at 595.

67. The Attorney General further surmised that "[t]he fact that 'nuclear families' or some other widely recognized family unit generally carry societal importance says nothing about whether a *specific* nuclear family would be 'recognizable by society at large.'" *Id.* at 594 (citation omitted).

68. The Attorney General's statements represent a radical departure from past

precedent by imposing new criteria to meet the social distinction requirement under which an applicant's family must "carr[y] greater societal import" than ordinary families and be "recognizable by society at large."

69. This new legal standard precludes members of "ordinary" nuclear families from seeking protection from persecution based on their family membership and would arbitrarily limit asylum protections to members of well-known or famous families.

E. The New PSG Guidance

70. On September 24, 2019, USCIS issued a written Refugee, Asylum, and International Operations Directorate Officer Training Asylum Division Officer Training Course ("Credible Fear Lesson Plan"), entitled *Credible Fear of Persecution and Torture Determinations* (attached hereto as Exhibit A).

71. The Credible Fear Lesson plan instructs asylum officers to implement the *dicta* of *L-E-A- II* as follows:

> The relevant question in this analysis is not whether the degree and type of relationship that defines a potential family-based particular social group is immutable, particular and socially distinct. Rather, "[i]f an applicant claims persecution based on membership in his father's immediate family, then the adjudicator must ask whether that specific family is 'set apart, or distinct, from other persons within the society in some significant way.' It is not sufficient to observe that the applicant's society (or societies in general) place great significance on the concept of the family." Matter of L-E-A-, 27 I&N Dec. at 594 (citing M-E-V-G-, 26 I&N Dec. at 238). Matter of L-E-A- instructs that "[t]he fact that 'nuclear families' or some other widely recognized family unit generally carry societal importance says nothing about whether a specific nuclear family would be 'recognizable by society at large'" *Id.* Therefore, officers must analyze the specific group of people identified as a family group in making this assessment. Previous guidance that instructed officers to assess whether the society in question recognizes the type of relationship shared by the group as significant or distinct is no longer valid under Matter of L-E-A-.

See Credible Fear Lesson Plan at 23.

72. On or around September 30, 2019,[3] USCIS issued an unsigned, undated Policy Memorandum titled Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with Matter of L-E-A- ("USCIS Guidance") (attached hereto as Exhibit B).

73. The USCIS Guidance likewise instructs asylum officers to apply the *dicta* of *L-E-A- II* when conducting credible and reasonable fear interviews. It specifically directs that "in the ordinary case, a nuclear family will not, without more, constitute a 'particular social group' because most nuclear families are not inherently socially distinct." USCIS Guidance, at 3-4; *see also id.* at 1 (indicating that the "Authority" for the USCIS Guidance includes the expedited removal statute, 8 U.S.C. § 1225, and it's implementing regulations at 8 C.F.R. §§ 235 and 208).

74. The USCIS Guidance also announces a new policy not mentioned in *L-E-A- II* by mandating that, in making credible and reasonable fear determinations, USCIS asylum officers must ignore all federal court of appeals cases recognizing that ordinary families unambiguously qualify as PSGs under the INA:

> While a court order in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), currently requires officers to apply the law of the circuit most favorable to an alien undergoing credible fear screening, the Attorney General's decision in *Matter of L-E-A- [II]* is controlling law in every circuit, and must be applied going forward in every circuit, unless and until a circuit court holds to the contrary. The Attorney General in L-E-A- held that previous courts of appeals decisions that held that nuclear families categorically constituted particular social groups were interpretations of "particular social group," an ambiguous statutory term that the Attorney General has discretion to reasonably interpret. The Attorney General has reasonably interpreted that term to require social distinction and particularity, and has predicted that many family-based groups may not meet those requirements.

[3] While this document is undated, the publically available USCIS Memoranda website lists its publication date as September 30, 2019. *See* https://www.uscis.gov/legal-resources/policy-memoranda.

USCIS Guidance at 2, n.1.

75. This Court recently issued a preliminary injunction against Defendants, prohibiting them from applying a very similar guidance memorandum in *Grace*, and holding that directing asylum officers to ignore controlling court of appeals precedent is "clearly unlawful." 344 F. Supp. 3d at 137-38.

76. *L-E-A- II* and the subsequently issued guidance documents establish written policies concerning credible and reasonable fear interviews and implementing the expedited removal provisions at 8 U.S.C. § 1225(b)(I).

77. The Credible Fear Lesson Plan and USCIS Guidance (collectively, "New PSG Guidance") were first implemented during the last 60 days.

F. The Instruction to Reject PSGs Based on "Ordinary" Families Is Unlawful

78. The New PSG Guidance effects an irrational and unlawful change in our asylum laws that would reverse decades of federal courts of appeals and BIA authority interpreting the phrase "particular social group" as encompassing ordinary families. This New PSG Guidance (i) violates the APA because it is arbitrary, capricious, and contrary to law; and (ii) violates the INA and Refugee Act by imposing an unlawful presumption against family-based PSGs.

1. The Effort to Deny Protection to "Ordinary" Families Is Based on an Unreasonable Interpretation of the INA That Arbitrarily Departs from Past BIA and Federal Courts of Appeals Precedent

79. *Dicta* in *L-E-A- II* weights the PSG analysis heavily against family-based claims by adding an additional criterion, requiring applicants to show not just that their family is "distinct," but that it "carries greater societal import" than most families. 27 I. & N. Dec. at 595.

80. Based on the *dicta* in *L-E-A- II*, the New PSG Guidance instruct asylum

officers to reject claims based on membership in family-based PSGs in all but the most extraordinary cases. *See* USCIS Guidance, at 3-4 (directing that "in the ordinary case, a nuclear family will not, without more, constitute a 'particular social group' because most nuclear families are not inherently socially distinct.").

81. The New PSG Guidance violates the APA because its instruction to asylum officers represents a radical change in law that is arbitrary, capricious, is not the product of reasoned decision making, and "was neither adequately explained [] nor supported by agency precedent." *Grace*, 344 F. Supp. at 120 (internal citation omitted).

82. Relying on the *dicta* of *L-E-A- II*, the New PSG Guidance seeks to reverse decades of uniform federal courts of appeals and BIA precedent holding that ordinary families qualify as PSGs under the plain language of the INA.

83. The USCIS Guidance asserts that the Attorney General is free to reverse decades of court and BIA precedent, and is entitled to *Chevron* deference in doing so, because the term particular social group is ambiguous. USCIS Guidance at 2, n.1. But while courts have recognized that the outer contours of this term may be ambiguous, they have uniformly held that the particular social group unambiguously encompasses ordinary nuclear families.

84. The *dicta* in *L-E-A II* is at odds with the conclusion of *every* federal court of appeals that has ever interpreted this language. *See Villalta-Martinez v. Sessions*, 882 F.3d 20, 26 (1st Cir. 2018) ("[I]t is well established that the nuclear family constitutes a recognizable social group . . . ."); *Vanegas-Ramirez v. Holder*, 768 F.3d 226, 237 (2d Cir. 2014) (petitioner's "membership in his family may, in fact, constitute a 'social-group basis of persecution' against him"); *Vumi v. Gonzales*, 502 F.3d 150, 155 (2d Cir. 2007) (remanding a family-based claim because "[t]he BIA has long recognized that 'kinship ties' may form a cognizable shared

characteristic for a particular social group"); *S.E.R.L. v. Att'y Gen.*, 894 F.3d 535, 556 (3d Cir. 2018) ("Kinship, marital status, and domestic relationships can each be a defining characteristic of a particular social group . . . ."); *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) ("the family provides a prototypical example of a particular social group") (internal quotations omitted); *Al–Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009) ("[A] family is a 'particular social group' if it is recognizable as a distinctive subgroup of society."); *Torres v. Mukasey*, 551 F.3d 616, 629 (7th Cir. 2008) ("Our prior opinions make it clear that we consider family to be a cognizable social group . . . ."); *Ayele v. Holder*, 564 F.3d 862, 869 (7th Cir. 2009) ("Our circuit recognizes a family as a cognizable social group under the INA."); *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005) ("[P]etitioners correctly contend that a nuclear family can constitute a social group."); *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (families are "quintessential" particular social groups); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 648 (10th Cir. 2012) (approvingly citing the Board's prior characterization of particular social groups as including those bound by kinship ties formulation); *Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190, 1193 (11th Cir. 2006) (same).

85. Independent of overwhelming past precedent, the New PSG Guidance's directive that an "ordinary" family cannot be a "particular social group" within the meaning of the INA is not a reasonable interpretation of that broad statutory term.

86. Congress adopted the facially broad term "particular social group" into the INA through the Refugee Act of 1980.

87. The "motivation for the enactment of the Refugee Act" was the "United Nations Protocol Relating to the Status of Refugees ["Protocol"]," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 424, "to which the United States had been bound since 1968," *id.* at 432–33.

88. Thus, "[i]n interpreting the Refugee Act in accordance with the meaning intended by the Protocol, the language in the Act should be read consistently with the United Nations' interpretation of the refugee standards." *Grace*, 344 F. Supp. 3d at 124.

89. The term "particular social group" is a term of art first used in the 1951 Refugee Convention.[4] Since that time, the family unit has been closely associated with the idea of a social group as those terms were used in post-war international human rights law instruments. Both the conference that unanimously adopted the 1951 Refugee Convention[5] and the Universal Declaration of Human Rights,[6] which was passed just two years earlier, explicitly recognize the principle that "the family" is "the natural and fundamental group unit of society."[7]

90. The BIA has long recognized that Congress' intent in enacting the Refugee Act was to align domestic refugee law with the United States' obligations under the Protocol, to give statutory meaning to "our national commitment to human rights and humanitarian concerns," and "to afford a generous standard for protection in cases of doubt." *In Re S-P-*, 21 I. & N. Dec. 486, 492 (B.I.A. 1998) (quoting S. REP. NO. 256, 96th Cong., 2d Sess. 1, 4, reprinted in 1980 U.S.C.C.A.N. 141, 144).

91. For decades, BIA precedent has uniformly recognized that families are paradigmatic particular social groups for the purposes of the INA. *See Matter of C-A-*, 23 I. & N. Dec. 951, 955 (BIA 2006) ("[s]ocial groups based on . . . family relationship are generally easily

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[4] *See* Art. 1(A)(2), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 (Refugee Convention).
[5] United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.*, U.N. Doc. A/CONF.2/108/Rev.1, https:// www.refworld.org/docid/40a8a7394.html (July 25, 1951).
[6] G.A. Res. 217A, U.N. GOAR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948).
[7] *See also Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, U.N. Doc. A/CONF.2/108/Rev.1 (articulating principle that "the family" is "the natural and fundamental group unit of society"). This language was adopted concurrently with the 1951 Refugee Convention, where the term "particular social group" was first used. Thus, the intent behind the original use of that term, later imported into the INA, was in fact to encompass and protect families.

recognizable and understood by others to constitute social groups"); *Matter of V-T-S-*, 21 I. & N. Dec. 792, 798 (BIA 1997) (en banc) (analogizing the group "Filipino[s] of mixed Filipino-Chinese ancestry" to "kinship ties" when concluding it constituted a particular social group); *Matter of Kasinga*, 21 I. & N. Dec. 357, 365-66 (BIA 1996) (en banc) ("identifiable shared ties of kinship warrant characterization as a social group"); *Matter of H-*, 21 I. & N. Dec. 337, 342 (BIA 1996) (en banc) (noting that "clan membership . . . is inextricably linked to family ties" and therefore grounds for finding a particular social group); *see also Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 240 (BIA 2014) (noting that the particular social group found in a prior case was "inextricably linked to family ties"); *Matter of W-G-R-*, 26 I. & N. Dec. 208, 216 (BIA 2014) (same).

92. The Board has also previously interpreted the "social distinction" component of the "particular social group" analysis to be focused "on the extent to which the group is understood to exist as a recognized component of the society in question." *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (BIA 2014). The Board explained in *M-E-V-G-* that a "successful case"—*i.e.*, one in which the proposed group meets the standard—is one in which a group "is set apart within society in some significant way." *Id.* at 244.

93. The Attorney General's *dicta* in *L-E-A- II* is an abrupt departure from this well-settled law. It imposes a new requirement that PSGs not only be socially distinct but also be of "greater societal import" than "ordinary" groups. And it produces an irrational result that arbitrarily denies protections to member of "ordinary" nuclear families, while providing the same protections to members of well-known or famous families.

94. Moreover, while the Attorney General recognized that he was departing from federal courts of appeals precedent addressing family-based PSGs generally, he did not

acknowledge or explain his departure from precedent specifically addressing the "social distinction" component of the "particular social group" analysis, including *Matter of M-E-V-G-*. The absence of this recognition and a reasoned explanation further renders that departure unreasonable. *See Encino Motorcars, LLC v. Navarro,* 136 S. Ct. 2117, 2126 (2016) (an agency changing its interpretation of a statute must "at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy'") (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

95. The *dicta* of *L-E-A- II*, which the government has now attempted to make the law of the land by instructing asylum officers to follow it in the New PSG Guidance, is also poorly reasoned and illogical.

96. The Attorney General attempted to justify his reinterpretation of the INA by misapplying the *ejusdem generis* canon of construction, claiming that that canon requires the term "particular social group" be read "in conjunction with the terms preceding it, which cabins its reach." *Matter of L-E-A-*, 27 I. & N. Dec. at 592. But the terms surrounding "particular social group"—"political opinion," "religion," "race," and "nationality" (8 U.S.C. § 1101(a)(42)(A))—are all extremely broad.

97. Few persons exist who do not belong to a race, practice a religion, have a nationality, or hold a political opinion. Correctly applied, then, the *ejusdem generis* canon indicates that the term "particular social group" casts a very wide net. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 587 (2008).

98. The Attorney General also suggested that a broad interpretation of "particular social group" would "render virtually every [applicant] a member of a [particular social group]" and thus eligible for relief. 27 I. & N. Dec. at 593.

99. But that conflates the particular social group analysis with the *separate* requirement that an applicant show that he was persecuted *because of* membership in a particular social group (the "nexus" requirement). Thus, the Attorney General's suggestion that interpreting "particular social group" to include ordinary families would unreasonably extend asylum eligibility is logically flawed.

100. The Attorney General further argued that "particular social group" should not be interpreted to encompass ordinary families because "family" is not one of the grounds for protection explicitly listed in the INA. *See Matter of L-E-A,* 27 I. & N. Dec. at 583. The INA term "particular social group," however, is intentionally broad, and does not explicitly list any recognized groups. Congress' decision to use the broad international law term "particular social group," long understood to encompass families, rendered it unnecessary for Congress to also specifically list "family" as a protected group.

101. And, in *Matter of Acosta,* the seminal Board decision interpreting that term for the first time, the Board specified that "kinship ties" are a "characteristic that defines a particular social group," *see Matter of Acosta*, 19 I. & N. Dec. at 233, further indicating that the term was originally intended by Congress to encompass families. In any event, the Attorney General's argument that specific types of PSGs must be named in the INA to qualify for protection thereunder would render the "particular social group" language meaningless contrary to longstanding principles of statutory interpretation. *See Montclair v. Ramsdell,* 107 U.S. 147, 152 (1883) (interpreter must "give effect, if possible, to every clause and word of a statute"); *U.S. v. Perchman*, 42 U.S. 51, 69-70 (1833) ("It is one of the admitted rules of construction, that interpretation which . . . render an act null, are to be avoided").

102. Because the Attorney General's *dicta* suggesting that "ordinary" families

generally are not particular social groups is an unreasonable reading of the INA—as evidenced by the dozens of federal courts of appeals and Board decisions to the contrary—poorly reasoned, and inadequately explained, the implementation of this *dicta* in the New PSG Guidance is arbitrary, deprives asylum seekers of an impartial adjudication of their claims based on the specific facts of their cases, represents an improper departure from prior policy and reflects Defendants' unlawful presumption against entire categories of claims at the credible and reasonable fear stage.

2. The INA and Refugee Act Prohibit a Presumption Against Family-Based PSGs

103. The New PSG Guidance also violates the INA and Refugee Act because it instructs asylum officers to apply a presumption against claims premised on family-based PSGs. The USCIS Guidance explicitly informs asylum officers that "in the ordinary case, a nuclear family will not, without more, constitute a 'particular social group' because most nuclear families are not inherently socially distinct." USCIS Guidance, at 3-4.

104. The INA and Refugee Act, however, require an individualized approach to asylum adjudication.

105. In *Grace*, this Court struck down a similar directive creating a presumption against asylum claims premised on social groups related to victims of gang and domestic violence. As the Court held, such a "general rule is arbitrary and capricious because there is no legal basis for an effective categorical ban on" certain categories of PSGs and "runs contrary to the individualized analysis required by the INA." 344 F. Supp. 3d at 126. As the Court further explained:

> A general rule that effectively bars. . . claims related to certain kinds of violence is inconsistent with Congress' intent to bring "United States refugee law into conformance with the [Protocol]." *Cardoza-Fonseca*, 480 U.S. at 436-37, 107 S.Ct. 1207. The new general rule is thus contrary to the Refugee Act and the

> INA. In interpreting "particular social group" in a way that results in a general rule, in violation of the requirements of the statute, the Attorney General has failed to "stay[ ] within the bounds" of his statutory authority. *District of Columbia v. Dep't of Labor*, 819 F.3d at 449.

Id.

G. The Instruction to Disregard Contrary Court of Appeals Precedent Violates the APA

106. The New PSG Guidance is also unlawful because it instructs asylum officers to disregard any court of appeals precedent that contradicts the *dicta* of *L-E-A- II*. That wholesale rejection of federal court precedent contradicts basic separation-of-powers principles, and represents an irrational and radical departure from longstanding agency practice in violation of the APA.

107. The USCIS Guidance informs asylum officers that "the Attorney General's decision in Matter of L-E-A- [II] is controlling law in every circuit, and must be applied going forward in every circuit, unless and until a circuit court holds to the contrary." USCIS Guidance at 2, n.1.

108. But it is essential to our constitutional system that Executive Branch officials are bound by the decisions of Article III courts. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see also Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958).

109. This Court recently issued a preliminary injunction against Defendants prohibiting them from applying a similar directive in *Grace*, holding that directing asylum officers to ignore controlling court of appeals precedent is "clearly unlawful." 344 F. Supp. 3d at 137-38.

110. As this Court explained, "an agency's interpretation of a provision may override a prior court's interpretation if the agency is entitled to Chevron deference and the agency's interpretation is reasonable. If the agency is not entitled to deference or if the

agency's interpretation is unreasonable, a court's prior decision interpreting the same statutory provision controls." *Id.* at 137.

111. First, the simple fact that the Attorney General's discussion of family-based PSGs is *dicta* precludes Chevron deference with respect to those statements as a matter of law. *See Grace*, 344 F. Supp. 3d at 138 ("the only legal effect of [the Attorney General decision] is to overrule [a particular BIA decision]. Any other [] dicta would not be entitled to deference.").

112. Second, the BIA and federal courts of appeals have uniformly held that, while the outer contours of the term may be ambiguous, the term "particular social group" unambiguously encompasses the ordinary nuclear family. *See, e.g.*, *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) ("the family provides a prototypical example of a particular social group") (internal quotations omitted); *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (families are "quintessential" particular social groups); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 648 (10th Cir. 2012) (approvingly citing the Board's prior characterization of particular social groups as including those bound by kinship ties formulation); *Castillo-Arias v. Att'y Gen.*, 446 F.3d 1190, 1193 (11th Cir. 2006) (same).

113. Third, the Attorney General's newly proposed interpretation of the phrase "particular social group" is unreasonable in light of the legislative history and text of the INA and violates the INA's prohibition against establishing general presumptions against certain categories of asylum seekers.

114. Fourth, while the Attorney General recognized that he was departing from federal courts of appeals precedent addressing family-based PSGs generally, he did not acknowledge his departure from precedent specifically addressing the "social distinction"

component of the "particular social group" analysis, including *Matter of M-E-V-G-*. The failure to explain this departure from past Board precedent further renders that departure unreasonable. *See Encino Motorcars, LLC,* 136 S. Ct. at 2126 (an agency changing its interpretation of a statute must "at least 'display awareness that it is changing position' and 'show that there are good reasons for the new policy'") (quoting *FCC v. Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009)).

115. The directive of the New PSG Guidance represents an irrational and radical departure from longstanding agency practice, based on unreasonable interpretation of the INA and without any well-reasoned explanation. The New PSG Guidance is not entitled to *Chevron* deference, and this Court should enjoin its directive that asylum officers disregard controlling court of appeals precedent.

H. The New PSG Guidance Places Plaintiffs in Grave Danger

116. Under the correct legal standards, each of the Plaintiffs would have passed their credible or reasonable fear interview and would have been referred for full removal proceedings to seek asylum or withholding of removal. Instead, because of the New PSG Guidance, asylum officers summarily denied their claims.

117. Like the Plaintiff, thousands of similarly situated noncitizens have received or will receive negative determinations based on the new policies.

118. Defendants' New PSG Guidance is depriving Plaintiffs and other noncitizens of their right to pursue potentially meritorious claims for protection in full removal proceedings. As a result of the New PSG Guidance, there has been a dramatic increase in the number of negative determinations issued to non-citizens presenting claims based on family-based PSGs. *See* https://www.theguardian.com/us-news/2019/nov/13/asylum-credible-fear-interview-immigration-women-children-lawsuit.

119. As a result of the New PSG Guidance, the Plaintiffs and other noncitizens with meritorious claims for protection will be deported to their country of origin, where they will suffer violent persecution on account of their family membership.

FIRST CLAIM FOR RELIEF
(Violation of Immigration and Nationality Act, Refugees Act, and Administrative Procedure Act)

120. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

121. Pursuant to 8 U.S.C. § 1252(e)(3), judicial review is available before the Court regarding whether "a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement [8 U.S.C. § 1252(b)] is not consistent with applicable provisions of [Subchapter II of the INA] or is otherwise in violation of law."

122. The APA, 5 U.S.C. § 706, provides that a Court "shall hold unlawful and set aside agency action, findings, and conclusions found to be-(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

123. The New PSG Guidance violates the INA and Refugee Act by imposing an unlawful presumption against family-based PSGs, arbitrarily departing from decades of agency guidance requiring an individualized, fact-based, case-by-case social group analysis.

124. The New PSG Guidance also unreasonably and unlawfully interprets the INA term "particular social group" to exclude most families, which is at odds with the statutory text, context, and legislative history, and contrary to a substantial body of federal courts of

appeals and BIA precedent.

125. And the New PSG Guidance fails to adequately acknowledge, much less reasonably explain, its departure from settled law.

126. Because it is arbitrary, capricious, and contrary to law, the New PSG Guidance must be vacated under the Administrative Procedure Act.

SECOND CLAIM FOR RELIEF
(Administrative Procedure Act)

127. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

128. The New PSG Guidance violates the APA by explicitly prohibiting asylum officers from applying decades of controlling precedent from the courts of appeals and the BIA recognizing that ordinary families constitute quintessential PSGs.

129. The New PSG Guidance fails to adequately acknowledge, much less reasonably explain, its departure from settled law.

130. Because it is arbitrary, capricious, and contrary to law, the New PSG Guidance must be vacated under the Administrative Procedure Act.

THIRD CLAIM FOR RELIEF
(Due Process Clause of the Fifth Amendment to the United States Constitution)

131. All of the foregoing allegations are repeated and realleged as if fully set forth herein.

132. Plaintiffs have protected interests in applying for asylum and withholding of removal upon a showing that meets the applicable standards, and in not being removed to a country where they face serious danger and potential loss of life.

133. Plaintiffs are entitled under the Due Process Clause to a fair hearing of their claims, and a meaningful opportunity to establish their potential eligibility for asylum and withholding of

removal.

134. The New PSG Interview Policy has violated Plaintiffs' right to due process in numerous respects, including by foreclosing their claims regardless of their individual facts or merits; by applying an unlawful, more burdensome legal standard to Plaintiffs' claims; and by depriving them of a meaningful opportunity to establish their potential eligibility for asylum and withholding of removal.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray this Court to:

a. Declare the New PSG Guidance (including but not limited to *L-E-A- II,* the Credible Fear Lesson Plan, USCIS Guidance, and all written guidance issued by DHS and DOJ relating to *L-E-A- II)* contrary to law;

b. Enter an order vacating the New PSG Guidance (including but not limited to the Credible Fear Lesson Plan, USCIS Guidance, and all written credible fear guidance issued by DHS and DOJ relating to *L-E-A- II);*

c. Enter an order enjoining Defendants from continuing to apply the New PSG Guidance (including but not limited to the Credible Fear Lesson Plan, USCIS Guidance and all written guidance issued by DHS and DOJ relating to *L-E-A- II)* to credible or reasonable fear determinations, interviews, or hearings issued or conducted by asylum officers or immigration judges;

d. Enter an order staying the expedited removal of each of the Plaintiffs and vacating the expedited removal orders issued to each of the Plaintiffs;

e. Enter an order enjoining Defendants from removing the Plaintiffs without first providing each of them with a new credible or reasonable fear process under correct legal standards

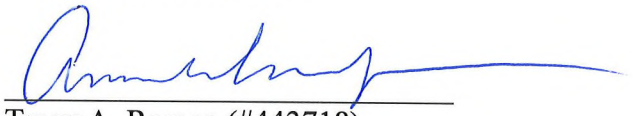
or, in the alternative, full immigration court removal proceedings pursuant to 8 U.S.C. § 1229a; and, for any Plaintiffs who have been removed pursuant to an expedited removal order prior to the Court's order, to parole those Plaintiffs into the United States for the duration of those credible fear and/or removal proceedings;

f. Award Plaintiffs' counsel reasonable attorneys' fees under the Equal Access to Justice Act, and any other applicable statute or regulation; and

g. Grant such further relief as the Court deems just, equitable, and appropriate.

Dated: November 22, 2019

Respectfully submitted,



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**Application for admission pro hac vice forthcoming*

Exhibit A

Lesson Plan Overview

Course	Refugee, Asylum, and International Operations Directorate Officer Training Asylum Division Officer Training Course
Lesson	***Credible Fear of Persecution and Torture Determinations***
Rev. Date	September 24, 2019
Lesson Description	The purpose of this lesson is to explain how to determine whether an alien subject to expedited removal or an arriving stowaway has a credible fear of persecution or torture.
Terminal Performance Objective	The Asylum Officer will be able to correctly make a credible fear determination consistent with the statutory provisions, regulations, policies, and procedures that govern whether the applicant has established a credible fear of persecution or a credible fear of torture.
Enabling Performance Objectives	1. Identify which persons are subject to expedited removal. (ACRR7)(OK4)(ACRR2)(ACRR11)(APT2) 2. Examine the function of credible fear screening. (ACRR7)(OK1)(OK2)(OK3) 3. Define the standard of proof required to establish a credible fear of persecution. (ACRR7) 4. Identify the elements of "torture" as defined in the Convention Against Torture and the regulations that are applicable to a credible fear of torture determination (ACRR7) 5. Describe the types of harm that constitute "torture" as defined in the Convention Against Torture and the regulations. (ACRR7) 6. Define the standard of proof required to establish a credible fear of torture. (ACRR7) 7. Identify the applicability of bars to asylum and withholding of removal in the credible fear context. (ACRR3)(ACRR7)
Instructional Methods	Lecture, practical exercises
Student Materials/ References	Lesson Plan; Procedures Manual, Credible Fear Process (Draft); INA § 208; INA § 235; INA § 241(b)(3); 8 C.F.R. § 1.2; 8 C.F.R. §§ 208.16-18; 8 C.F.R. § 208.30; 8 C.F.R. § 235.3. Credible Fear Forms: **Form I-860**: Notice and Order of Expedited Removal; **Form I-867-A&B**: Record of Sworn Statement; **Form I-869**:

Record of Negative Credible Fear Finding and Request for Review by Immigration Judge; **Form I-863**: Notice of Referral to Immigration Judge; **Form I-870**: Record of Determination/Credible Fear Worksheet; **Form M-444**: Information about Credible Fear Interview

Method of Evaluation Written test

Background Reading

1. Immigration and Naturalization Service, *Inspection and Expedited Removal of Aliens; Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10312 (March 6, 1997).

2. Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478 (February 19, 1999).

3. Immigration and Naturalization Service, *Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act*, 67 Fed. Reg. 68924 (November 13, 2002).

4. Immigration and Customs Enforcement, *Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture*, ICE Directive No. 11002.1 (effective January 4, 2010).

5. Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air*, 82 Fed. Reg. 4769 (January 17, 2017).

6. Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 4902 (January 17, 2017).

7. Department of Homeland Security, *Designating Aliens for Expedited Removal*, 84 Fed. Reg. 35409-01 (July 23, 2019).

8. H.R. Rep. No. 109-72 at 161-68 (2005).

CRITICAL TASKS

Critical Tasks

Knowledge of U.S. case law that impacts RAIO (3)
Knowledge of the Asylum Division history. (3)
Knowledge of the Asylum Division mission, values, and goals. (3)
Knowledge of how the Asylum Division contributes to the mission and goals of RAIO, USCIS, and DHS. (3)
Knowledge of the Asylum Division jurisdictional authority. (4)
Knowledge of the applications eligible for special group processing (e.g., ABC, NACARA, Mendez) (4)
Knowledge of relevant policies, procedures, and guidelines establishing applicant eligibility for a credible fear of persecution or credible fear of torture determination. (4)
Skill in identifying elements of claim. (4)
Skill in assessing credibility of aliens in credible fear interviews (4)
Knowledge of inadmissibility grounds relevant to the expedited removal process and of mandatory bars to asylum and withholding of removal. (4)
Knowledge of the appropriate points of contact to gain access to a claimant who is in custody (e.g., attorney, detention facility personnel) (3)
Skill in organizing case and research materials (4)
Skill in applying legal, policy, and procedural guidance (e.g., statutes, case law) to evidence and the facts of a case. (5)
Skill in analyzing complex issues to identify appropriate responses or decisions. (5)

TABLE OF CONTENTS

Presentation **References**

I. INTRODUCTION

The purpose of this lesson plan is to explain how to determine whether an alien seeking admission to the United States, who is subject to expedited removal or is an arriving stowaway, has a credible fear of persecution or torture using the credible fear standard defined in the Immigration and Nationality Act (INA or the Act), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and implementing regulations.

II. BACKGROUND

The expedited removal provisions of the INA were added by section 302 of IIRIRA, and became effective on April 1, 1997.

INA § 235(a)(2); § 235 (b)(1); *see* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Pub. L. No. 104-208, 110 Stat. 3009, Sept. 30, 1996).

In expedited removal, certain aliens seeking admission to the United States are immediately removable from the United States by the Department of Homeland Security (DHS), unless they indicate an intention to apply for asylum or express a fear of persecution or torture or a fear of return to their home country, in which case they are referred to an asylum officer to determine whether they have a credible fear of persecution or torture. Aliens who are present in the United States, and who have not been admitted, are treated as applicants for admission. In general, aliens subject to expedited removal are not entitled to a full immigration removal hearing or further review by a federal court unless they are able to establish a credible fear of persecution or torture.

INA § 235(a)(1).

INA section 235 and its implementing regulations provide that certain categories of aliens are subject to expedited removal. Those include the following: arriving stowaways; certain arriving aliens at ports of entry who are inadmissible under INA section 212(a)(6)(C) (because they have presented fraudulent documents or made a false claim to U.S. citizenship or other material misrepresentations to gain admission or other immigration benefits) or 212(a)(7) (because they lack proper documents to gain admission); and certain designated aliens who have not been admitted or paroled into the U.S.

Those aliens subject to expedited removal who indicate an intention to apply for asylum, a fear of persecution or torture, or a fear of return to their home country are referred to asylum officers to determine whether they have a credible fear of persecution or torture. An asylum officer will then conduct a credible fear interview to determine whether there is a significant possibility that the alien can establish eligibility for asylum as a refugee under section 208 of the

INA § 235(b)(1)(A); 8 C.F.R. § 208.30.

INA or withholding of removal under section 241(b)(3) of the INA. Pursuant to regulations implementing the Convention Against Torture (CAT) issued under the authority of the Foreign Affairs Reform and Restructuring Act of 1998, if an alien does not establish a credible fear of persecution, the asylum officer will then determine whether there is a significant possibility the alien can establish eligibility for protection under the Convention Against Torture through withholding of removal or deferral of removal.

Sec. 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277, Div. G, Oct. 21, 1998) and 8 C.F.R. § 208.30(e)(3).

A. Aliens Who May Be Subject to Expedited Removal

The following categories of aliens may be subject to expedited removal:

1. Arriving aliens coming or attempting to come into the United States at a port of entry or an alien seeking transit through the United States at a port of entry.

   8 C.F.R. § 235.3(b)(1)(i); *see* 8 C.F.R. § 1.2 for the definition of an "arriving alien."

   Aliens attempting to enter the United States at a land border port of entry with Canada must first establish eligibility for an exception to the Safe Third Country Agreement, through a Threshold Screening interview, in order to receive a credible fear interview.

   8 C.F.R. § 208.30(e)(6). *See also* ADOTC Lesson Plan, *Safe Third Country Threshold Screening.*

2. Aliens who are interdicted in international or United States waters and brought to the United States by any means, whether at a port of entry or not.

   This category does not include aliens interdicted at sea who are never brought to the United States.

   8 C.F.R. § 1.2; *see also* Immigration and Naturalization Service, *Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act*, 67 Fed. Reg. 68924 (Nov. 13, 2002); Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 4902 (Jan. 17, 2017), *as corrected in* Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 8431 (Jan. 25, 2017).

3. Aliens who have been paroled under INA section 212(d)(5) on or after April 1, 1997, may be subject to expedited removal upon termination of their parole.

   This provision encompasses those aliens paroled for urgent humanitarian or significant public benefit reasons.

   This category does not include those who were given advance parole as described in Subsection B.6. below.

4. Aliens who have arrived in the United States by sea (either by boat or by other means) who have not been admitted or paroled, and who have not been physically present in the United States continuously for the two-year period immediately prior to the inadmissibility determination.

Customs and Border Protection, *Designating Aliens For Expedited Removal*, 84 Fed. Reg. 35409 (Jul. 23, 20019); Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 4902 (Jan. 17, 2017), *as corrected in* Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 8431 (Jan. 25, 2017).

5. Aliens who did not arrive by sea, who are encountered anywhere in the United States more than 100 air miles from a U.S. international land border, and who have been continuously present in the United States for less than two years; or aliens who did not arrive by sea, who are encountered within 100 air miles from a U.S. international land border, and who have been continuously present in the United States for at least 14 days but for less than two year.

Customs and Border Protection, *Designating Aliens For Expedited Removal*, 84 Fed. Reg. 35409 (Jul. 23, 20019); Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*, 82 Fed. Reg. 4902 (Jan. 17, 2017), *as corrected in* Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Encountered in the United States or Arriving by Sea*,

82 Fed. Reg. 8431 (Jan. 25, 2017).

B. Aliens Seeking Admission Who are Exempt from Expedited Removal

While Cuban citizens and nationals were previously exempt from expedited removal, the regulations at 8 C.F.R. § 235.3(b)(1)(i) were modified to remove the exemption. *See* Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air*, 82 Fed. Reg. 4769 (Jan. 17, 2017), *as corrected in* Department of Homeland Security, *Eliminating Exception to Expedited Removal Authority for Cuban Nationals Arriving by Air*, 82 Fed. Reg. 8353 (Jan. 25, 2017).

The following categories of aliens are exempt from expedited removal:

1. Stowaways

   Stowaways are not eligible to apply for admission to the United States, and therefore they are not subject to the expedited removal program under INA section 235(b)(1)(A)(i). They are also not eligible for a full hearing in removal proceedings under INA section 240. However, if a stowaway indicates an intention to apply for asylum under INA section 208 or a fear of persecution, an asylum officer will conduct a credible fear interview and refer the case to an immigration judge for an asylum and/or Convention Against Torture hearing if the stowaway satisfies the credible fear standard.

   INA § 235(a)(2).

2. Persons granted asylum status under INA section 208.

   8 C.F.R. § 235.3(b)(5)(iii).

3. Persons admitted to the United States as refugees under INA section 207.

   8 C.F.R. § 235.3(b)(5)(iii).

4. Persons admitted to the United States as lawful permanent residents.

   8 C.F.R. § 235.3(b)(5)(ii).

5. Persons paroled into the United States prior to April 1, 1997.

6. Persons paroled into the United States pursuant to a grant of advance parole that the alien applied for and obtained in the United States prior to the alien's departure from and return to the United States.

7. Persons denied admission on charges other than or in addition to INA Section 212(a)(6)(C) or 212(a)(7).

8. Persons applying for admission under INA Section 217, Visa Waiver Program for Certain Visitors ("VWP").

   This exemption includes nationals of non-VWP countries who attempt entry by posing as nationals of VWP countries.

   Individuals seeking admission under the Guam and Northern Mariana Islands visa waiver program under INA section 212(l) are not exempt from expedited removal provisions of the INA.

9. Asylum seekers attempting to enter the United States at a land border port of entry with Canada must first establish eligibility for an exception to the Safe Third Country Agreement, through a Threshold Screening interview, in order to receive a credible fear interview.

8 C.F.R. § 235.3(b)(3).

8 C.F.R. § 235.3(b)(10); *see also Matter of Kanagasundram*, 22 I&N Dec. 963 (BIA 1999); Procedures Manual, Credible Fear Process (Draft), sec. IV.L., "Visa Waiver Permanent Program"; and Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations. Visa Waiver Pilot Program (VWPP) Contingency Plan, Wire #2 (Washington DC: Apr. 28, 2000).

8 C.F.R. § 208.30(e)(6).

III. FUNCTION OF CREDIBLE FEAR SCREENING

In applying the credible fear standard, it is critical to understand the function of the credible fear screening process. As explained by the Department of Justice when issuing regulations adding Convention Against Torture screening to the credible fear process, the function of the process is to "quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch."

Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8479 (Feb. 19, 1999).

IV. DEFINITION OF CREDIBLE FEAR OF PERSECUTION AND CREDIBLE FEAR OF TORTURE

A. Definition of Credible Fear of Persecution

According to statute, an alien has a credible fear of persecution only if "there is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum" as a refugee under section 208 of the INA. Regulations further provide that the applicant will be found to have a credible fear of persecution if the applicant establishes that there is a significant possibility that he or she can establish eligibility for withholding of removal

INA § 235(b)(1)(B)(v); 8 C.F.R. § 208.30(e)(2).

under section 241(b)(3) of the INA.

B. Definition of Credible Fear of Torture

An applicant will be found to have a credible fear of torture if the applicant establishes that there is a significant possibility that he or she is eligible for withholding of removal under section 241(b)(3) of the Act or deferral of removal, if the applicant is subject to a mandatory bar to withholding of removal under the regulations issued pursuant to the legislation implementing the Convention Against Torture.

8 C.F.R. § 208.30(e)(3); 8 C.F.R. § 208.16; 8 C.F.R. § 208.17

V. BURDEN OF PROOF AND STANDARD OF PROOF FOR CREDIBLE FEAR DETERMINATIONS

A. Burden of Proof / Testimony as Evidence

See RAIO Training Module, *Evidence*.

The applicant bears the burden of proof to establish a credible fear of persecution or torture. This means that the applicant must produce sufficiently convincing evidence that establishes the facts of the case, and that those facts must satisfy every element of the relevant legal standard.

Matter of A-B -, 27 I&N Dec. 316, 340 (AG 2018).

Asylum officers are required by regulation to "conduct the interview in a nonadversarial manner." The regulation also instructs asylum officers that "[t]he purpose of the [credible fear] interview shall be to elicit all relevant and useful information bearing on whether the applicant has a credible fear of persecution or torture...."

8 C.F.R. § 208.30(d).

An applicant's testimony is evidence to be considered and weighed along with all other evidence presented. According to the INA, the applicant's testimony may be sufficient to sustain the applicant's burden of proof if it is "credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee." An applicant is a refugee only if he or she has been persecuted or has a well-founded fear of persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." An applicant's testimony must satisfy all three prongs of the "credible, persuasive, and ... specific facts" test in order to establish his or her burden of proof without corroboration. An applicant may be credible, but nonetheless fail to satisfy his or her burden to establish the required elements of eligibility. "Specific facts" are distinct from statements of belief. When assessing the probative value of an applicant's testimony, the asylum officer must distinguish between fact and opinion

INA § 208(b)(1)(B)(ii).

INA § 101(a)(42)

INA § 208(b)(1)(B)(ii).

testimony and determine how much weight to assign to any claimed facts.

Under the INA, the asylum officer is also entitled to determine that the applicant must provide evidence that corroborates the applicant's testimony, even where the officer might otherwise find the testimony credible. In cases in which the asylum officer determines that the applicant must provide such evidence, the asylum officer must provide the applicant notice and the opportunity to submit evidence, and the applicant must provide the evidence unless the applicant cannot reasonably obtain the evidence.

INA § 235(b)(1)(B)(v); 8 C.F.R. § 208.30(e)(2); *see* RAIO Training Module, *Country Conditions Research*.

Additionally, pursuant to the statutory definition of "credible fear of persecution," the asylum officer must take account of "such other facts as are known to the officer." Such "other facts" include relevant country conditions information.

8 C.F.R. §§ 208.16(c)(3)(iii), (iv).

Similarly, country conditions information should be considered when evaluating a credible fear of torture. The Convention Against Torture and implementing regulations require consideration of "[e]vidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and [o]ther relevant information regarding conditions in the country of removal."

8 C.F.R. § 208.12(a),

The regulations instruct asylum officers as follows: "in deciding whether the alien has a credible fear of persecution or torture pursuant to § 208.30 of this part, …the asylum officer may rely on material provided by the Department of State, other USCIS offices, or other credible sources, such as international organizations, private voluntary agencies, news organizations, or academic institutions."

Thus, in evaluating the credibility of an applicant's claim to be a refugee, the asylum officer must consider information about the country from which the alien claims refugee status, such as the prevalence of torture or persecution based on race, religion, nationality, membership in a particular social group, or political opinion. Such information may be derived from several sources.

B. Credible Fear Standard of Proof: Significant Possibility

The party who bears the burden of proof must persuade the adjudicator of the existence of certain factual elements according to a specified standard of proof, or degree of certainty. The relevant standard of proof specifies how convincing or probative the applicant's evidence must be.

In order to establish a credible fear of persecution or torture, the applicant must show a "significant possibility" that he or she could establish eligibility for asylum, withholding of removal, or deferral of removal.

See INA § 235 (b)(1)(B)(v); 8 C.F.R. §§ 208.30(e)(2), (3).

The showing required to meet the "significant possibility" standard is higher than the "not manifestly unfounded" screening standard favored by the Office of the United Nations High Commissioner for Refugees ("UNHCR") Executive Committee. **A claim that has no possibility, a minimal possibility, or a mere possibility of success would not meet the "significant possibility" standard.**

UNHCR, *A Thematic Compilation of Executive Committee Conclusions*, pp. 438-40, 6th Ed., June 2011.

In a non-immigration case, the "significant possibility" standard of proof has been described to require the person bearing the burden of proof to "demonstrate a *substantial and realistic possibility* of succeeding." While that articulation of the "significant possibility" standard was provided in a non-immigration context, the "*substantial and realistic possibility*" of success description is a helpful articulation of the "significant possibility" standard as applied in the credible fear process.

See Holmes v. Amerex Rent-a-Car, 180 F.3d 294, 297 (D.C. Cir. 1999) (quoting *Holmes v. Amerex Rent-a-Car*, 710 A.2d 846, 852 (D.C. 1998)) (emphasis added).

The U.S. Court of Appeals for the D.C. Circuit found that the showing required to satisfy a "substantial and realistic possibility of success" is higher than the standard of "significant evidence" but lower than that of "preponderance of the evidence."

Id.

In sum, the credible fear "significant possibility" standard of proof can be best understood as requiring that the applicant "demonstrate a *substantial and realistic possibility* of succeeding," or establishing eligibility for asylum, withholding of removal, or deferral of removal. The standard requires the applicant to identify more than "significant evidence" that the applicant is a refugee entitled to asylum, withholding of removal, or deferral of removal, but the applicant does not need to show that the "preponderance" or majority of the evidence establishes that entitlement.

C. Important Considerations in Interpreting and Applying the Standard

1. When conducting a credible fear interview, an asylum officer must determine what law applies to the applicant's claim. The asylum officer should apply all applicable precedents of the Attorney General and the Board of Immigration Appeals (BIA), which are binding on all immigration judges and asylum officers

8 C.F.R. § 208.30(e)(4).

Matter of E-L-H-, 23 I&N Dec. 814, 819 (BIA 2005); *Matter of Gonzalez*, 16 I&N

nationwide, to the extent those precedents have not been invalidated by subsequent binding federal court precedent.[1]

Dec. 134, 135–36 (BIA 1977); *Matter of Waldei*, 19 I&N Dec. 189 (BIA 1984).

Where there is disagreement among the United States Courts of Appeals as to the proper interpretation of a legal issue, the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard.[2]

D. Identity

The applicant must be able to establish his or her Identity credibly. In many cases, an applicant will not have documentary proof of identity or nationality. However, testimony alone can establish identity and nationality if it is credible, is persuasive, and identifies specific facts. Documents such as birth certificates and passports are accepted into evidence, if available. The officer may also consider information provided by ICE or Customs and Border Protection (CBP).

See RAIO Training Module, *Refugee Definition*.

VI. CREDIBILITY

A. Credibility Standard

In making a credible fear determination, asylum officers are specifically instructed by statute to "[take] into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer."

INA § 235(b)(1)(B)(v).

The asylum officer should assess the credibility of the assertions underlying the applicant's claim to be a refugee entitled to asylum, considering the totality of the circumstances, including other statements made by the applicant, evidence of country conditions, State Department reports, and all other relevant facts and evidence, and all relevant factors.

[1] If the permanent injunction in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal pending*, No. 19-5013 (D.C. Cir. filed Jan. 30, 2019), is lifted, then officers must additionally follow the following guidance:

> The asylum officer should also apply the case law of the relevant federal court of appeals, together with the applicable precedents of the Attorney General and the BIA. The BIA applies precedents of the circuit in which the removal proceedings took place, *Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989), except in certain special situations, *see id. See also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U. S. 967, 982 (2005) ("A court's prior judicial construction of statute trumps agency construction otherwise entitled to *Chevron* deference only if prior court decision holds that its construction is required by unambiguous terms of statute and leaves no room for agency discretion.").

[2] If the permanent injunction in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal pending*, No. 19-5013 (D.C. Cir. filed Jan. 30, 2019), is lifted, this policy will no longer apply. Officers will be required to apply the law in the circuit in which the alien is located at the time of the interview.

The Board of Immigration Appeals (BIA) has explained that the "burden of proof is upon an applicant for asylum to establish that the 'reasonable person' in her circumstances would fear persecution upon return" to her home country "'on account of' one of the five grounds specified in the Act." The applicant may satisfy that burden through a combination of credible testimony and the introduction of documentary evidence and background information that supports the claim.

INA § 208(b)(1)(B)(iii); See RAIO Training Module, *Credibility*; *see also Matter of B-*, 21 I&N Dec. 66, 70 (BIA 1995); *Matter of Kasinga*, 21 I&N Dec. 357, 364 (BIA 1996).

B. Evaluating Credibility in a Credible Fear Interview

1. General Considerations

See RAIO Training Module, *Credibility*.

a. The asylum officer must gather sufficient information to determine whether the alien has a credible fear of torture or persecution based on one of the five specified grounds. The applicant's credibility should be evaluated (1) only after all information is elicited, and (2) in light of "the totality of the circumstances, and all relevant factors."

b. The asylum officer must remain neutral and unbiased and must evaluate the record as a whole. The asylum officer's personal opinions or moral views regarding a particular applicant should not affect the officer's decision.

c. The applicant's ability or inability to provide specific facts supporting the main points of the claim is critical to the credibility evaluation. An applicant may claim that his or her ability to identify such facts is impacted by the context and nature of the credible fear screenings, but the INA requires the applicant to identify such facts in order to satisfy his or her burden of proof. It is the job of the asylum officer to determine whether that burden has been met.

2. Properly Identifying and Probing Credibility Concerns During the Credible Fear Interview

See RAIO Training Module, *Credibility*.

In making this determination, the asylum officer should take into account the same factors considered in evaluating credibility in the affirmative asylum context, which are discussed in the RAIO Modules: *Credibility* and *Evidence*.

Section 208 of the Act provides a non-exhaustive list of factors that may be used in a credibility determination in the asylum context. Those include the following: internal consistency;

INA § 208(b)(1)(B)(iii); *see also* RAIO Training Module,

external consistency; plausibility; demeanor; candor; and responsiveness.

Credibility, for a more detailed discussion of these factors.

The amount of detail provided by an applicant is another factor that should be considered in making a credibility determination. The INA requires an applicant to identify "specific facts." In order to rely on "lack of detail" as a credibility factor, however, asylum officers must specify the level of detail sought. That can be done by asking specific, probing questions that seek to elicit specific facts from the applicant.

INA § 208(b)(1)(B)(ii)

8 C.F.R. § 208.30(d).

C. Assessing Credibility in Credible Fear when Making a Credible Fear Determination

1. In assessing credibility, the officer must consider the totality of the circumstances and all relevant factors, including any reports or data available to the officer regarding conditions in the country or region regarding which the applicant claims a fear of return. Credibility determinations must be made on a case-by-case basis, requiring the officer to consider the totality of the circumstances provided by the applicant's testimony and all relevant country conditions information available to the officer.

2. Officers should refer to all relevant country conditions reports made available to USCIS by the Department of State or other intelligence sources to assess whether the applicant's claims are credible and plausible in the regions in which the applicant claims they have or will occur, as well as to assess whether an applicant could relocate to another area of his or her home country in order to avoid the alleged persecution. If such internal relocation is reasonable, the applicant does not have a credible fear of persecution. Claims that are inconsistent with country conditions reports or are indicative of "boilerplate" language used in credible fear claims by applicants in different proceedings might be valid indications of fraud supporting an adverse credibility finding, although the applicant should be given the opportunity to explain.

See Matter of R-K-K-, 26 I&N Dec. 658 (BIA 2015).

3. The asylum officer should follow up on all credibility concerns during the interview by making the applicant aware of each concern, and the bases for questioning the applicant's testimony. The officer should give the applicant an opportunity to explain all concerns during the credible fear interview.

See RAIO Training Module, *Credibility*.

4. As recommended by Congress in enacting the REAL ID Act of 2005, in making credibility determinations, asylum officers should "rely on those aspects of demeanor that are indicative of truthfulness or deception…[and] a credibility determination

H.R. Rep. No. 109-72.

should follow an examination of all relevant circumstances, including the circumstances of the individual applicant."

5. Inconsistencies between the applicant's initial statement to the CBP or ICE official and his or her testimony before the asylum officer must be probed during the interview. Such inconsistencies may provide support for a negative credibility finding when taking into account the totality of the circumstances and all relevant factors.

   The sworn statement completed by CBP (Form I-867A/B) does not always record detailed information about any fear of persecution or torture or other general information—such as the reason the individual came to the United States—However, the asylum officer may find that the CBP officer did, in fact, gather additional information from the applicant regarding the nature of his or her claim. In such cases, the applicant's prior statements should inform the asylum officer's line of questioning in the credible fear interview, and any inconsistencies between those prior statements and the statements made during the credible fear interview should be probed and assessed in determining the applicant's credibility.[3]

See 8 C.F.R. § 235.3(b)(4) (stating that if an applicant indicates an intention to apply for asylum, or expresses a fear of persecution or torture, or a fear of return to his or her country, the "examining immigration officer shall record sufficient information in the sworn statement to establish and record that the alien has indicated such intention, fear, or concern," and should then refer the alien for a credible fear interview).

Matter of J-C-H-F-, 27 I&N Dec. 211 (BIA 2018).

[3] If the permanent injunction in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal pending*, No. 19-5013 (D.C. Cir. filed Jan. 30, 2019), is lifted, then officers must additionally follow the following guidance:

> A number of federal courts have cautioned adjudicators to keep in mind the circumstances under which an alien's statement to a CBP official is taken when considering whether an applicant's later testimony is consistent with the earlier statement. For instance, the Seventh Circuit Court of Appeals observed that although "airport interviews are not always reliable indicators of credibility[,] . . . . [i]n certain cases, . . . the interview can help support an adverse credibility finding," especially if "the record of [the] airport interview [has] markers of probative value and reliability." *Chatta v. Mukasey*, 523 F.3d 748, 752 (7th Cir. 2008) (quotation marks omitted). In addition, the Fourth Circuit Court of Appeals has advised that asylum adjudicators should exercise caution in relying "extensively" on statements made in airport interviews and in "basing an adverse credibility determination solely on inconsistencies and, especially, omissions that arise out of [such] statements." *Qing Hua Lin v. Holder*, 736 F.3d 343, 352-53 (4th Cir. 2013).
>
> Some factors to keep in mind include: (1) the extent to which the questions posed at the port of entry or place of apprehension were designed to elicit the details of an asylum claim; (2) whether the immigration officer asked relevant follow-up questions; (3) whether the alien was reluctant or afraid to reveal information during the first meeting with U.S. officials because of prior interrogations or other coercive experiences in the alien's home country; (4) whether the interview was conducted in a language other than the applicant's native language; (5) whether the alien's remarks were transcribed verbatim, rather than merely summarized; and (6) whether the inconsistency or omission concerns a minor evidentiary detail or a central facet of the protection claim. *See, e.g.*, Qing Hua Lin, 736 F.3d at 353; Guan v. Gonzales, 432 F.3d 391, 396-97 (2d Cir. 2005); *see also Ramsameachire v. Ashcroft*, 357 F.3d 169, 179-81 (2d Cir. 2004) (holding that the BIA was entitled to rely on fundamental inconsistencies between the applicant's airport interview statements and his hearing testimony where the applicant was provided with an interpreter, given ample opportunity to explain his fear of persecution in a careful and non-coercive interview, and signed and initialed the typed record of statement). The Second Circuit Court of Appeals has advised: "If, after reviewing the record of the [CBP] interview in light of these factors and any other relevant considerations suggested by the circumstances of the interview, the ... [agency] concludes that the record of the interview and the alien's statements are reliable, then the agency may, in appropriate circumstances, use those statements as a basis for finding the alien's testimony incredible. Conversely, if it appears that either the record of

Id. at 212-213.

All reasonable explanations must be considered when assessing the applicant's credibility. The asylum officer need not credit an unreasonable explanation.

If, after providing the applicant with an opportunity to explain or resolve any credibility concerns, the officer finds that the applicant has provided a reasonable explanation, for inconsistencies between prior statements and statements made at the credible fear interview, those inconsistencies alone need not preclude a positive credibility determination when considering the totality of the circumstances and all relevant factors.

If, however, after providing the applicant with an opportunity to explain or resolve any credibility concerns, the applicant fails to provide an explanation for such inconsistencies, or the officer finds that the applicant did not provide a reasonable explanation, a negative credibility determination based upon the totality of the circumstances and all relevant factors will generally be appropriate.

D. Documenting a Credibility Determination

1. The asylum officer must clearly record in the interview notes the questions used to inform the applicant of any relevant credibility issues and the applicant's responses to those questions.

2. The officer must specify in the written case analysis the basis for the credibility finding, including a summary of the material facts as stated by the applicant, any additional facts relied on by the officer, and the officer's determination of whether, in light of such facts, the alien has established a credible fear. In the case of a positive credibility determination, the officer should note any specific portions of testimony that contributed to the officer's overall credibility determination, including specificity of the presentation, consistency with corroborating evidence submitted or country condition reports available and any other factors about the applicant's narrative, demeanor, or presentation that weighed in favor of a positive credibility determination. In the case of a negative credibility determination, the officer should note any portions of the testimony found not credible, including the specific inconsistencies, lack of detail, or other factors, along with the applicant's explanation and the basis for determining that the explanation is deemed not to be reasonable.

8 C.F.R §§. 208.30(d)(7), (e)(1).

the interview or the alien's statements may not be reliable, then the ... [agency] should not rely solely on the interview in making an adverse credibility determination." *Ramsameachire*, 357 F.3d at 180.

3. If information that impugns the applicant's testimony becomes available after the interview but prior to serving the credible fear determination, a follow-up interview should be scheduled to confront the applicant with the derogatory information and to provide the applicant with an opportunity to address the adverse information.

VII. ESTABLISHING A CREDIBLE FEAR OF PERSECUTION

For the most recent Asylum Division guidance on eligibility for asylum under section 208 of the INA, please consult the latest applicable RAIO Training Module.

A. General Considerations in Credible Fear

INA § 235(b)(1)(B)(v); 8 C.F.R. § 208.30(e)(2).

An applicant will be found to have a credible fear of persecution if there is a significant possibility the applicant can establish eligibility for asylum as a refugee under section 208 of the Act or withholding of removal under section 241(b)(3) of the Act or deferral of removal, if the applicant subject to the mandatory denial of withholding of removal.

8 C.F.R. § 208.13(b)(1).

1. In general, findings by the asylum officer that (1) there is a significant possibility – that is, a substantial and realistic possibility based on more than significant evidence – that the applicant experienced past persecution on account of a protected characteristic, (2) the conditions that gave rise to such persecution continue to exist in the applicant's home country, and (3) the applicant could not avoid such persecution by relocating within his or her home country, are sufficient to satisfy the credible fear standard.

   See 8 C.F.R. § 208.13(b)(1)(iii)(B), (b)(3).

   However, if the evidence does not establish a significant possibility of future persecution, or other serious harm or compelling reasons for being unwilling or unable to return to the applicant's home country given the severity of past persecution, or reasons why internal relocation is not possible, a negative credible fear determination is appropriate.[4]

4 Only aliens who have been found to have suffered past persecution are eligible for a grant of asylum based on "other serious harm." 8 C.F.R. § 208.13(b)(1)(iii). If the alien demonstrates past persecution, he or she can be granted asylum if: (1) the applicant has also demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of past persecution or if (2) the applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country. Thus, if an alien establishes a significant possibility that he or she has suffered past persecution and either of the conditions described above exist, the alien could establish a credible fear of persecution.

2. In cases in which an applicant does not claim to have suffered any past persecution, or in which the evidence is insufficient to establish a significant possibility of past persecution under section 208 of the Act, the asylum officer must determine whether there is a significant possibility the applicant could establish a well-founded fear of persecution on account of a protected characteristic under section 208 of the Act. An applicant establishes that he or she has a well-founded fear of persecution if a reasonable person in the applicant's circumstances would fear persecution upon return to his or her country of origin.

See RAIO Training Modules, *Persecution* and *Well-Founded Fear of Persecution*.

B. Past Persecution/Well-Founded Fear of Future Persecution

1. Elements Required to Establish a Credible Fear: In order to establish a credible fear of persecution, the applicant must establish each one of the elements below, to the satisfaction of the asylum officer. If the applicant is not able to establish all of the elements, the applicant must receive a negative credible fear determination.

See RAIO Training Module, *Well Founded Fear*.

2. Severity of Harm: For a credible fear of persecution, there must be a significant possibility the applicant can establish that the harm the applicant has experienced or fears he or she will experience if returned to his or her home country is sufficiently serious to amount to persecution.

INS v. Cardoza-Fonseca, 480 U.S. 421, 430-31 (1987).

3. Future Fear (Well-Founded Fear): Well-founded Fear of Persecution

See RAIO Training Module, *Well Founded Fear*, for more detailed information about the subjective and objective elements of well-founded fear, including the standards of proof needed to establish these elements. *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987).

   a. In cases in which an applicant does not claim to have suffered any past harm, or in which the evidence is insufficient to establish a significant possibility of past persecution on account of a protected characteristic under section 101(a)(42)(A) of the Act, the asylum officer must determine whether there is a significant possibility the applicant could establish a well-founded fear of persecution under section 208 of the Act.

   b. To establish a well-founded fear of persecution on account of a protected characteristic, an applicant must show that (1) he or she has a subjective fear of persecution, and (2) that such fear has an objective basis.

See RAIO Training Modules, *Nexus and the Protected Grounds (minus PSG)* and *Nexus – Particular Social Group*.

   c. The applicant satisfies the subjective element if he or she credibly articulates a genuine fear of return. Fear

See Matter of Kasinga, 21 I&N Dec. 357, 366-67 (BIA 1996); *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir.

has been defined as an apprehension or awareness of danger.

1997).

d. The applicant satisfies the objective element if he or she demonstrates past persecution based on continuing country conditions, or has a "well-founded fear" of persecution. An applicant has a well-founded fear of persecution if a reasonable person in the applicant's circumstances would fear persecution upon return to his or her country of origin.

See RAIO Training Module, *Well Founded Fear.*

480 U.S. at 431.

The Supreme Court concluded that the standard for establishing the likelihood of future harm in asylum is lower than the standard for establishing likelihood of future harm in withholding of deportation: "One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place."

Id. at 440.

To make the point, *Cardoza-Fonseca* used the following example: "In a country where every tenth adult male is put to death or sent to a labor camp, 'it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted' upon his eventual return.'"

Id. at 448.

Id. at 448 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984)).

Cardoza-Fonseca did *not*, however, hold that "well-founded fear" always equals a ten percent chance. Instead, *Cardoza-Fonseca* deemed the term "ambiguous," and explicitly declined to set forth guidance on how the well-founded fear test should be applied. The Court merely held that the government was "incorrect in holding that the two standards [i.e., well-founded fear and clear probability] are identical" and invited the affected *agencies* to expound on the meaning of "well-founded fear."

Cardoza-Fonseca's extreme example of every tenth adult male being put to death or sent to a labor camp may well satisfy this standard in a particular case (assuming that all other requirements are met, including nexus), but officers must bear in mind the unusual severity of this example. While the *Cardoza-Fonseca* example seems simple, the Court describes an extremely unusual and high murder rate of 10 percent of adult males. It is important for

officers to note that such rate is extraordinarily high and incredibly rare. Indeed, it is significantly higher than the murder rates in countries with even the highest rates of violence. Additionally, the asylum officer must determine whether the applicant's testimony supports an objective finding that the applicant, himself or herself, will be persecuted, which requires a more extensive analysis than whether persecution is occurring at all in the country of origin. In doing that, the asylum officers must also determine whether any objective fear claimed by the applicant is credible. The officer may well find that a claimed rate of 10% chance of persecution, in light of the applicant's statements and the country conditions available to the officer, is not credible. It is important to note also that rarely will an applicant be able to demonstrate, with certainty, the rates of people being persecuted countrywide.

Id. at 448.

After *Cardoza-Fonseca*, neither the Board of Immigration Appeals nor DHS has definitively resolved how much fear is "well-founded." There is thus no single, binding interpretation of *Cardoza-Fonseca*'s discussion of "well-founded fear," including its suggestions about a one-in-ten chance.

INS v. Elias-Zacarias, 502 U.S. 478, 483 (1992).

Thus, the determination of whether a fear is well-founded does not ultimately rest on the statistical probability of persecution, which is almost never available. Rather, the determination rests on whether the applicant's fear is based on facts that would lead a reasonable person in similar circumstances to fear persecution.

4. Motivation: For a credible fear of persecution, the applicant must establish that there is a significant possibility that the persecutor was or will be motivated to harm him or her on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.

   a. Nexus analysis requires officers to determine the following: (1) whether the applicant possesses or is perceived to possess a protected characteristic; and (2) whether the persecution or feared persecution is at least in part on account of that protected characteristic.

Matter of A-B-, 27 I&N Dec. 316, 320, 337-38, 343-44 (AG 2018), *enjoined in part by Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018) (holding that *Matter of A-B-* raised the standard for "unable or willing" and enjoining that change), *appeal filed*, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

b. There must be a significant possibility that at least one reason motivating the persecutor is the applicant's possession or perceived possession of a protected characteristic.[5]

c. Particular Social Groups:

To determine whether the applicant can establish a significant possibility that he or she belongs to a viable particular social group, asylum officers must analyze the facts using the BIA test for evaluating whether a group meets the definition of a particular social group, set out by the Board 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), and reaffirmed by the Attorney General in *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019).[6]

First, the group must comprise individuals who share a common, immutable characteristic, which is either a characteristic that members cannot change or is a characteristic that is so fundamental to the member's identity or conscience that he or she should not be required to change it.

Second, the group must be defined with particularity; it "must be defined by characteristics that provide a clear benchmark for determining who falls within the group." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239. A group is particular if the "group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons." *Matter of S-E-G-*, 24 I&N Dec. 579, 584 (BIA 2008). A particular social group must not be "amorphous, overbroad, diffuse, or subjective," and "not every 'immutable characteristic' is sufficiently precise to define a particular social group." *Matter of M-E-V-G-*, 26 I&N Dec. at 239. *See also Matter of L-E-A-*, 27 I&N Dec. at 593 (citing *Matter of S-E-G-*, 24 I&N Dec. at 597, 585 (BIA 2008) (noting that the "proposed group of

[5] If the permanent injunction in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal pending*, No. 19-5013 (D.C. Cir. filed Jan. 30, 2019), is lifted, then officers must instead follow the following guidance:

> There must be a significant possibility that at least *one central* reason motivating the persecutor is the applicant's possession or perceived possession of a protected characteristic. If the applicant's interview or hearing is in the Ninth Circuit, the alien need only establish a significant possibility that at least *a* reason motivating the persecutor is the applicant's possession or perceived possession of a protected characteristic. *Barajas-Romero v. Lynch*, 846 F.3d 351, 359-60 (9th Cir. 2017).

[6] *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014) is controlling nationwide. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U. S. 967, 982 (2005) ("A court's prior judicial construction of statute trumps agency construction otherwise entitled to Chevron deference only if prior court decision holds that its construction is required by unambiguous terms of statute and leaves no room for agency discretion."). Therefore, application of this decision is consistent with the court order in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), which requires officers to apply the case law most favorable to the alien in credible fear screenings.

'family members,' which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others, is . . . too amorphous a category" to satisfy the particularity requirement)).

Third, the group must be socially distinct within the society in question. Social distinction involves examining whether "those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it." *See Matter of M-E-V-G-*, 26 I&N Dec. at 238. In other words, "[m]embers of a particular social group will generally understand their own affiliation with that group, as will other people in their country." *Id.* Social distinction relates to society's, not the persecutor's, perception, though the persecutor's perceptions may be relevant to social distinction. *See Matter of A-B-*, 27 I&N Dec. 316, 320 (AG 2018).

Asylum officers should analyze claims based on membership in a particular social group defined by family or kinship ties as required under *Matter of L-E-A-*, *supra*. Under that decision, officers must analyze whether a specific family group is immutable, particular and socially distinct. The relevant question in this analysis is *not* whether the degree and type of relationship that defines a potential family-based particular social group is immutable, particular and socially distinct. Rather, "[i]f an applicant claims persecution based on membership in his father's immediate family, then the adjudicator must ask whether *that* specific family is 'set apart, or distinct, from other persons within the society in some significant way.' It is not sufficient to observe that the applicant's society (or societies in general) place great significance on the concept of the family." *Matter of L-E-A-*, 27 I&N Dec. at 594 (citing *M-E-V-G-*, 26 I&N Dec. at 238). *Matter of L-E-A-* instructs that "[t]he fact that 'nuclear families' or some other widely recognized family unit generally carry societal importance says nothing about whether a *specific* nuclear family would be 'recognizable by society at large.'" *Id.* Therefore, officers must analyze the specific group of people identified as a family group in making this assessment. Previous guidance that instructed officers to assess whether the society in question recognizes the type of relationship shared by the group as significant or distinct is no longer valid under *Matter of L-E-A-*.

5. Persecutor: For a credible fear of persecution, there must be a significant possibility the applicant can establish that the entity that harmed the applicant (the persecutor) is either an agent of the government or an entity that the government is unable or unwilling to control.

Asylum officers must recognize that no government can guarantee the safety of each of its citizens or control all potential persecutors at all times. It is not sufficient for an applicant to assert that the government lacks sufficient resources to address criminal activity. Rather, the government must have abdicated its responsibility to control persecution. A determination of whether a government is unable to control the entity that harmed the applicant requires evaluation of country of origin information and the applicant's circumstances. For example, a government in the midst of a civil war or one that is unable to exercise its authority over portions of the country might be unable to control the persecutor in areas of the country where its influence does not extend. Asylum officers must consult all available and salient information, including the objective country conditions set forth in Department of State country reports. In order to establish a significant possibility of past persecution, the applicant is not required to demonstrate that the government was unable or unwilling to control the persecution on a nationwide basis. The applicant may meet his or her burden with evidence that the government was unable or unwilling to control the persecution to which the applicant was subject.

6. Applicant Did Not Remain in Country after Threats or Harm

   a. A significant lapse of time between the occurrence of incidents that form the basis of the claim and an applicant's departure from the country may be evidence that the applicant's fear is not well-founded. The lapse of time may indicate that the applicant does not possess a genuine fear of harm, or the persecutor does not possess the ability or the inclination to harm the applicant.

   b. However, there may be valid reasons why the applicant did not leave the country for a significant amount of time after receiving threats or being harmed, including the following: lack of funds to arrange for departure from the country and time to arrange for the safety of family members; belief that the situation would improve; promotion of a cause within the home country; and temporary disinclination by the persecutor to harm the applicant.

7. Applicant Has Not Acted Inconsistent with Subjective Fear of Persecution

An applicant's return to the country of feared persecution generally weakens the applicant's claim of a well-founded fear of persecution. It may indicate that the applicant does not possess a genuine (subjective) fear of persecution, or that the applicant's fear is not objectively reasonable.

8 CFR 208.13(b)(1)(i)(B), (b)(2)(ii), (b)(3); *Matter of M-Z-M-R-*, 26 I&N Dec. 28 (BIA 2012).

8. Internal Relocation

a. In cases in which the feared persecutor is a government or is government-sponsored, there is a presumption that there is no reasonable internal relocation option. That presumption may be overcome if a preponderance of the evidence shows that, under all of the circumstances, the applicant could avoid future persecution by relocating to another part of the applicant's country, and that it would be reasonable to expect the applicant to relocate. Asylum officers must consult all available and salient information, including information in the objective country conditions set forth in Department of State country reports.

b. If the persecutor is a non-governmental entity, there must be a significant possibility that the applicant cannot reasonably internally relocate within his or her country. In cases in which the persecutor is a non-governmental entity and the applicant has not established past persecution, the applicant has the burden of establishing that internal relocation is not reasonable.

8 C.F.R. § 208.13(b)(3)(i).

c. In assessing an applicant's well-founded fear and internal relocation, apply the following two-step approach:

(i) Determine whether an applicant could avoid future persecution by relocating to another part of the applicant's home country. If the applicant will not be persecuted in another part of the country, then:

(ii) Determine whether an applicant's relocation, under all of the circumstances, would be reasonable. Some factors that could be considered—but are in no way controlling or determinative—are listed in 8 C.F.R. § 208.13(b)(3).

C. Multiple Citizenship

Persons holding multiple citizenship or nationalities must demonstrate a credible fear of persecution or torture from at least one country in which they are a citizen or national to be eligible for referral to immigration court for a full asylum or withholding of removal hearing. If the country of removal indicated is different from the applicant's country of citizenship or nationality, fear from the indicated country of removal must also be evaluated.

See RAIO Training Module, *Refugee Definition*, for more detailed information about determining an applicant's nationality, dual nationality, and statelessness.

In addition, if the applicant raises a fear with respect to another country, aside from the country of citizenship or nationality or the country of removal, the officer should memorialize it in the file to ensure that the fear is explored in the future if DHS ever contemplates removing the person to such other country.

D. Statelessness/Last Habitual Residence

The asylum officer does not need to make a determination of whether an applicant is stateless or the applicant's country of last habitual residence. The asylum officer should determine whether the applicant has a credible fear with respect to any country of proposed removal. If the applicant demonstrates a credible fear with respect to any country of proposed removal, regardless of citizenship or habitual residence, the applicant should be referred to the Immigration Judge for a full proceeding, because he or she may be eligible for withholding of removal with respect to that country.

VIII. ESTABLISHING A CREDIBLE FEAR OF TORTURE

An applicant will be found to have a credible fear of torture if the applicant establishes that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under 8 C.F.R. §§ 208.16 or 208.17, the regulations issued pursuant to the legislation implementing the Convention Against Torture (CAT). In order to be eligible for withholding or deferral of removal under CAT, an applicant must establish that it is more likely than not that he or she would be tortured in the country of removal. The credible fear process is a "screening mechanism" that attempts to identify whether there is a significant possibility that an applicant can establish that it is more likely than not that he or she would be tortured in the country in question.

See ADOTC Lesson Plan, *Reasonable Fear of Persecution and Torture Determinations* for a detailed discussion of the background of CAT and legal elements of the definition of torture; Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8484 (Feb. 19, 1999).

In the CAT withholding or deferral of removal hearing, the applicant will have to establish that it is more likely than not that he

or she will be tortured in the country of removal. As discussed above, for asylum the applicant must establish either past persecution or a well-founded fear of persecution. Well-founded fear is a lower standard than "more likely than not."

Therefore **a significant possibility of establishing eligibility for CAT withholding or deferral of removal is necessarily a greater burden than establishing a significant possibility of eligibility for asylum**. In other words, to establish a credible fear of torture, the applicant must show there is a significant possibility that he or she could establish in a full hearing that it is more likely than not he or she would be tortured in that country.

A. Definition of Torture

8 C.F.R. § 208.18(a) defines "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

8 C.F.R. § 208.18(a); *see* ADOTC Lesson Plan, *Reasonable Fear of Persecution and Torture Determinations*.

B. General Considerations

1. U.S. regulations require that several elements be met before an act is found to constitute torture.

8 C.F.R. §§ 208.18(a)(1)-(8). Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478 (Feb. 19, 1999).

2. After establishing that the applicant's claim is credible, the applicant satisfies the other elements of the credible fear of torture standard where there is a significant possibility that he or she could establish in a full withholding of removal hearing that:

   a. The torturer specifically intends to inflict severe physical or mental pain or suffering;

   b. The harm constitutes severe pain or suffering;

   c. The torturer is a public official or other person acting in an official capacity, or someone acting at the

See section VI., *Credibility*, above, regarding establishing credibility. An adverse credibility determination on the persecution claim does not necessarily defeat a claim made under the Convention Against Torture. *Camara v. Ashcroft*, 378 F.3d 361 (4th Cir. 2004); *Kamalthas v. INS*, 251 F.3d 1279, 1284 (9th Cir. 2001); *Mansour v. INS*, 230 F.3d 902 (7th Cir. 2000.

instigation of or with the consent or acquiescence of a public official or someone acting in official capacity; and

Matter of J-E-, 23 I&N Dec. 291 (BIA 2002).

8 C.F.R. § 208.18(a)(5).

d. The applicant is in the torturer's custody or physical control.

8 C.F.R. § 208.18(a)(2).

Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions, including the death penalty and other judicially imposed sanctions. However, sanctions that defeat the object and purpose of the Convention are not lawful sanctions. Harm arising out of such sanctions may constitute torture.

3. The Convention Against Torture does not require that the torture be connected to any of the five protected characteristics identified in the definition of a refugee, or any other characteristic the individual possesses or is perceived to possess.

8 C.F.R. § 208.18(a)(6).

8 C.F.R. § 208.18(a)(3).

C. Specific Intent

For an act to constitute torture, the applicant must establish that it is more likely than not that the act is specifically intended to inflict severe physical or mental pain or suffering. An intentional act that results in unanticipated and unintended severity of pain and suffering is not torture under the Convention definition.

8 C.F.R. §§ 208.18(a)(1), (5).

Specific intent is "intent to accomplish the precise criminal act that one is later charged with" while "general intent" commonly "takes the form of recklessness . . . or negligence."

Matter of J-E-, 23 I&N Dec. 291, 301 (BIA 2002) (citing Black's Law Dictionary 813-14 (7th ed. 1999).

D. Degree of Harm

1. For harm to constitute torture, the applicant must establish that it is more likely than not that the harm rises to the level of severity of torture.

2. Torture requires severe pain or suffering, whether physical or mental. "Torture" is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture. Therefore, many forms of harm that may be considered persecution may not be considered severe enough to amount to torture.

8 C.F.R. § 208.18(a)(1); 8 C.F.R. § 208.18(a)(2).

3. For mental pain or suffering to constitute torture, the mental pain must be prolonged mental harm caused by or resulting from:

a. The intentional infliction or threatened infliction of severe physical pain or suffering;

8 C.F.R. § 208.18(a)(4).

b. The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

c. The credible threat of imminent death; or

d. The credible threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

E. Identity of the Torturer

1. For an act to constitute torture, the applicant must establish that it is more likely than not that the harm he or she fears would be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

8 C.F.R. § 208.18(a)(1).

See ADOTC Lesson Plan, *Reasonable Fear of Persecution and Torture Determinations* for a more extensive discussion on this element of CAT eligibility.

2. Harm by a Public Official

The term "public official" can include any person acting on behalf of a national or local authority or any national or local government employee regardless whether the official is acting in their official or personal capacity.[7]

3. Instigation, Consent, or Acquiescence

a. When the "torturer" is not a public official, a successful CAT claim requires that a public official or other person acting in an official capacity

[7] If the permanent injunction in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal pending*, No. 19-5013 (D.C. Cir. filed Jan. 30, 2019), is lifted, then officers must instead follow the following guidance:

> In the withholding or deferral of removal setting, when a public official acts in a wholly private capacity, outside any context of governmental authority, the state action element of the torture definition may not be satisfied depending on the circuit. *See, e.g.*, *Barajas-Romero v. Lynch*, 846 F.3d 351, 362-63 (9th Cir. 2017) (holding that the public official need not be acting on behalf of the government); *Mendoza-Sanchez v. Lynch*, 808 F.3d 1182, 1185 (7th Cir. 2015) ("It is irrelevant whether the police are 'rogue' (in the sense of not serving the interests of the Mexican government)."); *Ramirez-Peyro v. Holder*, 574 F.3d 893, 900 (8th Cir. 2009) (While our circuit has yet to adopt the agency's interpretation of 'in an official capacity' as the equivalent of 'under color of law' as used in the civil-rights context as reasonable, we do so now."); *Khouzam v. Ashcroft*, 361 F.3d 161, 171 (2d Cir. 2004) ("[W]hen it is a public official who inflicts severe pain or suffering, it is only in exceptional cases that we can expect to be able to conclude that the acts do not constitute torture by reason of the official acting for purely private reasons.").

instigates, consents, or acquiesces to the torture. Asylum officers must consult all available and salient information, including information in the objective country conditions set forth in Department of State country reports.

b. Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

8 C.F.R. § 208.18(a)(7).

The Senate ratification history for the Convention explains that the term "awareness" was used to clarify that government acquiescence may be established by evidence of *either* actual knowledge or willful blindness. "Willful blindness" imputes knowledge to a government official who has a duty to prevent misconduct and "deliberately closes his eyes to what would otherwise have been obvious to him."

c. There is no acquiescence when law enforcement does not breach a legal responsibility to intervene to prevent torture.

8 C.F.R. § 208.18(a)(7).

In the context of government consent or acquiescence, the court in *Ramirez-Peyro v. Holder* reiterated its prior holding that "use of official authority by low level officials, such a[s] police officers, can work to place actions under the color of law even when they act without state sanction." Therefore, even if country conditions show that a national government is fighting against corruption, that fact will not necessarily preclude a finding of consent or acquiescence by a local public official.

Ramirez-Peyro v. Holder, 574 F.3d 893, 901 (8th Cir. 2009).

See Ontunez-Tursios v. Ashcroft, 303 F.3d 341, 354-55 (5th Cir. 2002).

d. Evidence that private actors have general support in some sectors of the government, without more, is insufficient to establish that the officials would acquiesce to torture by the private actors.

4. Consent or Acquiescence vs. Unable or Unwilling to Control

The public official requirement under CAT is distinct from the inquiry into a government's ability or willingness to control standard applied under the refugee definition.

Reyes-Sanchez v. U.S. Atty. Gen., 369 F.3d 1239 (11th Cir. 2004) ("That the police did not catch the culprits

does not mean that they acquiesced in the harm.")

a. A finding that a government is unable to control a particular person(s) is not dispositive of whether a public official would instigate, consent to, or acquiesce in the feared torture.

b. A more relevant query is whether a public official who has a legal duty to intervene would be unwilling to do so. In that circumstance, the public official would also have to be aware or deliberately avoid being aware of the harm in order for the action or inaction to qualify as acquiescence under CAT.

F. Past Harm

Unlike a finding of past persecution, a finding that an applicant suffered torture in the past does not raise a *presumption* that it is *more likely than not* the applicant will be subject to torture in the future. However, regulations require that any past torture be *considered* in evaluating whether the applicant is likely to be tortured, because an applicant's experience of past torture may be *probative* of whether the applicant would be subject to torture in the future.

8 C.F.R. § 208.16(c)(3)(i); Immigration and Naturalization Service, *Regulations Concerning the Convention Against Torture*, 64 Fed. Reg. 8478, 8480 (Feb. 19, 1999).

Credible evidence of past torture is strong evidence in support of a claim for protection based on fear of future torture. For that reason, an applicant who establishes that he or she suffered past torture also establishes a credible fear of torture, unless changes in circumstances are so substantial that the applicant has no significant possibility of future torture as a result of the change.

G. Internal Relocation

1. Regulations require immigration judges to consider evidence that the applicant could relocate to another part of the country of removal where he or she is not likely to be tortured, in assessing whether the applicant can establish that it is more likely than not that he or she would be tortured. Therefore, asylum officers should consider whether or not the applicant could safely relocate to another part of his or her country in assessing whether there is a significant possibility that he or she is eligible for CAT withholding of removal or deferral of removal. Asylum officers must consult all available and salient information, including the objective country conditions set forth in Department of State country reports.

8 C.F.R. § 1208.16(c)(3)(ii).

2. Unlike the persecution context, the regulations implementing CAT do not explicitly reference the need to evaluate the reasonableness of internal relocation. Nonetheless, the regulations provide that "all evidence relevant to the possibility of future torture shall be considered…." Therefore, asylum officers should apply the same reasonableness inquiry articulated in the persecution context to the CAT context.

8 C.F.R. § 208.16(c)(3)(ii).

8 C.F.R. § 208.13(b)(3); *See* RAIO Training Module, *Well Founded Fear.*

IX. APPLICABILITY OF BARS TO ASYLUM AND WITHHOLDING OF REMOVAL

Please consult the appropriate RAIO Training Module for a full discussion on mandatory bars.

A. No Bars Apply

Pursuant to regulations, evidence that the applicant is, or may be, subject to a bar to asylum or withholding of removal does not have an impact on a credible fear finding.

8 C.F.R. § 208.30(e)(5).

B. Asylum Officer Must Elicit Testimony

Even though the bars to asylum do not apply to the credible fear determination, the interviewing officer must elicit and make note of all information relevant to whether a bar to asylum or withholding applies or not. The immigration judge is responsible for finally adjudicating whether or not the applicant is barred from receiving asylum or withholding of removal.

INA § 208(b)(2); INA § 241(b)(3); 8 C.F.R. § 208.30(d)

There are no bars to a grant of deferral of removal to a country where the applicant would be tortured.

8 C.F.R. § 208.17(a).

Information should be elicited about whether the applicant:

1. Participated in the persecution of others;

2. Has been convicted by a final judgment of a particularly serious crime (including an aggravated felony), and constitutes a danger to the community of the United States;

INA § 208(b)(2)(B)(i).

3. Is a danger to the security of the United States;

4. Is subject to the inadmissibility or deportability grounds relating to terrorist activity as identified in INA section 208(b)(2)(A)(v);

5. Has committed a serious nonpolitical crime;

6. Is a dual or multiple national who can avail himself or herself of the protection of a third state; and,

This bar and the firm resettlement bar are not bars to withholding or deferral of removal. *See* INA § 241(b)(3).

7. Was firmly resettled in another country prior to arriving in the United States.

C. Flagging Potential Bars

The officer must keep in mind that the applicability of those bars requires further evaluation that will take place in the full hearing before an immigration judge if the applicant otherwise has a credible fear of persecution or torture. In such cases, the officer should consult a supervisory officer, follow procedures on "flagging" such information for the hearing, and prepare the appropriate paperwork for a positive credible fear finding. Officers may be asked to prepare a memorandum to file outlining the potential bar that may be triggered. Although positive credible fear determinations that involve a possible mandatory bar no longer require USCIS-HQ review, supervisory officers may use their discretion to forward the case to USCIS-HQ for review.

Procedures Manual, Credible Fear Process (Draft); Joseph E. Langlois. Asylum Division, Refugee, Asylum and International Operations Directorate. *Revised Credible Fear Quality Assurance Review Categories and Procedures*, Memorandum to Asylum Office Directors, et al. (Washington, DC: 23 Dec. 2008).

X. OTHER ISSUES

A. Treatment of Dependents

8 C.F.R. § 208.30(b).

A spouse or child of an applicant may be included in the alien's credible fear evaluation and determination, if the spouse or child arrived in the United States concurrently with the principal alien and desires to be included in the principal alien's determination. USCIS maintains discretion under this regulation not to allow a spouse or child to be included in the principal's credible fear request.

Any alien also has the right to have his or her credible fear evaluation and determination made separately, and it is important for asylum pre-screening officers to question each member of the family to be sure that, if any member of the family has a credible fear, his or her right to apply for asylum or protection under CAT is preserved. When questioning family members, special attention should be paid to the privacy of each family member and to the possibility that victims of domestic abuse, rape, and other forms of persecution might not be comfortable speaking in front of other family members.

The regulatory provision that allows a dependent to be included in a principal's determination does not change the statutory rule that any alien subject to expedited removal who has a credible fear has the right to be referred to an immigration judge.

B. Attorneys and Consultants

The applicant may consult with any person prior to the credible fear interview. The applicant is also permitted to have a consultant present at the credible fear interview. Asylum officers should determine whether or not an applicant wishes to have a consultant present at the credible fear interview. Although an alien is permitted by regulation to have a consultant present at a credible fear interview, the availability of a consultant cannot unreasonably delay the process. A consultant may be a relative, friend, clergy person, attorney, or representative. If the consultant is an attorney or representative, he or she is not required to submit a Form G-28, *Notice of Entry of Appearance as Attorney or Accredited Representative*, but may submit one if he or she desires.

8 C.F.R. § 208.30(d)(4).

8 C.F.R. § 208.30(d)(4); Procedures Manual, Credible Fear Process (Draft).

C. Factual Summary

For each credible fear interview, the asylum officer must create a summary of material facts as stated by the applicant. At the conclusion of the interview, the asylum officer must review the summary with the applicant and provide to the applicant an opportunity to correct any errors therein. The factual summary and its review should be contemporaneously recorded at the end of the asylum officer's interview notes.

8 C.F.R. § 208.30(d)(6).

D. No General Presumptions Against Certain Types of Cases.

Each claim must be evaluated on its own merits. Therefore, there is no general presumption against officers recognizing any particular type of fear claim.

Matter of A-B-, 27 I&N Dec. 316 (AG 2018).

For example, there is no general rule against claims involving domestic violence and gang-related violence as a basis for membership in a particular social group. Similarly, there is no general rule that proposed particular social groups whose definitions involve an inability to leave a domestic relationship are circular and therefore not cognizable. While a particular social group cannot be defined exclusively by the claimed persecution, each particular social group should be evaluated on its own merits. If the proposed social group definition contains characteristics independent from the feared

See *Matter of M-E-V-G-*, 26 I&N Dec. 227, 242 (BIA 2014).

persecution, the group may be valid. Analysis as to whether a proposed particular social group is cognizable should take into account the independent characteristics presented in each case.

E. No Need for the Applicant to Formulate or Delineate a Particular Social Group.

In evaluating whether the applicant has established a credible fear of persecution, if the claim is based on a particular social group, then the asylum officer cannot require an applicant to formulate or delineate particular social groups. The asylum officer must consider and evaluate possible formulations of particular social groups as part of the officer's obligation to elicit all relevant information from the applicant in this non-adversarial setting.

XIII. SUMMARY

A. Expedited Removal

In expedited removal, certain aliens seeking admission to the United States are immediately removable from the United States by DHS, unless they indicate an intention to apply for asylum or express a fear of persecution or torture or a fear of return to their home country. Aliens subject to expedited removal are not entitled to an immigration hearing or further review unless they are able to establish a credible fear of persecution or torture.

B. Function of Credible Fear Screening

The purpose of the credible fear screening process is to identify persons subject to expedited removal who have a significant possibility of ultimately being found eligible for asylum under section 208 of the INA or withholding of removal or deferral of removal under CAT, and to identify and screen out non-meritorious asylum claims.

C. Credible Fear Standard of Proof: Significant Possibility

In order to establish a credible fear of persecution or torture, the applicant must show a "significant possibility" that he or she could establish eligibility for asylum, withholding of removal, or deferral of removal.

The "significant possibility" standard of proof required to establish a credible fear of persecution or torture must be applied in conjunction with the standard of proof required for

the ultimate determination on eligibility for asylum, withholding of removal, or protection under CAT.

Where there is disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue, or the claim otherwise raises an unresolved issue of law, then the interpretation most favorable to the applicant is used when determining whether the applicant satisfies the credible fear standard.[8]

D. Credibility

The asylum officer should assess the credibility of the assertions underlying the applicant's claim, considering the totality of the circumstances and all relevant factors.

E. Establishing a Credible Fear of Persecution

In general, findings that (1) there is a significant possibility that the applicant experienced past persecution on account of a protected characteristic, (2) such conditions continue in the applicant's home country, and (3) the applicant could not avoid such persecution by relocating within his or her home country are sufficient to satisfy the credible fear standard. However, if the applicant fails to present evidence demonstrating that there is a significant possibility of future persecution or other serious harm, or if there are no reasons to grant asylum based on the severity of the past persecution, a negative credible fear determination is appropriate.

When an applicant does not claim to have suffered any past harm, or where the evidence is insufficient to establish a significant possibility of past persecution under INA section 208, the asylum officer must determine whether there is a significant possibility the applicant could establish a well-founded fear of persecution on account of a protected characteristic under INA section 208.

F. Establishing a Credible Fear of Torture

[8] If the permanent injunction in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), *appeal pending*, No. 19-5013 (D.C. Cir. filed Jan. 30, 2019), is lifted, then officers must instead follow the following guidance:

> The asylum officer should also apply the case law of the relevant federal circuit court, together with the applicable precedents of the Attorney General and the BIA. The BIA defers to precedents of the circuit in which the removal proceedings took place, *Matter of Anselmo*, 20 I&N Dec. 25, 31 (BIA 1989), except in certain special situations, *see id. See also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U. S. 967 (2005) ("A court's prior judicial construction of statute trumps agency construction otherwise entitled to Chevron deference only if prior court decision holds that its construction is required by unambiguous terms of statute and leaves no room for agency discretion.").

In order to be eligible for withholding or deferral of removal under CAT, an applicant must establish that it is *more likely than not* that he or she would be tortured in the country of removal. Therefore, a significant possibility of establishing eligibility for withholding or deferral of removal is necessarily a greater burden than establishing a significant possibility of eligibility for asylum.

After establishing that the applicant's claim would be found credible, the applicant satisfies the credible fear of torture standard where there is a significant possibility that he or she could establish in a full withholding of removal hearing that: (a) the torturer specifically intends to inflict severe physical or mental pain or suffering; (b) the harm constitutes severe pain or suffering; (c) the torturer is a public official or other person acting in an official capacity, or someone acting at the instigation of or with the consent or acquiescence of a public official or someone acting in official capacity; and (d) the applicant is in the torturer's custody or physical control.

In order to assess whether an applicant faces torture in the proposed country of removal, an officer must consider all relevant evidence, which includes but is not limited to the following: credible evidence of past torture; credible evidence that the applicant could internally relocate to avoid torture; and credible evidence of gross, flagrant, or mass violations of human rights within the country of removal, for which determination the officer must consult the objective country conditions set forth in Department of State country reports.

8 C.F.R. § 208.16(c)(3).

Under CAT, the burden is on the applicant to show that it is more likely than not that he or she will be tortured, and one of the relevant considerations is the possibility of internal relocation.

G. Other Issues

While the mandatory bars to asylum and withholding of removal do not apply to credible fear determinations, asylum officers must elicit and make note of all information relevant to whether a bar to asylum or withholding applies or not.

A spouse or child of an applicant may be included in the alien's credible fear evaluation and determination if the spouse or child arrived in the United States concurrently with the principal alien and desires to be included in the principal alien's determination.

The applicant may consult with any person prior to the credible fear interview. The applicant is also permitted to have a consultant present at the credible fear interview. A consultant may be a relative, friend, clergy person, attorney, or representative.

For each credible fear interview, the asylum officer must create a summary of material facts as stated by the applicant and review the summary with the applicant.

Exhibit B

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Washington, DC 20529-2100

U.S. Citizenship and Immigration Services

Policy Memorandum

SUBJECT: Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of L-E-A-*

Purpose
This policy memorandum (PM) provides guidance to U.S. Citizenship and Immigration Services (USCIS) officers for determining whether an applicant is eligible for asylum or refugee status or withholding of removal in light of the Attorney General's decision in *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019). The guidance in this memorandum supersedes all previous guidance dealing specifically with asylum, withholding, and refugee eligibility that is inconsistent with this guidance.

Scope
This PM applies to, and shall be used to, guide determinations by all USCIS employees. USCIS personnel are directed to ensure consistent application of the holding and reasoning in *Matter of L-E-A-* in reasonable fear, credible fear, asylum, and refugee screenings and adjudications.

Authority
Sections 101(a)(42), 103(a), 207, 208, and 235 of the Immigration and Nationality Act (INA) (8 U.S.C. §§ 1101(a)(42), 1103(a), 1157, 1158, 1225); Section 451 of the Homeland Security Act of 2002 (6 U.S.C. § 271); Title 8 Code of Federal Regulations (8 C.F.R.) Parts 207, 208, and 235.

I. Background

On July 29, 2019, the Attorney General published *Matter of L-E-A-*, which provides the framework to adjudicate protection claims based on membership in a particular social group "defined by family or kinship ties." The purpose of this memorandum is to provide guidance to asylum and refugee officers on the application of this decision while processing reasonable fear, credible fear, asylum, and refugee claims.

In his decision, the Attorney General overruled the portion of the Board of Immigration Appeals' (BIA) precedent decision in *Matter of L-E-A-*, 26 I&N Dec. 40, 42-43 (BIA 2017), which discussed whether the applicant's proposed particular social group is cognizable. The Attorney General found that, in analyzing the particular social group at issue, the BIA did not perform the required fact-based inquiry to determine whether the applicant had satisfied his burden of establishing the existence of a particular social group within the legal requirements of the statute. The Attorney General, however, left the Board's analysis of the nexus requirement undisturbed. *See id.* at 43–47. That analysis, in which the

Board concluded that the applicant failed to establish a sufficient nexus between his membership in the group and the persecution, remains good law.

Section 103(a) of the INA provides that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a). Further, under 8 C.F.R. §§ 103.10(b) and 1003.1(g), "decisions of the [BIA], and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security." And decisions of the Attorney General, as well as selected decisions designated by the Board, "shall serve as precedents in all proceedings involving the same issue or issues." *See* 8 C.F.R. §§ 103.10(b); 1003.1(g). Accordingly, the decision in *Matter of L-E-A-* was effective immediately and has been binding on all USCIS officers since July 29, 2019.[1]

II. Summary of Changes

Previous USCIS guidance, no longer valid in light of the Attorney General's decision in *Matter of L-E-A-*, instructed officers to recognize particular social groups based on familial relationships so long as the pertinent society perceived the degree of relationship among the family members as so significant that the society distinguished groups based on that type of relationship. This held true under past USCIS guidance, even for families that were not well-known in the relevant society. For example, the RAIO Nexus – Particular Social Group Lesson Plan, July 27, 2015, stated:

> Often, the determinative question is whether the familial relationship also reflects social distinctions. That would depend on the circumstances, including the degree and nature of the relationship asserted to define the group and the cultural context that would inform how that type of relationship is viewed by the society in question. The question here is not generally whether a specific family is well-known in the society. Rather, the question is whether the society perceives the degree of relationship shared by group members as so significant that the society distinguishes groups of people based on that type of relationship.
>
> In most societies, for example, the nuclear family would qualify as a particular social group, while those in more distant relationships, such as second or third cousins, may not. *Matter of H-*, 21 I&N Dec. 337, 342-43 (BIA 1996) (indicating that a Somali clan or subclan represents a familial-type relationship that is socially distinct)...You should carefully

[1] While a court order in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), currently requires officers to apply the law of the circuit most favorable to an alien undergoing credible fear screening, the Attorney General's decision in *Matter of L-E-A-* is controlling law in every circuit, and must be applied going forward in every circuit, unless and until a circuit court holds to the contrary. The Attorney General in *L-E-A-* held that previous courts of appeals decisions that held that nuclear families categorically constituted particular social groups were interpretations of "particular social group," an ambiguous statutory term that the Attorney General has discretion to reasonably interpret. The Attorney General has reasonably interpreted that term to require social distinction and particularity, and has predicted that many family-based groups may not meet those requirements. Therefore, the Attorney General concluded that the cognizability of family groups must be considered on a case-by-case basis, not categorically. Accordingly, this part of the Attorney General's decision in *L-E-A-* overrode court decisions (a) approving family-based particular social groups categorically or (b) suggesting that the particularity and social distinction requirements are satisfied where the type of relationship that unifies group members is particular and socially distinct, even where the specific family group at issue is not particular and socially distinct. *See Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs., Inc.*, 545 U.S. 967, 980 (2005); *see also Grace*, 344 F. Supp. 3d at 136-37 (explaining that where a court has interpreted an ambiguous statutory provision that an agency has discretion to interpret, the agency's reasonable interpretation of the statute may override the prior court interpretation). Questions or suggestions regarding the *Grace* order and its applicability to credible fear screenings should be addressed through appropriate channels to the Office of Chief Counsel.

> analyze this issue in light of the nature and degree of relationship within the family group and pay close attention to country of origin information about social attitudes toward family relationships.

Nexus Particular Social Group Lesson Plan at 22.

This language and all other guidance and training materials that conflicts with the holding in *Matter of L-E-A-* are **no longer valid** and **do not** reflect the current state of the law. Under the Attorney General's opinion in *Matter of L-E-A-*, officers should no longer recognize family-based particular social groups based only on the general significance of family relationships in the society in question, or the sole fact that a particular family has been the target of private criminal activity. Instead, officers "must be careful to focus on the particular social group *as it is defined* by the applicant and ask whether *that group* is distinct in the society in question." *Matter of L-E-A-*, 27 I&N Dec. at 594. For social groups defined by a specific family, such as an applicant's father's immediate family, "the adjudicator must ask whether *that* specific family is 'set apart, or distinct, from other persons within the society in some significant way.' It is not sufficient to observe that the applicant's society (or societies in general) place great significance on the concept of the family." *Id.* (citing *M-E-V-G-*, 26 I&N Dec. at 238). The Attorney General explicitly instructs that "[t]he fact that 'nuclear families' or some other widely recognized family unit generally carry societal importance says nothing about whether a *specific* nuclear family would be 'recognizable by society at large.'" *Id.* (citing *Matter of A-B-*, 27 I&N Dec. 316, 336 (A.G. 2018); *see also Castellano-Chacon v. INS*, 341 F.3d 533, 548 (6th Cir. 2003) (noting that a country or society's reaction to a group is a factor in establishing whether it is a cognizable particular social group)). For social groups defined as "a collection of familial relatives of persons who have certain shared characteristics"—such as family members of persons who have been killed by gang members—officers must ask whether "families sharing these characteristics are seen in society as cohesive and identifiable groups." *Id.* at 595. Further, the shared characteristic relied upon to establish "particular social group' status cannot be defined "in terms of the persecution" that the group "has suffered or that it fears." *Id.* at 595. In other words, if a family group fears retaliation from a gang, the characteristic establishing particular social group status cannot simply be people who fear retaliation from criminal gangs. The alleged family social group would have to be defined by a characteristic other than the particular harm that the group fears. This is because, by its terms, the INA defines refugees as needing to satisfy two separate and distinct elements—that of (i) having a protected status like membership in a "particular social group" and (ii) having experienced, or having a well-founded fear of, persecution on account of that status.

III. Analyzing Whether a Family Based Group is a Cognizable Particular Social Group

The Attorney General, in *Matter of L-E-A-*, reaffirmed long-standing BIA precedent that all proposed particular social groups, including family-based groups, must satisfy the criteria set forth in *Matter of M-E-V-G-* and *Matter of W-G-R-*. *See Matter of M-E-V-G-*, 26 I&N Dec. at 237; *Matter of W-G-R-*, 26 I&N Dec. at 215–18. In these cases, the BIA held that for any claim based on membership in a particular social group, an applicant has the burden to prove that he or she is a member of a group that is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. -. *See Matter of M-E-V-G-*, 26 I&N Dec. at 237; *Matter of W-G-R-*, 26 I&N Dec. at 215–18. The Attorney General thus did not bar all family-based groups from qualifying for asylum, but predicted that "[b]ased upon these immigration decisions, in the

ordinary case, a nuclear family will not, without more, constitute a 'particular social group' because most nuclear families are not inherently socially distinct." *Matter of L-E-A-*, 27 I&N Dec. at 589. In the same manner as former Attorney General Sessions's opinion in *Matter of A-B-*, 27 I&N Dec. at 318, the Attorney General's decision in *Matter of L-E-A-* also made clear that the rigorous application of that legal standard is required for all particular social group cases. Therefore, the Attorney General's decision in *Matter of L-E-A-* confirms, consistent with BIA precedent, that to qualify as a particular social group, a family-based group must satisfy ***all three*** of the criteria listed below.

Officers should note an important distinction between the context of *L-E-A-* and other Attorney General and Board precedents concerning particular social groups, and USCIS proceedings. In adversarial section 240 proceedings, the applicant has the burden to clearly indicate the exact delineation of any particular social group on which he or she bases her claim. *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189, 190-91 (BIA 2018). Proceedings before USCIS officers, unlike section 240 proceedings, are not adversarial. *See* 8 C.F.R. 208.9(b); 8 C.F.R. 208.30(d); 8 C.F.R. 208.31(c). The applicant in USCIS proceedings has the burden to show facts that would demonstrate eligibility for asylum or withholding, 8 C.F.R. 208.13(a); 8 C.F.R. 208.16(b), or in credible and reasonable fear proceedings, facts that show a significant or reasonable possibility the applicant could establish such eligibility, 8 C.F.R. 208.30(e)(2) & (3); 8 C.F.R. 208.31(c). However, the applicant in USCIS interviews does not have the burden to delineate a cognizable particular social group, and the officer must conduct the interview with the purpose of eliciting all relevant and useful information bearing on the applicant's eligibility. *See* 8 C.F.R. 208.9(b); 8 C.F.R. 208.30(d).

A. Legal Framework for Analysis of Whether A Family- or Kin- Based Group is a Cognizable "Particular Social Group"

i. Immutability

The members of a purported social group must have "a common immutable characteristic." *See Matter of M-E-V-G-*, 26 I&N Dec. at 237-38 ("Our interpretation of the phrase 'membership in a particular social group' incorporates the common immutable characteristic standard set forth in *Matter of Acosta*, 19 I&N Dec. [211,] 233 [(BIA 1985)], because members of a particular social group would suffer significant harm if asked to give up their group affiliation, either because it would be virtually impossible to do so or because the basis of affiliation is fundamental to the members' identities or consciences."). While the BIA has recognized that "kinship ties" may be one of the kinds of common, immutable characteristics that might form the basis for a "particular social group" under the INA, *Acosta*, 19 I&N Dec. at 233, officers must apply a society-specific and case-specific analysis to determine whether each set of facts, as presented by the applicant, meets the immutability element required by the BIA.

ii. Particularity

To qualify as a social group for purposes of evaluating refugee status, a family-based group must share one or more characteristics that enable the group to be defined with particularity. *Matter of A-B-*, 27 I&N Dec. at 320, 335-36. A group is particular if the "group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of

persons." *Id.* at 330 (citing *Matter of E-A-G-*, 24 I&N Dec. 591, 594 (BIA 2008)). A particular social group must not be "amorphous, overbroad, diffuse, or subjective," and "not every 'immutable characteristic' is sufficiently precise to define a particular social group." *Matter of M-E-V-G-*, 26 I&N Dec. at 239. *See also Matter of L-E-A-*, 27 I&N Dec. at 593 (citing *Matter of S-E-G-*, 24 I&N Dec. at 597, 585 (BIA 2008) (noting that the "proposed group of 'family members,' which could include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others, is . . . too amorphous a category" to satisfy the particularity requirement)). As with each element of a particular social group determination, officers must analyze the group at issue in the context of the society where the claim arises.

iii. Social Distinction

Officers must determine whether the facts show a particular social group that is socially distinct in the relevant society. *See Matter of M-E-V-G-*, 26 I&N Dec. at 238. In other words, the applicant's purported group must be "set apart, or distinct, from other persons within the society in some significant way." *Id.* ("...[I]f the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it."). In *Matter of L-E-A-*, the Attorney General emphasized this long-standing BIA precedent, stating, "'To have the "social distinction" necessary to establish a particular social group, there must be evidence showing that society in general perceives, considers, or recognizes persons sharing the particular characteristic to be a group.'" *Matter of L-E-A-*, 27 I&N Dec. at 593-94 (quoting *Matter of W-G-R-*, 26 I&N Dec. at 217). It is not enough that the purported group be set apart in the eye of the persecutor, because it is the perception of the relevant society—rather than the perception of the alien's actual or potential persecutors alone—that matters when determining social distinction. *Id.* at 594 (citing *W-G-R-*, 26 I&N Dec. at 217).[2]

B. Application of this Analysis to Common Family-Based Claims

The Attorney General in *Matter of L-E-A-* addressed two principal ways by which refugee or asylum applicants generally attempt to define family-based groups as "particular social groups:" (1) specific family units, or (2) a collection of familial relatives of persons who have certain shared characteristics. *Matter of L-E-A-*, 27 I&N Dec. at 594.

i. Specific Family Units

The Attorney General reiterated that applicants must show that the specific family unit being considered as a possible particular social group must have some greater significance or meaning in society. "In analyzing these claims, adjudicators must be careful to focus on the particular social group . . . and ask whether that group is distinct in the society in question." *Id.* It is not enough that a persecutor sets the family apart from the relevant society; the relevant society must perceive the family unit as set apart. *Id.* Consequently, the Attorney General predicted that the average family is unlikely to be recognized as a particular social group within the meaning of the asylum laws and binding precedent. *Id.*

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[2] Although not the focus of the social distinction analysis, the persecutor's perception remains critical to determining whether the actual or feared persecution is on account of the alien's membership in the proposed particular social group—i.e., the nexus analysis. *See Matter of L-E-A-*, 27 I&N Dec. at 43–47.

Officers must focus on the particular social group as it is presented by the facts the applicant provides, and determine whether that group is distinct in the society in question. For example, if the applicant claims persecution based on membership in his father's immediate family, then the adjudicator must ask whether that specific family is "set apart, or distinct, from other persons within the society in some significant way." *Matter of L-E-A-*, 27 I&N Dec. at 594. The officer should not assess the proposed particular social group as "immediate families in general."

ii. Collections of Familial Relatives of Persons Who Have Certain Shared Characteristics

The Attorney General explained that this category of family classification (collections of familial relatives of persons who have certain shared characteristics, such as a social group defined as "immediate family members of Honduran women unable to leave a domestic relationship") will only meet the social distinction requirement where there is evidence that families sharing these characteristics are seen in the society as cohesive and identifiable groups. *Matter of L-E-A-*, 27 I&N Dec. at 595. Officers should also be cautioned that when analyzing these kinds of groups, a particular social group cannot be defined by the harm group members have suffered or fear as the persecution that is the basis of the claim. *Id.* (citing *Matter of M-E-V-G-*, 26 I&N Dec. at 236 n.11 and other cases).

C. No Categorical Bar or Universal Particular Social Groups

The Attorney General's decision in *Matter of L-E-A-* "does not bar all family-based social groups from qualifying for asylum." *Matter of L-E-A-* 27 I&N Dec. at 595. To the contrary, an applicant may be a member of a specific kinship group or clan that, based on the evidence in the applicant's case and of the pertinent society, is immutable, particular, and socially distinct. *Id.* Additionally, officers must not assume that because one particular social group is cognizable in one specific case and society, that it is cognizable in another case or society. Officers must analyze each case on its merits. Because particular social groups must be both particular and socially distinct in the societies in question, as well as immutable, each case requires a fact-specific analysis based on the evidence presented by the applicant. *Id.* at 591. Instead of imposing any categorical bar, this PM is issued to remind officers of the requirements for particular social groups and to highlight that family-based groups do not automatically qualify as particular social groups under the law.

IV. Summary

Under current precedent, including *Matter of L-E-A-*, *Matter of A-B-*, *Matter of M-E-V-G-*, and *Matter of W-G-R-*, an applicant who claims that he or she has experienced, or has a well-founded fear of, persecution on account of membership in a particular social group based on family or kinship has the burden to establish that he or she is a member of a group that is (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question. It is not sufficient to observe that the applicant's society (or societies in general) place great significance on the concept of the family. *Matter of L-E-A-*, 27 I&N Dec. at 594 (citing *M-E-V-G-*, 26 I&N Dec. at 238). The specific family-based group to which the applicant belongs must hold some greater meaning or significance in their society that sets that specific family group apart or

makes it distinct from other persons within the society in some significant way. *Id.* at 593-95; *Matter of M-E-V-G-*, 26 I&N Dec. at 238.

Officers should be alert that, under the standards clarified in *Matter of L-E-A-*, the Attorney General predicted that the average or ordinary family typically will not meet the standard, because it will not have the kind of identifying characteristics that render a specific family socially distinct within the society in question. Where a preponderance of the evidence does not show that the specific family unit is socially distinct, eligibility for asylum or refugee status on that basis will not be established. See 8 U.S.C. 1158(b)(1)(B)(i). Likewise, in the absence of evidence that the individual family is socially distinct, applicants will be unable to show, on that basis, a significant possibility of establishing eligibility for asylum or withholding of removal under INA § 241(b)(3) for purposes of credible-fear screenings, INA § 235(b)(1)(B)(v), or a reasonable fear of persecution in reasonable fear screenings, 8 C.F.R. § 208.31(c).

Even if an applicant establishes membership in a legally cognizable particular social group, officers must find that the applicant also presents sufficient evidence to satisfy all the other elements of the refugee definition in order to be determined eligible for asylum or refugee status. Officers must examine each element separately, even though certain types of evidence may be relevant to several elements.

V. Contact

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Office of Chief Counsel.

VI. Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to, create any right or benefit, substantive or procedural, enforceable at law, or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.