



**U.S. Citizenship  
and Immigration  
Services**

**RAIO DIRECTORATE – OFFICER TRAINING**

**RAIO Combined Training Course**

**NEXUS –  
PARTICULAR SOCIAL GROUP**

**TRAINING MODULE**

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## **NEXUS – PARTICULAR SOCIAL GROUP**

### **Training Module**

#### **MODULE DESCRIPTION:**

This module discusses membership in a particular social group (PSG), one of the protected grounds in the refugee definition codified in the Immigration and Nationality Act. The discussion describes membership in a particular social group (PSG) and examines its interpretation in administrative and judicial case law. The primary focus of this module is the determination as to whether an applicant has established that past harm suffered or future harm feared is on account of membership in a particular social group.

#### **TERMINAL PERFORMANCE OBJECTIVE(S)**

Given a request to adjudicate either a request for asylum or a request for refugee status, the officer will be able to apply the law (statutes, regulations and case law) to determine whether an applicant is eligible for the requested relief.

#### **ENABLING PERFORMANCE OBJECTIVES**

1. Explain factors to consider in determining whether persecution or feared persecution is on account of membership in a particular social group.

#### **INSTRUCTIONAL METHODS**

- Interactive Presentation
- Discussion
- Practical Exercises

#### **METHOD(S) OF EVALUATION**

#### **REQUIRED READING**

1. Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014).
2. Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014).
3. Matter of W-G-R-, 26 I&N Dec. 208 (BIA 2014)

**Division-Specific Required Reading - Refugee Division**

**Division-Specific Required Reading - Asylum Division**

**Division-Specific Required Reading - International Operations Division**

**ADDITIONAL RESOURCES**

1. Matter of C-A-, 23 I&N Dec. 951 (BIA 2006).
2. Matter of Acosta, 19 I&N Dec. 211, 233-34 (BIA 1985)
3. Lynden D. Melmed, USCIS Chief Counsel. Guidance on Matter of C-A-, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).
4. United Nations High Commissioner for Refugees, Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. HCR/GIP/02/02, 7 May 2002, 5 pp.
5. Phyllis Coven. INS Office of International Affairs. Considerations For Asylum Officers Adjudicating Asylum Claims From Women (Gender Guidelines), Memorandum to all INS Asylum Officers, HQASM Coordinators (Washington, DC: 26 May 1995), 19 p. *See also* RAIO Training Module, Gender-Related Claims.
6. Rosemary Melville. INS Office of International Affairs. Follow Up on Gender Guidelines Training, Memorandum to Asylum Office Directors, SAOs, AOs (Washington, DC: 7 July 1995), 8 p.
7. Paul W. Virtue. INS Office of General Counsel. Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA, Memorandum to Kathleen Thompson, INS Office of International Affairs (Washington, DC: 9 December 1993), 7 p.

**Division-Specific Additional Resources - Refugee Division**

**Division-Specific Additional Resources - Asylum Division**

**Division-Specific Additional Resources - International Operations Division**

**CRITICAL TASKS**

<b>Task/ Skill #</b>	<b>Task Description</b>
ILR6	Knowledge of U.S. case law that impacts RAIO (3)
ILR9	Knowledge of policies and procedures for processing lesbian, gay, bisexual and transgender (LGBT) claims (3)
ILR10	Knowledge of policies and procedures for processing gender-related claims (3)
ILR14	Knowledge of nexus to a protected characteristic (4)
ILR15	Knowledge of the elements of each protected characteristic (4)
DM2	Skill in applying legal, policy and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence) (5)
RI1	Skill in identifying issues of claim (4)
RI2	Skill in identifying the information required to establish eligibility (4)

SCHEDULE OF REVISIONS

Date	Section (Number and Name)	Brief Description of Changes	Made By
11/06/2013	Summary (of 4/30/2013 edition)	Revised last sentence of paragraph 1 of Summary and corrected corresponding footnote # 114; added an additional sentence as clarification.	J.Kochman
2/4/2014	Additional Resources	Removed Dea Carpenter memo (not yet accepted)	L. Gollub (incorporated by V. Conley and Joyce)
7/27/15	Throughout LP	Substantial revision of LP for updated case law and new guidance:	ASM QA, ASM Training, RAD TAQA, RAIO Training

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Throughout this training module you will come across references to division-specific supplemental information located at the end of the module, as well as links to documents that contain division-specific, detailed information. You are responsible for knowing the information in the referenced material that pertains to your division. Officers in the International Operations Division who will be conducting refugee interviews are also responsible for knowing the information in the referenced material that pertains to the Refugee Affairs Division.

For easy reference, each division's supplements are color-coded: Refugee Affairs Division (RAD) in pink; Asylum Division (ASM) in yellow; and International Operations Division (IO) in purple.

## 1. INTRODUCTION

The refugee definition at INA §101(a)(42) states that an individual is a refugee if he or she establishes past persecution or a well-founded fear of future persecution on account of one or more of the five protected grounds. All of the elements of the refugee definition are reviewed in the RAIO Training Module, *Refugee Definition*. The requirements for an applicant to establish eligibility based on past persecution are discussed in the module, *Persecution*. The elements necessary to establish a well-founded fear of future persecution are discussed in the module, *Well-Founded Fear*. The analysis of the persecutor's motive and the requirements needed to establish that persecution or feared persecution is "on account of" race, religion, nationality, or political opinion are discussed in the module, *Nexus and the Protected Grounds* (minus PSG).

This module provides you with an understanding of the requirements needed to establish whether persecution or feared persecution is "on account of" membership in a particular social group (PSG).

The nexus analysis for particular social group claims is fundamentally the same as it is for cases involving the other protected characteristics; you must determine:

1. whether the applicant possesses or is perceived to possess a protected characteristic;  
and
2. whether the persecution or feared persecution is on account of that protected characteristic.

## 2. DOES THE APPLICANT POSSESS A PROTECTED CHARACTERISTIC?

The first question is the starting point for all protected grounds – whether the applicant possesses, or is perceived to possess, a protected characteristic: membership in a particular social group. Membership in a particular social group may overlap with other protected grounds, such as political opinion, and you should also consider whether the applicant can establish eligibility based on a different protected ground.

For cases based on membership in a particular social group, the analysis is expanded, requiring you to identify the characteristics that form the particular social group and explain why persons with those characteristics form a particular social group within the meaning of the refugee definition.

Determining whether a specific group constitutes a particular social group can be a complicated task. Recognizing this complexity, the Board of Immigration Appeals has set forth a three-part test for evaluating whether a group meets the definition of a particular social group.<sup>1</sup> While looking to precedential decisions from the Board and the circuit courts of appeals may help inform your decision, you must apply the analysis discussed below to the facts of each individual case.

## 2.1 Is the Applicant a Member of a Particular Social Group?

An applicant who is seeking asylum based on membership in a particular social group must establish that the group is (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question, and (3) defined with particularity.<sup>2</sup> All three elements must be established.

It is important to remember that membership in a particular social group may be imputed to an applicant who is not, in fact, a member of a particular social group.

### Step One: Common Immutable Characteristic

The group must comprise individuals who share a common, immutable characteristic, meaning it is one that the members of the group either cannot change, or should not be required to change because it is fundamental to each member's identity or conscience.<sup>3</sup> The defining characteristic can be a shared innate characteristic, a shared past experience, or a social or other status.<sup>4</sup>

#### *Unchangeable Characteristics*

<sup>1</sup> *Matter of M-E-V-G*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R*, 26 I&N Dec. 208 (BIA 2014).

<sup>2</sup> *Matter of M-E-V-G*, 26 I&N Dec. at 237; *Matter of W-G-R*, 26 I&N Dec. at 212-218; see also *Matter of A-R-C-G*, 26 I&N Dec. 388 (BIA 2014) (applying to a domestic violence scenario the three-part test put forth in *Matter of M-E-V-G* and *Matter of W-G-R*.)

<sup>3</sup> *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

<sup>4</sup> *Id.* at 233-34; *W-G-R*, 26 I&N Dec. at 212-13; *A-R-C-G*, 26 I&N Dec. at 392-393.

Unchangeable characteristics are traits that cannot be changed. Some examples of characteristics that cannot be changed include innate ones, like gender, race, ethnicity, skin color, and family relationships.<sup>5</sup> Some of these characteristics are biological traits of a person. Others might be shared past experiences that cannot be changed because a person is unable to change the past.

### *Fundamental Characteristics*

Fundamental characteristics are traits, beliefs, or statuses that a person should not be required to change because they are essential to the individual's identity or conscience. In analyzing this type of claim, you should consider both how the applicant experiences the trait as part of his or her identity and whether the trait is fundamental from an objective point of view. With regard to the latter, you may consider whether human rights norms suggest the characteristic is fundamental. An example of a shared trait that is fundamental to an individual's identity or conscience is having intact genitalia in the female genital mutilation (FGM) context. In contrast, even though an applicant may consider being a member of a terrorist or criminal organization as being fundamental to his or her identity or conscience, there is no basic human right to pursue such an association, and it would not be considered fundamental from an objective point of view.<sup>6</sup>

In *Matter of Acosta*, 19 I&N Dec. 211, 234 (BIA 1988), the Board explained that the unchangeable characteristic or fundamental characteristic is part of the definition of a particular social group because each of the other four protected grounds describe persecution aimed at an immutable characteristic.<sup>7</sup> Therefore, the Board interpreted the term "particular social group" consistently with the other grounds of persecution in the INA, explaining that "the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution."<sup>8</sup>

### *Assumption of Risk Considerations*

In some cases, the applicant's voluntary assumption of an extraordinary risk of serious harm in taking on the trait that defines the group may be evidence of fundamentality.<sup>9</sup> An applicant's decision to assume significant risks can, in some cases, provide evidence that the belief or trait is fundamental to the applicant's identity or conscience.<sup>10</sup> The relevance

<sup>5</sup> See *Fatin v. INS*, 12 F.3d 1233, 1239 (3d Cir. 1993); *Matter of Kasinga*, 21 I&N Dec. 357, 366 (BIA 1996).

<sup>6</sup> See *Arteaga v. Mukasey*, 511 F.3d 940, 946 (9th Cir. 2007) (the court noted, "we would be hard-pressed to agree with the suggestion that one who voluntarily associates with a vicious street gang that participates in violent criminal activity does so for reasons so fundamental to 'human dignity' that he should not be forced to forsake the association").

<sup>7</sup> *Matter of Acosta*, 19 I&N Dec. at 233-34.

<sup>8</sup> *Id.*

<sup>9</sup> See Lynden D. Melmed, USCIS Chief Counsel, *Guidance on Matter of C-A*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

<sup>10</sup> *Id.* at 3.

of an applicant's voluntary assumption of risk must be considered on a case-by-case basis. Not all individuals assume the risk of a particular activity because the activity is fundamental to their identity.<sup>11</sup> For example, an individual may assume the risk of a particular activity for monetary gain, and in such a case that assumption of risk may undercut fundamentality.<sup>12</sup>

### Step Two: Social Distinction

A group's shared characteristic must be perceived as distinct by the relevant society.<sup>13</sup> This element has sometimes been referred to as "social visibility." However, in its rulings 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), the Board renamed "social visibility" as "social distinction" to avoid confusion.<sup>14</sup> The Board emphasized that "social distinction" does not require the shared characteristic to be seen by society (i.e., visible); instead the group characteristic must be perceived as distinct by society.<sup>15</sup> There must be evidence indicating "that a society in general perceives, considers, or recognizes persons" as a group.<sup>16</sup> This requirement can be met by showing that the society in question sets apart or differentiates between people who possess the shared belief or trait and people who do not, even if individual group members are not visibly recognized as group members. In other words, if 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.<sup>17</sup> The Board's interpretation of "social distinction" is consistent with USCIS's longstanding interpretation of the term.<sup>18</sup>

In some circumstances, members of a group may be visibly recognizable, but society may also consider persons to be a group without being able to identify the members by sight. Board cases have recognized groups that were not ocularly visible. For instance, in *Matter of Kasinga*, 21 I&N Dec. 357, 365-66 (BIA 1996), the Board determined that young women from a certain ethnic group in Togo who have not been previously subjected to FGM but are opposed to it constitute a particular social group. In *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990) the Board held that "homosexuals" in Cuba were a particular social group. In *Matter of Fuentes*, 19 I&N Dec. 658 (BIA 1988), the Board concluded that former national police members could be

<sup>11</sup> Lynden D. Melmed, USCIS Chief Counsel, *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

<sup>12</sup> *Id.*

<sup>13</sup> *Matter of W-G-R-*, 26 I&N Dec. at 216.

<sup>14</sup> *Matter of M-E-V-G-*, 26 I&N Dec. at 240; *W-G-R-*, 26 I&N Dec. at 216.

<sup>15</sup> *M-E-V-G-*, 26 I&N Dec. at 240; *W-G-R-*, 26 I&N Dec. at 216.

<sup>16</sup> *W-G-R-*, 26 I&N Dec. at 217.

<sup>17</sup> *M-E-V-G-*, 26 I&N Dec. at 238.

<sup>18</sup> See, e.g., Lynden D. Melmed, USCIS Chief Counsel, *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

a particular social group in some circumstances. These cases illustrate the point that ocular visibility is not required. In such cases, it may not be easy or possible to identify who has not been subjected to or is opposed to FGM, who is gay, or who is a former member of the national police.<sup>19</sup>

***Social distinction must be evaluated on a case-by-case basis and society-by-society basis***

As previously noted, for social distinction, there must be evidence showing that society in general perceives or considers people who share a particular characteristic as distinct.<sup>20</sup> Evidence such as country conditions, witness testimony, and press accounts may establish that a group is distinct.<sup>21</sup> The Board has emphasized that the social distinction determination must be made on a case-by-case basis.<sup>22</sup> Laws, policies, or cultural practices of a society, as well as governmental or non-governmental programs targeting certain groups, may also establish social distinction. For instance, in evaluating whether Guatemalan widows are socially distinct, you could research whether the Guatemalan government has laws and policies addressing the needs of widows, and whether NGOs have assistance programs helping widows. In *Matter of A-R-C-G-*, the Board explained that evidence that a certain group is protected within a society could establish social distinction.<sup>23</sup> The Board and the courts have not limited the types of society-specific evidence upon which you can rely. In another context, a society might have songs or poetry about witnesses who testify in court against members of criminal groups, and this could serve as some evidence that such witnesses might be distinct in that society. The individual group member's treatment may be relevant to whether such a group is socially distinct. The relevant society may include the entire country or a particular region or community within the country. Accordingly, you should consider all evidence before you to determine whether or not the proposed group is socially distinct.

Examining the Board's holdings in *M-E-V-G-* and *W-G-R-*, the Ninth Circuit also has emphasized that the analysis must be case-specific and society-specific.<sup>24</sup> The Ninth Circuit noted that "[i]t is an error...to assume that if a social group related to the same international gang...has been found non-cognizable in one society, it will not be cognizable in any society. Honduras, El Salvador, Guatemala, Nicaragua, and Panama have used different strategies for combating gang violence...[and] these different local responses to gangs in nations with distinct histories...may well result in a different social

<sup>19</sup> *M-E-V-G-*, 26 I&N Dec. at 240.

<sup>20</sup> *W-G-R-*, 26 I&N Dec. at 217 (BIA 2014).

<sup>21</sup> *M-E-V-G-*, 26 I&N Dec. at 244 (BIA 2014); see also *Matter of A-R-C-G-*, 26 I&N Dec. 388, 394 (BIA 2014) (discussing the types of evidence that may show social distinction in domestic violence-related particular social groups, including evidence that the society recognizes the need to offer protection to victims of domestic violence and other sociopolitical factors).

<sup>22</sup> *M-E-V-G-*, 26 I&N Dec. at 242.

<sup>23</sup> *A-R-C-G-*, 26 I&N Dec. at 394.

<sup>24</sup> *Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014).

recognition of social groups opposed to gang violence....” The Ninth Circuit concluded that “the agency must make a case-by-case determination as to whether the group is recognized by the particular society in question . . . [and] may not reject a group solely because it had previously found a similar group in a different society to lack social distinction.”<sup>25</sup> The Second Circuit also has examined the Board’s holdings in *M-E-V-G-* and *W-G-R-* and remanded a case for the Board to conduct additional case-specific analysis.<sup>26</sup>

This case-specific approach is not new. In *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007), the Board indicated that determining whether a group has a socially distinct shared characteristic must be “considered in the context of the country of concern and the persecution feared.”<sup>27</sup> In *A-M-E- & J-G-U-*, the Board reviewed country conditions to evaluate whether, in context, the proposed particular social group members shared socially distinct characteristics. The Board found that the applicants did not establish the existence of a particular social group because the proposed particular social group – “affluent Guatemalans” – did not share a common trait that was socially distinct in Guatemalan society.<sup>28</sup> In that case, the country of origin information before the Board demonstrated that “affluent Guatemalans” were not at greater risk of criminality or extortion than the general population. Instead the country of origin information demonstrated that criminality is pervasive in all Guatemalan socio-economic groups. The report indicated that impoverished Indians were also subjected to both crimes. For the same reason, the Board also rejected the following possible formulations of the group: “wealth,” “upper income level,” “socio-economic level,” “the monied class,” and “the upper class.” The Board specifically noted, however, that wealth- or class-based social groups must be analyzed in context, and that, under some circumstances, such groups might qualify as particular social groups.<sup>29</sup> For example, should a government institute a policy of imprisoning and mistreating persons with assets or income above a fixed level, there could be a basis for a societal perception that the class of wealthy persons, as defined by the government, would constitute a particular social group.<sup>30</sup>

Because case-specific analysis is required, it is critical for you to look at all relevant information, including the applicant’s individual circumstances, the circumstances surrounding the events of persecution, and country of origin information, before making a

<sup>25</sup> *Id.* at 1084 n.7.

<sup>26</sup> *Paloka v. Holder*, 762 F.3d 191, 198 (2d Cir. 2014) (instructing the Board to determine whether the proposed groups of “young Albanian women” or “young Albanian women between the ages of 15 and 25” qualified as cognizable social group).

<sup>27</sup> *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007); *cf. Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2005).

<sup>28</sup> See also *Donchev v. Mukasey*, 553 F.3d 1206, 1218-1219 (9th Cir. 2009) (“friends of Roma individuals or of the Roma people” not a socially distinct group, in part, because country conditions did not show that members of the group, such as the applicant’s family members, were viewed or treated by Bulgarian society in a uniform manner).

<sup>29</sup> *A-M-E- & J-G-U-*, 24 I&N Dec. at 75, n.6.

<sup>30</sup> *Id.*; see also *Tapiero de Orejuela*, 423 F.3d at 672 (finding that a particular social group of educated, wealthy, landowning, cattle-farming Colombians, was a cognizable group because the group was not defined merely by wealth).

social distinction determination. Country of origin information indicating that the immutable characteristic reflects societal distinctions is relevant when analyzing whether a group constitutes a particular social group.<sup>31</sup>

***The group does not have to self-identify as a group and members may hide their membership***

It is not necessary for a group to identify itself explicitly as a group in order for the social distinction requirement to be met. In addition, the fact that a member of a particular social group may make efforts to hide his or her membership to avoid persecution does not prevent such a group from constituting a cognizable particular social group.<sup>32</sup> Accordingly, a group may not appear cohesive and may not display the traditional hallmarks of a group that shows its existence openly. If the society in question distinguishes people who possess the immutable trait from others because of their shared belief or characteristic, then the group is socially distinct.<sup>33</sup>

**Step 3: Particularity**

Applicants seeking to establish membership in a particular social group must also establish that the group is defined with sufficient particularity. The particularity requirement relates to the group's boundaries or the need to put outer limits on the definition of a particular social group.<sup>34</sup> The term "particular[ity]" is included in the plain language of "particular" social group and is consistent with the specificity by which race, religion, nationality, and political opinion are commonly defined.<sup>35</sup> The characteristics defining the group must provide a clear benchmark for determining who falls within the group and who does not.<sup>36</sup> The group must be discrete and have definable boundaries.<sup>37</sup>

The Board has made clear that this particularity inquiry must take into account the perspectives of the society in question.<sup>38</sup> Thus, the Board noted in *W-G-R-* that

<sup>31</sup> See *Castellano-Chacon v. INS*, 341 F.3d 533, 548 (6th Cir. 2003) (noting that a society's reaction to a group may provide evidence that a particular social group exists, so long as the persecutors' reaction to the members of the group is not the central characteristic of the group); see also *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991) ("A particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor – or in the eyes of the outside world in general.").

<sup>32</sup> *Matter of W-G-R-*, 26 I&N Dec. 208, 217 (BIA 2014).

<sup>33</sup> *Id.*

<sup>34</sup> *Matter of M-E-V-G-*, 26 I&N Dec. 227, 238 (BIA 2014) (citing *Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003)).

<sup>35</sup> *Id.* at 239.

<sup>36</sup> *Id.* (citing *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. at 76).

<sup>37</sup> *Id.* (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005)); see also *Matter of A-R-C-G-*, 26 I&N Dec. 388, 393 (BIA 2014) (noting that "married," "women," and "unable to leave the relationship" have commonly accepted definitions within Guatemalan society, and that these terms may be combined to create a group with discrete and definable boundaries).

<sup>38</sup> *W-G-R-*, 26 I&N Dec. at 214.

“landowners” might be able to meet the particularity requirement in an undeveloped, oligarchical society but would be considered too ill-defined in the United States or Canada.<sup>39</sup>

The Board has upheld the principle that “major segments of the population will rarely, if ever, constitute a distinct social group.”<sup>40</sup> This principle, however, does not preclude the possibility that a large segment of society could constitute a particular social group in some situations. The “particularity” requirement means that the group must be identifiable and have clearly defined boundaries, and major segments of a society frequently are not sufficiently “particular.”

You should avoid an overly broad or overly narrow characterization of a group. Courts have held that a particular social group should not be defined so broadly as to make it difficult to distinguish group members from others in the society in which they live, or so narrowly that what is defined does not constitute a meaningful grouping.<sup>41</sup> Moreover, even when such groups are cognizable, claims based on groups that are defined too broadly or too narrowly may fail the nexus requirement.

It also is important to remember that you should not analyze each characteristic of a group separately and reject one piece at a time. In a case involving a proposed social group of Tanzanians who exhibit erratic behavior and suffer from bipolar disorder, the Fourth Circuit concluded that the Board “erred because it broke down [the petitioner’s] group into pieces and rejected each piece, rather than analyzing his group as a whole.”<sup>42</sup> The court noted that “erratic behavior,” by itself, might lack particularity, but when combined with bipolar disorder, the group would satisfy the particularity requirement.<sup>43</sup> The Fourth Circuit cautioned not to “miss the forest for the trees.”<sup>44</sup>

## 2.2 General Principles for Formulating Particular Social Groups

*A social group cannot be defined by terrorist, criminal, or persecutory activity or association, past or present*

<sup>39</sup> *Id.* at 214-15.

<sup>40</sup> *M-E-V-G-*, 26 I&N Dec. at 239 (citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005) (holding a group of business persons were not particular)).

<sup>41</sup> See *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1575-1577 (9th Cir. 1986); *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991); *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003); *Raffington v. INS*, 340 F.3d 720, 723 (8th Cir. 2003).

<sup>42</sup> *Temu v. Holder*, 740 F.3d 887, 895 (4th Cir. 2014).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*



Under general principles of refugee protection, the shared characteristic of terrorist, criminal, or persecutory activity or association, past or present, cannot form the basis of a particular social group.<sup>45</sup>

Three federal courts have found that groups consisting of former gang members may constitute particular social groups in some circumstances. For asylum cases arising within the jurisdiction of the Fourth, Sixth, and Seventh Circuits, former membership in a gang may form a particular social group if the former membership is immutable and the group of former gang members is socially distinct and particular.<sup>46</sup> It is important to note, though, that these court decisions were issued before the BIA's rulings in *M-E-V-G-* and *W-G-R-* and did not analyze whether these groups met the "social distinction" and "particularity" criteria as articulated in those cases. Asylum officers in these circuits must analyze whether proposed groups meet these criteria on a case-by-case basis.<sup>47</sup> See Asylum Supplement – Former Gang Membership as a Particular Social Group.

Current gang membership, however, may not be the basis for a particular social group even in these circuits. For example, the Fourth Circuit noted:

We agree that current gang membership does not qualify as an immutable characteristic of a particular social group...It is not the case that current gang members "cannot change" their status as gang members, as they can leave the gang. Nor do we think that they "should not be required to change because [gang membership] is fundamental to their individual identities or consciences." To so hold would "pervert the manifest humanitarian purpose of the statute."<sup>48</sup>

<sup>45</sup> Lynden D. Melmed, USCIS Chief Counsel, *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007). See, e.g., *Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992) ("Whatever its precise scope, the term 'particular social groups' surely was not intended for the protection of members of the criminal class in this country...."); *Ariteaga v. Atukasey*, 511 F.3d 940 (9th Cir. 2007) (holding that current or former gang membership does not give rise to a particular social group due to gang members' criminal activities); *Cantarero v. Holder*, 734 F.3d 82, 85-88 (upholding the BIA's conclusion that recognizing former members of a gang as members of a particular social group would undermine the legislative purpose of the INA).

<sup>46</sup> *Urbina-Mejia v. Holder*, 597 F.3d 360, 365-67 (6th Cir. 2010) (holding that former gang members of the 18th Street gang have an immutable characteristic and are members of a "particular social group" based on their inability to change their past and the ability of their persecutors to recognize them as former gang members); *Benitez-Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009); *Martinez v. Holder*, 740 F.3d 902, 911-13 (4th Cir. 2014) (holding that the petitioner's membership in a group of former MS-13 members was immutable, and remanding the case to the Board to analyze the other particular social group criteria); see also USCIS Asylum Division Memorandum, *Notification of Ramos v. Holder: Former Gang Membership as a Potential Particular Social Group in the Seventh Circuit* (Mar. 2, 2010).

<sup>47</sup> See also *Matter of W-G-R-*, 26 I&N Dec. 208, 220-222 (BIA 2014) (holding that an applicant's proposed social group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" was not sufficiently particular, because it could include people of any age, sex, and background and their participation in the gang could vary widely in terms of strength and duration, or socially distinct, because there was not enough evidence in the record about the treatment or status of former Mara 18 members in Salvadoran society).

<sup>48</sup> *Martinez*, 740 F.3d at 912 (citations omitted).

The Fourth Circuit's position on gang membership not being a fundamental trait is consistent with USCIS's position that a particular social group may not be based on present criminal activity.<sup>49</sup>

### *Avoid Circular Reasoning*

A group cannot be defined *solely* by the fact that its members are subject to the harm that the applicant claims to have suffered or to fear as persecution. The shared characteristic of persecution by itself, however, does not disqualify an otherwise valid social group.<sup>50</sup> An otherwise valid group may be defined in part by the fact that its members are subject to persecution if the group is defined by other viable immutable characteristics separate from the feared persecution, or the fact of past persecution itself a basis for additional persecution.<sup>51</sup>

In some cases, the fact that an individual has been harmed in the past can create an independent reason why that individual would be targeted for additional harm in the future. In some societies, a shared past experience of having been harmed in the past may give rise to a socially distinct, particularly defined group. For example, in some circumstances, survivors of rape, if the rape is or were known to others, may be treated differently from other individuals by the surrounding society and/or may face social ostracism, or be more vulnerable to further harm as a result of their past harm. In such a case, the fact that the initial rape was not on account of a protected trait does not preclude a finding that subsequent harm, whether it is in the form of repeated rape or of some other kind of harm, may be on account of a shared characteristic that the applicant obtained by virtue of the initial rape.<sup>52</sup> In such scenarios, the inclusion of the initial incident of past harm as part of the particular social group definition does not violate the rule against circularity. Such a group formulation, however, could not provide the required nexus for the initial incident of mistreatment for purposes of any past persecution analysis.

Another example of past harm forming the basis of a valid particular social group is the Lukwago v. Ashcroft case, involving a Ugandan man who was forcibly recruited by the Lord's Resistance Army (LRA) as a child.<sup>53</sup> He claimed past persecution based on his membership in the particular social group of "children from Northern Uganda who are

<sup>49</sup> See also W-G-R, 26 I.&N. Dec. at 215 n. 5.

<sup>50</sup> Matter of M-E-V-G, 26 I.&N. Dec. 227, 243 (BIA 2014) (citing Cece v. Holder, 733 F.3d 662, 671 (7th Cir. 2013)); see also Matter of A-M-E- & J-G-U, 24 I.&N. Dec. 69, 74 (BIA 2007) (noting that the fact that members of a group have been harmed may be a relevant factor in considering the group's social distinction within society).

<sup>51</sup> Cece, 733 F.3d at 671-72.

<sup>52</sup> Cf. Gomez v. INS, 947 F.2d 660, 663-4 (2d Cir. 1991) (rejecting an applicant's claim that she would be harmed in the future as a member of a particular social group "women previously battered and raped by Salvadoran guerrillas" because there was no evidence that the applicant would be targeted for future harm on that basis).

<sup>53</sup> Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. 2003) (remanding to the BIA to consider an applicant's claim of well-founded fear on account of being a former child soldier).

abducted and enslaved by the LRA.”<sup>54</sup> The Third Circuit rejected the past persecution claim, holding that the LRA was motivated to recruit the applicant by a desire to grow its ranks, and not by his membership in the proposed particular social group.<sup>55</sup> The applicant was not a member of the group at the time he was recruited. However, the court held that the applicant might be able to present a claim based on his well-founded fear of future persecution on account of a similar particular social group.<sup>56</sup> There may be a valid particular social group since the experience of having been a child soldier for the LRA is immutable, and assuming former child soldiers are socially distinct and well-defined in Ugandan society, it could form a valid particular social group with regard to well-founded fear.

While evidence that members of a group are harmed by either the government or private actors can be evidence that they share a distinct trait, you should be careful to avoid defining a particular social group *solely* or *primarily* by the harm the applicants suffer.

***No size limitation***

There are no maximum or minimum limits to the size of a particular social group. While the Board has cautioned that major segments of the population will rarely constitute distinct social groups, particular social groups may contain only a few individuals or a large number of people.<sup>57</sup>

***The perception of the society in question, rather than the perception of the persecutor, is most relevant to social distinction.***

The Board has held that defining a particular social group from the perspective of the persecutor is inconsistent with prior holdings that a social group cannot be defined “exclusively” by the fact that a member has been subjected to harm.<sup>58</sup> The perception of the applicant’s persecutors may be relevant, as it can be indicative of whether society views the group as distinct.<sup>59</sup> The persecutors’ perception by itself, however, is insufficient to make a group socially distinct.<sup>60</sup>

***No voluntary associational relationship needed***

<sup>54</sup> *Id.* at 167.

<sup>55</sup> *Id.* at 170.

<sup>56</sup> *Id.* at 178-79.

<sup>57</sup> *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014); *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (reasoning “that the size and breadth of a group alone does not preclude a group from qualifying as such a social group”).

<sup>58</sup> *M-E-V-G-*, 26 I&N Dec. at 242 (disagreeing with the Ninth Circuit’s suggestion, in *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1089 (9th Cir. 2013), that the perception of the persecutor may matter the most).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

A voluntary association is not a required component of a particular social group, but can be a shared trait that defines a particular social group.<sup>61</sup> Thus, a voluntary association should be analyzed as any other trait asserted to define a particular social group.

***Cohesiveness or homogeneity not required***

Cohesiveness or homogeneity of group members is not a required component of a particular social group.<sup>62</sup> It is not necessary that group members be similar in all or many aspects and it is not required that the group members know each other or associate with each other. The relevant inquiry is whether there is a shared characteristic or belief that members share.

**3. IS THE PERSECUTION OR FEARED PERSECUTION “ON ACCOUNT OF” THE APPLICANT’S PARTICULAR SOCIAL GROUP MEMBERSHIP?**

Even if an applicant establishes that he or she is a member of a particular social group, the applicant must still establish that he or she was persecuted, or has a well-founded fear of persecution, on account of his or her membership in the group. To determine whether an applicant has established a nexus, you must elicit and consider all evidence, direct and circumstantial, relevant to the motive of the persecutor.

You must keep this step in the analysis distinct from your determinations of 1) whether a particular social group exists, and 2) whether the applicant is a member of the group. This step in the process is the same analysis that you must conduct with any of the four other protected grounds.

**4. PRECEDENT DECISIONS (SPECIFIC GROUPS)**

Below are summaries of precedent decisions that have identified certain groups that are particular social groups and other groups that were found not to be particular social groups based on the specific facts of the case. These examples are not an exhaustive list. Since this area of law is evolving rapidly, it is important to be informed about current cases and regulatory changes. It also is important to emphasize that these decisions were limited to the records before the Board and courts. Unlike the appellate context where the record is already developed, you have a duty to develop the record, eliciting testimony

<sup>61</sup> *Matter of C-A*, 23 I&N Dec. 951,956 (BIA 2006); see *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1097 (9th Cir. 2013) (acknowledging that the Board does not require members of a particular social group to share a voluntary associational relationship); *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1092-93 (9th Cir. 2000) (holding that a particular social group “is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members).

<sup>62</sup> *C-A*, 23 I&N Dec. at 957. See also *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1097 (9th Cir. 2013); *UNHCR Guidelines On International Protection: “Membership of a Particular Social Group”*, para. 15.

and researching country conditions, news reports, laws, policies, and other evidence, to determine whether a group is cognizable in the relevant society.<sup>63</sup>

#### 4.1 Family Membership

When analyzed on a case-by-case basis under the framework set out in this lesson plan, in many cases a family may constitute a particular social group. This approach is consistent with existing case law recognizing family as a “particular social group.” For instance, the First Circuit has held that a family constitutes the “prototypical example” of a particular social group. The court found a link between the harm the applicant experienced and his family membership, and concluded that the harm experienced was persecution on account of the applicant’s membership in a particular social group (his nuclear family).<sup>64</sup> The Seventh Circuit has found that parents of Burmese student dissidents share a common, immutable characteristic sufficient to constitute a particular social group.<sup>65</sup> The Fourth Circuit has found that “family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses” is a viable particular social group where evidence showed that street gang members often intimidate their enemies by attacking those enemies’ families. The court found that “[t]he family unit – centered around the relationship between an uncle and his nephew – possesses boundaries that are at least as ‘particular and well-defined’ as other groups whose members have qualified for asylum,” thus meeting the particularity requirement.<sup>66</sup>

In analyzing whether a specific family group qualifies as a particular social group, the shared familial relationship should be analyzed as the common trait that defines the group. The immutability criterion can easily be satisfied. The right to have a relationship with one’s family is fundamental, as it is protected by international human rights norms. Also, familial relationships for the most part cannot be changed. 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

<sup>63</sup> See *Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014) (reiterating that “[i]t is an error . . . to assume that if a social group . . . has been found non-cognizable in one society, it will not be cognizable in any society”); *Matter of S-M-J*, 21 I&N Dec. 722, 729 (BIA 1997) (noting that the adjudicator has the duty to develop the record). As refugee officers have limited ability to research country conditions when interviewing applicants abroad, RAD generally provides guidance at pre-departure briefings regarding particular social groups that have been recognized in certain regions. See RAD Supplement. In addition, RAD adjudicates applications abroad and outside of the jurisdiction of any federal circuit court of appeals. Consequently, while case law on particular social groups may be informative, refugee officers must ensure that they have elicited sufficient testimony consistent with specific, relevant country conditions to support a social group-based claim regardless of whether or not the particular social group has been recognized in circuit court case law.

<sup>64</sup> *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993).

<sup>65</sup> See *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998); see also *Iliev v. INS*, 127 F.3d 638, 642 (7th Cir. 1997) (recognizing that family could constitute a particular social group).

<sup>66</sup> *Crespin-Valladares v. Holder*, 632 F.3d 117, 125-26 (4th Cir. 2011) (reversing BIA’s rejection of particular social group comprised of family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses).

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. In other societies, however, extended family groupings may have greater social significance, such that they could meet the “social distinction” element.<sup>67</sup> You should carefully 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.

It is important to keep in mind that it is the family membership itself that forms the basis for the particular social group. A case that at first glance may appear to be a personal dispute may satisfy the nexus requirement with regard to family members; it is not necessary that the persecutor have initially targeted the family on account of a different protected characteristic. For example, the persecutor may target the applicant to seek revenge on a family member with whom the persecutor has a personal dispute. Where the persecutor is motivated to harm the victim because of the victim’s family membership, the targeting is not in fact because of a personal dispute with the applicant or for revenge against the applicant.<sup>68</sup>

In many cases, multiple members of a family may have been threatened or targeted by the same persecutor, and there may be evidence that the persecutor may have been motivated both by the applicant’s family membership and by other factors. You must determine whether the applicant’s family membership was a sufficient part of the persecutor’s motive to meet the nexus standard.

In *Aldana-Ramos v. Holder*, for example, the First Circuit considered a case in which two brothers applied for asylum after their father, a successful business owner, was kidnapped for ransom by members of a criminal gang in Guatemala. Although the brothers paid the

<sup>67</sup> *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).

<sup>68</sup> See, e.g., *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 950 (4th Cir. 2015) (“Hernandez’s relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join Mara 18, and the gang members’ demands leveraged her maternal authority to control her son’s activities. The BIA’s conclusion that these threats were directed at her not because she is his mother but because she exercises control over her son’s activities draws a meaningless distinction under these facts. It is therefore unreasonable to assert that the fact that Hernandez is her son’s mother is not *at least one* central reason for her persecution.”); *Cordova v. Holder*, 759 F.3d 332, 339 (4th Cir. 2014) (“The BIA certainly did not err in holding that Aquino [Cordova]’s cousin and uncle were targeted because of their membership in a rival gang and not because of their kinship ties. But that holding does not provide a basis for concluding that MS-13 did not target Aquino on account of his kinship ties to his cousin and uncle.”).

ransom, their father was killed, and they continued to receive threats from the gang. The First Circuit reversed the Board's conclusion that the brothers had been threatened solely on the basis of wealth and held that the Board had erred by failing to consider the applicants' contention that they had been targeted on account of their membership in their immediate family.<sup>69</sup> It remanded the case to the Board for further consideration of whether the applicants' family membership was "one central reason" they had been targeted as required for them to be eligible for asylum.<sup>70</sup> In *Perlora-Sola v. Holder*, by contrast, the First Circuit upheld the Board's determination that a Guatemalan applicant had not met his burden to show that his family membership was a central reason for the harm he suffered where the applicant had, along with several members of his family, been attacked and threatened by unknown criminals because of their perceived wealth.<sup>71</sup>

#### 4.2 Clan Membership

A clan is an extended family group that has been found to be a particular social group. The BIA has held that membership in a Somali sub-clan may form the basis of a particular social group.<sup>72</sup> In 1993, the Immigration and Naturalization Service (INS) Office of the General Counsel issued a legal opinion that a Somali clan may constitute a particular social group.<sup>73</sup> Although extended family groups may not always be recognized as particular social groups, in the Somali context, a clan is a discrete group, whose members are linked by custom and culture.<sup>74</sup> Clan members also are usually identifiable within their countries of origin as members of their clan.

#### 4.3 Age

The Board noted in *Matter of S-E-G* that a particular social group may be valid where the age of the members is one of the shared characteristics. The Board stated that although age is not strictly immutable, it may give rise to a particular social group since "the mutability of age is not within one's control and ... if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual's age places him within the group, a

<sup>69</sup> *Aldana-Ramos v. Holder*, 757 F.3d 9, 18-19 (1st Cir. 2014).

<sup>70</sup> *Id.* at 19.

<sup>71</sup> *Perlora-Sola v. Holder*, 699 F.3d 572, 576-577 (1st Cir. 2012).

<sup>72</sup> *Matter of H-*, 21 I&N Dec. at 338 (BIA 1996).

<sup>73</sup> Paul W. Virtue, INS Office of General Counsel, *Whether Somali Clan Membership May Meet the Definition of Membership in a Particular Social Group under the INA*, Memorandum to Kathleen Thompson, Director, Refugee Branch, OIA (Washington, DC: 9 December 1993).

<sup>74</sup> *Matter of H-*, 21 I&N Dec. 337, 342-43 (BIA 1996); *Malonga v. Mukasey*, 546 F.3d 546 (8th Cir. 2008) (concluding that Lari ethnic group of the Kongo tribe is a particular social group for purposes of withholding of removal; members of the tribe share a common dialect and accent, which is recognizable to others in Congo, and members are identifiable by their surnames and by their concentration in southern Congo's Pool region).

claim for asylum may still be cognizable:<sup>75</sup> In other words, in the context of age-based particular social groups, you should consider the immutability of age at the time of the events of past persecution or at the time the applicant expresses a fear of future persecution.

Several Board and circuit court cases have addressed the validity of using age, in conjunction with other characteristics, as the basis for a particular social group. The Board and some courts have rejected social groups composed of young, urban males who feared either conscription by the military or forcible recruitment by guerrillas.<sup>76</sup> In those cases, the persecutors targeted the young men because they were desirable combatants. It appears that the courts rejected the claims because of the applicants' failure to establish the requisite motive ("on account of"), and not because of their failure to establish membership in a valid particular social group.

The Third Circuit, in *Lukwago v. Ashcroft*, noted that age changes over time, "possibly lessening its role in personal identity." The court further noted that children as a class represent a large and diverse group, suggesting that the class is not particular enough. Nevertheless, age did make up an important component in the particular social group based on the applicant's shared past experience in *Lukwago*. The court held that "former child soldiers who escaped [Lord's Resistance Army] enslavement" were a particular social group at risk of persecution by the LRA and the Ugandan government because they could not undo the shared past experience of being child soldiers.<sup>77</sup>

The immutability of age was also taken into account by the Seventh Circuit in considering a case involving an Albanian woman who feared being trafficked in the future due to her youth, gender, and living alone. The court stated, "the Petitioner is part of a group of young Albanian women who live alone. Neither their age, gender, nationality, or living situation are alterable."<sup>78</sup> Without considering the Board's requirements of social distinction and particularity, the Seventh Circuit held, "These characteristics qualify Cece's proposed group as a protectable social group under asylum law."<sup>79</sup>

#### 4.4 Gender

<sup>75</sup> *Matter of S-E-G-*, 24 I&N Dec. 579, 583-84 (BIA 2008).

<sup>76</sup> *Matter of Vigil*, 19 I&N Dec. 572 (BIA 1988); *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986); *Matter of Sanchez and Escobar*, 19 I&N Dec. 276 (BIA 1985). See also *Civil v. INS*, 140 F.3d 52 (1st Cir. 1998); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008).

<sup>77</sup> *Lukwago v. Ashcroft*, 329 F.3d 157, 178 (3d Cir. 2003).

<sup>78</sup> *Cece v. Holder*, 733 F.3d 662, 673 (7th Cir. 2013) (en banc).

<sup>79</sup> *Id.*



Gender is an immutable trait and has been recognized as such by the BIA and some federal courts.<sup>80</sup> Courts have not yet addressed whether broad social groups based solely on an applicant's gender may meet the "particularity" and "social distinction" requirements as outlined in *M-E-V-G-* and *W-G-R-*,<sup>81</sup> but some earlier circuit court decisions have indicated that gender may form the basis of a particular social group in combination with the applicant's nationality or ethnicity and that there may be a nexus between an applicant's membership in that group and the harm he or she fears.<sup>82</sup>

In most cases, though, an applicant's status as a man or woman is not, by itself, a central reason motivating the persecutor to harm him or her. Rather, the persecutor is motivated to harm him or her based on membership in a group defined by gender in combination with some other characteristic he or she possesses, such as a person's social status in a domestic relationship.<sup>83</sup> In general, you will formulate gender-related particular social groups based on gender, nationality and/or ethnicity, and at least one other relevant trait or characteristic. The following sections discuss some of the common gender-related particular social groups.

#### 4.4.1 Female Genital Mutilation (FGM)<sup>84</sup>

FGM cases also raise gender-related issues. In *Matter of Kasinga*, the BIA held that gender, in conjunction with other characteristics, formed the basis of a particular social group. The BIA granted asylum to the applicant, who feared persecution on account of her membership in the particular social group defined as "young women of the Tchamba-Kunsuntu Tribe who have not had female genital mutilation, as practiced by that tribe, and who oppose the practice."<sup>85</sup>

Case law has taken a variety of approaches to defining a particular social group in cases involving FGM. As stated in the Attorney General's decision on certification in *Matter of*

<sup>80</sup> See, e.g., *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) (listing "sex" as a paradigmatic example of an immutable characteristic); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993); *Matter of Kasinga*, 21 I&N Dec. 357, 365-66 (BIA 1996).

<sup>81</sup> See *Paloka v. Holder*, 762 F.3d 191 (2d Cir. 2014) (remanding to the BIA for consideration of whether the proposed social groups of "young Albanian women" or "young Albanian women between 15 and 25" are proposed social groups under the *M-E-V-G-* framework).

<sup>82</sup> See *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005) (finding that "gender plus tribal membership" may identify a social group); *Mohammed v. Gonzales*, 400 F.3d 785, 797 ("the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law"); *Hossan v. Gonzales*, 484 F.3d 513, 518 (8th Cir. 2007). See also *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993); *Bah v. Mukasey*, 528 F.3d 99, 112 (2d Cir. 2008); *Perdomo v. Holder*, 611 F.3d 662, 668 (9th Cir. 2010).

<sup>83</sup> See, e.g., *Cece v. Holder*, 733 F.3d 662, 676 (7th Cir. 2013) (*en banc*) (finding that the petitioner had a well-founded fear of persecution on account of her membership in a particular social group of "young Albanian women living alone" and noting that "the social group is defined by gender plus one or more narrowing characteristics.").

<sup>84</sup> Sometimes referred to as female genital cutting.

<sup>85</sup> *Matter of Kasinga*, 21 I&N Dec. 357, 367 (BIA 1996).

*A-T-*, the framework for analyzing such cases depends in critical ways on how the group is formulated.<sup>86</sup>

In FGM cases, you should consider whether the relevant social group should be defined as females of a certain nationality or ethnicity who are subject to gender-related cultural traditions. For additional guidance on FGM cases in the asylum context, see RAIO Training Module, *Well-Founded Fear*.

#### *Eligibility Based on Feared FGM of Applicant's Children*

In *Matter of A-K-*, the BIA made clear that an applicant cannot establish eligibility for asylum based *solely* on a fear that his or her child would be subject to FGM if returned to the country of nationality. The persecution an applicant fears must be on account of the *applicant's* protected characteristic (or protected characteristic imputed to the applicant). When a child is subjected to FGM, it is generally not because of a parent's protected characteristic. Rather, the FGM is generally imposed on the child because of the *child's* characteristic of being a female who has not yet undergone FGM as practiced by her culture.<sup>87</sup>

If the child of an applicant were specifically targeted for FGM in order to harm the parent because of the parent's opposition to FGM, it might be possible to establish a nexus to the parent's membership in a particular social group defined as parents who oppose FGM, if that group, viewed in the applicant's society, meets the requirements to be considered a particular social group.<sup>88</sup> More simply, however, in most cases involving parent(s) who oppose FGM, the claim would fit better within a political opinion analysis. Accordingly, you should first explore any evidence that supports whether the persecutor may seek to harm the parent on account of his or her political opinion.

#### 4.4.2 Widows

A group consisting of widows from a country is another potential gender-related particular social group. The Eighth Circuit has held that a group consisting of Cameroonian widows is a cognizable particular social group.<sup>89</sup> The court reasoned that widows share the past experience of losing a husband—an experience that cannot be changed. The court also found that Cameroonian society perceives widows as a distinct

<sup>86</sup> *Matter of A-T-*, 24 I&N Dec. 617 (AG 2008).

<sup>87</sup> *Matter of A-K-*, 24 I&N Dec. 275 (BIA 2007).

<sup>88</sup> *Gatimi v. Holder*, 578 F.3d 611, 617 (7th Cir. 2009).

<sup>89</sup> *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034-35 (8th Cir. 2008); see also *Sibanda v. Holder*, 778 F.3d 676, 681 (7th Cir. 2015) (noting, in a case involving a widowed applicant who was expected to marry her deceased husband's brother, that her "proposed social group – married women subject to the bride-price custom – appears to fall easily within this court's established definition of particular social group").

group, noting the pervasiveness of discrimination against widows.<sup>90</sup> In cases involving widows, social distinction also may be demonstrated by laws providing benefits to widows, government or non-governmental programs specifically targeted to widows, testimony, or any other relevant evidence. Although the Eighth Circuit did not analyze particularity, a group comprised of widows seems to be defined with precision, such that it is clear who falls within the group: widowhood does not contain various permutations, as one is either widowed or not widowed.

#### 4.4.3 Gender-Specific Dress Codes

Where refusal to abide by gender-specific dress codes could result in serious punishment or consequences, an applicant may establish that treatment resulting from his or her noncompliance amounts to persecution on account of membership in a particular social group.

Both the Third Circuit, in *Fatin v. INS*, and the Eighth Circuit, in *Safaie v. INS*, stated that Iranian women who would refuse to conform to the country's gender-specific laws may constitute a particular social group. However, neither applicant in the cases before those courts established that she was a member of such a group, because each applicant failed to demonstrate that she would refuse to comply with the gender-specific laws.<sup>91</sup>

In *Fatin*, the Third Circuit found the applicant to be a member of the particular social group of "Iranian women who find their country's gender-specific laws offensive and do not wish to comply with them."<sup>92</sup> The court examined whether, for this applicant, compliance with the laws would be so abhorrent to her that wearing the chador would itself be tantamount to persecution. Because the applicant testified that she would only try to avoid compliance and did not testify that wearing the chador would be abhorrent to her, the court concluded that the applicant had not established that her compliance with the gender-specific laws was so abhorrent to her such that it could be considered persecution.

Similarly, the Seventh Circuit in *Yadegar-Sar'gis v. INS* considered whether an applicant who established her membership in the particular social group of "Christian women in Iran who do not wish to adhere to the Islamic female dress code" would suffer persecution by her compliance with the dress code. Looking to *Fatin* for guidance, the court found that because the applicant did not testify that compliance with the dress code violated a tenet of her Christian faith and testified that she was not prevented from attending church or practicing her faith when she complied with the dress code, the evidence could be interpreted such that the dress requirements were "not abhorrent to [the

<sup>90</sup> *Id.*

<sup>91</sup> *Fatin v. INS*, 12 F.3d 1233, 1241 (3d Cir. 1993); *Safaie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994).

<sup>92</sup> *Fatin*, 12 F.3d at 1241-42.

applicant's] deepest beliefs."<sup>93</sup> The issue in this case did not turn on whether the group constituted a particular social group, but rather on whether forced compliance with dress codes constituted persecution.

#### 4.5 Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI)

Persecution on account of sexual orientation constitutes persecution on account of membership in a particular social group. The Board found that a gay male in Cuba who was harmed on account of his homosexuality was persecuted on account of his membership in a particular social group.<sup>94</sup> In that case, where the applicant was registered as "homosexual" by the Cuban government, the Board found that the applicant was being targeted because of his status as a gay man, and that this status defined a particular social group.<sup>95</sup> A persecutor's perception of an applicant as a sexual minority can be established by a variety of types of evidence. For example, harm an applicant experiences because he or she engages in intimate sexual activity with a consenting adult of the same sex may constitute persecution on account of membership in a particular social group defined by its members' actual or imputed sexual minority status.<sup>96</sup>

The Ninth Circuit has held that gay men with female sexual identities in Mexico constitute a particular social group.<sup>97</sup> The court held that the applicant's female identity was immutable because it was an inherent characteristic. In *Matter of M-E-V-G-*, the Board emphasized that a gay male applicant does not need to be literally visible to society; instead the question is the extent to which the group is understood to exist as a recognized component of society.<sup>98</sup>

The Third Circuit, in *Amanfi v. Ashcroft*, recognized that harm suffered or feared on account of an applicant's *perceived* homosexuality, even where the applicant is not gay, could be sufficient to establish past or future persecution on account of an imputed membership in a particular social group.<sup>99</sup>

For more information, see RAI0 Training Module, *Guidance for Adjudicating LGBTI Refugee and Asylum Claims*.

<sup>93</sup> *Yadegar-Sargis v. INS*, 297 F.3d 596, 604-605 (7th Cir. 2002).

<sup>94</sup> *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990) (designated by the Attorney General as a precedent decision on June 16, 1994); see also *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1089 (9th Cir. 2005).

<sup>95</sup> *Toboso-Alfonso*, 20 I&N Dec. at 821.

<sup>96</sup> See *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (finding "no appreciable difference between an individual...being persecuted for being a homosexual and being persecuted for engaging in homosexual acts").

<sup>97</sup> *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1094-95 (9th Cir. 2000).

<sup>98</sup> *Matter of M-E-V-G-*, 26 I&N Dec. 227, 238-39 (BIA 2014).

<sup>99</sup> *Amanfi v. Ashcroft*, 328 F.3d 719, 730 (3d Cir. 2003).

## 4.6 Domestic Violence

### 4.6.1 Women Who Are Unable to Leave a Domestic Relationship or Women Who Are Viewed as Property by Virtue of their Position within a Domestic Relationship

The Board has addressed the issue of “whether domestic violence can, in some instances, form the basis for a claim of asylum.”<sup>100</sup> In *Matter of A-R-C-G-*, the applicant married at the age of 17 and suffered physical and sexual abuse by her husband. The respondent repeatedly attempted to leave the relationship by staying with relatives, but her husband continued to find her and threaten her.<sup>101</sup> Based on these facts, the group before the Board was articulated as “married women in Guatemala who are unable to leave their relationship.” The Board found that the proposed group satisfied the three necessary criteria. It was immutable because it involved gender and a marital status that the applicant could not change.<sup>102</sup> The Board also found that the group was defined with particularity, as the terms “married,” “women,” and “unable to leave the relationship” have commonly accepted definitions within Guatemalan society. The Board noted that evidence of social distinction for women in marriages they cannot leave would include “whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors.”<sup>103</sup>

Although the specific facts in *A-R-C-G-* involved a married woman, the absence of a formal marriage does not defeat the cognizability of the group if the domestic relationship (or imputed relationship) that gives rise to a group meets all three criteria. As the Board stated, the group “must be evaluated in the context of the evidence presented regarding the particular circumstances in the country in question.”<sup>104</sup> For instance, even in the absence of a formal marriage, there may be a valid particular social group. DHS’s brief to the Board in *Matter of L-R-*, another case that involved domestic violence, noted that the groups of women unable to leave a domestic relationship or women who are viewed as property by virtue of their positions within a domestic relationship could be cognizable particular social groups.<sup>105</sup> *L-R-* involved a woman who, although not married, was in a domestic relationship for two decades. This brief, which continues to represent the DHS position, argued that under these two social group formulations, an applicant’s status within a domestic relationship is immutable where the applicant is economically,

<sup>100</sup> *Matter of A-R-C-G-*, 26 I&N Dec. 388, 390 (BIA 2014).

<sup>101</sup> *Id.* at 389.

<sup>102</sup> *Id.* at 392-93.

<sup>103</sup> *Id.* at 394.

<sup>104</sup> *Id.* at 392.

<sup>105</sup> DHS’s Supplemental Brief in *Matter of L-R-*, April 13, 2009.

socially, or physically unable to leave the abusive relationship, or where “the abuser would not recognize a divorce or separation as ending the abuser’s right to abuse the victim.”<sup>106</sup>

The particularity requirement for either of these groups can be established by a showing that the domestic relationship has a clear definition.<sup>107</sup> The *L-R*-brief also emphasized that the term domestic relationship could be “tailored to the unique situation” in the applicant’s society.

#### 4.6.2 Other Types of Domestic Relationships

Of course, abuse serious enough to amount to persecution can also occur within other domestic relationships. Where claims are based on assertions of harm within a relationship that is not spousal or spouse-like, the adjudicator must identify the relationship, and determine whether such a relationship is a domestic relationship. Once the relationship is determined to be a domestic relationship, you can assess whether the applicant is a member of a cognizable particular social group similar to the ones discussed in the previous section. If you determine that the applicant is a member of a cognizable group, of course, the applicant must also establish a nexus and the other requirements for asylum or refugee status.

In *Ming Li Hui v. Holder*, for example, the Eighth Circuit addressed an asylum applicant’s claim for asylum based on physical and emotional abuse by her mother.<sup>108</sup> In that case, the applicant asserted that “her mother severely abused her as a child ‘because she hated girl[s].’ The abuse included the mother burning her hand with a cigarette butt, withholding food, calling her ‘trash, garbage,’ and telling her she ‘wish[ed] you’d die soon.’<sup>109</sup> The applicant also testified that at the age of 20, she got a job that paid well enough for her to be able to leave the home and escape the abuse. She was able to live away from her mother for five years, and although her mother threatened her during this period, she did not harm the applicant.<sup>110</sup> The Eighth Circuit, without specific analysis, accepted the applicant’s proposed particular social group of “Chinese daughters [who are] viewed as property by virtue of their position within a domestic relationship.”<sup>111</sup> The court concluded, however, that a fundamental change in circumstances rebutted the

<sup>106</sup> *Id.* at n.12.

<sup>107</sup> See *id.* at 19 (citing section 237(a)(2)(E)(1), which defines “crimes of domestic violence” to include offenses “against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabitating with or has cohabitated with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws.”

<sup>108</sup> *Ming Li Hui v. Holder*, 769 F.3d 984 (8th Cir. 2014).

<sup>109</sup> *Id.* at 985.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 985-86.

presumption of a well-founded fear on account of her membership in that group because the applicant testified that she had only been abused when she lived with her mother, and not after she was able to leave her mother's household.<sup>112</sup>

#### 4.6.3 Children in Domestic Relationships

As reflected in the decision in *Ming Li Hui*, claims involving child abuse can involve some of the same dynamics of power and impunity as claims involving other kinds of domestic violence. In some cases, a child's vulnerable status and lack of protection within the family and society may make a persecutor believe that he or she can harm the child with impunity and is entitled to do so, which in combination may form a significant part of the persecutor's motivation. In analyzing a child abuse case, you, following the proposed group before the court in *Ming Li Hui* and one of the groups analyzed in DHS's brief in *Matter of L-R-*, could formulate the particular social group as [nationality] children who are viewed as property by virtue of their position within a domestic relationship.

All claims require case-by-case analysis, but it is generally established in precedent that when persecution is suffered or feared on account of a characteristic that includes being a child, that characteristic is immutable within the meaning of *Acosta*. This is because a child cannot change his or her age at the time of persecution.<sup>113</sup> Similarly, a child is typically unable to leave the family or other domestic relationship in which the child is situated, due to the inherent dependency of minors as well as the established legal and cultural expectations in most societies that children are subordinate to the authority of their parents or other adults acting in the role of parents.<sup>114</sup> A child is not expected to leave his or her family.

In child abuse cases, social distinction could be established by evidence such as the existence of laws that are designed to protect children from domestic abuse, programs to assist such children, reports about the prevalence of domestic violence and prosecution of domestic violence or lack of prosecution, or other evidence that members of this group are distinguished from others in the society in which they live.<sup>115</sup> Additionally, although

<sup>112</sup> *Id.* at 986. Note that the fundamental change in circumstances analysis would not apply to refugee resettlement cases, as the past persecution, by itself, would be sufficient to establish a claim. For asylum cases, the assessment of what would constitute a fundamental change in circumstances under such an analysis would be specific to the facts of each case.

<sup>113</sup> See *Matter of S-E-G-*, 24 I&N Dec. 579, 583-84 (BIA 2008).

<sup>114</sup> Cf. *Matter of A-R-C-G-*, 26 I&N Dec. 388, 393 (BIA 2014) (In the separate context of intimate partner domestic violence, discussing the definable boundaries of a group involving married women unable to leave the relationship, noting "that a married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation").

<sup>115</sup> See *id.* at 394 (for a particular social group of married Guatemalan women who are unable to leave the relationship, noting that evidence of social distinction "would include whether the society in question recognizes the need to offer protection to victims of domestic violence, including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors.")

past persecution by itself cannot be used to define a particular social group, a group's being subjected to harm is a good indication that it is socially distinct.<sup>116</sup> At the same time, social distinctions do not have to be discriminatory or punitive. Many of the ways in which society distinguishes children are benign or are intended to protect them.

The group of children who are viewed as property by virtue of their position within a domestic relationship also can be described with sufficient particularity because it is possible to determine who falls within the group: they are (1) minors<sup>117</sup> (2) who fall within the boundaries of a domestic relationship, and (3) are treated and perceived as property because of their subordinate status within that relationship.<sup>118</sup> As noted by the Board in examining the particularity of a group involving violence within the domestic relationship, "the terms can combine to create a group with discrete and definable boundaries."<sup>119</sup>

Even where an applicant whose claim is based on child abuse can establish membership in a cognizable particular social group, all the other eligibility requirements must also be met. The dynamics of domestic relationships between children and their parents or other parental figures are different from the dynamics of domestic relationships between adults. In claims involving child abuse, nexus must be analyzed in the context of a parent's role (or that of another person acting in a parental capacity) in raising a child. The relevance of power and authority of an adult over a child is assessed differently than in the context of adult domestic partnerships. Strong deference is generally shown to parents in determining the child's best interests. Where a parent or person acting in a parental capacity is motivated by legitimate disciplinary or child-rearing goals and the discipline is reasonable in degree, the punishment is not on account of a protected ground. Only where harm is clearly inflicted for purposes other than discipline or other legitimate child-rearing goals or is clearly disproportionate to such goals could it objectively constitute persecution on account of a protected ground. Factors that may indicate that the harm is not legitimately related to discipline or other child-rearing goals (and hence there may be persecution and a nexus to a protected ground) could be: (1) where the harm inflicted is clearly disproportionate or unrelated to any child-rearing goal; (2) where the abuse is coupled with repeated remarks devaluing the child; or (3) where the abuser tries to cover up the abuse. Rape is an example of harm that would never further a legitimate child-rearing goal.

<sup>116</sup> *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006); see also *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74 (BIA 2007) ("the fact that its members have been subjected to harm...may be a relevant factor in considering the group's visibility in society").

<sup>117</sup> The Convention on the Rights of the Child defines children as individuals under the age of 18, and provides a benchmark for determining who is a minor.

<sup>118</sup> Cf. *A-R-C-G-*, 26 I&N Dec. at 393 (In the separate context of intimate partner domestic violence, discussing the definable boundaries of a group involving married women unable to leave the relationship, noting "that a married woman's inability to leave the relationship may be informed by societal expectations about gender and subordination, as well as legal constraints regarding divorce and separation").

<sup>119</sup> *Id.*



In the asylum context, in cases where the applicant has been found to have suffered past persecution based on his or her membership in a particular social group related to domestic violence, it is necessary to assess whether there is a fundamental change in circumstances or a reasonable possibility of internal relocation to rebut the presumption of well-founded fear. When an applicant is a child at the time of the asylum interview, the applicant remains dependent on caregivers, potentially including former abusers, and there is no obvious fundamental change in circumstances that rebuts the presumption of a well-founded fear, and children are not expected to relocate outside of the family. In such cases, you will generally find that the applicant is a member of a particular social group consisting of children who are viewed as property because of their position within a domestic relationship. If the applicant suffered past persecution within a domestic relationship and the applicant is no longer a child at the time of the asylum interview, you should examine whether the applicant continues to be viewed as property because of his or her position within a domestic relationship, such as due to being a daughter or son in the domestic relationship or a female or male in the domestic relationship.

In such cases, you will need to thoroughly analyze whether there has been a fundamental change in circumstances due to the applicant no longer being a child or whether the applicant could safely and reasonably relocate outside of the domestic relationship. Once an applicant is an adult, the conditions that created his or her subordinate and vulnerable status at the time the applicant was harmed may have fundamentally changed.<sup>120</sup> You must elicit testimony and review country conditions to determine whether there are specific facts showing that the dynamics of power and control within the relationship had fundamentally changed. Among other things, you must analyze whether the applicant can live independently and safely outside of the domestic relationship considering the applicant's age, economic resources, marriage, or other reasons.<sup>121</sup> In some circumstances, the harm to the applicant may have begun when he or she was a child and continued into adulthood, and the applicant continued to be in a subordinate and vulnerable status. In such circumstances, there would generally not be a fundamental change in circumstances.

#### 4.7- Ancestry

The Board has found that “Filipinos with Chinese ancestry” could define a particular social group, because of the immutability of the characteristic.<sup>122</sup> Note that this protected characteristic can also be appropriately analyzed under the nationality or race protected grounds.

<sup>120</sup> Cf. *Ming Li Hui v. Holder*, 769 F.3d 984 (8th Cir. 2014) (finding, in examining another proposed group involving the parent-child relationship, that there had been a fundamental change in circumstances because Hui, as an adult, could control whether she lived with her mother).

<sup>121</sup> If the presumption of well-founded fear is rebutted, you must complete a *Chen* analysis to determine whether an exercise of discretion to grant asylum may be warranted. Similarly, you must consider whether there is a reasonable possibility of other serious harm.

<sup>122</sup> *Matter of V-T-S*, 21 I&N Dec. 792, 797 (BIA 1997).

#### 4.8 Individuals with Physical or Mental Disabilities

In an opinion later vacated and remanded by the Supreme Court, the Ninth Circuit held in *Tchoukhrova v. Gonzales* that Russian children with serious disabilities that are long-lasting or permanent constitute a particular social group. The court reserved the question of whether individuals with disabilities from any country would constitute a particular social group, but found that in Russia, children with disabilities constitute a specific and identifiable group, as evidenced by their “permanent and stigmatizing labeling, lifetime institutional[ization], denial of education and medical care, and constant, serious, and often violent harassment.”<sup>123</sup>

The Supreme Court vacated the Ninth Circuit’s opinion in *Tchoukhrova v. Gonzales*, so this opinion is no longer precedent. However, the concerns with the case that were raised on appeal were unrelated to the formulation of the particular social group. The particular social group formulation in the Ninth Circuit’s opinion is consistent with USCIS’s interpretation. The Asylum Division has granted asylum to people with disabilities when the applicant established that he or she was persecuted in the past or would be persecuted in the future on account of his or her membership in a particular social group, defined as individuals who share those disabilities. The proper analysis is whether 1) the disability is immutable; 2) persons who share that disability are socially distinct in the applicant’s society; and 3) the group is particularly defined.

More recently, in *Temu v. Holder*, the Fourth Circuit held that individuals with bipolar disorder, who exhibit erratic behavior, can constitute a viable particular social group.<sup>124</sup> The applicant credibly testified that he was persecuted by nurses and prison guards because of his illness. The court concluded that the Board’s decision, finding no particular social group, was “manifestly contrary to the law and an abuse of discretion.”<sup>125</sup> Using the term “social visibility,” but essentially applying the social distinction test, the court found that the petitioner “appears to have a strong case for social visibility,” as Tanzanians with severe mental illnesses are singled out for abuse in hospitals and prisons and are labeled “mwenda wazimu.”<sup>126</sup> The court also rejected the Board’s reasoning that if a persecutor targets an entire population (“the persecutor’s net is too large”), “social visibility” must be lacking. The court highlighted that the “folly of this legal conclusion can be demonstrated with a hypothetical,” specifically to assume “that an anti-Semitic government decides to massacre any Jewish citizens [and] imagine that in putting its policy into practice, the government collects a list of surnames of individuals who are

<sup>123</sup> *Tchoukhrova v. Gonzales*, 404 F.3d 1181, 1189 (9th Cir. 2005), *reh’g and reh’g en banc denied*, 430 F.3d 1222 (9th Cir. 2005), *vacated*, 127 S.Ct. 57 (U.S. 2006).

<sup>124</sup> *Temu v. Holder*, 740 F.3d 887, 892-96 (4th Cir. 2014).

<sup>125</sup> *Id.* at 892.

<sup>126</sup> *Id.* at 893.

known to be Jewish and then kills anyone with the same surname. Jews and Gentiles alike might be murdered, but this does not change the fact that Jews have social visibility as a group.”<sup>127</sup>

The court in *Temu* also rejected the Board’s analysis related to particularity, noting that the Board “missed the forest for the trees.”<sup>128</sup> Specifically, the Board “erred because it broke down [the petitioner’s] group into pieces and rejected each piece, rather than analyzing his group as a whole.” The court recognized that a group characterized as people with “mental illnesses” without additional defining characteristics might lack particularity, as the group would cover “a huge swath of illness that range from life-ending to innocuous.”<sup>129</sup> Similarly, the court recognized that “erratic behavior,” by itself, would likely lack particularity. The petitioner’s group, however, did not “suffer from the same shortcoming” because his group was defined by people who exhibit erratic behavior *and* who suffer from bipolar disorder.<sup>130</sup> The court emphasized that the group as a whole must be analyzed for particularity. Finally, the court found that the proposed group “easily satisfies” the immutability requirement, as there is no cure for bipolar disorder and the petitioner would be unable to access medication to control his disorder.<sup>131</sup>

The Seventh Circuit also has held that mental illness can form the basis of a valid particular social group, disagreeing with the BIA’s finding that mental illness is not a basis for a particular social group in that case because it is not immutable.<sup>132</sup>

#### 4.9 Unions

In *Matter of Acosta*, a case that involved a member of a Salvadoran taxi cooperative, the BIA considered a social group with the defining characteristics of “being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages.”<sup>133</sup> The BIA found that neither characteristic was immutable, because the members of the group could either change jobs or cooperate in work stoppages. However, the BIA did not address whether being a member of a cooperative or union is a characteristic an individual should not be required to change.

<sup>127</sup> *Id.* at 894.

<sup>128</sup> *Id.* at 895.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 896-97.

<sup>132</sup> *Kholvavskiy v. Mukasey*, 540 F.3d 555, 572-73 (7th Cir. 2008). While the Eighth Circuit found that the groups of “mentally ill Jamaicans” or “mentally ill female Jamaicans” do not constitute a particular social group because the members of the group are not “a collection of people closely affiliated with each other, who are actuated by some common impulse or purpose,” *Raffington v. INS*, 340 F.3d 720, 723 (8th Cir. 2003), the Board rejected the need for cohesiveness or a voluntary associational relationship in its decision in *Matter of C-A-*, 23 I&N Dec. 951, 956-57 (BIA 2006).

<sup>133</sup> *Matter of Acosta*, 19 I&N Dec. 211, 234 (BIA 1985).

The Fifth Circuit, in *Zamora-Morel v. INS*, assumed without deciding that a trade union may constitute a particular social group. The court held that the applicant was not persecuted and did not have a well-founded fear *on account of* his membership in the union, analyzing the case as if the union was a particular social group.<sup>134</sup>

Depending on the facts, cases involving union membership, labor disputes, or union organizing also may be analyzed under political opinion.

#### 4.10 Students and Professionals

Courts have held that particular social groups of students are either not cognizable particular social groups,<sup>135</sup> or that the harm applicants suffered was not on account of their membership in student groups.<sup>136</sup> These holdings do not preclude a finding that a specific, identifiable group of students could constitute a particular social group.

The First Circuit has recognized that persons who are associated with a former government, members of a tribe, and educated or professional individuals could be members of a social group.<sup>137</sup> On the other hand, the Board has rejected a particular social group where the applicant, who was a former government soldier, testified that guerrillas targeted him due to his expertise as an artillery specialist.<sup>138</sup> The Second Circuit has determined that a particular social group of experts in computer science “was not cognizable because its members possess only ‘broadly-based characteristics.’”<sup>139</sup>

#### 4.11 Small-Business Owners Indebted to Private Creditors

The Tenth Circuit held in *Cruz-Funez v. Gonzales* that being indebted to the same creditor is not the kind of group characteristic that a person either cannot change or should not be required to change.<sup>140</sup> Therefore, the court concluded that the applicants in that case could not establish that they were members of a cognizable particular social group.

#### 4.12 Landowners

<sup>134</sup> *Zamora-Morel v. INS*, 905 F.2d 833, 838 (5th Cir. 1990).

<sup>135</sup> *Civil v. INS*, 140 F.3d 52, 56 (1st Cir. 1998) (social group of pro-Aristide young students is not cognizable because it is overbroad).

<sup>136</sup> *Matter of Martinez-Romero*, 18 I&N Dec. 75, 79 (BIA 1981).

<sup>137</sup> *Ananeh-Firempong v. INS*, 766 F.2d 621, 626-27 (1st Cir. 1985).

<sup>138</sup> *Matter of C-A-L-*, 21 I&N Dec. 754, 756-57 (BIA 1997).

<sup>139</sup> *Delgado v. Mukasey*, 508 F.3d 702, 704-05 (2d Cir. 2007).

<sup>140</sup> *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1191 (10th Cir. 2005).

The Seventh Circuit has found that the “educated, landowning class” in Colombia who had been targeted by the Revolutionary Armed Forces of Colombia (FARC) constituted a particular social group for asylum purposes. The court distinguished the situation in Colombia from other situations where the risk of harm flowing from civil unrest affects “the population in a relatively undifferentiated way” and found that members of this group were the “preferred victims” of the FARC.<sup>141</sup>

The court further distinguished this group from groups based solely on wealth, a characteristic that had been rejected as the basis of a particular social group when considered alone by the BIA in *Matter of V-T-S*, because it included the members’ social position as cattle farmers, their level of education, and their land ownership. These shared past experiences were of a particular type that set them apart in society such that the FARC would likely continue to target the group members, even if they gave up their land, cattle farming, and educational opportunities.<sup>142</sup>

In a separate case, the Seventh Circuit found that Colombian landowners who refuse to cooperate with the FARC constituted a particular social group.<sup>143</sup> The Seventh Circuit emphasized that “there can be no rational reason for the Board to reject a category of ‘land owners’ when the Board in *Acosta* specifically used land owning as an example of a social group.”<sup>144</sup>

The Board opined in *Matter of M-E-V-G-* that “in an underdeveloped, oligarchical society,” a group of landowners may meet the particularity and social distinction criteria.<sup>145</sup> If analyzing a claim involving landowners, the Board instructed adjudicators to “make findings whether ‘landowners’ share a common immutable characteristic, whether the group is discrete or amorphous, and whether the society in question considers ‘landowners’ as a significantly distinct group within the society.”<sup>146</sup>

Additionally, the Ninth Circuit has held that landownership may form the basis of a particular social group.<sup>147</sup> The court emphasized that “landownership [is] an illustrative example of a characteristic that might form the basis of a particular social group.”<sup>148</sup> The

<sup>141</sup> *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2005), citing *Ahmed v. Ashcroft*, 348 F.3d 611, 619 (7th Cir. 2003).

<sup>142</sup> *Id.*, citing *Matter of V-T-S*, 21 I&N Dec. 792, 799 (BIA 1997); cf. *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 75 (BIA 2007) (finding that the group of “affluent Guatemalans” was not sufficiently distinct in society to constitute a particular social group. Country conditions indicated that “affluent Guatemalans” were not at greater risk of criminality or extortion in particular.) See section on “Wealth or Affluence,” below for further discussion and comparison to the “landowner” particular social group.

<sup>143</sup> *N.L.A. v. Holder*, 744 F.3d 425, 439 (7th Cir. 2014).

<sup>144</sup> *Id.*

<sup>145</sup> 26 I&N Dec. 227, 241 (BIA 2014).

<sup>146</sup> *Id.*

<sup>147</sup> *Cordoba v. Holder*, 726 F.3d 1106, 1114 (9th Cir. 2013).

<sup>148</sup> *Id.*

### 3. Gender Roles

A woman's cultural and social background may also affect her ability or the ease with which she discusses her history with a stranger. In some cultures, women live secluded lives and may only rarely have contact with strangers, particularly strangers of the opposite sex. When women in such societies do encounter strangers, they may be accustomed to having male relatives speak for them. This may result in an applicant providing only short, limited answers to questions you pose.

### 4. Education Level

In some countries or cultures, women are denied the opportunity to obtain an education, or for a variety of reasons, may only be able to obtain a very limited education. In many refugee-producing countries, the literacy rate for women is quite low. A lack of education can affect a woman's ability to express herself or her understanding of the context of the social situation. A woman with little or no education may be unable to clearly express her claim, or may express it in a confused or halting manner creating the false impression that she is being evasive.

#### 7.2 Consistency

Given some women's limited literacy skills, coupled with the fact that women in some societies may be accustomed to having male relatives conduct all "public" activities for them, female asylum or refugee applicants may sign or mark applications that have been completed by a male relative who did not allow them to review it for accuracy. As in any asylum or refugee case, you should always inquire into who prepared the application for the applicant and whether the applicant had an opportunity to review it for accuracy before signing.

#### 7.3 Plausibility

You should exercise care in evaluating the plausibility of the claims by someone from a different culture when behavior or life choices are being evaluated. What may seem implausible behavior to you could be plausible in the applicant's culture, or given conditions in the applicant's country.

#### 7.4 Demeanor

As explained in the RAIO Training Module, *Credibility*, demeanor is often an unreliable and misleading indicator of credibility. This may be particularly true in cases involving torture or sexual violence. While some individuals who have been tortured become emotionally overcome when recalling their ordeals, others may exhibit no emotion at all. Because there are such a wide variety of emotional reactions to recounting experiences of torture, you should not expect the asylum or refugee applicant to manifest any particular emotion when recounting traumatic experiences.

court also pointed out that both petitioners offered evidence suggesting that landowners in their respective countries (Colombia and Mexico) are targets of persecution. One petitioner offered country conditions showing that the FARC specifically targets “wealthy landowners.” The other petitioner relied on testimony of a professor specializing in Latin American politics to show that the applicant’s family had been established landowners in Mexico for generations and this was a significant factor in why the applicant had been targeted by drug cartels.<sup>149</sup>

#### 4.13 Groups Based on “Wealth” or “Affluence”

In *Matter of A-M-E- & J-G-U-*, the BIA found that groups defined by wealth or socio-economic levels alone often will not be able to establish that they possess an immutable characteristic, because wealth is not immutable.<sup>150</sup> Wealth is, however, a characteristic that an individual should not be required to change, and therefore could be considered fundamental within the meaning of *Acosta*. In evaluating groups defined in terms of wealth, affluence, class, or socio-economic level, you must closely examine whether the proposed group can be defined with enough particularity and whether it is socially distinct. In *A-M-E- & J-G-U-*, the BIA concluded that the proposed group failed the particularity requirement, noting that the terms “wealthy” and “affluent” standing alone fail to provide an adequate benchmark for determining group membership. To support its particularity conclusion, the BIA stated that the concept of wealth is so indeterminate, the proposed group could vary from as little as 1 percent to as much as 20 percent of the population, or more.<sup>151</sup>

In the context of the facts established in *A-M-E & J-G-U-*, the BIA rejected various particular social group formulations involving wealth and socio-economic status for failure to establish social visibility (or social distinction). The BIA stressed that this analysis must take into account relevant country of origin information. Considering Guatemalan country conditions, the BIA found a variety of groups failed as particular social groups, including groups defined by “wealth,” “affluence,” “upper income level,” “socio-economic level,” “the monied class,” and “the upper class.”<sup>152</sup>

The BIA, however, did not reject altogether the possibility that a group defined by wealth could constitute a particular social group. The court noted that these types of social groups must be assessed in the context of the claim as a whole. For example, the Board opined that such a group might be valid in a case where persecutors target individuals within certain economic levels.<sup>153</sup>

<sup>149</sup> *Id.* at 1114-15.

<sup>150</sup> *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

The BIA's emphasis on social context is consistent with the Seventh Circuit's approach in *Tapiero de Orejuela v. Gonzales*, where members of the "educated, landowning class" in Colombia were recognized as members of a particular social group. Although affluence was a shared trait for this group, group members also shared a distinctive social status (albeit one derived in significant part from affluence and the attributes of affluence) that made them preferred targets of the FARC.<sup>154</sup> The significance of this social status was evident when the claim was viewed in the context of the country conditions that showed that the FARC is a "leftist guerilla group that was originally established to serve as the military wing of the Colombian Communist Party" and that membership in an economic class, not merely "wealth," was an important motivating factor for them.<sup>155</sup>

When encountering claims involving particular social groups based in whole or in part on wealth, you must assess the viability of the particular social group asserted in each case and carefully consider relevant country of origin information and other relevant evidence to determine if the group constitutes a particular social group as defined by the BIA and other courts. As the Seventh Circuit pointed out, "[t]here may be categories so ill-defined that they cannot be regarded as groups—the 'middle class,' for example. But this problem is taken care of by the external criterion—if a Stalin or a Pol Pot decides to exterminate the bourgeoisie of their country, this makes the bourgeoisie 'a particular social group,' which it would not be in a society that didn't think of middle-class people as having distinctive characteristics; it would be odd to describe the American middle class as 'a particular social group.'"<sup>156</sup>

#### 4.14 Present or Former Employment in Either Law Enforcement or the Military

When an applicant asserts membership in a particular social group that involves either past or present service as a police officer or soldier, you must first determine whether, in the context of the applicant's society, persons employed, or formerly employed, as police officers or soldiers form a particular social group.

Note, however, that often claims by persons employed, or formerly employed, as police officers or soldiers may also be analyzed under another protected ground, such as actual or imputed political opinion, depending on the facts of the case.

##### 4.14.1 Former Military/Police Membership

<sup>154</sup> *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2006).

<sup>155</sup> *Id.* at 668.

<sup>156</sup> *Benitez Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009).



The BIA recognized in both *Matter of C-A-* and *Matter of Fuentes* that former military leadership is an immutable characteristic that may form the basis for a particular social group under some circumstances. Similarly, while holding that the dangers arising solely from the nature of employment as a policeman in an area of domestic unrest do not support a claim, the Board indicated in *Fuentes* that former service in the national police is an immutable characteristic that, in some circumstances, could form the basis for a particular social group. In order to satisfy the definition of a particular social group, the applicant also must demonstrate that the purported social group has a distinct identity in society to meet the “social distinction” test.<sup>157</sup>

The USCIS interpretive memo on *C-A-* clarifies that “harm inflicted on a former police officer or soldier in order to seek revenge for actions he or she took in the past is not on account of the victim’s status as a former police officer or soldier.”<sup>158</sup> In other words, if the former officer is being targeted for his or her “status” as a former officer, he or she could establish an asylum claim, but not if he or she is being targeted only for his or her actions as a former police officer. It is important to note, however, that many of these cases will involve mixed motives, and it is possible that a former officer is being targeted on account of both status and former acts. An applicant would satisfy the “status” requirement where (1) there is a cognizable particular social group, (2) he or she is a member of the group, and (3) he or she is being targeted because of his or her membership, regardless of whether there may be evidence that he is also being targeted on account of past acts. As long as the membership in a cognizable particular social group is a sufficient reason to meet the requisite nexus standard, evidence that he is also targeted on account of past acts should not undermine the claim.

The Ninth Circuit, in *Madrigal v. Holder*, reviewed a case where the petitioner based his past persecution claim partially on the mistreatment he suffered while serving in the military and partially on events that occurred after he left the military.<sup>159</sup> The Ninth Circuit analyzed the petitioner’s proposed particular social group of “former Mexican army soldiers who participated in anti-drug activity,” and noted that case law distinguishes between current versus former military or police service when determining whether a particular social group is cognizable.<sup>160</sup> The Ninth Circuit concluded that the petitioner’s proposed particular social group was valid and remanded the case to the

<sup>157</sup> Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*. Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007); *Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006); see also *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985); *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988); *Estrada-Escobar v. Ashcroft*, 376 F.3d 1042, 1047 (10th Cir. 2004) (finding that the rationale of *Fuentes* applies to threats from terrorist organizations resulting from an applicant’s work as a law enforcement official targeting terrorist groups because the threat was received as a result of the employment, not the applicant’s political opinion).

<sup>158</sup> Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*. Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

<sup>159</sup> *Madrigal v. Holder*, 716 F.3d 499, 503-04 (9th Cir. 2013).

<sup>160</sup> *Id.* at 504.

Board.<sup>161</sup> Specifically, the Ninth Circuit noted, “Although mistreatment motivated purely by personal retribution will not give rise to a valid asylum claim, if a retributory motive exists alongside a protected motive, an applicant need show only that a protected ground is ‘one central reason’ for his persecution.... In Tapia Madrigal’s case, even if revenge partially motivated Los Zetas’ mistreatment of him, the record makes clear that their desire to intimidate members of his social group was another central reason for the persecution.”<sup>162</sup>

The Seventh Circuit has indicated that “former law-enforcement agents in Mexico” can be a viable particular social group.<sup>163</sup> In that case, drug organizations initially offered the applicant, an investigator, bribes to cooperate with them; however, when he refused, they tried to kill him under their “plata o plomo” policy— “money or bullets.” Afraid of being killed, the applicant resigned from his position and opened an office supply business, trying to conceal his former position. The Seventh Circuit concluded that being a former law enforcement agent is an immutable characteristic, as the applicant cannot erase his employment history.<sup>164</sup> The record also contained evidence supporting that the feared persecution was because the applicant was a former agent. The record contained evidence that drug organizations have tried to kill other officers who resigned from the police. The Seventh Circuit noted that “[p]unishing people after they are no longer threats is a rational way to achieve deterrence . . . [and] there’s nothing implausible about [the applicant’s] testimony that drug organizations in Mexico share this view of deterrence.”<sup>165</sup>

#### 4.14.2 Current Military/Police Membership

Current service as a soldier or police officer, under some circumstances, could define a particular social group if that service is so fundamental to the applicant’s identity or conscience that he or she should not be required to change it. The applicant would also have to demonstrate that the purported social group has a distinct identity in the society, and that the group is particular. If these requirements are met, it is possible that an applicant could establish a cognizable social group in such circumstances.<sup>166</sup>

Even if membership in a particular social group is established in such a case, however, the determination that the persecution was or will be “on account” of the particular social group is especially difficult. The determination requires special scrutiny.

<sup>161</sup> *Id.* at 505.

<sup>162</sup> *Id.* at 506 (internal citations omitted).

<sup>163</sup> *R.R.D. v. Holder*, 746 F.3d 807, 810 (7th Cir. 2014).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See Lynden D. Melmed, USCIS Chief Counsel. *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

Harm inflicted on a police officer or soldier because of his role as a public servant carrying out his official government duties in an ongoing armed struggle or civil war is not on account of the applicant's membership in a group of police officers or soldiers.<sup>167</sup> Such a claim would therefore fail on the "on account of" element, even if the applicant has established membership in a group that constitutes a particular social group.

Under a different set of circumstances, if the evidence showed that the applicant was targeted because he or she was a police officer or soldier, the nexus requirement may be met. It is only where the harm is inflicted because of the applicant's membership in a group, rather than to interfere with his or her performance of specific duties, that the nexus requirement may be met. This is a particularly difficult factual inquiry. One factor that may assist in making this determination is whether the harm inflicted on the applicant or threats occur while the applicant is on official duty, as opposed to once the applicant has been taken out of combat or is no longer on duty.

The Ninth Circuit also has held that the general risk associated with military or police service does not, in itself, provide a basis of eligibility. The Ninth Circuit, like the BIA, recognizes a distinction between *current* service and *former* service when determining the scope of a cognizable social group.<sup>168</sup>

It is important to note that the fact of current service does not preclude eligibility. A police officer or soldier may establish eligibility if he or she can show that the persecutor is motivated to harm the applicant because the applicant possesses, or is perceived to possess, a protected characteristic. The following passage from *Cruz-Navarro v. INS*, is instructive:

*Fuentes*, therefore, does not flatly preclude "police officers and soldiers from establishing claims of persecution or fear of persecution." [citing *Velarde* at 1311] Rather, *Fuentes* suggests that persecution resulting from membership in the police or military is insufficient, by itself, to establish persecution on account of membership in a particular social group or political opinion.<sup>169</sup>

The Seventh Circuit has not adopted the distinction between current and former police officers set forth in *Fuentes*. In dicta, the Court expressed disapproval of any reading of *Fuentes* that would create a *per se* rule that dangers encountered by police officers or military personnel during service could never amount to persecution. However, in the case before it, the Court upheld the BIA's determination that the dangers the applicant

<sup>167</sup> *Matter of Fuentes*, 19 I&N Dec. 658, 662 (BIA 1988).

<sup>168</sup> *Cruz-Navarro v. INS*, 232 F.3d 1024, 1029 (9th Cir. 2000); *Velarde v. INS*, 140 F.3d 1305 (9th Cir. 1998) (former bodyguard of daughters of Peruvian President threatened by Shining Path with reference to the applicant's specific duties); see also *Duarie de Guinac v. INS*, 179 F.3d 1156 (9th Cir. 1999) (suffering while in military on account of applicant's race, not participation in military).

<sup>169</sup> *Cruz-Navarro v. INS*, 232 F.3d at 1029.

experienced while serving as a military and police officer arose from the nature of his employment and were not on account of a protected characteristic.<sup>170</sup>

#### 4.15 Drug Traffickers

Under general principles of refugee protection, the shared characteristic of terrorist, criminal, or persecutory activity or association, past or present, cannot form the basis of a particular social group.<sup>171</sup> In *Bastanipour v. INS*, an applicant was convicted of trafficking in drugs in the United States and faced removal to Iran. He claimed a well-founded fear, asserting that the Iranian government executes individuals who traffic in illegal drugs. The Seventh Circuit held that:

[w]hatever its precise scope, the term “particular social groups” surely was not intended for the protection of members of the criminal class in this country, merely upon a showing that a foreign country deals with them even more harshly than we do. A contrary conclusion would collapse the fundamental distinction between persecution on the one hand and the prosecution of nonpolitical crimes on the other. We suppose there might be an exception for some class of minor or technical offenders in the U.S. who were singled out for savage punishment in their native land, but a drug felon sentenced to thirty years in this country (though Bastanipour’s sentence was later reduced to fifteen years) cannot be viewed in that light.<sup>172</sup>

#### 4.16 Criminal Deportees

Similarly, the USCIS position that criminal activity or association may not form the basis of a particular social group is consistent with courts’ views of criminal deportees as an invalid particular social group. In *Elien v. Ashcroft*, the First Circuit upheld a finding by the BIA that a group defined as “deported Haitian nationals with criminal records in the United States” does not qualify as a particular social group for the purposes of asylum. The First Circuit agreed with the BIA that it would be unsound policy to recognize criminal deportees as a particular social group, noting that the BIA had not extended particular social group to include persons who “voluntarily engaged in illicit activities.”<sup>173</sup>

<sup>170</sup> *Ahmed v. Ashcroft*, 348 F.3d 611, 616 (7th Cir. 2003).

<sup>171</sup> Lynden D. Melmed, USCIS Chief Counsel, *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

<sup>172</sup> *Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992) (citations omitted).

<sup>173</sup> *Elien v. Ashcroft*, 364 F.3d 392, 397 (1st Cir. 2004); see also *Toussaint v. Attorney General of U.S.*, 455 F.3d 409, 417 (3d Cir. 2006) (adopting the reasoning of the First Circuit in ruling that criminal deportees to Haiti do not constitute a particular social group).

#### 4.17 Persons Returning from the United States

The Ninth Circuit has held that “returning Mexicans from the United States” does not constitute a valid particular social group.<sup>174</sup> The applicant in that case pointed to reports of crime against Americans on vacation, as well as Mexicans who had returned to Mexico after living in the United States, to support the fear of harm based on membership in the proposed social group.<sup>175</sup>

The First Circuit has also upheld the BIA’s conclusion that a group defined as “Guatemalan nationals repatriated from the United States” did not constitute a particular social group. In that case, the court reasoned that the applicant was essentially arguing that he would be targeted by criminals for perceived wealth, and “being a target for thieves on account of perceived wealth, whether the perception is temporary or permanent, is merely a condition of living where crime is rampant and poorly controlled.”<sup>176</sup>

#### 4.18 Tattooed Youth

The Sixth Circuit has found that a group of “tattooed youth” does not constitute a particular social group under the INA. The court found that having a tattoo is not an innate characteristic and that “tattooed youth” are not closely affiliated with one another. Further, the court stated that “the concept of a refugee simply cannot guarantee an individual the right to have a tattoo.”<sup>177</sup>

#### 4.19 Individuals Resisting and Fearing Gang Recruitment, and Opposition to Gang Authority

In *Matter of S-E-G-*, the BIA rejected a proposed particular social group defined as “Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities,” because it lacked “well-defined boundaries” that make a group particular and, therefore, lacked social visibility.<sup>178</sup> Similarly, in *Matter of E-A-G-*, the BIA held that the applicant, a young Honduran male, failed to establish that he was a member of a particular social group of “persons resistant to gang membership,” as the evidence failed to establish that members of Honduran

<sup>174</sup> *Delgado-Ortiz v. Holder*, 600 F.3d 1148, 1151-1152 (9th Cir. 2010).

<sup>175</sup> *Id.* at 1151-52.

<sup>176</sup> *Escobar v. Holder*, 698 F.3d 36, 39 (1st Cir. 2012).

<sup>177</sup> *Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003).

<sup>178</sup> *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).

society, or even gang members themselves, would perceive those opposed to gang membership as members of a social group.<sup>179</sup>

In *Matter of M-E-V-G-*, a Honduran gang threatened to kill the applicant if he refused to join the gang.<sup>180</sup> The applicant claimed that he was persecuted on account of his membership in a particular social group, namely Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs. Citing *S-E-G-*, the BIA recognized that it is often difficult to conclude that such a group is much narrower than the general population, and noted that it might be difficult to satisfy the social distinction and particularity requirements.<sup>181</sup> The BIA, however, remanded the case for the immigration judge to analyze updated country conditions and arguments regarding the applicant's particular social group claim.<sup>182</sup> The BIA reasoned that its holdings in *S-E-G-* and *E-A-G-* should not be read as a blanket rejection of all factual scenarios involving gangs; the applicant's proposed particular social group had evolved during the pendency of his appeal; and the BIA's guidance on particular social group claims had been clarified since the case was last before the immigration judge.<sup>183</sup>

After the BIA's decision in *M-E-V-G-*, the Ninth Circuit, in *Pirir-Boc v. Holder*, held that a group characterized as individuals "taking concrete steps to oppose gang membership and gang authority" may be cognizable.<sup>184</sup> Prior to the Board's decision in *M-E-V-G-*, the Board had rejected the proposed group that Ninth Circuit analyzed in *Pirir-Boc*.<sup>185</sup> In *Pirir-Boc*, the petitioner's younger brother had joined the Mara Salvatrucha gang in Guatemala. Gang members overheard the petitioner instructing his brother to leave the gang. After his brother left the gang, gang members severely beat the petitioner and threatened to kill him. Without conducting case-specific analysis, the Board rejected the petitioner's proposed particular social group, citing to *S-E-G-*. On petition for review, the Ninth Circuit remanded the case to the Board to determine whether Guatemalan society recognizes the petitioner's proposed social group.<sup>186</sup>

In *Rodas-Orellana v. Holder*, the Tenth Circuit, applying *M-E-V-G-* and *W-G-R-*, upheld the BIA's determination that a social group characterized as "El Salvadoran males threatened and actively recruited by gangs, who resist joining because they opposed the gangs" was not socially distinct.<sup>187</sup> The Court found that the petitioner, a Salvadoran who

<sup>179</sup> *Matter of E-A-G-*, 24 I&N Dec. 591, 594-95 (BIA 2008).

<sup>180</sup> *Matter of M-E-V-G-*, 26 I&N Dec. 227, 228 (BIA 2014).

<sup>181</sup> *Id.* at 249-50.

<sup>182</sup> *Id.* at 253.

<sup>183</sup> *Id.* at 251-52.

<sup>184</sup> *Pirir-Boc v. Holder*, 750 F.3d 1077, 1084 (9th Cir. 2014).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 1084.

<sup>187</sup> *Rodas-Orellana v. Holder*, 780 F.3d 982, 992 (10th Cir. 2015).

was threatened and beaten for refusing to join the Mara Salvatrucha, had not presented evidence suggesting that Salvadoran society perceived individuals who resisted gang recruitment as a distinct group; rather, the record in that case showed that “Salvadoran gangs indiscriminately threaten people for monetary gain or for opposing them.”<sup>188</sup> The Court rejected the petitioner’s argument that the case needed to be remanded for additional analysis in light of *M-E-V-G* and *W-G-R-*, finding that, unlike in *Pirir-Boc*, the Board had properly considered the record before it.

#### 4.20 Non-Criminal Informants, Civilian Witnesses, and Assistance to Law Enforcement

The question of whether and when serving as a witness or providing other law enforcement assistance may form the basis of a particular social group is an evolving area of the law. In *Matter of C-A-*, the Board concluded that a group composed of confidential non-criminal informants did not constitute a particular social group.<sup>189</sup> The Board pointed out that “social visibility” is “limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members.”<sup>190</sup>

Circuit courts have subsequently recognized select circumstances where serving as a witness or cooperating with law enforcement may form the basis of a particular social group. In *Garcia v. Att’y Gen. of U.S.*, involving an individual placed in witness protection and relocated by the Guatemalan Public Ministry outside of her country, the Third Circuit recognized that “[c]ivilian witnesses who have the ‘shared past experience’ of assisting law enforcement against violent gangs that threaten communities in Guatemala” share an immutable characteristic.<sup>191</sup> In *Gashi v. Holder*, involving an individual who observed alleged military crimes by a leader of the Kosovo Liberation Army and cooperated with international investigators by being placed on a list of potential witnesses though ultimately not testifying in court, the Second Circuit held that a group of cooperating witnesses could constitute a particular social group.<sup>192</sup> The Ninth Circuit held in *Henriquez-Rivas v. Holder* that witnesses “who testified in court against gang members” in El Salvador may be a cognizable particular social group.<sup>193</sup> The

<sup>188</sup> *Id.* at 993.

<sup>189</sup> *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006).

<sup>190</sup> *Id.* at 960 (emphasis added).

<sup>191</sup> *Garcia v. Att’y Gen. of U.S.*, 665 F.3d 496, 504 n.5 (3d Cir. 2011) (distinguishing case from *C-A-* because the applicant’s identity was “known to her alleged persecutors,” whereas in *C-A-* the assistance to law enforcement was confidential).

<sup>192</sup> *Gashi v. Holder*, 702 F.3d 130, 137 (2d Cir. 2012) (holding that the group was immutable due to the shared past experience, was socially visible due to Gashi being labeled as a traitor for meeting with international investigators, and particular due to the finite number of people who have cooperated with official war crimes investigators).

<sup>193</sup> *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1092 (9th Cir. 2013) (finding that the BIA erred in applying its own precedents in deciding whether Henriquez-Rivas was a member of a particular social group, citing to language in *C-A-* that those who testify against cartel members are socially visible); see also *Madrigal v. Holder*, 716 F.3d 499, 506 (9th Cir. 2013) (citing *Henriquez-Rivas* for the principle that a retributive motive may exist alongside a protected motive, noting, “Gang persecution of adverse witnesses would certainly have revenge as one motive, but group-based intimidation would be another.”).

*Henriquez-Rivas* court concluded that “for those who have publicly testified against gang members, their ‘social visibility’ is apparent,” as it involves “a distinct group of persons.”<sup>194</sup> In addition, *Henriquez-Rivas* met the particularity criterion, as her “group can be easily verified – and thus delimited – through court records documenting group members’ testimony.”<sup>195</sup>

While the public nature of the past experience in *Garcia*<sup>196</sup> and *Henriquez-Rivas*<sup>197</sup> helped establish social distinction, the Ninth Circuit has emphasized that it “by no means intend[s] to suggest that the public nature of [the applicant’s] testimony is essential” for a viable particular social group.<sup>198</sup> Further, in *Garcia*, the Third Circuit case, the assistance was not completely public in that the applicant testified while wearing a disguise.<sup>199</sup> The Board, in *Matter of M-E-V-G*<sup>200</sup> and *Matter of W-G-R*,<sup>201</sup> has since made clear that literal visibility in the public or elsewhere is not a requirement to show social distinction.

Some courts have rejected particular social groups where gangs were targeting and harming the petitioners, and then the petitioners reported the gangs to the police. For instance, in *Zelaya v. Holder*, the Fourth Circuit rejected a group consisting of young Honduran males who (1) refuse to join a gang, (2) have notified authorities of gang harassment, and (3) have an identifiable tormentor within the gang.<sup>202</sup> In *Garcia v. Holder*, the Eighth Circuit rejected a particular social group consisting of “young Guatemalan men who have opposed the MS-13, have been beaten and extorted by that gang, reported those gangs to the police[,] and faced increased persecution as a result” because the group was insufficiently particular and the petitioner failed to produce sufficient evidence of social distinction.<sup>203</sup>

<sup>194</sup> *Id.* at 1093.

<sup>195</sup> *Id.*

<sup>196</sup> *Garcia*, 665 F.3d at 504.

<sup>197</sup> *Henriquez-Rivas*, 707 F.3d at 1092.

<sup>198</sup> *Id.* n.14.

<sup>199</sup> *Garcia*, 665 F.3d at 500.

<sup>200</sup> *Matter of M-E-V-G*, 26 I&N Dec. 227, 240 (BIA 2014).

<sup>201</sup> *Matter of W-G-R*, 26 I&N Dec. 208, 216 (BIA 2014).

<sup>202</sup> *Zelaya v. Holder*, 668 F.3d 159, 162 (4th Cir. 2012). While the Fourth Circuit rejected the proposed group in *Zelaya* due to lack of particularity, the court subsequently held in another case that “[e]ach component of the group... might not have particular boundaries[;]... [o]ur case law is clear, however, that the group as a whole qualifies.” *Temu v. Holder*, 740 F.3d 887, 896 (4th Cir. 2014) (citing *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011) (recognizing a particular social group of family members of those who actively oppose gangs by agreeing to be prosecutorial witnesses, even if on its own, “[p]rosecutorial witnesses’ might reach too broad a swath of individuals” and “those who actively oppose gangs’ might be too fuzzy a label for a group.”)).

<sup>203</sup> *Garcia v. Holder*, 746 F.3d 869, 872-73 (8th Cir. 2014).



In *Carvalho-Frois v. Holder*, the First Circuit rejected a group of “witnesses to a serious crime whom the government is unable or unwilling to protect” as not socially visible.<sup>204</sup> The applicant in that case heard two gunshots at a neighbor’s home, and was warned by two men leaving the home that she was in danger and not to reveal anything about what she saw. She subsequently learned that a murder had occurred. The applicant relocated after receiving a phone call that the callers knew where she lived and they would kill her if she said anything to the police. This decision was based on lack of social visibility, and was reached before the BIA’s decisions in *M-E-V-G-* and *W-G-R-* on social distinction and particularity.

In addition, in *Bathula v. Holder*, the Seventh Circuit upheld the BIA’s determination that an Indian applicant who was threatened after testifying in court against a land mafia had not established nexus to a protected ground because he “was the victim of intimidation and then retaliation for his specific testimony in a specific case against the land mafia” rather than on account of his membership in a particular social group, which he had defined as “those willing to participate, despite personal risk, in the orderly administration of justice against criminal elements.”<sup>205</sup> The court only considered the nexus issue and did not address the validity of the group.

Several circuit courts have upheld decisions that applicants who served as informants in the U.S. did not establish persecution on account of a protected ground.<sup>206</sup> In *Costa v. Holder*, the First Circuit considered the case of a Brazilian applicant who had worked as an ICE informant in the United States and received indirect threats from the family of a man named Lelito who had been arrested because of the applicant’s work. It upheld the BIA’s conclusion that she had not established that the threats were on account of her membership in the particular social group of “former ICE informants.”<sup>207</sup> The Court reasoned, “Although Costa participated in multiple sting operations, the record indicates that only Lelito’s arrest triggered the threats that form the basis of her application.... There is little to suggest that the scope of persecution extends beyond a ‘personal vendetta.’”<sup>208</sup> Similarly, in *Martinez-Galarza v. Holder*, the applicant proposed two groups: people who have provided information to ICE to enable that organization to remove individuals residing illegally in the United States, and witnesses for ICE. The Eighth Circuit rejected

<sup>204</sup> *Carvalho-Frois v. Holder*, 667 F.3d 69, 73 (1st Cir. 2012) (“[t]he fact that the petitioner was known by a select few to have witnessed a crime tells us nothing about whether the putative social group was recognizable to any extent by the community... Because we discern no feature of the group that would enable the community readily to differentiate witnesses to a serious crime from the Brazilian populace as a whole, the claimed group is simply too amorphous to satisfy the requirements for social visibility.”).

<sup>205</sup> *Bathula v. Holder*, 723 F.3d 889, 900-01 (7th Cir. 2013).

<sup>206</sup> See, e.g., *Jonaitiene v. Holder*, 660 F.3d 267 (7th Cir. 2011); *Wang v. Gonzales*, 445 F.3d 993 (7th Cir. 2006); *U.S. v. Aranda-Hernandez*, 95 F.3d 977 (10th Cir. 1996).

<sup>207</sup> *Costa v. Holder*, 733 F.3d 13, 17 (1st Cir. 2013).

<sup>208</sup> *Id.* See also *Scatambuli v. Holder*, 558 F.3d 53 (1st Cir. 2009); *Amilcar-Orellana v. Mukasey*, 551 F.3d 86, 91 (1st Cir. 2008) (involving a Salvadoran man who provided information to the police and testified before a grand jury concerning arson committed in the U.S. by two gang members, the First Circuit held, “Amilcar-Orellana’s fear of persecution stems from a personal dispute with X and Y, not his membership in a particular social group.”).

a nexus to these proposed groups, stating, “Sanchez’s alleged reason for wanting to harm Martinez–Galarza—because Martinez–Galarza ended Sanchez’s American dream—is motivated by purely personal retribution, and thus not a valid basis for an asylum claim.”<sup>209</sup> The court acknowledged, “There may be asylum protections for an applicant who shows the threatened persecution is motivated by both personal retaliation and a protected motive, but Martinez–Galarza presents no evidence to suggest this is the situation here. He does not allege that Sanchez has threatened or attacked other ICE informants.”<sup>210</sup> Based on the specific facts of the case, it may nonetheless be possible that an informant to U.S. law enforcement officials may be able to establish eligibility.

When you encounter potential particular social groups related to testifying against criminals or cooperating with law enforcement against criminals, there is no bright-line rule about what type of testimony or law enforcement assistance will establish a cognizable particular social group. As the Board held in *M-E-V-G-* and *W-G-R-*, the viability of a particular social group must be analyzed on a society-by-society and case-by-case basis. You should analyze country reports, news articles, testimony, and other evidence to determine whether someone who assists law enforcement through courtroom testimony or other means is perceived by society as distinct. Depending on the evidence, a certain type of law enforcement assistance or witness testimony might be socially distinct in one society, but not in another society. You also would need to articulate how the proposed group has definable boundaries, so it is clear who fits within the group and who does not.

The nexus inquiry may be difficult in cases where an applicant claims to have been targeted for having assisted law enforcement. Even where such a social group is cognizable and the applicant is a member of the group, you should examine the evidence to determine whether the applicant was targeted on account of his or her membership in a group defined by past assistance to law enforcement.

It is possible that an applicant who appears to have been targeted out of revenge for having cooperated with law enforcement may also be able to establish nexus to a particular social group defined by this shared past experience. You must carefully consider any direct evidence in the record of the persecutor’s motive and indirect evidence such as the timing and circumstances of the harm or threats the applicant claims to have experienced, the applicant’s testimony about the experiences of similarly situated individuals in the society, and country conditions reports or news articles relating to the treatment of other members of the group to make this determination. You should generally first examine whether there exists a group that meets the requirements of a particular social group, and then should analyze whether the applicant was or will be persecuted on account of any cognizable particular social group.

<sup>209</sup> *Martinez-Galarza v. Holder*, 782 F.3d 990, 993 (8th Cir. 2015).

<sup>210</sup> *Id.* at 994 (internal citation omitted).

#### 4.21 Gang Members

The Ninth Circuit has found that “tattooed gang members” is not a particular social group, because the group is not defined with particularity. The court also found that neither former nor current gang membership constitutes a valid particular social group.<sup>211</sup>

A group defined as “gang members” is not a particular social group, despite having the shared immutable trait of past experience and arguably being able to establish the social distinction prong, because the group’s shared experience stems from criminal activity.<sup>212</sup> Groups based upon criminality do not form the basis for protection, because the shared trait is “materially at war with those [characteristics] we have concluded are innate for purposes of membership in a social group.”<sup>213</sup> To find otherwise, said the court, would pervert the humanitarian purpose of refugee protection by giving “sanctuary to universal outlaws.” The court also found that “participation in criminal activity is not fundamental to gang members’ individual identities or consciences.”<sup>214</sup>

The court also analyzed whether current gang membership gives rise to a particular social group using the Ninth Circuit’s alternate “voluntary association” test. The court found that current gang membership does not constitute a particular social group, because the gang association is for the purpose of criminal activity. Thus, it is not an association that is fundamental to human dignity; i.e., it is not the kind of association that a person should not be required to forsake. Therefore, current gang members are not members of a particular social group on the basis of their gang membership.<sup>215</sup>

The applicant also failed to establish a particular social group of “former” gang members. Disassociation from a gang does not automatically result in the creation of a new social group. Citing to *Matter of A-M-E- & J-G-U-*, the court found that “non-association” and “disaffiliation” are unspecific and amorphous terms, even if qualified with the word “tattooed,” as in “former tattooed gang members.”<sup>216</sup>

#### 4.22 Former Gang Members

Some circuit courts have found that “former gang members” may be a particular social group. This finding is not consistent with USCIS’s and RAIO’s legal interpretation, according to which a particular social group may not be based on criminal activity or

<sup>211</sup> *Arteaga v. Mukasey*, 511 F.3d 940, 945 (9th Cir. 2007).

<sup>212</sup> *Id.* at 945-46.

<sup>213</sup> *Id.* at 945.

<sup>214</sup> *Id.* at 946.

<sup>215</sup> *Id.*; see also *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1097 (9th Cir. 2013) (acknowledging that the Board does not require members of a particular social group to share a voluntary associational relationship).

<sup>216</sup> *Id.*

associations, past or present.<sup>217</sup> However, for cases arising within the jurisdiction of those circuits, asylum officers must follow these rulings<sup>218</sup> as well as the analytical framework laid out by the BIA in *Matter of W-G-R* and *Matter of M-E-V-G*.<sup>219</sup> See Asylum Supplement – Former Gang Membership as a Particular Social Group. Because refugee applications are adjudicated outside of the jurisdiction of any circuit court of appeals, refugee officers are not bound by these circuit court decisions and should follow USCIS, RAIO and RAD guidance.

## 5. SUMMARY

An applicant who is seeking asylum based on membership in a particular social group must establish that the group is (1) composed of members who share a common immutable characteristic, (2) socially distinct within the society in question, and (3) defined with particularity. A common, immutable characteristic is one that the members of the group either cannot change, or should not be required to change because it is fundamental to the member's identity or conscience. For social distinction, a group's shared characteristic must be perceived as distinct by the relevant society. Social distinction does not require the shared characteristic to be seen by society (i.e., literally visible). To satisfy the particularity requirement, there must be a benchmark and definable boundaries for determining who falls within the group and who does not. All three elements are required, and the elements must be analyzed on a case-by-case basis and society-by-society basis. In analyzing particular social groups, it also is important to consider the other general principles discussed in this lesson plan, including: to avoid circular reasoning; to avoid defining a group by terrorist, criminal, or persecutory activity; and to recognize that voluntary association, cohesiveness, or homogeneity are not required.

You should also avoid conflating nexus with the validity of a particular social group. Even if an applicant establishes that he or she is a member of a particular social group, the applicant must still establish that he or she was persecuted, or has a well-founded fear of persecution, on account of his or her membership in the group. Membership in a particular social group also may be imputed to an applicant who, in fact, is not a member of a particular social group. Finally, membership in a particular social group may overlap

<sup>217</sup> See Lynden D. Melmed, USCIS Chief Counsel, *Guidance on Matter of C-A-*, Memorandum to Lori Scialabba, Associate Director, Refugee, Asylum and International Operations (Washington, DC: January 12, 2007).

<sup>218</sup> *Urbina-Mejia v. Holder*, 597 F.3d 360, 365–67 (6th Cir. 2010) (holding that former gang members of the 18th Street gang have an immutable characteristic and are members of “particular social group” based on their inability to change their past and the ability of their persecutors to recognize them as former gang members); *Benitez-Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009); *Martinez v. Holder*, 740 F.3d 902, 911–13 (4th Cir. 2014) (concluding that Martinez's membership in a group that constitutes former MS-13 members is immutable, but did not address the social distinction and particularity criteria. The court remanded the case to consider other criteria).

<sup>219</sup> *Matter of W-G-R*, 26 I&N Dec. 208, 215 n.5 (BIA 2014) (opining that “[g]ang members willingly involved in violent, antisocial behavior are more akin to persecutors and criminals, who are barred from establishing eligibility for asylum and withholding of removal, than to refugees, whom the Act is intended to protect”); *Matter of M-E-V-G*, 26 I&N Dec. 227 (BIA 2014).

with other protected grounds, such as political opinion, and you should also consider whether the applicant can establish eligibility based on a different protected ground.

**PRACTICAL EXERCISES**

Practical exercises will be added at a later time.

**Practical Exercise # 1**

- **Title:**
- **Student Materials:**

**OTHER MATERIALS**

There are no “Other Materials” for this module.

**SUPPLEMENT A – REFUGEE AFFAIRS DIVISION**

The following information is specific to the Refugee Affairs Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

**REQUIRED READING**

- 1.
- 2.

**ADDITIONAL RESOURCES**

- 1.
- 2.

**SUPPLEMENTS**

**RAD Supplement**

Given the nature of access to the U.S. Refugee Admissions Program (USRAP), many refugee applicants abroad are able to establish eligibility through nexus to one of the four protected grounds apart from membership in a particular social group (PSG). For that reason, a nexus to the other protected grounds should always be analyzed first. At pre-departure briefings, refugee officers will usually be informed of PSGs that have previously been recognized in populations they will be interviewing in that region. New PSGs are generally reviewed by the RAD Policy Branch to ensure consistency in RAD adjudications throughout all regions.

In the past, RAD has recognized PSGs of, for example, sexual minorities in certain countries as well as women from certain countries who have been subjected to sexual and gender-based violence (SGBV) who face familial and social ostracism, and other stigmatization or harm as a result. Before applying any of these PSGs to other populations, refugee officers must first ensure that the PSG meets the requisite three-part test and that country conditions support all elements of the PSG. For example, for women from a certain country who have been subjected to SGBV, country conditions should indicate that such women are socially distinct as



stigmatized, ostracized or facing other harm as a result of the violence before any such PSG claim is recognized to avoid circularity in the PSG definition.

For gender based PSG claims, it is also important to distinguish between UNHCR's designation of "women at risk" from any possible PSG to which such women may belong. "Women at risk" refers to one of UNHCR's seven categories for submission of refugees for resettlement and is one way in which a refugee may be granted access to the USRAP through a Priority 1 referral. However, UNHCR's identification of a refugee applicant as a "woman at risk" cannot be conflated with her eligibility for refugee status. Any gender-based PSG to which the applicant may belong must be fully analyzed and supported by the record and relevant evidence of country conditions where appropriate.

For further guidance, see RAIO Training Module, *Gender-Related Claims*; RAD Policy Branch, Responses to Queries: *PSGs within the context of Afghan Women at Risk* and *PSGs within the context of sexual and gender based violence against Congolese women*. Please note that these RAD documents were issued prior to the Board's articulation of the three-part test in 2014. Nonetheless, the documents contain other relevant guidance and suggested lines of inquiry.

### SUPPLEMENT B – ASYLUM DIVISION

The following information is specific to the Asylum Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

#### REQUIRED READING

- 1.
- 2.

#### ADDITIONAL RESOURCES

- 1.
- 2.

#### SUPPLEMENTS

##### ASM Supplement - Former Gang Membership as a Particular Social Group in the Fourth, Sixth, and Seventh Circuits

Prior to the Board of Immigration Appeals' decisions in *Matter of M-E-V-G-* and *Matter of W-G-R*, the Sixth and Seventh Circuits issued decisions holding that former gang membership can form the basis of a particular social group.<sup>220</sup> The Fourth Circuit has also held that former members of the MS-13 gang in El Salvador shared an immutable characteristic and rejected the argument that a particular social group may not be defined by former criminal associations, though it did not decide whether the group met the "particularity" or "social distinction" criteria and remanded for the Board to consider whether the proposed group met those criteria.<sup>221</sup> On the other hand, the First and Ninth Circuits have held that former gang membership does not give rise to a particular social group.<sup>222</sup>

<sup>220</sup> *Urbina-Mejia v. Holder*, 597 F.3d 360, 365–67 (6th Cir.2010) (holding that former gang members of the 18th Street gang have an immutable characteristic and are members of "particular social group" based on their inability to change their past and the ability of their persecutors to recognize them as former gang members); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

<sup>221</sup> *Martinez v. Holder*, 740 F.3d 902, 911-13 (4th Cir. 2014).

<sup>222</sup> See *Cantarero v. Holder*, 734 F.3d 82, 86 (1st Cir. 2013) ("The shared past experiences of former members of the 18th Street gang include violence and crime. The BIA's decision that this type of experience precludes recognition of the proposed social

In *W-G-R-*, the Board considered the case of an applicant who claimed that he had been targeted by the Mara 18 gang in El Salvador for retribution because he had left the gang.<sup>223</sup> The Board held that the applicant's proposed social group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" was not sufficiently particular, because it could include people of any age, sex, and background and their participation in the gang could vary widely in terms of strength and duration, or socially distinct, because there was not enough evidence in the record about the treatment or status of former Mara 18 members in Salvadoran society.<sup>224</sup> In addition, the Board opined that "[g]ang members willingly involved in violent, antisocial behavior are more akin to persecutors and criminals, who are barred from establishing eligibility for asylum and withholding of removal, than to refugees, whom the Act is intended to protect."<sup>225</sup> The Board quoted from its decision in *Matter of E-A-G-*, stating, "Treating affiliation with a criminal organization as being protected membership in a social group is inconsistent with the principles underlying the bars to asylum and withholding of removal based on criminal behavior."<sup>226</sup>

As the Fourth, Sixth, and Seventh Circuits have issued decisions that conflict with USCIS's interpretation of the term "particular social group" not to include groups based on past or present criminal, persecutory, or terrorist activity or association, and the Board has not expressly held that these decisions have been superseded, asylum officers adjudicating cases in those circuits may not rely on this principle. No circuit court, however, has yet considered whether social groups based on former membership in a criminal gang may be cognizable according to the three-part test set forth in *M-E-V-G-* and *W-G-R-*. Asylum Officers in the Fourth, Sixth, and Seventh Circuits must consider whether groups based on former criminal activities or associations are valid by applying all three criteria as articulated in the Board decisions.

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group is sound."); *Arteaga v. Mukasey*, 511 F.3d 940, 945-46 (9th Cir. 2007) ("We cannot conclude that Congress, in offering refugee protection for individuals facing potential persecution through social group status, intended to include violent street gangs who assault people and who traffic in drugs and commit theft."); cf. *Elfen v. Ashcroft* (1st Cir. 2004) (in rejecting repatriated Haitian criminals as a particular social group, stating, "the BIA has never extended the term 'social group' to encompass persons who voluntarily engaged in illicit activities"); *Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992) (rejecting drug traffickers as a particular social group).

<sup>223</sup> *Matter of W-G-R-*, 26 I&N Dec. 208, 209 (BIA 2014).

<sup>224</sup> *Id.* at 221.

<sup>225</sup> *Id.* at 215 n. 5.

<sup>226</sup> *Id.* (quoting *Matter of E-A-G-*, 24 I&N Dec. 591, 596 (BIA 2008)).

**SUPPLEMENT C – INTERNATIONAL OPERATIONS DIVISION**

The following information is specific to the International Operations Division. Information in each text box contains division-specific procedures and guidelines related to the section from the Training Module referenced in the subheading of the supplement text box.

**REQUIRED READING**

- 1.
- 2.

**ADDITIONAL RESOURCES**

- 1.
- 2.

**SUPPLEMENTS**

## Quiz for Gender Related Claims (*Answer Key*)

1. Gender related claims only concern female applicants.
  - A) True
  - B) **False**

**B- False – “...it is important to note that the forms of gender-based persecution described in this lesson can, and often are, inflicted on both females *and* males.” *Introduction to Gender lesson***
2. The human rights of all individuals are guaranteed within international instruments such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. There was, however, a need for special instruments addressing the rights of women because:
  - A) the more general international instruments fail to specify gender as a protected characteristic
  - B) the other instruments specifically exclude gender as a factor
  - C) **those instruments have not always provided sufficient protection to women due to discriminatory interpretations and applications**
  - D) the other instruments were enacted before the women’s rights movement

**C – taken from page 12 in the lesson plan under, International and National Guidelines Relating to Women and Children**
3. The most severe form of Female Genital Mutilation is:
  - A) Excision
  - B) Concatenation
  - C) **Infibulation**
  - D) Circumcision

**C – Infibulation (see page 19 of lesson, Types of FGM)**
4. The lesson on Gender Related Claims and various international instruments protecting women have altered the legal criteria used to evaluate an asylum or refugee claim that is gender-based.
  - A) True
  - B) **False**

**B – False, the lesson plan, in the legal analysis section, states that nothing in the lesson provides guidance that expands on the statutory definition of refugee**

**5. In evaluating whether internal relocation is reasonable all of the following are important considerations, EXCEPT:**

- A) significant restraints on a woman's right to travel**
- B) the applicant comes from a country where women are still economically dependent on men**
- C) the applicant's husband does not want to relocate**
- D) in the applicant's country a woman living outside the protection of her father, spouse, or clan may be vulnerable to attack and/or damaging social stigma**

**C – The husband's wishes are not a consideration. The other three choices are specifically mentioned in the lesson. The husband's preferences, without more, would not be a reason for not seeking to relocate internally. For that matter, the woman's preference, without more, would not be sufficient either.**

**6. Because of the stigma attached to rape, it is unusual for a woman to have documentary evidence, such as medical or police reports, documenting the rape.**

- A) True**
- B) False**

**A- True It may be unreasonable to expect a woman from a refugee-producing country to have documentation of sexual violence she suffered. Because of strong cultural stigma attached to rape, "women survivors of sexual violence often are reluctant to seek medical assistance or to file police reports, because they do not want it known that they were raped."**

**7. What factor that would affect a female applicant's ability to provide detailed testimony is NOT related to gender?**

- A) Social constraints may limit access to information**
- B) Gender roles**
- C) Education level**
- D) Faulty memory**

**D – Faulty memory is a human factor and is not specific to gender.**

**8. All gender based claims fall under the particular social group protected ground.**

- A) True**
- B) False**

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**B- B – False, in some instances gender may be a factor in political opinion and religious claims**

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# Nexus: Particular Social Group (PSG)

Corey Cappelloni, HQ Asylum Division,

Thea Lay, Office of the Chief Counsel

February 21-22, 2016

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# On Account Of

- \* **Motive** is critical.

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

- \* The “**motivation of the persecutors** involves questions of fact, and the burden **can be met by testimonial evidence.**”

  - \* *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007).

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# Imputed Membership

- \* As with any protected ground, membership in a PSG can be imputed.
- \* Persecutor falsely believes that an applicant is a member of the PSG.
- \* Do not include "imputed" in the PSG definition; instead, it is the applicant's PSG membership that is imputed.

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SENSITIVE

LS

# Exercise 1

# Domestic Violence PSGs

Claims re violence within spousal-like relationship:

1. (Nationality) women unable to leave a domestic relationship – *Matter of A-R-C-G-*
2. (Nationality) women viewed as property because of their position within a domestic relationship – DHS brief in *Matter of L-R-*;

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# Domestic Violence PSGs

Claims re violence to children within the domestic relationship:

- \* Children viewed as property because of their position within a domestic relationship.
- \* Reformulation of PSG involving children lacking effective familial protection.
- \* First time the LP articulates the PSG.

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# Domestic Violence PSGs

Ming Li Hui v. Holder, 769 F.3d 984 (8th Cir. 2014).

- \* Did not analyze but accepted the PSG of “Chinese daughters who are viewed as property by virtue of their position within a domestic relationship.”
- \* Found a fundamental change in circumstances.

# Family PSGs Involving Gang Targeting

## Courts finding a nexus:

- \* Hernandez-Avalos v. Lynch, 784 F.3d 944 (4th Cir. 2015).
- \* Cordova v. Holder, 759 F.3d 332 (4th Cir. 2014).
- \* Aldana-Ramos v. Holder, 757 F.3d 9 (1st Cir. 2014).

## Court finding no nexus:

- \* Perlora-Sola v. Holder, 699 F.3d 572 (1st Cir. 2012).

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# Exercise 4



# Law Enforcement Assistance

## Matter of C-A-

- \* Non-criminal informants generally not socially visible or particular, but there may be social visibility for those informants discovered because they appear as witnesses or otherwise come to the cartel's attention.
- \* In M-E-V-G-, BIA acknowledged C-A- "language highlighting... ocular visibility" and clarified that it's not required.

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# Witnesses

## Cases recognizing witness PSGs:

- \* *Garcia v. Att'y Gen. of U.S.* (3d Cir. 2011).
  - \* “[c]ivilian witnesses who have the ‘shared past experience’ of assisting law enforcement against violent gangs that threaten communities in Guatemala”
- \* *Gashi v. Holder* (2d Cir. 2012).
  - \* cooperating witnesses [who met with war crimes investigators]
- \* *Henriquez-Rivas* (9th Cir. 2013).
  - \* witnesses “who testified in court against gang members” in El Salvador

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SENSITIVE

## Law Enforcement Assistance: Lack of Consistent Precedent

- \* Proposed PSGs involving youth who report gang threats or gang beatings:
  - \* *Garcia v. Holder* (8th Cir. 2014).
  - \* *Zelaya v. Holder* (4th Cir. 2012).
- \* Those courts only examined the proposed PSG formulations put forward by the applicants, and rejected them.

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## Law Enforcement Assistance: Lack of Consistent Precedent

- \* *Carvalho-Frois v. Holder* (1st Cir. 2012).
  - \* Woman who received threats from two men leaving a neighbor's home where a murder occurred did not establish membership in a valid PSG.
- \* *Escobar v. Holder* (7th Cir. 2011).
  - \* Upheld PSG of truckers who refused to cooperate with FARC and collaborated with law enforcement.

## Law Enforcement Assistance

- \* “[Nationality] who assist law enforcement by reporting a serious gang-related crime”
- \* No bright line rule re proposed PSG. Elicit information re persecutor’s motive, circumstances of threats received, & similarly situated individuals. Review COI.
- \* If a valid proposed PSG exists, then examine nexus.

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# Law Enforcement Assistance in the U.S.

- \* Several circuits have rejected claims involving informants who help U.S. law enforcement.
  - \* *Martinez-Galarza v. Holder* (8th Cir. 2015).
  - \* *Costa v. Holder* (1st Cir. 2013).
- \* The courts decided those cases based on the record evidence. AOs should examine the specific facts of the case at hand to determine if an informant to U.S. law enforcement officials may be able to establish eligibility.

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# Former Gang Members

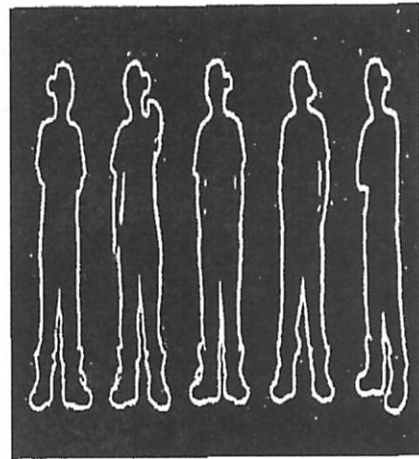
## Fourth, Sixth and Seventh Circuits

- \* Sixth and Seventh – Former gang membership can form the basis for a PSG

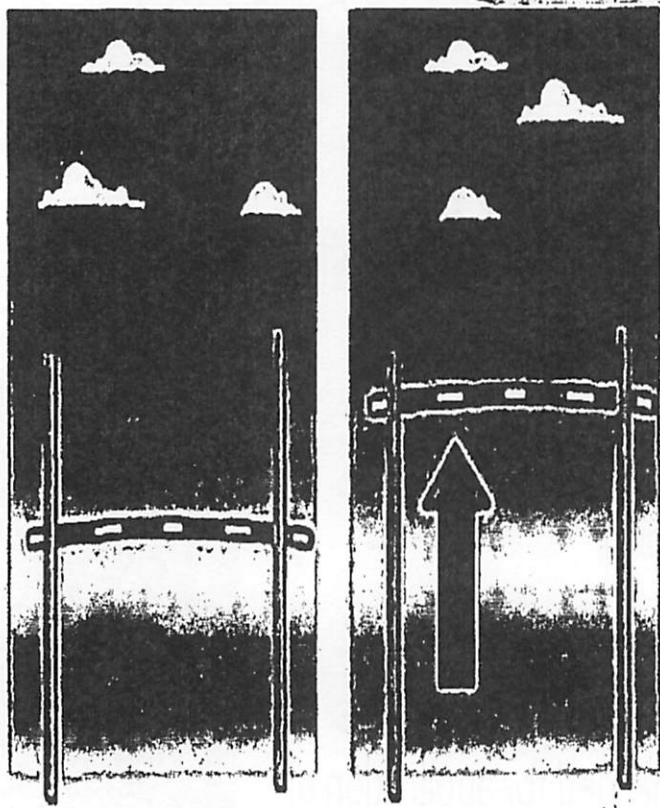
- *Urbina-Mejia v. Holder*  
(6th Cir. 2010) and *Benitez  
Ramos v. Holder* (7th Cir.  
2009).

- \* Fourth – former gang membership is immutable, remanded for application of other criteria.

- *Martinez v. Holder*,  
(4th Cir. 2014).



# CF/RF vs. Affirmative



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