

# IMMIGRATION **JUSTICE** CAMPAIGN

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## *Matter of A-B-*: Case Updates, Current Trends, and Suggested Strategies

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AILA Doc. No. 19020731. (Posted 2/7/19)  
Wednesday, January 31, 2018 - Open - New to immigration court? This



RESOURCES

Overview of Removal Proceedings

# Speakers

- Dree K. Collopy, Benach Collopy LLP
- Eunice Lee, Center for Gender and Refugee Studies
- Ashley Huebner, National Immigrant Justice Center
- Charles Shane Ellison, Justice for Our Neighbors
- Victoria Neilson, Catholic Legal Immigration Network, Inc.

# Roadmap

- Case Updates and Trends: *Matter of A-B-*, *Grace v. Whitaker*, and more
- Presenting Particular Social Groups and Nexus in the Post-*A-B-* World
- Addressing Private Actor Violence in the Post-*A-B-* World
- Procedural Trends and Suggested Strategies

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## LITIGATION UPDATE: *MATTER OF A-B-*

# *Matter of A-B- Overview*

- Ms. A.B. is a Salvadoran woman who fled years of egregious domestic violence at the hands of her partner
- Was granted asylum by the BIA in December 2016
- On June 11, 2018, Attorney General Sessions issued a decision in *Matter of A-B-*

A video profile of Ms. A.B. produced by HRW and CGRS is available online at <https://www.immigrantwomentoo.org/>

# What Did *Matter of A-B-* Hold?

- Overruled *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014) because the BIA's decision lacked “rigorous analysis” as DHS conceded certain issues
- Reversed grant of asylum to Ms. A.B. due to perceived errors in the Board's application of its standard of review

# What Doesn't *Matter of A-B-* Do?

Properly read:

1. *A-B-* does NOT preclude DV claims as a blanket matter
2. *A-B-* does NOT preclude gang claims as a blanket matter
3. *A-B-* does NOT preclude a case-by-case, record-specific adjudication



# Observations: Asylum Offices

- Between June 12, 2018 and November 30, 2018, attorneys have reported to CGRS:
  - At least **29 grants in domestic violence** (including partner abuse and child abuse) claims
  - At least **17 grants in fear-of-gang claims**

Jurisdictions include the Arlington, Boston, Chicago, Houston, Newark, New Orleans, New York, and San Francisco asylum offices.

# Observations: Immigration Courts

- Between June 12, 2018 and November 30, 2018, attorneys have reported to CGRS:
  - At least **41 grants** of asylum or withholding in **domestic violence** (including partner abuse and child abuse) claims
  - At least **35 grants** of asylum or withholding in **fear-of-gang** claims

Jurisdictions include the Arlington, Baltimore, Boston, Chicago, Florence, Los Angeles, Memphis, New York, Philadelphia, Portland, Salt Lake City, San Antonio, San Francisco, and Seattle courts.

# Tracking

- CGRS continues to track case outcomes **at the AO/EOIR level** as well as cases **pending in the federal courts of appeals** that may raise challenges to *Matter of A-B*.
- Simply use our “Report an Outcome” page or email us at [CGRS-ABtracking@uchastings.edu](mailto:CGRS-ABtracking@uchastings.edu)

# Current Status of Ms. A-B-'s Case

- Attorney General Sessions remanded the case back to IJ Couch
- CGRS and the Lopez Law Firm:
  1. Briefed Ms. A.B.'s continued eligibility for asylum
  2. Requested evidentiary hearing on the merits
  3. Filed motion for recusal
- On October 10, 2018, IJ Couch again denied Ms. A.B. asylum
- BIA appeal pending

# Takeaway for Practitioners

- Demand a record-specific analysis
- Consider *all* relevant protected grounds, particularly political opinion claims
- Build your record for appeal

For more details, request our *Matter of A-B-* practice advisory at <https://cgrs.uchastings.edu/assistance/request>

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Litigation update: *Grace v. Whitaker*

# *Grace v. Whitaker* Overview

- On August 7, 2018, CGRS and ACLU filed a lawsuit, *Grace v. Whitaker*, in the DC District Court, pursuant to 8 U.S.C. 1252(e)(3)
- *Grace* challenges the application of *Matter of A-B-* and related USCIS policy memoranda in **credible fear proceedings**
- Does not challenge *Matter of A-B-* in the context of full removal proceedings

# Grace v. Whitaker Overview

- *Grace* argues that several aspects of *A-B-* and the USCIS memoranda violate the INA and the APA, including:
  - The presumption against DV and gang claims
  - The heightened standard for state protection
  - The circularity of “unable to leave” social groups
  - The failure to consider mixed-motives nexus



# What Did *Grace* Hold?

- On December 19, 2018, the Court issued its decision, *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018).
- Agreed that several aspects of *A-B-* and the USCIS policy memoranda violate the INA and the APA with regard to credible fear proceedings.

# What Did *Grace* Hold?

- Specifically, the Court found the following to be unlawful in the context of credible fear:
  1. The “general rule” against DV and gang claims
  2. The heightened standard for state protection
  3. The circularity of “unable to leave” social groups
  4. Instruction to asylum officers to ignore circuit law inconsistent with *A-B-*
- Also reaffirmed that a personal relationship does not preclude establishing nexus under the mixed-motives standard

# What Did the Court in *Grace* Do?

- Entered a **permanent injunction** prohibiting the government from applying the unlawful aspects of the decision in future credible fear processes
  - Thus, credible fear proceedings as of December 19, 2018 cannot apply unlawful aspects of *A-B-* or USCIS guidance
- Also required the government to issue **updated guidance**

# How Did the Government React?

- Filed a motion to stay the injunction pending appeal
  - Denied by the Court on January 25, 2019
- USCIS issued a redacted version of its policy memo
  - Portions of the original memo that were declared unlawful are blacked out
- EOIR issued guidance confirming the IJs conducting CFI reviews are bound to follow the *Grace* injunction
- Appealed the decision to D.C. Circuit; appeal pending

# What Does *Grace* Mean in Asylum Interviews?

- The *Grace* injunction only applies to credible fear proceedings
- However, the redacted USCIS guidance expressly states that it covers both credible fear and merits proceedings
- Point to *Grace* and the redacted USCIS guidance when arguing against one of the enjoined provisions

# What Does *Grace* Mean in Removal Proceedings?

- While not binding, the opinion is persuasive authority
- Provides a roadmap for similar challenges in individual removal proceedings, and before Courts of Appeals
- May cite to helpful government litigation positions
  - For example: disavowing the idea that *A-B-* creates a general rule

Briefing and decision available at  
<https://www.aclu.org/cases/grace-v-whitaker>

# What Does *Grace* Mean for Asylum Seekers Previously Denied CFIs?

- If still in the U.S., should file immediate request for re-interview with asylum office -> new interview if granted must comply with *Grace*
- If already removed pursuant to an expedited removal order, applicant can again seek protection again if they arrive at or enter U.S.
  - If presenting at port of entry, should get CFI that complies with *Grace*
  - If apprehended EWI, subject to reinstatement (withholding only)

Briefing and decision at <https://www.aclu.org/cases/grace-v-whitaker>

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## Defining Particular Social Groups in a Post-A-B- World



# *Matter of A-B-*: PSG

- Vacates *A-R-C-G-*, but does not say the group can never be viable
- Reaffirms BIA's three-part test & holding in *Matter of W-Y-C- & H-O-B-* (must clearly delineate the PSG before the IJ)
- Claims “unable to leave” PSGs are inherently circular

# Defining and Defending Your PSG

## Post-A-B-

- Present all viable PSGs (& argue w/all elements), per *Matter of W-Y-C-* BUT be strategic
  - Present narrower/broader versions of the same PSG
- Focus on your circuit's positive PSG law and explain how it remains unchanged by *A-B-*
- For DV-based claims, explain what *A-B-* actually holds and what it does not.
- Avoid circular definitions
  - In DV claims, explain (and corroborate) that your PSGs are not circular

# Defining and Defending Your PSG

## Post-A-B-, Continued

- Potential PSGs: Domestic Violence Claims

Honduran women

Immediate family members of the “X” family

Honduran women in relationships they are unable to leave

Honduran women viewed as property by virtue of their status within a relationship

Honduran women who have violated social norms

# Defining and Defending Your PSG

## Post-A-B-, Continued

- Gang Claims:
  - No real impact on case law
  - Distinguish the initial reason from targeting vs the secondary reason for targeting post-anti-gang action
  - Distinguish characteristics that give rise to the harm from generalized violence
  - Look to non-gang case law with PSGs based on similar characteristics
- Examples:
  - Hondurans who have resisted/opposed/witnessed and reported gangs/gang activity/gang crimes/gang extortion
  - Former professions: police officers, small business owners

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## Establishing Nexus in a Post-A-B- World

# *Matter of A-B-*: Nexus

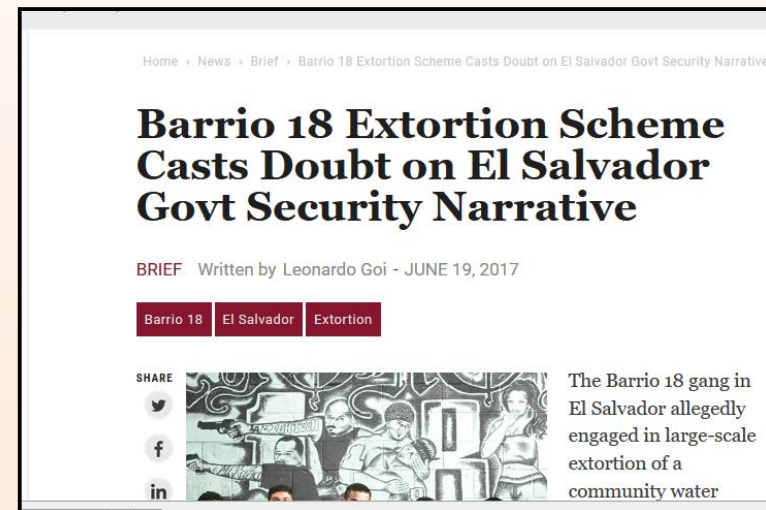
- Reaffirms one central reason standard (nothing new)

## But...dicta:

- Ignores mixed motives:
  - “A criminal gang may target people because they have money. . . . That does not make the gang’s victims persons who have been targeted “on account of” their membership in any social group.”
- Continued emphasis that a “personal” relationship or reason behind the persecution ≠ nexus:
  - “he attacked her because of his preexisting personal relationship with the victim.”

# Establishing Nexus *Post-A-B-*

- Use ALL evidence to establish context
  - Place harm into a broader context of a cultural norm, policy or modus operandi
  - Gender violence is NOT a personal dispute
- Demonstrate the persecutor's awareness of your client's PSG or at least, the immutable characteristic she shares with others



# Establishing Nexus *Post-A-B-*

- Follow a three-part analysis for gender-based claims (and other claims when possible)

Circumstantial evidence (similarly situated individuals; M.O.; context; harm itself, e.g. *Kasinga*)



Country evidence shows harm occurs because the govt has deemed it permissible and required

Direct evidence (words; actions)



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## Nonstate Actor Persecution and *Matter of A-B-*

# Nonstate Actor Harm

- In *Matter of A-B-*, the AG takes aim at claims arising out of nonstate actor persecution.
  - “Generally, claims by aliens pertaining to ... non-governmental actors will not qualify for asylum.... [I]n practice such claims are unlikely to satisfy the statutory grounds for proving group persecution that the government is *unable or unwilling* to address.” *Id.* at 320.
  - Later the AG states that the “applicant must show that the government *condoned* the private actions ‘or at least demonstrated a *complete helplessness* to protect the victim.” *Id.* At 337.

# Unable/Unwilling v. Condoned/Completely helpless

- *Matter of A-B-* pulls the condoned/completely helpless language from a few Seventh and Eighth Circuit cases. See e.g., *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000); *Gutierrez-Vidal v. Holder*, 709 F.3d 728, 732 (8th Cir. 2013).
- The language is an outlier in both circuits, though it has been used more often in the Eighth Circuit than the Seventh.

# Elevated Standard or Not?

## Not elevated:

- The AG does not announce that this is a new or different standard.
- The AG appears to use the terms as though they are interchangeable.
- The AG does not rely on the condone/completely helpless language in holding the state actor requirement was not met in *A-B-*. It is dicta.

## Elevated:

- The plain language would suggest that a true “completely helpless” standard is more difficult to meet.
- In the Eighth Circuit, where the “completely helpless” standard has been employed, petitioners are less likely to prevail.
- *Grace* held that it is an elevated standard that is inconsistent with the statute.

## After *Matter of A-B-*

- ❖ *Rosales Justo v. Sessions*, 895 F.3d 154, 164 (1st Cir. 2018)
  - “Here . . . the evidence in the record showed only that the police made efforts to investigate . . . . The evidence showed nothing about the quality of this investigation or its likelihood of catching the perpetrators. Indeed, evidence about law enforcement in Guerrero generally suggested that the investigation was unlikely to make Rosales's family any safer. Therefore, . . . the evidence of the investigation here was insufficient to justify the BIA's conclusion that the IJ . . . erred in finding that the Mexican police were . . . unable to protect Rosales.” *Id.* at 164.
  - The Court found this despite that there were “seven officers and a forensic team at the scene where [the] body was recovered, the police took statements from [petitioner] and his wife, and an autopsy was performed.” *Id.* at 129.

# Strategies:

- ❖ The condone/completely helpless test used in the Seventh Circuit is applied the same way as the unable/unwilling test. It can be met where the applicant is unable to obtain *effective* protection, even though the authorities may have taken steps to intervene. To a lesser degree, the same can be argued in the Eighth Circuit. See *e.g.*, *Galina v. INS*, 213 F.3d 955 (7th Cir. 2000); *Gathungu v. Holder*, 725 F.3d 900 (8th Cir. 2013); *Ngengwe v. Mukasey*, 543 F.3d 1029, 1035 (8th Cir. 2008).
- ❖ Alternatively, argue that if a true “completely helpless” standard is used, it is inconsistent with the statute, case law, and the well-founded fear standard. *Canales-Vargas v. Gonzales*, 441 F.3d 739, 743 (9th Cir. 2006) (“While a well-founded fear must be objectively reasonable, it ‘does not require certainty of persecution or even a probability of persecution.’”)

# Strategies:

- ❖ Argue against any rule that a failure to report defeats a showing that the government is unable/unwilling to protect. INA 101(a)(42) (a refugee may be “unable or unwilling to avail” herself of state protection). *Matter of S-A-*, 22 I&N Dec. at 1335. Also argue, where appropriate, that reporting would be futile.
- ❖ Consider whether there is an argument that the persecutor is part of a state entity.

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## Procedural Hurdles in a Post-*A-B*- World



# Procedural Hurdles to Asylum

- **Border Issues**
- **Affirmative Asylum Cases**
- **Defensive Asylum Cases**
  - Substantive issues
  - Procedural issues

# The “Asylum Ban”

- November 8, 2018 the DHS and DOJ released an Interim Final Rule entitled *Aliens Subject to a Bar on Entry under Certain Presidential Proclamations; Procedures for Protection Claims*.
- November 9, 2018 Trump issued a *Proclamation Addressing Mass Migration Through the Southern Border of the United States*.

## *Applies to:*

- Those who EWI at southern border on or after 11/09/18 can only apply for withholding of removal and CAT protection. Includes UCs.
- Applies to those in expedited removal (CFIs), affirmative applications, and before immigration court.
- See CLINIC Fact Sheet  
<https://cliniclegal.org/resources/questions-and-answers-november-9-2018-asylum-ban>

# What Is the Status of the “Asylum Ban”?

*East Bay Covenant Sanctuary, et. al. v. Trump*, 3:18-cv-06810 (N.D.C. December 19, 2018).

[https://ccrjustice.org/sites/default/files/attach/2018/12/99%20Order%20Granting%20Preliminary%20Injunction%202018.12.19%20\(1\).pdf](https://ccrjustice.org/sites/default/files/attach/2018/12/99%20Order%20Granting%20Preliminary%20Injunction%202018.12.19%20(1).pdf)

- Brought by four immigration non-profit organizations.
- Challenged the “asylum ban” for violating the INA and the Administrative Procedures Act
- Temporary Restraining Order granted on November 19 and on December 19, Preliminary Injunction granted by federal judge in San Francisco.
- “Asylum ban” currently enjoined
- “Remain in Mexico” now an issue

*O-A-, et. al. v. Trump*, 1:18-cv-02718 (D.D.C. 2018) - class action still pending. [https://immigrantjustice.org/court\\_cases/oa-v-trump](https://immigrantjustice.org/court_cases/oa-v-trump)

# “Remain in Mexico”

- Asylum seekers will be forced to remain in Mexico while awaiting immigration court proceedings
- Exceptions
  - Unaccompanied children
  - Citizens or nationals of Mexico,
  - Individuals processed for expedited removal
  - Returning LPRs
  - Individuals with an advance parole document or in parole status
  - Known physical/mental health issues
  - Criminals/history of violence
  - Government of Mexico or USG interest
  - Any individual who is more likely than not to face persecution or torture in Mexico, or
  - Other individuals at the discretion of the Port Director

# “Remain in Mexico,” Continued

- Will begin only in San Ysidro and only with Central Americans
- Will expand to all of southern border (POE) and between and all nationalities but Mexican
- “More likely than not” Mexico danger assessment will be made by USCIS asylum officers
  - No counsel present
- Individuals will get NTA (no CFI) with court date in US
- Many unknowns and concerns

# Asylum Office Procedures

- Last In, First Out
  - No decision because background hasn't cleared
- Backlog Issues
  - Consider expedite request
  - Consider mandamus
- Effect of A-B-?
  - No blanket rule against grants
  - Consider political opinion and non-PSG grounds
  - *Grace* not binding for affirmative asylum, but read it for reasoning (especially on government “complete helplessness”)

# Unaccompanied Children Seeking Asylum in Removal Proceedings

- By statute, USCIS has initial jurisdiction over asylum applications filed by “unaccompanied alien children” (UCs).
- USCIS - Kim Memo still in effect (allows for USCIS original jurisdiction over asylum applications of those previously determined to be UCs).
- EOIR - [Matter of M-A-C-O-, 27 I&N Dec. 477 \(BIA 2018\)](#), BIA determined that 18-year-old respondent was not a UC at the time he filed for asylum despite previous UC determination and therefore the immigration court properly exercised initial jurisdiction over his asylum application

# Unaccompanied Children Seeking Asylum in Removal Proceedings

- TIPS:
  - Argue that the Kim Memo is still in effect.
  - If based on having a guardian, argue out of scope of BIA's decision and/or the non-parental guardian is not a legal guardian.
  - File for asylum before USCIS as soon as possible if there is a "UAC Designation"



# PSG Immigration Court Procedure- *Matter of W-Y-C- & H-O-B-*

- *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018)
- BIA held that PSG involves a factual determination so must be considered before IJ (e.g. cannot articulate new PSG on appeal)
- Fallout: many IJs are requiring PSG to be articulated at Master Hearing
  - Practitioners should object, and, in the alternative reserve the right to amend PSG articulation up to the individual hearing
  - CLINIC and Central American Legal Assistance sample brief <https://cliniclegal.org/resources/sample-respondents-brief-regarding-psg-formulation-requirements>

# PSG Immigration Court Procedure- *Matter of E-F-H-L-*

- *Matter of E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018)
  - Sessions withdraws case that mandates hearing on asylum matters
  - Pushback - cite to *Matter of Fefe*, 20 I&N Dec. 116 (BIA 1989)
  - AILA Asylum Committee Practice Pointer
- Post *A-B-*
  - Some judges require briefing on PSG
  - Concern that hearings won't be scheduled without meeting prima facie PSG standard
  - Special concern for pro se litigants

# *Matter of L-A-B-R-*, 27 I&N Dec. 405 (A.G. 2018)

- Primary factors for continuances to pursue “collateral” matters - argue it is inapposite to other reasons for continuances
- Regulations authorize IJs to grant continuances for “good cause shown.” 8 CFR § 1003.29; *see* 8 CFR § 1240.6.
- The BIA has provided guidance on continuances in various contexts, including:
  - For attorney preparation (*Sibrun*, 18 I&N Dec. 354 (BIA 1983))
  - To find counsel (*C-B-*, 25 I&N Dec. 888 (BIA 2012))

# Asylum Application Adjudication Timeframes

- EOIR Memo - dated November 19, 2018 - completion within 180 days of filing unless “exceptional circumstances.” INA § 208(d)(5)(A)(iii)
- “Exceptional circumstances” criteria is higher than the good cause standard.
  - Good cause” for a continuance does not necessarily mean there are “exceptional circumstances” to toll the 180 adjudication requirement.
- Guidance regarding the adjudication of asylum applications consistent with INA § 208(d)(5)(A)(iii), OOD, PM 19-05.

# “Family Unit” Case Timeframes

- **What Are “Family Unit” Cases?**
  - Special designation by EOIR and DHS.
  - *Prospectively*, must be adjudicated within one year.
  - Priority to adjudicate expeditiously; without undue delay.
- **Where Are They Currently a Priority?**
  - 10 Immigration Courts (Atlanta, Baltimore, Chicago, Denver, Houston, LA, Miami, New Orleans, NYC, and San Francisco).

# “Family Unit” Case Timeframes

- **TIPS:** *build a record; request case be placed on status docket (or continued/administratively closed) if there are applications pending with USCIS.*
- *See EOIR November 16, 2018 Memorandum.*  
<https://www.justice.gov/eoir/page/file/1112036/download>

# Questions?

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