



# CATHOLIC LEGAL IMMIGRATION NETWORK, INC.

## Practice Pointer<sup>1</sup>

### *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019)

**August 2, 2019**

On July 29, 2019, U.S. Attorney General William Barr issued a precedential decision, *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019), a case in which CLINIC, along with co-counsel, represents Mr. L-E-A-. The decision continues the administration's assault on established tenets of asylum law. Following the playbook of *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), the decision engages in flawed analysis and makes blanket statements about categories of asylum claims that will likely not prevail while underscoring the need for case-by-case review. While *L-E-A-* involved a claim for asylum in immigration court, part of the Executive Office for Immigration Review (EOIR) within the Department of Justice, the attorney general's decision is also binding on the Department of Homeland Security (DHS) in both affirmative asylum applications and credible and reasonable fear interviews.<sup>2</sup> This practice pointer is intended to quickly provide practitioners with information about how to respond to *L-E-A-* in the immediate term. This is a developing area of the law and CLINIC plans to provide further updates and analysis related to this decision in the future.

#### **Brief Facts in *Matter of L-E-A-***

Mr. L-E-A- is a citizen of Mexico who sought asylum in the United States after a drug cartel, La Familia Michoacana, targeted him for harm in retaliation for his father refusing to allow the cartel to sell drugs from the father's store. The cartel shot at Mr. L-E-A- and attempted to kidnap him when he, too, refused their demands to sell drugs out of the family store. In 2017, the Board of Immigration Appeals (BIA or Board) issued a precedential decision, *Matter of L-E-A-*, 27

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<sup>2</sup> See 8 CFR §§ 103.10(b), 1003.1(g) (“[D]ecisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States.”)

I&N Dec. 40 (BIA 2017), which affirmed in clear language the longstanding recognition that family can be a particular social group (PSG):

We agree with the parties that the members of an immediate family may constitute a particular social group. We have long recognized that family ties may meet the requirements of a particular social group depending on the facts and circumstances in the case.<sup>3</sup>

Nonetheless, the BIA rejected Mr. L-E-A-'s asylum claim, finding that his feared persecution from the cartel had an insufficient nexus to his family membership. According to the BIA, the cartel's true motive was to increase profits by selling drugs from the store and not to harm the respondent because of his family membership.<sup>4</sup> In December 2018, Acting Attorney General Matthew Whitaker certified the Board's decision to himself.<sup>5</sup> After the attorney general's certification of the case to himself, CLINIC joined the case as co-counsel, arguing, *inter alia*,<sup>6</sup> that family is a quintessential PSG and that the attorney general should uphold the BIA's decision that family membership can constitute a PSG.

### **Narrow Holding of *Matter of L-E-A-***

The narrow holding in the attorney general's *L-E-A-* decision is that it "overrule[s] the portion of *Matter of L-E-A-* discussing whether the proposed particular social group is cognizable."<sup>7</sup> Similar to *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018)—a 2018 attorney general decision purporting to severely limit the availability of asylum for domestic violence survivors—the attorney general in *L-E-A-* determined that the BIA had relied on "concessions" by DHS, in this case that "the immediate family unit of the respondent's father qualifies as a cognizable particular social group."<sup>8</sup> The attorney general thus concluded that the BIA had not performed a fact-based analysis as to whether Mr. L-E-A-'s proposed PSG met the three-prong test laid out 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). Describing the BIA's 2017 *L-E-A-* decision, the attorney general states,

The Board here did not perform the required fact-based inquiry to determine whether the respondent had satisfied his burden of establishing the existence of a particular social group within the legal requirements of the statute. The Board's

<sup>3</sup> 27 I&N Dec. at 42.

<sup>4</sup> *Id.* at 46-47.

<sup>5</sup> *Matter of L-E-A-*, 27 I&N Dec. 494 (A.G. 2018).

<sup>6</sup> In his brief before the attorney general, Mr. L-E-A- also raised several irregularities in the referral process, namely that: the attorney general was not authorized to refer this case to himself because it was not pending before the BIA as required by 8 CFR § 1003.1(h); Matthew Whitaker, as an acting attorney general whose appointment did not comply with binding authority, was not authorized to refer this case to himself; that the attorney general has evinced such a bias against asylum seekers that he could not be a fair adjudicator; and that the immigration court lacked jurisdiction over this case because the Notice to Appear did not comply with 8 CFR § 1003.15 which requires the charging document to state the location of the immigration court where it will be filed in order to vest jurisdiction with the court. The attorney general dismissed each of these arguments.

<sup>7</sup> 27 I&N Dec. at 596-97 (referring to the BIA's 2017 *L-E-A-* decision).

<sup>8</sup> 27 I&N Dec. at 584 (citing DHS's brief).

summary conclusions, based on DHS's stipulation rather than its own legal analysis, must therefore be reversed.<sup>9</sup>

Employing a similar structure to *Matter of A-B-*, the attorney general in *L-E-A-* did not decide that the type of PSG proposed in the case cannot constitute a cognizable PSG. In fact, the attorney general's *L-E-A-* opinion expressly states that it "does not bar all family-based social groups from qualifying for asylum."<sup>10</sup> Instead the attorney general overruled the BIA decision's PSG cognizability holding because, according to the attorney general, the BIA had not conducted the required analysis in issuing its precedent decision.

### **Broad Dicta in *Matter of L-E-A-***

Even though the holding of the attorney general's *L-E-A-* decision is arguably quite narrow as noted above, the attorney general makes broad pronouncements in the decision predicting the likelihood of success on cases not before him<sup>11</sup> regarding the cognizability of family-based PSGs generally. It is in this part of the analysis that the attorney general seeks to radically change the accepted meaning of PSG. For example, he makes the following statements:

- "[U]nless an immediate family carries greater societal import, it is unlikely that a proposed family-based group will be 'distinct' in the way required by the [Immigration and Nationality Act (INA)] for purposes of asylum."<sup>12</sup>
- "The fact that 'nuclear families' or some other widely recognized family unit generally carry societal importance says nothing about whether a *specific* nuclear family would be 'recognizable by society at large'. . . . The average family—even if it would otherwise satisfy the immutability and particularity requirements—is unlikely to be so recognized."<sup>13</sup>
- "[M]any family-based social groups will have trouble qualifying as 'socially distinct,' a requirement that contemplates that the applicant's proposed group be 'set apart, or distinct, from other persons within the society in some significant way.'"<sup>14</sup>
- "[I]n the ordinary case, a nuclear family will not, without more, constitute a 'particular social group' because most nuclear families are not inherently socially distinct."<sup>15</sup>

Practitioners should argue that such statements are dicta and cannot be the basis for denying claims, particularly as the attorney general emphasizes the need for case-by-case analysis in asylum claims. These sweeping statements are also based on flawed reasoning, as described below.

<sup>9</sup> *Id.* at 586.

<sup>10</sup> *Id.* at 595.

<sup>11</sup> This tactic is similar to the one employed in the attorney general's 2018 decision in *A-B-*, where dicta in the decision went far beyond the narrow holding overruling *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014), for failure to conduct a complete PSG analysis, to make broad statements about types of cases not before him.

<sup>12</sup> 27 I&N Dec. at 595.

<sup>13</sup> *Id.* at 594 (internal citations omitted) (emphasis in original).

<sup>14</sup> 27 I&N Dec. at 593 (quoting *M-E-V-G-*, 26 I&N Dec. at 238).

<sup>15</sup> 27 I&N Dec. at 589.

## Flawed Reasoning in *Matter of L-E-A-*

In justifying the sweeping dicta described above, the attorney general engages in flawed analysis and disregards decades of agency<sup>16</sup> and U.S. courts of appeals precedent concluding that family members can constitute a PSG. Some examples of the flaws in the decision's reasoning include the following:

1. The attorney general rejects the BIA's 2017 conclusion in *L-E-A-* that the respondent was a member of the PSG of his father's immediate family because DHS had conceded that the PSG was cognizable—in other words, because both parties agreed that the respondent's father's immediate family was a cognizable PSG.<sup>17</sup> But the fact that both parties agree on a legal issue does not render their conclusion incorrect, particularly given DHS's role in interpreting immigration law. Furthermore, the BIA's decision in *L-E-A-* was grounded in its recognition that the cognizability of a PSG is a “fact-based inquiry made on a case-by-case basis,”<sup>18</sup> and it reaches the conclusion that the proposed family-based PSG is cognizable upon reviewing agency and U.S. courts of appeals precedents and “consider[ing] . . . the facts of this case” *as well as* the agreement of the parties.<sup>19</sup>
2. In reaching the sweeping conclusion that “most nuclear families are not inherently socially distinct,” the attorney general's decision improperly conflates the concepts of nexus and PSG. The decision, in rejecting the idea that families categorically qualify as PSGs, notes that most noncitizens are a member of a family. It reasons that this interpretation “would render virtually every alien a member of a [PSG],” summarily concluding that “[t]here is no evidence that Congress intended the term ‘particular social group’ to cast so wide a net.”<sup>20</sup> In fact, there is direct statutory evidence that Congress *did* intend to cast a wide net in defining protected characteristics. One need look no further than the other protected grounds Congress recognized alongside PSG: race, religion, nationality, and political opinion. Each of these categories encompasses a “wide net” of people; in fact, virtually all people possess one or more characteristics that form a protected ground. Simply possessing a protected characteristic has never been a basis for

<sup>16</sup> The initial, seminal BIA case on PSG was *Matter of Acosta*, 27 I&N Dec. 211 (BIA 1985), which employed the doctrine of *ejusdem generis* in interpreting PSG to require that membership in the group be immutable or so fundamental that the asylum seeker should not be required to change it. The BIA listed “kinship” as one example of a cognizable PSG. *Id.* at 233 (“The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.”). In *Matter of H-*, 21 I&N Dec. 337, 343 (BIA 1996), the BIA found that the “Marehan subclan” in Somalia met the PSG definition. In later cases, such as *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), the BIA recognized a “social visibility” element for PSGs. In that case the BIA concluded that “former noncriminal drug informants working against the Cali drug cartel” did not meet the PSG definition but noted that “[s]ocial groups based on innate characteristics such . . . family relationship are generally easily recognizable and understood by others to constitute social groups.” *Id.* at 959. 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 BIA clarified that there was never a requirement for “ocular visibility” for a PSG to be cognizable and renamed the “social visibility” requirement as “social distinction.”

<sup>17</sup> The attorney general states, “[T]he Board's particular social group analysis merely cited past Board and federal court precedents recognizing family-based groups and then agreed with the parties' stipulations.” 27 I&N Dec. at 596.

<sup>18</sup> 27 I&N Dec. at 42.

<sup>19</sup> 27 I&N Dec. at 43.

<sup>20</sup> 27 I&N Dec. at 593.

winning asylum; the applicant must demonstrate a nexus between the feared harm and the protected characteristic.<sup>21</sup>

3. The attorney general incorrectly applies the canon of statutory interpretation, long used to interpret the term PSG, of *ejusdem generis*.<sup>22</sup> Under that canon, “when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.”<sup>23</sup> While the attorney general is correct that *ejusdem generis* applies to interpreting what PSG means in the statute, he merely asserts that PSG cannot be an “‘omnibus catch-all’ for everyone who does not qualify under one of the other grounds for asylum”<sup>24</sup> rather than applying this statutory interpretation canon. The canon of *ejusdem generis* correctly applied actually refutes the attorney general’s reasoning that a proposed group cannot be a PSG merely because many people would then share a protected characteristic. As noted above, the other terms in the list—race, religion, nationality, and political opinion—are all characteristics that many, and in some cases most, or all, human beings have.
4. The decision compounds its flawed reasoning by noting that the term “family” is used ten times in INA § 101, the definitions section, and asserting that if Congress had intended to provide refugee status for those suffering persecution on account of family membership, “it would have included family identity as one of the expressly enumerated covered grounds for persecution.”<sup>25</sup> But there is no reason Congress would have included family-based PSGs in the definitional section of the INA when the only reference to asylum in that section is the general refugee definition at INA § 101(a)(42), and there are no PSGs defined anywhere in the INA, as Congress left it to adjudicators to determine the parameters of PSGs. And in fact, as courts have concluded for decades, family groups clearly fall within the scope of the term PSG.
5. The decision acknowledges that its sweeping conclusions about family groups generally not qualifying as PSGs comes after numerous U.S. courts of appeals precedents recognizing family-based PSGs.<sup>26</sup> The attorney general fails in his attempt to explain why those precedents cannot withstand his opinion. See below for details on U.S. courts of appeals precedent on family-based PSGs and the attorney general’s treatment of these cases in *L-E-A-*.

<sup>21</sup> See *N.L.A. v. Holder*, 744 F.3d 425, 439 (7th Cir. 2014) (“As the Board itself explained ‘the fact that almost all Somalis can claim clan membership and that interclan conflict is prevalent should not create undue concern that virtually all Somalis would qualify for refugee status, as an applicant must establish he is being persecuted on account of that membership.’” (quoting *Matter of H-*, 21 I&N Dec. 337, 343 (BIA 1996)).

<sup>22</sup> See, e.g., *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

<sup>23</sup> *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008); accord *Kucana v. Holder*, 558 U.S. 233, 247 (2010).

<sup>24</sup> 27 I&N Dec. at 592. The attorney general cites a concurring opinion in *Velasquez v. Sessions*, 866 F.3d 188, 194 (4th Cir. 2017), a case in which the majority once again “recognized that an individual’s membership in her nuclear family is a particular social group.” 866 F.3d at 194.

<sup>25</sup> 27 I&N Dec. at 593.

<sup>26</sup> *Id.* at 589.

These are just some of the reasons why the *L-E-A-* decision is legally flawed and subject to challenge in the U.S. courts of appeals. See below for further practice tips on challenging the validity of the *L-E-A-* decision.

### **U.S. Courts of Appeals Precedent Recognizing Family as Cognizable PSG Prior to *Matter of L-E-A-***

All U.S. courts of appeals that have reached the issue have concluded that family can be a PSG. Some of those cases are listed below. In circuits where a leading case precedes more recent BIA decisions about the PSG framework such as *M-E-V-G-* and *W-G-R-*, a more recent case is also included.

- **First Circuit**— *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993) (“There can, in fact, be no plainer example of a social group based on common, identifiable and immutable characteristics than that of the nuclear family.”); *Aldana-Ramos v. Holder*, 757 F.3d 9, 15 (1st Cir. 2014), *as amended* Aug. 8, 2014 (“ It is well established in the law of this circuit that a nuclear family can constitute a particular social group. . . .”; “The law in this circuit and others is clear that family may be a particular social group simply by virtue of its kinship ties, without requiring anything more.”).
- **Second Circuit**— *Vanegas-Ramirez v. Holder*, 768 F.3d 226, 237 (2d Cir. 2014) (recognizing that noncitizen’s “membership in his family may, in fact, constitute a ‘social-group basis of persecution’ against him”) (citing *Vumi v. Gonzales*, 502 F.3d 150, 155 (2d Cir. 2007)).
- **Third Circuit**— *S.E.R.L. v. Att’y Gen. U.S.*, 894 F.3d 535, 556 (3d Cir. 2018) (“Kinship, marital status, and domestic relationships can each be a defining characteristic of a particular social group, but that does not mean that adding two or more of those characteristics together necessarily establishes a cognizable particular social group.”).<sup>27</sup>
- **Fourth Circuit**— *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 (4th Cir. 2011) (finding family to be a “prototypical” PSG); *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015) (“[M]embership in a nuclear family qualifies as a protected ground for asylum purposes.”).
- **Sixth Circuit**— *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009) (“[A] family is a ‘particular social group’ if it is recognizable as a distinctive subgroup of society.”); *Trujillo Diaz v. Sessions*, 880 F.3d 244, 250 n.2 (6th Cir. 2018) (citing *Al-Ghorbani*).
- **Seventh Circuit**— *Ayele v. Holder*, 564 F.3d 862, 869 (7th Cir. 2009) (“Our circuit recognizes a family as a cognizable social group under the INA. . . .”); *Gonzalez Ruano v. Barr*, 922 F.3d 346, 353 (7th Cir. 2019) (“We and other circuits have recognized that membership in a nuclear family can satisfy the social group requirement.”).
- **Eighth Circuit**— *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005) (“[P]etitioners correctly contend that a nuclear family can constitute a social group. . . .”); *Aguinada-Lopez v. Lynch*, 825 F.3d 407, 409 (8th Cir. 2016) (assuming petitioner’s proposed family-based PSGs were cognizable and citing to *Bernal-Rendon*).
- **Ninth Circuit**— *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (finding immediate family to be a “prototypical” PSG); *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015) (finding family to be a “quintessential” PSG).

<sup>27</sup> Although this decision is very negative for domestic violence-based claims, it does have good language on kinship.

Other circuits, while not yet definitively deciding the issue, have favorably cited previous BIA precedent recognizing kinship ties and family as a cognizable PSG.<sup>28</sup>

### **Response in *Matter of L-E-A-* to U.S. Courts of Appeals Precedents Recognizing Family-Based PSGs**

The attorney general makes inadequate efforts to deal with the numerous U.S. courts of appeals precedent decisions recognizing family-based PSGs. For example, the attorney general dismisses decisions in the Sixth and Eighth Circuits recognizing family-based social groups by speculating that “the courts may have been willing (as the Board was in this case) to accept, or assume with little analysis, the existence of a particular social group because the court went on to deny asylum on other grounds.”<sup>29</sup>

The attorney general concedes that four circuits—the Ninth, Fourth, First, and Seventh—have indicated that family groups can be PSGs under the BIA’s framework but faults them for not “explicitly evaluating whether that position is consistent with *Matter of M-E-V-G-* and *Matter of W-G-R-*” or for purportedly relying on outdated dicta.<sup>30</sup> Looking at the First Circuit, the attorney general notes that the 1993 First Circuit *Gebremichael* case cites to the BIA’s *Matter of Acosta* decision, and states that *Acosta* did not define its use of the term “kinship ties” and does not justify a “broad assumption” that nuclear family can be a PSG.<sup>31</sup> The attorney general does not address First Circuit decisions such as the 2014 case *Aldana-Ramos v. Holder*, which stated that “[t]he law in this circuit . . . is clear that a family may be a particular social group simply by virtue of its kinship ties, without requiring anything more,” and concluded, “[o]ur interpretation is consistent with the language of the statute.”<sup>32</sup> Turning to the Seventh Circuit precedents concluding that family is a PSG, the attorney general notes that that circuit has declined to apply the Board’s particularity and social distinction requirements and that therefore its precedent on the issue goes back to the 1990s.<sup>33</sup> But the fact that the court’s precedent interpreting PSG goes back for decades if anything supports its continued validity rather than detracts from it. And the court’s rejection of BIA decisions narrowing the definition of PSG is more reason that it would continue to find family cognizable under *Acosta*.

<sup>28</sup> See, e.g., *Morales v. Sessions*, 860 F.3d 812, 816, 818 n.31 (5th Cir. 2017) (favorably noting the Board’s 2017 decision in *L-E-A-*, but not addressing whether the petitioner’s family was a particular social group); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 648 (10th Cir. 2012); *Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190, 1193 (11th Cir. 2006).

<sup>29</sup> 27 I&N Dec. at 589 (citing *Cruz-Guzman v. Barr*, 920 F.3d 1033, 1037 (6th Cir. 2019); *Rivas v. Sessions*, 899 F.3d 537, 542 (8th Cir. 2018); *Bernal-Rendon v. Gonzales*, 419 F.3d 877, 881 (8th Cir. 2005)). The attorney general also opines, “I do not believe that a cursory analysis of a question that was either uncontested, or not dispositive to the outcome, should be taken to undermine” the BIA’s three-prong PSG standard. 27 I&N Dec. at 589. The attorney general does not mention the Sixth Circuit precedent *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009), which granted the petition for review with respect to the petitioner’s withholding claim and noted that “a family is a ‘particular social group’ if it is recognizable as a distinctive subgroup of society.” 585 F.3d 980, 995 (6th Cir. 2009).

<sup>30</sup> 27 I&N Dec. at 590.

<sup>31</sup> *Id.*

<sup>32</sup> 757 F.3d 9, 15-16 (1st Cir. 2014), *as amended* Aug. 8, 2014.

<sup>33</sup> 27 I&N Dec. at 590.

Addressing the Fourth Circuit cases, the attorney general characterizes that court's explicit recognition of family-based PSGs in *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011), as inappropriately based on nothing more than a "passing suggestion" by the BIA in *Matter of C-A-*, 23 I&N Dec. 951, 959 (BIA 2006), that family relationships are social groups.<sup>34</sup> Contrary to the attorney general's claim, while *Crespin-Valladares* did cite *Matter of C-A-*, it also conducted a substantial analysis, going through each of the three BIA-created PSG elements,<sup>35</sup> to support its conclusion that family is "'a prototypical example of a 'particular social group.'"<sup>36</sup> Nor does the attorney general decision address Fourth Circuit decisions after the 2011 *Crespin-Valladares* case that have repeatedly affirmed family as a cognizable PSG.<sup>37</sup>

The attorney general does not attempt to address the Ninth Circuit precedents recognizing family-based PSGs other than to generally say that *Rios v. Lynch*, together with the decisions of other circuits "do not purport to contradict the Board's 'particular social group' framework and, in my view . . . have relied upon outdated dicta from the Board's early cases."<sup>38</sup> However, *Rios* does not rely on outdated dicta; rather, it specifically held that under the Board's contemporary framework in *M-E-V-G-*, "the family remains the quintessential particular social group."<sup>39</sup> The failure to discuss Ninth Circuit precedent is especially striking given that Mr. L-E-A-'s case arises in the Ninth Circuit.

The attorney general opines that to the extent any court of appeals decision does adopt a categorical rule that any nuclear family can constitute a PSG, "I believe that such a holding is inconsistent with both the asylum laws and the long-standing precedents of the Board."<sup>40</sup> The attorney general relies heavily on the notion that because the phrase "particular social group" is ambiguous, his conclusions are entitled to deference notwithstanding this large body of federal appellate law.<sup>41</sup> However, an agency's interpretation of an ambiguous statute must still be reasonable.<sup>42</sup> Especially where a circuit's precedent is that families are "quintessential,"

<sup>34</sup> *Id.* at 591.

<sup>35</sup> 632 F.3d at 124-26. *Crespin-Valladares* used the term "social visibility" rather than "social distinction," as the former was the term the BIA used prior to its 2014 decisions in *M-E-V-G-* and *W-G-R-*. See, e.g., *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008). Subsequent Fourth Circuit decisions issued after *M-E-V-G-* and *W-G-R-* have repeatedly affirmed the conclusion that family is a cognizable PSG.

<sup>36</sup> *Crespin-Valladares v. Holder*, 632 F.3d at 125 (quoting *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986)); see *Zelaya v. Holder*, 668 F.3d 159, 166 (4th Cir. 2012) (noting that *Crespin-Valladares*'s holding was based on the court's conclusions that "the family bonds of the proposed group satisfied the BIA's immutable characteristic requirement," that "the self-limiting nature of the family unit satisfied the particularity requirement," and that "the easily recognizable innate characteristic of family relationship satisfied the social visibility requirement").

<sup>37</sup> See, e.g., *Salgado-Sosa v. Sessions*, 882 F.3d 451, 457 (4th Cir. 2018); *Zavaleta-Policiano v. Sessions*, 873 F.3d 241, 247 (4th Cir. 2017); *Cruz v. Sessions*, 853 F.3d 122, 127 (4th Cir. 2017), as amended Mar. 14, 2017; *Hernandez-Avalos v. Lynch*, 784 F.3d 944, 949 (4th Cir. 2015).

<sup>38</sup> *L-E-A-*, 27 I&N Dec. at 590.

<sup>39</sup> *Rios v. Lynch*, 807 F.3d 1123, 1128 (9th Cir. 2015).

<sup>40</sup> 27 I&N Dec. at 591.

<sup>41</sup> See *id.* at 591-92.

<sup>42</sup> Generally, courts must defer to an agency's reasonable interpretation of an ambiguous statute. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). If a court's prior interpretation of an ambiguous status is at odds with an agency's subsequent construction, "the agency remains the authoritative interpreter (within the limits of reason)." *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (emphasis added). Justice Gorsuch, while a Judge on the Tenth Circuit, authored multiple



“prototypical” or “plain” examples of a PSG, the attorney general’s contrary conclusion cannot be considered reasonable. The substantive flaws in the decision discussed above further illustrate how the attorney general’s decision is an unreasonable construction of the statute, even in circuits where the law is less settled.

### **Practice Tips Related to Noncitizens Who Have Asylum Hearings Scheduled in the Future**

- **If Hearing/Interview Is Closely Approaching, Seek a Continuance or Rescheduling of Interview**—Practitioners with individual hearings or asylum interviews scheduled in the coming days or weeks should ask for a continuance in order to address *L-E-A-* through supplemental briefing and submission of additional evidence, as needed. In arguing for a continuance, practitioners should note that the holding in *L-E-A-* requires practitioners to submit individualized case-by-case evidence as to how the proposed family PSG satisfies the three-prong PSG test as articulated in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).<sup>43</sup>
- **Fight Back Against Wrongful Interpretations of *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018)**. In that case, the BIA held that because PSG analysis includes a factual component, asylum seekers must articulate their PSGs before the immigration judge (IJ), not in the first instance on appeal. As a result of this decision, some IJs have required practitioners to list all proposed PSGs and other protected characteristics at master calendar hearings.<sup>44</sup> If the practitioner only proposed a family-based PSG in a case, the practitioner should propose alternate PSGs or other protected characteristics where the facts support such arguments. Practitioners should also seek a continuance if necessary to develop further grounds for asylum. If DHS and/or the IJ try to limit arguments to the protected characteristic that was initially put forward in the case (before the attorney general’s *L-E-A-* decision), practitioners should object on the record arguing that *Matter of W-Y-C- & H-O-B-* does not require that the PSG be stated or developed at any time prior to the individual hearing. Practitioners can also argue that INA § 240(b)(4)(B) gives individuals in removal

opinions discussing *Brand X* in the immigration context, and concluded that “[a]n agency in the *Chevron* step two/*Brand X* scenario may enforce its new policy judgment only with judicial approval.” *De Niz Robles v. Lynch*, 803 F.3d 1165, 1174 n.7 (10th Cir. 2015) (Gorsuch, J.); see *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1145 (10th Cir. 2016) (Gorsuch, J.) (“*De Niz Robles* held that *Briones* was not legally effective in the Tenth Circuit until this court discharged its obligation under *Chevron* step two and *Brand X* to determine that the statutory provisions at issue were indeed ambiguous, that the BIA’s interpretation of them was indeed reasonable, and that *Padilla-Caldera I* [the 10th Circuit’s previous case] was indeed overruled.”).

<sup>43</sup> While practitioners should argue for continuances if they need them to fully prepare, they should also prepare for the individual immigration court hearing as though the continuance will not be granted. Immigration judges are subject to numerous memoranda requiring them to complete cases quickly. See, e.g., Memorandum from James R. McHenry III, Director, EOIR, Guidance Regarding the Adjudication of Asylum Applications Consistent with INA § 208(d)(5)(A)(iii) (Nov. 19, 2018), <https://www.justice.gov/eoir/page/file/1112581/download>; Memorandum from James R. McHenry III, Director, EOIR, Tracking and Expedition of “Family Unit” Cases (Nov. 16, 2018), <https://www.justice.gov/eoir/page/file/1112036/download>; Michelle N. Mendez, CLINIC, *New EOIR Memorandum on Continuances in Immigration Court*, <https://cliniclegal.org/resources/new-eoir-memorandum-continuances-immigration-court>. Practitioners should ensure that they have made a strong record before the IJ about the need for a continuance to preserve the issue for appeal, including arguments that a continuance is required to comply with due process and statutory and regulatory rights. See, e.g., INA § 240(b)(4)(B); 8 CFR § 1240.11(c)(3)(iii).

<sup>44</sup> For a sample brief arguing against this interpretation, see CLINIC and Central American Legal Assistance, Sample Respondent’s Brief Regarding PSG Formulation Requirements, <https://cliniclegal.org/resources/sample-respondents-brief-regarding-psg-formulation-requirements>.

proceedings the right “to present evidence on [their] own behalf” and as a matter of due process, an asylum seeker must be permitted to fully present their claim, which includes a meaningful opportunity to respond to new and relevant precedents that will be applied to their case.

- **Argue Due Process Violations If IJ Cuts Asylum Hearing Short**—At the same time that IJs are under increased pressure to meet case completion quotas or face unsatisfactory job performance reviews and potential termination,<sup>45</sup> the attorney general has issued another decision that increases the evidentiary burden on asylum seekers. After the decisions in *A-B-* and *L-E-A-*, any claim based on a PSG will require considerable testimony and evidence on each proposed PSG, proving that each prong of the three-part test is met. And following *W-Y-C-* & *H-O-B-*, practitioners often present multiple alternative PSGs in order to preserve all possible arguments for appeal. It will be difficult for asylum seekers to meet this evidentiary burden in the increasingly limited time slots that IJs are giving for asylum hearings. Practitioners should argue that failure to allow enough time to present all relevant testimony violates the asylum seeker’s constitutional right to due process and rights under the INA and regulations to present evidence,<sup>46</sup> and that the IJ performance quotas create an inherent conflict of interest for IJs.
- **Preserve Issues for Appeal**—Many IJs, especially newly hired IJs, may not feel comfortable reading *L-E-A-* narrowly and may feel that the attorney general’s decision requires them to deny cases with family-based PSGs. Practitioners should not withdraw claims based on a family-based PSG. Even if the IJ states that there is no more family-based asylum, practitioners should submit evidence about how the proposed family-based PSG meets the three-prong test. If the IJ refuses to allow this evidence, practitioners should make an offer of proof<sup>47</sup> to preserve the issue for appeal.

### **Practice Tips for Arguing That the Asylum Seeker Has a Winning Family-Based Claim in Spite of the Attorney General’s *L-E-A-* Decision**

- **Make an Evidentiary Record**—The most narrow reading of the attorney general’s decision in *L-E-A-* is that it overruled the BIA’s conclusion that Mr. *L-E-A-*’s immediate family constitutes a cognizable PSG because the BIA failed to conduct a case-by-case analysis. In presenting a family-based PSG (just like with any PSG), practitioners should go through each prong of the PSG analysis and make an evidentiary record that the proposed PSG meets the standard set forth in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014):

<sup>45</sup> See, e.g., Memorandum from James R. McHenry III, Director, EOIR, Case Priorities and Immigration Court Performance Measure (Jan. 17, 2018), <https://www.justice.gov/eoir/page/file/1026721/download>.

<sup>46</sup> INA § 240(b)(4)(B); 8 CFR § 1240.11(c)(3)(iii) (stating the applicant “shall be examined under oath on his or her application and may present evidence and witnesses in his or her own behalf”).

<sup>47</sup> An offer of proof refers to a statement “on the record [of] what you would prove if you were allowed to present evidence . . . of what you would testify to if allowed to testify.” *Matter of A-S-*, 21 I&N Dec. 1106, 1134 (BIA 1998) (Board Member Rosenberg, dissenting) (emphasis in original) (suggesting that if IJ will not allow certain testimony or evidence, representative should file a brief “arguing what the law requires and why your evidence or your explanation should be considered”).

- **Immutability**—Practitioners should argue that membership in a family is immutable, or fundamental and should not be required to be changed. The attorney general in the *L-E-A-* opinion concedes that “many family relationships will be immutable.”<sup>48</sup> Practitioners should cite to this statement in the decision but still include an argument that genetic relationships are immutable and that other legal relationships such as marriage or adoption are so fundamental that the applicant should not be required to change them.<sup>49</sup>
- **Particularity**—Under *M-E-V-G-* the “‘particularity’ requirement relates to the group’s boundaries or, as earlier court decisions described it, the need to put ‘outer limits’ on the definition of a ‘particular social group.’”<sup>50</sup> In *L-E-A-* the attorney general states, “some family-based group definitions may be too vague or amorphous to meet the particularity requirement—i.e., where an applicant cannot show discernible boundaries to the group.”<sup>51</sup> Practitioners should craft the PSG carefully to define the boundaries of the family. Practitioners should look to family law of the asylum seeker’s country, and define the family relationship in accordance with that law. It may be helpful to submit relevant law from the applicant’s country of origin including, if relevant: the constitution, family law statutes, and intestacy law that recognize the family definition as proposed in the asylum seeker’s case. If the practitioner is using an expert witness in the case, the expert could also discuss the significance of family within the society and the ways in which society recognizes specific formulations of the family unit.<sup>52</sup>
- **Socially Distinct**—*M-E-V-G-* states:

[T]he ‘social distinction’ requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. 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. A viable particular social group should be perceived within the given society as a sufficiently distinct group. The members of a particular social group will generally understand their own affiliation with the grouping, as will other people in the particular society.<sup>53</sup>

Even though the attorney general in *L-E-A-* broadly states that “the average family” is “unlikely to be . . . recognized” by society at large so as to meet the social distinction PSG requirement,<sup>54</sup> practitioners should argue that this statement is qualified by the

<sup>48</sup> 27 I&N Dec. at 593.

<sup>49</sup> See *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985).

<sup>50</sup> 26 I&N Dec. at 238.

<sup>51</sup> 27 I&N Dec. at 593.

<sup>52</sup> Expert testimony may be especially important where the family includes relationships or concepts for which it may be harder to find statutory definitions, such as common law spouses or cultural adoption.

<sup>53</sup> 26 I&N Dec. at 238.

<sup>54</sup> 27 I&N Dec. at 594.

attorney general's continued adherence to a case-by-case approach to PSG determinations. In *L-E-A-*, the attorney general requires asylum adjudicators to analyze the "particular social group *as it is defined* by the applicant and ask whether *that group* is distinct in the society in question."<sup>55</sup> In the 2017 BIA decision, the Board recognized Mr. L-E-A-'s "father's immediate family" as a PSG.<sup>56</sup> Significantly, the attorney general did not find that Mr. L-E-A-'s PSG could not succeed; instead, echoing the language of *Matter of A-B-*, he found that the BIA's " cursory treatment [of the PSG analysis] could not, and did not, satisfy the Board's duty to ensure that the respondent satisfied the statutory requirements to qualify for asylum."<sup>57</sup>

Practitioners should therefore be prepared to introduce evidence that the proposed family PSG is "recognizable by society at large."<sup>58</sup> This evidence could take the form of testimony by the applicant as well as affidavits from members of the relevant society that acknowledge that the family is known within their society. This evidence could include affidavits from members of the applicant's community such as faith leaders, neighbors, or others who can attest to the fact that the particular family group was known within that society.<sup>59</sup> Further, even seemingly obvious facts of social structure can help show that society recognizes an individual person's family as a group. Practitioners should consider making a detailed record of the ways in which a person's community and their country's legal structure treats *their* family as a group. Consider asking witnesses questions such as:

- What is your last name? Why?
- Who would care for your children if you passed away? Why?
- Who would inherit your property if you passed away? Why?
- Who would your neighbors or the police call if you were injured? Why?

- **Do Not Propose PSGs That Are Based on the Feared Harm**—In *Matter of A-B-*, the attorney general expounded on his view that a circular PSG—one that is defined by the harm that the asylum seeker suffered or fears in the future—is not cognizable.<sup>60</sup> In *L-E-A-*, the attorney general likewise lists PSGs that encompass family relationship plus harm and opines that such PSGs would generally not be socially distinct.<sup>61</sup> For example, he cites a case where the "defining attribute of applicant's proposed family member group was its persecution by the drug-trafficking organization."<sup>62</sup> To the extent possible given the facts of the case, it is better to propose a PSG that does not include the feared harm as part of the family

<sup>55</sup> *Id.* (emphasis in original).

<sup>56</sup> 27 I&N Dec. at 43.

<sup>57</sup> 27 I&N Dec. at 596.

<sup>58</sup> *L-E-A-*, 27 I&N Dec. at 594.

<sup>59</sup> The *L-E-A-* decision does not explain how "society" is defined. DHS may argue that "society" is a country-wide rather than local concept. An affidavit from an expert witness explaining how "society" is defined within a particular country may be helpful.

<sup>60</sup> 27 I&N Dec. 316, 334-335 (A.G. 2018).

<sup>61</sup> 27 I&N Dec. at 595.

<sup>62</sup> *Id.* (citing *Rodriguez v. U.S. Att'y Gen.*, 735 F.3d 1302, 1310 (11th Cir. 2013)).

definition.<sup>63</sup> Thus, for example, a proposed PSG could be “immediate family of John Smith.” Note that DHS may argue that this PSG formulation is foreclosed by the attorney general’s decision in *L-E-A-* but practitioners can counter with the arguments discussed above.

- **Argue the Existence of a Cognizable PSG and Nexus as Separate Elements**—As discussed above, the attorney general conflates the existence of a PSG with the existence of a nexus to harm. Practitioners must first prove that a cognizable PSG exists and then prove that the past or future feared harm is on account of the PSG. Practitioners should remind the adjudicator that these are distinct elements and that the fact that most people belong to cognizable PSGs does not mean that most people have winning asylum claims any more so than the fact that most people have a race or religion makes them eligible for asylum. Even after convincing an adjudicator that the proposed PSG is cognizable, the applicant must also prove nexus.<sup>64</sup>

### **Practice Tips for Making the Alternative Argument That the Attorney General’s *L-E-A-* Decision Was Wrongly Decided**

- **Tailor Arguments to the Decision Maker.**<sup>65</sup> In cases before the U.S. Citizenship and Immigration Services asylum office, the IJ, or the BIA, the adjudicator is bound by *L-E-A-*. Therefore, practitioners should consider limiting arguments that *L-E-A-* was wrongly decided to a single sentence in a brief or even a footnote, to preserve them for appeal. However, for practitioners in a jurisdiction where circuit authority is clear that family is a PSG, practitioners can argue that the circuit law is controlling despite the attorney general’s *L-E-A-* decision.<sup>66</sup> Regardless, in proceedings before the asylum office, the IJ, or the BIA, practitioners should consider arguing that *L-E-A-* stands for the limited proposition that an asylum applicant must provide case-specific evidence of social distinction. (See above section titled “Practice Tips for Arguing That the Asylum Seeker Has a Winning Family-Based Claim in Spite of the Attorney General’s *L-E-A-* Decision”).

<sup>63</sup> The attorney general in *L-E-A-* questions federal appellate court decisions of U.S. courts of appeal that did find cognizable PSGs that included family plus an external factor. See 27 I&N Dec. at 594-95. Practitioners should continue to cite U.S. court of appeals precedent where it supports the claim.

<sup>64</sup> It is worth reviewing the 2017 BIA decision in *Matter of L-E-A-* on this point. The BIA did not find a nexus between the harm and Mr. L-E-A-’s family membership even though it concluded that his family membership was a cognizable PSG.

<sup>65</sup> The Center for Gender and Refugee Studies (CGRS), co-counsel in *Matter of A-B-*, released an excellent practice advisory on July 6, 2018, following the attorney general’s *A-B-* decision, which includes strategic considerations for cases affected by the decision in various procedural postures. Practitioners are encouraged to request this advisory at <https://cgrs.uchastings.edu/>.

<sup>66</sup> See *De Niz Robles v. Lynch*, 803 F.3d 1165, 1174 n.7 (10th Cir. 2015) (Gorsuch, J.) (“An agency in the *Chevron* step two/*Brand X* scenario may enforce its new policy judgment only with judicial approval.”); accord *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1145 (10th Cir. 2016) (Gorsuch, J.) (stating that until subsequent, post-agency, 10th Circuit decision, earlier 10th Circuit decision “remained on the books as binding precedent in the Tenth Circuit”); cf. *Barrera-Lima v. Sessions*, 901 F.3d 1108, 1119 n.9 (9th Cir. 2018) (“[W]hile *Brand X* permits agencies to reject a court’s interpretation of an ambiguous statutory provision so long as the new interpretation is reasonable, it is not clear that an agency can advance an interpretation that the courts have previously deemed unambiguously foreclosed by law.”).

- **Develop the Facts.** If the case is before a factfinder, such as an asylum officer or IJ, practitioners should introduce evidence that the applicant’s family is, in fact, distinct. (See above section titled “Practice Tips for Arguing That the Asylum Seeker Has a Winning Family-Based Claim in Spite of the Attorney General’s *L-E-A-* Decision”). If the case is before an appellate tribunal, such as the BIA or a court of appeals, consider whether the applicant would benefit from a remand to further develop the record in light of the attorney general’s decision.
- **Consider Non-Retroactivity Arguments.** *L-E-A-* does not address whether it is retroactive. Several U.S. courts of appeals have recently applied anti-retroactivity principles to Board precedents.<sup>67</sup> Practitioners should consider raising non-retroactivity arguments in the alternative to challenging the *L-E-A-* decision on its merits in pending cases, both before the agency and the courts of appeal.
- **Considerations at the Court of Appeals.**<sup>68</sup> If the case is before a court of appeals, in addition to raising non-retroactivity arguments, practitioners should consider countering any argument that *L-E-A-* forecloses the family-based PSG claim by asserting that *L-E-A-* does not categorically foreclose any category of claims and that, at maximum, the case should be remanded for further consideration by the agency of the three-prong PSG test.<sup>69</sup> Practitioners may also argue that, due to the flaws described above, the attorney general’s decision in *L-E-A-* is not a reasonable construction of the statute. In the typical case, urging non-retroactivity and the appropriateness of remand as primary arguments is preferable to proceeding directly to the attorney general’s flawed statutory interpretation.
- **Considerations During Credible and Reasonable Fear Interviews.** Credible and reasonable fear interviews employ a relaxed standard in evaluating whether an asylum or withholding of removal claim should proceed.<sup>70</sup> Further, asylum officers conducting credible and reasonable fear interviews are enjoined from “disregard[ing] contrary circuit law” and “may not limit their analysis to the law of the circuit where the [applicant] is located during the credible fear process.”<sup>71</sup> Asylum officers must also consider whether the applicant’s case presents novel or unique issues that warrant full consideration by an IJ in removal proceedings.<sup>72</sup> Accordingly, advocates should argue to asylum officers and IJs conducting credible fear interviews and reviews that family-based applications are still cognizable despite *L-E-A-* because of the large body of contrary federal appellate case law.

<sup>67</sup> See, e.g., *Monteon-Camargo v. Barr*, 918 F.3d 423 (5th Cir. 2019); *Garcia-Martinez v. Sessions*, 886 F.3d 1291 (9th Cir. 2018); *Acosta-Olivarria v. Lynch*, 799 F.3d 1271 (9th Cir. 2015); *De Niz Robles v. Lynch*, 803 F.3d 1165 (10th Cir. 2015) (Gorsuch, J.).

<sup>68</sup> Please contact CLINIC’s federal litigation attorney Bradley Jenkins [bjenkins@cliniclegal.org](mailto:bjenkins@cliniclegal.org) if you have a family PSG case on appeal before a U.S. court of appeal.

<sup>69</sup> See *Gonzales v. Thomas*, 547 U.S. 183 (2006).

<sup>70</sup> See 8 CFR § 208.30(e)(2) (credible fear is established if there is a “significant possibility” of establishing eligibility for asylum); 8 CFR § 208.31(c) (reasonable fear established if there is a reasonable possibility of persecution or torture).

<sup>71</sup> See ACLU & CGRS, *Practice Advisory: Grace v. Whitaker*, Attachment C, Revised USCIS Guidance (Mar. 7, 2019), [https://www.aclu.org/sites/default/files/field\\_document/grace\\_practice\\_advisory\\_combined.pdf](https://www.aclu.org/sites/default/files/field_document/grace_practice_advisory_combined.pdf).

<sup>72</sup> 8 CFR § 208.30(e)(4).

## Conclusion

*Matter of L-E-A-* is the latest effort in the administration's assault on the asylum system. It is clear that the administration's goal is to limit or eliminate the opportunity to seek asylum in the United States for as many people as possible. It is therefore simultaneously erecting procedural barriers including: metering at the border; procedures forcing asylum seekers to remain in dangerous regions in Mexico to await court dates in the United States; and bans on asylum for those who enter between ports of entry or travel through a third country to reach the southern border. All of these restrictive policies are being litigated and many have been enjoined.

At the same time, the administration has politicized the asylum adjudication system, with the attorney general issuing substantive decisions that are calculated to make it more difficult for those fleeing harm to prevail on their asylum claims. It is difficult to conceive of a PSG that meets the elements of immutability; particularity; and social distinction more clearly than a family group. We are hopeful that *Matter of L-E-A-* will be struck down in court and urge practitioners to litigate each of these cases vigorously to preserve their clients' rights.



The Catholic Legal Immigration Network, or CLINIC, advocates for humane and just immigration policy. Its network of nonprofit immigration programs—over 370 affiliates in 49 states and the District of Columbia—is the largest in the nation.

Building on the foundation of [CLINIC's BIA Pro Bono Project](#), CLINIC launched the Defending Vulnerable Populations (DVP) Program in response to growing anti-immigrant sentiment and policy measures that hurt immigrants. DVP's primary objective is to increase the number of fully accredited representatives and attorneys who are qualified to represent immigrants in immigration court proceedings. To accomplish this, DVP conducts court skills trainings for both nonprofit agency staff (accredited representatives and attorneys) and pro bono attorneys; develops practice materials to assist legal representatives; advocates against repressive policy changes; and expands public awareness on issues faced by vulnerable immigrants. By increasing access to competent, affordable representation, the program's initiatives focus on protecting the most vulnerable immigrants—those at immediate risk of deportation.

DVP offers a variety of written resources including timely practice advisories and guides on removal defense strategies, amicus briefs before the BIA and U.S. courts of appeals, pro se materials to empower the immigrant community, and reports. Examples of these include a series of practice advisories specific to DACA recipients, a practice advisory on strategies and considerations in light of the Supreme Court's decision in *Pereira v. Sessions*, 138 S. Ct. 2105 (2018), a guide on how to obtain a client's release from immigration detention, amicus briefs on the "serious nonpolitical crime" bar to asylum as it relates to youth and on the definition of a minor for purposes of the asylum one-year filing deadline, an article in Spanish and English on how to get back one's immigration bond money, and a report entitled "Denied a Day in Court: In Absentia Removals and Families Fleeing Persecution."

These resources and others are available on the [DVP webpage](#).