



AILA Policy Brief: USCIS Guidance on *Matter of A-B-* Blocks Protections for Vulnerable Asylum Seekers and Refugees

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On July 11, 2018, U.S. Citizenship and Immigration Services (USCIS) published a policy memorandum that profoundly restricts the ability of vulnerable individuals to obtain asylum or refugee status in the United States and will result in the deportation of *bona fide* asylum seekers who are fleeing life-threatening danger.¹ The memorandum, “Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B-*,” instructs agency adjudicators on how to apply Attorney General Sessions’ opinion in *Matter of A-B-*² when processing credible and reasonable fear determinations, affirmative asylum applications, and refugee cases.

Taken together, *Matter of A-B-* and the corresponding USCIS memorandum rely on omissions and mischaracterizations of governing legal authority to arrive at legally unsound holdings that will prevent many legitimate asylum seekers from receiving protection in America. These new policies reduce an extremely complicated area of law still controlled by federal court and Board of Immigration Appeals (Board) precedent to overly simplistic instructions. In particular, the USCIS memorandum gives forceful instruction to asylum officers that they should deny the vast majority of domestic violence and gang-based persecution claims, eschewing the careful case-by-case analysis the law requires.

While the memorandum’s flawed legal analysis leaves it vulnerable to future legal challenge, for many asylum seekers the grave consequences of this guidance will be felt immediately. Those consequences could include:

- Mass deportations of survivors of domestic violence and gang-based persecution to further harm and even death in their home countries;
- Increased removals of asylum-seeking populations, including those applying in the interior of the United States, who are persecuted by private, non-state actors;
- Denial of asylum claims made by people who enter without inspection, resulting in unfair punishment for their manner of entry that runs counter to U.S. and international law;
- Escalation of the initial “credible fear” screening into an impossibly high standard that violates federal statute; and
- The attempted elevation of the Attorney General and the Board’s decisions above federal circuit court precedent as applied to credible fear determinations.

The Memorandum Directs Near-Blanket Denials of Domestic Violence and Gang-Based Persecution Claims

The USCIS memorandum, together with *Matter of A-B-*, will lead to widespread USCIS denials of asylum cases in which the person is seeking protection from domestic violence or persecution by powerful transnational criminal organizations referred to as “gangs.” The memorandum gives strongly-worded instruction to USCIS personnel that such claims do not typically qualify for asylum:

“In general...claims based on membership in a putative particular social group defined by the members’ vulnerability to harm of domestic violence or gang violence will not establish the basis for asylum, refugee status, or a credible or reasonable fear of persecution.” (emphasis in original)³

While the memorandum does not absolutely rule out that such claims could qualify, it instructs officers that they should rarely grant relief in these cases:

“Officers should be alert that under the standards clarified in *Matter of A-B-*, **few** gang-based or domestic-violence claims involving particular social groups defined by the members’ vulnerability to harm may merit a grant of asylum or refugee status.” (emphasis added).⁴

This sweeping directive prejudges entire categories of particular social group claims—those based on domestic violence or gang violence—and directly conflicts with the requirement that asylum officers and immigration judges evaluate proposed particular social groups on a case-by-case basis. In *Matter of Acosta*, the Board instructed that “[t]he particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis.”⁵ Similarly, the Board held in *Matter of M-E-V-G* that “[s]ocial group determinations are made on a case-by-case basis.”⁶ Previous USCIS guidance made it clear that not only particular social group assessments, but also asylum adjudications in their entirety, should be conducted on a case-by-case basis:

“Although many claims are similar, they are never identical, and each applicant is unique. Therefore, each request must be evaluated on its own merits. You should be mindful of the facts of each particular case without allowing previous cases to unduly influence your decision-making...Each case must be analyzed on its own facts.”⁷

The USCIS memorandum will lead to higher denial rates by asylum officers reviewing such cases in the southern border regions and demonstrates callousness toward the well-documented ongoing humanitarian crisis in the Northern Triangle of El Salvador, Guatemala, and Honduras. The United Nations Development Program states that “[i]n the Northern Triangle...the problem of femicide and violence against women has reached epidemic levels.”⁸ The Council on Foreign Relations warns that the region “remains menaced by...gang violence.”⁹ While the USCIS memorandum does not foreclose the possibility that some cases involving domestic abuse or gang violence will qualify for asylum, it seems likely that USCIS personnel will implement this guidance as a near-blanket preclusion of such claims. It is undeniable that the dangers facing

these asylum seeker populations will continue unabated while the consequences of these policies unfold.

The USCIS Memorandum Attempts to Impose a Heightened Standard for Asylum Claims Based on Persecution by Private Actors

For all claims based on persecution by private, non-state actors, the memorandum states that the applicant must “show the government condoned the private actions or at least demonstrated a *complete helplessness* to protect the victim” (emphasis added). Due to the repeated use of this term in the memorandum, USCIS adjudicators will likely interpret “complete helplessness” as going well beyond the long-held standard requiring a showing that the government was “unable or unwilling” to control the private actor. But the memorandum itself recognizes that the appropriate test is still the “unable or unwilling” standard, and adjudicators should not interpret the use of “complete helplessness” as elevating the standard.¹⁰ A more stringent standard would conflict with the legal requirement that an asylum seeker demonstrate only that there is a “reasonable possibility” of persecution.¹¹ The Supreme Court in *I.N.S. v. Cardoza-Fonseca* held that: “it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.” It went on to state that as low as a *10% chance* of persecution could be sufficient to qualify for asylum.¹²

A new and higher “complete helplessness” standard would impact many vulnerable populations persecuted by non-state actors, including lesbian, gay, bisexual, transgender, and intersex (LGBTI) asylum seekers; victims of other gender-based harms, such as female genital cutting (FGC), forced marriage, and honor killings; and individuals persecuted on the basis of religion, ethnicity, and nationality. Private actors—including family members, other villagers, and members of hate groups—perpetrate much of the harm inflicted on individuals targeted around the world due to their sexual orientation or gender. For example, the performance of FGC by private actors remains widespread in Burkina Faso¹³ despite an official government ban outlawing the practice and its prosecution of some individuals who carried it out.¹⁴ Under the standard set in the USCIS memorandum, the government of Burkina Faso’s policies on FGC could support a finding that it was not “completely helpless” to stop FGC practices. The “complete helplessness” requirement is likely to significantly increase denial rates of asylum seekers who fear persecution by private actors and could lead to ramped-up deportations of numerous members of vulnerable groups, returning them to persecution in their home countries.

The USCIS Memorandum Opens the Door to Widespread Denials of Asylum for Those Who Enter Without Inspection—Contrary to U.S. and International Law

The USCIS memorandum directs asylum officers to consider whether entry without inspection into the country should disqualify the person from eligibility for asylum, stating:

“Specifically, USCIS personnel may find an applicant’s illegal entry, including any intentional evasion of U.S. authorities, and including any conviction for illegal entry where the alien does not demonstrate good cause for the illegal entry, to weigh against a favorable exercise of discretion.”¹⁵

This instruction could result in widespread discretionary denials of asylum to people who enter without inspection, a practice that would run afoul of the Immigration and Nationality Act's (INA) guarantee that asylum seekers have the right to apply for asylum "whether or not at a designated port of arrival."¹⁶ In addition, Article 33 of the U.N. Refugee Convention, to which the United States is a party, forbids the penalization of asylum seekers who enter unlawfully in pursuit of protection.¹⁷ These laws are based on the humanitarian principle of *non-refoulement* established after the Holocaust that a country cannot force someone fleeing persecution back into harm's way even if the person entered the country in an irregular manner.

In justifying its improper practice of penalizing asylum seekers who enter illegally, USCIS cites the Board's decision *Matter of Pula*.¹⁸ But that decision indicated that unlawful entry alone should not result in a negative finding of discretion. Buried later in the memorandum, USCIS acknowledges the Board's instruction that the "danger of persecution will outweigh all but the most egregious of adverse factors."¹⁹

The memorandum also offers a misleading example of a situation where an applicant's entry without inspection might be excused: "For example, the applicant might show that the illegal entry was necessary to escape imminent harm and that he or she was thereby prevented from presenting himself or herself at a designated United States POE."²⁰ U.S. asylum law does not require that an asylum seeker be at risk of imminent harm immediately preceding his or her arrival at the U.S. border for that person to be eligible for asylum. This example in the memorandum should not be interpreted as establishing a new standard, which would not be supported in the law.

The USCIS Memorandum Emphasizes the Negative Use of Discretion to Deny Asylum Claims

The memorandum states that "the Attorney General emphasized in *Matter of A-B-* that asylum is a *discretionary* form of relief from removal. Therefore, once an officer has determined that an applicant meets the statutory eligibility requirements for asylum, he or she must then decide whether to favorably exercise discretion by granting asylum."²¹ The memorandum distorts the principle that an asylum officer has discretion when reviewing a claim by giving far more emphasis to consideration of negative discretionary factors and largely omitting mention of positive factors. For example, the memorandum highlights negative factors associated with an applicant's unlawful entry into the United States and any purported opportunities the applicant had to obtain safety in a third country prior to that entry:

"[O]fficers should consider any relevant factor, including but not limited to: "the circumvention of orderly refugee procedures; whether the alien passed through any other countries or arrived in the United States directly from her country; whether orderly refugee procedures were in fact available to help her in any country she passed through; whether he or she made any attempts to seek asylum before coming to the United States; the length of time the alien remained in a third country; and his or her living conditions, safety, and potential for long-term residency there." (citations omitted).

This misleading emphasis on negative factors is inconsistent with legal authority that states an asylum decision must consider the "totality of circumstances," including positive discretionary

factors.²² The Board’s decision in *Matter of Kasinga* states that, in weighing whether an asylum applicant merits a favorable exercise of discretion, “the danger of persecution will outweigh all but the most egregious adverse factors.”²³ Finally, the USCIS memorandum’s improper focus on negative exercise of discretion also runs counter to historic practice in which asylum adjudicators rarely deny asylum on a discretionary basis once the applicant has demonstrated statutory eligibility.²⁴

The Memorandum Threatens to Raise the Legal Standard in Credible Fear Determinations, Contrary to Congress’s Intent

The memorandum could elevate the standard that many arriving asylum seekers must meet in order to pass the preliminary credible fear screenings established by Congress. The memorandum states that asylum seekers with claims based on membership in a particular social group must “present facts that clearly identify a proposed particular social group.”²⁵ It is unclear if USCIS will require asylum seekers to meet a higher factual evidentiary standard and to actually propose a particular social group when initially screened during the credible fear interview.

If the agency tries to impose a higher standard, it would not only be fundamentally unfair but also likely violate the credible fear standard established in the INA. Congress intended for credible fear determinations—which are preliminary screenings for asylum conducted after entry or apprehension—to be made using a lower legal standard than that required at the final stage when asylum may be granted. During this screening, the INA requires the individual to show merely that there is a “significant possibility” that the individual could establish eligibility for asylum in a full hearing before an immigration judge, as compared to the higher showing of a “reasonable possibility” of persecution that the applicant must demonstrate in such a full hearing.²⁶

Asylum law, especially persecution based on membership in a particular social group, is one of the most complex areas of immigration law. Formulating a particular social group and presenting clear facts to prove such a claim typically requires proficiency in the law, extensive research into relevant country conditions, and detailed arguments. It would be extremely difficult, if not prohibitive, for arriving asylum seekers to meet such a standard immediately upon arrival without legal counsel. The lower threshold set by Congress is essential given credible fear claimants’ circumstances: most have only recently arrived in the United States and are traumatized, detained, and do not speak English. In the vast majority of cases, they lack legal counsel and have not had the chance to gather documentation to support their claims.

This Memorandum Purports to Elevate AG and BIA Decisions Above Circuit Court Precedent as Applied to Credible Fear Determinations

The memorandum attempts to elevate decisions by the Attorney General and the Board above the precedents established by federal courts of appeal as they apply to credible fear screenings. It states that, when performing those screenings “[t]he asylum officer should also apply the case law of the relevant federal circuit court, *to the extent that those cases are not inconsistent with Matter of A-B-*” (italics added). This statement suggests that *Matter of A-B-* trumps federal appellate law and instructs asylum officers to apply federal circuit court precedent in credible

fear determinations only if it is consistent with the Attorney General’s decision. USCIS tries to justify this position by noting that the Department of Homeland Security (DHS) may relocate the applicant to a different circuit following the determination.

This appears to mark a shift from prior USCIS policy providing that, when circuit court interpretations of a legal issue pertinent to a credible fear screening conflict with each other, and DHS policy does not address the issue, the USCIS adjudicator should apply the “[c]ircuit interpretation most favorable to the applicant.”²⁷ Now, by USCIS’s terms, to the extent that circuit court precedent is applicable at all, it is only the precedent of the circuit in which the applicant is located at the time of the credible fear interview that should be applied.

More broadly, the memorandum’s assertion that the Attorney General and Board’s decisions override federal court precedent and are immune to federal court review is both self-contradictory and at odds with core constitutional principles. USCIS cannot on the one hand instruct asylum officers to “apply the case law of a *relevant* federal circuit court” (italics added) when conducting credible fear determinations, then suggest on the other hand that the case law of that jurisdiction is *irrelevant* because DHS may later shunt the applicant to a different jurisdiction.

The overwhelming weight of legal authority, including Supreme Court decisions, indicate the reviewability of Board and Attorney General decisions by federal courts. The Board of Immigration Appeals Practice Manual states that “decisions of the Board are reviewable in certain federal courts, depending on the nature of the appeal.”²⁸ The Board itself ruled that a “Board precedent decision applies to all proceedings involving the same issue unless and until it is modified or overruled by...a Federal court.”²⁹ Likewise, the Supreme Court has held that courts may overrule agency interpretations of statutes those courts deem ambiguous.³⁰ At least five circuit courts of appeals demonstrated this power of review by rejecting Attorney General Michael Mukasey’s opinion in *Silva-Trevino*.³¹

The USCIS Memorandum Adds Another Brick in the Wall, Shutting Out Asylum Seekers

Ultimately this memorandum, when combined with other Trump Administration policies already in effect, will leave many asylum seekers with no viable option to obtain humanitarian protection. In April 2018, Attorney General Sessions announced a “zero tolerance” policy requiring U.S. attorneys to prosecute “to the extent practicable” all noncitizens—including asylum seekers—referred by DHS for illegal entry.³² That same month, criminal prosecutions of noncitizens apprehended at the border increased 30 percent over March totals.³³ The zero tolerance prosecution policy works hand-in-hand with the USCIS memorandum’s explicit instruction for asylum adjudicators to consider denying asylum if the person entered illegally. The memorandum even lists an applicant’s prosecution for illegal entry as a negative discretionary factor “where the alien does not demonstrate good cause for the illegal entry.”³⁴

However, ports of entry are not reliable points of access for asylum seekers. The Attorney General and DHS Secretary Nielsen have instructed asylum seekers to come to ports of entry,³⁵ but U.S. Customs and Border Protection (CBP) has improperly turned away numerous asylum seekers at the southern border—a well-documented practice that has accelerated under the current administration.³⁶ In one example, Human Rights First released a recording in July 2017

of a CBP officer illegally directing asylum seekers to turn back from the border and register with Mexican immigration officials, stating “[t]hey can’t come in here... They aren’t going to come in so you’re wasting your time.”³⁷ CBP officers have also reportedly informed asylum seekers that, “the United States is not giving asylum anymore” and “Trump says we don’t have to let you in.”³⁸

Finally, the *New York Times* reported on July 18, 2018 that the administration is considering plans presented by CBP to eliminate the use of ports of entry as asylum processing centers and require asylum seekers instead to seek protection outside of the United States.³⁹ Though the plans are not confirmed, they are consistent with statements made by the President that he intends to immediately reject people at the border without giving them the opportunity to seek asylum.⁴⁰

Whether it is a physical wall or one constructed upon faulty legal analysis that dismantles or disregards long-standing U.S. asylum law and international law, the administration has erected an almost impenetrable system to shut out even the most vulnerable from our nation. Asylum adjudicators, immigration judges, attorneys and advocates must scrutinize the USCIS memorandum and all of the administration’s policies to ensure they faithfully and consistently comply with our nation’s laws in every case.

¹ USCIS Policy Memorandum, “Guidance for Processing Reasonable Fear, Credible Fear, Asylum, and Refugee Claims in Accordance with *Matter of A-B*.” (Jul. 8, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf>.

² *Matter of A-B*, 27 I&N Dec. 316 (A.G. 2018).

³ USCIS Policy Memorandum at p. 6. *Matter of A-B* does not foreclose the possibility of such claims qualifying for asylum but states that they are “unlikely to satisfy the statutory grounds for proving group persecution...”, 27 I. & N. Dec. 316 at 320 (A.G. 2018).

⁴ USCIS Policy Memorandum at p. 10.

⁵ *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985).

⁶ *Matter of M-E-V-G*, 26 I&N Dec. 227 (BIA 2014).

⁷ USCIS, *Decision Making: Training Module* (Nov. 23, 2015), https://www.aila.org/File/Related/18022100_Part3.pdf.

⁸ *The Hindu Business Line*, “Latin America is world’s most violent region for women: UN,” (Nov. 23, 2017), <https://www.thehindubusinessline.com/news/world/latin-america-is-worlds-most-violent-region-for-women-un/article9970381.ece>.

⁹ Council on Foreign Relations, “Central America’s Violent Northern Triangle” (Jun 26, 2018), <https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle>.

¹⁰ See, e.g., *Matter of McMullen*, 17 I. & N. Dec. 542, 544 (B.I.A. 1980). *Matter of A-B* offers one authority, *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000), where the term “complete helplessness” is used.

¹¹ See 8 CFR 1208.13.

¹² See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987).

¹³ Department of State, “Burkina Faso 2017 Human Rights Report,” <https://www.state.gov/documents/organization/277217.pdf>

¹⁴ *Id.*

¹⁵ USCIS Policy Memorandum at p.8.

¹⁶ See INA §208(a)(1).

¹⁷ UN General Assembly, “Convention and Protocol Relating to the Status of Refugees,” <http://www.unhcr.org/en-us/3b66c2aa10>.

¹⁸ See *Matter of Pula*, 19 I&N Dec. 467, 473-74 (B.I.A. 1987)

¹⁹ USCIS Policy Memorandum at p. 8; *Matter of Kasinga*, 21 I&N Dec. 357, 367 (BIA 1996).

²⁰ USCIS Policy Memorandum at p. 8.

²¹ *Id.*

²² See *Zuh v. Mukasey*, 547 F.3d 504, 506-07 (4th Cir. 2008); *Gulla v. Gonzales*, 498 F.3d 911, 916 (9th Cir. 2007).

²³ *Matter of Kasinga*, 21 I&N Dec. 357, 367 (BIA 1996).

²⁴ See, e.g., Charles Gordon, Stanley Mailman, and Stephen Yale-Loehr, “Immigration Law and Procedure,” § 34.02(12)(d) (Matthew Bender, Rev. Ed. 2011).

²⁵ USCIS Policy Memorandum at p. 3

²⁶ INA § 235(b)(1)(B)(v).

²⁷ USCIS Lesson Plan, “Reasonable Fear of Persecution and Torture Determinations “ (Feb 13, 2017);

<https://www.aila.org/File/DownloadEmbeddedFile/70908>

²⁸ Board of Immigration Appeals, “Board of Immigration Appeals Practice Manual” (Mar. 23, 2018),

<https://www.justice.gov/eoir/page/file/1079696/download>.

²⁹ *Matter of E-L-H*, 23 I&N Dec. 814 (BIA 2005).

³⁰ See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

³¹ See, e.g., *Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014); See also, *Olivas-Motta v. Holder*, 746 F.3d 907, 911–16 (9th Cir. 2013) (amended opinion); *Prudencio v. Holder*, 669 F.3d 472, 480–84 (4th Cir. 2012); *Fajardo v. U.S. Att’y Gen.*, 659 F.3d 1303, 1307–11 (11th Cir. 2011); *Jean-Louis v. Att’y Gen. of U.S.*, 582 F.3d 462, 472–82 (3d Cir. 2009).

³² Department of Justice, “Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry” (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>; See 8 U.S.C. § 1325(a).

³³ TRAC Immigration, “Criminal Prosecutions for Illegal Border Crossers Jump Sharply in April ” (Jun. 4, 2018),

<http://trac.syr.edu/immigration/reports/515/>.

³⁴ USCIS Policy Memorandum at p.8.

³⁵ Paul Crookston, “DHS Secretary: ‘If You Are Seeking Asylum, Go to a Port of Entry’” (Jun. 18, 2018),

<https://freebeacon.com/issues/dhs-secretary-seeking-asylum-go-port-entry/>; Julia Manchester, “DHS secretary defends Trump administration's migrant policies” (Jun. 17, 2018),

<http://thehill.com/homenews/administration/392707-dhs-chief-defends-migrant-policies-we-do-not-have-a-policy-of>

³⁶ AILA Policy Brief: New Barriers at the Border Impede Due Process and Access to Asylum (Jun. 1, 2018);

<https://www.aila.org/infonet/policy-brief-new-barriers-at-the-border>.

³⁷ B. Shaw Drake, “Recording Proves Border Agents Are Illegally Turning Back Asylum Seekers Under Trump”

(Jul. 13, 2017), https://www.huffingtonpost.com/entry/recording-proves-border-agents-are-illegally-turning_us_59678d9fe4b07b5e1d96edbd.

³⁸ *Id.*

³⁹ Caitlin Dickerson, “Trump Administration Considers Unprecedented Curbs on Asylum for Migrants” (Jul. 18, 2018), <https://www.nytimes.com/2018/07/18/us/immigration-asylum-children.html>.

⁴⁰ Donald Trump, <https://twitter.com/realdonaldtrump/status/1010900865602019329?lang=en>. The President tweeted: “We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came. Our system is a mockery to good immigration policy and Law and Order. Most children come without parents...”