

July 19, 2018

## BRIEF ANALYSIS OF:

### **UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES (USCIS) POLICY GUIDANCE FOR ADJUDICATING ASYLUM CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-***

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The Tahirih Justice Center reviewed the USCIS July 11 Policy Memorandum providing guidance for USCIS in adjudicating Reasonable Fear, Credible Fear, Asylum, and Refugee claims in accordance with the Attorney General's June 11 decision in *Matter of A-B*.<sup>i</sup> This guidance impacts all USCIS officers who encounter asylum seekers, including those conducting screening interviews at the border, those conducting adjudications around the country, and officers evaluating refugee status claims overseas.

The guidance closely tracks the Attorney General's decision, including much of it verbatim. Tahirih previously analyzed that decision.<sup>ii</sup> The following is a brief summary of the most notable aspects of the guidance.

#### Legal Framework for Analysis of Particular Social Group (PSG) Claims

The guidance appropriately continues to require officers to evaluate whether a PSG is cognizable on a case-by-case basis. Per the guidance, cases should therefore be evaluated "on their own merits in the context of the society where the claim arises," and an officer's analysis of a proposed social group is incomplete if the elements "of the proposed group are analyzed in isolation." Rather than *Matter of A-B* resulting in blanket denials of all domestic violence-based claims, the guidance specifies that officers should "carefully apply the statutory factors to determine whether the group qualifies under the law."

However, the guidance does indicate that a PSG defined solely by the ability or inability to leave a relationship may not be sufficiently particular. Even if it were, "the applicant must show something more than the danger of harm from an abuser if the applicant tried to leave, because that would amount to circularly defining the PSG by the harm on which the asylum claim was based." Consistent with *Matter of A-B*, the guidance instructs officers to closely evaluate whether the PSG contains any elements that exist "independently of the harm asserted." Previously, officers had more flexibility in evaluating whether a PSG was cognizable. This flexibility has proven critical for women, given the unique nature of gender-based violence and the variety of contexts in which it occurs.

#### Proving Persecution, Nexus, and Internal Relocation

Quoting *Matter of A-B*, the guidance urges that where the persecutor is a non-state actor, the applicant must show that the government either "condoned the behavior or demonstrated a complete helplessness to protect the victim." Previously, the Board of Immigration Appeals (BIA) and Federal circuit courts of appeals nearly universally acknowledged that persecution may be established when a government is "unable or unwilling to control private conduct."<sup>iii</sup> Requiring the government to affirmatively "condone" persecution or be "completely helpless" to assist the victim therefore heightens the standard for when persecution by a non-state actor may form the basis of a claim.

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The guidance further states that even where a persecutor is a member of the government, if the harm is a “purely personal matter,” then there is no governmental “nexus” between the harm and the PSG. By contrast, officers previously had more flexibility in determining whether a nexus existed between abuse and a PSG where a woman’s abuser was a government official. In these cases, a woman may have no possibility of government protection, and her husband will target her because he knows he can abuse her with impunity. Now, despite a woman’s complete lack of government protection from domestic abuse at the hands of a government official, her chance of being granted asylum is greatly diminished.

### Exercising Discretion

The guidance notes the standards set forth by the BIA in *Matter of Pula* and *Matter of Kasinga* for exercising discretion to grant or deny asylum claims. While *Matter of Pula* held that unlawful entry can be an appropriate or even “serious adverse factor” to consider when exercising discretion, unlawful entry should not result in denial of relief in “virtually all cases.” In *Matter of Kasinga*, the BIA went further, holding that the threat of harm outweighs “all but the most egregious adverse factors.” Nonetheless, the guidance arguably and impermissibly appears to heighten the existing standards for exercising discretion. The guidance specifies that an applicant’s unlawful entry, “including any intentional evasion of U.S. authorities, and ... any conviction for illegal entry where the alien does not demonstrate good cause” for it, may “weigh against a favorable exercise of discretion.” Officers may take into account whether an individual could have entered lawfully, whether she was prevented from entering through a Port of Entry (POE), and/or whether the unlawful entry was “necessary to escape imminent harm.” Officers should also consider whether the applicant “demonstrated ulterior motives for the illegal entry that are inconsistent with a valid asylum claim ....” Again, the standard for exercising discretion outlined in *Matter of Kasinga* contains a more forgiving calculation, particularly in the absence of guidance as to what constitutes “good cause” for unlawful entry.

Consider the example of an individual fleeing extreme danger in her home country, who hears from others that, as reported in the news, asylum seekers at the POEs are being turned away. If she then enters without inspection, and/or is convicted of illegal entry as a result, an officer might find that she could have entered lawfully and was not prevented from doing so (ie, she personally did not try, or she has no proof of what she heard from others). Furthermore, an officer might determine that an applicant whose life is in grave danger does not face “imminent harm” unless her abuser is following directly on her heels as she makes her escape. These heightened standards fail to reflect the actual circumstances applicants face when they are fleeing for their lives. As applied, this part of the guidance will likely lend itself to very narrow interpretation. The facts involved in *Matter of A-B-* raised no issue about the exercise of discretion, and the Attorney General did not overrule or limit the standard set by *Matter of Kasinga*. That standard should continue to govern.

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<sup>i</sup> See <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf>.

<sup>ii</sup> See <https://www.tahirih.org/wp-content/uploads/2018/06/Updated-Brief-Analysis-Matter-of-AB.pdf>.

<sup>iii</sup> See, e.g., *Aldana-Ramos v. Holder*, 757 F.3d 9, 17 (1st Cir. 2014); see also *Malu v. U.S. Att’y Gen.*, No. 13-10409, 2014 WL 4073115, at \*8 (11th Cir. Aug. 19, 2014); *Paloka v. Holder*, 762 F.3d 191, 195 (2d Cir. 2014); *R.R.D. v. Holder*, 746 F.3d 807, 809 (7th Cir. 2014); *Constanza-Martinez v. Holder*, 739 F.3d 1100, 1102 (8th Cir. 2014); *Doe v. Holder*, 736 F.3d 871, 877–78 (9th Cir. 2013); *Karki v. Holder*, 715 F.3d 792, 801 (10th Cir. 2013); *Garcia v. Att’y Gen. of U.S.*, 665 F.3d 496, 503 (3d Cir. 2011); *Kante v. Holder*, 634 F.3d 321, 325 (6th Cir. 2011); *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011); *Tesfamichael v. Gonzales*, 469 F.3d 109, 113 (5th Cir. 2006); *Matter of Pierre*, 15 I&N Dec. 461, 462 (BIA 1975) (formalizing the “unwilling or unable” to control standard for non-governmental persecution in the context of a claim made under former section 243(h) of the Act, 8 U.S.C. § 1253(h) (1970)).