



## ACTING AG WHITAKER TAKES AIM AT ASYLUM SEEKERS FLEEING FAMILY-BASED PERSECUTION

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Acting Attorney General Matthew Whitaker has followed in his predecessor's footsteps by referring yet another immigration case to himself, [Matter of L-E-A-, 27 I&N Dec. 494 \(A.G. 2018\)](#). The Acting AG asks parties to brief "whether, and under what circumstances, an alien may establish persecution on account of membership in a particular social group under 8 U.S.C. 1101(a)(42)(A) based on the alien's membership in a family unit."

As background, the Board of Immigration Appeals (BIA) in [Matter of L-E-A-, 27 I&N Dec. 40 \(BIA 2017\)](#) recognized that membership in a family unit constitutes a particular social group. However, it held that to establish eligibility for asylum on such a basis, "an applicant must not only demonstrate that he or she is a member of the family but also that the family relationship is at least one central reason for the claimed harm." [The BIA denied asylum to the respondent, L-E-A-](#), for failing to meet this nexus requirement. The respondent was a native and citizen of Mexico whose father owned a general store in Mexico City. Members of a drug cartel approached the respondent's father to ask if they could sell drugs in the store as they viewed it as a favorable distribution location. The respondent's father refused. The members of the drug cartel approached respondent to see whether he would sell drugs for them at his father's store. Upon respondent also refusing, the members of the cartel tried to abduct him, but he was able to get away. The respondent fled to the United States and sought asylum. The IJ and BIA reasoned that the respondent was not entitled to relief because even if the persecutor had harmed the respondent, it was done so as a means to an end, i.e. to sell drugs. In other words, they argued, the persecution was not due to the respondent's membership in a particular social group and animus towards the family, but rather because he was interfering in their drug trade.

The BIA in *Matter of L-E-A-* recognized the long history of family units constituting particular social groups. See, e.g., *Crespin-Valladares v. Holder*, 632 F.3d 117, 128 (4th Cir. 2011); *Al-Ghorbani v. Holder*, 585 F.3d 980 (6th Cir. 2009); *Torres v. Mukasey*, 551 F.3d 616, 629 (7th Cir. 2008). The BIA has previously “explained that ‘persecution on account of membership in a particular social group’ refers to ‘persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic...such as...kinship ties.’” *Matter of C-A-*, 23 I&N Dec. 951, 955 (BIA 2006) (quoting *Matter of Acosta*, 19 I&N Dec. 211, 233-34 (BIA 1985)). “It has been said that a group of family members constitutes the ‘prototypical example’ of a particular social group.” INS, *Asylum Officer Basic Training Course: Eligibility Part III: Nexus 21* (Nov. 30, 2001) (quoting *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986)). “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.” *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993). Indeed, the BIA found that *L-E-A-*’s membership in his family constituted a particular social group. Instead, the key issue was whether the harm he experienced or feared was on account of his membership in that particular social group. The BIA in *L-E-A-* upheld the IJ’s decision below, opining that “any motive to harm the respondent because he was a member of his family was, at most, incidental... the cartel’s motive to increase its profits by selling contraband in the store was one central reason for its actions against the respondent and his family.” 27 I&N Dec. at 46.

[As we](#) and [others](#) have previously discussed, the BIA missed the mark in *L-E-A-*. The BIA in *L-E-A-* critically notes that “if the persecutor would have treated the applicant the same if the protected characteristic of the family did not exist, then the applicant has not established a claim on this ground.” 27 I&N Dec. at 44. Under this reasoning, *L-E-A-* should have been granted asylum. But for *L-E-A-*’s familial relationship with his father, he would not have been targeted by the cartel. In other words, despite their motivation of wanting to sell drugs at his father’s store, the cartel’s motivation in targeting *L-E-A-* was to get to his father, thus satisfying the nexus criteria. There is a reason why the cartel did not target the father’s neighbor – because the neighbor does not have a close, i.e. family, relationship to him. That the cartel ultimately had monetary motivations is irrelevant in the analysis of why they persecuted *L-E-A-*.

It is unclear how the Acting AG, or the incoming AG (anticipated to be William

Barr), will rule in a case that has already made the obstacles more onerous for asylum-seekers. Given the administration's animus towards asylum-seekers, it is unlikely that they seek to redress the problems with the BIA's holding. Rather, it is likely that the Acting AG seeks to build upon the BIA's flawed reasoning and make it even more difficult for those to flee persecution and obtain asylum. The BIA in *Matter of L-E-A-* affirmed, without question, that kinship ties are inherently a particular social group. Given the wording of the Acting AG's question *Matter of L-E-A-*, 27 I&N Dec. 494 (A.G. 2018), he will likely attack the case on this front.

As outlined by the BIA in *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017), and reiterated above, there is no clearer definition of particular social group than kinship ties. To be granted asylum based on one's membership in a particular social group, the applicant must show that the group is "(1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question." *Matter of A-R-C-G-*, 26 I. & N. at 392. As set forth in [Matter of Acosta, 19 I&N Dec. 211, 212 \(BIA 1985\)](#), a "common immutable characteristic" is defined as "a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed." Under [Matter of W-G-R-, 26 I&N Dec. 208 \(BIA 2014\)](#) and clarified in [Matter of M-E-V-G-, 26 I&N Dec. 227 \(BIA 2014\)](#), the social group must be defined with "particularity," or be defined by boundaries of who is actually a member of the group. Finally, as explained in *Matter of W-G-R-*, "social distinction" is defined as the 'recognition' or 'perception' of the particular social group in society. 26 I&N Dec. at 216. Family units very clearly satisfy each of these requirements, where you cannot change who your family is, where who members of your family are can be defined with particularity, and where others in society can recognize you as a member of your family. A challenge to the family unit particular social group would undermine the construction of nearly all particular social groups thereafter.

Once formulating one's social group, the applicant must also show that their persecution was on account of their membership in the social group (the "nexus requirement"), and that the government in the country of origin is unable or unwilling to afford them protection from such persecution. As [we've previously argued](#), the Courts need to clarify the nexus requirement. In *Matter of L-E-A-*, for example, the nexus analysis needed to have focused specifically on

why L-E-A- was targeted and persecuted – not what the cartel’s ultimate aim was *after* targeting him. Clarification on this issue is imperative for uniform adjudication of particular social group asylum cases. Additionally, given AG Sessions’ holding in [Matter of A-B-, 27 I&N Dec. 316 \(A.G. 2018\)](#), future courts and advocates will need to clarify the state protection analysis, especially when the persecution is carried out by private actors. In particular, advocates will need to demonstrate through country conditions reports and expert testimony that the country of origin is unable or unwilling to provide protection from these private actors. In *Matter of L-E-A-* in particular, one can demonstrate that the cartel acts as a quasi-government in the respondent’s town, and that the police do not have control (or choose not to have control) over them.

Although the legitimacy of Acting AG Whitaker’s appointment, and thus his self-referral of cases, [has been called into question](#), advocates must instead focus their efforts on litigating the asylum requirements. The constant self-referral of cases and unilateral, sweeping changes to the law have been tiresome for immigration advocates; however, we should use these opportunities to litigate existing, flawed case law to create a more robust asylum framework so that we can actually protect those fleeing violent persecution.