

POST-MATTER OF A-B-, THE NINTH CIRCUIT JOINS THE FIRST AND SIXTH CIRCUITS IN FINDING DOMESTIC VIOLENCE-BASED ASYLUM CLAIMS ARE STILL VIABLE

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After the former U.S. Attorney General (“A.G.”) Jeff Sessions issued *Matter of A-B-* in 2018, many immigration advocates were skeptical of the viability of domestic violence-based asylum claims.¹ *Matter of A-B-* contained dicta that many immigration advocates worried would be interpreted as a categorical ban on domestic violence-based asylum claims.² However, since 2018, several circuits have rejected this reading of *Matter of A-B-*. Most recently, the Ninth Circuit joined the First and Sixth Circuits in ruling that *Matter of A-B-* heightens the burden of proof required for domestic violence victims to claim asylum, but that domestic violence-based claims for asylum are still legally cognizable.³

To claim asylum in the United States, an asylum applicant must meet the statutory definition of a refugee under the Immigration and Nationality Act, which in part requires that a person has been persecuted or fears they will be persecuted in their country of origin on account of race, religion, nationality, political opinion, or membership in a particular social group (“PSG”).⁴ As the protected PSGs are not defined by statute, the Board of Immigration Appeals (“BIA”) has developed and narrowed specific requirements to establish membership in a PSG over the past few decades.⁵ Since the BIA’s

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

2. See e.g., Anne Weis, *Fleeing for Their Lives: Domestic Violence Asylum and Matter of A-B-*, 108 CAL. L. REV. 1319, 1350-51 (2020).

3. See *Diaz-Reynoso v. Barr*, 968 F.3d 1070, 1078 (9th Cir. 2020); *Fuentes Reyes v. Barr*, 816 F. App’x 139, 140 (9th Cir. 2020); *Arellano Rodriguez v. Barr*, 816 F. App’x 137, 138 (9th Cir. 2020).

4. 8 U.S.C.A. § 1101 (West 2014).

5. See, e.g., *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 251–52 (B.I.A. 2014) (holding that “membership in a particular social group” requires an applicant for asylum or withholding of removal to establish 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 Acosta*, 19 I. & N. Dec. 211, 212 (B.I.A. 1985) (holding 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).

holding in *Matter of A-R-C-G*,⁶ announcing that “married women in Guatemala who are unable to leave their relationship” are a legally cognizable PSG,⁷ other domestic violence victims from certain countries could also qualify as legally cognizable PSGs. However, in *Matter of A-B*, the A.G. Jeff Sessions overruled *Matter of A-R-C-G*, explaining that the “decision was wrongly decided and should not have been issued as a precedential decision.”⁸ The A.G. reasoned that the mere fact that a country “may have problems effectively policing certain crimes,” like domestic violence, “or that certain populations are more likely to be victims of crime cannot itself establish an asylum claim.”⁹ Rather, the A.G. ruled that “to be cognizable, a particular social group must exist independently of the harm asserted in an application for asylum.”¹⁰

Matter of A-B concerned human rights organizations and immigrant advocacy groups because these organizations worried that immigration judges would “outright deny domestic violence and gang violence-based asylum applications without careful consideration.”¹¹ Given the high volume of domestic violence-based applications, immigration advocates feared that hundreds of domestic violence victims, who would face persecution upon return to their country of origin, would not have viable asylum claims.¹² In 2015, the United Nations High Commissioner for Refugees conducted a study examining migration patterns of domestic violence victims and found a worrisome fivefold increase in domestic violence asylum-seekers arriving to the United States from the Northern Triangle region, composed of El Salvador, Guatemala, and Honduras.¹³ Accordingly, the interpretive scope of *Matter of A-B* has become a human rights issue with great national and international significance, and immigration advocates have looked for ways to protect domestic violence victims’ right to seek asylum in the United States.

Matter of A-B was unsuccessfully challenged as precedent in the D.C. Circuit.¹⁴ In *Grace v. Whitaker*,¹⁵ the petitioners argued that the holding in *Matter of A-B* violated the Administrative Procedure Act “by failing to adequately address important factors bearing on the policies’ adoption.”¹⁶ The D.C. District Court judge agreed, and subsequently abrogated the

6. 26 I. & N. Dec. 388, 393 (B.I.A. 2014).

7. 26 I. & N. Dec. at 388-89.

8. 27 I. & N. Dec. at 316.

9. *Id.*

10. *Id.*

11. *Matter of A-B Considerations*, Immigrant Legal Resource Center (Oct. 2018), https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf.

12. *See Take five: Fighting femicide in Latin America*, UN Women (Feb. 15, 2017), <http://unwomen.org/en/news/stories/2017/2/take-five-adriana-quinones-femicides-in-latin-america>.

13. *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico*, UNHCR, (Oct. 2015). <https://www.unhcr.org/56fc31864.html>.

14. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 96 (D.D.C. 2018).

15. *Id.*

16. *See Grace v. Barr*, 965 F.3d 883, 887 (D.C. Cir. 2020).

holding in *Matter of A-B-* as arbitrary and capricious.¹⁷ However, the D.C. Circuit reinstated, in relevant part, the holding in *Matter of A-B-*, finding that the A.G.'s decision is not within the scope of judicial administrative review because it provides "no general rule" against asylum claims from victims of domestic violence.¹⁸ Nonetheless, despite the finding by the D.C. Circuit that *Matter of A-B-* does not categorically bar domestic violence-based asylum claims, immigration courts, including the BIA, have continued to deny asylum claims to domestic violence survivors based on the improper understanding that *Matter of A-B-* is a license to bypass the particularized PSG examination required by *Matter of A-B-* whenever an asylum petition mentions that an asylum seeker is "unable to leave their relationship."¹⁹

The Ninth Circuit recently joined the First and Sixth Circuits in reversing several BIA decisions.²⁰ In *Diaz-Reynoso v. Barr*, the Ninth Circuit held that *Matter of A-B-* does not categorically bar asylum relief for domestic violence victims.²¹ Clarifying the scope of *Matter of A-B-*, the court confirmed that while the former A.G.'s decision imposes higher probative standards on domestic violence victims, domestic violence survivors still constitute a cognizable PSG under asylum law.²²

In *Diaz Reynoso v. Barr*, the plaintiff, Sontos Maudilia Diaz-Reynoso, an indigenous woman from Guatemala, sought withholding of removal on account of her membership in the PSG of "indigenous women in Guatemala who are unable to leave their relationship."²³ The BIA dismissed Ms. Diaz-Reynoso's case, holding that Diaz-Reynoso's particular social group was no longer a cognizable PSG after *Matter of A-B-*.²⁴

The Ninth Circuit reversed and remanded Ms. Diaz-Reynoso's case, reasoning that *Matter of A-B-* is "[f]ar from a categorical bar" on claims of asylum by domestic violence victims.²⁵ Rather, the court found that the BIA "must conduct the 'rigorous analysis' set forth in the BIA's precedents," and "conduct the proper particular social group analysis on a case-by-case basis" as articulated in *Matter of A-B-* when considering claims by domestic violence victims.²⁶

The court rejected the BIA's view that "in order [for a PSG] to exist independently from the petitioner's feared harm, a proposed group may not refer to that harm at all."²⁷ The Ninth Circuit explained that "the idea that the

17. *Grace v. Whitaker*, 344 F. Supp. 3d at 96.

18. *Grace v. Barr*, 965 F.3d 883, 906 (D.C. Cir. 2020).

19. *See, e.g., Diaz-Reynoso*, 968 F.3d at 1079–80 (9th Cir. 2020); *Fuentes Reyes*, 816 F. App'x at 139; *Arellano Rodriguez*, 816 F. App'x at 138, 140.

20. *Diaz-Reynoso*, 968 F.3d at 1089.

21. *Id.* at 1090.

22. *Id.*

23. *Id.* at 1074.

24. *Id.*

25. *Diaz-Reynoso*, 968 F.3d at 1079.

26. *Id.* at 1080.

27. *Id.* at 1082.

inclusion of persecution is a sort of poison pill that dooms any group does not withstand scrutiny.”²⁸ Accordingly, the court rejected the argument that an asylum applicant who includes that they are “unable to leave a relationship” as part of its PSG is impermissibly circular, and that a particular group is *per se* defined by its persecution when it merely mentions its persecution as part of its PSG.²⁹ The court clarified that a group can exist independent of persecution when it “shares an immutable characteristic other than the persecution it suffers.”³⁰ In this case, the court found that the PSG of “indigenous women in Guatemala who are unable to leave their relationship” included three narrowing, immutable characteristics irrespective of the persecution of “being unable to leave [one’s] relationship”: the women in this group share a common (1) indigenous status; (2) nationality; and (3) gender.³¹ Accordingly, the Ninth Circuit reasoned that these independent “narrowing characteristics” suffice to constitute a cognizable PSG under U.S. asylum law.³²

The Ninth Circuit subsequently vacated two BIA cases in two unpublished decisions, citing *Diaz-Reynoso*.³³ In both cases, the BIA refused to engage in a PSG analysis for asylum-seekers who included that they were “unable to leave their relationship” as part of their PSG, and concluded that the applicants’ asylum claim was not cognizable pursuant to *Matter of A-B*.³⁴ In *Fuentes-Reyes v. Barr* and *Arellano-Rodriguez v. Barr*, the Ninth Circuit rejected the BIA’s application of *Matter of A-B* for the same reasons they denied the BIA’s application of *Matter of A-B* in *Diaz-Reynoso*.³⁵ Relying on *Diaz-Reynoso*, the court reaffirmed the proposition that *Matter of A-B* cannot be construed as a license to bypass the PSG analysis when asylum-seekers claim to be “unable to leave their relationship.”³⁶ Accordingly, the BIA is obligated to conduct a proper PSG analysis on a case-by-case basis.

These two unpublished cases, along with *Diaz-Reynoso*, clarified the extent of *Matter of A-B*’s holding in the Ninth Circuit and may lift the concerns of human rights and immigration advocates who are worried that domestic violence victims may not have cognizable asylum claims on that basis. In ruling that domestic violence victims still have viable PSG-based asylum claims, the Ninth Circuit limited the potential interpretative scope of the dicta contained within *Matter of A-B*. While domestic violence victims face higher probative barriers post-*Matter of A-B*, these domestic violence victims can nonetheless bring successful claims if domestic violence victims

28. *Id.*

29. See Jeffrey S. Chase, *9th Cir. Sets BIA Straight on ‘Circularity’* (Aug. 10, 2020), <https://www.jeffreyschase.com/blog/2020/8/10/9th-cir-sets-bia-straight-on-circularity>.

30. *Id.* at 1083.

31. *Diaz-Reynoso*, 968 F.3d at 1083.

32. *Id.* at 1087.

33. *Fuentes Reyes*, 816 F. App’x at 140; *Arellano Rodriguez v. Barr*, 816 F. App’x 137, 138 (9th Cir. 2020).

34. *Fuentes Reyes*, 816 F. App’x at 140; *Arellano Rodriguez*, 816 F. App’x at 138.

35. *Fuentes Reyes*, 816 F. App’x at 140; *Arellano Rodriguez*, 816 F. App’x at 138.

36. *Fuentes Reyes*, 816 F. App’x at 140; *Arellano Rodriguez*, 816 F. App’x at 138.

share narrowing characteristics that are independent of their inability to leave their relationships. Given the clear interpretation that “[i]n *Matter of A-B*-, the Attorney General did not announce a new categorical exception for victims of domestic violence or other private criminal activity,”³⁷ a BIA decision that outright denies domestic violence-based applications without engaging in a rigorous individualized analysis is now more likely to be reversed and remanded.

37. *Diaz-Reynoso*, 968 F.3d at 1080.