

Prepared by Victoria Neilson, managing attorney of CLINIC's Defending Vulnerable Populations program and Heather Axford, senior attorney at Central American Legal Assistance (CALA). This brief is intended to serve as a model brief to submit, or as a basis for oral argument to respond to immigration judges who demand that the asylum seeker state the particular social group(s) at a master calendar hearing as a prerequisite to scheduling the individual hearing.

This brief is not intended to constitute legal advice. Asylum law is rapidly evolving. This brief was written in June 2018; practitioners must conduct their own research prior to submitting this, or any other sample brief.

If you wish to share this brief, please share the link for the brief on the CLINIC website <https://cliniclegal.org/resources/sample-respondents-brief-regarding-psg-formulation-requirements>, rather than the pdf of the brief.

INTRODUCTION

[Provide short intro of the case]

ARGUMENT

In *Matter of W-Y-C & H-O-B*, 27 I&N Dec. 189 (BIA 2018), the Board of Immigration Appeals (BIA) does not require that the applicant establish the boundaries of a proposed particular social group at any time before the individual hearing. In fact, per the BIA's particular social group standard in *Matter of M-E-V-G*-, 26 I&N Dec. 227 (BIA 2014), presenting the boundaries of a proposed particular social group prior to the individual hearing would often be impossible and could even subject counsel to ineffective assistance claims.

I. *Matter of W-Y-C & H-O-B* Does not Require Respondent to Define His or Her Particular Social Group at a Master Calendar Hearing

To establish that an asylum applicant is a member of a particular social group, he or she must articulate a particular social group that 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 M-E-V-G*- at 237. As with any of the five grounds for seeking asylum, the applicant bears the burden of proof that he or she possesses the protected characteristic. For particular social group claims, the applicant must present evidence at the individual hearing that the group itself exists. “Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as ‘distinct’ or ‘other’ in a particular society.” *Matter of M-E-V-G*- at 244.

Nothing in *Matter of M-E-V-G*- indicates that the applicant must establish the boundaries of a proposed particular social group at any time before the individual hearing.

The Board of Immigration Appeals recently held that an applicant for asylum or withholding of removal who is seeking protection based upon membership in a particular social group must articulate his or particular social group at the trial court level. *Matter of W-Y-C & H-O-B*. That is, the BIA found that the respondent could not put forward an entirely new theory of asylum eligibility on appeal based on membership in a particular social group which was not articulated in the record at the individual hearing. In reaching this conclusion, the Board explained that the “importance of articulating the contours of any proposed social group before the Immigration Judge is underscored by the inherently factual nature of the social group analysis.” *W-Y-C & H-O-B*, at 191.

Matter of W-Y-C & H-O-B does not require an applicant for asylum or withholding of removal to articulate the specific contours of the particular social group at a master calendar hearing; it only clarifies that, because the Board cannot engage in fact-finding, the respondent must articulate the particular social group at the individual hearing and not, in the first instance, on appeal.

Requiring an applicant do so at an earlier stage of litigation is inappropriate and potentially prejudicial to the applicant as discussed below.

a. Determining the contours of a particular social group involves developing the factual record which would generally be impossible to accomplish by the time of the master calendar hearing.

Determining whether a group is “particular” and has “social distinction” requires a complicated analysis that includes understanding country conditions through reports and expert affidavits. There is no requirement that an applicant or his or her attorney, have gathered all background evidence and, if necessary, secured an expert at this early stage in the adjudication process. Indeed, given the volatility of country conditions in many countries from which asylum seekers hail, the conditions that exist on the date of a master calendar hearing may be very different by the date of the individual hearing.

The Immigration Court Practice Manual (ICPM) does not require in depth factual development at the time of the master calendar hearing. The ICPM lays out specific dates by which supplemental evidence is due for detained and non-detained respondents, prior to the individual hearing. There is no instruction in the ICPM that the exact grounds of an asylum application be stated at a master calendar hearing. In fact, the ICPM specifically allows for asylum applications to be supplemented in accordance with the regular call-up date deadlines.¹

Furthermore, the ICPM anticipates that the respondent will submit supplementary evidence before the individual hearing date. ICPM Chapter 3.3(c)(i)(B) describes the format for the respondent to supplement the record after the master calendar hearing.

b. The unique vulnerabilities of asylum seekers often make it impossible for them to fully articulate their narrative at the outset of the case.

Asylum seekers have often fled horrific conditions, suffered persecution, and in some instances torture, they are therefore uniquely vulnerable to post traumatic stress disorder (PTSD) and other mental health issues.² Attorneys who work with asylum seekers understand that it can take many meetings with an asylum applicant, over the course of many months, and often in conjunction with seeking mental health therapy, to develop a relationship of trust that allows the asylum applicant to fully tell his or her narrative. Moreover, for those suffering from PTSD or other mental health issues, it may not ever be possible for the applicant to fully articulate the harm he or she suffered and the attorney may only learn the full narrative from other witnesses in the case. The legal theory of the case develops over time as the attorney and client develop a relationship that culminates in the preparation for the individual hearing. It is simply not possible

¹“After being placed in Immigration Court proceedings, the alien may amend his or her asylum application. For example, the alien may submit amended pages of the application, as long as all changes are clearly reflected. Such amendments must be filed by the usual filing deadlines, provided in subsections (b)(i) and (b)(ii), above.” Practice Manual at 40.

² USCIS, *Refugee, Asylum and International Operations Combined Training Course: Interviewing Survivors of Torture and Other Severe Trauma* (Oct. 11, 2015) available beginning at p. 301 at https://www.uscis.gov/sites/default/files/files/nativedocuments/Legal_standards_governing_Asylum_claims_and_iss_ues_related_to_the_adjudication_of_children.pdf.

to accurately articulate the protected characteristics at the outset of the case. The Board has also recognized that “there are cases where an alien establishes eligibility for asylum by means of his oral testimony when such eligibility would not have been established by the documents alone.” *Matter of Fefe*, 20 I. & N. Dec. 116, 118 (BIA 1989).³

c. The law governing particular social group is in flux.

Asylum law generally is in flux, and particular social group jurisprudence specifically is a rapidly developing area of the law. For example, the attorney general recently referred a case to himself, *Matter of A-B-*, 27 I&N Dec. 227 (A.G. 2018), in which his decision may considerably redefine the qualifications for particular social group membership. “Particular social group” is a legal term of art that is wholly constructed by the BIA and circuit court interpretation. With immigration court backlogs of two or three years, it would be all too possible for an asylum applicant to set forth a particular social group that would fall clearly within accepted precedent at the master calendar hearing, only to find that by the individual hearing, the particular social group analysis of the BIA or the circuit court has again changed and the articulated particular social group is no longer viable. It would be manifestly unfair to the applicant, and violate his or her rights to seek protection in the United States if the particular social group had to be locked in years before the applicant gets his or her day in court. Providing protection to those seeking persecution is not a game of wordsmithing, it is the obligation of the United States under international law.

d. Asylum applicants should not be required to reveal confidential details of their cases in open court at a master calendar hearing.

Furthermore, it is inappropriate for an immigration judge to require an asylum applicant to articulate in detail the nature of the asylum claim in open court at a master calendar hearing. The U.S. government is bound by strict confidentiality rules in asylum proceedings. 8 CFR §1208.6. By contrast, master calendar hearings are open to the public, and generally take place before a room packed with other litigants. It would violate the rights of the respondent to have to discuss and articulate sensitive facts in a crowded courtroom related to the particular social group which may include, for example, whether or not the individual’s genitals have been cut; the individual’s sexual orientation; or whether the individual has been the subject of domestic violence.

For all of these reasons, the court should allow the respondent to set forth the particular social group(s) and any other protected characteristics at the call-up date for evidence and not require this factually-based information at the master calendar hearing.

³ In a similar case, *Matter of E-F-H-L-*, 26 I&N Dec. 319, (BIA 2014), the BIA reconfirmed the importance of testimony in every asylum case. The attorney general recently withdrew *E-F-H-L-* as precedent, determining that the individual’s case had been made moot because the applicant had obtained unrelated relief, *E-F-H-L-*, 27 I&N Dec. 226 (A.G. 2018). However, the attorney general did not overturn *E-F-H-L-*, thus the holdings in earlier cases such as *Matter of Fefe*, are still binding. *See also Oshodi v. Holder*, 729 F.3d 883, 890 (9th Cir.2013); *Kuschchak v. Ashcroft*, 366 F.3d 597, 606 (7th Cir. 2004); *Mohamed v. Attorney General United States*, 705 Fed.Appx. 108, 114 (3rd Cir. 2017); *Ramirez-Canenguez v. Holder*, 528 Fed.Appx. 853, 855 (10th Cir. 2013).

II. In the Alternative, the Respondent Reserves the Right to Amend the Particular Social Groups Until and Including at the Individual Hearing

If the court nonetheless requires that the respondent fully articulate the particular social group(s) membership at the master calendar hearing, the respondent reserves the right to supplement or modify the particular social group up to the date of the individual hearing. As discussed more fully in section I above, it is common during the course of representation for an attorney to develop facts through meeting with an asylum applicant that may make out a claim that is different from or in addition to the claim contemplated at the master calendar hearing. There is nothing in the Immigration and Nationality Act, the Code of Federal Regulations, or the ICPM that prevents an applicant for relief from modifying the claim up until the date of the individual hearing.

In fact, page five Part V of the instructions for the I-589 states that an applicant, “will be permitted to amend or supplement [his or her] application . . . at [his or her] hearing in Immigration Court by providing additional information and explanations about [his or her] asylum claim.” Thus, even if the applicant is required to articulate membership in a particular social group at a master calendar hearing, the applicant clearly has the right to amend the application on the date of the hearing.

CONCLUSION

For the reasons stated above, the respondent should not be required to state the exact particular social group in this case at the master calendar hearing. Instead, the respondent has the right to articulate the particular social group at the time of the individual hearing. In the alternative, if the court requires the respondent to articulate the particular social group at the master calendar, the respondent reserves the right to modify or add to the particular social group membership, as well as any other protected grounds, at the time of the individual hearing.

Respectfully submitted,

Dated:

ATTORNEY/FULLY ACCREDITED REP
Counsel for Respondent
FIRM/ORGANIZATION

RESPONDENT'S NAME
A XXX-XXX-XXX

CERTIFICATE OF SERVICE

On DATE, I, NAME OF INDIVIDUAL PROVIDING SERVICE, served a true and correct copy of *RESPONDENT'S BRIEF REGARDING PARTICULAR SOCIAL GROUP FORMULATION REQUIREMENTS UNDER MATTER OF W-Y-C- & H-O-B-* on the Department of Homeland Security, Immigration and Customs Enforcement, Office of the Chief Counsel, to the following address: ADDRESS, CITY, STATE ZIP CODE by METHOD OF SERVICE (overnight courier, hand-delivery, first class mail, etc.).

DATE

SIGNATURE
FIRM/ORGANIZATION
ADDRESS
PHONE NUMBER