

**Supplement to NIJC's Practice Advisory: Applying for Asylum After *Matter of A-B-*
*** Template for Responding to *Matter of L-E-A-*
at the Asylum Office and in Immigration Court *****

INTRODUCTION:

On July 29, 2019, Attorney General Barr issued a precedential decision in *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) (*LEA II*), that addresses whether an asylum claim arising from a family-based particular social group can prevail. The decision overrules a portion of the Board of Immigration Appeal's decision in *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017) (*LEA I*) on the narrow question of whether the previous *L-E-A* decision conducted a proper analysis of the particular social group posited in that case. But similar to the Attorney General's 2018 decision in *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), *LEA II* contains substantial dicta untethered from legal basis or evidentiary support. While the decision is intended to give the impression that family-based particular social group claims cannot be granted, the decision does not announce a change in the law. In fact, the decision explicitly states that it *does not* bar all family-based social groups and recognizes that the Seventh Circuit does not follow the Board's modified particular social group test. As with *Matter of A-B-*, attorneys appearing before the USCIS asylum office and immigration courts must be prepared for adjudicators to read *LEA II* broadly and must plan to educate them and respond to opposing counsel regarding their clients' asylum eligibility.

This document provides case background and template language for responding to *LEA II* in a legal memorandum or brief. It is geared towards lawyers practicing in the Seventh Circuit, but attorneys practicing in all circuits will find it useful. Not every argument will be appropriate for all cases and before all adjudicators. Attorneys should conduct their own research and NIJC *pro bono* attorneys should submit pre-hearing briefs to their NIJC point-of-contact no less than five business days before filing to ensure NIJC has sufficient time to review and offer feedback.

Because of the similarities between the *A-B-* and *LEA II* decisions and the issues present therein, attorneys planning to brief *LEA II* should plan to track many of the same arguments made in response the *A-B-* decision. NIJC encourages attorneys to read NIJC's [Matter of A-B-](#)

[practice advisory](#), to which this template is a supplement, before reviewing this template response to *LEA II*.¹

Despite the administration's ongoing efforts to restrict access to asylum for Central American and Mexican asylum seekers, asylum matters involving family-based social group claims in the context of domestic violence, gang violence, and other scenarios remain winnable. Indeed, *LEA II* itself concedes, "[t]his opinion does not bar all family-based social groups from qualifying for asylum." 27 I&N at 595. With proper case preparation, strong records, and adept lawyering, attorneys can still secure protection for their clients.

BACKGROUND:

The asylum seeker in *LEA* is a Mexican man who applied for asylum in 2011 after a Mexican drug cartel attempted to force *LEA*'s father, and later *LEA*, to sell drugs for the cartel from the store the family operated. The cartel shot at, threatened, and sought to kidnap *LEA*. He fled to the United States and argued that his status as the immediate family member of his father placed him in a cognizable particular social group and was the reason he was targeted by the cartel. The immigration judge presiding over his case denied relief, finding the attacks were mere criminal activity. Before the Board of Immigration Appeals, the Department of Homeland Security conceded that the family-based particular social group posited by *LEA* was valid. In a published decision, the Board accepted the particular social group, but dismissed the appeal of the asylum denial because it found there was not sufficient nexus between *LEA*'s family group membership and the harm he experienced and feared. In other words, the attacks by the cartel were not *on account of* *LEA*'s family group membership. The matter was remanded to the immigration judge for consideration of *LEA*'s request for relief under the Convention Against Torture, a form of relief that has no protected ground (e.g., particular social group) component.

Though the Board resolved this case on nexus grounds and it presented no live issues as to particular social group, in late 2018 the Attorney General certified the case to himself and contorted this matter into a vehicle through which the government aims to narrow access to asylum based on family-based particular social groups. The result is a decision full of illogical and contradictory assertions that confirm the fundamental unworkability of the Board's particular social group test by relying on the inscrutable concept of social distinction. It also undercuts the *Accardi*² principle while paying the notion of case-by-case adjudication

¹ For additional information regarding *LEA*, including NIJC's amicus brief to the Attorney General and other practice advisories, please see <https://cliniclegal.org/resources/LEA>. Please note that these materials are not geared towards cases in the Seventh Circuit.

² The Attorney General has no power to decide asylum eligibility in cases he has not certified to himself, and it is highly unlikely that the Attorney General could order the Board and immigration judges not to exercise their discretion and judgment in a given case. If *LEA II* is intended to tell the Board and

meager lip service. As a published decision, *LEA II* may be construed to apply in every circuit but the Seventh, which has never deferred to social distinction as a factor in the particular social group analysis.³

The template argument below sets forth the limited holding of *LEA II* and provides guidance on how to defend family-based claims and overcome the legal misconceptions fostered by *LEA II*.

TEMPLATE ARGUMENT:

I. The Attorney General's Decision in *Matter of L-E-A-* Does Not Impact This Case

On July 29, 2019, the Attorney General issued a precedential decision in *Matter of L-E-A-*, 27 I&N Dec. 582 (A.G. 2019) (*LEA II*), which purports to limit the ability of asylum seekers to establish a family-based particular social group. As explained *infra*, because this decision relies exclusively on a legal test that has been rejected by the Seventh Circuit, *LEA II* does not control this case. To the extent this Court construes *LEA II* to apply, Respondent sets forth the following argument to explain the limited impact of this decision.

Similar to *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), the Attorney General in *LEA II* reversed a conclusion made by the Board in *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017) (*LEA I*), regarding the viability of a family-based particular social group, because of a procedural error the Attorney General identified in the Board's decision. Specifically, the Attorney General alleged that the Board's conclusion was the result of concessions by the Department of Homeland Security and not based on a case-by-case analysis of the social group at issue. 27 I&N Dec. at 596.⁴

immigration judges what to do, the Attorney General would be attempting "precisely what the regulations forbid him to do: dictating the Board's decision." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954). Nor is it required that an explicit order be given for the agency to violate the Accardi principle: "[i]t would be naive to expect such a heavy-handed way of doing things." *Id.*

³ Following publication of *LEA II*, the Court of Appeals for the Eleventh Circuit noted it had not had occasion to determine whether deference to the AG's new decision was warranted. This suggests litigators should consider challenging deference to *LEA II* in all circuits. *Perez-Sanchez v. U.S. Attorney Gen.*, No. 18-12578, 2019 WL 3940873, at *8 (11th Cir. Aug. 21, 2019) ("[T]he Attorney General recently reversed in part the BIA's holding in *Matter of L-E-A-*. Because this part of Mr. Perez-Sanchez's petition for review concerns only the nexus requirement, and not the PSG requirement, *we express no view on how, if at all, Matter of L-E-A- impacts Mr. Perez-Sanchez's proposed PSG or whether the Attorney General's decision is entitled to deference.*") (citation omitted)(emphasis added).

⁴ Significantly, this determination does not change the outcome for the applicant himself in *LEA II*. In *LEA I*, the Board had recognized the viability of *LEA*'s social group but denied asylum after finding there was no nexus between the applicant's social group membership and his persecution, and then remanded to the immigration judge solely for a determination of the applicant's eligibility for Convention Against Torture relief, which has no social group component. *LEA I*, 27 I&N Dec at 47. Thus, at the time the Attorney

Besides this determination, the Attorney General in *LEA II* did not announce any new law.⁵ Instead, he simply reasserted the now-uncontroversial rule (outside of the Seventh Circuit⁶), that family-based particular social groups, like all particular social groups, must meet the three requirements established by the Board: (1) immutability; (2) particularity; and (3) social distinction.

It is this third prong on which the Attorney General focuses much of his dicta. The Attorney General, without any legal or evidentiary support, asserts that many asylum seekers with family-based particular social groups will find it difficult to establish that their family-based group is seen as distinct within their societies, 27 I&N Dec. at 585, and thus, their particular social groups will fail. But if adjudicators must conduct a case-by-case analysis of each particular social group in each case and cannot make blanket determinations that a category of particular social group *is* viable (for which the Attorney General criticized the Board in both *LEA II* and *A-B-*), the converse is also true. It is equally inappropriate to make a blanket determination that a category of particular social group is not viable. A case-by-case analysis is required.

To the extent *LEA II* is intended to tell the Board and immigration judges how to decide asylum claims involving family-based particular social groups, the Attorney General would be attempting “precisely what the regulations forbid him to do: dictating the Board’s decision.” *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954).⁷ A case-by-case analysis is necessary with each particular social group, as the Board and Attorney General have repeatedly reaffirmed. When such case-by-case analysis is conducted under

General certified the case from the immigration judge to himself, there was no longer any live controversy regarding the viability of the applicant’s social group or even his eligibility for asylum.

⁵ While the Attorney General has not asserted that *LEA II* creates any new law, assuming arguendo that new law has been created in cases involving family-based particular social group claims, that standard cannot be applied retroactively to asylum seekers who had filed for asylum prior to *LEA II*, relying on the numerous, prior decisions from the Board and Courts of Appeals, recognizing family-based social groups. See e.g., *Montgomery Ward & Co., Inc. v. F.T.C.*, 691 F.2d 1322, 1333 (9th Cir. 1982); *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 520 (9th Cir. 2012).

⁶ The Attorney General’s decision claims family groups are rarely socially distinct. It does not find family membership is not an immutable characteristic. Since the Seventh Circuit has never deferred to the Board’s additions to the particular social group test and social distinction is not a factor in the particular social group analysis in this circuit, this decision does not diminish the viability of family-based claims in the Seventh Circuit.

⁷ It is not required that an explicit order be given for the Attorney General to violate the *Accardi* principle: “[i]t would be naïve to expect such a heavy-handed way of doing things.” *Id.* Counsel notes that the Attorney General’s decision in *A-B-* suffers from the same error if read as attempting to dictate the outcome of all gang and gender-based asylum claims. The Attorney General cannot order asylum denials in thousands of cases, unless he takes the responsibility to certify those cases to himself. Under *Accardi*, he can establish legal rules, but he cannot dictate the outcome of cases.

binding Seventh Circuit law, the evidence and case law establish that _____'s family-related social groups remain viable.

A. The Seventh Circuit Has Not Deferred to the Board's Social Distinction Requirement

The Attorney General's criticism of family-based social groups focuses almost exclusively on the premise that such groups will be unable to meet the Board's social distinction requirement. The Seventh Circuit, however, as the Attorney General recognized in *LEA II*, 27 I&N Dec. at 590, has not deferred to the Board's social distinction (or particularly) requirements, *see e.g. W.G.A. v. Sessions*, 900 F.3d 957, 964, 964 n.4 (7th Cir. 2018), and has consistently published decisions analyzing social groups without requiring the groups to satisfy these additional factors. *See e.g., Salgado Gutierrez v. Lynch*, 834 F.3d 800 (7th Cir. 2016) (rejecting breadth and homogeneity as requirements for establishing a particular social group); *Lozano-Zuniga v. Lynch*, 832 F.3d 822, 827 (7th Cir. 2016) ("This circuit defines social group as a group 'whose membership is defined by a characteristic that is either immutable or is so fundamental to individual identity or conscience that a person ought not be required to change.'"); *see also Sibanda v. Holder*, 778 F.3d 676 (7th Cir. 2015); *R.R.D. v. Holder*, 746 F.3d 807 (7th Cir. 2014); *N.L.A. v. Holder*, 744 F.3d 425 (7th Cir. 2014).⁸

Since the Attorney General did not question the fact that family-based social groups are based on an immutable characteristic, *LEA II* does not in any way change the manner in which family-based particular social groups are analyzed in the Seventh Circuit. As described further below _____'s family-based social groups are based on their immutable family ties and are therefore viable social groups under Seventh Circuit law.

B. Even if the Board's Social Distinction Requirement were Binding in the Seventh Circuit, _____'s Family-Based Particular Social Groups Remain Viable.

In jurisdictions where the Board's social distinction requirement controls, asylum seekers must demonstrate that their particular social group is socially distinct. The Board has defined social distinction as "social recognition. . . . To be socially distinct, a group . . . must be perceived as a group by society. . . . Society can consider persons to comprise a group without being able to identify the group's members on sight." *Matter of M-E-V-G-*, 26 I&N Dec. 227, 240 (BIA 2014).

The Attorney General claims in dicta that many families will be unable to establish this social distinction, but he offers no support for this opinion.⁹ This statement violates the Attorney

⁹ In attempting to explain why he believes many nuclear families will be unable to establish social distinction, the Attorney General at times appears to be confusing "social distinction" with "social

General's own admonishment that particular social groups must be analyzed on a case-by-case basis, based on the individual facts of the case. 27 I&N Dec. at 586. It also flies in the face of reason. The Attorney General seems to believe that multiple U.S. Courts of Appeals have too easily accepted that family groups can meet the particular social group test. *See e.g., Rios v. Lynch*, 807 F.3d 1123, 1128 (9th 2015); *Villalta-Martinez v. Sessions*, 882 F.3d 20, 26 (1st Cir. 2018); *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011). But that is precisely because the nuclear family is so obviously distinct within nearly every society. *See e.g., Universal Declaration of Human Rights, Article 16(3)* ("The family is the natural and fundamental group unit of society."); Diaz Munoz, Ana Rita "Major trends affecting families: South America in perspective," prepared for UN Dept. of Economic and Social Affairs, April 2003, available at <http://bit.ly/33LXuU5> ("Family relations are the basic criterion for the formation of households The social organization in which we live is based on the existence and functioning of households and families."); Skogrand, Linda, et al, "Understanding Latino Families, Implications for Family Education," Utah State University, 2005, available at <http://bit.ly/2MvzDmb> ("One of the most pervasive values in the Latino culture is the importance of the family."); Nicoletti, Kimber, "Habla Español? Working with Spanish-speaking victims/survivors in a rural setting," June 2010, available at <http://bit.ly/2TT7s1n> (The family unit is the single most important unit in the Latino culture.").

Although the Attorney General asserts that it "is not sufficient to observe that the applicant's society . . . places greater significance on the concept of the family," 27 I&N Dec. at 594, that is not what is argued here. Rather, the evidence establishes that _____ spent his life in a community where family membership and family ties were paramount and his own familial connections were well-known and recognized by neighbors, friends, community members, and persecutors alike. If a group of individuals, who – as in this case – share a last name and a residence [add in other factors related to the case] and who are recognized throughout the community as a discrete unit are not socially distinct, it is difficult to understand what that phrase can possibly mean.

In this case, the evidence establishes that numerous members of _____'s society in _____ – including the police, neighbors, and others – recognized the _____ as a distinct group. [Attorneys: note the importance of providing examples that the group is socially distinct to entities beyond simply the persecutor.] For example _____.

notoriety." For example, the Attorney General asserts, "But unless an immediate family group carries greater societal import, it is unlikely that a proposed family-based group will be "distinct." 27 I&N Dec. at 595. The Attorney General does not explain exactly what societal import an immediate family group must be greater than and since at no time does he assert that he is creating a new test or definition for establishing a particular social group, this language can only be read as non-binding dicta.

* * *

CONCLUSION:

Like *A-B-* before it, *LEA II* is the product of an administration seeking to foreclose asylum to bona fide refugees. The Attorney General does not have unbridled authority to set and interpret asylum law and, as with *A-B-*, NIJC expects legal challenges to *LEA II* to prevail. At bottom, *LEA II* is a narrow ruling that does not apply in the Seventh Circuit. And in the circuits where it is precedent, advocates should ensure adjudicators understand the rule is narrow and limited.

For more information on representing asylum seekers, including NIJC's asylum manual, please review the resources on NIJC's website at <https://www.immigrantjustice.org/useful-documents-attorneys-representing-asylum-seekers>. Attorneys representing asylum clients through NIJC are encouraged to consult with NIJC regarding any questions about their case.