

NATIONAL
IMMIGRANT
JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM



Establishing Nexus in Asylum Cases after *Matter of A-B-*

November 30, 2018
www.immigrantjustice.org

NIJC and Asylum

- Direct representation of > 600 asylum seekers/year:
 - Unaccompanied children
 - Detained adult asylum seekers
 - Non-detained adult and family asylum seekers
 - Asylum seekers who identify as LGBT
- Lead impact litigation across the CoAs to preserve asylum protections
 - PSG definition
 - Gender and LGBT-based asylum
 - Corroboration and credibility standards
- Participate as amicus (*A-B-*; *L-E-A-*; *A-R-C-G-*; *M-E-V-G-*; *Cece*; etc.)
- Advocate with and provide intel to members of Congress

HIRC and Asylum

- Direct representation of individuals applying for asylum and other forms of humanitarian protection
- Partnership with Greater Boston Legal Services, largest provider of legal services in New England
- Engage in appellate litigation and participate as amicus in cutting-edge asylum cases, including *Matter of A-B-*, *A-R-C-G-*, *Negusie*, among others
- Ground-breaking work in the field of gender asylum and on behalf of women refugees

Webinar Overview

➤ Asylum Background

➤ Nexus

- What is it?
- Burden of proof
- What it isn't

➤ *Matter of A-B-*

➤ Case Examples

➤ Q&A



Asylum Background

*Ashley Huebner,
Associate Director of Legal Services
National Immigrant Justice Center*

Asylum: Elements

1. “Well-Founded Fear”
2. of “Persecution”
3. Perpetrated by the government or an entity the government cannot/will not control
4. “On account of”
5. – Race
 - Religion
 - Nationality
 - Political Opinion
 - Membership in a Particular Social Group

These elements are SEPARATE!

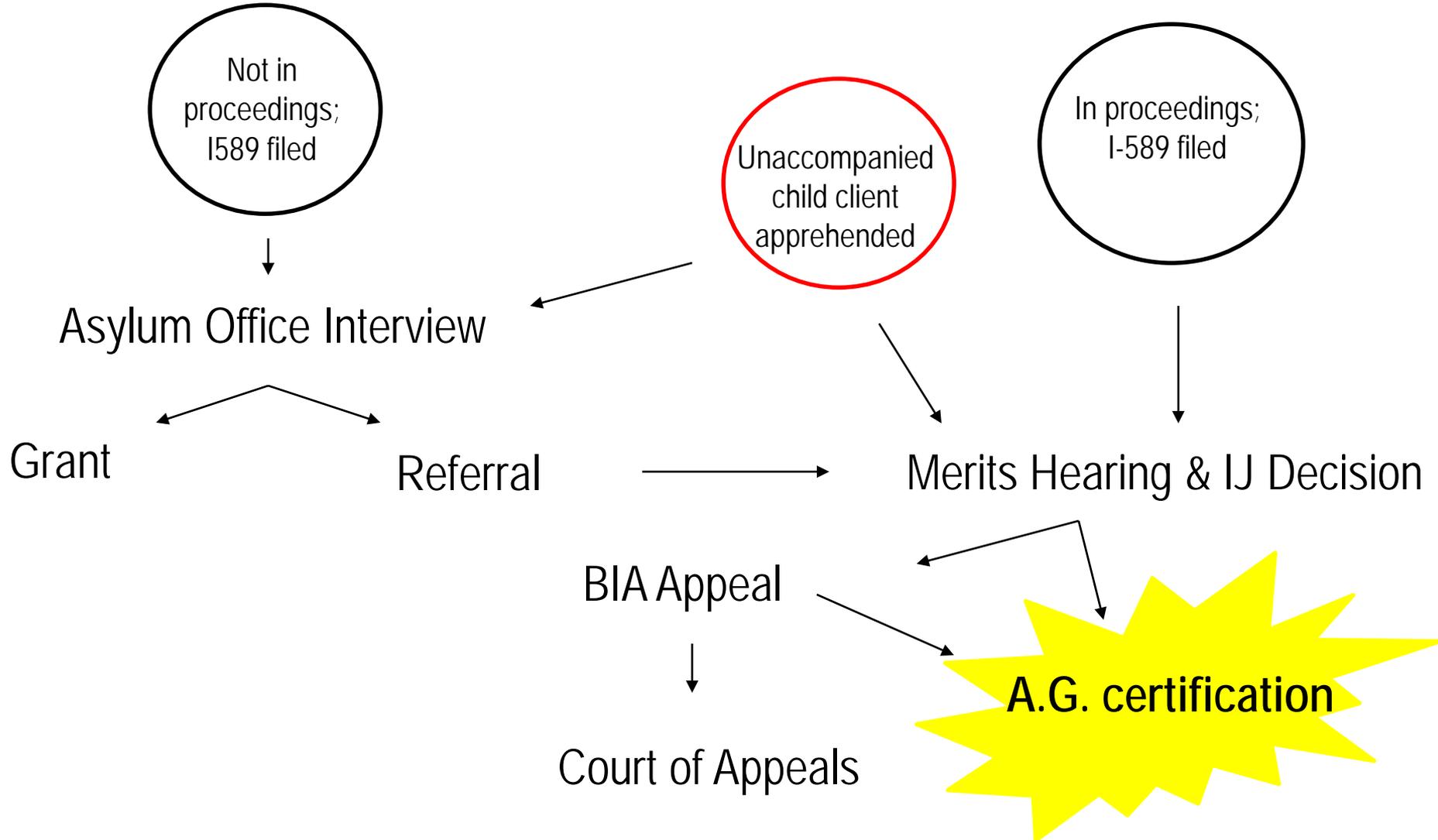
Case-By-Case Analysis

- **For PSG:** *Matter of Acosta* (“The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis”)
- **For PSG and nexus:** *Matter of A-R-C-G-* (“In particular, the issue of nexus will depend on the facts and circumstances of an individual claim”); *M-E-V-G-* (“[W]e emphasize that our holdings in *Matter of S-E-G-* and *Matter of E-A-G-* should not be read as a blanket rejection of all factual scenarios involving gangs. . . . Social group determinations are made on a case-by-case basis”); *Pirir-Boc v. Holder* (9th Cir. 2014) (remanding proceedings because the BIA failed to make a case-by-case determination, in violation of its own precedent).

The Asylum System

Asylum Office/Affirmative Process

Immigration Ct/Defensive Process



Whose Law is Applied?

- BIA precedent decisions generally binding on all immigration court, unless overruled by circuit precedent

Chevron

Congress delegates the administration of a statute to an agency → a statutory provision is ambiguous → the agency's interpretation is based on a permissible construction of the statute = *Chevron* deference

- Be aware of BIA/AG precedent AND conflicting circuit precedent, no matter how nuanced



Nexus Overview

*Deborah Anker, Founder and Director
Sabrineh Ardalan, Assistant Director
Harvard Immigration and Refugee Clinical Program*

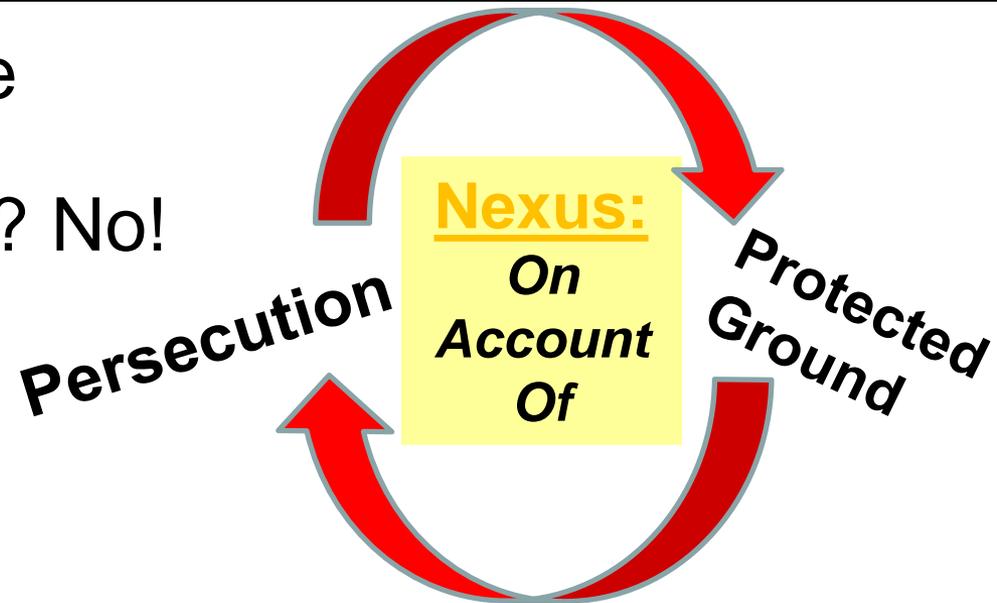
Elements of the U.S. Refugee Definition (Asylum)

1. **Standard of risk** (Past Persecution or Well-founded Fear)
- 2A. **Persecution** (Serious Harm)
- 2B. **Failure of State Protection**
3. **NEXUS (On Account Of)**
4. **Grounds** (Race, Religion, Nationality, Membership in a Particular Social Group, Political Opinion)
5. **Bars to Eligibility**

Favorable exercise of discretion
PARSE!!

Nexus Standards: Different Models

- Main or exclusive motive
- Motive: Subjective intent? No!
- But for cause? (tort law)
- Reasons v. motives?
- “Mixed” motives:
 - Convention ground need not be the sole or even dominant motive for risk of persecution; a central reason



REAL ID: Did it Change Anything?

- REAL ID: Nexus changes encoded at
- 8 U.S.C. 1158 (INA 208):
- (b) Conditions for granting asylum.
 - (1) In general.
 - ...
 - (B) Burden of proof.
 - (i) In general. The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 101(a)(42)(A) [8 USC § 1101(a)(42)(A)]. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion **was or will be at least one central reason** for persecuting the applicant.

Post REAL ID

- *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208 (BIA 2007)

- the protected ground cannot play a minor role . . . it cannot be incidental, tangential, superficial or subordinate to another reason for harm. Rather it must be a central reason for persecuting the respondent.”

- *Ndayshimiye v. Att’y Gen.*, 557 F.3d 124 (3d. Cir. 2009)

- Board’s use of “dominant” is wrong.
- Congress’ use of the phrase “one central reason” rather than “the central reason was deliberate.” Mixed reasons test should not depend on a hierarchy of *central* motivations; one among many.
- However cannot be just a reason; must be a central reason.

Withholding different?

- Significance of no reference to withholding in REAL ID’s “at least one central reason” test: does “any reason” test apply?
- Ninth Circuit v. the rest and the BIA: *Barajas-Romero v. Lynch*, 846 F.3d 351 (9th Cir. 2017) v. *Matter of C-T-L-*, 25 I. & N. Dec. 341 (BIA 2010)

Nexus: What isn't it?

***Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017)**

- Asylum applicant need only prove membership in PSG of X's family—not that X has suffered/fears persecution on account of protected ground
- BUT BIA held respondent could not establish nexus
- BIA concluded that gang members targeted her to avoid criminal prosecution not b/c animus against husband's family

***Hernandez Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015)**

- Rejecting BIA's "excessively narrow reading" of nexus
- BIA reasoned that mother "was not threatened [by gang] because of her relationship to her son (i.e. family), but rather because she would not consent to her son engaging in a criminal activity."
- "Hernandez's relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join"

Remember: Nexus ≠ PSG

Burden of Proof: Proving Nexus in Your Cases

- *INS v. Elias-Zacarias*, 502 U.S. 478 (1992):
 - Evidence of nexus can be “direct or circumstantial”
- *Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996):
 - Circumstantial evidence of nexus can include:
 - “Treatment of others in the population who might be confronted by government agents in similar circumstances”
 - “The extent to which suspected political opponents are subjected to arbitrary arrest, detention, and abuse.”
 - Totality of the circumstances approach

Burden of Proof: Proving Nexus in Your Cases

- Direct Evidence:
 - Statements or actions by the persecutor
 - Statements or actions by asylum seekers (i.e., expressing reasons for resisting)
- Circumstantial Evidence:
 - Persecutor's treatment of similarly situated
 - State's failure to protect similarly situated
 - Suppression or criminal prosecution of certain groups or opinions

Burden of Proof: Proving Nexus in Your Cases

- Importance of country conditions evidence
 - Place harm suffered or feared into broader country condition and cultural context
 - Document society's views about asylum applicant's PSG/immutable characteristics
 - Document persecutor's views re: asylum applicant
- Gather expert and supporting affidavits, where possible

***Note: Particularly critical with respect to gender and gang-based claims**

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Asylum Practice Advisory:
Applying for Asylum After *Matter of A-B-*

Matter of A-B- Changes the Complexion of Claims Involving Non-state Actors,
but Asylum Fundamentals Remain Strong and Intact.

On June 11, 2018, Attorney General Sessions issued a precedential decision in [*Matter of A-B-*, 27 I&N Dec. 316 \(A.G. 2018\)](#). The decision overrules a prior decision, *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014), which held that in some circumstances, domestic violence survivors could receive asylum protection. Additionally, *A-B-* attacks asylum claims involving harm by non-state actors.

MATTER OF A-B-: Holding, Dicta And Nexus

Ashley Huebner, NIJC

Matter of A-B-: Holding

- ***Matter of A-R-C-G-* is overruled on procedural grounds**
 - The decision was based on DHS concessions
 - The legal analysis of social distinction, particularity, and nexus was insufficient

- ***A-B-*'s case is remanded**

For more information regarding Matter of A-B-, see NIJC's Practice Advisory: Applying for Asylum After Matter of A-B-, available at www.immigrantjustice.org.

Cite as 27 I&N Dec. 316 (A.G. 2018)

Interim Decision #3929

Matter of A-B-, Respondent

Decided by Attorney General June 11, 2018

U.S. Department of Justice
Office of the Attorney General

- (1) *Matter of A-R-C-G-*, 26 I&N Dec. 338 (BIA 2014) is overruled. That decision was wrongly decided and should not have been issued as a precedential decision.
- (2) An applicant seeking to establish persecution on account of membership in a "particular social group" must demonstrate: (1) membership in a group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question; and (2) that membership in the group is a central reason for her persecution. When the alleged persecutor is someone unaffiliated with the government, the applicant must also show that her home government is unwilling or unable to protect her.

Matter of A-B-: Dicta

- “Generally” these claims will not be viable
- Only in “exceptional circumstances” will claims by non-state actors be viable
- Various formulations of the “unable/unwilling to control” standard
- Gender-based PSGs are impermissibly circular
- Consider denying asylum based on manner of entry; border interviews, and travel through other countries

Matter of A-B-: Nexus

- Restates the one central reason standard
- Claims when the persecutor has a personal relationship with the victim, it'll be difficult for the claim to succeed
- Hard to prove nexus when the persecutor was not aware of the alleged group's existence
- Provides 2 examples claims where there may be no nexus:
 - A gang may target people because they have money or property or because they inflict violence on the community.
 - An abuser may target his spouse “because of his preexisting personal relationship” with her (citing to a decision from 1975), rather than because he is aware of/hostile to her status in the relationship

Problematic analysis: ignores the possibility of mixed motives



PROVING NEXUS: Case Examples

Ashley Huebner, NIJC

John Willshire Carrera, Assistant Director, HIRC

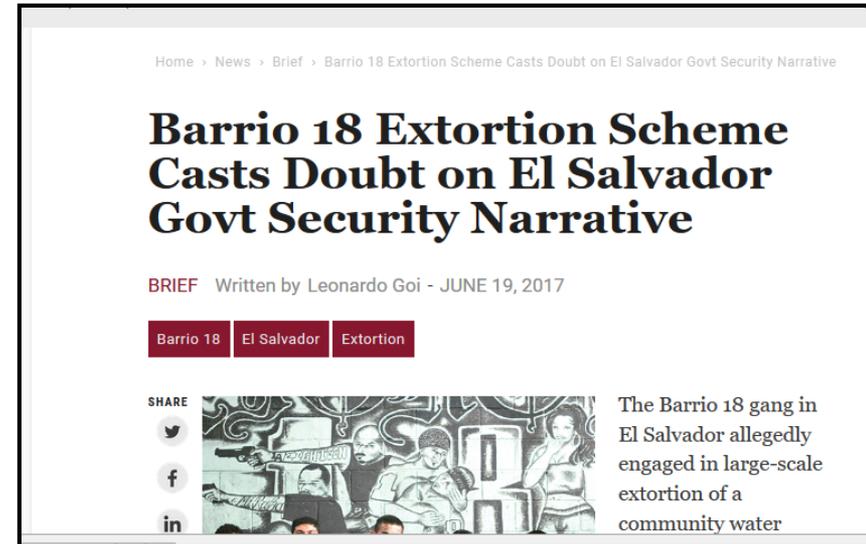
Gang Recruitment and Extortion

1) MS-13 members began recruiting Cristian on his way two and from school. He tried ignore them and said he'd think about it, but they became more aggressive. When he told them he did not want to join, they beat him up and flashed their weapons at him. They told him they weren't joking around and that he only had two more chances. Cristian fled to the United States soon afterwards.

1) Maricruz owned a small store out of her home and the Mara 18 charged her a tax in order to operate. Eventually, she told the gang members she no longer made enough money to pay, but they told her she had not choice. Maricruz closed her store, but M18 members continued coming to her home and threatened to harm her and her family if she did not pay. Maricruz fled to the United States with her two young children.

Nexus

- Use ALL evidence to establish context
 - Place harm into a broader context of a cultural norm, policy or modus operandi (*R.R.D.*; *Sarhan*)

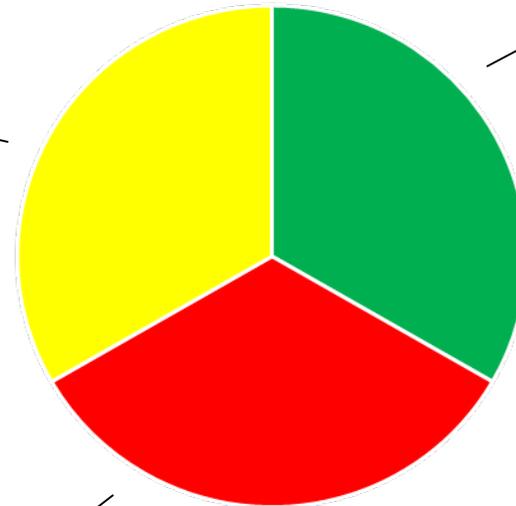


- Demonstrate the persecutor’s awareness of your client’s PSG or at least, the immutable characteristic she shares with others
- Avoid words like “revenge,” “vendetta,” and “retribution.”
- Separate the initial and subsequent reasons for harm.

Nexus cont.

- Utilize a three-part nexus analysis

Circumstantial evidence:
similarly situated individuals;
M.O.; context.



Country evidence shows harm occurs because the govt has deemed it permissible and required (*Sarhan*)

Direct evidence
(words; actions)

Nexus cont.

	Cristian	Maricruz
Direct Evidence	<ul style="list-style-type: none"> • C.'s affidavit • Affidavits from other witnesses • Police reports; medical reports 	<ul style="list-style-type: none"> • M.'s affidavit • Affidavits from other witnesses • Police reports; proof of store ownership; extortion payments
Circumstantial Evidence	<ul style="list-style-type: none"> • Affidavits re similarly situated individuals • Evidence re MS-13's policy response to disobedience/refusal & why 	<ul style="list-style-type: none"> • Affidavits re similarly situated individuals • Evidence re M18's use of extortion & targeting of small business owners as a policy
Other Country Condition Evidence	<ul style="list-style-type: none"> • Evidence re prevalence of gang recruitment & impunity/law enforcement response 	<ul style="list-style-type: none"> • Evidence re prevalence of gang recruitment & impunity/law enforcement response

Gender Violence

Maria comes from a Mayan village in Guatemala, targeted during the civil war. Maria later went to local schools where the teachers and many students called her “*india*.” Over time Maria and her family suffered attacks by the party of the Ladino mayor. While studying to be a teacher, Maria met Pablo, a Ladino. She later went to live with him. Pablo grew increasingly jealous and began abusing her. Yelling that he was the man of the house, he became more and more abusive. Finally, he began threatening to have his friends put her in her place if she didn’t obey him. Unable to take it anymore, Maria went into hiding and soon fled Guatemala.

Nexus cont.

	MARIA
Direct Evidence	<ul style="list-style-type: none">• Maria's affidavit.• Affidavits from family/friends.
Circumstantial Evidence	<ul style="list-style-type: none">• Affidavits of similarly situated individuals.• Evidence regarding racial mistreatment/genocidal attacks of Maria's indigenous community.• Evidence regarding machismo and culture of domestic violence in Guatemala.
Other Evidence	<ul style="list-style-type: none">• PTSD/Trauma expert testimony.

Gender Non-Conformity

Miguel has known he was gay from a young age. Growing up, his father and uncle often taunted him with homophobic slurs and when his teacher punished him for having effeminate mannerisms, his father would beat him. As he grew older, gang members also began to target him with threats specifically related to his sexual orientation, including threatening to rape him. When he attended university, he had his first relationship with a man, but when others found out, he was ostracized and his employer fired him. Unable to be freely out in his community, Miguel fled to the United States.

Nexus

- Differentiate the harm against your client from general violence
- Focus on the type of harm inflicted and the words used
- Demonstrate the persecutor's awareness of your client's PSG or at least, the immutable characteristic she shares with others
- Avoid words like "revenge," "vendetta," and "retribution."
- Utilize country condition documents to demonstrate attitudes/norms/legal standards



Nexus cont.

- Utilize a three-part nexus analysis

Circumstantial evidence: similarly situated individuals; context; laws; religious and cultural norms; type of harm inflicted

Country evidence shows harm occurs because the govt has deemed it permissible and required (*Sarhan*)

Direct evidence (words; actions)



Nexus cont.

	Miguel
Direct Evidence	<ul style="list-style-type: none">• Miguel's affidavit• Affidavits from other witnesses• Police reports, medical reports
Circumstantial Evidence	<ul style="list-style-type: none">• Affidavits of similarly situated individuals• Country condition evidence
Other Country Condition Evidence	<ul style="list-style-type: none">• Evidence regarding cultural/religious/legal views regarding men who do not conform to male stereotypes

Gang & Ethnicity

José is a 19-year-old Mayan from Guatemala. From an early age, José's family was targeted by the Ladinos for their community involvement. When José starting attending a higher level of school in the town, he was increasingly targeted by Ladinos going to and coming from school, including mareros (gang members) who demanded that he stop participating in his church and community groups, and instead join them. When Jose refused their demands, the mareros threatened to kill him "like the civil patrols had done to his grandfather." Immediately, José's parents put him in hiding. Then one morning José and his father were ambushed by mareros who threatened Jose's father for ordering José to refuse to their recruitment. José and his father fled to the U.S. to find safety with family.

Nexus cont.

	JOSE
Direct Evidence	<ul style="list-style-type: none">• Jose's affidavit.• Jose's father's and other affidavits.
Circumstantial Evidence	<ul style="list-style-type: none">• Affidavits of similarly situated individuals.• Evidence of racial mistreatment/genocidal attacks of indig com.• Evidence of granting of refuge to similarly situated family.
Other Evidence	<ul style="list-style-type: none">• Evidence of effects of trauma and harm to children.• PTSD/Trauma expert testimony.

Q&A

Additional Resources

- NIJC's Asylum Resources for Attorneys:
<https://immigrantjustice.org/index.php/resources/resources-attorneys-representing-asylum-seekers>
 - Webinars: <https://immigrantjustice.org/training-webcasts>
- HIRC: <https://harvardimmigrationclinic.org/>

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