

# Representing LGBTQ+ Asylum Seekers

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# About Me

Leanna M. Sac is an immigration attorney with an office in Fair Oaks, California. She worked at a nonprofit called East Bay Sanctuary Covenant before and during law school as a Refugee Rights Advocate, and opened her own practice in January, 2021. The bulk of her practice is dedicated to humanitarian immigration processes, such as asylum (both affirmative and defensive), U Visas, T Visas, and VAWA. She also works on family petitions, green card applications, and naturalization (citizenship).



# Introduction to Asylum Law

- To be granted asylum at an asylum office or an immigration court, an applicant must show that they are a refugee under INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005).
- A refugee is someone who has a well-founded fear of persecution based on their race, religion, nationality, political opinion, or particular social group.
- Particular social group is a common basis for LGBTQ+ claims, although political opinion may also be a basis in many cases
- If an applicant has experienced past persecution, there is a rebuttable presumption that they have a well-founded fear of future persecution. Otherwise, they must show why they have a well-founded fear of future persecution.

# LGBTQ+ Asylum Overview

- LGBTQ+ community covers a spectrum of identities, including lesbian, gay, bisexual, transgender, and queer individuals.
- Sometimes, more or less expansive acronyms are used, such as LGBTQI+ or LGBT
- In most parts of the world, LGBTQ+ individuals are at risk of harm on account of their sexual orientations or gender identities.
- This harm can include physical attacks, sexual violence, unjust imprisonment, forced conversion therapy, and lack of access to employment, marriage, parenthood, and/or gender-affirming care.
- Intersectionality matters; LGBTQ+ individuals may face compounded risks based on race, gender, or religion.

# Particular Social Groups Based on Sexual Orientation and/or Gender Identity

- When asserting particular social groups (PSGs) based on sexual orientation and gender identity, remember that a Social group must be cognizable, meaning that it must be a clear, well-defined group. A cognizable PSG has the following characteristics:
  - 1) shares immutable and/or fundamental traits
  - (2) is “socially distinct within the society in question”
  - (3) is “defined with particularity.”

*Matter of M-E-V-G*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014).

- Adjudicators analyze whether a PSG is cognizable on a case-by-case basis
- You can and should articulate several PSGs for your client, with varying levels of specificity and combined identities
- For example, you may articulate the following PSGs for the same client : “Guatemalan lesbians”, “LGBTQ+ Guatemalan women”, “Guatemalan women in same-sex relationships”, “indigenous lesbian Guatemalan women”, “gender nonconforming Guatemalan women”, “Guatemalan women”, and “indigenous LGBTQ+ Guatemalan women”

# Corroborating Evidence for LGBTQ+ Asylum Applicants

- Fear must be reasonable and supported by evidence of personal risk or risks inherent to group membership
- Proving that your client belongs to the LGBTQ+ community is recommended
- Supporting Evidence:
  - Country conditions documents
  - Affidavits
  - Declarations
  - Medical records
  - Photographs
  - Testimony

# Some Important 9th Circuit LGBTQ+ Asylum Cases

- *Hernandez-Montiel v. INS* (2000): Recognized LGBTQ+ individuals as a 'particular social group'.
- *Karouni v. Gonzales* (2005): Established that persecution for “committing homosexual acts” was tantamount to persecution for being homosexual
- *Avetova-Elisseva v. INS* (1998): Established precedent for transgender and gender non-conforming asylum seekers.
- *Nababan v. Garland* (2021): Stated LGBTQ+ applicants cannot be expected to hide their identity.
- *Pitcherskaia v. INS* (1997): Found forced conversion therapy could be considered persecution despite lack of intent to harm.

# Beyond Gay and Lesbian: Educating Adjudicators

- Many adjudicators are much more familiar with gay and lesbian identities than with other LGBTQ+ identities
- If you have a client with another identity under the LGBTQ+ umbrella, you may have to educate the immigration judge or asylum officer who will decide the case.
- For example, a bisexual or pansexual client may be considered potentially “straight passing” if in an opposite-sex relationship or single. However, same-sex attraction or a history of same-sex romantic or sexual relationships may put your client at risk of persecution.
- Transgender asylum applicants may be subjected to an erroneous assumption that all transgender people eventually get certain surgeries, or legally change their sex/gender from the one assigned at birth to the “opposite” binary gender. However, there are as many ways to be transgender as there are transgender individuals.



# Country Conditions

- Understanding the conditions in your client's country of origin conditions is crucial.
- Some examples of considerations:
  - Access to gender-affirming care
  - Legality of legal name and sex change and nonbinary genders
  - Legality of same-sex marriage
  - Adoption rights for LGBTQ+ individuals
  - Frequency and severity of violence against LGBTQ+ individuals
  - Legal protections for LGBTQ+ persons against discrimination and violence

# The Declaration

- A written declaration in an asylum case offers a personal account of experiences and provides detailed descriptions of past persecution or fear of harm.
- Your client's declaration is crucial for establishing a credible claim.
- Examples of possible areas to develop in a declaration:
  - Story of your client's journey to discovering their LGBTQ+ identity
  - Any past harm faced because of this identity or related attributes (such as childhood gender nonconformity, which is common but not always present)
  - Social and cultural practices in your client's country of origin
  - Family/friends' acceptance or lack thereof
  - Risks of "coming out", if your client is not yet out in their home country or wasn't when they left
  - Psychological and/or financial impact
  - Involvement in advocacy

# Using Affidavits

- Affidavits from credible sources support the asylum claim.
- Sources: LGBTQ+ organizations, allies, current or former partners, friends or family members, and/or community members.
- Ideally attests to, supplements or builds on statements in the testimony.

# Using Photographic Evidence

- Photographic evidence can provide context for risks faced by LGBTQ+ individuals.
- Photos may show conditions, community involvement, or prior threats.

# Claims for Clients Not 'Out' in Country

- Some LGBTQ+ asylum applicants have not faced past persecution in their countries of origin because they were not “out”.
- Some LGBTQ+ asylum applicants who were not “out” in their home countries faced past persecution because they were gender nonconforming or because others suspected that they were LGBTQ+
- Your LGBTQ+ client may be “out” now that they are living in the United States and therefore have a greater risk of being harmed than when they lived in their country of origin.
- Alternatively, your client may still be “in the closet”, and not feel safe coming out unless and until they have lawful status in the United States.
- In the absence of past persecution, provide evidence of your client’s identity and country conditions documents to show that individuals with that identity face persecution in their country.

# Case Study: Sofia from Mexico

- Background: 23-year-old pansexual Mexican woman who grew up in the United States, faced rejection and threats after family members in Mexico found out she was in a same-sex relationship.
- Claims: Well-founded fear based on widespread violence and discrimination against queer women in Mexico.







# Case Study: André from Brazil

- Background: 29-year-old gay Brazilian man, harassed and threatened because of his pro-LGBTQ+ advocacy. He was not “out” in his community but was commonly assumed to be gay due to his activism, his mannerisms and way of speaking.
- Claims: Past persecution based on sexual orientation PSGs and pro-LGBTQ+ activism (political opinion)

# Questions?

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