

## BEACON OF HOPE OR FAILURE OF PROTECTION? U.S. TREATMENT OF ASYLUM CLAIMS BASED ON PERSECUTION BY ORGANIZED GANGS

by

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In the past six years, disturbing trends have emerged within two intertwined areas of asylum law—the interpretation of “particular social group” and the adjudication of asylum claims by individuals fleeing persecution by gangs. These trends, which are explored in detail throughout this *Briefing*, have resulted in countless unprincipled and legally deficient denials of cognizable claims of petitioners fleeing gang-related violence. This *Briefing* intends to help attorneys surmount the difficulties that developments in the law have posed for many bona fide refugees fleeing gang persecution.

The *Briefing* begins with a summary of the current state of the law on social visibility and particularity requirements at the Board of Immigration Appeals (BIA or Board) and federal courts of appeals. As explained below, these new requirements have left asylum applicants who are fleeing gang violence struggling to demonstrate that they warrant asylum based on membership in a particular social group. This *Briefing* moves from a discussion of the jurisprudence on social visibil-

ity and particularity requirements to the treatment of gang claims based on particular social groups defined by characteristics, including resistance to gang recruitment, gender, having served as a witness or informant, family membership, and former gang membership.

Asylum claims involving resistance to gangs have not just foundered based on adjudicators’ failure to recognize a particular social group; these claims are also routinely denied for lack of nexus. The *Briefing* therefore also explores issues of nexus with particular focus on political opinion and religion claims.

Finally, the *Briefing* offers advice for litigating asylum claims based on persecution by gangs. As will be clear from this *Briefing*, numerous challenges thwart protection, but, with creative strategies, a compelling record, and strategic reliance on expert witnesses, individuals fleeing gang violence can prevail.

### PARTICULAR SOCIAL GROUP

#### ◆ Social Visibility and Particularity, State of Law at the BIA

For over two decades, the lucid standard articulated in *Matter of Acosta* governed particular social group analysis.<sup>1</sup> This standard called on courts to evaluate whether members of a pro-

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#### *This Issue in Brief*

PARTICULAR SOCIAL GROUP  
TREATMENT OF GANG CLAIMS BASED ON  
SOCIAL GROUP MEMBERSHIP  
NEXUS  
ADVICE  
CONCLUSION

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posed group share a “common [immutable] characteristic ... that the members ... either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”<sup>2</sup>

From 1985 until 2006, the Board and federal courts applied the *Acosta* standard<sup>3</sup> to rule on a range of particular social groups.<sup>4</sup> The United Nations High Commissioner for Refugees (UNHCR) and foreign jurisdictions also endorsed the *Acosta* framework.<sup>5</sup> In 2006, however, the Board explained that, while *Acosta* was the starting point for particular social group analysis, additional factors were relevant to a group’s cognizability.<sup>6</sup> These additional considerations were the “social visibility” and “particularity” of the group.<sup>7</sup> The Board described social visibility, or “the extent to which members of a society perceive those with the characteristic in question as members of a social group,” as a “relevant factor” and particularity as a “requirement.”<sup>8</sup> Applying these new concepts, the Board found that the social group “former noncriminal drug informants working against the Cali drug cartel” lacked visibility because of its hidden nature and was “too loosely defined” to be particular.<sup>9</sup> Furthermore, the Board held that the group was not defined by an immutable characteristic under *Acosta*.<sup>10</sup> See notes 145-165 and accompanying text, *infra*.

The Board did not acknowledge or explain its departure from *Acosta*. Instead, it claimed that the social groups that it had approved under *Acosta* were defined by characteristics that “were highly visible and recognizable by others in the country in question,” although there is no evidence of these “requirements” in prior decisions.<sup>11</sup> Arguably, groups approved under *Acosta* and its progeny, such as homosexuals in Cuba and young women from a specific tribe in Togo who have not undergone female genital cutting and oppose it,<sup>12</sup> would fail the social visibility and particularity tests. The Board claimed that social visibil-

ity was consistent with the UNHCR’s guidelines on membership in a particular social group; this interpretation patently misconstrues the guidelines.<sup>13</sup> It offered no explanation whatsoever for the particularity requirement.

One year later, in *In re A-M-E- & J-G-U-*, the Board interchangeably referred to social visibility and particularity as “factors” and “requirements” and relied on them to deny the social group of “affluent Guatemalans.”<sup>14</sup> The Board suggested that “affluent Guatemalans” might be a cognizable group under *Acosta*<sup>15</sup> (unlike the social group in *C-A-*), but rejected the group under social visibility and particularity. Neither *C-A-* nor *A-M-E-* clearly defines social visibility or particularity. For example, although *C-A-* describes social visibility as a question of societal perception of the group, it applies the concept in a literal sense.<sup>16</sup> Other than the vague statement in *A-M-E-* that visibility “must be considered in the context of the country of concern and the persecution feared,”<sup>17</sup> neither case explains how to analyze the visibility and particularity of a proffered group.<sup>18</sup>

In 2008, the Board issued *Matter of S-E-G-*, which unequivocally elevated social visibility and particularity to the status of binding requirements.<sup>19</sup> *Matter of S-E-G-* held that neither “Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities” nor the family members of such Salvadoran youth constitute a particular social group because the groups lack visibility and particularity. The BIA defined particularity as a question of “whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons,” and visibility as whether applicants would be “perceived as a group by society.”<sup>20</sup>

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The Board employed faulty analysis in *S-E-G*. First, it conflated particularity with nexus when it found that the group lacked particularity in part because gang members could be motivated to recruit young men “quite apart from any perception that the males in question were members of a class.”<sup>21</sup> The Board also rejected the particularity of the proposed group of family members of youth fleeing recruitment because it was “too amorphous” as it could include “fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others.”<sup>22</sup> Second, improperly driven in part by concern about the size of the group,<sup>23</sup> the Board found that the proposed social groups lacked visibility because they were not “much narrower than the general population of El Salvador” and society would not view members of the groups distinctly.<sup>24</sup> Third, the BIA did not explain how social visibility and particularity differ since both seem to require some level of societal recognition and distinction under *S-E-G*.<sup>25</sup>

*S-E-G* not only employed flawed analysis but also failed to provide a clear framework for establishing or analyzing social visibility and particularity especially in the context of gang claims. For example, the BIA did not make clear whether social visibility requires literal visibility or societal perception of the group,<sup>26</sup> who must perceive the group, and whether particularity is to be determined from the perspective of the adjudicator or from that of individuals in the society in question.<sup>27</sup> This lack of guidance has left attorneys at a loss for how to succeed in asylum claims based on resistance to gangs and social group claims more broadly.

Since deciding *Matter of S-E-G*, the Board has not retreated from social visibility and particularity in spite of numerous critiques and ongoing legal challenges.<sup>28</sup> If anything, it now regularly applies these “requirements” to deny claims that arguably would have succeeded under the *Acosta* standard.<sup>29</sup>

#### ◆ Social Visibility and Particularity, State of Law in Federal Courts of Appeals

The majority of federal courts of appeals have adopted social visibility and particularity as requirements; however, there is a growing circuit split regarding this issue. The Third and Seventh Circuits have firmly rejected the requirements while the First, Second, Fifth, Eighth, Tenth, and Eleventh Circuits have clearly accepted them. Social visibility and particularity were initially adopted by the Ninth Circuit but are currently under

review before the en banc court. Although neither the Fourth Circuit nor the Sixth Circuit has explicitly ruled on the validity of the requirements, the Fourth Circuit applies visibility and particularity while the Sixth Circuit lists them as requirements without applying them. Thus, in spite of the fact that the majority of circuits currently apply visibility and particularity, the requirements are increasingly being called into question.

#### Circuits that Explicitly Reject the BIA’s Requirements

**Seventh Circuit.** The Seventh Circuit was first to reject social visibility as a criterion for determining social group membership.<sup>30</sup> The court held that the requirement was inconsistent with BIA precedent approving groups that lacked social visibility and that the court cannot simply “pick one of the inconsistent lines and defer to that” as doing so would “condone arbitrariness.”<sup>31</sup> Judge Posner, who wrote for the court, forcefully rejected social visibility, saying that it “makes no sense” and that:

Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be ‘seen’ by other people in the society “as a segment of the population.”<sup>32</sup>

The Seventh Circuit has also criticized the Board’s lack of clear definition of social visibility, stating, “Often it is unclear whether the Board is using the term ‘social visibility’ in the literal sense or in the ‘external criterion’ sense, or even whether it understands the difference.”<sup>33</sup>

**Third Circuit.** The Third Circuit recently joined ranks with the Seventh Circuit in rejecting the BIA’s unexplained departure from *Matter of Acosta*. The court held that, “because the BIA’s requirements that a ‘particular social group’ possess the elements of ‘social visibility’ and ‘particularity’ are inconsistent with prior BIA decisions, those requirements are not entitled to *Chevron* deference.”<sup>34</sup>

Reviewing cases in which the BIA granted asylum to groups whose members have characteristics invisible to the naked eye, the court noted that

“if ... any of these groups applied for asylum today, the BIA’s ‘social visibility’ requirement would pose an insurmountable obstacle to refugee status, even though the BIA has already held that membership in any of these groups qualifies for refugee status if an alien can establish that s/he was persecuted.”<sup>35</sup> The court also recognized that members of a group that have been targeted for persecution will likely go to great lengths to avoid being “socially visible.”<sup>36</sup> Critiquing particularity, the court stated, “[W]e are hard-pressed to discern any difference between the requirement of ‘particularity’ and the discredited requirement of ‘social visibility.’ Indeed, they appear to be different articulations of the same concept and the government’s attempt to distinguish the two oscillates between confusion and obfuscation, while at times both confusing and obfuscating.”<sup>37</sup>

The Third Circuit held that it remains bound by *Acosta* unless and until the BIA provides an adequate explanation for departing from it.<sup>38</sup> *Valdiviezo-Galdamez* is currently on remand at the BIA.<sup>39</sup>

### Circuits that Explicitly Adopt BIA Requirements

**First Circuit.** The First Circuit has unambiguously adopted social visibility and particularity as requirements.<sup>40</sup> In doing so, the court explicitly addressed and rejected arguments that social visibility and particularity depart from precedent and that the BIA’s decision to engraft them onto the social group definition was unexplained. Rather, the court found that social visibility is an “elaboration of how that [immutable characteristic] requirement operates.”<sup>41</sup> Citing to *C-A-* and *A-M-E-*, the court stated that *Matter of S-E-G-* “did not blaze a new trail; earlier case law echoed the same refrain.”<sup>42</sup>

In a recent denial of a withholding of removal claim, the First Circuit went so far as to find that analysis of an individual’s particular social group was unnecessary “where the underlying issue is materially identical to several already decided in this circuit.”<sup>43</sup> Specifically, the court found that its earlier decisions rejecting social groups similar to the one advanced in *Garcia-Callejas* for lack of visibility and particularity were “directly [o]n point” without conducting any analysis of the record in *Garcia-Callejas*. How the court could reach this conclusion in the absence of analysis of the record in *Garcia-Callejas* is suspect in light of *A-M-E-*’s and *S-E-G-*’s instruction to evaluate social visibility and particularity within the society in question.<sup>44</sup> The First Circuit’s stance that social group determinations can apply across cases, abrogating

the need for individual record analysis, exemplifies a disturbing trend seen throughout asylum jurisprudence based on resistance to gangs and discussed in notes 86-111 and accompanying text.

Given the First Circuit’s unequivocal support for social visibility and particularity, an in-circuit challenge to the requirements seems unlikely to succeed.

**Fifth Circuit.** The Fifth Circuit recently held that the “particularity and social visibility test established by the BIA is entitled to deference under *Chevron*.”<sup>45</sup> Acknowledging that it was considering the validity of the requirements for the first time, the court reviewed its own unpublished decisions relying on BIA precedent on social visibility and particularity as well as published decisions from sister circuits deferring to the BIA’s requirements. It concluded that social visibility and particularity were “not a radical departure from prior interpretation, but rather a subtle shift that evolved out of the BIA’s prior decisions on similar cases.”<sup>46</sup> The court found that the shift was a permissible result of the BIA’s case-by-case adjudication process,<sup>47</sup> which, it explained, “does not necessarily follow a straight path.”<sup>48</sup> In light of the Fifth Circuit’s recent, explicit acceptance of the requirements, a direct challenge to the requirements is unlikely to succeed.

**Eighth Circuit.** While some judges in the Eighth Circuit have questioned social visibility and particularity, the circuit has adopted them. In a recent case, a petitioner challenged *S-E-G-*, arguing that it unreasonably converted social visibility and particularity from factors to absolute requirements and that the requirements should be rejected.<sup>49</sup> The court held that it was bound by recent Eighth Circuit precedent “requir[ing] sufficient particularity and visibility such that the group is perceived as a cohesive group by society.”<sup>50</sup> What the court failed to recognize, however, was that, while *Constanza* and *Ortiz-Puentes* applied social visibility and particularity, neither case ruled on their validity, leaving the requirements susceptible to a future challenge.

Judge Bye “reluctantly” concurred in the result reached by the majority because he felt “bound by” *Constanza* and *Ortiz-Puentes*, which accepted social visibility and particularity. In his concurrence, Judge Bye expressed his “disagreement with [the Eighth Circuit’s] as-a-matter-of-course adoption” of social visibility and particularity.<sup>51</sup> He noted that, were he not bound by Eighth Circuit precedent, he would find the requirements

“arbitrary and capricious” given their inconsistency with prior BIA decisions—in particular their “direct conflict” with the social group definition in *Acosta*—and the BIA’s failure to explain its departure from precedent.<sup>52</sup> Gaitan filed for panel rehearing and rehearing en banc, but his petition was recently denied.<sup>53</sup> A petition for certiorari is pending before the Supreme Court.

Despite the denial of rehearing in *Gaitan*, attorneys should consider seeking rehearing en banc in another case, bearing in mind that such a challenge is more likely to succeed in a case other than one involving a social group defined by resistance to gang recruitment.

**Tenth Circuit.** The Tenth Circuit adopted social visibility and particularity as requirements in 2011.<sup>54</sup> The court found that the particularity requirement “flows quite naturally from the language of the statute, which, of course, specifically refers to membership in a ‘particular’ social group.”<sup>55</sup> It explained that limiting social groups to those that can be defined with specificity is necessary to avoid “inconsistent, arbitrary, and over broad results.”<sup>56</sup> The court also held that social visibility was a reasonable requirement. Looking to *In re C-A-*, where the BIA stated that groups defined by opposition to genital mutilation, kinship ties, and prior employment as a police officer would be socially visible, the court concluded that “social visibility cannot be read literally” and therefore is not “inconsistent or illogical.”<sup>57</sup> This blind faith in the BIA is questionable given that the BIA never explained how previously recognized groups would satisfy social visibility and *C-A-* applies the requirement in the literal sense. After determining that social visibility is a question of societal perception, the Tenth Circuit articulated its own standard, stating that visibility “requires that the relevant trait be potentially identifiable by members of the community, either because it is evident or because the information defining the characteristic is publically accessible.”<sup>58</sup> Clearly, the court failed to appreciate that its own test is strikingly similar to literal visibility.

The UNHCR filed an amicus brief arguing, in part, that the requirements were inconsistent with the UNHCR’s social group guidelines.<sup>59</sup> The court acknowledged that social visibility and particularity are at odds with the UNHCR’s guidelines, but held that divergence from the UNHCR’s nonbinding guidance does not make visibility and particularity unreasonable.<sup>60</sup> However, regardless of the binding versus instructive nature of the UNHCR guidelines, the BIA relied on the guidelines to

justify the social visibility requirement. Once the court essentially debunked the Board’s rationale for social visibility, it should have refused to defer to the Board unless and until it explained its departure from *Acosta*.

Although the circuit’s analysis of visibility and particularity is flawed, the court has grappled with the requirements more than most of its sister circuits. Consequently, it is unlikely that a challenge to the requirements would succeed absent clear indication of support from judges in the circuit.

**Eleventh Circuit.** The Eleventh Circuit has not issued a published decision addressing social visibility and particularity since *Matter of S-E-G-* was decided, but it previously adopted the requirements in *Castillo-Arias v. U.S. Atty. Gen.*,<sup>61</sup> which upheld *In re C-A-*. There the court granted *Chevron* deference to the *Acosta* standard, but also employed visibility and particularity in its analysis of the particular social group.<sup>62</sup> Treating social visibility as a clarification of the *Acosta* standard, the court explained that the BIA could “revise and evaluate its own definition of a particular social group” as long as the revised definition was reasonable<sup>63</sup> and could rely on the UNHCR’s guidance referring to social visibility when doing so. Thus, unlike the Tenth Circuit in *Rivera-Barrientos*, the Eleventh Circuit did not acknowledge the inconsistency between the UNHCR’s guidelines and the BIA’s social visibility requirement. The court’s only reference to particularity was its unreasoned conclusion that the BIA’s concerns about “numerosity and inchoateness” of the social group in *C-A-* were “valid.”<sup>64</sup>

The Eleventh Circuit has cited to *S-E-G-* in a few recent unpublished opinions. One case called upon the court to overturn precedent upholding social visibility and particularity, arguing that they are arbitrary, inconsistent, and contrary to law.<sup>65</sup> The court stated that *S-E-G-* refined the requirements set out in *Acosta* and held that it was bound by *Castillo-Arias* until such precedent has been overturned by the en banc court or the Supreme Court.<sup>66</sup> A petition for certiorari challenging the social visibility criterion was filed, but recently rejected. Another unpublished Eleventh Circuit opinion upholding the BIA’s denial of a social group for lack of visibility is pending before the Supreme Court on a petition for certiorari.<sup>67</sup> In the meantime, the court continues to require that social groups be visible and particular.

**Second Circuit:** Similar to the Eleventh Circuit, the Second Circuit adopted social visibility and particularity prior to *Matter of S-E-G-*, but has not ruled on the requirements as articulated in *S-E-G-*. In upholding *A-M-E-*, the court described social visibility and particularity as “factors” in the social group analysis and applied them to affirm the BIA’s rejection of the particular social group “affluent Guatemalans.”<sup>68</sup> However, *Ucelo-Gomez* provided scant analysis of social visibility and none of particularity. According to the court, social visibility was consistent with *Gomez v. I.N.S.*, which stated that the immutable characteristic must be one “which serves to distinguish [group members] in the eyes of a persecutor—or in the eyes of the outside world in general.”<sup>69</sup> To the extent that *Ucelo-Gomez* relies on *Gomez v. I.N.S.*, the Second Circuit has since clarified<sup>70</sup> that *Gomez* should be read consistently with *Matter of Acosta*.<sup>71</sup>

The Second Circuit has not published an opinion ruling on the validity of social visibility and particularity as absolute requirements under *S-E-G-*. In unpublished decisions, the court has vacillated between granting *S-E-G- Chevron* deference<sup>72</sup> and finding it to be instructive, but not binding.<sup>73</sup> Since the Second Circuit has not been confronted with a direct challenge to social visibility and particularity, attorneys practicing there should consider contesting the requirements.

**Ninth Circuit.** The Ninth Circuit adopted social visibility and particularity in *Arteaga v. Mukasey*,<sup>74</sup> which was issued prior to *Matter of S-E-G-*. Following *Matter of S-E-G-*, the court continued to apply social visibility and particularity to reject a range of social groups,<sup>75</sup> and, in 2009, it held that the Board’s published decisions on particular social groups are entitled to *Chevron* deference.<sup>76</sup>

Recently, however, the court reheard en banc the unpublished decision in *Henriquez-Rivas v. Holder*, which had rejected a social group of testifying witnesses against a gang.<sup>77</sup> The issues before the en banc court include whether the court should grant *Chevron* deference to social visibility and particularity and whether the social group advanced in the case satisfies these requirements. A positive decision out of the Ninth Circuit would deepen the circuit split and could impact the law of other circuits.

### Circuits that Apply Requirements Without Having Ruled on the Validity of One or Both

**Fourth Circuit.** The Fourth Circuit has not been faced with a direct challenge to social visibil-

ity or particularity and has not ruled on the level of deference due to these criteria. While its decisions apply social visibility and particularity to social groups under review, none turns on visibility or particularity.

The Fourth Circuit has specifically declined to rule on the reasonableness of social visibility<sup>78</sup> and has not explicitly ruled on the reasonableness of particularity although it has applied both standards in cases. For example, in *Crespin-Valladares v. Holder*, the court reversed the Board’s finding that the social group of family of prosecution witnesses against a gang lacked social visibility,<sup>79</sup> and, in *Zelaya v. Holder*, the court rejected the group of “young Honduran males who refused to join gangs, had notified the authorities of gang harassment tactics, and had an identifiable tormentor within the gang” partially under the particularity requirement.<sup>80</sup> It also rejected the group advanced in *Lizama v. Holder* in part because of particularity.<sup>81</sup> Notably, however, the groups in both *Zelaya* and *Lizama* were also held deficient under *Acosta* because they lacked an immutable characteristic unlike the group approved in *Crespin-Valladares*.<sup>82</sup>

The Fourth Circuit’s application of particularity and to a lesser extent social visibility indicates its willingness to defer to the BIA’s requirements, but, since it has declined to rule on their validity, they remain open to direct legal challenge.

**Sixth Circuit.** Similar to the Fourth Circuit, the Sixth Circuit has no published decisions clearly ruling on the legitimacy of social visibility and particularity. Its decisions recognize that the BIA considers social visibility and particularity “two key characteristics” of a particular social group, but do not apply them in ruling on groups under review. For example, in *Al-Ghorbani v. Holder*, the Sixth Circuit approved two social groups—one defined by family membership, the other by resistance to repressive norms—without reference to the groups’ visibility or particularity.<sup>83</sup> Rather, the court approved both groups under *Acosta*.<sup>84</sup> More recently in *Kante v. Holder*, the Sixth Circuit listed social visibility and particularity as BIA requirements and rejected the particular social group advanced in the case, but did so on other bases.<sup>85</sup>

Despite listing social visibility and particularity as requirements, the Sixth Circuit has not applied them and has continued to adhere to *Acosta* and other pre-*In re C-A-* decisions in analyzing particular social groups. The requirements therefore remain open to legal challenge in the Sixth Circuit.

## TREATMENT OF GANG CLAIMS BASED ON SOCIAL GROUP MEMBERSHIP

### ◆ Groups Defined by Resistance to Recruitment

Refusal to join a gang is a characteristic that may be both immutable and fundamental, and individuals who resist membership may be “set apart” or perceived as a group in society.<sup>86</sup> Regardless, social groups defined by refusal to join or opposition to gangs face substantial resistance at all levels of adjudication.

The federal courts of appeals routinely deny<sup>87</sup> social groups defined by resistance to recruitment for lack of visibility and particularity.<sup>88</sup> Courts have rejected a variety of social group formulations, including “young males from El Salvador who have been subjected to recruitment by MS-13 and who have rejected or resisted membership in the gang based on personal opposition to the gang”;<sup>89</sup> “young Honduran males who refused to join gangs, had notified the authorities of gang harassment tactics, and had an identifiable tormentor within the gang”;<sup>90</sup> and “Guatemalan youth resisting gang recruitment.”<sup>91</sup> Most recently, the Fifth Circuit denied the social group of “Salvadoran males, ages 8 to 15, who have been recruited by Mara 18 but have refused to join due to principled opposition to gangs.”<sup>92</sup>

Many adjudicators are under the misimpression that *Matter of S-E-G-* precludes all social groups defined by refusal to be recruited. This has led to numerous denials in which courts simply cite to *Matter of S-E-G-* without providing any analysis specific to the facts at bar. In other cases, courts rely on the record in *S-E-G-*, as opposed to the record in the case under review, to reject social groups based on resistance to gangs. For example, in *Zelaya v. Holder*, the Fourth Circuit held that the petitioner’s proposed group was “materially indistinguishable” from the one that the BIA rejected in *Matter of S-E-G-* without analogizing any specific facts from *Zelaya*’s case to those in *Matter of S-E-G-*.<sup>93</sup> The court failed to explain how the social group in *Zelaya* (which was comprised of Honduran males who refused gang membership and reported gang violence to the police) was so indistinguishable from the group rejected in *S-E-G-* (which arose in El Salvador and was not defined by reporting to police) as to render analysis of *Zelaya*’s social group unnecessary.

Similarly, in *Ramos-Lopez v. Holder*, after granting *Chevron* deference to *S-E-G-*, the Ninth Circuit

rejected the social group of “young Honduran men who have been recruited by the MS-13,” stating that, while *S-E-G-* involved a Salvadoran petitioner, the BIA intended the case to apply to an equivalent group in Honduras.<sup>94</sup> The court compared Ramos’s social group to others that it had rejected as too broad.<sup>95</sup> Rather than analyzing Ramos’s individual facts and record, it dispensed of his social group by simply stating, “[t]he group consisting of young Honduran men who have been recruited by the MS-13, but who refuse to join, is similarly broad and diverse.”<sup>96</sup>

A petitioner in the First Circuit challenged the BIA’s denial of her social group of “young women recruited by gang members who resist recruitment,” arguing, inter alia, that the Board had failed to conduct an individualized assessment.<sup>97</sup> There the BIA had ruled, based on its prior holdings rather than the petitioner’s facts and record, that the group lacked “well-defined boundaries” and a “recognized level of visibility.”<sup>98</sup> The First Circuit concluded that the BIA’s analysis (or lack thereof) was a sufficient basis on which to repudiate the social group.<sup>99</sup> Since its decision in *Mendez-Barrera*, the First Circuit has rejected other social groups defined in part by recruitment without analyzing the facts or record.<sup>100</sup> Similarly, in *Ortiz-Puentes v. Holder*, the Eighth Circuit provided no individualized discussion of the relevant facts; rather it cited to *S-E-G-* in summarily concluding that “[a] group of persons defined as those who suffer violence because they refused to join criminal gangs ‘lacks the visibility and particularity required to constitute a social group.’”<sup>101</sup> Meanwhile, the BIA has gone so far in unpublished decisions to cite to *S-E-G-* in rejecting social groups bearing little, if any, resemblance to the groups advanced in *S-E-G-*. For example, in one case, the Board recharacterized a social group defined by religion and religious practice as “those who have taken direct action to oppose criminal gangs in El Salvador” and denied the claim under *S-E-G-*.<sup>102</sup>

While courts have repeatedly denied claims, no court has explained with the facts at bar what it would have taken to satisfy the elusive social group requirements. Given the lack of clarity and guidance from the BIA, this is unsurprising. In response to the wholesale rejection of claims based on resistance to gang recruitment, practitioners have crafted social groups incorporating characteristics in addition to youth and resistance to join gangs. These social groups have fared no better. For example, the First Circuit recently rejected the claim of “young Salvadoran men who have

already resisted gang recruitment and whose parents are unavailable to protect them.”<sup>103</sup> The court ruled that the group was not sufficiently particular because “lack of parental protection” was too subjective and resistance to gangs was “amorphous” and “boundless.”<sup>104</sup>

Underlying this pattern of rejection is the same erroneous conflation of nexus with cognizability of the particular social group referred to in the discussion of the BIA’s treatment of *S-E-G*. See notes 21-27 and accompanying text, *supra*. For example, the panel in *Orellana-Monson v. Holder* held that the social group of “Salvador[an] males between the ages of 8 and 15 who have been recruited by Mara 18 but have refused to join the gang because of their principal opposition to the gang and what they want” lacked social visibility and particularity because of the “pervasive nature of Mara 18 [violence] against any non-gang member in El Salvadoran society” and because gangs target young men for reasons other than their “particular political orientation, interests, lifestyle, or any other identifying factors.”<sup>105</sup> However, *why* gangs target who they do and *whether* a group is cognizable are separate analytical inquiries. Additionally, the fact that others in Salvadoran society may be victims of random gang violence does not preclude a legitimate claim of persecution based on social group membership. The court’s approach in *Orellana-Monson* disregards established case law that, even in situations of general strife (i.e., widespread gang violence), an individual may be targeted on account of a statutorily protected ground.<sup>106</sup>

In circuits such as the Third and Seventh, which adhere to the *Acosta* standard and do not require social visibility and particularity, social groups defined by resistance to recruitment may be found viable although neither court has ruled on this issue. First, refusal or resistance to join a gang may be based on deeply held religious or political beliefs so fundamental to one’s identity or conscience that one should not be required to abandon them.<sup>107</sup> Second, “youth” and the past experience of having been recruited and refused gang membership may be immutable characteristics.<sup>108</sup> Additionally, in its first decision in *Valdiviezo-Galdamez*, the Third Circuit expressed support for a social group defined by resistance to gang recruitment, which it recognized was similar to other social groups approved by the Board, such as the one in *Kasinga*.<sup>109</sup> The Seventh Circuit, however, has expressed doubt in dicta about the cognizability of a social group defined by resistance to recruitment.<sup>110</sup> A decision in *Valdiviezo-Galdamez*,

currently on remand to the BIA, may provide insight into the viability of recruitment cases in circuits that apply *Acosta* although the BIA will more likely continue to adhere to some version of social visibility and particularity.

While the BIA and the federal courts of appeals that apply social visibility and particularity have all but shut the door on social groups defined by resistance to recruitment, attorneys should not wholesale abandon this approach because, as discussed in notes 300-328 and accompanying text, *infra*, with the right facts, record, and argument, there is still the possibility of success. In addition, practitioners should watch for the BIA’s decision in *Valdiviezo-Galdamez* on remand<sup>111</sup> and decisions in the Third and Seventh Circuits on resistance to recruitment for developments in such claims under the *Acosta* framework.

### ◆ Gender-Based Claims

The U.S. has long recognized social groups defined by gender in combination with other characteristics.<sup>112</sup> Notwithstanding the acceptance of gender-defined social groups, the few gender-based cases involving gang persecution that have made it to the federal courts have been rejected.<sup>113</sup> Social groups defined by gender and resistance to recruitment fail for the same reasons that groups defined by resistance to recruitment fall short. However, even if one were to accept the prevailing analysis in male cases as legally sound (which the authors of this *Briefing* do not), the application of that same approach to gendered cases is deeply flawed. Women’s resistance to recruitment claims differ significantly from those of men, and analyzing them in the same manner ignores the deeply entrenched patriarchy in gangs and the societies in which gangs flourish as well as the unique nature of gang violence against women.<sup>114</sup>

### Background: Discrimination and Violence Against Women in Society and in Gangs

Much has been written on the firmly ingrained patriarchy, discrimination, and alarming rates of violence against women in Guatemala,<sup>115</sup> El Salvador,<sup>116</sup> and Honduras,<sup>117</sup> the countries from which the majority of asylum cases involving fleeing gang violence come. Women in Guatemala, El Salvador, and Honduras are disproportionately subjected to domestic violence, sexual abuse and exploitation, sex trafficking, and other forms of violence and discrimination both because their societies view women as inferior and because their states fail

to protect them from such violence. International and domestic bodies focused on women's rights have condemned the high levels of impunity for violence against women in the three countries.<sup>118</sup>

Similarly, gangs prey on young women in Central America because of their subordinate status in society and their deprivation of state protection. Central American gangs replicate the patriarchal norms, subjugation of women, and violence against women that is rife throughout Guatemala, El Salvador, and Honduras. Gang members threaten potential female recruits with sexual abuse if they decline to join the gang or refuse to become the girlfriend of a gang member.<sup>119</sup> For a girl who has been pressured into joining a gang, initiation often involves being gang raped by several male members of the gang.<sup>120</sup> Once a member of the gang, women are regularly physically and sexually abused and suppressed by male gang members because:

Male domination and the reproduction of the patriarchal model reach exaggerated proportions in gang culture. Male domination is present in all gang activities. ... In the gang world, the feminine model is seen as a sign of weakness, a lack of security, cowardice and inferiority. ... Male domination is also reflected in gangs' decision-making processes. Usually, female gang members have limited rights and are considered unreliable for activities outside those traditional roles assigned to women by society as a whole. ... Female gang members are under the constant control of men, even when they are in prison. ... This consideration of women as an object belonging to them is the same in all social groups where the system of patriarchal domination is practiced to an extreme, both inside and outside the prison. ... Physical, psychological and sexual violence against women is a common practice in street gangs. ... The men regularly denigrate the women and share a macho motto of abuse and domination towards them, elements which form part of the vicious domination-subjection spiral in which many women find themselves.<sup>121</sup>

Although female gang members have "increasingly started to carry out tasks which were traditionally performed by male gang members, this has not led to a breakaway from the traditional roles assigned to them by the patriarchal system of domination."<sup>122</sup> As with Guatemalan, Salvadoran, and Honduran women who are victims of domestic violence, sexual abuse, trafficking, and oth-

er forms of violence against women, women who are victimized by gangs have no recourse because of their governments' abysmal response rates to violence against women.<sup>123</sup> The generally feeble protection provided to women in these countries is arguably even more ineffectual in cases involving gang violence due to the inability of Central American governments to restrain gang violence thus far.<sup>124</sup>

### **Background: Social Groups Defined by Gender and the Context of Gang Violence Against Women**

The subordinate position women occupy in Guatemala, El Salvador, and Honduras and the acceptance of violence against them are key to making the argument that women who resist gang violence constitute a social group which meets the visibility and particularity requirements. The position set forth by the Department of Homeland Security (DHS) in its training materials, as well as in a brief submitted by its headquarters in a widely-reported-on domestic violence case known as *Matter of L-R* (see note 127), illustrates the framework for this approach. According to the DHS, social visibility can be established by showing that "members of the group possess a trait or traits that make the members recognizable or distinct in the society in question."<sup>125</sup> As the words themselves imply, social distinction can be shown by presenting evidence that "the society in question distinguishes people who share that trait from people who do not possess that trait."<sup>126</sup> Evidence that members of the group are treated differently—such as by "occupy[ing] a subordinate position" in society or being subjected to higher rates of violence than others in society—can establish social visibility.<sup>127</sup> Similarly, evidence that the state treats members of the group distinctly, for example by depriving them of protection generally provided others in society, can establish a group's social visibility.<sup>128</sup>

DHS' framework recognizes that social and legal norms tolerating domestic violence and providing impunity to abusers establish the social distinction or visibility of a social group defined by gender and status in a domestic relationship, and the DHS grants asylum based on domestic violence accordingly.<sup>129</sup> Immigration judges across the country have followed the DHS' framework to grant cases based on domestic violence.<sup>130</sup> Applying the DHS' framework in the context of gang violence against women in Guatemala, El Salvador, and Honduras, a social group defined by gender and resistance to gang membership or sexual exploitation should be found socially distinct. With-

in those societies, women, in general, and women who resist gangs, in particular, are viewed and treated distinctly by society, gangs, and the state, as discussed in notes 115-123 and accompanying text, above. Differential treatment of women who resist or refuse membership or sexual exploitation by gangs should establish the group's visibility and can be shown through evidence of (1) the entrenched patriarchal norms, discrimination and subordination of women and high rates of violence against women in these countries, (2) the fact that such violence against women is "reproduced at exaggerated proportions" in gangs, and (3) the utter failure of these states to protect women from violence in the home and other sectors of society and from violence at the hands of gangs.

Gender-based gang claims may also involve domestic violence at the hands of a gang member or gang members. While there are no published decisions on domestic violence as a basis for asylum, as discussed above, the DHS' position is that a social group defined by gender, nationality, and inability to leave a domestic relationship, or being viewed as property in the relationship, can fulfill the social visibility requirement when the evidence shows social distinction of the group through societal attitudes accepting domestic violence and lack of state protection for group members. The same or a very similar social group should thus succeed in the context of domestic violence by a gang member or members who view female gang members as property and who may prevent them from leaving the gang. Several immigration judges have granted asylum in this context.<sup>131</sup> In addition, the Board is currently considering whether domestic violence can be a basis for asylum and whether "Guatemalan women" constitutes a social group as it reviews several cases raising these questions.<sup>132</sup>

### Jurisprudence in Cases Involving Gang Violence Against Women

*Rivera-Barrientos* in the Tenth Circuit highlights the flaws in an approach that simply applies the same framework to the cases of young men and young women. The court rejected a particular social group defined as "women in El Salvador between the ages of 12 and 25 who resisted gang recruitment."<sup>133</sup> *Rivera-Barrientos* was brutally gang raped in a field as retribution for her refusal to join the gang.<sup>134</sup> She was told that she and her mother would be killed if she reported the rapes to the police.<sup>135</sup> The UNHCR filed an amicus brief in which it argued that gangs are "highly patriarchal in their structure and attitudes" and "young wom-

en are often targeted to act as sexual partners—whether voluntarily or by force—for the male gang members, leading to sexual assault, rape and violence."<sup>136</sup> The court held that the group was sufficiently particular because gender, age, and resistance to gang recruitment are "susceptible to easy definition" and therefore not vague, but was not visible since there was no evidence demonstrating that society perceives "young women who have resisted gang recruitment to be a distinct social group."<sup>137</sup> This conclusion fails to appreciate the relevance of the patriarchal structure of gangs, the unique vulnerability of women targeted for sexual exploitation by gangs,<sup>138</sup> and the history of subjugation of women in El Salvador, as well as their general exclusion from state protection, all of which clearly distinguish women who resist gang membership from men who do the same.

Similarly, the First Circuit rejected a social group of "young women recruited by gang members who resist such recruitment."<sup>139</sup> The petitioner, a Salvadoran woman, was threatened with sexual abuse if she did not acquiesce to the gang's demands.<sup>140</sup> The court found that the group lacked visibility since Mendez-Barrera "failed to provide even a scintilla of evidence" that it was recognized in the community. The group also lacked particularity because it would be "virtually impossible to identify who is or is not a member."<sup>141</sup> As was the case in *Rivera-Barrientos*, the court overlooked the relevance of the subordinate status and treatment of women in Salvadoran society and gangs, as well as their illusory protection by the state, to the determination of social visibility.<sup>142</sup> While the court also held that the group was not sufficiently particular because the characteristics defining it were too amorphous, *Rivera-Barrientos*'s later conclusion to the contrary supports the particularity of such a group.

In another case arising in the First Circuit, the BIA reversed an immigration judge's grant of asylum to a woman who feared persecution at the hands of a gang. The applicant was an indigenous Guatemalan woman who was threatened by a gang after helping her daughter flee gang threats and harassment stemming from her refusal to date a gang member, resistance to join the gang, or both.<sup>143</sup> After finding that indigenous Guatemalan women are "disproportionately affected by gang violence" and "are more likely to be victims of private crime and violence and less likely to seek or be afforded police protection," the immigration judge approved the social group of "indigenous women."<sup>144</sup> The Board perfunctorily

dismissed the applicant's social group under *S-E-G-* despite the fact that "indigenous women" is wholly distinct from the group advanced in *S-E-G-* and that the factual circumstances of the case differ significantly from those in *S-E-G-*, making *S-E-G-* inapposite. Moreover, the attempted forced relationship element of the case called for it to be analyzed as a domestic violence claim rather than a resistance to recruitment claim, again illustrating the faulty analysis applied in cases involving gang persecution of women. The First Circuit upheld the Board's decision, but did not rule on the social group.

A published Board decision approving a social group in the domestic violence context or accepting Guatemalan women as a social group would significantly impact the treatment of gender-based gang claims. In the meantime, social groups defined by the immutable characteristic of gender, the past experience of gang recruitment, and the fundamental characteristic of resistance to joining the gang; being sexually exploited; or being forced to date or become the property of a gang member or members should succeed with the right evidentiary showing and correct legal analysis.

#### ◆ Witness/Informant Claims

Once an individual testifies against a gang member, he or she becomes extremely vulnerable to gang persecution.<sup>145</sup> Social groups defined by an individual's role as a witness (i.e., an individual who testifies in court against a gang) or informant (i.e., an individual who provides information to government officials regarding gangs' criminal activities) have received mixed outcomes in the federal courts of appeals.

In *In re C-A-*, the BIA rejected the particular social group "former noncriminal drug informants working against the Cali drug cartel."<sup>146</sup> The Board concluded that the group lacked particularity because it was "too loosely defined" as it could "potentially include persons who passed along information concerning any of the numerous guerrilla factions or narco-trafficking cartels currently active in Colombia to the Government or to a competing faction or cartel."<sup>147</sup> Applying social visibility in the most literal sense, the Board held that the group was not visible because the nature of being a "confidential informant" is outside the public view. The applicant had argued that acting out of civic duty rather than for compensation made the group visible, but the BIA found "no showing that whether an informant was compensated is of any relevance to the Cali cartel" and that Colombian

society does not recognize informants acting out of civic duty.<sup>148</sup> Notably, the Board also found that the group did not satisfy *Acosta* because, while informing on the cartel was a past act and therefore unchangeable (i.e., immutable), not all past acts can define social group membership. The Board explained that the act of informing, even when morally compelled, is analogous to serving as a police officer, which it had ruled was not a social group in *Matter of Fuentes* because both acts involve the decision to take a calculated risk.<sup>149</sup> *Fuentes* held that *current* police officers were not a particular social group but that *former* police officers could be if targeted for their status as former officers.<sup>150</sup> Thus, the Board's comparison of *past* informants to *current* police officers relied on the wrong aspect of *Fuentes* and is misplaced.

Since *C-A-*, several federal courts of appeals have denied petitions for review in cases involving witness- or informant-defined social groups. Some groups have been denied based on social visibility.<sup>151</sup> Other groups have been denied under particularity.<sup>152</sup> The Fourth Circuit recently rejected the social group "young Honduran males who refuse to join MS-13, have notified the authorities of MS-13's harassment tactics, and have an identifiable tormentor within MS-13" because the group was both too amorphous and was not defined by an immutable or innate characteristic.<sup>153</sup> Finally, in *Soriano v. Holder*, the Ninth Circuit disapproved the social group of criminal government informants because it held the group was too broad and not "cohesive [or] homogenous" enough under Ninth Circuit precedent.<sup>154</sup>

By contrast, the Third Circuit, applying the *Acosta* standard, recently granted a petition for review in the case of a witness who testified against gang members.<sup>155</sup> The court reversed the Board's rejection of the social group and found:

The applicant shared a 'common, immutable characteristic' with other civilian witnesses who have the 'shared past experience' of assisting law enforcement against violent gangs that threaten communities in Central America. It is a characteristic that members cannot change because it is based on past conduct that cannot be undone. To the extent that members of this group can recant their testimony, they 'should not be required to' do so.<sup>156</sup>

Because the past act of having informed or testified against gangs is unchangeable and because belief that criminality is wrong and should be reported to law enforcement is a fundamental

belief that one should not have to abandon, other circuits applying *Acosta* should similarly endorse witness or informant social groups.

Even in circuits applying social visibility and particularity, some judges have expressed support for a social group of witnesses against gangs. For example, in his concurrence in *Zelaya*, Judge Floyd took the position that a group of prosecution witnesses who testify against gangs is visible and particular.<sup>157</sup> As mentioned above, *Zelaya* rejected the social group of individuals who have reported gang violence to police. The majority's opinion was based in part on its read of *Crespin-Valladares*, which it believed approved only the social group of family of prosecution witnesses and clearly "exclud[ed] persons who merely testify against" gangs.<sup>158</sup> Judge Floyd concurred with the majority that the social group was too broad and amorphous, but wrote separately because he disagreed with the majority's read of *Crespin-Valladares*. In his opinion, "*Crespin-Valladares* is properly read to indicate that such a group [of prosecution witnesses against gangs] satisfies [social visibility and particularity] in the same manner that 'family members of prosecution witnesses against gangs' do."<sup>159</sup> Judge Floyd explained that, "to the extent members of a particular, socially visible group are defined by their relationship to another person or group of people, this person or group presumably also satisfies the particularity and social visibility criteria."<sup>160</sup>

Additionally, Judge Bea's concurrence in *Henriquez-Rivas* conveys his belief that witnesses who testify against gang members form a social group.<sup>161</sup> Judge Bea stated that, were he not constrained by precedent, he would rule that a social group of witnesses or informants satisfies immutability, social visibility, and particularity.<sup>162</sup> He would find social visibility based on a recently enacted Salvadoran witness protection law, which provides "significant evidence that Salvadoran society recognizes the unique vulnerability of people who testify against MS gang members," and particularity based on the fact that group members "can be easily verified—and thus delimited—through court records documenting the petitioner's testimony against a gang."<sup>163</sup> Shortly after Judge Bea's concurrence, the Ninth Circuit granted rehearing en banc. During oral argument, a majority of judges on the en banc panel made clear that they were hard pressed to understand how the group at issue in the case was not socially visible and particular.<sup>164</sup>

Despite some resistance, these claims remain viable. The holdings in *C-A-* and *Scatambuli* that the group of informants lacked social visibility were based on an interpretation that requires literal visibility of the group. Following the government's retreat from this position<sup>165</sup> and Judge Bea's and Judge Floyd's respective concurrences in *Henriquez-Rivas* and *Zelaya*, witness and informant cases may have an easier time establishing social visibility. Particularity has posed a greater barrier to these claims than visibility, but, as Judge Bea's and Judge Floyd's concurrences show, cases involving testifying in formal proceedings should satisfy particularity. Meanwhile, the Third Circuit's holding in *Garcia* demonstrates that a social group of witnesses or informants should succeed under *Acosta's* immutable or fundamental characteristics approach.

#### ◆ Family-Based Claims

Family is well recognized as a social group, and consequently gang claims based on family membership are on more solid ground. However, the few published federal courts of appeals decisions squarely ruling on this issue cut both ways. In 2011, the Fourth Circuit granted a petition for review in a gang case based on family membership.<sup>166</sup> The petitioner, whose uncle was a witness against a gang, argued that he feared persecution on account of his membership in a social group of "family members of those who actively oppose [criminal gangs in El Salvador] by agreeing to be a prosecutorial witness."<sup>167</sup>

Looking to other circuit court decisions recognizing that "family ties can provide a basis for asylum,"<sup>168</sup> the court held that family membership is an immutable characteristic which can define a social group.<sup>169</sup> The court also concluded that Crespin's group was socially visible because (1) family is a "readily identifiable" group, (2) the BIA stated in *In re C-A-* that family is "easily recognizable and understood by others to constitute [a] social group[]," and (3) Crespin's family was especially identifiable "given that Crespin and his uncle publicly cooperated with the prosecution of their relative's murder."<sup>170</sup> Additionally, the court found that the inclusion of family membership distinguished Crespin-Valladares's social group from that of "government witnesses" or "informants," which the BIA had rejected in *C-A-*.<sup>171</sup>

The BIA had ruled that Crespin's social group lacked particularity because "anyone who testified against MS 13 as well as all of their family members would potentially be included," but the

Fourth Circuit disagreed, noting that the group was not defined in that manner but defined in relation to the family membership. Strikingly, the court failed to grapple with the BIA's contrary holding in *Matter of S-E-G-* that "family members" of gang resisters was too amorphous a group.<sup>172</sup> Sidestepping the issue altogether, the court simply concluded that the group was particular because the "family unit—centered here around the relationship between an uncle and his nephew—possesses boundaries that are at least as 'particular and well-defined' as other groups whose members have qualified for asylum."<sup>173</sup>

In an unpublished 2010 decision, the Ninth Circuit remanded a gang persecution case based on family membership and ordered the BIA to "adequately consider the family aspect of [Petitioner] Martinez-Seren's particular social group and any other issues that thereby arise."<sup>174</sup> Martinez-Seren claimed persecution by Mara Salvatrucha based on a particular social group "defined in part by membership in his family and in part by him and his sister's reporting the gang to police."<sup>175</sup> The Ninth Circuit vacated the BIA's decision and remanded, holding that "the BIA failed to address the family aspect of [petitioner's] proposed particular social group ... [which] was particularly relevant in light of record evidence that the gang targeted members of Martinez-Seren's family in addition to him and his sister."<sup>176</sup> The Ninth Circuit's remand indicates implicit support for such claims.

Meanwhile, the Eighth Circuit denied a gang persecution claim based on family membership in *Constanza v. Holder*.<sup>177</sup> Constanza had not been personally targeted by gangs while living in El Salvador, but his nephew had been kidnapped and held for ransom by a gang, and his cousin had been robbed and murdered by gang members. Constanza's siblings and children remained in El Salvador and were not targeted by the gang.<sup>178</sup> Through counsel, Constanza argued that he had a well-founded fear of persecution on account of membership in the social group of "a family that experienced gang violence." The court rejected the group for lack of visibility and particularity, but its analysis was flawed.<sup>179</sup> First, without any explanation, the court stated that the group was too broad to be perceived as a group by society.<sup>180</sup> This conclusory statement is not based on precedent; there is no authority which supports the proposition that visibility is dependent on a group's size. Second, the court conflated the issues of well-founded fear and cognizability of the group, rejecting the

group in part because "the record [did not] demonstrate that MS-13 will target Constanza's family in the future."<sup>181</sup> Whether Constanza and his family have a well-founded fear of persecution and whether they comprise a cognizable group are distinct legal issues.<sup>182</sup> Finally, the court held that, because Constanza's family was "no different from any other Salvadoran family that has experienced gang violence," his family lacked social visibility and particularity.<sup>183</sup> In doing so, the court made no reference to the body of jurisprudence affirming family as a particular social group, and it improperly focused on the visibility and particularity of Constanza's family as opposed to that of family more generally or "families targeted by gangs."<sup>184</sup> From the decision, it is unclear whether Constanza's family members who were targeted had resisted or opposed the gang—like *Crespin-Valladares's* uncle—or not, which would distinguish the facts and social group from those in *Crespin-Valladares*. The facts and social group in *Constanza* are also distinguishable from those in the cases discussed below, which involve family ties to individuals who resist gangs.

The majority of grants in post *S-E-G-* gang cases on file with the CGRS at the University of California Hastings College of the Law have been based on social groups defined in part by family ties. Family-based claims have been particularly successful in cases where immediate family members actively engaged in antigang efforts. For example, in a 2011 decision from Arlington, Virginia, an immigration judge granted the claim of a woman whose husband was an undercover officer working against gangs. The applicant documented numerous instances where she was viciously targeted because of her husband's involvement with antigang work. The immigration judge granted her claim based on the social group "immediate relatives of Salvadoran police officers involved in anti-gang efforts."<sup>185</sup> The judge noted that there is consensus amongst federal circuit courts that "kinship ties" may form the basis of a social group.<sup>186</sup>

Claims have also been granted where family members were not public in their opposition to gangs. For example, in a 2009 decision from Baltimore, an immigration judge granted the claim of a teenage Salvadoran boy whose brother had been killed when he was 16 years old (and the applicant was 10 years old) as a consequence of his refusal to join MS-13.<sup>187</sup> Gang members "frequently and repeatedly" attacked the applicant from the time when he was 10 years old. Here, the family's opposition to the gang was expressed through the

children's refusal to join the gang rather than an overt or public opposition to gang activity, such as testifying in court or engaging in antigang police work. The judge characterized the social group as "subset of nuclear XXX family at which MS 13 directed its persecution because of XXX's (respondent's brother's) refusal to join MS 13." The judge found that the group was sufficiently visible and particular because it was limited to nuclear family members.

#### ◆ Former Gang Members

The Sixth and Seventh Circuits have recognized former gang members as a particular social group.<sup>188</sup> The Ninth Circuit has rejected a claim based on *current* gang membership, which has subsequently been mischaracterized as a former gang member case.<sup>189</sup> While a social group defined by former gang membership should succeed under both the *Acosta* and *S-E-G* standards, adjudicators have hesitated to recognize such groups for policy reasons, such as concern about granting the benefits of asylum or withholding to individuals who have engaged in violent or criminal activities in their home countries.<sup>190</sup>

In *Arteaga v. Mukasey*, the Ninth Circuit denied the petition for review of a legal permanent resident convicted of gang-related crimes in the United States.<sup>191</sup> *Arteaga* claimed membership in the social group of "American Salvadorian U.S. gang members of a Chicano-American street gang" (or former members of the same).<sup>192</sup>

Although *Arteaga's* counsel characterized him as a former gang member, *Arteaga* testified before the immigration judge (IJ) that he was an inactive but *current* gang member.<sup>193</sup> The Ninth Circuit concluded that *Arteaga's* standing as a convicted felon and (current) gang member is not a characteristic that Congress intended to protect under the Refugee Act and would be an illogical basis for granting relief.<sup>194</sup> The court seemed particularly concerned with the "voluntary" nature of his gang association. Additionally, the court found that the characteristic of being a current but inactive gang member lacked particularity: "the category of non-associated or disaffiliated persons in this context is far too unspecific and amorphous to be called a social group."<sup>195</sup> Thus the Ninth Circuit did not rule in *Arteaga* and still has not ruled on whether former gang membership can constitute a particular social group.

The Sixth and Seventh Circuits have both held that former gang membership is an immutable

characteristic sufficient to define a particular social group under *Acosta*. Following its 2009 decision in *Gatimi*, the Seventh Circuit approved the social group of tattooed former members of the Mara Salvatrucha gang in El Salvador.<sup>196</sup> Distinguishing *Benitez-Ramos* from *Arteaga*, Judge Posner clearly explained:

Being a member of a gang is not a characteristic that a person "cannot change, or should not be required to change," provided that he can resign without facing persecution for doing so. But if he *can't* resign, his situation is the same as that of a former gang member who faces persecution for having quit—the situation Ramos claims to be in. A gang is a group, and being a former member of a group is a characteristic impossible to change, except perhaps by rejoining the group.<sup>197</sup>

In support of this conclusion, the court compared Ramos' proffered group to other recognized groups defined by past experience.<sup>198</sup> The court also responded to *Arteaga*, stating that Congress "said nothing about barring former gang members, perhaps because of ambiguity about what constitutes a 'gang'; or because of the variety of activities, not all criminal, that some 'gangs' engage in; or because of the different levels of participation, some innocuous, of members of some gangs."<sup>199</sup> Furthermore, the court acknowledged that adjudicators have other means of denial, including criminal bars and discretion.<sup>200</sup>

Subsequently, the Sixth Circuit, citing *Benitez-Ramos* and *Gatimi*, held that the Board erred in finding that former gang members were not a social group.<sup>201</sup> The court explained that, while current gang membership was not an immutable or fundamental characteristic, former gang membership was because it could not be shed or changed.<sup>202</sup> The issue of social visibility was not before the court,<sup>203</sup> nonetheless, the court went out of its way to note that the petitioner "instantly would be visibly identifiable" to rival gangs and his former gang.<sup>204</sup> Although the court denied the petitioner's claim on other grounds,<sup>205</sup> it established that, within the Sixth Circuit, former gang membership may qualify as a basis for social group membership.<sup>206</sup>

Following *Benitez-Ramos* but before *Urbina-Mejia*, U.S. Citizenship and Immigration Services (USCIS) issued guidance to the field clarifying that, "[w]ithin the Seventh Circuit, former gang membership may form a particular social group if the former membership is immutable and the group of former gang members is socially dis-

tinct."<sup>207</sup> For cases arising outside of the Seventh Circuit, the guidance memo instructs asylum officers that "the shared characteristic of terrorist, criminal or persecutory activity or association, past or present, cannot form the basis of a particular social group."<sup>208</sup> Consequently, in former gang member cases arising outside of the Sixth or Seventh Circuits, practitioners can expect the government to argue that the shared characteristic of membership in a criminal organization cannot define a particular social group. However, a correct understanding of *Arteaga*, as well as the positive holdings from sister circuits, may help courts recognize former gang members as a cognizable social group.

## NEXUS

Proving nexus has also been a formidable challenge in asylum claims based on gang violence. Adjudicators have been quick to conclude that gangs are motivated by the desire to increase their ranks, wealth, or power and consequently have been dismissive of evidence that persecution stems from a protected ground. The following discussion focuses on political opinion and religion claims involving gang persecution for two reasons. First, political opinion and religion claims involving persecution by gangs have failed primarily under nexus, unlike social group claims, which have typically foundered on cognizability of the group. Second, under proper application of nexus, these claims may be more successful than gang claims based on social group membership, which face the additional difficulty of establishing a cognizable group.

Nexus, which requires that the protected ground or grounds be "one central reason" for the persecution, can be established through either direct or circumstantial evidence.<sup>209</sup> Asylum applicants rarely have direct evidence that gang members targeted them because of religious affiliation or political opinion and so must rely on circumstantial evidence to prove nexus. Courts acknowledge the challenge to obtaining direct evidence: "[p]ersecutors do not always take the time to tell their victims *all* the reasons they are being beaten, kidnapped, or killed."<sup>210</sup> Notwithstanding this recognition by the courts, the jurisprudence in political opinion and religion cases involving persecution by gangs reveals that courts are imposing unreasonable evidentiary standards and discounting both direct and circumstantial evidence. The jurisprudence also indicates that courts are misinterpreting the REAL ID Act to require that the pro-

tected ground be *the* central reason, as opposed to *one* central reason, for persecution by gangs.<sup>211</sup> These trends are consistent with the general bias that many adjudicators appear to harbor against gang-related asylum claims.

### ◆ Political Opinion

Proving persecution on account of political opinion requires showing that (1) the applicant has an actual political opinion or has had one imputed to him or her and (2) the persecutor is motivated to target the applicant on the basis of his or her actual or imputed opinion. Understood in the relevant socio-political context, an individual's decision to challenge a gang's authority (for example, by resisting recruitment, testifying against gang members, reporting gang violence to police, refusing to date a gang member or be sexually exploited by a gang, or refusing to be extorted) may stem from his or her political opinion or may result in the gang imputing such opinion to him or her.<sup>212</sup> Nevertheless, gang claims based on political opinion are routinely denied for failing to establish a political opinion or nexus under *I.N.S. v. Elias-Zacarias* and *Matter of S-E-G*. Underlying this resistance is the belief that gang violence is about increasing size and power, general criminal intent, and punishing any expression of dissent, but nothing more.

Courts' refusal to find that resistance or opposition to gang activity constitutes "political opinion" diverges from the body of federal jurisprudence recognizing a broad range of opinions as political. The courts of appeals have found actual or imputed political opinions based on membership in a trade or labor union,<sup>213</sup> reporting corrupt government activity ("whistleblower" cases),<sup>214</sup> refusal to be sexually subjugated or tortured,<sup>215</sup> refusal to conform to social norms,<sup>216</sup> membership in an organization advocating political, economic, social, or cultural rights,<sup>217</sup> membership in a religious or spiritual organization,<sup>218</sup> refusal to be extorted,<sup>219</sup> refusal to join a guerrilla organization,<sup>220</sup> belief in the rule of law,<sup>221</sup> affiliation with a village or geographical region,<sup>222</sup> and other activities or beliefs. Consciously chosen political neutrality has also been held to constitute a political opinion "in an environment in which political neutrality is fraught with hazard, from governmental or uncontrolled anti-government forces."<sup>223</sup> In addition, according to the UNHCR, "political opinion" should be "understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged."<sup>224</sup>

Courts' reliance on *Elias-Zacarias* and *S-E-G-* to reject political opinion claims without engaging in a rigorous analysis of the record also diverges from the line of cases that consider the socio-political context in the country of persecution in ruling on whether conduct or belief is political and whether persecution is on account of the applicant's real or imputed political opinion. *Osorio v. I.N.S.* is illustrative.<sup>225</sup> There the court criticized the BIA for "ignor[ing] the political context of the dispute" and failing to recognize that "in a country where the standard of living is low, and where the government suppresses civil liberties and commits widespread human rights violations, unions (and student organizations) are often the only vehicles for political expression."<sup>226</sup>

The context in which gang violence occurs is relevant to the analysis of these claims and is politically charged. For example, gangs may exercise de facto control over certain neighborhoods or areas, and "activities of gangs and certain State agents may be so closely intertwined that gangs exercise direct or indirect influence over a segment of the State or individual government officials. Where criminal activity implicates agents of the State, opposition to criminal acts may be analogous with opposition to State authorities."<sup>227</sup> Within this context, resisting gangs in one way or another may be an expression of a range of political opinions, such as belief in the rule of law, opposition to gangs' criminality and violation of human rights, feminism or the right to be free from sexual exploitation, criticism of government policy on gangs, or conscious and deliberate neutrality. Furthermore, even if an individual's opinion might not be found to be political, an individual's resistance to gangs may cause a gang to impute a political opinion to him or her.

Gang mentality is also a critical contextual component to consider when analyzing nexus in these cases. "Central" to gang mentality is "the notion of respect and responses to perceived acts of disrespect. Because respect and reputation play such an important role in gang culture, members and entire gangs go to great lengths to establish and defend both. Refusals to succumb to a gang's demands and/or any actions that challenge or thwart the gang are perceived as acts of disrespect, and thus often trigger a violent and/or punitive response."<sup>228</sup> Consequently, individuals who resist gangs may be "perceived to oppose" the gang or to be "a threat to gangs," which may motivate gangs to persecute.<sup>229</sup> Even if gangs have mixed motives, persecution on account of politi-

cal opinion (or religion) can be established so long as the applicant's political opinion (or religion) is one central reason for the persecution.<sup>230</sup>

### Political Opinion Based on Refusal to Join

In *S-E-G-* and *E-A-G-*, the Board held that reprisal for the respective applicants' refusal to join a gang was not persecution on account of political opinion. Key to the Board's conclusion in those cases were the facts that there was "no evidence in the record that the respondents were politically active or made any anti-gang political statements ... or what political opinion, if any, they held" and no evidence "direct or circumstantial, that [gangs] imputed, or would impute to them, an anti-gang political opinion."<sup>231</sup> Contrary to the Board's assertion, the applicant in *E-A-G-* presented evidence that gangs would impute a political opinion to him because of his brothers' gang affiliation and his refusal to join. The applicant's brothers had both been gang members. One brother was murdered by a rival gang; the other was murdered by his own gang after he left it. Following the brothers' murders, gang members threatened the family.<sup>232</sup> Even this evidence was insufficient to show an actual or imputed opinion in the Board's eyes.

The Board's determination in both cases that no actual or imputed opinion had been established overlooks the fact that resistance to gangs, in and of itself, may be expression of a political opinion (or may result in such opinion being imputed) when considered within the context of the socio-political conditions in the countries where gang violence is rampant.

After concluding that the applicants in *S-E-G-* and *E-A-G-* did not prove actual or imputed political opinion, the Board ruled in both cases that persecution by gangs was not or would not be on account of any such opinion. Relying on *Elias-Zacarias*, where the Supreme Court held that forced recruitment by a guerrilla group was not necessarily persecution on account of political opinion,<sup>233</sup> the BIA found "no indication that the MS-13 gang members who pursued the respondents had any motives other than increasing the size and influence of their gang."<sup>234</sup> The applicant in *E-A-G-* argued that he would be targeted both by members of his brothers' former gang and by rival gangs because of their gang affiliation in addition to his refusal to join. Despite this additional evidence distinguishing the case from one based solely on resistance to recruitment, the Board ruled that any persecution by the gang would be motivated by "rivalry between gangs and a desire of rival gangs

to increase their own power and influence to diminish that of rivals."<sup>235</sup>

In *S-E-G-* and *E-A-G-*, the Board mistakenly interpreted *Elias-Zacarias* as foreclosing claims of persecution based on refusal to join a gang.<sup>236</sup> *Elias-Zacarias* does no such thing. As the Seventh Circuit explained in *Martinez-Buendia v. Holder*, *Elias-Zacarias* "does not stand for the proposition that attempted recruitment by a guerrilla group will never constitute persecution on account of the asylum seeker's political beliefs. Rather, *Elias-Zacarias* instructs courts to carefully consider the factual record of each case when determining whether the petitioner's fear of future persecution due to his refusing recruitment attempts constitutes persecution on account of political beliefs."<sup>237</sup> That approach explains why, even after *Elias-Zacarias*, some cases involving resistance to guerrilla organizations have been granted.<sup>238</sup>

Since *S-E-G-* was decided, no federal court has approved a claim involving resistance to gang recruitment under the statutorily protected ground of political opinion. Instead, courts have routinely held that resistance to gangs is not a political opinion and that reprisal for such resistance is not on account of an actual or imputed political opinion, absent any consideration of the socio-political context in the relevant society.<sup>239</sup> Courts' complete disregard for the political context in which gang violence occurs, and refusal to recognize resistance to gangs as political, is in tension with the jurisprudence discussed in notes 213-226 and accompanying text, *supra*. In addition, courts seem to require that the statutory ground be the only motive for persecution by gangs, which conflicts with the jurisprudence recognizing that nexus may be established in cases involving mixed motives.

The Tenth Circuit has gone so far as to rely on *Elias-Zacarias* to reject a political opinion claim despite direct evidence of the gang's motive.<sup>240</sup> When gang members first attempted to recruit Rivera-Barrientos, she refused, stating "[N]o, I don't want to have anything to do with gangs. I do not believe in what you do."<sup>241</sup> Gang members responded, "If you don't want to join with us, if you don't participate with us, if you are against us, your family will pay."<sup>242</sup> After months of continued pressure to join the gang, a gang member put a knife to Rivera-Barrientos's throat, forced her into a car, blindfolded her, drove her to a field, dragged her out of the car, and asked her whether she had changed her mind.<sup>243</sup> When she responded that she had not, gang members took turns raping her.<sup>244</sup> The immigration judge found Ms. Rivera-Barrientos's

testimony on this issue credible. Despite her vocal opposition, which was stated directly to the gang, the gang members' ensuing comment, which clearly conveyed their beliefs about her opinion, and the gang's subsequent brutal attack, the court concluded that the gang targeted Rivera-Barrientos "primarily" for recruitment purposes.<sup>245</sup> The court's determination, which was based chiefly on the fact that gang members attempted to recruit Rivera-Barrientos even after attacking her,<sup>246</sup> ignores critical evidence of how the gang interpreted Rivera-Barrientos's resistance as being "against" the gang, which called for retribution. Instead, the court simply analogized the case to *Elias-Zacarias*, which is highly distinguishable. Unlike the applicant in *Elias-Zacarias*, Rivera-Barrientos expressed a clear political opinion directly to the gang; moreover, the gang expressed their animosity towards her views and threatened harm because of them. Nevertheless, her brutal persecution was dismissed as recruitment-related violence. The court also overlooked the socio-political context in which gang violence occurs even though the UNHCR's amicus brief addressed the relevant societal context. It appears that the court expected political opinion to be the central reason, as opposed to one central reason, for Rivera-Barrientos's persecution.

By contrast, the Seventh Circuit overturned the BIA in a case involving pressure and recruitment by the FARC (Revolutionary Armed Forces of Colombia) and held that nexus was established between past persecution and the petitioner's political opinion.<sup>247</sup> *Martinez-Buendia*, an optometrist from Colombia and activist in the Health Brigades, was persecuted by the FARC.<sup>248</sup> About two years before *Martinez-Buendia* fled Colombia, the FARC began harassing her with phone calls and letters demanding that she give them public credit for the health care work she organized in rural communities through the Health Brigades.<sup>249</sup> *Martinez-Buendia* testified that, by spray-painting Health Brigade cars with "S.O.B. dogs from the government," the FARC "made it clear that they interpreted her repeated refusal to cooperate as her expressing an anti-FARC political opinion."<sup>250</sup>

According to the court, the record showed that the FARC imputed an anti-FARC political opinion to *Buendia*, which led to their increasingly violent retribution. Persuaded both by *Buendia*'s testimony and documentary evidence that the FARC views members of Health Brigades as political opponents, the court found that *Buendia*'s refusal to give the FARC credit for her work in the Health

Brigades was driven by her political views and the FARC's violent response was on account of those views.<sup>251</sup> Notably, the court found that Buendia's steadfast resistance in the face of increasing violence "would have only strengthened the FARC's belief that she was a political opponent."<sup>252</sup> The court found that *Martinez-Buendia* was distinguishable from *Elias-Zacarias* because, unlike in *Elias-Zacarias* where the petitioner immediately fled after being approached by guerrillas, there was evidence of "post-refusal persecution" and of how the FARC interpreted Buendia's actions.<sup>253</sup> Attorneys should look to *Martinez-Buendia* when litigating gang cases based on resistance to recruitment because the court properly understood the limits of *Elias-Zacarias*, carefully considered circumstantial evidence, including the societal context in which the persecution occurred, and recognized that the FARC's view of Buendia as a political opponent would be solidified by her continued resistance despite the FARC's increasing violence.

The court in *Rivera-Barrientos* and other federal courts of appeals decisions reveal a limited understanding of the socio-political context in which gang violence occurs and fail to recognize several critical points. First, an individual may resist gang recruitment because of his or her profound beliefs or deliberate decision to remain neutral—which should qualify as political under federal jurisprudence. Second, "refusal to give in to the demands of a gang is viewed by gangs as an act of betrayal, and gangs typically impute anti-gang sentiment to the victim whether or not s/he voices actual gang opposition."<sup>254</sup> Viewed in this light, gangs may be motivated to persecute on account of actual or imputed political opinion, and political opinion claims based on refusal to join a gang may be viable depending on the evidence in a particular case.

### Witness/Informant Political Opinion Claims

The federal courts of appeals have thus far denied witness/informant political opinion cases for lack of nexus.<sup>255</sup> For example, in *Soriano v. Holder*, a case of a Filipino informant, the Ninth Circuit held that any future persecution would be motivated by the gang's desire for retaliation, and hence there was no nexus between Soriano's fear and his real or imputed political opinion.<sup>256</sup> Soriano had associated with gang members and participated in some of their criminal activities. After his arrest, Soriano provided the police with information about other gang members who were subsequently arrested. The court found that Soriano failed to establish either an actual or imputed political

opinion or a nexus between any such opinion and his feared persecution.<sup>257</sup> Soriano's involvement with the gang and the fact that he informed on the gang only after his arrest clearly influenced the court's decision. Unlike in *Soriano*, the petitioner in *Castillo-Arias (C-A-)* had no prior criminal involvement and had informed on the Cali drug cartel out of a sense of civic duty; still, the Eleventh Circuit upheld the BIA's denial of the political opinion claim in its first review of the case.<sup>258</sup>

Despite *Soriano* and the first decision in *Castillo-Arias*, political opinion should be a viable ground for asylum under the circumstances in which these cases arise. For example, an individual who serves as a witness or informant against gangs may do so based on an actual political opinion or may have an opinion imputed to him or her by the gang and be persecuted on account of such opinion. In addition, an individual who is targeted after exposing government officials that collude with gangs or receive bribe money from gangs may be able to establish persecution on account of political opinion as a whistleblower. *Antonyan v. Holder* is instructive.<sup>259</sup> Antonyan was an Armenian woman who suffered threats and retaliation from a notorious criminal for testifying about his "drug dealing and his bribery of government officials who protected him."<sup>260</sup> Her repeated efforts to bring the criminal to justice and to expose his ties to corrupt officials were met with inaction by officials. Antonyan's pursuit of justice up the chain of command despite continuous resistance from corrupt officials compelled the court to conclude that she expressed a political opinion.<sup>261</sup> The facts that the criminal's "bribes, drug business, and work as an informant made him valuable to the police and prosecutors" and provided him impunity and that he bragged to Antonyan about the impunity that he enjoyed, compelled the court to conclude that the persecution was motivated by her political opinion. Acknowledging that, while Antonyan's persecutor may have been motivated in part by revenge, the court held that he was also motivated by her "exposing his corrupt ties to law enforcement agencies."<sup>262</sup> The level of corruption in *Antonyan* may be more extreme than in some cases involving gang persecution; nonetheless, the case provides a roadmap from which to analogize to potential whistleblower claims.

### Extortion Claims

As with refusal to be recruited, an individual's refusal to be extorted by gangs may be based on his or her political convictions or may result in the gang imputing such convictions to the individu-

al and persecuting him or her as a result, and, as with claims involving resistance to recruitment, extortion claims run into hurdles. These cases confront the dual challenges of general resistance to gang cases as well as skepticism that extortion cases—regardless of who the persecutor is—are about nothing other than the persecutor’s greed.<sup>263</sup> Unfortunately, the line of cases on extortion miss the fact that greed and persecution on account of a statutorily protected ground are not necessarily mutually exclusive and that gangs (or other persecutors) may be motivated by *several* factors.<sup>264</sup>

In *Marroquin-Ochoma v. Holder*, the Eighth Circuit made clear that, depending on the circumstances, extortion (or recruitment) could be on account of political opinion, but held that there was insufficient evidence to compel the conclusion that the gang targeted Marroquin-Ochoma on account of political opinion.<sup>265</sup> The petitioner in the case was a Guatemalan woman who worked in a bank at a large export company. Members of Mara Salvatrucha began threatening her and demanding that she join the gang and pay the gang money. Although the threats persisted, Ms. Marroquin-Ochoma did not follow the gang’s orders and eventually fled. The immigration judge in the case “[did] not believe that [Marroquin-Ochoma’s refusal to join the gang or to be extorted] really [was] a political opinion” because “[i]nadequate evidence ha[d] been presented to indicate that the gangs actually operate in a political framework, and the problems the respondent had in no way were related to her expression of any political opinion.” He continued, “Resistance to criminal activity is not a political opinion *in this context*.”<sup>266</sup> Marroquin-Ochoma argued to the Eighth Circuit that the judge had erred in requiring a single motive. The court rejected this argument, finding that “[t]he IJ did not improperly conclude that no extortion or recruitment could be motivated by political opinion; the IJ merely concluded that Marroquin-Ochoma had presented insufficient evidence to show that Mara Salvatrucha attributed an anti-gang political opinion to her.”<sup>267</sup> Although the court denied the petition for review, importantly it recognized that opposition or resistance to gangs “may have a political dimension” and that “evidence that a gang is politically minded could be considered evidence that the gang members would be somewhat more likely to attribute political opinions to resisters.”<sup>268</sup> This recognition is significant in light of the complete refusal of other circuits thus far to recognize any political dimension to opposition or refusal to be extorted by gangs.

The Ninth Circuit has held that persecution of an individual who refused to be extorted by the Shining Path in Peru was on account of political opinion.<sup>269</sup> Members of the Shining Path impersonated police officers and extorted Gonzales-Neyra, a business owner, warning that they would shut his business down if he did not pay. Believing that they were police officers, Gonzales-Neyra regularly gave them money. Once he discovered that his extortionists were actually members of the Shining Path, he told them he would no longer pay to “support their ‘armed struggle’” or “collaborate with a group that was trying to destroy [his] country.”<sup>270</sup> Shining Path members began threatening him and demanded that he close his business or be killed. Although the court noted that the Shining Path may have initially been motivated solely by economic interests, it held that persecution following Gonzales-Neyra’s express refusal to support the guerrilla group was on account of political opinion. Notably, in the absence of any express statement of motive by the Shining Path, the court found that “Shining Path representatives made it quite clear to Gonzales-Neyra that his political views motivated their hostility.”<sup>271</sup> If anything, the Shining Path members expressed little more than is typically stated by gang members in the course of persecution and certainly less than was expressed by the gang in *Rivera-Barrientos. Gonzales-Neyra*, which was issued after *Elias-Zacarias*, shows that, when evidence of nexus is properly considered, persecution for resistance to gang extortion (or gangs more generally) may be found to be on account of political opinion.

### Potential for Success

Despite the overwhelmingly negative jurisprudence, some immigration judges have granted gang cases based on political opinion. A recent grant by an immigration judge in New York<sup>272</sup> demonstrates the potential for success given the right facts and an adjudicator who applies the law to the facts at hand. There, the respondent was a bus fare collector in Guatemala. Members of Mara-18 demanded a monthly “tax,” but the respondent refused to pay it because his family needed the money. Gang members attacked him on three separate occasions with each attack dramatically escalating in intensity. Carefully considering the political climate in which the claim arose, the judge held that “refusing to pay the taxes demanded by Mara-18, the Respondent engaged in an activity that was viewed by the gang as a politically charged rejection of its authority.”<sup>273</sup>

An immigration judge in Baltimore granted asylum based on political opinion to a woman who witnessed gang violence. The respondent had witnessed gang members shoot and kill two young men. Shortly after the shooting, police officers arrived on the scene and attempted to interview the respondent, who was so terrified that she did not provide information. Believing that she had reported the murders to the police, gang members abducted and brutally raped her. The immigration judge found that, "because gang members perceive all cooperation with the authorities in response to gang activity as an expression of political opposition to the gang's control, they interpreted the respondent's presence at the scene as such and imputed an anti-gang political opinion to her."<sup>274</sup>

These decisions demonstrate that, in spite of the dearth of positive, published gang political opinion cases, these claims can be viable depending on the facts and evidence in the record and the quality of the legal arguments.

#### ◆ Religion

Two published gang decisions based on religion have been issued; both were denied for failure to establish nexus. In *Quinteros-Mendoza v. Holder*, the Fourth Circuit concluded that money and personal animosity, rather than religion, motivated the persecution.<sup>275</sup> Gang members frequently attacked Quinteros-Mendoza, a Salvadoran Seventh Day Adventist. Several attacks occurred at his church, and he was specifically threatened with further harm if he continued to attend.<sup>276</sup> Ultimately, Quinteros-Mendoza ceased going to church to avoid the gang's wrath, a clear example of the gang's suppression of his faith.<sup>277</sup> Nonetheless, the court denied his claim based on the facts that some attacks occurred in places other than church, gang members demanded money from Quinteros-Mendoza, attacks continued after he stopped going to church, and no other members of his church were targeted.<sup>278</sup>

Contrary to the direct evidence of motive, which was the gang's warnings that Quinteros-Mendoza would be hurt if he continued going to church, and the fact that three attacks occurred at his church, the court concluded that "Quinteros-Mendoza has provided no evidence that his religion or political beliefs were more than incidental or tangential to any part of the persecution he suffered."<sup>279</sup> Following *Quinteros-Mendoza*, one is left to wonder whether the BIA and courts of appeals will be satisfied that gangs are motivated by a pro-

tected ground short of statements such as "we are attacking you because of your religion *and only* your religion." Clearly, this approach misreads applicable law and shows that courts are inappropriately applying the nexus standard to require that religion be *the* central reason rather than *one* central reason for persecution.

In a case before the Seventh Circuit involving a Honduran Evangelical Christian who was active in his church youth group, including in efforts to proselytize youth, the court affirmed the BIA's nexus-based denial.<sup>280</sup> Bueso-Avila and other church members would walk around the community—with bible in hand—recruiting youth to join the church and avoid gangs. Bueso-Avila, who was found credible, testified that gang members considered the church a threat to their power and that, as a result, they attacked and harassed him repeatedly—including directly after church meetings—and also targeted other members of his church.<sup>281</sup> The youth group was ultimately disbanded because of the danger.<sup>282</sup> Bueso-Avila argued that the gang persecuted him on account of his religion.<sup>283</sup> There was no direct evidence of the gang's motive. Circumstantial evidence of nexus included Bueso-Avila's testimony that his church's efforts posed a threat to the gang and that the gang's reprisal was due to his proselytizing, the facts that some attacks occurred directly after church meetings and that other church members were also targeted, and general country conditions documentation on gang violence in Honduras. The Board ruled that the persecution "stemmed from the efforts of the gang members to forcibly recruit him" and that, even if the gang members had mixed motives for persecution, Bueso-Avila had not established that his religion or membership in the youth group "was at least one central reason" for it.<sup>284</sup>

The UNHCR filed an amicus brief, arguing that religion may include antigang beliefs as well as proselytizing or preaching against a gang and that persecution of religious individuals identified by a gang as opponents may be considered to be on account of religion.<sup>285</sup> Irrespective, the Seventh Circuit found that Bueso-Avila's religious persecution claim was plausible, but not compelled by the evidence.<sup>286</sup> Analogizing the case to *Elias-Zacarias*, the court stated that "there is substantial evidence in the record to support the finding that the gang threatened Bueso-Avila simply because he was a youth who refused to join their street gang, regardless of his religious activities."<sup>287</sup> The "substantial evidence" that the court referred to included the lack of direct evidence,

lack of proof that the gang was aware of his religious beliefs and activities, lack of evidence that the gang targets individuals because of their religion or church youth group affiliation, and the fact that the most serious attack on Bueso-Avila occurred after work—not church.<sup>288</sup>

Distinguishing the case from *Martinez-Buendia*, where it had held that the FARC persecuted the petitioner because of her political opinion, the court explained that evidence in *Martinez-Buendia* showed that “the FARC recognized [the petitioner’s] refusal to cooperate as a political stance, and, accordingly, increased their violence against her because of her continued political stand against them.”<sup>289</sup> However, the court failed to reconcile a relevant point in *Martinez-Buendia* with its finding of no nexus. There, the court stated that, “[i]f political opposition is the reason an individual refuses to cooperate with a guerrilla group, and that individual is persecuted for his refusal to cooperate, logic dictates that the persecution is on account of the individual’s political opinion; if the refusal to cooperate is for a non-political reason, the persecution would not be on account of the individual’s political beliefs (unless the petitioner can show that the persecutor imputed a particularly political belief on him based on his refusal to cooperate).”<sup>290</sup> Extrapolating to *Bueso-Avila*, where the petitioner’s refusal to join was based on his religious beliefs and he was harmed because of his refusal to cooperate, “logic [should] dictate[] that the persecution is on account of” his religion. Of course, as discussed in notes 247-253 and accompanying text, supra, in addition to *Martinez-Buendia*’s reason for refusing to cooperate with the FARC, the court relied on evidence of the FARC’s views of Health Brigade members and its perception of *Martinez-Buendia*’s opinion in finding nexus. It is difficult to imagine that the court would have concluded that she was persecuted on account of political opinion based solely on her reason for resisting FARC, but the relevance that the court attached to her basis for resistance is noteworthy.

As with the political opinion cases, *Bueso-Avila* reveals a deficit in judges’ understanding of the context of gang violence and their assessment of these cases. In particular, the court failed to grasp that gangs may view individuals like Bueso-Avila, who are driven by faith to proselytize youth to join the church and leave gangs, as a threat and persecute them to suppress their religion.

Although to date there have been no successful published religion cases based on gang perse-

cution in the federal courts, such claims have been granted in immigration court. For example, an immigration judge recently granted asylum to an applicant who was a devout churchgoer and publicly criticized gangs.<sup>291</sup> Gang members kidnapped her and took her to church where they gang raped her, stabbed her, and carved gang marks into her body. The judge found the facts that the respondent was an open critic of the gang and that gang members raped her at her church provided clear links between the persecution and the respondent’s religion, establishing nexus.<sup>292</sup> In another recent decision, an immigration judge granted the claim of an El Salvadoran Evangelical Christian who felt compelled to speak out against gangs as part of his religion.<sup>293</sup> The IJ was persuaded both by the applicant’s testimony regarding the ways in which he was targeted because of his religious opposition to gangs and by the testimony of an expert witness that gangs routinely persecute religious individuals who speak out against them.

#### ◆ Particular Social Group

Few federal courts have analyzed nexus in the context of social group claims as those claims are generally denied on the basis of a failure to prove particularity and visibility. When courts do reach nexus analysis, the same challenges seen in political opinion and religion cases tend to emerge. For example, in *Caal-Tiul*, the First Circuit refused the claim of an indigenous Guatemalan woman whose daughter was threatened and harassed by gangs, citing lack of evidence that “the gang was in any way motivated by the status of the mother or daughter ... and nothing in the record [that] suggests anything more than a gang preying on a girl and reacting with threats to a parent who sought to interfere.”<sup>294</sup>

The immigration judge had found that indigenous women were at heightened risk of gang violence and were less likely to receive state protection than other sectors of the population. This evidence is critical not only to the social group determination but also to nexus. In analyzing nexus, the Department of Homeland Security looks to direct evidence and circumstantial evidence, including “patterns of violence in the society against individuals similarly situated to the applicant,” as well as evidence that such violence “(1) [is] supported by the legal system or social norms in the country in question, and (2) reflect[s] a prevalent belief within society, or within relevant segments of society.”<sup>295</sup> Evidence that society and the state tolerate persecution of a particular group is rel-

evant to determining whether the persecutor believes that he or she “has the authority” to persecute on account of social group membership.<sup>296</sup> Considered in this light, the evidence of high levels of gang violence directed at indigenous women and low levels of state protection afforded them should have sufficed to establish nexus to the social group of indigenous women. Nevertheless, the court cast aside this decisive circumstantial evidence, stating that “some social, gender, economic, or other groupings are almost always more vulnerable to crime and predation. This does not by itself amount to persecution ... on one of the specific grounds required by the statute.”<sup>297</sup>

The Third Circuit, standing alone, reached a positive nexus decision in its first review of *Valdiviezo-Galdamez*.<sup>298</sup> Because gang members “sought out Galdamez again and again, and targeted him for abuse based on his status as a member of this group ... [n]o reasonable factfinder could conclude that Galdamez was attacked for any reason other than his status as a young Honduran man who had been recruited to join the gang and refused to join.”<sup>299</sup> The court’s positive nexus determination is noteworthy for two reasons. First, rather than discarding the case under *Elias-Zacarias*, the court conducted an individualized analysis of the record. Second, the court recognized that persecution was on account of Galdamez’s status as a young man who defied the gang’s authority, not simply the gang’s desire to swell its ranks.

## ADVICE

### ◆ General

In the face of significant resistance to asylum claims based on persecution by gangs, practitioners should be prepared to build an extensive record of relevant materials, advance creative legal arguments, and raise and preserve issues at every stage of litigation. Attorneys should work closely with clients to obtain a complete picture of their stories and should consult country conditions documentation and experts to understand the client’s situation in the broader societal context. When possible, attorneys should focus claims on aspects other than gang violence in response to resistance to recruitment to avoid reflexive denials by adjudicators. For example, if a woman suffered both domestic violence and gang violence for refusing to join, domestic violence should be the focus of the claim although the gang violence should also be argued. In addition, attorneys should present claims on alternative protected grounds because

an adjudicator may be more comfortable granting a claim based on one ground than another and because doing so preserves arguments on appeal. For example, a claim involving religious persecution may be argued as both a social group and religion claim and possibly a political opinion claim depending on the facts.

Country conditions experts can make the difference in the outcome of cases. The use of experts is critical because country conditions documentation regarding gangs is limited and often quite general. A strong country conditions expert should be able to provide the factual basis to support the various elements of asylum, such as well-founded fear of persecution, protected grounds (e.g., that the social group advanced is one that is perceived as a group and is determinable in the relevant society), nexus, state inability/unwillingness to protect, and unsafe or unreasonable relocation. An expert can also establish that gangs very specifically choose individuals for recruitment on the basis of certain characteristics that gangs are keenly aware of because they observe, follow, and obtain information about prospective recruits prior to inviting them to join the gang. Consequently, gangs have knowledge of where a potential recruit lives as well as his or her political and religious practices or beliefs, familial situation, school, socio-economic situation, and livelihood, and gangs choose potential recruits based on these factors, proof of which can help establish nexus.

For all gang claims, it is critical to paint as comprehensive and detailed a picture as possible of conditions on the ground. Furthermore, it is crucial to draw out the link between each piece of evidence and the legal element it supports, both to increase the chances of a grant and to create a strong record for appeal given the “substantial evidence” standard of review. This is especially true for evidence that supports visibility, particularity, and nexus because of the frequency with which claims are denied on these bases. While ample relevant evidence is necessary, keep in mind that articles about random gang violence are not helpful because they perpetuate the impression that gang violence is indiscriminate and widespread, which undermines arguments regarding targeted persecution and fuels floodgates concerns.

### ◆ Particular Social Group Claims

#### In Circuits that Apply the *Acosta* Standard

Under *Matter of Acosta*, a range of particular social groups raised in the context of persecution

by gangs should be cognizable. Arguably, a social group defined by the immutable characteristic of youth (where relevant) and the immutable experience of having been recruited and having refused to join, in combination with fundamental beliefs regarding rule of law and/or conscientious objection to gangs, should be sufficient to establish social group membership. See notes 86-111 and accompanying text, *supra*. The UNHCR's guidance note on asylum claims based on victims of organized gangs supports such a group.<sup>300</sup> Alternatively, a social group defined by the characteristics targeted in a recruit—such as youth and residence in a particular neighborhood, family ties, or lack of parental protection—might succeed under *Acosta*.<sup>301</sup> However, attorneys should be prepared to respond to arguments that such a group is too broadly defined.<sup>302</sup>

Additionally, former gang membership, already recognized by the Sixth and Seventh Circuits, should be recognized under *Acosta* in spite of the Langlois Memo.<sup>303</sup> A social group defined by the immutable and (likely) fundamental characteristic of having served as a witness or informant should qualify under the *Acosta* standard and has been recognized by the Third Circuit.<sup>304</sup> Family-defined social groups should also succeed under *Acosta* in the context of persecution by gangs.<sup>305</sup> Finally, social groups defined by gender alone or gender in combination with other characteristics should be approved under *Acosta* given the body of jurisprudence affirming gender-defined groups.<sup>306</sup>

### In Circuits that Require Social Visibility and Particularity

**Challenge the Requirements.** In circuits that apply but have not yet explicitly ruled on social visibility and particularity, attorneys should challenge the requirements. In circuits that have already adopted the requirements, attorneys can seek rehearing en banc to challenge their validity although rehearing is unlikely to be granted in the First, Fifth, and Tenth Circuits absent some indication of support from judges in those circuits. Attorneys might argue that social visibility and particularity are not entitled to *Chevron* deference because the BIA departed from the *Acosta* standard without a reasoned explanation, the requirements are inconsistent with prior BIA precedent, and the requirements are incoherent.<sup>307</sup> Practitioners can also argue that the requirements are inconsistent with U.S. obligations under international law because they misconstrue the UNHCR's guidelines on membership in a particular social group and

stray from the object and purpose of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol relating to the Status of Refugees.<sup>308</sup>

**Argue that the Cognizability of a Social Group Must Be Determined Case-By-Case Based on Record Evidence.** Argue that, under Supreme Court and Board precedent, social groups must be analyzed on a case-by-case basis.<sup>309</sup> As recently articulated by the First Circuit, "Asylum cases, virtually by definition, call for individualized determinations."<sup>310</sup>

Attorneys should also argue that social visibility and particularity are record-based determinations and that adjudicators may not import the findings on these elements from one case to another.<sup>311</sup> Consequently, the fact that *S-E-G's* record did not establish a socially visible or particular social group should not prevent another asylum applicant with a different record from establishing the cognizability of a similarly defined group. While this may be obvious to practitioners, it should be explicitly argued in cases given the frequency with which gang claims appear to be denied without individual record analysis.

**Articulate the Standard for Social Visibility and Particularity.** Argue that social visibility is not a question of literal visibility, but one of social perception or distinction.<sup>312</sup> In other words, evidence that society perceives the group as a group or that the group is treated distinctly in society, such as by being excluded from protection, should suffice.<sup>313</sup>

Argue that particularity is a question of whether, within the applicant's community, one can determine who is in the group and who is not.<sup>314</sup> This question must be examined within the relevant societal context, and characteristics that may seem ambiguous to an adjudicator, such as "opposition," may be clear to individuals in the society at issue. Alternatively, argue that particularity is a question of whether the group is defined clearly enough for an adjudicator to determine who is in and who is out of the group.<sup>315</sup> Some judges analyze particularity by separately scrutinizing the definitional clarity of each characteristic describing the social group.<sup>316</sup> This approach often results in judges holding that an individual characteristic is too ambiguous for the group to satisfy particularity. Attorneys should argue that particularity must be assessed based on the articulation of the group as a whole rather than each individual characteristic.

**Defining Social Groups that Should Satisfy Visibility and Particularity.** *Resistance to recruitment.* A social group defined by resistance to recruitment can be viable when the evidence establishes the group's social visibility and particularity. Expert testimony that supports a finding of social visibility and particularity of the group is particularly critical in these cases. In addition, *Rivera-Barrientos* provides support for the argument that a group defined by resistance or opposition to gangs is not amorphous despite the case law in other circuits reaching the opposite conclusion.<sup>317</sup> However, social groups defined by resistance to gang recruitment have not been recognized no matter how well documented they are; therefore, a different approach is necessary. If any characteristics distinguish the case from a typical gang resistance claim, they should be the focus of the social group definition. Distinguishing characteristics might include being lesbian, gay, bisexual, or transgender (LGBT) or having HIV-positive status (or being perceived as LGBT or as having HIV-positive status), having a disability, being a child, being a member of an ethnic or racial minority, or potential ostracism stemming from rape by gangs. For example, if the applicant is LGBT and has been recruited by gangs, an attorney might define the social group by sexual orientation or gender identity rather than resistance to recruitment depending on the facts. If a male applicant was raped by gang members as part of the recruitment process, he might reasonably fear future persecution on account of membership in a social group of men perceived to be gay. Social groups such as these help cases escape being viewed as recruitment-only cases.

Because of the perceived lack of cognizability of social groups defined by resistance to recruitment, attorneys should also consider defining the social group by the characteristics that make an individual particularly vulnerable to gang recruitment and violent retribution. For example, vulnerability due to age, being abandoned or an orphan, being a street child, ties to a specific neighborhood, membership in a church or other youth group, or a combination of these characteristics may be what motivates the gang to target certain individuals for recruitment.<sup>318</sup> Social groups that are defined by these characteristics alone, or in combination with refusal to be recruited, may have greater likelihood of success than groups built solely on resistance to recruitment because adjudicators may more readily find that they are perceived or treated distinctly and have determinable boundaries. Unlike the characteristics of "opposition" or

"resistance," which some courts have declared too vague to satisfy particularity, "childhood" is determinable because the age of majority is defined by law. Similarly, while courts have held that there was insufficient evidence that society perceives individuals who resist gang recruitment as a group, it is axiomatic that children are perceived as a group in society. Although the fear of floodgates may bias adjudicators against broadly defined groups, attorneys should argue that size is irrelevant to the cognizability of a social group.<sup>319</sup> Other statutorily enumerated groups such as race, religion, and nationality may be very large in number, but that does not prevent asylum from being granted on those grounds. Finally, as discussed in detail below, regardless of how the social group is defined, building the record on particularity and visibility is crucial.

*Gender-Based Claims.* Gender violence, as opposed to gang violence, should be emphasized when relevant. If, for example, an applicant suffered domestic violence at the hands of a gang member and also endured broader gang violence, her claim should be focused on domestic violence and should follow the framework set out by the DHS in its brief in *Matter of L-R-*. See notes 125-132 and accompanying text, *supra*. In a case where a gang enslaves a woman or views her as gang property, the attorney should consider a social group similar to those argued in the domestic violence context, such as one defined by gender, nationality, and being viewed as property of the gang.<sup>320</sup> If a woman has escaped gang slavery, she might argue past persecution based on her gender and nationality and an independent fear of future persecution based on membership in a social group of women who were enslaved by a particular gang and who have escaped.<sup>321</sup>

For gender claims involving recruitment by gangs, attorneys should consider arguing a social group such as x (nationality) women who have been recruited by gangs for sexual exploitation and have refused to join, and should highlight the significant differences between women who refuse recruitment and men who do the same. See notes 112-144 and accompanying text, *supra*. Such a group is clearly defined by immutable characteristics (gender and past experience of having been recruited) and fundamental characteristics (refusal to be a sex slave or property of a gang). In order for social groups such as these to succeed, it is critical for attorneys to submit evidence regarding the social distinction of women in the society in general and in gangs in particular.<sup>322</sup> Country

conditions experts will be needed to expound on gangs' views of and treatment of women. Finally, where relevant, attorneys should argue that persecution is on account of a social group defined by gender and nationality and should look for developments at the Board on Guatemalan women as a social group.

*Other cases.* Social groups of both witnesses who testify against a gang and informants who provide information to authorities about gangs have thus far been denied in circuits that apply social visibility and particularity. Some federal judges have expressed the opinion that a witnesses-defined social group should be found visible and particular,<sup>323</sup> but no judge has indicated support for an informant-defined social group. The social group of witnesses may satisfy social visibility and particularity with the right record. The key to success in witness cases is distinguishing from *In re C-A-* (including by arguing that *C-A-* improperly applied a literal visibility requirement) and carefully defining the group to ensure clear benchmarks for membership (e.g., limiting the group to testifying witnesses). A social group of informants could theoretically succeed as well, but attorneys should carefully define the group, so it is clear who is included and which informant activities are covered since particularity has posed a formidable challenge to these cases. For both witness and informant cases, expert testimony is central to proving social visibility and particularity.

Social groups based on family should also withstand the visibility and particularity tests<sup>324</sup> as long as the degree of familial relationship is clearly defined to avoid particularity problems. Attorneys must be prepared to argue, however, that the social visibility of such a group is a question of the visibility of family as a unit in society rather than the visibility of a specific family. Finally, former gang membership should satisfy social visibility and particularity provided that the asylum applicant lacks an ongoing affiliation with the gang unlike the rejected applicant in *Arteaga*.<sup>325</sup> However, the DHS is likely to take the position that former criminal activity cannot form the basis of a social group. Attorneys should argue that any former criminal activity is relevant to bars to asylum, but not social group membership.<sup>326</sup>

**Use Country Conditions Experts.** Given the dearth of specific, relevant research on gangs' belief system and how they operate, relevant and probative expert testimony is essential to a successful outcome.<sup>327</sup> Without a detailed understanding of how gang dynamics manifest in the

applicant's community, an adjudicator will likely be unable to appreciate how visible and particular the proposed group is. It is also worthwhile to consult country conditions experts when thinking about how to define the social group(s) because they have useful insight into who gangs target and why, which is vital to social group formulation and nexus.

**Build the Record.** Building a compelling record is essential. In order to establish visibility, think about what will demonstrate that the proffered group is perceived as a group by the applicant's society or is treated distinctly. Consider the following: news articles, scholarly research, popular literature discussing the group or characteristics of it, laws enacted regarding group members (e.g., witness protection law), words or phrases in vernacular regarding the group, statistics and/or expert testimony regarding the rate of persecution of the group or rates of prosecution/police response to targeting of the group, expert testimony that explains how the socio-political context makes the group recognizable by society, lay testimony from people in the community about how they perceive the group or how the group is treated differently, and testimony from former gang members about how gangs perceive the proffered group.

In order to establish particularity, put on evidence, including expert testimony, to show that, in the particular society, membership in the group is determinable (and is regularly determined by gangs or others). Additionally, consider what characteristics would enable a fact finder to determine with clarity whether the applicant is or is not a member of the proffered group. Are there laws or policies focused on the particular group (e.g., laws addressing children, women, or witnesses) or other objective means of determining membership (e.g., a court docket or transcript from a testifying witness case, birth certificates to show family relationship)? Groups must be defined by determinate or determinable characteristics; for example, "children of XX" or "nuclear family of XX" should be sufficient whereas "family members of XX" may be found to be too amorphous because it can include all degrees of familial relationship.<sup>328</sup>

Attorneys should also submit immigration judge decisions granting protection in similar cases. While not binding, such decisions may be persuasive. Finally, given the complexity and challenges posed by the jurisprudence, attorneys are encouraged to seek legal expertise in defining the social group.<sup>329</sup>

### ◆ Political Opinion Claims

As discussed in notes 247-254 and accompanying text, *supra*, resistance to gangs may be based on a number of opinions that, when properly considered in the context of the relevant socio-political and socio-cultural factors, should qualify as political under federal courts of appeals' interpretation of what constitutes a political opinion. Attorneys should distinguish the facts in their cases from those in *Elias-Zacarias* and *S-E-G-* and should argue that those cases do not foreclose gang-based political opinion claims but, instead, require careful consideration of the specific record to determine whether actual or imputed political opinion and persecution on account of the same have been established. See notes 236-238, 253-254 and accompanying text, *supra*.

To establish that the applicant has a political opinion known to the persecutor(s), consider whether the applicant has directly expressed his or her views to the gang or whether his or her opinion is otherwise known to the gang. Lay testimony from members of the community that, for example, "everyone knows that the applicant holds a certain political view because she is involved in a youth group that advocates against gang membership" would help. In cases where the applicant has not expressed or does not have a political opinion, a country conditions expert may be able to establish that a gang would likely impute one to him or her based on the gang's perception of his or her actions.

Proving that the gang persecuted the applicant on account of political opinion is more difficult. The best evidence of nexus is direct evidence, such as statements made by gang members in the course of persecution that show their motives (e.g., that the applicant is against the gang or is an enemy of the gang). Direct evidence is rare; consequently proving motive will likely require reliance on circumstantial evidence, such as testimony by a knowledgeable expert who can explain the relationship between a gang's motives and the applicant's political opinion. Expert testimony can also elucidate gang dynamics, including the gang code, gang core beliefs, context in which violence occurs, and how gangs would perceive an applicant's actions. Other circumstantial evidence should be submitted as well, such as evidence that the gang beat the applicant at the site of youth (or other political) group meetings or targeted other youth group members or that the gang destroyed youth group pamphlets.

Where relevant, attorneys should argue that a persecutor's motives may change over time; even if a gang initially targeted the applicant for reasons other than political opinion, the gang may ultimately be motivated by political opinion.<sup>330</sup> Finally, increasing gang violence in the face of ongoing resistance may help establish that the gang views the applicant as a political opponent.<sup>331</sup>

### ◆ Religion Claims

Attorneys should argue that religious freedom entails not only freedom to believe but also freedom to act in accordance with one's beliefs without fear of persecution.<sup>332</sup> Forcing a person of faith to join a gang may violate his or her religion as much as forcing a Seventh Day Adventist to eat meat or forbidding a Muslim woman to wear a headscarf. The right to freedom of religion extends well beyond the right to think one's religious thoughts and practice one's religious faith behind closed doors. Facing gang violence for living in accordance with one's faith in a situation where one's country is unable or unwilling to protect should form a cognizable claim.

Applicants seeking asylum based on religion must establish that gang members are aware of the applicant's religious beliefs or practices (or have imputed religious beliefs to the applicant) and targeted him or her because of those beliefs or practices. Given the paucity of documentary evidence regarding gangs targeting religious individuals and animosity between gangs and certain religions, expert testimony is particularly critical.

Of course, direct evidence that the gang targeted the applicant on account of his or her religion—such as threats by the gang that the applicant will suffer violence or death unless he or she stops attending church or proselytizing or derogatory comments about the applicant's religion made during the course of persecution—is ideal, but rarely available. Therefore, most religion claims will rely heavily on circumstantial evidence. In considering what circumstantial evidence would be most useful, think about the role of the church in the applicant's community. Does the church pose a threat to the gang's power? How influential is it in shaping opinions in the community? What social services does it provide, particularly for vulnerable youth? Does the church recruit youth away from gangs? Also, look to the historical relationship between the church and gangs. Has the gang targeted other church members? Has the gang desecrated church property in the past? Additionally, think about details surrounding the persecution: Did it take

place at the church or some other religiously affiliated space? Did the gang leave any of its markings on the petitioner or in the church? Consider the applicant's relationship to the church: Does he or she have a longstanding relationship with the church and involvement with specific church activities beyond regular attendance?

Some churches specifically recruit youth who are vulnerable to gangs and/or recruit current gang members, placing the church in direct competition with the gangs. Evidence of this rivalry may help establish nexus. There may also be certain prospective recruits whose membership in the gang would be of significant symbolic value or may influence others to join. For example, successfully persuading a church youth group leader to join the gang may signify the gang's victory over the church and may cause other youth to join the gang. Evidence that the applicant is a high-value recruit because of his or her position in the church should support a finding of nexus. Testimony from other church members and from a country conditions expert may help establish these points.

#### ◆ Additional Considerations

In addition to the issues discussed throughout this *Briefing*, several other considerations that apply to all asylum cases may pose particular challenges in cases involving persecution by gangs. They include proving that the applicant's state is unable or unwilling to control the persecutors, internal relocation issues, bars to asylum, and the exercise of discretion. Since these issues are rarely determinative in asylum claims based on resistance to gangs, they are not the focus of this *Briefing*. Nevertheless, attorneys should anticipate challenges with these issues and build claims accordingly.

#### Unable or Unwilling Requirement

In order to establish eligibility for asylum in cases involving persecution by nonstate actors, an applicant must prove that the government was "unable or unwilling" to control his or her persecutors. It is important to remember that the standard is disjunctive, so the requirement would be met if a government is willing but unable to protect.<sup>333</sup> Applicants can meet this requirement by establishing the actual failure of the police, courts, or other segments of the state to protect when help was sought or through country conditions evidence showing that seeking protection would have been futile or subjected the applicant to further danger.

As discussed herein, gang decisions tend to turn on social group and/or nexus requirements; consequently, courts generally do not reach the issue of whether a state is unable or unwilling to protect. That said, government attorneys may argue this issue, focusing on programs, policies, and laws to address gang violence in the country of persecution, such as the *mano dura* (tough hand) laws formally implemented in El Salvador and Honduras and informally adopted in Guatemala.

*Mano dura* laws represent the Central American zero-tolerance, enforcement-only approach to the proliferation of gangs. Not only have these policies failed to adequately address the situation but also, by all accounts, they have exacerbated violence, pushed gangs further underground, and increased hostility between gangs and police.<sup>334</sup> Additionally, focusing on the zero-tolerance laws themselves says nothing about enforcement of the laws, which requires both political will and state resources. Attorneys should submit evidence regarding enforcement of any antigang provisions, impunity for gang crimes, and corruption or collusion between police and gangs. Department of State Reports insufficiently address these issues. Country conditions experts can lend vital support.

#### Internal Relocation

Additionally, an applicant must establish that he or she would not be able to safely and reasonably relocate within his or her country in order to avoid persecution.<sup>335</sup> Due to the sophisticated gang network of communication combined with the small geographical area of Latin American countries, internal relocation provides no escape from gang violence. As explained by the Washington Office on Latin America, "gang presence is pervasive and relocation would not provide safety from persecution by gangs."<sup>336</sup> Even if one could manage to avoid persecution by gangs, relocation may be unreasonable because of an applicant's age or status as a minor,<sup>337</sup> mental health or other health issues,<sup>338</sup> or gender<sup>339</sup> or because of lack of economic opportunities<sup>340</sup> or general civil strife. A country conditions expert will likely be the only source of specific information regarding the viability of relocation for the petitioner. Thus, expert testimony may be necessary to establish that internal relocation is not a viable or reasonable option for the applicant.

#### Bars to Asylum and Discretion

Finally, all general principles regarding bars to asylum and withholding of removal and the use

of discretion apply in cases involving persecution by gangs, but practitioners should be aware of particular challenges in these cases with respect to bars and discretion. While a detailed discussion of bars and discretion is outside the scope of this *Briefing*, particular issues deserve mention. As in all cases, practitioners should determine whether any potential bars apply<sup>341</sup> and, if so, should consider arguments in response to those bars as well as whether any waivers apply.

Applicants who are former gang members most often face challenges with the particularly serious crime bar (if they have been convicted of crimes in the U.S.) and the serious nonpolitical crime bar (based on gang-related activities committed in their country). The persecutor of others bar and the terrorism and danger to security of the U.S. bars have also been raised in some cases of former gang members, but more infrequently than the criminal bars. Various resources on bars to asylum and withholding of removal are available to attorneys.<sup>342</sup> The UNHCR's guidance, which advises that an applicant's "individual responsibility" must be established when assessing exclusion grounds under the Refugee Convention, can also be helpful.<sup>343</sup>

Further, asylum is a discretionary form of relief, meaning that, even if an applicant meets the definition of a refugee and is not statutorily barred, he or she may *still* be denied relief if negative factors outweigh positive ones.<sup>344</sup> Former gang members may well be denied asylum in the exercise of discretion. Attorneys representing former gang members should document all positive factors, including, for example, sympathetic circumstances, evidence of rehabilitation, positive contribution to the community, success in school, an applicant's young age, etc.

Where an applicant was a child at the time of participation in those activities which could preclude him or her from protection, compelling arguments can be made that bars and discretion should be evaluated with the lens of recent child development and neuroscience research. This burgeoning body of research provides insight into issues regarding culpability, recidivism, and the effects of trauma—issues directly involved in the adjudication of the statutory bars and the exercise of discretion.<sup>345</sup>

## CONCLUSION

The jurisprudence discussed throughout this *Briefing* reveals widespread failure of immigration courts, the BIA, and federal courts of appeals to recognize fear of gang violence as a basis for asylum. The often cursory denials of asylum claims based on resistance to gangs seem to be largely a function of fear of floodgates, misunderstanding of precedent, or ignorance of conditions on the ground. This wholesale rejection of claims has caused bona fide refugees to be deported to their death<sup>346</sup> in violation of United States law and its international obligations.<sup>347</sup>

In addition to providing an overview on the state of the law, this *Briefing* aims to equip attorneys with tools to overcome the barriers presented by the case law. Applying and refining these tools, attorneys may be able to obtain relief for individual clients. Ultimately, conscientious lawyering, supported by partnership with experts who can provide key evidence regarding gang operation and dynamics in relevant countries, can turn the tide. In addition, one hopes that the real life stories of bona fide refugees deported to their deaths will increase adjudicators' willingness to apply the law in a principled manner. Only then will there be the possibility of substantial changes in outcomes for the victims of gang violence in Central America.

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## References

1. *Matter of Acosta*, 19 I. & N. Dec. 211, 1985 WL 56042 (B.I.A. 1985).
2. *Acosta*, 19 I. & N. Dec. at 233.
3. Every circuit court to address the issue upheld the *Acosta* standard. See *Gebremichael v. I.N.S.*, 10 F.3d 28, 36 (1st Cir. 1993); *Koudriachova v. Gonzales*, 490 F.3d 255, 262 (2d Cir. 2007); *Fatin v. I.N.S.*, 12 F.3d 1233, 1239-40 (3d Cir. 1993); *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002); *Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 547, 2003 FED App. 0293P (6th Cir. 2003) (holding modified on other grounds by *Almuhtaseb v. Gonzales*, 453 F.3d 743, 2006 FED App. 0246P (6th Cir. 2006)); *Lwin v. I.N.S.*, 144 F.3d 505, 512 (7th Cir. 1998); *Safaie v. I.N.S.*, 25 F.3d 636, 640 (8th Cir. 1994); *Niang v. Gonzales*, 422 F.3d 1187, 1198-99 (10th Cir. 2005); *Castillo-Arias v. U.S. Atty. Gen.*, 446 F.3d 1190, 1196-97 (11th Cir. 2006). Initially the Ninth

- Circuit took a different approach, requiring particular social groups to be defined by voluntary associational relationships. *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576 (9th Cir. 1986). However, in 2000, with its decision in *Hernandez-Montiel v. I.N.S.*, the court reconciled its position by adopting the *Acosta* criteria and ruling that a particular social group “is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.” *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1092-93 (9th Cir. 2000).
4. The Board recognized a range of social groups under *Acosta*. See, e.g., *Matter of Fuentes*, 19 I. & N. Dec. 658, 1988 WL 235456 (B.I.A. 1988) (former members of the Salvadoran national police); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 1990 WL 547189 (B.I.A. 1990) (homosexuals in Cuba); *In re H-*, 21 I. & N. Dec. 337, 1996 WL 291910 (B.I.A. 1996) (Marehan subclan members in Somalia); *In re Kasinga*, 21 I. & N. Dec. 357, 1996 WL 379826 (B.I.A. 1996) (young women of the Tchamba-Kunsuntu tribe who have not undergone female genital mutilation and who oppose the practice); *In re V-T-S-*, 21 I. & N. Dec. 792, 1997 WL 107592 (B.I.A. 1997) (Filipinos of Chinese ancestry). The Board also rejected social groups for failing to satisfy the *Acosta* standard. See, e.g., *Matter of Vigil*, 19 I. & N. Dec. 572, 1988 WL 235477 (B.I.A. 1988) (young, male, unenlisted, urban Salvadorans); *Matter of Jairo Quintero Rivera*, 2005 Immig. Rptr. LEXIS 10177 (B.I.A. Jan. 19, 2005) (long-time members of the business community); *Matter of Coky Henry Sidabutar a.k.a. Coky Paruliah*, 2006 Immig. Rptr. LEXIS 6961 (B.I.A. Jan. 19, 2006) (persons presumed to possess black magic powers).
  5. United Nations High Commissioner for Refugees (UNHCR), Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), available at <http://www.unhcr.org/3d58de2da.html>. See also *Islam v. Secretary of State for the Home Department* and *Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah*, [1999] 2 A.C. 629 (U.K.); *Secretary of State for the Home Department v. K (FC) and Fornah (FC) v. Secretary of State for the Home Department*, [2006] 1 A.C. 412 (U.K).
  6. See *In re C-A-*, 23 I. & N. Dec. 951, 2006 WL 1977492 (B.I.A. 2006).
  7. *C-A-*, 23 I. & N. Dec. at 956-57.
  8. *C-A-*, 23 I. & N. Dec. at 956-57.
  9. *C-A-*, 23 I. & N. Dec. at 957, 960.
  10. *C-A-*, 23 I. & N. Dec. at 958-59.
  11. *C-A-*, 23 I. & N. Dec. at 960.
  12. *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819, 1990 WL 547189 (B.I.A. 1990); *In re Kasinga*, 21 I. & N. Dec. 357, 1996 WL 379826 (B.I.A. 1996).
  13. In fact, the UNHCR has been clear that, only if the applicant cannot meet the immutable or fundamental characteristics standard, then, *in the alternative*, the court may consider whether the group is nonetheless perceived as a group in society. UNHCR, Guidelines on International Protection: “Membership of a particular social group,” *supra* note 5, at ¶ 13.
  14. *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74, 2007 WL 274141 (B.I.A. 2007).
  15. Without ruling on the issue, the Board indicated that, while wealth is not an immutable characteristic, it may be fundamental. (“We agree with the Immigration Judge that ‘wealth’ is not an immutable characteristic. This determination alone, however, is not dispositive if, for example, the shared characteristic is so fundamental to identity or conscience that it should not be expected to be changed. In this regard, we would not expect divestiture when considering wealth as a characteristic on which a social group may be based.”). *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 73-74.
  16. Literal visibility requires that the proposed group be visible to the naked eye; societal perception looks to whether there is some broader recognition of the group in society.
  17. *A-M-E- & J-G-U-*, 24 I. & N. Dec. at 74.
  18. For example, the BIA never explains whether the group needs to be visible countrywide, citywide, or neighborhood-wide.
  19. *Matter of S-E-G-*, 24 I. & N. Dec. 579, 2008 WL 2927590 (B.I.A. 2008).
  20. *S-E-G-*, 24 I. & N. Dec. at 584, 586-88.
  21. *S-E-G-*, 24 I. & N. Dec. at 585. Nexus is a separate question from the cognizability of the particular social group, and the BIA’s conflation of these two elements muddies the waters of social group analysis. See, e.g., *Ayala v. Holder*, 640 F.3d 1095, 1096-98 (9th Cir. 2011) (court reviews de novo whether a group constitutes a

- “particular social group,” but reviews for substantial evidence whether persecution was or will be on account of applicant’s membership in such group).
22. *S-E-G-*, 24 I. & N. Dec. at 585.
  23. Size is irrelevant to the cognizability of a social group. See UNHCR, Guidelines on International Protection: “Membership of a particular social group,” supra note 5, at ¶ 18 (“The size of the purported social group is not a relevant criterion in determining whether a particular social group exists.”). See also *Perdomo v. Holder*, 611 F.3d 662, 668-69 (9th Cir. 2010) (explaining that broadly defined groups have been rejected because of lack of a unifying characteristic, not because of size); *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005) (approving the social group of “all alien homosexuals”); *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007) (approving the social group of Somali women). Concern regarding a group’s size is inherently related to the fear that granting one claim will result in scores of additional applicants attempting to gain entry into the U.S.; this fear is often referred to as a “fear of floodgates.” Not only is this fear unprincipled, it is unfounded as well. After female genital cutting (FGC) was recognized as a basis for asylum in *Kasinga*, opponents predicted that the U.S. would be overwhelmed by claims on behalf of women fleeing. *In re Kasinga*, 21 I. & N. Dec. 357, 1996 WL 379826 (B.I.A. 1996). However, “the dire predictions of a flood of women seeking asylum never materialized. In fact, an INS publication explicitly noted that [a]lthough genital mutilation is practiced on many women around the world, INS has not seen an appreciable increase in the number of claims based on FGM [female genital mutilation]’ after the *Kasinga* decision. In this same publication, INS stated that it did not expect to see a large number of claims if the U.S. recognized domestic violence as a basis of asylum.” Musalo, Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action? 14 Va. J. Soc. Pol’y & L. 119, 132-33 (2007).
  24. *S-E-G-*, 24 I. & N. Dec. at 588.
  25. Compare the BIA’s definition of particularity, “whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons,” with its reason for finding that the group in *S-E-G-* lacked visibility, “The respondents are therefore not in a substantially different situation from anyone who has crossed the gang, or is perceived to be a threat to the gang’s interests.” *S-E-G-*, 24 I. & N. Dec. at 584, 587.
  26. Although the Board described visibility as a question of societal perception, it applied visibility in the literal sense in a companion case issued the same day. See *Matter of E-A-G-*, 24 I. & N. Dec. 591, 2007 WL 5367673 (B.I.A. 2008) (“the respondent does not allege that he possesses any characteristics that would cause others in Honduran society to recognize him as one who has refused gang recruitment”).
  27. The BIA describes particularity as a question of the group’s discernability in the eyes of the “the society in question,” but seems to analyze it according to the group’s discernability in the eyes of the adjudicator. *S-E-G-*, 24 I. & N. Dec. at 586-88.
  28. See, e.g., Marouf, The Emerging Importance of “Social Visibility” in Defining a Particular Social Group and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender, 27 Yale L. & Pol’y Rev. 47, 79-81 (2008). See also Casper, Germain, and Greenstein, The Evolution Convolution of Particular Social Group Law: From the Clarity of *Acosta* to the Confusion of *S-E-G-*, 565-69, in *Immigration Practice Pointers* (2010-2011 ed.), available at [http://www.ilcm.org/documents/litigation/AILA\\_Advisory\\_Social\\_Group-new.pdf](http://www.ilcm.org/documents/litigation/AILA_Advisory_Social_Group-new.pdf); Letter from Deborah Anker, et al. as Amici Curiae In Support of Attorney General Certification of *Matter of S-E-G-* (Jan. 27, 2010) (on behalf of 72 immigration law professors and instructors), available at [http://www.ilcm.org/litigation/AG\\_certification\\_amicus\\_law\\_professors.PDF](http://www.ilcm.org/litigation/AG_certification_amicus_law_professors.PDF); Letter from National Immigrant Justice Center, et al. as Amici Curiae In Support of Attorney General Certification of *Matter of S-E-G-* (Jan. 27, 2010) (on behalf of seventeen human rights law organizations and practitioners), available at [http://www.ilcm.org/litigation/AG\\_certification\\_amicus\\_NIJC.pdf](http://www.ilcm.org/litigation/AG_certification_amicus_NIJC.pdf); Letter from United Nations High Commissioner for Refugees as Amicus Curiae In Support of Attorney General Certification of *Matter of S-E-G-* (Mar. 18, 2009), available at [http://www.ilcm.org/litigation/AG\\_certification\\_amicus\\_UNHCR.pdf](http://www.ilcm.org/litigation/AG_certification_amicus_UNHCR.pdf).
- As discussed below, several circuits have rejected the visibility and particularity requirements.

29. See, e.g., CGRS Case #6906 (unpublished BIA decision finding that, while “family may constitute a particular social group . . . respondents have failed to demonstrate that their family has any recognized level of social visibility”); CGRS Case #5409 (unpublished BIA decision holding that “respondent has not shown that Mexican society, or any substantial segment of it, perceives his immediate family to constitute a discrete ‘social group’ in any sense, so as to satisfy the social visibility criteria elucidated in this Board’s precedents”). Since 1999, the CGRS has collected information about asylum case outcomes and trends in a database that now includes over 6,000 case records in gender-based, children’s, lesbian, gay, bisexual, and transgender (LGBT), and gang-based asylum claims. The outcomes in the majority of these cases—decided at the asylum office, immigration court, or Board of Immigration Appeals—are available nowhere else. To request documents from these cases or others from the CGRS database, visit <http://cgrs.uchastings.edu>.
30. *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009).
31. *Gatimi*, 578 F.3d at 615-616.
32. *Gatimi*, 578 F.3d at 615.
33. *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009).
34. *Valdiviezo-Galdamez v. Attorney General of U.S.*, 663 F.3d 582, 608 (3d Cir. 2011). In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694, 21 Env’t. Rep. Cas. (BNA) 1049, 14 Env’tl. L. Rep. 20507 (1984), the Supreme Court explained that a court reviewing an agency’s construction of a statute which it administers is confronted with two questions: (1) has Congress directly spoken on the precise question at issue (if the intent of Congress is clear, that is the end of the matter) and (2) if the statute is silent or ambiguous with respect to the specific issue, is the agency’s answer based on a permissible construction of the statute.
35. *Valdiviezo-Galdamez*, 663 F.3d at 604.
36. Lawyers for the government attempted to argue that social visibility is not a question of on-sight or literal visibility, but the court rejected this argument.
37. *Valdiviezo-Galdamez*, 663 F.3d at 608.
38. *Valdiviezo-Galdamez*, 663 F.3d at 608. This holding was recently reaffirmed in *Garcia v. Attorney General of U.S.*: “Until the BIA provides an analysis that adequately supports its departure from *Acosta*, we remain bound by the well-established definition of ‘particular social group’ found in *Fatin*.” *Garcia v. Attorney General of U.S.*, 665 F.3d 496, 504 n. 5 (3d Cir. 2011), as amended, (Jan. 13, 2012).
39. On remand, the Department of Homeland Security (DHS) argued that the Third Circuit’s decision in *Valdiviezo-Galdamez* simply requires the BIA to explain its departure from *Acosta*, which DHS claims it can easily do. Judge Hardiman’s concurrence supports DHS’ argument. He sees no problem with social visibility and particularity as requirements, but expects the BIA to explain the need for them. The majority opinion, however, clearly rejects the requirements as not being entitled to *Chevron* deference.
40. *Mendez-Barrera v. Holder*, 602 F.3d 21, 26 (1st Cir. 2010).
41. *Mendez-Barrera*, 602 F.3d at 26.
42. *Mendez-Barrera*, 602 F.3d at 26. The First Circuit initially adopted social visibility in *Scatambuli v. Holder*, 558 F.3d 53, 59-60 (1st Cir. 2009).
43. *Garcia-Callejas v. Holder*, 666 F.3d 828, 830 (1st Cir. 2012).
44. It is also curious since the First Circuit recently acknowledged that “[a]sylum cases, virtually by definition, call for individualized determinations.” *Morgan v. Holder*, 634 F.3d 53, 61 (1st Cir. 2011).
45. *Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012).
46. *Orellana-Monson*, 685 F.3d at 521.
47. See *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 416, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999) (“The BIA . . . should be accorded *Chevron* deference when it gives ambiguous statutory terms meaning through a process of case-by-case adjudication.”) (quoting *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 448-49, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987)).
48. *Orellana-Monson v. Holder*, 685 F.3d at 521.
49. See *Gaitan v. Holder*, 671 F.3d 678, 681 (8th Cir. 2012), petition for cert. filed, 81 U.S.L.W. 3004, 81 U.S.L.W. 3032 (U.S. June 20, 2012).
50. See *Gaitan*, 671 F.3d at 681 (citing *Constanza v. Holder*, 647 F.3d 749, 753 (8th Cir. 2011); *Ortiz-Puentes v. Holder*, 662 F.3d 481, 483 (8th Cir. 2011)).
51. *Gaitan*, 671 F.3d at 682 (Bye, J., concurring).
52. *Gaitan*, 671 F.3d at 685. (Bye, J., concurring).

53. Judge Colloton concurred in the denial of en banc rehearing, but stated that the panel in *Gaitan* “erred in refusing to decide whether” *Matter of S-E-G-* “validly declared ‘social visibility’ and ‘particularity’ to be ‘requirements’ of a ‘particular social group.’” Notably, Judge Colloton’s concurrence made clear that the Eighth Circuit “remains free to consider the validity of *Matter of S-E-G-* in a future case when the Board’s approach seems more likely to affect the outcome.” He did not support rehearing en banc in *Gaitan* for several reasons, including that the BIA should be given an opportunity to respond to *Valdiviezo-Galdamez* and that *Gaitan*’s social group, which was defined by resistance to gang recruitment, has been rejected by all federal courts of appeals to have ruled on the issue. *Gaitan v. Holder*, 683 F.3d 951 (8th Cir. 2012) (Colloton, J., concurring).
54. *Rivera Barrientos v. Holder*, 658 F.3d 1222, 1231-33 (10th Cir. 2011), as corrected on denial of reh’g en banc, 666 F.3d 641 (10th Cir. 2012).
55. *Rivera-Barrientos*, 658 F.3d at 1230 (emphasis in original).
56. *Rivera-Barrientos*, 658 F.3d at 1230.
57. *Rivera-Barrientos*, 658 F.3d at 1233. In fact, the court noted that it might have a problem with social visibility if required on sight (literal visibility).
58. *Rivera-Barrientos*, 658 F.3d at 1233.
59. Brief of the UNHCR as Amicus Curiae in Support of Petitioner at 9-18, *Rivera-Barrientos v. Holder*, 658 F.3d 1222 (10th Cir. 2011) (No. 10-9527), available at <http://www.unhcr.org/refworld/country,,,AMICUS,SLV,,4c6cdb512,0.html>.
60. The court noted that the UNHCR guidance is “a useful interpretive aid,” but is not binding on the BIA or federal courts. *Rivera-Barrientos*, 658 F.3d at 1231 (citing *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 427, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999)).
61. *Castillo-Arias v. U.S. Atty. Gen.*, 446 F.3d 1190, 1198-97 (11th Cir. 2006).
62. *Castillo-Arias*, 446 F.3d at 1198-97.
63. The court cited *Castellano-Chacon v. I.N.S.* for this point. *Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 546-48, 2003 FED App. 0293P (6th Cir. 2003).
64. *Castillo-Arias*, 446 F.3d. at 1198.
65. *Pierre v. U.S. Atty. Gen.*, 432 Fed. Appx. 845 (11th Cir. 2011), cert. denied, 132 S. Ct. 2771, 183 L. Ed. 2d 642 (2012) (rejecting the social group of uniformed security guards working at the United States Embassy in Haiti).
66. *Pierre*, 432 Fed. Appx. at 848.
67. See *Velasquez-Otero v. U.S. Atty. Gen.*, 456 Fed. Appx. 822 (11th Cir. 2012), petition for cert. filed, 80 U.S.L.W. 3638, 81 U.S.L.W. 3029 (U.S. May 1, 2012).
68. See *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007).
69. *Ucelo-Gomez*, 509 F.3d at 73 (quoting *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2d Cir. 1991)).
70. See *Koudriachova v. Gonzales*, 490 F.3d 255, 262 (2d Cir. 2007).
71. The broad statements regarding particular social group in *Gomez v. I.N.S.* are dicta; the court’s denial in *Gomez* was based on its finding that the petitioner lacked a well-founded fear of persecution as a member of the proffered group, not that the group was not a particular social group. *Gomez*, 947 F.2d at 664. See, e.g., *Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006), cert. granted, judgment vacated on other grounds, 552 U.S. 801, 128 S. Ct. 345, 169 L. Ed. 2d 2 (2007). In *Gao*, the court clarified that, while *Gomez* “used broad language that could (and has) been read as conflicting with *Matter of Acosta*, [...] the analysis portion of *Gomez*” rejected the claim “not because the social group she defined was too ‘broadly based’ but rather because ‘there is no indication that *Gomez* will be singled out for further brutalization on [the basis of her past victimization].’ In other words, *Gomez* can reasonably be read as limited to situations in which an applicant fails to show a risk of future persecution on the basis of the ‘particular social group’ claimed, rather than as setting an *a priori* rule for which social groups are cognizable.” *Gao*, 440 F.3d at 69 (quoting *Gomez*, 947 F.2d at 664). See also USCIS Asylum Officer Basic Training, Asylum Eligibility Part III: Nexus and the Five Protected Characteristics 36 (Mar. 12, 2009), available at: <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Nexus-the-Five-Protected-Characteristics-31aug10.pdf> (explaining that *Gao v. Gonzales* clarified that the reason for denial in *Gomez* was not the cognizability of the social group, but the fact that the applicant “failed to show that she would be singled out for further harm on account of her past victimization”).

72. See *Aguilar-Guerra v. Holder*, 343 Fed. Appx. 640, 642 (2d Cir. 2009) (denying the claim of El Salvadoran youth who resisted gang recruitment). The court found that S-E-G- and E-A-G- constituted Board precedent subject to *Chevron* deference and stated that, “[b]ecause those decisions consider proposed social groups that are virtually indistinguishable from the group proposed here, we conclude that Aguilar-Guerra’s social group claim based on his resistance to gang recruitment fails.”
73. See *Fuentes-Hernandez v. Holder*, 411 Fed. Appx. 438, 439 (2d Cir. 2011) (stating, “[w]hile the BIA’s decision in *Matter of S-E-G-* is not binding on us, its analysis is instructive” and denying social group defined by resistance to gang recruitment).
74. *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007).
75. See, e.g., *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008); *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009).
76. See *Ramos-Lopez*, 563 F.3d 855.
77. *Henriquez-Rivas v. Holder*, 449 Fed. Appx. 626 (9th Cir. 2011), reh’g en banc ordered, 670 F.3d 1033 (9th Cir. 2012).
78. See *Lizama v. Holder*, 629 F.3d 440, 447 n. 4 (4th Cir. 2011) (“Because social visibility is not essential to the result we reach here, we need not separately evaluate that criterion.”); *Crespin-Valladares v. Holder*, 632 F.3d 117, 125 n. 5 (4th Cir. 2011) (“Because we hold that the family satisfies the BIA’s visibility criterion, however, we need not decide whether that criterion comports with the INA.”); *Zelaya v. Holder*, 668 F.3d 159, 165 n. 4 (4th Cir. 2012) (“the Fourth Circuit has not yet decided whether such requirement comports with the INA. We have no occasion to do so in the present case” (citation omitted)).
79. *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011).
80. “[O]pposition to gangs is an amorphous characteristic providing neither an adequate benchmark for determining group membership nor embodying a concrete trait that would readily identify a person as possessing such a characteristic. Resisting gang recruitment is similarly amorphous.” *Zelaya*, 668 F.3d at 166-67 (citing *Lizama*, 629 F.3d at 447).
81. “[W]ealth, Americanization, and opposition to gangs are all amorphous characteristics that neither ‘provide an adequate benchmark for determining group membership’ nor embody concrete traits that would readily identify a person as possessing those characteristics.” *Lizama*, 629 F.3d at 447 (quoting *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 76, 2007 WL 274141 (B.I.A. 2007)).
82. See *Zelaya*, 668 F.3d at 166 (*Zelaya*’s proposed social group does not have the immutable characteristic of family bonds); *Lizama*, 629 F.3d at 447 (“Americanization is not an immutable characteristic”); contrast *Crespin-Valladares*, 632 F.3d at 124 (agreeing that kinship ties are “paradigmatically immutable” and “innate and unchangeable”).
83. *Al-Ghorbani v. Holder*, 585 F.3d 980, 995-98 (6th Cir. 2009).
84. Ruling on the family defined social group, the court held, “In the present case, the Al-Ghorbani family possesses several common, immutable characteristics that establish it as a particular social group.” *Al-Ghorbani*, 585 F.3d at 995. The court then approved the social group defined by resistance to repressive norms under precedent (which predated *In re C-A-*) recognizing similarly defined social groups based on their fundamental characteristics. Citing *Fatin v. I.N.S.*, 12 F.3d 1233, 1241 (3d Cir. 1993), *Yadegar-Sargis v. I.N.S.*, 297 F.3d 596, 603, 182 A.L.R. Fed. 737 (7th Cir. 2002), and *Safaie v. I.N.S.*, 25 F.3d 636, 640 (8th Cir. 1994), the court held that “[t]hese cases demonstrate that a particular social group may be made up of persons who actively oppose the suppression of their core, fundamental values and beliefs.” *Al-Ghorbani*, 585 F.3d at 996.
85. The court held that the proposed group of “women subjected to rape as a method of government control” was too sweeping under *Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 548, 2003 FED App. 0293P (6th Cir. 2003) (a decision which predated *In re C-A-*) and was circularly defined by the persecution. *Kante v. Holder*, 634 F.3d 321, 327 (6th Cir. 2011). The court found, “as a factual matter,” that Kante did not show that Guinean society “viewed females as a group specifically targeted for mistreatment,” but made no legal ruling on this basis. *Kante*, 634 F.3d at 327.
86. UNHCR, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs, ¶¶ 37-38, 41 (Mar. 31, 2010) (hereinafter UNHCR Gang Note), available at <http://www.unhcr.org/refworld/docid/4bb21fa02.html>.
87. A voluminous number of unpublished decisions also reject gang recruitment cases often

- without any reasoning beyond citing to *Matter of S-E-G-* or circuit law that has adopted *S-E-G-*.
88. The Tenth Circuit is the only circuit so far to hold, in a published opinion, that a social group defined by resistance to recruitment met the particularity requirement. See *Rivera Barrientos v. Holder*, 658 F.3d 1222, 1231 (10th Cir. 2011), as corrected on denial of reh'g en banc, 666 F.3d 641 (10th Cir. 2012) (finding El Salvadoran women between ages 12 and 25 who resisted gang recruitment could be described with sufficient particularity to meet standard for "particular social group," but proposed group did not meet social visibility requirement). See notes 133-144 and accompanying text, *infra*, for discussion of *Rivera-Barrientos*.
  89. *Gaitan v. Holder*, 671 F.3d 678, 682 (8th Cir. 2012), petition for cert. filed, 81 U.S.L.W. 3004, 81 U.S.L.W. 3032 (U.S. June 20, 2012).
  90. *Zelaya v. Holder*, 668 F.3d 159 (4th Cir. 2012).
  91. *Larios v. Holder*, 608 F.3d 105 (1st Cir. 2010).
  92. *Orellana-Monson v. Holder*, 685 F.3d 511, 521 (5th Cir. 2012).
  93. *Zelaya*, 668 F.3d at 167.
  94. *Ramos-Lopez v. Holder*, 563 F.3d 855, 860 (9th Cir. 2009).
  95. The cases that the court relied on were *Sanchez-Trujillo v. I.N.S.* and *Ochoa v. Gonzales* where social groups of individuals that "manifest a plethora of different lifestyles, varying interests, diverse cultures, and contrary political leanings" were deemed not cognizable. *Ochoa v. Gonzales*, 406 F.3d 1166, 1171 (9th Cir. 2005) (quoting *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1577 (9th Cir. 1986)). However, in *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010), the Ninth Circuit granted the petition for review based on the Board's reliance on *Sanchez-Trujillo's* voluntary associational test and its failure to consider *Hernandez-Montiel's* innate characteristics test, which reconciled Ninth Circuit case law with *Matter of Acosta* and federal circuits that had approved *Acosta*. As Judge Paez deftly explained, "To the extent we have rejected certain social groups as too broad, we have done so where [t]here is no unifying characteristic to narrow th[e] diverse and disconnected group.'" *Perdomo*, 611 F.3d. at 668 (citing *Ochoa*, 406 F.3d at 1171).
  96. *Ramos-Lopez*, 563 F.3d at 861-62.
  97. *Mendez-Barrera v. Holder*, 602 F.3d 21, 24 (1st Cir. 2010).
  98. *Mendez-Barrera*, 602 F.3d at 25.
  99. *Mendez-Barrera*, 602 F.3d at 25.
  100. See also *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010) (simply citing to *Mendez-Barrera* and *Matter of S-E-G-*, which the court noted was controlling, in holding that the social group of Guatemalan youth resistant to gang membership was not socially visible or particular).
  101. *Ortiz-Puentes v. Holder*, 662 F.3d 481, 483 (8th Cir. 2011) (quoting *Constanza v. Holder*, 647 F.3d 749, 754 (8th Cir. 2011)).
  102. The social group advanced in the case was Evangelical Christians who preach and proselytize to gang members. CGRS Case #6906, on file with CGRS.
  103. *Mayorga-Vidal v. Holder*, 675 F.3d 9 (1st Cir. 2012).
  104. *Mayorga-Vidal*, 675 F.3d at 16-17.
  105. *Orellana-Monson v. Holder*, 685 F.3d 511, 521-22 (5th Cir. 2012).
  106. See, e.g., *Sinha v. Holder*, 564 F.3d 1015, 1023-25 (9th Cir. 2009) (fact of widespread violence against Indo-Fijians does not diminish individual's claim or fear); *Vente v. Gonzales*, 415 F.3d 296, 301-02 (3d Cir. 2005) (reversing immigration judge for mischaracterizing claim as one of general strife in Colombia despite specific evidence of persecution of applicant); *In re H-*, 21 I. & N. Dec. 337, 343, 1996 WL 291910 (B.I.A. 1996) (acknowledging that "persecution can and often does take place in the context of civil war" (citing *Matter of Villalta*, 20 I. & N. Dec. 142, 1990 WL 385749 (B.I.A. 1990))).
  107. See, e.g., UNHCR Gang Note, *supra* note 86, at ¶ 38 ("Resisting involvement in crime by, for instance, evading recruitment or otherwise opposing gang practices may be considered a characteristic that is fundamental to one's conscience and the exercise of one's human rights. At the core of gang resistance is the individual's attempt to respect the rule of law and, in the case of those who refuse to join the gangs, also the right to freedom of association, including the freedom to not associate.") Case law recognizes that resistance or opposition may be based on a belief fundamental to one's identity or conscience. See, e.g., *In re Kasinga*, 21 I. & N. Dec. 357, 1996 WL 379826 (B.I.A. 1996) (opposition to the practice of female genital cutting is fundamental); *Fatin v. I.N.S.*, 12 F.3d 1233, 1242 (3d Cir. 1993) (refusal to conform to repressive gender

- norms may be fundamental); *Al-Ghorbani v. Holder*, 585 F.3d 980, 994 (6th Cir. 2009) (opposition to traditional Yemeni patriarchal marriage customs is fundamental).
108. See, e.g., *Matter of S-E-G-*, 24 I. & N. Dec. 579, 583-84, 2008 WL 2927590 (B.I.A. 2008) (“[W]e acknowledge that the mutability of age is not within one’s control, and that if an individual has been persecuted in the past on account of an age-described particular social group, or faces such persecution at a time when that individual’s age places him within the group, a claim for asylum may still be cognizable. Furthermore, youth who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which, by definition, cannot be changed.”).
109. *Valdiviezo-Galdamez v. Attorney General of U.S.*, 502 F.3d 285, 291 (3d Cir. 2007).
110. “We have no quarrel with the rejection in those cases of the attempted classification of specific groups as particular social groups. See *Ramos-Lopez v. Holder*, 563 F.3d 855, 859-61 (9th Cir.2009) (young Honduran men who resist being recruited into gangs); *Scatambuli v. Holder*, 558 F.3d 53, 58 (1st Cir.2009) (Brazilians who inform on drug smugglers); *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628-29 (8th Cir.2008) (competing Guatemalan owners of family businesses); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 72-73 (2d Cir.2007) (per curiam) (affluent Guatemalans); *Castillo-Arias v. United States Attorney General*, 446 F.3d 1190, 1194-95, 1197 (11th Cir.2006) (informants on the Colombian drug cartel).” *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009). This statement is mere dicta as it was unnecessary to the decision, and the Seventh Circuit neither addressed nor analyzed the cognizability of the groups listed.
111. The Third Circuit, citing to *Valdiviezo-Galdamez*, also recently remanded *Mejia-Fuentes v. Attorney General of U.S.*, 463 Fed. Appx. 76 (3d Cir. 2012), for the BIA to analyze the social group “young men who morally oppose criminal gangs and who lack family ties” under *Acosta*.
112. See, e.g., *Ngengwe v. Mukasey*, 543 F.3d 1029, 1034 (8th Cir. 2008) (Cameroonian widows); *Bi Xia Qu v. Holder*, 618 F.3d 602, 607-08 (6th Cir. 2010) (women who are sold or forced into marriage and involuntary servitude); *Gomez-Zuluaga v. Attorney General of U.S.*, 527 F.3d 330, 345 (3d Cir. 2008) (women who escaped involuntary servitude after being abducted and confined by the FARC); *Mohammed v. Gonzales*, 400 F.3d 785, 797-98 (9th Cir. 2005) (females of a certain tribe or nationality); *Niang v. Gonzales*, 422 F.3d 1187, 1200 (10th Cir. 2005) (female members of the Tukulor Fulani tribe); *Sarhan v. Holder*, 658 F.3d 649, 655 (7th Cir. 2011) (“women in Jordan who have (allegedly) flouted repressive moral norms, and thus who face a high risk of honor killing”); *Lin v. Ashcroft*, 385 F.3d 748, 752-53 (7th Cir. 2004) (Chinese women facing forced sterilization); *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3d Cir. 1993) (Iranian women who refuse to conform to the government’s repressive gender laws and norms); *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) (rejecting BIA’s analysis of the finding that “women in Guatemala” could not be a particular social group and remanding for agency to apply correct circuit law and rule on the group in the first instance).
113. But note that gender-based gang claims have succeeded before immigration judges. An immigration judge in Baltimore, for example, granted asylum to an El Salvadoran woman who was repeatedly and brutally gang raped by MS-13 members. The judge found cognizable the social group of “Salvadoran women who are viewed as gang ‘property’ by virtue of the fact that [they were] successfully victimized by gang members once before.” The judge granted the claim based both on imputed political opinion and social group membership. CGRS Case #6090.
114. Interview with Dr. Thomas Boerman, Central American Gang and Organized Crime Specialist (Aug. 6, 2012). See also Fariña, Miller, and Cavallaro, No Place to Hide: Gang, State, and Clandestine Violence in El Salvador 81-87 (International Rights Clinic, Harvard Law School 2007) (hereinafter Fariña, No Place to Hide).
115. See, e.g., Musalo, *supra* note 23, app. ¶ 8 (“The root cause of the abuse [of women in Guatemala] stems from a culture that embraces the subjugation of women and celebrates the man’s right to dominate” (quoting human rights expert Hilda Morales Trujillo)); UNHCR, Report of the United Nations High Commissioner for Human Rights on the activities of her office in Guatemala, ¶ 47, U.N. Doc. A/HRC/19/21/Add.1 (Jan. 30, 2012), available at [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A.HRC.19.21.Add.1\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A.HRC.19.21.Add.1_en.pdf) (“Femicide and gender-based violence re-

- mained of utmost concern...The cruelty with which some of these crimes were perpetuated shows how deeply rooted patterns of discrimination are in society, and also reveals the lack of institutional measures to tackle them.”).
116. See, e.g., U.N. Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: El Salvador*, ¶ 21, U.N. Doc. CEDAW/C/SLV/CO/7 (Nov. 7, 2008), available at <http://www.unhcr.org/refworld/country,,CEDAW,,SLV,,494ba8d20,0.html> (“[T]he Committee is strongly concerned at the pervasiveness of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men in the family, in the workplace and in society, which constitute serious obstacles to women’s enjoyment of their human rights, in particular their right to be free from all forms of violence, and impede the full implementation of the Convention. The Committee is further concerned that an overall strategy to eliminate sexist stereotypes has not yet been put into place by the State party.”); U.S. Department of State, *2010 Human Rights Report: El Salvador* (Apr. 8, 2011), available at <http://www.state.gov/j/drl/rls/hrrpt/2010/wha/154505.htm> (“Domestic violence was considered socially acceptable by a large portion of the population, and, as with rape, its incidence was underreported [...] Rape and other sexual crimes against women were widespread.”); Geneva Declaration on Armed Violence and Development, *When the Victim Is a Woman, in Global Burden of Armed Violence* 119 (Oct. 2011), available at [http://www.genevadeclaration.org/fileadmin/docs/GBAV2/GBAV2011\\_CH4.pdf](http://www.genevadeclaration.org/fileadmin/docs/GBAV2/GBAV2011_CH4.pdf) (ranking El Salvador as the country with the worst femicide rate in the world for femicides committed 2004-2009).
117. See Freedom House, *Countries at Crossroads, Country Report: Honduras* (2010), <http://www.freedomhouse.org/report/countries-crossroads/2010/honduras> (“Violence against women is widespread in Honduras, and the Center of Women’s Studies (CEM-H) reports that an average of 14,000 domestic violence complaints were filed annually between January 2003 and September 2008. Between 2002 and 2008, 1,114 women were murdered, the grand majority by their husbands or partners. This violence occurs against a backdrop of marginalization in which women experience limited levels of civic participation and high levels of poverty and discrimination. Few cases of domestic violence are investigated or reach the courts, and laws prohibiting gender-based discrimination are often not enforced.”); see also Manz, *Central America (Guatemala, El Salvador, Honduras, Nicaragua): Patterns of Human Rights Violations* 27 (2008), Writenet Report commissioned by the UNHCR, available at <http://www.unhcr.org/refworld/pdfid/48ad1eb72.pdf> (discussing widespread nature of discrimination and violence against women in Honduras).
118. See, e.g., Benítez, *Guatemala: Climate of Impunity Fuels Violence Against Women*, Inter Press Service, Nov. 24, 2007, available at <http://ipsnews.net/news.asp?idnews=40203> (Guatemala “has one of the highest homicide rates in Latin America and is the focus of concern from human rights groups because of the large number of women killed in a climate of impunity. ‘Unfortunately, in Guatemala, *killing a woman is like killing a fly; no importance is assigned to it,*’ complained local activist Hilda Morales, who argued that ‘the perpetrators are encouraged to continue beating, abusing and killing because they know that nothing will happen, that they won’t be punished.’” (emphasis added)).
- The Inter-American Commission for Human Rights (IACHR) has “confirmed a pattern of judicial ineffectiveness vis-à-vis acts of sexual violence in Mesoamerica, a pattern that adversely affects the prosecution of cases of sexual violence at every stage in the proceedings with the justice system. *This judicial ineffectiveness promotes and perpetuates impunity in the vast majority of cases involving sexual violence and breeds social tolerance of this phenomenon*” (emphasis added). Further, the IACHR has found that “[t]he vast majority of cases of sexual violence are never punished.” IACHR, *Access to Justice for Women Victims of Sexual Violence in Mesoamerica*, ¶¶11, 14, OEA/Ser.L/V/II. Doc. 63 (Dec. 9, 2011), available at <http://www.oas.org/en/iachr/women/docs/pdf/WOMEN%20MESOAMERICA%20ENG.pdf>. In an earlier report on access to justice for victims of violence against women, the IACHR detailed its finding that “a pattern of systemic impunity persists with respect to the judicial prosecution of cases involving violence against women. The vast majority of such cases are never formally investigated, prosecuted and punished by the administration of justice systems in this hemisphere.”

IACHR, Access to Justice for Women Victims of Violence in the Americas, ¶14, OEA/Ser.L/V/II. Doc. 68 (Jan. 20, 2007), available at <http://www.cidh.org/women/Access07/Report%20Access%20to%20Justice%20Report%20English%20020507.pdf>.

The statistics regarding the level of impunity are astounding: “In July 2006 Guatemala’s Human Rights Ombudsman reported that 70 percent of the murders of women were not even investigated and that 97 per cent of the time no one was ever arrested. Finally, in the 3 per cent of the cases that involved an investigation and an arrest, few were convicted because of the ineptly gathered or improperly preserved forensic evidence, the failure to protect witnesses and the general lack of resources needed to prosecute criminal defendants.” Manz, supra note 117, at 12. Similarly, in El Salvador, “few of the murders [femicides] are investigated and still fewer lead to any convictions.” Manz, supra note 117, at 19. In Honduras, “[t]he Women’s Movement for Peace reported in 2006 that alleged victims of abuse won only 204 of the 6,628 suits filed that year because judicial bias consistently favours the male, especially wealthy men, over the female.” Manz, supra note 117, at 27.

119. Interview with Dr. Thomas Boerman, Central American Gang and Organized Crime Specialist (Aug. 31, 2012). See also UNHCR Gang Note, supra note 86, at ¶12, recognizing that gangs target “young women and adolescent girls” for “prostitution and trafficking purposes, or to become sexual property of gangs.”
120. Fariña, No Place to Hide, supra note 114, at 77.
121. Aguilar Umaña and Ridders, Violent Women and Violence Against Women: Gender Relations in the Maras and Other Street Gangs of Central America’s Northern Triangle Region 14, Initiative for Peacebuilding (April 2012), available at <http://www.ifp-ew.eu/pdf/201204IfPEWViolentWomenAndViolenceAgainstWomen.pdf>.
122. Id. at 12.
123. See information on impunity, supra note 118.
124. “[T]he governments of El Salvador, Honduras, and Guatemala have shown themselves to be unable and unwilling to effectively protect their citizens from gang-related persecution. For example, since the implementation of mano dura (tough hand) strategies to combat gangs in El Salvador in 2003, homicide rates have risen from 33 per 100,000 in 2003 to 56 per 100,000 in 2006. (The U.S. homicide rate was 5.5 per 100,000 in 2004 according to FBI figures.)” Washington Office on Latin America, Central American Gang-Related Asylum: A Resource Guide 4 (May 2008) (hereinafter WOLA Guide), available at <http://www.wola.org/sites/default/files/downloadable/Central%20America/past/CA%20Gang-Related%20Asylum.pdf>.
125. USCIS Asylum Officer Basic Training: Nexus, supra note 71, at 26.
126. USCIS Asylum Officer Basic Training: Nexus, supra note 71, at 26.
127. See DHS’ Supplemental Brief to BIA at 14-15, 18, *Matter of L-R-* (BIA 2009), available at <http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf> (hereinafter DHS’ Supplemental Brief). The BIA does not disagree with this approach. See, e.g., *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74-75, 2007 WL 274141 (B.I.A. 2007) (finding the group lacked visibility based in part on lack of evidence that members of the group were at greater risk of crime or extortion than society at large); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 587, 2008 WL 2927590 (B.I.A. 2008) (finding no visibility based in part on lack of evidence of higher rates of gang violence directed at members of the social group).
128. See DHS’ Supplemental Brief, supra note 127, at 17-18 (noting that the “female respondent’s status by virtue of her relationship to [her abuser] could indeed be the kind of important characteristic that results in a significant social distinction being drawn in terms of who will receive protection from serious physical harm”); see also Proposed Asylum Regulations, 65 Fed. Reg. 76594 (Dec. 7, 2000) (proposing as nondeterminative factor to consider in evaluating social group membership whether members of a social group are “distinguished for different treatment” and stating that relevant evidence to establish this factor would include “evidence of societal attitudes toward group members or about harm to group members, including whether the institutions of the society at hand offer fewer protections or benefits to members of the group than to other members of society”). The DHS has also specifically acknowledged that women victims of domestic violence who are unable to leave the domestic relationship or are viewed as property because of their status in the relationship may be members of a socially visible group. See DHS’ Supplemental Brief, supra note 127.

129. DHS' Supplemental Brief, *supra* note 127, at 17-18; see also USCIS Asylum Officer Basic Training, Female Asylum Applicants and Gender-Related Claims 15, available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Female-Asylum-Applicants-Gender-Related-Claims-31aug10.pdf> (noting that domestic violence is driven by "perceived inferiority of women and unequal status granted by laws and societal norms").
130. For example, from December 2009 to April 2012, the CGRS recorded 40 immigration judge grants of asylum or withholding of removal based on domestic violence.
131. For example, an immigration judge in Seattle granted the claim of a woman who was raped and physically abused by her husband, a member of the Mara Salvatrucha gang. The applicant attempted to seek protection from Salvadorian authorities but was told that divorce was not an option and that she needed to resolve the conflict with her husband. The immigration judge did not issue a written decision, but granted the claim based on briefing arguing that the applicant was persecuted on account of social group membership and political opinion. CGRS Case #6394.
132. While the Board has not yet ruled on domestic violence as a basis for asylum, it has requested amicus briefing in several domestic violence cases pending before it, which may signal its intent to publish a decision. In addition, the CGRS is aware of several cases before the Board that argue that "Guatemalan women" is a cognizable social group. *Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010), also raises this question. There, the Ninth Circuit remanded for the BIA to correctly apply Ninth Circuit precedent in deciding whether Guatemalan women constitutes a social group and urged the Board to issue a published decision. However, that case has been remanded to the immigration court.
133. *Rivera Barrientos v. Holder*, 658 F.3d 1222, 1234-35 (10th Cir. 2011), as corrected on denial of reh'g en banc, 666 F.3d 641 (10th Cir. 2012).
134. *Rivera Barrientos*, 658 F.3d at 1225.
135. *Rivera Barrientos*, 658 F.3d at 1225.
136. Brief of the UNHCR as Amicus Curiae in Support of Petitioner at 23-24, *supra* note 59.
137. *Rivera Barrientos*, 658 F.3d at 1231, 1234-35.
138. Interview with Dr. Thomas Boerman, Central American Gang and Organized Crime Specialist (Aug. 6, 2012).
139. *Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010).
140. *Mendez-Barrera*, 602 F.3d at 23.
141. *Mendez-Barrera*, 602 F.3d at 26-27.
142. Admittedly, however, it is unclear what record evidence was submitted regarding views and treatment of Salvadoran women and women who resist gang membership.
143. *Caal-Tiul v. Holder*, 582 F.3d 92, 93 (1st Cir. 2009).
144. *Caal-Tiul*, 582 F.3d at 94.
145. As recently acknowledged by the U.S. Senate Caucus on International Narcotics Control, "Witnesses in Central America are often afraid to testify at hearings because of corruption in the judicial system and fear of retaliation." U.S. Senate Caucus on International Narcotics Control, Responding to Violence in Central America 7 (Sept. 2011), available at [http://www.feinstein.senate.gov/public/index.cfm/files/serve?File\\_id=a67575d5-66dd-4e36-a4ae-6a4f70de500a&SK=689B2D014C1464F4CFD6561AA5FEDC4F](http://www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=a67575d5-66dd-4e36-a4ae-6a4f70de500a&SK=689B2D014C1464F4CFD6561AA5FEDC4F).
146. *In re C-A-*, 23 I. & N. Dec. 951, 2006 WL 1977492 (B.I.A. 2006).
147. *C-A-*, 23 I. & N. Dec. at 957.
148. *C-A-*, 23 I. & N. Dec. at 960.
149. *C-A-*, 23 I. & N. Dec. at 958 (citing *Matter of Fuentes*, 19 I. & N. Dec. 658, 661, 1988 WL 235456 (B.I.A. 1988)).
150. *Fuentes*, 19 I. & N. Dec. at 662.
151. See, e.g., *Scatambuli v. Holder*, 558 F.3d 53, 60 (1st Cir. 2009) (relying on *C-A-* to reject the social group "informants to US government about smuggling ring" for lack of visibility).
152. See, e.g., *Velasco-Cervantes v. Holder*, 593 F.3d 975, 978 (9th Cir. 2010) (rejecting the group of "former material witnesses for the government" as insufficiently particular because "any person of any origin can be involuntarily placed in that role in any type of legal proceeding").
153. See *Zelaya v. Holder*, 668 F.3d 159, 166 (4th Cir. 2012).
154. *Soriano v. Holder*, 569 F.3d 1162, 1166 (9th Cir. 2009). For the precedential cases the court referred to see cases cited *supra* note 95.
155. *Garcia v. Attorney General of U.S.*, 665 F.3d 496 (3d Cir. 2011), as amended, (Jan. 13, 2012).

156. *Garcia*, 665 F.3d at 504. In *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009), Judge Posner called into question the viability of a social group of informants, but Posner's unreasoned statement is mere dicta. See discussion of *Gatimi*, supra note 110.
157. *Zelaya*, 668 F.3d at 169 (Floyd, J., concurring).
158. *Zelaya*, 668 F.3d at 166 (citing *Crespin-Valladares v. Holder*, 632 F.3d 117, 125).
159. *Zelaya*, 668 F.3d at 169 (Floyd, J., concurring).
160. *Zelaya*, 668 F.3d at 169 (Floyd, J., concurring).
161. *Henriquez-Rivas v. Holder*, 449 Fed. Appx. 626, 628-33 (9th Cir. 2011), reh'g en banc ordered, 670 F.3d 1033 (9th Cir. 2012) (Bea, J., concurring).
162. *Henriquez-Rivas*, 449 Fed. Appx. at 632 n. 5 (Bea, J. concurring).
163. *Henriquez-Rivas*, 449 Fed. Appx. at 633 (Bea, J. concurring).
164. Oral argument, *Henriquez-Rivas v. Holder* (No. 09-71571), March 20, 2012. Audio available at <http://www.ca9.uscourts.gov/media>.
165. See, e.g., *Valdiviezo-Galdamez v. Attorney General of U.S.*, 663 F.3d 582, 606 (3d Cir. 2011) ("[T]he government contends that 'social visibility' does not mean on-sight visibility. Rather, we are told that 'social visibility' is a means to discern the necessary element of group perceptibility, i.e., the existence of a unifying characteristic that makes the members understood by others in society to constitute a social group or recognized as a discrete group in society."); see also USCIS RAIO Directorate, Officer Training: Guidance for Adjudicating LGBTI Refugee and Asylum Claims 16 (Dec. 28, 2011), available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/Asylum%20Native%20Documents%20and%20Static%20Files/RAIO-Training-March-2012.pdf> ("social visibility or distinction does not mean visible to the eye. Rather, this means that the society in question distinguishes individuals who share this trait from individuals who do not").
166. *Crespin-Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011). The Fourth Circuit had earlier approved "family" as a social group in a gang claim that predated the social visibility and particularity requirements. *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004). There, the court had no problem approving the social group under *Acosta*, but denied the claim for lack of nexus. *Lopez-Soto*, 383 F.3d at 238. The case was ultimately vacated pursuant to a party settlement.
167. *Crespin-Valladares*, 632 F.3d at 120-21 (internal quotations marks omitted).
168. The court stated, "[E]very circuit to have considered the question has held that family ties can provide a basis for asylum." *Crespin-Valladares*, 632 F.3d at 125 (citing *Al-Ghorbani v. Holder*, 585 F.3d 980, 995 (6th Cir. 2009); *Ayele v. Holder*, 564 F.3d 862, 869 (7th Cir. 2009); *Jie Lin v. Ashcroft*, 377 F.3d 1014, 1028-29 (9th Cir. 2004); *Gebremichael v. I.N.S.*, 10 F.3d 28, 36 (1st Cir. 1993)). The court then held, "We agree; the family provides a prototypical example of a particular social group." *Crespin-Valladares*, 632 F.3d at 125 (citing *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576 (9th Cir. 1986)) (internal quotation marks omitted).
169. *Crespin-Valladares*, 632 F.3d at 125.
170. *Crespin-Valladares*, 632 F.3d at 125-26 (citing *In re C-A-*, 23 I. & N. Dec. 951, 959, 2006 WL 1977492 (B.I.A. 2006)).
171. *Crespin-Valladares*, 632 F.3d at 125-26 (citing *In re C-A-*, 23 I. & N. Dec. 951, 959, 2006 WL 1977492 (B.I.A. 2006)).
172. In *S-E-G-*, the Board found that "family members" of Salvadoran youth who resisted gang membership lacked particularity because the group could potentially "include fathers, mothers, siblings, uncles, aunts, nieces, nephews, grandparents, cousins, and others" and therefore was "too amorphous a category." *Matter of S-E-G-*, 24 I. & N. Dec. 579, 585, 2008 WL 2927590 (B.I.A. 2008). However, the BIA declined to rule on whether family alone was a social group under the facts of *S-E-G-*. *S-E-G-*, 24 I. & N. Dec. at 585 n.2.
173. *Crespin-Valladares*, 632 F.3d at 125. The court cited the groups recognized in *Urbina-Mejia v. Holder*, 597 F.3d 360, 365-66 (6th Cir. 2010) (former gang members); *Tapiero de Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2005) ("the educated, landowning class of cattle farmers"); *Safaie v. I.N.S.*, 25 F.3d 636, 640 (8th Cir. 1994) ("Iranian women who advocate women's rights or who oppose Iranian customs relating to dress and behavior"), superseded by statute on other grounds, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, as recognized in *Rife v. Ashcroft*, 374 F.3d 606, 614 (8th Cir. 2004).
174. *Martinez-Seren v. Holder*, 394 Fed. Appx. 404 (9th Cir. 2010).

175. *Martinez-Seren*, 394 Fed. Appx. at 404.
176. *Martinez-Seren*, 394 Fed. Appx. at 405.
177. *Constanza v. Holder*, 647 F.3d 749 (8th Cir. 2011).
178. *Constanza*, 647 F.3d at 753-54.
179. The Sixth Circuit has expressed doubt that “family members of youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected such membership” would be socially visible and particular under *S-E-G-*. *Bonilla-Morales v. Holder*, 607 F.3d 1132, 1137 (6th Cir. 2010). However, since the claim failed on nexus (the court ruled that persecution was not *on account of* membership in the group), the court did not reach the issue of social group. *Bonilla-Morales*, 607 F.3d at 1137.
180. *Costanza*, 647 F.3d at 753.
181. *Costanza*, 647 F.3d at 753.
182. See cases cited and USCIS Asylum Officer Basic Training materials, *supra* note 71.
183. *Costanza*, 647 F.3d at 753.
184. The BIA has taken a similar approach—requiring social visibility of a specific family as opposed to visibility of family as a unit in society—in some unpublished decisions on file with the CGRS. In CGRS Case #6906, for example, the Board rejected a social group defined by family, finding that “respondents here have failed to demonstrate that their family has any recognized level of social visibility.”
185. CGRS Case #8793. In another case, a San Francisco judge granted asylum to a young Honduran girl whose grandfather was an outspoken critic of the gang. The girl lived with her grandparents. Two of her uncles and one of her aunts had been murdered by gang members. The judge approved the social group “close members of the family of Respondent’s grandfather XX, who publicly and openly opposed the gangs and their activities.” CGRS case #6840.
186. This case was heard in the Fourth Circuit, following *Crespin-Valladares*. In another case, an immigration judge in San Antonio, Texas, granted the claim of a teenage girl whose aunt and uncle testified in the prosecution of a gang member who murdered their son. The applicant was sexually harassed by gang members daily. The judge held that she was a member of a social group consisting of “family members who had challenged the authority of the gang.” The judge cited *In re C-A*, 23 I. & N. Dec. 951, 959, 2006 WL 1977492 (B.I.A. 2006), for the proposition that family relations are “generally easily recognizable and understood by others to constitute social groups.” CGRS Case #8794.
187. CGRS Case #8831.
188. See *Urbina-Mejia v. Holder*, 597 F.3d 360, 367 (6th Cir. 2010); *Benitez Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009).
189. See *Arteaga v. Mukasey*, 511 F.3d 940, 946 (9th Cir. 2007).
190. Refusing to recognize a particular social group for policy reasons rather than based on valid legal analysis is unprincipled and further muddies the waters on the meaning of “particular social group.” It is also unnecessary as bars to asylum and withholding of removal—including the criminal, serious nonpolitical crimes, and terrorism bars—may disqualify former gang members from asylum and withholding. The discretionary nature of asylum also serves as a mechanism to prevent those who do not merit relief from obtaining it.
191. *Arteaga*, 511 F.3d at 949.
192. *Arteaga*, 511 F.3d at 942.
193. *Arteaga*, 511 F.3d at 945.
194. The court explained, “[W]e would be hard-pressed to agree with the suggestion that one who voluntarily associates with a vicious street gang that participates in violent criminal activity does so for reasons so fundamental to ‘human dignity’ that he should not be forced to forsake the association.” *Arteaga*, 511 F.3d at 946.
195. *Arteaga*, 511 F.3d at 946.
196. *Benitez Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009).
197. *Benitez Ramos*, 589 F.3d at 429 (citing *Arteaga*, 511 F.3d at 945-946).
198. The court referred to its decision in *Gatimi* where it relied on *Sepulveda v. Gonzales*, 464 F.3d 770, 772-73 (7th Cir. 2006), which approved the social group “former subordinates of the attorney general of Colombia who had information about the insurgents plaguing that nation.” The court explained, “One could resign from the attorney general’s office but not from a group defined as former employees of the office.” *Benitez Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009) (citing *Koudriachova v. Gonzales*, 490 F.3d 255, 262-63 (2d Cir. 2007) (former KGB agents); *Cruz-Navarro v. I.N.S.*,

- 232 F.3d 1024, 1028-29 (9th Cir. 2000) (former members of the police or military); *Velarde v. I.N.S.*, 140 F.3d 1305, 1311-13 (9th Cir. 1998) (former bodyguards of the daughters of the president); *Chanco v. I.N.S.*, 82 F.3d 298, 302-03 (9th Cir. 1996) (former military officers); *Matter of Fuentes*, 19 I. & N. Dec. 658, 662, 1988 WL 235456 (B.I.A. 1988) (former members of the national police)).
199. *Benitez-Ramos*, 589 F.3d at 430.
200. *Benitez-Ramos*, 589 F.3d at 431.
201. *Urbina-Mejia v. Holder*, 597 F.3d 360, 367 (6th Cir. 2010).
202. *Urbina-Mejia*, 597 F.3d at 366.
203. To date, no published decisions have issued analyzing the group of “former gang members” under the social visibility and particularity standards. The social visibility and particularity of former gang members should be easier to prove than it has been for groups defined by resistance to recruitment. For example, in *Urbina-Mejia*, the Sixth Circuit indicated that former gang membership is a “visibly identifiable” characteristic. *Urbina-Mejia*, 597 F.3d at 367 n. 3. And in *Benitez-Ramos v. Holder*, the Seventh Circuit stated that former gang membership is “neither unspecific nor amorphous.” *Benitez-Ramos*, 589 F.3d at 431. The court distinguished the case from *Arteaga* where the social group of current but inactive gang members was deemed too amorphous. *Benitez-Ramos*, 589 F.3d at 431 (citing *Arteaga*, 511 F.3d at 946).
204. *Urbina-Mejia*, 597 F.3d at 367 n. 3.
205. The claim was denied in part based on the serious nonpolitical crimes bar for acts committed while a member of the gang; this shows that the Sixth Circuit appropriately analyzes social group and bars to asylum as separate and distinct elements. *Urbina-Mejia*, 597 F.3d at 369.
206. The Sixth’s Circuit’s earlier decision in *Castellano-Chacon* (finding that tattooed youth did not comprise a social group) is not inconsistent. There the court rejected the group because group members’ only shared past experience was having gotten a tattoo, which it held was not an immutable or fundamental characteristic. While the group of former gang members “[was] not the social group properly at issue,” the court explained that former gang members might conceivably constitute a social group because of their “common immutable characteristic of their past experiences together.” *Castellano-Chacon v. I.N.S.*, 341 F.3d 533, 549, 2003 FED App. 0293P (6th Cir. 2003); see *Urbina-Mejia*, 597 F.3d at 365 (stating that “[b]oth the IJ and the Board misunderstood and misapplied our holding in *Castellano-Chacon*”).
207. DHS Memorandum to Asylum Officers, Notification of *Ramos v. Holder*: Former Gang Membership as a Potential Particular Social Group in the Seventh Circuit (Mar. 2, 2010) (hereinafter Langlois Memo), available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/Asylum-Ramos-Div-2-mar-2010.pdf>. The memo’s requirement that the group be “socially distinct” is inexplicable given the Seventh Circuit’s rejection of social visibility in *Gatimi*. *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009).
208. Langlois Memo, *supra* note 207 at 3 (citing USCIS memo, Guidance on *Matter of C-A* (Jan. 12, 2007)).
209. See INA § 208(b)(1)(B)(i) [8 U.S.C.A. § 1158(b)(1)(B)(i)] as modified by the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (May 11, 2005); *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 483, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992).
210. *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (quoting *Gafoor v. I.N.S.*, 231 F.3d 645, 650, 55 Fed. R. Evid. Serv. 1006, 177 A.L.R. Fed. 687 (9th Cir. 2000)) (emphasis in original).
211. This trend is consistent with the general difficulty of establishing nexus following the REAL ID Act of 2005. See, e.g., *Parussimova v. Mukasey*, 533 F.3d 1128 (9th Cir. 2008), opinion amended and superseded on denial of reh’g, 555 F.3d 734 (9th Cir. 2009). Parussimova was an ethnic Russian woman with Kazakhstani citizenship. One day while she was walking down the street and wearing a pin with the name of the American company she worked for, two men dragged her into the entryway of an apartment building, pulled off her work pin, and told her that she did not have the right to work for an American company. Parussimova passed out briefly, and, when she awoke, she found the men kicking her, spitting at her, and telling her that she was a Russian pig and had to get out of the country. After warning Parussimova not to report the attack, the men tore off her clothes and attempted to rape her. The court held that the evidence did not establish nexus: “The assailants’ reference to Parussimova’s ethnic-

- ity in the course of their attack may suggest that such trait played a role in this incident. Nevertheless, we cannot conclude that the utterance of an ethnic slur, standing alone, compels the conclusion that her ethnicity was a central motivating reason for the attack." *Parussimova*, 533 F.3d at 1135-36.
212. See UNHCR Gang Note, *supra* note 86, at ¶¶ 45-51.
  213. See, e.g., *Osorio v. I.N.S.*, 18 F.3d 1017, 1030-31 (2d Cir. 1994) (persecution of labor union leader was on account of political opinion).
  214. *Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1337-38 (10th Cir. 2008) (reversing and remanding IJ's determination that governmental persecution of journalist who threatened to expose abuse and torture in military and corruption in elections was not on account of political opinion); *Haxhiu v. Mukasey*, 519 F.3d 685, 690-91 (7th Cir. 2008) (finding past persecution on account of political opinion in case of former Albanian colonel who was persecuted for exposing corruption in military despite his official duty to end corruption in his role as director of recruitment); *Cao v. Attorney General of U.S.*, 407 F.3d 146, 153 (3d Cir. 2005) (finding political opinion and persecution on account of it where pediatrician applicant was jailed and abused following attempt to expose Chinese hospital's practice of killing babies born in violation of population-control policies to news reporter); *Grava v. I.N.S.*, 205 F.3d 1177, 1181 (9th Cir. 2000) (finding that persecution of Filipino policeman and customs officer who exposed corruption of supervisors may have been on account of political opinion regardless of the fact that applicant "did not concomitantly espouse political theory" and remanding to BIA to apply correct legal standard); *Antonyan v. Holder*, 642 F.3d 1250, 1256 (9th Cir. 2011) (extending whistleblower doctrine to case involving retaliation by well-known criminal with ties to high-level government officials).
  215. See, e.g., *Lazo-Majano v. I.N.S.*, 813 F.2d 1432, 1435 (9th Cir. 1987) (overruled in part on judicial notice grounds by *Fisher v. I.N.S.*, 79 F.3d 955 (9th Cir. 1996)) (resistance to rape and beating was assertion of political opinion opposing forced sexual subjugation) (en banc).
  216. See, e.g., *Zahedi v. I.N.S.*, 222 F.3d 1157, 1165 (9th Cir. 2000) (Iranian government sought to punish applicant for his political activities involving translating and distributing "The Satanic Verses" into Farsi); *Fatin v. I.N.S.*, 12 F.3d 1233, 1242 (3d Cir. 1993) (feminism is a political opinion).
  217. *Mendoza Perez v. U.S. I.N.S.*, 902 F.2d 760, 762-63 (9th Cir. 1990) (accountant with union that helped form peasant cooperatives demonstrated political opinion and threats received due to participation in cooperatives was on account of political opinion); cf. *Ontunez-Tursios v. Ashcroft*, 303 F.3d 341, 352 (5th Cir. 2002) (evidence did not compel conclusion that member of farm-worker organization was targeted by landlord for political opinion; rather landlord had "economic" motive).
  218. See, e.g., *Khup v. Ashcroft*, 376 F.3d 898, 905 (9th Cir. 2004) (Seventh Day Adventist's evangelism resulted in government imputing political dissident beliefs); *Zhou v. Gonzales*, 437 F.3d 860, 869 (9th Cir. 2006) (holding applicant faced well-founded fear of persecution on account of imputed antigovernment opinion for providing literature on Falun Gong).
  219. *Gonzales-Neyra v. I.N.S.*, 122 F.3d 1293, 1296 (9th Cir. 1997), opinion amended, 133 F.3d 726 (9th Cir. 1998) (refusal to make payments to Shining Path guerilla movement established persecution on account of political opinion).
  220. See, e.g., *Del Carmen Molina v. I.N.S.*, 170 F.3d 1247, 1249-50 (9th Cir. 1999) (BIA erred in finding persecution by FMLN in El Salvador was not on account of actual or imputed political opinion of opposition or resistance).
  221. *Reyes-Guerrero v. I.N.S.*, 192 F.3d 1241, 1245-46 (9th Cir. 1999) (Colombian attorney who investigated rival party members even after death threats was investigating for political reasons and had well-founded fear on account of such opinion).
  222. *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076-77 (9th Cir. 2004) (imputing pro-guerrilla opinion to entire village and persecuting village members on account of such imputed opinion).
  223. *Sangha v. I.N.S.*, 103 F.3d 1482, 1488 (9th Cir. 1997).
  224. See UNHCR, Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, ¶ 32, U.N. Doc. HCR/GIP/02/01 (May 7, 2002), available at [http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR\\_Guidelines\\_Gender.pdf](http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Gender.pdf); see also *Ahmed v. Keisler*, 504 F.3d 1183, 1192 (9th Cir. 2007) ("A political opinion encom-

- passes more than electoral politics or formal political ideology or action.”).
225. *Osorio v. I.N.S.*, 18 F.3d 1017 (2d Cir. 1994).
  226. *Osorio*, 18 F.3d at 1029-30; see also *Vumi v. Gonzales*, 502 F.3d 150, 156-57 (2d Cir. 2007) (reversing BIA determination of no nexus to imputed political opinion and remanding based on IJ and BIA failure to consider political context in which persecution occurred); *Chang v. I.N.S.*, 119 F.3d 1055, 1062-65 (3d Cir. 1997) (looking to the evidence and context of China’s human rights record and practices in determining applicant had well founded fear of persecution on account of political opinion), superseded in part by statute as stated in *Long Hao Li v. Attorney General of U.S.*, 633 F.3d 136, 142 n. 4 (3d Cir. 2011).
  227. UNHCR Gang Note, *supra* note 86, at ¶ 47.
  228. UNHCR Gang Note, *supra* note 86, at ¶ 6.
  229. UNHCR Gang Note, *supra* note 86, at ¶ 6.
  230. See, e.g., *In re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214, 2007 WL 1817032 (B.I.A. 2007) (holding that mixed motive doctrine survives REAL ID Act).
  231. *Matter of S-E-G-*, 24 I. & N. Dec. 579, 589, 2008 WL 2927590 (B.I.A. 2008); *Matter of E-A-G-*, 24 I. & N. Dec. 591, 597, 2007 WL 5367673 (B.I.A. 2008).
  232. *E-A-G-*, 24 I. & N. Dec. at 592.
  233. *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 482, 112 S. Ct. 812, 117 L. Ed. 2d 38 (1992).
  234. *S-E-G-*, 24 I. & N. Dec. at 589; see also *E-A-G-*, 24 I. & N. Dec. at 597.
  235. *E-A-G-*, 24 I. & N. Dec. at 597.
  236. *S-E-G-*, 24 I. & N. Dec. at 588-89.
  237. *Martinez-Buendia v. Holder*, 616 F.3d 711, 716 (7th Cir. 2010).
  238. See, e.g., *Del Carmen Molina v. I.N.S.*, 170 F.3d 1247, 1249-50 (9th Cir. 1999) (holding that BIA’s determination that persecution was not on account of political opinion was not supported by substantial evidence and noting that the fact that guerrillas may have been motivated “*in part*” to recruit Molina did not “defeat” her claim)(emphasis in original); *Rodriguez-Matamoros v. I.N.S.*, 86 F.3d 158, 160 (9th Cir. 1996) (refusal to support Sandinistas).
  239. See, e.g., *Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009) (young Honduran man’s refusal to join Central American gang did not amount to a “political opinion” and IJ’s determination that persecution was not on account of political opinion was supported by substantial evidence); *Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010) (denying political opinion claim of young woman who resisted gang recruitment, court found no evidence that persecutors knew of anti-gang political beliefs and targeted petitioner for that reason); *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 579 (8th Cir. 2009) (petitioner’s mere refusal to join gang, without more, does not compel a finding that persecution was on account of imputed political opinion); *Barrios v. Holder*, 581 F.3d 849, 856 (9th Cir. 2009) (young Guatemalan man’s refusal to join gang did not amount to “political opinion” and gang targeted him for “economic and personal reasons” rather than actual or imputed political opinion); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 747 (9th Cir. 2008) (Salvadoran asylum applicant was not persecuted on account of antigang political opinion, in that he was victimized by Mara Salvatrucha gang for economic and personal reasons, he was not politically or ideologically opposed to ideals espoused by Mara or to gangs in general, and Mara did not impute to him any particular political belief); *Mayorga-Vidal v. Holder*, 675 F.3d 9, 18-19 (1st Cir. 2012) (young Salvadoran male who resisted gang recruitment did not establish well-founded fear of future persecution on account of his political opinion). Evidence of nexus in these cases was circumstantial, but that can suffice under *Elias-Zacarias*.
  240. *Rivera Barrientos v. Holder*, 658 F.3d 1222 (10th Cir. 2011), as corrected on denial of reh’g en banc, 666 F.3d 641 (10th Cir. 2012).
  241. *Rivera Barrientos*, 658 F.3d at 1225 (citing Agency R. at 879).
  242. *Rivera Barrientos*, 658 F.3d at 1225 (citing Agency R. at 879).
  243. *Rivera Barrientos*, 658 F.3d at 1225 (citing Agency R. at 879).
  244. *Rivera Barrientos*, 658 F.3d at 1225 (citing Agency R. at 879).
  245. *Rivera-Barrientos v. Holder*, 666 F.3d 641, 647 (10th Cir. 2012) (amended opinion).
  246. The court also cited to one generalized sentence from the country conditions documentation which stated that “MS-13 has been known to use force and threats to coerce youth into joining the gang quite apart from any political or ideological point of view.” *Rivera-Barrientos*, 658 F.3d at 1228 (citing Fari-

- ña, No Place to Hide, *supra* note 114). How one sentence about general gang tactics was enough to discount specific evidence of motive is inexplicable.
247. *Martinez-Buendia v. Holder*, 616 F.3d 711, 716 (7th Cir. 2010).
248. *Martinez-Buendia*, 616 F.3d at 712.
249. *Martinez-Buendia*, 616 F.3d at 712.
250. *Martinez-Buendia*, 616 F.3d at 717. There was also “uncontested evidence in the record that the FARC views members of Health Brigades as political opponents. A 2002 Report by the Immigration and Naturalization Service indicates that individuals who do humanitarian work, such as working with Health Brigades, are at a ‘great risk’ of attack by the FARC or other armed groups in Colombia. [...] This report leads us to the conclusion that the FARC viewed Martinez-Buendia as a political opponent and sought to sway her politically so that they could take credit for the humanitarian work that she performed.” *Martinez-Buendia*, 616 F.3d at 717.
251. *Martinez-Buendia*, 616 F.3d at 717.
252. *Martinez-Buendia*, 616 F.3d at 717.
253. *Martinez-Buendia*, 616 F.3d at 717.
254. UNHCR Gang Note, *supra* note 86, at ¶ 51.
255. Few witness/informant cases have actually proceeded under the political opinion ground. See, e.g., *Velasco-Cervantes v. Holder*, 593 F.3d 975, 978 n. 3 (9th Cir. 2010) (failure to exhaust political opinion argument by not listing political opinion in asylum application or submitting supporting materials and not raising it in appeal to BIA). See also *Zelaya v. Holder*, 668 F.3d 159, 162 n. 3 (4th Cir. 2012) (“Zelaya does not press his political opinions as a ground for asylum or withholding of removal under the INA in his petition for review of the BIA’s final order. Accordingly, we do not address it further.”).
256. *Soriano v. Holder*, 569 F.3d 1162, 1164-65 (9th Cir. 2009).
257. *Soriano*, 569 F.3d at 1164-65. The court distinguished the facts in *Soriano* from those in *Briones v. I.N.S.* where it found nexus between the feared persecution and political opinion. The court explained that the petitioner in *Briones* was involved in an ideological dispute between the government and the New People’s Army, so his activity as a confidential informant was “political at its core,” and his fear of persecution was connected to his political opinion. *Soriano*, 569 F.3d at 1165 (citing *Briones v. I.N.S.*, 175 F.3d 727, 729 (9th Cir. 1999) (en banc)).
258. See *Castillo-Arias v. U.S. Atty. Gen.*, 446 F.3d 1190, 1193 (11th Cir. 2006) (citing *Castillo-Arias v. U.S. Atty. Gen.*, 82 Fed. Appx. 221 (11th Cir. 2003)). The BIA had held that “the people who threatened the Castillos did so ‘out of personal motives and not due to any political opinion imputed to [Castillo-Arias].’” *Castillo-Arias*, 446 F.3d at 1193.
259. *Antonyan v. Holder*, 642 F.3d 1250 (9th Cir. 2011).
260. *Antonyan*, 642 F.3d at 1252.
261. *Antonyan*, 642 F.3d at 1255-56.
262. *Antonyan*, 642 F.3d at 1256.
263. See, e.g., *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 74 (2d Cir. 2007) (rejecting political opinion claim due to lack of evidence that gang was motivated by anything aside from money); *Shehu v. Attorney General of U.S.*, 482 F.3d 652, 657 (3d Cir. 2007) (holding that Albanian gang was motivated by desire for money, not petitioner’s membership in family of immediate relative who worked at bank); *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164-65 (4th Cir. 2009) (finding that money and personal animosity, rather than religion, motivated gang attacks).
264. See, e.g., *Osorio v. I.N.S.*, 18 F.3d 1017, 1028-29 (2d Cir. 1994) (“[T]he conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of the persecution. ... Any attempt to unravel economic from political motives is untenable in this case.”).
265. *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 578 (8th Cir. 2009).
266. *Marroquin-Ochoma*, 574 F.3d at 578.
267. *Marroquin-Ochoma*, 574 F.3d at 578.
268. *Marroquin-Ochoma*, 574 F.3d at 578.
269. *Gonzales-Neyra v. I.N.S.*, 122 F.3d 1293, 1296 (9th Cir. 1997), opinion amended, 133 F.3d 726 (9th Cir. 1998) (order).
270. *Gonzales-Neyra*, 122 F.3d at 1294-95.
271. *Gonzales-Neyra*, 122 F.3d at 1296.
272. CGRS Case #8571.
273. Some judges have granted claims based on political opinion where the applicant reported gang violence to the police. Key to these grants was testimony by a Central American gang expert that reporting gang violence and threats in an environment where the respondent knows that doing so is futile and would only expose him or her to greater danger is a clear expres-

- sion of pro rule of law and antigang political opinion. Interview with Dr. Thomas Boerman, Central American Gang and Organized Crime Specialist (Aug. 6, 2012).
274. The judge also granted the case based on membership in a gender-defined social group. CGRS Case # 6090.
275. *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 164 (4th Cir. 2009). In a similar case, the BIA issued an unpublished decision denying asylum to a Salvadoran Evangelical family that regularly and publicly proselytized to potential and current gang members in an effort to recruit youth to the church and away from gangs. The Board rejected the religion claim, finding "little evidence connecting the actions of the gangs to the respondents' Evangelical beliefs or their work with the church, other than their work in anti-gang activities." CGRS Case #6906. Inexplicably, the BIA treated the family's "anti-gang activities" as separate from its deeply held religious beliefs. The court then determined the case was essentially a recruitment claim and denied it on that basis.
276. *Quinteros-Mendoza*, 556 F.3d at 160.
277. The International Religious Freedom Act (IRFA), 22 U.S.C.A. § 6401, unanimously passed by Congress in 1998, seeks to ensure that refugee protection is granted to individuals fleeing religious persecution that their governments are unable or unwilling to prevent. The IRFA recognizes that religious freedom entails not only freedom to believe but also freedom to act in accordance with one's beliefs without fear of persecution. By failing to recognize the claims of individuals like *Quinteros-Mendoza* who are prevented from freely practicing their religion due to fear of gang persecution, the U.S. is not fulfilling its obligations under the IRFA to protect against religious persecution.
278. *Quinteros-Mendoza*, 556 F.3d at 164-65.
279. *Quinteros-Mendoza*, 556 F.3d at 165.
280. *Bueso-Avila v. Holder*, 663 F.3d 934, 935-36 (7th Cir. 2011).
281. *Bueso-Avila*, 663 F.3d at 935-36.
282. *Bueso-Avila*, 663 F.3d at 937.
283. He also argued that he was persecuted on account of his membership in the social group "Evangelical Christian church youth group." *Bueso-Avila*, 663 F.3d at 938. However, neither the BIA nor the Seventh Circuit ruled on the viability of the group. *Bueso-Avila*, 663 F.3d at 938.
284. *Bueso-Avila*, 663 F.3d at 936.
285. Brief of the UNHCR as Amicus Curiae in Support of Petitioner at 17-21, *Bueso-Avila v. Holder*, 663 F.3d 934 (7th Cir. 2011) (No. 09-2878), available at <http://www.unhcr.org/refworld/pdfid/4cdbbd052.pdf>.
286. *Bueso-Avila*, 663 F.3d at 934, 938-39. Given the deference due to the lower court's decision, it is unusual for a federal court of appeals to reverse an agency denial. However, it also appears that courts reflexively affirm agency denials where there are recruitment overtones to a claim even when, as is the case here, the claim is based upon grounds other than social group membership.
287. *Bueso-Avila*, 663 F.3d at 939.
288. *Bueso-Avila*, 663 F.3d at 938.
289. *Bueso-Avila*, 663 F.3d at 938-39. It also distinguished *Gomes v. Gonzales*, a case involving persecution of Roman Catholics by Muslims in Bangladesh. *Gomes v. Gonzales*, 473 F.3d 746, 750-51 (7th Cir. 2007). Evidence in that case included anonymous threatening phone calls demanding that petitioner relinquish his Christianity and ultimately attackers breaking into his home and threatening to kill him if he did not abandon his faith. While there was direct evidence of motive in *Gomes*, direct evidence is not required.
290. *Martinez-Buendia v. Holder*, 616 F.3d 711, 718 (7th Cir. 2010).
291. CGRS Case #6991. The judge in the case issued an oral decision and DHS did not appeal, thus no decision is on file.
292. CGRS Case #6991. The judge in the case issued an oral decision and DHS did not appeal, thus no decision is on file.
293. CGRS Case #8989. This was a pre-REAL ID Act case.
294. *Caal-Tiul v. Holder*, 582 F.3d 92, 95 (1st Cir. 2009). See also *Bonilla-Morales v. Holder*, 607 F.3d 1132, 1137-38 (6th Cir. 2010) (holding that applicant's persecution was not on account of her membership in the group of family of youth who reject gang membership because her most severe mistreatment predated her son's refusal to join).
295. See USCIS Asylum Officer Basic Training: Gender, *supra* note 129, at 26.
296. See USCIS Asylum Officer Basic Training: Gender, *supra* note 129, at 26; see also DHS' Supplemental Brief, *supra* note 127, at 14,15 (noting that persecutor's belief in his right to abuse the applicant because of her status in the relationship may have been reinforced by

- “social expectations” regarding women in domestic relationships and lack of protection for the group).
297. *Caal-Tiul*, 582 F.3d at 95.
  298. *Valdiviezo-Galdamez v. Attorney General of U.S.*, 502 F.3d 285, 291 (3d Cir. 2007). The court then remanded for the BIA to rule on whether the social group was cognizable. *Valdiviezo-Galdamez*, 502 F.3d at 290. On remand, the Board rejected the particular social group and again denied the claim. The case then went back before the Third Circuit, which again granted the petition for review. See *Valdiviezo-Galdamez v. Attorney General of U.S.*, 663 F.3d 582 (3d Cir. 2011). The case is now back before the BIA.
  299. *Valdiviezo-Galdamez*, 502 F.3d at 291.
  300. The UNHCR states that “[p]ast actions or experiences, such as refusal to join a gang, may be considered irreversible and thus immutable” and that “[r]esisting involvement in crime by, for instance, evading recruitment or otherwise opposing gang practices may be considered a characteristic that is fundamental to one’s conscience and the exercise of one’s human rights. At the core of gang resistance is the individual’s attempt to respect the rule of law and, in the case of those who refuse to join the gangs, also the right to freedom of association, including the freedom to not associate.” UNHCR Gang Note, *supra* note 86, at ¶¶ 37-38.
  301. See UNHCR Gang Note, *supra* note 86, at ¶ 36, stating, “Young people of a certain social status are generally more susceptible to recruitment attempts or other violent approaches by gangs precisely because of the characteristics that set them apart in society, such as their young age, impressionability, dependency, poverty and lack of parental guidance.” The First Circuit’s decision in *Mayorga-Vidal* is not contrary; the social group there failed under visibility and particularity. *Mayorga-Vidal v. Holder*, 675 F.3d 9, 18 (1st Cir. 2012).
  302. See cases cited *supra* note 23.
  303. Attorneys should note that the Langlois Memo discussed in notes 188-208, *supra*, applies to all asylum offices.
  304. See *Garcia v. Attorney General of U.S.*, 665 F.3d 496, 503-04 (3d Cir. 2011), as amended, (Jan. 13, 2012).
  305. See, e.g., *Crespin-Valladares v. Holder*, 632 F.3d 117, 126 (4th Cir. 2011).
  306. See note 112, *supra*.
  307. See *Valdiviezo-Galdamez v. Attorney General of U.S.*, 663 F.3d 582, 605-06 (3d Cir. 2011); *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009); *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009); *Gaitan v. Holder*, 671 F.3d 678, 685-86 (8th Cir. 2012), petition for cert. filed, 81 U.S.L.W. 3004, 81 U.S.L.W. 3032 (U.S. June 20, 2012) (Bye, J., concurring). Contact the CGRS for model briefing challenging social visibility and particularity.
  308. See Brief of the UNHCR as Amicus Curiae in Support of Petitioner at 15-16, *Gaitan v. Holder*, 671 F.3d 678 (8th Cir. 2012) (No. 10-1724), available at <http://www.unhcr.org/refworld/pdfid/4c406e882.pdf> for further explanation.
  309. The Supreme Court has held that “the BIA should be accorded *Chevron* deference as it gives ambiguous statutory terms ‘concrete meaning through a process of case-by-case adjudication.’” *I.N.S. v. Aguirre-Aguirre*, 526 U.S. 415, 425, 119 S. Ct. 1439, 143 L. Ed. 2d 590 (1999) (citing *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 448-49, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987)). In *Matter of Acosta*, the BIA explained that “the particular kind of group characteristic that will qualify [as immutable or fundamental] remains to be determined on a case-by-case basis.” *Matter of Acosta*, 19 I. & N. Dec. 211, 233, 1985 WL 56042 (B.I.A. 1985).
  310. *Morgan v. Holder*, 634 F.3d 53, 62 (1st Cir. 2011).
  311. See *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74, 2007 WL 274141 (B.I.A. 2007); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 584, 2008 WL 2927590 (B.I.A. 2008).
  312. See notes 125-128 and accompanying text, *supra*; see also DHS’ Supplemental Brief, *supra* note 127, at 14-18; RAI0 Guidance, *supra* note 165.
  313. See notes 125-128 and accompanying text, *supra*; see also DHS’ Supplemental Brief, *supra* note 127, at 14-18; RAI0 Guidance, *supra* note 165.
  314. See *S-E-G-*, 24 I. & N. Dec. at 584.
  315. DHS’ Supplemental Brief, *supra* note 127, at 18.
  316. See, e.g., *Ahmed v. Holder*, 611 F.3d 90, 95 (1st Cir. 2010) (rejecting social group of “secularized, westernized Pakistanis perceived to be affiliated with the United States” because “westernized” and “secularized” are too subjective or amorphous to be particular rather than considering whether, within Pakistan, the group as a whole is sufficiently defined).
  317. See *Rivera Barrientos v. Holder*, 658 F.3d 1222, 1231 (10th Cir. 2011), as corrected on denial of reh’g en banc, 666 F.3d 641 (10th Cir. 2012).

318. Attorneys should note, however, that some courts have rejected broad age-defined social groups. See, e.g., *Escobar v. Gonzales*, 417 F.3d 363, 368 (3d Cir. 2005) (rejecting street children in Honduras as overly broad); *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003) (questioning whether “children” can be a particular social group given their “wide degree of varying experiences, interests, and traits”). However, there is no requirement that a social group be narrowly defined. See, e.g., USCIS Asylum Officer Basic Training: Nexus, *supra* note 71, at 31 (referring to *Lukwago* and stating, “DHS has taken the position that these decisions [rejecting groups as overly-broad] should not be read to mean that a group must be small in order to qualify as a particular social group. Rather, the best reading of these cases is that a social group is overbroad if it is broadly defined by general traits that are not the specific characteristic that is targeted by the persecutors.” (internal quotation marks omitted)).
319. See UNHCR Guidelines and cases cited *supra* note 23.
320. See, e.g., DHS’ Supplemental Brief, *supra* note 127, at 14 (arguing that “Mexican women who are unable to leave the domestic relationship” may be a socially visible and particular group that is defined by immutable characteristics. See also, e.g., CGRS Case #6394, *supra* note 131.
321. See, e.g., *Gomez-Zuluaga v. Attorney General of U.S.*, 527 F.3d 330 (3d Cir. 2008) (holding that Colombian women who were abducted and enslaved by FARC and who escaped qualified as “particular social group”). A social group referencing the past harm is not circularly defined in these circumstances because the past enslavement and subsequent escape (in addition to gender) are precisely the characteristics targeted for future persecution.
322. The CGRS can assist attorneys by providing country conditions information and expert affidavits on violence against women in these countries.
323. See notes 157-164 and accompanying text, *supra*, discussing Judge Floyd’s concurrence in *Zelaya v. Holder*, 668 F.3d 159 (4th Cir. 2012), and Judge Bea’s concurrence in *Henriquez-Rivas v. Holder*, 449 Fed. Appx. 626 (9th Cir. 2011), *reh’g en banc* ordered, 670 F.3d 1033 (9th Cir. 2012).
324. See *In re C-A-*, 23 I. & N. Dec. 951, 959, 2006 WL 1977492 (B.I.A. 2006) (establishing that family relations are “generally easily recognizable and understood by others to constitute social groups”). See also *Crespin-Valladares v. Holder*, 632 F.3d 117, 124-26 (4th Cir. 2011) (recognizing family membership as immutable, visible, and particular), but see *Constanza v. Holder*, 647 F.3d 749, 753-54 (8th Cir. 2011) (holding that petitioner’s family was not socially visible or particular).
325. See, e.g., *Urbina-Mejia v. Holder*, 597 F.3d 360, 367 n. 3 (6th Cir. 2010) (noting that former gang members would be easily recognizable), notes 188-208 and accompanying text, *supra*.
326. Former gang members may be barred from asylum and will likely run into a problem with discretionary determinations. Consequently, attorneys should submit evidence of force or coercion upon joining the gang in support of arguments that bars should not apply and should submit evidence of rehabilitation and other relevant evidence to support a positive discretionary determination. A mental health expert’s report may be helpful in addressing these issues. See notes 341-345 and accompanying text, *infra*, for additional information.
327. “An expert witness in an asylum case should be a person who has studied the applicant’s country extensively and/or traveled to or lived in the country and who has a deep knowledge of the conditions there and how they may affect the applicant.” Keast, *Using Experts for Asylum Cases in Immigration Court*, 82 Interpreter Releases 1237, 1238 (Aug. 1, 2005). See generally for discussion of considerations related to the use of an expert witness in asylum cases.
328. See *Matter of S-E-G-*, 24 I. & N. Dec. 579, 585, 2008 WL 2927590 (B.I.A. 2008) (finding social group of “family members” of youth resisting gang recruitment not particular because it could include a wide range of relatives).
329. The CGRS offers free technical assistance, including legal consultation, and provides copies of IJ and unpublished BIA decisions.
330. See, e.g., *Martinez-Buendia*, 616 F.3d at 717 (stating that, while FARC’s initial reasons for targeting petitioner were unclear, FARC later persecuted her because of her political opinion).
331. See, e.g., *Martinez-Buendia*, 616 F.3d at 717. In a recent opinion, an immigration judge in New York similarly found that the gangs’ motives changed over time and that continued, increasingly violent attacks indicated that persecution was on account of imputed political opinion. “Initially, the Respondent appears to

- have been targeted solely for extortionist reasons, unrelated to any political opinion that the gang may have attributed to him. However, the Respondent's testimony strongly indicates that by the time that Mara-18 attacked him in July 2009, their purpose was to punish his resistance to their authority and his imputed anti-Mara political opinion, rather than merely to extort money from him or punish his failure to pay." CGRS Case #8571.
332. See the International Religious Freedom Act (IRFA), 22 U.S.C.A. § 6401, *supra* note 277.
333. See, for example, *Garcia v. Attorney General of U.S.* where the court reversed the BIA's finding that petitioners did not meet the "unable or unwilling" requirement based on rather exceptional facts regarding the extensive but ultimately fruitless efforts of the Guatemalan government to protect them. *Garcia v. Attorney General of U.S.*, 665 F.3d 496, 503 (3d Cir. 2011), as amended, (Jan. 13, 2012).
334. See WOLA Guide, *supra* note 124.
335. 8 C.F.R. § 208.13(b)(2)(ii). In determining whether the applicant could relocate, adjudicators should consider whether the applicant would suffer "other serious harm in the suggested place of relocation" as well as "civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." 8 C.F.R. § 208.13(b)(3).
336. WOLA Guide, *supra* note 124, at 3; see also UNHCR Gang Note, *supra* note 86, at ¶ 53-54 ("Given that many of the Central American gangs, such as the Maras, have country- or even region-wide reach and organization, there may generally be no realistic flight alternative ... attempts [at relocation] have often been unsuccessful as gangs can locate the individual in urban as well as in rural areas, appearing at the applicant's home and place of work as well as near the homes of family members.").
337. In its Guidelines for Children's Asylum Claims, USCIS acknowledges that "[i]t is generally not reasonable to expect a child to internally relocate by himself or herself." USCIS Asylum Officer Basic Training, Guidelines for Children's Asylum Claims 42 (Sept. 1, 2009), available at <http://www.uscis.gov/USCIS/Humanitarian/Refugees%20&%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf>. The UNHCR advises against requiring relocation of a child, explaining: "What is merely inconvenient for an adult might well constitute undue hardship for a child, particularly in the absence of any friend or relation. Such relocation may violate the human right to life, survival and development, the principle of the best interests of the child, and the right not to be subjected to inhuman treatment." UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees ¶ 56, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009), available at [http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR\\_Guidelines\\_Child\\_Asylum.pdf](http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Child_Asylum.pdf).
338. Relocation may be unreasonable for an applicant who is under medical or mental health care for a diagnosed condition if disruption of care could be detrimental or if care would be unavailable upon relocation. Testimony of a mental health or medical expert would be critical to proving the unreasonableness of relocation based on health issues.
339. Given the dramatic rates of sexual and other violence against women in Guatemala, El Salvador, and Honduras, it may be unreasonable for a woman to relocate on her own.
340. See WOLA Guide, *supra* note 124 (discussing how lack of economic opportunity makes relocation "impossible").
341. INA § 208(a)(2) [8 U.S.C.A. § 1158(a)(2)] and INA § 208(b)(2)(A) [8 U.S.C.A. § 1158(b)(2)(A)] bars individuals from asylum if they:
- (1) have persecuted others on account of race, religion, nationality, membership in a particular social group, or political opinion (INA § 208(b)(2)(A)(i) [8 U.S.C.A. § 1158(b)(2)(A)(i)] and INA § 101(a)(42) [8 U.S.C.A. § 1101(a)(42)]),
  - (2) have been convicted of a particularly serious crime and are a danger to the U.S. (INA § 208(b)(2)(A)(ii) [8 U.S.C.A. § 1158(b)(2)(A)(ii)]),
  - (3) have committed a serious nonpolitical crime outside of the U.S. (INA § 208(b)(2)(A)(iii) [8 U.S.C.A. § 1158(b)(2)(A)(iii)]),
  - (4) are reasonably believed to pose a danger to the security of the U.S. (INA § 208(b)(2)(A)(iv) [8 U.S.C.A. § 1158(b)(2)(A)(iv)]),

- (5) are deemed to have participated in or supported terrorism (INA § 208(b)(2)(A)(v) [8 U.S.C.A. § 1158(b)(2)(A)(v)], INA § 212(a)(3)(B)(i)(I) to (VIII) [8 U.S.C.A. § 1182(a)(3)(B)(i)(I) to (VIII)], INA § 212(a)(3)(F) [8 U.S.C.A. § 1182(a)(3)(F)], INA § 237(a)(4)(B) [8 U.S.C.A. § 1227(a)(4)(B)]),
- (6) failed to file for asylum within one year of their last arrival to the U.S. (INA § 208(a)(2)(B) [8 U.S.C.A. § 1158(a)(2)(B)]),
- (7) have previously been denied asylum (INA § 208(a)(2)(C) [8 U.S.C.A. § 1158(a)(2)(C)]),
- (8) firmly resettled in another country before arrival in the U.S. (INA § 208(b)(2)(A)(vi) [8 U.S.C.A. § 1158(b)(2)(A)(vi)]), or
- (9) found a safe third country (INA § 208(a)(2)(A) [8 U.S.C.A. § 1158(a)(2)(A)]).
342. For a detailed discussion of the bars, see Musalo, Moore, and Boswell, *Refugee Law and Policy: A Comparative and International Approach* Ch. 11 (2011); Anker, *Law of Asylum in the United States* §§6:1 et seq.; *Essentials of Asylum Law* (2012), available for purchase at <http://www.ilrc.org/publications/essentials-of-asylum-law>; see also USCIS information on Asylum Bars, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=cf5318a1f8b73210VgnVCM100000082ca60aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD>. CGRS provides advice regarding bars to asylum and withholding of removal.
343. In particular, UNHCR recommends evaluating “(i) the involvement of the applicant in the excludable act; (ii) the applicant’s mental state (mens rea); and, (iii) possible grounds for rejecting individual responsibility.” UNHCR Gang Note, *supra* note 86, at ¶59.
344. 8 C.F.R. § 208.14 (a), (b). An adjudicator first determines whether the applicant is eligible for asylum and then determines whether the applicant merits a favorable exercise of discretion. This process involves the balancing of positive and adverse factors, but “the danger of persecution should generally outweigh all but the most egregious of adverse factors.” *Matter of Pula*, 19 I. & N. Dec. 467, 474, 1987 WL 108948 (B.I.A. 1987).
345. For a thorough discussion of the bars and the exercise of discretion in children’s cases, see Practice Advisory: Bars to Asylum and Withholding of Removal and the Exercise of Discretion in Children’s Refugee Cases, Center for Gender & Refugee Studies (May 2011), available by request.
346. See, e.g., Preston, *Losing Asylum, Then His Life*, N.Y. Times, June 28, 2010, available at <http://www.nytimes.com/2010/06/29/us/29asylum.html>; Posthumous US Asylum Bid Highlights Gang Debate, Wall Street Journal, Jan. 22, 2012, available at <http://online.wsj.com/article/APbcd97d5d79c446f1bde2c85225480659.html>; De Leon, *Guatemalan Youth Slain 17 Days After Being Deported From U.S.*, L.A. Times, May 9, 2004, available at <http://articles.latimes.com/2004/may/09/news/adfg-deport9>.
347. INA § 241(b)(3) [8 U.S.C.A. § 1231(b)(3)]; Convention Relating to the Status of Refugees, July 28, 1951, Art. 33, 189 U.N.T.S. 150; incorporated by U.S. in Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

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