

# Gang Based Asylum Claims

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# Overview of the Law

# BIA Decisions

*Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008)

- *Salvadoran youth who have been subjected to recruitment efforts by the Mara Salvatrucha (MS13) 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 do not constitute a particular social group.*
- Group lacks social visibility (would not be perceived as a group by society), and particularity (because it is too amorphous)

*Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008)

- *E-A-G-* rejects as a PSG *young persons who resist gang membership, or who are perceived to be affiliated with gangs.*
- Group lacks social visibility and would not be viewed as a “segment of the population.”

# First Circuit

- Mendez-Barrera v. Holder*, 602 F.3d 21 (1st Cir. 2010) (Rejects PSG “young women recruited by gang members who resist such recruitment” for lack of visibility and particularity, rejects political opinion and religion claims for failure to establish nexus –holding anti gang beliefs does not alone establish that persecution was on account of such beliefs.)
- *Scatambuli v Holder*, 558 F.3d 53 (1st Cir 2009) – rejects PSG "informants to US government about smuggling ring" as not being socially visible
- Amilcar-Orellana v. Mukasey*, 551 F.3d 86 (1st Cir. 2008) (witness claim, court rules nexus not established – no evidence persecutors were motivated by political opinion or PSG; rather, this it was about personal retribution)
- Larios v. Holder*, 2010 WL 2473327 (1st Cir. June 21, 2010) (Rejects PSG “young Guatemalan men recruited by gang members who resist such recruitment,” for lacking particularity and visibility).

# Second Circuit

- *Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007) (Extortion case: rejects PSG “affluent Guatemalans,” finding group lacks particularity; rejects political opinion claim due to lack of evidence that gang was motivated by anything other than money).
- *Aguilar-Guerra v. Holder*, 2009 U.S. Appx. LEXIS 18734 (2d Cir. 2009) (unpublished) (rejects PSG for individuals who have resisted gang recruitment)

# Third Circuit

-*Valdiviezo-Galdamez v Attorney General of the United States*, 502 F. 3d 285 (3d Cir. 2007) (Substantial evidence did not support BIA determination that applicant failed to establish harm was because he was a “young Honduran male who was actively recruited but refused to join a gang.” Remands for BIA to rule on whether this group is a PSG). **\*\*Case back at 3d Circuit.**

-*Shehu v. Attorney General of the United States*, 482 F.3d 652 (3d Cir. 2007) (Extortion case: Albanian gang motivated by desire for money, not petitioner’s family membership – in family where brother worked at bank).

-*Hernandez-Donis v Attorney General of the United States*, Slip Copy, 2007, WL 708991 (3d Cir. Mar. 9, 2007) (unpub.) (Gangs beat petitioner for money and for refusing to join the ranks, not because of his political opinion. Gangs are not political, they are simply criminal enterprises.)

# Fourth Circuit

*Quinteros-Mendoza v Holder*, 556 F. 3d 159 (4th Cir. 2009) (Religion claim: Maras threatened, beat, and demanded money from petitioner. 3 beatings occurred at church. Court ruled that money and personal animosity motivated the attacks, not religion. Finding based on facts that petitioner was attacked in other places besides his church and no other members of his church were attacked.)

*Contreras-Martinez v. Holder*, 2009 U.S. Appx. LEXIS 22476 (4th Cir. 2009) (unpublished) (Rejects PSG “adolescents in El Salvador who refuse to join the gangs of that country because of their opposition to the gangs’ violent and criminal activities” for lack of visibility, particularity.)

*Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004) (Rules that family is a PSG, but finds that persecution was not on account of family membership but was instead due to being of recruitable age and refusal to join)

# Fifth Circuit

\*No published decisions

*Orellana-Monson v. Holder*, 332 Fed. Appx. 202 (5th Cir. 2009) (Citing *S-E-G-*, rejects PSG “Salvadoran males between the ages of eight and fifteen who have been recruited but who do not wish to belong to a gang.” Holds that refusal to join a gang, without more, does not establish persecution on account of political opinion.”) **\*\*Update re current status of the case**

# Sixth Circuit

- *Urbina-Mejia v. Holder*, (6<sup>th</sup> Cir. Mar. 5, 2010)

Rules that former gang member is a PSG: “It is impossible for Urbina-Mejia to change his membership in the group of former 18<sup>th</sup> Street gang members. It is not that he is unwilling to cast off gang membership; indeed, he came to the United States in order to escape the gang. However, once one has left the gang, one is forever a former member of that gang.”

Social visibility was not before the court, but the court indicated that a former gang member would be “instantly identifiable” to rival gangs and his former gang.

- *Flores v. Mukasey*, 297 Fed. Appx. 389 (6<sup>th</sup> Cir. 2008) (unpublished) (Rejects PSG “young men who are targeted for conscription into Salvadorian gangs,” finding it lacks social visibility”)

# Seventh Circuit

*Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009)

- Rejects social visibility requirement and rules that “defectors from the Mungiki” is a PSG
- Recognizes absurdity of visibility requirement in that members of PSG might take pains to avoid being visible.

*Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009)

Being a gang member should not be a characteristic that a person cannot or should not have to change; but if “**he can’t resign**” it is an immutable characteristic. Holds that “former member of a street gang in El Salvador” is a PSG

# Eighth Circuit and Ninth Circuits

8th:

*Marroquin-Ochoma v. Holder*, 574 F.3d 574 (8th Cir. 2009)

Recruitment and extortion case: Court rules that opposition to a gang such as Mara Salvatrucha may have a political dimension, but refusal to join the gang is not necessarily politically motivated. “Consequently, the mere refusal to join Mara Salvatrucha, without more, does not compel a finding that the gang's threats were on account of an imputed political opinion.”

9th:

*Soriano v. Holder*, 569 F.3d 1162 (9th Cir. 2009)

- Government informant is not a PSG (Filipino gang case).

# Ninth Circuit Continued

- *Ramos Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009) “young Honduran men who have been recruited by MS-13 and who refuse to join” is not a cognizable PSG because it lacks visibility and particularity
- *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007) , rules that membership in a gang is not a PSG because Congress could not have intended to provide refugee status to violent gang members and rejects former gang members as being too amorphous a group.
- *Santos Lemus v Mukasey*, 542 F.3d 738 (9th Cir. 2008) - “the class of young men in El Salvador who resist the violence and intimidation of gang rule” lacks social visibility and particularity (group too broad and diverse). Refusal to join gang without more does not establish persecution on account of political opinion.

# Tenth and Eleventh Circuits, Unpublished Decisions

-*Nkwonta v. Mukasey*, 295 Fed. Appx. 279 (10th Cir. 2008)

Nigerian man who was forced at gunpoint to join a violent fraternity during his university studies and who eventually renounced membership. Court rejects PSG “members of the Black Axe Confraternity” as being based on criminal activity, which is not immutable or fundamental. Nexus not established – recruitment was about swelling ranks, not protected characteristic and threats after leaving fraternity were retaliatory.

-*Tovar-Cortez v. U.S. Att’y Gen.*, 352 Fed. Appx. 344 (11th Cir. 2009) (unpub.) Applicant argued he was targeted for gang violence because of his anti gang political opinion. Court ruled that applicant failed to prove he was targeted based on *his opinion* rather than because of the *gang’s opinion*.

-*Gomez-Benitez v. United States AG*, 295 Fed. Appx. 324, 326 (11th Cir. 2008) (unpublished) (“Honduran schoolboys who refuse to join gangs are not a socially visible group, and are, additionally, too numerous and inchoate.”)

# *S-E-G-* and *EAG* do not foreclose all gang claims

- *S-E-G-* is often read as holding that those who resist gangs or are family members of gang resisters can never constitute a PSG; *E-A-G-* is often read as holding that those who resist gang membership, or who are perceived as being gang members can never constitute a PSG. These interpretations are overbroad.
- These 2 cases have erroneously been understood by some adjudicators to preclude *all* gang based claims
- Social group determinations are to be made in a case by case basis. *Matter of Acosta*, 19 I&N Dec. 211 at 233 (BIA 1985).

# Note about nexus

- Many gang cases are denied based on failure to prove persecution is on account of the ground argued
- \*\*The motivation of the persecutor is also a fact-based determination, based on direct or circumstantial evidence. *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)
- An applicant's experience with the threatening gang can provide evidence of motive, as can the testimony of an expert regarding how and why gangs target who they do, how gangs perceive acts, such as refusal to join, etc.

# Claims Based on PSG

# Social Visibility

- Not required in the 7th Circuit. A few other circuits have not yet ruled.
- Some decisions interpret visibility to mean that the group is literally visible to the naked eye. This understanding is inconsistent with *Kasinga* and *Toboso-Alfonso*. A more reasonable interpretation would be that **the society perceives the members as a group within society.**
- The BIA recognizes that social visibility must be considered “in the context of the country of concern and the persecution feared.”  
*S-E-G-* at 586-87.
- DHS brief in L.R. explains that visibility can be established by showing societal perception or distinction (e.g. that a certain segment of the population is not afforded protection from harm)

# Particularity

- The BIA states that the test for particularity is whether the proposed group can be described “in a manner sufficiently distinct” that the group would be recognized as a group within the “society in question.” *S-E-G-* at 584
- DHS brief in L.R. explains that particularity can be established by showing that the terms defining the group are susceptible to a clear definition, such that an adjudicator can determine who is a member of the group, and recognizes that certain terms defining the group may be appropriate for factual findings by an adjudicator (such as whether a woman is unable to leave a relationship).

# Distinguishing PSG Claims from *SEG*

- The rulings in *S-E-G-* and *E-A-G-* that Central American youth who resist gang recruitment do not form a PSG are **fact-based** rulings. In other words, the BIA ruled based on the records before it in those cases.  
\*"there is little in the background evidence of record to indicate that Salvadoran youth who are recruited by gangs but refuse to join (or their family members) would be 'perceived as a group' by society" *S-E-G-* at 587.
- An applicant may be able to produce evidence that demonstrates that the society in question perceives the group as a group, or as distinguishable within society, and that the group is clearly defined.

# Establishing PSG Post *S-E-G*

- Immutable/fundamental – past recruitment, rejection of gang ethos/lifestyle
- Visibility
  - expert testimony re whether group is perceived as group or is given distinct treatment in society
  - country conditions documentation regarding the same, \*articles regarding group members also help establish that group is recognized
  - special laws targeted at the group (shows general laws not enough to protect)
  - policies regarding the group (shows recognition in society)
  - evidence of social norms regarding the group
- Particularity
  - establish through legal definitions of terms
  - expert opinion regarding whether the boundaries of the group are clear in the society in question
  - adjudicators can also make fact based determinations regarding who is a member of the group

- Other social groups that may be relevant in gang cases:
  - family based groups
  - groups defined by indigenous status
  - gender-based groups
  - former occupation
  - current occupation if it is fundamental to identity or conscience
  - former gang member (6th and 7th Cir. decisions), \*\*Langlois memo – AO does not recognize former gang members as a PSG by AO outside 7th Circuit
  - groups defined by childhood and abandonment
  - street children
  - orphans in a particular country
  - individuals involved in anti-gang movement, organization, sports league, etc.
  - groups defined by sexual orientation
  - disabled youth, youth and HIV+ status

# Gender based claims

- *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (“young women of the Tchamba-Kunsuntu Tribe who have not had FGM as practiced by that tribe, and who oppose the practice.”)
  - *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993) (“women” or “Iranian women who refuse to conform to the government’s gender-specific laws and social norms.”)
  - *Safaie v. INS*, 25 F.3d 636 (8th Cir. 1994) (“Iranian women who advocate women’s rights or oppose Iranian customs relating to dress and behavior.”)
  - *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (“Somali females” or “young girls in the Benadiri clan.”)
  - *Gomez-Zuluaga v. Mukasey*, 527 F.3d 330 (3rd Cir. 2008) (“women who have escaped involuntary servitude after being abducted and confined by the FARC”)
  - *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007) (“Somali females”)
  - *Ngengwe v. Mukasey*, 543 F.3d 1029 (8<sup>th</sup> Cir. 2008) (“Cameroonian widows”)
  - *Perdomo v. Holder*, 2010 WL 2721524 (9th Cir. 2010) (“Guatemalan women”)
- \*\* Thus a group defined by gender and refusal to conform to gang gender roles, by gender and nationality, by escape from involuntary gang servitude may be PSG**

# Claims based on family as PSG

- The majority of grants CGRS has seen post *S-E-G-* have been based on family
- Family is well-recognized as a particular social group, *see Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004); *Iliev v. INS*, 127 F.3d 638, 642 (7th Cir. 1997); *Gebremichael v. INS*, 10 F.3d 28, 36 (1st Cir. 1993); *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986); *In re Acosta*, 19 I & N Dec. 211, 233 (BIA 1985).

## Challenges to family based claims:

- BIA holds persecution is not on account of family membership, but is merely for monetary gain, to increase numbers, for criminal reasons
- BIA rejects an individual family as a PSG, holding that the particular family lacks visibility, unless the family is famous or otherwise well-known in society.

# Claims based on Religion

# Claims based on Religious Opposition to Gangs

- UNHCR recognizes that gang claims may be based on religion. See Gang Note ¶ 32.
- Under U.S. law, the gang members would need to be motivated to persecute because of religion.
- *e.g. Quinteros-Mendoza v. Holder*, 556 F.3d 159 (4th Cir 2009), in which the court ruled that there was insufficient evidence that the gangs were motivated by the applicant's religious affiliation. The court found that the gang's main motivation appeared to financial gain and personal animosity in that they demanded money during all encounters, continued their attacks even after Respondent quit his church and there was no evidence that other members of the church were targeted.

# Claims based on Religious Opposition to Gangs

- In a case now before the 9th Circuit, the BIA rejected a religion based claim in which the father had been actively involved in recruiting youth away from gangs and into the church. The BIA held that persecution was not on account of religion because the gangs began targeting members of the family prior to the father's activism.
- Establishing nexus is a significant challenge in religion cases
- Circumstantial evidence regarding gangs targeting similarly situated individuals based on religion, tension between the gang and church (e.g. competition over same pool of youth), supports a finding of nexus. \*\*Experts can talk to how gang members tend to keep tabs on potential recruits and thus know their religious affiliation/beliefs

# Claims Based on Political Opinion

# A viable claim could be based on political opinion

- Gang-related claims are not subject to special analytical rules; traditional jurisprudence should apply
- *S-E-G-* and *E-A-G-* do not preclude claims based on political opinion.
- If the facts demonstrate that the applicant holds an opinion in opposition to the gangs that meets the criteria of a “political opinion” (or such opinion has been imputed to the applicant by gangs), and if the facts show that the gang members targeted him or would target him for this opinion, the claim could be granted on this basis.
- The applicants in *S-E-G-* and *E-A-G-* refused to join gangs, but did not express anti gang beliefs. Refusal to join “without more” *could* be construed as a political opinion (anti gang, pro rule of law, etc) by gangs, but this would need to be established by an expert who can testify to how the gang would understand such refusal, given the negative case law.

# Political opinion, continued

- Decision to leave a gang may also be based on political opinion (or may be construed as political by gangs), since it is antithetical to the gang code of loyalty. \*\*Consider political opinion angle in former gang member cases, particularly outside the 6th and 7th circuits.
- Refusal to pay gang demands for money may be based on political opinion, but refusal to pay without more is likely to be denied.
- An applicant's reporting gang crime to the police may be based on political opinion in the context of common knowledge that police are ineffectual and that danger to applicant is likely to increase as a result of reporting.
- \*\*Again, need expert to establish political context and how desertion, refusal to pay, reporting to police are understood by the gang in question.

# UNHCR Gang Note

# Background

- Gangs expect loyalty and there are consequences for perceived violations of loyalty. ¶ 5 “[D]esertion carries heavy consequences; gangs tend to punish defectors severely, including..death threats and/or physical revenge.” ¶ 7
- Some gangs rely on forced recruitment, typically targeting “young people who are poor, homeless, and from marginalized segments of society or particular neighborhoods.” ¶ 7

- Gangs may specifically target individuals who oppose or who are perceived as opposing gang practices. Gang resisters “need to be understood in their specific country and societal contexts.” ¶ 11-12
- Groups of individuals at particular risk include (¶ 12):
  - young men and adolescent boys of a certain social status (who are at risk of or refuse recruitment)
  - young women or adolescent girls who refuse a gang’s sexual demands
  - business owners and individuals unable/unwilling to meet gang extortion or demands for other services
  - individuals who have witnessed or reported gang crime to authorities
  - law enforcement agents
  - human rights activists, NGO employees, participants in community or church based groups opposed to gangs
  - ethnic and sexual minorities

- Family may be targeted in retaliation for an individual's actions, or to put pressure on an individual to succumb to gang demands. Gangs may attribute views of one family member to other family members. ¶ 17
- Coercing someone into a gang, or preventing a person from leaving a gang through violence or threats violates a number of human rights and “would normally amount to persecution.” ¶ 22
- Unlawful or arbitrary state measures to combat gang violence – which target former gang members or young people perceived to be gang members – may give rise to a claim ¶ 15
- Note address state inability/unwillingness to protect and internal relocation alternatives ¶ 24-28, 52-54
- Note discusses how to determine whether applicability of exclusion - serious non political crime bar – is justified ¶ 55-61

# Nexus and protected grounds

- Nexus: gangs often target youth from poor neighborhoods who lack family or support networks; thus individuals are often at heightened risk of persecution by gangs because of their marginalization, social status, and vulnerability. ¶ 30
- Religion may be the basis of a claim where “the applicant’s religious beliefs are incompatible with the gang’s lifestyle.”
- ¶ 32: Viable claims could include those in which applicant refuses to join a gang because of his/her religious belief or conscience, or where a gang member who experiences religious conversion wants to exit the gang

- Race and nationality: may be the basis of a claim, where, for example, gangs “fuel xenophobia and carry out hate crimes against foreigners as well as ethnic and national minorities.”

¶ 33.

- Political opinion: needs to be assessed in context of the specific historical, geographic, political, legal, and socio-cultural context in the COI. “Expressing objections to the activities of gangs or to the state’s gang-related policies may be considered as amounting to an opinion that is critical of the methods and policies of those in power and thus, constitute a political opinion” ¶ 46.

-Central American maras control society and exercise de facto power in localities

-Opposition to criminal activity or support for the rule of law may be a political opinion

-Where dissent is rooted in political conviction or ideology and gang members are aware of the individual’s opposition to gangs, persecution may be on account of political opinion ¶ 48

- Neutrality may constitute a political opinion “in an environment in which political neutrality is fraught with hazard.” ¶ 50
- Anti-gang sentiment may be imputed to an individual who does not comply with gang demands
- Particular social group – young people of a certain social status are at greater risk of being recruited because of their “age, dependency, impressionability, poverty, and lack of guidance.” It follows that age and social status could form the basis of a PSG in a recruitment case.
- Resistance to a gang’s criminal lifestyle may be fundamental to a person’s conscience or exercise of human rights. ¶ 38

- An applicant who is a family member of a gang resister or a gang member may be persecuted based on family membership. ¶ 40
- Gang resisters may be recognized in society ¶ 41
- Individuals targeted for gang recruitment may be perceived as a group by society because of their youth, “origin, social background, or class.” ¶ 41
- Imputed gang membership may be the basis of a social group ¶ 42
- Former gang members may be PSG ¶ 44

# Identifying Resources

Crime, Violence, and the Crisis in Guatemala: A Case Study in the Erosion of the State

<http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=986>

No Place to Hide: Gang, State, and Clandestine Violence in El Salvador

<http://www.law.harvard.edu/programs/hrp/documents/No%20Place%20to%20Hide%28Jan%202010%29.pdf>

Central American Gang Related Asylum Cases: Background, Leverage Points And The Use Of Expert Witnesses

<http://www.ilw.com/articles/2009,1215-boerman.shtm>

Boerman, T. (2007). Central American Gangs: An Overview of the Phenomenon in Latin America and the U.S. *Journal of Gang Research*, 15(1), 35-52.

- WOLA website and publications:  
[www.wola.org](http://www.wola.org)
- UNHCR amicus briefs, eg *Valdiviezo Galdamez*
- Casa Alianza:  
[www.casa-alianza.org](http://www.casa-alianza.org)
- ILRC is working on a practice advisory on gang-based claims
- Potential experts:
  - El Salvador, Jim Cavallaro, contact:  
[cavallaro@law.harvard.edu](mailto:cavallaro@law.harvard.edu)
  - Throughout Central America, Tom Boerman:  
(541) 337-5141, [tboerman@comcast.net](mailto:tboerman@comcast.net)