U.S. Department of Justice
Executive Office for Immigration Review

http://eoir-vll/lib_index.html
Published since 2007

Immigration Law Advisor

June 2015 **A Legal Publication of the Executive Office for Immigration Review** *Vol. 9 No. 6*

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Gang-Related Asylum Claims: Looking Back and Looking Forward

by Jaclyn Kelley-Widmer

Gang-related asylum claims cover a wide swath of issues: an asylum applicant may request asylum on the basis of, for example, membership in a particular social group made up of former gang members; as a teacher with an anti-gang political opinion; or as a Christian whose ideals conflict with the gang's goals.[1] As Central America and Mexico suffer from high rates of gang-related violence, immigration courts, the Board of Immigration Appeals, and circuit courts of appeals continue to develop precedent interpreting whether asylum claims based on gang issues may be viable. This article will focus on some of the most-debated issues within gang-related asylum claims: (1) whether particular social groups which are in some way linked to gangs may be cognizable; and (2) if a group is cognizable, how courts might approach the subsequent issue of nexus.

Analysis of Particular Social Groups Based on Gang Membership

Although the Immigration and Nationality Act does not define the phrase "particular social group," the Board of Immigration Appeals has interpreted it to be defined by three requirements: immutability, social distinction,[2] and particularity. *Matter of M-E-V-G-*, 26 I&N Dec. 227, 237 (BIA 2014). Immutability is established through a common characteristic shared by all members of the group that they "either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985). The requirements of particularity and social distinction were discussed at length by the Board in *Matter of M-E-V-G-* and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014), two relatively recent companion cases involving gang-related asylum claims. The Board explained that the primary focus of the particularity requirement is that the group's boundaries can be easily delimited and verified in the society in question. *Matter of W-G-R-*, 26 I&N Dec. at 213–15. To establish social distinction, an applicant must show that members of the social group

are "perceived as a group by society." *Id*. at 216; *see also* Josh Lunsford, *Not Seeing Eye to Eye on Social "Visibility,"* Immigration Law Advisor, Vol. 8, No. 2, at 1 (Feb. 2014).

The circuit courts and the Board have reached varying results when applying these criteria to gang-related asylum claims, even where the proposed particular social groups may appear to be similar. This article will first explore perhaps the most basic of gang-related particular social groups: those formulated around the applicant's past or present membership in a gang. Because these claims are common and have already been evaluated by numerous circuit courts of appeals, they provide a basic framework for evaluating other gang-related particular social groups. This article will outline the differing approaches taken to these types of claims and discuss how courts might extrapolate this precedent in the analysis of other gang-related particular social groups.

Current Gang Members

In *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007), the Ninth Circuit found that a group defined as "American Salvadorian U.S. gang members of a Chicano American street gang," or, more simply, "tattooed gang members," could not form the basis of a particular social group. *Id*. at 942, 945–46. The applicant argued that he would be identified as a gang member due to his tattoos, placed in detention under the country's "Mano Dura" laws meant to crack down on gang activity, and thereafter suffer persecution by rival gang members. *Id*. at 943. The Ninth Circuit conducted a brief analysis of whether the applicant's proposed group qualified as a particular social group. The court noted that, although the applicant was then suggesting that his status as a *former* gang member might qualify him for relief, he had previously testified that he "was *still* a gang member." *Id*. at 945 (emphasis in the original). In any event, the Ninth Circuit addressed the possibility that the applicant might be subjected to harm on account of the fact that his tattoos identified him as a member of a gang. *See id*. The court concluded that a group composed of "[t]attooed gang member[s]" fell outside of its definition of a particular social group. *Id*. at 945 (discussing *Castellano-Chacon v. INS*, 341 F.3d 533 (6th Cir. 2003), and *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007)).

Although its discussion of the standard social group requirements was cursory, the *Arteaga* court conducted a deeper analysis of the policy considerations against granting current gang members asylum. The court found that even if it focused on the applicant's "unique and shared experience as a gang member," as opposed to simply the applicant's tattoos, such a characteristic "is materially at war with those we have concluded are innate for purposes of membership in a social group." *Arteaga v. Mukasey*, 511 F.3d at 945. The court reasoned that Congress did not intend for individuals who are part of "violent street gangs who assault people and who traffic in drugs and commit theft" to receive the humane relief of asylum. *Id*. at 945–46.

Former Gang Members

Since *Arteaga*, other circuit courts have followed the Ninth Circuit's lead in finding that particular social groups based on *current* gang membership are not valid. *See, e.g.*, *Benitez Ramos v. Holder*, 589 F.3d 426, 429 (7th Cir. 2009) ("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." (quoting *Arteaga v. Mukasey*, 511 F.3d at 945–46)); *see also Martinez v. Holder*, 740 F.3d 902, 912 (4th Cir. 2014); *Urbina-Mejia v. Holder*, 597 F.3d 360, 366 (6th Cir. 2010). However, adjudicators have taken various approaches when analyzing whether *former* gang membership may be a protected characteristic for asylum.

Basing its reasoning largely on policy arguments echoed from *Arteaga*, the First Circuit has found that a particular social group based on former gang member status is not cognizable under the Act. *Cantarero v. Holder*, 734 F.3d 82 (1st Cir. 2013). Subsequently, in *Matter of W-G-R-*, the Board found that "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" did not constitute a particular social group under the Act. 26 I&N Dec. at 221. Based on the evidence of record, the Board found that such a group was not socially distinct. The Board reasoned that, although the record contained substantial evidence regarding treatment of gang members in El Salvador, it contained very little information on the treatment or status of *former* gang members and the relevant information was largely equivocal. *Id*. at 222. Turning to the particularity requirement, the Board stated that a particular social group must be narrowly defined and "also be discrete and have definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective."

Id. at 214. In considering whether the particular social group of former gang members was sufficiently particular, the Board found that the proposed group contained too large and diverse a population. *Id*. at 221. For example, the group could include an individual who was in the gang only briefly at a young age, yet also include a "long-term, hardened gang member" who had only recently left the gang. *Id*. Thus, the group proposed in *Matter of W-G-R-* was too diffuse because it could include a person of any age, sex, background, or level of involvement in the gang. *Id*. Because the record did not establish that the proposed particular social group was either socially distinct or particular, the Board found that it was not cognizable.

Prior to the Board's decision in *Matter of W-G-R-*, the Fourth, Sixth, and Seventh Circuits diverged from the above reasoning, rejecting *Arteaga*'s policy rationale, and recognized former gang membership to be a basis for a particular social group. *See Martinez v. Holder*, 740 F.3d at 906 (finding that the Board "erred in its ruling declining—on immutability grounds—to recognize the particular social group of former members of MS–13 who have renounced their membership in the gang"); *Urbina-Mejia v. Holder*, 597 F.3d at 366; *Benitez Ramos v. Holder*, 589 F.3d at 429–30. The Fourth, Sixth, and Seventh Circuits based their holdings largely on the immutability requirement, noting that being a former member of a gang is not a characteristic that is possible for an individual to change, "except perhaps by rejoining the group." *Benitez Ramos v. Holder*, 589 F.3d at 429. In considering particularity and social distinction, the Seventh Circuit found that the applicant's membership in a "specific, well-recognized, indeed notorious gang" was sufficient to establish a clearly delineated particular social group because the group was "neither unspecific nor amorphous." *Id.* at 431. The Seventh Circuit in *Benitez Ramos* did not discuss particularity but criticized the then-called "social visibility" requirement, interpreting this requirement as the literal ability for a group member to be "spotted at a glance" by a stranger on the street. *Id*. at 430. The Sixth Circuit in *Urbina-Mejia* also did not go into great detail regarding whether the applicant's particular social group of former members of the 18th Street gang was socially distinct or particular. It instead relied upon the testimony of an expert witness who opined that the applicant would be easily recognizable in Honduras as an ex-gang member and that his life would be danger should he return. *Urbina-Mejia v. Holder*, 597 F.3d at 366–67.

In addressing policy concerns, the Seventh Circuit disagreed with the conclusion in *Arteaga* that gang membership might be an invalid basis for a particular social group because Congress would not have intended to grant asylum to members of criminal enterprises. *Benitez Ramos v. Holder*, 589 F.3d at 429–30. Rather, the court observed that Congress had barred other types of criminals, but it had not expressed the intention to categorically bar all former gang members from asylum. *Id*. at 430. The Fourth Circuit similarly noted that the Act contains specific categories of criminals who are barred from relief, including those who have engaged in past persecution or committed a particularly serious crime, but that gang members are not listed. *Martinez v. Holder*, 740 F.3d at 912; *see also* section 241(b)(3)(B) of the Act, 8 U.S.C. § 1231(b)(3)(B). Rather than addressing particularity or social distinction, the Fourth Circuit concluded that "former members of a gang in El Salvador" are members of a cognizable particular social group that is based on an immutable shared characteristic, and that such a group is not barred from relief as a policy matter. *Martinez v. Holder*, 740 F.3d at 911–13. The court remanded the case for further analysis.

Analysis of Other Gang-Related Groups

As the above precedent illustrates, circuit courts and the Board have reached various outcomes in applying the requirements of immutability, social distinction, and particularity to cases of former gang members. Some courts have also used a fourth consideration—policy concerns—to decide such cases. In comparing and contrasting the approaches circuit courts have already taken to social groups based on gang issues, adjudicators may find guidance for evaluating whether other types of gang-related social groups meet each of the particular social group requirements under the law as it currently stands.

Immutability

In considering the immutability of other gang-related particular social groups, the focus must center on whether or not the characteristic is one a person "cannot change, or should not be required to change." *Matter of Acosta*, 19 I&N Dec. at 233. Several circuit court decisions model this approach in the gang-claim context. For example, the Sixth Circuit has noted that "tattooed youth" could not form the basis of a particular social group because having a tattoo is not

an "innate characteristic." *Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003), *abrogated on other grounds by Almuhtaseb v. Gonzales*, 453 F.3d 743 (6th Cir. 2006). Similarly, in evaluating whether a social group of "young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs" could be a cognizable group, the Fourth Circuit found that "Americanization" was not fundamental to the applicant's identity or a trait that he could not change given that his background was Salvadoran and it was possible for him to change his manner of speech and dress. *Lizama v. Holder*, 629 F.3d 440, 446–47 (4th Cir. 2011). In contrast, in a case that involved gang persecution of a group defined as the applicant's immediate family, the First Circuit noted that a nuclear family can constitute a particular social group based on common, identifiable, and immutable characteristics. *Aldana-Ramos v. Holder*, 757 F.3d 9, 15 (1st Cir. 2014).

Social Distinction and Particularity

As mentioned above, guidance from the Board as to how the social distinction and particularity requirements may operate in gang-based claims can be found in its decisions in *Matter of W-G-R-* and *Matter of M-E-V-G-*. Prior to these cases, in considering the social groups of current or former gang members, circuit courts mostly focused on the immutability or policy questions and then, if necessary, remanded cases for consideration of social distinction and particularity. *See, e.g.*, *Cantarero v. Holder*, 734 F.3d at 85–86 (deferring to the Board's finding that former gang members were not meant to be protected by the laws regarding refugees); *Martinez v. Holder*, 740 F.3d at 912–13 (finding that former gang membership is an immutable characteristic and remanding the case for consideration of the remainder of the issues).

However, circuit courts have weighed in on the social distinction and particularity requirements with regard to other gang-related social groups. Prior to *Matter of W-G-R-* and *Matter of M-E-V-G-*, the Seventh Circuit declined to afford deference to the Board's former "social visibility" standard, and the Third Circuit rejected both the social visibility and particularity requirements. *See Benitez Ramos v. Holder*, 589 F.3d at 430; *Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 663 F.3d 582, 603–09 (3rd Cir. 2011). The Fourth Circuit applied these standards to several gang-related claims prior to the decisions in *Matter of W-G-R-* and *Matter of M-E-V-G-*. *See Zelaya v. Holder*, 668 F.3d 159, 166–67 (4th Cir. 2012); *Crespin-Valladares v. Holder*, 632 F.3d 117, 124–26 (4th Cir. 2011). The Fourth Circuit found in *Crespin-Valladares* that a particular social group based on a family that was targeted by gangs was immutable because of family bonds—especially because of the limited size of the family—and socially distinct because the family relationship was easily recognizable. *Crespin-Valladares v. Holder*, 632 F.3d at 125–26. In contrast, the Fourth Circuit in *Zelaya* held that "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" do not constitute a socially distinct and sufficiently particular group. 668 F.3d at 165–67. The court found that the latter group lacked immutable family characteristics, which would also contribute to an innate recognizability, and did not have sufficiently well-defined boundaries so as to delineate a discrete class of persons. *Id*. at 166.

Since *Matter of W-G-R-* and *Matter of M-E-V-G-*, the clarified standards for social distinction and particularity discussed in those cases have been addressed in five published circuit court decisions. *See Juarez Chilel v. Holder*, 779 F.3d 850 (8th Cir. 2015); *Kanagu v. Holder*, 781 F.3d 912 (8th Cir. 2015); *Rodas-Orellana v. Holder*, 780 F.3d 982 (10th Cir. 2015); *Paloka v. Holder*, 762 F.3d 191 (2nd Cir. 2014); *Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014). In *Pirir-Boc* and *Rodas-Orellana*, the courts analyzed a gang-related claim in detail.

In *Pirir-Boc*, the Ninth Circuit analyzed a proposed particular social group composed of "persons taking concrete steps to oppose gang membership and gang authority." 750 F.3d at 1080. The petitioner's brother had joined the Mara Salvatrucha, a gang that the petitioner strongly opposed. *Id*. at 1079–80. He convinced his brother, within earshot of gang members, to defect from the gang. *Id*. at 1080. Afterwards, gang members came looking for the petitioner and eventually beat him severely. *Id*. The Immigration Judge found that the petitioner was a member of the above-defined particular social group because he had allied himself with anti-gang organizations and was outspoken and visible in his opposition to the gang. *Id*. However, the Board reversed the Immigration Judge's decision. *Id*. at 1080–81.

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CIRCUIT COURT DECISIONS FOR MAY 2015

by John Guendelsberger

The United States courts of appeals issued 123 decisions in May 2015 in cases appealed from the Board. The courts affirmed the Board in 105 cases and reversed or remanded in 18, for an overall reversal rate of 14.6%, compared to last month's 17.5%. There were no reversals from the First, Second, Third, Fourth, Sixth, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for May 2015 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	0	0	0	0.0
Second	17	17	0	0.0
Third	6	6	0	0.0
Fourth	6	6	0	0.0
Fifth	12	10	2	16.7
Sixth	3	3	0	0.0
Seventh	2	1	1	50.0
Eighth	3	3	0	0.0
Ninth	67	53	14	20.9
Tenth	2	2	0	0.0
Eleventh	5	4	1	20.0
All	123	105	18	14.6

The 123 decisions included 53 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 31 direct appeals from denials of other forms of relief from removal or from findings of removal; and 39 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	53	44	9	17.0
Other Relief	31	26	5	16.1
Motions	39	35	4	10.3

The nine reversals or remands in asylum cases (all from the Ninth Circuit) involved remands to further address particular social group (six cases), nexus, and past persecution, and for application of the "clear error" standard of review to Immigration Judge fact-finding.

The five reversals or remands in the "other relief" category addressed divisibility in applying the categorical approach; "purpose or benefit" under the false claim to citizenship ground for removal; eligibility for naturalization; application of the Federal First Offender Act; and the meaning of the term "admission."

The four motions cases involved changed country conditions (two cases), ineffective assistance of counsel, and a motion to reconsider whether an offense was for an aggravated felony.

The chart below shows the combined numbers for January through May 2015 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	16	12	4	25.0
Ninth	353	279	74	21.0
First	5	4	1	20.0
Tenth	27	23	4	14.8
Eleventh	26	23	3	11.5
Second	82	74	8	9.8
Sixth	32	29	3	9.4
Third	45	41	4	8.9
Fourth	43	40	3	7.0
Fifth	48	46	2	4.2
Eighth	20	20	0	0.0
All	697	591	106	15.2

Last year's reversal rate at this point (January through May 2014) was 14.3%, with 899 total decisions and 142 reversals or remands.

The numbers by type of case on appeal for the first 5 months of 2015 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	349	285	64	18.3
Other Relief	193	166	27	14.0
Motions	155	140	15	9.7

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RECENT COURT OPINIONS

Supreme Court:

Mellouli v. Lynch, 135 S. Ct. 1980 (2015): The Supreme Court reversed the decision of the Eighth Circuit in *Mellouli v. Holder*, 719 F.3d 995 (8th Cir. 2013), which affirmed the Board's approach to determining removability under section 237(a)(2)(B)(i) of the Act based upon State convictions relating to drug paraphernalia. The Eighth Circuit had relied on the Board's holding in *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009). In that case, the Board concluded that State convictions for drug paraphernalia can satisfy the definition of a conviction "relating to a controlled substance" under section 237(a)(2)(B)(i) of the Act. The Board also held in *Matter of Martinez Espinoza* that a categorical comparison between the Federal and State schedules of controlled substances is unnecessary where the conviction is for possession of drug paraphernalia (as distinguished from drug possession or distribution offenses) because a paraphernalia conviction relates to "the drug trade in general," as opposed to a specific drug. In the instant case, the petitioner pleaded guilty under Kansas law to possession of drug paraphernalia with intent to use such paraphernalia to store or conceal a controlled substance. The specific paraphernalia possessed by the petitioner was a sock, in which he had concealed four unidentified orange tablets. Although Kansas defined "controlled substance" more broadly than 21 U.S.C. § 802 (the statute referenced in section 237(a)(2)(B)(i) of the Act), the Immigration Judge, relying on *Matter of Martinez Espinoza*, found the paraphernalia conviction sufficient to establish removability. The Board affirmed. The Eighth Circuit deferred to the Board's holding in *Matter of Martinez Espinoza* and affirmed the Board's conclusion that the Kansas paraphernalia conviction related to a controlled substance under section 237(a)(2)(B)(i). The Supreme Court disagreed, finding that the Board's approach could lead to consequences that were not intended by Congress. The Court noted that an alien would not be removable for *possessing* a substance under an overly broad Kansas controlled substance statute, yet he would be removable for "using a sock to contain that substance." The Court declined to afford deference to an approach leading to such an "anomalous result." The Court held that the construction of section 237(a)(2)(B)(i) "must be faithful to the text," meaning that, in order to establish removability, "the Government must connect an element of the alien's conviction to a drug 'defined in [21 U.S.C. § 802].'" Justice Thomas filed a dissenting opinion, in which Justice Alito joined.

First Circuit:

Renaut v. Lynch, No. 14-1766, 2015 WL 3486688 (1st Cir. June 3, 2015): The court granted a petition for review of a Board decision upholding an Immigration Judge's denial of a motion to reopen. The petitioner was ordered removed in absentia in 2004. Prior to that, a notice of hearing mailed to the address he provided was returned to the Immigration Court with its envelope stamped "ATTEMPTED, NOT KNOWN." Eight years later, the petitioner moved the Immigration Judge to reopen proceedings; the petitioner was now the beneficiary of a pending I-130 visa petition filed by his United States citizen spouse and he hoped to apply for adjustment of status upon its approval. As to his failure to appear, the petitioner stated that he lived at the address provided to the Immigration Court for a few months, but that even after moving he continued to receive mail there. The Immigration Judge denied reopening, and the Board dismissed the petitioner's appeal, concluding that the petitioner had evaded delivery of the hearing notice by moving without providing the required change of address. The First Circuit disagreed, noting that the petitioner continued to use the address in question as his mailing address. The court held that the Board erred in determining that the petitioner had evaded notice where he claimed that he continued to receive mail at the address to which the notice was mailed. The court found nothing in either the statute or the petitioner's notice to appear that defined "address" as a "residential address," rather than a valid mailing address The court noted the Government's admission at oral argument that an alien may provide a post office box as his or her address. The court interpreted the Board's decision as determining that the petitioner evaded the hearing notice solely by not updating his residential (as opposed to mailing) address. However, the court determined that it is not clear that the statute requires notice of a change of physical residence if the alien's mailing address remains unchanged. The court further acknowledged that there was an additional issue whether the petitioner exercised due diligence in inquiring about the status of his removal proceedings, but the court concluded that remand was appropriate because the Board had not directly addressed this issue.

Fourth Circuit:

Amos v. Lynch, Nos. 13-2005, 14-1633, 2015 WL 3606848 (4th Cir. June 10, 2015): The Fourth Circuit granted the petitioner's petitions for review of two Board decisions, which dismissed an appeal from the Immigration Judge's order of removal and denied a motion

for reconsideration. The petitioner, a lawful permanent resident, was convicted of the crime of "causing abuse to [a] child" under former Article 27, § 35A of the Maryland Code (1988). The Board relied on its precedent decision in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999), to conclude that the least culpable conduct under the former Maryland statute fell within the meaning of "sexual abuse of a minor," as used in the aggravated felony definition in section 101(a)(43)(A) of the Act. The Board then expanded its analysis in a later decision denying a motion for reconsideration. On appeal, the court determined that the Board had not set forth a definition of sexual abuse of a minor in *Matter of Rodriguez-Rodriguez*. The court disagreed with decisions of the Second, Third, and Seventh Circuits concluding that the Board in *Rodriguez-Rodriguez* adopted the definition of "sexual abuse" found in 18 U.S.C. § 3509(a)(8). The Fourth Circuit found instead that the Board had referenced 18 U.S.C. § 3509(a)(8) as a guide, without adopting the statute "as a definitive standard or definition." The court therefore concluded that deference could not be afforded to the Board's definition of sexual abuse of a minor in *Matter of Rodriguez-Rodriguez* under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), because no definition had actually been put forth. In the absence of a precedential definition, the court turned to the Board's nonprecedential analysis in the instant decision, to which the court applied the principles of deference articulated in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). The court was not persuaded by the Board's analysis or its conclusion that the least culpable conduct under the former Maryland statute (the failure to act to prevent such abuse) falls within the generic Federal crime of sexual abuse of a minor. Accordingly, the court found error in the Board's conclusion that the petitioner had been convicted of an aggravated felony and vacated the removal order.

Sixth Circuit:

Gaye v. Lynch, No. 14-3652, 2015 WL 3555937 (6th Cir. June 9, 2015): The Sixth Circuit dismissed in part and denied in part a petition for review from a Board decision dismissing an appeal from the Immigration Judge's denial of asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). The court found that it lacked jurisdiction to consider the Immigration Judge's determination that the asylum application was untimely. The court also concluded that it lacked jurisdiction to consider a due process issue that the petitioner had not raised before the Board, consideration of which was thus precluded by the exhaustion doctrine. The court next concluded that the petitioner had not met his burden of establishing eligibility for either withholding of removal or CAT protection. The court was not persuaded by the petitioner's claim that he was entitled under the Act to notice of the type of corroborating evidence required of him. The court disagreed with the Ninth Circuit's decision in *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011), which held that such notice is required by the plain language of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231. Finally, the Sixth Circuit concluded that the petitioner did not establish a claim of ineffective assistance of counsel, since no evidence was offered to establish prejudice based on his prior counsel's purported errors. The court's decision included a dissent.

Ninth Circuit:

Fuentes v. Lynch, No. 11-73131, 2015 WL 3605529 (9th Cir. June 10, 2015): The court denied a petition for review of a Board decision concluding that the petitioner was convicted of an aggravated felony. The petitioner pled guilty to conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). Under section 101(a)(43)(D) of the Act, such a conviction constitutes an aggravated felony if the amount of funds involved exceeded $10,000. On appeal, the petitioner contested the Board's determination that the threshold was met. The court first held that such determination need not be made using the categorical approach (requiring that the $10,000 threshold be an element of a generic crime). Following the holding of the Supreme Court in *Nijhawan v. Holder*, 557 U.S. 29 (2009), the Ninth Circuit agreed with the Board's conclusion that the monetary amount in section 101(a)(43)(D) refers to the specific circumstances of the money laundering offense. Turning to the method of calculation, the court found that the Board erred in relying on counts of the indictment that were dismissed pursuant to the petitioner's plea agreement. The indictment counts in question alleged that the petitioner (with others) conducted five wire transfers totaling approximately $25,000. The Board believed it could rely on the dismissed counts because they were incorporated by reference into the count of the indictment to which the petitioner pleaded guilty. However, the court cited to its own precedent holding that such a plea is not deemed to be an admission of allegations that are not necessary to be proven for a conviction. Since the petitioner pleaded guilty to conspiracy, which does not contain an overt act element, the court held that the allegations of such overt acts were not properly considered part of the plea

and could not be relied upon. The court nevertheless determined that the Board's error was harmless because the Board also relied on the pre-sentence report, which the court found to be proper and which proved by clear and convincing evidence that the threshold amount had been met. Accordingly, the court upheld the Board's determination that the petitioner was convicted of an aggravated felony and was thus ineligible for cancellation of removal.

Angov v. Lynch, No. 07-74963, 2015 WL 3540764 (9th Cir. June 8, 2015): The court amended its decision in *Angov v. Holder*, 736 F.3d 1263 (9th Cir. 2013), and voted to deny rehearing en banc. In its amended decision, the court reaffirmed its holding to allow reliance on overseas investigation reports as a basis to deny asylum. The circuit courts are split as to whether these reports contain sufficient indicia of reliability to be admissible as evidence against an asylum seeker. The Ninth Circuit noted that the Third, Fourth, Sixth, and Eighth Circuits have found the reports inadmissible on due process grounds. The Second Circuit also does not allow the use of consular reports, but on statutory (rather than constitutional) grounds. The Ninth Circuit disposed of the petitioner's due process argument on the ground that he was not entitled to such protection because he had not been formally admitted to the United States. Addressing the report's admissibility as a statutory matter, the court disagreed with the Second Circuit's determination that the lack of certain details or the availability of the report's preparer for cross-examination should render the document inherently unreliable. In reaching this conclusion, the Ninth Circuit focused on the unique context in which such claims arise. The court concluded that "pervasive, structural incentives for fraud" in the asylum system require that triers-of-fact be allowed to consider findings of consular investigations that might lack particular details bearing on credibility. The court stated that allowing consideration of such reports will not always lead to an adverse credibility finding. Rather, the Immigration Judge should be allowed to determine the individual reliability of any such document. The court additionally noted that the asylum seeker carries the burden of proof and is afforded the right to provide rebuttal evidence in response to a consular report. The court noted that Supreme Court and Ninth Circuit precedent afford a presumption of regularity to Government officials carrying out their official responsibilities. The court opined that the Second Circuit's requirements are unrealistic given the consulates' limited resources. As a result, the Ninth Circuit stated that the Second Circuit's rule would exclude from consideration certain evidence "which may be essential to weeding out fraudulent claims." The decision included a dissenting opinion.

BIA PRECEDENT DECISIONS

In *Matter of Z-Z-O-*, 26 I&N Dec. 586 (BIA 2015), the Board revisited the issue of what standard of review is applicable to an Immigration Judge's predictive findings of future events and held that those are factual findings subject to clear error review. Additionally, the Board held that the question of whether an asylum applicant has an objectively reasonable fear of persecution, based on events that the Immigration Judge has found may occur, is a legal determination which is reviewed de novo.

Observing that the Second, Third, Fourth, Seventh, Ninth, and Eleventh Circuits have all held that an Immigration Judge's findings as to future events are factual and are to be reviewed under the clear error standard, the Board noted that the courts have historically, and in contexts other than immigration, regarded findings concerning future events to be factual determinations. The Board explained that the courts have held that although future events have not yet occurred, a decision-maker like an Immigration Judge is deciding now, "as part of a factual framework for determining legal effect," the present probability of a future event. Adopting the courts' position, the Board held that predictive findings are factual and subject to review for clear error. The Board overruled *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008), and *Matter of V-K-*, 24 I&N Dec. 500 (BIA 2008), to the extent that those decisions regarded predictive findings as non-factual.

Addressing the question whether an asylum applicant has demonstrated an objectively reasonable fear of persecution based on future events that the Immigration Judge has found may occur, the Board identified this as a legal determination, subject to de novo review. Thus, the Board announced that it would accept underlying factual determinations unless they are clearly erroneous and would review de novo whether such facts meet the legal requirements for relief from removal. Applying these standards, the Board concurred with the Immigration Judge that the respondent had not established a

well-founded fear of persecution if returned to China. The appeal was dismissed.

In Matter of Francisco-Alonzo, 26 I&N Dec. 594 (BIA 2015), the Board decided that in determining whether a conviction is for an aggravated felony crime of violence under 18 U.S.C. § 16(b), the proper inquiry is whether the conduct encompassed by the elements of the offense presents a substantial risk that physical force may be used in the course of committing the offense in the "ordinary case."

The respondent had been convicted of felony battery in violation of section 784.041(1) of the Florida Statutes and was charged with removability under section 237(a)(2)(A)(iii) of the Act for having sustained an aggravated felony crime of violence conviction, as defined in section 101(a)(43)(F) of the Act. The Immigration Judge found that the conviction was not categorically for a crime of violence under 18 U.S.C. § 16(b) and terminated removal proceedings. The Board sustained the appeal of the Department of Homeland Security ("DHS"), concluding that the Florida statute required any intentional touching or striking to cause "great bodily harm, permanent disability, or permanent disfigurement," such that physical force equivalent to the definition of a "crime of violence" would necessarily be used to commit the crime. The Board rejected the Immigration Judge's consideration of the "eggshell plaintiff" circumstance, relying on *Matter of Ramon Martinez*, 25 I&N Dec. 571 (BIA 2011), which, in turn, cited *James v. United States*, 550 U.S. 192 (2007), for the proposition that § 16(b) cases should be examined in light of the risk of violent force that is present in the "ordinary case" arising under the statute of conviction.

On remand, the Immigration Judge again granted the respondent's motion to terminate, deciding that *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), signaled a shift in the categorical aggravated felony inquiry from the "ordinary case" analysis to a question of "least culpable conduct." The Immigration Judge concluded that the least culpable conduct prosecuted under section 784.041(1) could be a mere touching in a case where the victim had a "preexisting health condition," like an "eggshell victim." The case was certified back to the Board.

Examining the question whether the "ordinary case" analysis identified in *James* or the "least culpable conduct" test of *Moncrieffe* controls, the Board pointed out that in determining whether a State statute is a categorical match to an "elements-based" offense like 18 U.S.C. § 16(a), the query is whether the elements of the statute of conviction are the same or narrower than the generic offense pursuant to *Descamps v. United States*, 133 S. Ct. 2276 (2013). For a State statute to define a crime of violence as contemplated by § 16(a), it must have as an element the "use, attempted use, or threatened use of physical force against the person or property of another." A State statute creates a crime broader than the generic offense if there is a "realistic probability" that the State would apply the statute to conduct falling outside the generic definition of the offense.

In contrast, to decide whether a State offense is a crime of violence pursuant to § 16(b), which covers offenses that involve the risk that physical force may be used against another, the Supreme Court held in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), that in considering whether an offense qualifies as a crime of violence "by its nature" under § 16(b), the focus should be on the "ordinary" meaning of the term "crime of violence." The Board pointed out that it had found guidance in *James*, where the Court concluded that the Florida offense of attempted burglary was a "violent felony," as defined in 18 U.S.C. § 924(e)(2)(B)(ii), a provision similar to § 16(b). In *James* the Court explained that section 924(e)(2)(B)(ii) spoke of "potential risk," a concept which involves "inherently probabilistic concepts," so that a State statute may be a categorical match even if not all prosecutions of the State crime involve a risk of injury to others. The Court defined the inquiry as "whether the conduct encompassed by the elements of the [State] offense, in the ordinary case, presents a serious potential risk of injury to another." Reasoning that § 16(b) similarly defines a "crime of violence" in probabilistic terms, the Board noted that it had applied *James* in § 16(b) cases and considered "the risk of violent force that is present in the 'ordinary' case arising under the statute of conviction."

Subsequent to *James*, the Supreme Court held in *Moncrieffe* that applying the categorical approach to determine whether a State offense is a predicate "element-based" aggravated felony involves an examination of "what the state conviction necessarily involved," presuming that the conviction rested on the least of the acts criminalized under the statute and then determining whether such acts are within the ambit of the generic Federal offense. The question before the Board

was whether *Moncrieffe* overruled the "ordinary case" analysis for "risk-based" offenses, and the Board concluded that *James* remained good law. Noting that the Eleventh Circuit continued to apply the "ordinary case" analysis where the Federal offense is defined in probabilistic terms, the Board determined that it would continue to apply the *James* approach in considering whether a State offense is categorically a crime of violence under § 16(b).

Applying the "ordinary case" analysis to § 784.041(1), the Board concluded that felony battery, as defined therein involved a substantial risk of the use of physical force. Reviewing Florida case law, the Board pointed out that § 784.041(1) is a "violent" crime because of that substantial risk. The Board observed that the Immigration Judge posited that "mere touching not amounting to force could be punished" under the statute, but did not identify any examples of such a prosecution. Moreover, since the *Moncrieffe* "realistic probability" test differs from the "ordinary case" *James* analysis, even if a realistic probability exists that an offender whose conduct amounted to a crime of violence under § 16(a) could be prosecuted when his target was an "eggshell victim," such rare prosecutions are not representative of the "ordinary case" for purposes of a "substantial risk" analysis under § 16(b). The Board concluded that the respondent was removable under section 237(a)(2)(A)(iii) of the Act for having sustained an aggravated felony crime of violence conviction.

In *Matter of Fajardo Espinoza*, 26 I&N Dec. 603 (BIA 2015), the Board reaffirmed *Matter of Reza*, 25 I&N Dec. 296 (BIA 2010), and held that a grant of benefits under the Family Unity Program ("FUP") does not constitute an "admission" to the United States under section 101(a)(13)(A) of the Act for purposes of establishing the requisite 7 years of continuous residence to be eligible for section 240A(a) cancellation of removal. The Board stated that it would not follow contrary Ninth Circuit precedent, *Garcia-Quintero v. Gonzales*, 455 F.3d 1006 (9th Cir. 2006), based on the conclusion that its intervening published decision in *Matter of Reza* is entitled to *Chevron* deference.

The Board observed that the Ninth Circuit did not have the benefit of the reasoning in *Matter of Reza* when it decided *Garcia-Quintero v. Gonzales*. Acknowledging that the clear and unambiguous definition of the terms "admitted" and "admission" in section 101(a)(13)(A) of the Act may, in some circumstances, be fluid in order to avoid an absurd result, the Board stated that it disagreed with the Ninth Circuit's interpretation in *Garcia-Quintero v. Gonzales* that "admitted" and "admission" applied to aliens granted FUP benefits. Pointing out that the Ninth Circuit considered not only the "plain meaning" of the terms, but also the legislative history of 8 U.S.C. § 1229b and precedent decisions, rather than simply concluding that the plain meaning of the phrase "admitted in any status" was unambiguous, the Board explained that it had more broadly construed those terms only in the context of adjustment of status for the sole purpose of avoiding an absurd or bizarre result. Thus, the Board disagreed with the Ninth Circuit's determination that the phrase "admitted in any status" included a grant of FUP benefits. The appeal was dismissed.

It is worth noting that the Board's decision in *Matter of Fajardo Espinoza* coincided with the Ninth Circuit's decision in *Medina-Nunez v. Lynch*, No. 14–70657, 2015 WL 3540940 (9th Cir. June 8, 2015). In that case, the Ninth Circuit held that the Board's decision in *Matter of Reza* is entitled to *Chevron* deference. The issue whether a grant of FUP benefits constitutes an admission in the Ninth Circuit therefore appears to be settled.

In *Matter of J-R-R-A-*, 26 I&N Dec. 609 (BIA 2015), the Board developed guidance for an Immigration Judge assessing the credibility of an alien with competency issues. First, the Board pointed out that when an applicant exhibits indicia of incompetency, his or her competency must be assessed in accordance with *Matter of M-A-M-*, 25 I&N Dec. 474 (BIA 2011).

Next, the Board explained that when an asylum applicant has mental health issues that may result in delusions, an unreliable recounting of events, or testimony that is disjointed or incoherent, the applicant may nonetheless sincerely believe the testimony and may not be deliberately attempting to fabricate a claim. Noting that such occurrences should be considered on a case-by-case basis, the Board instructed Immigration Judges to, as a safeguard, generally accept the applicant's subjective belief in the claim and proceed to a determination whether the applicant can meet his or her burden of proof based on the objective evidence of record.

In *Matter of Pena*, 26 I&N Dec. 613 (BIA 2015), the Board held that an arriving lawful permanent resident is not regarded as seeking admission and may not be charged with inadmissibility under section 212(a) of the Act unless he or she falls within one of the exceptions articulated at section 101(a)(13)(C) of the Act.

The respondent had failed to disclose a prior arrest on an application for adjustment of status but later acknowledged the arrest and was granted lawful permanent resident status. Subsequently, after returning to the United States after a trip abroad, he was charged with inadmissibility under sections 212(a)(6)(C)(i), (ii)(I), and (7)(A)(i)(I) of the Act. The Immigration Judge found that the respondent's permanent resident status was unlawfully obtained because he was ineligible at the time he applied, so he could be charged as an arriving alien who was inadmissible pursuant to section 212(a) of the Act.

Relying on the plain language of section 101(a)(13)(C), the Board observed that an alien who did not fall within one of the statutory exceptions and who presents a colorable claim to lawful permanent resident status is not to be treated as an alien seeking admission and should not be regarded as an arriving alien. Additionally, the Board pointed out that the Supreme Court in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), held that a new entry did not occur when a lawful permanent resident alien returned from an "innocent, casual, and brief" trip outside of the United States. In *Matter of Rangel*, 15 I&N Dec. 789 (BIA 1976), which predated the enactment of section 101(a)(13)(C) of the Act, the Board applied the "Fleuti doctrine" and held that a returning permanent resident who is suspected of unlawfully attaining that status is not making an entry within the meaning of the Act, and the proper forum for adjudicating the legitimacy of her original admission was a deportation proceeding. Based on the statutory language and precedent, the Board opined that the long-established principles regarding the constitutional rights of lawful permanent residents remain viable and concluded that a returning lawful permanent resident who is not described in one of the exceptions in section 101(a)(13)(C) of the Act cannot be regarded as seeking admission.

Noting that the Immigration Judge relied on *Matter of Koloamatangi*, 23 I&N Dec. 548 (BIA 2003), in finding that the respondent had not been lawfully admitted because he obtained his lawful permanent resident status through fraud, the Board explained that the issue whether a returning lawful permanent resident can be regarded as an arriving alien and charged under section 212(a) of the Act was not before the Board in that case. The Board distinguished *Matter of Koloamatangi* because the alien there had been charged with deportability under section 237(a) of the Act and was thus afforded the due process owed him as an alien in lawful permanent resident status. Notably, in *Matter of Koloamatangi* the alien's eligibility for relief from removal was determined after the Immigration Judge resolved the issue of the unlawfulness of his permanent resident status, not prior to the filing of charges initiating the removal proceedings. The Board thus concluded that *Matter of Koloamatangi* was not controlling in this case.

Holding that the respondent, who does not fall within any of the exceptions in section 101(a)(13)(C) of the Act, should not have been regarded as seeking admission to the United States and charged under section 212(a) of the Act, the Board observed that the DHS could charge him with a comparable ground of deportability under section 237(a) of the Act. The proceedings were remanded. The decision contained a dissenting opinion.

REGULATORY UPDATE

80 Fed. Reg. 31,056 (June 1, 2015)
DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services
[CIS No. 2559–15; DHS Docket No. USCIS– 2013–0006]
RIN 1615–ZB38

Extension of the Designation of Somalia for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Through this Notice, the Department of Homeland Security (DHS) announces that the Secretary of Homeland Security (Secretary) is extending the designation of Somalia for Temporary Protected Status (TPS) for 18 months from September 18, 2015, through March 17, 2017.

The extension allows currently eligible TPS beneficiaries to retain TPS through March 17, 2017, so long as they otherwise continue to meet the eligibility requirements for TPS. The Secretary has determined that an extension is warranted because the conditions in Somalia that prompted the TPS designation continue to be met. There continues to be a substantial, but temporary, disruption of living conditions in Somalia due to ongoing armed conflict that would pose a serious threat to the personal safety of returning Somali nationals, as well as extraordinary and temporary conditions in the country that prevent Somali nationals from returning to Somalia in safety. The Secretary has also determined that permitting eligible Somali nationals to remain temporarily in the United States is not contrary to the national interest of the United States.

Through this Notice, DHS also sets forth procedures necessary for nationals of Somalia (or aliens having no nationality who last habitually resided in Somalia) to re-register for TPS and to apply for renewal of their Employment Authorization Documents (EADs) with U.S. Citizenship and Immigration Services (USCIS). Re-registration is limited to persons who have previously registered for TPS under the designation of Somalia and whose applications have been granted. Certain nationals of Somalia (or aliens having no nationality who last habitually resided in Somalia) who have not previously applied for TPS may be eligible to apply under the late initial registration provisions, if they meet: (1) At least one of the late initial filing criteria; and (2) all TPS eligibility criteria (including continuous residence in the United States since May 1, 2012, and continuous physical presence in the United States since September 18, 2012).

For individuals who have already been granted TPS under the Somalia designation, the 60-day re-registration period runs from June 1, 2015 through July 31, 2015. USCIS will issue new EADs with a March 17, 2017 expiration date to eligible Somalia TPS beneficiaries who timely re-register and apply for EADs under this extension.

DATES: The 18-month extension of the TPS designation of Somalia is effective September 18, 2015, and will remain in effect through March 17, 2017. The 60-day re-registration period runs from June 1, 2015 through July 31, 2015. (Note: It is important for re-registrants to timely re-register during this 60-day reregistration period and not to wait until their EADs expire.)

80 Fed. Reg. 31,461(June 3, 2015)
DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
8 CFR Part 1003
[Docket No. EOIR 183; A.G. Order No. 3534–2015]
RIN 1125–AA79

Expanding the Size of the Board of Immigration Appeals

AGENCY: Executive Office for Immigration Review, Department of Justice.
ACTION: Interim rule with request for comments.
SUMMARY: This rule amends the Department of Justice regulations relating to the organization of the Board of Immigration Appeals (Board) by adding two Board member positions, thereby expanding the Board to 17 members.
DATES: Effective date: This rule is effective June 3, 2015. Comment date: Written comments must be submitted on or before August 3, 2015. Comments received by mail will be considered timely if they are postmarked on or before that date. The electronic Federal Docket Management System (FDMS) will accept comments until midnight eastern time at the end of that day.

80 Fed. Reg. 36,346 (June 24, 2015)
DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services
[CIS No. 2568–15; DHS Docket No. USCIS– 2015–0003]
RIN 1615–ZB39

Designation of Nepal for Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.
ACTION: Notice.
SUMMARY: Through this Notice, the Department of Homeland Security (DHS) announces that the Secretary of Homeland Security (Secretary) has designated Nepal for Temporary Protected Status (TPS) for a period of 18 months, effective June 24, 2015 through December 24, 2016. Under section 244(b)(1)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. 1254a(b)(1)(B), the Secretary is authorized to designate a foreign state (or any part thereof) for TPS upon finding that the foreign state has experienced an earthquake resulting in a substantial, but temporary, disruption of living conditions.

This designation allows eligible Nepalese nationals (and aliens having no nationality who last habitually resided in Nepal) who have continuously resided in the United States since June 24, 2015, and have been continuously physically present in the United States since June 24, 2015 to be granted TPS. This Notice also describes the other eligibility criteria applicants must meet.

Individuals who believe they may qualify for TPS under this designation may apply within the 180-day registration period that begins on June 24, 2015 and ends on December 21, 2015. They may also apply for Employment Authorization Documents (EAD) and for travel authorization. Through this Notice, DHS also sets forth the procedures for nationals of Nepal (or aliens having no nationality who last habitually resided in Nepal) to apply for TPS, EADs, and travel authorization with U.S. Citizenship and Immigration Services (USCIS).

DATES: This designation of Nepal for TPS is effective on June 24, 2015 and will remain in effect through December 24, 2016. The 180-day registration period for eligible individuals to submit TPS applications begins June 24, 2015, and will remain in effect through December 21, 2015.

80 Fed. Reg. 36,551 (June 25, 2015)
DEPARTMENT OF HOMELAND SECURITY
U.S. Citizenship and Immigration Services
[CIS No. 2551–14, 2552–14, 2553–14; DHS Docket No. USCIS–2014–0010, USCIS–20014–0011, USCIS–2014–0009]
RIN 1615–ZB32, 1615–ZB33, 1615–ZB34

Extension of the Initial Registration Period for Guinea, Liberia, and Sierra Leone Temporary Protected Status

AGENCY: U.S. Citizenship and Immigration Services, Department of Homeland Security.

ACTION: Notice; extension of registration period.

SUMMARY: On November 21, 2014, the Secretary of Homeland Security (Secretary) published three notices in the Federal Register designating Guinea, Liberia, and Sierra Leone for Temporary Protected Status (TPS), each for a period of 18 months. The designations took effect on November 21, 2014 and are valid through May 21, 2016. The Department of Homeland Security (DHS) established a 180-day registration period from November 21, 2014 through May 20, 2015.

Through this Notice, the Secretary is extending the initial registration period for each of the designations to provide an additional 90 days for individuals who may be eligible for TPS under the Guinea, Liberia, or Sierra Leone designation to prepare and submit their applications. The initial registration period for all three countries has been extended from May 21, 2015 through August 18, 2015. Complete applications must be received with the appropriate fee or with a fee waiver request by August 18, 2015. The extension of the initial registration period does not extend the period of the TPS designation. To be eligible for TPS under the Guinea, Liberia, or Sierra Leone designations, applicants must demonstrate that they have been continuously physically present in the United States since November 21, 2014, and have continuously resided in the United States since November 20, 2014.

DATES: On November 21, 2014, DHS published notices in the Federal Register designating Guinea, Liberia, and Sierra Leone for TPS for a period of 18 months effective from November 21, 2014 through May 21, 2016. The original initial registration period, that was to expire on May 20, 2015, will be extended with a new filing deadline of August 18, 2015, for all three countries. Eligible applicants have until August 18, 2015, to submit an initial application. Additionally, an individual who previously submitted an application for TPS under the Guinea, Liberia, or Sierra Leone designations and to whom USCIS previously returned the application based on the prior May 20, 2015 filing deadline may now resubmit his or her complete application by August 18, 2015.

Gang-Related Asylum Claims *continued*

The Ninth Circuit did not make a final determination as to the cognizability of the particular social group in *Pirir-Boc*, but it found that the Board should have conducted a specific, fact-based inquiry into the relevant society in that case, including consideration of "how Guatemalan society views the proposed group." *Id.* at 1084 (noting also that the Board "did not consider the society-specific evidence" submitted by the petitioner). The court stated that, in light of *Matter of M-E-V-G-*'s holding that "[e]vidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as 'distinct' or 'other' in a particular society," the Board should have

considered the country conditions reports about anti-gang efforts in Guatemala in the record. *Id*. (quoting *Matter of M-E-V-G-*, 26 I&N Dec. at 241).

After *Pirir-Boc*, the Tenth Circuit analyzed a case in which the applicant feared being targeted by gangs because he had resisted their recruitment efforts. The Tenth Circuit found that the applicant had not demonstrated that "Salvadoran males threatened and actively recruited by gangs, who resist joining because they oppose the gangs" constitute a cognizable particular social group because he had not shown that such a group is socially distinct. *Rodas-Orellana v. Holder*, 780 F.3d at 991–93. Rather, the violence the applicant suffered at the hands of the gang "reflect[ed] generalized gang violence toward anyone resisting their efforts rather than defining a distinct social group." *Id*. at 993. The court declined to remand the case to the Board, distinguishing it from *Pirir-Boc* in the following ways: the proposed particular social group did not resemble any group that had been recognized in the past; the proposed group had been analyzed under a standard parallel to the *Matter of M-E-V-G-* standard previously established in the Tenth Circuit; and the record contained no society-specific evidence that would have changed the social distinction analysis, unlike the record in *Pirir-Boc*. *Id*. at 993–96.

These early published circuit court decisions utilizing the standards of *Matter of W-G-R-* and *Matter of M-E-V-G-* to evaluate a gang-based particular social group could signify that circuit courts will generally accept and apply those decisions. However, adjudicators should still be careful to engage in a society-specific analysis in each case, considering all country conditions evidence in the record and keeping in mind that the Board's decisions "should not be read as a blanket rejection of all factual scenarios involving gangs." *Matter of M-E-V-G-*, 26 I&N Dec. at 251.

Nexus

Even where an applicant can show that he is a member of a valid particular social group, he must go on to establish nexus—that gang members wish to persecute him on account of his membership in that group. *See, e.g.*, *Cordova v. Holder*, 759 F.3d 332, 339–40 (4th Cir. 2014) (considering the Board's decision regarding nexus for a family-based particular social group persecuted by gangs); *Madrigal v. Holder*, 716 F.3d 499, 505–06 (9th Cir. 2013) (finding a nexus where the applicant's former military status was at least a partial motivation for his targeting by members of a drug cartel).

Most recently, the Fourth Circuit analyzed a family-based claim brought by a mother who feared harm from gangs as a result of refusing to permit her son to join them. *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015). In *Hernandez-Avalos*, the Fourth Circuit did not credit the Board's finding that the applicant "was not threatened because of her relationship to her son (i.e. family), but was instead threatened because she would not consent to her son engaging in criminal activity." *Id*. at 949 (internal quotation mark omitted). The court found that this holding was "an excessively narrow reading" of the "on account of" requirement and that the analysis "dr[ew] a meaningless distinction" between several reasons the applicant was targeted, which included her maternal relationship to her son. *Id*. at 949–50. The court concluded that the applicant's "relationship to her son is why she, and not another person, was threatened with death if she did not allow him to join" the gang. *Id*. Therefore, the court ruled that her familial relationship to her son was at least one central reason for her persecution and that she had successfully established a nexus to a protected ground.

Beyond *Cordova*, *Madrigal*, and *Hernandez-Avalos*, circuit courts have largely not addressed the nexus issue in the gang context, as they have, instead, analyzed the cognizability of particular social groups and then remanded cases with valid groups to the Board for further fact-finding as to the nexus question. In coming years, as courts begin to more uniformly evaluate particular social groups based on gangs, the circuit courts of appeals will likely increasingly reach the nexus issue.

Conclusion

As more variations of gang-related particular social group claims arise, adjudicators may find it useful to consider past approaches to gang-related claims involving current and former gang members, as well as the analysis of published decisions since *Matter of W-G-R-* and *Matter of M-E-V-G-*. For example, while some courts have found that former gang membership is immutable because it is impossible to change except by rejoining the gang, others have found that it is not immutable because it is not an "innate" characteristic deserving of

protection. Adjudicators may analogize to these and other gang-related cases in determining whether a social group is cognizable under the Act. Further, as guidance regarding nexus is developed at the circuit court level, adjudicators may analogize to *Cordova*, *Madrigal*, and *Hernandez-Avalos* when considering whether a protected ground is "at least one central reason" for the applicant's persecution.

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1. *See, e.g.*, *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014); *Perez v. Holder*, 740 F.3d 57 (1st Cir. 2014); *Martinez-Buendia v. Holder*, 616 F.3d 711 (7th Cir. 2010).

2. The Board recently changed the name of the term "social visibility" to "social distinction." *Matter of W-G-R-*, 26 I&N Dec. at 216. This renaming clarified that the requirement does not refer to "ocular" visibility. Rather, the group must be perceived as a group by society, whether or not the group is literally visible. *Id.* at 216–17.