



Immigration Law Advisor

June 2010 A Monthly Legal Publication of the Executive Office for Immigration Review Vol 4, No.6

In this issue...

Page 1: Feature Article:

Recent Developments in Gang-Related Asylum Claims...

Page 6: Federal Court Activity

Page 12: BIA Precedent Decisions

Page 13: Regulatory Update

The Immigration Law Advisor is a professional monthly newsletter of the Executive Office for Immigration Review ("EOIR") that is intended solely as an educational resource to disseminate information on developments in immigration law pertinent to the Immigration Courts and the Board of Immigration Appeals. Any views expressed are those of the authors and do not represent the positions of EOIR, the Department of Justice, the Attorney General, or the U.S. Government. This publication contains no legal advice and may not be construed to create or limit any rights enforceable by law. EOIR will not answer questions concerning the publication's content or how it may pertain to any individual case. Guidance concerning proceedings before EOIR may be found in the Immigration Court Practice Manual and/or the Board of Immigration Appeals Practice Manual.

Recent Developments in Gang-Related Asylum Claims Based on Membership in a Particular Social Group

by Angela Munro

Introduction

Gang-related violence continues to plague Central America, and during the last decade, asylum claims based on gang violence have become commonplace in the Immigration Courts, at the Board of Immigration Appeals, and in the Federal circuit courts of appeals. Until recently, decisions concerning asylum claims based on gang-related violence were generally unfavorable to aliens seeking such relief. Specifically, in 2008, the Board held that young Salvadoran men who resist recruitment in gangs are not members of a particular social group. *Matter of S-E-G-*, 24 I&N Dec. 579, 583 (BIA 2008). The Board also held that gang membership, whether perceived or real, does not form the basis for inclusion in a cognizable social group. *Matter of E-A-G-*, 24 I&N Dec. 591, 596 (BIA 2008). In general, the circuit courts have agreed with the Board on these two issues, as well as on the broader topic of what constitutes a "particular social group" within the meaning of the Immigration and Nationality Act. However, the United States Courts of Appeals for the Sixth and Seventh Circuits, in March 2010 and December 2009, respectively, issued decisions holding that former gang membership can constitute grounds for membership in a particular social group within the meaning of the Act, despite the Board's findings to the contrary. *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009).

This article will discuss the recent administrative and judicial decisions concerning gang-related asylum claims. Although many legal issues are present in these cases, this article will focus on the concept of membership in a particular social group as it relates to gang-related asylum claims.¹ Many such claims have been based on membership in a purported social group, and various groups have been proposed, including those made up of gang members, former gang members, and individuals who

resisted recruitment in gangs.² This article will examine recent decisions involving gang-related asylum claims based on membership in a particular social group and, more broadly, how these decisions continue to shape the concept of particular social groups.

Guidance from the Board

On July 30, 2008, the Board issued a highly anticipated decision holding that neither Salvadoran youths who have resisted gang recruitment nor their family members were members of a particular social group under the Act. *Matter of S-E-G-*, 24 I&N Dec. at 583. The Board further held that the respondents in that case were not persecuted on account of their anti-gang political opinion. In reaching its conclusion with respect to particular social groups, the Board reaffirmed and applied its previously defined formulation, specifically that a social group must: (1) comprise a group of persons who share a “common, immutable characteristic,” (2) be socially visible, meaning that “the shared characteristic of the group should generally be recognizable by others in the community,” and (3) be defined with sufficient particularity, meaning that the proposed group should be recognized as a “discrete class of persons” in the society in question. *Id.* at 583-86; *see also Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 74-76 (BIA 2007) (holding that affluent Guatemalans were neither sufficiently socially visible in Guatemalan society, nor defined with enough particularity, to constitute a particular social group); *Matter of C-A-*, 23 I&N Dec. 951, 961 (BIA 2006) (holding that the group of former noncriminal drug informants working against the Cali drug cartel was not socially visible in Colombia and thus not a particular social group); *Matter of Acosta*, 19 I&N Dec. 211, 234 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987) (holding that a taxi cooperative in El Salvador was not a particular social group because the group’s defining characteristics were not immutable).

Applying its particular social group formulation to the case at hand, the Board held that while youth itself was not immutable, youth who have been targeted for recruitment by criminal gangs, and who have resisted, may have a shared past experience that cannot be changed. *Matter of S-E-G-*, 24 I&N Dec. at 584. Notwithstanding the potential immutability of the proposed group, the Board held that the group lacked the requisite social visibility and particularity. The Board noted that there was little evidence that youth who have resisted gang

recruitment were “perceived as a group” by society in El Salvador, or that people in the proposed group were more vulnerable to crime than the general population. *Id.* at 587. The evidence indicated that although gangs retaliated against individuals who refused to join their gang, they also harmed “anyone and everyone perceived to have interfered with . . . their criminal enterprises and territorial power.” *Id.* Thus, the risk of harm by a gang was not limited to young males who resisted recruitment, and for purposes of social visibility, the respondents were therefore not in a “substantially different situation” from any other individual who has crossed a gang. *Id.*

The Board found that the proposed group was also not sufficiently particular because the group’s defining characteristics, “male children who lack[ed] stable families . . . who are from middle and low income classes, who live in the territories controlled by the MS-13 gang, and who refuse recruitment,” were too subjective and described a “potentially large and diffuse segment of society.” *Id.* at 585. Also, the Board stated that the evidence did not establish that young males were targeted by gang members because they were perceived to be members of the proposed class. *Id.*

Finally, the Board relied on the Supreme Court’s decision in *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), in denying the respondents’ asylum claim based on their anti-gang political opinion. The Board held that there was no evidence that the respondents held a political opinion, that the MS-13 gang imputed to them an anti-gang political opinion, or that the gang would persecute them based upon any political opinion. *Matter of S-E-G-*, 24 I&N Dec. at 588. It found further that there was no indication that the gang had “any motives other than increasing the size and influence of their gang.” *Id.* at 589; *see also Elias-Zacarias*, 502 U.S. 478 (holding that attempted conscription by guerrillas did not constitute persecution on account of political opinion).

In a companion case issued the same day as *Matter of S-E-G-*, the Board held that neither “persons resistant to gang membership” nor “young persons who are perceived to be affiliated with gangs” were members of particular social groups cognizable under the Act. *Matter of E-A-G-*, 24 I&N Dec. at 594-95. In *Matter of E-A-G-*, the Board held that the purported group of “persons resistant to gang membership” was not socially visible in Honduran society because there was no evidence that such a group was “of concern to anyone in Honduras” or that the group was

viewed as a “segment of the population in any meaningful respect.” *Id.* at 594-95. Although the Board recognized that people in Honduras might be aware that gangs seek to recruit young, urban males, and that some of these young men refuse to join, such a “statistical showing” was not sufficient to establish a protected group without the requisite social visibility. *Id.* at 595.

With respect to the purported group of “young persons who are perceived to be affiliated with gangs,” the Board determined that such a group did have social visibility, because gangs and gang membership were a “recognized evil” in Honduran society. *Id.* However, relying on the Ninth Circuit’s reasoning in *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007), the Board rejected the purported group nonetheless, holding that gang members, or perceived gang members, did not belong to a particular social group because Congress could not have intended to offer protection to those affiliated with a criminal organization. *Matter of E-A-G*, 24 I&N Dec. at 596 (citing to *Arteaga*, 511 F.3d at 945, where the Ninth Circuit, in holding that gang members were not members of a particular social group, stated that the characteristic of being a gang member, which includes the shared experience of engaging in violent criminal activity, was “materially at war” with other innate characteristics found to form other protected social groups); *see also Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992) (finding that “the term ‘particular social group’ surely was not intended for the protection of members of the criminal class in this country”). *But see Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003) (noting that “gang membership cannot be equated to a criminal activity . . . unless that is its only purpose” and that “it is possible to conceive of the members of [the MS-13 gang] as a particular social group under the [Act], sharing for example the common immutable characteristic of their past experiences together, their initiation rites, and their status as Spanish-speaking immigrants in the United States”).

The Board also relied on *INS v. Elias-Zacarias* in finding that there was no evidence that the respondent’s refusal to join the gang was based on any political opinion, and no evidence that the gang would seek to harm the respondent because of any political opinion, real or imputed. *Matter of E-A-G*, 24 I&N Dec. at 597. On the contrary, the evidence suggested that any such harm would be motivated by gang rivalry and a desire to increase the gang’s influence. *Id.*

Related Circuit Court Decisions

Since *Matter of S-E-G*- and *Matter of E-A-G*- were issued in July 2008, the circuit courts have issued a number of decisions with respect to asylum claims based on gang-related violence. As explained below, the First and Ninth Circuits have generally agreed with the Board’s approach to these issues. The Sixth and Seventh Circuits, however, have recognized particular social groups based on former gang membership and, in doing so, the Seventh Circuit has questioned the Board’s social visibility doctrine. The other circuits, though they have not directly addressed gang-related asylum claims in published decisions, generally seem to be in accord with the Board’s approach.

First and Ninth Circuits

The Ninth Circuit has published three decisions holding that young men from Guatemala, Honduras, and El Salvador, respectively, who resist gang recruitment and violence are not members of any particular social group. *Barrios v. Holder*, 581 F.3d 849 (9th Cir. 2009) (involving a petitioner from Guatemala); *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009) (involving a petitioner from Honduras); *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008) (involving a petitioner from El Salvador). In *Santos-Lemus*, 542 F.3d at 745, the Ninth Circuit based its holding on the Board’s reasoning in *Matter of S-E-G*- but noted that the Board’s decision was not binding on the court. The court held that the proposed social group of young men in El Salvador who resisted gang violence was “too loosely defined” to meet the particularity test because it included “a sweeping demographic division.” *Id.* at 745-46. Similarly, the court held that the group was not socially visible, because there was little evidence that Salvadoran society perceived Salvadoran youth who resist gang membership as a visible group or that the gang targeted the petitioner because the gang considered him to be a member of such a group. *Id.* Finally, the court held that the petitioner’s refusal to join a gang did not constitute a political opinion, because there was no evidence that the petitioner had a political opinion and no evidence that the gang imputed one to him. *Id.* at 747.

In *Ramos-Lopez v. Holder*, 563 F.3d at 862, which was decided after *Santos-Lemus*, the Ninth Circuit held that young Honduran men who resisted recruitment into Central American gangs did not constitute a particular social group. In so holding, the court accorded deference

under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Board's determination in *Matter of S-E-G-* and found that the proposed group was not a particular social group because it lacked both particularity and social visibility. In *Barrios v. Holder*, 581 F.3d at 855, the Ninth Circuit, relying directly on its reasoning in *Ramos-Lopez*, held that young men in Guatemala who resist gang recruitment did not constitute a cognizable social group.

Most recently, in April 2010, the First Circuit issued a decision holding that young Salvadoran women recruited by gang members who resist such recruitment did not constitute a particular social group. *Mendez-Barrera v. Holder*, 602 F.3d 21, 26-27 (1st Cir. 2010). Like the Ninth Circuit in the cases cited above, the First Circuit held that the purported group was not socially visible and specifically noted that the relevant inquiry with respect to social visibility was not whether the alien is visible in the society, but whether the social group is visible. *Id.* at 27. The court further held that the "ambiguous group characteristics" of the proposed group failed to establish a sufficient level of particularity. *Id.*

Sixth and Seventh Circuits

In a December 2009 decision, the Seventh Circuit rejected the Board's social visibility requirement as it applies to the particular social group formulation and held that former members of a gang were members of a cognizable social group.³ *Benitez Ramos v. Holder*, 589 F.3d at 429-31. Writing for the three-member panel, Judge Posner stated that unlike being a current gang member, being a former member of a gang is a characteristic that cannot be changed, except by rejoining the gang. *Id.* at 429. This conclusion is in line with prior decisions from both the Board and the circuit courts, which have held that former members of a group may be a particular social group, specifically because the characteristic of former membership is immutable. *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (involving defectors from the Mungiki group in Kenya); *Koudriachova v. Gonzales*, 490 F.3d 255, 262-63 (2d Cir. 2007) (involving former KGB agents); *Sepulveda v. Gonzales*, 464 F.3d 770, 771-72 (7th Cir. 2006) (involving former subordinates of the attorney general of Colombia who had information about the insurgents plaguing the nation); *Cruz-Navarro v. INS*, 232 F.3d 1024, 1028-29 (9th Cir. 2000) (involving former members of the police or military); *Matter of*

Fuentes, 19 I&N Dec. 658, 662 (BIA 1988) (involving former members of the national police of El Salvador).

The *Benitez Ramos* court also rejected the Ninth Circuit's reasoning with respect to the availability of refugee protection for former gang members. As noted above, in *Arteaga v. Mukasey*, 511 F.3d at 946, the Ninth Circuit rejected a proposed social group made up of former gang members, notwithstanding the group's immutability, specifically because a former member of a criminal organization could not have been a group intended by Congress for refugee protection. The Seventh Circuit disagreed with *Arteaga* inasmuch as its holding applied to gangs in general, noting that gangs engage in a variety of activities, not all of which are criminal. *Benitez Ramos*, 589 F.3d at 430. The court further noted that Congress had specifically barred certain groups from asylum, including persecutors and those who have committed a "serious nonpolitical crime." *Id.* Congress did not, however, bar former gang members. *Id.* Thus, the court disagreed with the proposition that, in the court's words, "being persecuted for being a former member of a gang should not be a basis for asylum." *Id.*

In *Benitez Ramos*, the court took further issue with what it characterized as the Board's requirement that a particular social group have "literal" social visibility, rejecting the notion that "you can be a member of a particular social group only if a complete stranger could identify you as a member if he encountered you in the street, because of your appearance, gait, speech pattern, behavior or other discernable characteristic." *Id.* The court found that such a literal interpretation of social visibility was at odds with the "external criterion" interpretation, which requires that the society in question recognize the group, although not necessarily because of visible physical characteristics. *Id.* ("In our society, for example, redheads are not a group, but veterans are, even though a redhead can be spotted at a glance and a veteran can't be."); *see also Gatimi*, 578 F.3d at 616 (stating that the Board's position in that case would require Mungiki defectors to pin "a target to their backs with the legend 'I am a Mungiki defector'" in order to qualify as members of a particular social group, because the group would otherwise not be visually distinct from other members of society in a literal sense); *Castellano-Chacon*, 341 F.3d at 548-49 (discussing the "external" criterion in defining a particular social group).

The Sixth Circuit has recognized a particular social group related to a gang but has not gone as far as the Seventh Circuit. Specifically, in *Urbina-Mejia v. Holder*, 597 F.3d at 366-67, the Sixth Circuit found that former members of a gang can constitute a particular social group, relying on the Seventh Circuit's holding in *Benitez Ramos* that it is impossible to change the fact that a person used to belong to a gang. In its decision in *Bonilla-Morales v. Holder*, ___ F.3d ___, 2010 WL 2499388 (6th Cir. June 15, 2010), though, the court appeared uninterested in following the Seventh Circuit in questioning the social visibility test. That case involved a Honduran petitioner who argued that she was a member in the social group of "family members of youth who have been subjected to recruitment efforts by the MS-13 gang and who have resisted such membership." *Id.* at *3. The court upheld the denial of the petitioner's asylum application on the grounds that there was insufficient nexus between the harm suffered and her membership in the purported social group. In doing so, the court questioned whether the petitioner even belonged to a cognizable social group, stating that her proposed group "likely does not meet" the particularity and social visibility requirements. *Id.* at *3-4.⁴

Other Circuits

None of the other circuit courts have issued precedent decisions addressing particular social groups with respect to gang-related asylum claims. In unpublished decisions, however, the Second, Third, Fourth, Fifth, and Eleventh Circuits have adopted the Board's reasoning in *Matter of S-E-G-* and have declined to recognize proposed particular social groups related to Central American gang recruitment. See *Turcios-Avila v. U.S. Att'y Gen.*, 362 F.App'x 37 (11th Cir. 2010) (involving young Honduran men who have been recruited by gangs and who refuse to join); *Zavaleta-Lopez v. Att'y Gen. of the U.S.*, 360 F.App'x 331 (3d Cir. 2010) (involving young men in El Salvador who have been recruited by gangs and who refuse to join); *Contreras-Martinez v. Holder*, 346 F.App'x 956, 958 (4th Cir. 2009) (involving adolescents in El Salvador who refuse to join the gangs because of their opposition to the gangs' violent and criminal activities); *Vasquez v. Holder*, 343 F.App'x 681, 683 (2d Cir. 2009) (involving individuals who have been actively recruited by gangs, but who have refused to join because they oppose the gangs); *Cruz-Alvarez v. Holder*, 320 F.App'x 273, 274 (5th Cir.

2009) (involving children targeted for recruitment into gangs).

Interestingly, the Third Circuit, in a case issued prior to *Matter of S-E-G-*, had declined to decide in the first instance whether "young Honduran men who have been actively recruited by gangs and who have refused to join" are members of a particular social group. *Valdiviezo-Galdamez v. Att'y Gen. of U.S.*, 502 F.3d 285, 290 (3d Cir. 2007).⁵ In *Valdiviezo-Galdamez*, the court reversed the Immigration Judge's finding that there was no nexus between the harm the gang inflicted upon him and his refusal to join the gang. *Id.* The court found that "there [was] no evidence in the record that the gang members attacked [the petitioner] for any reason other than he is a young man who has repeatedly refused to join the gang after being actively recruited to join." *Id.* at 290-91. The court remanded the case to the Board for a determination on whether the proposed group was a particular social group for purposes of asylum and withholding of removal. *Id.* at 293. In so doing, the court seemed to hint that based on the Board's decisions to date, young Honduran men who have been actively recruited by gangs and who have refused to join did comprise a cognizable social group. *Id.* at 291 ("[T]he [Board's] decisions [concerning particular social groups] support [the petitioner's] position. The group in which [the petitioner] claims membership shares the characteristics of other groups that the [Board] has found to constitute a 'particular social group.'")

However, in an unpublished case issued after the Board's decision in *Matter of S-E-G-*, the Third Circuit found that the Board reasonably relied on *Matter of S-E-G-* in denying the petitioner's asylum application. *Zavaleta-Lopez*, 360 F.App'x at 334. *Zavaleta-Lopez* involved a purported particular social group of "young men who have been targeted by gangs for membership and who have refused to join." *Id.* at 332. In affirming the denial of relief, the court characterized this group as "simply too diffuse and without the common, immutable characteristics necessary to establish the contours of a particular social group." *Id.* at 334. Although *Zavaleta-Lopez* is unpublished, it can be read to suggest that if the Third Circuit should issue a published decision on this question, it would defer to the Board's determination in *Matter of S-E-G-*, despite its previous suggestion to the contrary in *Valdiviezo-Galdamez*.

continued on page 14

FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR MAY 2010

by John Guendelsberger

The United States courts of appeals issued 231 decisions in May 2010 in cases appealed from the Board. The courts affirmed the Board in 193 cases and reversed or remanded in 38, for an overall reversal rate of 16.5% compared to last month's 15.5%. There were no reversals from the First, Fourth, Fifth, and Eighth Circuits.

The chart below shows the results from each circuit for May 2010 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% reversed
First	3	3	0	0.0
Second	65	63	2	3.1
Third	40	37	3	7.5
Fourth	13	13	0	0.0
Fifth	12	12	0	0.0
Sixth	6	5	1	16.7
Seventh	4	3	1	25.0
Eighth	7	7	0	0.0
Ninth	63	35	28	44.4
Tenth	4	3	1	25.0
Eleventh	14	12	2	14.3
All circuits:	231	193	38	16.5

The 231 decisions included 142 direct appeals of denials of asylum, withholding, or protection under the Convention Against Torture; 45 direct appeals from denials of other forms of relief from removal or from findings of removal; and 44 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	%
Asylum	142	125	17	12.3
Other Relief	45	29	16	35.6
Motions	44	39	5	11.4

The 17 reversals in asylum cases included 10 adverse credibility determinations (all from the Ninth Circuit); 2 nexus determinations; 2 assessments of level of harm for past persecution; 1 well-founded fear determination; and 1 Convention Against Torture claim.

Half of the 16 reversals in the "other relief" category involved criminal grounds of removal, several

addressing whether the offense was a crime involving moral turpitude and several others addressing the application of the categorical or modified categorical approach. The other reversals involved waivers and relief from removal, including a section 212(c) denial and three cancellation of removal cases. One of these cancellation of removal cases involved the denial of a fair hearing where relevant testimony was cut off, another involved a physical presence determination, and the third involved the exceptional and extremely unusual hardship determination.

Four of the five reversals in motion cases involved motions to apply for asylum based on changed country conditions. The fifth concerned finality of a conviction.

The chart below shows the combined numbers for the first 5 months of 2010, arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% reversed
Ninth	711	593	118	16.6
Seventh	19	16	3	15.8
Tenth	17	15	2	11.8
Eighth	31	28	3	9.7
Sixth	36	33	3	8.3
Eleventh	108	100	8	7.4
Second	426	395	31	7.3
Third	187	174	13	7.0
Fifth	56	53	3	5.4
Fourth	64	62	2	3.1
First	11	11	0	0.0
All circuits:	1666	1480	186	11.2

The numbers by type of case on appeal for the first 5 months of 2010 combined are indicated below.

	Total	Affirmed	Reversed	%
Asylum	905	808	97	10.7
Other Relief	332	286	46	13.9
Motions	429	386	43	10.0

John Guendelsberger is a Member of the Board of Immigration Appeals.

“The Wrong Side of the Rock-Throwing Line?”: New Looks at an Old Bar to Refugee Protection

Edward R. Grant and Patricia M. Allen

The oft-complex factual circumstances giving rise to claims of persecution sometimes require Immigration Judges to examine whether the applicant is barred from asylum or withholding of removal on grounds of being a persecutor, a supporter of terrorist activity, or, in more rare cases, one who has committed a “serious nonpolitical crime.” The “persecutor” and “terrorist” bars have been the subject of frequent analysis in these pages. See Brigitte L. Frantz, *Assistance in Persecution Under Duress: The Supreme Court’s Decision in Negusie v. Holder and the Misplaced Reliance on Fedorenko v. United States*, Immigration Law Advisor, Vol. 3, No. 5 (May 2009); Lisa Yu, *Differentiating the Material Support and Persecutor Bars in Asylum Claims*, Immigration Law Advisor, Vol. 3, No. 2 (Feb. 2009); Lisa Yu, *New Developments on the Terrorism-Related Inadmissibility Ground Exemptions*, Immigration Law Advisor, Vol. 2, No. 12 (Dec. 2008); Linda Alberty, *Affording Material Support to a Terrorist Organization—A Look at the Discretionary Exemption to Inadmissibility for Aliens Caught Between a Rock and a Hard Place*, Immigration Law Advisor Vol. 2, No. 4 (Apr. 2008); Derek C. Julius, *Splitting Hairs: Burden of Proof, Voluntariness and Scierer Under the Persecutor Bar to Asylum-Based Relief*, Immigration Law Advisor Vol. 2, No. 3 (Mar. 2008); Edward R. Grant, *Persecution and Persecutors: No Bright Lines Here*, Immigration Law Advisor Vol. 1, No. 8 (Aug. 2007). The serious nonpolitical crime bar has not, due in large part to the paucity of judicial opinions on the subject.

A recent decision the United States Court of Appeals for the Sixth Circuit gives occasion to consider when there exist “serious reasons to believe that the alien has committed a serious nonpolitical crime outside the United States before the alien arrived in the United States,” as stated in section 241(b)(3)(B)(iii) of the Immigration and Nationality Act, 8 U.S.C. §1231(b)(3)(B)(iii). *Berhane v. Holder*, 606 F.3d 819 (6th Cir. 2010); see also section 208(b)(2)(A)(iii) of the Act, 8 U.S.C. §1158(b)(2)(A)(iii) (“serious reasons for believing” that the alien has committed a serious nonpolitical offense).

Berhane raises the question whether seemingly politically oriented violence—in this case, repeated rock-throwing at police and government vehicles in response

to questionable election results—nonetheless constitutes a serious nonpolitical crime under the standards set forth by the Board in *Matter of McMullen*, 19 I&N Dec. 90 (BIA 1984), and endorsed by the Supreme Court in *INS v. Aguirre-Aguirre*, 526 U.S. 415 (1999). As *Berhane* resulted in a remand to the Board, our analysis of the issues presented will be appropriately constrained. However, the questions posed by the Sixth Circuit are worthy of note, as are cases issued in the past decade since *Aguirre-Aguirre* raising similar issues.

McMullen and Aguirre-Aguirre

The petitioner in *Aguirre-Aguirre*, in protest against the Guatemalan Government’s increases in bus fares, joined fellow members of the Estudiante Sindicato in burning buses, assaulting and striking passengers who refused to disembark from buses under attack, breaking store windows, and attacking police cars. A divided panel of the Ninth Circuit held that the Board erred in concluding that these actions triggered the serious nonpolitical crime bar because it failed to consider whether the petitioner’s actions were grossly disproportionate to their alleged objective and atrocious in nature, and it failed to take into account the petitioner’s risk of persecution. *Aguirre-Aguirre v. INS*, 121 F.3d 521 (9th Cir. 1997). The Supreme Court unanimously reversed, deferring to the general standard set forth in *Matter of McMullen*: whether a crime is “political” in nature depends primarily on whether “the political aspect of the offense outweigh[s] its common-law [or criminal] character.” *Aguirre-Aguirre*, 526 U.S. at 429 (quoting *Matter of McMullen*, 19 I&N Dec. at 97-98). A crime that is grossly out of proportion to its “political” objective or involved “atrocious” acts can be deemed a serious nonpolitical crime even without being subjected to the balancing test. *Id.* at 429-30. However, the questions of proportionality and atrociousness need not be considered if the balancing test establishes that the offense was a serious nonpolitical crime. *Id.* at 430. In other words, the alien’s offenses need not be “grossly disproportionate” or “atrocious” in order to come within the sphere of serious nonpolitical crimes. *Id.* at 431.

This was the case in *McMullen*, where the criminality of the respondent’s actions as an active member of the Provisional Irish Republican Army clearly outweighed the “political” nature of the offenses. That, according to the Supreme Court’s reading of *McMullen*, provided sufficient grounds for concluding that a serious nonpolitical crime had been committed. The fact that

McMullen's actions were found to be both atrocious and grossly disproportionate to the political goal of achieving a united Ireland does not require that these factors be present in every case of a serious nonpolitical crime. See *Aguirre-Aguirre*, 526 U.S. at 429-30.

“The Crime in Context”

As demonstrated by the arguments in *Aguirre-Aguirre*, the waters begin to cloud when the allegedly political acts committed by the alien are deemed to be less than “atrocious” in nature. *Berhane* illustrates the point: how many rocks must be thrown, to what consequence, and in what context, to strip the crime of its allegedly political raiment?

The petitioner, along with other members of a prominent opposition group in Ethiopia, the Coalition for Unity and Democracy, took to the streets in protest against what they believed to be fraudulent election results. *Berhane*, 606 F.3d at 819-21. Over the course of more than 20 street protests, the petitioner threw rocks “countless” times at police and police vehicles, causing crashes and officers to be in “bad condition.” *Id.* at 823. The Board held that these activities constituted a serious nonpolitical crime, concluding that their criminal nature outweighed their political attributes and thus barred the petitioner from seeking asylum and withholding of removal. *Id.* at 823-24. In doing so, the Board also quoted the Immigration Judge, who “would understand if the [petitioner] took part in a peaceful demonstration” but instead took to throwing rocks, causing damage to public and private property, and “probably injured police officers as well.” *Id.* at 824.

Not satisfied with the Board's analysis, the Sixth Circuit remanded for an explanation as to why the petitioner had fallen on the “wrong side of the rock-throwing line.” *Id.* at 820, 824. In particular, the court remanded for a clarification of whether *all* rock-throwing, a “conventional, if nonetheless violent, form of street protest,” would constitute a serious nonpolitical crime, or whether it was the particulars of the petitioner's actions—their violence and frequency—that led to the finding. *Id.* at 824-25. Moreover, the Sixth Circuit also mandated that the Board weigh in the balance the petitioner's explanation that he only threw rocks in self-defense and never targeted civilians. *Id.* at 825.

Judge Karen Nelson Moore, in a concurring opinion, stated that she would have reversed the Board's decision and granted the petitioner's application. *Id.* at 826. Judge Moore called for the Board to “look[] at the full picture” and set the petitioner's conduct against the backdrop of the plight of democracy in Ethiopia: corrupt elections, thousands of political prisoners, and governmental prohibition or violent repression of protests, including instances where police shoot indiscriminately into crowds. *Id.* at 827-29. She asked, “[I]s it truly a disproportionate act for a Coalition protestor to throw rocks at police officers, some of whom had shields?” *Id.* at 828. In determining that the petitioner's conduct was squarely political, Judge Moore gave heavier consideration than the majority to whether innocent civilians were also targets for violence and the petitioner's explanation that he only threw rocks in self-defense. *Id.* at 826-27.

While no other Board or Federal court decision has ever addressed rock-throwing in this particular statutory context, additional guidance may be found in several cases involving analogous forms of violent political protest. The petitioner in *Chay-Velasquez v. Ashcroft*, 367 F.3d 751 (8th Cir. 2004), burned buses, threw bottle-bombs at police, and broke windows as a member of an informally organized opposition student group that protested privatization and supported indigenous rights. *Id.* at 753. The Eighth Circuit upheld the Board's finding of a serious nonpolitical crime because the petitioner's actions “had endangered the public and committed violent acts out of proportion to any political aspect of his conduct.” *Id.* at 755. The fact that civilians were not targets did “not convert [the petitioner's] acts into political offenses.” *Id.* While the latter observation has not been disputed in other cases, it seems more conclusive than the Sixth Circuit's requirement that civilian targets be addressed in the balance. See *Berhane*, 606 F.3d at 824-25.

The Albanian petitioner in *Comollari v. Ashcroft*, 378 F.3d 694, 698 (7th Cir. 2004), was deemed ineligible for asylum by the Board because of his participation in smuggling cigarettes and coffee and related activities. The court remanded, questioning whether Comollari's smuggling should be considered a “serious” crime because Albania, as a “disordered state[],” was not a “normal country,” but a nation where smuggling may be regarded as merely “little more than *malum prohibitum*.” *Id.* This

factor, which we could label “the crime in context,” clearly influenced the Sixth Circuit in *Berhane*, which considered “the prevalence of rock throwing as a form of street protest” that occurs “with some regularity in other countries.” See *Berhane*, 606 F.3d at 824. *Comollari* also found relevant the complicity of the Albanian Government itself in the very smuggling crimes that the petitioner was accused of committing, as well as the Government’s motive for “want[ing the petitioner] so that it can silence a whistleblower.” *Comollari*, 378 F.3d at 698. Finally, the court raised the question whether the petitioner’s offense was political in nature if it was done on behalf of a political party. *Id.*

In contrast, the Fifth Circuit in *Efe v. Ashcroft*, 293 F.3d 899, 905-06 (5th Cir. 2002), affirmed the Board’s conclusion that the killing of a police officer during a demonstration turned violent in Nigeria was a serious nonpolitical crime. In making this determination, the court laid out an exacting four-factor analysis culled from *Aguirre-Aguirre* on whether or not a crime is political. *Id.* at 905. First, the court determined whether “genuine political motives existed.” Second, it looked to whether the “act was directed toward modification of the political organization of the state.” Third, it looked to whether “a causal link exists between the crime and political purpose.” Fourth, it balanced “the political nature of the act with whether it was disproportionate to its objective or of an atrocious or barbarous nature.” *Id.*

Because the petitioner had nearly obliterated his credibility through numerous inconsistencies, the court found “no compelling evidence” that the petitioner was motivated politically when he killed the officer. *Id.* at 905-06. The court further found that even had the petitioner established a political motive, his act of returning to the demonstration to kill the officer was “disproportionate to the objective” of the protest, which was to install the elected president. *Id.* at 906. The court also considered the petitioner’s claim that he acted in self-defense, a factor recognized by the Sixth Circuit in *Berhane*, but discarded it in light of the petitioner’s lack of credibility.

The Second Circuit in *Guo Qi Wang v. Holder*, 583 F.3d 86 (2d Cir. 2009), found that the petitioner had committed a serious nonpolitical crime in light of his admission that “he was knowingly involved in the Chinese Government’s scheme to profit from the harvesting and transplantation of organs removed from executed prisoners

without their consent.” *Id.* at 91. The petitioner argued that the Immigration Judge erred in finding that he had committed a serious nonpolitical crime and asserted that he was “not involved in the extraction of organs or tissue from a live prisoner.” *Id.* at 90. The court gave short shrift to the applicant’s argument by evoking the Federal criminal prohibition of harvesting and transferring organs for profit, under 42 U.S.C. § 274e, which “alone [led it] to conclude that the scheme at issue here was a serious crime.” *Id.* at 91. The court then cited to international condemnation of the practice. *Id.* at 91 n.3.

Gang Claims: A Defining Characteristic Becomes a Bar

The Sixth and Seventh Circuits have both held, contrary to Board precedent, that former members of a violent street gang can constitute a particular social group. However, what the decisions give with one hand they take away with the other, for one holds, and the other strongly suggests, that activities engaged in while a gang member will constitute a serious nonpolitical crime. See *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010) (holding that the petitioner was barred for committing a serious nonpolitical crime); *Benitez Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009) (remanding for Board to consider the question). In effect, the alien is barred from eligibility as a result of the inherent nature and conduct of the particular social group in which he claims membership. *Urbina-Mejia* supported the Board’s conclusion that the petitioner was ineligible for withholding of removal where he had committed serious nonpolitical offenses, including extortion and violent assault, while he was a member of a criminal gang in Honduras. *Urbina-Mejia*, 597 F.3d at 369-70. Since the petitioner did not contest that his crimes were nonpolitical in nature, there was no need to apply the *McMullen* balancing test. The Seventh Circuit in *Benitez Ramos* similarly found that while the petitioner may be a member of a particular social group, to wit: “tattooed, former Salvadoran gang members,” the violence he may have perpetrated as a gang member may bar him from withholding of removal. See *Benitez Ramos*, 589 F.3d at 429, 431.

Serious Reasons to Believe

The standard for applying the serious nonpolitical crime bar is whether the adjudicator has “serious reasons” to believe that the applicant committed the offense. See section 241(b)(3)(B)(iii) of the Act. The Second Circuit,

RECENT COURT OPINIONS

Supreme Court:

Carachuri-Rosendo v. Holder, 560 U.S. ___, 2010 WL 2346552 (June 14, 2010): The Supreme Court reversed the decision of the United States Court of Appeals for the Fifth Circuit, which held that an alien with two State misdemeanor convictions (one for possession of a small quantity of marijuana; the other for possession of a single anti-anxiety pill) was ineligible for cancellation of removal as an aggravated felon under section 101(a)(43)(B) of the Act. Although the second conviction only resulted in a 10-day sentence, the Fifth Circuit found the offense to be an aggravated felony under the Supreme Court's 2006 decision in *Lopez v. Gonzales*, 549 U.S. 47 (2006) (holding that in order to be an aggravated felony for immigration purposes, a State drug offense must be punishable as an aggravated felony under Federal law). The Fifth Circuit employed a "hypothetical approach," determining that the second offense "could have" been prosecuted as a felony under the Federal Controlled Substances Act ("CSA"). The Supreme Court disagreed, finding first that neither the type of crime nor the penalty imposed satisfies the "common sense conception" of the term "aggravated felony." Next the Court found the "hypothetical approach" to be inconsistent with the statutory language of the Act, which, according to the Court, required looking "to the conviction itself as our starting place, not to what might have or could have been charged." The Court further found that the criminal record made no mention of the alien's prior conviction and thus failed to comply with the CSA's safeguards requiring prosecutorial notice of the recidivism charge and the opportunity to defend against it. The majority opinion was authored by Justice Stevens; Justices Scalia and Thomas each wrote concurring opinions.

Third Circuit:

Espinosa-Cortez v. Att'y Gen. of U.S., 607 F.3d 101 (3d Cir. 2010): The Third Circuit granted the petition for review of a Board decision denying asylum to a Colombian citizen for lack of nexus. The alien had credibly testified that the FARC had tried to recruit him as an informer because of his numerous social and business ties to the Colombian military and other government officials. He was also repeatedly threatened by FARC for refusing their overtures. In concluding that the alien failed to establish that FARC's request and threats were linked to a political opinion imputed to him, both the Immigration Judge and the Board relied on the Supreme Court's decision

in *Khouzam v. Ashcroft*, 361 F.3d 161, 165-66 (2d Cir. 2004), concluded that "serious reasons" is equivalent to the "probable cause" standard familiar to criminal law. The court agreed that evidence consisting of police reports and a warrant for the applicant's arrest, provided "serious reasons to believe" that the applicant had committed murder in Egypt. *Id.* at 166. Since the petitioner did not dispute that the alleged murder was nonpolitical in nature, the court found him ineligible for asylum and withholding of removal.

Conclusion

As in cases involving the "persecutor bar," those raising the question of "serious nonpolitical crime" require line-drawing. *Berhane* is too isolated an example to establish a trend. However, its "contextual" analysis, which seeks to gauge both the seriousness of the offense and its political character in the context of prevailing country conditions, echoes the Seventh Circuit's decision in *Comollari*, and even those of the contrasting decisions in *Chay-Velasquez* and *Efe*, both of which considered the context of the aliens' violent actions before rejecting their claims. The *Berhane* court also raised significant issues of whether the analysis should accord weight to whether the targets of the applicant's behavior included civilians, as opposed to officials involved in the suppression of political dissent, and what degree of deference is due the Immigration Judge and the Board on the question of the objective seriousness of the conduct.

While Immigration Judges and Board Members do not frequently contend with the serious nonpolitical crime question, our discussion illustrates that the circumstances that may give rise to the issue are commonplace, and the need for precise line-drawing, under the standards set forth in *McMullen* and *Aguirre-Aguirre*, is quite acute. In a global community where digital televisions and iPads instantly connect us to images of political discontent in faraway states, we have seen many a rock—or worse—launched in dissension. The question will undoubtedly recur: how does one end up on the wrong side of the rock-throwing line?

Edward R. Grant was appointed a Board Member at the Board of Immigration Appeals in January 1998. Patricia M. Allen is an Attorney Advisor for the Board of Immigration Appeals.

in *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). However, the Third Circuit distinguished the facts of the instant case from those in *Elias-Zacarias*, noting that the alien in that case did not possess the present alien's close ties to the government. The court adopted the rationale of the Ninth Circuit, as stated in *Navas v. INS*, 217 F.3d 646, 659 n.19 (9th Cir. 2005). The court quoted the holding in *Navas* that a motive of political opinion is imputed to persecution "of those who work for or with political figures . . . even if the nature of their work . . . is not in itself political."

Sixth Circuit:

Berhane v. Holder, 606 F.3d 819 (6th Cir. 2010): The Sixth Circuit vacated the Board's decision, which found that the alien was barred from eligibility for asylum and withholding of removal for having committed a serious nonpolitical crime, namely throwing rocks at police during political protests in his native Ethiopia. While noting that considerable deference is due to the Board's interpretation of what constitutes a "serious nonpolitical crime," the court explained that such decisions are upheld "when the agency has exercised reasoned discretion, not as a matter of grace." However, the court found the Board's decision to be ambiguous, lending itself to at least two interpretations as to why it found the criminal law aspects of the alien's rock throwing to outweigh the political aspects. The record was accordingly remanded for a new decision.

Seventh Circuit:

Chen v. Holder, __F.3d__, 2010 WL 2301691 (7th Cir. June 10, 2010): The Seventh Circuit granted the petition for review of an asylum seeker from China and remanded for further proceedings. The alien claimed to fear persecution for bringing suit in China against the local government, seeking compensation for the razing of her parents' house. The Immigration Judge made an adverse credibility finding, but the Board assumed credibility *arguendo* and found that the lawsuit did not constitute an expression of political opinion. The court gave several rationales for supporting that conclusion, noting that the alien's baseless suit likely constituted an abuse of the legal system, that a government has a right to limit litigation as a means of expressing a political opinion, and that there is a distinction between having a political opinion and expressing such an opinion, which may reasonably be subject to restrictions. However, the court found that the Board's decision failed to adequately examine the question whether suing a unit of government should be viewed as

an expression of political opinion. The court accordingly remanded the record for a new decision, noting that the Board may first wish to rule on the issue of the alien's credibility.

Ninth Circuit:

Poblete Mendoza v. Holder, 606 F.3d 1137 (9th Cir. 2010): The Ninth Circuit denied the alien's petition for review based on his claim of *res judicata*. In 2004, the alien had been placed in removal proceedings. At that time, he had two convictions: one for shoplifting and the other for possession of a controlled substance with intent to distribute. The DHS relied only on the latter conviction as a basis for removal. Proceedings were eventually terminated after the State court corrected a clerical error in its entry of the drug conviction, which, in fact, should have been for simple possession only. In 2006, the alien was again convicted, this time for solicitation to possess marijuana for sale. The DHS initiated removal proceedings for a second time, now charging the alien for being convicted of two crimes involving moral turpitude (i.e., the shoplifting and solicitation convictions). The Immigration Judge initially terminated proceedings, finding that *res judicata* barred the DHS from relying on the shoplifting conviction. The Board reversed and remanded. The alien next sought termination because his shoplifting conviction was vacated in the interim; his motion was denied by the Immigration Judge because the conviction was vacated for rehabilitative purposes only. On appeal, the court rejected the *res judicata* argument, distinguishing prior case law, where the DHS sought to rely on the same convictions in both proceedings, from the present case, which involved a new conviction. The court noted that the DHS could not have possibly relied on the two convictions cited in the second proceedings to charge two crimes involving moral turpitude, because the second conviction did not yet exist at the time of the earlier proceedings. The court also upheld the Immigration Judge's decision to disregard the *vacatur* because it was for rehabilitative purposes only.

Dobrova v. Holder, __F.3d__, 2010 WL 2292291 (2d Cir. June 9, 2010): The court upheld the Board's decision finding the alien ineligible for a waiver of inadmissibility under section 212(h) of the Act. The alien had been admitted to the U.S. as a lawful permanent resident ("LPR") in 1983, but was deported in 1989 based on his conviction for a crime involving moral turpitude (i.e., sexual abuse of a minor), for which he was sentenced to 4 years' imprisonment. In 2001, the alien gained

readmission to the U.S. by falsely representing himself as an LPR. In 2006, he was again placed in proceedings. He sought to adjust his status based on an I-130 petition filed by his U.S. citizen son, along with a section 212(h) waiver. The Immigration Judge found him ineligible for the waiver because he was previously admitted as an LPR, was subsequently convicted of an aggravated felony, and lacked the requisite 7 years of continuous lawful residence immediately preceding the commencement of proceedings. On appeal, the court rejected the alien's argument that for purposes of the section 212(h) waiver, the term "previously admitted" refers only to the most recent admission, finding that interpretation to be inconsistent with the common meaning of the word "previously."

BIA PRECEDENT DECISIONS

In *Matter of Mendez-Orellana*, 25 I&N Dec. 254 (BIA 2010), the Board considered the removability grounds under section 237(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(C) (offense involving a firearm). At issue in the case was who bears the burden of demonstrating whether the antique firearm exception in 18 U.S.C. § 921(a)(3) applies. In this case, the respondent argued that he was not removable as charged based on his conviction for carrying a loaded firearm in a vehicle and carrying a concealed firearm in a vehicle in violation of sections 12031(a) and 12025(a) of the California Penal Code, because the Federal definition of a firearm specifically excludes antique firearms. The Immigration Judge found that he could not determine on the record whether the firearm involved could be considered an antique and terminated proceedings. The Department of Homeland Security subsequently appealed.

The Board found that in criminal proceedings, the antique firearm exception is an affirmative defense that must be raised by a defendant by sufficient evidence to justify shifting the burden to the Government to disprove its applicability. The Board concluded that in removal proceedings, the antique firearm exception is also an affirmative defense. Where the DHS has presented evidence that an alien was convicted of an offense involving a firearm within the meaning of section 237(a)(2)(C), it has met its burden of presenting clear and convincing evidence of deportability, and the burden shifts to the respondent to show that the weapon was antique.

In *Matter of Castillo-Padilla*, 25 I&N Dec. 257 (BIA 2010), the Board resolved whether the release of the respondent from custody under section 236(a) of the Act, 8 U.S.C. § 1226(a), constitutes "a parole into the United States" for purposes of determining eligibility for adjustment of status under section 245(a) of the Act, 8 U.S.C. § 1255(a). The Board found that the respondent's release from custody under section 236(a) does not constitute parole for purposes of section 245(a) eligibility because a "conditional parole" under section 236(a)(2)(B) is not the equivalent of a "parole into the United States" under section 212(d)(5)(A) of the Act, 8 U.S.C. § 1182(d)(5)(A).

The respondent is a native and citizen of Mexico who entered the United States without inspection in 1999. The DHS detained the respondent in October of 2006 and issued a Notice to Appear charging him under section 212(a)(6)(A)(i) of the Act (present without being admitted or paroled). He was released from custody on November 9, 2006, after posting a \$12,000 bond. Before the Immigration Judge, the respondent sought adjustment of status based on his marriage to a United States citizen. On January 24, 2008, the Immigration Judge found the respondent removable as charged and ineligible for adjustment of status.

Section 245(a) provides that adjustment of status is only available to aliens who were "inspected and admitted or paroled into the United States." This language, "paroled into the United States," is identical to the language used in section 212(d)(5)(A) of the Act. Section 236(a)(2)(B) uses the phrase "conditional parole." To construe this language as equivalent would create conflicts within the regulatory and statutory schemes. For instance, because of the restrictions on section 245(i) adjustment eligibility, an alien released from detention would be placed in a better position than another alien who came into the country illegally but was not detained and released. Further, the two sections are distinct in their purposes and conditions. Section 212(d)(5) parole authorizes an alien to come into the United States temporarily for urgent humanitarian reasons or a significant public benefit and places strict conditions on the alien. Parole under section 212(d)(5) may be terminated. Under section 236(a), a person is released on conditional parole pending a decision in the removal case and is not under any restrictions. In addition, the DHS has the authority to grant parole under section 212(d)(5), whereas both the

Attorney General and the DHS have authority to make custody determinations under section 236(a). The Ninth Circuit is in accord with the Board's position. See *Ortega-Cervantes v. Gonzales*, 51 F.3d 111 (9th Cir. 2007).

In *Matter of Interiano-Rosa*, 25 I&N Dec. 264 (BIA 2010), the Board found that when an application for relief is timely filed but supporting documents are not submitted within the time established, the Immigration Judge may deem the opportunity to file the documents to be waived but may not deem the application itself abandoned. In this case, the respondent filed an application for special rule cancellation along with numerous supporting documents, which included rap sheets, docket sheets from all five of his arrests, and police reports from his three most recent arrests. The respondent's counsel indicated at the hearing that he was not able to obtain the police reports from the two earliest arrests, as previously required by the Immigration Judge, because they were no longer available. However, he failed to file a declaration explaining his inability to obtain the required documents or to submit a brief, which the Immigration Judge had also requested. The Immigration Judge held that the respondent abandoned his applications for relief because he did not comply with the directives given at the prior hearing. In reversing the Immigration Judge, the Board found that the proper course would have been for the Immigration Judge to deem the respondent's opportunity to file the requested documents waived and then determine what effect the failure to present them would have on his ability to meet his burden of establishing that he is eligible for relief and that he merits a favorable exercise of discretion.

In *Matter of Garcia Arreola*, 25 I&N Dec. 267 (BIA 2010), the Board overruled *Matter of Saysana*, 24 I&N Dec. 267 (BIA 2008), and found that section 236(c) of the Act requires mandatory detention of a criminal alien only if he or she is released from non-DHS custody after the expiration of the Transition Period Custody Rules and only where there has been a post-TPCR release that is directly tied to the basis for detention under sections 236(c)(1)(A)-(D). In *Matter of Saysana*, the Board found that the language of section 236(c)(1) of the Act does not support limiting the release to post-TPCR criminal custody tied to the offenses enumerated in the statute. After that case was decided, the United States Court of Appeals for the First Circuit and a number of district courts disagreed with its holding, and the DHS urged the Board to reconsider its decision. The Board did not

follow the reasoning of the First Circuit in *Saysana v. Gillen*, 590 F.3d 7 (1st Cir. 2009), noting that because the "released" language of section 236(c)(1) of the Act is not expressly tied to any other language that would clarify whether it refers to release from criminal custody, DHS custody, or some other form of detention, it is not clear and unambiguous. However, the Board did not find the view that the released language should be read more narrowly to be unreasonable and therefore adopted this reasoning. In this case, the Immigration Judge found that the respondent was not subject to mandatory detention and ordered his release on bond. The Board remanded for the Immigration Judge to reconsider whether the respondent is a danger to the community in light of his numerous arrests and criminal convictions.

REGULATORY UPDATE

75 Fed. Reg. 33446

DEPARTMENT OF HOMELAND SECURITY

U.S. Citizenship and Immigration Services Fee Schedule

SUMMARY: The Department of Homeland Security (DHS) proposes to adjust certain immigration and naturalization benefit fees charged by U.S. Citizenship and Immigration Services (USCIS). USCIS conducted a comprehensive fee study and refined its cost accounting process, and determined that current fees do not recover the full costs of services provided. Adjustment to the fee schedule is necessary to fully recover costs and maintain adequate service. DHS proposes to increase USCIS fees by a weighted average of 10 percent. DHS proposes among other amendments to add three new fees to cover USCIS costs related to processing the following requests: Regional center designation under the Immigrant Investor Pilot Program; Civil surgeon designation; and Immigrant visas.

DATES: Written comments must be submitted on or before July 26, 2010.

75 Fed. Reg. 37707

DEPARTMENT OF HOMELAND SECURITY

Administrative Process for Seizures and Forfeitures Under the Immigration and Nationality Act and Other Authorities

SUMMARY: On February 19, 2008, the Department of Homeland Security issued an interim final rule that

consolidated the asset seizure and forfeiture procedures for customs and immigration purposes. The interim final rule primarily aligned forfeiture procedures to allow petitioners to seek remission of seized property before the completion of the forfeiture process. The interim final rule also made technical and conforming changes to update the regulations. This final rule adopts, without change, the interim final rule.

DATES: This final rule is effective June 30, 2010.

Recent Developments in Gang-Related Asylum *continued*

Finally, the Second, Eighth, and Eleventh Circuits have issued published decisions that, although they do not involve gang-related asylum claims, afford deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, to the Board's particular social group formulation, specifically the social visibility requirement. See, e.g., *Davila-Mejia v. Mukasey*, 531 F.3d 624, 629 (8th Cir. 2008) (finding that competing family business owners lacked social visibility); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 74 (2d Cir. 2007) (finding that affluent Guatemalans lacked social visibility); *Al-Ghorbani v. Holder*, 585 F.3d 980, 994-97 (6th Cir. 2009) (agreeing with the Board that the group of people who oppose Yemeni cultural and religious marriage customs was socially visible); *Castillo-Arias v. U.S. Att'y General*, 446 F.3d 1190, 1198 (11th Cir. 2006) (finding that noncriminal informants working against a Colombian drug cartel were not socially visible).

Conclusion

As explained above, *Matter of S-E-G-* and *Matter of E-A-G-* likely foreclose many asylum claims based on purported particular social groups related to gangs. The circuit courts have generally accorded deference to these decisions. Yet, as *Benitez Ramos v. Holder* and *Urbina-Mejia v. Holder* both illustrate, not all gang-related asylum claims based on membership in a particular social group will necessarily fail. Moreover, the formulation for determining what constitutes a particular social group is not uniform among the circuit courts and continues to be debated. Case law regarding these issues, both in and out of the gang context, may well continue to evolve and should be watched closely.

Angela Munro is the Attorney Advisor at the Boston Immigration Court.

1. Other such legal issues include whether resistance to gang membership constitutes a political opinion and whether governments are unwilling or unable to control gang-related violence for purposes of asylum. See, e.g., *Barrios v. Holder*, 581 F.3d 849 (9th Cir. 2009); *Ramos-Lopez v. Holder*, 563 F.3d 855 (9th Cir. 2009); *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008); *Ortiz-Araniba v. Keisler*, 505 F.3d 39 (1st Cir. 2007); *Menjivar v. Gonzales*, 416 F.3d 918 (8th Cir. 2005).

2. The most notorious of the Central American gangs are Mara Salvatrucha or MS-13 and 18th Street Gang, both of which are present throughout Central America, Mexico, and even the United States, where they originated in the 1980s. USAID Bureau for Latin American and Caribbean Affairs, Office of Regional Sustainable Development, "Central America and Mexico Gang Assessment" (Apr. 2006), http://www.usaid.gov/locations/latin_america_caribbean/democracy/gangs_assessment.pdf. Many of the cases discussed in this article concern one or both of these gangs.

3. The Seventh Circuit had previously rejected the social visibility requirement in *Gatimi v. Holder*, 578 F.3d 611, 614 (7th Cir. 2009), which held that defectors from the Mungiki, a violent group in Kenya, formed a particular social group. In that decision, written by Judge Posner, the Seventh Circuit found that the Board's decisions concerning the social visibility requirement were inconsistent, because the Board had recognized particular social groups without referencing social visibility at all, while also refusing to recognize groups specifically because they were socially invisible. *Id.* at 615. The court found that the social visibility criterion made "no sense" and thus declined to follow it. *Id.*

4. However, in *Urbina-Mejia v. Holder*, 597 F.3d at 369-70, the Sixth Circuit denied the petitioner's application for withholding of removal on the grounds that he committed a serious nonpolitical crime outside the United States. In *Benitez Ramos v. Holder*, 589 F.3d at 431-32, the Seventh Circuit remanded for the Board to consider, among other questions, whether the petitioner had committed a serious nonpolitical crime. It may be that, even if they belong to cognizable social groups, many former gang members could find themselves barred from relief based on these or other similar grounds. See Edward R. Grant and Patricia M. Allen, "The Wrong Side of the Rock-Throwing Line?": *New Looks at an Old Bar to Refugee Protection*, *Immigration Law Advisor*, Vol. 4, No. 6 (June 2010).

5. The Board specifically noted in *Matter of S-E-G-* that the issue in that case was the same as the issue remanded for consideration by the Third Circuit in *Valdiviezo-Galdamez. Matter of S-E-G-*, 24 I&N Dec. at 582.

EOIR Immigration Law Advisor

David L. Neal, Acting Chairman
Board of Immigration Appeals

Brian M. O'Leary, Chief Immigration Judge
Office of the Chief Immigration Judge

Jack H. Weil, Assistant Chief Immigration Judge
Office of the Chief Immigration Judge

Karen L. Drumond, Librarian
EOIR Law Library and Immigration Research Center

Carolyn A. Elliot, Senior Legal Advisor
Board of Immigration Appeals

Emmett D. Soper, Attorney Advisor
Office of the Chief Immigration Judge

Layout: EOIR Law Library