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THE BOARD OF IMMIGRATION APPEALS' CONTINUOUS SEARCH FOR THE DEFINITION OF "MEMBERSHIP IN A PARTICULAR SOCIAL GROUP" IN *MATTER OF M-E-V-G-* AND *MATTER OF W-G-R-*: IN THE CONTEXT OF YOUTH RESISTANT TO GANG RECRUITMENT IN CENTRAL AMERICA

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Abstract

In a recent phenomenon, Central American youth have become the targets of forced recruitment by very powerful and well-entrenched gangs. The youth who refuse to join are often subject to vicious acts of retaliatory violence. Recently, the Board of Immigration Appeals (BIA) has attempted to clarify its social visibility and particularity requirements for asylum in Matter of M-E-V-G- and Matter of W-G-R, in effect, by renaming its social visibility element as social distinction and explaining that social group recognition for asylum purposes is determined by the perception of the society in question, rather than the perception of the persecutor. The BIA recognized that while the two criteria are similar they serve distinct functions. This Comment examines the development of these requirements and argues that the BIA should have eliminated the particularity requirement, and adopted a two-part "social distinction" test for assessing claims based on membership of a particular social group, thereby streamlining the process, minimizing ambiguity, and equalizing the chances of a successful asylum grant for this group, and similarly based social group claims.

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INTRODUCTION

Gangs in Central America have been a major problem and a driving force behind the most recent wave of children migrants illegally crossing into the United States to seek protection.[1] Gangs pose a serious threat to their local communities, and in particular, upon young people who resist or refuse to join these gangs.[2] Central American gangs have been targeting for recruitment the most vulnerable members of society, its youth, and often recruit children as young as nine.[3] In many cases, these children are killed for refusing to join the gangs.[4]

Many youth who are targeted for recruitment by criminal gangs have fled their countries of origin to seek safety abroad, often attempting to claim asylum in the United States.[5] Unfortunately, thousands of applicants fail to meet strict asylum criteria in the United States and must return to their native country.[6] These youth applicants frequently seek asylum as members of a particular social group ("PSG") who oppose recruitment and gang-related activity.[7] They quickly learn the difficulties in their claims when attempting to define the grounds for asylum and to establish that their proposed social groups satisfy "social visibility/distinction" and "particularity" requirements.

Under U.S. asylum law, an asylum-seeker filing a social group claim has the burden of showing the existence of a cognizable PSG, membership in that PSG, and a risk of persecution on account of membership in the specified PSG.[8] In

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1. *See generally* Frances Robles, *Fleeing Gangs, Children Head to U.S. Border*, N.Y. TIMES, July 9, 2014, http://www.nytimes.com/2014/07/10/world/americas/fleeing-gangs-children-head-to-us-border.html; *see also* Julia Preston & Randal C. Archibold, *U.S. Moves to Stop Surge in Illegal Immigration*, N.Y. TIMES, June 20, 2014, http://www.nytimes.com/2014/06/21/us/us-plans-to-step-up-detention-and-deportation-of-migrants.html?module=Search&mabReward=relbias%3Ar.

2. *See* U.N. High Comm'r for Refugees (UNHCR), *Living in a World of Violence: An Introduction to the Gang Phenomenon*, at 4, U.N. Doc. PPLA/2011/07 (2011) [hereinafter *UNHCR Living in a World of Violence*]; *see also* Elyse Wilkinson, *Examining the Board of Immigration Appeals' Social Visibility Requirement for Victims of Gang Violence Seeking Asylum*, 62 ME. L. REV. 387, 388 (2010).

3. Ana Arana, *How the Street Gangs Took Central America*, N.Y. TIMES, June 7, 2005, http://www.nytimes.com/cfr/international/20050501faessay84310_arana.html?pagewanted=all&module=Search&mabReward=relbias%3Ar.

4. Robles, *supra* note 1.

5. *See UNHCR Living in a World of Violence*, *supra* note 2; *see also* Wilkinson, *supra* note 2, at 388; *see also Three Myths About Central American Migration to the United States*, WASH. OFF. ON LATIN AM. (June 2014), *available at* http://www.wola.org/commentary/3_myths_about_central_american_migration_to_the_us [hereinafter WOLA] (stating that "[a]sylum claims are increasing all over the region, indicating that the cause of the increase is not unique to the U.S.").

6. Lorena S. Rivas-Tiemann, Comment, *Asylum to a Particular Social Group: New Developments and its Future For Gang-Violence Victims*, 47 TULSA L. REV. 477, 477 (2011).

7. *New BIA Decisions Undermine U.S. Obligations to Protect Asylum Seekers,* NAT'L IMMIGRANT JUSTICE CTR. (Feb. 18, 2014), http://www.immigrantjustice.org/litigation/blog/new-bia-decisions-undermine-us-obligations-protect-asylum-seekers#.U9XJzGd0z3g [hereinafter NAT'L IMMIGRANT JUSTICE CTR].

8. *In re* W-G-R-, 26 I. & N. Dec. 208, 223 (BIA 2014) (citing Ayala v. Holder, 640 F.3d 1095, 1097-98 (9th Cir. 2011)).

addition, an asylum-seeker bears the burden of showing that membership in a PSG was or will be a central reason for persecution.[9]

The Board of Immigration Appeals ("Board" or "BIA") has issued several precedent decisions on this issue. Most recently, in *Matter of M-E-V-G-*,[10] and its companion case, *Matter of W-G-R-*,[11] the Board attempted to clarify its interpretation of the term "particular social group."[12] In these cases, the Board continued to adhere to its prior interpretations of the phrase but asserted that literal or "ocular" visibility is not required, and it renamed the "social visibility" element as "social distinction."[13] In both cases, the Board maintained the "social visibility/distinction" and "particularity" requirements despite the respondent's and *amici curiae's* arguments to return to the *Acosta*[14] framework as the sole standard for assessing a PSG.[15] In addition, the Board dismissed the argument made by the Department of Homeland Security ("DHS") in its briefings that the "social visibility" and "particularity" elements of a PSG analysis should be streamlined into a single requirement to add clarity to the test.[16]

Despite the Board's attempt to bring clarity to the PSG analysis, its new decisions have revealed numerous inconsistencies and contradictions,[17] and as a result have generated significant controversy.[18] Notably, the Board has been criticized for maintaining the "particularity" requirement despite DHS's briefing that this requirement be deemphasized and effectively merged into one "social distinction" test.[19] Most circuit courts have deferred to the Board in applying the "social visibility" and "particularity" requirements to the analysis of a membership in a PSG.[20] Even prior to *M-E-V-G-* and *W-G-R-*, the Board's social visibility and particularity requirements have been highly criticized for being ambiguous and confusing, and for making claims based on social group membership far more difficult than claims on other protected grounds of asylum.[21] As of July of 2014, circuit courts have not had the opportunity to opine on the Board's newest interpretation of the definition of a PSG.

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9. *Id.* at 224.

10. *See In re* M-E-V-G-, 26 I. & N. Dec. 227, 288 (BIA 2014).

11. *See generally In re* W-G-R-, 26 I. & N. Dec. at 213-18.

12. *See In re* M-E-V-G-, 26 I. & N. Dec. at 236; *In re* W-G-R-, 26 I. & N. Dec. at 213-18.

13. *See In re* M-E-V-G-, 26 I. & N. Dec. at 236; *In re* W-G-R-, 26 I. & N. Dec. at 216.

14. *See infra* note 54.

15. *See generally In re* M-E-V-G-, 26 I. & N. Dec. at 233, 239-41; *In re* W-G-R-, 26 I. & N. Dec. at 211, 213-18.

16. *See In re* M-E-V-G-, 26 I. & N. Dec. at 233, 239-41.

17. DEBORAH ANKER, NEW 2014 BOARD DECISIONS: SOCIAL DISTINCTION AND OTHER CHANGES § 5:44 (2014 ed.).

18. Benjamin Casper et al., *Matter of M-E-V-G and the BIA's Confounding Legal Standard For "Membership in a Particular Social Group,"* 14-06 Immigr. Briefings 1, at *16-18 (June 2014).

19. ANKER, *supra* note 17.

20. Henriquez-Rivas v. Holder, 707 F.3d 1081, 1085 (9th Cir. 2013) (en banc) (citing Gaitan v. Holder, 671 F.3d 678, 681-82 (8th Cir. 2012)); Rivera-Barrientos v. Holder, 666 F.3d 641, 649-52 (10th Cir. 2012); Scatambuli v. Holder, 558F.3d 53, 59-60 (1st Cir. 2009); *contra* Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582, 606-07 (3d Cir. 2011) (rejecting social visibility and particularity); Gatimi v. Holder, 578 F.3d 611, 615-16 (7th Cir. 2009) (rejecting social visibility).

21. James Racine, Comment, *Youth Resistant to Gang Recruitment As a Particular Social Group in* Larios v. Holder, 31 B.C. THIRD WORLD L.J. 457, 469 (2011).

Part I of this Comment provides a brief background on the Central American gang problem. Part II provides an account of the development of the asylum law and outlines the Board's criteria on social group prior to *M-E-V-G-* and *W-G-R-*. Part III examines the Board's development of these requirements and their application to gang-related asylum applications, resulting in a circuit split. Part IV examines the Board's most recent decisions relating to membership in a particular social group in *Matter of M-E-V-G-* and *Matter of W-G-R-*. Part V describes the Board's reasoning and explanation in conceiving "social visibility/distinction" and "particularity" requirements, with a special focus on the Board's traditional *Acosta* framework in defining the "membership in a particular social group" protected ground. Part VI argues that the Board should have eliminated the particularity requirement in *M-E-V-G-* and *W-G-R-*, and adopted a two-part "social distinction" test for assessing claims based on membership in a particular social group, thereby streamlining the process, minimizing ambiguity, and equalizing the chances of gaining asylum for youth resistant to gang recruitment, and similarly based social group asylum claims.

I. CENTRAL AMERICAN GANGS AND FORCED RECRUITMENT OF YOUTH

Central American countries experienced the emergence of gangs in the 1980s.[22] A rapid growth in youth population and a host of social problems such as poverty and unemployment[23] contributed to the spread of gangs, which became violent and powerful.[24] Today, gang violence and forcible recruitment of youth in Central America have been the main cause of the recent surge of children migrants from Honduras, El Salvador, and Guatemala illegally crossing the border into the United States to seek protection.[25]

The two major gangs presently operating in Central America are the *Barrio Dieciocho* or "18th Street" gang (also known as M-18) and their main rival, the *Mara Salvatrucha* (MS-13).[26] A recent State Department report estimates that there are approximately 85,000 MS-13 and 18th Street gang members in El Salvador, Guatemala, and Honduras.[27] While gangs elsewhere in the world do not generally force individuals to join, the *Maras* have repeatedly resorted to forced recruitment methods to fill their ranks.[28] As part of their forced recruitment efforts, the *Maras* "target[] young and adolescent children [by] threatening them and their

22. WASH. OFFICE ON LATIN AM., CENTRAL AMERICAN GANG-RELATED ASYLUM: A RESOURCE GUIDE 1 (May 2008), *available at* http://www.wola.org/sites/default/files/downloadable/Central%20America/past/CA%20Gang-Related%20Asylum.pdf [hereinafter WOLA CENTRAL].

23. Arana, *supra* note 3 ("[A]ccording to the United Nations, 45 percent of Central Americans are 15 years old or younger.").

24. *See generally id.*

25. Julia Preston, *Hoping for Asylum, Migrants Strain U.S. Border*, N.Y. TIMES, April 10, 2014, http://www.nytimes.com/2014/04/11/us/poverty-and-violence-push-new-wave-of-migrants-toward-us.html?_r=0; *see also* Robles, *supra* note 1; Preston & Archibold, *supra* note 1.

26. CLARE RIBANDO SEEKLE, CONG. RESEARCH SERV., GANGS IN CENTRAL AMERICAN 2 (Feb. 20, 2014).

27. *Id.* at 3.

28. *UNHCR Living in a World of Violence, supra* note 2, at 16.

family members with physical violence or death unless they join the gang."[29] Many asylum-seekers who have escaped recruitment and fled abroad have claimed that a persistent refusal to join the gangs often triggers increasingly violent conduct by the gangs.[30]

Gangs have been known to engage in a variety of criminal activities, some of which include homicides, kidnapping, human trafficking, and drug and weapons smuggling.[31] In an effort to curtail gang activity, some Central American governments have implemented the "*Mano Dura*" (Heavy-Handed) anti-gang policies.[32] By apprehending and incarcerating large numbers of children for illicit association, and by providing sterner sentences for gang membership and gang-related crimes, these policies demonstrate an extreme effort by law enforcement to crack down on gangs.[33] Ultimately, these policies have failed to reduce gang-related violence, and may have contributed to an overall increase in the levels of violence.[34] Citizens have been unable to rely on their governments for protection because of police corruption and ineffectiveness, as some police routinely avoid even entering gang-affected areas.[35]

Thus, Central American governments have been unable and/or unwilling to effectively protect their citizens from gang-related persecution, or to guard the youth from forced recruitment.[36] Given the small geographical area of the affected countries in Central America, the pervasive gang presence, and a sophisticated communication network, relocation elsewhere within the country is not a viable alternative for youth trying to escape the violence.[37] As a result, many victims of gang violence have fled to seek safety abroad and to claim asylum in the United States.[38] The *L.A. Times* recently reported that "[i]n the last five years, [asylum] applications at the border have increased sevenfold, from just under 5,000 to more than 36,000, driven largely by an influx from El Salvador, Honduras, and Guatemala.[39] The youth continue to flee gang violence in their native countries and risk everything to seek protection in the United States and other countries.

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29. *Id.*
30. *Id.*
31. SEEKLE, *supra* note 26, at 5.
32. *See id.* at 9.
33. *See id.*
34. *See id.* at 10; *see also* WOLA CENTRAL, *supra* note 22, at 4-5.
35. *UNHCR Living in a World of Violence, supra* note 2, at 28.
36. *See* WOLA CENTRAL, *supra* note 22, at 4-5.
37. *UNHCR Living in a World of Violence, supra* note 2, at 24.
38. *Id.*
39. Cindy Chang & Kate Linthicum, *U.S. Seeing a Surge in Central American Asylum Seekers: With Gang and Drug Violence Growing in Central America, 'Credible Fear' Applications to the U.S. Have Risen Sharply. But Critics Fear Fraud*, L.A. TIMES, Dec. 15, 2013, *available at* http://articles.latimes.com/2013/dec/15/local/la-me-ff-asylum-20131215; *see also* Preston, *supra* note 25 (stating that "[a]s more Central Americans have come, fear claims have spiked, more than doubling in 2013 to 36,026 from 13,931 in 2012.").

II. ASYLUM CASE LAW AND THE DEFINITION OF "PARTICULAR SOCIAL GROUP"

Under the Immigration and Naturalization Act ("INA"), the Attorney General has the authority to confer asylum on any alien who qualifies as a refugee.[40] An applicant for asylum must meet the definition of a refugee according to the INA,[41] which provides that:

> [A]ny person who is outside any country of such person's nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .[42]

The *1951 Convention* and its *1967 Protocol* are the key international provisions governing the protection of refugees, which provide the definition of a "refugee," and specify the rights, responsibilities, and legal obligations of States. At the core of both the *1951 Convention* and its *1967 Protocol* is the obligation to provide protection to refugees and to safeguard the principle of non-refoulement, which is the obligation not to return a refugee to any country where he or she would face danger.[43] In 1968, the United States acceded to the *1967 Protocol*,[44] thereby binding itself to the international refugee protection regulations and the definition of a refugee in the *1951 Convention*.[45] In 1980, Congress passed the Refugee Act, codifying a statutory definition of "refugee" closely modeled on the U.N. definition, including the "membership in a particular social group" protection ground.[46] Thus, the Refugee Act serves to bring the United States into compliance with its international obligations under the *1967 Protocol*, and through the *1951 Convention*.

In order to qualify for asylum in the United States, an applicant must establish that the persecution that he or she has suffered was or will be inflicted on account of one of the five enumerated grounds.[47] "Membership in a particular social group" is one of the five protected grounds for refugee protection and "was

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40. 8 U.S.C. § 1158(b)(1)(A) (2006).
41. 8 U.S.C. § 1101(a)(42) (2006).
42. *Id.*
43. 8 U.S.C. § 1227 (2006). "Withholding from removal" implements the United States non-refoulement obligations under Article 3 of the 1951 U.N. Convention Relating to the Status of Refugees. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6264, 189 U.N.T.S. 150 [hereinafter 1951 Convention].
44. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6225, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]; *see* INS v. Cardoza-Fonseca, 480 U.S. 421, 436-37 (1987); *see generally* Rivas-Tiemann, *supra* note 6, at 479-81.
45. 1951 Convention, *supra* note 43; *see generally* Rivas-Tiemann, *supra* note 6, at 479-81.
46. Refugee Act of 1980, Pub. L. No. 96-212, § 208(a), 94 Stat. 108 (codified as amended at 8 U.S.C. § 1158(a) (2008)); I.N.S. v. Cardoza-Fonseca, 480 U.S 421, 436-37 (citing H.R. REP. No. 96-781, at 19 (1980); H.R. REP. No. 96-608, at 9 (1979); S. REP. No. 96-256, at 4 (1979)); *see also* INS v. Aguirre-Aguirre, 526 U.S. 415, 427 (1999).
47. Rivas-Tiemann, *supra* note 6, at 484.

intended to assist those who may not qualify for relief under the other enumerated criteria that define a refugee . . . ."[48] Although it is considered a broad category, the Office of the U.N. High Commissioner for Refugees ("UNHCR") cautioned that the term should not serve as a " 'catch-all' that applies to all persons fearing persecution."[49] Neither the *1951 Convention* nor the *1967 Protocol* have defined "membership in a particular social group,"[50] and the drafting history fails to specify its exact meaning.[51] Moreover, neither Congress nor the asylum regulations issued by the Department of Justice and the Department of Homeland Security have provided a specific definition.[52] As a result, the term has been subject to inconsistent interpretation and application by the Board and the circuit courts.[53]

In 1985, the Board first attempted to define a "particular social group" in the seminal case, *Matter of Acosta*.[54] In *Acosta*, the applicant for asylum claimed that he was targeted for persecution by guerillas in his native El Salvador based on his membership in a cooperative organization called COTAXI.[55] The Board held that the applicant failed to show that he was persecuted on account of his membership in a particular social group because he could have changed his employment or cooperated with the guerrillas' demands to discontinue operations.[56] The Board relied on the doctrine of "*ejusdem generis*," literally, "of the same kind," to construe "membership in a particular social group" in a way which most closely resembles the definition of the other four grounds of persecution under the INA (political opinion, nationality, race and religion).[57] *Acosta* concluded that because the other protected grounds were based on immutable characteristics, "particular social group" should therefore also be read to refer to groups of persons who share a common, immutable characteristic.[58] Accordingly, the Board defined a PSG as a

48. Melissa J. Hernandez Pimentel, *The Invisible Refugee: Examining the Board of Immigration Appeals' "Social Visibility" Doctrine*, 76 MO. L. REV. 575, 593 (2011).

49. UNHCR, *Guidelines on International Protection: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* , para. 2, U.N. Doc. HCR/GIP/02/02 (May 7, 2002), *available at* http://www.unhcr.org/3d58de2da.html [hereinafter *Guidelines on International Protection: "Membership of a Particular Social Group"*]; *see generally* Hernandez Pimentel, *supra* note 48, at 580-81.

50. *See* Hernandez Pimentel, *supra* note 48, at 580-81.

51. The term "membership of a particular social group" was added near the end of the deliberations on the draft 1951 Convention; all that the drafting records reveal is the Swedish delegate's observation: "[E]xperience ha[s] shown that certain refugees had been persecuted because they belonged to particular social groups. The draft Convention made no provision for such cases, and one designed to cover them should accordingly be included." Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, July 3, 1951, *Summary Record of the Third Meeting*, U.N. Doc. A/Conf.2/SR.3 (Nov. 19, 1951); *see also* Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582, 594 (3d Cir. 2011) (reciting this history).

52. Proposed regulations published in the Federal Register around 200 would have defined social group – but were not adopted. Social group regulations are reportedly still under active consideration.

53. *See* Rivas-Tiemann, *supra* note 6, at 484.

54. *In re* Acosta, 19 I. & N. Dec. 211, 233-34 (BIA 1985).

55. *Id.* at 216.

56. *Id.* at 234.

57. *Id.* at 233-34.

58. *Id.* at 233.

"group of persons all of whom share a common, immutable characteristic," which may be either "an innate one such as sex, color, or kinship ties" or a "shared past experience such as a military leadership or land ownership."[59] The Board further elaborated that the characteristic uniting the group must be "one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[60]

The Board's definition of a PSG in *Acosta* has been widely adopted in the United States[61] and internationally.[62] In fact, the definition has been so influential that all federal circuit courts adopted the *Acosta* definition of PSG.[63] While the Board has applied the immutability definition set out in *Acosta* in a variety of contexts,[64] the focus of this comment is on the ability of applicants to qualify for asylum based on membership in a PSG who are not gang members but who oppose recruitment and gang-related activity.

Beginning in 2006, the Board added two additional requirements to the particular social group analysis – social visibility and particularity.[65] The Board first introduced the social visibility element in *Matter of C-A-*[66] and *Matter of A-M-E & J-G-U-*.[67] In *C-A-*, the Board reiterated its adherence to *Acosta* formulation, but specified that particularity and social visibility are relevant factors in the analysis of PSG.[68] The Board referred to "social visibility" as the extent to which members of a society perceive those with the characteristic in question as members of a social group, although "cohesiveness" and "homogeneity" were not required.[69] *C-A-* was followed the next year by *Matter of A-M-E & J-G-U-*, in which the Board indicated that the "particularity" of the proposed group was another important factor.[70] The Board implied that a putative social group cannot be "too amorphous" or "indeterminate."[71]

In *C-A-* and *A-M-E- & J-G-U-*, the social visibility and particularity criteria were only listed as factors to be considered in determining a PSG, but not

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59. *Id.*

60. *Id.*

61. ANKER, *supra* note 17.

62. *Id.*

63. *See* Fatma E. Marouf, *The Emerging Importance of "Social Visibility" in Defining a "Particular Social Group" and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 53 (2008).

64. Gaitan v. Holder, 671 F.3d 678, 683 (8th Cir. 2012) (Bye, J., concurring).

65. ANKER, *supra* note 17; Casper et. al., *supra* note 18, at 6-7. The BIA first went down this path in *In re* R-A-, 22 I. & N. Dec. 906 (BIA 2001), but the decision was subsequently vacated by the Attorney General.

66. *See generally In re* C-A-, 23 I. & N. Dec. 951, 957-60 (BIA 2006).

67. *In re* A-M-E & J-G-U-, 24 I. & N. Dec. 69, 74-76 (BIA 2007).

68. *See In re* C-A-, 23 I. & N. Dec. at 956.

69. *See id.* at 959-60; *see also* Wilkinson, *supra* note 2, at 404-05; Casper et. al., *supra* note 18, at 8 (the Board claimed that the new element was compatible with the *Acosta* standard by recasting earlier social group cases).

70. *See In re* A-M-E & J-G-U-, 24 I. & N. Dec. at 76.

71. *Id.*; *see also* Casper et. al., *supra* note 18, at 9 ("The Board injected the elements of 'social visibility' and 'particularity' into social group analysis but used ambiguous language when describing how social visibility and particularity related to the *Acosta* test.").

requirements.[72] In 2008, however, the Board issued its landmark gang-recruitment precedent, *Matter of S-E-G-,* and a companion case, *Matter of E-A-G-*, imposing social visibility and particularity as distinct requirements for claims based on membership in a PSG.[73] These decisions "made clear what was left open by *C-A-*: that a particular social group must have at least one trait that is not just 'fundamental' or 'immutable' but also 'socially visible.'"[74] The Board again reiterated its adherence to the *Acosta* framework, stating that "'particularity' and 'social visibility' give greater specificity to the definition of a social group . . . ."[75] Although the Board continues to adhere to this framework, in neither case did it adequately explain why it departed from the *Acosta* standard and why it was converting "social visibility" and "particularity" from factors to requirements.[76]

Prior to *M-E-V-G-* and *W-G-R-*, the Board inconsistently applied the social visibility requirement, and recent cases have generated two possible meanings.[77] One interpretation of the term suggested that the asylum-seeker must be identifiable on-sight as a member of the alleged social group.[78] In separate instances, the Board indicated that social visibility entails that the applicant's alleged social group must be perceived as a distinct segment of a particular society.[79] In addition, there was confusion about whether the perception of society or the perception of the persecutor(s) was relevant to determining whether the group was socially visible.[80]

In early social visibility cases, the Board implied that members of the proposed social group must be identifiable on-sight to be socially visible.[81] For example, in *C-A-*, the Board denied particular social group status to criminal informants because their immutable characteristic – informing – was out of public view.[82] The Board further stated that, "visibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members."[83] Under this reasoning, an asylum applicant would have to be literally visible to others in society to meet the "social visibility" requirement.[84]

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72. Racine, *supra* note 21, at 463.

73. Wilkinson, *supra* note 2, at 406-07; *see also In re* S-E-G-, 24 I. & N. Dec. 579, 586-88 (BIA 2008); *In re* E-A-G-, 24 I. & N. Dec. 591, 593-95 (BIA 2008).

74. Wilkinson, *supra* note 2, at 407.

75. *Id.*

76. Racine, *supra* note 21, at 463; *see also* Gaitan, 671 F.3d at 685 (Bye, J., concurring).

77. Valdiviezo-Galdamez v. Holder, 663 F.3d 582, 604 (3d Cir. 2011) (concluding the BIA's "social visibility" and "particularity" requirements are inconsistent with prior BIA decisions and rejecting the government's attempt to graft these additional requirements onto petitioner's social group claims); Gatimi v. Holder, 578 F.3d 611, 615-16 (7th Cir. 2009) (criticizing the BIA's decisions in *S-E-G-* and *E-A-G-* for being "inconsistent with the BIA's precedents in *Acosta* and for failing to explain the reasons for adopting the "social visibility" criterion); *see also* Petition for a Writ of Certiorari at 15, Bathula v. Holder, 723 F.3d 889 (7th Cir. 2013) (No. 13-526), 2013 WL 5765867, at *15.

78. Petition for a Writ of Certiorari at 8, Rojas-Perez v. Holder, 699 F.3d 74 (1st Cir. 2012) (No. 13-174), 2013 WL 4027030, at *8 [hereinafter Petition for a Writ of Certiori].

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*; *see also In re* C-A-, 23 I. & N. Dec. 951, 960 (BIA 2006).

83. *In re* C-A-, 23 I. & N. Dec. at 960.

84. *See* Petition for a Writ of Certiorari, *supra* note 78, at 9.

Later, in *A-M-E & J-G-U-*, the Board changed its interpretation of the requirement, describing the "social visibility" test as being "whether members of the group are 'perceived as a group by society.' "[85] In that case, the Board denied protection to a group of "wealthy" Guatemalans . . . because the core characteristic of "wealth" was "not so readily 'identifiable' or sufficiently defined as to meet the requirements of a *particular* social group."[86]

The Board's inconsistent approach to defining social visibility continued in *S-E-G-* and *E-A-G-*, where the Board simultaneously adopted opposing viewpoints.[87] In *S-E-G-*, the Board stated that the proposed group must be "perceived as a group by society."[88] However, in *E-A-G-*, the Board alluded to both the on-sight visibility and perception of society as possible variations of social visibility.[89] The Board then articulated that the standard was based on society's perception, but ultimately it denied protection to the applicant due to a lack of evidence of on-sight visibility.[90] The Board explained that past cases had "emphasized that the purported group's social visibility – i.e., the extent to which members of a society perceive those with the characteristic in question as members of a social group – is of particular importance in determining whether an alien is a member of a claimed particular group."[91] Then, rather than question whether Honduran society recognized the applicant as a member of a PSG, the Board rejected the applicant's proposed social group because the group "lack[ed] the social visibility that would allow others to identify its members as part of such a group."[92]

III. THE BOARD OF IMMIGRATION APPEALS APPLIES SOCIAL VISIBILITY AND PARTICULARITY REQUIREMENTS INCONSISTENTLY IN GANG-RELATED ASYLUM CASES

In *S-E-G-* and *E-A-G-*, the Board established visibility and particularity as requirements rather than factors.[93] For the first time, the Board considered visibility and particularity criteria in asylum claims based on resistance to gang recruitment.[94] The Board's limited and ambiguous reasoning in both cases contributed to the confusion of what constitutes a cognizable PSG in gang-recruitment asylum claims.[95] As a result, the imposition of visibility and

85. *Id.* at 10; *see also In re* A-M-E & J-G-U-, 24 I. & N. Dec. 69, 74 (BIA 2007).

86. Petition for a Writ of Certiorari, *supra* note 78, at 10; *see also In re* A-M-E & J-G-U-, 24 I. & N. Dec. at 74.

87. *See* Petition for a Writ of Certiorari, *supra* note 78, at 11.

88. *Id.* at 11; *see also In re* S-E-G-, 24 I. & N. Dec. 579, 586-87 (BIA 2008).

89. *See* Petition for a Writ of Certiorari, *supra* note 78, at 11; *see also In re* E-A-G-, 24 I. & N. Dec. at 594.

90. *Id.*

91. Petition for a Writ of Certiorari, *supra* note 78, at 11; *see also In re* E-A-G-, 24 I. & N. Dec. at 594.

92. *Id.*

93. *See In re* E-A-G-, 24 I. & N. Dec. at 594; *In re* S-E-G-, 24 I. & N. Dec. at 590.

94. The BIA noted, "We have not previously addressed whether . . . Salvadoran youths who have resisted gang recruitment . . . constitutes a 'particular social group'" and that no federal circuit court had yet issued a decision on the matter. *See In re* S-E-G-, 24 I. & N. Dec. at 582.

95. Rivas-Tiemann, *supra* note 6, at 484.

particularity elements to PSG analysis have led to many denials of cognizable asylum claims in which applicants resisted forced gang recruitment and tried to escape persecution and gang-related violence.[96]

In *S-E-G-*, adolescent twin brothers refused to join the MS-13 gang. The gang members retaliated by beating them, stealing their money, threatening to kill them, and threatening to rape and kill their older sister.[97] Subsequently, the twins fled El Salvador after MS-13 escalated its threats and killed another youth in the neighborhood that refused to join.[98] In that case, the Board defined the applicant's proposed social group as "Salvadoran youth who are recruited by gangs but refuse to join."[99] Similarly, in *E-A-G-*, the applicant had two brothers who were gang members in the MS-13 gang, both of whom were killed by the gang.[100] Subsequently, the applicant's cousin, an MS-13 member, targeted him for recruitment, but he refused to join.[101] In this case, the Board identified the applicant's proposed social group as "persons resistant to gang membership (refusing to join when recruited)."[102]

In both cases, the Board denied the applicants' asylum claims because neither of their proposed social groups met the visibility and particularity requirements for a cognizable PSG.[103] In *S-E-G-*, the Board explained that a proposed social group only has "social visibility" where its members, "considered in the context of the country of concern and the persecution feared[,]" share some "discrete" characteristic by which they are "perceived as a group by society."[104] Furthermore, the Board explained, "[t]he essence of the particularity requirement. . . is whether the proposed social group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."[105] In *S-E-G-*, relying on *A-M-E- & J-G-U-* and *C-A-*, the Board reasoned that the social group of Salvadorian youth did not have "particular and well-defined boundaries," nor did it possess a recognized level of social visibility in order to be a social group, and as a result failed the "social visibility test."[106] Similarly, in *E-A-G-*, the Board stated that "[p]ersons who resist joining gangs have not been shown to be part of a socially visible group within Honduran society, and the respondent does not allege that he possesses any characteristics that would cause others in Honduran society to recognize him as one who has refused gang recruitment."[107]

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96. *Immigration Briefings on Asylum Claims Based on Persecution by Organized Gangs*, 89 No. 40 Interpreter Releases 1963 (Oct. 15, 2012).
97. *In re* S-E-G-, 24 I. & N. Dec. at 580.
98. *Id.*
99. *Id.* at 587.
100. *In re* E-A-G-, 24 I. & N. Dec. 591, 592 (BIA 2008).
101. *Id.*
102. *Id.* at 593.
103. *In re* S-E-G-, 24 I. & N. Dec. at 579-80; *In re* E-A-G-, 24 I. & N. Dec. at 592.
104. *In re* S-E-G-, 24 I. & N. Dec. at 586-88.
105. *Id.* at 585 (discussing Ucelo-Gomez v. Mukasey, 509 F.3d 70, 73 (2d Cir. 2007)).
106. Wilkinson, *supra* note 2, at 407; *see also In re* S-E-G-, 24 I. & N. Dec. at 584-88.
107. *In re* E-A-G-, 24 I. & N. Dec. at 594.

As *S-E-G-* and *E-A-G-* and the subsequent case law demonstrate, the Board failed to articulate a consistent or coherent meaning of the "social visibility" requirement.[108] The Board's new approach to determining what constitutes a cognizable PSG has caused some courts of appeals to disagree as to the validity and the proper application of the social visibility test in gang-recruitment asylum cases.[109]

A. Circuit Split as to the Validity and Application of the "Social Visibility" and "Particularity" Requirements Prior to M-E-V-G- and W-G-R-

The imposition of "social visibility" and "particularity" requirements and the Board's inconsistent application has generated significant controversy and caused a circuit split on the issue.[110] The Seventh Circuit was first to reject social visibility as a criterion for determining a PSG,[111] holding that it represents an unexplained departure from prior Board precedent that it is not entitled to deference[112] and that

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108. *See* Petition for a Writ of Certiorari, *supra* note 78, at 12.

109. Gaitan v. Holder, 671 F.3d 678, 685 (8th Cir. 2012) (Bye, J., concurring). *Compare* Valdiviezo–Galdamez v. Holder, 663 F.3d 582, 603-09 (3d Cir. 2011) (concluding the BIA's "social visibility" and "particularity" requirements are inconsistent with prior BIA decisions and rejecting the government's attempt to graft these additional requirements onto petitioner's social group claims); Gatimi v. Holder, 578 F.3d 611, 615-16 (7th Cir. 2009) (criticizing the BIA's decisions in *S-E-G-* and *E-A-G-*for being "inconsistent" with the BIA's precedents in *Acosta* and *Kasinga* and for failing to explain the reasons for adopting the "social visibility" criterion); Benitez Ramos v. Holder, 589 F.3d 426, 430-31 (7th Cir. 2009) (denouncing the BIA's insistence on "social visibility," sometimes in its literal form, and charging the BIA might not understand the difference between visibility in a social sense and the external criterion sense); Urbina–Mejia v. Holder, 597 F.3d 360, 365-67 (6th Cir. 2010) (noting being a former gang member is an immutable characteristic and defining former members of the 18th Street gang as a "particular social group" based on their inability to change their past and the ability of their persecutors to recognize them as former gang members), *with* Lizama v. Holder, 629 F.3d 440, 447 (4th Cir. 2011) (upholding the BIA's definition of a particular social group as requiring that "(1) its members share common, immutable characteristics, (2) the common characteristics give its members social visibility, and (3) the group is defined with sufficient particularity to delimit its membership"); Ramos–Lopez v. Holder, 563 F.3d 855, 862 (9th Cir. 2009) (upholding the BIA's adoption of the "social visibility" requirement); Scatambuli v. Holder, 558 F.3d 53, 60 (1st Cir. 2009) (rejecting petitioners' claims the BIA is precluded from considering the visibility of a group); Fuentes–Hernandez v. Holder, 411 Fed.Appx. 438, 438-39 (2d Cir. 2011) (stating that individuals who resisted gang recruitment in El Salvador do not constitute a "particular social group" because their proposed group lacked "social visibility" and "particularity" and because the alleged persecution "did not bear the requisite nexus to a protected ground").

110. *See* Petition for a Writ of Certiorari, *supra* note 78, at 8-14; *see also Gaitan*, 671 F.3d at 685 (Bye, J., concurring); Wilkinson, *supra* note 2, at 410; Brief of the Office of the U.N. High Comm'r for Refugees as *Amici Curiae* Supporting Claimants, *In re* Thomas, No. A75-597-033/-034/-035/-036 (BIA Jan. 25, 2007), *available at* http://www.refworld.org/docid/45c34c244.html (last visited Jan. 10, 2014) [hereinafter UNHCR Brief in re Thomas].

111. Lisa Frydman & Neha Desai, *Beacon of Hope or Failure of Protection? U.S. Treatment of Asylum Claims Based on Persecution by Organized Gangs*, 12-10 IMMIGR. BRIEFINGS, Oct. 2012, at 1, 3 [hereinafter *Beacon of Hope*]. I'm addressing disturbing trends that have emerged within two intertwined areas of law — interpretation of "particular social group" and the adjudication of asylum claims by individuals fleeing persecution by gangs.

112. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). An interpretation of law by the Board demands deference under *Chevron*: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously

it is, in any event, an unreasonable interpretation of the governing statute."[113] Following in the Seventh Circuit's footsteps, the Third Circuit rejected both the social visibility and particularity requirements, holding that the criteria are inconsistent with prior Board decisions.[114] Accordingly, an applicant in the Third Circuit would only have to satisfy the *Acosta* immutable characteristics test,[115] as well as the other elements of the refugee definition to qualify for asylum based on membership in a PSG.

Both the Seventh and Third Circuits, when they rejected the Board's social visibility requirements, acknowledged that they were disagreeing with the majority of the other circuits.[116] In *Gatimi v. Holder*, Judge Posner, in rejecting the social visibility element, noted several social groups that are not subject to 'on-sight' visibility but that the Board has nevertheless held to be PSGs.[117] Similarly, in *Valdiviezo-Galdamez v. Holder*, the Third Circuit expressly agreed with Judge Posner's conclusion that the social visibility requirement " 'makes no sense.'"[118] While the Seventh Circuit only rejected the Board's social visibility element,[119] the Third Circuit struck down both social visibility and particularity.[120] In *Valdiviezo-Galdamez*, the Third Circuit stated that it did not "believe that the government is using particularity to impose a numerical or size limitation on the meaning of a [PSG]."[121] However, the court explained that it was "hard-pressed to discern any difference between the requirement of 'particularity' and the discredited requirement of 'social visibility.'"[122] Further, the court explained that "particularity appears to be a little more than a reworked definition of 'social visibility and the former suffers from the same infirmity as the latter.'"[123] The court ultimately held "that adopting a 'particularity' requirement is unreasonable because it is inconsistent with many of the Board's prior decisions."[124]

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expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

113. Gatimi, 578 F.3d at 615-16; *see also* Petition for a Writ of Certiorari, *supra* note 78, at 13-14.

114. *See* Valdiviezo-Galdamez, 663 F.3d at 603-08.

115. *In re* Acosta, 19 I. & N. Dec. at 233 (overruled in part on other grounds by *In re* Mogharrabi, 19 I. & N. Dec. 439 (BIA 1987)).

116. *See* Valdiviezo-Galdamez v. Holder, 663 F.3d 582, 603 n.16 (3d Cir. 2011); Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009).

117. *See* Gatimi, 578 F.3d at 615-16 (citing *In re* Kasinga, 21 I. & N. Dec. 357, 365-66 (BIA 1996)) (women facing female genital mutilation); *In re* Toboso-Alfonso, 20 I. & N. Dec. 819, 822-23 (BIA 1990) (homosexuals); *In re* Fuentes, 19 I. & N. Dec. 658, 662 (BIA 1988) (former members of the national police); *In re* Acosta, 19 I. & N. Dec. 211, 233-34 (former military leaders or land owners).

118. *See* Valdiviezo-Galdamez, 663 F.3d at 605 (quoting *Gatimi*, 578 F.3d at 615).

119. Gatimi, 578 F.3d at 615-16.

120. Valdiviezo-Galdamez, 663 F.3d at 603-08.

121. *Id.* at 608.

122. *Id.*

123. *Id.*

124. *Id.*

In contrast, most courts of appeals have accepted the social visibility and particularity requirements and defer to the Board's interpretation.[125] However, even among the circuits that do defer to the Board's interpretation, some disagree over what the "social visibility" test requires.[126] Several circuits disagree on the meaning of social visibility and may require that the individual, the group, or both, be socially visible.[127] In addition, these courts disagree about whether the particular social group must be socially visible to society at large or to its alleged persecutors.[128] In the Fourth and Ninth Circuits, the status of the social visibility requirement remains ambiguous.[129]

Lack of uniformity among the circuits and the Board's prior decisions produced a highly arbitrary and uncertain application of "social visibility" and "particularity" requirements.[130] Due to this lack of uniformity, some circuit courts deemed it necessary to specify which definition of social visibility they are using.[131] For example, in applying the social visibility and particularity requirements, the Ninth Circuit deemed it necessary to clarify both requirements.[132] Although the Ninth Circuit determined "that social visibility refers to 'perception' rather than 'on-sight' visibility, [the court noted that that alone] does not fully clarify the requirement."[133] Accordingly, the court suggested "that the perception of the persecutors may matter most," and opined that a group may be persecuted because of the persecutor's perception of the existence of that group.[134] Without clarification, individual circuit courts' move towards establishing their own standards of what 'social visibility' requires may only deepen the circuit split and contribute to the lack of uniformity.[135] Subject to a mounting criticism by circuit courts, advocates, and members of the international community, the Board embarked to clarify its "social visibility" and "particularity" requirements in *Matter of M-E-V-G-*,[136] and its companion decision, *Matter of W-G-R-*.[137]

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125. *See* Petition for a Writ of Certiorari, *supra* note 78, at 13.
126. *Id.*
127. *Id.*
128. *Id.* at 19.
129. *Id.* at 13; *see also Beacon of Hope*, *supra* note 111, at 3.
130. Wilkinson, *supra* note 2, at 415-16.
131. *See, e.g.*, Henriquez-Rivas v. Holder, 707 F.3d 1081, 1089-91 (9th Cir. 2013); Umana-Ramos v. Holder, 724 F.3d 667, 672-73 (6th Cir. 2013).
132. Henriquez-Rivas, 707 F.3d at 1089-91.
133. *Id.* at 1089.
134. *Id.* at 1089; *see also* Gerald Seipp, *Ninth Circuit Rejects BIA's Application of "Particularity" and "Social Visibility" Criteria in Gang Case; Overrules Contrary Circuit Decisions*, 90 No. 8 INTERPRETER RELEASES 512, 514 (Feb. 25, 2013); Wilkinson, *supra* note 2, at 415.
135. *Beacon of Hope*, *supra* note 111, at 6.
136. *In re* M-E-V-G-, 26 I. & N. Dec. 227 (BIA 2014) (case on remand for the second time from the Third Circuit for consideration of the respondent's proposed social group, "Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs.").
137. *In re* W-G-R-, 26 I. & N. Dec. 208 (the rejected PSG was "former members of the Mara 18 gang in El Salvador who have renounced their gang membership").

IV. THE BOARD OF IMMIGRATION APPEALS DECISIONS IN *MATTER OF M-E-V-G-* AND *MATTER OF W-G-R-*

A. Matter of M-E-V-G-

Matter of M-E-V-G- involved a Honduran applicant who was approached by MS-13 gang members and pressured to join.[138] The gang members beat him, kidnapped and assaulted him and his family, and threatened to kill him if he did not join the gang.[139] Despite filing five separate police reports about these incidents, he received no response from the police.[140] He attempted to avoid the gang by relocating within the country and then to Guatemala, but the gang continued to pursue him, even kidnapping him in Guatemala.[141] After he discovered that the gang was finished trying to recruit him and would instead kill him, he fled Honduras and sought asylum in the United States.[142] A complex procedural history of the case follows.

The Immigration Judge denied the applicant's applications for asylum, withholding of removal, and relief under the Convention Against Torture (CAT).[143] The Board summarily affirmed the decision of the Immigration Judge.[144] In 2007, the Third Circuit granted the applicant's petition for review and remanded the case to the Board to address the question of whether "young men who have been actively recruited by gangs and who have refused to join the gangs" constitutes a PSG – an issue that neither the Immigration Judge nor the Board had decided – and which the court declined to decide in the first instance.[145]

On remand, the Board again rejected the applicant's claims, finding that he failed to establish past persecution or a well-founded fear of future persecution "on account of" one of the protected grounds.[146] In rejecting the applicant's claim, the Board relied on *Matter of S-E-G-*, and its companion case, *Matter of E-A-G-*, and concluded that the he did not show that his proposed PSG possessed the required elements of "particularity" and "social visibility."[147] The Board reasoned, as it did in *Matter of S-E-G-,* that the proposed PSG of "Honduran youth who have been actively recruited by gangs but have refused to join because they oppose gangs" lacked "particularity" because it was a "potentially large and diffuse segment of society" and "too broad and inchoate."[148] Moreover, the proposed social group lacked "social visibility" as required under *Matter of E-A-G-* because persons who

138. *See In re* M-E-V-G-, 26 I. & N. Dec. at 228.
139. *Id.*
140. *In Two Gang-Related Cases, BIA Clarifies and Renames Its "Social Visibility" Requirement for Establishing a "Particular Social Group"*, 91 No. 7 INTERPRETER RELEASES 273, 273 (Feb. 17, 2014) [hereinafter *Two Gang Related Cases*].
141. *Id.*
142. *Id.*
143. *In re* M-E-V-G-, 26 I. & N. Dec. at 228.
144. *Id.*
145. *Id.* at 228-29 (citing Valdiviezo-Galdamez v. Att'y Gen. of U.S. ("Valdiviezo-Galdamez I"), 502 F.3d 285 (3d Cir. 2007)); *see also In Two Gang-Related Cases, supra* note 140, at 274.
146. *In re* M-E-V-G-, 26 I. & N. Dec. at 228-29.
147. *Id.*
148. *In Two Gang-Related Cases, supra* note 140, at 274.

resist gangs were not shown to be socially visible or a recognizable group or segment of Honduran society.[149] The Board then concluded that the risk of harm that the applicant feared was actually an individualized gang reaction to his specific behavior.[150] Subsequently, the applicant again sought review in the court of appeals.

In *Valdiviezo-Galdamez v. Attorney Gen. of U.S.* ("*Valdiviezo-Galdamez II*"),[151] the U.S. Court of Appeals for the Third Circuit joined the Seventh Circuit[152] in holding that the "social visibility" and "particularity" in claims based on membership in PSG are inconsistent with prior Board decisions,[153] and therefore are not entitled to deference under *Chevron*.[154] The court observed that the statute does not define PSG and the legislative and negotiating history of the pertinent international agreements do not shed much light on the meaning of this phrase.[155] The court explained that, in the wake of *Acosta*, the Board recognized a number of groups as "particular social groups" where there was no indication that the group's members possessed "characteristics that were highly visible and recognizable by others in the country in question" or possessed characteristics that were otherwise "socially visible" or recognizable.[156] Further, the Court opined that the members of each of these groups have characteristics which are completely internal to the individual and cannot be observed or known by other members of the society in question (or even other members of the group) unless and until the individual member chooses to make that characteristic known.[157] The Court stated that the Board's adjudication of social group asylum claims was inconsistent or irrational.[158] Consequently, the Court concluded, as did the Seventh Circuit in *Gatimi*, that, since the "social visibility" requirement is inconsistent with past Board decisions, it is an unreasonable addition to the requirements for establishing

149. *Id.*

150. *Id.*

151. Valdiviezo-Galdamez v. Att'y Gen. of U.S., *("Valdiviezo-Galdamez II*") 663 F.3d 582 (3d Cir. 2011).

152. Gatimi v. Holder, 578 F.3d 611 (7th Cir. 2009), *summarized in* 86 INTERPRETER RELEASES 2148 (Aug. 31, 2009); Benitez Ramos v. Holder, 589 F.3d 426 (7th Cir. 2009), *discussed in* 87 INTERPRETER RELEASES 4 (Jan. 4, 2010).

153. *In re* Kasinga, 21 I. & N. Dec. 357, 366 (BIA 1996) (finding that "young women of the Tchamba-Kunsunto Tribe who had not had been subjected to FGM [female genital mutilation] as practiced by that tribe, and who oppose the practice" to be a "particular social group."); *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990) (finding that homosexuals in Cuba could constitute a "particular social group" because the Cuban government required homosexuals to register, report regularly, and undergo physical examinations and that "once registered by the Cuban government as a homosexual, that characteristic [was not] subject to change."); *In re* Fuentes, 19 I. & N. Dec. 658 (BIA 1988) (holding that "former members of the national police of El Salvador" could form a "particular social group" because the alien's status as a former policeman is "an immutable characteristic, as it is one beyond the capacity of the [alien] to change").

154. Nat. Res. Def. Council, Inc., 467 U.S. at 842-43;Valdiviezo-Galdamez II, 663 F.3d at 608.

155. *In Two Gang-Related Cases, supra* note 140, at 275.

156. *Id.*

157. *Id.* at 276.

158. *Id.*

refugee status where that status turns upon persecution on account of membership in a particular social group.[159]

The Third Circuit also declined to extend *Chevron* deference to the Board's interpretation of its "particularity" requirement.[160] The Court noted that the Board in *Matter of S-E-G-* explained:

> The essence of the particularity requirement . . . is whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons. While the size of the proposed group may be an important factor in determining whether the group can be so recognized, the key question is whether the proposed description is sufficiently particular, or is too amorphous . . . to create a benchmark for determining group membership.[161]

The government in *Valdiviezo-Galdamez II* attempted to explain to the court that the "particularity" requirement assesses whether a specified group has definable boundaries while the "social visibility" element assesses whether a proposed group shares a unifying characteristic that is perceived as discrete or set apart by the society in question.[162] However, the Third Circuit opined that it was "hard-pressed to discern a difference between the requirement of 'particularity' and the discredited requirement of 'social visibility' " and that they seemed to be different articulations of the same concept.[163] The court then concluded that the Board's addition of the requirements of "social visibility" and "particularity" to its definition of PSG is inconsistent with its prior decisions, and that it had not announced a "principled reason" for its adoption of those inconsistent requirements.[164] As a result, the court granted the petition for review and remanded the case to the Board for further proceedings.[165]

1. The Board Clarified that Literal or "Ocular" Visibility is Not Required and Renamed the "Social Visibility" Element as "Social Distinction"

In February 2014, the Board issued two precedential decisions, *Matter of M-E-V-G-*[166] and *Matter of W-G-R-*,[167] in which it attempted to clarify the social visibility and particularity requirements. The two decisions restated and emphasized the Board's decision in *S-E-G-* and *E-A-G-*, making it clear that the

159. *Id.*
160. *In re* M-E-V-G-, 26 I. & N. Dec. at 229.
161. *In re* S-E-G-, I. & N. Dec. 579, 584 (BIA 2008).
162. *In Two Gang-Related Cases*, *supra* note 140, at 276.
163. *Id.*
164. *Id.*
165. *Id.*
166. *In re* M-E-V-G-, 26 I. & N. Dec. 227.
167. *In re* W-G-R-, 26 I. & N. Dec. 208.

Board rejected the criticisms of the Seventh[168] and Third[169] Circuit Courts of Appeals.

The Board explained that its social visibility test had always focused on whether the group members were "set apart" or "distinct" from other persons in the society "in some significant way."[170] "Literal or 'ocular' visibility is not, and never has been a prerequisite for a viable particular social group," the Board said,[171] and to eliminate any possibility of confusion, the Board changed the term used for the requirement from "social visibility" to "social distinction."[172] Although the Board provided some guidance and clarification, many immigrants' rights advocates and members of the international community continue to criticize the requirements.

The Board stated that "the 'social distinction' requirement considers whether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way."[173] In other words, social distinction signifies whether a particular society distinguishes the group in any way from those who are not in the group. To be socially distinct, the Board stated, "a group need not be *seen* by society but must be *perceived* as a group by society . . . ."[174] The Board further explained that "[s]ociety can consider persons to comprise a group without being able to identify the group's members on sight . . . [and] [t]he fact that members of a particular social group may make efforts to hide their membership in the group to avoid persecution does not deprive the group of its protected status."[175] Therefore, some characteristics, such as religious or political beliefs, are not literally visible, but individuals with certain religious or political beliefs may only be treated differently within society if their beliefs were made known or acted upon by the individual.[176] The Board elaborated that members of these groups generally understand their own affiliation with the group, and other people in the particular society understand that such a distinct group exists.[177] This reasoning makes the application of the new "social distinction" requirement to the analysis of a social group highly dependent on the context of the country in question.

The Board, however, disagreed with the Third Circuit's conclusion that it was difficult to discern a difference between the requirements of particularity and social visibility.[178] The Board offered no new interpretation or clarification of the particularity requirement, reiterating its concern with the "boundaries" or the "outer limits" of the group.[179] The Board further explained that "particularity" requires

168. Gatimi, 578 F.3d 611.
169. Valdiviezo-Galdamez II, 663 F.3d 582.
170. *In re* M-E-V-G-, 26 I. & N. Dec. at 238.
171. *Id.*
172. *Id.* at 240.
173. *Id.* at 238.
174. *In Two Gang-Related Cases*, *supra* note 140, at 277 (stating that "society may consider persons to comprise a group without being able to identify the group's members on sight").
175. *In re* M-E-V-G-, 26 I. & N. Dec. at 240.
176. *Id.* at 236.
177. *Id.*
178. *Id.* at 240.
179. *Id.* at 241.

"characteristics that provide a clear benchmark for determining who falls within the group" and thus "commonly accepted definitions."[180] The Board stressed that a group must be "discrete" and must not be "amorphous, overbroad, diffuse, or subjective."[181] Furthermore, the Board explained that:

> Societal considerations have a significant impact on whether a proposed group describes a collection of people with appropriately defined boundaries and is sufficiently "particular." Similarly, societal considerations influence whether the people of a given society would perceive a proposed group as sufficiently separate or distinct to meet the "social distinction" test.[182]

According to the Board, an asylum seeker trying to establish eligibility based on membership in a PSG, can use any evidence to show that the proposed social group is identifiable in a particular society.[183] However, it remains a hurdle for many asylum seekers to establish eligibility for asylum based on a a PSG because of a lack of knowledge or resources to gather the evidence and being unable to afford to hire an attorney to represent them.

2. The Board Clarified that a Social Group Recognition for Asylum Purposes is Determined by the Perception of the Society in Question, Not the Perception of the Persecutor

The Board also explained that "a group's recognition for asylum purposes is determined by the perception of the society in question, rather than by the perception of the persecutor."[184] The Board justified this departure from the views of several circuit courts on the ground that a focus on the perspective of the persecutor would conflate "social distinction" with the requirement of nexus.[185] It would further conflict with the Board's case law that rejects, as circular, groups defined by the common characteristic of experiencing persecution.[186] While social distinction may not be defined solely by the persecutors' perception, "[t]he perception of the applicant's persecutors may be relevant because it can be indicative of whether society views the group as distinct."[187] Under the Board's

180. *Id.* at 239.
181. *Id.*
182. *Id.* at 241.
183. *Id.* at 244.
184. *Id.* at 242.
185. *Id.* at 242-43.
186. *Id.*
187. *Id.* at 242. For example, "a proposed social group composed of former employees of the attorney general's office of a country may not be valid for asylum purposes. Although such a shared past experience is immutable and the group is sufficiently discrete, the employees may not consider themselves a separate group within the society and the society may not consider these employees to be meaningfully distinct within society in general." *Id.*

reasoning, groups largely defined by the views of the persecutor may be socially distinct, and therefore could potentially meet the criteria for a cognizable PSG.[188]

The Board further explained that "such a social group determination must be made on a case-by-case basis because it is possible that, under certain circumstances, the society would make such a distinction and consider the shared past experience to be a basis for distinction within that society."[189] Finally, the Board concluded that "[o]nly when the inquiry involves the perception of the society in question will the 'membership in a particular social group' ground of persecution be equivalent to the other enumerated grounds of persecution."[190] The Board ultimately did not decide whether the applicant's proposed social group was cognizable.[191] Instead, it provided an explanation of the meaning of PSG to be applied on remand.[192]

B. Matter of W-G-R-[193]

Matter of W-G-R- involved a Salvadoran applicant who was a member of the Mara 18 gang operating in his country.[194] He left the gang after being a member for less than year.[195] Members of his former gang confronted him after he left, and he was shot in the leg during one of the two attacks.[196] After he was targeted for retribution for leaving the gang, he fled El Salvador and sought asylum in the United States.[197]

Applying the same set of rules it set out in *M-E-V-G-*, the Board found the proposed social group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" to be problematic for a number of reasons.[198] The proposed social group was not sufficiently particular because it was too diffuse and broad since "the group could include persons of any age, sex, or background."[199] The Board elaborated that for a social group to be sufficiently particular, it would need additional *specificity*, such as defining the group by "the duration or strength of the members' active participation in the activity and the recency of their active participation."[200] Furthermore, the Board reasoned that "the boundaries of a group are not sufficiently definable unless the members of society generally agree on who is included in the group . . . ."[201]

In addition, the proposed social group failed to meet the "social distinction" requirement because the evidence in the record did not show that Salvadoran

188. *Id.* at 242-43.
189. *Id.* at 242.
190. *Id.* at 243.
191. *Id.* at 252-53.
192. *Id.*
193. *In re* W-G-R-, 26 I. & N. Dec. 208.
194. *Id.* at 209.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 221.
199. *Id.*
200. *Id.* at 221-22 (emphasis added).
201. *Id.* at 221.

society considers former gang members who have renounced their gang membership as a distinct social group.[202] Although the record contained documentary evidence relating to gangs in general, the Board found very little documentation discussing the treatment or status of former gang members.[203] Therefore, the Board concluded that the proposed social group of "former Mara 18 gang members who have renounced their gang membership" is not perceived, considered, or recognized in Salvadoran society as a distinct group.[204] Even though *W-G-R-* involved former gang members, the decision is important because it illustrates a complex dynamic between social distinction and particularity and the challenges in making a successful claim of asylum based on membership in a PSG.

V. THE BOARD HAD NOT FINISHED EXPOUNDING UPON THE PRINCIPLE OF *EJUSDEM GENERIS* AFTER *ACOSTA* IN DEFINING THE MEMBERSHIP IN A PARTICULAR SOCIAL GROUP PROTECTED GROUND

In *M-E-V-G-*, the Board explained how the social visibility and particularity requirements flow from the same method of statutory interpretation the Board first used in *Matter of Acosta*.[205] The Board began with first principles, reviewing the "overall framework of refugee protection."[206] The Board emphasized that the refugee definition in the INA does "not extend protection to all individuals who are victims of persecution," but only to those who are persecuted on account of a finite list of protected grounds.[207] The Board reasoned that a faithful interpretation of the refugee definition must give effect to the statutory intent to limit protection to a special subset of persons fleeing dangerous conditions in their home country, rather than extending protection to persons "fleeing from natural or economic disaster, civil strife, . . . war" or "crime and other societal afflictions."[208] The Board explained that in *Acosta*, it had relied on the doctrine of "*ejusdem generis*," literally, "of the same kind," to reason that "particular social group" should be "interpreted on the same order as the other grounds of persecution" in the INA's refugee definition – i.e., race, religion, nationality, and political opinion.[209] *Acosta* concluded that because the other protected grounds were based on immutable characteristics, "particular social group" should be also be read to refer to groups of persons who share a common, immutable characteristic.[210] *Acosta* specified that an immutable characteristic could be a characteristic that the members of the group either cannot change (like gender or sexual orientation) or one that they should not

202. *Id.* at 222.
203. *Id.*
204. *Id.*
205. *In re* M-E-V-G-, 26 I. & N. Dec. 227.
206. *Id.* at 234.
207. *Id.* at 234-36.
208. *Id.* at 235.
209. *Id.* at 230, 234 (explaining that "the proper interpretation of the phrase ["*ejusdem generis*"] can only be achieved when it is compared with the other enumerated grounds of persecution (race, religion, nationality, political opinion), and when it is considered within the overall framework of refugee definition.").
210. *In re* Acosta, 19 I. & N. Dec. at 233.

be required to change (like being an uncircumcised female) because it is fundamental to their identity or conscience.[211]

The applicant in *M-E-V-G-* contended that the *Acosta* immutable characteristics test should be the sole criterion for whether a putative group is cognizable as a "particular social group,"[212] but the Board explained why it found it necessary to supplement the immutable characteristics test with the social visibility and particularity criteria and why the new criteria were consistent with the rationale of *Acosta*. The Board explained in *M-E-V-G-* that experience showed "the generality permitted by the *Acosta* standard . . . led to confusion and a lack of consistency as adjudicators struggled with . . . social groups, some of which appeared to be created exclusively for asylum purposes."[213] In *M-E-V-G-*, the Board noted that as early as 1999, it had cautioned that the social group concept would "virtually swallow the entire refugee definition if common characteristics . . . were all that need be shown" to make a protected ground.[214] Relying on shared immutable characteristics as the only criterion for "particular social group" would therefore defeat the INA's evident purpose of extending protection only to a special subset of persons who are in danger of persecution.[215] The imposition of particularity and social visibility as requirements was intended to supplement the overly general immutable characteristics test to assure that "particular social group" is defined consistently with the other four protected grounds.[216] The Board concluded that the other protected grounds described individuals united by an immutable characteristic that made them "factions" that are understood as such within a particular society.[217] The Board said that it had adopted supplemental criteria to assure that 'particular social group' was likewise limited to groups that were such "factions" in their societies.[218]

It still remains uncertain what the Board meant when it conceived the particularity requirement. If particularity is another way of determining whether the group exists within a particular society and who belongs in that group, then that interpretation would be consistent with the principle of *ejusdem generis*. However, some critics contend that the particularity requirement's primary function is to limit the size of social groups[219] – a restriction the Board does not place on other protected grounds. If that is indeed the case, then that use of the particularity element would violate the principle of *ejudem generis* because the other four protected grounds of asylum – race, religion, nationality, and political opinion

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211. *Id.*

212. *In re* M-E-V-G-, 26 I. & N. Dec. at 233.

213. *Id.* at 231.

214. *Id.* (citing Matter of R-A-, 22 I. & N. Dec. 906, 919 (BIA 2001)).

215. *See id.* at 235 (observing that refugee definition does not cover all persons at risk of persecution and "particular social group" was not meant to be a "catch all").

216. *Id.* at 236 (explaining "[T]hese enumerated grounds of persecution have more in common that simply describing persecution aimed at an immutable characteristic. They have an external component within a given society, which need not involve literal or 'ocular' visibility.").

217. *Id.*

218. *Id.*

219. NAT'L IMMIGRANT JUSTICE CTR., *supra* note 7.

encompass - groups that are large or small and may consist of members of varied backgrounds and demographics.[220]

A. Social Distinction

As with the immutable characteristics test, the social distinction requirement for recognizing cognizable PSGs appears to adhere to the principle of *ejusdem generis* and is therefore consistent with the meaning of the other four protected grounds.[221] After all, it is not difficult to imagine how groups made up of members of a certain race, religion, political opinion, or nationality could form separate "factions" in their societies. The social distinction requirement, as described in *M-E-V-G-* and *W-G-R-,* assesses whether society distinguishes the group in any way from those who are not in the group.[222] If a particular group exists in a society, the people in that society would most likely be able to identify who is included in the group, even when the members of the group are not literally visible or identifiable on-sight.[223] Indeed, even when the members of these factions are not literally visible, such as the case with religious or political groups, other people in the particular society understand that such a distinct group exists.[224] Thus, the social distinction requirement appears to be consistent with the other four protected grounds under the doctrine of *ejusdem generis*.[225] Moreover, the Board reiterated in *M-E-V-G-* that "the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown."[226] The Board also referred to the guidelines to the *Protocol* issued by the UNHCR, which provided that the PSG category was not meant to be "a 'catch all' that applies to all persons fearing persecution."[227] Thus, the Board averted such an unintended effect on the refugee definition by adding the social distinction requirement, which is entitled to *Chevron* deference because it is a reasonable interpretation of what constitutes a cognizable "particular social group."[228]

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220. Brief of the National Immigrant Justice Center as Amici Curiae In Support of Respondents at 10, *In re* Valdiviezo-Galdamez, No. A097-447-286, (BIA Aug. 14, 2012) [hereinafter Valdiviezo-Galdamez brief], *available at* http://immigrantjustice.org/sites/immigrantjustice.org/files/Valdiviezo%20NIJC%20Amicus%20FINAL.pdf.

221. *In re* M-E-V-G-, 26 I. & N. Dec. at 237-38.

222. *Id.* at 238; *In re* W-G-R-, 26 I. & N. Dec. at 217 (explaining that "[a]lthough the society in question need not be able to easily identify who is a member of the group, it must be commonly recognized that the shared characteristic is one that defines the group.").

223. *In re* M-E-V-G-, 26 I. & N. Dec. at 235 (stating that "[s]ocieties use a variety of means to distinguish individuals based on race, religion, nationality, and political opinion").

224. *Id.* at 235-36 (stating that "[t]he distinctions may be based on characteristics that are overt and visible to the naked eye or on those that are subtle and only discernible by people familiar with the particular culture. The characteristics are sometimes not literally visible.").

225. *Id.* at 236 (asserting that the "enumerated grounds of persecution have more in common than simply describing persecution aimed at an immutable characteristic. They have an external perception component within a given society, which need not involve literal or 'ocular' visibility.").

226. *Id.* at 231; *see also In re* R-A-, 22 I. & N. Dec. 906, 919 (BIA 2001).

227. *In re* M-E-V-G-, 26 I. & N. Dec. at 235.

228. *See id.* at 234; *see also* Nat. Res. Def.Council, Inc., 467 U.S. at 843.

B. Particularity

As the Board continues to expand the PSG analysis and expound upon the principle of *ejusdem generis* beyond the *Acosta* framework, social distinction and particularity have become the subject of significant controversy because they have been difficult to characterize. In *Acosta*, the Board's fundamental reasoning from the *ejusdem generis* principle is that the phrase "membership in a particular social group" should be interpreted in light of and consistently with the other four protected grounds of asylum.[229] The Board adhered to this reasoning in *M-E-V-G-*, when it explained that beyond the plain language of the Act, the particularity requirement "is consistent with the specificity by which race, religion, nationality, and political opinion are commonly defined."[230] Yet, the Board noted that "there is a critical difference between a political opinion or religious belief, which may in theory be entirely personal and idiosyncratic, and membership in a particular social group, which requires that others in the society share the characteristics that define the group."[231]

In *M-E-V-G-*, the Board also acknowledged, as did other courts, that "there is considerable overlap between the 'social distinction' and 'particularity' requirement," but stressed that each requirement "emphasize[s] a different aspect of a particular social group."[232] The Board elaborated that "particularity remains essential in the interpretation of the phrase "particular social group," especially in the analysis of broadly defined social groups."[233] In *M-E-V-G-* and *W-G-R-*, the Board noted that it found large groups like gender or homosexuals to be cognizable PSGs,[234] yet in both decisions the Board stated that "major segments of the population will rarely, if ever, constitute a distinct social group."[235] Because of these inconsistencies and contradictions, the meaning of particularity or what role it plays in the PSG analysis still remains unclear and controversial.

Next, in *M-E-V-G-*, the Board stated that to be sufficiently particular, a social group must be "discrete" and must not "be amorphous, overbroad, diffuse, or subjective."[236] Some immigrants' rights advocates contend that the particularity requirement is flawed and inconsistent with the principle of *ejusdem generis* because the "words . . . can only serve to limit the number and diversity of people

229. *In re* Acosta, 19 I. & N. Dec. 211, 233-34 (BIA 1985).

230. *In re* M-E-V-G-, 26 I. & N. Dec. at 239; *see also In re* W-G-R-, 26 I. & N. Dec. at 213.

231. *In re* M-E-V-G-, 26 I. & N. Dec. at 239.

232. *Id.* at 240-41.

233. *Id.* at 241.

234. *Id.* at 238-39; *In re* W-G-R-, 26 I. & N. Dec. at 218-19 (citing Matter of Kasinga, 21 I. & N. Dec. at 365; Matter of Toboso-Alfonso, 20 I. & N. Dec. at 822).

235. *In re* M-E-V-G-, 26 I. & N. Dec. at 239; *In re* W-G-R-, 26 I. & N. Dec. at 214 (citing Ocha v. Gonzales, 406 F.3d 1166, 1170-71 (9th Cir. 2005) (stating that a particular social group must be narrowly defined and that major segments of the population will rarely, if ever, constitute a distinct social group)).

236. *In re* M-E-V-G-, 26 I. & N. Dec. at 239 (citing Ochoa v. Gonzales, 406 F.3d 1166, 1170-71 (9th Cir. 2005)).

who would be members of a group."[237] In *M-E-V-G-*, the Board stressed that a social group "must be defined by characteristics that provide a clear benchmark for determining who falls within the group."[238] For that purpose, the Board stated, "it is critical that the terms used to describe the group have commonly accepted definitions in the society of which group is a part."[239] However, in *W-G-R-*, the Board rejected the applicant's social group "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" because the group was not sufficiently particular as it was "diffuse, . . . broad[,] and subjective" because the group could include persons of "any age, sex, or background."[240] To be sufficiently particular, the group would need further specificity and that any group characterized by former association may well require additional definition with respect to "the duration or strength of the members' active participation . . . and the recency of their participation."[241]

While the applicant in *W-G-R-* failed to present sufficient evidence that his proposed group was socially distinct in Salvadoran society, this case demonstrates that in order to satisfy the particularity requirement a group must be defined in very narrow and specific terms. This requirement falls in conflict with *ejusdem generis* principle the Board professed in *M-E-V-G-*, because specificity and internal homogeneity are not required for the other four protected grounds. For example, it is enough that an asylum-seeker posses the religious belief, even if shared by many, and it is irrelevant whether the individuals who share that political opinion or religious belief vary in age, sex, background, length or fervency of belief so long as they meet the nexus requirement.[242] As NIJC's recent amicus brief described:

> This size restriction appears to be the BIA's response to accusations that particularity and social distinction are not actually different criteria. Indeed, if the size limitation is discarded, particularity collapses into social distinction: both merely look to how the relevant society understands a group, and that social understanding provides the standard the applicant must meet to prove that he is a member of the group.[243]

A problem arises when a proposed social group is defined in sufficiently particular terms, but ultimately fails the social distinction test only because it was too narrowly defined. For example, the NIJC submitted an amicus brief to the Board in which it highlighted these difficulties: "[i]f the applicant defines a group broadly, she risks the Board rejecting her proposed group as too vague. But if she

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237. Brief Amici Curiae of the National Immigrant Justice Center at 10, *In re* Santos, No. A089-843-168, (3d Cir. May 29, 2014), *available at* http://immigrantjustice.org/sites/immigrantjustice.org/files/Santos%20Amicus%20Brief.pdf [hereinafter Santos brief].

238. *In re* M-E-V-G-, 26 I. & N. Dec. at 239.

239. *Id.*

240. *In re* W-G-R-, 26 I. & N. Dec. at 221.

241. *Id.* at 221-22.

242. Casper et al., *supra* note 18, at 16.

243. Santos brief, *supra* note 237, at *12.

creates a group that is too narrow, it may not be considered socially visible."[244] This whipsaw effect represents one of the most troubling aspects of the Board's particularity and social distinction requirements because they tend to eliminate cognizable social group claims (e.g. youth resistant to forced gang recruitment). For example, the Tenth Circuit in *Rivera-Barrientos*,[245] found that a social group of "women in El Salvador between the ages of 12 and 25 who resisted gang recruitment" was sufficiently particular, but not socially visible; while the proposed social group was found to be sufficiently particular, it is unlikely that the Salvadoran society would perceive such a narrowly defined group as socially distinct.[246] On the other hand, if the group had been defined as "young women who resisted gang recruitment," it would then probably be deemed socially distinct, but unlikely to satisfy the Board's particularity requirement.[247] Thus, taken together, social distinction and particularity requirements make claims based on social group membership far more difficult than claims on other protected grounds in violation of *ejusdem generis* principle.

VI. THE TWO-PART "SOCIAL DISTINCTION" TEST FOR ASSESSING ASYLUM CLAIMS BASED ON MEMBERSHIP IN A PARTICULAR SOCIAL GROUP: RECOMMENDATIONS

The Board should have used *M-E-V-G-* and *W-G-R-* to eliminate the particularity requirement and instead adopted a two-part "social distinction test" for assessing asylum claims based on a membership in a particular social group.[248] After *M-E-V-G-* and *W-G-R-*, an applicant for asylum or withholding of removal seeking relief based on "membership in a particular social group" must establish that the group is: (1) composed of members who share a common immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.[249] Under the two-part "social distinction test," the first step is to apply the *Acosta* standard to determine whether the group is composed of members who share a common immutable or fundamental characteristic, and the second step is to determine whether the group is socially distinct within the society in question.

The two-part "social distinction test" would ensure that the term "membership in a particular social group" would be interpreted in light of and consistently with the other protected grounds of asylum. Based on the above analysis, adding specificity that the Board required for a social group to be sufficiently particular "not only potentially compels asylum seekers to draw artificial lines around a proposed group, but also risks causing the group to fail the social distinction prong

244. Valdiviezo-Galdamez brief, *supra* note 220, at *19-20.

245. Rivera-Barrientos v. Holder, 666 F.3d 641, 650 (10th Cir. 2012).

246. Casper et al, *supra* note 18, at 17 (stating that "[T]o be particular, the group must be defined in narrow and specific terms, and with terms that limit internal heterogeneity of the group.").

247. *Id.* (stating that "For societal recognition to attach a group must be defined in terms that 'have socio-cultural resonance in the country at issue.'").

248. *See also In re* M-E-V-G-, 26 I. & N. Dec. at 233.

249. *Id.* at 237; *see In re* Acosta, 19 I. & N. Dec. at 233. Until recently, the Board largely defined the term "membership in a particular social group" by reference to a "protected" characteristic that is either immutable or is fundamental to one's identity or conscience. *Id.*

of the test because asylum seekers will have difficulties establishing that societies view these contrived groups as distinct entities."[250] If the Board did not intend to restrict the size of social groups when it conceived the particularity requirement, then the social distinction requirement could be used to show whether the society in question perceives the group as distinct. If a particular society perceives the putative group as distinct, then it would be able to identify who is part of the group and who is not. In turn, this would make the particularity requirement a redundant and unnecessary third step in the analysis of PSGs.

Each stage in the two-part analysis is consistent with the rationale underlying the *Acosta* standard. By establishing an "immutable or fundamental characteristic," an asylum-seeker would show one characteristic he shares with the other members of a group. In *M-E-V-G-*, the Board concluded that the other four protected grounds of asylum (race, religion, political opinion and nationality) describe groups united by an immutable characteristic that made them "factions" that are understood as such within a particular society. The second step is consistent with the rationale set out in *Acosta* because it would assure that the putative social group would likely be limited to groups that formed such "factions" in their societies.

Both portions of the two-part test establish a clear standard of what constitutes a cognizable particular social group. Once an applicant establishes an immutable or fundamental characteristic, any documentary evidence, such as country reports, could be used to show that the proposed social group is distinct in that society. If the Board's ultimate purpose behind the particularity requirement was to set clear boundaries to determine who is part of the group as an alternative to social distinction, then that would be consistent with the meaning of the other protected grounds of asylum. But, if the Board's motivation behind particularity was to impose a numerical limitation on the size of social groups, then that would be a violation of the canon of *ejusdem generis*, which the Board applied in *M-E-V-G-*.[251] Indeed, "just as the other four protected asylum grounds encompass groups that are large or small and whose individuals members may vary in multiple ways, particular social groups need not be homogenous or small in order to be cognizable."[252] Moreover, there is no requirement in INA § 101(a)(42(A) that a particular social group be small or be narrowly defined.[253] In addition, a number

250. NAT'L IMMIGRANT JUSTICE CTR., *supra* note 7.

251. *In re* M-E-V-G-, 26 I. & N. Dec. at 234-35.

252. Valdiviezo-Galdamez brief, *supra* note 220, at *10-11, 13 ("If breadth were a disqualifier, those persecuted on account of political opinion would be ineligible for asylum in situations where a dictatorial regime oppresses the majority, such as in Poland under the communist regime. Such result would be illogical.").

253. Nor is there anything in international treaties recognized as the basis of United States asylum law, or in the history of their negotiations that supports a requirement that a particular social group be defined narrowly. *See* 1951 Convention, *supra* note 43; United Nations High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1992). As the Supreme Court has noted, it is indeed appropriate to consider international law in construing the asylum statute. INS v. Cardoza-Fonseca, 480 U.S. 421, 424 (1987) (stating that the UNHCR Handbook provides instructive guidance on claims for protection in accordance with the

of circuit courts have determined that size of a social group is irrelevant in assessing whether a putative PSG is cognizable.[254]

CONCLUSION

The Board's decisions in *M-E-V-G-* and *W-G-R-* failed to clarify the PSG analysis and to eliminate confusion surrounding the particularity requirement. In these cases, the Board not only rejected the criticisms levied against it by the Courts of Appeals, but it also preserved a very confusing and complicated standard that makes successful claims based on membership in a PSG very difficult, if not impossible. While the Board did not dismiss all factual scenarios involving gangs,[255] this standard – requiring that the proposed group be both socially distinct and sufficiently particular – is redundant, difficult to apply, and unreasonably heightens the traditional *Acosta* standard. In order to achieve its goals and to stay true to the rationale of *Acosta*, the Board should have streamlined the approach as suggested by the DHS in its brief to the Board. The Board could have articulated the test as a modification of *S-E-G-* and *E-A-G-* precedent and, while *M-E-V-G-'s* case was remanded for further fact-finding on the question of whether the evidence demonstrates the applicant's group as socially distinct and sufficiently particular, the two-part "social-distinction test" would have elucidated a clear and much simpler approach to assessing social group claims consistent with the principle of *ejudem generis* and the other protected grounds. Until then, youth resistant to gang recruitment and other deserving social group claims will have a far more difficult time qualifying for asylum under the social distinction and particularity requirements than the other four protected grounds of asylum.

United Nations Protocol Relating to the Status of Refugees, "which provided the motivation for the enactment of the Refugee Act of 1980.").

254. In the Ninth Circuit's consideration of *Perdomo*, the Court similarly found that "the size and breadth of a group alone does not preclude a group from qualifying as such a social group." 611 F.3d 662, 669 (9th Cir. 2010) (citing Singh v. INS, 94 F.3d 1353 (9th Cir. 1996)); *see also* Benitez-Ramos v. Holder, 589 F.3d 426, 431 (7th Cir. 2009). The Eighth Circuit has also found concerns over the potential size of a group irrelevant to the particular social group determination. Malonga v. Mukasey, 546 F.3d 546, 553-54 (8th Cir. 2008).

255. *In re* M-E-V-G-, 26 I. & N. Dec. at 251.