

# *Successfully Litigating Gang- Based Asylum Cases in a Shifting Legal Landscape*

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# Typical claims in “gang-based asylum cases”

- Former gang members
- Forced recruitment of boys and young men
- Forced recruitment of girls, “gang girlfriends”
- Forced extortion/ rent of people with their own businesses, land or jobs
- Targeting family members of above for the family member’s refusal to pay, join, etc.
- Other possible activities –
  - religious work, witnesses of crimes, resistance to gang activity, occupation (police officers, bus drivers), land ownership, students

# Protected Grounds in Gang Based Cases

## ○ Religion

- Refused to join a gang because of his/her religious belief of conscience or was targeted after a religious conversion when trying to exit the gang
- “The Universal Declaration of Human Rights and the Human Rights Covenant proclaim the right to freedom of thought, conscience, and religion, which right includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance.” UNHCR Handbook, para. 71.

## ○ Race/Ethnicity

## ○ Political Opinion or imputed political opinion

## ○ Particular Social Group (or imputed)

- Gender based PSGs
- Family based PSGs
- Shared experiences: occupations and former occupations, witnesses to crimes, landowners, etc.

*\*\*\* There can be overlapping protected grounds\*\*\**

# Political Opinion

“[A]n asylum applicant must satisfy two requirements in order to show that he was persecuted ‘on account of’ a political opinion. First, the applicant must show that he held (or that his persecutors believed that he held) a political opinion. Second, the applicant must show that his persecutors persecuted her/him, or that s/he faces the prospect of such persecution because of her/his political opinion.” *Navas v. INS*, 217 F.3d 646, 656 (9th Cir. 2000)

Anti-gang political activity →

- *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008)

- General aversion to gangs did not constitute a political opinion for asylum purposes
- Because Santos-Lemus *had not provided any evidence that he was politically or ideologically opposed to the ideals espoused by Mara Salvatrucha or gangs in general, or that the gang held any sort of belief system they perceived Santos-Lemus to oppose*, the Court concluded the gang did not persecute Santos-Lemus on account of his political opinion.

# Political Opinion (cont'd)

- **Alvarez Lagos v. Barr**, 927 F.3d 236 (4th Cir. 2019) “If Barrio 18 had imputed to her an anti-gang political opinion, then that imputed opinion would be a central reason for likely persecution if she were returned to Honduras.”
  - Evidence in the record: failure to comply with gang’s extortion demands and her subsequent flight to the United States would be seen by Barrio 18 as “a direct challenge to its efforts to establish and maintain political domination within Honduras.”
- **Hernandez Chacon v. Barr**, No. (2d Cir. Jan. 23, 2020): “resistance to the norm of female subordination to male dominance that pervades El Salvador.”
  - “There is ample evidence in the record to support her claim: Gangs control much of El Salvador, including the neighborhood in which Hernandez-Chacon lived. The law enforcement systems that would normally protect women -- police, prosecutors, judges, officials -- do not have the resources or desire to address the brutal treatment of women, and the Salvadoran justice system “favors aggressors and assassins” and “punish[es] victims of gender violence.”

# Particular Social Group

- A 'particular social group' is one united by a voluntary association, including a former association, OR by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it." **Hernandez Montiel v. INS**, 225 F.3d 1084, 1092–93 (9th Cir. 2000).
- To determine whether a social group exists, the court considers certain factors, including "whether a group's shared characteristic gives members social visibility and whether the group can be defined with sufficient particularity to delimit its membership."
  - "Social distinction" → refers to "social recognition" and requires that a group "be perceived as a group by society."
  - The "particularity" requirement → whether a group's boundaries are so amorphous that, in practice, the persecutor does not consider it a group. The ultimate question is whether a 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."

# PSG: A Fact Based Analysis

“To determine whether a group is a particular social group for the purposes of an asylum claim, the agency **must make a case-by-case determination** as to whether the group is recognized by the particular society in question. To be consistent with its own precedent, the BIA may not reject a group solely because it had previously found a similar group in a different society to lack social distinction or particularity, especially where, as here, it is presented with evidence showing that the proposed group may in fact be recognized by the relevant society.”

*Pirir-Boc v. Holder*, 750 F.3d 1077, 1083-84 (9th Cir. 2014).

# Forced recruitment and “gang girlfriend” cases

- “People who have been actively recruited by gangs but refuse to join because they oppose gangs”
  - Limited since doesn’t include people who were targeted for other reasons, such as criminal purposes
  - Gangs only persecute the youth who refuse to join
  - Need to show that society acknowledges that people who refuse recruitment or have anti-gang opinions are in danger of persecution
  - Need to show that gangs’ activity = administration of government
- “Persons taking concrete steps to oppose gang authority in El Salvador”. *Pirir-Boc v. Holder*, 750 F.3d 1077 (9th Cir. 2014)
- Gender based PSGs (can include men)
  - Gender + nationality
  - Women in (El Salvador) deemed property of gangs
  - Women in (Mexico) in domestic or intimate relationships



# Women + Nationality Social Groups

- **Perdomo v. Holder**, 611 F.3d 662, 669 (9th Cir. 2010)
  - explaining in the context of a claimed gender-based particular social group that the "size and breadth of a group alone does not preclude a group from qualifying as . . . a social group."
- **Orellana v. Lynch**, 646 Fed. Appx. 532 (9th Cir. 2016)
  - PSG: "young women in El Salvador who have been solicited by gangs"
- **Ticas-Guillen v. Whitaker**, (9th Cir. 2018) <https://law.justia.com/cases/federal/appellate-courts/ca9/16-72981/16-72981-2018-11-30.html>
  - IJ and BIA found that the PSG of "women in El Salvador" – was "just too broad." However, at the Ninth, both parties agreed that the case should be remanded for the Board to consider whether this proposed social group is cognizable in light of our precedent. "Under our law, gender and nationality can form a particular social group."
- **Trinidad Silvestre-Mendoza v. Sessions**, (9th Cir. 2018) (<https://cases.justia.com/federal/appellate-courts/ca9/15-71961/15-71961-2018-07-03.pdf?ts=1530648070>)
  - *Young women in Guatemala, women in Guatemala*
  - *Remanded back to the BIA*: "evidence attests to pervasive femicide in Guatemala, along with the government's attempts to combat it through specialized courts for femicide victims to seek justice, police officers available around the clock and allocated specifically to receive and respond to reports of femicide, special compensation for femicide victims, and mandatory sentences for perpetrators.<sup>3</sup>
  - "This evidence provides some support for the social group "Guatemalan women" being socially distinct, as we have recognized that legislation passed to protect a specific group can be evidence that the society in question views members of that group as distinct."

# Women + Nationality Social Groups, cont'd

- **Miguelina De Pena-Paniagua v. Barr**, (1st Cir. 2020) :
  - It is not clear why a larger group defined as "women," or "women in country X" -- without reference to additional limiting terms -- fails either the "particularity" or "social distinction" requirement. Certainly, it is difficult to think of a country in which women are not viewed as "distinct" from other members of society.... It is equally difficult to think of a country in which women do not form a "particular" and "well-defined" group of persons."
  - It is unsurprising, then, that if race, religion, and nationality typically refer to large classes of persons, particular social groups -- which are equally based on innate characteristics -- may sometimes do so as well. **See Perdomo v. Holder.**
- **Jacelys Miguelina De Pena-paniagua v. Barr**, No. 18-2100 (1st Cir. 2020)
  - Dominican women abused and viewed as property by their romantic partners, who are unable to escape or seek protection, by virtue of their gender";
  - "Dominican women viewed as property and unable to leave a domestic relationship"; and
  - "Dominican women unable to leave a domestic relationship"
  - ALSO: "Dominican Women"

# *The Record: “Women + Country”*

*Country conditions evidence should be used to both prove the existence of a PSG as well as for nexus to the PSG. For gender-based PSGs, you should look for proof of:*

- **family member’s attitudes accepting machismo if relevant**
- **social norms that prevent a woman from severing legal or social ties with a husband or co-parent**
- **the high rates of gender-based violence in the country due to machismo, including widespread and tolerated violence by male heads of household against their partners**
- **laws in place recognizing a need to protect women or girls from femicide and VAW**
- **how gang members perceive women to be “property” (is conveyed through the term “jaina” in El Salvador) and how women are killed because they reject a gang member, or they don’t want to be the girlfriend of a gang member.**

# Using gender-based PSGs for men: Example-military aged men in Mexico

Client from Michoacán Mexico was the victim of death threats and attacked by cartel members for refusing to join the cartel

- Use the same case law for women supporting the PSG: men or military aged men in Mexico (i.e. Perdomo)
- Record contains evidence of how men are particularly vulnerable to being killed by cartel members in Mexico and in particular in Michoacán:
  - Organized Crime and Violence in Mexico 2019 report published by the Justice in Mexico Project, 88.9% of homicide victims in Mexico are male...
  - Osborne, Hannah, "Mexico's Murder Rate Is So High It Has Altered The Life Expectancy Of Men," Newsweek, January 24, 2019
  - Laura Calderon & Octavio Rodriguez Ferreira & David A. Shirk, "Drug Violence in Mexico," Justice in Mexico, April 2018, available at: [https://justiceinmexico.org/wp-content/uploads/2018/04/180411\\_DrugViolenceinMexico.pdf](https://justiceinmexico.org/wp-content/uploads/2018/04/180411_DrugViolenceinMexico.pdf)

# Social Groups Based on Family Membership

1. The family remains the quintessential particular social group. **Parada v. Sessions**, 902 F.3d 901, 910 (9th Cir. 2018); **Rios v. Lynch**, 807 F.3d 1123, 1128 (9th Cir. 2015) (same)
  - o While the Attorney General recently overruled **Matter of L-E-A**, 27 I&N Dec. 40 (BIA 2017), when it certified the case to himself, 27 I&N Dec. 581 (A.G. 2019), this cannot in and of itself overrule longstanding precedent in the Ninth Circuit Court of Appeals holding that the family is a per se particular social group. The Ninth Circuit has already analyzed the family PSG under the BIA's framework in *Matter of M-E-V-G-*, 26 I. & N. Dec. 227, 240 (B.I.A. 2014).
  - o "The new 'social distinction' prong of the social group analysis 'refers to social recognition' and requires that a group 'be perceived as a group by society.'... Under the BIA's revised rubric, an applicant for [asylum] on the basis of membership in a particular social group must now show 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." *Id.* at 237. *Even under this refined framework, the family remains the quintessential particular social group.*" **Rios v. Lynch**, 807 F.3d at 1128. (emphasis added).

Therefore, the Respondent need not prove that family is a particular social group as it is well-established case law in this Circuit.

# Family based PSGs, cont'd

2. Nonetheless, the Respondent can show that his family is recognized and distinct in his community :
  - What makes the family stand out? What factors make them known in their community?
    - Types of jobs, land ownership, characteristics of certain family members making them infamous (i.e. alcoholic dad), church involvement, known membership in political party
    - What are the ways in which a person's community and their country's legal structure treats their family as a group.
3. Dicta: "[U]nless an immediate family carries greater societal import, it is unlikely that a proposed family-based group will be 'distinct' in the way required by the [Immigration and Nationality Act (INA)] for purposes of asylum."
  - Some IJs will fully follow *L-E-A's dicta* and require a showing that the family is renowned, not just unique to the community but known on a national level like the Kennedy family.

## ***Other PSGs: Shared Experiences, Former Occupations, Occupations, Land Ownership, Witnesses to Gang Crimes***

- An applicant's status based on her **former occupations, associations, or shared experiences**, may be the basis for social group claim. **See, e.g., *Cruz Navarro v. INS***, 232 F.3d 1024, 1028–29 (9th Cir. 2000) (member of Peruvian National Police). **See also *Ayala v. Holder***, 640 F.3d 1095, 1097 (9th Cir. 2011) (per curiam) (recognizing that a group of former officers may be a cognizable social group)
- ***Cordoba v. Holder***, 726 F.3d 1106, 1114 (9th Cir. 2013) (**land ownership** may be the basis of a particular social group).
- ***Henriquez-Rivas v. Holder***, 707 F.3d 1081, 1091–93 (9th Cir. 2013) (en banc) (held that **witnesses** who testify against gang members may constitute a particular social group on an application for asylum despite a lack of social visibility)
  - But see ***Conde Quevedo v. Barr***, 947 F.3d 1238, 1243 (9th Cir. 2020) (“Substantial evidence supports the BIA’s conclusion that ‘the record is devoid of any society specific evidence, such as country reports, background documents, or news articles, which would establish that persons who “‘report the criminal activity of gangs to the police’” are perceived or recognized as a group by society in Guatemala.’”)
- ***Perez Morales v. Barr***, 781 F. App'x 192 (4th Cir. 2019)- group of witnesses to the Zetas’ crimes

# What Groups are Problematic as PSGs

- When the group is defined solely by the persecution or harm:
  - Victims of extortion by gang members
- Too many factors in the proposed PSG
  - Young, single women in Honduras who own businesses
- Current occupations, depending on how immutable it is



# On Account of: Nexus

- Why s/he, and not some other person, was (or will be) targeted for violence, extortion, threats
- For applications filed on or after May 11, 2005 ( the REAL ID Act of 2005): An applicant needs to establish that “race, religion, nationality, membership in a particular social group, or political opinion **was or will be at least one central reason** for persecuting the applicant.” 8 U.S.C. § 1158(b)(1)(B)(i)
- The persecutor's motivation may be established by direct or circumstantial evidence. **See *INS v. Elias-Zacarias***, 502 U.S. 478, 483 (1992):
  - Direct proof of motivation may consist of evidence concerning statements made by the persecutor to the victim, or by victim to persecutor.
  - Circumstantial evidence--- make use of your country conditions!

# Nexus cont'd: example for family based PSG

Client has a child with someone in the Jalisco Nueva Generacion cartel. He was a drug addict and disappeared, probably after stealing drugs and money from the cartel. Members of the cartel started threatening client- if she couldn't find him, they'd kill her and kidnap her child. Even though they only briefly lived together, they told her she was his woman and the child. What kind of evidence should be presented to show that the cartel targeted her and not another person:

- Declaration and testimony should include statement about "being his woman"
- Expert statement and/or articles about how cartels in Mexico target the family members of cartel members for similar reasons
- Articles from local news sources showing other similar victims.

# HUMANITARIAN ASYLUM

## ○ Other Serious Harm

- An asylum applicant qualifies for humanitarian asylum if she would face the reasonable possibility of other serious harm under 8 C.F.R. § 1208.13(b)(1)(iii)(B). See *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012). ) (in “other serious harm” cases the focus should include current conditions such as civil strife and psychological harm to the applicant).
- IS there a past harm that has nothing to do with gang violence, that can be used to satisfy past persecution, eliminating the need to find future persecution on account of a protected ground? I.e., Child abuse or domestic violence

## ○ Severe Past Harm

- An applicant may also qualify for humanitarian asylum if there is severe past persecution, provided there are “compelling reasons” for being unwilling to return. See 8 C.F.R. § 1208.13(b)(1)(iii)(A); **see also, *Matter of Chen***, 20 I.&N. Dec. 16 (BIA 1989).

# Other tips

- Make sure your country conditions are tailored to your client and not completely boilerplate. Take advantage of local sources!
- Don't assume the TA or even the IJ is completely knowledgeable about asylum law and especially social groups. Be ready to argue the law in court.
- Don't assume the TA has spent any significant amount of time reviewing the case.
- In closing statements, either oral or written, make sure that you cite to your country conditions.
- Always keep in mind creating a good record for an appeal.

**QUESTIONS?**