

# ASYLUM CLAIMS FOR UACs (unaccompanied Alien Children)

By Geoffrey Hoffman, Director University of Houston Law  
Center Immigration Clinic , Clinical Associate Professor

JOSEPH A. VAIL ASYLUM / UAC WORKSHOP

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# U.S. Definition of “refugee”

- To qualify for **asylum** here in the U.S. must meet definition of “refugee”: under the INA (Immigration and Nationality Act) as follows:

“any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and 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 of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .**”

8 U.S.C. 1101(42)(a).

# Ethical Issues when dealing with UACs

- Ability to participate in interview/hearing: depends on age, health, development, cognitive processes, education, language ability, background
- Trauma dramatically affects development of child's brain
- Trauma = chaotic social conditions, violence, lack of protection and caring by adults, nutritional deficits, physical and mental disabilities
- Capacity to consent
- Parents can sign forms if child under 14, 8 CFR 103.2(a)(2)
- Parents can be given notice, 8 CFR 236.3(f)
- Conflicts: are child's and parents' interests aligned?
- Children cannot present testimony with same level of precision as adults

Source: AILA Colorado Representing UAC's July 2014 powerpoint - AILA doc. No. 14072245.

# Child Sensitive Interviewing Techniques

- Shorter Meetings to hold attention span
- Show empathy, speak w/ facts
- Start with neutral topic, nonjudgmental
- Ask open-ended questions
- Avoid complex questions
- Use active reflective listening
- Continually check-in

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# WHAT IS “PERSECUTION”?

- First step is to determine whether persecution exists. What is it? When does it occur?
- “The infliction of harm or suffering by a government or persons a government is unwilling or unable to control.” Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996)
- A subjective punitive or malignant intent is **not** required but the definition does not encompass:
  - Treatment that our society may consider unfair, unjust or even unlawful or unconstitutional
  - Harms solely relating to or arising out of civil strife

# The “nexus” requirement

- Remember the applicant must show “nexus” (a sufficient connection) between past persecution or future persecution and at least one of the five grounds:
  - 1. Race
  - 2. Religion
  - 3. Nationality (this includes ethnicity, like “Quiche”)
  - 4. Membership in a particular social group (“PSG”) (for children’s case this ground will be most important).
  - 5. Political Opinion

# UAC PSG Claims

- With respect to UAC cases, note there may be multiple PSGs into which a particular child may fit, 2 frequent formulations:
- GANG-BASED particular social group
- DOMESTIC VIOLENCE particular social group

These are by no means easy to prove.

# Important Gang Cases

- *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) (rejected PSG based on Salvadoran youths who resisted gang recruitment or their family)
- *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2009) (rejected PSG young persons who resist gang membership or perceived to be affiliated with gangs; ruled that the group would lack social visibility)
- *Matter of W-G-R-*, 26 I. & N. Dec. 208 (2014) (replaced “social visibility” req’t with “socially distinct” ; BIA rejected social group of “former members of the Mara 18 gang in El Salvador who have renounced their gang membership” as not “socially distinct” due to a lack of evidence introduced at the proceedings; remand ordered)
- *Matter of M-E-V-G-*, 26 I. & N. Dec. 227 (2014) (the BIA declined to make a ruling on whether Honduran youths who were actively recruited by gangs but who refused to join constituted a particular social group because further fact-finding was required; remand).



# So What Might Constitute Viable PSG Claims for UAC – Gang cases?

- The starting point for any PSG claim is *Matter of Acosta 19 I&N Dec. 211 (BIA 1995)* (The Board required that PSG to be cognizable must relate to “immutable” or “fundamental” characteristics).

# Acosta

- The touchstone case for PSG is *Matter of Acosta* 19 I&N Dec. 211 (BIA 1995)
- *The Board required that PSG to be cognizable must relate to “immutable” or “fundamental” characteristics: “a common, immutable characteristic... that the members... either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”*
- In *Acosta*, the PSG offered by respondent was rejected -- “El Salvadoran taxi drivers who refused to collaborate with guerillas” was found not to be “immutable” nor sufficiently fundamental to warrant relief.

# Gang-based asylum claims

- To meet the “social distinction” and “particularity” requirements now required under the latest case law, consider other PSGs which meet the immutable characteristic required by *Acosta* but are also distinct, e.g.:
  - Those who have been **witness to crime** or reported it to local authorities--**prosecutorial witness relating to gang violence**
  - Those who because of their **young age** would be targeted by gangs (age as “immutable characteristic”) (“Street children”)
  - Those who have some other special characteristic which makes them especially vulnerable, such as “**sexual identity**”
  - Those whose religion, ethnicity, cultural or linguistic identity make them part of a particular social group (e.g. Quiche)

# The evolution of PSG law

## **Applications of *Matter of Acosta***

- *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990)
  - (homosexual Cubans)
- *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996)
  - (“young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice”)
- *Tchoukhrova v. Gonzales*, 404 F.3d 1181 (9th Cir. 2005)(*vacated on other grounds*, 549 U.S. 801 (2006)).
  - The Board and Ninth Circuit both acknowledged that “disabled children in Russia” constitute a PSG as they have both common immutable characteristics and shared experiences.
    - The Asylum Officer Basic Training Course, *Asylum Eligibility Part III: Nexus and the Five Protected Characteristics* 53 (Mar. 21, 2009) states that this understanding of PSG for disabled children is in line with agency interpretation.

# The evolution of PSG law

U.N. definition of particular social group:

*“a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”*

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, U.N. Doc. HCR/GIP/02/02 ¶¶11-12 (May 7, 2002)

# The evolution of PSG law

“Social visibility” and “particularity” become requirements for all PSGs

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

(“Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and who have rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang’s values and activities” and “the family members of such Salvadoran youth”)

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

(Former gang members)

# Challenges to *S-E-G-/E-A-G-*

A developing circuit split:

Six circuit courts have **upheld** *S-E-G-* against direct challenges:

- *Ramos-Lopez v. Holder*, 563 F.3d 855, 858-62 (9th Cir. 2009)
- *Mendez-Barrera v. Holder*, 602 F.3d 21, 26 (1st Cir. 2010)
- *Lizama v. Holder*, 629 F.3d 440, 447 (4th Cir. 2011)
- *Fuentes-Hernandez v. Holder*, 411 F. App'x 438, 438-39 (2d Cir. 2011)
- *Gaitan v. Holder*, 671 F.3d 678 (8th Cir. 2012)(finding that young males from El Salvador who flee to avoid gang violence fail to qualify as a PSG)
- *Orellana-Monson v. Holder*, 685 F.3d 511 (5th Cir. 2012)(upholding social visibility and particularity requirements and finding that males aged 8 to 15 in Salvador who have been recruited by Mara 18 but refused to join due to opposition fail to qualify as a PSG)

# Challenges to S-E-G-/E-A-G- Cont.

- Three circuit courts have **rejected** S-E-G- and/or E-A-G-
  - *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009); *Ramos v. Holder*, 589 F.3d 426 (7th Cir. 2009)
    - *Urbina-Mejia v. Holder*, 597 F.3d 360 (6th Cir. 2010) (relying primarily on *Acosta's* definition of PSG and finding that a former gang member is part of a PSG)
  - *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582, 603-09 (3d Cir. 2011)
    - Note: The Ninth Circuit in a recent *en banc* published decision in *Henriquez-Rivas v. Holder* held that without reaching the validity of “social visibility” and “particularity” that both were met **for an El Salvadorian girl who testified against gang members for killing her father.**
      - » Redefining social visibility to only be “understood by others” to be a social group and not on-sight visibility.



# Even within *S-E-G-*, Age is an “Immutable Characteristic”

- The Board in *Matter of S-E-G-* has reasoned that age is outside an asylum applicant’s control making it an “immutable characteristic” for purposes of the Acosta test.
- Adequate mechanisms within asylum law can deal with “aging out” such as a finding of a “fundamental change of circumstances” as found by the Eighth Circuit in *Ixtlilco-Morales v. Keisler*, 507 F 3d 651, 654-55 (8th Cir. 2007).
- Lastly, a young person should not be precluded from a PSG for simply passing the age of 18 since being young and vulnerable often identifies a person for being persecuted. *See generally* Michelle Foster, *Intl. Refugee Law & Socio-Economic Rights: Refuge from Deprivation* (2007).

# Beyond S-E-G-

- “Street Children”
  - The Board has found, in an 2001 unpublished decision, that “abandoned street children in Nicaragua” amounted to a PSG. In that case, *Matter of B-F-O-*, the boy had seen his parents killed by guerillas and left on the streets where he was continuously vulnerable to violence & abuse.
    - The Board also found it was on account of an imputed political opinion and in cases of severe harm humanitarian asylum should be considered as well.

# Formulating PSG's for Gang-Based Asylum Claims of Children

- Age is an immutable characteristic, but can also be combined with other factors to make the PSG more socially visible/distinct such as:
  - Disabilities
  - Being “abandoned street children”
  - Their geographical location
  - Values/political beliefs
  - Being prosecutorial witnesses
  - Forced recruitment
  - And others

# Beyond *S-E-G-*

## Alternative social group formulations:

- Family

- *Crespin Valladares v. Holder*, 632 F.3d 117 (4th Cir. 2011) (stating that prosecutorial witnesses as well as their family members who suffer persecution on account of family ties constitutes a PSG)
- *Gebremichael v. INS*, 10 F.3d 28, 36 (1<sup>st</sup> Cir. 1993) (“There can, in fact, be no plainer example of a social group based on common identifiable and immutable characteristics than that of the nuclear family.”)
- *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9<sup>th</sup> Cir. 1986) (“Perhaps a prototypical example of a particular social group would consist of the immediate members of a certain family, the family being a focus of fundamental affiliation concerns and common interests for most people.”)
- Since *S-E-G-*, some IJs have granted asylum to applicants fleeing gang recruitment/retribution based on membership in the particular social group of their own nuclear family. Links to these decisions are available at the Immigrant Law Center of Minnesota’s gang-asylum web page.

# OTHER ASYLUM CLAIMS BESIDES GANG CASES FOR UACs

Alternative social group formulations (continued):

- Gender alone:
  - *Perdomo v. Holder*, 611 F.3d 662 (9<sup>th</sup> Cir. 2010)(Guatemalan women)
- Gender/domestic violence: (may apply to abused child not just spouse)
  - [Matter of R-A-](#), 22 I&N Dec. 906 (A.G.2001; BIA 1999)
    - “women in domestic relationships who are unable to leave”
    - “women who are viewed as property by virtue of their positions within a domestic relationship.”
- Religion
  - Occasionally as a basis for recruitment; more often persecution due to church-based, anti-gang efforts

# Beyond S-E-G-

Pursue alternatives to social group:

- Political opinion claims remain viable in gang-related cases if sufficient direct or circumstantial evidence of the gang's political motives is present to satisfy *INS v. Elias-Zacarias*, 502 U.S. 478 (1992), and INA Sec. 208(b)(1)(B)(i).
  - *Marroquin-Ochoma v. Holder*, 574 F.3d 574, 578 (8<sup>th</sup> Cir. 2009) (“Opposition to a gang such as Mara Salvatrucha may have a political dimension”).
  - See *Martinez-Buendia v. Holder*, 2010 U.S. App. LEXIS 16479 (7<sup>th</sup> Cir. Aug. 10, 2010) (reversing BIA's application of S-E-G- to deny political opinion claim where Board did not analyze with sufficient particularity those facts in the record that demonstrated political motives of persecutors, the FARC rebels of Colombia).

# IMPORTANT NEW CASE

## Matter of A-R-C-G- (Domestic Violence)

- On August 26, 2014, the Board issued a published decision: Matter of A-R-C-G, 26 I&N Dec. 388 (BIA 2014). Everyone should read!
- **Held:** Depending on the facts and evidence in an individual case, “*married women in Guatemala who are unable to leave their relationship*” can constitute a cognizable particular social group that forms the basis of a claim for asylum or withholding of removal

# Don't forget: ASYLUM LAW IS CASE SPECIFIC!

- Many practitioners try to use canned briefs or templates – don't cut corners.
- Be aware that the BIA has not foreclosed gang-based cases, but just emphasized further fact finding and proving up of cases is required
- Therefore, you will need to invest a **lot of time to gather the evidence, help client with affidavits, present the record and get country condition and/or psych. experts!**



# RESOURCES

- The Law of Asylum by Deborah E. Anker
- AILA's Asylum Primer, 6th ed. by Regina Germain
- Immigrant Law Center of Minnesota (ILCM.ORG):
  - *Matter of S-E-G*/ gang asylum web page
  - Technical assistance: litigation@ilcm.org
- Center for Gender and Refugee Studies (CGRS)  
<http://cgrs.uchastings.edu/>

Gender-based asylum resources and technical assistance



# Questions & Answers

Contact Professor Geoffrey Hoffman  
[ghoffman@central.uh.edu](mailto:ghoffman@central.uh.edu)

University of Houston Law Center

To schedule an intake for a UAC contact the intake  
desk at our Immigration Clinic: 713 743 2094

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Immigration Clinic