

**Particular Social Group Practice Advisory:  
Applying for Asylum After *Matter of M-E-V-G-* and *Matter of W-G-R***

I. The Starting Point: *Matter of Acosta*

To qualify for asylum, an individual must demonstrate a well-founded fear of persecution on account of “race, religion, nationality, membership in a particular social group, or political opinion.” INA § 101(a)(42)(A). In [Matter of Acosta, 19 I&N Dec. 211 \(BIA 1985\)](#), the Board of Immigration Appeals (BIA) established a rule for determining whether an asylum applicant has demonstrated membership in a particular social group (“PSG”). Relying on the doctrine of *ejusdem generis*, “of the same kind,” the BIA construed the term in comparison to the other protected grounds within the refugee definition (i.e. race, religion, nationality and political opinion). The BIA concluded that the commonality shared by all four protected grounds is the fact that they encompass innate characteristics (like race and nationality) or characteristics one should not be required to change (like religion or political opinion). *Id.* at 233. To be a protected ground then, PSG membership can be based either on a shared characteristic members cannot change (like gender or sexual orientation) or a characteristic they should not be required to change (like being an uncircumcised woman). See *id.* (listing gender as an immutable characteristic); see also [Matter of Toboso-Alfonso, 20 I&N Dec. 819 \(BIA 1990\)](#) (recognizing homosexuality as an immutable characteristic); [Matter of Kasinga, 21 I&N Dec. 357, 366 \(BIA 1996\)](#) (recognizing the status of being an uncircumcised woman as a characteristic one should not be required to change).

Federal courts of appeals have endorsed the *Acosta* standard for discerning PSGs as a valid interpretation of the statute. The *Acosta* test – or a variation of it – has governed the analysis of PSG claims for decades. See *Niang v. Gonzales*, 422 F.3d 1187, 1199 (10th Cir. 2005); *Castellano-Chacon v. INS*, 341 F.3d 533, 546-48 (6th Cir. 2003); *Lwin v. INS*, 144 F.3d 505, 511 (7th Cir. 1998); *Safaie v. INS*, 25 F.3d 636,640 (8th Cir. 1994); *Fatin v. INS*, 12 F.3d 1233 (3rd Cir. 1993); *Alvarez-Flares v. INS*, 909 F.2d 1, 7 (1st Cir. 1990).

II. Confusing the PSG Analysis: *Matter of S-E-G-* and *Matter of E-A-G-*

In 2008, the BIA issued two precedential decisions in cases involving gang-based asylum claims and the test for establishing membership in a PSG. The first case, [Matter of S-E-G-, 24 I&N Dec. 579 \(BIA 2008\)](#), involved siblings who sought asylum based on their membership in the group of “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 their family members.” The second case, [Matter of E-A-G-, 24 I&N Dec. 591 \(BIA 2008\)](#), involved a young man who sought asylum based on his membership in the group of “young persons who are perceived to be affiliated with gangs.”

In these cases, for the first time, the BIA added two new requirements to the PSG test.<sup>1</sup> The BIA held that in order to establish a viable PSG, the group must be based on an immutable characteristic, be socially visible, and particularly defined. According to the BIA, “particularity” means that a group is defined in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons. *S-E-G-*, 25 I&N Dec. at 584. To meet the particularity requirement, a group must not be “too amorphous . . . to create a benchmark for determining group membership.” *Id.* The BIA went on to reject the respondent’s proposed group under the particularity requirement because the group was made up of “a potentially large and diffuse segment of society.” *Id.* at 585. The BIA did not provide a definition of “social visibility” beyond stating that a PSG’s shared characteristic “should generally be recognizable by others in the community.” *Id.* at 586.

The immigrant advocacy community harshly criticized these two decisions. The BIA’s reasoning in *S-E-G-* and *E-A-G-* was often circular and frequently conflated social visibility and particularity with nexus (the “on account of” requirement), which is separate question from whether the PSG is viable in the first place. For example, in analyzing the *S-E-G-* respondents’ proposed group of “Salvadoran youth who have resisted gang recruitment, or family members of such Salvadoran youth,” the BIA held that the group (1) failed the particularity test because the gang could have had many different motives for targeting Salvadoran youth, and (2) failed the social visibility test because members of the group weren’t targeted for harm more frequently than the rest of the population. These justifications for denying asylum rest on a finding that the asylum seekers were not harmed *because of* their status as gang resisters – which is a nexus issue – and not because the PSG suffers from legal infirmity.

In addition, the BIA’s decisions left unclear whether “particularity” only required that a group be defined with clear, objective words, or if a group must also be narrow and homogenous. The BIA also created confusion as to whether social visibility meant literal or figurative visibility. In a subsequent asylum case before the U.S. Court of Appeals for the Seventh Circuit, Judge Posner queried whether an asylum seeker needed to put a target on his back announcing his PSG in order to qualify for asylum. *Gatimi v. Holder*, 578 F.3d 611, 616 (7th Cir. 2009). Finally, the decisions completely ignored the fact that PSGs the BIA had previously accepted, such as young women of a particular tribe who oppose the practice of female genital mutilation, or gay men from a particular country, no longer appeared viable under this new test.

### III. The Reaction of the Federal Courts

As asylum cases involving PSG claims and the BIA’s new social visibility and particularity requirements soon began to make their way to the U.S. Courts of Appeals, some courts deferred to the BIA’s addition of the two new PSG requirements under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). However, others courts struck down the requirements and refused to find that they merited *Chevron* deference.<sup>2</sup>

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<sup>1</sup> Although the BIA had previously referenced social visibility and particularity in other decisions, see [Matter of A-M-E- & J-G-U](#), 24 I&N Dec. 69 (BIA 2007) and [Matter of C-A-](#), 23 I&N Dec. 951 (BIA 2006), the BIA did not state that they were requirements for establishing a PSG until *S-E-G-* and *E-A-G-*.

<sup>2</sup> See Appendix A for a list of each circuit’s position on the social visibility/distinction requirement.

## Seventh Circuit

The first court to strike down parts of the BIA's new PSG test was the Seventh Circuit in *Gatimi*, 578 F.3d at 616. In *Gatimi*, the Court found that the social visibility requirement "makes no sense" and that the BIA has never attempted "to explain the reasoning behind the criterion of social visibility." Because the BIA had been inconsistent in its use and explanation of the social visibility criterion, the Seventh Circuit declined to defer to the BIA's interpretation and rejected social visibility as a requirement for establishing membership in a PSG.

Although the Seventh Circuit has not explicitly rejected the particularity requirement, several decisions after *S-E-G-* and *E-A-G-* directly contradict the BIA's explanation of particularity. In particular, in *Cece v. Holder*, 733 F.3d 662 (7th Cir. 2013), the en banc Seventh Circuit explicitly stated that the breadth of a protected ground has never been a per se bar to asylum and that it would be "antithetical to asylum law to deny refuge to a group of persecuted individuals who have valid claims merely because too many have valid claims."<sup>3</sup> *Cece*, 733 F.3d at 674-75. Moreover, the *Cece* Court reaffirmed that the Seventh Circuit follows a pure, *Acosta*-only test for establishing membership in a PSG, in which a group need only be based on an immutable characteristic in order to be a viable social group. See *Cece*, 733 F.3d at 669 ("This Circuit has deferred to the Board's *Acosta* formulation of social group"), at 672 (explaining that it is not fair to analyze the group "merely based on the language used . . . we must look to see whether the group shares "common characteristics that members of the group either cannot change, or should not be required to change.").

## Third Circuit

In 2011, the Third Circuit joined the Seventh in rejecting social visibility and struck down the particularity requirement as well. *Valdiviezo-Galdamez v. Holder*, 663 F.3d 582 (3d Cir. 2011). Like the Seventh Circuit, the Third Circuit declined to give *Chevron* deference to the BIA's new PSG requirements because they were unreasonable additions to the PSG definition and inconsistent with prior BIA decisions. The Court also noted that it was "hard-pressed to discern any difference between the requirement of "particularity" and the discredited requirement of "social visibility." Indeed, they appear to be different articulations of the same concept and the government's attempt to distinguish the two oscillates between confusion and obfuscation, while at times both confusing and obfuscating." *Valdiviezo-Galdamez*, 663 F.3d at 608.

## Ninth Circuit

Unlike the Seventh and Third Circuits, the Ninth Circuit declined to reject social visibility and particularity. *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013)<sup>4</sup>. Significantly, however, the Court acknowledged that the BIA and the Ninth Circuit had both conflated the social visibility and particularity tests at times. *Id.* at 1090-91. The Court explicitly clarified that a PSG need not be homogenous and overruled its prior precedent decisions that seemed to indicate otherwise. *Id.* at 1093-94. The Court also noted that although the BIA has not made clear whose perspective is relevant in determining social visibility, it believes the perception of the persecutor may matter the most. *Id.* at 1089-90.

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<sup>3</sup> NIJC's amicus brief in support of the petitioner in *Cece* can be found at <http://immigrantjustice.org/sites/immigrantjustice.org/files/Cece%20NIJC%20amicus%20FINAL.pdf>.

<sup>4</sup> NIJC's amicus brief in support of the petitioner in *Henriquez-Rivas* can be found at <http://immigrantjustice.org/sites/immigrantjustice.org/files/HENRIQUEZ%20NIJC%20amicus%20Final.pdf>.

#### IV. Rolling Back the Courts' Progress: *Matter of M-E-V-G* and *Matter of W-G-R*

Despite the criticism of the Courts of Appeals, in February 2014, the BIA issued two decisions, [Matter of M-E-V-G, 26 I&N Dec. 227 \(BIA 2014\)](#)<sup>5</sup> and [Matter of W-G-R, 26 I&N Dec. 20 \(BIA 2014\)](#), which restated and emphasized the BIA's decision in *S-E-G*. In *M-E-V-G*, the BIA clarified that social visibility does not mean literal visibility, but instead refers to whether the PSG is recognized within society as a distinct entity. 26 I&N Dec. at 240-41. The BIA therefore renamed the requirement "social distinction." The decisions do not provide any new clarification or interpretation of the "particularity" requirement, but include some troubling dicta. For example, in *W-G-R*, the BIA applied the particularity test to a PSG composed of former gang members. The BIA held that such a group failed the "particularity" requirement because "the group could include persons of any age, sex, or background," despite having previously noted in *Matter of C-A*, 23 I&N Dec. 951, 956-57 (BIA 2006), that homogeneity was *not* a requirement for PSG membership. 26 I&N Dec. at 221.<sup>6</sup> According to the BIA, such a group would need to be defined with 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." *Id.* at 222.

The BIA claimed its intention in issuing the two decisions was to "provide guidance to courts and those seeking asylum," *M-E-V-G*, 26 I&N Dec. at 234, citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009). The decisions, however, suffer from the same errors as *S-E-G* and *E-A-G*, and are made worse by the fact that *M-E-V-G* and *W-G-R* seek to rationalize a legal test that is simply irreconcilable with existing domestic and international asylum law. These errors continued in the BIA's August 2014 decision, [Matter of A-R-C-G, 26 I&N Dec. 388 \(BIA 2014\)](#), in which it found that the group of "married women in Guatemala who are unable to leave their relationship" was socially distinct and sufficiently particular. While this decision provided much-needed recognition that domestic violence survivors can be eligible for asylum, the BIA's particular social group analysis remained inconsistent with prior BIA case law and extremely problematic.

##### A. The BIA's post-hoc rationalization of the social distinction and particularity requirements is disingenuous.

A frequent criticism of the BIA's decisions in *S-E-G* and *E-A-G* was that the BIA had not explained how previously accepted PSGs would still qualify under the new standard. See e.g., *Gatimi*, 578 F.3d at 615-16 ("[R]egarding "social visibility" as a criterion for determining "particular social group," the Board has been inconsistent rather than silent. It has found groups to be "particular social groups" without reference to social visibility . . . as well as, in this and other cases, refusing to classify socially invisible groups as particular social groups but without repudiating the other line of cases.").

The BIA attempted to respond to this criticism in *M-E-V-G* and *W-G-R*, but its attempts ring false. For example, the BIA asserted that in *Kasinga*, 21 I&N Dec. 357, it found the group of young

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<sup>5</sup> *M-E-V-G* is *Valdiviezo-Galdamez* on remand to the BIA. NIJC's amicus brief in support of the respondent in *M-E-V-G* can be found at <http://immigrantjustice.org/sites/immigrantjustice.org/files/Valdiviezo%20NIJC%20Amicus%20FINAL.pdf>.

<sup>6</sup> It is also worth noting that during the litigation of *Valdiviezo-Galdamez* that led to the remand and subsequent decision of *M-E-V-G*, the government assured the Third Circuit that "particularity" was not intended to limit the size of groups, *Valdiviezo-Galdamez*, 663 F.3d at 607-08, but the BIA's decisions show otherwise.

women of the Tchamba-Kunsuntu Tribe who had not been subjected to FGM and opposed the practice was a distinct group based on the record evidence regarding the prevalence of FGM and the expectation that women would undergo it. *M-E-V-G-*, 26 I&N Dec. at 246. But in the BIA's decision in *Kasinga*, the BIA at no time discussed whether the group was perceived as distinct within the applicant's society. The entire analysis of the PSG in *Kasinga* was two, short paragraphs long and merely stated that the characteristics which make up the group either cannot be changed or should not be required to be changed. *Kasinga*, 21 I&N Dec. at 365-66. Country evidence discussed in the decision related to conditions for women in Togo generally, or in some cases, in all of Africa, as opposed to just the applicant's tribe. *Id.* at 361-62. All of this undercuts the BIA's claim, nearly 20 years later, that the PSG in *Kasinga* was found to have met the social distinction test and is not inconsistent with the BIA's new analysis.

B. The combination of "particularity" and "social distinction" creates a Scylla and Charybdis dilemma.

According to the BIA, a PSG cannot be defined by language commonly used in society (such as "wealth" or "young") if the language would not define the group with precision. *W-G-R-*, 26 I&N Dec. at 221-22. For example, "young" does not say how young; "wealthy" does not say how wealthy. Even "former gang member" does not pass the particularity test – says the BIA – because a variety of people from different backgrounds and levels of gang involvement could be former gang members. *Id.* However, the BIA simultaneously requires the definition to capture a concept which is "distinct" in the eyes of the society from whence the claim arises. That is, if the group is defined as "18 to 25 year olds," the applicant would need to demonstrate that society views that group as distinct from, e.g., 26 year olds. Thus, the particularity requirement, as defined in *M-E-V-G-* and *W-G-R-*, effectively precludes the use of common parlance labels to describe a PSG, even as the social distinction test requires that a PSG be limited by parameters a society would recognize. Taken together, it's hard to see how any PSG-based claim can succeed, unless the BIA wants it to succeed.

In fact, after the BIA announced its social visibility and particularity requirements in 2008, it did not recognize a new particular social group for six years. In August 2014, the BIA issued the first published decision recognizing a particular social group since it created the social visibility and particularity requirements in the case of a woman who claimed asylum based on domestic violence. *A-R-C-G-*, 26 I&N Dec. 388. The BIA's new decision demonstrates how a group's viability now depends on the BIA's arbitrary policy determinations regarding the categories of individuals it believes deserve asylum, rather than the application of the BIA's own particular social group test. In *W-G-R-*, the BIA held that the group of "former members of the Mara 18 gang in El Salvador who have renounced their gang membership" was not defined with sufficient particularity because it was "too diffuse" and "broad" since it could include persons of any age, sex, or background. 26 I&N Dec. at 221. In *A-R-C-G-*, the BIA found that the group of "married women in Guatemala who are unable to leave their relationship" was sufficiently particular even though this group, as in *W-G-R-*, could also include persons of any age or background, including women who had been married for 20 years or only two weeks. 26 I&N Dec. at 393. Thus, the BIA's test alone cannot purport to explain why one group allegedly met the test and another did not.

C. The BIA requirements effectively preclude pro se applicants from obtaining asylum.

As noted above, the BIA requires an asylum applicant to formulate a group in terms which are statistically precise, i.e., not using natural, common linguistic descriptors, and also commonly recognized. Nearly all pro se applicants will be unable to posit such a group. For example, a former child soldier who fears persecution in her home country because of that former affiliation will not know the duration of membership necessary to formulate a PSG – she only knows that people in her country wish to harm her for something she cannot change.

Second, the BIA's social distinction test requires a country condition expert or similar evidence to show how the society from whence the claim arises views the group. *M-E-V-G-*, 26 I & N Dec. at 244 (“Evidence such as country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like may establish that a group exists and is perceived as ‘distinct’ or ‘other’ in a particular society.”). This standard effectively requires sociological evidence, though it appears that significant country conditions documentation might suffice. Pro se applicants are unlikely to be able to marshal such evidence.

In addition to prejudicing pro se applicants, the BIA's tests disadvantage under-represented asylum applicants, whose attorneys may understand asylum generally but are not experts in the area. Notably, nowhere on the application for asylum or in its accompanying instructions does the government ask the applicant for a precise PSG. And even where one manages to articulate a PSG, many applicants have limited resources and cannot pay for experts – who often charge thousands of dollars – even where they can be identified. In *Cece*, the Seventh Circuit noted that it is the substance of the claim rather than the precise construction of the PSG that should drive the adjudicator's assessment in asylum cases. 733 F.3d at 672. The BIA's tests purport to tie the hands of adjudicators, forcing them to determine asylum eligibility based on whether an applicant can craft a sufficient PSG rather than by discerning whether she is a bona fide refugee.

D. The BIA requirements call on the BIA and immigration judges to act outside their expertise.

The BIA's decisions apparently call upon the BIA and immigration judges (IJs) to not merely decide the facts and law before them, but to opine on sociological matters in foreign societies, in cases which will commonly lack any kind of expert opinion which might enable adjudicators to make such findings. The BIA and IJs are tasked with arriving at conclusions based on evidence in the record, but the BIA has not developed any way for adjudicators to competently make the determinations required by these tests. *Cf. Banks v. Gonzales*, 453 F.3d 449, 453–55 (7th Cir. 2006) (suggesting the use of agency experts); *Chun Hua Zheng v. Holder*, 666 F.3d 1064, 1068 (7th Cir. 2012) (same).

The issues that arise when the BIA acts outside its expertise and issues opinions on the sociology of another country are immediately evident from the decision in *W-G-R-*. Here, the BIA found the group of former gang members not sufficiently particular because it could include someone who joined the gang many years ago, but left shortly after initiation, as well as a long-term hardened gang member. According to the BIA, “[i]t is doubtful that someone in the former category would consider himself, or be considered by others, as a “former gang member” or could be said to have any but the most peripheral connection to someone in the latter category.”

26 I&N Dec. at 221. The BIA provides no evidence to support this speculative conclusion, which is at odds with the stories told by asylum seekers from Central America and objective evidence supplied in other matters. Federal courts of appeals have been troubled by the attempts of IJs to substitute their own judgment for that of an expert, but this is precisely what these tests compel adjudicators to do. See e.g. *Tassi v. Holder*, 660 F.3d 710, 724-25 (4th Cir. 2011) (rejecting an IJ's adverse credibility determination where the IJ had "imposed her own assumptions about the steps necessary to evade detection and the efficiency of Cameroonian airport officials in identifying wanted student activists"); *Torres v. Mukasey*, 551 F.3d 616, 632 (7th Cir. 2008) (criticizing an IJ for having "improperly relied on his own assumptions about the Honduran military . . . to reach his conclusion.").

E. The BIA's international law analysis was deeply flawed.

The BIA noted – after years of avoidance – that while it had derived the “social visibility” test from the UNHCR, it had not followed the UNHCR's use of that idea. The UNHCR advocates for a disjunctive test, finding a social group where the characteristic forming the group is either immutable or the group is perceived as a group by society. See Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of the Petitioner, p. 13, *Valdiviezo-Galdamez v. Attorney Gen. of U.S.*, 663 F.3d 582, 587 (3d Cir. 2011) (“The Board's reliance here on its previous articulations of “social visibility” is misplaced because its conclusion in *S-E-G-* and earlier decisions that the *UNHCR Social Group Guidelines* “endorse an approach in which an important factor is whether the members of the group are ‘perceived as a group by society’ is inaccurate.”). The BIA requires both. The BIA purported to agree with the European Union's approach, 26 I & N Dec. at 248 n.15, but the BIA's characterization of the EU rules is dubious. The BIA, for instance, failed to acknowledge that the House of Lords interpreted the precise EU text as supporting the UNHCR approach to the matter. *Secretary of State for the Home Department v. K and Fornah v. Secretary of State for the Home Department* (“Fornah and K”), [2006] UKHL 46 (U.K.). The BIA also failed to acknowledge other international case law that adopts a divergent approach, noted in *M-E-V-G-* by amicus curiae, including Canada, Australia, New Zealand, and South Africa, as well as various non-common law countries. Brief of Thomas & Mack Legal Clinic, University of Nevada, Las Vegas, William S. Boyd School of Law as Amicus Curiae in Support of the Respondent, *In re Valdiviezo-Galdamez* (Aug. 13 2012).

F. The BIA's approach conflicts with *ejusdem generis* principles.

The BIA has historically interpreted “particular social group” in parallel with the other four protected grounds, pursuant to principles of *ejusdem generis*. *Acosta*, 19 I&N Dec. at 233. In *M-E-V-G-* and *W-G-R-*, the BIA continues to pay lip service to that doctrine but simultaneously violates its core principle. *M-E-V-G-*, 26 I&N Dec. at 234 n.10. The BIA's PSG tests are entirely unlike those employed in the analysis of the other four protected grounds. Responding to the criticism that the particularity requirement involves boundary determinations that do not exist for the other protected grounds, the BIA asserts 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.” *Id.* at 239 n.13. This blanket assertion lacks any explanation.

According to the BIA, where a proposed group doesn't have precise boundaries, it is not cognizable; no such rule applies to political groups or religious groups. The fact that the word

“Catholic” might be thought to apply either to devoted practitioners or to “cultural” members of the group would not preclude a religious-based claim where Catholicism was the basis of the persecution. Yet a “former gang member” group would not be cognizable simply because the boundaries of the group may be unclear (although possibly irrelevant to the claim). Likewise, no expert testimony is required to show that a society recognizes Catholics; the fact that the individual has established her own status as a Catholic is enough.

It is true that the PSG ground refers by its nature to particular groups. But the BIA’s definitional tests go far beyond this justification and the excuses that some protected grounds may be “personal and idiosyncratic” while such characteristics are fatal in the PSG context is unfounded in the law and unsupported by commonsense.

G. The BIA considers society’s view when determining social distinction; not the persecutor’s view.

In *M-E-V-G*, the BIA clarified that when determining whether a group is socially distinct, it is society’s perspective – not the persecutor’s – that is relevant. 26 I&N Dec. at 242. The BIA reasons that considering the persecutor’s views would conflate the fact of the persecution with the reasons for it. *Id.* This does not follow. If a persecutor targets redheads for death, a redheaded person might reasonably fear death even if society in general does not think of redheads differently than other people. Limiting the viability of a PSG by requiring that society – and not merely the persecutor – view the group conflicts with well-reasoned appellate case law<sup>7</sup> and draws false lines that honor neither the purpose nor intent of the statute.

#### IV. The State of Particular Social Group Case Law Today

As noted above, before *M-E-V-G* and *W-G-R*, the Seventh and Third Circuits had rejected the BIA’s social visibility (now distinction) requirement, the Third Circuit had rejected the particularity requirement, and the Seventh and Ninth Circuits had issued decisions that appear to limit, if not reject, the particularity requirement.

For circuits that had already accepted the social visibility/distinction and/or particularity requirements, the BIA’s decisions have a limited impact. However, even in those circuits, there may be slight differences in the interpretation and application of the BIA’s decisions that conflict with *M-E-V-G* and *W-G-R*. For example, although *M-E-V-G* determined that “the persecutors’ perception is not itself enough to make a group socially distinct,” *M-E-V-G*, 26 I&N Dec. at 242, the Second Circuit has examined social visibility from the eyes of the persecutor. See *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007) (deferring to the BIA’s “social visibility” criterion with the understanding that a reasonable requirement of societal perception would protect groups “comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them *in the eyes of a persecutor*—or in the eyes of the outside world in general.”) (emphasis added). Thus, by replacing the social visibility test with the social distinction test in which the persecutor’s perspective is no longer important, *M-E-V-G* and

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<sup>7</sup> The Ninth Circuit in *Henriquez-Rivas* had stated that the perspective of the persecutor may be more important than society’s perspective. However, in *Pirir-Boc v. Holder*, 750 F.3d 1077, 1083 n.6 (9th Cir. 2014), the Court acknowledged that the BIA in *M-E-V-G* had decided that “the persecutors’ perception is not itself enough.” *M-E-V-G*, 26 I&N Dec. at 242. As explained in section IV, the Second Circuit’s interpretation of social visibility has also been based on the idea that the group must be visible to the persecutor. *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007).

*W-G-R-* have violated Second Circuit precedent. It follows then that the Second Circuit's determination in *Ucelo-Gomez* that social visibility is a reasonable interpretation of "particular social group" is no longer binding on subsequent panels of the Second Circuit.

Likewise, even though the decisions do not purport to provide a new interpretation or clarification of "particularity," the BIA's determination in *W-G-R-* that a former membership-based PSG failed the particularity test may conflict with precedent in some circuits (not to mention, as described *supra*, with the BIA's own decisions in *C-A-* and *A-R-C-G-* regarding the homogeneity and diversity of group membership). For example, while the BIA rejected the former gang member PSG in *W-G-R-* as insufficiently particular, the Seventh Circuit explicitly found that the same PSG was "neither unspecific nor amorphous." *Benitez-Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009). Numerous other circuits have found that former-membership-based PSGs are viable under *Acosta*, although most of these decisions pre-date the social visibility/distinction and particularity requirements. See *e.g.*, *Koudriachova v. Gonzales*, 490 F.3d 255, 263 (2d Cir. 2007) ("it is clear that a shared past experience, such as prior military leadership, can be the type of immutable characteristic that will characterize a particular social group. . . . There is no additional requirement that members of a group share an 'element of cohesiveness' or homogeneity."); *Cruz-Navarro v. INS*, 232 F.3d 1024, 1029 (9th Cir. 2000) (explaining that former police or military officers may constitute a cognizable particular social group). The dicta in *W-G-R-* regarding former-membership-based PSGs and the particularity test provides a new reason for circuits to reexamine their position on the particularity test if they had previously found it reasonable, but had also recognized former-membership-based PSGs.

The BIA has a longstanding policy of following circuit precedent in any case arising within that circuit. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Where there is disagreement regarding an ambiguous statute, the BIA may invoke its authority to interpret the statute, and may in some cases decline to follow circuit precedent, even within that circuit. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). Under *Brand X* principles, it appears that the Courts of Appeals that have rejected social visibility/distinction may have to consider anew whether the BIA's interpretation is reasonable. Because the BIA in *M-E-V-G-* and *W-G-R-* did not purport to clarify or issue a new interpretation of the particularity requirement, *Brand X* arguably does not require new analysis of particularity by circuits that previously issued decisions conflicting with the BIA's interpretation.

Significantly, since the BIA published *M-E-V-G-* and *W-G-R-*, the two circuits that most strongly criticized the social visibility/distinction and particularity tests – the Third and the Seventh – have yet to recognize the decisions as binding. In the year since the BIA issues *M-E-V-G-* and *W-G-R-*, the Seventh Circuit has published several decisions that have discussed the particular social group definition. See *Sibanda v. Holder*, 778 F.3d 676 (7th Cir. 2015); *R.R.D. v. Holder*, 746 F.3d 807 (7th Cir. 2014); *N.L.A. v. Holder*, 744 F.3d 425 (7th Cir. 2014). None of these decisions have referenced *M-E-V-G-* or *W-G-R-* and all have reaffirmed that the Seventh Circuit follows the *Acosta* definition of particular social group as established in *Cece*. Based on these decisions, it appears the Seventh Circuit does not believe the BIA decisions are binding on it.

The Third Circuit has not issued any precedential decisions that discuss the particular social group definition since the BIA published *M-E-V-G-* and *W-G-R-*. However, in an unpublished decision, *Sazo-Godínez v. Att'y Gen.*, No. 14-4832, 2015 WL 7274836 at \*3 (3d Cir. 2015), the Third Circuit stated, "We have not yet decided whether the BIA's explanation of the term "particular social group" is sufficient to address the concerns we expressed in *Valdiviezo-*

*Galdamez*.” The positions of other circuits regarding *M-E-V-G-* and *W-G-R-* can be found in Appendix A to this practice advisory.

Even without a circuit decision explicitly rejecting the aspects of *M-E-V-G-* and *W-G-R-* that conflict with the circuit’s precedent, it can be argued at the asylum office and immigration court levels that conflicting circuit precedent remains binding law despite the new BIA decisions. First, where the BIA has declined to follow binding circuit precedent within a federal circuit, it has explicitly said so in a published decision. See, e.g., *Matter of Konan Waldo Douglas*, 26 I&N Dec. 197 (BIA 2013) (“we respectfully decline to follow the Third Circuit’s case law to the contrary and will apply our holding in *Matter of Baires* to cases arising in that circuit”); *Matter of Gallardo*, 25 I&N Dec. 838, 844 (BIA 2012) (“our holding... should apply uniformly nationwide”); *Matter of Armendarez-Mendez*, 24 I&N Dec. 646, 653 (BIA 2008) (“we ... respectfully decline to follow *Lin v Gonzales*, *supra*, and *Reynoso-Cisneros v. Gonzales*, *supra*, even within the Ninth Circuit.”).

*Matter of W-G-R-* does not invoke *Brand X* at all. *Matter of M-E-V-G-* only does so in passing reference to the general proposition that the BIA’s reasonable interpretation of “membership in a particular social group” is entitled to deference and when explaining why the BIA has decided to use a different PSG test than the UNHCR. *M-E-V-G-*, 26 I&N Dec. at 230. At no point in either *M-E-V-G-* or *W-G-R-* does the BIA ever state that it is declining to follow any circuit’s analysis within that circuit, not even *Valdiviezo-Galdamez*, whose remand by the Third Circuit led to the BIA’s decision in *M-E-V-G-*.

It also seems unlikely that *Brand X* would apply to the BIA’s discussion of particularity in *M-E-V-G-* and *W-G-R-* because the BIA has not issued any new clarification or interpretation of the term. Therefore, any particular social groups that were found to have met the particularity test after *S-E-G-* and *E-A-G-*, but before *M-E-V-G-* and *W-G-R-* should remain viable. Similarly, any circuits that rejected some or all aspects of the particularity definition, such as the Ninth Circuit’s rejection of a homogeneity requirement, the Seventh Circuit’s rejection of a requirement that a PSG be narrowly defined, and the Third Circuit’s wholesale rejection of particularity should all remain binding precedent.

Second, even if *Brand X* principles are implicated at the asylum office and immigration court levels, arguments can and should still be made that the BIA’s requirements do not merit deference because – as described in section III – they are an impermissible and unreasonable interpretation of “membership in a particular social group.”

## V. Building Your Record in a Particular Social Group Claim

The BIA’s decisions in *M-E-V-G-* and *W-G-R-* have created much confusion among asylum adjudicators. Many adjudicators have responded by focusing on the fact that *M-E-V-G-* and *W-G-R-*, like *S-E-G-* and *E-A-G-*, involve gang-based asylum claims and have concluded, therefore, that no PSG based on gang resistance or recruitment can be viable.<sup>8</sup>

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<sup>8</sup> Significantly, the BIA in *M-E-V-G-* emphasized that its holdings “should not be read as a blanket rejection of all factual scenarios involving gangs” because adjudicators must determine the viability of a PSG on a case-by-case basis. *M-E-V-G-*, 26 I&N Dec. at 251; see *Pirir-Boc*, 750 F.3d at 1083-84 (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.”).

It is important to note that while *M-E-V-G-* and *W-G-R-* both involved asylum claims based on Central American gang violence, the BIA's decisions may impact all PSG-based asylum claims, including asylum claims based on gender; sexual orientation; resistance to recruitment and extortion by criminal organizations; status as former child soldiers or trafficking victims; and many other common and well-established reasons that individuals seek protection in the United States. However, due to the significant increase in Central American children and families seeking protection in the United States and the BIA's clear focus on this population in *M-E-V-G-* and *W-G-R-*, most PSG claims in the coming years are likely to involve asylum seekers from Central America who fear gender and gang-based violence.

Ultimately, the Courts of Appeals will be called upon to provide clarification and correction. In the meantime, attorneys representing asylum seekers must be prepared to respond to these decisions when presenting PSG-based asylum claims, no matter the jurisdiction. Attorneys should plan to both educate adjudicators about the impact – or lack thereof – of *M-E-V-G-* and *W-G-R-* on PSG case law and establish, possibly in the alternative, how their clients' cases meets the BIA's requirements. Furthermore, attorneys representing these claims, particularly those involving Central American children and families, must build the record in each case with the possibility of an appeal in mind.

#### A. Formulating a PSG

NIJC does not recommend that attorneys significantly modify their PSGs in response to the BIA's decisions, especially in circuits that have not yet accepted *M-E-V-G-* or *W-G-R-*, like the Third and the Seventh Circuits. Doing so will likely result in complex and artificial PSGs that will pass either the particularity or social distinction requirement, but only at the expense of the other. However, attorney should consider creating an alternative PSG that meets the particularity and social distinction requirements. In addition, given the uncertain state of PSG case law, it has become even more important that attorneys formulate PSGs carefully and with a clear understanding of the current law in their jurisdictions. Circuit law from only a few years ago, although not explicitly overruled, may no longer be useful to support a proposed PSG. Moreover, since PSG claims are now more likely to result in federal litigation, it is important that the strongest PSGs possible be preserved at the immigration court level. Although some circuits have held that adjudicators should focus less on the specific language used to define a PSG and more on the underlying characteristics that give rise to the persecution, see *Cece*, 733 F.3d at 672, on appeal, attorneys will generally be held to the PSGs they raised below.

With this in mind, below are several practice pointers for creating a viable PSG:

1. Avoid creating PSGs with circular wording that include the persecution suffered as part of the PSG definition. A PSG can include the shared risk of harm as one of the characteristics defining the PSG, so long as it is not the only shared characteristic. See e.g., *C-A-*, 23 I&N Dec. 951; *Kante v. Holder*, 634 F.3d 321, 327 (6th Cir. 2011); *Rivera Barrientos v. Holder*, 658 F.3d 1222 (10th Cir. 2011). Many adjudicators, however, will reject a PSG on this basis, without conducting much analysis. Moreover, if the PSG for a past persecution claim references the past persecution suffered, the applicant will generally find it difficult to establish nexus, i.e. that she was persecuted on account of her membership in a PSG of people who have been persecuted. See e.g., *Lukwago v. Ashcroft*, 329 F.3d 157, (3d Cir. 2003) (“[T]he shared experience of enduring past persecution . . . does not support defining a “particular social group” for past persecution

because the persecution must have been “on account of” a protected ground. . . . [T]he “particular social group” must have existed before the persecution began.”).

2. Keep in mind what “particularity” means in your circuit. As explained *supra*, the BIA has repeatedly contradicted itself when explaining particularity. At times, it has defined particularity as a requirement that a group be clearly defined, *S-E-G-*, 25 I&N Dec. at 584, while at other times, it has relied on “particularity” to reject PSGs that it believes include too broad or diverse a group of members, *W-G-R-*, 26 I&N Dec. at 221, even though *C-A-* has rejected homogeneity as a requirement for a PSG. 23 I&N Dec. at 956-57. Several circuits, however, have clearly rejected the requirement that a PSG be narrowly defined or made up of homogeneous members. See *Cece*, 733 F.3d at 674-75; *Henriquez-Rivas*, 707 F.3d at 1093-04; *Perdomo v. Holder*, 611 F.3d 662, 668 (9th Cir. 2010); *Gao v. Gonzales*, 440 F.3d 62, 67 (2d Cir. 2006); *vacated on other grounds sub nom., Keisler v. Gao*, 552 U.S. 801 (2007). Nonetheless, adjudicators within these circuits still often express concern regarding the breadth and diversity of PSGs and may need to be reminded about circuit precedent and the conflicting BIA precedent.
3. A number of circuits have now rejected PSGs based on gang resistance.<sup>9</sup> When defining a PSG based on gang-resistance, no matter the circuit, examine whether other, viable PSGs that involved resistance or opposition in a different context could be used to support the PSG. See *e.g.*, *Kasinga*, 21 I&N Dec. 357; *Escobar v. Holder*, 657 F.3d 537 (7th Cir. 2011).<sup>10</sup>
4. Remember that in addition to establishing the viability of your PSG, you must also establish a nexus between the persecution suffered or feared and your PSG. While this may seem obvious, the BIA’s intense focus on the viability of PSGs has caused some attorneys to focus exclusively on finding a viable particular social group, while failing to connect that social group with evidence establishing a nexus to the persecution.

*Pro bono* attorneys representing NIJC asylum clients are strongly encouraged to consult with NIJC when formulating PSGs for their clients’ cases. More information about developing a PSG can be found in NIJC’s asylum manual, available at <https://www.immigrantjustice.org/useful-documents-attorneys-representing-asylum-seekers> and NIJC’s PSG seminar at <http://immigrantjustice.org/nijc-pro-bono-seminars>.

## B. Client affidavits and testimony

If an adjudicator defers to the BIA’s social distinction requirement, attorneys must use their client’s affidavit and testimony to help establish that the proposed PSG is socially distinct. A

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<sup>9</sup> *But see Pirir-Boc*, 750 F.3d at 1084 (noting that that the proposed social group of “persons taking concrete steps to oppose gang membership and gang authority” may be comparable to the group of “witnesses who testify against gang members,” which the Court had found viable in *Henriquez-Rivas*).

<sup>10</sup> Similarly, when presenting a political opinion claim in a gang-based asylum case, attorneys should look to other political opinion cases involving resistance or opposition to a criminal entity other than a Central American gang. See *e.g. Martinez-Buendia v. Holder*, 616 F.3d 711 (7th Cir. 2010), *De Brenner v. Ashcroft*, 388 F.3d 629 (8th Cir. 2004). Although this practice advisory does not discuss presenting a political opinion claim in a gang-based asylum case, in jurisdictions where the court of appeals has consistently rejected PSGs that are based on resistance or opposition to gangs, it will often be prudent for the attorney to present a political opinion-based claim in addition to a PSG claim.

client should provide examples of how her community viewed her group as a group. For example, in an asylum claim based on forced gang recruitment, the client's affidavit and testimony should explain how the community viewed individuals who resisted recruitment. Descriptions of the way in which community members, including law enforcement, treated those pressured for recruitment differently from others in the community (perhaps by helping them escape from the gangs or ignoring their requests for assistance) can help establish the group's "distinction." Similarly, in a case involving forced marriage, the client's affidavit and testimony should explain how the community viewed women who refused a marriage. Are they ostracized or punished within the society? In a domestic violence-based asylum claim, it may be useful in the affidavit and testimony to compare how the community responded to domestic violence as opposed to an assault by one man against another man. Showing that women who are harmed in the context of a relationship are treated differently than individuals harmed in other contexts can be useful to prove the group is socially distinct.

### C. Other evidence

The asylum statute, as modified by the REAL ID Act, states that an asylum applicant must provide corroborating evidence to meet her burden proof, if required to do so by the adjudicator, unless the applicant does not have the evidence and cannot reasonably obtain it. INA § 208(b)(1)(B)(ii). As a result, attorneys must plan to provide evidence that specifically corroborates every aspect of their client's claim – identity, timelines, deaths/births/marriages, country conditions, and all of the asylum elements – or explain through the client's affidavit and other evidence, why such evidence cannot be reasonably obtained.<sup>11</sup>

In the case of Central American PSG asylum claims, a lack of corroboration – specifically regarding the social distinction and particularity requirements – has been one of the primary reasons that these cases have been denied. See e.g., *Umana-Ramos v. Holder*, 724 F.3d 667, 674 (6th Cir. 2013) (“Umana-Ramos’s proposed group also is not sufficiently socially visible. There is no evidence in the record suggesting that the group of youths whom the MS gang threatens because of their refusal to join is perceived as distinct segment of the Salvadoran population.”); *W-G-R-*, 26 I&N Dec. at 221 (“The boundaries of a group are not sufficiently definable unless the members of society generally agree on who is included in the group, and evidence that the social group proposed by the respondent is recognized within the society is lacking in this case.”). However, several decisions from the courts of appeals, as well as the BIA’s decisions in *M-E-V-G-*, *W-G-R-*, and *A-R-C-G-*, have provided examples of the type of evidence that can help corroborate a Central American asylum claim.

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<sup>11</sup> There are arguments that the statutory language of INA § 208(b)(1)(B)(ii) requires that an adjudicator provide an applicant with specific “notice of the corroboration required, and an opportunity to either provide that corroboration or explain why he cannot do so.” *Ren v. Holder*, 648 F.3d 1079, 1091-92 (9th Cir. 2011). The courts of appeals, however, have not been consistent in their response to this argument. See e.g., *Darinchuluun v. Lynch*, 804 F.3d 1208, 1216 (7th Cir. 2015) (finding that an adjudicator has no need to provide an applicant with additional notice of the need for corroborating evidence before making an adverse ruling); *Gaye v. Lynch*, 788 F.3d 519, 528-30 (6th Cir. 2015); *Liu v. Holder*, 575 F.3d 193, 198 (2d Cir. 2009); cf. *Chukwu v. Att’y Gen.*, 484 F.3d 185, 192 (3d Cir. 2007) (finding that an adjudicator must inform the applicant of the need for corroboration prior to an adverse ruling). As a result, attorneys must generally be prepared to corroborate all aspects of their client's claim without specific notice from the adjudicator, but should plan to make arguments regarding notice in their BIA appeal should the adjudicator deny asylum based on a lack of corroboration without sufficient prior notice.

In *Oliva v. Lynch*, 807 F.3d 53, 58, 61 (4th Cir. 2015), the Fourth Circuit vacated the BIA's decision and remanded the case because the BIA had failed to address evidence establishing that Oliva's PSGs ("Salvadorans who are former members of MS-13 and who left the gang, without its permission, for moral and religious reasons," and "Salvadorans who were recruited to be members of MS-13 as children and who left the gang as minors, without its permission, for moral and religious reasons") were socially distinct. The Court noted that the BIA should have considered evidence in the record regarding the group's social distinction, such as "evidence of government-and-community-driven programs to help former gang members rehabilitate themselves" as well as "an affidavit from a community organization who stated that former gang members who leave the gang for religious reasons become seriously and visibly involved in churches." To support the landowner-based PSGs and nexus in *Cordoba v. Holder*, 726 F.3d 1106, 1115-16 (9th Cir. 2013), the Ninth Circuit referenced country condition documents showing that the FARC targets wealthy landowners, a U.S. government report explaining that the FARC maintains archives of landowners to find victims for its extortion efforts, and expert testimony that noted the petitioner's family had been established landowners in the region for decades.

As noted *supra*, in *M-E-V-G-* the BIA also provided a list of evidence that it believes could be used to establish that a group is socially distinct: "country conditions reports, expert witness testimony, and press accounts of discriminatory laws and policies, historical animosities, and the like." *M-E-V-G-*, 26 I&N Dec. at 244. Similarly, in *A-R-C-G-*, the BIA provided examples of the type of evidence that could show the PSG of "married women in Guatemala who are unable to leave their relationship" was socially distinct, including "whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors." 26 I&N Dec. at 394. The BIA further note that "the issue of social distinction will depend on the facts and evidence in each individual case," and that such evidence includes documented country conditions, law enforcement statistics, expert witnesses, the respondent's past experiences, and "other reliable and credible sources of information." *Id* at 395.

All of these decisions reference expert testimony as crucial to establishing a viable PSG claim. Country condition experts have long been critical in asylum cases, but in light of the BIA's new decisions, their importance has grown significantly. It is difficult to see how most PSGs could meet the social distinction test without the assistance of an expert witness. Therefore, whenever possible, attorneys representing clients with PSG-based claims should plan to provide an expert affidavit and in some cases, expert testimony to support their claim. Generally, country condition experts are most useful when they are truly experts, such as academics or professionals with substantial scholarly credentials, and when they are not overtly partisan. Individuals who are active in political or advocacy organizations with a pronounced point of view about a particular country may have their credentials as "experts" called into question by Immigration and Customs Enforcement (ICE) attorneys, asylum officers, and immigration judges.

Although generally it is not wise for an expert to make legal conclusions as to whether an individual meets the asylum elements, that rule does not apply to the social distinction requirement. Once a qualified expert is found, it will be important for the expert's affidavit and testimony to specifically address the social distinction issue. Attorneys may find it useful to review the evidentiary findings in *M-E-V-G-*, *W-G-R-*, and *A-R-C-G-* and ask the expert whether he or she can adopt similar language in the expert's affidavits. See e.g., *M-E-V-G-*, 26 I&N Dec. at 246 (explaining that the group of young women of a certain tribe who had not been subjected to

FGM was a socially distinct group based on objective evidence regarding the prevalence of FGM in the society and the expectation that women of the tribe would undergo FGM). In asylum claims arising out of countries in which civil strife or criminal violence is wide-spread, it will be particularly important that experts differentiate clients' PSGs from the rest of the population. See *id.* at 250-51; *W-G-R*, 26 I&N Dec. at 222-23. Attorneys should also be sure to clarify that the question of whether the client fears persecution on account of her PSG membership (as opposed to random violence) is a separate question from whether the PSG is cognizable in the first place.

#### D. Briefing the issue

Because of the new BIA decisions, it is more important than ever that attorneys clearly separate the asylum elements in their briefs and when arguing their cases before the courts. Although the BIA in *M-E-V-G* states that adjudicators must be sure to separate the assessment of whether the applicant has established a protected ground from the issue of nexus (the "on account of" prong), the rest of the BIA's analysis says otherwise. 26 I&N Dec at 242. As in *S-E-G* and *E-A-G*, the BIA's analysis of the PSGs in *M-E-V-G* and *W-G-R* frequently conflates the question of whether the PSG is cognizable with the question of whether the applicant was targeted on account of his PSG membership. See e.g., *W-G-R*, 26 I&N Dec. at 222 ("Other parts of the report also indicate that such discrimination and . . . harassment are directed at a broader swatch of people . . . even if they never had any affiliation with a gang. . . This broader grouping suggests that former gang members are not considered to be a distinct group by Salvadorans.") Attorneys briefing PSG-based asylum claims must therefore clearly separate the PSG element from the nexus element in their briefs. Discussion of reasons why a client was targeted should remain within the nexus section of the brief, not the PSG section.

NIJC strongly recommends that all attorneys representing clients with PSG-based asylum claims include in their brief an argument that *M-E-V-G* and *W-G-R* are not good law and do not provide a reasonable interpretation of "particular social group," even if an attorney is practicing in a circuit that has explicitly deferred to these decisions. Since PSG case law continues to be in flux, this will preserve the argument for future use on appeal, should it become necessary.

If an attorney is representing a client within a circuit that has rejected some or all of the BIA's PSG test, attorneys should argue that positive circuit precedent remains binding and that their client's PSG is valid under that law, but also assert that their clients' groups meet the BIA's social distinction and particularity tests. As discussed *supra*, arguments can be made that prior circuit precedent remains binding unless and until the circuit reexamines the reasonableness of the BIA's new decisions. However, because the state of the law is uncertain, it is crucial that attorneys still explain how their clients' PSGs remain viable under the social distinction and particularity requirements, even if they should not apply. For attorneys practicing in the Seventh Circuit, please see Appendix B for suggested language to include in asylum briefs.

Finally, because of the poor analysis, circular reasoning, and confusing dicta in *M-E-V-G* and *W-G-R*, attorneys should expect that many adjudicators and ICE attorneys will not have a clear understanding of the BIA decisions or the state of PSG case law. Attorneys representing clients with PSG-based asylum claims should plan to use their briefs to educate adjudicators regarding the BIA decisions and their impact on PSG law in the adjudicator's jurisdiction.

## E. The Merits Hearing

The merits hearing is generally the final opportunity the attorney will have to build the record for their client's asylum claim. It is therefore crucial that attorneys use this opportunity to elicit testimony from their clients that supports the PSG and nexus elements, and present the PSG test that they believe is binding in their circuit. However, due to the manner in which the BIA has attacked Central American gang-based asylum claims in its four decisions, many adjudicators may be reluctant to even consider the viability of a gang-based claim. Attorneys from certain parts of the United States have reported adjudicators stating that gang-based claims are no longer viable post-*M-E-V-G-/W-G-R-* (despite the BIA's requirement that claims be analyzed on a case-by-case basis). Other attorneys report that adjudicators have been hostile to Central American asylum claims, pressured clients to accept prosecutorial discretion or modify an asylum claim so it is not based on a PSG, and attempted to limit a line of questioning that they deemed irrelevant in light of the BIA's case law. When this occurs, attorneys must do their best to walk the fine line of showing deference to the court, while zealously advocating for their client by making the record necessary to establish the client's claim.

For more information on representing asylum seekers, including sample briefs from PSG-based asylum claims, please review the resources on NIJC's website at <https://www.immigrantjustice.org/useful-documents-attorneys-representing-asylum-seekers>. Attorneys representing asylum clients through NIJC are encouraged to consult with NIJC regarding any questions about their case.

**Appendix A**

**SOCIAL VISIBILITY/DISTINCTION TODAY**

The federal circuit courts of appeals are divided on the BIA's addition of social visibility/distinction to the particular social group definition as described in *Matter of S-E-G-*, 24 I&N Dec. 519 (BIA 2008) and *Matter of M-EV-G-*, 26 I&N Dec (BIA 2014).

Federal Court of Appeals	Case(s)	Position
First Circuit	<p><i>Paiz-Morales v. Lynch</i>, 795 F.3d 238 (1st Cir. 2015)</p> <p><i>Mendez-Barrera v. Holder</i>, 602 F.3d 21, 26 (1st Cir. 2010); but see <i>Rojas-Perez v. Holder</i>, 699 F.3d 74 (1st Cir. 2012) (questioning rationality of the BIA's application of new rule, but noting that the Court is bound by its own precedent).</p>	<p>Accepts, without analyzing, <i>M-E-V-G-</i> as a clarification of the BIA's prior interpretation of the PSG definition</p> <p>Accepts social visibility, but doubts its rational application</p>
Second Circuit	<p><i>Paloka v. Holder</i>, 762 F.3d 191 (2d Cir. 2014)</p> <p><i>Gashi v. Holder</i>, 702 F.3d 130 (2d Cir. 2012)</p> <p><i>Ucelo-Gomez v. Mukasey</i>, 509 F.3d 70 (2d Cir. 2007)</p>	<p>Defers to <i>M-E-V-G-</i> under <i>Chevron</i> without analysis, but notes that a PSG based on gender and age may be viable under the BIA's test.</p> <p>Accepts a PSG based on people who witnessed war crimes and cooperated with the authorities, citing <i>Ucelo-Gomez</i> for the social visibility requirement.</p> <p>PSGs must have social visibility, but social visibility is defined as visibility to the persecutor.</p>



<p><b>Eighth Circuit</b></p>	<p><i>Juarez Chilel v. Holder</i>, 779 F.3d 850 (8th Cir. 2015)</p> <p><i>Garcia v. Holder</i>, 746 F.3d 869 (8th Cir. 2014)</p> <p><i>Davila-Mejia v. Mukasey</i>, 531 F.3d 624, 629 (8th Cir.2008); <i>but see Gaitan v. Holder</i>, 671 F.3d 678, 681 (8th Cir. 2012) (noting that the court is bound by the decisions of earlier panels to find that social visibility is not arbitrary or capricious) <i>cert. denied</i>, 133 S. Ct. 256 (2012)</p>	<p>Cites to <i>M-E-V-G-</i> without analyzing.</p> <p>Social visibility means that a group’s members suffer from a higher incidence of crime than the rest of the population.</p> <p>Accepts Social Visibility</p>
<p><b>Ninth Circuit</b></p>	<p><i>Rojas v. Lynch</i>, 807 F.3d 1123 (9th Cir. 2015)</p> <p><i>Pirir-Boc v. Holder</i>, 750 F.3d 1077 (9th Cir. 2014)</p> <p><i>Henriquez-Rivas v. Holder</i>, 707 F.3d 1081, 1089 (9th Cir. 2013) (en banc)</p>	<p>Cites to <i>M-E-V-G-</i> and accepts social visibility and distinction, without analysis.</p> <p>Cites to <i>M-E-V-G-</i>, but declines to address whether the interpretation is reasonable. Reaffirms that case-by-case analysis of a particular social group is required and that the BIA may not reject a group solely because it has previously found a similar group to lack social distinction and particularity.</p> <p>Clarifies the Court’s understanding of social visibility and particularity, but declines to address whether they are reasonable interpretations of the PSG definition.</p>
<p><b>Tenth Circuit</b></p>	<p><i>Rodas-Orellana v. Holder</i>, 780 F.3d 982 (10th Cir. 2015)</p> <p><i>Rivera-Barrientos v. Holder</i>, 666 F.3d 641, 652-53 (10th Cir. 2012); <i>Rodas-Orellana v. Holder</i>, No. 14-9516 (10th Cir. March 2, 2015)</p>	<p>Holds that <i>M-E-V-G-/W-G-R-</i> are consistent with the Court’s past interpretation of social visibility.</p> <p>Accepts Social Visibility</p>
<p><b>Eleventh Circuit</b></p>	<p><i>No published decisions citing M-E-V-G-</i></p> <p><i>Castillo-Arias v. U.S. Att’y Gen.</i>, 446 F.3d 1190, 1197 (11th Cir.2006)</p>	<p>Accepts Social Visibility</p>

## Appendix B

### Sample Language to Include in Asylum Briefings and Legal Memoranda Filed in the Seventh Circuit's Jurisdiction to Support Particular Social Group-Based Claims Post-*Matter of M-E-V-G* and *Matter of W-G-R*

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*On February 7, 2014, the Board of Immigration Appeals issued two decisions – Matter of M-E-V-G-, 26 I&N Dec. 227 (BIA 2014) and Matter of W-G-R-, 26 I&N Dec. 20 (BIA 2014) – that address the analysis of asylum claims based on membership in a particular social group. For background on M-E-V-G and W-G-R, please review NIJC's analysis of the decisions, practice advisory, and the decisions themselves at <http://immigrantjustice.org/asylum-brief-bank-membership-particular-social-group>. In light of these decisions, NIJC recommends that attorneys with asylum claims arising in the Seventh Circuit include an argument that draws from the guidance below to support asylum claims based on membership in a particular social group before the asylum office and immigration court.*

*As always, NIJC invites pro bono attorneys handling asylum matters through NIJC to consult with the NIJC managing attorney for asylum prior to positing a proposed particular social group before the USCIS asylum office and/or immigration courts.*

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A. The Respondent's social group remains viable despite recent BIA decisions.

The BIA recently issued two decisions which purport to "clarify" its prior case law regarding the particular social group analysis. See *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014). Specifically, the BIA renamed the social visibility requirement (which the Seventh Circuit rejected in *Gatimi v. Holder*, 578 F.3d 611 (7th Cir. 2009)) "social distinction" and clarified that it does not mean literal visibility. *M-E-V-G-*, 26 I&N Dec. at 228. The new BIA decisions are unreasonable interpretations of the statutory text; but in any event the BIA has not yet decided to apply them in circuits which adhere to the traditional *Acosta* formulation. As such, Seventh Circuit precedent remains binding in this matter.

1. The BIA applies circuit case law, unless the BIA explicitly indicates it seeks to impose a new interpretation that conflicts with existing circuit court precedent.

The BIA has a longstanding policy of following circuit precedent in any case arising within that circuit. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993); *Matter of Anselmo*, 20 I&N Dec. 25 (BIA 1989). Where there is disagreement regarding an ambiguous statute, the BIA may invoke its authority to interpret the statute, and may in some cases decline to follow circuit precedent, even within that circuit. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005). However, where the BIA declines to follow binding circuit precedent within a federal circuit, it has explicitly said so in a published decision. See, e.g., *Matter of Konan Waldo Douglas*, 26 I&N Dec. 197, 201 (BIA 2013) ("we respectfully decline to follow the Third Circuit's case law to the contrary and will apply our holding in *Matter of Baires* to cases arising in that circuit"); *Matter of Gallardo*, 25 I&N Dec. 838, 844 (BIA 2012) ("our holding... should apply uniformly nationwide"); *Matter of Armendarez-Mendez*, 24 I&N Dec. 646, 653 (BIA 2008) ("we ... respectfully decline to follow

*Lin v Gonzales, supra*, and *Reynoso-Cisneros v. Gonzales, supra*, even within the Ninth Circuit”).

Indeed, the BIA frequently decides whether to apply its precedent, rather than case law from the circuit, many years after it issues its interpretation. See, e.g., *Matter of M-H-*, 26 I&N Dec. 46, 49 (BIA 2012) (“we will respectfully apply our ruling in *Matter of N-A-M-* [24 I&N Dec. 336 (BIA 2007)] to cases arising in the Third Circuit”); *Matter of Islam*, 25 I&N Dec. 637, 641 (BIA 2011) (“we respectfully conclude that our analysis [in *Matter of Adetiba*, 20 I&N Dec. 506 (BIA 1992)], should now be uniformly applied in all circuits throughout the country”).

The BIA has made no such decision here. *Matter of W-G-R-* does not invoke *Brand X* at all. *Matter of M-E-V-G-* only does so in passing reference to the general proposition that the BIA’s reasonable interpretation of “membership in a particular social group” is entitled to deference and when explaining why the BIA has decided to use a different social group test than the UNHCR. *M-E-V-G-*, 26 I&N Dec. at 230, 248-49. At no point in either *M-E-V-G-* or *W-G-R-* does the BIA ever state that it is declining to follow the Seventh Circuit’s analysis within the Seventh Circuit, or anything to that end. The closest the BIA comes to observing a parting of ways with circuit court precedent is with regard to the Third Circuit and its finding that social visibility and particularly are indistinguishable. *M-E-V-G-*, 26 I&N Dec. at 240 (“The Third Circuit has indicated that it was “hard-pressed to discern any difference between the requirement of ‘particularity’ and the discredited requirement of ‘social visibility.’” *Valdiviezo-Galdamez II*, 663F.3d at 608. We respectfully disagree”). This general statement does not refuse to apply Seventh Circuit case law.

Indeed, it seems unlikely that *Brand X* would apply to the BIA’s discussion of particularity in *M-E-V-G-* and *W-G-R-* because the BIA has not issued any new clarification or

interpretation of the term. Unlike social visibility, which the BIA renamed “social distinction” and clarified does not mean literal visibility, the definition of particularity asserted by the BIA in *M-E-V-G-* and *W-G-R-* is not new. It is the same definition that existed in 2009 when the Seventh Circuit held that “tattooed, former Salvadoran gang members” were a particular social group, *Benitez-Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009); in 2011 when the Seventh Circuit held that “Jordanian women who . . . are accused of being immoral criminals,” were a particular social group, *Sarhan v. Holder*, 658 F.3d 649, 654 (7th Cir. 2011); and in 2013, when the en banc Seventh Circuit found that “young Albanian women who live alone” were a particular social group. *Cece v. Holder*, 733 F.3d 662, 671 (7th Cir. 2013). Significantly, the Court in *Cece* noted that the particular language used to define a group should not be over-emphasized; rather, the Court must look at the characteristics the group members share to discern particular social group viability. *Id.* at 672.

Recent Seventh Circuit decisions make clear that the Seventh Circuit also does not believe itself bound by *M-E-V-G-* and *W-G-R-*. Since the BIA issued these decisions, the Seventh Circuit has published three decisions that have discussed the particular social group definition. See *Sibanda v. Holder*, 778 F.3d 676 (7th Cir. 2015); *R.R.D. v. Holder*, 746 F.3d 807 (7th Cir. 2014); *N.L.A. v. Holder*, 744 F.3d 425 (7th Cir. 2014). None of these decisions have referenced *M-E-V-G-* or *W-G-R-* and all have reaffirmed the *Acosta* definition of particular social group as established in *Cece*.

Because the intervening BIA decisions do not explicitly decline to follow Seventh Circuit precedent within the Seventh Circuit, either with regard to the social distinction requirement or to the particularity requirement, and because the Seventh Circuit has continued to apply the *Acosta*-only definition when analyzing particular social groups even post-*M-E-V-G-/W-G-R-*, it follows that the Seventh Circuit’s decisions rejecting the BIA’s social

visibility (distinction) requirement and affirming the *Acosta* immutable characteristic test as the only requirement for establishing a particular social group remain binding precedent on this Court.

2. Deference is not warranted here because the BIA's interpretation is impermissible.

In order for the BIA's interpretation of "particular social group" to receive deference, the agency's interpretation must be based on a permissible construction of the statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Cece*, 733 F.3d at 668-669 (the BIA's reasonable interpretation of the INA receives *Chevron* deference). The asylum statute states that "[a]ny alien who is physically present in the United States or who arrives in the United States . . . may apply for asylum." INA § 208(a)(1). The term "particular social group" is included in the definition of a refugee at INA § 101(a)(42)(A). Though this term and the process of seeking asylum in general are concededly ambiguous, the BIA's convoluted and burdensome interpretation of the statute is impermissible.

The requirements the BIA set forth in *M-E-V-G-* and *W-G-R-* for establishing a particular social group effectively preclude pro se applicants from seeking asylum and this cannot possibly represent congressional intent. First, the BIA's particularity requirement requires the applicant to articulate a particular social group in terms which are statistically precise. *W-G-R-*, 26 I&N Dec. at 221-222. A pro se applicant – and indeed many represented applicants – would generally be unable to prevail because formulating such a group is counterintuitive and complex to the point of being nearly impossible. Second, the BIA's social distinction requirement effectively requires a country condition expert or similar sociological evidence to show how the foreign society views the group posited by the

applicant. *M-E-V-G-*, 26 I&N Dec. at 244. Pro se applicants and represented applicants with limited resources are unlikely to be able to marshal such evidence, assuming it even exists. By raising the evidentiary burden for an individual seeking asylum based on membership in a particular social group to such a level that an asylum seeker must have representation, expert witnesses, and significant financial resources to obtain asylum, the BIA's interpretation directly conflicts with the statutory language allowing "any alien" to apply for asylum.<sup>1</sup> As an impermissible interpretation of the statute, the BIA's decisions cannot receive deference.

The BIA's approach also fails to keep with *ejusdem generis* principles that were the basis of its initial interpretation of "particular social group." *Acosta*, 19 I&N Dec. at 233. Although the BIA claims that *ejusdem generis* principles are consistent with its social distinction and particularity requirements, these particular social group tests are entirely unlike the tests employed for other protected grounds. For example, according to the BIA, a group is not cognizable unless it has precise boundaries. *M-E-V-G-*, 26 I&N Dec at 239; *W-G-R-*, 26 I&N Dec at 214. No such rule applies to political or religious groups – the fact that "Catholic" could apply to a devoted practitioner or a "cultural" member would not preclude a religious persecution claim. Likewise, a Catholic need not provide evidence that Catholics are considered a group in his country of origin; proof that the applicant is Catholic or is

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<sup>1</sup> The unreasonable obstacle that the BIA's particular social group test places on asylum applicants is further demonstrated by the fact that after the BIA announced its social visibility/distinction and particularity requirements in 2008, it did not recognize a new particular social group for six years. In August 2014, the BIA issued the first published decision recognizing a particular social group since it created the social visibility and particularity requirements in the case of a woman who claimed asylum based on domestic violence. *A-R-C-G-*, 26 I&N Dec. 388. This decision, however, exemplifies how a group's viability now depends on the BIA's arbitrary policy determinations regarding the categories of individuals it believes deserve asylum, rather than the application of the BIA's own particular social group tests. In *A-R-C-G-*, the BIA found that the group of "married women in Guatemala who are unable to leave their relationship" was sufficiently particular even though this group could include persons of any age or background, including women who had been married for 20 years or only two weeks, the exact rationale the BIA used to reject the proposed group in *W-G-R-*. 26 I&N Dec. at 393. Thus, the BIA's test alone cannot purport to explain why one group allegedly met the test and another did not.

believed to be Catholic is enough to establish the protected ground. The BIA addresses this incongruity by stating “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 society share the characteristics that define the group.” *W-G-R-*, 26 I&N Dec. at 213 n.3. This blanket assertion that the tenets of *ejusdem generis* don’t fully apply to particular social groups lacks any explanation, finds no support in the law and, as such, warrants no deference. Because the BIA’s decisions are not a permissible interpretation of the asylum statute, they are not entitled to *Chevron* deference.

3. Deference is not warranted here because the BIA’s interpretation is unreasonable.

One of the primary reasons the Third and Seventh Circuits found the social visibility requirement arbitrary and unreasonable was the BIA’s failure to explain how previously accepted social groups would still qualify under the new standard. *Gatimi*, 578 F.3d at 615-16. Although the BIA attempted to respond to this criticism in *M-E-V-G-* and *W-G-R-*, its attempts are disingenuous and insufficient. For example, in *M-E-V-G-*, the BIA asserted that based on the record evidence, it found the social group in *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), to be perceived as a distinct group. 26 I&N Dec. at 246. In reality, the decision in *Kasinga* never references anything about the social group beyond the immutable characteristics forming the group and the evidence cited does not support the group being perceived as distinct among others in the respondent’s home country. *Kasinga*, 21 I&N Dec. at 360-62, 365-66.

Likewise, the BIA’s attempt to make the social group in *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990), fit the social visibility requirement also falls flat. *M-E-V-G-*, 26 I&N

Dec. at 245. The evidence the BIA references to explain that Cuban society considers homosexuals a discrete group does not do so; it only supports the idea that the respondent's *persecutors* consider the group as such. *Id.* The BIA's continued failure to reconcile previously accepted social groups with its new social group requirements means that social visibility/distinction remains an arbitrary and unreasonable addition to the particular social group test.

Furthermore, the BIA's interpretation of the "particularity" requirement is inconsistent and irrational. According to the BIA, "particularity" means that a group must "be defined by characteristics that provide a clear benchmark for determining who falls within the group. . . . [and] be discrete and have definable boundaries – it must not be amorphous, overbroad, diffuse, or subjective." *M-E-V-G-*, 26 I&N Dec. at 239. Since these terms all have very different and potentially divergent meanings, it is unclear how "particularity" can encompass them all in any cogent way. To the extent the BIA intends for the particularity requirement to constrict group size, that limitation would violate *ejusdem generis* since the other protected grounds are not so limited (as noted by the Seventh Circuit in *Cece*, 773 F.3d at 674). Likewise, although the BIA attempts to explain that social distinction and particularity are two separate terms, its explanation that "[s]ocietal considerations have a significant impact on whether a proposed group . . . is sufficiently particular" and "whether the people in a given society would perceive a proposed group as sufficiently separate or distinct" *M-E-V-G-* 26 I&N Dec at 241, leaves it extremely difficult "to discern any difference between the requirement of 'particularity' and the discredited requirement of 'social visibility.'" *Valdiviezo-Galdamez*, 663 F.3d 582, 608 (3d Cir. 2011) (agreeing with the Seventh Circuit's rejection of social visibility and rejecting the particularity requirement). Because the BIA's

explanation of social distinction and particularity is not reasoned, the decisions are not entitled to *Chevron* deference.

4. The Respondent's particular social group remains viable under the BIA's modified particular social group test.

If this court applies the social distinction and particularity tests as articulated in *M-E-V-G-* and *W-G-R*, the Respondent should nonetheless be found to be a member of a cognizable particular social group because the group of **GROUP** is (1) comprised of members who share a characteristic that is immutable or that they should not be required to change; (2) is social distinct; and (3) is particular.

- a. The group of **GROUP** is comprised of members who share a common immutable characteristic. **OR** The group of **GROUP** is comprised of members who share a characteristic they should not be required to change.

As established *supra*, the Respondent's social group is based on common immutable characteristics...

- b. The group of **GROUP** is socially distinct.

Evidence in the record establishes that the group of **GROUP** is socially distinct because society in **REGION/COUNTRY** views them as a group. **EXPLAIN THE EVIDENCE...**

- c. The group of **GROUP** is particularly defined.

The group of **GROUP** is also sufficiently particular, as the term has been interpreted by the Seventh Circuit. The group of **GROUP** is not defined by unspecific or amorphous terms, any more so than the groups accepted in *Sibanda*, 778 F.3d 676 (7th Cir. 2015); *R.R.D.*, 746 F.3d 807; *N.L.A.*, 744 F.3d 425; *Benitez-Ramos*, 589 F.3d 426; *Sarhan*, 658 F.3d

649; or Cece, 733 F.3d 662. And under M-E-V-G- and W-G-R, the group is sufficient particular because evidence in the record establishes... **EXPLAIN THE EVIDENCE...**

Thus, the Respondent has shown that even under the new BIA decisions, her particular social group remains viable.