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SOCIAL VISIBILITY AND PARTICULARITY IN ASYLUM: *GAITAN v. HOLDER* AND THE IRONIC REQUIREMENT OF SOCIAL PERCEPTION TO AVOID PERSECUTION

JENNIFER HESS*

Abstract: On March 1, 2012, in *Gaitan v. Holder*, the U.S. Court of Appeals for the Eighth Circuit held that Oscar Gaitan, a citizen of El Salvador who was seeking asylum based on membership in a particular social group, did not belong to a group that was sufficiently particular. The court reasoned that young El Salvadoran males previously recruited to the MS-13 gang, but who were opposed to the nature of gangs, were not visible or particular enough such that the group could be perceived by society. The Eighth Circuit adopted the Board of Immigration Appeals' new standard for the definition of a particular social group, implementing a social visibility and particularity requirement. This requirement burdens potential refugees by requiring them to be part of a recognizable social group while they are simultaneously trying to avoid ill-treatment by the group's persecutors.

INTRODUCTION

By the time Oscar Gaitan turned twelve, he had been recruited by members of MS-13, a notorious Salvadoran gang, several times.¹ Gaitan rebuffed each recruitment attempt, endangering his life and the lives of his family in his native El Salvador.² In 2002, Gaitan sought refuge in the United States to avoid what would surely become a life of crime and violence in his home country.³ Nevertheless, in 2007, the Department of Homeland Security commenced removal proceedings against Gaitan under 8 U.S.C. § 1182(a)(6)(A)(i) for being “present in the United States without being admitted or paroled.”⁴ Gaitan appeared in Immigration Court and conceded removability, but sought to avoid deportation by claiming asylum.⁵ In order to claim asylum in the United States,

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¹ See *Gaitan v. Holder*, 671 F.3d 678, 679 (8th Cir. 2012).

² *Id.*

³ *Id.*

⁴ 8 U.S.C. § 1182(a)(6)(A)(i) (2006); *Gaitan*, 671 F.3d at 679.

⁵ *Gaitan*, 671 F.3d at 679.

a potential refugee must be persecuted as a result of his “race, religion, nationality, membership in a particular social group, or political opinion.”⁶ Gaitan argued that his social group consisted of those “young males that have been previously recruited by MS-13 and are opposed to the nature of gangs.”⁷ The immigration judge (IJ) denied Gaitan’s request on the grounds that his testimony was not consistent and interconnected enough to be deemed credible.⁸ Though the Board of Immigration Appeals (BIA) ultimately overturned the IJ’s ruling on that account, the BIA agreed with the second part of the IJ’s ruling: regardless of whether Gaitan could prove the credibility of his testimony, he failed to fall into a particular social group for purposes of granting asylum.⁹

Gaitan appealed to the U.S. Court of Appeals for the Eighth Circuit, and was ultimately denied review.¹⁰ The Eighth Circuit agreed with the BIA and the IJ in finding that the social group to which Gaitan claimed membership was not an acceptable social group to satisfy the terms for asylum.¹¹ In agreeing with the BIA, the Eighth Circuit has implemented a new standard for qualification to a particular social group, effectively limiting the persons who will qualify for asylum.¹²

I. THE JOURNEY, THE SOCIAL GROUP, AND THE REJECTION

In 2002, Oscar Gaitan entered the United States to escape recruitment into a gang in his native country of El Salvador.¹³ Though the MS-13 gang members never physically harmed Gaitan in their multiple recruitment attempts, the members threatened harm to both Gaitan and his family if he continued to refuse to join the gang.¹⁴ As a result, Gaitan fled El Salvador and entered the United States without inspection or the paperwork necessary to grant him citizenship or asylum.¹⁵

⁶ 8 U.S.C. § 1101(a)(42)(A).

⁷ *Gaitan*, 671 F.3d at 679.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See id.* at 682 (agreeing with the BIA that “Gaitan’s articulated social group is not sufficiently narrowed to cover a discrete class of persons who would be perceived as a group by the rest of society”).

¹² *Id.* at 686 (Bye, J., concurring).

¹³ *See Gaitan v. Holder*, 671 F.3d 678, 679 (8th Cir. 2012).

¹⁴ *Id.*

¹⁵ *Id.*

In 2007, the U.S. Department of Homeland Security commenced removal proceedings against Gaitan by filing a “Notice to Appear” in Immigration Court.¹⁶ The government claimed that Gaitan was “removable” from this country under 8 U.S.C. § 1182(a)(6)(A)(i) because he was “present in the United States without being admitted or paroled.”¹⁷ In Immigration Court, Gaitan conceded that he was, in fact, present in the United States without being admitted or paroled, but requested asylum.¹⁸ To prove that he should be deemed a refugee, and therefore granted asylum, Gaitan needed to demonstrate that he was “unable or unwilling to return to, and is unable or unwilling to avail himself . . . of the protection of, that country because of fear of persecution.”¹⁹ According to the criteria set forth in 8 U.S.C. § 1101 *et seq.*, Gaitan needed to fulfill at least one of the possible reasons for inability or unwillingness to return to his home country: “race, religion, nationality, membership in a particular social group, or political opinion.”²⁰ Gaitan argued that in refusing to join the El Salvadoran gang, he had become a member of a particular social group and therefore should be granted asylum.²¹

The IJ rejected Gaitan’s request for asylum and claim for relief, reasoning that Gaitan’s testimony and evidence “[were] not sufficiently detailed or cohesive to make a positive credibility finding.”²² The IJ found that even if Gaitan’s testimony could be shown to be credible, he was not eligible for asylum because he had failed to show that he was a member of a particular social group.²³ Gaitan appealed to the BIA who, after a single-member review, overturned the IJ’s credibility determination.²⁴ Nevertheless, the BIA upheld the IJ’s ruling that Gaitan had failed to show membership in a particular social group, and thus was not eligible for asylum.²⁵

Although the Eighth Circuit denied the petition to review the case, it did issue an opinion in support of the BIA.²⁶ In that opinion, the

¹⁶ *Id.*

¹⁷ 8 U.S.C. § 1182(a)(6)(A)(i) (2006); *Gaitan*, 671 F.3d at 679.

¹⁸ *See Gaitan*, 671 F.3d at 679.

¹⁹ 8 U.S.C. § 1101(a)(42)(A); *Gaitan*, 671 F.3d at 680.

²⁰ 8 U.S.C. § 1101; *see Gaitan*, 671 F.3d at 680.

²¹ *Gaitan*, 671 F.3d at 679.

²² *Id.*

²³ *See id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See id.* at 679–80 (denying the petition for review, but nevertheless issuing an opinion). “Where . . . the BIA issues an independent decision without adopting the IJ’s conclusions, we review only the BIA decision.” *Id.* at 680 (citing *Constanza v. Holder*, 647 F.3d 749, 753 (8th

Eighth Circuit stated that a specific social group must have particular and well-defined boundaries and must be sufficiently cohesive so as to be recognized by society.²⁷ The majority of the Eighth Circuit found that Gaitan's description of the social group to which he belonged was too diffuse and "not sufficiently narrowed to cover a discrete class of persons who would be perceived as a group by the rest of society."²⁸ Instead, the majority found Gaitan was indistinguishable from other Salvadorans who have "experienced . . . gang violence."²⁹

In his concurring opinion, Judge Bye cautioned that the adoption of social visibility and particularity as requirements for membership in a particular social group was arbitrary.³⁰ Although Judge Bye agreed with the majority's ultimate outcome against Gaitan, he did so only because the court was bound by precedent.³¹ Judge Bye, relying on *Benitez Ramos v. Holder*, explained that the arbitrary adoption of the social visibility and particularity requirements failed to fully value the social dimension of identifiable characteristics of a group.³² As Gaitan argued, social visibility and well-defined boundaries should only be treated as factors for consideration.³³

II. THE CHANGING QUALIFICATIONS OF "SOCIAL GROUP"

Previously, in order to determine whether a person belonged to a particular social group, the court focused its attention primarily on the immutability of the characteristic binding the members of the group together.³⁴ The criteria used to determine a particular social group was not based on the physical visibility of that characteristic to the rest of

Cir. 2011)). The court gives considerable "deference to the BIA's interpretation of immigrant statutes and regulations." *Id.* (citing *Puc Ruiz v. Holder*, 629 F.3d 771, 777 (8th Cir. 2010)). Because "social group" is not explicitly defined in 8 U.S.C. § 1101(a)(42)(A), the court deferred to "the BIA's reasonable interpretation of the phrase and will not overturn the BIA's conclusion unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984)).

²⁷ *See Gaitan*, 671 F.3d at 681 (citing *In re S-E-G*, 24 I. & N. Dec. 579, 588 (B.I.A. 2008)).

²⁸ *Id.* at 678–79, 682.

²⁹ *Id.* at 682 (citing *Constanza*, 647 F.3d at 754).

³⁰ *See id.*

³¹ *Id.* at 682 (Bye, J., concurring) (reluctantly agreeing with the majority, but writing separately to "express . . . disagreement with [the Eighth Circuit's] as-a-matter-of-course adoption of 'social visibility' and 'particularity' as requirements for establishing 'membership in a particular social group'").

³² *See id.* at 685; *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009).

³³ *See Gaitan*, 671 F.3d at 681.

³⁴ *See Gaitan v. Holder*, 671 F.3d 678, 683 (8th Cir. 2012) (Bye, J., concurring).

society, but rather on the social existence of that characteristic.³⁵ For asylum purposes, a refugee must show that he or she is a member of a particular social group that “share[s] 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 and consciences.”³⁶ The BIA set forth this definition in its 1985 case, *In re Acosta*, and with small variations, all of the federal circuits adopted it.³⁷ Nevertheless, by the time Gaitan’s case was argued before the Eighth Circuit, the BIA’s approach to understanding membership in a particular social group as a basis for asylum was shifting.³⁸ The approach was moving towards emphasizing the visibility of the binding characteristic to society.³⁹

Since 2001, the BIA articulated its new approach in piecemeal form, but finally clarified it in 2006 in *In re C-A*.⁴⁰ The approach mandated that a group could not be considered a “particular group” that would earn asylum without being recognized in the public view or having characteristics that would allow for public recognition.⁴¹ This was a distinct departure from the original definition of membership in a particular social group for which asylum can be granted.⁴² The new approach, lacking any apparent justification, emphasized “social visibility”

³⁵ See *id.* at 682–83.

³⁶ *Id.* at 680 (citing *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987), *abrogated by Pitcherskaia v. I.N.S.*, 118 F.3d 641 (9th Cir. 1997)). This definition maintains consistency with the other grounds of persecution such as race, religion, nationality, and political opinion, which are all characteristics that either cannot be changed or are so personal and identifiable that they should not be forced to be changed. See *Acosta*, 19 I. & N. Dec. at 233.

³⁷ *Gaitan*, 671 F.3d at 683 (Bye, J., concurring) (citing Fatma E. Marouf, *The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL’Y REV. 47, 53 & n.24 (2008)); see *Acosta*, 19 I. & N. Dec. at 233–34 (striving to preserve a resemblance between the possible grounds of persecution under 8 U.S.C. § 1101(a)(42)(a): race, religion, nationality, political opinion, and particular social group).

³⁸ *Gaitan*, 671 F.3d at 683 (Bye, J., concurring).

³⁹ See *id.* at 684.

⁴⁰ See *id.* at 683–84; *Constanza v. Holder*, 647 F.3d 749, 754 (8th Cir. 2011); *In re C-A*, 23 I. & N. Dec. 951, 956–57 (B.I.A. 2006) (holding that a persecuted group of “noncriminal informants” is not a particular social group because a “relevant factor [is] the extent to which members of a society perceive those with the characteristic in question as members of a social group”).

⁴¹ See *Gaitan*, 671 F.3d at 681; *id.* at 685 (Bye, J., concurring); *Constanza*, 647 F.3d at 753–54 (holding that applicant-refugee’s claims of belonging to a group of a family that had experienced gang violence or of being a person who resisted to gang violence were too broad to be perceived as social groups by the rest of society).

⁴² *Constanza*, 647 F.3d at 753 (citing *Davila-Mejia v. Mukasey*, 531 F.3d 624, 628–29 (8th Cir. 2008)).

and required “particularity,” and in doing so, created a new standard.⁴³ This definition raised social visibility and particularity from merely factors in the broader assessment, to absolute conditions necessary to successfully show membership in a particular social group.⁴⁴

In 2011, in *Constanza v. Holder* and *Ortiz-Puentes v. Holder*, the Eighth Circuit adopted the BIA’s new approach for determining membership in a particular social group.⁴⁵ The court implemented the BIA’s previous decision in *In re S-E-G*, altering the meaning of social group with respect to the inclusion of sufficient particularity and visibility to the point that “the group is perceived as a cohesive group by society.”⁴⁶ Because the decisions in those cases created circuit precedent, the judges were bound to the reasoning from those rulings when they later considered Gaitan’s case.⁴⁷

After the adoption of the BIA’s new approach to understanding particular social groups, the federal circuits split in their acceptance and approval of a standard that requires social visibility and particularity.⁴⁸ The First, Second, Fourth, and Ninth Circuits all took into account visibility and particularity in varying degrees.⁴⁹ The Fourth Circuit up-

⁴³ See *Gaitan*, 671 F.3d at 685–86 (Bye, J., concurring).

⁴⁴ *Id.* at 682, 685.

⁴⁵ See *id.* at 682; *Constanza*, 647 F.3d at 753; *Ortiz-Puentes v. Holder*, 662 F.3d 481, 483 (8th Cir. 2011). Although both cases adopted the social visibility and particularity requirements to satisfy the criteria for a social group to be granted asylum, neither case explained the adoption of the new standard. See *Constanza*, 647 F.3d at 753; *Ortiz-Puentes*, 662 F.3d at 483. The standard created by the cases is a departure from the older standard and thus should have been explained so that the Eighth Circuit’s adoption was not merely arbitrary and capricious. *Gaitan*, 671 F.3d at 685–86 (Bye, J., concurring).

⁴⁶ See *Constanza*, 647 F.3d at 752–53 (holding that a Salvadoran male resistant to gang violence was not a member of a particular social group because “a social group requires sufficient particularity and visibility”); *Ortiz-Puentes*, 662 F.3d at 483 (holding that three siblings who refused to join Guatemalan gangs and were subjected to persecution and violence failed to satisfy the “social group” criteria for seeking asylum because the group was not sufficiently visible or particular); *In re S-E-G*, 24 I. & N. Dec. 579, 588 (B.I.A. 2008) (holding that Salvadoran youths who resisted gang recruitment failed the “social group” criteria due to lack of particular and well-defined boundaries and a level of social visibility).

⁴⁷ See *Gaitan*, 671 F.3d at 681.

⁴⁸ See *id.* at 685 (Bye, J., concurring).

⁴⁹ *Fuentes-Hernandez v. Holder*, 411 F. App’x 438, 438–39 (2d Cir. 2011) (finding that El Salvadorans who “resisted gang recruitment” did not belong to a particular social group for purposes of seeking asylum because they could not demonstrate “particularity and social visibility”); *Lizama v. Holder*, 629 F.3d 440, 447 (4th Cir. 2011) (finding that “young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs” do not belong to a particular social group for purposes of seeking asylum because that group does not satisfy the criteria of having social visibility or the definition of particularity); *Ramos-Lopez v. Holder*, 563 F.3d 855, 862 (9th Cir. 2009) (finding that “young

held the BIA's new approach, reasoning that membership in a particular social group required not just immutability of a characteristic, but also that the characteristic provided members with social visibility and that the group had a particularity such that its membership was defined.⁵⁰ Though the Ninth Circuit merely upheld the BIA's new requirement without incorporation of the previous approach or explanation of its adoption of the new one, the First Circuit ruled that the BIA is not barred from considering the group's visibility when determining membership in a particular social group.⁵¹ In addition, the Second Circuit agreed with the BIA's new approach, and found that a person cannot claim membership in a particular social group if that group lacks social visibility and if no "nexus" can be established "between the harm he fears and one of the protected grounds enumerated in [8 U.S.C. § 1101(a)(42)]."⁵²

In contrast, the Third, Sixth, and Seventh Circuits have found the BIA's new approach inconsistent with the previous approach stressing immutability and imposed without adequate explanation.⁵³ The Seventh Circuit implied that the BIA conflated the understanding of social visibility with a group that is visible in a distinct, external sense.⁵⁴ In its opinion, the court overtly suggested that there is a difference between being physically distinguishable and socially visible.⁵⁵ Taken literally, social visibility would not require so much of a sense of distinction as it would physical evidence or awareness that can be visibly perceived by

Honduran men who have been recruited by MS-13 but refuse to join" do not belong to a particular social group for purposes of seeking asylum because the group is too large and is not visible to the rest of Honduran society); *Scatambuli v. Holder*, 558 F.3d 53, 59–60 (1st Cir. 2009) (finding that "government informants" do not belong to a particular social group for purposes of seeking asylum because, when social visibility is relevant criteria, only a few people knew that the petitioners' were informants).

⁵⁰ *Gaitan*, 671 F.3d at 681; *Lizama*, 629 F.3d at 447.

⁵¹ See *Gaitan*, 671 F.3d at 685 (Bye, J., concurring); *Ramos-Lopez*, 563 F.3d at 862; *Scatambuli*, 558 F.3d at 60.

⁵² *Fuentes-Hernandez*, 411 F. App'x at 438–39; see *Gaitan*, 671 F.3d at 685 (Bye, J., concurring).

⁵³ See *Gaitan*, 671 F.3d at 685 (Bye, J., concurring); *Valdiviezo-Galdamez v. Att'y Gen.*, 663 F.3d 582, 603–09 (3d Cir. 2011); *Urbina-Mejia v. Holder*, 597 F.3d 360, 365–67 (6th Cir. 2010); *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009). The Third, Sixth, and Seventh Circuits agree with Judge Bye's concurrence in that the shift of the new standard is "arbitrary and capricious" and inconsistent with the previous standard, thus refusing to implement the social visibility and particularity requirements without further explanation from the BIA. See *Gaitan*, 671 F.3d at 685 (Bye, J., concurring); *Valdiviezo-Galdamez*, 663 F.3d at 603–09; *Urbina-Mejia*, 597 F.3d at 365–67; *Benitez Ramos*, 589 F.3d at 430.

⁵⁴ See *Gaitan*, 671 F.3d at 685 (Bye, J., concurring); *Benitez Ramos*, 589 F.3d at 430.

⁵⁵ See *Benitez Ramos*, 589 F.3d at 430.

the rest of society.⁵⁶ It is this literal visibility requirement that the Seventh Circuit accuses the BIA of adopting in its new standard.⁵⁷

III. THE NEW STANDARD AND THE IRONY OF SOCIAL VISIBILITY

Although the Eighth Circuit denied Gaitan's petition for review, the court issued an opinion in support of the BIA's decision.⁵⁸ The court opined that Gaitan's perceived social group of "young males from El Salvador who have been subjected to recruitment by the MS-13 gang and who have rejected or resisted membership in the gang based on personal opposition to the gang" is not "sufficiently narrowed" to satisfy either the particularity or social visibility requirement.⁵⁹ The court was bound by its earlier opinions in *Constanza v. Holder* and *Ortiz-Puentes v. Holder*.⁶⁰ In those cases, the Eighth Circuit adopted the BIA's new arbitrary approach to understanding membership in a particular social group, holding that a social group must be distinguishable to society as a result of sufficient particularity and visibility.⁶¹ Nevertheless, the BIA's new approach fails to properly incorporate the original definition emphasizing immutability of the characteristic.⁶² The original definition maximizes the protection of persons seeking asylum from persecution by highlighting the social existence of the characteristic rather than the social visibility.⁶³ In contrast, the new approach "eviscerates protections" for groups who would previously have satisfied the agency's definition of social group.⁶⁴

⁵⁶ *Id.*

⁵⁷ *See id.*

⁵⁸ *Gaitan v. Holder*, 671 F.3d 678, 679–80 (8th Cir. 2012).

⁵⁹ *Id.* at 682.

⁶⁰ *Id.* at 681; *Constanza v. Holder*, 647 F.3d 749, 753 (8th Cir. 2011); *Ortiz-Puentes v. Holder*, 662 F.3d 481, 483 (8th Cir. 2011).

⁶¹ *See Gaitan*, 671 F.3d at 681; *id.* at 686 (Bye, J., concurring); *Constanza*, 647 F.3d at 753; *Ortiz-Puentes*, 662 F.3d at 483. "At the time that he filed his appeal, Gaitan was correct that no panel of this Court had gone so far as to refer to social visibility and particularity as requirements. Yet our recent decisions in [*Constanza* and *Ortiz-Puentes*] adopted such a reading." *See Gaitan*, 671 F.3d at 681.

⁶² *See Gaitan*, 671 F.3d at 683, 685 (Bye, J., concurring); *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009); *In re Acosta*, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985), *overruled in part by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987), *abrogated by Pitcherskaia v. I.N.S.*, 118 F.3d 641 (9th Cir. 1997).

⁶³ *See Gaitan*, 671 F.3d at 685–86 (Bye, J., concurring); *Benitez Ramos*, 589 F.3d at 430 ("Often it is unclear whether the Board is using the term 'social visibility' in the literal sense or in the 'external criterion' sense, or even-whether it understands the difference.").

⁶⁴ *Gaitan*, 671 F.3d at 686 (Bye, J., concurring).

The purpose of asylum is to provide refuge to persons who are persecuted for a specific reason.⁶⁵ Previously, the standard was based not on the existence of a characteristic, but rather on visible, social recognition of such a characteristic, putting those who possess the characteristic, despite its social invisibility, at increased risk of violence and persecution in their home countries.⁶⁶ The new approach, expounded by the BIA in an “unexplained departure,” and adopted by a number of circuits, including the Eighth Circuit, distinguishes membership of a particular social group from the other four grounds for persecution.⁶⁷ It does this by removing emphasis on the innateness or immutability of the characteristic in exchange for emphasis on social perception and particularity of the group.⁶⁸ The characteristic, as opposed to one of personal qualification based on identity of the individual, becomes an arbitrary test subject to the whim and perception of society.⁶⁹

If Gaitan stayed in El Salvador, he claimed that he would be recognized as a young male who had refused membership into the MS-13 gang.⁷⁰ As a result, Gaitan would be persecuted or harmed because of his personal conviction not to join the gang.⁷¹ Gaitan would still be visibly recognizable in his home country despite the Eighth Circuit’s opinion that Gaitan’s group had no social recognition that was clearly evident.⁷² But even if Gaitan was not visibly recognizable, he still has a characteristic that is a shared past experience with other young males, a

⁶⁵ See *id.* at 680 (majority opinion).

⁶⁶ See *id.* at 686 (Bye, J., concurring); *Benitez Ramos*, 589 F.3d at 430.

⁶⁷ See *Gaitan*, 671 F.3d at 686 (Bye, J., concurring); *Acosta*, 19 I. & N. Dec. at 233.

⁶⁸ See *Gaitan*, 671 F.3d at 686 (Bye, J., concurring); *Acosta*, 19 I. & N. Dec. at 233.

⁶⁹ See *Gaitan*, 671 F.3d at 680; *id.* at 685–86 (Bye, J., concurring) (quoting Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005) (stating that an unexplained departure from established precedent like the BIA’s departure from the *Acosta* definition is generally “a reason for holding [the departure] to be an arbitrary and capricious change from agency practice”). In *Benitez Ramos v. Holder*, the court stated that under the new definition, “a complete stranger” would need to be able to identify a member of a particular social group just from seeing the member on the street. *Benitez Ramos*, 589 F.3d at 430.

⁷⁰ *Gaitan*, 671 F.3d at 679.

⁷¹ *Id.*; Petition for Writ of Certiorari at 8, *Gaitan v. Holder*, 671 F.3d 678 (8th Cir. 2012) (No. 11–1525) (explaining that the “Salvadoran police [have] been unable to control the activities of gangs such as MS-13 and, as a result, youths who live in areas dominated by gangs ‘simply have no choice’ as to whether to join”).

⁷² See *Gaitan*, 671 F.3d at 682; *Benitez Ramos*, 589 F.3d at 430 (“If society recognizes a set of people having certain common characteristics as a group, this is an indication that being in the set might expose one to special treatment, whether friendly or unfriendly.”); Petition for Writ of Certiorari, *supra* note 71, at 9 (“It is now widely recognized that gangs such as MS-13 target youths who refuse to join, along with their families, for serious physical abuse and even death.”).

criteria that should be sufficient to successfully grant him asylum and provide him with protection that he would not have by staying in El Salvador.⁷³

Past cases illustrate a steadiness of persons seeking asylum for failure to join a gang in their home country.⁷⁴ This not only continues to support the immutability characteristic of the original definition of a specific social group through a shared past experience, it also highlights the vulnerability and limited options of persons in gang-ridden, violent nations.⁷⁵ Their options become limited to either joining the gang or risking persecution and possibly death for failure to do so.⁷⁶ Allowing members to avoid continuing the cycle of violence by seeking refuge in the United States would decrease the number of individuals involved in violence in their home countries and ultimately save lives—the BIA’s new approach makes this process more difficult, if not impossible.⁷⁷ A sound BIA approach should take advantage of the immutability of the group’s characteristic, expecting the group to strive towards

⁷³ See *Gaitan*, 671 F.3d at 679; *Gaitan*, 671 F.3d at 683 (Bye, J., concurring); *Benitez Ramos*, 589 F.3d at 430. Judge Bye’s concurrence states that “the characteristic uniting the group must be ‘one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.’” See *Gaitan*, 671 F.3d at 683 (Bye, J., concurring) (citing *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled in part by In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987), *abrogated by Pitcheskaia v. I.N.S.*, 118 F.3d 641 (9th Cir. 1997)). In *Benitez Ramos v. Holder*, the Seventh Circuit “held that former members of the MS-13 gang were a [particular social group] under *Acosta* because that past shared experience ‘is a characteristic impossible to change.’” Petition for Writ of Certiorari, *supra* note 71, at 18 (citing *Benitez Ramos*, 589 F.3d at 429).

⁷⁴ See *Constanza*, 647 F.3d at 753–54 (holding that applicant-refugee’s claim of belonging to a group of a family that had experienced gang violence or a person who resisted gang violence were too broad to be perceived as social groups by the rest of society); *Ortiz-Puentes*, 662 F.3d at 483 (holding that three siblings who refused to join Guatemalan gangs and were subjected to persecution and violence failed to satisfy the “social group” criteria for seeking asylum because the group was not sufficiently visible or particular); *Benitez Ramos*, 589 F.3d at 431 (holding that prior gang membership is not a group that is sufficiently cohesive or socially visible to qualify for asylum); *In re S-E-G-*, 24 I. & N. Dec. 579, 588 (B.I.A. 2008) (holding that Salvadoran youths who resisted gang recruitment failed the “social group” criteria due to lack of particular and well-defined boundaries and a level of social visibility).

⁷⁵ See *Gaitan*, 671 F.3d at 686 (Bye, J., concurring); *Benitez Ramos*, 589 F.3d at 430; *Acosta*, 19 I. & N. Dec. at 233 (providing the original definition of a particular social group); Petition for Writ of Certiorari, *supra* note 71, at 8.

⁷⁶ See *Gaitan*, 671 F.3d at 679 (noting that “the gang members threatened to harm Gaitan and his family if he did not join”); *Benitez Ramos*, 589 F.3d at 430 (claiming that the only option for former gang member sent back to his home country would be to “abandon his Christian scruples and rejoin the gang”); Petition for Writ of Certiorari, *supra* note 71, at 9.

⁷⁷ See *Gaitan*, 671 F.3d at 686 (Bye, J., concurring).

inconspicuousness in their home country to avoid persecution until they can safely seek asylum in the United States.⁷⁸ The “young males from El Salvador who have been subjected to recruitment by MS-13 and who have rejected or resisted membership in the gang” were already consistently persecuted against, so their immutable characteristic was sufficient to make them recognizable to their persecutors.⁷⁹ To demand particularity and visibility paints an even bigger target on the group members’ backs.⁸⁰

CONCLUSION

When Oscar Gaitan came to the United States in 2002, he emigrated to avoid persecution and to save himself from a life riddled with gang violence. Gaitan claimed that he was a member of a particular social group and that group had characteristics that were immutable. Unfortunately, the BIA recently adopted a new standard. Instead of highlighting the immutability of the characteristic necessary to satisfy membership in a particular social group, the new standard emphasizes the visibility and particularity of the group, asking whether the rest of society can recognize members belonging to the group based on the characteristic. Using the new standard, the BIA determined that Gaitan’s characteristic was not sufficiently visible or particular to merit granting asylum. The Eighth Circuit agreed, adopting the standard of the BIA and implementing it as precedent in the Eighth Circuit.

Applying the BIA’s new standard, the Eighth Circuit effectuated an arbitrary requirement, which relies on the perceptions of society rather than on the immutability of the characteristic binding the members of the group together. The new standard makes it more difficult for those individuals who fall into a category of a particular social group to successfully seek refuge. The new standard forces the persecuted group members to take advantage of and bring attention to the visibility of the group to society, which is exactly what the group is trying to avoid. Members of groups who are being persecuted will do everything in

⁷⁸ See *id.*; *Benitez Ramos*, 689 F.3d at 430; *Acosta*, 19 I. & N. Dec. at 233 (providing the original definition of a particular social group as one emphasizing immutability).

⁷⁹ See *Gaitan*, 671 F.3d at 682; *Benitez Ramos*, 589 F.3d at 430. In *Benitez-Ramos*, the court points out that the position that the BIA has adopted permits membership in particular social group “only if a complete stranger could identify [a member] . . . if he encountered [the member] in the street, because of [the member’s] appearance, gait, speech pattern, behavior or other discernible characteristic.” *Benitez Ramos*, 589 F.3d at 430.

⁸⁰ See *Gaitan*, 671 F.3d at 686 (Bye, J., concurring); *Benitez Ramos*, 689 F.3d at 430; Petition for Writ of Certiorari, *supra* note 71, at 9.

their power to avoid being recognized by their persecutors, including trying to blend into the rest of society. The limitation is their immutable characteristic, which is what contributed to making them a target for persecution in the first place. The particular social group is now forced to run the risk of harm and continued persecution in their home country due to the lack of visibility of the characteristic in this country. Ironically, the precise effort of the particular social group to avoid persecution in the group's home country is what prevents the members from successfully seeking asylum in the United States.