Youth Resistant to Gang Recruitment as a Particular Social Group in *Larios v. Holder*

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Abstract: Central American youth who refuse to join gangs are often subjected to horrific acts of retaliatory violence. Yet, the Board of Immigration Appeals’ introduction of two new requirements for asylum eligibility—visibility and particularity—have quashed the asylum hopes for members of this group. Recently, the First Circuit Court of Appeals adopted the visibility and particularity requirements and, in Larios v. Holder, applied them to deny asylum to youth resistant to gang recruitment. This Comment examines the development of these requirements and argues that there is no legal basis for their application. It further argues that the requirements unreasonably heighten the traditional asylum standard and ultimately concludes that the First Circuit should have rejected visibility and particularity as requirements for asylum, thereby rendering youth resistant to gang recruitment eligible for asylum.

Introduction

Gangs are a serious threat to Central American communities, and especially to young people who refuse to join gangs. Courts, however, have been extremely reluctant to grant asylum to this group, possibly


1 See Laura Pedraza Fariña et al., NO PLACE TO HIDE: GANG, STATE, AND CLANDESTINE VIOLENCE IN EL SALVADOR 72 (2010); Michele A. Voss, Note, Young and Marked for Death: Expanding the Definition of “Particular Social Group” in Asylum Law to Include Youth Victims of Gang Persecution, 37 RUTGERS L.J. 235, 239 (2005). Other groups seeking gang-related asylum include former gang members and women fearing gang violence, especially sexual violence, but this Comment is limited to youth resistant to gang recruitment. See Matthew J. Lister, Gang-Related Asylum Claims: An Overview and Prescription, 38 U. MEM. L. REV. 827, 830 (2008) (outlining the most typical gang-related asylum claims). The other groups raise a number of issues outside the scope of this discussion, including bars to asylum that might include former gang members’ past criminal activities. See 8 U.S.C. § 1158(b)(2) (2006); Sebastian Amar et al., CAiR Coal., Seeking Asylum from Gang-Based Violence in Central America: A Resource Manual, U.S. COMM. FOR REFUGEES & IMMIGRANTS, 8–20 (Aug. 2007), http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/Revised_Gang%20_Resource_Manual_Aug07.pdf (providing information on asylum claims involving former gang members).
fearing they might open the floodgates to all Central American youth. In *Larios v. Holder*, the First Circuit Court of Appeals recently joined the Board of Immigration Appeals (BIA) and other U.S. circuit courts in denying asylum to youth resistant to gang recruitment. These courts have created a new tool of exclusion by adding to the basic asylum standard two difficult-to-meet requirements—visibility and particularity.

Part I of this Comment provides an introduction to the gang phenomenon in Central America, with a focus on the practice of recruitment. Part II traces the history of asylum law and the development of the new asylum requirements through case law. This Part shows that visibility and particularity were first introduced as factors but were later imposed as requirements. It also shows that visibility has been defined inconsistently, with two very different definitions. Parts III and IV scrutinize the *Larios* court’s and other courts’ application of these requirements to gang-related asylum applications. Part V argues that the First Circuit in *Larios* should have refused to apply visibility and particularity as requirements because they are inconsistent with both international law and U.S. case law and are an unreasonable addition to the traditional asylum standard. This Comment ultimately concludes that the First Circuit should have remanded the case with instructions to apply the traditional test, thereby rendering youth resistant to gang recruitment eligible for asylum.

I. CENTRAL AMERICAN Gangs AND THE DANGER THEY POse TO YOUTH

By all accounts, gang violence has taken a considerable toll on Central American countries. Young people, like the asylum applicant

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3 See *Larios v. Holder*, 608 F.3d 105, 109 (1st Cir. 2010); Ramos-Lopez v. Holder, 563 F.3d 855, 856 (9th Cir. 2009); *S-E-G*, 24 I. & N. Dec. at 590.


in *Larios*, are especially vulnerable; most gang members are between twelve and twenty-four years old. Poor urban youth, in particular, are ripe for recruitment and live in communities pervaded by gang violence.7

There are many gangs in Central America, but the two largest are Mara Salvatrucha (MS-13) and Barrio 18 (18th Street).8 At the local level, gangs engage in small-scale crimes such as robbery and drug trafficking.9 The MS-13 and 18th Street gangs, now international criminal networks after years of rapid growth and expansion, are also involved in arms smuggling, human trafficking, and other large-scale organized crimes.10 MS-13 and 18th Street are notorious for the brutality they unleash.11 To consolidate power in neighborhoods, gangs commit especially ghastly acts of violence, even against non-gang members, “to shock the population of a certain area into submission.”12

Their size and increasingly “sophisticated” organizational structure has enabled these gangs to gain considerable power and influence,13 Thus, recruitment of new members is critical to maintaining and in-
creasing power.\textsuperscript{14} MS-13, for example, is constantly recruiting new members.\textsuperscript{15} Although recruitment sometimes involves offering gifts and other enticements, some gangs “rely heavily on forced recruitment to expand and maintain their membership.”\textsuperscript{16} Those who resist recruitment are often subjected to constant harassment and physical abuse and may even be murdered.\textsuperscript{17}

Partly due to sensationalistic accounts of gang violence by the media, Central American countries have increasingly adopted heavy-handed, or \textit{mano dura}, policies to stem gang violence.\textsuperscript{18} Such tactics include involving the military in combating gangs and allowing police to arrest young people who only look the part of gang members.\textsuperscript{19} These policies, however, have been a failure.\textsuperscript{20} They have not reduced the level of violence, and gangs continue to recruit new members.\textsuperscript{21}

\section*{II. History of Asylum Law and the Definition of a Particular Social Group}

An asylum seeker must satisfy the definition of “refugee” laid out in the Immigration and Nationality Act (INA).\textsuperscript{22} The INA provides the following definition for a refugee:

\begin{quote}
[A]ny person who is outside any country of such person’s nationality . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection
\end{quote}

\footnotesize
\textsuperscript{14} See id. at 72–73. In contrast to other gangs in the 1960s, 18th Street did not discriminate against mixed-race youth, and in 1996 the \textit{Los Angeles Times} reported that “the gang was breaking with tradition by opening recruitment to all youth in a deliberate move to increase its membership.” Immigration & Refugee Bd. of Can., \textit{El Salvador: Activities of the 18th Street/Dieciocho Gang; Gang Recruitment; Treatment of People Who Refuse to Join the Gang}, U.N. High Comm’r for Refugees (Nov. 22, 2002), http://www.unhcr.org/refworld/docid/3f7d4e1c15.html.


\textsuperscript{16} UNHCR Gang Guidance Note, supra note 2, at 2.

\textsuperscript{17} See FARIÑA ET AL., supra note 1, at 88–92; Voss, supra note 1, at 239 (describing the forms of retaliation used against resisters to gang recruitment); Julia Preston, \textit{On Gangs, Asylum Law Offers Little}, N.Y. Times, June 30, 2010, at A16 (reporting story about young man who refused to join gang, was denied asylum in the United States, and was shot in the face by gang upon returning to El Salvador).


\textsuperscript{19} Id.

\textsuperscript{20} See id.

\textsuperscript{21} Id.

of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . . 23

The INA’s definition of refugee is derived from the 1967 U.N. Protocol Relating to the Status of Refugees.24 The purpose of asylum, reflected in this definition, is to provide protection to people fearing or fleeing from persecution in their home countries.25 The INA thus allows the government to grant legal status to victims of persecution or those fearing persecution on account of one of the protected grounds.26

Asylum applicants who do not fit neatly into one of the more definite categories—political opinion, religion, race, nationality—can apply on the basis of membership in a “particular social group” (PSG).27 The term is intentionally flexible and is meant to be “read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”28 Thus, youth resistant to gang recruitment have often applied for asylum on the basis of membership in a PSG.29

23 Id. The asylum applicant has the burden to prove that he or she is a refugee. Id. § 1158(b)(1)(B).
26 See id.
27 See Sanchez-Trujillo v. INS, 801 F.2d 1571, 1575 (9th Cir. 1986); Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, U.N. High Comm’r for Refugees, ¶ 1 (May 7, 2002), http://www.unhcr.org/3d58de2da.pdf [hereinafter UNHCR Guidelines]. Groups that have been recognized as PSGs include families, tribes, occupational groups, and homosexuals. UNHCR Guidelines, supra, ¶ 1.
28 UNHCR Guidelines, supra note 27, ¶ 3. Although the U.N. High Commissioner for Refugees explains that there is no “closed list” of eligible PSGs, a PSG “cannot be interpreted as a ‘catch all’ that applies to all persons fearing persecution.” Id. ¶¶ 2–3.
The INA did not define a PSG, and courts have interpreted the term in different ways.\(^{30}\) In 1985, the BIA in In re Acosta provided the seminal definition.\(^{31}\) According to Acosta, the other grounds for asylum in the INA feature “a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”\(^{32}\) Applying the doctrine of *ejusdem generis* (“of the same kind”), the BIA determined that members of a PSG must also share a common, immutable characteristic.\(^{33}\)

This requirement that members of a PSG must share a common, immutable characteristic that they cannot change or should not be required to change has proven to be very influential; indeed, it has been adopted by all circuit courts of appeals.\(^{34}\) The test has also received international recognition; the U.N. High Commissioner for Refugees (UNHCR) has adopted it, as have several other countries.\(^{35}\)

Recently, however, the BIA added two additional requirements to the Acosta framework—visibility and particularity.\(^{36}\) Visibility and particularity were first introduced by the BIA in In re C-A- and In re A-M-E.\(^{37}\) Although the BIA affirmed the basic principles announced in Acosta, it explained that the Acosta standard needed elaboration.\(^{38}\) To

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\(^{30}\) See Hernandez-Montiel v. INS, 225 F.3d 1084, 1091–93 (9th Cir. 2000), overruled by Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005). The Ninth Circuit initially required a “voluntary associational relationship” between a group’s members but now applies that test as an alternative to the test articulated in Acosta. See id. at 1092–93.


\(^{32}\) Id. at 233.

\(^{33}\) See id.

\(^{34}\) See Davlia-Mejia v. Mukasey, 531 F.3d 624, 628 (8th Cir. 2008); Koudriachova v. Gonzales, 490 F.3d 255, 262 (2d Cir. 2007); Castillo-Arias v. U.S. Attorney Gen., 446 F.3d 1190, 1196 (11th Cir. 2006); Niang v. Gonzales, 422 F.3d 1187, 1198–99 (10th Cir. 2005); Lopez-Soto v. Ashcroft, 383 F.3d 228, 235 (4th Cir. 2004); Castellano-Chacon v. INS, 341 F.3d 533, 546 (6th Cir. 2003); Ontunez-Tursios v. Ashcroft, 303 F.3d 341, 352 (5th Cir. 2002); Hernandez-Montiel, 225 F.3d at 1091–93; Lwin v. INS, 144 F.3d 505, 511–12 (7th Cir. 1998); Fatin v. INS, 12 F.3d 1233, 1239–40 (3d Cir. 1993); Ananeh-Firempong v. INS, 766 F.2d 621, 626 (1st Cir. 1985).

\(^{35}\) Benjamin Casper et al., *The Evolution Convolution of Particular Social Group Law: From the Clarity of Acosta to the Confusion of S-E-G*, in Immigration Practice Pointers 565, 566 (Gregory P. Adams et al. eds., 2010); see UNHCR Guidelines, supra note 27, ¶ 11; see also Wilkinson, supra note 2, at 410 (explaining Canada’s Acosta-informed standard).


\(^{38}\) See C-A-, 23 I. & N. Dec. at 956. The BIA said in C-A-, “[W]e continue to adhere to the Acosta formulation,” but it also referred to Acosta as “the starting point.” Id. at 955–56.
that end, the BIA recognized as an important factor in a PSG analysis the social “visibility” of the proposed group, or “the extent to which members of a society perceive those with the characteristic in question as members of a social group.”\textsuperscript{39} The BIA recognized as another important factor the “particularity” of the proposed group—that is, a PSG must not include terms that “are too amorphous to provide an adequate benchmark for determining group membership.”\textsuperscript{40}

Notwithstanding its desire to add to the \textit{Acosta} standard, in \textit{CA-and A-M-E} the BIA merely considered visibility and particularity to be factors in determining a PSG, not requirements.\textsuperscript{41} It was not until two BIA cases in 2008, In re \textit{S-E-G-} and In re \textit{E-A-G-}, that visibility and particularity were imposed as requirements to be applied in addition to \textit{Acosta}'s fundamental, immutable characteristic test.\textsuperscript{42} In \textit{S-E-G-} and \textit{E-A-G-}, the BIA again affirmed \textit{Acosta}'s basic principles, adding that visibility and particularity merely give “greater specificity” to and provide “clarification” of the \textit{Acosta} standard.\textsuperscript{43} Yet the BIA in \textit{S-E-G-} declared that membership in a PSG requires that the group be socially visible and sufficiently particular.\textsuperscript{44} In neither case did the BIA explain why it converted visibility and particularity from factors to requirements.\textsuperscript{45}

\textsuperscript{39} See \textit{CA-}, 23 I. & N. Dec. at 951, 957.
\textsuperscript{40} See \textit{A-M-E-}, 24 I. & N. Dec. at 76. Assessing “affluent Guatemalans” for particularity, the BIA in \textit{A-M-E-} found that the terms “wealthy” and “affluent” are too amorphous to provide an adequate benchmark for determining group membership because, in a generally impoverished country, the “wealthy” could include small business owners and other middle class people, comprising as little as one percent to as much as twenty percent of the population. \textit{Id.} at 73, 76.
\textsuperscript{41} See Casper et al., \textit{supra} note 37, at 566; \textit{see also A-M-E-}, 24 I. & N. Dec. at 73; \textit{CA-}, 23 I. & N. Dec. at 957.
\textsuperscript{42} See Casper et al., \textit{supra} note 37, at 566–67; \textit{see also E-A-G-,} 24 I. & N. Dec. at 594; \textit{S-E-G-,} 24 I. & N. Dec. at 586. Although \textit{E-A-G-} did not explicitly refer to visibility and particularity as requirements, it disqualified the proposed group because it was neither visible nor particular. \textit{See} 24 I. & N. Dec. at 594.
\textsuperscript{44} \textit{S-E-G-,} 24 I. & N. Dec. at 582.
Since the BIA introduced visibility, the concept has been applied inconsistently, with two different definitions. The first definition requires that members of the proposed group be visible, in a literal and objective sense, as members of that group to observers. The second definition requires that society in general (in the applicant’s country of origin) merely perceive the proposed group as a group. Confusion as to the definition of visibility can be traced back to C-A-, which seemed to apply the first, objective definition. In that case, the BIA defined visibility as the possession of characteristics “that were highly visible and recognizable by others in the country in question.”

A-M-E, in contrast, gravitated toward the second, subjective definition and focused on whether Guatemalan society in general perceived “affluent Guatemalans” as a group.

Inconsistency in defining visibility continued in S-E-G- and E-A-G-. In S-E-G-, the BIA cited C-A- for the proposition that the shared characteristics of the proposed group must be “recognizable and discrete,” but it seemed to apply the subjective (societal perception) definition of visibility in reaching its conclusion. In E-A-G-, the BIA’s decision alluded to both definitions—it explained that the applicant did not possess “any characteristics that would cause others in [the applicant’s] society to recognize him” as a member of his proposed PSG and also

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46 See Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009) (“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.”).
48 See id. at 54–55. In its brief in Granados Gaitan v. Holder, the Office of Immigration Litigation of the U.S. Department of Justice distinguished between the two definitions and argued that the second is the true definition; it seemed to ignore, however, case law in which the first definition was applied. See id. at 55.
50 Id.
51 Id.
52 A-M-E, 24 I. & N. Dec. at 73–75. In denying the asylum claim, the BIA pointed to the fact that country reports do not suggest that the proposed group experiences more violence or human rights violations than other segments of society, which would create the general social perception that the group is distinct. See id. at 74–75.
54 See S-E-G-, 24 I. & N. Dec. at 586–88 (holding that the applicant failed to show his proposed group was viewed as a group by society in general due to a lack of evidence showing the proposed group is especially victimized in a violence-ridden country).
observed that the applicant failed to show that his proposed group “[was] seen as a segment of the population in any meaningful respect.” As *S-E-G* and *E-A-G* demonstrate, this definitional confusion is especially acute in the application of the requirements to gang-related asylum applications.

III. VISIBILITY AND PARTICULARITY AS APPLIED BY THE BIA AND THE FIRST CIRCUIT TO GANG-RELATED ASYLUM APPLICATIONS

The imposition of visibility and particularity as requirements frustrates the asylum claims of youth resistant to gang recruitment. Along with establishing visibility and particularity as requirements rather than factors, *S-E-G* and *E-A-G* are also significant because they mark the first time the BIA addressed resistance to gang recruitment as the basis for an asylum claim. In *S-E-G*, the applicant’s brothers refused to join MS-13 and, in retaliation, the gang stole money, harassed, beat, and threatened to kill the applicant and her brothers. These were not idle threats—the applicant and her brothers testified that a young boy in the neighborhood was killed for refusing to join the gang. In *E-A-G*, the applicant, a Honduran teenager, had two brothers who were MS-13 gang members; both were killed by rival gangs before they turned twenty. Consequently, when members of MS-13 attempted to recruit him, he refused to join. The applicant in *S-E-G* articulated her proposed PSG as “Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected or resisted membership,” or “family members of such Salvadoran youth”; the applicant in *E-A-G* asked the court to recognize as a PSG “persons resistant to gang membership (refusing to join when recruited).”

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56 See infra Part V.
58 See *S-E-G*, 24 I. & N. Dec. at 584. The BIA noted, “We have not previously addressed whether . . . Salvadoran youths who have resisted gang recruitment . . . constitutes a ‘particular social group’” and that no federal circuit court had yet issued a decision on the matter. See *id.* at 582.
59 *Id.* at 580.
60 *Id.*
62 *Id.*
63 *Id.* at 593; *S-E-G*, 24 I. & N. Dec. at 581.
In both cases, the BIA denied the applicants’ asylum petitions on the grounds that the proposed groups did not qualify as PSGs. The applicants failed to show that youth resistant to gang recruitment possess characteristics that make them visible or that such groups are perceived as cohesive social groups by Honduran or El Salvadoran society. The BIA reasoned in *E-A-G*, “There is no showing that membership in a larger body of persons resistant to gangs is of concern to anyone in Honduras, including the gangs themselves, or that individuals who are part of that body of persons are seen as a segment of the population in any meaningful respect.”

The groups also failed the particularity test because, according to the BIA in *S-E-G*, youth resistant to gang recruitment “make up a potentially large and diffuse segment of society.” Responding to the applicant’s attempt to limit the group to “male children who lack stable families and meaningful adult protection, who are from middle and low income classes, who live in the territories controlled by the MS-13 gang,” the BIA explained that each of these characteristics “remain[ed] amorphous” and was too open to interpretation.

Although the BIA’s holdings in *S-E-G* and *E-A-G* have been challenged, many circuit courts have accepted visibility and particularity, sometimes as factors and sometimes as requirements. For example, in

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67 *S-E-G*, 24 I. & N. Dec. at 585. The BIA concluded that youth resistant to gang recruitment is too broad to qualify as a PSG because “‘[t]here is no unifying relationship or characteristic to narrow this diverse and disconnected group.’” *Id.* at 586 (quoting Ochoa v. Gonzales, 406 F.3d 1166, 1171 (9th Cir. 2005)).
68 *Id.* at 584–85.
69 See, e.g., Contreras-Martinez v. Holder, 346 F. App’x 956, 958 (4th Cir. 2009) (holding that “adolescents in El Salvador who refuse[d] to join the gangs of that country because of their opposition to the gangs’ violent and criminal activities” does not constitute a PSG); Ramos-Lopez v. Holder, 563 F.3d 855, 856 (9th Cir. 2009) (holding that “young Honduran men who have been recruited by the MS-13, but who refuse to join” does not constitute a PSG); Gomez-Benitez v. U.S. Attorney Gen., 295 F. App’x 324, 326 (11th Cir. 2008) (holding that “Honduran schoolboys who conscientiously refuse[d] to join gangs” does not constitute a PSG). The Seventh Circuit Court of Appeals is the only circuit court that has explicitly rejected visibility and particularity as requirements. See Benitez Ramos v. Holder, 589 F.3d 426, 429 (7th Cir. 2009); Gatimi v. Holder, 578 F.3d 611, 616 (7th Cir. 2009). *Benitez Ramos v. Holder*, however, dealt with former gang members rather than youth resistant to gang recruitment, and Judge Posner in *Gatimi v. Holder* said he had “no quarrel” with holding that youth resistant to gang recruitment are not a PSG. See *Benitez Ramos*, 589 F.3d at 428; *Gatimi*, 578 F.3d at 616. Despite the circuit split, the U.S. Supreme Court recently denied certiorari to a case challenging the BIA’s holdings. See Contreras-Martinez, 346 F. App’x at 958, *cert. denied*, 130 S. Ct. 3274 (2010). Senator Patrick Leahy of Vermont
Scatambuli v. Holder, the First Circuit Court of Appeals explicitly described visibility and particularity as “factors” that are merely “relevant” to the PSG analysis.70 Addressing visibility and particularity for the first time, the First Circuit held that informants who feared retaliation were not a PSG.71 The court upheld C-A- and A-M-E and noted that the BIA had refined its definition of PSG.72 The court in Scatambuli also applied the objective definition of visibility, stating that a PSG is socially visible if its members possess “‘characteristics . . . visible and recognizable by others in the [native] country.’”73

Conversely, in 2009, the First Circuit established in Faye v. Holder that visibility and particularity are requirements for PSG.74 Faye also defined visibility according to the subjective definition, requiring that a PSG be perceived as a group by society in general.75 The First Circuit adhered to an understanding of visibility and particularity as requirements when, in 2010, it addressed gang-related asylum applications for the first time.76 In Mendez-Barrera v. Holder, the First Circuit accepted S-E-G’s analysis, applying visibility and particularity as requirements to deny asylum to “young women recruited by gang members who resist such recruitment.”77 Shortly after Mendez-Barrera, the First Circuit again upheld S-E-G- and denied asylum to youth resistant to gang recruitment.78

IV. Larios v. Holder

In July 2005, a fourteen-year-old Guatemalan native, Maynor Alonso Larios, fled to the United States.79 Later that year, the United States initiated removal proceedings against him for being present in

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70 Scatambuli v. Holder, 558 F.3d 53, 59 (1st Cir. 2009).
71 See id. at 55–56, 59.
72 Id. at 59.
73 Id. (alteration in original) (quoting In re C-A-, 23 I. & N. Dec. 951, 960 (B.I.A. 2006)).
74 See Faye v. Holder, 580 F.3d 37, 41–42 (1st Cir. 2009) (holding that “women who had a child out of wedlock/are considered adulterers because they gave birth to a child allegedly not their husband’s/have been abused by their husbands” is not a PSG because it is not a socially visible or sufficiently particular group).
75 Id. at 41–42.
76 Mendez-Barrera v. Holder, 602 F.3d 21, 26 (1st Cir. 2010).
77 Id. at 24, 26.
78 Larios v. Holder, 608 F.3d 105, 109 (1st Cir. 2010).
79 Larios v. Holder, 608 F.3d 105, 106 (1st Cir. 2010).
the country without admission or parole. Larios conceded removability but applied for asylum, claiming he faced persecution as a member of a group of “young Guatemalan men recruited by gang members who resist such recruitment.” The immigration judge (IJ) denied his application for asylum, determining that Larios “failed to establish that he faced future persecution on account of a protected ground,” and ordered his removal to Guatemala. On appeal, the BIA affirmed the IJ’s decision and Larios appealed to the First Circuit Court of Appeals.

In Larios, the First Circuit affirmed both the IJ’s and BIA’s decisions to deny Larios’s application for asylum. Declaring S-E-G- and E-A-G- to be “controlling BIA case law” and bowing to its precedent in Mendez-Barrera, the First Circuit concluded that “youth resistant to gang recruitment” was not a PSG because it did not meet the requirements of visibility and particularity.

In refusing to find a PSG because of a lack of visibility, the First Circuit failed to bring clarity to the concept and applied both definitions of visibility. With respect to objective visibility, the court found no evidence that youth resistant to gang recruitment possessed any “characteristics that render members of the putative group socially visible.” In terms of the group’s subjective visibility, the court declared that it was not “generally recognized in the community as a cohesive group.”

Nor did the First Circuit find the group to be sufficiently particular. The court reasoned,

[I]t is virtually impossible to identify who is or is not a member. There are, for example, questions about who may be considered “young,” the type of conduct that may be considered

80 Id. at 106–07.
81 Id. at 107, 108.
82 Id. at 107.
83 Id. at 106. On appeal, Larios argued two other points—that the BIA’s procedure of upholding an IJ’s decision without issuing an opinion is unconstitutional and that the BIA’s failure to address his second proposed social group, “street children,” also violated his due process rights. Id. at 108. The First Circuit rejected both arguments, reasoning that the issuance without opinion procedure is “a valid exercise of the Attorney General’s discretion to fashion its own rules of procedure” and that the BIA was not obligated to consider the “street children” group because Larios failed to raise it before the IJ. Id.
84 Larios, 608 F.3d at 109.
85 Id.
86 Id.
87 Id.
88 See id.
89 Larios, 608 F.3d at 109.
“recruit[ment],” and the degree to which a person must display “resist[ance].” These are ambiguous group characteristics, largely subjective, that fail to establish a sufficient level of particularity.90

Summing up its holding, the First Circuit concluded that “because [the] putative social group is neither socially visible nor sufficiently particular . . . the IJ did not err in denying Larios’s claim for asylum based on Larios’s membership in this particular group.”91

V. Criticisms of Visibility and Particularity

As Larios demonstrates, a major barrier to the asylum hopes of youth resistant to gang recruitment is the application of social visibility and particularity as requirements for establishing a PSG.92 As immigrant advocates, the United Nations, and Judge Posner of the Seventh Circuit Court of Appeals have cogently argued, the heightened standard that S-E-G- and E-A-G- introduced contradicts international law, is inconsistent with the traditional Acosta standard and U.S. case law decided under it, and only confuses the PSG analysis with detrimental consequences for deserving applicants.93 Thus, the First Circuit Court of Appeals should not have deferred to the BIA’s decisions in S-E-G- and E-A-G.94

First, visibility and particularity do not comport with international law.95 The UNHCR has criticized the requirements for not being “in accordance with the text, context or object and purpose of the 1951 Convention and its 1967 Protocol, nor with the [UNHCR’s] Social Group Guidelines.”96 Although the BIA professed to have international support for imposing visibility and particularity as requirements, it misinterpreted the UNHCR guidelines on which it based its claim.97 The guidelines clearly state that visibility is an alternative to the fundamental,
immutable characteristic test from _Acosta_, not a clarification, elaboration, or addition to it. The visibility test, therefore, should only be imposed if the applicant fails the _Acosta_ test. The requirement of particularity is inconsistent with international law because the apparent purpose of such a requirement is to limit the number of people eligible for asylum. This approach contradicts the UNHCR’s guidelines, which assert that “the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate.”

The addition of visibility and particularity also does not square with _Acosta_’s interpretive methodology, which determined the definition of PSG by identifying the general principle underlying the other protected groups. The other protected categories are not subjected to any visibility or particularity limitation. For example, a religion can be practiced in private and an unorthodox political opinion may not make its possessor stand out at all, in an objective sense. In terms of subjective societal understanding, an applicant’s political opinion or religious beliefs need not be generally recognized by society in order for the applicant to gain asylum. Additionally, the size of the group, implicit in the concept of particularity, should not be considered in determining a PSG because a persecuted political opinion, for example, could be held by the majority of a population and yet those who hold it would still be eligible for asylum.

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98 See UNHCR Brief, _supra_ note 24, at 13; UNHCR Guidelines, _supra_ note 27, ¶ 11 (“[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society.”).

99 See UNHCR Brief, _supra_ note 24, at 13; UNHCR Guidelines, _supra_ note 27, ¶ 11.

100 See UNHCR Brief, _supra_ note 24, at 17.

101 UNCHR Guidelines, _supra_ note 27, ¶ 18. The Ninth Circuit Court of Appeals recently held that all women in Guatemala may constitute a PSG. _Perdomo v. Holder_, 611 F.3d 662, 669 (9th Cir. 2010). The court stated, “[W]e have rejected the notion that a persecuted group may simply represent too large a portion of a population to allow its members to qualify for asylum,” adding, “the size and breadth of a group alone does not preclude a group from qualifying as [a PSG].” _Id._


103 Petition for a Writ of Certiorari, _supra_ note 102, at 16; see INA, 8 USC § 1101(a)(42) (2006); _Gatimi Brief, supra_ note 45, at 15.

104 _Gatimi Brief, supra_ note 45, at 15; see Petition for a Writ of Certiorari, _supra_ note 102, at 16.

105 _Gatimi Brief, supra_ note 45, at 15; see Petition for a Writ of Certiorari, _supra_ note 102, at 16.

106 See UNHCR Guidelines, _supra_ note 27, ¶ 18.
The visibility and particularity requirements are also inconsistent with case law decided under the *Acosta* standard. As Judge Posner has pointed out, many groups have been recognized as PSGs whose members would not be literally visible. For example, homosexuals, women of a certain tribe who have not yet been subjected to female genital mutilation, and former members of the national police have been recognized as PSGs. Moreover, the BIA in *S-E-G* and *E-A-G*, although claiming to uphold *Acosta* and *C-A-,* actually transformed visibility and particularity from factors to requirements, without offering justification.

The visibility and particularity requirements are also unreasonable and simply confuse the PSG analysis. For example, the visibility concept’s lack of definitional clarity has resulted in the application of two very different definitions; the BIA has offered no guidance as to which is the true definition or when to apply one over the other. One possible consequence of this confusion is the disqualification of a deserving group that meets one definition of visibility but not the other.

The requirements also confuse the definition of a PSG with other elements of the refugee definition. Visibility and particularity, for example, are more relevant in showing a well-founded fear of future persecution. Applying the literal, objective meaning of visibility is senseless, as Judge Posner pointed out, because it would require victims

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107 See *Gatimi v. Holder*, 578 F.3d 611, 615–16 (7th Cir. 2009).
108 See *id.*
111 See *Wilkinson*, *supra* note 2, at 413, 415.
112 See *Benitez Ramos v. Holder*, 589 F.3d 426, 430 (7th Cir. 2009); *supra* Part III.
113 See *Wilkinson*, *supra* note 2, at 413 (“[T]he lack of a clear definition combined with the heightened burden [of the new requirements] changes the balance almost positively in favor of denial of asylum.”). For example, youth resistant to gang recruitment are not visible in the literal, objective sense, but general society may well perceive such youth as a social group. See *UNHCR Brief*, *supra* note 24, at 25–27. Resisting recruitment is a sign of disrespect to gangs and puts the resister at great risk of retaliation; thus, resistance makes resisters “stand out from the rest of the community” and “set[s] them apart in society.” See *UNHCR Gang Guidance Note*, *supra* note 2, at 4, 12 (describing the importance of respect for gangs and the risks of showing disrespect). There is also a general societal perception that young, poor men are prime targets for gang recruitment. See *Clare Ribando Seelke, Cong. Research Serv., RL 34112, Gangs in Central America* 5 (2009), available at http://www.fas.org/sgp/crs/row/RL34112.pdf; *UNHCR Gang Guidance Note*, *supra* note 2, at 4.
115 See *Benitez Ramos*, 589 F.3d at 430; *Wilkinson*, *supra* note 2, at 415.
“who take pains to avoid being socially visible” to instead “pin[] a target to their backs.”

The traditional Acosta test is internationally accepted and much more analytically sound than the test created by the BIA in SE-G- and E-A-G-. Thus, the First Circuit Court of Appeals should have joined the Seventh Circuit Court of Appeals in rejecting visibility and particularity as requirements under PSG analysis. Then, the First Circuit should have remanded with instructions to apply the traditional Acosta test, thereby making asylum available to youth resistant to gang recruitment, a group for whom “hope is largely absent” in their home countries.

Conclusion

Youth resistant to gang recruitment deserve the protection from persecution that asylum offers. Refusing to join a gang places bull’s-eyes on the heads of young Central American people, especially those from poor backgrounds. Yet the BIA and most circuit courts of appeals have adopted a heightened standard for asylum that disqualifies this group. This standard—requiring that the proposed group be socially visible and sufficiently particular—is inconsistent with international law and U.S. case law and unreasonably heightens the traditional standard. Thus, the First Circuit Court of Appeals erred in adopting the BIA’s requirements and holding that youth resistant to gang recruitment do not qualify for asylum.

116 See Benitez Ramos, 589 F.3d at 430.
117 See Wilkinson, supra note 2, at 413–15.
118 See Gatimi, 578 F.3d at 616.