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Not Seeing Eye to Eye on Social "Visibility"

by Josh Lunsford

We must look at the lens through [which] we see the world, as well as the world we see, and [realize] that the lens itself shapes how we interpret the world.

– Stephen R. Covey

Included as a protected ground for both asylum and withholding of removal, membership in a "particular social group" (or "PSG" for short) has become one of the more hotly contested legal issues in recent years. Sections 101(a)(42)(A), 208(b)(1)(A), 241(b)(3)(A) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A), 1231(b)(3)(A). Some argue that the PSG net should be cast as broadly as possible to extend protection to any person facing potential mistreatment in another country. *See, e.g.,* Diane Uchimiya, *Falling Through the Cracks: Gang Victims as Casualties in Current Asylum Jurisprudence*, 23 La Raza L.J. 109, 111 (2013) ("[This] article supports the notion that the protective ethic, which lies at the root of all asylum law, should guide the analysis and interpretation of 'particular social group' . . ."). But others warn against the ground becoming a catchall for every societal problem in less developed countries. *See, e.g.,* *Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1096 (9th Cir. 2013) (Kozinski, C.J., dissenting) ("[C]ongress surely didn't mean to open the immigration floodgates to everyone in the world who is oppressed."). These competing considerations, among other things, have led to challenges in defining exactly what it is that constitutes a "particular social group."

To be sure, identifying a social group is no easy task. In the United States, for example, what would society consider to be a "social group"? Would it include "Vietnam veterans, male homosexuals, college students, lawyers, Masons, cancer survivors, blind people . . . , [or] hippies"? *Id.* at 1095-96. What about "left-handed people, high school dropouts, blondes . . . , [or] dog owners"? *Id.* at 1096. If not, *why* not? Would Californians recognize groups that, say, those living in Maine would not? This process is only made more difficult when an adjudicator is asked to

consider a society in another part of the world—one with customs, political issues, experiences, and languages far different from ours.

In light of this, adjudicators face a daunting task: to view a proposed group through a “societal lens” and determine whether, in the society at issue, that group constitutes a “particular social group.” *Cf. Chaib v. Ashcroft*, 397 F.3d 1273, 1279 (10th Cir. 2005) (explaining that societal problems facing other countries cannot be “viewed . . . through an American lens”). As we will explore below, this task has been further complicated by the fact that Federal courts have not all agreed whether this lens was intended to capture perfect, “20/20 visibility” or something more conceptual. That is, is a group a “social group” because it can be identified *on sight* as such, or is it because there is some general perception among society regarding the group’s existence?

Heeding the advice of Mr. Covey, this article will take a closer look at the lens through which adjudicators are expected to view the world. Specifically, the article will discuss the related issues of “social visibility” and “perspective” by highlighting the Board of Immigration Appeals’ recent decisions in *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014), and *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014).

Overview

The meaning of the term “particular social group” was first addressed in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985). Looking to the other four grounds for guidance, the Board stressed in *Acosta* that the nexus requirement was intended to be a *limitation* on refugee protection. *Id.* at 232-34. This was evidenced, the Board explained, by the fact that protection was only extended to those who are “unable by their own actions . . . to avoid persecution” because of race or nationality “or as a matter of consciousness should not be required” to change their political opinion or religion to do so. *Id.* at 234. Viewing the “particular social group” ground as a gap-filler designed to supplement the other four grounds, the Board held that a “common, immutable characteristic” is required to make a group cognizable for purposes of the Act—“immutable” because the characteristic in question is one that the group members “either [1] cannot change . . . or [2] should not be required to change because it is fundamental to their individual identities or consciences.” *Id.* at 233.

For nearly 20 years, *Acosta*’s immutability standard was *the* defining element of a “particular social group.” The practical result of this was that social group claims were conceivable for nearly any segment of society exposed to a risk of harm, so long as an applicant could define his or her existence within a group of persons who shared an “unchangeable” or “fundamental” characteristic. As the Board warned, such an approach would cause “the social group concept [to] virtually swallow the entire refugee definition” and render moot the other four protected grounds. *Matter of R-A-*, 22 I&N Dec. 906, 919 (BIA 1999; A.G. 2001).¹

In response to these concerns, the Board announced two additional requirements to the PSG analysis. Through a series of decisions, the Board explained that a proposed group must be defined with sufficient “particularity” and have “social visibility” within the society in question. *See Matter of S-E-G-*, 24 I&N Dec. 579, 584-88 (BIA 2008) (discussing the history of the two requirements). Together, these requirements sought to ensure that the group to which an alien purports to belong has some meaningful semblance of *a group* and is not simply a “statistical grouping of a portion of the population at risk.” *Matter of Sanchez & Escobar*, 19 I&N Dec. 276, 285 (BIA 1985), *aff’d sub nom. Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986); *see also Matter of E-A-G-*, 24 I&N Dec. 591, 595 (BIA 2008) (“The focus is not with statistical or actuarial groups, or with artificial group definitions. Rather, the focus is on the existence . . . of the group in the society in question.”).

Social Distinction

While views differ as to what is “immutable,” *see, e.g., Temu v. Holder*, 740 F.3d 887, 896-97 (4th Cir. 2014) (rejecting the Board’s finding that “bipolar disorder” is not immutable because it can be controlled with medication), and what causes a group to lack “particularity,” *see, e.g., Cordoba v. Holder*, 726 F.3d 1106, 1116 (9th Cir. 2013) (explaining that it would no longer uphold PSG denials based on “the breadth or diversity of membership within a proposed social group”), the first two parts of the Board’s PSG analysis have been generally accepted by the Federal courts of appeals. However, some courts have taken issue with the “social visibility” requirement.

The primary concern regarding this requirement has been with the use of the term “visible” (or “visibility”). Specifically, the concept of visibility is generally understood

to refer to the ability for something to be recognized “on sight.” For example, buildings, cars, and stoplights are all “visible” because they are said to be “perceptible to the eye” or “discernable by sight.” See *Black’s Law Dictionary* 1602 (8th ed. 2004). Imputing the meaning to “social visibility,” some have argued that a proposed group must be “visible to the naked eye.” *Henriquez-Rivas*, 707 F.3d at 1088 n.8.

The dictionary meaning of the term has not been the only source of confusion. Indeed, the Board itself has used terms commonly associated with on-sight recognition when discussing the cognizability of proposed groups. For instance, in *Matter of C-A-*, the Board characterized its “social visibility” requirement as an inquiry into whether a group is “highly visible” in society and discounted the proposed group in that case—“former noncriminal drug informants working against the Cali drug cartel”—because the very nature of being an informant is highly secretive and “outside the public view.” *Matter of C-A-*, 23 I&N Dec. 951, 960 (BIA 2006), *aff’d sub nom. Castillo-Arias v. U.S. Att’y Gen.*, 446 F.3d 1190 (11th Cir. 2006). In another case, the Board rejected “Mungiki defectors” because the group lacked “characteristics that would cause others in Kenyan society . . . to recognize [them].” *Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009) (citing an unpublished Board decision).

The Third and Seventh Circuits² identified two problems with requiring on-sight visibility. First, such an approach would be inconsistent with past Board decisions upholding proposed groups where the defining traits were “completely internal to the individual,” such as homosexuality in *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822-23 (BIA 1990). See *Valdiviezo-Galdamez v. Att’y Gen. of U.S.*, 663 F.3d 582, 604 (3d Cir. 2011); *Gatimi*, 578 F.3d at 615-16 (“Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual.”). Second, given the remedial nature of asylum, the Seventh Circuit concluded that requiring on-sight visibility “makes no sense” because aliens would have to “pin[] a target to their backs with the legend ‘I am a [member of the proposed group]’” to qualify for relief. *Gatimi*, 578 F.3d at 616; see also *id.* at 615 (“If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being [] visible; and to the extent that the members of

the target group are successful in remaining invisible, they will not be ‘seen’ by other people in the society ‘as a segment of the population.’”). For these reasons, both circuits rejected the “social visibility” requirement as unreasonable.³

In light of these criticisms, advocates presented the Board with a wide array of potential alternatives to “social visibility.” The Department of Homeland Security (“DHS”) argued that the “particularity” and “social visibility” requirements should be combined into a single requirement. *Matter of M-E-V-G-*, 26 I&N Dec. at 233, 236-37 n.11. Some called for a return to *Acosta* as the sole requirement, while others requested an approach requiring *either* “immutability” or “social visibility.” *Id.* at 233 & n.8.

The Board considered all three alternatives but opted instead to refine its approach. Reasoning that the determinative factor is, and has always been, whether a group is meaningfully *distinct* in the society in question,⁴ the Board emphasized that the “social visibility” requirement was never intended to require visibility in the ocular sense. See *id.* at 246-47 (“To the extent that *Matter of C-A-* has been interpreted as requiring literal or ‘ocular’ visibility, we now clarify that it does not.”). However, it also acknowledged that there was some incongruity with labeling the test “social visibility” yet requiring an assessment of *perception*. See *Matter of W-G-R-*, 26 I&N Dec. at 216. To avoid further confusion, the Board changed the name of the test to “social distinction.”⁵ See *Matter of M-E-V-G-*, 26 I&N Dec. at 228; *Matter of W-G-R-*, 26 I&N Dec. at 212. In doing so, it cautioned that this was simply a change in terminology, and not in approach, and explained that it would “reach the same result [in its past decisions] if [it] were to apply the term ‘social distinction’ rather than ‘social visibility.’” *Matter of M-E-V-G-*, 26 I&N Dec. at 247.

The Board acknowledged that it had previously found groups without “outwardly observable characteristics” to constitute PSGs but explained that it did so because the groups in question were socially distinct within their respective societies. *Matter of M-E-V-G-*, 26 I&N Dec. at 238, 244-47. For instance, homosexuals in Cuba were found to constitute a cognizable PSG in *Matter of Toboso-Alfonso*, irrespective of the fact that homosexuality is an internal trait not observable to the naked eye, because the evidence in that case established

that Cuban society regarded and treated homosexuals as a discrete segment of the community. *Id.* at 245. Again, literal visibility was never intended, nor ever required, for a social group to be cognizable. *See id.* at 246-47.

Applying this test in *Matter of W-G-R*, the group “former members of the Mara 18 gang in El Salvador who have renounced their gang membership” was determined not to be a “particular social group.” As the Board explained, there was simply no evidence that former gang members who renounced their gang membership were perceived to be a distinct segment of Salvadoran society in any meaningful respect. *Matter of W-G-R*, 26 I&N Dec. at 222.

Whose Perspective?

Having clarified that the relevant inquiry is one of perception, the Board was left to answer just one question: *Whose* perspective is determinative? *See Henriquez-Rivas*, 707 F.3d at 1089 (“[T]he BIA has [not] clearly specified whose perspectives are most indicative of society’s perception of a particular social group . . .”). Would it be “the [applicant] herself? Her social circle? Her native country as a whole? The United States? The global community?” *Id.* The answer to this question is especially important because “[d]ifferent audiences will be more or less likely to consider a collection of individuals as a social group depending on their own history, course of interactions with the group, and the overall context.” *Id.* Or as Mr. Covey put it, “the lens itself shapes how we interpret the world.”

The Board was not writing on a clean slate, however. Prior to *Matter of W-G-R* and *Matter of M-E-V-G*, three circuits had addressed the issue. The First and Second Circuits were the first to do so, though not in great detail, and each reached different outcomes. *Compare Mendez-Barrera v. Holder*, 602 F.3d 21, 27 (1st Cir. 2010) (“The relevant inquiry is whether the social group is visible in the society, not whether the alien herself is visible to the alleged persecutors.”), *with Gashi v. Holder*, 702 F.3d 130, 136 (2d Cir. 2012) (explaining that the defining trait of a PSG must “identif[y] members of the group to others in the community, particularly to potential persecutors”). The Ninth Circuit was the most recent to weigh in, noting whose perception it regarded as most essential. *See Henriquez-Rivas*, 707 F.3d at 1089 (“Looking to the text of the statute, in the context of persecution, we believe that the perception of the persecutors may matter the most.”).

The Ninth Circuit began its analysis in *Henriquez-Rivas* by pointing out that the perspective of society is potentially dispositive in *most* cases. *Id.* at 1089-90 (explaining that the inquiry ends “[w]hen there is evidence that a social group is visible to society”). The problem with assessing group recognition from a societal perspective in every case, the court explained, is that there are certain circumstances in which group-based persecution could occur that would not necessarily be recognized as such by society at large. *See id.* For instance, an overly aggressive persecutor might mistakenly identify an alien to be a member of an opposing social group, even though society, being more objective and less involved in the conflict, likely would not. *See id.* at 1089 (“[A] group may be persecuted because of the persecutor’s perceptions of the existence of those groups.”). Likewise, a persecuted group might be so geographically or numerically limited that mainstream society would not even recognize its existence. *See id.* Under such circumstances, the Ninth Circuit opined that the persecutors’ perception may be the most significant. *Id.* at 1089-90.

The Board, however, concluded that the controlling perspective in *all* cases is that of the relevant society. The Board noted two problems with defining a social group by the perception of the persecutors. First, while agreeing that a persecutor’s perspective is relevant to situations in which group membership is improperly attributed to an applicant, the Board cautioned against conflating the issue of nexus, or motive, with that of group cognizability. *Matter of M-E-V-G*, 26 I&N Dec. at 242-43. That is, a persecutor’s perspective may be relevant to the extent it establishes whether group membership was or will be improperly “imputed” to an applicant. *Id.*; *see also Matter of S-P*, 21 I&N Dec 486, 489 (BIA 1996). Group cognizability, on the other hand, is a separate issue. As the Board explained, when assessing the cognizability of an imputed social group, like any other PSG claim, the “perception” or “recognition” of the group is measured *from the perspective of society*. *Matter of M-E-V-G*, 26 I&N Dec. at 243. In other words, a persecutor can impute group membership to an applicant, but the group being imputed must still constitute a “particular social group” under the Act. *See id.*

In addition, the Board noted that defining a social group from the perspective of the persecutor conflicts with its precedent that a group cannot be defined exclusively by the experience of past harm. *Id.* at 242-43. Acknowledging that past maltreatment may in

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FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR JANUARY 2014

by John Guendelsberger

The United States courts of appeals issued 202 decisions in January 2014 in cases appealed from the Board. The courts affirmed the Board in 172 cases and reversed or remanded in 30, for an overall reversal rate of 14.9%. There were no reversals from the First, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits. In January 2013, by way of comparison, the courts of appeals issued 165 decisions and reversed or remanded in 19, a reversal rate of 11.5%.

The chart below shows the results from each circuit for January 2014 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	2	2	0	0.0
Second	25	20	5	20.0
Third	14	11	3	21.4
Fourth	16	14	2	12.5
Fifth	17	16	1	5.9
Sixth	9	8	1	11.1
Seventh	4	4	0	0.0
Eighth	4	4	0	0.0
Ninth	103	85	18	17.5
Tenth	2	2	0	0.0
Eleventh	6	6	0	0.0
All	202	172	30	14.9

The 202 decisions included 102 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 41 direct appeals from denials of other forms of relief from removal or from findings of removal; and 59 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	102	84	18	17.6
Other Relief	41	32	9	22.0
Motions	59	56	3	5.1

The 18 reversals or remands in asylum cases involved credibility (7 cases), nexus (3 cases), particular social group (2 cases), past persecution (2 cases), protection under the Convention Against Torture (2 cases), withholding of removal, and the persecutor bar. The nine reversals or remands in the “other relief” category included crimes involving moral turpitude (two cases), finality of a conviction pending on direct appeal, derivative citizenship, suppression of evidence, waivers under sections 212(c) and 237(a)(1)(H), corroboration requirements, and divisibility under the categorical approach. The three motions cases involved ineffective assistance of counsel, equitable tolling, and a motion to reconsider a credibility determination.

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RECENT COURT OPINIONS

First Circuit:

Alvarado v. Holder, No. 13-1322, 2014 WL 563464 (1st Cir. Feb. 14, 2014): The First Circuit denied a petition for review of the Board’s decision upholding the denial of cancellation of removal by an Immigration Judge. The petitioners are a husband and wife seeking cancellation of removal to Guatemala under section 240A(b)(1) of the Act, which is available to certain nonpermanent residents. The court noted that the only statutory requirement in dispute was whether the petitioners had established that their removal would result in exceptional and extremely unusual hardship to their U.S. citizen son, who was 12 years old on the day of the hearing. In addition to a general fear for their son’s safety arising from conditions in Guatemala (which include kidnappings, gangs, and violent crime), the petitioners focused on the roadblocks their gifted son would face in pursuing higher educational opportunities in their native country. The court was not persuaded by the petitioners’ argument that the Immigration Judge’s decision was inconsistent with *Matter of Monreal*, 23 I&N Dec. 56 (BIA 2001), because she failed to properly balance the hardship factors. The court found that although she did not cite the case by name, the

Immigration Judge “followed its precepts in her analysis.” According to the court, the Immigration Judge did not suggest that the compelling educational needs of gifted or special needs students could never constitute “exceptional and extremely unusual hardship” but concluded only that the particular hardship the petitioners’ son would suffer in this case did not rise to that level. In reaching this conclusion, the Immigration Judge stated that (1) the greater educational opportunities the son might enjoy in the U.S. did not give rise to a right to similar opportunities in Guatemala; and (2) that the petitioners had not demonstrated that their son could not obtain an adequate education in Guatemala, although it might be more costly or inconvenient to procure. The court also rejected the petitioners’ argument that the Immigration Judge failed to consider the other hardship factors cited by the petitioners in the aggregate.

Second Circuit:

Ay v. Holder, No. 11-2102-ag, 2014 WL 642689 (2d Cir. Feb. 20, 2014): The Second Circuit remanded the record for the Board to consider in the first instance whether the “material support bar” pursuant to sections 212(a)(3)(B)(i)(I) and (iv)(VI) of the Act contains a duress exception. An Immigration Judge found the petitioner inadmissible upon determining that he had provided food and clothing on several occasions to members of Kurdish terrorist groups in Turkey. The Immigration Judge concluded that such actions constituted material support for a terrorist organization under the Act. The Board affirmed in a single-member decision. The Board’s decision included a statement that the petitioner may be eligible for a duress exemption from the Secretary of the Department of Homeland Security (“DHS”) but that the Board lacked jurisdiction to determine whether such relief was warranted. The circuit court deferred to the Immigration Judge’s conclusion that the petitioner knew or should have known that those he was aiding were terrorist organizations. The court additionally addressed the petitioner’s argument that the aid he provided was not voluntary but was given under duress. The court found that this case presented circumstances similar to those in *Negusie v. Holder*, 555 U.S. 511 (2009), where the Supreme Court held that the statute’s silence as to a duress exception was not conclusive and remanded for the Board to consider the issue. Noting the frequency with which the question arises, the court remanded for the Board to address whether such an exception exists “in the first instance in light of its own expertise.” In response

to the Government’s argument that the availability of a waiver for duress from the Secretary of DHS obviates the need for remand, the court noted the absence of any procedure for seeking such a waiver from the DHS. The court also denied the petition for review in part, finding no error in the Board’s separate conclusion that the petitioner did not establish eligibility for relief under the Convention Against Torture (“CAT”) because he failed to show a likelihood that he would be tortured by the Turkish Government.

Fourth Circuit:

Ai Hua Chen v. Holder, 742 F.3d 171 (4th Cir. 2014): The Fourth Circuit granted in part a petition for review of the Board’s decision adopting an Immigration Judge’s denial of asylum to a married couple from China. The petitioners based their asylum claim on the birth of two children born to the couple in the U.S. In denying the petitioners’ claim, the Immigration Judge relied on a 2007 Department of State Report stating that U.S. officials are not aware of a policy of mandatory sterilization in China for parents of two children where at least one child was born abroad. The Immigration Judge also cited a 2006 letter from the Fujian Province family planning authority that children born abroad, if not registered as permanent residents of China, do not count under China’s family planning restrictions. The Immigration Judge additionally found that, even were the children to be counted, the economic penalties that the petitioners would face would not rise to the level of persecution. The Board affirmed the Immigration Judge’s findings, adding its own determination as to why some of the documentation offered by the petitioners (unauthenticated certifications from local officials and unsworn statements from individuals in China) were entitled to little evidentiary weight. The Board also concluded that country conditions evidence of record did not establish that the petitioners would face coercive measures rising to the level of persecution. The circuit court noted that the Board relied on the country report, which the court agreed was highly probative evidence. However, the court found that the Board did not adequately discuss contradictory evidence offered by the petitioners, which included a report of the Congressional-Executive Commission on China (“CECC”). The court found such contradictory evidence to be strong enough to warrant more meaningful consideration than the Board’s decision afforded. While the court referred to the State Department country report as “the definitive word in

asylum cases,” it cautioned that such reports should not be treated “‘as Holy Writ’ immune to contradiction.” The record was therefore remanded for further evaluation of the evidence by the Board. The court denied the petition for review of the Board’s denial of the petitioners’ alternative asylum claim based on their Christian religious beliefs.

Fifth Circuit:

Siwe v. Holder, No. 12-60546, 2014 WL 476508 (5th Cir. Feb. 6, 2014): The Fifth Circuit granted in part a petition for review of the Board’s determination that the petitioner was ineligible to adjust his status pursuant to section 209(b) of the Act. The petitioner had been granted asylum from Cameroon but was convicted several years later of involvement in a large-scale, interstate fraud scheme. After his release from prison, his asylum status was terminated in removal proceedings based on his conviction for an aggravated felony that was determined by the Immigration Judge to be a particularly serious crime. The Immigration Judge held that termination of the petitioner’s asylum status left him ineligible for section 209(b) adjustment and, in addition, denied his request for protection under the CAT. The Board affirmed on appeal in a single-member decision and denied the petitioner’s request for rehearing by a three-member panel. The circuit court found the petitioner eligible to apply for section 209(b) adjustment, considering the statute to be unambiguous since it contained no language requiring an applicant’s asylum status to be in effect at the time the application is filed. The language of section 209(a), which imposes just such a requirement on refugees seeking to adjust their status, was considered proof that Congress would have imposed the same requirement on asylees if it wished to do so. Moreover, the court observed that the section relating to asylees requires only that the applicant “continues to be a refugee.” To read the statute otherwise would render section 209(c) (allowing for a waiver of certain grounds of inadmissibility) superfluous, because an aggravated felon would not be able to apply for the waiver if he or she was barred *ipso facto* from applying for section 209(b) adjustment. The court did not find dispositive the case law cited by the Government, namely, the Board’s decision in *Matter of K-A-*, 23 I&N Dec. 661 (BIA 2004), and decisions of the Seventh and Ninth Circuits. Additionally, the court denied the Government’s request to remand for the Board to consider the matter and issue a precedent decision, noting that the Board had had prior opportunities to address the question. The petitioner’s challenge to the denial of protection under the CAT was dismissed for lack of jurisdiction.

Silva-Trevino v. Holder, 742 F.3d 197 (5th Cir. 2014): The Fifth Circuit declined to give deference to the Attorney General’s decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), which outlined a new method for determining whether a criminal conviction is for a crime involving moral turpitude (“CIMT”). In addition to applying the categorical and modified categorical approaches in reaching a CIMT determination, the Attorney General’s third approach allows an Immigration Judge to consider evidence outside of the formal record when it is deemed “necessary and appropriate.” Following the Attorney General’s decision, the record was remanded to the Immigration Judge, who considered extrinsic evidence under the new methodology and concluded that the petitioner’s offense of indecency with a child under Texas law was a CIMT. The circuit court noted that the issue before it was not whether the particular crime constituted a CIMT but rather the means by which an Immigration Judge can reach a CIMT determination. The court had historically allowed such determinations to be made based only on the categorical approach (which looks to the statute alone) and the modified categorical approach (which allows additional reference to the record of conviction where the statute is divisible). The court therefore looked to the statute in question, section 212(a)(2)(A)(i) of the Act, to determine if its applicable language was sufficiently ambiguous for the court to accord *Chevron* deference to the Attorney General’s alternative approach. Agreeing with the Third, Fourth, Ninth, and Eleventh Circuits that the statutory language is unambiguous, the Fifth Circuit observed that the Seventh and Eighth Circuits have held otherwise and have accorded deference to the Attorney General’s approach. The court further distinguished the two cases in which reference to extrinsic evidence had been allowed, *Nijhawan v. Holder*, 557 U.S. 29 (2009), and *Bianco v. Holder*, 624 F.3d 265 (5th Cir. 2010), observing that they involved language describing “a subset of a category of convictions, rather than an entire category.” In contrast, the statute in question described no subset but, rather, included all CIMTs. The court did not find the fact that “moral turpitude” is not an element of any crime to necessitate reliance on extrinsic evidence, holding that this fact did not imply that the characteristics of a CIMT may not be gleaned from the conviction record. The court was not persuaded that deference would lead to a more uniform application of the law in light of the circuit split regarding the Attorney General’s approach. The petition for review was therefore granted and the record was remanded.

Ninth Circuit:

Chavez-Reyes v. Holder, 741 F.3d 1 (9th Cir. 2014): The Ninth Circuit denied the petition for review of the Board's affirmance of an Immigration Judge's order of removal. The petitioner had pled guilty to possession of cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1). However, his criminal conviction had been overturned on appeal by the circuit court, which found the traffic stop that led to the petitioner's arrest to be unconstitutional. The court upheld the Board's reliance on the vacated conviction to find the petitioner removable under section 212(a)(2)(C)(i) of the Act, which relates to controlled substance traffickers. The court noted that unlike most sections of the Act, which require an actual conviction, the particular section applied to the petitioner requires only that there be "reason to believe" that he has been an illicit trafficker in any controlled substance. The court continued that "[a]s a general rule, a voluntary guilty plea to criminal charges is probative evidence that the petitioner did, in fact, engage in the charged activity," regardless of whether the conviction is later overturned for reasons unrelated to the voluntary nature of the guilty plea. The court was not persuaded by the petitioner's argument that the Board's "reason to believe" finding was not supported by substantial evidence. The court noted that the facts—that the petitioner was the driver and sole occupant of a truck containing nearly 900 pounds of cocaine—and the petitioner's guilty plea supported the conclusion that the petitioner knew that the truck he was driving contained drugs.

BIA PRECEDENT DECISIONS

In *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014), the Board revisited the issue of eligibility for a section 212(c) waiver of inadmissibility following the Supreme Court's opinion in *Judulang v. Holder*, 132 S. Ct. 476 (2011), which rejected the "statutory counterpart" construction underpinning the Board's section 212(c) jurisprudence. The Board concluded that a lawful permanent resident who has accrued 7 years of uninterrupted domicile in the United States is, with certain exceptions, eligible to apply for a section 212(c) waiver if he or she is removable pursuant to a guilty plea or a conviction for a removable offense entered before April 24, 1996.

The respondent, who was admitted as a lawful permanent resident in 1987, pled guilty in 1995 to conspiracy to commit arson and was sentenced to 24 months' imprisonment. The Department of Homeland Security initiated removal proceedings in July 2010. After sustaining the charge of removability, the Immigration Judge denied the respondent's application for a section 212(c) waiver based on the statutory counterpart rule. During the pendency of the respondent's appeal to the Board, the Supreme Court issued its decision in *Judulang*.

Reviewing the evolution of section 212(c) throughout its various legal permutations and the resulting administratively derived parameters for eligibility, the Board explained that the language of the statute had created a tension between the status of lawful permanent residents returning to the United States after traveling abroad and those who had never left and were thus deportable pursuant to conduct similar to that described in grounds of exclusion under the Act. Following the Supreme Court's retroactivity pronouncement in *INS v. St. Cyr*, 533 U.S. 289, 314-26 (2001), the Attorney General promulgated 8 C.F.R. § 1212.3(f)(5), which provided that section 212(c) relief was unavailable to any lawful permanent resident deportable or removable pursuant to a ground lacking a statutory counterpart in section 212(a) of Act. The statutory counterpart rule was the basis for the precedent decisions of *Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005), and *Matter of Blake*, 23 I&N Dec. 722 (BIA 2005).

In *Judulang*, the Supreme Court rejected the statutory counterpart reasoning, finding that a deportable lawful permanent resident may not be considered ineligible for section 212(c) relief based on "mechanical distinctions" between different classes of removable lawful permanent residents. Any approach to section 212(c) eligibility that disadvantages one removable lawful permanent resident in favor of another must rationally consider the individuals' relative "fitness to remain in the country" and must avoid an impermissible retroactive effect.

Examining possible approaches for implementing these standards and identifying deportable lawful permanent residents who are "fit" to remain in the United States, the Board concluded that an approach similar to that adopted in *Matter of Hernandez-Casillas*, 20 I&N

Dec. 262 (BIA 1990; A.G. 1991), was best to implement the *Judulang* mandate. In that case, the Board expanded the availability of section 212(c) relief to lawful permanent residents who are subject to all grounds of deportability except those comparable to grounds expressly excluded under the statute, including terrorism, sabotage, and war crimes. The Board reasoned that such an approach places inadmissible and deportable lawful permanent residents on a level playing field and provides a straightforward test of eligibility for relief. Recognizing the tension between this approach and the statutory counterpart requirement of 8 C.F.R. § 1212.3(f)(5), the Board pointed out that the *Judulang* mandate supersedes any conflicting authority.

The Board held that otherwise qualified applicants may apply for section 212(c) relief to waive any ground of deportability unless the applicant is subject to inadmissibility under sections 212(a)(3)(A), (B), (C), or (E), or (10)(C) of the Act. Additionally, since section 212(c) relief remains available only to those otherwise qualified lawful permanent residents who would incur an impermissible “new disability,” the Board established uniform standards for identifying the relevant applicants.

Based on Supreme Court and prevailing circuit court precedent, the Board determined that the presumption against retroactive application of a new statute eliminates the need for a showing of detrimental reliance. Thus, it directed Immigration Judges to treat deportable lawful permanent residents, whether convicted via plea agreements or pursuant to a trial, the same for purposes of section 212(c) relief. Additionally, the Board decided that the lawful permanent resident need not have been deportable at the time he or she was convicted, reasoning that: (1) such a requirement would be founded on a retroactivity/reliance premise, which has been rejected; (2) such a requirement would contravene *United States v. Leon-Paz*, 340 F.3d 1003 (9th Cir. 2003), where the Ninth Circuit held that a lawful permanent resident convicted of an offense in 1995 that did not render him deportable until 1996 would suffer impermissible retroactivity by the repeal of section 212(c); and (3) requiring Immigration Judges to focus on the law in effect at the time of a conviction would be unmanageable in practice. The Board also pointed out that section 212(c) relief contains a discretionary component requiring a balancing of an applicant’s equities and negative factors.

The Board held that a lawful permanent resident who has accrued 7 consecutive years of lawful unrelinquished domicile in the United States and who is removable or deportable by virtue of a plea or conviction entered before April 24, 1996, is eligible to apply for section 212(c) relief in removal or deportation proceedings *unless*:

(A) The applicant is subject to the grounds of inadmissibility under sections 212(a)(3)(A), (B), (C), or (E), or (10)(C) of the Act; or

(B) The applicant has served an aggregate term of imprisonment of at least 5 years as a result of one or more aggravated felony convictions entered between November 29, 1990, and April 24, 1996.

If an otherwise qualifying lawful permanent resident is removable or deportable by virtue of a plea or conviction entered between April 24, 1996, and April 1, 1997, he or she is eligible to apply for section 212(c) relief in removal or deportation proceedings *unless*:

(A) The applicant’s proceedings commenced on or after April 24, 1996, and the conviction renders the applicant deportable under one or more of the deportability grounds enumerated in 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996; or

(B) The applicant is subject to the grounds of inadmissibility under sections 212(a)(3)(A), (B), (C), or (E), or (10)(C) of the Act; or

(C) The applicant has served an aggregate term of imprisonment of at least 5 years as a result of one or more aggravated felony convictions entered between November 29, 1990, and April 24, 1996.

Since the respondent is a lawful permanent resident with more than 7 years’ unrelinquished domicile in the United States, is removable based on an aggravated felony conviction sustained before April 24, 1996, is not subject to the grounds of inadmissibility enumerated at sections 212(a)(3)(A), (B), (C), or (E), or (10)(C) of the Act, and was not sentenced to 5 years’ imprisonment, the Board determined that he is eligible to apply for section 212(c) relief. The record was remanded.

REGULATORY UPDATE

79 Fed. Reg. 10,760 (Feb. 26, 2014)

DEPARTMENT OF HOMELAND SECURITY

6 CFR Chapter I

8 CFR Chapter I

19 CFR Chapter I

33 CFR Chapter I

44 CFR Chapter I

46 CFR Chapters I and III

49 CFR Chapter XII

[Docket No. DHS–2014–0006]

Retrospective Review of Existing Regulations; Request for Public Input

AGENCY: Office of the General Counsel, DHS.

ACTION: Notice and request for comments.

SUMMARY: The Department of Homeland Security (Department or DHS) is seeking comments from the public on specific existing significant DHS rules that the Department should consider as candidates for modification, streamlining, expansion, or repeal. These efforts will help DHS ensure that its regulations contain necessary, properly tailored, and up-to-date requirements that effectively achieve regulatory objectives without imposing unwarranted costs.

DHS is seeking this input pursuant to the process identified in DHS's Final Plan for the Retrospective Review of Existing Regulations. According to the Final Plan, DHS will initiate its retrospective review process, on a three-year cycle, by seeking input from the public. The most helpful input will identify specific regulations and include actionable data supporting the nomination of specific regulations for retrospective review.

DATES: Written comments are requested on or before March 28, 2014. Late-filed comments will be considered to the extent practicable.

Not Seeing Eye to Eye *continued*

some circumstances be a catalyst for the social distinction of a group, the Board reiterated that the persecutor's perception and conduct are not sufficient alone to define a particular social group.

Regarding the potential for social groups to be geographically or numerically limited, the Board emphasized that this does not give reason to depart from

an evaluation of society's perspective, but it may help to focus the inquiry. *See id.* For instance, the proposed group was upheld in *Matter of Kasinga*, 21 I&N Dec. 357, 365-66 (BIA 1996), not because the larger Togolese society regarded women who opposed the practice of female genital mutilation to be a discrete group, but because such individuals were socially distinct within their *local* tribe. *Matter of M-E-V-G-*, 26 I&N Dec. at 243. *But see Henriquez-Rivas*, 707 F.3d at 1089 ("Society in general may also not be aware of a particular religious sect in a remote region."). Accordingly, the Board explained that the relevant perspective may come from "a more limited subset of the country's society" if persecutory conduct or group membership is "limited to a remote region of a country." *Matter of M-E-V-G-*, 26 I&N Dec. at 243. As is the case in any other PSG claim, perceptions regarding the proposed group must be considered within the context of "the society in question."⁶ *Id.* at 237.

Final Observations—Particularity

To properly understand the "social distinction" requirement, it is important to address the meaning of the related, but separate, requirement of "particularity." Generally speaking, "particularity" concerns a group's definition or boundaries. *See Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69, 76 (BIA 2007), *aff'd sub nom. Ucelo-Gomez v. Mukasey*, 509 F.3d 70 (2d Cir. 2007). This rule is commonly understood to require that a social group be defined in a sufficiently precise manner so as to prevent its boundaries from becoming too vague or uncertain. A number of terms have been used to describe what a PSG cannot be under this depiction of the rule, including "amorphous," "subjective," "indeterminate," and "variable." *Id.* Another rendition of the rule provides that a proposed group cannot be too "broad," "inchoate," "diffuse," or "numerous." *Matter of S-E-G-*, 24 I&N Dec. at 584-86 (rejecting the proposed group—"Salvadoran youth who have been subjected to recruitment efforts by MS-13 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"—in part because it comprised "a potentially large and diffuse segment of society").

While "particularity" is one of the least criticized of the PSG requirements, its merits have not gone completely unquestioned. In recent years, the requirement has been rejected, either entirely or in part, by at least the Third and Ninth Circuits. *See, e.g., Cordoba*, 726 F.3d at 1116; *Valdiviezo-Galdamez*, 663 F.3d at 607-09.

The Seventh Circuit has expressed its own concerns with the particularity requirement. See *N.L.A. v. Holder*, No. 11-2706, 2014 WL 806954, at *10 (7th Cir. Mar. 3, 2014) (“[T]his court does not determine the legitimacy of social groups by the narrowness of the category.”); *Benitez Ramos v. Holder*, 589 F.3d 426, 431 (7th Cir. 2009) (acknowledging that “[t]here may be certain categories so ill-defined that they cannot be regarded as groups,” but cautioning against application of this rule in every case because even an ill-defined group may be regarded as a social group because of perceptions or violence towards it); see also *Cece v. Holder*, 733 F.3d 662, 669-74 (7th Cir. 2013) (en banc) (upholding a group without mentioning the “particularity” requirement); *Sarhan v. Holder*, 658 F.3d 649, 654-55 (7th Cir. 2011) (same); *Gatimi*, 578 F.3d at 614-16 (same).

Most of the concerns regarding “particularity” relate, either directly or indirectly, to those associated with “social visibility.” For instance, the Third Circuit found that “particularity” and “social visibility” are nothing more than “different articulations of the same concept” and, as such, “the former suffers from the same infirmity as the latter.” *Valdiviezo-Galdamez*, 663 F.3d at 608 (“[W]e are hard-pressed to discern any difference between the [two].”). Likewise, employing the “from the persecutor’s perspective” approach it endorsed with respect to “social visibility,” the Ninth Circuit rejected the “particularity” requirement to the extent it focuses on group membership becoming too “broad,” “diffuse,” or “all-encompassing.” *Henriquez-Rivas*, 707 F.3d at 1090 (explaining that “the fact that [group members] might have a variety of *other* characteristics, and belong to various *other* groups,” is of no concern to a would-be persecutor); see also *Cordoba*, 726 F.3d at 1115-16. Accordingly, the future of “particularity”—at least in the Third and Ninth Circuits—largely depends on acceptance of the Board’s revamped “social distinction” requirement. *Matter of M-E-V-G-*, 26 I&N Dec. at 240-41 (“[T]here is considerable overlap between the ‘social distinction’ and ‘particularity’ requirements . . . , [but each] emphasize[s] a different aspect of a particular social group . . . [and] serves a separate purpose.”).

Conclusion

Since its announcement, the “social visibility” requirement has been a source of confusion for adjudicators and practitioners alike. With the majority of the concern revolving around the literal meaning of the term “visible,” the Board has opted to rename the requirement “social distinction” rather than change course entirely. However,

it remains to be seen whether this change is sufficient for the Board’s approach to be accepted by every Federal court of appeals.

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1. Although *Matter of R-A-* was vacated by the Attorney General, the Board has explicitly acknowledged that “its role in the progression of [the] particular social group . . . analysis remains relevant.” *Matter of M-E-V-G-*, 26 I&N Dec. at 231 n.7.
2. Although ultimately not joining suit, the First Circuit’s most recent decision on this issue explicitly recognized the “cogency and persuasiveness” of the Third and Seventh Circuit decisions. *Rojas-Perez v. Holder*, 699 F.3d 74, 80 (1st Cir. 2012) (finding itself bound by prior precedent and upholding the requirement as reasonable).
3. The following circuits have specifically rejected the notion that “social visibility” is synonymous with “on-sight” visibility: (1) the Fourth, see *Temu*, 740 F.3d at 893 (explaining that the requirement does not mandate “20/20 visibility”); (2) the Eighth, see *Gathungu v. Holder*, 725 F.3d 900, 908 (8th Cir. 2013) (refusing to find a lack of “social visibility” simply because “Kenyan society might not be able to identify a Mungiki defector by sight”); (3) the Ninth, see *Henriquez-Rivas*, 707 F.3d at 1087 (finding that “a requirement of ‘onsight’ visibility would be inconsistent with previous BIA decisions”); and (4) the Tenth, see *Rivera-Barrientos v. Holder*, 666 F.3d 641, 651-52 (10th Cir. 2012).
4. The Fifth, Sixth, Eighth, and Ninth Circuits have all recognized that “social visibility” refers to societal *perceptions* towards a proposed group. *Umana-Ramos v. Holder*, 724 F.3d 667, 672 (6th Cir. 2013); *Henriquez-Rivas*, 707 F.3d at 1085, 1089-90; *Orellana-Monson v. Holder*, 685 F.3d 511, 522 (5th Cir. 2012); *Gaitan v. Holder*, 671 F.3d 678, 681 (8th Cir. 2012).
5. This was the name suggested by the DHS as part of its proposal to combine “particularity” and “social visibility” into a single requirement. *Matter of M-E-V-G-*, 26 I&N Dec. at 236-37 n.11. The Board adopted the name but was not persuaded to employ the DHS’s approach. See *id.*
6. Although a numerically or geographically limited segment of society can constitute a “particular social group,” such circumstances may invite inquiry into a number of other potential hurdles for relief, including the availability of government protection, the feasibility of internal relocation, and the existence of countrywide persecution. See *Matter of M-E-V-G-*, 26 I&N Dec. at 243.

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