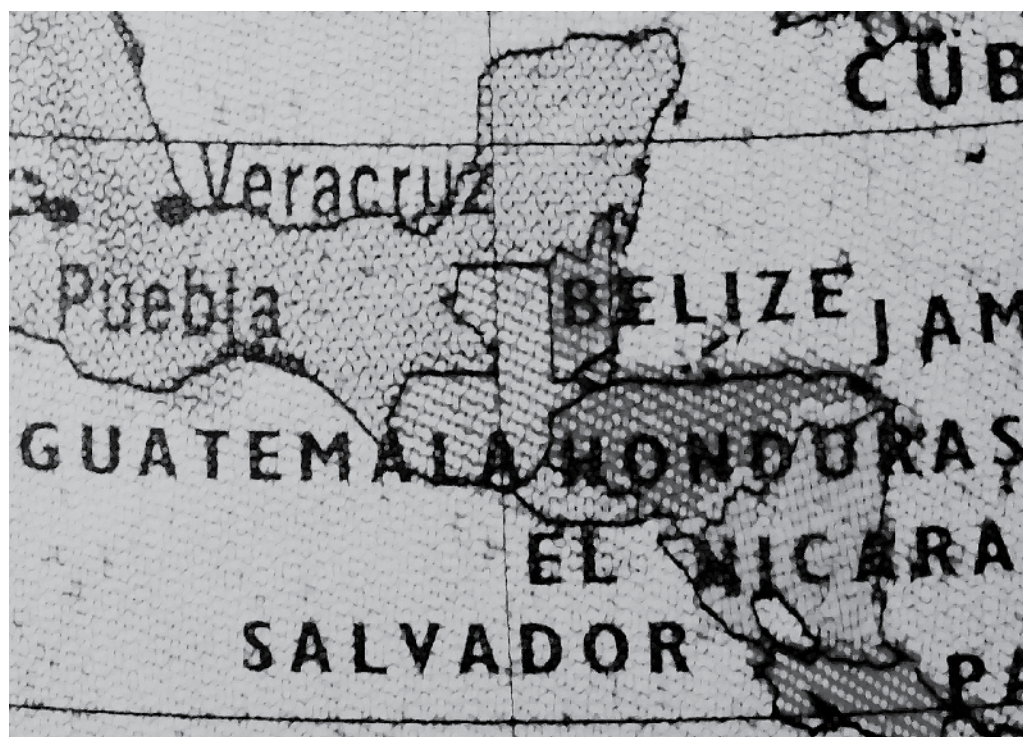


Central American Gang-Related Asylum

A RESOURCE GUIDE • MAY 2008



The Washington Office
on Latin America (WOLA)



Elements of Successful Legal Arguments for Gang-related Asylum¹

This section highlights some of the key legal arguments that have been used in successful gang-related asylum cases. This is not a technical legal document; WOLA staff are not attorneys and are not offering legal advice. It is, rather, a guide to technical and legal resources. As explained in the introductory and country-specific sections of this resource guide, WOLA believes that many former gang members risk persecution if deported to Central America and that many other Central Americans who have fled to the United States because they were harassed by gangs in Central America risk persecution if they return.

Gang-related asylum cases are argued, like all asylum cases, as either affirmative or defensive applications for relief. Cases that involve individuals who are present and seeking asylum in the United States, with or without documents, after fleeing their country are affirmative cases and are adjudicated by the Asylum Office of the Department of Homeland Security (DHS). Adult asylum seekers who are denied entry into the United States at the border or at an airport, or who request asylum after being detained in the United States and transferred to DHS custody, or who are otherwise detained by DHS and placed in removal proceedings, file defensive asylum cases before an immigration judge (IJ). Immigrant minors who are detained are taken into custody by the Office of Refugee Resettlement of the Department of Health and Human Services. Asylum cases must be filed by the asylum seeker within one year of entering the United States.²

Basic Requirements for Asylum

An individual may qualify for asylum if he or she meets the legal definition of a refugee according to the Immigration and Nationality Act (INA). According to the INA a refugee is:

[A]ny person who is outside any country of such person's nationality...and who is unable or unwilling to return to, and is unable or unwilling to avail himself or

...there is ample evidence that laws and policies in place to respond to the gang phenomenon in Guatemala, El Salvador and Honduras are ineffective and are probably making the problem worse.

herself of the protection of that country because of persecution or a well-founded fear or persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.³

Individuals who can demonstrate past persecution or fear of future persecution based on one of the five grounds may qualify for asylum. Nevertheless, asylum is discretionary, meaning that applicants may not be entitled to asylum, even if eligible.

In order to gain asylum, an individual must convincingly argue that:⁴

- ❶ he or she has experienced past persecution and/or has a well-founded fear of future persecution,
- ❷ the government is unable or unwilling to protect the asylum seeker from that persecution,
- ❸ the asylum seeker would not be able to re-locate internally to avoid persecution in his or her country, and
- ❹ the asylum seeker has been persecuted because of either her or his race, religion, nationality, political opinion, or membership in a particular social group.

Arguments Used in Gang-related Asylum Cases⁵

There are patterns in successful gang-related asylum cases. Below we cite arguments that have been used in making successful gang-related asylum claims. It is important to note that as asylum is discretionary, even if an advocate successfully presents arguments proving eligibility for asylum, the adjudicator has discretion to evaluate if an individual *merits* asylum. Social group claims, the basis for most gang-related asylum claims, are particularly vulnerable because rules on what can be considered a social group are vague. Most of the cases cited here are unpublished, but much of the case law cited therein may be useful for building arguments to support specific gang-related asylum claims.

► Asylum seeker has suffered past and/or has a well-founded fear of future persecution

In gang-related asylum cases, past persecution and well-founded fear of future persecution are usually argued through presentation of evidence such as police reports in which threats by the gang are reported, death certificates of family members murdered by gangs, and affidavits by family members and expert witnesses who can verify the persecution and/or fear of future persecution that the asylum seeker claims in his or her affidavit. Well-founded fear of future persecution can also be demonstrated by showing a pattern or practice of persecution by similarly situated individuals. Country conditions documents are useful for making these arguments.

► The government is unable or unwilling to protect the asylum seeker from the persecution

As noted in the introduction, there is ample evidence that laws and policies in place to respond to the gang phenomenon in Guatemala, El Salvador and Honduras are ineffective and are probably making the problem worse.⁶ The governments of these countries have continued to pursue heavy-handed policies, in response to which gangs have increased their clandestine operations and raised their levels of organization. Police forces in El Salvador, Guatemala and Honduras do not respond effectively to the gangs and are currently unable to protect citizens targeted by gang members. There is evidence of police corruption and collaboration with gangs. The governments of El Salvador, Honduras and Guatemala have demonstrated that they are not able and/or not willing to protect individuals targeted by gangs because of their social group or anti-gang political opinions. The social groups most at risk of persecution by the gangs, such as abandoned youth living in the streets, are marginalized populations and are even less likely to receive protection from the government.

► Internal relocation to avoid gangs is not possible in El Salvador, Honduras or Guatemala

In Guatemala, Honduras and El Salvador, the three countries of origin of most asylum seekers making gang-related claims, the small

geographical area of the countries and lack of economic opportunity make relocation within the country impossible as an escape from targeted gang violence. Relocation within these three countries can provide neither physical security nor economic security. Even if one were able to move to another city, the gang presence is pervasive and relocation would not provide safety from persecution by gangs. Abandoned children without family support are even less likely to be able to relocate.

► **The asylum seeker has been and/or will be persecuted because of his or her identification with a specific social group, because of his or her political opinion, or religion.**

In order to establish eligibility for asylum, the asylum seeker must demonstrate a nexus between the past persecution and/or fear of future persecution and one of the five protected grounds for asylum: race, religion, nationality, political opinion, and membership in a particular social group. Most gang-related asylum cases are argued by demonstrating membership in a specific, persecuted social group, or by demonstrating that the asylum seeker was or will be persecuted because he or she holds or is believed to hold an anti-gang political opinion or because of his or her religion.⁷ Arguments for asylum under these three categories are described below:

a. Social group. When an advocate argues that the asylum seeker was persecuted by virtue of membership in a specific social group, the group must be defined narrowly for the argument to be successful. The group must be defined as a discrete and identifiable entity with immutable characteristics. Attorneys have had success making the social group argument when defining the group very specifically. In making social group arguments, it is important to avoid constructing circular groups that include the persecution in the social group, e.g., “young men who are subject to gang violence.” A more narrowly defined social group would not include gang violence in its definition, e.g., “young men who resist gang recruitment.” Also, the advocate

needs to make the claim that the group is cognizable in society. The following categories have been argued successfully:

- **Former law enforcement officials threatened by gang members**
e.g., *Matter of “Alvarez”* (unpublished case).⁸ In this case, the social group was defined as “former Salvadoran law enforcement officers”⁹ and the immutable characteristic of the group was “shared past experience of working in law enforcement.”¹⁰
e.g., *Matter of X* (unpublished case).¹¹ In this case the social group was defined as: “police officers who are members of the Special Crimes Unit and exclusively investigate organized crime and gang members.”
- **Women threatened by gangs**
e.g., *Matter of “Sandra”* (unpublished case).¹² The social group was defined as: “women who refuse to be the victims of violent sexual crime.”
- **Minors who were forcibly recruited to the gangs**
e.g., *Re Enamorado* (unpublished case).¹³ The social group was defined as “former gang member likely to be persecuted by government and non-governmental entities.”
e.g., *Castellano-Chacon v. INS* (published)¹⁴ Decision finds that “tattooed youth” is not a social group but that “former gang members” might be.
e.g., *Re D-V*, (unpublished case)¹⁵ IJ Castro, Sept. 9, 2004, Ruled that the petitioner was eligible for asylum based on his persecution by gang members on account of his membership in the particular social group of those who “have been actively recruited by gangs, but who have refused to join because they oppose the gangs.” There was no appeal by the Attorney General of this ruling.

b. Political opinion. Some attorneys have successfully argued that their clients are

Relocation within these [El Salvador, Guatemala, Honduras] three countries can provide neither physical security nor economic security.

- e.g., *Matter of “Alvarez”* (unpublished case).¹⁶ The political opinion whose expression led to persecution was defined as “pro-rule of law, anti-gang political opinion.”
- e.g., *Matter of X* (unpublished case). The political opinion was defined as “public opposition to crime and investigation of the gangs.”¹⁷
- e.g., *In re Orozco-Polanco* (unpublished opinion).¹⁸ The political opinion was defined as “anti-gang sentiments.”

c. Religion. With mixed success, some advocates have argued that former gang members and others are eligible for asylum based on their religion or religious belief.

- *Matter of J.J.R.* (unpublished case).¹⁹ If returned to El Salvador J.J.R. would be forced to re-join the gang which would “defy his religious beliefs.”

- ▶ 8 U.S.C. §1101(a)(42)(A)
- ▶ 8 USC 1158
- ▶ 8 C.F.R. §208.13
- ▶ *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987)
- ▶ *Matter of Mogharrabi*, 19 I & N. Dec. 439 (BIA 1987)
- ▶ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status
- ▶ EOIR guidelines on unaccompanied minors' cases
- ▶ INS guidelines on children's asylum claims

A client not eligible for asylum does have other options. Attorneys have sought to prevent their client's deportation through seeking Withholding of Removal under the INA; through invoking the Convention Against Torture (CAT); through seeking Temporary Protected Status (TPS) for people from countries for which TPS is in effect; or pursuing "T" visas for victims of trafficking.

- 1 See the resources page for links to specific legal resources
on asylum issues. This section offers basic, non-technical
information about gang-related asylum, but should not be used
in replacement of legal advice from a qualified attorney.
- 2 8C.F.R. § 208.4(a).
- 3 INA §101 (a) (42)(A); 8 U.S.C. §1101(a)(42)(A).
- 4 The REAL ID (H.R. 418) act passed in 2005 may affect the
way the criteria for seeking asylum should be argued. See:
<http://www.AILA.org> for more information on REAL ID.
- 5 Individual cases vary widely, and additional arguments may be
relevant to individual gang-related cases. The non-technical
description of the arguments for gang-related asylum cases may
not be exhaustive but should provide a basis for beginning
research of individual cases.
- 6 Washington Office on Latin America. *Executive Summary:
Transnational Youth Gangs in Central America, Mexico and the
United States*. Washington, D.C., 2007. [http://www.wola.org/
media/Gangs/executive_summary_gangs_study.pdf](http://www.wola.org/media/Gangs/executive_summary_gangs_study.pdf).
- 7 Some attorneys have argued religious persecution, i.e., an
individual won't join the gang due to religious convictions
and is targeted for persecution by the gang as a result, though
fewer of these cases have been successful.
- 8 Memorandum of Law in Support of the Asylum Application
of Juan Alvarez. [http://www.refugees.org/uploadedFiles/
Participate/National_Center/Resource_Library/ES_012\(2\).pdf](http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/ES_012(2).pdf).
- 9 *Matter of Acosta*, 19 I&N Dec.211, 233-34 (BIA 1985).
- 10 *Matter of Acosta*, 19 I&N Dec 211 233-34 at 233, (“The
shared characteristic might be an innate one such as sex,

color, or kinship ties, or in some circumstances it might be shared past experience such as former military leadership or land ownership.”).

¹¹ Case no longer publicly accessible, but cited here for reference.

¹² *Fatin v. INS*, 12 F.3d1233, 1241 (3rd Cir.1993) http://www.refugees.org/article.aspx?id=1892&amp;subm=75&amp;area=Participate&amp;and_Matter_of_Acosta, 21 I&N Dec 357 (BIA 1996) http://www.refugees.org/uploadedFiles/Participate/National_Center/Resource_Library/G.008.pdf.

¹³ See the Asylum Resource Guide by the Capital Area Immigrant Rights (CAIR) Coalition. <http://www.refugees.org/article.aspx?id=1944&subm=75&area=Participate&ssm=118>.

¹⁴ *Castellano-Chacon v. INS*, 341 F.3d 533, 553 (6th Cir. 2003).

¹⁶ U.S. Committee for Refugees and Immigrants, "El Salvador" Resource Library, <http://www.refugees.org/article.aspx?id=1890&subm=75&area=Participate&ssm=86>.

¹⁷ See *Elias-Zacarias*, 502 U.S. 478 (1992) Argued November 4, 1991 Decided January 22, 1992.

¹⁸ Contact the Capital Area Immigrant Rights Coalition for a copy of this case.

¹⁹ The case can be found on the USCRI website <http://www.refugees.org/article.aspx?id=1890&subm=75&area=Participate&ssm=86>.