

SHOULD FORMER GANG MEMBERS BE ELIGIBLE FOR ASYLUM?: THE WAY
IMMIGRATION JUDGES CURRENTLY DECIDE THE ISSUE AND NECESSARY
CHANGES TO THE CURRENT SCHEME

BY

Nathan L. Herbert

Spring 2008 King Scholar Seminar
Instructor: Professor Kevin Saunders
Expert Reader: Professor Glen Staszewski

SHOULD FORMER GANG MEMBERS BE ELIGIBLE FOR ASYLUM?: THE WAY
IMMIGRATION JUDGES CURRENTLY DECIDE THE ISSUE AND NECESSARY
CHANGES TO THE CURRENT SCHEME

Nathan L. Herbert

TABLE OF CONTENTS

INTRODUCTION	2
I. ASYLUM AND WITHHOLDING OF REMOVAL ELIGIBILITY	5
A. Asylum Eligibility.....	5
1. “Refugee” as Defined in 8 U.S.C. § 1101(a)(42)(A)	6
a. Persecution	7
b. Past persecution	8
c. “Well-founded Fear” of Future Persecution	9
d. Nexus Requirement.....	10
e. “Particular Social Group”	11
f. Exclusion from Asylum Eligibility.....	14
2. <i>Discretionary Grant</i>	15
B. Withholding of Removal and Eligibility	15
II. ANALYSIS OF ASYLUM RELIEF FOR FORMER GANG MEMBERS.....	16
A. Asylum Eligibility.....	17
1. <i>Persecution and “Well-Founded” Fear of Persecution</i>	17
2. <i>Particular Social Group and Nexus Requirement</i>	21
3. <i>Discretionary grant</i>	26
B. Withholding of Removal.....	27
III. THE REASON WHY “CRIMES” AND “CRIMINALITY” SHOULD NOT BE ANALYZED IN THE DISCRETIONARY GRANT OF RELIEF AND NECESSARY IDEOLOGICAL ADJUSTMENTS TO ASYLUM ADJUDICATION.....	28
A. Why “crimes” in General Should Be Outside the Limit of an Immigrations Judges Discretionary Consideration	28
B. Considering Only Gang Membership is Abuse of Discretion.....	32
B. Necessary Ideological Adjustments to Gang Member Asylum Adjudications.....	32
IV. PROPOSED STATUTORY AMENDMENT.....	33
A. Language of the Amendment.....	34
B. Placement in the Statute	35
CONCLUSION.....	35

INTRODUCTION

As a result of current United States immigration policy former gang member/aliens are being removed from the United Sates and are being handed an almost certain death sentence on

the way out. Immigration Judges are less than sympathetic to former gang members and often deny their claims for asylum relief. Most of us are not touched by this dilemma and could really care less about the ultimate fate of these individuals. However, the truth of the matter is that these individuals are human beings who deserve a chance to reform and make a better life for themselves and their families. They also deserve to be free from the retaliation and the threat of harm that occurs when they are removed from the United States.

At first blush this seems to be a somewhat irrelevant or unimportant inquiry. However, gang membership and claims of asylum or withholding of removal based on gang membership are a real possibility.¹ Overall it is estimated that there are 30,000 active gangs in the United States with approximately 800,000 members.² As of October, 2007, the FBI estimated that there are some 10,000 members of one particular gang known as the *Mara Salvatrucha*, or MS-13, living and operating within the United States.³ In fact, MS-13 is of such particular concern to the FBI that it has established an MS-13 National Gang Task Force.⁴ The harsh reality is that gangs are prevalent in the United States and their numbers will likely increase in the coming years.⁵ Many of these gang members are not U.S. citizens leaving Immigration Courts to deal with the issue of gang member aliens.⁶ A clear national policy needs to be established to deal with the

¹ The FBI noted that *mara salvatrucha*, or MS-13, is now prevalent in 40 states and 10 countries around the world. See Going Global on Gangs: New Partnership Targets MS-13, press release on October 10, 2007, available at <http://www.fbi.gov/page2/oct07/ms13tag101007.htm> (last visited on March 12, 2008).

² See *id.*

³ See *id.*

⁴ See The FBI's Violent Gang website, available at http://www.fbi.gov/hq/cid/ngic/violent_gangs.htm (last visited on March 12, 2008).

⁵ See generally Clare Ribando, *Gangs in Central America*, Congressional Research Service Report for Congress (updated August 2, 2007), available at <http://www.fas.org/sgp/crs/row/RL34112.pdf>. For more on the Congressional Research Service see the Library of Congress website available at <http://www.loc.gov/crsinfo/>.

⁶ See Ribando, *supra* note 5, at CRS Summary (noting that increased transnational gang activity will likely accelerate illegal immigration).

potential onslaught of claims by former gang members/asylum applicants.⁷ It is in the interest of judicial economy and national uniformity that such a policy is set in place.

A few specific questions have arisen regarding this dilemma. First, is former gang membership a “particular social group” such that former gang members can make a colorable claim of “refugee” status? Second, if a former gang member could establish that he is a refugee as defined by 8 U.S.C. § 1101(a)(42)(A), would an Immigration Judge use his discretionary powers to grant the relief? Thirdly, if the Immigration Judge does not grant asylum relief, is there any other form of relief a former gang member/asylum applicant can seek to forestall removal to the proposed country of removal? Finally, if an otherwise eligible applicant is denied relief, are there ideological changes that need to be made in asylum adjudications?

This Note attempts to analyze these questions in further detail and provide answers and guidance to Immigration Judges⁸ who will be forced to make these life altering, highly important decisions. This Note contends that it is possible for an individual to establish membership in a particular social group based on past gang membership. Even more likely, the individual will be able to establish that he has a well-founded fear of being removed from the United States based on the former gang membership. Under the current ideology it is unlikely that an Immigration Judge would grant relief based on former gang membership as was the case in the Ninth Circuit’s decision in *Arteaga v. Mukasey*.⁹ Unfortunately the reasoning espoused in that case is ultimately

⁷ See N.C. Aizenman, *More Immigrants Seeking Asylum Cite Gang Violence*, WASHINGTON POST, November 15, 2006, at A8; see also Washington Office on Latin America (“WOLA”), *Gang Related Asylum Project*, available at <http://www.wola.org/> (follow “Programs” hyperlink; then follow “Gangs” hyperlink; then follow “Gang-Related Asylum Project” hyperlink) (noting that many youth flee their home countries because they were involved in gang activity and wish to get out but will be persecuted in their home country for doing so).

⁸ Immigration Judges are trial level judges for the Executive Office for Immigration Review (“EOIR”) which is an agency of the Department of Justice headed by the United States Attorney General. For the purposes of this Note, the terms “Attorney General” and “Immigration Judge” or “Immigration Court” will be used somewhat interchangeably. For more information on the Attorney General and agency structure visit: http://www.usdoj.gov/02organizations/02_1.html.

⁹ See *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007).

wrong. Asylum claims brought by former gang members should be evaluated on a case-by-case basis and there should not be a *per se* rule denying relief to such applicants.

Part I of this Note deals with the topics of eligibility for asylum and withholding of removal. It analyzes the statute establishing what is required for an applicant seeking asylum and how an Immigration Judge decides if the applicant is entitled to the relief sought. The second section of Part I discusses an alternative form of relief known as “withholding of removal.” That section discusses the intricacies of the alternative form of relief and how it is granted. Part II discusses whether former gang membership conceivably fits within the definition of a particular social group. This analysis deals with whether and how an applicant could potentially establish a colorable claim without more than former gang membership as a basis. Part III is the proposal of how former gang members should be dealt with and why. This Part discusses what Immigration Judges should use to evaluate the eligibility of an applicant who bases a claim on gang membership. Part IV of the Note is the proposed statutory amendment. That part lays out the language of the amendment, discusses its implications, and details where it is to be placed in the statute. Finally, the Note will conclude with an overview of the proposal and a comment on how the changes will fit within the current statutory scheme.

I. ASYLUM AND WITHHOLDING OF REMOVAL ELIGIBILITY

A. Asylum Eligibility

An applicant, physically present in the United States,¹⁰ may be granted asylum by the Attorney General if the Attorney General (i.e. Immigration Judge) determines that the alien is a “refugee” as defined in 8 U.S.C. § 1101(a)(42)(A).¹¹ The applicant has one year from the time of

¹⁰ See 8 U.S.C. § 1158(a)(1) (2006).

¹¹ See *id.* § 1158(b)(1).

entering the United States to file the application for asylum.¹² However, he may still be eligible notwithstanding the one year bar if he can demonstrate exception circumstances for the delay in filing.¹³ If the Attorney General determines that an application for asylum is untimely, no court is vested with authority to review that determination.¹⁴

The burden is upon the applicant to demonstrate that he is a refugee as defined in 8 U.S.C. § 1101(a)(42)(A), and the applicant must show that one of the five protected grounds is at least one central reason for the persecution he has suffered or potentially will suffer.¹⁵ Once an applicant has established that he is a refugee, the grant of asylum is within the discretion of the Attorney General.¹⁶ However, if an applicant was determined to be a “refugee” but did not warrant a favorable grant of discretion, he may still have recourse in a form of relief known as “withholding of removal.”¹⁷

1. “*Refugee*” as Defined in 8 U.S.C. § 1101(a)(42)(A)

A “refugee” is an alien, outside of his or her home country or last country of residence, who is unable or unwilling to return to that country because of past persecution or a well-founded fear of future persecution on account of race, nationality, religion, membership in a particular social group, or political opinion.¹⁸ The term “refugee” specifically excludes anyone who “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race,

¹² See *id.* § 1158(a)(2)(B).

¹³ See *id.* § 1158(a)(2)(D) (“An application for asylum of an alien may be considered...if the alien demonstrates the satisfaction of the Attorney General...extraordinary circumstances relating to the delay in filing an application....”).

¹⁴ See *id.* 1158(a)(3) (stating that no court shall have jurisdiction to review the Attorney General’s determination on timeliness of asylum application filing).

¹⁵ See *id.* § 1158(b)(1)(B)(i) (listing the five protected grounds as: race, religion, nationality, membership in a particular social group, or political opinion).

¹⁶ See *INS v. Elias-Zacarias*, 502 U.S. 478, 485 (1992) (noting, “[T]he Attorney General may, ‘in [his] discretion,’ grant asylum to refugees.”); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987) ([A]n alien who satisfies the applicable standard under § 208(a) does not have a *right* to remain in the United States; he or she is simply *eligible* for asylum, if the Attorney General, in his discretion, chooses to grant it.”).

¹⁷ See *id.* (noting that the Attorney General has no discretion to deny an eligible applicant withholding of removal).

¹⁸ See 8 U.S.C. § 1101(a)(42)(A) (2006).

religion, nationality, membership in a particular social group, or political opinion.”¹⁹ Essentially, the applicant must show that he was persecuted or has a well-founded fear of being persecuted in the country he will be removed to, but he cannot be a persecutor himself. He also has to demonstrate a nexus between his persecution and one of the five protected grounds: race, religion, nationality, membership in a particular social group, or political opinion.²⁰

a. Persecution

One basic element that must necessarily be addressed is whether the applicant has suffered, or has a well-founded fear of suffering, persecution. Persecution has been defined as “the infliction of suffering or harm upon those who differ in a way regarded as offensive.”²¹ Put differently, persecution is, “harm or suffering...inflicted upon an individual in order to punish him for having a belief or characteristic a persecutor [seeks] to overcome.”²² The act of persecution must be carried out either by a government actor or a group or individual the government is unable or unwilling to control.²³ A mere difficulty in controlling the behavior of a private individual is not enough; the applicant must show, “that the government condoned it or at least demonstrated a complete helplessness to protect the victims [of persecution].”²⁴ However,

¹⁹ See *id.* § 1101(a)(42)(B).

²⁰ See *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2005) (stating that the applicant was denied asylum because there was no nexus between the possible harm and one of the five protected grounds); see also *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1096 (9th Cir. 2000) (the applicant “must show that he was persecuted ‘on account of’ his membership in a particular social group.”); see also Jeffrey D. Corsetti, *Marked for Death: The Maras of Central America and Those Who Flee Their Wrath*, 20 GEO. IMMIGR. L. J. 407, 423 (2006) (stating that the applicant must show that he is being persecuted *because* of one of the five protected statutory grounds).

²¹ See *Ding v. Ashcroft*, 387 F.3d 1131, 1136 (9th Cir. 2004).

²² See *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985); see also *Kibinda v. AG of the U.S.*, 477 F.3d 113, 119 (3rd Cir. 2007) (“[W]e accepted the BIA’s definition of the term ‘persecution’ to include ‘threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.’”).

²³ See *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005) (noting that when the basis of the asylum claim is the actions of a private individual, the applicant must demonstrate that the government was unable or unwilling to control the persecutor); see also *Mohammed v. Gonzales*, 400 F.3d 785, 798 (9th Cir. 2005) (stating that with regard to Female Genital Mutilation cases in Somali, the fact that the Somali government does not have any laws precluding the practice evidences the fact that the government is unwilling to control the *per se* persecution); see also *Matter of Acosta*, 19 I. & N. Dec. 211, 222 (BIA 1985) (stating persecution is “harm or suffering ...inflicted either by the government of a country or by persons or an organization that the government was unable or unwilling to control.”).

²⁴ See *Menjivar*, 416 F.3d at 921.

an asylum applicant is not required to prove that the government “refused to protect him.”²⁵ Several courts have ruled that conscription, and punishment for evading conscription, into a sovereign’s military is not a sufficient ground for finding persecution.²⁶ However, conscription by guerilla organizations²⁷ or conscription by a nation’s military where the alien will be forced to commit humanitarian atrocities have been found to constitute persecution.²⁸ Surprisingly, an individual can also be persecuted in an economic sense.²⁹ Ultimately, persecution is a harm inflicted upon an individual for an illicit reason that Congress felt the United States could prevent or redress through its immigration policy.

b. Past persecution

When an asylum applicant demonstrates by a preponderance of the evidence that he has suffered past persecution, a rebuttable presumption arises that he has a well-founded fear of future persecution.³⁰ This presumption can be rebutted if the government can demonstrate that, either the country conditions in the proposed country of removal have changed such that the

²⁵ See *Valdiviezo-Galdamez v. AG of the U.S.*, 502 F.3d 285, 289 (3rd Cir. 2007).

²⁶ See *Lukwago v. Ashcroft*, 329 F.3d 157, 168-69 (3rd Cir. 2003) (“[A] sovereign nation enjoys the right to enforce its laws of conscription....We also are not inclined to suggest that a government that drafts its citizens for military service engages in persecution.”); see also *Kibinda v. AG of the U.S.*, 477 F.3d 113, 121 (3rd Cir. 2007) (noting that the general rule is that punishment for desertion does not constitute persecution for the purposes of an asylum claim).

²⁷ See *Lukwago*, 329 F.3d at 169 (stating that conscription into a guerilla organization could constitute persecution in appropriate circumstances).

²⁸ See *Kibinda*, 477 F.3d at 121 ([W]here conscription places an individual in a position in which he *might* be forced to commit acts that the international community condemns, punishment for refusing to participate in such acts may amount to persecution for purposes of an asylum claim.”).

²⁹ See *Borca v. INS*, 77 F.3d 210, 215 (7th Cir. 1996) (stating that persecution can be economic if it is of such a severity that it deprives the individual of all opportunity to make a living).

³⁰ See 8 C.F.R. § 208.13(b)(1) (2008) (“An applicant who has been found to have established past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim.”); see also *Valdiviezo-Galdamez*, 502 F.3d at 292 (“[A] lien who offers credible testimony regarding past persecution is presumed to have a well-founded fear of future persecution.” (citing *Berishaj v. Ashcroft*, 378 F.3d 314, 326 (3rd Cir. 2004))); see also *Lukwago v. Ashcroft*, 329 F.3d 157, 174 (3rd Cir. 2003) (noting that a rebuttable presumption is triggered when an applicant demonstrates past persecution); see also *Matter of Chen*, 20 I. & N. Dec. 16, 18 (BIA 1989) (stating that evidence of past persecution may be grounds for a grant of asylum only rebuttable by evidence that there is little likelihood of future persecution).

applicant has little fear upon return,³¹ or that the applicant can relocate within the country safely.³² In some instances, the demonstration of past persecution is sufficient for asylum notwithstanding the lack of a well-founded fear of future persecution.³³ Furthermore, the Board of Immigration Appeals and some courts have also utilized what has been dubbed “humanitarian asylum”.³⁴ Under the humanitarian asylum scheme an applicant may still be eligible for asylum despite little likelihood that he would actually be persecuted upon being returned to his home country.³⁵ The past harm inflicted on the applicant must have been particularly egregious and severe for him to qualify for this type of asylum relief.³⁶ This exception to requiring the applicant to demonstrate a well-founded fear of persecution prior to the grant of asylum has also been codified in the Code of Federal Regulations.³⁷ Essentially, if an applicant can demonstrate that he has suffered persecution on account of one of the five protected grounds, that history may be sufficient to grant the applicant the asylum relief he seeks.

c. “Well-founded Fear” of Future Persecution

If an asylum applicant cannot demonstrate that he suffered persecution in the past, he may still be a “refugee” if he can demonstrate that he has a “well-founded” fear of future

³¹ See *Matter of D-I-M-*, 24 I. & N. Dec. 448, 450 (BIA 2008) (noting that there is a burden shift to the government, after the applicant establishes past persecution, to demonstrate that either country conditions have change or that the applicant could safely relocate within the proposed country of removal).

³² See *Valdivizezo-Galdamez*, 502 F.3d at 292; see also 8 C.F.R. § 208.13(b)(1)(i)(A)-(B) (noting that the government can rebut the well-founded fear with a showing of changed country conditions or a showing that the applicant could safely relocate within the proposed country of removal).

³³ See *Matter of Chen*, 20 I. & N. Dec. at 18 (“[P]ast persecution and a well-founded fear of persecution are alternative methods of establishing eligibility for refugee status. If an alien establishes that he has been persecuted in the past for one of the five reasons listed in the statute, he is eligible for a grant of asylum.”)

³⁴ See *id.* at 19 ([T]here may be cases where the favorable exercise of discretion is warranted for *humanitarian* reasons even if there is *little likelihood of future persecution*.” (emphasis added)); see also *Lukwago v. Ashcroft*, 329 F.3d 157, 173-74 (3rd Cir. 2003) (recognizing the humanitarian exception announced in *Matter of Chen*); see also *Mohammed v. Gonzales*, 400 F.3d 785, 801 (9th Cir. 2005) (noting that even if the applicant’s record of past persecution could be successfully rebutted by the government, she may still be eligible for the “humanitarian exception.”).

³⁵ See *Mohammed*, 400 F.3d at 801 (“[A] victim of past persecution may be granted asylum even *without a fear of related future persecution*....” (emphasis added)).

³⁶ See *id.*; see also *Matter of Chen*, 20 I. & N. Dec. at 21 (finding applicant eligible for “humanitarian asylum” when he and his family were severely persecuted in the past).

³⁷ See 8 C.F.R. § 1209.13(b)(1)(iii)(B).

persecution.³⁸ The Supreme Court ruled that the “well-founded fear” standard is less than a preponderance standard.³⁹ In essence, the Court said the applicant could establish a well-founded fear with something less than a more likely than not standard. In fact, the Court noted that even a 10% chance of persecution upon being returned to the applicant’s home country may be sufficient to demonstrate a well-founded fear.⁴⁰ To establish a well-founded fear of future persecution, the applicant must establish two things. First, that he has a subjectively genuine fear of being returned to the proposed country of removal.⁴¹ This means that he must demonstrate that he genuinely fears being persecuted if returned to the proposed country of removal. Secondly, the applicant must show that the fear is objectively reasonable.⁴² In essence the applicant must show that a reasonable person in the applicant’s shoes would also fear being returned to the propose country of removal. The claim of fear upon being returned home (or to the proposed country of removal) is simply not enough. Essentially, a successful applicant must show that, “persecution is a reasonable possibility.”⁴³

d. Nexus Requirement

An asylum applicant, to successfully be classified as a “refugee,” must demonstrate that he was persecuted *on account of* one of the five protected statutory grounds: race, religion,

³⁸ See 8 U.S.C. § 1158(a)(42)(A).

³⁹ See *INS v. Cardoza-Fonesca*, 480 U.S. 421, 449 (1987) (“[T]o show a ‘well-founded fear of persecution,’ an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country.”).

⁴⁰ See *id.* at 440 (stating that there is “no room for concluding” that an alien with a 10% chance of being “shot, tortured, or otherwise persecuted” does not have a well-founded fear of persecution).

⁴¹ See *Matter of Acosta*, 19 I. & N. Dec. 211, 220 (BIA 1985) (noting that fear is a subjective emotion “characterized by the anticipation or awareness of danger”); see also *Kibinda v. AG of the U.S.*, 477 F.3d 113, 120 (3rd Cir. 2007) (“[A] petitioner must show a well-founded *subjective* fear....”(emphasis added)).

⁴² See *Matter of Acosta*, 19 I. & N. Dec. at 224 ([T]he Crucial question is whether the testimony, if accepted as true, makes out a realistic likelihood that he will be persecuted.”); see also *Kibinda v. AG of the U.S.*, 477 F.3d 113, 120 (3rd Cir. 2007) (noting that to establish a well-founded fear, the applicant must support his claim with objective evidence that persecution is “a reasonable possibility”).

⁴³ See *INS v. Cardoza-Fonesca*, 480 U.S. 421, 440 (1987) (citing *INS v. Stevic*, 467 U.S. 407, 424-25 (1984)).

nationality, membership in a particular social group, or political opinion.⁴⁴ This has become known as the “nexus” requirement for asylum applicants.⁴⁵ The five protected statutory grounds do not necessarily have to be the only reason that the individual was persecuted, but one of the grounds has to be at least one reason for the persecution.⁴⁶ It is the characteristic of the victim that is important and not the attributes of the persecutor.⁴⁷

e. “Particular Social Group”

Particular social group is of particular relevance to this Note, and is one of the five protected grounds that make up the essential elements of a claim for asylum. This Note explores the definition of particular social group particularly because there is the potential that asylum applicants will claim they have a well-founded fear of being returned to the proposed country of removal based on their former gang members which they contend constitutes a particular social group.

An applicant must show three things to successfully establish that he is a refugee based on his membership in a particular social group.⁴⁸ First, the applicant must show that there is a

⁴⁴ See 8 U.S.C. § 1158(b)(1)(A) (noting that , “the Attorney General may grant asylum to an alien...[if] the Attorney General determines that such an alien is a refugee within the meaning of section 1101(a)(42)(A)...”); see also 8 U.S.C. § 1101(a)(42)(A) (stating that a “refugee” is a person who has suffered past persecution or has a well-founded fear of persecution *on account of* race, religion, nationality, membership in a particular social group or political opinion); see also 8 C.F.R. § 208.13(b)(1) (listing the requirement that persecution or fear of persecution must be on account of one of the five protected grounds).

⁴⁵ See *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (9th Cir. 2005); see also *Corsetti*, *supra* note 19 at 423.

⁴⁶ See *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1096 (9th Cir. 2000) (“[P]ersecutory conduct may have more than one motive, and so long as one motive is of the statutorily enumerated grounds, the requirements [for asylum] have been satisfied.” (citing *Singh v. Ilchert*, 63 F.3d 1501, 1509-10 (9th Cir. 1995))); see also *Osorio v. INS*, 18 F.3d 1017, 1028 (2nd Cir. 1994) (stating that the persecution does not have to be based solely on account of the protected ground).

⁴⁷ See *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992) (noting in the case of an asylum claim based on political opinion, it is the victim’s political opinion, not the persecutor’s, that must be analyzed to determine if there is a nexus with the persecution); see also *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3rd Cir. 2003) (espousing the idea that there must necessarily be a correlation between the opinion held by the victim and the motive for the persecution).

⁴⁸ See *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004).

particular social group as defined by 8 U.S.C. § 1101(a)(42)(A).⁴⁹ Secondly, the applicant must show that he is a member of the group.⁵⁰ Finally, the applicant must demonstrate that he has a well-founded fear of persecution based on his membership in the group.⁵¹

There is no ready definition of “particular social group” that can be found in the United States Code.⁵² However, throughout the years many courts have attempted to flesh out exactly what constitutes a “particular social group.”⁵³ One particularly important Board of Immigration Appeals (“BIA”) case, *Matter of Acosta*,⁵⁴ has been cited in numerous other opinions for setting the framework for the current understanding of the definition of particular social group.⁵⁵ In that opinion the BIA proclaimed that a particular social group had to be made of individuals who share “a common, immutable characteristic” that they either “cannot change or should not be required to change because it is fundamental to their individual identities or consciences.”⁵⁶ Some examples the BIA gave representing a common, immutable characteristic were: sex, color, kinship, or past experiences including former military leadership or land ownership.⁵⁷

The Ninth Circuit established a new direction with regard to defining particular social group relative to the Board and other Circuit Courts who follow the definition in *Matter of*

⁴⁹ See *id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See *Matter of Acosta*, 19 I. & N. Dec. 211, 232 (BIA 1985) (noting that neither Congress nor the United Nations provided a definition of particular social group); see also *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1191 (10th Cir. 2005) (“The [Immigration and Nationality Act] does not define the phrase particular social group.”).

⁵³ See *Castellano-Chacon v. INS*, 341 F.3d 533, 546 (6th Cir. 2003) (claiming that there are three major definitions of particular social group followed by the different Circuit Courts).

⁵⁴ See *Matter of Acosta*, 19 I. & N. at 211.

⁵⁵ See *Cruz-Funez v. Gonzales*, 406 F.3d 1187, 1191 (10th Cir. 2005) (citing *Matter of Acosta* for the definition of particular social group and noting the BIA is entitled to deference); see also *Elien v. Ashcroft*, 364 F.3d 392, 396 (1st Cir. 2004) (citing *Matter of Acosta* as an example of a particular social group definition); see also *Lukwago v. Ashcroft*, 329 F.3d 157, 171 (3rd Cir. 2003) (noting that the definition of particular social group found in *Matter of Acosta* has been adopted in the 3rd Circuit).

⁵⁶ See *Matter of Acosta*, 19 I. & N. Dec. at 233.

⁵⁷ See *id.*

Acosta.⁵⁸ In *Hernandez-Montiel v. INS*, the Ninth Circuit firmly established the fact that it recognized “voluntary associations” as well as immutable characteristics as bases for establishing the existence of a particular social group.⁵⁹ Seven years after the *Hernandez-Montiel* decision the Ninth Circuit further refined its particular social group definition in *Arteaga v. Mukasey*.⁶⁰ In that opinion the court clarified the definition of “voluntary association” stating that the voluntary association had to be based on “common characteristic[s]” which are “fundamental to the members’ identities.”⁶¹ Additionally, the court noted that the members of the “voluntary association” social group should have some sort of outward manifestation that members can be readily identified.⁶² The members of the group have to be easily identifiable which requires that the outward manifestation, whatever it may be, gives them “social visibility.”⁶³

However a court defines particular social group one thing is clear, the group members cannot be defined by the fact that they have been persecuted.⁶⁴ As noted by the Third Circuit Court in *Lukwago v. Ashcroft*,⁶⁵ “[B]ecause the persecution must have been ‘on account of’ a protected ground...[t]he ‘particular social group’ must have existed before the persecution began.”⁶⁶ Certain groups have been *per se* excluded from the definition of particular social

⁵⁸ See *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000).

⁵⁹ See *id.* (“We thus hold that a ‘particular social group’ is one united by a voluntary association, including a former association, or by an innate characteristic...that members either cannot change or should not be required to change....”).

⁶⁰ See *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007).

⁶¹ See *id.* at 944.

⁶² See *id.* at 944-45.

⁶³ See *id.* (citing *In re A-M-E-*, 24 I. & N. Dec. 69, 74-74 (BIA 2007)).

⁶⁴ See *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3rd Cir. 2003).

⁶⁵ See *id.* at 157.

⁶⁶ See *id.* at 172.

group.⁶⁷ Ultimately, what is deemed to be a particular social group for asylum purposes must be determined on a case-by-case basis.⁶⁸

f. Exclusion from Asylum Eligibility

Logically asylum benefits will not be extended to individuals who “ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁶⁹ This seems to be a classic example of the equitable “clean hands doctrine.”⁷⁰ Congress, when enacting this legislation, was unwilling to award relief to an applicant who has violated another individual’s rights in the same manner the applicant fears. Applicants convicted in a final judgment of a particularly serious crime are also ineligible for asylum relief.⁷¹ If an individual is convicted of an “aggravated felony”⁷² that individual will be considered to have committed a “particularly serious crime.”⁷³ Furthermore, an applicant who committed a serious nonpolitical crime⁷⁴ or is regarded as being a danger to the security of the United States is ineligible for the grant of asylum.⁷⁵ Unsurprisingly, if the applicant is involved in terrorist activity he or she cannot receive asylum benefits.⁷⁶ Lastly, but not related to criminal grounds, an applicant who has “firmly resettled in another country prior to arriving in the United States” will not be eligible for

⁶⁷ See *Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003) (stating that the Immigration and Nationality Act “was surely not intended for the protection of members of the criminal class”); see also *Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992) (“[W]e have no doubt that drug traffickers are not the sort of ‘particular social group’ to which the provision on asylum refers.”).

⁶⁸ See *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

⁶⁹ See 8 U.S.C. § 1158(b)(2)(A)(i).

⁷⁰ See BLACK’S LAW DICTIONARY 268 (8th ed. 2004) (noting that the “clean-hands doctrine” stands for the proposition that a party cannot seek discretionary (equitable) relief if that person has violated equitable principles).

⁷¹ See 8 U.S.C. § 1158(b)(2)(A)(ii).

⁷² See 8 U.S.C. § 1101(A)(43) for a list of crimes that constitute an “aggravated felony.”

⁷³ See 8 U.S.C. § 1158(b)(2)(B)(i).

⁷⁴ See *id.* § (b)(2)(A)(iii).

⁷⁵ See *id.* § (b)(2)(A)(iv).

⁷⁶ See *id.* § (b)(2)(A)(v).

asylum.⁷⁷ Essentially this means if an individual fled a country because of fear of persecution and safely resettled in another country the United States will not extend that individual the relief of asylum because he likely has a safe country in which to return.

2. Discretionary Grant

Once the applicant has successfully demonstrated that he is a “refugee,” as defined in 8 U.S.C. § 1101(a)(42)(A), then he is eligible for the grant of asylum under 8 U.S.C. § 1158 (b)(1)(A). However, it is within the discretion of the Immigration Judge, acting on behalf of the Attorney General, to grant the relief of asylum.⁷⁸ As the United States Supreme Court eloquently stated, “Whether or not a ‘refugee’ is eventually granted asylum is a matter which Congress has left the Attorney General to decide.”⁷⁹ This discretionary element, as we will see, likely presents and obstacle to the applicant making his claim based on gang membership.

B. Withholding of Removal and Eligibility

If an applicant is able to establish that he is a “refugee,” but is denied the discretionary grant of asylum by the Attorney General he may not be at a total loss. There is a form of relief known as “withholding of removal” that is not discretionary.⁸⁰ Withholding of removal is analyzed almost exactly the same as asylum with regard to requiring that the applicant establish that he is

⁷⁷ See *id.* § (b)(2)(A)(vi).

⁷⁸ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987) (stating that an applicant who satisfied the definition of refugee is merely eligible for asylum and only has a right to remain in the United States if the Attorney General grants the discretionary relief); see also *Majd v. Gonzales*, 446 F.3d 590, 595 (5th Cir. 2006) (“The Attorney General has complete discretion whether to grant asylum to eligible individuals.”).

⁷⁹ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987).

⁸⁰ See 8 U.S.C. § 1231(b)(3)(A) (“[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in *that* country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”) (emphasis added); see also *Castellano-Chacon v. INS*, 341 F.3d 533, 547-48 (6th Cir. 2003).

a refugee under 8 U.S.C. § 1101(a)(42)(A).⁸¹ Furthermore, an applicant is not eligible for withholding for the same reasons barring asylum applicants.⁸² There is, however, one main difference between the two forms of relief. The main difference is with regard to the burden on the applicant to show, not that he has a well-founded fear of persecution, but to show that it is more likely than not that he will be persecuted upon being removed to the proposed country of removal.⁸³ This higher burden was clearly elucidated in an opinion by the United States Supreme Court.⁸⁴ Although a grant of withholding of removal has a higher burden of proof placed on the alien, if successful, the relief comes with fewer benefits. Unlike asylum, the alien does not automatically receive lawful permanent resident (“LPR”) status in the United States and may not even have a right to remain in the United States.⁸⁵ Furthermore, a grant of withholding or removal does not grant derivative benefits on the relatives of the applicant.⁸⁶ Withholding of removal is not attractive as asylum, but many applicants plead for this form of relief in the alternative preparing for an Immigration Judge who is not sympathetic to their claim.⁸⁷ In the case of a former gang member/applicant this may currently be his only hope for relief.

II. ANALYSIS OF ASYLUM RELIEF FOR FORMER GANG MEMBERS

⁸¹ See 8 U.S.C. § 1231(b)(3)(A); see also *Castellano-Chacon*, 341 F.3d at 545.

⁸² See 8 U.S.C. § 1231(b)(3)(B)(i-iv).

⁸³ See *Castellano-Chacon*, 341 F.3d at 545 (“[T]he courts consider the same factors to determine eligibility for both asylum and withholding [of removal], but in the case of withholding [of removal], a higher probability of persecution is required.”).

⁸⁴ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987) (requiring applicants for withholding to show a “clear probability of persecution”).

⁸⁵ See *Castellano-Chacon*, 341 F.3d at 545 (espousing the idea that a successful withholding applicant simply cannot be removed to the initial proposed country of removal).

⁸⁶ See *id.* Under 8 U.S.C. § 1158(b)(3)(A), the spouse or child[ren] of a successful asylum applicant will be granted asylum derivatively whether or not they would eligible for such relief on their own. This benefit does not come with withholding of removal.

⁸⁷ See *Matter of D-I-M-*, 24 I. & N. Dec. 448 (BIA 2008) (alien sought review of denial of asylum, withholding of removal, and relief under the Convention Against Torture (“CAT”)); see also *Orlien v. Gonzales*, 467 F.3d 67, 69 (1st Cir. 2006) (applicant sought relief under asylum, withholding of removal, and relief under CAT); see also *Matter of J-E-*, 23 I. & N. Dec. 291, 292 (BIA 2002) (alien sought relief under asylum, withholding of removal, and relief under CAT).

This Note is attempting to answer three questions. First, is former gang membership sufficient to constitute a particular social group as defined in 8 U.S.C. § 1101(a)(42)(A) such that a former gang member would be eligible for asylum? If so, will former gang members be eligible for a discretionary grant of asylum? Finally, if they are not eligible for a discretionary grant, will they be eligible for withholding of removal?

A. Asylum Eligibility

1. *Persecution and “Well-Founded” Fear of Persecution*

To establish that an applicant has a well-founded fear of future persecution he must demonstrate that there is at least a “reasonable possibility” that he will be persecuted upon returning to the proposed country of removal.⁸⁸ The Supreme Court noted that a 10% chance of persecution upon return may be sufficient for finding a “reasonable possibility.”⁸⁹ The persecution must be carried out by a government official or a group that the government is unable or unwilling to control.⁹⁰ In the case of returning gang members the required proof of future persecution by either government actors or groups the government is unable or unwilling to control will not be difficult. This is particularly true of former gang members returned to the Central American countries of El Salvador, Guatemala, and Honduras,

⁸⁸ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987) (“There is simply no room in the United Nations’ definition for concluding that because an applicant only has a 10% chance of being shot, tortured, or otherwise persecuted, that he has no ‘well-founded fear’ of the event happening. [I]t is enough that persecution is a reasonable possibility.”).

⁸⁹ See *id.*

⁹⁰ See *Valdiviezo-Galdamez v. AG of the U.S.*, 502 F.3d 285, 288 (3rd Cir. 2007) (stating that persecution must either be carried out “directly by the government” or “by forces the government is unable or unwilling to control”); see also *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005) (“[P]ersecution...requires a harm to be inflicted either by the government of [a country] or by persons or an organization that the government was unable or unwilling to control.”); see also *Matter of Pierre*, 15 I. & N. Dec. 461, 462 (BIA 1975).

El Salvador has an uncontrolled gang problem which is evidenced by the fact that gangs influence the judicial and prison systems.⁹¹ The Salvadoran government is also plagued with corruption and members of the security force, known as the PNC, has been charged with outright criminal activity.⁹² To combat some of the gang problems in 2004 El Salvador has enacted legislation known as the *Super Mano Dura* (“Super Firm Hand”).⁹³ Pursuant to this legislative enactment there have been reports of harassment and unwarranted violence by the police against suspected gang members and gang member that have been removed from the United States.⁹⁴

Guatemala also seems to be loosely under control. Between 2003 and 2005, 4000 officers were dismissed from the Guatemalan police force for “irregular or criminal activities.”⁹⁵ The United States Department of State reported that the police arbitrarily detain gang members.⁹⁶ Allegedly the police routinely ignore the writ of habeas corpus in regard to suspected gang members.⁹⁷ Further exemplifying the lack of respect for individual rights, the State Department noted that, “police corruption was a serious problem.”⁹⁸ It seems that in Guatemala direct government persecution against returning alien gang members present a problem, and the government and security forces are out of control (some are even criminals). With this state of governmental affairs it seems likely that the Guatemalan government could not possibly stop a gang bent on persecution even if they had the political will to do so.

Finally, in a 2007 Human Rights Report published by the United States Department state, the State Departed noted that in Honduras high number of adolescents in urban areas were killed as

⁹¹ See U.S. Dept. of State, *2007 Country Report on Human Rights Practices – El Salvador*, § 1(c) (March 11, 2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100639.htm>.

⁹² See *id.* at § 1(d).

⁹³ See Ribando, *supra* note 5, at CRS-8 (updated August 2, 2007).

⁹⁴ See *id.* (noting, however, that there have been no reports of extra-judicial killings of gang members).

⁹⁵ See *id.* at CRS-9.

⁹⁶ See U.S. Dept. of State, *2007 Country Report on Human Rights Practices – Guatemala*, § 1(c) (March 11, 2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100641.htm>.

⁹⁷ See *id.* at § 1(d).

⁹⁸ See *id.*

part of a “social cleansing” program because they were suspected of being gang members.⁹⁹ The report disturbingly stated, “Human rights groups alleged credibly that individual members of the security forces and civilians used unwarranted lethal force against supposed habitual criminals or suspected gang members....”¹⁰⁰ Moreover, the Honduran government has made membership in a gang, in and of itself, a crime with penalties ranging from three to 12 years.¹⁰¹ There is little doubt that either a “social cleansing” program or a multiple year term of imprisonment for an illicit association qualify as persecution.¹⁰²

When an individual is removed from the United States and returned to a country, such as the ones previously discussed, it is very difficult to leave the gang culture and shed the social stigma that comes with being a gang member.¹⁰³ Short of a religious conversion, marriage, or other major life altering event former gang members have few options when trying to leave gang life.¹⁰⁴ This means that an individual returned to a gang infested country, covered with gang tattoos, will be easy fodder for gang recruitment and retaliation if the recruiting is refused. If these former gang members are forced back into the gang, that act of “conscriptio” alone would likely constitute persecution.¹⁰⁵ Sensationalized media accounts in Central American have further lead many citizens to believe that youth street gangs are responsible for most of the local

⁹⁹ See U.S. Dept. of State, *2007 Country Report on Human Rights Practices- Honduras*, § 1(a) (March 11, 2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100644.htm>.

¹⁰⁰ See *id.* at § 5.

¹⁰¹ See *id.* at § 2(d).

¹⁰² Persecution has been defined as, “[T]he infliction of suffering or harm upon those who differ.” See *Ding v. Ashcroft*, 387 F.3d 1131, 1136 (9th Cir. 2004).

¹⁰³ See *Ribando*, *supra* note 5, at CRS-5.

¹⁰⁴ See *id.*

¹⁰⁵ See *Lukwago v. Ashcroft*, 329 F.3d 157, 169 (3rd Cir. 2003) (noting that although a sovereign can rightfully conscript and individual in the military, an act of conscription by a guerrilla organizations may constitute persecution).

violent crime.¹⁰⁶ Some frightened individuals, not choosing to wait for police protection, have taken matters into their own hands by forming anti-gang vigilante groups.¹⁰⁷

Returning gang members may not only be subjected to violence by rival gangs or their own former gangs, they may also be subjected to economic persecution because the tattoos they wear prevent them from being gainfully employed.¹⁰⁸ As was stated in *Borca v. INS*, economic persecution occurs when an individual is deprived of all opportunity to make a living.¹⁰⁹

It is difficult to ascertain what group is likely to persecute a returning former gang member. An individual is potentially at risk of being persecuted upon returning to his home countries not only from rival gangs, but also from members of his former gang. Furthermore, since corruption is such a rampant problem and many officials are even involved in criminal activity, applicants may even be subject to persecution directly at the hands of government officials.¹¹⁰ This is especially evident in countries like El Salvador, Guatemala, and Honduras where corruption is a problem and the governments are unable to control the activity of violent gangs. The issue of the subjective genuineness of an applicant's fear will be adduced at trial.¹¹¹ However, because some governments may be involved in the persecution, or are unable or unwilling to control private individuals and groups who persecute, certain applicants will likely be able to make a colorable claim substantiating a well-founded fear of persecution because the fear is objectively reasonable.¹¹²

¹⁰⁶ See Ribando, *supra* note 5, at CRS-5.

¹⁰⁷ See *id.* at CRS-5.

¹⁰⁸ See *id.*

¹⁰⁹ See *Borca v. INS*, 77 F.3d 210, 215 (7th Cir. 1996).

¹¹⁰ See Ribando, *supra* note 5, at CRS-8.

¹¹¹ See 8 U.S.C. § 1158(b)(1)(B)(iii) (stating that the credibility of the applicant's testimony, i.e. the genuineness of the applicant's fear of persecution, is to be adduced at trial weighing factor such as internal consistency, candor, and plausibility).

¹¹² See *infra* Part I (A)(1)(a). To substantiate a claim for asylum the act of persecution must be carried out at the hands of the government or by a private group or individual that the government is either unable or unwilling to control. As long as one of these criteria is met it does not matter statutorily who is carrying out the persecution.

2. Particular Social Group and Nexus Requirement

Under the Ninth Circuit’s “voluntary association” definition of particular social group, it seems plausible and even likely that former gang members would qualify as a particular social group.¹¹³ Logically former gang members originally came together on a voluntary basis to associate and that association forms part of their individual identities. Even under the Ninth Circuit’s newest variant on “voluntary association” found in *Arteaga v. Mukasey*,¹¹⁴ which requires that individuals be associated for some reason that is fundamental to their human dignity, an applicant could make a colorable claim.¹¹⁵ It could be plausibly argued that certain gangs may even have been established for reasons of “human dignity” as required by the Ninth Circuit in its definition of particular social groups. For instance, the *Mara Salvatrucha*, or MS-13, was established as an organization for mutual aid and defense of Salvadoran immigrants living in Los Angeles.¹¹⁶ It was established for reasons of self-preservation which goes to the very heart of human dignity. Furthermore, MS-13 particularly was established by a group of immigrants with a common national origin which further goes to the heart of their dignity: ancestry and identity. The *Arteaga v. Mukasey* opinion concluded that associations established to carry out “violent criminal activity” were not within the realm of particular social group meant to be protected by asylum laws.¹¹⁷ Seemingly this would rule out former gang membership as a

Fear of persecution requires a subjectively genuine belief that is objectively reasonable to meet the quantum of proof required for a well-founded fear.

¹¹³ See *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) (“Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as members of that discrete social group.”).

¹¹⁴ See *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007).

¹¹⁵ See *id.* at 944.

¹¹⁶ See Ribando, *supra* note 5, at CRS-3; see also Knowgangs.com available at http://www.knowgangs.com/gang_resources/profiles/ms13/ (noting the history of the MS-13 and how the gang was developed by a group of Salvadoran immigrants).

¹¹⁷ See *Arteaga*, 511 F.3d. at 945-46.

valid particular social group. However, as noted by the Sixth Circuit, “[G]ang membership *cannot* be equated to criminal activity.”¹¹⁸

Outside of the Ninth Circuit former gang membership may also potentially constitute a particular social group. In dicta, the Sixth Circuit Court of Appeals specifically alluded to the fact that former gang members may be eligible for asylum benefits based on membership in a particular social group.¹¹⁹ That opinion noted, “[I]t is possible to conceive of the members of MS-13 as a particular social group under the I[mmigration] [and] N[atinality] A[ct]....”¹²⁰ The court hypothesized this scenario based on its definition of particular social group which was adapted from the *Matter of Acosta* opinion, to wit: common, immutable characteristic.¹²¹ The court’s hypothesis makes logical sense considering that something you did in the past is immutable – no matter how hard one tries, he cannot change his past. The court even went as far as enumerating former military leadership as one possible immutable characteristic which may form the basis for a particular social group.¹²² Although it is a somewhat attenuated comparison, former military leadership and former gang membership do have some parallels. For instance, both individual who were members of their respective organizations (gang and military) were initiated into the groups.¹²³ At one time their social status may have been established by the membership in the particular group. Thirdly, their societal status upon leaving the organization may be based on their former membership and participation (i.e. an individual might be stigmatized for military participation the same way a gang member may be stigmatized for his

¹¹⁸ See *Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003) (emphasis added).

¹¹⁹ See *Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003).

¹²⁰ See *id.*

¹²¹ See *id.* (noting that past experiences may constitute an immutable characteristic); see also *Matter of Acosta*, 19 I. & N. Dec. 211, 233-34 (BIA 1985) (stating that particular social group for asylum purposes is based on common, immutable characteristics that an individual cannot change or should not be required to change).

¹²² See *Matter of Acosta*, 19 I. & N. Dec. at 233.

¹²³ See *Castellano-Chacon*, 341 F.3d at 549 (noting that the initiation rights of gang members might be considered an immutable characteristic).

gang participation). Furthermore, gang members, such as the ones belonging to MS-13, wear evidence of their collective pasts on their bodies in the form of tattoos.¹²⁴ Unlike an individual who formerly served in the military who may be able to run from his past, tattooed gang members perpetually have vestiges of their past adorning their bodies. Although it is true that there are tattoo removal programs in place in some Central American countries, it appears that these programs seem to help very few people.¹²⁵

In practice, a court may defer to the Attorney General's position¹²⁶ on the definition of "particular social group," but the best interpretation is found in the definition adopted by the Ninth Circuit. This is evident for two reasons. First, the Ninth Circuit's definition is consistent with the Congressional intent. Second, the foundation for the definition found in *Matter of Acosta* is flawed.

Although not binding on the courts in the United States,¹²⁷ the Supreme Court noted that the United Nations High Commission on Refugees' ("UNHCR") standards should provide guidance to a court interpreting the definition of "refugee," and, thus, particular social group.¹²⁸ One way the UNHCR defined "particular social group" is a group of individuals with "similar

¹²⁴ Michele A. Voss, *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, 240 (2005) (stating that gang tattoos make it impossible for former gang members to flee their past); see also *Arteaga v. Mukasey*, 511 F.3d 940, 943 (9th Cir. 2007) (applicant claimed that he could not adequately cloak his gang tattoos and feared reprisal after identification).

¹²⁵ See Ribando, *supra* note 5, at CRS-5.

¹²⁶ The position adopted by the Attorney General is the one found in *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985). This was a decision by the BIA which is a part of the Executive Office for Immigration Review and is an alien's first line of appeal from the Immigration Court. The BIA is also the final arbiter of immigration issues within the Department of Justice. Beyond the BIA an alien has a direct appeal to the Circuit Court for the circuit where the Immigration court sits. For more information see <http://www.justice.gov/eoir/biainfo.htm>.

¹²⁷ See *Castellano-Chacon v. INS*, 341 F.3d 533, 548 (6th Cir. 2003) ("[W]e recognize that UNHCR guidelines are not binding....").

¹²⁸ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437-39 (1987) (noting that Congress intended to incorporate the UNHCR definition of "refugee" found in the United Nations Protocol when it reformed the asylum statute and that the *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* is a proper guide for a court wrestling with elusive definitions).

background, habits or social status.”¹²⁹ Certainly an individual’s voluntary associations will have a direct causal link to that individual’s social status and may even be the sole determining factor. After all, “you are judged by the company you keep.” Also, an individual’s habits will likely be formed as a result of their social interaction. For instance, an individual’s manner of dress, choice of occupation, choice of habitation, and other activities will, to a great degree, be dictated by with whom the individual associates. These things are most certainly considered “habits.” Therefore, the definition of particular social group provided by the Ninth Circuit, a voluntary association, is in line with that of the UNHCR which is the polestar of the definition Congress intended.¹³⁰ That definition is also logical in light of the term “particular social group.” It could very simply mean a group formed for social purposes, namely: a voluntary association.

Furthermore, the foundation for the definition found in *Matter of Acosta* is flawed. The BIA used the canon of statutory construction, *ejusdem generis*,¹³¹ to conclude that particular social group must be founded in a common, immutable characteristic among its members because all the other protected grounds¹³² relate to things an applicant either cannot or should not have to change.¹³³ What the BIA failed to account for is that a political opinion is not immutable even though it may be essential to the identity of an individual. Simply put, an individual can hold any political opinion he so chooses. If one of the grounds for asylum can be voluntary and not immutable, it logically follows that others could also be voluntary. Therefore, *ejusdem*

¹²⁹ See United Nations High Commission on Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 77 (UNHCR 1979) available at <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>.

¹³⁰ See *Cardoza-Fonseca*, 480 U.S. at 437-39.

¹³¹ The BIA tried to determine what “particular social group” meant by looking at the other enumerated, protected grounds. That is the basis of *ejusdem generis*: you can determine the meaning of a term in a statute by looking at the other specific terms near it. See *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

¹³² The protected grounds are race, religion, nationality, membership in a particular social group, and political opinion. See 8 U.S.C. § 1101(a)(42)(A).

¹³³ See *Matter of Acosta*, 19 I. & N. Dec at 233.

generis is not a proper statutory canon to use in the context of asylum eligibility, and it should not be used to define “particular social group.”

It is true that the BIA noted that, with regard to political opinion, an applicant *should not be required* to change his or her belief.¹³⁴ However, the same can be said for the choice of with whom an individual associates. Both the political opinion of an individual and his choice of associates are end results of subjective evaluations made by that individual. The individual makes political choices just like he chooses his friends and may make those decisions for the same reasons. Unfortunately for former gang members, the BIA respects the subject evaluation with regard to political opinions but not in the context of associations.

Even though the BIA was not willing to take direct notice of the subjective qualities of some of the protected grounds, the opinion does indirectly point to voluntary association as a means to establishing a social group. It did this by specifically enumerating former military leadership as a basis for a particular social group.¹³⁵ Assuming the former military leader was not conscripted, his choice to enter the service was the result of a subjective evaluation. Just like an individual chooses his associates, a military leader likely chooses to join the military. Ultimately the “immutable characteristic” approach to particular social group is incorrect and does not take into account the fact that at least one enumerated, protected ground is obviously based on a subjective choice. The Ninth Circuit’s “voluntary association” approach is plausible in light of the fact that not all protected grounds are immutable. It also seems to be the better approach and a logical way to define “particular social group.”

Regardless of what definition of particular social group a court uses, it is plausible that an applicant with a gang history could establish that he is a member of a particular social group and

¹³⁴ *See id.*

¹³⁵ *See id.*

that he has well-founded fear of being persecuted based on membership in that group.¹³⁶ So while it may be preferable to remove individuals who are connected to criminal activity when possible, we must note that not all gang members are criminals and some may join for reasons other than the perpetration of illicit activity.

3. *Discretionary grant*

Assuming an applicant who is a former gang member successfully convinced the Immigration Judge that he meets all the requisite criteria and is a “refugee” under 8 U.S.C. § 1101(a)(42)(A), he still has to “jump the hurdle” of convincing the Immigration Judge that he should receive a favorable grant of discretionary asylum relief.¹³⁷ Convincing the Immigration Judge that allowing an individual, who was associated with a group known for its involvement in criminal activity, is in the best interest of the people of the United States will no doubt be a heavy burden. In all likelihood an Immigration Judge will decline to grant the requested relief and find the applicant removable.¹³⁸ The very idea that an individual would seek the protection of the United States by way of asylum, claiming membership in a particular social group comprised of a street gang, seemed to offend the Ninth Circuit in *Arteaga v. Mukasey*.¹³⁹ This idea seemed so offensive that, even if the equities were overwhelmingly in favor of the applicant,

¹³⁶ See *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004) (noting that an applicant must show: A. that group exists, B. that he is a member of that group, and C. that he will be persecuted on account of the membership).

¹³⁷ The grant of asylum relief is within the Immigration Judge’s discretion even if the applicant has established that he is a “refugee.” See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 443 (1987) (stating that an applicant who satisfied the definition of refugee is merely eligible for asylum and only has a right to remain in the United States if the Attorney General grants the discretionary relief); see also *Majd v. Gonzales*, 446 F.3d 590, 595 (5th Cir. 2006) (“The Attorney General has complete discretion whether to grant asylum to eligible individuals.”).

¹³⁸ It seems that in some cases the courts have re-characterized the applicant’s claim to avoid granting asylum to a former gang member. See *Castellano-Chacon v. INS*, 341 F.3d 533, 549 (6th Cir. 2003) (noting that the applicant was not really advocating he was a member of a particular social group based on past gang membership, but that his claim “at best” was that he belonged to a group defined as “tattooed youth”); see also *Arteaga v. Mukasey*, 511 F.3d 940, 945 (9th Cir. 2007) (focusing on the fact that an applicant was involved with a group who was engaged in criminal activity without considering the fact that the group, i.e. gang, may have been established and maintained for some other purpose).

¹³⁹ See *Arteaga*, 511 F.3d at 945-46.

the court would never grant the asylum relief based on principle.¹⁴⁰ This ideology seems to be the current trend,¹⁴¹ but conclusory denial of eligibility for former gang members presents a problem. Immigration Judges and judges sitting on the courts of appeals are basing the denials on discretionary inquiries that should not be delved into.

B. Withholding of Removal

Without the possibility of a discretionary grant of asylum relief, an applicant who has established “refugee” status based on former gang membership is left with one option - withholding of removal. Withholding of removal is compulsory and not subject to an Immigration Judge’s discretionary grant.¹⁴² Therefore, under the existing statutory scheme, as long as the applicant establishes that he is a refugee, and it is more likely that not that he will be persecuted upon being returned to the proposed country of removal, the Immigration Judge must grant him withholding of removal relief and he cannot be removed to the proposed country of removal.¹⁴³ Essentially, withholding of removal is a country specific form of relief.¹⁴⁴ A successful applicant will not be removed to the country where persecution is likely and will be relocated to a country that is hospitable.¹⁴⁵

The downfall of this form of relief is that it does not allow the applicant to remain in the United States and his relatives are not granted a derivative form of relief as would be the case in

¹⁴⁰ See *id.* (“To [grant asylum based on gang membership] would be to pervert the manifest humanitarian purpose of the statute in question and to *create a sanctuary for universal outlaws.*”) (emphasis added).

¹⁴¹ See *Arteaga*, 511 F.3d at 945-46; see also *Castellano-Chacon*, 341 F.3d at 533.

¹⁴² See 8 U.S.C. § 1231(b)(3)(A) (“[T]he Attorney General may not remove an alien to a country if the Attorney General decides that the alien’s life or freedom would be threatened in *that* country because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 (1987) (noting that the Attorney General was stripped of discretion with regard to withholding of removal); see also *Castellano-Chacon*, 341 F.3d at 547-48.

¹⁴³ See 8 U.S.C. § 1231(b)(3)(A).

¹⁴⁴ See *Cardoza-Fonseca*, 480 U.S. at 429.

¹⁴⁵ See *id.*

asylum.¹⁴⁶ However, this is an important and meaningful alternative to asylum for an individual who is not eligible for the discretionary grant. It could mean the difference between the ability to start a new life elsewhere in a welcoming land and the possibility of certain death upon returning to one's home country.

III. THE REASON WHY “CRIMES” AND “CRIMINALITY” SHOULD NOT BE ANALYZED IN THE DISCRETIONARY GRANT OF RELIEF AND NECESSARY IDEOLOGICAL ADJUSTMENTS TO ASYLUM ADJUDICATION

The case that comes closest to answering the ultimate question posed by this Note (whether an applicant who is a former gang member could successfully establish that he is a “refugee” and, thus, be eligible for asylum benefits) is the Ninth Circuit case of *Arteaga v. Mukasey*.¹⁴⁷ Ultimately the court found the particular applicant ineligible for asylum based on his criminal record and the fact that he was still a gang member.¹⁴⁸ Throughout the opinion, however, the court sprinkled in references to gang activity and it basically assumed that all gang members are criminals and, as such, should be completely excluded from asylum relief.¹⁴⁹ The court noted that gangs could simply not constitute particular social groups because their shared past experiences included violent criminal activity.¹⁵⁰ This assumption was previously refuted by the Sixth Circuit in *INS v. Castellano-Chacon* when the court reminded us all that, “[G]ang membership *cannot* be equated to a criminal activity.”¹⁵¹

A. Why “crimes” in General Should Be Outside the Limit of an Immigrations Judges Discretionary Consideration

¹⁴⁶ See *Castellano-Chacon*, 341 F.3d at 545 (espousing the idea that a successful withholding applicant simply cannot be removed to the initial proposed country of removal and that the spouse or child[ren] of a successful asylum applicant will be granted asylum derivatively whether or not they would be eligible for such relief on their own while that is not the case with an applicant who qualifies for withholding of removal.).

¹⁴⁷ See *Arteaga v. Mukasey*, 511 F.3d 940 (9th Cir. 2007).

¹⁴⁸ See *id.* at 945, 949.

¹⁴⁹ See generally *id.*

¹⁵⁰ See *id.* at 946.

¹⁵¹ See *Castellano-Chacon*, 341 F.3d at 549 (emphasis added).

When an Immigration Judge¹⁵² denies asylum relief to an otherwise qualified “refugee” based solely on the fact that the applicant was a member of a gang, the end result is problematic. This discretionary exercise is not warranted or permissible. It is clear that, to a certain degree, the ultimate grant of asylum relief is within the discretion of the Immigration Judge if he is satisfied that the applicant meets the definition of “refugee” as found in 8 U.S.C. § 1101(a)(42)(A).¹⁵³ It is also equally clear that when Congress drafted the legislation setting forth the requirement for asylum eligibility it specifically enumerated crimes which, if the applicant was convicted, he would be excluded from eligibility for asylum.¹⁵⁴ Through the enactment of this legislation, Congress demonstrated that it specifically contemplated criminal aliens and the consequences of their actions. As was stated in the classic agency discretion case, *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, “If the intent of congress is clear, that is the end of the matter...the agency [] must give effect to the unambiguously expressed intent of Congress.”¹⁵⁵ In the case of an applicant with no criminal record, but a gang affiliation, it is clear that Congress did not intend to deny the discretionary grant of asylum relief to that particular applicant on that particular basis.

Congress spoke with clarity and without ambiguity when it enumerated the crimes that would preclude applicants for asylum relief.¹⁵⁶ It is true that Congress did leave room for the *Attorney General* (not the Immigration Judge) to decide if any further crimes would be a bar as

¹⁵² In this Note the analysis will focus on Immigration Judges who are trial level judges under the Executive Office for Immigration Review (“EOIR”) which is a sub agency of the Department of Justice. The opinions at the trial level are not published so the sentiments of the circuit court judges regarding gang members will be imputed to the Immigration Judges. For more on the EOIR or the immigration courts see <http://www.usdoj.gov/eoir/>.

¹⁵³ See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987) (noting that the grant of asylum is within the discretion of the Attorney General (Immigration Judge)).

¹⁵⁴ See 8 U.S.C. § 1158(b)(2)(A)(i-vi).

¹⁵⁵ See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

¹⁵⁶ See *id.*; see also 8 U.S.C. § 1101(a)(43).

well as if there would be any further limitation or conditions placed on asylum grants.¹⁵⁷ The fact that this statutory grant of authority is a limitation on the Immigration Judge is evident by the fact that the statute requires all subsequent changes to be made by “regulation.”¹⁵⁸ So, although there is no question that Immigration Judges have some discretion to determine whether to grant an applicant relief, it appears that their discretionary inquiries are limited in scope.¹⁵⁹ Logically, therefore, the Immigration Judge’s discretionary determination must be based on something other than perceived criminality. Congress already spoke to the issue of criminal record and did not leave the criminal activity element to the discretion of the Immigration Judge.¹⁶⁰

Firstly, the fact that there is an enumerated list of crimes in the asylum statute demonstrates that Congress contemplated exactly how criminal aliens were to be treated with regard to asylum. Congress did not intend for all criminals to be excluded from asylum relief. This is evidenced by the language of 8 U.S.C. § 1158(b)(2)(A)(v). Although it could have denied asylum relief all criminal aliens regardless of the severity of their crimes, it did not. Congress chose to only limit those applicants (other than the ones were guilty of persecution¹⁶¹ or ones who had committed particularly serious crimes¹⁶²) who were involved in terrorist activity through incorporation of 8 U.S.C. § 1182(a)(3)(B)(i)(I-VI)¹⁶³ in the asylum statute. That section, 8 U.S.C. § 1182, specifies certain grounds of inadmissibility for aliens and specifically

¹⁵⁷ See 8 U.S.C. § 1158(b)(2)(B)(ii), (b)(2)(C).

¹⁵⁸ See *id.* This fact seems to imply that if additional crimes are to be bars to asylum, or other conditions are placed on a favorable grant of the relief, that the changes could not be made by a trial level Immigration Judge and would have to be made through the regulation process.

¹⁵⁹ See *Chevron U.S.A., Inc.*, 467 U.S. at 842-43 (noting that when Congress has spoken directly on the precise question at issue it is the end of the inquiry and the agency is not left with discretion).

¹⁶⁰ See 8 U.S.C. § 1158(b)(2)(A)(i-vi); see also 8 U.S.C. § 1101(a)(43).

¹⁶¹ See 8 U.S.C. § 1158(b)(2)(A)(i).

¹⁶² See 8 U.S.C. § 1158(b)(2)(A)(ii).

¹⁶³ See 8 U.S.C. § 1158(b)(2)(A)(v).

enumerates crimes that would render an alien inadmissible to the United States.¹⁶⁴ However, Congress, in the asylum statute, chose to specifically deny otherwise inadmissible criminal aliens asylum only for the most heinous crimes.

Using the cannon of statutory construction, *expression unius est exclusion alterius*,¹⁶⁵ a court could reasonably conclude that Congress enumerated certain crimes that would be a bar and did not leave the inquiry open for the Immigration Judge's exercise of discretion. Moreover, a well known and long settled principle of statutory construction is to limit general statutory wording by more specific language found in the same statute.¹⁶⁶ In the *Fourco Glass Company v. Transmirra Products Corporation* case the United States Supreme Court clearly stated, "Specific terms prevail over the general in the same or another statute which might otherwise be controlling."¹⁶⁷ What this means in the immigration context is that, although Congress left the Attorney General with a great deal of discretion when deciding whether a refugee would be granted asylum,¹⁶⁸ it did not leave the Immigration Judge with the discretion to deny the grant of asylum on the grounds of criminal activity unless the applicant had been convicted of the specific barring criminal violations found in 8 U.S.C. § 1158(b)(2)(A)(i-iii). Lastly, if a court is not moved by the foregoing argument, they must recognize that any ambiguity in how an immigration statute is to be applied in removal proceedings, the statute must be construed to favor the alien.¹⁶⁹ Much like the *rule of lenity*¹⁷⁰ in criminal law, ambiguous statutes must be read in favor of the non-governmental party.

¹⁶⁴ See 8 U.S.C. § 1182(a)(2).

¹⁶⁵ See BLACK'S LAW DICTIONARY 620 (8th ed. 2004) (defining the term to mean [T]o express or include one thing implies the exclusion of the other, or of the alternative.").

¹⁶⁶ See *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228-29 (1957).

¹⁶⁷ See *id.*

¹⁶⁸ See 8 U.S.C. § 1158(b)(1)(A) (the statute notes that the Attorney General "may grant asylum to an alien" if "such alien is a refugee within the meaning of section 1101(a)(42)(A)").

¹⁶⁹ See *INS v. St. Cyr*, 533 U.S. 289, 320 (2001).

¹⁷⁰ See BLACK'S LAW DICTIONARY 1359 (8th Ed 2004).

B. Considering Only Gang Membership is Abuse of Discretion

Even if an Immigration Judge impermissibly factors in gang membership and perceived criminal activity when making the discretionary determination, denying relief *solely on the basis* of former gang membership would be an abuse of discretion.

The grant or denial of asylum by the Immigration Judge is reviewed by the “abuse of discretion” standard.¹⁷¹ An Immigration Judge must weigh all factors for and against the grant of asylum when making the ultimate determination and cannot focus solely on one factor.¹⁷² This was evident in the recent unreported opinion of *Worku v. Mukasey*.¹⁷³ In that opinion the Ninth Circuit remanded a case finding the Immigration Judge abused his discretion denying asylum relief to an applicant when the Immigration Judge *only* considered the fact that the applicant was a member of a group known to use landmines to further its political goals.¹⁷⁴ The court noted, “[T]he I[mmigration] J[udge] abused its discretion in denying Worku asylum because the I[mmigration] J[udge] did not properly consider all relevant factors weighing in favor of and against granting asylum.”¹⁷⁵

The same analysis applies with a former gang member. An Immigration Judge cannot rely solely on the fact that an applicant was a gang member to deny the applicant asylum relief. The judge must weigh all factors – good and bad – to make the ultimate determination. To weigh only the one “negative” factor would be an abuse of discretion and is impermissible.¹⁷⁶

C. Necessary Ideological Adjustments to Gang Member Asylum Adjudications

¹⁷¹ See 8 U.S.C. § 1252(b)(4)(D) (noting that the Attorney General’s decision as to the grant of asylum under 8 U.S.C. § 1158 shall be conclusive “unless manifestly contrary to the law and *an abuse of discretion*.”) (emphasis added).

¹⁷² See *Worku v. Mukasey*, No. 04-71230, 2008 WL 510536, at *2 (9th Cir. Feb. 26, 2008).

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ See *id.* (“This Court has repeatedly held that in exercising its discretion the IJ *must* consider and weigh all relevant favorable and adverse factors.”) (citing *Kalubi v. Ashcroft*, 364 F.3d 1134, 1139 (9th Cir. 2004)).

All of these points lead to the conclusion that Immigration Judges were not granted the discretion to deny asylum relief based on convictions for crimes that were not enumerated in 8 U.S.C. § 1158(b)(2)(A)(i-iii), nor for being associated with individual who may have committed such crimes. Without a conviction, and specifically a conviction for one of the crimes enumerated in the statute, an individual's criminal record or record of illicit associations should not be a matter for the Immigration Judge's discretionary consideration.

There is no doubt that if an alien is convicted of a crime listed in 8 U.S.C. § 1158(b)(2)(A)(i-iii) he is not eligible for asylum relief. However, it seems that a court like the one who decided *Arteaga v. Mukasey* is willing to find a former gang member guilty by association and foreclose any opportunity for relief.¹⁷⁷ This is simply not permissible and foreclosing relief based solely on gang membership is an abuse of discretion.¹⁷⁸

The solution to this current ideological dilemma is to clarify the fact that Immigration Judges do not have unlimited discretion to deem an applicant ineligible for asylum relief, based on a criminal history or presumed criminal activity, unless the applicant has been convicted for the enumerated crimes found in 8 U.S.C. § 1158(b)(2)(A)(i-iii). The Immigration Judge should make a case-by-case analysis of each applicant to determine whether he is a "refugee," and if there is a reason other than perceived criminality to deny the asylum relief sought.

IV. PROPOSED STATUTORY AMENDMENT

To ensure nationwide uniformity, this Note proposes that 8 U.S.C. § 1158 should be amended. The amendment is necessary to clarify the fact that Immigration Judges have limited discretion and may only take into account criminal convictions which have been specifically enumerated in the statute when deciding whether an applicant is eligible for asylum relief. The

¹⁷⁷ See *Arteaga v. Mukasey*, 511 F.3d 940, 945-46 (9th Cir. 2007) (referring to gangs as "outlaw groups" and implying that all gangs and all gang members participate in "violent criminal activity").

¹⁷⁸ See *Worku*, No. 04-71230, 2008 WL 510536, at *2.

Immigration Judge cannot deny relief on the assumption that the applicant is involved in criminal activity or is associated with others who are so involved.

A. Language of the Amendment

This Note proposes to amend 8 U.S.C. § 1158 thereby clarifying the limitations placed on the discretion of an Immigration Judge when adjudicating asylum applications. The language that should be added to the statute is as follows:

Once an asylum applicant has established, to the satisfaction of the Attorney General, that he is a “refugee” as defined in 8 U.S.C. § 1101(a)(42)(A), the Attorney General shall, within his limited discretion, determine if such applicant is eligible for a grant of asylum. The Attorney General’s discretionary inquiry is limited by the other specific provisions of this section. Furthermore, the Attorney General may not deny an otherwise qualified applicant based solely on an actual or perceived past illicit association (gang membership).

This statutory amendment clarifies some things that may not have been readily apparent prior. First, it clearly demonstrates that the Attorney General has discretion to decide the issue of asylum eligibility after refugee status has been established. The discretionary grant could have been gleaned by the use of the term “may” in 8 U.S.C § 1158(b)(1)(A),¹⁷⁹ but after the adoption of this amendment there will be no doubt that asylum eligibility is partially discretionary.¹⁸⁰ Secondly, this amendment elucidates the fact that Immigration Judges do not have unlimited discretion to determine asylum eligibility for a qualified refugee. Now Judges will know, for instance, that illicit associations or perceived criminality cannot be reasons to deny an individual asylum relief. Congress clearly spoke to the issue of how to deal with criminal aliens and the

¹⁷⁹ See 8 U.S.C. § 1158(b)(1)(A) (“the Attorney General *may* grant asylum to an alien”) (emphasis added).

¹⁸⁰ Courts have stated that asylum relief is somewhat discretionary previously but the idea was never clearly elucidated in the statutory language. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987) (the Supreme Court recognized that the ultimate grant of asylum was within the discretion of the Attorney General); see also *Majd v. Gonzales*, 446 F.3d 590, 595 (5th Cir. 2006) (echoing the same notion of the Attorney General’s discretion).

amendment specifies that Immigrations Judges cannot consider the issue of criminality outside of the crimes specified in the statute.¹⁸¹

It may sound ludicrous to the average citizen that an Immigration Judge would be precluded from considering an applicant's propensity for committing crimes when deciding asylum eligibility. However, that is exactly how Congress structured the statute and the Congressional intent needs to be observed and respected. Congress did leave a provision that allows the Attorney General to specify crimes that will be considered barring offenses in the asylum statute, but these crimes must be "designate[d] by regulation" which means that the Immigration Judge cannot make the decision.¹⁸² Conceivably these new, not yet enumerated, offenses must be established in the Code of Federal Regulations and not by the whim of the Immigration Judge.

B. Placement in the Statute

This additional language will be placed in 8 U.S.C. § 1158(b)(2)(C) with the other "Additional Limitations." This is the logical place to put the amendment because it is where an individual would look to see the limiting factors of the statute. This new amendment will be read in conjunction with the other limitations language that requires the Attorney General to change the conditions for an asylum grant by regulation only.¹⁸³ The placement will make it evident that judicial fiat will not be a sufficient way to add limitations to an asylum applicant.

CONCLUSION

It seems plausible, even possible, that under the right set of circumstances a former gang member may be able to establish that he is a "refugee" under 8 U.S.C. § 1101(a)(42)(A).

Normally establishing refugee status would be sufficient for a discretionary grant of asylum.

However, it is currently unlikely that a judge would grant asylum relief to an individual based on

¹⁸¹ See 8 U.S.C. § 1158(b)(2)(A)(i-iii).

¹⁸² See 8 U.S.C. § 1158(b)(2)(B)(ii).

¹⁸³ See 8 U.S.C. § 1158(b)(2)(C).

former gang membership status.¹⁸⁴ Under the current ideology former gang members may not be at a total loss. If they are able to establish refugee status, assuming there is no other bar to relief, they will be eligible for withholding of removal and will not be removed to their home country. This means that they may be removed from the United States, but they will not be sent where their lives are in peril. However, if the proposed solution is adopted, Immigration Judges will be forced to take a hard look at the individual applicant and give serious consideration to his asylum claim based on former gang membership. No longer should an individual be denied necessary, life-saving relief because of past association or judicial misperception. Immigrations Judges must not broaden the scope of their asylum inquiry and this amendment helps clarify that fact.

¹⁸⁴ *But see* Castellano-Chacon v. INS, 341 F.3d 533, 549 (6th Cir. 2003) (implying that if an alien properly plead an argued he may be able to establish that former gang membership is a particular social group).