



The Honorable Judge Eileen Trujillo  
Immigration Court  
1961 Stout Street  
Denver CO 80294

Letter of Amicus Curiae, American Immigration Lawyers Association

Granting asylum is a hallmark of our nation's civilization. This civilized act of protecting foreigners from persecution is codified at § 208(a) of the Immigration and Nationality Act. Under § 208(a), the motivation of the persecutor is the defining characteristic of United States asylum law. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). Congress intended for the asylum statute to cast a protective net around those who could potentially come to harm if that harm was or is caused by ill motives, to wit, because of a victim's race, religion, nationality, political opinion, or membership in a particular social group.

Motives, though, are difficult to pin down. More so the difficulty given the reality of asylum adjudication: “Persecutors do not always take the time to tell their victims all the reasons they are being beaten or kidnapped or killed. Sometimes, they may not want their motives known for fear of public condemnation; other times, the motives may be so clear to both parties that no explanation is needed.” *Gafoor v. INS*, 231 F.3d 645, 650 (CA9 2000) Congress has never meant for asylum adjudication to be a precision endeavor. Indeed, it cannot be. It would be an impossible task to precisely discern the motives of persecutors who may not always articulate their motives to their victims and are not present in this court to be cross-examined. It is black letter law that “an applicant does not bear the unreasonable burden of establishing the exact motivation of a ‘persecutor’ where different reasons for actions are possible.” *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211 (BIA 2007).

So how, then, should a court approach ascertaining the motivation of the persecutor? In this letter, the American Immigration Lawyers Association, describes an approach to consistently apply the "one central reason" prong of INA § 208(b)(1)(B)(i). This letter cites to the facts in this case merely as illustrative of the legal issues, AILA takes no position on the merits.<sup>1</sup>

First, the court should identify the persecutor with clarity. This identification process includes naming the persecutor as well as describing the persecutor's history, purpose and goals. Second, the court should ascertain why the persecutor would harm (or harmed) the applicant. This involves a comparison of the evidence in the record, both direct and circumstantial, of the persecutor's reason with the claimed nexus. If there is a match with a protected ground, nexus is established.

#### **A. Identifying the Persecutor**

Who is the persecutor? While this seems to be an obvious question, in the so-called "gang" cases, this step may frequently be overlooked and, as a result, the analysis in the "gang" cases can become distorted. The grouping of such diverse and autonomous organizations such as the M-18 and MS-13 into a monolithic vague entity called "the gangs" obfuscates this critically important step of identification. It is *only* through the precise identification of the persecutor can the adjudicator elucidate the motivation for the persecution.

Indeed, the so-called "gangs" are, in fact, individual, particular sophisticated organizations with political agendas and objectives. They have structured leadership, communications systems, enforcement priorities and protocols. They act with particular motives to achieve their agenda and objectives. *See, e.g.*, Exh. M at 1

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<sup>1</sup> AILA is particularly well suited to assist the Court because we have recognized expertise on asylum law. The BIA has requested amicus briefing from AILA on numerous questions of law because of its expertise. Indeed, AILA's amicus positions have been adopted by the BIA in numerous published opinions. *See, e.g., Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014); *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010); *Matter of Abdelghany*, 26 I&N Dec. 254 (BIA 2014); *Matter of Garcia Garcia*, 25 I&N Dec. 93 (BIA 2009). In addition, AILA has appeared before the Supreme Court and every federal circuit court in an amicus capacity, with frequent favorable citation to its briefs and well-considered analysis.

(Sworn Declaration of Thomas J Boerman, Ph.D.) (cautioning against the use of the generic title of “gangs” because it introduces analytical distortions).

We use Ms. Respondent’s case as an example. The claimed persecutor here is the M-18. *See* Exh. J (Sworn Statement of - Respondent -). By naming the persecutor, the court can ascertain the history, purpose, and objectives (if any) of the M-18. The court could rely on experts, general country conditions, and the applicant’s own testimony as sources for this information. Here, as an example, the M-18’s political point of view merits identification because it provides the framework for understanding why and when a victim’s characteristics (be it, e.g., the victim’s religion, social group, nationality, race or political opinion) are actually (or perceived to be) hostile to the M-18.

The general country conditions show that the M-18 is widely considered a Third Generation gang that operates with political motivations and largely has taken control over government functions in the vast poorly governed spaces of Guatemala. *See, e.g.* Exh. P at 295-339 (Manwaring, *A Contemporary Challenge to State Sovereignty*); *id.* at 340-348 (Brands, *Third Generation Gangs and Criminal Insurgency in Latin America*).

An expert on the M-18 reinforces this finding and elaborates on it. In the declaration of Thomas Boerman, Ph. D, *see* Exh. M., he describes the M-18 as being “well resourced and defined by sophisticated organizational structures and concrete political agendas that are implemented through the combination of political manipulation and terror.” at 13. He opines that the M-18, like other third generation gangs, have motives “to impose their power and undermine the operational capacity and authority of legitimate state actors in order to create a socio-political climate in which they are free to expand and operate with virtual impunity.” *Id.*

As often may be the case, a respondent’s own testimony may provide the most granular level of evidence of the history, purpose and objectives of the persecutor. For example, Ms. Respondent has elaborated on her own personal experience with the M-18. *See* Exh. J (Sworn Statement of - Respondent -); Exh. K (Sworn Statement of - - -).

## **B. At Least One Central Reason**

*Why* does the M-18 harmed and intend to harm Ms. Respondent?

Every applicant for asylum has the burden to bring forth a preponderance of the evidence of the persecutor's motivation to harm the applicant. The applicant must demonstrate "facts on which a reasonable person would fear that the danger arises on account of" the claimed ground. *Matter of J-B-N- & S-M-*, 24 I&N Dec. 208, 211 (BIA 2007); *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646-47 (CA10 2012) (same). The evidence generally takes two forms: direct evidence or circumstantial evidence. *INS v. Elias Zacarias*, 502 U.S. 478, 481-83 (1992).

Direct evidence of motivation could include a persecutor's actual statement plainly providing for its motivation. *See Matter of S-P-*, 21 I&N Dec. 486, 494 (BIA 1996). It could be a manifesto. It could be propaganda or other dissemination of the persecutor's thoughts and intentions. With direct evidence, once presented, there is no other additional need for evidence of motivation and no inferences are necessary.

Again, using Ms. Respondent's case as an example, there are several items that provide direct evidence of the M-18's motivations. In her sworn statement, she explains that the M-18 told her that they were harming her and would harm her because of her husband. That is, the direct evidence of the motivation is what the M-18 said to her and that is the *sine qua non* of evidence.

Circumstantial evidence of motivation is equally valid to demonstrate motivation. In asylum claims, circumstantial evidence is especially powerful because it can elucidate facts that would be impossible to pin down otherwise. *See Gafoor*, 231 F.3d at 650. Many applicants may not know a belief or characteristic is the root of their problems - that is, they may only know that, for example, the M-18 has and wants to harm the family.

To explain this point, we draw on Ms. Respondent's case for examples. There are several instances where the record provides circumstantial evidence of the M-18's motivation. For example, the close proximity in timing between her spouse's preaching and the harm the M-18 cause him and her plainly indicates that the M-18 acted because of the preaching. Or, for example, after Ms. Respondent tells the M-18 that she was Christian, the M-18 tried to rape her. The cause ("I'm Christian")

and effect (attempted rape) are reasonable inferences to draw from the circumstances. The expert opinion of Dr. Boerman provides additional circumstantial evidence of the motivation. See Exh. M at 17 (describing the anti-religious viewpoint of the M-18 and how it attributes dissident political opinions to persons of faith).

This case also helps illuminate why proving motivation is not a precise science. Why does the M-18 want to harm and harmed Ms. Respondent? There is direct and circumstantial evidence that the motivation is because the M-18 wants to harm Ms. Respondent in order to harm her husband, the M-18 views her husband's family as guilty for her husband's perceived anti-gang sentiments; the M-18 wants to suppress the expression of her religious beliefs because of the religious content of those beliefs; and, the M-18 wants to suppress her religious beliefs because they are viewed by the M-18 as dissident political opinion. The evidence points to several overlapping reasons why the M-18 harmed (and will harm) the applicant.

It makes sense that a sophisticated organization like the M-18 would have mixed motivations to harm the applicant. And in the end, an applicant for asylum need only show a match between one of the motivations and a protected ground. When there are mixed motivations, the applicant is not required to show that the persecutor is *only* motivated by a protected ground. See *Matter of J-B-N & S-M-*, 24 I&N Dec. at 213; see also House Conf. Report 109-72, 2005 USCCAN 240, 288 (same). Indeed, the INA requires only that political opinion, or one of the other protected grounds, "was or will be at least one central reason for the persecution." See INA § 208(b)(1)(B). Accordingly, the "plain language [of the statute] indicates that a persecutor may have more than one central motivation for his or her actions; whether one of those central reasons is more or less important than another is irrelevant." *Ndayshimiye v. U.S. Attorney General*, 557 F.3d 124, 129 (CA3 2009) (agreeing in part with *J-B-N-*).

Here, as it happens, there is a categorical match between each of the M-18's motivations and a protected ground.

### **C. Conclusion**

In sum, Ms. Respondent's claim presents a prototypical example of a case in which an applicant may be granted asylum because she fears persecution on account of a protected ground by a "gang". Her claim demonstrates the importance of identification and good record development to demonstrate the "at least one central reason" for persecution by direct or circumstantial evidence.

Respectfully submitted,

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