



AMERICAN  
IMMIGRATION  
LAWYERS  
ASSOCIATION

November 3, 2014

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

Re: Name Withheld

Letter of Amicus Curiae, American Immigration Lawyers Association

Dear Honorable Judge Trujillo:

Asylum law provides refugee protection to Central American women and children fleeing gang violence. Amicus, the American Immigration Lawyers Association, proffers this letter to an analytical framework for adjudicating precedent regarding when an asylum applicant fleeing gang persecution may be protected based on her “political opinion.” Specifically, AILA addresses the governing case law from the Supreme Court, the Tenth Circuit, and the Board of Immigration Appeals. It cites to the facts in this case as illustrative of the legal issues, though takes no position on the merits.<sup>1</sup>

In addressing an asylum claim based on the applicant’s political opinion, where the alleged persecutor is the MS-13 or M-18, AILA suggests two steps as an appropriate analytical framework. *First*, the Court should ascertain whether the applicant has adequately described an opinion that is a “political opinion” cognizable under INA § 101(a)(42)(A), be it actual or imputed. *Second*, the Court should determine whether

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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.

there is sufficient evidence in the record that the persecutor was or would be motivated to persecute the applicant because of the applicant's political opinion.

**A. Is the opinion asserted by the applicant a “political opinion” protected by INA § 101(a)(42)(A)?**

The first step in addressing a political opinion asylum claim is to identify the opinion asserted by the applicant and then determine whether that opinion constitutes a “political opinion” as defined by statute. Section 101(a)(42)(A) of the INA protects a woman who is persecuted on account of her political opinion. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992). An opinion is considered “political” if it is a sufficiently detailed articulation of an “an ideal or conviction of sorts[.]” *Saldarriaga v. Gonzales*, 402 F.3d 461, 466 (CA4 2005). The opinion can be an actual opinion of the applicant's or an opinion imputed to the applicant.

The political opinion ground is broad and “designed to suit the situation of common [people], not only that of philosophers.” See Grahl-Madsen, *The Status of Refugee in International Law* 251 (1966).<sup>2</sup> That is to say, a political opinion is not limited to adherence to a formal political ideology or to the platform of an official political party. Instead, § 101(a)(42)(A) protects *any* opinion on *any* matter in which the machinery of the State or uncontrolled non-state actors may be engaged against. See Goodwin-Gill, *The Refugee in International Law* 30 (Oxford: Clarendon Press, 1983).

Ms. Respondent's claim is a good example to illustrate this point. She describes both an actual political opinion and imputed political opinion of being “an anti-gang dissident” because she opposes (and is perceived to oppose) the MS-13. See Exhibit 4 (Respondent's Pre-Hearing Statement) at 13-14. This formulation of her opinion is certainly cognizable as a “political opinion” under § 101(a)(42)(A) because it provides all the relevant detail needed to determine that it is based on an “ideal or conviction of sorts”. It describes her actual belief that she is opposed to the MS-13. See Exhibit 4 at 13 (explaining that she made statements such as filing a police report opposing the MS-13). This belief is based on her “ideal or conviction of sorts”

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<sup>2</sup> Mr. Grahl was the original commentator on the Refugee Convention on which U.S. asylum law is based.

in being opposed to the MS-13; that is, it is a dissident point of view. A dissident viewpoint is a view that opposes a different (often more powerful) point of view.

It is also a good example of an adequately described *imputed* political opinion. Here, Ms. Respondent asserts that the MS-13 has imputed to her an anti-gang dissident viewpoint because of her association with her partner, Spouse (and his relevant activities) as well as her filing of a police report against the MS-13. *See* Exhibit 4 at 3-5, 13-15. The imputation of a dissident political opinion may occur based on the applicant's past associations, family ties, race, nationality, or social class, among other characteristics.

Ms. Respondent's case nicely illustrates how to prove imputation. For example, the evidence that she presented to prove that the MS-13 imputed this anti-gang dissident point of view to her is particularly strong. There is an expert declaration and related testimony that explains that "the MS-13 and M-18 engage in exercising political power at its most basic element: obey the rules and orders of the MS-13 and M-18, or face violent reprisals." *See* Exhibit 4 at 13 (Expert Declaration of Elizabeth Kennedy). Ms. Respondent asserts that she her husband did not obey the rules of the MS-13, therefore the "refusal to obey the rules and orders is viewed by the MS-13 and M-18 as defiance to their control." *Id.* Her partner's refusal to support the MS-13 through "extortion-via-tax" payments, his support of the ARENA political party, and his filing of police reports denouncing the MS-13 are viewed by the MS-13 as "antagonistic act[s] in derogation of their 'rule'." *Id. See also id.* at 14 (explaining and showing photographs of ARENA's anti-gang philosophy and seeking the public anti-gang vote by saying "we are safe in the parks" and "my salary is not for the gangs"); Exhibit 4 at 98 (New York Post article explaining that the MS-13 "has been secretly backing the El Salvador's ruling party [FMLN] for several years, according to evidence that has emerged in recent weeks.").

In addition, Ms. Respondent's own testimony and personal experience reinforces the expert's conclusion regarding the MS-13's political motivations. *See, e.g.* Exhibit 1 (Form I-870 Q&A) (responding to the question "Q. Who threatened you for your political opinion? A. The gangs.").

**B. Is there direct or circumstantial evidence that the persecutor is motivated to harm the applicant because of her political opinion?**

The second step is determining whether the persecutor is *motivated* to harm “on account of” of the applicant’s political opinion (actual or imputed). The BIA has made plain 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). Rather, the applicant must demonstrate “facts on which a reasonable person would fear that the danger arises on account of” the political opinion. *Id.*; *Rivera-Barrientos v. Holder*, 666 F.3d 641, 646-47 (CA10 2012) (same). The Supreme Court has held that the applicant can use direct or circumstantial evidence to prove the motivation (that is, the nexus) of the persecutor. *INS v. Elias Zacarias*, 502 U.S. 478, 481-83 (1992).

### **1. Direct and Circumstantial Evidence of Motive**

Again, Ms. Respondent’s claim provides useful examples as to how to prove the motivation of the persecutor. First, she has presented direct evidence through her personal experience and the personal experience of others. During her hearing she explained that she and her family were threatened with death and harm when her partner refused to obey the orders of the MS-13. She explained that her partner was attacked and shot immediately after he refused to obey the MS-13’s orders to make a tax-via-extortion payment. She has recounted the contents of the death threats and the timing of the death threats that directly prove the motivation of the MS-13 is because they believe she is a dissident because of her own actions and/or the beliefs imputed to her because of her partner’s actions.

Second, there is substantial circumstantial evidence, in the form of the expert declarations and country conditions reports, that detail the *modus operandi* of the MS-13. See *Rivera-Barrientos*, 666 F.3d at 646-47. The MS-13 would perceive (and her personal experience supports) that her actions or her partner’s actions would engender in the mind of the MS-13 that she was a dissident and that dissidents are brutally harmed. See Exhibit 4 at 15 (describing kill orders of the MS-13 against perceived dissidents); *id.* at 18 (explaining that murder is the most common form of persecution against dissidents); *id.* at 50 (describing MS-13 in Honduras that “[i]n essence, an individual who is tainted as an adversary to the MS-13 in most cases will be identified as a traitor and disposed of in a violent manner by the MS-13 to preserve and protect their organizational, political, and economic power[.]”); *id.* at

81 (explaining research showing that the MS-13 is a third generation gang that has “transcended operating on localized turf with a simple market focus to operate across borders and challenge political structures.”).

A recent article about asylum and the Central American gangs provides additional context for determining the motivation of the MS-13. See Deborah Anker & Palmer Lawrence, “*Third Generation*” Gangs, Warfare in Central America, and Refugee Law’s Political Opinion Ground, 14-10 Immigr. Briefings 1 (Oct. 2014). Well-established scholarship, highlighted by Anker & Lawrence, demonstrate that third generation gangs in Central America are not engaged merely in “criminal activity” or “economic terrorism.” *Id.* at 7. Instead, they are “nonstate organizations that are attempting to take control of the state,” operating in many instances as “de facto governments.” *Id.* at 1-2 (quoting Military Strategies Professor Max Manwaring, *Street Gangs: The New Urban Insurgency*, Strategic Studies Institute at vi (Mar. 2005)). Indeed, the MS-13 “[o]ne of the most powerful gangs” in the region, “rules entire municipalities.” *Id.* at 1. MS-13 “collects ‘taxes’ by extorting payments from bus drivers, cab drives, and local business owners.” *Id.* at 2. And like other gangs, MS-13 administers its own system of “justice, demanding certain behavior from . . . citizens and sanctioning those who do not obey.” *Id.* at 1 (quoting U.S. Agency for International Development Bureau for Latin America and the Caribbean, Central America and Mexico Gang Assessment 51 (2006)). In short, Central American gang violence is “political war.” *Id.* at 2 (quoting Manwaring, *supra*).

## 2. Mixed Motives

When there are mixed motivations, the applicant is not required to show that the persecutor is *only* motivated by the applicant’s political opinion. 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[.]” *Ndayshimiye v. U.S. Attorney General*, 557 F.3d 124, 129 (CA3 2009) (agreeing in part with *J-B-N-*).

Ms. Respondent's claim helpfully delineates the proof and inquiry into possible mixed motive cases. *See, e.g. Rivera-Barrientos*, 666 F.3d at 646-47. For example, the MS-13 has been described as a sophisticated, complex organization that ultimately may have several motives for engaging in harmful actions. Clearly, befitting the *de facto* government role it has, the MS-13 wants money to fund its continuing operations and existence. *See* Exhibit 4 at 12-13 (explaining the sophisticated manner in which it levies taxes-via-extortion); 132-136 (Manwaring scholarship describing the economic motivations of the MS-13). The MS-13 also is motivated to expand its ranks through forced affiliation or conscription. If the MS-13's motivation to harm an individual is solely because of one of these reasons, then it is not on account of the claimed political opinion of an anti-gang dissident. *See Rivera-Barrientos*, 666 F.3d at 646-47.

The direct and circumstantial evidence in this case, however, demonstrates that Ms. Respondent's political opinion (both the actual and imputed) is at least one central reason for the MS-13's motivation to harm her.

"The conclusion that *a* cause of persecution is economic does not necessarily imply that there cannot exist other causes of persecution." *Osorio v. INS*, 18 F.3d 1017, 1028 (CA2 1994). The MS-13 may have been motivated to harm Spouse for economic reasons (the MS-13 wants the payment) and political reasons (the MS-13 views the refusal to pay as an antagonistic expression of dissent to their rule). *See* Exhibit 4 at 12-15 (describing MS-13's interpretation of a refusal to pay as an anti-gang expression of a political viewpoint). *See also* Exhibit 4 at 87 (article explaining that MS-13 acts like a government by charging \$3 million monthly use-of-road fees to bus collective drivers like Spouse and that refusal to pay results in burning of buses or death).

The MS-13 might want to harm Ms. Respondent's son because they want him to join their ranks. Here, though the evidence plainly shows that the *principal* reason is that they want to harm him and the family because his refusal is, in their minds, a dissident expression of a political viewpoint. *Id.* at 13 ("if a resident refuses to join the gang after being ordered to do so, the refusal to join is *not* viewed by the gang so much as a determination of affiliation. Rather the MS-13 and M-18 view the refusal as a repudiation of their power and a defiance of their order.") (emphasis added); *cf. Rivera-Barrientos*, 666 F.3d at 647 (holding the particular evidence in that

particular case did not show a possible political motivation of the gang). Nor would it matter that a political opinion is cynically imputed. *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (CA9 1987) overruled on other grounds by *Fisher v. INS*, 79 F.3d 955 (CA9 1996) (en banc).

### **3. The Tenth Circuit Decision Of Rivera-Barrientos**

This two step analytical framework comports with the Tenth Circuit's opinion in *Rivera-Barrientos v. Holder*, 666 F.3d 641 (CA10 2012). In that case, the Respondent claimed that she resisted gang recruitment based on her political opposition to the gangs, and because she refused to join, the gangs brutally beat and raped her. *Id.* at 644-45. The Immigration Judge found her political opposition to gangs credible, but concluded, based on the record presented, that her opposition was *not* "at least one central reason" that she was attacked by the gangs. *Id.* at 646-47. That is, her persecution was *not* "on account of . . . her political opposition" because she presented no evidence that the gang was motivated to harm her for any reason other than forced affiliation. Had, instead, she shown that one central reason for the gang's persecution was her opinion, rather than only "a desire to coerce her to join," she could have prevailed on her claim; but the record did not provide such evidence. *Id.* at 647. Accordingly, the Tenth Circuit's decision in *Rivera-Barrientos* acknowledges political opinion claims are cognizable if the evidentiary record exists. *Rivera-Barrientos* merely reinforces the second question regarding evidence of motivation. In claims like Ms. Respondent's the salient point is always whether the record contains the evidence of motive. In *Rivera-Barrientos*, it did not. Here, it does. Here, the record evidence is substantial in demonstrating the motivation of the MS-13 in desiring to overcome Ms. Respondent's actual and imputed political opinion.

### **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 her actual or imputed political opinion. Her claim and the evidence that supports it illustrate that the two-step approach is necessary in adjudicating Central American asylum claims arising from persecution caused by the MS-13 or M-18. The record evidence and the vast scholarship recognize that characterizing Central American

gang activity as “pervasive non-political criminality” is no longer valid given the “increasingly political nature of the gangs.” Anker & Lawrence at 6.

Respectfully submitted,

*/s/ Deborah Smith*  
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