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February 23, 2009

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Re: Request for Attorney General Certification of
<u>*Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008)</u>

Dear Mr. Attorney General:

We write to you on behalf of our clients, Silvia Eulalia Gonzales Mira and her twin brothers, Pablo Alejandro and Rene Mauricio Mira (A98 122 614, -615, and -616), to urge you to review the attached decision of the Board of Immigration Appeals denying their applications for asylum.[1] The Board's decision abandoned without explanation the "immutable characteristic" approach to defining social group membership that it adopted in *Matter of Acosta*[2]—a twenty-four-year-old precedent that set the standard internationally for social group-based asylum claims.[3] In its place, the Board adopted an unwieldy standard with no textual basis that is flatly contrary to the United States' treaty obligations and all but eliminates social group membership as an independent ground for asylum. Even if the Board's decision were legally defensible, certification of *Matter of S-E-G-* is appropriate because of its sweeping implications. Indeed, under the Board's new standard, groups such as victims of female genital mutilation, escaped child soldiers, and homosexuals—all of whom previously found protection based on their membership in a particular social group—almost certainly would fail the Board's singular test for establishing the existence of a particular social group. The decision is also wrong on a basic

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1 *Matter of S-E-G-*, 24 I. & N. Dec. 579 (B.I.A. 2008) (attached hereto), *appeal docketed*, No. 08-2925 (8th Cir. Aug. 26, 2008) (stayed pending resolution of Motion to Reopen), *Motion to Reopen filed* Oct. 29, 2008 (pending as of Feb. 23, 2009).

2 19 I. & N. Dec. 211 (B.I.A. 1985).

3 *See, e.g.*, *Shah & Islam v. Sec'y of State for the Home Dep't*, [1999] 2 A.C. 629 (H.L.) (United Kingdom); *Ward v. Attorney Gen. of Canada*, [1993] 2 S.C.R. 689 (Can.); *In. re G.J.*, Refugee Appeal No. 1312/93 (N.Z. R.S.A.A. 1995) (New Zealand); *see also* United Nations High Commissioner for Refugees, Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, U.N. Doc. HCR/GIP/02/02 ¶¶ 11-13 (May 7, 2002) ("UNHCR Guidelines").

human level because it will force three innocent youths to return to El Salvador and face a grave risk of death, as both the Immigration Court and Board fully acknowledged.

BACKGROUND

Silvia, Pablo, and Rene spent much of their childhood in Santa Maria, El Salvador. Like much of El Salvador, Santa Maria is plagued by endemic gang violence. When Pablo and Rene were fourteen years old, the notorious international street gang Mara Salvatrucha (also known as "MS-13") approached the boys and demanded that they join, threatening violence against the boys and their sister if they refused. Pablo and Rene steadfastly refused to join the gang because of their deeply held religious and family values. The gang then threatened to kill Pablo and Rene and to rape and murder Silvia because the boys would not join. After MS-13 brutally murdered another boy who refused to join by crushing his head with a rock, the three siblings fled for their lives. Upon arriving in the United States, they sought asylum based on their membership in a particular social group, namely, Salvadoran youths who had rejected or resisted gang recruitment based on moral and religious opposition to gangs.

The Board denied the siblings asylum in a transparently result-oriented precedent decision. The Board first ignored uncontradicted and fully-credited evidence before the Immigration Judge establishing the existence of the proposed social group. Even more unsettling, the Board utterly disregarded its own landmark decision in *Acosta* and required for the first time that applicants for asylum based on membership in a particular social group demonstrate that the proposed group satisfies some undefined measure of "social visibility."[4]

***ACOSTA'S* IMMUTABLE CHARACTERISTIC REQUIREMENT: THE INTERNATIONAL STANDARD**

Under *Acosta*, the touchstone of membership in a particular social group is that the group's members share "a common, immutable characteristic" "that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[5] Nothing in this definition suggests that the group must possess some requisite level of "social visibility"; indeed, before *Matter of S-E-G-*, numerous social groups were recognized by the Board and the U.S. Courts of Appeals without any discussion of "visibility."[6]

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[4] 24 I. & N. Dec. at 582.

[5] *Acosta*, 19 I. & N. Dec. at 233.

[6] *See, e.g.*, *Gomez-Zuluaga v. Attorney Gen.*, 527 F.3d 330 (3d Cir. 2008) (escapee of involuntary servitude); *Nabulwala v. Gonzles*, 481 F.3d 1115 (8th Cir. 2007) (homosexuals); *Lukwago v. Ashcroft*, 329 F.3d 157 (3d Cir. 2003) (escaped child soldiers); *Matter of Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996) (opposition to female genital mutilation); *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990) (homosexuals).

The Immigration and Nationality Act ("INA") codifies the definition of "refugee" found in the 1967 United Nations Protocol Relating to the Status of Refugees ("1967 Protocol"),[7] to which the United States is a party.[8] For almost twenty-four years, *Acosta* has served as the foundation for defining social groups under both the INA and 1967 Protocol. Numerous other common law countries have expressly endorsed *Acosta*'s "immutable characteristic" approach when interpreting their own obligations under the 1967 Protocol.[9] Likewise, the United Nations High Commissioner for Refugees' *Guidelines on International Protection: "Membership of a particular social group"* ("UNHCR Guidelines") embraces the *Acosta* approach, defining social groups as those individuals sharing common characteristics that either are "historical and therefore cannot be changed" (*i.e.*, immutable) or that, although theoretically capable of change, "are so closely linked to the identity of the person or are an expression of fundamental human rights" and therefore the individual "ought not to be required to change."[10]

As recently as 2006, the Board reaffirmed its commitment to *Acosta* in *Matter of C-A-*, stating that it would "continue to adhere to ... *Acosta*."[11] The Board further noted that, to the extent it was a pertinent consideration at all, "social perception" or "visibility" was nothing more than a "relevant factor."[12]

THE BOARD INEXPLICABLY ABANDONED ITS OWN PRECEDENTS AND SETTLED INTERNATIONAL LAW

Despite wide international acceptance of the *Acosta* immutable characteristic approach and the Board's own recent assurances of commitment to *Acosta*, in *Matter of S-E-G-* the Board abruptly departed from *Acosta* and required for the first time proof of "social visibility" to establish the existence of a social group. Under the Board's reasoning in *S-E-G-*, it is not enough that the group members share an immutable characteristic; they must further prove that this characteristic is "recognizable" to the general population.[13] This unexplained, dramatic departure from *Acosta* alone is grounds for rejecting the Board's decision as arbitrary and capricious.[14]

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[7] Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268.

[8] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987).

[9] *See* cases cited in n.3, above.

[10] UNHCR Guidelines ¶¶ 11-12.

[11] 23 I. & N. Dec. 951, 956 (B.I.A. 2006).

[12] *Id.* at 957.

[13] *Matter of S-E-G-*, 24 I. & N. Dec. at 582, 586.

[14] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins.*, 463 U.S. 29, 56-57 (1983). The Board's self-serving characterization of *Matter of C-A-* as requiring proof of social visibility is wrong. Although the Board's decision in *Matter of C-A-* leaves much to be desired in terms of clarity, one thing is clear: the decision *explicitly reaffirmed* the Board's commitment to *Acosta*. *See* 23 I. & N. Dec. at 956.

The Board also misrepresented the UNHCR Guidelines as somehow endorsing the Board's "social visibility" requirement.[15] They do not. The Guidelines provide in relevant part:

> [A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, ***or*** who are *perceived as a group* by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience, or the exercise of one's human rights.[16]

The "social perception" approach applies *only* if the group does not share an immutable or fundamental characteristic.[17] Moreover, unlike the Board's requirement in *Matter of S-E-G-*, in the limited cases where the Guidelines require some level of "social perception," they do *not* require that the group's shared attribute be literally "visible" to the naked eye or easily recognizable to the general public.[18]

The Board's novel and unfounded "social visibility" requirement has the added distinction of being both fundamentally wrong and analytically confused, simultaneously collapsing other elements of an asylum claim into the social group inquiry while raising the bar on proof of these distinctive elements—a combination that inevitably will cause widespread confusion among Immigration Judges and appellate courts.[19] The extent to which "the shared characteristic of the group" is "recognizable in the community"[20] relates to the likelihood the individual will be persecuted (*i.e.*, the fear of persecution is well-founded) on account of that characteristic, not whether the individual shares a common immutable characteristic with others in a particular society. But there are well-defined standards governing proof of the likelihood of persecution and that the persecution was on account of a protected ground.[21] In short, as long as

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15 *See Matter of S-E-G*, 24 I. &. N. Dec. at 586.

16 UNHCR Guidelines ¶ 11 (emphases added).

17 *Id.* ¶ 13

18 *Compare id.* (noting that "members of a particular profession might ... constitute a particular social group if in the society they are recognized as a group which sets them apart) with *Matter of C-A-*, 23 I. & N. Dec. at 956 (explaining that the "social perception" test adopted by the Second Circuit "requires that the members of a social group must be externally distinguishable").

19 *See, e.g., Donchev v. Mukasey*, 2009 WL 103661, at *7 (9th Cir. Jan. 2009) (noting that, like immutability, social visibility "is instructive, but very abstract," adding that "this definition is not very helpful to deciding cases" involving "something other than a tribe or clan" "because the abstractness allows most disputes to be decided either way"). Recognizing the hollowness of any "social visibility" requirement, Judge Betty Fletcher in dissent took the majority to task for failing to apply *Acosta* and to recognize the petitioner's membership in a particular social group based on a characteristic that was "fundamental to his individual identity and conscience" that "he should not be required to change." *Id.* at *13.

20 *Matter of S-E-G-*, 24 I. & N. Dec. at 586.

21 *See Cardoza-Fonseca*, 480 U.S. at 440 (noting that even "a 10% chance of being shot, tortured, or otherwise persecuted" establishes a well-founded fear of persecution); *In re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 214

the *persecutor* is aware of the victim's membership in the social group, how the public generally perceives her is irrelevant. Requiring proof that the group's unifying characteristic is "visible" and "recognizable and discrete" in society at large effectively sets the bar much higher for social-group-based claims than for claims based on any other protected ground.

The implications of the Board's decision of course reach far beyond gang-based asylum claims to many groups previously recognized by the Board and the courts—including women who oppose female genital mutilation, homosexuals, escaped child soldiers, or those escaping involuntary servitude to Columbian rebels.[22] Those groups would be hard pressed to show that their immutable characteristics are "recognizable" or "discrete" within in their home countries.[23] Yet, the Board makes no attempt to reconcile its decision in *Matter of S-E-G-* with these prior decisions. This omission falls far short of the Board's duty to issue precedent decisions that provide "clear and uniform guidance ... on the proper interpretation and administration of the" INA. 8 C.F.R. § 1003.1(d)(1).

The Board compounded this failure with its confused attempt to apply its new test. The Board focused almost exclusively on MS-13's motivation for *recruitment* generally.[24] Similarly, and despite considerable record evidence to the contrary, the Board concluded that there was "little ... evidence" that members of the asserted social group "suffer from a higher incidence of crime than the rest of the population" and that Silvia and her brothers are not "in a substantially different situation from anyone who has crossed the gang."[25] None of these observations relates even remotely to whether the brothers' refusal to join the gang on account of deeply held religious and moral convictions is a characteristic that is "immutable" or "fundamental to their individual identities or consciences," much less whether their group possesses sufficient "particularity" or "social visibility." At best such observations relate to whether the siblings will suffer persecution "on account of" their social group membership—a fact that the Immigration Judge did "not for one minute doubt."[26]

* * * * *

(B.I.A. 2007) (holding that persecution is "on account of" the protected ground as long as that ground is not "incidental, tangential, superficial, or subordinate to another reason for harm" and plays more than a "minor role" in the mistreatment).

[22] *See, e.g.*, cases cited in n.6, above.

[23] The Board's decision also presages a departure from *Acosta*'s admonition that the existence of a particular social group must be "determined on a case-by-case basis," rather than based on categorical rules. 19 I. & N. Dec. at 233. At least four courts of appeals have issued opinions suggesting that *Matter of S-E-G-* precludes all social group claims involving resistance to gang violence. *See Jiang v. Mukasey*, No. 08-1902, 2008 WL 4657532, at *1-2 (2d Cir. Oct. 17, 2008); *Flores v. Mukasey*, No. 07-3786, 2008 WL 4601932, at *10 (6th Cir. Oct. 15, 2008); *Gomez-Benitez v. Attorney Gen.*, No. 07-13999, 2008 U.S. App. LEXIS, at *4-5 (11th Cir. Sept. 22, 2008); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 745-46 (9th Cir. 2008).

[24] *See* 24 I. & N. Dec. at 586-88.

[25] *Id.* at 587.

[26] Immigration Judge Initial Decision, at AR154.

Because the Board's unexplained departure from its prior approach to analyzing social group membership works a drastic change in United States refugee policy and is contrary to established international standards related to our obligations under the 1967 Protocol, this case demands consideration at the highest level. We therefore respectfully request that you direct the Board to refer this case to you pursuant to 8 C.F.R. § 1003.1(h)(1)(i).[27]

Respectfully,

Richard P. Bress
of LATHAM & WATKINS LLP

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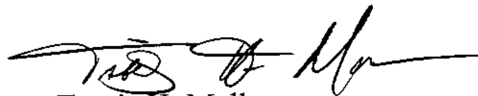

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Enclosure

[27] Certification is also consistent with the spirit of President Obama's recent memorandum regarding regulatory review. 74 Fed. Reg. 5977 (Feb. 3, 2009). In particular, certification will enable you to ensure that such a departure from established law is subject to appropriate transparency and public participation and ensure full consideration of the range of public policy concerns, including adherence to well-settled rules of international law.