# Searching for Consistency in Asylum's Protected Grounds

*Isaac T.R. Smith**

*ABSTRACT: Currently, international and domestic immigration laws identify persecution on account of membership in a "particular social group" as one basis for granting an individual asylum. The dominant approach in both domestic and foreign analysis for defining what constitutes a "particular social group" has been to look for an immutable characteristic that all members of the group share. This was the approach originally adopted in the landmark Board of Immigration Appeals ("BIA") ruling* Matter of Acosta. *However, since that ruling, the BIA has adopted an additional inquiry into the "social visibility" of potential "particular social groups." Circuit courts are divided on whether such a requirement is valid, and the definition of "particular social group" has strayed from its traditional sources grounded in the jurisprudence of the other protected grounds, such as political opinion and the interpretation of the UNHCR Guidelines. This Note argues that the BIA should adopt a cascading analysis for "particular social group" determinations that conforms to the Guidelines' use of social perception and the encompassing nature of the political opinion analysis.*



* J.D. Candidate, University of Iowa College of Law, 2015. I would like to thank the student writers and editors of Volumes 99 and 100 of the *Iowa Law Review*. I especially thank my family, friends, and past co-workers for their support, help, and encouragement.

## I. INTRODUCTION

In order to receive asylum or withholding of removal, immigrants must meet the Immigration and Nationality Act's ("INA") definition of refugee by showing they fear persecution based on race, religion, nationality, membership in a particular social group, or political opinion.[1] Of these five protected asylum grounds, membership in a "particular social group" is the most vague and has caused the most confusion for courts. Some courts, like the Seventh Circuit, define "particular social group" as a group of people sharing a common immutable characteristic.[2] To reach this definition, the Seventh Circuit and other courts examine the term "particular social group" in relation to the other protected grounds (e.g., political opinion).[3] While the Seventh Circuit ends its analysis at the immutable characteristic inquiry, other circuit courts have given deference to the Board of Immigration Appeals ("BIA"), which added an additional requirement that the particular social group have "social visibility."[4] In announcing the "social visibility"

1. Immigration and Nationality Act (INA) § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2012).

2. Benitez Ramos v. Holder, 589 F.3d 426, 428 (7th Cir. 2009).

3. Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled on other grounds by* Matter of Mogharrabi, 19 I. & N. Dec. 439, 441 (B.I.A. 1987).

4. *In re* C-A-, 23 I. & N. Dec. 951, 959 (B.I.A. 2006). In a recent decision, the BIA renamed the "social visibility" requirement to "social distinction" to clarify the definition. Matter of W-G-R-, 26 I. & N. Dec. 208, 212 (B.I.A. 2014). Since most of the case law still uses the term "social visibility," this Note uses that term in describing the requirement as it has been dealt with in the case law; however, as the BIA just renamed the term while clarifying that the analysis has not changed, when used generally, "social visibility" is synonymous with "social distinction."

requirement, the BIA asserted it was based on guidelines the United Nations High Commissioner for Refugees ("UNHCR") issued in 2002, which, if no immutable characteristic could be found, extended asylum protection to a particular social group that is socially perceived and cognizable.[5] The recent BIA decision, *Matter of W-G-R-*, attempted to clarify the definition and resolve the confusion about the "social visibility" requirement, rebranding the requirement "social distinction" and thus bringing it closer in line with the UNHCR Guidelines.[6] However, it retained "social distinction" as a requirement for showing a "particular social group," instead of as an alternative definition, as is the case with the UNHCR Guidelines.[7]

Much legal jurisprudence suggests that refugee and asylum law are intended to protect certain human rights of individuals.[8] The five protected asylum grounds each protect human rights and anti-discrimination in general.[9] Indeed, the Universal Declaration of Human Rights includes all of asylum's protected grounds in its anti-discrimination article.[10] The scope of all five protected asylum grounds have been interpreted to ensure protection from persecution based on one of the prohibited discriminatory characteristics. Examining political-opinion analysis provides a clear example of how asylum law can be employed to ensure full protection of the characteristics. In political-opinion analysis, courts have sought to protect all manners of political opinion. Courts determine political asylum eligibility by looking for the most explicit grounds for asylum and, if none exist,

---

5. *In re C-A-*, 23 I. & N. Dec. at 956 (citing U.N. High Comm'r 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*, ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) [hereinafter *UNHCR Guidelines*], *available at* http://www.unhcr.org/3d58de2da.html). The UNHCR is the refugee arm of the United Nations charged with facilitating efforts to protect refugees and clarifying international law concerning refugees, particularly the 1951 Convention on Refugees and its 1967 protocol. *See* UNHCR, *The Refugee Convention at 50* . . . , REFUGEES MAG., no. 2, 2001, at 2, 2, *available at* http://www.unhcr.org/3b5e90ea0.html. This mandate has led to the publishing of the UNHCR Handbook and other UNHCR guidelines intended to clarify ambiguities in the various international conventions relating to refugees.

6. *Matter of W-G-R-*, 26 I. & N. Dec. at 210–12.

7. *Id.*

8. *See* Fatma E. Marouf, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, 45 N.Y.U J. INT'L L. & POL. 391, 426 (2013) (quoting Canada (Att'y-Gen.) v. Ward, [1993] 2 S.C.R. 689, 733 (Can.) ("Underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination.")); Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733, 795 (1998).

9. *See* Marouf, *supra* note 8, at 426 (noting that "defence of human rights and anti-discrimination . . . form the basis for the international refugee protection initiative" (quoting *Ward*, 2 S.C.R. at 739)).

10. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 2, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, . . . religion, political or other opinion, national or social origin, . . . or other status.").

considering more implied forms. For example, a court will look for express manifestations and then consider more implied forms, such as imputed or unexpressed political opinions. By contrast, in "particular social group" analysis, where most circuits have shown deference to the BIA's "social visibility" requirement, those courts search for an immutable characteristic that links members of the group. Even if the courts find one, they further require that the group be socially distinct. An approach to "particular social group" that would mimic that used in political opinion would determine eligibility based on membership in a particular social group, where a court would first consider whether a particular social group is based on immutable characteristics and, if not, look to see if a particular social group exists based on "social perception."[11] This is the approach outlined in the UNHCR Guidelines.

This Note argues that the Supreme Court should resolve the circuit split by adopting an analysis to define "particular social group" that starts with the immutable characteristic analysis and then considers, as an alternative, social perception, as outlined in the UNHCR Guidelines. Such an approach would be more consistent with the approach used for other asylum grounds to ensure that asylum law protects the human rights and anti-discrimination foundations of asylum law. It would also bring U.S. asylum law into closer conformity with international refugee law, which was the intention of Congress in adopting the protected grounds in the Refugee Act of 1980.[12] Part II first examines the requirements for qualifying for asylum on account of political opinion to show, as one example, how an asylum analysis that contains several alternative forms of eligibility ensures full protection. Part II then focuses on asylum eligibility for membership in a particular social group. Part III frames the disagreement between the circuit courts and the BIA over the proper definition of "particular social group." Part IV proposes abandoning "social distinction" as a requirement and adopting it as an alternative form of "particular social group" eligibility to ensure conformity with the other grounds' analysis (e.g. political opinion analysis) and UNHCR Guidelines. Finally, Part V concludes by explaining why courts should apply "social distinction" as an alternative, rather than an additional requirement.

---

11. *See infra* Part II.C.2.

12. This definition of refugee was added through The Refugee Act of 1980 in order to align United States refugee law "with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968." INS v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987) (stating it was not only Congress's intent to adopt the Protocol's standard, but also to have it interpreted in conformance with the Protocol's definition); *see also* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

## II. GROUND FOR ASYLUM BASED ON POLITICAL OPINION AND MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

Asylum law is a complex and ever-evolving subset of immigration law. A person can gain asylum status in a number of ways. An asylee can gain work authorization, receive derivative asylum status for family members, attain permanent residence status, and, eventually, become a citizen.[13] Part II.A explains the necessary elements of an asylum claim. Subpart B examines the analysis used in determinations of political asylum claims to provide a comparative analysis of how "particular social group" analysis differs. Subpart C explains the evolving understanding of asylum claims based on persecution as a member of a particular social group and discusses the different approaches used by the circuit courts and the BIA in defining what constitutes a "particular social group."

### *A. ELIGIBILITY FOR ASYLUM*

The basis for gaining asylum in the United States is laid out in the INA.[14] Section 1158(b)(1)(A) authorizes a grant of asylum if "the Secretary of Homeland Security or the Attorney General determines that [an] alien is a refugee within the meaning of section 1101(a)(42)(A)" of the Act.[15] To qualify as a refugee, and thus attain eligibility for asylum, a person must be "unable or unwilling" to return to his home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[16]

---

13. *Benefits and Responsibilities of Asylees*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/humanitarian/refugees-asylum/asylum/benefits-and-responsibilities-asylees (last updated Apr. 1, 2011).

14. *See* Immigration and Nationality Act (INA) § 208, 8 U.S.C. § 1158 (2012 & Supp. I 2013). In order to apply for asylum, a person must be "physically present in the United States" or have arrived in the United States. *Id.* § 1158(a)(1).

15. *Id.* § 1158(b)(1)(A). The INA consistently uses the term "alien" to refer to non-citizens of the United States. *See id.* § 1101(a)(3) (defining "alien" as "any person not a citizen or national of the United States"). Despite the reliance on this term to describe non-citizens in federal statutes, regulations and administrative and judicial decisions, the term "alien" is still surrounded by a fair amount of controversy as applied to non-citizens. *See* Careen Shannon, *Stop Calling People 'Aliens,'* SALON (May 27, 2013, 3:00 PM), http://www.salon.com/2013/05/27/stop_calling_people_aliens ("Notwithstanding the fact that 'alien' is embodied in our law as a term of art, and that its first dictionary definition simply means 'foreigner,' not only does its second definition as 'strange' or 'repugnant' give the word a certain stench, its third definition as 'extraterrestrial' enhances its dehumanizing effect."). This Note uses the word "alien" in reference to the legal term of art merely to be consistent with the INA and case law, and to avoid confusion of terms.

16. 8 U.S.C. § 1101(a)(42)(A). This definition of refugee was added through the Refugee Act of 1980 in order to align United States refugee law "with the 1967 United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968." INS v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987) (citation omitted) (stating it was not only Congress's intent to adopt the Protocol's standard, but also that Congress intended "that the new statutory definition of 'refugee' be interpreted in conformance with the Protocol's definition"); *accord*

The INA does not define "persecution." Courts at times have tried to create a "precise definition or enumeration of acts that constitute persecution," but such attempts have been met with little success, "enabl[ing] adjudicators to examine the circumstances in each case."[17] Case law provides some general guidelines for what constitutes persecution, but similarly leaves significant room for adjudicators of individual cases to classify varying acts as persecution.[18]

A demonstration of persecution alone, however, is insufficient to make a person eligible for asylum. Persecution must be "on account of" one of the five statutory grounds.[19] That is, an applicant is eligible for asylum if he is able to prove that another person or entity caused harm (that rises to the level of persecution) to the applicant and that the person was motivated (at least genuinely in part) to do so because of the applicant's "race, religion, nationality, membership in a particular social group, or political opinion."[20] While the protected ground does not need to be the persecutor's only motivation, it must "be at least one central reason for persecuting the applicant."[21] In addition to non-specificity for the term "persecution," the INA also does not define the five protected grounds. However, federal courts and the BIA have developed extensive case law shaping such definitions.

### *B. POLITICAL OPINION*

The UNHRC broadly defines political-opinion grounds for asylum as incorporating "any opinion on any matter in which the machinery of State,

---

Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102; Protocol Relating to the Status of Refugees art. 1, Jan. 31, 1967, 19.5 U.S.T. 6223, 606 U.N.T.S. 267.

17. *See* REGINA GERMAIN, ASYLUM PRIMER: A PRACTICAL GUIDE TO U.S. ASYLUM LAW AND PROCEDURE 33–34 (6th ed. 2010). However, the UNHCR broadly acknowledged that "a threat to our freedom" on the basis of one of the five protected grounds "is always persecution." U.N. High Comm'r for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 51, U.N. Doc. HCR/IP/ENG/REV. 3 (2011) [hereinafter *UNHCR Handbook*].

18. *See* Stanojkova v. Holder, 645 F.3d 943, 948 (7th Cir. 2011) ("Persecution involves . . . the use of *significant* physical force against a person's body, or the infliction of comparable physical harm without direct application of force . . . or nonphysical harm of equal gravity . . . ."); Nikijuluw v. Gonzales, 427 F.3d 115, 120 (1st Cir. 2005) ("[P]ast persecution requires that the totality of a petitioner's experiences add up to more than mere discomfiture, unpleasantness, harassment, or unfair treatment."); *see also* GERMAIN, *supra* note 17, at 35–39 (listing acts that courts have found to rise to the level of persecution).

19. 8 U.S.C. § 1101(a)(42)(A).

20. *Id.*

21. *Id.* § 1158(b)(1)(B)(i). The Third Circuit has further flushed out the "one central reason" standard by holding that an applicant need not prove that the protected-ground motivation is subordinate to any unprotected motivation. Ndayshimiye v. Attorney Gen. of the U.S., 557 F.3d 124, 129–30 (3d Cir. 2009). However, the asylum applicant must prove that the protected ground was not "only an 'incidental, tangential or superficial' reason for persecution" of the applicant. *Id.* at 130.

government, society, or policy may be engaged."[22] For asylum purposes, it is not enough for an applicant to simply hold a political opinion that differs from that of the government[23] or a non-governmental actor.[24] In order to be considered a refugee, asylum applicants must show they reasonably "fear . . . persecution for holding such opinions."[25] Both the UNHCR and U.S. courts have generally held that qualifying political opinions are those in which a persecutor is on notice of an applicant's alleged opinion, and the persecutor is not willing to tolerate the applicant's political opinion.[26] The BIA and the federal courts have held that three forms of political opinion fall within this general framework: (1) express acts or words, (2) imputed political opinions, and (3) unexpressed political opinions.[27]

### 1. Express Acts or Words

Perhaps the most straightforward examples of political opinions for the purpose of asylum are those in which the applicant publicly expressed his status as a dissident. Such dissidence is most clear when the applicant is a formal member of a political party or organization, a participant in public protests or demonstrations, a voice in opposition of government policies, or the source of any other express statement or declaration indicating a political opinion.[28] The fact that courts accept both actions and spoken or written

22. U.N. High Comm'r for Refugees, *Guidelines on International Protection: Gender Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, ¶ 32, U.N. Doc. HCR/GIP/02/01 (May 7, 2002), *available at* http://www.refworld.org/docid/3d36f1c64.html.

23. *See UNHCR Handbook*, *supra* note 17, ¶ 80.

24. Avetova-Elisseva v. INS, 213 F.3d 1192, 1196 (9th Cir. 2000) ("[A]ffirmative state action is not necessary to establish a well-founded fear of persecution if the government 'is unwilling or unable to control those elements of its society responsible for targeting' a particular class of individuals." (quoting Mgoian v. INS, 184 F.3d 1029, 1035 (9th Cir. 1999))).

25. *UNHCR Handbook*, *supra* note 17, ¶ 80.

26. *Id.*; *see also* Desir v. Ilchert, 840 F.2d 723, 727 (9th Cir. 1988) (citations omitted) (holding that to determine if certain acts qualify as political persecution, the court may "examine the motives and perspective of both the victim and persecutor"); Hernandez-Ortiz v. INS, 777 F.2d 509, 516 (9th Cir. 1985) ("'Persecution' occurs only when there is a difference between the persecutor's views or status and that of the victim; it is oppression which is inflicted on groups or individuals because of a difference that the persecutor will not tolerate."), *superseded by statute on other grounds as stated in* Parussimova v. Mukasey, 555 F.3d 734, 739–40 (9th Cir. 2009).

27. *See* GERMAIN, *supra* note 17, at 57–60.

28. *See* Jabr v. Holder, 711 F.3d 835, 838–39 (7th Cir. 2013) (holding that the applicant who was a member of a Palestinian political organization, Fatah, was eligible for asylum when he explicitly told members of a rival political organization of his membership in Fatah and his contrary political beliefs, and then received threatening letters and was physically abused by the rival political organization's members); Baba v. Holder, 569 F.3d 79, 85–87 (2d Cir. 2009) (granting asylum where a Togo citizen and member of a pro-democracy movement participated in political demonstrations and was then imprisoned, beaten until he promised to cease political activity, and told he would be killed if he was caught engaging in political activity again); Tchemkou v. Gonzales, 495 F.3d 785, 795 (7th Cir. 2007) (granting asylum to a Cameroonian

words that explicitly express a political opinion shows that the political-opinion ground jurisprudence acknowledges freedom of speech and expression as one motivation behind the political opinion ground.[29]

### 2. Imputed Political Opinions

An imputed political opinion in the asylum context focuses instead on the beliefs of the persecutor—rather than those of the persecuted. It is a political opinion that a persecutor falsely attributes to a victim that is the motivation behind persecuting the victim.[30] Neither the INA nor the Supreme Court has indicated whether an imputed political opinion is a ground for asylum.[31] However, there is a consensus among the circuit courts that an imputed political opinion can serve as such a ground.[32] In *Pascual v. Mukasey*, the Sixth Circuit reasoned that in addition to the wide consensus among the circuit courts, this approach is appropriate given the Supreme Court's focus on the persecutor's motive in recent asylum cases.[33]

---

student who voiced opposition to her government, supported public school teachers in their strike, and then suffered death threats and beatings from the police).

29. Steinbock, *supra* note 8, at 795 ("[P]ersecution on account of political *opinion* also includes persecution on account of political *expression*. The entire concept represents a privileging of a particular human right—freedom of conscience and expression—just as the other elements of the refugee definition embody a form of the antidiscrimination principle."). Granting asylum to those who express their opinion also has pro-democracy effects. *Id.* ("Free speech is . . . antithetical to dictatorship, and in providing sanctuary to those who voiced their opposition, the authors of the Refugee Convention were, to some degree, aiming to undermine the oppressors' authority. While free speech does not ensure democracy, it is a necessary precondition. In a limited way, then, the Refugee Convention serves to encourage and facilitate the larger project of democracy.").

30. *See* Baghdasaryan v. Holder, 592 F.3d 1018, 1025 (9th Cir. 2010) (holding that where an Armenian law-enforcement official indicated that an asylum seeker "was detained and beaten because he was 'defaming' and 'raising his head' against" an Armenian general, such a comment was evidence that the government viewed the asylum seeker "as a protestor and punished him for his resistance to [the] government," thus establishing persecution based on imputed political opinion); *see also* Zhiqiang Hu v. Holder, 652 F.3d 1011, 1018 (9th Cir. 2011) (holding that a Chinese labor organizer was persecuted based on an anti-government opinion that was imputed to him by police even after he "told Chinese officials that he was just in favor of 'the legal rights of those laid off workers'").

31. *See* Haider v. Holder, 595 F.3d 276, 284 (6th Cir. 2010).

32. *Id.*; *see also* Uwais v. U.S. Attorney Gen., 478 F.3d 513, 517–18 (2d Cir. 2007) (finding eligibility for asylum on imputed political-opinion grounds where a Sri Lankan applicant was physically beaten and raped because of suspicions she was affiliated with the armed Tamil Tigers); Abdulnoor v. Ashcroft, 107 F. App'x 594, 595 (6th Cir. 2004) (finding grounds for asylum based on imputed political opinion when an Iraqi weapons-depot guard was accused of being part of an anti-government coup when weapons went missing on his watch).

33. Pascual v. Mukasey, 514 F.3d 483, 486–87 (6th Cir. 2007); *see also* INS v. Elias-Zacarias, 502 U.S. 478, 482–84 (1992); *Zhiqiang Hu*, 652 F.3d at 1017 ("When an asylum applicant argues he was persecuted because of an imputed political opinion, the focus shifts 'from the views of the victim to the views of the persecutor.'" (citation omitted)).

### 3. Unexpressed Political Opinions

The UNHCR Handbook outlines a possible ground for an unexpressed political opinion as a protected ground for asylum.[34] Where an applicant has not expressed his political opinion, he may still be eligible for asylum on political-opinion grounds when "the strength of his convictions" is such that "it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities."[35] In 1951, when the drafters of the UN Convention Relating to the Status of Refugees were considering the political-opinion ground in their definition of refugees, they were responding to the "recent, known events" of World War II and the early stages of the Cold War, where totalitarian regimes punished any form of political dissent, including unexpressed dissent.[36] Relevant factors a court would consider in determining whether an unexpressed political opinion can serve as the basis for asylum are the strength of the applicant's opinions, the likelihood of the alleged persecutor becoming aware of the unexpressed opinions, and the likelihood of persecution resulting from this discovery.[37]

Unexpressed political opinion represents one end of the analysis of what constitutes political opinion. From explicit and public political speech on down to unexpressed political opinions, the scope of the political-opinion ground is broad enough to ensure maximum coverage and uphold the purpose of protecting and guaranteeing the human rights foundation that the political-opinion ground was founded on.[38] The analysis under political-opinion grounds accomplishes protection for those persecuted on political-opinion grounds by generally focusing on broadly protecting political opinions in general and placing limited focus on narrowing the protection to specific political opinions.

## C. *MEMBERSHIP IN A PARTICULAR SOCIAL GROUP*

To gain asylum as a member of a "particular social group" an asylum seeker must prove three elements.[39] First, the alien needs to "identify a group

34. *See UNHCR Handbook*, *supra* note 17, ¶ 82.

35. *Id.*

36. *See* Steinbock, *supra* note 8, at 795 ("With respect to persecution for reasons of political opinion, [the drafters] knew only too well that the totalitarian regimes from which refugees of the World War II era had fled before, during, and after the war, tolerated no dissent. Severe persecution on account of political opinion, even unexpressed opinion, was a hallmark of these regimes.").

37. *See* GERMAIN, *supra* note 17, at 58 (quoting *UNHCR Handbook*, *supra* note 17, ¶ 82); *see also* Sharif v. INS, 87 F.3d 932, 935 (7th Cir. 1996).

38. *See* Steinbock, *supra* note 8, at 795 (emphasizing that asylum law's protection of political opinions is grounded in protecting the human right of free expression and conscience).

39. Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993) (holding that an Iranian woman satisfied the first two elements of establishing asylum eligibility based on membership in a particular social group when she identified her gender as a group with "an innate characteristic

that constitutes a 'particular social group'" within the meaning of the INA.[40] Second, the alien must prove he or she is a member of the group he or she identified.[41] Third, the alien must "show that he or she would be persecuted or has a well-founded fear of persecution based on that membership."[42] The BIA and the federal courts have spent significant time formulating the scope and limits of what constitutes a "particular social group" for the purpose of the first element.[43]

At first glance, the asylum ground for persecution as a member in a particular social group appears quite broad. Indeed, the BIA thought so when it considered the meaning of particular social group in their seminal decision *Matter of Acosta*.[44] The BIA noted "the notion of a 'social group' was considered to be of broader application than the combined notions of racial, ethnic, and religious groups and that in order to stop a possible gap in the coverage of the U.N. Convention, this ground was added to the definition of a refugee."[45] Since the Refugee Act of 1980, the BIA and federal courts have been looking for ways to define the scope of "particular social group." The definition has evolved in three very general phases: (1) the BIA's *Acosta* approach,[46] (2) the UNHCR Guidelines approach,[47] and (3) the *In re C-A-* and "social visibility" approach.[48]

### 1. The BIA's *Acosta* Approach

When the BIA began considering "membership in a particular social group" as a ground for asylum it did not have much guidance. The UNHCR Handbook broadly defined particular social group as "compris[ing] persons of similar background, habits or social status."[49]

In *Matter of Acosta*, the BIA applied the doctrine of *ejusdem generis*, meaning "of the same kind," in defining "membership in a particular social group."[50] To apply this analytical method, a court construes "general words used in an enumeration with specific words . . . in a manner consistent with the specific words."[51] That is, the BIA looked to shape the scope of

---

that . . . link[ed] the members of [such] a 'particular social group'" and asserted her membership in the gender group, but failed to establish the third element—that she had a reasonable fear of persecution based on her identity as a woman in Iran).

40. *Id.*
41. *Id.*
42. *Id.*
43. *See In re* C-A-, 23 I. & N. Dec. 951, 955–57 (B.I.A. 2006).
44. Matter of Acosta, 19 I. & N. Dec. 211, 232–35 (B.I.A. 1985).
45. *Id.* at 232.
46. *See id.* at 232–35.
47. *See generally UNHCR Guidelines*, *supra* note 5.
48. *See In re C-A-*, 23 I. & N. Dec. at 951.
49. *See UNHCR Handbook*, *supra* note 17, ¶ 77.
50. *Matter of Acosta*, 19 I. & N. Dec. at 233.
51. *Id.* (citing Cleveland v. United States, 329 U.S. 14, 18 (1946)).

"membership in a particular social group" in light of the scope of the other four grounds (e.g., "race, religion . . . political opinion," etc.).[52] The BIA determined that all of the other "grounds describe[d] persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed," and thus "membership in a particular social group" should be defined specifically to conform to this common principle.[53]

As a result of this analysis, the BIA defined "particular social group" broadly enough to leave room for discretion in individual cases, but emphasized the necessity of a common "immutable characteristic" among the members of the "particular social group."[54] The BIA thus provided limits on the scope of the concept of "particular social group" in holding that a particular social group is:

> a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one 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.[55]

This approach has been explicitly adopted or cited approvingly by all of the circuit courts except the Fourth and Fifth, which "have cited [the] language [of *Acosta*] approvingly without explicitly endorsing the approach."[56]

The BIA formulated the *Acosta* standard so that the definition of "particular social group" conformed with the underlying motivations behind the other protected grounds, but it also considered legislative intent.[57] Congress added the INA's definition of refugee through the Refugee Act of 1980 in order to conform to the definition in the 1967 United Nations

---

52. *Id.*

53. *Id.* (internal quotation marks omitted).

54. *Id.*

55. *Id.*

56. GERMAIN, *supra* note 17, at 53 (citing Lopez-Soto v. Ashcroft, 383 F.3d 228, 235 (4th Cir. 2004); Ontunez-Tursios v. Ashcroft, 303 F.3d 341, 352–53 (5th Cir. 2002)); *see also* Castillo-Arias v. U.S. Attorney Gen., 446 F.3d 1190, 1196–97 (11th Cir. 2006) (relying on the circuit courts' wide acceptance of the BIA's *Acosta* standard in adopting the standard in the Eleventh Circuit).

57. *See Matter of Acosta*, 19 I. & N. Dec. at 219–20.

Protocol Relating to the Status of Refugees ("the 1967 Protocol").[58] In doing so, the BIA grounded its holding in a thorough textual analysis, but also considered "the specific situation known to the drafters [of the 1967 Protocol]—concern for the plight of persons whose social origins put them at comparable risk to those in the other enumerated categories [and] the more general commitment to grounding refugee claims in civil or political status."[59]

The BIA's ruling in *Acosta* left immigration judges with a standard that "is sufficiently open-ended to allow for evolution in much the same way as has occurred with the four other grounds, but not so vague as to admit persons without a serious basis for claims to international protection."[60] The circuit courts have generally agreed that the *Acosta* approach strikes an appropriate balance in limiting relief to worthy and intended cases, while not being so narrow as to exclude groups that the United Nations definition of refugee was intended to cover.[61]

---

58. *Id.* at 220 ("Since Congress intended the definition of a refugee in section 101(a)(42)(A) of the [INA] to conform to the Protocol, it is appropriate for us to consider various international interpretations of that agreement. However, these interpretations are not binding upon us in construing the elements created by section 101(a)(42)(A) of the [INA], for the determination of who should be considered a refugee is ultimately left by the Protocol to each state in whose territory a refugee finds himself."); *see also* INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) ("If one thing is clear from the legislative history of the new definition of 'refugee,' and indeed the entire 1980 Act, it is that one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees."). The Supreme Court has also relied on the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status as a guiding source in interpreting provisions of the 1980 Act's definition of refugee. *See Cardoza-Fonseca*, 480 U.S. at 438–39.

59. Fatma E. Marouf, *The Emerging Importance of 'Social Visibility' in Defining a 'Particular Social Group' and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*, 27 YALE L. & POL'Y REV. 47, 52 (2008) (quoting JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 161 (1991)) (internal quotation marks omitted).

60. *Id.* (quoting HATHAWAY, *supra* note 59, at 161).

61. *Castillo-Arias*, 446 F.3d at 1197. The opinion espoused:

> *Acosta* strikes an acceptable balance between (1) rendering "particular social group" a catch-all for all groups who might claim persecution, which would render the other four categories meaningless, and (2) rendering "particular social group" a nullity by making its requirements too stringent or too specific. Reference to the UNHCR Guidelines by the BIA in elucidating the *Acosta* formulation is permissible because the U.S. Supreme Court has held that Congress intended to conform United States refugee law with the 1967 United Nations Protocol Relating to the Status of Refugees.

*Id.* The reasoning underlying *Acosta*, particularly its purpose to ensure broad coverage of human rights norms like non-discrimination, has proven persuasive in foreign courts as well. *See* Marouf, *supra* note 8, at 433 (citing a finding by the New Zealand Refugee Authority that "[t]he *Acosta ejusdem generis* interpretation of 'particular social group' firmly weds the social group category to the principle of the avoidance of civil and political discrimination" (alteration in original) (quoting *Refugee Appeal No. 1312/93, Re GJ*27–28 (N.Z. Refugee Status Appeals Authority, Aug. 30, 1995)) (internal quotation marks omitted), *available at* http://www.refugee.org.nz/rsaa/text/docs/1312-93.htm.).

2. The "Social Perception" Approach and the UNHCR Guidelines

Since the BIA's decision in *Acosta*, the immutable-characteristics test has been one of two dominant approaches to defining what constitutes membership in a "particular social group" for asylum purposes.[62] The other major "approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large."[63] This second approach is called the "'social perception' approach."[64] This term is potentially misleading because the approach does not require that the persecutor or the rest of society recognize the group as being "set apart from the rest of . . . society."[65] Rather, "[i]t is enough that the persecutor . . . single out the asylum-seeker for being a member of a class whose members possess a 'uniting' feature or attribute, and the persons in that class are cognizable [sic] *objectively* as a particular social group."[66] It is important to note that a particular social group can be recognized for asylum purposes where a third party perceives them to be distinct.[67]

There are two major distinctions between the immutable characteristics approach and the social perceptions approach. First, the social perceptions approach does not limit the types of common characteristics that unite the group.[68] More specifically, "[t]here is no requirement that the common trait be immutable or fundamental to human dignity."[69] The second difference involves the method of interpretation employed to justify the approach. While

62. *See* Marouf, *supra* note 59, at 56–57 ("[D]ecisions from Canada, New Zealand, and the United Kingdom show how the 'protected characteristic' approach set forth in *Acosta* has become 'transnationalized.'"); *see also UNHCR Guidelines*, *supra* note 5, ¶¶ 5–6 (recognizing that one of the two major approaches to defining what constitutes a social group for the purposes of the 1951 Convention is the "'protected characteristics' approach (sometimes referred to as an 'immutability' approach), [which] examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it").

63. *UNHCR Guidelines*, *supra* note 5, ¶ 7.

64. *Id.*

65. Talia Inlender, Note, *The Imperfect Legacy of* Gomez v. INS*: Using Social Perceptions to Adjudicate Social Group Claims*, 20 GEO. IMMIGR. L.J. 681, 696 (2006) (internal quotation marks omitted).

66. *Id.* (quoting *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, ¶ 69 (Austl.) (McHugh, J)); *see also* Marouf, *supra* note 59, at 58–59 (noting that the perception of the group as being apart from society is a sufficient, but not necessary, way to show that the group is distinguished from the rest of society and thus a cognizable group under the social perception approach). Much of the articulation of the social-perception approach comes from Australian Courts because it is the only common law country to emphasize such an approach. Marouf, *supra* note 59, at 58.

67. Marouf, *supra* note 8, at 433 ("[T]he factors that distinguish a group from the rest of society may be 'ascertained objectively from a third-party perspective.'") (citing *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, ¶ 34 (Austl.) (Gleeson, CJ, Gummow & Kirby, JJ)).

68. Inlender, *supra* note 65, at 696.

69. *Id.*

*Acosta* used the statutory interpretation doctrine of *ejusdem generis*,[70] the social perception approach is grounded in Article 31(1) of the Vienna Convention on the Law of Treaties, which states that "[a] treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in light of its object and purpose."[71] Courts utilizing this approach have interpreted the ordinary meaning of particular social group along sociological lines.[72]

In 2002, UNHCR sought to reconcile the ambiguity of the term "particular social group" and to clarify what constituted a protected ground under the 1951 Convention and 1967 Protocol's definition of refugee.[73] To accomplish this, UNHCR issued guidelines on *Membership of a Particular Social Group* ("UNHCR Guidelines").[74] The Guidelines acknowledge the validity of both the immutable characteristics approach and the social perception approach as legitimate interpretations of the 1951 Convention and 1967 Protocol and, as a result, adopt a single standard that incorporates both approaches.[75] The Guidelines define a "particular social group" as:

> [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.[76]

Under this definition, courts apply a two-part analysis to determine if a group qualifies. The first layer of analysis is essentially the one adopted by the BIA in *Acosta* and examines the shared characteristic to determine if it is immutable.[77] Included in this part of the analysis are past actions that cannot be changed, as well as characteristics that are possible to change, but that "ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human

---

70. Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

71. Inlender, *supra* note 65, at 697 (quoting Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 8 I.L.M. 679, 1155 U.N.T.S. 331) (internal quotation marks omitted).

72. Marouf, *supra* note 59, at 58. While there is a difference between the methods of interpretation each approach employs, it is important to note that both approaches attempt to ground their interpretations in the 1951 Convention and 1967 Protocol, and in doing so are recognized by the UNHCR Guidelines as consistent with the definition of "membership of a particular social group." *See UNHCR Guidelines*, *supra* note 5, ¶¶ 10–13.

73. *Id.* ¶ 1.

74. *See* Marouf, *supra* note 59, at 60 (noting that the Guidelines update UNHCR's Handbook, and "like the Handbook, provide legal 'interpretive guidance for governments, legal practitioners and decision-makers, including the judiciary'").

75. *UNHCR Guidelines*, *supra* note 5, ¶ 10.

76. *Id.* ¶ 11.

77. *See id.* ¶ 12 ("It follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently [from] men.").

rights."[78] Then, if a non-immutable or unalterable characteristic is the common trait of a posited group, "further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society."[79]

Under the UNHCR Guidelines definition the immutable characteristics approach and the social perceptions approach are "alternative tests rather than dual requirements."[80] As a result, the Guidelines' definition is broader than the BIA's *Acosta* approach, which only examines a group for immutable characteristics.[81]

### 3. *In re C-A-* and the "Social Visibility" Approach

While the BIA and federal courts have relied on the *Acosta* approach since it was decided in 1985, the BIA has since added a further layer of analysis to the immutable characteristic approach—purportedly justifying the additional requirement through reliance on the UNHCR Guidelines.[82] In *In re C-A-*, the BIA added the requirement that a posited social group have "social visibility" and "particularity" in order to qualify as a particular social group within the meaning of the INA.[83] Two recent BIA decisions have sought to clarify the social visibility requirement.[84] In doing so, the BIA has rejected the idea that "social visibility" requires "on-site" visibility, and to avoid confusion, they have rebranded the requirement "social distinction."[85] The terms are used interchangeably in this Subpart. Additionally, the BIA clarified that the "social distinction" requirement is determined by examining whether the society in question would find the social group cognizable.[86]

The group in question in *In re C-A-* consisted of "noncriminal drug informants working against [a Colombian] drug cartel."[87] The BIA began examining the group by considering the *Acosta* approach and reiterating a continued adherence to the immutable-characteristic analysis.[88] Though this was the first time the court referred explicitly to a requirement of "social

78. *Id.*

79. *Id.* ¶ 13 ("[I]f it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart.").

80. Marouf, *supra* note 59, at 62.

81. Matter of Acosta, 19 I. & N. Dec. 211, 233–34 (B.I.A. 1985).

82. *In re* C-A-, 23 I. & N. Dec. 951, 959–60 (B.I.A. 2006).

83. *Id.* at 957, 959.

84. *See* Matter of M-E-V-G-, 26 I. & N. Dec. 227, 237–40 (B.I.A. 2014); Matter of W-G-R-, 26 I. & N. Dec. 208, 210–11 (B.I.A. 2014).

85. *Matter of W-G-R-*, 26 I. & N. Dec. at 210–11.

86. *Matter of M-E-V-G-*, 26 I. & N. Dec. at 241–42.

87. *In re C-A-*, 23 I. & N. Dec. at 957 (internal quotation marks omitted).

88. *Id.* at 956–57 ("Having reviewed the range of approaches to defining particular social group, we continue to adhere to the Acosta formulation.").

visibility," the BIA mentioned that its past "decisions involving social groups [had] considered the recognizability . . . of the group in question."[89] For example, the BIA discussed *Matter of H-*, noting that in that case "before concluding that membership in [a specific] subclan in Somalia constituted membership in a particular social group," the BIA "examined the extent to which members of the purported group would be recognizable to others in Somalia."[90] In addition to claiming use of "recognizability" in past cases, the BIA also justified its use of the social visibility analysis by relying on the updated definition of social group established in the UNHCR Guidelines.[91] In doing so, however, the BIA seemingly ignored the Guidelines' use of social perception as an alternative test and instead established social visibility as an additional requirement. Upon considering the facts of *In re C-A-*, the BIA ruled the posited group was not a particular social group within the meaning of the INA because "the very nature of the [informants] is such that [they are] generally out of the public view."[92] The BIA also analyzed the group for particularity, concluding that "noncriminal informants" was "too loosely defined to meet the requirement of particularity."[93]

The BIA upheld and applied the social visibility requirements in subsequent cases, and continued to emphasize the need for "the group's shared characteristic [to] give the members the requisite social visibility to make them readily identifiable in society."[94] In *In re A-M-E & J-G-U-* the BIA

89. *Id.* at 959 ("Social groups based on innate characteristics such as sex or family relationship are generally easily recognizable and understood by others to constitute social groups."). The BIA in *In re C-A-* cites several cases where it engaged in a discussion of social visibility, but all of the discussed decisions were decided using *Acosta's* immutable characteristics approach. Marouf, *supra* note 59, at 64. For example, in *In re C-A-*, the BIA, citing to *In re Kasinga*, noted that a group consisting of "young women of [a specific Togo tribe] who did not undergo female genital mutilation as practiced by that tribe and who opposed the practice" constitutes a particular social group. *In re C-A-*, 23 I. & N. Dec. at 956. First, because being a woman and a member of the tribe are unchangeable, and second, because "having intact genitalia is [a characteristic] so fundamental to the individual identity of a young woman that *she should not be required to change* it." *In re* Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

90. *In re C-A-*, 23 I. & N. Dec. at 959 (holding that membership in a subclan in Somalia constituted membership in a particular social group under the INA because the record showed evidence of "the presence of distinct and recognizable clans and subclans in Somalia" which could be "differentiated based on linguistic commonalities as well as kinship ties" (quoting Matter of H-, 21 I. & N. Dec. 337, 343 (B.I.A. 1996) (internal quotation marks omitted)).

91. *Id.* at 960 ("The recent *Guidelines* issued by the United Nations confirm that 'visibility' is an important element in identifying the existence of a particular social group.").

92. *Id.* ("In the normal course of events, an informant against the Cali cartel intends to remain unknown and undiscovered. Recognizability or visibility is limited to those informants who are discovered because they appear as witnesses or otherwise come to the attention of cartel members.").

93. *Id.* at 957 (internal quotation marks omitted).

94. *Id.*; *see also In re* A-M-E & J-G-U-, 24 I. & N. Dec. 69, 75 (B.I.A. 2007), *aff'd*, Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007); *see also* Matter of S-E-G-, 24 I. & N. Dec. 579, 581–87 (B.I.A. 2008) (holding that the proposed group of "Salvadoran youth who have been subjected to recruitment efforts by MS-13 and who have rejected . . . membership . . . based on their own

considered whether a group of "wealthy Guatemalans" constituted a particular social group.[95] The BIA began with an *Acosta* analysis and determined that wealth is not an immutable characteristic because it is possible for a wealthy person to change that trait.[96] The BIA noted that lack of an immutable characteristic is not dispositive under *Acosta* if "the shared characteristic is so fundamental to identity or conscience that it should not be expected to be changed."[97] However, in an analysis that highlights the difference between the BIA's social visibility approach and the social perception approach of the UNHCR guidelines, the BIA acknowledged that it "would not expect divestiture when considering wealth as a characteristic on which a social group might be based," but that this *Acosta*-protected group did not constitute a particular social group under the INA because it nonetheless failed to satisfy the BIA's new requirements of social visibility and particularity.[98] While the BIA specifically denied asylum relief to a group that qualified under the immutable characteristics test for lack of social visibility, the approach outlined in the UNHCR Guidelines would end its analysis after finding an immutable characteristic, except when a group lacking an immutable characteristic could show social perception.[99]

The approach outlined by the BIA in *In re C-A-* and subsequent BIA decisions does not solely apply an immutable characteristic or social perception approach; nor does it combine the two in the way UNHCR envisioned when it issued its guidelines on the interpretation of particular social group.[100] Instead, this approach requires that an applicant demonstrate *both* that the group members share an immutable characteristic and that the group is socially distinct.[101]

## III. CONFUSION IN THE CIRCUITS ON SOCIAL VISIBILITY

The BIA's use of the term "social visibility" in *In re C-A-* to describe a new element in determining a "particular social group" has caused a great amount

personal, moral, and religious opposition to the gang's values and activities" was not a particular social group within the meaning of the INA because there was no evidence of social visibility, or that members of this group "would be perceived as a group by society" (internal quotation marks omitted)); Matter of E-A-G-, 24 I. & N. Dec. 591, 594 (B.I.A. 2008) ("Persons who resist joining gangs have not been shown to be part of a socially visible group within Honduran society, and the respondent does not allege that he possesses any characteristics that would cause others in Honduran society to recognize him as one who has refused gang recruitment.").

95. *In re A-M-E & J-G-U-*, 24 I. & N. Dec. at 74–76 (applying social visibility and particularity analysis to a proposed group).

96. *Id.* at 73.

97. *Id.*

98. *Id.* at 73–74; *see also id.* at 74 ("[T]here is little in the background evidence of record to indicate that wealthy Guatemalans would be recognized as a group that is at a greater risk of crime in general or of extortion or robbery in particular.").

99. *UNHCR Guidelines*, *supra* note 5, ¶¶ 11, 13.

100. *See id.* ¶ 11. *See generally In re* C-A-, 23 I. & N. Dec. 951 (B.I.A. 2006).

101. *In re C-A-*, 23 I. & N. Dec. at 959–60.

of confusion and divergence among the circuit courts.[102] The recent BIA opinions in *Matter of M-E-V-G-* and *Matter of W-G-R-* have done little to clarify the confusion beyond the clarification that "social distinction" (as the requirement was rebranded) does not mean "on-sight" perception and that the social group must be perceived as such from the perspective of society.[103] In its aftermath, the courts have since taken two different approaches towards social visibility, creating a circuit split: (1) outright rejection of social visibility, and (2) deference to the BIA's social visibility approach.

### *A. REJECTION OF SOCIAL VISIBILITY*

Both the Seventh and Third Circuits stop "particular social group" analysis at *Acosta*'s immutable characteristics approach and do not apply the BIA's social visibility requirements.[104] In 2009, the Seventh Circuit considered the case of Gatimi of the Kikuyu tribe, who joined a group called the "Mungiki."[105] The group had obscure aims and strict rules, such as "compel[ling] women, including wives of [defecting members], to undergo clitoridectomy and excision."[106] After Gatimi left the Mungiki, he received threats against himself and threats of female circumcision against his wife.[107] The BIA denied the asylum claim based on lack of social visibility because "Gatimi [did not] possess[] any characteristics that would cause others in Kenyan society to recognize him as a former member of Mungiki."[108] The government argued "that secrecy disqualifies a group from being deemed a particular social group."[109] The Seventh Circuit flatly rejected the government's arguments and the BIA's application of a social visibility

102. *See* Henriquez-Rivas v. Holder, 707 F.3d 1081, 1099 (9th Cir. 2013) (listing the circuits that have deferred to the BIA's use of social visibility as a requirement for particular social group, but noting that the Seventh and Third Circuits have rejected a social visibility requirement in their determinations).

103. Matter of M-E-V-G-, 26 I. & N. Dec. 227, 236 (B.I.A. 2014); Matter of W-G-R-, 26 I. & N. Dec. 208, 210–12 (B.I.A. 2014).

104. *See* Valdiviezo-Galdamez v. Attorney Gen. of U.S., 663 F.3d 582, 604 (3d Cir. 2011) ("Since the 'social visibility' requirement is inconsistent with past BIA decisions, we conclude that it is an unreasonable addition to the requirements for establishing refugee status where that status turns upon persecution on account of membership in a particular social group."); Gatimi v. Holder, 578 F.3d 611, 615–16 (7th Cir. 2009) ("[T]he Board has been inconsistent rather than silent. It has found groups to be 'particular social groups' without reference to social visibility, as well as . . . refusing to classify socially invisible groups as particular social groups but without repudiating the other line of cases." (citations omitted)).

105. *Gatimi*, 578 F.3d at 613.

106. *Id.*

107. *Id.* at 614.

108. *Id.* at 615 (internal quotation marks omitted).

109. *Id.* at 616.

requirement.[110] In doing so, the court reasoned that the test amounted to an on-sight, or ocular, visibility requirement:

> If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be "seen" by other people in the society "as a segment of the population."[111]

For similar reasons, the Third Circuit only applies an *Acosta* analysis and rejects a social visibility requirement.[112]

### *B. DEFERENCE TO THE BIA'S APPROACH*

The remaining circuit courts give deference to the BIA's social visibility requirement.[113] Deference to the BIA's application of the social visibility requirement has at times led courts to apply an "on-sight" visibility interpretation. In *Benitez Ramos v. Holder*, a First Circuit decision, the government argued that "you can be a member of a particular social group only if a complete stranger could identify you as a member if he encountered you in the street, because of your appearance, gait, speech pattern, behavior or other discernible characteristic."[114] There was some judicial support for such deference.[115] However, the BIA, in an attempt to clarify the meaning of social visibility, issued a precedential opinion in *Matter of W-G-R-*, renaming the requirement as "social distinction" and clarifying that social visibility does not require an ocular visibility test.[116]

---

110. *Id.* at 615–16. By finding that Gatimi was a member of a particular social group that shared an immutable characteristic, and rejecting a further requirement of social visibility, the court granted Gatimi asylum. *Id.* at 615–16, 618.

111. *Id.* at 615. The Seventh Circuit also drew similarities between the BIA's position and another position the court had previously "rejected: that a person cannot complain of religious persecution if by concealing his religious practice he escapes the persecutors' notice." *Id.* at 616. (citing Oyekunle v. Gonzales, 498 F.3d 715, 717 (7th Cir. 2007)); *see id.* ("The only way, on the Board's view, that the Mungiki defectors can qualify as members of a particular social group is by pinning a target to their backs with the legend 'I am a Mungiki defector.'").

112. *See* Valdiviezo-Galdamez v. Attorney Gen. of U.S., 663 F.3d 582, 606–07 (3d Cir. 2011) (interpreting the government's social visibility requirement as invalid "on-sight visibility" even when the government contended "that 'social visibility' is a means to discern the necessary element of group perceptibility" because the court was not sure that the BIA understood the difference between the two).

113. Matter of W-G-R-, 26 I. & N. Dec. 208, 210–11 (B.I.A. 2014).

114. Benitez Ramos v. Holder, 589 F.3d 426, 430 (7th Cir. 2009).

115. *See* Scatambuli v. Holder, 558 F.3d 53, 59 (1st Cir. 2009) (giving deference to a BIA standard requiring "'social visibility,' meaning that members possess 'characteristics . . . visible and recognizable by others in the [native] country'" (alteration in original) (citing *In re* C-A-, 23 I. & N. Dec. 951, 960 (B.I.A. 2006))).

116. *Matter of W-G-R-*, 26 I. & N. Dec. at 211–12.

The BIA's analysis in *Matter of W-G-R-* represented a step in clarifying the scope of "particular social group" towards conformity with that of the UNHCR Guidelines. Under the newly branded "social distinction" analysis, an on-site social visibility requirement could not be justified; instead, the BIA emphasized that the social group must be socially cognizable.[117] However, the BIA's analysis retained social distinction as a requirement in addition to a finding of an immutable characteristic.[118] Additionally, the BIA's opinion in *Matter of M-E-V-G-* stated that it is the society in question's perspective of the particular social group that determines if it is cognizable.[119] This new clarification remains inconsistent with the social perception definition of a particular social group that the UNHCR Guidelines outlined, which allowed for an objective third party to be able to classify the group as cognizable.[120]

## IV. THE BIA SHOULD ABANDON THE SOCIAL DISTINCTION REQUIREMENT AND ADOPT IT AS AN ALTERNATIVE BASIS FOR DEFINING "PARTICULAR SOCIAL GROUP" IN ORDER TO BE MORE CONSISTENT WITH POLITICAL OPINION JURISPRUDENCE AS WELL AS UNHRC GUIDELINES

With asylum application rates ballooning in recent years, it is crucial that the BIA and circuit courts adopt a uniform analysis of what constitutes a particular social group.[121] Uniformity is necessary to avoid inequalities in the asylum process, prevent forum shopping from prospective applicants, and promote judicial economy.

While *Matter of W-G-R-* served to clarify confusion surrounding whether social visibility required on-site distinction by rebranding the requirement "social distinction," its definition of "particular social group" is still inconsistent with the UNHCR Guidelines.[122] This Note proposes adopting the full definition of "particular social group" laid out in the UNHCR Guidelines. Such adoption will alleviate a split in the circuit courts, where no court has yet applied the UNHCR Guidelines' definition. By adopting this definition, the BIA will establish more consistency across the various protected grounds,

---

117. *Id.*

118. *Id.* at 212–13.

119. Matter of M-E-V-G-, 26 I. & N. Dec. 227, 241–42 (B.I.A. 2014).

120. Marouf, *supra* note 8, at 433 (quoting *Applicant S v Minister for Immigration & Multicultural Affairs* (2004) 217 CLR 387, ¶ 34 (Austl.)).

121. Joel Millman, *More Illegal Immigrants Ask for Asylum: 'Credible Fear' Claims Rise as Migrants Seek to Avoid Deportation*, WALL ST. J. (Oct. 17, 2013, 11:49 AM), http://www.wsj.com/articles/SB10001424052702304795804579097473250468020 (reporting that 27,546 migrants who entered the United States illegally made credible-fear claims in the 2013 fiscal year, more than doubling the 10,730 from fiscal year 2012 and more than 20,000 more than the 3273 credible-fear claims made in 2008).

122. *Compare UNHCR Guidelines*, *supra* note 5, ¶ 11 (allowing either an immutable characteristics approach or a social perception approach in determining if there is social visibility), *with Matter of W-G-R-*, 26 I. & N. Dec. at 211–13 (applying a social distinction requirement *in addition* to a finding of an immutable characteristic).

including political opinion. It will also bring United States asylum law into closer conformity with international norms.

### A. *Political Opinion*

It is important to maintain consistency between the particular social group asylum ground and the other grounds because the dominant approach to interpreting "particular social group" is through employing *ejusdem generis*, which necessitates the general term be framed in relation to the more specific terms that surround it. Since the definition of "particular social group" cannot be untethered from the other four protected grounds, it makes sense to consider the analysis utilized under a "particular social group" definition in relation to the analyses used by the other protected grounds, such as political opinion.

Under the *Acosta* approach, the goal of both political opinion analysis and particular social group analysis is to protect immutable characteristics and those traits that are "so fundamental to individual identity or conscience that [they] ought not be required to be changed."[123] Both of these grounds are rooted in anti-discrimination and human rights.[124] Limiting the application of the protected grounds is thus inconsistent with this human rights focus. Instead, courts should interpret all of the protected grounds in a way that allows for the full realization of the human-rights-based purpose that does not exclude from eligibility anyone who is persecuted based on an immutable characteristic. Political opinion is already shaped in such a way through an approach that takes into account all forms of political opinion, from public speaking to unexpressed forms. However, including a "social distinction" requirement narrows the particular social group ground to less than the full coverage required to adhere to *Acosta* and principles of human rights. The particular social group ground permits asylum based on persecution because of immutable characteristics, but an individual still may not be granted asylum because U.S. courts may not find his immutable characteristics to be socially distinct.

It is inconsistent for a court to recognize that the purpose of a protected asylum ground is to protect those with few fundamental human rights (e.g., political opinion, religion, nationality), and, then in the case of particular social groups, to limit protection to only those whose socially distinct fundamental rights are being abused. For example, in *A-M-E & J-G-U*, the BIA acknowledged that while wealthy Guatemalans should not be compelled to divest their wealth (seemingly finding a fundamental right to not have to divest one's wealth to avoid persecution), the Guatemalans were properly denied asylum relief because the common trait was not socially visible.[125]

123. Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985)

124. Steinbock, *supra* note 8, at 795, 800.

125. *In re* A-M-E- & J-G-U-, 24 I. & N. Dec. 69, 73–75 (B.I.A. 2007).

A political opinion is a characteristic of a person that is so fundamental to his identity that he should not be compelled to give it up.[126] That is the basis for political opinion inferred by the BIA in *Acosta*.[127] Courts adopted the *Acosta* test for "particular social group" in an attempt to restrict the grant of asylum to only those who share the immutable and fundamental characteristics, thus ensuring that the focus of the term was on protecting those with similar fundamental traits to a political opinion. By *requiring* the social visibility requirement in *addition* to the *Acosta* elements, some people would fail to qualify for asylum even if the persecution is on account of a fundamental trait not covered by another ground.[128]

Thus, employing a social visibility requirement in addition to the *Acosta* test narrows the scope of the definition of "particular social group" to a point where it may not even be precisely defined through the terms that surround it, and thus forces particular social group analysis into inconsistency with the other protected grounds.[129]

In the absence of a political opinion protected ground in the INA, given the reasoning of the BIA in *Acosta*, such a trait could still likely form the basis of an asylum claim under membership in a particular social group. The court, applying *ejusdem generis*, would arrive at the same definition of particular social group as those that share a characteristic "so fundamental to individual identity or conscience that it ought not be required to be changed."[130] However, given the requirement of social distinction currently used by the BIA and some district courts, the cascading analysis of political opinion would not be utilized and only those political opinions that are socially visible would receive protection. Such an application falls short of the purpose of the 1951 Convention Relating to the Status of Refugees, and the intention to ground refugee and asylum law in protecting human rights.[131]

Under the UNHCR Guidelines approach, several steps exist to ensure appropriate application of protection. First, a court would determine if there

126. *See* Universal Declaration of Human Rights, *supra* note 10, art. 19 ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

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

128. Gatimi v. Holder, 578 F.3d 611, 615, 617–18 (7th Cir. 2009) (overturning a BIA decision denying asylum, for lack of social visibility, to a man who had the immutable characteristic of being a former member of a group that coerced females into genital mutilation and to his wife).

129. *See id.* at 616 (noting that concealing religious practices to escape persecutors' notice is not a bar to asylum).

130. *Matter of Acosta*, 19 I. & N. Dec. at 233; *see also* Universal Declaration of Human Rights, *supra* note 10, art. 19 (listing freedom of opinion as a human right).

131. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987) (stating it was Congress's intent to align United States refugee law with the 1967 United Nations Protocol Relating to the Status of Refugees).

is a shared trait.[132] If a shared trait exists, the court looks to see if the trait is immutable or of such a fundamental nature that one cannot be compelled to relinquish it.[133] If these elements are satisfied, then there is a particular social group.[134] If there is no such trait, then the court moves onto the social perception analysis.[135] This approach is consistent with political opinion's cascading analysis which asks: (1) if there were actual words; (2) if there was actual expressive conduct; (3) if there was yet an unexpressed political opinion that is likely to be revealed; or, (4) if there was a political opinion imputed onto the asylum seeker.[136] The only way to ensure full asylum coverage of all fundamental rights is to adopt such an approach. Absent such an adoption, individuals will remain ineligible for asylum even though they are persecuted based on immutable or fundamental characteristics that are nevertheless not socially visible characteristics.

### *B. UNHCR GUIDELINES*

With the passage of the Refugee Act of 1980, it was the intention of Congress to align U.S. asylum law with international refugee law.[137] Adopting the UNHCR Guidelines' definition of particular social group would accomplish this. While the BIA has stated that the "social distinction requirement" was never intended to include on-site visibility, the new approach outlined by the BIA is still inconsistent with international refugee law in two general ways. First, it includes a social distinction requirement rather than including "social perception" as an alternative. Second, it defines social perception as that of the society in question.

No other common law country requires social distinction in addition to the immutable characteristic test.[138] The United Kingdom, Canada, Ireland, and New Zealand all have adopted the *Acosta* immutable characteristics definition of "particular social group."[139] While the interpretations of other countries are not binding upon United States' courts, it is persuasive evidence that the United States' interpretation of "particular social group" has not conformed to the intended international definition.[140]

Furthermore, the BIA's definition of "social distinction" is inconsistent with the concept of "social perception" incorporated by the UNHCR Guidelines. The BIA's approach focuses on the society in question to

132. *UNHCR Guidelines*, *supra* note 5, ¶ 11.

133. *Id.*

134. *Id.*

135. *Id.* ¶ 13.

136. GERMAIN, *supra* note 17, at 57–60.

137. INS v. Cardoza-Fonseca, 480 U.S. 421, 436 (1987); *see also* Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

138. *See* Marouf, *supra* note 8, at 425.

139. *Id.* at 426–31, 433–34.

140. *See generally id.*

determine if a social group is perceived to be as such.[141] However, Australia, the only common law country to adopt the "social perceptions" definition of "particular social group," and from where the UNHCR incorporated the term, allows for social perception to be determined by an objective third party.[142] This question has caused great confusion among courts that have given deference to the BIA's inclusion of a "social visibility" requirement.[143] Further, it may prove arbitrary to require immigration judges to pinpoint the perception of a society without even considering the vast differences and complexities between cultures. Following the Seventh and Third Circuit's approach of using only the *Acosta* analysis would alleviate some of these issues, and adopting the UNHCR Guidelines approach would limit confusion, provide full protection of the human rights underlying refugee law, and bring U.S. asylum law into greater conformity with the 1967 Protocol as Congress intended in passing the 1980 Refugee Act.

## V. CONCLUSION

The BIA should adopt the full definition of "particular social group" as articulated in the UNHCR Guidelines beginning with an immutable characteristics analysis and then, if no particular social group is identified, consider the "social perception" analysis. In order to maintain consistency with the purpose behind the other protected grounds and the UNHCR Guidelines, courts should apply the social perception analysis only after an *Acosta* analysis has revealed no immutable or fundamental trait. By adopting such a definition, asylum law can fully guarantee protection for those who find themselves oppressed and persecuted in their home countries based on a characteristic that they cannot or should not be compelled to change. Otherwise, the status quo will turn back the unlucky individuals who face such a situation but cannot convince a court that such a characteristic falls into the arbitrary category of "socially visible."

The current split in the analysis of courts harms judicial economy because the BIA is free to apply its own definition of "particular social group," which some appellate courts have consistently rejected, leading to more appeals than should be required. In addition, the very bedrock of asylum and refugee law, as noted by the BIA in *Acosta*, is to protect those who are facing persecution based on either something they cannot change or on something that is so fundamental to who they are that they should not be required to change.[144] Currently, immigration courts are failing such individuals whose claims are based on membership in a particular social group by returning

141. Matter of M-E-V-G-, 26 I. & N. Dec. 227, 241–42 (B.I.A. 2014).

142. Marouf, *supra* note 8, at 433 (quoting *Applicant S v Minister for Immigration & Multicultural Affairs* (2004) 217 CLR 387, ¶ 34 (Austl.)).

143. *See generally* Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013).

144. *See* Matter of Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

them to persecution, and in some cases death, because they cannot prove something *beyond* persecution based on an immutable characteristic. International human rights law and domestic asylum law never envisioned such a requirement, and by utilizing it, the United States is fatally failing many, as well as harming its reputation as a champion of human rights that is committed to international law.