

Recognizing and Responding to Gang Affiliation Allegations

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INTRODUCTION

In recent years, immigration practitioners have noted a trend of gang allegations based on false and flimsy evidence infiltrating the immigration system rendering those accused top immigration enforcement priorities.² Gang allegations increase the likelihood of detention, deprivation of an immigration bond, denial of immigration benefits, and, ultimately,

¹ The authors would like to thank CLINIC's Board of Immigration Appeals Pro Bono Project Legal Assistant Brenda Hernandez and Tulane Law School student Golare Dabiri Tanha for their research assistance.

² *Deportation by any Means Necessary*, Immigrant Legal Res. Ctr., www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf, 4 n.6 (Last visited on February 24, 2019) (demonstrating immigration practitioner survey respondents have noticed a trend of increased use of gang allegations over the past few years); *See Nat'l Gang Unit*, U.S. Immigration and Customs Enf't, www.ice.gov/national-gang-unit (Last visited on March 15, 2019); *Operation Cmty. Shield*, Immigration and Customs Enf't, www.ice.gov/features/community-shield (Last visited on March 15, 2019) (demonstrating that gang affiliation is an enforcement priority).

deportation.³ This practice advisory provides guidance on recognizing and responding to gang allegations, including the difference between a gang affiliate and a gang member, screening for the risk of gang allegations, understanding procedurally how they arise and the legal issues at stake, and ultimately, effective strategies for challenging allegations both before U.S. Citizenship and Immigration Services (USCIS) and in immigration court. While the guidance applies generally to cases in immigration court, for a specific perspective on bond proceedings, please refer to CLINIC’s “A Guide to Obtaining Release From Immigration Detention.”⁴

GANG MEMBER/ASSOCIATE v. GANG AFFILIATE ALLEGATIONS

Federal law does not prohibit gang affiliation, but federal law does allow for the prosecution of gang members or associates under, for example, the Racketeer Influence and Corrupt Organization (RICO) statute.⁵ States may have both civil and criminal laws relating to gang membership or association, with some laws enhancing criminal sentencing for such membership.⁶ Despite federal and state laws outlawing gang membership and association, law enforcement agencies at federal and state levels apply different meanings to these terms.⁷ With regard to immigration law, the Immigration and Nationality Act (INA) does not define gang member or gang associate.⁸ Regarding gang affiliation, there is no definition for this term under federal law, states’ laws, or the INA, yet practitioners have seen Department of Homeland Security (DHS) officials allege this against clients.

Varying definitions for gang member and gang associate coupled with no definition of affiliate may be the reason practitioners have reported in a number of cases that the Department of Homeland Security (DHS) officials have used all three terms interchangeably.⁹ For example, despite gang membership requiring criteria that is more stringent than gang affiliation, practitioners have witnessed Immigration and Customs Enforcement (ICE) allege that a client is a gang member without a related finding or charge arising in the prior federal or state criminal proceedings. Instead, the gang member allegation arises from circumstantial evidence like photos or posts on social media, clothing style and/or unverified and unreliable reports from third

³ Laila L. Hlass, *The School to Deportation Pipeline*, 34 *Ga. St. U. L. Rev.* 697 (2018), <https://readingroom.law.gsu.edu/cgi/viewcontent.cgi?article=2931&context=gsulr>.

⁴ Along with sample materials, the guide is available at <https://cliniclegal.org/resources/bond-guide>. See also *Immigrant Defense Project, Challenging Evidence of Gang-Related Activity at Immigration Court Bond Hearings* (Aug. 3, 2017), www.immigrantdefenseproject.org/wp-content/uploads/PracticeNote-8-3-17-gang-bond-hearings-1.pdf.

⁵ 18 U.S.C. §§ 1961–1968.

⁶ Prachi Gupta, *This is How a Tattoo Can Get You Detained by ICE*, Slot, <https://theslot.jezebel.com/this-is-how-a-tattoo-can-get-you-detained-by-ice-1826086153> (Last visited on March 15, 2019).

⁷ Neither law enforcement nor scholars agree on a uniform gang definition. See *Nat’l Youth Gang Survey Analysis*, NAT’L GANG CTR., www.nationalgangcenter.gov/Survey-Analysis (last visited March 11, 2019) (“There is no widely or universally accepted definition of a ‘gang’ among law enforcement agencies.”); C. Ronald Huff, Preface to *GANGS: THE ORIGINS AND IMPACT OF CONTEMPORARY YOUTH GANGS IN THE UNITED STATES*, vii (Scott Cummings & Daniel J. Monti eds., 1993) (noting that no comprehensive definition of “gang” has been put forward).

⁸ INA § 101(a) (Supp. 2014) (providing definitions).

⁹ *Supra* note 2, at 6 (“[I]n 17 [of 40 reported] cases, [clients] were accused of being both a gang member and an associate.”). In addition, one of the authors is aware of a case in which the HSI report said “verified gang affiliate” in the subject line and “verified gang member” in the body of the report. The ICE attorney then used both terms interchangeably during immigration court proceedings.

parties. Furthermore, whether the adjudicator is USCIS or the Immigration Judge (IJ), a gang member, gang associate or gang affiliate label has the same negative effect.

SCREENING FOR GANG ALLEGATIONS

In a recent report, *Deportation by Any Means Necessary*, practitioners reported dozens of questions that USCIS adjudicators, ICE attorneys and IJs asked clients regarding gang allegations, and this list of questions is reprinted as an Appendix to this practice advisory. Questions spanned asking clients about any help ever provided to gang members, even under coercion, to choices in clothing and friends, as well as general knowledge of gangs.¹⁰

Practitioners have noted that clients who are most at risk of gang allegations are Latino boys,¹¹ and allegations may be solely based on youths' clothes, friends, or even where they live.¹² Although practitioners note often being surprised by ICE or USCIS allegations because there has been no indication of gang affiliation, practitioners can take affirmative steps when working with a client to screen for risks. Practitioners should consider taking the following steps:

- Ask your client whether an immigration agent, law enforcement officer, school official, or another local, state, or federal government employee has ever questioned him about gangs. If so, request records of the related government entity to find reports or notes that may indicate a suspicion of gang affiliation against your client.
- Determine whether your client has any family members or friends who were or are involved with gangs in the home country or in the United States, such that a "gang" affiliate or associate classification may exist due to that relationship.
- Determine your client's presence on social media, and review photos on all the profiles. Note that DHS may allege gang affiliation, in part, based on wearing popular clothes or items, such as rosary beads, Chicago Bulls hats, Nike Cortez shoes, or specific colors, such as blue, white, red, and black.¹³
- Submit a Freedom of Information Act request¹⁴ to ICE to obtain all relevant immigration records relating to your client, including Form I-213, which may have language asserting the client is gang affiliated.
- Request the Federal Bureau of Investigations (FBI) criminal history check, termed "Identity History Summary Checks"¹⁵ to determine if your client has had any arrests, and if so, request the relevant police reports of the arrests to assess if there is any narrative relating to gangs.

¹⁰ See Appendix, reprinted from *Deportation by Any Means Necessary*, Immigrant Legal Res. Ctr, www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf, 18 (Last visited on March 15, 2019)

¹¹ *Supra* note 2, at 7; *Swept up in the Sweep*, NY Immigration Coal., http://thenyic.pi.bypronto.com/wp-content/uploads/sites/2/2018/06/SweptUp_Report_Final-1.pdf, 21 (May 2018).

¹² *Supra* note 2.

¹³ *Swept up in the Sweep*, NY Immigration Coal., http://thenyic.pi.bypronto.com/wp-content/uploads/sites/2/2018/06/SweptUp_Report_Final-1.pdf, 33 (May 2018); See *Supra* note 2 at 11-12.

¹⁴ See American Immigration Council Practice Advisory: *FOIA Immigration Lawyers* (Updated February 2017), www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/practice_advisory_foia_for_immigration_lawyers.pdf.

¹⁵ *Identity History Summary Checks*, FBI, www.fbi.gov/services/cjis/identity-history-summary-checks (Last visited February 24, 2019).

- If your client was held by the Office of Refugee and Resettlement (ORR), request the ORR file to determine if staff ever reported a suspicion of gang involvement.¹⁶
- If your client has ever been held in local or state law enforcement custody, request custodial records. It is particularly important to review if the jail segregated him based on suspected gang membership.
- If your client has ever been subjected to the juvenile justice system, request a copy of their file from their attorney in that proceeding. Often, public defenders represent juveniles in juvenile justice system proceedings.
- If your client is or was ever enrolled in school, request any disciplinary reports.

HOW GANG ALLEGATIONS AFFECT IMMIGRATION CASES

DHS may present evidence of gang affiliation in cases before USCIS and the immigration court. When USCIS or ICE introduce gang allegations evidence in either context, the aim is the same: to deprive the non-citizen of an immigrant benefit or protection from removal. Although neither gang affiliate or gang membership are defined under the Immigration and Nationality Act, allegations are relevant to several legal elements. First, USCIS officers and IJs have broad discretionary authority to determine eligibility for most immigration benefits or relief from removal, respectively.¹⁷ Second, gang allegations affect good moral character assessments.¹⁸ Third, gang allegations can present certain inadmissibility issues such as security-related grounds, terrorism-related grounds and “reason to believe.” Therefore, USCIS officers and IJs consider gang allegations and rely on these allegations to determine the non-citizen’s future in the United States.

1. Cases Before USCIS¹⁹

A review of a sampling of unpublished Administrative Appeals Office (AAO) decisions since 2017 reveals the impact of gang allegations on USCIS’s discretionary authority, good moral character assessment, and admissibility review while highlighting sources and examples of gang allegations.²⁰ These decisions stem from the Vermont Service Center (VSC) and the Nebraska Service Center (NSC).

Discretion	
Case Information	Facts, Procedural Description, and Decision Reasoning
Name of decision: Matter of N-A-C-R Decision date:	The VSC alleged that the Petitioner belonged to a transnational gang due to social media images. The Petitioner denied this affiliation and claimed that none of his social media posting related to gangs.

¹⁶ Request for UAC Case File Information, Off. of Refugee Resettlement, www.acf.hhs.gov/orr/resource/requests-for-uac-case-file-information (April 14, 2014).

¹⁷ See e.g., 8 CFR §245.24(d)(11) (U nonimmigrant status); INA §204(a)(1)(J) and 8 CFR §204.2(c)(2)(i) (VAWA).

¹⁸ INA §101(f).

¹⁹ To the authors’ knowledge, there are no published AAO decisions re gang allegations.

²⁰ Unless otherwise noted, practitioners can find these decisions through the AAO Non-Precedent Decision Repository, <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-aao/aao-non-precedent-decisions>.

<p>January 31, 2019</p> <p>Type of application: Form I-918, Petition for U Nonimmigrant Status</p> <p>Appeal from what office: Vermont Service Center</p> <p>AAO Decision: Motion to Reopen/Reconsider Denied</p>	<p>Photos available on social media account showed the Petitioner “wearing gang clothing, posting gang sayings, and associating with other documented gang members.” Petitioner submitted new evidence describing the significance of some of his clothing, hand gestures, and social media posts, but this evidence did not overcome the results of law enforcement investigations concluding gang membership. The AAO noted “we do not make [our] own determination as to [the Applicant’s] gang membership” and instead “the determination of whether an individual is a gang member is within the jurisdiction of the investigating law enforcement agency and we defer to that finding.” The Applicant highlighted that some law enforcement agencies have misidentified other individuals as affiliated with gangs, but the AAO concluded that the Applicant did not present evidence of unreliability or otherwise establish an error.</p>
<p>Name of decision: Matter of A-S-G²¹ WL 4407324</p> <p>Decision date: August 31, 2018</p> <p>Type of application: Form I-485, Application to Register Permanent Residence or Adjust Status based on derivative “U” nonimmigrant status</p> <p>Appeal from what office: Vermont Service Center</p> <p>AAO Decision: Motion to Reconsider Denied</p>	<p>Law enforcement authorities had stopped or arrested the Applicant on five occasions. In 2009, at the age of 17, he was charged with participation in a criminal street gang and misdemeanor simple assault, but that charge was never prosecuted. In September 2011, Petitioner received derivative U-3 nonimmigrant status based on his mother. Applicant filed the U adjustment application in June 2015.</p> <p>The AAO concluded that the Petitioner’s submissions highlight that he was a gang associate when apprehended by law enforcement officials in 2009. Although the victim of the incident that led to the Applicant’s 2009 charges for participation in street gang activity and simple assault stated that he mistakenly implicated the Applicant in the incident, the victim did not affirmatively state that the Applicant was not associated with or a member of the gang. Although the Applicant explained the specific facts surrounding his arrests and stated that they arose as a result of spending time with a “bad crowd,” he did not explain how often he spent time with these individuals, what sort of activities he engaged in while doing so, or why he himself was not a part of the same “bad crowd.” Furthermore, the AAO highlighted that the Applicant had failed to submit an updated personal statement with the motion to reconsider. The AAO held that the Petitioner’s juvenile criminal history and the indicia of his gang association in the record demonstrated that it was not in the public’s best interest to adjust the applicant’s status.</p>
<p>Name of decision: Matter of L-E-T-F</p> <p>Decision date: August 14, 2018</p> <p>Type of application: Form I-485, Application to</p>	<p>Applicant entered without inspection (EWI) in 1997. In 2007, he was removed and thereafter EWI-d again. In March 2015, the VSC approved Form I-929 Petition for Family Member of U-1 Nonimmigrant filed by his spouse on his behalf. The VSC denied his adjustment application in November 2017. The Applicant admitted that in 2001, when he was 18 years of age and working at a tattoo shop, he began hanging out with</p>

²¹ This decision is not available via the AAO Non-Precedent Decision Repository. Practitioners may access this decision via Westlaw or by requesting it from Michelle Mendez at mmendez@cliniclegal.org.

<p>Register Permanent Residence or Adjust Status based on “U” nonimmigrant status Appeal from what office: Vermont Service Center AAO Decision: Appeal Dismissed</p>	<p>members of different gangs, but that he never engaged in gang-related activities with them, only drinking and smoking.</p> <p>The Applicant stated that he never offered information about being a gang member in an ICE interview, but the AAO concluded that the Applicant’s allegation was not credible. The AAO held that it presumes that statements contained in a Form 1-213, and related administrative record, to be presumptively reliable in the absence of evidence to the contrary. Although the Applicant claimed he never admitted to having gang membership, he admitted in his written statements that he began to befriend gang members in 2001 and that, in 2003, when police stopped his vehicle, his friend found holding a gun was a gang member. The AAO found that the Applicant’s admitted close associations with gang members, at any time, even in the past, were considered extremely negative discretionary factors. Despite the Applicant’s positive equities, which include his marriage to an LPR, two U.S. citizen children, lengthy residence in the United States, employment and payment of taxes, and the support he provides to his family, the negative factors—his criminal, immigration, and gang association history—outweighed the positive equities.</p>
<p>Name of decision: Matter of J-B-P-R Decision date: May 24, 2018 Type of application: Form, I-918, Petition for U Nonimmigrant Status based on “U-1” nonimmigrant classification Appeal from what office: Nebraska Service Center AAO Decision: Appeal Dismissed</p>	<p>In denying the U petition, the NSC concluded that the Petitioner was inadmissible based upon the underlying denial of the Petitioner’s waiver application. The NSC denied the waiver application finding that the Petitioner was inadmissible under section 212(a)(6)(A)(i) and did not warrant waiver of the applicable ground of inadmissibility as a matter of discretion.</p> <p>The NSC noted that the Petitioner displayed a “pattern of delinquent behavior which ultimately led to the Petitioner’s permanent expulsion from Georgia schools in 2007.” The list of disciplinary offenses leading up to his expulsion included suspensions based upon possession of marijuana, fighting, lewd caressing, threats, and theft of and damage to private property, among other offenses. Petitioner was arrested for possession of marijuana in Georgia in 2009, and ultimately received a conditional discharge as a result of the offense. The record included various pieces of evidence, including the law enforcement certification, affirmatively submitted by the Petitioner, identify him as a member of a gang or stated that he was involved in gang-related activity. On appeal pending the adjudication of his motion to reopen and reconsider the denial of the waiver, the Petitioner only requested that the U petition denial be “held” and did not contest the ground of inadmissibility.</p>
<p>Name of decision: Matter of F-P-D Decision date: February 16, 2018 Type of application: Form I-485,</p>	<p>The Applicant EWI-ed in July 1990. The Applicant was a victim of felonious assault that resulted in a gunshot to his hand and abdomen. The Applicant filed the U adjustment application in August 2015, after his admission to the United States as a U nonimmigrant in August 2012. The Applicant was arrested on multiple occasions for public intoxication, patronizing a prostitute, battery, criminal mischief and criminal</p>

<p>Application to Register Permanent Residence or Adjust Status based on “U” nonimmigrant status Appeal from what office: Vermont Service Center AAO Decision: Appeal Dismissed</p>	<p>recklessness, residential entry and criminal trespass, and invasion of privacy.</p> <p>On appeal, the Applicant asserts that the VSC made an unsubstantiated accusation of gang involvement with no context offered to him. After the submission of additional letters attesting that the Applicant was not a gang member, the VSC withdrew the portion of the decision based on perceived gang membership. The VSC mentioned that although the Applicant was not a gang member, a search of the house revealed a revolver and gang-related paraphernalia. An affidavit from the Applicant’s eldest son noted that both he and his stepbrother formed friendships with gang members and a search warrant was executed on the residence because he and his stepbrother had been arrested. The AAO dismissed the appeal because the Applicant’s criminal history and the underlying circumstances of his arrests and criminal charges showed a history of disregarding the laws of the United States. The AAO reasoned that these facts did not demonstrate that the Applicant’s continued presence was in the public interest. Furthermore, the Applicant did not present outstanding equities regarding his four U.S. citizen children to establish that his continued presence in the United States was justified.</p>
<p>Name of decision: Matter of K-G-G-E Decision date: May 5, 2017 Type of application: Form I-485, Application to Register Permanent Residence or Adjust Status based on “U” nonimmigrant status Appeal from what office: Vermont Service Center AAO Decision: Appeal Sustained</p>	<p>The Applicant was a native and citizen of El Salvador. His mother filed the U derivative petition in 2009, prior to the Applicant’s 2010 arrest by El Salvadoran police for suspected membership in an illegal gang. In June 2015, the Applicant filed his U adjustment application, in which he indicated that he had never been arrested, cited, convicted, or imprisoned for breaking or violating any law. In response to a request for evidence regarding his 2010 arrest, the Applicant did not explain why he did not list any arrests, but rather submitted a personal statement explaining that his arrest was pursuant to a law against “walking in the street.”</p> <p>The VSC denied the application primarily due to the Applicant’s arrest in El Salvador in 2010 for suspected membership in an illegal gang. On appeal, the Applicant contended that he was not a gang member and had no criminal history, and that country conditions information on El Salvador showed that arbitrary arrests are common there. The Applicant also provided on appeal country conditions information showing that warrantless arrest and arbitrary detention, particularly against young people suspected of gang membership, frequently occur in El Salvador. He also submitted sworn statements from two family members in El Salvador, who stated that the Applicant did not belong to a gang and had good conduct in his community, but had to leave his home and school because he was the victim of harassment and threats by gang members. Three of the Applicant’s former neighbors in El Salvador made similar statements. The Applicant had previously submitted a clearance letter from the El Salvador Ministry of Justice and Public Security, General Directorate of Detention Centers, dated May 2016, stating that the Applicant did not have any</p>

	<p>“criminal record for conviction or sentence” and had not been charged with any crime. Since the evidence showed that the Applicant’s 2010 arrest did not lead to a criminal charge or conviction, and there was no corroborating evidence of his suspected gang membership, the Applicant’s arrest was not considered an adverse factor.</p>
<p>Name of decision: Matter of D-D-J-F-T Decision date: March 17, 2017 Type of application: Form I-485, Application to Register Permanent Residence or Adjust Status based on “U” nonimmigrant status Appeal from what office: Vermont Service Center AAO Decision: Appeal Sustained</p>	<p>Applicant entered the United States as an A-2 nonimmigrant with his family when he was a child. The Applicant and his mother were abused by his father, and his mother filed a U visa petition on his behalf. The VSC approved the U petition, and the Applicant filed the Adjustment of Status application. The VSC denied the adjustment application, concluding that the mitigating factors in the Applicant’s case did not outweigh the negative equities, and that it was not in the public interest to exercise discretion in his case.</p> <p>The Applicant argued that the VSC exaggerated and wrongly considered the Applicant’s juvenile record as “criminal,” speculated about a gang association that did not exist, and gave inadequate weight to the positive equities in his case. However, the AAO found that the Applicant admitted that although he had never “jumped in” to a gang, he “hung out” with gang members and his friends and family members were in gangs. As such, the AAO found that the VSC correctly took into consideration the Applicant’s association with gang members. The unfavorable factors were the Applicant’s commission of juvenile offenses, use of illegal drugs and alcohol, association with gang members, and a sentence for possession of a dangerous weapon as a minor and obstruction of justice. The favorable factors included the Applicant’s rehabilitation, expression of remorse, lack of a criminal record, length of time in the United States, family ties in the United States, and volunteer activities. Other favorable factors included the Applicant’s positive achievements in sports and education; his employment record; and letters from over 25 individuals who stated that the Applicant served as an inspiration and role model to others and was an asset to the community (including one letter from a member of the police department). The AAO held that, when viewed in its totality, the record contained “compelling evidence of positive equities in the Applicant’s favor which outweigh the negative factors.”</p>

Good Moral Character	
Case Information	Facts, Procedural Description, and Decision Reasoning
<p>Name of decision: Matter of J-P-V Decision date: February 15, 2018 Type of application: Form I-360, Petition</p>	<p>VSC denied the VAWA petition concluding that the Petitioner did not submit sufficient evidence to establish that she entered into the marriage with her U.S. citizen spouse in good faith. The VSC then dismissed her appeal and subsequent motion concluding that she had not shown that she married in good faith or that she is a person of good moral character.</p>

<p>for Amerasian, Widow(er) or Special immigrant based on Violence Against Women Act (VAWA)</p> <p>Appeal from what office: Vermont Service Center</p> <p>AAO Decision: Motion to Reopen/Reconsider Denied</p>	<p>With regard to good moral character, the record reflected that the Petitioner was convicted of criminal mischief in violation of Colorado Revised Statutes section 18-4-501, a class four felony, and sentenced to two years of probation and payment of \$5,000 in restitution. The Petitioner submitted a redacted conviction document from the criminal court relating to gang affiliation and association, but “did not plausibly explain the reason for the redaction.” The AAO acknowledged that the Petitioner stated in her affidavit submitted with her motion that she had never been involved in any gang personally or by association. However, the AAO was concerned that Petitioner had not shown that she attempted to get her records from the probation department. Further, the Petitioner had not assuaged the AAOs concerns about her potential gang affiliation or association. The Petitioner’s counsel stated in a brief that it was her decision, not the Petitioner’s, to redact and withhold information regarding the Petitioner’s criminal history when she filed the VAWA petition and that the Petitioner’s admission of her criminal history on the adjustment application showed that she is a person of good moral character. However, counsel did not submit an affidavit attesting to her role in omitting material information on the VAWA petition and the adjustment application. The AAO held that the Petitioner’s lack of accountability reflected negatively on her claim that she is a person of good moral character.</p>
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Inadmissibility²²	
Case Information	Facts, Procedural Description, and Decision Reasoning
<p>Name of decision: Matter of D-E-T</p> <p>Decision date: June 15, 2018</p> <p>Appeal from what office/agency: Nebraska Service Center</p> <p>Type of application: Form I-601, Application for Waiver of Grounds of Inadmissibility</p> <p>AAO Decision: Appeal Dismissed</p>	<p>The Applicant was from and resided in El Salvador. The Applicant applied for an immigrant visa, but the NSC found him inadmissible because of unlawful presence in excess of one year prior to his voluntary return to El Salvador in 2012 and because he was barred on security-related grounds due to gang membership.</p> <p>The NSC made an inadmissibility finding for unlawful activity under 212(a)(3)(A)(ii) based on an investigation conducted by the U.S. Department of State, which made the final determination concerning his eligibility for a visa. On appeal, the Applicant contended that local law enforcement in El Salvador mistakenly identified him as a gang member while residing with his grandfather, but that local law enforcement realized that he was not the person they were looking for. Furthermore, the Applicant stated that he showed all of his tattoos to the San Salvador police and to a U.S. consular officer to clear up any confusion in his case. However, the AAO noted that the Applicant had failed to appear for the second interview at the consulate and that it was unclear if the Applicant appeared for a subsequent interview. The AAO dismissed the appeal and upheld the NSC’s denial of the waiver based on the consular officer’s inadmissibility determination.</p>

2. Cases Before the Immigration Court

It is the respondent’s burden to establish eligibility for relief from removal.²³ Although gang allegations do not relate to a ground of removability, IJs often consider gang allegations and deny applications for relief pursuant to their discretionary authority, as illustrated by the following unpublished Board of Immigration Appeals (BIA) decisions.²⁴

²² A review of the Department of State Annual Report 2018 Immigrant and Nonimmigrant Visa Ineligibilities shows that ninety-nine individuals seeking immigrant status were found inadmissible based on a 212(a)(3)(A)(ii), for broadly any “unlawful activity,” with no one able to overcome this ground. Ninety-six individuals seeking non-immigrant status were found inadmissible on this ground and only six were able to overcome this finding. While the DOS has used this admissibility ground against those presumed to be gang affiliates, DOS could have applied this inadmissibility ground for other reasons. Note that for the 212(a)(3)(A)(ii) inadmissibility ground, there is a 212(d)(3) waiver available for non-immigrants. For immigrants, this waiver is available to those applying for U, T, or S visa based adjustment of status.

²³ INA §240(c)(4)(A); 8 CFR §1240.8(d).

²⁴ To the authors’ knowledge, there are no published AAO decisions re gang allegations.

Case Information	Facts, Procedural Description, and Decision Reasoning
<p>Name of decision: In re: Jorge Alberto Paz-Barrientos A.K.A. Alberto Paz A.K.A El Gordo, AXXX XX7 781</p> <p>Date: May 8, 2018</p> <p>Appeal from what immigration court: New Orleans, LA</p> <p>Type of application: Adjustment of Status</p> <p>Appellant: DHS</p> <p>BIA Decision: Remand</p>	<p>The IJ granted the Respondent’s application for adjustment of status as a matter of discretion. The IJ considered, on the one hand, the 20-year-old Respondent’s “very troubling Facebook postings implying, among other things, that he possesses weapons, and a police officer’s testimony that he has seen him loitering in parking lots with known members of the ‘Perros Salvajes’ gang in Louisiana.” On the other hand, the IJ considered the Respondent’s testimony, which he deemed credible, that he is not a gang member, does not drink or own real guns, has been employed for the last two years, and has never been arrested or committed a crime.</p> <p>On appeal, ICE argued that this case did not warrant a discretionary grant because, contrary to the IJ’s findings, the Respondent provided testimony that was inconsistent, implausible, and incredible and there was sufficient evidence in the record of the Respondent’s gang affiliation. There was also evidence in the record that the Respondent possessed firearms and attempted to sell one of those firearms. All of this evidence precluded a discretionary grant of relief. ICE also argued that a recently conducted investigation revealed that the Respondent’s allegation regarding his purported employment was not true. The BIA held that the newly-submitted evidence bore directly on the issue of whether a discretionary grant was warranted in this case and the record should thus be remanded to allow the IJ an opportunity to review the new evidence. The BIA instructed the IJ to re-adjudicate the Respondent’s application and make a new determination as to whether the Respondent merited a grant of adjustment of status as a matter of discretion.</p>
<p>Name of decision: In re: Marvin Arturo Escobar-Barrera, AXXX XX2 098</p> <p>Decision date: November 6, 2017</p> <p>Appeal from what immigration court: Boston, MA</p> <p>Type of application: Adjustment of Status</p> <p>Appellant: Respondent</p> <p>BIA Decision: Appeal Dismissed. Motion to remand granted and the</p>	<p>The Respondent, a native and citizen of El Salvador, appealed the decision of the IJ, dated June 5, 2017, denying his application for adjustment of status as the beneficiary of an approved special immigrant juvenile petition.</p> <p>On appeal, the Respondent argued that he is deserving of relief as he has extensive family ties in the United States, he is afraid of returning to El Salvador, a state court has awarded custody of himself to his father based upon neglect by his mother, and his gang involvement was disproven by an expert witness. However, the BIA highlighted that aside from his apparent association with gang members, the Respondent was charged with a variety of criminal offenses and smoked marijuana on a regular basis during his brief time in the United States. Overall, upon consideration of the totality of the circumstances presented in this case and a balancing of the appropriate factors, the BIA agreed with the IJ’s decision to deny the Respondent’s request for adjustment of status. With respect to the Respondent’s motion to remand, the BIA remanded the case so the IJ could</p>

record remanded to the IJ.	consider claims to asylum, withholding of removal and protection under the Convention Against Torture.
Name of decision: In re: Ricardo Antonio Ramires-Pleitez, AXXX XX4 335 Decision date: January 17, 2017 Appeal from what immigration court: Boston, MA Type of application: Adjustment of Status Appellant: Respondent BIA Decision: Appeal Dismissed	<p>The Respondent, a native and citizen of El Salvador, filed a Form I-360, which was approved on April 22, 2014. Based on its approval, the Respondent applied for adjustment of status. The IJ found the Respondent to be statutorily eligible, but denied adjustment as a matter of discretion. In the Spring of 2014, the Respondent was “encountered 3 times with gang members.” Though the Respondent denied it, law enforcement believed that Respondent was a member of the 18th Street gang. The Respondent was charged with armed robbery and assault to rob with a firearm. Those offenses were still pending at the time of the September 9, 2016 hearing.</p> <p>The Respondent appealed the IJ’s September 9, 2016 decision finding the Respondent removable and denying his application for adjustment of status. After considering both the equities and adverse factors, the BIA concurred with the IJ’s decision denying adjustment of status as a matter of discretion. The BIA noted that it is not error for an IJ to consider arrests in considering discretionary relief.</p>

RESPONDING TO GANG ALLEGATIONS

When faced with gang-related allegations, practitioners should be ready to mount a vigorous case, including both affirmative and defensive strategies, because even evidence of gang affiliation that is obviously unreliable or flimsy can have devastating consequences on a client’s case. This may mean both objecting strongly to the reliability of the government’s evidence, and filing rebuttal or rehabilitative evidence to demonstrate that a client is not a gang affiliate and has positive equities that are much better corroborated than the government’s allegations.

1. Objections to Government Evidence²⁵

Practitioners in immigration court should be prepared to challenge gang allegations by raising objections both orally and in writing. Raising objections in writing allows practitioners to include all possible arguments against admission of the proposed evidence of gang allegations. These may come in the form of procedural objections to the manner in which ICE often submits evidence in these cases and its effect on the fairness of the removal or bond proceeding, or substantive objections to the reliability and contents of ICE’s evidence.

²⁵ While the Federal Rules of Evidence are not binding in immigration court proceedings, they are guiding. *See Matter of Y-S-L-C-*, 26 I&N Dec. 688 (BIA 2015). The Federal Rules of Evidence can thus serve as a helpful guidepost in arguing whether or not evidence meets probative and fundamentally fair standard, which is the test for evidence admission during removal proceedings. *See Matter of Toro*, 17 I&N Dec. 340 (BIA 1980)/

Procedural objections and requests may include:

- Objecting to the government filing untimely evidence in violation of prior filing schedules or the Immigration Court Practice Manual without good cause;²⁶
- requesting a continuance to examine and respond to the government's evidence;
- requesting an evidentiary hearing;
- objecting to the admission of a government document without an opportunity to cross-examine its author;²⁷ and
- moving for a subpoena for the testimony of whoever prepared documents accusing your client of gang affiliation.²⁸ Before USCIS, practitioners should object to accusations of gang affiliation that are unsourced or refer to documents that are not provided to the client.

Both in immigration court or before USCIS, practitioners should also raise any applicable objections to the substance of the government's evidence,²⁹ which may include:

- Reliance on documents that are unreliable, unclear, unsourced, unauthenticated, or lack any chain of custody (such as printouts of blurry Facebook photos with no date or explanation of how they were obtained);
- Reliance on hearsay or double or triple hearsay (including allegations passing from informants to local law enforcement to ICE without named sources or corroboration and references to documents like social media accounts that are not themselves included);
- Factual inaccuracies, internal inconsistencies in alleged statements of law enforcement or the client, or misrepresentations of prior testimony or evidence;³⁰
- Conclusory allegations or inclusion in a gang database with no source, details, or definitions at all that would allow one to respond properly (such as claiming a client is an

²⁶ *Matter of Liadov*, 23 I&N Dec. 990, 992 (BIA 2006) (“critical” importance of meaningful filing deadlines to the operation of the BIA and the courts); Immigration Court Practice Manual, Ch. 3.1(d)(ii) (Untimely filings).

²⁷ National Institute for Trial Advocacy (NITA) has issued a short list of common objections pursuant to the Federal Rules of Evidence, <https://cliniclegal.org/sites/default/files/GGG-Short-list-of-common-objections.pdf>.

²⁸ See, e.g., INA §240(b)(4) (right to examine the government's evidence and cross-examine government witnesses); 4.20 (Subpoenas). For more on subpoenas, see Andrea Saenz, “Subpoenas in Immigration Court,” Immigration Law Advisor, Vol. 5 No. 7 (Aug. 2011), available at

www.justice.gov/sites/default/files/eoir/legacy/2011/10/06/vol5no7cr.pdf. In response to an opportunity to cross examine the preparer of the I-213, ICE will sometimes claim that the I-213 falls under the “business record” exception to hearsay and thus is inherently reliable even if it contains double or triple hearsay. Practitioners should be prepared to highlight that the I-213 does not meet the definition of a “business record” and that the I-213 is instead akin to a police report, which does not qualify as a “business record.” If the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, even if the information is recorded with scrupulous accuracy. See, e.g., *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930) (discussing that when a police report incorporates information obtained from a bystander, the officer qualifies as acting in the regular course but the informant does not).

²⁹ See Fed. R. Ev. 803(8) (public records admissible “unless the sources of information or other circumstances indicate lack of trustworthiness”).

³⁰ See *Murphy v. INS*, 54 F.3d 605, 610-11 (9th Cir. 1995) (vacating BIA's decision based on an inaccurate I-213 for which information was provided by a biased Service informant); *Pouhova v. Holder*, 726 F.3d 1007 1013-14 (7th Cir. 2013) (“[f]or example, [the I-213] may contain information that is known to be incorrect, it may have been obtained by coercion or duress, it may have been drafted carelessly or maliciously, it may mischaracterize or misstate material information or seem suspicious, or the evidence may have been obtained from someone other than the alien who is the subject of the form”)

“associate” of MS-13 without defining the term or who lodged this claim), or allegations that actually come from ICE counsel themselves with no support;³¹

- Allegations based on popular culture characteristics common to young people as to not be probative of gang affiliation, such as wearing clothing from popular sports teams, rosaries, or the Salvadoran or Honduran flag; and
- Background information, such as reports and news articles, about ICE and ICE Homeland Security Investigations’s history of lodging overbroad gang allegations against young Latino men, including for the purpose of denying them release on bond.³²

If the IJ admits the proposed evidence of gang allegations into the record, practitioners should urge the IJ to give the admitted evidence minimal evidentiary weight. Practitioners may base this argument on the client’s right to a fundamentally fair hearing, right to present evidence and examine evidence against him, and the judge’s proper role as a neutral arbiter who weighs all the evidence and does not take a prosecutorial role.³³

2. Rebuttal and Rehabilitative Evidence

In many gang allegation cases, simply undermining the reliability of the government’s evidence may not be enough. As such, a thorough practitioner will also submit affirmative evidence of who the client really is, including his or her lack of gang membership and proof of his or her positive equities and what the client’s daily life is like that departs from what the government has claimed. These may include:

- Affirmatively offering the client’s testimony or written statement about why he rejects gang membership (either by never joining or by leaving past associations and why), or did not make statements, have gang-involved friends or take actions attributed to him;³⁴

³¹ *Matter of Laureano*, 19 I&N Dec. 1, 3 n.2 (BIA 1983) (statements of counsel are not evidence); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980) (same).

³² See, e.g., Hannah Dreier, “How a Crackdown on MS-13 Caught Up Innocent High School Students,” N.Y. Times, Dec. 27, 2018, available at www.nytimes.com/2018/12/27/magazine/ms13-deportation-ice.html; Julianne Hing, “ICE Admits Gang Operations Are Designed to Lock Up Immigrants,” The Nation (Nov. 20, 2017), available at www.thenation.com/article/ice-admits-gang-operations-are-designed-to-lock-up-immigrants/; Sarah Gonzalez, “Teens Arrested On Gang Suspicion Are Released Due To Lack Of Evidence.” National Public Radio (December 5, 2017), available at www.npr.org/2017/12/05/568351544/teens-arrested-on-gang-suspicion-are-released-due-to-lack-of-evidence; Jonathan Blitzer, “How Gang Victims are Labeled as Gang Suspects.” The New Yorker, January 23, 2018, available at www.newyorker.com/news/news-desk/how-gang-victims-are-labelled-as-gang-suspects; Maryam Saleh, “Chicago’s Promise: Caught in a Gang Dagnet and Detained by ICE, an Immigrant Tests the Limits of a Sanctuary City,” The Intercept (January 28, 2018), available at <https://theintercept.com/2018/01/28/chicago-gangs-immigration-ice/>.

³³ See, e.g., INA §240(b)(1) (IJ’s broad power to admit evidence, interrogate witnesses, and issue subpoenas), (b)(4) (right to present evidence and examine government evidence); *Reno v. Flores* (immigrants’ right to due process in proceedings); *Elias v. Gonzales*, 490 F.3d 444, 451 (6th Cir. 2007) (“An immigration judge has a responsibility to function as a neutral, impartial arbiter and must refrain from taking on the role of advocate for either party.”); *Islam v. Gonzales*, 469 F.3d 53, 55 (2d Cir. 2006) (noting the IJ’s job is to be neutral and not be an advocate for either party).

³⁴ In the experience of one of the authors, in bond hearings with gang allegations present, it is crucial for the client to testify because the credible testimony “balanced out” the written ICE accusations that lacked a foundation or source. Therefore, offering a short direct examination of the client and/or preparing the client for cross examination has been critical to these cases.

- Declarations or letters of support of family, friends, teachers, or others;
- Evidence of school attendance, church attendance, work history or other activities
- Evidence of rehabilitation from past behavior, including disassociating from past friends, changing neighborhoods or schools, complying with probation or required programs, or engaging in substance abuse treatment or counseling;
- Evidence that the client has in fact overtly rejected gang affiliation or informed on/cooperated against gang members such that he or she is at risk of violence or persecution; and
- In some cases, expert opinions that a client's tattoos are not gang-related or that the client's characteristics or actions are not consistent with the alleged gang membership.

CONCLUSION

Although gang allegations based on false and flimsy evidence has become an emerging issue from coast to coast—particularly for young men—there are growing resources for practitioners and the public regarding this disturbing trend. The authors suggest that practitioners consider the following resources as they seek to recognize and respond to gang affiliation allegations:

- *Deportation by Any Means Necessary: How Immigration Officials Are Labeling Immigrant Youth as Gang Members*, Immigrant Legal Res. Ctr, 2018
www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf
- *Stuck with Suspicion*, N.Y. Civil Liberties Union, 2019,
www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report.pdf
- *Swept Up in the Sweep*, NY Immigration Coal., 2018, http://thenyic.pi.bypronto.com/wp-content/uploads/sites/2/2018/06/SweptUp_Report_Final-1.pdf

Through rigorous screening and preparation, practitioners can be well prepared to identify potential risks for gang allegations and be prepared to object to flimsy gang evidence, as well as fully prepare clients to respond to questions regarding gang affiliation. Furthermore, zealous advocates should be prepared to present rehabilitative and rebuttal evidence to counter gang allegations.

Questions From Immigration Judges and USCIS Adjudicators about Gang Affiliation reported by Survey Respondents

Supporting/Helping the Gang

- Did you [or a family member] give the gang money, or pay fees?
- Have you ever carried anything for the gang?
- Did you ever help anyone in a gang in any way?
- Even if you did not want to, did you give food or money to a gang?
- Even if you did not want to, did you ask anyone to give things to a gang, like money?
- Did you ever do any favor for a gang even if you did not want to?
- Even if you did not want to, did you ever run errands for gang members?
- Did you buy or transport anything for a gang?

Knowledge of Gangs

- How do gangs initiate people?
- What do you know about gangs?
- Do you know what MS-13 is? What is it?
- What was the name of the gang?
- How do you know information about gangs if you were not a gang member?

Current or Former Gang Member

- Plenty of people come arguing they are fleeing gangs and they are gang members themselves... Are you a gang member?
- Have you ever joined a gang?
- Isn't it true you were a member of the 18th Street/MS-13 gang?

Clothing/Hand Signals

- Ask about clothing worn in Facebook pictures (i.e. Bulls hat, Nike Cortez sneakers, blue and white Salvadoran shirt, rosary beads)
- If gangs wear vans shoes, why are you wearing vans shoes?
- Is that haircut something that gangs wear?
- Do you know any gang hand signs?
- Have you ever worn a shirt with an 18 on it?
- Can you do the hand signs?
- What colors do the gangs wear?

Social Media

- Who is this [Facebook friend]?
- Who are the people in this photo [from client's Facebook page]?

Associate/Affiliate

- Have you hung out with gang members or been affiliated with a gang?
- Were you aware that the men you were spending time with were in a gang?
- Do you know gang members? [sometimes specify a name of someone]
- Do you know who the leader of the gang in your town was?
- Do you know anyone associated with MS-13?
- Have you ever had contact with 18th Street Gang?
- Do you know anyone who became a gang member?
- Have you ever had any contact with a gang member?
- Do you have family members/friends/housemates associated with gang?
- Have you ever been involved with a gang?

Renounce/Refuse Recruitment

- Have you ever been recruited or approached by gang members?
- If not joining the gang meant death, why did you refuse to join the gang?
- Why did you put up with the gang recruitment for so long?
- Have you asked anyone to join a gang?
- Have you formally renounced gang membership?
- Why didn't the gang beat you out?
- Why do you think that the gang let you leave?

Gang Activities

- What gang activities were you involved with in prison?
- What did you do for the gang?
- Were you a gang lookout?
- Did you do any spying or watching for a gang?
- Did you collect money for the gang?

Tattoos

- Do you have a tattoo? Tell me about it.
- What is the significance of that tattoo?
- Is your tattoo gang-related?