

January 27, 2010

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

Re: *Amicus Curiae* in Support of Attorney General Certification of  
*Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).

Dear Mr. Attorney General:

We, the undersigned organizations, write to you as *Amicus Curiae* in support of the request for Attorney General Certification of *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008). We represent immigration, asylum/refugee, and human rights organizations from across the country who provide legal representation to non-citizens seeking protection in the United States from persecution and torture in their home countries.

#### *Statement of Interest*

We are deeply concerned about the decision of the Board of Immigration Appeals (“Board”) in *Matter of S-E-G-* regarding the criteria to be used in determining whether a group constitutes a “particular social group” under United States asylum law. Many of our clients fled their home countries after suffering persecution because they belonged to a “particular social group,” such as un mutilated women who oppose female genital mutilation, homosexuals, and former government employees. The present viability of *Matter of S-E-G-* is also a question of critical interest to our clients who must determine how to present their claims in light of rapidly changing asylum law.

#### *Summary of Argument*

Establishing an appropriate standard for analyzing the “particular social group” ground for asylum is a matter of great importance. Prior to *Matter of S-E-G-*, the Board analyzed particular social groups under the well-established “immutable characteristics” test created by the Board in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), and considered the “social visibility” of the group only as a relevant factor in the overall determination.<sup>1</sup> The Board’s decision in *Matter of S-E-G-* dramatically shifted from this position by making social visibility required for a group to constitute a particular social group under asylum law.<sup>2</sup> The decision to depart from a longstanding and repeatedly reaffirmed asylum precedent did not involve a thorough consideration of the issues involved.<sup>3</sup> As a result, *Matter of S-E-G-* has created significant and

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<sup>1</sup> *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006); see also *Matter of A-M-E- & J-G-U-*, 24 I&N Dec. 69 (BIA 2007).

<sup>2</sup> *S-E-G-*, 24 I&N Dec. at 582.

<sup>3</sup> See *Matter of Compean*, 25 I&N Dec. 1, 2 (A.G. 2009) (determining it appropriate to reconsider the Attorney General’s decision in *Matter of Compean*, 24 I&N Dec. 710 (A.G. 2009) because the issue involved was a “matter

on-going confusion among immigration adjudicators and a split in the Circuit Courts of Appeals.<sup>4</sup> Furthermore, the Board's decision in July 2009 to reopen and remand the proceedings of the *S-E-G-* respondents, while preserving *Matter of S-E-G-* as a precedent decision, creates additional uncertainty by effectively rendering *Matter of S-E-G-* advisory in nature. Based on the confusion created by *Matter of S-E-G-* and the advisory nature of the decision, we request that you grant the *S-E-G-* respondents' request for certification.

### *Argument*

The three young respondents in *Matter of S-E-G-* sought asylum in the United States and presented undisputed evidence that they were threatened with death and rape in El Salvador on account of their membership in the particular social group of Salvadoran youths who had rejected or resisted gang recruitment based on their moral and religious opposition to the gang's activities. On July 30, 2008, the Board denied the respondents' applications for asylum in the published decision *Matter of S-E-G-*. In this decision, the Board problematically shifted from determining membership in a particular social group by relying on the *Matter of Acosta* "immutable characteristic" test with social visibility as a "relevant factor," to a test requiring that the particular social groups have social visibility.<sup>5</sup> The abrupt departure from the "immutable characteristics" test utilized by the Board and affirmed by the Circuit Courts of Appeals since the Board's 1985 *Matter of Acosta* decision has caused significant confusion among adjudicators and the Circuit Courts of Appeals.<sup>6</sup>

The Board has added to the uncertainty caused by the *Matter of S-E-G-* decision through its inconsistent use of the social visibility criterion.<sup>7</sup> In past years, the Board has recognized the existence of many different social groups, such as homosexuals and young women who have not been mutilated and opposed mutilation, without referencing the social visibility of the group in question.<sup>8</sup> The Board even contradicted its own use of the social visibility test within *Matter of S-E-G-* itself, as the Board first discussed social visibility as a question of whether the group would be "perceived as a group by *society*," and then later as a question of whether the group is "actually perceived [as a group] by the *criminal gangs*" without noting the difference between the two questions.<sup>9</sup>

As recently noted by the Seventh Circuit in *Gatimi v. Holder*, members of well-established social groups like homosexuals and young women who have not been mutilated and opposed

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of great importance" and the process used did not result "in a thorough consideration of the issues involved, particularly for a decision that implemented a new, complex framework in place of a well-established and longstanding practice that had been reaffirmed by the Board.").

<sup>4</sup> See *Gatimi v. Holder*, 578 F.3d 611, 615-16 (7th Cir. 2009) (rejecting the "social visibility" criterion while describing other courts that have accepted the "social visibility" requirement).

<sup>5</sup> *Matter of C-A-*, 23 I&N Dec. at 957; *S-E-G-*, 24 I&N Dec. at 582; see *Acosta*, 19 I&N Dec. 211.

<sup>6</sup> See *Gatimi*, 578 F.3d at 616 (describing the courts that have approved of the "social visibility" criterion).

<sup>7</sup> See *id.* at 615-16 (noting that the Board has been inconsistent in its use of "social visibility" as it has found many groups to constitute "particular social groups" without any reference to social visibility); see also *Ramos v. Holder*, 589 F.3d 426, at \*10 (7th Cir. 2009) (stating that often "it is unclear whether the Board is using the term "social visibility" in the literal sense or in the "external criterion" sense, or even whether it understands the difference").

<sup>8</sup> *Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1990); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); see *Gatimi*, 578 F.3d at 615-616 (noting the Board's inconsistent use of the social visibility criterion).

<sup>9</sup> *S-E-G-*, 24 I&N Dec. at 587-88 (emphasis added).

mutilation generally do not look any different from the rest of society and are likely to try to remain socially invisible.<sup>10</sup> Thus, immigration judges presented with asylum claims based on social groups that are well-established in case law, but that may lack social visibility, must reconcile these other Board precedent decisions with the newly created social visibility requirement without any reasoned guidance from the Board regarding social visibility. The uncertainty and confusion surrounding *Matter of S-E-G-* will lead to inconsistencies among the decisions of immigration judges nationwide as they attempt to resolve the Board's inconsistent precedents.

The Board further increased the confusion surrounding *Matter of S-E-G-* on July 28, 2009 by granting a joint motion to reopen filed by the *S-E-G-* respondents and the Department of Homeland Security ("DHS") and remanding the respondents' proceedings so that U.S. Citizenship and Immigration Services ("USCIS") could adjudicate their asylum applications in the first instance pursuant to the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA").<sup>11</sup> While the Board reopened and remanded the proceedings of the individual *S-E-G-* respondents, the Board did not vacate the published decision in *Matter of S-E-G-*. By allowing the *S-E-G-* respondents to pursue asylum before USCIS, who will review their asylum applications *de novo*, the Board has effectively rendered its decision in *Matter of S-E-G-* advisory in nature.

Although administrative tribunals such as the Board are not restricted by the case-or-controversy requirement of Article III courts, the Board has historically refrained from rendering advisory opinions and issuing decisions in cases that have become moot.<sup>12</sup> In both Board precedent and in its Practice Manual, the Board states that it does not issue advisory opinions.<sup>13</sup> In addition, the Board's implementing regulations contain internal mechanisms to prevent the issuance of decisions by the Board when a case has been rendered moot as a result of the respondent's departure from the United States.<sup>14</sup> Allowing *Matter of S-E-G-* to remain a binding, published

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<sup>10</sup> *Gatimi*, 578 F.3d at 615.

<sup>11</sup> Pursuant to section 235(d)(7)(B) of the TVPRA, Pub. L. No. 110-457, 122 Stat. 5044, USCIS has initial jurisdiction over any asylum application filed by an unaccompanied alien child. The term "unaccompanied alien child" is defined as one who has no lawful immigration status in the United States, has not attained 18 years of age, and with respect to whom there is no parent or legal guardian in the United States or no parent or legal guardian in the United States is available to provide care and physical custody. 6 U.S.C. § 276(g). Two of the *S-E-G-* respondents filed their initial asylum applications while still minors and thus may constitute unaccompanied alien children.

<sup>12</sup> See e.g., *Matter of Valles*, 21 I&N Dec. 769 (BIA 1997) (finding the respondent's bond appeal moot where the judge granted the respondent's bond redetermination request during the pendency of the appeal); *Matter of Okoh*, 20 I&N Dec 864 (BIA 1994) (finding the respondent's motion for reconsideration moot because the respondent had already been deported); *Matter of Alphonse*, 18 I&N Dec. 178 (BIA 1981) (dismissing as moot the respondent's appeal of the judge's denial of his motion to change venue after finding that the judge did not have jurisdiction to rule on the motion).

<sup>13</sup> See *Matter of Leon-Orosco and Rodriguez-Colas*, 19 I&N Dec. 136, 152 (BIA 1983; A.G. 1984) (affirming the Board's decision declining to issue an advisory opinion); Board of Immigration Appeals Practice Manual at ch. 1.4(d)(iv).

<sup>14</sup> See 8 C.F.R §§ 1003.2(d) ("A motion to reopen or a motion to reconsider shall not be made by . . . a person . . . subsequent to his or her departure from the United States. Any departure . . . shall constitute a withdrawal of such motion."); 1003.4 ("Departure from the United States of a person who is the subject of deportation proceedings subsequent to the taking of an appeal, but prior to a decision thereon, shall constitute a withdrawal of the appeal . . . the initial decision shall be final.").

decision, while allowing the actual respondents in the case to continue pursuing asylum, is thus at odds with Board practice and precedent. We are greatly concerned that a precedential advisory opinion exists on an issue as significant as that which the Board addressed in *Matter of S-E-G*: the proper analysis for determining whether a group constitutes a particular social group under United States asylum law.

Moreover, the advisory nature of the Board's opinion only adds to the existing uncertainty and confusion among adjudicators regarding the proper standard for analyzing a "particular social group" and threatens to burden further the already beleaguered immigration courts. We have observed immigration judges issue continuances in the cases of asylum applicants with similar fact patterns to the *S-E-G* respondents because the judges believed the applicable law to be unsettled.<sup>15</sup> As immigration judges wait for additional guidance on the social visibility criterion, the number of such continuances is likely to grow exponentially. The lack of clarity regarding the *S-E-G* decision will thus cause increased delays in the adjudication of asylum applications, burden the immigration courts, and waste the limited resources of the Executive Office for Immigration Review.

For these reasons, we respectfully request that you grant the *S-E-G* respondents' request for certification to resolve the confusion engendered by the Board's decision in *Matter of S-E-G*, or in the alternative, vacate the Board's advisory opinion to resolve any lingering question regarding the precedential force of that decision. To the extent that the Board's decision in the companion case, *Matter of E-A-G*, 24 I&N Dec. 591 (BIA 2009), relies on the Board's holding in *Matter of S-E-G*, we request that you vacate *Matter of E-A-G* and remand it to the Board for further consideration.<sup>16</sup>

Should you have any questions regarding this matter, please feel free to contact Mary Meg McCarthy, Executive Director, National Immigrant Justice Center at 312-660-1351 or [mmcarthy@heartlandalliance.org](mailto:mmcarthy@heartlandalliance.org).

Sincerely,

National Immigrant Justice Center

The Advocates for Human Rights

Asian American Justice Center

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<sup>15</sup> The National Immigrant Justice Center's Asylum Project, which provides technical support to over 1,000 *pro bono* attorneys representing approximately 200 asylum applicants annually, has received numerous inquiries from attorneys regarding the current status of *Matter of S-E-G* and has observed several different immigration judges grant continuances in cases similar to *S-E-G* because of confusion surrounding the case. Counsel for the *S-E-G* respondents have also reported receiving inquiries from attorneys who have encountered confusion regarding *Matter of S-E-G* in immigration courts throughout the country, which has necessitated continuances and additional briefing.

<sup>16</sup> See *Ramos*, 589 F.3d 426 (finding that former members of a Central American gang can constitute a particular social group).

CARECEN (Central American Resource Center)

Center for Gender and Refugee Studies

Children and Family Justice Center  
Bluhm Legal Clinic  
Northwestern University School of Law

Coalition of African, Arab, Asian, European and Latino Immigrants of Illinois (CAAELII)

Florida Immigrant Advocacy Center

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Washington Lawyers' Committee for Civil Rights and Urban Affairs

Immigrants' Rights Project of Public Counsel

Jubilee Campaign USA

Lutheran Immigration and Refugee Services

Midwest Coalition for Human Rights

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cc: Juan Osuna, Deputy Assistant Attorney General, Office of Immigration Litigation