

## **Practice Alert: Negative BIA Decision in *Matter of H-L-S-A* Narrows Protection for Government Witnesses**

On January 28, 2021, the Board of Immigration Appeals (BIA or Board) issued a decision addressing a particular social group in the context of witnesses, [Matter of H-L-S-A-, 28 I&N Dec. 228 \(BIA 2021\)](#) (*AILA Doc* Doc. No. 21012833). While the headnote for the case— individuals who cooperate with law enforcement may constitute a valid particular social group—gives the impression that the case is favorable to asylum seekers, in fact the decision lays out extremely narrow grounds for cognizability of such particular social groups (PSGs).

### **Case Facts**

In this case, Mr. H-L-S-A-, a citizen of El Salvador, was threatened by MS-13 members in the United States while in federal criminal custody awaiting a trial on illegal re-entry charges. While in custody in the U.S. federal corrections system, Mr. H-L-S-A- was threatened by MS-13 members, and he eventually told the warden of the facility and asked to be placed into protective custody. This cooperation also resulted in Mr. H-L-S-A- meeting with Federal Bureau of Investigations agents and identifying MS-13 members in photographs that they showed him.

As a result of this cooperation, Mr. H-L-S-A- applied for withholding of removal based on his membership in the PSG of “prosecutorial witnesses” because he feared that MS-13 members in El Salvador would become aware of his cooperation with U.S. law enforcement. (He was not eligible for asylum because his prior removal order had been reinstated.) The immigration judge found that the proposed PSG was not cognizable, and the BIA upheld this conclusion, finding that Mr. H-L-S-A-’s PSG lacked both particularity and social distinction. The Board faulted the PSG formation of “prosecutorial witnesses” for being insufficiently “particular” in that it did not specify in what country he was serving as a prosecutorial witness, thus concluding it could apply to someone who had served as a witness “in any jurisdiction in the world.” *Id.* at 228. It further held that Mr. H-L-S-A-’s cooperation did not meet the social distinction prong of PSG cognizability because it was not sufficiently public. The BIA concluded that the “country conditions evidence reflects that the law is intended to protect witnesses who have been targeted by gangs after a ‘trial judge[] allowed or ordered their identities to be revealed during trial proceedings.’” *Id.*

### ***Key Flaws in Final Holding***

The holding is deeply problematic for several reasons. First, the BIA cited record evidence that those who cooperate with law enforcement are viewed as a distinct group. Under this very narrow holding, only witnesses who testify publicly in countries that provide some form of legal protection to such witnesses would appear to qualify as part of a cognizable PSG. By focusing on the public nature of the cooperation, the Board appears to be conflating “social distinction” with its earlier, rejected test of “social visibility.” There is no requirement for other recognized PSGs, or any protected characteristic, that the group be publicly known. Second, the BIA’s PSG analysis appears to conflate the PSG with the harm—the exact circularity analysis that the agency has repeatedly rejected. Here the Board doubts that the PSG could be distinct without public testimony, but by requiring the applicant to testify publicly, the Board is essentially determining that a witness cannot qualify for asylum unless he puts himself at the greatest potential risk in cooperating with law

enforcement. Moreover, the decision leads to the nonsensical result that if a witness's cooperation leads to a gang member being arrested and pleading guilty to a crime, the witness cannot succeed with their asylum claim, but if the gang member fights the charge through a trial, the witness's PSG may be cognizable. Finally, the Board utterly discounts the fact that other members of MS-13 knew that Mr. H-L-S-A- had provided evidence against the gang because gang members in the prison called him a "rat" and knew that he was in protective custody.

## **Conclusion**

The BIA has again issued a decision that narrows PSG cognizability to a standard that is nearly impossible to meet. Under this decision, it will not be enough for an asylum seeker to demonstrate that he has been a prosecutorial witness, that the criminal organization knew of his cooperation, and that he was threatened with death as a result. Instead, the applicant must further prove that he provided public testimony—a result that is beyond the control of the asylum seeker and that should not be required for them to receive asylum protection in the United States. Practitioners intending to proceed within this very narrow PSG framework are cautioned to provide not only evidence of country conditions as it relates to the particular asylum claim, but also, documenting that particular country's trial and criminal procedures, as well as protection afforded, if any, to witnesses who testify will be of paramount importance.

*Special thanks to the AILA Asylum and Refugee Committee.*