

How Vague Gang Allegations Impact Relief & Bond
for Immigrant New Yorkers

Stuck with Suspicion



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Acknowledgements

This report was written by Paige Austin, JP Perry, Irma Solis, and Camille Mackler, with support and input from Chris Dunn, Sebastian Krueger, Simon McCormack, and Abby Allender. The NYCLU and NYIC would like to thank the following organizations and individuals who helped make this report possible: Brooklyn Defenders Services, Bronx Defenders, CUNY School of Law Immigrant & Non-Citizen Rights Clinic, Empire Justice, Make the Road New York, New York Legal Assistance Group, Safe Passage Project, Claudine Annick-Murphy, Michelle Caldera-Kopf, Gregory Copeland, Yasmine Farhang, Tim Greenberg, Nyasa Hickey, Alexander Holtzman, Bryan Johnson, Zoey Jones, Courtney Lee, Maya Leszczynski, Xavier Palacios, Gregory Pietrzak, Alexia Schapira, Tina Song, Rebecca Sosa, Nabila Taj, Glykeria Tsiokanou, Philippe Weisz, and Jodi Zieseemer.

About the NYCLU

The New York Civil Liberties Union (NYCLU) is one of the nation's foremost defenders of civil liberties and civil rights. Founded in 1951 as the New York affiliate of the American Civil Liberties Union, the NYCLU is a not-for-profit, nonpartisan organization with eight chapters and regional offices and more than 180,000 members across the state. The NYCLU's mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including freedom of speech and religion, and the right to privacy, equality and due process of law for all New Yorkers. For more information, please visit www.nyclu.org.

About the NYIC

The New York Immigration Coalition (NYIC) is an umbrella policy & advocacy organization that represents over 200 immigrant and refugee rights groups throughout New York. The NYIC serves one of the largest and most diverse newcomer populations in the United States. The multi-racial and multi-sector NYIC membership base includes grassroots and nonprofit community organizations, religious and academic institutions, labor unions, as well as legal and socioeconomic justice organizations. The NYIC not only establishes a forum for immigrant groups to voice their concerns, but also provides a platform for collective action to drive positive social change. Since its founding in 1987, the NYIC has evolved into a powerful voice of advocacy by spearheading innovative policies, promoting and protecting the rights of immigrant communities, improving newcomer access to services, developing leadership and capacity, expanding civic participation, and mobilizing member groups to respond to the fluctuating needs of immigrant communities.



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Introduction

Lucas¹ is a high school student on Long Island. In 2017, he applied for Special Immigrant Juvenile Status (SIJS), which would put him on the path to obtaining a Green Card and eventually citizenship. Lucas had never been arrested or charged with a crime, but he had been suspended from high school for five days after a school official searched his backpack and found a drawing with the area code from his home country in it. He returned to school after his suspension and did not get in trouble again, but several months later, Immigration and Customs Enforcement came to his home on Long Island and arrested him. He was detained for over four months before an immigration judge ruled that the government’s allegations of gang membership were baseless and ordered his release.

Lucas returned home. But that spring, USCIS denied his SIJS petition based on the same allegations of gang involvement that the judge had rejected.

Unfortunately, Lucas’s experience has grown all too common in New York. In response to these reports and as a follow up to the NYIC’s 2018 report, *Swept Up in the Sweep*, the New York Civil Liberties Union (NYCLU) and the New York Immigration Coalition (NYIC) set out to research and draft a report on the denial of Special Immigrant Juvenile Status, bond, asylum, and other immigration relief on the basis of gang allegations. This report documents our findings and offers recommendations to practitioners seeking to rebut baseless allegations of gang involvement.

In addition to helping practitioners respond to gang allegations, we hope that the findings and trends we highlight here will support efforts by advocates, schools, and elected officials to limit the information that local agencies share with ICE and that schools share with School Resource Officers, and to implement laws and policies to ensure that information entered into gang databases is adequately vetted and reviewed.



KEY FINDINGS

- USCIS provides very little, if any, factual basis for the allegation that a child is a gang member and does not appear to give weight to the Family Court’s best interest finding or a Family or Immigration court’s earlier consideration and rejection of the same facts or allegations of gang affiliation.

- In denying or revoking SIJ Status for children suspected of gang membership, USCIS typically asserts the Family Court did not make an informed decision regarding the best-interest of the child and that is grounds for USCIS to withhold its consent. This argument relies on a very broad interpretation of USCIS’s consent authority, which Congress and the agency have interpreted as much more limited.

- Because USCIS does not disclose the evidence it relies on in any detail, and law enforcement agencies do not disclose information contained in gang databases or files, it is impossible for practitioners to put the government’s evidence before the Family Court, even though USCIS now requires the Court to consider such evidence before they will grant a SIJS application.

- DHS documents memorializing allegations of gang affiliation—including memoranda authored by Homeland Security Investigations (HSI) and I-213s—often mention the respondent’s attire, tattoos, associations or alleged self-admission, or unnamed third parties’ accusations, but these documents lack even basic details about when, where, or in what context the suspicious incidents occurred, making the allegations difficult to effectively refute.

- At bond hearings in which DHS has raised gang allegations, immigration judges often cite to the government’s gang allegations when issuing decisions on dangerousness.

- HSI places gang memoranda in individuals’ A-files explicitly directing that all future immigration services and applications for benefits or relief be denied.

- Gang allegations are used as a basis to detain individuals, including children, at interviews at the USCIS Asylum Office.

- Even where individuals are not detained, asylum officers have engaged in lines of questioning that amount to an interrogation related to gang allegations lodged against the individual or the individual’s family members.

- When an asylum applicant or one of his or her relatives is suspected of gang affiliation, asylum officers may convert a non-adversarial interview into an interrogation related to that individual or his or her family members. In some cases, the asylum officer begins to transcribe rather than simply take notes and then asks applicants to sign the transcript.

- During asylum hearings in immigration court, DHS uses evidence of alleged gang affiliation to impeach the respondent and to claim he or she could not possibly face danger from gangs in his or her home country.

- Gang allegations may be used to deny DACA renewal, U-visas, or other adjustment of status applications before USCIS.

Glossary

A-File or A-Number: “An A-number is a unique personal identifier assigned to a non-citizen. A-Files became the official file for all immigration and naturalization records created or consolidated since April 1, 1944.”²

Adjustment of Status (AOS or Form I-485): Adjustment of Status is the process that non-citizens present in the United States can use to apply, using Form I-485, for lawful permanent residency status, also known as LPR status or obtaining a Green Card.³

Board of Immigration Appeals (BIA): The Board of Immigration Appeals, or BIA, is the highest administrative body that interprets immigration law. The BIA hears appeals of the decisions of immigration judges and district directors at the Department of Homeland Security in proceedings where the United States government is one party and the other party is a non-citizen, citizen, or business. The decisions of the BIA are binding on all DHS officers and immigration judges unless modified by the Attorney General or a Federal Court.⁴

Bond: Bond, in the immigration court context, is the amount of money DHS or an immigration judge sets as a condition to release a person from detention while awaiting a hearing before immigration court at a later date.⁵

Deferred Action for Childhood Arrivals (DACA): Deferred Action for Childhood Arrivals, or DACA, is an option available for noncitizens who

came to the United States under the age of 16. DACA does not provide a pathway to lawful permanent residency, but does provide work authorization, temporary protection from deportation, and the ability to obtain a social security number.⁶

Department of Homeland Security (DHS): The Department of Homeland Security, or DHS, is a United States cabinet department that was created in response to the terrorist attacks of September 11. DHS’s stated mission is to “ensure a homeland that is safe, secure, and resilient against terrorism and other hazards.”⁷

Executive Office for Immigration Review (EOIR): The Executive Office for Immigration Review, or EOIR, is an office of the United States Department of Justice that is primarily responsible for adjudicating immigration cases.

Form I-213: The Form I-213, or “Record of Deportable/Inadmissible Alien,” is a form DHS prepares before it initiates removal proceedings. The Form I-213 includes information alleging the respondent’s alienage and bases for removability from the United States.⁸

Form I-360: The Form I-360, or “Petition for Amerasian, Widow(er), or Special Immigrant,” is the form a non-citizen in one of these special categories uses to petition U.S. Citizenship and Immigration Services (USCIS) for a Green Card.⁹

Homeland Security Investigations (HSI):

Homeland Security Investigations, also known as HSI, is a branch of DHS that operates in the United States and throughout the world to investigate unlawful activity, such as immigration violations and criminal activity.¹⁰

Immigration and Customs Enforcement (ICE):

Immigrations and Customs Enforcement, commonly referred to as ICE, is a federal law enforcement agency under the Department of Homeland Security that enforces the immigration laws of the United States.

Immigration Judges (IJs): An Immigration Judge (or IJ) is an attorney appointed by the United States Attorney General to serve as an administrative judge presiding over immigration court proceedings before EOIR.¹¹

Notice of Intent to Deny (NOID): A Notice of Intent to Deny (or NOID) is a document a person applying to USCIS for an affirmative immigration benefit, like asylum or SIJS, will receive to indicate that the agency intends to deny the petition or application. A person who receives a NOID has sixteen days to respond to the letter, and USCIS will either approve or deny the claim.¹²

Office of Refugee Resettlement (ORR): The Office of Refugee Resettlement, or ORR, is a federal agency under the Office of the Administration for Children & Families that provides services and assistance to refugees and unaccompanied children, including helping them to secure appropriate placements and social services. If a non-citizen child is arrested by immigration enforcement, the child is taken into ORR custody instead of being sent to immigration detention.¹³

Request for Evidence (RFE): USCIS issues a Request for Evidence, or RFE, to request missing or additional information from applicants or petitioners seeking immigration benefits.¹⁴

Special Immigrant Juvenile (SIJS, or Form I-360) Status:

Special Immigrant Juvenile Status, or SIJS, is a type of visa that a person under the age of 21 is eligible to apply for if a family court finds that five factual requirements are met, including that the child cannot reunite with one or both parents due to abuse, abandonment, or neglect.¹⁵ If USCIS grants a person SIJS, that person can then apply for lawful permanent residency, also known as a Green Card.

U.S. Citizenship and Immigration Services (USCIS):

U.S. Citizenship and Immigration Services, or USCIS, is an agency under the Department of Homeland Security that administers the United States immigration and naturalization process.

Methodology

The NYCLU and the NYIC contacted immigration legal service providers throughout New York seeking examples of instances where gang allegations formed the basis of a decision by USCIS or EOIR, or any other denial of immigration benefits that occurred in a written agency decision or during proceedings in immigration court. We received over 900 pages of documents written by USCIS, EOIR, immigration and local law enforcement officials, and immigration service providers relating to immigration cases in New York City, on Long Island, and in New York's Hudson Valley, as well as a few out-of-state cases.¹⁶

For cases with applications for benefits pending before USCIS, we received documentation from providers in New York City and on Long Island, primarily from 2017 and 2018, where gang allegations explicitly formed the basis for denial or revocation of SIJS. We also received documentation from one gang-based benefits denial outside New York and several cases in New York in which attorneys had reason to believe gang allegations were a basis for the denial, despite the absence of any mention of those issues in USCIS decisions.¹⁷

We supplemented this research with publicly available material, such as USCIS memos, court filings, and legislative history.

For custody and removal cases pending before EOIR, we received numerous examples of evidence packets that attorneys for DHS, the agency that initiates removal proceedings, introduced in opposition to attempts to secure bond.¹⁸ We also received several

redacted bond decisions from IJs in New York City or the Board of Immigration Appeals in cases in which DHS had leveled gang accusations against the respondent.¹⁹

We reviewed, compared, and analyzed the documentation we received and then conducted targeted follow-up interviews with providers who had directly represented clients in a variety of administrative proceedings. Below, we summarize our key findings, including a more in depth discussion of the documents we reviewed and trends we identified. We also provide recommendations that draw on interviews with practitioners, relevant case law, and secondary source material.

While we gathered documents and recommendations sufficient to identify recurring trends, our findings and recommendations are not exhaustive and do not replace careful legal analysis and research as so many forms of immigration relief, including what is discussed here, are factually and procedurally dependent and specific.

Findings & Recommendations

1 Gang Allegations Are Used as a Basis to Deny or Revoke Special Immigrant Juvenile Status

Special Immigrant Juvenile Status (SIJ Status or SIJS) is a valuable path to lawful status sought by thousands of children in New York and across the country each year.²⁰ Children who qualify for SIJS have often fled violence in their home countries—violence that one or both of their parents may have caused or made them more vulnerable to through abandonment or neglect. Since 2017, USCIS has used children’s alleged gang involvement as grounds to deny or revoke SIJS in numerous cases in the New York area. In some cases, USCIS does not even disclose that alleged gang involvement is a reason for its denial or revocation.²¹

Among the cases that the NYCLU and the NYIC reviewed, several common themes emerged.

USCIS Does Not Provide Details or Evidence Underlying Allegations

In cases where USCIS asserted that a SIJS applicant is a gang member or affiliate, the agency provided very little information about the factual basis for the assertion. It was then difficult for attorneys and applicants to respond or contest the accusations, or even to know what incidents or individuals USCIS discussed. Below are examples.

“[T]he Suffolk County Police Department Gang Unit has observed the petitioner wearing paraphernalia indicative of gang

KEY FINDINGS

- USCIS provides very little, if any, factual basis for the allegation that a child is a gang member and does not appear to give weight to the Family Court’s best interest finding or a Family or Immigration court’s earlier consideration and rejection of the same facts or allegations of gang affiliation.
- In denying or revoking SIJ Status for children suspected of gang membership, USCIS typically asserts the Family Court did not make an informed decision regarding the best-interest of the child and that is grounds for USCIS to withhold its consent. This argument relies on a very broad interpretation of USCIS’s consent authority, which Congress and the agency have interpreted as much more limited.
- Because USCIS does not disclose the evidence it has relied on in any detail, and law enforcement agencies typically make it impossible to obtain gang databases or files, it is impossible for practitioners to put the government’s evidence before the family court—although that appears to be what the agency requires to grant consent.

membership on multiple occasions in the presence of known gang members.”²²

“Petitioner had also been encountered by law enforcement in the presence of known gang members on multiple occasions with [sic] and encountered with known MS-13 writings in his possession.”²³

“Security system checks revealed that you have been identified by law enforcement as a known member of the violent street gang, MS-13 per self-admission.”²⁴ But the applicant denied ever having made such an admission—and his criminal attorney found no evidence of an admission in any of the applicant’s criminal history records.²⁵

Practically, the lack of detail can make these assertions impossible to rebut. The NOIDs also appears to fall short of the regulatory requirements that a NOID specify “the bases for the proposed denial sufficient to give the applicant or petitioner adequate notice and sufficient information to respond,” 8 C.F.R. § 103.2(b)(8)(iv), and that USCIS disclose “[d] erogatory information unknown to [the] petitioner or applicant” and give him or her “an opportunity to rebut the information.” 8 C.F.R. § 103.2(b)(16)(i).

USCIS does not appear to update or scrutinize allegations of gang involvement that have already been reviewed and rejected by immigration judges or ORR.

USCIS issued a NOID on the basis of two arrests and an alleged admission of gang affiliation—even though over a year earlier, an immigration judge had taken testimony about those same allegations at a hearing and ultimately concluded that the child was not a gang member and posed no danger.²⁶

USCIS denied SIJS to a young man in ORR custody. ORR subsequently released the child to his father—which requires that the agency determine he is not dangerous or gang involved. But nearly two months later, the AAO issued a NOID based in part on the

child’s alleged gang affiliation. The NOID was addressed to the child at the ORR care provider, suggesting USCIS was not aware of ORR’s decision to release him.²⁷

In a few cases, USCIS did not reveal that gang allegations were a basis for denial, preventing attorneys from addressing those allegations at all.

USCIS issued a NOID in a SIJS petition in November 2017 and then a denial without any mention of gang allegations. As a result, the attorney did not address alleged gang membership in either his NOID response or his AAO appeal. But in August 2018, the AAO issued a NOID citing the child’s alleged gang affiliation for the first time.²⁸

USCIS issued a NOID in March 2017 that made no mention of gang issues. When the attorney responded three weeks later, she did not address or refute that her client was gang involved. But approximately 1.5 months later, USCIS issued a denial asserting for the first time that “while in the United States, you have been identified by law enforcement as a member of the violent street gang, MS-13.”²⁹

Jorge was detained when he attended an adjustment of status interview based on an approved SIJS petition. A few weeks later, USCIS revoked his SIJS and—because he was now in removal proceedings—administratively closed his adjustment application. USCIS’s notice of revocation made no mention of gang allegations. But in court, DHS alleged Jorge was a gang member and so should not be released from custody.³⁰

Elisa, a girl with a strong SIJS claim, received a NOID that made no reference to gang issues. But FOIA results obtained by her attorney revealed that the Suffolk County Police Department had received an anonymous tip that she was dating a young man law enforcement believed to be a gang member and that the informant had observed them together after school.³¹

FIGURE 1

How SIJS Works

Created in 1990, Special Immigrant Juvenile (SIJ) Status is an important avenue to lawful status for immigrant children. 8 USC § 1101(a)(27)(J). To apply for SIJ status, a child first must go before a family court judge in the state where he or she lives to obtain an order from the judge making the following five factual findings:

- 1. The child is under 21 years of age;**
- 2. The child is unmarried;**
- 3. The child is under the jurisdiction of the family court;**
- 4. Reunification with one or both parents is not viable due to abuse, neglect or abandonment, or a similar basis under state law; and**
- 5. It is not in the young person's best interest to be returned to his country of nationality or last residence. *Deonne Andrea W. v. Wayne McD.*, 50 A.D.3d 507 (1st Dep't 2008); 8 C.F.R. § 204.11(a) (2008).**

The family court judge usually reviews written evidence and holds hearings to investigate whether those five criteria are met. Once the judge makes the relevant findings and issues an order, the child can use that order to apply for SIJ status with a federal government agency called USCIS. USCIS is supposed to defer to the family court's findings and conduct only a limited review to ensure that the family court order is bona fide. For children in removal proceedings before an immigration judge, a pending or approved application for SIJS is often a basis for the judge to continue the case. Once an application for SIJS is approved by USCIS and the date on the petition is current, a child can apply for a Green Card—either from the immigration judge or if DHS agrees to terminate removal proceedings—from USCIS.

USCIS Argues That the Family Court Was Not Informed of the Applicant's Gang Association Even When the Family Court Order References That Alleged Association

In the cases that the NYCLU and the NYIC reviewed where gang involvement or affiliation are alleged, USCIS always cites multiple reasons for denying or revoking SIJ Status.³² These denials suggest that gang issues may trigger a higher level of scrutiny and possibly pretextual reasons for denial of SIJS, such as inconsistencies between the family court order, statements at the border, or claims that the Special Findings Order is not detailed enough.

When it comes to gang allegations, USCIS consistently argues that the family court did not make an “informed decision”³³ in the best-interest part of the SIJ determination—the finding that it is in the young person's best interest not to return to his or her country of origin.³⁴

The agency reasons that the family court judge did not know the child was a gang member. Had the court known, the family court judge would not have found it was in the child's best interest to remain in the U.S. Following that logic, USCIS concludes that the family court's order lacks a factual basis.

“In this case, evidence in the record shows that when the Family Court issued its SIJ findings order the court was not informed that the petitioner was a gang member. As the Family Court was not fully informed, there was not a reasonable factual basis for its best interest determination and USCIS' consent to the Petitioner's SIJ classification is not warranted.”³⁵

“[T]here is no evidence that the family court was aware of the Petitioner's gang membership such that the court made an informed decision that it is not in his best interest to be removed to El Salvador . . . ”³⁶

“It is reasonable to believe that had the Family Court been aware of your gang activities in the United States, its findings would have been different.”³⁷

Remarkably, USCIS has made this claim even when the family court judge *specifically addressed the gang allegations* in his or her order.

“[T]he court states that in making its best interest determination it considered your previous arrests and gang allegations, ‘made by the US Department of Homeland Security and US Immigration and Customs Enforcement’ . . . However, the record does not establish what arrest and gang affiliation evidence was divulged to the court. . . Therefore, USCIS cannot conclude the court made an informed decision as is required for a reasonable factual basis for the court’s finding.”³⁸

In cases in which a family court judge has cited a child’s fear of gangs in his or her home country as a basis for the best interest finding, USCIS also casts further doubt on that finding by suggesting a child cannot be both a gang member and afraid of gangs.

“[T]he petitioner’s record shows that he has been identified by Homeland Security Investigations as a known member of the violent street gang, MS-13... [this] contradict[s] the Support of Petition for Guardianship and Motion for Special Findings . . . submitted to the Family Court, in which the petitioner claimed he was threatened by members of the MS-13 gang in El Salvador.”³⁹

“The Family Court based its best interest determination, in part, on a finding that the petitioner was threatened by gang members in El Salvador. However, the petitioner has been identified . . . as a known member of the violent street gang, MS-13.”⁴⁰

USCIS Construes Its Consent Authority Broadly

USCIS uses its finding that the family court did not make an informed decision to withhold its consent, which is required for a grant of SIJ Status under INA § 101(a)(27)(J)(iii).

FIGURE 2

Challenging Other Bases for Wrongful SIJS Denials

Since 2017, USCIS has used a host of new arguments to deny petitions for SIJS. Aside from alleged gang involvement, some of the common alternative grounds for denial of SIJS are that (1) the child is not truly under the jurisdiction of the family court if he or she is 18 years or older; (2) the family court judge’s order is not specific enough about the factual or state-law bases for the five factual findings; (3) there is no evidence that the family court considered alternative custodial placements in the child’s country of origin, particularly with any relatives that the child has lived with in the past; and (4) some aspect of the family court’s findings is contradicted by statements that the child made at the border upon entering the U.S.

In New York and California, class action lawsuits are challenging the denial of SIJS to children who applied when they were 18 or older. For more information on the lawsuit in New York, contact the Legal Aid Society of New York.

“To warrant USCIS’ consent to the grant of SIJ classification under section 101(a)(27)(J)(iii) of the Act, the juvenile court order must also contain, or be supported by evidence of, the reasonable factual basis for the requisite SIJS finding.”⁴¹

“USCIS’ consideration of the Petitioner’s gang membership is to determine under our statutory consent authority in section 101(a)(27)(J)(iii) of the Act whether the family court made an informed decision.”⁴²

These decisions reflect that USCIS has begun to take an extremely expansive view of its consent authority—an authority that Congress intended the agency to use only to determine whether a special findings order was “sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect.”⁴³ USCIS’s

policy manual states that it “relies on the expertise of the juvenile court” and “does not reweigh the evidence.”⁴⁴ And in a memorandum from 2011, USCIS explained that it exercised its consent authority to request more evidence or withhold consent only when family court orders “lack specific findings” or “the USCIS record contains evidence that the state court was not apprised of critical facts,” such as the fact that a child’s mother is alive when the family court found that she is dead.⁴⁵

But, instead of that more limited review, USCIS now takes the position that its consent authority allows it to re-assess the evidence for each prong of the family court judge’s findings.⁴⁶

In one recently issued NOID, USCIS addressed this discrepancy by claiming its review of the entire factual record in family court is *part* of its inquiry into whether the family court proceeding was brought to obtain an immigration benefit.

“Because there is no reasonable factual basis for the court’s ruling on best interest USCIS cannot conclude that it was sought primarily to obtain relief from parental abuse, neglect, abandonment, or similar maltreatment rather than to obtain an immigration classification. Therefore, you have not demonstrated that your request for SIJ classification is bona fide and merits USCIS’ consent.”⁴⁷

Putting the Government’s Evidence Before the Family Court Would be Impossible

Regulations require that an immigration benefit applicant “be permitted to inspect the record of proceeding which constitutes the basis for the decision” and that “[a] determination of statutory eligibility shall be based only on information contained in the record of proceeding which is disclosed to the applicant or petitioner.” 8 C.F.R. § 103.2(b)(16) & (16)(ii). But in no case that the NYCLU and the NYIC reviewed did USCIS make its evidence of gang membership available such that the evidence could be effectively rebutted or put before the Family

Court—though that appears to be what the agency requires.

In several cases, attorneys first learned of the gang allegations against their client after filing the Form I-360⁴⁸—in at least one case, from the denial or NOID itself.⁴⁹ Even when attorneys are aware of the allegations earlier, it would have been impossible to put the evidence relied upon by law enforcement before the Family Court because USCIS does not provide it. Nor is this evidence typically obtainable in other ways. The basis for inclusion in New York City Police Department’s gang database, for instance, is notoriously difficult to get from law enforcement in New York.⁵⁰ In Suffolk County, the Police Department has refused to provide any information on its gang criteria or training in response to a FOIL request by the NYCLU.⁵¹

Timing is another barrier to presenting gang evidence to the Family Court. In some cases reviewed by the NYCLU and the NYIC, by the time USCIS issued its NOID or denial, the child had either turned 21 or faced imminent removal through removal proceedings.

Recommendations for Immigration Practitioners

Initial Intake

- Screen your client closely, including reviewing your client’s social media activity, to see if there is any possibility that law enforcement may accuse him or her of gang involvement.
- Gather *all* information possible before completing the Family Court proceeding. In particular, gather any arrest records, school disciplinary records, statements at the border, and other evidence ICE or local law enforcement has used to allege that your client is a gang member or associate, such as social media posts.

Before the Family Court

- If you know ICE or local law enforcement think your client is a gang member, consider



putting that on the record in Family Court and asking the judge to specifically address that allegation in his or her Special Findings Order. Some attorneys file the entire Office of Refugee Resettlement (ORR) file of children released from ORR custody in Family Court.

- Save stamped copies of evidence filed in Family Court so that you have it available if you want to prove what evidence was before the family court judge.
- Remember, gang affiliation will not be the only basis of denial. Gang affiliation appears to trigger higher scrutiny and other pretextual reasons for denial, such as inconsistencies between the Family Court order and statements at the border or claims that the Special Findings Order is not detailed enough.

After Filing the I-360

- Remind your client to immediately inform you if he or she is stopped, arrested, questioned, or suspended from school. Early advocacy and representation in school suspension hearings can mitigate the risk of a child's disciplinary

infraction being labeled gang-related. In Suffolk County, the NYCLU is available to assist with school advocacy.

Responding to USCIS NOIDs and Appealing Denials to the AAO

- In replying to NOIDs or appealing denials, ask to inspect the record of proceeding. 8 C.F.R. § 103.2(b)(16). Also, consider raising legal arguments that USCIS's failure to disclose specific facts and evidence against the client violates 8 C.F.R. § 103.2(b)(8) and (16) and their right to due process.⁵² Finally, consider challenging USCIS's very broad construction of its consent authority under INA § 101(a)(27)(J)(iii) in light of the more limited review Congress intended this to involve and USCIS's own assertions that it defers to the family court.
- In responding to an NOID or filing an I-290B (Notice of Appeal to the AAO or USCIS), remember to address *all* allegations. For instance, instead of saying only that your client is not a gang member, you may wish to dispute whether he has ever knowingly been in the presence of gang members and if so why.

FIGURE 3

Challenges to SIJS Denials Based on Gang Allegations

In 2017, the ACLU filed a class action lawsuit in the Northern District of California challenging the federal government's treatment of immigrant children who were previously released from ORR custody and now face allegations of gang membership. In November 2017, that case resulted in a preliminary injunction ordering that children who were re-detained on the basis of gang allegations get a hearing before an immigration judge within seven days. *Saravia v. Sessions*, 280 F. Supp. 3d 1168 (N.D. Cal. 2017).

A year later, in November 2018, the ACLU filed a second amended complaint on behalf of a second proposed class. That putative class includes young people released from ORR custody who have been or "will be denied immigration benefits or relief by USCIS at a time when DHS has or is aware of any information that the noncitizen is or may have been affiliated with a gang." *Saravia v. Sessions*, No. 17-cv-03615 (N.D. Cal. Nov. 15, 2018).

For updates on the status of the *Saravia* litigation, visit the [ACLU of Northern California's webpage](#) or [contact the NYCLU](#).

Another case in the U.S. District Court for the Southern District of New York challenging the denial of a SIJS petition on the basis of gang affiliation is currently awaiting decision. That case is *Zabaleta v. Nielsen*, 17-cv-7512 (S.D.N.Y. 2017).

- Make sure you do not inadvertently undermine your client's case in the process, such as by saying your client began his or her Family Court proceeding to obtain immigration status.
- Do not hesitate to submit supplemental evidence to bolster the merits of the SIJS petition before USCIS or the AAO—even if evidence was not before the Family Court.
- Appeal denials to the AAO or to a district court.
 - An AAO appeal is not necessary before going to a federal district court.⁵³
 - But, an AAO appeal may help you obtain more information underlying the denial—including whether a denial that USCIS claims is for other reasons is in fact predicated in part on your client's alleged gang membership.
- If you are considering a district court case challenging the denial of your client's visa, please let the NYCLU know.

2 Gang Allegations Memorialized in Memoranda, I-213s, or Other Documents Are Used by DHS in Immigration Court to Oppose Bond and Other Relief

The Department of Homeland Security, in cooperation with local and federal law enforcement, compiles vague and overbroad evidence to argue that individuals are gang members or associates. Subsequently, DHS uses that evidence to oppose bond in removal and custody proceedings. DHS even alleges an individual is a “gang associate,” and is therefore presumed dangerous, based on nothing more than the person having some social interaction with a gang member, no matter the significance of the interaction. In some cases, particularly in 2017, Homeland Security Investigations (HSI), in coordination with local law enforcement, drafted memoranda that are placed in an individual’s A-File. These memoranda allege that the person is a gang member and direct that he or she is ineligible for bond or any future immigration relief or benefits.

Among cases in which DHS alleged that a respondent in immigration court is or was gang involved, NYCLU and NYIC identified 10 different types of supporting documents filed by DHS in support of those allegations.⁵⁴ These included:

- Form I-213⁵⁵
- Record of Sworn Statement
- Rap Sheet
- Memoranda from HSI regarding gang affiliation (HSI memo)⁵⁶
- ICE Memorandum of Investigation
- Letters from Suffolk County Police Department to HSI
- Arrest reports with box for “confirmed gang member?” checked
- Photos of tattoos

KEY FINDINGS

- DHS documents memorializing allegations of gang affiliation—including memoranda authored by Homeland Security Investigations (HSI) and I-213s—typically mention the respondent’s attire, tattoos, associations or alleged self-admission, or unnamed third parties’ accusations. But, these documents lack even basic details about when, where, or in what context the suspicious incidents occurred. This makes the allegations very difficult to effectively refute.

- At bond hearings in which DHS has raised gang allegations, IJs often credence the allegations when issuing decisions on dangerousness.

- HSI places gang memoranda in individuals’ A-files explicitly directing that that all future immigration services and applications for benefits or relief be denied. These memoranda appear to be written and placed in an applicant’s A-File to ensure any future immigration benefits are denied.

- Gang allegations memorialized in memoranda, I-213s, or other documents are used by DHS in immigration court to oppose bond and other relief.

- Screenshots of social media accounts (e.g., Facebook and Instagram)

- Online News Articles & Other Secondary Sources⁵⁷

These documents vary in form and content, but some common features hold true across the cases that NYCLU and NYIC reviewed.

DHS Evidence of Gang Membership Lacks Crucial Details That Practitioners Need to Adequately Refute Allegations, Such as Dates, Locations, and Descriptions of Relevant Clothing or Apparel

The documents that DHS uses to allege a particular young person is gang affiliated often lack basic details about the factual basis for the claim and even the type of affiliation alleged.

Each HSI Memo contains a “background” section with generic information on MS-13, or another gang, and then subsequent sections that set out why DHS believes the named individual is a gang member or affiliate. These factors include: having a tattoo associated with gang members; wearing or possessing clothing, accessories, or “paraphernalia” indicative of gang membership (such as a bandana or rosary beads); identification as a gang member by confidential informants or by other gang members; being seen with known gang members; being arrested in the presence of other gang members; or self-admitting gang membership.⁵⁸ For instance, one report mentioned arrests “while in the company of other MS-13 members,” as well as:

“[Redacted] was wearing gang colors and footwear associated with MS-13.”

“On [date], [redacted] was encountered by law enforcement and observed to be with other confirmed MS-13 members [name 1] and [name 2].”

“On [date], [redacted] was stopped by Suffolk County PD. [Redacted] was wearing MS-13 colors and apparel including Chicago Bulls Hat.”⁵⁹

Another HSI memo is even vaguer:

“[Redacted] frequents an area notorious for gangs and/or associates with gang members.”

“[Redacted] has been seen by law enforcement personnel or by a source previously deemed reliable displaying gang signs and/or symbols.”

“[Redacted] has been identified as a gang member by documented or undocumented sources of information previously deemed reliable by law enforcement personnel.”

“[Redacted] has been seen wearing gang apparel or been found possessing gang paraphernalia.”⁶⁰

Similarly, in gang-related cases, I-213s that the NYCLU and the NYIC reviewed also contained a section in the narrative portion entitled “criminal affiliation” or “gang affiliation,” which asserted that the respondent had some gang tie—often without specifying what type of tie.

“Subject has been identified as a of M.S.13”⁶¹ [sic]

“Subject has been identified as a of 20th Street Mara Salvatrucha (MS20)”⁶² [sic]

“Subject has been identified as a /Active of Los Ninos Malos” [sic]⁶³

“Subject has been identified as a Associate of M.S.13”⁶⁴ [sic]

The I-213 forms that the NYCLU and the NYIC reviewed contained even less detail than HSI memoranda, often lacking basic information such as the dates and locations of alleged admissions or the names of alleged gang associates.

In almost no cases did these documents contain further details such as what the clothing or apparel looked like and when or where it was worn. In a few cases, the names of the individuals that the respondent is alleged to have associated with are included.

Where a confidential source identified the respondent as a gang member, no HSI memos or I-213s provided the individual’s name or relationship to the respondent or any proof of the source’s credibility beyond, in a few cases, a bare assertion that the source is “reliable.” Similarly, when the respondent was supposedly observed with other gang members or wearing gang apparel, the documents often do not

say *who* made those observations or where—such as whether, for instance, the observation took place at school, a bus stop, a sports field, or someplace else where there may be a benign explanation for proximity to a range of other kids.

Finally, several HSI memos and I-213s indicate that the respondent admitted to gang membership but provide no further details about when or where such an admission occurred nor any contemporaneous written record of the admission. That lack of detail can mask significant sources of inaccuracy and unreliability, such as poor translation or even coercion. In one custody hearing, after testimony from a Suffolk County gang detective, an immigration judge in New York concluded that if there was any admission of gang membership by the minor respondent, it was not credible because the detective had interrogated him for hours without his mother or attorney present and testified that he routinely continued interrogations until the suspect stopped denying gang involvement.⁶⁵

Some allegations of gang involvement contained in I-213s are quoted below.

“[Redacted] has been classified as an MS-13 gang member by HSI predicated on the following: [Redacted] admitted to being a gang member during an interview with HSI agents. [Redacted] is a confirmed MS-13 member and has been observed associating with confirmed MS-13 members on more than four occasions. [Redacted] has been identified as a logistical facilitator for the gang involved in the movement of weapons and money for MS-13.”⁶⁶

“[Redacted] has been identified as an MS-13 associate by HSI. [Redacted] associates with known MS-13 associates [name 1] and [name 2]. A review of [redacted] social media accounts revealed numerous photographs of [x] wearing clothing and apparel consistent with association in MS-13. [Redacted] was identified as an associate of MS-13 by an untested cooperating source.”⁶⁷

“[Redacted] is a confirmed MS-13 gang member by Nassau County Police Department. [Redacted] has tattoos depicting MS-13 gang membership.... [Redacted] social media pages depict numerous images associated with MS-13 insignia. [Redacted] self admitted to being an MS-13 associated and provided agents with known MS-13 hang outs and 13 names of Uniondale MS-13 members.”⁶⁸ [sic]

I-213s also did not include any reference to a policy or protocol regarding what criteria or level of evidence are needed to prompt the conclusion or assertion that a person is gang affiliated.

Clients Facing Allegations of Gang Involvement Are More Likely to Have to Testify in Bond Hearings and to Face Difficulty Meeting Their Burden of Proof

When a respondent is accused of gang affiliation, practitioners report that it is more likely that the immigration judge or DHS will question him or her directly at a bond hearing. DHS uses cross-examination to try to poke holes in respondents’ explanations for photos and other social media posts—for instance, in two cases, DHS asked young people to identify a favorite player on the Chicago Bulls team.⁶⁹ Practitioners also reported that DHS asked detailed questions about types of music or bands that the respondent liked if he or she had stated that a particular style of dress, tattoo, or hand gesture was music-related.⁷⁰

Because the burden is placed on the respondent in bond hearings held under INA § 236(a),⁷¹ ambiguity or a judge’s lingering uncertainty over the veracity of DHS’s claims tends to be held against the respondent.⁷² That means a respondent’s failure to testify or the absence of any document definitively establishing a lack of gang affiliation can lead to the denial of bond.⁷³ In one bond denial that was later reversed by the BIA, the Immigration Judge cited press reports about the prevalence of gangs on Long Island and then wrote that although the Respondent had produced proof he had never been arrested,

“several letters of support,” and his school transcript, “[t]he Court finds that he has not met his burden.”⁷⁴

Confronted with objections to the admissibility of an I-213 containing unreliable hearsay, another immigration judge told the respondent’s attorney that she should have subpoenaed the deportation officer and then denied bond.⁷⁵

HSI Gang Memoranda Are Likely Written and Placed in an A-File for the Express Purpose of Ensuring All Future Benefits Are Denied

Although HSI memoranda, while still vague, generally provided more detail than an I-213, these documents appeared calculated to inflict particular harm on respondents by foreclosing future benefits.

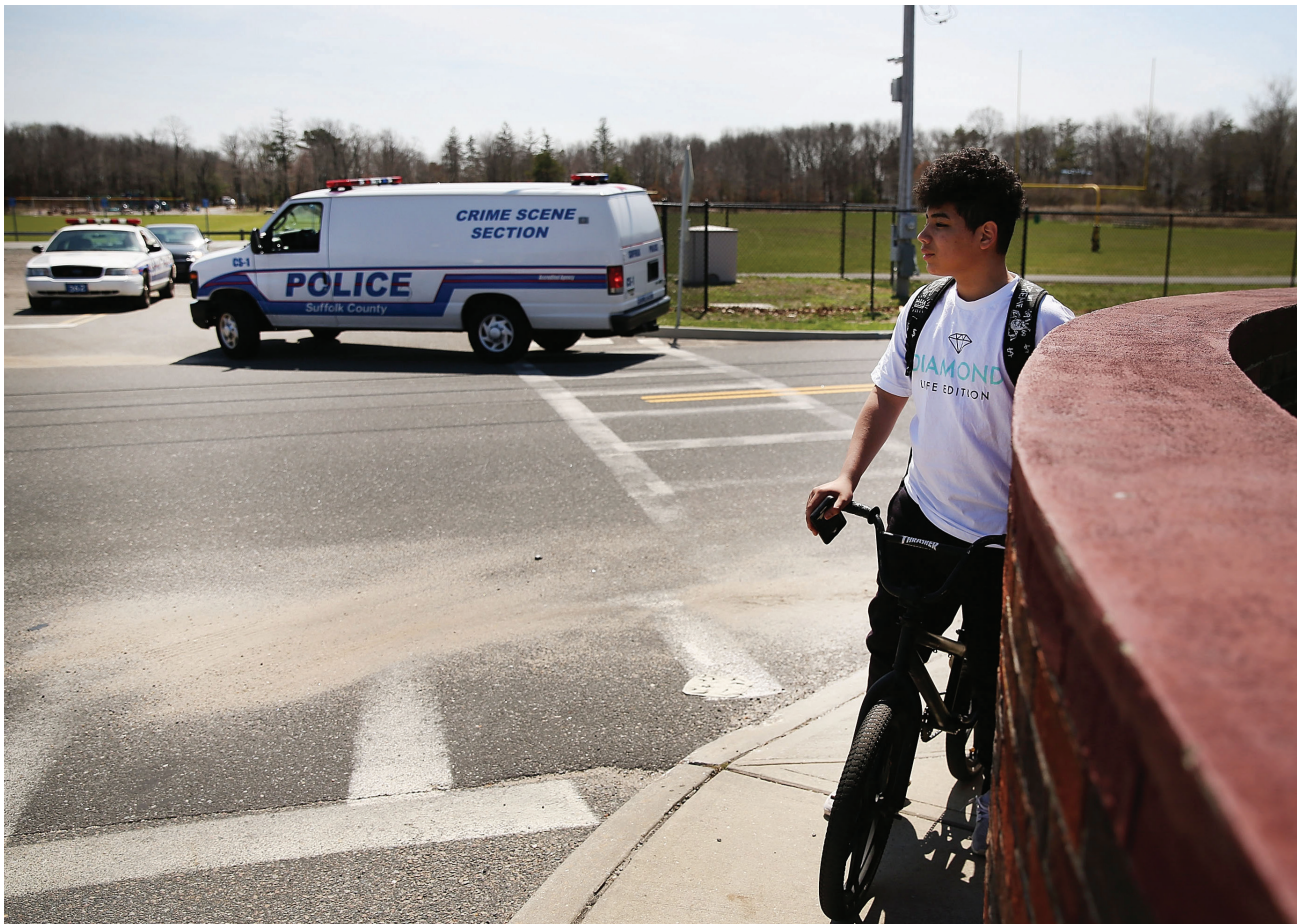
The headings on the HSI memoranda indicate that they are placed in the named person’s A-File—and

indeed, the intended recipient is the file itself—where they will be accessible to other agencies within DHS.⁷⁶

Every Gang Memorandum reviewed by NYCLU and NYIC concluded with the same or similar language:

“In light of [redacted]’s affiliation to a violent street gang, he should not be afforded any type of immigration services, relief, benefit or otherwise released from custody pending the outcome of removal proceedings.”⁷⁷

“As described above, [redacted] is a member of a transnational criminal organization, the MS-13 gang. His gang membership and serious criminal history should preclude him receiving any U.S. immigration benefits. His conduct... demonstrates that he poses a danger to the community and a risk of flight from removal proceedings. Hence, he should remain in custody.”⁷⁸



This language suggests that part of HSI’s purpose in writing these memoranda is to try to ensure that named individuals are denied bond and future immigration benefits. This conclusion accords with the goal espoused by some local law enforcement in New York⁷⁹—and demonstrates that USCIS benefits denials, potentially years later, *see supra* at III.1, are not random at all. USCIS benefits denials are precisely the point of labeling a child as a gang member.

Recommendations for Immigration Practitioners

Initial Intake

- Screen your clients in advance of a bond hearing to know if gang allegations may arise. Ask the client what questions ICE agents posed in their initial interrogation and whether your client knows or has ever been in close proximity to gang members. If you think gang issues may arise, consider asking DHS for their evidence in advance of the hearing so that you can carefully review it with your client.
- Try to gather as much information as possible to rebut or contextualize vague and unsubstantiated allegations of gang membership or affiliation. Some strategies include:
 - Review and save copies of all of your client’s social media accounts, including Facebook, Instagram, and Twitter accounts. DHS often uses print-outs from these accounts selectively. Discuss posts with your client and ask where he got relevant clothing or jewelry and why he likes or wore it. In some cases, a parent or sibling may be able to corroborate its origin as a gift or its perceived meaning or sentimental value.
 - Ask if ICE, local law enforcement, or a School Resource Officer obtained and/or searched your client’s cell phone and, if so, ask your client to detail the types of

messages, images, videos, and music that are on the phone.

- Obtain all possible documents associated with criminal arrests or convictions. Frequently, gang memoranda assert that a person “self-admitted” gang membership in the context of a law enforcement encounter. But that admission may not appear anywhere in criminal-record documents prepared at the time.
- If criminal records are incomplete, consider submitting FOIL requests under New York law to a local police department, Sheriff’s Office (for local jail), or prison facility.
- Obtain school records and ask questions about school suspensions or disciplinary matters as allegations of gang involvement often originate at school.
- Consider asking the immigration judge to sign a subpoena for the original records underlying the allegations contained in a gang memorandum or I-213 or for the officer/s who authored them to testify.⁸⁰ Even if the subpoena is not granted or no documents are produced, the effort signals your client’s desire to air all the facts and is a good way to argue that your client did everything possible to meet his or her burden. But bear in mind that testimony from a law enforcement officer may appear to bolster rather than undermine those allegations. Also, subpoenaed documents are sent straight to the court meaning the judge will see them before you do.

Bond Hearing

- Do not be afraid to request an adjournment of a bond hearing if new evidence is served that you have not had a chance to review with your client. Once the bond record is closed, you will need to demonstrate changed circumstances to get a new bond hearing.⁸¹

- Prepare your client to testify, even if you do not intend to call him or her as a witness. Practice asking several rounds of questions about the friends, sports team, music, or style of dress at issue in photos of your client or other gang evidence—such as who your client’s favorite players or musicians are.
- Provide as much equities evidence as possible. Think carefully about how you can demonstrate your client’s character and how he spent his time. Family members’ attendance at hearings may also help to assuage the immigration judge’s concerns about safety.
- Use experts and seek out resources and articles that contextualize tattoos, photos, clothing or other alleged signs of gang involvement that are in fact common in pop culture or particular communities.⁸²
- Make a point to distinguish allegations of “gang association” or some other unspecified type of involvement from “gang membership.” The difference between a “member” and an “associate” is based on the level of evidence the law enforcement entity collected. The term “gang associate” is typically used when a law enforcement agency does not have enough evidence to allege a person is a gang member. Consider using a gang expert to help explain the differences to the IJ.
- Object to evidence that is unfair, unsourced, or prejudicial to your client—even if it is in the form of an I-213. The BIA has held that I-213s are not accorded recognition when the “reliability of the [I-213] is somehow undermined,”⁸³ the form fails to attribute information or contradicts other written accounts from the original source (such as an arrest record),⁸⁴ or its use is fundamentally unfair. Also, the presumption of reliability that attaches to an I-213 is rooted in the business-records exception to the hearsay rule.⁸⁵ But the business records exception is applicable to standardized documents produced in the ordinary course of an official’s duties—not police reports.⁸⁶
- Object to *unauthenticated* and *untranslated* documents. If DHS files photos or social media printouts, DHS must establish what those are and where they came from through an affidavit, testimony, or other evidence.
- Consider filing a motion to suppress the gang-related documents all together.⁸⁷

3 Gang Allegations Are Used as a Basis to Detain Individuals, Including Children, at Interviews at the USCIS Asylum Office

For individuals applying for asylum, gang allegations can pose a unique set of problems. First, suspicion of gang involvement on the part of an applicant, or anywhere in his or her family or extended social circle, may lead asylum officers to convert a normally non-adversarial interview into a more aggressive interrogation. Information obtained in this interrogation can ultimately put an applicant at risk of detention. Second, DHS may use evidence of a respondent's gang involvement to impeach him or her in court or to argue that the respondent does not face danger from gangs in his or her home country.

Asylum Officers May Allege That an Asylum Applicant or Anyone that He or She Knows is a Gang Member or Affiliate.

In 2017, ICE detained several children at asylum offices in the New York City area. In one case, the asylum officer questioned a minor applicant extensively about his alleged gang involvement in the U.S. at his initial asylum interview. Afterwards, he was given a date to return for a decision. When he returned to the asylum office in Bethpage, he was detained by ICE officers. While detained, ICE officers interrogated him without his attorney or mother present, and threatened him, saying that if he did not speak with them, they may detain his undocumented mother. He was then sent to a secure detention facility in Virginia.⁸⁸

Even where children are not ultimately detained, several attorneys who regularly represent children at asylum interviews at USCIS's asylum office witnessed their clients undergo very aggressive and combative questioning related to their own alleged gang involvement or that of relatives or friends. *Cf.* 8 C.F.R. § 208.30(d) ("The asylum officer . . . will conduct the interview in a non-adversarial manner.").

KEY FINDINGS

- Gang allegations are used as a basis to detain individuals, including children, at interviews at the USCIS Asylum Office.
- Even where individuals are not detained, asylum officers have engaged in lines of questioning that amount to an interrogation related to gang allegations lodged against the individual or the individual's family members.
- When an asylum applicant or one of his or her relatives is suspected of gang affiliation, asylum officers may convert a non-adversarial interview into an interrogation related to that individual or his or her family members. In some cases, the asylum officer begins to transcribe rather than simply take notes and then asks applicants to sign the transcript.
- During asylum hearings in immigration court, DHS uses evidence of alleged gang affiliation to impeach the respondent and to claim he or she could not possibly face danger from gangs in his or her home country.

In some cases, asylum officers have advised the child and his or her attorney that the interview will be transcribed. After asking questions regarding alleged gang involvement of the child or the child's family member, at the conclusion of the questioning, the child was then asked to sign a document containing the officer's notes of the interview to attest to the veracity of what was discussed with little time to review or amend the written account.⁸⁹

Even where a child is not him- or herself the subject of gang suspicions, asylum officers may hone in on gang ties among family members, neighbors or other associates. Questions about these other

individuals may include where that person lives, how he or she can be contacted, and the extent of his or her relationship with the applicant—for instance, whether that person knows where the child is now, helped the child come to the U.S., or communicates with the child. In one case, an asylum applicant was questioned extensively regarding a relative’s alleged gang affiliation and then called for a second appointment at which she was questioned further about the same relative, even though that relative was not central to her claim for asylum. Ultimately, this child’s case was referred.⁹⁰

In Immigration Court, DHS Uses Evidence of Gang Membership as Impeachment Evidence and to Establish Negative Discretionary Factors

In merits hearings on asylum applications in immigration court, DHS uses evidence of gang involvement to try to impeach the respondent’s credibility, undermine the validity of gang-based claims asylum claims, and argue against the positive exercise of discretion.

FIGURE 4

Confronting Gang Allegations in Immigration Court Regarding Bond & Asylum

Andre, a teenager from El Salvador, came to the U.S. at the age of 13 and began attending school in central Long Island. In 2017, he obtained a Special Findings Order in family court and applied for SIJ Status. In more than five years in the U.S., he has never been arrested or suspended from school.

Three months before his high school graduation, Andre was detained by ICE at his home in Central Islip. Because he had already turned 18, he was placed at an ICE detention facility in New Jersey. At his bond hearing, DHS filed an I-213 alleging he “has been identified as an MS-13 associate by HSI.” By way of proof, the I-213 stated that Andre “associates with known MS-13 associates;” had photographs on social media “wearing clothing and apparel consistent with association in MS-13;” and was “identified as an associate of MS-13 by an untested cooperating source.” DHS also filed photos from Andre’s Facebook account posted more than two years before and showing Nike Cortez shoes and a Chicago Bulls hat.

Andre and his lawyer submitted extensive equities evidence in support of his release, including evidence that between school, work, and extracurricular activities, Andre had almost no remaining time in his schedule to be a gang associate. But, the IJ accepted the allegations in the I-213 and denied bond, writing, “The Court is

very alarmed by the Respondent’s willingness to surround himself with known MS-13 associates and by his decision to wear attire associated with the gang.”

With the bond denial on appeal and the I-360 still pending, the court forced Andre and his attorney to proceed to a merits hearing on his asylum application. At that hearing, DHS’s cross-examination centered almost exclusively on Andre’s alleged gang involvement. A different IJ noted at the end of the hearing that she did not accept the gang allegations as true, but nonetheless denied asylum.

Then in December 2018, almost nine months after Andre was first arrested, the BIA reversed the lower court’s bond denial, holding “that the respondent met his burden to demonstrate that he is not a danger to the community.” Andre’s attorney had submitted hundreds of pages of articles about the broad cultural appeal of Nike Cortez shoes and the Chicago Bulls in support of his appeal.

Andre hopes to win release at a new bond hearing. But, with his removal case now on appeal and his I-360 still pending, Andre’s prospects of winning the right to remain safely in the U.S.—and reaching the high school graduation ceremony he missed—are far from certain.

An attorney who represented a detained client in a defensive asylum application reported that DHS filed evidence of her client’s alleged gang affiliation after he testified that he was not gang involved, ostensibly to impeach him. The evidence included arrest reports and a letter from local law enforcement to HSI.⁹¹

In another case, DHS focused its cross-examination of a detained client, who sought asylum based on his fear of gangs and gang recruitment in El Salvador, on his alleged gang involvement in the U.S. The attorney objected to the relevance of these questions, but DHS claimed that gang involvement in the U.S. would undermine the respondent’s claim that he faced danger from gangs in El Salvador.⁹²

DHS has also suggested its allegations of a respondent’s gang membership in the U.S. are relevant to assessing his claim that he was part of a particular social group of imputed gang members.⁹³

Recommendations for Immigration Practitioners

Initial Intake

- Carefully screen your client and ask about any gang affiliations on the part of his or her relatives. In particular, watch for:
 - Any school disciplinary issues, as those frequently result in reports to ICE that a child is gang-involved—even if the incident had no gang tie or the child was the victim;
 - Gang involvement on the part of any family members in the U.S. or in the client’s home country;
 - Any police or criminal justice contact in the U.S.;
 - Any gang involvement or material support, even if coerced, by the child or his or her family members.
- Advise your client that their social media accounts may be checked and scrutinized and

that he or she should set their social media accounts to private and take down posts that may be viewed as potentially problematic. Posts involving any hand signals, tattoos, illicit substances (or underage alcohol consumption), graffiti, gang mottos, or sports paraphernalia that contains colors associated with gangs (red, blue, or white) have a high likelihood of causing suspicion.

Asylum Interview

- Prepare your client for questioning about relatives and friends whom the government may suspect of gang membership, including details such as their phone numbers or social media names and the extent of their contact with your client.
- Prepare your client for detailed questioning about their social media postings and choices of apparel. For example, if your client will testify that he likes a particular type of music or sports team, practice several rounds of follow-up questions such as what particular songs he likes, how often he watches games, and who on the team or in the band he particularly likes.
- Carefully consider the inclusion of any mention of gang involvement on the part of family members that is not relevant to the claim or responsive to a question on the I-589.
- Consider prioritizing other forms of relief for children whose claims or families may put them or others at risk of detention or enforcement.

4 Gang Allegations are Used to Deny or Revoke Other Types of Status

Although NYCLU and NYIC did not gather sufficient evidence to form conclusions on the denial of other benefits, immigration providers have also reported denial or revocation of other forms of status due to alleged gang involvement.

i. DACA

In 2017, USCIS claimed to have terminated DACA as a result of gang membership or affiliation or convictions relating to gang membership or affiliation in approximately 50 cases.⁹⁴ In one high-profile case in Washington State, a young man was detained and his DACA terminated after ICE came to his home to detain his father. ICE later claimed that the man, a 23-year old student, was a gang member based on his tattoo—and altered his detention-center intake form so that it appeared that, rather than denying gang membership, he was *admitting* membership.⁹⁵ A federal court ultimately ordered his release and enjoined the termination of his DACA.⁹⁶

ii. U-visas

In mid-2018, an applicant for derivative U-visa status in New York received a Request for Evidence (RFE) on his I-192 (Application for Advanced Permission to Enter as a Nonimmigrant) seeking extensive information about his alleged gang involvement—such as when he joined the gang, how long he was affiliated, his monikers or nicknames, and his current relationship to the gang. The RFE stated:

“Information obtained in your file and/or through routine background-checks [sic] reveals that you may have been or currently are a member or affiliate of a criminal street gang(s). You disclosed to the Suffolk County Police Department that you are an active member of the Bloods street gang. You have been observed by the local law enforcement agency wearing gang clothes and gang

KEY FINDING

- Gang Allegations may be used to deny DACA renewal, U-visas, or other adjustment of status applications before USCIS.

colors. You have been stopped and arrested with other known Blood members. You have posted numerous photos on social media depicting gang activity to include pictures of weapons and drugs, displaying gang signs and gang attire.”⁹⁷

In another case in New York in mid-2017, USCIS denied a child’s application for U-3 status (as a derivative on his mother’s U-visa application). In its denial, the agency claimed the child was “inadmissible” because “the record indicates that federal and local law enforcement have identified him as an active MS-13 gang member.” The letter cited only vague factual bases for that conclusion—such as that the child “frequent[ed] an area notorious for gangs” and had been “identified as a gang member by documented and undocumented source of information previously deemed reliable by law enforcement personnel.”⁹⁸

iii. Adjustment of Status

Adjustment of status requires a positive exercise of discretion.⁹⁹ An applicant for adjustment of status based on U-visa status was denied by USCIS in part because local law enforcement “believe him to be a gang member.”¹⁰⁰ Even though the applicant denied gang membership, the court accepted as credible “evidence that the Applicant [had] been affiliated with a gang,” and found that that allegation together with his criminal history were enough to outweigh the positive factors in favor of granting him LPR status in an exercise of positive discretion.¹⁰¹

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Endnotes

- 1 All names of children and adults with immigration cases in this report are pseudonyms.
- 2 USCIS, *About A-Files*, <https://www.uscis.gov/history-and-genealogy/genealogy/files-numbered-below-8-million#WhatAreAFiles> (last visited Dec. 28, 2018).
- 3 USCIS, *Adjustment of Status*, <https://www.uscis.gov/greencard/adjustment-of-status>.
- 4 US DOJ, *Board of Immigration Appeals*, <https://www.justice.gov/eoir/board-of-immigration-appeals> (last visited Jan. 22, 2019).
- 5 USCIS, *Bond*, <https://www.uscis.gov/tools/glossary/bond> (last visited Jan. 22, 2019).
- 6 Immigrant Legal Resource Center, *DACA*, <https://www.ilrc.org/daca> (last visited Jan. 22, 2019).
- 7 DHS, *Our Mission* (May 11, 2016), <https://www.dhs.gov/our-mission>.
- 8 Dree K. Collopy et al., *Challenges and Strategies Beyond Relief*, AILA (2014), <https://www.aila.org/File/Related/11120750b.pdf>.
- 9 See USCIS, *Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant*, <https://www.uscis.gov/i-360> (last visited Jan. 22, 2019).
- 10 See ICE, *Homeland Security Investigations* (Sept. 21, 2018), <https://www.ice.gov/hsi>.
- 11 USCIS, *Immigration Judge*, <https://www.uscis.gov/tools/glossary/immigration-judge> (last visited Jan. 22, 2019).
- 12 See USCIS, *NOID*, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/faq/what-notice-intent-deny> (last visited Jan. 22, 2019).
- 13 See Office of Refugee Resettlement, *What We Do* (Jan. 9, 2017), <https://www.acf.hhs.gov/orr/about/what-we-do>; Alexandra Schwartz, *The Office of Refugee Resettlement is Completely Unprepared for the Thousands of Immigrant Children Now in Its Care*, NEW YORKER: NEWS DESK (June 21, 2018), <https://www.newyorker.com/news/news-desk/the-office-of-refugee-resettlement-is-completely-unprepared-for-the-thousands-of-immigrant-children-now-in-its-care>.
- 14 USCIS, *Adjudicator's Field Manual: Chapter 10.5 Requesting Additional Information* (Sept. 11, 2018), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/0-0-0-1318.html>.
- 15 8 U.S.C. § 1101(a)(27)(J); INA § 101(a)(27)(J).
- 16 Between September 2018 and January 2019, the NYCLU and the NYIC obtained redacted documents from immigration legal services providers documenting instances of gang allegations that were used as a stated basis for USCIS or IJs to deny immigration benefits to individuals who were otherwise eligible for those benefits. We compiled the contents of our investigation into a document titled, *Survey of Gang-Related Immigration Benefits Denials*, which provides the foundation for this report. See New York Civil Liberties Union & New York Immigration Coalition, *Survey of Gang-Related Immigration Benefits Denials* (last updated January 27, 2019) [hereinafter NYCLU & NYIC Survey] (on file with authors).
- 17 We received the following types of documents from USCIS: Request for Evidence (RFE); Notice of Intent to Deny (NOID) Special Immigrant Juvenile Petition, Form I-360; Notice of Intent to Revoke Special Immigrant Juvenile Petition, Form I-360; Administrative Appeals Office Notice of Intent to Dismiss the appeal of a Form I-360 denial; and the opinions of a New York City IJs both granting and denying bond where gang allegations player a role in the immigration proceeding. See NYCLU & NYIC Survey, *supra* note 16.
- 18 *Id.* at 65-164, 195-205.
- 19 *Id.* at 61-64, 209-13, 392-99, 663-67.
- 20 See *infra* Figure 1: How SIJS Works.
- 21 NYCLU & NYIC Survey, *supra* note 16, at 19-23.
- 22 *Id.* at 416.
- 23 *Id.* at 170.
- 24 *Id.* at 22.
- 25 Some attorneys obtained documentation of the underlying bases for gang allegations in custody hearings if the client was detained at some point before or after the revocation. But even that documentation was vague and difficult to respond to. See *infra* IV. 2.
- 26 NYCLU & NYIC Survey, *supra* note 16, at 485-88.
- 27 *Id.* at 491-98.
- 28 *Id.* 318-417.
- 29 *Id.* at 402.
- 30 *Id.* at 503-04.
- 31 NYCLU & NYIC Survey, *supra* note 16 at 184-86.
- 32 See *infra* Figure 2: Challenging Other Bases for Wrongful SIJS Denials.
- 33 See e.g., NYCLU & NYIC Survey, *supra* note 16, at 97-98, 159-64, 216-24.
- 34 See *infra* Figure 1: How SIJS Works.
- 35 NYCLU & NYIC Survey, *supra* note 16, at 390.
- 36 *Id.* at 413.
- 37 *Id.* at 403, 413.
- 38 *Id.* at 487-88.
- 39 *Id.* at 409.
- 40 NYCLU & NYIC Survey, *supra* note 16, at 416.
- 41 *Id.* at 477-78.
- 42 *Id.* at 423.

- 43 H.R. Rep. No 105-405, 105th Cong., 1st Sess., at 130 (1997), *available at* <https://www.congress.gov/congressional-report/105th-congress/house-report/405> (“The language [of the SIJS statute] has been modified in order to limit the beneficiaries of this provision to those juveniles for whom it was created, namely abandoned, neglected, or abused children, by requiring the Attorney General to determine that neither the dependency order nor the administrative or judicial determination of the alien’s best interest was sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse or neglect.”).
- 44 USCIS, *Policy Manual: USCIS Consent* (2018), <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume6-PartJ-Chapter2.html#footnotelink-19>.
- 45 Memorandum from Lori Scialabla, USCIS Deputy Director, to January Contreras, Citizenship and Immigration Services Ombudsman, Response to Recommendation 47, Special Immigrant Juvenile (SIJ) Adjudications: An Opportunity for Adoption of Best Practices (July 13, 2011), https://www.uscis.gov/sites/default/files/USCIS/Resources/Ombudsman%20Liaison/Responses%20to%20Formal%20Recommendations/cisomb-2011-response47.pdf?fbclid=IwAR0jcYji9SyIytVzXRThZxP1Q0LqPsR2ArNZbDII6vWYy7rqP_z3NUnER8.
- 46 For a discussion of USCIS’s conflicting guidance on what its consent function entails, see Immigrant Legal Resource Center, *Responding to Inappropriate RFEs & NOIDs in Special Immigrant Juvenile Status Cases*, 2-3 (Oct. 2015), https://www.ilrc.org/sites/default/files/resources/sijs_rfes_noids_pa_final.pdf; see also *Budhathoki v. Dep’t of Homeland Sec.*, 220 F. Supp. 3d 778, 787 (W.D. Tex. 2016), *aff’d sub nom. Budhathoki v. Nielsen*, 898 F.3d 504 (5th Cir. 2018) (describing USCIS’s consent authority as a decision “whether the SIJ benefit was ‘sought primarily for the purpose of obtaining the status of an alien lawfully admitted for permanent residence, rather than for the purpose of obtaining relief from abuse of neglect or abandonment’ and examines the relevant evidence only to ensure that the record contains ‘a reasonable factual basis . . . for the [juvenile] court’s rulings.’”).
- 47 NYCLU & NYIC Survey, *supra* note 16, at 488.
- 48 *Id.* at 435-48, 480-88.
- 49 *Id.* at 437-38.
- 50 Alice Speri, *NYPD Gang Database Can Turn Unsuspecting New Yorkers Into Instant Felons*, INTERCEPT (Dec. 5, 2018), <https://theintercept.com/2018/12/05/nypd-gang-database/> (“Last year, the Legal Aid Society, one of several New York organizations that have demanded greater transparency from the NYPD about the database, launched a website to help New Yorkers file public records requests to learn whether they are listed in it. So far, more than 300 people have filed such requests – but police have denied every one of them.”).
- 51 Press Release, NYCLU Sues Suffolk Police to Force School-to-Deportation-Pipeline Transparency (Apr. 9, 2018), <https://www.nyclu.org/en/press-releases/nyclu-sues-suffolk-police-force-school-deportation-pipeline-transparency>.
- 52 This regulation can be construed as requiring that the original documents underlying USCIS’s negative eligibility determination be disclosed. See *Ghafoori v. Napolitano*, 713 F. Supp. 2d 871, 880 (N.D. Cal. 2010); *Naiker v. United States Citizenship & Immigration Servs.*, No. C17-1740-RAJ, 2018 WL 6249842, at *7 (W.D. Wash. Nov. 29, 2018). But even in the absence of such a requirement, USCIS’s statement of the factual basis for a denial needs to be specific enough to give the client a meaningful opportunity to respond—which many of the NOIDs and denials that NYCLU and NYIC reviewed were not. Cf. *Ogbolumani v. Napolitano*, 557 F.3d 729, 735 (7th Cir. 2009) (finding no violation of 8 C.F.R. § 103.2(b)(16)(i) where USCIS listed the evidence supporting its denial including the names of the “important” witnesses to the applicant’s marriage fraud); *Brinklys v. Johnson*, 175 F. Supp. 3d 1338, 1356 (M.D. Fla. 2016), (finding no violation of 8 C.F.R. § 103.2(b)(16)(i) where “the NOID included a specific statement of the evidence on which the derogatory information was based,” including property records, a police report, and a “Fraud Investigation Report,” of which the applicants received a copy) *aff’d sub nom. Brinklys v. Sec’y, Dep’t of Homeland Sec.*, 702 F. App’x 856 (11th Cir. 2017); see also *Matter of Estime*, 19 I. & N. Dec. 450, 450–52 (BIA 1987) (“Where a notice of intention to revoke is based on an unsupported statement or an unstated presumption, or where the petitioner is unaware and has not been advised of derogatory evidence, revocation of the visa petition cannot be sustained”).
- 53 See American Immigration Council, *Failure to Appeal to the AAO: Does it Bar all Federal Court Review of the Case?* (Sept. 26, 2016), https://www.americanimmigrationcouncil.org/practice_advisory/failure-appeal-ao-does-it-bar-all-federal-court-review-case.
- 54 See NYCLU & NYIC Survey, *supra* note 16.
- 55 The I-213 is a standard form that DHS generates each time it commences removal proceedings (or investigates an individual for removal from the U.S), but it does not always share this form or serve a copy on a respondent or the court. I-213s can be generated and updated by a wide range of ICE officers. The first page of the I-213 contains basic biographic information, such as address, date of birth, and parents’ names and nationalities. But, the narrative portion of the form that follows can include a wide range of information. See Dree K. Collopy et al, *Challenges and Strategies Beyond Relief*, AILA (2014), <https://www.aila.org/File/Related/11120750b.pdf>.
- 56 The HSI memos the NYCLU and the NYIC received were all dated between March and August 2017, suggesting a connection with Operation Matador, an ICE initiative launched in 2017 aimed at eradicating transnational gang presence in New York City, on Long Island, and in New York’s Hudson Valley. Operation Matador was “launched in 2017 as a part of Operation Community Shield led by ICE . . . uses resources of ICE Homeland Security Investigations (HSI), ICE Enforcement and Removal Operations (ERO), Customs and Border Protection (CBP), and local police departments to target MS-13 gang activity in the New York metropolitan area, including Long Island and the Hudson Valley.” NYIC & CUNY SCHOOL OF LAW IMMIGRANT & NON-CITIZEN RIGHTS CLINIC, SWEPT UP IN THE SWEEP: THE IMPACT OF GANG ALLEGATIONS ON IMMIGRANT NEW YORKERS (2018), http://thenyic.pi.bypronto.com/wp-content/uploads/sites/2/2018/06/SweptUp_Report_Final-1.pdf; see also ICE, *Joint Operation Nets 24 Transnational Gang Members, 475 Total Arrests Under Operation Matador*, ICE.GOV (Mar. 29, 2018), <https://www.ice.gov/news/releases/joint-operation-nets-24-transnational-gang-members-475-total-arrests-under-operation#wcm-survey-target-id>; ICE, *Operation Matador Nets 39 MS-13 Arrests in Last 30 Days*, ICE.GOV (June 14, 2017), <https://www.ice.gov/news/releases/operation-matador-nets-39-ms-13-arrests-last-30-days>.
- 57 The online news articles and other secondary sources DHS used as evidence against respondents included these publicly available documents: Zaira Cortes, *New Mexican Gangs Crop Up in Brooklyn Neighborhoods*, VOICES OF NY (Aug. 22, 2012), <https://>

voicesofny.org/2012/08/new-mexican-gangs-crop-up-in-brooklyn-neighborhoods/; Brooklyn District Attorney's Office, *Brooklyn Man Sentenced to 20 in Prison after Pleadings Guilty to Participating in Attack on Two Bedford-Stuyvesant Brothers, Killing One* (Sept. 13, 2017), <http://www.brooklynnda.org/2017/09/13/brooklyn-man-sentenced-to-20-years-in-prison-after-pleading-guilty-to-participating-in-attack-on-two-bedford-stuyvesant-brothers-killing-one/>; Paul Stremple, *Gang Member Sentenced for Involvement in Fatal Robbery, Stabbing of Man in Bed-Stuy*, BLYNER (Sept. 14, 2017), <https://bklynrc.com/prospect-park-south-man-seated-for-involvement-in-fatalrobbery-stabbing-of-man-in-bed-stuy/>; Canada Border Services Agency Organized Crime Section National Headquarters, *Tattoos and Their Meanings* (May 2008), <https://info.publicintelligence.net/CBSA-TattooHandbook.pdf>; James Bargent, *Hidden Meanings of Honduras Mara Gang Tattoos Explained*, InSight Crime (Sept. 3, 2013), <https://www.insightcrime.org/news/brief/hidden-meanings-honduras-mara-gang-tattoos/>; Everett Police Department Crime Prevention Unit, *Gang Recognition Guide*, <https://studylib.net/doc/8723537/gang-recognition-guide> (last visited Dec. 27, 2018); Tracy E. Barnhart, *Spread of a Menace*, CORRECTIONS.COM (Jan. 26, 2009), <http://www.corrections.com/articles/20497-spread-of-a-menace>.

58 NYCLU & NYIC Survey, *supra* note 16, at 97-98, 159-64, 216-24.

59 *Id.* at 164, 217.

60 *Id.* at 98.

61 *Id.* at 57, 83, 123

62 NYCLU & NYIC Survey, *supra* note 16, at 38.

63 *Id.* at 67.

64 *Id.* at 57.

65 *Id.* At 1077.

66 *Id.* At 39

67 NYCLU & NYIC Survey, *supra* note 16, at 39.

68 *Id.* at 83.

69 *Id.* at 509-15, 524-48.

70 *Id.* at 513-15.

71 *See Matter of Adenji*, 22 I. & N. Dec. 1102 (BIA 1999). Some practitioners have successfully challenged this allocation of the burden in 236(a) bond hearings. *Darko v. Sessions*, 342 F. Supp. 3d 429 (S.D.N.Y. 2018) (“[T]he Court concludes that due process requires the government to bear the burden of proving that detention is justified at a bond hearing under § 1226(a)... [and] that the government must bear the burden by clear and convincing evidence.”); *Martinez v. Decker*, No. 18-CV-6527, 2018 WL 5023946, at *5 (S.D.N.Y. Oct. 17, 2018) (“[I]n accordance with every court to have decided this issue, the Court concludes that due process requires the Government to bear the burden of proving that detention is justified at a bond hearing under Section 1226(a).”).

72 NYCLU & NYIC Survey, *supra* note 16, at 513-15.

73 *Id.* at 1071-73

74 *Id.* at 664-66.

75 *Id.* at 1073. The written bond decision stated, “[t]he Respondent elected not to testify at the hearing and failed to provide other evidence calling into question the reliability of the information contained in his Form I-213 aside from his mother’s address.” *Id.* at 1073.

76 *See* Memorandum from Secretary Michael Chertoff to All Department of Homeland Security Components, DHS Policy for Internal Information Exchange and Sharing (Feb. 1, 2007), *available at* <https://www.hsdl.org/?abstract&did=469772> (policy outlining DHS department-wide information sharing).

77 NYCLU & NYIC Survey, *supra* note 16, at 98, 164, 217, 219.

78 *Id.* at 162, 224.

79 “There are times when we know someone is an MS-13 gang member, and we know someone is an active MS-13 gang member, but we’re not in a position to make a criminal arrest,” Timothy Sini, the Suffolk County police commissioner, said in an interview. “So another tool in our toolbox is to work with the Department of Homeland Security to target active known MS-13 gang members for violation of civil immigration laws, which is another way to remove dangerous individuals from our streets.” Sarah Maslin Nir & Arielle Dollinger, *39 Members of MS-13 Are Arrested, Authorities Say*, N.Y. TIMES (June 14, 2017), <https://www.nytimes.com/2017/06/14/nyregion/ms13-gang-members-arrested.html>.

80 INA § 240(b)(1); 8 C.F.R. § 1287.4(a)(2)(ii).

81 8 C.F.R. § 1003.19(e).

82 CUNY School of Law’s Immigrant & Non-Citizen Rights Clinic is planning to release a toolkit with *pro se* materials that can be used to assist individuals who face gang allegations in proceedings before Immigration Court and when submitting applications to USCIS. The forthcoming toolkit will be available at: <http://www.law.cuny.edu/academics/clinics/immigration.html>.

83 *Felzcerek v. I.N.S.*, 75 F.3d 112, 117 (2d Cir. 1996).

84 *Balachova v. Mukasey*, 547 F.3d 374, 383 (2d Cir. 2008); *Lin v. U.S. Dep’t of Justice*, 459 F.3d 255, 268 (2d Cir. 2006); *see also Pouhova v. Holder*, 726 F.3d 1007, 1014 (7th Cir. 2013) (I–213 “was not inherently reliable because it was recorded seven years late, its critical information was obtained from someone other than the subject of the form, and it contradicts the other written account of its source.”).

85 *Felzcerek v. I.N.S.*, 75 F.3d 112, 115–16 (2d Cir. 1996); *see also Matter of Mejia*, 16 I. & N. Dec. 6, 8 (BIA 1976).

86 *See* Advisory Committee Notes, FRE 803(8): “observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the *adversarial nature of the confrontation between police and the defendant* in criminal cases.”

87 *See supra* note 82.

88 NYCLU & NYIC Survey, *supra* note 16, at 911-13.

89 *Id.* at 499-502.

90 *Id.*

91 *Id.* at 929

- 92 *Id.* at 660-62.
- 93 *Id.* at 524-48.
- 94 USCIS, *DACA Terminations Related to Criminal and Gang Activity by Fiscal Year*, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA_Terminations_Related_to_Criminal_and_Gang_Activity_by_Fiscal_Year.pdf (last visited Jan. 8, 2019).
- 95 See Mark Joseph Stern, *ICE claimed a dreamer was ‘gang-affiliated’ and tried to deport him. A federal judge ruled that ICE was lying*,” SLATE. (May 16, 2018), <https://slate.com/news-and-politics/2018/05/federal-judge-accused-ice-of-making-up-evidence-to-prove-that-dreamer-was-gang-affiliated.html>.
- 96 *Medina v. U.S. Dep’t of Homeland Sec.*, 313 F. Supp. 3d 1237, 1252 (W.D. Wash. 2018).
- 97 NYCLU & NYIC Survey, *supra* note 16, at 936
- 98 Second Amended Petition, *Saravia v. Sessions*, 3:17-cv-03615, ¶¶ 89-90 (N.D. Cal. Nov. 15, 2018), ECF No. 164; see also First Amended Petition, *Saravia v. Sessions*, 3:17-cv-03615, ¶¶ 95-106 (N.D. Cal. Aug. 11, 2017), ECF No. 31.
- 99 See *Matter of Arai*, 13 I. & N. Dec. 494, 496 (BIA 1970).
- 100 Second Amended Petition, *Saravia v. Sessions*, 3:17-cv-03615, ¶¶ 89-90 (N.D. Cal. Nov. 15, 2018), ECF No. 164.
- 101 *Id.*

