No. 12-1888

IN THE

Supreme Court of the United States

MARTIN JIMENEZ,

Petitioner,

v.

ERIC HOLDER,
ATTORNEY GENERAL OF THE UNITED STATES

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE AMES CIRCUIT

JOINT APPENDIX

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SUPREME COURT OF THE UNITED STATES

ORDER LIST

Certiorari Granted

September 9, 2013

12-1888 Jimenez v. Holder

The petition for a writ of certiorari is granted on the following two questions:

1. Whether an applicant for asylum claiming fear of persecution on account of his or her membership in a "particular social group" must show that the group has "social visibility."

2. Whether an applicant for asylum denied the right to the counsel of his or her choosing in immigration proceedings must show that the denial resulted in actual prejudice in order to obtain relief.

UNITED STATES COURT OF APPEALS
FOR THE AMES CIRCUIT

MARTIN JIMENEZ v. ERIC HOLDER	Docket No. 12-125

Before DIAMOND, JENKINS, and BROWN, Circuit Judges.

Opinion for the Court by Diamond, J:

Martin Jimenez appeals from an order of the Board of Immigration Appeals (BIA) denying his claim for asylum, as well as an order denying his motion to reopen his immigration proceedings.[1] He appeals on two grounds: first, that his status as a young male who resisted recruitment into the gang Mara Salvatrucha in El Salvador constitutes membership in a "particular social group" that can form the basis for an asylum claim; second, that he was denied the assistance of the counsel of his choice. For the reasons that follow, we affirm.

I.

Jimenez entered this country illegally from his native El Salvador in 2011, at the age of fifteen. Upon arrival in the United States, he was apprehended by the Department of Homeland Security (DHS), which initiated removal proceedings against him. During these proceedings, Jimenez admitted that he had entered the country illegally and conceded that he was removable, but requested asylum, claiming a fear of persecution at the hands of members of the street gang Mara Salvatrucha if he returned to El Salvador. Jimenez explained that he had recently been recruited to join the gang, but had refused to do so as a matter of conscience; members of the gang then threatened him and his family, stating that they would kill him if he refused to join the gang. Jimenez testified that he left El Salvador after members of the gang shot at his home repeatedly over the course of a week, with threats to continue the shooting—and to turn them fatal—unless he joined the gang.

[1] Jimenez timely petitioned for review of the BIA's original order denying his asylum claim. He also filed a timely administrative motion to reopen. The parties jointly requested that we stay appellate proceedings pending the resolution of Jimenez's motion. When the BIA denied that motion, Jimenez timely petitioned for review, and the matters were consolidated for this appeal.

The immigration judge (IJ) found Jimenez's testimony to be credible, but determined that under BIA precedent, Jimenez did not qualify for asylum because the group in which he claimed membership lacked the requisite "social visibility" to constitute a "particular social group" within the meaning of the asylum statute. On Jimenez's appeal, the BIA affirmed, in the process reaffirming its precedent that resisting gang recruitment does not constitute membership in a particular social group because the group is not "socially visible."

To represent him in his immigration proceedings, Jimenez retained attorney Marsha Boyle, an experienced immigration attorney who is a named partner in her own law firm, and is also affiliated with the Ames University Law School Immigration Clinic. Boyle agreed to represent Jimenez pro bono. However, apparently Boyle and Jimenez miscommunicated: she believed that he had authorized the clinic to represent him, while he believed that he would be represented at all times by her. As it happens, Jimenez had the better reading of the facts. His retainer agreement was with Boyle and her law firm; it made no mention of the possibility of anybody else conducting or assisting his representation.

Nevertheless, Melissa Doyle—a law student who mistakenly believed that she was authorized to represent Jimenez—represented him. Doyle satisfied the necessary formalities before the IJ and the Board. She submitted a form stating (incorrectly) that she was authorized to represent Jimenez, and that she was doing so in her capacity as a student of the clinic, supervised by Boyle. The IJ and the BIA both approved Doyle's appearance, without attempting to verify with Jimenez that he had consented to representation by a law student. Instead, it appears as if the agency simply relied on Doyle's erroneous representation to conclude that Jimenez had consented to such representation, when in fact he had not.

Doyle thus represented Jimenez at all stages of the proceedings, communicating with him regarding his case primarily via phone, appearing in person before the IJ on Jimenez's behalf, and drafting briefs to be submitted to the BIA. It is undisputed that although Boyle nominally supervised Doyle, Boyle played no material role in Jimenez's representation. She did not attend Jimenez's hearing, and she did not draft or even meaningfully review the briefs that were ultimately filed with the BIA. In fact, Boyle never met with Jimenez in person, and Jimenez mistakenly believed that Doyle *was* Boyle. It was only after his administrative appeal that Jimenez came to understand that Boyle had not, in fact, played any significant role in his representation, and that the IJ and BIA had conducted the proceedings with a law student at the helm.

After the BIA denied Jimenez's claim for relief, he retained new counsel and filed a timely motion to reopen his immigration proceedings with the BIA. The motion argued that Jimenez was entitled to a new hearing because by permitting a law student to represent him without his consent in violation of its own regulations, the agency had effectively denied him access to the counsel of his choice. Jimenez argued that had Boyle (or another fully qualified attorney) represented him, it is

possible that different arguments would have been made, or stronger evidence would have been marshaled, to prove that he was a member of a "particular social group." However, Jimenez did not identify which arguments or which evidence might have been provided. The BIA denied Jimenez's motion to reopen, assuming that a violation of the statutory and regulatory right to counsel had occurred, but holding that Jimenez could not show prejudice from the denial. The BIA concluded that there was no prejudice for two reasons: (1) Jimenez's asylum claim was meritless, and he had not shown that Boyle would have presented a different meritorious claim; and (2) Doyle provided able representation to Jimenez, raising and preserving all relevant arguments, and representing his interests zealously. Before this Court, Jimenez of course disputes that his asylum claim is meritless, but he concedes that Doyle provided him with strong representation such that he did not suffer prejudice from her involvement. The Attorney General, for his part, concedes that on the facts of this case, Jimenez was not represented by the counsel of his choice.

II.

Jimenez raises two arguments on appeal: that in rejecting his claim for asylum, the BIA erred in in applying the "social visibility" requirement; and that he was denied the counsel of his choice in violation of 8 U.S.C. § 1362.

In reviewing a final order of removal, we review the BIA's conclusions of law de novo, and its factual findings for substantial evidence, *id*. § 1252(b)(4)(B). In reviewing the denial of a motion to reopen, we employ "a deferential, abuse-of-discretion standard of review." *Kucana v. Holder*, 558 U.S. 233, 242 (2010). The BIA abuses its discretion when it makes an error of law, or when it makes a decision in an arbitrary, capricious, or irrational way.

With these standards in mind, we consider Jimenez's arguments.

A.

Jimenez argues first that his status as a young male in El Salvador who resisted recruitment into MS-13 constitutes membership in a particular social group. While we see substantial merit in his position, we nevertheless conclude that the Board of Immigration Appeals' contrary determination rests on a reasonable interpretation of the statute to which we must defer, and therefore reject his argument.

Only a "refugee" is eligible for asylum. 8 U.S.C. § 1158(b)(1)(A). To qualify as a refugee, an applicant must prove that he cannot return to his country because of a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." *Id*. § 1101(a)(42)(A). It is conceded in this case that the treatment Jimenez fears rises to the level of persecution, and that the Salvadoran government is unwilling or unable to protect him from that persecution. The sole question is whether the basis on which he is persecuted falls under the statute, as interpreted by the BIA.

It does not. As the BIA's decision explains, the BIA has consistently held that a person resisting recruitment into a gang does not, by virtue of that fact, become a member of a "particular social group." This is so because such persons are generally not members of a "socially visible" group, *i.e.*, they are not readily identifiable as such in their own society. Instead, according to the BIA, individuals who resist recruitment into gangs are just that: individuals, who act according to their own conscience, and who may suffer tragic consequences as a result, but are not persecuted because of any perceived group membership.

Several circuits have adopted the BIA's "social visibility" criterion. *See Scatambuli v. Holder*, 558 F.3d 53, 59-60 (1st Cir. 2009); *Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 74 (2d Cir. 2007); *Davila-Mejia v. Mukasey*, 531 F.3d 624, 629 (8th Cir. 2008); *Santos-Lemus v. Mukasey*, 542 F.3d 738, 746 (9th Cir. 2008); *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1196 (11th Cir. 2006). The Sixth Circuit has specifically held that individuals resisting recruitment into MS-13 are not members of a "socially visible" group. *See Umaña-Ramos v. Holder*, -- F.3d ----, 2013 WL 3880207 (6th Cir. July 30, 2013). By contrast, the Third and the Seventh circuits have held that the "social visibility" criterion does not constitute a valid reading of the statute and is not entitled to deference. *See Gatimi v. Holder*, 578 F.3d 611, 615 (7th Cir. 2009); *Valdiviezo-Galdamez v. U.S. Att'y Gen.*, 663 F.3d 582, 607 (3d Cir. 2011). In direct conflict with the Sixth Circuit, the Third has held that individuals resisting recruitment into MS-13 are, in fact, eligible for asylum as members of a particular social group. *Valdiviezo-Galdamez*, 663 F.3d at 607.

After considering the relevant authorities, and acknowledging the difficulty of the question presented, we conclude that the BIA's interpretation of the refugee statute is entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Indeed, this seems like precisely the sort of question that Congress would have expected an expert agency to decide. As such, we agree with the BIA that Jimenez has not shown that he fears persecution on account of his membership in a particular social group, and he is therefore ineligible for asylum.

B.

Jimenez also argues that he was denied his right to counsel before the immigration judge because his hearing was conducted without his attorney present.

The INA and its implementing regulations provide that "[i]n any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose." 8 U.S.C. § 1362; *see also id*. § 1229a(b)(4)(A); 8 C.F.R. §§ 1003.16(b), 1240.3, 1240.10(a), 1240.11(c)(1)(iii). The regulations further provide that a law student may represent an individual in removal proceedings only if, *inter alia*, "she is appearing at the request of the person entitled to representation." 8 C.F.R. § 1292.1(a)(2)(i).

Moreover, the law student's appearance must be "permitted by the official before whom he or she wishes to appear." *Id.* § 1292.1(a)(2)(iv). The official may require a supervising faculty member or attorney to appear with the student, *id.*, but that requirement was not imposed in this case.

In this case, the battle lines are clear. The Attorney General has made a binding concession that by permitting Doyle to represent Jimenez without his consent, the IJ and the BIA violated 8 C.F.R. § 1292.1(a)(2), and effectively denied Jimenez representation by the counsel of his choice in violation of 8 U.S.C. § 1362. The Attorney General argues nevertheless that because Jimenez has not shown that Doyle's representation of him resulted in prejudice, he is not entitled to relief. Jimenez concedes that Doyle conducted herself ably. He speculates that a fully qualified attorney might have done more to obtain relief—perhaps by raising additional claims, or perhaps by obtaining additional evidence in support of his asylum claim. However, Jimenez does not state with any specificity what those additional claims or additional evidence might be. Thus, we conclude that Jimenez was not prejudiced by the denial in this case.

That does not, however, resolve the matter. The courts of appeals are divided over whether an individual denied the right to counsel of his choice must show that he was prejudiced by the denial. The Second, Third, Seventh, Ninth, and D.C. circuits do not require a showing of prejudice, but the Fourth, Fifth, and Tenth circuits do. *Compare Montilla v. INS*, 926 F.2d 162, 169 (2d Cir. 1991); *Leslie v. U.S. Att'y Gen.*, 611 F.3d 171, 182 (3d Cir. 2010); *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1302 (7th Cir. 1975); *Montes-Lopez v. Holder*, 694 F.3d 1085, 1090 (9th Cir. 2012); *and Cheung v. INS*, 418 F.2d 460, 464 (D.C. Cir. 1969) *with Farrokhi v. INS*, 900 F.2d 697, 702 (4th Cir. 1990); *Patel v. INS*, 803 F.2d 804, 807 (5th Cir. 1986); *Mateo v. Holder*, 506 F. App'x 756, 759 (10th Cir. 2012).

After considering the authorities, we conclude that some showing of prejudice is required, and so Jimenez's claim must fail. While we agree with Jimenez that the denial of counsel in immigration proceedings can result in drastic consequences, we decline to adopt a per se rule requiring either the BIA or a reviewing court to set aside removal proceedings whenever such a denial takes place. Because Jimenez has not shown such prejudice, we hold that his motion to reopen was properly denied.

III.

For the foregoing reasons, Jimenez's petitions for review are DENIED.

FILED: August 1, 2013

In re: M.J., Respondent

Published September 5, 2012

U.S. Department of Justice
Executive Office of Immigration Review
Board of Immigration Appeals

(1) The members of a particular social group must share a common, immutable characteristic, which may be an innate one, such as sex, color, or kinship ties, or a shared past experience, such as former military leadership or land ownership, but it must be one that members of the group either cannot change, or should not be required to change, because it is fundamental to their individual identities or consciences. *Matter of Acosta*, 19 I&N Dec. 211(BIA 1985), followed.

(2) The social visibility of the members of a claimed social group is an important consideration in identifying the existence of a "particular social group" for the purpose of determining whether a person qualifies as a refugee. *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), followed.

(3) The group of "young men from El Salvador who have resisted recruitment into the violent gang MS-13" does not have the requisite social visibility to constitute a "particular social group."

FOR RESPONDENT: Melissa Doyle, law student; Marsha Boyle, Esq., supervisor.

FOR THE DEPARTMENT OF HOMELAND SECURITY: Mark Schmidt, Senior Attorney

BEFORE: Board Panel: SMITH, SMYTHE, and EISENSTADT.

SMYTHE, Board Member:

The respondent is a native and citizen of El Salvador. In his removal proceedings, he requested asylum, claiming fear of persecution in El Salvador on account of his membership in the "particular social group" of "young men from El Salvador who have resisted recruitment into the violent gang MS-13." The immigration judge (IJ) found the respondent credible, and further found that the respondent had a reasonable fear of persecution, but denied the respondent's claim for relief on the ground that "young men from El Salvador who have resisted recruitment into the MS gang" are not a "particular social group" because the group lacks particularity and social visibility, both required by our precedents. We affirm.

I. BACKGROUND

A. Facts

The respondent was born and raised in San Salvador, the capital of El Salvador. He is an only child, and was raised by his mother; he never knew his father. Gang

activity is endemic in El Salvador. In particular, the gang Mara Salvatrucha, or MS-13, has burgeoning ranks and an international reputation for aggressive and violent behavior.

In late 2010, members of MS-13 began efforts to recruit the respondent into the gang. The respondent testified that one senior member, who he knew only as Juan, ordered him to join the gang or else be killed. The respondent refused to join, and in fact informed Juan that he opposed the gang.

In spring of 2011, members of MS-13 continued to pressure the respondent to join the gang, repeatedly threatening him and his mother, and on one occasion beating him—albeit not severely enough to require hospitalization. Then, over the course of three days in June, 2011, individuals who the respondent believes to have been members of MS-13 repeatedly fired semi-automatic and automatic weapons at the respondent's home during the night. In all, the respondent testified that he counted over three dozen bullet holes in the façade of his home.

At this point, the respondent's mother urged him to flee San Salvador and take up residence with his uncle (her brother) in Holmes City. She claimed that she would follow him shortly. The respondent first left San Salvador to the town of Santa Ana, where he stayed with a friend. While there, MS-13 members again approached him about joining the gang. The respondent testified that he feared for his life if he again refused to join the gang, and so he falsely told them that he would join upon his return to San Salvador.

Instead of returning to San Salvador, the respondent headed north, passing through Guatemala and Mexico with the assistance of his friend's family, until he unlawfully crossed the border into the United States and Ames on July 14, 2011. He was apprehended upon arrival by the Department of Homeland Security (DHS), and subsequently released into the custody of his uncle, who resides in Holmes City, Ames. There, he was served with a Notice to Appear charging that he had entered the country without legal authorization and was therefore removable. The respondent conceded removability, but requested asylum relief. Specifically, the respondent claimed a fear that if he returned to El Salvador, he would be persecuted on account of his refusal to join MS-13.

B. The Immigration Judge's Decision

The IJ found the respondent to be credible, but determined that the respondent was not eligible for asylum because he did not meet the criteria for being a "refugee." Specifically, the respondent had not met the so-called "nexus requirement," *i.e.*, the requirement that any persecution he would suffer would be "on account of" a protected characteristic, in this case, membership in a "particular social group." The IJ reasoned that "young men who resisted recruitment into the violent gang MS-13" were not "socially visible" in El Salvador, and therefore could not constitute a "particular social group" within the meaning of the statute. The respondent appealed.

II. ANALYSIS

A. *Matter of Acosta* and *Matter of C-A-*

We first sought to define the phrase "particular social group" in *Matter of Acosta*, 19 I&N Dec. 2011 (BIA 1985). There, we explained that a "particular social group" refers to:

> a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences. Only when this is the case does the mere fact of membership become something comparable to the other four grounds of persecution under the Act, namely, something that is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed. By construing "persecution on account of membership in a particular social group" in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.

Id. at 233-34.

In *Matter of C-A-*, 23 I&N Dec. 951 (BIA 2006), we reaffirmed *Acosta*, *id*. at 956-57, and further noted that our "decisions recognizing particular social groups involved characteristics that were highly visible and recognizable by others in the country in question," *id*. at 960. This is because "the social group category was not meant to be a 'catch all' applicable to all persons fearing persecution," but instead a source of protection for clearly defined groups that are likely to be persecuted. *Id*. at 160. In *C-A-* itself, we held that the respondent, an informer against the Cali drug cartel, was not a member of a particular social group because there was no evidence that volunteer informers against the cartel were regarded as a group by the Cartel or by Colombian society in general. *Id*. at 160-61. We also noted that confidential informants, by their very nature, tend not to be members of an identifiable group, since they often prefer for their identities to remain secret, *i.e.*, to be socially *invisible.*

While many circuits have applied our "social visibility" requirement, two have not. In the Ames Circuit, the applicability of the requirement remains an open question. After careful consideration, and for the reasons set forth in *Matter of C-A-*

and subsequent cases, we continue to adhere to the requirement as an essential component of the "particular social group" analysis. We thus apply it in this case.

B. Application

We have consistently determined that mere opposition to gangs or gang recruiting, including in El Salvador, does not constitute membership in a "particular social group." *See, e.g.*, *Matter of N-C-M-*, 25 I&N Dec. 535 (BIA 2011); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008). We find that this matter is squarely controlled by those precedents. The purported "group" at issue here: young men from El Salvador who resisted recruitment into MS-13, is insufficiently socially visible to qualify as a "particular social group." Indeed, there appears to be nothing outward or cohesive about such males that would permit society (or even MS-13 members) to distinguish them from Salvadoran males in general. And of course in this case, the respondent denied his membership in the group to MS-13 members in Santa Ana—slipping into invisibility with ease. While we are of course sympathetic with the victims of gang violence, the asylum statute was not drafted to permit all of them to settle in the United States. For the reasons stated in our precedents, it does not authorize relief in the respondent's case.

Accordingly, we direct the entry of the following order:

ORDER: Appeal dismissed.

In re: M.J., Respondent

Published December 3, 2012

U.S. Department of Justice
Executive Office of Immigration Review
Board of Immigration Appeals

(1) Prejudice is an essential element of any procedural due process violation.

(2) Denial of statutory right to counsel is not basis to reopen proceedings unless the denial resulted in prejudice to the respondent.

MOTION

FOR RESPONDENT: Kevin Baker, Esq.

FOR THE DEPARTMENT OF HOMELAND SECURITY: Mark Schmidt, Senior Attorney

PER CURIAM:

On September 20, 2012, the respondent filed a timely motion to reopen his immigration proceedings pursuant to 8 U.S.C. § 1229a(c)(7), arguing that he was denied representation by the counsel of his choice when the immigration judge (IJ) and this Board permitted a law student to represent him without his consent. Based on the facts presented, we assume that a violation occurred, but we determine that because the respondent suffered no prejudice from the substitute representation, there is no reason to reopen the proceedings.

I. FACTS

In this case, the respondent contracted for pro bono representation with attorney Marsha Boyle, Esq., a seasoned immigration practitioner who, in addition to being a partner in her own immigration-focused law firm, is an adjunct clinical professor at the Ames University Law School Immigration Clinic. Ms. Boyle and her students regularly represent parties before immigration judges and this Board in Ames, and their representation has consistently been of high quality.

The respondent's retainer agreement with Ms. Boyle, however, made no mention of representation by clinic students. Instead, the agreement was clear that Ms. Boyle's firm had agreed to represent the respondent. It is undisputed that students at the clinic are not employed by Ms. Boyle's firm. Nevertheless, Ms. Boyle apparently believed that the respondent had agreed to representation by the clinic. She therefore requested one of her top students, Melissa Doyle, to represent the respondent before the IJ and, if necessary, the Board, under her supervision.

It is clear that Ms. Boyle played essentially no role in the respondent's representation. Sworn affidavits from Ms. Boyle, Ms. Doyle, and from the respondent indicate that Ms. Boyle never met with the respondent, that she did not

appear at his hearing, and that she did not draft the briefs that were filed with this Board. Ms. Boyle's affidavit claims that she did not take an active role because she understood that Ms. Doyle was providing capable representation, and she did not believe that she would add any significant value.

Compounding the confusion, the respondent apparently mistakenly believed that Ms. Doyle was, in fact, Ms. Boyle. Because he never met with Ms. Boyle face-to-face, the respondent did not know what she looked like. Moreover, he had communicated with Ms. Doyle three times on the phone, but she had never thought it necessary to advise him that she was not Ms. Boyle, or to expressly solicit his consent to representation by a law student. It is also possible that the similarity in their names lead the respondent to confuse the two.

The IJ, perhaps accustomed to Ms. Boyle's students appearing on behalf of clients without Ms. Boyle present, apparently thought nothing of Ms. Doyle's appearance. He never asked the respondent whether he had consented to representation by a law student, nor did he ask whether Ms. Doyle was in fact the respondent's attorney. Instead, the IJ entered an order noting Ms. Doyle's appearance, and conducted the hearing as normal. After the IJ denied the respondent's claim for asylum, the respondent—again represented by Ms. Doyle, nominally supervised by Ms. Boyle—appealed to this Board, which affirmed.

It was only after the proceedings concluded that Ms. Doyle and Ms. Boyle both met face-to-face with the respondent at the same time, and he came to realize that the person who had represented him was not, in fact, the attorney he had retained, but instead a law student. The respondent then sought new counsel, who filed this motion to reopen on his behalf alleging that the respondent had been denied the right to representation by the counsel of his choice. His motion contends that he was represented by a person to whom he had never consented, and further argues that had Ms. Boyle represented him, she might have set forth a different theory for relief, or might have obtained additional, more powerful evidence in support of the theory that Ms. Doyle set forth. The respondent does not specify what these alternative theories or pieces of evidence might be.

II. ANALYSIS

The Immigration and Nationality Act (INA) and its implementing regulations provide parties in removal proceedings with the right to be represented, at no cost to themselves, by the counsel of their choice. *See* 8 U.S.C. §§ 1229a(b)(4)(A), 1362; 8 C.F.R. §§ 1003.16(b), 1240.3, 1240.10(a), 1240.11(c)(1)(iii). The implementing regulations to the INA also set forth specific criteria under which law students may represent parties to immigration proceedings. One essential prerequisite to such representation is that the represented party must consent to it. *See* 8 C.F.R. § 1292.1(a)(2)(i). These rules exist to protect aliens from the harsh consequences of removal without adequate representation. The right to representation by the counsel of one's choice, however, is not absolute. It is not violated, for example, where an "Immigration Judge properly inform[s]" the respondent "of his right to

counsel and provide[s] [him] with adequate opportunity to obtain counsel." *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 329 (BIA 1996). Moreover, even when a violation of the right to counsel occurs, "an alien must demonstrate that he has been prejudiced . . . before his deportation proceeding will be invalidated." *Matter of Santos*, 19 I&N Dec. 105, 107 (BIA 1984).

The facts of this case are a peculiar comedy of errors. Ms. Boyle erred in failing to obtain the respondent's consent to representation by a law student; and perhaps by misleading the respondent into thinking that she would represent him personally. That error was likely innocent, as Ms. Boyle has little to gain from taking on an additional pro bono client, but it was a serious error nonetheless. Ms. Doyle likewise erred in failing to obtain the respondent's express consent to her representation. And most importantly for our purposes, the IJ and this Board erred by failing to do more to verify that respondent had indeed consented to representation by Ms. Doyle, and by failing to ensure that the respondent was represented by the counsel of his choice.

On these facts, we hold that Jimenez was denied the right to representation by the counsel of his choice. While he was represented, he was not represented by the counsel that he chose, and representation by a law student was in violation of the applicable regulations. However, that does not decide the matter, because the respondent must still demonstrate some degree of prejudice that would warrant reopening his removal proceedings. In this case, the respondent has not made the requisite showing. A bare allegation that his counsel of choice would have made some unspecified additional arguments or obtained some unspecified additional evidence is insufficient to show that the denial of counsel in this case prejudiced him.

Our conclusion is bolstered by two facts particular to this case. First, the Board correctly determined that the respondent's asylum claim is meritless. No matter who had represented him, our settled precedents hold that he is not entitled to asylum relief. Consequently, the denial of counsel could not have altered the outcome of this case.

Second, all indications suggest that Ms. Doyle provided very capable representation, given the inherent challenges facing the respondent's claim. While of course a seasoned practitioner will generally prove more capable than a law student in litigation, Ms. Doyle here made and preserved every relevant argument, and conducted herself professionally and uprightly.

For these reasons, the respondent's motion to reopen is denied.

ORDER: The Motion to Reopen is denied.

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Ames City, Ames

In re: M.J. (A 200 345 678)

In Removal Proceedings

AFFIDAVIT OF MARTIN JIMENEZ

I, Martin Jimenez, state under penalty of perjury that the following is true:

1. I am the respondent in removal proceedings that concluded with a final order of removal on September 5, 2012. I present this affidavit in connection with my motion to reopen those proceedings.

2. My first language is Spanish; my facility with English is limited.

3. During my removal proceedings, I believed that I was represented by Ms. Marsha Boyle. I had executed a pro bono retainer agreement with her law firm, a copy of which is enclosed with this Affidavit as Exhibit A.

4. The representation began when, after I was released from immigration custody to my uncle's home, I sought free legal service providers on the Internet, and discovered Ms. Boyle's law firm. My uncle prepared an e-mail to Ms. Boyle explaining my case, and she responded by phone to establish the representation. She then sent to me the enclosed retainer agreement, which I executed and returned.

5. At no time during my removal proceedings did I understand that anybody other than Ms. Boyle or attorneys at her law firm might represent me.

6. I also did not consent to or solicit representation by any other person.

7. I did not consent to representation by any law student.

8. At my removal proceedings, I was nevertheless represented by Melissa Doyle, a law student at Ames University Law School.

9. Ms. Doyle never identified herself to me as a law student, and never solicited my consent for her to represent me.

10. I understand that Ms. Doyle conducted essentially my entire representation. She spoke with me on the phone on three occasions to gather facts relating to my case, she appeared on my behalf at the hearing before the immigration judge, and she prepared my appellate briefs to the Board of Immigration Appeals.

11. I understand that this representation was nominally supervised by Marsha Boyle, but that Marsha Boyle did not, in fact, have any substantial involvement in my representation.

12. At no point did the Immigration Judge or the Board of Immigration Appeals ask me whether I had consented to representation by a law student, even though Ms. Doyle had clearly filed a notice of appearance with both the Immigration Judge and the Board of Immigration appeals stating that she was a law student.

13. I never saw the notice of appearance that Ms. Doyle had filed.

14. For a period of time, until my removal proceedings concluded, I mistakenly believed that Ms. Doyle and Marsha Boyle were in fact the same person. This is because I had never met Marsha Boyle in person, but I had understood that she had agreed to personally represent me. When I met with Ms. Doyle, I mistakenly assumed that she was Marsha Boyle, and that misimpression was never corrected.

15. I first became aware that Ms. Doyle was not Marsha Boyle after my removal proceedings had concluded, when the two of them met with me together to discuss options for judicial review

in the courts. At that meeting, it became clear to me that Ms. Doyle was a law student, and that I had not been represented by the council I had retained.

16. I agreed to have Marsha Boyle represent me because she is a well-known and experienced immigration attorney, and a partner at a law firm. I believed that her experience would enable her to provide me with the greatest possible chance of avoiding being sent back to El Salvador, where I fear that I will be harmed or killed.

17. For this reason, I would not have consented to representation by a law student.

18. Throughout the removal proceedings, neither the Immigration Judge nor the Board of Immigration Appeals ever made any effort to determine whether I was being represented by the counsel of my choice. Instead, they all appeared to assume that because somebody was there on my behalf, it was the person I had chosen. This was incorrect.

Sworn and subscribed this 20th day of September, 2012.

Ace Bishop, notary public.

Martin Jimenez

Martin Jimenez

Boyle & Pickler, P.C.

1552 Hauser Blvd.
Ames City, Ames 11111

September 13, 2011

Martin Jimenez
c/o Arturo Malanco
5225 Clapham Omnibus Way
Holmes City, Ames 11112

Exhibit A

Dear Mr. Jimenez,

This letter sets forth the terms upon which my firm has agreed to represent you. Our firm will provide you with representation *pro bono*, *i.e.*, at no cost, in your administrative removal proceedings and, if necessary, in the United States Court of Appeals for the Ames Circuit. In this regard, we will review your case with you, formulate legal theories and arguments supporting your claim for relief from removal, collect evidence to support your claim, negotiate with the government on your behalf, appear before the immigration authorities to present and defend your claim, litigate the case on appeal (if necessary), and provide related legal services for the purpose of permitting you to stay in this country. We agree to absorb all costs relating to this representation, including filing fees, printing costs, and other expenses.

If you agree to these terms as they have been explained, please sign below where indicated and return a copy of this letter to me. I look forward to working with you on this important case.

Best regards,

Marsha Boyle
Marsha Boyle, Esq.

Agreed on *September 18, 2010* by *Martin Jimenez*

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Ames City, Ames

In re: M.J. (A 200 345 678) **In Removal Proceedings**	**AFFIDAVIT OF MELISSA DOYLE**

I, Melissa Doyle, state under penalty of perjury that the following is true:

1. I have been requested to prepare this affidavit by Martin Jimenez and Kevin Baker, Esq., in connection with Mr. Jimenez's motion to reopen his immigration proceedings.

2. I represented Mr. Jimenez in his removal proceedings before the immigration judge and the Board of Immigration Appeals.

3. I was requested to assist Mr. Jimenez by Marsha Boyle, a clinical instructor at the Ames University School of Law, where I am a student. The representation was part of my work at the clinic.

4. I have previously represented four clients in removal proceedings, not including Mr. Jimenez. I was able to obtain relief for my client in one of those cases. In these past cases, I have never had to request consent from the clients to represent them; the consent was always given in advance when the client retained the clinic.

5. At the time I began representing Mr. Jimenez, I believed that he had consented to my doing so to Ms. Boyle. Consequently, I did not request additional consent from him.

6. I also filed with the Immigration Judge (and then with the Board of Immigration Appeals), a form EOIR-28, noting my appearance as a law student supervised by Ms. Boyle.

7. At the time I filed the form EOIR-28, I believed the information therein to be correct. I now understand that Mr. Jimenez had not consented to student representation.

8. Had I known that Mr. Jimenez had not consented to student representation, I would have either sought his consent, or would have refused to represent him.

9. I had considerable autonomy in representing Mr. Jimenez. I was charged with devising and executing the strategy to obtain relief from removal for him. The arguments presented were my ideas, and they were presented in terms that I drafted, using authorities that I researched.

10. Neither the Immigration Judge nor the Board of Immigration Appeals ever asked me whether Mr. Jimenez had consented to my representation of him. Nor did they require me to have Ms. Boyle accompany me at Mr. Jimenez's hearing.

11. I represented Mr. Jimenez at all times to the best of my ability.

Sworn and subscribed this 20th day of September, 2012.

Ace Bishop, notary public.

Melissa Doyle

Melissa Doyle

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Ames City, Ames

In re: M.J. (A 200 345 678) **In Removal Proceedings**	**AFFIDAVIT OF MARSHA BOYLE**

I, Marsha Boyle, state under penalty of perjury that the following is true:

1. I have been requested to prepare this affidavit by Martin Jimenez and Kevin Baker, Esq., in connection with Mr. Jimenez's motion to reopen his immigration proceedings.
2. I have practiced immigration law for over two decades, representing—in conjunction with my associates and my students—over four hundred clients in that time. My matters address a diverse array of immigration issues, including visas, citizenship applications, and relief from removal. I am presently representing seventeen immigration clients in ongoing matters.
3. I am a principal in the firm of Boyle & Pickler, P.C.
4. I am also a clinical professor at the Ames University School of Law where, together with one other instructor, I supervise the Immigration Law clinic, a program that provides free legal services to clients.
5. I volunteered to represent Martin Jimenez pro bono after learning that he had been issued a Notice to Appear by the Department of Homeland Security.
6. At the time I offered my services to Mr. Jimenez, I fully intended for him to be principally represented by a student at the clinic, under my supervision.
7. I assigned Melissa Doyle to represent Mr. Jimenez. I provided her with contact information for Mr. Jimenez, who was staying with his uncle, Arturo Malanco, in Holmes City, and permitted her to make the initial contact and to conduct the representation.

8. During the course of representation, I understood from Melissa Doyle that she was representing Mr. Jimenez to the best of her ability, and that there was little that I could add to the representation. Consequently, I did not involve myself in the day-to-day of the representation, and did not attend Mr. Jimenez's hearing before the Immigration Judge.

9. I never met Mr. Jimenez until after the Board of Immigration Appeals denied his appeal. I also never spoke directly with him on the phone. I spoke only with his uncle, who requested that I send a retainer agreement to his home for Mr. Jimenez to review.

10. At that meeting, Mr. Jimenez expressed confusion that somebody else was representing him. I had believed that this was our understanding, and so I conducted an inquiry, discovering that the retainer agreement that Mr. Jimenez executed and returned was sent to him in error. I had intended to send to him a retainer agreement making the clinic's involvement explicit. But due to a clerical error at my office, the wrong agreement was sent to him. The agreement he received did not mention the clinic, but instead stated that my firm would represent him.

11. I was never contacted by the Immigration Judge nor by the Board of Immigration Appeals to confirm that Melissa Doyle was representing Mr. Jimenez under my supervision; nor was I ever asked to verify that Mr. Jimenez had consented to student representation.

Sworn and subscribed this 20th day of September, 2012.

Ace Bishop, notary public.

Marsha Boyle

Marsha Boyle, Esq.