



**Practice Advisory<sup>1</sup>**  
April 2017

**Understanding Allegations of Gang Membership/Affiliation  
in Immigration Cases**

By the Immigrant Legal Resource Center

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Immigrants who are alleged to be involved with gangs are top immigration enforcement priorities for the Department of Homeland Security (DHS). This is true even if they have no criminal convictions and DHS is targeting them based on allegations alone. If such individuals choose to apply for immigration benefits, they may be exposing themselves to serious risk. This may be true even in cases where the individual seeking an immigration benefit is unaware him or herself of the gang allegations. Not only can they be denied immigration benefits, but they can also be placed into removal proceedings with the federal government putting them at the highest priority for removal.

This practice advisory discusses what gangs and gang databases are, how allegations of gang membership arise in immigration cases, the over-inclusive process law enforcement employs to allege gang membership, and strategies to identify whether your client may be labeled a gang member or associate. The purpose of this advisory is to help immigration advocates better understand how law enforcement documents and alleges gang membership or association, such that advocates are able to identify red flags in cases, and are better prepared to work with clients to assess possible risks in filing for relief. At the end of the advisory we provide: (a) a series of screening questions to assist practitioners in identifying any potential issues related to actual or alleged gang membership, affiliation, or participation; and (b) a list of further sociological research regarding gang-related issues.

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<sup>1</sup> The Immigrant Legal Resource Center (ILRC) is a national, non-profit resource center that provides legal trainings, educational materials, and advocacy to advance immigrant rights. The mission of the ILRC is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. For the latest version of this practice advisory, please visit <http://www.ilrc.org>. For questions regarding the content of this advisory, please contact Rachel Prandini at [rprandini@ilrc.org](mailto:rprandini@ilrc.org) or Angie Junck at [ajunck@ilrc.org](mailto:ajunck@ilrc.org). Thanks to Jose Magaña-Salgado, Managing Policy Attorney at the ILRC, and Lena Graber, Staff Attorney at the ILRC, for their contributions to this advisory. The authors are indebted to Josh Green and Sean Garcia-Leys at Urban Peace Institute for their incredibly helpful insights and contributions.



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## 1. What is a “gang?”

There is no single universally accepted definition of a “gang.” Federal, state and local law enforcement have different operational definitions for the terms “gang” (or “criminal street gang” in the federal context), “gang member,” and “gang crime” (or gang-related offense). For example, DHS employs a sweeping definition of gang that only requires the association of three or more individuals, as opposed to the federal statute, which requires *five* or more persons.<sup>2</sup> According to the National Gang Center, forty-three states and Washington, DC have statutes that define “gang” or similar concepts.<sup>3</sup> For example, California defines “criminal street gangs” as any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more specified criminal acts.<sup>4</sup>

## 2. How do allegations of gang membership arise in immigration cases?

Allegations of gang membership may arise at various points in an individual’s immigration case. The information that forms the basis of an allegation of gang membership may come from:

- Information gleaned by an Immigration & Customs Enforcement (ICE) agent during the course of an investigation, including alleged indicators of gang involvement such as gang dress or tattoos;
- Local, state, and federal gang databases (defined in the next section);
- Local or state law enforcement agencies;
- Records from criminal or delinquency proceedings such as probation reports that include charges, convictions or adjudications for crimes that are viewed as gang-related (e.g. tagging, vandalism), or gang enhancements;
- Detention and custody records, including those created by private prison companies operating criminal and immigration detention facilities, such as the GEO Group (GEO) and Corrections Corporation of America (CCA);
- Information provided in an immigration application;<sup>5</sup> and
- Criminal history background checks.

Immigration officers may allege gang membership at various stages of an individual’s interactions with the immigration system, including: when conducting immigration enforcement activities such as raids, when adjudicating an affirmative immigration application, when arresting and processing a person to be

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<sup>2</sup> See NATIONAL INSTITUTE OF JUSTICE, U.S. DEPARTMENT OF JUSTICE, *What is a Gang? Definitions* (Oct. 28, 2011), <http://www.nij.gov/topics/crime/gangs/pages/definitions.aspx> (hereinafter “National Institute of Justice”) (“The federal definition of gang as used by the Department of Justice and the Department of Homeland Security’s Immigration and Customs Enforcement (ICE), is . . . an association of three or more individuals . . . whose members collectively identify themselves by adopting a group identity . . . whose purpose is to engage in criminal activity which uses violence or intimidation to further its criminal objectives . . . whose members engage in criminal activity or acts of juvenile delinquency that if committed by an adult would be crimes with the intent to enhance or preserve the association’s power, reputation or economic resources.” Cf. 18 USC § 521(a) (West 2015) (“‘criminal street gang’ means an ongoing group, club, organization, or association of 5 or more persons— (A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described in subsection (c); (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and (C) the activities of which affect interstate or foreign commerce.”).

<sup>3</sup> NATIONAL GANG CENTER, U.S. DEPARTMENT OF JUSTICE, *Brief Review of Federal and State Definitions of the Terms “Gang,” “Gang Crime,” and “Gang Member”* (Dec. 2014), available at <http://www.nationalgangcenter.gov/Content/Documents/Definitions.pdf>.

<sup>4</sup> For a full list of criminal offenses designated under this statute as “criminal acts,” see CAL. PENAL CODE § 186.22 (a)(1)-(25), (31)-(33). See also CAL. PENAL CODE § 186.22(f) (defining “criminal street gang”).

<sup>5</sup> For the purposes of this advisory, the term application includes petitions, requests, and other immigration-related submissions.



placed into removal proceedings, during the course of an individual’s detention by ICE, or in the course of removal proceedings in immigration court.

### 3. What are gang databases?

Gang databases are gang information tracking systems that are used to track and share alleged gang affiliation and membership. Many jurisdictions nationwide maintain gang databases. Depending on the database, a wide variety of state, local, and federal law enforcement authorities may be able to access such databases and add individuals suspected of gang membership. Some databases only track individuals convicted of gang related crimes, while many others are so expansive that they also include persons alleged to be gang “affiliates” or “associates.”<sup>6</sup>

GangNet is a gang database software owned by SRA International that contracts with many state governments, federal government agencies, and areas of Canada to operate gang databases.<sup>7</sup> These databases contain personal information about suspected gang members, including gang allegiance, street address, physical description, identifying marks, tattoos, photographs, and nationality.<sup>8</sup> ICE, the FBI, the Bureau of Alcohol, Tobacco, Firearms and Explosives, fourteen states, and the District of Columbia have utilized GangNet to track gang members and in some cases share information between state, local, and federal agencies—with many of these jurisdictions sharing records in “real time.” Through GangNet, law enforcement agents in one jurisdiction can search gang records from a different participating local database.

Prior to 2016, ICE also operated its own gang database called ICEGangs, which “support[ed] information sharing on gang members and activities among participating law enforcement agencies.”<sup>9</sup> ICEGangs was based on the GangNet software, but tailored to include immigration-status related information.<sup>10</sup> ICEGangs was managed by the ICE Office of Investigations under the National Gangs Unit.<sup>11</sup> Any agent who had access to ICEGangs could also access all the other GangNet linked records. In 2016, ICE stopped using ICEGangs and the related GangNet software. This change in course was purportedly due to the fact that agents were not fully utilizing the expensive software and instead were using existing case management databases that they continue to use today. These case management databases include the Investigative Case Management (ICM) system, the Enforcement Integrated Database (EID), and FALCON. Though none of these databases are used solely for the purpose of tracking gang membership or allegations, gang-related information may be stored and accessed through them. Both ICM and EID have specific fields that allow officers to notate an individual’s gang membership/affiliation and role within the gang. It is not clear whether FALCON contains a specific field for gang membership or affiliation.

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<sup>6</sup> “Affiliate” refers to individuals loosely connected to a gang. See National Institute of Justice, *supra* note 2.

<sup>7</sup> For more information about GangNet, see <https://www.csra.com/gangnet>. For information about other local databases, see e.g., Michael

Garigan & George Rodriguez, *The Street Gangs of Tucson*, 72 THE POLICE CHIEF 1, 1-2 available at <http://www.policechiefmagazine.org/the-street-gangs-of-tucson/> (2005); Danielle Gordon, *The Usual Suspects*, CHI. REPORTER, Sept. 1998, available at <http://www.chicagoreporter.com/usual-suspects/>.

<sup>8</sup> See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, U.S. DEPARTMENT OF HOMELAND SECURITY, Request for Records Disposition Authority (July 23, 2010), available at [http://www.archives.gov/records-mgmt/rcs/schedules/Departments/Department-of-homeland-security/rg-0567/n1-567-10-007\\_sf115.pdf](http://www.archives.gov/records-mgmt/rcs/schedules/Departments/Department-of-homeland-security/rg-0567/n1-567-10-007_sf115.pdf).

<sup>9</sup> See U.S. Immigration and Customs Enforcement, U.S. Department of Homeland Security, Privacy Impact Assessment for the ICEGangs Database 3 (January 15, 2010), available at [http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_ice\\_icegangs.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ice_icegangs.pdf) (hereinafter “ICEGangs Privacy Assessment”).

<sup>10</sup> ICEGangs Privacy Assessment, at 3.

<sup>11</sup> ICEGangs Privacy Assessment, at 3.



The FBI operates the National Gang Intelligence Center (NGIC), which was established in 2005 to coordinate intelligence from federal, state and local policing agencies. Although the law creating the NGIC directed that it establish a database to collect, analyze and disseminate gang activity information, it is unclear whether the database was ever established. However, the FBI's website notes that "[t]he databases of each component agency are available to the NGIC, as are other gang-related databases, permitting centralized access to information.<sup>12</sup> In addition to gang-specific initiatives, the FBI has databases that may contain gang-related information. This includes the National Crime Information Center (NCIC), which has a gang file that contains information on gangs and their members and is populated by cooperating agencies. NCIC files are some of the most commonly accessed records by police in the field.<sup>13</sup> The FBI has not made public the criteria that must be met for a person to be included in the NCIC gang file.

Additional databases that may contain gang-related information exist – likely more than are publicly known. Many police departments keep “in-house” databases that are not necessarily networked to DHS; however, police departments may share information contained therein if requested by DHS. In addition, California's gang database “CalGangs” is one of the largest statewide gang databases in the country.<sup>14</sup> Police departments throughout California collect data for local gang databases that feed into a statewide gang file through CalGangs.<sup>15</sup> CalGangs then allows law enforcement authorities to identify gang members and associates.<sup>16</sup> It is unknown to what extent DHS has access to information in CalGangs, though it is likely that some sort of information sharing occurs.

#### **4. How are individuals documented and placed into gang databases by law enforcement agencies?**

In general, there are four ways in which persons are documented as gang members: during the investigation of a crime, through a “field interview,” through in-custody interviews, and as a result of gang-related convictions.<sup>17</sup> A “field interview” is a consensual interaction with law enforcement in areas such as inner city neighborhoods with high densities of gang members,<sup>18</sup> and does not necessarily involve a stop based on reasonable suspicion.<sup>19</sup>

In field interviews, police officers interview a person suspected of gang membership and document the results in a document, called the “FI card.” If the officer identifies a sufficient number of criteria on an FI card, another member of the department will enter it into the gang database.<sup>20</sup> The criteria for gang member documentation vary by jurisdiction, but are often incredibly overbroad. For example, in California, before law enforcement designates an individual as a gang member, that individual must fall

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<sup>12</sup> FBI, *What We Investigate: Gangs*, <https://www.fbi.gov/investigate/violent-crime/gangs>.

<sup>13</sup> See FBI, *About Us: National Crime Information Center*, available at <https://www.fbi.gov/about-us/cjis/ncic>.

<sup>14</sup> See Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. OF C.R. & C.L. 115, 125 (2005) (discussing the breadth of CalGangs gang-related identifications for FY 2001-02).

<sup>15</sup> *Id.* at 119.

<sup>16</sup> See California Gang Node Advisory Committee, Office of the California Attorney General, Policy and Procedures for the CalGang System 7-8 (Sept. 27, 2007), available at [http://oag.ca.gov/sites/all/files/agweb/pdfs/calgang/policy\\_procedure.pdf](http://oag.ca.gov/sites/all/files/agweb/pdfs/calgang/policy_procedure.pdf) (hereinafter “CalGang Policy and Procedures”).

<sup>17</sup> See Wright, *supra* note 14, at 120-121.

<sup>18</sup> *Id.* at 121.

<sup>19</sup> *Id.* Wright notes that “officers rarely used any pretext for making suspicion stops. If an individual was thought to be a gang member, or if there was a small crowd of young minority males in a known gang neighborhood, the squad targeted them.” *Id.*

<sup>20</sup> Wright, *supra* note 14, at 122.



within two of the following criteria (unless the individual satisfies the “in custody Classification interview” requirement,<sup>21</sup> which is sufficient on its own):

- (a) “has admitted to being a gang member;”
- (b) “has been arrested with known gang members for offenses consistent with gang activity;”
- (c) “has been identified as a gang member by a reliable informant/source;”
- (d) “has been identified as a gang member by an untested informant;”
- (e) “has been seen affiliating with documented gang members;”
- (f) “has been seen displaying gang symbols and/or hand signs;”
- (g) “has been seen frequenting gang areas;”
- (h) “has been seen wearing gang dress;”
- (i) “is known to have gang tattoos;” or
- (j) had an “in custody Classification interview.”<sup>22</sup>

Given that many of these criteria are overly broad, law enforcement often mistakenly label individuals living in neighborhoods where gang members reside as gang members or associates, even if they are not in a gang and have never been convicted of a crime. In California, an audit of CalGangs found that many law enforcement agencies could not substantiate a significant proportion of entries they had put into CalGangs.<sup>23</sup> Most individuals never become aware that they are in a database. Once an individual is placed in a gang database, it is incredibly difficult to challenge that determination.<sup>24</sup>

The use of gang databases by law enforcement authorities is problematic for a multitude of reasons. First, many databases have very low thresholds for inclusion, including criteria such as living in a certain neighborhood, appearing in photographs with gang members, talking to gang members, or merely wearing certain colors, which can disproportionately target individuals who live in areas with significant gang activity—often lower socio-economic neighborhoods with high numbers of immigrants.<sup>25</sup> In some cases, no conviction is necessary for law enforcement authorities to add an individual to a gang database.<sup>26</sup> Further, many gang databases fail to purge names of suspected gang members after the period required by state, local, or federal law.<sup>27</sup> Moreover, gang databases generally do not provide individuals with notice or an opportunity to challenge determinations.<sup>28</sup> Gang databases are also regularly riddled with errors as a result of administrative mistakes, lack of appropriate supervision and review, and even police misconduct.<sup>29</sup> Consequently, information from gang databases is often stale, inconclusive, or inaccurate. And yet, inclusion in gang databases has serious legal repercussions for an individual, including within the immigration context.<sup>30</sup> It is important for immigration advocates to

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<sup>21</sup> Most individuals who are detained have an in custody Classification interview, the purpose of which is to identify gang members or affiliates and house them away from rival gangs. As a result of this interview, people are routinely added to CalGangs. This can be based on either their own admission to gang membership or affiliation, or the interviewer’s independent conclusion that the person is a gang member or affiliate.

<sup>22</sup> CalGang Policy and Procedures, at 7.

<sup>23</sup> California State Auditor, *The CalGang Criminal Intelligence System*, Report 2015-130 (August 2016) at 2.

<sup>24</sup> See question 11 below for information about a new California law that allows individuals to challenge their inclusion in CalGangs.

<sup>25</sup> CalGang Policy and Procedures, at 7; Wright, *supra* note 14, at 121.

<sup>26</sup> See *id.*

<sup>27</sup> Wright, *supra* note 14, at 118.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 120.

<sup>30</sup> For additional sociological materials on the problems surrounding gang databases and other gang-related issues, see Appendix A.



understand the often baseless nature of gang allegations and to not assume that evidence of gang membership or affiliation contained in a law enforcement database is grounded in fact.

## 5. How does DHS use gang databases to allege gang membership?

It is unclear to what extent DHS relies upon information in gang databases to allege gang membership for purposes of immigration enforcement, or in individual removal proceedings before the Executive Office for Immigration Review (EOIR). However, it is possible that DHS relies upon its own case management databases to locate individuals with gang ties that may be removable. For example, ICE Enforcement and Removal Operations (ERO) personnel use the Investigative Case Management System discussed above to “query the system for information that supports its civil immigration enforcement cases,” which could include looking specifically for gang-related data.<sup>31</sup>

It is also not completely clear whether U.S. Citizenship & Immigration Services (USCIS), the agency within DHS that adjudicates immigration applications, has access to any specific gang databases. Nonetheless, USCIS reviews the results of biometrics in connection with many applications for relief.<sup>32</sup> These background checks consist of four separate checks against systems within the Department of Justice, Federal Bureau of Investigation, and DHS.<sup>33</sup> Two checks are fingerprint-based – the FBI Fingerprint Check of the Next Generation Identification database (“NGI” was formerly called IAFIS – the Integrated Automated Fingerprint Identification System) and the US-VISIT’s Automated Biometric Identification System (IDENT) Fingerprint Check, and two are biographic name-based – the FBI Name Check and the TECS Name Check.<sup>34</sup> It is unclear to what extent information searched through these checks includes information contained in state or federal gang databases.

As part of the background check process, USCIS’s Adjudicator’s Field Manual also requires that USCIS complete a check through the National Crime Information Center, discussed above.<sup>35</sup> Gang-related information may be submitted directly from police departments to the NCIC.<sup>36</sup> In sum, although it is difficult to discern what specific gang database information USCIS has access to, it does appear that USCIS may obtain information in at least some databases that contain gang-related allegations.

**PRACTICE TIP:** Individuals applying for immigration benefits must be aware that USCIS may receive the results of gang database searches as part of their biometrics processing.

## 6. How does DHS use detention and custody records to allege gang membership?

When an individual is in local, state, or federal custody, law enforcement authorities may identify an individual as a gang member, or in technical terms, a “security threat group roster.” For example, jails and prisons often classify detained individuals based on their presumed gang membership, or require

<sup>31</sup> Department of Homeland Security, *Privacy Impact Assessment for ICE Investigative Case Management* (June 16, 2016) 1, available at <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-icm-june2016.pdf>.

<sup>32</sup> Department of Homeland Security, *Privacy Impact Assessment for the Immigration Benefits Background Check Systems* (Nov. 5, 2010) 1, available at [http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_uscis\\_ibbcs.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_ibbcs.pdf).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Although the USCIS policy manual supersedes the Adjudicator’s Field Manual (AFM), the USCIS policy manual is currently silent on many subjects discussed at length in the AFM. Thus, in the absence of information to the contrary from the USCIS policy manual, the ILRC looks to the AFM for guidance. Per the AFM, all cases processed by the adjudications unit within a service center or local office include an NCIC query. See General Adjudication Procedures; Chapter 10.3(f), available at <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/0-0-0-1166.html>.

<sup>36</sup> See NCIC 2000 Operating Manual, Gang File, available at <https://www.oregon.gov/osp/CJIS/docs/NCIC%20Manuals/2015/Gang.pdf>.



that detainees provide a gang affiliation in order to separate members or alleged members of different gangs within the facility. There is little to no oversight regarding how this classification process functions and classification occurs without corroboration or due process.<sup>37</sup> At the federal level, agencies may also make gang determinations when an individual is detained or in the custody of ICE, U.S. Customs and Border Protection (CBP), the Office of Refugee Resettlement (ORR), or other agencies. These in-custody determinations about gang membership or affiliation can also be made by private companies that operate immigration detention centers, such as GEO and CCA, frequently with very little training in making such determinations. In post-custody situations, probation or parole officers may also create or possess records that allege gang membership. Despite the lack of oversight or due process in making determinations about gang membership in the custody context, DHS may nonetheless rely upon detention and custody records to allege that a noncitizen is a gang member.<sup>38</sup>

**PRACTICE TIP:** Practitioners should seek to review their client’s custodial history and obtain all records that may contain allegations of gang membership. Practitioners should also consider filing Freedom of Information Act (FOIA) requests to custodial agencies in order to obtain these records—especially a client’s Alien File (“A-file”) from USCIS. Practitioners should also specifically request the interview instrument used for the in-custody interview, as these are often full of leading questions and can serve as powerful evidence of the lack of precision that agencies employ in making this determination.

## 7. How do allegations of gang membership arise in the adjudication of immigration applications?

Identification of gang membership during the adjudication of an immigration application may arise as a result of: (a) information affirmatively disclosed on the immigration application; (b) review and adjudication of the application, including examining the results of biometrics; (c) disclosures made during interviews; or (d) statements made during hearings in immigration court, particularly bond hearings. Many immigration forms have questions designed to identify potential gang membership or activity. These forms may explicitly ask about gang membership or, more subtly, whether an individual engaged in conduct that would *suggest* gang membership.

Over the last several years, DHS has revised multiple applications for immigration benefits, including Form I-485 (Application to Register Permanent Residence or Adjust Status),<sup>39</sup> Form I-918 (Petition for U Nonimmigrant Status),<sup>40</sup> and Form I-821D (Consideration of Deferred Action for Childhood Arrivals) to identify potential gang membership or affiliation.<sup>41</sup> These revisions include new questions explicitly asking if an applicant is or was a member of a gang or whether they participated in activity that may implicate gang membership. For example, Form I-821D explicitly asks: “Are you NOW or have you **EVER** been a member of a gang?”<sup>42</sup> Conversely, Form I-485 and Form I-918 do not specifically ask applicants about gang involvement. Instead, because the questions on the form are meant to identify potential

<sup>37</sup> See Wright, *supra* note 14, at 118.

<sup>38</sup> See, e.g. ICEGangs Privacy Assessment, at 5 (stating that “ICE agents and support personnel also collect information from prisons about gang members in their populations on an ad hoc basis.”)

<sup>39</sup> See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, Form I-485, Application to Register Permanent Residence or Adjust Status (June 20, 2013), available at <http://www.uscis.gov/sites/default/files/files/form/i-485.pdf> (hereinafter “Form I-485”).

<sup>40</sup> See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, Form I-918, Petition for U Nonimmigrant Status (Jan. 15, 2013), available at <http://www.uscis.gov/sites/default/files/files/form/i-918.pdf> (hereinafter “Form I-918”).

<sup>41</sup> See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, Form I-821D, Consideration of Deferred Action for Childhood Arrivals (June 4, 2014), available at <http://www.uscis.gov/sites/default/files/files/form/i-821d.pdf> (hereinafter “Form I-821D”).

<sup>42</sup> *Id.* at 4.





grounds of inadmissibility, these forms ask about conduct. Form I-485 asks (among other questions designed to elicit information about bad behavior), whether an applicant has:

EVER been a member of, assisted in, or participated in any group, unit, or organization of any kind in which you or other persons used any type of weapon against any person or threatened to do so?<sup>43</sup>

EVER assisted or participated in selling or providing weapons to any person who to your knowledge used them against another person, or in transporting weapons to any person who to your knowledge used them against another person?

EVER received any type of military, paramilitary, or weapons training?

Similarly, Form I-918 asks, among other related questions, whether an applicant has:

EVER served in, been a member of, assisted in, or participated in any group, unit, or organization of any kind in which you or other persons transported, possessed, or used any type of weapon?<sup>44</sup>

[E]ver committed, planned or prepared, participated in, threatened to, attempted to, or conspired to commit . . . [t]he use of any firearm with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property?”<sup>45</sup>

Immigration officers may use affirmative answers to these questions to identify an individual as a current or former gang member. If DHS concludes or suspects that a noncitizen is a gang member, it will probably deny that individual an immigration benefit, such as adjustment of status or a U Visa. There is no ground of inadmissibility in the Immigration and Nationality Act (INA) that specifically bars persons who are or were gang members from being admissible.<sup>46</sup> Nonetheless, if the individual applying for an immigration benefit is not otherwise inadmissible and DHS alleges the person to be a former or current gang member, DHS may argue that such person triggers the security or terrorism related grounds of inadmissibility found at INA § 212(a)(3)(B). Moreover, even if an individual is not found to be inadmissible for alleged or actual gang membership, most immigration benefits are discretionary and any evidence of gang affiliation will undoubtedly be taken into account for discretionary purposes, likely to support a denial of an immigration benefit. The Obama Administration’s immigration enforcement priorities (prior to the Trump Administration’s recently announced and incredibly broad priorities), included as a top priority people “convicted of an offense for which an element was active participation in a criminal street gang, as defined in 18 U.S.C. § 521(a), or aliens not younger than 16 years of age who intentionally participated in an organized criminal gang to further the illegal activity of the gang.” Thus, even under the Obama Administration, it was clear that participation in gang-related activities was viewed as a priority for deportation. Under the enforcement-focused Trump Administration, the new

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<sup>43</sup> See Form I-485, at 4.

<sup>44</sup> See Form I-918, at 6.

<sup>45</sup> *Id.*

<sup>46</sup> See generally 8 U.S.C. § 1182.



priorities are so broad as to lack this level of specificity, but “gang bangers” have been an oft-referenced priority, and even a DACA recipient was arrested following allegations of gang involvement.<sup>47</sup>

As discussed above, during adjudication of immigration applications, USCIS reviews an individual’s criminal history by cross-referencing an individual’s biometrics and biographical information with various criminal history databases.<sup>48</sup> Accordingly, even information about alleged gang membership that is not affirmatively disclosed in an immigration application may be discovered during the adjudication of the application through background investigations.

Finally, during an in-person interview, immigration officers may ask questions related to gang affiliation. Immigration officers will also observe an individual’s dress, appearance, and other characteristics during an interview. For example, an immigration officer may suspect that an individual has gang affiliations if that individual is wearing a certain style of dress or has visible tattoos.

**PRACTICE TIP:** Advise your clients to dress nicely for their hearings in immigration court and/or interviews with an immigration officer and not to wear anything that may be interpreted to be affiliated with any gang they are alleged to associate with. If possible, also advise clients to cover any visible tattoos by wearing long sleeves or collared shirts. In addition, it may be wise for clients to remove any piercings or jewelry that could be interpreted to be associated with any gang they are alleged to be associated with.

## 8. What impact does alleged gang membership have on requests for DACA?

Although concerns about inadmissibility and deportability do not directly come into play in the context of Deferred Action for Childhood Arrivals (DACA), allegations of gang membership still have a pronounced impact. To be eligible for DACA, the applicant must not pose a threat to public safety or national security.<sup>49</sup> Because DHS views gang membership as a threat to public safety or national security, alleged gang membership is usually a nearly automatic bar to demonstrating eligibility for DACA. In addition, given the uncertain future of DACA in light of President Trump’s countless promises to end the program, it is now more risky than ever to file an initial DACA application, or renew a DACA application, if that application may contain any negative information, or the individual applying may trigger any negative information in a background check, including gang allegations.

An affirmative answer on the DACA application regarding gang participation is very likely to lead to a denial and put the applicant at serious risk of referral to ICE for removal. In addition, in adjudicating applications for DACA, USCIS will review the results of the background checks required through biometrics, and also appears to rely on reports from local police departments, schools, and/or arrest records to determine gang membership. USCIS’s Notice to Appear (NTA) policy establishes guidelines for when USCIS must issue NTAs or refer cases to ICE for a decision on NTA issuance. The NTA Memo classifies “known or suspected street gang members” as “Egregious Public Safety” cases which must be referred to ICE for action or to issue an NTA.<sup>50</sup> Because of this, it is typically not wise for an applicant

<sup>47</sup> CNN, *Immigrant Protected under ‘Dreamer’ Program Stays in Custody* (Feb. 17, 2017).

<sup>48</sup> See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEPARTMENT OF HOMELAND SECURITY, *Immigration Benefits Background Check Systems 3* (Nov. 5, 2010), available at [http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_uscis\\_ibbcs.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_uscis_ibbcs.pdf).

<sup>49</sup> See USCIS, *Consideration of Deferred Action for Childhood Arrivals (DACA)*, <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>.

<sup>50</sup> Memorandum from Alejandro Mayorkas, Director, U.S. Citizenship and Immigration Services to USCIS Employees on Revised Guidance for the Referral of Cases and Issuance of Notice to Appear (NTAs) in Cases Involving Inadmissible and Removable Aliens 3-4 (Nov. 7, 2011), available at [http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf](http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/NTA%20PM%20%28Approved%20as%20final%2011-7-11%29.pdf).



who has been gang-involved or may be listed in a gang database to apply for DACA, unless that person is already in removal proceedings, as their application may not only be denied, but they may also be referred to ICE for placement in removal proceedings.

**PRACTICE TIP:** Because of the risk of referral to ICE, individuals who know or suspect that they may be in a gang database are not advised to submit affirmative applications for DACA, even if they are not in fact gang members or associates.<sup>51</sup>

**9. Should my client apply for DACA if she has been labeled as a gang member or gang associate, even erroneously?**

USCIS denies nearly all requests for DACA where USCIS identified an applicant as a gang member. Accordingly, practitioners should refrain from submitting affirmative requests for DACA where an individual would have to admit to gang membership on Form I-821D, or if there is reason to believe a client is in one or more gang databases. Also note that USCIS may conduct reviews of existing DACA grants to identify individuals who have been added to gang databases since the grant of initial DACA or who may have not had their criminal history properly vetted during the initial application period. A review in 2015 yielded 49 of these individuals where USCIS was subsequently reviewing their grant of DACA.<sup>52</sup>

**10. What impact does alleged gang membership have on detained individuals?**

Individuals in immigration detention who ICE accuses of gang activity face different and more difficult hurdles than non-detained individuals. These may include the denial of bond outright based on evidence of gang membership, even if the evidence is of questionable reliability or little probative value.<sup>53</sup> Immigration judges often presume that gang membership—even absent a history of criminal behavior or arrests—is equivalent to a finding of dangerousness.<sup>54</sup> Consequently, noncitizens often are denied bond or held on unreasonably high bond after evidence of gang membership arises.<sup>55</sup>

If an immigrant seeks release from detention based on prima facie eligibility for relief such as DACA, ICE agents will check with local law enforcement and other databases to assess whether a person is in a gang and may determine that a person is ineligible for DACA based on unsubstantiated, outdated, or questionable evidence. ICE may also decline to release individuals whom ICE deems fall within the enforcement priorities. In the event of an imminent removal where evidence of DACA eligibility is not immediately available, practitioners should prepare a prosecutorial discretion request and, if appropriate, a request for an administrative stay of removal.

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<sup>51</sup> In a case where such an individual has strong evidence of lack of gang membership and/or affiliation, and can demonstrate that their placement in a gang database was in error, it may be possible to seek DACA, but any such individual should be strongly advised of the risks associated with filing their application.

<sup>52</sup> Letter from Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, to Charles E. Grassley, Chairman, Committee on the Judiciary (Apr. 17, 2015), available at [http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2015-04-17%20USCIS%20to%20CEG%20\(DACA%20for%20Gang%20Member\).pdf](http://www.grassley.senate.gov/sites/default/files/judiciary/upload/2015-04-17%20USCIS%20to%20CEG%20(DACA%20for%20Gang%20Member).pdf).

<sup>53</sup> Sharon Chaitlin-Pollack, et. al, *Practitioner Manual: Bond Arguments When Gang Membership is Alleged 1*, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD (Jan. 2009), on file with author.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*



## 11. How do I find out if federal, state, or local law enforcement has identified my client as a gang member?

There is no consistent or universal notification process for individuals identified as gang members. Indeed, most law enforcement authorities provide no notification process for individuals added to a gang database.<sup>56</sup> For example, when ICE still operated ICEGangs, it had a policy against notifying individuals of their placement in its gang database, providing, “All information collected about gangs and their members and associates is law enforcement sensitive and notice is not given to the subject that a record is being created in ICEGangs.”<sup>57</sup> Different states and localities have different statutes and regulations that govern due process protections for an individual. In recent years, California has increased transparency on gang databases, first by enacting a law in 2013 that required law enforcement authorities to notify the parents or guardians of a minor who is identified as a gang member within CalGangs,<sup>58</sup> and second through a new law passed in 2016 that requires notification when adults are placed on gang databases. AB 2298 was passed in 2016<sup>59</sup> and went into effect January 1, 2017. Amending Section 186.34 and adding Section 186.35 to the Penal Code, it extends the following rights to individuals:

- the right to written notification of placement in a gang database prior to designation;<sup>60</sup>
- the ability to request information about whether an individual has been placed in a gang database; and
- the right to contest a designation as a gang member, associate or affiliate.

It also provides timelines and processes for these rights, ensuring that they are put into effect.

For example, an individual who has received notice that they will be placed in a gang database may contest that designation, and the law enforcement agency must respond in writing within 30 days. If the law enforcement agency denies the person’s request not to be designated as a gang member, associate or affiliate, it must also provide the reason for the denial. The person may then appeal the denial by filing an appeal in superior court within 90 days. Further, law enforcement will have to respond to any request as to whether an individual is in a gang database within 30 days, and if the person is in fact in a gang database, the individual may also request the basis for the designation. Advocates representing individuals in California are strongly encouraged to rely upon California Penal Code Sections 186.34-35 to verify whether clients have been designated into CalGangs, and to contest any such designations where possible.<sup>61</sup> In addition, practitioners should cite to the 2016 state audit of CalGangs that revealed many errors in arguing that CalGangs designations are unreliable. Keep in mind, though, that some jurisdictions in California have “in-house” databases that are not subject to AB 2298, and some local law enforcement agencies will share information in these databases with DHS if requested. Additional legislation has been proposed to close this gap.

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<sup>56</sup> See Wright, *supra* note 14, at 120-21.

<sup>57</sup> ICEGangs Privacy Assessment, at 12.

<sup>58</sup> Cal. Pen. Code § 186.34(b).

<sup>59</sup> The text of AB 2298 is available at [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160AB2298](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB2298).

<sup>60</sup> AB 2298 does not require notice to individuals already included in a shared gang database prior to the law’s passage.

<sup>61</sup> For technical assistance in challenging a client’s placement in a shared gang database in California, contact the Urban Peace Institute by emailing Sean Garcia-Leys at [sgarcialeys@urbanpeaceinstitute.org](mailto:sgarcialeys@urbanpeaceinstitute.org).



**PRACTICE TIP:** Practitioners should consult their state’s relevant gang and privacy statutes to identify mechanisms to receive information regarding whether law enforcement authorities have identified a client as a gang member. Regardless of notification procedures, practitioners should screen their clients using the questions at the end of this advisory to identify all instances where an individual may have been designated as a gang member.

In states with less robust notification and contestation procedures, advocates may employ other strategies, such as requesting police records and probation or parole records from probation or parole officers, which may contain allegations of gang membership. Individuals may also want to obtain copies of their school and educational records to identify any potential instances of gang designation.<sup>62</sup> Practitioners should also closely review their clients’ criminal and/or juvenile records for gang-related offenses or gang enhancements and discuss these with the client’s public defender or criminal defense attorney. Finally, practitioners may also wish to have their clients perform an Identity History Summary Check, which involves submitting fingerprints to the FBI to obtain a record of previous law enforcement contacts, though FBI records may or may not include information about placement in a gang database.<sup>63</sup>

## 12. What sample intake questions can I use to try to determine whether my client is in a gang database?

Practitioners should use the below sample intake questions to identify potential situations where an individual may have been designated or identified as a gang member or associate. The below questions are not exhaustive and subsequent follow-up or clarifying questions may be helpful to fully assess potential gang membership. These questions are based upon a DACA intake created by Esperanza Immigrant Rights Project.<sup>64</sup>

- Are you or have you **EVER** been a member of a gang?
- Do you think there are people who think you are a gang member?
- Have you **EVER** admitted to anyone that you were a gang member?
- Do you know if you are in a gang database or subject to a gang injunction?
- Are you friends with or do you regularly talk to gang members?
- Have you **EVER** had any tattoos?
- Have you **EVER** worn colors or clothes associated with a gang?
- Have you **EVER** flashed gang symbols and/or hand signs?
- Have you **EVER** worn any gang necklaces, chains, bracelets, or earrings?
- Are there pictures or videos of you wearing gang colors, flashing gang symbols, or wearing gang jewelry?
- Have you **EVER** made social media posts about gangs, crime, or police?
- Have you made videos, songs, or other art about gangs, crime, or police?
- Do you spend time in areas where gangs hang out?

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<sup>62</sup> Individuals may obtain their school records through the relevant local, state, or federal statute. Federally, the Family Educational Rights and Privacy Act (FERPA) allows individuals to obtain their educational records. See U.S. Department of Education, Family Educational Rights and Privacy Act (FERPA) (Feb. 5, 2015), available at <http://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html>; see also 20 U.S.C. § 1232g.

<sup>63</sup> The FBI provides a mechanism for individuals to self-request their criminal background record. See FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, *Identity History Summary Checks*, available at <https://www.fbi.gov/services/cjis/identity-history-summary-checks>. For additional information about submitting an FBI background check request, see ILRC, *Background Check Advisory*, at <http://www.ilrc.org/resources/background-check-advisory-english-spanish>.

<sup>64</sup> See ESPERANZA IMMIGRANT RIGHTS PROJECT, <https://www.esperanza-la.org/>.



- Have you or someone else **EVER** tagged your name on property?
- Do you live in a neighborhood where there are gang members and/or gang activity?
- Do you have friends, family members, or acquaintances who are gang members?
- Are you in any pictures or videos with people who may be gang members?
- Have you **EVER** been threatened by a gang or gang member?
- Have you **EVER** threatened someone who was in a gang?
- Has anyone **EVER** asked you whether you were in a gang?
- Have you **EVER** been told by anyone that you were in a gang?
- Have you **EVER** been stopped by police?
- Do you get stopped by the police regularly?
- Have you **EVER** had your picture taken by police?
- Have you **EVER** been arrested or convicted of a crime?
- Have you **EVER** been prosecuted for an offense related to gang activity?
- Have you **EVER** been arrested alongside gang members?



## APPENDIX A

### SOCIOLOGICAL MATERIALS ON GANG-RELATED ISSUES

1. Charles M. Katz, *Issues in the Production and Dissemination of Gang Statistics: An Ethnographic Study of a Large Midwestern Police Gang Unit*, 49 CRIME AND DELINQUENCY 485 (2003).
2. CHARLES M. KATZ & VINCENT WEBB, *POLICING GANGS IN America* (1<sup>st</sup> ed. Cambridge Univ. Press 2006).
3. Charles M. Katz, Vincent J. Webb, and David R. Schaefer, *The Validity of Police Gang Intelligence Lists: Examining Differences in Delinquency Between Documented Gang Members and Non-Documented Delinquent Youth*, 3 POLICE QUARTERLY, 413 (2000).
4. Danielle Gordon, *The Usual Suspects*, CHI. REPORTER, Sept. 1998, available at <http://chicagoreporter.com/usual-suspects/>.
5. Deborah Lamm Weisel & Tara O'Connor Shelley, *Specialized Gang Units: Form and Function in Community Policing*, FINAL REPORT TO THE NATIONAL INSTITUTE OF JUSTICE, NCJRS DOCUMENT NO. 207204 (2000).
6. JACKSON, ROBERT K & MCBRIDE, WESLEY D., *UNDERSTANDING STREET GANGS* (1992).
7. Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. OF C.R. & C.L. 115 (2005).
8. K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620 (2011).
9. K. Babe Howell, *Gang Databases: Labeled for Life*, CHAMPION, July/August 2011.
10. Malcolm W. Klein, *What are Street Gangs When They Get to Court*, 31 VAL. U. L. REV. 515 (1997).
11. Michael Cannell, *Assumed Dangerous Until Proven Innocent: The Constitutional Defect in Alleging Gang Affiliation at Bail Hearings*, 63 DEPAUL L. REV. 1027 (2014).
12. Rebecca Rader Brown, *The Gang's All Here: Evaluating the Need for A National Gang Database*, 42 COLUM. J.L. & SOC. PROBS. 293 (2009).
13. Rebecca A. Hufstader, *Note: Immigration Reliance on Gang Databases: Unchecked Discretion and Undesirable Consequences*, 90 N.Y.U.L. REV. 671 (2015).
14. Sean Garcia-Leys, Meigan Thompson, Christyn Richardson, *Mislabeled: Allegations of Gang Membership and their Immigration Consequences*, UCI School of Law Immigrant Rights Clinic (2016).