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October 2018 Asylum Litigation Update to the
Vera Unaccompanied Children Legal Services Program

Below is an update on select current litigation issues relevant to the Vera network for the period of July through mid-October 2018. Please note that the list below is a snapshot of recent relevant decisions and not intended to be exhaustive of developing case law. Please contact CGRS (CGRS-TA@uchastings.edu) for further information.

Published Board of Immigration Appeals Decisions

***Matter of M-A-C-O-*, 27 I. & N. Dec. 477, 480 (B.I.A. Oct. 16, 2018):** The BIA held that an immigration judge (IJ) has initial jurisdiction over an asylum application filed by an individual who was previously determined to be an unaccompanied child (UAC) but who turned 18 *before* the date of filing. The BIA noted that the Kim Memo – which states that asylum offices will adhere to an initial UAC designation absent affirmative termination by Health and Human Services (HHS), Immigration and Customs Enforcement (ICE), or Customs and Border Protection (CBP) – is persuasive but not binding on IJs or the BIA. Thus it does not limit an IJ's "authority to determine whether a respondent in removal proceedings remains a UAC." However, the BIA declined to address whether the applicant lost UAC status by virtue of his reunification with a legal guardian.

Published Federal Courts of Appeals Decisions

***C.J.L.G. v. Sessions*, -- F.3d ----, 2018 WL 4479286 (9th Cir. Sept. 19, 2018):** A three-judge panel of the Court previously held that "neither the Due Process Clause nor the INA creates a categorical right to court-appointed counsel at government expense for alien minors." *C.J.L.G. v. Sessions*, 880 F.3d 1122, 1129 (9th Cir. 2018). The Court ordered *en banc* rehearing and instructed that adjudicators should not cite to the prior three-judge panel disposition as precedent.

While some of the following cases may not be directly applicable to unaccompanied children's asylum claims, they may be informative to Vera network providers.

***Saravia v. U.S. Att'y Gen.*, -- F.3d ----, 2018 WL 4688710, at *6-*7 (3d Cir. Oct. 1, 2018):** The Court held that the IJ was obligated to provide the applicant notice and opportunity to provide evidence to corroborate his claim for withholding of removal and relief under the Convention Against Torture (CAT). At his individual merits hearing, the IJ asked the applicant why two of his family members in the United States did not provide statements regarding threats they have received or witnessed against the applicant. The applicant's counsel explained they did not provide declarations from those witnesses because of time constraints but the witnesses were available to testify at the proceedings. The Court acknowledged there is a circuit split regarding whether there is a notice requirement for corroboration. However, it rejected the IJ's reliance on the BIA's decision in *Matter of L-A-C-*, 26 I. & N. Dec. 516 (B.I.A. 2015), stating "we cannot

conclude on review that it was fair to require Saravia to provide further corroboration without telling him to do so and giving him the opportunity either to supply that evidence or to explain why it was not available," as "[t]o decide otherwise is illogical temporally and would allow for 'gotcha' conclusions in Immigration Judge opinions."

***Quiroz Parada v. Sessions*, 902 F.3d 901, 916 (9th Cir. Aug. 29, 2018):** The Court reversed the BIA's denial of asylum, withholding of removal, and CAT protection to a Salvadoran man whose family was subjected to threats, home invasions, beatings, and killings by FMLN guerillas during the Salvadoran civil war due to his brother's and father's military and government service. The Court found the applicant was eligible for asylum and withholding of removal and held that the BIA erred in finding that the applicant's past harms did not rise to the level of persecution, that his persecution was not on account of a protected ground, and that the government successfully rebutted the presumption of well-founded fear. Specifically, the Court found the applicant established nexus to membership in the particular social group of the Quiroz Parada family and his imputed political opinion. The Court remanded for further consideration of the applicant's CAT claim, finding that the IJ did not properly consider all relevant evidence in the record and interpreted "acquiescence" of a public official – "at any level—even if not at the federal level" – too narrowly.

***Aguilar-De Guillen v. Sessions*, 902 F.3d 28, 34-36 (1st Cir. Aug. 27, 2018):** The Court upheld the BIA's denial of asylum, withholding of removal, and CAT protection to a woman who owned a store with her husband in El Salvador. Gang members threatened to kill them unless their business paid "rent." For the purposes of asylum and withholding of removal, the Court agreed with the IJ and the BIA that "the only reasonable inference to be made by the evidence . . . is that the gang members targeted Petitioner and her family to increase their wealth through extortion." Although the Court acknowledged that "the gang could have had more than one motive that would have resulted in the petitioner meeting the nexus prong," it did not find evidence to compel the conclusion that the applicant's familial relationship was a central reason for the past persecution. The Court also rejected the applicant's claim of future persecution based on her membership in a proposed social group of "single mothers without the protection of a male figure and unable to relocate within their country," finding that the group fails particularity as it is "overly broad" and "what constitutes 'without male protection' is an 'open question,' and possibly a subjective determination."

***W.G.A. v. Sessions*, 900 F.3d 957, 966-67 (7th Cir. Aug. 21, 2018):** The Court reversed the BIA's denial of asylum, withholding of removal, and CAT protection to a Salvadoran man who faced death threats from Mara 18 gang members looking for his brother, a former member. The Court declined to address whether the BIA's particularity and social distinction requirements are entitled to *Chevron* deference, noting that both the IJ and the BIA agreed that the applicant's proposed social group of his nuclear family is cognizable. The Court rejected the IJ's and BIA's argument that there was lack of nexus because other family members continue to live in El Salvador unharmed, finding not only that this was factually inaccurate but also that "[i]t was improper for the immigration judge to rely on a lack of harm to other family members, without more, to find that W.G.A. was not targeted on account of his kinship ties." The Court further noted that it "means little . . . that W.G.A.'s family has not sought to move elsewhere to avoid threats" as "the choice is between remaining in the Mara 18's territory and risking retribution, or

relocating to the rival gang's territory and being killed by them."

***Rivas v. Sessions*, 899 F.3d 537, 542 (8th Cir. Aug. 8, 2018):** The Court upheld the BIA's denial of asylum, withholding of removal, and CAT protection to a Salvadoran woman who witnessed Mara 18 gang members shoot her brother and later gave information to the hospital providing him medical care. Gang members subsequently beat the applicant, and a jailed member offered her protection in exchange for having sex with him in jail, which she refused. The Court agreed with the BIA that the applicant's proposed groups of "targeted gang girlfriends" and "witnesses who report crimes to the authorities" are not cognizable. The Court also agreed with the BIA that the applicant failed to establish nexus to her third proposed group defined by family membership (which the BIA acknowledged was cognizable) because "[t]he evidence established only that gang members persecuted Rivas because she was a witness to her brother's shooting, was one of the last people to see him before he went into hiding, and had information concerning his whereabouts" and "family relationship—independent of these other factors" was not a central reason for the persecution. The Court further noted that several members of her immediate family remain in El Salvador unharmed.

***Hussam F. v. Sessions*, 897 F.3d 707, 718-719 (6th Cir. July 27, 2018):** The Court held that the BIA abused its discretion in denying the applicant's asylum claim based solely on his "willful blindness" to the "non-traditional manner" in which his father obtained a passport for him to travel to the United States and his failure to disclose the passport's origins to immigration officials. The Court noted that under *Matter of Pula*, 19 I. & N. Dec. 467 (B.I.A. 1987), "the Board's analysis may not begin and end with his failure to follow proper immigration procedures." It went on to find that the applicant's non-disclosure "does not appear to be an overly serious misrepresentation," and that under the Board's own precedent, "[t]he danger of persecution will outweigh all but the most egregious adverse factors" (internal quotation marks omitted).

***Martinez-Perez v. Sessions*, 897 F.3d 33, 40 n.6 (1st Cir. July 24, 2018):** The Court upheld the BIA's denial of asylum, withholding of removal, and CAT protection to a Honduran woman who suffered mistreatment because of her Afro-Honduran race and physical disability caused by polio. The Court found that the three incidents she described – a home invasion by an unknown person and a death threat and a bottle thrown by a known man – did not rise to the level of persecution. In a footnote, the Court rejected the applicant's argument that "domestic violence victims have shown persecution in support of an asylum claim based on the violence or threats of a single tormenter, e.g., a spouse," noting that "even if domestic violence cases were applicable here, . . . [a]fter the Attorney General's decision in A-B- overruled A-R-C-G-, interpreting the 'causal connection' and 'government nexus' prongs of persecution analysis to exclude most domestic violence harms from satisfying that definition, the comparison Martinez-Perez tries to make does her no favors."

***Rosales Justo v. Sessions*, 895 F.3d 154 (1st Cir. July 16, 2018):** The Court reversed the BIA's denial of asylum to a Mexican man who fled after cartel members murdered his son and then targeted him and his family. The IJ had granted asylum initially on a legal theory of nuclear family, which the Department of Homeland Security (DHS) appealed. The BIA reversed the IJ's finding on government ability and willingness to protect because the police, for example, had

taken some steps to investigate the murder. The Court considered its review of the BIA's review of the IJ's factual determination a legal one – looking to whether the record was insufficient as a matter of law to support the judge's factual finding. Ultimately, the Court held that the BIA misapplied the unable or unwilling standard by failing to consider both prongs in the analysis. The Court distinguished *Matter of A-B-* where the Attorney General relied on the fact that police had issued restraining orders and arrested the applicant's persecutor on one occasion to overturn the Board's finding of lack of State protection; of note, the court did not treat *A-B-* as heightening the state action standard.

***S.E.R.L. v. U.S. Att'y Gen.*, 894 F.3d 535 (3d Cir. July 3, 2018):** The Court upheld the BIA's requirements for social distinction and particularity as reasonable because the BIA clarified that social distinction does not require ocular visibility and adequately distinguished the requirements of social distinction and particularity. The Court then upheld the BIA's denial of asylum to a Honduran woman who fears violence by her mother's and daughter's abusers, finding that her proposed social group of "immediate family members of Honduran women unable to leave a domestic relationship" failed social distinction.

<u>Unpublished Federal Courts of Appeals Decisions</u>

Although unpublished Court of Appeals decisions do not form precedent and are not binding on adjudicators, the following are two favorable unpublished decisions issued after the Attorney General's decision in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), overruling *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), that may be persuasive to adjudicators.

***Padilla-Maldonado v. U.S. Att'y Gen.*, --- F. App'x ---, 2018 WL 4896385, at *4 (3d Cir. Oct. 9, 2018):** The Court reversed and remanded the BIA's denial of asylum and withholding of removal to a Salvadoran woman who suffered domestic violence at the hands of her former partner. In the underlying proceedings which preceded *Matter of A-B-*, the IJ found the applicant's proposed group of "Salvadoran women in domestic relationships who are unable to leave" cognizable but held that she did not meet her burden of proof to corroborate her testimony because she failed to produce statements from key witnesses. The Court held that the IJ failed to give the applicant adequate notice of what corroborating evidence would be expected of her and an opportunity to present this evidence. Although the government brought attention to the Attorney General's intervening decision in *Matter of A-B-* on appeal, the Court noted: "While the overruling of *A-R-C-G-* will weaken Padilla-Maldonado's case, it does not automatically defeat her claim that she is a member of a cognizable particular social group. . . . [On remand], the IJ should determine whether Padilla-Maldonado's membership in the group of 'Salvadoran women in domestic relationships who are unable to leave' is cognizable according to the parameters of A-B- . . . ."

***Silvestre-Mendoza v. Sessions*, 729 F. App'x 597, 598 (9th Cir. July 3, 2018):** The Court reversed and remanded the BIA's denial of asylum to a Guatemalan woman, holding that the BIA erred by failing to consider the alternate social group of "Guatemalan women" because "'Guatemalan women' subsumes [the applicant's proposed group of] 'young Guatemalan females who have suffered violence due to female gender,' and it is the gravamen of Silvestre's

persecution claim." Notably, "Guatemalan women" was not a group argued by the applicant. Moreover, the Court noted that it left to the Board to consider in the first instance whether *Matter of A-B-* had any bearing on the question remanded; thus, it did not read *A-B-* as a categorical foreclosure of the case as a matter of law.