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

Below is an update on select current litigation and policy issues relevant to the Vera network for the period of January through March 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.

Recent relevant published decisions:

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.

Board of Immigration Appeals Decisions

***Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189 (B.I.A. 2018):** On January 19, 2018, the Board of Immigration Appeals (BIA) issued a precedential decision in *Matter of W-Y-C- & H-O-B-*, holding that asylum applicants seeking protection based on their membership in a particular social group must articulate their social group before an immigration judge in order for that social group to be considered on appeal. The Board held that it will not consider a particular social group claim that is "substantially different" from that which was argued in immigration court. The applicant in *W-Y-C- & H-O-B-* is a young Honduran mother seeking asylum for herself and her child on the basis of sexual abuse she suffered at the hands of family members. In immigration court the applicant's attorney argued that his client was persecuted on account of her membership in the social group "single Honduran women age 14 to 30 who are victims of sexual abuse within the family and who cannot turn to the government." On appeal, he argued the particular social group "Honduran women and girls who cannot sever family ties." Though both groups were presumably based on the same experiences of persecution, the BIA found them to be "substantially different" and dismissed the applicant's appeal. For more information on potential impacts of this decision, we suggest that Vera network attorneys consult AILA's new practice pointer, "*Matter of W-Y-C- & H-O-B-* and Articulating Particular Social Groups Before the Immigration Judge."

***Matter of J-C-H-F-*, 27 I. & N. Dec. 211 (B.I.A. 2018):** On February 20, 2018, the BIA issued a precedential decision in *Matter of J-C-H-F-*, holding that for the purposes of a credibility determination, "the Immigration Judge should assess the accuracy and reliability of [a border or airport interview] based on the totality of circumstances, rather than relying on any one factor among a list or mandated set of inquiries." Nonetheless, the BIA noted that the factors listed by the Second Circuit in *Ramsameachire v. Ashcroft*, 357 F.3d 169, 180 (2d Cir. 2004) (a pre-REAL ID Act decision), though not dispositive, are proper considerations in assessing whether to consider an interview in a credibility determination. The factors listed by the Second Circuit in *Ramsameachire* are: (1) whether the record of the interview is verbatim or merely summarizes

of paraphrases the statements; (2) whether the questions asked are designed to elicit the details of a claim and the interviewer asks follow-up questions that would aid the applicant in developing her account; (3) whether the applicant appears to have been reluctant to reveal information to the interviewer because of prior interrogation sessions or other coercive experiences in her home country; and (4) whether the applicant's answers to the questions posed suggest that she did not understand English or the interpreter's translations.

<u>Attorney General Decisions</u>

***Matter of A-B-*, 27 I. & N. Dec. 227 (A.G. 2018):** On March 7, 2018, Attorney General Jeff Sessions "certified" the asylum case *Matter of A-B-* to himself for reconsideration. The applicant in *Matter of A-B-* is a woman from El Salvador fleeing severe physical and emotional abuse at the hands of her domestic partner. Ms. A.B.'s application for asylum was initially denied by an immigration judge in North Carolina. She appealed that decision, and in 2016 the BIA ruled in her favor, affirming the principle that domestic violence can serve as a basis for asylum. By certifying the case, Sessions is positioning himself to reverse the Board's decision. Sessions has stated the issue he wants to address in this case is whether a victim of "private criminal activity" can be considered eligible for asylum. "Private criminal activity" is not a term referenced in asylum law, nor is it one that has been previously at issue in *Matter of A-B-*. But if Sessions rules that "victims of private criminal activity" do not qualify for protection, he will preclude asylum not only in cases involving survivors of domestic violence and other forms of gender-based persecution, but also in the many other cases where non-state actors persecute individuals, including those involving children, LGBTQ people, and individuals fleeing gang-related violence.

***Matter of E-F-H-L-*, 27 I. & N. Dec. 226 (A.G. 2018):** On March 5, 2018, Attorney General Jeff Sessions referred to himself the Board's precedent decision in *Matter of E-F-H-L-*, vacating the decision and sending the case back to immigration court. The original immigration judge in *E-F-H-L-* denied asylum to a Honduran man based on his written application alone, claiming that because the applicant had failed to establish prima facie eligibility for relief, he was not entitled to a full hearing. The applicant appealed to the Board, and the Board remanded the case, holding that immigration judges must provide asylum seekers the opportunity to have their claims heard in a full evidentiary hearing. The applicant subsequently withdrew his application for asylum and withholding of removal, and the immigration judge administratively closed proceedings to allow for the adjudication of a Form I-130 filed on his behalf. Sessions' decision holds that "because the application for relief which served as the predicate for the evidentiary hearing required by the Board [was] withdrawn," the BIA's decision was rendered moot. CGRS is monitoring closely immigration judges' application of Sessions' decision in *E-F-H-L-*. We encourage Vera network attorneys who encounter related obstacles in immigration court to contact us through our technical assistance program.

***Matter of L-A-B-R-*, 27 I. & N. Dec. 245 (A.G. 2018):** On March 22, 2018, Attorney General Jeff Sessions referred to himself the Board's decision in *Matter of L-A-B-R- et. al*. Sessions has asked parties to the proceedings and interested amici to submit briefs addressing the question of when there is "good cause" for an immigration judge to grant a continuance for a collateral matter – such as a pending visa petition – to be adjudicated. CGRS is concerned that Sessions'

decision in this case may impact the ability of individuals in removal proceedings to pursue all forms of immigration relief for which they are eligible. If immigration judges are no longer able to continue removal proceedings to allow for the adjudication of "collateral matters," more attorneys may need to consider pursuing full asylum claims in order to secure relief for their clients.

Courts of Appeals Decisions

Gender-based violence:

***Perez-Rabanales v. Sessions*, 881 F.3d 61 (1st Cir. 2018):** On January 26, 2018, the Court of Appeals for the First Circuit denied asylum and withholding of removal to a Guatemalan woman who was raped on two occasions and impregnated as a result. Relatives of the rapist, who was married, accused her of "wreck[ing] his home" and also abused her. The applicant articulated her social group as "Guatemalan women who try to escape systemic and severe violence but who are unable to receive official protection." The First Circuit agreed with the BIA that the social group was not cognizable because it was not sufficiently particular as it "potentially encompasses all women in Guatemala, as any woman in Guatemala may fall victim to violence and find herself unable to obtain official protection." Further, the court distinguished the social group from that in *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014) as one defined by the persecution of its members. The court did not address the applicant's CAT claim, deeming it abandoned.

***Nunez v. Sessions*, 882 F.3d 499 (5th Cir. 2018):** On February 8, 2018, the Court of Appeals for the Fifth Circuit upheld the BIA's denial of a Honduran woman's motion to reopen removal proceedings based on lack of notice and changed country conditions. With respect to changed country conditions, the court held that in this case, "there is some evidentiary foundation for concluding that the increase in violence [against women in Honduras] is incremental but not a material change," noting that "reasonable minds" may disagree. The court clarified: "We do not hold today that a significant increase in violence against women can never constitute a change in country conditions justifying waiver of the deadline for reopening."

Gang-related violence:

***Diaz v. Sessions,* 880 F.3d 244 (6th Cir. 2018):** On January 17, 2018, the Court of Appeals for the Sixth Circuit found that the BIA abused its discretion in finding that a Mexican woman had failed to present a *prima facie* showing of eligibility for asylum, withholding of removal, or CAT protection for the purposes of her motion to reopen. With respect to asylum and withholding of removal, the court found that the BIA abused its discretion by discrediting the applicant's father's affidavit, which provided evidence that she would be targeted by the Knights Templar because of her family membership. The BIA's failure to credit the affidavit directly led to their conclusion that the applicant had only a "generalized" fear of harm. With respect to CAT protection, the court found that the BIA abused its discretion in relying entirely on its analysis of the applicant's asylum and withholding claims, which was based on nexus, and summarily rejecting evidence that the applicant could not safely relocate in Mexico.

***Ruiz-Escobar v. Sessions*, 881 F.3d 252 (1st Cir. 2018):** On February 2, 2018, the Court of Appeals for the First Circuit upheld the BIA's denial of withholding of removal and CAT protection to a Honduran man in reinstatement proceedings fleeing gang-related violence. Several members of the applicant's family were killed by a narcotrafficking group, and armed intruders the applicant believed were narcotraffickers searched his home for an individual he did not know. The court upheld the BIA's conclusion that Mr. Ruiz-Escobar's belief that he was targeted because of his family membership was speculative, and that evidence regarding his relatives' deaths demonstrated, at most, that the narcotraffickers sought to obtain his family's land, not that they had a continuing interest in harming his family once they had obtained it. Further, the court noted that his sister's asylum grant (under unclear factual findings and legal conclusions) did not compel a nexus finding in Mr. Ruiz-Escobar's case because asylum determinations are individualized and, in any case, withholding of removal has a more stringent probability standard that the applicant did not meet.

***Villalta-Martinez v. Sessions*, 882 F.3d 20 (1st Cir. 2018):** On February 7, 2018, the Court of Appeals for the First Circuit upheld the BIA's denial of asylum, withholding of removal, and CAT protection to a Salvadoran woman fleeing gang-related violence. Armed gang members extorted the applicant, who was pregnant, under threats of brutal violence to her and her then-unborn child while she was working in a store owned by the father of the child. The court majority agreed with the BIA that there was insufficient evidence that the gang members were motivated by any reason other than to extort money, and disagreed with the dissent's suggestion that remand was appropriate in light of evidence of mixed motives (i.e., evidence suggesting that the applicant was targeted at least in part due to her familial ties to the store owner). In doing so, the majority distinguished this case from *Aldana-Ramos v. Holder*, 757 F.3d 9 (1st Cir. 2014), where a wealthy family was singled out by gang members, because in this case the gang members also extorted and threatened other store employees. Further, the court held that there was insufficient evidence the gang members knew the applicant was in a relationship with the store owner. The majority did not rule on the BIA's finding that the applicant was not a family member of the store owner. However, the court did note that if the case were remanded the applicant would face obstacles establishing family membership in the first place, because she has neither seen nor spoken with her child's father since fleeing El Salvador, and he is not listed on the child's birth certificate.

***Salgado-Sosa v. Sessions*, 882 F.3d 451 (4th Cir. 2018):** On February 13, 2018, the Court of Appeals for the Fourth Circuit vacated the BIA's denial of withholding of removal to a Honduran man fleeing gang-related violence and remanded the case for further proceedings with respect to whether he had established a changed circumstances exception to the one-year bar for asylum. After the applicant's stepfather refused to pay a gang war tax, gang members attacked and opened gunfire on the family. The applicant and his stepfather reported the incident to the police, and gang members forced the applicant to shut down his business, attacked the family home with gunfire again, and continued to search for the family after they fled Honduras. The Fourth Circuit followed the reasoning in *Hernandez-Avalos v. Lynch*, 784 F.3d 944 (4th Cir. 2015) to find the applicant had established nexus to his family membership, noting: (1) gang members had attacked the applicant because of his stepfather's conflict with the gang, not his own; (2) the applicant's relationship to his stepfather was why he and not another person was targeted by the gang; and (3) the BIA had improperly focused on whether the applicant's family

members were persecuted on account of a protected ground, rather than on whether the applicant himself was persecuted on account of a protected ground (i.e., family membership). The court then remanded to the BIA to reconsider whether the applicant had established an exception to the one-year filing deadline for asylum based on deteriorating conditions in Honduras, in light of the intervening holding in *Zambrano v. Sessions*, 878 F.3d 84 (4th Cir. 2017) that an intensification of a preexisting threat of persecution qualifies as a changed circumstance exception to the one-year bar to asylum.

***Sosa-Perez v. Sessions*, 884 F.3d 74 (1st Cir. 2018):** On February 28, 2018, the Court of Appeals for the First Circuit upheld the BIA's denial of asylum and withholding of removal to a Honduran woman fleeing gang-related violence. The applicant was robbed and threatened with rape by assailants she believes were gang members, after which she received anonymous calls threatening to kill her and her son if she did not pay the callers. There was a history of violence perpetrated by gang members against several of the applicant's family members over the course of three decades. In finding lack of nexus to family membership, the court distinguished this case from *Aldana-Ramos v. Holder* and likened the facts to those in *Ruiz-Escobar v. Sessions* (summarized above), noting that the applicant did not know who her direct assailants were and she did not present "evidence in the record that would compel – even if the evidence she did put forward might permit – a finding that the attacks on her family members were connected, let alone compel the conclusion that the assailants in these incidents targeted her family members on account of the family to which they belonged."

***Olmos-Colaj v. Sessions*, No. 16-2388, 2018 WL 1542030 (1st Cir. Mar. 29, 2018):** On March 29, 2018, the Court of Appeals for the First Circuit upheld the BIA's denial of asylum and withholding of removal to two Guatemalan indigenous sisters who had experienced ethnic discrimination. One of the sisters had also faced threats and violence at the hands of the Barrio Norte gang, as well as an attack by two unknown men. The sister reported the gang members to the police, resulting in their arrest. However, they were released when the sister decided not to testify against them, after receiving threats against her life. The sisters had previously used police assistance to help other indigenous women in their community, but they did not report the attack by the unknown men. The court rejected the applicants' claim that the immigration judge had violated their due process rights by not hearing testimony from their expert witness, noting that "frustration with a hearing that went on for three days was not without reason" and does not amount to bias. With respect to asylum, the court found that it lacked jurisdiction to review the BIA's determination that the applicants did not meet the extraordinary circumstances exception to the one-year deadline based on their psychological conditions, as the underlying credibility assessment was a factual finding. With respect to withholding of removal, the court found that the police had responded whenever the applicants sought their help in the past and that evidence of continuing pervasive discrimination "[did] not speak to the [applicants'] particular and individualized fears" of harm in the future, noting that indigenous family members have continued to live in Guatemala without experiencing harm. The court did not address the applicants' CAT claim, deeming it abandoned.

Anti-LGBTQ violence:

***Bernard v. Sessions*, 881 F.3d 1042 (7th Cir. 2018):** On February 8, 2018, the Court of Appeals for the Seventh Circuit upheld the BIA's denial of withholding of removal and CAT protection to a Jamaican man fearing violence in part on the basis of his bisexuality. As a child, the applicant witnessed mob violence, encouraged by his family, against two men in a sexual relationship. The applicant believed that his relatives were now aware of his sexual orientation and that one uncle in particular would beat him. After finding that it lacked jurisdiction to review a particularly serious crime finding with respect to the applicant's application for withholding of removal, the court agreed with the BIA that the incidents the applicant witnessed decades ago and general reports of homophobic violence in Jamaica were insufficient to demonstrate that the applicant "*specifically* would be targeted for extreme violence in the future" for the purposes of CAT protection. Further, the court found that it was unclear if the uncle would subject the applicant to harm (i.e., a beating) amounting to torture or that a public official would acquiesce. The court did find problematic the immigration judge's conclusion that the applicant "[would] be safe if he [hid] his sexual orientation," but held that because this was not the only factor the immigration judge considered, this error did not require the court to grant the petition for review.

Credibility:

***Ming Dai v. Sessions*, 884 F.3d 858 (9th Cir. 2018):** On March 8, 2018, the Court of Appeals for the Ninth Circuit granted a petition for review of the BIA's denial of asylum and withholding of removal to a Chinese man fleeing persecution on account of his resistance to China's coercive population control program. The court remanded the case to the BIA with instructions to grant the applicant withholding of removal. The Ninth Circuit rejected the BIA's conclusion that, even though the immigration judge did not make an explicit adverse credibility determination, the applicant had failed to meet his burden of proof for asylum and withholding of removal, because his concealment of the fact that his wife and child returned to China was "detrimental to his claim." The court held that where the agency does not explicitly enter an adverse credibility finding, an applicant's testimony must be treated as credible. The court then found that the applicant's testimony was sufficiently specific and persuasive. With respect to persuasiveness, the BIA had relied on the fact that the applicant's family had voluntarily returned to China, that the applicant had tried to conceal this fact, and that he had testified he had stayed in the United States because he did not have a job in China. In rejecting the BIA's argument, the court noted that the applicant's and his wife's past harms were "qualitatively different," that his concealment of his family's return was not "relevant in any way other than to undermine [his] credibility," and that "[a] valid asylum claim is not undermined by the fact that the applicant had additional reasons (beyond escaping persecution) for coming to or remaining in the United States, including seeking economic opportunity," which is "especially true when, as in this case, the loss of economic opportunity in the home country is part of the overall persecution."

Material support to terrorism bar:

***Hernandez v. Sessions*, 884 F.3d 107 (2d Cir. 2018):** On February 28, 2018, the Court of Appeals for the Second Circuit denied a Colombian woman's petition for review of a BIA decision finding her ineligible for asylum due to her prior material support for a terrorist

organization, the Revolutionary Armed Forces of Colombia (FARC). The Court held that the BIA's construction of the material support bar was reasonable under *Chevron* step two (*Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)) and thus joined several other circuits in concluding that the material support bar does not include an implied duress exception. First, with respect to the context, purpose, and legislative history of the INA, the court noted that Congress has explicitly addressed involuntary conduct with respect to terrorist activity and membership or affiliation with communist or totalitarian political parties elsewhere in the INA; thus, the court held, it is reasonable to conclude that the omission of an express exception in the material support bar is intentional. Second, with respect to U.S. treaty obligations, the court noted that the 1967 U.N. protocol is not self-executing and, regardless, the BIA recognized that the absence of an implied duress exception to the material support bar is consistent with U.S. obligations under the Protocol. Finally, with respect to the availability of a duress defense in criminal proceedings, the court noted that "ineligibility for relief from removal under the material support bar is not premised on criminal liability" and that removal proceedings are not criminal proceedings. The court also rejected the applicant's argument that the discretionary waiver system, the only way to obtain a duress exception to the material support bar, lacks sufficient procedural safeguards and thus violates due process. In doing so, the court held that asylum seekers "have no constitutionally-protected 'liberty or property interest' in such a discretionary grant of relief for which they are otherwise statutorily ineligible."