January 2019 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 October through December 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.

FEDERAL DISTRICT COURT DECISIONS

***Grace v. Whitaker*, No. 18-cv01853 at 11 (D.D.C. Dec. 19, 2018):** On December 19 Judge Emmet Sullivan of the D.C. District Court issued a positive decision in *Grace v. Whitaker*, CGRS's systemic challenge to the implementation of *Matter of A-B-* in credible fear proceedings. Under U.S. Citizenship and Immigration Services (USCIS) policy guidance issued after *Matter of A-B-*, many asylum officers and immigration judges had been rejecting domestic violence and fear-of-gang asylum claims at this initial screening stage.

In his December decision, Judge Sullivan declared that the following policies contained in *Matter of A-B-* and the related USCIS Policy Memorandum are arbitrary, capricious, and in violation of immigration law as applied to credible fear proceedings:

1. The general rule against claims relating to domestic and gang violence.
2. The requirement that a noncitizen whose claim involves non-governmental persecutors "show the government condoned the private actions or at least demonstrated a complete helplessness to protect the victim."
3. The Policy Memorandum's rule that domestic violence-based particular social group definitions that include "inability to leave" a relationship are impermissibly circular and therefore not cognizable.
4. The Policy Memorandum's requirement that individuals must delineate or identify any particular social group in order to satisfy credible fear based on the particular social group protected ground.
5. The Policy Memorandum's directive that asylum officers should apply federal circuit court case law only "to the extent that those cases are not inconsistent with *Matter of A-B-*."
6. The Policy Memorandum's directive that asylum officers should apply only the case law of "the circuit" where the individual is "physically located during the credible fear interview."

Judge Sullivan granted a permanent injunction blocking asylum officers and immigration judges conducting credible fear interviews and review hearings from implementing these policies. While Judge Sullivan's order is limited to credible fear proceedings in the expedited removal process, CGRS has been urging advocates to use his reasoning in merits hearings before the

Asylum Office and the Immigration Court, and on review before the Board of Immigration Appeals (BIA) and circuit courts. Of the six findings above, only (4) and (6) are specific to the nature of the credible fear process, which is intended to impose a low screening standard, providing the applicant with the benefit of the most advantageous case law. The other four findings (1,2,3, and 5) are more broadly based on Judge Sullivan's interpretation of key statutory terms of the refugee definition, and his reasoning should be adopted and argued at all levels of adjudication.

In accordance with Judge Sullivan's decision, USCIS and the Executive Office for Immigration Review (EOIR) have issued guidance bringing the government into compliance with his order, available online here: https://bit.ly/2R8QLfo. CGRS has been advising attorneys representing individuals at all stages of the asylum process to review the new guidance closely and cite to it as appropriate.

PUBLISHED FEDERAL COURTS OF APPEALS 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. The following include both favorable and unfavorable decisions.

***Saravia v. U.S. Att'y Gen.*, 905 F.3d 729, 737-38 (3d Cir. Oct. 1, 2018):** The Court held that the immigration judge (IJ) was obligated to provide the petitioner notice and opportunity to provide evidence to corroborate his claim for withholding of removal and protection under the Convention Against Torture (CAT). At his individual merits hearing, the IJ asked the petitioner why two of his family members in the United States did not provide statements regarding threats they received or witnessed against the petitioner. The petitioner'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."

***Molina-Avila v. Sessions*, 907 F.3d 977, 982-84 (7th Cir. Oct. 25, 2018):** The Court upheld the BIA's denial of CAT deferral of removal to a Guatemalan man who fears harm from Mara 18 as a deportee from the United States and because of his tattoos, based on the harm his brother faced after being removed to Guatemala. Mara 18 physically harmed the petitioner's brother when he was unable to pay the gang's "tax" and threatened the family, including the petitioner, with similar harm. After the brother passed away, Mara 18 continued to extort the brother's girlfriend under threat of harm. In upholding the BIA's denial, the Court noted that it "do[es] not suggest that evidence of torture of similarly situated individuals is irrelevant to a CAT petition for deferral," but the issue ultimately is whether the evidence establishes that the petitioner himself will more likely than not be tortured. The Court noted that the threats Mara 18 made to the petitioner's brother about the petitioner were vague and remote in time. The Court also found

insufficient evidence that U.S. deportees or tattooed individuals face mistreatment in Guatemala, noting that although the petitioner's brother had these characteristics, his mistreatment began after he became a bus driver and not immediately upon his return to Guatemala. The Court stated: "For example, Molina-Avila could have identified additional individuals with gang-related tattoos who were removed to Guatemala. If those individuals were mistreated by the Mara 18 or other Guatemalan gangs, Molina-Avila's fears of similar treatment would have been supported." Although Mara 18 also extorted his brother's girlfriend, the Court found that this indicated that the petitioner might face extortion but not necessarily harm rising to the level of torture. With respect to state action, the Court acknowledged that "[i]n extreme cases, government indifference to widespread misconduct can constitute acquiescence," but concluded that "less detailed evidence regarding 'gang problems'—and even 'government official corruption'" was insufficient to compel a finding of acquiescence by Guatemalan officials to gang violence in this case. Finally, the Court found that the petitioner failed to explain that internal relocation would be impossible, rejecting the petitioner's reference to his tattoos because tattoos can be concealed.

***Plaza-Ramirez v. Sessions*, 908 F.3d 282, 286 (7th Cir. Nov. 7, 2018):** The Court upheld the BIA's denial of withholding of removal to a Mexican man who fears harm from members of a gang called Los Negros. Members of the gang physically attacked him, mistakenly thinking that he was affiliated with his cousin's rival gang, and threatened him several times afterwards. The petitioner argued that he was persecuted on account of his membership in the particular social group of his family. The Court noted that "[a] person's family can qualify as a 'particular social group,'" citing to *W.G.A. v. Sessions*, 900 F.3d 957, 965 (7th Cir. 2018). However, the Court found lack of nexus to family membership, distinguishing this case from *W.G.A.* because of lack of evidence of harm or threats against any of his other family members.

***Urgilez-Mendez v. Whitaker*, 910 F.3d 566, 572 (1st Cir. Dec. 11, 2018):** The Court upheld the BIA's denial of asylum to an Ecuadoran man who fears harm from gang members. He had secretly reported to the police gang activity in his town, specifically that gang members were extorting money from his family and other community members. A gang member later stabbed and threatened the petitioner. The petitioner argued that he was persecuted on account of his political opinion in "opposition to lawbreakers." Noting that individuals report crime to the police for various reasons, the Court found the record indicated that the petitioner went to the police to stop extortion of his family and neighbors, not to express a political opinion. The Court further noted that the petitioner made his reports in secret, so there was no evidence that gang members knew of his role as an informant or any political beliefs. The Court also rejected the petitioner's alternate argument based on membership in the proffered social group of "those who act as state witnesses against criminals in Ecuador," citing to BIA and circuit decisions finding that confidential informants are not "visible and recognizable by others in the [native] country" (internal quotation marks omitted).

***Molina v. Whitaker*, 910 F.3d 1056, 1059–61 (8th Cir. Dec. 12, 2018):** The Court denied the petition for review of a Mexican woman who alleged the IJ violated her due process rights under the Fifth Amendment. The petitioner applied for asylum, withholding of removal, and CAT protection based on threats from cartel members who had kidnapped her niece. During the petitioner's merits hearing, her attorney did not elicit testimony identifying any particular social

group but instead asked to proffer social groups at the close of the hearing. The IJ rejected the attorney's request, stating that "it's not up to [the petitioner's attorney] to tell [the IJ] what the social groups are, it's up to the [petitioner] to do that" and finding it inappropriate to propose a social group at the end of testimony because the IJ may have to ask more questions. The IJ analyzed the petitioner's asylum claim based on her membership in the social groups of "family," "family members of police officers," and "persons who resist gangs in Mexico," but found lack of nexus between her fear of future persecution and a protected ground. The Court rejected the petitioner's argument that the IJ deprived her of her right to counsel by stopping her attorney from proposing a particular social group, finding that she did not demonstrate any prejudice even if this were a fundamental procedural error. Specifically, the petitioner acknowledged that the group her attorney would have proposed, "people who oppose cartels," is similar to the group defined by opposition to gangs. The Court also rejected the petitioner's argument that the IJ exhibited clear bias by repeatedly questioning her about her failure to report to the police, because the questions are relevant to her asylum eligibility and the judge did not show "a deep-seated favoritism or antagonism that precludes fair judgment."

FAVORABLE UNPUBLISHED FEDERAL COURTS OF APPEALS DECISIONS

Although unpublished Court of Appeals decisions do not form precedent and are not binding on adjudicators, the following are favorable unpublished decisions referencing 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 petitioner'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 petitioner 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- . . . ."

***Gonzales-Solares v. Whitaker*, 742 F. App'x 277, 278 (9th Cir. Nov. 8, 2018):** The Court remanded the petitioner's withholding of removal claim to the BIA to decide: (1) whether the petitioner's proposed social group of "young, single women" is cognizable; and (2) whether her membership in the group was "a reason" for her persecution. The Court agreed with the BIA that the petitioner's proffered groups of "persons subject to extortion demands in Guatemala" and "persons whose extended family members were killed due to their failure to comply with

extortion demands" were not cognizable, citing to *Matter of A-B-* in support of its finding that the groups do not share a characteristic other than the risk of persecution. The Court also agreed with the BIA that, for purposes of asylum eligibility, the petitioner failed to show her membership in the group "young, single women" was a "central reason" for persecution by gang members, finding that the gang members targeted her "because they thought she had money." However, in light of the intervening decision in *Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017), the Court remanded to the BIA to apply the "less demanding" nexus standard for withholding of removal (internal quotation marks omitted).

***Ticas-Guillen v. Whitaker*, 744 F. App'x 410, 410--11 (9th Cir. Nov. 30, 2018):** The Court remanded the petitioner's asylum and withholding of removal claims to the BIA to further analyze: (1) whether the petitioner's proposed social group of "women in El Salvador" is cognizable; and (2) whether her membership in the group was "a reason" for her persecution, citing to the lower nexus standard for withholding of removal in *Barajas-Romero v. Lynch*, 846 F.3d 351, 360 (9th Cir. 2017). The Court characterized *Matter of A-B-* as a decision that "clarifies what is required to be considered a 'particular social group.'" Nonetheless, it also cited favorably to *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010) to hold that "gender and nationality can form a particular social group" and rejecting the IJ's argument that the social group was too broad to be cognizable.