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**January 2020 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 2019. 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 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.

***Enamorado-Rodriguez v. Barr*, 941 F.3d 589 (1st Cir. Oct. 30, 2019) [child abuse/mixed motives/corroboration]:** The First Circuit granted in part the petition for review of a Honduran national who suffered abuse from his father and grandparents. *Id.* at 594. Petitioner sought asylum, withholding of removal, and Convention Against Torture (CAT) protection, arguing that his paternal grandparents abused him because he was a member of his mother’s nuclear family. *Id.* at 592. The Board of Immigration Appeals (BIA) found petitioner credible, but found that he failed to establish he was persecuted on account of a protected ground and failed to adequately corroborate his claim. *Id.* at 595. The court found the BIA erred in failing to conduct the appropriate mixed-motives analysis and failed to explain adequately why petitioner needed further corroborative evidence. *Id.* at 598. The court affirmed the agency’s findings that three other proposed social groups were not cognizable because they lacked particularity – (1) Honduran children viewed as property by immediate family and unable to leave; (2) Honduran children lacking parental protection; and (3) young Honduran male deportees labeled as gang members by U.S. law enforcement – and affirmed the denial of CAT relief. *Id.* at 599.

The court noted that the cognizability of the petitioner’s proposed social group “Enamorado’s maternal family” was not before the court as the government had not challenged the cognizability of that group in its brief. *Id.* at 597 n.2. With respect to the Attorney General’s *L-E-A-* decision, the court observed that the case at hand was distinguishable from the circumstances presented in *L-E-A-* because the government in *Enamorado-Rodriguez*’s case did not stipulate to the cognizability of the social group but instead “left it to *Enamorado* to establish the validity of his PSG, *which he did.*” *Id.* (emphasis added).

***Quinteros v. U.S. Att’y Gen.*, 945 F.3d 772 (3d Cir. Dec. 17, 2019) [CAT/former gang member/tattoos/BIA neutrality]:** The Third Circuit granted the petition for review of a former MS-13 gang member who challenged the agency’s denial of his CAT claim. *Id.* at 778. Petitioner became an MS-13 gang member in the United States. *Id.* at 777. He left the gang while he was in prison after being convicted of conspiracy to commit assault with a dangerous weapon under 18

U.S.C. § 1959(a)(6). *Id.* at 777. In removal proceedings, petitioner asserted that his New York Yankees tattoo identified him as a New York-based gang member, and feared that if he were returned to El Salvador, the police would either not protect him or would harm him themselves. *Id.* at 778. Among other evidence, he presented the testimony of Dr. Thomas Boerman, a country conditions expert, and a study from the Harvard Law School International Human Rights Clinic discussing the perception and treatment of individuals with tattoos in El Salvador. *Id.* The BIA found petitioner was convicted of an aggravated felony and also denied his claim for CAT protection. *Id.*

After determining that his conviction was not for an aggravated felony, the court found the BIA also erred in its CAT analysis. *Id.* at 787. The court found the BIA erred in ignoring evidence regarding the significance of petitioner's tattoo and in its evaluation of whether the government would acquiesce in petitioner's torture. The court rejected the BIA's focus on the Salvadoran government's *efforts* to address gang violence rather than the *results* of those efforts. *Id.* at 788. The court granted the petition for review and remanded the case to the agency.

Judge McKee authored a separate concurrence in which all judges joined. *Id.* at 789. Judge McKee was "compelled to write separately" due to the manner of the BIA's dismissal of petitioner's CAT claim: "[I]t is difficult for me to read this record and conclude that the Board was acting as anything other than an agency focused on ensuring [petitioner's] removal rather than as the neutral and fair tribunal it is expected to be." *Id.* The concurrence detailed the troubling manner in which the BIA mishandled petitioner's evidence in denying his appeal, and observed the errors were not isolated occurrences, as the BIA had in multiple instances mishandled or failed to apply the Third Circuit's analytical framework articulated in *Myrie v. US Att'y Gen'l*, 855 F.3d 509 (3d Cir. 2017) for considering CAT claims. *Id.* at 792.

***de la Rosa v. Barr*, 943 F.3d 1171 (8th Cir. Dec. 10, 2019) [family social group/cartel violence/lack of nexus]:** The Eighth Circuit denied the petition for review of a Mexican man who suffered and feared harm from cartels based on his membership in a social group of "members of the de la Rosa family." His uncle was kidnapped and extorted in 2016 and for some time his sister received phone calls from unknown individuals falsely claiming to have kidnapped petitioner and demanding ransom. *Id.* at 1174. The court affirmed the agency's denial based on the lack of nexus between the harm and petitioner's proposed social group. The court agreed with the agency that petitioner was targeted for his family's wealth rather than for their familial relationships and denied the petition for review. *Id.*

***Escobar-Hernandez v. Barr*, 940 F.3d 1358 (10th Cir. Oct. 18, 2019) [lack of nexus]:** The Tenth Circuit denied the asylum, withholding of removal, and CAT claims of a Salvadoran petitioner. A political party affiliate demanded petitioner remove graffiti critical of a particular political party from a fence near his home. When petitioner said he could not afford to do so, that man and another beat petitioner and threatened to kill him. *Id.* at 1360. The court recounted that petitioner was "unsure if the men assaulted him because of the political graffiti or if they used it as an excuse to assault him merely because he was a vulnerable youth." *Id.*

The BIA denied petitioner's imputed political opinion claim for lack of nexus, reasoning that petitioner was harmed because of a personal disagreement regarding who was responsible for the

graffiti and its removal. *Id.* at 1361. The BIA further found petitioner’s fear of future harm not objectively reasonable. Finally, the BIA denied petitioner’s CAT claim, where no evidence showed the aggressor was part of the government and petitioner acknowledged the police took his complaint seriously.

***Amezcu-Preciado v. U.S. Att’y Gen.*, 943 F.3d 1137 (11th Cir. Dec. 3, 2019) (per curiam)**
[*Matter of A-B-*]: In a per curiam decision, the Eleventh Circuit denied the petition for review of a Mexican woman who suffered and fears domestic violence at the hands of her husband, who physically and psychologically abused her, refused to financially support her, and threatened to kill her if she left him. *Id.* at 1340.

The immigration judge (IJ) found no past persecution but granted asylum based on petitioner’s fear of future harm from her husband. *Id.* at 1341. In pre-*Matter of A-B-* proceedings, the IJ found petitioner was a member of a particular social group of “women in Mexico who cannot leave domestic relationships.” The government appealed. *Id.* While the matter was pending appeal before the BIA, the Attorney General issued *Matter of A-B-*. In a single member decision, the BIA vacated the grant of asylum, finding the social group impermissibly defined by the harm and also defined “by reference to private criminal conduct to which broad swaths of society were susceptible.” *Id.*

In assessing the group’s cognizability, the court deferred to the Attorney General’s interpretation of the phrase “particular social group” in *A-B-* as consistent with the BIA and prior circuit precedent. *Id.* at 1344. It then found petitioner’s social group not cognizable as it “closely mirror[ed]” the group the Attorney General rejected in *A-B-*, and the court reasoned it suffered from the same infirmities identified by the Attorney General. *Id.*

First, the court observed without citation to any support that “while the members of [petitioner’s] proposed social group arguably share the immutable characteristic of being women, that characteristic alone is insufficient to make them cognizable as a particular social group under the INA.” *Id.*¹ In assessing social distinction, the court stated that “nothing in the country conditions evidence indicates that [petitioner’s] proposed social group is socially distinct within Mexican society.” *Id.* at 1345. The court also found the group lacked particularity because its boundaries were “amorphous, overbroad, and subjective.” *Id.* The court finally concluded the group was circularly defined to the extent group members were unable to leave their relationships because of fear of harm from their partners. *Id.* The court also rejected in a footnote the petitioner’s argument that the BIA misread *A-B-* to create a *per se* rule foreclosing all particular social groups based on domestic violence, instead finding the BIA had conducted an individualized assessment of petitioner’s proposed social group. *Id.*

UNPUBLISHED FEDERAL COURTS OF APPEALS DECISIONS

Unpublished courts of appeals decisions do not form precedent and are not binding on adjudicators. The following are notable unpublished decisions referencing the Attorney General’s decisions in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), overruling *Matter of*

¹ *Cf. Perdomo v. Holder*, 611 F.3d 662 (9th Cir. 2010) (finding the BIA erred in holding “all women in Guatemala” could not constitute a cognizable social group).

***A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014), and *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019), overruling in part *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017).**

UNPUBLISHED COURTS OF APPEALS DECISIONS CITING MATTER OF A-B-

***Matos v. U.S. Att’y Gen.*, 789 F. App’x 334, (3d Cir. Oct. 22, 2019) [domestic violence social group cognizability/nexus]:** The Third Circuit vacated and remanded the asylum claim of a Brazilian woman, Matos, and her daughter. Matos first dated her boyfriend as a teenager before marrying another man. *Id.* at 336. After separating from her husband, Matos resumed her relationship with her boyfriend. *Id.* The relationship became abusive. *Id.* Matos’ boyfriend sexually abused her and threatened to rape her daughter or throw her daughter out of the house. The police arrested Matos’ boyfriend after she reported her suspicions that he was involved in drugs and firearms trafficking. Matos fled the country after hearing that her boyfriend was going to be released, and that he suspected her role in his arrest and “intended to exact revenge.” *Id.* The agency found her social group “Brazilian women in domestic relationships, who cannot leave the relationship” cognizable but found that she was not a member of the group because she was able to leave the relationship. *Id.* Even if she were a group member, the agency found her boyfriend targeted her not because she was “stuck in her relationship” but because he sought revenge against her for reporting him. *Id.*

The court found neither agency finding supported by substantial evidence. The court rejected the agency’s finding that Matos was able to leave her abusive boyfriend for three reasons. First, it rejected the IJ’s reliance on the fact that Matos had ended her prior teenage relationship with the same abusive boyfriend. *Id.* at 337. The court drew a distinction between Matos leaving her teenage relationship and trying to leave the later, abusive one, reasoning that “a woman’s ability to leave a previous, non-abusive relationship is irrelevant in evaluating her ability to leave a later, abusive one[.]” *Id.* Second, the court rejected the IJ’s reasoning that Matos could leave by reporting the harm to the police, observing that the temporary removal of the abuser “hardly shows Matos’s ability to leave the relationship.” *Id.* Third, the court found unsupported the IJ’s conclusion that “no testimony” showed Matos and her daughter risked danger where they left, in light of Matos’ testimony to the contrary. *Id.*

The court next rejected the agency’s conclusion that even if Matos were a member of the proposed social group, her boyfriend targeted her for revenge for reporting him to the police and not based on her status in their relationship. *Id.* at 338. The court found that conclusion “unsupportable, as it fails to account for the continuity in an abusive relationship between abuse directed at a victim because she could not leave the relationship, and retaliation against a victim for trying to even temporarily sever that relationship.” *Id.* The court also described the IJ’s legal error in failing to correctly analyze the nexus between Matos’ social group and past harm. *Id.*

The court noted that the agency decision-making occurred pre-*A-B-* and left it to the agency to apply *A-B-* on remand. *Id.* at 338 n.3.

***Garcia-Ventura v. Barr*, 788 F. App’x 969 (5th Cir. Dec. 30, 2019) (per curiam) [domestic violence social group cognizability]:** The Fifth Circuit relied heavily on its opinion in *Gonzalez-Veliz v. Barr*, 938 F.3d 219 (5th Cir. Sept. 10, 2019) to deny the petition for review of

a Salvadoran woman who suffered domestic violence at the hands of her partner. *Id.* at 970. In a brief, unpublished, per curiam decision, the Fifth Circuit rejected as foreclosed by *Gonzalez-Veliz* petitioner's arguments that *Matter of A-B-* was flawed because it categorically denies claims based on domestic violence, and that the BIA's reliance on *A-B-* constituted a failure to perform the requisite individualized analysis. *Id.* at 970 (citing *Gonzalez-Veliz*, 938 F.3d at 230-32). The court held that the BIA conducted an individualized analysis in this case and affirmed the BIA's determination that petitioner's proposed social groups, "victims of domestic violence at the hands of their domestic partner and unable to leave their domestic partner" and "victims of domestic violence who are viewed as property by virtue of their positions within a domestic relationship" were not cognizable because they were "defined by, and do not exist independently of, the persecution of their group members." *Id.* at 971.

***Nolasco-Morales v. Barr*, 788 F. App'x 1022 (6th Cir. Oct. 18, 2019) [domestic violence social group cognizability]:** The Sixth Circuit denied the petition for review of an indigenous Guatemalan woman who suffered domestic violence from the father of her domestic partner. *Id.* at 1023. Before the IJ, petitioner sought asylum and withholding based on her membership in the groups "unmarried Guatemalan women with children not living with the father of the children," and "Guatemalan women unable to leave a relationship." *Id.* at 1024. The IJ found the former group lacked particularity and social distinction and found petitioner was not a member of the latter group. *Id.* While the case was pending before the BIA, the Attorney General issued *Matter of A-B-*. *Id.* The BIA found both groups not cognizable and denied asylum and withholding on that basis. *Id.* at 1024-25. The court rejected petitioner's argument that it should consider a new group which had not been raised to the agency, "unmarried indigenous Guatemalan women with children not living with the father of their children." *Id.* at 1025. Because the petitioner did not challenge either group she had presented to the agency and did not challenge the denial of CAT relief, the court denied the petition for review. *Id.* at 1025.

***Gonzalez-De Moreira v. United States*, 789 F. App'x 659 (11th Cir. Oct. 9, 2019) [in-law/child abuse]:** The Eleventh Circuit denied the petition for review of a Salvadoran woman (petitioner) and her minor sons, B.A. and R.E, who sought asylum and withholding of removal after experiencing domestic abuse and threats from gangs. Petitioner testified that B.A.'s paternal grandfather abused her because she wanted to end her relationship with B.A.'s father and because petitioner sought to regain legal custody over B.A. after living apart from him for some time. *Id.* at 662-63. B.A. indicated that his paternal grandfather abused him. *Id.* at 663. Petitioners were also threatened by gangs who demanded food and money from a restaurant petitioner co-owned with her husband, and sought to recruit B.A. into the gang. *Id.* at 661. Petitioner and B.A. argued that they were members of the social groups "Salvadoran women who are victims of violence" and "Salvadoran children who are victims of violence," respectively. *Id.*

The court rejected petitioners' argument that the BIA "in this case" misconstrued *A-B-* as a categorical bar to all asylum claims based on domestic violence and affirmed the agency's determination that the two proposed groups were not cognizable because their "defining attribute" was that the members had been subjected to past abuse. *Id.* The court next affirmed the agency's determination that petitioner and B.A. failed to establish a nexus between the harm they suffered and a protected ground. The court concluded that B.A.'s paternal grandfather was motivated by a personal dispute and not on account of petitioner's status as a "Salvadoran

woman who was a victim of violence.” *Id.* at 663. The court also observed that B.A. said his paternal grandfather was “always” violent and would hit B.A. “for no reason” or when he was drunk. *Id.* The court found these to be “acts of private violence” with no nexus to a protected ground. *Id.*

The court next affirmed the agency’s determination that petitioner and B.A. were not targeted by gang members on account of their social groups. The court observed that “gang activity is commonplace in El Salvador” and that the record supported the finding that petitioner was targeted as a business owner, not as a “female victim of violence.” *Id.* Similarly, the court affirmed the agency’s determination that B.A. was not targeted by gangs for his membership in his proposed group, but rather for his refusal to join the gang. *Id.*

***Galindo-Guerra v. U.S. Att’y Gen.*, No. 18-14775, 2019 WL 6048540, ---F. App’x --- (11th Cir. Nov. 15, 2019) [denial of motion to remand in light of A-B-]:** The Eleventh Circuit denied the petition for review of a Honduran woman who sought asylum, withholding of removal, and CAT protection based on past violence and feared future violence from her domestic partner. *Id.* at *1. The IJ found her not credible and denied her relief. To the BIA, petitioner argued the IJ lacked jurisdiction to hear her case, and, in the alternative, that her case should be remanded to the agency in light of A-B-, which the Attorney General issued after the IJ denied her claims for relief. After finding the IJ had jurisdiction to conduct petitioner’s removal proceedings, the court rejected petitioner’s contention that the BIA erred in denying her motion for remand. *Id.* Petitioner argued that A-B- “effectively eliminated asylum for domestic abuse victims” and sought remand so she could pursue a different basis for asylum. *Id.* at *2. The court found no error in the BIA’s denial of her motion to reopen where petitioner did not offer any evidence or provide any new basis for relief from removal or challenge the IJ’s finding that she was not credible. *Id.*

***Ascencio-Corado v. U.S. Att’y Gen.*, No. 19-11631, 2019 WL 7212264, --- F.App’x --- (11th Cir. Dec. 27, 2019) [exhaustion/anti-retroactivity]:** The Eleventh Circuit denied the petition for review of a Guatemalan woman who suffered and feared domestic violence from her husband. *Id.* at *1. The Attorney General issued *Matter of A-B-* while the case was pending before the BIA. Petitioner acknowledged *Matter of A-B-* in her brief to the BIA and argued her group was still cognizable. She did not address in her brief to the BIA whether *Matter of A-B-* should apply retroactively. *Id.* at *2. The only issue raised to the court was whether the BIA erred in retroactively applying *Matter of A-B-* to deny petitioner’s claims for relief. *Id.* at *2. The court found it lacked jurisdiction to consider the argument because petitioner never exhausted retroactivity before the BIA. *Id.* at *3. Notably, in addition to arguing that petitioner’s failure to raise retroactivity before the BIA was fatal to her argument before the court, the government argued in the alternative that *Matter of A-B-* did not announce a new agency rule but “simply reiterated BIA precedent.” *Id.* at *3.

UNPUBLISHED COURTS OF APPEALS DECISION CITING MATTER OF L-E-A-, 27 I&N Dec. 581 (A.G. 2019)

***Ruiz Ortiz v. Barr*, 784 F. App’x 898 (5th Cir. Nov. 22, 2019):** In a brief, per curiam decision, the Fifth Circuit remanded a Mexican woman’s asylum claim, identifying a number of errors in

the agency decision-making but expressing “no view of what decisions the BIA should make on remand.” The court found the IJ erred in not making a determination regarding the cognizability of petitioner’s social group before assessing nexus. *Id.* at 899. In articulating the standard to assess the cognizability of the social group on remand, the court cited *Pena Oseguera*, and quoted dicta from the Attorney General’s *L-E-A-* decision that “in the ordinary case” a family group will lack social distinction. *Id.* at 899.