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Spring 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 January through March 2020. 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.

***Perez-Rodriguez v. Barr*, 951 F.3d 972 (8th Cir. Mar. 9, 2020) [mental illness/nexus – upheld BIA asylum denial]:** The Eighth Circuit denied the petition for review of a Mexican man who fears he would be institutionalized, harmed, and subject to dire conditions in a mental health facility in Mexico on account of his membership in a social group of "individuals with schizophrenia who exhibit erratic behavior." In the underlying removal proceedings, the immigration judge (IJ) granted asylum to the petitioner, finding that mental health workers in Mexico often use physical restraints on their patients and are "motivated by a desire to overcome the patients' erratic behavior." *Id.* at 974. The Board of Immigration Appeals (BIA or "Board") reversed, finding that the record lacked evidence of "a persecutory motive" on the part of the Mexican government. *Id.* The Eight Circuit upheld the BIA's denial of asylum based on lack of nexus. The court stated generally that "[w]hen a harm affects many other persons who do not belong to the alleged social group, the alleged persecutor is much less likely to be targeting the group based on its identity." *Id.* at 975-76. Here, the court concluded that all individuals institutionalized in Mexico's mental health facilities face the same conditions, and that those conditions result from a lack of resources and insufficient political commitment, rather than a desire to target individuals with a specific form of schizophrenia. *Id.* The court acknowledged that individuals who exhibit "erratic behavior" may additionally face physical restraint but found that healthcare workers applied restraint to prevent patients from harming themselves, rather than to target them. *Id.* at 976. The court distinguished this case from the Fourth Circuit's decision in *Temu v. Holder*, 740 F.3d 887 (4th Cir. 2014), concluding that the record here did not reflect intentional mistreatment on the part of health workers, the petitioner did not suffer past harm due to his mental illness, and no one verbally threatened him or a similarly situated person because of their mental illness. *Id.*

***Guerra v. Barr*, 951 F.3d 1128 (9th Cir. Mar. 3, 2020) [mental illness/CAT protection – remanded BIA reversal of IJ CAT grant to apply "clear error" standard]:** The Ninth Circuit granted the petition for review of a Mexican man who fears he would be detained and harmed by law enforcement or institutionalized and harmed by mental health workers because he has a

seizure disorder and schizophrenia. In the underlying removal proceedings, the IJ granted the petitioner protection under the Convention Against Torture (CAT). On appeal, the BIA reversed the IJ's findings that Mexican mental health workers would have specific intent to inflict torture on the petitioner and that the petitioner would likely be tortured in criminal detention in Mexico. The Ninth Circuit found that the BIA erred by applying the wrong standard of review with respect to both issues and remanded to the Board to apply the correct "clear error" standard.

Regarding the intentional infliction of harm by mental health workers, the IJ pointed to, *inter alia*, systematic discrimination against individuals like the petitioner based on disability, the provision of health services only in the context of institutionalization, and common abusive practices by mental health workers, including physical restraints, physical and sexual abuse, and heavy sedation to control patients' behavior. *Id.* at 1134. The BIA concluded that there was insufficient evidence that health workers implement these practices to inflict harm on patients, as opposed to preventing patients from harming themselves or others, and that problems in Mexican mental health institutions stem from a lack of resources and bureaucratic issues. *Id.* at 1134-35. The Ninth Circuit held that the BIA erred by reweighing the evidence and engaging in impermissible factfinding. *Id.* at 1135-36.

As to the likelihood of torture in criminal detention, the BIA concluded that a general possibility of torture in the prison system was insufficient to meet the petitioner's burden to prove that he individually would be targeted for torture. *Id.* at 1136. The Ninth Circuit held that the BIA misconstrued the IJ's findings, because the IJ concluded that the petitioner's *particular* circumstances, namely his mental health conditions, would place him at risk of detention and torture. *Id.* 1136-37. Moreover, the court held that the BIA did not engage with the evidentiary record which included articles about the heightened "vulnerability of certain populations to which [the petitioner] belongs." *Id.* at 1137. Finally, the court held that the BIA erred in analyzing separately the likelihood of harm by the Mexican police and mental health workers, instead of considering the *aggregate* risk of torture at the hands of both groups. *Id.*

***Ortez-Cruz v. Barr*, 951 F.3d 190 (4th Cir. Feb. 26, 2020) [domestic violence/presumption of well-founded fear/changed circumstances/internal relocation – remanded to consider withholding]:** The Fourth Circuit granted in part the petition for review of a Honduran woman who fears death at the hands of her abusive ex-partner, and remanded to the agency to grant her withholding of removal. In the underlying removal proceedings, the IJ assumed that the petitioner suffered past persecution due to her membership in a particular social group, but held that the government rebutted the presumption of well-founded fear because of a fundamental change in circumstances and the possibility of internal relocation. The BIA affirmed the IJ's findings. The Fourth Circuit held, however, that the government failed to meet its burden where the IJ himself recognized that the record was "ambiguous" and "inconclusive" as to either condition. *Id.* at 198. The petitioner does not have the burden to prove that her abuser is still interested in her and that he would be able to find her; rather, the question is whether there is sufficient evidence that the abuser is *no longer* a threat and that he would *not* be able to find her. *Id.* at 199, 201.

With respect to changed circumstances, the IJ concluded that the petitioner's abuser had not contacted her for over 15 years or tried to harm their son who was living with the petitioner's

mother in a different part of Honduras. *Id.* at 197. The court held that the abuser's lack of contact with the petitioner or her family did not rebut the presumption of well-founded fear because there are "plausible alternative explanations." *Id.* at 199. For example, it may not have been feasible for the abuser to reach the petitioner in the United States, he may have taken on a different persona before her family, or he may not have thought they could have helped him contact the petitioner. *Id.* Moreover, the court pointed to expert testimony that abusers murder women after many years without contact, and there was no evidence to the contrary. *Id.*

As to internal relocation, the IJ concluded that the petitioner could safely relocate to southern Honduras, where her mother lives, because her abuser never contacted her mother despite knowing where she lives, he did not harm their son who was living with her mother, and he did not find the petitioner when she hid with her sisters in Tegucigalpa for eight months. *Id.* at 200. In rejecting the IJ's finding, the court emphasized that the threat of future harm need not be imminent; therefore, the government has the burden to show that the abuser would not be able to threaten the petitioner at *any* point in the future if she relocates. *Id.* The court stated that her abuser's lack of contact with her family is irrelevant because her family is "differently situated" from her, and her abuser knows where her mother lives so the petitioner herself cannot be expected to be safe there. *Id.* at 200-01. Furthermore, the court noted that the petitioner lived with her sisters only briefly and was in hiding at the time and asserted that "[i]t's not reasonable to expect her to live in hiding for the rest of her life." *Id.* at 201. The court also pointed out that "Honduras is a small country—smaller than North Carolina," so it would not be "overly difficult" for the petitioner's abuser to find her. *Id.*

The court did not address the cognizability of the petitioner's proffered social groups. The court denied the petition for review with respect to the CAT claim, noting the lapse in contact and the fact that the petitioner did not seek assistance from Honduran law enforcement. *Id.* at 203. The court reasoned that, unlike withholding of removal, for purposes of CAT protection there is no presumption of future harm based on past harm and the applicant must show likelihood of being tortured, not threatened. *Id.* at 202.

***Silvestre-Giron v. Barr*, 949 F.3d 1114 (8th Cir. Feb. 12, 2020) [extortion/family-based claim/nexus – upheld withholding and CAT denial]:** The Eighth Circuit denied the petition for review of a Guatemalan woman who fears extortion and death at the hands of a group who extorted, threatened, and harmed her family members in Guatemala. An unknown group extorted the petitioner's mother and stepfather, who operated a vending post in their local market, under threats of physical harm. When they were unable to continue to pay, the group killed the petitioner's stepfather and subsequently threatened her mother that they would kill her and her children unless payments resumed. In the underlying removal proceedings, the IJ and the BIA denied the petitioner withholding of removal, finding lack of nexus between any threat of harm and her membership in the social group of her family. *Id.* at 1117-18. "Assuming Silvestre-Giron's family constitutes a particular social group," the court affirmed the agency's finding on nexus. *Id.* at 1118. With respect to the extortion and murder of the petitioner's stepfather, the court found substantial evidence supporting the conclusion that the extortionists' only motivation was money, not family membership. *Id.* As to the threats to the petitioner's mother and siblings, the court found that family membership was only incidental or tangential, noting the petitioner testified that her family was targeted because the extortionists wanted more money and were

upset because they could not continue to pay. *Id.* In a footnote, the court stated that it did "not hold that a threat to harm the members of a family as a means to affect extortion can never support a meritorious application for withholding of removal." *Id.* at 1119 n.3. However, it was bound to review the factual question of nexus in this case under a "substantial evidence" standard of review. *Id.* In another footnote, the court also declined to address whether the proper standard for nexus in withholding of removal cases is "one central reason"—which is the language of the asylum statute but not the withholding statute—because the petitioner did not raise the issue before the BIA. *Id.* at 1118 n.2. Finally, the court upheld the agency's denial of CAT protection based on lack of evidence of acquiescence by a public official. The court noted that the petitioner's mother reported her husband's murder to the police and the district attorney's office had opened an investigation, but "the Guatemalan government's inability to identify and hold responsible the extortionists is, on its own, insufficient to establish [the petitioner's] CAT burden." *Id.* at 1119.

***Canales-Rivera v. Barr*, 948 F.3d 649 (4th Cir. Jan. 27, 2020) [gang violence/extortion/ business owners/social group cognizability – upheld asylum denial]:** The Fourth Circuit denied the petition for review of a Honduran man who owned a roasted chicken business in Honduras and was threatened with physical violence and death by Mara 18 gang members when he refused to comply with their payment demands. In the underlying removal proceedings, the petitioner proffered the social group of "merchants in the formal Honduran economy." The IJ found that petitioner failed to establish persecution because of a protected ground, but "described the social group as 'one who defied demands of gangs in Honduras.'" *Id.* at 654-55. On appeal, the BIA acknowledged that the IJ failed to review the proffered social group but conducted its own analysis and concluded that the group was not cognizable because it lacked immutability. *Id.* at 655. The Fourth Circuit found that the IJ's failure to address the proposed group did not prejudice the petitioner because the BIA reviewed the group on appeal. *Id.* at 657. Moreover, the court agreed with the BIA's analysis of the social group, finding that *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985) and subsequent courts of appeals decisions rejected "similar arguments related to merchants and other entrepreneurial groups." *Id.* at 657-58. The court rejected the petitioner's argument that *Acosta* imposed an impermissible "blanket prohibition against merchants," finding *Acosta* to be an individualized decision. *Id.* at 658. In the alternative, the petitioner argued that his group met the *Acosta* test for social group cognizability because members share the immutable characteristics of "self-determination and self-sufficiency." *Id.* The court also rejected this argument, stating that these characteristics apply to many "members of society in general" beyond merchants and would "effectively eliminate" boundaries needed to define social groups. *Id.*

***Conde Quevedo v. Barr*, 947 F.3d 1238 (9th Cir. Jan. 24, 2020) [gang violence/informants/witnesses/social group cognizability – upheld asylum denial]:** The Ninth Circuit denied the petition for review of a Guatemalan man who fears he would be harmed by gang members if removed to Guatemala because he reported to the police two prior attacks by gang members against him. The petitioner proffered the social group of "people who report the criminal activity of gangs to the police." The Ninth Circuit upheld the BIA's conclusion that the social group was not cognizable based on the record evidence in this case. *Id.* at 1243. The court distinguished this case from *Henriquez-Rivas v. Holder*, 707 F.3d 1081 (9th Cir. 2013), where the petitioner had testified in open court and there was evidence that El Salvador had enacted a

special witness protection law for those who testify against violence criminals. *Id.* Notably, the court stated that *Henriquez-Rivas* "does not foreclose the possibility that reporting gang violence to police *could* suffice to establish eligibility," if, for example, "there were evidence that, in a specific country, people in the community knew who reported crimes to the police, or if there were laws protecting those who did." *Id.* (emphasis in original). Here, however, the court noted that, although the record included three reports detailing gang violence in Guatemala generally, there was no evidence in the record discussing reporting gang violence to the police, including any risks or challenges of doing so, any laws or programs to protect people who report crimes to the police, or any indication that Guatemalan society would view such people as a distinct group. *Id.* at 1243-44. The court further highlighted that the petitioner had met with only one police officer separately from the main public precinct room, that the police did not photograph or take evidence from him, and that according to the petitioner's testimony, only his friends and family knew he filed a report. *Id.* at 1243.

***Hernandez-Chacon v. Barr*, 948 F.3d 94 (2d Cir. Jan. 23, 2020) [gang violence/sexual violence/social group cognizability/feminist political opinion/nexus/mixed motives – remand for consideration of political opinion claim]:** The Second Circuit granted in part the petition for review of a Salvadoran woman who was attacked and threatened by MS-13 gang members after she refused the sexual advances of one of the members. The first time the MS-13 member attempted to rape the petitioner, she said "no" and managed to escape from him. *Id.* at 97. A few days later, the same man and two other MS-13 members attacked her, started to take her by force, and beat her when she shouted and resisted until she lost consciousness. *Id.* at 98. In the underlying removal proceedings, the petitioner proffered the social groups of "Salvadoran women who have rejected the sexual advances of a gang member" and "Salvadoran women who are viewed as property," as well as a feminist political opinion of "resistance to male domination in Salvadoran society." The IJ granted the petitioner CAT relief, citing extensively to an expert declaration by Aracely Bautista Bayona (available through CGRS's technical assistance program upon request), but denied her asylum, finding that her proposed groups were not cognizable and that she had not advanced a political opinion. *Id.* at 99-100. On appeal to the BIA, the petitioner relied on the first social group and the political opinion claim, both of which the Board rejected. *Id.* at 100.

The Second Circuit affirmed the IJ's and the BIA's findings with respect to the first social group. Although the court acknowledged country conditions evidence of widespread violence against women in El Salvador, it found that the record did not reflect that the petitioner's "proposed subset of Salvadoran women" was perceived as a distinct group in society or at greater risk of harm than anyone else who resisted gang demands. *Id.* at 102. However, the court found that the IJ and the BIA erred with respect to the petitioner's political opinion claim. First, the court held that the agency failed to adequately consider whether her resistance to the gang member's sexual advances constituted or could be perceived as an expression of political opinion, "given the political context of gang violence and the treatment of women in El Salvador." *Id.* at 104. Second, the court highlighted the importance of mixed-motive analysis. Even if the petitioner's refusal was "motivated in part by her desire not to be a crime victim," as the IJ claimed, the court concluded that the petitioner's "resistance arguably took on a political dimension by transcending mere self-protection to also constitute a challenge to the authority of the MS gang." *Id.* Finally, the court held that the agency erred by considering only if the petitioner advanced a

political opinion and failing to take into account the possibility that the gang members imputed a political opinion to her and targeted her on that account. *Id.* In this regard, the court pointed out that one of the gang members told her that "because she would not 'do this with him in a good way, it was going to happen in a bad way,'" suggesting that they sought to "punish her because they believed she was taking a stand against the pervasive norm of sexual subordination." *Id.* at 105. In support of this third point, the court positively cited to the Fourth Circuit's decision in *Alvarez Lagos v. Barr*, 927 F.3d 236 (4th Cir. 2019), holding that the agency erred by not considering an imputed anti-gang political opinion where gang members threatened a woman under similar circumstances. *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 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-

***Calixtro Loya v. Barr*, 800 F. App'x 516 (9th Cir. Mar. 19, 2020) [domestic violence/social group cognizability – upheld BIA asylum denial]:** The Ninth Circuit denied the petition for review of a Mexican woman who suffered domestic violence at the hands of her sister-in-law. In the underlying proceedings, the IJ granted asylum and withholding of removal to the petitioner. On appeal, the BIA reversed the IJ's decision, finding that: (1) the petitioner failed to show the Mexican government was unable or unwilling to protect her; (2) her sister-in-law targeted her "because of a personal vendetta or grudge," not a protected ground; (3) the proffered social group of victims of domestic violence was not cognizable in light of *Matter of A-B-*; and (4) the petitioner could safely and reasonably relocate in Mexico. *Id.* at 517-18. Because the petitioner did not challenge the first three findings, the court found those issues waived. Regardless of waiver, however, the court concluded that substantial evidence supported the BIA's findings. With respect to government inability or unwillingness to protect, the court noted that even though the petitioner's sister-in-law was not arrested after the petitioner reported an incident to the police, the sister-in-law fled the scene, moved around to evade the government, and did not return for two years. *Id.* at 518. As to nexus, the court referred to the petitioner's testimony that her sister-in-law "did not like her and mistreated her because she had children by other men." *Id.* With regards to the social group, the court concluded that "*Matter of A-B-* clearly supports the Board's finding that [the petitioner's] proposed particular social group is not cognizable because such group was defined by the harm asserted." *Id.* It also found that it would be futile to remand the case to the agency to address the implications of *Matter of A-B-* for the proffered social group because the other BIA findings she waived were fatal to her claim. Finally, as to internal relocation, the court noted that the petitioner and members of her family had lived unharmed away from her sister-in-law in a different city. *Id.*

***Guerra-De Cardoza v. Barr*, 795 F. App'x 269 (5th Cir. Feb. 24, 2020) [domestic violence/ family-based claim/nexus – upheld asylum denial]:** The Fifth Circuit dismissed in part and denied in part the petition for review of a Salvadoran woman ("Ms. Guerra"), her children, and her mother ("Ms. Valencia"). Ms. Guerra suffered domestic violence at the hands of her former partner. In the underlying removal proceedings, the BIA affirmed the IJ's denial of asylum, withholding of removal, and CAT protection to the petitioners. Before the Fifth Circuit, Ms. Guerra argued that the BIA erred by finding her proposed social group of "Salvadoran women unable to escape domestic violence by their domestic partners" not cognizable. She stated that the BIA incorrectly: (1) gave retroactive effect to *Matter of A-B-*; and (2) concluded that the proffered group was impermissibly circular. *Id.* at 270. The Fifth Circuit concluded that it lacked jurisdiction to review these issues because Ms. Guerra had not raised these claims before the BIA, in either a motion to reopen or a motion for reconsideration. *Id.* at 271. Ms. Valencia set forth a claim based on her membership in the proposed social group of "immediate family members of [Ms. Guerra]," but the court upheld the BIA's finding of no nexus because of testimony by Ms. Valencia, Ms. Guerra, and Ms. Guerra's daughter that Ms. Guerra's former partner targeted the family "because he wanted money." *Id.* The court found that the petitioners waived their CAT claims on appeal by not briefing any challenge to the CAT denial. *Id.* at 270.

***Ortiz-Moreno v. Barr*, 793 F. App'x 654 (9th Cir. Feb. 14, 2020) [domestic violence/nexus – upheld asylum denial]:** The Ninth Circuit denied the petition for review of a Honduran woman who fled domestic violence at the hands of her ex-partner. The petitioner argued that her ex-partner inflicted harm on their daughter in order to persecute the petitioner. She proffered the social group of "women in Central America fleeing abusive partners or husbands." The court upheld the BIA's denial of asylum and withholding of removal, stating that "[e]ven assuming that [the petitioner's] proposed group is a cognizable particular social group," the BIA did not err in finding lack of nexus. *Id.* at 654. While acknowledging that "[h]arm to a child can amount to past persecution of the parent when that harm is, at least in part, directed against the parent 'on account of' or 'because of' *the parent's* membership in a particular social group," the court held that the record evidence in this case undermined the conclusion that the abuse of the daughter was directed against the petitioner. *Id.* at 654-55. Specifically, the court noted that the petitioner's ex-partner did not begin abusing their daughter until her grandmother died years after the petitioner left Honduras, and that the ex-partner had tried to hide his abuse of their daughter from the petitioner. *Id.* at 655.

***Gomez-De Saravia v. Barr*, 793 F. App'x 338 (5th Cir. Feb. 13, 2020) [domestic violence/social group cognizability – upheld BIA denial of motion to reopen]:** The Fifth Circuit denied the petition for review of a woman who filed a motion to reopen to present additional evidence in support of her fear-of-return claims based on her membership in a social group of "Salvadoran women who are unable to leave an abusive relationship." The BIA had denied the motion to reopen on the grounds that "her arguments related to her proposed particular social group and nexus to a protected ground are precluded by the Attorney General's decision in *Matter of A-B-*." *Id.* at 339. The court reiterated that, under its precedential decision in *Gonzales-Veliz v. Barr*, 938 F.3d 219, 232 (5th Cir. 2019), adjudicators may "rely on the Attorney General's reasoning in *Matter of A-B-* to assess whether a proposed group is substantially similar and warrants the same result." *Id.* The court acknowledged that "*Matter of A-B-* did not create a categorical ban against particular social groups based on domestic

violence," but rejected the petitioner's argument that the BIA in this case had concluded that *A-B-* "invalidated all social groups that relate to domestic violence." *Id.* (internal alterations and quotation marks omitted). The court held that the petitioner here only conclusorily argued that "it is clear who belongs to her proposed group," without explaining how it was particular or socially distinct in light of *Gonzales-Veliz*, which held that "Honduran women unable to leave their relationship" was impermissibly circular and lacked particularity and social distinction. *Id.* at 339-40.

***Amaya Jimenez v. Barr*, Nos. 17-9548 & 18-9541, --- F. App'x ----, 2020 WL 633583 (10th Cir. Feb. 11, 2020) [credibility/domestic violence/social group cognizability/insufficient corroborating evidence – upheld asylum denial]:** The Tenth Circuit denied the petition for review of a Honduran woman and her daughter seeking asylum, withholding of removal, and CAT protection on domestic violence grounds. In the underlying removal proceedings, the IJ denied the petitioners' applications based on an adverse credibility finding and lack of sufficient corroborating evidence. On appeal, the BIA affirmed the IJ's decision. Before the Ninth Circuit, the petitioner filed a motion to remand to the BIA to allow a jurisdictional argument based on *Pereira v. Sessions*, 138 S.C.t 2105 (2018) and to rebrief whether she and her daughter belong to a particular social group because the Attorney General's intervening decision in *Matter of A-B-* vacated *Matter of A-R-C-G-*, the decision she originally relied upon to support her claim. *Id.* at *3. The court denied the motion to remand. With respect to *Matter A-B-*, the court held that it would be "unproductive" for petitioners to rebrief whether they are a part of a particular social group of "women in Honduras unable to leave a relationship," because *A-B-* "makes it much *harder* for women alleging domestic abuse to obtain asylum on that ground." *Id.* (emphasis in original). In this regard, the court cited the Attorney General's statement in *A-B-* that "[g]enerally, claims by aliens pertaining to domestic violence . . . perpetrated by non-governmental actors will not qualify for asylum." *Id.* (internal quotation marks omitted). In any case, the court held that the IJ and the BIA based their decisions on the petitioner's lack of credibility and failure to meet her burden of proof, not on social group cognizability or membership. *Id.* The court then affirmed the agency's adverse credibility finding and its finding as to insufficient corroborating evidence for purposes of relief from removal.

***Wachira v. Barr*, 793 F. App'x 567 (9th Cir. Feb. 10, 2020) [domestic violence/social group membership – upheld asylum denial]:** The Ninth Circuit denied the petition for review of a Kenyan woman who suffered domestic violence. "For the purposes of this case, [the court] . . . assume[d] that [the petitioner's] proposed social group of 'married Kenyan women who are unable to leave their relationship' is cognizable under the INA." *Id.* at 568. However, it affirmed the agency's finding that the petitioner failed to establish that she is a member of her proposed group. *Id.* In this regard, the court noted that the petitioner had been separated from her husband for years, their adult children lived apart from her husband and had little to no contact with him, she was able to work and travel independently of her husband due to her successful businesses, and she had "the social means" to leave her husband because of family support. *Id.* In a footnote, the court stated that "[f]or the purposes of deciding this petition for review, we have no occasion to address or decide whether *A-R-C-G-* erred in finding cognizable the sorts of proposed particular social groups covered by that decision." *Id.* at 568 n.2.

***Martinez Casco v. U.S. Att'y Gen.*, 800 F. App'x 835 (11th Cir. Feb. 6, 2020) [domestic violence/social group cognizability/social group membership – upheld asylum denial]:** The Eleventh Circuit denied the petition for review of a Honduran woman who suffered domestic violence. In the underlying removal proceedings, the BIA affirmed the IJ's finding that the petitioner was not a member of her proposed social group of "women who are victims of domestic violence in Honduras and who are unable to leave." *Id.* at 836. The Board also held sua sponte that the proposed group was not cognizable based on intervening precedent in *Matter of A-B-*. First, the Eleventh Circuit held that the BIA did not exceed its authority or abuse its discretion by not remanding to the IJ, because cognizability is a legal issue and the BIA did not engage in factfinding. *Id.* at 838. Second, the Eleventh Circuit held that the BIA did not err in finding the proposed group invalid in this case. *Id.* The court noted that in *Amezcua-Preciado v. U.S. Att'y Gen.*, 943 F.3d 1337 (11th Cir. 2019), it had deferred to the Attorney General's interpretation of the term "particular social group" in *A-B-* and found the proposed group in that case not cognizable because it "closely mirrored, and suffered from the same defects as, the proposed group in *A-R-C-G-*." *Id.* at 837-38. Here, the court noted that the petitioner's brief before the BIA did not point to any facts distinguishing the group in this case from the groups discussed in *A-B-*. *Id.* at 838. The court found that there was no record evidence indicating that the subset of "female domestic violence victims who are unable to leave" is a distinct group, compared to "all domestic-violence victims, or all female domestic-violence victims." *Id.* It further held that the group is impermissibly circular because it is defined by the risk of harm. *Id.* Finally, aside from the cognizability of the social group, the court upheld the agency's finding that the petitioner was not a member of the proposed group because, unlike the respondent in *A-R-C-G-*, the petitioner was not married to her ex-partner, she was able to kick him out of her home and change the locks, and she was not denied police protection because of her relationship status. *Id.*

***Serrano-de Portillo v. Barr*, 792 F. App'x 341 (5th Cir. Feb. 4, 2020) [gang violence/forced relationship/gender/social group cognizability – upheld asylum denial]:** The Fifth Circuit denied the petition for review of a Salvadoran woman who faced gender-based violence at the hands of gang members. The petitioner proffered a social group of "El Salvadoran women targeted by gang members to be gang girlfriends." First, the court upheld the BIA's finding that the proposed group was impermissibly circular because it could not exist independently of the harm asserted. *Id.* at 342. The BIA noted in the underlying proceedings that "it did not matter that the IJ used a partially-defined-by-harm standard instead of an exclusively-defined-by-harm standard"; rather, in the BIA's view, "[t]he guiding standard" is that the particular social group "exist[s] independently of the persecution suffered by the applicant." *Id.* Second, the court upheld the BIA's finding that the petitioner failed to raise the alternative social group of "El Salvadoran women" before the IJ. *Id.* It acknowledged that the petitioner emphasized the importance of gender and country of origin to the group that she proffered before the IJ. However, the court cited the BIA's decision in *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018) to emphasize that the petitioner bore the burden of officially delineating the alternative social group. *Id.* at 342-43. Although the IJ should seek to clarify the social group if the applicant is unclear as to the exact formulation, the court stated that the IJ need not infer alternative groups from the applicant's testimony. *Id.* Finally, the court held that the BIA did not improperly rely on *A-B-* in rejecting the petitioner's proposed social groups, reiterating its conclusion in *Gonzales-Veliz v. Barr* that *A-B-* did not change the burden of proof and merely

restated established principles.

***Alfaro v. Barr*, 790 F. App'x 91 (9th Cir. Jan. 14, 2020) [domestic violence/social group membership/state protection – upheld asylum denial]:** The Ninth Circuit denied the petition for review of a Salvadoran woman who suffered domestic violence. The court "[a]ssum[ed] without deciding that [the petitioner's] social group [of 'Salvadoran women unable to leave a domestic relationship'] is cognizable under the INA." *Id.* at 92. In a footnote, the court noted that under the framework in *Matter of A-R-C-G-* (which the Board applied in the underlying proceedings), "whether a woman is able to leave her domestic relationship turns on, among other things, any 'religious, cultural, or legal constraints' that may preclude leaving, including 'societal expectations about gender and subordination' or lack of police protection." *Id.* at 92 n.2. "For purposes of deciding this petition for review . . . and on the administrative record" in this case, the court stated that it has "no occasion to address or decide whether *Matter of A-R-C-G-* erred in finding cognizable the sorts of proposed particular social groups covered by that decision." *Id.* Rather, under the facts of this case, the court held that the petitioner was not a member of her proposed group because she lived apart from her husband in El Salvador for several years, her attempt to file for divorce was thwarted by the "unscrupulous" conduct of her attorney rather than any legal or social obstacles, Salvadoran authorities arrested her husband twice, and she was able to obtain and enforce a restraining order against her husband. *Id.* at 92. The court acknowledged that the petitioner's husband continued to threaten and harass her but concluded that this did not "compel" the finding that the petitioner was "unable to leave" her relationship. *Id.* at 93.

With respect to state protection, the court noted that the police responded to the petitioner's calls several times and arrested her husband twice. *Id.* The court stated that the fact that the Salvadoran police did not respond sometimes, or responded without arresting or prosecuting her husband, did not compel a finding of government inability or unwillingness to protect the petitioner. *Id.* As to CAT protection, the court similarly upheld the agency's finding that the petitioner failed to establish "government acquiescence" in her torture in light of the authorities' prior responses. *Id.*

***Acosta Cervantes v. Barr*, 795 F. App'x 995 (9th Cir. Jan. 14, 2020) [domestic violence/social group membership/nexus/state protection – upheld asylum denial]:** The Ninth Circuit denied the petition for review of a Mexican woman who suffered domestic violence. The court "[a]ssum[ed] without deciding that [the petitioner's] proposed social group 'married women in Mexico who are unable to leave their relationship' is cognizable under the INA." *Id.* at 997. In a footnote, the court noted that under the framework in *Matter of A-R-C-G-* (which the Board applied in the underlying proceedings), "whether a woman is able to leave her domestic relationship turns on, among other things, any 'religious, cultural, or legal constraints' that may preclude leaving, including 'societal expectations about gender and subordination' or lack of police protection." *Id.* at 997 n.2. "For purposes of deciding this petition for review . . . and on the administrative record" in this case, the court stated that it has "no occasion to address or decide whether *Matter of A-R-C-G-* erred in finding cognizable the sorts of proposed particular social groups covered by that decision." *Id.* Rather, under the facts of this case, the court held that the petitioner was not a member of her proposed group because she lived apart from her husband for more than a year. *Id.* at 997. The court acknowledged that the petitioner's husband

threatened her while she was living apart from him but noted that he did not take "affirmative steps" to prevent her from moving or go to where she was living. *Id.*

Aside from social group membership, the court also upheld the BIA's finding of lack of nexus, stating that the petitioner's husband abused drugs and alcohol and had been violent "towards the community at large," including murdering a man in prison, engaging in public fights, threatening his parents, and getting involved with drug cartels. *Id.* at 997-98. Nevertheless, the court acknowledged the lower standard for nexus for purposes of withholding of removal and remanded the petitioner's son's claim to the agency. *Id.* at 998. As to state protection, the court noted that the police responded and looked for the petitioner's husband on the two occasions that her in-laws called the police. *Id.* According to the court, the fact that Mexican police did not take further action to arrest the abuser did not "compel" a finding of government inability or unwillingness to protect the petitioner. *Id.* It recognized that authorities in some parts of Mexico refuse to issue protective orders but found no evidence that this was the case in the city where the petitioner had been living. *Id.* Finally, with respect to CAT protection, the court stated cursorily that the petitioner failed to show that any government official would acquiesce in torture. *Id.*

***Lapop-Herrera v. Barr*, 795 F. App'x 999 (9th Cir. Jan. 14, 2020) [domestic violence/social group membership – upheld asylum denial]:** The Ninth Circuit denied the petition for review of a Guatemalan woman who suffered domestic violence. The court "[a]ssum[ed] without deciding that [the petitioner's] proposed social group ('Guatemalan women unable to leave their domestic relationship') is cognizable under the INA." *Id.* at 1000-01. In a footnote, the court noted that under the framework in *Matter of A-R-C-G-* (which the Board applied in the underlying proceedings), "whether a woman is able to leave her domestic relationship turns on, among other things, any 'religious, cultural, or legal constraints' that may preclude leaving, including 'societal expectations about gender and subordination' or lack of police protection." *Id.* at 1001 n.5. "For purposes of deciding this petition for review . . . and on the administrative record" in this case, the court stated that it has "no occasion to address or decide whether *Matter of A-R-C-G-* erred in finding cognizable the sorts of proposed particular social groups covered by that decision." *Id.* Rather, under the facts of this case, the court held that the petitioner was not a member of her proposed group because she was able to move away from her former partner, she obtained a restraining order against him, he was unable to get past building security when he tried to look for her, and—according to the court—there were no social constraints preventing her from ending the relationship. *Id.* at 1001.

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

***Andres-Diego v. U.S. Att'y Gen.*, No. 19-12190, --- F. App'x ----, 2020 WL 1242880 (11th Cir. Mar. 16, 2020) [extortion/wealth/family-based claim/social group cognizability/nexus – upheld asylum denial]:** The Eleventh Circuit denied the petition for review of a Guatemalan woman who fled after a group of masked men threatened to kill her and kidnap her children if she did not comply with their payment demands. The petitioner believed that the men targeted her because her father-in-law in the United States sent her family money regularly and she would visit a service to pick up the remittances. The petitioner proffered the social groups of "people in the Guatemala community who are identified as having access to money" and "the Diego Jacinto

family who live in the United States," as well as a political opinion against extortion. The court upheld the agency's denial of asylum and withholding of removal to the petitioner. First, the court held that the first proposed social group was not cognizable on the grounds that it was defined by the harm the petitioner suffered as a victim of extortion and the risk of persecution alone cannot define a particular social group. *Id.* at *3. The court further stated that "asylum applicants who were targeted for extortion solely because of their wealth or perceived wealth cannot show a nexus between their persecution and a protected ground." *Id.* Second, the court held that there was no nexus between the persecution and petitioner's family membership. *Id.* The court noted that the petitioner testified that she did not know why the men threatened her and only guessed that they found out her father-in-law sent her money. *Id.* It also noted that she did not provide evidence of harm to any other family members in Guatemala. *Id.* In a footnote, the court "assume[d], without deciding, that [the petitioner's] family membership PSG is cognizable," citing to the Attorney General's decision in *Matter of L-E-A-*. *Id.* at *3 n.3. As to the petitioner's political opinion claim, the court found that it lacked jurisdiction to review it because the petitioner did not include those arguments in her brief to the court. The court then concluded with a general statement that "evidence that is consistent with acts of private violence or that merely shows that a person has been the victim of criminal activity does not constitute evidence of persecution based on a statutorily protected ground." *Id.* at *3 (internal alterations and quotation marks omitted). As to CAT protection, the court found that the petitioner abandoned her claim because she failed to challenge the agency's denial in her brief to the court.

***Nolasco-Yok v. Barr*, No. 19-1402, --- F. App'x ----, 2020 WL 916941 (1st Cir. Feb. 26, 2020) [gang violence/family-based claim/nexus – upheld asylum denial]:** The First Circuit denied the petition for review of a Guatemalan woman who feared gang violence on the basis of her membership in her nuclear family. Gang members threatened and raped the petitioner's sister after she refused to join the gang. The petitioner testified that gang members also threatened and attempted to recruit the petitioner. The IJ and the BIA denied the petitioner's asylum and withholding of removal claims, finding that her family membership was not one central reason for her persecution. The petitioner filed a motion for reconsideration with the BIA, arguing that the agency failed to give sufficient weight to, and even distorted, the timeline of events, as the petitioner began receiving threats only after the gang members raped her sister. *Id.* at *2. The BIA acknowledged their error in recounting the timeline of events but concluded that the correct timeline was nonetheless insufficient to meet the petitioner's burden of proof because she testified that gang members targeted her to join them rather than because of her family membership. *Id.* The court upheld the agency's finding, concluding that it was within the agency's discretion to accord more weight to the petitioner's testimony regarding recruitment attempts than any alternative explanation that could be inferred from the timeline. *Id.* The court further noted the agency determined that family membership was not a reason at all for the persecution and therefore did not have to conduct mixed-motive analysis, but in any case, the IJ's and the BIA's decisions reflected their understanding that family membership would only have to be one central reason. *Id.* In a footnote, the court found irrelevant the petitioner's argument that the Attorney General's decision in *Matter of L-E-A-* is not binding on the court because neither the IJ nor the BIA relied on *L-E-A-* and "both assumed that family constitutes a particular social group." *Id.* at *1 n.1.

***Warsame v. U.S. Att'y Gen.*, 796 F. App'x 993 (11th Cir. Jan. 14, 2020) [family-based**

claim/political opinion/social group cognizability/administrative exhaustion – remanded to consider family-based social group/political opinion claims]: The Eleventh Circuit granted in part the petition for review of a Somalian man who fears harm at the hands of al-Shabaab. Al-Shabaab killed the petitioner's daughter and sister in a bombing directed at his father who was a police chief for the Somali government. The petitioner also received threats from al-Shabaab because he worked as a teacher. In the underlying removal proceedings, the IJ stated that she was unable to discern the social group proffered by the petitioner, who was a pro se applicant. *Id.* at 1000. After defining the group as "persons with master's degrees who return to Somalia to teach and whom al-Shabaab targets," the IJ proceeded to reject it because it lacked social distinction. *Id.* (internal alterations and quotation marks omitted). The IJ further found that the petitioner did not suffer past persecution, had not established nexus to a protected ground, and could safely relocate within Somalia to avoid al-Shabaab. *Id.* at 999-1000. The BIA rejected the petitioner's proffered group on appeal of "Somali teachers who teach the Western Education and are targeted by al-Shabaab" based on circularity and lack of immutability. *Id.* at 1000-01 (internal alterations and quotation marks omitted). The BIA also held that petitioner failed to establish nexus to the proposed group or to his implied political opinion and upheld the IJ's internal relocation finding. *Id.*

Before the Eleventh Circuit, the petitioner challenged the nexus findings, arguing that he was targeted because of his kinship ties to his father and his actual political opinion, in addition to his imputed political opinion based on his father's role as a police officer. *Id.* at 1002. The court held that the petitioner had repeatedly referenced his kinship ties and his actual political opinion in the underlying removal proceedings and therefore had exhausted these arguments before the agency. *Id.* at 1003-06. The court remanded to the agency to make a determination on his family-based and political opinion claims in the first instance. *Id.* The court further instructed the agency to review the petitioner's social group claim in light of the Attorney General's intervening decision in *Matter of L-E-A-*, which held that "an alien's family-based group will not constitute a particular social group unless it has been shown to be socially distinct in the eyes of its society, not just those of its alleged persecutor." *Id.* at 1006 (internal quotation marks omitted). The court noted that in a supplemental filing on appeal, the petitioner asserted that his family satisfied this requirement because it was "known in society for its ties to the government and vocal opposition to al-Shabaab." *Id.* (internal quotation marks omitted).

***Argueta-Martinez v. U.S. Att'y Gen.*, 795 F. App'x 760 (11th Cir. Jan. 6, 2020) [gang violence/family-based claim/nexus – upheld asylum denial]:** The Eleventh Circuit denied the petition for review of a Salvadoran man whose family has suffered harm at the hands of MS-13 gang members in El Salvador. With respect to the petitioner's asylum and withholding of removal applications, the court upheld the agency's finding that the feared persecution lacked nexus to the petitioner's family affiliation. *Id.* at 762-63. It cited the BIA's decision in *Matter of L-E-A-*, affirmed in part by the Attorney General's decision, for the proposition that "an asylum applicant's membership in a family-based particular social group does not necessarily mean that any harm inflicted or threatened by the persecutor is because of, or on account of, the family membership." *Id.* at 762 (internal alterations and quotation marks omitted). In this case, the court stated that although the petitioner's sister had been murdered by gang members, subsequent attacks on the petitioner's children occurred years after his sister's murder and "were typical of MS-13's general acts of violence toward the community at large." *Id.* at 762-63. The court

further noted that MS-13 never personally harmed the petitioner and many of his family members continued to live in El Salvador without problems. *Id.* at 763. As to CAT protection, the court held that the petitioner failed to show he was more likely than not to face torture for these same two reasons. *Id.* In addition, the court found that petitioner failed to show acquiescence by a public official because Salvadoran police officers had investigated the violence against his family members and "generalized evidence of official corruption in the Salvadoran law enforcement community does not suffice." *Id.* (internal alterations and quotation marks omitted).