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

Below is an update on select current litigation issues relevant to the Vera network for the period of April through mid-July 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.

***Matter of A-B-* and Post-*A-B-* Courts of Appeals Decisions:**

***Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. June 11, 2018):** The Attorney General (AG) vacated the BIA's precedent decision in *Matter of A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014). The AG stated that the Board had not engaged in a rigorous or in-depth application of its three-part test for particular social group cognizability when it recognized the social group "married women in Guatemala who are unable to leave their relationship" in *A-R-C-G-*. The AG also discussed his position on other general points of asylum law related to nexus, state inability or unwillingness to protect the applicant, internal relocation, discretion, and credibility, although much of the decision is *dicta.*

Having overruled *A-R-C-G-*, the AG cursorily reversed the Board's decision in the case at hand, which had found Ms. A.B., a Salvadoran woman who fled domestic violence at the hands of her husband, eligible for asylum. The AG also stated that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum." *Id.* at 320. However, although the AG attempted to cast doubt on the viability of such claims, he did not foreclose them as a categorical matter, noting that he "do[es] not decide that violence inflicted by non-governmental actors may never serve as the basis for an asylum or withholding application based on membership in a particular social group." *Id.*

For a more in-depth discussion of the AG's decision and strategies in asylum cases post-*A-B-*, please see CGRS's newly released practice advisory on the ruling, released on July 6, 2018 and available to all non-government attorneys upon request.

The following are published and unpublished Court of Appeals decisions issued after the AG's decision in *A-B-*, which may be helpful to practitioners.

***Rosales Justo v. Sessions*, --- F.3d ----, 2018 WL 3424685 (1st Cir. July 16, 2018) (published):** The Court reversed the Board's denial of asylum to a Mexican man who fled after cartel members murdered his son and then targeted him and his family. The Immigration Judge had granted asylum initially in a legal theory of nuclear family, which the Department of Homeland Security (DHS) appealed. The Board reversed the judge's finding on government ability and willingness to protect because the police, for example, had taken some steps to investigate the murder. The Court considered its review of the Board's review of the judge's

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

***Silvestre-Mendoza v. Sessions*, --- F. App'x ---- 2018 WL 3237505 (9th Cir. July 3, 2018) (unpublished):** The Court reversed and remanded the Board's denial of asylum to a Guatemalan woman holding that the Board erred by failing to consider the alternate social group of "Guatemalan women" because "'Guatemalan women' subsumes 'young Guatemalan females who have suffered violence due to female gender,' and it is the gravamen of Silvestre's persecution claim." Notably, this was not a group argued by the petitioner. Moreover, the Court noted that it left to the Board to consider in the first instance whether *Matter of A-B-* had any bearing on the question remanded (it did not read *A-B-* as a categorical foreclosure of the case as a matter of law).

***Juan-Pedro v. Sessions*, --- F. App'x ----, 2018 WL 3202953 (6th Cir. June 29, 2018) (unpublished):** The Court reversed a denial of asylum to an indigenous Guatemalan woman who was raped by MS-13. It held that the agency's nexus analysis—finding that the woman's indigenous group membership was not at least one central reason the gang targeted her, but rather that the gang was motivated mere criminal intent or personal vendetta—was not supported by substantial evidence in the record. In so doing, the Court recognized that *Matter of A-B-* did not disturb the well-settled nexus standard and highlighted that these claims may still be viable. The Court rejected the government's argument that because gang violence is rampant in Guatemala and impacts a large number of people, she could not show she was singled out for a protected reason. Notably, one member of the panel dissented on the grounds that the Court should have sent the case back to the Board to consider all of the record evidence and also the potential impact of Attorney General's intervening opinion in *Matter of A-B-*.

<u>Other Published Courts of Appeals Decisions:</u>

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.

***S.E.R.L. v. Sessions*, 2018 WL 3233796 (3d Cir. July 3, 2018):** The Court upheld the Board's requirements for social distinction and particularity as reasonable because the Board clarified that social distinction does not require ocular visibility and adequately distinguished the requirements of social distinction and particularity. The Court then upheld the Board's denial of asylum to a Honduran woman who fears violence by her mother's and daughter's abusers, finding that her proposed social group of "immediate family members of Honduran women unable to leave a domestic relationship" fails social distinction.

***Miranda v. Sessions*, 892 F.3d 940 (8th Cir. June 11, 2018):** The Court upheld the Board's denial of withholding of removal to a Salvadoran man who fled threats by gang members after

they shot a passenger in a moto-taxi he was driving. The Court agreed with the Board that the applicant did not present evidence that his proposed social group of "former taxi drivers from Quezaltepeque who have witnessed a gang murder" is socially distinct.

***Santos-Guaman v. Sessions*, 891 F.3d 12 (1st Cir. May 23, 2018):** The Court reversed and remanded the Board's denial of asylum to an Ecuadoran man who suffered "a great deal of abuse, discrimination, and harassment" in Ecuador based on his indigenous Quiche ethnicity. *Id.* at 14. The Court held that the Board and the Immigration Judge had failed to apply child-specific standards for asylum even though the applicant was a minor when he suffered harm. The Court also instructed the BIA to address on remand the applicant's argument that, although the Ecuadoran Constitution prohibits discrimination against indigenous people, the government does not actively enforce those rights.

***Cabrera v. Sessions*, 870 F.3d 153 (5th Cir. May 7, 2018):** The Court reversed and remanded the Board's denial of asylum to a Honduran woman who fled gang-related violence after she protested against gang crimes and joined a political party opposed to government corruption and inaction against the gangs. The applicant defined her social group as "female activists or human rights defenders from Honduras who actively protest the Maras" and her political opinion as "pro rule-of-law, anti-corruption, and anti-gang." The Court agreed with the Board that there was no nexus to the applicant's political opinion, finding the record did not demonstrate a pattern of persecution against similarly situated party members. However, the Court held that the Board and the Immigration Judge erred by re-characterizing her social group as "those who might defy gangs" and ignoring the relevance of her gender in her persecution, and remanded for consideration of her social group claim.

***Perez v. Sessions*, 889 F.3d 331 (7th Cir. May 2, 2018):** The Court reversed and remanded the Board's denial of protection under the Convention Against Torture (CAT) to a Honduran man who was threatened and nearly shot by gang members trying to prevent him from reporting his friend's murder. The Court held that the Board erred by focusing only on whether the applicant had actually been tortured in the past. The court noted that while "a narrow escape from torture" is not "actual torture," an escape is "strong evidence supporting a prediction of torture should the target be returned to that country." *Id.* at 335.

***Mayorga-Rosa v. Sessions*, 888 F.3d 379 (8th Cir. Apr. 24, 2018):** The Court upheld the Board's denial of asylum and withholding of removal to a Guatemalan man who fled after he refused gang members' request to distribute drugs in the United States and the gang members had his cousin murdered. The Immigration Judge did not allow the applicant to make a closing argument, during which he had planned to propose a social group. Instead, the Immigration Judge inferred the social group "relates to refusal to participate in drug trafficking and speaking out of turn about a solicitation to become involved in drug trafficking." Although the Court noted that the Board inaccurately stated this group was impermissibly defined by the harm, it found that the inaccuracy was harmless because the Board also held the group was not defined with particularity. The Court also rejected the applicant's request for a remand to the Immigration Judge after *Matter of W-Y-C- & H-O-B-*, 27 I. & N. Dec. 189 (B.I.A. 2018) to clarify the social group.