Asylum Law Under Attack: What is the impact on Unaccompanied Children?

With legal updates occurring so frequently, it can be difficult to keep up with the changes. Let CILA help you stay up to date with a recap of recent changes to asylum law and help identify the main changes that impact unaccompanied children (UC). Since in many instances, litigation is currently pending, you will need to keep tabs on the cases to see what is currently happening.

Asylum law in the United States[i] was built on the principle of non-refoulement, found in international law[ii], "that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm."[iii] Unfortunately, many of these recent changes run afoul of this principle and endanger the lives of individuals who need protection most.

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Asylum Ban 1.0 EWI on the Southern Border Interim Final Rule (by DOJ and DHS) and Presidential Proclamation entered in November 2018 - Seeks to bar anyone who entered the U.S. from Mexico without inspection from being eligible for asylum. Applies to unaccompanied children.	**Pending Litigation:** *East Bay Sanctuary Covenant v. Trump* • On 2/28/20, the Ninth Circuit affirmed the district court's temporary restraining order and grant of a preliminary injunction in East Bay Sanctuary Covenant v. Trump. In the summary of the opinion, as part of its rationale, the Court found the "Rule is unreasonable in light of the United States' treaty obligations" and "[s]pecifically, the panel concluded that the Rule runs afoul of three codified rules: 1) the right to seek asylum; 2) the prohibition against penalties for irregular entry; and 3) principles of non-refoulement, which prohibit signatories to the 1951 Convention from returning a refugee to the frontiers of territories where his life or freedom would be threatened." • The rule has not been in effect during litigation because the 9th Circuit also denied the government's emergency motion for a stay pending appeal in an opinion issued in December 2018. *O.A. v. Trump* • 8/2/19 D.C. District Court vacated the interim final rule, finding it unlawful. **As of publishing on 3/5/20, the Asylum Ban 1.0 is not in effect.**
Migrant Protection Protocols a.k.a. "Remain in Mexico" program MPP was implemented in January 2019. Unaccompanied children along with certain other vulnerable groups should not be included in the program; however, in reality, the program has impacted UC.[iv] The MPP program	**Following implementation of MPP:** • While the MPP program does not directly apply to unaccompanied children, many UC are being impacted. This has happened in several ways. As an example, in some cases, a child is separated from her family member at the border, and the child is then

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requires some asylum seekers on the Southern border to wait in Mexico while their claims are adjudicated.[v]	processed as an unaccompanied child while her family member waits for court in Mexico, through the MPP program.[vi] Ultimately, this makes reunification much more difficult for this child. There are other instances, where a child will go across the border by herself after her family was placed together in the MPP program, rather than stay in harsh and dangerous conditions. In other cases, a child's parents or the child was harmed while they were together in the MPP program so the child crossed the border alone as an UC. Each of these situations creates a difficult situation for the child due to family separation, as well as legal and procedural hurdles in her case. • Human Rights First has issued a report and published a database[vii] about the human rights abuses occurring as a result of the "Remain in Mexico" program. • The MPP program has been riddled with problems including issues such as lack of access to counsel.[viii] **Pending Litigation:** *Innovation Law Lab v. McAleenan* • Innovation Law Lab, eleven individual plaintiffs, and several organizations filed a suit challenging the MPP program. Plaintiffs are represented by the American Civil Liberties Union (ACLU), Southern Poverty Law Center (SPLC) and the Center for Gender and Refugee Studies (CGRS). • On 4/8/19, a federal court for the Northern District of California granted a motion for a preliminary injunction in the case, but that was appealed. On 5/7/19, the 9th Circuit granted a stay on the preliminary injunction, allowing MPP to continue while the case is pending appeal in the 9th Circuit. • On 2/28/20, the 9th Circuit issued an opinion affirming the district court's injunction against implementation and expansion of MPP. Hours later on 2/28/20, the Government filed an emergency motion for a stay pending disposition of an appeal to the Supreme Court or an immediate administrative stay, and the 9th Circuit granted an administrative stay on its

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	decision and created a briefing schedule regarding the longer stay. • On 3/4/20, the 9th Circuit, issued an order denying the stay in part and granting it in part. In its order the Court stated, "Because the MPP so clearly violates §§ 1225(b) and 1231(b), and because the harm the MPP causes to plaintiffs is so severe, we decline to stay our opinion pending certiorari proceedings in the Supreme Court, except as noted below with respect to the scope of the injunction." In regards to scope, the 9th Circuit granted the stay pending an appeal to the Supreme Court as it relates to Southern border states outside of the 9th Circuit (Texas – 5th Circuit and New Mexico – 10th Circuit) and denied the stay as it pertains to 9th Circuit border states (California and Arizona). Additionally, the 9th Circuit extended its administrative stay until 3/11/20 providing time for the Supreme Court to review the issue, and stated, "[i]f the Supreme Court has not in the meantime acted to reverse or otherwise modify our decision, our partial grant and partial denial of the Government's request for a stay of the district court's injunction, as described above, will take effect on Thursday, March 12." • Visit the ACLU's website for case updates and to read case documents.
USCIS "Lafferty Memo": "Updated Procedures for Asylum Applications Filed by Unaccompanied Alien Children" The "Lafferty Memo" issued 5/31/19 reversed the "Kim Memo" representing USCIS's prior policy (from May 2013) – The "Lafferty Memo" states USCIS now will make a new factual inquiry, independent of any prior designation by an agency other than EOIR, to determine whether the asylum applicant is a UAC at the time of filing of the asylum application. Effective as of 6/30/19.	**Pending Litigation:** *J.O.P v. DHS* • 10/15/19: Preliminary Injunction granted – enjoined USCIS from applying the Lafferty Memo, orders USCIS to retract adverse decisions already made, and covers all applicants previously determined to be unaccompanied children. • According to USCIS's website, "USCIS is reviewing all asylum applications where USCIS determined that it did not have jurisdiction under the 2019 UAC memorandum." If this applies to one of your clients, check out the USCIS webpage for more information on processing. • Catholic Legal Immigration Network, Inc. (CLINIC) posts case updates.

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	As of publishing on 3/5/20, the "Kim Memo" is still in effect. **BUT Immigration Judges are bound by a different policy regarding jurisdiction in unaccompanied children cases as reflected in *Matter of M-A-C-O-*, 27 I&N Dec. 477 (BIA 2018)**. "An Immigration Judge has initial jurisdiction over an asylum application filed by a respondent who was previously determined to be an unaccompanied alien child but who turned 18 before filing the application."
Asylum Ban 2.0 Transit Bar through 3rd Country Interim Final Rule (by DOJ and DHS) - Bars asylum protection for individuals who cross the Southern border on or after 7/16/19, if they transited through a third country en route to the U.S. unless they sought and were denied asylum in one of the countries through which they traveled on the way to the U.S. The bar also does not apply to victims of severe forms of trafficking as defined in 8 C.F.R. § 214.11 or individuals who "transited en route to the United States through only a country or countries[ix] that were not parties to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol, or the CAT".[x] Applies to unaccompanied children.	**Pending Litigation:** *East Bay Sanctuary Covenant v. Barr* • **Currently, the case is before the 9th Circuit on appeal, and oral argument took place on 12/2/19.** *CAIR Coalition v. Trump* • 7/24/19: federal District Court for D.C. denied the motion for temporary restraining order filed by CAIR Coalition and other organization/firms. • The case is still pending. *Al Otro Lado v. Wolf* • 11/19/19: federal District Court for the Southern District of California granted a motion for a provisional class certification and motion for a preliminary injunction. The judge blocked the bar from being applied to a provisionally certified class of "all non-Mexican asylum-seekers who were unable to make a direct asylum claim at a U.S. [port of entry (POE)] before July 16, 2019 because of the Government's metering policy, and who continue to seek access to the U.S. asylum process."[xi] • 12/6/19: Plaintiffs filed a motion for a temporary restraining order prohibiting application of the Asylum Cooperative Agreement (ACA) to provisional class members. Remember the ACAs should not apply to UC. See information below chart for more details. • The Government appealed to the 9th Circuit Court of Appeals. • 12/20/19: The 9th Circuit granted the government's motion for an emergency

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	temporary stay of the district court's order until the 9th Circuit makes a determination on the government's motion for a stay pending appeal. • 3/5/20: the 9th Circuit issued an order denying the stay, lifting the emergency temporary stay, on the preliminary injunction. For now, this leaves the lower court's preliminary injunction in place prohibiting application of the transit bar to the provisionally certified class. • The case is still pending before the 9th Circuit to decide the appeal on the preliminary injunction on the merits. • Visit the American Immigration Council's (AIC) website for case updates. **As of publishing on 3/5/20, the Asylum Ban 2.0 is pending before the 9th Circuit, but while litigation is pending, the rule is in effect nationwide (except as applies to the provisional class in *Al Otro Lado v. Wolf* – but this case is evolving so check current details).**
***Matter of A-B-* (Attorney General Certified BIA Decision)** *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018) – Set back years of progress on domestic violence cases and overruled *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014), which found "married women in Guatemala who are unable to leave their relationship" as a cognizable particular social group (PSG).	Following *Matter of A-B-*: • 7/11/18, DHS implemented new expedited removal policies based on *Matter of A-B-.* • 12/19/18: federal District Court for D.C. issued an opinion and order in *Grace v. Whitaker,* a lawsuit filed by the ACLU and CGRS. The case primarily deals with expedited removal and the credible fear process (which doesn't apply to unaccompanied children), but it also rejects some aspects of *Matter of A-B.* Of particular importance in asylum cases for unaccompanied children, the court enjoined any categorical ban on domestic violence and gang-based asylum claims. • CGRS wants advocates to "[r]eport case outcomes post-*A-B-* at all levels of adjudication, as well as any notable developments along the way such as challenges by DHS or IJ briefing orders". • Reach out to CGRS for resources to help you represent your client post *Matter of A-B-.* **This case, as well as *Matter of L-E-A-,* has changed the landscape of asylum claims involving PSGs. The case does not categorically ban asylum claims based on domestic violence,**

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	but advocates must develop the record and their arguments well to be successful. Asylum claims must be assessed on a case-by-case basis. It is important to keep making domestic violence related PSG arguments for a decision on the particular case and to preserve the record for appeal.
***Matter of L-E-A-* (Attorney General Certified BIA Decision)** *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019) – overruled *Matter of L-E-A-*, 27 I&N Dec. 40 (BIA 2017) which affirmed that family can be a PSG.	Following *Matter of L-E-A-*: • *Pena Oseguera v. Barr,* No. 17-60339 (5th Cir. 2019). ○ *Matter of L-E-A-* "stands for the proposition that families *may* qualify as social groups, but the decision must be reached on a case-by-case basis." The "applicant must establish that his specific family group is defined with sufficient particularity and is socially distinct in his society." This is a "fact-based inquiry made on a case-by-case basis." ○ "We recognize that *Matter of L-E-A-* is at odds with the precedent of several circuits. *Matter of L-E-A-*, 27 I&N Dec. at 589-91 (analyzing precedent from the First, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits.) However, it is not at odds with any precedent in the Fifth Circuit." • 9/30/19: USCIS released its policy guidance to USCIS officers regarding *Matter of L-E-A-*. • 11/22/19: CLINIC along with Crowell & Moring LLP filed a lawsuit in a federal District Court for D.C. challenging policy guidance following the A.G. decision in the expedited removal context. CLINIC "is monitoring how government officials and immigration judges are interpreting the attorney general's opinion. To that end, please share with CLINIC redacted copies of any decisions that rely on the attorney general's opinion." If you have a case in which an adjudicator relies on the attorney general's opinion, check out their webpage and contact CLINIC. • CLINIC also has a practice pointer available for representation post *Matter of L-E-A-* **This case, as well as *Matter of A-B-,* has changed the landscape of asylum claims involving PSGs. The case does not categorically**

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	ban asylum claims based on family PSGs, but advocates must develop the record and their arguments well to be successful. Asylum claims must be assessed on a case-by-case basis. It is important to keep making family-based PSG arguments for a decision on the particular case and to preserve the record for appeal.
***Matter of W-Y-C- & H-O-B-* BIA Decision** *Matter of W-Y-C- & H-O-B-*, 27 I&N Dec. 189 (BIA 2018) – Holds that "(1) [a]n applicant seeking asylum or withholding of removal based on membership in a particular social group must clearly indicate on the record before the Immigration Judge the exact delineation of any proposed particular social group. (2) The Board of Immigration Appeals generally will not address a newly articulated particular social group that was not advanced before the Immigration Judge."	Following *Matter of W-Y-C- & H-O-B-*: • *Cantarero-Lagos v. Barr*, No. 18-60115 (5th Cir. 2019) - Affirmed BIA's decision to not consider "a PSG on appeal that was never presented to the immigration judge ('IJ')".
Updated Form I-589 Current Edition date: **09/10/19**.	• Heed the advice on USCIS's website and in the instructions: Don't leave any field blank and don't forget to attach any addendums! Otherwise, the application may be returned as incomplete. • AILA is seeking case examples of I-589 rejections based on incompleteness received in October 2019 or later.

Proposed Rule: Asylum Application, Interview, and Employment Authorization for Applicants
 	
DHS published a Proposed Rule in the Federal Register "proposing to modify its current regulations governing asylum applications, interviews, and eligibility for employment authorization based on a pending asylum application."
	• The Proposed Rule was published on 11/14/19 and the comment period is closed.
	• Some of the proposed changes include:
	  ○ Extend EAD waiting period from 150/180 to 365 days.
	  ○ Any asylum seekers that entered EWI, failed to file by the 1-year deadline (except UC), felony convictions in any country, would not be eligible for (c)(8) EAD.
	  ○ Grant of EAD will be DISCRETIONARY.
	  ○ DHS would no longer have to return an incomplete application within 30 days, amending or supplementing I-589 will be considered applicant-caused delay.
	• **As of publishing on 3/5/20, this Proposed Rule is not in effect.**

Filing Fees for Form I-589 USCIS published a Proposed Rule in the Federal Register to introduce a non-waivable $50 fee for asylum applications, when filed with USCIS.	• The Proposed Rule was published on 11/14/19, and the comment period is closed. • According to the Proposed Rule, "DHS is proposing no fee for an unaccompanied

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The Proposed Rule also impacts other types of cases such as adjustment of status, DACA renewals, and naturalization.[xii]	alien child (UAC) in removal proceedings who files Form I-589. . . A UAC who is not in removal proceedings will be charged the same proposed $50 Form I-589 fee as other affirmative filers." • The Proposed Rule will also require asylum/withholding applicants to pay the initial filing fee for the I-765. • CLINIC has set up a webpage to follow the issue. • **As of publishing on 3/5/20, this Proposed Rule is not in effect.**
Proposed Rule for Procedures for Asylum and Bars to Asylum Eligibility USCIS and EOIR published the Proposed Rule in the Federal Register to announce several proposed changes to asylum bars and eligibility.	• The Proposed Rule was published on 12/19/19 and the comment period is closed. • The Proposed Rule presents several changes to asylum law including: new bars of eligibility for asylum, clarify effect of criminal convictions, remove current regulatory provision regarding reconsideration of discretionary asylum denials. • You can read Human Rights Watch's Comment to the Proposed Rule here. • **As of publishing on 3/5/20, this Proposed Rule is not in effect.**

There have also been several additional changes to asylum law that are not directly applicable to unaccompanied children, such as changes to credible fear interview procedures[xiii] and expedited removal processes,[xiv] as well as litigation challenging the changes. As a result of the William Wilberforce Trafficking Victims Protection Reauthorization Act (TVPRA) of 2008, unaccompanied children are not subject to expedited removal because they have a right to go through removal proceedings.

Additionally, the U.S. has worked on safe third country agreements (or "Asylum Cooperation Agreements" – ACAs) with Guatemala[xv], El Salvador, and Honduras. Generally, an individual cannot apply for asylum if there is a safe third country, where the individual could be removed; however, this does not apply to unaccompanied children.[xvi] USCIS and EOIR published a joint interim final rule on November 19, 2019 in the Federal Register "to provide for the implementation" of the ACAs the U.S. has entered into, except the agreement with Canada.[xvii] The rule applies to immigrants who enter the U.S. on or after November 19, 2019. EOIR additionally issued guidelines for immigration courts regarding the new regulations, and USCIS created guidance for Asylum Officers. As of publishing, the United States has begun deporting individuals to Guatemala as a result of the agreement. Litigation is pending regarding the legality of the rule and guidance implementing the ACAs.[xviii] The United States has had a Safe Third Country Agreement with Canada since 2002.[xix]

If you want to read more about recent changes to asylum law, here are a few articles that provide helpful explanations. These articles were also consulted when drafting this resource.

- AIC, Fact Sheet: "Policies Affecting Asylum Seekers at the Border", January 29, 2020.
- AILA, "Featured Issue: Border Processing and Asylum", *AILA Doc. No. 19032731*, November 25, 2019.

- National Immigrant Justice Center, "A Timeline of The Trump Administration's Efforts To End Asylum", January 2020.
- CLINIC, "Recent Updates on the Administration's Assault on Asylum", Reena Arya and Lolita Brayman, September 30, 2019.
- *The New Yorker*: "An Immigration Attorney at the A.C.L.U. On Fighting Trump's Asylum Ban", Jonathan Blitzer, September 17, 2019.

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[i] Congressional Research Service, "Immigration: U.S. Asylum Policy", Andorra Bruno, 2/19/19.
[ii] "In 1968, the United States acceded to the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol). The Protocol incorporated the 1951 United Nations Convention Relating to the Status of Refugees (Convention) . . ." *Id*. at 8. "The Protocol retained other elements of the Convention, including the latter's prohibition on *refoulement* (or forcible return), a fundamental asylum concept." *Id*. "Despite the U.S. accession to the 1967 U.N. Protocol, the INA did not include a conforming definition of a refugee or a mandatory nonrefoulement provision until the enactment of the Refugee Act of 1980." *Id*. at 9.
[iii] Non-refoulement explained by the United Nations Human Rights Office of the High Commissioner.
[iv] Learn more about the MPP program in American Immigration Council's Fact Sheet, as well as what the government says in CBP's MPP Guiding Principles.
[v] Laura Peña, with the American Bar Association (ABA), along with other experts presented testimony before Congress regarding the MPP program in November 2019. ABA, "ABA counsel testifies about concerns with Remain in Mexico immigration policy", November 19, 2019. *See also Chicago Tribune*, "'Remain in Mexico' policy faces internal critiques at House hearing", CQ- Roll Call, Tanvi Misra, November 19, 2019.
[vi] *Reuters*, "When the U.S. puts a border between migrant kids and their caretakers", Kristina Cooke, November 11, 2019.
[vii] According to Human Rights First's website, "Human Rights First has published for the first time its running database tracking kidnappings, attacks and other violence against asylum seekers under the 'Remain in Mexico' policy." The press release goes on to say, "[t]he tracker invites asylum seekers, attorneys, human rights researchers and others to provide information about abuses that researchers can investigate, assess and potentially add to the database. It also has a feature to assist asylum seekers or attorneys to file a formal complaint to the U.S. Department of Homeland Security's Office for Civil Rights and Civil Liberties."
[viii] The ACLU of San Diego and Imperial Counties filed *Doe v. Wolf* regarding the right to counsel in MPP non-refoulement interviews. On January 14, 2020 the Southern District of California federal court certified a proposed class and issued a preliminary injunction in the matter. Read the ACLU of San Diego and Imperial County's Practice Advisory about the case.
[ix] United Nations High Commissioner for Refugees (UNHCR), "State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol", April 2015. *Also see* United Nations Treaty Collection to see participants to the Convention against Torture (CAT) and other Cruel Inhuman or Degrading Treatment or Punishment. UC commonly come to the U.S. from Honduras, Guatemala, and El Salvador. All three countries are participants to the Convention, Protocol, and CAT.
[x] 84 FR 33829, 33835.
[xi] *Al Otro Lado, Inc. v. Wolf*, No. 3:17-cv-02366-BAS-KSC (S.D. Cal.).
[xii] *The Washington Post*, "The cost to become a U.S. citizen is going up 61 percent", Christopher Ingraham, November 13, 2019.
[xiii] On April 29, 2019, there was a Presidential Memorandum directing DHS to change how the agency administers Credible Fear Interviews. The following day, on April 30, 2019, the USCIS Asylum Division updated Lessons Plans making it more difficult to pass Credible Fear Screenings. In July 2019, USCIS issued new guidance to asylum officers regarding internal relocation during Credible Fear screenings. News outlets have also reported on pilot projects "Prompt Asylum Case Review" (PACR) and Humanitarian Asylum Review Process (HARP)which began in October 2019 in El Paso. The ACLU has filed a lawsuit against these programs. Check out the Congressional Research Service's flowchart showing the process adults and families now go through when arriving at the Southern border.
[xiv] AILA, "Featured Issue: Expedited Removal", *AILA Doc. No. 19073000*, November 6, 2019.
[xv] News outlets report the U.S. deported the first individual, a Honduran man, through its agreement with Guatemala on November 22, 2019. DHS also published the July 26, 2019 agreement between the U.S. and Guatemala in the Federal Register on November 20, 2019.

[xvi] 8 U.S.C. § 1158(a)(2)(E).
[xvii] UNHCR, "Statement on new U.S. asylum policy", November 19, 2019.
[xviii] UT v. Barr was filed on January 15, 2020 in the U.S. District Court in Washington, DC.
[xix] A lawsuit, filed in part by Amnesty International, challenges the U.S.'s Safe Third Country Agreement with Canada.