March 17, 2017

FOIA DOCUMENTS RELATED TO REINSTATEMENT

In February 2014, the National Immigration Project of the National Lawyers Guild and the Immigrant Rights Project and Human Rights Project of the American Civil Liberties Foundation filed a Freedom of Information Act (FOIA) request with the Department of Homeland Security (DHS) seeking information pertaining to individuals who receive orders reinstating prior removal, deportation or exclusion orders pursuant to 8 U.S.C. § 1231(a)(5).

In August 2014, U.S. Citizenship and Immigration Services (USCIS) responded to the request with documents that are available here.¹


Through the litigation, ICE produced nearly 9,000 pages of responsive documents. The production consisted mainly of email communications, statistics, training materials, and legal memoranda. Selected highlights of the production are listed on the table of contents on the next page. They include a comprehensive manual on reinstatement law, memoranda addressing custody for individuals in reasonable fear proceedings and the administrative record in a petition for review challenging a reinstatement order, as well as USCIS and ICE training materials.

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Immigration and Customs Enforcement
Office of Detention and Removal Operations (ICE/DRO)
Field Guidance for the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA)

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) was signed into law on December 23, 2008. The TVPRA significantly impacts Department of Homeland Security (DHS) operations at ports of entry, the northern and southern borders of the United States, and in the interior of the United States.

The following field guidance must be used by all ICE/DRO officers and agents when apprehending and/or processing Unaccompanied Alien Children (UAC). DHS is obligated to initiate the changes resulting from the TVPRA on Monday, March 23, 2009.

Definition of an Unaccompanied Alien Child (UAC)

The term “UAC” is defined by section 462(g) of the Homeland Security Act of 2002 (6 USC § 279(g)) as a child who:

(A) has no lawful immigration status in the United States;
(B) has not attained 18 years of age; and
(C) with respect to whom—
   (i) there is no parent or legal guardian in the United States; or
   (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

Age Determination Procedures

TVPRA requires Health and Human Services (HHS), in consultation with DHS, to develop procedures to make prompt age determinations. Once developed, ICE/DRO will implement these new procedures when making age determinations of aliens in ICE/DRO custody. Until these procedures are developed however, ICE/DRO officers and agents will continue to follow the current ICE policy for age determinations dated August 20, 2004 (attached).

Reunification

As of March 23, 2009, ICE/DRO may release a UAC only to a parent or legal guardian who is in possession of documentation supporting that relationship. Other than this and in very limited circumstances where ICE obtained custody of a UAC from a contiguous country apprehended at a land border of POE, ICE/DRO must transfer the custody of all UAC to HHS within the time frames indicated in TVPRA.
ICE Voluntary Departure.

ICE/DRO can no longer offer, as a matter of law, voluntary return or offer voluntary departure to any UAC who is apprehended in the U.S. ICE DRO may however, under limited circumstances, allow a UAC from a contiguous country who is apprehended at a land border or POE to withdraw his or her application for admission if the UAC is properly screened and if return occurs within 48 hours of apprehension.

Consultation Required Prior to Execution of Removal Order.

Prior to executing a removal order, ICE/DRO must ensure that DHS has consulted the Department of State’s Country Reports on Human Rights Practices and the Trafficking in Persons’ Report in assessing whether to repatriate a UAC to a particular country. Copies of the referenced reports will be placed in the UAC A-file.

Expedited Removal/Reinstatement.

UAC are not subject to expedited removal or reinstatement, and if sought to be removed from the U.S., except for UAC from contiguous countries apprehended at a land border or POE and who are permitted to withdraw their application for admission as described in the TVPRA, must be placed in removal proceedings following the issuance of a Notice to Appear.

Screening of UAC within 48 Hours after Apprehension.

TVPRA requires all UAC who are apprehended at the border or POE and are determined to be a national or habitual resident of a country contiguous with the United States, to undergo a screening process prior to repatriation. Following the screening and subsequent agency determinations, certain UAC may be permitted to withdraw their application for admission. If, within 48 hours, the UAC is not permitted to withdraw his or her application for admission, or if an agency determination is not made, the UAC must be placed in removal proceedings and transferred to HHS immediately. Therefore, ICE should not accept the physical custody transfer of UAC who have not first been screened to determine if the UAC may be allowed to withdraw the application.

UAC Screening: A UAC who is a national or habitual resident of a country that is contiguous with the United States (i.e. Canada and Mexico) may be permitted to withdraw the application for admission and/or be voluntarily returned if the apprehending agency determines that:

1. The UAC is able to make an independent decision to withdraw the application for admission to the United States and/or be voluntarily returned to his/her country of nationality or last habitual residence.
   a. The apprehending agency must determine whether the UAC is able to make an independent decision on a case by case basis. However, there are a few factors that the apprehending agency may take into consideration;
      i. UAC 14 years of age and older are presumptively able to make an independent decision.
ii. UAC under the age of 14 are presumptively unable to make an independent decision.

b. The guidelines above do not alleviate the need to determine the ability of the UAC to make an independent decision on a case-by-case basis. These presumptions may be overcome based on a number of factors including, but not limited to, the child’s intelligence, education level, familiarity with the immigration process, and physical and mental state at the time of processing.

2. The UAC does not have a fear of returning to his or her country of nationality or last habitual residence owing to a credible fear of persecution.
   a. CBP will use Form I-770 to provide the UAC with an opportunity to express such a fear of returning. If the UAC indicates a fear or identifying factors indicate a fear of return is likely to exist, then removal proceedings will be initiated under section 240 of the INA and the UAC will be transferred to HHS custody. CBP will refer these cases to U.S. Citizenship and Immigration Services (USCIS), Asylum Office, for a credible fear determination. The TVPRA stipulates that the USCIS Asylum Office has initial jurisdiction over all UAC who indicate a fear of return.

3. The UAC has not been a victim of a severe form of trafficking in persons and there is no credible evidence that the UAC is at risk of being trafficked upon return to his or her country of nationality or last habitual residence.
   a. CBP developed a UAC Screening Addendum to assess the likelihood that a UAC has been a victim of trafficking or is at risk of being trafficked. If the UAC claims to have been a victim, or appears to be at risk, removal proceedings will be initiated under section 240 of the INA and the UAC will be transferred to HHS custody. CBP will refer these cases to (ICE Office of Investigations for further investigation.

When it is determined that the UAC does not meet any of the above criteria, only then can the UAC be processed as a withdrawal or voluntary return. Current policies regarding repatriation, as outlined by local Repatriation Agreements as well as the April 2007 DRO Repatriation of UAC Policy, remain in effect. UAC must be returned to appropriate government officials of contiguous countries during reasonable business hours.

If a UAC does not meet the criteria or if the apprehending agency cannot make a determination within 48 hours of apprehension, then the UAC shall be placed in removal proceedings under section 240 of the INA and immediately transferred to HHS.
New statutorily mandated time frame under which HHS must accept UAC for placement; transfer requirements.

Should a request be made by CBP to transport UAC apprehended by CBP and therefore in the custody of CBP, ICE/DRO will accept custody of the UAC from CBP only after HHS placement and bed space is confirmed. Further, ICE/DRO officers are instructed to only accept custody of a UAC for purposes of transportation to HHS for placement, 1) after the UAC has been screened as required by the TVPRA or 48 hours have passed since the UAC was apprehended, 2) alienage has been determined and the minor has been processed for removal; and 3) HHS has confirmed placement. ICE/DRO should also review the NTA prior to accepting a UAC to confirm that the certificate of service of the NTAs indicates service upon HHS and the UAC in all cases.

Timeline for Transfer of Custody to HHS

Under the terms of the TVPRA, UAC can be broken into two distinct groups: 1) UAC from contiguous countries who are apprehended at a land border or POE and who may be permitted to withdraw their application for admission; and 2) all other UAC encountered by the federal government. Section 235 of the TVPRA establishes two new statutorily-mandated timeframes in which UAC must be transferred to HHS. UAC from contiguous countries must be transferred to HHS immediately upon a determination that the UAC will not be permitted to withdraw their application for admission or 48 hours after arrest, whichever occurs sooner. All other UAC must be transferred to HHS, except for cases of exceptional circumstances, within 72 hours of determining that the child is a UAC. Congress did not provide the same exceptional circumstance for a delay of transferring the first group of UAC.

The volume of UAC likely to require housing by and transportation to HHS is likely to increase significantly. As of March 13, 2009, while HHS has indicated that it does not have the funding to increase available bed space, currently at 1650, HHS intends to request additional funding to increase bed space. HHS must accept all UAC within the new statutorily mandated time frames. In those instances when ICE requests placement from HHS for a UAC apprehended by ICE and in the physical custody of ICE, and while the UAC is awaiting transfer to an appropriate facility, UAC must be held in accordance with the current ICE Hold Room Policy, dated February 29, 2009 (attachment 2). ICE will separate UAC from unrelated adults whenever possible.

Notification of HHS required

TVPRA § 235(b)(2) stipulates that each apprehending department or agency shall notify HHS within 48 hours upon either the apprehension or discovery of a UAC or any claim or suspicion that an alien in custody is under the age of 18.
Section 240 of the Immigration and Nationality Act (INA)

The TVPRA requires, with limited exceptions, that all UAC whom DHS seeks to remove from the United States be placed in removal proceedings under Section 240 of the Immigration and Nationality Act (INA). The removal order of a UAC may not be reinstated, nor as a matter of law may UAC be placed in expedited removal.

Voluntary Departure while Under 240 Proceedings

TVPRA § eliminates the requirement of the UAC to pay for the cost of voluntary departure. Therefore, DRO shall make all necessary travel arrangements for the UAC and shall incur the associated costs.

Special Immigrant Status (SIJ)

SIJ specific consent authority is transferred from DHS to HHS.
Paek v. Att’y Gen., --- F.3d ----, 2015 WL 4393910 (3d Cir. 2015)

1. As with any question of statutory interpretation, a court's analysis begins with the plain language of the statute.

2. In looking for the meaning of statutory language, a court must look to the statutory context in which that language is used and the broader context of the statute as a whole as well as the language itself.

3. It is true that, in the face of statutory ambiguity or uncertainty, a court may have recourse to the legislative history of the measure and the statements by those in charge of it during its consideration by the Congress, however, the court does not resort to legislative history to cloud a statutory text that is clear.

4. Provision of Immigration and Nationality Act (INA), which stated that no inadmissibility waiver was available to “an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence” if the alien had been convicted of aggravated felony since date of such admission, applied to aliens admitted as lawful permanent residents (LPR) regardless of whether such admission was on conditional basis, and thus alien, who was South Korea citizen who had been admitted as conditional LPR, was statutorily ineligible for inadmissibility waiver due to his first-degree robbery conviction in Delaware. 8 U.S.C. § 1182(h); 11 West’s Del. C. § 832(a)(2).

5. When a statute includes an explicit definition, a court must follow that definition, even if it varies from that term's ordinary meaning.

6. The canon against surplusage counsels courts to give effect to every word of a statute and to avoid rendering a statute superfluous, whether in whole or in part.

Barker v. Att’y Gen., --- F.3d ----, 2015 WL 4153672 (3d Cir. 2015)

1. Alien's due process rights were not violated by Immigration Judge's (IJ) failure to sua sponte ask him questions designed to assess his competency; there were no indicia of incompetency that should have triggered greater scrutiny of alien's competency, and in fact alien participated in his own removal proceedings, answered questions asked of him, pursued post-conviction relief in his related criminal proceeding, and submitted an application for asylum. U.S. Const. amend. V.

2. Court of Appeals reviews de novo Board of Immigration Appeals' (BIA) determination of a due process claim in removal proceedings. U.S. Const. amend. V.

3. Due process guarantees aliens in removal proceedings the right to a full and fair hearing that allows them a reasonable opportunity to present evidence on their behalf. U.S. Const. amend. V.

4. An alien in removal proceedings bears burden of showing that his due process rights were violated. U.S. Const. amend. V.
5. Test for competency in immigration proceedings is whether the alien has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and has a reasonable opportunity to examine and present evidence and cross-examine witnesses.

6. Indicia of incompetency, for purposes of immigration proceedings, will always be case-specific, but generally include issues with alien's behavior during proceedings, e.g., an inability to respond to questions, or with alien's medical history.

7. Aliens in removal proceedings are not entitled to the full panoply of constitutional protections afforded to criminal defendants; one of the key differences is that incompetent persons may not be tried in a criminal prosecution, but they may be subject to removal proceedings.

8. Despite Constitution's prohibition of criminal trials of incompetent defendants, criminal defendants are not constitutionally entitled to sua sponte questioning by a judge to ascertain their mental competency in every case; rather, a competency hearing is only required when there is sufficient reason to doubt a criminal defendant's mental competency, and it is constitutional to presume a criminal defendant is competent and to place the burden of proof on him to prove incompetency by a preponderance of the evidence.

9. Framework used by Board of Immigration Appeals (BIA), which presumes an alien is competent unless the alien exhibits indicia of incompetency, satisfies the minimal constitutional protections afforded to aliens in removal proceedings.

Sesay v. Att'y Gen., 787 F.3d 215 (3d Cir. 2015)

1. Under the Immigration and Nationality Act (INA), an asylum applicant must demonstrate either: (1) proof of past persecution, or (2) a well-founded fear of future persecution in his home country on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42).

2. An asylum applicant's well-founded fear of future persecution in his home country on account of race, religion, nationality, membership in a particular social group, or political opinion, without more, entitles the applicant to asylum. 8 U.S.C. § 1101(a)(42).

3. An asylum applicant's demonstration of past persecution can be rebutted by the government if the government establishes by a preponderance of the evidence that the applicant could reasonably avoid persecution by relocating to another part of his or her country or that conditions in the applicant's country have changed so as to make his or her fear no longer reasonable. 8 U.S.C. § 1101(a)(42).

4. On an application for withholding of removal, an applicant must establish a clear probability, that is, that it is more likely than not that his life or freedom would be threatened if he returned to his country, because of his protected class. § 101 et seq., 8 U.S.C. § 1101 et seq.

5. Regardless of whether an asylum applicant demonstrates that he is eligible for relief, he will be deemed inadmissible and ineligible for asylum or withholding of removal if he has
engaged in terrorist activities, which includes the provision of material support for terrorist
1227(a)(4)(B).

6. Where the Board of Immigration Appeals (BIA) relies on an Immigration Judge's (IJ) legal
collections and findings of fact, the appellate court reviews the IJ’s decision and the BIA's
decision, and, in doing so, accepts factual findings if supported by substantial evidence,
which is a deferential standard under which the appellate court upholds the agency's
determination unless the evidence would compel any reasonable fact finder to reach a
contrary result.

7. The appellate court reviews the Board of Immigration Appeals' (BIA) legal determinations
de novo, ordinarily subject to the principles of deference set forth in Chevron..

8. An appellate court does not give Chevron deference to unpublished, single-member Board of
Immigration Appeals (BIA) decisions; at most, the appellate court treats those decisions as
persuasive authority.

9. Actions of asylum applicant, a citizen of Sierra Leone, which included carrying weapons and
ammunition for a rebel group that had been designated as a terrorist organization during that
country's civil war, exceeded a de minimis threshold, and thus constituted material support to
a terrorist group within the meaning of the Immigration and Nationality Act (INA). 8 U.S.C.

10. In isolation, statutory silence may not be conclusive.

11. While an appellate court accords Chevron deference to the Board of Immigration Appeals'
(BIA) interpretations of ambiguity in the Immigration and Nationality Act (INA), the
appellate court does not need to await a precedential decision from the BIA when the issue is
one of unambiguous statutory interpretation. § 101 et seq., 8 U.S.C. § 1101 et seq.

12. Absent a waiver from the Executive Branch, the Immigration and Nationality Act (INA)
precludes asylum or withholding of removal for any alien who provided material support to a
terrorist group, voluntarily or involuntarily. 8 U.S.C. §§ 1158(b)(2)(A)(v),

Chavez-Alvarez v. Att'y Gen., 783 F.3d 478 (3d Cir. 2015)

1. Whether an alien's offense constitutes an aggravated felony, for removal purposes, is a purely

2. The court of appeals reviews legal challenges in immigration cases de novo.

3. When the Board of Immigration Appeals (BIA) issues its own decision on the merits, rather
than a summary affirmance, the court of appeals reviews its decision, not that of the
immigration judge (IJ).
4. The court of appeals may consider the opinion of the immigration judge (IJ), on petition for
review, only insofar as the Board of Immigration Appeals (BIA) deferred to it.

5. Mexican lawful permanent resident (LPR) alien's conviction for forcible sodomy in violation
of the Uniform Code of Military Justice did not constitute an “aggravated felony,” as
required to support alien's removal; the military court, pursuant to its regular practice,
sentenced alien to aggregate term of confinement of 18 months for the five charges and
specifications for which alien was found guilty, and no distinct sentence was apportioned for
sodomy offense, so it was impossible to determine whether the sentence imposed for the
sodomy offense was for term of imprisonment of at least one year. 8 U.S.C. §§

6. When a general sentence is issued by a military tribunal for multiple offenses, it is typically
conjectural what sentence the court-martial would have imposed for one charge in the
absence of another.

7. The mere fact that Congress may not have foreseen all of the consequences of a statutory
enactment is not a sufficient reason for a court to refuse to give effect to its plain meaning.

*Chavez-Alvarez v. Warden York County Prison*, 783 F.3d 469 (3d Cir. 2015)

1. Primary point of reference for justifying alien's confinement during pendency of removal
proceedings must be whether civil detention is necessary to ensure alien's participation in
removal process, and to protect community from danger that he or she poses. 8 U.S.C. §
1226(c).

2. Burdens to alien's liberties outweighed any justification for detaining him without bond more
than one year after removal proceedings had been commenced against him, and thus alien
was entitled to bond hearing to determine whether, on evidence particular to him, it was
necessary to continue to detain him, even though case proceeded in reasonable manner,
where alien's case involved complex issues of law, there was no evidence that alien raised
any of those issues or requested any continuances for purpose of delay, and government had
sufficient time to examine information about alien to assess whether he truly posed flight risk
or presented any danger to community. 8 U.S.C. § 1226(e).

*Shalom Pentecostal Church v. Acting Sec’y U.S. D.H.S.*, 783 F.3d 156 (3d Cir. 2015)

1. Court of Appeals reviews legal conclusions related to standing de novo.

2. Court of Appeals applies de novo review to district court's grant of summary judgment in

3. Alien had standing under Article III to bring action challenging denial by Citizenship and
Immigration Service (CIS) of church's petition on his behalf for special immigrant religious
worker visa, even if alien would not be eligible for adjustment to legal permanent resident
(LPR) status for at least ten years; visa petition process and adjustment of status process were
distinct, alien was only seeking visa, not adjustment of status, alien fell within zone of
interests protected by statute, loss of opportunity to receive visa was itself concrete injury,
and that injury was redressable by judicial action. U.S. Const. art. III, § 2, cl. 1; 8 U.S.C. §§ 1153, 1182(a)(9)(B)(i)(II), 1255.

4. Immigrant religious worker had statutory standing to bring action challenging denial by Citizenship and Immigration Service (CIS) of church's petition for special immigrant religious worker visa on his behalf. 8 C.F.R. § 204.5(c).

5. Even where standing is otherwise satisfied, aggrieved party may be precluded from pursuing relief if interest it seeks to vindicate falls outside zone of interests protected by statute invoked.

6. Zone-of-interests test for determining standing to bring actions under Administrative Procedure Act (APA) is not especially demanding, foreclosing suit only when plaintiff's interests are so marginally related to or inconsistent with purposes implicit in statute that it cannot reasonably be assumed that Congress authorized plaintiff to sue. 5 U.S.C. § 702.

7. Immigration and Nationality Act (INA) authorized alien who engaged in religious work continuously for two years preceding visa application and who met other statutory criteria to qualify for visa as special immigrant religious worker, and thus Citizenship and Immigration Service (CIS) regulation that added requirement that alien have performed work in “lawful immigration status” was invalid as being inconsistent with statutory scheme; INA specifically carved out exception to allow for adjustment of status for religious workers who had engaged in unauthorized employment, and Congress specified in other sections when it intended to require lawful status as prerequisite to grant of certain status or relief. 8 U.S.C. §§ 1101(a)(27)(C)(iii), 1255(k)(2); 8 C.F.R. § 204.5(m)(4), (11).

8. Court should interpret statute so as to give effect to every word of statute wherever possible.

9. When further fact-finding is necessary to resolve issue, court of appeals is not generally empowered to conduct de novo inquiry into matter being reviewed and to reach its own conclusions based on such inquiry.

_Gonzalez-Posadas v. Att'y Gen._, 781 F.3d 677. (3d Cir. 2015)

1. When the Board of Immigration Appeals (BIA) relies on an Immigration Judge's legal conclusions and findings of fact, the Court of Appeals reviews the Immigration Judge's decision and the Board's decision.

2. The Court of Appeals must accept the Board of Immigration Appeals' (BIA) factual findings if supported by substantial evidence on review of a final order of the BIA.

3. An alien seeking withholding of removal bears the burden of proving that he will more likely than not face persecution on account of one of the protected grounds under the Immigration and Nationality Act. 8 U.S.C. § 1231(b)(3)(A).

4. To establish eligibility for withholding of removal based on membership in a particular social group, an applicant must establish both that the group itself is properly cognizable as a social
group within the meaning of the statute, and that his membership in the group is one central reason why he was or will be targeted for persecution. 8 U.S.C. § 1231(b)(3)(A).

5. The Court of Appeals is not free to assume that an alien's past persecution was perpetrated on account of a protected characteristic, such as membership in a particular social group.

6. For a protected characteristic to qualify as one central reason for an alien's persecution, as required for withholding of removal under the Immigration and Nationality Act, it must be an essential or principal reason for the persecution; withholding of removal may not be granted when the characteristic at issue played only an incidental, tangential, or superficial role in persecution. 8 U.S.C. § 1231(b)(3)(A).


8. Substantial evidence supported the Board of Immigration Appeals' (BIA) determination that an alien, a native of Honduras, failed to demonstrate that he was persecuted on account of his sexual orientation, warranting denial of the alien's application for withholding of removal under the Immigration and Nationality Act; while the alien testified of altercations with a local gang that included homophobic slurs and sexual threats, the incidents were focused on extorting money from the alien and coercing him to join the gang, and two rapes committed by the alien's cousin were isolated criminal acts. 8 U.S.C. § 1231(b)(3)(A).

9. To qualify as a pattern or practice for purposes of withholding of removal, the persecution must be systematic, pervasive, or organized. 8 C.F.R. § 1208.16(b)(2).

10. Substantial evidence supported the Board of Immigration Appeals' (BIA) determination that an alien, a native of Honduras, failed to demonstrate that it was more likely than not he would be subjected to future persecution based on his sexual orientation, warranting denial of the alien's application for withholding of removal under the Immigration and Nationality Act; while evidence demonstrated that gay, lesbian, bisexual and transgender (GLBT) persons suffered indignities and discrimination in Honduras, the recent establishment of a special unit in the Honduran attorney general's office to investigate crimes against GLBT individuals and other vulnerable groups undercut any claim that there was a systematic, pervasive, or organized pattern or practice of persecution of GLBT persons in Honduras. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.; 8 C.F.R. § 1208.16(b)(2).

Comité de Apoyo a Los Trabajadores Agrícolas v. Perez, 774 F.3d 173 (3d Cir. 2014)

1. The Court of Appeals reviews challenges based on the Administrative Procedure Act (APA) on a de novo basis, applying the applicable standard of review to the underlying agency decision. 5 U.S.C. § 551 et seq.

2. With regard to administrative agency actions, considerations of ripeness reflect the need to protect agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.
3. When deciding if a case is ripe for adjudication, a court must consider: (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties from withholding judicial consideration.

4. When making a “fitness for review” determination, for purposes of assessing whether a case is ripe for adjudication, a court considers whether the issues presented are purely legal, and the degree to which the challenged action is final, and whether the claims involve uncertain and contingent events that may not occur as anticipated or may not occur at all.

5. Challenge of organizations representing agricultural workers to the Department of Labor's (DOL) use of private employer wage surveys to calculate the prevailing wage for unskilled, temporary foreign workers was ripe for adjudication, even though the DOL had stated that it intended to publish a notice of proposed rulemaking on the calculation of prevailing wages, where the DOL had been using private wage surveys to calculate prevailing wages for years, and the use of private wage surveys had forced United States workers to accept lower wages than that calculated by government surveys or face being replaced by foreign, temporary workers. 20 C.F.R. § 655.10(f).

6. The second prong of ripeness doctrine analysis requires that a court evaluates the hardship that may be imposed on the parties if the court denied judicial review, and determine whether the challenged action has a direct and immediate impact on the parties.

7. When making a shift in policy, an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. 5 U.S.C. § 706(2)(D).

8. A court reviewing an agency's decision must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. 5 U.S.C. § 706(2)(D).

9. A court will set aside an agency's action as arbitrary and capricious if the agency does not provide a reasoned explanation for its change in course. 5 U.S.C. § 706(2)(D).

10. The Department of Labor's (DOL) failure to explain its shift from refusing to consider private employer wage surveys in calculating prevailing wage determinations for unskilled, temporary foreign workers when an applicable governmental wage survey was available to unlimited consideration of employer wage surveys violated the Administrative Procedure Act (APA), where the DOL had admitted that information from governmental wage surveys was the most reliable basis for setting prevailing wages. 5 U.S.C. § 706(2)(D); 20 C.F.R. 655.10(f).

11. The Department of Labor's (DOL) decision to accept private employer wage surveys in calculating prevailing wage determinations for unskilled, temporary foreign workers when an applicable governmental wage survey was available was arbitrary and capricious; the DOL had stated that employer surveys were generally unrealistic, while governmental wage surveys were the most consistent, efficient, and accurate means of determining the prevailing wage rate. 5 U.S.C. § 706(2)(A); 20 C.F.R. § 655.10(f).
12. An agency acts arbitrarily and capriciously if it has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. 5 U.S.C. § 706(2)(A).

13. The Department of Labor's (DOL) calculation of four different prevailing wages, one for each of four skill levels within an occupation, for unskilled, temporary foreign workers was inconsistent with the DOL's own definition of a prevailing wage, and thus was unlawful under the Administrative Procedure Act (APA). 5 U.S.C. § 706(2)(A), (C); 20 C.F.R. § 655.10(b)(2), (f).

Guzman v. Att’y Gen., 770 F.3d 1077 (3d Cir. 2014)

1. Statute is impermissibly retroactive if it takes away or impairs vested rights acquired under existing laws, or creates new obligation, imposes new duty, or attaches new disability, in respect to transactions or considerations already past.

2. Illegal Immigration Reform and Immigrant Responsibility Act's (IIRIRA) stop-time rule did not have impermissible retroactive effect when applied to legal permanent resident's deportable drug offense, committed prior to IIRARA's passage, to prevent him from obtaining cancellation of removal for deportable crime committed after IIRARA's passage, where IIRIRA did not reclassify defendant's offense or change it in any way, alien had no right or ability to seek waiver from deportation when he pled guilty, and alien was ineligible for any form of removal relief when IIRIRA was passed. 8 U.S.C. §§ 1182(c), 1229b(d)(1)(B).

Mahn v. Att’y Gen., 767 F.3d 170 (3d Cir. 2014)

1. Where the Board of Immigration Appeals (BIA) issues a written decision on the merits, Court of Appeals reviews its decision and not the decision of the immigration judge (IJ).

2. Typically, Court of Appeals reviews the Board of Immigration Appeals’ (BIA) legal conclusions de novo subject to the principles of deference set forth in Chevron.

3. While Court of Appeals does not defer to Board of Immigration Appeals' (BIA) parsing of the elements of an underlying crime, it generally accords deference to the BIA's determination that a certain crime involves moral turpitude when that determination is reasonable.

4. Unpublished, single-member Board of Immigration Appeals (BIA) decisions are not entitled to Chevron deference; Court of Appeals accords Chevron deference only to agency action promulgated in the exercise of congressionally-delegated authority to make rules carrying the force of law, and unpublished, single-member BIA decisions are not “promulgated” under the BIA's authority to make rules carrying the force of law.
5. Unpublished, single-member Board of Immigration Appeals (BIA) decisions have no
precedential value, do not bind the BIA, and therefore do not carry the force of law except as
to those parties for whom the opinion is rendered.

6. The hallmark of moral turpitude under statute permitting removal of alien who has been
convicted of crime involving moral turpitude is a reprehensible act committed with an

7. It is the nature of the act itself and not the statutory prohibition of it which renders a crime
one of moral turpitude under statute permitting removal of alien who has been convicted of

8. Court of Appeals applies the categorical approach to assess whether a conviction qualifies as
a crime involving moral turpitude under statute permitting removal of alien who has been
convicted of crime involving moral turpitude, pursuant to which the Court compares the
elements of the statute forming the basis of the defendant's conviction with the elements of
the “generic” crime; in particular, the Court looks to the elements of the statutory offense to
ascertain the least culpable conduct hypothetically necessary to sustain a conviction under the

9. The possibility of conviction for non-turpitudinous conduct, however remote, is sufficient to
avoid removal under statute permitting removal of alien who has been convicted of crime

10. Conviction under Pennsylvania's reckless endangerment statute was not “crime involving
moral turpitude,” under statute allowing removal of aliens convicted of crimes of moral
turpitude; least culpable conduct punishable under Pennsylvania's reckless endangerment
statute was reckless conduct that may place another person in danger of serious bodily injury,
2705.

Hernandez-Cruz v. Att’y Gen., 764 F.3d 281 (3d Cir. 2014)

1. The Court of Appeals does not accord deference to the Board of Immigration Appeals' (BIA)
interpretation of criminal statutes; rather, the court reviews the agency's interpretation of
criminal statutes de novo.

2. It is the nature of the act itself and not the statutory prohibition of it which renders a crime
one of moral turpitude for purposes of finding alien removable. 8 U.S.C. §

3. The Court of Appeals applies the categorical approach to determine whether a conviction
constitutes a crime of moral turpitude rendering alien removable. 8 U.S.C. §

4. When determining whether a conviction constitutes a crime of moral turpitude, as would
render alien removable, the categorical approach requires courts to compare the elements of
the statute forming the basis of the defendant's conviction with the elements of the generic crime, i.e., the offense as commonly understood. 8 U.S.C. § 1182(a)(2)(A)(i)(I).

5. In assessing whether a conviction qualifies as a crime of moral turpitude, as would render alien removable, the court considers hypothetical conduct criminalized under the statute at issue; specifically, the court looks to the elements of the statutory offense to ascertain the least culpable conduct hypothetically necessary to sustain a conviction under the statute. 8 U.S.C. § 1182(a)(2)(A)(i)(I).


7. To sustain a conviction under Pennsylvania child endangerment statute, a defendant must both knowingly endanger the child's welfare and knowingly violate a duty of care. 18 Pa. Cons. Stat. § 4304(a)(1).

8. While Pennsylvania's child endangerment statute requires a knowing mens rea, it criminalizes a broad swath of conduct because it imposes a duty on parents and other caretakers to not risk any kind of harm, not just bodily injury, to a minor child in his or her care. 18 Pa. Cons. Stat. § 4304(a)(1).

9. Pennsylvania's child endangerment statute does not require the actual infliction of physical injury; nor does it state a requirement that the child or children be in imminent threat of physical harm. 18 Pa. Cons. Stat. § 4304(a)(1).


Syblis v. Att'y Gen., 763 F.3d 348 (3d Cir. 2014)

1. While jurisdiction to review removal orders issued against noncitizens convicted of certain crimes is generally precluded by statute, this jurisdiction stripping only applies where the noncitizen is found to be removable on the basis of the criminal conviction. 8 U.S.C. § 1252(a)(2)(C).

2. When Board of Immigration Appeals (BIA) issues its own decision on the merits in a removal proceeding, rather than a summary affirmance, Court of Appeals reviews its decision, not that of the Immigration Judge (IJ).

3. Court of Appeals reviews legal determinations de novo, subject to the principles of deference articulated in Chevron v. Natural Resources Defense Council.
4. Virginia statute prohibiting possession of drug paraphernalia was clearly a law relating to controlled substances, for purposes of statute rendering inadmissible any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a violation of (or a conspiracy or attempt to violate) any law or regulation relating to a controlled substance; Virginia statute made clear that an object was not controlled paraphernalia unless it was in some way linked to controlled substances. 8 U.S.C. § 1182(a)(2)(A)(i)(II); West's V.C.A. § 54.1–3466.

5. Given that there was no question that he was removable, alien who failed to demonstrate, by a preponderance of the evidence, that his Virginia conviction for possession of drug paraphernalia did not involve a federally-defined controlled substance, thus failed, as a matter of first impression in the Circuit, to satisfy his burden of proof to establish his eligibility for discretionary cancellation of removal; alien only demonstrated that the record was inconclusive, in that his conviction might or might not have been related to a federally controlled substance. 8 U.S.C. § 1182(a)(2)(A)(i)(II); West's V.C.A. § 54.1–3466.


8. As a matter of first impression in the Circuit, a record of conviction that is inconclusive as to whether it involved a federally-controlled substance does not satisfy an alien's burden of demonstrating eligibility for discretionary cancellation of removal. 8 U.S.C. § 1182(a)(2)(A)(i)(II).

9. A burden of proof by a preponderance of the evidence requires trier of fact to believe that the existence of a fact is more probable than its nonexistence, and thus establishes which party loses if the evidence is closely balanced.

Mayorga v. Att'y Gen., 757 F.3d 126 (3d Cir. 2014)

1. The question of whether alien's conviction was for a crime involving moral turpitude that rendered him inadmissible for life was a question of law over which Court of Appeals had jurisdiction. 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1252(a)(1).

2. Court of Appeals reviews constitutional and legal questions in immigration proceedings de novo, though subject to the principles of Chevron deference. 8 U.S.C. § 1252(a)(1).

3. Alien's challenge to immigration judge's (IJ) determination that he had been convicted of a crime involving moral turpitude presented Article III case or controversy, despite the fact that IJ ruled he was inadmissible, and therefore removable, both for having been convicted of crime involving moral turpitude and for being present in United States without having been admitted or paroled, since alien, a native of El Salvador, faced lifetime ban on reentry for
having been convicted of crime involving moral turpitude, as opposed to ten-year reentry bar
for being present in the United States without having been admitted or paroled, and this was
an actual injury traceable to the IJ’s decision and redressable by a favorable decision from the

4. It is the nature of the act itself and not the statutory prohibition of it which renders a crime
one of moral turpitude, for purposes of Immigration and Nationality Act’s (INA) bar on

5. In deciding whether an alien's criminal conviction is for a crime involving moral turpitude,
rendering alien inadmissible, court applies categorical approach, under which court looks to
the elements of the statutory offense, not to the specific facts, reading the applicable statute
to ascertain the least culpable conduct necessary to sustain a conviction under the statute. 8

6. Alien’s prior conviction for engaging in the unlicensed business of firearms dealing was not
categorically a “crime involving moral turpitude,” as would have rendered him inadmissible
for life, since the crime alien, a native of El Salvador, was convicted of was a
regulatory/licensing offense that could have been committed unintentionally. 8 U.S.C. §

7. Remand to Board of Immigration Appeals (BIA) was not warranted after Court of Appeals
reversed BIA’s decision affirming immigration judge’s (IJ) opinion that alien, a native of El
Salvador, was convicted of crime involving moral turpitude when he pled guilty to engaging
in the unlicensed business of firearms dealing: although BIA provided only cursory
discussion of whether the firearms offense was a crime involving moral turpitude, BIA
recognized the issue and there was no indication BIA decided not to consider it, instead, the
best interpretation was that the BIA merely adopted the IJ’s reasoning, which was not

8. When the Board of Immigration Appeals (BIA) adopts an immigration judge’s (IJ) reasoning
without significantly adding to it, Court of Appeals may review the IJ’s reasoning.

*Parra-Rojas v. Att’y Gen.*, 747 F.3d 164 (3d Cir. 2014)

1. Court of Appeals exercises plenary review over Board of Immigration Appeals’ (BIA) legal
conclusions, recognizing that BIA’s interpretation of Immigration and Nationality Act (INA)
is entitled to deference. 8 U.S.C. § 1252.

2. Alien need not be charged with or convicted of any criminal offense in order to be deemed

3. In context of immigration law, “to enter” is term of art referring to alien crossing United

4. To be held inadmissible for having “encouraged, induced, assisted, abetted, or aided any
other alien to enter or to try to enter the United States,” individual must have performed one
of these actions with respect to alien's actual entry into United States. 8 U.S.C. § 1182(a)(6)(E)(i).

5. Alien was not rendered ineligible for adjustment of status based on inadmissibility due to his conviction for bringing in and harboring aliens, where there was no evidence that alien performed any act encouraging, facilitating, or otherwise relating to smuggled aliens' entry into United States, no indication that he knew or had contact with aliens prior to transporting them after they had already been dropped off inside United States, and no evidence that he provided any financial or other assistance to aliens he transported prior to their entry into country. 8 U.S.C. §§ 1182(a)(6)(E)(i), 1324(a)(2)(B)(ii).

**Cadapan v. Att'y Gen.**, 749 F.3d 157 (3d Cir. 2014)

1. Court of Appeals lacked jurisdiction, on review of removal order, over alien's argument that because he was never admitted to the United States, Board of Immigration Appeals (BIA) erred in ordering him removed as an alien who had been admitted to the U.S.; claim was unexhausted, since alien had never raised it before the Immigration Judge (IJ) or the BIA. Immigration and Nationality Act, §§ 237(a)(2)(A)(iii), 242(d)(1), 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1252(d)(1).


3. Where Board of Immigration Appeals (BIA) had issued its own opinion, Court of Appeals reviewed its decision rather than that of immigration judge (IJ), but Court reviewed decision of IJ to extent that BIA deferred to or adopted IJ's reasoning.


**Louisiana Forestry Ass'n Inc. v. Secretary U.S. Dep't of Labor**, 745 F.3d 653 (3d Cir. 2014)

1. Employer associations' appeal of summary judgment in favor of Department of Labor (DOL) remained ripe despite DOL's stay of challenged regulation governing calculation of minimum wage that United States employers had to offer to recruit unskilled, non-agricultural foreign workers as part of H-2B visa program; case involved facial and purely legal challenge to final administrative rule, Congressional appropriations ban that prompted stay had been lifted, and thus rule was expected to be implemented swiftly and with direct and foreseeable impact, and there was no institutional interest in delay. 5 U.S.C. § 704; 20 C.F.R. § 655.10.
2. Court of Appeals reviews a district court's grant of summary judgment in a case brought under the Administrative Procedure Act (APA) de novo, applying the applicable standard of review to the underlying agency decision. 5 U.S.C. § 706(2)(A), (C)–(D).

3. Employer associations did not waive argument on appeal that Department of Labor (DOL) lacked statutory authority to issue regulation governing minimum wage that United States employers had to offer to recruit unskilled, non-agricultural foreign workers as part of H–2B visa program, even if associations did not challenge DOL’s authority during administrative rulemaking process, because exhaustion of administrative remedies was not required for challenge involving only statutory construction, for which there was no need for agency to develop factual record or apply its expertise. 20 C.F.R. § 655.10.

4. Department of Homeland Security's (DHS) interpretation of Immigration and Nationality Act (INA) as permitting it to issue regulation requiring H–2B visa petitioners to first obtain temporary labor certification from Department of Labor (DOL) was entitled to Chevron deference; DHS promulgated regulation pursuant to authority delegated to it by Congress to administer immigration laws generally, and to specifically regulate conditions for admission of unskilled, non-agricultural foreign workers under H–2B program, and to determine H–2B petitions after consultation with other appropriate agencies. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(a), (c); 6 U.S.C. §§ 202, 271(b); 8 C.F.R. § 214.2(h)(6)(iii); 20 C.F.R. § 655.10.

5. Administrative implementation of a particular statutory provision qualifies for Chevron deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.

6. Immigration and Nationality Act (INA) was ambiguous as to identity of agency with which Department of Homeland Security (DHS) was permitted to consult, and as to what consultation was permissible, in connection with DHS’s determination of United States employer's H–2B visa petition for unskilled, non-agricultural foreign workers, and thus DHS regulation requiring employer to obtain temporary labor certification from Department of Labor (DOL) before applying for H–2B visa was entitled to Chevron deference provided that it was reasonable policy choice. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1); 8 C.F.R. § 214.2(h)(6)(iii); 20 C.F.R. § 655.10.

7. Department of Homeland Security (DHS) reasonably interpreted Immigration and Nationality Act (INA) provision charging it with administration of H–2B visa program as permitting it to condition its grant of H–2B petition on Department of Labor's (DOL) grant of temporary labor certification, and thus DOL lawfully promulgated regulation, pursuant to grant of authority from DHS, to govern minimum wage United States employers had to offer to recruit unskilled, non-agricultural foreign workers under H–2B program; INA directed DHS to consult with appropriate agency in determining petition and DOL had institutional expertise in labor matters, and DHS gave DOL only as much rulemaking authority as needed to carry out consultative role. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(b), 1184(c)(1); 8 C.F.R. § 214.2(h)(6)(iii); 20 C.F.R. § 655.10.
8. When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent.

9. Agency delegates its authority when it shifts to another party almost the entire determination of whether a specific statutory requirement has been satisfied, or where the agency abdicates its final reviewing authority.

10. Where Congress has entrusted a federal agency with broad discretion to permit or forbid certain activities, court will uphold the agency's conditioning of its grant of permission on the decision of another entity, such as a state, local, or tribal government, so long as there is a reasonable connection between the outside agency's decision and the federal agency's determination.

11. Normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.

12. Agency's action in promulgating standards pursuant to informal rulemaking procedures under Administrative Procedure Act (APA) may be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 553.

13. Regulation promulgated to informal rulemaking procedures of Administrative Procedure Act (APA) is arbitrary and capricious only if the agency relied on facts other than those intended by Congress, did not consider an important aspect of the issue confronting the agency, provided an explanation for its decision which runs counter to the evidence before the agency, or is entirely implausible. 5 U.S.C. § 553.

14. Purpose of Administrative Procedure Act (APA) requirement that agency publish general notice of a proposed rule in the Federal Register is to give the public an opportunity to participate in the rulemaking process and to enable the agency to educate itself before establishing rules and procedures which have a substantial impact on those regulated. 5 U.S.C. § 553(b)(2), (3).

15. In evaluating an argument that an agency failed to satisfy the public notice requirement of Administrative Procedure Act (APA) with respect to proposed rulemaking, court must determine whether the notice given was sufficient to fairly apprise interested parties of all significant subjects and issues involved. 5 U.S.C. § 553(b)(2), (3).

16. Department of Labor (DOL) satisfied Administrative Procedure Act (APA) public notice requirements with respect to legal authority for, and description of issues involved in, proposed regulation governing minimum wage United States employers had to offer to recruit unskilled, non-agricultural foreign workers under H–2B visa program; DOL expressly identified regulatory and statutory bases of its authority to issue wage rule, and it explained rule was needed to ensure H–2B workers did not adversely affect United States workers and was required to bring wage-calculation methodology into compliance with court order. 5 U.S.C. § 553(b)(2), (3); 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6); 20 C.F.R. § 655.10.
17. Department of Labor (DOL) satisfied Administrative Procedure Act (APA) requirement to consider factors relevant to proposed regulation governing minimum wage United States employers had to offer to recruit unskilled, non-agricultural foreign workers under H–2B visa program; DOL considered potential that regulation would cause employers to experience higher labor costs as part of DOL’s balancing of interest in assuring adequate labor force against interest in protecting citizens’ jobs, which properly included potential of adverse effect on wages of citizens in jobs for which foreign workers were sought. 5 U.S.C. § 553; 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(iii)(A); 20 C.F.R. § 655.10.

18. To satisfy Administrative Procedure Act (APA) requirement that an agency consider factors relevant to the rule in question, agency need only demonstrate that it has considered the relevant factors brought to its attention by interested parties during the course of the rulemaking, and that it has made a reasoned choice among the various alternatives presented. 5 U.S.C. § 553.

19. Department of Labor (DOL) satisfied Administrative Procedure Act (APA) requirement to provide reasoned analysis, supported by evidence, for proposed regulation governing minimum wage United States employers had to offer to recruit unskilled, non-agricultural foreign workers under H–2B visa program; DOL responded to comments concerning variety of topics and devoted entire section of final rule to discussion of the 300 comments submitted, and DOL examined relevant data and articulated satisfactory explanation for its action, including rational connection between facts found and choice made. 5 U.S.C. § 553; 8 U.S.C. § 1101(a)(15)(H)(ii)(b); 8 C.F.R. § 214.2(h)(6)(iii)(A); 20 C.F.R. § 655.10.

20. Agency need not address every comment it receives during informal rulemaking procedures under Administrative Procedure Act (APA), rather, agency’s notice of proposed rulemaking need only show what major issues of policy were ventilated by the informal procedures and why the agency reacted to them as it did. 5 U.S.C. § 553.

21. Challenge to agency action on grounds that it is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, necessarily entails a firsthand judicial comparison of the claimed excessive action with the pertinent statutory authority. 5 U.S.C. § 706(2)(C).


Galarza v. Szaleczyk, 745 F.3d 634 (3d Cir. 2014)

1. To establish municipal liability under § 1983, plaintiff must demonstrate: (1) that he was deprived of rights, privileges or immunities secured by the Constitution and laws, and (2) that this deprivation was caused by an official government policy or custom. 42 U.S.C. § 1983.

2. Language in federal regulation dealing with immigration detainers, which provided that, upon determination by federal officer to issue such a detainer to local government agency for detention of alien or suspected alien, such agency “shall maintain custody of the alien for a period not to exceed 48 hours,” had to be interpreted, not as mandatory command that
deprived agency of any discretion whether to detain alien, but merely as indicating that, if individual was held in custody pursuant to detainer, any such detention could not exceed 48 hours; such a construction was in keeping with other provisions of regulation, which described immigration detainers as serving to “advise” other agencies and as being in nature of “requests,” and also foreclosed any argument that the regulation violated anti-commandeering doctrine of the Tenth Amendment. U.S. Const. amend. X; 8 C.F.R. § 287.7(a, d).

3. In deciding whether immigration detainer issued to local officials for detention of arrestee suspected of being an illegal alien was mandatory or permissive in nature, and whether local officials had any discretion whether to comply with detainer, court could consider policy statements of Immigration and Customs Enforcement (ICE) and of its predecessor, the Immigration and Naturalization Service (INS), as having persuasive weight. 8 C.F.R. § 287.7.

4. When confronted with two plausible interpretations of statute, one which could require court to interpret statute as unconstitutional and one which poses no constitutional problems, court is obliged to adopt the latter interpretation, unless this construction is plainly contrary to intent of Congress.

5. Tenth Amendment prohibits the federal government from commanding state government agencies to imprison persons of interest to federal officials. U.S. Const. amend. X.

6. All powers not explicitly conferred to the federal government are reserved to the states. U.S. Const. amend. X.

7. Any law that commandeers the legislative processes and agencies of the states by directly compelling them to enact and enforce a federal regulatory program is beyond the inherent limitations on federal power. U.S. Const. amend. X.

Fei Yan Zhu v. Att’y Gen., 744 F.3d 268 (3d Cir. 2014)

1. The denial of a motion to reopen is reviewed for an abuse of discretion; thus, the ultimate decision by the Board of Immigration Appeals (BIA) is entitled to broad deference, and will not be disturbed unless it is found to be arbitrary, irrational, or contrary to law, and the BIA’s evidentiary rulings are reviewed deferentially. 8 U.S.C. § 1252(a)(1); 8 C.F.R. § 1003.2.

2. To fulfill the requirement of meaningfully considering the evidence and arguments that an alien presents, the Board of Immigration Appeals (BIA) must provide an indication that it considered such evidence, and if the evidence is rejected, an explanation as to why it was rejected; this does not mean that the BIA is required to expressly parse each point or discuss each piece of evidence presented, but it may not ignore evidence favorable to the alien.

3. Although failure to authenticate documents from foreign sources does not result in automatic exclusion in an immigration proceeding, an unsuccessful effort to obtain such a certification does not excuse the proponent of the document from providing other grounds on which the Board of Immigration Appeals (BIA) could find that a document is what it purports to be;
proponents of evidence have an obligation to lay a foundation from which a factfinder can conclude the evidence is what it purports to be and that it is trustworthy. 8 C.F.R. § 1287.6.

4. Asylum applicants cannot always reasonably be expected to have an authenticated document from an alleged persecutor.

5. Although the Federal Rules of Evidence do not apply to immigration proceedings, evidence is admissible if it is probative and its use is fundamentally fair so as not to deprive the alien of due process. U.S. Const. amend. V.

6. In an immigration proceeding, exclusion of evidence is exceptional; nonetheless, the Board of Immigration Appeals (BIA) can reject evidence that it finds to be untrustworthy or irrelevant and can accept evidence that has significant indicia of reliability.

7. In an immigration proceeding, to authenticate documents from a foreign source, the proponent could provide information concerning how the document was obtained, identify the source of the information contained in the document, or show that there are consistencies between the information contained in the otherwise unauthenticated document and authenticated documents, a proponent could offer an expert to testify about these topics and others, such as the use of government seals or the presence of official signatures with which the expert is familiar, and the proponent could offer forensic testing results or evidence from the United States Department of State concerning foreign documents. 8 C.F.R. § 1287.6.

8. In an immigration proceeding, the burden to make a showing of authenticity of documents from a foreign source, as well as relevance, rests with the proponent of the document, and the Board of Immigration Appeals (BIA) is not required to conduct an independent examination of a document where the proponent has provided no basis from which it could find the document is authentic or decipher its relevance; thus, if a proponent fails to make such a showing, then it is within the BIA's discretion to decline to rely on such evidence, and if such a showing is made, then the BIA must consider the evidence. 8 C.F.R. § 1287.6.

9. Opinion of Board of Immigration Appeals (BIA) in denying Chinese alien's motion to reopen her removal proceedings, based on alien's failure to show changed country conditions, did not demonstrate that BIA reviewed and considered all of alien's evidence, necessitating remand of case for further proceedings.

10. Board of Immigration Appeals (BIA) did not abuse its discretion in discounting expert's opinion that had been proffered to authenticate documents, on motion by alien, citizen of China, to reopen her removal proceedings, where expert did not provide any information concerning how or from whom the documents had been obtained, other than saying that she received those documents from alien's counsel, and she did not provide any statements to show that she was familiar with official seals or serial numbers used by purported sources of those documents such that factfinder could determine that document came from entity associated with seal. 8 C.F.R. § 1287.6.

11. Remand was required for Board of Immigration Appeals (BIA) to give full consideration to annual reports of Congressional–Executive Commission on China (CECC), United States Department of State's May 2007 “China: Profile of Asylum Claims and Country Conditions,”
and prior State Department reports, since those reports materially bore on claim by alien, citizen of China, BIA had duty to consider material evidence and explain why it did or did not support position of party, and it appeared that BIA considered only parts of them.

*Bautista v. Atty Gen.*, 744 F.3d 54 (3d Cir. 2014)

1. Where the Board of Immigration Appeals (BIA) issues a written decision on the merits in removal proceedings, the Court of Appeals reviews its decision and not the decision of the immigration judge (IJ). 8 U.S.C. § 1252(a)(1).

2. Under categorical approach for determining if a state conviction came within Immigration and Nationality Act (INA) definition of aggravated felony as including a federal or state offense described in the federal arson statute, alien's conviction under New York law for attempted third-degree arson did not qualify as an aggravated felony, so as to make alien ineligible for cancellation of removal, because New York arson statute under which alien was convicted lacked the jurisdictional element that was a critical and substantive element of arson under federal statute; New York statute defining third-degree arson as intentionally damaging a building or vehicle by starting a fire or causing an explosion contained no jurisdictional element requiring that object of the arson be used in interstate commerce. 8 U.S.C. §§ 1101(a)(43), 1229b; 18 U.S.C. § 844(i); McKinney's Penal Law § 150.10.

3. Under the categorical approach for determining whether a state conviction is an aggravated felony under the Immigration and Nationality Act (INA), the court of appeals generally compares the elements provided by the federal law to the conduct and state statute of conviction, and essentially assesses whether the state statute and the conduct actually punished by the conviction amounts to a felony punishable under the corresponding federal statute; as such, the purpose of the categorical approach is to sort out which state offenses are properly included within the substance of a federal statute or generic offense and which are not. 8 U.S.C. § 1101(a)(43).

4. In certain, limited circumstances, a “modified categorical approach” for determining whether a state conviction is an aggravated felony under the Immigration and Nationality Act (INA) may be appropriate, where a state statute contains several different crimes, each described separately; in such a case, a court may determine which particular offense the noncitizen was convicted of by examining a limited set of documents from the record of conviction. 8 U.S.C. § 1101(a)(43).

5. The modified categorical approach for determining whether a state conviction is an aggravated felony under the Immigration and Nationality Act (INA) acts not as an exception, but instead as a tool to the implementation of the categorical approach, and it retains the categorical approach's basic method, comparing the conviction's elements with the generic offense's; this approach, therefore, does not invite inquiry into the facts underlying the conviction. 8 U.S.C. § 1101(a)(43).

6. For purposes of the Immigration and Nationality Act (INA) definition of the term aggravated felony as including a federal or state offense “described in” the federal arson statute, a state arson conviction will only be described in and punishable under the federal arson statute if
the state statute includes an element requiring that the object of the arson be actively used in interstate commerce. 8 U.S.C. § 1101(a)(43); 18 U.S.C. § 844(i).

*Eid v. Thompson,* 740 F.3d 118 (3d Cir. 2014)

1. In cases reviewing final administrative decisions under the Administrative Procedure Act (APA), the court of appeals review the district court's summary judgment decision de novo, while applying the appropriate standard of review to the administrative agency's decision. 5 U.S.C. § 706(2)(A).


3. Only a complaint that states a plausible claim for relief survives a motion to dismiss for failure to state a claim.

4. Alien who entered into prior marriage for sole purpose of obtaining immigration benefit of permanent residency did so for purpose of evading immigration laws and, thus, was ineligible for adjustment of status upon entering into second, bona fide marriage. Immigration and Nationality Act, § 204(c), 8 U.S.C. § 1154(c).

5. The court of appeals will defer to the reasonable interpretation by the Board of Immigration Appeals (BIA) of ambiguous provisions of the Immigration and Nationality Act (INA).

6. Under the familiar Chevron analysis, in determining the level of deference owed by a court to an administrative agency's interpretation of a statute, the court asks first whether Congress has directly spoken to the precise question at issue; if so, courts, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

7. Under Chevron, if the statute is silent or ambiguous with respect to the question at issue, a court interpreting a statute gives controlling weight to the administrative agency's interpretation of the statute unless it is arbitrary, capricious, or manifestly contrary to the statute.

8. A court's review of a statute for ambiguity must begin with the text of the statute.

9. A marriage entered into solely to obtain immigration benefits not otherwise available without the marriage has as its purpose the evasion of immigration laws, which triggers the statutory bar against preference status on the basis of a subsequent bona fide marriage. Immigration and Nationality Act, § 204(c), 8 U.S.C. § 1154(c).

10. Alien's withdrawal of his application for permanent residency, which was based on prior sham marriage, did not amount to a timely retraction or recantation of a false statement, for purpose of alien's subsequent petition for adjustment of status based on his later bona fide marriage, where the withdrawal occurred only after the application had been approved and alien and his citizen spouse were questioned about the legitimacy of their marriage by immigration officials. Immigration and Nationality Act, § 204(c), 8 U.S.C. § 1154(c).
11. Removal of an alien cannot violate the Eighth Amendment prohibition against cruel and unusual punishments because it is not a criminal punishment. U.S. Const. amend. VIII.

12. Both aliens who are inadmissible based upon an attempted fraud in connection with immigration benefits and those who are inadmissible based completed frauds in connection with immigration benefits are equally entitled to seek a discretionary waiver of inadmissibility, and thus, the statute permitting such waivers did not violate equal protection. U.S. Const. amend. V; Immigration and Nationality Act, § 237(a)(1)(H), 8 U.S.C. § 1227(a)(1)(H).

*Orabi v. Att’y Gen.*, 738 F.3d 535 (3d Cir. 2014)

1. One court may take judicial notice of the contents of another court’s docket.

2. On petition in Third Circuit for judicial review of order for removal of alien, citizen of Egypt, record of Second Circuit was controlling regarding documents received and matters affecting alien’s appeal of his sentence after he had been convicted of aggravated felonies of conspiracy to commit fraud in connection with access devices, possession of counterfeit access devices, possession of counterfeit and forged checks, and aggravated identity theft, absent any proof of actions, documents, affidavits, or similar submissions that might have contradicted that record. 8 U.S.C. §§ 1101(a)(43)(R), 1227(a)(2)(A)(iii).

3. In an immigration case, questions of law are reviewed de novo, but the Court of Appeals will not disturb the credibility determination and findings of fact made by an immigration judge (II) if they are supported by reasonable, substantial, and probative evidence on the record considered as a whole.

4. Issue of whether alien’s criminal conviction was final for immigration purposes despite the pendency of his appeal of that conviction was a question of law subject to plenary review.


6. Conviction of alien, citizen of Egypt, of aggravated felonies of conspiracy to commit fraud in connection with access devices, possession of counterfeit access devices, possession of counterfeit and forged checks, and aggravated identity theft would not attain sufficient degree of finality for immigration purposes until direct appellate review of conviction had been exhausted or waived; elimination of finality requirement in case of deferred adjudications under Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) did not disturb longstanding finality rule for direct appeals. 8 U.S.C. § 1101(a)(48)(A).

7. The Court of Appeals does not retain jurisdiction for immigration purposes when a collateral appeal is taken from a criminal judgment adverse to a petitioner. 8 U.S.C. § 1101(a)(48)(A).

8. A conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived.
Rachak v. Att’y Gen., 734 F.3d 214 (3d Cir. 2013)

1. To fall within the jurisdiction for a court to review a final order of removal, an issue must be either a purely legal inquiry or raise a colorable claim that a constitutional violation has occurred. 8 U.S.C. §§ 1227(a)(2)(B)(i), 1252(a)(2)(D).

2. The Court of Appeals had jurisdiction to review whether alien was statutorily eligible for cancellation of removal, as the issue involved a purely legal question concerning the operation of the stop-time rule. 8 U.S.C. §§ 1227(a)(2)(B)(i), 1229b(d)(1)(B), 1252(a)(2)(D).

3. The decision of an immigration judge to grant a continuance in the removal of a criminal-alien was discretionary and did not raise a constitutional claim or question that would support appellate jurisdiction in the Court of Appeals. 8 U.S.C. § 1252(a)(2)(D).

4. The denial of a motion for a continuance of removal is discretionary.

5. Conviction of alien, a native of Morocco, for possession of marijuana terminated the accrual of continuous residence, for purposes of cancellation of removal, even if alien had been eligible for a waiver to waive the inadmissibility of the conviction as a violation of state law relating to a controlled substance, where alien did not apply for this waiver. 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1182(h), 1229b(a)(2), 1229b(d)(1)(B).


Al-Sharif v. U.S. Citizenship and Immigration Services, 734 F.3d 207 (3d Cir. 2013)

1. Precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts the court of appeals on a course that is sure error.

2. Unworkable precedent may be overturned, especially if the precedent is particularly recent and has not generated any serious reliance interests, or if the precedent has sustained serious erosion from recent decisions.

3. When a statute’s language is plain, the sole function of the courts, at least where the disposition required by the text is not absurd, is to enforce it according to its terms.

4. An offense that involves fraud or deceit in which the loss to the victim exceeds $10,000 is an “aggravated felony,” within the meaning of the Immigration and Nationality Act (INA) provision listing several categories of offenses that are considered aggravated felonies for immigration purposes, regardless of whether the offense also meets the requirements of some other subparagraph of the same INA provision; overruling Nugent v. Ashcroft, 367 F.3d 162. 8 U.S.C. § 1101(a)(43)(M)(i).

5. Lawful permanent resident (LPR) alien’s prior conviction for conspiracy to commit wire fraud qualified as “aggravated felony” under the Immigration and Nationality Act (INA); the offense clearly involved fraud or deceit and the alien stipulated in his plea agreement that he
had caused a loss in excess of the $10,000 statutory threshold for such fraud to be considered an aggravated felony. 8 U.S.C. § 1101(a)(43)(M)(i).

6. The 1996 amendment to the Immigration and Nationality Act (INA), which reduced the statutory loss threshold to $10,000 for crimes involving fraud or deceit to be considered an "aggravated felony," applied retroactively to lawful permanent resident (LPR) alien's 1993 conviction for conspiracy to commit wire fraud, for purpose of alien's application to the United States Citizenship and Immigration Services (USCIS) for citizenship, which was denied in 2009. 8 U.S.C. § 1101(a)(43)(M)(i).

7. The rule of lenity requires courts to construe any lingering ambiguities in deportation statutes in favor of the alien.

*Verde-Rodriguez v. Att'y Gen.*, 734 F.3d 198 (3d Cir. 2013)


2. Thirty-day time limit on petitions for review of final orders of removal entered by the Board of Immigration Appeals (BIA) was not altered by provision of the Immigration and Nationality Act (INA) indicating that nothing in preceding subparagraphs limiting or eliminating judicial review could be construed as precluding review of constitutional claims or questions of law raised in petition for review filed in accordance with provisions of that statute; 30-day time limit, as limitation imposed by subsequent subsection of statute at issue and not by preceding subparagraphs, applied regardless of whether alien raised factual, legal, or constitutional claims in his or her petition for review. 8 U.S.C. § 1252(a)(2)(D), (b)(1).

3. Thirty-day time limit on petitions for review of final orders of removal entered by the Board of Immigration Appeals (BIA) ran from date that original order of removal was entered, and was not restarted, following alien's removal and reentry into the United States, by reinstatement of original removal order; mere fact that alien's petition to obtain review of removal order was filed within 30 days of its reinstatement did not render his petition timely. 8 U.S.C. § 1252(b)(1).

4. Suspension Clause did not necessitate the Court of Appeals' exercise of jurisdiction over habeas petition filed by alien who reentered the United States after being removed to Mexico, and who belatedly sought to challenge removal order following its reinstatement, though 30-day time limit on petitions for review was not in effect when alien was originally removed; no explanation was provided why alien could not have filed petition for review within 30 days following enactment of legislation that imposed this 30-day time limit. U.S. Const. art. I, § 9, cl. 2.; 8 U.S.C. § 1252(b)(1).

5. Claims raised in alien's habeas petition regarding process afforded to him at his removal hearing directly challenged lawfulness of removal order and were intertwined with decision to remove him to such an extent that the Court of Appeals had to conclude that alien's petition challenged order of removal, such that the Court could not exercise jurisdiction over habeas petition as challenging something other than order of removal. 8 U.S.C. § 1252(a)(5).
Taveras v. Att’y Gen., 731 F.3d 281 (3d Cir. 2013)

1. Grant of cancellation of removal only cancelled alien's removal in first removal proceeding, and alien's drug conviction, which served as a basis for removal in that earlier proceeding, could constitute a basis for ineligibility for adjustment of status and waiver of inadmissibility in a subsequent removal proceeding. Immigration and Nationality Act, §§ 212(h), 240A(a), 245(a)(2), 8 U.S.C. §§ 1182(h), 1229b(a), 1255(a)(2).

2. Adjustment of status under Immigration and Nationality Act (INA) serves to allow an alien who is already physically located in the United States after inspection and admittance or parole to obtain lawful permanent resident status while remaining within the United States without having to go abroad to obtain an immigrant visa at a United States consulate. Immigration and Nationality Act, § 245(a), 8 U.S.C. § 1255(a).


4. Immigration and Nationality Act (INA) subsection providing that legal permanent resident “shall not be regarded as seeking an admission into the United States for purposes of the immigration laws” does not apply to an applicant for adjustment of status in a removal proceeding: “admission” to United States, as used in INA, involves physical entrance into the country, which is inapposite to adjustment of status in removal proceedings, a procedure that is structured to take place entirely within the United States. Immigration and Nationality Act, § 101(a)(13)(A), (a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(A), (a)(13)(C)(v).

Castillo v. Att’y Gen., 729 F.3d 296 (3d Cir. 2013)

1. Court of Appeals reviews the Board of Immigration Appeals' (BIA) legal determinations de novo, subject to the principles of deference articulated in Chevron.

2. Under the Chevron doctrine, the Court of Appeals, as well as the agency, must give effect to the unambiguously expressed intent of Congress; on the other hand, if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute.

3. In its interpretation of the Immigration and Nationality Act (INA), the Board of Immigration Appeals (BIA) should be afforded Chevron deference as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

4. Where an agency interpretation reflects an impermissible construction of a statute, Court of Appeals will not defer to the agency's view.

5. Court of Appeals owes no deference to the administrative interpretation of a state criminal statute.

6. The reasonableness of an agency's statutory interpretation is dependent in part on the consistency with which the interpretation is advanced.
7. Remand of removal proceedings was required to allow Board of Immigration Appeals (BIA) to determine whether New Jersey judgment issued against alien, finding him guilty of disorderly persons offense of shoplifting, constituted a “conviction” for a “crime” that could give rise to immigration consequences, and to provide an explicit justification for its answer, where BIA had not yet attempted to reconcile, reject, or otherwise explain its erratic, irreconcilable interpretations of what constitutes a “conviction” for a “crime.” 8 U.S.C. §§ 1101(a)(48)(A), 1227(a)(2)(A)(ii); N.J.S. 2C:20-11.

8. Agencies are not free, under Chevron, to generate erratic, irreconcilable interpretations of their governing statutes.

9. Consistency over time and across subjects is a relevant factor under Chevron when deciding whether the agency's current interpretation is reasonable.

10. While it can change its own policies, the Board of Immigration Appeals (BIA) acts arbitrarily if it does so without proffering a principled reason or explanation.

Rojas v. Att’y Gen., 728 F.3d 203 (3d Cir. 2013)

1. In cases of statutory interpretation, the court begins by looking at the terms of the provisions at issue and the commonsense conception of those terms.

2. To prove removability of alien on ground that he was convicted of violating a law relating to a controlled substance, the government was required to show that alien's state criminal conviction was for possession of a substance that was not only listed under state law, but was also contained in the federal schedules of the Controlled Substances Act (CSA). 8 U.S.C. § 1227(a)(2)(B)(i).

3. Under certain conditions, both the federal statute enumerating categories of crimes that are aggravated felonies rendering an alien removable and the criminal statute of the alien's conviction, whether federal or state, can require a departure from the formal categorical approach of Taylor v. United States for determining whether an offense is an aggravated felony. 8 U.S.C. §§ 1101(a)(43)(M)(i), 1227(a)(2)(B)(i).

4. It was appropriate to remand removal proceedings of alien, a native of Dominican Republic and lawful permanent resident, to Board of Immigration Appeals (BIA) to determine whether remand to immigration judge (IJ) was appropriate for Department of Homeland Security (DHS) to make showing that alien was removable, under categorical approach, for having violated law relating to the involvement of a controlled substance as result of state law conviction for possession of drug paraphernalia. 8 U.S.C. § 1227(a)(2)(B)(i).

United States v. Ashurov, 726 F.3d 395 (3d Cir. 2013)

1. “Knowingly presents” clause of statute criminalizing fraud and misuse of immigration documents requires that the materially false statement be made under oath. 18 U.S.C. § 1546(a).

3. A statute should not be construed upon the speculation that if the legislature had thought of it, very likely broader words would have been used.

4. The rule of lenity requires more than a difficult interpretative question.

5. The idea embodied by the rule of lenity is that the citizen is entitled to fair notice of what sort of conduct may give rise to punishment.

Lozano v. City of Hazleton, 724 F.3d 297 (3d Cir. 2013)

1. The preemption doctrine is a necessary outgrowth of the Supremacy Clause. U.S. Const. art. VI, cl. 2.

2. Preemption may be either express or implied, and implied preemption includes both field preemption and conflict preemption.

3. Field preemption occurs when Congress intends federal law to occupy the field; to determine the boundaries that Congress sought to occupy within the field, courts look to the federal statute itself, read in the light of its constitutional setting and its legislative history.

4. Congress's intent to displace state law altogether, in the field preemption context, can be inferred from a framework of regulation so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

5. Conflict preemption can occur in one of two ways: where compliance with both federal and state regulations is a physical impossibility, or where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

6. Courts must utilize their judgment to determine what constitutes an unconstitutional impediment to federal law, in the conflict preemption context, and that judgment is informed by examining the federal statute as a whole and identifying its purpose and intended effects.

7. Employment provisions of city ordinance that regulated and prohibited a broad range of economic interactions with unauthorized aliens were preempted by the Immigration Reform and Control Act (IRCA) under the doctrine of conflict preemption; city ordinance's prohibition of broad array of commercial interactions, based solely on immigration status, was untenable in light of Congress's deliberate decision to limit IRCA's reach to the employer-employee relationship, the ordinance's lack of any safe harbor for employers who used the I–9 process to verify immigration status contravened congressional intent for the I–9 process to serve as an acceptable way of protecting against sanctions and Congress's desire to avoid placing an undue burden on employers, and the ordinance provided substantially fewer procedural protections than IRCA, which circumscribed sanctions with a detailed hearing and adjudication procedure. 8 U.S.C. §§ 1324a–1324b.

8. Housing provisions in city ordinances prohibiting unauthorized aliens from residing in any rental housing within the city constituted an impermissible regulation of immigration and
were field preempted by the INA because they intruded on the regulation of residency and presence of aliens in the United States and the occupied field of alien harboring. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

9. In the absence of a savings clause permitting state regulation in the field, the inference from the enactments of federal statutes authorizing state and local officials to arrest individuals guilty of harboring, and requiring federal agencies to respond to inquiries from states and localities regarding any alien's immigration status, is that the role of the state is limited to arrest for violations of federal anti-harboring law. 8 U.S.C. §§ 1324(c), 1329; 8 U.S.C. § 1373.

10. Housing provisions in city ordinances prohibiting unauthorized aliens from residing in any rental housing within the city interfered with the federal government's discretion in deciding whether and when to initiate removal proceedings, and therefore the provisions were conflict preempted.

11. The pervasiveness of federal regulation does not diminish the importance of immigration policy to the states; nonetheless, the relative importance to the state of its own law is not material when there is a conflict with a valid federal law, for the framers of the Constitution provided that the federal law must prevail.

12. City ordinance's rental registration scheme requiring rental housing occupants to report their immigration status to the city and penalizing the failure to register and obtain an occupancy permit pursuant to that requirement constituted an impermissible alien registration requirement, and was therefore field preempted.

13. States and localities may not intrude in the field of alien registration.

United States v. Moreno, 725 F.3d 255 (3d Cir. 2013)

1. A court of appeals exercises plenary review over the denial of a motion for acquittal; however, the court reviews the record in the light more favorable to the prosecution to determine whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence.

2. In any case involving statutory interpretation, courts must begin with the statutory text.

3. When a statute's language is plain, the sole function of the courts, at least where the disposition required by the test is not absurd, is to enforce it according to its terms; an interpretation is absurd when it defies rationality or renders the statute nonsensical and superfluous.

4. In interpreting a statute, a court should look to the statute's legislative history only if the text of the statute is ambiguous.

5. A passport is conclusive proof of citizenship only if its holder was actually a citizen of the United States when the passport was issued. 22 U.S.C. § 2705.
6. Where the text of a statute is unambiguous, the statute should be enforced as written and only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from that language.

7. Sufficient evidence existed for jury to conclude that defendant's misrepresentation of herself as a United States citizen was willful, as required to convict defendant for falsely and willfully representing herself as a United States citizen; in 2006, defendant was deported after an immigration judge (IJ), the Board of Immigration Appeals (BIA), and the Fifth Circuit found that she was not a United States citizen, in 2008, defendant's passport was confiscated, and immediately prior to her trip to Saint Thomas in 2011, a Department of Homeland Security (DHS) official informed her that she was not a citizen, and despite receiving all of these notifications that she was not a United States citizen, defendant asserted that she was a United States citizen when interviewed in Saint Thomas. 18 U.S.C. § 911.

8. A court of appeals exercises plenary review to determine whether jury instructions misstated the applicable law, but in the absence of a misstatement the court reviews for abuse of discretion.

9. Government's disclosure of documents favorable to the defense at 7 p.m. on the day before trial did not constitute a Brady due process violation; defendant was able to use the documents and suffered no prejudice as a result of the government's allegedly untimely disclosure. U.S. Const. amend. V.

10. In reviewing Brady due process claims regarding the government's failure to disclose documents favorable to the defense, a court of appeals reviews the district court's conclusions of law de novo and its findings of fact for clear error. U.S. Const. amend. V.

11. The government has an obligation to disclose any evidence favorable to the defense that is material as to guilt or punishment.

12. Where the government makes Brady evidence favorable to the defense available during the course of a trial in such a way that a defendant is able effectively to use it, due process is not violated and Brady is not contravened, as Brady is not implicated if there is no prejudice to the defendant. U.S. Const. amend. V.


14. A court of appeals reviews a district court's decision to admit or exclude evidence for abuse of discretion, and such discretion is construed especially broadly in the context of rule providing for exclusion of evidence that is more prejudicial than probative; in order to justify
reversal, a district court's analysis and resulting conclusion must be arbitrary or irrational. Fed. Rules Evid. Rule 403, 28 U.S.C.

15. Government's position in defendant's trial for falsely and willfully representing herself as a United States citizen, that defendant's passport was never revoked, was not inconsistent with the government's statement that the passport was issued in error, and therefore the government's statements did not establish prosecutorial misconduct. 8 U.S.C. § 1504; 18 U.S.C. § 911.


Lupera-Espinosa v. Att'y Gen., 716 F.3d 781 (3d Cir. 2013)

1. Court of Appeals had jurisdiction to consider alien's claims that he was eligible for discretionary relief from deportation and that his due process rights were violated during proceedings before the Immigration Judge (IJ), since these claims presented only constitutional claims and questions of law relating to the Board of Immigration Appeals' (BIA) final removal order. U.S. Const. amend. V; 8 U.S.C. §§ 1182(c), 1252(a)(2)(D).

2. When the Board of Immigration Appeals (BIA) affirms an immigration judge's (IJ) decision and adds analysis of its own, Court of Appeals reviews both the IJ's and the BIA's decisions.

3. Court of Appeals reviews questions of law in an immigration case de novo.

4. Alien, a native and citizen of Ecuador, was ineligible for a waiver of deportation because he had served more than five years for an aggravated felony by the time the Board of Immigration Appeals (BIA) affirmed the immigration judge's (IJ) deportation order; although alien had not served five years' imprisonment for an aggravated felony prior to his initial application for a waiver of deportation, he spent more than five years in prison for a subsequent aggravated felony, which period lapsed during the pendency of the administrative proceedings. 8 U.S.C. §§ 1101(a)(43)(B), 1182(c).

5. A court may not award equitable relief in contravention of the expressed intent of Congress.

6. Immigration Judge (IJ) advised alien, who was subject to deportation to his native Ecuador, of the availability of free legal services and provided him with a list of such programs, in compliance with federal regulations; at hearing alien requested a list of attorneys to contact and the IJ agreed to send him the list, the IJ and a second IJ then postponed alien's hearing twice more, for a total of three postponements, thereby giving alien more than five months to secure counsel, and at subsequent hearing alien said he had attempted to contact attorneys on the list. 8 C.F.R. § 1240.10(a)(2)–(3).

7. Alien, a native and citizen of Ecuador, suffered no prejudice and thus was not deprived of due process when Immigration Judge (IJ), on remand from the Board of Immigration Appeals (BIA), determined that alien was ineligible for a waiver of deportation because he had served more than five years for an aggravated felony, without first giving alien the opportunity to present his arguments; the IJ was ultimately persuaded by the government's
argument that relevant circuit precedent precluded alien from seeking waiver of deportation, BIA subsequently affirmed the IJ's decision, the proceedings did not require additional fact finding and turned on a discrete question of law that the IJ understood and carefully considered, and the IJ had acknowledged alien's best arguments on the issue during a prior hearing. U.S. Const. amend. V; 8 U.S.C. § 1182(c).

8. Where an alien claims a denial of due process because he was prevented from making his case to the Board of Immigration Appeals (BIA) or the Immigration Judge (IJ), he must show (1) that he was prevented from reasonably presenting his case and (2) that substantial prejudice resulted. U.S. Const. amend. V.

Sylvain v. Att'y Gen., 714 F.3d 150 (3d Cir. 2013)

1. Where an alien challenges the application of mandatory detention, the immigration judge (IJ) holds a Joseph hearing to determine whether the alien committed a relevant crime, and, even if the alien did so, the section of the Illegal Immigration Reform and Immigrant Responsibility Act implicitly authorizes detention only for a reasonable amount of time, after which immigration officials must make an individualized inquiry into whether detention is still necessary to fulfill the section's purposes of ensuring that an alien attends removal proceedings and that his release will not pose a danger to the community. 8 U.S.C. § 1226(c)(1)(A)–(D).

2. Provision of Illegal Immigration Reform and Immigrant Responsibility Act section regarding mandatory detention of aliens, stating that “The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review,” does not bar judicial review of whether the immigration officials had statutory authority to impose mandatory detention; whether the officials had authority is not a discretionary judgment, and, if the officials lacked authority, they could not act under that section. 8 U.S.C. § 1226(c).


4. Even if section of Illegal Immigration Reform and Immigrant Responsibility Act regarding pre-removal mandatory detention of aliens who had committed designated crimes called for detention “when the alien is released,” and even if “when” implied something less than four-year delay in present case, nothing in statute suggested that immigration officials lost authority to detain alien due to that delay; text of section did not explicitly remove authority to detain if alien had already left custody, and important public interest of keeping most dangerous aliens in custody and ensuring their attendance at removal proceedings was at stake. 8 U.S.C. § 1226(c)(1).

5. Provision that the government “shall” act within a specified time, without more, is not jurisdictional limit precluding action later.

Gen Lin v. Att'y Gen., 700 F.3d 683 (3d Cir. 2012)
1. Court of Appeals reviews for abuse of discretion decision declining to reopen removal proceedings.

2. Board of Immigration Appeals (BIA) may deny motion to reopen immigration proceedings: (1) when movant fails to establish prima facie case for relief sought; (2) when movant fails to introduce previously unavailable and material evidence; or (3) when movant would not be entitled to discretionary grant of relief. 8 C.F.R. § 1003.2(c).

3. Although alien bears burden of proving eligibility for requested relief, Board of Immigration Appeals (BIA) must actually consider evidence and argument that party presents, even though it need not expressly parse each point.

4. Board of Immigration Appeals (BIA) did not abuse its discretion in denying motion by native and citizen of People's Republic of China to reopen on ground that he failed to properly authenticate documents he submitted in support of motion, where alien did not attempt to authenticate documents, there was no evidence to suggest that authenticating documents would have been impossible or otherwise unreasonable, there was no indication as to how documents from Chinese sources came into alien's possession, photographs alien submitted were taken at undisclosed times and locations, and BIA had denied alien's asylum application based on his credibility determination. 8 C.F.R. § 1287.6.

5. Alien's failure to submit new application for asylum was sufficient basis for denying his motion to reopen his removal proceedings. 8 C.F.R. § 1003.2(c)(1).

**United States v. Kouevi, 698 F.3d 126 (3d Cir. 2012)**

1. Possession or use of authentic immigration documents obtained by fraud was prohibited. 18 U.S.C. § 1546(a).

2. A plenary standard of review is applied to issues of statutory interpretation.

3. Legislative history is only an appropriate aid to statutory interpretation when the disputed statute is ambiguous.

4. Where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning.


6. Statute relating to fraud and misuse of visas, permits, and other documents, that criminalized possession of authentic immigration document obtained by means of false statement, was not sufficiently ambiguous to justify resort to rule of lenity, since application of rule of lenity would have required ignoring canons of statutory construction. 18 U.S.C. § 1546(a).

7. The simple existence of some statutory ambiguity is not sufficient to warrant application of the rule of lenity, for most statutes are ambiguous to some degree.
Duran-Pichardo v. Att’y Gen., 695 F.3d 282 (3d Cir. 2012)

1. Court of Appeals had jurisdiction to review alien's challenge to the Immigration and Naturalization Service's (INS) denial of his citizenship claim because there were no factual issues and court retained the authority to determine its own jurisdiction. 8 U.S.C. § 1252(a)(2)(C).

2. Although alien did everything that was required for naturalization except take the oath, because he never took the oath, he never became a citizen and therefore remained subject to removal. 8 U.S.C. § 1423(a).

3. Alien's satisfactory completion of all of the other requirements for naturalization did not create a due process protected liberty interest in citizenship where he had no taken the statutorily-mandated oath; although government failed to act on alien's naturalization application within 120 days of his naturalization examination, alien failed to apply to the district court for a hearing on the matter, and having failed to invoke the very statutory and regulatory scheme that Congress enacted to address such delay, alien was not deprived of due process of law. U.S. Const. amend. V; 8 U.S.C. § 1446(d).

4. Nunc pro tunc review of alien's naturalization application was unavailable where it would require agency review of an alien's naturalization application while that alien was removable as aggravated felon.

Desai v. Att’y Gen., 695 F.3d 267 (3d Cir. 2012)

1. Where alien is removable for having been convicted of aggravated felony, Court of Appeals' jurisdiction to review denial of alien's motion to reopen is limited to addressing jurisdictional prerequisite, and evaluating constitutional claims or questions of law raised upon petition for review. 8 U.S.C. § 1252.

2. Because Board of Immigration Appeals (BIA) retains unfettered discretion to decline to sua sponte reopen or reconsider deportation proceeding, Court of Appeals is without jurisdiction to review decision declining to exercise such discretion to reopen or reconsider case. 8 U.S.C. § 1252; 8 C.F.R. § 1003.2(a).

3. Board of Immigration Appeals (BIA) lacked jurisdiction, pursuant to post-departure bar, to consider alien's motion to reopen sua sponte, where alien had been removed on basis of his conviction for aggravated felony, and had departed from United States. 8 U.S.C. § 1229a(c)(7)(C); 8 C.F.R. §§ 1003.2(a), 1003.2(d).

Green v. Att’y Gen., 694 F.3d 503 (3d Cir. 2012)

2. When the Board of Immigration Appeals (BIA) issues its own opinion, the Court of Appeals generally reviews that decision as the final agency decision; however, when the BIA's opinion invokes specific aspects of the analysis by the immigration judge (IJ) and fact finding in support of its conclusions, the Court of Appeals is obliged to review both the decisions of the IJ and the BIA. Immigration and Nationality Act, § 242(a), 8 U.S.C. § 1252(a).

3. Conclusion by immigration judge (IJ) on application for deferred removal under Convention Against Torture (CAT), that Jamaican government would not consent to, or acquiesce in, actions of powerful Jamaican drug gang to torture alien, citizen of Jamaica, for identifying members of gang in shooting, was factual determination that resulted from weighing of evidence, and thus Court of Appeals did not have jurisdiction to consider it on petition for judicial review. Immigration and Nationality Act, § 242(a), 8 U.S.C. § 1252(a); 8 C.F.R. § 1208.18(a)(1).

4. Immigration judge (IJ) and Board of Immigration Appeals (BIA) were not required on application by alien, citizen of Jamaica, for deferred removal under Convention Against Torture (CAT) to make factual finding as to whether alien would likely suffer harm if returned to Jamaica, where IJ and BIA had determined that harm alleged by alien would not amount to legal definition of torture. 8 C.F.R. § 1208.18(a)(1).

5. Argument by alien, citizen of Jamaica, that immigration judge (IJ) and BIA “misinterpreted the country condition research,” “erred in finding that the evidence falls short” of satisfying requirements for deferred removal under Convention Against Torture (CAT), and “rule[d] contrary to the substantial country condition research” was not that relevant evidence was ignored, but rather that IJ had incorrectly weighed evidence in making factual determinations, and thus Court of Appeals lacked jurisdiction to consider it. Immigration and Nationality Act, § 242(a), 8 U.S.C. § 1252(a); 8 C.F.R. § 1208.16(c)(3).

6. Immigration judge (IJ) and Board of Immigration Appeals (BIA) were not required to discuss every piece of evidence mentioned by applicant for deferred removal under Convention Against Torture (CAT); IJ made clear that she had “[c]onsider[ed] all of the evidence of record,” and that was all that was required. 8 C.F.R. § 1208.16(c)(3).

**Hanif v. Att’y Gen., 694 F.3d 479 (3d Cir. 2012)**

1. In general, courts of appeals have no jurisdiction to review the Board of Immigration Appeals' discretionary and factual determinations presented in petitions for review.

2. The court of appeals has jurisdiction to review the Board of Immigration Appeals' (BIA) final order denying relief from removal for constitutional claims and questions of law. 8 U.S.C. § 1252(a)(2)(D).

3. When the Board of Immigration Appeals (BIA) issues its own decision on the merits, rather than a summary affirmance, the court of appeals reviews its decision, not that of the Immigration Judge (IJ).
4. When the Board of Immigration Appeals (BIA) adopts and affirms the Immigration Judge's (IJ) decision, the court of appeals has authority to review both decisions.

5. The Board of Immigration Appeals' (BIA) factual findings are reviewed for substantial evidence.

6. The court of appeals reviews the legal determinations of the Board of Immigration Appeals (BIA) de novo, subject to the principles of deference articulated in Chevron.

7. When considering the propriety of an agency's interpretation of a statute, the court of appeals must turn to the analytical structure set forth by the Supreme Court in Chevron.

8. When considering the propriety of an agency's interpretation of a statute, under the familiar two-step Chevron inquiry, first, if the statute is clear the court of appeals must give effect to Congress' unambiguous intent, and, second, if the statute is silent or ambiguous with respect to a specific issue, the court of appeals defers to an implementing agency's reasonable interpretation of that statute.

9. The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent; if a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

10. When interpreting a statute, absent any indication to the contrary, the court of appeals must presume that Congress intended to give same terms the meaning ascribed to them elsewhere in the statute.

11. Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

12. Statute placing limitations on waivers of inadmissibility available to aliens who were previously admitted as an alien lawfully admitted for permanent residence required not only prior admission to the United States, but also that the prior admission was made while alien was in status of lawful permanent resident. 8 U.S.C. § 1182(h).

13. Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

14. Alien, a citizen of Guyana, who entered the United States illegally, but subsequently became a lawful permanent resident, was not admitted to the United States while in status of lawful permanent resident, within meaning of statute placing limitations on waivers of inadmissibility, and thus, alien was not precluded from seeking waiver following conviction for dealing in counterfeit United States currency. 8 U.S.C. § 1182(h); 18 U.S.C. § 473.

15. The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.
Oliva-Ramos v. Att'y Gen., 694 F.3d 259 (3d Cir. 2012)

1. Court reviews Board of Immigration Appeals' (BIA) decision rather than that of the immigration judge (IJ) where BIA issues its own opinion, but where BIA's opinion directly states that the BIA is deferring to the IJ, or invokes specific aspects of the IJ's analysis and fact finding in support of the BIA's conclusions, court reviews both the BIA and IJ decisions.

2. Court reviews the Board of Immigration Appeals' (BIA) denial of a motion to reopen for abuse of discretion, and reviews de novo the BIA's conclusions of law such as whether the BIA applied the correct legal standard in considering the motion to reopen, and any underlying constitutional claims.

3. Exclusionary rule may apply in removal proceedings where an alien shows egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained. U.S. Const. amends. IV, V.

4. Removal proceedings must comport with basic notions of due process; accordingly, concerns for brevity, efficiency and expediency must not be used to justify denying an alien the right to produce witnesses where that request is appropriate and the witnesses' presence appears necessary to satisfy basic notions of due process, particularly where the immigration judge's (IJ) refusal to issue or enforce subpoenas is contrary to the very regulatory scheme governing the removal process. U.S. Const. amend. V.

5. Board of Immigration Appeals (BIA) abused its discretion in denying alien's motion to reopen removal proceeding in order to permit him to subpoena additional witnesses and to introduce newly available documents related to the search and seizure of his home and arrest; immigration judge (IJ) never ruled on alien's motion to subpoena witnesses and documents, which were essential to alien's claim of egregious or widespread violations and alleged constitutional violations by the government, and which alien could have used to impeach the testimony of the government's sole witness during the suppression hearing or to adduce additional facts that may have altered the analysis of alleged constitutional violations, including the nature of his sister's alleged consent to entry of dwelling, and thus forced alien to rely on a Freedom of Information Act (FOIA) request to obtain documents that were in the exclusive custody and control of the government and were clearly germane to his legal claims. 8 C.F.R. § 1003.35(b).

6. Errors in the transcript of removal proceeding and related questioning did not deny alien due process of law; any such errors were clarified and the record demonstrated that alien fully understood the questions asked of him during his interview with Bureau of Immigration and Customs Enforcement (ICE) officer. U.S. Const. amend. V.

7. Evidence will be the result of an egregious violation of Fourth Amendment so as to render exclusionary rule applicable in removal proceedings if the record evidence establishes either (1) that a constitutional violation that was fundamentally unfair had occurred, or (2) that the violation, regardless of its unfairness, undermined the reliability of the evidence in dispute; courts and agencies evaluating the egregiousness of the violation should pay close attention.
to the characteristics and severity of the offending conduct, and must adopt a flexible case-by-case approach for evaluating egregiousness, based on a general set of background principles. U.S. Const. amend. IV.

8. Evidence of any government misconduct by threats, coercion or physical abuse might be important considerations in evaluating egregiousness of violation of Fourth Amendment for purposes of determining applicability of exclusionary rule in removal proceedings. U.S. Const. amend. IV.

9. A single Fourth Amendment violation is not sufficient to extend the exclusionary rule to civil removal proceedings unless it is also egregious. U.S. Const. amend. 4.

10. Court requires a careful examination of the totality of the circumstances surrounding how consent to search by immigration officer was obtained; appropriate inquiry into the voluntariness of a purported consent would include, without limitation: the age, education, and intelligence of the subject, whether the subject was advised of his or her constitutional rights, the length of the encounter, the repetition or duration of the questioning, and the use of physical punishment. U.S. Const. amend. IV; 8 C.F.R. § 287.8(f)(2).

11. Circumstances that might indicate a seizure of alien by immigration officer may exist even where the alien did not attempt to leave, such as threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. U.S. Const. amend. IV; 8 C.F.R. § 287.8(b)(1).

12. Formal removal proceedings begin only after the government has filed a notice to appear in immigration court. 8 C.F.R. § 1239.1(a).

Martinez v. Att'y Gen., 693 F.3d 408 (3d Cir. 2012)

1. When Board of Immigration Appeals (BIA) affirms decision of immigration judge (IJ) and adds analysis of its own, Court of Appeals reviews both IJ's and the BIA's decisions on alien's petition for review.

2. On petition for review of decision of Board of Immigration Appeals (BIA), Court of Appeals reviews de novo questions of law, such as the proper construction of immigration statute.

3. In interpreting statute, court, using all traditional tools of statutory construction, must determine whether Congress has directly spoken to the precise question at issue, and if Congress has done so, court's inquiry is at an end, since court must give effect to the unambiguously expressed intent of Congress.

4. If statute being interpreted by court is silent or ambiguous with respect to specific issue, court must assess whether agency's answer is based on a permissible construction of statute, and, if so, court must defer to that construction.

5. Discretionary waivers of inadmissibility are available to aliens who are not lawful permanent residents (LPRs) who are convicted of aggravated felonies, or aliens who were convicted of
aggravated felony prior to their admission as LPRs, but are unavailable to aliens who were convicted of aggravated felony after their admission as LPRs. 8 U.S.C. § 1182(h)(1)(C)(2).

6. Definition of “admitted” provided by Immigration and Nationality Act (INA), to mean “lawful entry of the alien into the United States after inspection and authorization by an immigration officer,” requires a procedurally regular admission into the United States, and not necessarily a substantively lawful one. 8 U.S.C. § 1101(a)(13)(A).

7. Under Immigration and Nationality Act (INA), alien permitted to enter the United States by immigration officer has been “admitted” even if he did not meet substantive legal requirements for admission at that time, although he was not “lawfully admitted for permanent residence” unless he was substantively in compliance with admission requirements. 8 U.S.C. §§ 1101(a)(13)(A), 1101(a)(20).

8. Alien whose admission into United States as lawful permanent resident was procedurally regular, even though he did not satisfy substantive admission requirements, was “previously...admitted to the United States as an alien lawfully admitted for permanent residence” under statute barring waiver of inadmissibility for alien previously admitted to United States as lawful permanent resident who later was convicted of aggravated felony, and therefore alien, as a result of his post-admission conviction for aggravated felony, was subject to statutory bar. 8 U.S.C. §§ 1101(a)(13)(A), 1182(h).

Roye v. Att’y Gen., 693 F.3d 333 (3d Cir. 2012)

1. Where the basis for an alien's removal is his conviction for an aggravated felony, Court of Appeals' jurisdiction is limited to constitutional claims or questions of law raised by his appeal, and factual or discretionary determinations are outside the scope of review; for purposes of this limitation, the phrase “questions of law” refers to purely legal inquiries such as those involved in statutory interpretation or inquiries into whether the Board of Immigration Appeals (BIA) used the correct standard in reviewing the Immigration Judge's (IJ) decision and whether the BIA assigned to the alien the correct burden of proof. 8 U.S.C. § 1252(a)(2)(D).

2. Alien can show that he is entitled to relief under the Convention Against Torture (CAT) by proving that it is more likely than not that his persecutors will commit an act that causes severe physical or mental pain or suffering; that the pain or suffering will be intentionally inflicted; that it will be inflicted for an illicit or proscribed purpose; that it will be inflicted by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the alien; and that the pain or suffering does not arise from lawful sanctions. 8 C.F.R. § 208.16(c)(2).

3. Under the Convention Against Torture (CAT), if an alien demonstrates that he will be subjected to torture by or at the instigation of or with the consent or acquiescence of a public official, then withholding of removal or deferral of removal is mandatory. 8 C.F.R. §§ 208.16(c)(2), 208.18(a)(1).

4. In a proceeding brought by an alien from Jamaica, who sought relief from removal under the Convention Against Torture (CAT), the Board of Immigration Appeals (BIA) improperly
focused on the intent of Jamaican public officials who decided to imprison people with mental illness, instead of focusing on whether the physical and sexual abuse that mentally ill prisoners experienced was intended to cause pain, so as to qualify as torture. 8 C.F.R. §§ 208.16(c)(2), 208.18(a)(1).

5. Under the Convention Against Torture (CAT), acquiescence to torture can be found when government officials remain willfully blind to torturous conduct and thereby breach their legal responsibility to prevent it. 8 C.F.R. § 1208.18(a)(7).

6. Whether Jamaican public officials would consent to or acquiesce in the torture of an alien was essentially a factual question which the Court of Appeals lacked authority to address on review of a determination of the Board of Immigration Appeals (BIA) denying relief under the Convention Against Torture (CAT).

7. In a proceeding under the Convention Against Torture (CAT), the Board of Immigration Appeals (BIA) inappropriately conflated the mens rea necessary to prove that public officials consent to or acquiesce in acts of torture with the mens rea necessary to prove that public officials themselves have committed acts of torture; BIA acknowledged that the record contained evidence that Jamaican officials deliberately ignored the rape of mentally ill prisoners, but nevertheless said that evidence of the government's willful blindness was insufficient to demonstrate "that the Jamaican government possesses the requisite specific intent to torture." 8 C.F.R. § 1208.18(a)(7).

Khan v. Att'y Gen., 691 F.3d 488 (3d Cir. 2012)

1. Court of Appeals had jurisdiction over premature petition for judicial review filed by aliens, citizens of Pakistan, challenging refusal by Board of Immigration Appeals (BIA) to adjudicate their motions for emergency stay of removal and to reopen their joint application for asylum, withholding of removal, and relief under Convention Against Torture (CAT), where petition had been amended after BIA denied those motions, Attorney General did not show that he would suffer prejudice resulting from premature filing, and Court had yet to take action on merits of appeal. 8 U.S.C. § 1252(a)(2).

2. In a civil case, a premature notice of appeal, filed after disposition of some of the claims before a district court, but before entry of final judgment, will ripen upon the court's disposal of the remaining claims, where there is no showing of prejudice by the adverse party and the Court of Appeals has not taken action on the merits of the appeal.

3. Evidence proffered by aliens, citizens of Pakistan, of violence towards members of Pakistan People's Party (PPP) was not material to their motion to reopen their asylum application that had been based on changed country conditions exception to 90 day deadline, where aliens had not addressed prior finding by administrative law judge (ALJ) that there was no credible evidence that aliens had belonged to PPP. 8 U.S.C. §§ 1101(a)(42)(A), 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(1).

4. Aliens, citizens of Pakistan, waived issue for consideration on petition for judicial review regarding denial of their motion for emergency stay of removal, since aliens did not challenge that denial in their appellate briefs.
5. The denial of a motion to reopen by the Board of Immigration Appeals (BIA) is reviewed for an abuse of discretion.

6. On an asylum claim, to establish a well-founded fear of persecution, the alien must show both a subjective fear and that a reasonable person in his position would fear persecution, either because he would be individually singled out for persecution or because there is a pattern or practice in his home country of persecution against a group of which he is a member; the source of the persecution must be the government or forces that the government is unwilling or unable to control. 8 U.S.C. § 1101(a)(42)(A).

7. On an asylum claim, in order to prove a reasonable fear of future persecution, the petitioner must produce credible, direct, and specific evidence that would support a reasonable fear of persecution. 8 U.S.C. § 1101(a)(42)(A).

8. On an asylum claim, the underlying factual determinations by the Board of Immigration Appeals (BIA) are entitled to broad deference under the substantial evidence standard, and will be upheld to the extent they are supported by reasonable, substantial and probative evidence on the record on as a whole. 8 U.S.C. § 1101(a)(42)(A).

9. When considering motions to reopen, the critical question is whether circumstances have changed sufficiently that a petitioner who previously did not have a legitimate claim for asylum now has a well-founded fear of future persecution. 8 U.S.C. §§ 1101(a)(42)(A), 1229a(c)(7)(C).

10. Board of Immigration Appeals (BIA) could defer to adverse credibility determination made by immigration judge (IJ) on motion by aliens, citizens of Pakistan, to reopen asylum application, where aliens did not dispute that such determination had been supported by record and that determination also was directly relevant to merits of application that the aliens sought to reopen. 8 U.S.C. §§ 1101(a)(42)(A), 1229a(c)(7)(C)(ii); 8 C.F.R. § 1003.2(c)(1).

11. Choice made by aliens, citizens of Pakistan, after being ordered deported to engage in political activities that would subject them to persecution in Pakistan did not alone support application of changed country conditions exception to time limit for filing motion to reopen asylum application. 8 U.S.C. § 1229a(c)(7)(C)(ii).

12. Aliens, citizens of Pakistan, who had been in United States for many years, did not show reasonable likelihood that they could establish that they were entitled to relief on their asylum application based on evidence of increased anti-American sentiment in Pakistan, since evidence submitted did not specifically report persecution of Pakistanis who had returned from United States to Pakistan, social group of “secularized and westernized Pakistanis perceived to be affiliated with the United States” was too amorphous, and Americanization was not immutable characteristic and neither was having affiliation with or connection to United States. 8 U.S.C. § 1101(a)(42)(A).

13. Substantial evidence supported finding by Board of Immigration Appeals (BIA) that aliens, citizens of Pakistan, did not sufficiently demonstrate based on evidence of abuse of psychiatric patients and social stigma attached to mental illness in Pakistan that they had
mental illness that would subject them to mistreatment upon return to Pakistan, as required for relief on their asylum application; although it was difficult to obtain mental health treatment in Pakistan, lack of access to mental health treatment alone did not create well-founded fear of persecution and aliens did not establish how their particular diagnoses would cause them to be persecuted in Pakistan. 8 U.S.C. § 1101(a)(42)(A).

14. Board of Immigration Appeals (BIA) sufficiently addressed claims of aliens, citizens of Pakistan, of changed country conditions and their evidence; although BIA's opinion did not specifically mention all evidence that aliens had submitted, it demonstrated that BIA reviewed record and sets forth in summary fashion why record supported its conclusion. 8 U.S.C. §§ 1101(a)(42)(A), 1229a(c)(7)(C); 8 C.F.R. § 1003.2(c)(1).

Borrone v. Att'y Gen., 687 F.3d 150 (3d Cir. 2012)

1. The Court of Appeals has jurisdiction to determine whether the facts which would strip it of jurisdiction to review Board of Immigration Appeals' (BIA) final order of removal against alien, under Immigration and Nationality Act (INA), are present, specifically (1) whether the petitioner is an alien and (2) whether he has been convicted of one of the enumerated offenses. 8 U.S.C. § 1252(a)(2)(C).

2. When the Board of Immigration Appeals (BIA) affirms an Immigration Judge's (IJ) decision without opinion, the Court of Appeals review the IJ's decision as the final agency determination.

3. The Court of Appeals reviews de novo, without affording the Attorney General deference under Chevron, the purely legal questions of whether an alien's violation of particular federal criminal statutes is an aggravated felony, as would support order of removal, and whether those statutes are laws relating to a controlled substance, as would support order of removal. 8 U.S.C. §§ 1252(a)(2)(C), 1227(a)(2)(A)(iii), 1227(a)(2)(B)(i).

4. In determining whether an alien's state conviction is an aggravated felony, as would warrant removal, the court uses the hypothetical federal felony test and the illicit trafficking element test; under the hypothetical federal felony route, the court compares the offense of conviction to the federal Controlled Substances Act to determine if it is analogous to an offense under that Act, and under the illicit trafficking element test, a state felony drug conviction constitutes an aggravated felony if it contains a trafficking element. 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 101, 21 U.S.C. § 801.

5. In determining whether an alien's conviction is an aggravated felony, as would warrant removal, the court presumptively starts its analysis by applying the formal categorical approach, and under this approach, the court must look only to the statutory definitions of the prior offenses, and may not consider other evidence concerning the defendant's prior crimes, including the particular facts underlying a conviction. 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii).

6. The court may depart from the formal categorical approach in determining whether an alien's conviction is an aggravated felony, as would warrant removal, in two instances: (1) when
confronted with a disjunctive statute of conviction, one in which there are alternative elements, to determine which of the alternative elements was the actual basis for the underlying conviction, and (2) when the language of a particular subsection of the aggravated felony enumerating statute invites inquiry into the underlying facts of the case. 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii).

7. Hypothetical federal felony test could be used to determine whether alien's violation of federal law, that was not one of the federal controlled substances laws enumerated in statute defining drug trafficking crimes, was an aggravated felony, as would warrant removal; key inquiry was simply whether alien's conviction was hypothetically punishable as a felony under any of the three controlled substances laws listed. 8 U.S.C. § 1101(a)(43)(B); 18 U.S.C. § 924(c)(2).

8. Government's motion to Board of Immigration Appeals (BIA) for summary affirmance of order of removal by Immigration Judge (IJ) precluded government's request, on appeal, for remand to BIA for reconsideration of IJ's determination that alien was removable; government provided no good reason why BIA should have second chance to consider issues raised on appeal, since BIA had opportunity to consider issues and, at government's insistence, chose not to do so.

9. Alien's conviction for violating federal Food, Drug, and Cosmetic Act's (FDCA) wholesale drug distribution provisions was not an aggravated felony, under hypothetical federal felony test, as would support order of removal; FDCA provisions prohibited wholesale distribution of prescription drugs without a license, and conviction under the FDCA provisions did not require a determination that drug at issue contained controlled substances, as would make it a drug trafficking crime. Federal Food, Drug, and Cosmetic Act, §§ 301(t), 503(c)(2)(A), 21 U.S.C. §§ 331(t), 353(e)(2)(A); 8 U.S.C. § 1101(a)(43)(B).

10. Alien's conviction for violating federal Food, Drug, and Cosmetic Act's (FDCA) wholesale distribution provisions was not an aggravated felony, under illicit trafficking element test, as would support order of removal; FDCA provisions prohibited wholesale distribution of prescription drugs without a license, and conviction under the FDCA provisions did not require a determination that drug at issue contained controlled substances, as would make it a drug trafficking crime. Federal Food, Drug, and Cosmetic Act, §§ 301(t), 503(c)(2)(A), 21 U.S.C. §§ 331(t), 353(e)(2)(A).

11. Alien's conviction for violating federal Food, Drug, and Cosmetic Act's (FDCA) wholesale distribution provisions was not a violation of laws relating to a controlled substance, as would support order of removal; connection between FDCA provisions and illicit controlled substance related activity was too attenuated, and the FDCA provisions criminalized a substantial swath of conduct with no nexus to controlled substances. 8 U.S.C. § 1227(a)(2)(B)(i); Federal Food, Drug, and Cosmetic Act, §§ 301(t), 503(e)(2)(A), 21 U.S.C. §§ 331(t), 353(e)(2)(A).

_Nelson v. Att’y Gen., 685 F.3d 318 (3d Cir. 2012)_
1. When the Board of Immigration Appeals (BIA) issues its own opinion, and does not simply adopt the opinion of the immigration judge (IJ), the court of appeals reviews only the BIA’s decision as the final agency decision. 8 U.S.C. § 1252(a).

2. To the extent the Board of Immigration Appeals (BIA) deferred to or adopted the reasoning of the immigration judge (IJ), the court of appeals will look to and consider the decision of the IJ on those points. 8 U.S.C. § 1252(a).

3. The court of appeals reviews the conclusions of law of the Board of Immigration Appeals (BIA) de novo, but gives so-called Chevron deference to its interpretation of the Immigration and Nationality Act (INA). 8 U.S.C. § 1252(a).

4. Under the familiar two-step Chevron inquiry, first, if the statute is clear, a court reviewing an administrative agency’s interpretation of the statute must give effect to Congress’ unambiguous intent, and, second, if the statute is silent or ambiguous with respect to a specific issue, the court defers to an implementing agency’s reasonable interpretation of that statute.

5. Commission of drug possession offense by legal permanent resident (LPR) alien, a native and citizen of Jamaica, triggered the stop-time provision of the Immigration and Nationality Act (INA) and ended his residency period short of the seven-year continuous residency requirement for cancellation of removal, after which alien’s continuous physical presence could no longer accrue or be restarted upon his reentry, following his departure for a two-day trip to Canada subsequent to the offense. 8 U.S.C. § 1229b(d)(2).

Leslie v. Att’y Gen., 678 F.3d 265 (3d Cir. 2012)

1. Four year detention of alien, citizen of Jamaica, was unreasonably long, and therefore he was entitled to individualized inquiry in bond hearing to determine whether detention was still necessary to fulfill statutory purposes of ensuring that alien attended removal proceedings and that his release would not pose danger to community, where alien was responsible only for five-week delay for unspecified medical reasons and for delay caused by his pursuit of bona fide legal challenges to his removal; alien’s voluntary pursuit of legal challenges could not render corresponding increase in time of detention reasonable. 8 U.S.C. §§ 1226(a), 1227(a)(2)(A)(iii), 1231(a)(6).

2. When evaluating the reasonableness of a detention under the statute authorizing the Attorney General to take into custody any alien who is inadmissible or deportable by reason of having committed certain offenses for as long as removal proceedings are “pending,” a reviewing court must first determine that a detention has been unreasonably long, and following such a determination, must determine whether the unreasonable detention is necessary to fulfill statute’s purposes. 8 U.S.C. § 1226.

3. An alien’s detention during a stay of removal is governed by the provision governing initial apprehension and detention of aliens, rather than provision governing detention and removal of aliens ordered removed. 8 U.S.C. § 1226.

Gonzalez v. Sec’y of Dep’t of Homeland Security, 678 F.3d 254 (3d Cir. 2012)
1. Declaratory relief, in form of judgment regarding lawfulness of denial of naturalization, was appropriate and sufficient, notwithstanding whatever role it may play in terminating removal proceeding, since it permitted alien to have day in court, while not upsetting priority of removal over naturalization because it affected record for, but not priority of, removal proceedings, thereby preserving both congressionally mandated goals, de novo review process, and elimination of race to courthouse. 8 U.S.C. §§ 1421(c), 1429; 8 C.F.R. § 1239.2(f).

2. A district court cannot order the Attorney General to naturalize an alien who is subject to pendent removal proceedings. 8 U.S.C. §§ 1421(c), 1429.

3. Alien's statement during his naturalization interview, that he did not have any children, was subjectively false, or at least willfully ignorant, where alien had relations with mother around time of conception, he had been told by mother that children were his, he developed relationship with those children, he did not adopt children but amended birth certificates to reflect himself as biological father. 8 U.S.C. §§ 1101(b)(1), 1101(f)(6), 1427(a).


5. Declaration by officer of United States Citizenship and Immigration Services, that alien, citizen of Spain, had stated that he did not have any children, offered on motion for summary judgment on alien's petition for review of denial of his application for naturalization, to prove what alien had said at his naturalization interview, was not hearsay on basis that it was not being offered for truth of matters asserted, i.e., that alien did or did not have children. 8 U.S.C. §§ 1101(f)(6), 1427(a); Fed. Rules Civ. Proc. Rule 56(c)(4), 28 U.S.C.; Fed. Rules Avid. Rules 801(c), 802, 28 U.S.C.

6. Statutory definition of “children” was not relevant to question of whether statement that alien had made in context of naturalization petition and interview, that he did not have children, was false. 8 U.S.C. §§ 1101(b)(1), 1427(a).


Singh v. Att’y Gen., 677 F.3d 503 (3d Cir. 2012)

1. Whether or not alien committed an aggravated felony for purposes of statute divesting federal courts of jurisdiction to review orders of removal based on an alien's commission of an aggravated felony is a question of law which is reviewed de novo; while court generally defer to the Board of Immigration Appeals’ (BIA) reasonable interpretations of the Immigration and Nationality Act (INA), it does not defer to the BIA's determination of whether a crime constitutes an aggravated felony. 8 U.S.C. § 1252(a)(2)(C).

2. An aggravated felony making offender subject to removal has two distinct elements: (1) it must be a crime that involves fraud or deceit, (2) in which the loss to the victim or victims exceeds $10,000. 8 U.S.C. § 1227(a)(2)(A)(iii).
3. To determine whether a crime involves fraud or deceit, for purposes of determining whether crime constitutes aggravated felony upon which removal may be based, court must employ a “categorical approach” in which it focuses on the crime's statutory elements, rather than the specific facts underlying the crime; by contrast, court must use a “circumstance-specific” approach to determine whether the alien's offense involved a loss to a victim(s) exceeding $10,000, wherein the loss must be “tethered” to the actual offense of conviction, not acquitted or dismissed counts or general conduct. 8 U.S.C. § 1227(a)(2)(A)(iii).

4. A crime involves fraud or deceit and therefore qualifies as a deceit offense under immigration statute defining aggravated felonies making offender removable if it necessarily entails fraudulent or deceitful conduct. 8 U.S.C. § 1101(a)(43)(M)(i).


6. Government must prove actual loss, not merely an intended or potential loss, in order to establish that loss to the victim of a deceit offense committed by alien exceeded $10,000, thus making the offense an aggravated felony for removal purposes. 8 U.S.C. § 1101(a)(43)(M)(i).

7. Immigration courts must use fundamentally fair procedures, including procedures that give an alien a fair opportunity to dispute a government claim that a prior conviction involved a fraud with the relevant loss to victims. 8 U.S.C. § 1101(a)(43)(M)(i).

8. Restitution order of $54,000, which was issued pursuant to an express agreement by the parties and not pursuant to Mandatory Victims Restitution Act (MVRA), was not ipso facto evidence that actual loss to victim of alien's “fraud or deceit” offense of knowingly making a false statement under penalty of perjury in a bankruptcy proceeding exceeded $10,000, thus making the offense an aggravated felony for removal purposes. 8 U.S.C. § 1101(a)(43)(M)(i); 18 U.S.C. §§ 152(3), 3663A.

9. Immigration courts are not bound to accept sentencing court's determination of actual loss for restitution purposes at face value in determining whether actual loss to victim of alien's “fraud or deceit” offense exceeded $10,000, thus making the offense an aggravated felony for removal purposes. 8 U.S.C. § 1101(a)(43)(M)(i).

10. A wrongdoer's interest in fraudulently obtained property is voidable.

11. No actual loss occurred as result of alien's “fraud or deceit” offense of knowingly making a false statement under penalty of perjury in a bankruptcy proceeding, and therefore his offenses did not constitute an aggravated felony for removal purposes; evidence showed that a government sting operation doomed any intended benefit when the crime was committed, and prevented any potential or incidental losses from in fact occurring, that a government entity had custody of the money, alien had no capacity to obtain that money for his personal benefit, that the trustee's personal compensation had not been affected, and that creditors had not been deprived of any property for any length of time. 8 U.S.C. § 1101(a)(43)(M)(i); 18 U.S.C. § 152(3).
Ying Chen v. Att’y Gen., 676 F.3d 112 (3d Cir. 2011)

1. Substantial evidence supported determination of Board of Immigration Appeals (BIA) that alien failed to establish a well-founded fear that she would be persecuted in China on account of the birth of her two children in United States, for purposes of asylum eligibility; State Department Reports and Law Library of Congress Report indicated that alien's children would not be considered Chinese nationals upon return, and State Department Country Report on Human Rights Practices for China reflected a variation in the amount of social compensation fees and the severity of hardship that Chinese government imposed for violation of family planning policy, and alien presented no evidence as to her individual financial circumstances to support her claim that she would face onerous fines. Immigration and Nationality Act, § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B).

2. In proceedings in which immigration judge (IJ) denied alien's application for asylum, IJ properly discounted as unauthenticated a letter that alien's mother purportedly had obtained from the local Village Committee in China that indicated that alien would be sterilized upon her return, since the Village Committee document had not been authenticated by any means at all, such as an affidavit from alien's mother as to how the document was obtained.


1. Court of Appeals exercise plenary review over the district court's grant of a motion to dismiss for failure to state a claim upon which relief can be granted. Fed. Rules Civ. Proc. Rule 12(b)(6), 28 U.S.C.

2. To the extent that apartment complex's property managers simply rented apartments to aliens not lawfully present, property managers did not commit the crime of harboring aliens not lawfully present, which resident of apartment complex alleged as predicate act on his claim under Racketeer Influenced and Corrupt Organizations Act (RICO) alleging injury to his leasehold property as a result of property managers' alleged conspiracy to seek out illegal aliens as prospective tenants. Immigration and Nationality Act, § 274(a)(1)(A)(iii), 8 U.S.C. § 1324(a)(1)(A)(iii); 18 U.S.C. § 1962(d).

3. Resident of apartment complex insufficiently alleged that complex's property managers substantially facilitated aliens' remaining in United States illegally, as required to state conspiracy claim under Racketeer Influenced and Corrupt Organizations Act (RICO) based on predicate act of harboring aliens not lawfully present; property managers allegedly specifically targeted illegal aliens as prospective tenants and steered them into certain properties to prevent authorities from detecting aliens' presence, but property managers were not required to disclose tenants' identities or immigration status to federal or state authorities, nor did they bring aliens into country, offer them assistance in procuring false documents, impede law enforcement investigation, or pay to rent apartments on aliens' behalf so as to keep their names off of leases. Immigration and Nationality Act, § 274(a)(1)(A)(iii), 8 U.S.C. § 1324(a)(1)(A)(iii); 18 U.S.C. § 1962(d).

4. Resident of apartment complex insufficiently alleged that complex's property managers prevented government authorities from detecting aliens' unlawful presence, as required to
state conspiracy claim under Racketeer Influenced and Corrupt Organizations Act (RICO) based on predicate act of harboring aliens not lawfully present; property managers allegedly exempted illegal aliens from background checks and segregated them into specific rental buildings, but property managers had no obligation to require background checks of tenants, moreover, resident did not allege that third party background check screeners would have passed aliens' immigration status along to immigration authorities, and by grouping large numbers of aliens into specific apartment buildings, property managers arguably made aliens more conspicuous. Immigration and Nationality Act, § 274(a)(1)(A)(iii), 8 U.S.C. § 1324(a)(1)(A)(iii); 18 U.S.C. § 1962(d).

5. Resident of apartment complex insufficiently alleged that complex's property managers substantially assisted aliens to reside in United States in violation of immigration law when they might not have otherwise, as required to state conspiracy claim under Racketeer Influenced and Corrupt Organizations Act (RICO) based on predicate act of encouraging or inducing aliens to unlawfully come to, enter, or reside in United States; property managers allegedly provided illegal aliens with rental housing at complex, but aliens could have resided in United States by renting housing elsewhere. Immigration and Nationality Act, § 274(a)(1)(A)(iv), 8 U.S.C. § 1324(a)(1)(A)(iv); 18 U.S.C. § 1962(d).

6. Prohibition against encouraging or inducing an alien to unlawfully come to, enter, or reside in the United States prohibits a person from engaging in an affirmative act that substantially encourages or induces an alien lacking lawful immigration status to come to, enter, or reside in the United States where the undocumented person otherwise might not have done so. Immigration and Nationality Act, § 274(a)(1)(A)(iv), 8 U.S.C. § 1324(a)(1)(A)(iv).

7. Prohibition against encouraging or inducing an alien to unlawfully come to, enter, or reside in the United States has the distinct character of foreclosing the type of substantial assistance that will spur a person to commit a violation of immigration law where they otherwise might not have. Immigration and Nationality Act, § 274(a)(1)(A)(iv), 8 U.S.C. § 1324(a)(1)(A)(iv).

8. In non-civil rights cases, properly requesting leave to amend a complaint requires submitting a draft amended complaint.

9. Plaintiff's request for leave to amend complaint for third time was properly denied, where plaintiff never presented draft of third amended complaint to district court.

10. Although a district court is authorized to grant a plaintiff leave to amend a complaint when justice so requires, it is not compelled to do so when amendment would be futile.

_Vera v. Att'y Gen.,_ 672 F.3d 187 (3d Cir. 2012)

1. Visitors to the United States admitted pursuant to the Visa Waiver Program (VWP) must waive certain procedural rights afforded other aliens within the country before they may be removed without their consent; most significantly, a VWP visitor must waive his or her rights to contest the government's admissibility determinations and removal actions, except that the alien may contest removal actions on the basis of asylum. 8 U.S.C. § 1187(a-b).
2. A Visa Waiver Program (VWP) applicant's execution, prior to admission to the United States, of the Form I-94W, Nonimmigrant Visa Waiver Arrival/Departure Form, is an ironclad requirement; indeed, a VWP applicant may not be provided a waiver of visa requirements under the VWP unless the applicant has signed a VWP waiver of rights to contest the government's admissibility determinations and removal actions, and an applicant who does not sign will be refused admission and removed. 8 U.S.C. § 1187(b); 8 C.F.R. §§ 217.2(b)(1), 217.4(a)(1).


4. Notice of Intent to Deport alien admitted pursuant to the Visa Waiver Program (VWP), for staying beyond the 90 days permitted by the VWP, coupled with Department of Homeland Security's near deportation of alien, was in effect a final order of removal, and thus Court of Appeals had jurisdiction over alien's petition for review of removal order. 8 U.S.C. § 1252(a)(1).

5. Department of Homeland Security was entitled to rebuttable presumption that alien admitted to United States under Visa Waiver Program (VWP) executed waiver of her due process right to contest her removal for staying beyond 90 days permitted by VWP, in proceeding on petition for review of removal order; although Department was unable to produce alien's signed waiver, execution of waiver was linchpin statutory and regulatory requirement for admission pursuant to VWP. U.S. Const. amend. V; 8 U.S.C. § 1187(a-b); 8 C.F.R. §§ 217.2(b)(1), 217.4(a)(1).

6. Courts generally indulge every reasonable presumption against waiver of fundamental constitutional rights.

7. Congress may prescribe such requirements as it seems fit for an alien to be admitted into this country.

8. Alien's request to enter United States pursuant to Visa Waiver Program (VWP) was statutorily based, without any constitutionally protected or even favored basis, and thus Court of Appeals was required to be particularly circumspect before finding that alien rebutted presumption that she executed waiver of her due process right to contest her removal as condition of entry pursuant to VWP, in proceeding on petition for review of removal order for staying beyond 90 days permitted by VWP. U.S. Const. amend. V; 8 U.S.C. § 1187(a-b); 8 C.F.R. §§ 217.2(b)(1), 217.4(a)(1).

9. Even if alien admitted pursuant to Visa Waiver Program (VWP) did not sign waiver of due process right to contest removal as condition of entry pursuant to VWP, or if she signed waiver that was invalid because she was a minor, alien was not substantially prejudiced by summary removal without hearing for staying beyond 90 days permitted by VWP, as required to establish due process violation; if alien had been of majority age at entry and knowingly and voluntarily executed waiver, she would have been in precisely same position of facing summary removal for staying longer than permitted, and if alien had refused to sign waiver, she should have been denied entry because she did not have visa and could not have

10. A principle of common law is that persons should not gain an advantage by their wrongful conduct.

11. Aliens either must accept the conditions of their admission or not enter the United States.

*Castro v. Att'y Gen.*, 671 F.3d 356 (3d Cir. 2012)

1. Court of Appeals reviews questions of its own jurisdiction de novo.

2. Adverse Board of Immigration Appeals' (BIA) decision on merits and accompanying order of removal, and BIA order denying motion to reconsider are two separate final orders, and either one may be subject of petition for judicial review, which must be filed within thirty days of date of order. 8 U.S.C. § 1252(a)(1), (b)(1).

3. Filing motion to reconsider Board of Immigration Appeals' (BIA) order does not toll thirty-day period for seeking review of earlier merits decision. 8 U.S.C. § 1252(a)(1), (b)(1).

4. Alien's decision to seek review of Board of Immigration Appeals' (BIA) reconsideration decision, but not BIA's earlier merits decision, did not curtail Court of Appeals' jurisdiction to consider merits of his arguments against inadmissibility and removability, where some review of merits decision was required in order to determine whether BIA erred in concluding, on reconsideration, that alien had not shown any error of fact or law in that decision that would alter outcome. 8 U.S.C. § 1252(a)(1), (b)(1); 8 C.F.R. § 1003.2(b)(1).

5. Court of Appeals reviews Board of Immigration Appeals' (BIA) denial of motion to reconsider for abuse of discretion. 8 U.S.C. § 1252.

6. Board of Immigration Appeals' (BIA) determinations of questions of law are reviewed de novo, subject to any applicable administrative law canons of deference. 8 U.S.C. § 1252.

7. Requirement that alien exhaust all administrative remedies available to alien as of right before seeking judicial review of Board of Immigration Appeals' (BIA) decision attaches to each particular issue raised by alien. 8 U.S.C. § 1252(d)(1).

8. Alien's failure to exhaust issue by presenting it to Board of Immigration Appeals (BIA) deprives Court of Appeals of jurisdiction to consider that issue. 8 U.S.C. § 1252(d)(1).

9. Alien exhausted his administrative remedies for his claims that he had not made false claim of United States citizenship for purpose or benefit under federal or state law and that failure to disclose police sergeant's letter that contradicted officer's testimony was violation of due process, and thus Board of Immigration Appeals' (BIA) determination of inadmissibility was subject to judicial review, where alien challenged inadmissibility throughout administrative proceedings, and his motion to reconsider framed alleged failure to disclose letter as due process violation. U.S. Const. amend. V; 8 U.S.C. §§ 1182(a)(6)(C)(ii), 1252(d)(1).
10. In removal context, due process requires that alien be provided with full and fair hearing and reasonable opportunity to present evidence. U.S. Const. amend. V.

11. Government's failure to produce police sergeant's letter that contradicted officer's testimony that he could not have misunderstood alien to have said that he was born in Costa Rica, rather than Puerto Rico, did not violate alien's due process rights during removal hearing, even though alien was ruled inadmissible for misrepresenting to officer that he was born in Puerto Rico, where alien had opportunity to present letter in proceedings before immigration judge (IJ), but counsel declined to review government's file in which letter was located. U.S. Const. amend. V.


13. Board of Immigration Appeals (BIA) did not abuse its discretion in denying alien's motion to reconsider its determination that police officer's testimony that alien had told him during arrest that he was born in Puerto Rico, rather than in Costa Rica, and thus was inadmissible due to his false claim of United States citizenship for purpose or benefit under federal or state law, even though officer had no independent recollection of alien's arrest, and alien testified that he told officer he was born in Costa Rica and had attempted to correct arrest report. 8 U.S.C. §§ 1182(a)(6)(C)(ii), 1229a(c)(2), 1255(a)(2).

14. Alien did not misrepresent his birthplace to arresting police officer as Puerto Rico, rather than Costa Rica, for any purposes or benefit under federal or state law, and thus alien was not inadmissible on that basis, even if alien intended to minimize risk that police would report his arrest to immigration authorities, and thereby endanger his application for adjustment of status, where alien's citizenship status had no bearing on police department's handling of his arrest, and police department could not confer any benefit on alien. 8 U.S.C. § 1182(a)(6)(C)(ii).

Pieschacon-Villegas v. Att’y Gen., 671 F.3d 303 (3d Cir. 2011)

1. Court of Appeals has jurisdiction to review final orders of removal issued by the Board of Immigration Appeals (BIA). 8 U.S.C. § 1252(a).

2. Court of Appeals has jurisdiction over constitutional claims or questions of law when reviewing a Board of Immigration Appeals (BIA) removal order against a criminal alien, but lacks jurisdiction to review the alien's mere disagreement with the BIA's determination as to the sufficiency of the alien's evidence against removal. 8 U.S.C. § 1252(a)(2)(C)-(D).

3. When the Board of Immigration Appeals (BIA) issues its own decision on the merits, rather than a summary affirmance of the immigration judge's (IJ's) opinion, the Court of Appeals reviews its decision, not that of the IJ. 8 U.S.C. § 1252(a).

4. When reviewing a Board of Immigration Appeals (BIA) decision on the merits, the Court of Appeals reviews legal determinations de novo, subject to the principles of deference articulated in Chevron.
5. Alien applying for relief under Article 3 of the Convention Against Torture (CAT), providing that states will not expel, return, or extradite an alien if there are substantial grounds that alien would be in danger of torture, bears the burden of establishing that it is more likely than not that, if removed to the proposed country of removal, he or she would be tortured by, or at the instigation or with the consent of, an individual acting in an official capacity. 8 C.F.R. §§ 1208.16(c)(2), 1208.18(a)(1).

6. Alien's testimony in support of a claim for relief under the Convention Against Torture (CAT), if credible, may be sufficient to sustain the burden of proof without corroboration. 8 C.F.R. § 1208.16(c)(2).

7. On a Convention Against Torture (CAT) claim, once the alien shows a public official's "acquiescence" to torture by showing, at minimum, that the official was willfully blind to torturous conduct and breached his legal responsibility to prevent it, withholding of removal or deferring of removal is mandatory. 8 C.F.R. §§ 1208.16, 1208.18(a)(7).

8. Colombian government's ability to control paramilitary groups allegedly engaged in torturous activities was relevant to, but was not dispositive of, assessment of willful blindness on alien's claim for deferring of removal under Convention Against Torture (CAT). 8 C.F.R. §§ 1208.16, 1208.18(a)(7).

9. Colombian government's opposition to paramilitary organization that was engaged in alleged torturous acts did not bar alien from establishing governmental acquiescence to those torturous activities on his application for deferring of removal under Convention Against Torture (CAT). 8 C.F.R. §§ 1208.16, 1208.18(a)(7).

10. On an alien's application for relief under the Convention Against Torture, country conditions can, by themselves, constitute sufficient grounds for determining that the alien would more likely than not be subjected to torture upon return to the country of removal. 8 C.F.R. § 1208.16(c)(3).

11. Remand to Board of Immigration Appeals (BIA) was required on alien's application for deferring of removal to Colombia under Convention Against Torture (CAT), where BIA failed to consider all evidence relevant to possibility of future torture, did not reference or show any meaningful consideration of immigration judge's (IJ's) credibility findings, alleged threats by paramilitary groups due to alien's assistance to FBI in monitoring drug trafficking, FBI's alleged recommendation to alien's wife not to return to Colombia, or alleged harm to alien while previously imprisoned in Colombia, and did not consider country reports indicating that various Colombian officials were suspected of or charged with involvement in paramilitary atrocities or that Colombian government claimed that all paramilitary organizations had demobilized despite abundant contrary evidence. 8 C.F.R. § 1208.16(c)(3).

*Chehazeh v. Att'y Gen.*, 666 F.3d 118 (3d Cir. 2012)

1. The Court of Appeals exercises plenary review over an order dismissing a complaint for lack of subject-matter jurisdiction.
2. Whether court had authority to review decision of Board of Immigration Appeals (BIA) under Administrative Procedure Act (APA) was not jurisdictional question. 5 U.S.C. § 701 et seq.; 28 U.S.C. § 1331.


4. The judicial review provisions of the Administrative Procedure Act (APA) provide a limited cause of action for parties adversely affected by agency action; thus, if agency action is committed to agency discretion by law, or the action is not “final agency action,” a plaintiff who challenges such an action cannot state a claim under the APA, and the action must be dismissed. 5 U.S.C. §§ 701(a)(2), 704.

5. Even if Congress has committed discretion to the Board of Immigration Appeals (BIA) by law to take or not take certain actions, it has not deprived a district court or the Court of Appeals of jurisdiction to consider a plaintiff’s claim that such action was erroneous pursuant to the Administrative Procedure Act (APA); the question is whether a plaintiff can state a claim for relief from such action under the APA. 5 U.S.C. §§ 701(a)(2), 704.

6. Court of Appeals could review threshold question of whether there was exceptional situation for Board of Immigration Appeals (BIA) to sua sponte reopen removal proceedings, since BIA had announced and followed general policy that it would exercise its discretion to reopen only in exceptional situations and “exceptional situations” requirement provided meaningful standard by which to judge agency’s action. 8 C.F.R. § 1003.2(a).


8. A motion to reopen removal proceedings or reconsider has to be consolidated before the Court of Appeals on an appeal when there is a final order of removal. 8 U.S.C. § 1252(b)(6).

9. Although all challenges to an order of removal must be consolidated, claims arising from administrative actions unrelated to an order of removal do not have to be consolidated. 8 U.S.C. § 1252(b)(9).

10. Provision providing that “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien” did not apply to quasi-judicial decision by Board of Immigration Appeals (BIA) to reconsider already adjudicated case, such as decision to sua sponte reopen removal proceedings; instead, it applied only to impose judicial constraints upon prosecutorial discretion. 8 U.S.C. § 1252(g).

11. When an agency refuses to take action, it is generally afforded a greater degree of deference than when it actually takes action.

12. Decision by Board of Immigration Appeals (BIA) to sua sponte reopen removal proceedings was functional equivalent of final agency action, as required to apply collateral order doctrine for purposes of judicial review, since it effectively would have been unreviewable on appeal
from final judgment, it was conclusive, and it decided important questions separate from merits of alien’s asylum claims; although administrative proceedings had not concluded, government's power to re-run proceedings except in exceptional situations implicated due process clause. U.S. Const. amend. V; 5 U.S.C. § 704.

13. While a “final decision” generally is one which ends the litigation on the merits, other preliminary decisions may be “final” under the collateral order doctrine if they are conclusive, resolve important questions completely separate from the merits, and would be effectively unreviewable on appeal from final judgment in the underlying action.

14. The collateral order doctrine applies to judicial review of agency decisions.

15. Double Jeopardy clause did not apply to decision by Board of Immigration Appeals (BIA) to sua sponte reopen removal proceedings against alien. U.S. Const. amend. V.

16. There is an exception to the exhaustion requirement when the claim for which review is sought is wholly collateral to the merits of the administrative proceedings.

17. District court had jurisdiction to review the decision by Board of Immigration Appeals (BIA) to sua sponte reopen removal proceedings against alien, citizen of Syria, which was effectively final and not committed to agency discretion by law, since no statute precluded review of decision.

18. Remand was required to allow parties to supplement record so that district court could review whole record to determine whether there was an exceptional situation that warranted reopening removal proceedings against alien, citizen of Syria. 5 U.S.C. § 706; 8 C.F.R. § 1003.2(c)(1).

19. The Court of Appeals may decide a legal issue not addressed by the district court when the record has been sufficiently developed for the Court of Appeals to resolve it.

_Totimeh v. Att’y Gen.,_ 666 F.3d 109 (3d Cir. 2012)

1. Because Board of Immigration Appeals (BIA) rendered its own opinion regarding alien’s removability under the Immigration and Nationality Act (INA), court would review the decision of the BIA and not the immigration judge (IJ). 8 U.S.C. § 1252.


3. Whether a conviction under a state law is a crime of moral turpitude for removal purposes calls for a “categorical” approach, focusing on the underlying criminal statute rather than the alien’s specific act; court considers what the convicting court must necessarily have found to support the conviction and not other conduct in which the defendant may have engaged in connection with the offense. 8 U.S.C. § 1227(a)(2)(A)(i).
4. Moral turpitude, for removal purposes, may inhere in serious crimes committed recklessly, i.e., with a conscious disregard of a substantial and unjustifiable risk that serious injury or death would follow. 8 U.S.C. § 1227(a)(2)(A)(i).

5. Violation of Minnesota predatory offender registration statute did not constitute a crime of moral turpitude for removal purposes; statute prescribed an offense that could be committed without intent, and did not regulate a crime that of itself was inherently vile or intentionally malicious. 8 U.S.C. § 1227(a)(2)(A)(i); M.S. § 243.166.5.

6. In determining whether an alien's crime involved moral turpitude for removal purposes, court employs modified categorical approach when a statute contains disjunctive elements, some of which are morally turpitudinous and others of which are not. 8 U.S.C. § 1227(a)(2)(A)(i).

7. Date of alien's adjustment of status was not a “date of admission” for purposes of determining whether alien was subject to removal for a crime involving moral turpitude; once an alien is in the United States legally, the five-year clock starts, and later adjustment of the reason that the alien may stay does not restart a clock that never stopped. 8 U.S.C. § 1227(a)(2)(A)(i).

Contreras v. Att’y Gen., 665 F.3d 578 (3d Cir. 2012)

1. When the Board of Immigration Appeals (BIA) affirms a decision by an immigration judge (IJ) and adds analysis of its own, the Court of Appeals reviews both the IJ’s and the BIA’s decisions.

2. The Court of Appeals reviews the denial of a motion to reopen for abuse of discretion and may reverse only if the denial is arbitrary, irrational, or contrary to law.

3. On review of the denial of a motion to reopen, the Court of Appeals reviews de novo questions of law, such as whether petitioners’ due process rights to the effective assistance of counsel have been violated. U.S. Const. amend. V.

4. Right of aliens, citizens of Mexico, under Fifth Amendment to effective assistance of counsel during removal proceedings did not extend to collateral matters, such as pre-proceeding attorney conduct in connection with visa petition process. U.S. Const. amend. V; 8 U.S.C. § 1255(i).

5. Counsel's pre-proceeding ineffective assistance to aliens, citizens of Mexico, in connection with visa petition process, over which aliens did not possess due process right, did not compromise fundamental fairness of removal proceedings, over which aliens did possess due process right, since aliens were still able to present arguments and evidence available to them at time of proceedings. U.S. Const. amend. V.

6. Because immigration proceedings are civil rather than criminal in nature, the Sixth Amendment right to the effective assistance of counsel does not apply; however, a claim of ineffective assistance of counsel in removal proceedings is cognizable under the Fifth Amendment as a violation of that amendment's guarantee of due process. U.S. Const. amends. V, VI.
7. To violate due process in a removal proceeding, an attorney's ineffectiveness must be so severe as to undermine the fundamental fairness of the removal proceeding. U.S. Const. amend. V.

8. The Due Process Clause guarantees an alien a right to assistance of counsel that is sufficiently effective to prevent removal proceedings from being fundamentally unfair. U.S. Const. amend. V.

9. Due process in removal proceedings entitles an alien (1) to fact finding based on a record produced before the Decision maker and disclosed to him or her; (2) the alien must be allowed to make arguments on his or her own behalf; and (3) the alien has the right to an individualized determination of his or her interests. U.S. Const. amend. V.

10. To make out an ineffective-assistance-of-counsel claim, an alien must show that prior counsel's deficient performance prevented him from reasonably presenting his case and caused him substantial prejudice. U.S. Const. amend. V.

11. To evaluate the merits of an alien's ineffective assistance of counsel claim, a court first asks whether competent counsel would have acted otherwise, and, if so, the court asks whether counsel's poor performance prejudiced the alien; to prove prejudice, an alien must show that there is a reasonable likelihood that the result of the removal proceedings would have been different had the error not occurred. U.S. Const. amend. V.

12. An alien's ineffective assistance of counsel claim properly requires the alien to show not just that he received ineffective assistance in his removal proceedings, but that the challenged order of removal is fundamentally unfair, because there is a significant likelihood that the IJ would not have entered an order of removal absent counsel's errors. U.S. Const. amend. V.

13. The Board of Immigration Appeals (BIA) has three procedural requirements under Lozada for motions to reopen based on ineffectiveness claims: (1) the alien's motion must be supported by an affidavit of the allegedly aggrieved alien attesting to the relevant facts; (2) former counsel must be informed of the allegations and allowed the opportunity to respond and this response should be submitted with the motion; and (3) if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.

14. The Fifth Amendment right to effective counsel in removal proceedings is narrower than the Sixth Amendment right to effective counsel in criminal proceedings. U.S. Const. amends. V, VI.

15. The Board of Immigration Appeals (BIA), as an exercise of its discretion to reopen removal proceedings, may consider ineffective assistance claims that arise after removal proceedings have been completed.

16. When assessing whether an alien has established extraordinary circumstances that would excuse the untimely filing of an asylum application, an immigration judge (IJ) and the Board of Immigration Appeals (BIA) are authorized to determine whether the alien's asylum
application was untimely due to ineffective assistance of counsel. 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. § 1208.4(a)(5)(iii).

17. Unlawful presence of aliens, citizens of Mexico, for more than one year and their ineligibility for any relief triggered impending ten-year bar of inadmissibility, and thus aliens had not been deprived of due process during removal proceedings by counsel's alleged ineffectiveness in not requesting third continuance, since aliens did not have approved visa petition making them eligible for relief from removal, counsel requested voluntary departure which was only form of relief available to aliens at that point, and possibility that aliens might have become eligible for relief from removal was speculative and thus any motion for continuance was futile. U.S. Const. amend. V.

Garcia v. Att'y Gen., 665 F.3d 496 (3d Cir. 2011)

1. Court of Appeals exercises de novo review over constitutional claims or questions of law and the application of law to facts.

2. Findings of fact by an Immigration Judge (IJ) will be upheld if they are supported by reasonable, substantial, and probative evidence on the record considered as a whole. 8 U.S.C. § 1252(b)(4)(B).

3. When the Board of Immigration Appeals (BIA) adopts or defers to the underlying decision of an Immigration Judge (IJ), Court of Appeals reviews the IJ's opinion as the decision of the agency. 8 U.S.C. § 1252(b)(4)(B).

4. Review of the decision of an Immigration Judge (IJ) was proper only to the extent affirmed or incorporated by the Board of Immigration Appeals (BIA); the BIA agreed with several of the IJ's findings but did not adopt all of them, and thus, the Court of Appeals could affirm the BIA's decision only if the court found that its stated reasons were correct, as it was the BIA, not the IJ, that provided the final and authoritative grounds invoked by the agency.

5. Alien waived the issue of whether the Board of Immigration Appeals (BIA) erred in denying her claim under the Convention Against Torture (CAT) by failing to argue that issue in her opening brief.

6. For purposes of an application for asylum or withholding of removal, persecution must be committed by the government or forces the government is either unable or unwilling to control. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B)(i); 8 C.F.R. §§ 1208.13(b)(1), 1208.13(b)(2)(f).

7. Alien seeking withholding of removal and asylum had a reasonable fear of persecution if returned to Guatemala; although the Guatemalan government displayed great willingness to protect the alien before and after her testimony in a murder trial, that willingness shed no light on Guatemala's ability to protect her, and the fact that Guatemala saw fit to relocate her to Mexico was tantamount to an admission that it could not protect her in Guatemala. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B)(i), 1231(b)(3)(A); 8 C.F.R. §§ 1208.13(b)(1), 1208.13(b)(2)(f).
8. Alien seeking withholding of removal to Guatemala and asylum was a member of a particular social group; the alien testified against members of a violent gang, and therefore shared a common, immutable characteristic with other civilian witnesses who had the shared past experience of assisting law enforcement against violent gangs that threatened communities in Central America, and it was a characteristic that members could not change because it was based on past conduct that could not be undone. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(B)(i), 1231(b)(3)(A); 8 C.F.R. §§ 1208.13(b)(1), 1208.13(b)(2)(f).

9. Evidence supported finding by the Board of Immigration Appeals (BIA), in support of a denial of withholding of removal, that an alien was not more likely than not to face persecution if returned to Guatemala; she admitted that she never personally contacted law enforcement in Guatemala about her interactions with members of a violent gang, and although she may have been understandably fearful while she was living in Guatemala, there was nothing in the record to support a finding that she was ever persecuted in the past, nor could she show a clear probability of future persecution absent corroboration of testimony about threats she allegedly received after she entered the United States. 8 U.S.C. §§ 1101(a)(42)(A), 1231(b)(3)(A); 8 C.F.R. § 208.16(b)(1)-(2).

_Nbaye v. Att’y Gen., 665 F.3d 57 (3d Cir. 2011)_

Taking judicial notice of post-removal order political change in Guinea, under which alien's political party was now in power, and therefore remanding to Board of Immigration Appeals (BIA) for consideration of that change, was appropriate on alien's motion to reopen proceedings for asylum, withholding of removal, and relief under Convention Against Torture (CAT) on basis of potential persecution based on his party membership, where fact that political change was not in record on appeal only barred Court of Appeals from deciding case on basis of that change, and yet such information was potentially outcome determinative; abrogating Wong v. Att’y Gen., 539 F.3d 225, and Berishaj v. Ashcroft, 378 F.3d 314. Immigration and Nationality Act, § 242(b)(4)(A), 8 U.S.C. § 1252(b)(4)(A).

_Aguilar v. Att’y Gen., 663 F.3d 692 (3d Cir. 2011)_

1. Since the interpretation of criminal provisions is a task outside the Board of Immigration Appeals' (BIA) special competence and congressional delegation, and very much a part of the Court of Appeals' competence, review of the BIA's interpretation of criminal provisions is de novo.

2. Under the categorical approach to determining whether an alien's state law conviction constitutes an aggravated felony warranting removal, Court of Appeals looks to the elements of the statutory state offense, not to the specific facts of the case, reading the applicable statute to ascertain the least culpable conduct necessary to sustain conviction under the statute. 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16(b).

3. Where a statute criminalizes different kinds of conduct, some of which would constitute aggravated felonies warranting removal while others would not, Court of Appeals turns to a modified categorical approach to determining whether the alien's conviction warrants
removal, under which it may look beyond the statutory elements to determine the particular part of the statute under which the alien was actually convicted.

4. Fact that a crime can be committed with a mens rea of recklessness does not necessarily disqualify it from being a crime of violence warranting removal; the focus must be on whether the crime, by its nature, raises a substantial risk that force may be used, not merely on mens rea. 18 U.S.C. § 16(b).

5. Court of Appeals can accord dicta as much weight as it deems appropriate.

6. Alien's Pennsylvania conviction of second degree sexual assault constituted a “crime of violence” warranting removal, notwithstanding fact that it could have been committed with mens rea of recklessness, since non-consensual sexual intercourse, by its nature, creates a substantial risk that the perpetrator will intentionally use physical force against the victim. 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16(b); 18 Pa. Cons. Stat. § 3124.1.

*Calla-Collado v. Atty Gen.*, 663 F.3d 680 (3d Cir. 2011)

1. Where the Board of Immigration Appeals (BIA) issues a decision on the merits, Court of Appeals reviews only the BIA's decision; however, the court will look to the immigration judge's (IJ) analysis to the extent that the BIA deferred to or adopted that analysis.

2. Court of Appeals will uphold the findings of the Board of Immigration Appeals (BIA) to the extent that the findings are supported by reasonable, substantial, and probative evidence on the record considered as a whole, and will reverse those findings only if there is evidence so compelling that no reasonable fact finder could conclude as the BIA did.

3. Review of the Board of Immigration Appeals' (BIA) legal conclusions is de novo, subject to principles of deference.

4. An alien is generally bound by the actions of his attorney.

5. When an admission is made as a tactical decision by an attorney, in a deportation proceeding, the admission is binding on the alien client and may be relied upon as evidence of deportability.

6. A claim of ineffective assistance of counsel requires that an alien demonstrate prejudice. U.S. Const. amend. VI.

7. For an alien to demonstrate that he suffered prejudice due to his counsel's unprofessional errors, the alien must show that there was a reasonable likelihood that the result would have been different if the errors had not occurred. U.S. Const. amend. VI.

8. Counsel's tactical decision to obtain alien's desired change of venue, by conceding to allegations in alien's notice to appear based on charge of being alien present in United States without being admitted or paroled, was not ineffective assistance of counsel affecting alien's deportation proceedings, even though alien claimed that counsel admitted alienage allegations without alien's consent, since alien was bound by counsel's admissions of alien's

9. Any violation of state attorney general directive, authorizing arresting officer to inquire, as part of booking process, about arrestee's citizenship, nationality, and immigration status, by police officers' questioning alien and contacting Immigration and Customs Enforcement (ICE) outside of booking process for his arrest for driving while intoxicated, was not grounds for invalidating alien's deportation proceedings, since alleged violation did not prejudice alien's interests that were protected by directive. 8 U.S.C. § 1182(a)(6)(A)(i).

10. Board of Immigration Appeals (BIA) did not abuse discretion by affirming immigration judge's (IJ) denial of alien's motion for continuance and by not requiring IJ to compel document production, for purpose of obtaining information as to alien's arrest for driving while intoxicated in order to support his argument for withdrawing his pleadings for his deportation proceeding, since additional information relating to his arrest was not necessary to support withdrawal of pleadings, as any violation of state attorney general directive by arresting officer did not prejudice any of alien's interests protected by directive. 8 U.S.C. § 1182(a)(6)(A)(i).

11. As a part of Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE) necessarily has the authority to determine the location of detention of an alien in deportation proceedings and therefore, to transfer aliens from one detention center to another. 6 U.S.C. § 202; 8 U.S.C. § 1231(g)(1).

12. An alien is guaranteed the right to counsel and the right to present witnesses and evidence at his deportation proceedings; however, an alien does not have the right to be detained where he believes his ability to obtain representation and present evidence would be most effective. U.S. Const. amend. VI; 8 U.S.C. § 1231(g)(1).

13. Department of Homeland Security's (DHS) transfer of alien from detention in New Jersey to detention in Louisiana did not violate alien's constitutional rights to counsel and to present witnesses and evidence at his deportation proceedings, even though alien claimed that transfer forced him to obtain less effective counsel, prevented him from presenting crucial evidence, and coerced him into admitting his alienage to secure change of venue, since alien had same rights and privileges at deportation hearing whether in New Jersey or Louisiana, alien chose not to obtain different counsel and to concede deportability as tactical decision to obtain change of venue, and transfer did not prejudice alien who did not specify any witnesses or evidence he would have presented had Louisiana hearing taken place in New Jersey and did not argue that conceded admissions were inaccurate. U.S. Const. amend. VI; 6 U.S.C. § 202; 8 U.S.C. §§ 1182(a)(6)(A)(i), 1231(g)(1).

Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582 (3d Cir. 2011)

1. The Court of Appeals reviews the Board of Immigration Appeals's (BIA) statutory interpretation of the Immigration and Nationality Act (INA) under the deferential standard set forth in Chevron, which provides that if statute is silent or ambiguous about an issue, the
Court must determine if the agency's interpretation is based on a permissible construction of the statute. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

2. The Court of Appeals reviews the Board of Immigration Appeals's (BIA) findings of fact under the substantial evidence standard, and can only BIA's decision if any reasonable adjudicator would be compelled to conclude to the contrary. 8 U.S.C. § 1252(b)(4)(B).

3. Where an applicant is unable to demonstrate it has been victim of past persecution, applicant nonetheless becomes eligible for asylum upon demonstrating a well-founded fear of future persecution if returned to its native country. 8 C.F.R. § 208.16(b)(1).

4. The well-founded fear of persecution standard, used to determine whether applicant is eligible for asylum under Immigration and Nationality Act (INA), involves both a subjectively genuine fear of persecution and an objectively reasonable possibility of persecution. 8 U.S.C. § 1101(a)(42)(A).

5. Determining whether an asylum applicant's fear of persecution is objectively reasonable requires ascertaining whether a reasonable person in the alien's circumstances would fear persecution if returned to a given country. 8 C.F.R. § 208.16(b)(1).

6. In applying for asylum, if applicant's persecution was not conducted directly by foreign government or its agents, applicant must also establish that it was conducted by forces the government is unable or unwilling to control. 8 C.F.R. § 208.16(b)(1).

7. To qualify for withholding of removal under Immigration and Nationality Act (INA), an alien must establish a clear probability of persecution, in effect, that it is more likely than not, it would suffer persecution upon returning home. 8 U.S.C. § 1231(b)(3).

8. Since the standard governing withholding of removal is more demanding than that governing eligibility for asylum, an alien who fails to qualify for asylum is necessarily ineligible for withholding of removal. 8 U.S.C. § 1231(b)(3).

9. The standard for relief under Convention Against Torture (CAT) has no subjective component, but instead requires the alien to establish, by objective evidence, that it is entitled to relief. 8 C.F.R. § 208.16(c)(2).

10. Country conditions alone can play a decisive role in determining if relief is warranted under Convention Against Torture, and law does not require that prospective risk of torture be on account of certain protected grounds. 8 C.F.R. § 208.16(c)(2).

11. Torture covers intentional governmental acts, not negligent acts or acts by private individuals not acting on behalf of the government.

12. District Court had jurisdiction to consider challenge by alien, a native and citizen of Honduras, to requirement of Board of Immigration Appeals (BIA) that group must have “particularity” and “social visibility” to constitute “particular social group” subject to persecution under Immigration and Nationality Act (INA), for purposes of determining whether alien was “refugee” eligible for asylum, withholding of removal, or relief under
Convention Against Torture, as BIA raised issue of whether alien qualified for asylum consideration on basis of his “particular social group” sua sponte. 8 U.S.C. § 1231(b)(3).

13. Board of Immigration Appeals (BIA), in denying application for asylum, withholding of removal, and relief under Convention Against Torture of alien, a native and citizens of Honduras, did not apply new standard to determine whether alien had membership in “particular social group” for purposes of eligibility for relief as “refugee” under Immigration and Nationality Act (INA), as concepts of “social visibility” and “particularity” did not originate in the cases analyzed by BIA which were decided after alien could argue cases' merits; rather, BIA simply applied those cases involving gang recruitment-based social group claims in which requirements of “social visibility” and “particularity” were discussed and applied, and concepts arose in cases which were decided prior to remand of alien's case. 8 U.S.C. § 1101(a)(42)(A).

14. Board of Immigration Appeals (BIA), in denying application for asylum, withholding of removal, and relief under Convention Against Torture of alien, a native and citizens of Honduras, provided alien with notice and opportunity to be heard, in accordance with due process, when applying recent decisions in determining whether alien had membership in “particular social group” and was thus “refugee” eligible for relief under Immigration and Nationality Act (INA); alien had no attorney of record, BIA was not required to notify alien of law it intended to apply to case, and BIA was required to apply new law to its review. U.S. Const. amend. V; 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 1003.2(b)(1).

15. Board of Immigration Appeals's (BIA) requirements that, under Immigration and Nationality Act (INA), “particular social group” must possess elements of “social visibility” and “particularity” in order for member of that group to be “refugee” eligible for asylum was not entitled to Chevron deference; requirements were inconsistent with past decisions of the BIA and would have excluded asylum claims that were granted in past decisions. 8 U.S.C. § 1101(a)(42)(A).

16. Administrative agencies are not free, under Chevron, to generate erratic, irreconcilable interpretations of their governing statutes; consistency over time and across subjects is a relevant factor under Chevron when deciding whether the agency's current interpretation is reasonable.

17. When an administrative agency's decisions are inconsistent, a court cannot pick one of the inconsistent lines and defer to that one, unless only one is within the scope of the agency's discretion to interpret the statutes it enforces or to make policy as Congress's delegate.

18. An administrative agency can clearly change or adopt its policies; however, an agency acts arbitrarily if it departs from its established precedents without announcing a principled reason for its decision.

19. If an administrative agency departs from an announced rule without explanation or an avowed alteration, such action could be viewed as arbitrary, capricious or an abuse of discretion.
20. Holding a political opinion, without more, is not sufficient to show persecution on account of that political opinion, for purposes of alien's application seeking asylum under Immigration and Nationality Act (INA); there must be evidence that the persecuting party knew of alien's political opinion and targeted alien because of it. 8 U.S.C. § 1158(a).

21. Acquiescence to torture, as required for relief under Convention Against Torture, requires only that government officials remain willfully blind to torturous conduct and breach their legal responsibility to prevent it. 8 C.F.R. § 208.18(a)(2).

22. Conclusion of Board of Immigration Appeals (BIA), in denying application for relief under Convention Against Torture (CAT) of alien, a native and citizen of Honduras, that alien failed to show it was more likely than not he would be tortured as a result of alleged willful blindness by Honduran government was supported by substantial evidence; although alien purportedly never saw progress in police's investigation of his complaints, that did not mean police were not taking measures to deal with gang problem, and media reports clearly showed that Honduran government sought to combat nation's gang problem and protect its citizens. 8 C.F.R. § 208.18(a)(2).

*Abulashvili v. Att'y Gen.*, 663 F.3d 197 (3d Cir. 2011)

1. A final order of the Board of Immigration Appeals (BIA) denying a motion to reopen is reviewed for abuse of discretion; under this standard, the BIA's denial of a motion to reopen may be reversed if it is arbitrary, irrational, or contrary to law. 8 U.S.C. § 1252; 8 C.F.R. § 1003.2(a).

2. The Court of Appeals reviews the decisions of both the immigration judge (IJ) and the Board of Immigration Appeals (BIA) when the BIA's original order of removal adopted the findings of the IJ and discussed the reasons behind the IJ's decision. 8 U.S.C. § 1252; 8 C.F.R. § 1003.2(a).

3. When reviewing an asylum claim, adverse credibility determinations are factual findings subject to substantial evidence review; the Court of Appeals will defer to and uphold the IJ's adverse credibility determination if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole, but such findings must be based on inconsistencies and improbabilities that go to the heart of the asylum claim. 8 U.S.C. § 1252; 8 C.F.R. § 1003.2(a).

4. Substantial evidence did not support adverse credibility determination on application of alien, citizen of Georgia, for withholding of removal and protection under Convention Against Torture (CAT), where some of purported contradictions that immigration judge (IJ) relied upon were not contradictions at all, but resulted from misreading alien's application, reading only part of it, or ignoring it, and to extent that some unexplained inconsistencies remained, court was left questioning whether those inconsistencies had been fairly evaluated. 8 C.F.R. § 1003.2(c)(2).

5. Asylum applicants are not required to list every incident of persecution on their I-589 statements.
6. Due process rights of alien, citizen of Georgia, were violated on his application for withholding of removal and protection under Convention Against Torture (CAT) when immigration judge (IJ) took over cross-examination at hearing after determining that government was not adequately prepared, particularly where such intervention did not favor alien as it did government and record did not establish that IJ had fairly considered entire record before making credibility determinations. U.S. Const. amend. V; 8 U.S.C. § 1229a(b)(1).

7. The Due Process Clause applies to all “persons” within the United States including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. U.S. Const. amend. V.

8. To establish a due process violation, a person must show that he was denied a full and fair hearing, which includes a neutral and impartial arbiter of the merits of his claim and a reasonable opportunity to present evidence on his behalf; no person may be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. U.S. Const. amend. V.

9. Alleged due process violations in deportation proceedings are reviewed de novo. U.S. Const. amend. V.

10. An immigration judge has a responsibility to function as a neutral, impartial arbiter and must refrain from taking on the role of advocate for either party.

11. An immigration judge (IJ) must assiduously refrain from becoming an advocate for either party; even if an IJ does not intend to become an advocate for the government, judicial conduct is improper whenever a judge appears biased, even if she actually is not biased.

12. In an immigration proceeding, where a court reverses an adverse credibility finding, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

Cheruku v. Att’y Gen., 662 F.3d 198 (3d Cir. 2011)

1. Advanced parole permits an alien temporarily to remain in the United States pending a decision regarding his application for admission.

2. When used by alien to enter the United States initially or after travel, advanced parole amounts to permission for ingress into the country but is not a formal “admission.”

3. On alien's petition for review of decision of Board of Immigration Appeals (BIA), Court of Appeals reviews BIA's opinion as the final agency decision where BIA has issued a fully reasoned opinion.

4. On review of decision of Board of Immigration Appeals (BIA), Court of Appeals reviews questions of law, such as BIA's interpretation of immigration statutes, de novo, including both pure questions of law and applications of law to undisputed facts, subject to Chevron principles of deference.
5. Construction of immigration statute by Board of Immigration Appeals (BIA) is entitled to deference, on judicial review, and must be accepted by Court of Appeals if it is based upon a permissible construction of the statute.

6. In determining whether deference is warranted on judicial review of agency's construction of statute, court conducts a two-part inquiry, first asking whether statute is silent or ambiguous with respect to specific issue before court, and if statute's language is clear and unambiguous, court upholds statute's plain meaning.

7. Under two-part inquiry performed in determining whether deference is warranted on judicial review of agency's construction of statute, if statute is silent or ambiguous, question for court is whether agency's answer is based on permissible construction of statute.

8. When ambiguity in statute being construed by agency is implicit, Chevron deference requires federal court to accept agency's construction of statute if agency's construction is reasonable, even if agency's reading differs from what court believes is best statutory interpretation.

9. Adjustment-of-status provisions of Legal Immigration Family Equity Act (LIFE Act), which were in tension with bars to admissibility set forth in Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), were “ambiguous” as to way in which LIFE Act implicitly waived unlawful presence as ground for alien's inadmissibility, requiring Court of Appeals to review for reasonableness statutory interpretation by Board of Immigration Appeals (BIA). 8 U.S.C. §§ 1182(a), 1255(i).

10. Board of Immigration Appeals (BIA) acted reasonably in interpreting Legal Immigration Family Equity Act (LIFE Act), which permitted certain aliens unlawfully present in United States to apply to adjust their statuses to lawful permanent residents without having to undergo consular inspection and admission abroad, as implicit waiver of inadmissibility as to those aliens who, under general statutory bar, were inadmissible simply because they were unlawfully present, but not as to those aliens who were inadmissible because they were unlawfully present in United States for one year or more and thereafter sought admission within 10 years of date of departure or removal, and therefore deference to BIA's interpretation was warranted on judicial review; application of general bar would render LIFE Act a nullity, whereas application of 10-year bar would not, making implicit waiver unnecessary. 8 U.S.C. §§ 1182(a)(6)(A)(i), 1182(a)(9)(B)(i)(II), 1255(i).

11. To prevail on equitable estoppel claim against agency, claimant must show that agency made a misrepresentation upon which she reasonably relied to her detriment, and that agency engaged in affirmative misconduct.

12. Advanced parole granted to alien by Department of Homeland Security (DHS) explicitly warned alien that, by traveling on advanced parole, she could render herself inadmissible, and therefore DHS did not make misrepresentation or engage in affirmative misconduct required for it to be equitably estopped from denying alien's admission after she traveled on advanced parole, even if alien believed that advanced parole would immunize her against later finding of inadmissibility.
13. Alien's advanced parole document did not excuse or render her travel outside United States a nullity with respect to statute making inadmissible alien who was unlawfully present in United States for one year or more and thereafter sought admission within 10 years of date of departure or removal; advanced parole anticipated travel and possible effects of travel on alien's admissibility. 8 U.S.C. § 1182(a)(9)(B)(i)(II).

14. Board of Immigration Appeals (BIA) could not grant equitable nunc pro tunc relief to alien who was found inadmissible on grounds that she was unlawfully present in United States for more than one year, departed United States, and subsequently sought admission within 10 years of her departure, and who was not eligible for statutory waiver to inadmissibility, since her adjustment application relied upon her work status, rather than on any family connections. 8 U.S.C. §§ 1182(a)(9)(B)(i)(II), 1182(a)(9)(B)(i)(II)(iii), 1182(a)(9)(B)(v).

15. Court may not award equitable relief in contravention of the expressed intent of Congress.

_Santos-Reyes v. Att'y Gen._, 660 F.3d 196 (3d Cir. 2011)

1. Court of Appeals reviews the Board of Immigration Appeals' (BIA) legal determinations de novo, subject to the principles of deference articulated in Chevron.

2. Where the Board of Immigration Appeals (BIA) relies upon the reasoning of the immigration judge, Court of Appeals reviews both the decision of the BIA and the immigration judge.

3. Phrase “has committed” in statute providing that an alien's continuous physical presence in the United States, for purpose of eligibility for cancellation of removal based upon seven years of continuous residence, shall be deemed to end when the alien has committed an offense means the stop-time rule is triggered either by an alien's criminal conduct occurring on a particular date before the end of the seventh year of continuous residence, or conduct that runs up to the date when the seventh year of residency ends. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 304(a), 8 U.S.C. § 1229b(d)(1).

4. Court of Appeals did not have jurisdiction to ascertain whether the Board of Immigration Appeals' (BIA) factual finding, that the criminal conspiracy in which alien participated began on a date certain, which triggered the “stop-time rule” and disqualified her from cancellation of removal based upon seven years of continuous residence, was supported by substantial evidence. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 304(a), 8 U.S.C. § 1229b(d)(1); Immigration and Nationality Act, § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

_Doe v. Att'y Gen._, 659 F.3d 266 (3d Cir. 2011)

1. A federal court has the power to declare, as a matter of common law or judicial legislation, rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress.

2. In order to parole a lawful permanent resident alien for prosecution, the government has burden of proving it had probable cause to believe that alien had committed one of the crimes specified by statute. U.S. Const. amend. IV; 8 U.S.C. § 1182(a)(2).
3. Department of Homeland Security (DHS) representatives had probable cause to believe that lawful permanent resident alien seeking reentry to United States had committed wire fraud, as required to parole alien for prosecution, despite fact that alien had not even been formally charged at that point, where there was at that time an outstanding warrant for alien's arrest, and alien never challenged warrant's validity. U.S. Const. amend. IV; 8 U.S.C. § 1101(a)(13)(C)(v).

4. A warrant issues only when a neutral and detached magistrate is satisfied that probable cause exists, which means that he has been shown evidence sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. U.S. Const. amend. IV.

5. Although the Board of Immigration Appeals' (BIA) interpretation of a statute within its enforcement jurisdiction is entitled to Chevron deference, that rule of interpretation does not apply unless the statute is ambiguous.

6. The usual approach to deciding whether a crime is an aggravated felony rendering an alien convicted of such crime ineligible for cancellation of removal is to look only at the elements and nature of the offense in question, without considering the particular facts underlying the conviction. 8 U.S.C. § 1101.

7. Where a statute criminalizes different kinds of conduct, some of which would constitute aggravated felonies rendering an alien convicted of such crime ineligible for cancellation of removal, while others would not, the court must apply a modified categorical approach by which a court may look beyond the statutory elements to determine whether the alien was actually convicted of an aggravated felony. 8 U.S.C. § 1101.

8. A court assessing whether a felony is aggravated, as would render an alien convicted of such crime ineligible for cancellation of removal, must limit itself to consideration of the loss tethered to the alien's specific offense of conviction. 8 U.S.C. § 1101.

9. Alien's conviction of wire fraud constituted an aggravated felony, rendering alien ineligible for cancellation of removal, where plea agreement referred to entire scheme as the underlying crime which alien admitted to aiding and abetting, and stipulated that alien was personally responsible for causing a loss of more than $120,000. 8 U.S.C. § 1101(a)(43)(M)(i).

10. Board of Immigration Appeals (BIA) lacked jurisdiction to address alien's Convention Against Torture (CAT) arguments, where immigration judge failed to such arguments. 8 C.F.R. § 1003.1(b).

Malik v. Att'y Gen., 659 F.3d 253 (3d Cir. 2011)

1. Alien, a native and citizen of Pakistan, received status as legal permanent resident (LPR) through consular process, rather than as adjustment of status, and therefore, five year statute of limitations did not apply for instituting removal proceedings against him; limitations statute only applied to aliens who received an adjustment of status. 8 U.S.C. § 1256(a).
2. When determining whether a marriage is fraudulent, courts in immigration proceedings consider whether the parties intended to establish a life together at the time of marriage; post-marriage conduct may be relevant to resolving this issue, insofar as it reveals the couple’s state of mind at the time they married. 8 U.S.C. § 1227(a)(1)(G)(i).

3. Substantial evidence supported finding that alien, a native and citizen of Pakistan, did not intend to establish life together at time of marriage to his wife, and therefore, marriage was fraudulent, for purposes of removal proceedings initiated against alien, where testimony of alien and wife conflicted on many crucial aspects, wife testified alien never contacted her, alien testified he sent letters and made phone calls to his brother’s house for her, and his brother and sister-in-law corroborated that testimony, but wife was pregnant and gave birth without brother and sister-in-law noticing. 8 U.S.C. § 1227(a)(1)(G)(i).

_Diop v. ICE/Homeland Security_, 656 F.3d 221 (3d Cir. 2011)

1. Special mootness exception for cases that are “capable of repetition” while “evading review” applies when (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again. U.S. Const. art. III.

2. Released petitioner's appeal challenging dismissal of his habeas petition challenging length of his pre-removal detention fell within mootness exception for cases that were “capable of repetition” while “evading review;” although petitioner was detained for over three years as a removable alien who had committed a crime involving moral turpitude, the claim that his detention was unlawful could not have been filed immediately, but instead, had to “ripen” at some unspecified time that was hard to pinpoint, and petitioner's claim was also capable of repetition since it was reasonable for petitioner to fear that he might once again be the subject of lengthy removal proceedings and pre-removal detention at any time. U.S. Const. art. III; U.S. Const. amend. V; 8 U.S.C. § 1226(c).

3. Even if petitioner's appeal challenging dismissal of his habeas petition challenging length of his pre-removal detention did not fall into mootness exception for cases capable of repetition yet evading review, he maintained his standing to appeal despite his release since government and its officials retained an interest in ensuring that they operated within the bounds of the Constitution, and petitioner could again be subject to prolonged pre-removal detention. U.S. Const. art. III; U.S. Const. amend. V; 8 U.S.C. § 1226(c).

4. Applicable regulations, and interpretations of the governing statutes by the Board of Immigration Appeals (BIA) allowed Bureau of Immigration and Customs Enforcement (ICE) to detain alien with a reason to believe, but no definitive legal conclusion, that he is covered by Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) provision authorizing mandatory detention of removable aliens who have committed, among other things, a crime involving moral turpitude or a crime involving a controlled substance. 8 U.S.C. § 1226(c).

5. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) subsection providing that aliens who have committed, among other things, a crime involving moral
turpitude or a crime involving a controlled substance could be detained for as long as removal proceedings are “pending,” even if they are “pending” for prolonged periods of time implicitly authorizes detention for a reasonable amount of time, after which the authorities must make an individualized inquiry into whether detention is still necessary to fulfill the statute's purposes of ensuring that an alien attends removal proceedings and that his release will not pose a danger to the community; when detention becomes unreasonable, the Due Process Clause demands a hearing, at which the government bears the burden of proving that continued detention is necessary to fulfill the purposes of the detention statute. U.S. Const. amend. V; 8 U.S.C. § 1226(c).

6. Alien's nearly three year detention on ground that he was removable because he had committed a crime involving moral turpitude was unconstitutionally unreasonable and, therefore, a violation of the Due Process Clause; immigration judge's numerous errors, combined with the government's failure to secure, at the earliest possible time, evidence that bore directly on the issue of whether petitioner was properly detained, resulted in an unreasonable delay. U.S. Const. amend. V; 8 U.S.C. § 1226(c).

_Higgs v. Att'y Gen._, 655 F.3d 333 (3d Cir. 2011)

1. Order by Board of Immigration Appeals (BIA), which mooted appeal by alien, born in Bahamas to unmarried Jamaican mother, had same effect as order of removal, and thus was “final order” reviewable by Court of Appeals, where immigration judge (IJ) had concluded that alien was deportable because he possessed more than 30 grams of marijuana and then issued separate, final order of removal and BIA never reviewed that order, having concluded that alien was appealing from different order, and, therefore, IJ's final order of removal still stood, and time for alien to remedy error and properly appeal from “dispositive” order had passed. 8 U.S.C. §§ 1227(a)(2)(B)(i), 1252(a)(1).

2. Alien, born in Bahamas to unmarried Jamaican mother, had exhausted his administrative remedies with regard to notice of removal, although he appealed only interlocutory order and not final order of removal; alien's notice of appeal unequivocally stated reasons for his appeal, including factual and legal errors committed by Board of Immigration Appeals (BIA), and thus he made some effort, however insufficient, to place BIA on notice of straightforward issue being raised on appeal. 8 U.S.C. § 1252.

3. Board of Immigration Appeals (BIA) had obligation to liberally construe pleadings of alien, born in Bahamas to unmarried Jamaican mother, who was proceeding pro se on appeal from final order of removal, no matter how difficult the practical reality of administrative practice; intricacy of legal system accentuated need to liberally construe pro se submissions of immigration petitioners, and like other administrative systems, immigration system had to be accessible to individuals who did not have any detailed knowledge of relevant statutory mechanisms and agency processes. 8 U.S.C. § 1227(a)(2)(B)(i).

4. Whether the Board of Immigration Appeals (BIA) applied the wrong standard in construing a petitioner's notice of appeal is a question of law that the Court of Appeals reviews de novo.
5. The policy of liberally construing pro se submissions is driven by the understanding that implicit in the right of self-representation is an obligation on the part of the court to make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of their lack of legal training.

6. When presented with a pro se litigant, a court has a special obligation to construe his complaint liberally; even if it is difficult to interpret a pro se litigant's pleadings, it is necessary to do so.

7. Board of Immigration Appeals (BIA) had to be given opportunity to resolve issues of whether immigration judge (IJ) had erred in finding that there was clear and convincing evidence that alien had possessed more than 30 grams of marijuana and that final order of removal was unenforceable because of alien's citizenship status prior to any judicial intervention, where BIA never reached merits of alien's appeal but instead dismissed it as moot. 8 U.S.C. § 1227(a)(2)(B)(i).

Simon v. Holder, 654 F.3d 440 (3d Cir. 2011)

1. Board of Immigration Appeals (BIA) abused its discretion in denying alien's motion for reconsideration of its prior decision upholding immigration judge's (IJ) denial of his motion to continue his removal proceedings, and in refusing to apply factors it had set forth in its own precedents for evaluating whether to grant a motion to continue removal proceedings pending an adjustment of status application premised on a pending visa petition; the IJ relied upon remoteness of visa availability and upon timing considerations to deny alien's motion, and the BIA upheld that denial largely based upon the remoteness of visa availability, without considering the other factors.

2. Visa availability should never be the one and only factor considered in evaluating whether to grant a motion to continue removal proceedings pending an adjustment of status application premised on a pending visa petition.

3. Once an immigration judge considers all of the relevant factors for evaluating whether to grant a motion to continue removal proceedings pending an adjustment of status application premised on a pending visa petition, including visa availability, he or she has the discretion to deny a continuance when visa availability is too speculative; but this should only be done after all of the factors are considered.

4. In determining whether to grant a motion to continue removal proceedings pending an adjustment of status application premised on a pending visa petition, the Board of Immigration Appeals (BIA) must follow its own precedents, unless it makes a reasoned determination to change or adapt its policy.

Brandao v. Att'y Gen., 654 F.3d 427 (3d Cir. 2011)

1. While Court of Appeals generally does not have jurisdiction to review an aggravated felon's removal order, it does have jurisdiction to determine its jurisdiction. 8 U.S.C. §§ 1252(a)(2)(C), 1252(b)(5)(A).
2. Under the REAL ID Act, factual or discretionary determinations are outside Court of Appeals' scope of review. REAL ID Act of 2005, § 101 et seq., 8 U.S.C. § 1101 et seq.

3. Court of Appeals gives plenary review to statutory questions presented in petitions for review on derivative citizenship.

4. When the Board of Immigration Appeals (BIA) issues its own opinion without merely adopting the opinion of the immigration judge (IJ), Court of Appeals ordinarily reviews the BIA's decision rather than that of the immigration judge.

5. Alien, a native of Cape Verde, was not child “born out of wedlock,” within meaning of former Immigration and Nationality Act (INA) provision governing derivative citizenship, even though alien's mother was unwed when he was born and naturalized prior to alien's eighteenth birthday, since law of Cape Verde had abolished distinction between illegitimate and legitimate children prior to alien's birth. 8 U.S.C. § 1432(a)(3).

*Prestol Espinal v. Att’y Gen.*, 653 F.3d 213 (3d Cir. 2011)

1. The Court of Appeals reviews the legal conclusions of the Board of Immigration Appeals (BIA) de novo.

2. Where agency's regulation allegedly conflicts with governing statute, the Court of Appeals employs Chevron analysis; under Chevron step one, court must first determine if statute is silent or ambiguous with respect to specific issue of law in case, using traditional tools of statutory construction to determine whether Congress had intention on precise question at issue, and if Congress' intent is clear, court's inquiry is at end as agency is required to give effect to unambiguously expressed intent of Congress, but if statute is ambiguous, court moves to step two and determines if agency's interpretation of statute, as expressed in regulation, is reasonable and entitled to deference.

3. The starting point for interpreting a statute is the language of the statute itself.

4. It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.

5. “Post-departure bar” regulation, which precluded aliens who had been removed from filing motion to reopen, conflicted with language of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), and thus, was invalid; text of IIRIRA provided each “alien” with right to file one motion to reopen and one motion to reconsider, Congress specifically considered and incorporated limitations on right and chose not to include “post-departure bar” despite its prior existence in regulation, bar would eviscerate right to reopen or reconsider by allowing government to forcibly remove alien prior to expiration of time allowance; Congress included geographic limitations on availability of domestic violence exception in statute, but included no such limitation generally, and Congress specifically withdrew bar to judicial review in conformity with IIRIRA's purpose of speeding departure but improving accuracy. 8 U.S.C. § 1229a(c)(6)(A), (7)(A); 8 C.F.R. § 1003.2(d).
Flores-Nova v. Att'y Gen., 652 F.3d 488 (3d Cir. 2011)

1. Court of Appeals reviews the Board of Immigration Appeals' (BIA) legal determinations de novo, subject to established principles of deference.

2. Deportation of the alien parents of children born in the United States does not violate the constitutional rights of the children to choose their residence.

3. By its plain language, statute governing cancellation of removal does not provide for an exception to the 90/180-day stop-time rule for humanitarian reasons. 8 U.S.C. § 1229b(d)(2).

4. A statute is not ambiguous merely because it does not expressly forbid every possible mechanism for functional, but not actual, satisfaction of statutory requirements.

5. Aliens who returned to Mexico for a funeral and stayed for an extended period of time after one of them was seriously injured failed to maintain continuous presence in the United States, as required for cancellation of removal. 8 U.S.C. § 1229b(d)(2).

6. Non-permanent resident aliens denied cancellation of removal based on departure from United States for extended period of time were not similarly situated to permanent resident aliens seeking naturalization, and thus statute governing cancellation of removal did not violate equal protection based on disparate treatment of aliens. U.S. Const. amend. V; 8 U.S.C. § 1229b(d)(2).

7. Statute governing cancellation of removal of nonresident aliens did not violate equal protection, absent showing that statute was not rationally related to a legitimate government purpose. U.S. Const. amend. V; 8 U.S.C. § 1229b(d)(2).

8. The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not mean that all aliens are entitled to all the advantages of citizenship; nor does the Clause establish that all aliens must be placed in a single homogeneous legal classification. U.S. Const. amend. XIV.

9. Standard of review applied in equal protection cases relating to immigration that do not involve suspect classes or the exercise of a fundamental constitutional right requires a "facially legitimate and bona fide" rationale supporting the immigration statute in question. U.S. Const. amend. V.

10. Inter-American Commission on Human Rights (IACHR) decision, that removing lawful permanent residents without giving them an opportunity for a meaningful hearing would violate numerous articles of the American Declaration of the Rights and Duties of Man, did obligate United States to provide aliens with a hearing prior to removal; language of the Organization of American States (OAS) Charter and of the IACHR's governing statute indicated that IACHR's decisions were not binding on the United States, to the extent that the IACHR operates under the authority given to it by the American Convention, its decisions are not enforceable domestically, and to the extent customary international law conflicted with United States statute governing removal, statute prevailed. 8 U.S.C. § 1229b(b).
11. A ratified treaty is the law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.

12. Unless a treaty is self-executing, it must be implemented by legislation before it gives rise to a private cause of action.

13. Unratified treaties are not binding on the United States and do not have the force of law.

*Sarango v. Att’y Gen.*, 651 F.3d 380 (3d Cir. 2011)

1. In reviewing final order of removal, Court of Appeals reviews questions of law de novo, but owes deference to Board of Immigration Appeals’ (BIA) reasonable, permissible interpretations of Immigration and Nationality Act (INA).

2. Alien who had previously been ordered deported was inadmissible as alien who had been ordered “removed.” 8 U.S.C. § 1182(a)(9)(C)(i)(II).

3. Secretary of Homeland Security, rather than Attorney General, was authorized to consider alien’s request for consent to reapply for admission, and thus immigration judge (IJ) lacked jurisdiction to consider alien’s nunc pro tunc consent request. 8 U.S.C. § 1182(a)(9)(C)(ii).

4. Alien who is inadmissible for reentry or attempted reentry into United States without being admitted cannot seek retroactive permission to reapply for admission. 8 U.S.C. § 1182(a)(9)(C)(i)(II); 8 C.F.R. § 212.2(e), (i)(2).

*Alli v. Decker*, 650 F.3d 1007 (3d Cir. 2011)

1. The court of appeals exercises plenary review over legal conclusions associated with orders dismissing claims for lack of subject matter jurisdiction.

2. Lawful permanent resident (LPR) aliens’ appeal from District Court’s denial of their motion for class certification and dismissal of putative class action, seeking declaration that government's detention for periods exceeding six months during pendency of removal proceedings violated the Immigration and Nationality Act (INA) and due process, was not rendered moot by District Court’s subsequent grant of aliens’ habeas petitions and order for individualized hearings; the denial of class certification occurred when aliens’ individual claims were still live. U.S. Const. amend. V; 8 U.S.C. §§ 1226(c), 1252(f)(1).

3. Jurisdictional provision of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), barring class actions that sought to “restrain” operation of several immigration statutes, including statute governing detention of criminal aliens during pendency of removal proceedings, did not deprive District Court of jurisdiction to certify putative class action brought by lawful permanent resident (LPR) aliens, seeking declaratory relief, in connection with their continued detention for periods exceeding six months during pendency of removal proceedings; term “restrain” did not include declaratory relief, as title of the statutory provision was “limit on injunctive relief,” other provisions of same statute used phrase “declaratory relief,” construing term “restrain” to include declaratory relief would not lead to
absurd result, and allowing class wide declaratory relief in the case would facilitate purpose of IIRIRA. 8 U.S.C. §§ 1226(c), 1252(f)(1).

4. Where the statutory language is unambiguous, the court interpreting the statute should not consider statutory purpose or legislative history, and the title of a statute cannot limit the plain meaning of the text.

5. The text of a statute must be considered in the larger context or structure of the statute in which it is found.

6. Interpretation of a word or phrase in a statute depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.

_Yusupov v. Att’y Gen., 650 F.3d 968 (3d Cir. 2011)_

1. On review the final orders of removal by the Board of Immigration Appeals (BIA) under Immigration and Nationality Act (INA), the Court of Appeals upholds the BIA’s factual determinations if they are supported by reasonable, substantial, and probative evidence on the record considered as a whole. 8 U.S.C. § 1252(b)(4)(B).

2. A Court of Appeals lacks jurisdiction to review discretionary findings regarding timeliness of an application for asylum.


4. Notwithstanding Congress’ determination that restrictions on removal are warranted if there are reasonable grounds to believe an alien poses a danger to national security, courts must strictly interpret exceptions to nonrefoulement precisely because they are applied to those determined to be deserving of protection. 8 U.S.C. § 1231(b)(3)(A).

5. Board of Immigration Appeals (BIA) violated its own rule that it would not engage in de novo review of findings of fact determined by immigration judge (IJ) when it concluded in precluding withholding of removal that presence of video clips of Osama bin Laden and what appeared to be attacks on Russian troops and vehicles and alleged evasion by alien, citizen of Uzbekistan, provided reasonable grounds to believe he was danger to United States, where, among other things, IJ found testimony by alien credible, that he watched videos out of general interest in his country and conflicts in area and that he evaded authorities because he feared deportation. 8 U.S.C. § 1231(b)(3)(B)(iv); 8 C.F.R. § 1003.1(d)(3).

6. When evaluating an immigration judge's determination whether there are reasonable grounds to believe an alien is a danger to the United States, the underlying circumstances are factual questions subject to clear error review by the Board of Immigration Appeals (BIA). 8 C.F.R. § 1003.1(d)(3).
7. When the Board of Immigration Appeals (BIA) determines whether those facts give rise to a reasonable belief that an alien is a danger to national security it has before it a mixed question of law and fact that requires its application of a legal standard to facts as to which it retains independent judgment and discretion. 8 C.F.R. § 1003.1(d)(3).

8. Whether there are reasonable grounds to believe an applicant for withholding of removal is a danger to the security of the United States, which precludes withholding of removal, is akin to a probable cause determination that requires a finding that an applicant “is” an actual and present danger. 8 C.F.R. § 1003.1(d)(3).

9. A determination that there is probable cause to believe an applicant for withholding of removal is a danger to the security of the United States, which precludes withholding of removal, is reviewed de novo. 8 U.S.C. § 1231(b)(3)(B)(iv).

10. Board of Immigration Appeals (BIA) was entitled to rely on established facts not taken into account by immigration judge (IJ) regarding manner that alien, citizen of Uzbekistan, entered into United States and his misdemeanor conviction, in precluding withholding of removal on basis that alien was danger to security of United States, since BIA was entitled under standard for mixed questions of law and fact to weigh evidence in manner different from that accorded by IJ.

11. Substantial evidence did not support ultimate conclusion by Board of Immigration Appeals (BIA) in precluding withholding of removal that there were reasonable grounds to believe aliens, citizens of Uzbekistan, were danger to security of United States, where BIA did not provide name of any potential terrorist organization or extremist movement with which they claimed aliens were affiliated and BIA did not provide coherent and reliable narrative connecting aliens’ seemingly innocuous actions and circumstances with any particular harm that aliens posed to United States. 8 U.S.C. § 1231(b)(3)(B)(iv).

12. Terrorist activity that is directed at another country does not invariably or necessarily involve a danger to the security of the United States which precludes withholding of removal. 8 U.S.C. § 1231(b)(3)(B)(iv).

13. The legal standard requiring “reasonable grounds to believe” that aliens are a danger to the security of the United States, which precludes withholding of removal, cannot be met without presentation of evidence satisfying probable cause; guilt by association does not suffice. 8 U.S.C. § 1231(b)(3)(B)(iv).

14. The Fifth Amendment entitles non-citizens to due process of law in, inter alia, deportation proceedings. U.S. Const. amend. V.

15. A mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to believe an applicant for withholding of removal is a danger to the security of the United States, which precludes withholding of removal. 8 U.S.C. § 1231(b)(3)(B)(iv).
16. In an immigration proceeding, where a factor and its opposite can both be used to support a finding of reasonable suspicion, such as flight or no flight, a court should not give weight to either factor.

17. Like factual findings, adverse credibility determinations in an immigration proceeding are reviewed for substantial evidence; as such, adverse credibility determinations based on speculation or conjecture, rather than on evidence in the record, are reversible.

18. Discrepancy regarding money that alien, citizen of Uzbekistan, had transferred to his brother could not support adverse credibility determination to preclude withholding of removal on basis that alien was danger to security of United States, since it did not go to heart of claim for withholding of removal; money did not finance terrorist or extremist activities and alien did not have any motive to lie or hide transfer. 8 U.S.C. § 1231(b)(3)(B)(iv).

19. In rare circumstances where application of the correct legal principles to the record could lead only to the same conclusion, there is no need to require agency reconsideration.

20. Remand was not warranted for Board of Immigration Appeals (BIA) to reconsider its decision to preclude withholding of removal that had been made on basis that aliens, citizens of Uzbekistan, were danger to security of United States, where aliens would be persecuted and tortured on religious and political grounds if returned to Uzbekistan. BIA had twice considered whole record and failed to support its conclusion that aliens were danger to national security with substantial evidence, and there were no additional facts or evidence to link either individual to activities or groups adverse to United States interests. 8 U.S.C. § 1231(b)(3)(B)(iv).

21. A Court of Appeals lacks jurisdiction to overturn an agency's denial of asylum.

United States v. Lopez, 650 F.3d 952 (3d Cir. 2011)

1. While a court of appeals generally reviews constitutional claims de novo, constitutional challenges not raised before the district court are subject to plain error review.


4. A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights.

5. Defendants alleging they received sentences without the benefit of a fast-track departure, thereby subjecting them to a sentencing process that was implemented in an arbitrary manner and contrary to their Fifth Amendment rights, had standing to challenge the constitutionality of Sentencing Guideline provision permitting a district court to depart not more than four levels pursuant to a “fast track” early disposition program; defendants' injury was concrete and actual, as defendants had already been sentenced, the injury was fairly traceable to the
implementation of fast-track programs in some districts but not others, and the injury was redressable because a favorable ruling that the operation of the fast-track program was unconstitutional would have essentially required a district court to depart from four levels, as done in fast-track districts, thereby eliminating the alleged unfairness. U.S. Const. amend. V.

6. If a statute neither burdens a fundamental right nor targets a suspect class, it does not violate equal protection so long as it bears a rational relationship to some legitimate end. U.S. Const. amend. V.

7. Under rational basis review, a classification under the Sentencing Guidelines will be upheld in the context of an equal protection challenge if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose; the party challenging the classification bears the burden to negate every conceivable basis which might support it. U.S. Const. amend. XIV; U.S.S.G. § 1B1.1 et seq., 18 U.S.C.

8. Endorsement of “fast-track” early disposition programs in districts with a low volume of immigration cases was rationally related to, among other things, the purposes of efficiently prosecuting illegal reentry cases and dealing with demands regarding allocation of prosecutorial resources, and therefore did not violate equal protection. U.S. Const. amend. V; U.S.S.G., § 5K3.1, p.s., 18 U.S.C.

9. In reviewing sentences, first, a court of appeals determines whether the sentencing court correctly calculated the Sentencing Guidelines range; next, it determines whether the trial court considered the statutory sentencing factors and any sentencing grounds properly raised by the parties which have recognized legal merit and factual support in the record; then, it ascertains whether those factors were reasonably applied to the circumstances of the case; after confirming that the district court followed the proper procedural requirements, the court of appeals reviews the resulting sentence to ensure that it is substantively reasonable. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.; 18 U.S.C. § 3553(a).

10. First defendant's sentence of 41 months' imprisonment for illegal reentry was reasonable, despite defendant's argument that the district court ignored the need to impose a sentence sufficient, but not greater than necessary; district court specifically noted that “the sentence at the bottom of the advisory guideline range was reasonable and no greater than necessary to comply with the statutory purpose,” and also explicitly found that a Guidelines range sentence was necessary, taking into consideration defendant's background. 18 U.S.C. § 3553(a).

11. A district court commits significant procedural error, and thus abuses its discretion, when it bases its calculation of the advisory Guidelines range on a clearly erroneous finding of fact; in that regard, a factual finding is “clearly erroneous” when although there is evidence to support it, the reviewing body on the entire evidence is left with the definite and firm conviction that a mistake has been committed. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.

12. District court's finding, in denying defendant's request for a sentencing variance, that defendant was not in “official detention” during time he spent in Immigration and Customs Enforcement (ICE) custody was not clearly erroneous, even though an ICE Agent described
the matter as a criminal illegal reentry prosecution; aside from the ICE Agent's statement, there was no record from the government to indicate that a definitive decision regarding criminal prosecution was made. 18 U.S.C. § 3585(b).

13. District court exercised its discretion to impose a sentence it believed was sufficient, but not greater than necessary, in sentencing second defendant for illegal reentry, by noting that it had the authority under the law to vary downward because of the fast-track disparity, but stating that it chose not to because of the defendant's criminal record and history. 18 U.S.C. § 3553(a); U.S.S.G., § 5K3.1, p.s., 18 U.S.C.

14. Third defendant's sentence of 46 months' imprisonment for illegal reentry was reasonable in light of the statutory sentencing factors; district court thoroughly considered the statutory sentencing factors, remarked on defendant's history of drug convictions, the need for deterrence, and the goal of avoiding unwarranted sentencing disparities, and, in doing so, it specifically reflected on the individual characteristics of defendant, and reached a decision that was premised upon appropriate and judicious consideration of the relevant factors. 18 U.S.C. § 3553(a).

15. District court did not abuse its discretion in sentencing fourth defendant to 46 months' imprisonment for illegal reentry, where the record reflected that the district court considered the seriousness of the offense and the need to promote deterrence, in light of the fact that defendant had illegally reentered the United States on several occasions and accumulated multiple drug convictions. 18 U.S.C. § 3553(a).

*United States v. Orocio*, 645 F.3d 630 (3d Cir. 2011)

1. “Writ of error coram nobis” is used to attack allegedly invalid convictions which have continuing consequences, when the petitioner has served his sentence and is no longer “in custody” for purposes of motion to vacate sentence. 28 U.S.C. §§ 2255, 1651(a).

2. Writ of error coram nobis is available to persons not held in custody to attack conviction for fundamental defects, such as ineffective assistance of counsel. U.S. Const. amend. VI; 28 U.S.C. § 1651(a).

3. Coram nobis relief is reserved for exceptional circumstances, and it is appropriate only to correct errors for which there was no remedy available at time of trial and where sound reasons exist for failing to seek relief earlier. 28 U.S.C. § 1651(a).

4. Determination of legal issues in coram nobis proceedings should be reviewed de novo, while findings of fact should be reviewed for clear error. 28 U.S.C. § 1651(a).

5. Supreme Court case requiring plea counsel to advise an alien defendant of potential removal consequences of recommended plea was retroactively applicable to alien defendant's petition for writ of error coram nobis challenging his plea conviction; case broke no new ground in holding that duty to consult also extended to counsel's obligation to advise defendant of immigration consequences of guilty plea and did not yield result so novel that it forged new rule. U.S. Const. amend. VI; 28 U.S.C. § 1651(a).
6. A rule is “new rule,” for purposes of determining retroactive application of constitutional principles to criminal cases, if result was not dictated by precedent existing at time the defendant's conviction became final.

7. An “old rule,” in context of determining retroactive application of constitutional principles to criminal cases, applies on both direct and collateral review.

8. Nothing in Teague v. Lane, which sets forth two regimes governing retroactive application of constitutional principles to criminal cases, restricts dictating source to Supreme Court precedent; that is condition for habeas relief under Antiterrorism and Effective Death Penalty Act (AEDPA), but not requirement under Teague.

9. Strickland standard provides sufficient guidance for resolving virtually all ineffective assistance of counsel claims. U.S. Const. amend. VI.

10. When Supreme Court decides Strickland case with novel facts, appellate court does not place emphasis on particular duty identified by Supreme Court as basis for classifying rule as “new,” for purposes of determining retroactive application of rule to criminal cases; appellate court looks instead to precedents and then-existing professional norms to determine whether decision broke new ground. U.S. Const. amend. VI.

11. Strickland did not freeze into place objective standards of attorney performance prevailing at time it was decided, never to change again. U.S. Const. amend. VI.

12. Every Strickland claim requires fact-specific inquiry, but it is not the case that every Strickland ruling on new facts requires announcement of “new rule” that would not be retroactively applicable to criminal cases, absent certain exceptions. U.S. Const. amend. VI.

13. A court's disposition of each individual factual scenario arising under long-established Strickland standard is not in each instance a “new rule,” for purposes of determining retroactive application of rule to criminal cases, but rather new application of an “old rule” in manner dictated by precedent. U.S. Const. amend. VI.

14. Defense counsel was deficient, as element of claim for ineffective assistance, in failing to advise alien defendant, who was lawful permanent resident of the United States, that accepting proposed guilty plea to federal drug charges would result in near-mandatory removal from the United States. U.S. Const. amend. VI; Controlled Substances Act, § 404(a), 21 U.S.C. § 844(a).

15. Although Supreme Court case of Padilla v. Kentucky clearly imposes duty on defense counsel during negotiation of plea bargain, a critical phase of litigation for purposes of Sixth Amendment right to effective assistance of counsel, to inform her noncitizen client that he faces risk of deportation, it does not undertake to provide instruction on whether client was prejudiced by ineffectiveness. U.S. Const. amend. VI.

16. In challenge to guilty plea based on ineffective assistance of counsel, prejudice inquiry takes form of whether counsel's constitutionally ineffective performance affected outcome of plea process. U.S. Const. amend. VI.
17. In order to satisfy “prejudice” requirement of Strickland standard for analyzing ineffective assistance of counsel claims challenging guilty plea, the defendant must show that there is reasonable probability that, but for counsel’s errors, he would not have pled guilty and would have insisted on going to trial; this assessment, in turn, will depend in large part, but not exclusively, on prediction whether errors likely would have changed outcome of trial. U.S. Const. amend. VI.

18. To obtain relief on ineffective assistance claim challenging counsel’s failure to advise alien defendant of potential removal consequences of recommended plea, defendant must convince court that decision to reject plea bargain would have been rational under circumstances, and rational decision not to plead guilty does not focus solely on whether defendant would have been found guilty at trial. U.S. Const. amend. VI.

19. Prejudice, as element of claim for ineffective assistance, could not be presumed from defense counsel’s failure to advise alien defendant, who was lawful permanent resident of the United States, of immigration consequences to pleading guilty to federal drug charge, and thus defendant was required to affirmatively prove prejudice in order to succeed on his claim; defendant did not allege type of scenario where government-caused prejudice was “so likely” that examination into facts of defendant’s particular case was not worth the cost. U.S. Const. amend. VI; Controlled Substances Act, § 404(a), 21 U.S.C. § 844(a).

20. Assuming that alien defendant established at evidentiary hearing facts that he alleged in his affidavit in support of his petition for writ of error coram nobis, alien would show prejudice, as element of claim for ineffective assistance, arising from defense counsel’s deficiency in failing to advise defendant of immigration consequences of pleading guilty to federal drug charge, and thus appellate court would remand case to give district court opportunity to decide case within framework of Supreme Court case requiring counsel to advise defendant of potential removal consequences of recommended plea, which was decided while defendant’s case was on appeal, and on basis of developed record. U.S. Const. amend. VI; Controlled Substances Act, § 404(a), 21 U.S.C. § 844(a).

21. In context of “prejudice prong” of ineffective assistance claim based on counsel’s failure to advise an alien defendant of immigration consequences to pleading guilty to federal offense, for defendant most concerned with remaining in the United States, especially legal permanent resident, it is not at all unreasonable to go to trial and risk ten-year sentence and guaranteed removal, but with chance of acquittal and right to remain in the United States, instead of pleading guilty to an offense that, while not an aggravated felony, carries “presumptively mandatory” removal consequences; just as threat of removal may provide defendant with powerful incentive to plead guilty to offense that does not mandate that penalty in exchange for dismissal of charge that does, threat of removal provides equally powerful incentive to go to trial if plea would result in removal anyway. U.S. Const. amend. VI.

22. Allusion to immigration authorities at change of plea hearing and/or sentencing was insufficient to mitigate prejudice, as element of claim for ineffective assistance, suffered by alien whose counsel failed to advise him of immigration consequences to pleading guilty to

*Argueta v. U.S. Immigration and Customs Enforcement*, 643 F.3d 60 (3d Cir. 2011)

1. Plenary review is exercised over a district court's qualified immunity rulings.

2. On a claim to qualified immunity, whether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded; accordingly, the sufficiency of a plaintiff's pleadings is both inextricably intertwined with and directly implicated by the qualified immunity defense.

3. Government officials are immune from liability for damages where their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

4. Immigrants did not state in Bivens action that very high-ranking federal officials based in Washington D.C. who had been charged with supervising enforcement of federal immigration law throughout country, or other officials responsible for supervising such enforcement throughout particular state, had notice of subordinates unconstitutional conduct, as required for supervisory liability claim based on knowledge and acquiescence, where complaint had alleged that numerous agents at different raids executed across country over period of years had engaged in misconduct, conduct of defendants was consistent with otherwise lawful behavior, and immigrants did not identify what defendants should have done differently.

5. When considering the sufficiency of a pleading, a court must determine whether the complaint as a whole contains sufficient factual matter to state a facially plausible claim; however, the plausibility requirement is not akin to a probability requirement. Fed. Rules Civ. Proc. Rule 12(b)(6), 28 U.S.C.

6. When considering the sufficiency of a pleading, a court must accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and then determine whether a reasonable inference may be drawn that the defendant is liable for the alleged misconduct. Fed. Rules Civ. Proc. Rule 12(b)(6), 28 U.S.C.


9. The qualified immunity doctrine exists to encourage vigorous and unflinching enforcement of the law.
Li Hua Yuan v. Att'y Gen., 642 F.3d 420 (3d Cir. 2011)

1. Court of Appeals' review of Board of Immigration Appeals' (BIA) factual findings, including findings of persecution and fear of persecution, is for substantial evidence, which means it must uphold findings of fact unless record evidence compels contrary finding.

2. Substantial evidence supported Board of Immigration Appeals' (BIA) determination that native and citizen of China failed to establish reasonable likelihood that she would be forcibly sterilized upon repatriation, and thus was not entitled to asylum, withholding of removal, or protection under Convention Against Torture (CAT), where evidence proffered on birth control policies was stale or irrelevant, alien failed to show she would be unable to pay any potential fine, and her evidence of forcible sterilization was either inapposite or unauthenticated. 8 U.S.C. § 1101(a)(42).

3. Doctrine of harmless error is applicable to judicial review of immigration decisions, and Court of Appeals will view error as harmless and not necessitating remand to Board of Immigration Appeals (BIA) when it is highly probable that error did not affect case's outcome.

4. Board of Immigration Appeals' (BIA) erroneous de novo review of immigration judge's (IJ) factual findings in asylum proceeding was harmless, where IJ had made factual findings adverse to alien, and de novo review, which paid no deference to those adverse findings, was, if anything, favorable for alien, and nothing in BIA's decision manifested disagreement with IJ's factual findings.

Plumi v. Att'y Gen., 642 F.3d 155 (3d Cir. 2011)

1. In immigration cases, the court of appeals reviews a denial of a motion to reopen or a motion to reconsider for abuse of discretion, regardless of the underlying basis of the alien's request for relief.

2. Because motions that ask the Board of Immigration Appeals (BIA) to sua sponte reopen a case are committed to the unfettered discretion of the BIA, the Court of Appeals lacks jurisdiction to review a decision on whether and how to exercise that discretion.

3. When presented with a Board of Immigration Appeals (BIA) decision rejecting a motion for sua sponte reopening, the Court of Appeals may exercise jurisdiction to the limited extent of recognizing when the BIA has relied on an incorrect legal premise; in such cases, the court can remand to the BIA so it may exercise its authority against the correct legal background, and on remand, the BIA would then be free to deny or grant reopening sua sponte, and the court would have no jurisdiction to review that decision.

4. Board of Immigration Appeals (BIA) did not abuse its discretion in denying alien's motion to reconsider and to reopen his asylum proceedings on the ground that alien failed to establish changed country conditions in Albania to justify his untimely filing of motion; evidence alien presented in support of his motion, including letters from people in Albania indicating that area in which aliens hometown was located was under psychological pressures by left extremists, and that his hometown was from time to time terrorized by Socialists due to lack
of police services, did not indicate meaningfully changed country conditions after 2005, when alien's case was before the immigration judge (IJ), but instead suggested that the conditions described had persisted. 8 U.S.C. § 1229a(c); 8 C.F.R. § 1003.2.

5. Remand to Board of Immigration Appeals (BIA) of case in which BIA had denied alien's motion to reopen his asylum proceedings sua sponte and grant him humanitarian asylum was appropriate for clarification of the basis for BIA's decision declining to exercise its discretion to reopen alien's case, since it was unclear from the record whether BIA recognized its authority, under regulation authorizing the granting of humanitarian asylum to an alien who established a reasonable possibility that he might suffer other serious harm upon removal to his home country, to consider alien's claim that he would suffer other serious harm in Albania because Albania's substandard healthcare system was insufficient to treat severe injuries he sustained in a hit-and-run car accident. 8 C.F.R. § 1208.13(b)(1)(ii).

Demandstein v. Att'y Gen., 639 F.3d 653 (3d Cir. 2011)

Alien, citizen of Israel, could not have had legitimate expectation that he could illegally reenter and resume period of continuous physical presence after border officials cancelled visa that he presented, noted that his admissibility was in question due to prior arrest, and he signed formal withdrawal of his application for admission which explained that he was doing so in lieu of formal determination of admissibility; thus, alien's continuous physical presence in country was terminated and he was rendered statutorily ineligible for cancellation of removal. 8 U.S.C. § 1229b(b)(1)(A).

Patel v. Att'y Gen., 639 F.3d 649 (3d Cir. 2011)

1. Court of Appeals reviews the denial of a motion to reopen a removal order entered in absentia for abuse of discretion. Immigration and Nationality Act, § 242(a), 8 U.S.C. § 1252(a).

2. Board of Immigration Appeals (BIA) did not abuse its discretion in finding that alien, a citizen of India, failed to demonstrate that he did not receive proper notice of deportation hearing, and thus was not entitled to reopening of removal proceedings 13 years after he was ordered deported in absentia; although alien's attorney of record was unable to contact alien to inform him about hearing, attorney was notified of hearing by certified letter from immigration court, and alien contributed to his lack of notice by failing to make any effort to contact his attorney or keep himself apprised of his immigration proceedings. 8 U.S.C. § 1252b.

3. Service by certified mail to an alien's attorney can satisfy the Immigration and Nationality Act's (INA) notice requirement for deportation hearings. 8 U.S.C. § 1252b(a)(2)(A).

Alzaarir v. Att'y Gen., 639 F.3d 86 (3d Cir. 2011)

Alien, citizen of Jordan, who delayed filing motion to reopen, while awaiting response by Department of Homeland Security (DHS) to his counsel's request to file joint motion to reopen, until deadline was past was not entitled to equitable tolling of limitation period for motion to reopen for not exercising diligence. 8 U.S.C. § 1229a(c)(7)(C)(i); 8 C.F.R. §
1003.2(c)(3)(iii).

Quao Lin Dong v. Att'y Gen., 638 F.3d 223 (3d Cir. 2011)

1. When the Board of Immigration Appeals (BIA) has affirmed the immigration judge's (IJ) decision, and adopted the analysis as its own, the Court of Appeals will review both decisions.

2. Court of Appeals reviews Board of Immigration Appeals' (BIA) findings of fact to determine whether they are supported by substantial evidence and its legal determinations de novo.

3. If the Court of Appeals takes issue with the application of law in an immigration case, it will defer to the authority granted an agency by Congress and remand to the Board of Immigration Appeals (BIA) for the appropriate consideration.

4. An alien can demonstrate a well-founded fear of future persecution, as required to be entitled to asylum, by showing that she has a genuine fear, and that a reasonable person in her circumstances would fear persecution upon return to her native country.

5. An alien's well-founded fear of future persecution, as required to be entitled to asylum, must be both subjectively and objectively reasonable.

6. An asylum applicant's subjective fear of future persecution can be shown through credible testimony.

7. Objective reasonableness of an asylum applicant's fear of future persecution may be established by, among other things, her own testimony, the testimony of other corroborating witnesses, or submitting evidence regarding conditions in her home country. 8 C.F.R. § 208.13(a).

8. Unlike asylum, withholding of removal is mandatory rather than discretionary.

9. An immigration judge (IJ) can find that an asylum applicant's failure to produce corroborating evidence is fatal, but only after following the three-step inquiry, which requires: (1) an identification of the facts for which it is reasonable to expect corroboration; (2) an inquiry as to whether the applicant has provided information corroborating the relevant facts; and, if he or she has not, (3) an analysis of whether the applicant has adequately explained his or her failure to do so.

10. Reliance by immigration judge (IJ), in determining that alien's testimony in support of her asylum application was not credible, on inconsistency in husband's asylum claim regarding date of alien's alleged forced abortion necessitated remand for consideration of whether other evidence offered by alien corroborated her claim; corroborating evidence from husband was not necessary or central to alien's claim, as alleged forced abortion occurred while husband was out of the country, and IJ failed to consider other evidence.

11. Alien did not have well-founded fear of future persecution and torture if she were returned to native country of China, based on birth of her children in United States, as required to
support her asylum, withholding of removal, and relief under Convention Against Torture (CAT) claims; alien failed to show any pattern or practice of persecution by Chinese officials of applicants on account of the birth of children in the United States.

_Denis v. Att’y Gen.,_ 633 F.3d 201 (3d Cir. 2011)

1. In determining whether alien's state conviction constitutes “aggravated felony” under Immigration and Nationality Act (INA), court must look to elements of statutory state offense, not to specific facts, reading applicable statute to ascertain least culpable conduct necessary to sustain conviction under statute. 8 U.S.C. § 1101(a)(43)(S).

2. In determining whether alien's state conviction constitutes “aggravated felony” under Immigration and Nationality Act (INA), where statute criminalizes different kinds of conduct, some of which would constitute aggravated felonies while others would not, court must apply modified categorical approach by which court may look beyond statutory elements to determine particular part of statute under which defendant was actually convicted. 8 U.S.C. § 1101(a)(43)(S).

3. Board of Immigration Appeals' (BIA) interpretation of phrase “relating to obstruction of justice,” as used in Immigration and Nationality Act (INA) provision defining “aggravated felony,” did not present obscure ambiguity or matter committed to agency discretion, and thus was not entitled to judicial deference; construction of criminal provisions was task outside BIA's special competence. 8 U.S.C. § 1101(a)(43)(S).


5. Board of Immigration Appeals' (BIA) interpretation of phrase “particularly serious crime,” as used in statute rendering alien who committed particularly serious crime ineligible for withholding of removal, was subject to Chevron deference. 8 U.S.C. § 1231(b)(3).

6. Board of Immigration Appeals' (BIA) determination that alien's New York conviction for tampering with physical evidence constituted “particularly serious crime,” rendering alien ineligible for withholding of removal, was not abuse of discretion, even though victim was deceased when tampering occurred, where alien had violently dismembered victim after killing her in order to transport her body to place of concealment. 8 U.S.C. § 1231(b)(3).

7. Immigration judge (IJ) did not improperly place burden on alien to establish that his prior state conviction did not constitute “particularly serious crime,” rendering him ineligible for withholding of removal, where both parties were allowed to explain and introduce evidence as to why crime was particularly serious or not, government advanced alien's testimony and record of conviction to demonstrate offense's particularly serious nature, but alien provided no explanation to rebut this conclusion. 8 U.S.C. § 1231(b)(3).

8. Pain and suffering that native and citizen of Haiti was likely to experience in Haitian prison due to his dependence upon hyperthyroid and hypertension medication, absence of which might render him mentally ill and seemingly noncompliant with prison guards, would not be
due to specific intent to torture, and he thus was not eligible for relief under Convention Against Torture (CAT), where alien's speculation as to how he might appear or act, how prison officials might react, and purported state of mind of prison officials that might hypothetically inflict pain upon him was unsupported. 8 U.S.C. § 1231; 8 C.F.R. § 208.18(a)(1).

9. To prevail on procedural due process challenge to Board of Immigration Appeals (BIA) decision, alien must make initial showing of substantial prejudice. U.S. Const. amend. V.

10. Alien was not denied due process as result of counsel's ineffectiveness in proceeding seeking relief under Convention Against Torture (CAT), where alien failed to adduce evidence establishing that he would more likely than not be singled out for torture, or identify any specific evidence that counsel failed to submit that would have likely changed outcome. U.S. Const. amend. V; 8 U.S.C. § 1231.

Long Hao Li v. Att'y Gen., 633 F.3d 136 (3d Cir. 2011)

1. As a general matter, fear of prosecution for violations of fairly administered laws does not itself qualify one as a refugee or make one eligible for withholding of removal. 8 U.S.C. § 1231(b)(3).

2. Under certain circumstances, prosecution under laws of general applicability may provide the basis for withholding of removal; to provide a basis for withholding of removal, a generally-applicable law must be based on an enumerated ground and the punishment must be sufficiently extreme to constitute persecution. 8 U.S.C. § 1231(b)(3).

3. Alien, a citizen and national of China who was ethnically Korean, did not provide evidence that prosecution he would undergo in China based on alien's admitted violation of Chinese law making it illegal to assist others who cross the border illegally was politically motivated, such that he had a reasonable fear of persecution if returned to China, as required for alien's application for withholding of removal; law was generally applicable and was not to silence or punish political dissent, alien did not provide any detail as to his political opinions or of Chinese government's awareness of his opinions, and alien did not provide any evidence that he or others had been mistreated during administration of the law. 8 U.S.C. § 1231(b)(3).

4. Finding was supported by substantial evidence that alien, a citizen and national of China who was ethnically Korean, failed to establish a clear probability of persecution based on Chinese government's intention to prosecute alien for assisting others in crossing the border illegally, as required for alien's application for withholding of removal; alien failed to present evidence that the government was aware he was involved in a smuggling operation, authorities only came looking for alien once, and alien contacted the Chinese government once he was in the United States and obtained a passport without difficulty. 8 U.S.C. § 1231(b)(3).

5. The “clear probability” standard for withholding of removal requires an alien to establish that it is more likely than not that the alien would be subject to persecution. 8 U.S.C. § 1231(b)(3).

Delgado-Sobalvarro v. Att'y Gen., 625 F.3d 782 (3d Cir. 2010)
1. The Court of Appeals exercises plenary review over the Board of Immigration Appeals' (BIA) determination that aliens are statutorily ineligible for adjustment of status.

2. In reviewing the Board of Immigration Appeals' (BIA) determination that aliens are statutorily ineligible for adjustment of status, the Court of Appeals reviews the BIA's legal conclusions de novo, including both pure questions of law and applications of law to undisputed facts.

3. Alien, who was native of Nicaragua, who was released on conditional parole, pending determination of removal, was not paroled into the United States, as would make her statutorily eligible to adjust her status to that of a lawfully admitted permanent resident; parole into the United States was not the same as conditional parole. 8 U.S.C. §§ 1226(a), 1255(a).

4. Where there is no clear, unambiguously expressed intent of Congress that speaks directly to the precise question at issue, the Court of Appeals must analyze the Board of Immigration Appeals' (BIA) interpretation of the statutes for reasonableness and will limit inquiry to determining whether the BIA's statutory interpretation is based on a reasonable, permissible construction of that statute.

5. To establish a violation of due process in removal proceedings, the alien must show that substantial prejudice resulted from the alleged procedural errors. U.S. Const. amend. V.

6. The absence of taped proceedings before the Immigration Judge (IJ) and the failure to provide transcripts of proceedings before IJ did not violate alien's due process rights; alien's contention that Board of Immigration Appeals (BIA) would “probably” have identified “irregularities or mistakes” in proceedings below was entirely speculative and did not demonstrate prejudice. U.S. Const. amend. V.

7. Five-year delay in adjudicating immediate relative petition, which may have impacted Immigration Judge's (IJ) decision to not grant continuance in the removal proceeding, did not violate alien's due process rights, where IJ acted well within his discretion by denying the request for continuance after he concluded that alien was not eligible to adjust her status. U.S. Const. amend. V.

*Thomas v. Att'y Gen.*, 625 F.3d 134 (3d Cir. 2010)

1. Board of Immigration Appeals' (BIA) grant of alien's motion for reconsideration did not deprive Court of Appeals of jurisdiction to review BIA's prior denial of alien's application for cancellation of removal; initial decision constituted a reviewable final order irrespective of the later filing. 8 U.S.C. §§ 1229b(b), 1252(a)(1).

2. Federal-court jurisdiction is limited to “cases and controversies,” i.e., questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process; when the questions or issues presented are no longer “live,” the case is moot. U.S. Const. art. III, § 2, cl. 1.
3. An issue is “moot” if changes in circumstances that prevailed at the beginning of the litigation have forestalled any occasion for meaningful relief.

4. Alien's petition for review of the denial of his application for cancellation of removal presented a live controversy, such that Court of Appeals had jurisdiction, where Board of Immigration Appeals' (BIA) grant of reconsideration motion did not vacate or materially alter its initial decision; BIA did not explicitly state, on reconsideration, that it was modifying, reversing, or vacating the prior decision, but only explained that its purpose was limited to correcting a factual error and stated that its prior decision properly evaluated the legal question presented. 8 U.S.C. §§ 1229(b), 1252(a)(1).

5. Whether an alien's convictions qualify as aggravated felonies, as would render him ineligible for cancellation of removal, is a question of law subject to plenary review. 8 U.S.C. § 1229(b)(1)(C).

6. Under the illicit trafficking route used in determining when a state drug offense constitutes an aggravated felony, as would render an alien ineligible for cancellation of removal, the alien's state drug conviction will not qualify as an aggravated felony unless (1) the offense is a felony under the law of the convicting sovereign, and (2) the offense contains a trafficking element, i.e., it must involve the unlawful trading or dealing of a controlled substance. 8 U.S.C. § 1229(b)(1)(C).

7. Under the hypothetical federal felony route used in determining when a state drug offense constitutes an aggravated felony, as would render an alien ineligible for cancellation of removal, the alien's state drug conviction, even if classified as a misdemeanor by the state, will qualify as an aggravated felony if it is punishable under one of the three specified statutes, if federally prosecuted, and would be punishable by a term of imprisonment of over one year. 8 U.S.C. § 1229(b)(1)(C).

8. Alien's New York misdemeanor convictions for fourth-degree criminal sale of marijuana were not categorically felony convictions under the Controlled Substances Act, requiring application of the modified categorical approach to determine if those convictions constituted aggravated felonies that rendered alien ineligible for cancellation of removal; although the New York statute encompassed selling, exchanging, giving, or disposing of marijuana to another, only selling or exchanging marijuana qualified as the hypothetical federal felony of distributing marijuana. 8 U.S.C. § 1229(b); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a), 21 U.S.C. § 841(a); McKinney's Penal Law § 221.40.

9. Remand was required, on review of the denial of alien's application for cancellation of removal, where Court of Appeals, after scrutinizing the record, could not definitively establish that alien actually admitted, during plea proceedings in his New York misdemeanor convictions for fourth-degree criminal sale of marijuana, that he sold or exchanged marijuana, as required to establish, under the modified categorical approach, that those convictions constituted the hypothetical federal felony of distributing marijuana; record was silent as to any factual basis for the pleas. 8 U.S.C. §§ 841(a), 1229(b); McKinney's Penal Law § 221.40.
Ramos-Olivieri v. Att’y Gen., 624 F.3d 622 (3d Cir. 2010)

Board of Immigration Appeals (BIA) acted within its discretion in denying motion to reopen that had been made by alien, citizen of Uruguay, who had been ordered removed in absentia to Uruguay and then subsequently married naturalized citizen, where alien had not made any affirmative efforts to contact immigration authorities to provide updated mailing information despite being notified of his obligation to do so in both notice to appear (NTA) and as condition of his release from custody, alien had incentive to avoid his removal hearing, and he did not make any arrangements for forwarding of his mail. 8 U.S.C. §§ 1229(a)(1), 1229a(b)(5)(A).

Catwell v. Att’y Gen., 623 F.3d 199 (3d Cir. 2010)

1. When the Board of Immigration Appeals (BIA) issues its own decision on the merits, rather than a summary affirmance, the Court of Appeals reviews its decision, not that of the Immigration Judge (IJ).

2. The Court of Appeals reviews the legal determinations of the Board of Immigration Appeals (BIA) de novo, subject to the principles of deference articulated in Chevron.

3. Where the basis for removal is a conviction for an aggravated felony, appellate jurisdiction is limited under the REAL ID Act to constitutional claims or questions of law. 8 U.S.C. § 1252(a)(2)(C)-(D).

4. The hypothetical federal felony route for determining whether a state drug offense constitutes an aggravated felony, as would render an alien ineligible for cancellation of removal, requires a comparison of the state conviction to the analogous offense in the Controlled Substances Act (CSA); a state marijuana conviction is therefore only equivalent to a federal drug felony if the offense involved payment or more than a small amount of marijuana. 8 U.S.C. §§ 1101(a)(43)(B), 1229b(a)(3).

5. Under the illicit trafficking element test for determining whether a state drug offense constitutes an aggravated felony, as would render an alien ineligible for cancellation of removal, a state felony drug conviction constitutes an aggravated felony if it contains a trafficking element; essential to the concept of trading or dealing is activity of a business or merchant nature, thus excluding simple possession or transfer without consideration. 8 U.S.C. §§ 1101(a)(43)(B), 1229b(a)(3).

6. Alien’s Pennsylvania conviction for possession with intent to distribute 120.5 grams of marijuana constituted an aggravated felony, thereby rendering him ineligible for cancellation of removal; alien possessed the equivalent of 241 marijuana cigarettes, which was an amount well beyond the Controlled Substances Act’s exception that possession of a small amount of marijuana for no remuneration should be treated as simple possession. 8 U.S.C. §§ 1101(a)(43)(B), 1229b(a)(3); 35 P.S. § 780-113(a)(30); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(4), 21 U.S.C. § 841(b)(4).

7. In all efforts at statutory construction, the Court of Appeals turns first to the language of the statute.
8. Where a statute's text is ambiguous, relevant legislative history, along with consideration of the statutory objectives, can be useful in illuminating its meaning.

9. In removability proceeding, Board of Immigration Appeals (BIA) was permitted to consider fact noted by Immigration Judge (IJ), and acknowledged by alien, that alien possessed 120.5 grams of marijuana to determine whether alien's Pennsylvania conviction for possession of marijuana with intent to distribute constituted an aggravated felony, thereby rendering alien ineligible for cancellation of removal. 35 P.S. § 780-113(a)(30); 8 U.S.C. §§ 1101(a)(43)(B), 1229b(a)(3).

10. Former statute did not unconstitutionally discriminate based on legitimacy and gender in violation of equal protection by allowing a child born out of wedlock outside of the United States, where paternity was not established, to receive derivative citizenship only through the naturalization of the mother; restrictions were rationally related to government's objective of protecting the rights of non-naturalized parents. U.S. Const. amend. V; 8 U.S.C. § 1432(a)(3).

*Fei Mei Cheng v. Att'y Gen.*, 623 F.3d 175 (3d Cir. 2010)

1. Where the Board of Immigration Appeals (BIA) issues an opinion, rather than a summary affirmance, of an immigration judge's (IJ) decision denying an alien's application for asylum, the Court of Appeals reviews the BIA's, rather than the IJ's, decision.

2. Court of Appeals reviews the BIA's legal determinations de novo, subject to principles of deference.

3. Court of Appeals applies a deferential “substantial evidence” standard of review to the Board of Immigration Appeals' (BIA) factual findings; under this standard, the court may reverse only if a reasonable adjudicator would be compelled to conclude to the contrary, however, the court's deference under this standard is expressly conditioned on support in the record, and the BIA may not ignore evidence in the record that favors the petitioner.

4. Under the plain language of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), a person who has been forced to undergo either an abortion or sterilization pursuant to a coercive population control program is automatically eligible for asylum, while an immigrant who has not undergone compelled abortion or sterilization is eligible for asylum if the applicant can show past persecution for failing or refusing to undergo such a procedure or for otherwise resisting the population control program, or a well-founded fear of abortion, sterilization, or persecution on account of such failure, refusal, or resistance. 8 U.S.C. § 1101(a)(42)(A).

5. Board of Immigration Appeals' (BIA) determination that forced insertion of intrauterine device (IUD) was not per se ground for asylum was entitled to deference, on Chinese alien's appeal from BIA's order affirming decision of Immigration Judge (IJ) denying her application for asylum; Congress had not directly spoken to whether “involuntary sterilization,” within meaning of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), encompassed compelled lifelong IUD usage or whether person who had been forced to have IUD inserted was refugee, and BIA's reasoning that forced IUD insertion was
not sterilization was reasonable and based on permissible construction of IIRIRA. 8 U.S.C. § 1101(a)(42).

6. In determining whether to defer to Board of Immigration Appeals' (BIA) interpretation of Immigration and Nationality Act (INA), Court of Appeals employs familiar two-step inquiry set forth in Chevron, under which court first assesses whether Congress has directly spoken to the precise question at issue, and if the plain meaning of the statute is unambiguous, then the statutory text controls, and no deference to the agency's interpretation of that text is called for; if, however, by employing traditional tools of statutory construction the court is unable to arrive at an unambiguous reading of the statutory language, then it proceeds to the second step and determines whether the BIA's reading of the provision is a reasonable one. 8 U.S.C. § 1101(a)(42).

7. If the Board of Immigration Appeals' (BIA) interpretation of the Immigration and Nationality Act (INA) is reasonable, Court of Appeals must let the interpretation stand. 8 U.S.C. § 1101 et seq.

8. Term "sterilization," as used in Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), did not unambiguously include compelled, lifelong usage of intrauterine device (IUD) accompanied by mandatory quarterly gynecological examinations to verify IUD's continued presence, since plain meaning of term sterilization referred to permanent and irreversible procedure to inhibit reproduction, IUD was temporary, rather than permanent, method of birth control, and IUD could be removed and its effect upon woman's reproductive capacity eliminated. 8 U.S.C. § 1101(a)(42).


10. An agency's interpretation of the statute it is charged with administering is entitled to deference if it represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

11. Alien, a native and citizen of China, who was subjected to involuntary insertion of intrauterine device (IUD) and quarterly gynecological examinations to confirm continued presence of IUD after giving birth to child while unmarried, resisted China's population control policies, and thus eligible for asylum under Illegal Immigration Reform and Immigrant Responsibility Act's (IIRIRA) "other resistance to a coercive population control program" provision, where alien repeatedly refused to comply with multiple Chinese officials' demands that she abort her first pregnancy, fled township to have her baby, defied orders that she undergo sterilization procedure, had to be dragged to clinic to have IUD forcibly inserted, and missed multiple mandatory gynecological appointments. 8 U.S.C. § 1101(a)(42).

12. Alien, a native and citizen of China, who was subjected to involuntary insertion of intrauterine device (IUD) and quarterly gynecological examinations to confirm continued
presence of IUD after giving birth to child while unmarried, was persecuted on account of her resistance to China’s population control policies, and thus eligible for asylum under Illegal Immigration Reform and Immigrant Responsibility Act’s (IIRIRA) “other resistance to a coercive population control program” provision; Chinese officials confiscated family farm and truck upon which alien’s livelihood depended, officials threatened to take alien’s daughter from her and detain her boyfriend for months if she did not comply with their demand to undergo sterilization, IUD insertion procedure was performed in hurried and improper manner that caused alien intense physical pain, and alien was subjected to fines for having unauthorized child and missing mandatory gynecological appointments. 8 U.S.C. § 1101(a)(42).

13. The Board of Immigration Appeals (BIA) may not, in determining whether an asylum applicant suffered past persecution, take a single instance of mistreatment from a larger pattern of abuse and confine its persecution analysis to the question of whether that single instance was, in and of itself, persecutory; instead, incidents alleged to constitute persecution must be considered cumulatively.

14. Persecution is an extreme concept that does not include every sort of treatment our society regards as offensive; but while the concept of persecution is “extreme,” it is not an impossible standard to satisfy.

15. In determining whether actual or threatened mistreatment amounts to persecution, for purposes of asylum, the cumulative effect of the applicant’s experience must be taken into account because taking isolated incidents out of context may be misleading.

16. Even if one incident of mistreatment is not, in and of itself, severe enough to constitute persecution, for purposes of asylum, a series of incidents of physical or economic mistreatment could, taken together, be sufficiently abusive to amount to persecution.

17. Express link existed between alien's resistance to China's population control policies and persecution alien suffered at hands of Chinese officials, and thus alien, a native and citizen of China, who was subjected to involuntary insertion of intrauterine device (IUD) and quarterly gynecological examinations to confirm continued presence of IUD after giving birth to child while unmarried, was eligible for asylum under Illegal Immigration Reform and Immigrant Responsibility Act's (IIRIRA) “other resistance to a coercive population control program” provision; Chinese officials, in response to alien's acts of resistance, threatened and punished her and expressly linked their sanctions to alien's defiance of China's family planning policies. 8 U.S.C. § 1101(a)(42).

De Leon-Ochoa v. Att’y Gen., 622 F.3d 341 (3d Cir. 2010)

1. When the Board of Immigration Appeals (BIA) issues its own opinion in a removal proceeding and does not adopt the Immigration Judge’s (IJ) findings, Court of Appeals reviews only the BIA’s decision.

2. Court of Appeals reviews de novo legal questions arising in removal proceedings, with appropriate deference for the Board of Immigration Appeals’ (BIA) reasonable interpretations of statutes it is charged with administering.
3. Under Chevron, if a statute is clear the Court must give effect to Congress’ unambiguous intent, and if the statute is silent or ambiguous with respect to a specific issue, the Court defers to an implementing agency’s reasonable interpretation of that statute.

4. Court of Appeals accords Chevron deference only to agency action promulgated in the exercise of congressionally-delegated authority to make rules carrying the force of law.

5. Agency action that does not qualify for Chevron deference may still deserve a lesser amount of deference under Skidmore, under which respect is granted to agency action according to its power to persuade.

6. Unpublished, single-member decisions of the Board of Immigration Appeals (BIA) have no precedential value, do not bind the BIA, and therefore do not carry the force of law except as to those parties for whom the opinion is rendered.

7. Essential factor in determining whether an agency action warrants Chevron deference is its precedential value.

8. An unpublished opinion of the Board of Immigration Appeals (BIA) is not issued pursuant to the BIA’s authority to make rules carrying the force of law.

9. In light of the plain language, in statute governing grants of temporary protected status (TPS), requiring that an alien seeking TPS show that he or she has continuously resided in the United States since the designated date, statute’s failure to explicitly permit or disallow a parent’s residency to be imputed to minor children for purposes of satisfying TPS requirements did not render it ambiguous. 8 U.S.C. § 1254a(c)(1)(A)(ii).

10. An extension of temporary protected status (TPS) does not constitute a “designation” for purposes of the statute’s continuous physical presence requirement. 8 U.S.C. § 1254a(c)(1)(A)(i).

11. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

12. A statute’s silence on a given issue does not confer gap-filling power on an agency unless the question is in fact a gap, i.e., an ambiguity tied up with the provisions of the statute.

13. Aliens were statutorily ineligible for temporary protected status (TPS), even though they were minors, where they failed to personally meet the continuous residence and continuous physical presence requirements; the continuous residence of aliens’ parents could not be imputed to the minor applicants. 8 U.S.C. § 1254a(c)(1)(A)(ii).

14. Aliens were unable to demonstrate continuous physical presence in the United States since the most recent designations of their home countries, as required to be eligible for temporary protected status (TPS), where aliens were minors who entered the United States following those designations; extensions of their countries’ TPS designations did not constitute the “most recent designation” for purposes of statute’s continuous physical presence requirement. 8 U.S.C. § 1254a(c)(1)(A)(i).
15. Substantial evidence supported denial of alien’s application for asylum; although alien alleged he was in danger of future persecution in Honduras based on an interfamily blood feud, his brothers remained in that country unharmed, he himself had lived there unmolested for six years after the last alleged feud-based murder, and his own documentation indicated that the feud ended more than ten years earlier. 8 U.S.C. § 1101(a)(42).

16. Alien’s failure to meet his burden of proof for asylum necessarily impelled conclusion that he could not satisfy his burden of proof for withholding of removal.

17. Evidence did not compel conclusion that it was more likely than not that alien would be tortured upon return to Honduras, as required to support his request for relief under the Convention Against Torture (CAT). 8 C.F.R. § 1208.16(c)(2).

_Duhaney v. Att’y Gen._, 621 F.3d 340 (3d Cir. 2010)

1. Court of Appeals exercises de novo review, in removal proceedings, over legal and constitutional issues arising out of finding that alien was removable based on his conviction for an aggravated felony. 8 U.S.C. § 1252(a)(2)(C)-(D).

2. Board of Immigration Appeals (BIA) did not disregard its established precedent, after alien’s New York conviction for third-degree criminal possession of a controlled substance was vacated and the indictment dismissed with prejudice, by remanding his removal proceedings, for further proceedings rather than simply terminating them; the vacatur of alien’s conviction presented BIA with new facts to consider, and remand was warranted to allow evaluation of the impact of those new facts. 8 U.S.C. § 1227(a)(2)(A)(iii).

3. When a motion to remand removal proceedings also requires reopening closed proceedings, the motion must comply with the requirements for a motion to reopen, and therefore remand is generally only appropriate for consideration of new facts or changed circumstances.

4. Alien was not prejudiced, and therefore was not deprived of due process, by alleged failure of the Board of Immigration Appeals (BIA) to provide him with notice of its motion to reopen his removal proceedings, where both parties had filed motions to reopen based on the vacatur of alien’s criminal conviction; both parties sought and received identical relief. U.S. Const. amend. V.

5. Res judicata, also known as claim preclusion, bars a party from initiating a second suit against the same adversary based on the same cause of action as the first suit.

6. A party seeking to invoke res judicata must establish three elements: (1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action.

7. Doctrine of res judicata bars not only claims that were brought in a previous action, but also claims that could have been brought.
8. Since the common law principles of collateral estoppel and res judicata are well established, courts may imply that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident.


10. In determining what constitutes a cause of action for res judicata purposes, Court of Appeals looks toward the essential similarity of the underlying events giving rise to the various legal claims.

11. Under the transactional approach used to determine what constitutes a cause of action for res judicata purposes, focus of the inquiry is whether the acts complained of were the same, whether the material facts alleged in each suit were the same, and whether the witnesses and documentation required to prove such allegations were the same; a mere difference in theory is not dispositive.

12. Doctrine of res judicata did not bar Government from lodging additional charges of removability following vacatur of alien’s controlled substance conviction, which formed the basis of initial removal order, where the second removal order was based on prior weapons convictions for which alien was not previously charged as removable; although there were common elements of facts between the two removal proceedings, the critical acts and necessary documentation were different.

13. Alien was not deprived of due process by Government’s attempts to initiate new removal proceedings against him based on charges that could have brought in earlier proceedings; doctrines of res judicata and procedural estoppel, as well as the Board of Immigration Appeals’ (BIA) own procedures, imposed principled limits on Government’s ability to revisit claims and issues already fully litigated. U.S. Const. amend. V.

14. Government was not precluded from lodging new charges of removal based on convictions disclosed in alien’s application for a discretionary waiver of removability; waiver applied only to the conviction which provided the basis for the underlying order to show cause, regardless of the disclosure of other convictions.

*Huang v. Att’y Gen.*, 620 F.3d 372 (3d Cir. 2010)

1. If the Board of Immigration Appeals (BIA) summarily affirms an Immigration Judge’s (IJ) order in an asylum proceeding, Court of Appeals reviews the IJ’s decision as the final administrative determination.

2. When the Board of Immigration Appeals (BIA) issues a separate opinion on appeal in an asylum proceeding, Court of Appeals reviews that disposition and looks to the Immigration Judge’s (IJ) ruling only insofar as the BIA defers to it.
3. Court of Appeals reviews the facts upon which the Board of Immigration Appeals’ (BIA) decision in an asylum proceeding rests to ensure that they are supported by substantial evidence from the record considered as a whole.

4. Court of Appeals, on review in an asylum proceeding, reviews the Board of Immigration Appeals' (BIA) legal conclusions de novo, but accords Chevron deference to BIA’s interpretation of statutes and regulations within its enforcement jurisdiction.

5. A person who is forced to undergo an abortion or a sterilization, or who has been persecuted for refusing to comply with a coercive population control policy, is deemed, in an asylum proceeding, to have been persecuted based on political opinion. 8 U.S.C. § 1101(a)(42)(B).

6. A person who has a well-founded fear of being forced to undergo an abortion or a sterilization, or of being persecuted for refusing to comply with a coercive population control policy, is deemed, in an asylum proceeding, to have a well-founded fear of political opinion-based persecution. 8 U.S.C. § 1101(a)(42)(B).

7. Mandatory birth-control measures short of abortion or sterilization, such as insertion of an IUD or required gynecological screenings, do not, on their own, rise to the level of persecution and therefore cannot be the sole support of an award of asylum; however, such measures do qualify as a coercive population control program, and an alien may obtain asylum if he resists those measures and the government persecutes him as a result. 8 U.S.C. § 1101(a)(42)(B).

8. To establish that his or her apprehension of future persecution is objectively reasonable, as required to demonstrate a well-founded fear of future persecution, an alien must show that a reasonable person in his position would fear persecution, either because he would be individually singled out for persecution or because there is a pattern or practice in his home country of persecution against a group of which he is a member. 8 U.S.C. § 1101(a)(42)(A).

9. Questions of judgment, such as an Immigration Judge’s (IJ) decision to grant asylum, to reopen the record, or to reconsider a disposition, receive no deference from the Board of Immigration Appeals (BIA). 8 C.F.R. § 1003.1(d)(3)(ii).

10. Immigration Judge’s (IJ) forecasting of future events, in asylum proceeding, constituted fact finding that the Board of Immigration Appeals (BIA) was required to review under the clearly erroneous standard; abrogating In re A-S-B-, 24 I&N Dec. 493. 8 C.F.R. § 1003.1(d)(3).

11. In any asylum case predicated on the fear of future persecution, an Immigration Judge (IJ) must answer three essential questions, asking: (1) what may happen if the alien returns to his home country, (2) whether those events meet the legal definition of persecution, and (3) whether the possibility of those events occurring gives rise to a well-founded fear of persecution under the circumstances of the alien’s case. 8 C.F.R. § 1003.1(d)(3).

12. Question, in an asylum proceeding, as to what may happen if an alien returns to his home country, is factual in nature and is subject to clearly erroneous review by the Board of Immigration Appeals (BIA).
13. Question, in an asylum proceeding, whether what happens to an alien when he returns to his country meets the legal definition of persecution, is plainly an issue of law and thus is reviewed de novo by the Board of Immigration Appeals (BIA).

14. Whether an alien has a well-founded fear of future persecution, for purposes of an asylum proceeding, presents a mixed question of fact and law, and thus requires application of a legal standard to a particular set of circumstances.

15. When the Board of Immigration Appeals (BIA) reaches a different conclusion than the Immigration Judge (IJ) in an asylum proceeding, either on the facts or the law, its review must reflect a meaningful consideration of the record as a whole; it is not enough for the BIA to select a few facts and state that, based on them, it disagrees with the IJ's conclusion, but it must describe its reasoning with enough specificity to inform the parties and the reviewing Court why it reached its conclusion.

16. Board of Immigration Appeals' (BIA) reversal of Immigration Judge's (IJ) grant of alien's claim for asylum, on basis that alien lacked a well-founded fear of future persecution in China, did not reflect the required consideration of the record as a whole; BIA failed to address evidence that, if credited, would lend support to alien's asserted fear of sterilization.

17. Court of Appeals could not meaningfully address Board of Immigration Appeals' (BIA) denial of alien's request for withholding of removal to China, requiring remand, where BIA performed an inadequate asylum analysis and did not independently assess alien's right to withholding of removal.

18. Board of Immigration Appeals (BIA) may deny a motion to reopen asylum proceedings if it determines that (1) the alien has not established a prima facie case for the relief sought, (2) the alien has not introduced previously unavailable, material evidence, or (3) in the case of discretionary relief, such as asylum, the alien would not be entitled to relief even if the motion was granted. 8 C.F.R. § 1003.2(c)(4).

19. To establish a prima facie case for asylum, an alien must produce objective evidence that, when considered together with the evidence of record, shows a reasonable likelihood that he is entitled to relief.

20. The BIA, in considering a motion to remand for consideration of new evidence in an asylum proceeding, must actually consider the evidence and argument that a party presents and may not summarily dismiss the motion.

21. Court of Appeals reviews the denial of a motion to remand or to reopen asylum proceedings for abuse of discretion, and will uphold that determination if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole.

22. To extent alleged new evidence proffered by alien in support of her motion to remand her asylum proceedings was either within alien's control at time of her hearing before the Immigration Judge (IJ) or was duplicative of other parts of the record, motion was properly denied.
23. To extent alleged new evidence proffered by alien in support of her motion to remand her asylum proceedings had no significant bearing on her asylum rights, motion was properly denied; Chinese family-planning propaganda proffered by alien contained no reference to mandatory sterilization, which was basis of alien’s allegation of a well-founded fear of future persecution.

24. Board of Immigration Appeals (BIA) erred in denying alien’s motion to remand her asylum proceedings for consideration of new evidence, consisting of a certification, allegedly issued by provincial family-planning authorities in China, which purported to be an official proclamation that alien would be required to undergo a sterilization procedure if returned to China; document, which was unavailable at time of alien’s hearing, appeared to provide individualized evidence showing that alien had reason to fear being singled out for persecution.

Lozano v. City of Hazleton, 620 F.3d 170 (3d Cir. 2010)

1. The Court of Appeals reviews a district court’s conclusions of law de novo and its factual findings for clear error.

2. A district court’s grant of a motion to proceed anonymously and grant of a confidentiality order are reviewed for abuse of discretion.

3. The severability doctrine governs whether a plaintiff has standing to challenge an entire ordinance, or just certain provisions.

4. Under Pennsylvania law, local ordinance’s provision creating private cause of action against businesses that employed unlawful workers was severable from provisions regulating employment of, and provision of rental housing to, undocumented aliens, such that issue of standing to challenge provision would be analyzed separately from ordinance’s other provisions; city council that enacted ordinance intended that private-cause-of-action provision be severable from balance of its regulatory scheme.

5. For an ordinance to be severable, the legislative body must have intended that the ordinance be separable, and the ordinance must be capable of separation in fact; the valid portion of the ordinance must be independent and complete within itself.

6. The inquiry into Article III standing must focus on whether a claim is being brought by a party whose interests entitle him to raise it. U.S. Const. art. III, § 1 et seq.

7. Prudential standing encompasses: the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked. U.S. Const. art. III, § 1 et seq.

8. An organization wishing to bring suit on behalf of its members must satisfy a specific combination of constitutional and prudential standing requirements. U.S. Const. art. III, § 1 et seq.
9. To establish that it has associational standing and can represent its members' interests in federal court, an organization must show that: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

10. Landlord who hired contractors to work on his rental properties had standing to challenge validity of local ordinance regulating employment of undocumented aliens; landlord suffered particularized injury in having to bear costs of submitting affidavits to city enforcement office affirming he did not knowingly utilize services of unlawful workers. U.S. Const. art. III, § 1 et seq.

11. A "particularized injury," as required for Article III standing, is one that affects the plaintiff in a personal and individual way, and is established when a plaintiff shows that she has sustained or is immediately in danger of sustaining some direct injury, not merely that she suffers in some indefinite way in common with people generally. U.S. Const. art. III, § 1 et seq.

12. Landlord who employed contractors to work on his rental properties lacked standing to challenge validity of local ordinance provision creating private cause of action against businesses that employed undocumented aliens; landlord would only be injured by provision if he hired multiple employees, terminated lawful employee while retaining undocumented employee, and was sued by terminated employee, which was too attenuated to establish imminent injury. U.S. Const. art. III, § 1 et seq.

13. Landlord had standing to challenge validity of local ordinance regulating provision of rental housing to undocumented aliens; landlord suffered particularized injury because ordinance made it more difficult for him to rent apartment and he was required to bear cost of complying with ordinance's reporting provision. U.S. Const. art. III, § 1 et seq.

14. Undocumented aliens had standing to challenge validity of local ordinance regulating provision of rental housing to illegal aliens; aliens suffered imminent injury in that they lost their apartments or were threatened with eviction, and enjoining enforcement of ordinance would provide meaningful redress by decreasing likelihood they would be unable to procure housing. U.S. Const. art. III, § 1 et seq.

15. Aliens with uncertain immigration status were entitled to proceed anonymously in action challenging validity of local ordinances regulating employment of, and provision of rental housing to, undocumented aliens; because of their status, aliens would have faced greater risk of harassment in city if their identities were revealed, and they would have been deterred from bringing action if doing so required alerting federal immigration authorities to their presence.

16. In pre-emption inquiries, courts assume that the historic police powers of the states were not to be superseded by the federal act unless that was the clear and manifest purpose of Congress.

17. Express pre-emption occurs when Congress expressly declares a law's pre-emptive effect.
18. In analyzing instances of express pre-emption, courts focus on the plain wording of the federal statute’s pre-emption clause, which necessarily contains the best evidence of Congress’ pre-emptive intent; courts also consider the structure and purpose of the statute as a whole as revealed not only in the text, but through reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to operate.

19. Implied field pre-emption occurs when state or local governments attempt regulation in a field which Congress has implied an intent to exclusively occupy.

20. For purposes of pre-emption analysis, Congress’s intent to occupy a field can be inferred where a federal regulatory scheme is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it, or where a statute touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

21. Implied conflict pre-emption occurs where it is impossible to comply with both state and federal law, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

22. Local ordinance regulating employment of undocumented aliens was entitled to presumption against pre-emption in action challenging ordinance’s validity; ordinance did not regulation immigration, but rather regulated employment of persons unauthorized to work in United States.

23. Only state and local laws aimed at areas beyond the state’s historic police powers, that venture into matters long regulated by the federal government, are not afforded the benefit of the presumption against pre-emption.

24. Local ordinance regulating employment of undocumented aliens was not expressly pre-empted by Federal Immigration Reform and Control Act; ordinance was licensing law within meaning of Act’s saving clause because it conditioned grant of business license on company’s agreement not to employ unauthorized aliens. 8 U.S.C. § 1324a(h)(2).

25. Terms that are not statutorily defined are usually ascribed their ordinary or natural meaning.

26. When statutory language is plain and unambiguous, the sole function of the courts is to enforce it according to its terms.

27. Local ordinance regulating employment of undocumented aliens was pre-empted by Federal Immigration Reform and Control Act under doctrine of conflict pre-emption; ordinance stood as obstacle to accomplishment and execution of Act by undermining Act’s careful balance between effectively deterring employment of unauthorized aliens, minimizing resulting burden on employers, and protecting authorized aliens and citizens perceived as foreign from discrimination. 8 U.S.C. § 1324a(h)(2).

28. Local ordinance regulating provision of rental housing to undocumented aliens was not entitled to presumption against pre-emption in action challenging ordinance’s validity;
ordinance attempted to regulate housing based solely on immigration status, and deciding which aliens could live in United States was historical prerogative of federal government.

29. Local ordinance regulating provision of rental housing to undocumented aliens was preempted by Federal Immigration Reform and Control Act; central concern of Act was with terms and conditions of admission to country and subsequent treatment of aliens lawfully in country, and comprehensiveness of Act precluded city efforts, whether harmonious or conflicting, to regulate residence based on immigration status. 8 U.S.C. § 1324a(h)(2).

*Patel v. Att’y Gen.*, 619 F.3d 230 (3d Cir. 2010)

1. Alien’s arguments, that immigration judge (IJ) misapplied hardship standard in denying cancellation of removal by failing to consider all consequences of moving her family to India, raised quarrels over IJ’s exercise of discretion and correctness of factual findings, rather than constitutional claims or questions of law, and thus Court of Appeals lacked jurisdiction to consider them. 8 U.S.C. §§ 1229(b)(1), 1252(a)(2)(B)(i), 1252(a)(2)(D).

2. Challenges to “exceptional and extremely unusual” hardship determinations, for purposes of cancellation of removal, constitute quarrels over the exercise of discretion and the correctness of factual findings and do not raise constitutional claims or questions of law for purpose of appellate review. 8 U.S.C. § 1229(b)(1).

3. Alien’s voluntary departure terminated upon her filing of petition for appellate review of Board of Immigration Appeals (BIA) decision affirming immigration judge’s (IJ) denial of her petition for cancellation of removal, and thus Court of Appeals lacked jurisdiction to stay alien’s voluntary departure. 8 C.F.R. § 1240.26(i).

4. Voluntary departure arrangement between alien and government following denial of petition for cancellation of removal was quid pro quo, and thus, given mutual benefit envisioned in grant of voluntary departure, regulation conditioning right to voluntarily depart on alien’s relinquishing right to engage in appellate proceedings was not objectionable. 8 C.F.R. § 1240.26(i).

5. Automatic termination of an alien’s grant of voluntary departure upon the filing of a petition for review of an order denying petition for cancellation of removal, and conditioning the grant of voluntary departure upon the alien’s foregoing that right, is unobjectionable. 8 C.F.R. § 1240.26(i).

*Gallimore v. Att’y Gen.*, 619 F.3d 216 (3d Cir. 2010)

1. Board of Immigration Appeals (BIA) did not adopt or defer to findings or analysis of immigration judge (IJ) by agreeing with ultimate legal conclusion of IJ, and thus Court of Appeals reviewed only decision of Board of Immigration Appeals (BIA) on petition for judicial review, where BIA had agreed with ultimate legal conclusion of IJ for expressly different reasons.

2. An alien who becomes an lawful permanent resident (LPR) through fraud has not been “lawfully admitted” for purposes of permitting certain immigrants found deportable on the
basis of a criminal offense to apply for discretionary relief, known as “waiver,” from deportation. 8 U.S.C. § 1182(c).

3. Remand was required for Board of Immigration Appeals (BIA) to address question of when status of alien, citizen of Jamaica, was adjusted to “lawfully admitted for permanent residence,” where there were two points in time potentially relevant to whether and when alien was “lawfully admitted for permanent residence” and those two dates straddled date of potentially disqualifying conviction. 8 U.S.C. §§ 1101(a)(20), 1182(c), 1186a, 1255(a)(2).

4. An alien whose status has been adjusted to lawful permanent resident (LPR), but who subsequently is determined to have obtained that status adjustment through fraud, has not been “lawfully admitted for permanent residence” because the alien is deemed, ab initio, never to have obtained LPR status; therefore, such an alien is ineligible for discretionary relief, known as “waiver,” from deportation. 8 U.S.C. § 1182(c).

5. Agency’s determination that a person does not “lawfully” obtain lawful permanent resident (LPR) status through fraud is entitled to deference, since it is a reasonable interpretation of the provision that provides for discretionary relief, known as “waiver,” from deportation. 8 U.S.C. § 1182(c).

6. An alien whose status has been adjusted to lawful permanent resident, but who subsequently is determined in an immigration proceeding to originally have been ineligible for that status, has not been “lawfully admitted for permanent residence,” as required for discretionary relief, known as “waiver,” from deportation. 8 U.S.C. § 1182(c).

7. Disposition by Board of Immigration Appeals (BIA), from which supporting interpretation theoretically could be gleaned, was not entitled to deference on petition for judicial review, since review for reasonableness required Board of Immigration Appeals (BIA) to adequately explain its reasoning. 8 U.S.C. §§ 1101(a)(20), 1182(c), 1186a, 1255(a)(2).

8. While the Court of Appeals gives deference to the decisions of the Board of Immigration Appeals (BIA), the Court cannot give meaningful review to a decision in which the BIA does not explain how it came to its conclusion.

9. Conditional permanent residents should be deemed “lawfully admitted for permanent residence” as of the date their status is initially adjusted. 8 U.S.C. § 1186a.

10. A court of appeals generally is not empowered to conduct a de novo inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry; rather, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.

11. Claim made by alien, citizen of Jamaica, that his removal was barred by five-year statute of limitations, was unexhausted, leaving Court of Appeals without jurisdiction to review it on petition for judicial review, where alien did not raise claim either to immigration judge (IJ) or BIA when alien was charged alien as removable. 8 U.S.C. § 1256(a).

Restrepo v. Att’y Gen., 617 F.3d 787 (3d Cir. 2010)
1. Court of Appeals, on review in removal proceeding, would review both the decision of the Immigration Judge (IJ) and that of the Board of Immigration Appeals (BIA), where BIA, in the proceeding below, had adopted and affirmed the IJ’s decision and provided additional reasoning in support of its decision.

2. Court of Appeals has jurisdiction to review final orders of removal. 8 U.S.C. § 1252(a).

3. Although Court of Appeals lacks jurisdiction to review an order to remove an alien who commits an aggravated felony, it retains jurisdiction to determine whether an alien was convicted of a non-reviewable aggravated felony. 8 U.S.C. § 1252(a)(2)(C).

4. Whether an alien’s offense constitutes an aggravated felony is reviewed de novo, since it implicates a purely legal question that governs the appellate court’s jurisdiction. 8 U.S.C. § 1252(a)(2)(C).

5. Court of Appeals has jurisdiction to hear constitutional claims and questions of law presented in petitions for review of final removal orders, even for those aliens convicted of an aggravated felony, and review of such claims is de novo.

6. Court of Appeals reviews de novo issue of whether an alien’s removal proceedings were time-barred.

7. Pursuant to statute, Court of Appeals lacked jurisdiction to review the denial of alien’s application to adjust his status. 8 U.S.C. §§ 1252(a)(2)(B), 1255.

8. Term “aggravated felony,” as used in removal provision of the Immigration and Nationality Act (INA), applies not only to federal offenses, but also to violations of state law. 8 U.S.C. § 1101(a)(43).


10. When confronted with a potential Chevron application, Court of Appeals uses a three-step analysis which begins by examining the language of the statute to ascertain whether its meaning is plain and unambiguous in light of the specific dispute at hand; if so, the inquiry ends, but if the statutory language is unclear, Court must endeavor to discern congressional intent by utilizing various tools of statutory construction, and if that endeavor is unsuccessful, Court may defer to the agency’s interpretation, provided that such interpretation is reasonable.

11. Board of Immigration Appeals’ (BIA) interpretation of phrase “sexual abuse of a minor,” that it included the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children, was reasonable, and thus was entitled to Chevron deference for purposes of determining whether alien’s New Jersey conviction for aggravated criminal sexual contact qualified as the aggravated felony of sexual abuse of a minor, within meaning of the...
Immigration and Nationality Act (INA); interpretation was consistent with principles of statutory construction and represented a logical extension of precedent. 8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii), 1252(a)(2)(C); N.J.S. § 2C:14-3(a).

12. Alien’s New Jersey conviction for aggravated criminal sexual contact qualified as the aggravated felony of sexual abuse of a minor, within meaning of the Immigration and Nationality Act (INA), and thus Court of Appeals lacked jurisdiction to review order for his removal; conduct constituting “sexual abuse of a minor” was necessary for the New Jersey conviction. 8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii), 1252(a)(2)(C); N.J.S. § 2C:14-3(a).

13. Removal proceedings were not subject to federal “catch-all” statute of limitations, even though they did not commence until a decade after alien’s conviction; removal did not amount to a forfeiture or penalty within meaning of the statute of limitations. 8 U.S.C. § 1227(a)(2)(A)(iii); 28 U.S.C. § 2462.

*Pareja v. Att'y Gen.*, 615 F.3d 180 (3d Cir. 2010)


2. Court of Appeals’ jurisdiction on review of the denial of a claim for cancellation of removal is narrowly circumscribed, in that it is limited to colorable claims or questions of law. 8 U.S.C. § 1252(a)(2)(D).

3. To determine whether a claim in an immigration proceeding presents a colorable constitutional claim or question of law, Court of Appeals asks whether the claim is immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous.

4. Question of Court of Appeals’ jurisdiction over a colorable legal claim in an immigration proceeding does not turn on whether that claim is ultimately meritorious. 8 U.S.C. § 1252(a)(2)(D).

5. If a claim in an immigration proceeding is frivolous, Court of Appeals lacks jurisdiction to review it, no matter its label. 8 U.S.C. § 1252(a)(2)(D).

6. Court of Appeals had jurisdiction to review whether Board of Immigration Appeals (BIA) misinterpreted the statutory phrase “exceptional and extremely unusual hardship” when denying alien’s request for cancellation of removal; issue was a question of law that related solely to the nondiscretionary question when BIA’s binding legal standards were correct. 8 U.S.C. §§ 1229b, 1252(a)(2)(D).

7. Court of Appeals had jurisdiction to review whether Board of Immigration Appeals (BIA) erred, when denying alien’s request for cancellation of removal, by attaching weight, in its hardship determination, to the number of her qualifying relatives; issue was one of statutory interpretation, which clearly raised a colorable question of law. 8 U.S.C. §§ 1229b(b)(1)(D), 1252(a)(2)(D).
8. While a hardship determination, like the ultimate decision to grant or deny cancellation of removal, is discretionary and therefore beyond the jurisdictional purview of the Court of Appeals, where the Board of Immigration Appeals (BIA) is alleged to have made such hardship determination based on an erroneous legal standard or on fact finding which is flawed by an error of law, the Court’s jurisdiction to review that determination is secure. 8 U.S.C. §§ 1229b(b)(1)(D), 1252(a)(2)(D).

9. Board of Immigration Appeals (BIA) did not err, when denying alien’s request for cancellation of removal, in predicking its hardship determination on assumption that alien’s daughter would return to Mexico with her rather than staying in the United States and thus concluding that it did not need to address whether alien’s removal would result in her separation from her daughter; alien herself testified that her daughter would accompany her to Mexico. 8 U.S.C. §§ 1229b(b)(1)(D), 1252(a)(2)(D).

10. Court of Appeals lacked jurisdiction to review issue of whether Board of Immigration Appeals (BIA) would infringe the constitutional rights of alien’s United States citizen daughter to remain in the U.S. by denying alien’s request for cancellation of removal; issue did not raise a colorable legal question. 8 U.S.C. §§ 1229b(b)(1)(D), 1252(a)(2)(D).

11. Under the so-called doctrine of unconstitutional conditions, government is prohibited from conditioning the discretionary grant of a benefit on an individual’s waiver of a constitutional right.

12. Court of Appeals lacked jurisdiction to review issue of whether decision in Mendez-Moranchel v. Ashcroft, in which the Court held that the Board of Immigration Appeals’ (BIA) determination of whether an alien has met the “exceptional and extremely unusual hardship” standard in the cancellation of removal statute was discretionary and therefore beyond its jurisdiction, should be overruled; issue did not present a colorable constitutional or legal issue, since it was either made solely for purpose of obtaining jurisdiction or had no possible validity. 8 U.S.C. §§ 1229b(b)(1)(D), 1252(a)(2)(D).

13. Court of Appeals ordinarily exercises plenary review over Board of Immigration Appeals’ (BIA) legal determinations; however, where the Court is called upon to interpret a statute that is within the scope of an agency’s rulemaking and lawmaking authority, the Court’s inquiry implicates principles of Chevron deference.

14. Chevron deference is required when an agency construes or interprets a statute that it administers and its interpretation is based on a permissible interpretation of the statute.

15. Chevron deference to an agency’s interpretation of a statute it administers involves a two-step inquiry, in which the court, using traditional tools of statutory construction to determine whether Congress had an intention on the precise question at issue, asks first if the statute is silent or ambiguous with respect to the specific issue of law in the case; if the answer is affirmative, the inquiry ends, but if Congress’s intention is not evident, the court asks whether the agency’s answer is based on a permissible construction of the statute.
16. When Congress has left a gap in a statute, implicitly leaving the administering agency responsible for filling that gap, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

17. Phrase “exceptional and extremely unusual hardship,” as used in statute governing applications for cancellation of removal, was ambiguous. 8 U.S.C. § 1229b(b)(1)(D).

18. A basic tenet of statutory construction is that the Court must begin with the assumption that the ordinary meaning of statutory language accurately expresses the legislative purpose.

19. Board of Immigration Appeals’ (BIA) interpretation of phrase “exceptional and extremely unusual hardship,” as used in statute governing applications for cancellation of removal, that it required a higher level of hardship than did prior suspension of deportation statute, was a permissible construction of the statute and thus was entitled to Chevron deference; BIA’s interpretation did not fall outside the broad range of permissible interpretations authorized by the statutory language, and that interpretation was buttressed by the legislative history. 8 U.S.C. § 1229b(1)(D).

20. Statutory provision governing eligibility for cancellation of removal unambiguously stated that such eligibility could be predicated on hardship to a single qualifying relative, and thus issue of whether alien’s daughter was her only qualifying relative would not have been a proper focus of inquiry for purpose of determining alien’s eligibility for relief. 8 U.S.C. § 1229b(b)(1)(D).

21. Remand was required, in proceedings on claim for cancellation of removal filed by an alien who had only one qualifying relative, for limited purpose of determining whether Board of Immigration Appeals (BIA) gave weight to an impermissible factor by differentiating alien’s situation from that presented in a case in which the petitioning alien had six children; it was uncertain whether BIA failed to implement congressional intent by requiring alien to establish hardship by reference to a consideration not contemplated by the statute. 8 U.S.C. §§ 1229b(b)(1)(D), 1252(a)(2)(D).

Leslie v. Att’y Gen., 611 F.3d 171 (3d Cir. 2010)

1. An appellant’s failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal.

2. The Court of Appeals had jurisdiction to review alien’s claims raised in petition for review that his notice to appear for his removal hearing was deficient, thereby denying him a meaningful opportunity to be heard, and that the immigration judge’s (IJ’s) failure to inform him of the availability of free legal services deprived him both of his constitutional right to due process and his statutory right to counsel; the claims raised both questions of law and constitutional issues. U.S. Const. amend. V; 8 U.S.C. § 1252(a)(2)(D).

3. Immigration judge’s (IJ’s) failure to inform Jamaican alien of the availability of free legal services, in violation of immigration regulations, violated alien’s due process rights and rendered the subsequently entered removal order invalid, without regard to alien’s ability to demonstrate substantial prejudice; the regulations protected the fundamental statutory right to
counsel at removal hearing, which was derivative of the due process right to a fundamentally fair removal hearing, and, as such, were required to be enforced without regard to the existence of prejudice resulting from its violation. U.S. Const. amend. V; 8 U.S.C. § 1362; 8 C.F.R. § 1240.10(a)(2)-(3).

4. Allegations of due process violations in a removal proceeding must ordinarily be accompanied by an initial showing of substantial prejudice. U.S. Const. amend. V.

5. Rules promulgated by a federal agency that regulate the rights and interests of others are controlling upon the agency.

6. Violations of immigration regulations promulgated to protect fundamental statutory or constitutional rights need not be accompanied by a showing of prejudice to warrant judicial relief on due process grounds. U.S. Const. amend. V.

7. Absent a showing of prejudice, when a violation of immigration regulations implicates less than the alien’s fundamental rights, wholesale remand places an unwarranted and potentially unworkable burden on the adjudication of immigration cases by the Board of Immigration Appeals (BIA).

8. An administrative agency is not a slave of its rules, but the notion of fair play animating the Fifth Amendment precludes an agency from promulgating a regulation affecting individual liberty or interest, which the rule-maker may then with impunity ignore or disregard as it sees fit. U.S. Const. amend. V.

9. When an administrative agency promulgates a regulation protecting fundamental statutory or constitutional rights of parties appearing before it, the agency’s failure to comply will merit invalidation of the challenged agency action on due process grounds without regard to whether the alleged violation has substantially prejudiced the complaining party. U.S. Const. amend. V.

10. Aliens in removal proceedings are entitled to Fifth Amendment Due Process protection, which guarantees them a fundamentally fair removal hearing. U.S. Const. amend. V.

11. A removal proceeding may be fundamentally unfair, in violation of due process, if an alien is prevented from reasonably presenting his case. U.S. Const. amend. V.

12. Although the Fifth Amendment does not mandate government-appointed counsel for aliens at removal proceedings, it indisputably affords an alien the right to counsel of his or her own choice at his or her own expense. U.S. Const. amend. V.

Bhargava v. Att’y Gen., 611 F.3d 168 (3d Cir. 2010)

1. The conclusion of Board of Immigration Appeals (BIA) that regulation that authorized asylum officers to terminate a grant of asylum made under the jurisdiction of any asylum officer upon a showing of fraud in the alien’s application, with no mention of review by an immigration judge (IJ) of an asylum officer’s termination of asylum, did not confer jurisdiction on IJs to review an asylum officer’s termination of asylum was not arbitrary or
capricious, nor plainly erroneous or inconsistent with the regulation, and thus the Court of Appeals would defer to that conclusion on alien’s petition for review of BIA’s order affirming IJ’s determination that IJ lacked jurisdiction to review termination of alien’s asylum status by Department of Homeland Security (DHS). 8 C.F.R. § 208.24.

2. The Court of Appeals owes deference to a conclusion of the Board of Immigration Appeals (BIA) as to the scope of its jurisdiction, so long as the BIA’s interpretation of a statute or a regulation is not arbitrary or capricious, nor plainly erroneous or inconsistent with the regulation.

*Kang v. Att’y Gen.*, 611 F.3d 157 (3d Cir. 2010)

1. Because Board of Immigration Appeals (BIA) did not adopt or defer to Immigration Judge’s (IJ) opinion regarding Convention Against Torture (CAT) claim of alien, a Korean citizen of China, appellate court would review only BIA’s decision. 8 U.S.C. § 1252; 8 C.F.R. §§ 1003.1(b)(3), 208.16(c)(2).


3. While appellate court’s review of Board of Immigration Appeals’ (BIA) decision in immigration proceeding is deferential, deference is not due where findings and conclusions are based on inferences or presumptions that are not reasonably grounded in record, viewed as whole. 8 U.S.C. § 1252; 8 C.F.R. § 1003.1(b)(3).

4. Board of Immigration Appeals (BIA) may not ignore evidence in record in immigration proceeding that favors the petitioner. 8 C.F.R. § 1003.1(b)(3).

5. To reverse Board of Immigration Appeals’ (BIA) finding in immigration proceeding, appellate court must find that evidence “compels” different result. 8 U.S.C. § 1252; 8 C.F.R. § 1003.1(b)(3).

6. Board of Immigration Appeals’ (BIA) determinations in immigration proceeding will be upheld if they are supported by reasonable, substantial, and probative evidence in record considered as whole. 8 U.S.C. § 1252; 8 C.F.R. § 1003.1(b)(3).

7. Under substantial evidence standard, Board of Immigration Appeals’ (BIA) determinations in immigration proceeding must be upheld unless evidence not only supports contrary conclusion, but compels it; however, BIA must substantiate its decisions. 8 U.S.C. § 1252; 8 C.F.R. § 1003.1(b)(3).

8. Appellate court will not accord Board of Immigration Appeals (BIA) deference where its findings and conclusions in immigration proceeding are based on inferences or presumptions that are not reasonably grounded in record. 8 U.S.C. § 1252; 8 C.F.R. § 1003.1(b)(3).

9. Under *Kaplun v. Attorney General*, which set forth two-part standard of review for Board of Immigration Appeals (BIA) to apply in reviewing an Immigration Judge’s (IJ) determination of Convention Against Torture (CAT) claim, appellate court will uphold BIA’s reversal of
IJ’s grant of CAT relief if there is substantial evidence supporting BIA’s conclusion that IJ
clearly erred in finding likelihood of torture, or if court determines that alleged mistreatment
does not legally constitute torture; conversely, court will reverse BIA’s determination if
evidence compels finding that it is more likely than not that petitioner will be tortured if
removed. 8 U.S.C. § 1252; 8 C.F.R. §§ 1003.1(b)(3), 208.16(c)(2), 208.18(a)(1),
208.18(a)(5).

10. Remand of Board of Immigration Appeals’ (BIA) decision reversing Immigration Judge’s
(IJ) grant of withholding of removal to alien, a Korean citizen of China, under Convention
Against Torture (CAT) for BIA to analyze IJ’s decision under Kaplun v. Attorney General,
which set forth two-part standard of review for BIA to apply in reviewing IJ’s determination
of CAT claim, was not required, since BIA’s reversal of IJ and determination that alien was
not entitled to relief under CAT was not supported by substantial evidence. 8 U.S.C. § 1252;
8 C.F.R. §§ 1003.1(b)(3), 208.16(c)(2), 208.18(a)(1), 208.18(a)(5).

11. Deplorable prison conditions do not, by themselves, constitute torture within meaning of
Convention Against Torture (CAT). 8 C.F.R. §§ 208.16(c)(2), 208.18(a)(1, 5).

12. A petitioner seeking withholding of removal under Convention Against Torture (CAT) must
demonstrate that his prospective torturer will have motive or purpose to cause him pain or
suffering. 8 C.F.R. §§ 208.16(c)(2), 208.18(a)(1, 5).

13. Board of Immigration Appeals’ (BIA) determination that alien, a Korean citizen of China,
failed to show required likelihood of torture to support her Convention Against Torture
(CAT) claim was not supported by substantial evidence, and thus appellate court owed BIA’s
determination no deference; BIA ignored majority of evidence alien presented, including
most telling evidence of torture, and instead mentioned only United States State Department
County Report and alien’s testimony, and BIA made no mention of testimony of individuals
who were similarly situated to alien. 8 C.F.R. §§ 208.16(c)(2), 208.18(a)(1, 5).

14. Although appellate court generally defers to Board of Immigration Appeals’ (BIA)
conclusion that an alien failed to show required likelihood of torture to support Convention
Against Torture (CAT) claim, BIA may not simply overlook evidence in record that supports
claim. 8 U.S.C. § 1252; 8 C.F.R. §§ 208.16(c)(2), 208.18(a)(1, 5).

15. It was more likely than not that alien, a Korean citizen of China who was involved in
organization being sought by Chinese police for providing food and shelter to North Korean
refugees who had illegally entered China on their way to South Korea, would be tortured if
removed to China, and thus alien was entitled to withholding of removal under Convention
Against Torture (CAT); other individuals in alien’s organization were beaten, suffocated,
deprived of sleep, shocked with electrical current and/or forced to stand for long periods of
time, and such acts were inflicted upon those individuals for purpose of causing severe pain
and suffering. 8 U.S.C. § 1252; 8 C.F.R. §§ 208.16(c)(2), 208.18(a)(1, 5).

16. An attorney representing United States in immigration proceeding carries double burden; to
be sure, he owes obligation to government, just as any attorney owes obligation to his client,
to conduct his case zealously, however, at same time he must be ever cognizant that he is
representative of government dedicated to fairness and equal justice to all and, in this respect, he owes heavy obligation to his adversary.

17. While ordinarily proper course, except in rare circumstances, is for appellate court to remand to Board of Immigration Appeals (BIA) for additional investigation or explanation, where application of correct legal principles to record could lead only to same conclusion, there is no need to require BIA reconsideration. 8 U.S.C. § 1252; 8 C.F.R. § 1003.1(b)(3).

Dwumaah v. Att’y Gen., 609 F.3d 586 (3d Cir. 2010)

1. Where the Board of Immigration Appeals (BIA) essentially adopted the immigration judge’s (IJ) findings and discussed the IJ’s decision, Court of Appeals reviews the decisions of both the IJ and the BIA. Immigration and Nationality Act, § 242(a), 8 U.S.C. § 1252(a).

2. Substantial evidence supported immigration judge’s (IJ) finding that alien, a citizen of Ghana, falsely claimed citizenship in connection with federal student loan applications, and thus was removable on that basis; alien had applied for student loans, applicant marked “yes” to indicate that he was citizen of United States and signed both forms, alien had used alias when he did so, he attended school listed on applications, and forms set forth alien’s correct home address and marital status, as well as social security number and false date of birth that were linked to alien through his own admissions. Immigration and Nationality Act, § 237(a)(3)(D), 8 U.S.C. § 1227(a)(3)(D).


4. Immigration judge (IJ) could draw negative inference from refusal of alien, a citizen of Ghana, to provide handwriting exemplar on his application for cancellation of removal, where removal was based on alien’s false claim to citizenship in connection with federal student loan applications. Immigration and Nationality Act, § 237(a)(3)(D), 8 U.S.C. § 1227(a)(3)(D).

Espinosa-Cortez v. Att’y Gen., 607 F.3d 101 (3d Cir. 2010)

1. In reviewing a final order of removal, where the Board of Immigration Appeals (BIA) issues an opinion, rather than a summary affirmance, a court of appeals reviews the BIA’s, rather than the immigration judge’s (IJ), decision. 8 U.S.C. § 1252(a)(1).

2. A court of appeals’ review of a Board of Immigration Appeals’ (BIA) denial of an alien’s asylum application is highly deferential; it affirms any findings of fact supported by substantial evidence and is bound by the administrative findings of fact unless a reasonable adjudicator would be compelled to arrive at a contrary conclusion.

3. Whether, for asylum purposes, an alien has proven that he or she has a well-founded fear of persecution is a question of fact, and the agency determination must be upheld if it is supported by substantial evidence in the record.
4. The requirement that a Board of Immigration Appeals’ (BIA) decision be supported by substantial evidence is not an empty one; deference is not due where findings and conclusions are based on inferences or presumptions that are not reasonably grounded in the record, viewed as a whole, and the BIA is not permitted simply to ignore or misconstrue evidence in the asylum applicant’s favor.

5. “Persecution,” in the asylum context, includes, but is not limited to, threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A).

6. An asylum applicant who establishes that he or she was previously persecuted on account of a statutorily enumerated ground triggers a rebuttable presumption that the applicant has a well-founded fear of future persecution. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A).

7. In order to show that a fear of future persecution is “well-founded,” in the asylum context, an alien must demonstrate that his or her fear is both subjectively and objectively reasonable, which he or she may do by using testimonial, documentary, or expert evidence; to satisfy the subjective prong of this inquiry, the alien must show that the fear is genuine, and to satisfy the objective prong, the petitioner must show that a reasonable person in the alien’s circumstances would fear persecution if returned to the country in question. 8 U.S.C. § 1101(a)(42)(A).

8. An asylum applicant bears the burden of proving eligibility for asylum, and testimony, by itself, is sufficient to meet this burden, if credible.

9. Substantial evidence did not support Board of Immigration Appeals’ (BIA) determination, in denying Colombian alien’s asylum application, that guerrilla organization’s threats to alien, used in an effort to coerce alien, who had close connections to the Colombian government and military, into becoming a guerrilla informant, were not centrally motivated by a political opinion the guerrillas imputed to alien, where alien testified about his long-term association with the Colombian government, made his living by providing support to those institutions, would not have come to the guerrillas’ attention but for his relationship with the government and military, rebuffed repeated overtures from the guerrillas to join with them, and expressly made his anti-guerrilla opinions known to the guerrilla agents attempting to recruit him.

10. A person can be eligible for asylum if he faces the prospect of persecution on account of imputed, as well as actual, political beliefs.

11. In determining whether an asylum applicant was persecuted because of an imputed political opinion, a court focuses on whether the persecutor attributed a political opinion to the victim, and acted upon the attribution.

12. An asylum applicant must provide some evidence of motive, direct or circumstantial, in alleging persecution because of an imputed political opinion; in certain cases, however, factual circumstances alone may constitute sufficient circumstantial evidence of a persecutor’s motives.

*Bradley v. Att’y Gen.*, 603 F.3d 235 (3d Cir. 2010)
1. Purpose of the Visa Waiver Program (VWP) is to facilitate international travel and promote the more effective use of the resources of affected government agencies while not posing a threat to the welfare, health, safety, and security of the United States. 8 U.S.C. § 1187(a).

2. Evidence was sufficient to prove that alien, a native and citizen of New Zealand, who was admitted to the United States under the Visa Waiver Program (VWP) visitor, signed a valid waiver form, waiving his right contest the government’s removal order; the VWP and its regulations did not permit VWP entrants to be admitted unless alien signed waiver, and there was no showing that the Department of Homeland Security admitted alien in violation of VWP statute and its own regulations. 8 U.S.C. § 1187(a); 8 C.F.R. § 217.2(a)(1), (b)(1).

3. New Zealand alien, admitted under Visa Waiver Program (VWP), was not prejudiced by any unknowing or involuntary waiver of his right to contest removal order, allegedly resulting from alien’s intoxication at time he signed waiver form, and thus, issuance of summary removal order without hearing did not violate his due process rights; alien’s waiver was an express condition precedent to his entry into the United States, if alien had knowingly and voluntarily refused to sign the waiver, he would have faced the same consequence of summary removal, and there was no showing how alien’s knowledge of the waiver realistically could have changed the outcome. U.S. Const. amend. V; 8 U.S.C. § 1187(a).

4. New Zealand alien admitted under Visa Waiver Program (VWP) was not eligible to apply for adjustment of status on basis of his marriage to United States citizen after the expiration of the statutory 90-day VWP stay. 8 U.S.C. §§ 1187(a), 1187(b)(2), 1255(c)(4).

Johnson v. Att’y Gen., 602 F.3d 508 (3d Cir. 2010)

1. The Court of Appeals lacks jurisdiction to review discretionary decisions regarding the granting or denial of an application for cancellation of removal on ground of extreme hardship. 8 U.S.C. § 1229b.

2. The Court of Appeals lacked jurisdiction to review the determination by the Board of Immigration Appeals (BIA) that alien, a native and citizen of Guyana, had not been battered by his wife or otherwise subjected to extreme cruelty by her, and thus, was not entitled to cancellation of removal on that ground; the BIA’s extreme cruelty determination was discretionary, rather than an issue implicating legal or constitutional principles. 8 U.S.C. §§ 1229b, 1229b(b)(2), 1252(a)(2)(D); 8 C.F.R. § 204.2(c)(1)(vi).

3. An alien may not create subject matter jurisdiction on a petition for review that Congress chose to remove simply by cloaking an argument in constitutional garb. 8 U.S.C. § 1252(a)(2)(D).

4. The elements necessary to demonstrate eligibility for cancellation of removal are conjunctive such that an alien’s inability to demonstrate extreme cruelty precludes him from relief under the extreme hardship provision. 8 U.S.C. §§ 1229b, 1229b(b)(2), 1252(a)(2)(D); 8 C.F.R. § 204.2(c)(1)(vi).

Zegrean v. Att’y Gen., 602 F.3d 273 (3d Cir. 2010)
1. Standard of review for questions of law in immigration proceedings, including statutory interpretation, is de novo.

2. When the Board of Immigration Appeals’ (BIA) decision in a removal proceeding simply states that BIA affirms the Immigration Judge’s (IJ) decision for the reasons set forth in that decision, the IJ’s opinion effectively becomes the BIA’s, and, accordingly, the Court must review the IJ’s decision.

3. Alien was not entitled to termination of his removal proceedings so as to allow consideration of his naturalization application, where he failed to establish his prima facie eligibility for naturalization; pursuant to statute, the Attorney General was precluded from even considering an application for naturalization if a removal proceeding was pending against the applicant. 8 U.S.C. § 1429; 8 C.F.R. § 1239.2(f).

Kaplan v. Att’y Gen., 602 F.3d 260 (3d Cir. 2010)

1. When the Board of Immigration Appeals (BIA) issues its own decision on the merits and not a summary affirmance, Court of Appeals reviews BIA’s decision, not that of the Immigration Judge (IJ).

2. Where an alien is subject to a final order of removal by reason of having committed an aggravated felony, Court of Appeals reviews his petition only to extent it raises questions of law or constitutional claims; purely factual or discretionary determinations are outside the Court’s scope of review. 8 U.S.C. § 1252(a)(2)(C)-(D).

3. Court of Appeals reviews the Board of Immigration Appeals’ (BIA) legal determinations de novo, subject to the principles of deference articulated in Chevron v. Natural Resources Defense Council, Inc.

4. Board of Immigration Appeals’ (BIA) interpretation of its own regulation is controlling unless plainly erroneous or inconsistent with the regulation.

5. Clear and convincing evidence supported finding that alien’s conviction for securities fraud was a conviction for an aggravated felony, rendering him removable on basis that his offense involved fraud or deceit in which the loss to the victim exceeded $10,000; the criminal information to which alien pled guilty alleged he converted nearly $900,000 of investors’ funds to his personal use and that of his accomplices, and alien did not object to presentence report (PSR) which alleged a loss of at least $700,000. 8 U.S.C. §§ 1101(a)(43)(M)(i), 1127(a)(2)(A)(iii); Securities Act of 1933, §§ 7, 24, 15 U.S.C. §§ 77q, 77x; 18 U.S.C. § 2.

6. Board of Immigration Appeals (BIA) did not err in exercising its discretion to find that although alien was not sentenced to an aggregate term of at least five years’ imprisonment upon his conviction for securities fraud, his offense was a particularly serious crime, rendering him ineligible for withholding of removal; alien pled guilty to an information alleging securities fraud with losses of nearly $900,000. 8 U.S.C. § 1231(b)(3)(A), (B); Securities Act of 1933, §§ 7, 24, 15 U.S.C. §§ 77q, 77x; 18 U.S.C. § 2.
7. Court of Appeals does not have jurisdiction over discretionary decisions of the Board of Immigration Appeals (BIA).

8. A finding of fact by an Immigration Judge (IJ) in a removal proceeding includes expressions of likelihood based on testimony, both lay and expert, and/or documentary evidence.

9. Board of Immigration Appeals (BIA) applied an improper de novo standard of review to Immigration Judge’s (IJ) finding that alien would probably be tortured if removed to the Ukraine; BIA reexamined the record and conducted de novo fact finding instead of applying the clearly erroneous standard, disagreed with IJ’s crediting of the expert witness’s statements regarding what would happen in alien’s specific situation if he were removed, and disagreed with the IJ’s factual finding that public officials would consent or acquiesce to alien’s mistreatment. 8 C.F.R. § 1003.1(d)(3).

10. Board of Immigration Appeals (BIA) correctly applied a de novo standard of review, when reversing Immigration Judge’s (IJ) ruling that alien was entitled to protection under the Convention Against Torture (CAT), in determining whether the discrimination or mistreatment alien alleged he would suffer in the Ukraine would constitute torture. 8 C.F.R. § 208.16(c).

Cyberworld Enterprise Technologies, Inc. v. Napolitano, 602 F.3d 189 (3d Cir. 2010)

1. When reviewing grant of summary judgment in case brought under Administrative Procedure Act (APA), Court of Appeals applies de novo review to district court’s ruling, and applies applicable standard of review to underlying agency decision. 5 U.S.C. §§ 702, 706.

2. Agency decision based on issue of law that does not implicate agency expertise in meaningful way is subject to de novo review.

3. Secretary of Homeland Security’s failure to make “reasonable basis” determination within Immigration and Nationality Act’s (INA) 30-day deadline, as to whether temporary staffing company that placed H-1B employees with secondary employers had violated INA by failing to inquire of those employers whether placements would displace United States workers, did not deprive Secretary of jurisdiction to impose sanction for violations once determination was made; INA’s use of word shall to refer to requirement for making determination did not, by itself, render deadline jurisdictional. 8 U.S.C. § 1182(n)(1)(F), (n)(2)(B); 20 C.F.R. §§ 655.738(d)(5), 655.806(a)(3).

4. Doctrine of laches bars action only when delay in bringing action both caused prejudice and was inexcusable.

5. Court of Appeals reviews district court’s determination regarding laches for abuse of discretion.

6. Court of Appeals reviews district court’s discovery orders for abuse of discretion, and will not disturb such orders without showing of actual and substantial prejudice.
7. No prejudice was shown, as would permit application of doctrine of laches, from 19-month delay in Secretary of Homeland Security’s making “reasonable basis” determination under Immigration and Nationality Act as to whether temporary staffing company that placed H-1B employees with secondary employers had violated INA by failing to inquire of those employers whether placements would displace United States workers; company conceded that it had violated inquiry requirement, and if it had concerns about employees’ fading memories it could have taken affidavits from them. 8 U.S.C. § 1182(n)(1)(F), (n)(2)(B).

8. Pursuant to Immigration and Nationality Act’s (INA) provision requiring that employer placing H-1B employee with another employer both inquire of other employer as to whether placement will displace United States workers, “and ha [ve] no knowledge that” placement will cause such displacement, Secretary of Homeland Security’s imposition of sanction for violation of that provision is not conditioned on finding of scienter on placing employer’s part; failure to make inquiry constitutes violation by itself, independently of any knowledge of displacement, and by itself justifies imposition of sanction. 8 U.S.C. § 1182(n)(1)(F), (n)(2)(C)(i).

9. Both Immigration and Nationality Act (INA) and its implementing regulations authorize Secretary of Homeland Security to impose sanction for violation of INA provision requiring that employer placing H-1B employees with another employer inquire of other employer as to whether placement will displace United States workers; imposition of sanction is not reserved for situations of actual displacement. 8 U.S.C. § 1182(n)(1)(F), (n)(2)(C)(i); 20 C.F.R. §§ 655.738, 655.810(b, d).

10. Immigration and Nationality Act (INA) provision requiring imposition of debarment sanction, following Secretary of Homeland Security’s determination of violation of INA requirement that employer placing H-1B employee with another employer inquire of other employer as to whether placement will displace United States workers, does not permit Secretary to exercise discretion as to whether to impose sanction. 8 U.S.C. § 1182(n)(2)(C)(i).

11. Presumption that identical words used in different parts of same act are intended to have same meaning may be overcome when there is such variation in connection in which words are used as reasonably to warrant conclusion that they were employed in different parts of act with different intent.

*Patel v. Att’y Gen.*, 599 F.3d 295 (3d Cir. 2010)

1. The Court of Appeals looks to the decision of the immigration judge (IJ) to the extent that the Board of Immigration Appeals (BIA) defers to, or adopts, the IJ’s reasoning.

2. The Court of Appeals reviews the Board of Immigration Appeals’ (BIA) legal conclusions de novo, subject to established principles of deference.

3. Confidentiality provisions of the section of the Immigration and Nationality Act (INA) governing adjustment of status for certain entrants before 1982 did not apply to an application for employment authorization submitted by the child of an applicant for adjustment of status under the Legal Immigration Family Equity (LIFE) Act, so as to
preclude government from using application for purposes of removal proceedings; the
section of the LIFE Act affording applicants protection under INA’s confidentiality
provisions made clear that those provisions only applied to an application by an alien for
adjustment to residency status. 8 U.S.C. § 1255a(c)(5); Pub. L. No. 106-553, §§ 1104(b),

United States v. Lopez-Reyes, 589 F.3d 667 (3d Cir. 2009)

1. Sentencing courts must engage in a three-step analysis to determine the appropriate sentence
to impose on a defendant.

2. The sentencing process begins by correctly calculating the applicable Guidelines range.

3. After calculating the Guideline range for sentencing, the sentencing court must formally rule
on the motions of both parties and state on the record whether it is granting a departure and
how that departure affects the Guidelines calculation.

4. At the final step of sentencing, the court is required to exercise its discretion by considering
the relevant statutory factors in setting the sentence it imposes regardless of whether it varies
from the sentence calculated under the Guidelines. 18 U.S.C. § 3553(a).

5. When reviewing a sentence on appeal, the Court of Appeals first makes certain that the
sentencing court did not commit a serious procedural error, such as failing to calculate, or
improperly calculating, the Guidelines range or treating the Guidelines as mandatory; the
Court of Appeals then reviews the substantive reasonableness of the sentence under an
abuse-of-discretion standard, while keeping in mind that as long as a sentence falls within the
broad range of possible sentences that can be considered reasonable in light of the statutory
factors, the Court of Appeals must affirm. 18 U.S.C. § 3553(a).

6. A district court is not required to engage in independent analysis of the empirical
justifications and deliberative undertakings that led to a particular Guideline.

7. District court was aware, when sentencing defendant who pled guilty to illegally reentering
the United States following deportation, of discretionary nature of Guidelines and its
authority to impose sentence outside of prescribed range; district court gave defendant full
opportunity to explain why relevant Guideline was unreasonable, both in general and as it
applied to his specific case, and noted that “the guidelines represent the institutional authority
of the Commission and Congress,” and explained that Sentencing Commission and Congress
1326(a), (b)(2).

8. Defendant’s sentence of 46 months’ imprisonment for illegally reentering the United States
following deportation was reasonable; sentence was at bottom of Guideline range, sentence
did not result from Guideline that misjudged defendant’s potential for dangerousness and risk
of recidivism, defendant illegally entered United States three times, and sentence was
intended to deter him specifically and provide general deterrence to others. U.S.S.G. § 2L1.2,
9. If the Court of Appeals determines that the district court has committed no significant procedural error, it reviews the substantive reasonableness of the sentence under an abuse-of-discretion standard, regardless of whether it falls within the Guidelines range.

10. The Court of Appeals will affirm the sentence imposed unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided.

_Sheriff v. Att’y Gen., 587 F.3d 584 (3d Cir. 2009)_

1. Where the Board of Immigration Appeals (BIA) issued its own decision denying asylum, the Court of Appeals reviews that decision, and not that of the Immigration Judge (IJ).

2. The determination of the Board of Immigration Appeals (BIA) to deny asylum will be upheld if supported by reasonable, substantial, and probative evidence in the record considered as a whole.

3. Under the substantial evidence standard, the determination of the Board of Immigration Appeals (BIA) to deny asylum must be upheld unless the evidence not only supports a contrary conclusion, but compels it.

4. The Board of Immigration Appeals (BIA) must substantiate its decision to deny asylum; the Court of Appeals will not accord the BIA deference where its findings and conclusions are based on inferences or presumptions that are not reasonably grounded in the record.

5. "Persecution," as required to support an asylum application, must amount to more than generally harsh conditions shared by many other persons, but does include threats to life, confinement, torture, and economic restrictions so severe that they constitute a real threat to life or freedom. 8 U.S.C. § 1101(a)(42)(A).

6. To be eligible for asylum on the basis of past persecution, the applicant must show: (1) an incident, or incidents, that rise to the level of persecution; (2) that is on account of one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either unable or unwilling to control.

7. Asylum applicant, who was native and citizen of Liberia, who witnessed the burning of her home, murder of her mother, and rape of her eldest daughter, among other atrocities, based on their membership in Mandingo tribe established past persecution.

8. Board of Immigration Appeals (BIA) failed to adequately consider the evidence in the record when it concluded that, due to changed country conditions, asylum applicant, who was native and citizen of Liberia, had no reason to fear persecution based on her political beliefs and membership in Mandingo tribe, and thus remand was required; BIA ignored applicant’s gripping testimony that former president’s people were still in power, were searching for her, and would kill her if she returned, and that testimony was corroborated by an affidavit explaining and demonstrating that former president still had power. 8 U.S.C. § 1101(a)(42)(A).
9. Failure of Board of Immigration Appeals (BIA) to discuss evidence presented by asylum applicant, who was native and citizen of Liberia, of past persecution required remand for BIA to consider whether applicant was eligible for humanitarian asylum based on past persecution; applicant, who was member of Mandingo tribe, presented evidence that former president’s forces burned her home to the ground, murdered her mother and raped her daughter in front of her, shot her father and then refused to allow him to leave the country for medical treatment, abducted her other daughter, and murdered the woman with whom she was staying in Guinea. 8 C.F.R. § 208.13(b)(1)(iii)(A).

Jean-Louis v. Att’y Gen., 582 F.3d 462 (3d Cir. 2009)

1. An alien seeking discretionary relief from removal has no cognizable liberty or property interest. U.S. Const. amend. V.

2. Although the Court of Appeals defers to the Board of Immigration Appeals’ (BIA) determination of whether an offense constitutes a crime involving moral turpitude (CIMT) for purposes of cancellation of removal, it accords no deference to its construction of a state criminal statute, as to which it has no particular expertise. 8 U.S.C. § 1229b(d)(1).

3. Haitian alien’s conviction under Pennsylvania law for simple assault against a child under 12 years of age was not a crime involving moral turpitude (CIMT) for purposes of cancellation of removal; age requirement in statute of conviction was a grading factor and thus permitted conviction even if defendant did not know victim was under 12 years. 18 Pa. Cons. Stat. § 2701(b)(2); 8 U.S.C. § 1229b(d)(1).

4. The determination of whether an alien’s conviction is for a crime involving moral turpitude (CIMT) for purposes of cancellation of removal is done using the categorical approach articulated in Taylor, not by examination of the alien’s underlying conduct. 8 U.S.C. § 1229b(d)(1).

5. As a general rule, an agency’s construction of an ambiguous statute under its purview, and in which it has special expertise, is entitled to deference.

6. Where Congress has spoken clearly on the precise issue, no deference is owed to the agency’s interpretation of a statute.

7. Where an agency interpretation reflects an impermissible construction of the statute, the Court of Appeals will not defer to the agency’s view.

United States v. Arrelecea-Zamudio, 581 F.3d 142 (3d Cir. 2009)

1. The Court of Appeals reviews a sentence for reasonableness under the deferential abuse-of-discretion standard.

2. Appellate review of procedural errors in sentencing includes a district court’s improper calculation of the Sentencing Guidelines, treating the Guidelines as mandatory, failing to consider the statutory sentencing factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence. 18 U.S.C. § 3553(a).
3. In reviewing a sentence for reasonableness, alleged factual errors are subject to a clearly
erroneous standard, but purely legal errors, such as a misinterpretation of the Sentencing
Guidelines or the governing case law, are reviewed de novo.

4. The Sentencing Guidelines are advisory only.

5. The Sentencing Guidelines are only one of the factors for a district court to weigh in
determining the appropriate sentence to impose, and in doing so the court may not presume
that the Guidelines range is reasonable.

6. Although a panel of the Court of Appeals is bound by, and lacks authority to overrule, a
published decision of a prior panel, a panel may reevaluate a precedent in light of intervening
authority.

7. Absence of fast-track sentencing option for immigration offenses could be considered at
sentencing to avoid unwarranted disparity under the totality of the statutory sentencing

8. In sentencing a defendant for illegal reentry in a non-fast-track district, a sentencing court
must make an individualized assessment based on the facts presented, and judge their import
under the statutory sentencing factors. 18 U.S.C. § 3553(a).

*Camara v. Att’y Gen.*, 580 F.3d 196 (3d Cir. 2009)

1. Ordinarily, Courts of Appeals review decisions of the Board of Immigration Appeals (BIA),
and not those of an Immigration Judge (IJ).

2. Court of Appeals has jurisdiction, on review in an asylum proceeding, to review the opinion
of the Immigration Judge (IJ) only where the Board of Immigration Appeals (BIA) has
substantially relied on that opinion.

3. Court of Appeals lacked jurisdiction to review the denial of alien’s motion to reconsider the
denial of her claim for asylum, where she did not petition for review of that decision.

4. Court of Appeals, on review in an asylum proceeding, affirms any findings of fact supported
by substantial evidence and is bound by the administrative findings of fact unless a
reasonable adjudicator would be compelled to arrive at a contrary conclusion.

5. Whether an alien has met her burden, in an asylum proceeding, of showing a well-founded
fear of future persecution, is a question of fact, and the agency determination must be upheld
if it is supported by substantial evidence in the record.

6. In conducting its review in an asylum proceeding, Court of Appeals would treat alien’s
testimony as credible, where neither the Immigration Judge (IJ) nor the Board of Immigration
Appeals (BIA) made a determination that she was not credible. 8 U.S.C. § 1158(b)(1)(B)(iii).

7. An asylum applicant bears burden of establishing that he or she falls within the Immigration
8. Under the Immigration and Nationality Act (INA), an alien can establish eligibility for asylum in one of two ways: (1) by showing past persecution, or (2) by showing a well-founded fear that she would be persecuted in the future if returned to her country of nationality. 8 U.S.C. § 1101(a)(42)(A).

9. Regardless of past persecution, an asylum applicant can demonstrate that she has a well-founded fear of future persecution by showing that she has a genuine fear, and that a reasonable person in her circumstances would fear persecution if returned to her native country.

10. A demonstration of past persecution can be rebutted by the government, in an asylum proceeding, if the government establishes by a preponderance of the evidence that the alien could reasonably avoid persecution by relocating to another part of his or her country or that conditions in that country have changed so as to make his or her fear no longer reasonable. 8 C.F.R. § 208.13(b)(1)(i-ii).

11. A showing of past persecution raises a presumption of a well-founded fear of future persecution that shifts the burden of proof to the government. 8 C.F.R. § 208.13(b)(1).

12. For purposes of an asylum application, the concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.

13. Alien’s experiences in Guinea, after she left Ivory Coast, did not qualify her for asylum; Guinea was not alien’s country of nationality. 8 C.F.R. § 1208.13(b).

14. Substantial evidence did not support conclusion, in asylum proceeding, that the “mistreatment” experienced by alien in Ivory Coast did not amount to past persecution; alien’s father was kidnapped in her presence, a kidnapping that was accompanied by direct threats to alien and her family.

_Jama v. Esmor Correctional Services, Inc._, 577 F.3d 169 (3d Cir. 2009)

1. Court of Appeal reviews reasonableness of statutory attorney fee award for abuse of discretion, but its review of legal standard applied in calculating fee is plenary.

2. Court Of Appeals’ review of district court’s interpretation of jury’s answers to interrogatories is plenary.

3. In determining degree of alien’s success in her action alleging that government contractor that detained her pending asylum proceedings violated Religious Freedom Restoration Act (RFRA), for purposes of calculating her attorney fee award, district court could not attribute portion of alien’s state law tort award to her RFRA claim, where court had instructed to award compensatory damages for RFRA claim if it found any actual damages, but jury awarded only nominal damages on RFRA claim. 42 U.S.C. § 1988; Religious Freedom Restoration Act of 1993, § 2 et seq., 42 U.S.C. § 2000bb et seq.

4. In calculating attorney fee award in civil rights action, district court determining degree of plaintiff’s success should consider not only difference between relief sought and achieved,

5. In determining degree of plaintiff’s overall success in action involving federal civil rights claims and state tort law claims, for purposes of calculating plaintiff’s attorney fee award under federal civil rights statute, court may consider results on plaintiff’s tort claims if federal claims and pendent state tort claims involved common core of facts or were based on related legal theories, as well as extent to which federal claim might independently justify fee award, even if only nominal damages were awarded on that claim. 42 U.S.C. § 1988.

6. District court’s determination of market billing rates used in calculating statutory attorney fee award is factual question that is subject to clearly erroneous standard of review.

7. In moving for attorney fee award, plaintiff bears burden of producing sufficient evidence of what constitutes reasonable market rate for essential character and complexity of legal services rendered in order to make out prima facie case, and once plaintiff has carried this burden, defendant may contest that prima facie case only with appropriate record evidence.

8. Under clearly erroneous standard, finding of fact may be reversed on appeal only if it is completely devoid of credible evidentiary basis or bears no rational relationship to supporting data.

9. District court’s determination that hourly rates of $600 for partner, $205 for first-year associate, and $400 for law school clinic attorney were reasonable in calculating attorney fee award for prevailing plaintiff in civil rights action was not clearly erroneous. 42 U.S.C. § 1988.

_United States v. Cuevas-Reyes_, 572 F.3d 119 (3d Cir. 2009)

1. Upon review for sufficiency of the evidence, the appellate court will sustain a defendant’s conviction if, viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

2. To support a conviction for shielding illegal aliens, the government is required to prove: (1) the alien entered or remained in the United States in violation of the law, (2) the defendant concealed, harbored, or sheltered the alien in the United States, (3) the defendant knew, or recklessly disregarded the fact that the alien entered or remained in the United States in violation of the law, and (4) the defendant’s conduct tended to substantially facilitate the alien remaining in the United States. 8 U.S.C. § 1324(a)(1)(A)(ii).

3. Defendant’s conduct of assisting illegal aliens in leaving the United States Virgin Islands, by arranging for their flight to the Dominican Republic and telling the aliens to meet him directly on the airplane, rather than proceeding to immigration and customs inspection, could not support conviction for shielding illegal aliens, which required proof that defendant concealed or harbored the aliens in the United States and substantially facilitated aliens remaining in the United States; the flight arrangements assisted with aliens’ removal from the United States, and to the extent that defendant’s conduct helped the departing aliens to avoid
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detection by Immigration and Customs Enforcement officials, this also facilitated their removal from the United States. 8 U.S.C. § 1324.

Hua Wu v. Att’y Gen., 571 F.3d 314 (3d Cir. 2009)

1. Court of Appeals, on review in asylum proceeding, would review Immigration Judge’s (IJ) decision, including those portions not discussed by the Board of Immigration Appeals (BIA) on appeal, where BIA stated that the IJ’s adverse credibility determination was not clearly erroneous and adopted and affirmed all bases for the IJ’s decision.

2. Court of Appeals reviews factual findings in an asylum proceeding under the substantial evidence standard, such that a factual determination will be upheld if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole.

3. Court of Appeals’ review of the agency’s legal conclusions in an asylum proceeding is de novo, and the Court applies the principles of deference set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council.

4. A petitioner in an asylum proceeding is deemed to have exhausted all administrative remedies, and thereby preserved the right of judicial review, if he or she raised all issues before the Board of Immigration Appeals (BIA), but so long as the petitioner makes some effort, however insignificant, to place the BIA on notice of a straightforward issue being raised on appeal, that petitioner is deemed to have exhausted her administrative remedies. 8 U.S.C. § 1252(d)(1).

5. Court of Appeals lacked jurisdiction, on review in asylum proceeding, to consider alien’s claim that he was persecuted in China for “other resistance” to the country’s coercive population control program for having hidden his pregnant girlfriend from the authorities; alien did not raise that claim before the Immigration Judge (IJ) or the Board of Immigration Appeals (BIA). 8 U.S.C. § 1252(d)(1).

6. Court of Appeals had jurisdiction, on review in asylum proceeding, to consider alien’s claim that he was eligible for relief based on his pregnant girlfriend’s persecution for violating China’s coercive population control program, where alien’s brief to the Board of Immigration Appeals (BIA) stated that he qualified as a refugee because he was married to his girlfriend in a traditional marriage ceremony; BIA was put on notice that alien was challenging the determination that he was statutorily ineligible for asylum based on his girlfriend’s forced abortion. 8 U.S.C. § 1252(d)(1).

7. Substantial evidence supported conclusion, in asylum proceeding, that alien was statutorily ineligible for asylum based on his girlfriend’s forced abortion in China, regardless of whether they had been married in a traditional ceremony, or otherwise; Immigration and Nationality Act (INA) did not extend automatic refugee status to spouses or unmarried partners of individuals who were forcibly subjected to family planning measures. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

8. Court of Appeals lacked jurisdiction, on appeal in asylum proceeding, to consider argument that the economic loss alien suffered when Chinese family planning officials destroyed his
furniture and imposed a fine after they were unable to find alien and his pregnant girlfriend rose to level of persecution; alien waived that argument by failing to raise it before either the Immigration Judge (IJ) or the Board of Immigration Appeals (BIA).

Issiaka v. Att’y Gen., 569 F.3d 135 (3d Cir. 2009)

1. Adverse credibility determinations by the Board of Immigration Appeals (BIA) or an immigration judge (IJ) must be based on specific, cogent reasons; they must not rest on speculation, conjecture, or otherwise unsupported personal opinion.

2. Adverse credibility findings by the Board of Immigration Appeals (BIA) or an immigration judge (IJ) in asylum proceedings may not rest upon minor inconsistencies that do not go to the heart of the asylum claim.

3. Substantial evidence did not support the determination of the immigration judge (IJ) that the alien’s testimony in support of his application for withholding of removal was not credible; IJ found that the alien’s testimony regarding the head wounds he sustained when he was beaten by soldiers in Cote d’Ivoire lacked credibility because of his inability to reasonably describe his injury, but the IJ continued to press the alien to provide more detail about his wounds even after the alien explained how he was injured, how many cuts he believed were on his head, and that the wounds were “serious,” “deep” and “open,” and the IJ examined the alien’s head and acknowledged that he had scars.

United States v. Cole, 567 F.3d 110 (3d Cir. 2009)

1. Issue of whether the statutes governing supervised release permit tolling in during a period of exclusion from the United States is a question of statutory interpretation subject to de novo review.

2. Tolling was not a “condition of supervised release,” and therefore, district court did not have authority under supervised-release statute to issue special “conditions” of supervised release which would toll the period for which deported alien was subject to supervised release; if Congress had wanted to authorize tolling the period of supervised release while defendant was outside the jurisdiction of the United States as the result of deportation, it would have expressly indicated that in the supervised-release statute, 18 U.S.C. § 3583(d).

3. A statute of limitations may be tolled while the plaintiff is a minor, or when the plaintiff has been prevented from asserting his rights in some extraordinary way.

4. Court-ordered tolling of defendant’s period of supervised release while defendant was outside the jurisdiction of the United States as the result of deportation was “plain error” affecting defendant’s substantial rights, regardless of whether defendant would be immediately prejudiced by the tolling; such tolling unlawfully extended the time that the supervised release conditions would apply to defendant beyond the statutory three years of his sentence. 18 U.S.C. § 3583(d).

Sandie v. Att’y Gen., 562 F.3d 246 (3d Cir 2009)
1. When reviewing the denial of an alien’s application for asylum, the Court of Appeals is without jurisdiction to decide issues where the alien has failed to exhaust all available remedies. 28 U.S.C. § 1252(d)(1).

2. Court of Appeals would review immigration judge’s (IJ) discussion and determinations along with Board of Immigration Appeals’ (BIA) decision denying alien’s application for asylum, where the IJ’s discussion and determinations were affirmed and partially reiterated in the BIA’s decision.

3. Court of Appeals would assume alien’s testimony was credible when reviewing the denial of alien’s application for asylum, where the Board of Immigration Appeals (BIA) expressly stated that it would not address the immigration judge’s (IJ’s) finding that alien’s testimony was not credible.

4. To establish the existence of a well-founded fear of persecution, an applicant for asylum must prove an objectively reasonable possibility of statutorily cognizable persecution, and that the applicant’s professed fear is genuine; that means he must demonstrate his professed fear is objectively reasonable and not merely subjective, and that this fear is rooted in persecution recognized by the statute setting forth the definition of refugee. 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1)(A).

5. The Court of Appeals reviews factual findings in an asylum proceeding, including findings of persecution and fear of persecution, under the substantial evidence standard.

6. The Court of Appeals reviews legal conclusions in an asylum proceeding de novo.

7. Board of Immigration Appeals (BIA) was not required to review immigration judge’s (IJ’s) adverse credibility finding with respect to alien seeking asylum in order to affirm the IJ’s conclusion that alien did not meet his burden of proof; IJ held that even if alien’s testimony was deemed credible, alien would have had to corroborate his story and he failed to do so, IJ’s corroboration determination, thus, did not depend on her finding that alien’s testimony was not credible, and BIA could review IJ’s corroboration determination without reviewing the finding on credibility.

8. Credible testimony alone is not always sufficient to meet an asylum applicant’s burden of proof.

9. An applicant for asylum must provide reliable evidence to corroborate testimony when it is reasonable to expect corroborating evidence and there is no satisfactory explanation for its absence; it is reasonable to expect corroboration for testimony that is central to an applicant’s claim and easily subject to verification.

10. Before concluding that an asylum applicant did not meet the burden of proof for lack of corroboration, the immigration judge (IJ) must conduct the following three-part Abdulai inquiry: (1) identify the testimony for which it is reasonable to expect the applicant to produce corroboration; (2) examine whether the applicant corroborated that testimony; and (3) analyze whether the applicant has adequately explained any failure to provide corroboration.
11. An immigration judge (IJ) must give an asylum applicant notice of what aspects of the applicant’s testimony need corroboration, and, if the applicant cannot produce corroborating evidence, the IJ must also afford the applicant an opportunity to explain why.

12. Substantial evidence supported Board of Immigration Appeals’ (BIA’s) and immigration judge’s (IJ’s) determination that alien, a native of Sierra Leone, failed to corroborate his story, alleging that secret group of the Wonde and Poro Society would kill him if he returned because he refused to become their Supreme Leader, and therefore failed to carry his burden to establish well-founded fear of persecution, as required for asylum, though alien submitted reports in an attempt to bolster his testimony; IJ was clear she sought reliable evidence about existence of Society, IJ determined reports did not assist alien, and there was no other objective evidence confirming contentions central to alien’s claims. 8 U.S.C. § 1158(b)(1)(A).

13. An alien seeking to stay voluntary departure must explain why such a stay is justified notwithstanding the alien’s prior agreement to depart voluntarily and the strict time limits for departure imposed by regulation. 8 C.F.R. §§ 1240.26(e), 1240.26(f).

14. The Court of Appeals will not simply assume that a request for staying removal implicitly includes a request to stay a voluntary departure period; having pursued voluntary departure, an alien accorded that privilege must expressly ask for a stay of the voluntary departure period before its expiration, or request withdrawal of the order of voluntary departure.

15. The Court of Appeals does not have the authority to reinstate or extend a period of voluntary departure. 8 C.F.R. § 1240.26(f).

Hoxha v. Holder, 559 F.3d 157 (3d Cir. 2009)

1. In a removal proceeding, the identification of an issue in a party’s notice of appeal satisfies the statutory requirement of exhaustion provided that the description of that issue in the notice sufficiently apprises the Board of Immigration Appeals (BIA) of the basis for the appeal; failure to address that issue in the brief subsequently filed with the BIA will not deprive the Court of Appeals of jurisdiction. 8 U.S.C. § 1252(d)(1).

2. Court of Appeals had jurisdiction to review issue whether Immigration Judge (IJ) abused his discretion in denying motion by counsel for continuance in removal proceeding, even though alien did not raise such issue in his brief before Court of Appeals, where he had raised it in his notice of appeal, his assertion of error concerned process afforded by IJ, and issue whether he received sufficient process was matter within expertise of Board of Immigration Appeals (BIA) and was matter for which BIA could grant remedy. 8 U.S.C. § 1252(d)(1).

Richardson v. United States, 558 F.3d 216 (3d Cir. 2009)

1. An alien validly waives his rights associated with a deportation proceeding only if he does so voluntarily and intelligently.
2. Appellate rights and administrative remedies associated with deportation proceedings can be waived, and one way to signify a knowing and intelligent waiver is a written document to that effect.

3. When challenging the validity of a written waiver of rights in a deportation proceeding, the alien bears the burden of proving that the waiver is invalid.

4. Given the civil nature of deportation proceedings, an alien seeking to demonstrate the invalidity of a written waiver will be held to a “preponderance of the evidence” standard.

5. Alien failed to demonstrate by a preponderance of evidence that his signed written waiver of his right to appeal deportation order was invalid, and therefore waiver was valid, even though alien’s attorney had not signed the waiver, and the judge allegedly failed to inform alien that he might be eligible for discretionary relief under the Immigration and Nationality Act (INA); while the omission of attorney’s signature betrayed a less than careful approach to memorializing the parties’ agreement, it was not an error of constitutional, statutory, or even regulatory dimension, and alien did not have a constitutional right to be informed of possible eligibility for discretionary relief. 8 U.S.C. § 1182(e).

6. Alien, who signed a valid written waiver of his right to appeal his deportation order, failed to demonstrate that he exhausted administrative remedies, was denied meaningful review, and that the deportation proceeding was fundamentally unfair, as required to allow alien to collaterally challenge his deportation. 8 U.S.C. § 1326(d).

7. Fundamental precepts of due process provide an alien subject to illegal re-entry prosecution with the opportunity to challenge the underlying removal order under certain circumstances. U.S. Const. amend. V; 8 U.S.C. § 1326.

8. To establish that a deportation proceeding was fundamentally unfair, as a prerequisite to challenging a deportation order, an alien must show both that there was a fundamental defect in the proceeding and that the defect caused him prejudice; an alien can show that the proceedings had a fundamental defect by demonstrating either that he was deprived of a substantive liberty or property interest or that the Immigration and Naturalization Service (INS) violated procedural protections such that the proceeding is rendered fundamentally unfair. 8 U.S.C. § 1326(d).

**Ponta-Garcia v. Att’y Gen., 557 F.3d 158 (3d Cir. 2009)**

1. Regulation authorizing immigration officers, rather than immigration judges, to reinstate prior removal orders of aliens who illegally reentered United States was a reasonable construction of statute governing reinstatement of removal orders, although separate statutory section provided that an immigration judge was to conduct all proceedings for deciding the deportability of an alien and that, unless otherwise specified, a proceeding under that section was the sole and exclusive procedure for determining whether an alien might be admitted or removed; aliens subject to reinstatement had already been ordered removed and, thus, had already been provided with requisite procedures and review. 8 U.S.C. §§ 1229(a), 1231(a)(5); 8 C.F.R. § 241.8(a).
2. Regulation authorizing immigration officers, rather than immigration judges, to reinstate prior removal orders of aliens who illegally reentered the United States did not violate due process rights of alien who allegedly reentered the United States illegally after allegedly departing voluntarily pursuant to an order of removal; regulation provided more than just minimal procedural protections, alien was specifically given opportunity to be heard under the regulation, and full judicial review was available to an alien adjudged removable following the reinstatement procedure. U.S. Const. amend. V; 8 U.S.C. §§ 1231(a)(5), 1252; 8 C.F.R. § 241.8(a), (b).

3. While an appellate court may not grant immigration inspectors the same fact finding deference as it would immigration judges, there is a presumption that immigration inspectors are not biased.

4. While statute governing reinstatement of removal orders against aliens, which provides that an original order of removal is not subject to being reopened or reviewed at the time of a reinstatement determination or on judicial review, prohibits relitigation of the merits of the original order of removal, it does not prohibit an examination of whether the original order was invalidated, or preclude judicial review of whether Immigration and Customs Enforcement (ICE) met its obligations in making the reinstatement determination. 8 U.S.C. § 1231(a)(5).

5. In alien’s judicial review proceedings contesting reinstatement of order of removal, claiming that order had been judicially invalidated, remand was required for Immigration and Customs Enforcement (ICE) to further develop facts and consider alien’s claims; record was sparse, and alien had offered some support for why he might be correct, including the fact that his application for a New Alien Registration Receipt Card was granted after removal was ordered and that the alien had reentered the United States from Canada using his green card without incident after removal was ordered. 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8.

Lin-Zheng v. Att’y Gen., 557 F.3d 147 (3d Cir. 2009)

1. A court reviews factual findings of the Board of Immigration Appeals (BIA) under the substantial evidence standard; a factual determination will be upheld if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole.

2. Adverse credibility determinations of the Board of Immigration Appeals (BIA) are factual matters and are reviewed under the substantial evidence standard; the BIA’s determination must be upheld on review unless any reasonable adjudicator would be compelled to conclude to the contrary.

3. Extension of refugee status, under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), to include “a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program,” as well as “a person who has a well-founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance,” did not extend refugee status to the person persecuted as well as his or her spouse, in light of the

**Ndayshimiye v. Att’y Gen.,** 557 F.3d 124 (3d Cir. 2009)

1. Under the plain language of the statute providing that an asylum applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant, an asylum applicant is not required to establish that a protected ground for persecution was not subordinate to any unprotected motivation. 8 U.S.C. § 1158(b)(1)(B)(i).

2. The interpretation by the Board of Immigration Appeals (BIA) of the statute requiring that an asylum applicant establish that race, religion, nationality, membership in a particular social group, or political opinion was or would be at least one central reason for persecuting the applicant as dictating that asylum could not be granted if a protected ground was only an “incidental, tangential, or superficial” reason for persecution of the asylum applicant constituted a reasonable, valid construction of the statute, so as to be entitled to deference by the Court of Appeals on appeal from the denial of an asylum application. 8 U.S.C. § 1158(b)(1)(B)(i).

3. Substantial evidence supported Board of Immigration Appeals’ (BIA) finding that aliens’ Burundian origin was no more than incidental factor in their persecution in Rwanda by alien’s aunt, and thus, that aliens failed to establish that a protected ground was or would be at least one central reason for their persecution, as required for asylum eligibility; aliens testified they enjoyed conflict-free relationship with the aunt for eight years, without persecution or harassment, and it was only eight years after their arrival from Burundi, when land dispute arose, that aunt exhibited hostility toward them, and even once that conflict began, alleged persecutors made only a few remarks referencing their Burundian background, in context of telling them to return to Burundi so aunt could take the land. 8 U.S.C. § 1158(b)(1)(B)(i).

**Liu v. Att’y Gen.,** 555 F.3d 145 (3d Cir. 2009)

1. The Court of Appeals reviews the denial of a motion to reopen a removal order for an abuse of discretion.

2. The Court of Appeals upholds the factual determinations of the Board of Immigration Appeals (BIA) if they are supported by reasonable, substantial, and probative evidence on the record considered as a whole. Immigration and Nationality Act, § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B).

3. Chinese alien who filed untimely motion to reopen her claim for asylum based on her opposition to forced sterilization policy in China did not demonstrate changed circumstances in China, as required to excuse late filing, based on the birth of her two children in the United States; the birth of her children was change in personal circumstances, and there was no showing that Chinese returnees were subjected to forced sterilization after giving birth abroad. Immigration and Nationality Act, § 208(a)(2)(D), 8 U.S.C. § 1158(a)(2)(D).


Robinson v. Napolitano, 554 F.3d 358 (3d Cir. 2009)

1. Eligibility for an immediate relative visa depends upon the alien’s status at the time U.S. Citizenship and Immigration Services (USCIS) adjudicates the petition for alien relative, not when that petition was filed. 8 U.S.C. § 1151(b)(2)(A)(i).

2. Alien ceased to be an immediate relative, for purposes of obtaining an immediate relative visa via a petition for alien relative, where alien’s citizen spouse died before the couple had been married at least two years. 8 U.S.C. § 1151(b)(2)(A)(i).

3. Doctrine of inclusio unius est exclusio alterius informs a court to exclude from operation those items not included in a list of elements that are given effect expressly by the statutory language.

4. A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary contemporary, common meaning at the time Congress enacted the statute.

Garcia v. Att’y Gen., 553 F.3d 724 (3d Cir. 2009)

1. The five-year statute of limitations for seeking to rescind a grant of adjustment of status applied to bar Department of Homeland Security’s (DHS) removal proceeding based on alien’s fraudulent application for adjustment of status, brought more than five years after the application was granted. Immigration and Nationality Act, § 246(a), 8 U.S.C. § 1256(a).

2. Alien challenging removal order on statute of limitations grounds was not challenging the Attorney General’s discretionary decision to commence proceedings, but rather the Attorney General’s very authority to commence those proceedings, and therefore Court of Appeals had jurisdiction to review the Board of Immigration Appeals’ (BIA) decision affirming immigration judge’s (IJ) order of removal as a final order. Immigration and Nationality Act, § 242(a)(1), 8 U.S.C. § 1252(a)(1).
Evanson v. Att'y Gen., 550 F.3d 284 (3d Cir. 2008)

1. A state drug conviction constitutes an “aggravated felony” for purposes of removability if (a) it would be punishable as a felony under the federal Controlled Substances Act, or (b) it is a felony under state law and includes an illicit trafficking element. 8 U.S.C. § 1101(a)(43)(B).


3. Under the hypothetical federal felony test to determine whether a state drug offense constitutes an aggravated felony for purposes of removability, a state marijuana conviction is only equivalent to a federal drug felony if the offense involved payment or more than a small amount of marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a), (b)(1)(D), (b)(4), 21 U.S.C. § 841(a), (b)(1)(D), (b)(4).

4. Under the illicit trafficking element test, used to determine whether a state drug offense constitutes an aggravated felony for purposes of removability, a state felony drug conviction constitutes an aggravated felony if it contains a trafficking element.

5. To contain a trafficking element, for purposes of the illicit trafficking element test used to determine whether a state drug offense constitutes an aggravated felony for purposes of removability, a state felony must involve the unlawful trading or dealing of a controlled substance.

6. To determine whether an offense of conviction amounts to an aggravated felony, including by means of the hypothetical federal felony and illicit trafficking element tests, the Court of Appeals presumptively applies a “formal categorical approach”; a formal categorical approach prohibits the court from any review of the factual basis for an underlying conviction.

7. When determining whether an offense of conviction amounts to an aggravated felony, for purposes of determining removability, the term “modified categorical approach” means looking beyond the statutory definition, but only for the purpose of determining the elements necessarily found by a jury, or admitted by a defendant in pleading guilty.

8. A categorical approach to determining whether an offense of conviction amounts to an aggravated felony does not apply to subsections of Immigration and Nationality Act that include ‘in which’ or other analogous qualifying language; in these cases, the court’s inquiry is not limited to facts actually and necessarily found beyond a reasonable doubt by a jury or judge, and the court may look to a wider array of records that possess a high indicia of reliability, including records not permitted by the modified categorical approach. 8 U.S.C. § 1101(a)(43).

9. In removability proceeding, Board of Immigration Appeals (BIA) was not permitted to consider sentencing document to determine whether alien’s guilty plea to possession of marijuana with intent to deliver and criminal conspiracy in violation of Pennsylvania law
constituted aggravated felony; facts judge considered in sentencing were not necessarily admitted by alien. 8 U.S.C. § 1227(a)(2)(A)(iii) 35 P.S. § 780-113(a)(30); 18 P.S. § 903.

10. A court applying the modified categorical approach may only consider the charging document to the extent that the petitioner was actually convicted of the charges.

11. Facts a judge considers in making a discretionary sentencing determination are not necessarily admitted by the defendant; accordingly, factual assertions contained only in a judgment of sentence may not be considered under the modified categorical approach.

Mehboob v. Att’y Gen., 549 F.3d 272 (3d Cir. 2008)

1. Court of appeals gives no deference to the Board of Immigration Appeals’ (BIA’s) parsing of the elements of criminal statutes.

2. When a statute is “divisible,” meaning that it prohibits several different types of conduct, the Court of Appeals reviewing Board of Immigration Appeals’ (BIA’s) decision in removal proceedings looks to the record of conviction to determine whether an alien was convicted under a part of the statute which defines a crime involving moral turpitude.

3. When no sub-section is specified in the record of conviction, the Court of Appeals reviewing Board of Immigration Appeals’ (BIA’s) determination during removal proceedings begins its categorical inquiry to identify whether an alien convicted of a crime is removable based on a crime involving moral turpitude with the sub-section requiring the least culpability.

4. A crime involves moral turpitude, for purposes of removal proceedings, when the least culpable conduct necessary to sustain a conviction under the statute can be considered morally turpitudinous.

5. To determine whether a particular crime involves “moral turpitude,” for purposes of removal proceedings, the Court of Appeals asks whether the criminal act is accompanied by a vicious motive or a corrupt mind.

6. Evil intent is a requisite element for a crime involving moral turpitude, for purposes of removal proceedings.

7. The “hallmark” of moral turpitude, for purposes of removal proceedings, has become a reprehensible act with an appreciable level of consciousness or deliberation.

8. For purposes of determining whether an alien is subject to removal, absence of mens rea as to a specific element of a crime does not necessarily preclude a finding that a strict liability sex offense involves moral turpitude; it is the nature of the crime, in addition to the particular elements, that determines whether it involves moral turpitude.

9. Misdemeanor indecent assault was crime of “moral turpitude,” dejecting alien to removal, regardless of fact that statute did not contain mens rea element as to age of victim, where society’s rules of morality were violated by the touching of a child under sixteen years of age.
by a person four or more years older for purpose of arousal or sexual gratification. 18 Pa. Cons. Stat. § 3126(a).

Zheng v. Att’y Gen., 549 F.3d 260 (3d Cir. 2008)

1. Board of Immigration Appeals (BIA) abused its discretion in determining that Chinese nationals seeking to reopen denied asylum applications failed to demonstrate changed circumstances in China warranting exceptions from 90-day filing limitation; rather than being based solely upon birth of children in United States, nationals’ motions were supported by affidavits, Consular Information Sheet and other evidence not adequately considered by BIA. 8 C.F.R. § 1003.2(c).

2. Limitations period governing Chinese national’s motion to reopen denied asylum application was not equitably tolled, where national’s lack of diligence in pursuing asylum claim was not justified; when national first sought to reopen proceedings, he had known for over four years that his application had been denied by reason of failure to appear for hearing. 8 C.F.R. § 1003.2(c).

Khousam v. Att’y Gen., 549 F.3d 235 (3d Cir. 2008)


2. A challenge to diplomatic assurances falls outside the narrower scope of an “alien’s claim for protection” under regulation requiring an immigration judge (IJ), the Board of Immigration Appeals (BIA), or an asylum officer to cease considering an alien’s claim for protection under Convention Against Torture (CAT) once the government proffers diplomatic assurances. 8 C.F.R. § 1208.18(c)(3).

3. Court must avoid construing a statute in a manner that would raise serious constitutional problems, if an alternative interpretation that would avoid such problems is fairly possible.

4. Court of Appeals had jurisdiction over alien’s petition for review challenging Department of Homeland Security’s (DHS) termination of his deferral of removal based on diplomatic assurances; DHS’s decision to terminate alien’s deferral of removal was a final order of removal. REAL ID Act of 2005, §§ 101(e, f), 106(a), 8 U.S.C. § 1252; 8 C.F.R. § 1208.17.

5. Suspension Clause is not implicated so long as Congress provides an adequate and effective alternative to habeas review. U.S. Const. art. I, § 9, cl. 2.

7. Political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.

8. Fact that the resolution of the merits of a case would have significant political overtones does not automatically invoke the political question doctrine.

9. A predicted negative impact on foreign relations does not, by itself, render a case nonjusticiable under the political question doctrine.

10. Factors for determining whether a case involves a nonjusticiable political question are: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) or a lack of judicially discoverable and manageable standards for resolving it; (3) or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) or an unusual need for unquestioning adherence to a political decision already made; (6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

11. When it applies, "rule of non-inquiry" bars courts from evaluating the fairness and humanity of another country's criminal justice system, requiring deference to the Executive Branch on such matters; however, it has traditionally been applied only in the extradition context.


13. Diplomatic assurances from Egypt were not categorically insufficient to permit removal of Egyptian citizen under Foreign Affairs Reform and Restructuring Act (FARRA) and its implementing regulations. Foreign Affairs Reform and Restructuring Act of 1998, § 2242, 8 U.S.C. § 1231 note; 8 C.F.R. § 1208.18(c).

14. Basic dictates of due process must be met whether an alien facing removal overstayed a visa, entered the country undetected, or became a legal resident but then committed an enumerated crime. U.S. Const. amend. V.

15. Alien was entitled to due process before he could be removed on the basis of the termination of his deferral of removal under Convention Against Torture (CAT). 8 C.F.R. § 1208.17.

16. Alien, who was not afforded notice and a full and fair hearing, was denied due process prior to his removal on the basis of diplomatic assurances and was substantially prejudiced by such deprivation; government, which merely provided alien with a cursory three-line letter dated three months after the termination decision had been made, did not permit alien to see the written diplomatic assurances that had been obtained from Egypt, and provided no information pertaining to the government's reasons for crediting those assurances, alien had
no opportunity to make arguments on his own behalf, and alien was denied his right to an individualized determination and the benefit of a neutral and impartial decision maker. U.S. Const. amend. V; 8 C.F.R. § 1208.17.

17. A statute is not facially unconstitutional unless no set of circumstances exists under which the Act would be valid.

18. Prior to removal on the basis of diplomatic assurances, due process requires that alien be afforded notice and an opportunity to test the reliability of those assurances in a hearing that comports with Abdulai and its progeny, that alien have an opportunity to present, before a neutral and impartial decision maker, evidence and arguments challenging the reliability of diplomatic assurances proffered by the government, and the government’s compliance with the relevant regulations, and also be afforded an individualized determination of the matter based on a record disclosed to the alien. U.S. Const. amend. V; 8 C.F.R. § 1208.17.

Lin v. Att’y Gen., 543 F.3d 114 (3d Cir. 2008)

1. Where Court of Appeals has jurisdiction to entertain a petition for review of a final order of removal, under Immigration and Nationality Act (INA), and the Board of Immigration Appeals (BIA) adopted the opinion of the immigration judge (IJ), Court of Appeals treats the IJ’s opinion as the opinion of the BIA, and accordingly, reviews the IJ’s opinion to the extent the BIA relied upon it. 8 U.S.C. § 1252(a)(1).

2. Adverse credibility determinations by an immigration judge (IJ) are afforded deference, provided the IJ supplies specific cogent reasons why the alien is not credible. 8 U.S.C. § 1252(b)(4)(B).

3. As compared to judicially crafted exhaustion doctrines, statutory exhaustion requirements deprive Court of Appeals of jurisdiction over a given case.

4. An alien is deemed to have “exhausted all administrative remedies,” within meaning of Immigration and Nationality Act (INA) provision governing judicial review of removal orders, and thereby preserves the right of judicial review, if the alien raises all issues before the Board of Immigration Appeals (BIA); however, this principle is not applied in a draconian fashion. 8 U.S.C. § 1252(d)(1).

5. So long as an immigration petitioner makes some effort, however insufficient, to place the Board of Immigration Appeals (BIA) on notice of a straightforward issue being raised on appeal, a petitioner is deemed to have exhausted her administrative remedies, as required by Immigration and Nationality Act (INA). 8 U.S.C. § 1252(d)(1).

6. Alien’s notice of appeal to Board of Immigration Appeals (BIA) that asserted no arguments whatsoever and brief containing no challenge to immigration judge’s (IJ) adverse credibility determination, in denying alien’s application for asylum, withholding of removal, and protection under Convention Against Torture (CAT), were not sufficient to notify BIA of any challenge even “hovering around” adverse credibility determination, as required for alien to have “exhausted all administrative remedies,” within meaning of Immigration and
Nationality Act (INA) provision governing judicial review of removal orders, so as to permit judicial review of credibility issue. 8 U.S.C. § 1252(d)(1).

7. Board of Immigration Appeals’ (BIA) sua sponte consideration of immigration judge’s (IJ) adverse credibility determination, in denying alien’s application for asylum, withholding of removal, and protection under Convention Against Torture (CAT), sufficiently “exhausted all administrative remedies,” within meaning of Immigration and Nationality Act (INA) provision governing judicial review of removal orders, despite alien’s failure to raise credibility issue to BIA, since BIA waived requirement that alien was required to specifically identify challenged findings of fact and conclusions of law, by BIA’s choice to address alien’s petition on merits, consideration of credibility issue, and then adoption and affirmation of IJ’s decision based on alien’s lack of credibility. 8 U.S.C. § 1252(d)(1); 8 C.F.R. §§ 1003.1(d)(2)(i), 1003.3(b).

8. Role of Court of Appeals is not to substitute its own preference for the optimal administrative procedure for the Board of Immigration Appeals’ (BIA) determination of its internal rules; ignoring the BIA’s determination of these issues would amount to a judicial determination that the BIA acted ultra vires in following its own rules.

9. Agencies may waive compliance with their procedural rules adopted for the orderly transaction of agency business.

10. Where the Board of Immigration Appeals (BIA) has issued a decision considering the merits of an issue, even sua sponte, the exhaustion doctrine’s interests have been fulfilled regarding prevention of premature interference with agency processes, providing agency opportunity to correct own errors, affording parties and federal courts benefit of its experience and expertise, and compiling record which is adequate for judicial review.

11. Immigration judge’s (IJ) determination, in denying alien’s application for asylum, withholding of removal, and protection under Convention Against Torture (CAT) for alleged persecution based on his religious practices, that alien was not credible due to discrepancies between his testimony and affidavit, was supported by substantial evidence including discrepancies that went to heart of alien’s claim, due to affidavit stating that police told alien reason for his first arrest was his religious practice, whereas alien repeatedly testified that police gave no reason for arrest, and alien’s inconsistent statements about where and with whom he practiced religion after his first arrest, buttressed by IJ’s finding as to alien’s unpersuasive demeanor.

United States v. Silveus, 542 F.3d 993 (3d Cir. 2008)

1. The Court of Appeals reviews the district court’s denial of the motion to suppress for clear error as to the underlying facts, but exercises plenary review as to its legality in light of the court’s properly found facts.

2. A seizure occurs, under the Fourth Amendment, when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen. U.S. Const. amend. IV.
3. Seizure occurred when agents, through show of authority, prevented defendant from disembarking from car ferry. U.S. Const. amend. IV.

4. Warrantless searches and seizures are per se unreasonable under the Fourth Amendment. U.S. Const. amend. IV.

5. The Fourth Amendment permits law enforcement to stop vehicles briefly for further investigation when there is reasonable suspicion that criminal activity may be afoot. U.S. Const. amend. IV.

6. Reasonable suspicion for a Terry stop requires some minimal level of objective justification for making the stop. U.S. Const. amend. IV.

7. Probable cause necessary to obtain a search warrant means a fair probability that contraband or evidence of a crime will be found, and the level of suspicion required for a Terry stop is less demanding than for probable cause. U.S. Const. amend. IV.

8. While the standards are different, both reasonable suspicion and probable cause require the Court to consider the totality of the circumstances. U.S. Const. amend. IV.

9. Immigration and Customs Enforcement (ICE) agents had reasonable suspicion that alien who failed to report for deportation would be on car ferry and that defendant would be transporting alien, supporting Terry stop in which agents prevented defendant from disembarking from ferry; agents were familiar with both defendant and alien, agents were aware that defendant and alien lived together and were involved in romantic relationship, agents knew alien’s asylum application had been denied, and anonymous tipster who reported that defendant was on ferry with alien identified defendant and alien by name and identified defendant’s car by color and license plate number. U.S. Const. amend. IV.

10. Following a valid investigatory stop, an officer who develops a reasonable, articulable suspicion of criminal activity may expand the scope of an inquiry beyond the reason for the stop and detain the vehicle and its occupants for further investigation. U.S. Const. amend. IV.

11. Following Terry stop, federal agents developed independent reasonable, articulable suspicion that defendant was transporting illegal aliens, as required to make lawful arrest; original tip was that defendant would be transporting illegal aliens in her car on car ferry, once agent located vehicle on ferry he observed pants on empty front passenger seat and two visibly nervous passengers in rear who could not speak English. U.S. Const. amend. IV.

12. In reviewing the denial of a motion to suppress evidence, the Court of Appeals may look at the entire record; it is not restricted to the evidence presented at the suppression hearing where the motion was denied.

13. Inventory searches are excepted from the general warrant requirement for several reasons: to protect the owner’s property while it remains in police custody, to protect the police from claims or disputes over lost property, and to protect the police from potential danger. U.S. Const. amend. IV.
14. The Court of Appeals exercises plenary review over a district court’s grant or denial of a motion for acquittal based on the sufficiency of the evidence, applying the same standard as the district court. Fed. R. Cr. P. Rule 29, 18 U.S.C.

15. Sufficient evidence established that defendant acted willfully in furtherance of aliens’ illegal presence in United States, as required to support her conviction for aiding and abetting transportation of illegal aliens; Haitian national who traveled on same night as aliens in question testified that defendant approached him and other aliens and collected identification documents and money for transportation to St. Thomas, aliens in question then got into defendant’s vehicle which she drove onto car ferry, defendant hid one alien in rear of vehicle prior to boarding, and Haitian identification documents had been concealed under front passenger floor mat. 8 U.S.C. § 1324(a)(1)(A)(ii).

16. To sustain a conviction for transporting illegal aliens, the government must prove that: (1) the defendant transported or attempted to transport an alien within the United States; (2) the alien was in the United States illegally; (3) the defendant knew or recklessly disregarded the fact that the alien was in the United States illegally; and (4) the defendant acted willfully in furtherance of the alien’s violation of the law. 8 U.S.C. § 1324(a)(1)(A)(ii).

17. Federal agent’s testimony was insufficient to establish that defendant was harboring an illegal alien; agent went to defendant’s apartment to search for alien who failed to report for deportation, as he approached apartment he heard door slam and bushes break, defendant told agent alien was not in apartment, defendant did not allow agent into apartment, and agent conceded that he never saw alien on day he went to apartment. 8 U.S.C. § 1324(a)(1)(A)(iii).

18. To sustain a conviction for harboring an illegal alien, the government must prove conduct tending substantially to facilitate an alien’s remaining in the United States illegally and to prevent government authorities from detecting the alien’s unlawful presence. 8 U.S.C. § 1324(a)(1)(A)(iii).

19. Unlike an insufficiency of the evidence claim, when a district court evaluates a defendant’s motion for a new trial it does not view the evidence favorably to the Government, but instead exercises its own judgment in assessing the Government’s case. Fed. R. Cr. P. Rule 33, 18 U.S.C.

20. Even if a district court believes that the jury verdict is contrary to the weight of the evidence, it can order a new trial only if it believes that there is a serious danger that a miscarriage of justice has occurred—that is, that an innocent person has been convicted. Fed. R. Cr. P. Rule 33, 18 U.S.C.


22. Jury verdict convicting defendant of aiding and abetting the transportation of illegal alien was not against the weight of the evidence, and thus defendant was not entitled to new trial; alien testified that he was concealed in back of defendant’s car and defendant’s identification documents were found under front passenger floor mat. Fed. R. Cr. P. Rule 33, 18 U.S.C.; 8 U.S.C. § 1324(a)(1)(A)(ii).
23. District court’s order precluding defendant from cross-examining federal agent regarding
codefendant’s prior prosecution did not violate defendant’s Sixth Amendment right of
confrontation, since she was still able to inquire into agent’s alleged bias; defendant inquired
about agent’s alleged requests that defendant break up with codefendant and turn him over to
authorities and date agent instead. U.S. Const. amend. VI.

24. The Court of Appeals reviews both a district court’s denial of a motion for a severance and
limitation on cross-examination for abuse of discretion.

25. There is a preference in the federal system for joint trials of defendants who are indicted
together, because they promote efficiency and serve the interests of justice by avoiding the
scandal and inequity of inconsistent verdicts.

26. Trial courts should grant a severance only if there is a serious risk that a joint trial would
compromise a specific trial right of one of the defendants, or prevent the jury from making a
reliable judgment about guilt or innocence. Fed. R. Cr. P. Rule 14, 18 U.S.C.

27. Exposure of a witness’ motivation in testifying is a proper and important function of the
constitutionally protected right of cross-examination. U.S. Const. amend. VI.

28. Trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose
reasonable limits on cross-examination based on concerns about, among other things,
harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is
repetitive or only marginally relevant. U.S. Const. amend. VI.

29. A two-part test is used to determine whether a judge’s limitation on cross-examination
violates the Confrontation Clause: (1) the Court of Appeals must determine whether that
ruling significantly inhibited a defendant’s effective exercise of her right to inquire into the
witness’s motivation in testifying; and (2) if the district court’s ruling did significantly inhibit
the defendant’s exercise of that right, whether the constraints it imposed on the scope of the
cross-examination fell within reasonable limits which a trial court, in due exercise of its
discretion, has authority to establish. U.S. Const. amend. VI.

Ranci v. Att’y Gen., 540 F.3d 165 (3d Cir. 2008)

1. Given that the Board of Immigration Appeals (BIA) issued an opinion rather than a summary
affirmance, Court of Appeals, on review of the dismissal of alien’s appeal from the denial of
his motion to reopen removal order, would review BIA’s opinion rather than that of the
Immigration Judge (IJ).

2. Court of Appeals reviews the Board of Immigration Appeals’ (BIA) denial of an alien’s
motion to reopen removal proceedings under the abuse of discretion standard, which allows
reversal of that denial only if it is arbitrary, irrational, or contrary to law.

3. Court of Appeals, on review in removal proceedings, reviews the Board of Immigration
Appeals’ (BIA) legal conclusions de novo, including both pure questions of law and
applications of law to undisputed facts.
4. Due Process Clause did not prevent Government, which had sought and obtained alien’s cooperation in the prosecution of an alien smuggler, from ordering alien’s subsequent removal to Albania, where the smuggler, who was alleged to have threatened alien’s life, allegedly resided; the state-created danger exception was not applicable in immigration proceedings. U.S. Const. amend. V.

5. Generally, due process of law does not create an affirmative obligation for the Government to protect private individuals from other private individuals. U.S. Const. amend. V.

6. The state-created danger doctrine imposes on the Government a duty, under the Due Process Clause, to protect a person against injuries inflicted by a third-party when the Government affirmatively places the person in a position of danger the person would not otherwise have faced. U.S. Const. amend. V.

7. Alien’s claim, in his affidavit in support of his motion to reopen removal proceedings, that he was entitled to protection under the state-created danger exception based on his cooperation in the prosecution of an alien smuggler, did not satisfy requirement that such motion be supported by “new facts;” alien had set out in his asylum application his concerns about the danger allegedly waiting for him upon removal to Albania. 8 C.F.R. § 1003.2(c)(1).

8. To proceed with a claim of ineffective assistance of counsel in immigration proceedings, the allegedly aggrieved person must (1) provide an affidavit attesting to the relevant facts, (2) inform former counsel of the allegations and allow him an opportunity to respond, and (3) if it is asserted that prior counsel’s handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not. U.S. Const. amend. V.

9. Affidavit of alien’s current counsel, attesting to a conversation with alien’s former counsel regarding the latter’s allegedly ineffective representation, and his alleged intimidation, of alien, satisfied Lozada requirement that former counsel be informed of the allegations and allowed an opportunity to respond, for purposes of alien’s motion to reopen asylum proceedings on basis of ineffectiveness of counsel, even though former counsel did not provide his own written rebuttal; affidavit made Board of Immigration Appeals (BIA) aware of former counsel’s response.

10. Alien, in seeking to reopen removal proceedings on basis of ineffective assistance of former counsel, sufficiently explained why he did not pursue disciplinary action against former counsel to comply with Lozada requirement that a complaint be filed with appropriate disciplinary authorities, where policies underlying that requirement were met; former counsel, in being informed of his alleged ineffectiveness, was given information that would help him do better in the future, the claim of ineffectiveness was not meritless, and there was no suggestion of collusion between alien and his former counsel.

11. Ineffective assistance of counsel in immigration proceedings can constitute a denial of due process if an alien is prevented from reasonably presenting his case. U.S. Const. amend. V.
12. Court of Appeals, in assessing error and prejudice for purposes of an alien’s allegation of ineffective assistance in immigration proceedings, asks (1) whether competent counsel would have acted otherwise, and, if so, (2) whether the alien was prejudiced by counsel’s poor performance. U.S. Const. amend. V.

13. Possibility that alien’s former counsel provided ineffective assistance in asylum proceeding was strong enough to warrant remand to the Board of Immigration Appeals (BIA) for consideration of whether counsel erred, as would warrant reopening of alien’s case; counsel did not do enough research to identify any legal theory that might have helped alien, who had cooperated in the prosecution of an alien smuggler, obtain relief, counsel confused his client by abruptly switching strategies and recommending that alien ask for voluntary departure, and that recommendation may have been erroneous given the peril alien appeared to face in his home country.

14. For an alien to demonstrate that he suffered prejudice due to his counsel’s unprofessional errors, he must show that there was a reasonable likelihood that the result would have been different if the errors had not occurred.

15. Possibility that alien was prejudiced by former counsel’s alleged ineffectiveness, in recommending that he forego a full hearing on his request for relief under the Convention Against Torture (CAT) and accept voluntary departure, warranted remand to Board of Immigration Appeals (BIA) for reconsideration of alien’s motion to reopen; in light of circumstantial evidence of the threat alien faced as result of his cooperation in the prosecution of an alien smuggler, it was not implausible that he might be tortured or killed if returned to Albania. 8 C.F.R. § 1208.18(a)(7).

16. Possibility that alien was prejudiced by former counsel’s alleged ineffectiveness in failing to argue that he was entitled to protection under the Convention Against Transnational Organized Crime, based on his cooperation in the prosecution of an alien smuggler, warranted remand for reconsideration of his motion to reopen.

*Sioe Tjen Wong v. Atty Gen.,* 539 F.3d 225 (3d Cir. 2008)

1. Decision of Board of Immigration Appeals (BIA) dismissing alien’s appeal of denial by immigration judge (IJ) of her asylum application was sufficiently detailed to allow for meaningful review by Court of Appeals; although BIA’s explanation was brief, BIA considered the merits of alien’s asylum, withholding of removal, and Convention Against Torture claims, and BIA considered the 2003 and 2004 State Department reports on Indonesia and concluded that there was no pattern or practice of persecution of ethnic Chinese in Indonesia.

2. For purposes of establishing refugee status, “persecution” includes threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom; however, persecution does not encompass all treatment that society regards as unfair, unjust or even unlawful or unconstitutional. *Immigration and Nationality Act,* § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).
3. For purposes of establishing refugee status, the well-founded fear of persecution standard has both a subjective and an objective component; first, an applicant must show that his or her subjective fear is genuine, and second, that a reasonable person in the alien’s circumstances would fear persecution if returned to the country in question. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

4. Record did not compel conclusion that alien demonstrated a pattern or practice of persecution of ethnic Chinese Christians in Indonesia, for purposes of establishing well-founded fear of future persecution in support of alien’s asylum application; although 2003 and 2004 State Department reports documented ongoing harassment of Chinese Indonesians and isolated incidents of anti-Christian violence, including burning of churches, reports did not indicate that such violence was widespread or systemic, and 2004 report said discrimination and harassment of ethnic Chinese Indonesians had declined compared with previous years, and reports emphasized steps taken by Indonesian government to promote religious, racial, and ethnic tolerance and to reduce interreligious violence. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.13(b)(2)(iii).

5. In dismissing alien’s appeal of denial by immigration judge (IJ) of her asylum application, Board of Immigration Appeals (BIA) applied the correct legal standard in determining that alien had failed to demonstrate a pattern or practice of persecution of ethnic Chinese Christians in Indonesia, for purposes of establishing a well-founded fear of future persecution; although the BIA did not expressly cite the “systemic, pervasive, or organized” standard, the BIA properly reviewed the record and determined that violence was not sufficiently widespread and incidents of harassment and discrimination were not sufficiently severe to constitute a pattern or practice of persecution. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.13(b)(2)(iii).

6. Alien was not entitled to have her asylum application granted because her husband, who like alien was a Chinese Christian from eastern Java in Indonesia, faced similar experiences and was granted asylum; alien provided no details as to her husband’s claim, so as to permit an assessment of its similarity or relevance to alien’s claim. Immigration and Nationality Act, § 208, 8 U.S.C. § 1158.

7. Where an alien has not met her burden of proof with respect to asylum, the alien is also not eligible for withholding of removal. Immigration and Nationality Act, § 208, 8 U.S.C. § 1158.

_Cospito v. Att’y Gen., 539 F.3d 166 (3d Cir. 2008)_

1. A party cannot confer jurisdiction on the court of appeals under the REAL ID Act where none exists simply by attaching a particular label to the claim raised in a petition for review of an immigration decision. 8 U.S.C. § 1252.

2. The Court of Appeals lacked jurisdiction over Jamaican alien’s challenge on petition for review to the denial by the immigration judge (IJ) of her application for extreme hardship discretionary waiver of removal, on the basis that the IJ purportedly gave short shrift to crucial evidence, ignored crucial evidence, and failed to consider the emotional impact on
alien’s husband of the loss of his two children who would return to Jamaica with alien; such contentions amounted to nothing more than quarrels over the exercise of discretion and correctness of the IJ’s factual findings. 8 U.S.C. § 1252(a)(2)(B)(i).

3. The Department of Homeland Security (DHS) was not collaterally estopped from raising as a basis for Jamaican alien’s removal in a removal hearing her prior convictions, which had already occurred at the time of the grant of lawful permanent resident (LPR) status; the LPR status adjustment was made following an interview with a DHS official, no adjudicative hearing was held concerning the adjustment of status, DHS had no evidentiary burden of proof to meet and was not required to rebut any evidence concerning whether alien was eligible to adjust, and the DHS relied on alien’s fraudulent written assertion in her application for adjustment of status that she had no criminal history. 8 U.S.C. § 1227(a)(1)(A).

4. Application of collateral estoppel is a question of law, and the court of appeals exercises plenary review over the legal determinations of the Board of Immigration Appeals (BIA), subject to established principles of deference.

5. In order for collateral estoppel to apply, the following requirements must be met: (1) the identical issue was previously adjudicated, (2) the issue was actually litigated, (3) the previous determination was necessary to the decision, and (4) the party being precluded from relitigating the issue was fully represented in the prior action.

Hashmi v. Att’y Gen., 531 F.3d 256 (3d Cir. 2008)

1. The court of appeals has jurisdiction to review an immigration judge’s decision to deny a continuance, and does so for abuse of discretion. 8 C.F.R. § 1003.29.

2. The denial by the immigration judge (IJ) of the alien’s motion for a continuance of his removal proceedings while he awaited adjudication of his pending application for residency based on his marriage to a United States citizen, based on case-completion goals set by the Department of Justice (DOJ) rather than on the facts and circumstances of the alien’s case, was arbitrary and an abuse of discretion; the sole basis for the IJ’s exercise of discretion was the IJ’s perceived obligation to manage his calendar and complete cases within a reasonable period of time, and the IJ failed to take into account the specific facts and circumstances of the alien’s case, instead treating the case as if it were interchangeable with any other case within the same case-completion goal category. 8 C.F.R. § 1003.29.

3. The regulation prohibiting the Board of Immigration Appeals (BIA) from engaging in fact finding in the course of deciding appeals prohibited the BIA, in affirming the decision of the immigration judge (IJ) denying the alien’s motion for a continuance of his removal proceedings while he awaited adjudication of his pending application for residency based on his marriage to a United States citizen, from resting its decision on its own finding of fact that the IJ did not abuse his discretion by denying the continuance because the alien’s own actions regarding the residency application contributed to the delay. 8 C.F.R. § 1003.1(d)(3)(iv).

Paredes v. Att’y Gen., 528 F.3d 196 (3d Cir. 2008)
1. Court of Appeals reviews questions of law de novo.

2. Alien was not deprived of due process by Immigration Judge’s (IJ) issuance of removal order while alien’s petitions for writs of error coram nobis challenging his two New Jersey state convictions were still pending; alien’s time to directly appeal his convictions had expired, and his petitions were not direct appeals of, but rather collateral attacks on, the convictions. U.S. Const. amend. V; 8 U.S.C. § 1227(a)(2)(A)(iii), (B)(i).

3. A conviction does not attain a sufficient degree of finality for immigration purposes until direct appellate review of the conviction has been exhausted or waived. 8 U.S.C. § 1227(a)(2)(A)(iii), (B)(i).

4. The pendency of post-conviction motions or other forms of collateral attack on criminal convictions does not vitiate the finality of such convictions for immigration removal purposes unless and until the convictions are overturned as a result of the collateral motions.

5. Court of Appeals lacked jurisdiction, on review of removal order, to consider alien’s argument that his convictions on state offenses could not be held punishable as felonies under federal law, where alien failed to exhaust his administrative remedies by raising that issue before the Board of Immigration Appeals (BIA) rendered its decision. 8 U.S.C. § 1252(d)(1).

Pierre v. Att’y Gen., 528 F.3d 180 (3d Cir. 2008)

1. Where the Board of Immigration Appeals (BIA) affirms an Immigration Judge’s (IJ) decision without opinion, the Court of Appeals reviews the IJ’s decision as the final agency determination.

2. The Court of Appeals will review legal determinations of an Immigration Judge (IJ) de novo, subject to the principles of deference to administrative decisions articulated in Chevron.

3. Under the REAL ID Act, which authorized judicial review of constitutional claims and questions of law, notwithstanding any other provision of the chapter that eliminated or limited judicial review, factual or discretionary determinations of the Board of Immigration Appeals (BIA) are outside the scope of review of the Court of Appeals. REAL ID Act of 2005, § 101 et seq., 8 U.S.C. § 1101 et seq.

4. Pain and suffering that alien was likely to experience in Haitian prison due to lack of medical care for his esophagus injury would not be due to specific intent to torture, and he thus was not eligible for relief under Convention Against Torture (CAT), where his imprisonment would be due to Haiti’s blanket policy of imprisoning ex-convicts who were deported to Haiti in order to reduce crime, and lack of medical care would be unintended consequence of poor conditions resulting from Haiti’s extreme poverty; overruling Lavira v. Attorney General, 478 F.3d 158 (3d Cir. 2007).

5. The Convention Against Torture (CAT) requires a showing of specific intent before the court can make a finding that an applicant will be tortured.
6. Proof of knowledge on the part of government officials that severe pain or suffering will be the practically certain result of an applicant’s detention does not satisfy the specific intent requirement of the Convention Against Torture (CAT); rather, the specific intent requirement requires an applicant to show that his prospective torturer will have the motive or purpose to cause him pain or suffering.

7. For an act to constitute torture under the Convention Against Torture (CAT), there must be a showing that the actor had the intent to commit the act as well as the intent to achieve the consequences of the act.

8. Specific intent to torture, required for relief under the Convention Against Torture (CAT), requires not simply the general intent to accomplish an act with no particular end in mind, but the additional deliberate and conscious purpose of accomplishing a specific and prohibited result.

9. Mere knowledge that a result is substantially certain to follow from one’s actions is not sufficient to form the specific intent to torture, as required for relief under the Convention Against Torture (CAT).

10. An applicant cannot obtain relief under the Convention Against Torture (CAT) unless he can show that his prospective torturer will have the goal or purpose of inflicting severe pain or suffering.

11. Willful blindness can be used to establish knowledge but it does not satisfy the specific intent requirement in the required for relief under the Convention Against Torture (CAT).

Gomez-Zuluaga v. Att’y Gen., 527 F.3d 330 (3d Cir. 2008)

1. When the Board of Immigration Appeals (BIA) adopts some of the findings of the immigration judge (IJ) and makes additional findings, the Court of Appeals will review the decisions of both the BIA and the IJ.

2. If the statute is silent or ambiguous with respect to the specific issue, the question for the court, in determining whether to grant deference to the administrative agency’s interpretation of the statute, is whether the agency’s answer is based on a permissible construction of the statute.

3. The Court of Appeals reviews legal determinations by the Board of Immigration Appeals (BIA) de novo.

4. Whether an alien’s proffered particular social group is cognizable in an asylum claim is a question of law, and is therefore subject to de novo review. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b).

5. The alien seeking asylum has the burden of establishing persecution and a well-founded fear of persecution, which includes, but is not limited to, threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom. Immigration

6. Whether an alien asserting an asylum claim has established the elements of persecution is a question of fact, and the Board of Immigration Appeals (BIA) determination must be upheld if it is supported by substantial evidence in the record. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b).

7. An alien asserting an asylum claim based on persecution in connection with her membership in a social group has a right to allege membership in different social groups depending on whether she is making a past persecution claim or a well-founded fear of future persecution claim. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).

8. One way an alien may qualify for asylum is by showing past persecution, which gives rise to a rebuttable presumption of a well-founded fear of future persecution. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b).

9. Columbian alien’s abduction and involuntary confinement by guerrilla group constituted past persecution, as required to support asylum claim; alien was forced by an armed man to walk for two hours, blindfolded with her hands bound, she was then chained to a bed in an unfamiliar house, where she remained blindfolded and confined for eight days, while the men repeatedly threatened her and told her that they wanted her to stay with them, and upon her release, she was told that the guerrilla group would be watching her and waiting for her to finish school so that she could work for them. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b).


11. Surveillance of Columbian alien by guerrilla group to determine whether she was dating government officers, followed by two brief detentions at gunpoint, while certainly threatening and violative of alien’s privacy, did not rise to the level of persecution, as required to support asylum claim; alien was surveilled and detained, along with several other women and warned her not to fraternize with government officers, the detentions were brief, and neither alien or the other women were physically injured. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b).


13. In deciding whether an alien’s past persecution warrants asylum, a court must look beyond the conduct to the persecutor’s motives, in order to determine if the persecution was on account of one of the enumerated statutory grounds. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b).
14. Colombian alien’s abduction and eight-day confinement by guerrilla group was not centrally motivated by any imputed political opinion or social group status, based on alien’s dating of government officers, but rather by a desire to recruit alien to work for guerrilla group, and thus, persecution suffered by alien was not on account of any protected ground; although alien had previously been warned by guerrilla group not to date government officers, during the eight-day abduction, alien asked the guerrillas if she was being punished for dating a military officer, but they told her that was not the reason, alien had not recently been dating anyone, the guerrillas indicated that they wanted alien to stay with them, and when they released her, she was told that she was obliged to return to them when she was done with school. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b).

15. It is not necessary for an alien seeking asylum to show past persecution if she can nonetheless show a well-founded fear of future persecution without the benefit of the rebuttable presumption of future persecution based on finding of past persecution. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b).

16. Designated group of Colombian women who escaped involuntary servitude after being abducted and confined by a guerrilla group qualified as “particular social group,” for purpose of Colombian alien’s asylum claim based on well-founded fear of persecution on account of her membership in the group; the escapee status was sufficiently immutable, as it was based on events that happened in the past, it was narrow and distinctive, and it existed independently of alien’s past persecution. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b).

17. In order to show that a fear of future persecution is well-founded under the asylum statute, alien must show that her fear is both subjective and objectively reasonable, which she may do by using testimonial, documentary, or expert evidence. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b).

18. To satisfy the objective prong of a well-founded fear of future persecution, an alien seeking asylum must show he or she would be individually singled out for persecution or demonstrate that there is a pattern or practice in his or her country of nationality of persecution of a group of persons similarly situated to the alien on account of a protected ground. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b).

19. Colombian alien had well-founded fear of persecution based on her membership in particular social group of Colombian women who escaped involuntary servitude after being abducted and confined by a guerrilla group, warranting grant of asylum; alien had subjective fear that she would be killed if she did not return to work for guerrilla group, since her cousin had been killed after escaping, and alien’s fear was objectively reasonable, based on threats and violence from guerrilla group that alien witnessed directed toward other family members, and based on repeated threatening phone calls and messages that alien received from guerrillas since her abduction, reminding her that they were watching her, and state department reports stated that guerrilla group practiced systemic and pervasive forced conscription and violence,
Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§
1101(a)(42)(A), 1158(b).

20. As with asylum, alien asserting claim for withholding of removal must show that any
persecution is on account of a protected ground, but in addition, she must show that such
persecution is more likely than not to occur. Immigration and Nationality Act, §§ 208(b),
241(b)(3), as amended, 8 U.S.C. §§ 1158(b), 1231(b)(3).

21. An alien who cannot meet the standard for asylum will necessarily be unable to meet the
standard for withholding of removal. Immigration and Nationality Act, §§ 208(b), 241(b)(3),
as amended, 8 U.S.C. §§ 1158(b), 1231(b)(3).

22. In order to succeed on a claim for relief under the Convention Against Torture, an alien must
show that it is more likely than not that she will be tortured if removed to her native country,
and that such torture will occur with the consent or acquiescence of the government. 8 C.F.R.
§ 208.18(a)(1).

23. The more likely than not standard in a claim for relief under the Convention Against Torture
(CAT) is equivalent to the clear probability standard used for withholding of removal, and
both standards are equivalent to a preponderance of the evidence. Immigration and
Nationality Act, §§ 208(b), 241(b)(3), as amended, 8 U.S.C. §§ 1158(b), 1231(b)(3).

24. Alien asserting a claim for relief under the Convention Against Torture (CAT) need not show
that she is a refugee to sustain her CAT claim or that any torture was on account of a
protected ground. 8 C.F.R. § 208.18(a)(1).

25. An alien can satisfy the burden established for relief under the Convention Against Torture
(CAT) by producing sufficient evidence that the government in question is willfully blind to
such activities. 8 C.F.R. § 208.18(a)(1).

26. Where Board of Immigration Appeals (BIA) applied incorrect legal standard of government
acquiescence in determining whether Colombian alien qualified for relief under Convention
Against Torture (CAT), case would be remanded to the BIA to give the BIA the first
opportunity to apply the correct standard of acquiescence, which required showing that
government was willfully blind. Illegal Immigration Reform and Immigrant Responsibility

27. When the Board of Immigration Appeals (BIA) fails to adequately explain its reasoning, such
that it becomes impossible for the Court of Appeals to review its rationale, the Court of
Appeals will vacate and remand for further explanation of the decision.

United States v. Geiser, 527 F.3d 288 (3d Cir. 2008)

1. Legislative history should not be considered at the first step of the analysis under Chevron
defersence should be accorded to an agency’s interpretation of a statute.
2. At step one of the analysis under Chevron U.S.A., Inc. v. Natural Resources Defense Council as to whether deference should be accorded to an agency’s interpretation of a statute, in which a court must ask whether Congress has directly spoken to the precise question at issue, the Court of Appeals determines whether Congress has unambiguously expressed its intent by looking at the plain and literal language of the statute.

3. When determining a statute’s plain meaning, the Court of Appeals’ starting point is the ordinary meaning of the words used.

4. The experiences of prisoners at Nazi concentration camps fit squarely within the plain meaning of the term “persecution” in the Refugee Relief Act (RRA) provision prohibiting issuance of a visa to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin, and thus, for purposes of the determination of whether deference should be accorded to the State Department’s interpretation of the RRA in an action by the United States to revoke a naturalized citizen’s citizenship due to his service as a concentration camp guard, the text of the RRA was not ambiguous due to the use of the term persecution. 8 U.S.C. § 1451(a).

5. Service as an armed concentration camp guard, without further participation in atrocities, is sufficient to constitute assistance in persecution, for purposes of the Refugee Relief Act provision prohibiting issuance of a visa to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin.

6. A naturalized citizen’s conduct as an Waffen Schutzstaffel (SS) guard at Nazi concentration camps fit within the plain meaning of the phrase “personally advocated or assisted in persecution” in the Refugee Relief Act (RRA) provision prohibiting issuance of a visa to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin, and thus, for purposes of the determination of whether deference should be accorded to the State Department’s interpretation of the RRA in an action by the United States to revoke a naturalized citizen’s citizenship due to his service as a concentration camp guard, the text of the RRA was not ambiguous due to the use of that phrase. 8 U.S.C. § 1451(a).

7. According to the plain meaning of the Refugee Relief Act (RRA) provision prohibiting issuance of a visa to any person who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin, concentration camp guards personally advocated or assisted in persecution.

8. The Refugee Relief Act (RRA) provision requiring individuals to establish eligibility for a visa and admissibility into the United States under both the RRA and the immigration laws and regulations did not render the RRA structurally ambiguous, for purposes of the determination of whether deference should be accorded to the State Department’s interpretation of the RRA in an action by the United States to revoke a naturalized citizen’s citizenship due to his service as a concentration camp guard.
9. As an armed concentration camp guard in World War II, a subsequently naturalized citizen personally advocated or assisted in the persecution of a group of persons because of race, religion, or national origin, so as to be ineligible for a visa under the Refugee Relief Act (RRA).

*Areca-Pineda v. Att’y Gen.*, 527 F.3d 101 (3d Cir. 2008)

1. Court of Appeals reviews legal questions de novo, but defers to the reasonable interpretations of statutes the Board of Immigration Appeals (BIA) is charged with administering.

2. Administrative closure of removal proceedings against alien, a native and citizen of Peru, did not terminate the proceedings, so as to restart alien’s continuous physical presence clock required for suspension of deportation; administrative closure merely removed her proceedings from the Immigration Judge’s (IJ) calendar. 8 U.S.C. § 1229b(d)(1); 8 U.S.C. § 1254(a)(1).

3. Disparate treatment of different groups of aliens triggers only rational basis review under equal protection doctrine. U.S. Const. amend. V.

4. Differential treatment of aliens under stop-time rule on suspensions of deportation, whereby aliens who left United States and lawfully reentered could restart continuous physical presence clock, but barring such relief upon administrative closure of immigration proceedings against alien, a native and citizen of Peru, who remained in United States following her failure to appear at deportation hearing, was rationally related to government’s legitimate purpose in combating efforts by aliens to intentionally delay their immigration proceedings to enable them to apply for suspension of deportation, and thus, did not violate equal protection; by not appearing at hearing and remaining in the United States, alien was seeking to benefit from delays in her case to argue she satisfied presence requirement, but, on the other hand, an alien who left country and lawfully reentered caused no delay in her case. U.S. Const. amend. V; 8 U.S.C. § 1229b(d)(1).

5. Congress enacted the stop-time rule on suspensions of deportation to remove an alien’s incentive for prolonging deportation proceedings in order to become eligible for suspension. 8 U.S.C. § 1229b(d)(1).

*United States v. Ozcelik*, 527 F.3d 88 (3d Cir. 2008)

1. In order to convict a defendant, the government must prove each element of a charged offense beyond a reasonable doubt.

2. A deferential standard applies in determining whether a jury’s verdict rests on sufficient evidence; viewing the evidence in the light most favorable to the government, a defendant’s conviction will be sustained if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

3. Jury reasonably could have concluded that defendant, as Customs and Border Protection Officer, received money offered by illegal alien with corrupt intent, as required on theory of aiding and abetting to be convicted on charge of seeking and accepting bribe in return for
being influenced in performance of official acts and being induced to do or omit acts in violation of official duties, on defendant’s own statements to alien that his unnamed friend in exchange for bribe was going to adjust alien’s visa within system, although there was no evidence that friend actually adjusted visa status. 18 U.S.C. § 201(b)(2).

4. There are three essential elements that must be met to obtain a conviction on a charge of seeking and accepting bribe in return for being influenced in performance of official acts and being induced to do or omit acts in violation of official duties: (1) defendant must be a public official, (2) who directly or indirectly demanded, sought, received, accepted, or agreed to receive or accept anything of value personally or for any other person or entity, and (3) did so specifically for one of the three corrupt purposes set forth in the governing statutory subsections (A) through (C). 18 U.S.C. § 201(b)(2).

5. Reasonable juror could have found that defendant directly or indirectly demanded, sought, received, accepted, or agreed to receive or accept something of value, as required on theory of aiding and abetting to be convicted on charge of seeking and accepting bribe in return for being influenced in performance of official acts in violation of official duties, where government agents testified that illegal alien took $2,300 to meeting with defendant, defendant responded, “no, no, no I believe you,” to alien’s recorded question to defendant if he would “like to count” the money, and alien did not return with that money. 18 U.S.C. § 201(b)(2).

6. The Court of Appeals on appeal of a conviction is required to defer to a jury’s assessment of witness credibility and recognize that the government’s proof need not exclude every possible hypothesis of innocence.

7. One who aids and abets another is as guilty of the underlying offense as the principal.

8. Defendant, as Customs and Border Protection Officer, could be convicted on theory of aiding and abetting to charge of seeking and accepting bribe in return for being influenced in performance of official acts and being induced to do or omit acts in violation of official duties, on basis that defendant lied to illegal alien by telling him that his unnamed friend at Immigration and Naturalization Service (INS) would adjust alien’s status in exchange for bribe, when, in reality, there was no “friend” at INS and defendant intended to keep money offered by alien without taking any action to adjust alien’s status. 18 U.S.C. § 201(b)(2).

9. Jury reasonably could reject defendant’s viable explanation for request for funds in favor of government’s reasonably supported aiding and abetting theory to charge of seeking and accepting bribe in return for being influenced in performance of official acts and being induced to do or omit acts in violation of official duties. 18 U.S.C. § 201(b)(2).

10. Defendant did not show on plain error review that alleged erroneous verbal jury instruction on bribery charge substantially affected outcome of proceedings, by proffering transcript of jury charge which stated, “in his or her capacity,” rather than statutory language, “in such official’s official capacity,” where district court did not recollect omitting word “official” and jurors had copies of instructions that contained word “official.” 18 U.S.C. §§ 201(a)(3), 201(b)(2).
11. Defendant’s conduct in telling illegal alien to keep low profile and not draw attention to himself, and stating that it was good that he lived at different address than that on file with Immigration and Naturalization Service (INS), did not constitute harboring, concealing, or shielding alien, where defendant did not know about any imminent threat to alien’s immigration status and alien already had changed his address before he even spoke to defendant. 8 U.S.C. § 1324(a)(1)(A)(iii).

12. On a charge of shielding, harboring, and concealing an alien, the terms “shielding,” “harboring,” and “concealing” encompass conduct tending to substantially facilitate an alien’s remaining in the United States illegally and to prevent government authorities from detecting the alien’s unlawful presence. 8 U.S.C. § 1324.

13. On a charge of shielding, harboring, and concealing an alien, shielding does not require the use of a physical barrier, artifice, or trick. 8 U.S.C. § 1324.

Nijhawan v. Att’y Gen., 523 F.3d 387 (3d Cir. 2008)

1. The alien’s conviction under federal law for conspiracy to commit mail fraud, wire fraud, and bank fraud constituted a conviction for an offense that involved fraud or deceit, for purposes of the statutory definition of an “aggravated felony” for immigration purposes as an offense that involved fraud or deceit in which the loss to the victim or victims exceeded $10,000, even if the common-law fraud elements of actual reliance upon the fraudulent statements and harm from that reliance were not necessary legal elements of the federal fraud statutes under which the alien was convicted, since the statutes under which the alien was convicted required that fraud or false or fraudulent pretenses be employed. 8 U.S.C. § 1101(a)(43)(M)(i); 18 U.S.C. § 371.

2. In order for the alien’s conviction under federal law for conspiracy to commit mail fraud, wire fraud, and bank fraud to meet the statutory definition of an “aggravated felony” for immigration purposes as an offense that involved fraud or deceit in which the loss to the victim or victims exceeded $10,000, a jury determination that there was a loss in excess of $10,000 was not required. 8 U.S.C. § 1101(a)(43)(M)(i); 18 U.S.C. § 371.

3. Taken together, indictment charging alien with conspiracy to commit mail fraud, wire fraud, and bank fraud, judgment of conviction against him for that offense, and sentencing stipulation provided clear and convincing evidence that a loss to the victim or victims exceeding $10,000 was tied to alien’s offense, as required for conviction to satisfy statutory definition of “aggravated felony” for immigration purposes as an offense involving fraud or deceit in which loss to victim or victims exceeded $10,000; indictment charged scheme to deprive banks of hundreds of millions of dollars, alien agreed in sentencing stipulation that loss from offense exceeded $100,000, and in entering judgment of conviction, trial judge filled in space for “loss” with amount $683,632,800.23. 8 U.S.C. § 1101(a)(43)(M)(i); 18 U.S.C. § 371.

Kaita v. Att’y Gen., 522 F.3d 288 (3d Cir. 2008)

1. When a decision of the Board of Immigration Appeals (BIA) substantially relies upon the decision of the Immigration Judge (IJ), the Court of Appeals has jurisdiction to consider the
IJ’s decision, as well as the BIA’s decision.

2. In asylum proceedings, the Court of Appeals reviews adverse credibility determinations under the substantial evidence standard. 8 U.S.C. § 1252(b)(4)(B).

3. Court of Appeals lacked jurisdiction to review claim for asylum, where Immigration Judge (IJ) and Board of Immigration Appeals (BIA) determined that applicant failed to prove by clear and convincing evidence that she had filed her application within one year of her date of entry. 8 U.S.C. § 1158(a)(3).

4. To qualify for withholding of removal, an applicant must establish a clear probability, that is, that it is more likely than not, that her life or freedom would be threatened if returned to her country due to her race, religion, nationality, membership in a particular social group, or political opinion; if an applicant meets that standard, the Attorney General must grant withholding of removal. 8 U.S.C. § 1231(b)(3)(A).

5. Determination by Immigration Judge (IJ), that applicant seeking withholding of removal was not credible, was not supported by substantial evidence, in that any omissions or vagueness with respect to dates of her husband’s disappearance and of her hospitalization following her gang rape by rebel soldiers in Sierra Leone did not go to heart of her claim, inconsistent testimony may have been result of translation problems or IJ’s interruptions, and IJ’s statement that applicant failed to provide specifics was contradicted by record. 8 U.S.C. § 1231(b)(3)(A).

6. To qualify for relief under the Convention Against Torture (CAT), an applicant must show that it is more likely than not that he or she would be tortured if returned to the proposed country of removal.

7. The standard for relief under the Convention Against Torture (CAT) differs significantly from the “reasonable fear of persecution” standard for asylum, because the CAT standard has no subjective component and requires the applicant to establish entitlement to relief on the basis of objective evidence.

8. Unlike an applicant seeking asylum or withholding of removal standards, an applicant seeking protection under the Convention Against Torture (CAT) need not establish that she is a refugee, and therefore need not prove that she was persecuted due to any protected status; rather, to state a claim under the CAT, the applicant must show that she will more likely than not be tortured.

9. The distinguishing feature of torture, for purposes of the Convention Against Torture (CAT), is the severity of pain inflicted. 8 C.F.R. § 208.18(a)(1).

10. Rape can be torture under the Convention Against Torture (CAT). 8 C.F.R. § 208.18(a)(1).

11. Court of Appeals would vacate decisions of Board of Immigration Appeals (BIA) and Immigration Judge (IJ) concluding that applicant submitted no evidence of likely torture if returned to Sierra Leone, and would remand for further proceedings including additional testimony if necessary and consideration of State Department Country Report, where IJ
failed to consider applicant’s testimony that she had been brutally beaten and raped by rebels, and neither IJ nor parties discussed Country Reports.

*Augustin v. Att’y Gen.*, 520 F.3d 264 (3d Cir. 2008)

1. Argument raised by alien, a native and citizen of Haiti, that he was not removable on the basis of a conviction for receiving stolen property, was moot on appeal, where Immigration Judge (IJ) and Board of Immigration Appeals (BIA) had affirmed that alien was also removable as charged with having been convicted of a firearm offense.

2. Court of Appeals reviews legal questions in an immigration matter de novo, but defers to the Board of Immigration Appeals (BIA) as to its reasonable interpretations of statutes it is charged with administering.

3. Interpretation of the Immigration and Nationality Act by the Board of Immigration Appeals (BIA) in an opinion dismissing an alien’s appeal is entitled to Chevron deference. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

4. Court had to determine whether Board of Immigration Appeals (BIA) reasonably and permissibly interpreted cancellation of removal statute when it declined to read imputation of parent’s time as a lawful permanent resident to minor aliens into seven-year continued residence requirement under cancellation of removal statute, since statute was silent with respect to the specific issue. 8 U.S.C. § 1229b(a)(1).

5. Board of Immigration Appeals (BIA), by declining to impute Haitian alien’s father’s years as a lawful permanent resident to alien, permissibly interpreted cancellation of removal statute’s requirement that an alien possess seven years of continued residence in the United States, thus warranting denial of cancellation of removal, even though interpretation did not further the goal of maintaining the relationships between lawful permanent resident parents and their minor children, and notwithstanding any conflict with the ameliorative purpose of cancellation of removal, where Congress had not specifically provided that such years of residence would be imputed to their minor children. 8 U.S.C. § 1229b(a)(1).

*Vakker v. Att’y Gen.*, 519 F.3d 143 (3d Cir. 2008)

1. Court of Appeals generally reviews motions to remand deportation proceedings, like motions to reopen or reconsider, for abuse of discretion.

2. Questions of law, such as whether the Board of Immigration Appeals (BIA) applied the correct legal standard in considering the motion to reopen and the underlying legal claim are reviewed by Court of Appeals de novo.

3. Ordinarily, when the Board of Immigration Appeals (BIA) remands removal proceedings to the Immigration Judge (IJ) for certain identity and background checks, the final order in the removal proceedings, for purposes of requirement that petition for review must be filed not later than thirty days after date of the final order of removal, is the IJ’s order following remand. 8 U.S.C. § 1252(b)(1); 8 C.F.R. §§ 1003.47(h).
4. Orders denying motions to remand, like orders denying motions to reopen or reconsider, can qualify as independent final orders over which Court of Appeals can, in appropriate circumstances, assume jurisdiction.

5. Board of Immigration Appeals (BIA) order denying motion to remand adjustment of status issue raised by alien, a native of Russia, which the BIA chose to consolidate with Attorney General’s appeal of alien’s removal proceedings, was final, for purposes of 30-time period within which to file a petition for review, on date of Immigration Judge’s (IJ) order on remand for certain identity and background checks, rather than on date of BIA decision denying motion to remand. 8 U.S.C. §§ 1252(a)(1), 1252(b)(2); 8 C.F.R. § 1003.2(c)(4); 8 C.F.R. §§ 1003.47(h).

6. Once the Board of Immigration Appeals (BIA) determines that an alien is eligible for the relief requested and remands the deportation proceeding to Immigration Judge (IJ) for the requisite background checks, the IJ’s ensuing order granting relief then becomes the final administrative order in the case, for purposes of requirement that petition for review must be filed not later than thirty days after date of the final order of removal. 8 U.S.C. § 1252(b)(1).

7. In proceedings for removal of Russian alien who had been paroled into United States, Board of Immigration Appeals (BIA) properly denied alien’s motion to remand to Immigration Judge (IJ) for reconsideration of his previously denied application for adjustment of status, despite alien’s contention that removal proceedings could not be concluded without determination from the agency regarding his application; alien made no showing how he would have been eligible to renew his application. 8 C.F.R. § 1245.2(a).

8. Decision of Board of Immigration Appeals (BIA) denying alien’s motion to remand to Immigration Judge (IJ) for reconsideration of his previously denied application for adjustment of status did not deny alien due process, since BIA considered his motion and properly denied it, providing adequate explanation and authority to support its decision. U.S. Const. amend. V; 8 C.F.R. § 1245.2(a).

Kosak v. Aguirre, 518 F.3d 210 (3d Cir. 2008)

1. Court of Appeals reviews the Board of Immigration Appeals’ (BIA’s) interpretation of the Immigration and Nationality Act (INA) pursuant to Chevron, treating the INA as controlling where Congress has directly spoken to precise question at issue, but deferring to the BIA’s interpretation where statute is silent or ambiguous with respect to the specific issue, as long as the BIA’s interpretation is based on permissible construction of statute. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

2. To find that the Board of Immigration Appeals’ (BIA’s) interpretation of ambiguous provision of the Immigration and Nationality Act (INA) is permissible construction, so as to be entitled to deference under Chevron, the Court of Appeals need not conclude that the BIA’s construction was only one that it permissibly could have adopted, nor that the Court of Appeals would have adopted same interpretation. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.
3. On Chevron review of the Board of Immigration Appeals’ (BIA’s) interpretation of ambiguous provision of the Immigration and Nationality Act (INA), the Court of Appeals may not substitute its own construction for reasonable interpretation of the BIA; rather, as long as the BIA’s construction represents reasonable accommodation of conflicting policies that were committed to its care by statute, the Court of Appeals will not disturb it.

4. Board of Immigration Appeals’ (BIA’s) interpretation of provision of the Immigration and Nationality Act (INA) granting visa preference to qualified immigrants who are “brothers or sisters of citizens of the United States,” as not granting preference to biological sibling of naturalized Taiwanese native who had been adopted by citizens of the United States, on theory that adoption had terminated not only the parent-child relationship that existed between this Taiwanese native and her biological parents, so as to prevent parents from obtaining immigration benefits through child that they had put up for adoption, but sibling relationship as well, was reasonable accommodation of conflicting policies at issue and was entitled to deference under Chevron. Immigration and Nationality Act, § 203(a)(4), 8 U.S.C. § 1153(a)(4).

5. Interpretation of statutory provision by agency which conflicts with agency’s earlier interpretation of same provision is entitled to considerably less deference than a consistently held agency view.

6. Principle that an interpretation of statutory provision by agency which conflicts with agency’s earlier interpretation of same provision is entitled to considerably less deference than a consistently held agency view applies only to final agency interpretations, not preliminary or deliberative ones.

7. Deference that Court of Appeals would otherwise have accorded to the Board of Immigration Appeals’ (BIA’s) reasonable interpretation of provision of the Immigration and Nationality Act (INA) that granted visa preference to qualified immigrants who were “brothers or sisters of citizens of the United States,” as not granting preference to biological sibling of naturalized Taiwanese native who had been adopted by citizens of the United States, was not undercut by the many changes in position taken by federal officials as alien’s petition for visa on behalf of her biological sister was transmitted back and forth between Immigration and Naturalization Service (INS) agencies and the State Department for several years, where the BIA’s final decision was consistent with settled BIA precedent that predated alien’s petition by over a decade. Immigration and Nationality Act, § 203(a)(4), 8 U.S.C. § 1153(a)(4).

Yusupov v. Att’y Gen., 518 F.3d 185 (3d Cir. 2008)

1. Ordinarily a remand to an administrative agency is not a final order for purposes of appellate jurisdiction.

2. A removal order is final for jurisdictional purposes when a removability determination has been made that is no longer appealable to the Board of Immigration Appeals (BIA), regardless whether a formal order of removal has been entered. Immigration and Nationality Act, § 101(a)(47)(B)(i), 8 U.S.C. § 1101(a)(47)(B)(i).

3. Determinations of Board of Immigration Appeals (BIA) were final reviewable orders within
meaning of Immigration and Nationality Act (INA), and thus Court of Appeals had jurisdiction to review them, where BIA affirmed IJ’s denial of asylum application as untimely, vacated decision to grant withholding of removal or denied withholding of removal, and upheld decision to grant limited remedy under Convention against Torture (CAT) of deferral of removal. Immigration and Nationality Act, § 101(a)(47)(B)(i), 8 U.S.C. § 1101(a)(47)(B)(i); 8 C.F.R. §§ 1003.1(d)(6), 1003.47(h).

4. The Court of Appeals upholds the determinations of the Board of Immigration Appeals (BIA) if they are supported by reasonable, substantial, and probative evidence on the record considered as a whole.

5. The factual findings of an immigration judge are reviewed under the substantial evidence standard where the Board of Immigration Appeals (BIA) refers to the opinion and decision of the IJ who originally assessed the application.

6. The judiciary is the final authority on issues of statutory construction.

7. The judiciary must reject administrative constructions that are contrary to clear congressional intent.

8. Judicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations.

9. Chevron deference is afforded to the reasonable interpretations of statutes the Board of Immigration Appeals (BIA) that it is charged with administering.

10. When court reviews agency’s construction of statute which it administers, a court must determine whether Congress has directly spoken to the precise question at issue and unambiguously expressed its intent; if so, the inquiry ends, as both the agency and the court must give effect to the plain language of the statute.

11. When a statute is silent or ambiguous with respect to the specific issue, a court inquires whether the agency’s answer is based on a permissible construction of the statute; if a statute is ambiguous or silent, and if the implementing agency’s construction is reasonable, a federal court must accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.

12. When ascertaining whether the agency’s interpretation is a permissible construction of the language, a court must look to the structure and language of the statute as a whole.

13. When Congress use a term of art, it intends to incorporate the requirements imposed by the jurisprudence regarding that term.

14. Chevron deference was due to Attorney General’s reasonable interpretation of ambiguous phrase, “reasonable grounds for regarding,” in statute governing national security exception to mandatory withholding of removal of alien, as being satisfied “if there is information that would permit a reasonable person to believe”; although statutory language did not

15. Attorney General acted reasonably in interpreting statute that governed national security exception to mandatory withholding of removal of alien as allowing consideration of any evidence that was “not intrinsically suspect”; although Immigration and Nationality Act (INA) imposed implicit requirement that evidence be reliable enough to allow reasonable person to decide that alien posed national security risk, INA did not incorporate Rules of Evidence and nothing in statute required that information considered had to be admissible under Federal Rules of Evidence. Immigration and Nationality Act, § 241(b)(3)(B)(iv), 8 U.S.C. § 1231(b)(3)(B)(iv).

16. Term, “is,” in context of phrase, “is a danger to the security of the United States,” in statute that governed national security exception to mandatory withholding of removal of alien, indicated that Congress intended exception to apply to individuals who actually posed danger to security of United States; Congress did not intend that exception to cover aliens who conceivably could be such danger or had ability to pose such danger. Immigration and Nationality Act, § 241(b)(3)(B)(iv), 8 U.S.C. § 1231(b)(3)(B)(iv).

17. Remand was warranted for Board of Immigration Appeals (BIA) to apply correct legal standard to application of alien, citizen of Uzbekistan, for withholding of removal, where incorrect standard was recited by BIA and application of correct standard could not be discerned from record on judicial review.

18. Attorney General interpreted statutory national security exception to mandatory withholding of removal of alien reasonably in concluding that it applied to any “nontrivial level of danger” or “nontrivial degree of risk” to security of United States, and thus Chevron deference had to be accorded to that interpretation.

*Yu v. Att’y Gen.*, 513 F.3d 346 (3d Cir. 2008)

1. If what an asylum applicant fears is properly characterized as persecution, the claim’s viability turns on whether it is shown that this fear is well-founded. 8 U.S.C. § 1101(a)(42)(B).

2. Asylum applicants must demonstrate a subjective fear that is supported by objective evidence that persecution is a reasonable possibility. 8 U.S.C. § 1101(a)(42)(B).

3. Whether an asylum applicant has shown a well-founded fear is a determination for the Board of Immigration Appeals (BIA) to make; the Court of Appeals is charged only with ascertaining whether its conclusion is supported by substantial evidence. 8 U.S.C. § 1101(a)(42)(B).

4. A determination of the Board of Immigration Appeals (BIA) as to whether an asylum applicant’s fear is well-founded will not be disturbed unless any reasonable adjudicator would be compelled to conclude to the contrary. 8 U.S.C. §§ 1101(a)(42)(B), 1252(b)(4)(B).
5. Finding of Board of Immigration Appeals (BIA), that fear of forcible sterilization expressed by husband and wife, based on their having had second child while outside China, was not reasonable, and that they thus were not eligible for asylum, was supported by substantial evidence, in that BIA’s explanation for crediting State Department reports over demographer’s testimony concerning forced sterilizations was well-reasoned. 8 U.S.C. § 1101(a)(42)(B).

6. Since the threshold for asylum is lower than for protection under the withholding of removal or Convention Against Torture (CAT) provisions, rejection of applicants’ asylum claims necessarily requires that their CAT and withholding claims be rejected as well. 8 U.S.C. § 1101(a)(42)(B).

Jahjaga v. Att’y Gen., 512 F.3d 80 (3d Cir. 2008)

1. The Court of Appeals has jurisdiction to review a denial of a motion to reissue a Board of Immigration Appeals (BIA) opinion as long as none of the exceptions apply.

2. Because no statute provides that motions to reissue an opinion are solely within the Board of Immigration Appeals’ discretion, the Court of Appeals possesses jurisdiction to review their denial for abuse of discretion. 8 U.S.C. § 1252(a)(2)(B)(ii).

3. Remand to Board of Immigration Appeals (BIA) was warranted in two cases in which BIA denied aliens’ motions to reissue opinions that the aliens claimed they had never received in the mail, for a determination of what weight to accord to the aliens’ claims that they did not receive the opinions in determining whether the opinions were properly served.

Myat Thu v. Att’y Gen., 510 F.3d 405 (3d Cir. 2007)

1. In cases where the Board of Immigration Appeals (BIA) has based its decision on the adverse credibility analysis of the Immigration Judge (IJ), the Court of Appeals may review both the BIA’s opinion and the IJ’s opinion.

2. Adverse credibility determinations must be upheld in immigration proceedings if supported by substantial evidence, and can only be reversed if the evidence is such that a reasonable fact finder would be compelled to conclude otherwise.

3. The Court of Appeals upholds adverse credibility determinations of an Immigration Judge (IJ) if they are supported by reasonable, substantial, and probative evidence on the record considered as a whole.

4. In making an adverse credibility finding, an Immigration Judge (IJ) must supply specific, cogent reasons why the applicant is not credible; moreover, an examination of the record must also reveal that the alien has not supplied a convincing explanation for discrepancies and omissions.

5. Although the Court of Appeals’ review of rulings of the Board of Immigration Appeals (BIA) is limited, the Court is not foreclosed from determining whether the BIA followed proper procedures and considered and appraised the material evidence before it; if the
administrative record fails to reveal that such evidence has been fairly considered, the proper course is to remand the case so that the IJ may evaluate such evidence and consider its effect on the application as a whole.

6. To establish eligibility for asylum on the basis of past persecution, an applicant must show: (1) an incident, or incidents, that rise to the level of persecution; (2) that is on account of one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either unable or unwilling to control. 8 U.S.C. § 1101(42)(A).

7. To establish eligibility for asylum based on a well-founded fear of future persecution, an applicant must show that she has a genuine fear, and that a reasonable person in her circumstances would fear persecution if returned to her native country. 8 U.S.C. § 1101(42)(A).

8. Immigration Judge (IJ) failed to consider all evidence in record in deciding whether asylum applicant had well-founded fear of future persecution in Burma, and thus would be required on remand to consider letter from political advisor to Burma Democratic Action Group, letter from editor of pro-democracy journal, State Department’s Country Report, and other Burma reports. 8 U.S.C. § 1101(42)(A).

9. Consideration of all evidence by an Immigration Judge (IJ), in deciding an asylum applicant’s credibility, does not require comment on all evidence; however, the record of decision should reflect that such evidence has been fairly considered. 8 U.S.C. § 1101(42)(A).

10. On remand warranted by failure of Immigration Judge (IJ) to consider all evidence in record in deciding whether Burmese asylum applicant had well-founded fear of future persecution in Burma, IJ would be required, in making her credibility decision, to consider applicant’s explanations of any discrepancies in his statements in light of State Department Country Report and other evidence he had adduced or might be permitted to adduce. 8 U.S.C. § 1101(42)(A).

*Santana Gonzalez v. Att’y Gen.*, 506 F.3d 274 (3d Cir. 2007)

1. In order to show that she did not receive notice of her removal hearing, for purposes of motion to rescind the in absentia removal order that had been entered against her, the alien did not have to rebut the strong presumption of effective service of the notice to appear that would have applied if the notice had been sent to her by certified mail; rather, the alien had only to rebut a weaker presumption of effective service, since her notice to appear was sent by ordinary, first-class mail. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 304(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C).

2. A strong presumption of effective service of a notice to appear applies only when a notice from an Immigration Court or the Immigration and Naturalization Service (INS) or Department of Homeland Security is sent by certified mail, and a weaker presumption of receipt applies when such a notice is sent by regular mail. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 304(b)(5), 8 U.S.C. § 1229a(b)(5).
Debeato v. Atty Gen., 505 F.3d 231 (3d Cir. 2007)

1. The REAL ID Act provision granting the court of appeals jurisdiction to review constitutional claims or questions of law raised upon a petition for review permits the court to exercise jurisdiction over legal and constitutional challenges to final orders of removal, including those final orders that the Attorney General has reinstated after finding that an alien has reentered the United States illegally after having been removed or having departed voluntarily. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 305(a)(5), 8 U.S.C. § 1231(a)(5); Immigration and Nationality Act, § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D).

2. Standard of review by court of appeals remained the same after alien’s habeas corpus petition was converted to a petition for review of deportation order of Board of Immigration Appeals (BIA), and thus, court of appeals would review constitutional and legal questions de novo, but defer to BIA’s reasonable interpretation of statutes it was charged with administering.

3. Provision of Anti-Terrorism and Effective Death Penalty Act (AEDPA) making aliens who were deportable for certain criminal convictions ineligible for discretionary relief from deportation did not apply retroactively to case of alien whose deportation case was pending when AEDPA was enacted. Immigration and Nationality Act, § 212(c), 8 U.S.C. § 1182(c).

4. Decision of Board of Immigration Appeals (BIA) affirming deportation order against alien was not grossly unjust, as required for alien to succeed in collateral challenge to order; although BIA’s order erroneously held that provision of Anti-Terrorism and Effective Death Penalty Act (AEDPA) making aliens who were deportable for certain criminal convictions ineligible for discretionary relief from deportation applied retroactively to alien’s case, which was pending when AEDPA was enacted, Court of Appeals and Supreme Court cases holding that such retroactive application of AEDPA was improper had not yet been issued at time of BIA’s decision, and under Attorney General’s interim decision, which was the law as it then existed, BIA’s decision was not a gross miscarriage of justice. Immigration and Nationality Act, § 212(c), 8 U.S.C. § 1182(c).

Shardar v. Atty Gen., 503 F.3d 308 (3d Cir. 2007)

1. An appellate court reviews a Board of Immigration Appeals’ (BIA) denial of a motion to reopen for abuse of discretion and reviews its underlying factual findings related to the motion for substantial evidence.

2. The Board of Immigration Appeals (BIA) denial of a motion to reopen may only be reversed if it is arbitrary, irrational, or contrary to law.

3. Persecution rendering a person eligible for asylum includes threats to life, confinement, torture, and economic restrictions so severe that they constitute a real threat to life or freedom. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.13(b).

4. To qualify for asylum, the applicant must show that the persecution is on account of one of the statutorily recognized grounds, i.e., race, religion, nationality, membership in a particular

5. For an asylum claim, making a prima facie claim for eligibility means merely showing a realistic chance that the petitioner can at a later time establish that asylum should be granted.

6. Facts presented in the motion to reopen are accepted as true unless inherently unbelievable.

7. In the context of alien’s motion to reopen removal proceedings, the re-emergence of the political party responsible for the alien’s prior persecution in Bangladesh constituted a material change in county conditions for alien, who was previously beaten by the political-affiliated police force. 8 C.F.R. § 1003.2(c)(3)(ii).

8. On alien’s motion to reopen, Board of Immigration Appeals’ (BIA) conclusion that alien, a citizen of Bangladesh, would not face a particularized threat of persecution if returned to Bangladesh was not supported by substantial evidence; a detailed affidavit by an expert in the society, politics, and economics of South Asian countries repeatedly explained why alien’s political beliefs and his position of a former political leader would likely result in his persecution, and, an affidavit from alien’s brother in Bangladesh stated that he had been recently threatened with a gun and beaten by political officials and that the perpetrators specifically asked about alien’s whereabouts. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252; REAL ID Act of 2005, § 101(b), 8 U.S.C. § 1158(b).

9. On motion to reopen asylum proceedings, alien, a native of Bangladesh, established a prima facie case for asylum, specifically past persecution and a well-founded fear of future persecution, warranting remand to the Board of Immigration Appeals (BIA) with directions to reopen the removal proceedings. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252; 8 C.F.R. §§ 1003.2(a), 1003.2(c)(2).

Biskupski v. Att’y Gen., 503 F.3d 274 (3d Cir. 2007)

1. The Court of Appeals retains jurisdiction to review questions of law and has jurisdiction to determine its jurisdiction.

2. Whether a statute has retroactive application and issues of statutory construction are questions of law over which the Court of Appeals exercises plenary review.

3. Polish alien’s offense of aiding and abetting alien smuggling was an aggravated felony under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) for purposes of his application for suspension of deportation, even though alien smuggling was a misdemeanor under federal law, since crime of alien smuggling was listed in IIRIRA’s definition of aggravated felony. Immigration and Nationality Act, §§ 101(a)(43)(N), 274(a)(2), 8 U.S.C. §§ 1101(a)(43)(N), 1324(a)(2).

4. If the text of a statute is plain and unambiguous, then appellate analysis ends there.
5. The role of the Court of Appeals in interpreting a statute is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.

6. If a statute includes an explicit definition, the Court of Appeals must follow that definition, even if it varies from that term’s ordinary meaning.

7. The first question in determining whether a civil statute applies retroactively is whether Congress has expressly provided for retroactive application.

8. With regard to section of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) providing that amended definition of “aggravated felony” applies to “actions taken” after IIRIRA’s enactment, term “actions taken” means orders or decisions of the Immigration Judge (IJ) or the Board of Immigration Appeals (BIA) which apply the aggravated felony definitions and thus determine the availability of discretionary hardship relief to such felons. Immigration and Nationality Act, § 101(a)(43)(N), 8 U.S.C. § 1101(a)(43)(N).

9. Application of amended definition of “aggravated felony” contained in section of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) to alien’s conviction for alien smuggling which occurred prior to date of amendment was not impermissibly retroactive, as Congress clearly intended that new definition of aggravated felony apply to all convictions without regard to date of occurrence. Immigration and Nationality Act, § 101(a)(43)(N), 8 U.S.C. § 1101(a)(43)(N).

Valdiviezo-Galdamez v. Att’y Gen., 502 F.3d 285 (3d Cir. 2007)

1. In order to establish past or future persecution, an asylum applicant must show past or potential harm rising to the level of persecution on account of a statutorily enumerated ground that is committed by the government or by forces the government is unable or unwilling to control. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42).

2. In order to establish that he suffered past persecution in Honduras, for purposes of asylum eligibility, alien was not required to prove that the government in Honduras refused to protect him from persecution by gang members, but only that government was unable or unwilling to protect him. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42).

3. The asylum applicant must prove that persecution that he fears is on account of one of the enumerated grounds, but need not show that the government’s refusal to control a group that engages in persecution is on account of one of these grounds. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42).

4. Substantial evidence did not support determination of immigration judge (IJ) that alien failed to establish that the harm he suffered in Honduras was on account of his membership in the group consisting of young Honduran men who had been actively recruited by gangs and had refused to join gangs; gang members sought out alien repeatedly and targeted him for abuse for his refusal to join gang, IJ’s determination was inconsistent with her findings that the men who attacked alien wanted him to join gang and engage in gang activities, and that alien’s
refusal caused him to be attacked by those men, and there was no showing that the gang members attacked alien for any other reason than his repeated refusal to join gang. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42).

Luciana v. Att’y Gen., 502 F.3d 273 (3d Cir. 2007)

1. Court of Appeals reviews de novo applications of the legal standard of frivolousness by the Board of Immigration Appeals (BIA) and the Immigration Judge (IJ).

2. In light of fact that alien’s asylum application was untimely and her case did not fall under an exception to the time limit, the false statement in her application was not material, and therefore conclusion that she filed a frivolous application was erroneous; alien’s false statement, that she had been assaulted and injured because of her religious beliefs while on the way to church in Indonesia, lacked the capacity to influence the decision in her case. 8 C.F.R. § 208.20.

Kolkevich v. Att’y Gen., 501 F.3d 323 (3d Cir. 2007)

1. The Court of Appeals should eschew a formalistic reading of the REAL ID Act (RIDA) in favor of one that seeks to fulfill Congress’s broader goals and purposes. 8 U.S.C. § 1252.

2. The Suspension Clause does not require Congress to guarantee aliens the right to petition for habeas in a district court at all times and under all circumstances. U.S. Const. art. I, § 9, cl. 2.

3. The regime in which aliens may petition for review in a court of appeals but may not file habeas petitions is constitutional, since the substitution of a new collateral remedy which is both adequate and effective satisfies the requirements of the Suspension Clause. U.S. Const. art. I, § 9, cl. 2; 8 U.S.C. § 1252(a)(5).

4. Transfer from district court to Court of Appeals was permitted not only of those habeas petitions challenging final orders of removal of criminal aliens that were pending in district court at time REAL ID Act (RIDA) became law, but also those that could have been brought in district court prior to RIDA’s enactment, but were not. REAL ID Act § 106(c).

5. Criminal aliens who had failed to file habeas petitions challenging final orders of removal prior to enactment of REAL ID Act (RIDA) had 30 days from enactment of RIDA to do so. REAL ID Act § 106(c).

6. To apply a ruling in a purely prospective fashion, the Court of Appeals must consider whether: (1) the decision establishes a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreseen; (2) application of the new rule retroactively would further or retard the rule’s operation; and (3) the equities cut in favor of prospective application.

7. Court of Appeals’ ruling, that criminal aliens who had failed to file habeas petitions challenging final orders of removal prior to enactment of REAL ID Act (RIDA) had 30 days from enactment of RIDA to do so, would not be applied prospectively only, so as to exclude
alien who had failed to meet such deadline, inasmuch as equities did not cut in alien’s favor, given that he had been put on notice that significant change to immigration laws had taken place but had failed to file immediately, and had sat on his appeal until nearly one year after RIDA had been passed. REAL ID Act § 106(c).

Cespedes-Aquino v. Att’y Gen., 498 F.3d 221 (3d Cir. 2007)

1. Alien, who was legal permanent resident, who was convicted of a deportable offense was not eligible for discretionary relief under repealed statute allowing for discretionary relief under certain circumstances, since alien’s conviction occurred years after the statute was repealed. Immigration and Nationality Act, § 212(c), 8 U.S.C. § 1182(c).

2. If an alien’s conviction for a deportable offense occurred before the repeal of the statute allowing for discretionary relief under certain circumstances and he is at that time otherwise eligible for relief, he retains that eligibility despite the repeal; on the other hand, if the underlying conviction occurs after the repeal, there has been no retroactive effect and discretionary relief under the repealed statute is not available. Immigration and Nationality Act, § 212(c), 8 U.S.C. § 1182(c).

United States v. Hernandez-Gonzalez, 495 F.3d 55 (3d Cir. 2007)

The defendant’s offense of being an alien found in the United States following deportation commenced on the date he entered the United States, rather than on the date he was discovered in the United States by immigration authorities, for purposes of the sentencing guidelines requirement that the defendant’s prior sentences that were imposed within ten years of the commencement of the instant offense were to be included in the calculation of the defendant’s criminal history score, since the defendant’s conduct of entering the United States constituted relevant conduct to be included in the calculation of the ten-year period for counting prior sentences. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326; U.S.S.G. §§ 1B1.3, 4A1.2(e)(2), 18 U.S.C.

Henry v. Bureau of Immigration and Customs Enforcement, 493 F.3d 303 (3d Cir. 2007)


2. The alien’s conviction under New York law for second-degree criminal possession of a weapon constituted an offense that, by its nature, involved a substantial risk that physical force against the person or property of another might have been intentionally used in the course of committing the offense, and thus, it constituted a crime of violence, so as to render the alien removable for having committed an aggravated felony; the New York statute of conviction required that the alien possessed a loaded firearm with the intent to use it unlawfully against another. Immigration and Nationality Act, §§ 101(a), 237(a)(2)(A)(iii), 8 U.S.C. §§ 1101(a), 1227(a)(2)(A)(iii); 18 U.S.C. § 16; McKinney’s Penal Law § 265.03.

3. To determine if a person was convicted of a crime of violence within the meaning of the statutory definition, the court of appeals employs the categorical approach, which requires
the court to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to the person’s crime; however, the categorical approach does not bar the court from determining which numbered subsection was violated where the disjunctive phrasing of the statute of conviction invites inquiry into the specifics of the conviction. 18 U.S.C. § 16.

4. A crime of violence under the statutory definition of any felony offense that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense, must involve a substantial risk that the actor will intentionally use physical force in committing his crime. 18 U.S.C. § 16(b).

_Briseno-Flores v. Att’y Gen., 492 F.3d 226 (3d Cir. 2007)_

1. The Court of Appeals has jurisdiction to review a final order of removal. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252.

2. The Court of Appeals reviews the legal determinations of the Board of Immigration Appeals (BIA) de novo, subject to the principles of deference articulated in Chevron.

3. Alien, a citizen of Mexico, was not eligible for suspension of deportation, where he pled guilty to petty theft for stealing two bottles of rum in the United States, which constituted crime of moral turpitude, so that he stopped accruing a period of continuous physical presence on the date of the offense, and was unable to achieve the required seven years of continuous physical presence necessary for suspension of deportation. 8 U.S.C. § 1254; Immigration and Nationality Act, § 240A, 8 U.S.C. § 1229b(d)(1)(B).

4. Stop-time rule, cutting off alien’s continued presence in United States upon commission of certain criminal offenses, for purposes of qualifying for suspension of deportation, is retroactively applicable to aliens who committed their offenses prior to passage of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), as amended by Nicaraguan Adjustment and Central American Relief Act (NACARA). Immigration and Nationality Act, § 240A, 8 U.S.C. § 1229b(d)(1)(B); 8 U.S.C. § 1254(a)(1).

5. After Mexican alien committed crime of moral turpitude which triggered the stop-time provision and stopped his accrual of a continuous period of physical presence necessary for suspension of deportation, no new period of continuous presence commenced. Immigration and Nationality Act, § 240A, 8 U.S.C. § 1229b(d)(1)(B); § 1254.

6. Under Chevron, courts are required to give deference to interpretations of statutes by the agencies that administer them.

7. Where an administrative agency interprets a statute, and the interpretation represents a reasonable accommodation of conflicting policies that were committed to the agency’s care by the statute, a court should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.

_Sun Wen Chen v. Att’y Gen., 491 F.3d 100 (3d Cir. 2007)_
1. To establish a well-founded fear of future persecution, as required qualify for asylum as a refugee, an asylum-seeker must show that he has a subjective fear and that his fear is objectively reasonable, which requires ascertaining whether a reasonable person in the alien’s circumstances would fear persecution if returned to the country in question. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42); REAL ID Act of 2005, § 101(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A).

2. Denial of alien wife’s application for asylum, based immigration court’s discretionary refusal to allow her benefit of changed circumstances exception to one-year timeliness requirement, was not reviewable, since alien did not identify any errors in immigration court’s finding. REAL ID Act of 2005, § 101(a)(3), 8 U.S.C. § 1158(a)(3).

3. Courts accord Chevron deference to an agency’s construction of the statute which it administers.

4. The attorney general has vested the Board of Immigration Appeals (BIA) with power to exercise the discretion and authority conferred upon the attorney general by the INA in the course of considering and determining cases before it, and therefore, the BIA’s interpretations of the INA made in the course of case-by-case adjudication are entitled to Chevron deference. Immigration and Nationality Act, § 103(a)(1), 8 U.S.C. § 1103(a)(1).

5. Under Chevron, courts ask first if a statute is silent or ambiguous with respect to the specific issue of law in the case by employing traditional tools of statutory construction to determine whether Congress had an intention on the precise question at issue, and if not, the question is whether the agency’s answer is based on a permissible construction of the statute, but when Congress has left a gap in a statute, implicitly leaving the administering agency responsible for filling that gap, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

6. Under the Chevron standard of review of an agency’s instruction of a statute which it administers, silence on a particular matter germane to the provisions of a statute suggests a gap of the sort that the administering agency may fill, but the statute’s silence does not confer gap-filling power on an agency unless the open question is in fact a gap, that is, an ambiguity tied up with the provisions of the statute; an agency cannot read a statute discussing topic X to confer a power over unrelated topic Y just because the statute fails to mention topic Y.

7. Board of Immigration Appeals (BIA) reasonably interpreted INA to impute Chinese wife’s fear of persecution by forced abortion or involuntary sterilization to Chinese husband, as required for spousal eligibility for asylum based on other spouse’s status, since BIA based interpretation on its notion of marital relationship and its knowledge of China’s one-child policy; BIA permissively filled INA gap by extending scope of spousal eligibility, on which INA was silent, to conclude that husband suffered emotional and sympathetic harm from wife’s forced abortion or sterilization and infringement on their shared reproductive rights, and Chinese government’s punishment for violating family planning law was directed at both husband and wife. Immigration and Nationality Act, § 101(a)(42)(B), 8 U.S.C. § 1101(a)(42)(B).
8. Under Chevron, court must leave an agency’s rule intact if it constitutes a reasonable interpretation of the relevant statutory provisions.

9. Court of Appeals reviews the findings of fact of the Board of Immigration Appeals (BIA) under the deferential substantial evidence standard, whereby its findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary. Immigration and Nationality Act, § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B).

10. When the Court of Appeals reviews the Board of Immigration Appeals’ (BIA) application of legal principles to undisputed facts, rather than its underlying determination of those facts or its interpretation of its governing statutes, the standard of review is de novo. Immigration and Nationality Act, § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B).

11. Errors in application of the law by the Board of Immigration Appeals (BIA), in denying a petition for asylum, are not excused by the fact that a hypothetical reasonable adjudicator, applying the law correctly, might also have denied a petition for asylum, nor can factual findings supporting such a denial be assumed on the basis of record evidence not relied on by the BIA. Immigration and Nationality Act, § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B).

12. If the Court of Appeals grants a petition for review of the Board of Immigration Appeals’ (BIA) denial of asylum, due to alien’s lack of fear of persecution, on the grounds that the BIA’s decision was not supported by substantial evidence, the decision is reversed and remanded with the understanding that a reasonable fact finder would have to conclude that the requisite fear of persecution existed to qualify for asylum, but if the BIA’s error is a legal one subject de novo review, the decision will be vacated; thus, insofar as the BIA either has not applied the law correctly, or has not supported its findings with record evidence, the Court of Appeals may grant a petition for review, even though a perfectly reasonable fact finder could have settled upon the same ultimate decision as was reached by the BIA. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42).

13. Factual findings of Board of Immigration Appeals (BIA), determining that persecution of Chinese husband, based on fear of forced abortion or involuntary sterilization of his Chinese wife, was not assured fact, did not support BIA’s denial of asylum to Chinese husband, since husband was only required to show his fear of persecution was objectively reasonable, not that his persecution was certain or was more likely than not to occur; BIA found that enforcement of China’s one-child policy was not uniformly applied, not all methods of enforcement involved forced abortion, sterilization, or other forms of persecution, and treatment of children born outside China was uncertain, rather than properly addressing degree of uncertainty that husband could face persecution. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42).

14. Fear is objectively reasonable, even if there is only a slight, though discernible, chance of persecution, as required for alien to demonstrate to qualify for asylum. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42).

Abdelfattah v. United States Dep’t of Homeland Sec., 488 F.3d 178 (3d Cir. 2007)

1. Court of Appeals employs two-tiered test in reviewing an order of a district court granting summary judgment in proceedings seeking disclosure under Freedom of Information Act (FOIA): first deciding whether the district court had an adequate factual basis for its determination, and, if it did, then deciding whether that determination was clearly erroneous. 5 U.S.C. § 552.

2. Under two-tiered test in reviewing an order of a district court granting summary judgment in proceedings seeking disclosure under Freedom of Information Act (FOIA), Court of Appeals will reverse only if the findings are unsupported by substantial evidence, lack adequate evidentiary support in the record, are against the clear weight of the evidence or where the district court has misapprehended the weight of the evidence. 5 U.S.C. § 552.

3. Under the Freedom of Information Act (FOIA), an agency has a duty to conduct a reasonable search for responsive records. 5 U.S.C. § 552.

4. The relevant inquiry in determining whether an agency’s conducted reasonable search for responsive records pursuant to Freedom of Information Act (FOIA) is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate. 5 U.S.C. § 552.

5. To demonstrate the adequacy of its search for responsive records for Freedom of Information Act (FOIA) purposes, the agency should provide a reasonably detailed affidavit, setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials were searched. 5 U.S.C. § 552.

6. Citizenship and Immigration Services’ (CIS) search for records responsive to Freedom of Information Act (FOIA) request for records pertaining to requestor was adequate and reasonably calculated to uncover all relevant documents; files searched included “Computer Linked Application Information Management System,” which was used to track applications or petitions for benefits. 5 U.S.C. § 552.

7. District Court had no factual basis for its determination that the Federal Bureau of Investigation’s (FBI) search for records responsive to Freedom of Information Act (FOIA) request for records pertaining to requestor was adequate, since FBI did not submit an affidavit describing its search. 5 U.S.C. § 552.

8. The justification for withholding records in response to Freedom of Information Act (FOIA) request provided by the agency in a Vaughn index may take any form as long as the agency offers a reasonable basis to evaluate its claim of privilege. 5 U.S.C. § 552.

9. Bureau of Immigration and Customs Enforcement (ICE) draft incident report was exempt from Freedom of Information Act (FOIA) disclosure as protected by the deliberative process
privilege; draft report involved discussions between the agency’s subordinates and seniors and may have been modified to ensure accurate reporting and clarify misleading statements. 5 U.S.C. § 552(b)(5).

10. Freedom of Information Act (FOIA) deliberative process privilege exemption encompasses the traditional discovery privileges, including the deliberative process privilege, which protects agency documents that are both predecisional and deliberative. 5 U.S.C. § 552(b)(5).

11. Vaughn index submitted by Citizenship and Immigration Services (CIS) failed to identify any connection between its law enforcement authority and the information contained in the withheld material, as required for Freedom of Information Act (FOIA) exemption for records or information compiled for law enforcement purposes; Vaughn index merely noted that the documents were “compiled for law enforcement purposes” without providing any further detail or explanation. 5 U.S.C. § 552(b)(7).

12. An agency seeking to invoke Freedom of Information Act (FOIA) exemption for records or information compiled for law enforcement purposes does not have to identify a particular individual or incident as the object of an investigation into a potential violation of law or security risk. 5 U.S.C. § 552(b)(7).

13. To establish that a record or information was compiled for law enforcement purposes, and thus exempt from disclosure under Freedom of Information Act (FOIA), requires an agency to demonstrate that the relationship between its authority to enforce a statute or regulation and the activity giving rise to the requested documents is based upon information sufficient to support at least a colorable claim of the relationship’s rationality. 5 U.S.C. § 552(b)(7).

14. Declarations and Vaughn index submitted by Citizenship and Immigration Services (CIS) provided no basis for the District Court to make a finding that CIS had released all reasonably segregable portions of each withheld document, as required by Freedom of Information Act (FOIA), warranting remand; there was no description of the agency’s process for making such a determination, no factual recitation of why certain materials were not reasonably segregable, and no indication of what proportion of the information in a document was non-exempt and how that material was dispersed throughout the document. 5 U.S.C. § 552(b).

15. An agency cannot justify withholding an entire document in response to Freedom of Information Act (FOIA) request simply by showing that it contains some exempt material; rather, the agency must demonstrate that all reasonably segregable, nonexempt information was released. 5 U.S.C. § 552(b).

_Fadiga v. Atty Gen., 488 F.3d 142 (3d Cir. 2007)_


2. Court of Appeals reviews for abuse of discretion Bureau of Immigration Appeals’ (BIA) denial of motion to reopen removal proceedings; however, Court reviews de novo BIA’s determination of underlying procedural due process claim, and BIA’s determination of

3. Due process in removal proceedings requires that alien: (1) is entitled to fact finding based on record produced before decision maker and disclosed to him or her; (2) be allowed to make arguments on his or her own behalf; and (3) has right to individualized determination of his or her interests. U.S. Const. amend. V; Immigration and Nationality Act, 8 U.S.C. § 1231.

4. When alien claims denial of due process because he was prevented from making his case to Bureau of Immigration Appeals (BIA) or immigration judge (IJ), alien must show that: (1) he was prevented from reasonably presenting his case, and (2) substantial prejudice resulted. U.S. Const. amend. V; Immigration and Nationality Act, 8 U.S.C. § 1101 et seq.


6. Bureau of Immigration Appeals’ (BIA) “bar complaint” procedural requirement for considering Fifth Amendment-based claim of ineffective assistance of counsel, that alien state whether complaint has been filed with appropriate disciplinary authorities regarding allegedly deficient representation, was satisfied, as to claim arising on petition for withholding of removal, by alien’s attorney’s affidavit taking responsibility for alien’s failure to put before Bureau all necessary evidence to support petition. U.S. Const. amend. V; Immigration and Nationality Act, 8 U.S.C. § 1231.

7. On claim of ineffective assistance of counsel in removal proceedings, court determines whether: (1) competent counsel would have acted otherwise, and (2) whether alien was prejudiced by counsel’s poor performance. U.S. Const. amend. V; Immigration and Nationality Act, 8 U.S.C. § 1231.

8. To satisfy prejudice prong of claim of ineffective assistance of counsel in removal proceedings, alien must show reasonable likelihood that result would have been different absent counsel’s unprofessional errors. U.S. Const. amend. V; Immigration and Nationality Act, 8 U.S.C. § 1231.

9. On alien’s motion to reopen petition seeking withholding of removal and protection under Convention Against Torture (CAT), on grounds of ineffective assistance of counsel, Bureau of Immigration Appeals (BIA), in evaluating prejudice prong, should not have required alien to demonstrate clear probability that result would have been different absent attorney’s unprofessional errors; rather, correct standard was reasonable likelihood of different outcome. U.S. Const. amend. V; Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3) and note; 8 C.F.R. § 1003.2(c)(4).

10. Attorney’s performance, on alien’s petition seeking withholding of removal and protection under Convention Against Torture (CAT), was deficient, as required to support reopening removal proceeding based on ineffective assistance of counsel; petition had been prepared by law student, had not been reviewed by attorney, and was not discussed with alien by attorney.
in advance of hearing before immigration judge (IJ), and attorney did not advise alien to produce witnesses or declarations that would have supported his claims of past persecution and probability of future torture. U.S. Const. amend. V; Immigration and Nationality Act, 8 U.S.C. § 1231.

11. Alien’s attorney’s deficient performance on petition seeking withholding of removal and protection under Convention Against Torture (CAT), consisting of, inter alia, failure to instruct alien to produce witnesses, was prejudicial to alien, warranting reopening of petition; immigration judge (IJ) doubted alien’s credibility, based on evidentiary inconsistencies that would have been avoided by competent counsel, and IJ also discounted probative value of documentary evidence as unsupported, but corroboration would have been available given competent advice and preparation. U.S. Const. amend. V; Immigration and Nationality Act, 8 U.S.C. § 1231.

*Nnadika v. Atty Gen.*, 484 F.3d 626 (3d Cir. 2007)

1. When the alien’s habeas petition does not directly challenge the administrative removal order, it does not fall within the transfer provision of the REAL ID Act and the District Court retains jurisdiction. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252.

2. Nigerian alien’s petition for review of order of removal issued by the Board of Immigration Appeals (BIA) would be denied; although petition asserted that the Immigration Customs Enforcement (ICE) officials failed to properly adjudicate alien’s derivative asylee petition which was filed after final removal order was entered, the petition did not assert any legal error in the earlier removal order itself. Immigration and Nationality Act, § 101, 8 U.S.C. § 1101; 8 C.F.R. § 3.23(b).

3. Court of Appeals lacked jurisdiction over Nigerian alien’s claim for injunctive and declaratory relief from his detention as result of the denial of his petition for derivative asylee status as spouse of alien who received grant of asylum, which was initially filed in the District Court; the claim did not fall within the REAL ID Act’s authority for transfer, as a petition for review of a final removal order, and thus, it should have remained with the District Court. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252.

*Chukwu v. Atty Gen.*, 484 F.3d 185 (3d Cir. 2007)

1. Reliance by immigration judge (IJ), in determining that alien’s testimony in support of his asylum application was not credible, on inconsistencies that were explained by the evidence, with no explanation of why the probative evidence in the record might have been rejected, necessitated remand for reconsideration of that evidence; evidence in the record indicated that alien’s statement that he continued to live with his wife until he left Nigeria was not inconsistent with his wife’s testimony in their divorce proceedings that alien had intermittently abandoned the family two years before leaving Nigeria, and there was evidence that alien’s ability to come and go from Nigeria using his passport was not inconsistent with his testimony that police were looking for him.
2. Inconsistencies between an airport statement and an asylum seeker’s testimony before an immigration judge (IJ) is not sufficient, standing alone, to support a Board of Immigration Appeals (BIA) finding that the alien was not credible.

3. In determining that aliens’ testimony in support of his asylum application was not credible, in part because he failed to corroborate certain aspects of his claim, immigration judge (IJ) was required to identify facts for which it was reasonable to expect alien to produce corroboration, and permit alien to explain why he had not produced corroborating evidence.

*Jarbough v. Att’y Gen.*, 483 F.3d 184 (3d Cir. 2007)

1. Alien’s claim that Board of Immigration Appeals (BIA) made clear factual mistakes in determining that extraordinary circumstances did not exist to justify alien’s untimely filing of asylum application did not state a colorable constitutional violation, and thus, court of appeals did not have jurisdiction to review BIA’s determination; although alien claimed his right to due process was violated by BIA’s factual mistakes, he made no attempt to tie his claim of factual errors to the Due Process Clause, and he did not claim that he was denied notice, reasonable opportunity to present evidence, or an individualized determination. U.S. Const. amend. V; Immigration and Nationality Act, § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D).

2. Substantial evidence supported determination of Board of Immigration Appeals (BIA) that alien’s past troubles in Syria did not rise to the level of persecution, for purposes of eligibility for withholding of removal; although alien testified that Syrian intelligence officers seized him on two occasions, and held him first for four hours while threatening him with wires and electrical cables and jabbing his shoulder with their fists, and later for two days, while threatening, kicking and shoving him, alien suffered only bruising, and he did not see a doctor because his injuries did not require immediate medical attention. 8 C.F.R. § 1208.16(b).

3. Immigration judge did not violate alien’s right to due process by refusing to grant a continuance of hearing on application for withholding of removal so alien could secure testimony of professor about plight of Syrian Druze, since alien was able to introduce lengthy article by professor, and he did not claim that professor’s in-court testimony would have materially differed from his written work. U.S. Const. amend. V.

4. Immigration judge did not violate alien’s right to due process at hearing on application for withholding of removal by excluding testimony of another Syrian Druze about Syrian government’s persecution of his family, offered to show that people similarly situated to alien were being killed in Syria on account of being Druze; alien was able to introduce the proposed witness’s affidavit, and he did not explain whether or how witness would have expanded on his account in live testimony. U.S. Const. amend. V.

5. Immigration judge did not violate alien’s right to due process at hearing on application for withholding of removal by repeatedly admonishing alien’s counsel not to ask alien leading questions, and instructing counsel at length about impropriety of his behavior; counsel repeatedly asked alien leading questions, and he announced the answer to one of his
questions to alien, such that it was counsel, rather than alien, who was testifying. U.S. Const. amend. V.

Shehu v. Att'y Gen., 482 F.3d 652 (3d Cir. 2007)

1. Despite the agreement of both parties, Court of Appeals has an independent obligation to examine its jurisdiction to hear an appeal.

2. Court of Appeals had jurisdiction to review Board of Immigration Appeals’ (BIA) denial of a Visa Waiver Program (VWP) applicant’s petition for asylum, withholding of removal, and relief under the CAT; denial of alien’s petition constituted a final order of removal, since the alien was entitled to no further process before deportation. Immigration and Nationality Act, §§ 217(a), 217(b), 242(a)(1), 8 U.S.C. §§ 1187(a), 1187(b), 1252(a)(1); 8 C.F.R. § 217.4(a)(1).


4. Court of Appeals reviews the Immigration Judge’s (IJ) and Board of Immigration Appeals’ (BIA) findings in an asylum proceeding for substantial evidence, and may not set them aside unless a reasonable fact finder would be compelled to find to the contrary.

5. Evidence in asylum proceeding did not compel conclusion that the criminal gang that pursued alien in Albania was motivated by anything more than a bare desire for money; gang kidnapped alien’s brother, who was a bank director, as well as alien, to force brother to give them access to the bank’s money, and there was no evidence that alien was targeted because of his political affiliation.

6. Substantial evidence supported decision, in asylum proceeding, to disregard alien’s testimony that the gang which kidnapped alien and his brother in Albania was headed by the Governor, where none of alien’s previous filings made that allegation.

7. Substantial evidence supported conclusion, in asylum proceeding, that the criminal gang which threatened alien and his brother in Albania, after they thwarted a plot to gain access to a bank’s money, was motivated by animus toward alien’s family, where there was no evidence that any family members not involved in thwarting the robbery were threatened.

8. Substantial evidence supported conclusion, in asylum proceeding, that any presumption of a well-founded fear of future persecution, to which alien might have been entitled on account of his prior imprisonment in Albania, was rebutted by the collapse of the Communist regime and the passage of eleven years during which alien was free from government persecution. 8 C.F.R. § 208.16(b)(1).

9. An applicant who establishes past persecution is entitled to a presumption that his life or freedom will be threatened if he returns. 8 C.F.R. § 208.16(b)(1).
10. Alien who failed to show an objectively reasonable basis for his fear of persecution in Albania, as would establish grounds for asylum, also failed to establish the clear probability of persecution required for withholding of removal.

11. Evidence did not compel conclusion that alien was more likely than not to be tortured with the consent or acquiescence of the Albanian government upon his return, as would warrant grant of his request for relief under the Convention Against Torture (CAT). 8 C.F.R. §§ 1208.16(c)(2), 208.18(a)(1).

*United States v. Laville*, 480 F.3d 187 (3d Cir. 2007)

1. In reviewing a suppression order, an appellate court exercises plenary review over the District Court’s legal conclusions, and it reviews the underlying factual findings for clear error.

2. The reasonableness of an arrest under the Fourth Amendment does not depend on whether is was lawful under state or local law. U.S. Const. amend. IV.

3. The validity of an arrest under state or local law is at most a factor that a court may consider in assessing the broader question of probable cause. U.S. Const. amend. IV.

4. An arrest that is unlawful under state or local law is not unreasonable per se under the Fourth Amendment. U.S. Const. amend. IV.

5. Mere violation of a state statute does not infringe the federal Constitution, and state rather than federal courts are the appropriate institutions to enforce state rules.

6. It is reasonableness that is the central inquiry in determining the validity of an arrest under the Fourth Amendment. U.S. Const. amend. IV.

7. Sufficient probability, not certainty, is the touchstone of determining the reasonableness of an arrest under the Fourth Amendment. U.S. Const. amend. IV.

8. Probable cause to support an arrest exists whenever reasonably trustworthy information or circumstances within an arresting officer’s knowledge are sufficient to warrant a person of reasonable caution to conclude that an offense has been or is being committed by the person being arrested. U.S. Const. amend. IV.

9. Reasonable suspicion and probable cause are determined with reference to the facts and circumstances within the officer’s knowledge at the time of the investigative stop or arrest. U.S. Const. amend. IV.

10. Arresting officer had probable cause to arrest defendant for alien smuggling offenses; officer went to a wharf to investigate a report that a witness had seen a boat run aground in the harbor and illegal aliens were coming ashore, officer observed boat stranded in harbor with a number of people still on board, witness pointed out for officer a group of persons sitting nearby on the boardwalk, who identified themselves as Cubans who came off the boat and indicated that other aliens were in the vicinity, witness and officer also observed defendant
and others nearby, and when defendant and the others spotted the approaching officer, they immediately stood up and started walking away quickly, and later began running. U.S. Const. amend. IV.

11. Where police officers reasonably suspect that an individual may be engaged in criminal activity, and the individual deliberately takes flight when the officers attempt to stop and question him, the officers generally no longer have mere reasonable suspicion, but probable cause to arrest. U.S. Const. amend. IV.

12. Where defendant’s initial arrest by Virgin Islands police officers did not violate the Fourth Amendment, the Immigration and Customs Enforcement (ICE) was not required to make an independent showing of probable cause before assuming custody of defendant. U.S. Const. amend. IV.

13. In determining whether an arrest is reasonable under the Fourth Amendment, courts must never lose sight of the fundamental principle that reasonable suspicion and probable cause are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. U.S. Const. amend. IV.

14. An alien who enters the United States is entitled to a removal proceeding, while an alien who has not entered can be refused admission through a summary exclusion proceeding.

15. An arrest which violates the federal constitution is not a legal one notwithstanding its legality under state law. U.S. Const. amend. IV.

Atkinson v. Att’y Gen., 479 F.3d 222 (3d Cir. 2007)

1. When faced with an appeal from a district court’s pre-REAL ID Act decision on an alien’s habeas petition, Court of Appeals vacates the district court’s opinion and reviews de novo constitutional claims and questions of law in the habeas petition as if they had been filed with the Court in the first instance as a petition for review of an immigration decision. Immigration and Nationality Act, § 242(a)(1), 8 U.S.C. § 1252(a)(1); 119 Stat. 231.

2. A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.

3. The judgment whether a statute has retroactive effect is informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.

4. Provision of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) precluding aliens who were removable because of convictions for aggravated felonies from applying for discretionary relief from deportation did not apply retroactively to alien who, prior to statute’s enactment, was convicted by a jury of Pennsylvania offenses of criminal conspiracy and possession with intent to distribute a controlled substance and served a term of imprisonment of less than five years; provision attached a new legal consequence, in form

Lavira v. Att’y Gen., 478 F.3d 158 (3d Cir. 2007)

1. For the purpose of determining availability of withholding of removal, the presumption that a drug trafficking crime is a “particularly serious crime” can be overcome if the offense is a drug trafficking crime but nevertheless falls short of that standard. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, §§ 305(b)(3)(ii), 305(b)(3)(iv), 8 U.S.C. § 1231(b)(3)(ii), § 1231(b)(3)(iv).


3. On a petition for withholding of removal, remand is appropriate when an IJ decision flatly ignores the grounds presented by the petitioner, since meaningful review is not possible; consequently, a decision maker such as the IJ must actually consider the evidence and argument that a party presents.

4. Petition for withholding of removal had to be remanded to dispose of challenge made by alien, citizen of Haiti, to presumptive designation that his drug conviction was “particularly serious crime” which would have rendered him ineligible for withholding of removal, where there was record evidence as to nature of drug conviction of alien and unique facts in alien’s favor but immigration judge stated that “[n]o evidence has been submitted to this Court that would allow the Court to find that” drug conviction was not particularly serious, and IJ never referred to facts of crime, and made only conclusory statement. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 305(b)(3)(ii), 8 U.S.C. § 1231(b)(3)(ii).

5. Immigration judge had to focus on specifics of situation of alien, citizen of Haiti, in considering his Convention Against Torture (CAT) claim, where claim detailed how prison guards would treat him as HIV-positive prisoner with politically unpopular affiliation and claim addressed specific act of placing someone with his medical conditions, as HIV-positive and above-the-knee amputee, in disease-infested facility; severe pain was not “a” possible consequence that “may result” from placing alien in that facility, it was only plausible consequence given what Haitian officials know about alien and about their own facility. 8 C.F.R. §§ 208.16(c)(2), 1208.16(c)(3).

6. In a Convention Against Torture (CAT) case, intent can be proven through evidence of deliberate ignorance or willful blindness. 8 C.F.R. §§ 208.16(c)(2), 1208.16(c)(3).

7. When the IJ’s findings are wholly unsupported by the record and essentially ignore the actual basis of a Convention Against Torture (CAT) claim, the case must be remanded so the IJ may take a fresh look, one that focuses on the true underpinnings of that claim. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 305, 8 U.S.C. § 1231.

Kibinda v. Att’y Gen., 477 F.3d 113 (3d Cir. 2007)
1. The Court of Appeals reviews the Board of Immigration Appeals’ refusal to reopen an asylum record to include supplemental documents and remand to the Immigration Judge (IJ) for abuse of discretion.

2. Where the Board of Immigration Appeals (BIA) adopted the reasoning of the Immigration Judge (IJ) in its decision denying asylum, the Court of Appeals reviews the decision of the IJ.

3. The Court of Appeals must uphold the findings of an Immigration Judge (IJ) denying asylum if there is substantial evidence in the record to support them, which is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

4. The findings of an Immigration Judge (IJ) denying asylum must be upheld unless the evidence not only supports a contrary conclusion, but compels it.

5. In order to establish past or future persecution, an asylum applicant must show past or potential harm rising to the level of persecution on account of a statutorily enumerated ground that is committed by the government or by forces the government is unable or unwilling to control. REAL ID Act of 2005, § 101(b)(1), 8 U.S.C. § 1158(b)(1).

6. Asylum applicant, a native and citizen of Angola who was from Cabinda, failed to establish that his five-day detention by Angolan army amounted to past persecution; applicant suffered single injury when “something” heavy was thrown in darkened cell at numerous individuals and hit applicant in jaw, and circumstances surrounding incident made it difficult to determine whether applicant was the intended target or to ascertain a motive.

7. In order to form the basis for an asylum claim, the conduct complained of must be extreme.

8. An asylum applicant is not required to provide direct proof of his persecutors’ motives in order to make out a claim of past persecution; however, because the statute makes motive critical, an applicant must provide some evidence of it, direct or circumstantial. REAL ID Act of 2005, § 101(b)(1), 8 U.S.C. § 1158(b)(1).

9. When an asylum request is based on a fear of future persecution, a petitioner must show a well-founded subjective fear, which is supported by objective evidence that persecution is a reasonable possibility.

10. Asylum applicant, a native and citizen of Angola who was from Cabinda, failed to establish that his fear of future persecution based on his suspected Cabindan sympathies was objectively reasonable; applicant was selected for special schooling and training by Angolan army, applicant was not punished after card demonstrating membership in Cabindan separatist group was discovered or after he helped Cabindan cadet desert army, and applicant was promoted in army.

11. An asylum applicant is required to raise and exhaust his remedies as to each claim or ground for relief before the Immigration Judge (IJ) of Board of Immigration Appeals (BIA) to preserve the right of judicial review of that claim. Immigration and Nationality Act, § 242(d)(1), 8 U.S.C. § 1252(d)(1).
12. Asylum applicant, a native and citizen of Angola who was from Cabinda, failed to establish that he would face disproportionately greater punishment for deserting the Angolan army because he was Cabindan, and thus failed to establish well-founded fear of future persecution; despite his Cabindan heritage, applicant was singled out for special training and promotions throughout his army career, and applicant was always treated by Angolan army as valued and trusted member up until the time he deserted.

13. Disproportionate punishment may constitute persecution in an appropriate asylum case.

14. Asylum applicant, a native and citizen of Angola who was from Cabinda, failed to establish a reasonable possibility that he would be placed in a position in which he might be forced to commit human rights abuses, and thus failed to establish a well-founded fear of future persecution; applicant only had speculative fear of having to fight his own people as member of Angolan army, in his decade of service in army he had never been placed in that situation, and in those ten years, applicant had only seen combat once and that was against non-Cabindan rebel forces in area outside of Cabinda.

15. It is the punishment for refusing to serve in an internationally condemned military that constitutes persecution; therefore, when an asylum applicant does not wish to be associated with a military that engages in universally condemned acts of violence, the only relevant factor is the likelihood that the applicant will be punished.

16. An asylum applicant who fails to establish a well-founded fear of persecution, fails to meet the higher standard of demonstrating a clear probability of persecution as required to be eligible for withholding of removal.

17. Although reports from state department and private organizations reported some incidents of torture in Angola, the evidentiary record as a whole did not compel the conclusion that alien, a native and citizen of Angola who was from Cabinda, would likely be tortured if removed to Angola, and thus did not support alien’s claim for relief under the Convention Against Torture (CAT). 8 C.F.R. § 208.16(c)(2).

18. An applicant seeking relief under the Convention Against Torture (CAT) must establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 208.16(c)(2).

19. Although the standard for establishing a Convention Against Torture (CAT) claim is more stringent than the asylum standard, it does not follow that a failure to meet the asylum standard necessarily precludes a CAT claim.

United States v. Vargas, 477 F.3d 94 (3d Cir. 2007)

1. The Court of Appeals has jurisdiction to review a sentence for reasonableness. 28 U.S.C. § 3742(a).

2. Disparity between sentences in fast-track and non-fast-track districts did not make defendant’s 41-month sentence for illegal reentry, which was imposed in non-fast-track district, unreasonable; by authorizing fast-track programs Congress was necessarily
providing that sentencing disparities that resulted from those programs were warranted and defendant failed to show that other defendants’ circumstances exactly paralleled his. 18 U.S.C. § 3553(a)(6); Immigration and Nationality Act, § 276(a), (b)(2), 8 U.S.C. § 1326(a), (b)(2).

3. Although the statutory sentencing factors do not require district courts to consider sentencing disparity among co-defendants, it also does not prohibit them from doing so where co-defendants are similarly situated. 18 U.S.C. § 3553(a).

4. The Court of Appeals reviews sentences solely for reasonableness.

5. The Court of Appeals will tolerate statutory sentencing disparities so long as a judge demonstrates that he or she viewed the Guidelines as advisory and reasonably exercised his or her discretion. 18 U.S.C. § 3553(a)(6).

6. District court considered the statutory sentencing factors in imposing 41-month sentence for defendant’s offense of illegal reentry; court heard testimony from defendant and his wife about circumstances surrounding his illegal reentry, expressly noted that Guidelines were advisory, knew sentence could vary from advisory range, and found defendant’s knife-point robbery conviction too serious to be offset by considering his personal circumstances. 18 U.S.C. § 3553(a)(6); Immigration and Nationality Act, § 276(a), (b)(2), 8 U.S.C. § 1326(a), (b)(2).

7. To determine if a district court acted reasonably in imposing a sentence, the Court of Appeals first considers whether the court exercised its discretion by considering the relevant statutory sentencing factors and looks to the record to see if the court gave meaningful consideration to the factors and to any meritorious grounds properly raised by the parties. 18 U.S.C. § 3553(a).

8. District courts are not required to discuss and make findings as to each of the statutory sentencing factors if the record makes clear the court took the factors into account in sentencing. 18 U.S.C. § 3553(a).

9. To determine if a district court acted reasonably in imposing a sentence, reviewing court determines whether the statutory sentencing factors were reasonably applied to the circumstances of the case. 18 U.S.C. § 3553(a).

10. The Court of Appeals shows great deference to the trial court, recognizing that it is in the best position to tailor a sentence to a particular defendant and his offense.

11. Because district court judges render sentencing decisions orally and spontaneously from the bench after the presentation of numerous arguments, the Court of Appeals does not expect them to deliver a perfect or complete statement of all of the surrounding law.

12. Counsel for the parties should clearly place the sentencing grounds they are raising on the record at the time of the sentencing hearing; the court is not required to manufacture grounds for the parties, or search for grounds not clearly raised on the record in a concise and timely manner.
13. District court understood its authority and exercised its discretion in denying defendant’s motion for downward departure at illegal reentry sentencing; district court explained that defendant’s family circumstances were not sufficient to warrant departure and cited an example of a situation in which it might be inclined to grant a departure. Immigration and Nationality Act, § 276(a), (b)(2), 8 U.S.C. § 1326(a), (b)(2).

14. The Court of Appeals does not have jurisdiction to review discretionary decisions by district courts to not depart downward at sentencing.

15. Appellate jurisdiction arises if the district court’s refusal to depart downward at sentencing is based on the mistaken belief that it lacks discretion to do otherwise.

16. Under the Sixth Amendment, a prior conviction does not need to be proven to a jury in order to be considered at sentencing. U.S. Const. amend. VI.

*Jeune v. Att’y Gen.*, 476 F.3d 199 (3d Cir. 2007)

1. The Court of Appeals exercises plenary review over an alien’s legal argument that he was not convicted of an aggravated felony, for purposes of determining whether alien was ineligible for discretionary relief from order of removal.

2. Pennsylvania offense of manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance, was not categorically an aggravated felony, for purposes of determining whether alien was subject to removal; it was not clear as to whether trafficking was an element of the offense. 35 P.S. § 780-113(a)(30); Immigration and Nationality Act, § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).


4. Alien’s Pennsylvania conviction for manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance, without additional facts, did not constitute an aggravated felony for purposes of determining whether alien was subject to removal; none of the documents in the appellate record shed any light on facts of alien’s conviction. 35 P.S. § 780-113(a)(30); Immigration and Nationality Act, § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

5. Alien’s Pennsylvania conviction for manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance, was not analogous to a conviction under the federal felony drug trafficking statute, for purposes of determining whether state conviction constituted aggravated felony warranting deportation; federal statute provided that distribution of drugs for no remuneration would be punished as misdemeanor, state statute did not contain remuneration as an element, and record contained no indication that alien was distributing marijuana for money. 35 P.S. § 780-113(a)(30); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C. § 841(a)(1).
Caroleo v. Gonzales, 476 F.3d 158 (3d Cir. 2007)

1. Upon alien’s petition for review of removal orders, the Court of Appeals review constitutional claims and questions of law de novo. Immigration and Nationality Act, § 242(a), 8 U.S.C. § 1252(a).

2. Using a categorical analysis to determine if removable alien is entitled to a discretionary waiver of removal, the Court of Appeals compares the removal and exclusion provisions of the Immigration and Nationality Act (INA) to determine whether they are substantially equivalent. Immigration and Nationality Act, §§ 212(c), 237, 8 U.S.C. §§ 1182(c), 1227.

3. The aggravated felony crime of violence ground for removal is not a statutory counterpart of the exclusion provision of the Immigration and Nationality Act (INA) for an crime involving moral turpitude, for purpose of discretionary waiver of removability. Immigration and Nationality Act, §§ 212(a), (c), 237, 8 U.S.C. §§ 1182(a), (c), 1227.

4. Italian alien convicted of attempted murder and ordered removable for commission of a crime of violence was not entitled to discretionary waiver of removal; the crime of violence aggravated felony ground for removal was not substantially equivalent to the crime involving moral turpitude ground for exclusion, such that the two could be considered statutory counterparts. Immigration and Nationality Act, §§ 212(a), (c), 237(a)(2)(C), 8 U.S.C. §§ 1182(a), (c), 1227(a)(2)(C).

Silva-Rengifo v. Att’y Gen., 473 F.3d 58 (3d Cir. 2007)

1. Unlike with asylum or withholding of removal, an alien seeking relief under Convention Against Torture (CAT) need not establish that he/she is a “refugee” and therefore need not establish that torture is inflicted “on account of” any protected status. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 305, 8 U.S.C. § 1231; 8 C.F.R. § 1208.18(a)(1).

2. The acquiescence that must be established under the Convention Against Torture (CAT) does not require actual knowledge of torturous activity; similarly, although a government’s ability to control a particular group may be relevant to an inquiry into governmental acquiescence under the CAT, that inquiry does not turn on a government’s “ability to control” persons or groups engaging in torturous activity. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 305, 8 U.S.C. § 1231; 8 C.F.R. § 1208.18(a)(7).

3. Convention Against Torture (CAT) does not require an alien to prove that the government in question approves of torture, or that it consents to it; rather, an alien can satisfy the burden established for CAT relief by producing sufficient evidence that the government in question is willfully blind to such activities. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 305, 8 U.S.C. § 1231; 8 C.F.R. § 1208.18(a)(1).

4. For purposes of Convention Against Torture (CAT) claims, “acquiescence” to torture requires only that government officials remain willfully blind to torturous conduct and breach their legal responsibility to prevent it. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 305, 8 U.S.C. § 1231; 8 C.F.R. § 1208.18(a)(7).
5. Where Board of Immigration Appeals (BIA) applied incorrect legal standard of acquiescence in determining whether Colombian petitioner qualified for relief under Convention Against Torture (CAT), case would be remanded to the BIA to give the BIA the first opportunity to apply the correct standard of acquiescence. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 305, 8 U.S.C. § 1231; 8 C.F.R. § 1208.18(a)(7).

Yong Wong Park v. Att’y Gen., 472 F.3d 66 (3d Cir. 2006)


4. Judicial estoppel is a judge-made doctrine that seeks to prevent a litigant from asserting a position inconsistent with one that she has previously asserted in the same or in a previous proceeding and is not intended to eliminate all inconsistencies; rather it is intended to prevent litigants from playing fast and loose with the courts.

5. Asserting inconsistent positions does not trigger the application of judicial estoppel unless intentional self-contradiction is used as a means of obtaining unfair advantage.

Celaj v. Att’y Gen., 471 F.3d 483 (3d Cir. 2006)

1. Substantial evidence supported determination of immigration judge that alien failed to establish that two robberies of his home in Albania constituted past persecution on account of alien’s political opinion, for purposes of eligibility for asylum; although alien testified that he thought the first robbery was committed by five members of the Socialist Party whom he had arrested and who had been released the previous night, alien admitted that he could not identify the perpetrators of the robberies or provide evidence of their motivation, and there was no evidence that the second robbery, which took place after alien left Albania, was on account of his political opinion. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b)(1), 242(b)(4)(B), 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1), 1252(b)(4)(B); 8 C.F.R. § 1208.13(b)(1).

2. Substantial evidence supported determination of immigration judge that alien failed to establish that his being fired from his job with the police department in Albania constituted past persecution on account of his political opinion, for purposes of eligibility for asylum; although alien testified that he believed he was fired because he complained that individuals
he had arrested were being released, and he claimed that police officers who supported the Democratic Party as he did were replaced by officers loyal to the Socialist Party, he admitted that the police chief did not tell him why he had been fired. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b)(1), 242(b)(4)(B), 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1), 1252(b)(4)(B); 8 C.F.R. § 1208.13(b)(1).

3. Substantial evidence did not support determination of immigration judge that alien failed to establish that anonymous threats he received in Albania were made on account of his political opinion, as required to establish past persecution on account of political opinion for purposes of eligibility for asylum; although alien could not identify perpetrators of the anonymous threats, he testified he received numerous anonymous threats and that the callers told him not to get involved in elections, and not to be a bodyguard to members of parliament, or he would be shot, and he testified that a man who identified himself as a member of the Albanian secret service threatened him as he was leaving a Democratic Party gathering, warning him to remove himself from meetings and gatherings. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b)(1), 242(b)(4)(B), 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1), 1252(b)(4)(B); 8 C.F.R. § 1208.13(b)(1).

4. Substantial evidence supported determination of immigration judge that anonymous threats that alien received in Albania did not rise to the level of past persecution, for purposes of eligibility for asylum; although alien testified that he received numerous anonymous threats and that the callers told him not to get involved in elections, and not to be a bodyguard to members of parliament, or he would be shot, neither he nor any of his family members were actually physically harmed, and he lived in Albania without incident for more than a year after receiving the initial threats. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b)(1), 242(b)(4)(B), 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1), 1252(b)(4)(B); 8 C.F.R. § 1208.13(b)(1).

5. Substantial evidence supported determination of immigration judge that alien failed to establish a well-founded fear of future persecution in Albania, for purposes of eligibility for asylum; although alien received threats on account of his political opinion in Albania, he failed to show why threats that were not fulfilled when they were made would be carried out upon his return to Albania several years later, and alien lived in Albania without incident for more than a year after receiving the initial threats. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b)(1), 242(b)(4)(B), 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1), 1252(b)(4)(B).

*Mudric v. Att’y Gen.*, 469 F.3d 94 (3d Cir. 2006)

1. Normally, the court of appeals has jurisdiction over an alien’s claims only where the alien has raised and exhausted his or her administrative remedies as to that claim; however, due process claims are generally exempt from the exhaustion requirement because the Board of Immigration Appeals (BIA) does not have jurisdiction to adjudicate constitutional issues. U.S. Const. amend. V.

2. Alien had no due process entitlement to the wholly discretionary benefits of asylum and adjustment of status based on his mother’s permanent resident alien application, and thus,
government did not violate alien’s right to due process by delaying consideration of his asylum application and his mother’s permanent resident alien application. U.S. Const. amend. V.

3. An alien seeking admission to the United States through asylum requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.

4. Even if government was negligent in not processing alien’s asylum application in a more expeditious fashion, such negligence did not constitute affirmative misconduct, as required for government to be equitably estopped from denying alien’s asylum application.

5. To prevail on a claim of equitable estoppel against the government in the immigration context, the alien must establish: (1) a misrepresentation; (2) upon which he reasonably relied; (3) to his detriment; and (4) affirmative misconduct.

6. Alien’s right to due process was not denied with respect to decision of immigration judge (IJ) denying alien’s asylum application, since fact finding by IJ was disclosed to alien, alien had an opportunity to make arguments on his own behalf, and IJ’s decision in the case constituted an individualized determination.

7. Substantial evidence supported determination of immigration judge (IJ) that alien’s testimony in support of asylum application was not credible; IJ found that alien’s testimony that he was a marked man in Serbia because of his relationship with a Muslim woman lacked credibility in light of country reports indicating that consorting between different ethnic groups was common in the former Yugoslavia before the civil war, and alien presented no evidence of past opposition to military service or expression of substantial anti-war sentiments in support of claim that he feared persecution for his moral opposition to military service and to the civil war.

_Ghebrehiwot v. Att’y Gen.,_ 467 F.3d 344 (3d Cir. 2006)

1. Where the Board of Immigration Appeals (BIA) affirms the Immigration Judge’s (IJ) decision in an asylum proceeding without opinion, Court of Appeals reviews the IJ’s decision as if it were the decision of the BIA.

2. Court of Appeals reviews the denial of relief in an asylum proceeding to determine if the conclusion is supported by substantial evidence.

3. To reverse the decision below in an asylum proceeding, Court of Appeals must find that the record not only supports reversal, but compels it.

4. Where the Immigration Judge (IJ) did not make an adverse credibility determination in an asylum proceeding, Court of Appeals, on review, proceeds as if the alien’s testimony was credible.

5. An asylum applicant who offers credible testimony regarding past persecution is presumed to have a well-founded fear of future persecution.
6. The well-found fear of persecution standard in an asylum proceeding involves both a subjectively genuine fear of persecution and an objectively reasonable possibility of persecution.

7. Withholding of removal is mandatory once the Attorney General determines that the alien’s life or freedom would be threatened because of a protected trait or activity. Immigration and Nationality Act, § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A).

8. To obtain withholding of removal, an alien must establish a clear probability — i.e., that it is more likely than not that he/she would suffer persecution if returned to his/her country of origin. Immigration and Nationality Act, § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A).


10. An applicant for relief under the Convention Against Torture (CAT) bears the burden of establishing that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 208.16(c)(2).

11. An alien’s testimony, if credible, may be sufficient, in an application for relief under the Convention Against Torture (CAT), to sustain the burden of proof without corroboration. 8 C.F.R. § 208.16(c)(2).

12. If an alien meets his or her burden of proof in an application for relief under the Convention Against Torture (CAT), withholding of removal or deferring of removal is mandatory. Immigration and Nationality Act, § 241(b)(3), 8 U.S.C. § 1231(b)(3); 8 C.F.R. §§ 208.16-208.18.


14. Remand was required, in asylum proceeding, so that government could consider whether alien’s country conditions evidence established a pattern and practice of persecution of Pentecostal Christians in Eritrea after alien left the country, as would demonstrate a well-founded fear of future persecution; alien submitted State Department’s International Religious Freedom Report 2004, which designated Eritrea a country of particular concern for particularly severe violations of religious freedom, as well as approximately thirty different articles which alien contended documented the Eritrean government's systematic persecution of adherents of disfavored religions.

15. Even though alien’s claim, on appeal in asylum proceeding, that he belonged to the social group of Eritrean soldiers forced to retreat into Sudan during war who were unwilling to return to Eritrea due to fear of persecution based on being labeled a traitor or spy, was raised before the Board of Immigration Appeals (BIA), claim was not properly before the Court of Appeals on appeal; argument was never raised before the Immigration Judge (IJ) and BIA never ruled on the claim, but only affirmed the IJ’s decision without opinion.
16. Immigration Judge (IJ) erred in finding that alien’s failure to meet the evidentiary burden for asylum precluded relief under the Convention Against Torture (CAT), requiring remand for a determination of alien’s CAT claim.

17. A government cannot exempt torturous acts from prohibition under the Convention Against Torture (CAT) merely by authorizing them as permissible forms of punishment in its domestic law. 8 C.F.R. § 208.18(a)(3).

*Joseph v. Att’y Gen.*, 465 F.3d 123 (3d Cir. 2006)

1. In order to exhaust his administrative remedies with respect to his claim that his offense of transporting or receiving firearms purchased or obtained outside the state of residence, which was basis for his removal order, was not an aggravated felony, as required for court of appeals to have jurisdiction to review the claim, alien was not required to apply for cancellation of removal, since alien was not asking court of appeals to grant him cancellation of removal. Immigration and Nationality Act, § 242(d)(1), 8 U.S.C. § 1252(d)(1).

2. Alien failed to exhaust his administrative remedies, as required for court of appeals to have jurisdiction to review claim, with respect to his claim that he was prima facie eligible for naturalization; alien did not contest determination of immigration judge (IJ) that he was ineligible for naturalization in either his brief in support of his appeal to Board of Immigration Appeals (BIA) or his motion to reconsider or reopen after BIA affirmed IJ’s decision. Immigration and Nationality Act, § 242(d)(1), 8 U.S.C. § 1252(d)(1).

3. Under categorical approach for determining whether alien’s offense constituted an aggravated felony, so as to be grounds for removal, alien’s conviction for transporting or receiving firearms purchased or obtained outside his state of residence was not a firearms trafficking offense, and thus, it was not an aggravated felony; statute of conviction did not include any element of dealing in firearms, and did not require that purchase and transportation or receipt of firearm be accompanied by any intent to sell or otherwise distribute the firearm. Immigration and Nationality Act, §§ 101(a)(43), 237(a)(2)(C), 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(C); 18 U.S.C. § 922(a)(3).

4. The court of appeals applies the formal categorical approach for determining whether an alien’s offense constitutes an aggravated felony unless: (1) the language of the particular subsection of the statute defining the term aggravated felony at issue invites inquiry into the underlying facts of the case, or (2) the disjunctive phrasing of the statute similarly invites inquiry into the specifics of the conviction. Immigration and Nationality Act, § 101(a)(43), 8 U.S.C. § 1101(a)(43).

*United States v. Delfin-Colina*, 464 F.3d 392 (3d Cir. 2006)

1. The Court of Appeals reviews for clear error a district court’s factual findings in a suppression hearing.

2. A traffic stop is a seizure within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and the resulting detention quite brief. U.S. Const. amend. IV.
3. An officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. U.S. Const. amend. IV.

4. Reasonable, articulable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence and only a minimal level of objective justification is necessary for a Terry stop. U.S. Const. amend. IV.

5. Fourth Amendment requires only reasonable suspicion in the context of investigative traffic stops, not probable cause. U.S. Const. amend. IV.

6. Though reasonable suspicion for a traffic stop is a generally undemanding standard, a police officer does have the initial burden of providing the specific, articulable facts to justify a reasonable suspicion to believe that an individual has violated the traffic laws.

7. A traffic stop will be deemed a reasonable seizure when an objective review of the facts shows that an officer possessed specific, articulable facts that an individual was violating a traffic law at the time of the stop. U.S. Const. amend. IV.

8. Even though state trooper had mistaken belief that anything hanging from rearview mirror violated Pennsylvania traffic code, trooper had reasonable suspicion to conduct traffic stop when he noticed what appeared to be long necklace hanging from rearview mirror, since he believed item was not stationary and was obscuring driver’s vision; law prohibited items attached to rearview mirrors in a position to materially obstruct or obscure driver’s vision, and an officer who correctly interpreted the Pennsylvania traffic code would have possessed reasonable suspicion to believe the driver (transporting illegal alien) was in violation of the code. U.S. Const. amend. IV; 75 Pa. Cons. Stat. § 4524(c).

Gabuniya v. Att’y Gen., 463 F.3d 316 (3d Cir. 2006)

1. Substantial evidence did not support finding of immigration judge (IJ) that alien’s testimony in support of withholding of removal application was not credible; discrepancy between alien’s testimony that his wife died immediately after being beaten by police in Georgia and his later testimony that she died three days later was minor inconsistency, six-day discrepancy between date alien originally gave for his arrest and corrected date to which he later testified was reasonably explained by causal link between first date, which was date of assassination attempt on Georgia’s president, and date of alien’s arrest on suspicion of links to assassination planners, and IJ’s conclusion that it was implausible that alien was held for only seven or eight hours after his arrest was based on speculation. Immigration and Nationality Act, § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B).

2. In making an adverse credibility determination, the immigration judge must provide specific, cogent reasons why the applicant is not credible.

3. Substantial evidence did not support finding of immigration judge (IJ) that alien did not show that he suffered past persecution in Georgia, for purposes of eligibility for withholding of removal; alien testified that he endured arbitrary arrests, detention, beatings, threats, and coercive attempts to extract a false confession to the attempted assassination of Georgia’s
president, and that his wife was murdered by police when she cried for help as alien was being beaten by police.

Garcia v. Att’y Gen., 462 F.3d 287 (3d Cir. 2006)

1. A plea of nolo contendere is a conviction for immigration purposes.

2. The legal classification of prior convictions is not a factual proposition susceptible of admission by a litigant, instead it is a legal proposition that must be determined by a court in accordance with legal authority.

3. A felony state drug conviction is an aggravated felony, for purpose of determining whether alien is ineligible for cancellation of removal, if the state offense contains a trafficking element. Immigration and Nationality Act, § 239(a)(3), 8 U.S.C. § 1229(a)(3).

4. A state drug conviction, regardless of its classification, is an aggravated felony, for purpose of determining whether alien is ineligible for cancellation of removal, if it would be punishable as a felony under the Federal Controlled Substances Act. Immigration and Nationality Act, § 239(a)(3), 8 U.S.C. § 1229(a)(3).

5. Alien’s conviction for violating Pennsylvania statute prohibiting manufacture, delivery, or possession with intent to manufacture or deliver controlled substance constituted an aggravated felony rendering alien ineligible for cancellation of removal; conviction was a felony and criminal complaint stated defendant unlawfully sold and delivered marijuana to an undercover police officer and latter possessed additional marijuana in a quantity indicating intent to deliver. 35 P.S. § 780-113(a)(30); Immigration and Nationality Act, § 239(a)(3), 8 U.S.C. § 1229(a)(3).

6. In order to qualify as an aggravated felony, rendering alien ineligible for cancellation of removal, under the illicit trafficking route, a state drug conviction must satisfy two requirements: (1) the offense must be a felony under the law of the convicting sovereign, and (2) the offense must contain a trafficking element. Immigration and Nationality Act, § 239(a)(3), 8 U.S.C. § 1229(a)(3).

7. In order for a state drug conviction to contain a trafficking element, as required for conviction to be an aggravated felony rendering an alien ineligible for cancellation of removal, it must involve the unlawful trading or dealing of a controlled substance. Immigration and Nationality Act, § 239(a)(3), 8 U.S.C. § 1229(a)(3).

United States v. Yusuf, 461 F.3d 374 (3d Cir. 2006)

1. Defendant must make a substantial preliminary showing that the affidavit contained a false statement, which was made knowingly or with reckless disregard for the truth, which is material to the finding of probable cause, in order to be entitled to Franks v. Delaware hearing. U.S. Const. amend. IV.

2. At Franks v. Delaware hearing, the defendant must ultimately prove by a preponderance of the evidence: (1) that the affiant knowingly and deliberately, or with a reckless disregard for
the truth, made false statements or omissions that created a falsehood in applying for a warrant; and (2) that such statements or omissions were material, or necessary, to the probable cause determination. U.S. Const. amend. IV.

3. In evaluating a claim that an officer asserted or omitted facts in warrant application with reckless disregard for the truth, (1) omissions are made with reckless disregard for the truth when an officer recklessly omits facts that any reasonable person would want to know; and (2) assertions are made with reckless disregard for the truth when an officer has obvious reasons to doubt the truth of what he or she is asserting. U.S. Const. amend. IV.

4. When faced with an affirmative misrepresentation in warrant application, the court is required to excise the false statement from the affidavit; in contrast, when faced with an omission, the court must remove the falsehood created by an omission by supplying the omitted information to the original affidavit. U.S. Const. amend. IV.

5. Informants are not presumed to be credible, and the government in seeking warrant is generally required to show by the totality of the circumstances either that the informant has provided reliable information in the past or that the information has been corroborated through independent investigation. U.S. Const. amend. IV.

6. Information received from other law enforcement officials during the course of an investigation is generally presumed to be reliable for purposes of warrant application. U.S. Const. amend. IV.

7. In challenging accuracy of warrant application based in part on information supplied by sister government agency, defendant is required to demonstrate initially that the information provided by the agency would have put a reasonable official on notice that further investigation was necessary; if this initial burden is met, the defendant must point to additional objective factors, suggesting that the agent’s subsequent inquiry would have rendered the agent’s reliance upon that information unreasonably reckless. U.S. Const. amend. IV.

8. Discrepancy between corporate federal income tax return reporting income of approximately $41 million and corporation’s gross receipts of $270,000 as supplied by Virgin Islands Bureau of Internal Revenue (VBIR) required government agent to search for corroboration and explanation before relying on latter information in seeking search warrant. U.S. Const. amend. IV.

9. In assessing whether agent was reckless in relying on inaccurate information supplied by sister agency in seeking search warrant, factors to be considered include: (1) whether a reasonable agent would have been aware of a systemic failure on the agency’s part to produce accurate information upon request, and (2) whether the agent’s particular investigation into possibly inaccurate information would give rise to an obvious reason to doubt the accuracy of the information. U.S. Const. amend. IV.

10. FBI agent did not act recklessly in including inaccurate information grossly understating defendant corporation’s reported gross receipts in application for warrant to search for corporate business records and cash, for purposes of Franks motion to suppress evidence in
money laundering prosecution, where information was supplied by Virgin Islands Bureau of Internal Revenue (VIBIR) pursuant to court order, there was no evidence of any systemic failure on agency’s part to provide accurate information, and agent conducted reasonable investigation into possibly questionable information, which resulted in repeated but mistaken assurances by VIBIR that information was accurate, and which did not give rise to obvious reason to doubt veracity of information. U.S. Const. amend. IV.

11. Agent who conducted reasonable investigation into veracity of information supplied by another government agency pursuant to ex parte court order in ongoing criminal investigation and uncovered no obvious reason to doubt information was not required to set forth his subjective misgivings regarding quality of information in search warrant affidavit that set forth all material information in his possession. U.S. Const. amend. IV.

12. In reformulating search warrant affidavit without recklessly false information supplied by agent, court may not include corrected information. U.S. Const. amend. IV.

13. Probable cause determination is to be made only after considering the totality of the circumstances, which requires courts to consider the cumulative weight of the information set forth by the investigating officer in connection with reasonable inferences that the officer is permitted to make based upon the officer’s specialized training and experiences. U.S. Const. amend. IV.

14. Assuming agent was reckless in including false gross receipts information in search warrant affidavit in money laundering investigation, reformulated affidavit supplied probable cause for issuance of warrant to search corporation’s supermarkets for business records and cash; affidavit alleged that corporation’s principals made large currency deposits that were inconsistent with corporation’s usual business practices, and which consisted solely of large denomination $50 and $100 bills, suggesting that money was not tied to legitimate grocery sales, and which structured more than $1.9 million into smaller deposits that were more consistent with normal business activity. U.S. Const. amend. IV.

15. Mere passage of time does not render information in a search warrant affidavit stale where: (1) the facts suggest that the activity is of a protracted and continuous nature, and (2) the items to be seized were created for the purpose of preservation, such as business records. U.S. Const. amend. IV.

16. Six-month gap between deposits suggestive of money laundering and execution of warrant, as well as inclusion of historical information that unrelated search two years earlier had revealed approximately $3 million in cash in defendant’s offices, did not render search warrant affidavit stale. U.S. Const. amend. IV.

17. General warrants that fail to particularly describe things to be seized violate the Fourth Amendment because they essentially authorize a general exploratory rummaging in a person’s belongings. U.S. Const. amend. IV.

18. Search warrants issued in money laundering investigation to search three business locations for business records and cash were drawn with sufficient particularity; warrants were limited by specifying that agents were searching for evidence of several specifically enumerated
federal crimes, warrant was limited in time to records from 1990 to date of search in 2001, and evidence was limited to records pertaining to specifically named corporations, principals, and employees. U.S. Const. amend. IV.

*Bobb v. Att’y Gen.*, 458 F.3d 213 (3d Cir. 2006)

1. Although Court of Appeals gives deference to the Board of Immigration Appeals’ (BIA) interpretation of the aggravated felony provisions of the Immigration and Nationality Act (INA) if the court determines that the statute is ambiguous, the BIA is not entitled to deference as to whether a particular federal criminal offense is an aggravated felony; that determination requires the court to interpret federal criminal law and its own appellate jurisdiction, matters outside the authority or expertise of the BIA.

2. Based on alien’s conviction for forging an endorsement on a $13,277 treasury check, government was entitled to charge him as removable for having been convicted of an aggravated felony under either the statutory subsection making an offense involving fraud or deceit in which loss to the victim exceeded $10,000 an aggravated felony, or the subsection making an offense related to forgery for which the term of imprisonment was at least one year an aggravated felony, since those two subsections were not coextensive. Immigration and Nationality Act, § 101(a)(43)(M)(i), (R), 8 U.S.C. § 1101(a)(43)(M)(i), (R); 18 U.S.C. § 510(a)(2).

3. Alien’s conviction for forging an endorsement on a $13,277 treasury check, although it potentially constituted an aggravated felony, so as to render alien removable, under both statutory subsection making an offense involving fraud or deceit in which loss to victim exceeded $10,000 an aggravated felony, and subsection making offense related to forgery for which term of imprisonment was at least one year an aggravated felony, was not a conviction for a hybrid offense, so as to require government to meet requirements of both subsections in order to remove alien; classifications in the two subsections intersected, but had separate and independent elements. Immigration and Nationality Act, § 101(a)(43)(M)(i), (R), 8 U.S.C. § 1101(a)(43)(M)(i), (R); 18 U.S.C. § 510(a)(2).

4. Alien’s conviction for forging an endorsement on a $13,277 treasury check constituted an offense involving fraud or deceit in which loss to victim exceeded $10,000, and thus, it was an aggravated felony conviction, so as to render alien removable; statutory elements of offense required an intent to defraud, and amount of loss was greater than $10,000. Immigration and Nationality Act, § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i); 18 U.S.C. § 510(a)(2).

*United States v. Charleswell*, 456 F.3d 347 (3d Cir. 2006)

1. Fundamental precepts of due process provide an alien subject to illegal reentry prosecution with the opportunity to challenge the underlying removal order under certain circumstances. U.S. Const. amend. XIV; Immigration and Nationality Act, § 276, 8 U.S.C. § 1326.

2. Alien wishing to collaterally attack a previous deportation order or proceeding must establish that (1) he exhausted any administrative remedies that may have been available; (2) the hearing effectively eliminated the right of the alien to obtain judicial review from that
proceeding; and (3) the prior hearing was fundamentally unfair. Immigration and Nationality Act, § 276(d), 8 U.S.C. § 1326(d).

3. Court of Appeals had jurisdiction to review alien's original deportation order on appeal from his conviction for illegal reentry based on his alleged violation of order reinstating the deportation. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326.

4. Alien subject to illegal re-entry prosecution may mount, and courts must hear, a challenge to the validity of both a reinstatement order and the original deportation or removal order. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326.

5. Insofar as the underlying element of illegal re-entry prosecution is a reinstatement order, an alien may attempt to collaterally challenge both the original deportation order and the reinstatement order. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326.

6. Where either reinstatement proceeding or the original deportation proceeding is so procedurally flawed that it effectively eliminated the right of the alien to obtain judicial review, courts may invalidate criminal charges stemming therefrom. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326.

7. Alien was not effectively denied the right to obtain judicial review of order deporting him to the British Virgin Islands, precluding him from collaterally challenging the deportation order in illegal reentry prosecution; although the immigration judge erroneously believed that the United States Virgin Islands were not a territory of the United States for purposes of waiver of deportation, the deportation order was unambiguous, the alien was told he had the right to appeal, and he did not claim that he did not understand that right. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326.

8. Statute granting the courts of appeals subject matter jurisdiction over final orders of removal did not apply to alien's collateral attack on order reinstating his deportation in illegal reentry prosecution; thus, Court of Appeals with jurisdiction over alien's conviction could review the alien's collateral challenge, even though the reinstatement order was entered in district outside of its jurisdiction. Immigration and Nationality Act, §§ 242(a-b), 276, 8 U.S.C. §§ 1252(a-b), 1326.

9. Where a criminal prosecution is based upon an underlying deportation order, an alien may attempt to collaterally challenge that order in the court in which the prosecution takes place. Immigration and Nationality Act, § 242(a-b), 8 U.S.C. § 1252(a-b).

10. Alien was denied opportunity for judicial review of order reinstating his deportation, and thus his failure to directly appeal the reinstatement order did not bar him from collaterally attacking that order in subsequent prosecution for illegal reentry; alien, who appeared pro se at reinstatement proceeding, was never informed he could appeal the reinstatement order to the federal courts of appeal, and was instead given form that suggested that he could only contest the order by making a written or oral statement to an immigration officer. Immigration and Nationality Act, §§ 241(a)(5), 242(a)(1), 8 U.S.C. §§ 1231(a)(5), 1252(a)(1); 8 C.F.R. § 241.8.
11. Failure of Immigration and Naturalization Service (INS) to inform alien of his statutorily prescribed right to seek an appeal of order reinstating his deportation, combined with misleading form suggesting that he could only contest reinstatement order by making a written or oral statement to an immigration officer, was a fundamental defect that, if prejudicial, rendered the reinstatement proceeding fundamentally unfair, as required for alien to collaterally attacking the reinstatement order in subsequent prosecution for illegal reentry. Immigration and Nationality Act, § 276(d)(3), 8 U.S.C. § 1326(d)(3).

12. In order for a deportation proceeding to be “fundamentally unfair,” as required to collaterally attack deportation order in subsequent criminal proceeding, the alien must establish both that some fundamental error occurred and that as a result of that fundamental error he suffered prejudice. Immigration and Nationality Act, § 276(d)(3), 8 U.S.C. § 1326(d)(3).

13. Prejudice necessary for a deportation proceeding to be fundamentally unfair, as required for an alien to collaterally attack a deportation order in a subsequent criminal proceeding, requires a reasonable likelihood that the result would have been different if the error in the deportation proceeding had not occurred. Immigration and Nationality Act, § 276(d)(3), 8 U.S.C. § 1326(d)(3).

*Cabrera-Perez v. Gonzales*, 456 F.3d 109 (3d Cir. 2006)

1. The Court of Appeals reviews the denial of a motion to reopen a removal order entered in absentia for abuse of discretion, but it reviews de novo the legal question whether the alien’s due process rights were violated. U.S. Const. amend. V; Immigration and Nationality Act, § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C).

2. The Fifth Amendment’s due process protections apply to aliens in removal proceedings. U.S. Const. amend. V.

3. In the context of an immigration hearing, due process requires that aliens threatened with removal are provided the right to a full and fair hearing that allows them a reasonable opportunity to present evidence on their behalf. U.S. Const. amend. V.

4. Immigration judge (IJ) deprived alien, a native of the Dominican Republic, of her due process rights by issuing in absentia removal order, based upon alien’s arrival for immigration hearing 15 to 20 minutes after the scheduled start time; although IJ was no longer still on the bench, she had not yet left the building when the alien arrived, alien asserted that she was late because she was waiting for a late-arriving witness who was to ride in the same car with her and was crucial to her case, alien had no history of being late for other immigration proceedings, and alien made every effort to get the IJ to resume the hearing, by speaking to the immigration court staff. U.S. Const. amend. V; Immigration and Nationality Act, § 240(b)(5)(C)(i), 8 U.S.C. § 1229a(b)(5)(C)(i).

5. Alien, a native of the Dominican Republic, who arrived 15 to 20 minutes late for removal hearing did not fail to appear for the hearing, and thus, alien was not required to demonstrate exceptional circumstances to excuse failure to appear, for purpose of motion to reopen in absentia removal order. Immigration and Nationality Act, § 240(b)(5)(C)(i), 8 U.S.C. § 1229a(b)(5)(C)(i).
Alaka v. Att’y Gen., 456 F.3d 88 (3d Cir. 2006)

1. Court of Appeals had jurisdiction to review determination of Board of Immigration Appeals (BIA) that alien was ineligible for withholding of removal as having been convicted of particularly serious crime; jurisdiction-stripping provision of INA for acts committed to discretion of Attorney General did not apply, as exception to withholding of removal for particularly serious crimes was not decision specified to be at discretion of Attorney General. Immigration and Nationality Act, §§ 241(b)(3)(B)(ii), 242(a)(2)(B)(ii), 8 U.S.C. §§ 1231(b)(3)(B)(ii), 1252(a)(2)(B)(ii).

2. Where sections of a statute do not include a specific term used elsewhere in the statute, the drafters did not wish such a requirement to apply.

3. Question of whether discretionary authority has been specified by statute, within provision of INA stripping court of jurisdiction to review certain decisions of Attorney General, should be considered by examining the statute as a whole. Immigration and Nationality Act, § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii).

4. Board of Immigration Appeals (BIA) determination that alien was ineligible for § 212(c) discretionary relief and cancellation of removal upon reentry because she had abandoned her lawful permanent resident status was factual question, rather than constitutional or legal question over which Court of Appeals had jurisdiction as exception to jurisdiction-stripping provisions of INA for certain discretionary decisions of Attorney General. Immigration and Nationality Act, §§ 240A, 242(a)(2)(D), 8 U.S.C. §§ 1229b, 1252(a)(2)(D); 8 C.F.R. § 212.3(f)(2).

5. Basic test for evaluating whether a lawful permanent resident has abandoned that status by virtue of traveling abroad is whether the alien’s extended trips outside the United States constitute temporary visits abroad. Immigration and Nationality Act, § 240A(a)(1), 8 U.S.C. § 1229b(a)(1).

6. Trip outside United States is temporary, and thus not ground to find abandonment of lawful permanent resident status, if it is (1) relatively short, or (2) if not short, the petitioner had a continuous, uninterrupted intention to return to the United States during the entirety of his visit. Immigration and Nationality Act, § 240A(a)(1), 8 U.S.C. § 1229b(a)(1).

7. Issue of intent, in determining whether lawful permanent resident has abandoned that status by virtue of traveling abroad, is not whether the petitioner had the intent to return ultimately, but the intent to return to the United States within a relatively short period. Immigration and Nationality Act, § 240A(a)(1), 8 U.S.C. § 1229b(a)(1).

8. Whether an immigration judge (IJ) applied the correct legal standard is a question of law. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

9. Court of Appeals had jurisdiction over legal question of whether legal permanent resident’s conviction for bank fraud constituted a “particularly serious” crime, as determined by immigration judge (IJ), such that alien was ineligible for withholding of removal. Immigration and Nationality Act, § 240A, 8 U.S.C. § 1229b; 8 C.F.R. § 212.3(f)(2).
10. Offense must be an aggravated felony to be particularly serious within section of INA making alien convicted of particularly serious crime ineligible for withholding of removal. Immigration and Nationality Act, § 240A, 8 U.S.C. § 1229b; 8 C.F.R. § 212.3(f)(2).

11. Categorical approach prohibiting consideration of evidence other than the statutory definition of the offense presumptively applies in determining whether offense is aggravated felony within INA removal provisions; however, formal categorical approach properly may be abandoned when the terms of the statute on which removal is based invites inquiry into underlying facts. Immigration and Nationality Act, § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i).


13. In determining whether alien’s bank fraud conviction was aggravated felony rendering her ineligible for withholding of removal, immigration judge (IJ) erred in considering amount of intended loss for all of the charges rather than the single count to which alien pled guilty under plea agreement, notwithstanding that, for sentencing purposes, that alien’s conduct as to the dismissed charges was part of a common scheme or plan as the offense of conviction. Immigration and Nationality Act, § 101(a)(43)(M)(i), 241(b)(3)(B), 8 U.S.C. § 1101(a)(43)(M)(i), 1231(b)(3)(B); 18 U.S.C. § 1344.

14. For purposes of determining alien’s eligible for withholding of removal, alien’s bank fraud conviction was not for an aggravated felony, and thus was not a disqualifying particularly serious crime, because offense of conviction did not result in loss to victim of more than $10,000. Immigration and Nationality Act, § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

15. Dismissed charges could not be considered in addition to bank fraud count that was offense of conviction in determining whether alien’s offense was “particularly serious” and thus disqualified alien from eligibility for withholding of removal. Immigration and Nationality Act, § 241(b)(3)(B)(ii), 8 U.S.C. § 1231(b)(3)(B)(ii).

*Toussaint v. Atty Gen.*, 455 F.3d 409 (3d Cir. 2006)

1. To obtain mandatory withholding of removal under the Immigration and Nationality Act (INA), an alien must establish by a “clear probability” that his or her life or freedom would be threatened in the proposed country of deportation; clear probability means that it is more likely than not that an alien would be subject to persecution. Immigration and Nationality Act, § 241(b)(3), 8 U.S.C. § 1231(b)(3).

2. Board of Immigration Appeals (BIA) sufficiently explained its reasoning in reversing immigration judge’s grant of alien’s application for withholding of removal to allow for meaningful review by Court of Appeals; BIA considered alien’s claim that she was more
likely than not to be persecuted in Haiti on account of her father’s political opinion and explained that reason for alien’s father’s arrest and mistreatment was unclear, and that father lived for two years in Haiti without incident after his release, and BIA acknowledged alien’s testimony that two unknown individuals warned her she would be in danger if she returned to Haiti, and explained that no background or compelling testimonial evidence established that it was more likely than not that alien would be persecuted.

3. In reversing immigration judge’s grant of alien’s application for withholding of removal to Haiti, Board of Immigration Appeals (BIA) sufficiently demonstrated its acknowledgement and consideration of documentary evidence, including country reports, proffered by alien, since BIA stated that it had considered background evidence.

4. In reversing immigration judge’s grant of alien’s application for withholding of removal to Haiti, Board of Immigration Appeals (BIA) gave sufficient separate and individualized consideration to alien’s claims under Immigration and Nationality Act (INA) and Convention Against Torture (CAT); BIA first determined that alien was not entitled to withholding of removal under INA, considering alien’s testimony that she was threatened by unidentified men that she would be in danger if she returned to Haiti, likelihood that alien’s father’s political views would be imputed to her, and background evidence, and BIA separately addressed CAT claim and found that record did not show that it was more likely than not that alien would be subjected to torture. Immigration and Nationality Act, § 241(b)(3), 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(c)(2).

5. Even though claims for withholding of removal under the Immigration and Nationality Act (INA) and for protection under the Convention Against Torture (CAT) are likely to overlap, they seek two separate forms of relief, and each claim deserves individualized consideration. Immigration and Nationality Act, § 241(b)(3), 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(c)(2).

6. Alien’s status as a criminal deportee did not render her a member of a particular social group, for purposes of eligibility for withholding of removal on ground that she was more likely than not to be persecuted in Haiti on account of her membership in a particular social group. Immigration and Nationality Act, § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A).

Romanishyn v. Att’y Gen., 455 F.3d 175 (3d Cir. 2006)

1. Statute providing that alien must show that his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion to be eligible for grant of withholding of removal requires alien to demonstrate clear probability of persecution on one of these five grounds, and alien must demonstrate that it is more likely than not he would be subject to such persecution if returned to his native land. Immigration and Nationality Act, § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A).

2. Whether an alien who entered the country as a refugee and subsequently acquired lawful permanent resident (LPR) status could be placed in removal proceedings, even though his refugee status was never terminated, was a question of law within jurisdiction of Court of

3. Whether immigration judge (IJ) violated the requirements of due process when he limited the number of witnesses that alien could call at immigration hearing was constitutional claim within jurisdiction of Court of Appeals on petition for review, notwithstanding government’s contention that court lacked jurisdiction because IJ’s decision was discretionary. U.S. Const. amend. V; Immigration and Nationality Act, § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D).

4. Court of Appeals reviews legal decisions of Board of Immigration Appeals (BIA) de novo, but will afford Chevron deference to BIA’s reasonable interpretations of statutes which it is charged with administering.

5. Only ground on which Immigration and Nationality Act (INA) allows termination of refugee status is that the person was not in fact a refugee within meaning of statute at the time of his entry, such that Attorney General made a mistake in allowing him to enter as a refugee in the first place. Immigration and Nationality Act, § 207(c)(4), 8 U.S.C. § 1157(c)(4); 8 C.F.R. § 207.9.

6. A refugee whose refugee status has been not terminated, and who has not yet been adjudicated inadmissible by an immigration officer in the course of applying for lawful permanent resident (LPR) status, may not be placed in removal proceedings, even if he has engaged in conduct that would subject a non-refugee to removal. Immigration and Nationality Act, § 207(c)(4), 8 U.S.C. § 1157(c)(4); 8 C.F.R. § 209.1.

7. When a court reviews an agency’s construction of the statute it administers, it must ask whether the intent of Congress on the precise question at issue is clear, and if it is not clear, in that the statute is silent or ambiguous with respect to the question, the court must ask whether the agency’s interpretation is a permissible construction of the statute; if so, the court must defer to that interpretation.

8. In deciding whether agency’s interpretation of statute it administers is permissible construction of statute, court must determine whether agency’s regulation harmonizes with the plain language of the statute, its origin, and purpose, and so long as the interpretation bears a fair relationship to the language of the statute, reflects the views of those who sought its enactment, and matches the purpose they articulated, it will merit Chevron deference.

9. Alien who entered the United States as a refugee, subsequently adjusted his status to become a lawful permanent resident (LPR), and then was convicted of an aggravated felony and/or two or more crimes of moral turpitude, not arising out of a single scheme of criminal conduct, may be placed into removal proceedings, even though his refugee status was never terminated. Immigration and Nationality Act, §§ 207(c)(4), 209(a), 237(a)(2)(A)(ii, iii), 8 U.S.C. §§ 1157(c)(4), 1159(a), § 1227(a)(2)(A)(ii, iii).

10. Denial of alien’s request to call more than two witnesses in person during hearing in removal proceedings did not substantially prejudice alien, and thus did not violate his due process rights, given that alien was permitted to submit affidavits from witnesses that he was not
allowed to call which were considered by immigration judge (IJ), and that alien called only witness, even though permitted to call two. U.S. Const. amend. V.

11. Court of Appeals exercises plenary review over procedural due process claims arising in the immigration context. U.S. Const. amend. V.

12. Aliens facing removal are entitled to due process, and due process in this context requires that an alien be provided with a full and fair hearing and a reasonable opportunity to present evidence. U.S. Const. amend. V.

13. An alien must show substantial prejudice to prevail on a due process claim. U.S. Const. amend. V.

14. Immigration judges (IJ}s) are entitled to broad discretion over the conduct of trial proceedings, so long as those proceedings do not amount to a denial of the fundamental fairness to which aliens are entitled.

Kumarasamy v. Att’y Gen., 453 F.3d 169 (3d Cir. 2006)


2. Alien’s appeal from denial of writ of habeas corpus challenging deportation would not be converted to a petition for direct review of a removal order, under the REAL ID Act, where alien argued that his deportation was improper because there was no removal order at all. Immigration and Nationality Act, § 242(a)(5), 8 U.S.C. § 1252(a)(5).

3. In reviewing on appeal a federal habeas judgment, the Court of Appeals exercises plenary review over the district court’s legal conclusions and applies a clearly erroneous standard to its findings of fact. 28 U.S.C. § 2241(c).

4. Alien, a citizen of both Sri Lanka and Canada, who was already removed from the United States at the time he filed habeas petition challenging his removal was not “in custody,” for habeas purposes; he was subject to no greater restraint than any other non-citizen living outside American borders. 28 U.S.C. § 2241.

5. An individual need not be incarcerated to be considered in custody for habeas purposes. 28 U.S.C. § 2241.

6. In the criminal context, an individual who is on parole or released on his or her own recognizance is deemed in custody for habeas purposes because of the significant restrictions imposed on his or her freedom. 28 U.S.C. § 2241.

7. As long as the habeas petition was in custody when he filed his petition, a subsequent release from custody will not divest the habeas court of jurisdiction. 28 U.S.C. § 2241.

Obale v. Att’y Gen., 453 F.3d 151 (3d Cir. 2006)
1. Court of Appeals had jurisdiction to stay voluntary departure period specified in Board of Immigration Appeals (BIA) order; although Congress precluded jurisdiction to review denial or grant of request for voluntary departure, Congress failed to explicitly state that it wished to strip Court of jurisdiction to stay period for voluntary departure, and power to stay was part of Court’s traditional equitable powers. 8 U.S.C. § 1229c(f); 28 U.S.C. § 2349(a).

2. The jurisdiction of the Courts of Appeal is limited to that conferred by statute.

3. To support a finding that Congress intended to preclude judicial review of an administrative action, there must be clear and convincing evidence, such as that provided by the language of the applicable statute.

4. “Proceeding,” as used in the statute providing that Courts of Appeals have jurisdiction “of the proceeding” when reviewing agency decisions, would be interpreted according to its ordinary meaning of “[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.” 28 U.S.C. § 2349(a).

5. Department of Homeland Security (DHS) regulation, providing that removal order would become “final” upon overstay of new voluntary departure period granted by Board of Immigration Appeals (BIA) in case when Immigration Judge (IJ) issues alternate order of removal in connection with grant of voluntary departure and BIA reinstates or grants period of voluntary departure, would not be applied to determine finality for purposes of appeal, inasmuch as such application would be inconsistent with statutory definition of final order of removal. 8 U.S.C. §§ 1101(a)(47), 1252(b)(9); 8 C.F.R. § 1241.1(f).

6. Alien’s removal order became final for purposes of appeal when Board of Immigration Appeals (BIA) affirmed alternate order of Immigration Judge (IJ) determining that alien was removable but granting her 60-day period of voluntary departure, not when period for voluntary departure expired. 8 U.S.C. §§ 1101(a)(47), 1252(b)(9).

7. The standard for obtaining a stay of removal also applies to stays of voluntary departure.

8. The Court of Appeals applies the standard for granting a preliminary injunction when examining a petition for a stay of removal, and therefore also when considering a petition for a stay of voluntary departure.

9. Under the preliminary injunction standard, as applied to an alien’s request for a stay of removal, the alien must demonstrate: (1) a likelihood of success on the merits of the underlying petition; (2) that irreparable harm would occur if a stay is not granted; (3) that the potential harm to the moving party outweighs the harm to the opposing party if a stay is not granted; and (4) that the granting of the stay would serve the public interest.

10. Because Court of Appeals had previously granted alien’s petition for stay of removal, it would also grant alien’s petition for stay of voluntary departure pending its final decision on merits of alien’s challenge to removal order.
11. The threshold for establishing eligibility for withholding of removal is higher than that for establishing entitlement to asylum and requires the alien to demonstrate a clear probability that, upon removal to the country of origin, his or her life or freedom would be threatened on account of one of the statutorily enumerated factors. 8 U.S.C. § 1101(a)(42).


13. To qualify for relief under the Convention Against Torture (CAT), an applicant bears the burden of proving through objective evidence that it is more likely than not that s/he would be tortured in the country to which the applicant would be removed. 8 C.F.R. § 1208.16(c)(2).

14. To qualify for relief under the Convention Against Torture (CAT), an applicant bears the burden of proving through objective evidence that it is more likely than not that s/he would be tortured in the country to which the applicant would be removed. 8 C.F.R. § 1208.16(c)(2).

15. Where the Board of Immigration Appeals (BIA) affirms a decision of an Immigration Judge (IJ) without opinion, the Court of Appeals reviews the IJ’s opinion and scrutinizes its reasoning.

16. Review of a removal decision of an Immigration Judge (IJ) is conducted under the substantial evidence standard, which requires that administrative findings of fact be upheld unless any reasonable adjudicator would be compelled to conclude to the contrary. 8 U.S.C. § 1252(b)(4)(B).

17. Although Immigration Judge (IJ) impermissibly conflated the distinct concepts of credibility and corroboration in considering asylum application by citizen of Cameroon, IJ’s failure to make valid credibility determination did not affect result of appeal of denial of asylum, where applicant’s reasonable requests for corroboration were inexplicably unmet. 8 U.S.C. § 1101(a)(42).

18. Even a credible asylum applicant may be required to supply corroborating evidence in order to meet her burden of proof. 8 U.S.C. § 1101(a)(42).

19. If a decision of an Immigration Judge (IJ) denying asylum is supported by substantial evidence in the record, then the IJ’s failure to make a valid credibility determination would not bar the Court of Appeals from denying the applicant’s petition for review without a remand. 8 U.S.C. § 1101(a)(42).

20. Decision of Immigration Judge (IJ), that asylum applicant from Cameroon failed to reasonably corroborate her claim, was supported by substantial evidence, in that IJ’s expectation that applicant’s siblings, including her twin, would mention applicant’s persecution in their asylum applications was entirely reasonable, and, although IJ continued hearing twice, applicant failed to provide any explanation for siblings’ failure to mention her persecution. 8 U.S.C. § 1101(a)(42).
1. When either the terms of the federal statute enumerating categories of crimes or the criminal statute of conviction invite further inquiry into the facts, the immigration judge, the Board of Immigration Appeals (BIA), and the Court of Appeals are permitted to abandon the constraints of the categorical approach for assessing whether an alien has been convicted of an aggravated felony and consider the charging instrument and the plea colloquy for additional information regarding the offense.

2. New Jersey statute under which alien was convicted of third-degree endangering welfare of children invited further inquiry into the facts in order for Board of Immigration Appeals (BIA) to determine whether alien’s conviction was for sexual abuse of a minor, so as to render him deportable for having an aggravated felony conviction, and thus, BIA properly examined the charging instrument; New Jersey statute under which alien was convicted prohibited both sexual conduct that would impair or debauch the morals of a child and causing harm to a child that would make the child an abused or neglected child. Immigration and Nationality Act, § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A); Immigration and Nationality Act, § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii); N.J.S. 2C:24-4(a).

3. The categorical approach for assessing whether an alien has been convicted of an aggravated felony is inappropriate when the disjunctive phrasing of the statute of conviction invites inquiry into the specifics of the conviction.

4. Alien’s conviction under New Jersey law for engaging in sexual conduct which would impair or debauch the morals of a child did not constitute a conviction for sexual abuse of a minor, so as to be an aggravated felony conviction that would render alien deportable; statute of conviction did not require, and charging document did not allege, that alien engaged in sexual conduct with the child. Immigration and Nationality Act, § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A); Immigration and Nationality Act, § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii); N.J.S. 2C:24-4(a).

Cruz v. Att’y Gen., 452 F.3d 240 (3d Cir. 2006)

1. A motion to reopen is the proper means for an alien who has been ordered removed due to a conviction to challenge his removal after that conviction is vacated.

2. Remand was required for Board of Immigration Appeals (BIA) to address issue of whether alien remained removable based on his vacated New Jersey state law conviction for promoting prostitution, as required for Court of Appeals to determine scope of court’s jurisdiction to review BIA’s denial of alien’s motion to reopen removal proceedings based on vacation of conviction that had been basis for removal order; BIA’s decision gave no indication that BIA considered whether alien remained convicted for removal purposes after vacation of conviction, and BIA did not analyze whether alien’s conviction was vacated due to procedural or substantive defects in criminal proceedings or for rehabilitative purposes or to avoid immigration consequences. Immigration and Nationality Act, § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I); Immigration and Nationality Act, § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).
3. To make out a prima facie case for sua sponte reopening of immigration proceedings, an alien must show the presence of an exceptional situation. 8 C.F.R. § 1003.2(a).

4. Because there is no standard governing the agency’s exercise of discretion under regulation permitting Board of Immigration Appeals (BIA) at any time to reopen or reconsider on its own motion any case in which it has rendered a decision, Court of Appeals would lack jurisdiction to review BIA decisions not to reopen proceedings sua sponte. 8 C.F.R. § 1003.2(a).

5. Remand was required for Board of Immigration Appeals (BIA) to address issue of whether it decided not to sua sponte reopen alien’s removal proceedings in an exercise of its unfettered discretion, or based on a conclusion that the alien had not shown an exceptional situation based on the vacation of the state law conviction that was grounds for removal order, so as to establish a prima facie case for sua sponte relief, as required for Court of Appeals to determine whether court had jurisdiction to review BIA’s denial of alien’s motion to reopen removal proceedings based on vacation of conviction that had been basis for removal order. 8 C.F.R. § 1003.2(a).

_Luntungan v. Att’y Gen., 449 F.3d 551 (3d Cir. 2006)_

1. Pursuant to statute providing for judicial review of final orders of removal, Court of Appeals had jurisdiction to review denial of third motion to reopen filed by alien ordered removed in absentia. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252.

2. Ordinarily, the denial of alien’s motion to reopen removal proceedings is reviewed for abuse of discretion.

3. Court of Appeals reviews legal decisions of Board of Immigration Appeals (BIA) de novo, but will afford Chevron deference to BIA’s reasonable interpretations of statutes which it is charged with administering.

4. Alien ordered removed in absentia may file only one motion to reopen. Immigration and Nationality Act, § 240(c)(7), 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.23(b)(4)(ii).

5. Assuming that equitable tolling could be applied to one-motion rule limiting alien ordered removed in absentia to only one motion to reopen, equitable tolling did not apply to permit alien’s third motion to reopen, given that alien had already, in effect, received such relief through second motion to reopen, which alleged ineffective assistance of counsel who filed first motion and gave alien fair chance to be heard. Immigration and Nationality Act, § 240(c)(7), 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.23(b)(4)(ii).

_Purveegiin v. Gonzales, 448 F.3d 684 (3d Cir. 2006)_

1. An action is considered to be within an agency’s absolute discretion, and not subject to judicial review, if the relevant statute or regulation is drawn so that a court would have no meaningful standard against which to judge the agency’s action.
2. Determination by Board of Immigration Appeals (BIA) to employ single-member review was not a matter committed to agency discretion, and thus was subject to judicial review; regulation authorizing single member of BIA to resolve appeals limited that authority by directing that single member “shall” resolve case “unless” it fell within certain categories, which necessarily also implied that single member “shall not” resolve case if it did not fall within one of those categories, providing meaningful standard against which to judge BIA’s exercise of discretion. 8 C.F.R. § 1003.1(e)(5), (e)(6).

3. Board of Immigration Appeals (BIA) was required to refer case reversing determination of Immigration Judge (IJ) to grant withholding of removal to Mongolian alien under Convention Against Torture (CAT) to three member panel, where reversal was not based on intervening legal precedent, but instead on factual disagreements between IJ and authoring BIA member. 8 C.F.R. § 1003.1(e)(5), (e)(6).

François v. Gonzales, 448 F.3d 645 (3d Cir. 2006)

1. In light of intervening passage of REAL ID Act, which eliminated district courts’ habeas corpus jurisdiction over final orders of removal in almost all cases, but restored judicial review of constitutional claims and questions of law via petitions for review, Court of Appeals had to vacate and disregard district court’s opinion on alien’s petition for writ of habeas corpus, which was pending on appeal when Act was passed, and address claims raised in habeas petition as if presented before Court of Appeals in the first instance as a petition for review. Immigration and Nationality Act, § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D).

2. In a petition for review of removal order, the Court of Appeals is limited to pure questions of law, and to issues of application of law to fact, where the facts are undisputed and not the subject of challenge. Immigration and Nationality Act, § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D).

3. The Court of Appeals reviews the legal decisions of the Board of Immigration Appeals de novo, but will afford deference to the BIA’s reasonable interpretations of statutes which it is charged with administering. Immigration and Nationality Act, § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D).

Khan v. Att’y Gen., 448 F.3d 226 (3d Cir. 2006)

1. Authority of immigration judge (IJ) to grant or deny continuance of removal proceeding was not “specified” under certain statutes “to be in the discretion of the Attorney General,” and therefore statute precluding judicial review of decisions specified under such statutes to be within Attorney General’s discretion did not deprive Court of Appeals of jurisdiction over alien’s petition for review challenging denial of his request for continuance of his removal proceeding. Immigration and Nationality Act, § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii).

2. Court of Appeals reviews denial of continuance of removal proceeding for abuse of discretion. 8 C.F.R. § 1003.29.
3. Decision of immigration judge (IJ) denying continuance of removal proceeding should be reversed only if it is arbitrary, irrational, or contrary to law. 8 C.F.R. § 1003.29.

4. Denial of alien’s request for continuance of his removal proceeding, based on wife’s pending application for labor certification, was not abuse of discretion, given that alien was at that time ineligible for immigrant visa, which was prerequisite to adjustment of alien’s status under LIFE Act, that alien could not show that visa was immediately available to him or would be available to him at some estimable time in the future, and that government’s delay in processing wife’s labor certification was not extraordinary circumstance warranting open-ended continuance. Immigration and Nationality Act, § 245(i), 8 U.S.C. § 1255(i); 8 C.F.R. § 1003.29.

5. When alien has failed to submit a visa petition, decision of immigration judge (IJ) to deny alien’s request for continuance of removal proceeding is squarely within IJ’s broad discretion, at least absent extraordinary circumstances.

6. Court of Appeals had jurisdiction to consider alien’s due process claim arising from denial by immigration judge (IJ) of alien’s request for continuance of his removal proceeding, given that claim, stripped of its “due process” label, was claim of procedural error that was raised in such form before Board of Immigration Appeals (BIA); however, claim was properly treated as one of mere procedural error correctable through administrative process. U.S. Const. amend. V.

7. Court of Appeals has jurisdiction over alien’s claim arising from immigration proceedings only when alien has raised and exhausted remedies as to that claim.

8. Exhaustion of administrative remedies is not always required when alien advances a due process claim in immigration proceedings. U.S. Const. amend. V.

9. Denial of alien’s request for continuance of his removal proceeding did not prevent alien from reasonably presenting his case or cause alien substantial prejudice, and thus did not violate due process. U.S. Const. amend. V.

10. Due process challenges to deportation proceedings require an initial showing of substantial prejudice. U.S. Const. amend. V.

Filja v. Gonzales, 447 F.3d 241 (3d Cir. 2006)

1. The Court of Appeals must uphold the factual findings of the Board of Immigration Appeals (BIA) if they are supported by reasonable, substantial, and probative evidence on the record considered as a whole. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252.

2. The Court of Appeals reviews the conclusions of law of the Board of Immigration Appeals (BIA) de novo. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252.

3. The Court of Appeals reviews the denial of a motion to reopen by the Board of Immigration Appeals (BIA) for abuse of discretion, and reviews its underlying factual findings related to

4. The denial of a motion to reopen a deportation order may only be reversed if it is arbitrary, irrational, or contrary to law. 8 C.F.R. § 1003.2(c)(3)(ii).

5. The Board of Immigration Appeals (BIA) construction of an immigration statute is entitled to deference and must be accepted by the Court of Appeals if it is based upon a permissible construction of the statute.

6. Term “previous hearing” in the immigration statute providing for exception to limitations period for motions to reopen asylum proceedings based on changed country circumstances arising after the decision, if such evidence could not have been discovered or presented at the previous hearing, referred only to the hearing before the immigration judge (IJ) and did not encompass the previous proceedings before the Board of Immigration Appeals (BIA); the hearing before the IJ was the only proceeding at which new evidentiary material could be presented. Immigration and Nationality Act, § 240(c)(7), 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(3)(ii).

7. There are three principal grounds on which the immigration judge (IJ) or the Board of Immigration Appeals (BIA) may deny a motion to reopen immigration proceedings: (1) it may hold that the movant has failed to establish a prima facie case for the relief sought, (2) it may hold that the movant has failed to introduce previously unavailable material evidence that justified reopening, or (3) in cases in which the ultimate grant of relief being sought is discretionary, the BIA can pass by the first two bases for denial and determine that even if they were met, the movant would not be entitled to the discretionary grant of relief. 8 C.F.R. § 1003.2(c)(3)(ii).

8. Remand to the Board of Immigration Appeals (BIA) was required for reconsideration of alien’s motion to reopen asylum proceedings based on changed country conditions and ineffective assistance of counsel, and for reconsideration of alien’s motion to reopen claim for relief under the Convention Against Torture (CAT); the BIA rejected the motions on grounds of untimeliness, but the Court of Appeals determined that motions were timely, and the BIA did not sufficiently consider the evidence supporting the claims. Immigration and Nationality Act, § 240(c)(7), 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(3)(ii).

9. In addressing an ineffective assistance of counsel claim in connection with a motion to reopen an asylum proceeding, the Board of Immigration Appeals (BIA) is required to consider the issues raised, and announce its decision in terms sufficient to enable a reviewing court to perceive that it has heard and thought and not merely reacted. Immigration and Nationality Act, § 240(c)(7), 8 U.S.C. § 1229a(c)(7); 8 C.F.R. § 1003.2(c)(3)(ii).

Jilin Pharmaceutical USA, Inc. v. Chertoff, 447 F.3d 196 (3d Cir. 2006)

1. Decision to revoke prior approval of visa petition is left to discretion of Secretary of Homeland Security and thus courts lack jurisdiction to review decision; under statute, Secretary “may” revoke visas “at any time” when Secretary “deems” there to be “good and

2. Where there is no meaningful standard of review for an administrative decision within a statute’s text, the decision is not subject to judicial review.


Chavarria v. Gonzales, 446 F.3d 508 (3d Cir. 2006)

1. Where the Board of Immigration Appeals (BIA) issues a decision on the merits and not simply a summary affirmance, the Court of Appeals reviews the BIA’s, and not the Immigration Judge’s (IJ), decision; however, when there are special circumstances, the Court also looks to the decision of the IJ.

2. In reviewing decisions of the Board of Immigration Appeals (BIA), the Court of Appeals applies a deferential standard of review.

3. Conclusions of the Board of Immigration Appeals (BIA) in asylum proceedings regarding evidence of past persecution and a well-founded fear of persecution are findings of fact, and such conclusions are therefore reviewed under the deferential substantial evidence standard. 8 U.S.C. § 1101(a)(42).

4. So long as an asylum decision of the Board of Immigration Appeals (BIA) is supported by reasonable, substantial, and probative evidence on the record considered as a whole, the Court of Appeals will not disturb the BIA’s disposition of the case. 8 U.S.C. § 1101(a)(42).

5. A Board of Immigration Appeals (BIA) decision denying asylum can only be reversed if the evidence is such that a reasonable fact finder would be compelled to conclude otherwise. 8 U.S.C. § 1101(a)(42).

6. The Board of Immigration Appeals (BIA) must substantiate its decisions in an asylum proceeding, and the Court of Appeals will not accord the BIA deference where its findings and conclusions are based on inferences or presumptions that are not reasonably grounded in the record. 8 U.S.C. § 1101(a)(42).
7. The Court of Appeals will grant asylum to an otherwise qualified alien where the motives and perspective of the persecutor demonstrate that the persecution was on account of a political belief attributed to the alien, even where the alien did not overtly subscribe to that belief. 8 U.S.C. § 1101(a)(42).

8. Testimony of an alien, where credible, may be sufficient to support a claim for asylum based on either past persecution or a well-founded fear of future persecution. 8 U.S.C. § 1101(a)(42).

9. Any case in which an appeal from a decision of an Immigration Judge (IJ) was filed prior to September 25, 2002, which was the general effective date for clearly erroneous review of pending cases and motions by the Board of Immigration Appeals (BIA), is not subject to such new standard of review, and the BIA therefore must engage in de novo review of all factual findings of the IJ in cases in which an appeal was filed prior to such date, and is free to accept or disregard such findings. 8 C.F.R. §§ 1003.1(d)(3)(i), (iv), 1003.3(f).

10. De novo review allows the Board of Immigration Appeals (BIA) to engage in fact finding in the first instance when the BIA rejects, in whole or in part, the Immigration Judge’s (IJ) factual determination.

11. Specific statutory provisions prevail over more general provisions.

12. The requirement that a decision of the Board of Immigration Appeals (BIA) be supported by substantial evidence is not an empty one; thus, if no reasonable fact finder could reach the same conclusion as the BIA based on the record then the finding is not supported by substantial evidence.

13. In determining whether the Board of Immigration Appeals (BIA) erred, the Court of Appeals is required to look at the record as a whole.

14. Court of Appeals would caution Board of Immigration Appeals (BIA) to be diligent in accurately representing evidence and testimony put forth by asylum applicant where that evidence is credible. 8 U.S.C. § 1101(a)(42).

15. To establish past persecution, an asylum applicant must first show that he suffered persecution. 8 U.S.C. § 1101(a)(42).

16. Persecution, for purposes of asylum, does not encompass all forms of unfair, unjust, or even unlawful treatment. 8 U.S.C. § 1101(a)(42).

17. Persecution, for purposes of asylum, includes threats to life, confinement, torture, and economic restrictions so severe that they constitute a real threat to life or freedom. 8 U.S.C. § 1101(a)(42).

18. To constitute persecution for purposes of asylum, threats must be on account of a statutorily protected ground, which includes imputed political opinion, and may be established through credible and persuasive testimony of the applicant. 8 U.S.C. § 1101(a)(42).
19. Finding by Board of Immigration Appeals (BIA), that surveillance of Guatemalan asylum applicant’s home was not carried out by same paramilitaries involved in attack in which applicant had intervened, for purposes of determining whether applicant was persecuted based on imputed political opinion, was not supported by substantial evidence, in that BIA mischaracterized applicant’s testimony. 8 U.S.C. § 1101(a)(42).

20. Erroneous and unsupported facts may not require reversal of a denial of asylum if they were not prejudicial. 8 U.S.C. § 1101(a)(42).

21. Surveillance of Guatemalan asylum applicant by paramilitaries, after applicant had intervened in attack by suspected paramilitaries on women who were affiliated with human rights organization, did not constitute past persecution, in that any threat was not sufficiently imminent or menacing. 8 U.S.C. § 1101(a)(42).

22. Finding by Board of Immigration Appeals (BIA), that death threat made against Guatemalan asylum applicant by paramilitaries was based on fact that they had robbed him, and was not related to their earlier attack on human rights workers in which applicant had intervened, for purposes of determining whether applicant was persecuted based on imputed political opinion, was not supported by substantial evidence, in that applicant testified clearly that robbery was attempt to suppress information about earlier attack. 8 U.S.C. § 1101(a)(42).

23. Death threat against Guatemalan asylum applicant by paramilitaries constituted past persecution in that it was highly imminent, concrete, and menacing, and applicant suffered harm from it, where attackers robbed applicant, pointed gun to his face, and threatened him with death if he told his story of paramilitaries’ attack on human rights workers, in which applicant had intervened. 8 U.S.C. § 1101(a)(42).

24. To establish a well-founded fear of persecution, an asylum applicant must show that his fear is subjectively genuine and objectively reasonable. 8 U.S.C. § 1101(a)(42).

25. To establish a well-founded fear of persecution, an asylum applicant must show that he has a subjective fear of persecution that is supported by objective evidence that persecution is a reasonable possibility. 8 U.S.C. § 1101(a)(42).

26. For an asylum applicant to establish a well-founded fear of persecution, the persecution must be on account of a statutorily protected ground. 8 U.S.C. § 1101(a)(42).

27. While not always the case, an asylum applicant may succeed in demonstrating fear of persecution on account of imputed political opinion solely by testifying credibly that a specific political opinion has been imputed to him by a foreign government. 8 U.S.C. § 1101(a)(42).

28. While past threats against an asylum applicant may not rise to the level of past persecution, they are often quite indicative of a danger of future persecution. 8 U.S.C. § 1101(a)(42).

29. Testimony offered by an asylum applicant in support of a claim of a well-founded fear of future persecution need not demonstrate that the persecution would be more likely than not,
30. Guatemalan asylum applicant established well-founded fear of future persecution based on imputed political opinion, by providing evidence that he had been apolitical when he intervened in incident in which paramilitaries were assaulting human rights workers, that he was then put under surveillance by same paramilitaries, and that he believed he would be killed if he returned to Guatemala. 8 U.S.C. § 1101(a)(42).

31. Since the Court of Appeals is required to assess the motive and perspective of the persecutor to establish whether persecution of an asylum applicant was or will be on account of political opinion, the Court can rely on credible testimony of the alien. 8 U.S.C. § 1101(a)(42).

32. Credible testimony that an asylum applicant fears persecution if returned to his home country establishes a subjective and genuine fear of persecution. 8 U.S.C. § 1101(a)(42).

Shah v. Ati’y Gen., 446 F.3d 429 (3d Cir. 2006)

1. Where the Board of Immigration Appeals (BIA) directs the Court of Appeals to the opinion and decision of the Immigration Judge (IJ) who originally assessed the application, the Court of Appeals reviews the IJ’s opinion.

2. The Court of Appeals reviews an Immigration Judge’s (IJ) findings of fact and credibility determinations under a substantial evidence standard.

3. In reviewing an immigration judge’s (IJ) findings of fact and credibility determinations, the Court of Appeals asks whether such determinations are supported by evidence that a reasonable mind would find adequate.

4. Immigration Judge’s (IJ) conclusions, that Pakistani asylum applicant’s father was not dead, and that applicant thus was not credible, were not supported by substantial evidence, where witness’s statement that applicant’s father remained in Pakistan was reasonably explained by witness as reference to applicant’s father-in-law, IJ’s conclusion that death certificates were “questionable” was based on his selective perusal of documents that he had excluded, and IJ ignored corroborating evidence such as newspaper photograph of father lying in pool of blood where he had been shot.

5. The Court of Appeals does not expect an Immigration Judge (IJ) to selectively consider evidence, ignoring that evidence that corroborates an alien’s claims and calls into question the conclusion the judge is attempting to reach; where an IJ turns his back on these expectations and reaches a conclusion that is not supported by such relevant evidence as a reasonable mind would find adequate, the Court of Appeals will not uphold that conclusion.

Cham v. Ati’y Gen., 445 F.3d 683 (3d Cir. 2006)

1. A finding that an asylum application is frivolous must not be made lightly, for it renders the alien permanently ineligible for any benefits under the immigration laws. 8 U.S.C. § 1158(d)(6).
2. An adverse credibility determination does not automatically and sufficiently support a finding that an asylum application is frivolous, for the applicable regulation requires more, that is, a finding of deliberate fabrication of a material element of an application, plus an opportunity for the alien to account for inconsistencies. 8 U.S.C. § 1158(d)(6); 8 C.F.R. § 208.20.

3. In asylum proceeding, Court of Appeals would review opinion of Immigration Judge (IJ) to extent it was adopted by Board of Immigration Appeals (BIA). 8 U.S.C. § 1158.

4. An asylum applicant should expect dignity, respect, courtesy, and fairness in a hearing before an Immigration Judge (IJ), and such words are not merely advisory or aspirational, in that an applicant is entitled, as matter of due process, to a full and fair hearing on his application. U.S. Const. amend. V; 8 U.S.C. § 1158.

5. The issue of whether an asylum applicant has been denied due process is reviewed de novo. U.S. Const. amend. V; 8 U.S.C. § 1158.

6. A full and fair hearing, which an asylum applicant is entitled to as a matter of due process, will provide him with a neutral and impartial arbiter of the merits of his claim and a reasonable opportunity to present evidence on his behalf. U.S. Const. amend. V; 8 U.S.C. § 1158.

7. Immigration Judge (IJ) violated Gambian asylum applicant’s due process rights, in that IJ continually abused applicant during two-day hearing with result that applicant became increasingly distraught and unable to coherently respond to IJ’s questions, IJ engaged in wholesale nitpicking of applicant’s testimony in attempt to find inconsistencies, and IJ refused to consider relevant evidence that seven of applicant’s close relatives had been granted asylum. U.S. Const. amend. V; 8 U.S.C. § 1158.

8. An applicant cannot rely solely on the persecution of his family members to qualify for asylum, but such evidence can be relevant to the applicant’s claim; this is particularly true where there is a high degree of factual similarity between the applicant’s claim and those of his family members, and where his claim of political persecution rests on that very familial relationship. 8 U.S.C. § 1158.

9. Due process demands that an Immigration Judge (IJ) actually consider the evidence and argument that a party presents. U.S. Const. amend. V.

10. In a due process challenge to asylum proceedings, the issue is not whether the evidence as it stands supports the result reached by the Immigration Judge (IJ) and the Board of Immigration Appeals (BIA), but instead is whether the original deportation hearing was conducted in a fair enough fashion for one to determine that the BIA’s decision was based on reasonable, substantial, and probative evidence. U.S. Const. amend. V; 8 U.S.C. § 1158.

11. The standard for a due process violation in asylum proceedings is not that it must be clear that the applicant would have qualified for asylum had the violation not occurred; rather, it is only required that the violation of a procedural protection had the potential for affecting the outcome of the proceedings. U.S. Const. amend. V; 8 U.S.C. § 1158.
12. The one-year period of limitations for filing an asylum application does not violate the Supremacy Clause or the Due Process Clause. U.S. Const. art. VI, cl. 2; U.S. Const. amend. V; 8 U.S.C. § 1158(a)(2).


McAllister v. Att’y Gen., 444 F.3d 178 (3d Cir. 2006)

1. For purposes of the jurisdictional bar to appellate review of deportation proceedings under the Illegal Immigration Reform and Immigrant Responsibility Act, an alien is not removable for reason of having committed an enumerated criminal offense unless the final order of removal is grounded, at least in part, on one of those enumerated offenses. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252(a)(2)(C).

2. Court of appeals had jurisdiction over Board of Immigration Appeals (BIA) final order of removal, given that the BIA found alien removable because he engaged in terrorist activities, which was not an offense enumerated in jurisdictional bar to appellate review of deportation proceedings under the Illegal Immigration Reform and Immigrant Responsibility Act. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252(a)(2)(C).

3. An appellate court reviews the Board of Immigration Appeals’ (BIA) findings of fact to determine whether substantial evidence supports them.

4. An appellate court reviews the Board of Immigration Appeals’ (BIA) interpretation of the Immigration and Nationality Act (INA) to determine whether it is arbitrary, capricious or manifestly contrary to the statute. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

5. The Board of Immigration Appeals’ (BIA) denial of a motion to reopen will not be disturbed unless it is arbitrary, irrational, or contrary to law.

6. A statute is unconstitutionally vague if men of common intelligence must necessarily guess at its meaning and differ as to its application.

7. A statute is unconstitutionally overbroad if it does not aim specifically at the evils within the allowable area of control by the government but sweeps within its ambit other constitutionally protected activities.

8. Definition of “terrorist activity” in provision of the Immigration and Nationality Act (INA) requiring removal for an alien who has engaged in terrorist activities was neither unconstitutionally vague nor overbroad; the parenthetical phrase “other than for mere personal monetary gain” removed common crimes from the definition by requiring that the offending activity be conducted for reasons other than money, the mens rea element of the provision required the actor to have the specific intent to endanger the safety of individuals or to cause substantial damage to property, precluding situations in which an alien acted in self-defense or in which the alien lacked the capacity to meet the requisite intent, and, none of the aforementioned activities constituted a protected activity outside of the permissible


10. Alien engaged in terrorist activities, as defined by provision of Immigration and Nationality Act (INA) requiring removal for individuals engaged in terrorist activities, notwithstanding fact that alien was not involved in a terrorist organization, but rather the Irish National Liberation Army, given that the INA required only that the alien act as a member of an organization, not necessarily a terrorist organization. Immigration and Nationality Act, § 212(a)(3)(B)(iv), 8 U.S.C. § 1182(a)(3)(B)(iv).

11. Whether alien, a native and citizen of Northern Ireland, targeted non-combatants and whether the situation in Northern Ireland had risen to the level of an Article 3 conflict under Geneva Convention at the time he participated in the Irish National Liberation Army, were not determinative in finding that alien had engaged in terrorist activities, for purposes of alien’s petition for relief from removal. Immigration and Nationality Act, § 212(a)(3)(B)(vi), 8 U.S.C. § 1182(a)(3)(B)(vi).


13. Alien, a native and citizen of Northern Ireland, was ineligible for asylum, regardless of whether alien was a danger to the security of the United States, where alien had engaged in terrorist activities. Immigration and Nationality Act, § 208(b)(2)(A) (iv)-(v), 8 U.S.C. § 1158(b)(2)(A)(iv)-(v); Immigration and Nationality Act, § 237(a)(4)(B), 8 U.S.C. § 1227(a)(4)(B).


15. Alien, a native and citizen of Northern Ireland, failed to establish that it was more likely than not that he would be tortured if removed to Ireland, as required to establish a prima facie case for deferral of removal; country report indicated that Catholic nationalist, conservatives, and Irish Republican Army (IRA) supporters and former IRA members, even those who were convicted and sentenced for terrorist offenses, were able to freely go about their lives, hold prominent positions in business, government, education and other walks of life, and participate openly in the political process and hold public office. 8 C.F.R. § 208.16(c)(2).
Toure v. Att’y Gen., 443 F.3d 310 (3d Cir. 2006)

1. When the Board of Immigration Appeals (BIA) summarily affirms the Immigration Judge’s (IJ) decision, the decision reviewed by the Court of Appeals is that of the IJ.

2. Court of Appeals reviews an Immigration Judge’s (IJ) factual findings in an asylum proceeding, including his or her determination of whether an alien was subject to persecution or has a well-founded fear of future persecution, under the substantial evidence standard.

3. An Immigration Judge (IJ) must support her factual determinations in an asylum proceeding with specific, cogent reasons such that her conclusions flow in a reasoned way from the evidence of record and are not arbitrary and conjectural in nature.

4. To establish eligibility for asylum based on past persecution, an alien must show (1) one or more incidents rising to the level of persecution, (2) that is on account of one of the statutorily-protected grounds, and (3) is committed either by the government or by forces that the government is either unable or unwilling to control. 8 U.S.C. § 1101(a)(42)(A).

5. A showing, in an asylum proceeding, of past persecution gives rise to a rebuttable presumption of a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1).

6. The rebuttable presumption of a well-founded fear of future persecution, to which an alien may be entitled in an asylum proceeding, can be rebutted if the government establishes by a preponderance of the evidence that the alien could reasonably avoid persecution by relocating to another part of his or her country or that conditions in that country have changed so as to make his or her fear no longer reasonable. 8 C.F.R. § 208.13(b)(1).

7. To qualify for withholding of removal, an alien must show a clear probability that his or her life or freedom would be threatened if he or she is deported. 8 C.F.R. § 208.3(b).

8. If an alien fails to establish the well-founded fear of persecution required for a grant of asylum, he or she will, by definition, have failed to establish the clear probability of persecution standard for withholding of removal.

9. To obtain relief under the Convention Against Torture (CAT), an applicant must establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 208.16(c)(2).

10. The burden of establishing eligibility for asylum, withholding of removal, and relief under the Convention Against Torture (CAT) is on the applicant. 8 C.F.R. § 208.13(a).

11. For purposes of an asylum proceeding, “persecution” denotes severe conduct, and does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional.

12. Substantial evidence did not support finding, in asylum proceeding, that three incidents suffered by alien in Cote d’Ivoire were not sufficiently severe to constitute persecution, even if first two incidents did not amount to persecution and even though alien’s wife continued to
reside in the country; wife was in hiding, and persecution was established when first two incidents were considered in conjunction with third incident, in which alien’s home was invaded, his children terrorized, and his wife abducted and beaten by uniformed men.

13. Generally, evidence, in an asylum proceeding, of similarly-situated family members’ continued presence in the country where the persecution allegedly occurred is more probative of whether the petitioner will suffer persecution if he were returned to his home country than whether he suffered persecution in the past.

14. Substantial evidence did not support conclusion, in asylum proceeding, that any persecution suffered by alien in Cote d’Ivoire was not on account of any protected ground, even though he did not belong to any political party; alien was initially imprisoned for reading opposition newspapers at work, indicating that the government was aware of his opposition sympathies, his wife’s political activities might have been attributed to him, and statements made by his persecutors indicated a political and ethnic motivation. 8 U.S.C. § 1101(a)(42)(A).

15. To show eligibility for asylum based on past persecution, an alien must establish that the acts of persecution were committed either by the government or by forces that the government is either unable or unwilling to control.

16. Substantial evidence did not support conclusion that the invasion of alien’s home was not perpetrated by the government of Cote d’Ivoire, as required to establish the requisite governmental nexus in asylum proceeding; alien testified that his children told him that the home invasion was perpetrated by men in military uniforms with guns, and those men abducted alien’s wife, questioned her about his whereabouts, and made statements about northerners.

17. Government’s allegation in asylum proceeding, that alien’s reason for not returning to Cote d’Ivoire was that he would be court-martialed for deserting the military, was not sufficient to rebut presumption that he had a well-founded fear of persecution; alien testified that he left his position in the military because his family was in grave danger of being harmed by government authorities.

18. Rule that fear of prosecution for violations of fairly administered laws does not itself qualify an alien as a refugee or make him eligible for withholding of deportation does not apply where the alien must necessarily break a law to escape persecution.

19. Immigration Judge (IJ) erred, in asylum proceeding, by requiring alien to produce corroborating evidence, including photographic evidence of the ransacking of his home in Cote d’Ivoire, without having given him notice that such evidence was required or an opportunity to explain its absence or seek supporting evidence; IJ did not indicate she expected such evidence until she rendered her oral decision.

20. Adverse credibility determinations in asylum proceedings are reviewed under the substantial evidence standard, and court examines the determination to ensure that it was appropriately based on inconsistent statements, contradictory evidence, and inherently improbable testimony in view of the background evidence on country conditions.
21. Even if Immigration Judge’s (IJ) speculation in asylum proceeding, that alien’s testimony that he was persecuted by the government of Cote d’Ivoire was implausible since he was not fired from his job in the military, amounted to an adverse credibility determination, such determination was not supported by substantial evidence; alien made no inconsistent statements and provided no contradictory evidence, and State Department Report indicated there were major divisions within the military based on ethnic, religious, and political loyalties.

_Hernandez v. Gonzales_, 437 F.3d 341 (3d Cir. 2006)

1. Court of Appeals was required to treat habeas corpus case that was pending on appeal as of effective date of Real ID Act as petition for review of decision of Board of Immigration Appeals (BIA), and thus Court would vacate decision of district court and address issues as if they were presented for first time in petition for review. Immigration and Nationality Act, § 242(a)(5), 8 U.S.C. § 1252(a)(5); 28 U.S.C. § 2241.

2. Alien who overstayed his visa had no liberty or property interest in remaining in United States that would give rise to procedural due process right to apply for discretionary relief to avoid removal, as such relief was subject to Attorney General’s unfettered discretion. U.S. Const. amend. V; Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

3. Alien who overstayed his visa had no liberty or property interest in remaining in United States that would give rise to procedural due process right to apply for discretionary relief to avoid removal, as such relief was subject to Attorney General’s unfettered discretion. U.S. Const. amend. V; Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.


5. Aliens who seek only discretionary relief from deportation have no constitutional right to receive that relief; ability to stay in United States is matter of grace that is extended in Attorney General’s unfettered discretion. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

6. A statute will be impermissibly retroactive when it attaches new legal consequences to prior events because its application would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.

7. Question whether a new statute attaches new legal consequences to prior conduct, so as to be impermissibly retroactive, demands a common sense, functional judgment that should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.

8. Repeal of statute allowing aliens who were subject to removal to apply for suspension of deportation did not have impermissibly retroactive effect on alien who pled guilty to deportable offense prior to the change in the law and who was eligible for relief prior to its
repeal; alien was not qualified for such relief at time of entry of his plea, as suspension was conditioned upon ten years of continuous lawful residence following criminal act, and thus he could not and did not enter his plea in reliance on relief. Immigration and Nationality Act, § 244(a), 8 U.S.C. § 1254(a) (1994).

9. Repeal of statute allowing aliens who were subject to removal to apply for suspension of deportation did not have impermissible retroactive effect on alien by virtue of his post-repeal application for a benefit – adjustment of status based on his marriage to a United States citizen; repeal did not attach new disability to alien’s decision, as alien had no right to continue to conceal his illegal status, and alien had opportunity to reveal himself while pre-repeal rules were still in effect. Immigration and Nationality Act, § 244(a), 8 U.S.C. § 1254(a) (1994).

Ng v. Att’y Gen., 436 F.3d 392 (3d Cir. 2006)


2. Court of Appeals’ review of determination of Board of Immigration Appeals (BIA) that alien’s crime was a crime of violence, and thus an aggravated felony under removal statutes, was plenary, without deference to BIA’s interpretation of crime of violence, as definition was outside the INA. Immigration and Nationality Act, §§ 101(a)(43)(F), 237(a)(2)(A)(ii), 242(a)(2)(D), 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(ii), 1252(a)(2)(D); 18 U.S.C. § 16.

3. Categorical approach applied in determining whether alien’s crime constituted crime of violence, and thus an aggravated felony that rendered him removable, such that court would look only to statutory definition of crime and could not consider other evidence, including particular facts underlying conviction. Immigration and Nationality Act, § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16.


Duvall v. Att’y Gen., 436 F.3d 382 (3d Cir. 2006)

1. Appeal from decision of district court granting habeas relief from an order of removal, which was pending on effective date of Real ID Act, was to be converted to petition for review of decision of Board of Immigration Appeals (BIA), and attorney general substituted as respondent in place of district director of Immigration Customs Enforcement (ICE). 28 U.S.C. § 2241; Immigration and Nationality Act, § 242(b)(3)(A), 8 U.S.C. § 1252(b)(3)(A); Real ID Act § 106(c).
2. Congress, not judiciary, has discretion, based on its own weighing of policy goals, to prescribe the procedures by which an agency will perform its work and render decisions, constrained only by the Constitution, as embodied primarily in the requirement of due process. U.S. Const. amend. V.

3. Only if Congress requires administrative agency to apply collateral estoppel may the federal courts enforce that obligation.


5. An accepted common law doctrine should be implied in a statutory scheme, despite the absence of express authorization, if application of the doctrine is consistent with the structure and purpose of that scheme.

6. Congress may be presumed, when enacting a statute granting adjudicatory authority to an administrative agency, to mandate adherence to the doctrine of collateral estoppel, as an accepted common law doctrine.

7. Principles of collateral estoppel are to be read into INA with respect to functions of immigration judges (IJ's) and Board of Immigration Appeals (BIA) that are inherently adjudicatory in nature, as application of doctrine will not frustrate congressional intent or impede effective functioning of Immigration and Naturalization Service (INS). Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

8. Doctrine of collateral estoppel, or issue preclusion, as read into INA, will bar relitigation of issues in subsequent proceedings within agency itself as well as in subsequent proceedings in federal courts. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

9. Although collateral estoppel is favored as a matter of general policy, its suitability may vary according to the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedures.

10. Doctrine of collateral estoppel will not preclude relitigation of issue when there is substantial difference in procedures employed by the prior and current tribunals, a material intervening change in governing law or the burden of persuasion, or clear and convincing need for new determination of issue because of potential adverse impact of determination on public interest.

11. Application of collateral estoppel in the administrative context must be informed by considerations of agency structure and legislative policy.

12. A primary goal of amendments to INA, through Antiterrorism and Effective Death Penalty Act (AEDPA), Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), and
Real ID Act, is to ensure and expedite the removal of aliens convicted of serious crimes. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

13. Litigation error in prior deportation proceeding, which resulted in adverse determination of issue of alienage, no longer presented collateral estoppel bar to relitigation of issue of alienage by Immigration and Naturalization Service (INS), and thus to further attempts to remove alien, once alien committed subsequent criminal acts; continued application of collateral estoppel would have contravened congressional intent to ensure and expedite the removal of aliens convicted of serious crimes. Immigration and Nationality Act, §§ 101(a)(3), 240(c), 8 U.S.C. §§ 1101(a)(3), 1229a(c).

_Causi v. Att'y Gen._, 436 F.3d 220 (3d Cir. 2006)

1. Affirmance of an immigration judge’s factual findings by the Board of Immigration Appeals (BIA), including its determination of whether an alien was subject to persecution or has a well-founded fear of persecution, is reviewed under a substantial evidence standard.

2. Affirmance of an immigration judge’s credibility determinations by the Board of Immigration Appeals (BIA) is reviewed under substantial evidence standard.

3. Court of Appeals reviews the denial of a motion to reopen by the Board of Immigration Appeals (BIA) for abuse of discretion, and reviews its underlying factual conclusions related to the motion for substantial evidence.

4. The denial by the Board of Immigration Appeals (BIA) of a motion to reopen may only be reversed if it is arbitrary, irrational, or contrary to law.

5. In deciding an alien’s asylum application, an immigration judge must consider the complete record, analyzing the evidence both pro and con.

6. Determination of immigration judge (IJ) that alien was not eligible for asylum was not supported by substantial evidence; factual determinations related to alien’s eligibility for asylum were not supported by substantial evidence, and IJ’s conclusion that testimony of alien’s sister at hearing was selective and inaccurate was unsupported by any explanation or citation to specific instances where her testimony was deficient.

7. A motion to reopen an immigration case may be denied if the Board of Immigration Appeals (BIA) determines that: (1) the alien has not established a prima facie case for the relief sought; (2) the alien has not introduced previously unavailable, material evidence; or (3) in the case of discretionary relief such as asylum, the alien would not be entitled to relief even if the motion was granted.

8. Board of Immigration Appeals (BIA) did not abuse its discretion in denying motions to reopen asylum case in light of subsequent success of alien’s sister in obtaining asylum, as alien did not discuss in first motion any of the reasons sister was granted asylum, and therefore failed to establish that her subsequent case had any bearing on the immigration judge’s conclusion in his case that his sister lacked credibility when she testified in support of his asylum application; moreover, alleged new evidence presented in second motion was
known to alien at time of his hearing, and thus was not properly raised in motion to reopen. 8 C.F.R. § 1003.2(c)(1).

United States v. Bowley, 435 F.3d 426 (3d Cir. 2006)

1. An alien charged with illegal reentry has no possessory or proprietary interest in his or her immigration file or the documentary evidence contained in that file. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326.

2. An alien has no reasonable expectation of privacy, for Fourth Amendment purposes, in a file that is maintained solely by a government agency for official purposes and kept in the custody of that agency. U.S. Const. amend. IV.

3. Evidence of defendant’s true identity as demonstrated by his immigration file was not required to be suppressed as fruit of unlawful arrest, in prosecution for illegal reentry; defendant had no reasonable expectation of privacy in his immigration file. U.S. Const. amend. IV; Immigration and Nationality Act, § 276, 8 U.S.C. § 1326.

Sukwanputra v. Gonzales, 434 F.3d 627 (3d Cir. 2006)

1. One-year statutory period of limitations provided for in the Immigration and Nationality Act (INA) for filing an asylum application does not violate the Supremacy Clause. U.S. Const. art. VI, cl. 2; Immigration and Nationality Act, § 208, 8 U.S.C. § 1158(a)(2)(B).

2. One-year statutory period of limitations provided for in the Immigration and Nationality Act (INA) for filing an asylum application does not violate the Due Process Clause; the one-year period is not an unreasonable requirement for triggering the right to an adjudication, and, thus, an alien is not deprived of due process when his or her asylum claim is denied for failure to comply with the requirement. U.S. Const. amend. V; Immigration and Nationality Act, § 208, 8 U.S.C. § 1158(a)(2)(B).

3. Although the Fifth Amendment entitles aliens to the opportunity to be heard at a meaningful time and in a meaningful manner, it does not violate due process for Congress to impose a reasonable limitations period upon the filing of naturalization petitions. U.S. Const. amend. V; Immigration and Nationality Act, § 208, 8 U.S.C. § 1158(a)(2)(B).

4. Deportation is not a criminal proceeding and has never been held to be punishment, and thus no judicial review is guaranteed by the Constitution. U.S. Const. amend. V.

5. The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, with such opportunity for judicial review of their action as congress may see fit to authorize or permit.

7. Despite the changes of the REAL ID Act, which authorized judicial review of constitutional claims and questions of law, notwithstanding any other provision of the chapter which eliminated or limited judicial review, factual or discretionary determinations continue to fall outside the jurisdiction of the court of appeals entertaining a petition for review. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252(a)(2)(D); Immigration and Nationality Act, § 208, 8 U.S.C. § 1158(a)(3).

8. "Benefit of the doubt" standard did not apply to alien's application for asylum in immigration judge's determination whether alien had established changed or extraordinary circumstances excusing her untimely application; although the United Nations handbook indicated that if an applicant’s account appeared credible, he would be given the benefit of the doubt, the handbook was not binding on the Immigration and Nationality Services (INS) or American courts, and, the handbook set forth procedures for determining refugee status, not for assessing the circumstances surrounding the late filing of an asylum application.

9. Court of Appeals did not have jurisdiction to review alien's claim that evidence in the record demonstrated changed circumstances materially affecting asylum eligibility or extraordinary circumstances relating to the delay, as required to excuse late filing of asylum application, given that such a claim did not raise a constitutional claim or question of law as required for judicial review. Immigration and Nationality Act, § 208, 8 U.S.C. § 1158(a)(2)(D).

10. Documentary evidence, including the address on alien’s husband’s identification card and marriage certificate, if found to be genuine, could have corroborated alien’s testimony and resulted in a favorable credibility determination, and thus, immigration judge’s refusal to give any weight to the evidence and to afford alien an opportunity to authenticate the documents through other means was error, for purposes of withholding of removal claim. Immigration and Nationality Act, § 208, 8 U.S.C. § 1158.

11. Immigration judge’s adverse credibility determination in deciding alien’s withholding of removal claim was not supported by substantial evidence; the adverse credibility determination was based upon speculation and conjecture, and, furthermore, evidence which the immigration judge erroneously excluded, if found to be genuine, would corroborate alien’s testimony. 8 C.F.R. § 287.6.

12. An adverse credibility determination based on speculation or conjecture, rather than on evidence in the record, will be reversed.

13. Where an immigration judge bases an adverse credibility determination in part on implausibility, such a conclusion will be properly grounded in the record only if it is made against the background of the general country conditions.

14. Immigration judge’s failure to consider whether there was a pattern or practice of persecution against Chinese and/or Christians in Indonesia in denying alien’s application for asylum warranted remand for consideration of the question. 8 C.F.R. § 208.13(b)(2)(iii)(A).

15. To establish a well-founded fear of persecution, an asylum applicant must first demonstrate a subjective fear of persecution through credible testimony that her fear is genuine. 8 C.F.R. § 208.13.
16. Immigration judge’s remarks during removal proceedings, including, that the “whole world does not revolve around you and the other Indonesians that just want to live here because they enjoy the United States” gave the appearance that the immigration judge had a predisposition to find against alien, warranting remand to a different immigration judge in order to ensure fairness and the appearance of impartiality.

*Ilchuck v. Att’y Gen.*, 434 F.3d 618 (3d Cir. 2006)

1. If an alien is subject to removal as an aggravated felon, the Court of Appeals may review only constitutional and other legal issues. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252(a)(2)(C), (D); Immigration and Nationality Act, § 237, 8 U.S.C. § 1227(a)(2)(A)(iii).

2. The Court of Appeals reviews pure questions of law and issues of application of law to uncontested facts under a de novo standard.

3. Conviction of alien, who was native of Ukraine, under Pennsylvania theft of services statute, related to diverting dispatch calls for ambulances to his employer, constituted an aggravated felony which was grounds for removal under Immigration and Nationality Act (INA); ambulance calls were not valueless, reason calls were diverted was because they had value, and crime required taking or exercise of control over something of value knowing that its owner had not consented. 18 Pa. Cons. Stat. § 3926; Immigration and Nationality Act, § 101, 8 U.S.C. § 1101(a)(43).

4. Sentence of six to twenty-three months of house arrest with electronic monitoring was a term of imprisonment under Immigration and Nationality Act (INA); nothing in INA indicated that site or mode of imprisonment was determinative, home confinement with monitoring was serious restriction of liberty, and statute’s disjunctive phrasing that imprisonment included period of incarceration or confinement suggested intent to cover more than just time spent in jail. Immigration and Nationality Act, § 101, 8 U.S.C. § 1101(a)(48).

5. Whether offense is aggravated felony, for purposes of Immigration and Nationality Act (INA), is ordinarily determined by actual term of imprisonment imposed. Immigration and Nationality Act, § 101, 8 U.S.C. § 1101(a)(48).

6. Board of Immigration Appeals (BIA) erred in denying withholding of removal to alien, who was native of Ukraine and member of Pentecostal Church, by concluding that imprisonment for refusal to serve in military based on religious beliefs was not persecution, where it appeared as though military requirement in Ukraine provided exemption for members of various religions, but not for members of Pentecostal Church, which may have reflected government’s intent to persecute members of alien’s religion. Immigration and Nationality Act, § 241, 8 U.S.C. § 1231(b)(3)(A).

7. To be eligible for withholding or removal, an alien must demonstrate clear probability of persecution based on race, religion, nationality, membership in a particular social group, or political opinion. Immigration and Nationality Act, § 241, 8 U.S.C. § 1231(b)(3)(A).
8. To be eligible for withholding or removal, an alien must demonstrate that it is more likely than not he would be subject to such persecution if returned to his native land. Immigration and Nationality Act, § 241, 8 U.S.C. § 1231(b)(3)(A).

9. The requirement of showing a clear probability of persecution to be eligible for withholding of deportation is a more stringent standard than that required to establish eligibility for asylum. Immigration and Nationality Act, § 241, 8 U.S.C. § 1231(b)(3)(A).

Chen v. Gonzales, 434 F.3d 212 (3d Cir. 2005)

1. Withholding of removal does not rely on the perspective of the applicant’s well founded fear of persecution, but is instead appropriate only if the Attorney General determines that there is a clear probability that the alien’s life or freedom would be threatened upon her removal to a particular country. Immigration and Nationality Act, § 241, 8 U.S.C. § 1231(b)(3)(A).

2. Where Board of Immigration Appeals (BIA) affirms decision of an immigration judge (IJ) without opinion, in proceeding upon alien’s applications for asylum, withholding of removal, and relief under the Convention Against Torture (CAT), Court of Appeals reviews the IJ’s opinion, under the substantial evidence standard, and scrutinizes its reasoning. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252(b)(4)(B).

3. Adverse credibility determinations by an immigration judge (IJ) are factual findings subject to substantial evidence review. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252(b)(4)(B).

4. Court of Appeals will defer to and uphold adverse credibility determinations of an immigration judge (IJ) if they are supported by reasonable, substantial, and probative evidence on the record considered as a whole, but such findings must be based on inconsistencies and improbabilities that go to the heart of the asylum claim; deference is not due where findings and conclusions are based on inferences or presumptions that are not reasonably grounded in the record as a whole. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252(b)(4)(B).

5. Corroboration is not necessarily required to establish a petitioner’s right to asylum, and relief may be granted solely on the credible testimony of the applicant. 8 C.F.R. §§ 208.13, 208.16(b).

6. Substantial evidence supported IJ’s denial, due to inadequate corroboration, of asylum application of alien, a citizen of China, who claimed persecution based on allegedly having been forced to abort her pregnancy; only corroboration alien offered in support of her claim was an unsworn letter from her father stating that she had been seized by “village cadres” and taken to the hospital where she was forced to undergo an abortion, which affidavit appeared to be based solely on what alien told him, and an “abortion certificate,” which IJ questioned, based on country report which noted that embassy was “unaware” of practice of issuing abortion certificates, and country report also concluded that forced abortion was not governmental policy in China.
7. Failure to comply with regulations governing authentication of documents in immigration proceedings does not result in a per se exclusion of documentary evidence, and a petitioner seeking asylum is permitted to prove authenticity in another manner. 8 C.F.R. § 287.6.

8. Even if immigration judge (IJ) improperly based adverse credibility finding on failure of proof due to lack of corroboration as to alien’s claim that she had been subject to forced abortion in China, rather than discrepancies in alien’s testimony or improbability of her claim, IJ’s failure to make valid credibility determination did not preclude Court of Appeals from denying alien’s petition for review without remand, where IJ’s decision was supported by substantial record evidence.

9. The internal consistency of a witness’s testimony, its consistency with other testimony, its inherent (im)probability, as well as the witness’s tone and demeanor are important factors in determining credibility, in a proceeding on an application for asylum, although excessive focus on insignificant testimonial inconsistencies to support a finding of lack of credibility may not be justified.

10. A credibility determination, in an asylum proceeding, must be independent of an analysis of the sufficiency of an applicant’s evidence.

11. A failure of proof is not a proper ground per se for an adverse credibility determination in an asylum proceeding; the latter finding is more appropriately based upon inconsistent statements, contradictory evidence, and inherently improbable testimony.

12. Even a credible asylum applicant may be required to supply corroborating evidence in order to meet her burden of proof.

13. Fact that country report concluded that forced abortion was not governmental policy in China, but also stated that coercive abortions might occur in some areas, and thus “cut both ways,” did not mean that report could not constitute substantial evidence in support of denying asylum application of alien who claimed she was subjected to forced abortion and thus had been persecuted. Immigration and Nationality Act, § 101, 8 U.S.C. § 1101(a)(42).

14. Alien, who was Chinese citizen, was not entitled to withholding of removal or relief under Convention Against Torture (CAT), based on her claim that she had been forced to abort her pregnancy in China; alien alleged that, if returned to China, she would be prosecuted and imprisoned for illegally exiting China in the first instance, but Chinese law barring illegal emigration was generally applicable to all illegal emigrants who returned to China, and there was nothing in record to support conclusion that either alien would be singled out for particularly harsh punishment or that nature of punishment would be severe enough to amount to persecution or torture. Immigration and Nationality Act, § 241, 8 U.S.C. § 1231(b)(3).

Singh v. Gonzales, 432 F.3d 533 (3d Cir. 2006)

1. Whether alien’s convictions of simple assault and reckless endangerment constituted aggravated felonies presented question of law within Court of Appeals subject matter

2. Alien’s claim that he was denied due process when he was limited to one witness in removal proceedings before immigration judge (IJ) was within Court of Appeal’s subject matter jurisdiction to review constitutional claims. U.S. Const. amend. V; Immigration and Nationality Act, § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D).

3. Court of Appeals had subject matter jurisdiction to review alien’s Convention Against Torture (CAT) and withholding of removal claims to the extent they present questions of law, or of the application of law to undisputed fact. Immigration and Nationality Act, § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D).

4. Court of Appeals did not owe deference to interpretation of criminal statute by Board of Immigration Appeals (BIA), in determining that alien committed “crime of violence” and thus was removable as aggravated felon, as statute was outside BIA’s area of special expertise. 18 U.S.C. § 16.

5. Underlying facts of the conviction are not relevant in determining whether criminal conviction constitutes crime of violence, which will render alien removable for commission of aggravated felony; rather court must look to the elements and the nature of the offense of conviction when determining whether it is a crime of violence. Immigration and Nationality Act, § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16.

6. For purposes of federal statute defining crime of violence, it does not matter that the state criminal code does not characterize offense as a felony; rather, the key inquiry is whether crime has as an element the use, attempted use, or threatened use of physical force against the person or property of another, for which the term of imprisonment is at least one year. 18 U.S.C. § 16(a).

7. To qualify as a “crime of violence,” which will render alien removable as aggravated felon, a criminal statute must require a mens rea of specific intent to use force; mere recklessness is insufficient. Immigration and Nationality Act, § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16.

8. Section of Pennsylvania simple assault statute, requiring attempt by physical menace to put another in fear of imminent serious bodily injury, was a “crime of violence” under federal criminal statute, and thus an “aggravated felony” whose commission rendered alien removable; act of “physical menace,” intended to place another in fear of imminent serious bodily injury, at the very least, constitutes attempted or threatened use of physical force. Immigration and Nationality Act, § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16; 18 Pa. Cons. Stat. § 2701(a)(3).

9. Pennsylvania offense of recklessly endangering another person, was not a “crime of violence” under federal criminal statute, and thus not an aggravated felony that would render alien removable, because it required a mens rea of no more than recklessness. 18 U.S.C. § 16(a); 18 Pa. Cons. Stat. § 2705.
10. To prevail on due process claim, alien must show substantial prejudice as result of denial of
full and fair hearing of claims and reasonable opportunity to present evidence. U.S. Const.
amend. V.

11. Alien was not substantially prejudiced when he was precluded from presenting more than
one witness at removal hearing, as required to violate his due process rights, absent showing
that evidence would have been more than cumulative and would have tended to establish
withholding of removal or Convention Against Torture claims, particularly where counsel
consented to presentation of testimony from only one witness. U.S. Const. amend. V;

12. Alien was not substantially prejudiced when he was precluded from presenting more than
one witness at removal hearing, as required to violate his due process rights, absent showing
that evidence would have been more than cumulative and would have tended to establish
withholding of removal or Convention Against Torture claims, particularly where counsel
consented to presentation of testimony from only one witness. U.S. Const. amend. V;

13. Alien’s due process rights were not violated by his alleged inability to understand questions
from counsel, as immigration judge (IJ) understood his testimony as conveying alien’s fear of
torture and persecution and took it as establishing subjective fear. U.S. Const. amend. V;

*United States v. Kiam, 432 F.3d 524 (3d Cir. 2006)*

1. Court of Appeals’ review of the district court’s factual findings in hearing to suppress
confession was for clear error.

2. Court of Appeals’ review of legal rulings and mixed questions of law and fact is plenary.

3. Inquiry in Miranda cases is not into the officer’s subjective intent, suspicion, or views as to
whether individual being questioned is a suspect. U.S. Const. amend. V.

4. Border inspectors have authority to ask questions of those entering the United States, and a
person seeking entry does not have a right to remain silent, but must convince a border
inspector of his or her admissibility to the country by affirmative evidence. U.S. Const.
amend. V; Immigration and Nationality Act, § 235(b), 8 U.S.C. § 1225(b); 8 C.F.R. §
235.1(d)(1).

5. While an alien seeking entry into the United States is unquestionably in “custody” until he is
admitted to the country, normal Miranda rules do not apply to that unique situation at the
border; the alien still must meet his information production burden as to admissibility, and
the border inspector is accordingly entitled to ask questions and require answers. U.S. Const.
amend. V.

6. Border inspectors are not bound by any across-the-board rule to immediately cut off their
questioning of an alien seeking entry into the United States if they think they may be going
beyond what could be considered “routine” immigration questioning, nor are they required to
give Miranda warnings to an alien, based on some subjective suspicion of criminal conduct in addition to admissibility, before questioning alien on any subject. U.S. Const. amend. V.

7. Once a border inspector’s questioning of a person seeking entry into the United States objectively ceases to have a bearing on the grounds for admissibility and instead only furthers a potential criminal prosecution, then a line will have been crossed that triggers rights such as Miranda warnings; that is the only possible “line” which sufficiently reflects the deference due inspectors at the border of the United States. U.S. Const. amend. V.

8. Whether a border inspector has a “particularized suspicion” that alien seeking entry into the United States is involved in criminal activity is not determinative of whether questioning has gone beyond immigration admissibility issues so as to require Miranda warnings; suspicion of criminal conduct cannot overrule the simultaneous responsibility of immigration or customs agents to inspect entrants at the border. U.S. Const. amend. V; Immigration and Nationality Act, § 235(b), 8 U.S.C. § 1225(b); 8 C.F.R. § 235.1(d)(1).

9. Alien who was escorted by Customs and Border Patrol (CBP) inspectors to a secondary inspection area, an interview office to which alien went voluntarily and without being in handcuffs, was not entitled at that time to Miranda warnings, despite fact that agents had earlier uncovered alien smuggling schemes whose characteristics matched scenario presented by alien and Chinese nationals who were on the same international flight; until questioning turned from matters of administrative admissibility, inspectors were merely engaged in border immigration practice to which Miranda was not applicable. U.S. Const. amend. V; Immigration and Nationality Act, § 235(b), 8 U.S.C. § 1225(b); 8 C.F.R. § 235.1(d)(1).

10. Post- Miranda confession to alien smuggling activities was not tainted by pre-Miranda inculpatory statements of alien, made during border inspector’s interview with respect to alien’s administrative admissibility to the United States; inspector did not deliberately use two-step interview process to sidestep Miranda, there was no coercion or other improper tactics, and when determination was made that warnings were required, they were given carefully and thoroughly by another agent called in for that purpose, who employed a Chinese interpreter even though alien, a Singaporean citizen, stated that he was able to communicate in English as well. U.S. Const. amend. V; Immigration and Nationality Act, § 235(b), 8 U.S.C. § 1225(b); 8 C.F.R. § 235.1(d)(1).

Konan v. Att'y Gen., 432 F.3d 497 (3d Cir. 2005)

1. To show past persecution, an asylum applicant must demonstrate (1) an incident, or incidents, that rise to the level of persecution; (2) that is on account of one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either unable or unwilling to control. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

2. An asylum applicant who demonstrates past persecution is entitled to a presumption that he will suffer future persecution; such presumption can be rebutted if the Immigration and Naturalization Service (INS) establishes by a preponderance of the evidence that the applicant could reasonably avoid persecution by relocating to another part of his or her
country or that conditions in the applicant’s country have changed so as to make his or her fear no longer reasonable. 8 C.F.R. § 208.13(a)(1), (b)(1)(i, ii).

3. Applicant’s asylum case would be remanded since Board of Immigration Appeals (BIA) failed to address applicant’s claim that he was persecuted in the Ivory Coast due to membership in a particular social group. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

4. A reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.

5. Board of Immigration Appeals’ (BIA) finding that asylum applicant did not suffer past persecution in the Ivory Coast due to imputed political opinion was not supported by substantial evidence; the evidence demonstrated that, although rebel attack on the gendarme camp occurred in the context of general civil unrest, it was motivated, at least in part, by a desire to kill presumed government loyalists such as applicant, whose father was a gendarme. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

*Morgan v. Att’y Gen.*, 432 F.3d 226 (3d Cir. 2005)

1. The issue of derivative citizenship of an alien is a purely legal issue of statutory interpretation. 8 U.S.C. § 1432(a).

2. The Immigration and Nationality Act (INA) confers citizenship on children born outside of the United States to alien parents when certain statutory conditions are met. 8 U.S.C. § 1432(a).

3. The law applicable to an alien’s claim for derivative citizenship is that in effect at the time the critical events giving rise to the claim occurred. 8 U.S.C. § 1432(a).

4. In determining whether parents of Jamaican alien were legally separated at time of mother’s naturalization, for purpose of alien’s derivative citizenship claim, Court of Appeals would defer to Jamaica law and Pennsylvania law, in effect at the time of mother’s naturalization, to determine the meaning of “legal separation,” where parents were married in Jamaica, and were later divorced in Pennsylvania. 8 U.S.C. § 1432(a)(3).

5. The scope of a federal right is a federal question, but that does not mean that its content is not to be determined by state, rather than federal law.

6. Pennsylvania courts may issue a decree of divorce if, at the time the action was filed, at least one party had been a bona fide resident of Pennsylvania for a period of at least one year.

7. “Bona fide residence,” for purpose of meeting Pennsylvania’s divorce law requirement that one party be a bona fide resident of Pennsylvania for at least one year, means domicile; that is, actual residence coupled with the intention to remain there permanently or indefinitely.
8. A party to a Pennsylvania divorce proceeding need not be a citizen of the United States, nor is it necessary for the marriage to have occurred in the United States.


10. For purpose of meeting the separate and apart requirement of the Pennsylvania no-fault divorce statute, an independent intent to dissolve the marital union must be clearly manifested and communicated to the other spouse. 23 Pa. Cons. Stat. § 3103.

11. Parents of Jamaican alien were not “legally separated,” under either Jamaica law or Pennsylvania law, at time of mother’s naturalization, and thus alien was not entitled to derivative citizenship on that basis, where both jurisdictions required judicial order or decree for separation to be legally recognized, but no such order or decree was in effect at time of mother’s naturalization. 8 U.S.C. § 1432(a); 23 Pa. Cons. Stat. § 3103.

12. A “legal separation” of alien’s parents, for purposes of a derivative citizenship claim based on one parent’s naturalization, occurs only upon a formal governmental action, such as a decree issued by a court of competent jurisdiction that, under the laws of a state or nation having jurisdiction over the marriage, alters the marital relationship of the parties. 8 U.S.C. § 1432(a).

13. Aliens are entitled to due process protection during removal proceedings. U.S. Const. amend. V.

14. To establish that an immigration judge (IJ) violated alien’s due process rights, the alien must show that the IJ’s decision was an abuse of discretion which caused her to suffer actual prejudice. U.S. Const. amend. V.

15. Denial by immigration judge (IJ) of alien’s motions for continuances for additional time to obtain documentation did not deprive alien of due process, in removal proceeding, absent showing that additional documentation would have affected the outcome of her case. U.S. Const. amend. V.

Szelinsky v. Att’y Gen., 432 F.3d 253 (3d Cir. 2005)

1. When the Board of Immigration Appeals (BIA) affirms an Immigration Judge’s (IJ) ruling without opinion, the Court of Appeals reviews the opinion of the IJ.

2. Application of collateral estoppel is a question of law.

3. The Court of Appeals exercises plenary review of the Board of Immigration Appeals’ (BIA) legal determinations, subject to established principles of deference.

4. The standard requirements for collateral estoppel, more generally termed “issue preclusion,” are: (1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action.
5. “Assisted in persecution,” as used in Displaced Persons Act (DPA), had same meaning as when used in Holtzman Amendment, and, thus, determination in prior denaturalization proceedings, that immigrant, as concentration camp guard during World War II, had assisted in persecution within meaning of DPA, presented identical issue, for purposes of collateral estoppel, as current removal proceedings against immigrant under Amendment; congressional floor debate did not evidence intent for Amendment to cover only those punishable for war crimes at Nuremberg, and statutory language did not support such distinction. 8 U.S.C. § 1182(a)(3)(E); Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, amended by Pub. L. No. 81-555, 64 Stat. 219 (1950).

6. The law is what Congress enacts, not what its members say on the floor.

7. The text of a statute controls the Court of Appeals’ interpretation of it.

*Pinho v. Gonzales*, 432 F.3d 193 (3d Cir. 2005)

1. Bureau of Immigration and Customs Enforcement (BICE) Administrative Appeals Office (AAO) action of denying alien’s request for adjustment of immigration status based on marriage to a United States citizen, based on its determination that alien was statutorily ineligible based on a prior conviction, was a final and non-discretionary agency action subject to judicial review; there was no provision for Board of Immigration Appeals (BIA) review of the AAO status-adjustment eligibility decision, and the determination itself and denial of employment authorization were clear adverse effects that raised the possibility that alien could suffer irreparable harm if unable to secure immediate judicial consideration of his claim. 5 U.S.C. § 704; 28 U.S.C. § 1331.

2. To support Administrative Procedure Act (APA) jurisdiction, the agency action must be final, it must adversely affect the party seeking review, and it must be non-discretionary. 5 U.S.C. § 704.

3. As a general matter, two conditions must be satisfied for agency action to be “final”: first, the action must mark the consummation of the agency’s decision making process, it must not be of a merely tentative or interlocutory nature; and, second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow. 5 U.S.C. § 704.

4. Where the Administrative Procedure Act (APA) applies, an appeal to superior agency authority is a prerequisite to judicial review only when expressly required by statute or when an administrative rule requires appeal before review and the administrative action is made inoperative pending that review. 5 U.S.C. § 704.

5. A decision by the Bureau of Immigration and Customs Enforcement (BICE) Administrative Appeals Office is final, and subject to judicial review, where there are no deportation proceedings pending in which the decision might be reopened or challenged. 5 U.S.C. § 704.

6. An appellate court exercises plenary review of a District Court’s statutory interpretation, but afford deference to a reasonable interpretation adopted by the agency.
7. An appellate court will not disturb an agency’s settled, authoritative interpretation of a statute it is charged with implementing unless that interpretation is plainly unreasonable in light of the plain language of the statute taken as a whole.

8. An alien whose conviction is vacated on collateral attack because the alien’s trial counsel was ineffective under the Sixth Amendment, no longer stands “convicted” for immigration purposes. U.S. Const. amend. VI; Immigration and Nationality Act, § 101, 8 U.S.C. § 1101(a)(48)(A).

9. To determine the basis for a vacatur order, in determining whether a vacated criminal conviction remains a “conviction” for immigration purposes, the agency must look first to the order itself and if the order explains the court’s reasons for vacating the conviction, the agency’s inquiry must end there, but if the order does not give a clear statement of reasons, the agency may look to the record before the court when the order was issued; no other evidence of reasons may be considered. Immigration and Nationality Act, § 101, 8 U.S.C. § 1101(a)(48)(A).

10. Alien’s prior conviction for possession of cocaine was vacated based on a defect in the underlying criminal proceedings, and was therefore no longer a conviction for purposes of application for adjustment of status based on marriage to a United States citizen; in his pleading for post-conviction relief, the alien raised only one claim, namely, ineffective assistance of counsel, the state did not file an answer, and the judge’s vacatur order referred to placement in Pre-Trial Intervention (PTI) program, which was reached in settlement of alien’s ineffective assistance claim. Immigration and Nationality Act, § 212, 8 U.S.C. § 1182; Immigration and Nationality Act, § 101, 8 U.S.C. § 1101(a)(48)(A).

*Butt v Gonzales*, 429 F.3d 430 (3d Cir. 2005)

1. In asylum cases, an appellate court must uphold the agency’s factual findings if they are supported by substantial evidence; that is, the denial of asylum can be reversed only if the evidence presented by the Petitioner was such that a reasonable fact finder would have to conclude that the requisite fear of persecution existed. Immigration and Nationality Act, § 208, 8 U.S.C. § 1158.

2. Aliens have the burden of supporting their asylum claims through credible testimony. Immigration and Nationality Act, § 208, 8 U.S.C. § 1158.

3. To establish eligibility for asylum, an applicant must demonstrate past persecution by substantial evidence or a well-founded fear of persecution that is both subjectively and objectively reasonable. Immigration and Nationality Act, § 208, 8 U.S.C. § 1158.

4. Immigration judge’s adverse credibility finding with respect to asylum claim of alien, a native and citizen of Pakistan, was not supported by substantial evidence; the immigration judge based his determination, in large part, on what the judge perceived as a contradiction between alien’s testimony that he was treated at home by a doctor for injuries incurred in a beating by police and the doctor’s note indicating that he remained under the doctor’s care, but a commonsense interpretation of the allegedly contradictory statement that the alien “remained under the doctor’s care” for 35 days did not necessarily lead to the conclusion that
the alien was treated at the doctor’s clinic for 35 days, but rather that he received treatment, in some form, from the doctor, and, further, the judge’s other reasons for the finding were generic and conclusory. Immigration and Nationality Act, § 208, 8 U.S.C. § 1158.

Mendez-Reyes v. Att’y Gen., 428 F.3d 187 (3d Cir. 2005)

1. When the Board of Immigration Appeals (BIA) merely adopts the decision of the immigration judge (IJ), the Court of Appeals reviews the IJ’s opinion on petition for review. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252.

2. The Court of Appeals would not determine whether alien’s failure to timely depart under grant of voluntary departure mooted his petition for review of the decision of the Board of Immigration Appeals (BIA) denying cancellation of removal, where such argument was not addressed by the BIA. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 240B(d), 8 U.S.C. § 1229c(d).

3. In reviewing the merits of an alien’s claims, the Court of Appeals reviews the conclusions of law reached by the Board of Immigration Appeals (BIA) de novo, subject to established principles of deference. Immigration and Nationality Act, § 242(b), 8 U.S.C. § 1252(b).

4. In determining whether an administrative agency decision is entitled to Chevron deference, a court must first determine whether Congress has directly spoken to the precise question at issue.

5. If Congress has directly spoken to the precise question at issue, the inquiry to determine whether an administrative agency decision is entitled to deference is at an end; the court must give effect to the unambiguously expressed intent of Congress.

6. The fact that Congress has declared that an alien’s departure of more than 90 days shall constitute a break in physical presence, warranting denial of cancellation of removal, does not necessarily mean that departures of less than 90 days shall not constitute a break in physical presence for such purpose. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 240B(d), 8 U.S.C. § 1229c(d).

7. In the absence of statutory language addressing the precise issue at hand, a court moves to the second step of the Chevron analysis for deference to an administrative agency decision to determine whether the agency has adopted a permissible construction of the statute.

8. Board of Immigration Appeals’ (BIA’s) interpretation of cancellation of removal statute, that alien’s departure from United States, pursuant to grant of voluntary departure under threat of coerced deportation, occasioned break in his “continuous physical presence in the United States,” required to be eligible for cancellation of removal, was reasonable interpretation of statute entitled to Chevron deference. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 240A(d), 8 U.S.C. § 1229b(d).

9. Permission granted by Attorney General to alien, a citizen of Mexico, authorizing the withdrawal of his application for cancellation of removal would be treated the same as a voluntary departure under threat of coerced deportation, for purpose of breaking the alien’s
period of continuous physical presence in the United States, as required for cancellation of removal; alien signed document in connection with the withdrawal of his application, stating that he understood that the withdrawal was in lieu of a formal determination on his admissibility. Immigration and Nationality Act, § 235(a)(4), 8 U.S.C. § 1225(a)(4); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 240A(d), 8 U.S.C. § 1229b(d).

Mahmood v Gonzales, 427 F.3d 248 (3d Cir. 2005)


4. Remand was not required to allow immigration judge (IJ) to determine in first instance whether alien exercised due diligence that might entitle him to equitable tolling of deadline on filing of motions to reopen where it was clear as matter of law that alien had not exercised due diligence. Immigration and Nationality Act, § 240(c)(7)(C)(i), 8 U.S.C. § 1229a(c)(7)(C)(i).


1. Habeas corpus petition which was filed by alien who had been ordered removed, and which was on appeal at time of enactment of provisions of the Real ID Act shifting certain immigration disputes formerly raised through habeas corpus in district courts to the Courts of Appeals, had to be treated as petition for review and retained by Court of Appeals. Immigration and Nationality Act, § 242(a)(2)(D), as amended, 8 U.S.C. § 1252(a)(2)(D).

2. Timely motion to reopen that was filed by alien prior to expiration of time granted for him to voluntarily depart served to toll time allotted for voluntary departure; Board of Immigration Appeals (BIA) could not, simply by failing to rule on alien’s timely motion to reopen within time originally allotted for him to depart, avoid having to rule on motion, on theory that alien’s failure to depart rendered him ineligible for the adjustment of status that he sought in his motion to reopen. Immigration and Nationality Act, §§ 240(c)(7), 240B(d), as amended, 8 U.S.C. §§ 1229a(c)(7), 1229c(d).

Jordon v. Att’y Gen., 424 F.3d 320 (3d Cir. 2005)
1. Physical detention is not necessarily required for a petitioner to meet the “in custody” requirement for filing a federal habeas petition. 28 U.S.C. § 2241.

2. The REAL ID Act permits all aliens subject to removal, including criminal aliens, to obtain review of constitutional claims and questions of law upon filing of a petition for review with an appropriate court of appeals. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252(a).

3. In light of passage of REAL ID Act, which eliminated district courts’ habeas corpus jurisdiction over final orders of removal in almost all cases, but restored judicial review of removal orders via petitions for review, Court of Appeals would vacate and disregard District Court’s decision granting alien’s petition for writ of habeas corpus, challenging final order of removal based on claim of derivative citizenship, and address claim as if presented before Court of Appeals in the first instance as petition for review. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252(a); 28 U.S.C. § 2241.

4. The Court of Appeals exercises plenary review over an alien’s derivative citizenship claim, as it presents a pure question of statutory interpretation. 8 U.S.C. § 1432(a).

5. Provision of the Immigration and Nationality Act (INA) conferring derivative citizenship on alien child born outside the United States to alien parents upon the naturalization of parent having legal custody when parents were legally separated required that the parent having legal custody be naturalized after a legal separation from alien’s other parent. 8 U.S.C. § 1432(a)(3).


1. As judicial officers, immigration judges have a responsibility to function as neutral and impartial arbiters and must assiduously refrain from becoming advocates for either party.

2. Board of Immigration Appeals (BIA) decision which dismissed asylum claim in one paragraph, by upholding adverse credibility finding of Immigration Judge (IJ), essentially adopted opinion of IJ, and thus Court of Appeals would review opinion of IJ.

3. Where an opinion issued by the Board of Immigration Appeals (BIA) essentially adopts the opinion of the Immigration Judge (IJ), the Court of Appeals reviews the latter.

4. Determination of Immigration Judge (IJ), that asylum applicant from China was not credible, was not supported by substantial evidence; instead of addressing factual issues of whether applicant’s wife had been forcibly sterilized and whether Chinese government would inflict improper punishment on applicant if he returned to China, IJ attacked applicant’s moral character and made determinations regarding whether she found applicant to be a good father and son.

5. Under the due process clause, no person may be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. U.S. Const. amend. XIV.
6. Public confidence in the judicial system turns on the appearance of neutrality and impartiality in the administration of justice.

7. Generally, if the conclusion of an Immigration Judge (IJ) is not based on a specific, cogent reason, but, instead, is based on speculation, conjecture, or an otherwise unsupported personal opinion, the Court of Appeals will not uphold it because it will not have been supported by such relevant evidence as a reasonable mind would find adequate; in other words, it will not have been supported by substantial evidence.

8. An adverse credibility determination by an Immigration Judge (IJ) does not pass muster under the substantial evidence rubric when it is not supported by an adequate explanation of the IJ’s reasoning.

Zheng v. Gonzales, 422 F.3d 98 (3d Cir. 2005)

1. Procedural requirements were met for Board of Immigration Appeals (BIA) to grant motion of alien, a native of China, to reopen removal proceedings due to ineffective assistance of counsel, due to failure of former attorney to file appellate brief, where alien submitted reasonably detailed affidavit explaining that his former attorney had agreed to file appellate brief, former attorney claimed that he did not do so because he never received briefing schedule, and alien’s later attorneys diligently investigated issue and stated that they did not file disciplinary complaint against former attorney because of their uncertainty as to whether former attorney ever received briefing schedule. U.S. Const. amend. V.

2. The decision of the Board of Immigration Appeals (BIA) to deny reopening is reviewed for abuse of discretion.

3. Aliens in removal proceedings have a Fifth Amendment right to due process, which entails a right to be represented by counsel. U.S. Const. amend. V.

4. Ineffective assistance of counsel in a removal proceeding may constitute a denial of due process if the alien was prevented from reasonably presenting his case. U.S. Const. amend. V.

5. Fact that Immigration and Naturalization Service (INS) did not submit appellate brief to Board of Immigration Appeals (BIA) did not establish that neither alien’s attorney nor INS received briefing notice or schedule, for purpose of alien’s ineffective assistance of counsel claim that was based on counsel’s failure to file appellate brief, since alien’s failure to file brief was in itself sufficient cause for BIA to dismiss appeal and thus INS would not have had reason to file brief without brief from alien. U.S. Const. amend. V; 8 C.F.R. § 1003.1(d)(2)(i)(E).

6. Board of Immigration Appeals (BIA) did not abuse its discretion by determining, on motion of alien, a native of China, to reopen removal proceedings, that alien had not been prejudiced by his former counsel’s alleged ineffective assistance, since motion did not explain why alien would have been eligible for relief from removal beyond general statement that he would have had opportunity to “make his claim for asylum again to the BIA,” and alien otherwise failed to exhaust his other claim before BIA. U.S. Const. amend. V.
7. Application to adjust status made by alien, a native of China, in removal proceeding under Chinese Student Protection Act (CSPA) was subject to statute that governed adjustment of status of non-immigrant to that of person admitted for permanent residence. Immigration and Nationality Act, § 245, 8 U.S.C. § 1255(a); 8 C.F.R. § 1245.1(c)(8).

8. The legal conclusions of the Board of Immigration Appeals (BIA) are subject to de novo review, with appropriate deference to the agency’s interpretation of the underlying statute.


10. Alien, a native of China, was paroled “arriving alien,” for purpose of regulation that categorically prohibited arriving aliens from adjusting status, despite moratorium in enforcement of immigration laws under Chinese Student Protection Act (CSPA), where alien arrived in United States without inspection, left pursuant to advance parole, and re-entered with no legal status greater than that of parolee. 8 C.F.R. § 1245.1(c)(8).

11. Court of Appeals had authority to review challenge made by alien, a native of China, to interpretation of legal standards made by Board of Immigration Appeals (BIA) for eligibility for adjustment, although Court could not review Attorney General’s exercise of discretion in granting adjustment of status in individual case. Immigration and Nationality Act, § 245, 8 U.S.C. § 1255; 8 C.F.R. § 1245.1.

12. Where Congress has not merely failed to address a precise question, but has given an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation, then the agency’s legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

13. When a court reviews an agency’s construction of the statute which it administers, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

14. When a court reviews an agency’s construction of the statute which it administers, courts may employ traditional tools of statutory construction to ascertain that Congress had an intention on the precise question at issue; deference to an agency’s statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent.

15. To extent that immigration statute granted discretion to Attorney General to create categorical eligibility rules for adjustment of status, rules were subject to review for reasonableness. Immigration and Nationality Act, § 245, 8 U.S.C. §§ 1252(a)(2)(B)(i), 1255(a); 8 C.F.R. § 1245.1(c)(8).

16. Statutory structure and language that left some ambiguity about whether Attorney General could determine by regulation what classes of aliens were eligible to apply for adjustment of status did not so totally abdicate authority to Attorney General as to allow regulation that
essentially reversed eligibility structure set out by Congress. Immigration and Nationality Act, § 245, 8 U.S.C. § 1255(a); 8 C.F.R. § 1245.1(c)(8).

17. Regulation that rendered most aliens paroled into United States ineligible to apply for adjustment of status was impermissible and unreasonable construction of somewhat ambiguous governing statute, and was invalid, since Congress’ intent indicating otherwise was apparent both from language of underlying statute, which allowed aliens “paroled into the United States” to apply for adjustment, and from its structure, which allowed such applications as general matter and excluded only few narrow classes from eligibility. Immigration and Nationality Act, §§ 212, 245, 8 U.S.C. §§ 1101(a)(13)(B), 1182(d)(5)(A), 1225, 1255(a); 8 C.F.R. §§ 1.1(q), 212.5(b)(5), 1245.1(c)(8).

18. Broad deference to a regulation that an administrative agency implemented in interpreting a statute which it was charged with enforcing will be merited so long as the regulation bears a fair relationship to the language of the statute, reflects the views of those who sought its enactment, and matches the purpose they articulated.

19. Alien, a native of China, qualified as “alien paroled into the United States,” and was eligible to apply for adjustment of status, despite receiving Notice to Appear before immigration judge, since Notice to Appear merely commenced removal proceedings, rather than executing removal order, and alien remained free on parole throughout pendency of removal proceedings and was currently free on parole. Immigration and Nationality Act, § 245, 8 U.S.C. § 1255; 8 C.F.R. § 212.5.

20. Review of an agency’s decision is based solely on the stated grounds for that decision.

_Dinnall v. Gonzales_, 421 F.3d 247 (3d Cir. 2005)

1. Order that reinstated prior removal order was functional equivalent of final order of removal, which the Court of Appeals had jurisdiction to review on alien’s petition for review. Immigration and Nationality Act, § 241(a)(5), as amended, 8 U.S.C. § 1231(a)(5).

2. Court of Appeals would review de novo, with no special deference to agency’s views, the legal question of whether provision of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) could be applied retroactively to deported alien who had reentered the United States illegally before provision’s effective date, so as to bar alien from applying for discretionary relief from reinstatement of prior removal order. Immigration and Nationality Act, § 241(a)(5), as amended, 8 U.S.C. § 1231(a)(5).

3. While Congress may undoubtedly enact statutes that operate retroactively, there is presumption that Congress intends for legislation to apply only prospectively.

4. To determine whether a statute enacted after particular event can alter the legal consequences of that event, court must conduct a two-part inquiry, under which it first determines whether Congress has declared whether statute should have retroactive effect.

5. To determine, as first part of a Landgraf retroactivity analysis, whether Congress has declared whether statute should have retroactive effect, court should employ customary rules
of statutory construction, assaying the language of statute itself and then considering its structure and purpose.

6. If statute itself does not sufficiently denote temporal reach of its provisions, there is presumption against statutory retroactivity, and further inquiry should follow to resolve question of whether the statute may nonetheless be given retroactive effect.

7. To determine whether a statute whose temporal reach is unclear may be applied retroactively, court must consider whether retroactive application of statute will impair rights a party possessed when he acted, increase party’s liability for past conduct, or impose new duties with respect to transactions already completed; if such ramifications loom, then default rule is that statute should not be construed to regulate past conduct.

8. New law is not impermissibly retroactive simply because it has implications for completed events; rather, statute’s temporal reach becomes unacceptable only where its retroactive application would significantly impair existing rights and thereby disappoint legitimate expectations.

9. While the court, in deciding whether ambiguous statute may be construed to regulate past conduct, considers disappointed expectations of parties whose conduct is addressed by statute, the party opposing retroactive application of statutory amendment need not establish his or her actual reliance on prior statute.

10. Likelihood that party before court did or did not in fact rely on prior law is not germane to question of whether a new law may be applied retroactively; rather, courts are to concentrate on group to whose conduct statute is addressed.

11. Subsection of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) that provided for reinstatement of orders of removal previously entered against aliens who illegally reenter the United States could not be applied retroactively to alien who reentered the United States and married a United States citizen prior to the IIRIRA’s effective date, regardless of whether alien in question had actually relied on the pre-IIRIRA law, as impermissibly interfering with expectation that such aliens might reasonably have had, under the pre-IIRIRA law, that they would be eligible for some form of discretionary relief, such as grant of leave to voluntarily depart. Immigration and Nationality Act, § 241(a)(5), as amended, 8 U.S.C. § 1231(a)(5).

*Joseph v. Att’y Gen.*, 421 F.3d 224 (3d Cir. 2005)

1. Court of Appeals cannot refuse to allow a de novo review of a citizenship claim if the evidence presented in support of the claim would be sufficient to entitle the alien to trial were such evidence presented in opposition to a motion for summary judgment. Immigration and Nationality Act, § 242(b)(5)(B), 8 U.S.C. § 1252(b)(5)(B).

2. Genuine issues of material fact existed as to whether alien was the son of an alleged rape victim who subsequently became a naturalized U.S. citizen, as would entitle the alien to derivative citizenship, requiring transfer of case to a District Court for a de novo review of that issue. Immigration and Nationality Act, § 242(b)(5)(B), 8 U.S.C. § 1252(b)(5)(B).
Kamara v. Att’y Gen., 420 F.3d 202 (3d Cir. 2005)

1. In light of intervening passage of REAL ID Act, which eliminated district courts’ habeas corpus jurisdiction over final orders of removal in almost all cases, but restored judicial review of constitutional claims and questions of law via petitions for review, Court of Appeals had to vacate and disregard district court’s opinion on alien’s petition for writ of habeas corpus, which was pending on appeal when Act was passed, and address claims raised in habeas petition as if they were presented before Court of Appeals in the first instance as petition for review. Immigration and Nationality Act, § 242(a)(2)(D), as amended, 8 U.S.C. § 1252(a)(2)(D).

2. Standard of review by Court of Appeals remained the same after government’s appeal of district court’s decision granting alien’s petition for writ of habeas corpus was converted into petition for review pursuant to REAL ID Act. Immigration and Nationality Act, § 242(a)(2)(D), as amended, 8 U.S.C. § 1252(a)(2)(D).

3. On petition for review of decision of Board of Immigration Appeals (BIA), Court of Appeals is limited to pure questions of law and to issues of application of law to fact, where the facts are undisputed and not the subject of challenge.

4. On petition for review of decision of Board of Immigration Appeals (BIA), Court of Appeals reviews legal decisions de novo, but will afford Chevron deference to BIA’s reasonable interpretations of statutes which it is charged with administering.

5. Board of Immigration Appeals (BIA) decision in alien’s case contained sufficient indicia that BIA undertook individualized determination of alien’s eligibility for relief under Convention Against Torture (CAT), and thus satisfied due process, given that decision described in detail CAT petition submitted by alien, procedural posture of case, basis for immigration judge’s (II) decision, and relevant statutes and regulations. U.S. Const. amend. V; Immigration and Nationality Act, § 241, as amended, 8 U.S.C. § 1231.

6. Aliens facing removal are entitled to due process. U.S. Const. amend. V.

7. Under due process principles, in the administrative context, an alien (1) is entitled to fact finding based on a record produced before the decision maker and disclosed to him or her, (2) must be allowed to make arguments on his or her own behalf, and (3) has the right to an individualized determination of his or her interests. U.S. Const. amend. V.

8. In the context of alien’s due process right to individualized determination of removal status, question is not whether Board of Immigration Appeals (BIA) reached the correct decision but rather is simply whether BIA made an individualized determination of alien’s interest, and BIA’s decision need only provide sufficient indicia that such a determination was made. U.S. Const. amend. V.

9. Agency action is entitled to a presumption of regularity, and it is burden of alien asserting due process claim based on alleged lack of individualized decision to show that Board of Immigration Appeals (BIA) did not review the record when it considered appeal. U.S. Const. amend. V.
10. Although its decision might not have been model of exposition, decision of Board of Immigration Appeals (BIA) addressing alien’s eligibility for relief under Convention Against Torture (CAT) sufficiently set forth BIA’s reasoning in manner that permitted reviewing court to discern basis of its decision, and thus satisfied requirements of Administrative Procedure Act (APA). 5 U.S.C. § 551 et seq.; Immigration and Nationality Act, § 241, as amended, 8 U.S.C. § 1231.

11. Under Administrative Procedure Act (APA), agency need only set forth the basis of its administrative action with such clarity as to be understandable; it need not provide a detailed statement of its reasoning and conclusions. 5 U.S.C. § 551 et seq.

12. An applicant for relief on the merits under Convention Against Torture (CAT) bears the burden of establishing that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. Immigration and Nationality Act, § 241, as amended, 8 U.S.C. § 1231; 8 C.F.R. § 208.16(c)(2).

13. Standard for relief under the Convention Against Torture (CAT) has no subjective component, but instead requires alien to establish, by objective evidence, that he is entitled to relief. Immigration and Nationality Act, § 241, as amended, 8 U.S.C. § 1231.

14. Alien’s testimony in support of claim for relief under Convention Against Torture (CAT), if credible, may be sufficient to sustain the burden of proof without corroboration. Immigration and Nationality Act, § 241, as amended, 8 U.S.C. § 1231.

15. If an alien meets his or her burden of proof on claim for relief under Convention Against Torture (CAT), withholding of removal under CAT is mandatory, just as it is for withholding of deportation. Immigration and Nationality Act, §§ 241, 243(h), as amended, 8 U.S.C. §§ 1231, 1253(h).

16. To establish eligibility for relief under Convention Against Torture (CAT), alien had to establish only that it was more likely than not that, if removed to Sierra Leone, he faced torture by either Sierra Leone government or military rebel force assumed to qualify as “public official” when two entities were considered together, in that alien was entitled to CAT protection if able to demonstrate that cumulative probability of torture by those two entities exceeded 50 percent; he was not required to show greater than 50 percent probability that he would face torture at hands of either entity, considered separately. Immigration and Nationality Act, § 241, as amended, 8 U.S.C. § 1231; 8 C.F.R. §§ 208.16(c)(3), 208.18(a) 208.16(c)(3)(ii).

17. Remand to Board of Immigration Appeals (BIA) for determination of alien’s eligibility for relief under Convention Against Torture (CAT) was warranted when BIA erroneously required alien to show greater than 50 percent probability that, if removed to Sierra Leone, he would face torture at hands of either Sierra Leone government or military rebel force, considered separately, and declined to reach issue of whether rebel force qualified as “public official” under CAT. Immigration and Nationality Act, § 241, as amended, 8 U.S.C. § 1231; 8 C.F.R. §§ 208.16(c)(3), 208.18(a), 1208.16(c)(3)(ii).
18. Writ of habeas corpus performs a precise and specific function: it forces the government to justify a decision to hold an individual in custody.

19. State-created danger exception, imposing due process duty on government to protect person against injuries inflicted by third party when government affirmatively placed person in position of danger he would not otherwise have faced, did not apply in immigration context, precluding alien’s claim that Board of Immigration Appeals (BIA), in issuing final order of removal, violated alien’s right to substantive due process under exception. U.S. Const. amend. XIV.

20. The Due Process Clause of the Fourteenth Amendment applies to all persons within the United States, including aliens, whether their presence is lawful, unlawful, temporary, or permanent. U.S. Const. amend. XIV.

21. In most circumstances, the Due Process Clause imposes no obligation on a state to protect an individual from harm inflicted by private parties, but under state-created danger exception, government has a constitutional duty to protect a person against injuries inflicted by a third party when it affirmatively places the person in a position of danger the person would not otherwise have faced. U.S. Const. amend. XIV.

22. Orders granting permanent injunction against removal based on alien’s eligibility for relief under Convention Against Torture (CAT) are overbroad, inasmuch as regulations governing CAT relief establish that protection under CAT may be terminated upon changes in country conditions, and therefore government is authorized to file motion to reopen, after CAT relief is granted, to terminate alien’s deferral of removal. Immigration and Nationality Act, § 241, as amended, 8 U.S.C. § 1231; 8 C.F.R. § 208.17(d).

*Lusingo v. Gonzales*, 420 F.3d 193 (3d Cir. 2005)

1. Court of Appeals would presume veracity of alien’s testimony at his removal hearing where immigration judge (IJ) made no finding of adverse credibility with respect to the alien’s testimony.

2. The Court of Appeals does not review an Immigration Judge’s rulings unless adopted by the Board of Immigration Appeals (BIA).

3. The Court of Appeals must affirm an order of the Board of Immigration Appeals (BIA) affirming a decision of an immigration judge denying alien’s application for asylum and withholding of removal if it is supported by substantial evidence, where the BIA’s denial of relief was based on a factual finding.

4. “Substantial evidence,” as required for the Court of Appeals to affirm an order of the Board of Immigration Appeals (BIA) that is based on a factual finding, is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
5. The inquiry into whether an alien has established the requisite well-founded fear of future persecution for refugee status is both subjective and objective, with the subjective component being satisfied by proof that the professed fear is genuine, and the objective component being satisfied by proof that the alien’s subjective fear is reasonable in light of all of the record evidence. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

6. An alien may demonstrate that his or her fear of future persecution is “objectively reasonable,” as required to establish refugee status, by documentary or expert evidence about the conditions in a given country, and when documentary evidence is lacking, an applicant’s credible, persuasive, and specific testimony may suffice. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

7. Board of Immigration Appeals’ (BIA) conclusion that alien, a citizen of Tanzania, did not have an objectively reasonable fear of future persecution, as required to establish refugee status and be granted asylum, was not supported by substantial evidence, where the BIA’s rejection of the claim was based primarily on its misinterpretation of alien’s analogy of his situation, in which media attention over his disappearance while he attended international Boy Scout jamboree in United States at age 16 embarrassed the Tanzanian government, to Tanzania’s repressive attitude toward street children because they were an embarrassment to the Tanzanian government. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

8. When deficiencies in a decision of the Board of Immigration Appeals (BIA) make it impossible for the Court of Appeals to meaningfully review its decision, the Court must vacate that decision and remand so that the BIA can further explain its reasoning.


Lawful permanent resident alien’s 1992 conviction of drug crimes would remain an “aggravated felony” for purposes of precluding his application for cancellation of removal even if his deportation based on his 1992 conviction were waived under former section providing for discretionary waiver of deportation. Immigration and Nationality Act, §§ 212(c), 240A, as amended, 8 U.S.C. §§ 1182(c), 1229b.

Oyebanji v. Gonzales, 418 F.3d 260 (3d Cir. 2005)

1. Where the underlying facts of a habeas petition are undisputed, the Court of Appeals exercises plenary review over a district court’s decision. 28 U.S.C. § 2241.

2. In determining whether an alien’s prior crime, to which alien pled guilty, fits the definition of crime of violence, for purpose of Immigration and Naturalization Act provision authorizing removal of aliens convicted of an aggravated felony, the court looks to the fact of conviction and the statutory definition of the offense, not the alien’s actual conduct. 18 U.S.C. § 16(b); Immigration and Nationality Act, § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).

3. Interpretation of general criminal statute defining “crime of violence” by the Board of Immigration Appeals (BIA) is not entitled to Chevron deference, in alien’s challenge to
BIA’s removal decision, because the BIA is not charged with administering the statute, and it has no special expertise regarding the interpretation of that statute. 18 U.S.C. § 16.

4. Legal permanent resident alien’s conviction for vehicular homicide under New Jersey law was not a “crime of violence,” and thus did not qualify as an “aggravated felony” as would warrant removal under the Immigration and Nationalization Act (INA); although the vehicular homicide statute required proof of reckless driving of a motor vehicle, it did not require the intentional use of physical force. Immigration and Nationality Act, § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16; N.J.S. 2C:11-5, subds. a, b(1).

_Paripovic v. Gonzales_, 418 F.3d 240 (3d Cir. 2005)

1. Review of the legal conclusions by the Board of Immigration Appeals (BIA) regarding an asylum applicant’s last habitual residence is de novo, with appropriate deference to the agency’s interpretation of the underlying statute in accordance with administrative law principles; regarding factual determinations, the Court of Appeals affirms findings of fact supported by substantial evidence.

2. Determination of Immigration Judge (IJ) that last habitual residence of stateless asylum applicant, who was ethnic Serb born in Croatia, was Serbia was supported by substantial evidence, even though applicant claimed he lived in Serbia under duress; applicant had lived in Serbia for more than two years in an at least semi-permanent dwelling of refugee camp before entering United States. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42).

3. A grant of asylum allows an otherwise-removable alien to stay in the United States.

4. Subject to numerous exceptions, the Attorney General may grant asylum to an alien determined to be a refugee.

5. Substantial evidence supported determination that asylum applicant, who was ethnic Serb born in Croatia, was not persecuted in Serbia and did not have well-founded fear of persecution in Serbia, as required to support application for asylum.

6. To establish eligibility for asylum on the basis of past persecution, an applicant must show, inter alia, an incident (or incidents) that rise to the level of persecution or a well-founded fear of future persecution.

7. A sovereign nation enjoys the right to enforce its laws of conscription, and thus penalties for evasion of military service are not considered persecution for purposes of determining eligibility for asylum.

8. Asylum applicant who failed to establish eligibility for asylum, necessarily also failed to meet the more stringent standard for showing a clear probability of persecution to be eligible for withholding of deportation.

_Partyka v. Att'y Gen._, 417 F.3d 408 (3d Cir. 2005)
1. An appellate court reviews legal determinations of the Board of Immigration Appeals (BIA) de novo.


3. As a general rule, for purposes of deportation proceedings, a criminal statute defines a crime involving moral turpitude only if all of the conduct it prohibits is turpitudinous. Immigration and Nationality Act, § 237(a)(2)(A)(i), as amended, 8 U.S.C. § 1227(a)(2)(A)(i).

4. For purposes of deportation proceedings, where a statute covers both turpitudinous and non-turpitudinous acts, it is divisible, and an appellate court must then look to the record of conviction to determine whether the alien was convicted under that part of the statute defining a crime involving moral turpitude. Immigration and Nationality Act, § 237(a)(2)(A)(i), as amended, 8 U.S.C. § 1227(a)(2)(A)(i).

5. Alien’s conviction under New Jersey statute for third degree aggravate assault on a police officer was not a crime involving moral turpitude, as required for deportation; alien’s indictment charged that alien committed a simple assault causing bodily injury to two law enforcement officers, but it did not specify under which section of the simple assault statute alien was charged, and, therefore, the determination had to be based on the least culpable conduct required to secure a conviction under the New Jersey statute, which was negligent infliction of a bodily injury with a deadly weapon, which lacked inherent baseness or depravity that evinces moral turpitude. Immigration and Nationality Act, § 237(a)(2)(A)(i), as amended, 8 U.S.C. § 1227(a)(2)(A)(i); N.J.S. 2C:12-1, subd. b(5)(a).

6. Under the general rule governing moral turpitude determinations for purposes of deportation, absent specific evidence to the contrary in the record of conviction, the statute must be read at the minimum criminal conduct necessary to sustain a conviction under the statute. Immigration and Nationality Act, § 237(a)(2)(A)(i), as amended, 8 U.S.C. § 1227(a)(2)(A)(i).


1. Immigration judge’s (IJ’s) finding, with no basis in record, logic, or experience, that it was implausible that school principal would allow alien to return home to write his self-criticism, rather than require him to write it immediately in his office, did not provide basis for adverse credibility finding at asylum proceeding at which alien alleged persecution in connection with having written school essay critical of government and of his mother’s forcible sterilization.

2. Juvenile alien’s omission of address where he stayed in hiding for no more than a few weeks, on application form requiring aliens to list residences during the last five years, was minor error which did not provide basis for adverse credibility finding at asylum proceeding.

3. Substantial evidence supported IJ’s adverse credibility finding at asylum proceeding at which alien alleged persecution in connection with having written school essay critical of government and of his mother’s forcible sterilization; alien’s testimony, application, and
supporting documentary evidence all strongly supported IJ’s conclusion that case was all about a young boy wanting to join his parents, rather than about an opponent of country’s birth control policies fleeing governmental persecution, copy of school essay which was in record created distinct impression that it was written solely for asylum purposes, and alien failed to provide corroboration from family members in his country, despite fact that lines of communication with them remained open.

*Escobar v. Gonzales*, 417 F.3d 363 (3d Cir. 2005)


2. The Court of Appeals reviews legal determinations by the Board of Immigration Appeals (BIA) de novo.

3. Homeless children in Honduras who lived in the streets did not constitute a particular social group whose members could seek asylum and withholding of removal based on their persecution or a well-founded fear of persecution in Honduras; poverty, homelessness, and youth were far too vague and all encompassing to be characteristics that set the perimeters for a protected group within the scope of the Immigration and Naturalization Act. Immigration and Nationality Act, § 101(a)(42)(A), 208(a), 241(b)(3), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a), 1231(b)(3).

*Popal v. Gonzales*, 416 F.3d 249 (3d Cir. 2005)

1. In general, the administrative exhaustion requirement means that an alien who does not appeal an immigration judge’s (IJ’s) order to the Board of Immigration Appeals (BIA) cannot challenge that order in a petition for review.

2. Alien was not required to appeal the final removal order issued by the immigration judge (IJ) on remand from the Board of Immigration Appeals (BIA), in order to meet administrative exhaustion requirement for Court of Appeals to have jurisdiction to review removal order, where the BIA had already considered the only claim alien raised by reversing the IJ’s initial decision to terminate removal proceedings, and IJ’s removal order on remand was merely a ministerial act, and considered no new issues that had not been decided by the BIA. Immigration and Nationality Act, § 242(d), 8 U.S.C. § 1252(d).

3. The administrative exhaustion requirement for immigration proceedings is jurisdictional, and there is no general futility exception. Immigration and Nationality Act, § 242(d), 8 U.S.C. § 1252(d).

4. Where the alien’s claim is not within the jurisdiction of the Board of Immigration Appeals (BIA), or where the BIA is incapable of granting the remedy sought, there can be no duty to exhaust administrative remedies in an immigration proceeding. Immigration and Nationality Act, § 242(d), 8 U.S.C. § 1252(d).

5. Where an alien has raised only one claim before the immigration judge and the Board of Immigration Appeals (BIA), and where that claim has been fully and fairly litigated by the
alien before the IJ and the BIA, the petitioner has fully exhausted that claim, and may present it to the Court of Appeals. Immigration and Nationality Act, § 242(d), 8 U.S.C. § 1252(d).

6. Alien’s conviction under Pennsylvania’s misdemeanor simple assault statute did not constitute a “crime of violence,” as would render him removable as an aggravated felon; the simple assault statute required only a showing of recklessness for the mens rea, rather than intent to use force, and it did not involve a substantial risk that the perpetrator would intentionally use physical force in committing the offense. 18 U.S.C. § 16(a, b); Immigration and Nationality Act, § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii); 18 Pa. Cons. Stat. § 2701(a).

Johnson v. Gonzales, 416 F.3d 205 (3d Cir. 2005)

1. Motion for award of attorney fees, pursuant to the Equal Access to Justice Act (EAJA), was proper even though motion was filed prior to expiration of government’s time to appeal. 28 U.S.C. § 2412(d)(1)(B), (d)(2)(B).

2. Alien, whose petition for review was remanded to the Board of Immigration Appeals (BIA) for further proceedings, was a “prevailing party” for purposes of his motion for an award of attorney fees, pursuant to the Equal Access to Justice Act (EAJA), even though he might not ultimately prevail in his immigration proceedings; alien secured the setting aside of an erroneous decision in his case, and the Court entered judgment in his favor and relinquished jurisdiction. 28 U.S.C. § 2412(d)(1)(A).

3. An alien whose petition for review of a Board of Immigration Appeals (BIA) decision is granted, and whose case is then remanded to the BIA, is a prevailing party under the Equal Access to Justice Act (EAJA), and may therefore be entitled to attorney fees. 28 U.S.C. § 2412(d)(1)(A).

4. A court, in considering a motion for an award of attorney fees pursuant to the Equal Access to Justice Act (EAJA), must not assume that the government’s position was not substantially justified simply because it lost on the merits. 28 U.S.C. § 2412(d)(1)(A).

5. Government waived any argument that its litigation position at the agency level was substantially justified, and therefore alien, whose petition for review of the denial of his request for asylum was remanded to the Board of Immigration Appeals (BIA) for further proceedings, was entitled to an award of attorney fees pursuant to the Equal Access to Justice Act (EAJA); government failed, in its response, to make any reference to the underlying proceedings. 28 U.S.C. § 2412(d)(1)(A).

6. Even if government did not, for purposes of alien’s motion for an award of attorney fees pursuant to the Equal Access to Justice Act (EAJA), waive any argument that its litigation position at the agency level was substantially justified, government’s position, that alien was not entitled to asylum because his claim arose out of his forced recruitment into the army, was not substantially justified; alien had credibly testified that he feared persecution at least in part on account of an imputed political opinion. 28 U.S.C. § 2412(d)(1)(A).
7. Government was not substantially justified, for purposes of alien’s motion for an award of attorney fees pursuant to the Equal Access to Justice Act (EAJA), in opposing alien’s petition for review of the denial of his application for asylum, on the ground that alien’s claim arose out of his desertion from the army of a political group; alien credibly testified that he feared persecution at least in part on account of an imputed political opinion, and government’s position did not comport with “mixed motive” case law. 28 U.S.C. § 2412(d)(1)(A).

8. Attorney who successfully represented alien in asylum proceeding, and was then awarded attorney fees pursuant to the Equal Access to Justice Act (EAJA), was not entitled to reimbursement at a rate in excess of the statutory cap of $125 per hour, even though he was an experienced attorney who specialized in immigration cases; case required only straightforward application of the substantial evidence and asylum standards, rather than research into little-known areas of immigration law or particular knowledge of alien’s culture. 28 U.S.C. § 2412(d)(2)(A)(ii).


10. Attorney reasonably spent 82 hours working on asylum case, and therefore award of attorney fees pursuant to the Equal Access to Justice Act (EAJA), in amount of $10,799.89, which included $549.89 in costs, was reasonable. 28 U.S.C. § 2412(d)(2)(A)(ii).

Vente v. Gonzales, 415 F.3d 296 (3d Cir. 2005)

1. The Court of Appeals must uphold the Board of Immigration Appeals (BIA’s) factual findings if they are supported by substantial evidence. Immigration and Nationality Act, § 242(a), 8 U.S.C. § 1252(a).

2. The denial of asylum by the Board of Immigration Appeals (BIA) can be reversed only if the evidence presented by alien was such that a reasonable fact finder would have to conclude that the requisite fear of persecution existed. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

3. Aliens have the burden of supporting their asylum claims. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

4. To establish eligibility for asylum, an alien must demonstrate past persecution by substantial evidence or a well-founded fear of future persecution that is both subjectively and objectively reasonable. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

5. To support an asylum claim, the persecution on account of race, religion, nationality, membership in particular social group, or political opinion must be committed by the government or forces the government is unable or unwilling to control. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).
6. The Board of Immigration Appeals (BIA) was not required to conduct an independent corroboration analysis after reversing the immigration judge’s (IJ) mixed credibility determination and finding that alien had testified credibly, in asylum proceeding, where corroboration was not an issue, and BIA determined that alien did not otherwise demonstrate that he was entitled to asylum. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

7. When the Board of Immigration Appeals (BIA) determines that the production of corroborating evidence is necessary for an otherwise credible asylum applicant to meet his burden of proof, it must conduct the following analysis: (1) an identification of the facts for which it is reasonable to expect corroboration, (2) an inquiry as to whether the applicant has provided information corroborating the relevant facts, and if he or she has not, (3) analysis of whether the applicant has adequately explained his or her failure to do so.

8. The finding by the Board of Immigration Appeals (BIA) that alien’s asylum claim, asserting persecution on account of membership in a particular social group, was based on general unrest was not supported by substantial evidence; although some of the threats from the paramilitaries were directed generally at residents of the area in which alien lived, one of the threats included alien’s name on a list of people identified by a paramilitary organization as having collaborated with the guerrillas, and another of the threats was specifically directed against alien, and stated that he should not have returned home to see his mother. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

9. The status of alien’s family was irrelevant to an inquiry into whether alien’s own fear of persecution by paramilitary organizations on account of his membership in a particular social group, upon return to his native country, was subjectively and objectively reasonable, in asylum proceeding, where alien did not claim that the persecution he allegedly faced was on account of kinship ties. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

10. Alien’s residence in another part of his native country before the alleged persecution on account of his membership in a particular social group began was irrelevant to whether he suffered past persecution, and to whether relocation to another part of the country was a reasonable possibility for him after the alleged persecution, for purpose of asylum proceeding. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1); 8 C.F.R. § 1208.13(b)(3)(i).

Tran v. Gonzales, 414 F.3d 464 (3d Cir. 2005)

1. Use of force in statute defining crimes of violence under federal law requires specific intent to use force.

2. Pennsylvania crime of reckless burning or exploding was not a crime of violence under federal law, and therefore, was not an aggravated felony warranting removal.

3. The interpretation of criminal statutes is a task outside the special competence of the Board of Immigration Appeals (BIA) and its congressional delegation, while it is very much a part of the Court of Appeals’ competence.
Bonhomme v. Gonzales, 414 F.3d 442 (3d Cir. 2005)

1. Due process is not a talismanic term which guarantees review in the Court of Appeals of alleged procedural errors correctable by the administrative tribunal. U.S. Const. amend. V.

2. In a petition for review of a removal order, the Court of Appeals reviews the issue of whether an alien’s procedural due process rights were violated by the failure of the Board of Immigration Appeals (BIA) to inform him of his potential eligibility for relief from removal de novo. U.S. Const. amend. V; Immigration and Nationality Act, § 242(a), 8 U.S.C. § 1252(a).

3. When reviewing administrative agency determinations, the Court of Appeals begins with a determination of whether it has subject matter jurisdiction to consider the claims.

4. To exhaust a claim before the Immigration and Naturalization Service (INS), an alien must first raise the issue before an immigration judge (IJ) or the Board of Immigration Appeals (BIA), so as to give it the opportunity to resolve a controversy or correct its own errors before judicial intervention. Immigration and Nationality Act, § 242(d)(1), 8 U.S.C. § 1252(d)(1).

5. An alien’s claim is available as of right, for purpose of meeting the Immigration and Nationality Act’s (INA’s) exhaustion requirement, if, at the very least, (1) the alien’s claim was within the jurisdiction of the Board of Immigration Appeals (BIA) to consider and implicated agency expertise, and (2) the agency was capable of granting the remedy sought by the alien. Immigration and Nationality Act, § 242(d)(1), 8 U.S.C. § 1252(d)(1).

6. The Board of Immigration Appeals (BIA) has the ability to conduct de novo review of a removal proceeding and the subsequent decision of the immigration judge (IJ), and has sufficient expertise in this area to be eminently capable of addressing whether the IJ properly explored all avenues of relief that were available.

7. Alien failed to exhaust his administrative remedies before the Immigration and Naturalization Service (INS), with respect to his claim that his procedural due process rights were violated by the immigration judge’s (IJ’s) failure to inform him of his potential eligibility for relief from removal, and thus Court of Appeals lacked jurisdiction over claim, where the claim could have been presented to and decided by the Board of Immigration Appeals (BIA), but alien failed to present that claim to the BIA. U.S. Const. amend. V; Immigration and Nationality Act, § 242(d)(1), 8 U.S.C. § 1252(d)(1).

8. To prevail on a procedural due process challenge to a decision by the Board of Immigration Appeals (BIA), an alien must make an initial showing of substantial prejudice. U.S. Const. amend. V.

9. Alien was not prejudiced by immigration judge’s (IJ’s) failure to inform him of his potential eligibility for relief from removal, and thus, alien’s procedural due process rights were not violated by that failure, where alien was a lawful temporary alien at time of removal hearing, so that he was not eligible for relief as a permanent resident alien, alien was an aggravated felon, so that he was not entitled to relief for extreme hardship, and alien was not entitled to
relief under the Convention Against Torture (CAT). U.S. Const. amend. V; Immigration and Nationality Act, § 212(c, h), 8 U.S.C. § 1182(c, h); 8 C.F.R. § 1208.16(c)(2).

10. There is no due process right for an alien to be informed of possible eligibility for discretionary relief from a removal order. U.S. Const. amend. V.

_Papageorgiou v. Gonzales_, 413 F.3d 356 (3d Cir. 2005)

1. Judicial review provision of the REAL ID Act retroactively restored to the Courts of Appeals jurisdiction to review constitutional claims and questions of law presented in petitions for review of final orders of removal and enabled Court of Appeals, on petition for review, filed by alien, to consider merits of decision of Board of Immigration Appeals (BIA) that alien was removable on account of his past convictions. Immigration and Nationality Act, § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D).

2. Where the Board of Immigration Appeals (BIA) summarily affirms a decision by an Immigration Judge (IJ) without issuing a separate opinion, the Court of Appeals normally reviews the IJ’s decision itself.

3. Board of Immigration Appeals’ (BIA) issuance of affirmance without opinion of an Immigration Judge’s (IJ) final order of removal did not violate alien’s due process rights. U.S. Const. amend. V.

_Fiadjoe v. Att’y Gen._, 411 F.3d 135 (3d Cir. 2005)

1. Court of Appeals had jurisdiction, in asylum proceeding, to review both Immigration Judge’s (IJ) finding as to alien’s credibility, and Board of Immigration Appeals’ (BIA) credibility determination, particularly given the abusive nature of the asylum hearing; BIA provided only a sketchy credibility analysis, consisting of a single paragraph discussing some, but not all, of the bases for the IJ’s determination, and stated that it agreed with IJ’s finding. Immigration and Nationality Act, § 242(a)(1), 8 U.S.C. § 1252(a)(1).

2. Board of Immigration Appeals’ (BIA) adverse credibility determinations must be reviewed under the substantial evidence standard, and must be upheld unless any reasonable adjudicator would be compelled to conclude to the contrary.

3. Minor inconsistencies do not provide an adequate basis, in an asylum proceeding, for an adverse credibility finding.

4. Court of Appeals must uphold Board of Immigration Appeals’ (BIA) factual finding if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole.

5. Court of Appeals, in review of a factual finding in an asylum proceeding, should find substantial evidence lacking only where the evidence was so compelling that no reasonable fact finder could fail to find the requisite fear of persecution. Immigration and Nationality Act, § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B).
6. Substantial evidence did not support Immigration Judge’s (IJ) credibility determination in asylum proceeding; hostile and abusive atmosphere at hearing, which included bullying questions as to alien’s sexual abuse by her father, resulted in memory loss, blocking, dissociation, and breakdown, alien’s inability to recall year she returned to her father’s house was immaterial, alien was not inconsistent as to how she knew there were idols in one room of the house, IJ did not accurately recite alien’s testimony or contents of a psychologist’s letter, and issues of what alien told her boyfriend about her sexual abuse, or how he was killed, were immaterial.

7. Substantial evidence did not support Board of Immigration Appeals’ (BIA) credibility determination in asylum proceeding; alien’s imprecision in stating whether her father raped her at age seven, or attempted to rape her, was not necessarily inconsistent, and the inconsistency between her hearing testimony and her sworn statement before an Asylum Officer, as to whether her father had sexually abused her was insufficient, standing alone, to support an adverse credibility determination, particularly in light of alien’s mental and emotional state.

8. To establish persecution, for purposes of an application for asylum, an alien must show past or potential harm rising to the level of persecution on account of a statutorily enumerated ground that is committed by the government or by forces the government is unable or unwilling to control. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

9. Substantial evidence did not support Board of Immigration Appeals’ (BIA) finding, in asylum proceeding, that alien failed to establish that government of Ghana was either unable or unwilling to control her father’s ritualistic sexual abuse, despite fact that practice had been formally outlawed; BIA ignored evidence of the deep hold the ritual had on substantial elements in Ghana, and there was evidence the police would have done nothing even if they had been informed of the abuse.


1. Decision of Board of Immigration Appeals (BIA) affirming immigration judge’s decision to deny alien’s asylum application, rather than decision of IJ, was final order subject to review, where BIA agreed with the IJ’s decision to deny relief, but did not adopt or defer to the findings of the IJ. Immigration and Nationality Act, § 242(a)(1), 8 U.S.C. § 1252(a)(1).

2. In cases where the Board of Immigration Appeals (BIA) rejects portions of the immigration judge’s (IJ) analysis, but nonetheless agrees with the IJ’s decision to deny relief, the BIA need not write a lengthy opinion; however, it must either briefly state its own reasons for rejecting the petitioner’s claim, or identify the portions of the IJ’s analysis that it has adopted in support of its decision to deny relief.

3. An asylum applicant must demonstrate either past persecution or a well-founded fear of future persecution.

4. In order to establish eligibility for asylum on the basis of past persecution, an applicant must show: (1) an incident, or incidents, that rise to the level of persecution; (2) that is on account
of a statute or protected ground; and (3) is committed by the government or forces the
government is either unable or unwilling to control.

5. Asylum applicant has a well-founded fear of future persecution if he shows that he has a
subjectively genuine fear, and that a reasonable person in his circumstances would fear
persecution if returned to his native country.

6. Whether an asylum applicant has demonstrated past persecution or a well-founded fear of
future persecution is a factual determination reviewed under the substantial evidence
standard.

7. Question whether an agency determination is supported by substantial evidence is the same
as the question whether a reasonable fact finder could make such a determination based upon
the administrative record; if a reasonable fact finder could make a particular finding on the
administrative record, then the finding is supported by substantial evidence.

8. If no reasonable fact finder could make fact finding on the administrative record, the finding
is not supported by substantial evidence.

9. Mistreatment allegedly suffered by alien in Albania at hands of police was sufficiently severe
to constitute persecution, as required to support his application for asylum; alien alleged that
he suffered multiple beatings, seven of which he characterized as severe, and at least one of
which resulted in a broken knee and an extended hospital stay, that he was threatened on
multiple occasions, and that police attempted to intimidate his family members and
threatened their safety if he refused to abandon his political activities.

10. Police violence arising in response to civil unrest and violent protests, even police violence
that might involve excessive force, is not necessarily considered persecution on account of an
applicant’s political beliefs, for purposes of asylum application.

11. Remand to Board of Immigration Appeals (BIA) was required to determine whether alien
had adequately corroborated his testimony regarding political persecution he experienced in
Albania to support his application for asylum; it was not clear from the BIA’s opinion
upholding denial of asylum whether BIA believed that alien had failed to provide adequate
corroborated, and BIA’s opinion did not apply three-part inquiry required by BIA’s rule
concerning corroboration.

12. To extent question of changed country conditions in Albania had potential bearing on alien’s
application for asylum, remand to the Board of Immigration Appeals (BIA) was required in
order to permit the BIA to assess the issue in light of its own expertise; BIA’s opinion did not
reference regulation governing changed country conditions inquiry or apply its burden-
shifting framework, and did not discuss the possibility of changed country conditions in
Albania. 8 C.F.R. § 208.13.

Okeke v. Gonzales, 407 F.3d 585 (3d Cir. 2005)
1. The Court of Appeals must review the Board of Immigration Appeals (BIA’s) statutory interpretation of the Immigration and Nationality Act (INA) under the deferential standard of Chevron. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

2. The alien’s commission of a specified crime that renders alien inadmissible is the functional equivalent of the service of a notice to appear, for purposes of triggering the “stop-time” provision of the Immigration and Nationality Act (INA), which ends the alien’s period of continuous physical presence in the United States necessary to qualify for cancellation of removal. Immigration and Nationality Act, § 240A(d)(1), as amended, 8 U.S.C. § 1229b(d)(1).

3. Alien was entitled to a new period of continuous physical presence, commencing upon his lawful reentry into the United States, so as to allow him to accrue the time required to establish eligibility for cancellation of removal, even though prior period of continuous physical presence ended upon his commission of a drug offense, where alien left the United States after his drug conviction and returned lawfully again, and Notice to Appear, charging alien with removability, did not mention drug offense as ground for removal. Immigration and Nationality Act, § 240A(b)(1), (d)(1), as amended, 8 U.S.C. § 1229b(b)(1), (d)(1).

*Cao v. Att’y Gen.*, 407 F.3d 146 (3d Cir. 2005)

1. Where the Board of Immigration Appeals (BIA) affirmed immigration judge without opinion, Court of Appeals would review immigration judge’s opinion alone.

2. On petition for review in immigration case, Court of Appeals reviews immigration judge’s opinion under “substantial evidence” standard, and will uphold judge’s findings of fact to extent that they are supported by reasonable, substantial, and probative evidence on record considered as whole.

3. On petition for review in immigration case, immigration judge’s credibility determinations, like his or her factual findings, are reviewed under “substantial evidence” standard.

4. Immigration judge’s adverse credibility determinations may be based on inconsistent statements, contradictory evidence, and inherently improbable testimony.

5. Immigration judge’s adverse credibility findings are afforded substantial deference as long as they are supported by specific cogent reasons; reasons must be substantial and must bear a legitimate nexus to findings.

6. Testimony of Chinese national that, while working as pediatrician at hospital in China, she had discovered that it was hospital’s practice, as means of implementing China’s population control policies, to allegedly kill newborn babies by injecting them with alcohol if their parents did not have necessary permits, and that she had been persecuted by government for attempting to expose this practice to news media, would establish, if credible, that she had been persecuted for “other resistance” to China’s coercive population control program, within meaning of provision of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) making her automatically eligible for grant of asylum. Immigration and Nationality Act, § 101(a)(42), as amended, 8 U.S.C. § 1101(a)(42).
7. Even assuming that persecution directed at Chinese national for allegedly attempting to expose infanticide being practiced in Chinese hospital as means of implementing China’s coercive population control policies was not persecution for “other resistance” to such policies, within meaning of provision of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) making victims of such persecution automatically eligible for grant of asylum, Chinese national’s allegations of detention and physical abuse for exposing and criticizing this government practice would, if credible, be encompassed in more general asylum protections for those who have been persecuted on account of political opinion, and would render Chinese national eligible for asylum on that basis. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).

8. Immigration judge’s determination that, despite her “perfect” demeanor, Chinese national was not credible in testifying to her shock on discovering that hospital where she worked as pediatrician, as means of implementing China’s population control policies, was allegedly engaged in practice of killing newborn babies by injecting them with alcohol if their parents did not have necessary permits, based on fact that Chinese national already knew of forced, late-term abortions at hospital and could not rationally have drawn moral distinction between the two procedures, was not supported by substantial evidence, but based entirely on speculation, conjecture and otherwise unsupported personal opinion, as was immigration judge’s finding, in rejecting Chinese national’s asylum claim, that it was incredible to think that Chinese government would persecute her for attempting to expose this practice to media when incidents of forced abortions and sterilizations in Mainland China were already well known. Immigration and Nationality Act, § 101(a)(42), as amended, 8 U.S.C. § 1101(a)(42).

9. Chinese national’s testimony, when describing reaction of reporter that she told of infanticide allegedly being practiced in Chinese hospital where she worked as means of implementing China’s coercive population control policies, that reporter became “indignant,” despite fact that, according to Chinese national’s testimony, reporter had already heard of this practice, did not constitute permissible basis for rejecting Chinese national’s testimony as incredible; term “indignant” was translation, that could not be given determinative weight, and did not, in any event, necessarily imply that reporter was surprised by Chinese national’s statements.

10. While lack of authentication for letter allegedly written by Chinese reporter in support of alien’s application for asylum might justify giving that letter little weight, it did not support adverse credibility determination against alien.

11. Immigration judge’s speculation that no Chinese official would accept bribe of 30,000 yuan or dollars to assist Chinese national in fleeing from Mainland China and judge’s doubts as to whether Chinese national, having previously been imprisoned for information critical of China’s coercive population practices in letter to reporter which had been intercepted by government officials, would send another letter, even by means of a friend mailing this letter out of Hong Kong, to warn this same reporter to stay out of country was insufficient to support judge’s adverse credibility finding.

12. Alleged vagueness of four-page asylum application submitted by Chinese national, which indicated only that she had been “arrested” after her letter to reporter exposing infanticide allegedly being practiced at hospital where she worked was intercepted by government
officials and did not indicate, as Chinese national later testified, that she was arrested in her home, or which indicated only that, following her arrest, she was interrogated “several” times and not, as she later testified, on six occasions, did not rise to level of meaningful omission, such as might support adverse credibility finding.

Singh v. Gonzales, 406 F.3d 191 (3d Cir. 2005)

1. On petition for review of final order of the Board of Immigration Appeals (BIA) denying alien’s application for asylum and withholding of removal, Court of Appeals had to uphold the BIA’s factual findings if supported by substantial evidence.

2. Board of Immigration Appeals’ (BIA’s) denial of asylum can be disturbed on petition for review only if evidence presented by petitioner was such that a reasonable fact finder would have to conclude that requisite fear of persecution existed.


4. Credible testimony may itself be sufficient to satisfy alien’s burden of proof on application for asylum. 8 C.F.R. § 208.13(a).

5. To establish eligibility for asylum, alien must demonstrate past persecution by substantial evidence or a well-founded fear of persecution that is both subjectively and objectively reasonable. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b)(1), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1).

6. Asylum applicant who establishes that he/she has suffered past persecution on statutorily-protected ground triggers a rebuttable presumption of well-founded fear of future persecution as long as that fear is related to the past persecution. 8 C.F.R. § 208.13(b)(1).

7. While grant of asylum is discretionary, withholding of removal is mandatory if alien meets more stringent standard by demonstrating that it is more likely than not that he/she will be persecuted on statutorily-protected ground if returned to his/her home country. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b)(1), 241(b)(3), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1), 1231(b)(3).

8. Alien may be eligible for asylum if the persecution that he suffered, or has well-founded fear of suffering, is on account of political opinion that he in fact holds or that foreign government has imputed to him. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b)(1), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1).

9. To determine whether the persecution that asylum applicant experienced, or has well-founded fear of experiencing, was on account of imputed political opinion, Court of Appeals focuses on whether the persecutor has attributed a political view to applicant and acted on that attribution. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b)(1), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1).
10. Asylum applicant who claims persecution based on imputed political opinion need not have any knowledge about the political belief that is being imputed to him; focus is instead on whether this attribution has in fact occurred. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b)(1), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1).

11. Asylum applicant’s credible testimony that both he and his father, a known member of political party advocating a separate Sikh state in India, had been taken into custody by Indian police, and that, during beating of father and applicant by police officers, they had repeatedly mentioned father’s activities in support of this political party, was sufficient to compel conclusion that police had imputed father’s separatist political opinions to applicant. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b)(1), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1).

12. Asylum applicant need not prove that persecution he/she suffered, or fears suffering in future, occurred solely on account of statutorily-protected ground; rather, applicant must show that persecution was motivated, at least in part, by a protected characteristic. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b)(1), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1).

13. Asylum applicant satisfied burden of showing that persecution that he experienced at hands of Indian police was motivated, at least in part if not entirely, by separatist political opinions which police had imputed to applicant on account of his father’s political activities, though police, in taking applicant and his father into custody, had informed father that they had information that he had guns and ammunition in his home, where applicant credibly testified that, during beating of father and applicant at stationhouse, officers had repeatedly mentioned father’s activities in support of separatist political party, and that neither applicant nor father was ever questioned about these alleged firearms. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b)(1), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1).

14. Where deficiencies in the Board of Immigration Appeals’ (BIA’s) decision make it impossible for Court of Appeals to meaningfully review that decision, Court of Appeals must vacate and remand for further explanation of the BIA’s reasoning.

15. Upon reversal of the Board of Immigration Appeals’ (BIA’s) decision that alien was not eligible for asylum, Court of Appeals would remand to the BIA for decision as to whether to exercise its discretion to grant asylum, as well as for further proceedings on alien’s application for withholding of removal. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b)(1), 241(b)(3), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1), 1231(b)(3).

Zhang v. Gonzales, 405 F.3d 150 (3d Cir. 2005)

1. The Court of Appeals must review the administrative record on which the final removal order is based.

2. The final removal order to be reviewed is usually that of the Board of Immigration Appeals (BIA), but when the BIA simply states that it affirms the immigration judge’s (IJ) decision for the reasons set forth in that decision, the IJ’s opinion effectively becomes the BIA’s, and, accordingly, the Court of Appeals must review the IJ’s decision.
3. The Court of Appeals will ordinarily affirm the immigration judge’s (IJ) decision if it is supported by reasonable, substantial, and probative evidence on the record considered as a whole.

4. The deferential standard of review of an immigration judge’s (IJ) decision dictates that the IJ’s findings must be upheld unless the evidence not only supports a contrary conclusion, but compels it.

5. Remand to the Board of Immigration (BIA) of a final removal determination is appropriate where the Court of Appeals makes a legal determination that fundamentally upsets the balancing of facts and evidence upon which the BIA decision is based.

6. The Court of Appeals cannot sustain the exclusion of the documents, in a removal proceeding, without an explanation of the basis for the ruling.

7. Records corroborating alien’s claim of forced abortion, including abortion certificate, notice fining alien for attempt to give birth secretly, and notice ordering alien and her husband to submit to sterilization procedures, could not be excluded, in asylum proceeding, based solely on alien’s failure to comply with Immigration and Naturalization Service (INS) regulation requiring certification of foreign official records by Foreign Service officer, inasmuch as such a certification was not the exclusive method for authenticating such records. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 287.6.

8. Remand to the Board of Immigration Appeals (BIA) was required in asylum proceeding to determine reasons, if any, that immigration judge (IJ) excluded records corroborating alien’s claim of forced abortion, including abortion certificate, notice fining alien for attempt to give birth secretly, and notice ordering alien and her husband to submit to sterilization procedures, or if records were admitted, to explain reasons for denial of asylum, which was based upon finding that alien lacked credibility, in light of corroborating evidence. Immigration and Nationality Act, § 101(a)(42)(A, B), 8 U.S.C. § 1101(a)(42)(A, B).

_Wang v. Gonzales_, 405 F.3d 134 (3d Cir. 2005)

1. A determination by the Board of Immigration Appeals (BIA) of whether an asylum applicant has suffered from persecution or whether that individual has a well-founded fear of persecution is factual and thus is entitled to deference. Immigration and Nationality Act, § 208(b), as amended, 8 U.S.C. § 1158(b).

2. Attempts by the Board of Immigration Appeals (BIA) to fill gaps in the Immigration and Nationality Act (INA) are reviewed under the direction requiring the Court of Appeals to respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program, but also under the direction that the courts decide pure questions of statutory construction. Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C. § 1101 et seq.

3. The crux of an asylum determination is whether an applicant has established that he has suffered from past persecution or has a well-founded fear of future persecution on account of

4. Any persecution of asylum applicant’s parents in China, based on their violation of one-child policy, was not persecution of applicant on account of political opinion, inasmuch as applicant’s interest in birth of child to his parents was only interest of potential sibling, and thus was remote. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).

5. Harm experienced by asylum applicant in China, as result of his parents’ violation of one-child policy, including destruction of family’s home, resulting in its relocation to inferior home, and applicant’s subsequent separation from his parents, did not constitute past persecution, where applicant was not arrested, detained, fined, or deprived of opportunity to attend school. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).

6. There is no bright-line rule that persecution of parents never can be regarded as persecution of a minor child who is a member of the parents’ household, for purposes of an asylum claim; thus, immigration judges (IJ) and the Board of Immigration Appeals (BIA) must decide such cases on an individual basis. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).

7. Chinese applicant was not entitled to relief under Convention Against Torture (CAT), even if his parents were persecuted because of their violation of one-child policy, inasmuch as there was no clear probability that applicant would be tortured if returned to China.

Al-Fara v. Gonzales, 404 F.3d 733 (3d Cir. 2005)


2. Under the substantial evidence standard, the Court of Appeals must uphold an Immigration Judge’s (IJ) factual findings if they are supported by reasonable, substantial, and probative evidence on the record considered as a whole.

3. Findings of past and future persecution in an asylum proceeding are factual determinations and are accordingly subject to deferential review. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

4. Determination of Immigration Judge (IJ), that incident in which Israeli soldiers entered asylum applicant’s home in Gaza Strip in 1967, and shot at him as he fled, along with ensuing encounters between Israeli forces and applicant’s family, did not constitute “persecution” for purposes of asylum, was supported by substantial evidence, where neither applicant nor his parents were arrested, detained, abused, or physically harmed, and where war had broken out, such that threat of injury or harm affected entire population in Gaza. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).
5. “Persecution” for purposes of asylum is not a limitless concept; while it includes threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom, it does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).


10. An asylum applicant’s demonstration of a well-founded fear of persecution carries both a subjective and objective component; the applicant must show a subjective fear of persecution that is supported by objective evidence that persecution is a reasonable possibility. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).

11. Testimony alone may be sufficient to satisfy the burden of demonstrating a well-founded fear of persecution, so long as it is found credible. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).

12. To qualify for asylum on account of membership in a particular social group requires that an applicant: (1) identify a group that constitutes a particular social group; (2) establish that he or she is a member of that group; and (3) show persecution or a well-founded fear of persecution based on that membership. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).

13. Evidence that asylum applicant’s cousin was arrested and tortured in Intifada in 1987, that another cousin who served as judge in Gaza was killed because he refused to unlawfully apply laws to Palestinians before him, and that applicant’s parents’ house was among the thousands destroyed in 1976 pursuant to Israeli policy, was insufficient to establish that any persecution of his family members was because of their familial relationship, and thus was insufficient to establish applicant’s membership in a particular social group. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).

15. Substantial evidence supported finding of Immigration Judge (IJ), that asylum applicant’s fear of retaliation from Israeli forces as result of his attack on Israeli soldier in Gaza in 1967 was not objectively reasonable, given passage of 38 years since such incident, and 30 years since Israelis last inquired of applicant’s whereabouts. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).

16. Asylum applicant, who was born in Gaza Strip, failed to establish well-founded fear of persecution based on his Palestinian nationality, even if harsh conditions confronted those residing in Gaza, where applicant personally suffered isolated harm or little cumulative harm. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).

17. Although an individual who resides in a country where the lives and freedoms of a significant number of persons of a protected group are targeted for persecution may make less of the individual showing required to qualify for asylum, the applicant must do more than rely on a general threat of danger arising from a state of civil strife; some specific showing is required. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).

18. Statelessness alone was not sufficient to warrant asylum on part of Palestinian who was born in, but fled, Gaza. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).


20. Asylum applicant failed to exhaust his available administrative remedies as to claim that he qualified as refugee pursuant to legal opinion of Immigration and Naturalization Service (INS) General Counsel’s Office, and judicial review thus was precluded by Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), where he failed to raise it before Immigration Judge (IJ) or on direct appeal to Board of Immigration Appeals (BIA). Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A); Immigration and Nationality Act, § 106(c), as amended, 8 U.S.C. (1994 Ed.) § 1105a(c).


_Borges v. Gonzales_, 402 F.3d 398 (3d Cir. 2005)

1. Court of Appeals reviews for abuse of discretion the Board of Immigration Appeals’ (BIA’s) denial of motion to reopen removal proceedings.

2. Board of Immigration Appeals’ (BIA’s) denial of motion to reconsider, like denial of motion to reopen, is reviewed for abuse of discretion and will be disturbed only if it was arbitrary, irrational, or contrary to law.
3. Court of Appeals reviews the Board of Immigration Appeals’ (BIA’s) legal conclusions de
novo and reviews its factual determinations under “substantial evidence” standard, which
requires Court to treat such findings as conclusive unless any reasonable adjudicator would
be compelled to conclude to the contrary.

4. One-hundred-and-eighty-day time limit on motion to reopen a removal order entered in
absentia is not jurisdictional, but is in nature of statute of limitations, so as to be subject to
equitable tolling. Immigration and Nationality Act, § 240(b)(5)(C)(i), as amended, 8 U.S.C. §
1229a(b)(5)(C)(i).

5. Whether alien had been defrauded by immigration service and attorneys that he hired to
represent him, so as to warrant equitably tolling the 180-day time limit on motion to reopen a
removal order entered in absentia, was factual determination that had to be made, in first
instance, by the Board of Immigration Appeals (BIA). Immigration and Nationality Act, §

6. Assuming that alien had been defrauded by immigration service and attorneys that he hired to
represent him, his own alleged lack of diligence would not preclude an equitable tolling of
180-day time limit on motion to reopen the removal order entered against him where, for
every one of the “red flags” that alien allegedly ignored or unreasonably overlooked, there
was a corresponding red herring offered up by immigration service and attorneys, and even
by the Immigration and Naturalization Service (INS), to prevent alien from discovering the
mishandling of his case any earlier than he did. Immigration and Nationality Act, §

7. Fifth Amendment entitles aliens to due process of law in deportation proceedings. U.S.
Const. amend. V.

8. Aliens have both a statutory and a Fifth Amendment due process right to counsel in
deposition proceedings. U.S. Const. amend. V; Immigration and Nationality Act, § 292, as

9. Implicit in aliens’ statutory and Fifth Amendment right to counsel in deportation proceedings
is requirement that the assistance rendered not be ineffective. U.S. Const. amend. V;

10. Ineffective assistance of counsel exists, in violation of alien’s Fifth Amendment due process
rights, where, as result of counsel’s actions or inaction, deportation proceeding was so
fundamentally unfair that alien was prevented from reasonably presenting his case. U.S.
Const. amend. V.

11. Assuming that alien had been defrauded by immigration service and attorneys that he hired to
represent him, so as to warrant equitably tolling the 180-day time limit on motion to reopen
removal order entered in absentia, such fraud would also constitute an “extraordinary
circumstance” excusing alien’s failure to appear at hearing at which this removal order was

Jishiashvili v. Att’y Gen., 402 F.3d 386 (3d Cir. 2005)
1. Where the Board of Immigration Appeals (BIA) summarily affirms immigration judge's decision under its streamlining procedure, Court of Appeals essentially reviews immigration judge's decision as if it were decision of the BIA.

2. Immigration judge's credibility determinations are factual matters, that are reviewed for substantial evidence and that may be reversed only if any reasonable adjudicator would be compelled to conclude to the contrary. Immigration and Nationality Act, § 242(b)(4)(B), as amended, 8 U.S.C. § 1252(b)(4)(B).

3. Court of Appeals will not disturb the immigration judge's credibility determination and findings of fact if they are supported by reasonable, substantial and probative evidence on record considered as whole.

4. Asylum applicants have burden of supporting their claims with credible testimony.

5. In reviewing immigration judge's credibility determination, Court of Appeals must ask whether that determination is supported by evidence that a reasonable mind would find adequate.

6. On petition for review, Court of Appeals looks at immigration judge's adverse credibility determination to ensure that it is appropriately based on alien's inconsistent statements, contradictory evidence, and inherently improbable testimony, in view of background evidence on country conditions.

7. While the Court of Appeals generally defers to immigration judge on credibility questions, that deference is expressly conditioned on support for judge's credibility determinations in the record, and is not due where judge's findings and conclusions are based on inferences or presumptions that are not reasonably grounded in record.

8. When immigration judge rejects asylum applicant's testimony, judge must provide a specific, cogent reason for doing so, rather than relying on speculation, conjecture, or otherwise unsupported personal opinion.

9. When immigration judge bases an adverse credibility determination in part on implausibility of alien's testimony, such a determination will be properly grounded in record only if it is made against background of general country conditions.

10. Immigration judge's adverse finding on credibility of asylum applicant, notwithstanding that he had provided quite detailed, internally consistent testimony that was materially in accord with his asylum application, and that was corroborated, at least in part, by documentary evidence and by evidence of general country conditions, based upon alleged lack of detail on other matters not bearing heavily on asylum application and on judge's belief as to implausibility of certain events testified to by applicant, including suggestion that government officials would be involved in arson which, while it most heavily damaged applicant's business, also threatened other businesses in same building, and that applicant's parents had never told government officials harassing them of applicant's flight to the United States in attempt to end this harassment, was not based on substantial evidence and
necessitated remand for further development of factual record, or to allow judge to provide further support for conclusions.

11. Immigration judge’s overall credibility determination does not necessarily rise or fall upon each element of witness’ testimony but is more properly decided based on cumulative effect of entirety of all such elements.

*Li v. Att’y Gen.*, 400 F.3d 157 (3d Cir. 2005)

1. Where the Board of Immigration Appeals (BIA) issues decision on merits, and not simply a summary affirmance of immigration judge’s decision, Court of Appeals, on a petition for review, examines the BIA’s, and not immigration judge’s, decision.

2. Determinations by the Board of Immigration Appeals (BIA) on whether asylum applicant has suffered past persecution or has well-founded fear of future persecution are findings of fact, which the Court of Appeals reviews under “substantial evidence” standard.

3. Under “substantial evidence” standard of review, Court of Appeals must uphold the Board of Immigration Appeals’ (BIA’s) factual findings if supported by reasonable, substantial and probative evidence on record considered as whole.

4. Unlike asylum, which constitutes discretionary relief, applicant is entitled to withholding of removal if he/she can satisfy higher burden of demonstrating that it is more likely than not that his/her life or freedom will be threatened on protected ground if he/she is removed. Immigration and Nationality Act, §§ 101(a)(42), 208, 241(b)(3)(A), as amended, 8 U.S.C. §§ 1101(a)(42), 1158, 1231(b)(3)(A).

5. Where the Board of Immigration Appeals (BIA), while noting immigration judge’s adverse credibility determination, did not itself make any findings on credibility issue, but held that asylum applicant’s testimony, even if accepted, was insufficient to establish any persecution, Court of Appeals had to proceed as if alien’s testimony were credible and to determine whether the BIA’s decision was supported by substantial evidence in the face of alien’s assumed, but not determined, credibility.

6. Threats, standing alone, constitute “persecution,” of kind required to support asylum claim, in only a small category of cases, and only when threats are so menacing as to cause significant actual suffering or harm. Immigration and Nationality Act, §§ 101(a)(42), 208, as amended, 8 U.S.C. §§ 1101(a)(42), 1158.

7. Unfulfilled threats of physical mistreatment, detention or sterilization allegedly directed at asylum applicant, following birth of his fourth child in violation of Mainland China’s population control policies, were not sufficiently imminent or concrete for these threats themselves to be considered past “persecution,” such as might entitle applicant to presumption of well-grounded fear of future persecution, where neither applicant nor any of his family members were actually imprisoned, beaten, sterilized or otherwise physically harmed. Immigration and Nationality Act, §§ 101(a) (42), 208, as amended, 8 U.S.C. §§ 1101(a)(42), 1158.
8. “Persecution,” of kind required to support asylum claim, denotes “severe” conduct and does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional. Immigration and Nationality Act, §§ 101(a)(42), 208, as amended, 8 U.S.C. §§ 1101(a)(42), 1158.

9. Deliberate imposition of severe economic disadvantage which threatens alien’s life or freedom may constitute “persecution,” of kind required to support asylum claim. Immigration and Nationality Act, §§ 101(a)(42), 208, as amended, 8 U.S.C. §§ 1101(a)(42), 1158.

10. Although the standard for “economic persecution,” such as might support asylum claim, is stringent and will be satisfied only if alien is subjected to severe economic harm, alien need not suffer complete loss of all means of earning a livelihood, nor does court have to find evidence of near-starvation for economic restrictions to rise to level of “persecution.” Immigration and Nationality Act, §§ 101(a)(42), 208, as amended, 8 U.S.C. §§ 1101(a)(42), 1158.

11. Testimony of Chinese national that, after birth of his fourth child in violation of Mainland China’s population control policies, he had been fined more than eighteen-months’ salary, blacklisted from any government employment and from most other forms of legitimate employment, lost his health benefits, school tuition and food rations, and suffered from having his household furniture and appliances confiscated, if accepted as true, would show “persecution,” of kind required to support asylum claim, as rising to level of deliberate imposition of severe economic disadvantage which could threaten his family’s freedom, if not their lives. Immigration and Nationality Act, §§ 101(a)(42), 208, as amended, 8 U.S.C. §§ 1101(a)(42), 1158.

Muhanna v. Gonzales, 399 F.3d 582 (3d Cir. 2005)

1. Where the Board of Immigration Appeals (BIA) affirms immigration judge’s decision without opinion, Court of Appeals, on petition for review, reviews immigration judge’s opinion and scrutinizes its reasoning.

2. Aliens have Fifth Amendment right to due process in removal proceedings. U.S. Const. amend. V.

3. Aliens’ Fifth Amendment right to due process in removal proceedings entitles them: (1) to fact finding based on a record produced before decision maker and disclosed to alien; (2) to opportunity to make arguments on his or her own behalf; and (3) to an individualized determination of his or her interests. U.S. Const. amend. V.

4. Immigration judges are entitled to broad, though not uncabin’d, discretion over conduct of trial proceedings, as long as those proceedings do not amount to a denial of fundamental fairness to which aliens are entitled.

5. At hearing on alien’s good faith marriage waiver application, it was not fundamentally unfair for immigration judge to question alien about incident described in his still pending application for asylum, even assuming that alien and his counsel were unprepared to address
the asylum claim, where incident could be viewed as relevant to his good faith marriage waiver application, insofar as it may have given alien an ulterior motive for marrying American citizen and thus called into question whether that marriage was entered in good faith; immigration judge’s inquiry did not rise to level of violation of alien’s Fifth Amendment right to due process. U.S. Const. amend. V.

6. Immigration judge’s finding that asylum application was frivolous and that alien was thus disqualified from receiving any immigration benefits, based not on her thorough examination of alien’s application but instead upon her assessment of credibility of certain testimony given by alien regarding alleged stabbing incident, while refusing to allow further testimony on any of other incidents described in application, violated alien’s Fifth Amendment due process rights. U.S. Const. amend. V; Immigration and Nationality Act, § 208(d)(6), as amended, 8 U.S.C. § 1158(d)(6); 8 C.F.R. § 208.20.

7. Finding that asylum application is “frivolous,” so as to disqualify alien from receiving any immigration benefits, does not flow automatically from adverse credibility determination. Immigration and Nationality Act, § 208(d)(6), as amended, 8 U.S.C. § 1158(d)(6); 8 C.F.R. § 208.20.

8. To be entitled to withholding of removal, alien must show a clear probability that his or her life or freedom could be threatened in proposed country of removal. Immigration and Nationality Act, § 241(b)(3)(A), as amended, 8 U.S.C. § 1231(b)(3)(A).

9. To obtain protection under the United Nations Convention Against Torture, alien must show that it is more likely than not that he or she will be tortured if removed to proposed country of removal.

10. Alien’s credibility, by itself, may satisfy his burden or doom his claim as to both a withholding of removal and protection under the United Nations Convention Against Torture. Immigration and Nationality Act, § 241(b)(3)(A), as amended, 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 208.16(b), (c)(2).

11. Court of Appeals reviews immigration judge’s adverse credibility determinations under substantial evidence standard.

12. Under “substantial evidence” standard of review, Court of Appeals will uphold determinations of immigration judge to the extent that they are supported by reasonable, substantial and probative evidence on record considered as whole.

13. Immigration judge’s adverse credibility findings with respect to alien’s claims for withholding of removal and relief under the United Nations Convention Against Torture were not supported by substantial evidence, where immigration judge, in finding that alien was not credible, did not focus on alien’s assertions that his life would be threatened or that he would be tortured if he were removed to Jordan, but rather upon inconsistencies in alien’s testimony regarding his marriage to American citizen. Immigration and Nationality Act, § 241(b)(3)(A), as amended, 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 208.16(b), (c)(2).
14. One adverse credibility determination does not beget another, and immigration judge must justify each credibility finding with statements or record evidence specifically related to the issue under consideration.

*Barrios v. Att’y Gen.*, 399 F.3d 272 (3d Cir. 2005)

1. An appellate court reviews the Board of Immigration Appeals’ (BIA) denial of a motion to reopen for abuse of discretion.

2. Failure of immigration authorities to adjudicate alien’s timely filed motion to reopen deportation proceedings before his scheduled voluntary departure date constituted the requisite “exceptional circumstances” to overcome the statutory bar prohibiting an alien who has remained in the United States past the period of departure from applying for an adjustment of status for a period of five years. Immigration and Nationality Act, § 242B(e)(2)(A), as amended, 8 U.S.C. § 1252b(e)(2)(A).

*Hubbard v. Taylor*, 399 F.3d 150 (3d Cir. 2005)

1. Proper inquiry, in deciding whether conditions of pretrial detention violate detainee’s constitutional right not to be deprived of liberty without due process, is whether those conditions amount to “punishment”; under the Due Process Clause, detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. U.S. Const. amend. XIV.

2. To determine, for purpose of due process challenge by pretrial detainee to conditions of his confinement, whether the challenged conditions amount to “punishment” which has been unconstitutionally imposed prior to adjudication of guilt, court must decide whether disability is imposed for purpose of punishment, or whether it is but an incident of some other legitimate governmental purpose. U.S. Const. amend. XIV.

3. Absent a showing of expressed intent to punish on part of detention facility officials, determination as to whether conditions of pretrial detention amount to “punishment” that has been improperly imposed in violation of detainee’s due process rights will generally will turn upon whether these conditions have some alternative purpose, and whether they appear excessive in relation to that purpose. U.S. Const. amend. XIV.

4. If particular condition or restriction of pretrial detention is reasonably related to legitimate governmental objective, then it does not, without more, amount to “punishment,” which has been improperly imposed in violation of detainee’s due process rights. U.S. Const. amend. XIV.

5. If particular condition or restriction of pretrial detention is not reasonably related to a legitimate goal, i.e., if it is arbitrary or purposeless, then court may permissibly infer that purpose of this condition or restriction is punishment, which may not, consistent with requirements of due process, be inflicted on pretrial detainees qua detainees. U.S. Const. amend. XIV.
6. In deciding, for purpose of due process challenge by pretrial detainee to conditions of his confinement, whether these conditions are reasonably related to government’s interest in maintaining security and order and operating detention facility in manageable fashion, courts must remember that such considerations are peculiarly within province and professional expertise of corrections officials and, in absence of substantial evidence indicating that officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. U.S. Const. amend. XIV.

7. To determine, for purpose of due process challenge by pretrial detainee to conditions of his confinement, whether the challenged conditions amount to “punishment” which has been unconstitutionally imposed prior to adjudication of guilt, court must employ two-part test, under which it asks, first, whether any legitimate purposes are served by these conditions, and second, whether these conditions are rationally related to such purposes. U.S. Const. amend. XIV.

8. When assessing, for purpose of due process challenge by pretrial detainee to conditions of his confinement, whether conditions are reasonably related to their assigned purposes, court must inquire as to whether these conditions cause detainees to endure such genuine privations and hardship over an extended period of time that adverse conditions become excessive in relation to the purposes assigned to them. U.S. Const. amend. XIV.

9. Court’s inquiry into whether conditions of pretrial detention amount to “punishment,” which has improperly been imposed on detainees in violation of their due process rights, must involve consideration of totality of circumstances within detention facility or institution. U.S. Const. amend. XIV.

10. In resolving pretrial detainees’ due process challenge to conditions of their confinement, which involved the triple-celling of three detainees in cell designed to be occupied by a single person, with one of detainees sleeping on floor in proximity to toilet, district court had to employ “due process” analysis to determine whether conditions of confinement amounted to “punishment” which was improperly imposed prior to adjudication of guilt, and not Eighth Amendment standards governing whether punishment should be regarded as cruel and unusual; Eighth Amendment’s Cruel and Unusual Punishment Clause did not apply to pretrial detainees. U.S. Const. amends. VIII, XIV.

11. Eighth Amendment is designed to protect those convicted of crimes, and it applies only after state has complied with constitutional guarantees traditionally associated with criminal prosecutions, and after sentence and conviction. U.S. Const. amend. VIII.

12. Unlike convicted prisoners, who cannot constitutionally be subjected to any cruel and unusual punishment, pretrial detainees cannot be punished at all as matter of due process. U.S. Const. amends. VIII, XIV.

13. If, on remand for assessment of pretrial detainees’ due process challenge to conditions of their confinement under proper standard, prison officials again asserted qualified immunity from suit under § 1983, district court would have to resolve this immunity claim first. U.S. Const. amend. XIV; 42 U.S.C. § 1983.
14. District court should not have granted prison officials’ motion for summary judgment on prisoner’s claim under the Americans with Disabilities Act (ADA) without providing some accompanying explanation sufficient to permit parties and Court of Appeals to understand legal premise for its order. Americans with Disabilities Act, § 2 et seq., 42 U.S.C. § 12101 et seq.

Bagot v. Ashcroft, 398 F.3d 252 (3d Cir. 2005)


2. Crucial question regarding waiver of argument on appeal in habeas proceeding is whether petitioner presented the argument with sufficient specificity to alert the district court. 28 U.S.C. § 2241.

3. Court of Appeals has discretionary power to address issues that have been waived.

4. Habeas proceeding in which petitioner challenged his deportation on ground he was derivatively a United States citizen because he was in his father’s legal custody at time his father was naturalized was an exceptional case, permitting Court of Appeals to consider petitioner’s waived argument on appeal; waived arguments were closely related to ones raised at trial and presented pure question of law, no additional fact finding was necessary, and failing to consider arguments would result in the substantial injustice of deporting an American citizen.

5. The burden of proof of eligibility for citizenship is on the applicant; all doubts should be resolved in favor of the United States and against the claimant.

6. If there is a judicial determination or judicial or statutory grant of custody, then the parent to whom custody has been granted has legal custody for purposes of Immigration and Nationality Act’s (INA) derivative citizenship provision; if no such determination or grant exists, then the parent in actual uncontested custody is deemed to have legal custody. Immigration and Nationality Act, § 321(a)(3), 8 U.S.C. (2000 Ed.) § 1432(a)(3).

7. The mere fact of divorce jurisdiction under New York law does not create child-custody jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA); the requisites for the two types of jurisdiction are different and must be separately satisfied. N.Y. McKinney’s DRL §§ 75-d(1), 230(5).

8. New York trial court did not have jurisdiction under the Uniform Child Custody Jurisdiction Act (UCCJA) to determine custody of child in parents’ divorce proceeding, where child resided with his mother in Guyana and had never set foot in New York, and there was no finding that it was in child’s best interest to take jurisdiction over his custody. N.Y. McKinney’s DRL § 75-d(1)(d).

9. New York child custody decree that was not properly based on subject matter jurisdiction pursuant to the Uniform Child Custody Jurisdiction Act (UCCJA) was not binding on federal courts in immigration proceeding. N.Y. McKinney’s DRL § 75-d.
10. Under New York law, and the Uniform Child Custody Jurisdiction Act (UCCJA) as adopted by most states, one state need not recognize the custody decree of another state where the decree was not made under factual circumstances meeting the jurisdictional standards of the UCCJA. N.Y. McKinney’s DRL § 75-d.

11. Lawful permanent resident alien was in his father’s “legal custody” at time father was naturalized, and thus was entitled to derivative citizenship based on his father’s naturalization; although there was no court decree granting custody to father, father had actual physical custody of alien, a minor who lived with him while attending high school in New York, and mother, who lived in Guyana, approved of the arrangement. Immigration and Nationality Act, § 237, 8 U.S.C. § 1227; § 321(a), 8 U.S.C. (2000 Ed.) § 1432(a).

12. Citizenship in the United States and naturalization proceedings are federal matters and are governed by the federal Constitution and federal statutes. (Per concurring opinion of Rosenn, J., for a majority of the court.)

_Lie v. Ashcroft_, 396 F.3d 530 (3d Cir. 2005)

1. Alien’s claim under the Convention Against Torture (CAT) was waived on appeal, where alien did not raise argument regarding denial of CAT claim except by mentioning the Convention in her concluding paragraph, and alien did not rebut government’s argument that she waived issue in her reply brief or at oral argument.

2. Where the Board of Immigration Appeals (BIA) issues a decision on the merits and not simply a summary affirmance, the Court of Appeals reviews the BIA’s, not the Immigration Judge’s, decision.

3. The Court of Appeals must uphold the factual findings of the Board of Immigration Appeals (BIA) denying asylum and withholding of removal if they are supported by reasonable, substantial, and probative evidence on the record considered as a whole; the Court of Appeals should find substantial evidence lacking only where the evidence was so compelling that no reasonable fact finder could fail to find the alien eligible for asylum or withholding of removal.

4. In reviewing an asylum application, a persecutor may have multiple motivations for his or her conduct, but the persecutor must be motivated, at least in part, by one of the enumerated grounds. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 1208.13(b)(1).

5. Ethnic slur during robbery of asylum applicant’s home and workplace was insufficient to establish that applicant suffered past persecution on account of race, religion, nationality, membership in particular social group, or political opinion, as required to support application; thieves fled after stealing jewels and money, neighbors of same ethnicity were not robbed, robbery of relatively wealthy individuals was not uncommon, and applicant lived in peace for almost two years following robberies.
6. Isolated acts of robbery of asylum applicant’s house and workplace, by unknown assailants, which only resulted in theft of some personal property and a minor injury, did not constitute persecution, as required to support application for asylum.

7. For purposes of an asylum application, “persecution” is threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.

8. To establish a well-founded fear of future persecution an asylum applicant must first demonstrate a subjective fear of persecution through credible testimony that her fear is genuine; second, the applicant must show, objectively, that a reasonable person in the alien’s circumstances would fear persecution if returned to the country in question.

9. Asylum applicant failed to establish that her fear of future persecution was genuine, as required to support her application; applicant acknowledged that she came to United States to see if she wanted to settle there, applicant did not leave home country with her husband after first robbery, and applicant waited nearly two years after subsequent robbery of home to come to United States because son was still in school.

10. Asylum applicant, who was Chinese Christian from Indonesia, failed to establish either that she faced individualized risk of persecution or that there was a pattern or practice of persecution of Chinese Christians in Indonesia, as required to support her application; all of applicant’s siblings and her husband’s siblings remained safely in Indonesia, country report on Indonesia indicated sharp decline in violence against Chinese Christians and noted that Indonesian government officially promoted religious and ethnic tolerance, and violence seemed to be wrought by fellow citizens and not result of governmental action or acquiescence.

11. When an asylum applicant’s family members remain in applicant’s native country without meeting harm, and there is no individualized showing that applicant would be singled out for persecution, the reasonableness of an applicant’s well-founded fear of future persecution is diminished.

12. Violence or other harm perpetrated by civilians against the asylum applicant’s group does not constitute persecution unless such acts are committed by the government or forces the government is either unable or unwilling to control.

*Korytnyk v. Ashcroft*, 396 F.3d 272 (3d Cir. 2005)

1. Court has a special obligation to satisfy itself of its own jurisdiction.

2. Court of Appeals had jurisdiction over discretionary denial by the Board of Immigration Appeals (BIA) of motion to remand for adjustment of status under the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA); motion to remand would be treated as a motion to reopen, which was a “final order of exclusion or deportation.” Immigration and Nationality Act, § 101, 8 U.S.C. § 1101; 8 C.F.R. § 3.2(c)(1, 4) (now § 1003.2(c)(1, 4)).
3. For purposes of appellate jurisdiction, court treats a motion to remand as a motion to reopen exclusion or deportation proceedings. Immigration and Nationality Act, § 101, 8 U.S.C. § 1101.

4. Where the ultimate grant of relief on alien’s motion to remand was discretionary and Board of Immigration Appeals (BIA) “leaped ahead” over the two threshold concerns, and determined that, even if they were met, alien would not be entitled to the discretionary grant of relief, BIA’s findings of fact would be reviewed under the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) for substantial evidence, while its ultimate decision to reject motion to remand would be reviewed for abuse of discretion. Immigration and Nationality Act, § 106(a)(4), as amended, 8 U.S.C. (1994 Ed.) § 1105a(a)(4).

5. Because immigration judge’s (IJ) factual determination that alien participated in criminal activities in the Ukraine was the sole reason that Board of Immigration Appeals (BIA) denied alien’s motion to remand, appellate court would review IJ’s decision in reviewing BIA’s denial of motion to remand.

6. Immigration judge’s (IJ) finding that alien participated in criminal activities, which was a direct product of his finding that alien’s overall testimony was not credible, was not supported by substantial evidence; IJ’s adverse credibility finding did not logically flow from the facts he considered.

7. It is an abuse of discretion to deny a motion to remand or reopen in an immigration case solely on the basis of a factual finding that lacks substantial evidence.

8. On alien’s motion to remand, immigration judge (IJ) improperly treated alien’s proffer of medical records because the IJ silenced alien’s attorney when he tried to confirm that alien’s full medical records were in evidence.

9. While immigration judge (IJ) is not required to write an exegesis on every contention raised on motion to remand, he must show that he has reviewed the record and grasped the movant’s claims.

Auguste v. Ridge, 395 F.3d 123 (3d Cir. 2005)

1. Treaties that are not self-executing do not create judicially-enforceable rights, unless they are first given effect by implementing legislation.

2. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is not self-executing, and does not create judicially-enforceable rights, except as given effect by implementing legislation.

3. Although alien against whom removal order was entered based on his conviction of aggravated felony/drug trafficking crime was statutorily barred from filing petition for direct review in the Court of Appeals from decision of the Board of Immigration Appeals (BIA) that he was ineligible for relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), he retained right to

4. On direct petition for review in immigration case, Court of Appeals reviews factual findings made by immigration judge, or by the Board of Immigration Appeals (BIA), under “substantial evidence” standard.

5. On habeas review in immigration case, Court of Appeals’ review is limited to constitutional issues and errors of law, including both statutory interpretations and application of law to undisputed facts or adjudicated facts, but does not include review of administrative fact findings or the exercise of discretion. 28 U.S.C. § 2241.

6. Regulation-specific jurisdiction-stripping provision of the Foreign Affairs Reform and Restructuring Act (FARRA) did not deprive court of jurisdiction to review alien’s habeas corpus petition, alleging that his removal would violate the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), where FARRA, which implemented the CAT, neither stated explicitly that court could not exercise jurisdiction over habeas corpus claims alleging violations of the CAT nor indicated, in unmistakably clear terms, Congress’ intent to eliminate habeas jurisdiction over such claims. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, § 2242(d), 8 U.S.C. § 1231 note; 28 U.S.C. § 2241; 8 C.F.R. § 208.16(c)(2).

7. Interpretive views of government agencies that have been charged with negotiation and enforcement of treaty are entitled to great weight.

8. Regardless of whether the term “torture,” as used in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), was intended to include specific intent requirement, and regardless of whether the shared understanding of President and the United States Senate, as part of ratification process, that term required a specific intent to inflict severe pain and suffering was consistent with understanding of that term in international community, this shared understanding, as codified in the Foreign Affairs Reform and Restructuring Act (FARRA), governed interpretation of term in domestic context. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, § 2242(b), 8 U.S.C. § 1231 note; 8 C.F.R. § 208.18(a)(5).

9. Generally, courts should interpret treaties so as to give a meaning consistent with shared expectations of contracting parties.

10. Though treaties should generally be interpreted in manner consistent with shared expectations of contracting parties, where President and the United States Senate express a shared consensus on meaning of treaty as part of the ratification process, that meaning is to govern in domestic context.

11. Board of Immigration Appeals’ (BIA’s) interpretation of “specific intent” requirement incorporated in definition of “torture,” as used in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as enacted
into domestic law by the Foreign Affairs Reform and Restructuring Act (FARRA), to impose same limitations as are ordinarily imposed by “specific intent” requirement under American criminal law, was not unreasonable, though the CAT is not concerned with criminal prosecution; “specific intent” standard is term of art well-known in American jurisprudence, and the BIA could rely on this jurisprudence to conclude that, in order for act to constitute “torture” under the CAT as implemented by the FARRA, there must be showing that actor had both intent to commit the act and intent to achieve the consequences of that act, i.e., infliction of severe pain and suffering. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, § 2242(b), 8 U.S.C. § 1231 note; 8 C.F.R. § 208.18(a)(5).

12. Board of Immigration Appeals’ (BIA’s) interpretation and application of immigration law are subject to Chevron deference.

13. Court of Appeals must defer to the Board of Immigration Appeals’ (BIA’s) interpretation of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), to extent that the CAT involves issues of immigration law which may implicate questions of foreign relations.

14. For alien to establish that there are “substantial grounds” for believing that he will be subjected to torture if removed to proposed country of removal, as required for grant of relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as enacted into domestic law by the Foreign Affairs Reform and Restructuring Act (FARRA), alien must establish that it is more likely than not that he will be subjected to torture if removed. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, § 2242(b), 8 U.S.C. § 1231 note; 8 C.F.R. § 208.16(c)(2).

15. Court of Appeals would review de novo district court’s denial of alien’s petition for habeas relief on theory that his removal to Haiti would violate rights that he possessed under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as enacted into domestic law by the Foreign Affairs Reform and Restructuring Act (FARRA). Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, § 2242(b), 8 U.S.C. § 1231 note.

16. Board of Immigration Appeals’ (BIA’s) interpretation and application of its own regulations is entitled to great deference.

17. Deference to the Executive Branch is especially appropriate in immigration context, where officials exercise especially sensitive political functions that implicate questions of foreign relations.

18. Alien applying for relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), as enacted into domestic law by the Foreign Affairs Reform and Restructuring Act (FARRA), bears burden of establishing that it is more likely than not that he will be tortured if removed to proposed country of removal. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, § 2242(b), 8 U.S.C. § 1231 note; 8 C.F.R. § 208.16(c)(2).
19. Standard for relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) has no subjective component, but instead requires alien to establish, by objective evidence, that he is entitled to relief.

20. For an act to constitute “torture” under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), as enacted into domestic law by the Foreign Affairs Reform and Restructuring Act (FARRA), it must be: (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for some illicit or proscribed purpose; (4) by or at instigation of, or with consent or acquiescence of, public official who has custody or physical control of alien; and (5) not arising from lawful sanctions. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, § 2242(b), 8 U.S.C. § 1231 note; 8 C.F.R. § 208.18(a).

21. Alien’s uncorroborated testimony, if credible, may be sufficient to sustain his burden of proof on claim for relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

22. If alien satisfies burden of establishing right to relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), then withholding of removal is mandatory.

23. Fact that Haitian national, if removed to Haiti, would be detained indefinitely in Haitian prison due to combined effect of Haitian government’s policy of preventively detaining criminal deportees and of his own prior United States conviction of narcotics offense did not rise to level of “torture,” such as would provide basis for relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as enacted into domestic law by the Foreign Affairs Reform and Restructuring Act (FARRA), given complete lack of evidence that Haitian authorities were detaining criminal deportees with specific intent to inflict severe physical or mental pain or suffering. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, § 2242(b), 8 U.S.C. § 1231 note; 8 C.F.R. § 208.18(a).

24. Deplorable nature of conditions inside prison where Haitian national would be detained if he were removed to Haiti, which were so crowded that inmates allegedly had to sleep sitting or standing up, and in which lack of sanitation facilities allegedly meant that prison floors were covered with urine and feces, did not rise to level of “torture,” such as would provide basis for relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as enacted into domestic law by the Foreign Affairs Reform and Restructuring Act (FARRA), where prison conditions appeared to be result of budgetary and management problems, not of any specific intent to inflict severe physical or mental pain or suffering; mere fact that Haitian authorities had knowledge of severe pain and suffering that might result from incarcerating detainees in such conditions did not support finding that they intended to inflict severe pain and suffering. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, § 2242(b), 8 U.S.C. § 1231 note; 8 C.F.R. § 208.18(a).
25. While isolated reports of physical beatings of prisoners by Haitian guards might constitute evidence of torture, Haitian national failed to establish that such beatings were so pervasive within prisons in Haiti that it was more likely than not that he would be subjected to such beatings if returned to Haiti and imprisoned pursuant to Haiti’s policy of detaining criminal deportees; alien did not claim that he had been tortured in past and failed to make requisite showing for grant of relief under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) as enacted into domestic law by the Foreign Affairs Reform and Restructuring Act (FARRA). Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, § 2242(b), 8 U.S.C. § 1231 note; 8 C.F.R. § 208.16(c)(2).

Leia v. Ashcroft, 393 F.3d 427 (3d Cir. 2005)

1. An agency’s interpretation of its own regulation is controlling unless it is plainly erroneous or inconsistent with the regulation.

2. The test for refugee status because of well-founded fear of persecution contains both a subjective component, which is satisfied if the fear is genuine, and an objective component, which requires a showing by credible, direct, specific evidence in the record that persecution is a reasonable possibility. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

3. It was appropriate for Court of Appeals, on petition for review of denial of asylum, to review the decisions of both Board of Immigration Appeals (BIA) and the immigration judge (IJ), where BIA affirmed for reasons set forth in IJ’s decision, but also advanced its own rationale and analysis on one issue. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252.

4. Regulation requiring attestation of foreign official records by foreign official and certification by U.S. foreign service officer in same country is not an absolute rule of exclusion, and is not exclusive means of authenticating records before immigration judge (IJ). Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.; 8 C.F.R. § 287.6(b).

5. Board of Immigration Appeals (BIA) and immigration judge (IJ) erred in rejecting admissibility of hospital documents that, if found genuine, would have corroborated asylum-seeker’s claims regarding physical attacks, on basis of noncompliance with regulation requiring attestation of records by foreign official, inasmuch as regulation was not exclusive means for authenticating records. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 287.6.

6. Board of Immigration Appeals (BIA) abused its discretion in approving sub silentio decision of immigration judge (IJ) to reject testimony of stipulated expert in Ukrainian political affairs as to why then-current political conditions made it difficult, if not impossible, for asylum-seeker to follow regulation regarding authentication of supporting documents. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 287.6.
7. Remand to agency to reconsider and reweigh the facts is appropriate in situations where a
court of appeals has made a legal determination that fundamentally upsets the balancing of
facts and evidence upon which an agency’s decision is based.

8. Perceived inconsistencies in asylum-seeker’s testimony failed to support immigration judge’s
(IJ) adverse credibility determination; determination was based on minor discrepancy in date
that was attributable to typographical error in hospital record, coupled with lack of
authentication of record, and testimonial inconsistencies regarding legal status of alien’s
political organization, which were attributable to murky status of group that had applied for
legal status but had not yet been rejected or accepted by Ukrainian government. Immigration

9. Although a showing of past persecution raises the presumption of future persecution, this
presumption may be rebutted by a finding that the asylum-seeker could avoid future harm by
relocating to a different part of the country; burden of proof is ordinarily on the government
to prove the feasibility of relocation. Immigration and Nationality Act, § 101(a)(42)(A), 8

10. Court must engage in a two-part inquiry regarding the feasibility of asylum-seeker’s avoiding
future harm by relocating to other areas of country: first, the court must consider whether the
relocation would be a successful means of escaping persecution, and second, whether
relocation would be reasonable. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C.
§ 1101(a)(42)(A).

11. Evidence in asylum case was insufficient to support determination of immigration judge (IJ),
in support of denial of asylum, that alien could live without persecution in other areas of the
Ukraine, where administrative record was stale. Immigration and Nationality Act, §

Yan Lan Wu v. Ashcroft, 393 F.3d 418 (3d Cir. 2005)

1. In removal cases in which the Board of Immigration Appeals (BIA) merely adopts the
Immigration Judge’s (IJ) opinion, Court of Appeals reviews IJ’s decision, rather than
decision of BIA. Immigration and Nationality Act, § 242(a)(1), as amended, 8 U.S.C. §
1252(a)(1).

2. Court of Appeals gives Chevron deference to the reasonable statutory interpretations of
Board of Immigration Appeals (BIA) in reviewing final orders of removal. Immigration and

3. Deference is due where agency findings and conclusions in removal cases are based on
inferences or presumptions that are not reasonably grounded in the record, viewed as a
1254(b)(4)(B).

4. Alien sufficiently raised issue of immigration judge’s (IJ) exclusive reliance on her airport
statement in notice of appeal to Board of Immigration Appeals (BIA) to satisfy requirement
that she exhaust her administrative remedies, even though notice phrased issue as whether
substantial evidence in record supported denial of asylum. Immigration and Nationality Act, § 242(d), as amended, 8 U.S.C. § 1252(d).

5. So long as an immigration petitioner makes some effort, however insufficient, to place the Board of Immigration Appeals (BIA) on notice of a straightforward issue being raised on appeal, a petitioner is deemed to have exhausted her administrative remedies. Immigration and Nationality Act, § 242(d), as amended, 8 U.S.C. § 1252(d).

6. An alien seeking asylum must demonstrate (1) an incident, or incidents, that rise to the level of persecution; (2) that is on account of one of the statutorily-protected grounds; and (3) is committed by a government or forces a government is either unable or unwilling to control. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

7. Aliens have the burden to establish they are eligible for asylum. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

8. If past persecution is not established, an alien must, in order to seek asylum, establish a subjective well-founded fear of future persecution that is objectively reasonable. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

9. To qualify for withholding of removal, an alien must demonstrate that it is more likely than not that she will face persecution if she is removed. Immigration and Nationality Act, § 241(b)(3)(A), as amended, 8 U.S.C. § 1231(b)(3)(A).

10. Record required clarification of decision of immigration judge (IJ) to deny asylum to Chinese alien, whom he found credible, on basis that was contrary to her hearing testimony regarding persecution by officials based on her Christian faith; IJ seized on two statements made by alien in airport interview and relied on them to exclusion of her hearing testimony, without any explanation, such that clarification of inconsistency was required before agency findings could be given deference. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

Ambartsoumian v. Ashcroft, 388 F.3d 85 (3d Cir. 2004)

1. Substantial evidence supported immigration judge’s determination that alien did not suffer a well-founded fear of persecution based on alien’s Baptist religious beliefs if returned to the Ukraine, as required for alien’s asylum claim; although alien’s family was persecuted during the Soviet era in the Ukraine, State Department profile indicated that Evangelicals were no longer denied religious freedom and worshipped without interference, and alien admitted that family members still lived in the Ukraine and practiced the Baptist faith without persecution. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

2. Substantial evidence supported immigration judge’s determination that alien would not suffer persecution based on ethnicity if returned to the Ukraine, as required for alien’s asylum claim; State Department reports indicated that Ukraine’s nationality policy met international standards required for the protection of minority groups and alien’s testimony could be read as indicating that alien was unable to work and was harassed by police mainly because he

3. Substantial evidence supported immigration judge’s determination that aliens had not established a well-founded fear of persecution based on their Armenian ethnicity if returned to Georgia, as required for aliens’ asylum claim; although there was evidence of prior discrimination in Georgia against Armenians, there was no evidence of discrimination since regime change, and State Department reports indicated that there was no evidence of actions taken against Armenians on the basis of their ethnicity since the regime change. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42).


5. Alien’s allegations that life in Georgia was difficult for alien due to a civil war and that alien was conscripted to fight in that war were insufficient to establish past persecution, as required for alien’s asylum claim under the Immigration and Nationality Act. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42).

_Smrko v. Ashcroft_, 387 F.3d 279 (3d Cir. 2004)

1. Member of Board of Immigration Appeals (BIA) acted arbitrarily and capriciously by issuing affirmance without opinion, in violation of BIA’s streamlining regulations, of Immigration Judge’s decision denying motion to terminate removal proceedings brought against alien who argued the Immigration and Nationality Act (INA) afforded him additional protection because he received refugee status upon entry into United States, even though he later obtained lawful permanent resident status, and thus remand to BIA was required; case presented novel and substantial legal issues without precedent, INA was ambiguous, IJ offered no analysis of relevant statutory provisions, and BIA did not provide an agency answer to challenge. Immigration and Nationality Act, § 209(a), as amended, 8 U.S.C. § 1159(a); 8 C.F.R. § 1003.1(e)(4).


3. When the Board of Immigration Appeals (BIA) issues an affirmance without opinion under the streamlining regulations, the Court of Appeals reviews the Immigration Judge’s opinion and scrutinizes its reasoning.

4. The Court of Appeals reviews the legal determinations of the Board of Immigration Appeals (BIA) de novo, subject to established principles of deference.


7. The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.

8. When interpreting a statute, if the intent of Congress is clear, the court, as well as an agency, must give effect to the unambiguously expressed intent of Congress.

9. In situations where there is conflicting legislative history and the statute is silent or ambiguous with respect to the specific issue, the role of the Court of Appeals is to determine whether an agency’s answer is based on a permissible construction of the statute.

10. Where an Immigration Judge (IJ) offers no reasoning and cites no authority the Court of Appeals has no basis on which to conclude that the IJ’s reading and application of a statute is reasonable and therefore entitled to deference under Chevron.

11. Court of Appeals had jurisdiction to review challenged application of streamlining regulations of Immigration and Nationality Act (INA); INA did not preclude review, Administrative Procedure Act (APA) authorized review of exercise of discretion, APA authorized review for arbitrary or capricious actions, and streamlining regulations were not committed to agency discretion. 5 U.S.C. § 701(a)(2), 706(2)(A); Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C. § 1101 et seq.; 8 C.F.R. § 1003.1(e)(4)(i).

12. Administrative Procedure Act (APA) makes it clear that judicial review is not to be had in those rare circumstances where the relevant law is drawn so that a court would have no meaningful standard against which to judge an agency’s exercise of discretion. 5 U.S.C. § 701(a)(2).

13. The Court of Appeals is required to accord Chevron deference to the Board of Immigration Appeals (BIA) as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication.

**Guo v. Ashcroft**, 386 F.3d 556 (3d Cir. 2004)

1. Alien with well-founded fear that he or she will be forced to undergo coercive population control procedure, or be subject to persecution for failing to do so, has well-founded fear of “persecution,” of kind required to make alien eligible for grant of asylum. Immigration and Nationality Act, § 208(b), as amended, 8 U.S.C. § 1158(b).

2. Asylum applicant bears burden of proving his or her eligibility for asylum based on specific facts and credible testimony. Immigration and Nationality Act, § 208(b), as amended, 8 U.S.C. § 1158(b); 8 C.F.R. § 208.13(a).

3. To demonstrate well-founded fear of persecution, of kind required to make him or her eligible for grant of asylum, alien must demonstrate three things: (1) that he or she has fear of
persecution in his or her native country; (2) that there is reasonable possibility that he or she will be persecuted upon being returned to that country; and (3) that applicant is unwilling to return to that country as result of his or her fear. Immigration and Nationality Act, § 208(b), as amended, 8 U.S.C. § 1158(b); 8 C.F.R. § 208.13(b)(2)(i).

4. To be eligible for a withholding of removal, alien must demonstrate a clear probability, and not just a well-founded fear, of persecution on statutorily protected ground. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), 241(b)(3), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b), 1231(b)(3).

5. Alien who is not eligible for grant of asylum also does not qualify for withholding of removal. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), 241(b)(3), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b), 1231(b)(3).

6. Determinations of the Board of Immigration Appeals (BIA) are upheld if they are supported by reasonable, substantial and probative evidence on record considered as whole.

7. On petition for review, Court of Appeals will reverse determination of the Board of Immigration Appeals (BIA) only if the evidence not only supports, but compels, a contrary conclusion.

8. Adverse credibility determinations by the Board of Immigration Appeals (BIA) are factual matters, which are reviewed for substantial evidence, and which will be upheld unless any reasonable adjudicator would be compelled to conclude to the contrary. Immigration and Nationality Act, § 242(b)(4)(B), as amended, 8 U.S.C. § 1252(b)(4)(B).

9. As general rule, motions to reopen immigration proceedings are granted only under compelling circumstances.

10. Attorney General has broad discretion to grant or deny motion to reopen immigration proceedings.

11. Motions to reopen immigration proceedings are disfavored, especially when the proceeding at issue is deportation proceeding, where, as general matter, every delay works to advantage of deportable alien, who wishes merely to remain in the United States.

12. Court of Appeals reviews denial of motion to reopen deportation proceedings by the Board of Immigration Appeals (BIA) under a highly deferential, abuse-of-discretion standard.

13. Discretionary decisions of the Board of Immigration Appeals (BIA) will not be disturbed unless they are found to be arbitrary, irrational or contrary to law.

14. Mere fact that immigration judge had previously rejected, as not credible, a Chinese national’s claims of persecution in her homeland as result of her religious beliefs did not provide sufficient basis for denying, based on prior adverse credibility finding, alien’s motion to reopen removal proceedings to present evidence that, because she became pregnant with second child while present in the United States, she had well-founded fear of forced abortion or forced sterilization if returned to Mainland China based on China’s one-child policy; prior
credibility finding was made in completely different context, on unrelated religious-based claim for asylum.

15. Immigration judge must justify each adverse credibility finding with statements or record evidence specifically related to the issue under consideration.

16. Immigration judge’s adverse credibility findings are afforded deference only if they are supported by specific cogent reasons; these reasons must be substantial, and must bear a legitimate nexus to findings.

17. On motion to reopen deportation proceedings, in order to present new evidence of his eligibility for asylum, alien must establish his prima facie eligibility for asylum by producing objective evidence to demonstrate a reasonable likelihood, i.e., a realistic chance, that he can establish that he is entitled to relief.

18. Prima facie scrutiny that immigration judge must conduct, in deciding whether to reopen deportation proceedings to permit alien to present new evidence of eligibility for asylum, entails consideration of evidence that accompanies motion, as well as of relevant evidence that may exist in record of prior hearing, in light of applicable statutory requirements for relief. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b).

19. Whether alien’s fear of persecution is well-founded, as required to make alien eligible for grant of asylum, turns on two inquiries: on whether alien has shown a subjective fear of persecution, and on whether he or she has demonstrated the objective reasonableness of his or her fear. Immigration and Nationality Act, § 208(b), as amended, 8 U.S.C. § 1158(b).

20. Asylum applicant may satisfy burden of demonstrating a subjective fear of persecution by showing that his or her fear is genuine to alien. Immigration and Nationality Act, § 208(b), as amended, 8 U.S.C. § 1158(b).

21. Determination as to whether alien’s subjective fear of persecution on statutorily protected ground is objectively reasonable, as required to make alien eligible for grant of asylum, requires ascertaining whether reasonable person in alien’s circumstances would fear persecution if returned to country in question. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b).

22. Chinese national who sought to reopen removal proceedings in order to present new evidence of her alleged eligibility for asylum on unrelated ground, based on fact that she had become pregnant with second child while present in the United States, presented prima facie case of her eligibility for asylum, and should have been given opportunity to pursue her claim in reopened proceeding, by presenting substantial evidence suggesting that there was reasonable possibility that she would be subject to forced abortion or sterilization if returned to Mainland China; government’s introduction of five-year-old State Department report, without more, was insufficient to undermine alien’s prima facie showing. Immigration and Nationality Act, § 208(b), as amended, 8 U.S.C. § 1158(b).

Singh-Kaur v. Ashcroft, 385 F.3d 293 (3d Cir. 2004)
1. On review of Board of Immigration Appeals’ (BIA) determination of alien’s status, Court of Appeals reviews BIA’s interpretation of INA under arbitrary and capricious standard, and reviews underlying factual findings to determine whether they are supported by substantial evidence. Immigration and Nationality Act, § 105(a), 8 U.S.C. § 1105(a).

2. Provision of food to, and setting up of shelter for, persons who alien knows or reasonably should know have committed or plan to commit terrorist activity constitutes affording “material support” for such persons, and in turn is within INA’s definition of “engaging in terrorist activity.” Immigration and Nationality Act, § 212(a)(3)(B)(iv)(VI)(bb), 8 U.S.C. § 1182(a)(3)(B)(iv)(VI)(bb).

3. Evidence supported Board of Immigration Appeals’ (BIA) finding that Sikh militants for whom alien had furnished food and shelter at purported religious meetings had committed or planned to commit terrorist activity against Indian government and that alien knew or should have known of their connection to such activity, as required to support BIA’s finding that alien had furnished “material support” for persons engaged in terrorist activity, warranting his deportation; Amnesty International Report and State Department memo, among other items, described militant Sikh organizations’ terrorist activities including bombings and assassinations, and alien was member of several such organizations including same one for whose members he admitted supplying food and shelter. Immigration and Nationality Act, § 212(a)(3)(B)(iii)(IV, V), (a)(3)(B)(iii)(VI)(bb), 8 U.S.C. § 1182(a)(3)(B)(iii)(IV, V), (a)(3)(B)(iii)(VI)(bb).

Knapik v. Ashcroft, 384 F.3d 84 (3d Cir. 2004)

1. Chevron deference is afforded only when an agency construes or interprets a statute it administers.

2. Chevron deference was owed to Board of Immigration Appeals (BIA) definition of “moral turpitude,” under section of INA allowing removal of aliens who have been convicted of such crimes, as term was not defined in the INA, and legislative history left no doubt that Congress left the term to future administrative and judicial interpretation. Immigration and Nationality Act, § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i).


6. For purposes of Chevron deference, Board of Immigration Appeals (BIA) reasonably defined “moral turpitude,” under statute providing for removal upon conviction of crime of moral turpitude, as conduct that is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed other persons, either individually or to society in general, and noted that crimes involving moral turpitude normally include only acts that are malum in se. Immigration and Nationality Act, § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i).


9. Conviction under New York law of crime of attempted reckless endangerment was not crime involving moral turpitude, under statute allowing removal of aliens convicted of crimes of moral turpitude; categorically speaking, concept of attempted recklessness made no sense, in that attempt under New York law required intent to commit crime, while acting recklessly was inconsistent with mens rea required for attempt. Immigration and Nationality Act, § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i); N.Y. McKinney’s Penal Law §§ 110.00, 120.25.


Singh v. Ashcroft, 383 F.3d 144 (3d Cir. 2004)

1. In applying the formal categorical approach of Taylor v. United States, 495 U.S. 575 (1990), for determining whether an alien’s prior conviction is for an aggravated felony, so as to render the alien removable, an adjudicator must look only to the statutory definitions of the prior offenses, and may not consider other evidence concerning the defendant’s prior crimes, including the particular facts underlying a conviction. Immigration and Nationality Act, §§ 101(a)(43), 237(a)(2)(A)(iii), as amended, 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii).

2. While the formal categorical approach of Taylor v. United States presumptively applies in assessing whether an alien has been convicted of an aggravated felony, so as to be removable, in some cases the language of the particular subsection of the statute defining “aggravated felony” will invite inquiry into the underlying facts of the case, and in some cases the disjunctive phrasing of the statute of conviction will similarly invite inquiry into the specifics of the conviction. Immigration and Nationality Act, §§ 101(a)(43), 237(a)(2)(A)(iii), as amended, 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii).
3. For purposes of determining whether a decision of the Board of Immigration Appeals (BIA) is entitled to Chevron deference, the interpretation and exposition of criminal law is a task outside the BIA’s sphere of special competence.

4. The Court of Appeals normally considers jurisdictional matters de novo.

5. Determination by Board of Immigration Appeals (BIA), that formal categorical approach of Taylor v. United States did not apply to question whether alien committed aggravated felony of sexual abuse of minor, and thus was removable, was not entitled to deference, where Immigration Judge (IJ) offered no reason for his decision, and BIA, by affirming without opinion, gave no considered and authoritative agency-wide interpretation of statute. Immigration and Nationality Act, §§ 101(a)(43)(A), 237(a)(2)(A)(iii), as amended, 8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii).

6. Under formal categorical approach of Taylor v. United States, alien’s prior Delaware conviction for unlawful sexual contact in the third degree was not for aggravated felony, and thus did not render him removable, since statute of conviction said nothing about age of victim, and, even assuming that appeals to other statutes fell within formal categorical approach, Delaware’s statutory scheme did not establish that sexual abuse of minor was necessary for conviction under statute of conviction. Immigration and Nationality Act, §§ 101(a)(43)(A), 237(a)(2)(A)(iii), as amended, 8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii); 10 Del. C. § 922(a)(19); 11 Del. C. §§ 767-773, 1112(b)(4)(A).


8. The two-step formal categorical approach of Taylor v. United States, for determining whether an alien’s prior conviction is for an aggravated felony, so as to render the alien removable, requires both interpretation of the federal statute describing the offense, and a comparison with the statute of criminal conviction. Immigration and Nationality Act, § 237(a)(2)(A)(iii), as amended, 8 U.S.C. § 1227(a)(2)(A)(iii).

9. Under certain conditions, both the federal statute enumerating categories of crimes that are aggravated felonies rendering an alien removable, and the criminal statute of the alien’s conviction, whether federal or state, can require a departure from the formal categorical approach of Taylor v. United States for determining whether an offense is an aggravated felony. Immigration and Nationality Act, §§ 101(a)(43), 237(a)(2)(A)(iii), as amended, 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii).

10. A departure from the formal categorical approach of Taylor v. United States, for determining whether an offense is an aggravated felony rendering an alien removable, is warranted when the terms of the statute invite inquiry into the facts underlying the conviction at issue. Immigration and Nationality Act, §§ 101(a)(43), 237(a)(2)(A)(iii), as amended, 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii).
11. The formal categorical approach of Taylor v. United States, for determining whether an offense is an aggravated felony rendering an alien removable, applies in cases interpreting relatively unitary categorical concepts, like forgery, burglary, or crime of violence, which do not look to underlying facts because the enumerating statute does not invite any such inquiry. Immigration and Nationality Act, §§ 101(a)(43), 237(a)(2)(A)(iii), as amended, 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii).

12. Cases applying the hypothetical federal felony analysis, which asks only whether the elements of a federal criminal statute can be satisfied by reference to the actual statute of conviction, present no invitation to depart from the formal categorical approach of Taylor v. United States for determining whether an offense is an aggravated felony rendering an alien removable. Immigration and Nationality Act, §§ 101(a)(43), 237(a)(2)(A)(iii), as amended, 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii).

13. A departure from the formal categorical approach of Taylor v. United States, for determining whether an offense is an aggravated felony rendering an alien removable, is warranted where a look into the underlying facts, or at least the charging instrument, is called for based upon the statute of conviction. Immigration and Nationality Act, §§ 101(a)(43), 237(a)(2)(A)(iii), as amended, 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii).

14. When disjunctive parts of statutes of conviction represent distinct offenses, with distinct punishments, a departure from the formal categorical approach of Taylor v. United States, for determining whether an offense is an aggravated felony rendering an alien removable, is warranted, such that further inquiry into which particular crime the alien was actually convicted of is allowed. Immigration and Nationality Act, §§ 101(a)(43), 237(a)(2)(A)(iii), as amended, 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii).

15. Even when disjunctive wording or outline formatting in the statute of conviction simply describes variations of the same offense, with no difference in punishment and no distinction on the judgment of conviction, a departure from the formal categorical approach of Taylor v. United States, for determining whether an offense is an aggravated felony rendering an alien removable, may be warranted, because the face of the statute might not make clear whether the conviction qualifies as an aggravated felony. Immigration and Nationality Act, §§ 101(a)(43), 237(a)(2)(A)(iii), as amended, 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii).

16. When departing from the formal categorical approach of Taylor v. United States, the best way to resolve the question whether an offense is an aggravated felony rendering an alien removable, where the conviction is under a statute phrased in the disjunctive, or structured in outline form, will be to look to the charging instrument or to a formal guilty plea. Immigration and Nationality Act, §§ 101(a)(43), 237(a)(2)(A)(iii), as amended, 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii).

17. Formal categorical approach of Taylor v. United States applied to question whether alien’s prior Delaware conviction for unlawful sexual contact in the third degree was for aggravated felony of sexual abuse of a minor, so as to render him removable, where statute of conviction was not phrased in disjunctive in any relevant way so as to invite further inquiry, nothing in phrase “sexual abuse of a minor” signaled that factual investigation was called for, and

18. Under the maxim noscitur a sociis, the meaning of a word in a statute is or may be known from the accompanying words.

United States v. Torres, 383 F.3d 92 (3d Cir. 2004)


2. Under statute proscribing illegal re-entry after deportation and precluding collateral attack on underlying removal order unless alien demonstrates that removal proceedings at which order was issued improperly deprived him of opportunity for judicial review, “judicial review” includes review beyond administrative context. Immigration and Nationality Act, § 276(d), as amended, 8 U.S.C. § 1326(d).

3. Generally, same words in same statute are interpreted in same way.

4. Aliens in removal proceedings are entitled to due process, though procedural protections accorded to them in that context measure less than panoply available to criminal defendant. U.S. Const. amend. V.

5. In removal proceeding, due process requires that alien be provided (1) notice of charges against him, (2) hearing before executive or administrative tribunal, and (3) fair opportunity to be heard. U.S. Const. amend. V.

6. Alien’s removal proceeding was not rendered fundamentally unfair, in violation of due process, by immigration judge’s (IJ) erroneous conclusion, in accordance with then-reigning interpretation of the law, that alien was ineligible for discretionary relief, and therefore removal was proper predicate for his conviction for illegal re-entry; discretionary relief was necessarily a matter of grace rather than of right, and possibility that IJ would have granted alien such relief was speculative at best. U.S. Const. amend. V; Immigration and Nationality Act, §§ 212(c), 276, as amended, 8 U.S.C. §§ 1182(c), 1326.

7. Where state creates parole system that statutorily mandates release unless specified conditions are met, prisoner eligible for parole consideration may be entitled to certain due process protections. U.S. Const. amend. XIV.

Shardar v. Ashcroft, 382 F.3d 318 (3d Cir. 2004)

1. Showing of past persecution by alien gives rise to rebuttable presumption of well-founded fear of future persecution, of kind required to make alien eligible for grant of asylum. 8 C.F.R. § 208.13(b)(1).
2. Government may rebut presumption that asylum applicant who establishes that he was persecuted in past has requisite well-founded fear of future persecution by establishing, by preponderance of evidence, that applicant could reasonably avoid persecution by relocating to another part of his native country, or that conditions in native country have changed, so as to make his fear no longer reasonable. 8 C.F.R. § 208.13(b)(1).

3. Whether asylum applicant has demonstrated past persecution or a well-founded fear of future persecution is factual question, that Court of Appeals reviews under “substantial evidence” standard, and that it will uphold to extent supported by reasonable, substantial, and probative evidence on record considered as whole. Immigration and Nationality Act, §§ 101(a)(42), 208(a), as amended, 8 U.S.C. §§ 1101(a)(42), 1158(a).

4. Under “substantial evidence” standard of review, findings of the Board of Immigration Appeals (BIA) must be upheld unless the evidence not only supports a contrary conclusion, but compels it.

5. Board of Immigration Appeals (BIA) may require documentary evidence to support asylum claim even from otherwise credible applicants. Immigration and Nationality Act, §§ 101(a)(42), 208(a), as amended, 8 U.S.C. §§ 1101(a)(42), 1158(a).

6. As general rule, fear of prosecution for violations of fairly administered laws does not itself qualify one as “refugee” or make one eligible for asylum or withholding of deportation. Immigration and Nationality Act, §§ 101(a)(42), 208(a), 241(b), as amended, 8 U.S.C. §§ 1101(a)(42), 1158(a), 1231(b).

7. Fear of prosecution, even under generally applicable laws, may constitute grounds for asylum or for withholding of removal, if the prosecution is motivated by statutorily enumerated factor, such as political opinion, and if punishment under the law is sufficiently serious to constitute “persecution.” Immigration and Nationality Act, §§ 101(a)(42), 208(a), 241(b), as amended, 8 U.S.C. §§ 1101(a)(42), 1158(a), 1231(b).

8. Finding that asylum applicant who had been arrested and beaten in past for participating in violent political demonstration in which people were allegedly killed failed to demonstrate requisite well-founded fear of future persecution if removed to his country of origin was supported by substantial evidence, and would not be disturbed on judicial review of the Board of Immigration Appeals’ (BIA’s) decision; even assuming that these police beatings qualified as past persecution, government presented evidence that political conditions had changed, and that alien would not be persecuted based upon his political affiliation. Immigration and Nationality Act, §§ 101(a)(42), 208(a), as amended, 8 U.S.C. §§ 1101(a)(42), 1158(a).

9. Standard for withholding of removal is higher than, albeit similar to, standard for asylum, and if alien is unable to satisfy standard for asylum, then he will necessarily fail to meet standard for withholding of removal. Immigration and Nationality Act, §§ 101(a)(42), 208(a), 241(b), as amended, 8 U.S.C. §§ 1101(a)(42), 1158(a), 1231(b).

10. Court of Appeals reviews the Board of Immigration Appeals’ (BIA’s) denial of motion to reopen for abuse of discretion, mindful of the broad deference that it should afford.
11. Motions to reopen immigration proceedings implicate important finality concerns even when they seek to raise an underlying claim for relief, such as relief under the Convention Against Torture, that is not committed to the Attorney General’s discretion.

12. Applicant for relief on merits under the Convention Against Torture bears burden of establishing that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 208.16(c)(2).

13. Decision by the Board of Immigration Appeals (BIA), that police beatings to which alien was allegedly subjected following his arrest for participating in violent political demonstration in which people were allegedly killed did not rise to level of “torture” under the Convention Against Torture was not abuse of discretion. 8 C.F.R. § 208.16(c)(2).

*Barker v. Ashcroft*, 382 F.3d 313 (3d Cir. 2003)

1. Court of Appeals has appellate jurisdiction to review the denial of a motion to reopen deportation proceedings by the Board of Immigration Appeals (BIA).

2. Court of Appeals reviews a decision by the Board of Immigration Appeals (BIA) to deny a motion to reopen deportation proceedings on grounds of failure to make out a prima facie case for abuse of discretion, and the Board’s findings of fact for substantial evidence.

3. Under the abuse of discretion standard applicable to a denial of a motion to reopen deportation proceedings on grounds of failure to make out a prima facie case, the decision by the Board of Immigration Appeals (BIA) is reversible only if it is arbitrary, irrational, or contrary to law.

4. Alien seeking judicial reversal of findings of facts by the Board of Immigration Appeals (BIA) must show that the evidence was so compelling that no reasonable fact finder could fail to find in her favor.

5. Motions for reopening of immigration proceedings are disfavored, and this is especially true in a deportation proceeding, where, as a general matter, every delay works to the disadvantage of the deportable alien who wishes merely to remain in the United States.

6. Court of Appeals would not review alien’s argument that she did not receive adequate or sufficient oral notice of the consequences of failing to depart voluntarily; alien’s failure to raise the issue before Board of Immigration Appeals (BIA), in her motion to reopen her deportation order, barred consideration of claim.


*Chen v. Ashcroft*, 381 F.3d 221 (3d Cir. 2004)

1. Board of Immigration Appeals’ (BIA) determination not to extend the statutory asylum protection afforded to women undergoing forced abortions to their unmarried partners was
reasonable, and thus entitled to Chevron deference; the BIA had an interest in promoting administrability and verifiability of such claims, especially in light of the limited number of spots allowed for asylum claims based on forced abortions and sterilizations. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42).

2. Alien’s allegations that but for China’s allegedly inflated age requirements for marriage, namely, 25 for men and 23 for women, alien would have married pregnant fiancée and avoided forced abortion failed to establish persecution for purposes of alien’s asylum application; alien and fiancée were not permanently barred from marrying, and marriage at the minimum ages in question would not have precluded them from having a long life together or from raising children. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C. § 1101(a)(42).

Gambashidze v. Ashcroft, 381 F.3d 187 (3d Cir. 2004)

1. To qualify for withholding of removal, an alien must show a clear probability that upon his return to the country of removal he would be persecuted; put differently, the standard is that he must show that it is more likely than not that he will face persecution if he is deported.

2. Regulation providing a rebuttal to presumption of future persecution if it is reasonable for alien to relocate within country of removal to avoid future persecution envisions a two-part inquiry: whether relocation would be successful, and whether it would be reasonable. 8 C.F.R. § 208.16(b)(1)(i)(B).

3. Determination by Board of Immigration Appeals (BIA) that alien, who was native of Republic of Georgia, could avoid future persecution in Georgia by relocating within Georgia in denying alien’s request for withholding of removal was not supported by evidence, requiring remand; record only revealed that alien was able to live unmolested in city of Tianeti for about eight months, it was unknown as to whether alien lived freely in Tianeti or had to remain in hiding underground, or whether persecutors knew alien had relocated to Tianeti. 8 C.F.R. § 208.16(b)(1)(i)(B).

Soltane v. U.S. Dep’t of Justice, 381 F.3d 143 (3d Cir. 2004)

1. The Court of Appeals is required to consider the issue of subject matter jurisdiction, even if neither party contends that it is lacking.

2. Preference visa determination as to whether an alien qualified as a special immigrant religious worker was not a decision or action of the Attorney General the authority for which was specified to be at the discretion of the Attorney General, and thus Court of Appeals had subject matter jurisdiction to review decision by Internal Revenue Service (IRS) denying application for visa; statute outlining special immigrant religious worker made clear that Attorney General was required to grant preference visas to those who fell within certain numerical limits set by statute and made no explicit reference to discretion. Immigration and Nationality Act, §§ 101(a)(27)(C), 203(b)(4), 242(a)(2)(B)(ii), 8 U.S.C. §§ 1101(a)(27)(C), 1153(b)(4), 1252(a)(2)(B)(ii).
3. For purposes of determining whether the Court of Appeals has subject matter jurisdiction of the decision of the Internal Revenue Service (IRS) denying a visa application, the language of the statute in question must provide the discretionary authority before the bar under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) provision precluding court review of certain decisions of the Attorney General “the authority for which is specified ** to be in the discretion of the Attorney General” can have any effect. Immigration and Nationality Act, § 242(a)(2)(B)(ii), 8 U.S.C. § 1252(a)(2)(B)(ii).

4. The Court of Appeals defers to both formal and informal agency interpretations of an ambiguous regulation unless those interpretations are plainly erroneous or inconsistent with the regulation.

5. For purposes of visa petition for alien to be classified as special immigrant religious worker, Immigration and Naturalization Service (INS) erroneously concluded that proposed position of houseparent at facility which provided services to young adults with mental disabilities was not a religious occupation because it included secular activity; an alien could qualify as having a religious occupation if job included both secular and religious aspects. Immigration and Nationality Act, §§ 101(a)(27)(C), 203(b)(4), 8 U.S.C. §§ 1101(a)(27)(C), 1153(b)(4); 8 C.F.R. § 204.5(m)(2).

6. For purposes of visa petition for alien to be classified as special immigrant religious worker, Immigration and Naturalization Service (INS) determination that position of houseparent at facility which provided services to young adults with mental disabilities involved only secular activity was not supported by evidence in the record; facility consistently testified that position involved conducting house-based activities including prayer and Bible readings, instructing other staff on practices and Christian values, and teaching religious subjects and values to mentally retarded young adults. Immigration and Nationality Act, §§ 101(a)(27)(C), 203(b)(4), 8 U.S.C. §§ 1101(a)(27)(C), 1153(b)(4); 8 C.F.R. § 204.5(m)(2).

7. For purposes of visa petition for alien to be classified as special immigrant religious worker, Immigration and Naturalization Service (INS) determination that position of houseparent at facility which provided services to young adults with mental disabilities was not a full-time position was not supported by evidence in the record; evidence demonstrated that house parent’s position required at least 80 hours of labor per week and that alien would be working full-time without supplemental employment. Immigration and Nationality Act, §§ 101(a)(27)(C), 203(b)(4), 8 U.S.C. §§ 1101(a)(27)(C), 1153(b)(4); 8 C.F.R. § 204.5(m)(2).

8. For purposes of visa petition for alien to be classified as special immigrant religious worker, Immigration and Naturalization Service (INS) did not explain its determination that alien did not have two years of continuous experience in relevant occupation in light of evidence in the record, requiring remand; employer had submitted letter explaining that alien had undergone significant religious training and had been employed for two years. Immigration and Nationality Act, §§ 101(a)(27)(C), 203(b)(4), 8 U.S.C. §§ 1101(a)(27)(C), 1153(b)(4); 8 C.F.R. § 204.5(m)(2).

9. An agency’s rejection of uncontradicted testimony can support a finding of substantial evidence.

1. The Court of Appeals may not supplement a grossly out-of-date administrative record in asylum proceedings. Immigration and Nationality Act, § 208, as amended, 8 U.S.C. § 1158.

2. While the Board of Immigration Appeals (BIA) may not hide behind the State Department’s letterhead in asylum proceedings and place full and uncritical reliance on a country report, neither is it permissible for the Immigration Judge (IJ) and BIA not to address the relevant country report in some detail. Immigration and Nationality Act, § 208, as amended, 8 U.S.C. § 1158.

3. Where the Board of Immigration Appeals (BIA) affirms without opinion a decision of an Immigration Judge (IJ) denying asylum, the IJ’s decision is the final agency determination, which the Court of Appeals is called upon to review. Immigration and Nationality Act, § 208, as amended, 8 U.S.C. § 1158; 8 C.F.R. § 3.1(e)(4) (2003).


5. Immigration Judge’s (IJ) determination that asylum applicant, who was ethnic Albanian from Montenegro, was not credible, was not supported by substantial evidence, inasmuch as it was based on speculation and conjecture, and IJ was incorrect in stating that applicant’s testimony about his experience in Serbian military was not supported by evidence, that it was implausible that Serbians would have killed him had he not obeyed their orders to shoot civilians, and that it was ludicrous that he could learn enough Serbian to understand instructions on operating tank. Immigration and Nationality Act, § 208, as amended, 8 U.S.C. § 1158.

6. There must be record support and specific, cogent reasons for an adverse credibility determination by an Immigration Judge (IJ).

7. The Immigration and Naturalization Service (INS) is obligated to introduce evidence that, on an individualized basis, rebuts a particular asylum applicant’s specific grounds for his well-founded fear of future persecution; information about general changes in the country is not sufficient. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).

8. An Immigration Judge (IJ) is required to consider the record as a whole in ruling on an asylum claim. Immigration and Nationality Act, § 208, as amended, 8 U.S.C. § 1158.

9. Immigration Judge’s (IJ) conclusion that, due to changed country conditions, asylum applicant, who was ethnic Albanian from Montenegro, could no longer have objectively reasonable fear of future persecution in Serbian military, was supported by substantial evidence, including that war in Bosnia had ended and the Yugoslav parliament had approved amnesty for those who had avoided military service prior to end of war. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.13(b)(1)(ii).
10. Immigration Judge’s (IJ) conclusion that, due to changed country conditions, asylum applicant, who was ethnic Albanian from Montenegro, had no reason to fear persecution from Montenegrin police, was not supported by substantial evidence, where applicant testified police had come to his parents’ home looking for him, and IJ’s observation that Montenegrin government had shown signs of self-determination did nothing to refute claims of police-initiated persecution. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.13(b)(1)(ii).

11. It is a salutary principle of administrative law review that the reviewing court act upon a closed record.

12. Due to problem of stale administrative records regarding changed country conditions in asylum proceedings, Department of Justice (DOJ) would be encouraged to adopt policy encouraging its attorneys to file motions to reopen when adjudication of applicant’s claim would benefit from updated administrative record. Immigration and Nationality Act, §§ 208, 240(c)(6)(C)(iii), as amended, 8 U.S.C. §§ 1158, 1229a(c)(6)(C)(ii); 8 C.F.R. § 1003.2(c)(3)(ii).

13. Due to problem of stale administrative records regarding changed country conditions in asylum proceedings, Board of Immigration Appeals (BIA) would be encouraged to adopt, by opinion, regulation, or otherwise, policies that would avoid Court of Appeals having to review administrative records concerning changed country conditions that were so out-of-date as to verge on meaningless. Immigration and Nationality Act, § 208, as amended, 8 U.S.C. § 1158.

14. It is the burden of the applicant seeking relief under the Convention Against Torture (CAT) to show that it is more likely than not that he would be tortured in the country of removal, and objective evidence is required. 8 C.F.R. § 1208.16(c)(2).

15. Record as whole did not show that ethnic Albanian was more likely to be tortured than not if removed to Montenegro, and he thus was not entitled to relief under Convention Against Torture (CAT), where his testimony did not address contemporary treatment of disfavored persons in Montenegro in any particularized way. 8 C.F.R. § 1208.16(c)(2).

*He Chun Chen v. Ashcroft*, 376 F.3d 215 (3d Cir. 2004)

1. Under deferential standard of review afforded credibility determinations of immigration judge (IJ) and Board of Immigration Appeals (BIA), Court of Appeals will uphold determination unless any reasonable adjudicator would be compelled to conclude to the contrary. Immigration and Nationality Act, § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B).

2. Court of Appeals is required to sustain adverse credibility determination of immigration judge (IJ) or Board of Immigration Appeals (BIA) unless no reasonable person would have found the applicant incredible; evidence of credibility must be so strong in alien’s favor that in a civil trial he would be entitled to judgment on credibility issue as matter of law. Immigration and Nationality Act, § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B).
3. Adverse credibility determinations in removal cases that are based on speculation or conjecture, rather than on evidence in the record, are reversible. Immigration and Nationality Act, § 242(a)(1), 8 U.S.C. § 1252(a)(1).

4. When the Board of Immigration Appeals (BIA) both adopts the findings of the immigration judge (IJ) and discusses some of the bases for the IJ’s decision in a removal case, the Court of Appeals has authority to review the decisions of both the IJ and the BIA. Immigration and Nationality Act, § 242(a)(1), 8 U.S.C. § 1252(a)(1).

5. Court of Appeals had authority to review both order of immigration judge (IJ) and decision of Board of Immigration Appeals (BIA) dismissing appeal from IJ’s decision, where BIA did not conduct de novo review of the record to arrive independently at its conclusions, but merely identified some of the inconsistencies supporting IJ’s adverse credibility determination and its denial of asylum and withholding of deportation. Immigration and Nationality Act, § 242(a)(1), 8 U.S.C. § 1252(a)(1).

6. Attorney General must grant withholding of removal if the alien demonstrates a clear probability that, upon return to his or her home country, his or her life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

7. The applicant for asylum has the burden of proof to establish his or her eligibility for asylum. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.; 8 C.F.R. § 208.13(a).

8. Substantial evidence standard of review is extremely deferential, setting a high hurdle by permitting the reversal of factual findings only when the record evidence would compel a reasonable fact finder to make a contrary determination.

9. Substantial evidence in record supported immigration judge’s (IJ) adverse credibility determination, and thus denial of asylum and withholding of deportation to Chinese alien, based on inconsistencies in his testimony and his airport interview, regarding his wife’s forced abortions and ultimate sterilization under family planning policies and alleged closing of his bookstore because he sold Falun Gong materials. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

10. Fact that male alien was unlikely to face sterilization under China’s family planning policies if he returned to China did not affect his eligibility for asylum, if his testimony regarding his wife’s forced abortions and sterilization were deemed credible, because he stood in shoes of his wife for purposes of asylum application. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

11. Board of Immigration Appeals (BIA) erroneously rejected validity of abortion certificate that alien seeking asylum submitted to prove that his wife had been forced to have two abortions under China’s family planning policies, where validity of certificates was rejected on nothing more than State Department country report indicating that “such purported certificates, if they exist at all, may be documents issued to women who voluntarily submit to an abortion and are entitled to the resulting benefits.” Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.
12. Erroneous refusal to consider abortion certificates purportedly reflecting that alien’s wife had been forced to undergo two abortions against her will did not require remand of case to Board of Immigration Appeals (BIA) for further consideration, where there was other evidence, including discrepancies between alien’s airport interview and his testimony, on which immigration judge based adverse credibility determination that formed basis for denial of asylum and withholding of deportation. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.


1. The proper standard for review of motions to stay removal pending review of a decision of the Board of Immigration Appeals (BIA) is the traditional four-part test used for adjudicating motions for preliminary injunction so that an alien requesting a stay of removal must demonstrate: (1) a likelihood of success on the merits of the underlying petition; (2) that irreparable harm would occur if a stay is not granted; (3) that the potential harm to the moving party outweighs the harm to the opposing party if a stay is not granted; and (4) that the granting of the stay would serve the public interest.

2. The clear and convincing evidence standard is inapplicable to motions to stay removal pending judicial review of the underlying petition.

3. The Court of Appeals must first address any arguments that it lacks subject matter jurisdiction because each court must first satisfy itself of its own jurisdiction.

4. Court of Appeals lacked jurisdiction to review Board of Immigration Appeals (BIA) order finding alien removable based on sexual misconduct offense, where alien conceded that he was removable based on his controlled substance conviction. Immigration and Nationality Act, § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

*Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004)

1. A statute will be impermissibly retroactive when it attaches new legal consequences to prior events because its application would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.

2. The question whether a new statute impermissibly attaches new legal consequences to prior conduct demands a commonsense, functional judgment that should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.

3. Without a clear statement by Congress, retroactive application of a statute is impermissible when it would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.

4. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) provision repealing availability of discretionary relief from deportation for aliens convicted of aggravated felonies who served term of imprisonment less than five years was impermissibly retroactive with respect to aliens who turned down a plea agreement and elected to go to trial in

5. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) provision repealing availability of discretionary relief from deportation for aliens convicted of aggravated felonies who served term of imprisonment less than five years could not be applied retroactively to alien convicted of felony offense after he rejected misdemeanor plea agreement in reliance on fact that he would be eligible for relief from deportation even if he were convicted. Immigration and Nationality Act, § 240A, as amended, 8 U.S.C. § 1229b; Immigration and Nationality Act, § 212(c), 8 U.S.C. (1994 Ed.) § 1182(c).

_Bhiski v. Ashcroft_, 373 F.3d 363 (3d Cir. 2004)

1. Exhaustion is a jurisdictional prerequisite to review of a final order of removal. Immigration and Nationality Act, § 242(d), 8 U.S.C. § 1252(d).

2. Failure to file a brief in support of a notice of appeal before Board of Immigration Appeals (BIA) did not bar court’s review of alien’s claim based on alleged due process violations at his removal hearing where claim was not so complex that it would have required a brief and where the notice of appeal placed the BIA on notice of what was at issue. Immigration and Nationality Act, § 242(d), 8 U.S.C. § 1252(d); 8 C.F.R. § 1003.3(b).

3. An alien at an immigration hearing has some form of right to counsel. U.S. Const. amend. V.

4. Alien’s final “no audible response” was too flimsy a foundation on which to base a claim of violation of due process at immigration hearing due to absence of counsel inasmuch as immigration judge (IJ) asked alien three times if he wanted to proceed without counsel and alien responded three times in the affirmative immediately before the final non-response. U.S. Const. amend. V.

5. No due process violation resulted from proceeding without counsel at immigration hearing or failing to explain to alien the consequences of overstaying his departure date; failure to enter a continuance absent counsel was not an abuse of discretion since absence of either relatives or a fear of return left alien ineligible for anything other than voluntary departure, and given alien’s “I’m single” response and the letter submitted by alien’s girlfriend, there was no reason to think counsel could have successfully used the alleged common law marriage, to the extent there was one, to avoid voluntary departure. U.S. Const. amend. V.

6. A motion to reopen for adjustment of status based on a marriage entered into after the commencement of proceedings may be granted where: (1) the motion is timely filed; (2) the motion is not numerically barred by the regulations; (3) the motion is not barred by Matter of Shaar, or on any other procedural grounds; (4) the motion presents clear and convincing evidence indicating a strong likelihood that the alien’s marriage is bona fide; and (5) Immigration and Naturalization Service (INS) either does not oppose the motion or bases its opposition solely on Matter of Arthur, which held that a motion to reopen could not be granted on the ground of a pending unadjudicated relative petition based on subsequent marriage.
7. Board of Immigration Appeals (BIA) did not err in denying alien’s motion to remand and stay of removal for adjustment of status based on a visa petition filed after alien’s marriage where Immigration and Naturalization Service (INS) opposed the motion on non-Matter of Arthur grounds; alien’s statutory ineligibility for failing to depart by his voluntary departure date and his ineligibility based upon his failure to provide clear and convincing evidence of a bona fide marriage were non-Matter of Arthur grounds, and therefore alien’s motion did not fall within exception carved out by Matter of Velarde-Pacheco.

8. A motion to reopen for the adjustment of status should not be granted when the alien is subject to a statutory bar.

*United States v. Lennon*, 372 F.3d 535 (3d Cir. 2004)


2. A law does not run afool of the Ex Post Facto clause unless it retroactively alters the definition of criminal conduct or increases the penalty by which a crime is punishable. U.S. Const. art. I, § 9, cl. 3.

3. Sentencing Guidelines, along with all statutes that impose or dictate sentence, are subject to the Ex Post Facto clause. U.S. Const. art. I, § 9, cl. 3; U.S.S.G. § 1B1.1 et seq., 18 U.S.C.

4. District court is entitled to employ Sentencing Guidelines in place at the time of sentencing unless doing so would expose the defendant to harsher penalties than were in effect at the time the crime was committed; therefore, in order to establish that the Ex Post Facto clause requires the application of an earlier version of the Sentencing Guidelines, a defendant must show that the crime was committed at a time that the earlier Guidelines version was in force and that the earlier version is more favorable to him or her. U.S. Const. art. I, § 9, cl. 3; U.S.S.G. § 1B1.1 et seq., 18 U.S.C.

5. Where alien unlawfully entered United States with a fictitious name, she was, for purposes of prosecution for being found in the United States, having knowingly and unlawfully re-entered the United States, “found in” the United States when actually discovered. Immigration and Nationality Act, § 276(a), 8 U.S.C. § 1326(a).

6. Since downward departure provision under the November 2000 Sentencing Guidelines was inapplicable to defendant, the November 2000 version of the Guidelines was no more favorable to defendant than was the November 2001 version, and therefore, Ex Post Facto clause did not prevent her from being sentenced under the November 2001 Guidelines, the Guidelines in force at the time of her sentencing for being found in the United States, having knowingly and unlawfully re-entered the United States. U.S. Const. art. I, § 9, cl. 3; U.S.S.G. § 1B1.1 et seq., 18 U.S.C.

1. When the Board of Immigration Appeals (BIA) affirms an Immigration Judge’s decision denying asylum without opinion, it is the reasoning and decision of the Immigration Judge that the Court of Appeals reviews on appeal.

2. An agency’s interpretation of its own regulation is controlling unless it is plainly erroneous or inconsistent with the regulation.

3. Asylum applicants can not always reasonably be expected to have an authenticated document from an alleged persecutor.

4. Immigration and Naturalization Service (INS) regulation requiring certification of foreign official records by a Foreign Service officer was not an absolute rule requiring exclusion of records from an asylum proceeding if proffered records did not comply; regulation was not the exclusive means of authenticating records before an Immigration Judge. 8 C.F.R. § 287.6.

5. Records documenting asylum applicant’s abortions, which were claimed to have been forced, could not be excluded based solely on applicant’s failure to comply with Immigration and Naturalization Service (INS) regulation requiring certification of foreign official records by Foreign Service officer, inasmuch as procedure specified in such regulation was not the exclusive method for authenticating such records. 8 C.F.R. § 287.6.

6. Purported inconsistencies in alien’s testimony, concerning gender of aborted child, date of alien’s baptism, and length of pregnancy before abortion, were insufficient to support immigration judge’s (IJ) decision that alien was not credible, upon review of denial of application for asylum and withholding of deportation, where inconsistencies were ill-founded, trivial, or nonexistent.


1. Properly understood, an administrative closing has no effect other than to remove a case from the court’s active docket and permit the transfer of records associated with the case to an appropriate storage repository; in no event does such an order bar a party from restoring the action to the Court’s active calendar upon an appropriate application.

2. Nor is the power to resurrect reserved to the parties; the court, too, retains the authority to reinstate a case if it concludes that the administrative closing was improvident or if the circumstances that sparked the closing abate.

3. Administrative closings may permissibly contain a built-in timetable under which it automatically will expire, effectively reinstating the case, or, conversely, mature into a final judgment if no action inures within a specified period.

4. The administrative closure reflects nothing more than the federal courts’ overarching concern with tidy docket; it has no jurisdictional significance.

5. An administrative closure of an immigration case temporarily removes the case from an immigration judge’s calendar; the administrative closing of a case does not result in a final order; it is merely an administrative convenience which allows the removal of cases from the
calendar in appropriate situations; it is a device that, when used in correct context, enhances a
district court’s ability to manage its docket.

6. “Final decision,” for purposes of statute providing appellate review of final decisions of
district courts, is one that disposes of whole subject, gives all relief that was contemplated,
provides with reasonable completeness for giving effect to judgment and leaves nothing to be
done in cause save to superintend, ministerially, execution of decree. 28 U.S.C. § 1291.

7. District court’s order marking civil action closed due to “having been advised ... of the full
and final settlement” was not “final decision,” even though in wake of order parties and court
operated under mistaken assumption that litigation had been terminated, since dispute
subsequently arose whether settlement in fact had been reached and parties had to
continue litigation in district court and related bankruptcy action to determine existence and
terms of settlement, and since order failed to comport with technical requirements of finality.

8. District court’s order marking civil action closed due to “having been advised ... of the full
and final settlement,” which was premature due to fact that no settlement actually had been
reached, constituted administrative closing, with its only legal consequence being to remove
case from active docket.

9. Administratively closed case could be set for trial, even though nearly three years had passed
between district court’s order marking case “closed” and party’s motion to set case; order had
not provided any built-in timetable under which closing would either automatically expire or
mature into final decision.

United States v. Adedoyin, 369 F.3d 337 (3d Cir. 2004)

1. District court did not abuse its discretion by denying 90 day postponement of trial due to
September 11, 2001 terrorist attacks, since criminal activity of which defendant had been
charged at trial had no similarity to terrorism of that horrific day, defendant’s national origin
was not similar to that of terrorist attackers and he could not have been confused with them,
allegation that defendant drained the World Trade Center of rent several years prior to the
terrorism could have been addressed fairly by jury, and court conducted individual voir
dire of each juror as means of determining whether jury in fact could be fair. 18 U.S.C. §
3161(h)(8)(A).

2. The Court of Appeals reviews for abuse of discretion a district court’s denial of a defendant’s

3. Review of a district court’s questioning of a defendant and defense witnesses is for abuse of

4. Inasmuch as a trial is a search for the truth and the court is more than a mere umpire of the
proceedings, it is certainly within its province to question witnesses; however, a judge must
not abandon his or her proper role and assume that of an advocate. Fed. Rules Evid. Rule
614(b), 28 U.S.C.
5. District court did not abuse its discretion in mail and wire fraud trial by asking questions of
defendant and defense witness about new venture that defendant was attempting to establish.

6. The Court of Appeals reviews a district court’s ruling admitting a prior conviction under an

7. Certified copy of defendant’s prior conviction in state court, which was predicated on plea of
nolo contendere, was admissible in his trial on charge of improper entry into the United
States by an alien, for purpose of showing that defendant had prior felony conviction which
he failed to disclose when he sought entry into United States, although plea of nolo
contendere and conviction on basis of such plea was not admissible for purposes of proving
that defendant was guilty of that crime. Immigration and Nationality Act, § 275(a), 8 U.S.C.

8. The Court of Appeals conducts a plenary review of a district court’s ruling admitting a prior
conviction to the extent that the district court based its determination on an interpretation of

9. A plea of nolo contendere is not an admission of guilt and thus the fact that a defendant made
such a plea cannot be used to demonstrate that he was guilty of the crime in question;
nevertheless, a plea of nolo contendere has the same legal consequences as a plea of guilty


1. On petition for review of the denial of an application for asylum, the Court of Appeals must
establish whether the factual determinations of the Board of Immigration Appeals (BIA) are
supported by substantial evidence; this standard is even more deferential than the clearly
erroneous standard, and requires the Court of Appeals to sustain an adverse credibility
determination unless no reasonable person would have found the applicant incredible.

2. Adverse credibility findings are afforded substantial deference so long as the findings are
supported by specific cogent reasons.

3. Where an alien failed to establish eligibility for asylum, he necessarily failed to meet the
more stringent standard for showing a clear probability of persecution to be eligible for
withholding of deportation.

4. Sufficient evidence supported Immigration Judge’s finding that alien failed to support
asylum claim with credible evidence; it was doubtful that alien could have escaped guerilla
camp by himself on foot and then supported himself in Mexico from ages 10 to 16, alien’s
account did not provide plausible basis for fearing threat of former guerillas, there were
changed country conditions and guerillas had disbanded, and alien’s testimony was
exaggerated, embellished, and not particularly believable.
5. An alien who is deported may not reenter the United States for ten years unless the Attorney General permits it; however, an alien who departs voluntarily is not bound by this restriction and may reenter the United States once he or she has obtained proper documentation.

6. Court of Appeals did not have authority to extend voluntary departure order pending review of denial of alien’s request for asylum; Attorney General was vested with sole power to reinstate or extend time within which an alien could depart voluntarily, nothing prevented alien from subsequently seeking additional voluntary departure period from Attorney General, and appellate courts retained jurisdiction over alien’s appeal after he departed country. 8 C.F.R. § 1240.26(f).

7. The Court of Appeals is required to give deference to the Board of Immigration Appeals’ interpretation of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C. § 1101 et seq.

8. It is the alien who bears the burden of proving statutory eligibility for voluntary departure and demonstrating that it is warranted. Immigration and Nationality Act, § 240B(b)(1), as amended, 8 U.S.C. § 1229c(b)(1).

9. If voluntary departure periods could be extended until after the completion of an appeal, it would discourage prompt departure and even encourage frivolous appeals in an attempt to continue extending an alien’s departure date.

Wang v. Ashcroft, 368 F.3d 347 (3d Cir. 2004)

1. Court of Appeals reviews legal determinations of Board of Immigration Appeals (BIA) de novo, subject to established principles of deference, but defers to BIA’s factual findings unless any reasonable adjudicator would be compelled to conclude to the contrary. Immigration and Nationality Act, § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B).

2. Board of Immigration Appeals (BIA) could review the record de novo on appeal by Immigration and Naturalization Service (INS) of immigration judge’s (IJ) decision granting alien’s application for withholding of removal when appeal was filed before effective date of regulation restricting BIA to clear error review of IJ’s factual findings. 8 C.F.R. §§ 1003.1(d)(3)(i), 1003.3(f).

3. That immigration judge (IJ) issued oral decision which was lengthier than written decision of Board of Immigration Appeals (BIA) did not, without more, provide Court of Appeals with basis to ignore BIA’s decision and review IJ’s decision.

4. Court of Appeals would review decision of Board of Immigration Appeals (BIA) which vacated immigration judge’s (IJ) granting of alien’s application for withholding of removal, and BIA’s de novo fact finding, rather than IJ’s decision and fact finding, where BIA did not commit error of law in applying burden of proof. 8 C.F.R. § 208.16(c)(2).

5. Standard for invocation of Convention Against Torture (CAT) is more stringent than the standard for granting asylum.
6. Court of Appeals will sustain decision of Board of Immigration Appeals (BIA) regarding whether alien seeking withholding of removal pursuant to Convention Against Torture (CAT) established likelihood of torture if substantial evidence in the record supports BIA’s decision. 8 C.F.R. § 208.18(a)(1).

7. Substantial evidence supported determination of Board of Immigration Appeals (BIA) that alien failed to prove that he was more likely than not to face torture upon his return to China, and thus was not entitled to withholding of removal pursuant to Convention Against Torture (CAT), given State Department reports which indicated that returning illegal immigrants were generally fined or subject to detention or “reeducation,” but did not reference torture, and which indicated that persons within certain groups, in which alien did not show membership, were subject to torture, and given that neither BIA nor Court of Appeals could assume likelihood of torture upon removal for all Chinese immigrants. 8 C.F.R. § 208.18(a)(1).

8. Requirement that returning illegal immigrants pay a fine does not fit within the definition of “torture” for purposes of Convention Against Torture (CAT). 8 C.F.R. § 208.18(a)(1).

*Ki Se Lee v. Ashcroft*, 368 F.3d 218 (3d Cir. 2004)

1. Immigration and Nationality Act provision precluding court jurisdiction over a final order of removal against an alien who committed a criminal offense comes into play only when the petitioner is an alien who is deportable by reason of having been convicted of one of the enumerated offenses; the Court of Appeals necessarily has jurisdiction to determine whether these jurisdictional facts are present. Immigration and Nationality Act, § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

2. The Court of Appeals applies de novo review to purely legal questions of statutory interpretation that govern the Court’s jurisdiction.

3. The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case; if the statutory meaning is clear, the Court’s inquiry is at an end, if the statutory meaning is not clear, the Court must try to discern Congress’ intent using the ordinary tools of statutory construction.

4. In interpreting a statute, if, by employing traditional tools of statutory construction, the Court of Appeals determines that Congress’ intent is clear, that is the end of the matter; if the Court of Appeals is unable to discern Congress’ intent using the normal tools of statutory construction, it will generally give deference to the Board of Immigration Appeals’s interpretation, so long as it is reasonable.

5. Alien’s conviction of filing false income tax returns was not an aggravated felony for purposes of determining removability under the Immigration and Naturalization Act, and thus alien was not removable; other subsection of statute specifically applied to federal tax evasion indicating that only removable tax offense was tax evasion. Immigration and Nationality Act, § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i); 26 U.S.C. § 7206(1).
6. In interpreting a statute, if at all possible, the Court of Appeals should adopt a construction which recognizes each element of the statute.

7. A commonplace rule of statutory construction is that the specific governs the general; where Congress includes particular language in one section of the statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

8. In interpreting a statute, the principle that the specific governs the general has special force when Congress has targeted specific problems with specific solutions in the context of a general statute; it applies particularly when the two provisions are interrelated and closely positioned, both in fact being parts of the same statutory scheme.

9. Tax evasion is the capstone of tax law violations.

10. There is a longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.

_Nugent v. Ashcroft_, 367 F.3d 162 (3d Cir. 2004)


2. Alien’s conviction under a Pennsylvania theft by deception statute, stemming from alien’s involvement with $4,800 in bad checks, did not constitute an aggravated felony as defined by the Immigration and Nationality Act (INA); although an offense under the Pennsylvania statute was a “theft offense” as defined by the INA, because the state statute was bottomed on fraud or deceit, the offense also qualified as an “offense involving fraud or deceit,” requiring victims’ loss to exceed $10,000 in order to be considered an aggravated felony. Immigration and Nationality Act, § 101(a)(43)(G), (a)(43)(M)(i), as amended, 8 U.S.C. § 1101(a)(43)(G), (a)(43)(M)(i); 18 Pa. Cons. Stat. § 3901.

_Urena-Tavarez v. Ashcroft_, 367 F.3d 154 (3d Cir. 2004)

1. Where congressional intent to preclude judicial review of administrative action is fairly discernible in the detail of the particular legislative scheme, presumption favoring judicial review of administrative action does not apply.


_Bamba v. Riley_, 366 F.3d 195 (3d Cir. 2004)
1. Expedited removal proceedings apply to all aliens not lawfully admitted for permanent residence who are convicted of an aggravated felony, including parolees into country. Immigration and Nationality Act, § 238(b), 8 U.S.C. § 1228(b).

2. To the extent that a statute is silent or ambiguous, court will defer to the agency’s interpretation and the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

3. Board of Immigration Appeals’ (BIA’s) interpretation of the INA is subject to established principles of deference, including Chevron deference to BIA decisions giving meaning to ambiguous statutory terms. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

4. To extent statute was ambiguous, Board of Immigration Appeals (BIA) interpretation of statute as applying expedited removal proceedings for commission of aggravated felony to paroled aliens was entitled to Chevron deference. Immigration and Nationality Act, § 238(b), 8 U.S.C. § 1228(b); 8 C.F.R. § 238.1.

5. One of principal purposes in enacting Illegal Immigration Reform Responsibility Act of 1996 (IIRIRA) was to expedite removal of criminal aliens. Immigration and Nationality Act, § 238(b), 8 U.S.C. § 1228(b).

6. Title of statute may can be examined for interpretive purposes to shed light on some ambiguous word or phrase.

_Bakhtriger v. Elwood_, 360 F.3d 414 (3d Cir. 2004)

1. District court’s determination that it lacks subject matter jurisdiction is determination of law, over which Court of Appeals exercises plenary review.

2. Court of Appeals exercises plenary review when district court dismisses a habeas corpus petition based on legal conclusion without holding evidentiary hearing. 28 U.S.C. § 2241.

3. Federal habeas review of immigration decisions does not include broad review, of kind authorized under the Administrative Procedure Act (APA), of agency’s exercise of its discretion, or of sufficiency of evidence to support its decision, but is confined to questions of constitutional and statutory law. 28 U.S.C. § 2241.

4. Determination by the Board of Immigration Appeals (BIA) that circumstances of alien’s case and past persecution to which he was exposed did not rise to level of other cases in which authorities had exercised their discretion in favor of asylum was precisely the sort of discretionary determination that district court lacked jurisdiction to review on alien’s petition for habeas relief following the BIA’s removal decision. 28 U.S.C. § 2241.

_Xie v. Ashcroft_, 359 F.3d 239 (3d Cir. 2004)

1. Court of Appeals had jurisdiction to review both the decision of the Board of Immigration Appeals (BIA) and the decision of the Immigration Judge (IJ), both of which denied alien’s
application for asylum and withholding of deportation, where BIA substantially relied on adverse credibility findings of IJ.


3. Under the substantial evidence standard used to review the determination that an alien is not credible, the determination of adverse credibility by the Board of Immigration Appeals (BIA) must be upheld on review unless any reasonable adjudicator would be compelled to conclude to the contrary; minor inconsistencies do not provide an adequate basis for an adverse credibility finding. Immigration and Nationality Act, § 242(b)(4)(B), 8 U.S.C. § 1252(b)(4)(B).

4. Finding of Board of Immigration Appeals (BIA), in affirming decision of immigration judge (IJ), denying application for asylum and withholding of deportation, that alien, a male from China claiming that he and his wife were persecuted for not adhering to birth control laws, was not credible, was supported by substantial evidence; alien failed to mention in written asylum application that his wife had been sterilized, there were inconsistencies regarding alien’s claimed detention in China, alien’s testimony was not consistent with China’s implementation of one-child policy, and there were various other inconsistencies in alien’s testimony. Immigration and Nationality Act, §§ 208, 241(b)(3), as amended, 8 U.S.C. §§ 1158, 1231(b)(3).

Coraggioso v. Ashcroft, 355 F.3d 730 (3d Cir. 2004)

1. On petition for review of final order of removal, Court of Appeals would review decision of immigration judge as adopted by the Board of Immigration Appeals (BIA).


3. Board of Immigration Appeals’ (BIA’s) interpretation of the Immigration and Nationality Act (INA) is subject to established principles of deference under Chevron. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

4. Under Chevron principles of deference, court, as well as agency, must give effect to unambiguously expressed intent of Congress; however, if statute is silent or ambiguous with respect to specific issue, then question for court is whether agency’s answer is based on permissible construction of statute.

5. Phrase “only through the end of the specific fiscal year,” as used in statute providing that aliens qualifying for diversity visas shall remain eligible to receive such visas only through end of specific fiscal year for which they were selected, unambiguously indicates Congress’ intent to impose time deadline on alien’s eligibility to receive visa once randomly selected as qualifying for the Diversity Immigrant Visa Program; mandatory language in statute requiring the Attorney General to administer this program did not serve to extend statutorily-
limited period of eligibility for diversity visa, where the Immigration and Naturalization
Service (INS) had failed to act on visa application filed by qualifying alien before expiration
of specific fiscal year in question. Immigration and Nationality Act, §§ 203,

6. In interpreting statute, court must begin with statutory language.

7. Ambiguities in immigration statutes are resolved in favor of aliens.

8. Where statutory language provides a clear answer, court’s inquiry usually ends.

9. Even clear statutory language will not be given effect if to do so is absurd.

_Dia v. Ashcroft_, 353 F.3d 228 (3d Cir. 2003)

1. To qualify for withholding of removal, an alien must show that, if deported, there is a clear
probability that he will be persecuted on account of a specified ground, such as political
opinion, if returned to his native country. 8 C.F.R. § 208.16(b).

2. To qualify for relief under the United Nations Convention Against Torture, and Other Cruel,
Inhuman or Degrading Treatment or Punishment, an alien must prove that he is more likely
than not to be tortured in the country of removal. 8 C.F.R. §§ 208.16(c)(2, 4), 208.17.

3. When confronted with questions implicating an agency’s construction of the statute which it
administers, the Court of Appeals applies the principles of deference described in _Chevron

4. In considering an agency’s construction of the statute it administers, the Court of Appeals
initially asks whether the statute is silent or ambiguous with respect to the specific issue the
Court confronts; if it is, the question for the Court is whether the agency’s answer is based on
a permissible construction of the statute.

5. Judicial deference to the Executive Branch is especially appropriate in the immigration
context where officials exercise especially sensitive political functions that implicate
questions of foreign relations.

6. Attorney General permissibly construed Immigration and Nationality Act (INA) in
promulgating streamlining regulations allowing affirmance without opinion (AWO) of
Immigration Judge’s (IJ) decisions; INA said nothing about administrative appeal procedures
and thus left such procedures to Attorney General’s discretion. Immigration and Nationality

7. The basic tenet of administrative law that, absent constitutional constraints or extremely
compelling circumstances the administrative agencies should be free to fashion their own
rules of procedure and to pursue methods of inquiry capable of permitting them to discharge
their multitudinous duties, has even more force in the immigration context, where the Court
of Appeals’ deference is especially great.
8. Streamlining regulations promulgated by Attorney General, allowing affirmance without opinion (AWO) of Immigration Judge’s (IJ) decisions, did not violate alien’s due process rights. U.S. Const. amend. V; 8 C.F.R. § 3.1(a)(7).

9. The Court of Appeals has plenary review over constitutional challenges to immigration procedures.

10. Although the Fifth Amendment entitles aliens to due process of law in deportation proceedings, due process is flexible and calls for such procedural protections as the particular situation demands. U.S. Const. amend. V.

11. The due process afforded aliens stems from those statutory rights granted by Congress and the principle that minimum due process rights attach to statutory rights. U.S. Const. amend. V.

12. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. U.S. Const. amend. V.

13. The procedure by which a Court of Appeals affirms via “judgment orders,” with no mention of whether or not the Court agrees with the reasoning provided by the district court, does not violate the due process clause. U.S. Const. amend. V; F.R.A.P. Rule 36(a)(2), 28 U.S.C.

14. An alien has no due process right to any administrative appeal at all, and, therefore, no constitutional right to a meaningful administrative appeal. U.S. Const. amend. V.

15. An agency must set forth the basis for its order with sufficient specificity to permit meaningful review by the Court of Appeals, and all that is required for meaningful review is that the agency put forth a sufficiently reasoned opinion.

16. Neither the due process clause nor Congress guarantee a de novo review of a decision by the Board of Immigration Appeals (BIA); nor do they guarantee a right to a fully reasoned opinion by the BIA. U.S. Const. amend. V.

17. What is “fair” within the context of immigration proceedings, for purposes of the due process clause, need not always measure up to the requirements of fairness in other contexts, especially because aliens only have those statutory rights granted by Congress. U.S. Const. amend. V.

18. The process of reviewing an agency determination must be a meaningful one, aided by a reasoned opinion from the agency.

19. When the issue before the Court of Appeals is the validity of an agency’s regulations establishing its procedures, unless they violate Congressional dictates or give rise to a due process violation, the regulations must stand, especially where Congress has specifically delegated the power to establish procedures by regulation. U.S. Const. amend. V.
20. When the Board of Immigration Appeals (BIA) issues an affirmation without opinion (AWO) under the Attorney General’s streamlining regulations, the Court of Appeals reviews the opinion of the Immigration Judge (IJ) and scrutinizes its reasoning. 8 C.F.R. § 3.1(a)(7).

21. An alien’s credibility, by itself, may satisfy his burden of supporting his claim for relief from removal, or doom his claim. 8 C.F.R. § 208.13(a).


23. The substantial evidence standard is the standard governing the relationship between administrative agencies and courts of review.

24. The question whether an agency determination is supported by substantial evidence is the same as the question whether a reasonable fact finder could make such a determination based upon the administrative record.

25. If a reasonable fact finder could make a particular finding on the administrative record, then the agency’s finding is supported by substantial evidence; conversely, if no reasonable fact finder could make that finding on the administrative record, the finding is not supported by substantial evidence.

26. When the Court of Appeals reviews a credibility determination of an Immigration Judge (IJ), it must ask whether the determination is supported by evidence that a reasonable mind would find adequate.

27. The Court of Appeals looks at an adverse credibility determination by an Immigration Judge (IJ) in an asylum proceeding to ensure that it was appropriately based on inconsistent statements, contradictory evidences, and inherently improbable testimony in view of the background evidence on country conditions. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

28. Where an Immigration Judge (IJ) bases an adverse credibility determination in an asylum proceeding in part on implausibility, such a conclusion will be properly grounded in the record only if it is made against the background of the general country conditions. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

29. While the Court of Appeals defers to an Immigration Judge (IJ) on credibility questions, that deference is expressly conditioned on support in the record.

30. Deference is not due to a decision of an Immigration Judge (IJ) where findings and conclusions are based on inferences or presumptions that are not reasonably grounded in the record.

31. Adverse credibility determinations of an Immigration Judge (IJ) based on speculation or conjecture, rather than on evidence in the record, are reversible.
32. An Immigration Judge (IJ) must support her adverse credibility findings with specific, cogent reasons.

33. If a conclusion of an Immigration Judge (IJ) is not based on a specific, cogent reason, but, instead, is based on speculation, conjecture, or an otherwise unsupported personal opinion, the Court of Appeals will not uphold it because it will not have been supported by such relevant evidence as a reasonable mind would find adequate; in other words, it will not have been supported by substantial evidence.

34. The applicant bears the burden of establishing eligibility for relief from removal. 8 C.F.R. §§ 208.13, 208.16.

35. In asylum proceedings, some leeway must be given to the administrative arbiters to draw inferences based on common sense and logic as well as on personal experience and background knowledge gained from exposure to certain situations. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

36. In asylum proceedings, the soundness of the basis of the administrative decision making, even if experiential or logical in nature, must be apparent; the process of drawing inferences cannot be left to whim, but must withstand scrutiny. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

37. The Court of Appeals must be vigilant to ensure that a conclusion of an Immigration Judge (IJ) is based on the implausibility of testimony, the IJ provides at least some insight into why he or she finds that testimony implausible.

38. An asylum applicant must provide corroborating evidence, in order to be found credible, only when it would be reasonably expected. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

39. Corroboration is not required to establish an asylum applicant’s credibility; the law allows one seeking refugee status to prove his persecution claim with his own testimony if it is credible. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

40. When an Immigration Judge (IJ), in making a credibility determination, requires corroboration of an asylum applicant, the IJ must provide: (1) an identification of the facts for which it is reasonable to expect corroboration; (2) an inquiry as to whether the applicant has provided information corroborating the relevant facts; and, if he or she has not, (3) an analysis of whether the applicant has adequately explained his or her failure to do so. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

41. Though the hearsay nature of evidence affects the weight it is accorded, it does not affect its admissibility in immigration removal proceedings.

43. Determination of Immigration Judge (IJ), that asylum applicant from the Republic of Guinea was not credible, was not supported by substantial evidence, in that it was based on combination of misstatements of applicant’s testimony, unreasonably speculative or arbitrary conclusions, inaccurate or insufficiently explained findings of contradictions, and arbitrary rejection of probative testimony. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

44. While the Court of Appeals owes deference to findings of an Immigration Judge (IJ), its focus, and the essence of its review function, must be on the IJ’s stated reasons.

45. The reasoning in the opinion of an Immigration Judge (IJ) must bear a legitimate nexus to the finding, and the Court of Appeals is not to invent explanations that may justify the IJ’s conclusion.

46. Upon finding that Immigration Judge’s adverse credibility finding against asylum applicant was not credible, Court of Appeals, rather than granting asylum, would vacate and remand in order for agency to further explain or supplement record. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

*Munroe v. Ashcroft*, 353 F.3d 225 (3d Cir. 2003)


2. The amount of restitution ordered as a result of a conviction may be helpful to a court’s inquiry into the amount of loss to the victim if the plea agreement or the indictment is unclear as to the loss suffered; but when the amount of restitution ordered is not based on a finding as to the amount of the loss but is instead intended solely to affect the defendant’s immigration status, the amount of restitution is not controlling.

*Tineo v. Ashcroft*, 350 F.3d 382 (3d Cir. 2003)

1. Fleuti doctrine providing that innocent, casual, and brief trips abroad should not interrupt an alien’s permanent residency was not reincorporated by Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), and therefore does not apply to departures and attempts to reenter the United States that occurred on or after IIRIRA’s effective date. Immigration and Nationality Act, § 101(a)(13), 8 U.S.C. § 1101(a)(13).

2. Interpretation of Board of Immigration Appeals (BIA) that Fleuti doctrine providing that innocent, casual, and brief trips abroad should not interrupt an alien’s permanent residency was not reincorporated by Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) was entitled to Chevron deference; BIA’s statutory interpretation was based on a reasonable, permissible construction of the statute. Immigration and Nationality Act, § 101(a)(13), 8 U.S.C. § 1101(a)(13).
3. Permanent resident alien did not have a due process right to an individualized determination of whether his departure from the United States was innocent, casual, and brief so as to not be interruptive of his residence in the United States pursuant to statutorily-eliminated Fleuti doctrine. U.S. Const. amend.5; Immigration and Nationality Act, § 101(a)(13), 8 U.S.C. § 1101(a)(13).


1. The Court of Appeals would review the district court’s denial of injunctive relief in immigration case for abuse of discretion.

2. Alien deemed removable based upon state court conviction for possession with intent to distribute more than one ounce of marijuana was not entitled to waiver of inadmissibility. Immigration and Nationality Act, § 212(a)(2)(A)(i)(II), (h), 8 U.S.C. § 1182(a)(2)(A)(i)(II), (h).


4. Once the Court of Appeals determines that the underlying state criminal statute under which alien was convicted fits the legal definition of aggravated felony, its review of the alien’s deportability comes to an end. Immigration and Nationality Act, § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

5. A crime categorized as a felony under state law that involves drug trafficking is an “aggravated felony,” for purpose of determining whether alien is deportable based upon conviction for aggravated felony. Immigration and Nationality Act, § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

6. If a state drug violation, regardless of categorization, would be punishable as a felony under an analogous federal statute, then it constitutes an “aggravated felony,” for purpose of determining whether alien is deportable based upon conviction for aggravated felony. Immigration and Nationality Act, § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

7. Alien’s state court conviction for violation of New Jersey statute prohibiting possession with intent to distribute at least one ounce of marijuana was not analogous to federal felony marijuana trafficking statute, for purpose of determining whether state court conviction constituted “aggravated felony” warranting deportation; federal statute provided that distribution of small amount of marijuana for no remuneration would be punished as misdemeanor, and state statute did not contain sale for remuneration as an element. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), (b)(4), 21 U.S.C. § 841(a)(1), (b)(4); N.J.S. 2C:35-5, subd. b(11).

8. In evaluating whether a state conviction is analogous to a federal felony, for purpose of determining whether the conviction qualifies as an aggravated felony warranting deportation, the Court of Appeals looks to the elements of the statutory state offense, not to the specific facts. Immigration and Nationality Act, § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).
9. Remand to district court was required to determine whether alien’s state court conviction for possession with intent to distribute at least one ounce of marijuana was a drug trafficking crime, for purpose of determining whether conviction qualified as an “aggravated felony” warranting deportation, where district court incorrectly determined that state court conviction qualified as “aggravated felony” because it was analogous to federal drug trafficking statute. Immigration and Nationality Act, § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

Breyer v. Ashcroft, 350 F.3d 327 (3d Cir. 2003)

1. United States citizenship obtained either by birth or legitimate naturalization cannot be lost unless the citizen voluntarily renounces his citizenship. Immigration and Nationality Act, § 349(b), 8 U.S.C. § 1481(b).

2. Party claiming a loss of nationality has occurred bears the burden of proving by a preponderance of the evidence that the citizen voluntarily performed expatriating act with the intent to relinquish his citizenship. Immigration and Nationality Act, § 349(b), 8 U.S.C. § 1481(b).

3. District court adequately considered all of the relevant evidence in concluding that citizen’s continued service in the Waffen SS subsequent to his eighteenth birthday could not be deemed voluntary for expatriation purposes, despite fact that court did not address “causation” as a discrete factor in its voluntariness analysis; although citizen could have done more to secure leave, deserting his unit under what he believed to be penalty of execution suggested that his service was not voluntary. Immigration and Nationality Act, § 349(b), 8 U.S.C. § 1481(b).

4. Citizen’s demonstrated inability to secure release from the Waffen SS and his subsequent desertion were sufficient to defeat the presumption that his continued military service in Third Reich subsequent to his eighteenth birthday was voluntary. Immigration and Nationality Act, § 349(b), 8 U.S.C. § 1481(b).

5. As a civil proceeding, the standard for showing duress in an expatriation proceeding is lower than in a criminal proceeding. Immigration and Nationality Act, § 349(b), 8 U.S.C. § 1481(b).

6. Citizen’s continued service in the Waffen SS subsequent to his eighteenth birthday was not voluntary for expatriation purposes, particularly in light of his desertion under what he believed to be penalty of execution; fact that citizen sought to return to his unit because he feared he would be shot did not establish intentional relinquishment of United States citizenship since Allied armies were approaching Germany from all sides at that time. Immigration and Nationality Act, § 349(b), 8 U.S.C. § 1481(b).


1. Although the Court of Appeals lacks jurisdiction to review a final order of removal based upon the commission of an aggravated felony, it has jurisdiction to determine jurisdictional facts; that is to say, it is empowered to decide whether the petitioner is an alien, and whether

2. On Bangladeshi citizen’s petition for review of order of Board of Immigration Appeals (BIA) finding him removable, Court of Appeals could consider Bangladeshi citizen’s claim that he was not removable because he was national of United States and thus was not alien, where Government did not contest any factual bases for his claim, but argued that he was not national as matter of law. Immigration and Nationality Act, § 242(b)(5), 8 U.S.C. § 1252(b)(5).

3. Simply filing an application for naturalization does not prove that a noncitizen owes a permanent allegiance to the United States, so as to be a “national” as defined by the Immigration and Nationality Act (INA). Immigration and Nationality Act, § 101(a)(22)(B), 8 U.S.C. § 1101(a)(22)(B).

4. For a citizen of another country, nothing less than United States citizenship will show permanent allegiance to the United States, making such person a “national” of the United States, as defined by the Immigration and Nationality Act (INA). Immigration and Nationality Act, § 101(a)(22)(B), 8 U.S.C. § 1101(a)(22)(B).

5. Bangladeshi citizen was not “national” of United States, so as to be nonremovable for having committed aggravated felony, even if he had subjectively declared allegiance to United States, where he could not complete his application process and become citizen of United States due to his conviction of aggravated felony. Immigration and Nationality Act, §§ 101(a)(22)(B), (f)(7, 8), 316(a)(3), 8 U.S.C. §§ 1101(a)(22)(B), (f)(7, 8), 1427(a)(3).

Mulanga v. Ashcroft, 349 F.3d 123 (3d Cir. 2003)

1. The Court of Appeals has jurisdiction to review final orders of removal pursuant to the Immigration and Nationality Act (INA). Immigration and Nationality Act, § 242(a)(1), as amended, 8 U.S.C. § 1252(a)(1).

2. Where the Board of Immigration Appeals (BIA) defers to the decision of the Immigration Judge (IJ) denying asylum, the Court of Appeals reviews the decision of the IJ. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

3. Whether an asylum applicant has demonstrated past persecution or a well-founded fear of future persecution is a factual question, which the Court of Appeals reviews under the substantial evidence standard. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).


5. To establish eligibility for asylum based on past persecution, an asylum applicant must show: (1) one or more incidents rising to the level of persecution; (2) that is on account of one of the statutorily-protected grounds; and (3) is committed either by the government or by forces
that the government is either unable or unwilling to control. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).


7. Once an asylum applicant shows that he or she has a subjective fear of persecution that is supported by objective evidence that persecution is a reasonable possibility, the Attorney General may, but is not required to, grant asylum. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

8. To qualify for withholding of removal, an applicant must show a clear probability that his or her life or freedom would be threatened if he or she is deported. Immigration and Nationality Act, § 241(b)(3), as amended, 8 U.S.C. § 1231(b)(3).


10. Once an applicant establishes a claim for relief under the Convention Against Torture, he or she may not be removed to the country where the torture occurred. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.


12. Otherwise-credible applicants seeking asylum may be required, under certain circumstances, to provide corroborating evidence in order to meet their burden of proof. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

13. An applicant can establish eligibility for asylum or withholding of removal based on persecution on account of either a political opinion he or she actually holds or on the basis of one imputed to him or her, whether correctly or incorrectly, by a foreign government. Immigration and Nationality Act, §§ 208(b)(1), 241(b)(3), as amended, 8 U.S.C. §§ 1158(b)(1), 1231(b)(3).

14. Asylum and withholding of removal cases are different from other types of cases because, while the burden of proof is borne by the applicant, the Immigration Judge (IJ) and the Immigration and Naturalization Service (INS) have a responsibility to make sure that qualified applicants are provided refuge in accordance with the obligations imposed by international law. Immigration and Nationality Act, §§ 208(b)(1), 241(b)(3), as amended, 8 U.S.C. §§ 1158(b)(1), 1231(b)(3).
15. The procedures for requesting asylum and withholding of deportation are not a search for a justification to deport; justice requires that an applicant for asylum be given a meaningful opportunity to establish his or her claim. Immigration and Nationality Act, §§ 208(b)(1), 241(b)(3), as amended, 8 U.S.C. §§ 1158(b)(1), 1231(b)(3).

16. Decision of Immigration Judge (IJ), that grant of asylum was precluded by applicant’s failure to provide corroboration evidence concerning events in Democratic Republic of the Congo (DRC), was not supported by substantial evidence; applicant supplied State Department reports and medical certificate regarding her gunshot wound, and, although she failed to provide evidence corroboration her husband’s political affiliation, IJ may have discouraged her from doing so, and it was unreasonable to expect such evidence given her four-year absence from DRC and subsequent detention. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

17. Record did not support Immigration Judge’s (IJ) impeachment of asylum applicant’s credibility based on fact that applicant stated at airport that she was unaware who shot her, but later testified that she was shot by soldier supporting Zaire’s Mobutu government, inasmuch as such statements were not necessarily inconsistent. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

18. Immaterial discrepancies between airport interviews and subsequent testimony should not be used to make adverse credibility determinations in asylum proceedings. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

19. Immigration Judge (IJ) erred in finding not credible asylum applicant’s testimony concerning her escape from detention in Democratic Republic of the Congo (DRC), where IJ merely stated that applicant’s ability to walk away with government soldier “lacks common sense,” but applicant explained that government soldier had been friend of her husband’s, and State Department Reports indicated that corruption was rampant in military. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

20. An applicant for asylum must provide corroboration evidence only when it would be reasonably expected. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

21. Immigration Judge (IJ) should have given asylum applicant opportunity to provide corroboration documentation of her husband’s political affiliation with Union for Democracy and Social Progress (UDPS) in Democratic Republic of the Congo (DRC), or, if she could not produce such evidence, opportunity to explain her inability to do so, rather than IJ requesting various other documents while failing to request documents concerning husband’s political affiliation, thus perhaps signaling that latter documents were not needed. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

Sierra v. Romaine, 347 F.3d 559 (3d Cir. 2003)

1. In a habeas proceeding, the Court of Appeals exercises plenary review over a district court’s legal conclusions and ordinarily would review its findings of fact under a clearly erroneous standard, but where the relevant facts are undisputed, the entire review is plenary.
2. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) applied to unadmitted, inadmissible alien, who had entered United States during 1980 Mariel boatlift from Cuba, where alien had been ordered excluded and deported prior to IIRIRA’s general effective date. Immigration and Nationality Act, § 241(a)(6), as amended, 8 U.S.C. § 1231(a)(6); Illegal Immigration Reform and Immigrant Responsibility Act § 309(c)(1), 11 U.S.C. § 1101 note.

3. The transition section of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), specifying that certain of the IIRIRA’s provisions do not apply to aliens in exclusion or deportation proceedings prior to the IIRIRA’s general effective date, applies only to matters relating to ongoing deportation or exclusion proceedings and not to post-final-order detention determinations. Illegal Immigration Reform and Immigrant Responsibility Act § 309(c)(1), 11 U.S.C. § 1101 note.

4. A governmental agency may change its interpretation of a statute, and ordinarily it should make such a change if it believes that its prior interpretation was incorrect; thus, the Court of Appeals has no intention of discouraging agencies from reevaluating their positions regarding the meaning of statutes.

5. An agency’s interpretation of a statute is entitled to deference in accordance with the thoroughness evident in the agency’s consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

6. Court of Appeals would accord little deference to position of Immigration and Naturalization Service (INS) that Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) did not apply to unadmitted, inadmissible alien ordered excluded and deported prior to IIRIRA’s effective date, in view of INS’s shifting position, where government appeared to have advocated such position only in litigation, and INS’s position had been inconsistent. Illegal Immigration Reform and Immigrant Responsibility Act § 309(c)(1), 11 U.S.C. § 1101 note.

7. Presumptive six-month temporal limit on post-removal detention for resident aliens established in Zadvydas did not apply to detention of unadmitted, inadmissible alien who had been paroled into United States following Mariel boatlift from Cuba in 1980. Immigration and Nationality Act, § 241(a)(6), as amended, 8 U.S.C. § 1231(a)(6).


Given that Immigration Judge’s (IJ) ruling that asylum applicant needed to present additional corroborating evidence in order to carry his burden of proof was informed by its adverse credibility determination, Board of Immigration Appeals (BIA), which found applicant credible, should have conducted an independent corroboration analysis; rather than simply restating the findings of the IJ regarding corroboration, BIA either should have explored the issue and reached its own conclusion, or remanded the case to the IJ with instructions to conduct another corroboration analysis given that the BIA had deemed applicant credible.

*Yeboah v. U.S. Dep’t of Justice*, 345 F.3d 216 (3d Cir. 2003)
1. District court had subject matter jurisdiction over juvenile alien’s action for review of decision of Immigration and Naturalization Service (INS) denying consent to his request for state juvenile dependency proceeding, inasmuch as such action arose under Administrative Procedure Act (APA). 5 U.S.C. § 551 et seq.; 28 U.S.C. § 1331.

2. On appeal from denial of cross-motion for summary judgment, Court of Appeals’ standard of review of decision of Immigration and Naturalization Service (INS) denying consent to juvenile alien’s request for state juvenile dependency proceeding was limited to abuse of discretion. 5 U.S.C. § 706(2)(A); Fed. R. Civ. P. Rule 56(c), 28 U.S.C.

3. Although a reviewing court must engage in a substantial inquiry of the administrative record before an agency, the ultimate standard of review is a narrow one where the reviewing court is not empowered to substitute its judgment for that of the agency.

4. The terms of the enabling statute establish the scope of agency authority and the factors for a court to consider in reviewing the agency’s action.

5. Under the Administrative Procedure Act (APA), a reviewing court may set aside an agency decision only if there is clear error of judgment. 5 U.S.C. § 706(2)(A).

6. At the summary judgment stage of a suit challenging an agency action, even if there are genuine issues of material fact, deference must be given to the agency’s interpretation of the facts, so long as they are based upon credible information. Fed. R. Civ. P. Rule 56(c), 28 U.S.C.

7. It is not arbitrary or capricious for the Immigration and Naturalization Service (INS) to deny consent to a dependency hearing for special immigrant juvenile (SIJ) status if the hearing would be an exercise in futility. Immigration and Nationality Act, § 101(a)(27)(J), as amended, 8 U.S.C. § 1101(a)(27)(J).

8. Under the arbitrary and capricious standard, much deference is afforded to the agency.

9. An agency action will not be deemed arbitrary, capricious, or an abuse of discretion simply because one may happen to think it ill-considered, or to represent the less appealing alternative solution available; rather, it is required that the agency’s action be rationally related to the purposes to be served, and supported by the facts found in the record.


11. A juvenile alien has the right to have his request for a dependency hearing considered in accordance with Immigration and Naturalization Service (INS) policy. Immigration and Nationality Act, § 101(a)(27)(J), as amended, 8 U.S.C. § 1101(a)(27)(J).

12. Immigration and Naturalization Service (INS) acted within its discretion in considering evidence of juvenile alien’s relationship with his family and his physical and mental
condition in deciding whether to grant or deny consent to juvenile alien’s request for state juvenile dependency proceeding. 28 U.S.C. § 1331.

13. District Director of Immigration and Naturalization Service (INS) did not abuse his discretion or act arbitrarily or capriciously in denying juvenile alien’s request for state juvenile dependency proceeding, on ground that juvenile alien, who arrived unaccompanied in United States at age 10 with no travel documents, failed to establish abuse, abandonment, or neglect in Ghana. 28 U.S.C. § 1331.

Oghudimkpa v. Ashcroft, 342 F.3d 207 (3d Cir. 2003)

1. Under the law-of-the-case doctrine, once an issue has been decided, parties may not relitigate that issue in the same case.

2. Dicta statements are not binding law of the case, and thus, courts will not impute the resolution of a complicated issue from dictum in a judgment order.

3. Under the law-of-the-case doctrine, courts may refuse to infer decisions on issues that were barely presented, or from summary decisions.

4. The Court of Appeals’s review of jurisdictional questions is plenary.

5. Provision of the Foreign Affairs Reform and Restructuring Act (FARRA) limiting judicial review of a final order of removal did not deprive District Court of jurisdiction to review alien’s habeas corpus petition, alleging that his removal would violate the United Nations Convention Against Torture (CAT), where FARRA and its regulations, which implemented CAT, neither stated explicitly that a district court may not exercise jurisdiction over habeas corpus claims alleging violations of CAT, nor clearly stated Congress’s intent to eliminate habeas jurisdiction over such claims. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, § 2242(d), 8 U.S.C. § 1231 note; 28 U.S.C. § 2241; 8 C.F.R. § 208.16(c)(2).

6. With a self-executing treaty, no domestic legislation is required to give it the force of law in the United States; conversely, a non-self-executing treaty is one that must be implemented by legislation before it gives rise to a private cause of action.


9. Habeas relief is traditionally available to correct errors of law, including the erroneous application or interpretation of statutes. 28 U.S.C. § 2241.

10. A district court’s habeas jurisdiction encompasses review of the Board of Immigration Appeals’s (BIA) application of legal principles to undisputed facts. 28 U.S.C. § 2241.

_Awolos v. Ashcroft_, 341 F.3d 227 (3d Cir. 2003)

1. While the Court of Appeals gives deference to the decisions of the Board of Immigration Appeals (BIA), and must affirm its findings unless the evidence “compels” a contrary conclusion, it cannot give meaningful review to a decision in which the BIA does not explain how it came to its conclusion.

2. Board of Immigration Appeals (BIA) was within its discretion in accepting Immigration and Naturalization Service’s (INS) brief on appeal from immigration judge’s (IJ) decision granting asylum to alien and his son, although INS claimed that it had timely served a copy of brief on alien’s attorney when in fact it had not, where BIA’s acceptance of brief did not amount to a due process violation, since alien did not show that he was prejudiced by INS’s misrepresentation. U.S. Const. amend. V.

3. The Court of Appeals reviews factual determinations of the Board of Immigration Appeals (BIA) under the substantial evidence standard.

4. The Court of Appeals reviews the decision of the Board of Immigration Appeals (BIA), not that of the immigration judge (IJ).

5. In reviewing a decision of the Board of Immigration Appeals (BIA) in an immigration proceeding, the question for due process purposes is simply whether the BIA made an individualized determination. U.S. Const. amend. V.

6. Board of Immigration Appeals’s (BIA) terse order reversing immigration judge’s (IJ) decision granting asylum to alien and his son was insufficient to permit the Court of Appeals to give meaningful review to BIA’s decision, and thus, vacatur and remand were warranted, where order gave no indication why BIA denied asylum application, and Court could not determine whether BIA acted arbitrarily.

_Acosta v. Ashcroft_, 341 F.3d 218 (3d Cir. 2003)

1. For purposes of Immigration and Naturalization Act (INA), “conviction” encompassed a plea of nolo contendere in Pennsylvania state court to a charge of heroin possession, which was subsequently dismissed pursuant to Pennsylvania Controlled Substance Act provision allowing dismissal of charge after completion of probation without verdict; INA’s definition of “conviction” did not implicitly incorporate Federal First Offenders Act (FFOA) providing for discretionary dismissal of federal drug charges upon first-time offender’s successful completion of probation. Immigration and Nationality Act, § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A); 18 U.S.C. § 3607; 35 P.S. § 780-117.
2. Equal protection did not mandate that the dismissal of alien’s state charge of heroin possession be treated as if the same charge had been dismissed under Federal First Offenders Act (FFOA) for purposes of determining whether alien had been convicted of a controlled substance offense for purposes of Immigration and Naturalization Act (INA); Congress rationally could have thought that aliens whose federal charges were dismissed under the FFOA were unlikely to present a substantial threat of committing subsequent serious crimes, and could have rationally worried that state criminal justice systems, under the pressure created by heavy case loads, might permit dangerous offenders to plead down to simple possession charges and take advantage of those state schemes to escape what was considered a conviction under state law. U.S. Const. amend. V; 8 U.S.C. § 101(a)(48)(A) § 1101(a)(48)(A); 18 U.S.C. § 3607; 35 P.S. § 780-117.


Officially sanctioned legal and economic discrimination against stateless Palestinians in Saudi Arabia did not amount to “persecution” sufficient to warrant grant of asylum to Palestinian, even though applicant had been imprisoned in Saudi Arabia on two occasions, where discrimination applied to all foreigners, police had grounds to hold applicant on both occasions, and applicant was able to obtain employment in Saudi Arabia. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

Tarrawally v. Ashcroft, 338 F.3d 180 (3d Cir. 2003)

1. Court of Appeals would review immigration judge’s (IJ’s) adverse credibility determination and findings of fact with respect to alien’s INA withholding of deportation and Convention Against Torture claims under the substantial deference standard. Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C. § 1101 et seq.

2. Although the Court of Appeals normally reviews only the decisions of the Board of Immigration Appeals (BIA), where the BIA summarily affirms the immigration judge’s (IJ’s) decision, the Court must then review the decision of the IJ.

3. The Court of Appeals reviews de novo the issue of whether it has jurisdiction to determine what constitutes extraordinary circumstances for a late filed asylum petition.

4. The Court of Appeals will not disturb the immigration judge’s (IJ’s) credibility determination and findings of fact if they are supported by reasonable, substantial and probative evidence on the record considered as a whole.

5. Although the Court of Appeals generally defers to the immigration judge’s (IJ’s) inferences, deference is not due where findings and conclusions are based on inferences or presumptions that are not reasonably grounded in the record, viewed as a whole.

6. Court of Appeals lacked jurisdiction to review an asylum petition that an immigration judge (IJ) and the Board of Immigration Appeals (BIA) deemed untimely. Immigration and Nationality Act, § 208(a)(2, 3), as amended, 8 U.S.C. § 1158(a)(2, 3).
7. Substantial evidence supported immigration judge’s (IJ’s) adverse credibility determination regarding alien’s claim that if deported, he would be persecuted on account of his political involvement in various groups, warranting denial of alien’s application for withholding of removal under the INA; although some of the IJ’s reasons for his determination were based on presumptions not grounded in the record, the IJ also offered other rationales which went to the heart of the claim, including alien’s numerous contradictions as to his location and activities during certain time periods, and irreconcilable contradictory assertions between his affidavit and testimony. Immigration and Nationality Act, § 241(b)(3)(A), as amended, 8 U.S.C. § 1231(b)(3)(A).

8. An alien must establish by a clear probability that his life or freedom would be threatened in the proposed country of deportation in order to be entitled to withholding of removal; a “clear probability” means more likely than not. Immigration and Nationality Act, § 241(b)(3)(A), as amended, 8 U.S.C. § 1231(b)(3)(A).

9. Substantial evidence supported finding that alien was not likely to be persecuted or tortured if deported to Sierra Leone, warranting denial of alien’s withholding claim under the Convention Against Torture; although documents alien presented established that citizens who did not support certain political organizations were specifically targeted for torture, such as limb amputation, alien introduced no evidence other than his own discredited testimony that he was a member of groups opposing those organizations. 8 C.F.R. §§ 208.16(c)(2), 208.18(a)(1).

10. A decision-maker must review claims for relief from deportation under the Convention Against Torture and consider relevant country conditions even where adverse credibility determinations have precluded relief under the INA. Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C. § 1101 et seq.


Issue of whether alien met hardship requirement for discretionary cancellation of deportation under the INA was a discretionary decision by the Board of Immigration Appeals (BIA) which the Court of Appeals lacked jurisdiction to review. Immigration and Nationality Act, §§ 240A(b), 242(a)(2)(B)(i), as amended, 8 U.S.C. §§ 1229b(b), 1252(a)(2)(B)(i).


1. Provision of Immigration and Nationality Act (INA) removing Attorney General’s discretion to waive alien’s inadmissibility for crimes of moral turpitude in the case of aliens who were previously admitted as permanent residents and had either been convicted of aggravated felony or had not resided in United States for seven continuous years did not violate equal protection component of Fifth Amendment’s Due Process clause, even though provision did not apply to non-legal permanent resident aliens. U.S. Const. amend. V; Immigration and Nationality Act, § 212(h), as amended, 8 U.S.C. § 1182(h).

2. Aliens facing removal are afforded due process protections. U.S. Const. amend. V.
3. Delay in processing alien’s removal following imposition of 27-year sentence, with nine-year period of parole ineligibility, for aggravated felony did not entitle her to consideration for relief from removal, under provision repealed after her conviction, as permanent resident alien with lawful unrelinquished domicile of seven consecutive years; alien knew when she entered her guilty plea that she would be exposed to period of incarceration that could preclude consideration for relief. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C. § 1182(c).

4. Statute requiring that Attorney General begin removal proceedings as expeditiously as possible does not create any due process right. U.S. Const. amend. V; Immigration and Nationality Act, § 239(d)(1, 2) 8 U.S.C. § 1229(d)(1, 2).

5. Removal proceedings were initiated against alien not when Order to Show Cause (OSC) was issued, but when Notice to Appear (NTA) was filed with Immigration Court, and therefore, delay between OSC and NTA did not implicate due process. U.S. Const. amend. V; 8 C.F.R. § 239.1; 8 C.F.R. § 242.1 (1992).

6. Doctrine of estoppel can apply to action of the government.

7. In order to succeed on estoppel argument against government, party must prove (1) misrepresentation by government, (2) which she reasonably relied upon, (3) to her detriment and (4) affirmative misconduct.

*Duvall v. Elwood*, 336 F.3d 228 (3d Cir. 2003)

1. Subject matter jurisdiction can never be waived.


3. Although Board of Immigration Appeals (BIA) had held that doctrine of collateral estoppel did not bar Immigration and Naturalization Service (INS) from relitigating habeas petitioner’s alienage, there was no final removal order, nor had petitioner exhausted administrative remedies, as required for judicial review. Immigration and Nationality Act, § 242(d)(1), 8 U.S.C. § 1252(d)(1).


*Kayembe v. Ashcroft*, 334 F.3d 231 (3d Cir. 2003)

1. Whether alien has demonstrated either past persecution or a well-founded fear of future persecution, as required for grant of asylum, is factual question which Court of Appeals reviews under a “substantial evidence” standard. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).
2. Court of Appeals will uphold findings of the Board of Immigration Appeals (BIA) to extent that they are supported by reasonable, substantial and probative evidence on record considered as whole, and will reverse those findings only if there is evidence so compelling that no reasonable fact finder could conclude as the BIA did.

3. On petition for review of decision of the Board of Immigration Appeals (BIA) denying alien’s application for asylum, Court of Appeals’ power of review extended only to decision of the BIA, and only if the BIA expressly adopted or deferred to a finding of immigration judge (IJ) would Court of Appeals review the IJ’s decision.

4. Where the Board of Immigration Appeals (BIA), in denying alien’s appeal from adverse decision of immigration judge rejecting his application for asylum, had not adopted the IJ’s credibility determinations or made any credibility findings of its own, Court of Appeals, in considering alien’s petition for review, had to proceed on assumption that alien was credible and had to determine whether the BIA’s decision was supported by substantial evidence in face of alien’s assumed credibility.

5. Country report issued by the State Department, concluding that the government of the Congo was no longer engaged in practice of arresting and detaining those of Tutsi ethnicity, was substantial evidence supporting determination by the Board of Immigration Appeals (BIA) that alien petitioning for grant of asylum did not have the requisite well-founded fear of persecution if returned to the Congo, at least not based on his alleged Tutsi ethnicity. Immigration and Nationality Act, § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

6. Where Board of Immigration Appeals (BIA), in failing to make any determination that alien was not credible or to explain what corroboration was needed for alien’s apparently credible testimony regarding arrest of his father based on political beliefs which government officials allegedly imputed both to alien and his father, had made it impossible for Court of Appeals to meaningfully review its decision upholding denial of alien’s application for asylum, Court of Appeals had to vacate the BIA’s decision and to remand case so that the BIA could further explain its reasoning.

7. Board of Immigration Appeals (BIA) may sometimes require an otherwise-credible applicant to supply corroborating evidence in order to meet his burden of proof, but only after conducting three-part inquiry under which it first identifies those facts for which it is reasonable to require corroboration, then decides whether applicant has provided corroboration for such relevant facts, and finally considers whether alien has adequately explained any failure to corroborate.

*Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003)

1. An alien seeking asylum must present some evidence that the alleged persecutors want to punish him/her on account of one of the five enumerated grounds in order to be eligible for a grant of asylum. Immigration and Nationality Act, § 208(a), as amended, 8 U.S.C. § 1158(a).

2. “Well-founded fear of persecution” that an asylum applicant must demonstrate involves both a subjectively genuine fear of persecution and an objectively reasonable possibility of persecution; subjective prong requires a showing that the fear is genuine, and determination
of objectively reasonable possibility requires ascertaining whether a reasonable person in the alien’s circumstances would fear persecution if returned to the country in question. Immigration and Nationality Act, § 208(a), as amended, 8 U.S.C. § 1158(a).

3. The law does not require that asylum be granted even if the alien qualifies as a “refugee;” rather, that is left to the discretion of the Attorney General and is decided on a case by case basis. Immigration and Nationality Act, § 208(a), as amended, 8 U.S.C. § 1158(a).

4. In order to obtain mandatory withholding of deportation, alien must first establish by a “clear probability” that his/her life or freedom would be threatened in the proposed country of deportation; “clear probability” means that it is “more likely than not” that an alien would be subject to persecution. Immigration and Nationality Act, § 243(h), 8 U.S.C. (1994 Ed.) § 1253(h).

5. Alien’s testimony, if credible, may be sufficient under the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to sustain the burden of proof without corroboration. Immigration and Nationality Act, § 241, as amended, 8 U.S.C. § 1231; 8 C.F.R. § 208.16(c)(2).

6. Rape can constitute “torture” for purposes of United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. 8 C.F.R. § 208.16(c)(3)(i).

7. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment excludes from its definition of torture severe pain or suffering that is the unintended consequence of an intentional act; however, Convention does not require that the persecutor actually intend to cause the threatened result, rather, it is sufficient if the persecutor causes severe psychological suffering by threatening beatings for one of the specified purposes such as extracting information or coercing a confession. 8 C.F.R. § 208.18(a)(5).

8. Board of Immigration Appeals (BIA) erred in providing only a minimal analysis of alien’s claim under United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and deciding government’s appeal on the basis of Matter of J-E, as well as allowing rulings on her asylum and withholding of deportation claims to control her claim under the Convention. Immigration and Nationality Act, § 241, as amended, 8 U.S.C. § 1231.

Ponce-Leiva v. Ashcroft, 331 F.3d 369 (3d Cir. 2003)

1. Asylum applicant did not waive claim that immigration judge’s (IJ) denial of his continuance request violated his right to counsel and due process rights, even though he could have taken greater pains in equating denial with due process violation, where assertion that right to counsel was violated was based solely on denial, which resulted in applicant’s attorney failing to attend hearing. U.S. Const. amend. V; Immigration and Nationality Act, § 240(b)(4)(A), as amended, 8 U.S.C. § 1229a(b)(4)(A).

2. Asylum applicant did not waive claim that counsel’s absence from hearing constituted ineffective assistance of counsel, in emphasizing due-process aspect of ineffective assistance
claim before Board of Immigration Appeals (BIA), but then emphasizing in his appellate brief issue of procedural requirements for reopening removal proceedings on basis of ineffective assistance of counsel, where brief also suggested that counsel’s ineffectiveness was denial of due process. U.S. Const. amend. V; Immigration and Nationality Act, § 240(B)(4)(A), as amended, 8 U.S.C. § 1229a(b)(4)(A).

3. Although an alien at an immigration hearing has some form of right to counsel, there is no Sixth Amendment right to counsel in deportation hearings. U.S. Const. amend. VI.

4. An alien’s constitutional right to counsel at an immigration hearing is based upon the Fifth Amendment’s guarantee of due process of law. U.S. Const. amend. V.

5. Immigration judge (IJ) did not abuse his discretion, or deny asylum applicant’s constitutional or statutory right to counsel, in denying his counsel’s request for continuance and then proceeding with asylum hearing without counsel, where counsel requested continuance only two days before hearing, he had agreed to hearing date eight months previously, counsel failed to explain reason for his planned out-of-town absence, IJ reasonably determined that counsel’s absence would make no difference at hearing, and it was clear that asylum claim would not merit relief. U.S. Const. amend. V; Immigration and Nationality Act, § 240(b)(4)(A), as amended, 8 U.S.C. § 1229a(b)(4)(A).

6. An interpretation of an alien’s statutory right to counsel by the Board of Immigration Appeals (BIA) is an interpretation of Immigration and Naturalization Service (INS) regulations to which the Court of Appeals gives great deference. Immigration and Nationality Act, § 240(b)(4)(A), as amended, 8 U.S.C. § 1229a(b)(4)(A).

7. Resolution of the question whether denial of a continuance in an immigration proceeding constitutes an abuse of discretion is fact-driven.

8. It is reasonable and proper for an immigration judge (IJ) to consider the apparent lack of merit in an asylum claim when deciding to proceed without counsel at an immigration hearing.

9. Counsel’s absence from removal hearing did not prejudice alien, and thus did not constitute ineffective assistance, where alien admitted removability, and made no attempt to show that questions asked by immigration judge (IJ) did not give him opportunity to present his case fully. U.S. Const. amend. V.

10. To advance a successful claim for ineffective assistance of counsel, an alien must demonstrate prejudice, that is, the alien must show that he was prevented from reasonably presenting his case. U.S. Const. amend. V.

*Drakes v. INS*, 330 F.3d 600 (3d Cir. 2003)

Having failed to appeal state convictions that provided basis for his removal, alien could not challenge constitutionality of those convictions by petition for federal habeas relief; alien was represented by counsel throughout his state court criminal proceedings, and he had ample
time to seek review of his state convictions on direct appeal or through post-conviction or habeas review.

_Abdulrahman v. Ashcroft_, 330 F.3d 587 (3d Cir. 2003)

1. Decision by Board of Immigration Appeals (BIA) that applicant is ineligible for asylum constitutes final order of removal that may be subject to judicial review. Immigration and Nationality Act, § 242(a)(1), as amended, 8 U.S.C. § 1252(a)(1).

2. Where Board of Immigration Appeals (BIA) has deferred to immigration judge’s (IJ) decision rather than rendering its own opinion, reviewing court must review IJ’s decision to assess whether BIA’s decision to defer was appropriate. Immigration and Nationality Act, § 242(a)(1), as amended, 8 U.S.C. § 1252(a)(1).

3. Because Congress has delegated authority over immigration laws to Attorney General, who in turn vested that authority in Board of Immigration Appeals (BIA), principles of Chevron deference apply in immigration context.

4. Implications for foreign policy make judicial deference especially appropriate in immigration context.

5. To establish eligibility for asylum on basis of past persecution, applicant must show (1) incident, or incidents, that rise to level of persecution, (2) that is on account of statutorily-protected grounds, and (3) that is committed by government or forces government is either unable or unwilling to control. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(a)(1), (b)(1), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a)(1), (b)(1).

6. To qualify for withholding of removal, previously called withholding of deportation, applicant must show that there is clear probability that he or she would face persecution if returned to his or her home country.

7. Relief under Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, requires that alien prove that he or she is more likely than not to be tortured in country of removal. 8 C.F.R. § 208.16(c)(2, 4).


9. Presumption that applicant for asylum has well-founded fear of future persecution based on past persecution can be rebutted if Immigration and Naturalization Service (INS) establishes by preponderance of evidence that applicant could reasonably avoid persecution by relocating to another part of his or her country or that conditions in applicant’s country have changed so as to make his or her fear no longer reasonable. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(a)(1), (b)(1), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a)(1), (b)(1); 8 C.F.R. § 208.13(b)(1).
10. Where past persecution is not established, applicant for asylum can demonstrate that she has well-founded fear of future persecution by showing that she has genuine fear, and that reasonable person in her circumstances would fear persecution if returned to her native country. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(a)(1), (b)(1), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a)(1), (b)(1); 8 C.F.R. § 208.13(b)(1).


12. While aliens seeking asylum are not required to show that persecution is more likely than not, they must show subjective fear of persecution that is supported by objective evidence that persecution is reasonable possibility. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(a)(1), (b)(1), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a)(1), (b)(1); 8 C.F.R. § 208.13(b)(1).

13. Testimony alone may be sufficient to meet burden on alien seeking asylum to show subjective fear of persecution, so long as it is credible. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(a)(1), (b)(1), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a)(1), (b)(1); 8 C.F.R. § 208.13(b)(1).

14. Court of Appeals lacked jurisdiction over alien’s claim that immigration judge (IJ) erroneously applied more stringent “more likely than not” standard, applicable to withholding of removal, to alien’s claim for asylum based on past persecution, since alien failed to raise claim in his appeal to Board of Immigration Appeals (BIA). Immigration and Nationality Act, § 242(d)(1), 8 U.S.C. § 1252(d)(1).

15. Although grounded in procedural due process, alien’s claim that immigration judge (IJ) was biased remains subject to administrative exhaustion requirements mandating that issue be raised before Board of Immigration Appeals (BIA) before it may be raised before Court of Appeals. U.S. Const. amend. V; Immigration and Nationality Act, § 242(d)(1), 8 U.S.C. § 1252(d)(1).

16. Alien adequately alerted Board of Immigration Appeals (BIA) to his claim that bias of immigration judge (IJ) presiding at hearing on alien’s application for asylum violated alien’s due process rights to preserve claim for review by Court of Appeals; while alien’s appeal did not frame his contention that IJ’s alleged bias violated due process in so many words, both his notice of appeal and his later brief to BIA argued that IJ impermissibly based her decision on her own speculative beliefs, rather than on evidence. U.S. Const. amend. V; Immigration and Nationality Act, § 242(d)(1), 8 U.S.C. § 1252(d)(1).

17. Court of Appeals review of alien’s claim that his due process rights were violated by alleged bias of immigration judge (IJ) presiding over hearing on alien’s application for asylum was de novo. U.S. Const. amend. V.

18. Despite fact that there is no constitutional right to asylum, aliens facing removal are entitled to due process. U.S. Const. amend. V.
19. In context of immigration hearing, due process requires that aliens threatened with deportation are provided right to full and fair hearing that allows them reasonable opportunity to present evidence on their behalf. U.S. Const. amend. V.

20. Due process demands impartiality on part of those who function in judicial or quasi-judicial capacities. U.S. Const. amend. V.

21. As judicial officers, immigration judges (IJ) have responsibility to function as neutral and impartial arbiters, and must assiduously refrain from becoming advocates for either party.

22. Immigration judge (IJ) presiding over hearing on alien’s application for asylum did not act as witness against alien in violation of alien’s due process rights; IJ questioned logic of alien’s factual assertions concerning alleged past persecution based on alien’s alleged membership in student group, but made no statements expressing her own opinions, IJ did not unreasonably impose restrictions on alien’s presentation of either testimonial or documentary evidence, and did not obstruct or denigrate his testimony, and, although language used by IJ during hearing and in her opinion reflected annoyance and dissatisfaction with alien’s testimony that was far from commendable, such a lack of courtesy and absence of expected level of professionalism did not violate due process. U.S. Const. amend. V.

23. Court of Appeals reviews immigration judge’s (IJ) factual determination of alien’s eligibility for asylum under substantial evidence standard.

24. Findings of fact by immigration judge (IJ), including adverse credibility determinations, will be upheld to extent that they are supported by reasonable, substantial, and probative evidence on record considered as a whole.

25. Although adverse credibility determinations cannot be based on speculation or conjecture, such finding will be afforded substantial deference where it is grounded in evidence in record and where immigration judge (IJ) provides specific cogent reasons for her determination.

26. Immigration judge’s (IJ) determination that testimony of applicant for asylum concerning past arrests and persecution based on his membership in student group was not credible was supported by substantial evidence in record; while IJ’s commentary was not confined to evidence in record and smacked of impermissible conjecture, alien’s testimony about his political activities and nature of student group was remarkably generalized, and he failed totally to explain how his asserted activities brought him to attention of security forces and led to his three claimed arrests.

_Lukwago v. Ashcroft_, 329 F.3d 157 (3d Cir. 2003)

1. Court of Appeals reviews the Board of Immigration Appeals’ (BIA’s) statutory interpretation of the Immigration and Nationality Act (INA) under the deferential Chevron standard. Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C. § 1101 et seq.

2. Court of Appeals must treat the Board of Immigration Appeals’ (BIA’s) findings of fact as conclusive unless any reasonable adjudicator would be compelled to conclude to the

3. Court of Appeals will reverse the Board of Immigration Appeals’ (BIA’s) finding of fact that an asylum applicant did not have a well-founded fear of persecution only if a reasonable fact finder would have to conclude that the requisite fear of persecution existed. Immigration and Nationality Act, § 242(b)(4)(B), as amended, 8 U.S.C. § 1252(b)(4)(B).

4. In considering asylum applicant’s petition for review of Board of Immigration Appeals’ (BIA’s) decision, Court of Appeals must give his testimony the benefit of the BIA’s acceptance of his credibility.

5. Under the Immigration and Nationality Act (INA), a “refugee” may be one who suffered past persecution on account of one of the statutorily enumerated grounds or fears future persecution on account of one of those grounds. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).

6. To qualify for asylum based on past persecution, applicant first must show that s/he suffered persecution. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b).

7. For asylum purposes, “persecution” does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional; rather, persecution includes threats to life, confinement, torture, and economic restrictions so severe that they constitute a real threat to life or freedom. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b).

8. Sovereign nations enjoy the right to enforce their laws of conscription, and penalties for evasion are not considered “persecution” under the Immigration and Nationality Act (INA). Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b).


10. Asylum applicant’s demonstration of past persecution is not enough to qualify him or her for asylum; applicant has the burden of showing that the persecution was on account of applicant’s race, religion, nationality, membership in a particular social group, or political opinion. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. § 208.13(b)(1).

11. When determining if an asylum applicant has suffered persecution on account of protected grounds, court must look beyond the applicant’s conduct to the persecutor’s motives. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. § 208.13(b)(1).
12. Immigration and Nationality Act (INA) makes motive critical and, therefore, although an
asylum applicant is not required to provide direct proof of his persecutor’s motives, applicant
must provide some evidence of it, direct or circumstantial. Immigration and Nationality Act,
§§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. §
208.13(b)(1).

13. Asylum applicant’s persecutor may have had multiple motivations for his or her conduct, but
for the applicant to qualify for asylum, the persecutor must have been motivated, at least in
part, by one of the statutorily enumerated grounds. Immigration and Nationality Act, §§
101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. §
208.13(b)(1).

14. Asylum applicant failed to demonstrate that his abduction and persecution by guerrilla
organization in Uganda was on account of his political opinions; applicant did not contend
that he opposed the guerrilla movement or its political opinions prior to his abduction, nor
did he show that his abduction and persecution was motivated by any reason other than the
organization’s need for additional labor and soldiers. Immigration and Nationality Act, §§
101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. §
208.13(b)(1).

15. There are three requirements to qualify for asylum on account of membership in a “particular
social group”: (1) applicant must identify a group that constitutes a “particular social group,”
(2) applicant must establish that s/he is a member of that group, and (3) applicant must show
that s/he was persecuted based on that membership. Immigration and Nationality Act, §§
101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. §
208.13(b)(1).

16. Under the Immigration and Nationality Act (INA), a “particular social group” must exist
independently of the persecution suffered by the applicant for asylum. Immigration and
1158(b); 8 C.F.R. § 208.13(b)(1).

17. Although the shared experience of enduring past persecution may, under some
circumstances, support defining a “particular social group” for purposes of fear of future
persecution, it does not support defining a “particular social group” for past persecution
because the persecution must have been “on account of” a protected ground. Immigration and
1158(b); 8 C.F.R. § 208.13(b)(1).

18. Finding that guerrilla organization in Uganda did not target asylum applicant for persecution
because he was a child was supported by evidence that the organization abducted applicant
due to its need for labor, that the organization indiscriminately persecuted civilians regardless
of age, that the organization also held adults captive, and that, the night applicant was
abducted, the organization also abducted three adults from his village. Immigration and
1158(b); 8 C.F.R. § 208.13(b)(1).
19. Asylum applicant, who failed to establish that he had suffered past persecution on account of his membership in any “particular social group” or on account of any other statutorily enumerated ground, was not entitled to a discretionary grant of asylum for humanitarian reasons, despite the severity of the persecution suffered by him. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. § 208.13(b)(1).

20. Asylum applicant who demonstrates that s/he has suffered past persecution on account of race, religion, nationality, membership in a particular social group, or political opinion triggers a rebuttable presumption of a well-founded fear of future persecution, as long as that fear is related to the past persecution. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. § 208.13(b)(1).

21. Immigration and Naturalization Service (INS) has the burden of establishing either changed circumstances or the reasonableness of relocation, as required to rebut presumption that asylum applicant who demonstrated that s/he had suffered past persecution on account of statutorily enumerated grounds has a well-founded fear of future persecution. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. § 208.13(b)(1)(ii).

22. If asylum applicant meets all of the statutory criteria, the Attorney General has discretion to grant asylum, but is not required to do so. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. § 208.13(b)(1).

23. Asylum applicant who fails to demonstrate past persecution may still qualify for asylum by showing that s/he has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion if returned to his or her native country. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. § 208.13(b)(1).

24. Term “well-founded fear,” as used in the Immigration and Nationality Act (INA), has both a subjective and objective component; asylum applicant must show that s/he has a subjective fear of persecution that is supported by objective evidence that persecution is a reasonable possibility. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. § 208.13(b)(1).

25. Finding that asylum applicant, who had been abducted as a child and forcibly conscripted into service by guerrilla organization opposed to the government of Uganda, did not have an objectively reasonable fear of future persecution by the Ugandan government on account of his membership in a “particular social group” or an imputed anti-government political opinion, was supported by evidence that Uganda had instituted an amnesty policy for former rebels, that the Ugandan government’s policies toward abducted child soldiers who escaped had become more humane than in the past, and that United States Embassy was of the opinion that it was unlikely that the Ugandan government would harm former abductees. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. § 208.13(b)(1).
26. Asylum applicant may use testimonial, documentary, or expert evidence to show both a subjective and an objectively reasonable fear of future persecution. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. § 208.13(b)(1).

27. Asylum applicant was not required to show that persecution would be more likely than not or even probable; applicant was only required to show that his fear was subjective and objectively reasonable. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. § 208.13(b)(1).

28. Asylum applicant, who had been abducted as a child and forcibly conscripted into service by guerrilla organization opposed to the government of Uganda, was a member of a “particular social group” within meaning of the Immigration and Nationality Act (INA); membership in group of former child soldiers who had escaped the organization’s captivity fit Board of Immigration Appeals’ (BIA’s) own recognition that a shared past experience may be enough to link members of a “particular social group,” and applicant’s status as a former child soldier was a characteristic he could not change and that was now fundamental to his identity. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. § 208.13(b)(1).

29. Court of Appeals would remand to Board of Immigration Appeals (BIA) an applicant’s appeal of BIA decision denying his application for asylum, so that BIA could reconsider whether applicant, who had been abducted as a child and forcibly conscripted into service by guerrilla organization opposed to the government of Uganda, had demonstrated a well-founded fear of persecution by the guerrilla group if he returned to Uganda, especially in light of applicant’s assertion that widespread publicity over his case had increased likelihood that group would recognize and retaliate against him; substantial evidence did not support BIA’s determination that the group of escaped child soldiers was in no greater danger from the guerrilla organization than other members of the Ugandan population. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. § 208.13(b)(1).

30. Asylum applicant claiming fear of future persecution by non-governmental entity had burden to show that relocation to another part of his country of nationality would not eliminate the risk of persecution and that relocation would be unreasonable. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. § 208.13(b)(1), (b)(2)(i), (b)(3)(i).

31. Court of Appeals would remand to Board of Immigration Appeals (BIA) an applicant’s appeal of BIA decision denying his application for asylum, so that BIA could consider whether relocation to another part of Uganda would be reasonable and would abate the risk of persecution by guerrilla organization that had abducted applicant as a child and forcibly conscripted him into service in opposition to government of Uganda; although applicant provided evidence in the record that relocation would not eliminate the risk of persecution and that relocation would not be reasonable, BIA had not decided the issue. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. § 208.13(b)(1), (b)(2)(i), (b)(3)(i).
32. For asylum applicant, who had been abducted as a child and forcibly conscripted into service by guerrilla organization opposed to the government of Uganda, to prevail on his imputed political opinion claim, he had to show that organization had attributed to him an anti-organization political opinion and that he had a well-founded fear of persecution based on that imputed political opinion. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b); 8 C.F.R. § 208.13(b)(1).

33. Standard for withholding of removal under the Immigration and Nationality Act (INA) is higher than, albeit similar to, the standard for asylum. Immigration and Nationality Act, §§ 208(b), 241(b)(3), as amended, 8 U.S.C. §§ 1158(b), 1231(b)(3).

34. As in the case of asylum, applicant seeking withholding of removal under the Immigration and Nationality Act (INA) must show that s/he will be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion if deported. Immigration and Nationality Act, §§ 208(b), 241(b)(3), as amended, 8 U.S.C. §§ 1158(b), 1231(b)(3); 8 C.F.R. § 208.16(b).

35. Applicant seeking withholding of removal under the Immigration and Nationality Act (INA) must show that his or her future persecution is “more likely than not” to occur. Immigration and Nationality Act, §§ 208(b), 241(b)(3), as amended, 8 U.S.C. §§ 1158(b), 1231(b)(3); 8 C.F.R. § 208.16(b)(2).

36. If applicant is unable to satisfy the standard for asylum, he necessarily fails to meet the standard for withholding of removal under the Immigration and Nationality Act (INA). Immigration and Nationality Act, §§ 208(b), 241(b)(3), as amended, 8 U.S.C. §§ 1158(b), 1231(b)(3); 8 C.F.R. § 208.16(b).

37. Standard for withholding of removal under the United Nations Convention Against Torture (CAT) is different than that under the Immigration and Nationality Act (INA). Immigration and Nationality Act, § 241(b)(3), as amended, 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(c)(2).

38. Under the United Nations Convention Against Torture (CAT), applicant seeking withholding of removal must show that it is more likely than not he will be tortured if removed to his native country. 8 C.F.R. § 208.16(c)(2).

39. United Nations Convention Against Torture (CAT) does not require a showing that the torture that would be inflicted on applicant seeking withholding of removal is on account of any protected ground, but only applies to torture that is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. 8 C.F.R. § 208.18(a)(1).

40. Applicant, who had been abducted as a child and forcibly conscripted into service by guerrilla organization opposed to the government of Uganda, was not entitled to withholding of removal under the United Nations Convention Against Torture (CAT); applicant not only failed to demonstrate that the Ugandan government acquiesced in the organization’s activities, but the evidence he submitted showed that the Ugandan government and the organization were in continuous opposition. 8 C.F.R. § 208.18(a)(1).
41. Finding that it was not “more likely than not” that applicant, who had been abducted as a child and forcibly conscripted into service by guerrilla organization opposed to the government of Uganda, and who now sought withholding of removal under the United Nations Convention Against Torture (CAT), would be tortured by the Ugandan government if he returned to that country, was supported by evidence that Ugandan government had adopted an amnesty policy toward rebel fighters and that the United States Embassy was of the opinion that it was unlikely that the Ugandan government would harm former abductees. 8 C.F.R. §§ 208.16(c)(2), 208.18(a)(1).

_Amanfi v. Ashcroft_, 328 F.3d 719 (3d Cir. 2003)

1. Alien’s removal to Ghana before Court of Appeals rendered judgment did not moot his petition for review of Board of Immigration Appeal’s (BIA) order of removal.

2. Court of Appeals’s standard of review of Board of Immigration Appeals’s (BIA) findings of facts is quite deferential; while court must ascertain whether BIA’s factual determinations are supported by substantial evidence, only if evidence compels otherwise may court decline to uphold those findings.

3. Convention Against Torture, as implemented by Immigration and Naturalization Service (INS) regulations, prohibits removal of alien to a country when alien sustains his burden of proving that it is more likely than not that he will be subject to torture by, at instigation of, or with acquiescence of public official. 8 C.F.R. §§ 208.16(c), 208.18(a).

4. Petition for protection under Convention Against Torture differs significantly from petitions for asylum or withholding of removal because alien need not demonstrate that he will be tortured on account of particular belief or immutable characteristic. 8 C.F.R. §§ 208.16(c), 208.18(a).

5. Alien failed to establish that there was high probability that he would be tortured based on perception that he was homosexual if alien were removed to Ghana, as required to support petition for protection under Convention Against Torture; while homosexuality was illegal in Ghana, law was not strictly enforced and homosexuality was generally tolerated, various reports on conditions in Ghana made no mention of torture or mistreatment of homosexuals, fact that alien had been tortured in the past did not make it more likely than not that he would be tortured again, and group that tortured alien in the past were private actors, and alien presented no evidence that government officials had acquiesced in torture. 8 C.F.R. §§ 208.16(c)(3), 208.18(a)(1, 7).

6. Key element that must support petition for asylum and withholding of removal is existence or fear of persecution, committed by either private or state actors, on account of belief or immutable characteristic. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(a), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a).

7. Alien failed to establish that he had been persecuted, or had reason to fear persecution, by members of ethnic group in Ghana because of his religious beliefs, as required to support alien’s petitions for asylum and withholding of removal; evidence showed that alien was persecuted because his father had preached against fetish worship and human sacrifice.
practiced by members of ethnic group, not because of alien’s and his father’s belief in Christianity. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(a), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a).

8. When reviewing Board of Immigration Appeals’s (BIA) interpretation of INA, Court of Appeals must apply principles of deference described in Chevron. Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C. § 1101 et seq.

9. Although agency can change or adapt its policies, it acts arbitrarily if it departs from its established precedents without announcing a principled reason for departure.

10. If Immigration and Naturalization Service (INS) departs from announced rule without explanation or avowed alteration, such action could be viewed as arbitrary, capricious, or abuse of discretion.


12. Remand was required to permit Board of Immigration Appeals (BIA) to determine whether evidence supported alien’s claim that he was subject to persecution if removed to Ghana on account of his imputed status as homosexual on petition for asylum or withholding of removal, where BIA’s legal determination that imputed membership in social group was not sufficient was reversed by Court of Appeals. Immigration and Nationality Act, §§ 101(a)(42)(A), 241(b)(3), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1231(b)(3).

13. Whether to discredit alien’s testimony is matter for Board of Immigration Appeals (BIA) to decide de novo.

United States v. Bamfield, 328 F.3d 115 (3d Cir. 2003)


2. Sentencing Guideline that was identified in the Statutory Index in Guidelines Manual as being the guideline applicable to aliens convicted of preventing or hampering their removal under the predecessor to current statute prohibiting any alien from preventing or hampering his removal pursuant to lawful deportation order remained the guideline applicable to aliens convicted under current statute, though the Sentencing Commission, following amendment and renumbering of predecessor statute, failed to amend Statutory Index to reflect this renumbering; this failure was mere inadvertent omission by the Sentencing Commission. Immigration and Nationality Act, § 243(a), as amended, 8 U.S.C. § 1253(a); § 242(e), as amended, 8 U.S.C. (1994 Ed.) § 1252(e); U.S.S.G. § 2L1.2, 18 U.S.C.

Avila-Macias v. Ashcroft, 328 F.3d 108 (3d Cir. 2003)

1. Federal statute authorizing the Attorney General to reinstate prior order of removal, if alien has illegally reentered the United States, also permits reinstatement of prior order of

2. Section of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) that provides that “any reference in law to an order of removal shall be deemed to include a reference to an order of exclusion and deportation or an order of deportation” is not limited in its application only to transitional rules cases, i.e., to cases in which alien was in exclusion or deportation proceedings before the IIRIRA’s effective date, but in which hearing was not held until after the IIRIRA’s effective date. Omnibus Consolidated Appropriations Act, 1997, Div. C, § 309(d)(2), as amended, 8 U.S.C. § 1101 note.

3. Court applies a two-pronged test to determine whether statute applies retroactively to events that occurred prior to its enactment, under which court: (1) determines whether Congress’ intent with regard to temporal reach of statute is clear from statutory language; and if not, then (2) decides whether applying statute to pre-enactment conduct would have retroactive effect; if so, then court will presume that legislation does not apply to the conduct in question, and apply it prospectively only.

4. Determination as to whether statute would operate retroactively if applied to events predating its enactment demands a commonsense, functional judgment about whether statute attaches new legal consequences to events completed before its enactment.

5. New statute may not impair rights a party possessed when he acted, increase party’s liability for past conduct, or impose new duties with respect to transactions already completed.

6. No impermissible retroactivity would result from application, to alien who had previously been deported, of statute providing for reinstatement of order of removal if a removed alien later reenters the United States illegally, where alien did not reenter the United States until after statute went into effect. Immigration and Nationality Act, § 241(a)(5), as amended, 8 U.S.C. § 1231(a)(5).

7. Notice of reinstatement proceedings that was issued to alien who was again found inside the United States, following implementation of prior order of removal, was not invalid for failing to specify the date and place of his illegal reentry. Immigration and Nationality Act, § 241(a)(5), as amended, 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8(a).

8. Failure to notify alien’s counsel of record of proceedings to reinstate order of removal previously entered against him did not violate alien’s right to due process of law, where alien conceded that he was subject to prior order of deportation and that he had illegally reentered the United States; failure to notify counsel was not prejudicial. U.S. Const. amend. V.

9. Court was barred from reviewing prior order of deportation in a proceeding to reinstate it after alien was again found illegally present in the United States following his deportation. Immigration and Nationality Act, § 241(a)(5), as amended, 8 U.S.C. § 1231(a)(5).

United States v. Dixon, 327 F.3d 257 (3d Cir. 2003)

1. Defendant who had been deported could be “found in” United States while he was
involuntarily incarcerated, for purposes of charge of illegal reentry into United States, absent indication that alien’s illegal return to United States was involuntary. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326.

2. Violation of statute making it a felony to reenter United States following deportation only requires alien’s illegal return and a subsequent discovery; although the act of returning to the United States must be voluntary, it is not relevant whether an alien’s continued presence in the United States was voluntary at the moment of discovery. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326.

3. Defendant convicted of illegally reentering United States following deportation could not collaterally attack his deportation order, where he did not exhaust administrative remedies by appealing the deportation order or show that he was deprived of the opportunity for judicial review of the deportation proceedings. Immigration and Nationality Act, § 276(d), 8 U.S.C. § 1326(d).

United States v. Pollard, 326 F.3d 397 (3d Cir. 2003)

1. Court of Appeals’ review of district court’s interpretation and application of legal principles is plenary.

2. On review of order addressing constitutionality of immigration statute and regulation, Court of Appeals was required keep in mind the limited scope of judicial inquiry into immigration legislation, and that Congress had developed a complex scheme governing admission to the United States and status within its borders which required delicate policy judgments counseling the judicial branch to avoid intrusion into this field. Immigration and Nationality Act, § 212(d)(7), 8 U.S.C. § 1182(d)(7); 8 C.F.R. § 235.5(a).

3. The Due Process Clause of the Fifth Amendment to the Constitution contains the same guarantee of equal protection under law as that provided in the Fourteenth Amendment. U.S. Const. amends. V, XIV.

4. For purposes of equal protection analysis, the relevant classifications under challenged law are those among persons similarly situated. U.S. Const. amend. V.

5. Strict scrutiny did not apply to equal protection challenge to immigration laws which subjected persons traveling on airline flights that originated in United States Virgin Islands to other locations within United States to questioning about their citizenship status at fixed checkpoint. U.S. Const. amend. V; Immigration and Nationality Act, § 212(d)(7), 8 U.S.C. § 1182(d)(7); 8 C.F.R. § 235.5(a).

6. Under rational basis review in an equal protection context, classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose; in other words, the inquiry is whether the difference in treatment rationally furthers a legitimate state interest. U.S. Const. amend. XIV.

7. Normally, under rational basis review, the party alleging an equal protection violation has the
burden of showing the irrationality of the classification drawn by the challenged statute. U.S. Const. amends. V, XIV.

8. Government could not be required to bear burden of proof with respect to equal protection challenge to immigration laws that subjected persons traveling to other locations within United States on airline flights from United States Virgin Islands to checkpoint questioning about their citizenship status on grounds that Congress’ intent to treat differently Virgin Islands and persons departing therefrom appeared on face of statute and regulation, and that issue was raised via defendant’s motion to suppress evidence obtained through warrantless seizure, inasmuch as presumption of legislative validity was not altered when alleged discrimination was on face of statute or when issue arose in criminal context, and therefore defendant retained burden of negating every conceivable basis that could support challenged classification. U.S. Const. amend. V; Immigration and Nationality Act, § 212(d)(7), 8 U.S.C. § 1182(d)(7); 8 C.F.R. § 235.5(a).

9. The threshold for upholding under rational basis review distinctions in a statute subject to equal protection challenge is extremely low, and it is not within the purview of the courts to conduct anything but a limited review of the reasons that legislation subject to rational basis review classifies among similarly situated persons. U.S. Const. amends. V, XIV.

10. Even if government fails to come forward with its own rationale for classification created by statute challenged on equal protection grounds, court may hypothesize the motivations of the legislature to find a legitimate objective promoted by the provision under attack; courts are free to consider any conceivable legislative purpose so long as it reasonably could have been entertained by the legislature. U.S. Const. amends. V, XIV.

11. Under rational basis review, party asserting equal protection challenge not only must show that any justifications for the classification forwarded by the government were not rational, but also must convince the court that no set of facts rationally could justify the classification. U.S. Const. amends. V, XIV.

12. In deciding whether immigration laws which subjected persons who were traveling on airline flights to other United States locations from United States Virgin Islands to checkpoint questioning about their citizenship status violated Fifth Amendment’s equal protection guarantee, district court could not conduct in-depth probe into whether challenged statute and its implementing regulations accomplished government’s stated purpose of controlling illegal immigration in Virgin Islands and preventing illegal immigrants from traveling to United States’ mainland, and whether statute and regulations were justified. U.S. Const. amend. V; Immigration and Nationality Act, § 212(d)(7), 8 U.S.C. § 1182(d)(7); 8 C.F.R. § 235.5(a).

13. Congress and United States Attorney General rationally could have believed that illegal immigration had to be dealt with differently in the United States Virgin Islands than in other United States jurisdictions, and therefore immigration statute and regulation which subjected to checkpoint questioning about their citizenship status persons traveling to other United States locations via airline flights originating in Virgin Islands did not violate equal protection guarantee embedded in Fifth Amendment’s Due Process Clause. U.S. Const. amend. V; Immigration and Nationality Act, § 212(d)(7), 8 U.S.C. § 1182(d)(7); 8 C.F.R. §
235.5(a).

14. Under rational basis review of equal protection challenge, the government need not treat all jurisdictions exactly alike. U.S. Const. amends. V, XIV.

15. As is explicit in courts’ use of scrutiny levels in determining the constitutionality of legislation, different treatment is not necessarily impermissible discrimination under equal protection principles. U.S. Const. amends. V, XIV.

16. Just as Congress and the executive branch may attack a perceived problem in piecemeal fashion without running afoul of equal protection guarantees, they may attack the problem in different ways in different jurisdictions. U.S. Const. amends. V, XIV.

17. The Fourth Amendment’s central concern is to protect liberty and privacy from arbitrary and oppressive interference by government officials. U.S. Const. amend. IV.

18. The touchstone of Fourth Amendment analysis is reasonableness. U.S. Const. amend. IV.

19. For the most part, searches and seizures undertaken without a warrant and probable cause or reasonable suspicion are unreasonable and violative of the Fourth Amendment. U.S. Const. amend. IV.

20. In determining whether an exception exists to Fourth Amendment’s probable cause or reasonable suspicion requirement, court balances the intrusion on the individual’s Fourth Amendment rights against the legitimate governmental interests at stake, and where the balance tilts in favor of the government, court considers the suspicionless search reasonable. U.S. Const. amend. IV.

21. Stops and questioning of travelers conducted at fixed airport checkpoint with respect to persons traveling on airline flights originating in United States Virgin Islands and bound for other parts of United States were consistent with principles of Fourth Amendment, and thus could occur in the absence of individualized suspicion, given that government had compelling interest in interdicting aliens illegally entering or present in United States, checkpoint stops involved only brief detention of travelers, checkpoint minimized physical and psychological intrusion and was not likely to cause concern or fright on part of lawful travelers, checkpoint interfered minimally with traffic, and stops were conducted in manner that minimized possible evils of absolute discretion on part of officers in the field. U.S. Const. amend. IV; Immigration and Nationality Act, § 212(d)(7), 8 U.S.C. § 1182(d)(7); 8 C.F.R. § 235.5(a).


1. Civil detention, including civil detention by Immigration and Naturalization Service (INS), does not trigger Speedy Trial Act’s requirement that information or indictment be filed within 30 days from date on which individual was arrested or served with summons. 18 U.S.C. § 3161(b).

2. Even if civil detention by Immigration and Naturalization Service (INS) could trigger Speedy
Trial Act under ruse exception, exception did not apply, despite fact that INS special agent contacted United States Attorney’s Office the day after defendant was in custody to inform them that defendant might be subject to criminal prosecution; defendant was indicted within 15 days of being taken into civil detention by INS, within 16 days of civil detention United States Attorney’s Office accepted case for prosecution, and within 41 days of civil detention defendant was indicted for unlawful reentry after previous deportation. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326; 18 U.S.C. § 3161(b).

3. Rule requiring that defendant who is arrested be brought before Magistrate Judge “without unnecessary delay” only applies to criminal arrests; it does not apply to civil detention by Immigration and Naturalization Service (INS). Fed. R. Cr. P. Rule 5(a), 18 U.S.C.

4. Defendant’s asserted legal purpose for illegal reentry after previous deportation was insufficient to warrant downward departure on ground that case was not within heartland of Sentencing Guidelines. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326; U.S.S.G. § 1B.1 et seq., 18 U.S.C.

_Ezeagwuna v. Ashcroft_, 325 F.3d 396 (3d Cir. 2003)

1. Where the Board of Immigration Appeals (BIA) had conducted independent analysis of record in asylum proceedings, Court of Appeals would limit its review to the BIA’s final order. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

2. On appeal from order entered by the Board of Immigration Appeals (BIA) in asylum proceedings, Court of Appeals would review de novo whether alien’s due process rights were violated. U.S. Const. amend. V.

3. On appeal from order entered by the Board of Immigration Appeals (BIA) in asylum proceedings, Court of Appeals would review, for abuse of discretion, the BIA’s decision not to reopen the record and to remand to immigration judge for consideration of supplemental evidence.

4. Board of Immigration Appeals (BIA) violated due process rights of alien seeking political asylum when it rejected her claims of past persecution based almost entirely upon hearsay statements of State Department official in letter that alien received only days prior to final hearing on her asylum application, where this letter, which concerned results of “investigation” allegedly conducted by unknown individual into documents that alien had submitted in support of her application, was in nature of multiple hearsay authored by government official with no personal knowledge of matters reported, of alleged investigator, or of how alleged investigation was conducted. U.S. Const. amend. V.

5. Due process protections are afforded to aliens facing removal. U.S. Const. amend. V.

7. Whether the Board of Immigration Appeals (BIA) violated alien’s due process rights when it rejected her claim of past persecution based almost entirely upon hearsay statements of State Department official as to “investigation” allegedly conducted by unknown individual of alien’s documents turned on whether letter written by State Department official regarding results of investigation was reliable and trustworthy. U.S. Const. amend. V.


9. Hearsay is generally inadmissible because hearsay statements are inherently untrustworthy: declarant may not have been under oath at time of statement, his or her credibility cannot be evaluated at trial, and he or she cannot be cross-examined.

10. Decisions of the Board of Immigration Appeals (BIA) in asylum cases cannot be sustained simply by invoking the State Department’s authority. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

11. Decision of the Board of Immigration Appeals (BIA) not to reopen record in asylum proceedings in order to allow alien to introduce undated affidavit of nun who had visited alien’s country of origin prior to hearing on application for asylum, on ground that alien had failed to show that nun’s affidavit could not have been presented earlier, was not abuse of discretion. 8 C.F.R. § 3.2(c)(1).

12. Psychological evaluation by clinical psychologist, concluding that asylum applicant possessed psychiatric profile consistent with and strongly corroborative of her claim that she was a victim of persecution and continued to suffer effects of those experiences, was material to question of whether alien had in fact been persecuted, and was not duplicative of affidavit that alien had previously introduced from family doctor, so that where this psychological evaluation admittedly could not have been introduced prior to close of hearing on alien’s application for asylum, the Board of Immigration Appeals (BIA) should have reopened record in asylum proceedings in order to allow alien to introduce this evaluation.

Bejar v. Ashcroft, 324 F.3d 127 (3d Cir. 2003)

1. Court of Appeals would review for abuse of discretion decision by the Board of Immigration Appeals (BIA) that it lacked jurisdiction to consider alien’s appeal from denial of her motion to reopen removal proceedings, based upon fact that she had since been removed from the United States.

2. No “exceptional circumstances” existed, of kind that would relieve alien of need to contest, within 180 days, a removal order entered in absentia, based on ineffective assistance that she allegedly received from her attorney in failing to advise her of need to appear; attorney was at most guilty of act of nonfeasance, and not of any misfeasance.

3. Notice of removal hearing that was admittedly provided to alien’s attorney was notice to alien and prevented alien, after she failed to appear at hearing and removal order was entered in absentia, from filing out-of-time motion to reopen based upon alleged lack of notice.
4. Alien’s failure timely to appeal to Board of Immigration Appeals (BIA) an immigration judge’s denial of her motion to reopen was failure to exhaust administrative remedies, which prevented Court of Appeals from reviewing legal basis for removal order itself. Immigration and Nationality Act, § 242(d), 8 U.S.C. § 1252(d).

5. Alien’s removal from the United States did not divest Court of Appeals from considering alien’s claim that she had been unlawfully removed prior to expiration of 30-day period for her to appeal denial of her motion to reopen.

6. Immigration and Nationality Act (INA) does not provide for automatic stay of removal during the 30-day period when alien can appeal denial of motion to reopen removal proceedings, such that where alien failed to request such a stay, Immigration and Naturalization Service (INS) acted lawfully in removing her before this 30-day period had elapsed. 8 C.F.R. § 3.23(b)(4)(ii) (2002).

*United States v. One ““Piper”“ Aztec ““F” De Luxe Model 250 PA 23 Aircraft Bearing Serial No. 27-7654057, 321 F.3d 355 (3d Cir. 2003)*


2. Whether a statutory provision applies retroactively to pending cases depends on statutory interpretation.

3. An aircraft used to bring or attempt to bring aliens into the United States illegally is subject to forfeiture to the United States. Immigration and Nationality Act, § 274(b), as amended, 8 U.S.C. § 1324(b).

4. The plain meaning of a statute controls unless the language is ambiguous or leads to absurd results.

5. The Court of Appeals’ task in interpreting a statute is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive.

6. The plain meaning of a statute is conclusive except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.


8. Under forfeiture law in effect prior to Civil Asset Forfeiture Reform Act (CAFRA), government had probable cause to execute forfeiture of aircraft in rem, where pilot testified
he piloted aircraft that transported illegal aliens to British Virgin Islands, customs agent testified he stopped vessel transporting same illegal aliens but could not detain them because boat drifted into United States waters, and special agent stated that illegal aliens lacked United States visas and entered United States illegally. Immigration and Nationality Act, § 274(b)(5), as amended, 8 U.S.C. § 1324(b)(5).

9. The government can rely on hearsay evidence to meet its probable cause burden in a civil forfeiture action.

10. Under forfeiture law in effect prior to Civil Asset Forfeiture Reform Act (CAFRA), once government demonstrated probable cause to execute civil forfeiture, burden shifted to property owner to disprove such presumption by preponderance of evidence. Immigration and Nationality Act, § 274(b)(5), as amended, 8 U.S.C. § 1324(b)(5).

11. Under forfeiture law in effect prior to Civil Asset Forfeiture Reform Act (CAFRA), fact that aircraft owner’s criminal conviction for smuggling illegal aliens was overturned was insufficient to rebut presumption created by government’s demonstration of probable cause to execute civil forfeiture of aircraft. Immigration and Nationality Act, § 274(b)(5), as amended, 8 U.S.C. § 1324(b)(5).

12. The absence of a criminal conviction is irrelevant in a civil forfeiture proceeding, which is directed against the property, not the owner.

13. Burden of proof in effect in civil forfeiture actions prior to Civil Asset Forfeiture Reform Act (CAFRA), under which burden lay upon claimant, except that probable cause was required to be first shown, did not violate claimant’s due process rights. U.S. Const. amend. V; Immigration and Nationality Act, § 274(b)(5), as amended, 8 U.S.C. § 1324(b)(5).

Calle-Vujiles v. Ashcroft, 320 F.3d 472 (3d Cir. 2003)

1. Board of Immigration Appeals’ (BIA) decision whether to invoke its sua sponte authority to reopen deportation proceedings is committed to Board’s unfettered discretion; thus, very nature of decision renders it not subject to judicial review. 8 C.F.R. § 3.2(a).

2. Court of Appeals lacked jurisdiction to review Board of Immigration Appeals’ (BIA) decision not to invoke its authority to sua sponte reopen deportation proceeding or reconsider its denial of earlier challenge to proceeding; although BIA had acknowledged that governing regulation allowed it to reopen proceedings in “exceptional situations,” Board was not required to reopen proceedings in such situations, giving Court no meaningful standard of review. 8 C.F.R. § 3.2(a).

Zayas v. INS, 311 F.3d 247 (3d Cir. 2002)


2. Second or successive habeas corpus petitions filed under § 2241 are not subject to the gatekeeping restrictions of the Antiterrorism and Effective Death Penalty Act (AEDPA)
under which petitioner must receive prior appellate approval before proceeding with second or successive collateral attack on state court conviction. 28 U.S.C. §§ 2241, 2244(b).

3. Abuse of writ doctrine, as set forth by United States Supreme Court in McCleskey, was not supplanted by enactment of Antiterrorism and Effective Death Penalty Act (AEDPA), which built on doctrine. 28 U.S.C. §§ 2241, 2254, 2255.

4. Abuse of writ doctrine barred successive habeas petition under § 2244 alleging that restrictions of Antiterrorism and Effective Death Penalty Act (AEDPA) should not have been retroactively applied to bar alien’s eligibility for discretionary relief from deportation, where petitioner’s initial writs raised only issue of his indefinite detention pending deportation, and petitioner did not show cause for omission of AEDPA issue. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C. (1994 Ed.) § 1182(c); 28 U.S.C. § 2241.

5. Fact that habeas petitioner was not represented by counsel at time he filed his first two habeas petitions did not constitute cause or demonstrate prejudice that would excuse filing of third petition raising new issue from operation of abuse of writ doctrine. 28 U.S.C. § 2241.

North Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002)

1. Richmond Newspapers analysis was applicable in determining whether newspapers had a First Amendment right to attend deportation proceedings. U.S. Const. amend. I.

2. Newspapers did not have a First Amendment right of access to deportation proceedings that were determined by the Attorney General to present significant national security concerns; history of open deportation proceedings was not sufficient to satisfy the Richmond Newspapers “experience” prong, relaxing the Richmond Newspapers experience requirement would lead to perverse consequences, and public access did not play a significant positive role in the functioning of the process. U.S. Const. amend. I.

United States v. Best, 304 F.3d 308 (3d Cir. 2002)


2. Issue of whether district court properly dismissed indictment for lack of jurisdiction was question of law over which Court of Appeals would exercise plenary review.

3. Court’s power to try defendant is ordinarily not affected by the manner in which defendant is brought to trial.

4. Due process of law is satisfied when one present in court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. U.S. Const. amends. V, XIV.

5. When a treaty is self-executing, no legislation is necessary to authorize executive action pursuant to its provisions.

7. Defendant cannot rely upon a mere violation of international law as a defense to the court’s jurisdiction.

8. United Nations Convention on the Law of the Sea, which was signed by United States, but has not been ratified by Senate, does not have force of law. U.S. Const. art. II § 2, cl. 2.

9. Even if presidential proclamation indicated that government could punish individuals found in United States’ contiguous zone only for infringement of laws committed within United States’ territory or territorial sea, proclamation did not affect scope of Ker-Frisbie doctrine that court’s power to try defendant was ordinarily not affected by the manner in which defendant was brought to trial, given proclamation’s statement that it did not amend existing federal or state law.

Obianuju Ezeagwuna v. Ashcroft, 301 F.3d 116 (3d Cir. 2002)

1. Due process protections are afforded to aliens facing removal.

2. Because the Federal Rules of Evidence do not apply in asylum proceedings, the test for admissibility of evidence is whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law.

3. The sole test governing the admission of evidence in deportation proceedings is whether the evidence is probative and its admission is fundamentally fair; in the evidentiary context, fairness is closely related to the reliability and trustworthiness of the evidence.

4. Although hearsay can be admitted in asylum cases under certain circumstances, reliance on such evidence here raises the precise concerns that are fundamental to its general inadmissibility in civil proceedings, and raises concerns that it is not fundamentally fair.

5. The Board’s decisions cannot be sustained simply by invoking the State Department’s authority; the Court of Appeals is expected to conduct review of the Board’s decisions, and that procedural safeguard would be destroyed if the Board could justify its decisions simply by invoking assertions by the State Department that themselves provide no means for evaluating their validity.

6. Partially due to the multiple levels of hearsay involved here, we have absolutely no information about what the “investigation” consisted of, or how the investigation was conducted in this case.

M.B. v. Quarantillo, 301 F.3d 109 (3d Cir. 2002)
Headnotes – Third Circuit

1. District court had jurisdiction to review ruling under the Administrative Procedure Act of the Immigration and Naturalization Service's (INS) refusal to yield jurisdiction to the juvenile court with respect to application for special immigration juvenile status. 5 U.S.C. § 702; Immigration and Nationality Act, § 101(a)(27)(J)(i), 8 U.S.C. § 1101(a)(27)(J)(i); 8 C.F.R. § 204.11.

2. District Director of Immigration and Naturalization Service (INS) did not act arbitrarily and capriciously in denying an alien's request to have his dependency status determined by a state juvenile court in connection with his application for special immigration juvenile status; District Director withheld consent on the ground that alien was too old to be eligible for a dependency order, and thus did not satisfy one of the statutory eligibility requirements. Immigration and Nationality Act, § 101(a)(27)(J)(i), 8 U.S.C. § 1101(a)(27)(J)(i); 8 C.F.R. § 204.11.

Gao v. Ashcroft, 299 F.3d 266 (3d Cir. 2002)

1. When the Board of Immigration Appeals (BIA) does not render its own opinion, and either defers or adopts the opinion of the Immigration Judge (IJ), a Court of Appeals must then review the decision of the IJ.

2. In order to establish eligibility for asylum on the basis of past persecution, an applicant must show: (1) an incident, or incidents, that rise to the level of persecution; (2) that is "on account of" one of the statutorily-protected grounds; and (3) is committed by the government or forces the government is either unable or unwilling to control. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b)(1), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1).

3. An asylum applicant can demonstrate that she has a well-founded fear of future persecution by showing that she has a genuine fear, and that a reasonable person in her circumstances would fear persecution if returned to her native country. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(b)(1), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(b)(1).

4. Aliens have the burden of supporting their asylum claims through credible testimony.

5. Whether an asylum applicant has demonstrated past persecution or a well-founded fear of future persecution is a factual determination reviewed under the substantial evidence standard; adverse credibility determination of Board of Immigration Appeals (BIA) must be upheld on review unless any reasonable adjudicator would be compelled to conclude to the contrary Immigration and Nationality Act, § 242(b)(4)(B), as amended, 8 U.S.C. § 1252(b)(4)(B).

6. In denying applicant's claims for asylum and withholding of deportation, Immigration Judge (IJ) rested his decision on a credibility determination that was not supported by substantial evidence in the record; in addition, IJ failed to consider or discuss potentially corroborative evidence. Immigration and Nationality Act, § 242(b)(4)(B), as amended, 8 U.S.C. § 1252(b)(4)(B).

Perez v. Elwood, 294 F.3d 552 (3d Cir. 2002)
1. The ex post facto clause, which applies only to the retroactive application of criminal statutes, did not apply to deportation statutes, which were civil in nature, even where an alien qualified for removal because of a past criminal act. U.S. Const. art. I, § 9, cl. 3; Immigration and Nationality Act, § 237(a)(2)(A)(iii), as amended, 8 U.S.C. 1227(a)(2)(A)(iii); § 212(c), as amended, 8 U.S.C. (1994 Ed.) § 1182(c).

2. Congress may apply civil laws retroactively as long as: (1) it indicates clearly its intention to do so, and (2) it would not violate the Constitution for it to do so.

3. If Congress does not clearly indicate its intention to apply a civil statute retroactively, courts apply a presumption against retroactive application.

4. If Congress speaks clearly in saying that it intends for a civil statute to apply retroactively, a court must effectuate Congress’s intent, absent a constitutional violation, regardless of the potential unfairness of retroactive application.

5. If Congress has not spoken clearly to indicate its intent for a civil statute to apply retroactively, then a court must determine whether the application of the statute to the conduct at issue would result in a retroactive effect; if there would be such a retroactive effect, then the court should presume that the legislation does not apply to the conduct in question, and apply it only prospectively.


7. For the purposes of the Immigration and Nationality Act (INA) as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), a “conviction” occurs when either (1) a formal judgment of guilt of the alien is entered by a court, and such a judgment must set forth the plea, verdict or finding, the adjudication, and the sentence, or (2) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt and the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed. Immigration and Nationality Act, § 101(a)(48), as amended, 8 U.S.C. § 1101(a)(48); Fed. R. Cr. P. Rule 32(d)(1), 18 U.S.C.

8. For the purposes of the Immigration and Nationality Act (INA) as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), alien’s “conviction” occurred not when he was tried and found guilty by a jury in federal district court before IIRIRA’s effective date, but rather, when the district court imposed sentence, after IIRIRA’s effective date, and thus, IIRIRA’s repeal of waiver of deportation provision applied to alien and barred him from eligibility for such relief. Immigration and Nationality Act, §§ 101(a)(48), 237(a)(2)(A)(iii), as amended, 8 U.S.C. §§ 1101(a)(48), 1227(a)(2)(A)(iii); § 212(c), as amended, 8 U.S.C. (1994 Ed.) § 1182(c); Fed. R. Cr. P. Rule 32(d)(1), 18 U.S.C.

Patel v. Ashcroft, 294 F.3d 465 (3d Cir. 2002)
Petitioner’s conviction for harboring an alien met the definition of an “aggravated felony” under Immigration and Nationality Act (INA) despite fact that petitioner had no part in the alien’s illegal admission or entry; parenthetical “relates to alien smuggling” in statutory definition of “aggravated felony” was descriptive of all of the offenses contained in statute prohibiting bringing in and harboring certain aliens. Immigration and Nationality Act, §§ 101(a)(43)(N), 274(a)(1)(A), 8 U.S.C. §§ 1101(a)(43)(N), 1324(a)(1)(A).

**De Leon-Reynoso v. Ashcroft**, 293 F.3d 633 (3d Cir. 2002)


2. Whether an alien’s crime is one involving moral turpitude so as to warrant deportation is determined by the statute and record of conviction rather than the alien’s specific act. Immigration and Nationality Act, § 237(a)(2)(A)(i), as amended, 8 U.S.C. § 1227(a)(2)(A)(i).

3. Statute authorizing waiver of an alien’s inadmissibility for a crime of moral turpitude, which created a distinction between aliens who had not previously been lawfully admitted to the United States (non-LPRs) and those who had been previously admitted to the United States but had not resided in the United States for seven consecutive years before removal proceedings were initiated (LPRs), did not violate the equal protection component of the Fifth Amendment’s Due Process clause; distinction survived rational basis scrutiny since Congress could have concluded that LPRs who commit crimes of moral turpitude, despite rights and privileges based on their status that illegal aliens do not share, were uniquely poor candidates for waiver, that LPRs with employment and family ties to the United States, who are still willing to commit serious crimes, were a higher risk for recidivism than non-LPRs who commit serious crimes but lacked ties to the United States, and that non-LPR waiver eligibility was more theoretical than real. U.S. Const. amend. V; Immigration and Nationality Act, § 212(h), as amended, 8 U.S.C. § 1182(h).

4. Court applies rational basis review to equal protection challenges in the area of admission or removal of aliens. U.S. Const. amend. V.

**Sevoian v. Ashcroft**, 290 F.3d 166 (3d Cir. 2002)

1. When the Board of Immigration Appeals or an Immigration Judge denies reopening on prima facie case grounds, the ultimate decision should be reviewed for an abuse of discretion, while findings of fact should be reviewed for substantial evidence.

2. Standard for relief under the Convention Against Torture has no subjective component, but instead requires the alien to establish, by objective evidence that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. 8 C.F.R. § 208.16(c)(2).
3. Conclusion that alien failed to produce sufficient evidence of torture in Republic of Georgia was based on substantial evidence, and therefore his deportation would not violate the United Nations Convention Against Torture. 8 C.F.R. §§ 208.16(e), 208.18(a).

4. Board of Immigration Appeals followed proper procedures and considered and appraised the material evidence before it in denying alien’s motion to reopen on ground that alien failed to establish a prima facie case for relief under the Convention Against Torture; opinion did not contain any material factual errors concerning the record, and specifically addressed the State Department report on alien’s country. 8 C.F.R. § 3.2(c).

_Usparsegno v. Ashcroft_, 289 F.3d 226 (3d Cir. 2002)

1. Principles of Chevron deference apply to decisions of the Board of Immigration Appeals (BIA), Immigration and Nationality Act, § 103(a)(1), as amended, 8 U.S.C. § 1103(a)(1); 8 C.F.R. § 3.1(d)(1).

2. Court of Appeals’ inquiry in alien’s challenge to determination by Board of Immigration Appeals (BIA) that he was subject to ten-year physical presence requirement of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) was limited to determining whether IIRIRA was either silent or ambiguous as to application of such requirement to individuals in alien’s situation and, if so, whether BIA’s interpretation was based on permissible statutory construction. Immigration and Nationality Act, § 240A(b)(1)(A), as amended, 8 U.S.C. § 1229b(b)(1)(A).

3. Removal proceeding commenced either with filing of notice to appear with Immigration Court or with service of notice upon alien, not when he filed his asylum petition, for purposes of determining whether he was subject to ten-year physical presence requirement of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), inasmuch as his filing of petition did not implicate any quid pro quo arrangement with government, and he thus could demonstrate no detrimental reliance on pre-IIRIRA law. Immigration and Nationality Act, § 240A(b)(1)(A), as amended, 8 U.S.C. § 1229b(b)(1)(A).

4. Stop-time provision of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), under which period of continuous physical presence in United States is deemed to end when alien is served with notice to appear, does not violate equal protection guarantees. U.S. Const. amend. XIV; Immigration and Nationality Act, § 240A(d)(1), as amended, 8 U.S.C. § 1229b(d)(1).

5. Because there was no Sixth Amendment right to counsel in deportation hearings, any claim of ineffective assistance of counsel advanced by alien was required to be based on Fifth Amendment’s due process guaranty. U.S. Const. amends. V, VI.

6. To meet the standard for a due process violation based on ineffective assistance of counsel in deportation proceedings, an alien must show that he was prevented from reasonably presenting his case. U.S. Const. amend. V.

7. Immigration and Naturalization Service (INS) did not abuse its discretion in issuing notice to appear two months before alien would have satisfied ten-year physical presence requirement.

8. Authority to determine whether and when to initiate removal proceedings rests solely with the Immigration and Naturalization Service (INS).

Johnson v. Ashcroft, 286 F.3d 696 (3d Cir. 2002)

1. Court of Appeals will often defer to agency interpretations in the immigration context.

2. Although an agency can change or adapt its policies, it acts arbitrarily if it departs from its established precedents without announcing a principled reason for the departure.

3. If agency departs from an announced rule without explanation or an avowed alteration, such action could be viewed as arbitrary, capricious, or an abuse of discretion.

4. For Board of Immigration Appeals (BIA) to retain jurisdiction over all but a narrow issue when remand is ordered, generally it must do two things in the text of its remand order: expressly retain jurisdiction, and limit the remand to a specific purpose.

5. Remand order by Board of Immigration Appeals (BIA), which indicated that matter was remanded “for consideration of [alien’s] claim pursuant to” regulations pertaining to Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and which cited pertinent regulations, did not expressly retain BIA jurisdiction over everything but alien’s CAT claims, so as to foreclose immigration judge’s consideration of alien’s eligibility for asylum based on changed country conditions, given that order did not state that BIA retained jurisdiction or otherwise make reference to BIA’s jurisdiction. 8 C.F.R. § 208.18(b)(2).

6. Order in which Board of Immigration Appeals (BIA) remanded matter for consideration of alien’s claims for relief pursuant to Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) was not qualified or limited to that purpose, and thus did not foreclose immigration judge’s consideration of alien’s eligibility for asylum based on changed country conditions; given absence of limiting language, order contained nothing more than stated purpose, notwithstanding reference to CAT regulations, which was insufficient to narrow immigration judge’s jurisdiction. 8 C.F.R. § 208.18(b)(2).

7. Under order in which Board of Immigration Appeals (BIA) remanded matter for consideration of alien’s claims under Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), but did not limit immigration judge’s jurisdiction to that purpose, immigration judge could consider alien’s CAT claims and all other appropriate matters, including alien’s claim of eligibility for asylum based on changed country conditions. Immigration and Nationality Act, § 241(B)(3), as amended, 8 U.S.C. § 1231(B)(3); 8 C.F.R. §§ 3.2(b)(2), (c)(3)(ii), 3.23(b)(3), 208.16(c)(2), 208.18(b)(2).

8. Board of Immigration Appeals (BIA) acted arbitrarily by failing to provide reasonable explanation for its departure from general rule that immigration judge had broad jurisdiction over case on remand when it determined that immigration judge lacked jurisdiction to
consider alien’s eligibility for asylum based on changed country conditions on remand for consideration of alien’s claims under Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). 8 C.F.R. § 208.18(b)(2).

*Bovkun v. Ashcroft*, 283 F.3d 166 (3d Cir. 2002)

1. Though Court of Appeals lacks jurisdiction to review a final administrative order of removal if the petitioner is “an alien who is removable by reason of having committed,” a crime of violence, the Court may properly review the threshold question whether the petitioner has been convicted of an offense that deprives the Court of jurisdiction. Immigration and Nationality Act, § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).

2. Erroneous citation in final administrative order of removal to section of removal statute stating that aggravated felony includes theft offenses, rather than to section on crimes of violence, was not prejudicial and could not surmount the jurisdictional restriction on judicial review of such orders, where alien did not dispute the fact that he was convicted for the offense of making terroristic threats, and did not allege that the erroneous citation confused him regarding the basis on which deportation was being sought. Immigration and Nationality Act, §§ 101(a)(43)(F, G), 242(a)(2)(C), 8 U.S.C. §§ 1101(a)(43)(F, G), 1252(a)(2)(C).

3. Offense of making terroristic threats, under Pennsylvania law, qualified as a “crime of violence,” so that Court of Appeals lacked jurisdiction to entertain alien’s petition to review a final order of removal based on that conviction when the sentence was at least one year, though the mens rea of the offense may be causing “public inconvenience,” or “reckless disregard” of causing such inconvenience, since the actus reus of the offense, which must be shown in every case, is a “threat[ ] to commit a crime of violence,” and no state has held that the latter term includes any offense that does not have as an element “the use, attempted use, or threatened use of physical force against the person or property of another,” as used in federal definition of crime of violence. Immigration and Nationality Act § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C); 18 U.S.C. § 16(a); 18 Pa. Cons. Stat. §§ 105, 2706(a).

4. Offense of making terroristic threats, which was a crime of violence, qualified as one “for which the term of imprisonment [sic] at least one year,” so that Court of Appeals lacked jurisdiction to entertain alien’s petition to review a final order of removal based on that conviction, though the minimum sentence was 11 months, where the maximum term was 23 months and, under Pennsylvania law, the minimum term imposed on a prison sentence merely sets the date prior to which a prisoner may not be paroled, so that the sentence was functionally the same as a sentence of 23 months, with parole eligibility beginning after 11 months. Immigration and Nationality Act §§ 101(a)(43)(F), 242(a)(2)(C), 8 U.S.C. §§ 1101(a)(43)(F), 1252(a)(2)(C); 61 P.S. § 331.21.

5. In determining whether a sentence to a term of imprisonment of at least one year was imposed upon conviction for a crime of violence, such that the Court of Appeals lacks jurisdiction to entertain alien’s petition to review a final order of removal based on that conviction, sentence with both a minimum and a maximum term is treated comparably with a functionally equivalent sentence with only a maximum term. Immigration and Nationality Act §§ 101(a)(43)(F), 242(a)(2)(C), 8 U.S.C. §§ 1101(a)(43)(F), 1252(a)(2)(C).
6. Pennsylvania conviction for making terrorist threats was an “aggravated felony,” so that so
that Court of Appeals lacked jurisdiction to entertain alien’s petition to review a final order
of removal based on that conviction, though the offense was graded as a misdemeanor under
state law, where a term of imprisonment of at least one year was imposed. Immigration and

United States v. Cassedes, 282 F.3d 253 (3d Cir. 2002)

1. A non-constitutional error committed at trial does not warrant reversal where it is highly
probable that the error did not contribute to the judgment.

2. For purpose of the rule that a non-constitutional error committed at trial does not warrant
reversal where it is highly probable that the error did not contribute to the judgment, a “high
probability” requires that the reviewing court have a sure conviction that the error did not
prejudice the defendants.

3. Any error in district court’s failure to act upon defendants’ requests to appoint death-penalty
qualified counsel in prosecution for alien smuggling resulting in a death, which offense may
be punished by death, until several weeks after the requests were made, when the requests
were rendered moot by the government’s decision not to seek the death penalty, was
harmless, where, although the possibility of the death penalty was hanging over the
defendants’ heads during plea negotiations, they were not pressured by that fact to enter into
plea agreements with the government, nor to provide it with statements or information
prejudicial to them at their trial. 18 U.S.C. § 3005; Fed. R. Civ. P. Rule 52(a), 28 U.S.C.

4. District Court in non-capital prosecution for alien smuggling resulting in a death, and alien
smuggling in which the life of a person was put in jeopardy, properly refused to order the
prosecution, within a reasonable time before trial, to disclose and allow the defense to
interview the only available eyewitnesses, who were in the prosecution’s custody.

5. A criminal defendant does not have the right to full discovery of the government’s case.

6. The fact that there was a regulation designating ports of entry did not preclude testimony of
Immigration and Naturalization Service (INS) agent with 11 years of experience that location
in question in alien smuggling prosecution was not a designated port of entry. Immigration
and Nationality Act, § 274(a)(1)(A), 8 U.S.C. § 1324(a)(1)(A); 8 C.F.R. § 100.4

Gerbier v. Holmes, 280 F.3d 297 (3d Cir. 2002)

1. State felony drug conviction without a trafficking element constitutes an “aggravated felony”
under Immigration and Nationality Act (INA), thus rendering alien ineligible for cancellation
of removal, only when that same crime would be punishable as a felony under federal

2. Although alien pleaded guilty to a felony for violation of Delaware statute prohibiting
“trafficcking in cocaine,” alien’s drug conviction, which was based on his possession of
between 5 and 50 grams of cocaine, did not constitute an “aggravated felony” for purposes of Immigration and Nationality Act (INA) since offense did not contain a trading or dealing element and was not punishable as a felony under federal law; under federal controlled substance simple possession statute, the most analogous federal statute, the offense was a federal misdemeanor. Immigration and Nationality Act, § 101(a)(43)(B), as amended, 8 U.S.C. § 1101(a)(43)(B); 18 U.S.C. § 924(c)(2); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 404(a), 21 U.S.C. § 844(a); 16 Del. C. § 4753A.

Valansi v. Ashcroft, 278 F.3d 203 (3d Cir. 2002)


2. Court of Appeals reviews Board of Immigration Appeals’ (BIA) determination that alien’s conviction qualifies as aggravated felony de novo, because it is purely legal question, and one that governs Court’s jurisdiction to review final order of removal against alien under Immigration and Nationality Act (INA). Immigration and Nationality Act, §§ 237(a)(2)(A)(iii), 242(a)(2)(C), as amended, 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1252(a)(2)(C).

3. Despite Court of Appeals’ exercise of de novo review of Board of Immigration Appeals’ (BIA) determination that alien’s conviction qualifies as aggravated felony, Court will give deference to agency’s interpretation of Immigration and Nationality Act’s (INA) aggravated felony definition if Congress’s intent is unclear. Immigration and Nationality Act, §§ 237(a)(2)(A)(iii), 242(a)(2)(C), as amended, 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1252(a)(2)(C).

4. Under Chevron, courts only defer to agency interpretations of statutes that, applying normal tools of statutory construction, are ambiguous.

5. First step in interpreting statute is to determine whether language at issue has plain and unambiguous meaning with regard to particular dispute in case; when language has clear meaning, court need look no further.

6. Plainness or ambiguity of statutory language is determined by reference to language itself, specific context in which that language is used, and broader context of statute as whole.

7. Because term “fraud,” “within definition of “aggravated felony,” is not defined in Immigration and Nationality Act (INA), it should be used in commonly accepted legal sense, that is, as consisting of false representations of material fact made with knowledge of their falsity and with intent to deceive, and representation must be believed and acted upon by party deceived to his disadvantage. Immigration and Nationality Act, § 101(a)(43)(M)(i), as amended, 8 U.S.C. § 1101(a)(43)(M)(i).

8. “Offense that involves fraud or deceit,” within Immigration and Nationality Act’s (INA) definition of “aggravated felony,” is offense that includes fraud or deceit as necessary component or element, but elements of offense need not be coextensive with crime of fraud.

9. To obtain conviction for embezzlement from national bank, government must establish: (1) that defendant was employee, (2) of federally connected bank, (3) who took cash or other assets, (4) in custody or care of bank, (5) with intent to injure or defraud bank. 18 U.S.C. § 656.

10. While no longer explicitly required by statute, intention to injure or defraud bank is still essential element of crime of embezzlement from national bank. 18 U.S.C. § 656.

11. Mens rea element of embezzlement from national bank may be shown either by intent to injure or intent to defraud. 18 U.S.C. § 656.

12. Conviction for embezzlement from national bank which establishes only that defendant employee of bank acted with intent to injure his or her employer is not offense that “involves fraud or deceit” under Immigration and Nationality Act’s (INA) definition of “aggravated felony.” Immigration and Nationality Act, § 101(a)(43)(M)(i), as amended, 8 U.S.C. § 1101(a)(43)(M)(i); 18 U.S.C. § 656.

13. Alien’s embezzlement from bank was not offense involving “fraud or deceit” within Immigration and Nationality Act’s definition of “aggravated felony,” and thus did not support alien’s removal; entire context of alien’s conviction, including offense as charged in indictment, as explained to her by district court, and as confirmed by alien’s responses during plea colloquy, demonstrated intent to injure bank by depriving it of its property, but never demonstrated clearly that alien’s specific intent was to defraud bank. Immigration and Nationality Act, § 101(a)(43)(M)(i), as amended, 8 U.S.C. § 1101(a)(43)(M)(i); 18 U.S.C. § 656.

**United States v. Szehinskyj**, 277 F.3d 331 (3d Cir. 2002)

1. Review by Court of Appeals of a pure issue of law is plenary.

2. There must be strict compliance with all the congressionally imposed prerequisites to naturalization, and failure to comply with any of these terms renders the naturalization illegally procured and subject to revocation under Immigration and Nationality Act (INA). Immigration and Nationality Act, § 340(a), 8 U.S.C. § 1451(a).

3. An alien who entered the country pursuant to Displaced Persons Act of 1948 (DPA), but who had previously assisted in the persecution of any person because of race, religion, or national origin, and thus was not an “eligible displaced person” eligible for an immigration visa under DPA, illegally procured any subsequent naturalization, so that the naturalization is subject to revocation under Immigration and Nationality Act (INA). Immigration and Nationality Act, § 340(a), 8 U.S.C. § 1451(a); Displaced Persons Act of 1948, § 13, 62 Stat. 1009.

4. Assistance in persecution ground for visa eligibility under Displaced Persons Act of 1948 (DPA) is an independent ground that does not include a fraud element, and once a determination of eligibility is made on this ground, there is no need to look for and find a
material misrepresentation in order to determine that an alien who obtained a visa under DPA despite having assisted in persecution illegally procured any subsequent naturalization, so that the naturalization is subject to revocation under Immigration and Nationality Act (INA). Immigration and Nationality Act, § 340(a), 8 U.S.C. § 1451(a); Displaced Persons Act of 1948, § 13, 62 Stat. 1009.

5. Showing that naturalized citizen had assisted Nazi government in persecution of individuals because of their race, religion, and national origin when he served as an armed concentration camp guard, and thus was not an “eligible displaced person” under Displaced Persons Act of 1948 (DPA), would be sufficient to show that the had illegally procured his naturalization after entering country pursuant to immigrant visa issued under DPA, so that naturalization was subject to revocation under Immigration and Nationality Act (INA); government was not required to additionally show that he had made a material misrepresentation on his visa application. Immigration and Nationality Act, § 340(a), 8 U.S.C. § 1451(a); Displaced Persons Act of 1948, § 13, 62 Stat. 1009.

6. Documentary evidence, and witness testimony, were sufficient to establish that naturalized citizen had served as an armed Nazi concentration camp guard who assisted in the persecution of persons because of race, religion, or national origin during World War II, and thus to show that citizen was not an “eligible displaced person” who could enter the United States pursuant to an immigrant visa under Displaced Persons Act of 1948 (DPA), so that his subsequent naturalization after entering United States pursuant to such a visa was illegally procured and subject to revocation. Immigration and Nationality Act, § 340(a), 8 U.S.C. § 1451(a); Displaced Persons Act of 1948, § 13, 62 Stat. 1009.

7. District court’s findings of fact in connection with action in which government seeks to revoke citizenship are reviewed for clear error.

8. Right to acquire American citizenship is a precious one; therefore, the government carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship, and the evidence for revocation must be clear, unequivocal, and convincing and not leave the issue in doubt.

9. An individual’s personal participation in atrocities is not required for that person to have assisted in persecution, so that the person was not an “eligible displaced person” eligible for an immigration visa under DPA, and any subsequent naturalization of the person would be illegally procured and subject to revocation under Immigration and Nationality Act (INA); being an armed concentration camp guard is sufficient. Immigration and Nationality Act, § 340(a), 8 U.S.C. § 1451(a); Displaced Persons Act of 1948, § 13, 62 Stat. 1009.

Patel v. Zemski, 275 F.3d 299 (3d Cir. 2001)

1. Court of Appeals had jurisdiction over appeal from dismissal of federal habeas corpus petition in which lawful permanent resident alien challenged constitutionality of provision of Immigration and Nationality Act (INA) which allows aliens to be mandatorily detained pending a final determination on removal without any opportunity for an individualized determination of the alien’s risk of flight or danger to community, even though provision in
question restricts judicial review of decisions made under it; restriction does not preclude
judicial review of provision’s constitutionality. Immigration and Nationality Act, § 236(c), 8

2. Provision contained within section of Immigration and Nationality Act (INA) governing the
apprehension and detention of aliens which restricts judicial review of decisions made by
Immigration and Naturalization Service (INS) under that section does not preclude judicial
review of section’s constitutionality. Immigration and Nationality Act, § 236(e), 8 U.S.C. §
1226(e).

3. Court of Appeals reviews de novo a district court’s legal conclusions regarding the
constitutionality of the statute at issue.

4. Immigration laws reflect part of a growing effort by Congress to expedite the removal of
criminal aliens.

5. Immigration and Nationality Act (INA) gives Attorney General discretion to release an alien
who is subject to detention only if the alien’s release is necessary to provide protection to,
inter alia, a witness, a potential witness, or a person cooperating with a criminal
investigation, and even then only if the alien will not pose a danger to the safety of others or
flight risk; no discretion otherwise remains to consider whether criminal aliens, including
those who were lawfully admitted to this country, pose any danger or flight risk during the

6. Fifth Amendment entitles aliens to due process of law in deportation proceedings. U.S.
Const. amend. V.

7. Although due process rights can be denied to aliens seeking admission to the United States,
aliens who have entered the country are entitled to the protection of due process clause
whether their presence in this country is lawful or not. U.S. Const. amend. XIV.

8. A lawful permanent resident alien is entitled to due process protection against unlawful or
arbitrary restraint. U.S. Const. amend. V.

9. Provision of Immigration and Nationality Act (INA) which allows a lawful permanent
resident alien to be mandatorily detained pending a final determination on removal without
any individualized determination of the alien’s risk of flight, or danger to the community,
implied fundamental right to be free from restraint that was held by lawful permanent
resident alien, who was being detained following his conviction for harboring an
undocumented alien, and thus could only be upheld under due process clause if it was
narrowly tailored to serve a compelling state interest. U.S. Const. amend. V; Immigration and

10. Congress has plenary power to create substantive immigration law, to which the judicial
branch generally must defer.
11. In the exercise of its broad power over immigration and naturalization, Congress regularly makes rules that would be unacceptable if applied to citizens; however, Congress’ power is subject to constitutional limitations, including due process constraints. U.S. Const. amend. V.

12. Distinction exists between the deference that must be afforded to immigration policies established by Congress, and the more searching review of the procedures used to implement those policies.

13. If a statute infringes on a fundamental liberty interest, it must be narrowly tailored to serve a compelling state interest to withstand scrutiny under due process clause, but if not, there need only be a reasonable fit between the government’s purpose and the means chosen to implement that purpose. U.S. Const. amend. V.

14. Government has the right to remove aliens and to detain them during the pendency of their removal proceedings.

15. Freedom from bodily restraint has always been at the core of the liberty protected by the due process clause from arbitrary governmental action. U.S. Const. amend. V.

16. Government detention violates substantive due process unless it is ordered in special and narrow non-punitive circumstances where a special justification outweighs the individual’s constitutionally protected interest in avoiding physical restraint. U.S. Const. amend. V.

17. Mandatory detention pending final removal determination, pursuant to Immigration and Nationality Act (INA), of lawful permanent resident alien, who had been convicted of harboring an undocumented alien, resulted in violation of alien’s substantive due process rights, where alien had not been provided with opportunity for an individualized determination of his risk of flight, or danger to community; detention implicated alien’s fundamental right to be free from physical restraint, and while statute was aimed at legitimate governmental interests, mandatory detention without an individualized inquiry was excessive in relation to those interests. U.S. Const. amend. V; Immigration and Nationality Act, §§ 236(c), 274(a)(1)(A)(iii), 8 U.S.C. § 1226(c), 1324(a)(1)(A)(iii).

18. The power to deport aliens necessarily encompasses the power to detain.

19. Provision of Immigration and Nationality Act (INA) which allows a lawful permanent resident alien to be mandatorily detained pending a final determination on removal without any individualized determination of the alien’s risk of flight, or danger to the community, was enacted with goal of ensuring the immediate availability of criminal aliens for hearings and ultimately deportation, while protecting the public from the danger posed by criminal aliens. Immigration and Nationality Act, § 236(c), 8 U.S.C. § 1226(c).

20. Due process requires an adequate and proportionate justification for detention of an alien pending a final determination on removal—a justification that cannot be established without an individualized inquiry into the reasons for detention. U.S. Const. amend. V.

21. Mandatory detention pursuant to Immigration and Nationality Act (INA) of aliens who have been found subject to removal, but who have not yet been ordered removed because they are
pursuing their administrative remedies, violates aliens’ substantive due process rights unless they have been afforded the opportunity for an individualized hearing at which they can show that they do not pose a flight risk or danger to the community; abrogating Edwards v. Blackman, 48 F. Supp.2d 477 (M.D. Pa. 1999); U.S. Const. amend. V; Immigration and Nationality Act, § 236(c), 8 U.S.C. § 1226(c).

Kiareldeen v. Ashcroft, 273 F.3d 542 (3d Cir. 2001)

1. Government was required to meet twice the threshold provided by Equal Access to Justice Act (EAJA) provision requiring substantial justification for United States’ position or special circumstances in order for United States to avoid payment of attorney fees, in that government was required to independently establish that agency action giving rise to litigation was substantially justified, and that its litigation positions were substantially justified. 28 U.S.C. § 2412(d)(1)(A).


3. Court of Appeals will not interfere with a district court’s exercise of discretion in making a determination regarding substantial justification in an Equal Access to Justice Act (EAJA) suit unless there is a definite and firm conviction that the court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. 28 U.S.C. § 2412(d)(1)(A).

4. Court of Appeals may find an abuse of discretion with respect to a determination regarding substantial justification in an Equal Access to Justice Act (EAJA) suit when no reasonable person would adopt the district court’s view or when the district court’s decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact. 28 U.S.C. § 2412(d)(1)(A).

5. The Court of Appeals will review an award of attorney fees de novo insofar as it rests on conclusions of law, such as an interpretation of the statutory terms that define eligibility for an award.

6. Alien was not entitled to attorney fees under Equal Access to Justice Act (EAJA) upon bringing successful habeas challenge under due process clause to detention pending resolution of removal proceedings, on ground that Immigration and Naturalization Service (INS) used but failed to disclose to him classified evidence obtained by FBI’s Joint Terrorism Task Force, which evidence suggested he was member of terrorist organization, was involved in 1993 bombing of World Trade Center, and had threatened United States Attorney General, inasmuch as United States was substantially justified in opposing his contentions in removal and habeas proceedings, especially in light of FBI’s statement that investigation of international terrorism was necessary to national security. U.S. Const. amend. V; 28 U.S.C. § 2412(d)(1)(A).

7. Though the hearsay nature of evidence affects the weight it is accorded, it does not prevent its admissibility in immigration removal cases.
8. In determining when the government’s position in immigration matters is substantially justified for purposes of the Equal Access to Justice Act (EAJA), especially when dealing with potential terrorists, it is improper to evaluate its position by using traditional standards of proof used in both administrative and court proceedings. 28 U.S.C. § 2412(d)(1)(A).

9. The standard of proof that the government must utilize in removal proceedings is the intermediate standard, generally utilized in fraud or quasi-criminal matters, requiring a higher standard of proof than mere preponderance of the evidence.

10. In considering question of attorney fees under Equal Access to Justice Act (EAJA), Court of Appeals would not determine whether government was substantially justified based upon result reached in district court proceeding granting alien’s habeas petition challenging constitutionality of detention pending resolution of removal proceedings, or upon inquiry into whether government met its stated burden of proof; rather, substantial justification would be measured on basis whether government was justified in initiating proceeding and going forward with hearing before immigration judge (II). 28 U.S.C. § 2412(d)(1)(A).

11. To be substantially justified for purposes of the Equal Access to Justice Act (EAJA), the government’s position need not be correct, or even justified to a high degree; rather, the government must simply have a reasonable basis in both law and fact or be justified in substance or in the main, that is, justified to a degree that could satisfy a reasonable person. 28 U.S.C. § 2412(d)(1)(A).

12. Whether the government was substantially justified for purposes of the Equal Access to Justice Act (EAJA) does not present the same question as that presented by the underlying merits of the case. 28 U.S.C. § 2412(d)(1)(A).

13. The relevant legal question in determining if the government was substantially justified for purposes of the Equal Access to Justice Act (EAJA) is not what the law now is, but what the government was substantially justified in believing it to have been. 28 U.S.C. § 2412(d)(1)(A).

14. In determining whether the government was substantially justified for purposes of the Equal Access to Justice Act (EAJA), a court must not assume that the government’s position was not substantially justified simply because the government lost on the merits. 28 U.S.C. § 2412(d)(1)(A).

15. The Fourth Amendment, which states that no warrants shall issue but upon probable cause, applies to arrest warrants as well as search warrants. U.S. Const. amend. IV.

Francis v. Reno, 269 F.3d 162 (3d Cir. 2001)

1. Jurisdiction is only removed from courts under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) if (1) the petitioner is an alien (2) who is deportable by reason of having been convicted of one of certain delineated offenses. Immigration and Nationality Act, § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).
2. Under Chevron, when a court reviews an agency’s construction of the statute which it administers, if the intent of Congress is clear, courts and agencies must give effect to that unambiguously expressed intent, but if Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation; rather, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.

3. Interpretation of general criminal statute defining “felony” by the Board of Immigration Appeals (BIA) was not due Chevron deference, because the BIA did not rely upon any expertise in interpreting meaning of “felony,” the BIA was not charged with administering the statute, and the statute was not transformed into an immigration law merely because it was incorporated into the Immigration and Nationality Act (INA). Immigration and Nationality Act, § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16.

4. Alien’s state-court misdemeanor conviction of vehicular homicide was not an “aggravated felony” under the Immigration and Nationality Act (INA), as would provide grounds for alien’s removal, and thus Board of Immigration Appeals’s (BIA) interpretation of general criminal statute defining “felony” to include vehicular homicide was not a permissible construction of statute, given that default statute BIA relied on in determining that state vehicular homicide offense was a felony for purposes of removability statute was intended as a last resort, and state law, rather than federal classification, determined what was considered a felony under subsection of criminal statute. Immigration and Nationality Act, § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. §§ 16(b), 3559; 75 Pa. Cons. Stat. § 3732.

5. Under the rule of lenity, lingering ambiguities in deportation statutes are construed in favor of the alien.

6. Even if state-court misdemeanor conviction of vehicular homicide could be converted into felony for purposes of removal statute, driving with a suspended license did not involve a substantial risk of physical force, as would provide grounds for alien’s removal, and thus Board of Immigration Appeals’s (BIA) interpretation of general criminal statute defining “felony” to include vehicular homicide on grounds conviction was based on recklessness was not a permissible construction of statute; alien was convicted of criminal negligence, not recklessness, and vehicular homicide conviction did not require conduct that presented a serious risk of physical injury to another. Immigration and Nationality Act, § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. §§ 16(b), 3559; 75 Pa. Cons. Stat. § 3732.

7. The categorical approach to determining whether previous conviction comes within statutory meaning of a conviction for sentence enhancement purposes permits the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of the relevant generic offense.

Chmakov v. Blackman, 266 F.3d 210 (3d Cir. 2001)

1. District courts retain jurisdiction to hear habeas petitions filed by aliens subject to deportation for having committed certain criminal offenses.
2. Alien challenging deportation order on basis of alleged due process violation has right to seek habeas relief in district court. 28 U.S.C. § 2241.

3. Congress has power to preclude non-criminal aliens from filing habeas petitions challenging final orders of removal where those aliens have available to them another avenue of review. 28 U.S.C. § 2241.

4. Federal district court had subject matter jurisdiction over non-criminal aliens’ habeas petition alleging that their Fifth Amendment right to due process had been violated because they received ineffective assistance of counsel in asylum proceedings before Board of Immigration Appeals (BIA), even though aliens had right to appeal BIA order, where aliens were challenging legality of BIA’s decision dismissing their claim for asylum and entering removal order against them, not Attorney General’s discretionary decision to execute removal order, and counsel’s ineffectiveness frustrated aliens’ right of direct appeal. U.S. Const. amend. V; Immigration and Nationality Act, § 242(g), as amended, 8 U.S.C. § 1252(g); 28 U.S.C. § 2241.

5. If Congress wishes to repeal federal courts’ habeas jurisdiction, (1) repeal must not violate Suspension Clause, and (2) repeal must be made in clear and unambiguous language. U.S. Const. art. I, § 9, cl. 2; 28 U.S.C. § 2241.

Chong v. District Director, INS, 264 F.3d 378 (3d Cir. 2001)

1. Alien was “in custody” for habeas corpus purposes, notwithstanding her removal from United States, because custody was measured at the time petition was filed. 28 U.S.C. § 2241(c).

2. A court will not dismiss a case as moot if: (1) secondary or “collateral” injuries survive after resolution of the primary injury; (2) the issue is deemed a wrong capable of repetition yet evading review; (3) the defendant voluntarily ceases an allegedly illegal practice but is free to resume it at any time; or (4) it is a properly certified class action suit. U.S. Const. art. III, § 2, cl. 1.

3. Sufficient collateral consequences flowed from Board of Immigration Appeals’ (BIA) order of removal to make alien’s appeal from denial of her habeas petition seeking relief from a final order of removal a live case or controversy; Board’s order of removal prevented alien from entering the United States for ten years. U.S. Const. art. III, § 2, cl. 1; Immigration and Nationality Act, § 212(a)(9)(A)(ii), as amended, 8 U.S.C. § 1182(a)(9)(A)(ii).

4. Aliens facing removal are entitled to due process. U.S. Const. amend. V.

5. Due process entitled aliens facing removal to fact finding based on a record produced before the Board of Immigration Appeals (BIA) and disclosed to her, to be allowed to make arguments on her own behalf, and to have the right to an individualized determination of her interests. U.S. Const. amend. V.

6. An individual’s due process right to be heard does not ensure a hearing in all contexts. U.S. Const. amend. V.
7. Board of Immigration Appeals (BIA) did not violate alien’s due process rights by affirming immigration judge’s (IJ) decision that alien was ineligible for withholding of removal because her drug convictions constituted a “particularly serious crime” without remanding to the IJ for an individualized hearing; alien had the opportunity to present any evidence concerning the “particularly serious crime” determination to the IJ, and the Board had the administrative record before it when deciding alien’s appeal. U.S. Const. amend. V; Immigration and Nationality Act, § 241(b)(3)(B), as amended, 8 U.S.C. § 1231(b)(3)(B).

8. Due process did not require that alien be given an individualized hearing to determine whether she committed a “particularly serious crime” so as to be ineligible for withholding of removal; Board of Immigration Appeals’ (BIA) interpretation of statute as necessitating only an individualized examination of the “particularly serious crime” issue, rather than an individualized hearing, was a permissible one. U.S. Const. amend. V; Immigration and Nationality Act, § 241(b)(3)(B), as amended, 8 U.S.C. § 1231(b)(3)(B).

9. Immigration judge (IJ), who certified his decision to Board of Immigration Appeals (BIA), violated Immigration and Naturalization Service (INS) regulation by not informing alien that she could make representations before the Board, including the making of a request for oral argument and the submission of a brief. 8 C.F.R. § 3.7.

10. Court’s standard of review is even more deferential when an agency is interpreting a regulation rather than a statute that it administers; an agency’s interpretation of its own regulation is controlling unless it is plainly erroneous or inconsistent with the regulation.

11. An agency’s failure to afford an individual safeguard required under its own regulations may result in the invalidation of the ultimate administrative determination, even if the regulation is not constitutionally mandated.

12. Immigration judge’s (IJ) failure to provide alien with notice that she could make representations before Board of Immigration Appeals (BIA) did not prejudice alien since alien failed to address the Board’s alternate holding that she did not have a valid claim for withholding of removal. 8 C.F.R. § 3.7.

Xu Yong Lu v. Ashcroft, 259 F.3d 127 (3d Cir. 2001)

1. Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act, the authority to reopen a deportation proceeding derived solely from regulations promulgated by the Attorney General who had broad discretion to grant or deny such motions. Immigration and Nationality Act, § 240(c)(6), as amended, 8 U.S.C. § 1229a(c)(6).

2. Motions to reopen deportation proceedings are disfavored because as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.

3. The Court of Appeals reviews the Board of Immigration Appeals’ (BIA) decision to deny reopening deportation proceeding for abuse of discretion, mindful of the broad deference that the Supreme Court allows the BIA.
4. Immigration proceedings are civil, rather than criminal, in nature; therefore, the Sixth Amendment guarantee of effective counsel does not attach. U.S. Const. amend. VI.

5. Aliens in deportation proceedings enjoy Fifth Amendment Due Process protections. U.S. Const. amend. V.


7. The requirement that alien claiming ineffective assistance of counsel in connection with request to reopen immigration proceedings file a disciplinary bar complaint against former counsel not only serves to deter meritless claims of ineffective assistance of counsel, but also highlights the standards which should be expected of attorneys who represent aliens in immigration proceedings. U.S. Const. amend. V; Immigration and Nationality Act, § 292, 8 U.S.C. § 1362.

8. The Board of Immigration Appeals’ (BIA) three-prong test for reopening immigration proceedings based upon ineffective assistance of counsel, requiring affidavit setting forth agreement between alien and former counsel with respect to appellate representation, former counsel to be informed, and bar complaint against counsel to be filed by alien, is not abuse of the BIA’s wide-ranging discretion. U.S. Const. amend. V; Immigration and Nationality Act, § 292, 8 U.S.C. § 1362.

9. In many, if not most, cases, alien alleging ineffective assistance of counsel in connection with alien’s request to reopen immigration proceeding, should file disciplinary complaint against counsel with the bar; however, this is not an absolute requirement, and failure to file a complaint is not fatal if alien provides a reasonable explanation for his or her decision not to file bar complaint. U.S. Const. amend. V; Immigration and Nationality Act, § 292, 8 U.S.C. § 1362.


11. Alien who sought to reopen deportation and exclusion proceeding after he missed filing deadline for appealing decision of Immigration Judge to exclude and deport him could not establish ineffective assistance of his former counsel, where alien failed to file affidavit setting forth agreement with counsel regarding scope of counsel’s representation on appeal, and alien failed to file disciplinary bar complaint against former counsel. U.S. Const. amend. V; Immigration and Nationality Act, § 292, 8 U.S.C. § 1362.

12. Fact that alien’s counsel represented alien pro bono in exclusion and deportation proceedings was not valid reason to excuse alien’s failure to file disciplinary bar complaint against former counsel, so as to establish ineffective assistance of counsel, so that exclusion and deportation order could be reopened despite alien’s failure to meet deadline for appealing order; even if
attorney represented alien on pro bono basis, alien deserved same level of basic competency as paying clients. Immigration and Nationality Act, § 292, 8 U.S.C. § 1362.

13. An attorney’s obligation to his client is not diminished by the pro bono nature of his representation. U.S. Const. amend. VI.

14. The purpose of the requirement that alien seeking to reopen immigration proceeding based upon ineffective assistance of counsel file a complaint against former counsel with the bar is to reinforce the standards which should be expected of attorneys who represent aliens in immigration proceedings. Immigration and Nationality Act, § 292, 8 U.S.C. § 1362.

15. Complaints of ineffectiveness of counsel give bar associations an opportunity to conduct a legal post mortem of an action to determine if one of its members performed below the horizon of professional competence. U.S. Const. amend. VI.

*Pinho v. INS*, 249 F.3d 183 (3d Cir. 2001)

1. Board of Immigration Appeals (BIA) properly applied stop-time rule, which changed how the continuous physical presence test was calculated for purposes of qualifying for suspension of deportation, to aliens’ case, which was decided by BIA after the transition rules of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) took effect. Immigration and Nationality Act, § 240A(d)(1), as amended, 8 U.S.C. § 1229b(d)(1).

2. Decision of Board of Immigration Appeals (BIA) constituted the “final administrative decision” for purposes of rule requiring that stop-time rule, which changed how the continuous physical presence test was calculated for purposes of qualifying for suspension of deportation, be applied to all pending cases in which a final administrative decision had not been rendered by the enactment of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Immigration and Nationality Act, § 240A(d)(1), as amended, 8 U.S.C. § 1229b(d)(1).

3. Application of the stop-time rule, which changed how the continuous physical presence test was calculated for purposes of qualifying for suspension of deportation, to aliens’ pending case did not constitute an unconstitutional retroactive application of law; suspension of deportation was prospective relief because it did not impair any vested rights, and since the relief had not yet been granted and was discretionary even if the aliens met all eligibility criteria, the change in eligibility criteria did not overturn a final administrative decision or impair vested rights. U.S. Const. amend. XIV; Immigration and Nationality Act, § 240A(d)(1), as amended, 8 U.S.C. § 1229b(d)(1).

4. Power to regulate the admission or removal of aliens is a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control; therefore, court applies narrow standard of review to law establishing differing treatment for certain classes of aliens, and upholds the law if it has a rational basis.

5. Nicaraguan Adjustment and Central American Relief Act’s (NACARA) exceptions from the general stop-time rule, which changed how the continuous physical presence test was calculated for purposes of qualifying for suspension of deportation, for aliens from
Nicaragua, Cuba, and certain other Central American and eastern European countries had a rational relationship to the legitimate government interests of foreign relations, national security policy, and compliance with on-going government programs, and therefore did not violate equal protection component of the Fifth Amendment’s Due Process Clause. U.S. Const. amend. V; Immigration and Nationality Act, § 101, 8 U.S.C. § 1101 note.

*Abdille v. Ashcroft*, 242 F.3d 477 (3d Cir. 2001)

1. Although factors other than the issuance of a formal government offer of some type of permanent resettlement may prove relevant to the question whether an applicant has been firmly resettled and thus is ineligible for asylum, the Court of Appeals will not follow a “totality of the alien’s circumstances” approach that would have it consider the existence of an offer as simply one component of a broader firm resettlement inquiry according equal weight to non-offer-based factors. Immigration and Nationality Act, § 208(b)(2)(A)(vi), as amended, 8 U.S.C. § 1158(b)(2)(A)(vi); 8 C.F.R. § 208.15.

2. An asylum applicant bears the burden of establishing that he or she falls within the statutory definition of “refugee.” Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.13(a).


5. Under the substantial evidence standard, a finding by the Board of Immigration Appeals (BIA) in an asylum proceeding must be upheld unless the evidence not only supports a contrary conclusion, but compels it. Immigration and Nationality Act, § 208(b)(1), as amended, 8 U.S.C. § 1158(b)(1).

6. The Court of Appeals owes great deference to the Immigration and Naturalization Service (INS) in immigration matters, particularly when the agency interprets and applies its own regulations.

7. Because the prime element in the inquiry as to whether an applicant has been firmly resettled in another country, so as to be ineligible for asylum, is the existence vel non of an offer of permanent resident status, citizenship, or some other type of permanent settlement, the firm resettlement analysis centers on the question whether a third country issued to the applicant an offer of some type of official status permitting the applicant to reside in that country on a permanent basis. Immigration and Nationality Act, § 208(b)(2)(A)(vi), as amended, 8 U.S.C. § 1158(b)(2)(A)(vi); 8 C.F.R. § 208.15.

8. If the Immigration and Naturalization Service (INS) is unable to secure direct evidence of a formal government offer of some type of permanent resettlement, and thus is unable to make
a prima facie showing that an applicant has been firmly resettled and thus is ineligible for asylum, non-offer-based elements can serve as a surrogate for direct evidence of a formal offer of some type of permanent resettlement, if they rise to a sufficient level of clarity and force. Immigration and Nationality Act, § 208(b)(2)(A)(vi), as amended, 8 U.S.C. § 1158(b)(2)(A)(vi); 8 C.F.R. § 208.15.

9. A principal facet of immigration law is that a nation has broad authority to regulate the terms and conditions under which an individual can be admitted within its borders, and under which the individual can seek to establish a residence therein.

10. Citizenship or permanent residency cannot be gained through adverse possession.

11. Absent some government dispensation, an immigrant who surreptitiously enters a nation without its authorization cannot obtain official resident status no matter his length of stay, his intent, or the extent of the familial and economic connections he develops.

12. Asylum proceeding would be remanded for further investigation by Board of Immigration Appeals (BIA) into content of South African law, for purposes of determining whether Somali applicant had been firmly resettled in South Africa, so as to be ineligible for asylum in United States; record on appeal was limited, and Court of Appeals owed considerable deference to Immigration and Naturalization Service (INS) on factual determination of content of foreign law. Immigration and Nationality Act, § 208(b)(2)(A)(vi), as amended, 8 U.S.C. § 1158(b)(2)(A)(vi).

13. In determining whether alien had been firmly resettled in South Africa so as to be ineligible for asylum in United States, Court of Appeals would not take judicial notice of content of South African refugee law, where district court had not followed fact finding procedure of rule governing determination of foreign law. Immigration and Nationality Act, § 208(b)(2)(A)(vi), as amended, 8 U.S.C. § 1158(b)(2)(A)(vi); Fed. R. Civ. P. Rule 44.1, 28 U.S.C.

14. In general, foreign law is treated as a fact that must be proven by the parties and cannot be judicially noticed.

15. Immigration and Naturalization Service (INS), as party initially seeking to rely on foreign law, would bear burden of establishing content of South African law for purposes of demonstrating that Somali applicant had been firmly resettled in South Africa and thus was ineligible for asylum in United States, but, if INS introduced evidence sufficient to indicate that firm resettlement bar would apply, burden of proving relevant provisions of South African law would shift to applicant. Immigration and Nationality Act, § 208(b)(2)(A)(vi), as amended, 8 U.S.C. § 1158(b)(2)(A)(vi); 8 C.F.R. § 208.13(c)(2)(ii).

16. Determination by Board of Immigration Appeals (BIA) that Somali asylum applicant did not suffer past persecution in South Africa was supported by sufficient evidence; although applicant testified that he was attacked twice by groups of South Africans as he worked as street vendor and that police did nothing to help him, and although he presented documentary evidence of xenophobia among South Africans with respect to Somali immigrants, assaults
could have been ordinary criminal activity. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.13(b)(1).

17. Determination by Board of Immigration Appeals (BIA) that Somali asylum applicant failed to establish that he had well-founded fear of persecution in South Africa was supported by sufficient evidence, including evidence that his fear of persecution, resulting from violence he suffered while working as street vendor in Cape Town, did not exist country-wide. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.13(b)(2) (2000).

18. Establishing a well-founded fear of persecution does not require an asylum applicant to demonstrate that persecution is more likely than not to occur; rather, fear of persecution can be well-founded even when there is a less than 50% chance of the occurrence taking place. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.13(b)(2) (2000).

19. An asylum applicant’s demonstration of a well-founded fear of persecution carries both a subjective and an objective component; the applicant must show that he or she has a subjective fear of persecution that is supported by objective evidence that persecution is a reasonable possibility. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 208.13(b)(2) (2000).

_Drakes v. Zimski_, 240 F.3d 246 (3d Cir. 2001)


2. Second-degree forgery of which alien was convicted under Delaware law was deportable aggravated felony under Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), as required to divest Court of Appeals of jurisdiction to hear alien’s petition to review deportation order; while Delaware forgery statute apparently encompassed more conduct than was encompassed by traditional definition of forgery, statute did not encompass acts beyond those subject to prosecution under federal definition. Immigration and Nationality Act, §§ 101(a)(43)(R), 237(a)(2)(A)(iii), 242(a)(2)(C), 8 U.S.C. §§ 1101(a)(43)(R), 1227(a)(2)(A)(iii), 1252(a)(2)(C); 11 Del. C. § 861.

3. Alien’s suspended sentence of one year on each of two forgery counts under Delaware law was term of imprisonment of at least one year under Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), as required to divest Court of Appeals of jurisdiction to hear alien’s petition to review deportation order. Immigration and Nationality Act, § 101(a)(43)(R), 8 U.S.C. § 1101(a)(43)(R).

_Abdulai v. Ashcroft_, 239 F.3d 542 (3d Cir. 2001)
1. Absent special circumstances, the Court of Appeals reviews only decisions by the Board of Immigration Appeals (BIA) and not those by immigration judges.

2. Withholding of removal, in contrast to asylum, confers only the right not to be deported to a particular country, not a right to remain in the United States. Immigration and Nationality Act, §§ 208(b)(1), 241(b)(3)(A), as amended, 8 U.S.C. §§ 1158(b)(1), 1231(b)(3)(A).

3. “Final order of removal” reviewed by Court of Appeals would be order of Board of Immigration Appeals (BIA), not that of Immigration Judge (IJ), where BIA never expressly adopted any portion of IJ’s opinion or announced it was deferring to any of IJ’s findings. Immigration and Nationality Act, § 242(a)(1), as amended, 8 U.S.C. § 1252(a)(1).

4. The Board of Immigration Appeals (BIA) may disregard the factual findings of an Immigration Judge (IJ) and conduct a de novo review of the entire record, but it also entitled to defer to an IJ’s fact finding, assuming that the IJ’s conclusions are supported by the evidence.

5. When the Board of Immigration Appeals (BIA) defers to an Immigration Judge (IJ), a reviewing court must, as a matter of logic, review the IJ’s decision to assess whether the BIA’s decision to defer was appropriate.

6. Board of Immigration Appeals (BIA) was not required to conduct de novo review of entire record in reviewing decision of Immigration Judge (IJ) denying applications for asylum and withholding of removal. Immigration and Nationality Act, §§ 208(b)(1), 241(b)(3)(A), as amended, 8 U.S.C. §§ 1158(b)(1), 1231(b)(3)(A).


8. In adjudicative contexts, due process requires that an alien: (1) is entitled to fact finding based on a record produced before the decision maker and disclosed to him or her; (2) must be allowed to make arguments on his or her own behalf; and (3) has the right to an individualized determination of his or her interests. U.S. Const. amend. V.

9. In immigration proceedings, a decision maker must actually consider the evidence and argument that a party presents in order to comply with the due process clause. U.S. Const. amend. V.

10. Because agency action is entitled to a presumption of regularity, an alien alleging that the Board of Immigration Appeals (BIA) has denied him or her due process by failing to make an individualized determination of his or her interests bears the burden of proving that the BIA did not review the record when it considered the appeal. U.S. Const. amend. V.

11. In denying applications for asylum and withholding of removal, Board of Immigration Appeals (BIA) made individualized determination of applicant’s interests, as required by due process clause, inasmuch as BIA’s statements indicated it was aware that applicant was Nigerian seeking asylum on basis of political persecution, that there had been issues

12. Principles of Chevron deference to agency determinations are applicable in the immigration context.

13. Judicial deference to the Executive Branch is especially appropriate in the immigration context.

14. Because the Attorney General has vested the Board of Immigration Appeals (BIA) with the power to exercise the discretion and authority conferred upon him by law, Chevron principles of deference apply to the BIA. 8 C.F.R. § 3.1(d)(1).

15. The Court of Appeals accords Chevron deference to interpretations of the Immigration and Nationality Act (INA) by the Board of Immigration Appeals (BIA), and the Court’s inquiry, therefore, is limited to determining whether the statute is silent or ambiguous with respect to the specific issue, and, if so, whether the agency’s answer is based on a permissible construction of the statute. Immigration and Nationality Act, § 101 et seq., as amended, 8 U.S.C. § 1101 et seq.

16. The standard of review of an agency action is even more deferential when the agency is interpreting a regulation rather than a statute that it administers.

17. An agency’s interpretation of its own regulation is controlling unless it is plainly erroneous or inconsistent with the regulation.


19. The Board of Immigration Appeals (BIA) is required to follow court of appeals precedent within the geographical confines of the relevant circuit.

20. A panel of the Court of Appeals is bound by the decisions of a prior panel.


22. Because Board of Immigration Appeals (BIA) failed to explain what particular aspects of applicant’s testimony it would have been reasonable to expect him to have corroborated, and serious question thus existed as to whether BIA properly applied its own rules in denying applications for asylum and withholding of removal based on applicant’s failure to present
corroborating evidence, it was impossible for Court of Appeals to review BIA’s rationale, and vacatur and remand were appropriate. Immigration and Nationality Act, §§ 208(b)(1), 241(b)(3)(A), as amended, 8 U.S.C. §§ 1158(b)(1), 1231(b)(3)(A).

Li Wu Lin v. INS, 238 F.3d 239 (3d Cir. 2001)

1. Where denial of application for asylum, and withholding of deportation, does not turn on any novel legal interpretation by Board of Immigration Appeals (BIA), and instead involves BIA’s fact finding and application of established legal standards, Court of Appeals will reverse denial only if a reasonable fact finder would have to conclude that the requisite fear of persecution existed. Immigration and Nationality Act, § 208(a), as amended, 8 U.S.C. § 1158(a); §§ 106(a)(1), 243(h), as amended, 8 U.S.C. (1994 Ed.) §§ 1105a(a)(1), 1253(h).

2. To establish a well-founded fear of persecution based on his political opinions, as will allow alien to qualify as a “refugee” eligible for political asylum, alien must show that (1) the government pursued him because of his political opinions, (2) the action that the government would take against him is sufficiently serious to constitute persecution, and (3) he has a well-founded fear that the persecution will in fact occur. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(a), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a).

3. For actions of government in alien’s native country to constitute persecution, as will allow alien to qualify as a refugee eligible for political asylum, the actions must amount to more than generally harsh conditions shared by many other persons; however, persecution does include threats to life, confinement, torture, and economic restrictions so severe that they constitute a real threat to life or freedom. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(a), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a).

4. Requirement that alien’s fear of persecution upon return to his native country must be “well-founded” for alien to qualify as a refugee eligible for political asylum includes both a subjective and objective component; under objective component, alien’s subjective fear of persecution must supported by objective evidence that persecution is a reasonable possibility, and standard does not require a showing that persecution is more likely than not, as fear can be well-founded even when there is less than 50% chance of the occurrence taking place. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(a), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a).

5. If an alien satisfies standards governing eligibility for political asylum, Attorney General has discretion to decide whether to grant asylum or not. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(a), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a).

6. If an alien qualifies for withholding of deportation under Immigration and Nationality Act (INA), Attorney General is prohibited from deporting the alien to the country where the persecution will occur. Immigration and Nationality Act, § 208(a), as amended, 8 U.S.C. § 1158(a).

7. To qualify for withholding of deportation, alien must show a clear probability that upon his return to his native country his life or freedom would be threatened because of his political opinions; put differently, the standard is that alien must show that it is more likely than not
that he will face persecution if he is deported. Immigration and Nationality Act, § 208(a), as amended, 8 U.S.C. § 1158(a).

8. Alien can be entitled to both asylum, and withholding of deportation, based on a fear of prosecution under a law of general applicability. Immigration and Nationality Act, § 208(a), as amended, 8 U.S.C. § 1158(a); § 243(h), as amended, 8 U.S.C. (1994 Ed.) § 1253(h).

9. Alien who as a 15-year-old had participated in 1989 pro-democracy protests in China, and who had fled country following crackdown in Tiananmen Square, had a well-founded fear of political persecution if he returned to China and was more likely than not to face such persecution, and thus was eligible for grant of asylum and withholding of deportation; in wake of crackdown, Chinese authorities had issued subpoena for alien and had repeatedly gone to his residence in attempt to find him, and while alien had committed trespass on government property, it was improbable, in light of recent harsh crackdown, that subpoena was motivated by trespass rather than his political expression. Immigration and Nationality Act, § 208(a), as amended, 8 U.S.C. § 1158(a); § 243(h), as amended, 8 U.S.C. (1994 Ed.) § 1253(h).

10. Decisions by Board of Immigration Appeals (BIA) cannot be sustained simply by invoking the State Department’s authority; Court of Appeals is expected to conduct review of the Board’s decisions, and that procedural safeguard would be destroyed if the Board could justify its decisions simply by invoking assertions by the State Department that themselves provide no means for evaluating their validity.

11. Potential punishment of a year and a half of incarceration and forced labor for a 15-year-old who voiced opposition to the government is sufficiently severe punishment to qualify as persecution which will support grant of asylum and withholding of deportation. Immigration and Nationality Act, § 208(a), as amended, 8 U.S.C. § 1158(a); § 243(h), as amended, 8 U.S.C. (1994 Ed.) § 1253(h).

Steele v. Blackman, 236 F.3d 130 (3d Cir. 2001)

1. District Court properly exercised jurisdiction to hear alien’s petition for habeas corpus following removal order where petitioner had been found to have been convicted of an aggravated felony. Immigration and Nationality Act, § 242(a)(1), (a)(2)(C), (b)(9), as amended, 8 U.S.C. § 1252(a)(1), (a)(2)(C), (b)(9); 28 U.S.C. § 2241.

2. Court of Appeals possesses appellate jurisdiction over the district court’s denial of alien’s habeas corpus petition and reviews de novo the district court’s denial of habeas corpus relief and its interpretation of the applicable statutes. 28 U.S.C. §§ 1291, 2253.

3. On review, if a statute administered by agency is ambiguous, and agency has provided a reasonable interpretation of its language, court must simply ask whether the agency’s construction is a permissible one; where the language of a statute is clear, however, the text of the statute is the end of the matter.

4. Statute providing that waivers of inadmissibility might be granted to certain immigrants who traveled abroad for brief periods of time was not applicable to removal proceeding initiated
before effective date of its repeal; because the repealing statute related only to the discretion of the Attorney General to grant a future waiver, its eligibility restriction had only prospective impact, and thus removal of relief was not retroactive. Immigration and Nationality Act, § 213(c), as amended, 8 U.S.C. § 1182(c).

5. Statute authorizing Attorney General to waive the inadmissibility of an alien convicted of a controlled substance offense if that alien’s inadmissibility relates to a single offense of simple possession of 30 grams or less of marijuana was not applicable to alien who admitted to committing more than one controlled substance offense for which he could be found inadmissible. Immigration and Nationality Act, § 212(a)(2)(A)(i)(II), (h), as amended, 8 U.S.C. § 1182(a)(2)(A)(i)(II), (h).

6. Alien’s second New York misdemeanor conviction for distribution of 30 grams or less of marijuana without remuneration was not for a hypothetical offense punishable as a felony under the federal Controlled Substances Act and therefore was not an “aggravated felony” so as to render alien ineligible to apply for waiver of inadmissibility; alien’s “one time loser” status was never litigated as a part of a criminal proceeding, and that status was not an element of the crime charged in the second misdemeanor proceeding against him, and consequently, the record evidenced no judicial determination that such status existed at the relevant time. N.Y. McKinney’s Penal Law § 221.40; Immigration and Nationality Act, §§ 101(a)(43)(B), 240A(a), as amended, 8 U.S.C. §§ 1101(a)(43)(B), 1229b(a); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 404, 21 U.S.C. § 844.

_Breyer v. Meissner_, 214 F.3d 416 (3d Cir. 2000)


2. In reviewing a motion to dismiss, Court of Appeals allows the non-movant the benefit of all reasonable inferences drawn from the allegations contained in the complaint, and accepts these allegations as true.

3. In reviewing a motion to dismiss, Court of Appeals is not required to accept legal conclusions alleged or inferred in the complaint.

4. Court of Appeals reviews the District Court’s denial of a petitioner’s second motion to amend under an abuse of discretion standard.

5. Applicant for United States citizenship, who was born in a foreign country to mother who was an American citizen, had third-party standing to bring his mother’s challenge to statute, which granted citizenship to foreign-born children of American fathers but not to foreign-born children of American mothers, under Equal Protection Clause; applicant was denied citizenship under statute, and mother was deceased, so that she could not assert her own rights. U.S. Const. amend. V; Act May 24, 1934, § 1993, 48 Stat. 797.

6. In determining constitutionality of statute which granted United States citizenship to foreign-born children of American fathers but not to foreign-born children of American mothers

7. When reviewing a statute that contains a gender-based classification under the Equal Protection Clause, heightened level of scrutiny requires parties who seek to defend gender-based government action to demonstrate an exceedingly persuasive justification for that action. U.S. Const. amend. V.

8. When reviewing a statute that contains a gender-based classification under the Equal Protection Clause, heightened level of scrutiny requires that an exceedingly persuasive justification for such classification must be proffered, even if the statute is designed to remedy past gender-based discrimination. U.S. Const. amend. V.

9. When reviewing a statute that contains a gender-based classification under the Equal Protection Clause, the burden of proving that the classification serves important objectives and that the discriminatory means employed to achieve these objectives are substantially related to the achievement of those objectives rests entirely on the state. U.S. Const. amend. V.


12. Remand of Immigration and Naturalization Service’s (INS) denial of application for citizenship by petitioner born in foreign country to American mother was required to determine if petitioner’s Nazi activities during World War II were voluntary and done with an intent to relinquish citizenship.

Liang v. INS, 206 F.3d 308 (3d Cir. 2000)

1. The permanent rules of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) do not deprive federal district courts of habeas jurisdiction over claims of aliens ordered deported for having committed crimes specified in the Immigration and Nationality Act (INA); no provision of the permanent rules expressly refers to habeas jurisdiction, and elimination of habeas jurisdiction would give rise to serious constitutional problems under the Suspension Clause. U.S. Const. art. I, § 9, cl. 2; Immigration and Nationality Act, § 242(a)(1), (a)(2)(C), (b)(2, 9), 8 U.S.C. § 1252(a)(1), (a)(2)(C), (b)(2, 9); 28 U.S.C. § 2241.

2. A repeal of habeas jurisdiction will not be found by implication.
3. A repeal of habeas jurisdiction can only be effected by express congressional command.

4. A panel of the Court of Appeals cannot overrule a prior panel precedent.

5. Congress may divest the district courts of habeas jurisdiction without violating the Suspension Clause so long as it substitutes a collateral remedy which is neither inadequate nor ineffective to test the legality of a person’s detention. U.S. Const. art. I, § 9, cl. 2.


Chi Thon Ngo v. INS, 192 F.3d 390 (3d Cir. 1999)

1. Court of Appeals reviews dismissal of an application for habeas corpus de novo.

2. Under former version of Immigration and Nationality Act (INA), which required Attorney General to take into custody any alien convicted of an aggravated felony upon release of the alien from incarceration, pending a determination that he was excludable, Attorney General had authority to detain alien following issuance of final order of exclusion. Immigration and Nationality Act, §§ 212(d)(5)(A), 236(e), 8 U.S.C. §§ 1182(d)(5)(A), 1226(e).


4. Power to exclude aliens is a fundamental sovereign attribute exercised by the federal government’s political departments, which is largely immune from judicial control.

5. In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.

6. Alien who is on the threshold of initial entry stands on a footing different from those who have “passed through gates,” and whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned. U.S. Const. amend. V.

7. Even an excludable alien is a “person” for purposes of the Fifth Amendment, and is thus entitled to substantive due process. U.S. Const. amends. V, XIV.

8. Procedural due process is available to aliens in some circumstances. U.S. Const. amends. V, XIV.

9. There is no constitutional impediment to the indefinite detention of an alien with a criminal record under a final order of exclusion, deportation, or removal if (1) there is a possibility of
his eventual departure, (2) there are adequate and reasonable provisions for the grant of parole, and (3) detention is necessary to prevent a risk of flight or a threat to the community.

10. Aliens with criminal records as specified in Immigration and Nationality Act may be detained for lengthy periods without violating due process clause when removal is beyond the control of the Immigration and Naturalization Service (INS), provided that appropriate provisions for parole are available; however, when detention is prolonged, special care must be exercised so that the confinement does not continue beyond the time when the original justifications for custody are no longer tenable. U.S. Const. amends. V, XIV; Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

11. Continued detention of alien who was excludable under Immigration and Nationality Act, but whose country of origin had refused to allow his return, violated alien’s due process rights, where alien was repeatedly denied parole on basis of no more than a reading of his file that listed years-old convictions for firearm, attempted robbery, and bail jumping offenses, and no inquiry was made to ascertain whether threat to community posed by alien, and risk of flight, warranted continuation of custody. U.S. Const. amends. V, XIV; Immigration and Nationality Act, § 212, 8 U.S.C. § 1182.

12. Process due even to deportable and excludable aliens requires that an opportunity for an evaluation of the alien’s current threat to the community and his risk of flight be provided before alien may be detained for a lengthy period. U.S. Const. amends. V, XIV.

13. Alien who is excludable under Immigration and Nationality Act, but whose country of origin has refused to allow his return, receives due process in connection with his extended detention by Attorney General where Immigration and Naturalization Service (INS) uses procedure involving written notice to the alien thirty days prior to the custody review advising that he may present information supporting a release, right to representation by counsel or other individuals, opportunity for an annual personal interview, written explanations for a custody decision, opportunity for review by INS headquarters, reviews every six months, and a refusal to presume continued detention based on criminal history. U.S. Const. amends. V, XIV; Immigration and Nationality Act, § 212; 8 U.S.C. § 1182.

DeSousa v. Reno, 190 F.3d 175 (3d Cir. 1999)

1. A district court decision relying on statutory interpretation is reviewed de novo.

2. District court’s conclusions regarding constitutionality of statute would be reviewed de novo.

3. Section of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) precluding court jurisdiction over aliens’ claims arising from Attorney General’s decisions to commence proceedings, adjudicate cases, or execute removal orders did not bar alien’s habeas petition alleging that Antiterrorism and Effective Death Penalty Act (AEDPA), as interpreted by Board of Immigration Appeals (BIA) to deny discretionary waivers of inadmissibility to deportable but not to excludable aliens, violated his equal protection rights, inasmuch as petition did not challenge government’s selective enforcement of immigration laws. U.S. Const. amend. V; Immigration and Nationality Act, § 242(g), 8 U.S.C. § 1252(g); § 212(c), 8 U.S.C. (1994 Ed.) § 1182(c); 28 U.S.C. § 2241.
4. Section of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), precluding court jurisdiction over aliens' claims arising from the Attorney General's decisions to commence proceedings, adjudicate cases, or execute removal orders, applies only to suits challenging the government's selective enforcement of the immigration laws. Immigration and Nationality Act, § 242(g), 8 U.S.C. § 1252(g).

5. Section of Antiterrorism and Effective Death Penalty Act (AEDPA), as interpreted by Board of Immigration Appeals (BIA) to deny discretionary waivers of inadmissibility to deportable but not to excludable aliens, did not violate equal protection rights of deportable alien; Congress could have rationally decided to encourage criminal aliens to leave the country by offering incentive of potential waiver of removal upon seeking reentry. U.S. Const. amend. V; Immigration and Nationality Act, § 212(c), 8 U.S.C. (1994 Ed.) § 1182(c).

6. The constitution provides due process and equal protection guarantees to aliens as well as citizens. U.S. Const. amend. V.

7. Disparate treatment of different groups of aliens triggers only rational basis review under equal protection doctrine. U.S. Const. amend. V.

8. Under rational basis review of an equal protection challenge, a classification is accorded a strong presumption of validity and the government has no obligation to produce evidence to sustain its rationality. U.S. Const. amend. V.

9. Under the rational basis test, a classification can be upheld as not violating equal protection rights even when it is based on rational speculation rather than on empirical data. U.S. Const. amend. V.

10. Under the rational basis test, once a facially legitimate reason for a classification is found, whether such a reason was articulated by Congress or not, the classification does not violate equal protection guarantee. U.S. Const. amend. V.

11. When performing a rational basis review of an equal protection challenge, the Court of Appeals is not to judge the wisdom or fairness of Congress' policy choices, but rather their constitutionality. U.S. Const. amend. V.

12. Out of abundance of caution, Court of Appeals would address alien's argument that section of Antiterrorism and Effective Death Penalty Act (AEDPA) denying discretionary waivers of inadmissibility to deportable aliens convicted of certain crimes was retroactive as applied to him, even though his mentions of retroactivity in appellate briefs referred to case that concerned deportation proceedings pending before AEDPA's effective date while his deportation proceedings began after AEDPA's effective date, where it appeared that alien argued in district court that AEDPA was retroactive as applied to him because underlying convictions occurred prior to AEDPA's effective date. Immigration and Nationality Act, § 212(c), 8 U.S.C. (1994 Ed.) § 1182(c).

13. The first step in a retroactivity analysis is to determine whether Congress has expressed its views on the temporal reach of the statute; if it has, the role of the Court of Appeals is simply to enforce congressional intent.
14. Section of Antiterrorism and Effective Death Penalty Act (AEDPA), denying discretionary waivers of inadmissibility to deportable aliens convicted of certain crimes, was not retroactive as applied to alien whose underlying criminal convictions occurred before AEDPA’s effective date and against whom deportation proceedings were begun after AEDPA’s effective date. Immigration and Nationality Act, § 212(c), 8 U.S.C. (1994 Ed.) § 1182(c).

15. Even though traditional rules of statutory construction suggest that a statute does not have retroactive effect, where the evidence is not absolutely clear, the Court of Appeals proceeds to the next step in the retroactivity analysis, that is, whether the statute has a retroactive effect.

Mwongera v. INS, 187 F.3d 323 (3d Cir. 1999)

1. Review of findings of fact by Board of Immigration Appeals (BIA) is limited to whether they are supported by reasonable, substantial, and probative evidence on the record considered as a whole.

2. Determinations of fact by Board of Immigration Appeals (BIA) adverse to petitioner will be reversed only if the evidence was so compelling that no reasonable fact finder could fail to find for the petitioner.

3. To extent that decision of Board of Immigration Appeals (BIA) rests on interpretation of the agency’s governing statute on a matter as to which Congress has not expressed a clear intent, Court of Appeals will defer to the agency’s reasonable interpretation of the statutory language.

4. Finding of Board of Immigration Appeals (BIA), that alien’s intended visit to United States could not be considered temporary and thus exceeded scope of temporary business visitor visa, was supported by substantial evidence, including alien’s statement that if “granted authorization, I’ll be coming here as I was doing before, just coming in and out.” 8 C.F.R. § 214.2(a)(10).

5. Finding of Board of Immigration Appeals (BIA), that the majority of alien’s time spent in United States was central to continued extension of his company into the United States market, and that his activities thus were not business activities for purposes of temporary business visitor visa, was supported by substantial evidence, including alien’s testimony that he was extending retail sales business that was incorporated in United States. 8 C.F.R. § 214.2(a)(10).

6. Where Congress has not expressed an intention on the precise question, Court of Appeals is obliged to defer to agency’s interpretation of its governing statute unless it is unreasonable.

7. Board of Immigration Appeals (BIA) reasonably interpreted Immigration and Nationality Act (INA) when it concluded that alien who entered United States to engage in day-to-day operation of his United States corporation that marketed African goods within United States was not a temporary business visitor. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.; 8 C.F.R. § 214.2(a)(10).
8. Board of Immigration Appeals (BIA) is accorded deference when it interprets ambiguous statutory provisions through a process of case-by-case adjudication.

9. Immigration and Naturalization Service (INS) is not required to show an intent to deceive to show that alien obtained visa by fraud; rather, knowledge of falsity of representation will suffice. Immigration and Nationality Act, § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i).

10. Finding by Board of Immigration Appeals (BIA), that alien made willful misrepresentation on application for business visitor visa by understating his prior stay in United States, as required for finding of fraud, was supported by substantial evidence, including alien’s three distinct and not entirely consistent reasons for understating his stay. Immigration and Nationality Act, § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i); 8 C.F.R. § 214.2(a)(10).

11. Alien’s understatement of time he had spent in United States, made in applying for business visitor visa, was material, as required for understatement to constitute fraud, in that Immigration and Naturalization Service (INS) agent testified that if she had known of discrepancy between alien’s actual and reported lengths of stay, she would have pursued further inquiry and would have denied visa on basis of fraud. Immigration and Nationality Act, § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i); 8 C.F.R. § 214.2(a)(10).

12. Statement made in attempt to obtain visa is material, as required for statement to constitute fraud, if either: (1) the alien is excludable on the true facts, or (2) the misrepresentation tends to shut off a line of inquiry which is relevant to the alien’s eligibility and which might well have resulted in a proper determination that he be excluded. Immigration and Nationality Act, § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i).

*Catney v. INS*, 178 F.3d 190 (3d Cir. 1999)

1. Court of Appeals has jurisdiction to adjudicate statutory or constitutional claims, as well as to review denials of relief from deportation, in the case of most aliens other than criminal aliens. Immigration and Nationality Act, § 242(a)(1), (b)(4, 9), 8 U.S.C. § 1252(a)(1), (b)(4, 9).

2. Following passage of Antiterrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), any challenge by a criminal alien to an interpretation of the immigration laws or to the constitutionality of such laws by the Board of Immigration Appeals (BIA) must be made through a habeas petition. Immigration and Nationality Act, § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(C).


United States v. Graham, 169 F.3d 787 (3d Cir. 1999)

1. Addition of 16 points to defendant’s base offense level for illegally reentering United States following deportation, based on prior criminal conviction, was not barred by collateral estoppel, although, in his prior unlawful reentry prosecution, court had added only four points based on same information, because change in law governing definition of aggravated felonies meant that issues were not the same in the two prosecutions, and matter was not actually litigated in previous sentencing proceeding. Immigration and Nationality Act, § 101(a)(43), 8 U.S.C. § 1101(a)(43); U.S.S.G. § 2L1.2(b)(1)(B), 18 U.S.C.

2. Whether offense is aggravated felony, for purposes of immigration and deportation, is determined by actual term of imprisonment imposed for that offense, not by statutory minimum for that offense, so lack of statutory minimum for particular offense does not preclude finding that offense was aggravated felony. Immigration and Nationality Act, § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G); U.S.S.G. § 2L1.2(b)(1)(B), 18 U.S.C.

3. The rule of lenity does not apply simply because a statute requires interpretation, and courts will also consider other clear provisions of a law in order to interpret an ambiguous portion of the statute.

4. Defendant’s prior offense of petit larceny under New York law was “aggravated felony,” for purpose of enhanced penalty provisions for offense of reentering United States following deportation, even though petit larceny was misdemeanor under state law, where defendant received one-year sentence for that prior offense. Immigration and Nationality Act, §§ 101(a)(43)(G), 276(b), 8 U.S.C. §§ 1101(a)(43)(G), 1326(b); N.Y. McKinney’s Penal Law § 155.25; U.S.S.G. § 2L1.2(b)(1)(B), 18 U.S.C.

Sandoval v. Reno, 166 F.3d 225 (3d Cir. 1999)

1. Section of Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), amending Immigration and Nationality Act (INA) to preclude court jurisdiction over alien’s claims arising from Attorney General’s decision to commence proceedings, adjudicate cases, or execute removal orders, applied to alien whose case was pending when IIRIRA was enacted, inasmuch as IIRIRA stated that such section would apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings. Immigration and Nationality Act, § 242(g), as amended, 8 U.S.C. § 1252(g); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 306(a), 8 U.S.C. § 1231 note.

2. District courts continue to have habeas jurisdiction to review claims by aliens who have been ordered deported based on commission of crimes listed in Illegal Immigration Reform and

3. Repeal of jurisdictional statutes by implication is disfavored.

4. Courts should not lightly presume that a congressional enactment containing general language effects a repeal of a jurisdictional statute; consequently, only a plain statement of congressional intent to remove a particular statutory grant of jurisdiction will suffice.

5. Title of statute alone is not controlling as to interpretation of statute.

6. Court of Appeals is obliged to read statutes to avoid serious constitutional problems.

7. District court had jurisdiction, in habeas claim of alien who have been ordered deported based on commission of drug crime, to consider alien’s statutory claim that Attorney General could apply statute providing for discretionary relief to pending cases. Antiterrorism and Effective Death Penalty Act of 1996, § 440(d), 110 Stat. 1277; Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C. § 1182(c); 28 U.S.C § 2241.

8. Court of Appeals is required, in absence of direct expression of congressional intent on an issue, to defer to agency’s reasonable interpretation of its governing statute.

9. In deferring to agency’s reasonable interpretation of its governing statute, Court of Appeals is to ascertain, by employing traditional tools of statutory construction, whether Congress has expressed an intention on the precise question at issue.

10. Section of Antiterrorism and Effective Death Penalty Act (AEDPA), adding drug offenses to list of deportable offenses that made aliens ineligible for discretionary relief from Attorney General, did not apply to pending cases. Antiterrorism and Effective Death Penalty Act of 1996, § 440(d), 110 Stat. 1277; Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C. § 1182(c).

11. To determine temporal reach of statute, court first determines, using the ordinary tools of statutory construction, whether Congress prescribed the temporal compass of the statute, and, if Congress did not, determines whether application would have a retroactive effect; if the statutory construction inquiry yields the answer that Congress intended prospectivity, the
inquiry ends and court need not engage in analysis of whether there would be a retroactive effect.

12. It is a principle of statutory construction that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.

*Senathirajah v. INS*, 157 F.3d 210 (3d Cir. 1998)

1. Applicant for withholding of deportation must demonstrate that there is greater-than-fifty-percent chance of persecution upon his or her return. Immigration and Nationality Act, § 243(h), as amended, 8 U.S.C. (1994 Ed.) § 1253(h).

2. If alien fails to establish that his or her life or freedom will be threatened upon return so as to require that deportation be withheld, Attorney General may still exercise her discretion and not deport alien by grant of asylum on ground of subjective fear of persecution supported by objective evidence that persecution is reasonable possibility. Immigration and Nationality Act, § 208, as amended, 8 U.S.C. § 1158.


4. Board of Immigration Appeals (BIA) may defer to credibility rulings of immigration judge who actually heard testimony, and observed witnesses, but BIA is not required to do so, and it ought not to defer when such deference is not supported by its own independent review of the record.

5. Adverse credibility determination of Board of Immigration Appeals (BIA) must be sustained if there is substantial evidence in record to support it.

6. Immigration judge who rejects witness’s positive testimony because in his or her judgment it lacks credibility should offer a specific, cogent reason for his or her disbelief.

7. Finding of Board of Immigration Appeals (BIA), in denying petition for review of immigration judge’s ruling denying application for asylum and withholding of deportation, that alien, a Tamil from Sri Lanka claiming that he had been tortured, was not credible, was not supported by substantial evidence. Immigration and Nationality Act, § 208(a), as amended, 8 U.S.C. § 1158(a); § 243(h), as amended, 8 U.S.C. (1994 Ed.) § 1253(h).

8. Procedures for requesting asylum and withholding of deportation are not a search for justification to deport; justice requires that applicant be afforded meaningful opportunity to establish his or her claim. Immigration and Nationality Act, § 208(a), as amended, 8 U.S.C. § 1158(a); § 243(h), as amended, 8 U.S.C. (1994 Ed.) § 1253(h).

*United States v. Vasquez De Reyes*, 149 F.3d 192 (3d Cir. 1998)

1. Alien’s putative husband’s inculpatory statements to Immigration and Naturalization Service (INS) agents were not purged of taint of the illegal stop of alien, where husband came to INS
office only after he learned of alien’s arrest, which was tainted by the stop. U.S. Const. amend. IV.

2. Incriminating evidence derived from the illegally obtained evidence, colorfully termed the “fruit of the poisonous tree,” is excluded; on the other hand, evidence that the prosecution can show has been discovered independent of any constitutional violation is not excluded. U.S. Const. amend. IV.

3. If the prosecution can establish by a preponderance of the evidence that illegally obtained information ultimately or inevitably would have been discovered by lawful means, then the deterrence rationale has so little basis that the evidence should be admitted. U.S. Const. amend. IV.

4. Under inevitable discovery doctrine, it is the government’s burden to show that illegally obtained evidence would have been acquired through lawful means, a burden that can be met if the government establishes that the police, following routine procedures, would inevitably have uncovered the evidence; analysis should focus upon the historical facts capable of ready verification, and not speculation. U.S. Const. amend. IV.

5. Alien’s putative husband’s statement and alien’s confession, acquired as result of illegal stop, were not admissible under inevitable discovery doctrine; it was speculative whether Immigration and Naturalization Service (INS) procedures would have led to discovery of sham marriage. U.S. Const. amend. IV.

Morel v. INS, 144 F.3d 248 (3d Cir. 1998)

1. Alien’s claim, that Immigration and Naturalization Service (INS) was required to credit him for accumulated residency of his parent who preceded him in United States when determining whether he was eligible for discretionary relief from deportation based on length of residency, was not claim of deprivation of rights of constitutional proportion, and Court of Appeals thus was divested of jurisdiction to hear claim, by statute removing from Courts of Appeals jurisdiction to review claim of legal error in deportation proceedings involving aliens convicted of certain criminal offenses. Antiterrorism and Effective Death Penalty Act of 1996, § 440(a), 110 Stat. 1214; Immigration and Nationality Act, § 212(c), 8 U.S.C. § 1182(c).

2. Court of Appeals would entertain jurisdictional challenge even though it was not advanced until petition for rehearing challenging Court of Appeals’ merits opinion was filed.

3. Court of Appeals is obliged to investigate into its competence to hear a case regardless of the action or inaction of the parties.

4. No action of the parties can confer subject-matter jurisdiction upon a federal court.

5. Consent of the parties is irrelevant to determination of whether Court of Appeals has subject-matter jurisdiction.
6. Principles of estoppel do not apply to question of whether Court of Appeals has subject-
matter jurisdiction.

7. Party does not waive requirement that court have subject-matter jurisdiction by failing to
challenge jurisdiction early in the proceedings.

8. A court, including an appellate court, will raise lack of subject-matter jurisdiction on its own
motion.

9. Rule, springing from the nature and limits of the judicial power of the United States,
requiring Supreme Court, of its own motion, to deny its jurisdiction, and, in the exercise of
its appellate power, that of all other courts of the United States, in all cases where such
jurisdiction does not affirmatively appear in the record, is inflexible and without exception.

10. Court of Appeals’ obligation to investigate into its subject-matter jurisdiction over case
applies with equal force to claims that Court is without jurisdiction because the action has
become moot.

*Balasubramaniam v. INS*, 143 F.3d 157 (3d Cir. 1998)

1. Whether asylum applicant has demonstrated well-founded fear of persecution is factual
determination reviewed under substantial evidence standard.

2. Court of Appeals will uphold agency’s findings of fact to the extent they are supported by
reasonable, substantial, and probative evidence on the record considered as a whole.

3. Adverse credibility determinations of Board of Immigration Appeals are reviewed for
substantial evidence.

4. Asylum applicant bore burden of showing that he qualified as refugee, for purposes of
asylum statute, in that he was persecuted in past or had well-founded fear of future
persecution on grounds of political opinion. Immigration and Nationality Act, §§

5. Eligibility for withholding of deportation under Immigration and Nationality Act involves
stricter standard, clear probability, than eligibility for asylum. Immigration and Nationality

6. Finding by Board of Immigration Appeals that asylum applicant was not credible was not
reasonable, inasmuch as interview of applicant at airport was not valid basis upon which to
base such finding, despite some inconsistencies between interview and applicant’s testimony
before immigration judge; accuracy and completeness of only record of interview was
questionable, interview was not application for asylum and questions posed were not
designed to elicit pertinent details, and Board’s assessment of applicant’s English skills
lacked basis.

7. When immigration judge makes credibility determination, Board of Immigration Appeals can
independently assess that determination and make de novo findings on credibility.
8. Findings of Board of Immigration Appeals must be set aside when the record before Court of Appeals clearly precludes Board’s decision from being justified by fair estimate of worth of testimony of witnesses or its informed judgment on matters within its special competence or both.

9. Although Court of Appeals defers to reasonable inferences drawn by Board of Immigration Appeals from conflicting evidence, deference is not due when findings and conclusions are based on inferences or presumptions that are not reasonably grounded in the record, viewed as a whole.

10. Board of Immigration Appeals should give specific reasons for its determination that witness is not credible.

11. Court of Appeals must evaluate reasons for Board of Immigration Appeals’ determination that witness is not credible to determine whether they are valid grounds upon which to base finding that asylum applicant is not credible; reasons must bear legitimate nexus to the finding.

12. That some inconsistencies existed between airport statement of asylum applicant and his testimony before immigration judge was not sufficient, standing alone, to support finding of Board of Immigration Appeals that applicant was not credible.

13. Persecution supporting finding that asylum applicant is refugee may be on account of political opinion applicant actually holds or on account of one foreign government has imputed to him. Immigration and Nationality Act, §§ 101(a)(42)(A), 208, 8 U.S.C. §§ 1101(a)(42)(A), 1158.

14. Well-founded fear standard for determining whether asylum applicant qualifies as refugee has subjective and objective component; applicant must show that he has subjective fear of persecution that is supported by objective evidence that persecution is reasonable possibility. Immigration and Nationality Act, §§ 101(a)(42)(A), 208, 8 U.S.C. §§ 1101(a)(42)(A), 1158.

15. When documentary evidence is lacking, asylum applicant’s credible, persuasive, and specific testimony may suffice to satisfy objective component of well-founded fear standard for alien refugee status. Immigration and Nationality Act, §§ 101(a)(42)(A), 208, 8 U.S.C. §§ 1101(a)(42)(A), 1158.


Lacap v. INS, 138 F.3d 518 (3d Cir. 1998)

Persons born in the Philippines during territorial period were not born in United States within meaning of citizenship clause of Fourteenth Amendment, and are thus not entitled to United States citizenship by birth. U.S. Const. amend. XIV.
United States v. Rudolph, 137 F.3d 173 (3d Cir. 1998)

1. Defendant’s two uncharged bribes constituted relevant conduct upon which two-level increase could be based pursuant to Sentencing Guideline in sentencing defendant for receiving bribe while acting as special agent for Immigration and Naturalization Service (INS); highly credible witness testified as to his and defendant’s role in the three bribes, of which involved sale of metal template that could imprint marking on “green cards.” 18 U.S.C. § 201(b)(2)(B); U.S.S.G. §§ 1B1.3(a)(1), 2C1.1(b)(1, 2), 18 U.S.C.

2. In review of sentence, factual findings are reviewed for clear error, while application and interpretation of Sentencing Guidelines are subject to plenary review. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.

3. Relevant conduct that is uncharged may be the basis of sentencing enhancement. U.S.S.G. § 1B1.3, 18 U.S.C.

4. Defendant’s due process rights were not violated by the use of his admissions to his probation officer that he had engaged in uncharged bribes, assertedly made because of his belief that he would be ineligible for two-level downward adjustment for acceptance of responsibility if he refused to answer truthfully a probation officer’s questions; no governmental coercion occurred, inasmuch as defendant could have remained silent with regard to relevant conduct without affecting his ability to obtain reduction for acceptance of responsibility. U.S. Const. amend. V; U.S.S.G. §§ 2C1.1(b)(1), 3E1.1, 18 U.S.C.


6. District court’s factual findings in determining whether offenses charged were part of one overall scheme or continuing course of criminal conduct, for purposes of determining whether offenses should be grouped under Sentencing Guidelines, are reviewed for clear error. U.S.S.G. § 3D1.2, 18 U.S.C.

7. Offense of bribery by public official arising from defendant’s sale of metal template that could imprint marking on “green cards,” and offense of sale of government property arising from his sale of presentence report (PSR), were not subject to Sentencing Guideline subsection authorizing grouping when offense behavior was ongoing or continuous and offense guideline was written to cover such behavior; offenses caused analytically distinct harms, and, although defendant’s offense level was enhanced because he took more than one bribe, that enhancement did not encompass his sale of PSR. 18 U.S.C. §§ 201(b)(2)(B), 641; U.S.S.G. § 3D1.2(d), 18 U.S.C.

8. Sentencing Guideline subsection, authorizing grouping when offense level is determined largely on basis of total amount of harm or loss, quantity of substance involved, or some other measure of aggregate harm, or if offense behavior is ongoing or continuous and offense guideline is written to cover such behavior, seeks to eliminate duplication created by what is, in essence, merely aggregation of harm or course of conduct that has already been taken into account by setting of offense level. U.S.S.G. § 3D1.2(d), 18 U.S.C.
9. Under Sentencing Guideline subsection authorizing grouping when offense level is determined largely on basis of total amount of harm or loss or in certain other situations, if offense level is not determined on basis of amount of harm or loss, then grouping is not authorized based on continuing conduct unless offense guideline expressly takes into account the continuing nature of the conduct. U.S.S.G. § 3D1.2(d), 18 U.S.C.

10. Offense of bribery by public official arising from defendant’s sale, while acting as special agent for Immigration and Naturalization Service (INS), of metal template that could imprint marking on “green cards,” and his offense of sale of government property arising from his sale of presentence report (PSR), harmed different societal interests, and thus would not be grouped under Sentencing Guideline as offenses involving same victim; acceptance of bribes jeopardized integrity and efficacy of the nation’s immigration policies, while theft of PSR was directed to identifiable victim, i.e., individual for whom PSR was prepared. 18 U.S.C. §§ 201(b)(2)(B), 641; U.S.S.G. § 3D1.2(b), 18 U.S.C.

11. Offense of bribery by public official arising from defendant’s sale of metal template that could imprint marking on “green cards,” and his offense of sale of government property arising from his sale of presentence report (PSR), would not be grouped under Sentencing Guideline authorizing grouping when one count embodies conduct treated as specific offense characteristic in guideline applicable to the other count; although defendant’s status as public official affected both counts, the two counts addressed distinct criminal acts, neither of which encompassed conduct that affected his sentence for the other. 18 U.S.C. §§ 201(b)(2)(B), 641; U.S.S.G. § 3D1.2(c), 18 U.S.C.

*United States v. Marin-Castaneda*, 134 F.3d 551 (3d Cir. 1998)

1. Generally, Court of Appeals lacks jurisdiction to review refusal to depart downward when district court, knowing it may do so, nonetheless determines that departure is not warranted under Sentencing Guidelines. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.

2. Court of Appeals has jurisdiction to review refusal to depart downward from Sentencing Guidelines when district court refuses to depart on ground that it lacks authority to do so. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.


4. District court’s determination of scope of its authority to depart downward from Sentencing Guidelines is based entirely in law. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.

5. District court by definition abuses its discretion when it makes error of law.

6. District court lacked authority to depart downward from Sentencing Guidelines based on defendant’s willingness to consent to deportation when prosecution opposed departure on such basis and defendant failed to show arguable objection to deportation that he was willing to waive in exchange for departure. Immigration and Nationality Act, § 242A(c)(1), as amended, 8 U.S.C. (1994 Ed.) § 1252a(c)(1); 18 U.S.C. § 3553(b); U.S.S.G. § 5K2.0, p.s., 18
U.S.C.


9. Even if prosecution had requested downward departure under Sentencing Guidelines based on defendant’s consent to deportation, district court would have had discretion not to depart downward. U.S.S.G. § 5K2.0, p.s., 18 U.S.C.

10. District court lacked authority to depart downward under Sentencing Guidelines based on Attorney General’s statutory power to deport alien before completion of prison term; statute only offered post-sentence method by which alien could be deported before fully serving sentence, and vested Attorney General, not district court, with authority to curtail prison sentence for deportation purposes. Immigration and Nationality Act, § 241(a)(4)(B), as amended, 8 U.S.C. § 1231(a)(4)(B); U.S.S.G. § 5K2.0, p.s., 18 U.S.C.


13. Ordeal of being hospitalized as result of ingesting heroin being smuggled into United States did not provide basis for downward departure from Sentencing Guidelines, given that defendant had been aware of health risks involved in ingesting heroin and manifest danger of doing so did not deter him from embarking on endeavor, and that physical trauma experienced was inherent in smuggling drugs in such fashion, and thus could not be considered unusual characteristic or circumstance distinguishing case from “heartland” of Guideline cases. U.S.S.G. § 5K2.0, p.s., 18 U.S.C.

14. Defendant was not entitled to downward departure from Sentencing Guidelines based on collective effect of his consent to deportation, his age of 67, and physical trauma he experienced due to smuggling heroin by ingesting it. U.S.S.G. § 5K2.0, p.s., 18 U.S.C.

*United States v. West Indies Transport, Inc.*, 127 F.3d 299 (3d Cir. 1997)

1. Rule announced by United States Supreme Court in Gaudin, providing that materiality of defendant’s false statements should be submitted to jury, applied retroactively to direct appeal in which defendants challenged convictions for aiding and abetting visa fraud. 18 U.S.C. §§ 2, 1546.
2. Court of Appeals would not apply invited error doctrine to preclude review of defendants’
challenge on direct appeal to instructions on visa fraud that took issue of materiality away
from jury, on ground that defendants invited error by submitting challenged instructions,
where proposed instructions were based on then-current law, but were subsequently declared

3. When defendant submits proposed jury instructions in reliance on current law, and on direct
appeal that law is declared constitutionally infirm, Court of Appeals will not apply invited
error doctrine, but instead will review for plain error. Fed. R. Cr. P. Rule 52, 18 U.S.C.

4. Although, in prosecution for visa fraud, failure to submit to jury issue of materiality of
defendants’ representations to government officials regarding Filipino workers purportedly
hired to work as crewmen aboard foreign flagged vessels was plain error, reversal was not
warranted, given defendants’, failure to show that statements were not material or that failure
to submit issue to jury affected trial’s outcome, or to demonstrate that error seriously affected
fairness, integrity, or public reputation of judicial proceedings. 18 U.S.C. §§ 2, 1546; Fed. R.
Cr. P. Rule 52, 18 U.S.C.

5. To satisfy “substantial rights” prong of plain error test, defendants usually must show that
error was prejudicial, in that it affected outcome of district court proceedings. Fed. R. Cr. P.
Rule 52, 18 U.S.C.

6. Defendants bear burden of proving that error was prejudicial for purposes of plain error test’s

7. When first three parts of plain error rule are satisfied, including error that is plain and affects
substantial rights, appellate court must then determine whether forfeited error seriously
affects fairness, integrity, or public reputation of judicial proceedings before it may exercise

8. Any error in challenged jury instruction was invited, and thus did not provide basis for
reversal, when defendants failed to request instruction that they asserted on appeal and their
proposed instruction was remarkably similar to that actually given.

9. Court of Appeals reviews de novo when question is one of statutory interpretation.

10. Whether immigrant workers lacked criminal intent when they presented false information to
United States immigration officials was irrelevant in prosecution of employers for aiding and
abetting visa fraud, so long as employers intentionally caused workers to submit false
information. 18 U.S.C. §§ 2(b), 1546.

11. When defendant uses innocent intermediary to present false claims or make false statements
to government, criminal intent of intermediary is not element of offense. 18 U.S.C. § 2(b).

12. Defendants’ conduct in severing 250-ton concrete and rebar block from stern of ferrous
concrete barge and dumping it into bay, severing approximately one hundred pieces of rebar
and attached concrete from barge’s stern and dropping it into lagoon, and conducting
sandblasting operations on floating barge that projected sand and paint chip residue into bay
constituted discharge of pollutant from point source, and thus violated Clean Water Act, in that barge was “floating craft” expressly included within definition of “point source.” 33 U.S.C. §§ 1311(a), 1362(6, 12, 14).

13. Barge that defendants used to house workers was not “vessel” within meaning of Clean Water Act, and therefore defendants could be convicted for discharging untreated sewage from barge into bay under provisions of Act that did not governed sewage from vessels; at relevant times, barge was permanently moored to shore, and was not and could not be used as transport, given that it was partly submerged with portion of hull resting on bottom of bay. 33 U.S.C. §§ 1311(a), 1319(c)(2)(A), 1322(a)(1), 1362(12).


15. Convictions under Rivers and Harbors Act for building unlawful structure were supported by evidence that defendants intentionally built large dock to conduct their business activities; defendants strung together numerous derelict barges to form permanent dock for loading activities, repairs, and housing of employees, permanently attached barges together and to land, connected barges to shore with walkways constructed of metal and wood, and wired resulting wharfs, which were substantial enough to support use of forklifts, with electricity. 33 U.S.C. § 403.

16. Rivers and Harbors Act’s prohibition on building or commencing building of wharf, pier, or other structures contemplates purposeful creation of something formulated or designed, or construction work in conventional sense. 33 U.S.C. § 403.

17. Defendants invited error when they proposed jury instructions without mention of harbor lines element with regard to offense of constructing structures in United States waters outside established harbor lines or where no harbor lines have been established, and therefore alleged error in failing to instruct jury on harbor lines element did not provide basis for reversal. 33 U.S.C. § 403.

18. Failure to instruct jury on harbor lines element of offense of constructing structures in United States waters outside established harbor lines or where no harbor lines have been established was not plain error, given absence of evidence showing that failure affected trial’s outcome and district court’s use of defendants’ proposed instruction. 33 U.S.C. §§ 2, 1546.

19. Defendants charged with visa fraud in connection with hiring of illegal workers were not entitled to mistrial based on local labor official’s testimony regarding costs defendants would have incurred had they employed workers through legal means, despite claim of resulting possible prejudice among union workers on jury; testimony was relevant and probative on intent element of visa fraud, in that it tended to establish motive, and district court carefully questioned jury to ensure that there was no prejudice affecting jury’s impartiality. 18 U.S.C. §§ 2, 1546.

20. Court of Appeals reviews denial of mistrial for abuse of discretion.

21. Entrapment by estoppel defense applies when defendant establishes by a preponderance of
the evidence that government official told defendant that certain criminal conduct was legal, defendant actually relied on government official’s statements, and defendant’s reliance was in good faith and reasonable in light of identity of government official, point of law represented, and substance of official’s statement.

22. For purposes of entrapment by estoppel defense, defendant’s reliance on government official’s statements that certain criminal conduct was legal is reasonable and in good faith only when person truly desirous of obeying the law would have accepted information as true, and would not have been put on notice to make further inquiries.

23. Defendants were not entitled to assert and present evidence on entrapment by estoppel defense to visa fraud charges, given their failure to proffer evidence showing that United States immigration officials were informed of, and approved, their scheme to employ as permanent dockhands alien workers admitted to United States on foreign crewman visas. 18 U.S.C. §§ 2, 1546.

24. Instruction on entrapment by estoppel defense was not warranted with regard to convictions under Ocean Dumping Act for dumping scrap metal and other debris into ocean, despite defendants’ claimed reliance on placards required by Coast Guard regulations warning of prohibited discharges from vessels, which allegedly caused defendants to believe they could legally dump scrap metal when at least 12 miles offshore; placard at issue made no representations about dumping of scrap metal and clearly indicated existence of restrictions other than those listed, and substantial evidence suggested that claimed reliance was neither actual nor in good faith. 33 U.S.C. §§ 1411(a), 1415(b)(1).

25. Placard manufactured by private entity, warning of illegality of certain discharges of debris from vessels, did not support claims of entrapment by estoppel asserted by defendants convicted under Ocean Dumping Act for dumping scrap metal and other debris into ocean; defense applied only to representations made by government officials, and, even if placard contained representations by government, it contained no statements regarding legality of dumping scrap metal at sea. 33 U.S.C. §§ 1411(a), 1415(b)(1).

26. Requirement, under Virgin Islands’ Racketeer Influenced and Corrupt Organizations Act (RICO) statute, that at least one predicate act charged as federal offense also constitute felony under Virgin Islands law, was satisfied with regard to defendants charged with and convicted for conspiracy under federal law, inasmuch as conspiracy also constituted felony under Virgin Islands Code; statute did not require that requisite local predicate act be charged as local felony. 14 V.I.C. §§ 551, 604(j)(2)(C).

27. Court of Appeals reviews district court’s determination of amount of fine for clear error.

28. Untreated human sewage fell within clear meaning of “pollutant” under relevant Sentencing Guideline, and therefore defendants were not entitled to reduction of six-level sentence enhancement for ongoing, continuous, or repetitive discharge on ground that raw human sewage that they dumped into navigable waters was fully biodegradable. U.S.S.G. § 2Q1.3(b)(1)(A), 18 U.S.C.

29. Court of Appeals’ review of contention that six-level sentence enhancement for ongoing,
continuous, or repetitive discharge of pollutant assessed under Sentencing Guidelines should be reduced was plenary. U.S.S.G. § 2Q1.3(b)(1)(A), 18 U.S.C.

30. Defendants could be ordered to pay restitution to offset costs of cleaning up their environmental damage, notwithstanding defendants’ claim that restitution could not be ordered for Title 33 offenses, given that each Title 33 offense also charged violation of statute for which restitution was authorized. 18 U.S.C. §§ 2, 3663.

31. Court of Appeals’ review of challenge to validity of restitution order was plenary.

32. Setting amount of restitution based on Coast Guard’s estimates of costs required to clean up defendants’ environmental damage, while ordering that any amount over actual costs be returned to defendants, was not abuse of discretion.

33. Court of Appeals reviews appropriateness of particular restitution award for abuse of discretion.

Getahun v. Office of Chief Administrative Hearing Officer of Executive Office For Immigration Review of U.S. Dep’t of Justice, 124 F.3d 591 (3d Cir. 1997)

1. Standards governing entry of summary judgment under federal rules of civil procedure in federal court cases are applied in determining whether summary decision is appropriate in Office of the Chief Administrative Hearing Officer (OCAHO) cases charging unfair immigration-related employment practices. Fed. R. Civ. P. Rule 56(c), 28 U.S.C.; 28 C.F.R. § 68.38(c).

2. Alien was authorized to be employed in United States on date that she was terminated by former employer, where alien had been granted asylum and had applied for, though not received, employment authorization document (EAD), as evidenced by receipt, at that time, even though alien did not apply for renewal of interim EAD which expired after asylum was granted, because employment authorization was automatically extended upon grant of asylum; thus alien had standing to file claim against employer alleging unfair immigration-related employment practice in form of document abuse. Immigration and Nationality Act, § 274B(a)(1, 6), as amended, 8 U.S.C. § 1324b(a)(1, 6); 8 C.F.R. § 208.20.

3. Court of Appeals applies de novo standard of review to agency’s conclusions of law, although some deference is given to agency’s reasonable construction of statute it is charged with administering.


Chang v. INS, 119 F.3d 1055 (3d Cir. 1997)

1. As to construction of Immigration and Nationality Act (INA) by Board of Immigration Appeals (BIA), if Congress has evidenced clear and unambiguous intent concerning precise
question before Court of Appeals, then Court gives effect to that intent, but, if statute is silent or ambiguous, Court defers to agency’s interpretation if it is based on permissible construction of statute. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. (1994 Ed.) § 1101 et seq.

2. On review of decision by Board of Immigration Appeals (BIA), Court of Appeals will not substitute its own judgment for that of BIA, but must reject any interpretation of statute by BIA that is arbitrary, capricious, or manifestly contrary to statute.

3. On questions of fact, Court of Appeals will reverse determination of Board of Immigration Appeals (BIA) that alien is not eligible for asylum and not entitled to withholding of deportation only if reasonable fact finder would have to conclude that requisite fear of persecution existed. Immigration and Nationality Act, §§ 208(a), 243(h), 8 U.S.C. (1994 Ed.) §§ 1158(a), 1253(h).

4. Fact that Chinese security laws restricting its citizens’ entry into, or stay in, other countries were generally applicable did not preclude finding that alien’s fear of prosecution under such laws constituted “persecution” supporting grant of asylum and withholding of deportation. Immigration and Nationality Act, §§ 208(a), 243(h), 8 U.S.C. (1994 Ed.) §§ 1158(a), 1253(h).

5. If law of foreign country is based on one of enumerated factors supporting grant of asylum and withholding of deportation, and if punishment under that law is sufficiently extreme to constitute persecution, law may provide basis for asylum or withholding of deportation even if law is generally applicable. Immigration and Nationality Act, §§ 208(a), 243(h), 8 U.S.C. (1994 Ed.) §§ 1158(a), 1253(h).

6. China’s potential prosecution of alien who led delegation to United States under China’s security laws, if alien returned to China, would be, at least in part, on account of alien’s political opinion and thus supported withholding of deportation and eligibility for discretionary grant of asylum; alien violated laws prohibiting illegal departure from China and requiring him to report suspicions that others intended to stay in United States rather than return to China because alien disagreed with Chinese government’s likely treatment of others upon their return, and alien held unique position of trust with respect to Chinese government. Immigration and Nationality Act, §§ 208(a), 243(h), 8 U.S.C. (1994 Ed.) §§ 1158(a), 1253(h).

7. Fact that alien did not call himself a dissident or couch his resistance to policy of Chinese government in terms of particular ideology did not preclude finding that alien’s opposition was political, for purpose of alien’s application for asylum and withholding of deportation. Immigration and Nationality Act, §§ 208(a), 243(h), 8 U.S.C. (1994 Ed.) §§ 1158(a), 1253(h).

8. Applicant for asylum claiming fear of persecution due to applicant’s political opinions must show not that persecutor’s motives for persecuting applicant are political in some general sense but instead that persecutor is motivated specifically by political opinions of asylum-seeker. Immigration and Nationality Act, § 208(a), 8 U.S.C. (1994 Ed.) § 1158(a).
9. Under clear probability of persecution standard, Attorney General must withhold deportation if alien demonstrates that, upon return to alien’s home country, alien’s life or freedom would be threatened on account of statutory factor by showing with objective evidence that it is more likely than not alien would face persecution if he was deported. Immigration and Nationality Act, § 243(h)(1), 8 U.S.C. (1994 Ed.) § 1253(h)(1).

10. To show eligibility for discretionary grant of asylum, alien need only show that he has subjective fear of persecution that is supported by objective evidence that persecution is reasonable possibility; fear can be well-founded even when there is less than 50% chance of occurrence taking place. Immigration and Nationality Act, § 208(a), 8 U.S.C. (1994 Ed.) § 1158(a).

11. Punishment which alien would likely face upon his return to China, which would result from China’s prosecution of alien for violating security laws by remaining in United States without authorization and failing to report suspicions that other Chinese citizens in delegation led by alien would remain in United States, was sufficiently severe to constitute “persecution,” within meaning of statutes governing asylum and withholding of deportation, based on evidence that violations of exit laws alone could result in year of punishment and that those who expressed political opposition to Chinese government could face imprisonment and torture. Immigration and Nationality Act, §§ 208(a), 243(h), 8 U.S.C. (1994 Ed.) §§ 1158(a), 1253(h).

12. Only if punishment which alien would face upon return to home country is severe enough to constitute “extreme conduct,” can it constitute persecution supporting eligibility for discretionary grant of asylum or withholding of deportation. Immigration and Nationality Act, §§ 208(a), 243(h), 8 U.S.C. (1994 Ed.) §§ 1158(a), 1253(h).

13. Alien who led Chinese technical delegation to United States would, more likely than not, face persecution if alien was returned to China, in form of prosecution for violating China’s security laws by remaining in United States for unauthorized period of time and failing to report suspicions that other delegates would not return to China, in view of alien’s violations of Chinese law, seeking of asylum in United States, and high-level position with Chinese government, as well as China’s possible knowledge of alien’s meetings with Federal Bureau of Investigation (FBI) agent; thus, alien was entitled to withholding of deportation and consideration of his request for discretionary grant of asylum. Immigration and Nationality Act, §§ 208(a), 243(h), 8 U.S.C. (1994 Ed.) §§ 1158(a), 1253(h).

Sidoti v. INS, 107 F.3d 191 (3d Cir. 1997)

1. Right of foreign sovereign to demand and obtain extradition of accused criminal is created by treaty, and, in absence of treaty, government has no duty to surrender fugitive to foreign government.

2. Power to extradite, which derives from President’s power to conduct foreign affairs, is executive, not judicial, function.

3. Purpose of extradition proceeding is to determine whether individual who has been arrested in United States, according to complaint filed on behalf of foreign government seeking
extradition, is subject to surrender to government of requesting country. 18 U.S.C. §§ 3181-3195.

4. In extradition proceeding, court determines whether there is probable cause to believe that defendant is guilty of crimes charged; if evidence is sufficient, court makes finding of extraditability and certifies case to Secretary of State. 18 U.S.C. § 3184.

5. Individual challenging magistrate judge’s extradition order must pursue writ of habeas corpus; extradition order may not be appealed because it is not final decision of district court. 28 U.S.C. § 1291.

6. Scope of habeas corpus review of magistrate judge’s extradition order under treaty with foreign country is extremely limited.

7. Turkish Court of Appeals’ General Board of Criminal Appeals convicted accused of rape and murder, which was sufficient to support finding of probable cause for extradition purposes, by remanding his case back to trial court and overturning his acquittal on rape and murder charges; trial court did not have discretion to insist on its judgment after General Board’s reversal, so that case was remanded for sentencing only.


9. Competent evidence in record supported magistrate judge’s finding of probable cause, for extradition purposes, to believe that accused was guilty of rape and murder, where crimes were committed in his home at time when he was only male resident, there were no intruders on night of murder, blood was found on accused’s pajamas and cloth, and victim was strangled with belt belonging to accused’s wife.

10. Probable cause standard applicable in extradition proceedings is identical to that used by courts in federal preliminary hearings.

*United States v. Stelmokas*, 100 F.3d 302 (3d Cir. 1996)

1. Party asserting privilege against self-incrimination was not prejudiced by district court’s alleged error in finding that he did not face real and substantial threat of domestic and foreign prosecution, where he was not sanctioned, his answer was not stricken, allegations of complaint against him were not deemed admitted, default judgment was not entered against him, and he was not precluded from presenting witnesses including even himself or held in contempt. U.S. Const. amend. V.

2. Party asserted privilege against self-incrimination by claiming privilege in his answer and at his deposition, where he never filed amended answer or indicated that he would make himself available to complete his deposition; his attorney merely said at trial that he may waive privilege, which he never did. U.S. Const. amend. V.

3. If party initially claims privilege against self-incrimination and then intends to waive it, he should do so clearly. U.S. Const. amend. V.
4. Negative inferences could be drawn against party asserting privilege against self-incrimination in civil case based on independent evidence to support them. U.S. Const. amend. V.

5. Severity of consequences do not alter legal determination that court may draw inferences against person pleading privilege against self-incrimination in civil case. U.S. Const. amend. V.

6. Occupation documents from Lithuanian archives and other sources demonstrating naturalized citizen’s employment and activities in Europe during World War II were admissible under ancient documents exception to hearsay for statements in document that is at least 20 years old, where documents were certified by competent Lithuanian archival personnel and independent experts testified that documents were authentic and reliable. Fed. Rules Evid. Rule 803(16), 28 U.S.C.

7. Court of Appeals reviews for abuse of discretion district court’s admission of evidence over challenge to its authenticity.


9. Alien voluntarily served as officer in German-organized armed Lithuanian group during World War II to assist occupation of Lithuania and persecution of Jews, so that he was not lawfully admitted to United States and was ineligible for citizenship, where all officers in group served voluntarily and members could be released at their own request. Immigration and Nationality Act, § 316, as amended, 8 U.S.C. § 1427; Displaced Persons Act of 1948, § 2(b), 50 U.S.C. App. (1952 Ed.) § 1951(b).

10. Alien misrepresented his wartime employment, so that he was not lawfully admitted to United States and was ineligible for citizenship, where he represented to United States Displaced Persons Commission analyst and American vice consul that he was teacher from 1940 to 1943 when he was actually serving as officer in armed Lithuanian unit assisting Germans in occupation of Lithuania and persecution of Jews there. Immigration and Nationality Act, § 316, as amended, 8 U.S.C. § 1427; Displaced Persons Act of 1948, § 10, 50 U.S.C. App. (1952 Ed.) § 1959.

11. Date that group was placed on list of groups inimical to United States was not significant for determining if it was movement hostile to the United States during World War II as basis for finding its members inadmissible; placement on list, regardless of when it was done, established that it was hostile movement during World War II. Displaced Persons Act of 1948, § 13, 50 U.S.C. App. (1952 Ed.) § 1962.

12. Naturalized citizen was not entitled to relief in denaturalization proceeding on claim that his misrepresentations regarding his wartime employment and residence were not material because no consular or Immigration and Naturalization Service (INS) official was called to testify that decision to admit him would have been different if truth had been known, where, even if naturalized citizen had made no misrepresentations, his conduct and associations during World War II made him ineligible for visa, and thus ineligible for citizenship.

13. In denaturalization proceeding, materiality of misrepresentation is legal issue.


15. Materiality of misrepresentation in denaturalization proceeding is matter of law, not fact, so that government does not have to produce evidence from officials that if truth had been told they would have reached different result.

16. Naturalized citizen’s misrepresentations on his application for displaced person status and for visa that he was laborer and school teacher during World War II when in fact he was officer in Nazi occupation force and served in German air force were material, since they would have disqualified him from securing displaced person status and from obtaining visa.

17. Government is not required to establish materiality of misrepresentation on visa application with testimony from consular or Immigration and Naturalization Service (INS) officer that truthful disclosure would have produced different result.

_Bamidele v. INS, 99 F.3d 557 (3d Cir. 1996)_

1. Attorney General’s construction of statute of limitations applicable to rescission of alien’s adjustment of status did not require special knowledge within Immigration and Naturalization Service’s (INS) field of technical expertise, and, thus, was not entitled to any presumption of special expertise. Immigration and Nationality Act, § 246(a), 8 U.S.C. § 1256(a).

2. Applicability of statute of limitations is not matter within particular expertise of Immigration and Naturalization Service (INS), for its interpretation to be entitled to deference, but rather, it is clearly legal issue that courts are better equipped to handle.

3. Statute of limitations is general legal concept with which judiciary can deal at least as competently as can executive agency, so that agency’s construction of statute of limitations is not entitled to presumption of special expertise.

4. Five-year statute of limitations proscribing untimely rescission of alien’s adjustment of status to permanent resident applied to bar Immigration and Naturalization Service (INS) from deporting him for obtaining adjustment of status through sham marriage, which INS claimed rendered original adjustment of status improper. Immigration and Nationality Act, §§ 241(a)(1)(G), 246(a), 8 U.S.C. §§ 1251(a)(1)(G), 1256(a).

_Salazar-Haro v. INS, 95 F.3d 309 (3d Cir. 1996)_

Provision of Antiterrorism and Effective Death Penalty Act of 1996 removing judicial review of final deportation order for aliens convicted of certain criminal offense applied to preclude review of alien’s final order of deportation that was imposed because of his conviction on charges of conspiracy to distribute cocaine; provision of Act became effective on its date of


1. Congress clearly intended single, uniform procedure under Refugee Act for asylum applicants, regardless of their stowaway status; plain language of Refugee Act left no room for agency to construe statute to permit different asylum procedures for aliens with stowaway status; statute specifically provided that “Attorney General shall establish a procedure.” Immigration and Nationality Act, §§ 208(a), 273(d), as amended, 8 U.S.C. §§ 1158(a), 1323(d).

2. Board of Immigration Appeals’ (BIA) construction of the Refugee Act, which approved of Immigration and Naturalization Service’s (INS) nonadversarial asylum interview procedure for stowaways while condemning that same procedure as creating inadequate record for review, was entitled to less deference on judicial review than consistently held agency view. Immigration and Nationality Act, § 208(a), as amended, 8 U.S.C. § 1158(a).

3. Immigration and Naturalization Service’s (INS) nonadversarial interview procedure for stowaways seeking asylum failed to satisfy most basic due process protections by not providing neutral judge or complete record of proceeding; although asylum applicants lack constitutional due process protections, Congress instructed Attorney General to establish fair, uniform asylum procedure irrespective of alien status, so that inherent unfairness of existing INS asylum procedure for stowaways was contrary to clear intent of Congress. Immigration and Nationality Act, § 208(a), as amended, 8 U.S.C. § 1158(a).

4. Alien seeking initial admission to United States requests privilege and has no constitutional rights regarding his application, for power to admit or exclude aliens is sovereign prerogative.

5. Aliens only have those statutory rights granted by Congress.

6. When Congress directs agency to establish procedure, it can be assumed that Congress intends that procedure to be fair one.

7. Precisely what minimum procedures are due under statutory right to comply with due process clause depends on circumstances of particular situation. U.S. Const. amend. V.

8. Stowaway asylum applicants must be afforded same asylum procedures deemed necessary for other aliens; in addition to hearing before neutral immigration judge and transcribed record of proceeding, stowaway asylum applicants must be advised of their right to counsel and of availability of free legal services, to a public hearing, to examine and object to adverse evidence, to compel testimony of witnesses by subpoena, to administrative review, and to services of translator. Immigration and Nationality Act, § 208(a), as amended, 8 U.S.C. § 1158(a).

_State of N.J. v. United States_, 91 F.3d 463 (3d Cir. 1996)
1. Under Tenth Amendment, federal government, which has considerable power to regulate individuals directly and to encourage states to adopt certain legislative programs, cannot require states to govern according to its instructions. U.S. Const. amend. X.

2. Neither law enforcement nor educational expenses incurred by state for illegal aliens resulted from any command by Congress, for federal government to be required to reimburse those costs under Tenth Amendment; state made its own decision to prosecute illegal aliens for acts they committed in violation of state’s own criminal code and its education of illegal aliens did not derive from any Congressional or executive directive, but from Constitution itself. U.S. Const. amend. X.

3. Any asserted failure of federal government to adequately enforce its immigration laws, with indirect result of increasing law enforcement and educational expenditures for certain states, was not kind of coercion that could violate Tenth Amendment’s limitation of federal powers to those specifically enumerated. U.S. Const. amend. X.

4. Indirect law enforcement and educational costs imposed on some states from congressional action under naturalization clause of Constitution did not amount to unconstitutional infringement on state sovereignty. U.S. Const. art. I, § 8, cl. 4.

5. Naturalization clause of Constitution could not be read to impose affirmative duty on federal government to protect states from harm caused by illegal aliens, as nongovernmental third parties. U.S. Const. art. I, § 8, cl. 4.

6. Federal government’s alleged failure to stem tide of illegal immigrants into state, while it may have had incidental effect of causing state to incur additional law enforcement and education costs, did not interfere with state’s “investment-backed” and “reasonable expectations” to be considered taking of state property in violation of the takings clause of the Fifth Amendment. U.S. Const. amend. V.

7. Relevant considerations for determining whether governmental action is compensable taking include economic impact of regulation on claimant and extent to which regulation has interfered with distinct investment-backed expectations, and nature of action, such as whether it is physical invasion of land and thus more likely to be taking, or public program adjusting benefits and burdens of economic life to promote common good, which ordinarily will not be compensable. U.S. Const. amend. V.

8. Federal government’s failure to prevent entry of illegal aliens into New Jersey did not violate its constitutional obligation to “protect each of [the states] against Invasion”; there was no support for reading term “invasion” to mean anything other than military invasion. U.S. Const. art. IV, § 4.

9. Requiring state to increase and expend state taxes for law enforcement and educational expenses of illegal aliens did not pose any realistic risk of altering form or method of functioning of state government to support state’s claim under constitutional clause providing that “The United States shall guarantee to every State in this Union a Republican Form of Government.” U.S. Const. art. IV, § 4.
10. State alleged no viable claim that it was entitled to judicial relief because it had no remedy through political process established by Constitution of United States to seek reimbursement for law enforcement and educational expenses of illegal aliens by not alleging that it was deprived of any right to participate in national political process or that it was singled out in way that left it politically isolated and powerless. U.S. Const. amend. X.

11. Naturalization clause represented textually demonstrable constitutional commitment of immigration to legislative branch, making state’s constitutional claims for reimbursement of its law enforcement and educational expenses, nonjusticiable under political question doctrine. U.S. Const. art. I, § 8, cl. 4.

12. Court lacked judicially discoverable and manageable standards for resolving state’s claim that it was entitled to reimbursement of its law enforcement and educational expenses for illegal aliens, so that state’s claim represented nonjusticiable political question; power to expel or exclude aliens has been recognized as fundamental sovereign attribute exercised by government’s political departments largely immune from judicial control.

13. Decisions about how best to enforce nation’s immigration laws to minimize number of illegal aliens crossing its borders patently involved policy judgments about resource allocation and enforcement methods, so that such issues fell squarely within substantive area clearly committed by Constitution to political branches to be nonjusticiable political questions.


15. Since none of lump-sum appropriation for Immigration and Naturalization Service (INS) “salaries and expenses” nor monies recovered from fines, penalties and expenses from persons violating immigration laws were earmarked by Congress for disbursement to states, decision as to whether to appropriate any of those funds for that purpose was “committed to agency discretion” and therefore unreviewable under the Administrative Procedures Act (APA). 5 U.S.C. § 701(a)(2); Immigration and Nationality Act, §§ 280, 501, as amended, 8 U.S.C. §§ 1330, 1365.

Massieu v. Reno, 91 F.3d 416 (3d Cir. 1996)

1. Alien was precluded from initially asserting his constitutional claims in district court action; he had to exhaust his administrative remedies and then petition for review in Court of Appeals. Immigration and Nationality Act, § 106(c), as amended, 8 U.S.C. § 1105a(c).

2. Even where alien is attempting to prevent exclusion or deportation proceeding from initially taking place and not, strictly speaking, attacking final order of deportation or exclusion, judicial review is precluded if alien has failed to avail himself of all administrative remedies, one of which is either deportation or exclusion hearing itself. Immigration and Nationality Act, § 106(c), as amended, 8 U.S.C. § 1105a(c).

3. Courts of Appeals generally may provide meaningful review as to any properly exhausted claims directly attacking final order of deportation.
4. Exception to exhaustion of administrative remedies doctrine for claims considered wholly collateral to administrative review process did not apply for alien, where he was challenging constitutionality of statutory provision on which his deportation was ordered, and where delaying his constitutional challenge until after he exhausted his administrative remedies would not foreclose meaningful judicial review; alien was directly challenging his deportability. Immigration and Nationality Act, § 106(b, c), as amended, 8 U.S.C. § 1105a(b, c).

Morel v. INS, 90 F.3d 833 (3d Cir. 1996)

1. The Court of Appeals has plenary review over questions of law, but must defer to an agency’s reasonable construction of ambiguities in the statutes it is charged with administering.

2. The Court of Appeals will uphold the agency’s findings of fact to the extent that they are “supported by reasonable, substantial, and probative evidence on the record considered as a whole.” 8 U.S.C. § 1105a(a)(4); INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992).

3. The time for filing a petition for review differs, depending on whether the petitioner was convicted of an aggravated felony or a lesser offense. See 8 U.S.C. § 1105a(a)(1) (“[A] petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony ..., not later than 30 days after the issuance of such order.”).

4. While it may be anomalous that there could be differing circuit law governing a federal agency’s application of a uniformly applicable federal statute where two circuits have potential connection with the case, all of the other appellate courts confronted with a similar situation have applied the law of their own circuits and are obliged to do so despite problems created by lack of uniformity in application of immigration laws.

5. While the BIA has long held that the seven years of domicile required by section 212(c) must follow admission as a lawful permanent resident, the courts of appeals have read the statute differently.

6. The statute itself makes the distinction between “admission for permanent residence” and “lawful ... domicile.” The INA defines “lawfully admitted for permanent residence” as “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.” 8 U.S.C. § 1101(a)(20).

7. The INA does not define “domicile,” but the term is ordinarily understood to mean physical presence with an intent to remain in that place indefinitely.

8. In order for an alien to establish a “lawful” domicile, the alien must be legally capable of forming an intent to remain in the United States indefinitely.

9. Aliens such as those admitted as temporary visitors, students or workers may not lawfully form an intent to remain in the United States because they have visas that require that the
holder have “a residence in a foreign country which he has no intention of abandoning.” 8 U.S.C. § 1101(a)(15). This excludes them as lawful “domiciliaries.”

10. Likewise, an alien who enters the country illegally cannot have a lawful intent to remain here.

11. It does not follow that the two statutory phrases – admission for permanent residence and lawful domicile – are co-extensive; certain categories of aliens may lawfully form an intent to remain here without having been admitted for permanent residence.

12. Nothing in section 212(c) suggests that these requirements qualify or limit one another in a way that would require that all seven years of “lawful domicile” have been in a “permanent resident” status.

13. The plain language of a statute “should be conclusive, except in the ‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’”

14. The plain language of section 212(c) is consistent with its purpose, which is to permit application for a waiver of deportation for individuals who have established significant ties to this country.

15. “Considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer,” but “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”

16. “A minor’s domicile is the same as that of its parents, since most children are presumed not legally capable of forming the requisite intent to establish their own domicile.”

17. The domicile of a parent may be imputed to his or her child for purposes of determining whether the child has met the seven year domicile requirement of section 212(c).

18. Application of the common-law definition of “domicile” here is consistent with the “object and policy” of section 212(c), which is to provide relief to aliens for whom deportation “would result in peculiar or unusual hardship.”

19. At common law, the domicile of a child born in wedlock followed that of the father, while an “illegitimate” child assumed the domicile of the mother, but a minor should be permitted “to establish domicile through a parent with whom he had a significant relationship during the time in question,” because such an approach better serves “the ameliorative purpose of § 212(c),” and is more consistent with Congress’ concern with keeping families intact, reflected in the other provisions referred to above, to have the imputation of a child’s domicile turn on the nature of the relationship between parent and child rather than on the status of the parents’ relationship.

Scheidemann v. INS, 83 F.3d 1517 (3d Cir. 1996)
1. Starting point in interpreting statute is its language; if intent of Congress is clear, that is end of matter.

2. If statute is silent or ambiguous with respect to specific issue, question for court reviewing agency’s construction of statute is whether agency’s answer is based on permissible construction of the statute.

3. Courts must respect interpretation of agency to which Congress has delegated responsibility for administering statutory program unless that interpretation is arbitrary, capricious, or manifestly contrary to statute.

4. Prohibition against ex post facto laws does not apply to deportation proceedings, which are purely civil actions to determine eligibility to remain in country, not to punish; past conduct is relevant only insofar as it may shed light on respondent’s right to remain. U.S. Const. art. I, § 9, cl. 3.

5. Application of aggravated felony statutory bar to discretionary relief from deportation to alien who had been convicted of aggravated felony before effective date of statutory bar did not have retroactive effect; change merely withdrew previously available form of discretionary relief from deportation without attaching additional consequences to his past criminal activity. Immigration and Nationality Act, § 212(c), 8 U.S.C. § 1182(c).

6. Elementary considerations of fairness dictate that individuals should have opportunity to know what law is and to conform their conduct accordingly, supporting application of presumption against statutory retroactivity; settled expectations should not be lightly disrupted.

7. Temporally unrestricted definition of “aggravated felony” applied to preenactment convictions based on substantive provisions of immigration law using term, though nothing in law expressly commanded retroactive application of term; crime described in original definition was aggravated felony regardless of date of conviction, but its immigration consequences varied according to effective date of substantive provision employing term. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.

8. Court must presume that Congress is aware of existing judicial interpretations of statutes.

9. Alien was subject to statutory bar to eligibility for discretionary relief from deportation, where he had served at least five years’ imprisonment for felony conviction, and he applied for discretionary relief after November 29, 1990 effective date of aggravated felony bar statute. Immigration and Nationality Act, § 212(a), 8 U.S.C. § 1182(c).

United States v. DeLeon-Rodriguez, 70 F.3d 764 (3d Cir. 1995)

1. A prior conviction for an aggravated felony was not an element of the offense of illegal reentry after deportation, so as to require proof for conviction, but instead was sentencing enhancement provision. Immigration and Nationality Act, § 276(a), (b)(2), 8 U.S.C. § 1326(a), (b)(2).
2. Whether a defendant has accepted responsibility, so as to warrant reduction in offense level, is a factual matter and is reviewed under a clearly erroneous standard. U.S.S.G. § 3E1.1(a), 18 U.S.C.

3. Defendant bears burden of establishing by preponderance of the evidence that reduction of offense level for having “accepted responsibility” is warranted. U.S.S.G. § 3E1.1(a), 18 U.S.C.

4. Denial of reduction in offense level for “acceptance of responsibility for offense” was warranted based on finding that defendant contested his factual guilt beyond a mere legal challenge, despite defendant’s argument that he contested only selected legal issues but not fact of illegal reentry. U.S.S.G. § 3E1.1, comment. (n.2), 18 U.S.C.

_Yang v. Maugans_, 68 F.3d 1540 (3d Cir. 1995)

1. Board of Immigration Appeals’ (BIA) findings of fact are conclusive and must be upheld if supported by reasonable, substantial and probative evidence on the record considered as a whole. Immigration and Nationality Act, § 106(a)(4), as amended, 8 U.S.C. § 1105a(a)(4).

2. Board of Immigration Appeals’ (BIA) interpretation of Immigration and Nationality Act (INA) is entitled to deference under the Chevron standard governing deference applicable to statutory interpretation by agency charged with administering statute. Immigration and Nationality Act, § 106(a)(4), as amended, 8 U.S.C. § 1105a(a)(4).

3. Where Congress has not spoken directly on the issue, reviewing court asks only whether agency’s answer is based on permissible construction of statute.

4. Board of Immigration Appeals’ (BIA) interpretation of burden of proof provisions of Immigration and Nationality Act (INA) as placing upon aliens the burden to prove that they had established all three elements of “entry” test was entitled to deference under Chevron standards, where that interpretation was not unreasonable. Immigration and Nationality Act, § 291, as amended, 8 U.S.C. § 1361.

5. Under the Immigration and Nationality Act (INA), aliens have the burden of proving that they have set aside all three elements of entry test before they are eligible for deportation proceedings. Immigration and Nationality Act, § 291, as amended, 8 U.S.C. § 1361.

6. Aliens who have “entered” the United States, regardless of whether such entry was legal, enjoy more rights and privileges than those who are still “on the threshold of initial entry.”

7. Immigration and Naturalization Service (INS) may deport an alien who has effected an “entry” only pursuant to deportation proceeding, whereas it may exclude an alien who has not “entered” through an exclusion hearing.

8. In deportation proceedings, aliens receive many advantages that they are not entitled to in exclusion proceedings, including advance notice of the charges against them, direct appeal to the Court of Appeals, and a right to designate the country of destination.
9. Under the Immigration and Nationality Act (INA), merely crossing into the territorial waters of United States is insufficient to constitute “physical presence” for purpose of determining whether alien has entered the United States; physical presence requirement of entry test can be satisfied only when alien reaches dry land. Immigration and Nationality Act, § 101(a)(38), as amended, 8 U.S.C. § 1101(a)(38).

10. In determining whether alien has “entered” United States second element of test, that is, actual or intentional evasion of inspection at nearest inspection point, must be satisfied on dry land, since first element of entry, physical presence, can only be satisfied on dry land. Immigration and Nationality Act, § 101, as amended, 8 U.S.C. § 1101.

11. Under “freedom from official restraint” element of entry test, freedom from official restraint means that alien is no longer under constraint emanating from the government that would otherwise prevent her from physically passing on. Immigration and Nationality Act, § 101, as amended, 8 U.S.C. § 1101.

12. Freedom from official restraint element of entry test can be satisfied only after finding of physical presence in the United States, as freedom from official restraint outside the United States is irrelevant. Immigration and Nationality Act, § 101, as amended, 8 U.S.C. § 1101.

13. When alien attempts to enter the United States, the mere fact that he or she may have eluded the gaze of law enforcement for brief period of time after having come upon United States territory is insufficient, in and of itself, to establish freedom from official restraint required for finding of entry making alien eligible for deportation rather than exclusion. Immigration and Nationality Act, § 101, as amended, 8 U.S.C. § 1101.

14. Aliens who swam ashore from vessel grounded in United States territorial waters failed to satisfy burden that they were “free from official restraint” as required to find that they had “entered” United States; none of aliens ever left beach area, which was teeming with law enforcement activity soon after ship ran aground, and none of the aliens were free to go at large and mix with general population, but instead all were either apprehended shortly after coming ashore or brought into custody as result of immediate and intense law enforcement efforts. Immigration and Nationality Act, § 101, as amended, 8 U.S.C. § 1101.


1. At summary judgment stage, court must give benefit of all inferences to nonmoving party.

2. To determine which material facts are not in dispute, Court of Appeals conducts independent review of record on appeal from order granting summary judgment.

3. Court of Appeals has plenary review over district court’s order granting summary judgment.

4. Government carries heavy burden of proof in proceeding to divest naturalized citizen of his citizenship.

5. Courts require strict compliance with all congressionally imposed prerequisites to acquisition of citizenship.
6. Government may seek revocation of order admitting person to citizenship and cancellation of that person’s certificate of naturalization if such order and certificate were illegally procured. Immigration and Nationality Act, § 340(a), as amended, 8 U.S.C. § 1451(a).

7. To legally obtain naturalization order and certificate, applicant must have resided in United States for at least five years after having been lawfully admitted for permanent residence. Immigration and Nationality Act, §§ 316(a)(1), 318, as amended, 8 U.S.C. §§ 1427(a)(1), 1429.


9. For purposes of denaturalization proceeding, alien was not eligible for Displaced Persons Act (DPA) visa at time of entry if, prior to his obtaining the visa he (1) had assisted the enemy in persecuting civilian populations of countries within the meaning of the International Refugee Organization (IRO) constitution, (2) had advocated or assisted in the persecution of any person because of race, religion or natural origin under the DPA or (3) he was or had been a member of or participant in movement hostile to the United States or form of government of the United States within the meaning of DPA. Displaced Persons Act of 1948, §§ 2(b), 13, 62 Stat. 1009, as amended.

10. In denaturalization proceeding, “assistance in persecution” as used in Displaced Persons Act is to be applied on case by case basis with reference to relevant facts presented in each case. Displaced Persons Act of 1948, § 1 et seq., 62 Stat. 1009, as amended.

11. Sufficient evidence supported conclusion that denaturalization defendant’s involvement in publication of anti-Semitic articles by Hungarian newspaper had assisted in persecution of Hungarian Jews within meaning of Displaced Persons Act (DPA) under which defendant was originally admitted to United States, by fostering climate of anti-Semitism in northern Transylvania which conditioned Hungarian public to acquiesce, to encourage, and to carry out anti-Semitic policies of Hungarian government in early 1940’s. Displaced Persons Act of 1948, § 13, 62 Stat. 1009, as amended.

12. Evidence supported district court’s conclusion that denaturalization defendant was ineligible for a visa under the Displaced Persons Act (DPA) on basis that he advocated or assisted in persecution because of race, religion or national origin; articles published in newspaper during citizen’s tenure in key editorial positions advocated persecution of Hungarian Jews. Displaced Persons Act of 1948, § 13, 62 Stat. 1009, as amended.

13. Physical participation by denaturalization defendant in commission of physical atrocities was not necessary to show that denaturalization was warranted on grounds that defendant assisted in or advocated persecution and thus was not eligible for visa under Displaced Persons Act (DPA) when he entered United States. Immigration and Nationality Act, § 212(a)(3)(E)(i), as amended, 8 U.S.C. § 1182(a)(3)(E)(i).

14. Denaturalization defendant’s activities as editor at Hungarian newspaper during 1941 and 1942 constituted assistance in persecution of civilians under International Refugee
Organization (IRO) and the advocacy or assistance in the persecution of persons because of race, religion or national origin under Displaced Persons Act (DPA), thus rendering defendant ineligible for DPA visa under which he entered United States; defendant sought and obtained from Hungarian government license to publish newspaper, and thus his actions in connection with newspaper could not be fairly characterized as one of passive accommodation. Immigration and Nationality Act, § 340(a), as amended, 8 U.S.C. § 1451(a); Displaced Persons Act of 1948, § 13, 62 Stat. 1009, as amended.

15. Denaturalization defendant’s activities as editor at newspaper which espoused anti-American views and pro-Nazi philosophy during his tenure, constituted membership and participation in a movement hostile to the United States; during early 1950’s when editor got his visa, Displaced Persons Committee (DPC) frequently denied Displaced Persons Act (DPA) status to persons associated with private and semi-private newspapers that had published anti-American propaganda in Axis nations during World War II because they were deemed members of movements hostile to the United States, and record showed that newspaper received some degree of editorial direction from Hungarian government and that newspaper could not have operated without government license. Displaced Persons Act of 1948, § 13, 62 Stat. 1009, as amended.

16. Under Displaced Persons Act, membership in movement hostile to United States required only willing membership in such organization, without proof of personal participation in acts of persecution; thus, denaturalization defendant was ineligible for visa under hostile movement provision of Displaced Persons Act (DPA) where it was undisputed that defendant had voluntarily assumed position as responsible editor of a newspaper which constituted a movement hostile to the United States. Displaced Persons Act of 1948, § 13, 62 Stat. 1009, as amended.

17. Elements of laches are lack of diligence by party against whom defense is asserted and prejudice to party asserting the defense.

18. Party asserting defense of laches has burden of establishing elements of defense.

19. Defendant in denaturalization proceeding failed to show he suffered any specific prejudice from government’s alleged lack of diligence in bringing denaturalization case as required for affirmative defense of laches.

United States v. Eversley, 55 F.3d 870 (3d Cir. 1995)

Defendant’s guilty plea to illegally entering United States after being deported for non-aggravated felony did not prevent sentencing court from imposing 16-level Sentencing Guidelines enhancement for prior conviction of aggravated felony, rather than 4-level enhancement for non-aggravated felony conviction, where he conceded that he had actually been deported for commission of aggravated felony; nature of illegal reentry violation did not control determination of defendant’s status as felon or aggravated felon for purposes of Sentencing Guidelines enhancement. Immigration and Nationality Act, § 276(b)(1), 8 U.S.C. § 1326(b)(1); U.S.S.G. § 2L1.2(b)(2), 18 U.S.C.

Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220 (3d Cir. 1995)
1. District court’s determination with respect to forum non conveniens may be reversed only where there has been clear abuse of discretion, and where court has considered all relevant public and private interest factors and its balancing of these factors are reasonable, its decision deserves substantial deference; case law demands that Court of Appeals accord deference even to trial court’s decision to refuse to exercise its lawful jurisdiction, on ground of forum non conveniens, and deference should be at least as great, if not greater, when district court decides to dismiss.

2. District court cannot dismiss on forum non conveniens grounds if that decision would render plaintiff unable to pursue his or her action elsewhere; case can be dismissed on that ground only when some other forum that would also have jurisdiction is better suited to adjudicate the controversy.

3. Ordinarily plaintiff’s choice of forum is entitled to great deference, but amount of deference is lessened when foreigner has brought suit; however, fact that plaintiff is a foreigner does not mean that decision to sue in the United States is entitled to no deference, in determining whether suit should be dismissed on ground of forum non conveniens.

4. It is defendant’s burden to demonstrate that dismissal on ground of forum non conveniens is warranted.

5. No abuse of discretion was shown in refusal to dismiss on ground of forum non conveniens in personal injury suit by Indian nationals against Indian corporation and vessel, based on evidence that it could take up a quarter of a century to resolve the litigation in India.

6. Though delays of a few years are of no legal significance in forum non conveniens calculus, at some point the prospective judicial remedy becomes so temporally remote that it is no remedy at all and may render alternative forum so “clearly unsatisfactory” as to be inadequate.

7. In denial of motion to dismiss on ground of forum non conveniens in suit brought by Indian nationals against Indian corporation and vessel, there was no clear error in fact findings regarding judicial delay in India rendering Indian courts inadequate as alternative forum in the instant case, despite defendant’s evidence that case would be granted expedited hearing request given tender age of minor plaintiff, in light of evidence to contrary by plaintiff’s experts.

8. Mere presentation of arguments or evidence seriatim does not justify reconsideration, particularly where district court may reasonably conclude that putative new testimony is of no evidentiary value.

9. After denying motion to dismiss, on ground of forum non conveniens, in suit brought by Indian nationals, resident in the United States, against Indian corporation and Indian vessel, and denying motion for reconsideration, there was no abuse of discretion in denial of second motion for reconsideration based on theory that plaintiffs had withheld information that plaintiffs had been illegal aliens when they brought their action.

10. Law of India applied to suit by Indian nationals against Indian corporation and vessel for
injuries sustained by a crew member’s child aboard the vessel in international waters.

11. In action on behalf of injured child of crew member of Indian vessel against Indian shipping company and the vessel, under Indian law, which is like American law with respect to requirements for finding negligence, evidence was sufficient to find negligence on part of duty officer in allowing child to remain on bridge, which was off limits to authorized persons, and in failing to stop negligent acts of steward and helmsman which caused injury to the child.

12. In suit by Indian nationals against Indian shipping company and vessel arising from injury to crew member’s child on the vessel on the high seas, award of $150,000 in nonpecuniary damages, in case subject to Indian law, was so disproportionate to amounts awarded in other Indian tort cases as to require vacation and remand for reassessment, in light of principle that Indian courts attempt to make awards comparable and uniform among tort victims.

13. In suit by Indian nationals against Indian shipping company and vessel arising from injury to crew member’s child aboard the vessel in international waters, there was no error in denying award to child’s mother for loss of services, absent evidence that damages for loss of services are compensable under Indian law, which was applicable, and in light of lack of evidence that the mother lost any of the services of child, who was six years old at the time of injury.

Huang v. INS, 47 F.3d 615 (3d Cir. 1995)

Notice of appeal of immigration judge’s deportation order was timely filed when received by mail within 13 days after decision was issued; regulations governing how to appeal to Board of Immigration Appeals were ambiguous on whether time for appeal would be extended from 10 to 13 days if decision of immigration judge or notice of appeal was mailed, and Immigration and Naturalization Service’s own notice of appeal form could not reasonably be read as referring to mailing of decision, rather than mailing of notice. 8 C.F.R. §§ 3.0-3.40.

Green v. INS, 46 F.3d 313 (3d Cir. 1995)

1. Alien subject to deportation was not denied due process by immigration judge’s failure to advise alien’s attorney of consequences of his failure to file timely application for waiver of deportation. Immigration and Nationality Act, § 212(c), 8 U.S.C. § 1182(c); 8 C.F.R. § 3.29 (1992).

2. Immigration judge did not abuse his discretion in failing to advise alien’s attorney of consequences of his failure to file timely application for discretionary waiver of deportation. Immigration and Nationality Act, § 212(c), 8 U.S.C. § 1182(c); 8 C.F.R. § 3.29 (1992).

3. Alien was entitled to raise ineffective assistance of counsel claim in motion to reopen decision of Board of Immigration Appeals based on her attorney’s failure to make timely application for discretionary waiver of deportation. U.S. Const. amend. VI; Immigration and Nationality Act, § 212(c), 8 U.S.C. § 1182(c).

United States v. Breyer, 41 F.3d 884 (3d Cir. 1994)

2. There must be strict compliance with all congressionally imposed prerequisites to naturalization, and failure to comply with any of these terms renders naturalization illegally procured and subject to revocation. Immigration and Nationality Act, § 340(a), 8 U.S.C. § 1451(a).


4. Citizen who entered United States after World War II was excluded from entry under Displaced Persons Act for assisting in persecution, where there was undisputed evidence that he was trained, paid, uniformed armed Nazi guard who patrolled perimeters of two different Nazi concentration camps during World War II with orders to shoot those who tried to escape, and that prisoners he guarded were oppressed, brutalized and killed for no other reason than their race, national origin or religion. Displaced Persons Act of 1948, § 13, 62 Stat. 1009, as amended.


6. District court did not err in ordering cancellation and surrender of former Nazi concentration camp guard’s certificate of naturalization, since his naturalization was illegally procured through visa obtained under Displaced Persons Act, which excluded him from coverage based on his wartime activities. Displaced Persons Act of 1948, § 13, 62 Stat. 1009, as amended.

7. That naturalized citizen might be citizen of the United States through some other means, such as derivatively through his mother, did not alter his ineligibility under the Displaced Persons Act by reason of serving as an armed guard in Nazi concentration camps during World War II or validate his visa and entry under that Act, thus did not nullify the government’s right to require surrender of certificate of naturalization to which he was not entitled; derivative citizenship claim was separate and distinct from, and had no bearing on, government’s denaturalization case. Immigration and Nationality Act, § 340(a), 8 U.S.C. § 1451(a); Displaced Persons Act of 1948, § 13, 62 Stat. 1009, as amended.

8. Federal district court does not have jurisdiction to declare citizenship of one asserting derivative citizenship through parent, absent exhaustion of applicant’s administrative remedies. Immigration and Nationality Act, §§ 341(a), 360(a), 8 U.S.C. §§ 1452(a), 1503(a); 8 C.F.R. §§ 341.1-341.7.

9. Government, in seeking denaturalization of naturalized citizen based upon his service as armed guard in Nazi concentration camps, did not have to prove that he entered the United States in alien status. Immigration and Nationality Act, § 340(a), 8 U.S.C. § 1451(a).
10. District court did not abuse its discretion in denying former Nazi concentration camp guard’s motion to stay government’s denaturalization action until final resolution of his pending administrative derivative citizenship proceeding, where there were no compelling reasons offered for issuance of stay.

11. Power to stay is incidental to power inherent in every court to dispose of cases so as to promote their fair and efficient adjudication.

*United States v. McCalla*, 38 F.3d 675 (3d Cir. 1994)

1. Due process did not require that government be limited to the maximum sentence promulgated by the government’s own inaccurate notice of penalty for reentry offense in Immigration and Naturalization Service (INS) form, although inaccuracy in form was regrettable, reentry offense statute clearly set forth activity which constituted the crime and punishment authorized for the offense. Immigration and Nationality Act, § 276(b)(2), 8 U.S.C. § 1326(b)(2); U.S. Const. amends. V, XIV.

2. Rule of lenity applied to ambiguous criminal statutes and thus did not apply to criminal statute which was unambiguous, even though Immigration and Naturalization Service (INS) form erred in reciting penalties which could be imposed under that statute. Immigration and Nationality Act, § 276(b)(2), 8 U.S.C. § 1326(b)(2).

3. Defense of entrapment serves to protect against deception on part of government that induces criminal act by actually implanting criminal design in mind of defendant.

4. Claim of entrapment requires proof that defendant lacked predisposition to commit the crime.

5. Alien was not entrapped into reentering United States without permission within five years of deportation by fact that Immigration and Naturalization Service (INS) form misstated penalty which could be imposed for offense of illegal reentry following deportation. Immigration and Nationality Act, § 276(b)(2), 8 U.S.C. § 1326(b)(2).

6. Use of alien’s prior aggravated felony conviction to enhance his punishment for illegal reentry without permission within five years of deportation did not violate ex post facto clause; because violation of reentry provision occurred subsequent to effective date of statutory amendment which provided for enhanced punishment, there was no ex post facto violation. Immigration and Nationality Act, § 276(b), 8 U.S.C. § 1326(b); U.S. Const. art. I, §§ 9, cl. 3, 10, cl. 1.

7. Admitting evidence of circumstances under which deported alien’s reentry without permission came to attention of authorities and of his subsequent arrest processing was not an abuse of discretion; evidence was foundation for understanding sequence of events which established alien’s surreptitious and voluntary presence in United States, and helped to establish his identity in light of alien’s various aliases.

8. Severely deficient deportation proceeding which effectively deprives defendant of his right of direct appeal may preclude use of that deportation as predicate to prosecution for unpermitted reentry following deportation. Immigration and Nationality Act, § 276, 8 U.S.C.
§ 1326.

9. Alien who failed to show he was effectively deprived of right to direct appeal was not entitled to dismissal of charge of unpermitted reentry following deportation, notwithstanding alien’s claim that deportation hearing did not comport with due process or applicable statutes and regulation. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326.

Dia Nav. Co., Ltd. v. Pomeroy, 34 F.3d 1255 (3d Cir. 1994)

1. Court of Appeals’ decision not to consider vessel owner’s claim for injunctive relief did not render moot owner’s appeal from dismissal of challenge to validity of Immigration and Naturalization Service (INS) policy of placing upon common carriers burden of detaining stowaways who had applied for asylum, as Court of Appeals had to consider relevant statutory provisions and their interpretations by INS in addressing owner’s claims for monetary relief and, moreover, to extent that claims for damages may not have supported depth of Court’s analysis, case was among those capable of repetition, yet evading review.

2. In cases “capable of repetition, yet evading review,” finding of mootness is avoided by determination that complaining party may reasonably expect to be subject to challenged activity in future and that challenged activity is by its nature so short in duration that its validity could not be fully adjudicated prior to its association or termination.

3. In addition to being excludable aliens, stowaways are generally viewed as disfavored category and, consequently, in contrast to other excludable aliens, stowaways are automatically subject to deportation and have no right to hearing to determine their status. Immigration and Nationality Act, § 273(d), as amended, 8 U.S.C. § 1323(d).

4. Immigration and Naturalization Service’s (INS) policy holding common carriers liable for unlimited costs of detention of stowaways who have applied for asylum and imposing custody with no guidelines, or subject only to standards as determined by INS officer on scene, was “legislative rule,” rather than “interpretative rule,” and therefore could only be promulgated pursuant to notice and comment provisions of Administrative Procedure Act (APA); neither statutes nor regulations set out standards concerning liability for costs of detention or spoke to conditions of detention. Immigration and Nationality Act, §§ 106, 212(f), 235(b), 237(a)(1), 273(d), 286(h)(2)(A)(v), as amended, 8 U.S.C. §§ 1105a, 1182(f), 1225(b), 1227(a)(1), 1323(d), 1356(h)(2)(A)(v); 5 U.S.C. §§ 551(4), 553(b); 8 C.F.R. §§ 235.3(b-e), 237.1 et seq., 253.1(f)(3).

5. For purposes of Administrative Procedure Act (APA) notice and comment requirements, “legislative rule” has substantive effect, while “interpretative rule” typically involves construction or clarification of statute or regulation. 5 U.S.C. § 553(b).

6. While substantial impact of rule is relevant to its classification as “legislative rule” or “interpretative rule” for purposes of Administrative Procedure Act’s (APA) notice and comment requirements, such impact will not, without more, compel finding that rule is legislative. 5 U.S.C. § 553(b).

7. Vessel owner’s claims for reimbursement of its expenses in detaining stowaways who had applied for asylum was claim for “money damages” which could not be awarded under
Administrative Procedure Act (APA); Congress had given Immigration and Naturalization Service (INS) authority to promulgate regulations it deemed necessary in implementing INA and, thus, entitlement to those costs had to originate from INS, rather than from court lacking requisite expertise and information to craft appropriate standard. Immigration and Nationality Act, § 103, as amended, 8 U.S.C. § 1103; 5 U.S.C. § 702.

8. Claims Court’s exclusive jurisdiction, pursuant to Tucker Act, over vessel owner’s claim against United States for damages amounting to $127,580 was not overridden by Supplemental Jurisdiction Act. 28 U.S.C. §§ 1346(a)(2), 1367, 1491.

Yi v. Maugans, 24 F.3d 500 (3d Cir. 1994)

1. Court of Appeals’ review of district court’s determination regarding subject matter jurisdiction is plenary.

2. Aliens who receive adverse decision from immigration judge must first exercise their right to take administrative appeal to Board of Immigration Appeals (BIA), and only after BIA affirms immigration judge’s decision would alien be entitled judicial review. Immigration and Nationality Act, § 106(c), as amended, 8 U.S.C. § 1105a(c).

3. Proposed class of Chinese aliens and their custodians could not be certified, where it included aliens or custodians who were not within judicial district, and aliens who had not yet received final decision of Board of Immigration Appeals (BIA). Immigration and Nationality Act, § 106(b, c), as amended, 8 U.S.C. § 1105a(b, c).

4. Statute must be construed so as to give effect to each provision.

5. Judicial challenges of orders of exclusion are permitted solely by way of habeas proceedings and only by those aliens who have exhausted their administrative remedies. Immigration and Nationality Act, § 106(b, c), as amended, 8 U.S.C. § 1105a(b, c).

6. Warden of prison or facility where detainee is held is considered “custodian” for purposes of habeas corpus action, as warden has day-to-day control over prisoner and can produce actual body.

Tipu v. INS, 20 F.3d 580 (3d Cir. 1994)


2. Discretionary decisions of Board of Immigration Appeals will not be disturbed unless they are found to be arbitrary, irrational or contrary to law. Immigration and Nationality Act, § 106(a)(1), as amended, 8 U.S.C. § 1105a(a)(1).

3. Applicant bears burden of demonstrating that he merits discretionary relief from deportation. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C. § 1182(c).
4. Board of Immigration Appeals' (BIA) failure to properly consider important factors in deportee’s favor, in denying him special equitable relief from deportation due to his conviction on narcotics charges, required remand for further proceedings; BIA’s opinion failed adequately to explain its discrediting of three factors in deportee’s favor (i.e., hardship deportation would impose on deportee’s sick brother and his brother’s family, deportee’s minor role in single crime ten years previous to BIA opinion, and deportee’s rehabilitation), and BIA did not consider deportee’s property and business ties to United States in form of his ownership of taxicab. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C. § 1182(c).

5. Court of Appeals’ reversal of Board of Immigration Appeals’ (BIA) determination that deportee was ineligible for discretionary relief from deportation also entitled deportee on remand to pursue motion to reopen with BIA based both on his eligibility for relief under statute granting Attorney General discretionary authority to suspend deportation of certain aliens who become deportable due to drug-related offenses, and in order to present evidence of changes in equities of his case over seven years since his case was first heard by immigration judge. Immigration and Nationality Act, § 244(a)(2), as amended, 8 U.S.C. § 1254(a)(2).

Fatin v. INS, 12 F.3d 1233 (3d Cir. 1993)


3. Attorney General has discretion to grant asylum, but is not required to do so. Immigration and Nationality Act, §§ 101(a)(42)(A), 208(a), as amended, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a).

4. “Particular social group” within meaning of statutes permitting asylum or withholding of deportation because of persecution or account of membership in particular social group can be interpreted by Board of Immigration Appeals (BIA) to refer to group of persons all of whom share common, immutable characteristic; characteristic defining the group must be one that members of group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences. Immigration and Nationality Act, §§ 208(a), 243(h)(1), as amended, 8 U.S.C. §§ 1158(a), 1253(h)(1).

5. In order to qualify for withholding of deportation or asylum based on membership in particular social group, alien must (1) identify group that constitutes particular social group, (2) establish membership in that group, and (3) show persecution or well-founded fear of persecution based on that membership. Immigration and Nationality Act, §§ 208(a), 243(h)(1), as amended, 8 U.S.C. §§ 1158(a), 1253(h)(1).
6. Iranian woman who opposed Iran’s gender specific laws failed to show that she was member of group of women who would prefer to suffer consequences of noncompliance or that compliance with the laws was so abhorrent as to constitute persecution, and, thus, she was not entitled to asylum or withholding of deportation based on membership in particular social group or political opinion; the woman never testified that she would refuse to comply with the gender-specific laws and at most testified that she would not observe them if she could avoid doing so. Immigration and Nationality Act, §§ 208(a), 243(h)(1), as amended, 8 U.S.C. §§ 1158(a), 1253(h)(1).

7. “Persecution” within meaning of statutes permitting asylum or withholding of deportation because of persecution can be interpreted by Board of Immigration Appeals (BIA) as extreme conduct and does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional. Immigration and Nationality Act, §§ 208(a), 243(h)(1), as amended, 8 U.S.C. §§ 1158(a), 1253(h)(1).

8. In order to prevail on claim of asylum or withholding of deportation based on political opinion, alien must (1) specify the opinion, (2) show holding of that opinion, and (3) show persecution or well-founded fear of persecution based on the opinion. Immigration and Nationality Act, §§ 208(a), 243(h)(1), as amended, 8 U.S.C. §§ 1158(a), 1253(h)(1).

Singh v. Daimler-Benz AG, 9 F.3d 303 (3d Cir. 1993)

1. Congress is empowered to authorize federal jurisdiction on basis of diversity as long as at least one plaintiff and one defendant are diverse. U.S. Const. art. III, §§ 1 et seq., 2, cl. 1.

2. In resolving question of statutory interpretation, Court of Appeals turns first to language of provision.

3. Amendment to diversity jurisdiction statute defining permanent resident alien as citizen for diversity purposes gives federal court subject matter jurisdiction over case brought by permanent resident alien against two defendants, one of whom is nonresident alien, and other of whom is citizen of state other than that of which permanent resident alien is deemed to be citizen. 28 U.S.C. § 1332(a).

Graham v. INS, 998 F.3d 194 (3d Cir. 1993)

1. Discretionary relief may be extended to alien in deportation proceedings if alien has been lawfully admitted for permanent residence and has maintained lawful unrelinquished domicile for seven consecutive years. Immigration and Nationality Act, §§ 101 et seq., 212(c), 8 U.S.C. §§ 1101 et seq., 1182(c).

2. Time spent in United States under temporary worker visa cannot be used to satisfy seven-year “lawful domicile” requirement needed for alien to be eligible for discretionary relief from deportation; terms of temporary worker visa required alien to not intend to establish domicile in United States. Immigration and Nationality Act, § 212(c), 8 U.S.C. § 1182(c).

Katsis v. INS, 997 F.2d 1067 (3d Cir. 1993)
1. Power of administrative agency to administer a congressionally created program necessarily requires formulation of policy and making of rules to fill any gap left, implicitly or explicitly, by Congress.

2. When Congress has implicitly delegated authority to agency on particular question, court may not substitute its own construction of statutory provision for reasonable interpretation made by administrator of agency.

3. Considerable weight should be accorded to executive department's construction of statutory scheme it is entrusted to administer.

4. When court reviews agency's construction of statute that it administers, it must first determine whether Congress has directly spoken to precise question at issue, and if it has not, whether agency's construction is permissible.

5. Courts must respect interpretation of agency to which Congress has delegated responsibility for administering statutory program, unless agency's interpretation is arbitrary, capricious or manifestly contrary to statute.

6. Motions to reopen immigration proceedings are disfavored, for same reasons as are motions for new trial based on newly discovered evidence.

7. Board of Immigration Appeals may deny motion to reopen immigration proceedings based on movant's failure to establish prima facie case for relief sought, based on movant's failure to introduce previously unavailable, material evidence, or based on its determination that, even if these requirements are met, movant will not be entitled to discretionary relief sought.

8. Alien's status as "lawful permanent resident" changes, so as to render him or her statutorily ineligible to move to reopen immigration proceedings to obtain discretionary relief from deportation order, when alien becomes subject to administratively final deportation order; this interpretation of relevant statutes by Board of Immigration Appeals, under which alien's status will change once Board has concluded its de novo review of immigration judge's deportation order or once time for appeal to Board has expired, is neither arbitrary nor capricious nor manifestly contrary to statutes. Immigration and Nationality Act, §§ 101(a)(20), 212(c), 8 U.S.C. §§ 1101(a)(20), 1182(c).

9. Deference is required whether agency is interpreting statute directly or through rule or regulation promulgated thereunder.

10. On review, federal court defers to agency's construction of its own regulation, unless it is plainly erroneous or inconsistent with regulation.

Marrero v. INS, 990 F.2d 772 (3d Cir. 1993)

1. Court of Appeals has jurisdiction to review order of deportation after alien has been forcibly deported if record reveals colorable due process claim. Immigration and Nationality Act, § 106(c), as amended, 8 U.S.C. § 1105a(c); U.S. Const. amends. V, XIV.
2. Alien’s claims that immigration judge erred by failing either to reopen or to continue his deportation proceedings upon his belated arrival for hearing and that Immigration and Naturalization Service (INS) failed to serve either him or his attorney of record with order to show cause informing him of nature of charges against him were colorable due process claims, and, thus, could be raised by alien following his deportation. U.S. Const. amends. V, XIV; Immigration and Nationality Act, § 106(c), as amended, 8 U.S.C. § 1105a(c).

3. Alien cannot file motion to reopen deportation proceedings in Immigration Court once jurisdiction over case becomes vested in Bureau of Immigration Affairs (BIA).

4. Alien challenging deportation order failed to exhaust his administrative remedies when he failed to file in Immigration Court a motion to reopen deportation order that court entered against him in absentia, and, thus, Court of Appeals could not consider merits of aliens’ petitions; alien failed to pursue an administrative remedy that was available to correct due process violation he raised in his petitions for review. Immigration and Nationality Act, §§ 106(c), 242(b), as amended, 8 U.S.C. §§ 1105a(c), 1252(b); U.S. Const. amends. V, XIV.

Perez v. INS, U.S. Dep’t of Justice, 979 F.2d 299 (3d Cir. 1992)

Section of Immigration Reform and Control Act allegedly requiring prompt initiation of deportation proceedings following alien’s conviction of deportable offense could not be construed to require deportation of alien before she had finished serving her criminal sentence. Immigration and Nationality Act, § 242(h, i), 8 U.S.C. § 1252(h, i).

Landano v. U.S. Dep’t of Justice, 956 F.2d 422 (3d Cir. 1992)

1. Agency’s invocation of Freedom of Information Act (FOIA) exemption for records compiled for law enforcement purposes on ground of privacy interests requires court of appeals to identify privacy interest that would be affected by release of requested information as well as public interest that would be served by disclosure; after identifying competing interests, court of appeals is then called upon to balance those interests to determine if disclosure is appropriate, i.e., whether disclosure could reasonably be expected to constituted unwarranted invasion of personal privacy. 5 U.S.C. § 552(a)(4)(B), (b)(7)(C).

2. Individuals who were associated with criminal investigation, including suspects, witnesses, interviewees and investigators, had privacy interest under Freedom of Information Act (FOIA) in records compiled by Federal Bureau of Investigation (FBI) such that government might be justified in refusing to disclose their names pursuant to exemption for records compiled for law enforcement purposes on ground of unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(7)(C).

3. Information requested by inmate convicted of murder of policeman regarding criminal investigation of murder by Federal Bureau of Investigation (FBI) including names of FBI employees, interviewees, third parties mentioned by those interviewed, identities of state and local law enforcement personnel participating in investigation shed no light on way that FBI fulfilled its responsibilities to public so as to give rise to public interest in disclosure within meaning of Freedom of Information Act exemption for records compiled for law
enforcement purposes to extent disclosure would violate privacy interests. 5 U.S.C. § 552(b)(7)(C).

4. Only when information requested pursuant to Freedom of Information Act (FOIA) reflects directly upon way agency conducts business has requester placed something on public interest side of balancing equation for purposes of determining whether record was exempt under FOIA to extent that disclosure would violate privacy interest. 5 U.S.C. § 552(a)(4)(B), (b)(7)(C).

5. There was no public interest recognized under Freedom of Information Act (FOIA) in discovering wrongdoing by state agency so as to entitle requester to obtain records of Federal Bureau of Investigation (FBI) investigation into murder of state police officer pursuant to FOIA. 5 U.S.C. § 552(b)(7)(C).

6. Federal Bureau of Investigation (FBI) records regarding investigation into murder of state police officer were exempt from disclosure under Freedom of Information Act (FOIA) on ground that disclosure of names of individuals interviewed during investigation and third parties named by those interviewed would constituted unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(7)(C).

7. Information in Federal Bureau of Investigation (FBI) file sought by inmate convicted for murder of state police officer did not come within Freedom of Information Act (FOIA) exemption of records compiled for law enforcement purposes, disclosure of which could reasonably be expected to disclose identity of confidential source, due to insufficiency of FBI’s supporting affidavits; FBI could not sustain its burden to show particular circumstances of interview or source to establish implied assurance of confidentiality by tendering its entire files for in camera inspection. 5 U.S.C. § 552(a)(4)(B), (b)(7)(C, D).

8. When source that has supplied information in course of criminal investigation is confidential, agency may withhold not only source’s identity but also any information obtained from that source pursuant to Freedom of Information Act (FOIA). 5 U.S.C. § 552(b)(7)(C, D).

9. Freedom of Information Act (FOIA) exemption for records compiled for law enforcement purposes to extent that production would disclose identity of confidential source did not require or allow any weighing of interests or any consideration of contents of information; if information was provided by confidential source, courts may not order disclosure of that information no matter how strong public interest is in disclosure. 5 U.S.C. § 552(b)(7)(C, D).

10. If government agency files affidavit reciting all surrounding circumstances of particular interview and district court believes reasonable interviewee would feel assured of confidentiality under such circumstances, conclusion that interviewee was confidential source, within meaning of Freedom of Information Act (FOIA) exemption, is clearly warranted. 5 U.S.C. § 552(a)(4)(B), (b)(7)(C, D).

Janusiak v. U.S. INS, 947 F.2d 46 (3d Cir. 1991)

1. Decisions of the Immigrations Appeals Board regarding asylum and withholding of deportation are reviewed for abuse of discretion. Immigration and Nationality Act, § 106(a), as amended, 8 U.S.C. § 1105a(a).

2. Applicant for withholding of deportation will lose unless he shows clear power or ability of prosecution; "clear probability" is considered a higher standard than "well-founded fear" which is required for grant of asylum, so that applicant who fails to prove a well-founded fear in his quest for asylum will similarly be unable to prove clear probability with respect to withholding of deportation. Immigration and Nationality Act, § 106(a), as amended, 8 U.S.C. § 1105a(a).

3. Alien seeking asylum did not show well-founded fear of prosecution if returned to Poland despite claim that he would be persecuted for his membership in Solidarity; Solidarity had become ruling party in the government and even though communists might still control local political units and retain the power to punish, there was no showing of well-founded fear of persecution.

4. Prosecution for criminal violations of fairly administered laws is not ordinarily one of the statutory grounds upon which a claim for asylum can be based; alien must show that fear of persecution is attributable to one of the five statutorily enumerated grounds of race, political beliefs, religion, nationality, or membership in a particular source or group. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).

5. Alien was not entitled to asylum based on fear that, if returned to Poland, he would be prosecuted for having bribed a passport bureau official where there was no showing that his earlier requests had been denied for nonlegitimate political reasons. Immigration and Nationality Act, § 101(a)(42)(A), as amended, 8 U.S.C. § 1101(a)(42)(A).

6. Alien seeking asylum did not show well-founded fear of prosecution based on evidence that, while communists had been in charge in his native Poland, security police had visited friends and asked about him.

United States v. Rana, 944 F.2d 123 (3d Cir. 1991)

1. Under usual standard for judging sufficiency of jury verdict in criminal case, Court of Appeals will resolve all conflicts in evidence in favor of Government, and give it benefit of all reasonable inferences from that evidence.

2. In event of abuse of discretion in conduct of trial by district court, Court of Appeals must decide whether district court’s error was harmless.

3. While great discretion is left to district court when conduct of trial is at issue, its decisions about proper trial conduct must be designed to protect rights of criminal defendant and every other litigant before jury that is bound to decide purely on law and evidence, and it is therefore error for jury to rely on items not admitted into evidence to reach its verdict.
4. District court erred in allowing Government to provide each juror with notebook containing exhibits before the exhibits were admitted into evidence.

5. District court’s error in allowing Government to provide each juror during trial with notebook containing exhibits which had not yet been admitted into evidence was harmless in prosecution of defendant arising out of scheme by which he arranged false or paper marriages between United States women and Pakistani men so that the Pakistanis could attain permanent resident alien status in United States; defendant demonstrated no prejudice from any of the incidents in which the jury allegedly reviewed exhibits prematurely, and evidence against defendant was overwhelming. 18 U.S.C. §§ 2, 371, 1001.

United States v. Riviere, 924 F.2d 1289 (3d Cir. 1991)

1. Defendant’s extradition did not violate “rule of specialty” provided in extradition treaty between Commonwealth of Dominica and United States, despite his contention that he was charged with crimes for which he was not surrendered; defendant could not successfully assert rights under treaty because of express waiver by Commonwealth of any restrictions on defendant’s prosecution by United States.

2. Nation may expel fugitive within its borders without request from nation seeking fugitive.

3. Nation may surrender fugitives accused of crimes not named in treaty.

4. Commonwealth of Dominica’s express waiver of any restrictions on defendant’s prosecution in the United States precluded finding that double jeopardy and dual criminality provisions of extradition treaty between Commonwealth and United States barred his prosecution on firearms offenses, even though, in Dominica, defendant pleaded guilty to those offenses.

5. Prosecutions under laws of separate sovereigns do not, in language of Fifth Amendment, subject defendants for same offense to be twice put in jeopardy. U.S. Const. amend. V.

6. United States did not perpetrate “sham” on government of Dominica by seeking defendant’s extradition on marijuana offense as ruse for prosecuting him on firearms offenses; marijuana offense was real, there was no reason in record to believe that Dominica would have refused defendant’s extradition on firearms offenses, and Dominica waived any treaty limitation on defendant’s prosecution, thereby indicating willingness to see him depart.

7. Under Sentencing Guidelines, where base offense level for possession of firearm by felon was increased for specific offense characteristics on ground that firearm had altered or obliterated serial number, and defendant also pleaded guilty to possession of firearm with altered or obliterated serial number, which was same conduct treated as specific offense characteristic in possession of firearm count, those two offenses should have been grouped as closely related counts. 18 U.S.C. § 922(g)(1, 3), (k); U.S.S.G. § 3D1.2(c), 18 U.S.C. App.

8. Under Sentencing Guidelines, convictions for possession of firearms by felon, delivery of firearms to common/contract carrier, and possession of altered firearm should have been grouped as closely related counts; guidelines already provided for enhanced punishment for possession of firearm by felon if that firearm was altered, and to enhance penalty further by
adding “units” for count for possession of altered firearm would violate guideline section which requires groupings for those offenses, and grouping of offenses of possession of firearm by felon and delivery to common/contract carrier was required because to hold otherwise would provide enhanced punishment for defendant’s status as felon, rather than his “additional conduct that is not otherwise accounted for by the guidelines.” 18 U.S.C. § 922(e), (g)(1, 3), (k); U.S.S.G. §§ 3D1.2, 3D1.4, 18 U.S.C. App.

9. Under Sentencing Guidelines, upon defendant’s conviction for assault of federal officer, upward departure in base offense level for disruption of governmental functions was improper; even though due to defendant’s resistance, marshals could not take defendant on plane that had been arranged for his transport and had to charter plane in order to take him, this did not amount to significant disruption of governmental function, as rescheduling defendant’s transportation was one-time effort by marshal’s office in which marshals were performing their usual functions, i.e., arranging transportation of convicted criminal. 18 U.S.C. § 111; U.S.S.G. §§ 5K2.0, p.s., 5K2.7, 18 U.S.C. App.

10. Court of Appeals reviews under “clearly erroneous” standard district court’s determination that defendants did not accept responsibility and were thus not entitled to downward departure in calculating his offense level under Sentencing Guidelines. U.S.S.G. § 1B1.1 et seq., 18 U.S.C. App.

_Etugh v. U.S. INS_, 921 F.2d 36 (3d Cir. 1990)

1. Essential elements of prima facie case of “well-founded fear of persecution” needed for asylum under Immigration and Nationality Act, can only be given concrete meaning through process of case-by-case adjudication. Immigration and Nationality Act, § 208, as amended, 8 U.S.C. § 1158.

2. Native of Nigeria did not make out prima facie case for asylum by alleging that he was in danger from inhabitants of areas near his native village; alien had also alleged that he would be safe in capital city. Immigration and Nationality Act, § 208, as amended, 8 U.S.C. § 1158.

3. Failure of alien to establish prima facie case for asylum; based upon “well-founded fear of persecution” in home country, did not establish prima facie case for withholding of deportation which required more difficult showing of “clear probability of persecution.” Immigration and Nationality Act, §§ 208(a), 243(h), as amended, 8 U.S.C. §§ 1158(a), 1253(h).

4. Alien was not denied his due process rights by Board of Immigration Appeals’ refusal to grant a hearing on his asylum application after concluding that alien had not made out a prima facie case of entitlement to asylum; Board had discretion to deny motion to reopen even if alien had made out prima facie case for relief. U.S. Const. amend. V.

_Clarker v. INS_, 904 F.2d 172 (3d Cir. 1990)

Deportation proceedings are not adversary adjudications “under section 554” of Administrative Procedure Act (APA) and thus are not covered by Equal Access to Justice Act (EAJA);
APA’s hearing procedures do not apply to deportation proceedings. 5 U.S.C. §§ 504, 554; Immigration and Nationality Act, § 242(b), as amended, 8 U.S.C. § 1252(b).

Sewak v. INS, 900 F.2d 667 (3d Cir. 1990)

1. Alien’s failure to move for reopening in immigration court before appealing to Board of Immigration Appeals did not constitute failure to exhaust administrative remedies that would have stripped Court of Appeals of jurisdiction over his petition for review of BIA order; although alien could have sought reopening in immigration court on basis of newly discovered evidence instead of appealing deportation order to BIA, alien did not learn of circumstances surrounding original hearing until after he appealed to BIA and received record from Immigration and Naturalization Service (INS) and he had only 13 days to file timely appeal with BIA at that time.

2. Because of alien’s alleged initial unawareness of basis upon which he could have sought reopening in immigration court, his appeal to Board of Immigration Appeals was not a waiver that precluded him from seeking to reopen in immigration court.

3. When alien claims that deportation hearing was wrongfully held in his absence, Court of Appeals ordinarily reviews record for abuse of discretion.

4. Court of Appeals’ review of question of whether total lack of notice to alien violates his right to due process is plenary. U.S. Const. amends. V, XIV.

5. Record on petition for review of deportation order of Board of Immigration Appeals was insufficient to show whether attorney’s appearance on behalf of alien was unauthorized, whether alien ever received notice of deportation hearing, and whether his due process rights were violated; therefore, remand was required. U.S. Const. amends. V, XIV.

Alleyne v. U.S. INS, 879 F.2d 1177 (3d Cir. 1989)

1. An alien’s motion asking Board of Immigration Appeals to reconsider or reopen its decision affirming finding of deportability did not render order of deportation nonfinal, and thus Court of Appeals had jurisdiction over petition for review of Board’s decision that was filed before motion to reconsider.

2. Court of Appeals would not consider issues raised by alien that were not raised before Board of Immigration Appeals.

3. Court of Appeals was unable to review alien’s due process claim, inasmuch as claim involved only procedural error correctable through administrative process and alien did not present claim to Board of Immigration Appeals. U.S. Const. amend. V.

United States v. Fiorilla, 850 F.2d 172 (3d Cir. 1988)

1. Trial judge could determine that continuing jury poll after one juror indicated disagreement with guilty verdicts did not coerce juror into acquiescing in majority’s guilty verdicts, and thus, defendants subsequently found guilty [of unlawfully bringing aliens into United States, conspiracy to commit offense against United States, and making false statements to federal department or agency] were not entitled to new trial; defense counsel failed to voice specific and contemporaneous objection to polling after juror indicated dissent, polling was not continued until next day, after polling, deliberations continued for two days before jury returned unanimous guilty verdicts against two defendants and jury completely exonerated two codefendants, even though the juror initially stood as lone vote for acquittal of codefendants.

2. Trial judge’s continuance of jury poll after one juror voices dissent from initially reported verdict does not per se require reversal; rather, trial court has limited discretion to determine whether circumstances demonstrate lack of coercion upon initially dissenting member of jury.

Chong v. Director, U.S. Information Agency, 821 F.2d 171 (3d Cir. 1987)

1. In order to find that agency action is not subject to judicial review, where Congress was not affirmatively precluded review, court must find that there are no judicially manageable standards against which court may judge whether agency abused its discretion. 5 U.S.C. §§ 701 et seq., 701(a)(2), 706(2)(A).

2. Presumption of reviewability of agency action under APA is unchanged, but, when Congress does not provide guidelines for exercise of enforcement discretion, agency’s refusal to institute proceedings is presumptively unreviewable. 5 U.S.C. §§ 701 et seq., 701(a)(2), 706(2)(A).

3. Underlying regulations provide sufficient guidance to make possible judicial review under abuse of discretion standard of decision of Director of United States Information Agency on whether to recommend waiver of requirement that nonimmigrant exchange visitor reside abroad for two years before becoming eligible for immigrant visa or permanent residence; although statute merely states that waiver may be granted upon favorable recommendation of Director, regulations require submission of findings of hardship and of summary of details for Director’s recommendation and require director to review policy, program, and foreign relations aspect of case prior to transmitting recommendation to Attorney General; disagreeing with Abdelhamid v. Ichert, 774 F.2d 1447 (9th Cir. 1985); Dina v. Attorney General, 793 F.2d 473 (2d Cir. 1986); El-Omrani v. Director, USIA, 638 F. Supp. 430 (W.D. Pa. 1986); Nwankpa v. Kissinger, 376 F. Supp. 122 (M.D. Ala. 1974). 5 U.S.C. § 701(a)(2); Immigration and Nationality Act, § 212(e), 8 U.S.C. § 1182(e).

4. Scope of review of recommendation by Director of United States Information Agency on request for waiver of requirement that nonimmigrant exchange visitor reside abroad for two years before becoming eligible for immigrant visa or permanent residence is limited to
whether USIA followed its own guidelines. 5 U.S.C. § 701(a)(2); Immigration and Nationality Act, § 212(e), 8 U.S.C. § 1182(e).

5. Function of United States Information Agency in making recommendation on request for waiver of requirement that nonimmigrant exchange visitor reside abroad for two years before becoming eligible for immigrant visa or permanent residence is not so much the product of political choices made in context of foreign policy as to preclude judicial review. 5 U.S.C. § 701(a)(2); Immigration and Nationality Act, § 212(e), 8 U.S.C. § 1182(e).

6. Nonimmigrant exchange visitor failed to establish that he would be denied British certification to practice medicine in Hong Kong, and thus, United States Information Agency did not abuse its discretion in not making favorable recommendation as to visitor’s request for waiver of requirement that visitor reside abroad for two years before becoming eligible for immigrant visa or permanent residence; evidence indicated that visitor needed British certification to practice in Hong Kong, but did not indicate that visitor had ever applied for certification and been denied it. 5 U.S.C. § 701(a)(2); Immigration and Nationality Act, § 212(e), 8 U.S.C. § 1182(e).

7. United States Information Agency’s explanation of its denial of nonimmigrant exchange visitor’s request for recommendation of waiver of requirement that visitor reside abroad for two years before becoming eligible for immigrant visa or permanent residence, that visitor did not conclusively prove that he would not be able to practice medicine abroad, was sufficiently particularized, in light of foreign policy concerns raised by cases involving exchange visitor program. 5 U.S.C. § 701(a)(2); Immigration and Nationality Act, § 212(e), 8 U.S.C. § 1182(e); Mutual Educational and Cultural Exchange Act of 1961, § 102, 22 U.S.C. § 2452.

8. United States Information Agency did not depart from its own policy of leniency or congressional intent in denying recommendation of waiver of requirement that nonimmigrant exchange visitor reside abroad for two years before becoming eligible for permanent visa or permanent residence, in light of evidence that small percentage of exchange visitor doctors were denied recommendation if proper substantiation of hardship were not supplied, and that visitor failed to establish that he would be denied certification to practice medicine in Hong Kong. Immigration and Nationality Act, § 212(e), 8 U.S.C. § 1182(e).

_Hernandez v. Gregg_, 813 F.2d 633 (3d Cir. 1987)

The Immigration Reform and Control Act of 1986 made eligible for legalization many Cubans who arrived from Mariel, Cuba, in 1980 but did not by itself change the status of such an alien as an Immigration and Nationality Act parolee, subject to parole revocation. Immigration and Nationality Act, § 245A, as amended, 8 U.S.C. § 1255A.

_Hector v. INS_, 810 F.2d 65 (3d Cir. 1987)

Alien was not entitled to suspension of deportation pursuant to deportation statute, though she resided for past seven years in country and was of good moral character, and though deportation would allegedly result in extreme hardship to teenage nieces who were residing
with her, where nieces were not her “children” for purposes of statute. Immigration and Nationality Act, § 244(a)(1), 8 U.S.C. § 1254(a)(1).

Matter of Ghalamsiah, 806 F.2d 68 (3d Cir. 1986)

Under Immigration and Nationality Act, Attorney General of the United States had exclusive discretionary authority to release on bail an alien, not illegally detained, pending motion to reopen deportation proceedings, subject to review by district court; therefore, district court lacked power to release alien on bail pending motion to reopen deportation proceedings and stay deportation. Immigration and Nationality Act, §§ 242, 242(c), as amended, 8 U.S.C. §§ 1252, 1252(c).

McLeod v. INS, 802 F.2d 89 (3d Cir. 1986)

1. In order to qualify for relief under statute providing for grant of asylum or statute providing for withholding of deportation, applicant must present objective evidence that demonstrates a clear probability of persecution upon return to his native country. Immigration and Nationality Act, §§ 101(a), 208, 243(h), as amended, 8 U.S.C. §§ 1101(a), 1158, 1253(h).

2. Applicant for asylum and withholding of deportation failed to establish clear probability of persecution if he was required to return to his native land of Grenada where, although applicant suggested that Government of Grenada continued to hold political prisoners, applicant offered no evidence to refute Grenadian Government’s report that remaining prisoners were on trial for murder of former leader, and applicant’s allegations that factions of Government would persecute him as former opponent were highly speculative. Immigration and Nationality Act, §§ 101(a), 208, 243(h), as amended, 8 U.S.C. §§ 1101(a), 1158, 1253(h).

3. Official notice, rather than judicial notice, is proper method by which agency decision-makers may apply knowledge not included in the record. 5 U.S.C. § 556(e).

4. Immigration judge should have included State Department’s Country Reports on Human Rights Practices for 1983 in asylum and deportation hearing, rather than taking judicial notice of document, but failure of immigration judge to include reports in record was harmless error in view of the fact that judge did not base his decision on reports.

5. Immigration judge did not abuse his discretion in declining to seek second advisory opinion from Bureau of Human Rights and Humanitarian Affairs of the Department of State after overthrow of Grenadian Government in view of the fact that Bureau had no information supportive of applicant’s request for asylum during period in which purported persecutor was alive and in power so that a second opinion issued after the death of persecutor and installation of reformed government would not materially aid adjudication.

6. The fact that transcript of proceedings before immigration judge contained 96 incidents where transcriber could not make out testimony, and in lieu thereof wrote down “indiscernible,” did not establish prima facie showing of likely persecution if applicant for asylum was required to return to Grenada, where many of the “indiscernibles” occurred
within colloquies between the judge and counsel that did not bear on legal or factual issues in case and import of many of the omissions was detectable from the context of the dialogue.

7. Agency action is entitled to presumption of regularity, and burden of proof rests on party alleging irregularity.

8. The fact that Bureau of Human Rights and Humanitarian Affair’s findings that the State Department did not have any information supportive of applicant’s request for asylum was communicated in standard form did not imply that applicant’s claims were not investigated so as to deprive applicant of meaningful advisory opinion and there was no requirement in the statute or regulation that Bureau respond directly and specifically to every allegation made by an applicant for asylum.

*Whitehead v. Haig*, 794 F.2d 115 (3d Cir. 1986)

Applicable “final administrative denial” for determining when five-year limitations period for seeking adjudication of citizenship had run was denial of passport application, subsequent to approval of certificate of loss of nationality for citizen born in United States who repudiated citizenship and subsequently brought action for declaration that he was national of United States; disagreeing with Linzalone v. Dulles, 120 F. Supp. 107 (S.D.N.Y. 1954), Garcia-Sarquiz v. Saxbe, 407 F. Supp. 789 (S.D. Fla. 1974), aff’d, 527 F.2d 1389 (5th Cir. 1976). Immigration and Nationality Act, §§ 358, 360(a), as amended, 8 U.S.C. §§ 1501, 1503(a).

*United States v. Kungys*, 793 F.2d 516 (3d Cir. 1986)

1. All depositions taken in the Soviet Union should not be automatically excluded from evidence.

2. When truthful answer on visa application or naturalization petition would not have necessarily resulted in denial of application, citizenship may nonetheless be subject to revocation if the Government is able to prove by clear, convincing and unequivocal evidence that the concealments or misrepresentation would have triggered an investigation which probably would have revealed disqualifying facts. Immigration and Nationality Act, § 340(a), 8 U.S.C. § 1451(a).

3. Once individual has obtained citizenship after misrepresenting or concealing facts at either the visa or naturalization stage, if the Government can prove by clear, unequivocal and convincing evidence that misrepresentations or concealments are material, citizenship is subject to revocation. Immigration and Nationality Act, § 340(a), 8 U.S.C. § 1451(a).

4. Test of materiality under Supreme Court decision in Chaunt v. United States, 364 U.S. 350 (1960), is invoked when the Government attempts to denaturalize citizen based on the false testimony provisions of statute which excludes from definition of “person of good moral character” one who has given false testimony for the purpose of obtaining benefits under the Immigration and Nationality Act. Immigration and Nationality Act, §§ 101(f)(6), 316(a), 340(a), 8 U.S.C. §§ 1101(f)(6), 1427(a), 1451(a).

5. While all doubt must be resolved in favor of the United States in the naturalization process,
any doubts in denaturalization proceedings should be resolved in the citizen’s favor.

6. Misrepresentations in visa application about applicant’s date and place of birth were material so as to provide basis for revoking citizenship where discrepancies between application and falsified supporting documents would have triggered an investigation which would in turn probably have resulted in denial of either nonpreference quota immigration visa or naturalization petition in that investigation would probably have revealed that defendant had not been victim of Nazi persecution and therefore would not have been eligible for the visa. Immigration and Nationality Act, § 101(f)(6), 8 U.S.C. § 1101(f)(6).

7. Court is not required to examine or ascertain motives in determining materiality of misrepresentations made in visa application or naturalization petition, for purposes of determining whether citizenship should be revoked on ground of material misrepresentations. Immigration and Nationality Act, § 101(f)(6), 8 U.S.C. § 1101(f)(6).

8. Misrepresentations in nonpreference quota immigration visa application concerning applicant’s wartime occupations as clerk-bookkeeper and as to his residences were not in themselves material so as to support revocation of citizenship, though applicant concealed that he lived in town where atrocities had occurred, where these matters were not supported by falsified documents and it was not shown that knowledge of defendant’s true residence or occupation would have prompted investigation or affected eligibility. Immigration and Nationality Act, § 101(f)(6), 8 U.S.C. § 1101(f)(6).

9. Misrepresentations on naturalization petition were material so as to justify denaturalization where discrepancies between the truth and visa materials would have resulted in field investigation or outright denial of petition and investigation would probably have resulted in denial of petition by proving ineligibility for nonpreference quota immigration visa in the first instance. Immigration and Nationality Act, § 101(f)(6), 8 U.S.C. § 1101(f)(6).

Nocon v. INS, 789 F.2d 1028 (3d Cir. 1986)

1. Court of Appeals can review final deportation orders, as well as orders denying motions to reopen or reconsider deportation case. Immigration and Nationality Act, § 106, as amended, 8 U.S.C. § 1105a.

2. For Court of Appeals to review final deportation order or order denying motion to reconsider deportation case, petition for review must be filed within six months of specific order for which review is sought, and timely filing of motion to reconsider does not suspend six-month period for seeking review of deportation order; declining to follow Hyun Joon Chung v. INS, 720 F.2d 1471 (9th Cir.1983), and Bregman v. Immigration and Naturalization Service, 351 F.2d 401 (9th Cir. 1965). Immigration and Nationality Act, § 106(a)(1), as amended, 8 U.S.C. § 1105a(a)(1).

3. Board of Immigration Appeals’ denial of aliens’ motion to reconsider its decision to deport was not abuse of discretion, where aliens offered only conclusory statements, unbuttressed by case law cites, to support motion.
4. Board of Immigration Appeals lacked authority to extend voluntary departure date previously set for aliens’ departure from country. Immigration and Nationality Act, § 244(e), as amended, 8 U.S.C. § 1254(e).

**United States v. Kowalchuk**, 773 F.2d 488 (3d Cir. 1985)


3. District court’s finding that voluntary membership, of defendant in Government’s denaturalization suit, in Ukrainian schutzmannschaft, an auxiliary militia/police force organized by the Germans in World War II in occupied territory, constituted “voluntary assistance to the enemy,” and thus, was not refugee or displaced person of concern to International Refugee Organization as would be eligible for admission to United States for permanent residence under section 2(b) of Displaced Persons Act, was supported by evidence which included provisions of International Refugee Organization constitution and testimony including that of chief eligibility officer for the Organization in 1948. Displaced Persons Act of 1948, § 2(b), 50 U.S.C. App. (1952 Ed.) § 1951(b).

4. Order admitting applicant to citizenship was properly revoked and applicant’s certificate of naturalization was properly cancelled by district court, where applicant was found to have willfully misrepresented and concealed, in process of obtaining visa, his activities in Ukrainian schutzmannschaft, an auxiliary militia/police force organized by the Germans in World War II in occupied territory, since disclosure of true facts would have made applicant ineligible for visa. Immigration and Nationality Act, § 340(a), as amended, 8 U.S.C. § 1451(a); Displaced Persons Act of 1948, §§ 10, 13, 50 U.S.C. App. (1952 Ed.) §§ 1959, 1962.

5. Defendant in Government’s denaturalization suit was not denied due process on ground that he was unable to investigate and interview “potentially favorable witnesses to him” residing in territory controlled by Soviet Union, in that Soviet Union imposed same limitations upon Government counsel, and defendant made no showing that any testimony was excluded that would have been material and favorable to his defense. Immigration and Nationality Act, § 340(a), as amended, 8 U.S.C. § 1451(a); U.S. Const. amend. V.

**Dill v. INS**, 773 F.2d 25 (3d Cir. 1985)

1. Immigration and Nationality Act [8 U.S.C. § 1101 et seq.] vests in Attorney General broad discretion to suspend deportation of alien who has been ordered deported, provided alien establishes good moral character, seven years’ continuous physical presence in United States, and “extreme hardship” to alien, or, in alternative, to alien’s spouse, parent or child, if that close family member is citizen or lawful permanent resident of the United States.
Immigration and Nationality Act, §§ 101 et seq., 244(a)(1), as amended, 8 U.S.C. §§ 1101 et seq., 1254(a)(1).

2. Although alien whose motion for suspension of deportation has been turned down by Board of Immigration Appeals may seek review in appropriate Court of Appeals, Board decisions denying suspension of deportation are not to be lightly overturned.

3. On questions of law, administrative judgment is subject to plenary judicial review.

4. Alien’s claim that her voluntary departure and readmission one month later did not “meaningfully interrupt” seven-year period of residence in United States for purposes of statute [8 U.S.C. § 1254(a)(1)] governing suspension of deportation was reasonable in light of overall case law at time, as was alien’s attempt to invoke Court of Appeals’ appellate jurisdiction to review denial of stay of deportation pending Board of Immigration Appeals’ disposition of appeal from immigration judge’s denial of motion to reopen deportation proceeding and to suspend deportation. Immigration and Nationality Act, § 244(a)(1), as amended, 8 U.S.C. § 1254(a)(1).

5. Conclusion of Board of Immigration Appeals that alien had not demonstrated that separation from her uncle and aunt would constitute “extreme hardship”, either for herself or aunt and uncle within meaning of statute [8 U.S.C. § 1254(a)(1)] governing suspension of deportation was not irrational or without substantial evidentiary support, even though uncle and aunt were alien’s de facto parents, where alien was adult, and alien had other relatives on Bermuda as cushion for hardship she would suffer. Immigration and Nationality Act, § 244(a)(1), as amended, 8 U.S.C. § 1254(a)(1).

Reid v. INS, 766 F.2d 113 (3d Cir. 1985)

1. Alien’s petition for review of decision of Board of Immigration Appeals denying his motion for stay of deportation pending consideration of motion to reopen deportation proceedings was not moot, even though, while petition for review was pending before Court of Appeals, Board denied alien’s motion to reopen and thus alien was not in fact deported during pendency of his motion to reopen, since jurisdictional issue presented was capable of repetition yet evading review.

2. In case involving single plaintiff, rather than class action, capable-of-repetition doctrine relating to mootness applies only in exceptional situations, and generally only where named plaintiff can make reasonable showing that he will again be subjected to alleged illegality.

3. Decision by Board of Immigration Appeals denying stay of deportation is not “final order of deportation” reviewable in Court of Appeals under § 1105a(a) of Immigration and Nationality Act. Immigration and Nationality Act, § 106(a), (a)(3), (c), as amended, 8 U.S.C. § 1105a(a), (a)(3), (c).

Dabone v. Karn, 763 F.2d 593 (3d Cir. 1985)
1. Alien who leaves country and makes new entry on his or her return is then subject to all current exclusionary laws and new entry stands alien on same footing as if it were initial entry.

2. Alien returning to the United States from trip abroad was effecting an “entry” within meaning of immigration statute [8 U.S.C. § 1101(a)(13)] defining entry, where alien did not merely venture few miles over border for few hours, but rather, was out of country for two months on planned and purposeful journey, traveled thousands of miles between three continents and had to procure visas for admission to two of the countries he visited. Immigration and Nationality Act, § 101(a)(13), as amended, 8 U.S.C. § 1101(a)(13).


4. Where lawful resident alien failed to meet his burden of proving that his trip out of the United States was innocent, casual and brief, alien was properly placed in exclusion proceedings.

5. Unlike Board of Immigration Appeals’ denial of stay which is not reviewable, denial of motion to reopen exclusion proceedings is reviewable.

6. Denial of motion to reopen exclusionary proceeding is discretionary, and can be reviewed only under arbitrary-and-capricious standard.

7. Accrual of seven years for purposes of provision of Immigration and Nationality Act [8 U.S.C. § 1182(c)] which states that aliens lawfully admitted for permanent residence who temporarily proceed abroad voluntarily and not under order of deportation, and who are returning to lawful unrelinquished domicile of seven consecutive years, may be admitted in discretion of Attorney General without regard to certain grounds for exclusion stops at least when decision to exclude is administratively final. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C. § 1182(c).

8. Where alien did not have seven years domicile at time Board of Immigration Appeals entered final deportation hearing, Board of Immigration Appeals did not err in failing to grant alien’s motion to reopen exclusion proceedings. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C. § 1182(c).

Miller v. U.S. INS, 762 F.2d 21 (3d Cir. 1985)

1. Persons convicted of crimes of moral turpitude are among classes of persons precluded by law from being found to be of good moral character, which is statutory requirement for suspension of deportation; thus, alien who was convicted of welfare fraud was ineligible for suspension of deportation. Immigration and Nationality Act, §§ 101(f), (f)(3), 212, 212(h), 244(a)(1), 8 U.S.C. §§ 1101(f), (f)(3), 1182, 1182(h), 1254(a)(1).

2. Where Board of Immigration Appeals did not address issue of whether misfiling of alien’s application for adjustment of status denied alien due process, remand for determination of
whether statutory requirement for adjustment of status that immigrant visa be immediately available to applicant at time of application was satisfied by availability of court ordered injunctive relief in class action at time of alien’s application for adjustment of status was necessary. Immigration and Nationality Act, §§ 245, 245(a)(3), 8 U.S.C. §§ 1255, 1255(a)(3).

United States v. Abushaar, 761 F.2d 954 (3d Cir. 1985)

1. District court had discretion to sentence youth offender to adult probation even though option to exercise later discretion to discharge the offender from probation was foregone. 18 U.S.C. (1982 Ed.) § 5010(d).

2. Sentence of probation imposed upon defendant eligible for sentencing under Youth Corrections Act did not have to be imposed as a matter of law. 18 U.S.C. (1982 Ed.) § 5010(a-d).

3. Youth Corrections Act does not require district court to find that a youth offender will not benefit from treatment; it is enough that district court comply with requirement of statute that it must find that youth offender will not derive benefit from treatment, and once district court has satisfied that requirement, appeals court may not impose any additional requirement. 18 U.S.C. (1982 Ed.) § 5010(a-d).

4. Conditions placed on probation are valid so long as they are reasonably related to the ends of probation.

5. Condition of probation imposed on alien, who pleaded guilty to making false statements to an agency of United States, that defendant serve probation time outside the country was impermissible as being completely unrelated to any purpose to rehabilitate defendant or to protect public and as undermining authority vested by Congress in Attorney General to control deportation of aliens.

6. A condition of probation may not circumvent another statutory scheme.

Sankar v. INS, 757 F.2d 532 (3d Cir. 1985)

1. Court of Appeals may overturn decision of Board of Immigration Appeals only if the Board abused its discretion.

2. Board of Immigration Appeals, in denying applications for asylum, did not abuse its discretion in equating statutory standard of “well-founded fear” of persecution with a “clear probability,” “good reason,” or “realistic likelihood,” as opposed to a “reasonable possibility” standard. Immigration and Nationality Act, §§ 208, 243(h), as amended, 8 U.S.C. §§ 1158, 1253(h).

Reid v. INS, 756 F.2d 7 (3d Cir. 1985)

1. Denial of motion to reopen deportation proceeding is reviewable in a Court of Appeals. Immigration and Nationality Act, § 106(a), as amended, 8 U.S.C. § 1105a(a).
2. For purpose of establishing, as threshold for discretionary relief from deportation order, that alien has maintained “a lawful unrelinquished domicile of seven consecutive years,” termination of lawful domicile is not tied to alien’s actual departure from the United States. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C. § 1182(c).

3. Even assuming, for purpose of discretionary relief from deportation order, that alien’s lawful domicile does not terminate until merits of original deportation decision have been fully resolved by the courts, alien failed to meet threshold requirement of seven consecutive years of domicile where he became lawful permanent resident in February, 1974, and district court denied petition for review of deportation order in December, 1979. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C. § 1182(c).

4. In reviewing Board of Immigration Appeals’ disposition of motion to reopen deportation proceedings, Court of Appeals’ review is limited to determining whether the Board abused its discretion. Immigration and Nationality Act, § 212(c), as amended, 8 U.S.C. § 1182(c).

5. Board of Immigration Appeals did not abuse its discretion in concluding that alien was not eligible for relief from deportation order which was issued following alien’s conviction for possession of a controlled dangerous substance, in view of evidence that approximately 20 ounces of vegetation had been submitted for testing in connection with the case and was identified as marijuana. Immigration and Nationality Act, § 241(f), as amended, 8 U.S.C. § 1251(f).

_Sotto v. U.S. INS_, 748 F.2d 832 (3d Cir. 1984)

1. An alien applying for withholding of deportation on ground that his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group or political opinion bears burden of showing a clear probability of persecution which is equivalent to showing that it is more likely then not that the alien would be subject to persecution; furthermore, same standard applies on a request for discretionary asylum on basis of “refuge” status. Immigration and Nationality Act, §§ 208(a), 243(h)(1), as amended, 8 U.S.C. §§ 1158(a), 1253(h)(1).

2. Where Board of Immigration Appeals and immigration judge made no reference to affidavit of a retired general of the Philippines Air Force and Philippine assemblyman which, on its face, constituted material evidence going to heart of alien’s claim that he would face persecution if deported to the Philippines, remand was required for Board to reconsider Philippine alien’s appeal from decision of immigration judge that denied his application for asylum or withholding of deportation based on a likelihood of persecution. Immigration and Nationality Act, §§ 208(a), 243(h)(1), as amended, 8 U.S.C. §§ 1158(a), 1253(h)(1).

3. Although Court of Appeals may overturn Board of Immigration Appeals’ determination affirming denial of application for asylum or withholding of deportation only for abuse of discretion, court is not foreclosed from determining whether Board followed proper procedures and considered and appraised material evidence before it and if the administrative record fails to reveal that such evidence had been fairly considered, the proper course is to
remand the case to the Immigration and Naturalization Service so that Service may evaluate such evidence and consider its effect on the application as a whole.

_Moret v. Karn_, 746 F.2d 989 (3d Cir. 1984)

1. Parole from Immigration and Naturalization Service custody does not grant alien legal residence in United States, but it does allow for temporary harborage in this country of otherwise inadmissible alien. Immigration and Nationality Act, § 212(d)(5), as amended, 8 U.S.C. § 1182(d)(5).

2. Attorney General has broad discretion to grant or deny parole from Immigration and Naturalization Service custody, but discretion is not unlimited; like other agency actions, parole-related decisions may be reviewed to determine whether action was arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law. Immigration and Nationality Act, § 212(d)(5), as amended, 8 U.S.C. § 1182(d)(5); 5 U.S.C. §§ 701-706, 706(2)(A).

3. Even if court could not review merits of Immigration and Naturalization Service decision to revoke immigrant’s parole, court was not precluded from deciding whether agency exercised its authority in arbitrary and capricious manner. Immigration and Nationality Act, § 212(d)(5), as amended, 8 U.S.C. § 1182(d)(5); 5 U.S.C. §§ 701-706, 706(2)(A).

4. Once procedural protections against termination of alien’s parole are in place, agency’s failure to follow its own directives is actionable. 5 U.S.C. § 706(2)(A).

5. Court of Appeals is not free to uphold government agency’s determination on basis of post hoc rationalization by government, or to supply its own justification for agency’s decision; rather, court must evaluate propriety of agency action solely on grounds invoked by agency in its initial determination, and if those grounds are inadequate or improper, agency action must be set aside.

6. Agency abuses its discretion if it fails to follow its own regulations and procedures.

7. In absence of explicit finding that Mariel Cuban immigrant posed “clear and imminent danger” to society, which was not indicated by evidence that immigrant failed to abide by conditions of his resettlement program, agency’s revocation of immigrant’s parole from Immigration and Naturalization Service custody was abuse of discretion. Immigration and Nationality Act, § 212(d)(5), as amended, 8 U.S.C. § 1182(d)(5); 5 U.S.C. §§ 701-706, 706(2)(A).

_Gunaydin v. U.S. INS_, 742 F.2d 776 (3d Cir. 1984)

1. Aliens’ lawful entry into United States did not nullify earlier illegal entry without inspection; thus, their deportation for illegal entry without inspection was statutorily justified. Immigration and Nationality Act, §§ 241(a)(2), 275, 8 U.S.C. §§ 1251(a)(2), 1325.

2. Aliens were not entitled to benefit of rule that alien is not subject to consequences of entry without inspection where trip across border was innocent, casual and brief, so that there was
no intent to depart in manner which could be regarded as meaningfully interruptive of alien’s permanent residence, where counsel for aliens, in hearing on second order to show cause why alien should not be deported for illegal entry, stated that departure was meaningful. Immigration and Nationality Act, §§ 241(a)(2), 275, 8 U.S.C. §§ 1251(a)(2), 1325.

Nezowy v. United States, 723 F.2d 1120 (3d Cir. 1983)

1. In prosecution for making false statements to Immigration and Naturalization Service, evidence that defendant filed for political asylum for a number of Polish nationals without their authorization was sufficient to sustain conviction. 18 U.S.C. § 1001.

2. As general rule, mode of impeachment of witness is matter committed to discretion of trial court.

3. Questioning of witness by Government as to whether he had previously claimed constitutional right to refuse to testify at grand jury proceeding constitutes trial error, subject only to harmless error determination. U.S. Const. amend. V.

4. In prosecution for making false statement to Immigration and Naturalization Service, trial court erred in allowing Government to cross-examine defense witness about invocation of her Fifth Amendment privilege against self-incrimination in effort to show that witness had not been harassed by United States attorney during grand jury investigation, but such error was harmless, where witness’ only testimony which was exculpatory was fully credited by jury and resulted in acquittal on relevant charge, her other testimony was of only minimal probative value as to charges on which defendant was convicted, and witness’ claim of privilege could not have been associated by jury with defendant’s guilt. U.S. Const. amend. V.

Nguyen v. U.S. Catholic Conference, 719 F.2d 52 (3d Cir. 1983)

1. Limitations of Fifth Amendment restrict only federal governmental action and not actions of private entities. U.S. Const. amend. V.

2. Activities of private charitable organization in providing financial assistance and variety of other services to refugees seeking better lives in America did not constitute federal action within meaning of Fifth Amendment, even though government had contracted with organization to continue aid to refugees. U.S. Const. amend. V.

3. Refugee Act, essentially appropriation bills designed to ease burdens of organizations that traditionally devote enormous time and money to help others did not impliedly create right of action entitling refugees to recover for religiously sponsored charitable agency’s alleged failure to provide refugees with unused part of per capita resettlement grants made by federal government. Migration and Refugee Assistance Act of 1962, § 2, 22 U.S.C. § 2601.

4. Refugees settling in United States through assistance of religiously sponsored charitable agencies were not third-party beneficiaries of contracts between agency and Department of State, and thus agency’s alleged failure to provide refugees with unused part of per capita resettlement grant made by federal government pursuant to such contracts was not violation

Amezquita-Soto v. INS, 708 F.2d 898 (3d Cir. 1983)

1. Even if petitioner alien’s daughter, who was born out of wedlock and who had been raised since birth by her maternal grandmother, was his “child” under the Immigration and Nationality Act, and hardship to her was considered, the Board of Immigration Appeals did not abuse its discretion by holding that petitioner, who had overstayed his visa and was admittedly deportable, failed to prove that either he or his child would suffer extreme hardship if he was deported. Immigration and Nationality Act, §§ 241(a)(2), 244(a)(1), 8 U.S.C. §§ 1251(a)(2), 1254(a)(1).

2. Court should not encroach upon the authority of the immigration judges and the Board of Immigration Appeals to determine what constitutes “extreme hardship” justifying suspension of deportation. Immigration and Nationality Act, § 244(a)(1), 8 U.S.C. § 1254(a)(1).

3. Immigration judges and the Board of Immigration Appeals have the authority to narrowly construe “extreme hardship,” justifying suspension of deportation, should they deem it wise to do so.

4. Findings of fact of immigration judges and Board of Immigration Appeals are conclusive if supported by reasonable, substantial, and probative evidence on the record as a whole. Immigration and Nationality Act, § 106(a)(4), 8 U.S.C. § 1105a(a)(4).

5. Determination by immigration judges and Board of Immigration Appeals as to whether an alien has proven extreme hardship, justifying suspension of deportation, is discretionary in nature and will be overturned only if arbitrary, irrational or contrary to law. Immigration and Nationality Act, § 244(a)(1), 8 U.S.C. § 1254(a)(1).

Marroquin-Manriquez v. INS, 699 F.2d 129 (3d Cir. 1983)

1. The “well founded fear” standard for determining claims of political asylum equates with the “clear probability of persecution” standard formerly used and Board of Immigration Appeals did not err in requiring alien to demonstrate a clear probability of persecution. Immigration and Nationality Act, § 243(h), as amended, 8 U.S.C. § 1253(h).

2. Evidence that other members of Marxist group to which alien belonged had been released from jail, that alien’s wife shared his views and had not been persecuted and that Mexico, the alien’s home country, had adopted a new amnesty law sustained Board of Immigration Appeals’ finding that alien did not show a clear probability of persecution if he were returned to Mexico. Immigration and Nationality Act, § 243(h), as amended, 8 U.S.C. § 1253(h).

3. After final agency order, court’s review of discovery order is confined to determining if agency discretion has been abused; to find such abuse, it is usually necessary to conclude that there has been an interference with a substantial right or that the discovery ruling is a gross abuse of discretion resulting in fundamental unfairness.
4. Alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, as the power to admit or exclude aliens is a sovereign prerogative; once the alien gains admission to the country, and begins to develop ties which go with permanent residence, his constitutional status changes and a continuously present resident alien is entitled to a fair hearing when threatened with deportation and has a right to due process in such cases. U.S. Const. amend. V.

5. In determining whether procedure in a particular case accords with due process, court must consider the interest at stake for the individual, the risk of erroneous deprivation of the interest through the procedures used, the probable value of additional or different procedural safeguards, and the interest of government in using the current procedures rather than additional or different procedures. U.S. Const. amend. V.

6. In immigration proceedings, party seeking a letter rogatory has the burden showing necessity and feasibility.

7. Immigration judge did not abuse his discretion or deprive alien of due process when he declined to order letter rogatory directed toward Mexican officials who, according to alien, would give testimony establishing that they deliberately exposed the alien to torture and assassination and had directed the torture of political prisoners.

8. Where the most which FBI reports sought by alien could establish was that alien had been politically active in Mexico, and there was other evidence of record which established that fact, immigration judge did not abuse his discretion in denying alien’s requested subpoena duces tecum for FBI documents from the American Embassy in Mexico City, especially in view of the fact that the alien had obtained the benefit of 50,000 FBI documents which one of his witnesses had obtained.

9. Alien who pled guilty to charge of illegal entry into the United States was estopped from claiming in subsequent deportation proceeding that he had not entered the country. Immigration and Nationality Act, § 275, as amended, 8 U.S.C. § 1325.

Rejaie v. Immigration and Naturalization Service, 691 F.2d 139 (3d Cir. 1982)

1. Generalized, undocumented fears of persecution or political upheaval which affect a country’s general populace are insufficient bases for withholding deportation. Immigration and Nationality Act, § 243(h) as amended 8 U.S.C. § 1253(h).

2. In considering Iranian’s request for political asylum, Board of Immigration Appeals properly required him to prove a clear probability of persecution, a formulation that the Immigration and Naturalization Service equated with a well-founded fear of persecution. Immigration and Nationality Act, § 243(h) as amended 8 U.S.C. § 1253(h).

3. Where petitioner, an Iranian who came to this country in 1978 to attend school for ten months, did not demonstrate by objective evidence a realistic likelihood that he would be persecuted in his native land, the Board of Immigration Appeals properly denied request for political asylum and did not err in denying motions to reopen deportation proceedings. Immigration and Nationality Act, § 243(h) as amended 8 U.S.C. § 1253(h).
Garcia v. I. & N. S., 690 F.2d 349 (3d Cir. 1982)

1. Both order of the Board of Immigration Appeals sustaining order of voluntary departure and dismissing appeal from denial of application for suspension of deportation and subsequent order denying motion to reopen the deportation proceedings were final orders for purposes of statute requiring alien to take appeal to the Court of Appeals within six months. Immigration and Nationality Act, § 106(a) as amended 8 U.S.C. § 1105a(a).

2. Where alien did not appeal within six months of order affirming voluntary suspension and order denying motion to reopen deportation proceedings, Court of Appeals lacked jurisdiction to review the matter, even though appeal was taken within six months from receipt of notices informing alien of date of departure and penalties for returning to the country without authorization.

3. Notices informing alien of her date of departure and the penalties for returning to the country without authorization were not final orders and thus were not reviewable by the Court of Appeals. Immigration and Nationality Act, § 106(a) as amended 8 U.S.C. § 1105a(a).

4. Where Board of Immigration Appeals had issued a final order of deportation which was not contested at the proper time, it was not arbitrary or capricious for the Immigration and Naturalization Service to send alien a letter containing a specific date of deportation.

De Laurentiis v. Haig, 686 F.2d 192 (3d Cir. 1982)

Statute providing that records pertaining to issuance or refusal of visas or permits to enter United States shall be considered confidential fell under section of the Freedom of Information Act providing that Act does not apply to matters that are specifically exempted from disclosure by statute, and thus plaintiffs were not entitled to disclosure of certain Department of State documents pertaining to denial of immigrant visa request. 5 U.S.C. §§ 552, 552(b)(3); Immigration and Nationality Act, § 222(f), 8 U.S.C. § 1202(f).

Bak v. U.S. I. N. S., 682 F.2d 441 (3d Cir. 1982)

1. Motion to reopen deportation proceedings is new, independently reviewable order within jurisdiction of Court of Appeals. Immigration and Nationality Act, § 106(c) as amended 8 U.S.C. § 1105a(c).

2. Where petitioners did not appeal immigration judge’s refusal to reopen their deportation proceeding to Board of Immigration Appeals, petitioners failed to exhaust their administrative remedies and Court of Appeals had no jurisdiction to review denial by immigration judge of request to reopen. Immigration and Nationality Act, § 106(c) as amended 8 U.S.C. § 1105a(c).

Arana v. U.S. Immigration and Naturalization Service, 673 F.2d 75 (3d Cir. 1982)

Behavior of person subject to order of deportation who concealed his whereabouts from immigration authorities and federal courts and failed to comply with order and bench warrant
issued by federal district court disentitled him from calling upon resources of Court of
Appeals for determination of his claims.

Babula v. Immigration and Naturalization Service, 665 F.2d 293 (3d Cir. 1981)

1. Protections of the Fourth Amendment apply to seizures which do not amount to a traditional
   arrest. U.S. Const. amend. IV.

2. Questioning which is permissible under the Fourth Amendment is also permissible under
   statute authorizing INS agents to make warrantless interrogations of aliens or persons
   believed to be aliens concerning the right to be or remand in the United States. Immigration
   and Nationality Act, § 287(a)(1, 2), 8 U.S.C. § 1257(a)(1, 2), U.S. Const. amend. IV.

3. Tip from reliable source concerning the employment of illegal Polish aliens at factory
   combined with indications that the company did employ Polish aliens was sufficient to
   justify the minimally intrusive questioning which was conducted by INS agents who entered
   the plant and asked each employee whether he was a Polish national, had a green card, or had
   come to the United States on a tourist visa.

4. Attempts of two persons to flee from factory when INS agents arrived to question employees
   about their alienage justified brief detention of those persons as it led the agents to
   reasonably believe that the two persons attempting to flee were illegal aliens.

5. Employees of factory did not have standing to assert Fourth Amendment rights of factory
   owner involved in actions of INS agents in entering factory and questioning employees
   concerning their alienage. U.S. Const. amend. IV.

6. Term “arrest” as used in statute authorizing INS agents to arrest suspected aliens means an
   arrest upon probable cause, not simply detention for purposes of the interrogation, and
   requirement that certain warnings be given upon arrest does not apply until the arrest based
   on probable cause takes place. Immigration and Nationality Act, § 287(a)(2), 8 U.S.C. §
   1357(a)(2).

Dastmalchi v. Immigration and Naturalization Service, 660 F.2d 880 (3d Cir. 1981)

1. Court of Appeals did not have initial jurisdiction under the judicial review provisions of the
   Immigration and Naturality Act to entertain Iranian students’ constitutional attack on
   Immigration and Naturalization Service regulation, which required all nonimmigrant alien
   postsecondary students from Iran to report to a local INS representative and to provide the
   representative with information as to residency and maintenance of nonimmigrant status, nor
   did the Court of Appeals have initial jurisdiction to review the Iranian students’ contention
   that the INS abused its discretion both in implementing the regulation and in refusing to
   restore them to nonimmigrant status. Immigration and Nationality Act, § 106(a), 8 U.S.C. §
   1105a(a).

2. Under the judicial review provisions of the Immigration and Nationality Act, initial review in
   the Court of Appeals is available only to challenge a final order of deportation, an order
   entered in the course of a deportation proceeding and reviewable by the Board of
Immigration, or a motion to reopen deportation proceedings or to reconsider a final order of deportation. Immigration and Nationality Act, § 106(a), 8 U.S.C. § 1105a(a).

3. Neither an Immigration Judge nor the Board of Immigration Appeals, in the course of deportation proceeding, can enter an order voiding an alien’s deportation in response to a constitutional objection.

4. Under judicial review provisions of the Immigration and Nationality Act, Court of Appeals’ initial jurisdiction extends only to agency factual determinations involving deportability and to any orders entered during the deportation proceeding itself. Immigration and Nationality Act, § 106(a), 8 U.S.C. § 1105a(a).


1. Court of Appeals has jurisdiction to review denial of motion to reopen proceedings before the Board of Immigration Appeals and in such case the review is limited to whether Board abused its discretion. Immigration and Nationality Act, §§ 241(a)(2), 244(a)(1), 8 U.S.C. §§ 1251(a)(2), 1254(a)(1).

2. When motion to stay deportation of couple and their child and to reopen proceedings was accompanied by previously unavailable psychiatric evaluation of effect that return of child to foreign country would have on her stability, Board of Immigration Appeals erred in considering the evaluation in isolation in determining whether prima facie case for reopening was established; thus Court of Appeals would grant review of order denying relief and remand so that Board could determine whether, considering all relevant factors on record, psychiatric evaluation could not have affected decision denying petition for suspension of deportation and whether reopening would be appropriate. Immigration and Nationality Act, §§ 106, 241(a)(2), 244(a)(1), 8 U.S.C. §§ 1105a, 1251(a)(2), 1254(a)(1).

*Petition for Naturalization of Serano*, 651 F.2d 178 (3d Cir. 1981)

1. Under statute governing permanent ineligibility of aliens relieved or discharged from military training because of alienage to become United States Citizens, there is two-pronged prerequisite for loss of eligibility for citizenship: the alien must be one who applies or has applied for exemption or discharge from military service; and alien is or was relieved or discharged from service. Immigration and Nationality Act, § 315, 8 U.S.C. § 1426.

2. Permanent resident alien was permanently ineligible to become United States citizen as result of his exemption, knowingly sought under treaty with foreign country, from military service, even though local draft board never changed alien’s classification from either I-A or I-H to correct classification for person permanently exempt from service on basis of alienage. Immigration and Nationality Act, §§ 315, 336, 8 U.S.C. §§ 1426, 1447; Treaty of Friendship, Commerce and Navigation between United States and Italy, Art. 1 et seq., 63 Stat. 2255.

*United States v. Helstoski*, 635 F.2d 200 (3d Cir. 1980)

1. A court will not look behind face of an indictment and invalidate it because grand jury received inadequate or incompetent evidence.
2. Wholesale violation of speech or debate clause before grand jury which indicted Congressmen on charges of violating statute prohibiting bribery of public officials required quashing indictment. 18 U.S.C. § 201(c)(1); U.S. Const. art. I, § 6, cl. 1.

3. Prosecutor in presenting material to grand jury considering charges against Congressmen [accused of soliciting and accepting bribes in return for introducing private legislation on behalf of certain aliens] must refrain from introducing evidence of past legislative acts or motivation for performing them. 18 U.S.C. § 201(c)(1); U.S. Const. art. I, § 6, cl. 1.

4. Where proof of charge that Congressmen made false material statements to grand jury would require introduction of evidence of past legislative acts, dismissal of indictment was proper. 18 U.S.C. § 1623; U.S. Const. art. I, § 6, cl. 1.

5. Counts of indictment charging one defendant with perjury did not meet requirements of precision and clarity and dismissal of such counts was proper.

Pierre v. Hess Oil Virgin Islands Corp., 624 F.2d 445 (3d Cir. 1980)

1. Under traditional rules of maritime law, Panamanian law governed employment agreement between seaman and owner of tugboats registered in the Republic of Panama.

2. Under Panamanian law, a seaman employed for a fixed sum per month was not entitled to overtime pay.

3. Under applicable Panamanian Labor Code an employment contract covering a seaman may be oral in which case the terms of the agreement alleged by the seaman are presumed to be correct.

4. Award of overtime pay to nonimmigrant seamen on basis of agreement between employer and Immigration and Naturalization Service did not entitle plaintiff who was resident to overtime payment even though nonimmigrant seamen’s cases were consolidated with plaintiff’s. Immigration and Nationality Act, §§ 101-360, 8 U.S.C. §§ 1101-1503.


6. Panamanian Labor Code which prescribes labor rights and actions within one year was procedural and not applicable to suit for overtime pay brought by seamen in the Virgin Islands.

7. Statute of limitations is not applicable to bar claim in admiralty, since delay in bringing suit on an admiralty claim is barred by laches.

8. Where seaman seeking overtime pay was employed by Virgin Islands corporation to work on vessels registered in the Republic of Panama, court would consider Virgin Islands statute of limitation allowing six years in which to bring suit upon a contract in determining whether seaman was guilty of laches. 5 V.I.C. § 31(3)(A).
9. Where seaman brought suit seeking overtime pay, employer had burden of proving laches.

10. Evidence in suit by seaman to recover overtime pay did not establish that seaman was guilty of laches.

*Newton v. Immigration and Naturalization Service*, 622 F.2d 1193 (3d Cir. 1980)

1. Although notification of order to report for deportation was not sent to last counsel who made appearance for alien, Immigration and Naturalization Service, by notifying alien’s original counsel, whose appearance had not been withdrawn and whose representative actually accompanied alien to office of INS on day of deportation complied with INS rule requiring notification of alien’s counsel of order to report for deportation. Immigration and Nationality Act, § 106(c), 8 U.S.C. § 1105a(c).

2. Having been filed after alien’s deportation had been effected, petition to review order of the Board of Immigration Appeals dismissing appeal of alien from order for his deportation was untimely and court was without jurisdiction to review deportation. Immigration and Nationality Act, § 106(c), 8 U.S.C. § 1105a(c).

*United States v. DiSantillo*, 615 F.2d 128 (3d Cir. 1980)

1. Immigration and Naturalization Service form, which did not mention word “deportation” in its title, but, rather, was merely entitled “notice of revocation and penalty,” failed properly to notify 16-year-old alien, who served as deck boy on merchant ship, that he had been arrested and deported, and INS form entitled notice to detain, deport, or remove aliens, which was served on ship’s captain by INS agent, also provided insufficient notice to alien, where form was directed to captain, the notice, by means of box checked by INS authorities, directed captain to detain alien on board, but another box on form, which stated “deport from the United States,” was left blank, and reason stated on form for action against alien was inaccurate. Immigration and Nationality Act, §§ 252(b), 276, 8 U.S.C. §§ 1282(b), 1326.

2. The general principle is that statute of limitations begins to run at moment crime is complete, and thus federal judiciary regards with disfavor assertions that a crime is a continuing offense.

3. Court of Appeals has responsibility to construe statutory language so as to give effect to intent of Congress.

4. In construing a statute, Court of Appeals is obliged to give effect, if possible, to every word Congress used.

5. The purpose of statute of limitations is to balance government’s need for sufficient time to discover and investigate crime against defendant’s right to avoid perpetual jeopardy for offenses committed in distant past, and the major purpose of statute of repose is to protect individuals from having to defend themselves against charges when basic facts may have become obscured by passage of time and to minimize danger of official punishment because of acts in far-distant past.

7. An alien may not be indicted for reentering United States after being arrested and deported more than five years after he entered or attempted to enter United States through official Immigration and Naturalization Service port of entry when immigration authorities have record of when he entered or attempted to enter, and if no record is possible because entry was surreptitious and not through official port of entry, alien is “found” when his presence is first noted by immigration authorities. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326; 18 U.S.C. § 3282.

**Tovar v. Immigration and Naturalization Service**, 612 F.2d 794 (3d Cir. 1980)

1. Relief in form of suspension of a deportation order is discretionary with Board of Immigration Appeals. Immigration and Nationality Act, §§ 242(b), 244(a)(1), 8 U.S.C. §§ 1252(b), 1254(a)(1).


3. An alien seeking suspension of deportation must show continuous physical presence within United States for at least seven years immediately preceding date of application for suspension of deportation, good moral character throughout period, and extreme hardship which would result from deportation of alien. Immigration and Nationality Act, §§ 242(b), 244(a)(1), 8 U.S.C. §§ 1252(b), 1254(a)(1).

4. In reviewing a deportation order, Court of Appeals is limited to consideration of administrative record upon which deportation order is based. Immigration and Nationality Act, §§ 106(a)(4), 244(a)(1), 8 U.S.C. §§ 1105a(a)(4), 1254(a)(1); 5 U.S.C. § 706.

5. Findings of Board of Immigration Appeals in deportation proceeding, if supported by reasonable, substantial, and probable evidence on record considered as a whole, are conclusive. Immigration and Nationality Act, §§ 106(a)(4), 244(a)(1), 8 U.S.C. §§ 1105a(a)(4), 1254(a)(1); 5 U.S.C. § 706.


7. Suspension provision permits Immigration and Naturalization Service to suspend deportation of an illegal alien after evaluating hardship that would result to a spouse, parent or child, if resulting hardship would be extreme. Immigration and Nationality Act, § 244(a), 8 U.S.C. § 1254(a).
8. Hardship to grandchild from deportation of alien should have been considered in determining whether alien was eligible for stay of deportation where alien’s relationship to grandchild closely resembled that of a parent to a child. Immigration and Nationality Act, § 244(a), 8 U.S.C. § 1254(a).

9. Same privilege that suspension provision affords to the nuclear family should be extended to a grandmother-headed family. Immigration and Nationality Act, § 244(a), 8 U.S.C. § 1254(a).

10. Immigration and Naturalization Service should make a fresh determination with knowledge that hardship to alien’s grandchild was legally relevant to deportation, where less than full evaluation of hardship may have been undertaken due to mistaken belief that legal standard in determining extreme hardship excluded consideration of hardship to grandchild. Immigration and Nationality Act, § 244(a), 8 U.S.C. § 1254(a).

Pistentis v. Immigration and Naturalization Service, 611 F.2d 483 (3d Cir. 1979)

1. Since implicit assumption of Immigration and Naturalization Service is that case law interpretation of an administrative regulation is as valid as administrative rule making even when the interpretation effects a substantial change in applicable standards, such logically requires that the Ko precept that a request for investor exemption from labor certification requirement filed prior to change in governing regulation may be decided under either current or previous regulation, whichever is more favorable to the alien, apply to case law precedent as well as to the investor regulation itself. Immigration and Nationality Act, § 212(a)(14), 8 U.S.C. § 1182(a)(14).

2. Cypriot national, who in 1976 applied for determination of his qualification under investor exemption from labor certification requirement and his whose application was denied in March of 1978, should have been accorded the law most favorable to him, be it precedent or regulation, when the Immigration and Naturalization Service examined his application for change of status from nonimmigrant student; request for exemption should be decided under either current or previous precepts, whichever was the more favorable to the alien. Immigration and Nationality Act, § 212(a)(14), 8 U.S.C. § 1182(a)(14).

3. Since Board of Immigration Appeals’ Ruangswang decision, which purported to restate the Heitland test for investor status, was read to be a substantial change in immigration board case law, Board’s application of Ruangswang’s standards to an application for investor status filed almost six months prior to that decision was improper. Immigration and Nationality Act, § 212(a)(14), 8 U.S.C. §§ 1182(a)(14).

4. Whether alien had established the requisite $10,000 investment should have been made at threshold of proceeding seeking change in status from nonimmigrant student to investor. Immigration and Nationality Act, § 212(a)(14), 8 U.S.C. §§ 1182(a)(14).

Bastidas v. Immigration and Naturalization Service, 609 F.2d 101 (3d Cir. 1979)

1. Where special inquiry officer’s determination of statutory ineligibility for suspension of deportation was made in course of hearing conducted pursuant to statute governing
proceedings to determine deportability, it was reviewable by Court of Appeals as final order of deportation under statute governing judicial review of orders of deportation. Immigration and Nationality Act, §§ 106, 242(b), 8 U.S.C. §§ 1105a, 1252(b).

2. Decision whether to suspend deportation of individual who satisfies statutory requirements is discretionary and can only be overturned for abuse of discretion; however, the determination whether individual has satisfied the statutory requirements in first place must be supported by reasonable, substantial, and probative evidence on record considered as whole, and under such standard of review, courts may not determine substantiality of evidence by looking solely to evidence which supports finding, but rather must take into account whatever in record fairly detracts from its weight. Immigration and Nationality Act, §§ 106(a), (a)(4), 244(a)(1), 8 U.S.C. §§ 1105a(a), (a)(4), 1254(a)(1).

3. Where father expresses deep affection for his child and where record in deportation proceedings demonstrates that his actions are consistent with and supportive of his expression of affection, a finding of no extreme hardship will not be affirmed by Court of Appeals unless reasons for such finding are made clear. Immigration and Nationality Act, § 244(a)(1), 8 U.S.C. § 1254(a)(1).

4. Where question of economic hardship was addressed in proceedings on application for suspension of deportation, but decision was silent as to non-economic, emotional hardship which would result from separation of the alien, who expressed deep affection for his child and who had been shown to have acted consistently with his expression of affection, from his young son, insufficient consideration was given to non-economic hardship which would result from the alien’s deportation, and thus remand was required. Immigration and Nationality Act, § 244(a)(1), 8 U.S.C. § 1254(a)(1).

*So Chun Chung v. U.S. Immigration and Naturalization Service*, 602 F.2d 608 (3d Cir. 1979)

1. Inasmuch as alien whose marriage to man who at time of ceremony was permanent resident of United States and who is now an American citizen was invalid because of prior unterminated marriage, alien was in United States illegally and was thus deportable. Immigration and Nationality Act, § 244(a)(1), 8 U.S.C. § 1254(a)(1).


3. When reviewing a petition under section of Immigration and Nationality Act authorizing the Attorney General to suspend deportation of alien and to adjust alien’s status to that of one legally admitted for permanent residence, the Immigration and Naturalization Service may consider several factors in adjudging hardship claim by petitioners, including financial position of a family but it is improper to consider alien’s former dependence on public assistance so as to deny petition. Immigration and Nationality Act, § 244(a)(1), 8 U.S.C. § 1254(a)(1).

4. Discretion given the Immigration and Naturalization Service under statute permitting it to suspend deportation of alien and to adjust alien’s status to that of one legally admitted for permanent residence is broad, but it is a discretion to determine what does or does not
constitute an extreme hardship to the applicant. Immigration and Nationality Act, § 244(a)(1), 8 U.S.C. § 1254(a)(1).

5. Where the Immigration and Nationality Service may have rejected petition seeking suspension of deportation, at least in part, because Service believed petitioner to have been a burden on public purse, case would be remanded to the board for reconsideration of extreme hardship issue. Immigration and Nationality Act, § 244(a)(1), 8 U.S.C. § 1254(a)(1).

6. The decision of the United States Immigration and Naturalization Service on petition for suspension of deportation of alien on hardship grounds will be overturned only if it is arbitrary, irrational or contrary to law. Immigration and Nationality Act, § 244(a)(1), 8 U.S.C. § 1254(a)(1).

*Suite v. Immigration and Naturalization Service*, 594 F.2d 972 (3d Cir. 1979)

Knowledge of charged falsity, namely, submission of a forged letter and a forged employment certification application to consular office on application for an immigrant visa, was sufficient to satisfy fraud and willfulness requirements of statute and, hence, to warrant deportation for procuring a visa or other documentation by fraud or willful misrepresentation of a material fact. Immigration and Nationality Act, §§ 212(a)(19), 241(a)(1), 8 U.S.C. §§ 1182(a)(19), 1251(a)(1).

*Lee v. Immigration and Naturalization Service*, 590 F.2d 497 (3d Cir. 1979)

1. Issue presented by encounter between criminal investigator with the Immigration and Naturalization Service and suspected illegal aliens was whether investigator’s stop and interrogation of aliens were reasonably related in scope to the justification for their initiation.

2. Criminal investigator with the Immigration and Naturalization Service acted upon reasonable suspicion in deciding to approach two persons for interrogation, in light of their conversation in Chinese, their mode of dress of type normally worn by kitchen help in restaurants, and their proximity to restaurant which was a known employer of illegal aliens in the past; further, in light of the nervousness of one of the persons and his attempt to walk away from the investigator, investigator adopted an appropriate “intermediate response” in asking such person to stop and making a direct inquiry about his status in the United States. Immigration and Nationality Act, § 287(a)(1), 8 U.S.C. § 1357(a)(1); U.S. Const. amend. IV.

3. Where investigator reasonably asked alien to stop and make inquiry about his status in the country, landing permit which alien thereupon voluntarily produced for inspection, as well as statements made prior to arrest, were admissible at deportation hearing.

*Smith v. Immigration and Naturalization Service*, 585 F.2d 600 (3d Cir. 1978)

1. Deportation proceeding is civil in nature, not criminal, and thus alien could be required to answer questions about his status and his right to remain in country, as long as answers would not subject him to criminal liability, and his responses could be used to prove deportability. U.S. Const. amends. IV, V.
2. Entire deportation proceeding could not be rendered invalid by allegedly illegal arrest of alien.

3. Because challenged evidence was not in fact introduced at deportation proceedings, issue as to whether alien was entitled to hearing on motion to suppress illegally seized evidence was moot.

Jacobe v. Immigration and Naturalization Service, 578 F.2d 42 (3d Cir. 1978)

1. On appeal from deportation order and other orders entered by the Board of Immigration, alien’s contention of error with respect to the denial of a relative visa petition filed on her behalf was moot, in view of fact that after appeal was taken, the Board of Immigration Appeals reversed the denial and remanded it to the agency.

2. Court of Appeals lacked jurisdiction to entertain alien’s attack on deportation proceeding, in view of fact that alien failed to exhaust administrative remedies by appealing deportation order to Board of Immigration Appeals. Immigration and Nationality Act, § 106(c), 8 U.S.C. § 1105a(c).

3. Board of Immigration did not abuse its discretion in denying alien’s motion to reopen deportation proceedings, in view of fact that immigrant visa was not immediately available to alien. Immigration and Nationality Act, § 245(a), 8 U.S.C. § 1255(a).

United States v. Helstoski, 576 F.2d 511 (3d Cir. 1978)

1. Since prosecution of defendant for violation of official bribery statute was a case potentially within appellate jurisdiction of the Court of Appeals, Court had jurisdiction to grant writ of mandamus sought by defendant to compel district court to dismiss indictment. 18 U.S.C. § 201(c)(1, 2).

2. A party seeking a writ of mandamus must have no other adequate means to attain the relief he seeks and must show that his right to issuance of writ is clear and undisputable in order to be entitled to writ.

3. Indictment charging former Congressman with conspiracy to violate official bribery statute by acting with others to solicit and obtain bribes from resident aliens in return for being influenced in performance of official acts to benefit those aliens did not violate speech or debate clause of Constitution since Government was not required to show any of the legislative acts for which Congressman allegedly accepted bribes in order to establish a prima facie case. U.S. Const. art. I, § 6, cl. 1; 18 U.S.C. § 201(c)(1, 2).

4. Since prima facie case for violation of official bribery statute could be established without any showing of legislative acts on part of defendant, district court’s order prohibiting the introduction by the Government of any evidence of past legislative acts did not modify proof of an essential element of offense from that found by grand jury so as to constitute a “constructive amendment” of indictment. 18 U.S.C. § 201(c)(1, 2).

5. Even though grand jury may have heard evidence in violation of speech or debate clause of
Constitution, district court possessed jurisdiction to try indictment against former Congressman for violations of official bribery statute returned by a competent grand jury. U.S. Const. art. I, § 6, cl. 1; 18 U.S.C. § 201(c)(1, 2).

6. An indictment returned by a legally constituted and unbiased jury, if valid on its face, is enough to call for a trial of the charge on the merits.

7. In prosecution for violations of official bribery statute, defendant was not entitled to extraordinary writ of mandamus to compel district court to dismiss indictment. 18 U.S.C. § 201(c)(1, 2).

8. District court’s order in prosecution for violations of official bribery statute, which had practical effect of preventing the Government from introducing evidence of defendant’s past legislative acts that it otherwise most certainly would have introduced at trial, was one “suppressing or excluding evidence” so as to give Court of Appeals jurisdiction to hear Government’s appeal from order. 18 U.S.C. §§ 201(c)(1, 2), 3731.


10. Speech or debate clause’s function as a protection for the legislative branch against encroachment by the executive and judicial branches precludes a finding of waiver of rights under clause in the context of a criminal prosecution except where the legislator expressly forfeits his protection under the clause for the purpose for which the Government seeks to use evidence of his legislative acts. U.S. Const. art. I, § 6, cl. 1.

11. Speech or debate clause is designed to protect the integrity of the legislative process and insure the independence of individual legislators by prohibiting the introduction into evidence of legislative acts. U.S. Const. art. I, § 6, cl. 1.

12. Legislator’s decision to testify and produce documents after receiving general warnings that he had the right to refuse to answer incriminating questions, and after receiving warnings that his statements were being recorded for possible use against him, did not constitute requisite express waiver to relinquish right under speech or debate clause to be free from inquiry into legislative acts. U.S. Const. art. I, § 6, cl. 1.

Musso v. Immigration and Naturalization Service, 574 F.2d 794 (3d Cir. 1978)

1. In deportation proceedings, alien has burden of proving time, place, and manner of his or her entry into United States. Immigration and Nationality Act, § 291, 8 U.S.C. § 1361.

2. Concomitant with alien’s burden in deportation proceedings of proving time, place and manner of his or her entry into United States is government’s responsibility to prove by clear, unequivocal, and convincing evidence that facts alleged as grounds for deportation are true. Immigration and Nationality Act, § 291, 8 U.S.C. § 1361.
3. Just as refusal to testify pursuant to Fifth Amendment privilege against self-incrimination is not persuasive of guilt, it is not persuasive of innocence. U.S. Const. amend. V.

4. Just as Court of Appeals could not consider alien’s refusal to testify in deportation proceedings in Court’s review of final order of deportation entered by Board of Immigration Appeals, Court of Appeals could not infer from alien’s silence presence of defense to Board’s final order. U.S. Const. amend. V.

5. When alien who is subject of deportation proceedings elects to assert Fifth Amendment privilege against self-incrimination and there is nothing in record to indicate that alien’s refusal to testify was ground for ultimate finding of deportability, Court of Appeals will not disturb final order of deportation. U.S. Const. amend. V.

Yang v. Immigration and Naturalization Service, 574 F.2d 171 (3d Cir. 1978)

1. Reviewing court should look with disfavor upon actions by a federal agency in violation of its own regulations.

2. Estoppel requires proof of affirmative misconduct on the part of the government.

3. Where many of the facts which would be significant in deciding claim of estoppel asserted by aliens were developed subsequent to their appeal to the Board of Immigration Appeals, and where possibility that the aliens might be within a particular policy of the INS as expressed in a memorandum dealing with rectifying errors which arose when the INS improperly advised many aliens that they could not simultaneously apply for a visa and for adjustment of status had not been fully and formally considered by the Service, Court of Appeals would remand to the Board to reopen the proceedings to consider the aliens’ claims.

Von Pervieux v. Immigration and Naturalization Service, 572 F.2d 114 (3d Cir. 1978)

1. Even if an alien is statutorily eligible for adjustment of status, the Board of Immigration Appeals is charged with deciding whether, in exercise of its discretion, it is appropriate to adjust his status; however, in exercising its discretion the Board is not beyond the pale of judicial review. Immigration and Nationality Act, § 245, 8 U.S.C. § 1255.

2. Judicial deference is due determination of administrative authorities in area of adjustment of an alien’s status; thus, absent sufficient reason to act otherwise, Court of Appeals was required to respect finding by Board of Immigration Appeals that petitioners, who went to United States as nonimmigrant visitors for pleasure and who sought to obtain status of permanent residents, had entered with a preconceived intent to remain permanently, in that they had sold their home in Argentina prior to entry and overstayed their visitors’ visas without explanation. Immigration and Nationality Act, § 245, 8 U.S.C. § 1255.

3. Denial of request to adjust status of aliens, who entered United States from Argentina as nonimmigrant visitors for pleasure, to that of permanent residents was not abuse of discretion in view of finding that they entered United States with a preconceived intent to remain permanently. Immigration and Nationality Act, § 245, 8 U.S.C. § 1255.
Martinez de Mendoza v. Immigration and Naturalization Service, 567 F.2d 1222 (3d Cir. 1977)


2. Court of Appeals, by treating appeal from deportation order of Immigration and Naturalization Service as application for leave to adduce additional evidence, had jurisdiction to review district director’s subsequent refusal to grant petition to stay deportation founded upon alleged threat to life of citizen child of alien where evidence that deportation would put both alien and daughter in danger of assault and possible homicide was “material” to decision to deport alien, and where, because such evidence did not become available until after board of appeals rendered its decision, reasonable grounds existed for not bringing such information to attention of Board of Immigration Appeals.

3. Where evidence that deportation would put both alien mother and citizen daughter in danger of assault and possible homicide was “material” to decision to deport alien, and where, because such evidence did not become available until after Board of Immigration Appeals rendered its decision, reasonable grounds existed for not bringing such information to attention of board, order of deportation would be stayed and case remanded to Immigration and Naturalization Service to receive such evidence. 28 U.S.C. §§ 2347, 2347(c); Immigration and Nationality Act, §§ 106, 243(h), 244(a)(1), 8 U.S.C. §§ 1105a, 1253(h), 1254(a)(1).

Jaen v. Immigration & Naturalization Service, 564 F.2d 155 (3d Cir. 1977)

Deportation order would not be set aside on ground that immigration judge had requested and received from State Department its opinion on alien’s request for political asylum, since alien was given ample opportunity to respond to State Department’s negative recommendation, and to make her own case for entitlement to political asylum.

Rogers v. Larson, 563 F.2d 617 (3d Cir. 1977)

1. Although power to regulate immigration is unquestionably exclusively federal power, regulation of immigration is not per se preempted by constitutional power.

2. Local statute will be preempted by federal law if Congress has unmistakably so ordained, or if nature of regulated subject matter permits no other conclusion but preemption, or if local law violates supremacy clause by standing as obstacle to accomplishment and execution of full purposes and objectives of Congress. U.S. Const. art. VI, cl. 2.

3. Test whereby local statute will be preempted by federal law if nature of regulated subject matter permits no other conclusion but preemption, means that preemption will occur where subject matter of federal and local laws is such that two laws or regulatory schemes must inherently either conflict or be duplicative; under such test it is impossible for there to be
local regulation in subject area that does not conflict with or duplicate federal regulation. U.S. Const. art. VI, cl. 2.

4. Test whereby local statute is preempted by federal law because it violates supremacy clause by standing as obstacle to accomplishment and execution of full purposes and objectives of Congress is applied when there is room in subject area for both federal and local regulation; such test requires court to examine both statutory schemes to determine if they can coexist or if they conflict. U.S. Const. art. VI, cl. 2.

5. Decision holding that Virgin Islands statutes requiring employers to pay back wages for violating Virgin Islands minimum wage and hour laws do not stand as obstacle to purposes of Immigration and Nationality Act does not mean that Virgin Islands statute requiring termination of alien’s employment when United States citizen or permanent resident alien who is qualified for same occupation is available does not stand as obstacle to purposes of Immigration and Nationality Act since, in context of preemption, each case must be decided on its own particular facts. U.S. Const. art. VI, cl. 2; amend. XIV; Immigration and Nationality Act, §§ 101 et seq., 214(a, c), 8 U.S.C. §§ 1101 et seq., 1184(a, c); 24 V.I.C. § 129, 129(a-f).

6. Virgin Islands statute requiring termination of alien’s employment whenever United States citizen or permanent resident alien qualified for same occupation is available constituted obstacle to accomplishment and execution of full purposes and objectives of Immigration and Nationality Act of providing employers reasonable expectation that there would not be frequent and disruptive turnovers in work force due to government action and of providing aliens with incentive to come to United States, and statute was therefore invalid under supremacy clause of United States Constitution. U.S. Const. art. VI, cl. 2; amend. XIV; Immigration and Nationality Act, § 101 et seq., 8 U.S.C. § 1101 et seq.; 24 V.I.C. § 129.

*Acosta v. Gaffney*, 558 F.2d 1153 (3d Cir. 1977)

1. District court had jurisdiction to review, at the instance of plaintiff aliens, the refusal of the Immigration and Naturalization Service to stay its order of deportation against plaintiff, where stay was sought on grounds other than invalidity of deportation order. 5 U.S.C. § 702; Immigration and Naturalization Act, §§ 101 et seq., 106, 279 as amended 8 U.S.C. §§ 1101 et seq., 1105a, 1329.


3. Citizen child of alien parents, who was not a party to agency deportation proceedings and intervention was not sought on her behalf in those proceedings, nonetheless had standing to join as a plaintiff in action brought by her alien parents for review of agency’s denial of stay of deportation of alien plaintiffs, where infant child alleged that as a United States citizen she had been subjected to a legal wrong by the order denying a stay of deportation of her parents in that the order would violate her constitutional rights to the equal protection of the laws and

4. Claim that alien husband and his alien wife would suffer economic hardship if husband were compelled to return to Colombia and could not find work there, as was likely in view of economic conditions in that country, even if proved, was not sufficient to establish such extreme hardship as would warrant stay of a valid order of deportation, and district director’s failure to act upon his authority, set forth in operating instructions manual, to grant a stay of deportation upon his own initiative did not constitute an abuse of discretion even though there may have existed appealing humanitarian factors which might support such action.

5. It is fundamental right of an American citizen to reside wherever he wishes, whether in the United States or abroad, and to engage in the consequent travel; it is the right to exercise a choice of residence, not an obligation to remain in one’s native country whether one so desires or not.

6. The right of an American citizen to fix and change his residence is a continuing one which he enjoys throughout his life.

7. Infant, citizen child was not entitled to a stay of her alien parents’ deportation order because that order, although admittedly valid as against them, would operate, if executed, to deny to her the right which she has as an American citizen to continue to reside in the United States.

8. Deportation order was valid insofar as it determined the status of alien parents but would have no effect upon infant, citizen child of alien parents after such child reaches years of discretion and can exercise the right of choice of residence.

Rucker v. Saxbe, 552 F.2d 998 (3d Cir. 1977)

1. Retention of citizenship provision requiring that persons born outside limits and jurisdiction of United States to parent citizen and parent alien must reside for a certain period within United States to retain citizenship applied despite plaintiff’s subjective unawareness of requirement, and plaintiff’s situation did not present excuse or hardship which might justify abrogation of requirement, where plaintiff did not undertake any rational inquiry, despite indication that he was aware of possible problems and was a man of some independence and ability. Immigration and Nationality Act, §§ 301(b), 360 as amended 8 U.S.C. §§ 1401(b), 1503; Act May 24, 1934, 48 Stat. 797 as amended.

2. Application of citizenship retention requirements to plaintiff, who was born abroad of one citizen parent, did not deny due process, although plaintiff did not have subjective knowledge of requirement, where plaintiff was not stateless, asserted no claim of hardship, and was presumably eligible to apply for naturalization. Immigration and Nationality Act, §§ 301(b), 360 as amended 8 U.S.C. §§ 1401(b), 1503; Act May 24, 1934, 48 Stat. 797 as amended; U.S. Const. amend. XIV.

3. Government has no affirmative duty to inform citizens residing abroad of changes in nationality laws on continuing basis and was not estopped from applying retention requirements to plaintiff who was born abroad of one citizen parent by reason of failure to
directly inform plaintiff of amendment to retention statute. Immigration and Nationality Act, §§ 301(b), 360 as amended 8 U.S.C. §§ 1401(b), 1503; Act May 24, 1934, 48 Stat. 797 as amended.

**Persaud v. Immigration and Naturalization Service**, 537 F.2d 776 (3d Cir. 1976)

1. Once alien qualifies under forgiveness clause in deportation statutes applicable to aliens excludable for procuring documentation or entry into the United States by fraud, he will not be deported. Immigration and Nationality Act, § 241(f), 8 U.S.C. § 1251(f).

2. Forgiveness clause of deportation statutes, applicable to alien who procured documentation or entry into United States by fraud, will not be available when its application would permit alien to avoid basis for deportation which is separate, independent and unrelated to fraud; however, forgiveness provision may not be circumvented when fraudulent acts alone form basis for deportation. Immigration and Nationality Act, § 241(f), 8 U.S.C. § 1251(f).

3. Alien was not deprived of benefit of forgiveness provision of deportation statutes by fact that, because he was excludable for having procured visa or other documentation by fraud, he was also excludable for not being in possession of valid documentation, which was ordinarily a separate, independent ground for deportation, to which forgiveness provision did not apply. Immigration and Nationality Act, §§ 212(a)(19, 20), 241(f), 8 U.S.C. §§ 1182(a)(19, 20), 1251(f).

**Brea-Garcia v. Immigration and Naturalization Service**, 531 F.2d 693 (3d Cir. 1976)

1. In absence of federal definition of “adultery,” that word, as used in statute permitting denial of deportable alien’s application for voluntary departure on ground that he has committed adultery and is therefore not of good moral character, must be construed with reference to state civil, not criminal, law. Immigration and Nationality Act, § 101(f)(2), 8 U.S.C. § 1101(f)(2).

2. Since deportation proceedings are civil, not criminal, in nature, decision to deport rather than to grant application for voluntary departure may be based upon considerations derived from civil law which do not rise to level of criminal offenses. Immigration and Nationality Act, § 101(f), 8 U.S.C. § 1101(f).

3. In view of precedent in related areas, Court of Appeals could not say that application of varying standards for determining whether alien has committed adultery and is therefore not of “good moral character,” for purposes of considering application for voluntary departure, was necessarily repugnant to federal scheme, and federal definition for “adultery” therefore would not be adopted. Immigration and Nationality Act, § 101(f), (f)(2, 4, 5, 7, 8), 8 U.S.C. § 1101(f), (f)(2, 4, 5, 7, 8); U.S. Const. amend. I.

4. Where deportable alien’s conduct in having sexual relations, while married, with unmarried woman, was neither isolated nor inconsequential, and viable marriage was apparently destroyed by such conduct, alien was guilty of “adultery” such that he was conclusively presumed to be person lacking in good moral character and would not be permitted to deport country voluntarily, and alien’s subsequent marriage to paramour, on such facts, did not erase
his prior adulterous relationship with its resulting birth out of wedlock. Immigration and Nationality Act, §§ 101(f), (f)(2-5, 7, 8), 106(a), 244(e), 8 U.S.C. §§ 1101(f), (f)(2-5, 7, 8), 1105a(a), 1254(e); N.J.S. 2A:88-1; U.S. Const. amend. I.

5. Since deportation of alien is civil proceeding, cruel and unusual punishment did not result when deportable alien was denied application for voluntary departure on ground that he had committed adultery and was therefore not of good moral character. Immigration and Nationality Act, §§ 101(f), (f)(2), 244(e), 8 U.S.C. §§ 1101(f), (f)(2), 1254(e).

Ribeiro v. Immigration and Naturalization Service, 531 F.2d 179 (3d Cir. 1976)


2. While evidence that alien was to receive modest sum of money for his part in attempt to bring three aliens into United States might suffice to support finding that alien acted “for gain” within contemplation of Immigration and Naturalization Act where record contained no evidence of offsetting expenses or losses, where $50 which alien was to be paid might have been reimbursement for expenses incurred by alien during round trip from New Jersey to Albany, government failed to establish by clear, unequivocal and convincing evidence that the alien had acted “for gain” and, therefore, deportation order was contrary to law. Immigration and Nationality Act, § 241(a)(13), 8 U.S.C. § 1251(a)(13).

Leung v. Immigration and Naturalization Service, 531 F.2d 166 (3d Cir. 1976)

1. Alien was not required to be put under oath before executing request for asylum where such procedure did not occur at end of deportation hearing. Immigration and Nationality Act, § 243(h), 8 U.S.C. § 1253(h).

2. Contention that Immigration and Naturalization Service failed to swear and examine alien under oath on occasion of request for asylum could not be raised for first time in proceedings to review decision of Board of Immigration Appeals not to reopen deportation hearing. Immigration and Nationality Act, §§ 106, 243(h), 8 U.S.C. §§ 1105a, 1253(h).

3. Proceedings for deportation of alien would be reopened where it appeared that Board of Immigration Appeals had not considered alien’s request for asylum, of which alien’s counsel had been unaware due to language problems. Immigration and Nationality Act, §§ 106, 243(h), 8 U.S.C. §§ 1105a, 1253(h).


Cisternas-Estay v. Immigration and Naturalization Service, 531 F.2d 155 (3d Cir. 1976)

1. Language of provision in regulations relating to organization of Board of Immigration Appeals, granting Board power to exercise such discretion and authority conferred upon
Attorney General by law as is appropriate and necessary for disposition of cases before it, is sufficient to allow division of Board into panels for hearing of cases.

2. When Board of Immigration Appeals sits in review of determinations under sections of Immigration and Naturalization Act ultimately relating to correctness of deportation under provision relating to adjustment of status of aliens, Board functions as integral part of such specialized procedures. Immigration and Nationality Act, §§ 212, 212(h), 242, 243, 243(h), 245, 8 U.S.C. §§ 1182, 1182(h), 1252, 1253, 1253(h), 1255.

3. Provisions of Administrative Procedure Act were not controlling during review by Board of Immigration Appeals of decision of immigration judge regarding adjustment of deportation status of aliens where provisions of Administrative Procedure Act were not controlling over proceedings before immigration judge. Immigration and Nationality Act, § 242, 8 U.S.C. § 1252; 5 U.S.C. § 500 et seq.

4. Board of Immigration Appeals did not abuse discretion by denying aliens’ request to withhold deportation on grounds that petitioners would be subject to persecution if deported to particular nation where it was not shown that there was clear probability that petitioners would be subject to persecution if deported to such nation. Immigration and Nationality Act, § 243(h), 8 U.S.C. § 1253(h).

5. Immigration and Naturalization Service, in making determination of adjustment of deportation status of certain aliens, did not abuse discretion by relying in part on letter from Office of Refugee and Migration Affairs of Department of State commenting on asylum requests of petitioners and others and noting that government from which asylum was sought had been removed from power, even though petitioners claimed that asylum was now being sought from succeeding regime, since it was reasonable for Service to assess validity of asylum request under both governments in that petitioners’ request hinged at one time or other on their opposition to both. Immigration and Nationality Act, § 243(h), 8 U.S.C. § 1253(h).

6. Court of Appeals does not sit as administrative agency and if counsel appealing decision of administrative agency wishes to preserve issue on appeal, he must raise it in proper administrative forum.

7. Language of amended regulation of Immigration and Naturalization Service authorizing Service to consider protocol defenses to deportation places burden on petitioning aliens to raise applicable protocol as defense to deportation.

_Giambanco v. Immigration and Naturalization Service_, 531 F.2d 141 (3d Cir. 1976)

1. Section of the Administrative Procedure Act requiring separation of adjudicative and prosecutorial functions does not apply to a proceeding before the Board of Immigration Appeals to consider a petition to adjust status and to waive a ground of excludability. 5 U.S.C. § 554(d); Immigration and Nationality Act, §§ 212(h), 242(b), 245, 8 U.S.C. §§ 1182(h), 1252(b), 1255.
2. Administrative Procedure Act did not apply to preclude from sitting as a member of the Board of Immigration Appeals, in considering a petition to adjust status and to waive a ground of excludability, attorney who was employed by the Immigration and Naturalization Service’s general counsel at the time of the case’s oral argument before the Board, but who was in no way involved with the case. 5 U.S.C. § 500 et seq.; Immigration and Nationality Act, §§ 212(a)(9), (h), 241(b)(2), 245, 8 U.S.C. §§ 1182(a)(9), (h), 1251(b)(2), 1255.

3. Where former attorney in the office of the Immigration and Naturalization Service’s general counsel, who sat on the Board of Immigration Appeals in defendant’s case, had not participated in the Service’s investigation in the instant case, there was no denial of due process.

4. Determination of district judge, who sentenced alien for fraud in connection with marriage found to be designed to defraud the United States to obtain a permanent residence visa, that such conviction should not be a cause for deportation superseded any discretionary determination by the Immigration and Naturalization Service, so that the Service could not take the conviction into account as a factor in its discretionary adjustment of status determination. Immigration and Nationality Act, §§ 241(a)(4), (b)(2), 245, 8 U.S.C. §§ 1251(a)(4), (b)(2), 1255.

_Bagamasbad v. Immigration and Naturalization Service_, 531 F.2d 111 (3d Cir. 1976)

1. The rule of review of final deportation orders obtains even where the challenge to the deportation order seeks review only of a denial of the adjustment of status. Immigration and Nationality Act, §§ 212, 245(a), 8 U.S.C. §§ 1182, 1255(a).

2. Intent of the 1958 and 1960 amendments to that provision of the Immigration and Nationality Act authorizing a status adjustment by the Attorney General was to provide a method for determining whether an alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, without the necessity of preexamination in the United States and subsequent physical departure to a foreign-based American consul to obtain a visa. Immigration and Nationality Act, § 245, 8 U.S.C. § 1255.

3. The statutory schema of Immigration and Nationality Act provision pertaining to status adjustment by the Attorney General requires a determination of eligibility as a prerequisite to any exercise of discretion by the Attorney General so that an alien, physically present in the United States, can avail himself of administrative and judicial review. Immigration and Nationality Act, §§ 245, 245(a), 8 U.S.C. §§ 1255, 1255(a).

_Naporano Metal & Iron Co. v. Secretary of Labor of United States_, 529 F.2d 537 (3d Cir. 1976)

1. Where employer, as result of Secretary of Labor’s denial of labor certification to alien employee, was required either to increase the employee’s wage or to forego the employee’s services, employer was “adversely affected or aggrieved” by Secretary’s action and, therefore, had standing under Administrative Procedure Act to seek judicial review of action. Immigration and Nationality Act, § 212(a)(14), (a)(14)(A, B), 8 U.S.C. § 1182(a)(14), (a)(14)(A, B); 28 U.S.C. § 1291; 5 U.S.C. §§ 701 et seq., 702.
2. Wage established under negotiated collective bargaining agreement and paid to aliens and nonalien workers alike could not, absent evidence impugning the agreement, be deemed to “adversely affect” the wages and working conditions of Americans similarly employed within meaning of Immigration and Nationality Act provision which prohibits an alien from performing skilled or unskilled labor unless Secretary of Labor has determined and certified that employment of such alien will not adversely affect wages and working conditions of similarly employed workers in the United States. Immigration and Nationality Act, §§ 101 et seq., 212(a)(14), 8 U.S.C. §§ 1101 et seq., 1182(a)(14).

3. Once having determined that alien is subject to negotiated collective bargaining agreement and receives no less than his nonalien coworkers, Secretary of Labor has legal duty under Immigration and Nationality Act to certify the alien, and such certification is not matter of discretion. Immigration and Nationality Act, §§ 101 et seq., 212(a)(14), 8 U.S.C. §§ 1101 et seq., 1182(a)(14).

4. Where alien was employed as welder and cutter of scrap metal at wage established by negotiated collective bargaining agreement between employer and union, Secretary of Labor acted improperly in denying the alien labor certification, notwithstanding fact that wage at which alien was employed was less than wage prevailing for United States workers similarly employed in the area of employment. Immigration and Nationality Act, §§ 101 et seq., 212(a)(14), 8 U.S.C. §§ 1101 et seq., 1182(a)(14).

5. Where complaint is predicated upon mandamus statute, plaintiff must allege and show that government owes him performance of a legal duty so plainly prescribed as to be free from doubt. 28 U.S.C. § 1361.

6. Where government official has taken action which is contrary to law and which is so plainly prohibited as to be free from doubt, action may be remedied by issuance of writ of mandamus. 28 U.S.C. § 1361.

7. Where Secretary of Labor had no remaining discretion to deny labor certification to alien based on fact that union wage which alien was paid fell below Secretary’s “prevailing wage” standard, and remand would be fruitless, mandamus would issue to require that Secretary exercise his statutory legal duty to certify alien. Immigration and Nationality Act, § 212(a)(14), 8 U.S.C. § 1182(a)(14); 28 U.S.C. § 1361.

_Cheng v. Immigration and Naturalization Service_, 521 F.2d 1351 (3d Cir. 1975)

Petitioner, native of mainland China, who fled to Hong Kong and then illegally entered United States, would not be deemed a subject of People’s Republic of China, deportable only to mainland (in which case he might claim political asylum) but could be ordered deported to Taiwan. Immigration and Nationality Act, § 243(a, h), 8 U.S.C. § 1253(a, h).

_Chlomos v. U.S. Dep’t of Justice, Immigration and Naturalization Service_, 516 F.2d 310 (3d Cir. 1975)
1. An order to show cause why alien should not be deported should contain a concise statement of the violation and a designation of charges against alien; such order is comparable to an indictment in criminal proceedings or a complaint in a civil action.

2. While venue is not clearly delineated in statute dealing with deportation of aliens, a hearing for deportation of alien would be appropriate in New Jersey and not in Florida where he was found by immigration officer, where New Jersey was alien’s permanent residence, witnesses were available in New Jersey, the alien’s opportunity to establish his cooperation with the government in criminal prosecution was there, and likelihood that alien’s lawyer who had detailed knowledge of circumstances could be present for a hearing in New Jersey. Immigration and Nationality Act, § 244, 8 U.S.C. § 1254.

3. An alien subjected to deportation proceeding is entitled to due process of law.

4. The Court of Appeals disapproves of administrative agency scheduling a hearing for a person who it knows is represented by counsel without giving reasonable notice to the lawyer; such conduct is unfair.

5. An order of deportation of 20-year-old alien who had retained counsel in New Jersey which was the alien’s permanent residence and who was apprehended in Florida for violation of probation would be vacated on ground that the deportation hearing was held despite the alien’s protest that he wished to consult with his counsel. Immigration and Nationality Act, §§ 242, 292, 8 U.S.C. §§ 1252, 1362.

*Petition of Yiu Nam Donn*, 512 F.2d 808 (3d Cir. 1975)

Alien who served actively in Korea after the Korean cease fire and who was on inactive duty during the Vietnamese conflict did not qualify for citizenship under section of Immigration and Nationality Act which allows citizenship to aliens who have served actively in the armed forces during specified periods of wartime or hostilities. Immigration and Nationality Act, § 329(a), 8 U.S.C. § 1440(a).

*DiMattina v. Immigration and Naturalization Service*, 506 F.2d 443 (3d Cir. 1974)

1. Review of a deportation order is a civil proceeding and, therefore, costs may be awarded in favor of the Immigration and Naturalization Service. Immigration and Nationality Act, § 106, 8 U.S.C. § 1105a; 28 U.S.C. § 2412.

2. In a proceeding to review a deportation order, the clerk may not tax as costs the expense of printing briefs or appendices. Immigration and Nationality Act, §§ 106, 106(a)(8), 8 U.S.C. §§ 1105a, 1105a(a)(8); 28 U.S.C. § 2412; Fed. R. App. P. Rules 28(g), 39(c), 28 U.S.C.

*Yu Fung Cheng v. Rinaldi*, 493 F.2d 1229 (3d Cir. 1974)

2. Article 32 of the Protocol provides in part that: ‘1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.’

3. The terms ‘lawfully in … (the) territory’ were intended to require that a refugee under the Protocol be in a country in compliance with the immigration laws of that country.

4. Where the appellant has had a deportation hearing at which he was found deportable, and has taken no appeal from the finding that he was unlawfully present, the judgment of the district court, granting summary judgment against an appellant seeking an injunction to restrain the defendant from deporting them on the ground that his denial of asylum was arbitrary, capricious and illegal, was properly affirmed.

*Biggin v. Immigration and Naturalization Service*, 479 F.2d 569 (3d Cir. 1973)

1. Scope of review of administrative proceeding is limited and restricted to question of whether the manner in which the deportation proceedings were conducted was arbitrary, capricious, or illegal.

2. Claim that denial of extension of temporary stay of deportation was based on erroneous factual information and that special inquiry officer deprived alien student of due process by denying offer to introduce evidence concerning civil suit in which alien student was attempting to reestablish his student status was rendered moot by district director’s subsequent stipulation that he would reopen deportation proceedings should student be successful in civil suit. Immigration and Nationality Act, §§ 101(a)(15)(F), 106, 241(a)(2), 242(b)(3) as amended 8 U.S.C. §§ 1101(a)(15)(F), 1105a, 1251(a)(2), 1252(b)(3).

3. Determination that alien was deportable for overstaying authorized time as nonimmigrant student, despite his claim that his failure to register as student resulted from conspiracy, was not an abuse of discretion and action of special inquiry officer in refusing to delay deportation was not arbitrary, capricious, or illegal. Immigration and Nationality Act, §§ 101(a)(15)(F), 106, 241(a)(2), 242(b)(3) as amended 8 U.S.C. §§ 1101(a)(15)(F), 1105a, 1251(a)(2), 1252(b)(3).

*Bufalino v. Immigration and Naturalization Service*, 473 F.2d 728 (3d Cir. 1973)

1. Where it was stipulated at deportation hearing that alien failed to file address reports each year, burden of persuasion shifted to alien to establish that failure to file was “reasonably excusable or was not willful.” Immigration and Nationality Act, §§ 241(a)(5), 265, 8 U.S.C. §§ 1251(a)(5), 1305.

2. Finding that alien’s failure to file address reports each year was not reasonably excusable or was willful and thus that alien was deportable on basis of such failure was warranted by reasonable, substantial and probative evidence. Immigration and Nationality Act, §§ 241(a)(5), 265, 8 U.S.C. §§ 1251(a)(5), 1305.

3. Though Court of Appeals may review judgments on motions to reopen deportation proceedings, right to appeal from order of deportation is extinguished when six-month period
expires and is not revived by proceedings on a motion to reopen. Immigration and Nationality Act, § 106(a)(1), 8 U.S.C. § 1105a(a)(1).

4. Petition for review could be construed as seeking reexamination of Board of Immigration Appeals’ denial of alien’s motion to reopen and reconsider deportation proceeding. Immigration and Nationality Act, § 106(a)(1), 8 U.S.C. § 1105a(a)(1).

5. Term “willful” within statute providing in effect that alien shall be deported if he fails to file address reports each year and if he does not establish that failure was reasonably excusable or was not willful does not require evil motive or bad purpose. Immigration and Nationality Act, § 241(a)(5), 8 U.S.C. § 1251(a)(5).

6. “Deportation statutes” are not penal in nature.

7. Denial by Board of Immigration Appeals of motion by alien, whose deportable offense of failure to file address reports each year had been proven, to reopen deportation proceeding was not abuse of discretion. Immigration and Nationality Act, §§ 241(a)(5), 265, 8 U.S.C. §§ 1251(a)(5), 1305.

8. Where prejudgment issue was neither placed before nor considered by Board of Immigration Appeals during proceedings on motion to reopen deportation proceeding, issue was not properly before Court of Appeals on review of denial of motion.

9. Deportation did not constitute cruel and unusual punishment.

10. Evidence failed to support alien’s contentions which were raised in supplemental motion to reopen deportation proceedings and which pertained to claim of improper electronic surveillance.

*Chan Yiu Fai v. INS*, 467 F.2d 907 (3d Cir. 1972)

Whether to reopen a deportation decision on ground of substantial new evidence, which was not and could not have been available at hearing allowed, is for discretion of the District Director and the Board of Immigration Appeals.

*Lam Chuen Ching v. Immigration and Naturalization Service*, 467 F.2d 644 (3d Cir. 1972)

There was no showing of abuse of discretion by Board of Immigration Appeal in refusing to reopen deportation of alien who had illegally entered country and had not voluntarily left country more than four years previously in accordance with his then request for a voluntary departure.

*In re Blasko*, 466 F.2d 1340 (3d Cir. 1972)

1. District court finding, preceded by a like finding of the Immigration and Naturalization Service, that petitioner could not be naturalized for failure to comply with the writing requirement of the Immigration and Nationality Act, providing that a person seeking naturalization must demonstrate an understanding of the English language including an
ability to write words in ordinary usage in the English language, was not clearly erroneous. Immigration and Nationality Act, § 312(1), 8 U.S.C. § 1423(1).

2. Congress did not intend to include age within the “physically unable” exception of Immigration and Nationality Act section in part providing that no person shall be naturalized who cannot demonstrate an understanding of the English language, provided that “this requirement shall not apply to any person physically unable to comply therewith, if otherwise qualified to be naturalized, or to any person who, on the effective date of this chapter, is over fifty years of age and has been living in the United States for periods totaling at least twenty years”; rather, “physically unable” is limited to such disabilities as deafness or blindness. Immigration and Nationality Act, § 312(1), 8 U.S.C. § 1423(1).

Strantzalis v. Immigration and Naturalization Service, 465 F.2d 1016 (3d Cir. 1972)

1. Right of voluntary departure, rather than deportation, allows an alien to select his own destination and facilitates possibility of his return to the United States. Immigration and Nationality Act, § 244(e), 8 U.S.C. § 1254(e).

2. Attorney General’s exercise of discretion to permit an alien facing deportation to depart voluntarily may not be exercised arbitrarily or capriciously. Immigration and Nationality Act, § 244(e), 8 U.S.C. § 1254(e).

3. Meeting of minimum prerequisites for voluntary departure in lieu of deportation does not mandate such relief, since deportation can still be ordered when deemed appropriate on other grounds. Immigration and Nationality Act, § 244(e), 8 U.S.C. § 1254(e).

4. When an alien is informed of his right to retain private counsel and the alien decides to proceed with deportation hearing on his own, he has waived any right to have counsel present. Immigration and Nationality Act, § 292, 8 U.S.C. § 1362.

5. An alien is not entitled to the same rights against self-incrimination and right to counsel as a criminal.


7. Self-incriminatory statements taken from alien at original deportation hearing were admissible in reopened second hearing where alien has been informed of and declined assistance of counsel at original hearing and failed to show that admissions were inaccurate or based on misunderstood translations.


9. An alien cannot be heard to object to introduction of evidence at a deportation hearing unless it makes the proceeding unfair.

Intercontinental Placement Service, Inc. v. Shultz, 461 F.2d 222 (3d Cir. 1972)
Employment agency which located employment for entering aliens lacked standing to contest Secretary's temporary suspension of precertification list permitting admission of aliens only as Secretary determined that there was specific labor shortage of given skill at place to which alien was destined and that alien's employment would not adversely affect wages and working conditions of United States' workers similarly employed. Immigration and Nationality Act, § 212(a)(14), 8 U.S.C. § 1182(a)(14).

Riva v. Mitchell, 460 F.2d 1121 (3d Cir. 1972)

1. Alien who obtained permanent resident status and thereafter left country to return in nonimmigrant status which would enable him to gain draft exemption was alien who departed from United States to evade military service in armed forces of United States and was inadmissible. Immigration and Nationality Act, § 212(a)(22), 8 U.S.C. § 1182(a)(22).

2. Aliens who are ineligible for citizenship are excluded under statute from admission as permanent residents.

3. In enacting statutes making aliens who have lawfully obtained relief from military service ineligible for citizenship and making aliens who have departed United States to avoid or evade service in armed forces inadmissible, intention of Congress was to see that once alien faced induction into armed services he would have to choose between either maintaining permanently his status as alien or serving in armed forces and securing right to become citizen and permanent resident. Immigration and Nationality Act, §§ 212(a)(22), 315, 8 U.S.C. §§ 1182(a)(22), 1426.

4. Even when alien returns to United States and serves in armed forces, he may still be excludable if he left country to avoid military service. Immigration and Nationality Act, § 212(a)(22), 8 U.S.C. § 1182(a)(22).

United States v. Kwun, 456 F.2d 1031 (3d Cir. 1972)

Alien seaman who was smuggled into United States after being once deported was subject to deportation. Immigration and Nationality Act, §§ 101(g), 276, 8 U.S.C. §§ 1101(g), 1326.

La Franca v. Immigration and Naturalization Service, 455 F.2d 517 (3d Cir. 1972)

The petition for review is entirely without merit and counsel for the petitioner should not have submitted it to this court. Accordingly, the petition will be dismissed as frivolous and copies of this opinion and of the order of dismissal shall be dispatched to the parties forthwith.

United States v. Glantzman, 447 F.2d 199 (3d Cir. 1971)

1. In prosecution for falsifying government documents, evidence was insufficient to sustain conviction of defendant who was owner of employment agency and who categorically denied that he had personal knowledge of false information contained in forms furnished Department of Labor and Immigration and Naturalization Service and processed by employment agency in behalf of three aliens. 18 U.S.C. §§ 2, 1001.
2. In prosecution for falsifying government documents, evidence sustained conviction of defendant, who was head of employment agency’s unskilled labor department and who interviewed at least two of the three aliens for whom forms containing false information were processed by the agency and furnished to Department of Labor and Immigration and Naturalization Service, as aider and abettor under four counts involving those two aliens but did not sustain his conviction on remaining two counts relating to a third alien. 18 U.S.C. §§ 2, 1001.

United States v. Ryba, 441 F.2d 1137 (3d Cir. 1971)

Where alien, who was admitted to United States as an immigrant privileged to remain permanently and who filed with board a questionnaire which specified that he was an alien admitted for permanent residence, attempted, after he had been indicted for failure to report for induction, to seek election, granted by statute to alien who has not been admitted for permanent residence, to be relieved from liability for service in armed forces, board properly declined to grant any relief as it had adequate basis to subject to induction the alien who had not attempted to follow prescribed statutory procedure. Immigration and Nationality Act, §§ 101(a)(20), 247, 8 U.S.C. §§ 1101(a)(20), 1257; Military Selective Service Act of 1967, § 4(a), 50 U.S.C. App. § 454(a).

Ameeriari v. Immigration and Naturalization Service, 438 F.2d 1028 (3d Cir. 1971)

1. Adjustment of status from nonimmigrant to permanent resident is matter of administrative grace, not mere statutory eligibility. Immigration and Nationality Act, § 245, 8 U.S.C. § 1255.

2. Adjustment of status from nonimmigrant to permanent resident should be granted only in meritorious cases. Immigration and Nationality Act, § 245, 8 U.S.C. § 1255.

3. In determining whether to give adjustment of status from nonimmigrant to permanent resident, Attorney General, or his delegate, may consider whether applicant entered United States with prefixed intent to remain. Immigration and Nationality Act, § 245, 8 U.S.C. § 1255.

4. Absent administrative error, any alien who arrives in United States with fixed intention to remain permanently has misrepresented his intention to immigration authorities and thus, on application for adjustment of status from nonimmigrant to permanent resident, presents weak case for favorable exercise of Attorney General’s discretion to grant adjustment. Immigration and Nationality Act, § 245, 8 U.S.C. § 1255.

5. Where alien entered United States on visitor’s pleasure visa with preconceived intention of bypassing normal consular procedures for obtaining permanent residence, special inquiry officer and Board of Immigration Appeals did not abuse their discretion in denying adjustment of status from nonimmigrant to permanent resident. Immigration and Nationality Act, § 245, 8 U.S.C. § 1255.

Calvo-Ahumada v. Rinaldi, 435 F.2d 544 (3d Cir. 1970)
Deportation was required where alien within five years of entry was convicted for making a false statement under oath in an application for permanent residence, a crime involving moral turpitude, and was sentenced to confinement for a year or more, even though sentence was suspended. Immigration and Nationality Act, § 241(a)(5), 8 U.S.C. § 1251(a)(5); 18 U.S.C. § 1546.

*Wong Pak Yan v. Rinaldi*, 429 F.2d 151 (3d Cir. 1970)

1. Statute giving refugees from Communism a preference in form of conditional entry into United States and providing that certain immigrant visas may be made available to such aliens who have been continuously physically present in United States for period of at least two years prior to application for adjustment of status provides for immigration of refugees and does not define any new method of adjustment of status. Immigration and Nationality Act, § 203(a)(7) as amended 8 U.S.C. § 1153(a)(7).

2. Statute giving refugees from Communism a preference in form of conditional entry into United States was intended to make conditional entries available to refugees who apply for them in certain foreign countries and to authorize issuance of immigration visas “in lieu of conditional entries of a like number” to refugees previously admitted on conditional entries, who have been continuously present in United States for two years and whose status has been adjusted to that of alien lawfully admitted for permanent residence. Immigration and Nationality Act, § 203(a)(7) as amended 8 U.S.C. § 1153(a)(7).

3. Immigration regulation relating to adjustment of status and to refugees from Communism merely makes clear the interacting relationship of statute relating to refugees from Communism and statute providing authority for adjustment of status; in so doing, regulation carries out intent of Congress in enacting proviso of first-mentioned statute and is not invalid. Immigration and Nationality Act, §§ 203(a)(7), 245 as amended 8 U.S.C. §§ 1153(a)(7), 1255.

4. Under statute providing for adjustment of status of alien other than an alien crewman, applications of alien crewmen for reclassification as refugees and for admission for permanent residence as refugees from Communism were properly denied. Immigration and Nationality Act, §§ 203(a)(7), 245(a) as amended 8 U.S.C. §§ 1153(a)(7), 1255(a).

*Lau, Wun Man v. INS*, 426 F.2d 689 (3d Cir. 1970)

1. Immigration and Naturalization Service’s grant to deportable alien of a second opportunity to depart voluntarily is highly discretionary and ordinarily appropriate only when satisfactory reasons are given for failure to depart in accordance with terms of the initial grant.

2. Even if estoppel could arise from alleged practice of Immigration and Naturalization Service of giving deportable alien a second opportunity to depart voluntarily, alien would have to show that he remained in country illegally after being initially granted privilege of departing voluntarily in reliance on the alleged practice.

*Yeung Ying Cheung v. Immigration and Naturalization Service*, 422 F.2d 43 (3d Cir. 1970)
1. Where Special Inquiry Officer’s remark as to disturbed political conditions in Hong Kong was very general and alien failed to offer any evidence to support his request to Board to remand case for introduction of evidence relative to political situation in Hong Kong, Board which took notice of improved conditions in Hong Kong was fully justified in refusing to remand matter. Immigration and Nationality Act, §§ 244(a)(1), (f), 252(a), 8 U.S.C. §§ 1254(a)(1), (f), 1282(a).

2. Finding that alien may be eligible for consideration of suspension of deportation and adjustment of his status for permanent residence does not mean that application should be automatically granted. Immigration and Nationality Act, §§ 244(a)(1), (f), 252(a), 8 U.S.C. §§ 1254(a)(1), (f), 1282(a).

3. Refusal of suspension of deportation and adjustment of status for permanent residence of citizen of Republic of China who deserted ship and resided in United States for many years and was working as cook at salary of $70 per week was not an abuse of discretion. Immigration and Nationality Act, §§ 106, 244(a)(1), (f), 252(a), 8 U.S.C. §§ 1105a, 1254(a)(1), (f), 1282(a).

4. Difference in economic standards which exist between United States and other countries cannot be held to command exercise of favorable discretion to suspend deportation. Immigration and Nationality Act, §§ 244(a)(1), (f), 252(a), 8 U.S.C. §§ 1254(a)(1), (f), 1282(a).

**Kerkai v. Immigration and Naturalization Service**, 418 F.2d 217 (3d Cir. 1969)

Denial of discretionary relief of stay of deportation of alien was not arbitrary, capricious, or abuse of discretion, where Board of Immigration Appeals found that alien, a native of Hungary, had not been and probably would not be persecuted for religious beliefs, that possible arrest in Hungary for overstaying authorized time in United States was not basis for granting relief, and that she had not shown that she would be excluded from all means of employment. Immigration and Nationality Act, § 243(h), 8 U.S.C. § 1253(h).

**Dibadj v. Immigration and Naturalization Service**, 411 F.2d 983 (3d Cir. 1969)

1. Alien, who was granted several extensions for completion of medical training after his five-year limit as an exchange visitor had expired but was denied a further extension of time and had not obtained a waiver of a two-year foreign residence requirement of exchange visitors for status as aliens for permanent residence, was properly deported under the applicable law.

2. Where application for recommendation of waiver of the two-year foreign service residence condition was not made to the Waiver Board of the Department of Health, Education and Welfare until after the deportation proceedings had been completed and denial of waiver occurred after petition for review of deportation proceeding had been filed in Court of Appeals, denial of waiver was not within jurisdiction of court to pass upon.

**Cheng Ho Mui v. Rinaldi**, 408 F.2d 28 (3d Cir. 1969)
1. Regulation dealing with conditional entries was not invalid for failure to list the United States as a non-Communist or non-Communist dominated country where application may be made. Immigration and Nationality Act, § 203(a)(7) as amended 8 U.S.C. § 1153(a)(7).

2. Regulation dealing with conditional entries was not invalid for failure to designate an officer in Far East to whom Chinese National could have applied for relief after escaping from China. Immigration and Nationality Act, § 203(a)(7) as amended 8 U.S.C. § 1153(a)(7).

3. Alien crewmen, even if they were permitted valid, conditional entry into the United States, would be precluded from filing for a subsequent adjustment of status under Immigration and Nationality Act. Immigration and Nationality Act, §§ 203(a)(7), 245 as amended 8 U.S.C. §§ 1153(a)(7), 1255.

*United States v. McAllister*, 395 F.2d 852 (3d Cir. 1968)

Although no reversible error occurred at trial in which defendant’s deportation was ordered, it was appropriate in view of record strongly indicating that defendant had been rehabilitated for the authorities to make further inquiry to end that, if justified, defendant’s deportation at least be stayed during his good behavior.

*In re Kosberg*, 390 F.2d 198 (3d Cir. 1968)

Denial of naturalization petition of alien who had claimed exemption from military service by reason of his alienage was justified over objection that petioner had been misled and prevented from making a knowing and intelligent election. Immigration and Nationality Act, § 315, 8 U.S.C. § 1426; Universal Military Training and Service Act, § 4(a), 50 U.S.C. App. § 454(a).

*Rodrigues v. Immigration and Naturalization Service*, 389 F.2d 129 (3d Cir. 1968)


2. No deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true. Immigration and Nationality Act, § 241(a)(2), 8 U.S.C. § 1251(a)(2).

3. A deportation order predicated on a rescission order which held the government burden to have been met when the ground of deportation was established by reasonable, substantial, and probative evidence was not proper. Immigration and Nationality Act, § 241(a)(2), 8 U.S.C. § 1251(a)(2).

4. Decision as to whether government has established ground of deportation by clear, unequivocal and convincing evidence that the facts alleged as ground for deportation are true is solely the province of the special inquiry officer. Immigration and Nationality Act, §§ 106(a)(4), 242(b), 8 U.S.C. §§ 1105a(a)(4), 1252(b).
5. Evidence of criminal conviction of alien who had been admitted for permanent residence was admissible at hearing resulting in rescission order, although conviction was then being appealed and so was not a final judgment. Immigration and Nationality Act, §§ 241(a)(2), 242(b), 8 U.S.C. §§ 1251(a)(2), 1252(b).

Cheng Fan Kwok v. Immigration and Naturalization Service, 381 F.2d 542 (3d Cir. 1967)

1. Neither Congress by enacting section of Immigration and Nationality Act conferring jurisdiction on courts of appeals to review orders of deportation and exclusion nor United States Supreme Court by construing that section liberally intended that all administrative decisions affecting deportation of an alien should be reviewable directly and exclusively in courts of appeals. Immigration and Nationality Act, § 106(a), 8 U.S.C. § 1105a(a).

2. Court of Appeals had no jurisdiction to review decisions of District Director of Immigration and Naturalization Service denying applications of citizens of China, who had entered the United States as crewmen, for stays of deportation pending disposition of their applications for adjustment of status pursuant to the Immigration and Nationality Act. Immigration and Nationality Act, §§ 106(a), 203(a)(7), 252(a), 8 U.S.C. §§ 1105a(a), 1153(a)(7), 1282(a).

In re Haniatakis, 376 F.2d 728 (3d Cir. 1967)

1. Where alien’s false answers in written application and petition for naturalization were repeated as oral testimony at preliminary investigation, they were within statute making “false testimony” conclusive proof of lack of good moral character necessary for naturalization. Immigration and Nationality Act, §§ 101(f), 316(a)(3), 8 U.S.C. §§ 1101(f), 1427(a)(3).

2. Having asked a question which it deems significant to determine the qualifications of one seeking citizenship, the government is entitled to full disclosure. Immigration and Nationality Act, §§ 101(f), 316(a)(3), 8 U.S.C. §§ 1101(f), 1427(a),(3).

3. Alien’s false testimony concerning her marital status established her lack of good moral character, precluding naturalization, notwithstanding claim that such question was immaterial since her marriage to another alien would not have affected her application. Immigration and Nationality Act, §§ 101(f), 316(a)(3), 8 U.S.C. §§ 1101(f), 1427(a)(3).

Ah Chiu Pang v. Immigration and Naturalization Service, 368 F.2d 637 (3d Cir. 1966)

1. Testimony of investigator of Immigration and Naturalization Service in deportation proceeding as to making signing, and verifying of statement by alien, together with evidence by interpreter of his regular routine in all cases, gave ample authentication to alien’s statement under flexible rules regarding admission of evidence before administrative tribunals in deportation proceedings.

2. Where government showed in deportation proceeding that alleged alien was an alien, burden shifted to alien to justify his presence in United States. Immigration and Nationality Act, §§ 106, 241(a)(2), 291, 8 U.S.C. §§ 1105a, 1251(a)(2), 1361.

4. Alien could not challenge constitutionality of order of deportation on ground that when he was apprehended he was not afforded benefit of counsel and notification of his constitutional rights as required in criminal cases, since aliens in deportation proceedings are not entitled to same immunities to be accorded defendants in criminal cases.

5. Where deportation proceeding was reopened to choose alternate country to which to deport alien because Republic of China refused to receive him, and Special Inquiry Officer read into record information contained in seaman’s discharge book disclosing departure of alien from Hong Kong and other details, substantial amount of which coincided with information given by alien’s statement received in evidence at main hearing, and Special Inquiry Officer directed that Hong Kong be named as alternate country for deportation, alien was accorded full and fair hearing at reopened proceeding. Immigration and Nationality Act, §§ 106, 241(a)(2), 291, 8 U.S.C. §§ 1105a, 1251(a)(2), 1361.

**Chang v. Immigration and Naturalization Service, 358 F.2d 699 (3d Cir. 1966)**

Special inquiry officer of Immigration and Naturalization Service has authority to alternatively specify country, in event person found to be deportable fails to depart voluntarily within time required to country named by him, to which person shall be deported. Immigration and Nationality Act, § 243, 8 U.S.C. § 1253.

**Lopez v. U.S. Dep’t of Justice, Immigration and Naturalization Service, 356 F.2d 986 (3d Cir. 1966)**

1. A petition to review an order of deportation filed more than two years after that order became final exceeds the statutory of the Court of Appeals, but is considered as one for review of a motion to reconsider filed denied less than six months before the petition for review was filed.

2. As nothing was presented or urged by the petitioner in support of his motion for reconsideration that was not known and available to him at the hearing which resulted in the order of deportation, the denial of reconsideration was not an abuse of discretion.

**Clegg v. District Director of Immigration and Naturalization Service, 344 F.2d 962 (3d Cir. 1965)**

This appeal, while zealously argued on behalf of appellant, is completely devoid of merit. The judgment of the district court will be affirmed.

**Junco v. Immigration and Naturalization Service, 343 F.2d 474 (3d Cir. 1965)**

The decision of the administrative agency that petitioner should be deported was based on reasonable, substantial and probative evidence; it was neither arbitrary, capricious nor

*Coughlin v. Ryder*, 341 F.2d 291 (3d Cir. 1965)

Federal District Court was without jurisdiction to entertain action by discharged employee for reinstatement to his former position of general investigator for Immigration and Naturalization Service with back pay, where discharged employee failed to join members of the Civil Service Commission who were indispensable parties. 28 U.S.C. § 1391(e, f); Fed. R. Civ. P. 28 U.S.C.

*Scalzo v. Hurney*, 338 F.2d 339 (3d Cir. 1964)

1. Deposition of husband of petitioner, who was seeking declaration that order of deportation entered against her was invalid, should not have been filed without leave of court and must be stricken from record, where it was taken over objection of district director and no order granting authority to file it was shown.

2. Only record of administrative proceeding itself is pertinent and relevant in proceeding for declaration that order of deportation is invalid.

*United States v. Riela*, 337 F.2d 986 (3d Cir. 1964)

1. Burden rests on government in denaturalization action to prove its charges by clear, unequivocal and convincing evidence which does not leave issue in doubt, and burden is substantially identical with that required in criminal cases, which is proof beyond reasonable doubt. Immigration and Nationality Act, § 340(a), 8 U.S.C. § 1451(a).

2. Evidence of government in denaturalization action that defendant in response to pertinent questions contained in various documents gave answers that were knowingly false would not satisfy requirements as to government’s burden of proof in absence of further evidence that answers were material. Immigration and Nationality Act, § 340(a), 8 U.S.C. § 1451(a).

3. False answers given by defendant in response to pertinent questions contained in various documents were material, so that government could prevail in denaturalization action, if answers resulted in suppression of facts which, if known, would have warranted denial of citizenship. Immigration and Nationality Act, § 340(a), 8 U.S.C. § 1451(a).

4. Where alien entered United States as stowaway in violation of law, his subsequent presence in the United States was unlawful, and when he thereafter filed his petition for citizenship he lacked permanent legal residence requisite for naturalization. Act March 2, 1929, § 4, 45 Stat. 1513.

5. Where defendant, who entered United States as stowaway in violation of law, gave false answers to pertinent questions with willful intent to deceive in connection with his petition for citizenship, and answers resulted in suppression of facts which, if known, would have barred naturalization of defendant because of his obvious failure to meet statutory requirements, certificate of naturalization was properly cancelled in denaturalization action.

United States v. Bowles, 331 F.2d 742 (3d Cir. 1964)

1. Matter attached to notice of appeal filed in Court of Appeals could not be treated as part of record where it had not been before lower court.

2. Statements made by counsel in their briefs on appeal could not be treated as evidence.

3. Alien charged with being found in United States after having been previously arrested and deported was not collaterally estopped from attacking deportations shown in indictment where it did not appear that United States district court in prior habeas corpus proceeding had passed upon issue of entry. Immigration and Nationality Act §§ 101(a)(13), 212(a)(17), 241(a)(1), 8 U.S.C. §§ 1101(a)(13), 1182(a)(17), 1251(a)(1).

4. Burden was upon government to demonstrate that alien charged with being found in United States after he had been previously arrested and deported was collaterally estopped from attacking any of deportations shown in indictment. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326.

5. Assuming that collateral estoppel may arise in certain circumstances against defendant, for doctrine to be applicable, disputed issue must be shown to have been actually adjudicated.

6. “Deported” within statute prohibiting re-entry of alien who has been arrested and deported means deported according to law. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326.

7. Statute imposing penalties for re-entry of alien after he had been arrested and deported need not be treated like a broad arrow statute; it was not sufficient to show simply that alien was deported, and it must be shown that he was deported according to law. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326.

8. Order of deportation may be attacked in criminal proceeding on ground that there is no basis of fact for board’s conclusion in respect to deportability or that there is no warrant in law for issuance of deportation order. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326.

9. When court finds basis for Board’s order of deportation, question of preponderance of evidence is not for trial anew and is not relevant to issue of guilt of accused for disobedience of order. Immigration and Nationality Act, §§ 212(a)(17), 241(a)(1), 8 U.S.C. §§ 1182(a)(17), 1251(a)(1).

10. Whether there is warrant in law for issuance of deportation order is for court. Immigration and Nationality Act, § 276, 8 U.S.C. § 1326.

DeLuria v. U.S. Dep’t of Justice, Immigration and Naturalization Service, 325 F.2d 718 (3d Cir. 1963)
Court lacked power to grant mandamus compelling Immigration and Naturalization Service to take custody of petitioner confined in state prison under valid sentence, although State Parole Board approved parole on condition that petitioner be deported, and petitioner had previously been found to be deportable by Service, where Service had been unable to obtain travel document for petitioner from foreign consul who refused to issue one because parole was only for purpose of deportation.

*Scalzo v. Hurney*, 314 F.2d 675 (3d Cir. 1963)

Court of Appeals was without jurisdiction of a petition for review of an order of deportation entered by the Board of Immigration Appeals where alien challenged order only in so far as she sought review of board’s refusal to adjust her status to that of a permanent resident under the Immigration and Nationality Act, such determination being collateral to the order of deportation and not initially reviewable in the Court of Appeals. Immigration and Nationality Act, § 106 as added in 1961, § 245 as amended 8 U.S.C. §§ 1105a, 1255.

*Lam Man Chi v. Bouchard*, 314 F.2d 664 (3d Cir. 1963)

1. An administrative order must be “final” in order to be subject to judicial review.

2. Whether an administrative order is “final” for purposes of appeal must be ascertained by a realistic appraisal of the consequences of such action.

3. Administrative orders are reviewable ordinarily when they impose an obligation as a consummation of the administrative process. Administrative Procedure Act, § 10, 5 U.S.C. § 1009.

4. Determination by Immigration and Naturalization Service of the place to which an alien is deportable is “final agency action” under section of Administrative Procedure Act concerning review of agency action. Administrative Procedure Act, § 10(c), 5 U.S.C. § 1009(c); Immigration and Nationality Act, § 243, 8 U.S.C. § 1253.

5. Determination of place to which an alien is deportable is a final order or direction consummating deportation within contemplation of statute providing for judicial review of all “final orders” of deportation. Immigration and Nationality Act, § 106(a) as added in 1961, 8 U.S.C. § 1105a(a).

6. Purpose of 1961 Amendment to Immigration and Nationality Act of 1952 was to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens, and to make review by Court of Appeals the sole and exclusive procedure for judicial review of orders of deportation. Immigration and Nationality Act, § 106 as added in 1961, 8 U.S.C. § 1105a.

7. District court had jurisdiction to entertain an action by aliens challenging their deportation to Hong Kong without a prior determination by Immigration Service as to whether Communist China would receive them. Immigration and Nationality Act, § 106(a) as added in 1961 and §§ 242(b), 279, 8 U.S.C. § 1105a(a) and §§ 1252(b), 1329; Administrative Procedure Act, § 10, 5 U.S.C. § 1009.

9. Court of Appeals is not authorized to make findings of fact or to apply the law in the first instance in proceedings involving the deportation of aliens.

Sawkow v. Immigration and Naturalization Service, 314 F.2d 34 (3d Cir. 1963)

1. Where state court vacated alien’s plea of non vult to criminal charge and judgment of conviction and dismissed indictment, original judgment of conviction was a nullity and his subsequent conviction of same charge on another indictment, with recommendation that alien not be deported, could not be used as foundation for deportation of alien as one who had been convicted of two crimes involving moral turpitude. Immigration and Nationality Act, § 241(a)(4), 8 U.S.C. § 1251(a)(4); R.R.N.J. 3:7-10(a).

2. Finding of Board of Immigration Appeal that alien’s convictions for receipt of stolen automobile and for theft of automobile on following day did not arise out of a single scheme of criminal misconduct within statute making alien subject to deportation if subsequent to entry into country, he has been convicted of two crimes involving moral turpitude not arising out of single scheme of criminal misconduct, was not supported by substantial evidence. Immigration and Nationality Act, § 241(a)(4), 8 U.S.C. § 1251(a)(4).

3. Any doubt in interpretation of statute providing for deportation of alien who, since entry into country, has been convicted of two crimes involving moral turpitude must be resolved in favor of alien. Immigration and Nationality Act, § 241(a)(4), 8 U.S.C. § 1251(a)(4).

4. Immigration and Naturalization Service seeking to deport alien on ground that he had, since entry into country, been convicted of two crimes involving moral turpitude had burden to show that two crimes of which he was convicted did not arise out of single course of criminal misconduct and that alien was convicted of two crimes. Immigration and Nationality Act, § 241(a)(4), 8 U.S.C. § 1251(a)(4).

5. Test of substantial evidence to support finding is not met by evidence which gives equal support to inconsistent inferences.

Field v. Immigration and Naturalization Service, 313 F.2d 743 (3d Cir. 1963)

It was proper to remand deportation case to Immigration and Naturalization Service, where seven years had elapsed since entry of order deporting alien for Communist party membership, alien was married to United States citizen and had children who were born in United States, and the Service desired to bring record up to date and to review proceedings in light of Supreme Court decisions. Immigration and Nationality Act, §§ 105(a), 221 et seq., 241(a)(6)(C), 8 U.S.C. §§ 1105a(a), 1201 et seq., 1251(a)(6)(C).

Giammario v. Hurney, 311 F.2d 285 (3d Cir. 1962)
1. United States law is applicable in determining whether a crime committed by an alien in another country is a misdemeanor of the class which will preclude his admission. Immigration and Nationality Act, §§ 212(a)(9), 8 U.S.C. §§ 1182(a)(9); 18 U.S.C. § 1(3).

2. Alien, who had been convicted in Australia of stealing property which had a value in excess of $100, was guilty of grand larceny which is a felony under United States law and he was excludable from admission. Immigration and Nationality Act, §§ 212(a)(9), 241(a)(1), 8 U.S.C. §§ 1182(a)(9), 1251(a)(1); 18 U.S.C. § 1(3).

3. Maximum punishment provided by statute determines whether offense is a felony or a misdemeanor.

4. Alien, who pleaded guilty and was convicted of stealing property having a value in excess of $100, could not in deportation proceeding successfully claim that he had not committed the crime. Immigration and Nationality Act, §§ 212(a)(9), 241(a)(1), 8 U.S.C. §§ 1182(a)(9), 1251(a)(1).


6. Congress may provide whatever procedure it deems appropriate for judicial review of administrative orders.

Morin v. Bouchard, 311 F.2d 181 (3d Cir. 1962)

Record established that Attorney General did not abuse discretion in refusing to withhold deportation of Yugoslavian on ground that he would be subject to physical persecution if deported. Immigration and Nationality Act, §§ 106(a), 243(h) as amended 8 U.S.C. §§ 1105a(a), 1253(h).

Bergen Dress Co. v. Bouchard, 304 F.2d 145 (3d Cir. 1962)

1. Immigration and Nationality Act provisions do not leave allotting and issuance of immigration visas within quota groups to discretion of Attorney General, and accordingly District Court has jurisdiction to entertain declaratory judgment action to review denial of petition to acquire first preference status for prospective quota immigrant in view of administrative procedure act provisions permitting review where agency action is not committed to agency discretion or where review is not precluded by statute. Immigration and Nationality Act, §§ 203 and Subd. (a)(1)(A), 204, 8 U.S.C. §§ 1153 and subd. (a)(1)(A), 1154; Administrative Procedure Act, § 10 and subd. (e)(B)(1), 5 U.S.C. § 1009 and subd. (e)(B)(1).

3. Requirements for first preference status for quota immigrant could be established either by regulations or by decision of agency in specific case, and fact that requirements were set forth first in denial of petition and not in regulation did not militate against their validity. Immigration and Nationality Act, §§ 203(a)(1)(A), 204(c), 8 U.S.C. §§ 1153(a)(1)(A), 1154(c).

4. There was rational basis for requirement of five years’ journeyman experience as tailor, subsequent to attainment of age 21, for first preference status for prospective quota immigrant, and regulation requiring such was valid, notwithstanding that such eligibility requirements had not been applied to services of artisans of other trades. Immigration and Nationality Act, § 204(b), 8 U.S.C. § 1154(b).

*Milutin v. Bouchard*, 299 F.2d 50 (3d Cir. 1962)


2. Deportable alien has right to have application for stay of deportation considered in accordance with pertinent regulations promulgated by Attorney General, and right that his application not be capriciously denied. Immigration and Nationality Act, § 243(h), 8 U.S.C. § 1253(h).


4. Deportable alien could be denied stay of deportation on basis of undisclosed information, without finding that disclosure would prejudice security interests of United States. Immigration and Nationality Act, §§ 242(b, c), 243(h), 245, 8 U.S.C. §§ 1252(b, c), 1253(h), 1255.

*Dunat v. Hurney*, 297 F.2d 744 (3d Cir. 1961)

1. Denial of employment for church membership or for failure to join Communist party is “physical persecution” under statute authorizing Attorney General to withhold deportation of any alien to any country in which in his opinion alien would be subject to physical persecution. Immigration and Nationality Act, § 243(h), 8 U.S.C. § 1253(h).

2. Statutory construction is question of law and peculiarly appropriate for independent judicial ascertainment.

3. Statutory standards involved in deportation proceeding may be independently construed by courts.

*Pemberton v. Colonna*, 290 F.2d 220 (3d Cir. 1961)

1. Citizen of the United States is citizen of state in which he is domiciled.
2. Citizen of the United States who is domiciled abroad is not citizen of country where he makes his home.

3. United States citizen who is domiciled abroad, to become citizen of country where he makes his home, must renounce United States citizenship and acquire citizenship in country where he makes his home.

4. Plaintiff, who left domicile in Pennsylvania and went to Mexico, where she established her domicile, was still citizen of the United States and not citizen of Mexico, and therefore federal District Court in Pennsylvania did not have jurisdiction of her diversity action against defendant who was resident of Pennsylvania. 28 U.S.C. § 1332(a) (2).

Petition of Rego, 289 F.2d 174 (3d Cir. 1961)

1. Within statute making ineligible for citizenship any alien who was “relieved” from military training or service on ground of alien status, postponement of induction resulting in service of full army term did not result in alien having been relieved from service. Immigration and Nationality Act, § 315(a), 8 U.S.C. § 1426(a).

2. Statute attaching penalty of loss of right to citizenship should be strictly construed to avoid imposition which goes beyond manifest intent of Congress. Immigration and Nationality Act, § 315(a), 8 U.S.C. § 1426(a).

3. Universal Military Training and Service Act provision debarring from citizenship certain aliens applying for relief from military service because of foreign citizenship had no application to alien who had acquired permanent residence and had been in same selective service category as citizen notwithstanding fact that Selective Service Board for a period erroneously classified him as exempt. Universal Military Training and Service Act, §§ 4(a), 6(a), 50 U.S.C. Appendix, §§ 454(a), 456(a).

Blazina v. Bouchard, 286 F.2d 507 (3d Cir. 1961)

1. Whether alien would be physically persecuted in native country was solely for Attorney General, and where he considered application for stay of deportation in conformity with regulations and granted procedural due process, District Court had no right to exercise independent judgment. Fed. R. Civ. P. Rule 56(b), 28 U.S.C.; Immigration and Nationality Act, § 243(h), 8 U.S.C. § 1253(h).

2. Under statute leaving to Attorney General whether to stay deportation because alien would be subject to physical persecution in native country, alien has right to have application considered in conformity with regulations and to procedural due process, and his application may not be denied arbitrarily or capriciously. Immigration and Nationality Act, § 243(h), 8 U.S.C. § 1253(h).

4. “Physical persecution” the likelihood of which authorizes stay of deportation means confinement, torture or death inflicted on account of race, religion or political viewpoint, but not imprisonment for jumping ship. Immigration and Nationality Act, § 243(h), 8 U.S.C. § 1253(h).

5. Whether alien’s desertion of his country by jumping ship and his subsequent anti-communist statements would cause physical persecution, so as to authorize stay of deportation, was for Attorney General. Immigration and Nationality Act, § 243(h), 8 U.S.C. § 1253(h).

6. In view of alien’s induction into United States armed forces, which did not appear in record on his application to Attorney General for stay of deportation, reviewing court would stay its mandate upon reversing judgment enjoining deportation to permit petition for certiorari or new application. Immigration and Nationality Act, § 243(h), 8 U.S.C. § 1253(h).

McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960)

1. Meticulous care must be exercised in deportation proceeding lest procedure not meet essential standards of fairness.

2. Where it can be shown convincingly that fundamental errors have been committed in deportation proceeding, and where holding that alien was bound by failures of his counsel or of immigration officials will result in gross miscarriage of justice, deportation proceedings should be reopened and appropriate corrective measures taken.

3. Where immigration and naturalization service erroneously denied application of alien for suspension of deportation, on ground that granting of application would diminish small quota allotted to persons of alien’s nationality, and that alien was eligible for admission under statute dealing with nonquota status, and alien then agreed to order of voluntary departure on assurances of immigration and naturalization service that, if he did so, immigration and naturalization service would aid his wife in making necessary application for his legal re-entry, and would assist him to return to United States, and alien took no appeal, and his wife who was fatally ill failed to make application for his legal re-entry, alien’s failure to take appeal from order of deportation and denial of application for suspension of deportation did not prevent him from subsequently making a collateral attack on the order. Immigration and Nationality Act, § 205, 8 U.S.C. § 1155.

4. Where conditions under statute dealing with suspension of deportation have been met so that Attorney General may exercise his discretion to suspend deportation, applicant for suspension of deportation has a right to have his application considered. Immigrant and Nationality Act, § 244(a)(2), 8 U.S.C. § 1254(a)(2).

5. Phrase “preceding his application” as used in statute providing that in order to qualify for suspension of deportation of an alien he must have been physically present in the United States for a continuous period of not less than five years immediately “preceding his application” refers to the time that the application is reviewed by the Attorney General, and the phrase cannot refer merely to the time of filing an application. Immigration and Nationality Act, § 244(a)(2), 8 U.S.C. § 1254(a)(2).
6. Where immigration and naturalization service erroneously denied application of alien for suspension of deportation, on ground that granting of application would diminish small quota allotted to persons of alien’s nationality, and that alien was eligible for admission under statute dealing with nonquota status, and alien then agreed to order of voluntary departure on assurances of immigration and naturalization service that, if he did so, it would aid his wife in making necessary application for his legal re-entry, and would assist him to return to the United States, and alien took no appeal, and his wife who was fatally ill failed to make application for his legal re-entry, alien’s departure for Canada did not interrupt alien’s continuous presence in the United States within meaning of statute providing that in order to qualify for suspension of deportation an alien must have been physically present in United States for continuous period of not less than five years immediately preceding his application. Immigration and Nationality Act, § 244(a)(2), 8 U.S.C. § 1254(a)(2).

7. Where alien, who brought habeas corpus proceeding to review order of deportation and denial of application for suspension of deportation, was out of custody on bond, writ of habeas corpus did not lie.

8. Where alien failed to appeal from order of deportation and denial of application for suspension of deportation, proper procedure for review of order was to file complaint in federal District Court requesting temporary restraining order and declaratory judgment asserting jurisdiction to review proceedings pursuant to Administrative Procedure Act. Administrative Procedure Act, § 10, 5 U.S.C. § 1009; Immigration and Nationality Act, § 244, 8 U.S.C. § 1254.

9. Where alien brought habeas corpus proceeding to review order of deportation and denial of application for suspension of deportation, though writ of habeas corpus did not lie, because alien was out of custody on bond, but there was a full hearing in federal District Court, and lengthy consideration was given case in Court of Appeals, Court of Appeals would not dismiss action and require alien to institute proceeding under Administrative Procedure Act, but would treat complaint as if it were based on Administrative Procedure Act, and would direct District Court to so treat it and to stay deportation pending application by alien to Attorney General for discretionary relief under statute. Administrative Procedure Act, § 10, 5 U.S.C. § 1009; Immigration and Nationality Act, § 244, 8 U.S.C. § 1254.

United States v. Zeid, 281 F.2d 825 (3d Cir. 1960)

1. In prosecution for failure to register as an alien, evidence warranted finding that defendant was fully aware that he was an alien required to register and be fingerprinted and that he purposely and wrongfully refused to do so. Immigration and Nationality Act, § 262(a), 8 U.S.C. § 1302(a).

2. In prosecution of alien for failure to give written notice to Attorney General of his current address, the evidence, including evidence that search of Immigration and Naturalization Service records had disclosed no annual address report of alien and that alien was aware that he was not a citizen and was required to register as an alien, warranted conviction. Immigration and Nationality Act, § 265, 8 U.S.C. § 1305.
3. Trial court has discretion to permit the government to reopen its case.

4. In prosecution for failure to register as alien and for failure to give written notice to Attorney General of current address, where master fingerprint record was offered to help establish defendant’s birthplace as Russia and record indicated that defendant had been arrested and charged with assault and battery but did not disclose that there had been a conviction and the court eliminated the matter of the arrest and the charge from the consideration of the jury, defendant was not deprived of a fair trial.

5. In prosecution for failure to register as alien and for failure to give written notice to Attorney General of current address, admission in evidence of defendant’s grand jury testimony that he had known since 1950 that he was not a citizen did not violate defendant’s privilege against self-incrimination even though he was not warned that what he said might be used against him, where defendant’s appearance before the grand jury had to do solely with an inquiry by that body which was not directed at defendant and from which nothing ever arose involving him and the grand jury never dealt with him as a possible defendant and was in nowise investigating him and he was a witness and nothing more and he gave such information in answer to a question by juror and not in response to any question put by the district attorney. Immigration and Nationality Act, §§ 262(a), 265, 8 U.S.C. §§ 1302(a), 1305.

Bufalino v. Holland, 277 F.2d 270 (3d Cir. 1960)

1. In proceeding on application for termination of deportation proceedings wherein alien contended that his failure to register with Attorney General in two successive years was reasonably excusable in that he believed he had been born in the United States rather than in Italy, evidence sustained special inquiry officer’s adverse findings. Immigration and Nationality Act, §§ 241(a)(5), 244(e), 265, 8 U.S.C. §§ 1251(a)(5), 1254(e), 1305; 8 U.S.C. § 1251a.

2. Evidence admitted in administrative proceeding for termination of deportation proceedings was not required to meet judicial standards of admissibility. Immigration and Nationality Act, §§ 241(a)(5), 244(e), 265, 8 U.S.C. §§ 1251(a)(5), 1254(e), 1305, 8 U.S.C. § 1251a.

3. Special inquiry officer conducting proceeding for termination of deportation proceedings, in making determination as to moral character of alien involved, was free to consider both witnesses and affidavits relating thereto in terms of association or knowledge upon which they testified or were based and to weigh such evidence together with all other evidence in case before him, and introduction of 161 affidavits and oral testimony of 13 witnesses did not necessarily result in establishment of good moral character. Immigration and Nationality Act, §§ 241(a)(5), 244(e), 265, 8 U.S.C. §§ 1251(a)(5), 1254(e), 1305; 8 U.S.C. § 1251a.

4. Where special inquiry officer, conducting hearing upon application for termination of deportation proceedings, determined that alien seeking termination had testified falsely in proceedings in order to avoid deportation, he was required, under statute, to find that alien was not a person of good moral character, irrespective of testimony and affidavits submitted to establish the alien’s asserted good moral character. Immigration and Nationality Act, §§ 241(a)(5), 244(e), 265, 8 U.S.C. §§ 1251(a)(5), 1254(e), 1305; 8 U.S.C. § 1251a.
5. Statutory provisions stating that an alien who entered United States by fraud or misrepresentation or without proper documentation and who would otherwise be subject to deportation may be saved therefrom, in exercise of discretion on part of Attorney General, providing that he is both spouse of an American citizen and otherwise admissible, could not save from deportation an alien who had made a re-entry into United States without proper documentation and who was not eligible, under regulation, to waiver of such deficiency in that he was otherwise subject to deportation because he had failed to give required information to Attorney General in January of that year. Immigration and Nationality Act, §§ 241(a)(5), 244(a)(5), (e), 265, 8 U.S.C. §§ 1251(a)(5), 1254(a)(5), (e), 1305; 8 U.S.C. § 1251a.

6. Alien was not entitled to request that he be allowed to depart voluntarily, pursuant to statutory authority, rather than being deported where he did not meet required minimum residence period in United States of 10 years and where he could not prove himself to be a person of good moral character during such period. Immigration and Nationality Act, §§ 241(a)(5), 244(a)(5), (e), 265, 8 U.S.C. §§ 1251(a)(5), 1254(a)(5), (e), 1305; 8 U.S.C. § 1251a.

7. Alien resisting deportation was not entitled to preexamination pursuant to regulation where he failed to meet requirements of regulation in that he had not shown himself to be a person of good moral character and he could not demonstrate that he was prima facie eligible for waiver of excludability in view of his ineligibility for that relief as determined by special inquiry officer. 8 U.S.C. § 1251a.

8. In proceeding for review of order for deportation and denial of relief sought in proceeding for termination of deportation proceedings, or alternatively, for voluntary departure and preexamination, record revealed that comments made in administrative proceedings relating to alien’s invocation of fifth amendment when he was called to testify before investigative bodies were not prejudicial to him so as to constitute abuse of discretion and that such conduct was not determinative of decisions. 8 U.S.C. § 1251a; U.S. Const. amend. V.

9. In proceeding for review of order for deportation and denial of relief sought in proceeding for termination of deportation proceedings, or alternatively, for voluntary departure and preexamination, evidence would not sustain alien’s contention that he had been prejudiced in that newspapers had sensationaly linked him to meeting of various individuals. 8 U.S.C. § 1251a; U.S. Const. amend. V.

10. Right of review by court of action of administrative agency in regard to deportation was limited to whether decision of deportability was based on reasonable, substantial and probative evidence and was neither arbitrary, capricious nor violative of procedural due process. Immigration and Nationality Act, §§ 241(a)(1, 2, 5), 244(a)(5), (e), 265, 8 U.S.C. §§ 1251(a)(1, 2, 5), 1254(a)(5), (e), 1305; 8 U.S.C. § 1251a.

*Petition of Wolff*, 270 F.2d 422 (3d Cir. 1959)

1. Where alien admitted for permanent residence in United States had filed declaration of intention to become a citizen pursuant to 1940 Nationality Act which was subsequently
repealed by the 1952 Immigration and Nationality Act imposing certain conditions for citizenship that alien could not meet, alien’s residence within United States under 1940 act was a “status”, “condition” or “right in process of acquisition” within meaning of savings clause of 1952 act, and hence he was entitled to citizenship. Immigration and Nationality Act, §§1 et seq., 316, 334(f), 405(a), 8 U.S.C. §§1101 et seq., 1427, 1445(f), 1101 note.

2. United States was entitled to maintain appeal to Court of Appeals from decree of naturalization, despite delivery of certificate of citizenship to party.

Holzapfel v. Wyrsch, 259 F.2d 890 (3d Cir. 1958)

1. In deportation cases involving statute making it a ground for deportation if one has been convicted of a crime involving moral turpitude within five years after entry, where a state crime is involved courts have to look to the law and procedure of state to interpret what happened in state court. Immigration and Nationality Act, §241(a)(4), 8 U.S.C. §1251(a)(4); N.J.S. 2A:115-1, 2A:164-6.

2. Alien who was convicted of offense of open lewdness in New Jersey and given a suspended sentence to reformatory and placed on probation on condition that defendant take psychiatric treatment under New Jersey Sex Offenders Act, was not alien convicted of crime involving moral turpitude and either sentenced to confinement or confined therefor in a prison or corrective institution within meaning of statute providing that such conviction and sentence was a ground for deportation. Immigration and Nationality Act, §241(a)(4), 8 U.S.C. §1251(a)(4); N.J.S. 2A:115-1, 2A:164-6.

Dabrowski v. Holland, 259 F.2d 449 (3d Cir. 1958)

In action by alien for review of an order denying him a stay of deportation, record showed no unfairness or arbitrariness in Attorney General’s action in denying alien a stay of deportation under statute authorizing Attorney General to withhold deportation where, in his opinion, the alien would be subject to physical persecution. Immigration and Nationality Act, §243(h), 8 U.S.C. §1253(h).

Petition of Terzich, 256 F.2d 197 (3d Cir. 1958)

1. Where alien was arrested and a final order of deportation was outstanding against him, Naturalization Court did not have jurisdiction to review final order of deportation in hearing on alien’s petition for naturalization. Immigration and Nationality Act, §§241(a)(6)(C), 242(b-d), 318, 405(a), 8 U.S.C. §§1251(a)(6)(C), 1252(b-d), 1429, 1101 note; Administrative Procedure Act, §10(b), 5 U.S.C. §1009(b).

2. Under statute providing that no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to warrant of arrest, order directing deportation of alien, who was arrested as an alien unlawfully in the United States and whose appeal from order was dismissed by Board of Immigration and who sought no judicial review of order, was “final”. Immigration and Nationality Act, §318, 8 U.S.C. §1429.
3. Under provision of Administrative Procedure Act stating that form of proceeding for judicial review shall be any special statutory review proceeding relevant to subject matter in any courts specified by statute or in absence or inadequacy thereof, any applicable form of legal action in any court of competent jurisdiction, a naturalization proceeding is not “any applicable form of legal action” within contemplation of act. Administrative Procedure Act, § 10(b), 5 U.S.C. § 1009(b); Immigration and Nationality Act, § 318, 8 U.S.C. § 1429.

4. Eligibility for citizenship of alien, who filed petition for naturalization in 1945 and against whom a final order of deportation was entered in 1954, was not preserved by savings clause of Nationality Act of 1952. Immigration and Nationality Act, §§ 318, 405(a), 8 U.S.C. §§ 1429, 1101 note.

Quintana v. Holland, 255 F.2d 161 (3d Cir. 1958)

1. Under statute providing that if at any time within five years after status of an alien has been adjusted to that of an alien lawfully admitted for permanent residence, it shall appear to satisfaction of Attorney General that person was not in fact eligible for such adjustment of status, Attorney General shall submit to Congress statement of facts and pertinent provisions of law in the case and if during session of Congress at which case is reported or prior to close of session of Congress next following session at which case is reported, Congress passes concurrent resolution withdrawing suspension of deportation, the person shall thereupon be subject to deportation as if adjustment of status had not been made, Congress meant to require Attorney General to take the described action within five years and to be bound by that limitation itself. Immigration and Nationality Act §§ 103, 244, 244(a)(1, 2), 246(a), 281, 8 U.S.C. §§ 1103, 1254, 1254(a)(1, 2), 1256(a), 1351.

2. Under statute providing that if at any time within five years after status of alien has been adjusted to that of an alien lawfully admitted for permanent residence “it shall appear to satisfaction of Attorney General that person was not in fact eligible for such adjustment of status,” Attorney General shall submit to Congress statement of facts and pertinent provisions of law in the case, the quoted words mean a reasonable determination made in good faith after such investigation and hearing as is required. Immigration and Nationality Act, §§ 103, 244, 8 U.S.C. §§ 1103, 1254.

3. Under statute providing that if at any time within five years after status of person has been adjusted to that of an alien lawfully admitted for permanent residence it shall appear to satisfaction of Attorney General that person was not in fact eligible for such adjustment of status he shall submit to Congress a complete statement of facts and pertinent provisions of law in the case, proceeding to rescind alien’s adjustment of status was not timely brought when Attorney General could not have made such determination by end of five-year period from the latest possible date that could be considered. Immigration and Nationality Act, §§ 103, 244, 244(a)(1, 2), 281, 8 U.S.C. §§ 1103, 1254, 1254(a)(1, 2), 1351.

4. Under statute providing that if at any time within five years after status of person has been adjusted to that of an alien lawfully admitted for permanent residence it appears to Attorney General that person was not in fact eligible for such adjustment and he submits statement of facts and pertinent provisions of law to Congress and Congress passes concurrent resolution
withdrawing suspension of deportation, person shall be subject to provisions of statute concerning deportation, concurrent resolution of Congress withdrawing suspension of deportation of alien did not indicate a change of congressional mind and time limit of statute could not be disregarded. Immigration and Nationality Act, §§ 103, 244, 246(a), 8 U.S.C. §§ 1103, 1254, 1256(a).

Jalbuena v. Dulles, 254 F.2d 379 (3d Cir. 1958)

1. Where individual, a natural born citizen of the United States, moved to Philippine Islands and by operation of law became a citizen thereof so that he then had a dual citizenship, action of individual, who did not realize he retained United States citizenship, in applying for and receiving Philippine passport after subscribing to oath to support Philippine Constitution, did not constitute a renunciation of the United States citizenship which would authorize a revocation thereof under statute. Immigration and Nationality Act, §§ 349, 350, 8 U.S.C. §§ 1481, 1482.

2. Under expatriation statute as applied to dual citizenship cases, conduct merely declaratory of what one national aspect of dual citizenship necessarily connotes cannot reasonably be construed as an act of renunciation of the other national aspect of the actor’s dual status. Immigration and Nationality Act, §§ 349, 350, 8 U.S.C. §§ 1481, 1482.

Anselmo v. Hardin, 253 F.2d 165 (3d Cir. 1958)

1. A final judgment by a court of competent jurisdiction is res judicata as to the parties not only as to all matters litigated and determined by such judgment, but also as to all relevant issues which could have been presented, but were not.

2. A question of fact or of law distinctly put in issue and directly determined cannot afterwards be disputed between the same parties, and where a question of priority in time and right was directly presented by the pleadings and evidence and distinctly dealt with and resolved in a prior opinion, the decree entered pursuant to such opinion is res judicata as to such litigated issue.

3. The circumstance that a final judgment on an issue raised was premised on failure of the losing party to support its position by sufficient evidence does not impair binding effect of the judgment rendered.

4. A judgment in habeas corpus proceedings discharging a petitioner for the writ is res judicata of the issues of law and fact necessarily involved in the result.

5. Doctrine of res judicata applied with respect to a judgment of the United States District Court granting alien a writ of habeas corpus in a deportation proceeding premised on judicial determination that rights of alien were governed by Immigration Act of 1917 and that he was not deportable under its provisions, and therefore government was precluded from bringing further deportation proceedings based on theory alien’s rights were governed by Immigration Act of 1924 or on theory that previous determination of his nondeportability under Immigration Act of 1917 did not preclude deportation under such act as subsequently

Vlisidis v. Holland, 245 F.2d 812 (3d Cir. 1957)

1. In deportation proceeding, a “Crewman’s Landing Permit” which appeared to be an original document duly executed and signed by an immigration officer and countersigned by “N. Mavrelos” as a Greek national who had entered the United States as a seaman on certain date and had been granted permission to remain not more than 29 days, which was an official document prescribed by regulations of Immigration and Naturalization Service on its face such indicia of authenticity that it was admissible in evidence without the need for identification by one of its signers, especially where such document was shown to respondent whose name appeared thereon and opportunity afforded him to impeach it if he so desired. Administrative Procedure Act, 5 U.S.C. § 1001 et seq.; Immigration and Nationality Act, § 291, 8 U.S.C. § 1361.

2. In proceeding for deportation of alien named “Nicholaos Mavrelos” wherein alien refused to identify a document which was a “Crewman’s Landing Permit” executed by immigration officer and countersigned by “N. Mavrelos” as a Greek national who had entered the United States as a seaman and been granted permission to remain not more than 29 days, the identity of alien’s name, with name of alien seaman whose record of entry was before the special inquiry officer justified an inference, absent any showing to the contrary, that alien was that seaman. Administrative Procedure Act, 5 U.S.C. § 1001 et seq.; Immigration and Nationality Act, § 291, 8 U.S.C.A § 1361.

3. In proceeding for deportation of alien named “George Vlisidis,” when in addition to “Crewman’s Landing Permit” a purported Greek passport was exhibited to alien and an English translation of its relevant part was read into record and such passport had been issued to “George Vlisidis,” a Greek citizen, and appeared regular on its face and contained a picture which the special inquiry officer compared with appearance of the alien and stated that photograph was likeness of the man before him, and same procedure was followed in case of Greek “diploma” bearing a photographic likeness of the man who was in court and stating, as translated, that he was a qualified seaman, such exhibits constituted proper evidentiary basis for finding that person before the inquiry officer was an alien who had remained in the United States beyond the authorization of his temporary entry. Administrative Procedure Act, 5 U.S.C. § 1001 et seq.; Immigration and Nationality Act, § 291, 8 U.S.C. § 1361.

4. In deportation proceedings, wherein immigration service asserted that respondents were alien crewmen who had entered the United States on shore leaves and had failed to depart with their ships, and respondents remained silent relying on privilege against self-incrimination, respondents were not prejudiced because of their invocation of the Fifth Amendment where essential fact of alienage was established quite apart from that action. Administrative Procedure Act, 5 U.S.C. § 1001 et seq.; Immigration and Nationality Act, § 291, 8 U.S.C. § 1361; U.S. Const. amend. V.

United States v. Larocca, 245 F.2d 196 (3d Cir. 1957)
1. Perjury count of indictment charging that during an administrative hearing when defendant was testifying under oath, he had his attention directed to fact that on a certain date detectives raided a certain company and seized a number of slot machines, and that defendant stated that he did not have anything to do with this business, was sufficiently definite to present an issue for trial. 18 U.S.C. § 1621.

2. Indictment charging defendant with filing a false statement to influence an official proceeding based upon alleged willful misstatement of fact in a formal petition for reopening of a deportation hearing submitted by defendant about a month after the hearing had closed, alleging the petition contained a categorical assertion that on a certain date assets of a company later found to be in possession of certain slot machines was sold to another man and the defendant thereupon ceased to be a partner in the enterprise, was sufficiently categorical and explicit to present triable issues. Immigration and Nationality Act, § 244(a)(1), 8 U.S.C. § 1254(a)(1); 18 U.S.C. § 1001.

3. Allegation in an indictment that defendant willfully misstated a fact pertaining to his interest in a partnership later found to be in possession of slot machines, in a formal petition for reopening of a deportation hearing, afforded a proper basis for charge of perjury in view of fact government sought to prove at trial that company was engaged in illegal traffic in coin operated machines, and in view of fact that it was material to issue of defendant’s good character which was put in issue in deportation proceeding.

4. An administrative officer in exercising his discretionary power to grant relief from deportation to an individual upon a showing of his good moral character, is entitled to give weight to any showing that the individual was engaged in illegal traffic in slot machines.

5. In prosecution for filing a false statement in a deportation proceeding with intent to influence the outcome, materiality of allegedly false statements was to be determined in light of the circumstances which existed when the statements were made, rather than on the fact that deportation proceedings were dropped. 18 U.S.C. § 1001.

6. In a perjury prosecution, it is sufficient that the false statement relates to a matter that is legally capable of being proved in the cause, and serves to legally evidence the propositions to be proved, and it is of no consequence that the subsequent course of events make it unnecessary to decide the contested issue to which the false statements were germane.

7. In prosecution for perjury in a deportation hearing, and for filing a false statement in a deportation proceeding, record of the deportation hearing did not require conclusion that examining officer knew defendant did not intend to be bound by his oath in a matter about which alleged false testimony was given, in view of fact defendant had been duly sworn for whatever testimony he might give in proceeding in question, and therefore, indictment presented issues for trial. 18 U.S.C. §§ 1001, 1621.

*Diogo v. Holland*, 243 F.2d 571 (3d Cir. 1957)

In proceedings on deportation of nonimmigrant business visitors who obtained unauthorized gainful employment, record indicated that conditions surrounding the arrest of aliens gave
officers of Immigration and Naturalization Service making the arrests reasonable justification for so doing. 8 U.S.C. § 1357.

Tripolitis v. Holland, 242 F.2d 344 (3d Cir. 1957)

1. The contentions by appellant — a seaman who admittedly entered the United States illegally, obtained unauthorized gainful employment shortly after that and, as he states, desires to remain in this country — regarding of illegal arrest and unlawful search and seizure are without substantial merit.

2. As proper and sufficient evidence supported the decision of the Special Inquiry Officer, and there was no wrongful restriction of appellant’s rights to examine and cross-examine the arresting officer witness at the immigration hearing, the judgment will be affirmed.

Da Cruz v. Holland, 241 F.2d 118 (3d Cir. 1957)

Claims by alien ordered deported for failure to maintain non-immigrant, visitor's status, that he was illegally arrested without warrant, that certain documents, including passport, were then illegally taken from him, that he was denied hearing de novo after demand that arresting officer testify before hearing officer, and that hearing officer himself was without authority to proceed in case, where alien asserted in effect that neither provisions of Administrative Procedure Act nor of Immigration and Nationality Act were complied with, and that he was denied rights guaranteed by Fifth Amendment, were without merit. Administrative Procedure Act, 5 U.S.C. §§ 1001-1011; Immigration and Nationality Act, §§ 1 et seq., 405, 8 U.S.C. §§ 1101 et seq., 1101 note; U.S. Const. amend. V.

United States v. Montalbano, 236 F.2d 757 (3d Cir. 1956)

1. Burden on United States of establishing that defendants had procured United States citizenship fraudulently and illegally, in denaturalization proceedings, is heavy; Court of Appeals would affirm denaturalization orders only if records contained clear, unequivocal, and convincing evidence, which did not leave issues of fraud or illegality in doubt. 8 U.S.C. § 1451(a).

2. In denaturalization proceedings involving defendants who had had criminal records at time they applied for citizenship, evidence sustained findings that each defendant had deliberately concealed his criminal record and by so doing had committed fraud upon government. 8 U.S.C. § 1451(a).

3. Deliberate failure of alien to disclose his criminal record at time of application for citizenship, in response to question to that effect by government, was proof that alien was not of good moral character, as required by statute, and that, accordingly, his citizenship had been illegally procured. 8 U.S.C. §§ 1427(a), 1451(a).

4. Mere fact that alien, who had record of arrests without conviction, would not have been refused citizenship on basis of such a record, would not preclude his denaturalization on ground that his deliberate denial of existence of such record at time of application for citizenship constituted his procurement of citizenship fraudulent and illegal. 8 U.S.C. §§
Delmore v. Brownell, 236 F.2d 598 (3d Cir. 1956)

1. Where person, whom United States sought to deport as alien, sought to have himself declared United States citizen, and issue at bar was framed in terms of person’s status as United States citizen, he was entitled to trial de novo, under statute, free of any burden of overcoming prior adverse administrative finding. Immigration and Nationality Act, § 360 and subd. (a), 8 U.S.C. § 1503 and subd. (a); 28 U.S.C. § 2201.

2. Though letter from Commissioner of Immigration, stating that in view of facts submitted and considered person was United States citizen was not formal adjudication of citizenship status, it was nonetheless a determination of person’s status.

3. Person, who brought suit to have himself declared to be a native born citizen of United States, had burden of proving his citizenship by a preponderance of the evidence.

4. Where person, who brought suit to have himself declared to be a native born citizen of United States, introduced letter from Commissioner of Immigration stating that in view of facts submitted and considered person was United States citizen, person established prima facie case.

5. Once United States has determined that an individual is a citizen, it must disprove its own determination by clear, unequivocal, and convincing evidence, to prevail in suit by person to have himself declared native born United States citizen.

6. Where Commissioner of Immigration had replied to inquiry that in view of facts submitted and considered person was United States citizen, United States which subsequently sought to deport person as alien, was required, in person’s suit to establish his citizenship, to disprove its own prior determination of citizenship by clear, unequivocal, and convincing evidence, of sort which would sustain judgment of denaturalization. Immigration and Nationality Act, § 360 and subd. (a), 8 U.S.C. § 1503 and subd. (a).


Lavdas v. Holland, 235 F.2d 955 (3d Cir. 1956)

1. In proceeding on petitioner’s application for change of status from alien to permanent resident, evidence sustained finding of Regional Commissioner that petitioner could return to Greece, the country of his birth, nationality and last residence, without fear of prosecution on account of political opinion. Displaced Persons Act of 1948, § 4 as amended 50 U.S.C. Appendix, § 1953.

2. Judicial notice should be taken that political circumstances in Greece have changed greatly since 1949 and 1950.
3. Judicial notice should be taken of the fact that Greece is a considerable country of some 8 million inhabitants while Andros is a very small off-shore island with only one substantial settlement of some 3,000 inhabitants.


In re Naturalization of Cuozzo, 235 F.2d 184 (3d Cir. 1956)

If there existed an administrative practice, in those cases in which alien who had requested an exemption from military service on ground of alienage had nevertheless later served in military forces of the United States, of refraining from insisting on denial of citizenship pursuant to statute, such administrative practice was not a ground upon which court could decline to enforce explicit statutory direction. Selective Service Act of 1948, § 1 et seq., as amended 50 U.S.C. Appendix, § 451 et seq., § 4(a), 50 U.S.C. Appendix, § 454(a); Immigration and Nationality Act, § 315(a), 8 U.S.C. § 1426(a).

Stipa v. Dulles, 233 F.2d 551 (3d Cir. 1956)

1. In proceeding against Secretary of State to obtain judgment declaring plaintiff to be United States citizen, District Court's conclusion that plaintiff had expatriated himself by accepting employment as an auxiliary in the Italian Police Force was in nature of an ultimate finding of fact and, therefore, was but a legal inference from other facts and, as such, was subject to review free of restraining impact of the so-called "clearly erroneous" rule applicable to ordinary findings of fact made by trial court. Immigration and Nationality Act, §§ 349(a), 360, 8 U.S.C. §§ 1481(a), 1503; Fed. R. Civ. P. Rule 52(a), 28 U.S.C.

2. Person, who was born in Pennsylvania of parents who were Italian nationals, thus acquired dual nationality in the United States and Italy.


4. Very essence of expatriation is that the expatriating act must be completely voluntary. Immigration and Nationality Act, § 349(a), 8 U.S.C. § 1481(a).

5. Burden of proving expatriation generally is upon Secretary of State who affirmatively alleges it, and the evidence must be clear, unequivocal, and convincing, and factual doubts are to be resolved in favor of citizenship. Immigration and Nationality Act, § 349(a), 8 U.S.C. § 1481(a).

6. In expatriation cases, facts and law should be construed as far as is reasonably possible in favor of the citizen. Immigration and Nationality Act, § 349(a), 8 U.S.C. § 1481(a).

7. "Economic duress" is a valid defense to expatriating conduct, and, therefore, it became incumbent upon government, in expatriation case, to rebut proof offered as to existence of
such duress, and, having failed to do so, plaintiff was entitled to judgment declaring him to be United States citizen. Immigration and Nationality Act, § 349(a), 8 U.S.C. § 1481(a).

Quilodran-Brau v. Holland, 232 F.2d 183 (3d Cir. 1956)

1. Conviction of alien for larceny of government property involved “moral turpitude” regardless of value of that which was stolen, as respects deportation proceeding against alien on ground of conviction of crime involving moral turpitude. Immigration and Nationality Act, §§ 212(a)(9), 241, 8 U.S.C. §§ 1182(a)(9), 1251.

2. Refusal of alien in deportation proceeding to answer question as to whether he had been previously deported supported an inference against him, and weight to be given his silence was for trial tribunal, as regards issue whether alien could be deported under statute making excludable aliens who had been arrested and deported. Immigration and Nationality Act, § 212(a)(17), 8 U.S.C. § 1182(a)(17).

3. Evidence established that alien was subject to deportation under statute making excludable aliens who have been arrested and deported. Immigration and Nationality Act, § 212(a)(17), 8 U.S.C. § 1182(a)(17).

4. In hearing on warrant of arrest of alien who allegedly had been previously deported for a crime involving moral turpitude, admission of “onion skin” document which purported to be a transcript of prior deportation proceedings, even if inadmissible, was harmless error where case was abundantly proved without it. Immigration and Nationality Act, § 212(a)(17), 8 U.S.C. § 1182(a)(17).

Perri v. Dulles, 230 F.2d 259 (3d Cir. 1956)

A nonresident American citizen acquiring Italian nationality through parents’ naturalization in Italy was entitled to a declaration of nationality on the ground that the two year limitation of the Nationality Act had been tolled and did not expatriate the plaintiff, where diplomatic relations between Italy and United States were resumed July 1, 1944 plaintiff made application for permission to come to the United States in May 1947 and persisted in such application down to the time he brought the present proceedings. 8 U.S.C. § 1481(a).

Tsimounis v. Holland, 228 F.2d 907 (3d Cir. 1956)

1. Deportation proceedings were properly heard before a Special Inquiry Officer, notwithstanding contention that they should have been conducted by hearing examiner under Administrative Procedure Act. Immigration and Nationality Act, §§ 101(b), 211(a), 242(b), 287(a)(1, 2), 8 U.S.C. §§ 1101(b), 1181(a), 1252(b), 1357(a)(1, 2); Administrative Procedure Act, 5 U.S.C. § 1001 et seq.

2. In proceeding brought for review of deportation order, evidence sustained finding that there had been no illegal arrest or illegal search and seizure. 8 U.S.C. §§ 1357(a)(1, 2).
3. Proofs in deportation proceeding were conclusive that alien seaman was in country without an unexpired immigration visa and that he had intention of staying as long as he could. 8 U.S.C. § 1181(a).

_United States v. Anastasio_, 226 F.2d 912 (3d Cir. 1955)

1. A denaturalization proceeding is essentially an action for rescission, and to prevail, the government must establish that defendant was guilty of fraud or misrepresentation and that government was deceived thereby. 8 U.S.C. § 1451(a); Act March 2, 1929, 45 Stat. 1512.

2. In denaturalization proceeding, evidence, which revealed that naturalized citizen had, in prior naturalization proceeding, concealed his criminal record and illegal entry, but which revealed that, in subsequent independent naturalization proceeding, government was aware of such facts, failed to establish that government had been deceived into granting citizenship in the subsequent proceeding and established that naturalized citizen had not practiced fraud or illegality upon government in such subsequent proceeding. 8 U.S.C. § 1451(a); Act March 2, 1929, 45 Stat. 1512.

3. Premise of a denaturalization action is fraud or illegality, which allegedly is practiced by defendant in naturalization proceeding, and which deceives the government or court into granting citizenship. 8 U.S.C. § 1451(a); Act March 2, 1929, 45 Stat. 1512.

4. In denaturalization proceeding, government has burden of establishing by clear, unequivocal, and convincing evidence, which does not leave the issue in doubt, that defendant has been guilty of fraud or illegal conduct in his naturalization proceeding. 8 U.S.C. § 1451(a); Act March 2, 1929, 45 Stat. 1512.

5. In denaturalization proceeding, there must be a solidity and proof which leaves no troubling doubt in deciding question of such gravity as is implied in an attempt to reduce a citizen to status of an alien. 8 U.S.C. § 1451(a); Act March 2, 1929, 45 Stat. 1512.

6. In denaturalization proceedings, facts and law should be construed, as far as is reasonably possible, in favor of the citizen. 8 U.S.C. § 1451(a); Act March 2, 1929, 45 Stat. 1512.

7. Essential element of fraud is that complaining party must have been deceived by the fraudulent statements of the accused, and, if such element is lacking, accused has failed in his purpose to defraud.

_United States v. Ginn_, 222 F.2d 289 (3d Cir. 1955)

1. Immigration and Nationality Act of 1952 savings clause provision that nothing in Act, unless otherwise provided, should be construed to affect any prosecution, status, condition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at time Act took effect would not be applied to save prosecution for failure to register under an earlier enactment. Act June 28, 1940, § 31(a), 54 Stat. 673; Immigration and Nationality Act, §§ 261-266, 405, 8 U.S.C. §§ 1301-1306, 1101 note; U.S. Const. amend. V.

2. Evidence was not sufficient to sustain conviction for alien’s failure to file address cards in

*United States ex rel. Czapkowski v. Holland*, 220 F.2d 436 (3d Cir. 1955)

1. In deportation proceeding, Attorney General’s determination that defendant had not established that her failure to furnish notification of address was reasonably excusable or was not willful, was not abuse of discretion. Immigration and Nationality Act, § 241(a)(5), 8 U.S.C. § 1251(a)(5).

2. Statute providing that aliens may be deported for failure to furnish notification of address unless such failure is reasonably excusable or not willful provides sufficiently definite standards to justify deportation and is not so vague as to be unconstitutional. Immigration and Nationality Act, § 241(a)(5), 8 U.S.C. § 1251(a)(5).

3. The tests of reasonableness and willfulness when applied in a statute to a specific act are constitutionally valid standards.

*United States v. Minker*, 217 F.2d 350 (3d Cir. 1954)

1. Meaning of word “witness” as used in a statute is to be determined in case of each statute by attendant circumstances and context and there is no safe general rule that can be applied universally.

2. Statute providing for denaturalization proceedings should be strictly construed and court should incline toward construction favorable to persons whose status is put in jeopardy. Immigration and Nationality Act, § 101 et seq., 8 U.S.C. §§ 1101 et seq.

3. Citizen confronted with administrative proceeding which posed challenge to his right to retain citizenship was not “witness” within meaning of statute conferring subpoena power in connection with proceedings seeking revocation of naturalization, and was not required under such statute to appear and testify against himself. Immigration and Nationality Act, § 235(a), 8 U.S.C. § 1225(a).

*Lehmann v. Acheson*, 214 F.2d 403 (3d Cir. 1954)

Action under the Nationality Act of 1940 against the Secretary of State by native born citizen of the United States for declaratory judgment that he was a citizen of United States and had not been expatriated by reason of his conscription into the Swiss army and by his incidental taking of an oath of allegiance to the Swiss government was not abated because of his failure to substitute new Secretary of State as defendant within six months after the new Secretary of State succeeded the one against whom the action had been instituted. Immigration and Nationality Act, § 360, 8 U.S.C. § 1503; U.S.C., 3d Cir., Rules, rule 28(5); Fed. R. Civ. P. Rule 25(d), 28 U.S.C.

*Ling Share Yee v. Acheson*, 214 F.2d 4 (3d Cir. 1954)
Where consul to whom minor plaintiff had applied for travel documents for purpose of being admitted to United States as a citizen had merely withheld action pending production of additional evidence, there had not been a denial by the consul of a right or privilege of minor plaintiff as national of the United States within contemplation of the Nationality Act, and thus dismissal of complaint for declaration of status of minor plaintiff as citizen of United States was proper, since District Court was without jurisdiction in absence of final administrative action. Immigration and Nationality Act, § 101(a)(14), 8 U.S.C. § 1101(a)(14).

Petition of Acchione, 213 F.2d 845 (3d Cir. 1954)

Under Nationality Act provision, that person, who has acquired foreign nationality through naturalization of his parent and who at same time is citizen of United States and who is abroad, shall be estopped from claiming American citizenship, unless he takes up permanent residence in United States within two years from effective date of 1940 Nationality Act, the two-year period of limitation did not begin to run until such person learned that she, because her father was a naturalized citizen of United States prior to her birth, had a claim to American citizenship. Immigration and Nationality Act, § 349, 8 U.S.C. § 1481(a).

United States v. Kessler, 213 F.2d 53 (3d Cir. 1954)

1. A “breach of the peace” is a disturbance of public order by an act of violence or by any act likely to produce violence, or which, by causing consternation and alarm, disturbs the peace and quiet of the community.

2. Alien’s denial, in her petition for naturalization, that she had ever been arrested, was not ground for cancellation of her certificate of naturalization, where the seventeen “arrests” relied upon by United States as establishing the falsity of such denial were illegal and invalid and, at best, false arrests. Act June 29, 1906, 34 Stat. 596, as amended Act March 2, 1929, 45 Stat. 1512.

3. In regulation requiring naturalization examiners to ask specific questions about applicant’s arrest record, and to thoroughly cover the question of “possible arrests”, quoted term does not include false arrests.

4. A very high degree of proof is required in order to revoke citizenship.

United States v. Vasilatos, 209 F.2d 195 (3d Cir. 1954)

1. Aliens coming from abroad directly to designated stations for entry and seeking admission in the regular course do not accomplish an “entry” into the United States by crossing the national boundary in transit or even by arrival at a port so long as they are detained there pending formal disposition of their requests for admission. Immigration and Nationality Act, §§ 101(a)(13), 232, 271, 8 U.S.C. §§ 1101(a)(13), 1222, 1321.

2. With respect to aliens who come from abroad directly to designated stations for entry into the United States in order to accomplish an “entry”, freedom from official restraint must be added to physical presence before “entry” is accomplished. Immigration and Nationality Act,
3. An alien seaman entered the United States at Philadelphia where by misrepresentation of fact to an immigration officer he caused that official to grant him a clearance for a temporary stay with freedom of movement in the United States, notwithstanding the seaman did not leave the ship in Philadelphia but left the ship at Baltimore, and hence venue in prosecution for illegal entry was properly laid in the Eastern District of Pennsylvania where the violation occurred. Immigration and Nationality Act, §§ 101(a)(13), 232, 271, 276, 279, 8 U.S.C. §§ 101(a)(13), 1222, 1321, 1326, 1329.

*United States v. Correia*, 207 F.2d 595 (3d Cir. 1953)

Provision of the Immigration and Nationality Act authorizing officer or employee of immigration service to interrogate any alien or person believed to be an alien as to his right to remain in the United States, is constitutional. Immigration and Nationality Act, § 287(a)(1), 8 U.S.C. § 1357(a)(1).

*Perri v. Dulles*, 206 F.2d 586 (3d Cir. 1953)

1. One born in Italy after his father, who was Italian citizen by birth, became naturalized American citizen, did not lose his American citizenship on his father’s reacquisition of Italian citizenship under Italian nationality law after two years residence in Italy, but became citizen of both nations. 8 U.S.C. § 713.

2. An American citizen by birth cannot expatriate himself by taking oath of allegiance to foreign country before attaining his majority, as a minor’s act is not regarded as voluntary in sense required to effect his expatriation. Act Mar. 2, 1907, 34 Stat. 1228.

3. An American citizen’s mere continuance in service as a conscript in Italian army after attaining his majority was not a continuation of his previous taking of oath of allegiance to King of Italy and hence did not effect his expatriation, especially as it was not a voluntary act. Act Mar. 2, 1907, 34 Stat. 1228.

4. Evidence that a citizen of both United States and Italy was drafted into Italian army while a minor and that all his subsequent service therein was under such draft was sufficient to establish prima facie that his continued service in such army after effective date of statute providing that American citizen entering or serving in foreign country’s armed forces shall lose his nationality, if he acquires nationality of such country, was involuntary, so as to preclude holding that he was thereby expatriated from American citizenship, in absence of rebuttal evidence that Italian law or military practice would have permitted his release from such service because of his American citizenship after that date. Nationality Act of 1940, § 401(c), 8 U.S.C. § 801(c).

5. One losing his American citizenship under Nationality Act because of having voted in 1946 Italian elections will be permitted to take oath of allegiance to United States and non-Communist oath before date specified in subsequent act authorizing naturalization of one losing his citizenship by voting in Italian election between January 1, 1946, and April 18, 1948, on his taking of such oaths but their effect as to restoration of his citizenship must

6. The power of naturalization, vested in Congress by Constitution, is power to confer citizenship, not to take it away, and change of citizenship cannot be arbitrarily imposed by Congress without citizen’s concurrence.

7. The statute providing that nonresident American citizen, acquiring foreign nationality through his parents’ naturalization in foreign country, shall be deemed to have elected to be American citizen after returning to and taking up permanent residence in United States within two years from effective date of such statute, and that his failure to do so shall be deemed a determination by him to discontinue such citizenship, must be given reasonable construction, so that two year limitation must be considered tolled as to such a citizen of both United States and Italy, residing in Italy on such date, by existence of war between such countries during major part of limitation period. Nationality Act of 1940, § 401(a), 8 U.S.C. § 801(a).

8. The two year limitation period prescribed by act providing that nonresident American citizen, acquiring foreign nationality through his parents’ naturalization in foreign country, shall be deemed to have elected to be American citizen after returning to and taking up permanent residence in United States within two years from effective date of act, and that his failure to do so shall be deemed determination by him to discontinue such citizenship and forever estop him from claiming it, did not begin to run as to such a citizen of both United States and Italy until he learned that he had a claim to American citizenship. Nationality Act of 1940, § 401(a), 8 U.S.C. § 801(a).

9. The two year limitations prescribed by act providing that failure of nonresident American citizen, acquiring foreign nationality through his parents’ naturalization in foreign country, to return to United States and take up permanent residence therein within two years after effective date of act, shall be deemed a determination by him to discontinue such citizenship and forever estop him from claiming it, applies to application by such a citizen for permission to come to United States to live, not to time of his actual arrival, as it is sufficient for him to do what he reasonably can do within time prescribed to gain such permission and to persist in and not abandon such efforts. Nationality Act of 1940, § 401(a), 8 U.S.C. § 801(a).

United States ex rel. McLeod v. Garfinkel, 202 F.2d 392 (3d Cir. 1953)

Where determination of trial court in habeas corpus proceeding, wherein it was contended that person held for deportation as an alien was an American citizen, that such person was not an American citizen was to substantial extent arrived at from evidence which was not before the court, order discharging rule to show cause why writ of habeas corpus should not issue would be reversed and cause remanded for further proceedings. 28 U.S.C. § 2246.

Arakas v. Zimmerman, 200 F.2d 322 (3d Cir. 1952)
1. Under statute providing that as to any alien, with exceptions, who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may suspend deportation if he finds that alien has resided continuously in United States for seven years or more, when alien had met residence requirements, whether deportation should be suspended was within discretion of Attorney General, and fact that large part of residence was within a period when alien was actually under order of deportation did not make such residence invalid for purposes of statute. Immigration Act of 1917, § 19(c), as amended, in 1948, 8 U.S.C. § 155(c).

2. Provision of regulations of Attorney General outlining procedure an alien may use during his deportation hearing in order to apply for suspension of deportation, had no application in situation wherein alien requested that his deportation hearing before Board of Immigration Appeals be reopened on ground that alien had, since prior hearing, met seven years’ residence requirement for suspension of deportation in discretion of Attorney General as authorized by statute. Immigration Act of 1917, § 19(c), as amended in 1948, 8 U.S.C. § 155(c).

3. In habeas corpus proceeding involving question of whether due process required that alien be granted a hearing on his application for suspension of deportation, wherein it appeared that Board of Immigration Appeals had previously entered order after deportation hearing, but that alien had in the interim met the seven year statutory residence requirement for suspension of deportation in discretion of Attorney General, evidence sustained determination of Board refusing to reopen the hearing and did not show abuse of its discretion as agent of Attorney General. Immigration Act of 1917, § 19(c), as amended in 1948, 8 U.S.C. §§ 1254(a)(1, 2), 1351.

**Belizaro v. Zimmerman**, 200 F.2d 282 (3d Cir. 1952)

1. Federal District Court was without jurisdiction to entertain proceedings for review of deportation orders where only the district officer, and not the Commissioner of Immigration and Naturalization, was before the court by personal service.


3. While the United States has plenary power to provide for deportation of aliens on terms and conditions of its own choice, deportation without a fair hearing or on charges not supported by any evidence constitutes the denial of due process of law which may be prevented by habeas corpus. U.S. Const. amend. V.

4. A deportation hearing must be conducted in accordance with the fundamental principles that inhere in due process of law. Immigration Act of 1924, § 1 et seq., as amended, 8 U.S.C. § 201 et seq.; U.S. Const. amend. V.
Paolo v. Garfinkel, 200 F.2d 280 (3d Cir. 1952)

1. The test for necessity of presence of superior officer in suit involving government official is whether decree which is entered will effectively grant relief desired by expending itself on subordinate official who is before the court. Administrative Procedure Act, § 10, 5 U.S.C. § 1009.

2. Commissioner of Immigration and Naturalization Service was “indispensable party” in proceeding to review deportation order. Administrative Procedure Act, § 10, 5 U.S.C. § 1009.

United States v. Anzalone, 197 F.2d 714 (3d Cir. 1952)

1. Where more than three years had elapsed since alleged violation of statute making it an offense for one to represent falsely and willfully that he is a citizen of the United States, by alien who signed and filed a Pennsylvania Voter’s Registration Card, prosecution was barred by three-year limitations. 18 U.S.C. §§ 911, 3282; 25 P.S. Pa. §§ 951-17, 2811.

2. To justify conviction under statute making it an offense for one to represent falsely and willfully that he is a citizen of the United States, there must be a direct representation by accused that he is a citizen of the United States. 18 U.S.C. § 911.

3. Alleged fact that alien signed a Pennsylvania voter’s certificate certifying that he was qualified to vote at general election did not warrant conviction of alien under statute making it an offense for one to represent falsely and willfully that he is a citizen of the United States. 18 U.S.C. § 911.

United States ex rel. Jaegeler v. Ugo Carusi, 187 F.2d 912 (3d Cir. 1951)

1. The discretion of the President as to the removal of alien enemies deemed to be dangerous to the public peace and safety of the United States is not subject to judicial review. 50 U.S.C. § 21; Proclamation July 14, 1945, No. 2655, 59 Stat. 870.

2. The War Power of the President is not subject to judicial review because the President chooses to have that power exercised within narrower limits than the Congress authorized.

3. The Alien Enemy Act merely allows an enemy alien to leave the country voluntarily and so long as there is any foreign country to which he could have gone, his failure to go there is a neglect or refusal to depart voluntarily. 50 U.S.C. § 21; Proclamation July 14, 1945, No. 2655, 59 Stat. 870.

4. Where alien was ordered deported on the ground that he was a dangerous enemy alien, his right to a voluntary departure was not nullified by the act of the Government in requesting foreign governments not to grant him a visa and in notifying a steamship company of refusal by friendly governments of visas where only friendly governments were informed and there were many countries to which the alien could go if he so desired. 50 U.S.C. § 21; Proclamation July 14, 1945, No. 2655, 59 Stat. 870.
United States v. Maisel, 183 F.2d 724 (3d Cir. 1950)

1. Where subsequent to issuance of warrant of deportation alien seaman made voyage from United States to Philippine Islands as member of crew of American ship and returned on same ship without having left ship until return, alien in going to the Philippines “left the United States” within illegal entry statute and in returning to United States he reentered country illegally. 8 U.S.C. §§ 173, 180(a, b).

2. In prosecution for knowingly, unlawfully and feloniously reentering United States after having been arrested and deported therefrom, admission of alien’s prior arrests and convictions and of two prior deportations, which occurred during reading to jury of certain questions and answers from alien’s examination by immigration service, was error despite absence of any semblance of objection to such evidence but in view of other evidence did not seriously prejudice alien. 8 U.S.C. § 180.


Klapprott v. United States, 183 F.2d 474 (3d Cir. 1950)

1. Evidence sustained finding of trial court that defendant in a denaturalization proceeding knowingly, voluntarily and intentionally permitted entry of default judgment cancelling his certificate of citizenship.

2. Evidence sustained finding of trial court that defendant in a denaturalization proceeding was not prevented by his physical condition from entering an appearance in denaturalization proceeding and that defendant was not prevented from obtaining legal assistance with case.

3. Evidence sustained finding of trial court that defendant in a denaturalization proceeding knowingly allowed his court appointed attorney to enter a default judgment against him.

4. Evidence sustained finding of trial court that defendant’s criminal trials and jail confinement had not so preoccupied him and undermined him physically and mentally as to excuse his failure to defend a denaturalization proceeding.

5. In action to set aside a default judgment in a denaturalization proceeding, where it was necessary to test credibility of defendant as to his knowledge of former proceeding, trial court did not err in admitting testimony relating to defendant’s prior activities and political views.

United States ex rel. Chin Fat Neu v. Zimmerman, 180 F.2d 582 (3d Cir. 1950)

The Administrative Procedure Act, 5 U.S.C. 1001 et seq., applies to a deportation hearing conducted by the Immigration and Naturalization Service.

Podovinnikoff v. Miller, 179 F.2d 937 (3d Cir. 1950)
1. District court has jurisdiction under the Administrative Procedure Act to review a deportation order. Administrative Procedure Act, §§ 1-12, 5 U.S.C. §§ 1001-1011.

2. Notification to Commissioner of Immigration by mail of pending suit by alien under the Administrative Procedure Act to review a deportation order, was insufficient, and he should have been served in district where he resided. Administrative Procedure Act, §§ 1-12, 5 U.S.C. §§ 1001-1011; 28 U.S.C. § 1391(b).

3. Residence of Commissioner of Immigration for purpose of suit against him by alien under the Administrative Procedure Act to review a deportation order, was in the District of Columbia where he performed the duties of his office. Administrative Procedure Act, §§ 1-12, 5 U.S.C. §§ 1001-1011; 28 U.S.C. § 1391(b).

4. The Commissioner of Immigration is an indispensable party in proceeding under the Administrative Procedure Act by an alien to review a deportation order, and where court had no jurisdiction over the commissioner because he was merely notified by mail of the suit, dismissal was proper. Administrative Procedure Act, §§ 1-12, 5 U.S.C. §§ 1001-1011; 28 U.S.C. § 1391(b).

*United States ex rel. Sommerkamp v. Zimmerman*, 178 F.2d 645 (3d Cir. 1949)

1. In habeas corpus proceeding by alien who was taken into custody by immigration authorities for deportation, the only question for Court of Appeals on appeal from discharge of writ was whether alien could be lawfully detained, and if sufficient grounds for his detention were shown, he could not be discharged because of defects in original arrest or commitment.

2. Where alien was brought to United States from Guatemala at outbreak of World War II as an alien enemy, but after the war his status as an internee was terminated and he was given opportunity to depart voluntarily in lieu of deportation but failed to do so, subsequent presence of alien in United States was “voluntary” and he would be regarded as having made an “entry”, and as being subject to deportation as an “immigrant”. Immigration Act of 1924, §§ 3, 13, 14, as amended, 8 U.S.C. §§ 203, 213, 214; Proclamation No. 2685, 50 U.S.C. § 21 note; Immigration Act of 1917, § 19, as amended, 8 U.S.C. § 155.

*Valle v. Stengel*, 176 F.2d 697 (3d Cir. 1949)

1. On motion to dismiss complaint, allegations of complaint and inferences to be drawn therefrom must be taken most favorably to plaintiffs.

2. It is to be presumed on motion to dismiss complaint, that an individual who is alleged to be chief of police of a New Jersey borough is lawfully in office.

3. A person who acts by virtue of an office conferred upon him under authority of state law and purportedly pursuant to state law is acting under “color of law”.

4. Allegation that defendant chief of police of a New Jersey borough aided and abetted management of privately owned amusement park open to public upon payment of fees, in refusing plaintiffs admission to swimming pool in park and in ejecting plaintiffs from park,
because plaintiffs’ party included Negroes, alleged that defendant chief was acting under “color of law” within Federal Civil Rights Act although the chief acted in violation of state statute. 8 U.S.C. § 43.

5. Plaintiffs who allegedly were refused admission to swimming pool of privately owned amusement park open to public upon payment of fees, and who were allegedly ejected from park by park management, aided and abetted by borough chief of police, because their party included negroes, were thereby denied equal protection of the laws guaranteed by Fourteenth Amendment were denied right to make or enforce contracts within Federal Civil Rights Act, and were denied privileges and immunities of citizenship. 8 U.S.C. §§ 41, 43; U.S. Const. amend. XIV; U.S. Const. art. 4, § 2.

6. The Federal Civil Rights Act is not to be narrowly interpreted. 8 U.S.C. § 41 et seq.

7. The privileges and immunities of Federal Civil Rights Act rendering liable a person who under color of law subjects a person to deprivation of privileges or immunities secured by constitution, are the privileges and immunities of article 4, § 2 of Federal Constitution, and of the Fourteenth Amendment. 8 U.S.C. § 43; U.S. Const. amend. XIV; U.S. Const. art. IV, § 2.

8. Under Article of Federal Constitution entitling citizens of each state to all privileges and immunities of citizens of the several states, the right of citizen to indulge in a lawful commerce, trade or business, without molestation or harassment, or to engage in the pursuit of happiness, is protected. U.S. Const. art. IV, § 2.

9. Federal civil rights act was intended to confer on Negroes a civil status equivalent to that enjoyed by white persons.

10. Citizens of a state are citizens of the United States.

United States v. Backofen, 176 F.2d 263 (3d Cir. 1949)

1. Under Federal Rule before amendment respecting relief against a judgment taken through mistake, inadvertence, surprise or excusable neglect, exception that the rule should not limit the power of a court to entertain an action to relieve a party from a judgment, order or proceeding was construable to mean that in a proper case proceedings by way of bill of review or bill in nature of a bill of review could be had. Fed. R. Civ. P. Rule 60(b), 28 U.S.C.

2. In denaturalization proceedings, where defendants after adverse default judgments sought review for alleged error on the face of the record under the Federal Rule as before amendment, the trial judge properly considered the applications as bills of review which ordinarily must be brought within the time limited for an appeal. Fed. R. Civ. P. Rule 60(b), 28 U.S.C.

3. In denaturalization proceedings, where complaints were filed and default judgments entered before amended Federal Rule became effective liberalizing the time for motion for relief from judgment for mistake, inadvertence, surprise or excusable neglect, and requiring only that motion be made within a reasonable time, the amended rule would be applied in considering bills of review to set aside the defaults. Fed. R. Civ. P. Rule 60(b), 28 U.S.C.
4. Letter petitions on bills of review to set aside default judgments entered more than 3 years before in denaturalization proceedings to which Federal Rule as amended was applicable, were presented within a reasonable time and were sufficient to justify setting aside the defaults. Fed. R. Civ. P. Rule 60(b), 28 U.S.C.

5. Petition on bill of review to set aside default judgment entered in denaturalization proceeding was sufficient to warrant invoking the “any other reason” clause of the Federal Rule as amended to which the one-year limitation does not apply, so as to justify setting aside the default entered on August 10, 1943. Fed. R. Civ. P. Rule 60(b), 28 U.S.C.

6. Allegations of bill of review to set aside default judgment entered in denaturalization proceedings disclosed an “extraordinary situation” bringing into force the “any other reason” clause of Federal Rule as amended so as to permit setting aside of the default entered on July 17, 1942. Fed. R. Civ. P. Rule 60(b), 28 U.S.C.

7. Where rule to show cause why default in denaturalization proceedings should not be set aside was really a motion which squarely presented the “any other reason” for reopening the default judgment under the Federal Rule as amended, there was no present necessity for dealing with the later bill of review, and affidavits on which the rule to show cause was issued would be considered as a petition to reopen the default judgment. Fed. R. Civ. P. Rule 60(b), 28 U.S.C.

Doreau v. Marshall, 170 F.2d 721 (3d Cir. 1948)

1. In action for declaratory judgment that an American woman who had retained American citizenship when she married a Frenchman is a national of the United States, complaint alleging procurement of certificate of French nationality to prevent risk of being put into concentration camp by Germans and that plaintiff had no intention of renouncing American nationality stated a cause of action. Nationality Act of 1940, §§ 401, 503, 8 U.S.C. §§ 801, 903.

2. The essence of expatriation is that it be voluntary.

United States v. Stabler, 169 F.2d 995 (3d Cir. 1948)

1. Attempt to reopen denaturalization proceedings five years after citizenship was cancelled for fraud came too late, if the trial court, had authority to enter default judgment cancelling the citizenship, but if the applicable statute was not complied with, and the court had no authority to proceed, the party involved could properly call upon the court to clear its record of a void judgment. Nationality Act of 1940, § 338(a, b), 8 U.S.C. § 738(a, b).

2. Evidence that at time denaturalization proceedings were begun in Federal Court in New Jersey, defendant was confined in federal institution in Michigan, that prior to time of his arrest for the offense for which he was incarcerated he had worked for several weeks at his trade of barbering in New Jersey but in the meantime had retained a room previously occupied by him in New York City justified conclusion that prior to institution of proceedings defendant was a resident of New Jersey. Nationality Act of 1940, § 338(a, b), 8 U.S.C. § 738(a, b).
3. A person who is domiciled within a country and is a citizen thereof, is subject to jurisdiction of its courts wherever he may be, since both domicile and national allegiance are recognized bases of jurisdiction over the person, though reasonable means of notice must be provided for to comply with procedural due process.

4. “Residence” is a term of broad content having no exact legal meaning, and sometimes when used in a statute or constitution means a domicile but on other occasions means something less than domicile and involves physical presence in a place without requiring intent to make it one’s home, which is involved in the domicile concept.

5. The use of the term “residence” in statute relating to denaturalization proceedings does not require such proceedings to be conducted at domicile of person against whom proceedings are brought nor does statute contemplate a distinction in legal rights or duties based on a distinction between a little or unimportant residence as contrasted with a big or important residence. Nationality Act of 1940, § 338(a, b), 8 U.S.C. § 738(a, b).

6. One does not acquire a domicile or residence while imprisoned.

7. With “residence” as well as with “domicile”, some picking out of a place to live in by the individual concerned is involved.

8. Where at time denaturalization proceedings were begun, defendant was confined in federal institution in Michigan but immediately prior to time of his arrest for offense for which he was incarcerated he had worked for several weeks at his trade of barbering in New Jersey, the defendant had a “residence” in New Jersey for purpose of giving New Jersey Court jurisdiction, and New Jersey was place where defendant last had his “residence” within statutory provision for notice if defendant is absent from district in which he last had his “residence”. Nationality Act of 1940, § 338(a, b), 8 U.S.C. § 738(a, b).

9. Where at the time denaturalization proceedings were begun in New Jersey, defendant, was confined in federal institution in Michigan, but immediately prior to time of arrest for offense for which defendant was incarcerated he had worked for several weeks at his trade of barbering in New Jersey, and where notice of proceeding was sent to defendant in Michigan, court had jurisdiction to enter judgment by default, cancelling defendant’s citizenship. Nationality Act of 1940, § 338(a, b), 8 U.S.C. § 738(a, b).

10. Statute providing that denaturalization proceedings shall be brought in the judicial district in which naturalized citizen may reside at time of bringing suit and that if a naturalized person in absent from the district in which he last had his residence means shall be taken to provide him with notice of action, is a provision for venue which can be waived and failure to object to the district in which the proceedings were commenced before judgment was rendered waives such objection. Nationality Act of 1940, § 338(a, b), 8 U.S.C. § 738(a, b).

United States ex rel. Trinler v. Carusi, 168 F.2d 1014 (3d Cir. 1948)

1. The federal rule relating to continuance of action by or against successor to a federal officer who ceases to hold office during pendency of action to which he is a party is inapplicable to proceedings in the Circuit Court of Appeals. Fed. R. Civ. P. Rule 25(d), 28 U.S.C.
2. A proceeding against Commissioner of Immigration and Naturalization to set aside a deportation order abated where Commissioner resigned and no application was made to substitute his successor as party respondent until nearly nine months after former Commissioner’s resignation. 28 U.S.C. 780; Rules of the Circuit Court of Appeals, Rule 28(5).

3. Officers of the United States may be sued, and suit against them may be maintained only pursuant to the rules of law laid down by Congress.

4. A decision of Supreme Court with respect to time for making application to continue action against successor to federal officer who is party to action was binding upon the Circuit Court of Appeals.

United States v. Christoph, 167 F.2d 900 (3d Cir. 1948)

Letter reciting that writer relinquished United States citizenship, that he did not feel that he owed allegiance and fidelity to the United States, and requesting deportation to Germany at earliest possible moment constituted a consent to government’s prayer for revocation of citizenship.

United States ex rel. Forino v. Garfinkel, 166 F.2d 887 (3d Cir. 1948)

1. Under proviso of Immigration Act that provision thereof for deportation of aliens convicted of crimes involving moral turpitude should not apply to one who has been pardoned, alien who has received legislative pardon or presently possesses status of person who is entitled to one, cannot be deported. Immigration Act of 1917, § 19, 8 U.S.C. § 155.

2. Under proviso of Immigration Act that provision thereof for deportation of aliens convicted of crimes involving moral turpitude shall not apply to one who has been pardoned, alien’s position in respect to pardon was determinable by state law under which he had been convicted. Immigration Act of 1917, Sec. 19, 8 U.S.C. 155.

3. A “pardon” whether granted by executive or by legislature, is simply an act of grace and no one has or can acquire a vested right thereto.

4. Alien who had not completed service of sentence at time of repeal of Pennsylvania statute giving service of sentence by one who has “endured” punishment adjudged the effect of pardon could not invoke statute to avoid deportation, notwithstanding provision in repeal statute preserving “civil rights” or “remedies” and notwithstanding Pennsylvania Statute prohibiting giving laws a retroactive effect, since the possibility of access to a legislative pardon is not a civil right or remedy. Immigration Act of 1917, § 19, 8 U.S.C. §§ 1251, 1254, 1351; 18 P.S. Pa. §§ 5102, 5201; 19 P.S. Pa. § 893; 46 P.S. Pa. §§ 504, 556.

5. Pro tanto effect could not be ascribed to Pennsylvania statute giving service of sentence the effect of a pardon, and a convict could not become entitled to some part of a pardon because he had served some part of his sentence at time the statute was repealed. 18 P.S. Pa. §§ 5102, 5201, 19 P.S. Pa. § 893.
6. Any law which alters punishment or inflicts greater punishment than law annexed to crime when committed is “ex post facto”.

7. Where alien had not completed service of sentence at time of repeal of Pennsylvania statute giving service of sentence the effect of a pardon, construing the repealing act as depriving alien of the legislative pardon did not give act the effect of an “ex post facto” law within constitutional prohibition. 18 P.S. Pa. §§ 5102, 5201; 19 P.S. Pa. § 893; U.S. Const. art. I, § 9; P.S. Pa. Const. art. I, § 17.

8. Pennsylvania statute which provided that punishment endured by person convicted of felony should have like effect as pardon by Governor and which was in force at time alien was convicted of felony and commenced serving his sentence but which was repealed prior to completion of such sentence did not preclude deportation of alien because of proviso of Immigration Act that provision thereof for deportation of aliens convicted of crimes involving moral turpitude should not apply to one who has been pardoned. Immigration Act of 1917, § 19, 8 U.S.C. §§ 1251, 1254, 1351; 18 P.S. Pa. §§ 5102, 5201; 19 P.S. Pa. § 893.

Klapprott v. United States, 166 F.2d 273 (3d Cir. 1948)


3. Congress, in regulating the acquisition and loss of citizenship rights has made denaturalization proceedings civil, and the proceeding is not changed into a criminal prosecution, by the fact that the Supreme Court has pointed out the necessity of clear evidence in a contested case. Nationality Act of 1940, § 338, 8 U.S.C. § 738.

4. The fact that defendant was not represented by counsel in a default denaturalization proceeding, did not entitle him to have default judgment set aside on ground that constitutional rights had been violated. Nationality Act of 1940, § 338, 8 U.S.C. § 738.


Rasmussen v. Robinson, 163 F.2d 732 (3d Cir. 1947)

1. In habeas corpus proceeding to obtain release from custody under warrant of deportation of an alien who had admitted commission of crimes involving moral turpitude, admission of alien as a returning resident for purposes of trial for such crimes must be presumed to have been a legal entry. Immigration Act of 1917, § 19, 8 U.S.C. §§ 1251, 1254, 1351.

2. Section 19 of the Immigration Act of 1917 was intended to provide means for deportation of aliens who had obtained entry into United States despite provisions of section 3 excluding
aliens who have been convicted of or admit having committed crimes involving moral turpitude. Immigration Act of 1917, §§ 3(e), 19, 8 U.S.C. §§ 1182(a), 1251, 1254, 1351.

3. Alien admittedly guilty of embezzlement committed in Virgin Islands more than five years after his admission there as a permanent resident but before re-entry after trip to French West Indies was deportable, since such crime was committed prior to “entry” within deportation statute. Immigration Act of 1917, § 19, 8 U.S.C. §§ 1251, 1254, 1351.

4. The recommendation by sentencing court against deportation of alien convicted of a crime involving moral turpitude is to be made to attorney general of the United States and is mandatory upon him, but it may be invoked only as to crimes committed by an alien in the United States prior to entry and not as to crimes committed outside the United States. Immigration Act of 1917, § 19, 8 U.S.C. §§ 1251, 1254, 1351.

5. Alien convicted of embezzlement committed in Virgin Islands before trip to French West Indies and re-entry as returning resident for purpose of trial was entitled to benefit of sentencing court’s recommendation against deportation, though he subsequently admitted to immigration authorities commission of such offenses involving moral turpitude, since such offenses were committed in the United States prior to entry. Immigration Act of 1917, § 19, 8 U.S.C. §§ 1251, 1254, 1351.

United States v. Agne, 161 F.2d 331 (3d Cir. 1947)


United States ex rel. Orlando v. Carusi, 160 F.2d 744 (3d Cir. 1947)

1. In habeas corpus proceeding to obtain release from custody under warrant of deportation of an alien who had admitted commission of crimes involving moral turpitude, admission of alien as a returning resident for purposes of trial for such crimes must be presumed to have been a legal entry. Immigration Act of 1917, § 19, 8 U.S.C. §§ 1251, 1254, 1351.

2. Section 19 of the Immigration Act of 1917 was intended to provide means for deportation of aliens who had obtained entry into United States despite provisions of section 3 excluding aliens who have been convicted of or admit having committed crimes involving moral turpitude. Immigration Act of 1917, §§ 3(e), 19, 8 U.S.C. §§ 1182(a), 1251, 1254, 1351.

3. Alien admittedly guilty of embezzlement committed in Virgin Islands more than five years after his admission there as a permanent resident but before re-entry after trip to French West Indies was deportable, since such crime was committed prior to “entry” within deportation statute. Immigration Act of 1917, § 19, 8 U.S.C. §§ 1251, 1254, 1351.

4. The recommendation by sentencing court against deportation of alien convicted of a crime involving moral turpitude is to be made to attorney general of the United States and is
mandatory upon him, but it may be invoked only as to crimes committed by an alien in the United States prior to entry and not as to crimes committed outside the United States. Immigration Act of 1917, § 19, 8 U.S.C. §§ 1251, 1254, 1351.

5. Alien convicted of embezzlement committed in Virgin Islands before trip to French West Indies and re-entry as returning resident for purpose of trial was entitled to benefit of sentencing court’s recommendation against deportation, though he subsequently admitted to immigration authorities commission of such offenses involving moral turpitude, since such offenses were committed in the United States prior to entry. Immigration Act of 1917, § 19, 8 U.S.C. §§ 1251, 1254, 1351.

United States ex rel. Reichel v. Carusi, 157 F.2d 732 (3d Cir. 1946)

1. The Circuit Court of Appeals took judicial notice of treaty between Germany and Czechoslovakia and its terms.

2. One who was born in 1905, in Bohemia which became part of Czechoslovakia, and who came from Bohemia to the United States on passport issued by Czechoslovakia in 1935, and who stated to German authorities, after the place of his birth was ceded to Germany, that he was willing to bear arms for Germany and who applied for and received a German passport, became a German citizen, and was therefore properly arrested on presidential warrant issued under the Alien Enemy Act and presidential proclamation, and German citizenship was not lost when his place of birth was reincorporated in Czechoslovakia. Proclamation Dec. 8, 1941, No. 2526; 50 U.S.C. § 21.

3. Where foreign public documents are pertinent to the decision they, with accurate translations of them, should be incorporated in the record made in the trial court.

United States v. German-American Vocational League, 153 F.2d 860 (3d Cir. 1946)


2. An “overt act” is one which manifests the intention of the doer to commit the offense.


5. In prosecution for conspiracy to violate Foreign Agents Registration Act, evidence was sufficient to sustain determination that corporate defendant was agent for foreign principal.

6. Testimony of Government’s witnesses favorable to defendants and credibility of the witnesses were for jury to pass on along with other evidence.


8. Propaganda is a subject for expert testimony.


10. Cross-examination of witness is a matter of right, but its proper bounds are within sound discretion of trial judge.

11. In prosecution for conspiracy to violate the Foreign Agents Registration Act, where Government’s witness, an investigator, for national security reasons, was permitted to testify under an assumed name, refusing to permit cross-examination as to part of his background which antedated by several years the period covered by his testimony was not error, where none of data testified to by him was obtained by witness during period which was barred to cross-examination, and defense thoroughly developed the various avenues of cross-examination and anything further would have been cumulative. Cr. Code § 37, 18 U.S.C. § 371; Foreign Agents Registration Act of 1938, § 2, 52 Stat. 632, 22 U.S.C. § 612.

12. In prosecution for conspiracy to violate the Foreign Agents Registration Act, where defendants contended that a film showed to court and jury was not the same as original film, but there was testimony on behalf of Government that the film was the same as had been shown at meetings of corporate defendant, the problem was properly left to the jury. 18 U.S.C. § 371; Foreign Agents Registration Act of 1938, § 2, 52 Stat. 632, 22 U.S.C. § 612.


United States v. Fiswick, 153 F.2d 176 (3d Cir. 1945)

1. Instruction, in prosecution for conspiracy to violate the Alien Registration Act respecting the admission of statements and verbal admissions by conspirators of activities not in furtherance of object of conspiracy, was not erroneous as assuming there was proof of conspiracy and its
continued existence in view of other portions of charge and statements clarifying language to expressed satisfaction of jury that they were to find whether or not a conspiracy existed. Alien Registration Act 1940, § 31 et seq., 8 U.S.C. § 452 et seq.

2. A prosecution for conspiracy to violate Alien Registration Act was not barred by limitations in view of conversations with and statements by defendants, which established the continued functioning of plan of not disclosing information and of giving false information up to and right into the trial. Alien Registration Act 1940, § 31 et seq., 8 U.S.C. § 452 et seq.


_West Indian Co. v. Root_, 151 F.2d 493 (3d Cir. 1945)

1. Notice to detain alien seamen given to master of vessel would not charge agent of operator of vessel with duty to detain, in absence of showing that master was also representative of agent, since such a notice creates a personal liability. Immigration Act of 1924, § 20(a), 8 U.S.C. § 1284(a).

2. Where requirement to detain alien seamen was communicated to ship operator’s agent, refusal of agent’s boarding clerk to acknowledge receipt of notice did not alter effectiveness thereof so as to render agent liable to fine for failure to detain seamen. Immigration Act of 1924, § 20(a), 8 U.S.C. § 1284(a).

3. The statute makes duty of master of vessel to detain alien on notice to do so absolute, hence Attorney General did not abuse discretion in imposing fines for failure to detain alien seamen or in refusing to remit such fines because master of vessel allegedly did all he could to prevent escape of seamen and because imposition of fines would work hardship on the port. Immigration Act of 1924, § 20(a), 8 U.S.C. § 1284(a).

4. Where alien seamen left ship with intent to desert and were not apprehended until following day, fact that vessel had not sailed until after they were found, did not make it any less an escape or failure by ship operator’s agent to detain such seamen as required by order communicated to agent. Immigration Act of 1924, § 20(a), 8 U.S.C. § 1284(a).

5. The privilege of an alien seaman to land or his obligation to remain aboard ship is determined administratively, and liability for failure to detain on board pursuant to administrative order is also determined administratively. Immigration Act of 1924, § 20(a), 8 U.S.C. § 1284(a).

6. Administrative remedies must be exhausted, such as in procuring relief from fines imposed for failing to detain alien seamen on ship as required by administrative order, before resort to courts, and party complaining in such proceeding must raise all judicial questions on which he intends to rely in the administrative proceeding, and available administrative remedies are not exhausted with respect to contentions not specifically passed on. Immigration Act of 1924, § 20(a), 8 U.S.C. § 1284(a).

7. Ship operator’s agent could not for first time in action to recover fines imposed for failing to detain on shipboard alien seamen pursuant to order requiring such detention, assert that
detention order was illegal because detainees were bona fide seamen entitled to land and had not been accorded fair examination, where agent had never raised such issue in the administrative process nor offered any evidence thereof to Attorney General. Immigration Act of 1924, § 20(a), 8 U.S.C. § 1284(a).


9. The purpose of statute providing for imposition of penalties on owner, charterer or agent, consignee or master of vessel who fails to detain on board alien seamen until immigration officer has inspected seamen, or after such inspection, is to prevent aliens from entering United States in guise of seamen. Immigration Act of 1924, § 20(a), 8 U.S.C. § 1284(a).

10. Immigration inspector, in determining which alien seamen shall have privilege of landing for shore visit, by examination of seamen aboard ship, must rely on impression which he receives through such examination, bringing to his assistance his experience and information properly before him respecting membership of crew. Immigration Act of 1924, § 20(a), 8 U.S.C. § 1284(a).

11. The immigration rule prescribing entry requirements for alien seamen does not grant right of entry nor does it prevent detention for other reasons. Immigration Act of 1924, § 20(a), 8 U.S.C. § 1284(a).


13. In view of presumption of regularity adhering to administrative determination, such as order of immigration inspector requiring detention of alien seamen on shipboard, reviewing court cannot say, in absence of clear showing to contrary, that when detention order was issued inspector should have believed that seamen ordered detained intended merely to change their berths and not to abandon their calling. Immigration Act of 1924, § 20(a), 8 U.S.C. § 1284(a).

14. Where vessel operator was not served with order for detention of alien seamen or with notice of intention to fine operator for permitting their escape, and no attempt was made to collect fines from operator and it did not pay fines, and before commencement of action by agent of operator to recover fines paid by agent operator made no claim for remission of fines, operator was not a proper party plaintiff in action to recover the fines. Immigration Act of 1924, § 20(a), 8 U.S.C. § 1284(a); Fed. R. Civ. P. Rule 21, 28 U.S.C.

*United States v. Doshen*, 133 F.2d 757 (3d Cir. 1943)

1. An oath taken before an officer who has no legal authority to administer it cannot serve as basis for perjury. Cr. Code, § 125, 18 U.S.C. § 1621.

2. Department of Justice employee designated as special inspector in immigration and naturalization service who at time of administering oath to alien was not authorized to do
work under Alien Registration Act, was not an “immigrant inspector” within meaning of statute giving immigrant inspectors power to administer oaths, hence false swearing before such officer was not “perjury”. Immigration Act of 1917, § 29 as amended 8 U.S.C. §§ 1224, 1225, 1357, 1362; 18 U.S.C. § 111; Cr. Code § 125, 18 U.S.C. § 1621.

3. Indictment charging the making of a false oath before an officer of the United States designated as a special inspector of the immigration and naturalization service, Department of Justice, did not charge “perjury” within Criminal Code section defining perjury as the taking of a false oath before a competent officer since power to administer oaths by officers of immigration and naturalization service is extended only to immigrant inspectors. Immigration Act of 1917, § 29, as amended 8 U.S.C. §§ 1224, 1225, 1357, 1362; 18 U.S.C. § 111; Cr. Code § 125, 18 U.S.C. § 1621.

4. A prosecution for perjury for falsely swearing before an official of the United States not specifically authorized to administer oaths, could not be sustained under statute empowering all federal employees investigating frauds upon the government to administer oaths on theory that false statement in naturalization proceedings is a fraud in absence of showing that oath was administered to defendant in proceedings in which a false statement made by defendant in a naturalization proceeding was basis of investigation. 5 U.S.C. § 93.


6. Under provision of Alien Registration Act that registration forms to be filled out by alien shall contain inquiry with respect to date and place of entry of alien into United States, it was no defense to perjury prosecution for knowingly making a false statement in reply to question as to date of alien’s last arrival in United States and place of entry, that such question was unauthorized by the act. Alien Registration Act 1940, § 34(a)(1), 8 U.S.C. § 1304.

*United States ex rel. Santarelli v. Hughes*, 116 F.2d 613 (3d Cir. 1940)

1. An alien must have a consular visa or if he leaves the country temporarily, a re-entry permit as a “condition precedent” to entry. Immigration Act of 1924, §§ 2(a), 13(b), 8 U.S.C. §§ 202(a), 213(b).

2. Where quota alien who had no consular visa or re-entry permit fled to Canada with money which he had embezzled from Philadelphia bank and was there arrested for theft, and Philadelphia police lodged a detainer at Canadian jail and took alien into custody on his release therefrom, board of inquiry before which police appeared with alien properly refused alien permanent admission, since his status had become that of a temporary visitor under the statute and regulations appropriate thereto, and his term having expired, alien became deportable as an alien who had remained longer than permitted under statute. Act May 19, 1921, 42 Stat. 5; Immigration Act of 1917, § 17, 8 U.S.C. § 153; Immigration Act of 1924, §§ 2(a), 4(b), 13(b), 15, 8 U.S.C. §§ 202(a), 204(b), 213(b), 215.

3. A limiting clause in a statute should be restrained to the last antecedent unless the subject matter requires a different construction.
4. Under the provision of the “Immigration Act” stating that any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude shall be deported, the phrase “prior to entry” modifies the word “commission” and not the word “admits”. Immigration Act of 1917, § 19, 8 U.S.C. § 155.

5. The class of aliens deportable under statute because convicted, or admitting the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude is excluded from the provision stating that deportation shall not be made or directed if the court or judge thereof sentencing an alien for a crime involving moral turpitude shall make a recommendation to the Secretary of Labor that the alien shall not be deported. Immigration Act of 1917, § 19, 8 U.S.C. § 155.

6. Statutory language must be construed in a sense of accomplishment.

*United States ex rel. Vounas v. Hughes*, 116 F.2d 171 (3d Cir. 1940)


3. Under statute providing for deportation of alien seaman upon “examination” by a board of special inquiry as to seaman’s qualifications for admission to the United States, a “qualification” for admission was a “condition precedent” to the operation of the statute, so that where alien seaman ordered deported after hearing by single immigrant inspector admitted his deportability, he could not claim right to be heard by board of special inquiry since the condition precedent was admittedly absent and board could not “examine” as to a nondisputed fact. Immigration Act of 1917, § 34, 8 U.S.C. § 166; Immigration Act of 1924, § 14, 8 U.S.C. § 214.

4. The implied repeal of a special act or one dealing with a special subject is not generally effected by a subsequent general act or one dealing with a general subject.

5. Under statute relating to deportation of “any alien” in country for longer time than permitted, alien seaman was deportable upon hearing before single immigration inspector notwithstanding previous statute required hearing for deportation of alien seaman to be before board of special inquiry. Immigration Act of 1917, §§ 17, 19, 34, 8 U.S.C. §§ 153, 155, 166; Immigration Act of 1924, §§ 14, 28, 8 U.S.C. §§ 214, 224.

*United States ex rel. Drachmos v. Hughes*, 110 F.2d 662 (3d Cir. 1940)

1. Where alien who entered country illegally in 1921 made a short trip to Canada subsequent to passage of 1924 immigration act, his return from Canada constituted a “new entry” rendering him subject to deportation. 8 U.S.C. § 101 et seq., § 201 et seq.
2. That length of time during which alien remained in Canada on visit subsequent to passage of 1924 immigration act, after having entered country illegally in 1921, was very short was immaterial in determining whether alien thereby made a new entry subjecting him to deportation. 8 U.S.C. § 201 et seq.

3. An alien who, prior to entry of order of deportation, had made a statement to an inspector, had been examined under oath without being represented by an attorney and had been examined under oath with his attorney present had thereby received a full, fair and impartial hearing.

4. An order of deportation cannot be stayed by court on the facts where relevant testimony was offered tending to sustain charge against alien, since court cannot determine as a primary matter the weight of evidence.

Perkins v. United States ex rel. Malesevic, 99 F.2d 255 (3d Cir. 1938)

1. The provision of Immigration Act that provision thereof for deportation of aliens convicted of crimes involving moral turpitude shall not apply to one who has been pardoned applies to alien who has served sentence imposed on his conviction of felony, committed between dates of his original entry and re-entry in state having statute providing that punishment endured by person convicted of felony shall have like effects as pardon by Governor, so that such alien may not be deported. Immigration Act of 1917, § 19, 8 U.S.C. § 155; 19 P.S. Pa. § 893.

2. The effect of Pennsylvania statute, providing that punishment endured by person convicted of felony shall have like effects as pardon by Governor, on alien seeking discharge from custody under warrant of deportation after serving sentence imposed on his conviction of felony, committed in such state between dates of his entry and re-entry, on ground that he had been pardoned, must be determined by decisions of Pennsylvania Supreme Court. 19 P.S. Pa. 893; Immigration Act of 1917, Sec. 19, 8 U.S.C. 155.

3. The effect of pardon, conferred by Pennsylvania statute providing that punishment endured by one convicted of felony shall have like effects as pardon by Governor, on convicted person, who has served his term, is precisely that which would have been afforded him had Governor granted him free and unconditional pardon, according to decisions of Pennsylvania Supreme Court. 19 P.S. Pa. § 893.

Kubara v. United States, 89 F.2d 965 (3d Cir. 1937)

United States held not entitled to collect penalty provided in bond required obligors to cause alien to be delivered into custody of immigration officer for deportation at any time upon request, and providing that delivery and acceptance of alien for deportation would cancel bond, even though Commissioner General of Immigration had declared conditions of bond broken, where obligors spent $500 in search for alien, officer accepted alien upon delivery by obligors thereafter, and government deported alien.

United States v. Balestra, 88 F.2d 43 (3d Cir. 1937)
1. Statute specifying how alien marrying citizen “after the passage of this Act, as here amended” may be naturalized held applicable to alien marrying citizen after passage of original act but before passage of amendment. 8 U.S.C. § 368.

2. A retroactive construction of a statute is usually to be avoided, but the rule is a more or less artificial aid in arriving at the true intention of the Legislature and will not govern if in conflict with the general objectives of the legislation.

Loufakis v. United States, 81 F.2d 966 (3d Cir. 1936)

1. Order directing alien to answer questions relative to his right to reside within United States held not to invade constitutional guaranty against self-incrimination, since such guaranty is applicable to criminal and not to civil proceedings and deportation proceedings are civil. Immigration Act 1917, § 16, 8 U.S.C. §§ 1224, 1225, 1357, 1362; 18 U.S.C. § 111; Immigration Act 1924, § 14, 8 U.S.C. §§ 1251(a)(1, 2, 9), 1252.

2. Immigration Act held to confer jurisdiction on District Court to require alien in deportation proceeding to answer questions affecting his right to remain in United States as against contention that act was restricted to exclusion cases. Immigration Act 1917, § 16, 8 U.S.C. § 152.

Loufakis v. United States, 75 F.2d 627 (3d Cir. 1935)

1. Where jurisdiction of Circuit Court of Appeals depends on finality of order appealed from, it is such court’s duty to examine and determine that question, though not raised by parties.

2. Order directing alien at large on bail to answer immigration inspector’s questions in deportation proceeding held not final, but interlocutory, so as to require dismissal of appeal therefrom for want of jurisdiction. 8 U.S.C. § 152.

3. Party may appeal from interlocutory order before entry of final judgment only when disobedience of order results in order punishing him criminally for contempt.

Rein v. United States, 69 F.2d 206 (3d Cir. 1934)

1. Rule that question in respect of arrest is inadmissible to impeach witness does not apply to naturalization proceedings where purpose is not to impeach witness but to ascertain trustworthiness of his opinion concerning applicant’s good moral character. 8 U.S.C. § 379; Cr. Code § 80, 18 U.S.C. § 142.

2. “Naturalization proceedings” are administrative of naturalization laws and constitute inquiry into applicant’s fitness for citizenship and particularly his disposition with relation to theory of United States government, 8 U.S.C. § 379.

3. Witness for applicant in naturalization case who falsely testified that he had never been arrested committed offense against United States, since answer was material and purpose of question was not to impeach witness. 8 U.S.C. § 379; Cr. Code § 80, 18 U.S.C. § 142.
United States ex rel. Mastoras v. McCandless, 61 F.2d 366 (3d Cir. 1932)

1. Evidence that government witness in deportation proceeding was actuated by personal animosity toward alien did not show that he was deprived of fair hearing, when findings of immigration inspectors and board of review were based on testimony of other unbiased witnesses.

2. Immigration inspectors’ conduct of hearings in deportation proceedings at city in or near which alien and all witnesses resided, instead of immigration station in another state, held not abuse of discretion or unfair to alien.

3. Inclusion of irrelevant material in record of deportation proceeding does not render hearing unfair, where there is ample legitimate evidence supporting finding against alien.

4. Determination of weight of evidence in deportation proceeding is within exclusive jurisdiction of Department of Labor, and courts cannot consider admissibility or weight thereof; question being whether any relevant testimony sustaining charge was offered.

5. Health and police officers’ testimony that alien, sought to be deported, resided in bawdyhouse in August, 1927, when it was raided, sufficiently specified time to enable alien to answer charge of managing such house. Immigration Act 1917, § 19 (8 U.S.C. § 155).

6. Deportation proceedings are not subject to same strictness of pleading and proof as criminal proceedings.

7. Writ of habeas corpus to release alien, held by immigration commissioner for deportation, is properly discharged, if there is any evidence sustaining deportation warrant.

8. Evidence held to warrant finding of Secretary of Labor that alien sought to be deported was connected with management of bawdyhouse. Immigration Act 1917, § 19 (8 U.S.C. § 155).

9. Alien’s acquittal of charge, under which deportation warrant was issued, is not res judicata in deportation proceeding.

10. Question not discussed in appellant’s brief may be assumed to be abandoned.

11. “Country” to which statute requires deportation of alien is state which includes place from which he came at time of deportation. Immigration Act 1917, § 20 (8 U.S.C. § 156).

12. Assignments of error, not briefed or argued, must be deemed abandoned and will not be considered.

McCandless v. United States ex rel. Donati, 56 F.2d 151 (3d Cir. 1932)

2. Decision sustaining hearing before Assistant Secretary of Labor and upholding Secretary’s finding cannot be found erroneous, where record does not contain evidence given before Secretary.

*United States v. Sixto Mestres-Janssens*, 55 F.2d 881 (3d Cir. 1932)

Applicant held not entitled to be admitted as citizen, where continuity of residence was broken by four years’ voluntary absence. 8 U.S.C. § 382.

*McCandless v. United States ex rel. Murphy*, 47 F.2d 1072 (3d Cir. 1931)

Immigrant’s voluntary statement showing entry under wrongfully obtained papers justified deportation, though she was taken to immigration station without previous arrest.

*Allen v. United States*, 47 F.2d 735 (3d Cir. 1931)

1. Virgin Islands being appurtenant to, rather than incorporated in, United States under treaty of cession, naturalization laws do not extend thereto, except by express legislation.

2. United States, having acquired absolute dominion over Virgin Islands through treaty of cession, may extend its general naturalization laws thereto.


4. Statutes held to confer on District Court of Virgin Islands jurisdiction for naturalization purposes. 8 U.S.C. §§ 5b, 5c, 358a, 377a, 380b, 405; 48 U.S.C. §§ 1391-1396.

5. Title of act should be resorted to only for purpose of resolving doubt as to meaning of words used in act in case of ambiguity.

*United States ex rel. Fitleberg v. McCandless*, 47 F.2d 683 (3d Cir. 1931)

1. Secretary of Labor may deport alien to country of nativity or citizenship rather than to country from which alien last entered. Immigration Act 1917, § 20 (8 U.S.C. § 156).

2. Alien’s return to United States by Canadian immigration officials after extradition held unlawful entry, in view of original unlawful entry, warranting deportation.

*United States ex rel. Orisi v. Marshall*, 46 F.2d 853 (3d Cir. 1931)

1. Law authorizing deportation of aliens not in possession of unexpired immigration visa is inapplicable to one entering before enactment. Immigration Act 1924, § 5, 8 U.S.C. § 205.

2. Alien admitted as transient destined to Canada had burden of showing that subsequent entry from Canada was lawful, regardless of possible legality of original entry. Immigration Act 1924, § 23, 8 U.S.C. § 221.

3. Re-entry permit issued to alien was only prima facie evidence of status.
4. Alien unlawfully remaining within United States after admission as temporary visitor from Canada was subject to deportation. Immigration Act 1924, § 23, 8 U.S.C. § 221.

*United States ex rel. Alther v. McCandless*, 46 F.2d 288 (3d Cir. 1931)

1. On habeas corpus in deportation proceeding, only questions are whether alien had fair hearing and whether substantial evidence sustains finding.

2. In determining whether alien’s absence from United States is “temporary visit,” burden of proof is with government and must be met by substantial evidence.

3. Where alien leaves with no definite intention either of staying away permanently or of returning, stay would not be “temporary visit.” Immigration Act 1924, § 4(b), 8 U.S.C. § 204(b).

4. Evidence sustained finding in deportation proceeding that alien at time of entry was quota immigrant not in possession of quota immigration visa. Immigration Act 1924, §§ 3(2), 4(b), 10(f), 13, 14, 8 U.S.C. §§ 203(2), 204(b), 210(f), 213, 214.

*McCandless v. United States ex rel. Pantoja*, 44 F.2d 786 (3d Cir. 1931)

Where alien seaman in United States made voyage to foreign port and returned, there was “entry” as regards right to deport.

*United States v. Saracino*, 43 F.2d 76 (3d Cir. 1930)

1. Alien seeking admission to citizenship must deal with utmost good faith toward the government.

2. Certificate of naturalization may be canceled if applicant has committed fraud upon government, fraud necessary not being limited to fraud upon court. 8 U.S.C. § 405.


*United States v. Tapolesanyi*, 40 F.2d 255 (3d Cir. 1930)

1. Right to work for amendment of Constitution does not extend to aliens.

2. “Citizenship” is civil status which sovereign government may refuse or grant on specified conditions.

3. Representation of communist alien in application for citizenship that he was attached to principles of United States Constitution held fraudulent, warranting vacation of naturalization order. 8 U.S.C. § 382.

4. In government’s suit to vacate naturalization order on ground of fraud introduction of manifesto of American communist party and witness’ testimony as to communist parties held
not prejudicial error, where applicant had declared himself communist. 8 U.S.C. §§ 1427, 1430(b), 1446(g).

McCandless v. United States ex rel. Chila, 37 F.2d 575 (3d Cir. 1930)

1. Evidence held to make prima facie case of alien’s arrival more than five years preceding date of warrant of deportation.

2. Testimony of government witness in deportation proceeding that alien’s father told him that alien came to United States on stated date held hearsay and incompetent.

United States ex rel. Squillari v. Day, 35 F.2d 284 (3d Cir. 1929)

1. Decision of Board of Special Inquiry should be reviewed on habeas corpus only when administrative officers have manifestly abused discretion.

2. Admission or exclusion of aliens is administrative function intrusted to Commissioner General of Immigration.

3. Commissioner General of Immigration and officials are invested with wide discretion in administering law relating to exclusion or admission of aliens.

4. Perjury before Board of Special Inquiry was not “crime involving moral turpitude prior to entry”. 8 U.S.C. § 155.

5. Alien has burden of proving that he is not subject to exclusion under Immigration Law. 8 U.S.C. § 221.

6. Finding that alien was quota immigrant not in possession of immigration visa held without support. 8 U.S.C. § 213(a) (1).

7. Whether alien seeking admission has complied with terms and conditions prescribed by Congress is administrative question determinable after fair hearing.


United States v. Kolpachnikoff, 34 F.2d 139 (3d Cir. 1929)

Absence of four years and four months held departure from “continuous residence” requirement of statute, requiring denial of petition for citizenship.

McCandless v. United States ex rel. Swystun, 33 F.2d 882 (3d Cir. 1929)


McCandless v. United States ex rel. Rocker, 30 F.2d 652 (3d Cir. 1929)

1. Statute excluding aliens whose passage is paid by corporation held inapplicable to assistant superintendent of large industrial works. Immigration Act 1917, § 3; 8 U.S.C. § 136(k).

2. Alien whose passage money was advanced by corporation held not subject to deportation on that ground, or that corporation had promised employment. Immigration Act 1917, § 3; 8 U.S.C. § 136(k).

3. Fact findings of immigration authorities in deportation proceedings are conclusive on Circuit Court of Appeals, but court must itself determine whether facts found justify deportation.

Perrone v. United States, 26 F.2d 213 (3d Cir. 1928)

Certificate of naturalization held not subject to cancellation under evidence on ground defendant within five years took permanent residence in native country. 8 U.S.C. § 405.

McCandless v. United States ex rel. Diabo, 25 F.2d 71 (3d Cir. 1928)

1. Member of Six Nations tribe residing in Canada held authorized to cross boundary to work as skilled structural iron worker.

2. General acts of Congress do not apply to Indians, unless clearly so intended.

3. Indians are wards of nation.

4. Rights of Indians under treaty authorizing passage across Canadian boundary held not annihilated by War of 1812.

United States v. Roberto, 24 F.2d 418 (3d Cir. 1928)

To review order of naturalization, record should contain the evidence.

United States v. Srednik, 19 F.2d 71 (3d Cir. 1927)


2. Government’s remedy for mere mistake in holding favoring naturalization is by appeal only.

United States v. Richmond, 17 F.2d 28 (3d Cir. 1927)

1. Government, in proper case, can sue to cancel certificate of citizenship on ground of fraud, or that certificate was illegally procured, 8 U.S.C. § 405.

2. Certificate of citizenship held not “illegally procured,” and subject to cancellation, because judge left room during proceedings. 8 U.S.C. §§ 398, 399, 405.

4. Laches is not chargeable to sovereign.

*United States ex rel. Berman v. Curran*, 13 F.2d 96 (3d Cir. 1926)

1. When the record shows that immigration authorities have exceeded their powers in excluding an alien, he may maintain habeas corpus.

2. Arbitrary exclusion of children under 16, not accompanied by or not coming to one or both their parents, held unlawful. Immigration Act 1917, § 3 (8 U.S.C. § 136).

3. Assisted alien children held not subject to exclusion, unless affirmatively shown to be within excluded class. Immigration Act 1917, § 3, (8 U.S.C. § 136).

4. Finding of statutory ground for exclusion must be supported by some evidence.

5. Evidence held not to support finding that children were likely to become public charges.

6. Finding on which alien is excluded is reviewable, to ascertain whether it is supported by any evidence.

*United States v. Curran*, 4 F.2d 356 (3d Cir. 1925)

1. Appellate courts will not review weight of evidence on appeal in habeas corpus proceedings.

2. Congress has plenary power to prescribe terms for admission of aliens.

3. Alien held not given fair hearing where Board of Special Inquiry did not consider documentary evidence of residence in South America.

4. Alien has rights of which he cannot be deprived without due process of law; courts may inquire whether he has had fair hearing.

5. Determination, after fair hearing, by proper administrative authority, that alien has not complied with statutory requirements, held conclusive.

*Hughes v. United States ex rel. Branzetti*, 1 F.2d 417 (3d Cir. 1924)

1. Natives of San Marino could not be excluded merely because quota allotted to “other Europe” exhausted.

2. Decision of immigration officers conclusive, if not arbitrary or in bad faith, and supported by evidence.

3. Order for deportation of children because of exclusion of mother held not conclusive, where mother was not in fact excess quota.
United States ex rel. Di Battista v. Hughes, 299 F. 99 (3d Cir. 1924)

1. Mere proof that decision rendered in deportation proceeding was wrong does not establish denial of fair hearing.

2. Warrant of deportation is invalid, unless there is evidence to support charge of unlawful entry.

3. Deportation hearing before immigration inspector need not be in accordance with rules of evidence.

4. Where alien in deportation proceedings admitted truth of written confession to immigration inspector, and offered no contradictory evidence or defense to charges, the statement was sufficiently identified for consideration as evidence.

5. Alien’s written statement to immigration inspector that he had been smuggled into the United States, and alien’s testimony in deportation proceeding that statement was true in every respect, held to support order of deportation.

6. Where native of Italy had remained in Mexico for only a month, a part of which was consumed in transit to the United States, and there was no evidence in deportation proceedings that Mexico was country of his domicile, or that he ever claimed it as his domicile, warrants of deportation to Italy held valid, under Immigration Act Feb. 5, 1917, § 20, 8 U.S.C. § 156, notwithstanding his desire to be sent to Mexico.

7. Deportation hearing before immigration inspector, to constitute due process of law, need not be in accordance with rules of evidence; compliance with procedure prescribed by rules of department being sufficient.

Hughes v. Tropello, 296 F. 306 (3d Cir. 1924)

1. Act Feb. 5, 1917, § 19, 8 U.S.C. § 155, providing that deportable aliens shall be taken into custody and deported within five years after entry, held applicable to an alien who entered the United States before the enactment of the statute, but who was arrested on the ground that he was in the United States in violation of such act, after enactment thereof, in view of sections 3, 15-17, 21, 8 U.S.C. §§ 136, 151 et seq., 158, and notwithstanding section 20, 8 U.S.C. § 156, providing that the expenses of removal shall be borne in one way “if deportation proceedings are instituted at any time within five years after the entry of the alien,” and in other way “if deportation proceedings are instituted later than five years after the entry of the alien,” since the word “proceedings,” within such statute, refers to proceedings of taking the alien into custody for purpose of deportation after a term of imprisonment, where the right of deportation is based on alien’s conduct after entry.

2. Under Act Feb. 5, 1917, 8 U.S.C. §§ 173, 175, providing for deportation of aliens within five years after entry, an alien whose entry into the United States was lawful, but whose deportation is sought on the ground that he has been guilty of some offense forfeiting the right to remain, cannot be deported, unless the fact of the alien’s guilt is judicially
determined in a proceeding concluded within the period of five years after the alien’s entry into the country.

3. In proceedings involving the right of the United States to deport an alien, whose entry into the United States in the first instance was unlawful, under Act Feb. 5, 1917, § 19, 8 U.S.C. § 155, the alien has the burden of establishing his right to remain; but where the right to deport is based on the conduct of the alien subsequent to his entry, forfeiting the right to remain, the presumption of innocence obtains, and under the due process clause of the Constitution, Amendment 5 and Amendment 14, § 1, the burden is on the federal government or a state government in some formal proceedings, criminal or otherwise, to establish the fact of the alien’s guilt.

_Hughes v. United States_, 295 F. 800 (3d Cir. 1942)

1. Surgeon’s certificate certifying that alien was afflicted with trachoma, but that a statement that the condition might have been detected at the foreign port of embarkation was not warranted, did not support a finding by the board of special inquiry, under Act Feb. 5, 1917, § 17, 8 U.S.C. § 153, that the alien was afflicted with trachoma, such disease developing very slowly, and embarkation and debarkation occurring within 15 days, and the alien was properly discharged on habeas corpus.

2. Though decision of board of special inquiry on the fact of dangerous contagious disease is final, under Act February 5, 1917, § 17, 8 U.S.C. § 1226, federal courts have jurisdiction on habeas corpus to determine whether the alien has been denied a proper hearing and a fair trial, and to this end may inquire, not whether on the evidence the decision of the board is right or wrong, but whether evidence adequately supports the decision, and, if it does not, may discharge the alien.

3. On appeal in habeas corpus proceedings, where assignments of error addressed to expressions in the judge’s opinion and to his refusal to enter judgment for defendant are wholly inadequate, the appeal may be dismissed.

_Sibray v. United States_, 282 F. 795 (3d Cir. 1922)

1. Aliens must be deported according to law and the statute must be administered according to its terms and the rules established by the Commissioner General of Immigration, and those charged with its enforcement are not at liberty in any particular case, and for reasons that may appeal to them at the moment, to set aside any one of the rules on which the rights of aliens depend.

2. Under Immigration Rule 5, subd. (b), authorized by Act Feb. 5, 1917, § 19, 8 U.S.C. § 155, an alien under arrest, charged with acts for which he is sought to be deported, must be allowed to inspect the warrant of arrest and all the evidence on which it is based.

3. After reaching the conclusion that an alien ordered deported by the Department of Labor did not have a full, fair, and impartial hearing after he had been arrested, the court may consider and decide the case on its merits.
4. Whether the evidence is sufficient to justify the deportation of an alien is for the
determination of the Department of Labor, its decision being final, and the District Court is
without jurisdiction to review the sufficiency of the evidence on which the order of
departation is based, if the alien had a hearing according to law.

5. When an alien is imprisoned for deportation without having been accorded the legal rights to
which he was entitled under the statute and the rules of the Department of Labor, habeas
corpus is the usual remedy.

6. If it appears that the procedure prescribed by law for the determination of the facts on which
an order of deportation is based was disregarded, and the alien did not have a fair hearing
according to the rules of the department, the District Court had jurisdiction to issue a writ of
habeas corpus to review the case.

*United States v. Morena*, 247 F. 484, 159 C.C.A. 538 (3d Cir. 1918)

Certificate of naturalization, issued to alien, who made declaration of intention prior to Act June
29, 1906, 8 U.S.C. §§ 382, 386, on petition filed more than seven years after the act was
passed, held subject to cancellation.

*Young Ti v. United States*, 246 F. 110, 158 C.C.A. 336 (3d Cir. 1917)

1. In suit for deportation of Chinese laborers, who under Act May 5, 1892, 8 U.S.C. § 284, had
burden of establishing their right to remain, evidence held insufficient to establish right to
remain in United States.


*Louie Lit v. United States*, 238 F. 75 (3d Cir. 1916)

1. It was competent for Congress by the Chinese Exclusion Act to empower a United States
Commissioner to determine the facts on which citizenship of a person of Chinese descent
depends.

2. Evidence held to require a finding that a Chinese person was born in the United States, and
therefore was not subject to deportation.

3. A child born in the United States of Chinese parents domiciled here becomes at birth a
citizen of the United States, under the first clause of the Fourteenth Amendment to the

*Louie Dai v. United States*, 238 F. 68 (3d Cir. 1916)

1. The Chinese Exclusion Act, embraces all Chinese within its terms, and imposes on all,
including merchants, certain requirements as a condition to the privilege of remaining in this
country.
2. That a Chinese person admitted to the United States as a merchant subsequently becomes a laborer is not in itself ground for his deportation.

3. Under Chinese Exclusion Act May 5, 1892, § 3, 8 U.S.C. § 284, one claiming to have been a Chinese merchant during the registration period may prove that fact by Chinese witnesses, notwithstanding the provision of section 6, as amended by Act Nov. 3, 1893, § 1, 8 U.S.C. § 287, relating to laborers.

4. In proceedings to deport a Chinese person, evidence held insufficient to show that defendant had been recently smuggled into the United States.

5. Under Chinese Exclusion Act May 5, 1892, § 3, 8 U.S.C. § 284, a Chinese person must prove beyond a reasonable doubt that he was a merchant.

6. In proceedings for the deportation of a Chinese, who was a laborer when he was arrested, evidence held to show, notwithstanding the finding of the commissioner and of the lower court to the contrary, that he was a merchant during the registration period.

7. The language of the Chinese Exclusion Act, prescribing the character of the testimony required of defendant in deportation proceedings, does not authorize a judicial officer arbitrarily to disregard it.

8. A finding of the commissioner against the claim of a Chinese person that he was a merchant can be inquired into and reversed by the appellate court.

*Hoey Ay Sing v. United States*, 227 F. 209 (3d Cir. 1915)

Evidence held to require a finding that a Chinese person was born in the United States, and therefore was not subject to deportation.

*Sibray v. United States ex rel. Yee Yok Yee*, 227 F. 1 (3d Cir. 1915)

1. Proceedings for a deportation of aliens under Act Feb. 20, 1907, §§ 20, 21, are reviewable by the courts only so far as to determine whether the department officials acted within the scope of their authority and the fairness of their proceedings.

2. A habeas corpus proceeding cannot be made to perform the function of a writ of error, but only to examine into the power and authority of the court to act, and not the correctness of its conclusions.

*United States v. Neugebauer*, 221 F. 938 (3d Cir. 1911)

The Circuit Court of Appeals has no jurisdiction of a writ of error sued out by the United States to review a decree admitting an alien to citizenship.

*United States v. Cantini*, 212 F. 925 (3d Cir. 1914)
1. The words “resided continuously” in the Naturalization Law, requiring five years’ continuous residence immediately preceding application for naturalization, do not mean that the residence shall not be interrupted at all; the question whether there has been continuous residence being one of fact for determination under all the circumstances of the case.

2. On an application of an alien for naturalization, facts held to require a finding that he had not resided continuously within the United States for five years immediately preceding his application.

3. Presumption in favor of finding of fact by a trial judge is less strong where the hearing is on bill and answer than where it has been made after trial or hearing of the ordinary sort.

*United States v. Kolodner*, 204 F. 240 (3d Cir. 1913)

The word “district,” as used in sections 4 and 10 of Naturalization Act June 29 1906, 8 U.S.C. §§ 379, 383, in the phrase, “state, territory, or district,” refers to the District of Columbia, and not to the judicial district in which a petition for naturalization is filed.

*United States ex rel. Perelman v. International Mercantile Marine Co.*, 194 F. 408 (3d Cir. 1912)

A finding of the Board of Inquiry that an alien was likely to become a charge, and hence should be excluded, will not be disturbed, if supported by evidence, though a different conclusion might be reached.

*United States ex rel. Barlin v. Rodgers*, 191 F. 970 (3d Cir. 1911)

1. Whether or not an alien who has once been admitted into the United States, but who, without being naturalized afterward returned to the country of his original domicile, upon again coming to this country, is an “alien immigrant” within the meaning of Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898, and subject to its provisions, depends upon the circumstances of the particular case. If, on his first entry, he left a family in his native country, to which he returned, without any definite intention of again coming to the United States, and leaving neither business nor property here, he cannot be considered to have acquired a domicile here, which takes him out of the operation of the statute when he again applies for admission without his family.

2. Under Immigration Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898, which provides that “the following classes of aliens shall be excluded from admission into the United States; *** any person whose ticket or passage is paid for with the money of another or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes and that said ticket or passage was not paid for by any corporation, association, authority or municipality, or foreign government, either directly or indirectly”-a finding by the immigration officers that an immigrant was assisted to come by another warrants his exclusion, unless such disability is removed by affirmative and satisfactory evidence, and unless evidence on that question is offered no further finding is required.
3. While the record of proceedings before the immigration officers must show a regular procedure in accordance with the requirements of the law to justify an order for the deportation of an immigrant when attacked in habeas corpus proceedings, it is only a substantial conformity of the procedure to such requirements that is demanded, and a technical precision in the exemplification of the record is not to be expected.

4. There an alien immigrant was before the board of inspectors, so that they had an opportunity to inspect and examine him in person, and he was given a fair hearing and full opportunity to present evidence, an order denying him admission on the ground that he is likely to become a public charge cannot be reviewed by the courts in habeas corpus proceedings as not supported by evidence.

5. Order denying immigrant admission, held not reviewable in habeas corpus proceeding where he has had fair hearing.

6. The power and authority of the United States, as an attribute of its sovereignty, to either prohibit or regulate the immigration of aliens, are plenary, and Congress may choose such agencies as it pleases to carry out whatever policy or rule of exclusion it may adopt, and, so long as such agencies do not transcend the limits of the authority or abuse the discretion reposed in them, their judgment is not open to challenge or review by the courts.

_Sibray v. United States_, 185 F. 401 (3d Cir. 1911)

1. Under Immigration Act Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904, which authorizes the deportation of any alien who has entered the United States in violation of law at any time within three years after entry, the fact that an alien entering is a resident of the United States and left temporarily is immaterial, and the legality of the last entry is to be determined as though there had been no previous entry, with the right to deport within three years thereafter if such entry is unlawful.

2. The jurisdiction of the federal courts in cases of habeas corpus is statutory and can only be exercised where the body of the relator is in the custody of the respondent, and is brought into court in response to the writ, and the proceeding will not lie therefor where the relator is at large on bail.

_United States ex rel. De Rienzo v. Rodgers_, 185 F. 334 (3d Cir. 1911)

1. Under Act March 2, 1907, c. 2534, § 5, 34 Stat. 1229, 8 U.S.C. § 8, providing that a child born without the United States of alien parents shall be deemed a citizen by virtue of the naturalization of the parent, taking place during the minority of the child, provided that the citizenship of such child shall begin when he begins to reside permanently in the United States, until a minor child of a naturalized parent has begun to reside permanently in the United States, he is an alien, and he cannot begin to so reside if he belongs to a class of aliens debarred from entry, and the naturalization of a father will not permit his minor child born abroad, and remaining in the country of his nativity until after the naturalization, to come into the United States if prohibited from entering by Act Feb. 20, 1907, c. 1134, 34 Stat. 898, excluding from admission into the United States persons belonging to enumerated classes.
2. The right of aliens to acquire citizenship is statutory, and the laws regulating and restricting such right are not in derogation of common right, and an applicant for admission must strictly comply with the conditions imposed by law.

*United States v. Martorana*, 171 F. 397 (3d Cir. 1909)

Under Naturalization Act June 29, 1906, c. 3592, § 4, 34 Stat. 596, 8 U.S.C. §§ 382, 386, which requires a petition to be verified by the affidavits “of at least two credible witnesses who are citizens of the United States,” stating certain facts relating to the applicant, a petition not so verified is not merely voidable but void, and cannot be amended.

*United States ex rel. Huber v. Sibray*, 171 F. 150 (3d Cir. 1910)

1. That an alien committed a single act of fornication abroad before she emigrated, and thereafter was living in fornication within the state of Pennsylvania with a man who was not her husband, contrary to the laws of that state, was not ground for exclusion.

2. A warrant for the arrest of an alien charging that she was a member of the excluded classes, in that she entered the United States for an immoral purpose, was not sufficiently specific.

3. Hearings in deportation proceedings of which the alien had no notice and was given no opportunity to be present at which witnesses were sworn and examined, were improper.

4. Where a deportation warrant stated that the alien was a member of the excluded classes, in that she entered the United States for an immoral purpose, and admitted having committed a felony or other crime or misdemeanor prior to her entry, it was insufficient, there being no finding that any particular felony, crime or misdemeanor had been so committed, nor as to her purpose in coming to the United States.

5. Where two children were born to a female alien after her entry into the United States, the children were citizens and not subject to deportation, either in proceedings for the deportation of the mother, or at all.

*Schrotter v. United States*, 157 F. 1005 (3d Cir. 1908)

1. The ordinary case of a sailor deserting while on shore leave is not comprehended by the provisions of Immigration Act March 3, 1903, c. 1012, § 18, 32 Stat. 1213, 1217, making it the duty of any officer in charge of any vessel bringing an alien to the United States to adopt precautions to prevent the landing of such alien at any time or place other than that designated by the immigration officers, and punishing him if he lands or permits to land any alien at any other time or place, notwithstanding the omission from this section of the word “immigrant,” which had followed the word “alien” in the earlier acts.

2. The fact that an alien seaman deserting while on shore leave was a stowaway under order of deportation does not bring the case within the provisions of Immigration Act March 3, 1903, c. 1012, § 18, 32 Stat. 1213, 1217, making it the duty of any officer in charge of any vessel bringing an alien to the United States to adopt precautions to prevent the landing of such
alien at any time or place other than that designated by the immigration officers, and
punishing him if he lands or permits to land any alien at any other time or place.

3. The United States may bring error under Act March 2, 1907, c. 2564, 34 Stat. 1246, 18
U.S.C. § 3731, to review a judgment of a federal circuit court, quashing an indictment for
violating Immigration Act March 3, 1903, c. 1012, § 18, 32 Stat. 1213, 1217, by willfully
permitting an alien to land at another place than that designated by the immigration officers,
because the indictment disclosed that the alien in question was a seaman.

Rodgers v. United States ex rel. Cachigan, 157 F. 381 (3d Cir. 1907)

1. In the provision of section 10 of the immigration act, Act March 3, 1903, c. 1012, 32 Stat.
1216, making the decision of the board of special inquiry based upon the certificate of the
examining medical officer final as to the rejection of aliens affected with a loathsome or
dangerous contagious disease the word “final” is not used in such broad sense as to deprive
an alien so rejected of the right of appeal unqualifiedly given by section 25 of the act, or of
the right to invoke the provisions of section 37, relating to the wife and children of a
naturalized alien, in a case to which such section is applicable.

2. Congress has plenary power to exclude aliens from entry into the United States, or to provide
for their admission subject to such restrictions as it may prescribe; and, where it has given
discretionary power to executive officers or agencies to determine the right of entry under
such restrictions, the ground of such determination cannot be inquired into by the courts in
habeas corpus proceedings instituted by an alien, who is restrained of his liberty for the
purpose of deportation by such officers. The question, however, whether the law does vest
such officers with power of final decision is necessarily one for judicial inquiry, and an alien
given by the law a right of appeal may invoke the powers of a court for the enforcement of
such right.

Rodgers v. United States ex rel. Buchbaum, 152 F. 346 (3d Cir. 1907)

1. The provision of section 2, Act March 3, 1903, c. 1012, 32 Stat. 1214, which excludes from
admission into the United States “aliens” who are afflicted with a loathsome, or with a
dangerous contagious disease, cannot be construed to apply to aliens who are domiciled in
this country, especially in view of the title of the act, which is “An act to regulate the
immigration of aliens into the United States,” and of its other provisions and prior statutes in
pari materia.

2. An alien, who has acquired a domicile in the United States, cannot thereafter, and while still
retaining such domicile, legally be treated as an immigrant on his return to this country after
a temporary absence for a specific purpose not involving change of domicile.

3. Under the Immigration Act of March 3, 1903, c. 1012, 32 Stat. 1213, and rule 7 of the
regulations established thereunder by the Secretary of Commerce and Labor, an immigrant
who on examination by a board of special inquiry has been denied the right to enter the
United States has the right to be informed that he has a right of appeal therefrom, and the fact
that he has been so informed must be entered of record in the minutes of the board’s
proceedings, and the withholding of that right precludes finality in the decision of the board which may in such case be reviewed by the courts on a writ of habeas corpus.

*Berkowitz v. United States*, 93 F. 452 (3d Cir. 1889)

1. Rev. St. § 5424, 18 U.S.C. § 138, providing that any person who utters, sells, etc., any false naturalization certificate shall be punished, etc., not having declared such offense a felony, and having repealed the former acts making it such, the offenses was reduced to a misdemeanor.

2. As at common law a conspiracy to commit a misdemeanor or felony was only a misdemeanor, so conspiracy under Rev. St. § 5440, 18 U.S.C. § 371, not being declared a felony, is also merely a misdemeanor.

3. The offense of conspiracy to commit a misdemeanor is not merged in the commission of the offense.

4. The doctrine of merger of offenses does not apply as between misdemeanors; and hence a misdemeanor which is the object of a conspiracy is not merged in the latter offense.

5. The fifth amendment of the constitution of the United States (U.S.C.), providing that no person shall be subject, for the same offense, to be twice put in jeopardy of life or limb, applies to misdemeanors as well as treason and felony.

6. An indictment under Rev. St. § 5440, 18 U.S.C. § 371, charging a defendant with conspiring to utter as true false naturalization certificates, in violation of Rev. St. § 5424, charges an offense different from that under the latter section; and hence an acquittal on the indictment for such conspiracy is not a bar to a subsequent prosecution for the offense of uttering, etc.

7. A sworn statement by a defendant that he was on a certain date arraigned and acquitted on an indictment specified in the statement, in the same court in which the second trial occurs, and that the “offense to which he is now called upon to defend the facts and circumstances is the same offense of which he was heretofore acquitted,” is properly to be treated as a plea of former acquittal.
FYSA. I am waiting on and ES but wanted to get this to you asap

From: Homan, Thomas
Sent: 5 May 2015 21:03:45 -0400
To: Daniel H Ragsdale; Ramlogan, Ria; Edge, Peter T
Subject: FW: Detention of ERO Officer -- GoM Seizure of One (1) Pistol Magazine

Tom,

On May 3, 2015, two ERO Seattle officers escorted [redacted] to Guadalajara, Mexico. [redacted] is a Mexican national convicted of Child Molestation 1st Degree and sentenced to 89 months in prison. [redacted] was processed with a reinstatement of removal order at the Yakima Sub-office and subsequently transferred to the NWDC. Because [redacted] suffered from both brain and lung cancer, ERO expeditiously removed him to Mexico to ensure continuity of care.

On May 3, 2015, the Assistant Field Office Director (AFOD) in charge of the NWDC received a phone call from an escorting officer advising that he was being detained by Mexican Federal Police at the Guadalajara, Mexico International Airport, because the police having found a loaded pistol magazine in his luggage. The officer did not have a weapon on his person, only the single magazine. The AFOD spoke directly with an individual identifying himself as a Captain of the Mexican Federal Police, who confirmed to the AFOD that the escorting officer was found in possession of a loaded magazine. The Captain stated that he has spoken with other Government of Mexico (GoM) officials and the decision was made to keep the IEA's loaded magazine but allow the officer to board the plane to LAX.

On May 6, 2015, the ICE Attaché Mexico City is scheduled to meet with GoM officials to address this incident.

Phil
From: [Redacted]
Sent: 13 Feb 2013 15:43:07 -0500
To: [Redacted]
Subject: FW: Reinstatement (9th Cir)
Attachments: [Redacted] guidance.docx

From: [Redacted]
Sent: Tuesday, February 05, 2013 2:37 PM
To: [Redacted]
Subject: FW: Reinstatement (9th Cir)

Flipping to an interested who!

Associate Legal Advisor
Immigration Court Practice Section (West)
Immigration Law & Practice Division
Office of the Principal Legal Advisor — Enforcement and Litigation Directorate
U.S. Immigration and Customs Enforcement
Desk: (703) 847-0908
Blackberry: (202) 739-2208
Email: [Redacted]

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Please consider the environment before printing this e-mail.

From: [Redacted]
Sent: Tuesday, February 05, 2013 2:20 PM
To: [Redacted]
Subject: FW: Reinstatement (9th Cir)
Associate Legal Advisor  
Immigration Court Practice Section (East)  
Immigration Law and Practice Division  
Enforcement and Litigation Directorate  
Office of the Principal Legal Advisor  
U.S. Immigration and Customs Enforcement  
U.S. Department of Homeland Security  
Tel: 703-824-5841 (main)  
Tel: 703-824-8170 (direct)  
Cell: 202-383-7558  
Fax: 703-756-6281

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552(b)(5), (b)(7).

From: [Redacted]
Sent: Thursday, November 29, 2012 11:54 PM
To: [Redacted]
Subject: Fw: Reinstatement: [Redacted] (9th Cir)

FYI, OIL issued their guidance.

______________________________
Sent from my BlackBerry Wireless Handheld

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USC §§ 552(b)(5), (b)(7).

From: [Redacted]
Sent: Thursday, November 29, 2012 11:23 PM
To: [Redacted]
Cc: [Redacted]
Subject: FW: Reinstatement: [Redacted] (9th Cir)

Going, going, gone. Here it is for your reading pleasure.
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From: (censored)
Sent: Thursday, November 29, 2012 1:17 PM
To: (censored)
Subject: RE: Reinstatement (9th Cir)

Good to hear from you. Hope you are doing well also. Here you go. We've issued this guidance to OIL-Appellate Attorneys after DHS' general counsel's office signed off on it. [We would not send this to the courts of course].

From: (censored)
Sent: Thursday, November 29, 2012 12:48 PM
To: (censored)
Subject: Reinstatement (9th Cir)

Hi. Hope you are well. Can you tell me if OIL has actually issued guidance regarding this case to its court coordinators nationwide? If so, could you please send me a copy of the final version that was distributed. Thank you.
*** Warning *** Attorney/Client Privilege *** Attorney Work Product ***

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GUIDANCE IN CASES WHERE AN ALIEN SUBJECT TO REINSTATEMENT OF REMOVAL OR ADMINISTRATIVE REMOVAL IS REFERRED FOR REASONABLE FEAR PROCEEDINGS

has approved this office-wide guidance directing OIL circuit counselors to move to dismiss petitions for review where the petitioning aliens have been referred for reasonable fear proceedings.

GUIDANCE:
In the Ninth Circuit, the filing of a motion to dismiss automatically stays briefing and record production. See 9th Cir. R. 27-11(a)(1), (b).
MEMORANDUM FOR: Field Office Directors and Special Agents in Charge
FROM: John P. Torres
Director, Office of Detention and Removal Operations
Office of Investigations

SUBJECT: Record of Proceedings in Reinstatement and Administrative Removal Cases

Purpose


Section 238(b) of the INA, 8 U.S.C. § 1228(b) (2000), provides the Attorney General with the authority to administratively remove certain criminal aliens.

This memorandum will standardize the practice in preparing and preserving records of proceedings (ROP) in these matters. This practice will allow these cases to be defended more successfully in federal courts.

Background

8 C.F.R. §§ 241.8 and 238.1 implement the aforementioned sections of the INA. Guidance is also provided in Chapters 14.7 and 14.8 of the Detention and Deportation Officer’s Field Manual, which sets forth the procedure for reinstating a final order, the content of the ROP, and the manner of certifying a reinstatement case for judicial review. See also the Administrative Removal Proceedings Manual (M-430), Appendix 14-1 for guidance on preparation of the record in administrative removal proceedings. This memorandum reinforces guidance already in place and provides supplementary instructions to both Field Office Directors and Special Agents in Charge on how to properly create the administrative record or the ROP in reinstatement and administrative removal cases.

Discussion

A. Reinstatement:

The deciding officer (DO) must maintain a permanent ROP in each case where a Notice of Intent/Decision to Reinstate Prior Order (Form I-871) is issued. This is necessary to facilitate development of the administrative record for possible judicial review. Processing officers (PO) are required to create the ROP for presentation to the DO. Included in the ROP are those documents the Government will rely on to reinstate the prior order, and any other pleadings or evidence pertaining to the reinstatement. At a minimum, the ROP must include copies of:

www.ice.gov
1. Notice of Intent/Decision to Reinstate Prior Order (Form I-871);
2. The prior administrative removal order;
3. Notice to Alien Ordered Removed/Departure Verification (Form I-296);
4. The record check or fingerprint match, as reflected in the Integrated Automated Fingerprint ID System (IAFIS);
5. Any documentary evidence submitted by the alien;
6. Record of Sworn Statement or the alien’s declination to provide such statement (Form I-877);
7. Record of Deportable/Inadmissible Alien (Form I-213);
8. Previously executed Warrant of Removal/Deportation (Form I-205); and
9. Previously executed Warning to Alien Ordered Removed or Deported (Form I-294).

Additionally, the ROP must include any other evidence that the official relied upon to support the charges and any documents that rebut the alien’s assertion that reinstatement is improper, such as a decision on an application for adjustment of status if it is related to reinstatement. See 8 C.F.R. § 241.8(a).

The issuing DO must certify the authenticity of the documents contained in the ROP. It is important that the original documents that were copied and placed in the ROP be kept in the A-File for possible use in any criminal or civil action.

B. Administrative Removal:

Similarly, a ROP must be maintained where a Final Administrative Removal Order (Form I-851A) is issued. Again, POs are required to create the ROP for presentation to the DO. The ROP must include copies of:

1. Notice of Intent to Issue a Final Administrative Removal Order (Form I-851);
2. Evidence of immigration status (CIS, RAPS, NIIS, etc.);
3. Record of Deportable/Inadmissible Alien (Form I-213);
4. Record of Sworn Statement or the alien’s declination to provide such statement (Form I-877);
5. Final Administrative Removal Order (including any supplemental memorandum of decision)(Form I-851A);
6. Certified Conviction documents for commission of an aggravated felony;
7. Any response the alien offers;
8. Any evidence the Government relied upon to support the charges; and
9. All admissible evidence (briefs and other documents) submitted by either party respecting deportability.

The ROP should include all documents in support of the Notice of Intent to Issue a Final Administrative Removal Order. See 8 C.F.R. § 238.1. The original documents that were copied and placed in the ROP should be kept in the A-File and made available for use in any potential civil or criminal action.

In both instances, the PO’s written findings and conclusions of law must be supported by reasonable, substantial, and probative evidence, and must also be included in the ROP. The ROP should be clearly labeled and placed in the left hand side of the A-file. Moreover, the ROP should contain an Index (see attached sample indexes) noting which documents are contained in the ROP. A blue ROP coversheet should be placed on top of the Index and the documents.

Ultimately, the DO is responsible for the certification of authenticity of the ROP (see attached sample certification). The certification should be placed under the ROP coversheet. When feasible, DOs must maintain possession and control of the ROP during the pendency of any adjudication and ensuing legal challenge or during any credible fear proceedings. If the file is required elsewhere, the DO should retain a copy of the ROP. If necessary, the Department of
Subject: Record of Proceedings in Reinstatement and Administrative Removal Cases
Page 3

Justice's Office of Immigration Litigation will directly contact the local U. S. Immigration and Customs Enforcement's Office of the Chief Counsel (OCC) in order to obtain a copy of the ROP, which must include the DO's certification.

If you have any questions on the aforementioned information, please contact your local OCC.

Attachments
INDEX

RECORD FILE

Alien Name
A00-000-0

☐ Certification.

☐ Notice of Intent/Decision to Reinstate Prior Order (Form I-871).

☐ The prior administrative removal order.

☐ Notice to Alien Ordered Removed/Departure Verification (Form I-296).

☐ The record check or fingerprint match.

☐ Any documentary evidence submitted by the alien.

☐ Record of Sworn Statement or the alien's declination to provide such statement (Form I-877).

☐ Record of Deportable/Inadmissible Alien (Form I-213).

☐ Warrant of Removal/Deportation (Form I-205).

☐ Warning to Alien Ordered Removed or Deported (Form I-294).

☐ Any other evidence relied upon to support the charges.

☐ Any documents that rebut the alien's assertion that reinstatement is improper.
INDEX

RECORD FILE:
Alien Name
A00-000-0

☐ Certification.

☐ Notice of Intent to Issue a Final Administrative Removal Order (Form I-851).

☐ Evidence of immigration status (CIS, RAPS, NISS, etc.).

☐ Record of Deportable/Inadmissible Alien (Form I-213).

☐ Record of Sworn Statement or the alien's declination to provide such statement (Form I-877).

☐ Final Administrative Removal Order (including any supplemental memorandum of decision)(Form I-851A).

☐ Certified Conviction documents for commission of an aggravated felony.

☐ Any response the alien offers.

☐ Any evidence the government relied upon to support the charges.

☐ All admissible evidence (briefs and other documents) submitted by either party respecting deportability.
UNITED STATES DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

CERTIFICATION OF THE RECORD OF PROCEEDINGS


I, [name of officer], declare:

1. I am a Deportation Officer with United States Department of Homeland Security, Immigration and Customs Enforcement. I have served in this position since [month & year]. My office is located in [City, State], and my responsibilities include the maintenance and creation of the official Record of Proceedings. I am the deciding officer in the matter of [Alien Name], [A-number].

2. Attached to this Certification is a copy of the official Record of Proceedings. These documents relate to:

   Subject: [Alien Name]
   File Number: [A-number]

3. These records were prepared by personnel of the United States Department of Homeland Security, Immigration and Customs Enforcement in the ordinary course of business at or near acts, conditions, or events described in the records.

I, [name of officer], do hereby certify that I have compared the copy of the Record of Proceedings attached to this certificate with the original Record of Proceedings as it appears of record and on file in my office, and it is a true and correct copy of the original.

Date: ___________

[Name]
Deportation Officer
UNITED STATES DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

CERTIFICATION OF ________________________:

1. I am a ______position title______ with U.S. Immigration and Customs Enforcement, United States Department of Homeland Security. I have served in this position since ____________. My office is located in ________________ and my responsibilities include the maintenance and creation of the official Record of Proceedings. I am the deciding officer in the matter of ________________, file number A_______.

2. Annexed to this Certification is the official Record of Proceedings.

I hereby certify to the best of my knowledge and belief that the annexed documents are originals, or copies thereof, of the official Record of Proceedings. These documents relate to:

Subject:
File Number: A

Dated: ____________

__________________________________
Name

Title
The Headquarters Post Order Custody Review Unit (POCRU) is disseminating guidance concerning aliens subject to a Reinstated Final Order of removal who express a reasonable fear of returning to the country to which they have been ordered removed. The message below summarizes and clarifies these existing policies, regulations, and guidance. In the interest of efficiency and uniformity throughout the field offices, POCRU instructs that the appropriate Post Order Custody Reviews be performed.

Please see the message below for further information and instructions. Disseminate accordingly throughout your AOR.

Thank you,

Deportation Officer
Los Angeles Statistics & Taskings Unit
U.S. Department of Homeland Security
Immigration & Customs Enforcement
Los Angeles Field Office
(213) (b)(6), (b)(7)(C)

From: ERO Taskings
Sent: Friday, September 14, 2012 9:07 AM
Subject: Clarifying Guidance for aliens falling under the Reasonable Fear Process

This message is sent on behalf of Robert P. Helwig, Assistant Director for Repatriation, and is approved by Christopher Shanahan, Acting Assistant Director for Field Operations:

To: Field Office Directors and Deputy Field Office Directors

Subject: Clarifying Guidance for aliens falling under the Reasonable Fear Process

The Headquarters Post Order Custody Review Unit (POCRU) is disseminating guidance concerning aliens subject to a Reinstated Final Order of removal who express a reasonable fear of returning to the country to which they have been ordered removed (e.g. INA 241(a)(5)). Chapter 17 of the Office of Detention and Removal Operations Policy and Procedure Manual details post order custody removal procedures. The following summarizes and clarifies these existing policies, regulations, and guidance related to aliens subject to a Reinstated Final Order of Removal who express a reasonable fear of returning to the country to which they have been ordered removed:

- In the event an alien subject to a Reinstated Final Order expresses a reasonable fear of being returned to the country to which they are ordered removed, the order must be processed (i.e. signed) and served on the alien before his case is referred to an asylum officer for a reasonable fear determination.
• If the alien is detained during the pendency of the adjudication of the alien’s request for withholding (e.g. USCIS and EOIR), that alien will be subject to the detention authority of INA § 241(a).

• Continued detention beyond the removal period requires the appropriate Post Order Custody Reviews as set forth by 8 C.F.R. §§ 241.4 & 241.13.

In the interest of efficiency and uniformity throughout the field offices, POCRU instructs that the appropriate Post Order Custody Reviews be performed.

Any questions regarding this message should be directed to the POCRU Unit Chief [redacted] or (202) [redacted].
MEMORANDUM FOR: (b)(6)(b)(7)(C)
ACTING PRINCIPAL LEGAL ADVISOR

FROM: (b)(6)(b)(7)(C)
Acting Deputy Principal Legal Advisor

SUBJECT: Interpretation of the Term "Final Order of Removal" in Immigration Proceedings

An issue has arisen as to whether the term "final order of removal" includes situations where the Department of Homeland Security (DHS) has appealed to the Board of Immigration Appeals (Board) from a grant of withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1231(b)(3), or from a grant of withholding or deferral of removal under the Convention Against Torture (CAT), 8 C.F.R. §§ 208.16-.18, and no other issues remain on appeal. For the reasons outlined below, DHS recommends that this interpretation of the term "final order of removal" not be adopted.

- There is no regulatory support for this interpretation.
- This interpretation is not clearly supported by case law.
- It would result in release of criminal aliens from custody under Zadvydas.
- The loss of a bright line test would confuse the area of law and encourage further inroads by aliens.
- It would endanger the availability of "exhaustion" arguments in federal court.

DEEMING FINAL ORDERS TO INCLUDE CASES PENDING DHS APPEAL OF WITHHOLDING AND CAT GRANTS LACKS DIRECT SUPPORT IN STATUTE OR CASE LAW.

Under the Act, an immigration judge's (IJ's) decision ordering an alien's removal becomes final upon a determination by the Board affirming the order, or upon the expiration of the time to seek review of the immigration judge's order by the Board. See section 101(a)(47)(B) of the Act, 8 U.S.C. § 1101(a)(47)(B); 8 C.F.R. § 241.1. This language unambiguously indicates that if an appeal to the Board has been filed, an immigration judge's
decision ordering an alien’s removal only becomes final when the Board affirms the order. Therefore, if the Board renders a decision in which it does not affirm the immigration judge’s order of removal, the removal order does not become final. Similarly, if the appeal is still pending and the Board has not yet affirmed the immigration judge’s order of removal, the removal order is not yet final.

A question about the definition of “final order of removal” has arisen, however, in the context of a case pending before the Board solely pursuant to a DHS appeal on the issue of whether the immigration judge properly granted withholding or CAT protection. In such a situation, the determination of removability, and resulting order of removal, would not be issues before the Board. Arguably, the immigration judge’s removal order could be deemed final despite the pending DHS appeal because the Board would only review whether the alien’s removal to a particular country should be withheld or deferred.

However, this would be a novel approach. In practice, an order of removal has not been deemed final if a case was pending before the Board on direct appeal of any issue. For example, in determining eligibility for a waiver of inadmissibility under former section 212(c) of the Act, 8 U.S.C. § 1182(c), the Board held that lawful domicile ended at the time a final order was entered. Matter of Lok, 18 I&N Dec. 101 (BIA 1981), aff’d, 681 F.2d 107 (2d Cir. 1982). The Board stated that an administrative order was final when the Board rendered its decision in a case on appeal or certification or, where no appeal was taken, when the time allotted for appeal had expired or the right to appeal was waived. Id.; see also Matter of L-V-K., 22 I&N Dec. 976 (BIA 1999). In so defining a final order, the Board made no distinctions based on which party filed the appeal or which issues were raised on appeal. Courts of appeals of various circuits subsequently grappled with whether or not to defer to the Board’s interpretation in Matter of Lok, supra, of when lawful domicile ends for 212(c) purposes, but they accepted the Board’s definition of a final order without question. See e.g., Jaramillo v. INS, 1 F.3d 1149 (11th Cir. 1993); Variaparambil v. INS, 831 F.2d 1362 (7th Cir. 1987); Rivera v. INS, 810 F.2d 540 (5th Cir. 1987). Thus, it appears to be well-settled that when any direct appeal is pending before the Board, the immigration judge’s removal order is not final until the Board renders its decision on that appeal.

Moreover, no reported cases from the federal courts support the notion that a case may be final despite the fact that DHS has appealed a grant of withholding or CAT protection to the Board. Although several courts of appeal have recently published decisions that may open the door to such an argument, the argument would require an extension of existing law. The cases are distinguishable in that they involved remands from the Board to the IJ, after the Board had ruled on the material issues in the case. That is very different from a situation where the Board has never spoken on a case pending before it. In addition, the cases cited are adverse to the government and it seems therefore unusual to expand this area of law.

In Perkovic v. INS, 33 F.3d 615 (6th Cir. 1994), for example, the court rejected the government’s contention that there was no final order of the court to review. The court found that it could review the immigration judge’s order on remand and the Board’s decision denying asylum even though the aliens petitioned for review without first appealing the immigration judge’s decision on remand to the Board. The Sixth Circuit recognized that the decision by the
immigration judge on remand involved “issues not in dispute” and that it would have been pointless to decline jurisdiction because the aliens had not appealed “uncontested matters” to the Board before filing their petition for review. *Id.* at 620. The language quoted above, while suggesting a broad assertion of jurisdiction over cases which might still have unresolved issues before the Board, was essentially a rationale for asserting jurisdiction in a case in which no issues remained for the Board to adjudicate.

Thus, the Sixth Circuit seems to have adopted an issue-based approach to “final orders” suggesting that, as each issue is finally addressed by the Board, it becomes “final” and can be the subject of its own petition for review to the federal circuit courts of appeals. However, this issue-based approach does not comport with the Act’s judicial review framework, which contemplates multiple petitions for review stemming from the same immigration court proceedings only in the context of motions to reconsider or reopen. Specifically, INA § 242(b)(6), 8 U.S.C. § 1252(b)(6), allows the consolidation of petitions for review arising from both a removal order and a denial of a motion to reopen or reconsider. See *Stone v. INS*, 514 U.S. 386, 390-399 (1995) (discussing Congressional policy behind judicial review consolidation provisions in former INA § 106(a)(6), 8 U.S.C. § 1105a(a)(6)). However, the general rule of INA § 242(b)(9), 8 U.S.C. 1252(b)(9), provides that judicial review of “all questions of law and fact … arising from any … proceeding brought to remove an alien from the United States shall be available only in judicial review of a final order under this section.” (emphasis supplied). Clearly, any issues arising in an alien’s removal proceedings can only be reviewed after a single, final order has been issued. That is, all “questions of law and fact” for which the alien is seeking judicial review must be the subject of the same petition for review. Accordingly, DHS should maintain that Perkovic’s holding on this issue is incorrect and therefore should not be expanded.

In *Castrejon-Garcia v. INS*, 60 F.3d 1359 (9th Cir. 1995), the Ninth Circuit’s very limited legal analysis is founded wholly upon the erroneous Sixth Circuit decision in *Perkovic*. In *Castrejon-Garcia*, an alien filed a petition for review after the Board had reversed a grant of suspension of deportation and remanded the case to the immigration judge for a determination regarding voluntary departure, but before the immigration judge had entered his order on remand. Before briefs were filed in the Ninth Circuit, the immigration judge granted voluntary departure. In its decision, the Ninth Circuit rejected the government’s argument that the petition for review was premature because it had been filed after the Board’s decision rather than after the immigration judge’s subsequent grant of voluntary departure on remand. The Ninth Circuit stated that the Board’s order was a final order of deportation because “there was nothing pending before the Board and the petitioner had no reason or basis for appealing the Immigration Judge’s decision in his favor.” *Id.* at 1361-62. As the immigration judge in fact granted voluntary departure before the Ninth Circuit entertained this appeal, it is not surprising that the Ninth Circuit treated the remand for voluntary departure as a peripheral issue unworthy of delaying the finality of the deportation order.

A case similar to *Perkovic* and *Castrejon-Garcia* is *Del Pilar v. United States Attorney General*, 326 F.3d 1154 (11th Cir. 2003). In *Del Pilar*, the alien had filed a petition for review directly from a Board decision in which the Board had reversed an immigration judge’s grant of section 212(c) relief and remanded to the immigration judge for the sole purpose of allowing the alien to designate a country of removal. Relying directly on the holdings in *Perkovic* and
Castrejon-Garcia, without any independent analysis of the issue, the Eleventh Circuit found that the Board’s order constituted a final order of removal because “all of the issues presented to us were subject to a final order by the BIA and there is nothing remaining for Del Pilar to appeal as the only thing left to the IJ to determine is the country to which Del Pilar will be removed.” Id. at 1157. As in Perkovic and Castrejon-Garcia, the court’s result was not unreasonable under the circumstances. The designation of a country of removal is a peripheral issue. Usually, the designation involves several questions of the alien about whether there is a country of deportation he or she would like to request aside from his or her own country, and immigration judge’s resulting designation is seldom the subject of controversy.

The courts’ finding of final orders in Perkovic, Del Pilar, and Castrejon-Garcia does not comport with the Act’s judicial review framework. However, limited narrowly to their facts, the results reached in those cases were generally acceptable. The issues which remained to be addressed by the immigration judges on remand were minor, and in two of these three cases those issues had in fact already been resolved before the courts issued their decisions. Withholding of removal and CAT protection are, however, issues of considerable import. As things stand, were an alien to petition for review while DHS had its appeal of a withholding or CAT grant pending before the Board, a circuit court might well view the alien’s action as a strategy to circumvent the Board and deprive DHS of the opportunity to have its appeal adjudicated. It is hard to imagine that a court would find such a petition for review as anything other than premature. The government has a strong interest in preventing such appeals by aliens based on arguments regarding exhaustion of remedies. Therefore, reliance on Perkovic, Castrejon-Garcia, and Del Pilar, which involved peripheral issues of voluntary departure and country designation, to find that an immigration judge’s order of removal is final despite a pending DHS appeal of a withholding or CAT protection grant would be misguided.

Such an approach would be similarly misguided under the corresponding regulations. For instance, 8 C.F.R. § 1003.6(a) (2003) mandates that removal cannot be effectuated “while an appeal is pending . . . before the Board . . .” Under this regulation, any pending appeal before the Board, regardless of the issue(s) on appeal or the party bringing the appeal, precludes execution of an IJ’s decision. Thus, such a decision is not yet “final.” Regulations also provide that an IJ’s decision only “becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken” 8 C.F.R. § 1003.39 (2003). This strongly suggests that an order can only be considered final once appeal issues have been disposed of. Finally, the regulations defining “final order of removal” mandate that such an order must be made at the “conclusion” of proceedings “[u]pon dismissal of an appeal by the [Board].” 8 C.F.R. § 241.1(a) (2003) (emphasis added). Accordingly, until the Board has dismissed a pending appeal (subject to certain other exceptions not relevant here), the underlying order cannot be considered “final” under this regulation. Thus, the regulations clearly belie any interpretation of “final order of removal” which includes an order subject to a pending appeal before the Board.

Finally, any such interpretation would be legally unclear as to what did or did not constitute a “peripheral” issue. For instance, consider the scenario of an arriving alien who is granted withholding of removal from his country of embarkation by an IJ, and this grant is subsequently appealed by DHS. Under the suggested interpretation, such an order would be final as to any third country of removal, notwithstanding the DHS appeal. However, if the appeal is
sustained, the Act requires removal of the alien to the country of embarkation. See INA § 241(b)(1)(A), 8 U.S.C. § 1231(b)(1)(A). That is, the alien could not even legally be removed to the third country. In such circumstances, which involve only the supposedly “peripheral” issue of country designation, it is possible that the appeal will bear directly on whether the alien can even be removed to a third country. Thus, such an order should not be considered final until the appeal is concluded.

DEEMING FINAL ORDERS TO INCLUDE CASES PENDING DHS APPEAL OF WITHHOLDING AND CAT GRANTS WOULD RESULT IN AN INCREASE IN PIECENAIL APPEALS.

If cases were deemed final despite DHS appeal of a grant of withholding or CAT protection, an alien would be permitted to petition for review before the Board had adjudicated the appeal. Moreover, if the Board ultimately sustained DHS’ appeal and reversed the immigration judge’s grant of withholding or CAT protection, the alien would presumably have a basis for a second petition for review, as well as a possible basis for a writ of habeas corpus in district court. This approach to appeals would impose burdens on the courts and the counsel involved, would delay ultimate resolution of the proceedings against the alien, and would violate a strong Congressional policy against piecemeal review in the removal context.

This Congressional policy is discussed in Foti v. INS, 375 U.S. 217 (1963), in which the Supreme Court interpreted former section 106(a) of the Act, 8 U.S.C. § 1105a(a), which gave courts of appeals sole and exclusive jurisdiction of “judicial review of all final orders of deportation . . . made against aliens within the United States pursuant to administrative proceedings under section 242(b) of the Act . . . .” The Supreme Court held in Foti v. INS, supra, that this jurisdiction extended to all matters decided in the course of a deportation proceeding, including determinations on requests for discretionary relief, even though those requests were not reviewed by a district court first. The Supreme Court noted that the fundamental purpose behind section 106(a) of the Act was to “abbreviate the process of judicial review of deportation orders in order to frustrate certain practices” by aliens designed to forestall departure by dilatory tactics in the courts. Id. at 224. In this regard, the Supreme Court examined the legislative history of section 106(a) of the Act and quoted one congressman as saying that the “legislative history should make absolutely clear that if there is any remedy on the administrative level left of any nature, that the deportation order will not be considered final.” Id.

Since the time of the Supreme Court’s decision in Foti v. INS, supra, Congress has underscored its interest in abbreviating the process of judicial review by passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). IIRIRA repealed section 106(a) of the Act and set up a procedure for judicial review of orders of removal that, inter alia, deprived courts of appeals of jurisdiction to review order of removal against many criminal aliens as well as most denials of discretionary relief. See section 242(a)(2) of the Act, 8 U.S.C. § 1252(a)(2). To adopt an interpretation of “final order of removal” which would lead to additional steps of judicial review of removal orders in the district courts and the courts of appeals would be contrary to Congress’ strong interest in avoiding delay in the resolution of removal proceedings.
DEEMING FINAL ORDERS TO INCLUDE CASES PENDING DHS APPEAL OF WITHHOLDING AND CAT GRANTS WOULD YIELD NO BENEFITS AND WOULD CAUSE SIGNIFICANT OPERATIONAL BURDENS.

The positive impact on DHS of declaring an order of removal final despite a pending DHS appeal from a withholding or CAT protection grant would be negligible, and the adverse impact would be considerable. Because the order of removal would already be deemed "final," DHS would theoretically be able to remove the alien to any country other than one to which his removal had been ordered withheld or deferred, even while DHS’ appeal was pending before the Board. As a practical matter, however, the likelihood of finding a safe third country willing to accept the alien would be extremely small. Many aliens with an immigration judge’s grant of withholding or CAT protection have been granted that form of relief rather than the relief of asylum because they have criminal records or a history of involvement in persecuting others that make them ineligible for asylum. Third countries would not be inclined to accept aliens with such undesirable backgrounds. Moreover, even under the current interpretation of “final order of removal,” DHS is able to withdraw its appeal to the Board and remove an alien to a safe third country if such a country is found while a DHS appeal is pending. Therefore, a change in interpretation of “final order of removal” would not yield a new benefit.

On the other hand, the potential for an adverse impact on DHS of a change in interpretation is great. Logistical problems would be unavoidable. As an initial matter, the Detention and Removal Office (DRO) would be confused about whether a final order existed in a case in which a DHS appeal was pending before the Board. For example, a case involving a DHS appeal from a grant of withholding of removal would constitute a “final order of removal,” but a case involving a DHS appeal from an immigration judge’s order granting asylum would not constitute a “final order of removal.” When the Board finally adjudicated the appeal, it could sua sponte address an issue not raised on appeal which could affect the alien’s removability; removing an alien whom the Board subsequently declared not removable would be a scenario DHS would want to avoid.

Even more burdensome than these problems would be the adverse impact on the detention system caused by declaring an order final while a DHS appeal was still pending before the Board. Different legal procedures apply to the detention of aliens depending upon whether or not they are subject to a final order of removal. In Demore v. Kim, ___ U.S. ___, 123 S.Ct. 1708 (2003), the Supreme Court found the mandatory detention provision of section 236(c) of the Act, 8 U.S.C. § 1226(c), constitutional. The Supreme Court held that Congress may, without violating due process, require certain criminal aliens to be detained without bond prior to and during their removal proceedings and that such detentions do not require particularized hearings as to the alien’s risk of flight or danger to society.

The procedures approved of in Kim contrast sharply with the procedures required for mandatory detention of criminal aliens after entry of a removal order. DHS is required to remove an alien within 90 days of the issuance of an alien’s final order of removal. Section 241(a)(1)(A) of the Act, 8 U.S.C. § 1231(a)(1)(A). This 90-day removal period may be extended under certain circumstances, but an extension involves formal custody review procedures. See 8 C.F.R. § 241.4. Moreover, in Zadvydas v. Davis, 533 U.S. 678 (2001), the Supreme Court held
that if, after six months of post-removal order detention, an alien admitted to the United States but subsequently ordered removed provides good reason to believe it is unlikely DHS can effect his or her removal in the reasonably foreseeable future, and DHS cannot rebut the alien's showing and/or cannot establish special circumstances, DHS must release the alien. Establishing a basis for continued detention of removable aliens after the six-month mark is severely limited. See e.g., 8 C.F.R. § 241.14. Moreover, the problem is growing; two circuits have expanded the reach of Zadvydas to include inadmissible aliens. See Rosales-Garcia v. Holland, 322 F.3d 386 (6th Cir. 2003), cert denied, 2003 WL 1878569 (June 23, 2003); Xi v. INS, 298 F.3d 832 (9th Cir. 2002).

Thus, DHS would be significantly burdened by an interpretation of "final order of removal" which would take cases out from under Kim and place them under Zadvydas. Such an approach would needlessly accelerate the Zadvydas clock and risk the possibility that criminal aliens with grants of CAT protection would be released before the Board reviewed the immigration judge's CAT grant in their cases. Then, there would be no reasonable time during the post-order custody period where these aliens could be removed to a country willing to accept them. Moreover, members of the House Subcommittee on Immigration, Border Security and Claims recently criticized certain aspects of the implementation of CAT, specifically noting their concern that criminal aliens with CAT protection were being released into the community. See e.g., Lawmakers Attack Immigrants' Use of Antitorture Law to Block Deportation, N.Y. Times, July 12, 2003 at A8. Placing aliens unnecessarily into the Zadvydas context would likely draw the ire of Congress in a time in which national security and community safety issues are especially prevalent.
Sorry for the delay. While the reg focuses on affirmative expression of fear, ERO procedures call for officers to actually ask about fear of return when they complete the sworn statement. The relevant chapter from the DROPPM appears in my chain below with thanks!

Sent via BlackBerry by:

Office of the Principal Legal Advisor
U.S. Immigration and Customs Enforcement
(202) (office)
(202) (cell)

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I totally didn’t think you would ask for it but here you go:

14.8 Reinstatement of Final Orders.
(a) Applicability. Section 241(a)(5) of the Act provides that the Attorney General will reinstate (without referral to an immigration court) a final order against an alien who illegally reenters the United States after being deported, excluded, or removed from the United States under a final order, or who departed voluntarily while under a final order of deportation, exclusion, or removal ("self deports"), regardless of the date that the previous order was entered. Thus, an alien who was deported five years ago, but who illegally reenters the United States today, is subject to reinstatement of the final order. Generally, this provision is not limited to orders of removal entered after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, within which this provision was created, (the 9th and 6th Circuit Courts of Appeal have ruled that the underlying illegal reentry must have occurred after April 1, 1997 in order for this provision of law to apply). Reinstatement is not applicable, however, to an alien who was granted voluntary departure by an immigration judge and left the United States in compliance with the terms of that grant. In such instances, the alien was not subject to a final order of deportation or removal. Reinstatement does not preclude criminal prosecution in accordance with local procedures.
and guidelines. However, in order to properly preserve a case for criminal prosecution, the processing officer must advise an alien of his or her Miranda Rights pursuant to Miranda v. State of Arizona, 384 U.S. 436 (1966) prior to taking the alien's sworn statement. Much like expedited removal under Section 235(b)(1) of the Act, reinstatement of a final order is a significant expansion in authority for immigration officers to remove aliens from the United States without referral to an immigration judge. It is particularly important in this context to ensure that officers follow all applicable procedures which ensure that aliens understand the reinstatement process, and that officers carefully evaluate all available evidence before determining that an alien was previously removed and illegally reentered the United States.

(b) Procedure. Refer additionally to 8 CFR 241.8.

(1) Required Elements. Before reinstating a prior order, the officer processing the case must determine:

(A) That the alien believed to have reentered illegally was previously excluded, deported, or removed from the United States. Included in this class of aliens are those who voluntarily departed the United States while subject to a final order of exclusion, deportation, or removal ("self deports"). An alien who complied with the terms of a voluntary departure order is not subject to reinstatement. If, however, the alien stayed beyond the period authorized for voluntary departure, or left of his or her own volition while a final order was outstanding (i.e., the alien "self-deported"), the alien is subject to reinstatement. The officer must obtain the alien's A-file or copies of the documents contained therein to verify that the alien was subject to a final order and that the previous order was executed. In uncontested cases, suitable database printouts to document these facts will suffice.

(B) That the alien believed to have reentered illegally is the same alien as the one previously removed. If, during questioning, the alien admits to having been previously excluded, deported or removed, or to having self-deported by leaving after the expiration of a voluntary departure period with an alternate order, the Form I-213 and the sworn statement must so indicate. If a record check or fingerprint hit reveals such prior adverse action, that information must be included in the A-file. The alien should be questioned and confronted with any relevant adverse information from the A-file, record check or fingerprint hit, and such information must be included in the I-213 and sworn statement, if applicable. If the alien disputes the fact that he or she was previously removed, a comparison of the alien's fingerprints with those in the A-file documenting the previous removal must be completed to document positively the alien's identity. The fingerprint comparison must be completed by a locally available expert, or by the Forensic Document Laboratory via Photophone. In the absence of fingerprints in a disputed case, the alien shall not be removed pursuant to this paragraph.

(C) That the alien did in fact illegally reenter the United States. In making this determination, the officer shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession. The officer shall attempt to verify an alien's claim, if any, that he or she was lawfully admitted, which shall include a check of service data systems available to the officer. If the alien has a former order of deportation or removal that the officer finds should be reinstated, but is in possession of an apparently valid visa permitting him or her to enter the United States, the officer should determine whether the alien applied for and was granted permission to reenter the United States from the Attorney General. If the alien did not apply for and receive permission to reenter, he or she did illegally reenter the United States despite having the allegedly valid visa and is subject to reinstatement. In any case in which the officer is not able to satisfactorily establish the preceding facts, the previous order cannot be reinstated, and the alien must be processed for removal through other applicable procedures, such as administrative removal under section 238 of the Act, or removal proceedings before an immigration judge under section 240 of the Act.
(2) Record of Sworn Statement. In all cases in which an order may be reinstated, the officer must create a record of sworn statement. The record of sworn statement will document admissions, if any, relevant to determining whether the alien is subject to reinstatement, and whether the alien expressed a fear of persecution or torture if returned on the reinstated order. The basic Record of Sworn Statement is recorded using Form I-877.

In addition to addressing routine informational elements (identity, alienage, and the required elements listed in paragraph (b)(1) above), the sworn statement must include the following question and the alien's response thereto: "Do you have any fear of persecution or torture should you be removed from the United States?"

If the alien refuses to provide a sworn statement, the record should so indicate. An alien's refusal to execute a sworn statement does not preclude reinstatement of a prior order, provided that the record establishes that all of the required elements discussed in paragraph (b)(1) have been satisfied. If the alien refuses to give a sworn statement, the officer must record whatever information the alien orally provided that relates to reinstatement of the order or to any claim of possible persecution.

(3) Form I-871 and Notification to the Alien. Once the processing officer is satisfied that the alien has been clearly identified and is subject to the reinstatement provision (and the sworn statement has been taken), the officer prepares Form I-871, Notice of Intent/Decision to Reinstate Prior Order. The I-871 must be typed and the officer's printed name shall be legible. The processing officer completes and signs the top portion of the form, provides a copy to the alien and retains a copy for the file. The officer must read, or have read, the notice to the alien in a language the alien understands. The officer will ask the alien if he or she has any evidence to present to rebut the determination that the alien illegally reentered the United States after deportation or removal. The alien has the right to review the evidence that the officer intends to rely on in making the final determination. The alien signs the second box of the file copy and indicates whether he or she intends to rebut the officer's determination. In the event that the alien declines to sign the form, the officer shall note the block that a copy of the form was provided, but that the alien declined to acknowledge receipt or provide any response. If the alien provides a response, the officer shall review the information provided and promptly determine whether reevaluation of the decision or further investigation is warranted. If not, or if no additional information is provided, the officer shall proceed with reinstatement based on the information already available.

(4) Reinstatement of a Final Order. If, after considering the alien's response, the processing officer determines that the alien's prior order should be reinstated, the officer shall create the Record of Proceedings (ROP) for presentation to the deciding official. The ROP shall contain the following:
- Form I-871,
- the prior final order and executed warrant of removal (Form I-205 or I-296),
- Warning to Alien Ordered Removed or Deported (Form I-294),
- the sworn statement or the alien's declination to provide such statement, or officer's attestation of the alien's refusal,
- any evidence provided by the alien,
- any additional documentation that rebuts the alien's assertion that reinstatement was improper,
- fingerprint match, if required, and
- Record of Deportable Alien (Form I-213).

The officer presents the Form I-871 and all relevant evidence to a deciding officer for review and signature at the bottom of the form. A deciding officer is any officer authorized to issue a Notice to Appear, as listed in 8 CFR 239.1.
After the deciding officer signs the Form 1-871 reinstating the prior order, the officer issues a new Warrant of Removal, Form 1-205, in accordance with 8 CFR 241.2. The officer indicates on the 1-205, in the section reserved for provisions of law, that removal is pursuant to section 241(a)(5) of the Act, as amended by IIRIRA.

(c) Aliens Expressing a Fear of Persecution or Torture. If the alien expresses a fear of persecution or torture, the alien must be referred to an asylum officer, who determines whether the alien has a reasonable fear of persecution or torture. The fact that an alien will be referred to an asylum officer does not preclude the completion of the reinstatement order. If the alien is subject to reinstatement of the prior order, the reinstatement processing should be finished before forwarding the case to an asylum officer. In referring the alien to the asylum officer, the processing officer provides the alien with Form 1-589 and the appropriate list of providers of free legal services. If the asylum officer determines that the alien has a reasonable fear, the asylum officer will refer the case to an immigration judge for a determination only of withholding of removal under section 241(b)(3) of the Act or Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment (the Torture Convention), or for deferral of removal. Either party may appeal the decision of the immigration judge to the Board of Immigration Appeals.

If the asylum officer finds that the alien does not have a reasonable fear, the alien will have an opportunity for an expeditious review by an immigration judge of such negative finding. If the immigration judge upholds the asylum officer's decision, the alien may be removed without further review. If the immigration judge reverses the asylum officer's decision, the immigration judge will make a determination only to withholding or deferral of removal. Either party may appeal this decision of the immigration judge to the Board of Immigration Appeals. Withholding and deferral of removal are country specific. In some cases, application may be made for removal to an alternate country, based upon the request of the alien or pursuant to arrangements made by the Service. Form 1-241 is used in these circumstances. In such cases, the reinstated order may be executed if the alien is accepted by, and is being removed to, such alternate country.

(d) Criminal Prosecution. Whenever possible, reinstatement processing should be completed before referring an alien for criminal prosecution. Aliens whose reinstatement processing is completed prior to criminal prosecution will be removed more quickly after any criminal sentence is served. Upon remanding the subject to the custody of another law enforcement agency, the officer must lodge a detainer, Form 1-247, and note on the form that a final order has been entered. Officers must be aware that, once the Order of Removal is final, the detention of the alien is permissible only to the extent described as the Removal Period in section 241(a)(6) of the Act, for the purpose of executing the Warrant of Removal. For terrorist cases, see Chapter 14.10.

(e) Execution of Reinstated Final Order. At the time of removal, the officer executing the reinstated final order must photograph the alien and obtain a classifiable rolled print of the alien's right index finger on Form 1-205. If a classifiable print of the right index finger cannot be obtained, a print of another finger may be used (annotation of such must be made as appropriate). The alien and the officer taking the print must sign in the spaces provided.

Once the final order has been executed, it is attached to a copy of the set of previously executed documents establishing the prior departure, exclusion, deportation, or removal. The officer executing the reinstated order must also serve the alien with a notice of penalties on Form 1-294. The penalty period commences on the date the reinstated order is executed. Since the instant removal may be the alien's second (or subsequent) removal, the alien is subject to the 20-year bar; unless the alien is also an
aggravated felon, in which case the lifetime bar applies. (Note that the alien being removed need not have been found deportable as an aggravated felon for the lifetime bar to apply, only to have been convicted of an aggravated felony.) The officer routes Form I-205 and a copy of Form I-294 to the A-file. A comparison of the photographs and fingerprints between the original I-205 and the second I-205 executed at the time of reinstatement may prove essential in the event the reinstatement order is questioned at a later date.

(f) Case Tracking Using the Deportable Alien Control System (DACS). As with all removal cases, the progress and completion of these cases must be documented electronically by use of DACS. The basic instructions for entering, managing and closing cases in DACS, contained in the latest version of the DACS Manual, are valid, except for certain additional or revised codes. Use the final charge from the order that is being reinstated on the alien as the initial and final charge codes. Place these cases in CASE CAT use DECISION CODE o indicate that the previous final order has been reinstated and, once they are removed again, close the case using DEPART-CLEARED-STAT of the order being reinstated was an order of deportation or removal based on deportability or the order being reinstated was an order of exclusion or removal based on inadmissibility).

(g) Authority. Aliens taken into custody pursuant to this section are detained as warrantless arrests in accordance with section 287.2 of the INA. No Warrant of Arrest (Form I-200) is required. Form I-200 is completed for detention pursuant to INA 236, rather than detention pursuant to INA 241. The previously executed Warrant of Removal, Form I-205, serves as authority to detain such aliens.

From: [redacted]
Sent: Friday, November 30, 2012 4:30 PM
To: [redacted]
Subject: Re: reinstatement & withholding

Thanks--can you fwd me to DROPPM sub-chapter in its entirety?

Sent via BlackBerry by:

--- ATTORNEY/CLIENT PRIVILEGE --- ATTORNEY WORK PRODUCT ---
This document may contain confidential and/or sensitive attorney/client privileged information or attorney work product and is not for release, review, retransmission, dissemination or use by anyone other than the intended recipient. Please notify the sender if this message has been misdirected and immediately destroy all originals and copies. Any disclosure of this document must be approved by the Office of the Principal Legal Advisor, U.S. Immigration and Customs Enforcement. This document is for INTERNAL GOVERNMENT USE ONLY. FOIA exempt under 5 U.S.C. § 552(b)(5).
The regulation at 8 CFR 241.8(e) states as follows:

**Exception for withholding of removal.** If an alien whose prior order of removal has been reinstated under this section expresses a fear of returning to the country designated in that order, the alien shall be immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture pursuant to §208.31 of this chapter.

Further, the regulation at 8 CFR 208.31(a) provides, in pertinent part, as follows:

**Jurisdiction.** This section shall apply to any alien ... whose deportation, exclusion, or removal order is reinstated under section 241(a)(5) of the Act who, in the course of the ... reinstatement process, expresses a fear of returning to the country of removal.

Thanks,

Chief, Appellate and Protection Law Section
Office of the Principal Legal Advisor | Immigration Law and Practice Division
DHS | U.S. Immigration and Customs Enforcement
5201 Leesburg Pike Falls Church, VA 22041
703. (b) (6), (b) (7) (C)

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Can you guys tag-team on a response for me to send to [b](b)(6). I can't remember what the reg says, but [b](b)(5), [b](b)(6), [b](b)(7), [b](C)

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Re: (b)(5)(C) (b)(6) (b)(7)(C)

Rescission of Reinstatement of Prior Order of Removal

Pursuant to my authority and in the exercise of my prosecutorial discretion in the case of ..., I hereby rescind the Notice of Intent / Decision to Reinstate Prior Order (Form 1-871), dated April 21, 2003, as issued in accordance with section 241(a)(5) of the Immigration and Nationality Act and 8 C.F.R. § 241.8. This rescission is retroactive to the date of reinstatement.

[Signature]
Acting Field Office Director
Reinstatement: Law and Procedure

ACC
A. **What is Reinstatement?**

1. **It is reinstatement of a prior order.** INA § 241(a)(5) (2010); 8 C.F.R. § 241.8 (2009); *Delgado v. Mukasey*, 516 F.3d 65, 67, 74 (2d Cir. 2008).

   a. “If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.” INA § 241(a)(5).


   c. *What is the “prior order?”* Any previous order of removal and not just the most recent order. *Spence v. U.S. Att’y General*, 14–11073, slip op. at 1-2 (11th Cir. Nov. 5, 2014) (holding that DHS could reinstate a prior expedited removal order even if a subsequent in absentia removal order existed).

B. **History**

1. At first, under a 1950 law, only certain aliens—such as those deported as anarchists or subversives who illegally re-entered the United States after an order were subject to reinstatement. Internal Security Act of 1950, § 23(d), 64 Stat. 1012, 8 U.S.C. § 156(d) (1946 ed., Supp. V).

2. Congress modified the law in 1952 to include certain criminal aliens, those deportable due to a failure to register or the falsification of documents, and aliens posing a security risk. 8 U.S.C. § 1252(f) (1994). These aliens, however, could seek some discretionary relief, such as suspension of deportation. *Id.* § 1244(a)(1).

3. In 1996, Congress greatly expanded reinstatement. INA § 241(a)(5); *Fernandez-Vargas*, 548 U.S. at 34-35.

   a. Rationale: Congress wanted to “make the removal of illegal reentrants more expeditious.” *Garcia-Villeda v. Mukasey*, 531 F.3d 141, 149 (2d Cir. 2008) (quoting *Lattab v. Ashcroft*, 384 F.3d 8, 20 (1st Cir. 2004)). It “was concerned with the inefficiencies of the previous scheme and sought to modernize it by narrowing the range of defenses available to recidivist illegal aliens and, most importantly, by eliminating any duplication between removal and reinstatement proceedings. It is clear that Congress enacted INA § 241(a)(5) to facilitate the quick and certain removal of illegal reentrants.” *Id.* § 241(a)(5).
241(a)(5) to effect a "substantive change" in the prior regime. Quite simply, "Congress replaced [the] reinstatement provision with one that toed a harder line...." Id. (quoting 62 Fed. Reg. 10312, 10326 (Mar. 6, 1997); Fernandez-Vargas, 548 U.S. at 34, respectively).

C. **LEGAL AUTHORITY:** Immigration and Nationality Act ("INA") § 241(a)(5); 8 C.F.R. §§ 241.8, 1241.8.

1. **The regulations are a valid interpretation of the INA.** Garcia-Villeda, 531 F.3d at 149; Miller v. Mukasey, 539 F.3d 159, 163 (2d Cir. 2008); Ponta-Garcia v. Att'y Gen. of the United States, 557 F.3d 158, 161 (3d Cir. 2009).

2. **The regulations afford due process.** Herrera-Molina v. Holder, 597 F.3d 128, 139-40 (2d Cir. 2010); Garcia-Villeda, 531 F.3d at 149-50; Miller, 539 F.3d at 164; Ponta-Garcia, 557 F.3d at 162.

D. **CONSEQUENCES OF REINSTATMENT**

1. **There is no right to seek any relief under the INA.** INA § 241(a)(5); Delgado v. Mukasey, 516 F.3d 74-75 (2d. Cir. 2008); Garcia-Villeda, 531 F.3d at 148 (holding, "[I]llegal reenentrants are now categorically declared ineligible for any relief from removal...") (emphasis added).

   a. "The bar to relief is prospective and not conditioned upon the issuance of an order reinstating the prior order of removal." Delgado, 516 F.3d at 74 (emphasis added). This result ensues because "[g]rammatically, section 241(a)(5) does not make ineligibility for relief dependent upon reinstatement of the prior deportation order." Lattab, 384 F.3d at 16; see also Galindo-Romero v. Holder, 621 F.3d 924, 930-31 (9th Cir. 2010) (stating that the reinstatement would "thwart" the respondent's cancellation of removal application and commenting that "[n]othing in § 1231(a)(5) indicates that its bar on eligibility for relief applies only to relief sought prospectively" for a case in which the alien was placed in removal proceedings; applied for cancellation of removal; departed during his proceedings; sought to re-enter and was removed on an expedited removal order; re-entered without inspection; and continued his removal proceedings, which the IJ terminated for reinstatement).

   i. "Nothing in § 1231(a)(5) indicates that its bar on eligibility for relief applies only to relief sought prospectively, as opposed to an application for relief already pending." Galindo-Romero v. Holder, 640 F.3d 873, 880 (9th Cir. 2011) (dicta).
b. What about 245(i)? An alien with a prior order who re-enters, is inadmissible for prior illegal presence under INA § 212(a)(9)(C)(i)(II), and seeks to adjust under INA § 245(i) before reinstatement is ineligible for the relief sought. *Delgado*, 516 F.3d at 74. That is, under these circumstances, INA § 245(i) does not trump the reinstatement provision. *See id.*

c. What about a waiver under 8 C.F.R. § 212.2—consent to reapply for admission after deportation, removal or departure at government expense? An alien with a prior order who re-enters, is inadmissible for prior illegal presence under INA § 212(a)(9)(C)(i)(II), and seeks to adjust status in conjunction with this waiver is ineligible for the relief sought. *Id.* at 73-74; *Garcia-Villeda*, 531 F.3d at 150-51 (relying on *Delgado*, 516 F.3d at 73).

d. What about reopening under a special motion to seek 212(c) relief? It is barred. 8 C.F.R. § 1033.46(k)(2).

e. DHS is not required to wait for the alien to exhaust administrative appeals on a denied application for relief before proceeding with reinstating removal. *Morales de Soto v. Lynch*, 824 F.3d 822, (9th Cir. May 31, 2016) (considering a case in which the alien had a pending appeal of a denied I-212 application for consent to reapply for admission).

2. The alien “has no right to a hearing before an immigration judge,” unless an exception or exemption applies. 8 C.F.R. §§ 241.8(a), 1241.8(a); Matter of W-C-B-, 24 I&N Dec. 118, 120 n.1 (BIA 2007).

3. The alien is removed under the prior order. INA § 241(a)(5); *Delgado*, 516 F.3d at 74-75.

4. No Bond Determination By EOIR: When “the respondent is subject to detention under section 241 of the Act...neither the Immigration Judge nor this Board has jurisdiction to redetermine the respondent’s custody status.” *Eddie Mendiola*, 2009 WL 1653805 (BIA May 27, 2009); accord *Juan Diego Moreno-Garcia*, 2009 WL 3818010 (BIA Nov. 3, 2009); *but see Lopez v. Napolitano*, 2014 WL 1091336, slip op. at 3 (9th Cir. Mar. 17, 2014) (“While § 1231(a)(5) pertains to the reinstatement of Petitioner's prior removal order, the language of that provision does not authorize detention. The authority for Petitioner's detention must be derived from § 1226(a) authorizing detention 'pending a decision on whether the alien is to be removed' or § 1231(a)(6) authorizing 'removal period' and post 'removal period' detention. Authorization for detention shifts from § 1226(a) to § 1231(a)(5) at the critical moment when the [removal period] begins as determined by § 1231(a)(1)(B)...”).
a. The alien is “detained under 241(a)(5) of the Act rather than 241(a)(6).” *Avraham More-Yosef*, A072-301-429 (BIA Apr. 19, 2011); *Pierre v. Dep’t Homeland Security*, 2013 WL 4083777, slip op. at (MD. Pa. Aug. 13, 2013) (“Section 1231 governs detention after removal has become certain. Leslie, 678 F.3d at 270 (“the purpose of § 1231 detention is to secure an alien pending the alien’s certain removal”). Specifically, section 1231 governs detention after the start of the “removal period,” defined in the section as potentially starting on three different dates, but for our purposes starting on the “date the order of removal becomes administratively final.”); but see *Lopez v. Napolitano*, 2014 WL 1091336, slip op. at 3 (9th Cir. Mar. 17, 2014) (detailed above).


c. *Impact of Withholding Application*. ERO guidance issued August 7, 2014, states that post-order custody provisions in INA §§ 241(a)(2), (a)(6) control. The Second Circuit, however, has found that INA § 236(a) controls in this instance, *Guerra v. Shanahan*, 15-504-cv, slip op. at 12 (2d Cir. Jul. 28, 2016). District courts are split.


Rather, Petitioner’s appeal of the immigration judge’s August 13, 2013 Order denying his application for withholding removal INA § 241(b)(3) and under CAT affects only whether Petitioner may be removed to Honduras. Thus, we agree with Respondents that “[c]ontrary to [Petitioner’s] assertions, the pendency of a reasonable fear determination does not impact the finality of a reinstated removal order under [INA § 241(a)(5)].” Therefore, as Respondents point out, even if Petitioner prevails on his pending appeal with the Third Circuit and the Court overturns the denial of Petitioner’s application for withholding removal and lifts the stay or removal, Petitioner can still be removed from the United States, just not to Honduras. (Doc. 13, pp. 4–6). Accordingly,

₁ The memo states that separate guidance applies for the Ninth Circuit. Aliens will nonetheless be eligible to request a bond redetermination hearing before an IJ under *Dieuff v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) if they: (1) Are subject to a reinstated order of removal; (2) Have a petition for judicial review of the BIA’s denial of withholding of removal pending before the Ninth Circuit; (3) Have a motion for stay of removal pending before the Ninth Circuit or have been granted a stay of removal by the Ninth Circuit; and (4) Have been detained for 180 days within the territorial jurisdiction of the Ninth Circuit.
we agree with Respondents that Petitioner Santos is being detained under [INA§ 241, and not § [236]. *Santos v. Sabol*, 2014 WL 2532491, slip op at 3-4 (M.D. Pa. June 5, 2014); see also *Khemial v. Shanahan*, 2014 WL 5020596, slip op. at 6 (S.D.N.Y. Oct. 8, 2014); *Moreno-Gonzalez v. Johnson*, 2014 WL 5305470, slip op. at 3 (S.D. Ohio Oct. 15, 2014) (“Stated another way, § 1226(a) does not apply to provide an alien subject to a reinstated removal order under § 1231(a)(5) the right to an individualized bond hearing even if he has an application for withholding of removal pending. As indicated above, the issue of Petitioner’s removability became administratively final when the prior removal order was reinstated. While Petitioner has an appeal of the denial of his applications for withholding of removal and withholding of removal under CAT pending, his status will not change even if he wins his appeal.”); see also *Acevedo-Rojas v. Clark*, 2014 WL 6908540 (W.D. Wash. Dec. 8, 2014); *Castaneda v. Aitken*, 2015 WL 3882755, slip op at *4 (N.D. Cal. Jun. 23, 2015); *Reyes v. Lynch*, 2015 WL 5081597 (D. Colo. Aug. 28, 2015); *Padilla-Ramirez v. Bible*, 2016 WL 1555679, slip op at *2-5 (D. Idaho Apr. 15, 2016).


iii. This analysis could be impacted by cases in which the circuit court have assessed whether an alien can appeal a reinstatement order while pursuing a reasonable fear claim. The Ninth Circuit has determined that “reinstatement of a prior removal order, the reinstated removal order does not become final until the reasonable fear of persecution and withholding of removal proceedings are complete.” *Ortiz-Alfaro*, 694 F.3d at 957; see also *Jimenez-Morales v. U.S. Att'y. Gen.*, --- F.3d ----, 2016 WL 1732663, slip op. at 2 (11th Cir. May 2, 2016) (finding that once the reasonable fear proceedings are complete, the petition for review automatically ripens into a judiciable
5. **No Stay Order By EOIR.** Because an alien who is subject to reinstatement is not entitled to relief under the INA, see INA § 241(b)(5), and since the United States Department of Homeland Security ("Department" or "DHS")—not EOIR—determines when reinstatement applies, see 8 C.F.R. §§ 241.8, 1241; W-C-B-, 24 I&N Dec. at 122-23; Matter of G-N-C-, 22 I&N Dec. 281, 284 (BIA 1998), rejected by, Castro-Cortez v. I.N.S., 239 F.3d 1037 (9th Cir. 2001), EOIR has no jurisdiction to stay the reinstatement order.

a. **ILPD Guidance:** As per guidance issued June 2, 2009.

E. **EXCEPTIONS FOR LIMITED HEARING**

1. **A protection hearing is possible for aliens with a reasonable fear of persecution or torture.** If an alien expresses a fear of returning to the designated country of removal, an asylum officer must conduct an interview before the alien can be subjected to reinstatement. See 8 C.F.R. §§ 241.8(a); 208.31.2

   a. The Department has "exclusive jurisdiction" to find that the alien has a "reasonable fear" of returning to the designated country. *Id.* § 208.31(a).

   b. The immigration court may review a negative finding by the asylum officer. 8 C.F.R. § 1208.31(g). If the immigration court concurs with the asylum officer, the alien may not appeal that finding. *Id.* The matter is then returned to the Department for the alien's removal. *Id.*

   c. If the asylum officer makes a positive finding, the matter is referred to the immigration court for "full consideration of the request for withholding of removal only." *Id.* § 1208.31(e).

   d. Only withholding of removal is available to the alien. *Id.* § 1208.31(e), (g) (2008); *Herrera-Molina*, 597 F.3d at 139 n.8. The alien can seek withholding of removal under the INA or the Convention Against Torture. *See* 8 C.F.R. §

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2 "If an asylum officer determines that an alien described in this section has a reasonable fear of persecution or torture, the officer shall so inform the alien and issue a Form I-863, Notice of Referral to the Immigration Judge, for full consideration of the request for withholding of removal only. Such cases shall be adjudicated by the immigration judge in accordance with the provisions of 8 CFR § 208.16. Appeal of the immigration judge's decision shall lie to the Board of Immigration Appeals." 8 C.F.R. §§ 208.31(e), 1208.31(e).
1208.31(c). "The regulations provide no means by which an alien with a reinstated removal order may apply for asylum." *Ortiz-Alfaro v. Holder*, 694 F.3d 955, 957 (9th Cir. 2012); *Ramirez-Mejia v. Lynch*, ---F.3d---, 14-60546, slip op. at 5 (5th Cir. Jul. 21, 2015). The immigration judge’s decision on a withholding of removal application is appealable to the Board of Immigration Appeals. 8 C.F.R. § 208.31(g)(2).

c. "The regulations do not provide any means for the alien to appeal the IJ’s decision regarding a reasonable fear of persecution to the Board of Immigration Appeals." *Ortiz-Alfaro*, 694 F.3d at 957.

F. **Statutory Exemptions from Reinstatement.** Reinstatement does not apply to:

1. Applicants for adjustment under the *Haitian Refugee Immigration Fairness Act* of 1998. 8 C.F.R. §§ 241.8(d), 1241.8(d).


   a. *Who is affected*: aliens 1) who are less than eighteen-years-old; 2) have no parent or legal guardian in the United States or the parent or legal guardian is unavailable to provide care and physical custody; and 3) has no lawful immigration status. 6 U.S.C. § 279 (g) (2010) (defining unaccompanied alien child).


   c. *Adults initially deported as UACs*. Adults who were deported as unaccompanied minors and re-enter without inspection as adults. According to an e-mail by former New York DCC on January 4, 2010, JOPA/ELC, JOPA Enforcement Law Division, concurred with the following guidance: “An adult is subject to reinstatement regardless of the fact that the prior removal order was directed to him as a UAC. There is no provision in the TVPRA, or policy decision in writing precluding reinstatement of UACs where an individual is removed as a UAC, and centers as an adult. That said, while there is no specific prohibition in

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3 This division has since been renamed under OPLA restructuring.

7 Attorney Work Product: Do Not Distribute
reinstating a removal order under these circumstances we must note as we 
have in the past that we must look at these cases carefully on a case by case 
basis in light of the exercise of prosecutorial discretion despite the mandatory 
language in the statute on reinstatement.”

4. **Certain class action members** applying for adjustment of status under the 
legalization program (INA § 245A). LIFE Act § 1104(g).

a. Applicable class action lawsuits include *Catholic Social Services, Inc. v. 
Meese, vacated sub nom, 509 U.S. 43 (1993); League of United Latin 
American Citizens v. INS, vacated sub nom, Reno v. Catholic Social Services, 
Inc. 509 U.S. 43 (1993); and Zambrano v. I.N.S., vacated sub nom, 509 U.S. 
918 (1993). It may include *Proyecto San Pablo v. INS, 2001 WL 36167472 
(D. Ariz. Feb. 2, 2001).*

b. If the alien’s LIFE Act application is no longer pending, the alien is subject to 
reinstatement. *Khakhn v. Holder,* 2010 WL 1274225, at slip op. 3 (10th Cir. 
Apr. 5, 2010).

G. **Determining When Reinstatement Applies**

1. **Reinstatement applies when an alien re-enters the United States illegally after a 
prior order.**

   a. It applies to orders of deportation, exclusion, or removal. 8 C.F.R. §§ 
   241.8(a), 1241.8(a); *Matter of W-C-B-,* 24 I&N Dec. at 120 n.1; *Matter of 

   i. When considering whether to reinstate a prior order, DHS need not 
   consider discretionary factors, such as the alien’s equities in the United 
   States. *Ovalle-Ruiz v. Holder,* 14–3130, slip op. at 3, 2014 WL 6610934, 
   (6th Cir. Nov. 21, 2014).

   b. It applies to expedited removal orders as well. *Delgado v. Mukasey,* 516 F.3d 
   65, 67, 74 (2d. Cir. 2008) (upholding reinstatement after the issuance of an 
   expedited removal order); *Jose Ismael Moreno-Zaragoza,* 2009 WL 2981815 
   (BIA Aug. 31, 2009).

   600221, at *2–3 (6th Cir. Feb. 19, 2013) (finding that it had no jurisdiction to 
   review the reinstatement of a stipulated removal order).

   d. It applies without regard to whether the alien was forcibly removed or 
   otherwise left under an order. 8 C.F.R. §§ 241.8(a), 1241.8(a).
i. The Third Circuit has questioned in a footnote whether “leaving the country for a four-day personal trip” qualifies as “depart[ing] voluntarily, under an order of removal.” Ponta-Garcia, 557 F.3d at 165 n.5 (emphasis in original) (quoting INA § 241(a)(5)).

e. Multiple Removal Orders. DHS may reinstate a removal order issued after a prior order. The subsequent order does not invalidate or supersede the prior order. Tamayo-Tamayo v. Holder, --- F.3d ---, 2013 WL 2994803, slip op. at *2 (9th Cir. June 18, 2013).

f. Parole. An alien whose removal order was reinstated and who was removed after the immigration judge and Board declined to grant her withholding application but whose withholding application was reopened and who was subsequently paroled into the United States for her withholding-only proceeding could still have her order reinstated. The parole did not render the reinstatement provisions “inoperative.” Ramirez-Mejia v. Holder, ---F.3d---, 14-60546, slip op. at 6 (5th Cir. Jul. 21, 2015).

g. Admission.

i. Fraudulent admission upon re-entry. If the alien uses an assumed identity upon re-entry and is admitted, he or she qualifies for re-instatement. Beekhan v. Holder, 634 F.3d 723, 724 (2d Cir. 2011); cf. Anderson v. Napolitano, 611 F.3d 275, 278-79 (5th Cir. 2010) (upholding the reinstatement of a prior order for an alien who was deported and later admitted under a new, married name); Martinez v. Johnson, 740 F.3d 1040, 1042-43 (7th Cir. 2014) (upholding the reinstatement of the prior order when the alien was deported on a deportation order, illegally re-entered the United States, and received a “new immigration card under a different identity and number, and without divulging that he previously has been deported.”); Avalos-Martinez v. Johnson, 560 F. App’x 385, 388 (5th Cir. Apr. 1, 2014) (stating that the alleged presentation of an LPR card by a previously removed aggravated felony “simply indicates [he] was admitted through an immigration checkpoint, [and] is not evidence that the Attorney General consented to [Avalos] applying for readmission.”) (quoting Anderson v. Napolitano, 611 F.3d 275, 279 (5th Cir. 2010)).

- As a policy matter, we do not apply this to lawful permanent residents (“LPR”).

ii. Mistaken admission. If an alien is admitted using an invalid entry document after a removal order, DHS can still reinstate the order. Tamayo-Tamayo, 2013 WL 718455, at *2-3.
iii. What constitutes an admission?

- A stamp on a passport does not show the respondent was inspected and admitted. *Anderson v. Napolitano*, 611 F.3d 275, 278-79 (5th Cir. 2010).

- An alien has been deemed admitted to the United States when she crossed the border as a car passenger without being questioned by the border officer, who questioned the U.S. citizen driving the car. *Matter of Quilantan*, 25 I&N Dec. 285, 286, 294 (BIA 2010); *but see Cordova-Soto v. Holder*, 659 F.3d 1029, 1034 (10th Cir. 2011) (“We cannot conclude that a previously removed alien’s procedurally regular entry could be, at the same time, a legal reentry for purposes of § 1231(a)(5), thereby precluding reinstatement of her removal order, yet also an illegal reentry subjecting her to criminal prosecution under § 1326(a). The BIA’s reasoning in *Quilantan* is simply inapposite to the construction of the phrase “reentered the United States illegally” in § 1231(a)(5).”)

2. The Department, not the immigration judge or Board of Immigration Appeals, determines whether reinstatement applies. 8 C.F.R. §§ 241.8, 1241; *W-C-B-*, 24 I&N Dec. at 122-23; *G-N-C-*, 22 I&N Dec. at 284.

   a. The Board of Immigration Appeals (“Board”) may not review a decision to reinstate a prior order. *G-N-C-*, 22 I&N Dec. at 285. Presumably, the immigration court may not either. *Cf. id.*

   i. The Department does not waive “its right to reinstate his prior removal order by failing to request termination of the removal proceedings in a more timely manner”; that is, after removal proceedings have begun. *Saul Gomez*, 2010 WL 5173977 (BIA Nov. 30, 2010).

   ii. When a question of fact exists regarding whether the respondent meets the criteria for reinstating a prior order, the immigration judge may still terminate for reinstatement because “whether or not the DHS would ultimately satisfy the criteria for reinstating the prior order of deportation is for the immigration officer, not the Board or the Immigration Judge, to decide.” *Rogelio Cardenas-Alvarez*, 2010 WL 5174003 (BIA Nov. 24, 2010) (citing *W-C-B-*, 24 I&N Dec. at 122).

   iii. The immigration judge did not err by terminating for DHS to reinstate the prior order, despite the respondent’s argument that the prior proceedings were “procedurally deficient” because she was not read her
Miranda rights or “permitted to withdraw her admission to the factual allegation made in the Notice to Appear alleging that she was previously removed in January 2000.” Ceja De Valdovino, 2011 WL 1373707 (Mar. 25, 2011) (citing W-C-B-, 24 I&N Dec. at 122-23).

iv. A Board order terminating the proceedings on appeal from an immigration judge’s decision to terminate for reinstatement is not a “final order under § 1241.1.” Rather, it is a termination. Ramona Barboza, 2012 WL 5178807 (Sept. 6, 2012) (citing Galindo-Romero v. Holder, 640 F.3d 873, 881 (9th Cir. 2011)).

b. The Immigration Judge should not sua sponte terminate proceedings for reinstatement when the Department does not intend to reinstate the prior order. Isaul Paredes-Rapalo, 2009 WL 523152 (BIA Feb. 12, 2009).

c. The alien may not collaterally attack the prior order before the immigration judge. W-C-B-, 24 I&N Dec. at 122.

d. Policy Considerations.

i. U-Visas, T-Visas, VAWA-Based Adjustment (local OCC Newark policy). As a matter of policy, DHS will stay removal if an alien has a prima facie determination from USCIS that the alien is eligible for a U-Visa, T-Visa, or VAWA-based adjustment. But see Ochoa v. Lynch, 639 F. App’x 429, 429 (9th Cir. Apr. 18, 2016) (“We likewise lack jurisdiction to review Ochoa’s contention that the Violence Against Women and Department of Justice Reauthorization Act of 2005 precluded the DHS from reinstating Ochoa’s expedited removal order.”). Talk to a deputy chief counsel if there is a pending application but no prima facie determination.

ii. Legal permanent residents. We will not apply the reinstatement provisions to them, even if they obtained their LPR status by fraud.

iii. Prosecutorial Discretion. One circuit court declined to remand an appeal of the reinstated order so ICE could consider prosecutorial discretion, the policy on which had changed since ICE first notified the alien of its intent to reinstate. Morales de Soto v. Lynch, ---F.3d---, 2016 WL 3065304 (9th Cir. May 31, 2016).


4. Retroactivity: Reinstatement applies to aliens who illegally re-entered before the law’s enactment on April 1, 1997, but remained after it took effect without

a. An alien has no retroactivity claim if he or she is ordered deported or excluded, re-enters the United States before April 1, 1997, and fails to take "some action\" to legalize his status before that date "that would elevate it above the level of hope." *Fernandez-Vargas*, 548 U.S. at 44 n.10; accord *Herrera-Molina*, 597 F.3d at 136 (finding that the respondent’s statutory ineligibility for adjustment due to a criminal conviction weakened her argument that the reinstatement provisions were impermissibly retroactive); *United States v. Charleswell*, 322 F. App’x. 184, 188 (3d Cir. Jan. 27, 2009) (applying *Fernandez-Vargas*); *Avila-Macias v. Ashcroft*, 328 F.3d 108, 114 (3d Cir. 2003).

i. **Filing an I-130** is not enough to make the statute impermissibly retroactive. *Silva Rosa v. Gonzales*, 490 F.3d 403, 409-10 (5th Cir. 2007); *Labojewski v. Gonzales*, 407 F.3d 814, 822 (7th Cir. 2005); *Montoya v. Holder*, 744 F.3d 614, 616-17 (9th Cir. 2014).

ii. **Filing a labor certification** is not enough either. *Rivera v. Att’y General of the United States*, 2015 WL 3643484, slip op. at 1 (3d Cir. Jun. 12, 2015) (“While Rivera argues that the Department of Labor certification he submitted on June 10, 1996 “grandfathers” him under the prior version of the reinstatement statute, thus apparently exempting him from the provision of the current statute, he offers no support for, or explanation of, this position.”)

ii. The act of marrying—without filing an adjustment application—is insufficient to render the statute impermissibly retroactive. *Herrera-Molina*, 597 F.3d at 135.

iii. **Filing an I-485 that subsequently denied** is insufficient when he did not re-file it. *Ortega v. Holder*, 747 F.3d 1133, 1135 (9th Cir. 2014) (“Ortega’s retroactivity argument fails, as he has taken no action to vest any right he may have initially had. Ortega’s initial application for adjustment of status was denied on the merits in 1987. Ten years would pass until the Act would become effective, but during this decade Ortega did nothing to renew his application—for example, he did not re-marry another citizen or re-acquire an I-130 from his initial spouse, nor did he ever re-apply for adjustment of status.”).

iv. Circuits differ on whether **filing an I-589** is sufficient to render the statute impermissibly retroactive.

- Eighth Circuit: *Molina Jerez v. Holder*, 625 F.3d 1058, 1070-72 (8th Cir. 2010) (finding no retroactivity claim for an alien who
entered the United States in 1987; was granted voluntary departure in 1989 but overstayed; apparently departed the United States in 1990 and re-entered in 1991, and filed an I-589 in 1992, which DHS denied as abandoned in 2005 and declined to refer the immigration judge). The Eight Circuit stated that “an application for asylum is not an application for adjustment of legal status, and in all other relevant respects Molina is similarly situated to the alien in Fernandez-Vargas.” Id. at 1071. It also rejected the respondent’s attempts to distinguish Fernandez-Vargas, 548 U.S. at 44, stating that “IIRIRA did not affect the substance of his asylum application...The relevant legal standards governing Molina’s asylum application remained constant over time, and applying such constant legal standards, DHS found Molina was not entitled to asylum. Molina received exactly what he expected when he filed his asylum application-evaluation of his asylum claim and permission to work in the United States pending its final resolution.” Id.

- Ninth Circuit: Ixcot v. Holder, 646 F.3d 1202,1213 (9th Cir 2011) (finding that the reinstatement provisions were impermissibly retroactive for an alien who entered the United States without inspection, was ordered removed, then filed an affirmative asylum application in 1993—which was never adjudicated, then departed the United States, then re-entered without inspection in 1993). Comparing this case to those in which aliens filed a pre-IIRIRA adjustment application and claimed that IIRIRA’s reinstatement provisions are impermissibly retroactive, the court found that the difference between an 1-485 and I-589 is “immaterial” to the retroactivity analysis. Id.

  - Does it matter if the respondent abandoned the asylum application by departing? The Ninth Circuit acknowledged that the government raised this argument but did not address it when finding that IIRIRA’s reinstatement provisions are impermissibly retroactive. Id. at 1206 n. 9.

b. Reinstatement statute is impermissibly retroactive when applied to aliens who had taken steps to legalize their status before April 1, 1997. Valdez-Sanchez v. Gonzales, 485 F.3d 1084, 1089-90 (10th Cir. 2007) (distinguishing Fernandez-Vargas, 548 U.S. 30, because the case involved an alien who applied to adjust status after she illegally re-entered and before April 1, 1997); Arevalo v. Ashcroft, 344 F.3d 1, 15 (1st Cir. 2003); Faiz-Mohammed v. Ashcroft, 395 F.3d 799, 809-10 (7th Cir. 2005); Sarmiento-Cisneros v. Ashcroft, 381 F.3d 1277, 1284-85 (11th Cir. 2004); compare Miguel v. Holder, 2010 WL 3516631, slip op. at 1 (9th Cir. Sept. 9, 2010) (finding the reinstatement provisions were not impermissibly
retroactive for an alien who—after IIRIRA’s effective date—“departed, entered, and remained in the United States while subject to” an in absentia deportation order and then filed an I-589).

c. Impact of Re-Entering After IIRIRA Took Effect: The Tenth Circuit found that IIRIRA’s reinstatement provisions were not impermissibly retroactive for an alien who filed an application for “legalization” in 1990 that was never adjudicated, left the United States, and returned after April 1, 1997. Khakhn v. Holder, 2010 WL 1274225, at slip op. 3-4 (10th Cir. Apr. 5, 2010). It found that because the respondent re-entered the United States after IIRIRA took effect, the alien “is assumed to have known, at the time he illegally reentered the country in 1998, that § 1231(a)(5) provided that aliens in his position were ineligible for any relief under the immigration law.” Id. at 4.

H. WHEN AUTHORITY EXISTS TO REINSTATE THE PRIOR ORDER

1. DHS has sole authority to reinstate the prior order. Matter of W-C-B-, 24 I&N Dec. at 123.

2. If a Notice to Appear has been served on the alien but not the immigration court, DHS may cancel the notice and reinstate the prior order. G-N-C-, 22 I&N Dec. at 284 (BIA 1998).

3. If jurisdiction lies with the immigration court, DHS may not cancel the Notice to Appear; rather, the immigration court may terminate the proceedings as improvidently initiated. G-N-C-, 22 I&N Dec. at 284; W-C-B-, 24 I&N Dec. at 122. When doing so, the court must consider arguments from both parties. G-N-C-, 22 I&N Dec. at 284-85. DHS must serve proof of the prior removal. Marcos Sanchez-Cortez, 2008 WL 2783003 (BIA June 23, 2008).

   a. See ILPD-approved brief for suggested language on moving to terminate such proceedings.

   b. If the immigration judge refuses to terminate the proceedings, the Department may still be able to argue that the alien is nonetheless ineligible for any relief. As noted, “[t]he bar to relief is prospective and not conditioned upon the issuance of an order reinstating the prior order of removal.” Delgado, 516 F.3d at 74; accord Galindo-Romero, 621 F.3d at 930-31.

   c. Guidance: If the immigration judge refuses to terminate, please consult your supervisor to ascertain whether an interlocutory appeal is warranted.
I. Reinstating the Prior Order

1. Reinstatement is accomplished by serving an I-871—a Notice of Intent to Reinstall, which contains a “decision, order, and officer’s certification” at the bottom of the form. I-871.

2. Apprehension. It does not violate the alien’s due process to call him for arrest and removal—using the pretense of giving him a benefit—if the alien was not prejudiced. Tamaya-Tamayo, 2013 WL 718455, at *4 (considering whether an alien’s due process was violated when he was detained after being called in to receive a replacement permanent resident card and finding no prejudice—even when the alien claims he would have brought an attorney had he been aware of the impending arrest—because the alien did not show that the “outcome of the proceedings” would have been different had he brought an attorney).

3. To determine whether reinstatement applies, the Department must consider: a) whether a prior order exists; b) the alien’s identity; and c) whether the alien unlawfully re-entered the United States. 8 C.F.R. § 241.8.
   a. An Enforcement and Removal Operations ("ERO") officer will make this determination. As outlined below in Section L, contact an ERO supervisor.
      i. While OPLA consults ERO to make this determination, any "immigration officer" is authorized to do so. 8 C.F.R. § 241.8(a).
   b. There is no right to counsel. Dinall v. Ashcroft, 421 F.3d 247, 253 (3d Cir. 2003); Rivera v. Att’y General of the United States, 2015 WL 3643484, slip op. at 1 (3d Cir. Jun. 12, 2015). Nonetheless, the best practice is to encourage the presence of attorneys to avoid subsequent challenges.
   c. The alien’s lawyer need not be present to afford the alien due process if the alien has already conceded the above elements. Garcia-Villeda, 531 F.3d at 149; see also Villegas de la Paz v. Holder, 640 F.3d 650, 656 (6th Cir. 2010) (finding that the respondent was not prejudice by a denial of a right to counsel

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4 “The following employees of the Department of Homeland Security, including senior or supervisory officers of such employees, are designated as immigration officers authorized to exercise the powers and duties of such officer as specified by the Act and this chapter: Immigration officer, immigration inspector, immigration examiner, adjudications officer, Border Patrol agent, aircraft pilot, airplane pilot, helicopter pilot, deportation officer, detention enforcement officer, detention officer, investigator, special agent, investigative assistant, immigration enforcement agent, intelligence officer, intelligence agent, general attorney (except with respect to CBP, only to the extent that the attorney is performing any immigration function), applications adjudicator, contact representative, legalization adjudicator, legalization officer, legalization assistant, forensic document analyst, fingerprint specialist, immigration information officer, immigration agent (investigations), asylum officer, other officer or employee of the Department of Homeland Security or of the United States as designated by the Secretary of Homeland Security as provided in § 2.1 of this chapter. Any customs officer, as defined in 19 CFR 24.16, is hereby authorized to exercise the powers and duties of an immigration officer as specified by the Act and this chapter.” 8 C.F.R. § 103.1 (b).
because she did not show that she was prejudiced); see also Ruiz v. Holder, 2013 WL 5699763 at *4 (6th Cir. Oct. 15, 2013).

4. If warranted, ERO must allow an asylum officer to conduct an interview to determine if the alien has a reasonable fear of returning to the country of removal. See supra § E(1) in this outline.

5. When the identity of the alien is disputed, the alien’s identity must be verified by comparing his or her fingerprints with those of the alien subject to a prior order. If no fingerprints are available, the alien is not subject to removal by reinstatement. 8 C.F.R. § 241.8(a)(1).

   a. ERO does not have to take fingerprints unless the alien makes his identity an issue. See Chevalier v. Mukasey, 2008 WL 4788288 (9th Cir. Oct. 28, 2008).

      • Fingerprinting for reinstatement does not run afoul of the Fourth Amendment. See United States v. Guijon-Ortiz, 2009 WL 4545104 (S.D.W.V. Nov. 25, 2009).

      • Why? “[T]he taking of basic personal information such as name, age, and place of birth is a ministerial duty incident to arrest and custody which does not constitute “interrogation or its functional equivalent, ‘reasonably likely to elicit an incriminating response.’” Id. at 6 (quoting United States v. Taylor, 799 F.2d 126, 128 (4th Cir.1986)).

      • Caution! This “booking exception” is, however, “narrow” because while there is a “‘booking exception’ to Miranda ‘the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions ....’”) Id. (quoting Pennsylvania v. Muniz, 496 U.S. 582, 601-02, 602 n.14 (1990) (plurality)).

6. If ERO determines that reinstatement is warranted, it must: 1) “[P]rovide the alien with written notice of his or her determination;” 2) “Advise the alien that he or she may make a written or oral statement contesting the determination;” 3) “If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien’s statement warrants reconsideration of the determination.” 8 C.F.R. § 241.8(b).

   i. The need to show consideration of the respondent’s challenge. The Third Circuit remanded a case finding, “Assuming that Ponta-Garcia contested before the immigration officer the notice of intent to reinstate the prior order of removal, more is required than it appears was done here.” Ponta-Garcia, 557 F.3d at 165 n.5. The court did not identify what actions the Department failed to take that caused it to remand the matter other than to note that it was “troubled” by the case and apparently wanted more evidence showing that the
Department considered the respondent’s challenge to the reinstatement order and attempted to verify it, as required. See id.

ii. Failure to allow a statement. In one case, the Department failed to allow the respondent to make a statement contesting the reinstatement, but the Sixth Circuit still found the order valid because the respondent was not prejudiced since “documents...demonstrated that [she] was ordered excluded, which [was] the only criterion for reinstatement she disputed.” Villegas de la Paz v. Holder, 640 F.3d 650, 656 (6th Cir. 2010).

iii. Timing. “A DHS supervisory deportation officer prematurely completed, signed, and dated the reinstatement form before [the alien] was in DHS custody and before he was permitted a chance to contest the officer’s findings...When provided an opportunity to contest the officer’s reinstatement determination, [the alien] signed a form indicating that he did not wish to do so. His failure to contest DHS’s factual findings at the agency level was equivalent to a concession of their accuracy. Accordingly, [the alien] cannot establish that he was prejudiced by any procedural deficiencies, and his due process claim fails as a result.” Familia v. Holder, --2015 WL 895320--, slip op, at 1 (2d Cir. Mar. 4, 2015) (internal citation omitted).

iv. Translation Issues. One court found that failure to provide a Spanish translation of the Notice of Intent to Reinstatement violated due process but was not prejudicial. United States v. Lopez-Collazo, 824 F.3d 453, 462-63 (4th Cir. 2016).

J. EXERCISING DISCRETION—OFFICE POLICY AND GUARDING AGAINST NEGATIVE CIRCUIT DECISIONS

1. Even when a matter is ripe for reinstatement, DHS must consider exercising its discretion. The immigration court and the Board have no jurisdiction to review the Department’s decision to reinstate, but the alien may file a petition for review with the circuit.

a. DHS has the discretion to forgo reinstatement and issue a new NTA. Villa-Anguiano v. Holder, 727 F.3d 873, 878 (9th Cir. 2013).

b. Impact of November 2014 Executive Action. ICE should evaluate “on a case-by-case basis” aliens who were removed and illegally re-entered the United States before January 1, 2014, but whose prior removal orders were reinstated after this date. When doing so, ICE should “determine whether their removal would serve an important federal interest,” according to ICE internal employee FAQs on Executive Action.
2. In this regard, as per guidance issued by then-DCC (OCC NYC) on July 3, 2008:

   a. “We may not want to reinstate a prior order if it was entered in absentia and the file does not contain proof the alien received notice.”

   b. “[T]he best time to reinstate a prior order is before the decision is made to issue a new NTA....[T]here will be times in which the existence of a prior order is discovered after the new NTA is issued. If this happens, the new NTA should be terminated as improvidently issued at the first opportunity, preferably at the first master. We do ourselves a tremendous disservice by trying to terminate a case after it has been substantially litigated in order to reinstate a prior order. You may find that the IJ will refuse to terminate under such circumstances.”

3. **Check for procedural irregularities** in the underlying order, as they could come up on review in the circuit. See, e.g., *United States v. Arias-Ordoñez*, 597 F.3d 972, 981-81 (9th Cir. 2010) (considering a collateral attack during criminal proceedings and holding that the underlying in absentia order was invalid because the government erroneously told the alien that no challenges were possible); *United States v. Rojas-Pedroza*, 716 F.3d 1253, 1262-1264 (9th Cir 2013).

4. **Clear-Cut discretion ary case:** If the person is currently an LPR, we will not reinstate, even if that person obtained LPR status by fraud.

5. **U-Visas, T-Visas. Adjustment under the Violence Against Women Act.** “As Congress enacted waivers to exempt these individuals from virtually all inadmissibility grounds, including INA § 212(a)(9)(C)(i), there is an equitable argument that the bar to relief in INA § 241(a)(5) should be similarly construed...” Trina Realmuto, American Immigration Law Foundation, “Practice Advisory: Reinstatement of Removal,” at 17-18 (April 2008); see also *Platas-Hernandez v. Lynch*, 611 F. App’x 404, 405 (9th Cir. May 27, 2015) (“Applicants for nonpermanent resident cancellation of removal under INA § 240A(b)(1) are not protected from the reach of the reinstatement statute because the plain language of the statute bars those subject to reinstatement from “any relief.” 8 U.S.C. § 1231(a)(5). Though there are limited exceptions to this bar, Platas–Hernandez does not argue that he falls within one of them. Cf. Padilla v. Ashcroft, 334 F.3d 921, 925 (9th Cir.2003) (noting that “when Congress intended to exempt certain groups of aliens from the sweep of the reinstatement statute, it knew how to do so”). Moreover, even assuming Platas–Hernandez is correct that the Violence Against Women Reauthorization Act of 2005 (VAWRA) extends some protection to certain aliens subject to reinstatement, *406 he could not benefit from such protection because he is neither a T- nor U-visa applicant nor an applicant for special rule cancellation of removal under INA § 240A(b)(2)).
K. Review in the Circuit.

1. *Jurisdiction:* The circuits have authority to review the Department’s decision to reinstate a prior order. *See, e.g., Delgado v. Mukasey, 516 F.3d 65, 67, 68 (2d. Cir. 2008); De Rincon v. Dep’t. of Homeland Security, 539 F.3d 1133, 1137 (9th Cir. 2008) (noting that the review is limited to the Department’s compliance with the regulations).*

   i. The circuits lack jurisdiction over an appeal of an immigration judge’s termination of removal proceedings when the immigration judge terminated so DHS could reinstate a prior order. *Galindo-Romero v. Holder, 640 F.3d 873, 880-81 (9th Cir. 2011).*

   ii. Failure of the alien to make a statement regarding his reinstatement does not divest the circuit court of jurisdiction over the reinstatement order for failure to exhaust administrative remedies. The statement is not an administrative remedy. Rather it is an oral request for discretionary relief from reinstatement. *Castro-Cortez v. Holder, 259 F.3d 1037, 1045 (9th Cir. 2001); Ruiz v. Holder, 547 F. App’x 656, 658-59 (6th Cir. Oct. 15, 2013) (finding that the alien’s refusal to check a box on the notice of intent to reinstate form did not amount to a failure to exhaust his administrative remedies so as to deprive the court of jurisdiction for judicial review).*

   iii. The reinstatement order is not final and thus appealable during when the alien is pursuing a reasonable fear determination “because it cannot be executed until further agency proceedings are complete.” The order is not final “until the reasonable fear and withholding of removal proceedings are complete.” *Luna-Garcia v. Holder, ---F.3d---, 2015 WL 534839, slip op. at 3 (10th Cir. Feb. 10, 2015); see also Ortiz-Alfaro, 694 F.3d at 957; Ponce-Osorio v. Johnson, 824 F.3d 502, 506 (5th Cir. 2016) (agreeing with Luna-Garcia).*

2. *Time limits for appeal.* The alien must file a petition for review within thirty days of reinstatement. INA § 242(b)(1); Cordova-Soto v. Holder, 659 F.3d 1029, 1031-32 (10th Cir. 2011). Two circuits have found that the clock runs from the day the Notice of Intent to Reinstatement (I-871) is served on the alien. *Ponta-Garcia v. Ashcroft, 386 F.3d 341, 343 (1st Cir. 2004); Villegas de la Paz v. Holder, 640 F.3d 650, 654 (6th Cir. 2010); but see Nowak v. INS, 94 F.3d 390, 392 (7th Cir. 1996) (finding that the clock runs from the date of order); Lemos v. Holder, 636 F.3d 365, 366 (7th Cir. 2011) (same); Singh v. INS, 315 F.3d 1186, 1188 (9th Cir. 2003) (finding that the clock runs “when the [agency] complies with the terms of federal regulations [governing service of the agency’s decision].”)*

   i. Is the time to appeal tolled for a reasonable fear interview? The Ninth Circuit has determined that “reinstatement of a prior removal order, the reinstated
removal order does not become final until the reasonable fear of persecution and withholding of removal proceedings are complete.” *Ortiz-Alfaro*, 694 F.3d at 957; see also *Jimenez-Morales v. U.S. Att'y Gen.*, --- F.3d ----, 2016 WL 1732663, slip op. at 2 (11th Cir. May 2, 2016) (finding that once the reasonable fear proceedings are complete, the petition for review automatically ripens into a judicial claim for review); *but see Moreira v. Mukasey*, 509 F.3d 709, 712 714 (5th Cir. 2007); *Jaber v. Gonzalez*, 486 F.3d 223, 228–30 (6th Cir. 2007).

3. **Issues on Appeal.** Review of reinstatement order is limited to: “(1) whether the petitioner is an alien; (2) whether the petitioner was subject to a prior removal order, and (3) whether the petitioner re-entered illegally”); 8 U.S.C. § 1231(a)(5) (if the DHS “finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date”). *Garcia de Rincon v. DHS*, 539 F.3d 1133, 1137 (9th Cir.2008).

4. **Venue.** Venue may lie in the circuit in which the Department reinstates the prior order, even if the underlying proceedings were held in an immigration court located in another circuit. *Avila v. United States Att'y Gen.*, 560 F.3d 1281, 1285 (11th Cir. 2009).

5. **Impact of Failure to Contest DHS Findings.** “When provided an opportunity to contest the officer's reinstatement determination, Familia signed a form indicating that he did not wish to do so. His failure to contest DHS's factual findings at the agency level was equivalent to a concession of their accuracy.” *Familia v. Holder*, 600 F. App’x 23 (2d Cir. Mar. 4, 2015)* Miller*, 539 F.3d at 164 (finding “no meaningful difference between conceding the predicate facts, on the one hand, and choosing not to contest them, on the other”).

6. **Collateral Attack – Civil Proceedings.**

i. **No Collateral Attack.** Collateral attack of the underlying order is not permissible when the alien failed to “challenge” the prior order “at the agency level.” *Garcia-Villeda*, 531 F.3d at 150; *Miller*, 539 F.3d at 165; *Pomar-Garcia*, 557 F.3d at 165 (distinguishing between relitigating the underlying order and determining whether that order had been invalidated); *but see Lema v. Holder*, 363 F. App’x 81, 90 (2d Cir. Jan. 29, 2010) (discussed at infra § J(5)(d)(iv) n. 4); *Zambrano-Reyes v. Holder*, --- F.3d ---, 2013WL39642852, at *8 n. 3 (7th Cir. Aug. 5, 2013) (stating that jurisdiction extend to motions to reopen a reinstated order but holding that the statute bars reopening). *Cardova-Soto v. Holder*, 732 F.3d 789, 795 (7th Cir. 2013); *Torres-Tristan v. Holder*, 656 F.3d 653, 656 (7th Cir. 2011); *Avila v. U.S. Att'y Gen.*, 560 F.3d 1281, 1285 (11th Cir. 2009).
a. *Rationale:* This outcome “merely gives effect to a final order issued after a formal hearing before an immigration judge. The purpose is to ‘stop an indefinitely continuing violation that the alien himself could end ... by voluntarily leaving the country.’ As the Ninth Circuit put it, ‘[w]hile aliens have a right to fair procedures, they have no constitutional right to force the government to re-adjudicate a final removal order by unlawfully reentering the country.’” *Garcia-Villeda,* 531 F.3d at 150 (internal citation omitted) (quoting *Fernandez-Vargas,* 548 U.S. at 44; *Morales-Izquierdo v. Gonzales,* 486 F.3d 484, 498 (9th Cir. 2007) (*en banc* respectively).

b. Filing a petition for review of the underlying order within 30 days of the order of reinstatement of that order is not a timely appeal of the underlying order. *Verde-Rodriguez v. Att’y Gen. of the United States,* 734 F.3d 198, 203 (3d Cir. 2013)

ii. *Can Collaterally Attack*

a. *For Constitutional Claims or Questions of Law.* *Villegas de la Paz v. Holder,* 640 F.3d 650, 656-67 (6th Cir. 2010).

b. *For a Gross Miscarriage of Justice.* Some circuits have also found that INA § 242(a)(2)(D) grants them jurisdiction to review underlying removal orders (but not expedited removal orders) under a gross miscarriage of justice standard. See *Debeato,* 505 F.3d at 235-36; *Ramirez-Molina,* 436 F.3d at 513-14; *Lorenzo v. Mukasey,* 508 F.3d 1278, 1282 (10th Cir. 2007); *Rincon,* 539 F.3d at 1138; see also *Verde-Rodriguez v. Att’y Gen. of the United States,* 734 F.3d 198, 204 (3d Cir. 2013) (stating that a timely petition to review reinstatement of an order does not reset the clock for a timely review of the underlying order)

c. *What is a “gross miscarriage of justice?”* “[A] conclusion that a gross miscarriage of justice has occurred is ‘rare.’” *Banuelas-Perez v. Napolitano,* 538 F. App’x. 531, 532 (5th Cir Aug. 14, 2013) (quoting *Lara v. E.M. Trominski,* 216 F.3d 487, 493 (5th Cir. 2000)) (hinting that a violation of the regulations by DHS may not be enough). A “gross miscarriage of justice would exist were the respondent to be removed for an offense that did not constitute the ground of deportation charged and warrant removal.” *Matter of Palacios-Pinera,* 22 I&N Dec. 434, 442 (BIA 1998); accord *Debeato v. Att’y Gen. of the United States,* 505 F.3d 231, 237 (3d Cir. 2007) (“[A] gross miscarriage of justice has been found only when the individual should not have been deported based on the law as it existed at the time of the
original deportation.""") (quoting Robledo-Gonzales v. Ashcroft, 342 F.3d 667, 682 n. 13 (7th Cir. 2003) (emphasis deleted)).

One court declined to find a "gross miscarriage of justice" because the respondent did not "contest his removability" during his earlier proceedings. Ramirez-Molina v. Ziglar, 436 F.3d 508, 513-14 (5th Cir. 2006); see also Banaelus-Perez, 2013 WL 4082890, at *1; Martinez v. Johnson, ---F.3d---, 2014WL274463, slip op. at *2 (7th Cir. Jan. 24, 2014) (stating that "there is no miscarriage where the petitioner failed to contest his removability in prior proceedings" and where he "repeatedly engaged in self-help by illegal reentering in violation of his deportation on numerous occasions").

- **Change in law.** "Under our precedents, enforcement of a removal order would result in a gross miscarriage of justice only if the order clearly could not have withstood judicial scrutiny under the law in effect at the time of its issuance or initial execution." Roman Miguel Duran-Alvarado, 2014 WL 7691451, (BIA Dec. 17, 2014) (citing Matter of Farinas, 12 I&N Dec. 467, 471-72 (BIA 1967), Matter of Malone, 11 I&N Dec. 730, 731-32 (BIA 1966)).

d. **In absentia orders.** Does it matter if the alien was initially ordered removed in absentia? It is not clear. The Ninth Circuit had said no, Morales-Izquierdo, 486 F.3d at 488, 498 (reversing the Ninth Circuit panel en banc) (considering an underlying order issued in absentia), but later stated that it can review underlying removal orders under a "gross miscarriage of justice" standard. As stated above, we should consider exercising our discretion in this instance, particularly if notice is in doubt.

e. **Expedited removal orders.** An alien may not collaterally attack an expedited removal order on a petition to review the reinstatement of that order. De RIncon v. Dept. of Homeland Security, 539 F.3d 1133, 1139 (9th Cir. 2008); Lorenzo v. Mukasey, 508 F.3d 1278, 1281 (10th Cir. 2007); Ochoa-Carrillo v. Gonzales, 446 F.3d 781, 782 (8th Cir. 2006).

f. **Habeas corpus petitions.**

ii. An alien may file a habeas petition to review the expedited removal order. *De Rincon*, 539 F.3d. at 1139. Even then, the review is limited to whether the petitioner is an alien; was subjected to an expedited order; or is a legal permanent resident, refugee, or asylee. INA § 242(c)(2); *De Rincon*, 539 F.3d. at 1139.


g. **District Court Actions Against USCIS.** An alien may not bring an action against USCIS in District Court for failing to adjudicate an I-212 application when the action would collaterally attack a prior removal order that ICE seeks to reinstate. *Delgado v. Quarantillo*, 643 F.3d 52, 55 (2d Cir. 2011); *see also Torres-Tristan v. Holder*, 656 F.3d 653 (7th Cir. 2011) (finding the same for a U-Visa application and distinguishing *Morales-Izquierdo v. Dep’t of Homeland Security*, 600 F.3d 1076, 1085 (9th Cir. 2010) because the U-Visa challenge—unlike an adjustment denial by an immigration judge—is not “inextricably link[ed]” to the removal order) (pinpoint page unavailable).

7. **Collateral Attack—Criminal Proceedings.** This issue arises when the reinstatement becomes an element of a criminal charge for re-entry after removal under 8 U.S.C. § 1326.

i. **Custody during criminal illegal re-entry proceedings.** “[T]he Executive Branch has a choice to make. It may take an alien into custody for the purpose of removing or deporting that individual or it may temporarily decline to do so while criminal proceedings are maintained against that person. If ICE takes custody of Mr. Alvarez–Trujillo for the purpose of removing or deporting him, there is little (and probably nothing) that this Court can do about that, which is precisely what Magistrate Judge Acosta stated on the record. If, however, ICE declines to take custody of Mr. Alvarez–Trujillo for the purpose of removing or deporting him, then, as Congress plainly declared in the [Bail Reform Act], such a person shall be
treated “in accordance with the other provisions” of that law, which require his pretrial release subject to the conditions imposed by Judge Acosta. What neither ICE nor any other part of the Executive Branch may do, however, is hold someone in detention for the purpose of securing his appearance at a criminal trial without satisfying the requirements of the BRA.” United States v. Trujillo-Alvarez, 900 F. Supp.2d 1167, 1179 (D. Ore. 2012); but cf. United States v. Ramirez-Hernandez, 910 F. Supp.2d 1155, 1158-59 (N.D. Iowa 2012) (finding that pretrial detention was warranted based on the defendants’ prior removal orders that would be reinstated if they were released to ICE).

ii. Impact on reinstatement. When “a district court finds constitutional infirmities in the prior removal proceedings that invalidate the prior removal for purposes of criminal prosecution, the agency cannot simply rely on a pre-prosecution determination to reinstate the prior removal order. Instead the agency must—as it may well ordinarily do—(1) provide the alien with an opportunity after the criminal prosecution is dismissed to make a written or oral statement addressing the expedited reinstatement determination in light of the facts found and the legal conclusions reached in the course of the criminal case; and (2) independently reassess whether to rely on the order issued in the prior proceedings as the basis for deportation or instead to instigate full removal proceedings.” Villa-Anguiano v. Holder, 727 F.3d 873, 880 (9th Cir. 2013) (remanding the matter for DHS to reconsider reinstatement in light of the district court findings).

a. DHS policy is ordinarily not to reinstate if the underlying criminal conviction is invalidated on collateral attack. Villa-Anguiano v. Holder, 727 F.3d 873, 879-80 (9th Cir. 2013) (“The government agreed, at argument, that the agency ordinarily would not have done what it did here.”).

iii. Reviewing the underlying order. It can be done. United States v. Arias-Ordoñez, 597 F.3d 972, 981-81 (9th Cir. 2010). “When the reinstatement becomes an element of a criminal charge, however, limiting review to the procedural requirements for reinstatement without regard to the soundness of the underlying removal proceeding implicates due process concerns by effectively foreclosing all opportunity for ‘meaningful’ review of the underlying removal. This is a result contrary to the Supreme Court’s teaching in Mendoza-Lopez. See 481 U.S. at 837-38 (‘[W]here a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding.’). The government’s theory thus runs afoul of Mendoza-Lopez’s guarantee of the right to seek a collateral attack after criminal proceedings are filed. See id.
at 837-39. We must therefore conclude that when the government relies upon a reinstatement as a basis for a reentry prosecution, due process requires that the defendant have an opportunity to attack the validity of the underlying removal proceeding.” *Id.*

iv. **Standard.** Collateral attacks during criminal proceedings involve a different standard than civil proceedings for challenging the initial order. *See, e.g., United States v. Gonzalez-Roque,* 301 F.3d 39, 45 (2d Cir. 2005) (holding that “a defendant may collaterally attack an order of deportation on due process grounds where, as here, the order becomes an element of a criminal offense. To do so successfully, he must satisfy each of the three requirements of 8 U.S.C. § 1326(d), which provides that: [A]n alien may not challenge the validity of [a] deportation order ... unless the alien demonstrates that (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair.”) (internal citation omitted, formatting altered). Notably, “ineffective assistance of counsel can be grounds for excusing the administrative exhaustion requirement of 8 U.S.C. § 1326(d)(1).” *United States v. Cerna,* 603 F.3d 32, 42 (2d Cir. 2010).

v. **Stipulated removal orders.** Best practice is to ensure that the order afforded due process, considering the factors outlined in *United States v. Ramos,* 623 F.3d 672 (9th Cir. 2010) (holding in criminal proceedings that a defendant’s waiver of his right to appeal in underlying stipulated removal proceedings was not considered or intelligent, and was thus invalid; that a defendant lacked assistance of counsel in entering into stipulated removal proceedings, that a defendant did not receive a competent Spanish language translation of his right to appeal when he signed the form, and the government failed to establish by clear and convincing evidence that defendant received adequate advisement of the consequences of his waiver of appeal.). See *United States v. Rodriguez-Ocampo,* 664 F.3d 1275, 1276 (9th Cir. 2011).

8. **Identity contested:** When the alien raises an identity defense, he or she must make a written administrative record for circuit court review or risk dismissals on appeal. *Ochoa-Carrillo v. Gonzales,* 437 F.3d 842, 845-46 (8th Cir. 2006).

9. **Respondent claims to be a U.S.C. Batista v. Ashcroft,** 270 F.3d 8, 12, 16 (1st Cir. 2001) (finding jurisdiction to review the petition in pre-REAL ID Act case and transferring the matter to the district court for fact finding on the alien’s citizenship claim); Minasyan-Gonzalez v. Gonzales, 401 F.3d 1069, 1075 (9th Cir. 2005) (“Thus, “[t]he statutory administrative exhaustion requirement of §
1252(d)(1) does not apply” to ‘a person with a non-frivolous claim to U.S. citizenship’ even if he has previously been (illegally) deported by the government.”) (quoting Rivera v. Ashcroft, 394 F.3d 1129, 1140 (9th Cir. 2005)); Iracheta v. Holder, 730 F.3d 419, 420-23 (5th Cir. 2013) (finding jurisdiction to review the citizenship claim in a petition to review a reinstatement order).

10. Constitutional Challenge. Lata v. INS, 204 F.3d 1241, 1246 (9th Cir. 2000) (to prevail on a due process challenge, an alien must show error and prejudice).

11. U-Visas. One district court upheld a collateral attack on the underlying order because the immigration judge did not inform the alien, appearing pro se, about his right to apply of a U-visa. United States v. Resuleo-Flores, 2012 WL 761701, slip op. at 8-12 (N.D. Cal. Mar. 7, 2012) (finding also the requisite due process deprivation and prejudice to the alien).

L. MOTIONS TO REOPEN THE PRIOR ORDER

1. Can the underlying order be reopened? Circuits are split.

a. Yes. “A person subject to reinstatement can file a motion to reopen the underlying order after re-entering because the prior order is not automatically reinstated until the requirements of 8 C.F.R. § 241.8(a)-(b) are met. Lopez-Velasquez v. Mukasey, 308 F. App’x 236, 239 (9th Cir. Jan. 15, 2009) (‘[T]he reinstatement of a prior order does not change the alien’s rights or remedies.... [I]t creates no new obstacles to attacking the validity of the removal order and does not diminish the petitioner’s access to whatever path for lawful entry might otherwise be available to him under the immigration laws.’ We are thus unpersuaded by the Government’s argument that the reinstatement order bars all future review of the underlying proceeding’) (quoting Morales-Lizquierda v. Gonzales, 486 F.3d 484, 498 (9th Cir. 2007) (en banc)) (citation omitted); Lin v. Gonzales, 473 F.3d 979, 981 (9th Cir. 2007) (considering the impact of the motion to reopen departure bar at 8 C.F.R. § 1003.23(b)(1)); see also Hector Javier Reyes-Versosa, 2014 WL 2919240 (BIA Apr. 25, 2014) (declining to find that reinstatement bars the motion to reopen by deciding the case on alternate grounds).

a. No. “Because of his unlawful reentry after his removal, Zambrano-Reyes is simply barred as a matter of law from the discretionary relief and the reopening of his removal proceedings that he seeks.... That provision of the regulation implements 8 U.S.C. § 1231(a)(5), which provides that a prior order of removal ‘is not subject to being reopened or reviewed’ if the alien has reentered the United States illegally. Zambrano-Reyes v. Holder, --- F.3d---, 2013WL39642852, at *7-8 (7th Cir. Aug. 5, 2013) (dismissing the appeal of a motion to reopen by a former lawful permanent resident who came 212(c)
eligible after a change in law); see also INA § 241(a)(5) (stating that an when an has reentered the United States illegally after having been removed ... the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed.” (emphasis added); Cordova-Soto, 2013 WL 6514407 at *6.

2. *Sua Sponte Motions to Reopen.* The departure bar applies. *Desai v. Attorney General of U.S.*, 695 F.3d 267 (3d Cir. 2012); Escobedo-Fernandez v. Holder, 2013 WL 98562, at *1 (9th Cir. Jan. 9, 2013) (stating that the Board properly dismissed the petitioner’s motions to reopen because the petitioner was “statutorily barred from seeking review of the underlying order of deportation”); *Alejandro Garcia-Perez*, 2013 WL 1933941 (BIA Mar. 18, 2013) (“We agree with the Immigration Judge that, because the respondent is subject to reinstatement of a prior removal order under section 241(a)(5) of the Immigration and Nationality Act, 8 U.S.C. § 1231(a)(5), the Immigration Judge is without jurisdiction to reopen the respondent's prior removal proceedings. This is true regardless of any right the respondent may have to challenge the constitutionality of his prior removal order in a United States Court of Appeals.”); but see *Gonzalo Vasquez-Gonzalez*, 2016 WL 1357946 (BIA Mar. 17, 2016).


**M. Office of Chief Counsel, Administrative Procedures**

1. DHS attorneys who run across these cases should follow them to completion.
5. Other Resources

2. ILPD-approved brief to terminate for reinstatement (9th Circuit).
From: ERO Taskings  
Sent: Thursday, July 31, 2014 2:57 PM  
Subject: Clarification Regarding Custody Procedures in Reinstatement of Removal Cases

This message is being sent on behalf of Assistant Director for Repatriation, with the concurrence of Philip Miller, Assistant Director for Field Operations.

To: Assistant Directors, Deputy Assistant Directors, Field Office Directors and Deputy Field Office Directors

Subject: Clarification Regarding Custody Procedures in Reinstatement of Removal Cases

Please immediately distribute this guidance to your employees.

This message clarifies the authority under which aliens in the reinstatement process are detained by Enforcement and Removal Operations. As you know, section 241(a)(5) of the Immigration and Nationality Act (INA) allows ICE to reinstate the removal orders of previously removed aliens who have illegally reentered the United States. When fear is expressed, however, the regulation at 8 C.F.R. § 241.8(c) requires that the alien be referred to U.S. Citizenship and Immigration Services (USCIS) for a “reasonable fear” adjudication. Under 8 C.F.R. § 208.31, a negative reasonable fear determination can be reviewed by an immigration judge (IJ); also, if the alien is determined to have a reasonable fear, he or she is placed into “withholding-only” proceedings before an IJ for consideration of a withholding of removal application. Denial of that application can be appealed to the Board of Immigration Appeals (BIA) and a U.S. Circuit Court of Appeals.

Aliens detained during this process may therefore be in one of a number of different situations, including:

1. Pending a reasonable fear interview and determination by USCIS;
2. Pending IJ review of a negative USCIS reasonable fear determination;
3. Pending adjudication of “withholding-only” proceedings before an IJ or the BIA following a positive reasonable fear determination; or
4. Pending judicial review of the BIA’s denial of withholding of removal and subject to a judicial stay of removal.

The detention of aliens in these situations is governed by the post-order custody provisions of INA §§ 241(a)(2) and (6).

For purposes of detention, an alien’s order of removal becomes administratively final and the removal period begins when the prior order of removal is reinstated under INA § 241(a)(5) (i.e., when the Decision, Order, and Officer’s Certification on the Form I-871 (Notice of Intent/Decision to Reinstate Prior Order) is executed). For such aliens, INA § 241(a)(2) makes clear that, unless they have been found removable under one or more of the criminal and public safety removability grounds of INA §§ 212(a)(2), 212(a)(3)(B), 237(a)(2) or 237(a)(4)(B), detention during the 90-day removal period is discretionary. After the conclusion of the 90-day
removal period, INA § 241(a)(6) allows field offices to either continue detention or release the alien under an Order of Supervision.

Field offices are reminded that the standard post-order custody review (POCR) process under 8 C.F.R. § 241.4 must be applied in the cases of all aliens subject to a reinstated order of removal.

**Note for offices within the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit (AK, WA, OR, CA, MT, ID, NV, AZ, and HI):** Aliens will nonetheless be eligible to request a bond redetermination hearing before an IJ under *Diosf v. Napolitano*, 634 F.3d 1081 (9th Cir. 2011) if they:

1. Are subject to a reinstated order of removal;
2. Have a petition for judicial review of the BIA’s denial of withholding of removal pending before the Ninth Circuit;
3. Have a motion for stay of removal pending before the Ninth Circuit or have been granted a stay of removal by the Ninth Circuit; and
4. Have been detained for 180 days within the territorial jurisdiction of the Ninth Circuit.

Field Office Directors (FODs) should consult with their respective Office of the Chief Counsel on any questions regarding the implementation of this guidance.

Please note that a conference call will be scheduled for Tuesday, August 12, 2014 at 1:00pm EST for all ERO FODs and Deputy Field Office Directors to discuss this guidance with the Repatriation Division and the Office of the Principal Legal Advisor. The Assistant Director for Repatriation requests that each FOD designate up to two additional staff from their respective field office to participate on the call. Names of participants must be sent to Repatriation Management Division Special Assistant by Wednesday, August 6, 2014. Along with names of participants, field offices are encouraged to also send questions by that date.

Any questions regarding this message should be directed to the Post-order Custody Review Unit Chief via email or by telephone at (202) 732-

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This message is being sent on behalf of Assistant Director for Repatriation, with the concurrence of Philip Miller, Assistant Director for Field Operations.

To: Assistant Directors, Deputy Assistant Directors, Field Office Directors and Deputy Field Office Directors

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This message is being sent by Philip Miller, Assistant Director for Field Operations

To: Assistant Directors, Deputy Assistant Directors, Field Office Directors and Deputy Field Office Directors

Subject: Custody Procedures in Expedited Removal Cases and ERO Responsibilities when an Alien Expresses a Fear of Return

Please immediately distribute this guidance to your employees.

Aliens issued expedited removal orders by U.S. Customs and Border Protection (CBP) under section 235(b)(1)(A)(i) of the Immigration and Nationality Act (INA) are routinely transferred to U.S. Immigration and Customs Enforcement (ICE) for detention and execution of the expedited removal order. This message serves as a reminder of the custody procedures applicable to such cases and Enforcement and Removal Operations' (ERO) responsibilities where an alien expresses a fear of return after issuance of the expedited removal order and transfer to ERO custody. This message does not address cases in which the alien expressed a claim of fear prior to issuance of the expedited removal order and was transferred to ERO custody pending a credible fear interview before U.S. Citizenship and Immigration Services (USCIS). It also does not address cases in which the alien has been determined by USCIS to possess a credible fear and has been referred to the immigration court for removal proceedings under INA § 240.

Detention and Release

As set forth in regulations, an alien who has been issued an expedited removal order “shall be detained pending . . . removal,” 8 C.F.R. § 235.3(b)(2)(iii). Aliens subject to an expedited removal order are not detained pursuant to the post-order custody provisions of INA § 241(a) and are not eligible for release on an order of supervision. Such aliens are may only be released from custody on parole on a case-by-case basis in the limited circumstances where “parole is required to meet a medical emergency or is necessary for a legitimate law enforcement objective.” 8 C.F.R. § 235(b)(2)(iii).

Fear Claims

The expedited removal regulations provide significant opportunities for aliens to raise a claim of fear prior to the issuance of an expedited removal order. The examining officer is required to read to the alien the contents of Form I-867A, which advises that U.S. law provides protection to certain persons who face persecution, harm or torture upon return to their home country and advises the alien to tell the officer if he or she has fear or concern about being removed from the United States. In addition, the regulations require that the examining officer complete the Form I-867B, which expressly asks: (i) why the alien left his or her home country or country of last
residence; (ii) whether the alien has any fear or concern about being returned; and (iii) whether
the alien would be harmed, if returned.

There may, nonetheless, be cases in which an alien first indicates an intention to apply for
asylum or expresses a fear of return after the expedited removal order is issued and the alien is
transferred to ERO custody. This includes any verbal or non-verbal indications that the alien
may be afraid to return to his or her homeland. In these cases, ERO must refer the alien for a
credible fear interview before a USCIS asylum officer. Similarly, if an alien who is not in ERO
custody (e.g., one who has been transferred to the custody of another law enforcement agency),
indicates an intention to apply for asylum or expresses a fear of return to ERO, ERO must refer
the alien for a credible fear interview before a USCIS asylum officer. ERO should not advise the
alien to file an application for asylum directly with USCIS.

Field Officer Directors should consult with their respective Office of the Chief Counsel on any
questions regarding the implementation of this guidance.

If you have any concerns regarding this guidance, please contact the ERO Field Operations Staff
Officer assigned to your AOR.

Limitation on the Applicability of this Guidance. This message is intended to provide internal
guidance to the operational components of U.S. Immigration and Customs Enforcement. It does
not, is not intended to, shall not be construed to, and may not be relied upon to create any rights,
substantive or procedural, enforceable at law by any person in any matter, civil or criminal.

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disseminate, or otherwise use this information. Please inform the sender that you received this message in error and
delete the message from your system.
16001.2: Investigating the Potential U.S. Citizenship of Individuals Encountered by ICE

Issue Date: November 10, 2015
Effective Date: November 10, 2015

Federal Enterprise Architecture Number: 306-112-002b

1. Purpose/Background. This Directive establishes ICE policy and procedures for ensuring that the potential U.S. citizenship of individuals encountered by U.S. Immigration and Customs Enforcement (ICE) officers, agents, and attorneys is immediately and carefully investigated and analyzed. The Immigration and Nationality Act of 1952, as amended (INA), sets forth the parameters for U.S. citizenship by virtue of birth in the United States. Additionally, the INA and various related statutes codify numerous avenues by which an individual may derive, acquire, or otherwise obtain U.S. citizenship other than through birth in the United States. As a matter of law, ICE cannot assert its civil immigration enforcement authority to arrest and/or detain a U.S. citizen. While performing their civil immigration enforcement duties, ICE officers, agents, and attorneys may encounter individuals who are not certain of their citizenship status, who claim to be U.S. citizens, and/or for whom there are indicia warranting further examination to determine whether they may be U.S. citizens.

2. Policy. It is ICE policy to carefully and expeditiously investigate and analyze the potential U.S. citizenship of individuals encountered by ICE. ICE officers, agents, and attorneys should handle these matters with the utmost care and highest priority, recognizing that, while some cases may be easily resolved, many may require additional investigation and substantial legal analysis, particularly in light of the complexity of U.S. citizenship and nationality law.

ICE personnel must assess the potential U.S. citizenship of an individual encountered by ICE if the individual makes or has made a claim to U.S. citizenship, as well as when certain indicia of potential U.S. citizenship, as identified in this Directive, are present in a case even if the individual does not affirmatively make a claim to U.S. citizenship. In all situations where an individual’s potential U.S. citizenship requires further investigation, Enforcement and Removal Operations (ERO) and Homeland Security Investigations (HSI) personnel must consult with the Office of the Principal Legal Advisor’s (OPLA) local Office of the Chief Counsel (OCC), as prescribed in this Directive.
3. **Definitions.** The following definitions apply for purposes of this Directive only.

3.1. **Indicia of Potential U.S. Citizenship.** Circumstances that tend to indicate that an individual may be a U.S. citizen. Indicia are not conclusive evidence that the individual is a U.S. citizen but factors that trigger the need for further investigation. With respect to individuals encountered by ICE, the existence of any of the following factors should lead to further investigation of the individual’s U.S. citizenship:

1) An immigration judge, legal representative, or purported family member indicates to ICE that the individual is or may be a U.S. citizen;

2) There is some information suggesting that the individual was born in the United States, as defined in INA § 101(a)(38), or a past or present U.S. territorial possession, such as the Panama Canal Zone;

3) There is some information suggesting that one or more of the individual’s parents, grandparents, or foreign-born siblings are or were U.S. citizens, particularly when the timeline for the physical presence of these family members in the United States is incomplete;

4) The individual entered the United States as a lawful permanent resident when he or she was a minor and has at least one parent who is a U.S. citizen;

5) There is some information suggesting that the individual was adopted by a U.S. citizen;

6) An application for naturalization, a U.S. passport, or a certificate of citizenship has been filed by the individual or on the individual’s behalf, and remains pending;

7) The individual has served in the U.S. Armed Forces;

8) The individual equivocates (or is unsure) about his or her date and/or place of birth and appears to be under the age of 21 years old;

9) The individual has been present in the United States since before his or her fifth birthday and does not know who his or her parents are; and/or

10) The individual was born abroad out of wedlock and there is some information suggesting that one or both of his or her parents may have been U.S. citizens, but the initially available information is inconclusive regarding physical and legal custody and/or legitimation.
3.2 Individual Encountered by ICE. An individual who is:

1) Arrested and taken into ICE custody pursuant to the agency’s civil immigration authorities, including those released from such custody pending a decision on removal or execution of a removal order.

2) Subject to, or may become subject to, a request made by ICE that another law enforcement agency continue to hold the individual for up to 48 hours following the completion of his or her criminal custody, i.e., an “immigration detainer” and/or

3) In proceedings before the Executive Office for Immigration Review (EOIR) or administrative removal proceedings before ICE, including but not limited to pursuant to sections 217, 235, 238(b), or 241(a)(5) of the INA.

3.2. Probative Evidence of U.S. Citizenship. A unique policy standard adopted by ICE meaning that the evidence before the agency tends to show that the individual may, in fact, be a U.S. citizen. U.S. citizenship need not be shown by a preponderance of the evidence for the agency to find that there is some probative evidence of U.S. citizenship.

4. Responsibilities.

4.1. ERO Officers, HSI Agents, and OCC Attorneys have responsibilities under Section 5.1 of this Directive.

4.2. ERO Field Office Directors (FODs), HSI Special Agents in Charge (SACs), and OPLA Chief Counsels are responsible for providing appropriate supervisory oversight to ensure officers, agents and attorneys in their respective offices comply with the policy (see section 2) and procedures (see section 5) prescribed in this Directive.

4.3. FODs are responsible for ensuring that all state and local officers with delegated immigration authority pursuant to INA § 287(g) within their area of responsibility have the training and oversight necessary to understand and adhere to this Directive, and thoroughly investigate all U.S. citizenship claims made by individuals encountered by 287(g)-designated officers.

4.4. Headquarters (HQ) OPLA, ERO, and HSI have responsibilities under section 5.1(3). (Headquarters Review).

4.5. The Executive Associate Directors for ERO and HSI, and the Principal Legal Advisor, or their designees, are responsible for providing appropriate supervisory oversight to ensure officers, agents and attorneys in their respective offices comply with the policy (see section 2) and procedures (see section 5) of this Directive.

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1. This includes individuals subject to the former Form I-247 (Immigration Detainer Notice of Action), Form I-247D (Immigration Detainer - Request for Voluntary Action), Form I-247X (Request for Voluntary Transfer) when this form requests detention rather than simply notification, and/or any successor form serving the same or substantially similar process.
5. **Procedures/Requirements.** An ICE officer, agent or attorney must assess the potential U.S. citizenship of an individual encountered by ICE if the individual makes or has made a claim to U.S. citizenship or, even in the absence of such a claim, when indicia of potential U.S. citizenship are present in a case. The ICE Directorate that first encounters the individual is generally responsible for identifying indicia of potential U.S. citizenship.

5.1. **Procedures for Investigating and Assessing Potential U.S. Citizenship.**

1) **Factual Examination.** The assessment of potential U.S. citizenship under this Directive must include a factual examination and a legal analysis and shall include a check of all available DHS data systems and any other reasonable means available to the officer. In general, the factual examination should be conducted by the ICE operational Directorate (ERO or HSI) that first encountered the individual. In cases where the OCC first encounters the individual, ERO should generally conduct the factual examination in coordination with the OCC.

   a) Depending on the nature of the claim, the factual examination may include a review of the A-file and other pertinent documents, an interview of the individual, searches of vital records databases, interviews of family members and other individuals in possession of relevant information, and other appropriate investigation.

   b) If the claim to U.S. citizenship cannot be verified, the claimant will be advised of the penalties of perjury and will be placed under oath and allowed to make a sworn statement about his or her claim to U.S. citizenship. Because a willful false claim to U.S. citizenship may be criminally prosecuted by the United States Attorney’s Office (USAO), immigration officers and HSI agents should also ensure that the proper criminal procedural warnings are provided. See *Miranda v. Arizona*, 384 U.S. 436 (1966), and work with their local OCC and USAO in appropriate cases to ensure that any additional statements include information sufficient to use in future criminal prosecutions under 18 U.S.C. § 911.

   c) Interviews with individuals making U.S. citizenship claims or for whom there are indicia of potential U.S. citizenship must be conducted by an officer or agent in the presence of and/or in consultation with a supervisor.

   d) If the individual does not have a legal representative, prior to conducting an interview of the individual, an ICE officer or agent must arrange for the individual to be provided with the EOIR list of free legal services providers described in 8 C.F.R. § 1003.61, even if this list was previously provided.

   e) Such interviews must be documented as sworn statements and must include all questions needed to complete all fields on a Record of Deportable/Inadmissible Alien, Form I-213.
f) The sworn statement must also include any additional questions designed to elicit information sufficient to allow a thorough investigation of the individual’s claim to citizenship.

g) While ICE’s access to, and information about, an individual detained in the custody of another law enforcement agency may be limited, ICE officers and agents should, to the extent feasible, conduct necessary and appropriate interviews to aid in assessing the potential U.S. citizenship of individuals against whom ICE has lodged, or is contemplating lodging, an immigration detainer.

2) Preparing and Submitting Memorandum. After the factual examination is completed, ERO or HSI (whichever conducted the factual examination) and the relevant OCC must jointly prepare and submit a memorandum for HQ review, using as a guide the attached HQ-approved template, which assesses the claim and recommends a course of action.

a) Absent extraordinary circumstances, this memorandum must be submitted no more than one business day from the time ERO, HSI, or OPLA first becomes aware of a claim or indicia of potential U.S. citizenship if the individual is subject to an immigration detainer or is detained in ICE custody. In all other cases, the memorandum must be submitted as promptly as practicable.

b) For purposes of such memoranda, the legal analysis must indicate whether, in the OCC’s view:

1) The evidence in the case strongly suggests that the individual is a U.S. citizen or his or her claim to U.S. citizenship is credible on its face;

2) Some probative evidence indicates that the individual may be a U.S. citizen but the evidence is inconclusive; or

3) No probative evidence indicates that the individual is a U.S. citizen.

c) The memorandum must be clearly annotated as containing pre-decisional, privileged attorney-client communication, attorney work product, and sensitive personally identifiable information.

d) Upon completion, the memorandum must be elevated via e-mail to the HQ OPLA Immigration Law and Practice Division at [Redacted] and either the HQ ERO Assistant Director for Field Operations at [Redacted] or to the HQ HSI Domestic Operations Manager assigned responsibility for the relevant SAC office, as appropriate.

c) Any significant change in circumstances in a case elevated to HQ should be reported in the same manner as outlined in the preceding subparagraph, as well as
to any previously assigned HQ points of contact, as an update to the original memorandum.

3) Headquarters (HQ) Review.

a) HQ OPLA and either HQ ERO or HQ HSI will respond to the field with a decision on the recommendation within one business day of receipt of the memorandum by detained claimants and individuals subject to an immigration detainer. In all other cases a decision will be made as promptly as practicable.

4) Detainer/Custody Determination.

a) In those cases involving individuals who fall within section 5.1(2)(b)(1) or 5.1(2)(b)(2) of this Directive (cases involving strong/facially credible or probative evidence of U.S. citizenship):

1) ICE should not lodge an immigration detainer against or arrest the individual.

2) If ICE has already lodged an immigration detainer against the individual, it should be immediately cancelled.

3) If the individual is already in ICE custody, he or she should be immediately released.

4) If the individual has been released from ICE custody on conditions, those conditions should be re-evaluated in consultation with OPLA.

b) Where the field’s initial recommendation to HQ is that an individual falls within section 5.1(2)(b)(1) or 5.1(2)(b)(2) of this Directive, it is not necessary to await HQ concurrence before cancelling an immigration detainer, releasing the individual from custody, or terminating conditions of release.

c) On a case-by-case basis and in consultation with OPLA, an individual determined by ICE to fall within section 5.1(2)(b)(1) or 5.1(2)(b)(2) of this Directive may be placed in removal proceedings on EOIR’s non-detained docket to more conclusively resolve his or her immigration and citizenship status if reasons remain to believe that he or she is an alien present in the United States in violation of law.

d) Where no probative evidence of U.S. citizenship exists (section 5.1(2)(b)(3) of this Directive) and probable cause exists that the individual is a removable alien, it is permissible to lodge an immigration detainer in the case, arrest the individual, and/or process the individual for removal.

e) In any case in which there is uncertainty about whether the evidence is probative of U.S. citizenship, ICE should not detain, arrest, or lodge an immigration
detainer against the individual and should cancel any immigration detainer already lodged by ICE.

f) Where ICE determines that it will not proceed further with an enforcement action due to the U.S. citizenship claim, the individual should be informed that he or she may attempt to obtain proof of U.S. citizenship by submitting a passport application to the Department of State (http://travel.state.gov/passport) or filing an Application for Certificate of Citizenship, Form N-600, with U.S. Citizenship and Immigration Services (www.uscis.gov/n-600).

5) Case Management.

a) ICE officers and agents will make a notation in the appropriate database(s) (e.g., ENFORCE Alien Booking Module and/or Alien Removal Module), and place a copy of the memorandum and resulting decision, properly marked as containing attorney work product, attorney-client communication, and sensitive personally identifiable information in the individual’s A-file, if one already exists.

b) ICE attorneys will save the memorandum in the PLAnet case management system and document the resulting HQ decision and other information about the claim by completing the “USC Claims” section in PLAnet.

6. Recordkeeping. Records generated pursuant to this directive are maintained in the Alien File, Index, and National File Tracking System of Records, 76 Fed. Reg. 34233 (June 13, 2011), the General Counsel Electronic Management System (GEMS), 74 Fed. Reg. 41914 (August 19, 2009), the Immigration and Enforcement Operational Records (ENFORCE), 75 Fed. Reg. 23274 (May 3, 2010), and any other applicable system. The memorandum and resulting HQ decision will be also be saved in PLAnet.

7. Authorities/References.

7.1. Immigration and Nationality Act (INA) § 101(b) and (c).

7.2. INA §§ 301 - 303.

7.3. INA §§ 306 - 309.

7.4. INA § 316.

7.5. INA §§ 319 - 320.

7.6. INA § 322.

7.7. INA §§ 328 - 329.

8. Attachments.

8.1. Sample – USC Claims Memorandum Template.\(^2\)

9. **No Private Right.** This document provides only internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. It is not intended to, does not, and may not be relied upon to create or diminish any rights, substantive or procedural, enforceable at law or equity by any party in any criminal, civil, or administrative matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigative prerogatives of the Department of Homeland Security.

Sarah R. Saldana
Director
U.S. Immigration and Customs Enforcement

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\(^2\)This template may be periodically updated by OPLA, as new legal and policy developments warrant. In such circumstances, OPLA will work with the Office of Policy to have the updated template posted to the ICE Policy Manual online environment.
MEMORANDUM FOR: REGIONAL DIRECTORS
       GENERAL COUNSEL
       DEPUTY EXECUTIVE ASSOCIATE COMMISSIONER,
       IMMIGRATION SERVICES
       DIRECTOR, INTERNATIONAL AFFAIRS

FROM: Michael Pearson
       Executive Associate Commissioner
       Office of Field Operations

SUBJECT: Implementation of Amendment to the Legal Immigration Family Equity Act
        (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to
        NACARA 203 Beneficiaries

On December 21, 2000, President Clinton signed into law the Legal Immigration Family
Equity Act (the “LIFE Act”) and Miscellaneous Amendments to Various Adjustment and Relief
Acts (the “LIFE Act Amendments”), which affect individuals who may be eligible to apply for
adjustment of status under section 202 of the Nicaraguan Adjustment and Central American
Relief Act (NACARA) or the Haitian Refugee Immigration Fairness Act (HRIFA), or for
suspension of deportation or special rule cancellation of removal under section 203 of NACARA
(“NACARA 203 relief”). The purpose of this memorandum is to explain how the new
legislation affects applicability of section 241(a)(5) of the Immigration and Nationality Act
(INA) to potential beneficiaries of section 203 of NACARA and to provide guidance on
implementation. The effect of this recent legislation on applicants for adjustment of status under
section 202 of NACARA (certain Cubans and Nicaraguans) or HRIFA (certain Haitians) is
discussed in a separate memorandum.

Section 1505(c) of the LIFE Act Amendments\(^1\) provides that an individual who is
otherwise eligible for relief under section 203 of NACARA shall not be barred from applying for
such relief by operation of section 241(a)(5) of the INA (reinstatement)\(^2\). This means that a

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\(^1\) Life Act Amendments, Title XV of H.R. 5666, enacted by reference in Consolidated Appropriations Act for FY
2001, Public Law 106-554 (Dec. 21, 2000) (Pages H12299-H12300), provides that individuals eligible to apply for
relief under NACARA 203 and who are otherwise eligible for relief “shall not be barred from applying for such
relief by operation of section 241(a)(5) of the Immigration and Nationality Act,” as in effect after the effective date
of IIRIRA. A copy of the amendment is attached to this memo.

\(^2\) Section 241(a)(5) of the INA provides: “If the Attorney General finds that an alien has reentered the United States
illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of
Memorandum for Regional Directors, et al.

Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries

NACARA 203 applicant or potential NACARA 203 applicant who was deported, excluded or removed from the United States, or who otherwise left the United States, while under a final order and then reentered the United States illegally, may still apply for and be granted relief under NACARA 203, if eligible. Consequently, in many cases involving persons covered by NACARA 203, INS officers should not reinstate the existing final order, but should instead follow the guidance set out in this memorandum. Immigration officers should become familiar with the general categories of persons affected by the reinstatement exemptions that are described in this memorandum.

Specifically, the new legislation affects certain nationals of El Salvador, Guatemala, former Soviet bloc countries, and their dependents who are eligible to apply for suspension of deportation and special rule cancellation of removal under NACARA 203. It should be noted that dependents are not required to be nationals of El Salvador, Guatemala or the former Soviet bloc to be eligible for NACARA 203 relief. The legislation also affects certain individuals (non-nationality specific) who have been battered or subject to extreme cruelty by a NACARA 203 beneficiary or by a United States Citizen (USC) or Lawful Permanent Resident (LPR).

An Immigration and Naturalization Service (INS) officer who encounters an individual who appears eligible to apply for NACARA 203 relief should not reinstate a prior order unless a final denial (no pending appeal) of NACARA 203 relief has been made, the alien has been convicted of an aggravated felony, or one of the other specific circumstances outlined in this memorandum applies. In all other cases, the officer should either take no further action or should place the alien in removal proceedings, depending upon the particular circumstances described below. The attached chart summarizes the general categories and appropriate actions discussed in this memorandum.

A. Eligibility Categories for NACARA 203

An individual may be eligible to apply for NACARA 203 relief if he or she has not at any time been convicted of an aggravated felony, as defined under section 101(a)(43) of the INA, and is described in one of the following categories:

(1) A registered class member of the settlement in American Baptist Churches vs. Thornburgh (ABC) who has not been apprehended at time of entry after December 19, 1990. This includes any

and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry."
Memorandum for Regional Directors, et al.

Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries

- **Guatemalan** national who first entered the United States on or before October 1, 1990, and registered for ABC benefits on or before December 31, 1991; and any

- **Salvadoran** national who first entered the United States on or before September 19, 1990, and registered for ABC benefits or applied for Temporary Protected Status (TPS) on or before October 31, 1991.

Because the determination of whether an ABC class member registered for benefits requires an adjudication and may, in some cases, be established by credible testimony, INS officers should consider only whether the individual is a class member (Guatemalan who first entered the U.S. on or before October 1, 1990 or Salvadoran who first entered the United States on or before September 19, 1990), not whether the individual registered, in determining whether to reinstate the prior order.

Asylum Officers are responsible for determining whether an ABC class member was apprehended at time of entry. If there is evidence that an ABC class member was apprehended at time of entry, the ABC Coordinator of the local Asylum Office should be contacted to make the determination and, where appropriate, issue a notice of ABC ineligibility to the class member. For further guidance on this issue, see memorandum from David Dixon, Deputy General Counsel, "The ABC Settlement Agreement term: apprehended at entry," July 22, 1999 (attached).

To give effect to the recent legislation, a prior order should not be reinstated against an alien in this category unless the alien has been convicted of an aggravated felony. If an I-589 (asylum application) or an I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) is pending with the INS Asylum Division or Executive Office for Immigration Review (EOIR), the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(2) A Guatemalan or Salvadoran national who filed an application for asylum with the INS on or before April 1, 1990, either by filing an application with the INS or filing the application with the Immigration Court and serving a copy of that application on the INS. For purposes of applying for relief under NACARA 203, it does not matter whether the asylum application has been denied.

To give effect to the recent legislation, a prior order should not be reinstated against an alien in this category unless the alien has been convicted of an aggravated felony. If an I-589 or an
I-881 is pending with the INS Asylum Division or EOIR, the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(3) An alien who entered the United States on or before December 31, 1990, filed an application for asylum on or before December 31, 1991, and, at the time of filing the application, was a national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia. For purposes of applying for relief under NACARA 203, it does not matter whether the asylum application has been denied.

To give effect to the recent legislation, a prior order should not be reinstated against an alien in this category unless the alien has been convicted of an aggravated felony. If an I-589 or an I-881 is pending with the INS Asylum Division or EOIR, the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(4) An alien who is the spouse or child of an individual described in paragraph (1), (2), or (3) above at the time a decision is made to suspend the deportation, or cancel the removal, of the individual described in paragraph (1), (2), or (3).

To give effect to the recent legislation, a prior order should not be reinstated against an alien who is the spouse or child of an individual described in paragraph (1), (2), or (3), unless the parent or spouse has received a final denial of NACARA 203 relief or the alien has been convicted of an aggravated felony. If an I-589 or I-881 is pending with the INS Asylum Division or EOIR, the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 proceedings.

If the alien formerly was the spouse of an alien described in paragraph (1), (2) or (3) above and the spouse was granted relief under NACARA 203 before the marriage was terminated by divorce or death, the alien may still be eligible for NACARA relief and therefore the prior order should not be reinstated.

(5) An unmarried son or unmarried daughter of an individual described in paragraph (1), (2), or (3) above who:
Memorandum for Regional Directors, et al.

Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries

- is 21 years of age or older at the time a decision is made to suspend the deportation, or cancel the removal, of the parent described in paragraph (1), (2), or (3) above, and

- entered the United States on or before October 1, 1990.

To give effect to the recent legislation, a prior order should not be reinstated against an alien who is the unmarried son or unmarried daughter of an individual described in paragraph (1), (2), or (3) unless

- the parent has received a final denial of relief under NACARA 203; or

- the unmarried son or unmarried daughter entered the United States after October 1, 1990 and either the parent's NACARA application has not been decided or was granted after the unmarried son or daughter turned 21 years of age; or

- the alien has been convicted of an aggravated felony.

If an I-589 or an I-881 is pending with the INS Asylum Division or EOIR, the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(6) An alien who was issued an Order to Show Cause or was in deportation proceedings before April 1, 1997, and who applied for suspension of deportation under section 244(a)(3) of the INA (applies to someone who has been battered or subjected to extreme cruelty by a spouse or parent who is a USC or LPR, or who is the parent of a child of a USC or LPR, who has been battered or subjected to extreme cruelty by a USC or LPR).

If the individual is in proceedings before EOIR, allow the process to continue pending determination on eligibility for relief. If not in proceedings before EOIR, issue charging documents placing the individual in 240 removal proceedings.

(7) An alien who was the spouse or child of an individual described in paragraph (1), (2), or (3) and the spouse, child or child of the spouse has been battered or subjected to extreme cruelty by the individual described in paragraph (1), (2), or (3). The spousal or parental relationship must have existed at the time the individual described in paragraph (1), (2), or (3) had a decision made on the application for suspension or cancellation, submitted the application, registered for ABC, applied for TPS, or applied for asylum.
To give effect to the new legislation, an INS officer should not reinstate the prior order of an alien who previously was the spouse or child of an individual described in paragraph (1), (2), or (3) above if it is alleged that the spouse, child or child of the spouse has been battered or subjected to extreme cruelty by the individual described 1, 2 or 3 unless the alien has been convicted of an aggravated felony.

If an I-589 or an I-881 is pending with the INS Asylum Division or EOIR, the process should be allowed to continue for appropriate eligibility determinations. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

B. Determination of Appropriate Actions

As noted above, generally, a previous final order should not be reinstated unless there has been a final denial of a NACARA 203 application, the alien has been convicted of an aggravated felony, or the other limited circumstances outlined in this memorandum apply. In all other cases, the appropriate action to take depends on the current status of the alien's NACARA or asylum applications.

If an individual described in one of the categories above has an asylum application or a NACARA 203 suspension of deportation or special rule cancellation of removal application pending with the INS or EOIR, the INS officer should not reinstate a prior order. Instead, the INS or EOIR will continue to process the pertinent application(s) and determine whether the individual is eligible for relief under NACARA 203. The Asylum Officer will refer to EOIR the NACARA application of any applicant found ineligible for an INS grant of relief. (Note that the INS has authority to grant only certain NACARA applicants and some individuals not eligible for a grant of relief by the INS may still be eligible for a grant by an immigration judge).

If an individual described in one of the categories above appears subject to section 241(a)(5) and does not have an asylum application or NACARA 203 application pending with the INS or EOIR, the INS officer should place the individual in removal proceedings so that a determination can be made on NACARA 203 eligibility, except in the specific circumstances outlined in this memorandum. If the individual is a spouse, child, or unmarried son or daughter of an alien described in numbered paragraph (1), (2), or (3) of this memorandum and the alien described in paragraph (1), (2), or (3) appears inadmissible or deportable, the INS officer should issue charging documents against that spouse or parent, as well, provided that he or she does not have an asylum or NACARA 203 application pending with the INS Asylum Office.
The attached chart summarizes these actions and also describes the limited circumstances under which reinstatement may be appropriate.

C. Coordination with ABC Implementation

Because many of the potential NACARA applicants are also members of the ABC class, the General Counsel's memorandum of December 15, 1999, "ABC Settlement Implementation" has been attached for review. The December 15, 1999 memorandum outlines the provisions of the settlement agreement in American Baptist Churches vs. Thornburgh and gives instructions on verifying ABC eligibility. An updated list of ABC/NACARA coordinators is also attached to this memorandum.

If you have any questions regarding this guidance, please contact Ms. Wenona G. Paul at (202) 305-9742.

Attachments (4)
MEMORANDUM FOR: REGIONAL DIRECTORS
REGIONAL COUNSEL
DISTRICT DIRECTORS (EXCEPT FOREIGN)
DISTRICT COUNSEL
SECTOR COUNSEL
OFFICERS IN CHARGE (EXCEPT FOREIGN)
CHIEF PATROL AGENTS
ASYLUM OFFICE DIRECTORS

FROM: Michael Pearson
Executive Associate Commissioner
Office of Field Operations

SUBJECT: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries.

On December 21, 2000, President Clinton signed into law the Legal Immigration Family Equity Act (the “LIFE Act”) and Miscellaneous Amendments to Various Adjustment and Relief Acts (the “LIFE Act Amendments”), which affect individuals who may be eligible to apply for adjustment of status under section 202 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) or the Haitian Refugee Immigration Fairness Act (HRIFA), or for suspension of deportation or special rule cancellation of removal under section 203 of NACARA (“NACARA 203 relief”). The purpose of this memorandum is to explain how the new legislation affects applicability of section 241(a)(5) of the Immigration and Nationality Act (INA) to potential beneficiaries of section 203 of NACARA and provides guidance on implementation. The effect of this recent legislation on applicants for adjustment of status under section 202 of NACARA (certain Cubans and Nicaraguans) or HRIFA (certain Haitians) is discussed in a separate memorandum.

Section 1505(c) of the LIFE Act Amendments\(^1\) provides that an individual who is otherwise eligible for relief under section 203 of NACARA shall not be barred from applying for such relief by operation of section 241(a)(5) of the INA (reinstatement)\(^2\). This means that a

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\(^1\) Life Act Amendments, Title XV of H.R. 5666, enacted by reference in Consolidated Appropriations Act for FY 2001, Public Law 106-554 (Dec. 21, 2000) (Pages H12299-H12300), provides that individuals eligible to apply for relief under NACARA 203 and who are otherwise eligible for relief “shall not be barred from applying for such relief by operation of section 241(a)(5) of the Immigration and Nationality Act,” as in effect after the effective date of IIRIRA. A copy of the amendment is attached to this memo.

\(^2\) Section 241(a)(5) of the INA provides: “If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of
Memorandum

Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries

NACARA 203 applicant or potential NACARA 203 applicant who was deported, excluded or removed from the United States, or who otherwise left the United States, while under a final order and then reentered the United States illegally, may still apply for and be granted relief under NACARA 203, if eligible. Consequently, in many cases involving persons covered by NACARA 203, INS officers should not reinstate the existing final order, but should instead follow the guidance set out in this memorandum. Immigration officers should become familiar with the general categories of persons affected by the reinstatement exemptions that are described in this memorandum.

Specifically, the new legislation affects certain nationals of El Salvador, Guatemala, former Soviet bloc countries, and their dependents who are eligible to apply for suspension of deportation and special rule cancellation of removal under NACARA 203. It should be noted that dependents are not required to be nationals of El Salvador, Guatemala or the former Soviet bloc to be eligible for NACARA 203 relief. The legislation also affects certain individuals (non-nationality specific) who have been battered or subject to extreme cruelty by a NACARA 203 beneficiary or by a United States Citizen (USC) or Lawful Permanent Resident (LPR).

An INS officer who encounters an individual who appears eligible to apply for NACARA 203 relief should not reinstate a prior order unless a final denial (no pending appeal) of NACARA 203 relief has been made, the alien has been convicted of an aggravated felony, or one of the other specific circumstances outlined in this memorandum applies. In all other cases, the officer should either take no further action or should place the alien in removal proceedings, depending upon the particular circumstances described below. The attached chart summarizes the general categories and appropriate actions discussed in this memorandum.

A. Eligibility Categories for NACARA 203

An individual may be eligible to apply for NACARA 203 relief if he or she has not at any time been convicted of an aggravated felony, as defined under section 101(a)(43) of the INA, and is described in one of the following categories.

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removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.”

3 Life Act Amendments, Title XV of H.R. 5666, enacted by reference in Consolidated Appropriations Act for FY 2001, Public Law 106-554 (Dec. 21, 2000) (Pages H12299-H12300), provides that individuals eligible to apply for relief under NACARA 203 and who are otherwise eligible for relief “shall not be barred from applying for such relief by operation of section 241(a)(5) of the Immigration and Nationality Act,” as in effect after the effective date of IIRIRA. A copy of the amendment is attached to this memo.

4 Section 241(a)(5) of the INA provides: “If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.”
Memorandum

Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 202 beneficiaries

(1) A registered class member of the settlement in American Baptist Churches vs. Thornburgh (ABC) who has not been apprehended at time of entry after December 19, 1990. This includes any

- Guatemalan national who first entered the United States on or before October 1, 1990, and registered for ABC benefits on or before December 31, 1991; and any
- Salvadoran national who first entered the United States on or before September 19, 1990, and registered for ABC benefits or applied for Temporary Protected Status (TPS) on or before October 31, 1991.

Because the determination of whether an ABC class member registered for benefits requires an adjudication and may, in some cases, be established by credible testimony, INS officers should consider only whether the individual is a class member (Guatemalan who first entered the U.S. on or before October 1, 1990 or Salvadoran who first entered the US on or before September 19, 1990), not whether the individual registered, in determining whether to reinstate the prior order.

Asylum Officers are responsible for determining whether an ABC class member was apprehended at time of entry. If there is evidence that an ABC class member was apprehended at time of entry, the ABC Coordinator of the local Asylum Office should be contacted to make the determination and, where appropriate, issue a notice of ABC ineligibility to the class member. For further guidance on this issue, see memorandum from David Dixon, Deputy General Counsel, “The ABC Settlement Agreement term: apprehended at entry,” July 22, 1999 (attached).

To give effect to the recent legislation, a prior order should not be reinstated against an alien in this category unless the alien has been convicted of an aggravated felony. If an I-589 (asylum application) or an I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) is pending with the INS Asylum Division or EOIR, the process should be allowed to continue. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(2) A Guatemalan or Salvadoran national who filed an application for asylum with the Service on or before April 1, 1990, either by filing an application with the Service or filing the application with the Immigration Court and serving a copy of that application on the Service. For purposes of applying for relief under NACARA 203, it does not matter whether the asylum application has been denied.

To give effect to the recent legislation, a prior order should not be reinstated against an alien in this category unless the alien has been convicted of an aggravated felony. If an I-589 (asylum application) or an I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) is pending with the INS Asylum Division or
EOIR, the process should be allowed to continue. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(3) An alien who entered the United States on or before December 31, 1990, filed an application for asylum on or before December 31, 1991, and, at the time of filing the application, was a national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia. For purposes of applying for relief under NACARA 203, it does not matter whether the asylum application has been denied.

To give effect to the recent legislation, a prior order should not be reinstated against an alien in this category unless the alien has been convicted of an aggravated felony. If an I-589 (asylum application) or an I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) is pending with the INS Asylum Division or EOIR, the process should be allowed to continue. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(4) An alien who is the spouse or child of an individual described in paragraph (1), (2), or (3) above at the time a decision is made to suspend the deportation, or cancel the removal, of the individual described in paragraph (1), (2), or (3).

To give effect to the recent legislation, a prior order should not be reinstated against an alien who is the spouse or child of an individual described in paragraph (1), (2), or (3), unless the parent or spouse has received a final denial of relief NACARA 203 or the alien has been convicted of an aggravated felony.

If the alien formally was the spouse of an alien described in paragraph (1), (2) or (3) above and the spouse was granted relief under NACARA 203 before the marriage was terminated by divorce or death, the alien may still be eligible for NACARA relief and therefore the prior order should not be reinstated.

(5) An unmarried son or unmarried daughter of an individual described in paragraph (1), (2), or (3) above who

- is 21 years of age or older at the time a decision is made to suspend the deportation, or cancel the removal, of the parent described in paragraph (1), (2), or (3) above, and

- entered the United States on or before October 1, 1990.
Memorandum

Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries

To give effect to the recent legislation, a prior order should not be reinstated against an alien who is the unmarried son or unmarried daughter of an individual described in paragraph (1), (2), or (3) unless

➢ the parent has received a final denial of relief under NACARA 203; or

➢ the unmarried son or unmarried daughter entered the United States after October 1, 1990 and either the parent’s NACARA application has not been decided or was granted after the unmarried son or daughter turned 21 years of age; or

➢ the alien has been convicted of an aggravated felony.

If an I-589 (asylum application) or an I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) is pending with the INS Asylum Division or EOIR, the process should be allowed to continue. If there is no I-589 or I-881 pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

(6) An alien who was issued an Order to Show Cause or was in deportation proceedings before April 1, 1997, and who applied for suspension of deportation under section 244(a)(3) of the INA (applies to someone who has been battered or subjected to extreme cruelty by a spouse or parent who is a US citizen or LPR or who is the parent of a child of a US citizen or LPR who has been battered or subjected to extreme cruelty by a US citizen or LPR).

If the individual is in proceedings before EOIR, allow the process to continue pending determination on eligibility for relief. If not in proceedings before EOIR, issue charging documents placing the individual in 240 removal proceedings.

(7) An alien who was the spouse or child of an individual described in paragraph (1), (2), or (3) and the spouse, child or child of the spouse has been battered or subjected to extreme cruelty by the individual described in paragraph (1), (2), or (3). The spousal or parental relationship must have existed at the time the individual described in paragraph (1), (2), or (3) had a decision made on the application for suspension or cancellation, submitted the application, registered for ABC, applied for TPS, or applied for asylum.

To give effect to the new legislation, an INS officer should not reinstate the prior order of an alien who previously was the spouse or child of an individual described in paragraph (1), (2), or (3) above if it is alleged that the spouse, child or child of the spouse has been battered or subjected to extreme cruelty by the individual described 1, 2 or 3 unless the alien has been convicted of an aggravated felony.

If an I-589 (asylum application) or an I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) is pending with the INS Asylum Division or EOIR, the process should be allowed to continue. If there is no I-589 or I-881
Memorandum

Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries

pending with the INS Asylum Division or EOIR, charging documents should be issued placing the individual in 240 removal proceedings.

B. Determination of Appropriate Actions

As noted above, generally, a previous final order should not be reinstated unless there has been a final denial of a NACARA 203 application, the alien has been convicted of an aggravated felony, or the other limited circumstances outlined in this memorandum apply. In all other cases, the appropriate action to take depends on the current status of the alien's NACARA or asylum applications.

If an individual described in one of the categories above has an asylum application or a NACARA 203 suspension of deportation or special rule cancellation of removal application pending with the INS or EOIR, the INS officer should not reinstate a prior order. Instead, INS or EOIR will continue to process the pertinent application(s) and determine whether the individual is eligible for relief under NACARA 203. The Asylum Office will refer to EOIR the NACARA application of any applicant found ineligible for an INS grant of relief. (Note that the INS has authority to grant only certain NACARA applicants and some individuals not eligible for a grant of relief by the INS may still be eligible for a grant by an immigration judge). If it is ultimately determined that the individual is not eligible for relief, the INS may file a motion to terminate proceedings before EOIR to reinstate the prior order.

If an individual described in one of the categories above appears subject to section 241(a)(5) and does not have an asylum application or NACARA 203 application pending with the INS or EOIR, the INS officer should place the individual in removal proceedings so that a determination can be made on NACARA 203 eligibility, except in the specific circumstances outlined in this memo. Again, if it is ultimately determined that the individual is not eligible for relief, the INS may file a motion to terminate proceedings before EOIR to reinstate the prior order. If the individual is a spouse, child, or unmarried son or daughter of an alien described in numbered paragraph (1), (2), or (3) of this memorandum and the alien described in paragraph (1), (2), or (3) appears inadmissible or deportable, the INS officer should issue charging documents against that spouse or parent, as well, provided that he or she does not have an asylum or NACARA 203 application pending with the INS Asylum Office.

The attached chart summarizes these actions and also describes the limited circumstances under which reinstatement may be appropriate.

C. Coordination with ABC Implementation

Because many of the potential NACARA applicants are also members of the ABC class, the General Counsel's memorandum of December 15, 1999, "ABC Settlement Implementation" has been attached for review. The December 15, 1999 memorandum outlines the provisions of the settlement agreement in American Baptist Churches vs. Thornburgh and gives instructions on
Memorandum

Subject: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries

verifying ABC eligibility. An updated list of ABC/NACARA coordinators is also attached to this memorandum.

If you have any questions regarding this guidance, please contact Wenona G. Paul at (202) 305-9742 for questions regarding NACARA 203.
**ACTION FOR INDIVIDUALS DESCRIBED IN NACARA 203 WHO ALSO APPEAR SUBJECT TO REINSTATEMENT**

**NOTE:** If individual described below has been convicted of an aggravated felony or has a final denial of an application for suspension of deportation or special rule cancellation of removal under section 203 of NACARA (Form I-881) this chart does not apply and a prior order may be reinstated.

<table>
<thead>
<tr>
<th>Type of Case</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Guatemalan either</td>
<td>If I-589 (asylum application) or I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) pending with the INS Asylum Division or EOIR, do not reinstate prior order and do not place individual in proceedings. Allow process to continue pending determination on I-881. If no I-589 or I-881 pending with INS Asylum Division, issue charging documents placing the individual in 240 removal proceedings.</td>
</tr>
<tr>
<td>- first entered the United States on or before October 1, 1990, and has not been apprehended at time of entry; or   - applied for asylum on or before April 1, 1990. (It does not matter whether the asylum application has been denied.)</td>
<td></td>
</tr>
<tr>
<td>2. Salvadoran either</td>
<td>If I-589 (asylum application) or I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) pending with the INS Asylum Division or EOIR, do not reinstate prior order and do not place individual in proceedings. Allow process to continue pending determination on I-881. If no I-589 or I-881 pending with INS Asylum Division, issue charging documents placing the individual in 240 removal proceedings.</td>
</tr>
<tr>
<td>- first entered the United States on or before September 19, 1990; or   - applied for asylum on or before April 1, 1990. (It does not matter whether the asylum application has been denied.)</td>
<td></td>
</tr>
<tr>
<td>3. Alien who was a national of the Soviet Union, Russia, any republic of the former Soviet Union, Latvia, Estonia, Lithuania, Poland, Czechoslovakia, Romania, Hungary, Bulgaria, Albania, East Germany, Yugoslavia, or any state of the former Yugoslavia at the time of filing an asylum application and who   - entered the United States on or before December 31, 1990, and   - filed an application for asylum on or before December 31, 1991. (It does not matter whether the asylum application has been denied.)</td>
<td>If I-589 (asylum application) or I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) pending with the INS Asylum Division or EOIR, do not reinstate prior order and do not place individual in proceedings. Allow process to continue pending determination on I-881. If no I-589 or I-881 pending with INS Asylum Division, issue charging documents placing the individual in 240 removal proceedings.</td>
</tr>
</tbody>
</table>
4. **Child or spouse of an individual described in 1, 2, or 3 above.**

If I-589 (asylum application) or I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) pending with the INS Asylum Division or EOIR, do not reinstate prior order and do not place individual in proceedings. Allow process to continue pending determination on I-881.

If no I-589 or I-881 pending with INS Asylum Division, issue charging documents placing the individual in 240 removal proceedings, unless the parent or spouse described in 1, 2, or 3 has received a final denial of a NACARA 203 application (Form I-881). Also issue charging documents against the parent or spouse described in 1, 2 or 3 if he/she appears inadmissible or deportable.

If parent or spouse described in 1, 2 or 3 has received a final denial of a NACARA 203 application (Form I-881), reinstate prior order.

5. **Unmarried son or daughter of an individual described in 1, 2, or 3 above.**

If I-589 (asylum application) or I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) pending with the INS Asylum Division or EOIR, do not reinstate prior order and do not place individual in proceedings. Allow process to continue pending determination on I-881.

If no I-589 or I-881 is pending with INS Asylum Division, issue charging documents placing the individual in 240 removal proceedings, unless

a. The parent described in 1, 2, or 3 has received a final denial of a NACARA 203 application (Form I-881), or

b. the unmarried son or unmarried daughter entered the United States after October 1, 1990, and either
   - the parent's NACARA application has not been decided; or
   - the parent's application was granted after the unmarried son or daughter turned 21 years of age.

If paragraph a or b above applies, reinstate prior order.

If charging documents are issued against the unmarried son or daughter, also issue charging documents against the parent described in 1, 2 or 3 if he/she appears inadmissible or deportable.

6. **Alien was issued an Order to Show Cause or was in deportation proceedings before April 1, 1997, and who applied for suspension of deportation under section 244(a)(3) of the INA (applies to someone who has been battered or subjected to extreme cruelty by a spouse or parent who is a US citizen or LPR or who is the parent of a child of a US citizen or LPR who has been battered or subjected to extreme cruelty by a US citizen or LPR).**

If in proceedings before EOIR, allow process to continue pending determination on eligibility for relief.

If not in proceedings before EOIR, issue charging documents placing the individual in 240 removal proceedings.
<table>
<thead>
<tr>
<th>7.</th>
<th>Previously was the spouse or child of an individual described in 1, 2, or 3 and it is alleged that the spouse, child or child of the spouse has been battered or subjected to extreme cruelty by the individual described 1, 2 or 3.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>If I-589 (asylum application) or I-881 (application for suspension of deportation or special rule cancellation of removal under section 203) pending with the INS Asylum Division or EOIR, do not reinstate prior order and do not place individual in proceedings. Allow process to continue pending determination on I-881.</td>
</tr>
<tr>
<td></td>
<td>If no I-589 or I-881 pending with INS Asylum Division, issue charging documents placing the individual in 240 removal proceedings.</td>
</tr>
</tbody>
</table>
MEMORANDUM FOR OFFICE OF FIELD OPERATIONS
OFFICE OF INTERNATIONAL AFFAIRS
OFFICE OF PROGRAMS
ALL REGIONAL OFFICES
ALL DISTRICT OFFICES
BORDER PATROL

FROM: David M. Dixon
Deputy General Counsel

SUBJECT: The ABC Settlement Agreement term: “apprehended at time of entry”

QUESTIONS PRESENTED

1. What is the meaning of “apprehended at time of entry” in the ABC settlement agreement?

2. Who determines whether an ABC class member was apprehended at time of entry?

3. What are the criteria for determining if a class member was apprehended at time of entry?

4. What is the effect of a determination that a class member was apprehended at time of entry?

SUMMARY CONCLUSIONS

1. “Apprehended at time of entry” in the ABC settlement agreement means “apprehended before an entry (pursuant to the entry doctrine) has been effected.”

2. Immigration and Naturalization Service (INS) asylum officers determine whether an ABC class member was apprehended at time of entry.

3. An ABC class member who was placed in exclusion proceedings after December 19, 1990 after having been apprehended before an entry has been effected has been apprehended at time of entry. An ABC class member who is apprehended attempting to enter and is placed in removal proceedings after April 1, 1997 is also apprehended at time of entry. For
purposes of the analysis, entry is determined as it was under the entry doctrine prior to the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. 104-208, 110 Stat. 3009 (1996). For entries on or after April 1, 1997, a class member who did not make an entry under the entry doctrine (in general, who was detained while entering the country and was paroled or is still detained) has been apprehended at time of entry. An asylum officer may consult with INS district counsel in determining whether an entry was made under the entry doctrine.

5. An ABC class member who has been apprehended at time of entry becomes ineligible for benefits under the ABC settlement agreement and under current regulations can be placed in expedited removal proceedings if the apprehension occurs at a port of entry. Any class member who has been issued an expedited removal order shall receive a 30-day stay of removal, which is waivable by the applicant.

ANALYSIS

The settlement agreement in the ABC litigation states: “Class members apprehended at time of entry after the date of preliminary approval of this agreement shall not be eligible for the benefits hereunder.” American Baptist Churches v. Thornburgh, 760 F. Supp. 796, 800 (N.D. Cal. 1991).

Definition of "apprehended at time of entry"

Under the law as it existed at the time of the ABC settlement agreement, entry was defined in section 101(a)(13) of the Immigration and Nationality Act (INA) for aliens other than returning lawful permanent residents, as any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise. This section, and the law interpreting it, is referred to as the entry doctrine. Under the entry doctrine, an alien who had made an entry into the United States was subject to deportation proceedings.

Effective April 1, 1997, the IIRIRA deleted the definition of entry from the INA, and replaced it with the definition of admission. Similarly, the separate deportation and removal proceedings were eliminated and replaced with a single removal proceeding. Despite these subsequent changes, because the settlement agreement refers to the concept of entry, the doctrine will continue to be applied to determine whether a class member made an entry prior to being apprehended. The change in the underlying law does not modify the settlement agreement or make it contrary to law.

Who determines whether an ABC class member was apprehended at time of entry?

In Morales v. INS, Int. Dec. 3259 (BIA 1996) (en banc), the Board of Immigration Appeals (BIA) held that Executive Office of Immigration Review proceedings should be stayed or administratively closed for any alien who was an eligible ABC class member and who had not been given a de novo asylum interview. The BIA also decided that all determinations whether class members have been apprehended at time of entry under paragraph 2 of the ABC agreement, should be made by an INS asylum officer. Thus, an asylum officer should determine if an alien is not eligible for benefits because he or she was apprehended at time of entry.
What are the criteria for determining if a class member was apprehended at time of entry?

Because the term apprehended at time of entry in the ABC settlement agreement refers to the entry doctrine, the criteria for determining if a class member was apprehended at time of entry are the same as those used to determine whether an entry under the entry doctrine was made. Thus, the same test used to decide whether someone was properly placed into exclusion or deportation proceedings under the INA prior to amendment by IIRIRA is applicable to this determination. Asylum officers may consult the file to determine whether an immigration judge or the BIA has addressed the "entry" issue in the particular case at hand.

Under the law as interpreted by the Board of Immigration Appeals, an entry involves three elements:

1. a crossing into the territorial limits of the United States;
2. either
   a. an inspection and admission by an immigration officer, or
   b. actual and intentional evasion of inspection at the nearest inspection point; and
3. freedom from official restraint.

See Matter of Pierre, 14 I&N Dec. 467, 468 (1973). Thus, an alien who enters the United States without inspection has typically made an entry into the United States, unless the alien has been under the control or surveillance of the INS or other officials from the time he or she crossed the border. See United States v. Aguilar, 833 F.2d 662, 681 (9th Cir. 1989) (Continuous surveillance by immigration authorities can be sufficient to place an alien under official restraint.), cert. denied, 498 U.S. 1046, 111 S.Ct. 751 (1991); Pierre, 14 I&N at 469 (The restraint may take the form of surveillance, unknown to the alien; he has still not made an entry despite having crossed the border with the intention of evading inspection, because he lacks the freedom to go at large and mix with the population.) If an alien crosses the border undetected and is encountered even a short distance into the United States, however, he or she has made an entry under the doctrine. See United States v. Kavengaunian, 623 F.3d 730, 739 n.19 (1st Cir. 1980) (Even a temporary evasion of the inspection process suffices to produce an entry.); Cheong v. INS, 534 F.2d 1018 (2d Cir. 1976) (Van not detected until it had proceeded four-tenths of a mile over the border held to have made an entry.)

In carrying out the INS's responsibility to determine if an alien was apprehended at the time of entry, asylum officers should consult with district counsel in determining whether the alien made an entry. The asylum officer may be able to make a determination based on a review of the A file or may in some cases need to interview the ABC class member. It is incumbent upon the INS officer apprehending a class member at the border to document the circumstances of the arrest and apprehension so that the asylum officer can make the appropriate determination regarding ABC eligibility.

What is the effect of a determination that a class member was apprehended at time of entry?
An ABC class member who has been apprehended at time of entry becomes ineligible for benefits under the ABC agreement. Under the current regulatory scheme, a class member is subject to expedited removal if the applicant has failed to obtain advance parole and is apprehended at a port of entry, unless INS has charged a ground for removal other than INA section 212(a)(6)(C) or 212(a)(7). If another ground for removal has been charged, the class member is removable under INA section 240. Under the current regulatory scheme, an ABC class member who has been given advance parole should be paroled at the port of entry and is not subject to expedited removal. In cases in which the person has a valid parole document but there is a remaining question regarding ABC eligibility (for example, the applicant appears to be an aggravated felon) the inspecting officer should confer with the appropriate asylum office.

Any class member who has been issued an expedited removal order shall receive a waivable 30-day stay of removal. Paragraph 19.b. of the ABC agreement provides for a 30-day stay of deportation for “class members denied any of the rights or benefits of this agreement (including membership in the class and eligibility to apply).” Class members who have been apprehended at time of entry and are not eligible for the benefits of the agreement thus are entitled to a 30-day stay of removal. Any ABC class member who has been ordered removed will be detained during the 30-day stay of removal. The alien may waive the 30-day stay in writing.

The asylum officer has the responsibility of notifying a class member who has been apprehended at time of entry that he or she is no longer eligible for ABC benefits. The ABC Procedures Manual contains a notification letter for this purpose.

CONCLUSION

The phrase “apprehended at time of entry” in the ABC settlement agreement means “apprehended before an entry (pursuant to the entry doctrine) has been effected.” Under BIA precedent, INS asylum officers determine whether an ABC class member was apprehended at time of entry. As a general rule, a class member has been apprehended at time of entry if he or she was placed in exclusion proceedings following a re-entry before April 1, 1997, or was apprehended while attempting to re-enter and was placed in removal proceedings on or after April 1, 1997. A class member who has been apprehended at time of entry is not eligible for ABC benefits. Ineligible class members who have been charged under INA section 212(a)(6)(C) or 212(a)(7) will be placed in expedited removal proceedings; those charged on other grounds will be placed in removal proceedings under INA section 240. Class members who are apprehended at time of entry and are not entitled to benefits of the agreement are entitled to a 30-day stay of removal. Any class member who has been ordered removed shall be detained during the period of the stay. The class member may waive the stay in writing.
MEMORANDUM FOR REGIONAL DIRECTORS
REGIONAL COUNSEL
- DISTRICT DIRECTORS (EXCEPT FOREIGN)
  DISTRICT COUNSEL
  SECTOR COUNSEL
- OFFICERS IN CHARGE (EXCEPT FOREIGN)
- CHIEF PATROL AGENTS
- ASYLUM OFFICE DIRECTORS AND SUPERVISORS

FROM: Bo Cooper
Acting General Counsel

SUBJECT: ABC Settlement Implementation

OVERVIEW

Many registered ABC class members, as well as Salvadorans and Guatemalans who applied for asylum on or before April 1, 1990, are eligible to apply for suspension of deportation or special rule cancellation of removal under the Nicaraguan Adjustment and Central American Relief Act (NACARA), Pub. L. No. 105-100, 111 Stat. 2160, 2193 (1997). Consequently, it is likely that INS officers may face new questions regarding both ABC registration and continuing eligibility for ABC benefits. This memorandum outlines the provisions of the settlement agreement in American Baptist Churches v. Thornburgh (ABC), 760 F. Supp. 796 (N.D. Cal. 1991) and gives instructions on verifying ABC eligibility.

NOTE: The benefits provided by NACARA do not replace the benefits available under the ABC settlement agreement. An individual may be eligible for both NACARA relief and the benefits of the ABC settlement agreement.
Memorandum to Field  
Subject: ABC Settlement Implementation

1. ELIGIBILITY FOR ABC BENEFITS

To be eligible for ABC benefits, the individual must: 1) Be an ABC class member (see I.A. below), 2) have registered for ABC (either directly or, if Salvadoran, by applying for TPS) (see I.B. below), and 3) have filed a timely asylum application (see I.C. below). A class member is not eligible for ABC benefits if the applicant has been convicted of an aggravated felony (see II.A. below), apprehended at time of entry after December 19, 1990 (see II.B. below), or has withdrawn the asylum application (see part II.C. below).

A. ABC class membership

A class member is any Guatemalan who first entered the United States on or before October 1, 1990, and any Salvadoran who first entered the United States on or before September 19, 1990. There is no requirement that the class member have been in the United States on the qualifying date or remained continuously in the United States since that date (but see II.B. below, “apprehended at time of entry”).

B. Registration for ABC benefits

ABC Guatemalan class members must have submitted an ABC registration form on or before October 31, 1991. Salvadoran class members must have submitted an ABC registration form on or before October 31, 1991, or have applied for TPS on or before October 31, 1991. Application for TPS by a Salvadoran constitutes ABC registration regardless of whether the TPS application was granted or denied.

Registration may be evidenced by any of the following:

For Salvadorans, any file with an A# between 94 million and 94,399,500, or documentation in a file or INS database indicating the applicant has an A-file with such number (indicating registration for TPS)

Copy of an ABC registration form

Certified mail return receipt (or a copy) addressed to Post Office Box 96821, Washington, DC. To allow sufficient time for postal processing, the receipt for Guatemalans should be dated no later than January 31, 1992; for Salvadorans, no later than December 1, 1991 (nine months have been added to the filing deadline to account for delays in retrieving mail from the post office box).

TPS registration form for a Salvadoran (I-821)

Evidence that a Salvadoran has been issued an employment authorization document on the basis of 8 CFR 274a 12 (a)(11), (a)(12), or (c)(19) [thus indicating TPS registration], or a form I-94
Memorandum to Field
Subject: ABC Settlement Implementation

with the same notations or with the notation "TPS" or "DED." Such evidence may be found on
the I-765 itself or a copy of an EAD card. CIS and/or CLAIMS should be checked to see if an
EAD was issued under one of those codes (unlike the regulations, the EAD screen and cards use
capital letters for EAD codes).

Inclusion in the ABC registration database.

Credible sworn testimony from the class member and/or the person who registered the class
member that the class member registered for ABC or applied for TPS.

INS officers may ask a class member to produce evidence of registration, but a class
member's inability to produce evidence of registration does not conclusively establish that the
individual has failed to register for ABC benefits. Similarly, production of such evidence does
not conclusively establish that the individual registered. The difficulty in quickly determining registration
in some cases arises from certain administrative problems associated with the initial registration
process. Some individuals who registered for ABC benefits did not have a case pending before
the INS or EOIR at the time of registration. Consequently, the record of registration may never
have been forwarded to the INS or EOIR by the time the file was created, or may be recorded under a
different A-number. Moreover, some INS judges did not request information on date of birth,
making it difficult in some cases to verify registration based solely on the registration lists.
Consequently, an asylum officer generally reviews the entire record when determining whether
an applicant registered for ABC benefits.

Generally, only an INS asylum officer is permitted to make the determination that an
individual is a registered ABC class member. In cases before the immigration court, however,
where no evidence of registration exists, it may be necessary for the immigration judge to make
the determination based on the credible testimony of the class member and/or the person who
registered the class member.

The Office of International Affairs, Asylum Division (HQASY) maintains an ABC
registration database. Whenever registration is in doubt, the INS officer should consult with
either the local asylum office ABC coordinator or one of the national ABC coordinators at
asylum headquarters. For cases before the immigration court, if there are questions regarding
registration, the INS attorney should consult with the ABC coordinator to determine whether
registration can be established through a review of the record or database. If it is necessary for
the class member to testify regarding registration, the INS attorney may consult with the ABC
coordinator regarding the nature of such testimony. The ABC coordinator list is attached for
your convenience.
C. Timely asylum application

Guatemalan class members must have applied for asylum on or before January 3, 1995. Salvadoran class members must have applied for asylum on or before January 31, 1996. Salvadoran class members' applications received on or before February 16, 1996, are considered timely filed. (The grace period was extended for processing considerations). The class member has met the filing deadline as long as there is any asylum application in the file that was submitted by the requisite date or there is a record in RAPS indicating the I-589 was filed by that date. If the filing date in RAPS is different from the date-stamp on the I-589, the earlier date is determinative.

There is no requirement that the class member file a new asylum application under the terms of the settlement agreement, even if the previously filed asylum application has already been adjudicated. An eligible class member is entitled to a de novo adjudication of a previously adjudicated asylum application, unless the application has already been adjudicated de novo by an asylum officer pursuant to the terms of the settlement agreement. Generally, the INS did not interview non-detained ABC applicants prior to March 1996. If there is a question as to whether a class member has had a de novo adjudication under the terms of the settlement agreement, you should contact the local asylum office ABC coordinator or HQASY.

To determine whether an asylum application has been filed, INS officers must conduct a name search in CIS to identify all A-numbers associated with the class member and check whether an asylum application has been filed under any of those A-numbers. Not all cases administratively closed by EOIR for de novo asylum adjudication by an asylum officer have been entered into RAPS. Therefore, if the class member claims to have filed an asylum application, but no evidence has been found in any INS database, then a physical review of all A-files associated with the applicant must be conducted. Multiple files should be consolidated according to procedure.

Note: Notice 5

Under the terms of the settlement agreement, the Service is required to give notice to all Salvadoran class members who applied for TPS that they have 90 days from the date of the notice to apply for asylum (Notice 5). In July of 1995, Notice 5 was sent to Salvadorans who applied for TPS. Notice 5 informed these class members that they had until January 31, 1996 to have an asylum application on file in order to retain benefits of the settlement agreement.

If a Salvadoran class member who applied for TPS claims not to have received Notice 5, HQASY can check the Notice 5 mailing list database to determine if Notice 5 was sent to that class member. If it is determined that Notice 5 was not sent to the last address provided by the
class member, the Service must give the class member Notice 5 and allow him or her 90 days to apply for asylum. ABC class members were initially required to send special change of address forms to the ABC post office box in Washington, D.C. Submission of a form I-765 to a service center or district office does not qualify as notification of an address change for purposes of determining whether Notice 5 was sent to the proper address.

NACARA note: Section 203 of NACARA does not limit NACARA eligibility to registered ABC class members who submitted a timely asylum application. Although an ABC class member must have filed a timely asylum application to continue to remain eligible for ABC benefits, NACARA eligibility only requires that the ABC class member registered for ABC benefits or, if Salvadoran, applied for TPS. See Section 309(c)(5)(C) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as amended by NACARA; interim 8 CFR 240.61(a).

II. BARS TO ABC ELIGIBILITY

An alien who meets the requirements set forth under part I above is nevertheless ineligible for ABC benefits if he or she:

1. Has been convicted of an aggravated felony (see II.A. below);
2. Was apprehended at time of entry after 12/19/90 (see II.B. below); or
3. Has withdrawn an affirmative request for asylum and thereby waived the right to a de novo interview with an asylum officer (see II.C. below).

An alien who is an ABC class member but is barred from ABC eligibility is, with one exception discussed in II.A. below, entitled to a 30-day stay of deportation. Based on the circumstances of the case, the alien may be detained during the 30-day period, and should be allowed to waive, in writing, the 30-day stay if he or she wishes to do so.

A. Conviction of aggravated felony

Under the ABC settlement agreement, any class member who has been convicted of an aggravated felony is specifically excluded from receiving benefits under the agreement. Under IIRIRA, the definition of an aggravated felony contained in section 101(a)(43) of the INA has been significantly expanded. In addition, IIRIRA made the definition of aggravated felony applicable without respect to the date of commission of the crime or conviction for it. The

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The INS recently published a notice in the Federal Register announcing that class members could notify the INS of a change in address by submitting written notice directly to the asylum office that has jurisdiction over the applicant's case. This change does not affect Notice 5 determinations.
definition of aggravated felony is no longer dependent on the commission or conviction date, as it was in the past.

If an otherwise eligible ABC class member has been convicted of an aggravated felony, the asylum office with jurisdiction over the asylum application will, upon request, provide a letter for the applicant and the file explaining the reason the applicant is not eligible for ABC benefits. Before such a letter can be issued, a supervisory asylum officer must determine that an otherwise eligible class member has been convicted of an aggravated felony. This independent determination is necessary even in those cases, such as administrative removal, where the applicant has been found by the Service to have committed an aggravated felony. The letter shall explain that because of the aggravated felony conviction the class member is not eligible for a de novo asylum interview under the terms of the settlement agreement. The letter shall also notify the class member that he or she cannot be deported or removed for 30 days from the date of the notice, unless the deportation or removal order was based on the aggravated felony conviction. If the ground for deportation or removal cited in the order is the aggravated felony conviction, the alien is not eligible for the 30-day stay. The letter should be sent to the applicant at the detention facility, if he or she is detained. A copy of the notification must also be sent to any attorney or representative of record and a copy placed in the A-file.

B. Apprehended at time of entry

A second ground of ineligibility for benefits is a determination that an ABC class member has been “apprehended at time of entry.” The meaning of this phrase and the procedure for making a determination is explained in detail in the memorandum entitled “The ABC Settlement Agreement term: “apprehended at time of entry,”” David Dixon, Acting General Counsel, Office of the General Counsel, July 22, 1999. As the memorandum notes, the asylum office with jurisdiction over the apprehended class member’s asylum application should be contacted to make the eligibility determination.

If the asylum office determines that the applicant is not eligible for ABC benefits, the office will issue a letter explaining the reason. The letter will be sent to the applicant, either at the detention center, if detained, or at the last known address. A copy of the letter will be sent to any attorney or representative and a copy placed in the A-file. The class member may be subject to expedited removal if INA section 212(a)(6)(c) and/or 212(a)(7) are the only removal grounds charged. If another ground for removal has been charged, the class member may be placed in removal proceedings under INA section 240.
Memorandum to Field
Subject: ABC Settlement Implementation

C. Waiver of rights under the ABC agreement

A class member may waive his or her rights under the ABC agreement by withdrawing an affirmative request for asylum. This waiver must be made in writing. A class member whose case was administratively closed is not required to waive ABC eligibility, however, in order to move to reopen his or her case, if the motion to reopen is based on issues that were not raised in the administratively closed proceedings. Matter of Gutierrez-Lopez, Int. Dec. #3286 (BIA, June 18, 1996).

III. Recent Modifications to the ABC Settlement Agreement

Because the regulations implementing Section 203 of NACARA permit asylum officers to adjudicate the NACARA applications of many ABC class members, the agency considered how best to coordinate and streamline the asylum and NACARA application process. As a result, the agency, EOIR, and class counsel sought two modifications to the ABC settlement agreement. On May 30, 1999, the district court approved these modifications, which will facilitate the government’s ability to process NACARA and ABC applications more efficiently.

Both modifications streamline ABC procedures that could have caused delays in issuing both ABC and NACARA decisions. Paragraph 19(a)(1) of the agreement has been amended to permit the INS to grant asylum to those persons whose applications were under the joint jurisdiction of INS and EOIR without first moving to terminate the case in front of EOIR. Second, paragraphs 2 and 15 of the agreement have been modified to reflect more closely the current procedures for obtaining comments from the Department of State. Under the modified agreement, asylum officers are permitted to issue a final ABC asylum decision without first waiting for a reply from the Department of State. Pursuant to current procedures, in those cases where a subsequent opinion from the Department of State materially affects the decision, asylum officers would take appropriate steps to rescind the earlier decision.

A copy of the motion and modified agreement is attached.
Alternate Orders of Removal

Detention and Removal Operations Training Division

Lesson Plan
DRO 6130.01
December 2008

U.S. Immigration and Customs Enforcement

This document is not to be released outside the ICE Academy without the written permission of the ICE Office of Training and Development (HQ).
2. Administrative Order of Removal (under the Visa Waiver Program)  8 CFR §217.4
§217 of the INA

3. Reinstatement of Previous Removal Order  8 CFR §241.8
§241(a)(5) of the INA

4. Judicial Removal of in conjunction with a criminal case  §238(c) of the INA

5. Administrative Removal of Aggravated Felons  8 CFR §238.1
§238(b) of the INA

6. Expedited Removal under Section 235(b)(1) of the INA  8 CFR 235(b)(1)

7. Crewman  8 CFR 252.2
§252(b) of the INA

8. Stowaways  8 CFR 241.11, 235(d)(4)
§235(a)(2); 241(d)

9. S-Nonimmigrant Visa Holders  8 CFR 236.4

10. Section 250 Removals  § 250; 8 CFR 250

**Proper Method to Obtain an Order of Removal**

**EPO 2**

Identify the case information used to determine the proper method of obtaining an Order of Removal.
c. Procedures

1) Serve the alien the “Notice to Intent to Deport for Violating the Terms of your Admission under Section 217 of the INA”.

No formal “G” or “I” form exists for this purpose. Many offices utilize local templates. Also an appendix to the Detention and Removal Operations Policy and Procedure Manual contains a sample Visa Waiver packet.

2) The “Order of Deportation Section 217” is signed by the Authorized Official. This is the actual removal order.

As with the Notice of Intent, no formal “G” or “I” form exists for this order.


d. Authorized Officials

8 CFR 217.4 charges the District Director with determining removal under this Section. Following reorganization and within the Detention and Removal Program, this authority now resides with the Field Office Directors.

Reinstatement of a Previous Order of Removal

An alien that has been removed from the United States pursuant to a Order of Removal and then unlawfully reenters the United States may be subject to having their prior Order of Removal reinstated. This reinstatement will provide the basis for a subsequent removal.

An alien that unlawfully reenters the United States after removal may also face criminal charges under 8 USC 1326.
a. Authority

Section 241(a)(5) of the INA states: *If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.*

8 CFR 241.8 further identifies our requirements. We must determine:

1) the alien has been subject to a prior order of removal and has physically been removed or departed

2) we must positively identify whether the alien is in fact the alien who was previously removed. (Positive identity may be accomplished by fingerprint comparison)

3) whether the alien unlawfully reentered the United States

If we determine that the alien is subject to removal under this section, we must provide written notice of this determination. The alien may contest our determination orally or in writing.

c. Scope

An alien that has previously been ordered removed from the United States and has been physically removed or departed voluntarily under an order of removal. And that has unlawfully reentered the United States.

d. Procedure

1) Determine that the alien was previously removed pursuant to a removal order. This is normally accomplished by a review a Prior Removal order and the previously executed Warrant of Removal (I-205).
2) Identify the alien via fingerprint comparison of the encountered alien and print from the previously executed Warrant of Removal.

3) Determine that the alien was not lawfully admitted.

4) Serve the top portion of the Notice of Intent/Decision to Reinstate Prior Order (I-871).

5) Bottom section of the Notice of Intent/Decision to Reinstate Prior Order (I-871) is completed and signed by the Authorized Official. Once completed, this is our authority to remove the pursuant to the previous removal order.

6) After the authorized official signs the Form I-871 reinstating the prior order, the officer issues a new Warrant of Removal, Form I-205, in accordance with 8 CFR 241.2. The officer indicates on the I-205, in the section reserved for provisions of law, that removal is pursuant to section 241(a)(5) of the Act, as amended by IIRIRA.

7) At the time of removal, the officer executing the reinstated final order must photograph the alien and obtain a classifiable rolled print of the alien's right index finger on Form I-205.

The officer executing the reinstated order must also serve the alien with a notice of penalties on Form I-294. The penalty period commences on the date the reinstated order is executed. Since the instant removal may be the alien's second (or subsequent) removal, the alien is subject to the 20-year bar; unless the alien is also an aggravated felon, in which case the lifetime bar applies. (Note that the alien being removed need not have been found deportable as an aggravated felon for the lifetime bar to apply, only to have been convicted of an aggravated felony.) The officer routes Form I-205 and a copy of Form I-294 to the A-file. A comparison of the photographs and fingerprints between the original I-205 and the second I-205 executed at the time of reinstatement may prove essential in the event the reinstatement order is questioned at a later date.
8) The Authorized Official is charged by regulation and directive to maintain a Record of Proceeding (ROP) including all documents and evidence used in this decision.

The ROP shall contain the following:

- Form I-871
- The prior final order and executed warrant of removal (Form I-205 or I-296),
- Records checks and fingerprint match as reflected in IAFIS, and
- Any evidence provided by the alien and any additional documentation that rebuts the alien's assertion that reinstatement was improper
- The sworn statement or the alien's declination to provide such statement, or officer's attestation of the alien's refusal, (I-877)
- Record of Deportable Alien (Form I-213).
- Previous Warning to Alien Ordered Removed or Deported (Form I-294).

e. Relief

If the alien expresses a fear of persecution or torture, the alien must be referred to an asylum officer, who determines whether the alien has a reasonable fear of persecution or torture. In referring the alien to the asylum officer, the processing officer provides the alien with Form I-589 and the appropriate list of providers of free legal services. If the asylum officer determines that the alien has a reasonable fear, the asylum officer will refer the case to an immigration judge, via an I-863, for a determination only of withholding of removal under section 241(b)(3) of the Act or Article 3 of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment of Punishment (the Torture Convention), or for deferral of removal. Either party may appeal the decision of the immigration judge to the Board of Immigration Appeals.

Form M-488, Information About Reasonable Fear Interview

The fact that an alien will be referred to an asylum officer does not preclude the completion of the reinstatement order. If the alien is subject to reinstatement of the prior order, the reinstatement processing should be finished before forwarding the case to an asylum officer.
f. Authorized Official

The deciding official is any officer authorized to issue a Notice to Appear, as listed in 8 CFR 239.1.

Judicial Removal in Conjunction with a Criminal Case

The INA makes provisions for a United States District Court Judge to order and alien removed from the U.S. at the time of their sentencing.

a. Statutory Authority

Section 238(c) of the INA states: *a United States district court shall have jurisdiction to enter a judicial order of removal at the time of sentencing against an alien who is deportable*

This section provides for a U.S. District Attorney to file with the US District Court and serve the alien and DHS, prior to the commencement of the defendant’s trial or entry of a guilty plea, a notice of intent to request a judicial removal. This action must be with the concurrence of the Director of DHS. If the court determines that substantial evidence exists to establish prima facie eligibility for relief from removal, the Director of DHS will provide the court a recommendation regarding such relief. The Order of Removal is issued at the time of sentencing. The District Court Judge’s decision may be appealed by either party to the Circuit Court of Appeals.

Also, and probably more commonly used, is the provision under Section 238(c)(5) of the INA pertaining to Stipulated Judicial Orders of Removal. This provision allow the U.S. Attorney may enter into a plea agreement which calls for a alien, who is deportable, to waive right to a hearing and stipulate to the entry of a judicial order of removal.
Resources

HANDOUTS

- None

SUPPLEMENTAL RESOURCES

- Detention and Removal Operations Policy and Procedure Manual (DROPPM) available at

(b)(7)(E)

APPLICATION MATERIALS

Participant workbook.
# Approval Page

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The signature of the Division Representative, but if present indicates that the content presented in this lesson plan is accurate.
Asylees, Refugees & Special Status Aliens

Detention and Removal Operations

Lesson Plan: Asylees, Refugees & Special Status Aliens

Course Number:
January, 2009

U.S. Immigration and Customs Enforcement

This document is not to be released outside the ICE Academy without the written permission of the ICE Office of Training and Development (HQ).
Evidentiary Requirements

Evidence of Identity and Nationality (if available)
If documents are unavailable, applicant shall file an affidavit showing proof of unavailability.
Nationality can be determined from items such as: Passports, birth certificates, national identity documents.
The applicant may also be an alien having no nationality but may have habitually resided in the country.

Headquarters guidance has leaned toward an adjudicative philosophy based on an absence of negative information...in other words, the Service presumes eligibility for this benefit unless there is hard evidence that proves otherwise.

TPS eligibility is not affected by being in or out of status or by manner of entry into the US (EWI, parole, lawful admission, etc.) In addition, an alien may also be eligible for TPS if they are in detention. In fact, many aliens are released or may be released as a result of the TPS designation. Alien may be eligible even though they are subject to reinstatement of a previous order of deportation, exclusion, or removal.

If an alien receives TPS and they are subject to a previous order of deportation, exclusion, or removal, execution of the order will be stayed during the period of TPS designation and extension.

Inadmissibility Grounds for TPS

Most grounds of inadmissibility under 212(a) can be waived or do not apply to TPS applicants.

However the following grounds cannot be waived:

212(a)(2)(A) Criminal & related - conviction of certain crimes (CIMT)
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prosecution until the reinstatement of Removal is issued, based on obtaining key evidence to support the reinstatement.

differ on the interpretation of this directive.

IV. ADMINISTRATIVE ACTION

A. Inadmissibility

1. If a subject that is seeking admission (at a port of entry) has been previously removed, he is inadmissible under 212(a)(9)(A) if:

   a. The time period for his remaining outside the United States has not expired, and
   b. He has not received permission from the Secretary of DHS to lawfully re-enter the United States.

B. Reinstatement of Removal Order – Section 241(a)(5) INA

1. Section 241(a)(5) of the Act states that:

   An alien who has entered the United States illegally after having been removed under an Order of Removal, the prior order of removal will be re-instatd from it's original date, and is not subject to being re-opened or reviewed, and the alien shall be removed under the prior order.

2. Once approved, this removal will be effected without a hearing before an immigration judge.

3. A Notice of Intent/Decision to Re-Instate Prior Order, Form I-871, will be issued by the officer and served on the alien.

4. Upon service of the I-871, the officer will explain to the alien that he may make a written or oral statement contesting the determination.

5. The deciding official will review the alien's statement, along with evidentiary material presented by the officer, prior to issuing a determination.

6. The deciding official is one of the persons noted in 8 CFR 239.1, as having the authority to sign a Notice to Appear.
7. In order to support the reinstatement of the original removal order, evidence must be presented that establishes the same 3 steps that are necessary for prosecution under 8 USC 1326:

a. Alien was previously removed;
b. Alien is positively identified;
c. Alien made an unlawful re-entry into the U.S.

8. Therefore, the same evidence obtained to support the prosecution will be used to support the reinstatement of the original removal order.

9. Along with the above noted evidence, the officer will present a record of sworn statement from the alien to the deciding official. If the alien refuses to make a statement, a record of the refusal must be submitted.

10. Once it is decided that the prior order will be re-instated, the Deciding Official will sign the I-871, and the Field Office Director will issue a new Warrant of Removal/Deportation (I-205). This I-205 will note that the removal is pursuant to 241(a)(5).

11. The officer that is serving the I-205 must also provide the alien with Form I-294, Warning to Alien Ordered Removed or Deported.

12. When an alien is removed pursuant to 241(a)(5), he will be required to remain outside of the United States for the amount of time that corresponds to the original removal charge. This time begins when the current removal is effected.

13. If an alien that is subject to removal under 241(a)(5) expresses a fear of persecution he will be referred to an asylum officer for an interview. The asylum officer may decide to withhold removal, if it is established that the alien has a credible fear of persecution.

V. SUMMARY REVIEW QUESTIONS

1. What is the criminal statute that addresses unlawful re-entry after removal?
Removal Charges
(Hours 17 & 18)

Detention and Removal Operations Training Division

Lesson Plan: Removal Charges, (Hours 17 & 18)
Course Number XXX
Date January, 2009

U.S. Immigration and Customs Enforcement

This document is not to be released outside the ICE Academy without the written permission of the ICE Office of Training and Development (HQ).
E. Application may be adjudicated by any of the following individuals in ICE:

**Delegation to Detention and Removal Program**

a. Director, Detention and Removal  
b. Deputy Assistant Director, Field Operations Division  
c. Field Office Directors  
d. Deputy Field Office Directors  
e. Officers in Charge  
(and anyone acting in the aforementioned positions)

**Delegation to Investigations Program**

a. Director, Investigations  
b. Special Agents in Charge  
c. Deputy Special Agents in Charge  
d. Associate Special Agents in Charge  
e. Assistant Special Agents in Charge  
f. Resident Agents in Charge  
(and anyone acting in the aforementioned positions)

F. Authorization for removal (form I-202) may include spouse and children even if they are United States citizens;

G. The alien must obtain own travel document;

H. Removal will be to the country of citizenship, nationality, last residence or any country that will accept the alien.

I. If an alien is removed under this section, that alien would be ineligible to apply for or receive a visa or other documentation for readmission, or to apply for admission to the U.S. except with prior approval of the Attorney General (AG).

**Reinstatement**

**EPO 6**

Determine if an alien is subject to having a prior removal order reinstated pursuant to Section 241(a)(5) of the Act.
Section 241(a)(5) of the Act, Reinstatement of Removal Orders Against Aliens illegally Re-entering.

A. If the Attorney General determines that an alien has re-entered the United States illegally after having been removed or departed voluntarily under an order of removal, the prior order may be reinstated from its original date and the alien shall be removed under the prior order at any time after the entry. The alien has no right to a hearing before an immigration Judge (IJ).

B. An alien is subject to this section of the law if an ICE Officer can establish:

1. that the alien has been subject to a prior order of removal (the officer must obtain the prior order - exclusion, deportation, or removal);

2. the identity of the alien; i.e., whether the alien is in fact an alien who was previously removed (fingerprint verification will probably be required); and

3. whether the alien unlawfully re-entered the United States.

4. All three elements must be present to remove an alien pursuant to section 241(a)(5) of the Act.

Form I-871 is used for this purpose.

Alien may still request asylum.

Immigration Law Handbook
Section 212(a)(9) of the Act shows inadmissibility periods for removed aliens.

This section may be used regardless of how the alien illegally re-entered the U.S. Therefore, an EWI (entry without inspection) may be amenable to this in place of removal proceedings based upon inadmissibility.

Officer should obtain “Nonexistence of Record” check.

The Attorney General may grant permission for lawful re-entry prior to the expiration of time required outside the United States.

In the absence of fingerprints in a disputed case, an alien shall not be removed under this section.
Section 237(b) of the Act states that removal proceedings will not be commenced in the case of a nonimmigrant A-1 or G-1 without the approval of the U.S. Secretary of State, unless the alien is deportable under Section 237(a)(4) of the Act.
Summary

A. Section 237(a)(5) of the Act relates to public charge within five years of entry.

B. Section 237(a)(6) of the Act relates to unlawful voters.

C. In accordance with section 217 of the Act, an alien who is admitted under the Visa Waiver Program waives any right to removal hearings.

D. Section 252(b) of the Act is the procedure by which an officer may remove a crewman.

E. Section 250 of the Act provides for the removal of an alien who has fallen into distress due to causes arising after admission.

F. Section 241(a)(5) of the Act provides for the reinstatement of removal orders against aliens illegally re-entering.

Enabling Performance Objectives

Now that you have completed this course you should be able to:

1. Determine if an alien is deportable under 237(a)(5) and 237(a)(6) of the Act.
2. Identify the elements of those charges.
3. Identify the procedure for removal of an alien who was admitted under the visa waiver program.
4. Determine what elements must be present to support the removal of an alien crewman under section 252(b) of the Act.
5. Determine if administrative relief is available under Section 250 of the Act.
6. Determine if an alien is subject to having a prior removal order reinstated pursuant to Section 241(a)(5) of the Act.
Resources

**HANDOUTS**

- Immigration Law Handbook
- Pocket Field Guide
- Removal Charges Participate Workbook

**SUPPLEMENTAL RESOURCES**

- Detention and Removal Operations Policy and Procedure Manual (DROPPM) available at

  (b)(7)(E)

**APPLICATION MATERIALS**

List the laboratory or practice materials required for this lesson. Copy and paste any of these documents as an attachment in the sections below.
**Approval Page**

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MEMORANDUM FOR ASYLUM OFFICE DIRECTORS
DEPUTY DIRECTORS
SUPERVISORY ASYLUM OFFICERS
QUALITY ASSURANCE/TRAINING OFFICERS
ASYLUM OFFICERS

FROM: Joseph E. Langlois
Director, Asylum Division

SUBJECT: Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) regarding applicability of INA section 241(a)(5) (reinstatement) to NACARA 203 beneficiaries.

This memorandum supercedes the memorandum dated January 16, 2001, that covers the same subject. Please remove the January 16, 2001, memorandum from your files and replace it with this one. The January 16, 2001, memorandum instructed Asylum Offices that section 241(a)(5) would preclude an applicant granted NACARA 203 relief from also being granted asylum, if otherwise eligible. This memorandum revises that guidance. It clarifies that an asylum applicant who has been granted lawful permanent resident status is not barred by section 241(a)(5) from seeking and, if eligible, receiving, a grant of asylum.

On December 21, 2000, President Clinton signed into law an amendment to the Legal Immigration Family Equity Act (the "LIFE Act"), which provides that an individual who is otherwise eligible for relief under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) shall not be barred from applying for such relief by operation of section 241(a)(5) of the Immigration and Nationality Act (INA) (reinstatement). The NACARA Procedures Manual currently instructs Asylum Offices to not schedule any interviews for NACARA or ABC cases in which it appears that the individual may be subject to

1 (See, LIFE Amendments of 2000, Title XV of H.R. 5666, enacted in Consolidated Appropriations Act for FY 2001, Public Law 106-554 (Dec. 21, 2000). (Pages H12299-H12300.) The amendment provides that individuals eligible to apply for relief under NACARA 203 and who are otherwise eligible for relief "shall not be barred from applying for such relief by operation of section 241(a)(5) of the Immigration and Nationality Act," as in effect after the effective date of IIRIRA. A copy of the amendment is attached to this memo.
2 Section 241(a)(5) of the INA provides: "If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry."
reinstatement, pending further guidance on the issue. (See section V.D.2.) It further instructs that, in those cases where the reinstatement issue is not apparent until the time of the interview, asylum officers should suspend the interview and take no further action at this time.

In light of the recent legislative action that specifically provides that an individual who is otherwise eligible for relief shall not be barred from applying for NACARA 203 relief by operation of section 241(a)(5) of the INA, you may now process NACARA 203 applications of individuals who reentered the United States illegally after having received final orders of removal, exclusion, or deportation. Such NACARA applications should be adjudicated without regard to section 241(a)(5). If the applicant appears eligible for relief under NACARA 203, the application should be granted. If the applicant is not found eligible for relief under NACARA, the application should be referred to the immigration judge, unless the applicant has a pending ABC asylum application (see below).

Section V.D.2 of the NACARA Procedures Manual is revised as follows:

2. Individuals who depart the U.S. while under a final order and reenter the U.S. illegally (reinstatement of prior orders)

If an individual is removed or departs from the U.S. after the issuance of a final order, the order is generally considered to have been executed and is no longer outstanding. An exception may apply if the individual received advance parole while in temporary protected status. If an individual returns to the United States illegally after having been removed from the United States, or departed voluntarily while under an order of removal, deportation or exclusion, the individual may be subject to reinstatement of the prior order. 8 CFR § 241.8. Pursuant to section 241(a)(5) of the INA, once the previous order is reinstated, the individual is not eligible to apply for relief under the INA. However, the Legal Immigration Family Equity Act of 2000 (LIFE), as amended, specifically provides that an individual who is otherwise eligible for relief under NACARA shall not be barred from applying for such relief by operation of section 241(a)(5). This means that a NACARA applicant who was deported, excluded or removed from the United States, or otherwise left the United States while under a final order, and subsequently reentered the United States illegally, may still apply for and be granted relief under NACARA 203, if eligible.

a. ABC asylum application pending

The INS has not yet determined whether an ABC-registered class member's eligibility for benefits under the settlement agreement is affected by the applicability of the reinstatement provision. However, the Office of General Counsel has advised that an applicant otherwise subject to reinstatement who has

3 An individual with an outstanding final order who 1) is given authorization to travel abroad while in temporary protected status and 2) returns in accordance with this authorization may not have executed the final order by his or her departure from the U.S. See, Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MTINA), Sec. 304.
been granted NACARA relief is no longer subject to the reinstatement bar because he or she has become a lawful permanent resident (LPR). Because an LPR may apply for asylum, the asylum application may be adjudicated. Therefore, if NACARA relief has been granted, the asylum application of any ABC-eligible applicant who otherwise would have been subject to reinstatement may be adjudicated if the applicant wishes to proceed with the asylum application. If the applicant is not eligible for relief under NACARA, place both the NACARA application and the asylum application on hold. Further guidance on adjudicating asylum applications of ABC-eligible applicants who are not granted NACARA relief will be provided shortly.

b. Non-ABC asylum application pending

A non-ABC asylum application (for example, an application filed by an ABC class member on or before April 1, 1990, who did not register for benefits or by a Former Soviet Bloc national (FSB) applicant whose asylum application filed on or before December 31, 1991 is still pending), is affected by the reinstatement provisions. However, the Office of General Counsel has advised that an applicant otherwise subject to reinstatement who has been granted NACARA relief is no longer subject to the reinstatement bar because he or she has become a lawful permanent resident (LPR). Because an LPR may apply for asylum, the asylum application may be adjudicated. Therefore, if the applicant has been granted NACARA relief, the asylum application may be adjudicated if the applicant wishes to go forward with the application. If NACARA relief has not been granted the pending non-ABC asylum application should be administratively closed in RAPS under “C4” as being under the jurisdiction of the immigration judge. Notice should be given to the applicant with the referral letter informing him or her that the asylum application has been closed because the applicant appears to be subject to section 241(a)(5) of the INA. See Appendix BC.

If the applicant has a derivative asylum application pending and is not eligible for ABC benefits or NACARA relief, the dependent should be removed from the principal in RAPS, and the Asylum Office should give notice to both the principal asylum applicant and the dependent of the action taken. See Appendix BD. Note that, if the principal on the asylum application is granted NACARA relief and withdraws the asylum application, the dependent will no longer have a pending derivative asylum application and therefore no notice regarding possible application of section 241(a)(5) is necessary.

Please remove from the NACARA Procedures Manual APPENDIX AZ(3) - NACARA Dismissal Letter - Applicant Subject to Reinstatement, which should no longer be used.

If you have any questions regarding this guidance, please contact [ ]

4 Although technically the asylum application would not be under the jurisdiction of the IJ, we do not yet have a code in RAPS to indicate that the person is precluded from seeking asylum based on section 241(a)(5) of the INA.
APPENDIX BC – Notice of Dismissal or Referral of Asylum Application Based on Application of Section 241(a)(5) (For Non-ABC applicants only) (Rev.2/21/01)

ADDRESS

Dear [Name]:

This letter refers to your application for asylum, Form I-589. Our records indicate that on [date], you were [deported, excluded or removed] from the United States [or, you left the United States while under a final order of deportation, exclusion or removal]. You then reentered the United States illegally on [date].

Section 241(a)(5) of the Immigration and Nationality Act (INA) provides:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

Individuals who are eligible to apply for suspension of deportation or special rule cancellation of removal under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) are permitted to apply for and be granted such relief, if eligible, even if the above provision would otherwise apply. (See, LIFE Amendments of 2000, Title XV of H.R. 5666, enacted in Consolidated Appropriations Act for FY 2001, Public Law 106-554 (Dec.21, 2000). Individuals granted lawful permanent resident status under Section 203 of NACARA ("NACARA 203 relief") are no longer subject to reinstatement under 241(a)(5) of the INA. However, individuals who have not been granted NACARA 203 relief and who therefore are still subject to Section 241(a)(5) of the INA are not permitted to apply for asylum. Because you reentered the United States illegally after having been ordered deported, excluded or removed, and you have not been granted NACARA 203 relief, you are not permitted to apply for asylum in the United States.

The INS has determined that you are not eligible for an INS grant of relief under section 203 of NACARA (see attached letter). However, the INS is not reinstating your prior order of deportation, exclusion or removal, because you may still be eligible for a grant of relief under section 203 of NACARA by an Immigration Judge. Therefore your NACARA application is being referred to an Immigration Judge for a determination. Your asylum application has been dismissed because you are not eligible to apply for asylum as a result of your illegal reentry to the United States after receiving a final order. Please note that section 241(a)(5) does not bar an individual from applying for withholding of removal based on fear of persecution or torture. Therefore, you may also request withholding of removal in proceedings before the Immigration Judge.

Sincerely,

DIRECTOR NAME
Asylum Office Director

cc: Name of Representative
APPENDIX BD - LOSS OF DERIVATIVE STATUS Based on Application of Section 241(a)(5) (For Non-ABC applicants only) (Rev. 2/21/01)

A Number
Date:

ADDRESS

Dear M:

This letter refers to your inclusion of [name of dependent] as a dependent in your application for asylum, Form I-589. Our records indicate that on [date], [name of dependent] was [deported, excluded, or removed] from the United States [or, left the United States while under a final order of deportation, exclusion, or removal]. He/she then reentered the United States illegally on [date].

Section 241(a)(5) of the Immigration and Nationality Act (INA) provides:

If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.

Because your dependent reentered the United States illegally after having been ordered deported, excluded, or removed, he/she is not permitted to apply for asylum in the United States and therefore cannot be included in your asylum application. However, individuals who are eligible to apply for suspension of deportation or special rule cancellation of removal under section 203 of the Nicaraguan Adjustment and Central American Relief Act (NACARA) are still permitted to apply for and be granted such relief, if eligible, even if the above provision would otherwise apply. (See, LIFE Amendments of 2000, Title XV of H.R. 5666, enacted in Consolidated Appropriations Act for FY 2001, Public Law 106-554 (Dec.21, 2000). Although, the law permits the Immigration and Naturalization Service (INS) to consider your dependent’s application for relief under section 203 of NACARA, it prohibits the INS from including your dependent in your application for asylum.

The INS has determined that your dependent is not eligible for an INS grant of relief under section 203 of NACARA. However, the INS is not reinstating the prior order of deportation or removal against your dependent because he/she may still be eligible for a grant of relief under section 203 of NACARA by an Immigration Judge. Therefore your dependent’s NACARA application is being referred to an Immigration Judge for a determination. In addition, your dependent has been removed from your asylum application because it appears he/she is not eligible to apply for asylum or be included in an asylum application as a result of his/her illegal reentry to the United States after receiving a final order. Please note that section 241(a)(5) does not bar an individual from applying for withholding of removal based on fear of persecution or torture. Therefore, your dependent may also request withholding of removal in proceedings before the Immigration Judge.

Sincerely,

DIRECTOR NAME
Asylum Office Director

cc: [Name of Dependent]
[Name of Representative]
Date: April 11, 2007

1306 North Taylor Street
Lexington, NE 68850

Notice of Ineligibility for ABC Benefits

Dear [Name],

This letter is to notify you that U.S. Citizenship and Immigration Services (CIS) has found that you are not eligible for benefits of the settlement agreement in American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) (ABC). ABC benefits include protection from removal from the United States prior to an asylum interview and decision by an asylum officer, eligibility to apply for work authorization, and protection from detention in certain cases. To be a member of the ABC class, you must be either 1) a national of El Salvador who entered the United States on or before September 19, 1990; or 2) a national of Guatemala who entered the United States on or before October 1, 1990. An ABC class member may be eligible for benefits of the settlement agreement only if the class member meets both of the following requirements: 1) the class member properly registered for ABC benefits, either directly or, if Salvadoran, by applying for temporary protected status (TPS); and 2) the class member applied for asylum by the applicable filing deadline.

It has been determined that you are not eligible for ABC benefits for the following reason (s):

_____ You have not established that you are a member of the ABC class.

____X_____ There is no credible evidence that you registered for ABC benefits, either by filing directly or, if Salvadoran, by applying for TPS.

_____ Although you are a national of El Salvador, you did not apply for asylum on or before January 31, 1996 (with a grace period granted until February 16, 1996).

_____ Although you are a national of Guatemala, you did not apply for asylum on or before January 3, 1995.
Although you are not eligible for benefits of the ABC settlement agreement, you may be able to continue pursuing any asylum application you may have filed under current regulations and procedures. If you previously were in deportation or exclusion proceedings before an Immigration Judge, or had a case on appeal to the Board of Immigration Appeals or federal district court, those proceedings will be reopened or resumed.

If you were previously ordered deported or excluded from the United States and you have not filed and been granted a motion to reopen, that previous order may be enforced against you and you may be removed from the United States. However, you will be given 30 days from the date of this letter to challenge this ABC ineligibility determination in federal court. If you have evidence that you are eligible for ABC benefits, provide that evidence to this office within 30 days of the date of this letter, and this office may reconsider the determination that you are ineligible for ABC benefits. Please include your A-number on any future correspondence with this office.

Asylum Office Director
Waiver of 30-Day Period Allowed to Challenge this Finding in Federal Court

I understand that the INS has determined that I am ineligible for the benefits of the ABC settlement agreement for the reasons set out above. I further understand that I have 30 days in which to challenge this determination in federal court. I wish to waive this 30-day period in order to complete my removal.

(Signature of Alien)  

(Printed Name of Alien)  

04/11/07  

(Date and Time)

(Signature of Witness)  

(printed Name of Witness)  

04/11/07 @ 1510 hrs

(Date and Time)

Certificate of Service

I served this Notice of Ineligibility for ABC Benefits. I have determined that the person served with this document is the individual named on the Notice.

(Signature of Witness)  

04/11/07 @ 1510 hrs

(Date and Time)

I explained and/or served this Notice to the alien in ENGLISH / SPANISH (circle the appropriate language).

Fax or mail a copy of this Notice of Ineligibility for ABC Benefits, with the Certificate of Service completed, to:

CIS Asylum Office
401 S. LaSalle, 8th Floor
Chicago, IL 60605

Fax number: (312) 886-0204

Attention: ABC/NACARA coordinator

IMPORTANT REMINDER: A copy of this Notice, with certificate of service completed, must be placed into the alien’s A-file.
C/O
Port Isabel Service Processing Center
Los Fresnos, TX

Re: 6X6(C)

Date: 11/3/2011

Notice of Ineligibility for ABC Benefits (Rev. 8/2003)

Dear: 6X6(C)

This letter is to notify you that the Bureau of Citizenship and Immigration Services (CIS) has found that you are not eligible for benefits of the settlement agreement in American Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991) (ABC). ABC benefits include protection from removal from the United States prior to an asylum interview and decision by an asylum officer, eligibility to apply for work authorization, and protection from detention in certain cases. To be a member of the ABC class, you must be either 1) a national of El Salvador who entered the United States on or before September 19, 1990; or 2) a national of Guatemala who entered the United States on or before October 1, 1990. An ABC class member may be eligible for benefits of the settlement agreement only if the class member meets both of the following requirements: 1) the class member properly registered for ABC benefits, either directly or, if Salvadoran, by applying for temporary protected status (TPS); and 2) the class member applied for asylum by the applicable filing deadline.

It has been determined that you are not eligible for ABC benefits for the following reason (s):

_____ You have not established that you are a member of the ABC class.

_____ There is no credible evidence that you registered for ABC benefits, either by filing directly or, if Salvadoran, by applying for TPS.

_____ Although you are a national of El Salvador, you did not apply for asylum on or before January 31, 1996 (with a grace period granted until February 16, 1996).

_____ Although you are a national of Guatemala, you did not apply for asylum on or before January 3, 1995.
Although you are not eligible for benefits of the ABC settlement agreement, you may be able to continue pursuing any asylum application you may have filed under current regulations and procedures. If you previously were in deportation or exclusion proceedings before an Immigration Judge, or had a case on appeal to the Board of Immigration Appeals or federal district court, those proceedings will be reopened or resumed.

If you were previously ordered deported or excluded from the United States and you have not filed and been granted a motion to reopen, that previous order may be enforced against you and you may be removed from the United States.

You have the right to challenge this determination in federal court. The Department of Homeland Security (DHS) may not remove you from the United States for at least 30 days from the date of this letter, unless you request in writing to waive this right in order to return immediately to your country.

Please make reference to the file number(s) listed above in any future correspondence or contact with CIS.

[Signature]

Marie N. Hummert, 
Asylum Office Director
To be eligible for benefits under the ABC Settlement Agreement, the applicant must be a class member who registered (either directly or by applying for TPS) and filed a timely asylum application, and who has not been convicted of an aggravated felony or apprehended at the time of entry after December 19, 1990.

1. Is the applicant a member of the ABC class?
   - Yes, because
     - X: Salvadoran: first entered United States on or before September 19, 1990
     - No, not a class member

2. Did the applicant register for ABC benefits?
   - Yes, as evidenced by any of the following (check whichever applies):
     - For Salvadorans, any file with an A# between 94 million and 94,399,500, or documentation in a file or DHS database indicating the applicant has another A-file with such number (indicating registration for TPS - Note: for ABC benefits, Salvadorans had to register for TPS on or before October 31, 1991).
     - X: A copy of an ABC registration form; for Guatemalans, the registration form must be dated no later than December 31, 1991; for Salvadorans, no later than October 31, 1991.
     - A certified mail return receipt (or a copy) addressed to Post Office Box 96821, Washington, DC. To allow sufficient time for postal processing, the receipt for Guatemalans should be dated no later than January 31, 1992; for Salvadorans, no later than December 1, 1991.
     - A TPS registration form for a Salvadoran (I-821). (Note that applying alone suffices, regardless of whether the application was denied. Note: the applicant had to register for TPS on or before October 31, 1991 in order to be eligible for ABC benefits.)
     - Evidence that a Salvadoran has been issued an Employment Authorization Document on the basis of CFR 274a.12 (a)(11) or (12); or (c) (19) (thus indicating TPS registration if the EAD was issued on or before April 30, 1996; or a Form I-94 with the same notations, or "TPS" or "DHD." Such evidence may be found on the I-765 itself or on a copy of an EAD card. The reviewer must also check the Central Index System and/or CLAIMS to see if an EAD was issued under one of those codes.
     - Inclusion in one of the ABC registration databases, including the Notice 5 database.
     - A credible sworn statement from the applicant and/or the applicant's representative that the applicant has registered for ABC or applied for TPS
     - X: No, there is no evidence the applicant timely submitted an ABC registration form or timely applied for TPS.

No evidence applicant filed for TPS
All I-765's signed (c.f.b.)
QUALITY ASSURANCE REFERRAL SHEET

LOCAL OFFICE CONTROL

APPLICANT NAME: [signature]
NATIONALITY: El Salvador

ALL OF THE FOLLOWING CASES REQUIRE SUBMISSION TO, AND A RESPONSE FROM, HQ/Q&A PRIOR TO SERVICE OF ANY DECISION

☐ Gender cases (grant, referrals, and NOID) of domestic violence cases where gender forms the basis of a PSQ, and applicant is found credible, and no mandatory bars apply

☐ Contiguous Territory and Visa Waiver (grant of Mexican and Canadian asylum seekers and grant of applicants from countries in the Visa Waiver Program, see 8 CFR § 217.2(f))

☐ National Security-Related (grant of cases involving national security concerns where the concern was not resolved through vetting)

☐ National Security-Related - Possible 212(d) Exemption (e.g., Material Support) (grant, referrals, and NOID in which the applicant is eligible for asylum but for a terrorist ground of inadmissibility for which an exemption under 212(d)(3)(B)(i) is or may be available)

☐ Persecutor-related issues (grant of cases where evidence indicates that the applicant may have been involved in participating in persecution or human rights violations, and individual meets burden of proof to demonstrate that he/she should not be barred as a persecutor; referrals and NOID of cases involving an individual barred as a persecutor where it may be publicized nationally or who may pose a threat to others)

☐ Discretionary Denials/Referrals (referrals and NOID of applicant who meets the definition of a refugee and is otherwise eligible for asylum, but is denied or referred because of acts that are not a bar to asylum)

☐ Has been on or is likely to be Publicized (grant, referrals, and NOID of cases likely to have national exposure, not just local interest, such as: the individual has publicized that (s)he has filed or intends to file for asylum, cases involving notable individuals, including citizens of North Korea and dual nationals of North and South Korea, cases involving areas of law that would be perceived in the media as novel; NOTE: could include cases with resolved national security concerns)

☐ Diplomats (grant, referrals, and NOID of cases of entering diplomats to the US or UN, or other high level government or military officials and/or their family members; high ranking diplomats to other countries)

☐ Reasonable Fear of Persecution or Torture Cases (all negative reasonable fear of persecution or torture determinations; all reasonable fear determinations – both positive and negative – in which the alien is subject to a Final Administrative Removal Order; any case that a SAPSO, Deputy Director, or Director believes should be reviewed by TRAQ) (see relevant memos on the Reasonable Fear process)

☐ Credible Fear of Persecution or Torture Cases (all negative credible fear of persecution or torture determinations; high profile cases (e.g., high-ranking foreign government officials or their family members, or any person whose case has been or is likely to be publicized, including citizens of North Korea and dual nationals of North and South Korea); claims involving novel legal issues (as identified by the local office or meeting fast patterns provided by HQASM); and any case a SAPSO, Deputy Director, or Director believes should be reviewed by TRAQ (see relevant memos on the Credible Fear process)

☐ NACARA (grant of cases where evidence indicates that the applicant may have been involved in participating in persecution or human rights violations, and individual meets burden of proof to demonstrate that he/she should not be barred as a persecutor; referrals of cases involving an individual barred as a persecutor where the case may be publicized nationally or who may pose a threat to others; all decisions in which the applicant is otherwise eligible for relief but for a terrorist ground of inadmissibility for which an exemption under 212(d)(3)(B)(i) is or may be available; referral or approval involving an unusual legal issue)

☐ Cases with a prior denial by EOIR (grant, referrals, and NOID)

☐ Juvenile cases (grant, referrals, and NOID of all cases in which the principal applicant is less than 18 years old at the time of filing)

☐ Asylum Office Requests for HQASM/QA Review (any case for which the Asylum Office Director requests review)

Attach copy of 1-589 or 1-811, officer notes, Assessment or Adjudication Worksheet, Decision (if appropriate), ABC Checklist, Material Support Exemption Worksheet (if appropriate), BCAA (if any), any other supporting documents specifically relevant to applicant.

Asylum Officer

[signature]

Date 11/3/2011

Supervisory Asylum Officer

[signature]

Date 11/3/11

Forwarded to HQ by

[signature]

Date

Referral Action

☐ HQ CONCURS WITH RECOMMENDED DECISION.
☐ HQ RECOMMENDS MODIFICATION
☐ See comments. HQ AO: [signature]
☐ Response communicated to SAO by telephone/fax/e-mail on
☐ Resubmitted to HQASM/QA (date)

Revision Date 2/10/2011

40
SECTION I: INTERVIEW PREPARATION

1.1 10/24/2011
Date of interview [MM/YY/DD]

1.2 Los Fresnos, TX
Interview site

1.3 X Applicant received and signed Form M-488 and relevant pro bono list on 8/22/2011
Date signed [MM/DD/YY]

1.4 Representative name, address, telephone number and relationship to applicant:

None

1.5 Persons present at the interview (check which apply)

☐ Representative
☐ Other(s), list:

☐ No one other than applicant and asylum officer

1.6 Language used by applicant in interview:

Spanish

1.7 X Yes ☐ No
Interpreter Service, Interpreter ID Number.
Interpreter Has Forms

9:46am 11:08am
Time Started Time Ended

1.8 ☐ Yes ☐ No
Interpreter Service, Interpreter ID Number.
Interpreter Has Forms

Time Started Time Ended

1.9 ☐ Yes ☐ No
Interpreter Service, Interpreter ID Number.
Interpreter Has Forms

Time Started Time Ended

1.10 X Interpreter oath completed.

1.11 X Interpreter was not changed during the interview

1.12 ☐ Interpreter was changed during the interview for the following reason(s):

1.13 ☐ Applicant requested a female interpreter replace a male interpreter, or vice versa

1.14 ☐ Applicant found interpreter was not competent

1.15 ☐ Applicant found interpreter was not neutral

1.16 ☐ Officer found interpreter was not competent

1.17 ☐ Officer found interpreter was not neutral

1.18 ☐ Bad telephone connection

1.19 ☒ Asylum officer read the following paragraph to the applicant at the beginning of the interview:

The purpose of this interview is to determine whether you should be referred to an immigration judge to apply for withholding or deferral of removal. You will be eligible for such a referral if the INS finds that there is a reasonable possibility you would be persecuted or tortured in the country to which you have been ordered removed. I am going to ask you questions about why you fear returning to the country to which you have been ordered removed, or any other country. It is very important that you tell the truth during the interview and that you respond to all of my questions. This may be your only opportunity to give such information. Please feel comfortable telling me why you fear harm. U.S. law has strict rules to prevent the disclosure of what you tell me today about the reasons you fear harm. The information you tell me about the reasons for your fear will not be disclosed to your government, except in exceptional circumstances. The statements you make today may be used in deciding your claim and in any future immigration proceedings. It is important that we understand each other. If at any time I make a statement you do not understand, please stop me and tell me you do not understand so that I can explain it to you. If at any time you tell me something I do not understand, I will ask you to explain.
SECTION II: BIOGRAPHIC INFORMATION

2.1 Last Name/First Name [ALL CAPS]

2.2 First Name

2.3 Middle Name

2.4 7/4/1954
   Date of birth [MM/DD/YY]

2.5 Gender
   Male [X]   Female [ ]

2.6 Other names and dates of birth used

2.7 El Salvador
   Country of birth

2.8 El Salvador
   Country (countries) of citizenship (list all)

2.9 Prior address in last country in which applicant fears persecution or torture (List Address, City/Town, Province, State, Department and Country):

Usulutan, El Salvador

2.10 06/09/2011
    Date of last arrival [MM/DD/YY]

2.11 Hidalgo, TX
    Port of arrival

2.12 06/09/2011
    Date of detention [MM/DD/YY]

2.13 P.I.S.P.C. BUENA VISTA RD., RT. 3, BOX 341, LOS
     FRESNOS, TX 78566
     Place of detention

2.14 Grounds provided by Deportation Officer for removal:
   [X] Prior order reinstated pursuant to 241 (a)(5) of the INA
   [ ] Removal order pursuant to 238(b) of the INA (based on aggravated felony conviction)

2.15 Hispanic/Latino
   Applicant’s race or ethnicity

2.16 Evangelical
   Applicant’s religion

2.17 Spanish
   All languages spoken fluently by applicant

2.18 Does the applicant claim to have a medical condition (physical or mental), or has the officer observed any
   indication that a medical condition (physical or mental) exists?
   [X] Yes   [ ] No

2.19 If YES, Explain:
   Applicant stated he is taking ibuprofen for pain.

2.20 Does applicant indicate, or does officer believe medical condition is serious?
   [ ] Yes   [X] No

2.21 Does applicant request immediate attention for a medical condition, or does the officer believe applicant
   needs immediate attention for a medical condition?
   [ ] Yes   [X] No

2.22 Does applicant claim that medical condition relates to torture?
   [ ] Yes   [X] No
SECTION III:

REASONABLE FEAR FINDING

TYPED SWORN STATEMENT IN QUESTION AND ANSWER FORMAT AND ASSESSMENT OF REASONABLE FEAR MUST BE ATTACHED TO THIS WORKSHEET. If the asylum officer finds the applicant not credible, the sworn statement must reflect that the applicant was asked to explain any inconsistencies or lack of detail on material issues.

A person has a reasonable fear of persecution or torture if there is a reasonable possibility the person would be persecuted or subjected to torture.

A. Credibility Determination

3.1 ☑ The applicant’s testimony was sufficiently detailed, consistent and plausible in material respects and therefore is found credible.

3.2 ☐ The applicant’s testimony was found not credible in material respects. [Assessment must (1) identify specific discrepancies, inconsistencies, kind of detail applicant was unable to provide, etc. (2) Summarize applicant’s explanation for the inconsistencies, inability to provide detail, etc.; and (3) explain how the non-credible aspects of the testimony are material to the claim.]

3.3 ☐ Material aspects of the applicant’s testimony were found credible in part and not credible in part. [Assessment must identify which material aspects were credible and which were not credible. For part of testimony found not credible, (1) identify specific discrepancies, inconsistencies, kind of detail applicant was unable to provide, etc.; (2) Summarize applicant’s explanation for the inconsistencies, inability to provide detail, etc.; and (3) Explain how the non-credible aspects of testimony are material to the claim.]

B. Reasonable Fear Determination

3.4 ☐ Reasonable Fear of Persecution Established (I-863 Box 6)

[The applicant has established that there is a reasonable possibility of suffering harm constituting persecution in the country to which the applicant has been ordered removed, AND the applicant has established that there is a reasonable possibility the persecution she/he fears is on account of race, religion, nationality, membership in a particular social group, or political opinion.]

Is political opinion related to Coercive Family Planning? ☑ Yes ☐ No

3.5 ☐ Reasonable Fear of Torture Established (I-863 Box 6)

[The applicant has established that there is a reasonable possibility that 1) the applicant would be subject to severe pain or suffering in the country to which the applicant has been ordered removed; 2) the feared harm would be specifically intended to inflict severe physical or mental pain or suffering; 3) the pain or suffering would be inflicted by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity; 4) the feared harm would be inflicted while the applicant is in the custody or physical control of the offender; and 5) there is a reasonable possibility that the feared harm would not be in accordance with lawful sanctions.]

3.6 ☑ No Reasonable Fear of Persecution Established and No Reasonable Fear of Torture Established (I-863 Box 5, if applicant requests review) [Assessment must explain reasons for both findings.]

ASYLUM OFFICER / SUPERVISOR NAMES AND SIGNATURES

3.7 (Signature)

Asylum officer name and ID CODE (print)

3.8 (Signature)

Supervisory asylum officer name

3.9 ⓐ/ⓑ/ⓒ/ⓓ

Decision date

3.10 (Signature)

Supervisor's signature

3.11 ⓐ/ⓑ/ⓒ/ⓓ

Date supervising officer approved decision

Page 3 of 3

Form I-999 (3/22/99)
United States Department of Homeland Security
U.S. Citizenship and Immigration Services

Declaration of Sworn Statement

Reasonable Fear Interview

A File Number: 8368037314
Applicant: 8368037314
Nationality: El Salvador
Location of Applicant: PORT ISABEL DETENTION CENTER, LOS FRESNOS, TX
Was Attorney Present During Interview? Yes ☐ No ☐ N/A
Asylum Officer: 8368037314
Reviewing Officer: 8368037314
Location of Interview: Service Processing Center, Los Fresnos, TX
Asylum Office: Houston, TX

Interpreter service: Lionbridge
ID #: 28A89414
Language Used: Spanish
Start time: 8:48 am

My name is Officer 8368037314. I am an officer of the United States Citizenship & Immigration Services, authorized by law to administer oaths and take testimony in connection with enforcement of the Immigration and Nationality laws of the United States. I am here to take your sworn statement regarding your request for protection from removal to El Salvador.

The purpose of this interview is to determine whether you should be referred to an immigration judge to apply for withholding or deferral of removal. You will be eligible for such a referral if the Department of Homeland Security finds that there is a reasonable possibility you would be persecuted or tortured in the country to which you have been ordered removed. I am going to ask you questions about why you fear returning to the country to which you have been ordered removed, or any other country. It is very important that you tell the truth during the interview and that you respond to all of my questions. This may be your only opportunity to give such information. Please feel comfortable telling me why you fear harm. U.S. law has strict rules to prevent the disclosure of what you tell me today about the reasons you fear harm. The information you tell me about the reasons for your fear will not be disclosed to your government, except in exceptional circumstances. The statements you make today may be used in deciding your claim and in any future immigration proceedings. It is important that we understand each other. If at any time I make a statement you do not understand, please stop me and tell me you do not understand so that I can explain it to you. If at any time you tell me something I do not understand, I will ask you to explain.

Q. Do you have any questions about what was just read to you?
A. No.

Q. Are you comfortable with the translation so far?
A. Yes.

Q. Are you willing to answer my questions at this time?
A. Yes.
Q. Before we begin, I need to place you under oath. Will you please raise your right hand? Do you swear or affirm that all the statements you are about to make will be the truth, the whole truth, and nothing but the truth?
A. Yes.

Q. Do you have any health problems or illness?
A. No.

Q. Are you taking any medications?
A. Ibuprofen 600.

Q. What is that for?
A. Body pain, sometimes when I am in pain, the doctor tells me to take one when needed.

Q. Did you receive the information about the reasonable fear interview and the list of free legal services? Did you receive it on 8/22/2011?
A. Yes, I received it.

Q. Have you consulted with an attorney or anyone else since you were brought into custody?
A. No I don’t have one.

Q. And you are comfortable to continue without an attorney?
A. Yes.

Q. It looks like we gave you more time to find an attorney back in August. A. Yes, but I don’t have the financial resources to get one.

Q. That’s no problem.

Q. What is your complete and correct name?

Q. Have you previously used any other names or aliases?
A. No.

Q. What is your date and place of birth?
A. Usulutan, El Salvador

Q. Have you used any other Dates of Birth?
A. No.

Q. What languages do you speak fluently?
A. Spanish, and I speak a little English.

Q. What would you say is your race or ethnic group?
A. Hispanic.
Q. What is your citizenship?
A. El Salvador

Q. Are you a citizen of any other country?
A. No

Q. Have you ever lived in any other country?
A. No

Q. Did you ever apply for asylum in the United States before?
A. Yes.

Q. What happened?
A. I went to court the 3 times, and I didn’t pay attention to proofs (pruebas), and I lost the asylum claim.

Q. Have you applied for asylum in any other country?
A. No

Q. Are you single, married, separated, divorced or widowed?
A. I am separated.

Q. Where is your wife?
(b)(6)

Q. Where is she right now?
(b)(6)

Q. How many years of education did you complete?
A. 4 years.

Q. Have you applied for any other immigration benefit?
A. Yes, I applied for TPS, a seasonal protection, but I lost it, too.

Q. How did you lose TPS?
(b)(6)

Q. What work did you do in the US?
A. (b)(6)

Q. Did you have any type of business in El Salvador?
(b)(6)

Q. When did you have that business?
A. I had it 3 for three years

Q. Did you close it?
A. Yes, I closed it.

Q. When did you close it?
A. I closed it before coming here, I closed it – I left in the month of May 2011.
ENTRY INFORMATION

Q. When was the very first time you entered the US?

Q. After that when did you leave the US?
A. I was arrested by immigration in 2005, and I abandoned the US.

Q. From 1985 to 2005 did you ever leave the US?
A. Yes, I left under TPS permission.

Q. When was that?

Q. Why did you return to El Salvador?
A. I asked for permission because my mother was sick.

Q. When did you return to the US after that?
A. 6 weeks after having gotten the permission.

Q. Did you have any other trips outside of the US?
A. No, that's the only one.

Q. I have that you were removed December 6, 2006?
A. Correct.

Q. When did you next enter the US?
A. June 2011.

Q. And you left El Salvador in May 2011?
A. Yes, I left.

Q. Did you ever apply for a program called ABC?
A. No, I haven't.

Q. When did you first apply for TPS?
A. My attorney filled out the form, and I went to immigration.

Q. Do you recall the year?

Q. I see in your file...I will look at your file again...
[Note: will review the file again, but I-765's from that time period refer to C08 classification, based on prior asylum application. No indication they are related to an I-821.]

REASONS FOR COMING TO US & SUBSTANCE OF THE CLAIM

Q. Why are you afraid to return to El Salvador?

[Blank response]

[Blank response]
Q. Who advised the police?
A. The wife of him.

Q. The wife of the person killed?
A. Yes.

Q. Who was the person killed?
A. About 26.

Q. What did he do for a living?
A. I don't know.

Q. When was this?

Q. It was the end of 2009?
A. End of 2009.

Q. So, his wife told the police and they sent paramedics?
A. Yes.

Q. How was he killed?
A. He was shot.

Q. Did the police investigate?
A. Until today, that I know they didn't investigate. They said they did, but so far no investigation.
Q. Were there any witnesses?
A. Well, it was a market, and there were many people, but the key person is his wife, since she
was with him.

Q. Did she know or see who did it?
A. She received threats as well, but the man who shot her husband, they say she doesn't
remember his face because it terrorized her to hear the shots.

Q. So, she was not able to give the police a description of who it was?
A. Yes, she gave a description, but to be sure in her declaration, she didn't know him/have
knowledge. The declaration she gave as to how he was killed.

Q. Ok, so he was killed almost 2 years ago, correct?
A. Yes.

Q. How were you involved in this?
A. The reason is because all the family congregated with me in church. And over time they started
asking me questions by phone, and they put me a certain type of rent, $50 per week, and then
they threatened me with death.

Q. When did you start getting phone calls?
A. It was about 6 months before coming here.

Q. Were you still meeting with the family at that time?
A. Yes.

Q. What questions were they asking you by phone?
A. The first was they started to ask me for information about the family, but I didn't want to give
any type of information about them. They asked where I lived, what I did. I denied all this. And
then they started asking me for rent. So, I became afraid, and I didn't think it would be a death
threat. And the reason was I didn't give them information about the family.

Q. They asked you where you lived and what you did?
A. Yes.

Q. So, it seems like they wanted information about you?
A. In some case, yes, but they were more interested in information about the family.

Q. What kind of information?
A. Just their address, and I refused to give it to them.

Q. Why do you think they wanted the address?
A. I don't know why they wanted it.

Q. Do you think they might have information on who committed the crime?
A. Well, I think probably, they can have that information if it was them.

Q. Why do you think they wanted to know where you lived?
A. His wife had also gotten threats.
Q. Have you personally had problems with the police?
A. No, no.

Q. Why do you think there is no guarantee with the authorities?
A. I saw many cases in which people go and report the crimes, and later organized crime teams about it and those people are assassinated.

Q. So, you think the authorities are corrupt?
A. Yes, I think so.

Q. Is it possible organized criminals have lookouts who watch to see who goes in and out of police stations?
A. Yes, I think so.

Q. Have you ever been harmed in the past in El Salvador that we have not talked about?
A. No, no I don't have anything. Just this case because most of my life I have spent in the US.

Q. Have you ever served in the military?
A. No, but I have brothers (who have.)

Q. Did you ever serve in the guerrilla?
A. No, I was in the union, but I was apolitical.

NEXUS

Do you believe that anyone in will harm you because of:
your race?
A. My ethnic group? No.
your religion?
A. Yes.
Q. So, as far as you know, they did not have any problem with the Christianity you were preaching?
A. No, no, no.

Q. Your political opinion?
A. Personally, yes.

Q. Can you explain why you explain that?
A. Yes, that's my fear.

Q. I am asking if you fear harm for your political views. Can you explain how this is political?
A. For political issues, I am not involved in politics.

Q. Do you fear someone would harm you for your political opinion?
A. For political opinion? No, no, no, I don't think so.

your belonging to a particular social group?
A. Yes.

Q. or because of your nationality?
A. No.

CONVENTION AGAINST TORTURE:

Q. Do you understand the meaning of the word torture? (severe physical or severe mental anguish)
A. Yes.

Q. Are you afraid to be tortured by the police or the government?
A. No, no, no.
BARB

Q. Do you think that you safely live in another part of El Salvador? For example, if you moved to the capital, is San Salvador?
A. Look, they have everything controlled at a national level.

Q. Have you ever committed a crime in the United States, or in any other country?
A. No.

Q. Have you ever been arrested at any time for anything in the US?
A. Only tickets.

Q. What kind?
A. Traffic.

Q. Have you ever been a member of or assisted in any way a group that uses violence to achieve its goals?
A. No, ma'am.

Q. Have you previously persecuted or harmed another human being?
A. No.

Q. Have you ever caused harm or suffering to any person because of his or her race, religion, nationality, membership in a particular social group or political opinion?
A. No

CONCLUSION

Q. Did you have any problems understanding the interpreter during this interview?
A. No, I understood her well.

Q. Did you understand each of the questions that I asked you today?
A. Yes.

Q. Is there any other information regarding your request for withholding of removal that we did not discuss?
A. No, this information is complete and correct. I don't have more because my time in El Salvador has been short.

Q. Do you feel that we have discussed everything that happened to you in the past in El Salvador?
A. Yes.

Q. Do you feel that we have discussed everything that could happen to you if you are returned to El Salvador in the future?
A. Yes.

INTERVIEW ENDED: 10/24/11 at 11:08am Hours.
I have read (or have had read to me) the foregoing statement consisting of -10- pages. I state that
the answers made therein by me are true and correct to the best of my knowledge and belief and
that this statement is a full, true, and correct record of my interrogation on the date indicated by
the above-named officer of the Immigration and Naturalization Service. I have initialed each page
of this statement and any correction(s).

Date: 10/24/11

Subscribed and Sworn before me at Los Fresnos, TX on 10/24/11.

Date: 10/24/11

(Signature of Witness)

Date: 10/24/11
REASONABLE FEAR DETERMINATION

NAME: [Redacted]  ASYLUM OFFICER: [Redacted]
COUNTRY: El Salvador  REVIEWING SAO: [Redacted]
INTERVIEW DATE: 10/24/2011  LOCATION: Harlingen, Texas

Background

Testimony

HQASY (rev. 3/23/99)
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Withheld pursuant to exemption
(b)(8),(b)(7)(C)

of the Freedom of Information and Privacy Act
LIST OF FREE LEGAL SERVICE PROVIDERS

The following organizations and attorneys provide free legal services and/or referrals for such services to indigent individuals in immigration removal proceedings, pursuant to 8 CFR § 1003.61. Some of these organizations may also charge a nominal fee for legal services to certain low income individuals.

<table>
<thead>
<tr>
<th>Harlingen, Texas</th>
<th>South Texas Immigration Council</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Pro Bono - South Texas Pro Bono Asylum Representation</strong></td>
<td></td>
</tr>
<tr>
<td>301 East Madison</td>
<td></td>
</tr>
<tr>
<td>Harlingen, TX 78550</td>
<td></td>
</tr>
<tr>
<td>(956) 25-9231</td>
<td></td>
</tr>
<tr>
<td>1-888-425-9231 if calling from the PISPC Detention Center</td>
<td></td>
</tr>
<tr>
<td>- Will represent aliens in Asylum hearings</td>
<td></td>
</tr>
</tbody>
</table>

| **Casa De Proyecto Libertad** |
| 113 N. 1st St. |
| Harlingen, TX 78550 |
| (956) 425-9852 |
| 1-800-477-9852 if calling from the PISPC Detention Center |
| - Will represent aliens in Asylum hearings |

| **South Texas Immigration Council** |
| 4 E. Lavee St. |
| Brownsville, TX 78520 |
| (956) 542-1991 |
| - Will represent aliens in Asylum hearings |

| **South Texas Immigration Council, Inc.** |
| 301 Galveston St. |
| McAllen, TX 78501 |
| (956) 682-8397 |
| (956) 682-8133, Fax |
| - Will represent aliens in Asylum hearings |
| - May charge a nominal fee |

| **Texas Rio Grande Legal Aid, Inc.** |
| 316 S. Colnac Blvd. |
| Edinburg, TX 78539 |
| Local Phone: (956) 393-6200 |
| Toll Free Intake: 1-866-988-9996 |
| - Will represent Legal Permanent Residents, United States citizens, and VAWA, U-visa or T-visa applicants |

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08/22/2011

Signature of Applicant
Record of Negative Reasonable Fear Finding and Request For Review by Immigration Judge

Alien File Number (b)(6),(b)(7)(C) 

1. To be explained to the alien by the asylum officer:
The INS has determined that you do not have a reasonable fear of persecution or torture pursuant to 8 CFR 208.30 for the following reason(s):

A. You have not established a reasonable fear of persecution in your country of nationality or country of last residence because:

☐ You have not indicated that you were harmed in the past and you have not expressed fear of future harm.

☒ There is no reasonable possibility that the harm you experienced and/or the harm you fear is on account of one or more of the five grounds for asylum (race, religion, nationality, political opinion, or membership in a particular social group).

☐ You have not indicated that you were harmed in the past, and there is no reasonable possibility that the harm you fear in the future constitutes persecution.

☐ There is no reasonable possibility that you could suffer the harm you fear.

AND

You have not established a reasonable fear of torture in a country to which you may be removed because you have not established that there is a reasonable possibility that:

☐ You would suffer severe physical or mental pain or suffering.

☒ The harm you fear would be specifically intended to inflict severe physical or mental pain or suffering.

☒ The harm you fear would be inflicted by or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.

☐ The harm you fear would be inflicted while you are in the custody or physical control of the offender; and/or

☐ The harm you fear would not be in accordance with lawful sanctions.

B. Your claim has been found not credible because your testimony was inconsistent or lacked detail on material issues. When you were given an opportunity to explain, you were unable to give a reasonable explanation about the following issues:

☐ Your testimony was internally inconsistent on material issues.

☐ Your testimony was not consistent with documentation on material issues.

☐ Your testimony was not consistent with country conditions on material issues.

☐ Your testimony lacked reasonably sufficient detail on material issues.

You may request that an Immigration Judge review this decision.

If you request that an Immigration Judge review this decision, you will remain in detention until an Immigration Judge reviews your case. If you do not request that an Immigration Judge review the decision, you may be removed from the United States immediately.

2. To be completed by the alien:

☐ Yes, I request Immigration Judge review of the decision that I do not have a reasonable fear of persecution or torture.

☐ No, I do not request Immigration Judge review of the decision that I do not have a reasonable fear of persecution or torture.

Applicant's Last Name/ Family Name (Print) Applicant's First Name (Print) Applicant's Signature

☐ XX (b)(7)(C)

Asylum Officer's Last Name (Print) Asylum Officer's First Name (Print) Date

The contents of this form were read and explained to the applicant in the Spanish language.

Interpreter used:

By telephone (list interpreter service / ID number used)

In person (I, N/A certify that I am fluent in both the Spanish and English languages. I interpreted the above information completely and accurately to the alien.)

Interpreter's Signature Date

Page 1 of 1

Form I-408 (3/22/99)
Notice of Referral to Immigration Judge

To immigration judge:

☐ 1. The above-named alien has been found inadmissible to the United States and ordered removed pursuant to section 235(b)(1) of the Immigration and Nationality Act (Act). A copy of the removal order is attached. The alien has requested asylum and/or protection under the Convention against Torture and the matter has been reviewed by an asylum officer who has concluded the alien does not have a credible fear of persecution or torture. The alien has requested a review of that determination in accordance with section 235(b)(1)(E)(ii)(III) of the Act and 8 CFR § 208.30(g).

☐ 2. The above-named alien arrived in the United States as a stowaway and has been ordered removed pursuant to section 235(a)(2) of the Act. The alien has requested asylum and/or withholding of removal under the Convention against Torture and the matter has been reviewed by an asylum officer who has concluded the alien does not have a credible fear of persecution or torture. The alien has requested a review of that determination in accordance with section 235(b)(1)(E)(ii)(III) of the Act.

☐ 3. The above-named alien arrived in the United States in the manner described below and has requested asylum and/or withholding of removal under the Convention against Torture. The matter is referred for a determination in accordance with 8 CFR 208.2(e). Arrival category (check one):

☐ Crewmember/applicant  ☐ Crewmember/refused  ☐ Crewmember/landed
☐ Crewmember/violator  ☐ VWP/applicant  ☐ VWP/violator
☐ 235(c) order  ☐ 8-visa nonimmigrant  ☐ Stowaway: credible fear determination attached

☐ 4. The above-named alien has been ordered removed by an immigration officer pursuant to section 235(b)(1) of the Act. A copy of the removal order is attached. In accordance with section 235(b)(1)(C) of the Act, the matter is referred for review of that order. The above-named alien claims to be (check one):

☐ a United States citizen  ☐ a lawful permanent resident alien
☐ an alien granted refugee status under section 207 of the Act  ☐ an alien granted asylum under section 208 of the Act.

☐ 5. The above-named alien has been ordered removed pursuant to section 238(b) of the Act, or the Immigration and Naturalization Service (INS) has reinstated a prior exclusion, deportation, or removal order of the above-named alien pursuant to section 241(a)(5) of the Act. A copy of the removal order and, if applicable, the notice of reinstatement, are attached. The alien has expressed fear of persecution or torture and the claim has been reviewed by an asylum officer who has concluded the alien does not have a reasonable fear of persecution or torture. The alien has requested a review of that determination in accordance with 8 CFR §§ 208.31(f) and (g).

☐ 6. The above-named alien has been ordered removed pursuant to section 238(b) of the Act, or the INS has reinstated a prior exclusion, deportation, or removal order of the above-named alien pursuant to section 241(a)(5) of the Act. A copy of the removal order and, if applicable, the notice of reinstatement, are attached. The alien has expressed fear of persecution or torture and the claim has been reviewed by an asylum officer who has concluded the alien has a reasonable fear of persecution or torture. The matter is referred for a determination in accordance with 8 CFR § 208.31(e).

☐ 7. The Commissioner of the INS has determined that the release from custody of the above-named alien who is under a final order of removal would pose a special danger to the public according to the standards set in 8 CFR § 241.14(f)(1). The INS has therefore invoked procedures to continue the alien's detention even though there is no significant likelihood that the alien will be removed from the United States in the reasonably foreseeable future. The matter is referred to the immigration judge for a review of this determination in accordance with 8 CFR § 241.14 (g).
NOTICE TO APPLICANT

You are ordered to report for a hearing before an immigration judge for the reasons stated above. Your hearing is scheduled on

(Date) (Time)

27991 BUENA VISTA BLVD, LOS FRESNOS, TX 78866
(complete office address)

☐ You may be represented in this proceeding, at no expense to the government, by an attorney or other individual authorized and qualified to represent persons before an Immigration Court. If you wish to be so represented, your attorney or representative should appear with you at this hearing. In the event of your release from custody, you must immediately report any change of your address to the Immigration Court on Form EOIR-33, which is provided with this notice. If you fail to appear for a scheduled hearing, a decision may be rendered in your absence.

 ☐ You may consult with a person or persons of your own choosing prior to your appearance in Immigration Court. Such consultation is at no expense to the government and may not unreasonably delay the process.

☐ Attached is a list of recognized organizations and attorneys that provide free legal service.

(Signature and title of immigration officer)

CERTIFICATE OF SERVICE

☐ The contents of this notice were read and explained to the applicant in the ___Spanish____ language.

☐ The original of this notice was delivered to the above-named applicant by the undersigned on _________ and the alien has been advised of communication privileges pursuant to 8 CFR 236.1(e). Delivery was made:

☐ In person ☐ by certified mail, return receipt requested ☐ by regular mail

Attachments to copy presented to immigration judge:

☐ Passport ☐ Form I-860
☐ Visa ☐ Form I-869
☐ Form I-94 ☐ Form I-899
☐ Forensic document analysis ☐ Asylum officer’s reasonable fear determination worksheet (I-900)
☐ Fingerprint and photographs ☐ Asylum officer’s credible fear determination worksheet (I-870)
☐ EOIR-33

☐ FOR 8 CFR 241.14(d) CASES ONLY: Written statement including summary of the basis for the Commissioner’s determination to continue the alien in detention, and description of the evidence relied on in finding the alien specially dangerous (with supporting documents attached).


☐ Other (specify): ______________________

(Signature and title of immigration officer)
Lesson Plan Overview

Course
Refugee, Asylum, and International Operations Directorate Officer Training
Asylum Division Officer Training Course

Lesson
Credible Fear

Rev. Date
March 7, 2013

Lesson Description
The purpose of this lesson is to explain how to determine whether an alien subject to expedited removal or an arriving stowaway has a credible fear of persecution or torture using the credible-fee standards.

Terminal Performance Objective
The Asylum Officer will be able to correctly make a credible fear determination consistent with the policies, procedures, and regulations that govern whether the applicant has established a credible fear of persecution or a credible fear of torture.

Enabling Performance Objectives

1. Identify which persons are subject to expedited removal. (ACR7)(OK4)(ACR2)(ACR11)(APT2)

2. Examine the function of credible fear screening. (ACR7)(OK1)(OK2)(OK3)

3. Define the standard of proof required to establish a credible fear of persecution. (ACR7).

4. Identify the elements of "torture" as defined in the Convention Against Torture and the regulations that are applicable to a credible fear of torture determination (ACR7).

5. Describe the types of harm that constitute "torture" as defined in the Convention Against Torture and the regulations. (ACR7)

6. Define the standard of proof required to establish a credible fear of torture. (ACR7)

7. Identify the applicability of bars to asylum and withholding of removal in the credible fear context. (ACR3)(ACR7)

Instructional Methods
Lecture, practical exercises

Student Materials/References
Credible Fear Forms: **Form I-860**: Notice and Order of Expedited Removal; **Form I-867-A&B**: Record of Sworn Statement; **Form I-869**: Record of Negative Credible Fear Finding and Request for Review by Immigration Judge; **Form I-870**: Record of Determination/Credible Fear Worksheet; **Form M-444**: Information about Credible Fear Interview

**Method of Evaluation**

Written test

**Background Reading**


8. Joseph E. Langlois, Asylum Division, Office of International Affairs. *Mentally Incompetent Aliens in the Credible Fear Process*

CRITICAL TASKS

Critical Tasks

- Knowledge of U.S. case law that impacts RAIO (3)
- Knowledge of the Asylum Division history. (3)
- Knowledge of the Asylum Division mission, values, and goals. (3)
- Knowledge of how the Asylum Division contributes to the mission and goals of RAIO, USCIS, and DHS. (3)
- Knowledge of the Asylum Division jurisdictional authority. (4)
- Knowledge of the applications eligible for special group processing (e.g., ABC, NACARA, Mendez) (4)
- Knowledge of relevant policies, procedures, and guidelines, establishing applicant eligibility for a credible fear of persecution or credible fear of torture determination. (4)
- Skill in identifying elements of claim. (4)
- Knowledge of inadmissibility grounds relevant to the expedited removal process and of mandatory bars to asylum and withholding of removal. (4)
- Knowledge of the appropriate points of contact to gain access to a claimant who is in custody (e.g., attorney, detention facility personnel). (3)
- Skill in organizing case and research materials. (4)
- Skill in applying legal, policy, and procedural guidance (e.g., statutes, case law) to evidence and the facts of a case. (5)
- Skill in analyzing complex issues to identify appropriate responses or decisions. (5)
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Presentation

US CITIZENSHIP AND IMMIGRATION SERVICES – RAIO
MARCH 7, 2013

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ASYLUM DIVISION OFFICER TRAINING COURSE
CREDIBLE FEAR
I. INTRODUCTION

The purpose of this lesson is to explain how to determine whether an alien seeking admission to the U.S., who is subject to expedited removal or is an arriving stowaway, has a credible fear of persecution or torture using the credible fear standard defined in the Immigration and Nationality Act (INA), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), and implementing regulations.

II. BACKGROUND

The expedited removal provisions of the INA, were added by section 302 of IIRIRA, and became effective April 1, 1997. Certain aliens seeking admission to the United States are subject to these provisions.

Under INA section 235 and its implementing regulations, arriving stowaways, certain arriving aliens at ports of entry who are inadmissible under INA section 212(a)(6)(C) (because they have presented fraudulent documents or made a false claim to U.S. citizenship or other material misrepresentations to gain admission or other immigration benefits) or 212(a)(7) (because they lack proper documents to gain admission), and certain designated aliens who have not been admitted or paroled into the U.S., are immediately removable from the United States by the Department of Homeland Security, unless they indicate an intention to apply for asylum or indicate a fear of return to their home country.

Those aliens subject to expedited removal who indicate an intention to apply for asylum or indicate a fear of return to their home country are referred to asylum officers to determine whether they have a credible fear of persecution or torture. After interviewing the applicant, an asylum officer will determine whether such an alien has a credible fear of persecution. Pursuant to regulation implementing the Convention Against Torture and the Foreign Affairs Reform and Restructuring Act of 1998, if an alien does not establish a credible fear of persecution, the asylum officer will determine whether the alien has a credible fear of torture.

Note: Aliens who are present in the U.S., and who have not been admitted, are treated as applicants for admission. INA § 235(a)(1).

A. Aliens Subject to Expedited Removal

The following categories of aliens may be subject to expedited removal:

1. Arriving aliens coming or attempting to come into the United States at a port of entry or an alien seeking transit through the United States at a port of entry.  

   Aliens attempting to enter the United States at a land border port of entry with Canada must first establish eligibility for an exception to the Safe Third Country Agreement, through a Threshold Screening interview, in order to receive a credible fear interview.  

   § 243.3(b)(1)(i); see § 1.1(g) for the definition of an “arriving alien.”

   § 208.30(e)(6). See the lesson, Safe Third Country Threshold Screening.

2. Aliens who are interdicted in international or United States waters and brought to the United States by any means, whether or not at a port of entry.  

   This category does not include aliens interdicted at sea who are never brought to the United States.  

   § 1.1(q); see also 67 Fed. Reg. 68924 (Nov. 13, 2002).

3. Aliens who have been paroled under INA section 212(d)(5) on or after April 1, 1997, are subject to expedited removal upon termination of their parole.  

   This provision encompasses those aliens paroled for urgent humanitarian or significant public benefit reasons, including those paroled in between May 1, 2000 and October 29, 2000 pursuant to the Visa Waiver Pilot Program Contingency Plan.  

   This category does not include those who were given advance parole as described in Subsection B (6) below.

4. Aliens who have arrived in the United States by sea (either by boat or by other means) who have not been admitted or paroled, and who have not been present in the U.S. for two years prior to the inadmissibility determination.  


5. Aliens who have been apprehended within 100 air miles of any U.S. international land border, who have not been admitted or paroled, and who have not established to the satisfaction of an immigration officer (typically a Border Patrol Agent) that they have been physically present in the U.S. continuously for the 14-day period immediately prior to the date of encounter.  

B. Aliens Seeking Admission Who are Exempt from Expedited Removal

The following categories of aliens are exempt from expedited removal:

1. Stowaways

Stowaways are not eligible to apply for admission to the U.S., and therefore they are not subject to the expedited removal program under INA section 235(b)(1)(A)(i). They are also not eligible for a full immigration hearing under INA section 240. However, if a stowaway expresses a fear, an asylum officer will conduct a credible fear interview and refer the case to an immigration judge for an asylum and/or Convention Against Torture hearing if the stowaway meets the credible-fee standard.

INA § 235(a)(2).

2. Cubans citizens or nationals


3. Persons granted asylum status under INA Section 208

8 CFR § 235.3(b)(5)(iii).

4. Persons admitted to the United States as refugees under INA Section 207

8 CFR § 235.3(b)(5)(iii).

5. Persons admitted to the United States as lawful permanent residents

8 CFR § 235.3(b)(5)(ii).

6. Persons paroled into the United States prior to April 1, 1997

7. Persons paroled into the United States pursuant to a grant of advance parole that the alien applied for and obtained in the United States prior to the alien's departure from and
8. Persons denied admission on charges other than, or in addition to INA Section 212(a)(6)(C), or 212(a)(7).

9. Persons applying for admission under INA Section 217, Visa Waiver Permanent Program (VWPP) (effective October 30, 2000) and those who applied for admission under the Visa Waiver Pilot Program (also known as VWPP, which expired April 30, 1999).

This exemption includes nationals of non-VWPP countries who attempt entry by posing as nationals of VWPP countries.

However, individuals seeking admission under the expired Visa Waiver Pilot Program under the Contingency Plan from May 1, 2000 through October 29, 2000 were paroled into the United States and are subject to expedited removal.

10. Asylum seekers attempting to enter the United States at a land border port of entry with Canada must first establish eligibility for an exception to the Safe Third Country Agreement, through a Threshold Screening interview, in order to receive a credible-fear interview.

C. Historical Background

1. In 1991, the Immigration and Naturalization Service developed the credible-fear of persecution standard to screen for possible refugees among the large number of Haitian migrants who were interdicted at sea during the mass exodus following a coup d'etat in Haiti.

2. Prior to implementation of the expedited removal provisions of IIRIRA, credible-fear interviews were first conducted by INS (Immigration and Naturalization Service) trial attorneys and later by asylum officers, to assist the district director in making parole determinations for detained aliens.

3. In 1996, the INA was amended to allow for the expedited removal of certain inadmissible aliens, who would not be entitled to an immigration hearing or further review unless they were able to establish a credible fear of persecution. At the outset, expedited removal was mandatory for "arriving aliens," and the Attorney General was given the discretion to designate applicability to certain other aliens.


208 § 30(c)(6).

8 C.F.R § 208.30(c)(6).

The credible fear standard as it is applied to interdicted migrants outside the United States is beyond the scope of this lesson plan.
who have not been admitted or paroled and who have not established to the satisfaction of an immigration officer, continuous physical presence in the United States for the two-year period immediately following the inadmissibility determination. Initially, expedited removal was only applied to "arriving aliens."

4. The credible fear screening process was expanded to include the credible fear of torture standard with the promulgation of the Regulations Concerning the Convention against Torture (CAT) that were published in the Federal Register on February 19, 1999, and became effective March 22, 1999.

5. Designation of other groups of aliens for expedited removal
   a. In November 2002, the Department of Justice published a notice in the Federal Register to expand the application of the expedited removal provisions of the INA to certain aliens who arrived in the United States by sea, who have not been admitted or paroled and who have not been present in the United States for two years prior to the inadmissibility determination.
   b. On August 14, 2004, the DHS further expanded the application of expedited removal to aliens determined to be inadmissible under sections 212(a)(6)(C) or (7) of the INA who are present in the U.S. without having been admitted or paroled, who are apprehended within 100 air miles of the land border, and who have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the fourteen-day (14-day) period immediately prior to the apprehension.

6. The expedited removal provisions of the INA require that all aliens subject to expedited removal be detained through the credible fear determination until removal, unless found to have a credible fear of persecution, or a credible fear of torture. After a positive credible fear determination, the ICE Special Agent-in-Charge (SAC) may exercise discretion to parole the alien out of detention. Therefore, the credible fear interview process also provides a mechanism for DHS to gather information that may be used by the ICE SAC to make parole determinations.

III. FUNCTION OF CREDIBLE FEAR SCREENING
In applying the credible fear standard, it is critical to understand the function for which the standard was developed. According to a member of the Conference Committee that crafted the standard, “[t]he standard...is intended to be a low screening standard for admission into the usual full asylum process.” Similarly, the credible fear of torture standard was designed to “ensure that no alien is removed from the United States under circumstances that would violate Article 3 [of the Convention Against Torture] without unduly disrupting the issuance and execution of removal orders consistent with Article 3.”

The credible fear process serves a screening function and its purpose is not to foreclose on possible viable claims, but to dispose of claims where there is no significant possibility of success. To this end, the asylum pre-screening officer (APSO) has an affirmative duty to elicit all information relevant to the credible fear determination. Where the law is unsettled, as when there are conflicting decisions or no specific case that is on-point, a claim generally will meet the credible fear standard.

It may be helpful to think of the standard as a net that will capture all potential refugees and individuals who would be subject to torture if returned to their country of feared persecution or harm. Such a protective net may also capture non-refugees and individuals who may not be subject to torture. When regulations were issued to implement the credible fear screening process, the Department of Justice described the nature of the credible fear standard as a screening mechanism that sets: “a low threshold of proof of potential entitlement to asylum; many aliens who have passed the credible fear standard will not ultimately be granted asylum.” The purpose of the credible fear screening is to ensure access to a full hearing for all individuals who qualify under the standard.

In cases where circuit courts have issued conflicting decisions, the credible fear determination must reflect the legal interpretation most favorable to the alien.

IV. DEFINITION OF CREDIBLE FEAR OF PERSECUTION AND CREDIBLE FEAR OF TORTURE

A. Definition of Credible Fear of Persecution

According to statute, the term credible fear of persecution means that “there is a significant possibility, taking into account the credibility of the statements made by the alien in support of his or her claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum under Section 208” of the INA.
B. Definition of Credible Fear of Torture

Regulations provide that the applicant will be found to have a credible fear of torture if the applicant establishes that there is a significant possibility that he or she is eligible for withholding of removal or deferral of removal under the Convention Against Torture.

V. STANDARD OF PROOF FOR CREDIBLE FEAR DETERMINATIONS

A. Standards of Proof Generally

The party who bears the burden of proof must persuade the adjudicator of the existence of certain factual elements according to a specified "standard of proof," or degree of certainty. The relevant standard of proof specifies how convincing or probative the applicant's evidence must be.

A number of different standards of proof are relevant in the immigration context, and more than one standard may be applied to evaluate the evidence in different stages of a single case, or two discrete issues in a single proceeding. It may be useful to think of these standards as falling along a continuum, ranging from a very low Standard requiring little probative evidence, to a higher standard requiring highly probative evidence.

B. Credible Fear Standard of Proof

In order to establish a credible fear of persecution or torture, the applicant must show a "significant possibility" that he or she could establish eligibility for asylum, withholding of removal, or deferral of removal, in a full hearing before an immigration judge. The "significant possibility" standard of proof required to establish a credible fear of persecution or torture, must be applied in conjunction with the standard of proof required for the ultimate determination on eligibility for asylum, withholding of removal, or protection under the Convention Against Torture. For example, in order to establish a credible fear of torture, an applicant must show a "significant possibility" that he or she could establish eligibility for protection under the Convention Against Torture, i.e. a "significant possibility" that he or she could show a "clear probability" of future torture.

Neither the statute nor the immigration regulations define the "significant possibility" standard of proof, and the standard has not yet been addressed in immigration case law. The legislative...
history indicates that the standard "is intended to be a low-screening standard for admission into the usual full asylum process."

The showing required to meet a "significant possibility of success" is higher than the "not manifestly unfounded" screening standard favored by the UNHCR. A claim that has "no possibility of success," or only a "minimal or mere possibility of success," would not meet the "significant possibility" standard.

While a mere possibility of success is insufficient to meet the credible fear standard, the "significant possibility of success" standard does not require the applicant to demonstrate that the chances of success are more likely than not.

In a non-immigration context, the "significant possibility" standard of proof has been described to require the person bearing the burden of proof to "demonstrate a substantial and realistic possibility of succeeding." While this articulation of the "significant possibility" standard was provided in a non-immigration context, the "substantial and realistic possibility" of success description is a helpful articulation of the "significant possibility" standard as applied in the credible fear process.

The Court of Appeals for the D.C. Circuit found that the showing required to meet a "substantial and realistic possibility of success" is lower than the "preponderance of the evidence" standard.

In sum, an applicant will be able to show a significant possibility that he or she could establish eligibility for asylum, withholding of removal, or protection under the Convention Against Torture (statement of Sen. Hatch).

See U.S. Committee on International Religious Freedom, Study on Asylum Seekers in Expedited Removal—Report on Credible Fear Determinations, pg. 170 (Feb. 2005); 142 Cong. Rec. S11491-02 (Sept. 27, 1996) (statement of Sen. Hatch) (noting that the rejected Senate bill provided for a "manifestly unfounded" credible fear standard). "Manifestly unfounded" claims are (1) "clearly fraudulent" or (2) "not related to the criteria for the granting of refugee status."

142 Cong. Rec. H11071-02 (Sept. 25, 1996) (statement of Rep. Hyde) (noting that the credible fear standard was "redefined in the conference document to address fully concerns that the 'more probable than not' language in the original House version was too restrictive").

See Holmes v. Ainerex Rent-a-Car, 180 F.3d 294, 297 (D.C. Cir. 1999) (quoting Holmestj v. Ainerex Rent-a-Car, 710 A.2d 846, 852 (D.C. 1998) (emphasis added)) (stating that the "significant possibility" standard "need not cross the threshold of demonstrating that such success was more likely than not").
if the evidence indicates that there is a substantial and realistic possibility of success on the merits before an immigration judge. However, the applicant need not show that she has a greater than 50 percent chance that she could establish eligibility for relief in a full hearing before the immigration court.

C. General Considerations

1. Questions as to how the standard is applied should be considered in light of the nature of the standard as a screening standard to identify all persons who could qualify for asylum or protection under the Convention against Torture.

2. When there is reasonable doubt regarding an issue, that issue should be decided in favor of the applicant. When there is reasonable doubt regarding the decision, the applicant should be determined to have a credible fear of persecution. Such doubts can be addressed in a full hearing before an immigration judge.

3. In determining whether the alien has a credible fear of persecution, the asylum officer shall consider whether the alien's case presents novel or unique issues that merit consideration in a full hearing before an immigration judge.

4. Similarly, where there is disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue, or where the claim otherwise raises an unresolved issue of law, generally the interpretation most favorable to the applicant is used when determining whether the applicant meets the credible fear standard.

D. Credibility

1. The officer must make a determination whether there is a significant possibility that the applicant would be found credible in a full asylum and withholding hearing before an immigration judge.

2. Credibility is discussed in greater detail in Section VI of the lesson, below.

E. Identity

1. An applicant must establish his or her identity with a
reasonable degree of certainty. Credible testimony alone can establish identity.

2. In many cases, an applicant will not have documentary proof of identity or nationality. The officer must elicit information in order to establish that there is a significant possibility that the applicant will be able to credibly establish his or her identity in a full asylum or withholding of removal hearing. Documents such as birth certificates and passports are accepted into evidence if available.

3. After the credible fear interview, the information obtained by the asylum officer may be used by the ICE’s SAC to determine whether to parole a detained alien. The ICE authorities in charge of detaining the alien must be satisfied that identity is established before granting parole.

VI. CREDIBILITY

A. Credibility Standard

To meet the credible fear standard, an applicant must establish that there is a significant possibility that the assertions underlying his or her claim could be found credible in a full asylum or withholding of removal hearing. This means that there is "a substantial and realistic possibility" that the applicant will be found credible in a full hearing. The applicant does not need to establish a "clear probability" (i.e., that it is "more likely than not"), that his or her testimony will be found credible in a full hearing. The significant possibility standard is higher than the "not clearly fraudulent" or "not manifestly unfounded" standard favored by UNHCR.

B. Evaluating Credibility in a Credible Fear Interview

1. Guidelines

a. The screening function of the credible fear determination is important to remember when evaluating credibility.

b. Because the credible fear determination is a screening process, the asylum officer does not make the final determination as to whether the applicant is credible. The immigration judge makes that determination in the full hearing on the merits of the claim.
c. As long as there is a significant possibility that the applicant could establish in a full hearing that the claim is credible, unresolved questions regarding an applicant’s credibility should not be the basis of a negative credible fear determination.

d. The asylum officer must gather sufficient information to determine whether the alien has a credible fear of persecution or torture. This includes the identifying and evaluating issues related to the applicant’s credibility. The applicant’s credibility should be evaluated only after all information relevant to the claim is elicited.

e. The purpose of evaluating an applicant’s credibility is solely to determine eligibility for a full asylum and withholding hearing. The asylum officer’s personal opinions or moral views regarding an applicant should not affect the officer’s decision.

2. Factors to Consider

The same factors that are considered when determining credibility in an asylum or withholding of removal adjudication are evaluated in the credible fear determination. However, the applicant in the credible fear process only needs to establish that there is a significant possibility that the assertions underlying his or her claim could be found credible in a full asylum or withholding of removal hearing.

a. The asylum officer, considering the totality of the circumstances and all relevant factors, may base a credibility determination on:

(i) the demeanor, candor, or responsiveness of the applicant;

(ii) the inherent plausibility of the applicant’s account;

(iii) the consistency between the applicant’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made);

See, RAIO Training Module, Credibility.

INA § 208(b)(1)(B)(i)(ii).

See also, RAIO Training Module, Credibility; for a more detailed discussion of these factors as they are considered in asylum adjudications.
(iv) the internal consistency of each such statement;

(v) the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions); and.

(vi) any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor.

b. When considering the totality of the circumstances in determining whether there is a significant possibility that the assertions underlying the applicant’s claim could be found credible in a full asylum or withholding of removal hearing the following factors must be considered as they may impact an applicant’s ability to present his or her claim:

(i) trauma the applicant has endured; See also, RAIO Training Module, Interviewing Survivors of Torture.

(ii) passage of a significant amount of time since the described events occurred;

(iii) certain cultural factors, and the challenges inherent in cross-cultural communication;

(iv) detention of the applicant;

(v) problems between the interpreter and the applicant, including problems resulting from differences in dialect or accent, ethnic or class differences, or other difference that may affect the objectivity of the interpreter or the applicant’s comfort level; and

(vi) unfamiliarity with speakerphone technology; the use of an interpreter the applicant cannot see, or the use of an interpreter that the applicant does not know personally.

Detention can especially affect applicants who were detained and mistreated in the past, triggering memories of past trauma.

See: RAIO Training Module, Interviewing - Working with an Interpreter.

Asylum officers must ensure that persons with potential biases against applicants on the grounds of race, religion, nationality, membership in a particular social group, or political opinion are not used as interpreters. See International Religious Freedom Act of 1998, 22 U.S.C. § 6473(a) (1999); RAIO Training Module, IRFA (International Religious Freedom Act).

The considerations listed above, and any other factors relevant to the applicant’s ability to recall and relate events, must be considered when evaluating whether
there is a significant possibility the applicant’s testimony could be found credible in a full asylum or withholding hearing.

C. Making a Credibility Determination

1. In making a credibility determination, the officer must evaluate whether there is a significant possibility that the applicant’s testimony could be found credible in a full hearing before an immigration judge. The officer must consider the totality of the circumstances and all relevant factors when evaluating credibility.

2. The testimony should be evaluated in terms of its internal consistency, its consistency with prior statements, and its consistency with known country conditions. A positive credibility finding means that the evidence is such that there is a significant possibility the testimony could be found credible in a full hearing. A negative credibility finding means that there is not a significant possibility that the applicant’s testimony could be found credible in a full hearing before an immigration judge.

3. An applicant who presents inconsistent information must be given an opportunity to address and explain all inconsistencies during the credible fear interview. The asylum officer must follow up on all inconsistencies by making the applicant aware of each portion of the testimony that raises credibility concerns, and the reasons the applicant’s testimony is in question. The applicant must also be given an opportunity to explain any claims the officer deems implausible or lacking in detail.

   a. Minor inconsistencies and inconsistencies that are not material to the claim will not be sufficient to find an applicant not credible in the credible fear context. These inconsistencies will be explored by the immigration judge in the full asylum and withholding hearing.

   b. Material or significant inconsistencies that have not been adequately resolved during the credible fear interview may be sufficient to support a negative credible fear determination.

4. Inconsistencies between the applicant’s initial statement to the Customs and Border Protection (CBP) officer and his or her testimony before the asylum officer must be probed. Such inconsistencies may form the basis of a negative See 8 C.F.R. § 235.3(b)(4) (stating that if an applicant requests asylum or expresses a fear of return, the examining immigration
credibility determination if, taking into account an explanation offered by the applicant, there is not a significant possibility that the applicant could establish in a full hearing that the claim is credible.

Note, however, that the sworn statement completed by CBP (Form I-867B) is not intended to record detailed information about any fear of persecution or torture. The interview statement is intended to record whether or not the individual has a fear, not the nature or details surrounding that fear.

A number of federal courts have cautioned adjudicators to keep in mind the circumstances under which an alien’s statement to an inspector is taken when considering whether an applicant’s later testimony is consistent with the earlier statement. Factors to keep in mind include: 1) whether the questions posed at port of entry or place of apprehension were designed to elicit the details of an asylum claim, and whether the immigration officer asked relevant follow-up questions; 2) whether the alien was reluctant or afraid to reveal information during the first meeting with U.S. officials because of past abuse; and 3) whether the interview was conducted in a language other than the applicant’s native language.

5. All reasonable explanations must be considered in reaching a determination on the applicant’s credibility. The asylum officer need not credit an unreasonable explanation.

If, after providing the applicant with an opportunity to explain or resolve any inconsistencies, the officer finds that there is a significant possibility the applicant could establish in a full hearing that there is a reasonable explanation for the inconsistencies, a positive credibility determination will generally be appropriate.

If, however, the applicant fails to provide an explanation for a substantial or material inconsistency, or the officer finds that there is not a significant possibility that the applicant could establish a reasonable explanation for the inconsistencies in a full hearing, a negative credible fear determination will generally be appropriate.

D. Documenting a Credibility Determination

See Balasubramaniam v. INS, 143 F.3d 157 (3d Cir. 1998); cf. Rumsfeld v. Ashcroft, 357 F.3d 169, 179 (2d Cir. 2004) (discussing in detail the limitations inherent in the initial interview process, and holding that the BIA was entitled to rely on fundamental inconsistencies between the applicant’s airport interview statements and his hearing testimony where the applicant was provided with an interpreter, and given ample opportunity to explain his fear of persecution in a careful and non-coercive interview).
1. The asylum officer must clearly record in the interview notes the questions used to inform the applicant of any relevant credibility issues, and the applicant's responses to those questions.

2. The officer must specify in the written case analysis the basis for the negative credibility finding. In the negative credibility context, the officer must note any portions of the testimony found not credible, including the specific inconsistencies, lack of detail or other factors, along with the applicant's explanation and the reason the explanation is deemed not to be reasonable.

3. If information that impugns the applicant's testimony becomes available after the interview but prior to serving the credible-fear determination, a follow-up interview must be scheduled to confront the applicant with the derogatory information and to provide the applicant with an opportunity to address the adverse information.

4. Note-taking procedures for credible-fear interviews, as described in the Credible Fear Procedures Manual, must be followed.

VII. ESTABLISHING A CREDIBLE FEAR OF PERSECUTION

A. Persecution on Account of a Protected Ground

1. Persecution on account of a protected ground means serious harm or suffering inflicted upon an individual on account of race, religion, nationality, membership in a particular social group, or political opinion. The agent of persecution may be either the government or a non-governmental entity that the government is unwilling or unable to control.

2. A determination whether the harm suffered or feared is persecution on account of a protected ground has two components:

   a. The harm or suffering must be serious, identifiable, and assessed on individual circumstances.

   b. The harm must be on account of race, religion, nationality, membership in a particular social group, or political opinion.
3. For an applicant to establish a credible fear of persecution, there must be a significant possibility that the applicant could establish in a full asylum hearing that the harm the applicant suffered or fears constitutes persecution on account of a protected ground.

a. There must be a significant possibility that the applicant could establish in a full hearing before an immigration judge that the past or feared harm is serious enough to constitute persecution.

b. There must be a significant possibility that the applicant could establish in a full hearing before an immigration judge that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one of the central reasons for persecuting the applicant.

4. The following are examples of past or feared harm serious enough in some instances to be deemed persecution:

   a. Certain violations of an individual’s core or fundamental human rights, such as:

      (i) genocide;

      (ii) slavery;

      (iii) torture and other cruel, inhuman, or degrading treatment;

      (iv) prolonged detention without notice of an opportunity to contest the grounds for detention; and

      (v) rape and other severe sexual violence, such as forced female circumcision, and other forced genital mutilation.

   b. Cumulative acts of discrimination or harassment, if the adverse practices or treatment accumulates or increases in severity to the extent that it leads to consequences of a substantially prejudicial nature, such as:

      (i) serious restrictions on right to earn a livelihood;

      (ii) serious restrictions on the access to normally available educational facilities;
(iii) arbitrary interference with privacy;
(iv) relegation to substandard dwellings;
(v) enforced social or civil inactivity;
(vi) passport denial;
(vii) constant surveillance;
(viii) pressure to become an informer;
(ix) confiscation of property; and
(x) arrests and detentions based on illegitimate government action or marked by mistreatment or excessive duration.

c. Other forms of harm, including physical abuse, may amount to persecution:

(i) Substantial economic harm
(ii) Serious psychological harm
(iii) Forced abortion or sterilization
(iv) Serious harm to family members

B. Past Harm

1. In general, a finding that there is a significant possibility that harm experienced in the past could be considered persecution on account of a protected ground in a full asylum hearing is sufficient to satisfy the credible fear standard. This is because the applicant in such a case has shown a significant possibility of establishing in a full hearing that he or she is a refugee and a full asylum hearing provides the better mechanism to evaluate whether or not the applicant merits a favorable exercise of discretion to grant asylum.

2. However, if there is evidence so substantial that there is no significant possibility of future persecution or other serious harm or that there are no reasons to grant asylum based on the severity of the past persecution, a negative credible fear determination may be appropriate.

3. Factors such as the applicant’s risk of future harm, changed
conditions in the applicant's country or in the applicant's circumstances, and the applicant's ability to safely relocate within the country are generally not relevant to the credible fear determination, if the applicant has shown a significant possibility of establishing in a full hearing that he or she is a refugee based on past persecution on account of a protected ground. However, if the evidence that an applicant could reasonably relocate within the country is so substantial that there is no significant possibility that the applicant could establish eligibility for asylum in a full hearing, a negative credible fear determination may be appropriate.

C. Future Harm

1. When an applicant does not claim to have suffered any past harm, or where the evidence is insufficient to establish a significant possibility that any harm experienced in the past could be considered persecution on account of a protected ground, the asylum officer must determine whether there is a significant possibility the applicant could establish a well-founded fear of persecution in a full asylum hearing.

2. The applicant will meet the credible fear standard based on a fear of future harm if there is a significant possibility that he or she could establish in a full hearing that there is reasonable possibility that he or she will be persecuted on account of a protected characteristic. Asylum officers should elicit and consider information relating to the four prongs of the modified Mogharrabi test for well-foundedness: possession, awareness, capability, and inclination.

3. The applicant does not need to show that he or she may be singled out individually for persecution. A positive determination of credible fear of persecution may be found if the evidence shows a significant possibility that the applicant could establish in a full asylum hearing that he or she may be singled out for persecution, or if there is a pattern or practice of persecution of individuals similarly situated to the applicant.

D. Nexus to One of the Five Grounds Listed in the Refugee Definition

1. The APSO's affirmative duty to elicit all information relevant to the legal determination is particularly important.
in the context of determining a nexus between the harm experienced or feared and any protected ground. The APSO must determine whether there is a significant possibility that the applicant can establish in a full asylum hearing that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

2. Both during the interview and when evaluating the case, the officer must explore all possible connections to a protected ground. For cases where no nexus to a protected ground is immediately apparent, the APSO should ask questions related to all five grounds to ensure that no nexus issues are missed.

3. The nexus to a protected ground must be identifiable and articulable, and there must be a significant possibility the applicant could establish in a full hearing that it is at least one central reason for persecuting the applicant.

4. Any credible evidence that at least one central reason the persecutor was or is motivated to harm the applicant may be on account of a protected ground is sufficient to find a nexus to a protected ground for purposes of the credible fear of persecution screening.

5. The evidence of motive can be either direct or circumstantial, and either from the applicant’s testimony or other evidence provided by the applicant or from country conditions information.

6. If there is a significant possibility that the applicant will be able to establish in a full hearing that at least one central reason for the harm relates to his or her possession of a protected characteristic, the officer should find a nexus to a protected ground for the purposes of the credible fear of persecution screening.

7. Officers should be aware of novel issues that have not been completely developed by case law, such as issues surrounding whether harm is on account of membership in a particular social group or whether a political opinion is imputed to the applicant.

8. If the applicant demonstrates a significant possibility that he or she could establish past persecution or a well-founded fear of future persecution, and that at least one central reason for the harm was or will be on account of a
protected ground, then the applicant has met the credible fear of persecution standard.
E. **Multiple Citizenship**

Persons holding multiple citizenship or nationality must demonstrate a credible fear of persecution or torture from at least one country in which they are citizen or national to be eligible for referral to immigration court for a full asylum or withholding of removal hearing.

Although the applicant would not be eligible for asylum unless he or she establishes eligibility with respect to all countries of citizenship or nationality, he or she might be entitled to withholding of removal with respect to one country and not the others. Therefore, the protection claim must be referred for a full hearing to determine this question.

In addition, if the applicant demonstrates a credible fear with respect to any country of proposed removal, regardless of citizenship, the applicant should be referred to the Immigration Judge for a full proceeding, since he or she may be eligible for withholding of removal with respect to that country as well.

F. **Statelessness/Last Habitual Residence**

The asylum officer does not need to make a determination as to whether an applicant is stateless or what the applicant’s country of last habitual residence is. The asylum officer should determine whether the applicant has a credible fear of persecution in any country to which the applicant might be returned.

If the applicant demonstrates a credible fear with respect to any country of proposed removal, regardless of citizenship or habitual residence, the applicant should be referred to the Immigration Judge for a full proceeding since he or she may be eligible for withholding of removal with respect to that country.

VIII. **ESTABLISHING A CREDIBLE FEAR OF TORTURE**

As explained above, a credible fear of torture is defined as a *significant possibility* that the applicant could establish eligibility for withholding of removal or deferral of removal under the *Convention Against Torture* in a full hearing. An individual may be eligible for withholding of removal or deferral of removal to a country if it is more likely than not that the applicant would be
tortured in that country. Because in the withholding or deferral of removal hearing the applicant will have to establish that it is more likely than not that he or she will be tortured in the country of removal, a significant possibility of establishing eligibility for withholding is necessarily a greater burden than establishing a significant possibility of eligibility for asylum. In other words, to establish a credible fear of torture, the applicant must show there is a significant possibility that he or she could establish in a full hearing that it is more likely than not he or she would be tortured in that country.

A. Definition of Torture

The Convention Against Torture defines “torture” as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

B. General Considerations

Although the Convention definition of torture requires that several elements be met before an act may constitute torture, many of those elements are not relevant for the credible fear determination. This is because the purpose of the credible fear determination is to cast a wide net to identify all those who might require protection under the Convention, and many elements of the Convention definition of torture require complex legal and factual analyses that may be more appropriately considered in a full hearing before an immigration judge.

The applicant satisfies the credible fear of torture standard where there is a significant possibility that he or she could establish in a full withholding of removal hearing that:

1. the applicant’s claim would be found credible;

2. the applicant would be intentionally subjected to serious physical or mental harm in a country to which the applicant may be removed; and
3. that the person(s) the applicant fears is a government official, someone acting in an official capacity or someone who would act at the instigation of or with the consent or acquiescence of a government official or someone acting in an official capacity.

activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity,” 8 C.F.R. 208.16(a)(7). An applicant may establish acquiescence by showing the public official’s actual knowledge of the torture, “willful blindness” to the torture on the part of public officials, or that public officials would “turn a blind eye” to the torture. Zheng v. Ashcroft, 332 F. 3d 1186 (9th Cir. 2003); Ontunen- Tyeiros v. Ashcroft, 303 F. 3d 341 (5th Cir. 2002).

By attaching the aforementioned understanding, the Senate could hardly have made it clearer that it did not intend “acquiescence” in the Convention to require a showing that the government in question was actually aware of the conduct that constitutes torture. Rather, an alien seeking relief under the CAT can establish that the government in question acquiesces to torture by showing that the government is willfully blind to a group's activities. Any more restrictive reading of the CAT would be inconsistent with the fact that the Senate ratified the Convention only after attaching an understanding that acquiescence does not require “actual knowledge.” See S. Exec. Rep. 101-30, at 36 (1996).


For purposes of the credible fear of torture determination, the APSO does not need to take into account other elements of the torture definition, such as whether the individual would be in the offender’s custody or control, or whether the feared harm would.
arise from lawful sanctions. These additional questions will be explored by the immigration judge during the full hearing.

C. Intent.

In evaluating whether an individual has established a credible fear of torture, the APSO must determine whether there is a significant possibility that the applicant could establish in a full hearing that he or she would be intentionally harmed. For purposes of the credible fear determination, this does not necessarily mean that the feared offender intends to inflict serious harm on the applicant, only that the offender intends to take some action that would result in serious harm to the applicant.

Example: Applicant credibly testifies that, because he left his country without authorization, he will be forced by his government to undergo prolonged detention with common criminals in notoriously squalid conditions without access to common medications he requires for his heart condition. Although the intention of the government is simply to detain the applicant for violating departure laws, the government’s intentional act could result in serious harm, subjecting the applicant to prolonged detention under conditions that could result in serious harm. Therefore, a positive credible fear of torture determination may be appropriate in this case.

Example: Applicant credibly testifies that she will be subjected to serious harm because of famine in her country, or because a medical procedure she requires is unavailable in her country. Neither scenario would meet the credible fear of torture standard, because the applicant does not fear intentional infliction of harm. She has not indicated an action the government intends to inflict on her that could result in serious harm.

Important Note: This standard regarding intent is different from the standard that will be applied in eligibility determinations for withholding of removal under the Convention Against Torture. To be eligible for protection under the Convention Against Torture, it would be necessary to show that the offender specifically intends to inflict severe pain or suffering upon the victim. In the screening process, however, the lower standard will be applied so that the screening may serve as a broad net to ensure that all individuals who have a significant possibility of establishing eligibility are permitted to present their claims before the immigration judge.
Important Note: There is no requirement that the feared torture be on account of a protected characteristic in the refugee definition.

D. Serious Harm

The harm the applicant fears may be physical or mental, but it must be serious enough that there is a significant possibility that the applicant could establish in a full hearing that the feared harm amounts to torture. This does not mean that the harm as articulated in the credible fear screening must be as severe as that required to meet the Convention definition of torture ("severe pain or suffering"), but it must be more serious than certain types of harm that may be sufficient to meet the credible fear of persecution standard. For example, fear of discrimination or harassment would not be sufficient to meet the credible fear of torture standard. In evaluating this aspect of the claim, the officer must take into account that the perception of harm varies among individuals.

Example: Applicant fears he will be intentionally deprived of the right to education because he left his home country. The feared harm would not be serious enough to meet the credible fear of torture standard.

Example: Applicant fears he will be jailed because he broke the law and will be beaten because guards routinely beat inmates. The feared harm would be serious enough to meet the credible fear of torture standard.

Important Note: As discussed above, the purpose of the credible fear screening is to cast a broad net to ensure that all individuals who have a significant possibility of establishing eligibility for protection under the Convention Against Torture are permitted to present their claims before an immigration judge. Thus, individuals who later are found not to be eligible for protection under the Convention Against Torture may, nevertheless, meet the credible fear of torture standard.

E. Identity of the Feared Person or Persons

There must be a significant possibility that the applicant can establish that the harm he or she fears would be inflicted by a person who is a government official, or a person acting in an official capacity, or who would act at the instigation of or with the consent or acquiescence of a public official on either a national or local level. This may include persons who have affiliations, either formal or informal, with the government or
F. Past Harm

Although protection under the Convention Against Torture is based solely on an applicant's fear of future torture, credible evidence of past torture is strong evidence in support of a claim for protection based on fear of future torture. For that reason, an applicant who establishes that he or she suffered past torture will establish a credible fear of torture, unless changes in circumstances are so substantial that the applicant has no significant possibility of future torture as a result of the change.

G. Internal Relocation

For purposes of the credible fear of torture determination, the applicant does not need to show that there is a significant possibility that the applicant will be able to establish in a full hearing that the threat of serious harm exists throughout the country to which the applicant may be returned. Given that the applicant must establish that the harm he or she fears would be inflicted by a government official or a person acting with the consent or acquiescence of a public official in order to satisfy the credible fear of torture standard, an examination into an internal relocation alternative is not necessary at the credible fear screening stage.

IX. EVIDENCE

Credible Testimony

To establish eligibility for withholding of removal under section 241(b)(3) of the Act or the Convention Against Torture, the testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

Evidence may be direct or circumstantial.

It is not appropriate to require that a person seeking relief under the Convention Against Torture articulate, with personal knowledge, how he knows he will be tortured. As in the asylum context, there may be cases where lack of corroboration, without reasonable explanation, casts doubt on the credibility of the claim or otherwise affects the applicant's ability to meet the requisite burden of proof. Asylum officers should follow the guidance in the RAIO: Evidence Training Module and the RAIO Credibility Training Module, and HQASY memos on this issue.

*Site v. Höldle*, 656 F.3d 590 (7th Cir. 2011)

*8 C.F.R. §§ 208.16(b); 208.16(c)(2)*

*Bosede v. Mukasey*, 512 F.3d 946 (7th Cir. 2008)
in evaluating whether lack of corroboration affects the applicant's ability to establish a credible fear of persecution or torture.

X. APPLICABILITY OF BARS TO ASYLUM AND WITHHOLDING OF REMOVAL

A. No Bars Apply

Pursuant to regulations, evidence that the applicant is, or may be, subject to a bar to asylum or withholding of removal does not have an impact on a credible fear finding.

8 C.F.R. § 208.30(e)(5).

See also, Asylum lesson plan, Mandatory Bars Overview and Criminal Bars to Asylum, for a discussion of bars to asylum.

B. APSO Must Elicit Testimony

Even though the bars to asylum do not apply to the credible fear determination, the interviewing officer must elicit and make note of all information relevant to whether or not a bar to asylum or withholding applies. The immigration judge is responsible for finally adjudicating whether or not the applicant is barred from asylum or withholding of removal.

There are no bars to a grant of deferral of removal to a country where the applicant would be tortured.

8 C.F.R. § 208.17.

Information should be elicited about whether the applicant:

1. participated in the persecution of others;

2. has been convicted by a final judgment of a particularly serious crime (including aggravated felony), and therefore constitutes a danger to the community of the US;

3. is a danger to the security of the US;

4. is subject to the inadmissibility or deportability grounds relating to terrorist activity as identified in INA section 208(b)(2)(y);”

5. has committed a serious non-political crime;

6. is a dual or multiple national who can avail himself or herself of the protection of a third state; and,
7. was firmly resettled in another country prior to arriving in the United States.

C. **Flagging** Potential Bars

The officer must keep in mind that the applicability of these bars requires further evaluation that will take place in the full hearing before an immigration judge, if the applicant otherwise has a credible fear of persecution or torture. In such cases, the APSO should consult with the supervisory asylum-pre-screening officer (SAPSO) in charge and follow procedures on "flagging" such information for the hearing and prepare the appropriate paperwork for a positive credible fear finding.

XI. ROLE OF COUNTRY CONDITIONS INFORMATION

Pursuant to the definition of the credible fear standard, the APSO must take account of "such other facts as are known to the officer." Such "other facts" include relevant country conditions information. Similarly, country conditions information should be considered when evaluating a credible fear of torture. The Convention Against Torture and implementing regulations require consideration of "evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable, and other relevant information regarding conditions in the country of removal."

INA §235(b)(1)(B)(v); 8 CFR §208.30(c)(2); see also, *Resarch the Resources Research and the Country Conditions Research and the Country Conditions Resource Center (RIC).*

See also, 8 C.F.R. §§ 208.1(b) (training of asylum officers); 208.11 (Department of State comments); 208:12(a) (relancé on information compiled by other sources); 208:10(c)(3) (asserting eligibility for withholding of removal under CAT).

A. Proper Use of Country Conditions Information in the Credible Fear of Persecution and Torture Processes

1. Country conditions information may assist the APSO in formulating questions that fully develop the applicant's claim.
   
a. An officer who has a good understanding of country conditions can identify the most relevant parts of the testimony more clearly and ask specific questions to develop the relevant issues further.
   
b. A good understanding of country conditions information is especially important when eliciting information from a confused or inarticulate applicant.

2. Country conditions information may add relevant information that can assist the APSO's evaluation of the claim and the applicant's eligibility.
   
a. Country conditions information may indicate groups of persons who could be subjected to harm or groups of persons who appear to have no risk of harm.
   
b. Country conditions information may also assist in the identification of applicants who may be persecutors or security risks.

3. Country conditions information may assist the APSO in developing a sufficient record to evaluate the applicant's credibility appropriately.
   
a. Knowledge of country conditions information helps the APSO to ask appropriate, probing questions to evaluate credibility.
   
b. Knowledge of country conditions can help an officer uncover false claims more effectively and fairly.
   
c. Knowledge and proper use of country conditions information prevents credibility findings erroneously based on the officer's personal experiences, biases, or expectations of how people behave.
B. CHANGED CONDITIONS

4. 1. Credible fear of persecution

If the applicant has shown a significant possibility that he or she experienced past harm that after a full hearing could be determined to be persecution on account of a protected characteristic, generally the applicant will satisfy the credible fear standard. In most cases, changes in the conditions in the applicant’s country or the applicant’s circumstances need not be considered in making the credible fear of persecution determination. However, evidence of changed country conditions so substantial that the applicant has no significant possibility of establishing eligibility for asylum may be considered, taking into the account any evidence that the applicant may establish eligibility for asylum based on past persecution alone.

2. Credible fear of torture

Because the credible fear of torture determination looks at prospective harm, changes in conditions in the applicant’s country or circumstances could affect the credible fear of torture determination. If an applicant has suffered serious harm inflicted by a government actor, the applicant usually will satisfy the credible fear of torture standard. Changes in the conditions in the applicant’s country or circumstances can lead to a negative credible-fear-of-torture decision where the changes, as they affect the applicant, are so substantial that the applicant has no significant possibility of establishing that it is more likely than not that he or she will be tortured in the future.

XII. TREATMENT OF DEPENDENTS

A spouse or child of an alien may be included in the alien’s credible fear evaluation and determination, if the spouse or child:

- arrived in the United States concurrently with the principal alien; and

- desires to be included in the principal alien’s determination.

Any alien also has the right to have his/her credible fear evaluation and determination made separately, and it is important for asylum pre-screening officers to question each member of the family to be sure that, if any member of the family has a credible fear, his or her right...
to apply for asylum or withholding of removal is preserved. When questioning family members, special attention should be paid to the privacy of each family member and to the possibility that victims of domestic abuse, rape and other forms of persecution might not be comfortable speaking in front of other family members.

The regulatory provision that allows a dependent to be included in a principal’s determination does not change the statutory rule that any alien subject to expedited removal who has a credible fear has the right to be referred to an immigration judge.

XIII. SUMMARY

A. Function of Credible Fear Screening

The purpose of the credible fear screening process is to identify all persons subject to expedited removal who might ultimately be eligible for asylum, withholding of removal, or protection under the Convention Against Torture.

B. Credibility

Considerations:

1. Standard

The applicant must establish that there is a significant possibility, considering the totality of the circumstances and all relevant factors, that the applicant’s claim could be found credible in a full hearing.

2. Factors to consider

The same factors that are considered when determining credibility in an asylum or withholding of removal interview are evaluated in the credible fear interview, but the applicant only needs to establish that there is a significant possibility that the assertions underlying his or her claim could be found credible in a full asylum or withholding of removal hearing.

3. Scope of evidence to be considered

The totality of the circumstances and all relevant factors must be considered in making a credibility determination in the credible-fear process.

4. The applicant must be given an opportunity to explain any inconsistency, implausibility or lack of detail before a

credibility determination is made.

5. The APSO's personal opinions or moral views may not be considered when making a credibility determination.

C. Definition of Credible Fear of Persecution

"Credible fear of persecution" means that there is a significant possibility, taking into account the credibility of the alien's statements and such other facts as are known to the officer, that the alien could establish eligibility for asylum on account of a protected ground in a full asylum hearing.

D. Definition of Credible Fear of Torture

"Credible fear of torture" means that there is a significant possibility that the applicant could establish eligibility for withholding of removal or deferral of removal under the Convention Against Torture in a full hearing before an immigration judge.

E. Establishing a Credible Fear of Persecution

1. The "significant possibility" standard has been described in the non-immigration context as requiring the person bearing the burden of proof to "demonstrate a substantial and realistic possibility of succeeding." This standard of proof is lower than the "clear probability" standard which requires a determination that success is "more likely than not."

2. A "significant possibility of establishing eligibility for asylum" is higher than the "not manifestly unfounded" standard.

3. For claims based on past persecution, the standard is met by finding that there is a significant possibility that the applicant could establish in a full hearing that the past harm endured could be found to be persecution on account of a protected ground. The officer need not determine if the harm described constitutes persecution; the officer need only determine if there is a significant possibility that the applicant could establish in a full asylum hearing that the harm would be considered persecution. If there is a significant possibility that the past harm endured could be found to be persecution on account of a protected ground, credible fear is established, regardless of changed country conditions, ability to relocate, or any other factors.
For claims based on a fear of future persecution, the credible fear standard is met by a finding that there is a significant possibility the applicant could establish in a full hearing a well-founded fear of persecution on account of a protected ground.

4. There must be a significant possibility that the applicant's testimony could be found credible in a full hearing before an immigration judge.

5. To establish identity for the purpose of the credible fear determination the applicant must show that there is a significant possibility that he or she could establish who he or she claims to be in a full hearing before an immigration judge.

6. There must be a significant possibility that the applicant could establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant in a full asylum hearing. If doubts exist, the officer should resolve the issue in favor of the applicant.

7. All reasonable inferences should be drawn in favor of the applicant.

8. Disputed, close or novel questions of law should be analyzed as to whether they merit consideration in a full asylum hearing before an immigration judge.

F. Establishing a Credible Fear of Torture

To establish a credible fear of torture, the applicant must demonstrate that there is a significant possibility that he or she could establish in a full hearing before an immigration judge:

1. that the applicant's testimony could be found credible;

2. that he or she would be intentionally subjected to some action that would result in serious physical or mental harm in a country to which the applicant may be removed, and

3. that the harm feared would be inflicted by or at the instigation of, or with the consent or acquiescence of, a government official or other person acting in an official capacity.
G. Bars to Asylum and Withholding of Removal

1. The applicability of a bar to asylum or withholding of removal cannot form the basis for finding no credible fear of persecution or torture.

2. However, the possibility that a bar to asylum or withholding of removal may apply must be explored and flagged for the record.

H. Role of Country Conditions Information

Knowledge of country conditions information informs the credible fear interview and assists the interviewing officer in developing the applicant's claim.

I. Treatment of Dependents

A dependent (spouse or child) who arrives concurrently with a "principal" applicant for admission may be included in the credible fear evaluation of the "principal" if the spouse or child requests to do so. All aliens also have a right to have their credible fear determinations done separately.
Lesson Plan Overview

Course
Refugee, Asylum and International Operations Directorate Officer Training
Asylum Division: Officer Training: Course

Lesson
Reasonable Fear of Persecution and Torture Determinations

Rev. Date
March 11, 2013

Lesson Description
The purpose of this lesson is to explain when reasonable fear screenings are conducted and how to determine whether the alien has a reasonable fear of persecution or torture using the appropriate standard.

Terminal Performance Objective
When a case is referred to an Asylum Officer to make a “reasonable fear” determination, the Asylum Officer will be able to correctly determine whether the applicant has established a reasonable fear of persecution or a reasonable fear of torture.

Enabling Performance Objectives
1. Indicate the elements of “torture” as defined in the Convention Against Torture and the regulations. (AIL5)(AIL6)
2. Identify the type of harm that constitutes “torture” as defined in the Convention Against Torture and the regulations. (AIL5)(AIL6)
3. Describe the circumstances in which a reasonable fear screening is conducted. (APT2)(OK4)(OK6)(OK7)
4. Identify the standard of proof required to establish a reasonable fear of torture. (ACRR8)(AA3)
5. Identify the standard of proof required to establish a reasonable fear of persecution. (ACRR8)(AA3)
6. Examine the applicability of bars to asylum and withholding of removal in the reasonable fear context. (ACRR3)

Instructional Methods
Lecture, practical exercises.

Student Materials/References
United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (see RAIO Module, International Human Rights/Law)


Reasonable Fear forms and templates (are found on the ECN website)

Method of Evaluation
Written test

Background Reading


4. Langlois, Joseph E.: Asylum Division, Office of International Affairs. Withdrawal of Request of Reasonable Fear Determination, Memorandum to Asylum Office Directors, et al. (Washington, DC: May 25, 1999), 1 p. plus attachment (including updated version of Withdrawal of Request of Reasonable Fear Determination form, 6/13/02, version).


CRITICAL TASKS

Knowledge of U.S. case law that impacts RAIO. (3)
Knowledge of the Asylum Division jurisdictional authority. (4)
Skill in identifying information required to establish eligibility. (4)
Skill in identifying issues of claim. (4)
Knowledge of relevant policies, procedures, and guidelines of establishing applicant eligibility for reasonable fear of persecution of torture. (4)
Knowledge of mandatory bars and inadmissibilities to asylum eligibility. (4)
Skill in organizing case and research materials (4)
Skill in applying legal, policy, and procedural guidance (e.g., statutes, precedent decisions, case law) to information and evidence. (5)
Skill in analyzing complex issues to identify appropriate responses or decisions. (5)
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US CITIZENSHIP AND IMMIGRATION SERVICES – RAIO
MARCH 11, 2013

ASYLUM DIVISION OFFICER TRAINING COURSE:
REASONABLE FEAR OF PERSECUTION AND TORTURE DETERMINATIONS

4
I. INTRODUCTION

This lesson instructs asylum officers on the substantive elements required to establish a reasonable fear of persecution or torture. More detailed instruction on procedures for conducting interviews and processing cases referred for reasonable fear determinations are provided in the Reasonable Fear Procedures Manual and separate procedural memos. For guidance on interviewing techniques to elicit information in a non-adversarial manner, asylum officers should review the RAIO Training Modules: Interviewing – Introduction to the Non-Adversarial Interview; Interviewing - Eliciting Testimony; and Interviewing - Survivors of Torture and Other Severe Trauma.

II. BACKGROUND

Interim regulations require asylum officers to make reasonable fear determinations in two types of cases referred by other DHS officers after a final order of removal has been issued or reinstated. These are cases in which an individual ordinarily is removed without being placed in removal proceedings before an immigration judge.

Congress has provided for special removal processes for certain aliens who are not eligible for any form of relief from removal. At the same time, however, obligations under Article 33 of the Refugee Convention relating to the Status of Refugees and Article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment ("Convention against Torture" or "the Convention") still apply in these cases. Therefore, withholding of removal under either section 241(b)(3) of the INA or under the regulations implementing the Convention against Torture may still be available in these cases. Withholding of removal is not considered to be a form of relief from removal, because it is specifically limited to the country where the individual is at risk and does not prohibit the individual’s removal from the United States.

The purpose of the reasonable fear determination is to ensure compliance with U.S. treaty obligations not to return a person to a country where the person would be tortured or the person’s life or freedom would be threatened on account of a protected characteristic in the refugee definition and, at the same time, to adhere to Congressional directives to subject certain categories of aliens to streamlined removal proceedings.

Similar to credible fear determinations in expedited removal proceedings, reasonable fear determinations serve as a screening mechanism to identify potentially meritorious claims for further

References

8 C.F.R. 208.31; 64 Fed. Reg. 8478 (February 19, 1999)

These treaty obligations are based on Article 33 of the 1951 Convention relating to the Status of Refugees; and Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
consideration by an immigration judge, and at the same time to prevent individuals subject to removal from delaying removal by filing clearly unmeritorious or frivolous claims.

III. JURISDICTION

A. Reinstatement under Section 241(a)(5) of the INA

1. Reinstatement of Prior Order

Section 241(a)(5) of the INA requires DHS to reinstate a prior order of exclusion, deportation, or removal, if a person enters the United States illegally after having been removed, or after having left the United States after the expiration of an allotted period of voluntary departure, giving effect to an order of exclusion, deportation, or removal. Once a prior order has been reinstated under this provision, the individual is not permitted to apply for asylum or any other relief under the INA. However, that person may apply for withholding of removal under section 241(b)(3) of the INA (based on a threat to life or freedom on account of a protected characteristic in the refugee definition) and withholding or deferral of removal under the Convention Against Torture.

There are certain restrictions on issuing a reinstatement order to people who may qualify to apply for NACARA-203 pursuant to the Legal Immigration Family Equity Act (LIFE). The LIFE amendment provides that individuals eligible to apply for relief under NACARA 203 and who are otherwise eligible for relief "shall not be barred from applying for such relief by operation of section 241(a)(5) of the Immigration and Nationality Act." Section 241(a)(5) applies retroactively to all prior removals, regardless of the date of the alien's illegal reentry. There are other issues that may affect the validity of a reinstated prior order, such as questions concerning whether the applicant's departure executed a final order of removal. An Asylum Prescreening Officer who is unsure about the validity of a reinstated prior removal order should consult the Reasonable Fear Procedures Manual, a supervisor or Headquarters Quality Assurance unit.

See: Reasensible Fear Procedures Manual (DRAFT January 2003), Section II.C: (Types of Reasonable Fear Cases)

INA § 241(a)(5); 8 C.F.R. § 241.8


Pearson, Michael Implementation of Amendment to the Legal Immigration Family Equity Act (LIFE) Regarding Applicability of INA Section 241(a)(5) (Reinstatement) to NACARA 203 Beneficiaries (Washington, DC: February 23, 2001). 7p. plus attachments.
2. Referral to Asylum Officer

If a person subject to reinstatement of a prior order of removal expresses a fear of return to the intended country of removal, the DHS officer must refer the case to the asylum officer for a reasonable fear determination, after the prior order has been reinstated.

3. Country of Removal

Form I-871, Notice of Intent/Decision to Reinstate Prior Order does not designate the country where DHS intends to remove the alien. Depending on which removal order is being reinstated under INA §241(a)(5), that order may, or may not designate a country of removal. For example, Form I-860, Notice and Order of Expedited Removal does not indicate a country of removal, but an IJ order of removal resulting from section 240 proceedings does designate a country of removal. Regardless of which type of prior order is being reinstated, DHS must indicate where it intends to remove the alien in order for the APSO to determine if the alien has a reasonable fear of persecution or torture in that particular country.

The asylum officer need only explore the person’s fear with respect to the countries designated and any other country to which DHS is contemplating removal. For example, if the applicant was previously ordered removed to country X, but is now claiming to be a citizen of country Y, the asylum officer should explore the person’s fear with respect to both countries. If the person expresses a fear of return to any

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**Fernández-Vargas v. Gonzales, 126 S.Ct. 2422 (2006).**

**Note:** In the Fifth Circuit, an individual’s departure from the U.S. after issuance of an NTA, but prior to the order of removal, does not strip an immigration judge of jurisdiction to order that individual removed; thus that individual can be subject to reinstatement if previously ordered removed in absentia. See U.S. v Ramirez-Cárdeno, 559 F.3d 384 (5th Cir. 2009).

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§ C.F.R. §§ 208.31 (a) & (b): 241.8(e)

**NOTE:** Procedures are currently being developed for referring a person back to the asylum office when DHS decides to disregard a country of removal designation and the person expresses a fear of return to the new country of removal.
other country; the officer should memorialize that in the file to ensure that the fear is explored should DHS ever contemplate removing the person to that other country.

B. Removal Orders under Section 238(b) of the INA (based on aggravated felony conviction)

1. DHS removal order

Under certain circumstances, DHS may issue an order of removal if DHS determines that a person is deportable under section 237(a)(2)(A)(iii) of the INA (convicted by final judgment of an aggravated felony after having been admitted to the U.S.). This means that the person may be removed without removal proceedings before an immigration judge.

INA § 238(b)

2. Referral to an asylum officer

If a person who has been ordered removed by DHS pursuant to section 238(b) of the INA expresses a fear of persecution or torture, that person must be referred to an asylum officer for a reasonable fear determination.

8 C.F.R. §§ 208.31(a) & (b); 238.1(f)(3). Note that regulations require the DHS to give notice of the right to request withholding of removal to a particular country, if the person ordered removed fears persecution or torture in that country. 8 C.F.R. § 238.1(b)(2)(i)

3. Country of Removal

The removal order under Section 238(b) should designate a country of removal, and in some cases, will designate an alternative country.

IV. DEFINITION OF "REASONABLE FEAR"

Regulations define "reasonable fear of persecution or torture" as follows:

The alien shall be determined to have a reasonable fear of persecution or torture if the alien establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group or political opinion, or a reasonable possibility that he or she would be tortured in the country of removal. For purposes of the screening determination, the bars to eligibility for withholding of removal under section 241(b)(3)(B) of the Act shall not be considered.

8 C.F.R. § 208.31(c)
A few points to note, which are discussed in greater detail later in the lesson, are the following:

1. The “reasonable possibility” standard is the same standard required to establish eligibility for asylum (the “well-founded fear” standard).

2. Like asylum, there is an “on account of” requirement necessary to establish reasonable fear of persecution:

   the persecution must be on account of a protected characteristic in the refugee definition.

3. There is no “on account of” requirement necessary to establish a reasonable fear of torture.

4. Mandatory and discretionary bars are not considered in a determination of reasonable fear of persecution or reasonable fear of torture.

V. STANDARD OF PROOF

The standard of proof to establish “reasonable fear of persecution or torture” is the “reasonable possibility” standard. This is the same standard required to establish a “well-founded fear” of persecution in the asylum context. The “reasonable possibility” standard is lower than the “more-likely-than-not” standard required to establish eligibility for withholding of removal. It is higher than the standard of proof required to establish a “credible fear” of persecution. The standard of proof to establish a “credible fear” of persecution or torture is whether there is a significant possibility of establishing eligibility for asylum or withholding of removal under CAT before an immigration judge.

Where there is disagreement among the United States Circuit Courts of Appeal as to the proper interpretation of a legal issue, the precedent for the Circuit in which the applicant resides is used in determining whether the applicant has a reasonable fear of persecution or torture. Note that this differs from the credible fear context in which the Circuit interpretation most favorable to the applicant is used.

VI. PRIOR DETERMINATIONS ON THE MERITS

An adjudicator or immigration judge previously may have made a determination on the merits of the claim. This is most common in the case of an applicant who is subject to reinstatement of a prior order. For example, the applicant may
have requested asylum and withholding of removal in prior removal proceedings before an immigration judge, and the immigration judge may have made a determination on the merits that the applicant was ineligible for relief.

While the APSO should accord deference to the prior determination unless there is clear error, the officer must explore the applicant’s claim. The officer should also inquire as to whether there are any changed circumstances that would otherwise affect the applicant’s eligibility.

**VII. CREDIBILITY**

**A. Credibility Finding**

To determine whether an applicant has a reasonable fear of persecution or a reasonable fear of torture, the asylum officer must evaluate whether the applicant’s claim is credible. In contrast to the credible fear determination, where the asylum officer determines only whether there is a significant possibility the applicant may establish a credible claim, the asylum officer must make a finding as to whether the claim is or is not credible.

In making this determination, the asylum officer should take into account the same factors considered in evaluating credibility in the affirmative asylum context, which are discussed in the RAIO Modules: Credibility and Evidence. The asylum officer should evaluate the consistency, detail, and plausibility of the testimony, in light of country conditions and other documentary evidence. The asylum officer must also take into account factors that may impede clear communication or lead to misunderstandings, such as effects of trauma, cultural factors, and use of an interpreter.

**B. Relevance**

If parts of the testimony are found not credible, the asylum officer must determine whether those parts of the testimony are relevant to the applicant’s claim of persecution or to the applicant’s claim of torture. Only if the aspects of the testimony found not credible are relevant to the applicant’s claim may the APSO base an adverse reasonable fear determination on the applicant’s lack of credibility. For example, if there are inconsistencies between the applicant’s testimony and government records regarding the number of times applicant entered the United States but this inconsistency does not affect the applicant’s claim, this would not be relevant and an adverse determination should not be based on this discrepancy.
However, there are instances where this inconsistency could be relevant. For example, if the government records indicate that the applicant was in the United States during the time she claims to have been harmed while residing in a foreign country, this would be relevant and it could be used as a factor supporting a negative determination, provided that the applicant is unable to explain the inconsistency reasonably.

C. Opportunity to Address Inconsistencies and Discrepancies

The asylum officer must afford the applicant the opportunity to explain any apparent relevant inconsistencies and discrepancies. This opportunity to respond must be documented in the sworn statement. This is particularly important in the reasonable fear process, because the interview may be the applicant's only opportunity to explain perceived discrepancies.

The individual previously may have provided testimony regarding his or her claim in the context of an asylum or withholding of removal application. It is important that the asylum officer review all prior testimony before the interview in order to ask the individual about any inconsistencies between prior testimony and the testimony provided at the reasonable fear interview. If the individual is not given such an opportunity at the reasonable fear interview, and inconsistencies are discovered at a later date, it may be necessary to conduct a second interview to give the individual an opportunity to explain.

D. Prior Credibility Determinations

An adjudicator previously may have made a determination on the credibility of the individual's assertions regarding facts that form the basis of the claim, particularly in the case of an applicant who is subject to reinstatement of a prior order. For example, the applicant may have requested asylum and withholding of removal in prior removal proceedings before an immigration judge, and the immigration judge may have made a determination that the claim was or was not credible.

The APSO should accord deference to previous credibility determinations made on the same facts alleged in support of the reasonable fear claim. However, the asylum officer is not strictly bound by prior credibility determinations—whether the determination was that the assertions were credible or not credible. The evidence presented to the asylum officer may be different than that presented to the previous adjudicator, either because the individual has obtained additional information since the previous adjudication, or because of the difference in the nature of the claim for protection from removal. (For example, previously the applicant may not have.

See Mansour v. INS, 230 F.3d 902 (7th Cir. 2000) (Where the basis for an applicant's asylum and torture claims differ, individualized treatment is warranted to ensure a thorough exploration of the torture claim)

See Ejeg v. Ashcroft, 293 F.3d 899 (5th Cir. 2002) (Factual conclusions of Board of Immigration Appeals (BIA) are reviewed for substantial evidence, and questions of law are reviewed de novo, giving great deference to an immigration judge's decisions concerning an alien's credibility.)
have been able to present a claim based on fear of torture.)

Deference is typically thought of in the context in which a reviewing body is reviewing a decision made below to determine whether or not decision as a whole should be upheld. Defeference operates differently where the APSO is making a new decision on a new record. Even when the claim asserted is the same as the claim previously adjudicated, a new reasonable fear interview creates a new record. The APSO decision is a new action under a different authority. The APSO is not acting as a reviewing body for the previous decision and must instead make a new determination, which includes a new credibility determination. Therefore, deference in this context cannot entail assumption of a negative credibility determination as a fact found and application of it to the new decision in lieu of a separate analysis. Instead, it requires the APSO to acknowledge the significance of the prior credibility considerations on the “same facts” and then take them into account in the analysis. What constitutes “the same facts” is an important part of this discussion. Prior vague testimony might not be considered to be the same facts as more specific testimony received during the reasonable fear interview.

Some prior negative credibility determinations may be clear and the facts they address are easily identified as being the same facts that are being assessed for credibility in the reasonable fear interview. In such a case, deference can be accorded by raising to the applicant the problems noted by the previous adjudicator, during the reasonable fear interview, giving the applicant the opportunity to explain, and deferring to the previous adjudicator’s judgment in assessing the reasonableness of any explanation where that judgment is supportable. Since it is important that the applicant be given the opportunity to explain the negative credibility factors raised by the prior adjudicator, this would require a review of the previous record and determination prior to the reasonable fear interview and some exploration of the credibility concerns during the reasonable fear interview. The record of the applicant’s previous testimony can also be helpful in the determination of whether the explanation of credibility issues is reasonable. For example, if the applicant indicates during his reasonable fear interview that he was not given the opportunity to talk about other instances of harm, but the transcript of his prior hearing indicates he was asked several times if anything else happened to him, this could support a determination that the applicant’s explanation is not reasonable. Keep in mind, however, that some of the instances that applicant is testifying about may have occurred after the previous interview or hearing.

Note: This differs from how we treat prior credibility determinations in the affirmative asylum context where an applicant was previously denied by an Immigration Judge. An asylum seeker cannot apply for asylum before an AO if he or she has previously applied for and has been denied asylum (and there is no appeal pending) by an immigration judge (IJ) or the Board of Immigration Appeals (BIA) (collectively EOIR), unless the asylum seeker demonstrates to the satisfaction of the adjudicator changed circumstances (in facts or in law) that materially affect asylum eligibility.
In any case in which the APSO’s credibility determination differs from the credibility determination previously reached by another adjudicator on the same allegations, the asylum officer must provide a sound explanation and support for the different finding.

VIII. ESTABLISHING REASONABLE FEAR OF PERSECUTION

To establish a reasonable fear of persecution, the applicant must show that there is a reasonable possibility he or she will suffer persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. As explained above, this is the same standard asylum officers use in evaluating whether an applicant is eligible for asylum. However, the reasonable fear standard in this context is used not as part of an eligibility determination for asylum, but rather as a screening mechanism to determine whether an individual may be able to establish eligibility for withholding of removal in Immigration Court.

In contrast to an asylum adjudication, the APSO may not exercise discretion in making a positive or negative reasonable fear determination and may not consider the applicability of any mandatory bars that may apply if the applicant is permitted to apply for withholding of removal before the immigration judge.

A. Persecution

The harm the applicant fears must constitute persecution. The determination of whether the harm constitutes persecution for purposes of the reasonable fear determination is no different from the determination in the affirmative asylum context. This means that the harm must be serious enough to be considered persecution, as described in case law, the UNHCR Handbook, and USCIS policy guidance. Note that this is different from the evaluation of persecution in the credible fear context, where the applicant need only demonstrate a significant possibility that he or she could establish that the feared harm is serious enough to constitute persecution.

B. Nexus to a Protected Characteristic

As in the asylum context, the applicant must establish that the feared harm is on account of a protected characteristic in the refugee definition (race, religion, nationality, membership in a particular social group, or political opinion). This means the
applicant must provide some evidence, direct or circumstantial, that the persecutor is motivated to persecute the applicant because the applicant possesses or is believed to possess one or more of the protected characteristics in the refugee definition.

C. Past Persecution

1. Presumption of future persecution.

If an applicant establishes past persecution on account of a protected characteristic, it is presumed that the applicant has a reasonable fear of persecution in the future on the basis of the original claim. This presumption may be overcome if a preponderance of the evidence establishes that,

a. there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution, or

b. the applicant could avoid future persecution by relocating to another part of the country of feared persecution and, under all the circumstances, it would be reasonable to expect the applicant to do so.

2. Severe past persecution

A finding of reasonable fear of persecution cannot be based on past persecution alone, in the absence of a reasonable possibility of future persecution. A reasonable fear of persecution may be found only if there is a reasonable possibility the applicant will be persecuted in the future, regardless of the severity of the past persecution. This is because withholding of removal is accorded only to provide protection against future persecution and may not be granted without a likelihood of future persecution.

As noted above, a finding of past persecution raises the presumption that the applicant’s fear of future persecution is reasonable.

D. Internal Relocation

As in the asylum context, the evidence must establish that the applicant could not avoid future persecution by relocating within the country of feared persecution or that, under all the circumstances, it would be unreasonable to expect him or her to do so. In cases in which the persecutor is a government or is
government-sponsored, or the applicant has established persecution in the past, it shall be presumed that internal relocation would not be reasonable, unless DHS establishes by a preponderance of the evidence that, under all the circumstances, it would be reasonable for the applicant to relocate.

E. Mandatory Bars

Asylum officers may not take into consideration mandatory bars to withholding of removal when making reasonable fear of persecution determinations.

If the asylum officer finds that there is a reasonable possibility the applicant would suffer persecution on account of a protected characteristic, the asylum officer must refer the case to the immigration judge, regardless of whether the person has committed an aggravated felony, has persecuted others, or is subject to any other mandatory bars to withholding of removal.

However, during the interview the officer must develop the record fully by exploring whether the applicant may be subject to a mandatory bar.

For the purposes of drafting the determination, the asylum officer should flag any potential bars by including a brief description of the facts that may implicate a mandatory bar. The asylum officer should then note that the mandatory bars were not considered when making the determination.

The immigration judge will consider mandatory bars in deciding whether the applicant is eligible for withholding of removal under section 241(b)(3) of the Act.

The following mandatory bars apply to withholding of removal under section 241(b)(3)(A) for cases commenced April 1, 1997 or later:

1. the alien ordered, incited, assisted, or otherwise participated in the persecution of an individual because of the individual's race, religion, nationality, membership in a particular social group, or political opinion;

2. the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States;

3. there are serious reasons to believe that the alien committed a serious nonpolitical crime outside the United States before the alien arrived in the United States;
(4) there are reasonable grounds to believe that the alien is a danger to the security of the United States (including anyone described in subparagraph (B) or (F) of section 212(a)(3)); or

(5) the alien is deportable under Section 237(a)(4)(D) (participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing. Any alien described in clause (i), (ii), or (iii) of section 212(a)(3)(E) is deportable).}.

IX. CONVENTION AGAINST TORTURE – BACKGROUND

This section contains a background discussion of the Convention Against Torture, to provide context to the reasonable fear of torture determinations. As a signatory to the Convention Against Torture the United States has an obligation to provide protection where there are substantial grounds to believe that an individual would be in danger of being subjected to torture. Notably, there are no bars to protection under the Convention Against Torture. Torture is an act universally condemned and so repugnant to basic notions of human rights that even individuals who are undeserving of refugee protection, will not be returned to a country where they are likely to be tortured. An overview of the Convention Against Torture may be found in the RAIO Module: International Human Rights Law.

A. U.S. Ratification of the Convention and Implementing Legislation

The United States Senate ratified the Convention Against Torture on October 27, 1990. President Clinton then deposited the United States instrument of ratification with the United Nations Secretary General on October 21, 1994, and the Convention entered into force for the United States thirty days later, on November 20, 1994.

Recognizing that a treaty is considered “law of the land” under the United States Constitution, the Executive Branch took steps to ensure that the United States was in compliance with its treaty obligations, even though Congress had not yet enacted implementing legislation. The INS adopted an informal process to evaluate whether a person who feared torture and was subject to a final order of deportation, exclusion, or removal would be tortured in the country to which the person would be removed. Similarly, the Department of State considered whether a person would be subject to torture when addressing requests for extradition.

On October 21, 1998, President Clinton signed legislation that required the Department of Justice to promulgate regulations to implement the United States' obligations under Article 3 of the Convention Against Torture, subject to any reservations.

understandings, declarations, and provisos contained in the United States Senate resolution to ratify the Convention.

Pursuant to the statutory directive, the Department of Justice regulations provide a mechanism for individuals fearing torture to seek protection under Article 3 of the Convention. One of the mechanisms for protection provided in the regulations, effective March 22, 1999, is the "reasonable fear" screening process.

See 8 CFR 208.16-208.18
B. Article 3:

1. Non-Refoulement.

Article 3 of the Convention provides:

No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

This provision does not prevent the removal of a person to a country where he or she would not be in danger of being subjected to torture. Like withholding of removal under section 241(b)(3) of the INA, which is based on Article 33 of the Convention relating to the Status of Refugees, protection under Article 3 of the Convention Against Torture is country-specific.

In addition, this obligation does not prevent the United States from removing a person to a country at any time if conditions have changed such that it no longer is likely that the individual would be tortured there.

2. U.S. Ratification Document

When ratifying the Convention Against Torture, the U.S. Senate adopted a series of reservations, understandings and declarations, which modify the U.S. obligations under Article 3, as described in the section below on the Convention definition of torture. These reservations, understandings, and declarations are part of the substantive standards that are binding on the United States and are reflected in the implementing regulations.

X. DEFINITION OF TORTURE

Torture has been defined in a variety of documents and in legislation unrelated to the Convention Against Torture. However, only an act that falls within the definition described in Article 1 of the Convention, as modified by the U.S. ratification document, may be considered “torture” for purposes of making a reasonable fear of torture determination. These substantive standards are incorporated in the regulations at 8 C.F.R. § 208.18(a)(1999).

See RAIO Module:
Article 1 of the Convention defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The Senate adopted several important “understandings” regarding the definition of torture, which are included in the implementing regulations and are discussed below. These “understandings” are binding on adjudicators interpreting the definition of torture.

A. Identity of Torturer

The torture must be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

1. Public official

The torturer of the person who acquires in the torture must be a public official or other person acting in an official capacity in order to invoke Article 3: Convention Against Torture protection. A non-governmental actor could be found to have committed torture within the meaning of the Convention only if that person inflicts the torture (1) at the instigation of, (2) with the consent of, or (3) with the acquiescence of a public official or other person acting in official capacity.

The phrase “acting in an official capacity” modifies both “public official” and “other person,” such that a public official must be “acting in an official capacity” to satisfy the state action element of the torture definition.

When a public official acts in a wholly private capacity,
outside any context of governmental authority, the state action element of the torture definition is not satisfied. On this topic, the Second Circuit provided that, "[i]f two of the CAT's drafters have noted, when it is a public official who inflicts severe pain or suffering, it is only in exceptional cases that we can expect to be able to conclude that the acts do not constitute torture by reason of the official acting for purely private reasons."

To determine whether a public official is acting in a private capacity or in an official capacity, APSOs must elicit testimony to determine whether the public official was acting within the scope of their authority and/or under color of law. A determination that the public official is acting under either of the scope of their authority or under color of law would result in a determination that the public official was acting "in an official capacity."

Although the regulation does not define "acting in an official capacity," the Attorney General equated the term to mean "under color of law" as interpreted by cases under the civil rights act.

Thus, a public official is acting in an official capacity when he misuses power possessed by virtue of law and made possible only because he was clothed with the authority of law.

To establish whether a public official is acting in an official capacity (i.e., under the color of law), the applicant must establish a nexus between the public official's authority and the harmful conduct inflicted on the applicant by the public official. The Eighth Circuit addressed "acting in an official capacity" in its decision in *Ramirez Peyro v. Holder*. The court indicated such an inquiry is fact intensive and includes considerations like "whether the officers are on duty and in uniform, the motivation behind the officer's actions and whether the officers had access to the victim because of their positions, among others." *Id.*

Following the guidance provided in *Ramirez Peyro v. Holder*, the Fifth Circuit also addressed "acting in an official capacity" by noting "[w]e have recognized on numerous occasions that acts, motivated by an officer's personal objectives, are "under color of law" when the officer uses his official capacity to further those objectives." Citing directly to *Ramirez Peyro v. Holder*, the Fifth Circuit determined that "proving action in an
officer's official capacity "does not require that the public official be executing official state policy or that the public official be the nation’s president or some other official at the upper echelons of power. Rather... the use of official authority by low-level officials, such as police officers, can work to place actions under the color of law even where they are without state sanction."

In this context, the court points to two published cases as examples. First, Bennett v. Pippin, 74 F.3d 578, 589 (5th Cir. 1996), in which the court found that an officer’s action was "under color of state law" when a sheriff raped a woman and used his position to ascertain when her husband would be home and threatened to have her thrown in jail if she refused. The Fifth Circuit compared this case to Delcambre v. Delcambre, 635 F.2d 407, 408 (5th Cir. 1981) (per curiam), in which the court found "no action under color of law where a police chief assaulted his sister-in-law over personal arguments about family matters, but did not threaten her with his power to arrest."

As Marmorato v. Holder illustrates with its citation to Bennett v. Pippin, an official need not be acting in the scope of their authority to be acting under color of law.

It is unsettled whether an organization that exercises power on behalf of the people is subject to its jurisdiction, as in the case of a rebel force which controls a sizable portion of a country, would be viewed as a "government actor." It would be necessary to look at factors such as how much of the country is under the control of the rebel force and the level of that control. See Matter of S-V-, Int. Dec. 3430 (BIA 2000), concurring opinion, see also Habibemichael v. Ashcroft, 370 F.3d 774 (8th Cir. 2004) (remanding for agency determination as to the extent of the Eritrean People's Liberation Front's (EPLF) control over parts of Ethiopia during the period when the applicant was conscripted by the EPLF); D-Mahumed v. U.S. Atty. Gen., 388 F.3d 814 (11th Cir. 2004) (denying protection under CAT because "Somalia currently has no central government, and the clans who control various sections of the country do so through continued warfare and not through official power.") See also the Committee Against Torture decision in
Acquiescence

When the “torturer” is not a public official or other individual acting in an official capacity, a claim under the Convention Against Torture only arises if a public official or other person acting in an official capacity instigates, consents, or acquiesces to the torture.

A public official cannot be said to have “acquiesced” in torture unless, prior to the activity constituting torture, the official was “aware” of such activity and thereafter breached a legal responsibility to intervene to prevent the activity.

The Senate ratification history explains that the term “awareness” was used to clarify that government acquiescence may be established by evidence of either actual knowledge or willful blindness. “Willful blindness” imputes knowledge to a government official who has a duty to prevent misconduct and “deliberately closes his eyes to what would otherwise have been obvious to him.”

In addressing the meaning of acquiescence as it relates to fear of Colombian guerrillas, paramilitaries and narco-traffickers who were not attached to the government, the Board of Immigration Appeals (BIA) indicated that more than awareness or inability to control is required. The BIA held that for acquiescence to take place the government officials must be “willfully accepting” of the torturous activity of the non-governmental actor.

Elmi v. Australia, Comm. No. 120/1998 (1998) (finding that warring factions in Somalia fall within the phrase “public official(s) or other person(s) acting in an official capacity). Note that the United Nations Committee Against Torture a monitoring body for the implementation and observance of the Convention Against Torture, The U.S. recognizes the Committee, but does not recognize its competence to consider cases. The BIA considers the Committee’s opinions to be advisory only. See Matter of S-V-, 8 C.F.R. § 208.18(a)(7)


Several federal circuit courts of appeals have rejected the BIA’s “willful acceptance” phrase in favor of the more precise “willful blindness” language that appears in the Senate’s ratification history.

For purposes of threshold reasonable fear screenings, asylum officers must use the willful blindness standard.

The United States Circuit Court of Appeals for the Ninth Circuit ruled that the correct inquiry concerning the acquiescence of a state actor is “whether a respondent can show that public officials demonstrate willful blindness to the torture of their citizens.” The court rejected the notion that acquiescence requires a public official’s “actual knowledge” and “willful acceptance.” The Ninth Circuit subsequently reaffirmed that the state actor’s acquiescence to the torture must be “knowing,” whether through actual knowledge or imputed knowledge (“willful blindness”). Both forms of knowledge constitute “awareness.”

The United States Circuit Court of Appeals for the Second Circuit agreed with the Ninth Circuit approach on the issue of acquiescence of government officials, stating “torture requires only that government officials know of or remain willfully blind to act and thereby breach their legal responsibility to prevent it.”

**References:**
- Ontuño-Turciós v. Ashcroft, 303 F.3d 134, 34-55 (5th Cir. 2002); Hakim v. Holder, 628 F. 3d 151 (5th Cir. 2010); Ali v. Reno, 237 F.3d 591, 597 (6th Cir. 2001); Zheng v. Ashcroft, 332 F.3d 1186 (9th Cir. 2003); Khourzam v. Ashcroft, 361 F.3d 161 (2d Cir. 2004); Azanor v. Ashcroft, 364 F.3d 1013 (9th Cir. 2004); Lopez-Soto v. Ashcroft, 383 F.3d 228, 240 (4th Cir. 2004); Anir v. Gonzalez, 467 F.3d 921, 922 (6th Cir. 2006); Silva-Rengifo v. Atty. Gen. of U.S., 473 F.3d 58, 70 (3d Cir. 2007); Aguilar-Ramos v. Holder, 594 F.3d 701, 706 (9th Cir. 2010); Díaz v. Holder, 2012 WL 5359295 (10th Cir. 2012) (unpublished); Pieschacon-Villegas v. Atty. Gen. of U.S., 671 F.3d 303 (3d Cir. 2011).
- Zheng v. INS, 332 F.3d 1186 (9th Cir. 2003)
- Azanor v. Ashcroft, 364 F.3d 1013, 1020 (9th Cir. 2004)
- Khourzam v. Ashcroft, 361 F.3d 161, 171 (2d Cir. 2004) (finding that even if the Egyptian police who would carry out the abuse were not acting in an official capacity, “the 'routine' nature of the torture and its connection to the criminal justice system supply ample evidence that higher-level officials either knew of the torture or remain willfully blind to the torture and breach their legal
a. Relevance of a government’s ability to control a non-governmental entity from engaging in acts of torture:

The requirement that the torture be inflicted by or at the instigation, or with the consent or acquiescence of a public official or other person acting in an official capacity, is distinct from the “unable or unwilling to protect” standard used in the definition of “refugee”.

Although a government’s ability to control a particular group may be relevant to an inquiry into governmental acquiescence under CAT, that inquiry does not turn on a government’s ability to control persons or groups engaged in torturous activity.

In *De La Rosa v. Holder* the Second Circuit stated “it is not clear to this Court why the preventative efforts of some government actors should foreclose the possibility of government acquiescence, as a matter of law, under the CAT. Where a government contains officials that would be complicit in torture, and that government, on the whole, is admittedly incapable of actually preventing that torture, the fact that some officials take action to prevent the torture, would seem neither inconsistent with a finding of government acquiescence nor necessarily responsive to the question of whether torture would be “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”

In a similar case, the Third Circuit remanded to the BIA, indicating that the fact that the government of Colombia was engaged in war against the FARC, it did not in itself establish that it could not be consenting or acquiescing to torture by members of the FARC.

Evidence that private actors have general support, without more, in some sectors of the government may be insufficient to establish that the officials would acquiesce to torture by the private actors. Thus, a Honduran peasant and land reform activist who testified to fearing severe harm by a group of landowners did not demonstrate that government officials would turn a blind eye if he were tortured simply because they had ties to the landowners.
B. Torturer's Custody or Control over Individual

The definition of torture applies only to acts directed against persons in the offender’s custody or physical control.

The United States Circuit Court of Appeals for the Ninth Circuit held that an applicant need not demonstrate that he or she would likely face torture while in a public official’s custody or physical control. It is enough that the alien would likely face torture while under private individuals’ exclusive custody or control if such torture were to take place with consent or acquiescence of a public official or other individual acting in an official capacity.

For example, the Seventh Circuit has posited in dictum that, “(p)robably—more often than not the victim of a murder is within the murderer’s physical control for at least a short time before the actual killing...” However, the court provided “that would not be true if, for example, the murderer were a sniper or a car bomber”.

Pre-custodial police operations or military combat operations are outside the scope of Convention protection.

Establishing whether the act of torture may occur while in the offender’s custody or physical control is very fact specific and in practicality it is very difficult to establish. While the applicant bears the burden of establishing “custody or physical control”, the burden must be a reasonable one and this element may be established solely by circumstantial evidence.

While the law is unsettled as to the meaning of “in the offender’s custody or physical control”, when considering this element, APSOs must give applicants the benefit of doubt.

C. Specific Intent

For an act to constitute torture, it must be specifically intended to inflict severe physical or mental pain or suffering. An intentional act that results in unanticipated and unintended severity of pain is not torture under the Convention definition.

Where the evidence shows that an applicant may be specifically targeted for punishment that may rise to the level of torture, the harm the applicant faces is specifically intended.
1. Reasons torture is inflicted

The Convention definition provides a non-exhaustive list of possible reasons torture may be inflicted. The definition states that torture is an act that inflicts severe pain or suffering on a person, for such purposes as:

a. obtaining from him or a third person information or a confession,

b. punishing him for an act he or a third person has committed or is suspected of having committed,

c. intimidating or coercing him or a third person, or

d. for any reason based on discrimination of any kind.

Note: All discrimination is not torture.

2. No nexus to protected characteristic required.

Unlike the non-refoulement obligation in the Convention relating to the Status of Refugees, the Convention Against Torture does not require that the torture be connected to any of the five protected characteristics identified in the definition of a refugee, or any other characteristic the individual possesses or is perceived to possess.

D. Degree of Harm

"Torture" requires severe pain or suffering, whether physical or mental. "Torture" is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.
The Report of the Committee on Foreign Relations, accompanying the transmission of the Convention to the Senate for ratification, explained:

The requirement that torture be an extreme form of cruel and inhuman treatment is expressed in Article 16, which refers to "other acts of cruel, inhuman, or degrading treatment or punishment which do not amount to torture ...". The negotiating history indicates that the underlined portion of this description was adopted in order to emphasize that torture is at the extreme end of cruel, inhuman and degrading treatment or punishment and that Article 1 should be construed with this in mind.
Therefore, certain forms of harm that may be considered persecution may not be considered severe enough to amount to torture.

Types of harm that may be considered torture include, but are not limited to, the following:

1. rape and other severe sexual violence;
2. application of electric shocks to sensitive parts of the body;
3. sustained, systematic beating;
4. burning;
5. forcing the body into positions that cause extreme pain, such as contorted positions, hanging, or stretching the body beyond normal capacity;
6. forced non-therapeutic administration of drugs; and
7. severe mental pain and suffering.

Any harm must be evaluated on a case-by-case basis to determine whether it constitutes torture. In some cases, whether the harm above constitutes torture will depend upon its severity and cumulative effect.

The BIA in *Matter of G-A*, 23 I&N Dec. 366, 372 (BIA 2002) held that treatment that included “suspension for long periods in contorted positions, burning with cigarettes, sleep deprivation, and... severe and repeated beatings with cables or other instruments on the back and on the soles of the feet... beatings about the ears, resulting in partial or complete deafness, and punching in the eyes, leading to partial or complete blindness” when intentionally and deliberately inflicted constitutes torture.

1. Mental Pain or Suffering

For mental pain or suffering to constitute torture, the mental pain must be prolonged mental harm caused by or resulting from:

   a. The intentional infliction or threatened infliction of severe physical pain or suffering;
   b. The administration or application, or threatened administration or application, of mind altering...
substances or other procedures calculated to disrupt profoundly the senses or the personality;

c. The threat of imminent death; or

d. The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration of application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

E. Lawful Sanctions

Article 1 of the Convention provides that pain or suffering "arising only from, inherent in or incidental to lawful sanctions" does not constitute torture.

1. Definition of lawful sanctions

"Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture."

The supplementary information published with the implementing regulations explains that this provision "does not require that, in order to come within the exception, an action must be one that would be authorized by United States law. It must, however, be legitimate, in the sense that a State cannot defeat the purpose of the Convention to prohibit torture."

Note that "lawful sanctions" do not include the intentional infliction of severe mental or physical pain during interrogation or incarceration after an arrest that is otherwise based upon legitimate law enforcement considerations.

2. Sanctions cannot be used to circumvent the Convention

A State Party cannot through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture. In other words, the fact that a country's law allows a particular act does not preclude a finding that the act constitutes torture.

Example: A State Party's law permits use of electric...
A. Torture

In evaluating whether an applicant has established a reasonable fear of torture, the asylum officer must address each of the elements in the torture definition and determine whether there is a reasonable possibility that each element is satisfied.

1. Severity of feared harm

Is there a reasonable possibility the applicant will suffer severe pain and suffering?

If the feared harm is mental suffering, does it meet each of the requirements listed in the Senate “understandings,” as reflected in the regulations?

2. State action

Is there a reasonable possibility the pain or suffering would be inflicted by or at the instigation of a public official or other person acting in an official capacity?

If not, is there a reasonable possibility the pain or suffering would be inflicted with the consent or acquiescence of a public official or other person acting in an official capacity?

3. Custody or physical control

Is there a reasonable possibility the feared harm would be inflicted while the applicant is in the custody, or physical control of the offender?

4. Specific intent

Is there a reasonable possibility the feared harm would be specifically intended by the offender to inflict severe physical or mental pain or suffering?

5. Lawful sanctions

Is there a reasonable possibility the feared harm would not arise only from, or be inherent in or incidental to lawful sanctions?

If the feared harm arises from, is inherent in, or is incidental to, lawful sanctions, is there a reasonable possibility the sanctions would defeat the object and
purpose of the Convention?

B. No Nexus Requirement

There is no requirement that the feared torture be on account of a protected characteristic in the refugee definition. While there is a "specific intent" requirement, that the harm be intended to inflict severe pain or suffering, the reasons motivating the offender to inflict such pain or suffering need not be on account of a protected characteristic of the victim.

Rather, the Convention definition provides a non-exhaustive list of possible reasons the torture may be inflicted, as described in section IX.C. above. The use of the modifier "for such purposes" indicates that this is a non-exhaustive list, and that severe pain and suffering inflicted for other reasons may also constitute torture.

Note that the reasons for which a government has inflicted torture on individuals in the past may be important in determining whether the government is likely to torture the applicant.

C. Past Torture

Unlike a finding of past persecution, a finding that an applicant suffered torture in the past does not raise a presumption that it is more likely than not the applicant will be subject to torture in the future. However, regulations require that any past torture be considered in evaluating whether the applicant is likely to be tortured, because an applicant's experience of past torture may be probative of whether the applicant would be subject to torture in the future.

However, for purposes of the reasonable fear screening, which requires a lower standard of proof than is required for withholding of removal, that an applicant who demonstrates that he or she has been tortured in the past should generally be found to have met his or her burden of establishing a reasonable possibility of torture in the future, absent evidence to the contrary.


See Servian v. Ashcroft, 290 F.3d 166 (3d Cir. 2002) (finding that the BIA did not abuse its discretion in denying a motion to reopen to consider a Convention claim when country conditions indicate that the government in question usually uses torture to extract confessions or in politically-sensitive cases and there is no reason to believe that the applicant falls into either category).

64 Fed. Reg. 8478, 8480 (February 19, 1999); 8 C.F.R. § 208.16(c)(3)

This approach governs only the reasonable fear screening and is not applicable to the actual eligibility determination for withholding under the Convention Against Torture.

See Abdel-Masih v. INS, 73 F.3d 579, 584 (5th Cir. 1996); (past actions do not create "an outer limit" on the government's future actions against an individual).
contrary.

Conversely, past harm that does not rise to the level of torture does not mean that torture will not occur in the future, especially in countries where torture is widespread.

D. Internal Relocation

Regulations require the immigration judge to consider evidence that the applicant could relocate to another part of the country of feared torture, in assessing whether the applicant is eligible for withholding of removal under the Convention Against Torture.

However, for purposes of the reasonable-fear of torture determination, the asylum officer should not consider whether the applicant could relocate to another part of his or her country. In light of the lower standard applied in the reasonable-fear screening process, asylum officers should find a reasonable fear of torture if the applicant establishes a reasonable possibility of torture in any part of the country to which the applicant has been ordered removed.

E. Mandatory Bars

Although certain mandatory bars apply to a grant of withholding of removal under the Convention Against Torture; no mandatory bars may be considered in making a reasonable-fear of torture determination.

Because there are no bars to protection under Article 3, an immigration judge must grant deferral of removal to an applicant who is barred from a grant of withholding of removal, but who is likely to be tortured in the country to which the applicant has been ordered removed. Therefore, the reasonable-fear screening process must identify and refer to the immigration judge aliens who have a reasonable fear of torture, even those who would be barred from withholding of removal, so that an immigration judge can determine whether the alien should be granted deferral of removal.

APSOs must elicit information regarding any potential bars to withholding of removal and document such information in the sworn statement.

8 C.F.R. § 208.16(c)(3)(ii)

Again, this approach governs only the reasonable fear of torture screening and is not applicable to the actual-eligibility determination for withholding under the Convention Against Torture.

This approach should be differentiated from the reasonable fear of persecution determination, in which internal relocation is considered.

8 C.F.R. §§ 208.16(d)(2); 208.31(c)

8 C.F.R. § 208.17(a)

For the purposes of drafting the determination, the officer should flag the potential bar by including a brief description of the facts that may implicate a mandatory bar. If a bar is flagged then
XII. EVIDENCE

A. Credible Testimony

To establish eligibility for withholding of removal under section 241(b)(3) of the Act or the Convention Against Torture, the testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

As in the asylum context, there may be cases where lack of corroboration, without reasonable explanation, casts doubt on the credibility of the claim or otherwise affects the applicant's ability to meet the requisite burden of proof. Asylum officers should follow the guidance in the RAIO Modules, Credibility, and Evidence, and HQASY memos on this issue in evaluating whether lack of corroboration affects the applicant's ability to establish a reasonable fear of persecution or torture.

B. Country Conditions

Country conditions information is integral to most reasonable fear determinations, whether the asylum officer is evaluating reasonable fear of persecution or reasonable fear of torture.

The Convention Against Torture specifically requires State Parties to take country conditions information into account, where applicable, in evaluating whether a person would be subject to torture in a particular country.

"[T]he competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

The implementing regulations reflect this treaty provision by providing that all evidence relevant to the possibility of future torture must be considered, including, but not limited to, evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable, and other relevant information regarding conditions in the country of removal.

8 C.F.R. §§ 208.16(b); 208.16(c)(2)


Convention Against Torture, Article 3: para.2.

8 C.F.R. §§ 208.16(c)(3)
As discussed in the supplementary information to the regulations, "the words 'where applicable' indicate that, in each case, the adjudicator will determine whether and to what extent evidence of human rights violations in a given country is in fact a relevant factor in the case at hand. Evidence of the gross and flagrant denial of freedom of the press, for example, may not tend to show that an alien would be tortured if referred to that country."

Analysis of country conditions requires an examination into the likelihood that the applicant will be persecuted or tortured upon return. Some evidence indicating that the feared harm or penalty would be enforced against the applicant should be cited in support of a positive reasonable fear determination.

In Matter of G-A-, the BIA found that an Iranian Christian of Armenian descent who lived in the U.S. for more than 25 years and who had been convicted of a drug-related crime is likely to be subjected to torture if returned to Iran. The BIA considered the combination of the harsh and discriminatory treatment of ethnic and religious minorities in Iran, the severe punishment of those associated with narcotics trafficking; and the perception that those who have spent an extensive amount of time in the U.S. are opponents of the Iranian government or even U.S. spies to determine that, in light of country conditions information, the individual was entitled to relief under the Convention Against Torture:

In Matter of J-F-F-, the Attorney General held that the applicant failed to meet his evidentiary burden for deferral of removal to the Dominican Republic under the Convention Against Torture: Here, the IJ improperly "...strung together [the following] series of suppositions: that respondent needs medication in order to behave within the bounds of the law; that such medication is not available in the Dominican Republic; that as a result, respondent would fail to control himself and become 'rowdy'; that this behavior would lead the police to incarcerate him; and that the police would torture him while he was incarcerated." The Attorney General determined that this hypothetical chain of events was insufficient to meet the applicant's burden of proof. In addition to considering the likelihood of each step in the hypothetical chain of events, the adjudicator must also consider whether the entire chain of events will come together to result in


See Matter of M-B-A-, 23 I&N Dec. 474, 478-479 (BIA 2002) (finding that a Nigerian woman convicted of a drug offense in the United States was ineligible for protection under the Convention where she provided no evidence that a Nigerian law criminalizing certain drug offenses committed outside Nigeria would be enforced against her).


Matter of J-F-F-, 23 I&N Dec. 912, 917 n.4 (A.G. 2006) ("An alien will never be able to show that he faces a more likely than not chance of torture if one link in the chain cannot be shown to be more likely than not to occur." Rather, it "is the likelihood of all necessary events coming together that must more likely than not lead to torture, and a chain of events cannot be more likely than its least likely link."). (citing Matter of Y-L-, 23 I&N Dec. 270, 282 (A.G. 2002)).
the probability of torture of the applicant.

"Official as well as unofficial country reports are probative evidence and can, by themselves, provide sufficient proof to sustain an alien's burden under the INA". Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. 2003)

The Ninth Circuit has also addressed the use of country conditions in withholding cases. Kamilthas v. I.N.S., 251 F.3d 1279 (C.A.9, 2001) held that the "BIA failed to consider probative evidence in the record of country conditions which confirm that Tamil males have been subjected to widespread torture in Sri Lanka."

XIII. INTERVIEWS

A. General Considerations

Interviews for reasonable fear determinations should generally be conducted in the same manner as asylum interviews. They should be conducted in a non-adversarial manner, separate from the public and consistent with the guidance in the RAIO Combined Training lessons regarding interviewing.

The circumstances surrounding a reasonable fear interview may be significantly different from an affirmative asylum interview. A reasonable fear interview may be conducted in a jail or other detention facility and the applicant may be handcuffed or shackled. Such conditions may be particularly traumatic for individuals who have escaped persecution or survived torture and may impact their ability to testify. Additionally, the applicant may have an extensive criminal record. Given these circumstances, officers should take particular care to maintain a non-adversarial tone and atmosphere during reasonable fear interviews.

At the beginning of the interview, the asylum officer should determine whether the applicant has an understanding of the reasonable fear process and answer any questions the applicant may have about the process.

B. Confidentiality

The information regarding the applicant's fear of persecution and/or fear of torture is confidential and cannot be disclosed without the applicant's written consent, unless one of the exceptions in the regulations regarding the confidentiality of the...
asylum process apply. At the beginning of the interview, the asylum officer should explain to the applicant the confidential nature of the interview.

C. Interpretation

If the applicant is unable to proceed effectively in English, the asylum officer must use a commercial interpreter with which USCIS has a contract to conduct the interview.

If the applicant requests to use a relative, friend, NGO or other source as an interpreter, the asylum officer should proceed with the interview using the applicant's interpreter. However, asylum officers are required to use a contract-interpreter to monitor the interview to verify that the applicant's interpreter is accurate and neutral while interpreting.

The applicant's interpreter must be at least 18 years old. The interpreter must not be:

- the applicant's attorney or representative,
- a witness testifying on behalf of the applicant, or
- a representative or employee of the applicant's country of nationality, or if the applicant is stateless, the applicant's country of last habitual residence.

D. Note Taking

Notes must be taken in the Question and Answer format and recorded on a sworn statement. The asylum officer must read the sworn statement to the applicant (unless the applicant is able to read it, in which case the applicant may read the sworn statement to make any corrections), and allow the applicant to make any corrections before signing it.

E. Representation

The applicant may be represented by counsel or by an accredited, representative at the interview. The representative submits a signed form G-28. The role of the representative in the reasonable fear interview is the same as the role of the representative in the asylum interview.

The representative may present a statement at the end of the interview and, where appropriate, should be allowed to make clarifying statements in the course of the interview, so long as the representative is not disruptive. The asylum officer, in his or

8 C.F.R. § 208.31(c)

Asylum officers may conduct interviews in the applicant's preferred language provided that the officer has been certified by the State Department, and that local office policy permits asylum officers to conduct interviews in languages other than English.


8 C.F.R. § 208.31(c)

Note that the signatures on the sworn statement must be witnessed by a third party. See Draft Reasonable Fear Procedures Manual (Jan. 2003), 4. Note Taking and Sworn Statement.


See Draft Reasonable Fear Procedures Manual (Jan. 2003), IV.6. Discussion on role of the representative in the RAIO Module, Interviewing/Introduction to the Non Adversarial Interview
her discretion, may place reasonable limits on the length of the
statement.

F. Eliciting Information

The APSO must elicit all information relating both to fear of
persecution and fear of torture, even if the asylum officer
determines early in the interview that the applicant has
established a reasonable fear of either.

Specifically, the asylum officer must explore each of the
following areas of inquiry, where applicable:

1. What the applicant fears would happen to him/her if
   returned to a country (elicit details regarding the specific
type of harm the applicant fears)

2. Whom the applicant fears

3. The relationship of the feared persecutor or torturer to the
government or government officials

4. Was a public official or other individual acting in an
   official capacity? Often the public official is a police
   officer. The following is a brief list of questions that may
   be asked when addressing whether a police officer was,
   acting in an official capacity:

   a. Was the officer on duty?

   b. Was the officer in uniform?

   c. Did the officer show a police badge or other type of
      official credential?

   d. Did the officer have access to the victim because of
      his/her authority as a police officer?

   e. If a potential torturer is not a public official or
      someone acting in official capacity, is there evidence
      that a public official or other person acting in official
capacity had, or would have, prior knowledge of the torture and breached, or would breach a legal duty to prevent the torture; including acting in a manner that can be considered to be willfully blind to the torture? Is the torturer part of the government in that country (including local government)?

f. If not, would a government or public official know what they were doing?

g. Would a government or public official think it was okay?

h. If you believe that the government would think this was okay or that the government is corrupt, why do you think this?

i. What experiences have you or people you know or had with the authorities that make you think they would think it was okay if someone was tortured?

j. Would the (agents of harm?) person or persons inflicting torture be told by the government or public official to do that?

k. Did you report any past harm to a public official?

l. What did the public official say to you when you reported it?

m. Did the public official ask you questions about the incident? Did public officials go to crime scene to investigate?

n. Did you ever speak with police after you reported incident?

o. Did you inquire about any investigation? If so, please provide details.

p. Do you know if anyone was ever investigated or charged with crime?

5. The reason(s) someone would want to harm the applicant

6. Whether the applicant has been and/or would be in the
feared offender’s custody or control.

a. How do you think you will be harmed?

b. How will the feared offender find you?

7. Whether the harm the applicant fears may be pursuant to legitimate sanctions

a. Would anyone have a legal reason to punish you in your in your home country?

b. Do you think you will be given a trial if you are arrested?

c. What will happen to you if you are put in prison?

8. Information about any individuals similarly situated to the applicant, including family members or others closely associated with the applicant, who have been threatened, persecuted, tortured, or otherwise harmed.

9. Any groups or organizations the applicant is associated with that would place him/her at risk of persecution or torture, in light of country conditions information.

10. Any actions the applicant has taken in the past (either in the country of feared persecution or another country, including the U.S.) that would place him/her at risk of persecution or torture, in light of country conditions information.

11. Any harm the applicant has experienced in the past:

a. A description of the type of harm

b. Identification of who harmed the applicant

c. The reason the applicant was harmed

d. The relationship between the person(s) who harmed the applicant and the government

e. Whether the applicant was in that person(s) custody or control

f. Whether the harm was in accordance with legitimate sanctions
When probing into a particular line of questioning, it is important to keep asking questions that elicit details so that information relating to the issues above is thoroughly elicited. It is also important to ask the application questions such as, "Is there anyone else or anything else you are afraid of, other than what we’ve already discussed?" until the applicant has been given an opportunity to present his or her entire claim.

The asylum officer should also elicit information relating to exceptions to withholding of removal, if it appears that an exception may apply. This information may not be considered in evaluating whether the applicant has a reasonable fear, but should be included in the sworn statement, where applicable.

XIV. REQUESTS TO WITHDRAW THE CLAIM FOR PROTECTION

An applicant may withdraw his or her request for protection from removal at any time during the reasonable fear process. When an applicant expresses a desire to withdraw the request for protection, the asylum officer must conduct an interview to determine whether the decision to withdraw is entered into knowingly and willingly. The asylum officer should ask sufficient questions to determine the following:

- The nature of the fear that the applicant originally expressed to the DHS officer,

- Why the applicant no longer wishes to seek protection and whether there are any particular facts that led the applicant to change his or her mind,

- Whether any coercion or pressure was brought to bear on the applicant in order to have him or her withdraw the request, and

- Whether the applicant clearly understands the consequences of withdrawal, including that he or she will be barred from any legal entry into the United States for a period that may run from 5 years to life.

An elicitation of the nature of the fear that the applicant originally expressed does not require a full elicitation of the facts of the applicant’s case. Rather, information regarding whether the request to withdraw is knowing and voluntary is central to determining whether processing the withdrawal of the claim for protection is appropriate. The determination as to whether the request to withdraw is knowing and voluntary is unrelated to whether the
applicant has a fear of future harm. Processing the withdrawal of the claim for protection is appropriate when the decision was made knowingly and voluntarily even when the applicant still fears harm.

XV. SUMMARY

A. Applicability

Asylum officers conduct reasonable fear of persecution or torture screenings in two types of cases in which an applicant has expressed a fear of return: 1) A prior order has been reinstated pursuant to section 241(a)(5) of the INA; or 2) DHS has ordered an individual removed pursuant to section 238(b) of the INA based on a prior aggravated felony conviction.

B. Definition of Reasonable Fear of Persecution

A reasonable fear of persecution must be found if the applicant establishes a reasonable possibility that he or she would be persecuted on account of his or her race, religion, nationality, membership in a particular social group, or political opinion.

C. Definition of Reasonable Fear of Torture

A reasonable fear of torture must be found if the applicant establishes there is a reasonable possibility he or she will be tortured.

D. Bars

No mandatory bars may be considered in determining whether an individual has established a reasonable fear of persecution or torture.

E. Credibility

The same factors apply in evaluating whether an applicant's claim is credible as apply in the asylum adjudication context. Only if the aspects of a claim found not credible are relevant to the claim may the asylum officer base an adverse determination on lack of credibility. The applicant must be given the opportunity to address any inconsistencies and discrepancies.

F. Effect of Past Persecution or Torture

1. If an applicant establishes past persecution on account of a protected characteristic, it is presumed that the applicant
has a reasonable fear of future persecution on the basis of the original claim. This presumption may be overcome if a preponderance of the evidence establishes that,

a. due to a fundamental change in circumstances, the fear is no longer well-founded, or

b. the applicant could avoid future persecution by relocating to another part of the country of feared persecution and, under all the circumstances, it would be reasonable to expect the applicant to do so.

2. If the applicant establishes past torture, it may be presumed that the applicant has a reasonable fear of future torture, unless a preponderance of the evidence establishes that there is no reasonable possibility the applicant would be tortured in the future.

G. Internal Relocation

To establish a reasonable fear of persecution, the applicant must establish that it would be unreasonable for the applicant to relocate. If the government is the feared offender, it shall be presumed that internal relocation would not be reasonable, unless a preponderance of the evidence establishes that, under all the circumstances, internal relocation would be reasonable.

For purposes of reasonable fear of torture determinations, the asylum officer does not need to consider whether the threat of torture exists country-wide.

H. Elements of the Definition of Torture

1. The torturer must be a public official or other person acting in an official capacity, or someone acting with the consent or acquiescence of a public official or someone acting in official capacity.

2. The applicant must be in the torturer's control or custody.

3. The torturer must specifically intend to inflict severe physical or mental pain or suffering.

4. The harm must constitute severe pain or suffering.

5. If the harm is mental suffering, it must meet the requirements listed in the regulations, based on the "understanding" in the ratification instrument.
6. Harm arising only from, inherent in, or incidental to lawful sanctions generally is not torture. However, sanctions that defeat the object and purpose of the Torture Convention are not lawful sanctions. Harm arising out of such sanctions may constitute torture.

7. There is no requirement that the harm be inflicted “on account” of any ground.

I. Evidence

Credible testimony may be sufficient to sustain the burden of proof, without corroboration. However, there may be cases where a lack of corroboration affects the applicant’s credibility and ability to establish the requisite burden of proof. Country conditions information, where applicable, must be considered.

J. Interviews

Reasonable fear screening interviews generally should be conducted in the same manner as interviews in the affirmative asylum process, except DHS is responsible for providing the interpreter and the interview notes must be recorded in Question and Answer format in an sworn statement. The asylum officer must elicit all relevant information.