

3RD CIRCUIT COURT OF APPEALS DECISIONS
(Pennsylvania, New Jersey, Delaware, and Virgin Islands)
(Please Keycite or shepardize cases to ensure that they have not been overruled)

York/Baltimore Immigration Courts

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I. ASYLUM, WITHHOLDING, & CAT CLAIMS

A. Credibility

Thu v. Att'y Gen., 510 F.3d 405 (3d Cir. Dec. 18, 2007). PFR/Asylum/ Burma- Court granted PFR of a decision dismissing Burmese petitioner's appeal of a denial of his application for asylum. Remanded to the BIA where, for purposes of establishing a well-founded fear of persecution and a credibility determination, the IJ failed to consider all of the evidence in the record, including particularly the U.S. Department of State Country Report on Human Rights Practices in Burma.

Santana v. Attorney General of the United States, 506 F.3d 274 (3d Cir. Oct. 22, 2007) (A97 437 427). Presumption of Receipt - The alien, a native and citizen of Cuba, sought a reversal of the Board's order which held that the petitioner had failed to rebut the presumption of effective delivery, an order rescinding and reopening removal proceedings, and an order remanding those proceedings to the Board with instructions to remand to the IJ. The court held that it adopts a less stringent standard for determining the presumption of receipt for notices of hearing sent by regular mail rather than the strong presumption employed by the Board in *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995). The court remands to the Board with directions to reopen the in absentia order of removal and directs the Board to instruct the IJ on remand to apply the less stringent presumption to the evidence which the petitioner may produce.

Valdiviezo v. Attorney General of the United States, 502 F.3d 285 (3d Cir. Sept. 7, 2007) (A97 447 286). Honduras/ Gangs - The alien, a native and citizen of Honduras, sought review of the Board's decision denying his application for asylum, withholding of removal, and relief under the CAT. He argued before an IJ that he was part of a particular social group of young Honduran men who have been actively recruited by gangs and who have refused to join the gangs. The IJ denied his claim saying that the alien failed to establish that the government refused to protect him from his persecutors, he failed to prove that the injuries he sustained were inflicted on account of one of the five statutory grounds, and he failed to show that the danger of persecution is countrywide. The court held that (1) the IJ erred by requiring the alien to prove that the police "refused" to protect him, rather than that the government was simply "unable or unwilling" to protect him; (2) the IJ erred by placing the burden on the alien to prove both that the police refused to protect him from the gang and that this refusal was on account of one of the five statutory grounds; (3) the IJ ignored several important pieces of evidence, namely five police reports filed by the alien concerning the gang members' attacks against him and the evidence that the police failed to take any action in response to these reports; and (4) the IJ's

finding that the alien was not persecuted on account of his membership in a particular group is not supported by substantial evidence.

Briseno-Flores v. Gonzales, 492 F.3d 226 (3d Cir. June 26, 2007). Continuous Presence -

The petitioner sought review of the Board's decision denying him suspension of deportation under the statute in effect at the time he applied for that relief, § 244(a)(1). The court held that the Board's interpretation of § 1229b(d)(1) is reasonable and the petitioner stopped accruing time of continuous physical presence when he committed his first petty theft offense. Thus, he cannot establish seven years of continuous presence.

Mudric v. Attorney General of the United States, 469 F.3d 94 (3d Cir. Nov. 24, 2006). The alien petitioned for review from an order of the Board regarding the legality of his pending deportation. The alien claimed that his right to procedural due process was violated by undue delays, the government should be estopped from removing him because he was prevented from obtaining lawful status as a result of the Government's own undue delay, and that due process violations occurred in the course of his asylum hearing. The court held that (1) given the discretionary nature of immigration benefits, the alien's INS delay-as-due process violation claim failed at the threshold; (2) the alien's claim for equitable estoppel was also without merit; (3) the IJ's adverse credibility determinations were supported by specific and cogent reasons.

Gabuniya v. Attorney General, 463 F.3d 316 (3d Cir. Sept. 19, 2006). Georgia/ Asylum -

The alien, a native and citizen of Georgia, petitioned the court for review arguing that he is entitled to withholding of removal and protection under the CAT because of the persecution he faced at the hands of the Georgian government. He alleged that he was threatened, arrested, and beaten on numerous occasions, and that his wife was killed by government officials. The IJ found that he was not credible because of inconsistencies in his testimony with regard to the date of his wife's death, the date of his third arrest, and his description of the injury he suffered when the police assaulted him and his wife. The IJ also ruled that even if the petitioner had been credible, his allegations did not demonstrate past persecution or torture; and, conditions in Georgia had changed since his departure. The court held that the IJ's adverse credibility finding, and the IJ's determination that, if credible, the alien's testimony did not establish past persecution are not supported by substantial evidence. In addition, because the Board did not consider or adopt the IJ's finding of changed country conditions the case is remanded.

Jishiashvili v. Attorney General, 402 F.3d 386 (3d Cir. 2005). Georgia/asylum/credibility -

The IJ's adverse credibility finding, based on his concerns regarding the "plausibility" of certain aspects of the respondent's testimony, was not supported by substantial evidence. Where the respondent presented testimony that was detailed, internally consistent, and materially in accord with his asylum application, and there was both supportive evidence of country conditions and corroborative documentation, the IJ erred in finding him not credible based on a few equivocal aspects that were not logically compelled by the record or by common sense.

Korytnyuk v. Ashcroft, 396 F.3d 272 (3d Cir. 2005).

Motion/Adjustment/Asylum/Credibility - The Board abused its discretion in denying the respondent's motion to remand to apply for adjustment of status where it relied on the IJ's conclusion, made in denying the respondent's asylum application, that he participated in criminal activities in the Ukraine, which was based on an adverse credibility finding that was not supported by substantial evidence. Although the respondent did not directly raise the issue, the court also found that the Board abused its discretion because it failed to recognize that the IJ improperly treated the respondent's proffer of medical records and may not have had all the material evidence before him when he made his findings.

Leia v. Ashcroft, 393 F.3d 427 (3d Cir. 2005) (A73 535 070).

Ukraine/asylum/credibility/document authentication - The IJ's adverse credibility finding was based primarily on the respondent's failure to authenticate his documents pursuant to the regulation, but also on two inconsistencies in his testimony and State Department documents disputing his claim that relocation was safe impossible. The court remanded for reconsideration in light of its recent decision in *Liu v. Ashcroft* holding that the regulation is not the exclusive means of authenticating a document and that asylum seekers must be given the opportunity to prove authentication by other means. The court also noted its disagreement with the other bases for the IJ's credibility finding.

Berishaj v. Ashcroft, 378 F.3d 324 (3d Cir. Aug. 5, 2004) (A74 881 632). Ethnic

Albanian/Montenegro/asylum/credibility/country conditions - In a decision that is highly critical of both the IJ and the Board, the court rejected the IJ's adverse credibility finding as being based on speculation and conjecture, inconsistent with the record, and not "reasonably sound." Finding that the Government clearly did not rebut the presumption of a well-founded fear by evidence of changed country conditions, the court also criticized the Board for summarily affirming a decision where the record was very outdated (the most recent State Department report was 3 years old at the time of its decision) and the case involved a "highly volatile and evolving region of the world." The court suggested that the parties should seek reopening or the Board request supplemental evidence when a case would "benefit from an updated administrative record" to ensure that it is "reasonably current."

Montenegro v. Ashcroft, 68 Fed. Appx. 290 (3d Cir. May 16, 2002) (A73 033 366, 367)(unpublished).

Asylum/Guatemala - The respondent claimed he had been attacked and threatened on account of his participation in labor union efforts in Guatemala. The IJ found his testimony credible and granted asylum to the respondent and his wife and son. The Board reversed, finding that the harm claimed did not amount to persecution. The court concluded that the Board's decision was not supported by the record because the testimony presented was corroborated by a State Department report and family letters, and the respondents' evidence of multiple physical attacks, the destruction of their home, and threatening phone calls qualified as "persecution." Finding that the respondent produced substantial evidence of past persecution on

account of his union activities, the court remanded for the IJ to grant asylum.

I. China

Lin v. Att'y Gen., 543 F.3d 114 (3d Cir. Sept. 11, 2008). China- In reviewing Board's affirming the denial of (pre-REAL ID Act) asylum, withholding of removal, and relief under the CAT, the court held that substantial evidence supported IJ's adverse credibility determination because IJ found two unreconcilable discrepancies between alien's testimony and written affidavit, both of which went to the heart of alien's claim.

Wang v. Attorney General, 423 F.3d 260 (3d Cir. 2005) (A77 993 922).

China/asylum/credibility/IJ conduct - The IJ's adverse credibility finding was not credited because of the "pervasive influence of [her] unduly harsh character judgments" regarding the respondent's lack of concern for his disabled daughter and his parent's pension, which was withheld until he paid a fine for violating the birth control policy. The court concluded that the IJ's opinion was "highly improper for both its contemptuous tone and its consideration of personal issues irrelevant to the merits" of the respondent's claim. The court also rejected the Board's reliance on the IJ's determination, finding that there were no inconsistencies nor any inherent implausibility in the respondent's account.

Cao v. Attorney General, 407 F.3d 146 (3d Cir. 2005) (A79 309 920).

China/asylum/credibility - The respondent claimed that she was persecuted because she wrote a letter to a reporter to expose the fact that the hospital where she worked as a pediatrician was committing infanticide to comply with China's population control policy. The respondent's letter exposing the practice of infanticide constitutes "other resistance" to China's population control policy and therefore qualifies her for asylum if she is credible. The IJ's adverse credibility finding with respect to the respondent's testimony was based on speculation or had no support in the record, so the respondent's testimony was improperly discredited.

Zhang v. Gonzales, 405 F.3d 150 (3d Cir. 2005) (A77 293 449).

China/asylum/credibility/evidence - The record was unclear whether the IJ admitted documents showing that the respondent was forced to undergo an abortion but didn't give them significant weight, or whether he refused to admit them for lack of authentication or for some other reason. The record was remanded for clarification by the Board whether the documents were excluded by the IJ, and if so on what basis. Exclusion of the documents for failure to authenticate pursuant to 8 C.F.R. §§ 287.6 would be legal error under the court's decision in *Liu v. Ashcroft*. Although country reports suggested the possibility of fraud, the court declined to speculate whether reliance on the report justified refusal to give the documents any weight. If the documents were admitted by the IJ, the Board must reconcile the fact that they strongly corroborate the respondent's claim with the IJ's adverse credibility finding and denial of relief. Judge McKee concurred, but also expressed his concern that the IJ seemed to ignore the corroborating evidence and look for problems with the respondent's claim.

Wu v. Ashcroft, 393 F.3d 418 (3d Cir. 2005) (A77 340 613). China/asylum/credibility - The court held that in making an adverse credibility finding, the IJ relied on two statements made by the respondent at her airport interview that local villagers, rather than the Chinese government, might persecute her for her religious beliefs. Finding that the IJ's reliance on these statements made by the respondent was "at the expense of the entirety of her testimony" at the hearing, which the IJ appeared to deem credible, the court remanded for clarification of this inconsistency. Judge Nygaard dissented, finding that substantial evidence supported the IJ's holding that the respondent's mistreatment did not rise to the level of persecution, and disagreeing with the majority's conclusion that the respondent's airport statement was unreliable.

Guo v. Ashcroft, 386 F.3d 556 (3d Cir. Oct. 25, 2004)(A77 297 574).

China/asylum/reopening - The Board's " cursory rejection " of the respondent's motion to reopen to apply for asylum on the grounds of China's family planning policies was improper. The Board erred in relying on the IJ's credibility findings regarding the respondent's original asylum application based on her alleged religious persecution, which the court held were not relevant to her motion to reopen. The Board also incorrectly applied an "excessively rigid" standard in denying the motion, which requires only a prima facie showing of eligibility. The court found that this standard had been met by the evidence presented and that the Board abused its discretion in deeming the evidence insufficient, particularly where it had previously granted relief in similar circumstances.

Xing Chan Yang v. Ashcroft, 104 Fed. Appx. 254 (3d Cir. July 16, 2004) (A70 899 611)

(unpublished). China/asylum/authentication/credibility - The IJ found that there were inconsistencies between the respondent's testimony and his asylum application and that the documents presented relating to his marriage and children's birth were incredible because they were not certified by the American consulate. Citing its recent decision in *Liu*, the court ruled that the IJ erred by not allowing the respondent to prove the authenticity of his documents through other means and that his misapplication of the regulation regarding authentication affected his adverse credibility finding. The court also noted that the respondent's inconsistencies regarding dates were not sufficiently consequential to amount to substantial evidence to support an adverse credibility finding.

Gui Cun Liu v. Ashcroft, 372 F.3d 529 (3d Cir. June 24, 2004) (A73 168 631).

China/asylum/evidence/credibility - The respondents submitted uncertified abortion certificates in support of their asylum claim. The IJ stated that because 8 C.F.R. §§ 287.6 requires that foreign documents be certified, little or no weight could be given to them, and he denied asylum and withholding based on his adverse credibility finding, which relied in large part on the female respondent's confusing testimony regarding the gender of the fetus. The court held that the IJ erred in rejecting the documents based on the regulation, which allows for proof of authenticity by other means than certification by foreign officials. Holding that the IJ's improper application of the regulation caused him to disregard evidence that might have resulted

in a favorable credibility finding, the court remanded for the Board to reconsider and re-weigh the facts, taking the abortion certificates into consideration.

Xie v. Ashcroft, 359 F.3d 239 (3d Cir. Feb. 24, 2004). Asylum/China - The alien petitioned the court to review the decision of the Board which dismissed his application for asylum. The court found that substantial evidence supported the Board's finding that the petitioner was not credible. His asylum application failed to mention his wife's sterilization, there were inconsistencies regarding his claimed detention in China, and his testimony was not consistent with China's one-child policy.

Tang v. Ashcroft, 66 Fed. Appx. 306 (3d Cir. Apr. 4, 2003) (A70 582 053) (unpublished). PRC asylum/credibility- The court found that the record was "bereft of evidence" to support the IJ's adverse credibility finding, where his conclusions regarding the implausibility of the respondent's testimony were based on "inferences, assumption, and feelings that range from overreaching to sheer speculation." The court found that the respondent was credible in testifying regarding his employment in the U.S. and China and his acquisition of travel documents and therefore remanded for a decision whether to grant asylum and/or withholding.

Gao v. Ashcroft, 299 F.3d 266 (3d Cir. Aug. 7, 2002) (A77 341 155).

Asylum/FalunGong/Credibility - The court reversed the Immigration Judge's adverse credibility finding, which the Board had affirmed. The respondent claimed that she had been persecuted because she had acted as a messenger for the Falun Gong movement in China. In a lengthy decision, the court found that the Immigration Judge had not supported his adverse credibility finding with specific, cogent reasons, and that he failed to evaluate and consider an important piece of documentary evidence, the "Disciplinary Determination" issued by the respondent's school when it expelled her.

Li Wu Lin v. I.N.S., 238 F.3d 239 (3d Cir. Jan. 2001). Asylum - Alien petitioned for review after his application for political asylum, and withholding of deportation, was denied by the IJ and upheld on appeal. Held: on a fact-specific review where alien was found by IJ to be credible, Third Circuit held that alien satisfied standards for both asylum and withholding.

II. Asia (non-Chinese)

Shardar v. Attorney General of the United States, 503 F.3d 308 (3d Cir. Sept. 19, 2007) (A72 779 408) - The alien sought review of the Board's decision denying his motion to reopen removal proceedings which was based on changed country conditions. The court remanded the case to the Board and held that the re-emergence of the political party responsible for the alien's prior persecution in Bangladesh constituted a material change in country conditions; the Board's conclusion that the alien would not face a particularized threat of persecution if returned to Bangladesh was not supported by substantial evidence; and the alien established a prima facie case for asylum.

Luciana v. Attorney General of the United States, 502 F.3d 273 (3d Cir. Sept. 17, 2007) (A95 862 243). Indonesia/One Year Filing Deadline - The alien, an Indonesian national of Chinese ancestry, petitioned the Court for review of the Board's decision finding that she had filed a frivolous asylum application. The Court found that the IJ's frivolousness finding was based on an error of law - a time-barred asylum application cannot also be a frivolousness asylum application. The Court reasoned that, once it becomes clear that no exception to the time bar applies, misrepresentations as to the merits of the asylum application are of no consequence to the asylum claim and, therefore, cannot satisfy the "material misrepresentation" requirement for a frivolousness finding. The petitioner's false statement was not material.

Shehu v. Attorney General of the United States, 482 F.3d 652 (3d Cir. April 9, 2007). Asylum/ Albania - The alien petitioned the court for review of the Board's affirmance of an IJ's decision denying his claim for asylum, withholding of removal, and relief under the CAT. He entered the U.S. and was processed as an applicant of the Visa Waiver Program, overstayed the 90-day period, and filed an application for asylum, withholding of removal, and relief under the CAT. He claimed that a criminal gang kidnaped him and his bank director brother in order to gain access to the bank's money, and after leaving Albania, the gang tracked him to Greece. The IJ and the Board affirmed that the criminal gang was motivated by a desire for money, not by political opinion. The court affirmed finding that evidence did not compel a conclusion that the criminal gang that pursued the alien was motivated by anything more than a desire for money.

Yong Wong Park v. Attorney General of the United States, 472 F.3d 66 (3d Cir. Dec. 29, 2006). Removal - The alien, a native and citizen of the Republic of Korea, petitioned the court for review of the Board's decision finding the alien removal for having been convicted of an aggravated felony. The immigrant had pleaded guilty to trafficking in counterfeit goods in violation of the Trademark Counterfeiting Act of 1984, 18 U.S.C. § 2320. He was originally charged with removability under 8 U.S.C. § 1227(a)(2)(A)(i) for having been convicted of a crime involving moral turpitude, but following the BIA's remand of the IJ's decision that the immigrant was not removable under that provision, the charge under § 1227(a)(2)(A)(iii) was added. The court found that the immigrant's conviction under 18 U.S.C. § 2320 was an offense relating to counterfeiting for purposes of the definition of "aggravated felony" under 8 U.S.C. § 1101(a)(43)(R). 18 U.S.C. § 2320 penalized those who trafficked in goods while knowingly using a counterfeit mark and therefore sought to discourage the act of counterfeiting. Because the immigrant had been convicted of an aggravated felony, he was ineligible for cancellation of removal. The doctrine of judicial estoppel did not bar the addition of the "aggravated felony" removal charge; 8 C.F.R. § 1240.10(e) permitted the lodging of additional charges during the course of removal proceedings.

Singh v. Gonzales, 406 F.3d 191 (3d Cir. 2005) (A78 513 784). India/asylum - The respondent's credible uncontradicted testimony that while the police were beating him and his father, they said they were trying to stop the respondent's father from continuing his work in the

Akali Dal compels the conclusion that the Indian police attributed his father's separatist political to the respondent. The Board erred in finding no imputed political opinion and in failing to apply a mixed motive analysis where the respondent's testimony demonstrated that his arrest, beating, and threats to his life were motivated in significant part by the police's desire to punish the respondent and his father for the father's political activities, regardless of a legitimate law enforcement purpose.

Lie v. Ashcroft, 396 F.3d 530 (3d Cir. 2005). Asylum/ Indonesia - The petitioners, Indonesian citizens, petitioned the court for review of the Board's decision which denied asylum. They claim that they were persecuted in Indonesia because they are ethnically Chinese and Christian and were targeted and robbed on several occasions because of their ethnicity and their religion. The court held that substantial evidence supported the Board's conclusion that the robberies were not motivated by religion or ethnicity, and that they were not sufficiently severe so as to rise to the level of persecution. In addition, the petitioners did not establish a well-founded fear of persecution if they were to return to Indonesia.

Shardar v. Ashcroft, 382 F.3d 318 (3d Cir. Aug. 24, 2004). Bangladesh/ Asylum/ CAT/ Affirmance - The alien petitioned the court for review of the Board's decision which denied asylum and refused to reopen to consider relief under the CAT. He argued that the Board erred since the IJ found his testimony regarding his participation in a demonstration and his subsequent arrest and beating by police to be credible. The court stated that even though a petitioner's testimony is deemed credible, it is not determinative. There was substantial evidence to support the conclusion that the petitioner had not met his burden of proof for establishing eligibility for asylum. Instead, it showed that he was not persecuted on account of his political opinion, but rather that he had been legitimately prosecuted for participation in a violent political demonstration. The court held that (1) the alien failed to demonstrate a well-founded fear of future persecution and (2) the police beatings did not rise to the level of "torture" under the CAT.

Khan v. Ashcroft, 98 Fed. Appx. 183 (3d Cir. June 1, 2004) (A72 018 638, A72 797 275, 276) (unpublished). Bangladesh/CAT - The court rejected the respondents' contentions regarding the IJ's findings on credibility and past persecution. However, the record was remanded for the Board to consider the merits of their CAT claim, which was first raised in the appeal after regulations implementing the Convention were enacted, and which was not addressed in the Board's summary affirmance.

Kim v. Ashcroft, 95 Fed. Appx. 418 (3d Cir. Apr. 22, 2004) (A38 668 955-956) (unpublished). IJ recusal/rescission/evidence/credibility - The respondents entered in 1985 on invalid visas that were procured on the basis of false information. The IJ found them removable and denied cancellation, ruling that they failed to establish good moral character because their testimony was not credible. The court first rejected the respondents' contention that the IJ should have recused himself because he presided over their daughter's proceedings. The court also declined to decide whether the Government was time barred by the rescission provisions in section 246 from

instituting removal proceedings more than 5 years after the respondents' entry (rather than adjustment of status), remanding for the Board to decide the issue in the first instance. Finding that two letters from the State Department officials were not shown to be reliable, the court rejected them as inadmissible evidence. Finally, although the court upheld the IJ's ruling that the male respondent's testimony was not credible, it concluded that the adverse credibility finding as to the female respondent was "woefully inadequate" and remanded for further proceedings, "strongly" recommending a new IJ be assigned.

Miah v. INS, 346 F.3d 434 (3d Cir. Oct. 9, 2003) (A78 420 602). **Asylum - Credibility - Corroboration** - The court found that the Board did not comply with Third Circuit law, and its own precedent, on the issue of corroboration. The Board had reversed the Immigration Judge's adverse credibility finding, but then "essentially adopted the Immigration Judge's corroboration findings." As the Immigration Judge's corroboration ruling "was informed by" his adverse credibility finding, the Board should have conducted an independent corroboration analysis consistent with the applicable law.

Senathirajah v. I.N.S., 157 F.3d 210 (3d Cir. Oct. 1998). **Asylum** - Alien, native and citizen of Sri Lanka, petitioned for review of BIA's order denying his petition for asylum and withholding. Held: IJ's determination that alien lacked credibility was not supported by substantial evidence. Reversed and remanded.

Balasubramaniam v. I.N.S., 143 F.3d 157 (3d Cir. May 1998). **Asylum/credibility** - IJ and BIA denied applications for asylum and withholding, and alien appealed. Held: adverse credibility finding was not reasonable inasmuch as interview of applicant at airport was not a valid basis upon which to base finding despite minor inconsistencies between it and the applicant's oral testimony; the accurateness and completeness of only record of interview was questionable, the interview was not an application for asylum, and the questions posed were not designed to elicit pertinent details, and BIA's assessment of applicant's English skills lacked a basis.

III. Africa

Issiaka v. Attorney General of the United States, 569 F.3d 135, (3d Cir. June 11, 2009). **Ivory Coast** - The petitioner, a native and citizen of the Ivory Coast, sought review of the Board's decision which denied his application for asylum, withholding of removal, and relief under the CAT. The Board affirmed the IJ's finding that the petitioner was not credible. The court found that substantial evidence did not support the IJ's determination that the petitioner was not credible because he could not describe details about his head injury – how many cuts were on his head, the depth of the wounds, and whether or not they were serious or open. Additionally, the court could not understand the Board's concern about the petitioner's failure to testify that he received stitches. Next, the instant court found that it was difficult to review the remainder of the record because of the poor quality of the translation and transcription. The court grants the petition and remands for further proceedings.

Sandie v. Attorney General of U.S. 562 F. 3d 246 (3d Cir. Apr. 3, 2009). Sierra

Leone/Asylum/Credibility - Alien, a native and citizen of Sierra Leone, entered the United States on a J-1 student visa which gave him authorization to remain in the United States until June 2004. In March 2005 alien applied for asylum, withholding of removal and relief under CAT . The IJ denied his application, finding that the alien's testimony was not credible and granted alien voluntary departure at that time. The IJ held that the alien failed to corroborate his story and therefore did not carry his burden of establishing a well-founded fear of persecution. The alien appealed to the BIA, who affirmed the IJ's decision. The alien then petitioned for a review of the BIA's denial of his application for asylum, withholding of removal and relief under CAT. The court denied the petition for review, finding no error in the BIA's review of the IJ's corroboration determination. The court also held that his request to stay the voluntary departure period was not implicit in his petition to stay removal.

Kaita v. Att'y Gen., 522 F.3d 288 (3d Cir. Apr. 3, 2008). Sierra Leone - In reviewing Board's decision denying (pre-REAL ID Act) asylum, withholding, and relief under the CAT to alien, the court (1) held that it lacked jurisdiction to review the alien's untimely asylum application; (2) held that the adverse credibility finding made by IJ and adopted by Board was not supported by substantial evidence because the alleged vagueness and inconsistencies did not go to the heart of the claim and could have been problems in translation; and (3) vacated and remanded the decisions of the Board and IJ concluding that alien submitted no evidence of likely torture for further proceedings, including additional consideration of the current State Department Country Report on Sierra Leone.

Ghebrehiwot v. Att'y Gen., 467 F.3d 344 (3d Cir. Nov. 3, 2006). Asylum/ Eritrea - The alien, a Pentecostal Christian who is a citizen of Eritrea, petitioned the court for review of the BIA's order affirming without opinion the IJ's denial of his applications for asylum, withholding of removal and relief under the CAT. He argued that the materials that he submitted to the IJ established a pattern and practice of persecution of members of the Pentecostal religion and that he has demonstrated a well-founded fear of future persecution; even if he is a military deserter, he has a well-founded fear of persecution based upon his religious beliefs because he will be singled out for particularly cruel treatment merely because he does not practice one of the favored religions; he is entitled to relief because of his membership in a particular social group - Eritrean soldiers that were forced to retreat into Sudan by Ethiopian forces who have been unwilling to return home after Ethiopian forces withdrew due to a well-founded fear of persecution based on being labeled a traitor or spy; and even if he is a deserter and he does not have a well-founded fear of persecution based on his religious beliefs alone, or as a member of a social group, he is entitled to asylum because the punishment he will face as a deserter will be disproportionately greater because he is a Pentecostal. The court remands to the BIA so that the IJ can consider whether the country condition evidence submitted by the petitioner establishes a pattern and practice of persecution of Pentecostals by the Eritrean government after the petitioner left Eritrea; the BIA can make a determination of the petitioner's CAT claim in the first instance; and other claims not properly before the court can be reasserted to the Board on remand.

Fiadjoe v. Attorney General, 411 F.3d 135 (3d Cir. 2005) (A77 943 716).

Ghana/asylum/credibility. In a lengthy decision, the court was very critical of the IJ's insensitive questioning of a respondent whose claim was based on the alleged physical and sexual abuse by her father, and it concluded that his adverse credibility finding could be rejected on that basis alone. The court also found that the reasons cited by the IJ and the Board did not support an adverse credibility finding; nor was the one inconsistency between the respondent's airport statement and her hearing testimony sufficient alone to support such a finding. The Board's finding that the respondent failed to establish that the Government of Ghana was either unwilling or unable to control her father's sexual abuse was not supported by substantial evidence.

Muhanna v. Gonzales, 399 F.3d 582 (3d Cir. Mar. 2005). Due process/frivolous

asylum/credibility - The IJ erred when she halted the proceedings after basing her assessment of the respondent's credibility solely on his testimony regarding one stabbing incident, without giving him an opportunity to account for inconsistencies. She violated the respondent's due process rights by finding that his asylum application was frivolous, and that he was therefore ineligible for any form of relief, based on this credibility finding alone. The IJ's credibility finding with regard to the respondent's withholding and CAT claims was not supported by substantial evidence because her premature decision to halt the proceedings based on her flawed frivolousness finding prevented the development of an appropriate record on which to make a credibility finding.

Naul v. Ashcroft, 106 Fed. Appx. (3d Cir. Aug. 3, 2004) (unpublished) (A79 429 861).

Asylum - Credibility - The court reversed the Immigration Judge's credibility finding, noting that the Immigration Judge had found the respondent's testimony and asylum application consistent, and finding that the perceived inconsistencies relating to various documents were minor or nonexistent and did not go to the heart of the asylum claim. The court further found that the Immigration Judge's alternative conclusions that the attacks did not amount to persecution or were not on account of a protected ground, "carried over certain feelings" she had regarding credibility.

Senoga v. Ashcroft, 87 Fed. Appx. 823 (3d Cir. Feb. 23, 2004) (A76 118 595) (unpublished).

Uganda/asylum/credibility - The IJ denied the respondent's persecution claim, finding that part of his testimony was not credible, and the Board affirmed without opinion. The court concluded that the IJ failed to give sufficient weight to background information in the country reports regarding the poor human rights record of the Ugandan Government, and that his personal opinion that the respondent was no longer in danger was not supported by the evidence. The court noted that the IJ's rejection of the testimony was based on speculation, and that he failed to explain how certain issues he had with the respondent's testimony had any bearing on the asylum application. Because the court did not find the evidence "so clear as to compel" a grant of asylum, it remanded for further proceedings, noting that there must be "specific, cogent reasons" given for disbelieving the respondent.

Dia v. Ashcroft, 353 F.3d 228 (3d Cir. Dec. 22, 2003) (A78 514 349). Streamlining Regs. -

Asylum - Credibility - Guinea - The Third Circuit upheld the Board's streamlining regulations, joining the other circuits that have addressed the issue. The court found that the regs violate

neither the INA nor the due process clause of the Constitution. The court also found no problems with the Board's issuance of an affirmance without opinion in this case.

However, the court found that the Immigration Judge's credibility finding could not stand. In a lengthy decision, the court concluded that the Immigration Judge's opinion, "consists not of the normal drawing of intuitive inferences from a set of facts, but, rather, of a progression of flawed sound bites that gives the impression that she was looking for ways to find fault with Dia's testimony." The Immigration Judge also erred in requiring corroboration without first (1) identifying the facts for which it is reasonable to require corroboration, (2) inquiring whether the respondent has provided corroborating information, and if not, (3) inquiring whether the respondent has adequately explained the failure to corroborate. This violated the decisions in *Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001), and *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997).

In addition to the court's long opinion, there were three separate opinions issued in this case.

Mulunga v. Ashcroft, 349 F.3d 123 (3d Cir. Nov. 14, 2003) (A78 527 646).

Asylum/Congo/corroboration - The IJ denied asylum because (1) the respondent failed to submit corroborating documentary evidence that her husband was a member of the UDPS and that he was a vocal opponent of the government; (2) there was an inconsistency in her airport statement and her testimony regarding who shot her; and (3) her account of her escape from government detention was "incredulous." The court held that the IJ erred by failing to notify the respondent of what additional corroborating evidence was reasonably expected, and by not giving her an opportunity to explain her inability to present the required evidence. Noting that the respondent's 4-year absence from home and her detention since entry into this country put her at a significant disadvantage in obtaining corroborating evidence, the court concluded that the IJ's decision was not supported by substantial evidence. The court also stated that "immaterial discrepancies between airport interviews and subsequent testimony should not be used to make adverse credibility determinations," and, in any case, found no inconsistency in the respondent's statements. Finally the court was critical of the IJ's disbelief of the respondent's account of her escape, finding it to be "unsound."

Kayembe v. Ashcroft, 334 F.3d 231 (3d Cir. July 1, 2003) (A78 828 030). Asylum -

Democratic Republic of the Congo (DRC) - The court first found that a reasonable fact finder could conclude that Tutsis in the DRC do not have a reasonable fear of persecution based on ethnicity, and it therefore upheld the Board's ruling on that issue. However, the court found that a reasonable fact finder would have to conclude that the respondent had a reasonable fear of persecution based on imputed political beliefs. This finding was based on the assumption that the respondent's story that his father, a diamond dealer, was detained because diamond dealers were believed to be connected to the assassination of DRC President Kabila, was credible.

The court remanded for the Board to make a credibility determination and to decide if the respondent, if credible, had met his burden of proof. In doing so, it noted that the respondent's "testimony alone, even if found to be credible, may not meet his burden of proof." It cited *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997), for the rule that even credible asylum applicants, to

meet their burden of proof, may sometimes have to provide corroboration of their claims where it is reasonable to expect corroboration.

Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. June 23, 2003) (A78 824 095).

CAT/Congo/evidence - The respondent claimed that she would likely be detained upon her return to the Democratic Republic of the Congo and that she would be raped by government agents while in detention. The IJ denied her requests for asylum and withholding based on an adverse credibility determination founded on inconsistencies in her application and her testimony, but he granted CAT relief. The Board reversed the CAT grant, finding that the evidence was insufficient to show that the respondent would be detained upon her return to the Congo. The court first held that rape can constitute torture and that there is no requirement that specific intent to inflict suffering must be shown. Ruling that the Board erred in adopting a credibility finding based on inconsistencies in the application and testimony, the court also noted that an adverse credibility determination regarding an asylum application should not taint consideration of a CAT claim. Finally, the court found the Board's analysis of the evidence inadequate because it improperly minimized the country conditions reports of systematic rape and murder as "background evidence." The court remanded to the IJ because it was unclear whether he had taken administrative notice of the fact that the respondent was likely to be detained upon her return, and therefore whether the Board should have deferred to his finding.

Moshud v. Blackman, 68 Fed. Appx. 328 (3d Cir. June 18, 2003) (A74 762 458)

(unpublished). Asylum/credibility/FGM - The respondent, who presented false documents and claimed a false identity on entry, argued that she would be persecuted in Ghana because the man she had contracted to marry would force her to undergo FGM. The IJ granted asylum, but the Board reversed, finding that she was not credible and had failed to prove a well-founded fear of persecution because she could seek protection against FGM from government authorities. The court reversed, finding that the Board misread the record and that its decision was not supported by substantial evidence in view of the respondent's testimony and the IJ's positive findings about her demeanor, the country conditions evidence regarding the continued lack of protection against FGM by the Ghanaian government, and her mother's corroborating letters that the respondent's fiancée is looking for her to enforce the marriage contract. The court did uphold the Board's denial of reopening on a CAT claim, finding that the country conditions evidence did not establish that government officials would be "willfully accepting" of FGM.

Abdulrahman v. Ashcroft, 330 F.3d 587 (3d Cir. May 21, 2003). Asylum/ Sudan - The petitioner argued that the Board erred in affirming the IJ's decision because (1) the IJ had applied the more stringent standard of proof applicable to withholding of removal to his asylum claim, (2) the IJ acted as a witness and conducted the proceedings in a biased manner, and (3) the IJ's credibility determination was not based on substantial evidence in the record. The court concluded that it lacked jurisdiction to consider the standard of proof issue since it had not been raised before the Board, the IJ's questioning of the logic of the petitioner's factual assertions was not improper nor did it violate due process, and substantial evidence supported the conclusion that the petitioner had not met his burden of establishing his eligibility for asylum.

Ezeagwuna v. Ashcroft, 325 F.3d 396 (3d Cir. Apr. 14, 2003) (A76 142 746). **Asylum - Cameroon - Due Process** - This case was previously decided on 7/30/02 (see Case Law Update of 8/5/02). Upon rehearing, that decision was vacated by the court and this decision was substituted. However, the court again found that the Board's adverse credibility finding violated the respondent's right to due process because it was based almost entirely on a Department of State letter that contained the conclusions of an investigation in Cameroon. The court found that the letter was "multiple hearsay" and did not in any way describe how the information contained in it was gathered. The letter was not reliable or trustworthy and, further, the respondent was not given adequate time to respond to it. On remand, the letter may not be considered.

The court also found that some of the evidence presented by the respondent on appeal was material and not previously available. The case was remanded with instructions that the matter be remanded to the Immigration Judge for further consideration, including consideration of this evidence.

Obianuju Ezeagwuna v. Ashcroft, 301 F.3d 116 (3d Cir. July 30, 2002) (A76 142 746). **Asylum - Cameroon - Due Process** - Board found the respondent not credible based "almost entirely on a letter from the Department of State that contained the conclusions of an investigation in Cameroon." The court found that the reliance on this letter denied the respondent of due process. The respondent submitted considerable documentary evidence to support her claim, but the letter stated that several of the documents were fraudulent. The court described the letter as "multiple hearsay of the most troubling kind," and noted that it had no information about how the investigation in Cameroon was conducted. It concluded that the letter did not "satisfy our standards of reliability and trustworthiness." Further, the respondent was not given adequate time to respond to the letter. The court reminded the Board and the INS that they should not rely too heavily on "the State Department's authority."

Without the letter, the court could not conclude that the respondent submitted fraudulent documents, which was the main basis for the Board's adverse credibility finding. It found the respondent's story credible, corroborated by numerous documents, including the State Department Report on Cameroon, and concluded that she was eligible for asylum and withholding.

B. Withholding

Yusupov v. Attorney General of U.S., 518 F.3d 185 (3d Cir. Mar. 14, 2008) - Withholding of removal – Petitioners, Yusupov and Samadov, natives of Uzbekistan, petitioned the Court for review of the Board's decision finding the alien ineligible for withholding of removal due to the national security exception pursuant to **INA § 241(b)(3)**. Petitioners, who entered the United States on F-1 visas to learn English, conceded removability for overstaying and violating the terms of their student visas, but then applied for asylum, withholding of removal, and CAT relief. The BIA held that both Petitioners were ineligible for withholding of removal because there were sufficient evidence that would permit a reasonable person to believe that the respondents may pose a danger to the Nation's defense, foreign relations, or economic interests. On appeal, the 3rd Circuit applied the Chevron two-step analysis to interpret two elements of the national security exception: "reasonable grounds to believe," and "is a danger to the security of the United States." On the "reasonable grounds to believe" element, the Court ruled that the phrase was ambiguous

and deferred to the Government's interpretation. As to the phrase "is a danger to the security of the United States," the Court held that the Government's interpretation of "is a danger" as "may pose a danger" fails the first step of the Chevron analysis. Because the Court cannot discern from the record whether the results in petitioners' cases were affected by this misinterpretation, the Court remanded the cases for application of the correct legal standard.

Valdiviezo v. Attorney General of the United States, 502 F.3d 285 (3d Cir. Sept. 7, 2007)

(A97 447 286). Honduras/ Gangs/Particular Social Group - The alien, a native and citizen of Honduras, sought review of the Board's decision denying his application for asylum, withholding of removal, and relief under the CAT. He argued before an IJ that he was part of a particular social group of young Honduran men who have been actively recruited by gangs and who have refused to join the gangs. The IJ denied his claim saying that the alien failed to establish that the government refused to protect him from his persecutors, he failed to prove that the injuries he sustained were inflicted on account of one of the five statutory grounds, and he failed to show that the danger of persecution is countrywide. The court held that (1) the IJ erred by requiring the alien to prove that the police "refused" to protect him, rather than that the government was simply "unable or unwilling" to protect him; (2) the IJ erred by placing the burden on the alien to prove both that the police refused to protect him from the gang and that this refusal was on account of one of the five statutory grounds; (3) the IJ ignored several important pieces of evidence; and (4) the IJ's finding that the alien was not persecuted on account of his membership in a particular group is not supported by substantial evidence.

Fadiga v. Attorney General of the United States, 488 F.3d 142 (3d Cir. June 15, 2007) (A76 550 629). Withholding/ CAT/ Guinea - The petitioner, a native of Guinea, petitioned the court for review of the Board's denial of his claim for withholding of removal and relief under the CAT. He sought relief from removal based on claims that, inter alia, his uncle had been murdered for political reasons and the alien was a member of a party that opposed the current government of Guinea. The IJ found inconsistencies between the alien's testimony regarding those claims and statements on his application for relief; the alien argued that the discrepancies resulted from errors made by his former counsel. The court found that the BIA erroneously applied a "clear probability" standard in denying the motion to reopen, as the alien was required to show only a reasonable likelihood that the IJ's decision would have been different absent counsel's errors. The alien's failure to file a bar complaint did not preclude review. The alien established a Fifth Amendment due process violation based on counsel's ineffective assistance; counsel's inadequate performance in preparing the application and advising the alien severely compromised the alien's ability to present his claims to the IJ, and there was at least a reasonable likelihood that the IJ would have granted withholding of removal or protection under the CAT absent counsel's errors.

Kibinda v. Attorney General, 477 F.3d 113 (3d Cir. Feb. 20, 2007). Angola/CAT - Alien, a native and citizen of Angola who was from Cabinda, petitioned for review of the decision of BIA affirming the decision denying his request for asylum, withholding of removal, and relief under the Convention Against Torture (CAT). Alien failed to establish that his five-day detention by Angolan army amounted to past persecution; alien failed to establish that his fear of future persecuted was objectively unreasonable; alien failed to establish that he would face

disproportionately greater punishment for deserting the Angolan army because he was Cabindan; and alien 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. Petition denied.

Celaj v. Attorney General, 471 F.3d 483 (3d. Cir. Dec. 28, 2006).

Albania/persecution/withholding/CAT- Petition for review of BIA denied because (1) substantial evidence supported determination that alien failed to establish that robberies of his home in Albania constituted past persecution on account of political opinion;(2) substantial evidence did not support determination that alien failed to establish that anonymous threats he received were made on account of his political opinion;(3) substantial evidence supported determination that threats alien received did not rise to the level of past persecution; and (4) substantial evidence supported determination that alien failed to establish a well-founded fear of future persecution.

Gambashidze v. Ashcroft, 381 F.3d 187 (3d Cir. Aug. 26, 2004) (A78 198 931).

Georgia/withholding/relocation - The Board rejected the respondents' withholding claim, finding that the male respondent had "not met his burden of proof . . . because he and his family were able to internally relocate" to a summer home where they had stayed unharmed for 8 months. The court first noted that the Board may have incorrectly placed the burden of proof on the respondents rather than on the Government. Although the court agreed that it was "reasonable" for the respondents to relocate, it held that there was insufficient evidence in the record to support the conclusion that they could be "successful" in avoiding persecution permanently by moving, as required by the regulations. The court suggested that the problem of the "stale" record could be remedied on remand.

Dabo v. Ashcroft, 102 Fed. Appx. 243 (3d Cir. June 21, 2004) (A29 114 002) (unpublished).

Guinea/withholding of removal- Unaware that the respondent had been removed to Guinea, the Board granted reopening based on new evidence of persecution, but vacated its order upon being informed of the respondent's removal. The respondent's petition to review was still pending and he submitted "compelling evidence of his arrest, imprisonment and torture upon his removal to Guinea." Given the Board's "disposition" to grant the motion to reopen and the respondent's evidence of likely future persecution, the court remanded to the Board for further consideration of his application for withholding of removal.

C. Persecution

Thu v. Att'y Gen., 510 F.3d 405 (3d Cir. Dec. 18, 2007). Burma/Asylum - The court held that IJ failed to consider all the evidence in analyzing Burmese alien's well-founded fear of persecution for his asylum claim.

Shardar v. Att'y Gen., 503 F.3d 308 (3d Cir. Sep. 19, 2007). In reviewing Board's decision denying alien's motion to reopen, the court remanded and held that (1) re-emergence of the political party responsible for the alien's prior persecution in Bangladesh constituted a material change in country conditions; (2) Board's conclusion that alien would not face a particularized

threat of persecution if returned to Bangladesh was not supported by substantial evidence; and (3) alien established a prima facie case for asylum.

Celaj v. Attorney General, 471 F.3d 483 (3d. Cir. Dec. 28, 2006).

Albania/persecution/withholding/CAT- Petition for review of BIA denied because (1) substantial evidence supported determination that alien failed to establish that robberies of his home in Albania constituted past persecution on account of political opinion;(2) substantial evidence did not support determination that alien failed to establish that anonymous threats he received were made on account of his political opinion;(3) substantial evidence supported determination that threats alien received did not rise to the level of past persecution; and (4) substantial evidence supported determination that alien failed to establish a well-founded fear of future persecution.

Chavarria v. Gonzales, 446 F.3d 508 (3d. Cir. May 3, 2006). Guatemala/persecution/political

opinion- The alien was largely apolitical during Guatemala's civil war, but gave aid to two women who were being attacked by paramilitary forces. Those women were head of a human rights organization, and the case caught the attention of the media. The alien was repeatedly harassed and threatened. He left Guatemala, and when he returned he was followed and held at gunpoint. The alien applied for asylum and withholding of removal, which the BIA denied, though the IJ found his testimony to be believable. The court here found that the BIA's factual findings were not supported by substantial evidence since they did not give proper weight to the threats faced by the alien even though the BIA found that he was being targeted based on imputed political opinion. Additionally, the court found that the BIA's conclusion that the alien was not entitled to asylum or withholding because he failed to establish a well-founded fear of persecution was not substantially supported by the record, and so reversed the BIA's decision. The court found that the second attack was imminent enough to constitute persecution and lead to a well-founded fear of future persecution.

Toussaint v. Attorney General of the United States, 455 F.3d 409 (3d Cir. 2006).

Haiti/persecution/CAT - In 2001 the Supreme Court of New York convicted the alien of two counts of criminal sale of a controlled substance and one count of attempted criminal sale of a controlled substance, and so removal proceedings against her were initiated. The alien conceded her removability but sought asylum and, in the alternative, withholding of removal and relief under CAT based on her assertion that she would be tortured on return to Haiti due to her father's and her own political views. The original IJ found the alien ineligible for relief because she had committed particularly serious crimes but agreed to consider the issue of deferral of removal. At a later proceeding, a different IJ ruled that her offenses were not particularly serious but also considered her claims for relief, denying her asylum but granting her withholding of removal and, in the alternative, protection under CAT. The BIA reversed this decision, finding that it was not more likely than not that the alien would be persecuted. The alien filed a writ of habeas corpus in New York which was transferred to the 3rd Circuit as a petition for review. The court held that the BIA sufficiently considered all of the alien's claims and so was reasonable in its finding. The court also found that the BIA adequately examined the alien's claim under CAT (as distinct from her withholding claim). Finally, the court rejected the alien's assertion that criminal deportees

constitute a social group.

Caushi v. Attorney General, 436 F.3d 220 (3d Cir. Jan. 23, 2006) (A78 821 176).

Albania/asylum/persecution/credibility - The IJ failed to give cogent reasons for rejecting the respondent's claim of persecution, which was based on his allegations that he was beaten and slashed by the police, that his brother-in-law was murdered, and that his family was threatened, and he failed to properly consider the evidence presented. Also, substantial evidence did not support the IJ's finding that the testimony of the respondent's sister was inaccurate and selective, and therefore not credible.

Ilchuk v. Attorney General, 434 F.3d 618 (3d Cir. Jan. 17, 2006)(A71 248 856).

Ukraine/withholding/persecution - The court held that the respondent's Pennsylvania "theft of services" conviction was for an aggravated felony and that his house arrest with electronic monitoring constituted "imprisonment." However, the Board erred in denying him withholding of removal by concluding that his possible imprisonment for refusal to serve in the military based on his religious beliefs as a Jehovah's Witness was not persecution. If there is proof that members of some religions can avoid military service without penalty based on conscientious objection, but adherents of other religions are denied the exemption outright, the resulting imprisonment is on account of religion, not just failure to serve, and is therefore persecution.

Voci v. Gonzales, 409 F.3d 607 (3d Cir. June 2005). Albania/asylum/persecution - The Board erred in determining that the incidents of police mistreatment the respondent suffered on account of his political involvement in the "democracy movement" in Albania did not rise to the level of persecution. Because it was unclear from the Board's decision whether it believed that the respondent failed to provide adequate corroboration of his persecution claim to carry his burden of proof, it was necessary to remand the record for clarification. Remand was also required for a discussion regarding the question of changed country conditions, which the Board failed to address.

Lie v. Ashcroft, 396 F.3d 530 (3d Cir. 2005). Asylum/ Indonesia - The petitioners, Indonesian citizens, petitioned the court for review of the Board's decision which denied asylum. They claim that they were persecuted in Indonesia because they are ethnically Chinese and Christian and were targeted and robbed on several occasions because of their ethnicity and their religion. The court held that substantial evidence supported the Board's conclusion that the robberies were not motivated by religion or ethnicity, and that they were not sufficiently severe so as to rise to the level of persecution. In addition, the petitioners did not establish a well-founded fear of persecution if they were to return to Indonesia.

Muca v. Ashcroft, 116 Fed.Appx. 400 (3d Cir. Dec. 2004) (unpublished).

Albania/asylum/persecution. The record did not support a finding that the respondent was accosted by men seeking to force her into the sex trade to punish her for her political opinion. However, the record was remanded for the Board to determine if she was targeted because of her membership in a particular social group, i.e., women who are potential victims of the sex trade, and if so, whether the harm she suffered rose to the level of persecution.

Ambartsoumian v. Ashcroft, 388 F.3d 85 (3d Cir. 2004). Asylum/ CAT/ Ukraine/ Georgia/ affirmance - The aliens, the husband who is a Georgian citizen of Armenian and Ossetian parentage, his wife who is a Ukrainian citizen and a Baptist, and their two children, petitioned the court for review of the Board's decision which denied them asylum, withholding of deportation and protection under the CAT. They claimed that they faced persecution in both the Ukraine and Georgia and would be persecuted in either country if they returned. The court affirmed the Board and held that (1) substantial evidence supported the IJ's determination that the alien did not suffer a well-founded fear of persecution based on religious beliefs if returned to the Ukraine; substantial evidence supported the IJ's determination that the alien would not suffer persecution based on ethnicity if returned to the Ukraine; and substantial evidence supported the determination that the aliens had not established a well-founded fear of persecution based on their Armenian ethnicity if returned to Georgia.

Singh-Kaur v. Ashcroft, 385 F.3d 293 (3d Cir. 2004). Terrorist activity/ material support - The alien, a native and citizen of India, entered the U.S. without inspection in 1989. In his asylum application, he claimed membership in the Babbar Khalsa Group, whose purpose was to protect and promote the Sikh faith, and the Sant Jarnail Singh Bhindrawala Militant Group, whose purpose was to fight for and protect the religious and political cause of the Sikh community. He stated that he had participated in demonstrations and other activities of the two groups. The alien submitted additional materials including evidence of active membership in the International Sikh Youth Federation and a statement by the Khalistan Commando Force that he had taken an oath to participate. A previous IJ in the case referred Singh's asylum application to the Department of State for a non-mandatory review and comments. It concluded that the Indian government did not persecute Sikhs merely for their faith or membership in certain organizations, but rather those who had involvement in violent acts.

Kanivets v. Riley, 320 F.Supp.2d 297(D. Pa. June 1, 2004) (A77 554 283).

Kyrgyzstan/asylum/time barred - The respondent claimed that he had a well-founded fear of persecution based on his Jewish ancestry and religion. The IJ denied his application, finding that it was time barred and that the respondent's claim of antisemitism was not corroborated by objective evidence. The district court found that the respondent did present objective evidence that there was a clear-cut tradition of antisemitism in Kyrgyzstan. It further held that the IJ erred in failing to consider the respondent's arguments that his delay in applying for asylum should be excused because of changed circumstances in Kyrgyzstan.

Montenegro v. Ashcroft, 68 Fed. Appx. 290 (3d Cir. May 16, 2003) (A73 033 366, 367)

(unpublished). Asylum/Guatemala - The respondent claimed he had been attacked and threatened on account of his participation in labor union efforts in Guatemala. The IJ found his testimony credible and granted asylum to the respondent and his wife and son. The Board reversed, finding that the harm claimed did not amount to persecution. The court concluded that the Board's decision was not supported by the record because the testimony presented was corroborated by a State Department report and family letters, and the respondents' evidence of multiple physical attacks, the destruction of their home, and threatening phone calls qualified as

"persecution." Finding that the respondent produced substantial evidence of past persecution on account of his union activities, the court remanded for the IJ to grant asylum.

Derevianko v. Reno, 55 F.3d 609 (3d Cir. Jan. 31, 2003) (A75 801 920). Asylum - Ukraine - False Criminal Charges - The court here reversed the Immigration Judge's and Board's denial of asylum to an alien who persistently charged a government official with corruption, including in published articles. As INTERPOL warrant was then issued against the respondent, based on trumped up charges. The court found that the Immigration Judge erred in finding that the respondent's brief return trips to the Ukraine showed that he did not have a well-founded fear there. It further found that the Board erred, inter alia, in finding that the respondent had not raised the issue of the INTERPOL documents' authenticity before the Immigration Judge.

The court concluded, "it is difficult to see how any reasonable fact finder could conclude that Derevianko would not have well-founded fear of persecution if he is being deported into the custody of corrupt authorities who have brought false criminal charges against him."

Janusiak v. U.S. I.N.S., 947 F.2d 46 (3d Cir. Aug. 1991). Asylum/well founded fear - Alien sought review of denial of withholding of deportation and asylum. Held: alien did not show well-founded fear of prosecution based on his membership in Solidarity or his having bribed a passport official.

I. China

Hua Wu v. Attorney General of U.S., 571 F.3d 314 (3d Cir. June 18, 2009) – China/Asylum.

Respondent, citizen of the People's Republic of China, petitioned for review of the affirmance by the BIA of the IJ's denial of his applications for asylum, withholding of removal, and protection under the CAT. Respondent claimed persecution on the basis of being forced into hiding after Chinese government authorities discovered his girlfriend's out of wedlock pregnancy and tried to detain both him and his girlfriend immediately after their traditional wedding ceremony. Respondent and his girlfriend were allegedly forced into hiding for some time. Respondent later left for the United States and his girlfriend was discovered and forced by Chinese authorities to undergo an abortion. The court concluded that substantial evidence supported the IJ's conclusion that respondent, who was never legally married to his girlfriend, could not seek asylum based on persecution suffered by his pregnant girlfriend. The court further concluded that even if his traditional marriage was recognized, per the court's holding in *Lin-Zheng*, the INA does not extend automatic refugee status to spouses of those subjected to coercive family planning measures. Therefore, the IJ correctly held that the respondent was statutorily ineligible for asylum. The court further held that it lacked jurisdiction to consider the respondent's claim that he had been persecuted for having hidden his pregnant girlfriend from Chinese authorities as he had not administratively exhausted that claim.

Lin-Zheng v. Att'y Gen., 557 F.3d 147 (3d Cir. Feb. 19, 2009) (en banc) China/Coercive Population Control - The court held that alien was not entitled to refugee status based on persecution of his spouse, overruling *Sun Wen Chen v. Att'y Gen.*, 491 F.3d 100 (3d Cir. June 20, 2007)

Sun Wen Chen v. Attorney General of the United States, 491 F.3d 100 (3d Cir. June 20, 2007) (A78 203 050 & A72 019 011). China/ Asylum - The petitioners, husband and wife from China, petitioned the court for review of the Board's decision which reversed the IJ's grant of asylum and withholding of removal. They contend that they have a well-founded fear of persecution under China's one-child policy should they be returned to China. The court found that the Board erred in concluding that the petitioner did not meet his burden of proof based only on the findings that enforcement of China's one-child policy is "not uniformly applied," that "not all methods of enforcement involved forced abortion, sterilization, or other forms of persecution," and that the treatment of children born outside China is uncertain. The court held that the husband may qualify for asylum on the well-founded fear that his wife may be persecuted under a coercive population control policy. The court stated that the BIA must "address the degree of uncertainty that Chen may face persecution; it is not enough to find that some uncertainty exists."

Wang v. Gonzales, 405 F.3d 134 (3dCir. 2005). Asylum/ China. The alien, a native of China petitioned the court for review of the Board's decision which concluded that the alien failed to establish either past persecution or a well-founded fear of future persecution based on any one of the five statutory grounds for granting asylum. The BIA dismissed the alien's argument regarding his fear of imprisonment upon return to China predicated on his action in leaving the country illegally because he did not prove that the exit policy in China constituted punishment for invidious reasons. The BIA found that the harm that the alien claimed from past persecution stemming from his parents' violation of the family planning policies was too indirect to establish past persecution. The appellate court denied the alien's petition for review of the BIA's decision because the alien could not stand in the shoes of his parents where the persecution was claimed to have been experienced by his parents as a result of the family planning policies, and the alien failed to show that the persecution threatened his "life or freedom". Thus, the alien could not show persecution on account of political opinion. Inasmuch as the alien was not eligible for asylum, he could not demonstrate eligibility for withholding of removal.

Li v. Attorney General, 400 F.3d 157 (3d Cir. Mar. 2005). China/asylum/economic persecution - The deliberate severe economic disadvantage (including a fine of 20 months' salary, loss of employment and the accompanying health benefits, food rations, and school payments, and the confiscation of furniture and major household appliances), which was imposed on the respondent and his wife because of his violation of population control policies constituted economic persecution. The Board's decision, which understated the evidence in the record of the economic hardship the respondent suffered, was not supported by substantial evidence. Judge Sloviter dissented, agreeing with the Board's conclusion that a "fine, loss of a particular job, and confiscation of some personalty do not rise to the level of persecution, even when viewed in the aggregate."

Wu v. Ashcroft, 393 F.3d 418 (3d Cir. 2005) (A77 340 613). China/asylum/credibility. The court held that in making an adverse credibility finding, the IJ relied on two statements made by the respondent at her airport interview that local villagers, rather than the Chinese government, might persecute her for her religious beliefs. Finding that the IJ's reliance on these statements

made by the respondent was "at the expense of the entirety of her testimony" at the hearing, which the IJ appeared to deem credible, the court remanded for clarification of this inconsistency. Judge Nygaard dissented, finding that substantial evidence supported the IJ's holding that the respondent's mistreatment did not rise to the level of persecution, and disagreeing with the majority's conclusion that the respondent's airport statement was unreliable.

Guo v. Ashcroft, 386 F.3d 556 (3d Cir. Oct. 2004). China/asylum/reopening - The Board's "cursory rejection" of the respondent's motion to reopen to apply for asylum on the grounds of China's family planning policies was improper. The Board erred in relying on the IJ's credibility findings regarding the respondent's original asylum application based on her alleged religious persecution, which the court held were not relevant to her motion to reopen. The Board also incorrectly applied an "excessively rigid" standard in denying the motion, which requires only a prima facie showing of eligibility. The court found that this standard had been met by the evidence presented and that the Board abused its discretion in deeming the evidence insufficient, particularly where it had previously granted relief in similar circumstances.

Chen v. Ashcroft, 381 F.3d 221 (3d Cir. Aug. 20, 2004). Asylum/ China/ Affirmance - The alien petitioned the court for review of the Board's affirmance of the IJ's decision which denied asylum. His argument was based on *Matter of C-Y-Z*, 21 I&N Dec. 915 (BIA 1997) (which held that the spouse of a person who was forced to undergo an abortion or sterilization is deemed to have suffered past persecution). He claimed that he suffered past persecution due to his fiancée's forced abortion and said that if it was not for China's minimum marriage age requirement, he would have married his fiancée. The court denied the petition for review and found that the Board's interpretation of *C-Y-Z* may produce undesirable results in some cases, but it contributes to efficient administration and avoids difficult and problematic factual inquiries.

Gao v. Ashcroft, 299 F.3d 266 (3d Cir. Aug. 7, 2002) (A77 341 155). Asylum/Falun Gong/ Credibility - The court reversed the Immigration Judge's adverse credibility finding, which the Board had affirmed. The respondent claimed that she had been persecuted because she had acted as a messenger for the Falun Gong movement in China. In a lengthy decision, the court found that the Immigration Judge had not supported his adverse credibility finding with specific, cogent reasons, and that he failed to evaluate and consider an important piece of documentary evidence, the "Disciplinary Determination" issued by the respondent's school when it expelled her.

Chang v. I.N.S., 119 F.3d 1055 (3d Cir. July 1997). Asylum/withholding - Alien sought asylum and withholding based on his fear of persecution in his home country of China. The IJ denied application, and the BIA dismissed alien's appeal. Held: (1) fact that Chinese laws which alien violated were laws of general applicability did not preclude finding that prosecution under such laws would constitute persecution; (2) China's prosecution of alien would be on account of his political opinion; (3) punishment which alien would face upon return to China was sufficiently severe to constitute persecution; and (4) alien would, more likely than not, face persecution if returned to China.

II. Africa

Sheriff v. Attorney General of the United States, 587 F.3d 584(3d Cir. Nov. 24, 2009).

Liberia/ Asylum - The petitioner, a native and citizen of Liberia, sought review of the Board's decision which denied her application for asylum, withholding of removal, and relief under the CAT. She is a Muslim and a member of the Mandingo tribe, a group, that beginning in late-1989, was targeted and savaged by the National Patriotic Front of Liberia (NPFL) rebels led by Charles Taylor. In 1990, NPFL rebels entered her village and massacred more than 400 Mandingos, including her mother and raped her daughter in front of her. Her daughter later died. Her house burned to the ground. She escaped to Guinea and returned home only after a peacekeeping force was deployed to her home area. In 1997, she joined the All-Liberia Coalition Party (ALCOP), a political group opposed to Taylor and supporting the interests of the Mandingos. When Taylor's forces again raided the village, she was arrested, bound with tape, and raped multiple times. She later returned home to take care of her father, but he was not allowed to leave and died from a gunshot wound. During this time, her daughter was abducted and is presumed dead. The alien fled to Guinea with her remaining children and later came to the U.S. An IJ found her to be credible, granted her application for asylum, concluding first, that the government had not rebutted the presumption of a well-founded fear of future persecution, and, second, that even if it had, the alien had demonstrated reasons so compelling that humanitarian asylum was warranted. DHS appealed and the Board held that because of fundamental changes in country conditions, the alien had no reason to fear persecution based on her political beliefs and membership in the Mandingo tribe. The alien argues that the Board erred in concluding that DHS rebutted the presumption of future persecution, and, she claims that regardless of whether the presumption had been rebutted, the Board erred in concluding that she was not eligible for humanitarian asylum. The court held that the alien established past persecution; the Board failed to adequately consider the evidence in the record; and, the case is remanded for the Board to determine whether the alien was eligible for humanitarian asylum based on past persecution.

Camara v. Attorney General of the United States, 580 F.3d 196, (3d Cir. Sep. 4, 2009).

Ivory Coast - The petitioner, a native of the Ivory Coast sought review of the Board's decision denying her application for asylum. Her father was a founding member of the Rally of the Republicans political party which was a political party in opposition to the government of the Ivory Coast at the time of the events relevant to this case. In 2002, armed men came to her family's home, accused her father of supporting anti-government rebel forces, and took him away by force. They threatened that they would return and make the rest of the family disappear. When her father didn't return, the family moved to stay with her father's brother, and then later, she moved to Guinea, where her mother left her in the care of a relative. She escaped from her guardian and came to the U.S. where she was detained immediately, and then, was granted and passed a credible fear interview with an asylum officer. The petitioner argued before an IJ that she was entitled to asylum because she faced past persecution and had a well-founded fear of future persecution. The IJ denied her petition and found that her alleged past persecution in Guinea was irrelevant because she is a citizen of the Ivory Coast, she did not herself sustain any mistreatment in the Ivory Coast, no objective evidence was presented that her father was abducted on account of his ethnicity or religion, and there was no objective evidence to support a finding of future persecution. On appeal, the Board affirmed the IJ's decision. The court held the substantial

evidence does not support the BIA's conclusion that petitioner did not experience past persecution in the Ivory Coast, as petitioner directly witnessed abduction of her father by a group that she can definitively identify as having directly and unambiguously threatened her with harm as well and remands the case.

Kibinda v. Attorney General of the United States, 477 F.3d 113 (3d Cir. Feb. 20, 2007). The alien, a native and citizen of Angola, petitioned the court for review of the Board's decision denying his request for asylum, withholding of removal, and relief under the CAT. The alien was an Angolan army officer. Although he originally claimed that he was detained and tortured for five days for political reasons, he later retracted that claim. The IJ found that although the alien had a subjective fear of persecution, his fear was objectively unreasonable in light of the record evidence, including the fact that, despite his Cabindan heritage, he was treated as a valued and trusted member of the Angolan army. The court held that the alien failed to establish that (1) his five-day detention by Angolan army amounted to past persecution; (2) his fear of future persecution was objectively unreasonable; (3) he would face disproportionately greater punishment for deserting the Angolan army because he was Cabindan; and (4) there was a reasonable possibility that he would be placed in a position in which he might be forced to commit human rights abuses.

Toure v. Attorney General of the United States, 443 F.3d 310 (3d Cir. Apr. 5, 2006) (A97 152 778). **Cote d'Ivoire/asylum/persecution** - The IJ erred in finding that several incidents suffered by the respondent and his family, which included a 2-day detention during which the respondent was repeatedly beaten, and the invasion of his home and abduction of his wife, were not sufficiently severe to rise to the level of persecution. Neither the facts in the record nor the canons of logic supported the IJ's conclusions that the respondent was not harmed on account of his political opinion because he did not belong to a political party, or on account of his ethnicity because the conflict in the country was not ethnically [sic] or regionally based. The IJ's finding that the home invasion was not perpetrated by the Cote d'Ivoire government was speculative and unsupported by the evidence in the record. The IJ also erred in finding that Government rebutted the respondent's fear of future imprisonment for having deserted the military, because he had to break the law to escape persecution by government authorities, so his prosecution and imprisonment for desertion would constitute persecution. The court also rejected the IJ's rulings regarding corroboration and the plausibility of the respondent's testimony.

Konan v. Gonzales, 432 F.3d 497 (3d Cir. Dec. 30, 2005) (A76 091 411). **Ivory Coast/asylum/social group/imputed political opinion** - A remand of the record was required where the Board summarily affirmed the IJ's decision, which failed to address the respondent's claim that he was persecuted due to his membership in a particular social group (his status as the son of a military police officer). Furthermore, substantial evidence did not support the IJ's conclusion that the respondent failed to establish past persecution based on an imputed political opinion where the evidence demonstrated that the rebel attack on the Gendarmerie Camp, where the gendarmes lived with their families, was motivated, at least in part, by a desire to kill government supporters.

Voci v. Gonzales, 409 F.3d 607 (3d Cir. June 2005). Albania/asylum/persecution - The Board erred in determining that the incidents of police mistreatment the respondent suffered on account of his political involvement in the "democracy movement" in Albania did not rise to the level of persecution. Because it was unclear from the Board's decision whether it believed that the respondent failed to provide adequate corroboration of his persecution claim to carry his burden of proof, it was necessary to remand the record for clarification. Remand was also required for a discussion regarding the question of changed country conditions, which the Board failed to address.

Dabo v. Ashcroft, 102 Fed. Appx. 243 (3d Cir. June 21, 2004) (A29 114 002) (unpublished). Guinea/withholding of removal- Unaware that the respondent had been removed to Guinea, the Board granted reopening based on new evidence of persecution, but vacated its order upon being informed of the respondent's removal. The respondent's petition to review was still pending and he submitted "compelling evidence of his arrest, imprisonment and torture upon his removal to Guinea." Given the Board's "disposition" to grant the motion to reopen and the respondent's evidence of likely future persecution, the court remanded to the Board for further consideration of his application for withholding of removal.

Moshud v. Blackman, 68 Fed. Appx. 328 (3d Cir. June 18, 2003) (A74 762 458) (unpublished). Asylum/credibility/FGM - The respondent, who presented false documents and claimed a false identity on entry, argued that she would be persecuted in Ghana because the man she had contracted to marry would force her to undergo FGM. The IJ granted asylum, but the Board reversed, finding that she was not credible and had failed to prove a well-founded fear of persecution because she could seek protection against FGM from government authorities. The court reversed, finding that the Board misread the record and that its decision was not supported by substantial evidence in view of the respondent's testimony and the IJ's positive findings about her demeanor, the country conditions evidence regarding the continued lack of protection against FGM by the Ghanaian government, and her mother's corroborating letters that the respondent's fiancée is looking for her to enforce the marriage contract. The court did uphold the Board's denial of reopening on a CAT claim, finding that the country conditions evidence did not establish that government officials would be "willfully accepting" of FGM.

Amanfi v. Ashcroft, 328 F. 3d 719 (3d Cir. May 2003). Asylum/imputed social group - The court found no merit to the respondent's claim under the Torture Convention because he failed to show that government officials would commit or acquiesce to his torture. Finding that the respondent's persecution was in retaliation for his father's preaching, rather than on account of his own religious faith, the court also rejected his claim to asylum and withholding on the basis of religious persecution. However, the court concluded that the Board erred in deviating from its prior precedent by holding, as a matter of law, that imputed membership in a particular social group cannot be the basis for an asylum claim. The record was, therefore, remanded for the Board to analyze whether the evidence supports the respondent's theory of persecution on account of his imputed status as a homosexual.

Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. May 14, 2003) (A78 420 780).

Asylum/Uganda/Recruitment/Persecution/Particular Social Group - The respondent's parents were killed by rebels in front of him when he was 15. He was abducted and forced to fight battles against the government. He saw the rebels commit atrocities on civilians and also saw them kill other people who were abducted when they tried to escape. He was physically and psychologically abused. The court first found that this treatment constituted persecution. It distinguished *Elias-Zacarias*, finding that the very severe punishment imposed was not just forced recruitment.

However, the court agreed with the majority of the Board that the respondent did not suffer past persecution on account of a protected ground. It found that the Board reasonably found that the respondent was abducted due to its need for forced labor, not due to his membership in a particular social group. The court also found no well-founded fear of future persecution by the Ugandan government. As for CAT protection, the court found that the government did not commit or acquiesce in torture.

However, the court did find that there was support for the respondent's claim that, as former child soldier who escaped, he might face future persecution from the rebels. The court also noted that there had been considerable publicity generated in the respondent's case. The case was remanded for further consideration of the claim of a well-founded fear of persecution by the rebels on account of the respondent's particular social group and/or imputed political opinion.

Sene v. Ashcroft, 54 Fed. Appx. 753 (3d Cir. Dec. 11, 2002) (A78 416 310). **Asylum/Senegal/Imputed Political Opinion** - The court first found that the respondent had not shown eligibility for asylum based on persecution from a rebel group in Senegal, because the evidence showed he was not tortured on account of protected ground. It concluded that he was harmed because he refused to join the group, which does not constitute persecution under the Act under *Elias-Zacarias*. Further, the court found that the respondent has not shown that he was persecuted on account of an imputed political opinion, holding that under *Elias-Zacarias*, refusing to join a rebel group is not by itself an expression of political opinion. The court also found that the respondent could avoid persecution by the rebel group by relocating within Senegal.

Arjune v. Ashcroft, 281 F.3d 218 (3d Cir. Dec. 18, 2001) (A77 936 647). **Asylum/Guyana** - Alien is of Indian descent and claimed he was persecuted by Guyanese of African descent who threatened and stabbed him for refusing to give up the land he received through a government land grant program. He testified that when he went to the police, who are predominantly Afro-Guyanese, they refused to help him. The court recognized that a government cannot guarantee the safety of its citizens at all times, but concluded that the Guyanese authorities had not made "reasonable efforts" to help and protect this respondent. The court noted that there was evidence showing that the police force is overwhelmingly Afro-Guyanese, who do not support the land grant program, and who are known to commit civil rights abuses with impunity.

Abdille v. Ashcroft, 242 F.3d 477 (3d Cir. Mar. 2001). **Firm resettlement** - Alien, native of Somalia, appealed decision of BIA denying his asylum request on ground that he had firmly resettled in South Africa, and deny his asylum request from South Africa on ground that he failed to establish past persecution or a likelihood of future persecution. Held: firm resettlement centers on whether third country issued an offer of some type of official status. Case remanded to

evaluate third country's law. Burden on DHS to show third country's law.

Fatin v. I.N.S., 12 F.3d 1233 (3d Cir. Dec. 1993). Asylum - Iranian woman petitioned for review of order of Board of Immigration Appeals requiring departure or deportation. Held: (1) "particular social group" within meaning of statutes permitting asylum or withholding of deportation because of persecution based on membership in particular social group refers to group of persons all of whom share common, immutable characteristic; (2) "persecution" can be interpreted as extreme conduct; and (3) Iranian woman was not entitled to asylum or withholding of deportation.

Etugh v. U.S. I.N.S., 921 F.2d 36 (3d Cir. Oct. 1990). Asylum/well founded fear - The BIA dismissed alien's motion to reopen deportation proceedings. Held: (1) alien failed to make out prima facie case for asylum based on "well-founded fear of persecution" in Nigeria, by asserting that he would suffer persecution only in the local vicinity of his home town if he were returned to Nigeria; (2) alien failed to make out prima facie case for withholding of deportation; and (3) alien's due process rights were not violated by Board's refusal to reopen hearing.

D. Convention Against Torture

Khouzam v. Att'y Gen., 549 F.3d 235 (3d Cir. Dec. 5, 2008). Egypt - In reviewing alien's claim for deferral of removal under CAT, the court held that (1) REAL ID Act removed district court's habeas jurisdiction over alien's challenge to the government's termination of his deferral of removal; (2) decision to terminate alien's deferral of removal was a final order of removal over which court had jurisdiction; (3) political question doctrine did not preclude court from exercising jurisdiction over alien's petition for review; and (4) alien was denied due process prior to his removal on the basis of diplomatic assurances.

Pierre v. Att'y Gen., 528 F.3d 180 (3d Cir. June 9, 2008) (en banc). Haiti - The court held that alien was not eligible for relief under CAT because pain and suffering that alien was likely to experience in Haitian prison due to lack of medical care would not be due to specific intent to torture, overruling *Lavira v. Att'y Gen.*, 478 F.3d 158 (3d Cir. 2007).

Silva-Rengifo v. Attorney General of the United States, 473 F.3d 58 (3d Cir. Jan. 9, 2007). Columbia - The alien petitioned the court for a review of an en banc decision of the Board which denied his motion to reopen and concluded that the alien had not established that the Colombian government acquiesces in torture and had failed to demonstrate prima facie eligibility for relief under the CAT. The court found that the Board's en banc decision adopted an incorrect legal standard in requiring official "consent" or "actual acquiescence" rather than willful blindness as set out in the Convention's implementing regulations. The definition of "acquiescence" adopted in *Matter of S-V* was the wrong legal standard to apply. For purposes of CAT claims, acquiescence to torture requires only that government officials remain willfully blind to torturous conduct and breach their legal responsibility to prevent it.

Hoxha v. Levi, 465 F.3d 554 (3d Cir. Oct. 3, 2006). Albania/Habeas Corpus/CAT- The

Republic of Albania seeks extradition of Respondent for the murders of three Albania citizens that took place in Albania in 1996. Following a finding by a Magistrate Judge that he was extraditable, Respondent filed a petition for habeas corpus that was denied by the District Court. On appeal, Respondent argues that he is entitled to habeas relief because (1) the Magistrate Judge should have allowed testimony at the extradition hearing by recanting witnesses, (2) the extradition treaty between Albania and the United States is invalid, and (3) he should not be returned to Albania because he will face torture and possible death there. The court concluded that Respondent's claims do not justify a grant of his habeas petition, and the judgment of the District Court was affirmed.

Lavira v. Att'y Gen., 478 F.3d 158 (3d Cir. Feb. 26, 2007). **Haiti** - Respondent is an above-the-knee amputee with a lifelong political affiliation with exiled former President Jean-Bertrand Aristide of Haiti. He is also HIV positive. He petitions for review of the decision of the Immigration Judge ("IJ"), affirmed by the Board of Immigration Appeals ("BIA"), that his conviction for purchasing a \$10 bag of drugs for an undercover agent was a "particularly serious crime" under the terms of the INA. In addition, Respondent claims that the IJ failed to recognize the basis for his claim under the United Nations Convention Against Torture. Respondent argues that his removal to Haiti would violate the CAT in that placing him in the inhumane conditions of the Haiti detention center would more likely than not subject him to severe pain and suffering. The court granted the petition for review and remanded the case to the agency for further proceedings.

Kibinda v. Attorney General, 477 F.3d 113 (3d Cir. Feb. 20, 2007).

Angola/Asylum/Withholding/CAT- Alien, a native and citizen of Angola who was from Cabinda, petitioned for review of the decision of BIA affirming the decision denying his request for asylum, withholding of removal, and relief under the Convention Against Torture (CAT). Alien failed to establish that his five-day detention by Angolan army amounted to past persecution; alien failed to establish that his fear of future persecuted was objectively unreasonable; alien failed to establish that he would face disproportionately greater punishment for deserting the Angolan army because he was Cabindan; and alien 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. Petition denied.

Silva-Rengifo v. Attonrey General of the United States, 473 F.3d 58 (3d Cir. Jan. 9, 2007).

CAT - The alien petitioned the court for a review of an en banc decision of the Board which denied his motion to reopen and concluded that the alien had not established that the Colombian government acquiesces in torture and had failed to demonstrate prima facie eligibility for relief under the CAT. The court found that the Board's en banc decision adopted an incorrect legal standard in requiring official "consent" or "actual acquiescence" rather than willful blindness as set out in the Convention's implementing regulations. The definition of "acquiescence" adopted in Matter of S-V- was the wrong legal standard to apply. For purposes of CAT claims, acquiescence to torture requires only that government officials remain willfully blind to torturous conduct and breach their legal responsibility to prevent it.

Celaj v. Attorney General, 471 F.3d 483 (3d. Cir. Dec. 28, 2006).

Albania/persecution/withholding/CAT- Petition for review of BIA denied because (1) substantial evidence supported determination that alien failed to establish that robberies of his home in Albania constituted past persecution on account of political opinion;(2) substantial evidence did not support determination that alien failed to establish that anonymous threats he received were made on account of his political opinion;(3) substantial evidence supported determination that threats alien received did not rise to the level of past persecution; and (4) substantial evidence supported determination that alien failed to establish a well-founded fear of future persecution.

Francois v. Gonzales, 448 F.3d 645 (3d. Cir May 19, 2005). The alien had LPR status but, after leaving the United States for a short period, was found inadmissible at entry due to criminal convictions. He conceded removability but applied for asylum and withholding of removal, which the IJ denied, and relief under CAT, which was granted. The BIA reversed. The alien then filed a petition for habeas corpus, which was denied, and a subsequent appeal, maintaining that as a criminal deportee he would be arrested, indefinitely detained and tortured upon return to Haiti. The court concludes, however, that while conditions in Haitian prisons are deplorable and prisoners are often held for long periods of time, the petitioner has not met his burden of proving under CAT that such treatment constitutes torture.

Kamara v. Attorney General, 420 F.3d 202 (3d Cir. 2005) (A75 805 924). Sierra

Leone/CAT - The Board applied the CAT regulations incorrectly when it separately considered the likelihood of the respondent's torture at the hands of the Sierra Leone Government and the rebel forces of the RUF, finding that he had to show by a preponderance of the evidence that at least one of the entities, taken alone, would torture him. Under the proper analysis, the respondent need only show that the cumulative probability of torture by the two entities is greater than 50%. The court declined to extend the "state-created danger" exception in the context of an immigration case. It further ordered the Board to decide whether the RUF should be deemed a "public official" for purposes of applying the CAT regulations and then to apply the proper analysis of the likelihood of torture.

Ambartsoumian v. Ashcroft, 388 F.3d 85 (3d Cir. 2004). Asylum/ CAT/ Ukraine/ Georgia/

Affirmance - The aliens, the husband who is a Georgian citizen of Armenian and Ossetian parentage, his wife who is a Ukrainian citizen and a Baptist, and their two children, petitioned the court for review of the Board's decision which denied them asylum, withholding of deportation and protection under the CAT. They claimed that they faced persecution in both the Ukraine and Georgia and would be persecuted in either country if they returned. The court affirmed the Board and held that (1) substantial evidence supported the IJ's determination that the alien did not suffer a well-founded fear of persecution based on religious beliefs if returned to the Ukraine; substantial evidence supported the IJ's determination that the alien would not suffer persecution based on ethnicity if returned to the Ukraine; and substantial evidence supported the determination that the aliens had not established a well-founded fear of persecution based on their Armenian ethnicity if returned to Georgia.

Shardar v. Ashcroft, 503 F.3d 308 (3d Cir. Aug. 24, 2004). Bangladesh/ Asylum/ CAT/ Affirmance - The alien petitioned the court for review of the Board's decision which denied asylum and refused to reopen to consider relief under the CAT. He argued that the Board erred since the IJ found his testimony regarding his participation in a demonstration and his subsequent arrest and beating by police to be credible. The court stated that even though a petitioner's testimony is deemed credible, it is not determinative. There was substantial evidence to support the conclusion that the petitioner had not met his burden of proof for establishing eligibility for asylum. Instead, it showed that he was not persecuted on account of his political opinion, but rather that he had been legitimately prosecuted for participation in a violent political demonstration. The court held that (1) the alien failed to demonstrate a well-founded fear of future persecution and (2) the police beatings did not rise to the level of "torture" under the CAT.

Khan v. Ashcroft, 98 Fed. Appx. 183 (3d Cir. June 1, 2004) (A72 018 638, A72 797 275, 276) (unpublished). Bangladesh/CAT - The court rejected the respondents' contentions regarding the IJ's findings on credibility and past persecution. However, the record was remanded for the Board to consider the merits of their CAT claim, which was first raised in the appeal after regulations implementing the Convention were enacted, and which was not addressed in the Board's summary affirmance.

Udenze v. Riley, No. CIV.A. 03-2337, 2003 WL 22006805 (E.D. Pa. Aug. 22, 2003) (A91 646 924) (unpublished). CAT/Nigeria/evidence - The respondent, a Nigerian citizen who was convicted of a drug offense in the U.S., claimed that he will be tortured in Nigeria because of his likely mandatory detention as a drug convict and his family's support of the Movement for the Survival of the Ogoni People. The IJ denied relief, relying in large part on the changed government in Nigeria. The court found that it was unclear whether the IJ considered all the relevant evidence concerning "gross, flagrant or mass violations of human rights," as required by 8 C.F.R. §§ 208.16(c)(3), beyond his assumption that such violations would not be as pervasive under the new regime. Reviewing a State Department report, as well as an Amnesty International report that the IJ did not consider, the court found evidence of both an ongoing pattern of human rights abuses and governmental acquiescence in "such torture." The court therefore remanded for further evaluation of all the relevant evidence that should have been considered in assessing the respondent's CAT claim.

Zubeda v. Ashcroft, 333 F.3d 463 (3d Cir. June 23, 2003) (A78 824 095).

CAT/Congo/evidence - The respondent claimed that she would likely be detained upon her return to the Democratic Republic of the Congo and that she would be raped by government agents while in detention. The IJ denied her requests for asylum and withholding based on an adverse credibility determination founded on inconsistencies in her application and her testimony, but he granted CAT relief. The Board reversed the CAT grant, finding that the evidence was insufficient to show that the respondent would be detained upon her return to the Congo. The court first held that rape can constitute torture and that there is no requirement that specific intent to inflict suffering must be shown. Ruling that the Board erred in adopting a credibility finding based on inconsistencies in the application and testimony, the court also noted that an adverse credibility determination regarding an asylum application should not taint consideration of a CAT

claim. Finally, the court found the Board's analysis of the evidence inadequate because it improperly minimized the country conditions reports of systematic rape and murder as "background evidence." The court remanded to the IJ because it was unclear whether he had taken administrative notice of the fact that the respondent was likely to be detained upon her return, and therefore whether the Board should have deferred to his finding.

Amanfi v. Ashcroft, 328 F. 3d 719 (3d Cir. May 2003). Asylum/imputed social group - The court found no merit to the respondent's claim under the Torture Convention because he failed to show that government officials would commit or acquiesce to his torture. Finding that the respondent's persecution was in retaliation for his father's preaching, rather than on account of his own religious faith, the court also rejected his claim to asylum and withholding on the basis of religious persecution. However, the court concluded that the Board erred in deviating from its prior precedent by holding, as a matter of law, that imputed membership in a particular social group cannot be the basis for an asylum claim. The record was, therefore, remanded for the Board to analyze whether the evidence supports the respondent's theory of persecution on account of his imputed status as a homosexual.

Lukwago v. Ashcroft, 329 F.3d 157 (3d Cir. May 14, 2003) (A78 420 780). Asylum/Uganda/Recruitment and Persecution/Particular Social Group - The respondent's parents were killed by rebels in front of him when he was 15. He was abducted and forced to fight battles against the government. He saw the rebels commit atrocities on civilians and also saw them kill other people who were abducted when they tried to escape. He was physically and psychologically abused. The court first found that this treatment constituted persecution. It distinguished *Elias-Zacarias*, finding that the very severe punishment imposed was not just forced recruitment.

However, the court agreed with the majority of the Board that the respondent did not suffer past persecution on account of a protected ground. It found that the Board reasonably found that the respondent was abducted due to its need for forced labor, not due to his membership in a particular social group. The court also found no well-founded fear of future persecution by the Ugandan government. As for CAT protection, the court found that the government did not commit or acquiesce in torture.

However, the court did find that there was support for the respondent's claim that, as former child soldier who escaped, he might face future persecution from the rebels. The court also noted that there had been considerable publicity generated in the respondent's case. The case was remanded for further consideration of the claim of a well-founded fear of persecution by the rebels on account of the respondent's particular social group and/or imputed political opinion.

Ezenwa v. INS, No. 3:CV-02-1302 (M.D. Pa. Sept. 27, 2002) (A26 878 305). Withholding/due process - The respondent claimed that he would be tortured in Nigeria by fellow IBO tribe members in retaliation for informing on other tribe members while cooperating with the FBI in connection with a fraud investigation. The IJ found that his fraud offense was an aggravated felony, but granted him withholding and relief under the Convention Against Torture. The Board sustained a Service appeal and ordered the respondent removed to Nigeria. The court agreed that the respondent was convicted of an aggravated felony, but held that the Board erred in finding

that the respondent would not be persecuted due to his membership in a particular social group because the threat he fears is a result of his membership in the IBO tribe. Finding that the respondent was not convicted of a particularly serious crime because his term of imprisonment was only for a year, the court granted withholding. In addition, the court concluded that returning the respondent to Nigeria would violate his substantive due process rights because the government made him vulnerable to harm in that country by leaking information regarding his cooperation with the FBI to the IBO community.

Sevoian v. Ashcroft, 290 F.3d 166 (3d Cir. May 8, 2002). Asylum/ Georgia/ Convention Against Torture - After his asylum claim on the grounds of religious and ethnic persecution was denied, the petitioner filed a motion to reopen claiming that he is entitled to withholding of removal under the Convention Against Torture. The BIA denied the motion, concluding that the petitioner had failed to establish a prima facie case for relief because insufficient evidence supported his claim that he would face torture for failure to serve in the Georgian military. The court concluded that substantial evidence supported the Board's decision and under the abuse of discretion standard, the court held that Sevoian failed to raise a prima facie case.

Johnson v. Ashcroft, 286 F.3d 696 (3d Cir. Apr. 16, 2002) (A73 149 183). Remand to Immigration Judge/What Can Be Considered - Board granted the respondent's motion to remand for CAT protection, stating the case was being remanded "for consideration of the respondent's claim pursuant to [CAT] regulations." On remand, the Immigration Judge also granted the respondent's motion to consider the asylum application based on changed country conditions, and granted both asylum and CAT protection. The Service appealed, and the Board affirmed the decision on CAT, but vacated the asylum grant, stating that the Immigration Judge had lacked jurisdiction to consider that request.

The court of appeals reversed, concluding that under Board precedent, a remand to an Immigration Judge is effective for the stated purpose and for consideration of any other related or appropriate matters, unless the remand order does two things: (1) expressly retains jurisdiction and (2) limits the remand to a specific purpose. Simply stating that this case was being remanded for CAT purposes was not sufficient to limit the remand, in that the Board did not state that it was retaining jurisdiction, nor did it limit or qualify the remand.

E. Miscellaneous

Gomez v. Att'y Gen., 527 F.3d 330 (3d Cir. May 30, 2008). Columbia/Particular Social Group - In reviewing Board's affirming the denial of asylum, withholding of removal, and relief under the CAT, the court (1) granted the petition with respect to the alien's well-founded fear of future persecution because Columbian women who escaped involuntary servitude after being abducted and confined by a guerrilla group qualified as particular social group; (2) held that alien was entitled to asylum based on well-founded fear of future persecution; and (3) remanded on claim of relief under the CAT.

Filja v. Gonzales, 447 F.3d 241 (3d Cir. May 12, 2006). Time limitations/motion to reopen/changed country conditions - Petitioners application for asylum and withholding were

denied by an IJ and the BIA affirmed. Petitioners moved to reopen the decision based on changed country conditions, which the BIA denied. The court held that the BIA misinterpreted the time limit that applies to motions to reopen based on changed country conditions and that its denial of the motion on other grounds was an abuse of discretion, so the court remanded to the BIA for further proceedings. The alien's asylum claim was based on political opinion, and after the BIA's decision the political party who had allegedly persecuted the alien in the past came back to power in his native Albania. However, the BIA found that the motion to reopen based on these changed political circumstances was untimely because it was not filed within 90 days of the order, rejecting the alien's argument that the time limitation for filing the motion should have been tolled due to ineffective assistance of counsel. Normally motion to reopen removal proceedings must be filed no later than 90 days after the final administrative decision, but there is an exception for motions to reopen in asylum and withholding cases where changed country conditions are present "if such evidence is material and was not available and could not have been discovered or presented at the previous hearing." 8 C.F.R. § 1003.2(c)(3)(ii). The court determines that the statute refers to the previous hearing before an IJ and not the previous proceeding before the BIA, principally because the BIA does not engage in any fact-finding or de novo review of findings of fact determined by an IJ. The court then found that the BIA did not adequately review the alien's arguments regarding changed country conditions and ineffective assistance of counsel, and also did not properly his CAT claim. The BIA's decision denying the motion to reopen was vacated and the case remanded to the BIA for further proceedings.

Reynoso-Lopez v. Ashcroft, 369 F.3d 275 (3d Cir. May 25, 2004). Voluntary Departure - The petitioner sought review of the Board's affirmance of the IJ's decision which denied asylum and in the alternative requested the court to reinstate the expired thirty-day voluntary departure order. The court held (1) that substantial evidence supported the IJ's determination that the petitioner failed to support his asylum withholding of deportation and CAT claims, and (2) that they lacked jurisdiction to reinstate the petitioner's voluntary departure.

Wongso v. Ashcroft, 91 Fed. Appx.751 (3d Cir. Feb. 4, 2004) (unpublished) (A79 316 241). Asylum/Frivolous application - The court upheld the Immigration Judge's decision denying asylum, withholding, and CAT protection, in the process upholding the adverse credibility finding. However, the court remanded regarding the Immigration Judge's decision that the respondent had filed a frivolous asylum application. Noting the extreme consequences that flow from a finding that an asylum application was frivolous, the court stated that it was not enough for the Immigration Judge to find the application frivolous because of "the notorious number of contradictions" in the case. The Immigration Judge must make an actual finding that there were specific, material statements in the application that were knowingly false.

Lacap v. I.N.S., 138 F.3d 518 (3rd Cir. 1998). Citizenship - Alien appealed denial of asylum and withholding, claiming that he could not be deported because he was a U.S. citizen by birth. Held: persons born in the Philippines during the territorial period are not entitled to U.S. citizenship at birth. Followed reasoning of *Rabang v. I.N.S.*, 35 F.3d 1449 (9th Cir. 1994).

I. China

Wang v. Attorney General, 423 F.3d 260 (3d Cir. 2005) (A77 993 922).

China/asylum/credibility/IJ conduct - The IJ's adverse credibility finding was not credited because of the "pervasive influence of [her] unduly harsh character judgments" regarding the respondent's lack of concern for his disabled daughter and his parent's pension, which was withheld until he paid a fine for violating the birth control policy. The court concluded that the IJ's opinion was "highly improper for both its contemptuous tone and its consideration of personal issues irrelevant to the merits" of the respondent's claim. The court also rejected the Board's reliance on the IJ's determination, finding that there were no inconsistencies nor any inherent implausibility in the respondent's account.

Chen v. Ashcroft, 117 Fed. Appx. 853 (3d Cir. Dec. 28, 2004) (A78 199 307-308)

(unpublished). Motion/China/asylum - Because the respondents presented substantially similar evidence to that offered in *Guo v. Ashcroft*, the court found that they met their burden of establishing prima facie eligibility for asylum. The court rejected the Board's determination that the respondents failed to present new and previously unavailable evidence, i.e., the fact of pregnancy was known at the time of a prior motion, because only giving birth, not the pregnancy alone, would have been grounds for relief and thus a basis for reopening.

Wang v. Ashcroft, 368 F.3d 347 (3d Cir. May 19, 2004). De Novo Review/ Asylum/ China -

The petitioner, a citizen of China, sought review of the Board's decision which vacated the IJ's granting Wang's application for withholding of removal under the CAT. He claimed that the Board erred when it undertook a de novo review of the record because it is prohibited under 8 C.F.R. §§ 1003.1(d)(3)(1). The court found that since the INS had filed its appeal with the Board more than one year before the September 25, 2002 deadline, 8 C.F.R. §§ 1003.1(d)(3)(1) was inapplicable in this case. In the alternative, Wang argued that the court should bypass the Board's decision and review the IJ's decision. The court found that since the BIA did not commit an error of law, they would review the Board's decision and its de novo fact-finding rather than the IJ's decision and fact-finding. The court held that substantial evidence supported the Board's determination that the alien failed to prove that he was more likely than not to face torture upon his return to China.

Cai v. Ashcroft, 63 Fed. Appx. 625 (3d Cir. Apr. 29, 2003) (A73 058 470) (unpublished).

Asylum/China/Family Planning - The court found that the Board erred in denying the respondent's motion to reconsider. In the motion, the respondent pointed out that the Board, in denying asylum, had not considered the evidence the respondent offered regarding the two additional children she had had since coming to the United States, the second one a boy. The court stated that the Chinese authorities might be more likely to enforce the family planning policies now that the respondent has four children, including a boy.

Yang v. Maugans, 68 F.3d 1540 (3d Cir. Oct. 1995). Asylum - Aliens who were ordered excluded after denial of their applications for asylum filed habeas corpus petitions. District Court granted partial summary judgment, holding the alien had entered the U.S. within the meaning of the INA. Held: (1) entry is not effected under INA merely by encroaching upon United States territorial waters without being detected or pursued by authorities, and (2) under INA, aliens have

burden of proving that they have satisfied all three elements of entry test before they are eligible for deportation proceedings.

Yi v. Maugans, 24 F.3d 500 (3d Cir. May 1994). Asylum/appeal - Chinese alien sought nationwide class certification and interim class relief, in connection with aliens' claims for asylum. Held: judicial challenges to orders of exclusion are permitted solely by way of habeas proceedings and only by those aliens who have exhausted their administrative remedies.

II. Africa

Ndayshimiye v. Att'y Gen., 557 F.3d 124 (3d Cir. Feb. 24, 2009) Rwanda/Asylum/Nexus - In reviewing Board's affirming the denial of asylum, withholding of removal, and relief under the CAT, the court examined the "one central reason" test in the REAL ID Act, under which the Board requires an applicant to show that a protected ground is more than "incidental, tangential, superficial, or subordinate to another reason for harm." The court upheld the test except for the use of the term "subordinate" and held that (1) Board's statutory interpretation of asylum requirements was reasonable; and (2) substantial evidence supported finding that aliens' Burundian origin was no more than incidental factor in their persecution in Rwanda.

Lusingo v. Gonzales, 420 F.3d 193 (3d Cir. Aug. 19, 2005) (A79 239 847). Tanzania/asylum - The Board misinterpreted the respondent's evidence regarding the treatment of street children by the Tanzanian Government, which was introduced to show that, like the children, he was an embarrassment to the Government when he disappeared from a Boy Scout Jamboree and would therefore likely suffer retaliation as a result upon his return. The Board also gave unwarranted weight to the fact that the respondent's parents had not been persecuted by the Government in retaliation for his actions.

Awolesi v. Ashcroft, 341 F.3d 227 (3d Cir. Aug. 15, 2003) (A73 034 576-577). Asylum/Nigeria/Reversal of Immigration Judge Grant - The Immigration Judge granted asylum based on imputed political opinion, because the lead respondent had helped finance the political career of his brother, a member of a pro-democracy party in Nigeria. The brother was the target of ambush and assassination attempts and went into hiding. The Board reversed the Immigration Judge in a four-sentence order. The court reversed the Board. It stated that, "we are given no indication why the BIA denied Awolesi's petition and we cannot determine whether it acted arbitrarily," and "we simply do not know what evidence the BIA used to come to its decision." The court noted that under the new Streamlining Regulations, a reversal of an Immigration Judge decision "will necessarily require some explanation."

Sene v. Ashcroft, 54 Fed. Appx. 753 (3d Cir. Dec. 11, 2002) (unpublished) (A78 416 310). Asylum/Senegal/Imputed Political Opinion - The court first found that the respondent had not shown eligibility for asylum based on persecution from a rebel group in Senegal, because the evidence showed he was not tortured on account of protected ground. It concluded that he was harmed because he refused to join the group, which does not constitute persecution under the Act

under *Elias-Zacarias*. Further, the court found that the respondent has not shown that he was persecuted on account of an imputed political opinion, holding that under *Elias-Zacarias*, refusing to join a rebel group is not by itself an expression of political opinion. The court also found that the respondent could avoid persecution by the rebel group by relocating within Senegal.

Abdulai v. Ashcroft, 239 F.3d 542(3d Cir. Feb. 12, 2001) Evidence - Alien appealed BIA's denial of asylum and withholding. Held: BIA may require otherwise-credible asylum applicants to present evidence corroborating their stories in order to meet burden of proof; because question remained as to whether or not BIA properly applied its own rules in this case, it was remanded.

II. CANCELLATION

Augustin v. Att'y Gen., 520 F.3d 264 (3d Cir. Mar. 20, 2008). The court upheld Board's refusal to impute alien's father's years of lawful permanent residence to alien for requirement of seven years of continuous residence for cancellation of removal.

Mendez-Reyes v. Gonzales, 428 F.3d 187 (3d Cir. Nov. 1, 2005). **Continuous Presence:** The alien, a citizen of Mexico, petitioned the court for review of the Board's decision affirming the removal order of the IJ. He claimed that he had been residing in the United States since 1985, he took a brief trip to Mexico in 1998 and, and after being inspected by immigration officials he withdrew his application for admission to the United States and departed the country. He reentered later that year and removal proceedings based on his unlawful reentry were initiated four years later. At these removal proceedings, the alien conceded that he was removable but applied for cancellation of removal. The immigration judge determined that the alien could not establish the required 10 years of continuous physical presence because of the withdrawal of his application for admission and subsequent departure in 1998. The court affirmed the IJ's order and held that for the purpose of breaking the alien's period of continuous physical presence in the U.S. as required for cancellation of removal, the withdrawal of his application would be treated the same as when an alien voluntarily departs under the threat of deportation.

Rodriguez-Munoz v. Gonzales, 419 F.3d 245 (3d Cir. Aug. 16, 2005). **212(c)** - The court affirmed the Board's determination that even though the respondent was eligible for a 212(c) waiver for his pre-AEDPA aggravated felony conviction, that conviction would nonetheless remain an aggravated felony for purposes of precluding his application for cancellation of removal under section 240A(a) in regard to his post-IIRIRA non-aggravated felony offenses.

Okeke v. Gonzales, 407 F.3d 611 (3d Cir. 2005) (A26 188 596). **Cancellation/continuous presence** - A respondent who lawfully reentered the country after his commission of a controlled substance offense, which was a clock-stopping event under the "stop-time" rule, accrued the requisite 10-year period of continuous presence for cancellation of removal, because "the clock started anew" after his lawful entry. The court noted that the notice to appear did not charge the respondent with commission of a crime and expressed no opinion as to his immigration status had such a charge been made. Judge Ambro concurred, concluding that Congress intended to allow the continuous physical presence clock to restart after the commission of an offense, but noting that conviction would bar eligibility for cancellation. Judge Nygaard dissented, finding that the respondent was not eligible because he admitted pleading guilty to drug possession and therefore was convicted of the crime.

Vasquez-Martinez v. Ashcroft, 98 Fed. Appx. 128 (3d Cir. May 4, 2004) (A75 798 556) (unpublished). **Summary affirmance** - The IJ denied the respondent's application for cancellation for failure to establish hardship. On appeal, the respondent presented new arguments that he had received ineffective assistance of counsel at his hearing and that he had newly discovered evidence of hardship in that his son was recently diagnosed with asthma. The court acknowledged as "persuasive" the Governments arguments that the respondent failed to support

his claims. However, because the Board summarily affirmed the IJ's decision, the court held that the Board "effectively dismissed" the respondent's claims without offering any stated rationale, which precluded any meaningful judicial review. The record was therefore remanded for further proceedings.

Kim v. Ashcroft, 95 Fed. Appx 418 (3d Cir. Apr. 22, 2004) (A38 668 955-956) (unpublished).

IJ recusal/rescission/evidence/credibility - The respondents entered in 1985 on invalid visas that were procured on the basis of false information. The IJ found them removable and denied cancellation, ruling that they failed to establish good moral character because their testimony was not credible. The court first rejected the respondents' contention that the IJ should have recused himself because he presided over their daughter's proceedings. The court also declined to decide whether the Government was time barred by the rescission provisions in section 246 from instituting removal proceedings more than 5 years after the respondents' entry (rather than adjustment of status), remanding for the Board to decide the issue in the first instance. Finding that two letters from the State Department officials were not shown to be reliable, the court rejected them as inadmissible evidence. Finally, although the court upheld the IJ's ruling that the male respondent's testimony was not credible, it concluded that the adverse credibility finding as to the female respondent was "woefully inadequate" and remanded for further proceedings, "strongly" recommending a new IJ be assigned.

III. CONSTITUTIONAL

A. Due Process

Paredes v. Att'y Gen., 528 F.3d 196 (3d Cir. June 9, 2008). The court held that (1) alien was not deprived of due process rights for being ordered removed for his two New Jersey state convictions for which petitions for writs of error coram nobis were pending and (2) the court lacked jurisdiction to consider whether his convictions on state offenses could not be held punishable as felonies under federal law.

Purveegün v. Gonzales, 448 F.3d (3d Cir. June 1, 2006). Streamlining/three-member panel review/ due process - An IJ granted petitioner withholding of removal under CAT, but the BIA, acting through a single member, reversed. Petitioner alleged that the BIA made a procedural error in not referring the case to a three-member panel for review. The court first found that it had the judicial discretion to review agency action in this matter. The court then agreed with the petitioner and remanded to the Board for further consideration. Single members of the BIA can make decisions under certain circumstances; in all other cases the matter must be referred to a three-member panel. One BIA member may affirm, modify or remand an IJ's decision, but is not permitted to reverse a decision.

Cham v. Attorney General, 446 F.3d 533 (3d Cir. Apr. 28, 2006) (A79 307 524).

Gambia/asylum/IJ conduct - The IJ violated the respondent's due process rights by his belligerent questioning and failure to consider relevant evidence regarding the grants of asylum to the respondent's family members.

Papageorgiou v. Gonzales, 413 F.3d 356 (3d Cir. 2005). REAL ID Act - The alien petitioned the court for review of the Board's decision which summarily affirmed the IJ's order of removal where the alien had been convicted of an aggravated felony. The Third Circuit reached the same conclusion as the Ninth Circuit and concluded that the alien petitioner's convictions did not divest the court of jurisdiction under 8 U.S.C. §§ 1252(a)(2)(B) because the REAL ID Act restores judicial review of constitutional claims and questions of law presented in petitions for review pursuant to new provision §§ 1252(a)(2)(D). Their review of the Act confirms that Congress expressly intended that the amendments restoring jurisdiction be applied retroactively to pending petitions for review. After determining that they were not jurisdictionally barred from reviewing the alien's petition for review on account of his past conviction, they held that the Board did not violate the alien's due process rights by summarily affirming the decision of the IJ.

Gaur v. Gonzales, 124 Fed. Appx. 738 (3d Cir. Mar. 8, 2005) (A41 364 514) (unpublished).

"Good faith" waiver of joint petition - An affidavit by the respondent's former wife, who was not present to testify, was not reliable and trustworthy where the INS officer could not confirm that it was a reflection of her free will, and no one could testify as to the truth and veracity of the affidavit's contents. Due process requirements were not satisfied by reliance on the affidavit, so there was no substantial evidence for the Board's conclusion that the respondent failed to meet his burden of proving that the marriage was entered into in good faith where the government

produced no other evidence to contradict the respondent's testimony. The court commented on the fact that the respondent's appeal was pending for 9 years and concluded that the "delay present in this case is unwarranted and fundamentally unfair."

Muhanna v. Gonzales, 399 F.3d 582,(3d Cir. Mar. 3, 2005) (A46 010 274). Due process/frivolous asylum/credibility - The IJ erred when she halted the proceedings after basing her assessment of the respondent's credibility solely on his testimony regarding one stabbing incident, without giving him an opportunity to account for inconsistencies. She violated the respondent's due process rights by finding that his asylum application was frivolous, and that he was therefore ineligible for any form of relief, based on this credibility finding alone. The IJ's credibility finding with regard to the respondent's withholding and CAT claims was not supported by substantial evidence because her premature decision to halt the proceedings based on her flawed frivolousness finding prevented the development of an appropriate record on which to make a credibility finding.

Togbah v. Ashcroft, 104 Fed. Appx. 788 (3d Cir. July 8, 2004) (A74 705 993) (unpublished). §§ 209(c) waiver/due process - The IJ granted the respondent's §§ 209(c) waiver request, but the Board reversed, relying on the AG's policy in Matter of Jean to apply a heightened burden of proof to a waiver consideration where the alien committed a violent crime. The court agreed that it was correct to employ the AG's new policy, but found it was a denial of due process to change the evidentiary burden without giving the respondent an opportunity to meet the heightened burden. The record was remanded with instructions to remand to the IJ for further proceedings. The court also held that the respondent was subject to mandatory detention and could be held without an individualized hearing.

Bonhometre v. Ashcroft, 306 F.Supp.2d 510 (E.D.Pa. Feb. 20, 2004). Due process/notice of available relief - The IJ found the respondent removable on the basis of his armed robbery conviction but did not advise him of his possible eligibility for any relief. The court found that the respondent, a temporary resident, was not eligible for a §§ 212(c) waiver, but that there was a reasonable possibility that he was eligible for relief under §§ 212(h) or the CAT. According to the court, the IJ's failure to advise the respondent of his opportunity to apply for relief deprived him of his right to due process, so the record was remanded for a new hearing.

Dia v. Ashcroft, 353 F.3d 228 (3d Cir. Dec. 22, 2003) (A78 514 349). Streamlining Regs./Asylum/Credibility/Guinea - The Third Circuit upheld the Board's streamlining regulations, joining the other circuits that have addressed the issue. The court found that the regs violate neither the INA nor the due process clause of the Constitution. The court also found no problems with the Board's issuance of an affirmance without opinion in this case.

However, the court found that the Immigration Judge's credibility finding could not stand. In a lengthy decision, the court concluded that the Immigration Judge's opinion, "consists not of the normal drawing of intuitive inferences from a set of facts, but, rather, of a progression of flawed sound bites that gives the impression that she was looking for ways to find fault with Dia's testimony." The Immigration Judge also erred in requiring corroboration without first (1) identifying the facts for which it is reasonable to require corroboration, (2) inquiring whether the

respondent has provided corroborating information, and if not, (3) inquiring whether the respondent has adequately explained the failure to corroborate. This violated the decisions in *Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001), and *Matter of S-M-J-*, 21 I&N Dec. 722 (BIA 1997). In addition to the court's long opinion, there were three separate opinions issued in this case.

Ezeagwuna v. Ashcroft, 325 F.3d 396 (3d Cir. Apr. 14, 2003) (A76 142 746). Asylum/Cameroon/Due Process - This case was previously decided on 7/30/02 (see Case Law Update of 8/5/02). Upon rehearing, that decision was vacated by the court and this decision was substituted. However, the court again found that the Board's adverse credibility finding violated the respondent's right to due process because it was based almost entirely on a Department of State letter that contained the conclusions of an investigation in Cameroon. The court found that the letter was "multiple hearsay" and did not in any way describe how the information contained in it was gathered. The letter was not reliable or trustworthy and, further, the respondent was not given adequate time to respond to it. On remand, the letter may not be considered. The court also found that some of the evidence presented by the respondent on appeal was material and not previously available. The case was remanded with instructions that the matter be remanded to the Immigration Judge for further consideration, including consideration of this evidence.

Calle-Vujiles v. Ashcroft, 320 F.3d 472 (3d Cir. March 5, 2003). Reopening - The petitioner argued that his due process rights were violated by the Board when it failed to exercise its discretion to sua sponte reopen the deportation proceedings or reconsider its prior decision. Since the Board retains unfettered discretion to decline to sua sponte reopen or reconsider a deportation proceeding, the court lacked jurisdiction to review a decision declining to exercise such discretion to reopen or reconsider the case.

Ezenwa v. INS, No. 3:CV-02-1302 (M.D. Pa. Sept. 27, 2002) (A26 878 305). Withholding/due process - The respondent claimed that he would be tortured in Nigeria by fellow IBO tribe members in retaliation for informing on other tribe members while cooperating with the FBI in connection with a fraud investigation. The IJ found that his fraud offense was an aggravated felony, but granted him withholding and relief under the Convention Against Torture. The Board sustained a Service appeal and ordered the respondent removed to Nigeria. The court agreed that the respondent was convicted of an aggravated felony, but held that the Board erred in finding that the respondent would not be persecuted due to his membership in a particular social group because the threat he fears is a result of his membership in the IBO tribe. Finding that the respondent was not convicted of a particularly serious crime because his term of imprisonment was only for a year, the court granted withholding. In addition, the court concluded that returning the respondent to Nigeria would violate his substantive due process rights because the government made him vulnerable to harm in that country by leaking information regarding his cooperation with the FBI to the IBO community.

Obianuju Ezeagwuna v. Ashcroft, 301 F.3d 116 (3d Cir. July 30, 2002) (A76 142 746). Asylum/Cameroon/Due Process - Board found the respondent not credible based "almost entirely on a letter from the Department of State that contained the conclusions of an investigation

in Cameroon." The court found that the reliance on this letter denied the respondent of due process. The respondent submitted considerable documentary evidence to support her claim, but the letter stated that several of the documents were fraudulent. The court described the letter as "multiple hearsay of the most troubling kind," and noted that it had no information about how the investigation in Cameroon was conducted. It concluded that the letter did not "satisfy our standards of reliability and trustworthiness." Further, the respondent was not given adequate time to respond to the letter. The court reminded the Board and the INS that they should not rely too heavily on "the State Department's authority."

Without the letter, the court could not conclude that the respondent submitted fraudulent documents, which was the main basis for the Board's adverse credibility finding. It found the respondent's story credible, corroborated by numerous documents, including the State Department Report on Cameroon, and concluded that she was eligible for asylum and withholding.

Chmakov v. Blackman, 266 F.3d 210 (3d Cir. Sept. 2001). Jurisdiction - Non-criminal aliens filed petition for writ of habeas corpus alleging that their 5th Amendment right to due process had been violated because they received ineffective assistance of counsel in proceedings before BIA. Held: federal district court had jurisdiction over matter. **But see** REAL ID Act of 2005.

Chong v. District Director, I.N.S., 264 F.3d 378 (3d Cir. Sept. 2001). In custody, PSC. Alien appealed from an order of the USDC which denied her habeas petition seeking relief from a final order of removal. Held: (1) alien met the "in custody" requirement because sufficient collateral consequences flowed from BIA's order of removal to make appeal a live case or controversy; (2) IJ's failure to provide alien with notice that she could make representations before the BIA did not prejudice alien; and (3) BIA did not violate alien's due process rights by affirming the IJ's decision without remanding for another individualized determination of whether heroin trafficking was a PSC.

Chi Thon Ngo v. I.N.S., 192 F.3d 390 (3d Cir. Sept. 1999). Detention/parole - Alien who was excludable, but whose country of origin refused to allow his return, petitioned for writ of habeas corpus, challenging his prolonged detention. Held: (1) former and current versions of INA give AG authority to detain aliens following issuance of final order of removal; (2) aliens may be detained for lengthy period without violating due process clause when removal beyond control of INS; and (3) continued detention in this case violated alien's due process rights, as no determination had been made as to whether justifications for custody continued to exist - must provide individualized periodic review of an alien's eligibility for release on parole.

Green v. I.N.S., 48 F.3d 313 (3d Cir. Jan. 1995). Due process - Alien brought petition for review of decision of BIA upholding order of deportation. Held: immigration judge's failure to advise alien's attorney of consequences of his failure to file timely application for discretionary relief from deportation did not deprive alien of her due process rights.

Marrero v. I.N.S., 990 F.2d 772 (3d Cir. Apr. 1993). Deportation order - Alien petitioned for review of immigration judge's in absentia order of deportation. The BIA dismissed the alien's

appeal and denied his motion to reopen deportation proceedings. Alien sought review. Held: (1) Court of Appeals has jurisdiction to review order of deportation after alien has been forcibly deported if record reveals colorable due process claim, and (2) 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. Petitions denied.

Etugh v. U.S. I.N.S., 921 F.2d 36 (3d Cir. Oct. 1990). Asylum/well founded fear - The BIA dismissed alien's motion to reopen deportation proceedings. Held: (1) alien failed to make out prima facie case for asylum based on "well-founded fear of persecution" in Nigeria, by asserting that he would suffer persecution only in the local vicinity of his home town if he were returned to Nigeria; (2) alien failed to make out prima facie case for withholding of deportation; and (3) alien's due process rights were not violated by Board's refusal to reopen hearing.

Sewak v. I.N.S., 900 F.2d 667 (3d Cir. Apr. 1990). Due process - Alien petitioned for review of deportation order of BIA. Held: record was **insufficient** to show whether alien's due process rights were violated; therefore, remand was warranted.

B. Equal Protection

De Leon-Reynoso v. Ashcroft, 293 F.3d 633 (3d Cir. June 11, 2002). Moral turpitude/receiving stolen property/ Pennsylvania/Equal Protection - The Circuit Court held that the District Court did not err in concluding that the alien had committed a crime of moral turpitude where he was convicted of possessing stolen property that he believed probably was stolen. Also, the District Court did not err in holding 8 U.S.C. §§ 1182(h) does not violate the equal protection component of the Fifth Amendment's Due Process clause.

Pinho v. I.N.S., 249 F.3d 183 (3d Cir. Jan. 2001). Stop time rule - Alien petitioned for review from an adverse ruling by the BIA, which dismissed their appeal from an immigration judge decision denying suspension of deportation. Held: application by BIA of stop-time rule (enacted during the pendency of alien's appeal) did not have an impermissible retroactive effect. Also NACARA exceptions to the stop-time rule did not violate **equal protection** clause.

Breyer v. Meissner, 214 F.3d 416 (3d Cir. June 2000). Derivative citizenship - Petitioner born in a foreign country to a mother who was American citizen, following his denaturalization for his service as a Nazi guard, and finding that he was deportable, brought declaratory judgment action seeking review of denial of his application for citizenship. Held: (1) petitioner 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; (2) such statute discriminated based on gender in violation of **equal protection clause**; (3) statute which retroactively granted citizenship to foreign-born children of American mothers except for those who committed expatriating acts violated equal protection; and (4) remand required to determine whether petitioner's Nazi activities were voluntary and done with an intent to relinquish citizenship.

DeSousa v. Reno, 190 F.3d 175 (3d Cir. Aug. 1999). **AEDPA/retroactivity** - Criminal alien sought habeas relief, alleging that AEDPA, as interpreted by the BIA to deny discretionary waivers of inadmissibility to deportable but not to excludable aliens, violated equal protection rights. Held: (1) IIRIRA did not bar alien's petition inasmuch as petition did not challenge the government's selective enforcement of immigration laws; (2) AEDPA did not violate alien's equal protection rights; and (3) AEDPA was not impermissibly retroactive as applied to alien whose conviction occurred prior to effective date and against whom deportation proceedings were begun after AEDPA. **But see** St. Cyr decision.

Massieu v. Reno, 91 F. 3d 416 (3d Cir. July 1996). **Administrative/procedural** - Alien sought declaratory and injunctive relief against being deported because of Secretary of State's determination that he was deportable based on adverse foreign policy consequences for United States. Held: (1) alien was precluded from initially asserting his constitutional claims in district court action before exhausting his administrative remedies and then petitioning for review in Court of Appeals, and (2) exception to exhaustion of administrative remedies doctrine for claims considered wholly collateral to administrative review process did not apply to alien who was challenging constitutionality of statute under which his deportation was being sought.

IV. CRIMINAL

A. Aggravated Felony

Evanson v. Att’y Gen., 550 F.3d 284 (3d Cir. Dec. 19, 2008). In considering whether alien’s state conviction for possession with intent to deliver marijuana was an aggravated felony, the court held that, under the modified categorical approach, none of the appropriate documents in the record specified the amount of marijuana for which he was convicted.

Nijhawan v. Att’y Gen., 523 F.3d 387 (3d Cir. May 2, 2008). The court held that alien’s conviction was an aggravated felony where (1) alien’s conviction for conspiracy to commit bank fraud, mail fraud, and wire fraud constituted offense involving fraud or deceit; (2) jury determination of loss in excess of \$10,000 was not required; and (3) clear and convincing evidence that loss exceeding \$10,000 was tied to alien’s offense.

Caroleo v. Gonzales, 476 F.3d 158, (3d Cir. Feb. 7, 2007). AEDPA - The alien, a native and citizen of Italy who had been found removable on the basis of his state court conviction for attempted murder, petitioned the court for review of the Board’s decision denying his motion for a discretionary waiver of removal pursuant to § 212(c). He argued that he had pled guilty after AEDPA’s effective date of April 24, 1996, but that his crime had been committed in 1993, prior to the enactment of AEDPA, so the principles of *St. Cyr* should be extended to render AEDPA inapplicable to him. The court agrees with the Board’s determination and held that an aggravated felony/crime of violence has no statutory counterpart in INA § 212(a).

Jeune v. Attorney General, 476 F.3d 199(3d Cir. Feb. 20, 2007). Haiti/Aggravated Felony – Alien, a native and citizen of Haiti, under final order of removal filed petition for writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. Habeas petition was converted into petition for review. IJ held that alien’s Pennsylvania drug conviction, without additional facts, did not constitute an aggravated felony, and alien’s Pennsylvania conviction was not analogous to a conviction under the federal felony drug trafficking statute. The petition was granted and remanded.

U.S. v. Vargas, 477 F.3d 94 (3d Cir. Feb. 16, 2007). Aggravated Felony – Appellant appeals his sentence of 41 months of imprisonment imposed following his pleading guilty to illegally reentering the U.S. after he was deported following conviction of an aggravated felony in violation of 8 U.S.C. § 1326(a), (b)(2). He claims the District Court erred in sentencing him. Because Vargas’ sentence is reasonable and the District Court acted properly in sentencing him, District Court decision affirmed.

Caroleo v. Attorney General, 476 F.3d 158 (3d Cir. Feb. 7, 2007). Aggravated Felony/Italy – Petitioner sought review of a decision of the Board of Immigration Appeals (“BIA”) denying his motion for a discretionary waiver of removal pursuant to § 212(c) of the Immigration and Nationality Act (“INA”). The court affirmed the BIA’s determination that an aggravated felony/crime of violence-for which petitioner has been found removable on the basis of his state

court conviction for attempted murder-has no statutory counterpart in § 212(a) of the INA. Petition for review denied.

Yong Wong Park v. Attorney General of the United States, 472 F.3d 66 (3d Cir. Dec. 29, 2006). Removal/Aggravated Felony/Korea - The alien, a native and citizen of the Republic of Korea, petitioned the court for review of the Board's decision finding the alien removal for having been convicted of an aggravated felony. The immigrant had pleaded guilty to trafficking in counterfeit goods in violation of the Trademark Counterfeiting Act of 1984, 18 U.S.C. § 2320. He was originally charged with removability under 8 U.S.C. § 1227(a)(2)(A)(i) for having been convicted of a crime involving moral turpitude, but following the BIA's remand of the IJ's decision that the immigrant was not removable under that provision, the charge under § 1227(a)(2)(A)(iii) was added. The court found that the immigrant's conviction under 18 U.S.C. § 2320 was an offense relating to counterfeiting for purposes of the definition of "aggravated felony" under 8 U.S.C. § 1101(a)(43)(R). 18 U.S.C. § 2320 penalized those who trafficked in goods while knowingly using a counterfeit mark and therefore sought to discourage the act of counterfeiting. Because the immigrant had been convicted of an aggravated felony, he was ineligible for cancellation of removal. The doctrine of judicial estoppel did not bar the addition of the "aggravated felony" removal charge; 8 C.F.R. § 1240.10(e) permitted the lodging of additional charges during the course of removal proceedings.

Joseph v. Attorney General, 465 F.3d 123 (3d Cir. Oct. 2, 2006). Aggravated Felony - The alien petitioned the court for review of the finding that his conviction under 8 U.S.C. § 922(A)(3) (which makes it illegal for a person, other than a licensed importer, dealer or manufacturer, to transport into or receive in the state where he resides firearms purchased or otherwise obtained by that person outside of his state of residence) constitutes an aggravated felony. The court held that the defendant's 18 U.S.C. § 922(a)(3) conviction for transporting firearms across state lines was not an aggravated felony of "illicit trafficking in firearms" under 8 U.S.C. § 1101(a)(43)(C) granted the petition for review and remanded to the BIA.

Garcia v. Attorney General, 462 F.3d 287 (3d Cir. Sept. 5, 2006). Aggravated Felony - The alien was convicted in Municipal Court of two counts of manufacturing, delivering or possessing with the intent to deliver a controlled substance, and two counts of knowingly possessing a controlled substance. An IJ found that these crimes constituted an aggravated felony and thus a "particularly serious crime" and denied the alien's application for asylum and withholding of removal. The BIA remanded for further consideration and the IJ upheld the original holding, which the BIA then affirmed. The alien then filed a writ of habeas corpus in federal district court, seeking a determination that his conviction was not an aggravated felony and requesting that his case be further remanded for consideration of his asylum and withholding claims. Using the BIA's two-route approach— under which a state drug conviction can be considered an aggravated felony if it qualifies as a hypothetical federal felony or contains a trafficking element— the court found that the Pennsylvania statute under which the alien was convicted contained the requisite trafficking element and thus constituted an aggravated felony.

Bobb v. Attorney General, 458 F.3d 213 (3d Cir. Aug. 3, 2006). Aggravated Felony - The

alien, a lawful permanent resident, plead guilty to forging a check in the amount of \$13,444 and was sentenced to four months imprisonment. An IJ held that this did not constitute an aggravated felony, and the BIA affirmed. However, at a subsequent removal hearing another IJ held that the crime was an aggravated felony and the BIA again affirmed, rendering the alien removable and barring him from seeking adjustment of status. The alien argued on appeal that only 8 U.S.C. § 1101a(43), subsection (R)-- requiring that for offenses of fraud to constitute an aggravated felony the loss to the victim must exceed \$10,000-- applied exclusively to his case, and not subsection (M)(i), which is a broader catch-all category. In the alternative, he argued that his was a hybrid offense under *Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004) and that the government should have to establish all criteria in both subsections. Under either theory the alien's conviction would not be an aggravated felony because subsection R requires imprisonment of more than one year. The court found that Congress did not intend that subsection (R) exclusively govern forgery convictions, but rather that (M)(i) was constructed broadly to also cover certain forgery offenses and that the two statutes were intended to be coextensive. The court ultimately held that the BIA was correct in determining that the conviction was an aggravated felony under subsection (M)(i), and that his was not a hybrid offense, and so denied his petition for review.

Ng v. Attorney General, 436 F.3d 392 (3d Cir. Feb. 7, 2006). Aggravated Felony - The alien was convicted in the United States District Court for the Eastern District of Michigan of three counts of violating 18 U.S.C. § 1958, which proscribes the use of interstate commerce facilities in the commission of a murder-for-hire. An IJ found him removable for committing a "crime of violence." The alien argued to the court that his crime did not involve any risk that physical force would be used against another because the hitman he attempted to hire was a government informant who had no intent to commit the murder. Using the categorical approach, the appellate court determined that the crime in question posed a substantial risk that physical force would have been used against another. Under this approach, only the elements of the crime were considered; and it was irrelevant that the hitman had no actual intent to kill the victim. The court concluded that the alien's conviction is a crime of violence and is therefore an aggravated felony.

Rodriguez-Munoz v. Gonzales, 419 F.3d 245 (3d Cir. Aug. 16, 2005). 212(c) - The court affirmed the Board's determination that even though the respondent was eligible for a 212(c) waiver for his pre-AEDPA aggravated felony conviction, that conviction would nonetheless remain an aggravated felony for purposes of precluding his application for cancellation of removal under section 240A(a) in regard to his post-IIRIRA non-aggravated felony offenses.

Ytem v. Ashcroft, No. 03-3333 (3d Cir. May 20, 2004) (unpublished)(WL cite unavailable).
Aggravated felony/fraud/failure to report income - Relying on its recent decision in *Lee v. Ashcroft*, 2004 WL 1118720 (see 5/26/04 update), the court held that the respondent's conviction for failing to report certain income on his income tax return was not for an aggravated felony because filing a false tax return in violation of 26 U.S.C. § 7206(1) is not an aggravated felony.

Ki Se Lee v. Ashcroft, 368 F.3d 218 (3d Cir. May 19, 2004) (A38 656 406, A36 775 995).
Aggravated felony/filing false tax returns - Applying the rules of statutory construction, the

court concluded that section 101(a)(43)(M)(i) of the Act does not apply to tax offenses, so the respondents' offense, filing false income tax returns, was found not to be an aggravated felony. Judge Alito dissented because he found that the offense of filing a false tax return that caused a loss of more than \$10,000 fell squarely within the definition of an aggravated felony.

Ezenwa v. INS, No. 3:CV-02-1302 (M.D. Pa. Sept. 27, 2002) - (A26 878 305).

Withholding/due process - The respondent claimed that he would be tortured in Nigeria by fellow IBO tribe members in retaliation for informing on other tribe members while cooperating with the FBI in connection with a fraud investigation. The IJ found that his fraud offense was an aggravated felony, but granted him withholding and relief under the Convention Against Torture. The Board sustained a Service appeal and ordered the respondent removed to Nigeria. The court agreed that the respondent was convicted of an aggravated felony, but held that the Board erred in finding that the respondent would not be persecuted due to his membership in a particular social group because the threat he fears is a result of his membership in the IBO tribe. Finding that the respondent was not convicted of a particularly serious crime because his term of imprisonment was only for a year, the court granted withholding. In addition, the court concluded that returning the respondent to Nigeria would violate his substantive due process rights because the government made him vulnerable to harm in that country by leaking information regarding his cooperation with the FBI to the IBO community.

Perez v. Elwood, 294 F.3d 552 (3d Cir. June 28, 2002). Removal/ IIRIRA - This appeal comes from an order of the District Court for the Middle District of Pennsylvania, denying the alien's petition for a writ of habeas corpus. The appeal challenged the Board's affirmance of an order of removal entered by an IJ following the alien's conviction for conspiracy to launder money. The court held that an order of removal was proper where, under the Illegal Immigration Reform and Immigrant Responsibility Act's definition of "conviction," a resident alien was convicted after the repeal of section 212(c) of the Act, and cannot now obtain relief under that statute.

Patel v. Ashcroft, 294 F.3d 465 (3d Cir. June 20, 2002). Aggravated Felony/ Harboring an Alien - The court concluded that the Board did not err in its conclusion that the petitioner had been convicted of an aggravated felony. The court found that "the parenthetical 'relates to alien smuggling' in INA §§ 101(a)(43)(N) is descriptive of all of the offenses contained in INA §§ 274(a)(1)(A), including the offense of harboring an alien in violation of INA §§ 274(a)(1)(A)(iii). Therefore, Patel's conviction for harboring an alien meets the definition of a aggravated felony under INA §§ 101(a)(43)(N)."

Bovkun v. Ashcroft, 283 F.3d 166 (3d Cir. Mar. 8, 2002). Terroristic Threats/ Crime of Violence - The petitioner was convicted with the crime of making terroristic threats in violation of 18 Pa. Cons. Stat. §§ 2706 (1998), a misdemeanor under state law. The court held that for deportation purposes, a conviction for making terroristic threats meets the definition of the term "crime of violence" in 18 U.S.C. section 16(a), and, even though a misdemeanor under state law, is an aggravated felony for immigration purposes.

Valansi v. INS, 278 F.3d 203, (3d Cir. Jan. 23, 2002) (A90 573 515). Aggravated

felony/embezzlement - The respondent argued that her conviction for embezzlement of bank funds was not for an offense that "involves fraud and deceit" and was therefore not an aggravated felony conviction. The crime to which the respondent pled guilty included the element of "intent to injure or defraud" the bank. The court concluded that a conviction for embezzlement with specific intent to defraud qualifies as an aggravated felony conviction. However, a conviction based on intent to injure is not. Having determined that it was appropriate to look beyond the statute to the record, the court reviewed the transcript of the plea colloquy and found that an intent to defraud was not established in this case.

Francis v. Reno, 269 F.3d 162 (3d Cir. Oct. 2001). **Aggravated felony** - Appeal of BIA finding that vehicular homicide constituted an aggravated felony under INA. Held: misdemeanor vehicular homicide is not a "felony" under the INA; even if it could be converted into a felony, it did not involve a substantial risk of physical force that is required to make it an aggravated felony.

Drakes v. Zimski, 240 F.3d 246 (3d Cir. Feb. 2001). **Jurisdiction** - Alien petitioned for review of deportation. Held: Court had jurisdiction to determine whether jurisdictional facts were present, and because alien's conviction for forgery met definition of "aggravated felony," IIRIRA divested Court of jurisdiction.

U.S. v. Graham, 169 F.3d 787 (3d Cir. Mar. 1999). **Aggravated felony** - Alien appealed his sentence enhancement under the federal sentencing guidelines. Held: (1) whether offense is an aggravated felony, for purposes of immigration and deportation, is determined by actual term of imprisonment imposed, not by statutory minimum, and (2) prior NY offense of petit larceny was aggravated felony even though a misdemeanor under state law.

Scheidemann v. I.N.S., 83 F.3d 1517 (3d Cir. May 1996). **Aggravated felony** - Alien petitioned for judicial review of BIA decision dismissing his appeal from deportation. Held: (1) 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 was not retroactive, and (2) alien was ineligible for discretionary relief from deportation after serving at least five years' imprisonment for felony conviction based on his application for discretionary relief after November 29, 1990 effective date of aggravated felony bar statute.

B. Crimes Involving Moral Turpitude

Jean-Louis v. Attorney General of U.S., 582 F.3d 462 (3d Cir. Oct. 6, 2009). **Criminal/CIMT** - Respondent, a native and citizen of Haiti, petitioned for review of the Board's decision denying his application for cancellation of removal. Respondent was convicted of the crime of simple assault of a child under twelve under Pennsylvania law. The IJ and Board classified the crime as a CIMT that made respondent ineligible for cancellation of removal. The court declined to classify the crime as a CIMT using the categorical approach employed by the Third Circuit. The court granted respondent's petition, reversed the order of the BIA, and remanded the case to the BIA for proceedings consistent with their opinion.

Mehboob v. Att'y Gen., 549 F.3d 272 (3d Cir. Nov. 26, 2008). The court held that alien's conviction for indecent assault under 18 Pa. Cons. Stat. § 3126(a) was a crime involving moral turpitude, regardless of the lack of mens rea as to age of victim, because the offense combined a reprehensible act with deliberate conduct.

Cruz v. Attorney General, 452 F.3d 240 (3d Cir. June 21, 2006). **Motion to reopen/vacated conviction/moral turpitude** - The alien was arrested for promoting prostitution, plead guilty, and was sentenced to, and served, two years probation. He subsequently left the United States for a short period and was found inadmissible upon return for having committed a crime of moral turpitude; he was placed in removal proceedings. The conviction ultimately was vacated, but BIA did not grant a motion to reopen in the removal proceedings because it considered the motion to be untimely. A vacated conviction cannot form the basis for removal. However, the court found that the BIA's reasoning was unclear and remanded the case for further proceedings, stating that if the BIA found that the conviction could no longer be the basis of a removal order it would have to grant the alien's motion to reopen regardless of untimeliness, or explain its unwillingness to do so.

Partyka v. Attorney General, 417 F.3d 408 (3d Cir. Aug. 11, 2005) (A46 389 774). **Assault on police officer/moral turpitude** - Moral turpitude does not inhere in the least culpable conduct under the N.J. statute prohibiting assault on a police officer, because it allows conviction for negligently inflicted bodily injury, which lacks the inherent baseness or depravity required for moral turpitude. Because the record of conviction did not specify the subsection under which the respondent was convicted or reveal that the level of criminal culpability involved was greater than negligence, the respondent was not convicted of a CIMT. Judge Alito concurred in the grant of the petition for review, but dissented from the majority's "unexplained refusal to remand to the BIA" for clarification whether the unintentional infliction of bodily injury on a person known to be a police officer who is performing an official duty is a CIMT.

Knapik v. Ashcroft, 384 F.3d 84 (3d Cir. Sept. 17, 2004) (A74 902 513). **CIMT/attempted reckless endangerment** - The court affirmed the Board's conclusion that reckless endangerment under N.Y. Penal Law §§ 120.25 is a crime involving moral turpitude, noting that a determination by the Board that a reckless endangerment crime may involve moral turpitude is entitled to *Chevron* deference. However, the court declined to defer to the Board's ruling that the respondent's offense, attempted reckless endangerment in the first degree, was a CIMT, because determining what the elements of a particular statute are does not implicate the Board's expertise. Applying the categorical approach in a de novo review, the court held that attempted reckless endangerment is not a CIMT, because attempt, which necessarily requires intent to commit a crime, is inconsistent with recklessness, which, by definition, implies acting without intent. Noting that a person cannot intend to commit a criminally reckless act, the court concluded that attempted reckless endangerment does not necessarily involve moral turpitude, because "categorically speaking, the concept makes no sense."

De Leon-Reynoso v. Ashcroft, 293 F.3d 633 (3d Cir. June 11, 2002). **Moral turpitude/receiving stolen property/ Pennsylvania/Equal Protection** - The Circuit Court held that the District Court did not err in concluding that the alien had committed a crime of moral turpitude where he was convicted of possessing stolen property that he believed probably was

stolen. Also, the District Court did not err in holding 8 U.S.C. §§ 1182(h) does not violate the equal protection component of the Fifth Amendment's Due Process clause.

C. Vehicular Crimes

Ovebanji v. Gonzales, 418 F.3d 260 (3d Cir. Aug. 11, 2005) (A70 907 858). Vehicular homicide/crime of violence - Because vehicular homicide under New Jersey law requires only proof of recklessness, it is not a crime of violence under 18 U.S.C. §§ 16(b). The court relied on *Leocal v. Ashcroft*, where the Supreme Court indicated that "accidental" conduct (which, according to the circuit court "would seem to include reckless conduct") is not enough to qualify as a crime of violence.

Francis v. Reno, 269 F.3d 162 (3d Cir. Oct. 2001). Aggravated felony - Appeal of BIA finding that vehicular homicide constituted an aggravated felony under INA. Held: misdemeanor vehicular homicide is not a "felony" under the INA; even if it could be converted into a felony, it did not involve a substantial risk of physical force that is required to make it an aggravated felony.

D. Controlled Substances

Okeke v. Gonzales, 407 F.3d 611 (3d Cir. 2005) (A26 188 596). Cancellation/continuous presence - A respondent who lawfully reentered the country after his commission of a controlled substance offense, which was a clock-stopping event under the "stop-time" rule, accrued the requisite 10-year period of continuous presence for cancellation of removal, because "the clock started anew" after his lawful entry. The court noted that the notice to appear did not charge the respondent with commission of a crime and expressed no opinion as to his immigration status had such a charge been made. Judge Ambro concurred, concluding that Congress intended to allow the continuous physical presence clock to restart after the commission of an offense, but noting that conviction would bar eligibility for cancellation. Judge Nygaard dissented, finding that the respondent was not eligible because he admitted pleading guilty to drug possession and therefore was convicted of the crime.

Udenze v. Riley, No. CIV.A. 03-2337, 2003 WL 22006805 (E.D. Pa. Aug. 22, 2003) (A91 646 924) (unpublished). CAT/Nigeria/evidence - The respondent, a Nigerian citizen who was convicted of a drug offense in the U.S., claimed that he will be tortured in Nigeria because of his likely mandatory detention as a drug convict and his family's support of the Movement for the Survival of the Ogoni People. The IJ denied relief, relying in large part on the changed government in Nigeria. The court found that it was unclear whether the IJ considered all the relevant evidence concerning "gross, flagrant or mass violations of human rights," as required by 8 C.F.R. §§ 208.16(c)(3), beyond his assumption that such violations would not be as pervasive under the new regime. Reviewing a State Department report, as well as an Amnesty International report that the IJ did not consider, the court found evidence of both an ongoing pattern of human rights abuses and governmental acquiescence in "such torture." The court therefore remanded for further evaluation of all the relevant evidence that should have been considered in assessing the respondent's CAT claim.

Gerbier v. Holmes, 280 F.3d 297 (3d Cir. Feb. 8, 2002). Delaware Drug Possession/Aggravated Felony - The court agrees with the Board's interpretation of 8 U.S.C. §§ 1101(1)(43)(B) that a state felony drug conviction without a trafficking element constitutes an "aggravated felony" for immigration purposes only when the same crime would be punished as a felony were the alien prosecuted in federal court.

Steele v. Blackman, 236 F.3d 130 (3d Cir. Jan. 2001). Aggravated Felony - Former resident alien denied admission and charged as an aggravated felon. Held: prior state misdemeanor for criminal sale of marijuana was not an aggravated felony under hypothetical felony approach because all the elements of the hypothetical federal crime were not litigated and proven as part of alien's state criminal proceeding.

Sandoval v. Reno, 166 F.3d 225 (3d Cir. Jan. 1999). Jurisdiction - Alien ordered deported by reason of having committed criminal act petitioned for writ of habeas corpus. Held: (1) district courts continue to have habeas jurisdiction to review claims by aliens who have been ordered deported based on commission of crimes listed in IIRIRA; (2) district court had jurisdiction to consider alien's statutory claim during habeas proceeding; and (3) AEDPA section adding drug offenses to list of deportable offenses that make aliens ineligible for discretionary relief does not apply to pending cases. **But see** REAL ID Act of 2005.

U.S. v. Igbonwa, 120 F.3d 437 (3d Cir. Aug. 1997). Jurisdiction - NIV pled to drug charges and INS commenced proceedings. NIV moved for specific performance of plea agreement, arguing that the government promised not to deport him if he assisted in other drug trafficking investigations. Held: AUSA cannot make a promise regarding deportation that will be binding on INS without their explicit authority.

Salazar-Haro v. I.N.S., 95 F.3d 309 (3d Cir. Sept. 1996). Deportation order - Alien petitioned for review of final deportation order that was based on his conviction for conspiracy to distribute cocaine. Held: provision of Antiterrorism and Effective Death Penalty Act of 1996, removing judicial review of final deportation order for aliens convicted of certain criminal offenses, applied to preclude review of alien's deportation order.

Tipu v. I.N.S., 20 F.3d 580 (3d Cir. Apr. 1994). Deportation/special equitable relief - At deportation hearing concerning deportee who was convicted on narcotics charges, IJ denied special equitable relief from deportation. Deportee appealed. The BIA affirmed, and ordered deportation. Deportee appealed. Held: the BIA failed to consider important factors in deportee's favor.

E. Sexually Oriented Crimes

Stubbs v. Attorney General, 452 F.3d 251 (3d Cir. 2006). Sexual abuse of a minor/aggravated felony/categorical approach - The alien was charged with "engaging in sexual conduct that would impair... the morals of a child...". The court found that this did not qualify as sexual abuse of a minor and so could not be considered an aggravated felony. Additionally, the court concluded that the BIA did not err in examining the charging document, as the alien alleged, because the New Jersey statute under which he was charged invited further inquiry into the facts of the case.

United States v. Remoi, 404 F.3d 789 (3d Cir. 2005). Sentencing - Defendant resisted when agents attempted to remove him from the country pursuant to a final order of removal. On appeal, defendant claimed that the district court erroneously instructed the jury regarding the burden of proof for an entrapment defense and that defendant's previous conviction for criminal sexual contact was incorrectly treated as a crime of violence for sentence enhancement purposes. The court found no error as to the conviction but remanded for resentencing. The court found that defendant was not entitled to an instruction on entrapment because there was no evidence of government inducement. Therefore, any error in the instruction could not constitute plain error. As to defendant's previous conviction for criminal sexual contact on a helpless victim, under N.J. Stat. Ann. §§§§ 2C:14-2c (1990), the court determined under the categorical approach that just as sexual abuse of a minor was considered to be a crime of violence under U.S. Sentencing Guidelines Manual §§§§ 2L1.2, penetration of a physically helpless victim equally constituted a forcible sexual offense under §§§§ 2L1.2.

Singh v. Ashcroft, 383 F.3d 144 (3d Cir. Sept. 17, 2004) (A41 930 720). Agg fel/sexual abuse of a minor - In deciding whether the respondent's conviction for third-degree unlawful sexual contact under Delaware law was a conviction for sexual abuse of a minor, the court first noted a "surprising pattern" of its lack of affirmative deference given to the Board's decisions on the question whether a particular crime is an aggravated felony, and the court declined to defer to the Board's summary affirmance here. Following an extensive review of its cases involving the formal categorical approach under Taylor, the court concluded that the categorical approach does apply to an inquiry whether the Delaware offense constitutes sexual abuse of a minor under the federal statute. Applying that approach, the court held that because the Delaware statute contained no element regarding the age of the victim, sexual abuse of a "minor" was not required for a conviction, so the crime was not an aggravated felony.

Ponnapula v. Ashcroft, 373 F.3d 480 (3d Cir. June 28, 2004). Section 212(c) retroactivity - The court held that because aliens who affirmatively turned down plea agreements had a reliance interest in the potential availability of section 212(c) relief, IIRIRA's repeal of that section was impermissibly retroactive with respect to those aliens. In reaching this conclusion, the court emphasized that the respondent relied on counsel's advice that if convicted, he would likely only receive a minimum sentence of 1 to 3 years for his misdemeanor offense, which would not disqualify him from eligibility for a waiver.

Tenreiro v. Ashcroft, No. CV 04-768-PA, 2004 WL 1354277 (D. Pa. June 14, 2004) (A91 074 078). mandatory detention/"when released" - The respondent was placed in removal

proceedings and was detained on the basis of his conviction for theft, for which he was sentenced to 2 years' probation. The district court held that the respondent was not subject to mandatory detention during his proceedings because he was not taken into immigration custody "when [he was] released," as he was never in physical custody for the theft conviction. The court concluded that probation is not "custody" for purposes of triggering mandatory detention.

Kossonov v. INS, (M.D.Pa. Aug. 8, 2002) (WL cite unavailable). Aggravated Felony - Statutory Rape - The court here held that the respondent's conviction for statutory rape, following his relationship with a 16-year-old girlfriend, was not a rape or sexual abuse of a minor within the meaning of section 101(a)(43), and thus not an aggravated felony. The court stated that, "the question is not whether the offense was categorized as a felony under state law, but whether the offense would be punishable as a felony under federal law." The court concluded that the "appropriate analog" under federal law in 18 U.S.C. §§2241 and 2242, and the respondent's offense, which involved consensual sex with a 16-year-old, did come within those statutes.

F. Illegal Reentry

U.S. v. Lopez-Reyes, 589 F.3d 667 (3d Cir. Dec. 2, 2009) Defendant, a native and citizen of Mexico, was charged with illegally reentering the United States subsequent to an aggravated felony conviction. He was sentenced to forty-six months imprisonment and three years of supervised release. The court considered and denied his claims that the District Court had misapprehended its authority to categorically vary from the Guidelines, that his sentence was unreasonable, and that the "felony" and "aggravated felony" provisions of 8 U.S.C. § 1326(b)(1)-(2) are unconstitutional

U.S. v. Arrelucea-Zamudio, 581 F.3d 142 (3d Cir. Sep. 14, 2009). The alien, who is originally from Peru illegally entered the United States in 1979. In 1991 alien was convicted of possession with intent to distribute a controlled substance and sentenced to twelve years imprisonment. The alien was deported to Peru after serving four years of his sentence. The alien then illegally reentered the United States in December 2000 and in 2006 was arrested and sentenced to five years imprisonment for possession with intent to distribute cocaine. After spending fifteen months in prison, the alien was transferred to ICE custody. A federal grand jury indicted the alien on one count of illegal reentry. The alien pled guilty and admitted to being previously deported and illegally reentering the United States. The district court sentenced the alien to forty-eight months imprisonment. At his sentencing, the alien raised a constitutional challenge to the aggravated felony sentencing enhancement of the illegally reentry statute, which the court rejected. The alien appealed his sentence, challenging the court's rejection of his argument for a downward variance of the sentence based on the disparity between defendants in fast-track and non-fast-track districts. In a lengthy opinion, the court concluded that in light of recent cases, the district court is not barred from considering a fast-track argument. The court vacated defendant's sentence and remanded the case to the district court for further consideration.

U.S. v. Cole, 567 F.3d 110 (3d Cir. May 29, 2009). Illegal Reentry/Tolling as a condition of supervised release – Alien was convicted of illegal reentry and sentenced to seventy-one months

imprisonment and three years of supervised release. Because of suspicion that he would illegally reenter the country again, the district court ordered that the supervised release period be tolled as long as the alien was outside of the United States. The court stated that the tolling was plain error, that it affected the alien's substantial rights, and also affected the fairness and integrity of the judicial proceedings. The court therefore concluded that the district court did not have the authority to suspend the period of supervised release and remanded the case for correction of this aspect of his sentence.

G. Smuggling out of the United States

U.S. v. Cuevas-Reyes, 572 F.3d 119, (3d Cir. July 10, 2009). U.S. citizen smuggling illegal aliens out of U.S. – Defendant attempted to leave United States territory with four illegal aliens in order to fly them to the Dominican Republic. The alien were attempting to leave the United States without detection because of their illegal immigration status. U.S. citizen defendant was charged and found guilty of the shielding of illegal aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(iii) and aiding and abetting the shielding of illegal aliens violation of 8 U.S.C. § 1324(a)(1)(A)(v)(II). Defendant appeals the jury's verdict, asserting that the evidence was insufficient to sustain the conviction. The court noted that 8 U.S.C. § 1324 is designed to prevent aliens from entering or remaining in the United States and punishing the defendant for helping aliens leave the United States is contrary to that goal. The court held that the defendant's conduct could not support a conviction and vacated defendant's convictions under § 1324.

V. DEPORTATION

A. Jurisdiction

Kumarasamy v. Attorney General, 453 F.3d 169 (3d Cir. June 23, 2006).

Jurisdiction/Custody. The alien was found removable but was granted withholding of removal to his native Sri Lanka. DHS failed to attach the requisite removal order, but an IJ granted permission to attach an amended order, which the alien claims he never saw. He was subsequently deported to Canada, where he also had citizenship. He filed a petition for habeas corpus, claiming that there was no removal order and so his deportation was illegal. For the court to consider an immigration-related habeas claim (which is ordinarily converted to a petition for review), the alien must be in the custody of the federal immigration agency. However, the court found the alien was not in federal custody at the time he filed the habeas petition because he had already been removed from the country. The court affirmed the district court's dismissal of the case for lack of jurisdiction.

Calle-Vujiles v. Ashcroft, 320 F.3d 472 (3d Cir. Mar. 5, 2003). Reopening - The petitioner argued that his due process rights were violated by the Board when it failed to exercise its discretion to sua sponte reopen the deportation proceedings or reconsider its prior decision. Since the Board retains unfettered discretion to decline to sua sponte reopen or reconsider a deportation proceeding, the court lacked jurisdiction to review a decision declining to exercise such discretion to reopen or reconsider the case.

Drakes v. Zimski, 240 F.3d 246 (3d Cir. Feb. 2001). Jurisdiction - Alien petitioned for review of deportation. Held: Court had jurisdiction to determine whether jurisdictional facts were present, and because alien's conviction for forgery met definition of "aggravated felony," IIRIRA divested Court of jurisdiction.

Liang v. I.N.S., 206 F.3d 308 (3d Cir. Mar. 2000). Jurisdiction - Permanent legal aliens brought petitions for review of final orders of removal. Held: (1) the permanent rules of IIRIRA do not deprive federal district courts of habeas jurisdiction over claims of aliens ordered deported for having committed crimes specified in the INA, and (2) under permanent rules of IIRIRA, Court of Appeals lacked jurisdiction over petitions for review filed by such aliens.

Catney v. I.N.S., 178 F.3d 190 (3d Cir. May 1999). Jurisdiction. Alien petitioned the Third Circuit for review of decision of BIA dismissing his appeal of the denial of relief from deportation. Held: (1) habeas jurisdiction survives AEDPA's and IIRIRA's limitations on judicial review of certain deportation orders, but direct review did not survive, and (2) per *Sandoval v. Reno*, 166 F.3d 225 (3rd Cir. 1999), alien must raise claims in a petition for habeas corpus in the district court. **But see** REAL ID Act of 2005.

Sandoval v. Reno, 166 F.3d 225 (3d Cir. Jan. 1999). Jurisdiction - Alien ordered deported by reason of having committed criminal act petitioned for writ of habeas corpus. Held: (1) district courts continue to have habeas jurisdiction to review claims by aliens who have been ordered deported based on commission of crimes listed in IIRIRA; (2) district court had jurisdiction to consider alien's statutory claim during habeas proceeding; and (3) AEDPA section adding drug

offenses to list of deportable offenses that make aliens ineligible for discretionary relief does not apply to pending cases. **But see** REAL ID Act of 2005.

Morel v. I.N.S., 144 F.3d 248 (3d Cir. May 1998). **Jurisdiction** - Alien declared ineligible for relief from removal because of criminal offenses. Held: alien's claim that the INS was required to credit him with the accumulated residency of his parents who preceded him in U.S. when determining whether he was eligible for discretionary relief due to his lengthy residency here was not a claim of constitutional proportions and Court of Appeals was, thus, divested of jurisdiction by statute removing from circuit court jurisdiction to review claims by aliens convicted of certain criminal offenses; jurisdictional challenge could be heard even though not advanced until petition for rehearing challenging the merits opinion was filed.

Marrero v. I.N.S., 990 F.2d 772 (3d Cir. Apr. 1993). **Deportation order** - Alien petitioned for review of immigration judge's in absentia order of deportation. The BIA dismissed the alien's appeal and denied his motion to reopen deportation proceedings. Alien sought review. Held: (1) Court of Appeals has jurisdiction to review order of deportation after alien has been forcibly deported if record reveals colorable due process claim, and (2) 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. Petitions denied.

B. Citizenship and Marriage

Bagot v. Ashcroft, 398 F.3d 252 (3d Cir. 2005) **Naturalization/legal custody** - This case was not appealed to the Board but relies on *Matter of M-* to hold that the respondent was in the "actual uncontested custody" of his father at the time that his father naturalized and that he is therefore a derivative U.S. citizen and was not deportable.

Urena-Tavarez v. Ashcroft, 367 F.3d 154 (3d Cir. May 7, 2004). **Removal** - After the citizen-spouse withdrew her joint application to remove the condition on the alien's permanent resident status, and the alien's conditional status expired, the INS began proceedings to remove him. The IJ denied a waiver of joint application requirement and the Board affirmed. The alien petitioned the court arguing that the IJ's decision was not based on adequate findings of fact. The court held that 8 U.S.C. §§ 1252(a)(2)(B)(ii) barred them from reviewing the discretionary denial of a waiver under 8 U.S.C. §§ 1186a(c)(4), which permits removal of the conditions on a petitioner's permanent resident status without requiring his spouse to petition jointly.

Lacap v. I.N.S., 138 F.3d 518 (3d Cir. Mar. 1998). **Citizenship** - Alien appealed denial of asylum and withholding, claiming that he could not be deported because he was a U.S. citizen by birth. Held: persons born in the Philippines during the territorial period are not entitled to U.S. citizenship at birth. Followed reasoning of *Rabang v. I.N.S.*, 35 F.3d 1449 (9th Cir. 1994).

Bamidele v. I.N.S., 99 F.3d 557 (3d Cir. Nov. 1996). **Marriage/citizenship** - IJ ordered alien deported because he obtained adjustment of status through a sham marriage. BIA affirmed. Held: (1) Attorney General's construction of statute of limitations for rescission of adjustment of status

was not entitled to any presumption of special expertise, and (2) five-year statute of limitations applied to bar his deportation for obtaining adjustment of status through sham marriage.

C. Voluntary Departure

Obale v. Attorney General, 453 F.3d 151 (3d Cir. June 22, 2006). Stay of Voluntary departure/jurisdiction/asylum/persecution - The alien was ordered removed and the IJ denied all requested forms of relief (asylum, withholding of removal, CAT) but did grant a 60-day voluntary departure period after which an order of removal would be entered. The BIA affirmed the IJ's decision without opinion and granted a 30-day voluntary departure period from the date of its order. Two days before the expiration of this 30-day period the alien sought review of the BIA's decision as well as a stay of removal and the 30-day period of voluntary departure pending appellate review. The court granted the motion for a stay of removal but referred the motion for a stay of voluntary departure to a merits panel to determine jurisdiction. Other courts of appeal have addressed this question, mostly holding that there is jurisdiction to stay the voluntary departure period, either because courts of appeal have equitable power to issue a stay or because 28 U.S.C. § 2349 contains a statutory grant of jurisdiction. This court ultimately concurred and applied the same standard used for obtaining a stay of removal. The court then reviewed the IJ's findings regarding the alien's credibility and corroboration and found that under the facts of her particular case she did not provide sufficient corroboration. Accordingly the court denied her petition for review.

Barrios v. Attorney General, 399 F.3d 272 (3d Cir. 2005). Motion to reopen/voluntary departure - The filing of a timely motion to reopen that has not been intentionally delayed and has been filed prior to the date that voluntary departure expires, but has not been acted upon by immigration authorities, falls within the "exceptional circumstances" exception to overcome the statutory bar of section 242B. The court rejected the Board's reasoning in *Matter of Shaar*, relying on the dissent of Judge Browning to find that the failure of immigration authorities to act on a legitimate application for relief filed within the voluntary departure period is an exceptional circumstance "beyond the control of the alien." Under the pre-IIRIRA voluntary departure provision, aliens must be afforded a "reasonable opportunity to receive a ruling on the merits of a timely-filed motion to reopen."

Danu v. Ashcroft, 120 Fed. Appx. 910 (3d Cir. Jan. 6, 2005) (A29 109 144) (unpublished). Motion/ineffective assistance - The Board abused its discretion where, acknowledging that the respondent did not receive notice of the dismissal of her appeal as a result of the ineffective assistance of counsel, the Board permitted her to voluntarily depart, but arbitrarily denied her the opportunity to proceed with her claim for suspension of deportation under NACARA.

Reynoso-Lopez v. Ashcroft, 369 F.3d 275 (3d Cir. May 25, 2004). Voluntary Departure - The petitioner sought review of the Board's affirmance of the IJ's decision which denied asylum and in the alternative requested the court to reinstate the expired thirty-day voluntary departure order. The court held (1) that substantial evidence supported the IJ's determination that the petitioner failed to support his asylum withholding of deportation and CAT claims, and (2) that they lacked

jurisdiction to reinstate the petitioner's voluntary departure.

Barker v. Ashcroft, 382 F.3d 313 (3d Cir. Dec. 24, 2003). Motion to Reopen/ Affirmance -

The petitioner appealed the final order of the Board which denied her motion to reopen her deportation proceedings. The petitioner, a native and citizen of Jamaica, entered the U.S. with a fiance visa, did not marry her fiance and remained in this country. At deportation proceedings she requested asylum, which was denied, but received voluntary departure. She argued to the court that the Board had erred in denying her motion to reopen because the IJ failed to provide her with proper notice of the consequences for failing to depart voluntarily. The court held that (1) it would not review the alien's argument that she did not receive adequate or sufficient oral notice of the consequences of failing to depart voluntarily and (2) the court lacked power to reopen deportation proceedings which involved an alien who had failed to comply with a voluntary departure order.

D. Miscellaneous

Garay-Mendoza v. Ashcroft, 70 Fed. Appx. 625 (3d Cir. July 11, 2003) (A42 287 750)

(unpublished). Conditional residence/hardship waiver - The court found that the Board erred in failing to address the issue of the IJ's denial of the respondent's request for a hardship waiver, because the Board misinterpreted the statute and incorrectly held that the respondent waived his right to review the rejection of his waiver request by the INS when he failed to raise the issue before the IJ. According to the court, the waiver request and its denial by the INS were, in fact, before the IJ, who did address the question of the propriety of the INS denial in determining the respondent's deportability. Because the IJ ruled on the issue, the court concluded that the Board was required to review it and remanded for the Board to consider the issue.

Perez v. Elwood, 294 F.3d 552 (3d Cir. June 28, 2002). Removal/ IIRIRA - This appeal comes from an order of the District Court for the Middle District of Pennsylvania, denying the alien's petition for a writ of habeas corpus. The appeal challenged the Board's affirmance of an order of removal entered by an IJ following the alien's conviction for conspiracy to launder money. The court held that an order of removal was proper where, under the Illegal Immigration Reform and Immigrant Responsibility Act's definition of "conviction," a resident alien was convicted after the repeal of section 212(c) of the Act, and cannot now obtain relief under that statute.

Pinho v. I.N.S., 249 F.3d 183 (3d Cir. Jan. 2001). Stop time rule - Alien petitioned for review from an adverse ruling by the BIA, which dismissed their appeal from an immigration judge decision denying suspension of deportation. Held: application by BIA of stop-time rule (enacted during the pendency of alien's appeal) did not have an impermissible retroactive effect. Also NACARA exceptions to the stop-time rule did not violate equal protection clause.

Salazar-Haro v. I.N.S., 95 F.3d 309 (3d Cir. Sept. 1996). Deportation order - Alien petitioned for review of final deportation order that was based on his conviction for conspiracy to distribute cocaine. Held: provision of Antiterrorism and Effective Death Penalty Act of 1996, removing

judicial review of final deportation order for aliens convicted of certain criminal offenses, applied to preclude review of alien's deportation order.

Massieu v. Reno, 91 F. 3d 416 (3d Cir. July 1996). Administrative/procedural - Alien sought declaratory and injunctive relief against being deported because of Secretary of State's determination that he was deportable based on adverse foreign policy consequences for United States. Held: (1) alien was precluded from initially asserting his constitutional claims in district court action before exhausting his administrative remedies and then petitioning for review in Court of Appeals, and (2) exception to exhaustion of administrative remedies doctrine for claims considered wholly collateral to administrative review process did not apply to alien who was challenging constitutionality of statute under which his deportation was being sought.

Yang v. Maugans, 68 F.3d 1540 (3d Cir. Oct. 1995). Asylum - Aliens who were ordered excluded after denial of their applications for asylum filed habeas corpus petitions. District Court granted partial summary judgment, holding the alien had entered the U.S. within the meaning of the INA. Held: (1) entry is not effected under INA merely by encroaching upon United States territorial waters without being detected or pursued by authorities, and (2) under INA, aliens have burden of proving that they have satisfied all three elements of entry test before they are eligible for deportation proceedings.

Huang v. I.N.S., 47 F.3d 615 (3d Cir. Feb. 1995). Time/appeal - Aliens petitioned for review of BIA's dismissal as untimely of their attempt to appeal immigration judge's deportation order. Held: notice of appeal received by mail within 13 days after decision was issued was timely under regulations that were ambiguous as to whether 13 days applied if decision of immigration judge was mailed or if notice of appeal was mailed.

Tipu v. I.N.S., 20 F.3d 580 (3d Cir. Apr. 1994). Deportation/special equitable relief - At deportation hearing concerning deportee who was convicted on narcotics charges, IJ denied special equitable relief from deportation. Deportee appealed. The BIA affirmed, and ordered deportation. Deportee appealed. Held: the BIA failed to consider important factors in deportee's favor.

Graham v. I.N.S., 988 F.2d 194 (3d Cir. July 1993). Discretionary relief/deportation - Alien who entered United States under temporary worker visa and later obtained permanent resident status applied for discretionary relief from order of deportation. Board of Immigration Appeals denied relief on ground that seven-year residency requirement to be eligible for discretionary relief was not satisfied. Held: time spent in United States under temporary worker visa could not be used to satisfy seven-year "lawful domicile" requirement to be eligible for discretionary relief from deportation.

Katsis v. I.N.S., 997 F.2d 1067 (3d Cir. July 1993). Discretionary relief/deportation - Alien petitioned for review of decision of BIA denying his motion to reopen immigration proceedings to obtain discretionary relief from deportation order. Held: alien's status as "lawful permanent resident" changed, so as to render him statutorily ineligible for moving to reopen immigration

proceedings, once alien became subject to administratively final deportation order.

Clarke v. I.N.S., 904 F.2d 172 (3d Cir. May 1990). Attorney fees - Alien who prevailed in deportation proceedings petitioned for review of order of the BIA denying his request for attorney fees under Equal Access to Justice Act (EAJA). Held: EAJA does not apply to deportation proceedings before Immigration and Naturalization Services (INS).

VI. DERIVATIVE CITIZENSHIP

Breyer v. Meissner, 214 F.3d 416 (3d Cir. June 2000). **Derivative citizenship** - Petitioner born in a foreign country to a mother who was American citizen, following his denaturalization for his service as a Nazi guard, and finding that he was deportable, brought declaratory judgment action seeking review of denial of his application for citizenship. Held: (1) petitioner 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; (2) such statute discriminated based on gender in violation of equal protection clause; (3) statute which retroactively granted citizenship to foreign-born children of American mothers except for those who committed expatriating acts violated equal protection; and (4) remand required to determine whether petitioner's Nazi activities were voluntary and done with an intent to relinquish citizenship.

Joseph v. Attorney General, 421 F.3d 224 (3d Cir. 2005) (A40 135 340). **Derivative citizenship/evidence** - Where there was a genuine issue of material fact as to the respondent's derivative citizenship from a woman who he claimed was his mother, but who the Government asserted was his sister, the order of deportation was vacated and the record was transferred to the district court for a de novo hearing.

Bagot v. Ashcroft, 398 F.3d 252 (3d Cir. 2005). **Naturalization/legal custody** - This case was not appealed to the Board but relies on *Matter of M-* to hold that the respondent was in the "actual uncontested custody" of his father at the time that his father naturalized and that he is therefore a derivative U.S. citizen and was not deportable.

VII. DETENTION

Jama v. Esmor Correctional Services, Inc., 577 F.3d 169 (3d Cir. Aug. 12, 2009).

Detention/Tort Law - Aliens brought suit alleging that the government contractor that detained them pending their asylum proceedings violated the Religious Freedom Restoration Act (RFRA) and state tort law. The contractor appealed a jury verdict in alien's favor. The court held that the district court could not attribute a portion of the aliens' state law tort award to the RFRA claim, and that the district court could consider results on the aliens' tort claims. The case was remanded to the district court.

Togbah v. Ashcroft, 104 Fed. Appx. 788 (3d Cir. July 8, 2004) (A74 705 993) (unpublished).

§§ 209(c) waiver/due process - The IJ granted the respondent's §§ 209(c) waiver request, but the Board reversed, relying on the AG's policy in Matter of Jean to apply a heightened burden of proof to a waiver consideration where the alien committed a violent crime. The court agreed that it was correct to employ the AG's new policy, but found it was a denial of due process to change the evidentiary burden without giving the respondent an opportunity to meet the heightened burden. The record was remanded with instructions to remand to the IJ for further proceedings. The court also held that the respondent was subject to mandatory detention and could be held without an individualized hearing.

Tineo v. Ashcroft, 350 F.3d 382 (3d Cir. Dec. 4, 2003) (A31 199 681). Fleuti/LPR detention -

The court held that the Fleuti doctrine, i.e., that a lawful permanent resident whose departure was "innocent, casual, and brief" did not make an entry, which was based on the intent element of former section 101(a)(13) of the Act that was entirely replaced by the admission provisions of the IIRIRA, did not survive the passage of that law. In so holding, the court concluded that the district court erred in failing to give proper deference to the Board's ruling in Matter of Collado, 21 I&N Dec. 1061 (BIA 1998), when it remanded for a hearing to determine if the respondent made a Fleuti departure and was therefore not ineligible for bond as an alien seeking admission. Detention. Rejecting a Seventh Circuit ruling, the Third Circuit holds that an alien detained by the INS pending a final determination on removal has a due process right to an individualized hearing regarding such detention. *Patel v Zemski*, 275 F.3d 299. 70 U.S.L.W. 2552 (2002).

Patel v. Zemski, 275 F.3d 299 (3d Cir. Dec. 2001). Mandatory detention - Detained alien filed habeas petition following his conviction for harboring an undocumented alien. Held: mandatory detention pursuant to INA without providing for individualized determination of his risk of flight, or danger to community, violated substantive due process rights. **Overruled by** *Demore v. Kim*, 538 U.S. 510 (2003).

Chong v. District Director, I.N.S., 264 F.3d 378 (3d Cir. Sept. 2001). In custody, PSC - Alien appealed from an order of the USDC which denied her habeas petition seeking relief from a final order of removal. Held: (1) alien met the "in custody" requirement because sufficient collateral consequences flowed from BIA's order of removal to make appeal a live case or controversy; (2) IJ's failure to provide alien with notice that she could make representations before the BIA did not prejudice alien; and (3) BIA did not violate alien's due process rights by affirming the IJ's

decision without remanding for another individualized determination of whether heroin trafficking was a PSC.

Chi Thon Ngo v. I.N.S., 192 F.3d 390 (3d Cir. Sept. 1999). **Detention/parole** - Alien who was excludable, but whose country of origin refused to allow his return, petitioned for writ of habeas corpus, challenging his prolonged detention. Held: (1) former and current versions of INA give AG authority to detain aliens following issuance of final order of removal; (2) aliens may be detained for lengthy period without violating due process clause when removal beyond control of INS; and (3) continued detention in this case violated alien's due process rights, as no determination had been made as to whether justifications for custody continued to exist - must provide individualized periodic review of an alien's eligibility for release on parole.

VIII. EVIDENCE

Sukwanputra v. Gonzales, 434 F.3d 627 (3d Cir. Jan. 19, 2006) (A79 312 251-252).

Indonesia/asylum/evidence - The court rejected the respondent's various arguments regarding their failure to file a timely asylum application, concluding in part that despite the changes of the REAL ID Act, it did not have jurisdiction to review factual or discretionary determinations. The IJ erred by refusing to accept documentary evidence on the grounds that it was not authenticated under 8 C.F.R. § 287.6 without giving the respondents an opportunity to authenticate it through other means, particularly where the evidence corroborated the respondents' testimony and might have resulted in a favorable credibility finding if it had been considered. The IJ's adverse credibility finding was based on speculation and conjecture, rather than any evidence in the record, and he failed to specifically address whether a pattern or practice of persecution existed in Indonesia. Although the court did not reach the respondents' due process claim regarding the IJ's conduct, it noted that the IJ "interjected intemperate and bias-laden remarks."

Joseph v. Attorney General, 421 F.3d 224 (3d Cir. 2005) (A40 135 340). Derivative

citizenship/evidence - Where there was a genuine issue of material fact as to the respondent's derivative citizenship from a woman who he claimed was his mother, but who the Government asserted was his sister, the order of deportation was vacated and the record was transferred to the district court for a de novo hearing.

Lusingo v. Gonzales, 420 F.3d 193 (3d Cir. 2005)(A79 239 847). Tanzania/asylum - The Board misinterpreted the respondent's evidence regarding the treatment of street children by the Tanzanian Government, which was introduced to show that, like the children, he was an embarrassment to the Government when he disappeared from a Boy Scout Jamboree and would therefore likely suffer retaliation as a result upon his return. The Board also gave unwarranted weight to the fact that the respondent's parents had not been persecuted by the Government in retaliation for his actions.

Zhang v. Gonzales, 405 F.3d 150 (3d Cir. 2005) (A77 293 449).

China/asylum/credibility/evidence - The record was unclear whether the IJ admitted documents showing that the respondent was forced to undergo an abortion but didn't give them significant weight, or whether he refused to admit them for lack of authentication or for some other reason. The record was remanded for clarification by the Board whether the documents were excluded by the IJ, and if so on what basis. Exclusion of the documents for failure to authenticate pursuant to 8 C.F.R. §§ 287.6 would be legal error under the court's decision in *Liu v. Ashcroft*. Although country reports suggested the possibility of fraud, the court declined to speculate whether reliance on the report justified refusal to give the documents any weight. If the documents were admitted by the IJ, the Board must reconcile the fact that they strongly corroborate the respondent's claim with the IJ's adverse credibility finding and denial of relief. Judge McKee concurred, but also expressed his concern that the IJ seemed to ignore the corroborating evidence and look for problems with the respondent's claim.

Gaur v. Gonzales, 124 Fed. Appx. (3d Cir. Mar. 8, 2005) (A41 364 514) (unpublished).

"Good faith" waiver of joint petition - An affidavit by the respondent's former wife, who was not present to testify, was not reliable and trustworthy where the INS officer could not confirm that it was a reflection of her free will, and no one could testify as to the truth and veracity of the affidavit's contents. Due process requirements were not satisfied by reliance on the affidavit, so there was no substantial evidence for the Board's conclusion that the respondent failed to meet his burden of proving that the marriage was entered into in good faith where the government produced no other evidence to contradict the respondent's testimony. The court commented on the fact that the respondent's appeal was pending for 9 years and concluded that the "delay present in this case is unwarranted and fundamentally unfair."

Duvall v. Riley, No. 04-3483, 2004 WL 2137817 (E.D.Pa. Sept. 22, 2004) (A71 041 214).

Collateral estoppel - The Government is estopped from introducing evidence of the respondent's alienage in a second removal hearing following its failure to timely present it at the first hearing, because it cannot be considered "new evidence" where it could have been offered previously through the exercise of due diligence.

Togbah v. Ashcroft, 104 Fed. Appx. 788 (3d Cir. July 8, 2004) (A74 705 993) (unpublished).

§§ 209(c) waiver/due process - The IJ granted the respondent's §§ 209(c) waiver request, but the Board reversed, relying on the AG's policy in Matter of Jean to apply a heightened burden of proof to a waiver consideration where the alien committed a violent crime. The court agreed that it was correct to employ the AG's new policy, but found it was a denial of due process to change the evidentiary burden without giving the respondent an opportunity to meet the heightened burden. The record was remanded with instructions to remand to the IJ for further proceedings. The court also held that the respondent was subject to mandatory detention and could be held without an individualized hearing.

Gui Cun Liu v. Ashcroft, 372 F.3d 529 (3d Cir. June 24, 2004) (A73 168 631).

China/asylum/evidence/credibility - The respondents submitted uncertified abortion certificates in support of their asylum claim. The IJ stated that because 8 C.F.R. §§ 287.6 requires that foreign documents be certified, little or no weight could be given to them, and he denied asylum and withholding based on his adverse credibility finding, which relied in large part on the female respondent's confusing testimony regarding the gender of the fetus. The court held that the IJ erred in rejecting the documents based on the regulation, which allows for proof of authenticity by other means than certification by foreign officials. Holding that the IJ's improper application of the regulation caused him to disregard evidence that might have resulted in a favorable credibility finding, the court remanded for the Board to reconsider and reweigh the facts, taking the abortion certificates into consideration.

Wang v. Ashcroft, 368 F.3d 347 (3d Cir. May 19, 2004). De Novo Review/ Asylum/ China -

The petitioner, a citizen of China, sought review of the Board's decision which vacated the IJ's granting Wang's application for withholding of removal under the CAT. He claimed that the Board erred when it undertook a de novo review of the record because it is prohibited under 8 C.F.R. §§ 1003.1(d)(3)(1). The court found that since the INS had filed its appeal with the Board

more than one year before the September 25, 2002 deadline, 8 C.F.R. §§ 1003.1(d)(3)(1) was inapplicable in this case. In the alternative, Wang argued that the court should bypass the Board's decision and review the IJ's decision. The court found that since the BIA did not commit an error of law, they would review the Board's decision and its de novo factfinding rather than the IJ's decision and factfinding. The court held that substantial evidence supported the Board's determination that the alien failed to prove that he was more likely than not to face torture upon his return to China.

Vasquez-Martinez v. Ashcroft, 98 Fed. Appx. 128 (3d Cir. May 4, 2004) (A75 798 556) (unpublished). **Summary affirmance** - The IJ denied the respondent's application for cancellation for failure to establish hardship. On appeal, the respondent presented new arguments that he had received ineffective assistance of counsel at his hearing and that he had newly discovered evidence of hardship in that his son was recently diagnosed with asthma. The court acknowledged as "persuasive" the Government's arguments that the respondent failed to support his claims. However, because the Board summarily affirmed the IJ's decision, the court held that the Board "effectively dismissed" the respondent's claims without offering any stated rationale, which precluded any meaningful judicial review. The record was therefore remanded for further proceedings.

Senoga v. Ashcroft, 87 Fed. Appx. 823 (3d Cir. Feb. 23, 2004) (A76 118 595) (unpublished). **Uganda/asylum/credibility** - The IJ denied the respondent's persecution claim, finding that part of his testimony was not credible, and the Board affirmed without opinion. The court concluded that the IJ failed to give sufficient weight to background information in the country reports regarding the poor human rights record of the Ugandan Government, and that his personal opinion that the respondent was no longer in danger was not supported by the evidence. The court noted that the IJ's rejection of the testimony was based on speculation, and that he failed to explain how certain issues he had with the respondent's testimony had any bearing on the asylum application. Because the court did not find the evidence "so clear as to compel" a grant of asylum, it remanded for further proceedings, noting that there must be "specific, cogent reasons" given for disbelieving the respondent.

Cai v. Ashcroft, 63 Fed. Appx. 625 (3d Cir. April 29, 2003) (A73 058 470) (unpublished). **Asylum/China/ Family Planning** - The court found that the Board erred in denying the respondent's motion to reconsider. In the motion, the respondent pointed out that the Board, in denying asylum, had not considered the evidence the respondent offered regarding the two additional children she had had since coming to the United States, the second one a boy. The court stated that the Chinese authorities might be more likely to enforce the family planning policies now that the respondent has four children, including a boy.

Ezeagwuna v. Ashcroft, 325 F.3d 396 (3d Cir. Apr. 14, 2003) (A76 142 746). **Asylum/Cameroon/Due Process** - This case was previously decided on 7/30/02 (see Case Law Update of 8/5/02). Upon rehearing, that decision was vacated by the court and this decision was substituted. However, the court again found that the Board's adverse credibility finding violated the respondent's right to due process because it was based almost entirely on a Department of State

letter that contained the conclusions of an investigation in Cameroon. The court found that the letter was "multiple hearsay" and did not in any way describe how the information contained in it was gathered. The letter was not reliable or trustworthy and, further, the respondent was not given adequate time to respond to it. On remand, the letter may not be considered.

The court also found that some of the evidence presented by the respondent on appeal was material and not previously available. The case was remanded with instructions that the matter be remanded to the Immigration Judge for further consideration, including consideration of this evidence.

Obianuju Ezeagwuna v. Ashcroft, 301 F.3d 116 (3d Cir. July 30, 2002) (A76 142 746).

Asylum/Cameroon/Due Process - Board found the respondent not credible based "almost entirely on a letter from the Department of State that contained the conclusions of an investigation in Cameroon." The court found that the reliance on this letter denied the respondent of due process. The respondent submitted considerable documentary evidence to support her claim, but the letter stated that several of the documents were fraudulent. The court described the letter as "multiple hearsay of the most troubling kind," and noted that it had no information about how the investigation in Cameroon was conducted. It concluded that the letter did not "satisfy our standards of reliability and trustworthiness." Further, the respondent was not given adequate time to respond to the letter. The court reminded the Board and the INS that they should not rely too heavily on "the State Department's authority."

Without the letter, the court could not conclude that the respondent submitted fraudulent documents, which was the main basis for the Board's adverse credibility finding. It found the respondent's story credible, corroborated by numerous documents, including the State Department Report on Cameroon, and concluded that she was eligible for asylum and withholding.

Abdulai v. Ashcroft, 239 F.3d 542 (3d Cir. 2001). **Evidence** - Alien appealed BIA's denial of asylum and withholding. Held: BIA may require otherwise-credible asylum applicants to present evidence corroborating their stories in order to meet burden of proof; because question remained as to whether or not BIA properly applied its own rules in this case, it was remanded.

IX. INEFFECTIVE ASSISTANCE OF COUNSEL

Pinho v. Gonzales, 432 F.3d 193 (3d Cir. Dec. 20, 2005) (A29 881 624). Vacated conviction -

This lengthy order does not involve a Board decision, but it contains a thorough discussion of vacated convictions, including the legal history of the issue. The court found a reasonable distinction between "rehabilitative" and "substantive" vacatur and held that a conviction vacated "based on" ineffective assistance of counsel was no longer valid for immigration purposes. It also set forth a test for determining the "basis" for a vacatur order, stating that if the trial court explains its reasons for vacating the conviction, the inquiry ends there.

Ponce-Leiva v. Ashcroft, 331 F.3d 369 (3d Cir. June 5, 2003). Right to Counsel/ Ineffective Assistance - The alien, a native and citizen of Guatemala, appeared with counsel at a hearing before the Immigration Judge and through counsel admitted removability and stated that he would pursue asylum. However, two days before the merits hearing, counsel requested a continuance because he would be out of the area. The IJ refused since counsel had agreed to the hearing date eight months previously. The hearing took place on the scheduled date and the petitioner raised economic grounds for asylum. The IJ denied the request for a continuance and denied asylum. The alien argued that the denial of the continuance request and the holding of the hearing was a denial of his right to counsel. In addition, he argued that counsel's performance constituted ineffective assistance of counsel. The court held that denial of the continuance request did not violate the alien's right to counsel or constitute an abuse of discretion and counsel's absence did not prejudice the alien since he was able to fully present his case.

Danu v. Ashcroft, 120 Fed. Appx. 910 (3d Cir. Jan. 6, 2005) (A29 109 144) (unpublished). Motion/ineffective assistance - The Board abused its discretion where, acknowledging that the respondent did not receive notice of the dismissal of her appeal as a result of the ineffective assistance of counsel, the Board permitted her to voluntarily depart, but arbitrarily denied her the opportunity to proceed with her claim for suspension of deportation under NACARA.

Chmakov v. Blackman, 266 F.3d 210 (3d Cir. Sept. 2001). Jurisdiction - Non-criminal aliens filed petition for writ of habeas corpus alleging that their 5th Amendment right to due process had been violated because they received ineffective assistance of counsel in proceedings before BIA. Held: federal district court had jurisdiction over matter. **But see** REAL ID Act of 2005.

Xu Yong Lu v. Ashcroft, 259 F.3d 127 (3d Cir. July 2001). Ineffective assistance - Alien appealed BIA's decision affirming IJ's denial of alien's motion to reopen. Held: alien failed to establish ineffective assistance of former counsel where she failed to comply with reasonable Lozada requirements - alien failed to show existence of agreement to file appeal and failed to file a disciplinary complaint with the bar association.

Green v. I.N.S., 48 F.3d 313 (3d Cir. Jan. 1995). Due process - Alien brought petition for review of decision of BIA upholding order of deportation. Held: immigration judge's failure to advise alien's attorney of consequences of his failure to file timely application for discretionary relief from deportation did not deprive alien of her due process rights.

X. JURISDICTION

Zheng v. Gonzales, 422 F.3d 98 (3d Cir. 2005). The Third Circuit holds that the regulatory provision at 8 C.F.R. 1245.1(c)(8), which categorically precludes adjustment of status for an arriving alien in removal proceedings, contradicts the clear language and expressed intent of INA section 245(a) and is not a permissible exercise of the Attorney General's discretion.

The Third Circuit joins the First Circuit in finding this regulation invalid. **See Succar v. Ashcroft, 394 F.3d 8 (1st Cir. 2005); Rodriguez de Rivera v. Ashcroft, 394 F.3d 37 (1st Cir. 2005).**

We have a circuit split of authority on this issue with the Eighth Circuit having recently found that the regulation is within the scope of the Attorney General's authority. **Mouelle v. Gonzalez, 416 F.3d 923 (8th Cir. 2005).**

The Third Circuit in **Zheng**, fn. 12, indicates that cases presenting this issue are pending in other circuits, including the 9th and the 11th.

Neither **Zheng** nor **Succar** resolve whether the DHS or the IJ should have jurisdiction over adjustment applications of arriving aliens who have been placed in removal proceedings, but **Zheng** states that "we tentatively conclude that the USCIS district director [in the controlling district] should have jurisdiction over Zheng's adjustment status" and remands to the Board to address that issue.

Singh v. Ashcroft, 112 Fed. Appx. 868 (3rd Cir. 2005), petition for cert. filed, Sub nom, Singh v. Gonzales, 73 U.S.L.W. 3501 (U.S. Jan. 27, 2005) (No. 04-1038). Indian national who conceded that he was arriving alien is ineligible for adjustment of status, and thus immigration judge lacked jurisdiction to consider his application for adjustment of status during his removal proceedings; alien's contentions that he is otherwise eligible for adjustment of status are meritless.

Questions Presented: (1) Did the Third Circuit err in holding that the petitioner is "arriving alien" and therefore ineligible for adjustment of status? (2) Does the immigration court have jurisdiction to adjudicate petitioner's application for adjustment of status? (3) Should the Third Circuit have remanded the petitioner's case to the immigration judge for further proceedings insofar as the petitioner's application for adjustment of status is concerned?

Petition for certiorari filed 1/27/05, by Ephraim Tahir Mella, of Philadelphia, Pa.

Singh v. Gonzales, 112 Fed. Appx. 868 (3d Cir. 2004), cert. denied, 73 U.S.L.W. 3668 (2005) (No. 04-1038) Ruling: Indian national who conceded that he was arriving alien is ineligible for adjustment of status, and thus immigration judge lacked jurisdiction to consider his application for adjustment of status during his removal proceedings; alien's contentions that he is otherwise eligible for adjustment of status are meritless.

Reynoso-Lopez v. Ashcroft, 369 F.3d 275 (3d Cir. May 25, 2004). **Voluntary Departure** - The petitioner sought review of the Board's affirmance of the IJ's decision which denied asylum and in the alternative requested the court to reinstate the expired thirty-day voluntary departure order. The court held (1) that substantial evidence supported the IJ's determination that the petitioner

failed to support his asylum withholding of deportation and CAT claims, and (2) that they lacked jurisdiction to reinstate the petitioner's voluntary departure.

Abdulrahman v. Ashcroft, 330 F.3d 587 (3d Cir. May 21, 2003). **Asylum/ Sudan** - The petitioner argued that the Board erred in affirming the IJ's decision because (1) the IJ had applied the more stringent standard of proof applicable to withholding of removal to his asylum claim, (2) the IJ acted as a witness and conducted the proceedings in a biased manner, and (3) the IJ's credibility determination was not based on substantial evidence in the record. The court concluded that it lacked jurisdiction to consider the standard of proof issue since it had not been raised before the Board, the IJ's questioning of the logic of the petitioner's factual assertions was not improper nor did it violate due process, and substantial evidence supported the conclusion that the petitioner had not met his burden of establishing his eligibility for asylum.

Calle-Vujiles v. Ashcroft, 320 F.3d 472 (3d Cir. Mar. 5, 2003). **Reopening** - The petitioner argued that his due process rights were violated by the Board when it failed to exercise its discretion to sua sponte reopen the deportation proceedings or reconsider its prior decision. Since the Board retains unfettered discretion to decline to sua sponte reopen or reconsider a deportation proceeding, the court lacked jurisdiction to review a decision declining to exercise such discretion to reopen or reconsider the case.

Chmakov v. Blackman, 266 F.3d 210 (3d Cir. Sept. 2001). **Jurisdiction** - Non-criminal aliens filed petition for writ of habeas corpus alleging that their 5th Amendment right to due process had been violated because they received ineffective assistance of counsel in proceedings before BIA. Held: federal district court had jurisdiction over matter. But see REAL ID Act of 2005.

Drakes v. Zimski, 240 F.3d 246 (3d Cir. Feb. 2001). **Jurisdiction** - Alien petitioned for review of deportation. Held: Court had jurisdiction to determine whether jurisdictional facts were present, and because alien's conviction for forgery met definition of "aggravated felony," IIRIRA divested Court of jurisdiction.

Liang v. I.N.S., 206 F.3d 308 (3d Cir. Mar. 2000). **Jurisdiction** - Permanent legal aliens brought petitions for review of final orders of removal. Held: (1) the permanent rules of IIRIRA do not deprive federal district courts of habeas jurisdiction over claims of aliens ordered deported for having committed crimes specified in the INA, and (2) under permanent rules of IIRIRA, Court of Appeals lacked jurisdiction over petitions for review filed by such aliens.

Catney v. I.N.S., 178 F.3d 190 (3d Cir. May 1999). **Jurisdiction** - Alien petitioned the Third Circuit for review of decision of BIA dismissing his appeal of the denial of relief from deportation. Held: (1) habeas jurisdiction survives AEDPA's and IIRIRA's limitations on judicial review of certain deportation orders, but direct review did not survive, and (2) per *Sandoval v. Reno*, 166 F.3d 225 (3rd Cir. 1999), alien must raise claims in a petition for habeas corpus in the district court. But see REAL ID Act of 2005.

Sandoval v. Reno, 166 F.3d 225 (3d Cir. Jan. 1999). **Jurisdiction** - Alien ordered deported by reason of having committed criminal act petitioned for writ of habeas corpus. Held: (1) district

courts continue to have habeas jurisdiction to review claims by aliens who have been ordered deported based on commission of crimes listed in IIRIRA; (2) district court had jurisdiction to consider alien's statutory claim during habeas proceeding; and (3) AEDPA section adding drug offenses to list of deportable offenses that make aliens ineligible for discretionary relief does not apply to pending cases. But see REAL ID Act of 2005.

Morel v. I.N.S., 144 F.3d 248 (3d Cir. May 1998). **Jurisdiction** - Alien declared ineligible for relief from removal because of criminal offenses. Held: alien's claim that the INS was required to credit him with the accumulated residency of his parents who preceded him in U.S. when determining whether he was eligible for discretionary relief due to his lengthy residency here was not a claim of constitutional proportions and Court of Appeals was, thus, divested of jurisdiction by statute removing from circuit court jurisdiction to review claims by aliens convicted of certain criminal offenses; jurisdictional challenge could be heard even though not advanced until petition for rehearing challenging the merits opinion was filed.

U.S. v. Igbonwa, 120 F.3d 437 (3d Cir. Aug. 1997). **Jurisdiction** - NIV pled to drug charges and INS commenced proceedings. NIV moved for specific performance of plea agreement, arguing that the government promised not to deport him if he assisted in other drug trafficking investigations. Held: AUSA cannot make a promise regarding deportation that will be binding on INS without their explicit authority.

Marrero v. I.N.S., 990 F.2d 772 (3d Cir. Apr. 1993). **Deportation order** - Alien petitioned for review of immigration judge's in absentia order of deportation. The BIA dismissed the alien's appeal and denied his motion to reopen deportation proceedings. Alien sought review. Held: (1) Court of Appeals has jurisdiction to review order of deportation after alien has been forcibly deported if record reveals colorable due process claim, and (2) 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. Petitions denied.

XI. MISCELLANEOUS

A. Terrorism

McAllister v. Attorney General, 444 F.3d 178 (3d Cir. Apr. 10, 2006). Terrorist Activities -

The aliens, natives and citizens of Northern Ireland, petitioned the court for review of two Board decisions. In the first, the Board found that Malachy McAllister (Malachy) was removable because he had engaged in terrorist activities. In the second, the Board found that Malachy's wife and their children were removable because they had overstayed their visas. Malachy was involved with the Irish National Liberation in the 1980s and participated in incidents for which he was convicted of "conspiring to murder." Malachy challenged the Board's determination that he is removable claiming that he did not engage in "terrorist activities." The court held that the Board properly interpreted the statute in determining that Malachy was not eligible for asylum because he had engaged in terrorist activities. The court dismissed the petitions of the other petitioners for lack of jurisdiction.

B. Authority of Attorney General

Togbah v. Ashcroft, (D.N.J. Jan. 15, 2003) (A74 705 993) (unpublished). Authority of Attorney General - The Board reversed an IJ grant of a 209(c) waiver, relying heavily on the Attorney General's decision in Matter of Jean, 23 I&N Dec. 373 (A.G. 2002). The district court found that in Matter of Jean, the Attorney General "severely curtailed" the Board's ability to exercise its discretion, and in so doing, "overstated his discretionary role and encroached upon powers granted only to Congress." It found that only Congress can decide which crimes warrant ineligibility for a 209(c) waiver, and held that, "Matter of Jean is an example of executive legislation, not an executive's application of the legislation enacted by Congress."

C. Temporary Business Visa

Mwongera v. I.N.S., 187 F.3d 323 (3d Cir. July 1999). Temporary business visa - Alien petitioned for review of decision of BIA ordering him excluded on grounds he was not in possession of valid immigrant visa and had procured visa by fraud. Held: (1) where alien lived in U.S. for 20 out of 24 months prior to seeking renewal of visitor visa, intended visit could not be considered temporary, and (2) alien who entered U.S. to engage in day-to-day operation of a U.S. business that sold goods within U.S. was not a temporary business visitor.

D. Five-Year Imprisonment Bar

Archibald v. I.N.S., 2002 WL 1434391 (E.D. Pa. July 1, 2002). 212(c)/five-year imprisonment bar - The court first discussed the rule that the section 5-year imprisonment bar to 212(c) relief turns on the period of actual incarceration, not on the length of the sentence imposed. Here, however, the alien had only served 3 years at the time of his administratively final removal order (i.e. the time of the Board's order in the case), and would have been eligible to seek 212(c) relief but for the erroneous application of section 440(d) of AEDPA to his case. The court concluded

that the respondent should be given the opportunity to apply for a 212(c) waiver.

E. Denaturalization

U.S. v. Koreh, 59 F.3d 431 (3d Cir. July 1995). Denaturalization - Alien appealed from order of U.S. District Court finding that he was ineligible for visa he received under DPA in light of his wartime activities. Held: (1) facts supported conclusion that defendant, who had served as editor of pro-Nazi newspapers in Hungary during WWII, had assisted in persecution of Hungarian Jews through his activities; and (2) defendant assisted in or advocated persecution of Jews, regardless of his lack of personal participation in the commission of physical atrocities.

U.S. v. Breyer, 41 F.3d 884 (3d Cir. Nov. 1994). Denaturalization - Alien appealed district court's ruling that ordered cancellation and surrender of citizen's certificate of naturalization as being illegally procured. Held: Where alien revealed membership in Waffen SS but not SS Totenkopf (Death Squad), visa under DPA illegally procured.

F. Time/Appeal

Arca-Pineda v. Att'y Gen., 527 F.3d 101 (3d Cir. May 28, 2008). The court held that (1) administrative closing of alien's removal proceedings did not terminate proceedings so as to restart continuous physical presence clock under the stop-time rule of INA § 240A(d)(i) and (2) differential treatment under time-stop rule did not violate equal protection.

Mudric v. Attorney General of the United States, 469 F.3d 94 (3d Cir. Nov. 24, 2006) - The alien petitioned for review from an order of the Board regarding the legality of his pending deportation. The alien claimed that his right to procedural due process was violated by undue delays, the government should be estopped from removing him because he was prevented from obtaining lawful status as a result of the Government's own undue delay, and that due process violations occurred in the course of his asylum hearing. The court held that (1) given the discretionary nature of immigration benefits, the alien's INS delay-as-due process violation claim failed at the threshold; (2) the alien's claim for equitable estoppel was also without merit; (3) the IJ's adverse credibility determinations were supported by specific and cogent reasons.

Huang v. I.N.S., 47 F.3d 615 (3d Cir. Feb. 1995). Aliens petitioned for review of BIA's dismissal as untimely of their attempt to appeal immigration judge's deportation order. Held: notice of appeal received by mail within 13 days after decision was issued was timely under regulations that were ambiguous as to whether 13 days applied if decision of immigration judge was mailed or if notice of appeal was mailed.

G. Commercial Carriers/Stowaway

Dia Nav., Co., Ltd. v. Pomeroy, 34 F.3d 1255 (3d Cir. Sept. 1994). Commercial carriers/stowaway - Vessel owner brought action seeking declaratory judgment that policy of Immigration and Naturalization Service (INS) requiring commercial carriers to detain stowaways

applying for political asylum and pay for detention costs and expenses for such stowaways was unlawful and void. Held: (1) INS policy was "legislative rule," rather than "interpretative rule," and therefore could only be promulgated pursuant to notice and comment provisions of Administrative Procedure Act (APA); (2) 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 APA; and (3) 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.

H. Attorney Fees

Clarke v. I.N.S., 904 F.2d 172 (3d Cir. May 1990). **Attorney fees** - Alien who prevailed in deportation proceedings petitioned for review of order of the BIA denying his request for attorney fees under Equal Access to Justice Act (EAJA). Held: EAJA does not apply to deportation proceedings before Immigration and Naturalization Services (INS).

I. Sentencing

United States v. Remoi, 404 F.3d 789 (3d Cir. 2005). **Sentencing** - Defendant resisted when agents attempted to remove him from the country pursuant to a final order of removal. On appeal, defendant claimed that the district court erroneously instructed the jury regarding the burden of proof for an entrapment defense and that defendant's previous conviction for criminal sexual contact was incorrectly treated as a crime of violence for sentence enhancement purposes. The court found no error as to the conviction but remanded for resentencing. The court found that defendant was not entitled to an instruction on entrapment because there was no evidence of government inducement. Therefore, any error in the instruction could not constitute plain error. As to defendant's previous conviction for criminal sexual contact on a helpless victim, under N.J. Stat. Ann. §§§§ 2C:14-2c (1990), the court determined under the categorical approach that just as sexual abuse of a minor was considered to be a crime of violence under U.S. Sentencing Guidelines Manual §§§§ 2L1.2, penetration of a physically helpless victim equally constituted a forcible sexual offense under §§§§ 2L1.2.

J. In absentia/Equitable tolling of motion time limits/Fraud

Santana v. Att'y Gen., 506 F.3d 274 (3d Cir. 2007) The court held that alien did not have to rebut the strong presumption of effective service of the NTA that would have applied had the NTA been sent by certified mail.

Luntungan v. Attorney General, 449 F.3d 551 (3d Cir. June 5, 2006). **In absentia multiple motions to reopen/ ineffective assistance of counsel/due process** - The alien failed to attend two consecutive hearings and was ordered removed in absentia. He then filed three consecutive motions to reopen, all of which were denied. The BIA, reviewing the third, agreed with the IJ that the alien was permitted to file only one. The alien argued that an equitable exception should apply because the counsel who filed the first motion was ineffective. However, the court found that

even if the first attorney was ineffective, any due process violation was remedied by the second motion, which would have been permitted under the doctrine of equitable tolling. However, the court found that the alien had a fair chance to be heard and that the one-motion rule applied.

Borges v. Gonzales, 402 F.3d 398 (3d Cir. Mar. 2005). **In absentia/equitable tolling of motion time limits/fraud** - The 180-day time limit on motions to reopen in absentia proceedings is analogous to a statute of limitations and is therefore subject to equitable tolling. The record was remanded for the Board to determine whether the respondent's counsel perpetrated a fraud that resulted in the issuance of an in absentia removal order, taking into account the respondent's newly discovered evidence. If fraud is found, the time period for reopening should be equitable tolled. Because fraud is an extraordinary circumstance, and by definition ineffective assistance of counsel, the in absentia order should also be vacated if fraud is found.

Cabrera-Perez v. Gonzales, 456 F.3d 109 (3d Cir. 2006). **In absentia-** The alien, seeking adjustment of status and an adjudication on whether her marriage was entered into in good faith, arrived 15-20 minutes late to her removal hearing due to traffic. The court held that this did not constitute a failure to appeal and therefore she was not required to prove exception circumstances that would excuse a failure to appear.

K. "Good Faith" Waiver of Joint Petition

Gaur v. Gonzales, 124 Fed.Appx. 738 (3d Cir. Mar. 2005) (unpublished). **"Good faith" waiver of joint petition** - An affidavit by the respondent's former wife, who was not present to testify, was not reliable and trustworthy where the INS officer could not confirm that it was a reflection of her free will, and no one could testify as to the truth and veracity of the affidavit's contents. Due process requirements were not satisfied by reliance on the affidavit, so there was no substantial evidence for the Board's conclusion that the respondent failed to meet his burden of proving that the marriage was entered into in good faith where the government produced no other evidence to contradict the respondent's testimony. The court commented on the fact that the respondent's appeal was pending for 9 years and concluded that the "delay present in this case is unwarranted and fundamentally unfair."

L. Commencement of Proceedings

Uspango v. Ashcroft, 289 F.3d 226 (3d Cir. 2002). **commencement of proceedings.** The petitioner argued that his removal proceedings began when he filed an asylum application in July 1996 rather than when the Notice to Appear was served and filed. He claims that the BIA abused its discretion when it determined that he was subject to the Act's ten year physical presence requirement rather than pre-IIRIRA's seven year requirement. The court held that the removal proceedings commenced either with the filing or service of the Notice to Appear and that the petitioner was subject to the ten year physical presence requirement and to the stop-time provision introduced by the Act.

M. Streamlining

Smriko v. Ashcroft, 387 F.3d 279 (3d Cir. 2004). Streamlining. The respondent presented a novel argument that his refugee status was not terminated by his adjustment of status to an LPR and that it continued to protect him from removal on the basis of his CMTs. Because this issue was not "squarely controlled by existing Board or federal court precedent" and could not be disregarded as legally insubstantial, the Board's decision to affirm the IJ's decision without opinion was arbitrary and capricious, in violation of the streamlining regulations, and deprived the court of the Board's expertise in interpreting the statute. Judge Lay filed a concurrence to explain that while he had previously joined two 8th Circuit opinions holding that an affirmance without opinion was not subject to judicial review, he now considers the 3rd Circuit's contrary analysis to be correct.

N. Adjustment of Status

Robinson v. Napolitano, 554 F.3d 358 (3d Cir. Feb. 2, 2009). Immediate relative visa - The court held that (1) eligibility for an immediate relative visa depends upon alien's status at the time USCIS adjudicates the petition for the alien relative, not when that petition was filed; and (2) alien married less than two years ceased to be an immediate relative upon her husband's death.

Garcia v. Att'y Gen., 553 F.3d 724 (3d Cir. Jan. 14, 2009). The court held that the five-year statute of limitations for rescinding a grant of adjustment of status barred commencement of removal proceeding based on alien's fraudulent application for adjustment of status. The court vacated its previous decision at 545 F.3d 252 (3d Cir. 2008), where it held that the five-year limitation applied both to rescission and removal proceedings.

Vakker v. Attorney General of U.S., 519 F.3d 143 (3d Cir. March 14, 2008). Time/appeal/adjustment of status - The Petitioner, a native of Russia, initially arrived in the United States after being granted "parole" status. His application for adjustment of status was denied because he was convicted of a crime involving moral turpitude. Petitioner appealed to the BIA. While the proceedings were on appeal to the BIA, Petitioner filed a motion with the BIA to remand his case to the IJ for reconsideration of the adjustment of status issue predicated upon a recent intervening case in the 3rd Circuit, *Zheng v. Gonzales*. The BIA denied the motion to remand and Petitioner appealed to the 3rd Circuit. The government raised a jurisdictional challenge to Vakker's petition, alleging that his petition was untimely because the BIA's order denying Petitioner's motion to remand was a "final order" and Petitioner failed to file within thirty days after the date of the final order of removal. The 3rd Circuit ruled that Vakker's petition was timely because (i) there were separate orders within the BIA's decision; and (ii) the BIA's "denial of Vakker's motion to remand" order became final at the same time as the remainder of Vakker's case. However, the Court ruled that the BIA did not err when it denied his motion to remand. The BIA's decision did not deny him due process of the law because the BIA provided adequate explanation and authority to support its decision. Petitioner has offered no argument why the new regulations, after *Zheng v. Gonzales*, would better aid his cause than the version in force at the time BIA decided his motion.

Kosak v. Aguirre, 518 F.3d 210 (3d Cir. Mar. 6, 2008). The court upheld the Board's determination that since adopted children are barred from providing immigration benefits to their biological parents, adoption also terminates relationship between adoptees and their biological siblings for immigration purposes.

Alaka v. Attorney General, 456 F.3d 88 (3d Cir. Aug. 23, 2006) Aggravated

felony/adjustment of status/ abandonment of LPR status/ asylum - The alien was indicted on three counts of fraud but was convicted on one; she was sentenced to eight months incarceration, three years supervised released, and was required to pay restitution. She was also convicted and incarcerated twice outside the US. When the alien attempted to reenter the US after a trip abroad she was detained and denied admission because she had been convicted of a crime of moral turpitude. She sought relief by asserting that she would be persecuted in her home country, but was denied. There are two major issues: one, the crime of moral turpitude and two, the alien's numerous trips abroad, which the IJ found had caused her to abandon her permanent resident status, leaving her ineligible for cancellation of removal or adjustment of status. The alien then applied for relief under CAT and was denied, because the IJ found that the offense that she had committed constituted a "particularly serious" crime based on the individual facts of her case. The court first had to determine jurisdiction, because review of a decision within the discretion of the Attorney General is precluded. However, the court interprets this to mean that some issues are solely within the ambit of the Attorney General but broader categories exist that may still be subject to judicial review, including the determination of what constitutes a particularly serious crime. The second jurisdictional question arises from 8 U.S.C. § 1251(a)(2)(C), which divests courts of "jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense," including those found inadmissible at entry. The court finds that there is still jurisdiction over constitutional or legal questions. However, review of the issue of whether she abandoned her LPR status is precluded because it is a factual rather than legal determination. The court does have jurisdiction to review whether the IJ applied the wrong legal standard in determining that her crime was particularly serious. The court concludes that an offense must be an aggravated felony to be classified as "particularly serious." The court then holds that the IJ was incorrect in considering the total amount of the loss for all three charges for which she was indicted rather than the amount for her one conviction. Thus her crime should not have been classified as an aggravated felony.

Romanishyn v. Attorney General, 455 F.3d 175 (3d Cir. 2006) Adjustment of status/due

process - The alien, who was convicted twice for burglary, was found removable for having committed both an aggravated felony and two or more crimes involving moral turpitude not arising out of a common scheme. The alien argued that it was in error to find him removable because even though he had been granted LPR status, his prior status as a refugee had never been terminated. The government, however, argued that his refugee status terminated automatically when he was granted LPR status. The BIA held in 2005 that an LPR whose refugee status was never terminated may be found removable because refugee status never provides a complete exemption from removal. The court found that the BIA interpretation was reasonable and so the alien could be found removable. Finally, responding to the alien's due process argument, the court found that the IJ did not deny the alien due process when it limited the number of witnesses who

could testify at the hearing on his application for withholding of removal.

Singh v. Gonzales, 112 Fed. Appx. 868 (3d Cir. 2004). Adjustment of status - Ruling: Indian national who conceded that he was arriving alien is ineligible for adjustment of status, and thus immigration judge lacked jurisdiction to consider his application for adjustment of status during his removal proceedings; alien's contentions that he is otherwise eligible for adjustment of status are meritless.

Ponnapula v. Ashcroft, 373 F.3d 480 (3d Cir. June 2004). Section 212(c) retroactivity - The court held that because aliens who affirmatively turned down plea agreements had a reliance interest in the potential availability of section 212(c) relief, IIRIRA's repeal of that section was impermissibly retroactive with respect to those aliens. In reaching this conclusion, the court emphasized that the respondent relied on counsel's advice that if convicted, he would likely only receive a minimum sentence of 1 to 3 years for his misdemeanor offense, which would not disqualify him from eligibility for a waiver.

El Kanafani v. Ashcroft, 99 Fed.Appx. 419 (3d Cir. June 2004) (unpublished).

Reopening/joint petition waiver - The IJ denied the respondent's motion to reopen because he believed that he lacked authority to stay proceedings pending the INS's adjudication of the respondent's request for a waiver of the joint petition requirement. The court noted the Board's precedent decisions directing IJs to "grant continuances where an alien can make a prima facie showing that he or she is eligible for the waiver" and held that the IJ abused his discretion in denying the motion. The court declined to decide whether the IJ could have determined that the respondent was unable to make a prima facie showing of eligibility because he had a final order of removal, and it remanded for the Board to address the issue.

Coraggioso v. Ashcroft, 355 F.3d 730 (3d Cir. Jan. 2004). Diversity visa - The court affirmed the IJ's removal order finding that all diversity visas for a given year's Diversity Visa Program must be issued by the end of that fiscal year. The petitioner is now statutorily ineligible for the visa despite having timely filed his application.

Ignatov v. Ashcroft, 71 Fed. Appx. 157 (3d Cir. Aug. 2003) (unpublished). Right to counsel.

The respondent's counsel filed a motion to withdraw 3 days before his asylum hearing, explaining that he had recently told her he intended to obtain representation through a volunteer organization. When counsel failed to appear at the asylum hearing, the IJ granted her motion to withdraw and required the respondent to proceed with his application unrepresented. The IJ concluded that the respondent's testimony was not credible and denied his requests for relief. Finding that the respondent's asylum claim had facial merit and that the assistance of counsel might have changed the outcome of the hearing, the court held that the IJ violated the respondent's right to counsel by granting the motion to withdraw on the day of the hearing, which gave him no time to obtain new counsel.

Garay-Mendoza v. Ashcroft, 70 Fed.Appx. 625 (3d Cir. July 2003) (unpublished).

Conditional residence/hardship waiver - The court found that the Board erred in failing to

address the issue of the IJ's denial of the respondent's request for a hardship waiver, because the Board misinterpreted the statute and incorrectly held that the respondent waived his right to review the rejection of his waiver request by the INS when he failed to raise the issue before the IJ. According to the court, the waiver request and its denial by the INS were, in fact, before the IJ, who did address the question of the propriety of the INS denial in determining the respondent's deportability. Because the IJ ruled on the issue, the court concluded that the Board was required to review it and remanded for the Board to consider the issue.

O. Discretionary Relief

Morel v. I.N.S., 144 F.3d 248 (3d Cir. May 1998). **Jurisdiction** - Alien declared ineligible for relief from removal because of criminal offenses. Held: alien's claim that the INS was required to credit him with the accumulated residency of his parents who preceded him in U.S. when determining whether he was eligible for discretionary relief due to his lengthy residency here was not a claim of constitutional proportions and Court of Appeals was, thus, divested of jurisdiction by statute removing from circuit court jurisdiction to review claims by aliens convicted of certain criminal offenses; jurisdictional challenge could be heard even though not advanced until petition for rehearing challenging the merits opinion was filed.

P. Habeas Corpus

Debeato v. Attorney General of the United States, 505 F.3d 231 (3d Cir. Oct. 9, 2007).

Habeas - The petitioner filed a 28 U.S.C. § 2241 habeas petition in the United States District Court for the Eastern District of Pennsylvania challenging her incarceration in connection with an 8 U.S.C. § 1326 illegal reentry crime. Pursuant to the REAL ID Act, Pub. L. No. 109-13, div. B, tit. I, § 106(c) (2005), the petition was transferred to the court and treated as a petition for review challenging a Board. In 1993, an IJ found that the alien was ineligible for a waiver under former § 212(c) and ordered her to be removed after she was convicted of drug-related crimes. In her habeas petition, the alien argued that the BIA erred, during her original removal proceedings, in upholding the IJ's finding that she was ineligible for a waiver. Pursuant to 8 U.S.C. § 1231(a)(5), the original deportation order was reinstated while the alien's habeas petition was pending. The court held that it could exercise jurisdiction over the petition for review because the exception to the jurisdictional bar, set out in 8 U.S.C. § 1252(a)(2)(D), applied to constitutional and legal claims raised in connection with both original and reinstated removal orders. Although the BIA's conclusion, that the alien was ineligible for a waiver under former § 212(c) of the INA, was legally erroneous, no gross miscarriage of justice resulted. That decision was correct at the time it was issued. At that time, § 404(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, was applied retroactively to all aliens.

Jeune v. Attorney General of the United States, 476 F.3d 199, (3d Cir. Feb. 20, 2007) - The alien, a native and citizen of Haiti who had been convicted under 35 Pa. Cons.Stat. Ann. § 780-113(1)(30), filed a habeas corpus petition in the United States District Court for the Eastern District of Pennsylvania after the BIA entered a final removal order against him. The district court transferred the habeas petition to the court. It treated the habeas petition as a petition for review

challenging the BIA's decision. The alien contended that his state law conviction did not constitute an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(B) and that he was improperly ordered removed. The charging instrument and state records had to be consulted, to determine if the alien's conviction had a "trafficking" element or constituted a felony under the Federal Controlled Substances Act. None of the records pertaining to the conviction shed any light on the facts underlying the alien's conviction. The court could not hold that the petitioner's conviction was an aggravated felony and remain consistent with their holding in *Garcia v. Attorney General of the United States*, 462 F.3d 287 (3d Cir. 2006), therefore, the petition for review was granted and the case remanded to the Board.

Hoxha v. Levi, 559 F.3d 157 (3d Cir. Oct. 3, 2006). Albania/Habeas Corpus/CAT- The Republic of Albania seeks extradition of Respondent for the murders of three Albania citizens that took place in Albania in 1996. Following a finding by a Magistrate Judge that he was extraditable, Respondent filed a petition for habeas corpus that was denied by the District Court. On appeal, Respondent argues that he is entitled to habeas relief because (1) the Magistrate Judge should have allowed testimony at the extradition hearing by recanting witnesses, (2) the extradition treaty between Albania and the United States is invalid, and (3) he should not be returned to Albania because he will face torture and possible death there. The court concluded that Respondent's claims do not justify a grant of his habeas petition, and the judgment of the District Court was affirmed.

Q. Motions to Continue/Reopen/Reconsider/Other

Hashmi v. Att'y Gen., 531 F.3d 256 (3d Cir. July 7, 2008). The court held that IJ's denial of continuance based on case-completion goals rather than on facts and circumstances of alien's case was arbitrary and an abuse of discretion.

Hoxha v. Att'y Gen., 559 F.3d 157 (3d Cir. Mar. 2, 2009). The court held that it had jurisdiction to review issue of denial of motion for continuance, even though alien had not raised such issue in his brief, where he had raised such issue in his notice of appeal.

Jahjaga v. Att'y Gen., 512 F.3d 80 (3d Cir. Jan. 4, 2008). The court remanded to Board to determine weight to accord to claims of non-receipt of its opinions in determining whether opinions were properly served.

I. Changed Country Conditions

Liu v. Att'y Gen., 555 F.3d 145 (3d Cir. Feb. 4, 2009). The court held that (1) alien did not demonstrate changed country circumstances as required to excuse late filing of motion to reopen, and (2) successive asylum applications based on changed personal circumstances are permitted only within the 90-day reopening period.

Zheng v. Att'y Gen., 549 F.3d 260 (3d Cir. Nov. 26, 2008). In reviewing Board's final orders denying motions to reopen denied asylum applications, the court held that (1) Board failed to

consider changed country conditions in China; and (2) the limitations period governing filing of motions was not equitably tolled where national's lack of diligence in pursuing claim was not justified.

Shardar v. Att'y Gen., 503 F.3d 308 (3d Cir. Sep. 19, 2007). In reviewing Board's decision denying alien's motion to reopen, the court remanded and held that (1) re-emergence of the political party responsible for the alien's prior persecution in Bangladesh constituted a material change in country conditions; (2) Board's conclusion that alien would not face a particularized threat of persecution if returned to Bangladesh was not supported by substantial evidence; and (3) alien established a prima facie case for asylum.