

# Evidentiary Issues: Reliability of Government Documents Circuit Court Case Law Summaries

## Table of Contents

### **I. Airport/Border Interviews/Notes**

First Circuit.....	3
Second Circuit.....	4
Third Circuit.....	8
Fourth Circuit.....	10
Fifth Circuit.....	10
Sixth Circuit.....	11
Seventh Circuit.....	11
Eighth Circuit.....	14
Ninth Circuit.....	14
Tenth Circuit.....	17
Eleventh Circuit.....	17

### **II. Asylum Officer Interviews/Notes**

First Circuit.....	18
Second Circuit.....	18
Third Circuit.....	19
Fourth Circuit.....	19
Fifth Circuit.....	19
Sixth Circuit.....	19
Seventh Circuit.....	20
Eighth Circuit.....	22
Ninth Circuit.....	22
Tenth Circuit.....	22
Eleventh Circuit.....	23

### **III. Overseas DOS/DHS Investigation Reports**

First Circuit.....	24
Second Circuit.....	24
Third Circuit.....	25
Fourth Circuit.....	26
Fifth Circuit.....	27
Sixth Circuit.....	27

Seventh Circuit.....	27
Eighth Circuit.....	27
Ninth Circuit .....	28
Tenth Circuit .....	29
Eleventh Circuit .....	29

## I. Airport/Border Interviews/Notes

### First Circuit

*Ye v. Lynch*, 845 F.3d 38 (1st Cir. 2017)

The alien was detained at apprehension on the Arizona border and interviewed by DHS officers who advised him that U.S. provides protection to certain people who face persecution. *Id.* at 41. That interview was conducted in Mandarin, through an interpreter, and recorded in a 3-page Record of Sworn Statement and a 1-page “Jurat,” both of which were signed by the alien on each page. *Id.* The alien expressed a fear of return after these documents were created and he was given a credible fear interview and thereafter placed in asylum proceedings. *Id.* At his asylum proceedings, the DHS submitted a copy of the Sworn Statement and Jurat. *Id.* At his hearing, the alien testified to having suffered past persecution and feared future persecution on account of his religion. *Id.* at 41-42. He admitted that he had answered questions through an interpreter who read back the answers and that he had signed all of the pages, which indicated that his answers were true and accurate. *Id.* at 42. The IJ found the alien not credible and relied largely on the Sworn Statement and Jurat in which he had stated that he came to the U.S. because he wanted to and had left China to live and work and had no fear of return to China. *Id.* The IJ found that the alien had not provided a rational and reasonable explanation for his failure to express a fear of return to the Border Patrol agent. *Id.* The Board dismissed the appeal, emphasizing that the alien had an interpreter, had signed off on his answers are being true and accurate, and did not tell the agent that he was nervous or unable to understand the questions. *Id.* 42-44. The court found that the alien’s explanation for not indicating to border officers that he had a fear of return was not sufficiently compelling and found no error by the IJ or the Board. *Id.* at 44. The court stated that the Board gave clearly articulated reasons for finding the DHS documents reliable and that the IJ had found it implausible that the alien would make no mention of any alleged past persecution to the DHS interviewer if such persecution had occurred. *Id.* The court also stated that it did not require IJs to make inquiries into the reliability of border interviews using specifically enumerated factors, unlike its sister circuit (citing, *Ramsameachire v. Ashcroft*, 357 F.3d 169, 180 (2d Cir. 2004)). *Id.* at 44-45.

*Simo v. Gonzales*, 445 F.3d 7 (1st Cir. 2006)

The alien, a native and citizen of Albania, arrived in the United States on a falsified passport. *Id.* at 9. The alien was detained on arrival at Boston’s Logan Airport and interviewed by an immigration officer. *Id.* He was asked why he had come to the United States and said only that he “wanted to leave Albania.” *Id.* He also stated that he had purchased his passport for \$11,000 from “a guy in the market.” *Id.* at 9-10. During his hearing in immigration court, the alien stated that he had not slept for 2 days before the interview and that he had never said that he procured the falsified passport himself. *Id.* at 12. The alien also claimed that he left Albania because of politically motivated harassment. *Id.* at 9. The Board discredited the alien’s tendered explanation, which the court upheld where the alien’s corroborating evidence was unconvincing. *Id.* at 12. The court stated that the alien did not provide a compelling explanation and said that its precedents make frequent reference to the failure of a petitioner to sufficiently explain inconsistencies (citing *Chen v.*

*Gonzales*, 418 F.3d 113 (1st Cir. 2005); *Dhima v. Gonzales*, 416 F.3d 92, 96 (1st Cir. 2005). *Id.* The court further explained that [w]ith no countervailing corroborating evidence suggesting a reason for the inconsistency . . . the Board validly concluded on the basis of the inconsistency that [the alien’s] story was not credible. . . .” *Id.*

## **Second Circuit**

*Zhang v. Holder*, 585 F.3d 715 (2d Cir. 2009)

On June 6, 2003, the alien and her son were detained at John F. Kennedy Airport in New York while attempting to enter the country. *Id.* at 718. Later that same day, an immigration officer interviewed the alien with the assistance of a Mandarin interpreter. *Id.* In response to the officer’s question about whether she had “any fears or concerns about being removed from the United States or being sent back to [her] home country,” the alien stated: “I am afraid because I had by pass [sic] surgery on my heart and the government was forcing me not to have any more children. The government wanted me to go to a hospital and have a birth control device implant inside of me.” *Id.* In response to the inspector’s question about whether she would be harmed if returned to her home country, the alien stated: “If I am sent back I would die.” The alien then affirmed that she had read the transcript of her statement (or had it read to her), that her answers were “true and correct to the best of [her] knowledge,” and that “this statement [wa]s a full, true and correct record of [her] interrogation.” *Id.* The IJ denied relief and stated that he had “very serious doubts regarding [the] testimony” that the alien had offered on these matters based on “discrepancies” between her testimony at the merits hearing and the statements that she had offered in other contexts. *Id.* at 720. The Board dismissed the appeal. *Id.* at 721.

On appeal, the alien argued that the agency erred in relying on the record of her airport interview when assessing her credibility. *Id.* The court disagreed, stating that the alien was “informed about the purpose of the airport interview and the importance of providing full and accurate testimony, asked about her ability to comprehend the questions posed to her, and given the opportunity to be interviewed in a private area.” *Id.* Moreover, the record of the alien’s airport interview “bears hallmarks of accuracy and reliability, as it is typewritten, signed by [alien], and initialed by [her] on each page.” *Id.* And the court explained that the alien’s airport interview was both “conducted in a non-coercive and careful manner,” appropriately documented by the interviewing authorities. *Id.* at 722. Lastly, the court noted that the alien’s subsequent assertions that she was “nervous” and “afraid” during this interview did not affect its analysis. *Id.*

*Balachova v. Mukasey*, 547 F.3d 374 (2d Cir. 2008)

Husband and wife aliens each filed for asylum, based upon separate claims, and listed each other as derivative applicants on the applications. *Id.* at 378. The court remanded the male alien’s case (hereinafter “the alien”) for further proceedings. *Id.* The alien sought asylum from Russia because he was Jewish. *Id.* The IJ denied asylum finding the alien not credible because his testimony was inconsistent with his asylum application. *Id.* at 379. The Board summarily affirmed the IJ’s decision. *Id.* at 380. The court found that the basis for the adverse credibility determination was

unclear as the only reason given was a difference between the alien's testimony and his asylum application but that inconsistency was not identified. *Id.* The court noted that the IJ had previously mentioned one inconsistency and may have disbelieved two other aspects of the alien's testimony. *Id.* Although the court remanded for a decision which clearly sets forth the basis for the adverse credibility finding, the court also addressed those possible bases that it had identified which it found were "clearly mistaken." *Id.* at 381. The IJ had discussed a consular investigation report which indicated that the alien's birth certificate did not conform to Russian standards and the copy of the birth certificate provided was not authenticated. *Id.* at 382-83. The report indicated that the consulate asked the Russian Ministry of Foreign Affairs to verify the information in the birth certificate with the appropriate authorities and that the response was that the certificate submitted did not comport with the official certified birth record. *Id.* at 383. The court observed that no further information was provided regarding the investigation. *Id.* The court found that the lack of detail in the report did not meet the standards set forth in INS Guidelines issued on June 21, 2001 (which required at a minimum 1) the name and title of the investigator, 2) the level of fluency in the relevant language by the investigator, 3) an explanation regarding the language competency of the investigator and/or translator, 4) the specific objective of the investigation, 5) the places searched or where conversations occurred, the names of titles of people spoken to, the method used to verify information, 6) the circumstances, content, and results of each search or conversation, and 7) a statement that the INS investigator was aware of the INS confidentiality regulations). *Id.* The court found that the absence of information on the qualifications of the investigators, the identity of the Russian officials who prepared the response, the methods (if any) used to verify the information, and the lack of information as to how the provided birth certified differed from the original meant that the consular report was unreliable. *Id.*

*Siewe v. Gonzales*, 480 F.3d 160 (2d Cir. 2007)

The IJ made an adverse credibility determination based on finding two documents in the record (an arrest warrant and a letter) to be inauthentic. *Id.* at 169-70. The Board affirmed without opinion. *Id.* at 161. The court affirmed. *Id.* at 171. In dicta, the court stated that it may be inappropriate for an IJ to rely on a false statement given during an airport interview to invoke the maxim *falsus in uno, falsus in omnibus* (false in one thing, false in everything) to discredit other evidence in the record. *Id.* at 721. The court explained that aliens, particularly those who may have a well-founded fear of government authorities in general, may not be entirely forthcoming during the initial interview due to their perception that it is coercive or threatening. *Id.*

*Chen v. U.S. Att'y. Gen.*, 454 F.3d 103 (2d Cir. 2006)

The Board affirmed the IJ's denial of asylum, which was based on a finding that the alien's testimony was not credible because it was inconsistent with the alien's airport interview. *Id.* at 107-08. The court stated that the IJ committed no error by relying on the alien's airport interview as a basis for the determination of adverse credibility. *Id.* The court noted that the interview in this case (1) was recorded verbatim; (2) included questions reasonably designed to elicit details of petitioner's asylum claim; (3) was conducted through a translator; and (4) was apparently unhindered by prior coercive experiences or interrogations. All of these factors suggested that the

alien's airport statements provided a reliable record and a permissible basis for finding the alien's testimony incredible.

*Kanacevic v. I.N.S.*, 448 F.3d 129 (2d Cir. 2006)

The alien arrived at the Los Angeles International Airport, bearing a fraudulent Slovenian passport. *Id.* at 132. At the airport, she was detained and interviewed by United States Immigration officers. *Id.* The IJ stated that the alien's airport interview was substantially inconsistent with her asylum claim. *Id.* At the airport interview, the alien said she came to the United States to marry a Yugoslav whom her parents had arranged for her to marry. *Id.* She said she did not fear that she would be harmed if she were removed from the United States. *Id.* Two years later, the alien filed an application for asylum, stating that she had been harassed by Serbian soldiers on account of her Albanian ethnicity and that she feared the Serbs would harass, rape, or murder her if she returned to Montenegro; and she sought political asylum. *Id.* at 132.

The IJ denied the asylum application and found the alien not credible. *Id.* at 136. The Board summarily affirmed. *Id.* at 133. The court concluded that the circumstances weighed in favor of considering the airport interview reliable, as the interview was memorialized in a verbatim, sworn, signed statement; the alien was assisted by an interpreter and asked at the outset if she would freely and voluntarily answer the questions; she answered yes, and she gave no reason to believe she was reluctant to answer freely. *Id.* at 136. Further, the alien was asked questions designed to elicit any possible asylum claim, and she did not mention anything about the war or the Serbians. *Id.* at 137. The court explained that when an alien gives a substantially different explanation for the decision to immigrate at the airport than he or she later adopts in an asylum application, the inconsistency is a specific, cogent reason for finding that the asylum claim is not credible. *Id.*

*Guan v. Gonzales*, 432 F.3d 391 (2d Cir. 2005)

The IJ found that the alien's testimony was not credible, in part because of inconsistencies between the alien's account of persecution given in an airport interview and her subsequent testimony. *Id.* at 393. The Board affirmed. *Id.*

The court listed several factors to consider when assessing the reliability of testimony given at an airport interview including: (1) whether the record of the interview merely summarizes or paraphrases the alien's statements rather than providing a verbatim account or transcript, (2) whether the questions posed to the alien seem designed to elicit the details of an asylum claim, (3) whether the alien appears to have been reluctant to reveal information to INS officials because of prior interrogation sessions or other coercive experiences in his or her home country, and (4) whether the alien's answers to the questions posed suggest that the alien did not understand English or the translations provided by the interpreter. *Id.* at 396. In applying these factors and comparing the alien's interview to another airport interview that the court endorsed in *Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004), the court concluded that the record of alien's airport interview was reliable. *Id.* at 397. The court noted that an alien's testimony during an airport interview, if not coerced, unfairly truncated, or mistranslated in any material way, represents the

alien's own unpolished and unrevised description of the events giving rise to the asylum claim. *Id.* at 397-98.

The court further held that where an alien's account of persecution before an IJ differs only in insignificant and trivial respects from an account that he previously provided, the court will decline to accept such inconsistencies as a proper basis for an adverse credibility finding. *Id.* at 398. However in this case the court held that the alien provided two distinct, non-overlapping accounts of persecution thereby rendering her testimony incredible. *Id.* In the alien's airport interview, she stated she left China to avoid the prospect of a blind marriage, but when asked by the IJ during her hearing she said she fled China to flee persecution stemming from the closure of her clothing store. *Id.* at 395-96. Moreover, unlike in *Latifi v. Gonzales*, 430 F.3d 103 (2d Cir. 2005), the alien did not provide a persuasive explanation for the inconsistencies. *Id.* at 399.

*Latifi v. Gonzales*, 430 F.3d 103 (2d Cir. 2005)

The IJ made an adverse credibility determination based on discrepancies between the accounts the alien gave at the airport interview, the credible fear interview, and in his hearing testimony. *Id.* at 104. The IJ's determination was further based on the alien's failure to provide a reason for why he was not forthcoming in his airport interview. *Id.* The Board summarily affirmed. *Id.*

The court determined that the IJ erred and remanded. First, the court found that the IJ did not identify specific inconsistencies between the alien's credible fear interview and his testimony at his hearing. *Id.* at 105. Moreover, the court determined that any potential discrepancies were insignificant and trivial. *Id.* Second, the court held that the IJ failed to properly evaluate the explanation that the alien gave for omitting information during his airport interview. *Id.* at 105. Relying on *Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004), the court explained that airport interviews may be perceived by the alien as coercive or threatening and an alien may not be entirely forthcoming because they are wary of governmental authorities. *Id.* at 105. The court acknowledged that the alien's airport interview was inconsistent with his later testimony. *Id.* at 105. However, the court determined that the alien's explanation — he was afraid and pressured and he did not know whether any harm would come to him if he mentioned his political situation — fell squarely within the category of reasons why airport interviews must be viewed with caution. *Id.* at 105.

*Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004)

The Board affirmed the IJ's denial of asylum, which was based on a finding that the alien's testimony was not credible because it was inconsistent with the alien's airport interview. *Id.* at 176-77. The Second Circuit denied the alien's petition for review. The court held that, although airport statements are in some circumstances unreliable, the Board may consider them in assessing the weight given to an alien's in-court testimony. *Id.* at 175. The Second Circuit provided a list of factors that the Board must consider before deeming an airport interview to be sufficiently reliable to be used in assessing the alien's credibility: (1) whether the statement is a verbatim account of the alien's statement, as opposed to a mere summary or paraphrase; (2) whether the questions asked of the alien were designed to elicit the details of an asylum claim and whether the

interviewing officer asked follow-up questions to aid the alien in developing his or her account; (3) whether any history of prior interrogations or coercive experiences may have caused the alien to be hesitant to reveal information to the interviewing officer; and (4) whether the alien was able to understand the translations provided by an interpreter. *Id.* at 179-80. In this case, the court held that the Board properly considered the dangers inherent in relying upon an airport interview before including it as part of the evidentiary record. *See id.* at 181.

### **Third Circuit**

*Yan Lan Wu v. Ashcroft*, 393 F.3d 418 (3d Cir. 2005)

The alien, a native and citizen of China, entered the United States via an airline flight *Id.* at 420. When questioned by an immigration officer, the alien stated, through an interpreter, that she feared she might be incarcerated if she returned to China because she was a Christian. *Id.* When asked who was harassing her, she replied “only the people in the village.” *Id.* The officer found Ms. Yan inadmissible and processed her for removal. Later, the IJ found that the alien was not at risk of religious persecution from the Chinese government or its agents because of statements the alien made during her initial airport interview. *Id.* at 423. While the IJ found the alien to be credible, she did not consider the alien’s references to “police,” “arrest,” “village officials,” or “village authority” throughout her hearing testimony as words showing state-sponsored persecution. *Id.* at 424. The Board dismissed the appeal.

The Third Circuit granted the alien’s petition for review and remanded. The court stated that the Board erred in determining that it was local villagers, and not government officials, who were persecuting the alien and her fellow parishioner. *Id.* at 424. The court explained that the IJ “seized upon two statements made by [the alien] at her airport interview and relied on them at the expense of the entirety of her testimony.” *Id.* at 425.

*He Chun Chen v. Ashcroft*, 376 F.3d 215 (3d Cir. 2004)

The Board dismissed an appeal from the IJ’s denial of asylum, withholding of removal, and protection under the Convention Against Torture. *Id.* at 217. The Third Circuit denied the alien’s petition for review. The court held that the IJ did not place undue weight on the alien’s “airport interview” in finding the alien not credible. *Id.* at 223-24. Although the Third Circuit had counseled in prior precedent against placing too much weight on airport interviews — particularly when the manner in which the interview was conducted was unknown — in this case, the alien’s contradictory statements were significant and material to his claim. *Id.* Furthermore, the IJ cited to other discrepancies in the alien’s testimony that led to the adverse credibility finding. *Id.* Although the Third Circuit denied the alien’s petition for review, the court did find that the Board erroneously rejected some of the alien’s evidence. *Id.* at 225-26. Specifically, the court held that the Board should not have rejected the validity of two “abortion certificates” merely because the State Department’s Country Report may have generally undermined their validity. *Id.* (noting that the Third Circuit has previously questioned the Board’s wholesale reliance on the country reports). However, the court did not find remand appropriate because the Board’s rejection of the abortion



certificates was separate and apart from the adverse credibility finding, which independently supported the Board's decision. *Id.* at 226.

*Dia v. Ashcroft*, 353 F.3d 228 (3d Cir. 2003)

The Board affirmed the IJ's denial of asylum, withholding of removal, and protection under the Convention Against Torture. *Id.* at 233-34. In a wide-ranging decision, the Third Circuit granted the alien's petition for review. *Id.* at 234. As to the alien's credibility, the court held that the IJ improperly rejected the alien's claims regarding his procurement of a passport and visa. *Id.* at 256-59. The court found that the IJ placed undue weight on an INS memorandum regarding the alien's "airport interview." *Id.* at 257-58 (noting that the Third Circuit is generally skeptical of reliance on reports of airport interviews). The Third Circuit also criticized the IJ for rejecting the testimony of the alien's expert witness, who testified regarding the signatures on the alien's passport and visa. *Id.* at 258. The Third Circuit held that the IJ's reasons for rejecting the expert's testimony were not supported by record evidence. *Id.* at 258-59.

*Mulanga v. Ashcroft*, 349 F.3d 123 (3d Cir. 2003)

The Board affirmed the IJ's denial of asylum and withholding of removal. *Id.* at 126. The Third Circuit granted the alien's petition for review. *Id.* At an airport interview the alien said that she was unaware who shot her, while at the hearing before the IJ, she testified she was shot by one of the Mobutu soldiers. *Id.* at 137. The court repeated its precedent that immaterial discrepancies between airport interviews and subsequent testimony should not be used to make adverse credibility determinations. *Id.* Furthermore, the statements were not necessarily inconsistent because the alien stated at the airport that she did not know who shot her. *Id.* The court stated, "That is, she did not know the name of the shooter. But, in her testimony, she said it was a Mobutu soldier." *Id.* The court stated that these statements could mean that the alien knew that a Mobutu soldier shot her but she could not identify that soldier by name at the airport interview. As such, the IJ erred in using the alien's airport statement to impeach her credibility. *Id.*

*Senathirajah v. INS*, 157 F.3d 210 (1998)

The Board affirmed the IJ's denial of asylum and withholding of deportation. *Id.* at 211. The Third Circuit granted the alien's petition for review, finding that the Board erred in affirming the IJ's adverse credibility determination because, among other things, the IJ and Board gave too much weight to an affidavit that was prepared during an airport interview. *Id.* at 216-18. The court held that the Board should have considered the limitations of such interviews in assessing the significance of discrepancies between the interview and testimony. *Id.* at 218.

*Balasubramanrim v. I.N.S.*, 143 F.3d 157 (3d Cir. 1998)

The Board affirmed the IJ's denial of asylum and withholding of deportation. *Id.* at 158. The Board, with one member dissenting, determined that the alien's testimony before the IJ was not credible because it was inconsistent with information he gave to INS officials at the airport upon entry into the United States. *Id.* The Third Circuit granted the alien's petition for review, finding that the Board erred in affirming the IJ's adverse credibility. *Id.*

The court concluded that the alien's airport interview may not have represented an accurate account of the persecution he suffered in Sri Lanka. *Id.* at 162. The court stated that the handwritten record of the airport interview may not have been reliable because it did not show how the interview was conducted or how the document was prepared; whether the questions and answers were recorded verbatim, summarized, or paraphrased; the extent to which the alien had difficulty comprehending the questions; and whether the alien's responses actually corresponded to those recorded or whether the examiner recorded some distilled or summary version based on the examiner's best estimation of the response. *Id.* The court also found that the "questions posed were not designed to elicit the details of an asylum claim, and it appears the airport examiner in this case had no interest in developing the details of a potential asylum claim." *Id.* The court further stated that an arriving alien who has suffered abuse during interrogation sessions by government officials in his home country may be reluctant to reveal such information during the first meeting with government officials in this country. *Id.* at 163. Finally, the Board relied heavily on its conclusion that the alien knew a "fair amount of English" at the time of the airport interview but the court could not see the basis for that conclusion. *Id.*

### **Fourth Circuit**

*Qing Hua Lin v. Holder*, 736 F.3d 343 (4th Cir. 2013)

The Board affirmed the IJ's denial of asylum, withholding of removal, and protection under the Convention Against Torture. *Id.* at 346. In its decision, the Board affirmed an adverse credibility determination that was based largely on inconsistencies between the alien's testimony and her prior statements in a Border Patrol interview. *See id.* at 351-53. The Fourth Circuit denied the alien's petition for review. The court joined several other circuits in holding that the Board should not rely, without qualification, on statements made in border interviews. *Id.* at 353. However, in this case, the court did not find error in the IJ's and Board's reliance on inconsistencies between the alien's testimony and her Border Patrol interview. *Id.* at 353. The court noted that the Border Patrol interview contained a major omission (the alien's allegation of a forced abortion) and her subsequent testimony regarding her marital status was not merely omitted in the border interview, but directly contradicted her prior statements. *Id.* at 353.

### **Fifth Circuit**

No published cases.

## **Sixth Circuit**

*Yu v. Ashcroft*, 364 F.3d 700 (6th Cir. 2004)

The IJ denied the alien's applications for relief based solely on lack of credibility; the BIA affirmed without opinion. *Id.* at 701-02. The IJ based his decision on implausibilities and inconsistencies, using the alien's four separate statements taken from his airport interview, asylum application, credible fear interview, and his testimony in front of the IJ. *Id.* at 703. While the court noted that some of the IJ's grounds seemed weak when the discrepancies were viewed in the context of the surrounding record, it upheld the decision and denied the petition for review. *Id.* at 704. In a footnote, the court stated that the alien refused to sign his interview statement because he claimed the translation produced errors. *Id.* at 703 n.4. The court noted that two sister circuits had discredited the reliability of initial airport interviews as "not sufficient standing alone" to be a reliable impeachment source because of the conditions under which they are taken. However, the court stated that even if its sister circuits were correct, the alien still would not prevail because the interview discrepancies in this case made up only part of the IJ's basis, and did not "stand alone." *Id.*

## **Seventh Circuit**

*Nadmid v. Holder*, 784 F.3d 357 (7th Cir. 2015)

The alien, a native and citizen of Mongolia, was detained at Chicago O'Hare International Airport, where a CBP officer, through a Russian translator, conducted two interviews with him. *Id.* at 358. In his first interview, the alien told the officer that he was coming to the United States to visit his daughter. *Id.* When asked if he feared returning to Mongolia, he answered "no." In a second interview later that day, the alien told the officer that, if returned to Mongolia, he feared being killed by agents at a partially government-owned mining operation. *Id.* The IJ concluded that the alien was not credible, noting that the inconsistencies between his testimony and the transcripts of his two airport interviews were "significant problems." *Id.* at 359. The Board upheld the IJ's findings about credibility and dismissed the appeal. *Id.* at 360.

The court granted the petition for review. The court agreed with the alien that the IJ incorrectly relied on the airport interviews to discredit him. *Id.* First, the IJ mischaracterized the record when he stated that the alien testified that he told the CBP officer that he "requested a Russian interpreter." *Id.* Second, the IJ concluded that the transcripts of the airport interviews showed "detailed, coherent responses," but the transcript contained several contradictory statements in quick succession, suggesting that the alien faced language barriers. *Id.* Third, the IJ stated that the alien had learned Russian when he attended technical school in Russia for three years, but the IJ did not acknowledge that the alien had attended that school more than 30 years before the interviews and that the classes were taught in Russian and through interpreters. *Id.* at 360-01.

*Xiao v. Mukasey*, 547 F.3d 712 (7th Cir. 2008)

The alien arrived in the United States at Miami International Airport and stated to the immigration officer at the airport that she was fleeing China because the Chinese government sought to arrest her for the practice of Falun Gong. *Id.* at 714. In a credible fear interview with an asylum officer, she stated that she fled China because she feared arrest because of her Falun Gong practice. The alien did not mention a forced abortion on either occasion. *Id.* The IJ found the alien not credible and denied relief; the Board affirmed, stating that the adverse credibility finding was not clearly erroneous. *Id.* at 716.

The Seventh Circuit upheld the adverse credibility finding where the alien failed to disclose the abortion during her airport interview and credible fear interview, stating that under its precedent, an IJ may properly consider statements made at an airport interview as long as they are reliable (citing *Jamal-Daoud v. Gonzales*, 403 F.3d 918, 923 (7th Cir.2005); *Balogun v. Ashcroft*, 374 F.3d 492, 504-05 (7th Cir.2004)). *Id.* at 717. The court noted that the IJ found the interview to be reliable because there was a translator present and the alien seemed to have understood the questions. *Id.* While the alien claimed that she did not mention the forced abortion during the airport interview because she was ashamed that she had become pregnant before marriage, the court stated that her explanation did not overcome the high level of deference that it gave to the IJ and BIA. *Id.*

*Chatta v. Mukasey*, 523 F.3d 748 (7th Cir. 2008)

The alien, citizen of Pakistan, entered the United States at Chicago's O'Hare International Airport without a valid entry document, and was interviewed by an immigration official *Id.* at 749. Later, an IJ found the alien not credible, denied the applications for relief, and the Board affirmed without opinion. *Id.* at 752. The Seventh Circuit denied the petition for review and stated that the IJ explained his reasons for finding that the alien's testimony was not credible. *Id.* There were material inconsistencies between alien's airport interview and his testimony at his hearing. *Id.* The court acknowledged that airport interviews "are not always reliable indicators of credibility." *Id.* But the IJ found that the record of the airport interview had many markers of probative value and reliability. *Id.* The actual transcript of the interview was in the record. *Id.* The immigration official asked the alien at least five times about his fear of returning to Pakistan and the alien acknowledged that he understood the translator during the interview, and he admitted the accuracy of the transcripts during his hearing testimony. *Id.* Although the alien was young and frightened, the reliance on the airport interview was reasonable. *Id.*

*Moab v. Gonzales*, 500 F.3d 656 (7th Cir. 2007).

The alien arrived at the airport without proper documents and requested asylum. *Id.* at 657. At the airport and in a later credible fear interview the alien stated that he feared return due to the civil war and a family land dispute. *Id.* On a later application for asylum he stated that he also feared return due to his sexual orientation. *Id.* The alien explanation at his removal hearing for why he did not mention his sexual orientation claim at the airport or the credible fear interview was hard to follow. *Id.* at 658. The IJ denied asylum based on a failure to meet the burden of proof and an

adverse credibility determination, based in part on inconsistency between the alien's initial interviews and his claim at his hearing regarding the basis of his fear of return. *Id.* The Board dismissed the appeal and agreed with the IJ that the alien had made questionable additions to his asylum application and inconsistencies before the asylum officer. *Id.* As the court noted, the adverse credibility determination was based primarily on the alien's failure to inform the immigration officers at the airport and the credible fear interview that he feared return due to his homosexuality. *Id.* at 660.

The court stated that it had previously found that airport interviews are not always reliable indicators of an alien's credibility. *Id.* It reiterated that it had favorably cited the non-exclusive list of factors required by the Second Circuit in *Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004): (1) a record of the interview that summarizes or paraphrases is less reliable than a verbatim account or a transcript; (2) interviews where the questions are not designed to elicit the details of an asylum claim or where an immigration officer fails to ask follow-up questions which would aid development of the alien's account are less reliable; (3) interviews are less reliable where an alien appears to be reluctant to reveal information because of having experienced in the home country prior interrogation sessions or other coercive experiences; and (4) an alien's statements are less reliable if the alien's answers suggest a lack of understanding of either the interpreter or the questions. *Id.* at 660-61.

The court also stated that it had previously added to this list that an alien's evasive answers regarding the fear of persecution may not be reliable where the alien has a reasonable fear of governmental authority where the alien may have been subjected to government abuse or coercion. *Id.* at 661. The court stated the alien's credible fear interview was not a verbatim account, there was no transcript of either the airport or credible fear interview, and it was not clear whether any follow-up questions had been asked during the interviews. *Id.* The court found that the Board's decision was not supported by the record and remanded for further proceedings. *Id.* at 661-62.

*Jamal-Daoud v. Gonzales*, 403 F.3d 918 (7th Cir. 2005)

The alien arrived at O'Hare International Airport in Chicago, at the age of seventeen, with a Lebanese passport bearing the name Hanni Moussa. *Id.* at 920. He was interviewed by an immigration officer with the assistance of a translator. *Id.* at The alien had no identification with him other than the passport, which he admitted had been falsified. *Id.* In immigration court, the alien admitted that he had provided inconsistent answers during his airport interview but stated, "I was afraid at that time, I was nervous, and I don't know what I was saying then." *Id.* at 921. He told the IJ that he was afraid that if he had answered the questions differently, he would have been returned to Iraq. *Id.* The IJ found the alien not credible and denied relief. *Id.* The IJ found that the alien's airport interview "further undercut" his claim of persecution, stating that the alien provided the wrong date and place of birth. *Id.* The alien also provided other untruthful answers to the immigration officer, including responses to such crucial questions as why he left Iraq and came to the United States, and whether he had been persecuted by the Iraqi government. *Id.* The Board dismissed the appeal. *Id.* at 922.

The Seventh Circuit denied the petition for review. The court recognized its precedent that airport interviews are useful only if they are reliable. *Id.* at 923. Based on the factors set forth in *Balogun v. Ashcroft*, 374 F.3d 492 (7th Cir. 2004), the court stated it was confident that the airport interview was reliable and “part of a sound basis for finding petitioner’s asylum claim incredible.” *Id.* The record contained a full transcript of the interview, which was conducted with a translator. *Id.* Based on the transcript, there was no indication that the alien did not understand the questions. *Id.* Although the officer could have probed further into the alien’s claim, the court noted that he asked several follow-up questions aimed at drawing out the nature of alien’s asylum claim. *Id.* at 924. The court also noted that the alien’s frank responses to some questions reflected that while he may have been nervous, “he was not intimidated or coerced into the answers he provided.” *Id.*

*Balogun v. Ashcroft*, 374 F.3d 492 (7th Cir. 2004)

The IJ relied on the alien’s past misrepresentations at her airport interview on her last trip in into the United States. *Id.* at 503. While the interview transcript incorrectly identified the alien as a “male” and the date on the transcript was wrong by 1 day, the court stated, “It is obvious that these were minor clerical errors—for example, the question and answer portion of the transcript reveals that there was, in fact, no confusion regarding [the alien’s] gender, and, on this record, these errors do not call into serious question the reliability of the airport interview.” *Id.* at 505. The Seventh Circuit noted that the alien was specifically asked at her airport interview whether she had “any fear or concern about being returned” to Nigeria and whether she would be harmed if she returned to Nigeria, to which she replied: “I don’t know” and “maybe.” *Id.* at 505. Moreover, the alien was a “well-educated, mature woman who speaks adequate English.” *Id.* The transcript was sworn and subscribed as true and correct; the alien signed not only the last page and initialed each page. *Id.* The transcript was typed in a “Q.” and “A.” format. *Id.* at 505-06. While the alien stated that she was nervous at the interview, she did not argue that any coercive techniques were used. *Id.* Based on these factors, the court concluded that the interview and transcript were reliable and probative. *Id.*

## **Eighth Circuit**

No published cases.

## **Ninth Circuit**

*Bassene v. Holder*, 737 F.3d 530 (9th Cir. 2013)

At the removal hearing the IJ asked the alien why he had not disclosed that he was arrested by the Senegalese military in the one-page statement he attached to his N-400 citizenship application. *Id.* at 535. The alien responded: “I was arrested. I don’t know why I didn’t (indiscernable) but I was.” *Id.* The IJ found the alien not credible and denied the application for asylum, withholding of removal, and protection under the Convention Against Torture; the BIA dismissed the appeal. *Id.* The Ninth Circuit granted the petition for review, vacated the adverse credibility finding, and

remanded the BIA for further consideration and investigation in light of its ruling that the petitioner was credible. *Id.* at 538. The court reiterated its precedent that airport interviews and asylum interviews do not require the same level of detail as later formal proceedings. *See Arulampalam v. Ashcroft*, 353 F.3d 679, 688 (9th Cir.2003) (holding that petitioner’s omission during an airport interview of specific details of torture that were revealed later at the removal hearing did not support a negative credibility finding). *Id.* at 537. The court explained that the lack of detail in the alien’s mistakenly filed but properly completed N-400 citizenship application, did not on its own undermine the alien’s credibility regarding his asylum application. *Id.*

*Yan Liu v. Holder*, 640 F.3d 918 (9th Cir. 2011)

The alien did not mention that she was involved with Falun Gong at the airport interview because she was tired and afraid that she would be returned to China if she discussed it. *Id.* at 923. The IJ found the alien not credible based on, in part, the alien’s failure to mention Falun Gong during her initial airport interview. *Id.* The Ninth Circuit stated that the alien’s failure to mention Falun Gong at her airport interview undermined her credibility to some degree. *Id.* at 925. The court explained, “Although Liu’s statements at her airport interview taken alone might not suffice to support the IJ’s adverse credibility finding, they do so when taken together with other discrepancies in Liu’s testimony.” *Id.* at 926. The airport interview statements combined with the improbable explanation for the omission in her uncle’s letter and her shifting account of her uncle’s arrest constituted sufficient evidence to support the IJ’s adverse credibility determination. *Id.*

*Yan Xia Zhu v. Mukasey*, 537 F.3d 1034 (9th Cir. 2008)

The alien was apprehended at the Miami airport carrying a false Malaysian passport. *Id.* at 1037. At her hearing, the IJ asked the alien whether she remembered stating at her airport interview, “I was persecuted by my boss, I work in a factory. He wants me to marry him and he is already married. That is why I ran away from him.” *Id.* at 1040. The alien responded that she did not and then testified, upon further questioning by the IJ, that “the smuggler told us that we need to say it this way.” *Id.* The IJ entered an adverse credibility finding against alien and denied her application for asylum, withholding of removal, and the Convention Against Torture; the Board affirmed. *Id.* at 1038. The Ninth Circuit granted the petition for review. *Id.* at 1046. The Ninth Circuit stated that the alien’s failure to mention her rape and attempted arrests at her airport interview was not a proper basis for an adverse credibility finding under the circumstances. *Id.* at 1041. As the alien’s statements that she left China because her boss wanted to make her his wife and was threatening her family were not inconsistent with her subsequent testimony, the court concluded that they constituted a vague outline of her more detailed testimony at the hearing. *Id.* Moreover, the alien was asked no follow-up questions in response to her answers at the airport, and such factual omissions were not a proper basis for an adverse credibility finding. *Id.* Furthermore, the IJ’s view as to what a smuggler told the alien to say in her airport interview was not sufficient to find that the alien’s subsequent, detailed testimony regarding her rape was not credible. *Id.*

*Chun He Li v. Ashcroft*, 378 F.3d 959 (9th Cir. 2004)

The record included the alien's sworn interview statement to an immigration inspector at the Honolulu Airport, and the inspector testimony at the hearing describing the procedures utilized in 1992 for interviewing arriving aliens. *Id.* at 961. The IJ found the alien not credible based on the alien's failure to mention any persecution when interviewed at the airport. *Id.* at 962. The IJ denied the alien's application for asylum and withholding; the Board affirmed without opinion. *Id.* at 961.

The Ninth Circuit upheld the decision, explaining that the IJ heard substantial evidence from the immigration inspector about the procedures used to ensure that interviews were accurately understood and recorded, including ensuring that both the INS supervisor and the interpreter carefully questioned and evaluated the alien before the interview and if any sign of a language barrier was detected, then the interview would be halted until an appropriate interpreter could be found. *Id.* at 963. Moreover, the alien affirmatively denied any mistreatment by the Chinese government, stated that neither he nor his family had ever been arrested, and explained that he left China for financial reasons. *Id.* Lastly, the court rejected the alien's argument that the IJ did not give sufficient weight to his testimony that he did not mention persecution to the immigration inspector out of fear of retaliation from Chinese officials because the IJ addressed the alien's explanations but noted that immediately after the interview, the alien disappeared and failed to attend the exclusion hearing, and none of his asylum applications mentioned forced sterilization. *Id.*

*Arulampalam v. Ashcroft*, 353 F.3d 679 (9th Cir. 2003)

In an airport interview, the alien expressed fear of persecution if returned to Sri Lanka, stating, "I had a lot of trouble with the army and the government. They were beating us[;] that is why I wanted to escape." *Id.* at 682. The IJ rendered an adverse credibility finding and denied the alien's application for asylum, withholding of removal, and protection under the Convention Against Torture; the Board affirmed. *Id.* at 680. The Ninth Circuit stated that the alien's omission during the airport interview of specific details of torture that were revealed later at the removal hearing did not support a negative credibility finding. *Id.* at 688. The airport interview was "fully consistent with [the alien's] later testimony; the only difference was the level of detail." *Id.* From the moment of his arrival at the Honolulu airport, the alien mentioned "beating" and stated that he was detained by the police. *Id.* The court stated that the IJ's concern about a lack of "great detail about such horrific torture" in the airport statement and the asylum officer's notes was not merited. *Id.*

*Singh v. INS*, 292 F.3d 1017 (9th Cir. 2002)

The Board affirmed the IJ's denial of asylum and withholding of deportation based on an adverse credibility finding. *See id.* at 1018. The Ninth Circuit granted the alien's petition for review, holding that variances between the alien's airport statement and his claims at an exclusion hearing did not support an adverse credibility finding. *Id.* at 1021-24. The court found that the alien's airport statement was unreliable for the following reasons: (1) the alien did not speak English and was not given a translator in his best language; (2) the airport statement did not provide information



as to how the statement was taken; (3) the nature of the airport interview did not provide an adequate opportunity for the alien to explain his circumstances and claim; and (4) the alien's history of abuse may have made him reluctant to reveal information regarding such abuse in an interview with unknown government officials. *Id.*

### **Tenth Circuit**

No published cases.

### **Eleventh Circuit**

*Shkambi v. U.S. Att'y. Gen.*, 584 F.3d 1041 (11th Cir. 2009)

The Board dismissed the appeal of the IJ's order denying the alien's application for asylum and withholding of removal. *Id.* at 1043. The IJ found the alien was not credible because he had not been consistent in describing the severity of his mistreatment in Albania. *Id.* at 1047. The court denied the petition for review and explained that in the alien's case, unlike in *Tang v. U.S. Att'y Gen.*, 578 F.3d 1270 (11th Cir. 2009), the IJ did not rely exclusively on omissions from the alien's airport interview to discredit him. *Id.* at 1051. Unlike in *Tang*, the alien's airport interview statement was not merely a less detailed version of the facts he gave in later statements. *Id.* Rather, the alien omitted entire incidents and other significant facts during his airport interview and again at his credible-fear interview. *Id.* The court rejected the alien's explanation that his fear was the reason for the omissions and inconsistencies. *Id.*

*Lin Lin Tang v. U.S. Att'y Gen.*, 578 F.3d 1270 (11th Cir. 2009)

The Board dismissed the alien's appeal from the IJ's denial of asylum, withholding of removal, and protection under the Convention Against Torture. *Id.* at 1273. The Eleventh Circuit granted the alien's petition for review as it related to an adverse credibility finding. Among other issues, the court disagreed with the IJ's determination that the alien's statements during an airport interview were inconsistent with statements made at her credible fear interview and asylum hearing. *Id.* at 1278-79. In this regard, the Eleventh Circuit noted that other courts have held that statements made during an airport interview may be unreliable as evidence. *Id.* at 1279 (citations omitted). The court also took issue with the IJ's generalized and selective reliance upon the State Department's Country Report because that report actually supported the alien's testimony. *Id.* at 1280.

## II. Asylum Officer Interviews/Notes

### First Circuit

No published cases.

### Second Circuit

*Zhang v. Holder*, 585 F.3d 715 (2d Cir. 2009)

The IJ found the alien was not credible based on the discrepancies between her testimony at the merits hearing and the statements that she had offered in other contexts. *Id.* at 721. The Board affirmed. *Id.*

In rejecting the alien's argument, the court held that an IJ is not precluded from relying on an alien's testimony in an airport interview as long as the record of that testimony represents a sufficiently accurate record of the alien's statements. *Id.* at 721. Applying the factors listed in *Guan v. Gonzales*, 432 F.3d 391, 396 (2d Cir. 2005), the court determined that the record of the alien's airport interview was sufficiently reliable because she was informed about the purpose of the interview and the importance of providing full and accurate testimony, she was asked about her ability to comprehend the questions posed to her, she was given the opportunity to be interviewed in a private area, and the interview was typewritten, signed by the alien and initialed by the alien on each page. *Id.* Because the interview was conducted in a non-coercive and careful manner and appropriately documented by interviewing authorities the alien's subsequent claims that she was nervous and afraid during the interview did not alter the court's analysis. *Id.* at 722. The court further concluded that credible fear interviews were more similar to airport interviews than asylum interviews and therefore warranted close examination to ensure their reliability. *Id.* at 724. In considering the record of the alien's credible fear interview, the court found that the credible fear interview was sufficiently reliable for the same reasons that it found the record of the airport interview to be reliable. *Id.* at 725. The alien's claims that she was nervous and distracted during her credible fear interview did not undermine the reliability of the record. *Id.* at 725.

Finally, the court concluded that the alien's failure to mention the forced abortions and suicide attempt, both of which went to the heart of her asylum claim, at the alien's airport interview and credible fear interview supported the IJ's adverse credibility determination. *Id.* at 726.

*Diallo v. Gonzales*, 445 F.3d 624 (2d Cir. 2006)

The IJ found the alien not credible due to inconsistencies between her interview with an asylum officer and her testimony at her hearing and found her explanations insufficient. *Id.* at 627-28. The alien argued that the asylum officer's summary of her interview was unreliable and the IJ erred by not explicitly analyzing the reliability of the summary. *Id.* at 625. The Board adopted and affirmed the IJ decision. *Id.* at 628. The court noted that the asylum officer's interview was different from the airport interview discussed in *Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004). *Id.* at 631. The court noted that asylum officer interviews are conducted in the first step of

the asylum application process whereas airport interviews are conducted immediately after an alien has been determined to be inadmissible to the U.S. *Id.* The court noted that the Board is still required to consider the reliability of an asylum officer interview before finding that the asylum officer's interview report was reliable in the present case. *Id.* The court stated that the "notwithstanding the asylum officer's failure to provide a verbatim transcript or to record the questions asked, the interview summary provides sufficiently reliable information" as to what occurred during the interview. *Id.* at 633.

### **Third Circuit**

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

The Board dismissed an appeal from the IJ's denial of asylum, withholding of removal, and protection under the Convention Against Torture. *Id.* at 274. The IJ found the alien not credible. In court, the alien had stated "I did say that," to the question whether he told an INS asylum officer that he had participated three times in beating people. *Id.* at 289. On appeal, the Third Circuit granted the petition for review and remanded the case. *Id.* at 294. The court explained that it was "generally skeptical" of using reports of asylum interviews as the basis for finding that an alien lacked credibility where the context for such interviews was unclear. *Id.* at 289. Moreover, the court stated that the record as a whole prompted it to conclude that no reasonable adjudicator would have relied on this statement for the proposition that the alien participated in criminal activities or to find that the alien lacked credibility. *Id.* at 289. The court reached this conclusion in part because it did not know where the alien's interview with the asylum officer occurred and there was no document in the record. *Id.* at 290.

### **Fourth Circuit**

No published cases.

### **Fifth Circuit**

No published cases.

### **Sixth Circuit**

*Jatinder Singh v. Sessions*, 880 F.3d 220 (6th Cir. 2018)

The alien was interviewed by an asylum officer as part of a credible fear interview. *Id.* at 222. The asylum officer found the alien not credible due to inconsistencies on material issues. *Id.* The alien was placed in removal proceedings. *Id.* at 222-23 [issues regarding competency not addressed in this case summary]. The IJ found the alien not credible, in part due to inconsistencies between his credible fear interview and his testimony at his hearing. *Id.* at 223. The Board

affirmed the IJ's decision. *Id.* at 224. The court stated that the alien did not contest on the petition for review the reliability of the credible fear interview but also found that the credible fear interview had sufficient indicia of reliability that it could be relied upon to support an adverse credibility finding. *Id.* at 226. The court noted that the interview summary was not a verbatim transcript but the document clearly indicated that the asylum officer asked follow-up questions so that the alien could develop his claim and there was no indication that the alien was reluctant to provide information or unable to understand the questions. *Id.*

*Koulibaly v. Mukasey*, 541 F.3d 613 (6th Cir. 2008)

The IJ found the alien not credible due to inconsistencies between her testimony at the hearing and the information provided at her interview with an asylum officer, in the Assessment to Refer, regarding her affirmative asylum application. *Id.* at 616, 618-19. The Board affirmed the IJ's decision. *Id.* at 619. After discussing the Ninth Circuit's views regarding the unreliability of an asylum officer's Assessment to Refer as set forth in *Singh v. Gonzales*, 403 F.3d 1081 (9th Cir. 2005), the court stated that there are times when an Assessment to Refer will have sufficient indicia of reliability that it can support an adverse credibility determination. *Id.* at 620-21. The court also said that because the quality of notes varies, there may be times when an Assessment to Refer may be reliable in part and unreliable in other parts. *Id.* at 621. The court found that the asylum officers' notes in the Assessment to Refer detailed only some of the questions asked which made it difficult to determine what question was being answered. *Id.* The notes also did not indicate what language was used in conducting the interview or whether an oath was administered prior to the start of the interview. *Id.* The court further said that the notes were in part vague. *Id.* at 622. Notwithstanding its finding that the asylum officer's notes were not reliable, the court found that the record supported the IJ's adverse credibility finding. *Id.*

## **Seventh Circuit**

*Ferreira v. Lynch*, 831 F.3d 803 (7th Cir. 2016)

The IJ denied the alien's asylum claim after finding the alien not credible and lacked corroborating evidence. *Id.* at 805, 807-8. The adverse credibility finding was based upon inconsistencies between the alien's testimony and her statements to an asylum officer at a credible fear interview regarding the domestic abuse that she experienced from her ex-partner. *Id.* at 805-6. The alien provided an explanation for the inconsistencies and submitted over 400 pages of documentary evidence, including police and doctors' reports. *Id.* at 807. The alien argued on appeal that the notes from the credible fear interview were unreliable and could not support an adverse credibility finding and that the IJ erred by failing to consider material corroborating evidence that she had provided. *Id.* at 808. Board stated that there was no indication that the asylum officer's notes were unreliable, did not mention the police or medical reports regarding the issue of corroborating evidence, and dismissed the alien's appeal. *Id.* The court agreed that the Board erred by not analyzing the reliability of the asylum officer's notes issue, noting that the indicators of unreliability were almost identical to those in *Moab v. Gonzales*, 500 F.3d 656 (7th Cir. 2007), in which the court had found the note unreliable, and that the Board had not mentioned any of the

criteria for reliability or the *Moab* decision. *Id.* at 809. The court observed that the Government argued that there were other indicia of reliability, including presence of an interpreter and the alien's information the asylum officer that she understood the questions. *Id.* The court rejected the Government's argument because it was not based upon the Board's rationale. *Id.* at 809-10.

*Moab v. Gonzales*, 500 F.3d 656 (7th Cir. 2007).

The alien arrived at the airport without proper documents and requested asylum. *Id.* at 657. At the airport and in a later credible fear interview the alien stated that he feared return due to the civil war and a family land dispute. *Id.* On a later application for asylum he stated that he also feared return due to his sexual orientation. *Id.* The alien explanation at his removal hearing for why he did not mention his sexual orientation claim at the airport or the credible fear interview was hard to follow. *Id.* at 658. The IJ denied asylum based on a failure to meet the burden of proof and an adverse credibility determination, based in part on inconsistency between the alien's initial interviews and his claim at his hearing regarding the basis of his fear of return. *Id.* The Board dismissed the appeal and agreed with the IJ that the alien had made questionable additions to his asylum application and inconsistencies before the asylum officer. *Id.* As the court noted, the adverse credibility determination was based primarily on the alien's failure to inform the immigration officers at the airport and the credible fear interview that he feared return due to his homosexuality. *Id.* at 660.

The court stated that it had previously found that airport interviews are not always reliable indicators of an alien's credibility. *Id.* It reiterated that it had favorably cited the non-exclusive list of factors required by the Second Circuit in *Ramsameachire v. Ashcroft*, 357 F.3d 169 (2d Cir. 2004): (1) a record of the interview that summarizes or paraphrases is less reliable than a verbatim account or a transcript; (2) interviews where the questions are not designed to elicit the details of an asylum claim or where an immigration officer fails to ask follow-up questions which would aid development of the alien's account are less reliable; (3) interviews are less reliable where an alien appears to be reluctant to reveal information because of having experienced in the home country prior interrogation sessions or other coercive experiences; and (4) an alien's statements are less reliable if the alien's answers suggest a lack of understanding of either the interpreter or the questions. *Id.* at 660-61.

The court also stated that it had previously added to this list that an alien's evasive answers regarding the fear of persecution may not be reliable where the alien has a reasonable fear of governmental authority where the alien may have been subjected to government abuse or coercion. *Id.* at 661. The court stated the alien's credible fear interview was not a verbatim account, there was no transcript of either the airport or credible fear interview, and it was not clear whether any follow-up questions had been asked during the interviews. *Id.* The court found that the Board's decision was not supported by the record and remanded for further proceedings. *Id.* at 661-62.

## **Eighth Circuit**

*Chakhov v. Lynch*, 837 F.3d 843 (8th Cir. 2016).

An asylum officer found the alien not credible based upon inconsistencies between his asylum application and his interview with the officer. *Id.* at 844. The alien was placed in removal proceedings where an IJ found him not credible based upon inconsistencies and lack of corroborating evidence. *Id.* at 845. The Board dismissed the appeal. *Id.* After the filing of a petition for review, the court granted the Government's motion to remand for the Board to clarify to what extent an IJ may incorporate or weigh an asylum officer's adverse credibility finding. *Id.* at 845-46. The Board again dismissed the appeal after finding that the IJ had not deferred to the asylum officer's credibility determination but had independently considered the totality of evidence in reaching the adverse credibility finding. *Id.* at 845-46. In his petition for review, the alien claimed that the IJ and the Board erred in making an adverse credibility finding and argued that the IJ "merely repeated the asylum officer's findings" without conducting an independent review of the evidence. *Id.* at 846-47. The court disagreed, stating that the IJ had considered the record, testimony, and all prior written and oral statements and observing that the alien admitted to testifying to "evolving facts" regarding his claim. *Id.* at 847. The court found that the IJ could take into account inconsistencies and omissions and had provided specific, cogent reasons for finding the alien not credible. *Id.* at 848.

## **Ninth Circuit**

*Jarnail Singh v. Gonzales*, 403 F.3d 1081 (9th Cir. 2005)

The Board affirmed the IJ's denial of asylum, withholding of removal, and protection under the Convention Against Torture. *Id.* at 1083. The Ninth Circuit granted the alien's petition for review. Among other issues, the court held that the IJ erred in relying on an asylum officer's Assessment to Refer as part of an adverse credibility determination. *Id.* at 1085. The court reasoned that asylum interviews are unreliable points of comparison for a variety of reasons. Regarding the Assessment to Refer, the court noted that: (1) the report contained only a short, conclusory summary of the asylum interview; (2) there was no transcript of the asylum interview; (3) there was no indication of the language used during the interview; (4) there was no indication that the alien had made a sworn oath before the interview; (5) the asylum officer did not testify at the hearing; and (6) the alien was not asked about the Assessment at the removal hearing. *Id.* at 1089-90. Based on the foregoing, the Ninth Circuit held that the Assessment to Refer was not entitled to much (if any) weight in assessing credibility. *See id.*

## **Tenth Circuit**

No published cases.

## **Eleventh Circuit**

*Indrawati v. U.S. Att’y Gen’l*, 779 F.3d 1284 (11th Cir. 2015).

The alien filed an affirmative asylum application, with supporting documentation and a 10-page statement from the alien, with the then INS which scheduled an interview with an asylum officer. *Id.* at 1290-91. The alien’s statement related information about two events, one of which was an embellishment of the event which resulted in the alien leaving Indonesia and the second was a fabricated event. *Id.* at 1291. The parties dispute whether the asylum officer relied upon or referenced the contents of the alien’s statement at the interview. *Id.* The asylum officer undisputedly questioned the alien about her application, took three pages of notes, and made corrections to her application on which he also made red checkmarks. *Id.* The asylum officer a week after the interview wrote a report recommending that the alien be granted asylum. *Id.* The alien’s statement contained red checkmarks, similar to those made on the asylum application at the interview. *Id.* The recommendation relied on, and quoted from, the alien’s statement. *Id.* The INS granted the alien asylum based upon this recommendation. *Id.*

Five years later, the alien received a Notice of Intent to Terminate Asylum Status on the ground that the United States Citizenship and Immigration Services (CIS) had information – a memorandum of an INS interview with the alien’s mother who said that she knew of nothing that would have made the alien seek asylum – indicating that the asylum claim had been fabricated. *Id.* at 1291-92. The alien appeared for an interview before an asylum officer at which she stated that she had only signed the asylum application, had not seen her statement, and was not questioned by the prior asylum officer about anything other than her asylum application. *Id.* at 1292. The asylum officer found that the alien had submitted a fraudulent asylum application, the unembellished version of the one event did not rise to the level of persecution, and terminated the alien’s asylum status. *Id.* The alien was also aware that the attorney who had prepared her asylum application and her friend had been indicted, with the attorney pleading guilty, to immigration fraud involving asylum applications. *Id.*

The alien was placed in removal proceedings where the IJ found that the alien had filed a frivolous asylum application but allowed her to file a second application for withholding of removal. *Id.* at 1292-93. The alien filed that application and an application for adjustment of status. *Id.* at 1293. She later withdrew her application for withholding and proceeding only on her adjustment application and claim that her asylum application was not frivolous. *Id.* Regarding the frivolous asylum claim, the IJ heard the testimony of the alien and both asylum officers and considered the color photocopy the alien’s statement, which was authenticated by the first asylum officer, the INS memorandum regarding the interview with the alien’s mother, and the Fraud Verification Memo regarding the investigation into the fraud perpetuated by the attorney who prepared the alien’s asylum application. *Id.* at 1294. The IJ credited the first asylum officer’s testimony regarding the interview and how the alien’s statement was checkmarked, found that the alien knowingly testified falsely at her asylum interview and thus knowingly filed a frivolous asylum application. *Id.* at 1295. The IJ also relied upon the testimony of the second asylum officer and the fraud report. *Id.* The Board dismissed the alien’s appeal. *Id.* at 1296-97. The court agreed with the Board that the alien’s claim that she should have been access to her original statement, on which the first asylum officer placed red checkmarks, so that she could show that the checkmarks were made at a later

date was speculative. *Id.* at 1300. The court then discussed the admission and reliance on the fraud report to find no due process violation. *Id.* at 1300-02. The court denied the petition for review. *Id.* at 1305.

NOTE: Although this case does not explicitly address any standards for determining the reliability of Government documents, it contains a thorough discussion of the evidence presented and how that evidence was considered which illustrates the type of consideration given in determining where admission or consideration of Government documents violates Due Process.

### **III. Overseas DOS/DHS Investigation Reports**

#### **First Circuit**

No published cases.

#### **Second Circuit**

*Lin v. U.S. Dep't of Justice*, 459 F.3d 255 (2d Cir. 2006)

The Board reversed an IJ decision in which the IJ found that the asylum applicant's right to confidentiality had been compromised through a DOS/INS overseas investigation and that the investigative report finding the certificate of release from prison was a forgery. *Id.* at 258. The Board found that the prison certificate was a forgery, the alien's testimony was not credible, and that the alien's confidentiality had not been violated. *Id.* The court found that the government had violated the alien's regulatory guarantee of confidentiality set forth at 8 C.F.R. § 208.6, the adverse credibility finding was not supportable, and the overseas investigative report was not reliable. *Id.* at 258-59.

The court noted the brevity of the response to the request for investigation and the resulting report. *Id.* at 260. The court stated that the investigation began with a letter from INS to the consulate requesting verification of documents to support a "claim for benefits," attached to which was an unredacted copy of the prison certificate of release. *Id.* at 260-61. In response to this request, the consulate received a call from the Prison Affairs Section of Prison Administration Bureau of Guangdong Province which related that the certificate of release document was fabricated and that there was no No. 7 Prison in Guangzhou. *Id.* at 260. The court stated that the Government had a variety of means to authenticate a document without revealing confidential information about the alien. *Id.* at 266.

It said that overseas investigations may be needed but cautioned that the opinion of a foreign government "may be of limited probative value if the country has an ulterior motive to deny the existence of the document." *Id.* As to the reliability of the consular investigative report, the alien argued that the report was not trustworthy because the Prison Bureau knew that the document related to the alien's asylum application. *Id.* at 268. The court agreed with the IJ that the consular report was unreliable because it was "entirely based on the opinions of Chinese government



officials who appear to have powerful incentive to be less than candid on the subject of their government's persecution of political dissidents." *Id.* at 269-70. The court stated that while it has not imposed rigid standards on what is required for reliability, there are some standards that must be met, such as sufficient detail, and "(i) the identity and qualifications of the investigator(s); (ii) the objective and extent of the investigation; and (iii) the methods used to verify the information discovered." *Id.* at 270-71. The court then found that the overseas report did not meet this standard as the report did not provide information regarding the competency or qualifications of the investigators, who received the phone call from the prison officials, where or when the phone call was received, the names or titles of the prison officials spoken to at the prison, when the conversation occurred, whether the conversation was in English or Mandarin, whether the people on the phone knew or understood and accurately relayed the conversation to the person who wrote the report, or the methods used to verify the information. *Id.* at 271 -72.

*Borovikova v. U.S. Dep't of Justice*, 435 F.3d 151 (2d Cir. 2006)

The alien sought asylum from Russia because she was Jewish but an IJ denied asylum finding the alien was not credible. *Id.* at 154, 156. The IJ found her not credible on three bases, any one of which the court found supportable. *Id.* at 157. In relevant part, the IJ found the alien not credible because the birth certificate provided was likely fraudulent. *Id.* at 156-7. The IJ relied for this finding on an Embassy report in which the INS employee stationed at the Embassy in Moscow identified two inconsistencies in the birth certificate that did not conform to the types of birth certificates issued by the government and provided specifics about the two differences. *Id.* at 157. The IJ found that the alien's rebuttal evidence – an affidavit from another woman from Ukraine who also had to obtain a replacement birth certificate, a letter from a Ukrainian official regarding the registry of the alien's birth, and speculation regarding numbers on the document that might constitute registration numbers – did not overcome the evidence from the Embassy report. *Id.* 157-58. The court found that while the IJ could have reasonably accepted that rebuttal evidence, it was not so persuasive that the IJ should have done so. *Id.* at 158.

### **Third Circuit**

*Ezeagwuna v. Ashcroft*, 325 F.3d 396 (3d Cir. 2003)

The IJ denied asylum after finding the alien not credible, which finding was based heavily upon a letter from the DOS Director of Country Reports, which indicated that documents provided by the alien were fraudulent. *Id.* at 403. The Board dismissed the alien's appeal and found that DOS letter properly admitted and considered by the IJ. *Id.* at 404. The court found that the IJ and the Board erred in relying on the DOS letter because that letter lacked reliability and trustworthiness. *Id.* at 406. The court noted that the letter referenced documents that were found to be fraudulent but those documents were not attached to the letter. *Id.* at 402. The court found that the letter involved multiple layers of hearsay and appeared to repeat the information contained in a prior letter from Vice-Consul at the Embassy in Cameroon, the original of which was not provided, without any additional investigation or even communication with the author of the earlier letter. *Id.* at 406-7. Moreover, the DOS letter writer had no personal or second-hand knowledge of the

investigation, contained no information regarding the investigation, its methods or how it was conducted, and had a “complete dearth” of information about the investigator or the investigation. *Id.* at 407-8. The Vice-Consul letter itself was problematic for the same reasons. *Id.* at 401-2, 406-7. The court was additionally concerned that the INS was attempting to use the prestige of the DOS to give greater credibility to the contents and thus to make its case. *Id.* at 407. The court found that the alien's Due Process rights were violated because the Board relied almost entirely on the DOS letter to find the alien not credible. *Id.* at 408. The court also found that the Board erred in denying the alien's motion to remand to consider the INS memorandum on the proper procedures to be followed in overseas investigations because the Board mistakenly found that the memorandum was previously available because it was dated June 2000 whereas the document was actually issued on June 2001. *Id.* at 411.

### **Fourth Circuit**

*Anim v. Mukasey*, 535 F.3d 243 (4th Cir. 2008)

An IJ denied asylum based upon a DOS letter which indicated that documents provided by the alien were fraudulent. *Id.* at 248. The IJ had asked the DHS to refer the alien's birth certificate, convocations, notarized Cameroonian affidavits, and a letter from the alien's supervisor in Cameroon, for an overseas investigation and to the DHS forensics laboratory for analysis. *Id.* at 250. In response, the DHS received a letter from the DOS in Washington, D.C. which reported the results of the investigation conducted by the Embassy in Cameroon. *Id.* The IJ stated that he could not determine if the alien's confidentiality had been violated because the DOS letter contained insufficient information about how the investigation was conducted or how the documents were determined to be fraudulent. *Id.* at 251. The IJ gave less weight to the DOS report due to the alien's concerns and objections. *Id.* at 251-52. The Board affirmed the IJ's decision but found that the alien's confidentiality had not been breached. *Id.* at 248, 252. The alien claimed in her petition for review that the investigation violated her regulatory right to confidentiality and that the report “lacked any meaningful indicia of reliability.” *Id.* After finding that the investigation violated the alien's right to confidentiality, the court examined whether the IJ and the Board erred in relying on the DOS letter. *Id.* at 253-56. The court found that the DOS letter was insufficiently reliable and thus its use was fundamentally unfair. *Id.* at 256. The court found that the document was composed of multiple layers of hearsay and that the letter was written by a person in the U.S. who did not explain how she received the information or identify the persons in the chain of communication. *Id.* at 257. The court observed that the letter writer could not comment on the trustworthiness of the information because she did not communicate directly with the persons involved. *Id.* The court also found that the letter contained insufficient information regarding how the investigation was conducted and did not meet the minimum standards set forth in the INS memorandum on overseas investigations. *Id.* at 257-58. The court also stated that the IJ appeared to rely on the general prestige and competence of the DOS when determining whether the letter was sufficiently reliable. *Id.* at 258.

## **Fifth Circuit**

No published cases.

## **Sixth Circuit**

*Alexandrov v. Gonzales*, 442 F.3d 395 (6th Cir. 2006)

The IJ denied asylum after finding the alien not credible, relying on two documents provided by the INS which indicated that documents provided by the alien were fraudulent. *Id.* at 397, 399. The first document from the Embassy in Sofia, Bulgaria, consisted of four paragraphs indicating that a court conviction document, a subpoena issued by the National Security Branch, and medical documents were fraudulent. *Id.* at 399-400. The second document was issued 7 months later by the Vice-Consul at the Embassy. *Id.* at 400. That document was two paragraphs long and dealt with two errors contained in the first document. *Id.* In addition, the INS had an official from DHS testify regarding the forged documents, who stated that he had spoken to the author of the second document that morning, but was only asked by the INS to testify that the document was from the Embassy. *Id.* at 400-01. The official, on cross-examination, testified about the general procedures for preparation of the reports, contradicted some of the information in the report, stated that he did not personally know how the Embassy determined that the Bulgarian court did not have the court decision involving the alien, did not know who the investigator was or the person who had authored the first document, and did not know how other information was obtained. *Id.* at 401-3. The court found that the two documents in this case were less reliable than the letter found to be unreliable in *Ezeagwuna v. Ashcroft*, 325 F.3d 396 (3d Cir. 2003). *Id.* at 407. The court noted that very little about the investigation was known other than the conclusions. *Id.*

## **Seventh Circuit**

No published cases.

## **Eighth Circuit**

*Banat v. Holder*, 557 F.3d 886 (8th Cir. 2009)

The IJ found the alien not credible, relying on a DOS investigation report which indicated that the hard-written letter from the terrorist group which had kidnaped and the alien was fraudulent. *Id.* at 889. The Board affirmed the adverse credibility determination and found that the admission of the DOS report did not violate the alien's Due Process rights. *Id.* The court stated that there must be sufficient evidence for an IJ "to determine the investigation's reliability and trustworthiness without surrendering that function to the author of the report." *Id.* at 890. The court found the investigation report lacked reliability because it failed to provide any details about the investigation, the qualifications or experiences of the investigators, or whether there was an attempt to verify the information received from the unidentified contact person. *Id.* at 891-92. The court found that the document did not meet any of the factors for reliability set forth by the Second

Circuit in *Lin v. U.S. Dep't of Justice*, 459 F.3d 255 (2d Cir. 2006). *Id.* at 891. The court found that the investigation report lacked reliability and trustworthiness and thus the IJ's reliance on the document violated the alien's Due Process rights. *Id.* at 892-93.

## **Ninth Circuit**

*Angov v. Lynch*, 788 F.3d 893 (9th Cir. 2015)

An IJ denied asylum finding that the alien had not established that he was persecuted because of his Roma ethnicity and was not credible. *Id.* at 896-97. In making the adverse credibility determination, the IJ relied on a DOS letter which indicated that an overseas investigation had concluded that the subpoenas to report to police provided by the alien were forgeries. *Id.* The Board adopted and affirmed the IJ's decision and denied the alien's motion to remand. *Id.* at 897.

The panel majority rejected the Second Circuit's approach in *Lin v. U.S. Dep't of Justice*, 459 F.3d 255 (2d Cir. 2006) that an overseas investigation letter or report contain certain types of information in order to be considered reliable. *Id.* at 900. The court found that as an appellate court it was required to consider the reasonableness of the agency's conclusions and not to develop criteria regarding the admissibility of evidence. *Id.* The court found that the Second Circuit's approach "smothered" the DOS consulate staff's informal process of verifying information in "layers of procedural complexity that will prove impossible to administer in practice." *Id.* at 902. The panel majority continued by stating that DOS overseas investigation letters or reports are not required to be excluded for consideration by an IJ because they do not include sufficient identifying detail. *Id.*

The court noted that the letter in the instant case lacked certain indicia of reliability but that alone was insufficient to reverse the IJ's adverse credibility determination. *Id.* The court stated that an alien can rebut the factual based conclusions in an overseas investigation, observed that the alien had done so regarding the existence of two of his purposed addresses, and then pointed out other ways the alien could have potentially rebutted that DOS letter's conclusions. *Id.* at 904. The court also stated that some of the information in the DOS letter was similar to country condition information provided by the DOS in its Country Reports, which are prepared by the same people using the same methods so that casting doubt on the former would cast doubt on the latter. *Id.* at 904. The panel majority then found that the DOS letter, as a government document, was entitled to the presumption of regularity in its preparation. *Id.* at 905. The court also stated that an underlying assumption in the Second Circuit's approach was that exclusion of DOS investigation reports or letters would lead to more comprehensive and thus more reliable DOS reports, which the panel majority felt would not likely happen. *Id.* at 906. The court found that the DOS letter in the instant case, along with the evidence submitted by the alien, was "a paragon of reliability." *Id.* at 909. The panel majority then found no error in the admission, consideration, or reliance of/on the DOS overseas letter and upheld the adverse credibility finding. *Id.* at 910. The dissent would have joined the Second Circuit in requiring certain indicia of reliability to be provided in an overseas investigative report or letter. *Id.* at 910-916.

**Tenth Circuit**

No published cases.

**Eleventh Circuit**

No published cases.