IMMIGRATION LAW

IN THE FOURTH CIRCUIT

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AGGRAVATED FELONIES

CATEGORICAL APPROACH

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United States v. Royal, 731 F.3d 333, 341–42 (4th Cir. 2013) (non-INA)
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(1) The Fourth Circuit held that "offenses are divisible when they consist of alternative elements through which the offense may be proved."
(2) "By 'elements,' the [*Descamps*] Court meant factual circumstances of the offense that the jury must find 'unanimously and beyond a reasonable doubt.'"
(3) The Fourth Circuit then went on to review how Maryland courts generally instruct juries with respect to the offense at issue in that case—second-degree assault. *Id.* at 341.
(4) The Fourth Circuit found that the statute was divided between alternative means of committing the offense, as opposed to alternative elements, and therefore, application of the modified categorical approach was inappropriate.

United States v. Cabrera-Umanzor, 728 F.3d 347 (4th Cir. 2013) (non-INA)
The Maryland child abuse statute is generally divisible, but "general divisibility is not enough; a statute is divisible for purposes of applying the modified categorical approach only if at least one of the categories into which the statute may be divided constitutes, by its elements, a crime of violence," or in other words, a removable offense. *Id.* at 352.
Holding: Maryland's former child abuse statute did not require the use or threatened use of physical force and this offense can be committed without performing any of the enumerated crimes of violence under the Sentencing Guidelines; thus, it is not categorically a crime of violence.

Mondragon v. Holder, 706 F.3d 535 (4th Cir. 2013)
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Salem v. Holder, 647 F.3d 111 (4th Cir. 2011)
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Statutory Interpretation of Former INA § 212(c): (1) Use of the term "admissions" in former INA § 212(c) to bar discretionary relief for aliens convicted of an aggravated felony did not necessarily preclude applicability of § 212(c) to aliens who had been admitted and were facing deportation; and (2) "aggravated felony" as used in amendment to INA applied to all aggravated felonies, regardless of the date of conviction.

SPECIFIC AGGRAVATED FELONY CATEGORIES

ATTEMPT

United States v. Dozier, 848 F.3d 180 (4th Cir. 2017) (non-INA)
Attempt Statutes:
West Virginia's attempt statute, W. Va. Code § 61-11-8, is a categorical match to the federal generic definition of attempt. When a defendant is convicted under a state's general attempt statute, two sets of elements are at issue; the elements of attempt *and* the elements of the underlying, attempted offense.

SEXUAL ABUSE OF A MINOR—INA § 101(a)(43)(A)

Larios-Reyes v. Lynch, 843 F.3d 146 (4th Cir. 2016)
A conviction under **Md. Code Ann., Crim. Law § 3-307(a)(3)** is not an aggravated felony under INA § 101(a)(43)(A) because it does not require, as an element, a purpose associated with sexual gratification.
Federal Generic Definition: The federal generic definition of "sexual abuse of a minor" is "a perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification."

Amos v. Lynch, 790 F.3d 512 (4th Cir. 2015)
Applicable Statute: former Md. Code, Art. 27 § 35A
A conviction under former Maryland statute for "causing abuse to a child" did not qualify as an aggravated felony under the generic federal crime of "sexual abuse of a minor." Further, the BIA's consideration in *Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999), of the definition of "sexual abuse" at 18 U.S.C. § 3509 did not qualify as a definitive standard or definition, but only as a guide in determining the types of crimes that constitute "sexual abuse." Therefore, the BIA's analysis in *Rodriguez-Rodriguez* was afforded only *Skidmore* deference and former Md. Code, Art. 27 § 35A was found to include conduct beyond the affirmative acts of watching or failing to intervene in the commission of acts of sexual abuse.

United States v. Perez-Perez, 737 F.3d 950 (4th Cir. 2014) (non-INA)
The Fourth Circuit held that after the alien's illegal reentry, his North Carolina conviction for taking indecent liberties with a minor under N.C. Gen. Stat. § 14-202.1(a) qualified categorically as sexual abuse of a minor, and therefore as a crime of violence within the meaning of the reentry Sentencing Guideline. Relying on language from its decision in *United States v. Cabrera-Umanzor*, 728 F.3d 347, 350 (4th Cir. 2013), the Fourth Circuit found that the elements of the North Carolina statute "correspond in substance" with the Court's generic definition of sexual abuse of a minor and that each offense contemplated criminalization of the same conduct. Generic definition of "sexual abuse of a minor" set forth in *Diaz-Ibarra* (see below) applied.

United States v. Cabrera-Umanzor, 728 F.3d 347 (4th Cir. 2013) (non-INA)
Applicable Statute: former Md. Code, Art. 27 § 35C.
Conviction under former Maryland child abuse statute did not constitute sexual abuse of a minor under the federal Sentencing Guidelines. Generic definition of "sexual abuse of a minor" set forth in *Diaz-Ibarra* (see below) applied.

United States v. Rangel-Castaneda, 709 F.3d 373 (4th Cir. 2012) (non-INA)
Applicable Statute: Tenn. Code Ann. § 39-13-506
A conviction under the statutory rape statute in Tennessee did not constitute "sexual abuse of a minor" for purposes of the federal Sentencing Guidelines. The generic federal definition of statutory rape sets the age of consent at 16, and the Tennessee statute sets age of consent at 18. Therefore, the Tennessee statute is overbroad.

United States v. Diaz-Ibarra, 522 F.3d 343 (4th Cir. 2008) (non-INA)
Applicable Statute: former Ga. Code Ann. § 16-6-4

Generic Definition of Sexual Abuse of a Minor: A perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification.
Holding: A conviction under former Ga. Code Ann. § 16-6-4 categorically constituted sexual abuse of a minor for purposes of the federal Sentencing Guidelines.

DRUG TRAFFICKING/ILLICIT TRAFFICKING—INA § 101(a)(43)(B)

United States v. Amaya-Portillo, 423 F.3d 427 (4th Cir. 2005) (non-INA)
Applicable Statute: Md. Code Ann., Crim. Law § 5-601(c)(1)/former Md. Code, Art. 27, 287(e)
"Felony" under the CSA means "any Federal or State offense classified by applicable Federal or State law as a felony." *Id.* at 435.
The Fourth Circuit found that since the defendant's cocaine possession offense was not classified as a felony by federal or Maryland law, the offense was not an "aggravated felony" under section 2L1.2 of the Sentencing Guidelines, which incorporates the definition of aggravated felony under INA § 101(a)(43).

ARSON OR FIREARMS OFFENSES—INA § 101(a)(43)(E)

Espinal-Andrades v. Holder, 777 F.3d 163 (4th Cir. 2015)
Applicable Statute: Md. Code Ann., Crim. Law § 6-102.
A conviction under Maryland's arson-in-the-first-degree statute qualifies as an aggravated felony under INA § 101(a)(43)(E). An arson conviction may qualify as an aggravated felony under INA § 101(a)(43)(E) in that it constitutes "an offense described in" 18 U.S.C. § 844(i), a federal arson statute. The Fourth Circuit found that use of the term "described in" at INA § 101(a)(43)(E) was intended to be broader than use of the term "defined in" at other parts of the statute, e.g., INA § 101(a)(43)(B), (C), and (D). The Fourth Circuit thus surmised that Congress intended for the aggravated felony offenses "described in" 18 U.S.C. § 844(i) to include crimes that are not "defined in"—and are not identical to—the federal statute.

CONSPIRACY—INA § 101(a)(43)(U)

United States v. McCollum, 885 F.3d 300 (4th Cir. 2018) (non-INA)
Conspiracy under the Sentencing Guidelines requires an overt act, but <u>conspiracy under the INA does not</u>. In reviewing cases analyzing criminal statutes under the Sentencing Guidelines, it is important to consider that the Sentencing Commission requires courts to examine a crime's *contemporary* meaning, whereas statutes including the INA adopt the *common law* definition of statutory terms.

Etienne v. Lynch, 813 F.3d 135 (4th Cir. 2015)
Conspiracy Defined: The term "conspiracy" under INA § 101(a)(43)(U) need not require proof of an overt act; the court must look to the state law definition of "conspiracy." Maryland adopted the common law definition, which does not require an overt act in furtherance of the agreement. *Townes v. State*, 548 A.2d 832, 834 (Md. Ct. App. 1988).
Scope of INA § 101(a)(43)(U): "Any state-law conspiracy to commit one of the substantive offenses listed in the INA . . . qualifies as an 'aggravated felony' under the categorical approach." *Etienne v. Lynch*, 813 F.3d at 145. The crime of conspiracy "to violate the controlled dangerous substances law" in Maryland accordingly qualifies as an aggravated felony.

CRIME OF VIOLENCE[1]—INA § 101(a)(43)(F)

United States v. Simmons, 917 F.3d 312 (4th Cir. 2019)
North Carolina assault with a deadly weapon on a government official under N.C. Gen. Stat. § 14-34.2 is categorically not a crime of violence. Negligent or merely accidental conduct does not constitute a *use* of physical force under the force clause. A crime that can be committed with culpable negligence is categorically disqualified as a crime of violence.

United States v. Simms, 914 F.3d 229 (4th Cir. 2019)
Conspiracy to commit Hobbs Act robbery in violation of 18 U.S.C. § 1951 is not categorically a crime of violence. The definition of a crime of violence under 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague.

United States v. Hammond, 912 F.3d 658 (4th Cir. 2019)
New York statutory robbery, irrespective of the degree of the offense, is a crime of violence, because it necessarily involves the use, attempted use, or threatened use of physical force against the person of another.

United States v. Hodge, 902 F.3d 420 (4th Cir. 2018) (non-INA)
Maryland misdemeanor reckless-endangerment does not qualify as a crime of violence under 18 U.S.C. § 16 in light of *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Respondent received a mandatory sentence enhancement under the ACCA based on three prior convictions, including a 1998 conviction for Maryland misdemeanor reckless-endangerment. He argued that his ACCA-enhanced sentence is now invalid in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Government conceded that Respondent's conviction only qualified as a violent felony under the now-void "residual clause" of the ACCA. The Fourth Circuit agreed, reasoning

[1] The definition of a "crime of violence" under the Federal Sentencing Guidelines is slightly different from the definition of a "crime of violence" under the INA. However, to the extent that the definitions partially overlap, cases discussing the Federal Sentencing Guidelines "crime of violence" definition are included in this outline.

that a Maryland reckless-endangerment conviction cannot constitute a violent felony under the "force clause" of the ACCA because the force clause requires a mens rea greater than recklessness.

United States v. Townsend, 886 F.3d 441 (4th Cir. 2018) (non-INA)
North Carolina assault with a deadly weapon with intent to kill under N.C. Gen. Stat. § 14-32(a) is categorically a violent felony under the force clause of the ACCA. The intent to kill element requires proof of a specific intent to kill, which requires proving a mens rea greater than negligence or recklessness.

United States v. Smith, 882 F.3d 460 (4th Cir. 2018) (non-INA)
North Carolina voluntary manslaughter is a crime of violence under the force clause of the ACCA because it requires, as an element, the use, attempted use, or threatened use of physical force against the person of another. More generally, voluntary manslaughter is a crime of violence if it "proscribes conduct that would otherwise be murder except for circumstances that served as partial justification for the conduct."

United States v. Middleton, 883 F.3d 485 (4th Cir. 2018) (non-INA)
South Carolina involuntary manslaughter is NOT a violent felony under the force clause of the ACCA because it encompasses conduct that does not involve violent physical force, such as selling alcohol to a minor. Although the "use of physical force" under the ACCA includes force applied directly or indirectly, this does not mean that *any* action leading to bodily injury necessarily qualifies as the use of violent physical force.

United States v. McCollum, 885 F.3d 300 (4th Cir. 2018) (non-INA)
Conspiracy under the Sentencing Guidelines requires an overt act, but conspiracy under the INA does not. In reviewing cases analyzing criminal statutes under the Sentencing Guidelines, it is important to consider that the Sentencing Commission requires courts to examine a crime's *contemporary* meaning, whereas statutes including the INA adopt the *common law* definition of statutory terms.

United States v. Covington, 880 F.3d 129 (4th Cir. 2018) (non-INA)
Unlawful wounding under W. Va. Code § 61-2-9(a) is categorically a crime of violence under the force clause of U.S.S.G. § 4B1.2(a) (same as 18 U.S.C. § 16(a)). The district court erred in relying on *United States v. Torres-Miguel*, 701 F.3d 165 (4th Cir. 2012), as *United States v. Castleman*, 134 S. Ct. 1405 (2014), had abrogated the direct-versus-indirect-use-of-force distinction articulated in *Torres-Miguel*. In addition, the district court erred in considering "hypothetical scenarios" from cases that did not interpret the criminal offense at issue in this case.

United States v. Salmons, 873 F.3d 446 (4th Cir. 2017) (non-INA)
West Virginia aggravated robbery under W. Va. Code § 61-2-12 (1961) is a crime of violence under the force clause of U.S.S.G. § 4B1.2(a) (same as 18 U.S.C. § 16(a)) because it requires, as an element, the use, attempted use, or threatened use of physical force against the person of another.

United States v. Gattis, 877 F.3d 150 (4th Cir. 2017) (non-INA)
Generic robbery is defined as "the misappropriation of property under circumstances involving immediate danger to the person." While North Carolina robbery is **NOT a crime of violence** under the "force clause" of U.S.S.G. § 4B1.2(a)(1), it is a crime of violence under U.S.S.G. § 4B1.2(a)(2) because it is a categorical match to the generic definition of robbery.
NOTE: Although the definition of a crime of violence under the INA is different from that under the Sentencing Guidelines, as it does not include a list of enumerated crimes, the Fourth Circuit's detailed discussion of the generic crime of robbery may be helpful in examining robbery convictions in the immigration context.

United States v. Diaz, 865 F.3d 168 (4th Cir. 2017) (non-INA)
The federal offense of interference with a flight crew under 49 U.S.C. § 46504 is NOT a crime of violence as defined by the "force clause" of 18 U.S.C. § 16(a): The use of the word "or" in the definition of a crime does not automatically render the crime divisible. The federal statute criminalizing interference with a flight crew under 49 U.S.C. § 46504 is not divisible, because the phrase "assaulting or intimidating" creates different means of committing a single element, rather than listing alternative elements. Section 46504 is not categorically a crime of violence because "assault" only requires "forcible touching," which does not rise to the requisite level of "violent force."

United States v. Burns Johnson, 864 F.3d 313 (4th Cir. 2017) (non-INA)
North Carolina robbery with a dangerous weapon under N.C. Gen. Stat. § 14-87 is categorically a crime of violence under 18 U.S.C. § 924(e)(2)(B)(i) because it requires, as an element, the use, attempted use, or threatened use of physical force against the person of another.

United States v. Reid, 861 F.3d 523 (4th Cir. 2017) (non-INA)
A conviction under Virginia Code § 18.2-55, for knowingly and willfully inflicting bodily injury on any employee, supervisor, or non-prisoner lawfully in a correctional facility, is a violent felony under 18 U.S.C. § 924(e)(2)(B)(i) because it requires, as an element, the use, attempted use, or threatened use of physical force against the person of another. **The "use of physical force" under the ACCA includes force applied directly or indirectly.**

Castendet-Lewis v. Sessions, 855 F.3d 253 (4th Cir. 2017)
Virginia statutory burglary is not categorically an aggravated felony under INA § 237(a)(2)(A)(iii). A statute is indivisible when it enumerates various factual means of committing a single element, rather than listing elements in the alternative. The Virginia burglary statute is indivisible as it provides different factual means that constitute entry and location, and it is categorically not an aggravated felony because it proscribes conduct that falls outside of the general federal offense of burglary.

United States v. Riley, 856 F.3d 325 (4th Cir. 2017) (non-INA)
A conviction in Maryland for robbery with a dangerous weapon qualifies as a crime of violence under the residual clause in U.S.S.G. § 4B1.2(a). **NOTE:** Unlike the INA, the Sentencing Guidelines are NOT subject to vagueness challenges under the Due Process Clause, leaving the residual clause of the career offender guideline intact.

United States v. Mack, 855 F.3d 581 (4th Cir. 2017) (non-INA)
North Carolina first-degree burglary under N.C. Gen. Stat. § 14-51 is categorically a crime of violence as defined in U.S.S.G. § 4B1.2(a). The residual clause in § 4B1.2(a)(2) is not void for vagueness because, unlike the INA, the Sentencing Guidelines are not subject to a vagueness challenge under the Due Process Clause.

United States v. Evans, 848 F.3d 242 (4th Cir. 2017) (non-INA)
The federal offense of carjacking is a crime of violence under the force clause because it requires, as an element, the use, attempted use, or threatened use of physical force against the person or property of another.

United States v. Doctor, 842 F.3d 306 (4th Cir. 2016) (non-INA)
South Carolina strong arm robbery is a crime of violence under the force clause because it requires, as an element, the use, attempted use, or threatened use of physical force against the person of another. This does not affect the holding in *United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016), in which the Court concluded that North Carolina common law robbery does not categorically qualify as a violent felony under the ACCA.

United States v. Alfaro, 835 F.3d 470 (4th Cir. 2016) (non-INA)
A forcible sex offense (crime of violence) under U.S. Sentencing Guidelines § 2L1.2 does NOT require, as an element, the intent to gratify sexual urges. The definition of a "sex offense" is an offense involving sexual conduct with another person. A sex offense is "forcible" if it is not consensual. Applying these definitions, the least culpable version of Md. Code Ann., Crim. Law § 3-307(a)(1) categorically qualifies as a forcible sex offense and thus a crime of violence under the Sentencing Guidelines.

United States v. Barcenas-Yanez, 826 F.3d 752 (4th Cir. 2016)

Texas aggravated assault with a deadly weapon under Texas Penal Code § 22.02(a) is not a crime of violence under the reentry sentencing guideline. The statute is overbroad because it includes mere recklessness. Moreover, it is not divisible because the Texas Court of Criminal Appeals has determined that jury unanimity as to mens rea is not required for an aggravated assault conviction under § 22.02(a). *Landrian v. State*, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008).

United States v. McNeal, 818 F.3d 141 (4th Cir. 2016) (non-INA)
Armed bank robbery under 18 U.S.C. § 2113(d) is a crime of violence: Bank robbery under 8 U.S.C. § 2113(a) is a lesser included offense of armed bank robbery under 8 U.S.C. § 2113(d). Therefore, § 2113(d) has four elements: (1) the defendant took, or attempted to take, money belonging to, or in the custody, care, or possession of, a bank, credit union, or saving and loan association; (2) *the money was taken "by force and violence, or by intimidation"*; (3) the deposits of the institution were federally insured; and (4) in committing or attempting to commit the offense, the defendant assaulted any person, or put in jeopardy the life of any person, by the use of a dangerous weapon or device. *United States v. Davis*, 437 F.3d 989, 993 (10th Cir. 2006). Federal crimes involving takings "by force and violence, or intimidation" are crimes of violence, because "by force and violence" requires the use of physical force and "by intimidation" requires the threatened use of physical force, in accordance with the statutory language of 18 U.S.C. § 924(c)(3). Accordingly, both armed bank robbery under § 2113(d) and bank robbery under § 2113(a) constitute crimes of violence.

United States v. Fuertes, 805 F.3d 485 (4th Cir. 2015) (non-INA)
Sex trafficking by force, fraud, or coercion under 18 U.S.C. § 1591(a) categorically is <u>not</u> a crime of violence under the force clause: A conviction under 18 U.S.C. § 924(c) for possession and use of a firearm in relation to a crime of violence was erroneous because the crime of "sex trafficking by force, fraud, or coercion," in violation of 18 U.S.C. § 1591(a), is not categorically a crime of violence. The crime of sex trafficking by force, fraud, or coercion categorically does not qualify as a crime of violence under the "force clause," § 924(c)(3)(A), since § 1591(a) specifies that sex trafficking may be committed nonviolently – through the use of fraudulent means.

United States v. Marlon Flores-Granados, 783 F.3d 487 (4th Cir. 2015) (non-INA)
Second-degree kidnapping under N.C. Gen. Stat. § 14-39 categorically is a crime of violence under the Sentencing Guidelines: Generic kidnapping involves: (1) unlawful restraint or confinement of the victim, (2) by force, threat or deception, or in the case of a minor or incompetent

individual without the consent of a parent or guardian, (3) either for a specific nefarious purpose or with a similar element of heightened intent, or (4) in a manner that constitutes a substantial interference with the victim's liberty. In this case, because the North Carolina statute requires a specific nefarious purpose for conviction, it falls within the generic definition and accordingly constitutes a crime of violence. It is not necessary for the kidnapping statute to require both a specific nefarious purpose as well as a risk of substantially interfering with the victim's liberty, so long as one of those elements is present.

United States v. Edgar Parral-Dominguez, 794 F.3d 440 (4th Cir. 2015) (non-INA)

Discharging a firearm into a building under N.C. Gen. Stat. § 14-34.1 categorically is not a crime of violence under the Sentencing Guidelines: The North Carolina statute does not require the use of force against a person, but instead only requires that the use of force be against property, even though that property must be occupied. Given that the North Carolina statute does not require the use, attempted use, or threatened use of force against another person, *per se*, a conviction under § 14-34.1 is insufficient to constitute a crime of violence.

United States v. Avila, 770 F.3d 1100 (4th Cir. 2014) (non-INA)

First-degree burglary under Cal. Penal Code § 459 is an aggravated felony crime of violence:

A conviction for first-degree burglary under Cal. Penal Code §§ 459 and 460(a) qualifies as a crime of violence and is thus an aggravated felony. Not every set of conceivable facts covered by first-degree burglary needs to present a serious risk of injury to qualify as a crime of violence. Under the categorical approach, Fourth Circuit found that Avila's conviction for first-degree burglary did not qualify as a burglary offense under INA § 101(a)(43)(G), because the California burglary statute is overbroad. However, Fourth Circuit instead held that Avila's conviction qualified under the more generalized "crime of violence" under 18 U.S.C. § 16(b). Citing *Leocal v. Ashcroft*, the Fourth Circuit noted that burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in the course of committing the crime.

United States v. Aparicio-Soria, 740 F.3d 152 (2014) (4th Cir. 2014) (non-INA)

Resisting arrest under Md. Code Ann., Crim. Law § 9-408(b)(1) is not a crime of violence: A Maryland resisting arrest conviction does not qualify categorically as a crime of violence under the force clause because the statute does not require as an element "the use, attempted use, or threatened use of violent force capable of causing physical pain or injury against another person."

United States v. Henriquez, 757 F.3d 144 (4th Cir. 2014) (non-INA)
Maryland first-degree burglary categorically is <u>not</u> a crime of violence (burglary of a dwelling): A Maryland first-degree burglary conviction, (MD. Code Ann., Crim. Law § 6-202(a)), does not qualify categorically as a crime of violence under the Sentencing Guidelines, which includes in the Guidelines definition of a crime of violence the phrase "burglary of a dwelling," because Maryland's definition of a "dwelling" encompasses boats and motor vehicles, and the Supreme Court has held that "generic burglary" does not include burglary of boats or motor vehicles.

Karimi v. Holder, 715 F.3d 561 (4th Cir. 2013)
Definition of Crime of Violence, INA § 101(a)(43)(F): An aggravated felony crime of violence incorporates the federal definition of crime of violence under 18 U.S.C. § 16, which provides that a crime of violence is:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

"Physical force" means violent force or "force capable of causing physical pain or injury to another person." *Id.* at 566.

Maryland second-degree assault is <u>not</u> a crime of violence: Maryland's second-degree assault statute encompasses both violent and nonviolent touching, and the statute is not divisible between the two. Thus, a conviction under the statute is not categorically a crime of violence.
The Fourth Circuit also noted that the framework set forth in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), is used in both the sentencing and immigration contexts; specifically, in the immigration context it is used to determine whether an alien is removable for an aggravated felony conviction. *Id.* at 567 n.6.

United States v. Cabrera-Umanzor, 728 F.3d 347 (4th Cir. 2013) (non-INA)
Maryland child abuse under former child abuse statute is <u>not</u> a crime of violence: Maryland's former child abuse statute (Md. Code, Art. 27 § 35C) did not require the use or threatened use of physical force and this offense can be committed without performing any of the enumerated crimes of violence under the Sentencing Guidelines; thus, it is categorically not a crime of violence under the Sentencing Guidelines.

Karimi v. Holder, 715 F.3d 561 (4th Cir. 2013)
Maryland second-degree assault is <u>not</u> an aggravated felony crime of violence under INA § 101(a)(43)(F). The statute encompasses both violent and nonviolent touching and is therefore overbroad.

United States v. Montes-Flores, 736 F.3d 357 (4th Cir. 2013) (non-INA)
South Carolina assault and battery of a high and aggravated nature is <u>not</u> a crime of violence: A South Carolina "assault and battery of a high and aggravated nature" (ABAHN) conviction constitutes an indivisible common law offense. An alien's ABAHN conviction is categorically not a crime of violence under the Sentencing Guidelines.

United States v. Torres–Miguel, 701 F.3d 165, 167 (4th Cir. 2012) (non-INA)
Conviction under Cal. Penal Code § 422(a) is categorically <u>not</u> an aggravated felony crime of violence under INA § 101(a)(43)(F). The statute does not contain an element requiring the use or threatened use of physical force.

United States v. Gomez, 690 F.3d 194 (4th Cir. 2012) (non-INA)
Maryland's former child abuse statute is indivisible: Md. Code, Art. 27, § 35C is not divisible between forceful and nonforceful conduct for purposes of the crime of violence analysis under INA § 101(a)(43)(F). The statute is technically divisible between physical and sexual abuse, but it is not divisible between forceful and nonforceful conduct or, in other words, removable and non-removable conduct. Thus, use of the modified categorical approach in the sentencing determination was reversible error.

United States v. Chacon, 533 F.3d 250 (4th Cir. 2008) (non-INA)
Conviction under former Maryland second-degree rape statute is a crime of violence: (1) A conviction under Maryland law for second-degree rape (former Md. Code, Art. 27, § 463) by engaging in vaginal intercourse with another by force or threat of force was a conviction for a crime of violence; (2) a conviction under Maryland law for statutory rape was a conviction for a crime of violence; and (3) a conviction under Maryland law for second-degree rape by engaging in vaginal intercourse with another who was mentally defective, mentally incapacitated, or physically helpless was a conviction for a crime of violence under the Sentencing Guidelines.

Mbea v. Gonzales, 482 F.3d 276 (4th Cir. 2007)
D.C. arson conviction constitutes an aggravated felony crime of violence: A District of Columbia arson conviction (D.C. Code § 22-401) constitutes a crime of violence and, hence, an aggravated felony conviction, which renders an alien ineligible for cancellation of removal.

Garcia v. Gonzales, 455 F.3d 465 (4th Cir. 2006)

New York second-degree reckless assault conviction is <u>not</u> a crime of violence under INA § 101(a)(43)(F): A New York second-degree reckless assault conviction (N.Y. Penal Code § 120.05) does not constitute a categorical INA aggravated felony conviction because: (1) under 8 U.S.C. § 1101(a)(43), an offense constitutes an aggravated felony only if the offense is a crime of violence; (2) under 18 U.S.C. § 16(b), an offense constitutes a "crime of violence" only if a defendant recklessly disregards the substantial risk that, when he commits a crime, he may use physical force against another; (3) under 18 U.S.C. § 16(b), an offense does not constitute a "crime of violence" when a defendant recklessly disregards the possibility that harm will result from his criminal conduct; and (4) N.Y. Penal Code § 120.05 requires a defendant recklessly to cause serious physical injury by means of a deadly weapon or dangerous instrument, not recklessly to disregard a substantial risk that he might employ physical force when he commits a crime.

Bejarano-Urrutia v. Gonzales, 413 F.3d 444 (4th Cir. 2005)

Virginia involuntary manslaughter under Va. Code § 18.2-36 is <u>not</u> a crime of violence: The Fourth Circuit reasoned that "[a]lthough the crime of violating Va. Code Ann. § 18.2-36 intrinsically involves a substantial risk that the defendant's actions will cause physical harm, it does not intrinsically involve a substantial risk that force will be applied as a means to an end." *Id.* at 446-47 (internal quotation marks omitted). The holding was based upon reasoning of the Supreme Court in *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

THEFT AND BURGLARY—INA § 101(a)(43)(G)

United States v. White, 836 F.3d 437 (4th Cir. 2016).

Burglary pursuant to W. Va. Code § 61-3-11(a) does not meet the definition of a "violent felony" under the ACCA.

The Supreme Court has defined the generic offense of burglary as the "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990). Comparing this definition to West Virginia's statute under the categorical approach, the Fourth Circuit concluded that West Virginia burglary is overbroad because it covers enclosures other than buildings or structures. Therefore, a West Virginia burglary conviction does not qualify as a "violent felony" under the ACCA.

United States v. Gardner, 823 F.3d 793 (4th Cir. 2016)

North Carolina common law robbery is not categorically a violent felony under the Armed Career Criminal Act (ACCA). Further, the statute is indivisible.

Mena v. Lynch, 820 F.3d 114 (4th Cir. 2016)
Receipt of embezzled property under 18 U.S.C. § 659 is not an aggravated felony under INA § 101(a)(43)(G). It does not have, as an element, a taking "without consent."
Theft: A taking of property without consent is an essential element of a theft offense under INA § 101(a)(43)(G).

Castillo v. Holder, 776 F.3d 262 (4th Cir. 2015)
Unauthorized use of a motor vehicle in violation of Va. Code § 18.2-102 categorically is <u>not</u> a theft offense: Because the VA Code § 18.2–102 statute covers circumstances typically viewed as "glorified borrowing," which the BIA has determined fall outside the definition of a "theft offense," the alien's prior conviction for "unauthorized use" under Virginia law did not qualify categorically as aggravated felony "theft offense."

Omargharib v. Holder, 775 F.3d 192 (4th Cir. 2014)
Virginia larceny conviction categorically does <u>not</u> constitute an aggravated felony theft offense: The Virginia larceny statute, which incorporates the common law definition of larceny, encompasses both wrongful and fraudulent takings. The Fourth Circuit found that the crime of larceny in Virginia is indivisible between removable and non-removable offenses and overbroad. Therefore, larceny in Virginia does not constitute an aggravated felony theft offense under INA § 101(a)(43)(G).

Soliman v. Gonzales, 419 F.3d 276 (4th Cir. 2005)
Virginia conviction for fraudulent use of a credit card under Va. Code § 18.2-195 categorically is <u>not</u> an aggravated felony theft offense: Fraudulent use of a credit card under Va. Code § 18.2-195 constitutes a fraud offense, not a theft offense, because the statute does not require a defendant to take property without the owner's consent. Thus, a § 18.2-195 conviction does not constitute a categorical aggravated felony theft offense.

ILLEGAL REENTRY AFTER REMOVAL FOR AN AGGRAVATED FELONY OFFENSE—INA § 101(a)(43)(O)

United States v. Matamoros-Modesta, 523 F.3d 260 (4th Cir. 2008)
(federal sentencing/some INA analysis)
Summary: Because the Texas drug possession offense does not constitute a felony under federal Controlled Substances Act, it is not an aggravated felony, and because defendant was not otherwise convicted of any INA-defined aggravated felony before his prior illegal reentry offense, the prior illegal reentry offense also does not qualify as an aggravated felony under INA § 101(a)(43)(O).

FORGERY – INA § 101(A)(43)(R)

Santos Alvarez v. Lynch, 828 F.3d 288 (4th Cir. July 7, 2016)
Virginia forgery under Va. Code Ann. § 18.2-168 categorically matches the federal generic definition of forgery, thereby making Virginia forgery an aggravated felony pursuant to INA § 101(a)(43)(R).

ASYLUM / WITHHOLDING OF REMOVAL

CREDIBILITY/CORROBORATION

Ilunga v. Holder, 777 F.3d 199 (4th Cir. 2014)
Adverse Credibility/Translation: Testimonial discrepancies provide inadequate justification for an adverse credibility finding when there is a strong indication that they result from translation errors or language-based misunderstanding. Evidence that tends to prove a translation was incompetent includes: (1) direct evidence of incorrectly translated words; (2) unresponsive answers by the witness; and (3) the witness's expression of difficulty understanding what was said to the witness. In addition, specific, cogent reasons must be provided to support a demeanor-based finding of adverse credibility, for instance, evidence of specific behavior or mannerisms.

Qing Hua Lin v. Holder, 736 F.3d 343 (4th Cir. 2013)
REAL ID Act: Inconsistencies between the applicant's statements during her Border Patrol interview and her later testimony and application materials provide sufficient justification, under the REAL ID Act, for an adverse credibility finding. Nevertheless, the Fourth Circuit noted its hesitation in relying extensively on statements made during Border Patrol interviews or "airport interviews" and the need to limit the extent to which credibility determinations may be based on such interviews.

Hui Pan v. Holder, 737 F.3d 921 (4th Cir. 2013)
REAL ID Act: The REAL ID Act "ensures that an IJ does not cherry pick solely facts favoring an adverse credibility determination while ignoring facts that undermine that result." *Id.* at 928 (internal quotation marks omitted).

Djondo v. Holder, 496 F. App'x 338 (4th Cir. 2012)
REAL ID Act: An adverse credibility finding based on a mistaken date in an alien's testimony and written application, as well as the testimony, affidavit, and letter of witnesses, is supported by substantial evidence and fully complies with the requirements of the REAL ID Act.

Singh v. Holder, 699 F.3d 321 (4th Cir. 2012)
REAL ID Act: The REAL ID Act allows for a "commonsense approach while taking into consideration the individual circumstances of the applicant." An adverse credibility finding does not need to be based on matters fundamental to the alien's claim for relief.
Responsiveness: An IJ reasonably based an adverse credibility finding on the applicant's non-responsiveness to questions regarding the applicant's political views, which formed the basis of his fear. *Id.* at 330.
Corroboration: Under the REAL ID Act, an applicant may be required to provide corroboration if the IJ is not fully satisfied with the credibility of his testimony alone, unless the applicant does not possess such evidence and cannot be reasonably expected to obtain it. *Id.* at 329.

Tassi v. Holder, 660 F.3d 710 (4th Cir. 2011)
Summary: An IJ cannot make legal and factual errors that prevent the IJ from the necessary weighing of the alien's corroborative evidence against any adverse credibility findings.
Corroboration: There is no rule that evidence offered in corroboration requires independent corroboration. *Id.* at 722.

Djadjou v. Holder, 662 F.3d 265 (4th Cir. 2011)
Summary (Pre-REAL ID): (1) A reasonable adjudicator could question the overall credibility of an alien when there are inconsistencies between the eviction notice and the alien's testimony, as well as between the alien's testimony and her application; and (2) when statements rely on multiple levels of hearsay and nothing in the statements alleviates concerns of reliability, it is reasonable to question the reliability of the statements.
Omissions: Omissions, inconsistent statements, contradictory evidence, and inherently improbable testimony are all appropriate bases for making an adverse credibility determination. *Id.* at 273.
Corroboration: Corroborating evidence must be objective. *Id.* at 276.

Marynenka v. Holder, 592 F.3d 594 (4th Cir. 2010)
Conjecture: An IJ cannot rely solely on conjecture when rejecting evidence.
Corroboration: An applicant may meet his burden of proof through testimony alone. However, even for credible testimony, corroboration may be required "when it is reasonable to expect such proof and there is no reasonable explanation for its absence." *Id.* at 601.

Kourouma v. Holder, 588 F.3d 234 (4th Cir. 2009)
Summary: The alien provided believable, corroborated testimony that demonstrated she had suffered FGM. Also, the clear statement from the doctor that the alien had been circumcised together with the State Department Report that 98.6% of women in Guinea had been circumcised is convincing evidence that the alien had suffered FGM.

Credibility/Corroboration: In determining credibility, an IJ must consider "both the petitioner's testimony and his or her corroborating evidence, whether documentary or testimonial . . . and thus may not deny asylum merely on the basis of incredible testimony without considering any corroborating evidence." *Id.* at 241. An IJ must offer a specific, cogent reason for rejecting evidence, whether testimonial or documentary, because it lacks credibility. *See id.*

Anim v. Mukasey, 535 F.3d 243, 261 (4th Cir. 2008)
Credibility of Future Fear: If the IJ finds an alien's testimony about future fear not credible, the alien could still demonstrate eligibility for relief by proving her claim through independent evidence of past persecution.

Zuh v. Mukasey, 547 F.3d 504, 513 (4th Cir. 2008)
Abuse of Discretion: In a case where the IJ found that the alien demonstrated he warranted asylum, but denied it in the exercise of discretion, the IJ "cannot have it both ways, finding an applicant and his documents incredible for one purpose and yet relying on them for another. . . . This sort of judicial sleight of hand constitutes the very definition of abuse of discretion."

Dankam v. Gonzales, 495 F.3d 113, 122 (4th Cir. 2007)
Cumulative Effect: Even where an IJ relies on discrepancies that, if taken separately, concern matters collateral or ancillary to the claim, the cumulative effect may nevertheless be deemed consequential by the fact-finder.
Explanation: An alien's testimony and corroborative documents may support an adverse credibility finding, even where a plausible explanation for the discrepancies is offered. *Id*. (citing *Camara*, 378 F.3d at 369).

Lin-Jian v. Gonzales, 489 F.3d 182, 191-92 (4th Cir. 2007)
Credibility of Past Persecution: A supportable adverse credibility finding regarding future persecution does not mean that the alien is incredible regarding past persecution. Where the IJ's credibility findings did not address past persecution, the IJ is deemed to be silent, and the alien will be presumed to be credible on this issue.

Gandziami-Mickhou v. Gonzales, 445 F.3d 351 (4th Cir. 2006)
Independent Evidence: Independent evidence must be of a nature that credibly proves past persecution, such as an opposition political party's membership card, an arrest warrant stating that a political demonstration is the reason for conviction, or a State Department report detailing the suppression of a political party, rather than documents of a more personal nature, such as affidavits from friends and family. Affidavits from friends and family members generally are not sufficiently objective to constitute independent evidence.

Tewabe v. Gonzales, 446 F.3d 533 (4th Cir. 2006)
Summary: An IJ must provide specific, cogent reasons for an adverse credibility determination. The reasons may be based on common sense, the record, or any other relevant factor for disbelieving the alien.
Examples of "specific, cogent reasons": "inconsistent statements, contradictory evidence, and inherently improbable testimony; [in particular,] where these circumstances exist in view of the background on country conditions." *Id.* at 538.
Speculation or Conjecture: Where an IJ's adverse credibility determination is not based on a specific, cogent reason but instead on "speculation, conjecture, or an otherwise unsupported personal opinion," it cannot be upheld because "it will not have been supported by substantial evidence." *Id.* (quoting *Dia v. Ashcroft*, 353 F.3d 228, 250 (3d Cir. 2003)).

Camara v. Ashcroft, 378 F.3d 361 (4th Cir. 2004)
Independent Evidence: (1) "Notice of Escape" from imprisonment, a political party membership card, a letter from the Respondent's political party's leader describing the Respondent's arrest after participating in a political protest, an arrest warrant for "disturbing the public order," and State Department reports recording the persecution of members of that political party cumulatively constitute independent evidence;
(2) An IJ may not rely solely on an adverse credibility finding to deny applications for asylum and withholding of removal if the applicant provides independent evidence that cumulatively shows strong circumstantial evidence of past persecution.

Rusu v. INS, 296 F.3d 316 (4th Cir. 2002)
Credibility: An unfavorable credibility determination is "likely to be fatal" to an asylum claim. *Id.* at 323.
Due Process Challenges: "[T]o prevail on a due process challenge to a deportation or asylum hearing, an alien must demonstrate that he was prejudiced by any such violation." *Id.* at 320.

Gonahasa v. INS, 181 F.3d 538 (4th Cir. 1999)
State Department Reports: State Department reports on country conditions are "highly probative evidence" in a well-founded fear case. *Id.* at 542.

Figeroa v. INS, 886 F.2d 76 (4th Cir. 1989)
Substantial Evidence: Adverse credibility findings must be supported by substantial evidence.
"Specific, cogent reason": A trier of fact must offer a specific, cogent reason for disbelief in an applicant's testimony.

PAST PERSECUTION

Tairou v. Whiteaker, 909 F.3d 702 (4th Cir. 2018)
The threat of death alone constitutes persecution, and an applicant is not required to prove additional physical or mental harm to establish past persecution. Respondent was engaged in a homosexual relationship with a man in Benin. He was harassed and threatened by members of his family and the community. The Fourth Circuit held that the BIA erred in finding that Respondent had not established past persecution despite Respondent's credible testimony of death threats he received in Benin. The Court emphasized its repeated holding that the threat of death alone constitutes persecution. The Court concluded that Respondent proved past persecution and is entitled to a presumption of a well-founded fear of future persecution. The Court remanded the case to the BIA to determine whether the Government can rebut this presumption.

Baharon v. Holder, 588 F.3d 228 (4th Cir. 2009)
Summary: An IJ must consider the entire record and cannot base his or her decision on only the harm the applicant suffered during a single, three-day detention when the applicant submitted other evidence of the fear and intimidation he suffered due to threats to his safety and the persecution of his relatives.

Kourouma v. Holder, 588 F.3d 234 (4th Cir. 2009)
FGM: FGM constitutes past persecution, not because of any particular method of conducting it, but because of the "serious mental and physical harm it inflicts on the women who endure it." *Id.* at 244.

Li Fang Lin v. Mukasey, 517 F.3d 685 (4th Cir. 2008)
Summary: Remand is warranted so the BIA can consider whether the forced insertion and mandatory continued usage of the IUD constitutes persecution for resistance to China's coercive population control program.

Li v. Gonzales, 405 F.3d 171 (4th Cir. 2005)
Summary: A fine of 10,000 RMB for having an unauthorized child, together with a one-time forced insertion of IUD, does not constitute past persecution.

WELL-FOUNDED FEAR OF FUTURE PERSECUTION

Tang v. Lynch, 840 F.3d 176 (4th Cir. 2016).
Chinese Religious Persecution: Evidence of only isolated instances of harassment and disparate treatment of unregistered Catholic churches in different locations in China may not support a finding of an objectively reasonable fear of persecution for a particular respondent. Although the country reports and other documentary evidence noted isolated incidents of harassment against individuals who participate

in underground churches, the Fourth Circuit concluded that the Respondent failed to present evidence of widespread persecution of Christians attending house churches in his region of the Fujian Province.

Ai Chen v. Holder, 742 F.3d 171 (4th Cir. 2014)
State Department Reports: IJs should not view State Department reports "as Holy Writ immune to contradiction." *Id.* (internal quotation marks omitted)
Evidence Considered: The BIA may not selectively consider evidence, ignoring that evidence that corroborates the alien's claims and calls into question the conclusion the judge is attempting to reach; BIA and IJ must offer "a specific, cogent reason for rejecting evidence, whether testimonial or documentary."

Crespin-Valladares v. Holder, 632 F.3d 117 (4th Cir. 2011)
Objectively Reasonable Fear: The BIA erred in rejecting the IJ's conclusion that the unrebutted evidence of death threats against Crespin and his family members, combined with MS-13's penchant for exacting vengeance against cooperating witnesses, gave rise to a reasonable fear of future persecution.

Mirisawo v. Holder, 599 F.3d 391 (4th Cir. 2010)
Objectively Reasonable Fear: When family members whose political opinion the respondent fears will be imputed to her have not themselves faced harm and the respondent did not face harm when she returned to her home country, the applicant's fear of persecution is not objectively reasonable.

Haoua v. Gonzales, 472 F.3d 227 (4th Cir. 2007)
FGM: (1) A finding that an applicant's risk of suffering FGM is only ten percent is clearly erroneous when the applicant presents credible testimony that her family sold her to a chieftain husband and that the transaction would, upon her return to Niger, force her to undergo FGM and assume her place as his wife;
(2) A determination that an applicant can avoid FGM by relocating within her country is not supported by substantial evidence when the IJ analyzes the relocation issue solely on the basis of an erroneous finding that the applicant's risk of suffering FGM is only ten percent.

Niang v. Gonzales, 492 F.3d 505 (4th Cir. 2007)
FGM: (1) To establish a claim for withholding of removal, an applicant cannot rely solely on psychological harm or the threat of such harm to others, but instead the applicant must also show injury or threat of injury to the applicant's person or freedom. Thus, the applicant's claim for withholding of removal based on the psychological harm she will suffer if her U.S. citizen daughter accompanies her to her country and therefore suffers FGM fails as a matter of law;
(2) The statute permitting withholding does not encompass derivative withholding claims (claims of withholding based on persecution of another person), so an applicant cannot establish a claim for withholding based on the alleged persecution her U.S. citizen daughter will face if she accompanies the applicant to Senegal.

Essohou v. Gonzales, 471 F.3d 518 (4th Cir. 2006)
Internal Relocation: Finding that the BIA erred in concluding that because the respondent lived in hiding for four years to avoid her persecutors, she could reasonably internally relocate. "The only reasonable reading of [respondent's] testimony reveals a four-year period in which she was in hiding, constantly fearing for her life. Any intermittent period in which [the respondent] was not specifically troubled by the Cobras was not due to a reasonable, internal relocation; rather, it was due to her efforts to hide in conjunction with the timing of the Cobras' forays."

Blanco de Belbruno v. Ashcroft, 362 F.3d 272 (4th Cir. 2004)
Standard: A well-founded fear of persecution must be both subjectively genuine and objectively reasonable. To meet this standard, an applicant must possess a subjective fear and must also demonstrate that "a reasonable person in similar circumstances would fear persecution on account of" one or more of the protected grounds. *Id.* at 284.
Return to Country: While efforts to obtain critical medical care might constitute "a compelling reason" to return to the country of claimed persecution, it is not a compelling reason when the respondent fails to show that she could not afford or otherwise obtain the procedure in the U.S.

Chen v. INS, 195 F.3d 198 (4th Cir. 1999)
Objectively Reasonable Fear/State Department Reports: An applicant's fears of persecution and involuntary sterilization are not objectively reasonable when a State Department report notes that couples returning with an additional child to Shanghai from university study abroad have been excluded from any penalties, and the applicant has not presented evidence to rebut the State Department report.

Gonahasa v. INS, 181 F.3d 538 (4th Cir. 1999)
Objectively Reasonable Fear/State Department Reports: (1) A State Department report on country conditions is highly probative evidence in a well-founded fear case;
(2) Absent powerful contradictory evidence, a State Department report supporting the BIA's judgment will generally suffice to uphold the BIA's decision.

Cruz-Diaz v. INS, 86 F.3d 330 (4th Cir. 1996)
Objectively Reasonable Standard for Juveniles: The IJ and BIA did not err in holding the juvenile respondent to the same objective standard as an adult when there is nothing in the record to suggest that the IJ and the BIA failed to consider the respondent's age as a factor in determining whether his fear of persecution was objectively reasonable.

Cruz-Lopez v. INS, 802 F.2d 1518 (4th Cir. 1986)
Objectively Reasonable Fear: A hand-written note delivered to respondent from the guerillas instructing him to join or "you will regret it" fails to establish a clear

probability of persecution or "good reason" to fear persecution when such notes are widely distributed throughout El Salvador and are frequently not acted upon.

PROTECTED GROUNDS

PARTICULAR SOCIAL GROUP

Oliva v. Lynch, 807 F.3d 53 (4th Cir. 2015)
Remanded for consideration of whether the proposed PSGs of "Salvadorans who are former members of MS-13 and who left the gang, without its permission, for moral and religious reasons" and "Salvadorans who were recruited to be members of MS-13 as children and who left the gang as minors, without its permission, for moral and religious reasons" were cognizable.

Temu v. Holder, 740 F.3d 887 (4th Cir. 2014)
Particular Social Group: The PSG "individuals with bipolar disorder who exhibit erratic behavior" met requirements of immutability, particularity, and social visibility.

Martinez v. Holder, 740 F.3d 902 (4th Cir. 2014)
Particular Social Group: "Former MS-13 members from El Salvador" is immutable for purposes of withholding of removal. Remanded for consideration of whether the Respondent's social group satisfies the other elements of a PSG. While current gang membership is not an immutable characteristic, former gang membership is immutable because the only way an applicant could change his membership in the group would be to rejoin the gang. Rejoining would contradict a "critical aspect of his conscience" that he should not be forced to change. *Id.* at 912. In addition, the Fourth Circuit noted that Congress has identified a subset of antisocial or criminal conduct as a bar to withholding of removal; however, "Congress 'has said nothing about barring former gang members.'" *See id.* at 912.
Social Visibility: The Fourth Circuit noted that it has not yet affirmed the statutory authority for the "social visibility" requirement. *Id.* at 913 n.4.

Solomon-Membreno v. Holder, 578 Fed. App'x 300 (4th Cir. 2014) **(unpublished)**
Particular Social Group: The PSGs "young Salvadoran students who expressly oppose gang practices and values and wish to protect their family against such practices" and "young female students who are related to an individual who opposes gang practices and values" are too amorphous to qualify as PSGs.

Zelaya v. Holder, 668 F.3d 159 (4th Cir. 2012)

Particular Social Group: The proposed PSG "young Honduran males who refuse to join the MS-13" does not constitute a PSG. It is not materially distinguishable from the one rejected in *Matter of S-E-G-*. It is distinguishable from *Crespin* because the PSG lacks the immutable characteristic of family bonds or the self-limiting features of the family unit.
Social Visibility: The Fourth Circuit explicitly declined to decide whether the social visibility requirement comports with the INA.

Lizama v. Holder, 629 F.3d 440 (4th Cir. 2011)
Criteria: The Board requires that a group have (1) an immutable characteristic, (2) social visibility, and (3) particularity.
Particular Social Group: "Young, Americanized, well-off Salvadoran male deportees with criminal histories who oppose gangs" is not a PSG. Americanization is not immutable. Wealth, Americanization, and gang opposition are too amorphous to provide an adequate benchmark for group membership. The Fourth Circuit did not evaluate the social visibility requirement.

Crespin-Valladares v. Holder, 632 F.3d 117 (4th Cir. 2011)
Family Ties PSG: The PSG "consisting of family members of those who actively oppose gangs in El Salvador by agreeing to be prosecutorial witnesses" constitutes a cognizable particular social group. The Fourth Circuit found that the family is the "prototypical example" of a PSG, and that the PSG in *Crespin* met the requirements of immutability, particularity, and social visibility.

POLITICAL OPINION

Saldarriaga v. Gonzales, 402 F.3d 461 (4th Cir. 2005)
Summary: Evidence of association with the DEA and employment by a DEA informant, without more, does not constitute a political opinion.
Political Opinion: When an asylum applicant alleges that political opinion is the statutorily protected ground on account of which he will be persecuted, the required showing of the protected ground is typically met by evidence of verbal or openly expressive behavior by the applicant in furtherance of the cause. For behavior to be political, it must be motivated by an ideal or conviction. Actions motivated by an employment interest or other personal benefit do not merit protection.

Cruz-Diaz v. INS, 86 F.3d 330 (4th Cir. 1996)
Evidence of the guerillas' conscription of the applicant as a child and the applicant's fleeing and hiding from both the guerrillas and the army does not establish a political opinion.

NEXUS

Oliva v. Lynch, 807 F.3d 53 (4th Cir. 2015)
the Respondent successfully had established a nexus between his persecution and his proposed social groups. The MS-13's demands for rent were part of the persecution that the Respondent faced, not a mere precursor to his persecution. Noting that persecution may be on account of multiple or intertwined central reasons, the Fourth Circuit found the Respondent had shown he was targeted by MS-13 because leaving the gang was not allowed unless he paid rent, and those rules were applied to individuals who are not active members. In addition, the fact the Respondent left the gang for moral or religious reasons placed him in the category of individuals that are required to pay rent, and so the decision to leave for moral and religious reasons was a central reason for his persecution.

Hernandez-Avalos v. Lynch, 784 F.3d 944 (4th Cir. 2015)
The IJ and BIA erred in finding that the respondent had suffered death threats not because of her relation to her son, but because she would not consent to her son engaging in criminal activity or joining the Mara 18 gang in El Salvador. The Fourth Circuit held the respondent was threatened with death because of her relationship to her son, her membership in their nuclear family, and her maternal authority to control her son's activities. With respect to the nuclear family PSG, the respondent was targeted because of her maternal authority to control her son's activities. Thus, it would be unreasonable to conclude that her relationship to her son was not at least one central reason she was threatened with death.

Cordova v. Holder, 759 F.3d 332 (4th Cir. 2014)
Particular Social Group: The IJ's incorrect characterization of the respondent's proposed particular social group was legal error. The IJ did not analyze the proposed family-based social group that the respondent actually proposed, which appears to be that of family members of those who are killed by gang members on account of their membership in a rival gang. *Id.* at 338.
Nexus: With respect to family-based particular social groups, the issue is whether *the respondent* was targeted on account of *his* kinship ties to his family members, not whether the family is uniquely or specifically targeted.

Yi Ni v. Holder, 613 F.3d 415 (4th Cir. 2010)
Forced Abortion: (1) An applicant cannot establish a claim for withholding of removal based solely on his wife's forced abortion; and (2) a claim that the applicant suffers depression as a result of his wife's forced abortion lacks the necessary nexus to a protected ground, particularly because he could not show a nexus between the alleged harm and his political opinion regarding population control policies.

Quinteros-Mendoza v. Holder, 556 F.3d 159 (4th Cir. 2009)

Mixed Motives: The REAL ID Act did not radically alter the standard in mixed motive cases. The REAL ID Act does not require a protected ground to be the central reason or even a dominant central reason for persecution; however, to be "at least one central reason," it cannot be incidental, tangential, superficial, or subordinate.

Abdel-Rahman v. Gonzalez, 493 F.3d 444 (4th Cir. 2007)
Persecution v. Prosecution: Although the applicant showed that he may be punished upon returning to his country, he did not meet his burden of showing that the treatment will be on account of his imputed political opinions instead of his criminal activity.

Menghesha v. Gonzales, 450 F.3d 142 (4th Cir. 2006)
Mixed Motives: An alien was not required to prove that his political opinion was the Ethiopian government's sole motive for persecuting him. The IJ committed legal error in holding the applicant to this overly stringent legal standard. Under the INA's "mixed-motive" standard, an asylum applicant need only show that the alleged persecutor is motivated in part to persecute him on account of a protected ground. **NOTE:** The Fourth Circuit's holding in *Menghesha* is limited by REAL ID Act's requirement that in mixed motive cases, the protected ground must be "at least one central reason" for the persecution. INA § 208(b)(1)(B)(i); *Abdel-Rahman v. Gonzales*, 493 F.3d 444, 453 n.12 (4th Cir. 2007) (discussing REAL ID Act's effect on *Menghesha* holding).

Blanco de Belbruno v. Ashcroft, 362 F.3d 272 (4th Cir. 2004)
No Nexus: Claims that unknown callers threatened the applicant's family and that unknown people shot at the applicant's family's house for unknown reasons do not meet the nexus requirement for asylum eligibility.

NEXUS AND FAMILY TIES

Cortez-Mendez v. Whitaker, 912 F.3d 205 (4th Cir. 2019)
No Nexus: Respondent's father is deaf and mute. Gang members began targeting Respondent for recruitment when he was a teenager. Any threats Respondent received or future harm he fears are results of general criminal activity, not membership in his disabled father's family. Even if the gang members knew about his father's disabilities it does not necessarily follow that they intimidated Respondent because of his relation to his father. The record reflects that the gangs targeted Respondent because he rejected their recruitment efforts. Flight from gang recruitment is not a protected ground under the INA.

Salgado-Sosa v. Sessions, 882 F.3d 451 (4th Cir. 2018)
Nexus: The Respondent's family operated a convenience store and were extorted by the MS-13 gang. The Respondent's stepfather refused to pay and gang members shot him (but did not kill him). The Respondent and his stepfather reported the incident to the police and later testified against MS-

13 members at a criminal proceeding. The Court held that the Respondent established that his membership in the particular social group of his family was at least one central reason for the persecution he suffered and feared. While greed or revenge may have been the "immediate triggers" for the gang's assaults, the Respondent's relationship to his stepfather and family "prompted the asserted persecution."
In assessing family-based claims, there is no meaningful distinction between whether a respondent was persecuted because of his connection to a family member, and whether a respondent was threatened because the persecutor sought revenge for an act committed by the family member.

Velasquez v. Sessions, 866 F.3d 188 (4th Cir. 2017)
No nexus: A personal conflict between family members cannot give rise to a claim for asylum. The Respondent's custody dispute with her mother-in-law did not constitute persecution on account of her family ties.

Cruz v. Sessions, 853 F.3d 122 (4th Cir. 2017)
Nexus: The Respondent sufficiently established that her membership in the particular social group of her nuclear family was at least one central reason for the persecution she suffered and feared. The Respondent's husband was killed by his former employer and subsequently targeted the Respondent. The BIA and IJ shortsightedly focused on the persecutor's articulated purpose of preventing the Respondent from contacting the police, while discounting the Respondent's relationship with her husband, which prompted her to confront her persecutor.

Zavaleta-Policiano v. Sessions, 873 F.3d 241 (4th Cir. 2017)
Nexus: The Respondent established that her membership in the particular social group of her nuclear family was at least one central reason for the persecution she suffered and feared. The Respondent and her father both owned stores near each other in El Salvador. Over time, gang members extorted the Respondent's father, who then left the country. After he left, the gang members targeted the Respondent. The Fourth Circuit held that the Respondent had established a nexus between her persecution and her family membership. When applying the statutory nexus standard, courts must consider the "intertwined reasons" for the persecution, rather than a "single minded focus on the articulated purpose."

Hernandez-Avalos v. Lynch, 784 F.3d 944 (4th Cir. 2015)
IJ and BIA erred in finding that the respondent had suffered death threats not because of her relation to her son, but because she would not consent to her son engaging in criminal activity or joining the Mara 18 gang in El Salvador. The Fourth Circuit held the respondent was threatened with death

because of her relationship to her son, her membership in their nuclear family, and her maternal authority to control her son's activities.
With respect to the nuclear family PSG, the respondent was targeted because of her maternal authority to control her son's activities. Thus, it would be unreasonable to conclude that her relationship to her son was not at least one central reason she was threatened with death.

GOV'T UNWILLING OR UNABLE TO PROTECT

Mulyani v. Holder, 771 F.3d 190 (4th Cir. 2014)
Summary: An alien did not meet her burden of showing that the government was "unwilling or unable to protect her from religious persecution" (despite four separate attacks) when she testified that she never notified the police or any other government authorities about the attacks and that at least once her attackers scattered when they heard police sirens; and when country reports indicated that the government operates programs to ease religious tensions and prosecutes perpetrators of religiously-motivated violence.
Key Notes: Cited *Matter of Acosta* for the requirement that an applicant alleging past persecution must show that the harm was inflicted by the government or by others whom the government is unable or unwilling to control, 19 I&N Dec. 211, 222 (BIA 1985), and noting that the requirement derives from BIA interpretations of "refugee" and "persecution." Also, at 199 n.4, listed other cases recognizing that persecution under the INA "encompasses harm inflicted by . . . an entity that the government cannot or will not control." *Crespin*, 632 F.3d at 128.

Crespin-Valladares v. Holder, 632 F.3d 117, 128-29 (4th Cir. 2011)
Summary: Persecution under the INA entails harm "inflicted by either a government or an entity that the government cannot or will not control." Whether a government is "unable or unwilling to control" private actors is a question of fact.

M.A. v. INS, 899 F.2d 304 (4th Cir. 1990) (en banc)
Summary: In rejecting a draft resister's asylum claim, the Fourth Circuit noted that "misconduct by renegade military units" did not amount to cognizable persecution because it was not "connected with official governmental policy." *Id.* at 312. The Court refused to inquire into "the government's 'control' over forces within its borders," *id.* at 314, but relied on the unique status of draft evasion in international law, *see id.* at 312, and declined to "formulate general legal prescriptions for . . . claims of asylum" outside of that context, *id.* at 314.

DISCRETION

Tassi v. Holder, 660 F.3d 710 (4th Cir. 2011)
Abuse of Discretion: It was abuse of discretion where the IJ "erroneously (1) applied the rules of evidence; (2) suggested that corroborative evidence requires

further corroboration; and (3) discredited documents as unauthenticated under the immigration regulations without providing [the applicant] an opportunity to authenticate them by other means and without otherwise providing sound, cogent reasons for rejecting them." *Id.* at 725.

Harmless Error Analysis: The BIA decision may stand if the legal and factual infirmities clearly had no bearing on the substance of the decision reached. Remand is necessary where, without the IJ's error, s/he might not have drawn the same inferences and conclusions, or s/he would likely have reached a different outcome if s/he had duly considered the independent evidence that s/he improperly discounted.

Jian Tao Lin v. Holder, 611 F.3d 228 (4th Cir. 2010)

Abuse of Discretion: The IJ may not "distort[ ] or disregard [ ] important aspects of the alien's claim"; make rulings that are based "on an inaccurate perception of the record"; or "rely on speculation, conjecture, or an otherwise unsupported personal opinion to discredit an applicant's testimony or her corroborating evidence." *Id.* at 237 (citations, internal quotation marks and alterations omitted). Importantly, even if the IJ determines that the applicant's testimony is incredible, "he must nevertheless evaluate the applicant's independent evidence." *Id.* at 236.

Baharon v. Holder, 588 F.3d 228 (4th Cir. 2009)

Jurisdiction: In reviewing agency decisions in immigration matters, it is "[the Circuit Court's] responsibility to ensure that unrebutted, legally significant evidence is not arbitrarily ignored by the factfinder." *Id.* at 233. An IJ is not entitled to "base [a] decision on only isolated snippets of [the] record while disregarding the rest." *Id.*

Zuh v. Mukasey, 547 F.3d 504 (4th Cir. 2008)

Standard of Review: The Fourth Circuit reviews the discretionary denial of asylum by an IJ for abuse of discretion. *Id.* at 506 (citing *Dankam*, 495 F.3d at 119 n.2). "Although this standard of review is deferential, it does not offer an IJ a blank check." *Id.*

Totality of the Circumstances: An IJ must weigh all relevant evidence under the totality of the circumstances when denying asylum as a matter of discretion. An IJ must offer specific, cogent reasons for his or her disbelief of the applicant. Adverse credibility findings based upon "speculation, conjecture, or an otherwise unsupported personal opinion" will not receive deference. *Id.* at 507 (internal quotation marks omitted).

Factors: The Fourth Circuit set forth a non-exhaustive list of factors to be considered when determining whether to grant or deny discretionary asylum relief.

Positive Factors:

1) Family, business, community, and employment ties to the United States, and length of residence and property ownership in this country; 2) Evidence of hardship to the alien and his family if deported to any country, or if denied asylum such that the alien cannot be reunited with family members (as derivative asylees) in this

country; 3) Evidence of good character, value, or service to the community, including proof of genuine rehabilitation if a criminal record is present; 4) General humanitarian reasons, such as age or health; 5) Evidence of severe past persecution and/or well-founded fear of future persecution, including consideration of other relief granted or denied the applicant (e.g., withholding of removal or CAT protection).

Negative Factors:

1) Nature and underlying circumstances of the exclusion ground; 2) Presence of significant violations of immigration laws; 3) Presence of a criminal record and the nature, recency, and seriousness of that record, including evidence of recidivism; 4) Lack of candor with immigration officials, including an actual adverse credibility finding by the IJ; 5) Other evidence that indicates bad character or undesirability for permanent residence in the United States.

Dankam v. Gonzales, 495 F.3d 113 (4th Cir. 2007)

Two-Part Analysis: "It is fundamental that an alien seeking asylum in the United States must demonstrate both that he is eligible under the INA for asylum and that he merits a favorable exercise of discretion." *Id.* at 120. "Despite the fact that the ultimate decision to grant or deny asylum is committed to the discretion of the Attorney General, not every denial of asylum involves an unfavorable exercise of discretion." *Id.*

Tewabe v. Gonzales, 446 F.3d 533 (4th Cir. 2006)

Abuse of Discretion: Where IJ did not provide specific and cogent reasons for rejecting asylum applicant's testimony about her departure from Ethiopia, adverse credibility determination was not supported by substantial evidence. Applicant testified that she spoke out against the government at a meeting, suddenly decided to leave the country after the meeting and could make departure arrangements quickly, and decided to apply for asylum after only a few days in the U.S. Such testimony was not inherently implausible.

FIRM RESETTLEMENT BAR

Mussie v. INS, 172 F.3d 329 (4th Cir. 1999)

Offer of Permanent Resettlement: The following was cumulatively sufficient to indicate that the alien had received an offer of permanent resettlement in Germany: evidence that respondent had lived in Germany for six years; a grant of asylum from Germany; German travel documentation; evidence of government assistance for language schooling, transportation, rent, and food; and evidence that alien held a job, paid taxes, and rented own apartment.

Conditions of Residency in Country: Evidence of racism by private individuals is insufficient to invoke conditions of residency exception to firm resettlement bar because respondent presented no evidence that the German *government* imposed any restrictions on her residency.

PARTICULARLY SERIOUS CRIME BAR

Hernandez-Nolasco v. Lynch, 807 F.3d 95 (4th Cir. 2015)
Summary: Va. Code Ann. § 18.2-248 qualifies as a drug trafficking crime and thus also a particularly serious crime. When a conviction under a state statute that proscribes conduct necessarily is punishable as a felony under the Controlled Substances Act, then the offense automatically qualifies as a drug trafficking crime and constitutes an aggravated felony. A conviction under § 18.2-248 for possession of cocaine with intent to distribute qualifies as an aggravated felony under INA § 101(a)(43)(B), and qualifies as a particularly serious crime.

Gao v. Holder, 595 F.3d 549 (4th Cir. 2010)
Particularly Serious Crimes are <u>not</u> limited to Aggravated Felonies: (1) A conviction may constitute a particularly serious crime even if it is not an aggravated felony;
(2) The BIA is permitted under INA § 1158(b)(2) to determine that an applicant's offense is particularly serious through the process of case-by-case adjudication.

Yousefi v. INS, 260 F.3d 318 (4th Cir. 2001)
***Frentescu* Factors:** Decision makers must consider the *Frentescu* factors when making a determination about whether an applicant's conviction constitutes a particularly serious crime. The standard should be applied through a case-specific analysis. The factors consist of: (1) nature of the conviction; (2) type of sentence imposed; (3) circumstances and underlying facts of the conviction; and (4) whether the type and circumstances of the crime indicate that the alien will pose a danger to the community. The last two factors are the most important to ensure a case-specific analysis was conducted.

Kofa v. INS, 60 F.3d 1084 (4th Cir. 1995)
Dangerousness: An applicant convicted of a particularly serious crime is considered to be a danger to the community. Thus, no separate finding regarding dangerousness is necessary.

MATERIAL SUPPORT BAR

Viegas v. Holder, 699 F.3d 798 (4th Cir. 2012)
Burden Shifting: DHS must present evidence indicating that the material support bar applies to respondent. Then burden then shifts to respondent to prove the bars do not apply to him. *See* 8 C.F.R. §§ 1208.13(c), 1208.16(d)(2).
The material support bar requires the existence of a terrorist organization; thus, the IJ must first determine whether DHS evidence satisfies the legal standard for a terrorist organization.
Summary: (1) The alien reasonably should have known that the organization he belonged to engaged in terrorist activities; and (2) the applicant's voluntarily-paid

dues is sufficient to trigger the material support bar, since the sum of the dues is sufficiently substantial on its own to affect the ability of the FLEC to accomplish its goals.
N.B. The material support bar is an independently sufficient ground for denying relief where an alien was at one time a member of the organization, but is not any longer and thus the membership bar does not apply.

Barahona v. Holder, 691 F.3d 349 (4th Cir. 2012)
No Duress Exception: The terms of the material support bar encompass both voluntary and involuntary support and fail to provide for a duress exception.
It was reasonable for the BIA to decline to create an involuntariness exception to the material support bar.

ONE-YEAR BAR

Zambrano v. Sessions, 878 F.3d 84 (4th Cir. 2017)
Changed Circumstances: New facts that provided additional support for a **pre-existing asylum claim** can satisfy the "changed circumstances" exception to the one-year filing deadline under INA § 208(a)(2)(D). The Court noted that new facts "may include circumstances that show an intensification of a preexisting threat of persecution or new instances of persecution of the same kind suffered in the past."

Mulyani v. Holder, 771 F.3d 190 (4th Cir. 2014)
Jurisdiction: A circuit court lacks jurisdiction to review an IJ's holding regarding timeliness, including the exception for extraordinary circumstances, of an asylum application unless the appeal presents a constitutional claim or question of law.

Gomis v. Holder, 571 F.3d 353 (4th Cir. 2009)
Jurisdiction: The question whether the changed or extraordinary circumstances exception applies to excuse an alien's delay in filing her asylum application is a *discretionary determination* based on factual circumstances. Therefore, absent a colorable constitutional claim or question of law, circuit court review of the issue is not authorized by the REAL ID Act of 2005, 8 U.S.C. § 1252(a)(2)(D).

PERSECUTOR BAR

Quitanilla v. Holder, 758 F.3d 570 (4th Cir. 2014)
Invoking Persecutor Bar: Adopts two requirements for invoking persecutor bar as identified by sister circuits: (1) there must have been some nexus between the alien's actions and the persecution of others, such that the alien can fairly be characterized as having actually assisted or otherwise participated in that persecution; and (2) the alien must have acted with scienter, or with some level of prior or contemporaneous knowledge that the persecution was occurring. The court must distinguish between genuine assistance in the persecution and inconsequential association with persecutors and must determine the alien had

some level of culpable knowledge that the consequences of one's actions would assist in acts of persecution.

Pastora v. Holder, 737 F.3d 902 (4th Cir. 2013)
Summary: Because the record contained evidence of numerous human rights abuses committed by armed groups associated with the military in the area during the years alien admitted patrolling for his military unit and because the record contained a list of names and ages of victims in alien's communities, as well as dates these victims were killed, disappeared, sexually assaulted, captured, or tortured, the totality of the specific evidence was sufficient to indicate the persecutor bar applied to Pastora. Thus, Pastora was required to prove by a preponderance of the evidence that he did not assist or otherwise participate in persecution.

Higuit v. Gonzales, 433 F.3d 417 (4th Cir. 2006)
Standard: If there is evidence that the alien engaged in persecution, he must prove by a preponderance of the evidence that he is not barred from relief on this ground. The text of 8 U.S.C. §§ 1158(b)(2)(A)(i), 1231(b)(3)(B)(i) makes clear that while the commission of actual physical harm may be sufficient to bring an alien within the persecution exception, it is not necessary.
Summary: Higuit was aware that his information-gathering and infiltration led to torture, imprisonment, and death of political opponents, as well as individuals merely suspected of affiliation with opposing groups. Thus, IJ properly determined that Higuit did assist or otherwise participate in persecution.

Munyakazi v. Lynch, 829 F.3d 291 (4th Cir. 2016)
Summary: Evidence obtained during a DHS investigation showing the respondent, a Rwandan Hutu, assisted in the genocide was sufficient to conclude that his applications for relief should be denied under the persecutor bar. 8 U.S.C § 1101(a)(42)(A).
Persecutor Bar: When deciding whether the persecutor bar applies, evidence raising a mere inference of participation in persecution is sufficient to trigger the persecutor bar. Commission of actual physical harm may be sufficient evidence, but is not necessary evidence, for the persecutor bar to apply. *Higuit v. Gonzales*, 433 F.3d 417, 420 (4th Cir. 2006); *see also Alvarado v. Gonzales*, 449 F.3d 915, 930 (9th Cir. 2006).

HUMANITARIAN ASYLUM

Niang v. Gonzales, 492 F.3d 505 (4th Cir. 2007)
FGM: The Fourth Circuit noted that "a humanitarian grant of asylum may be warranted in circumstances where a mother, who has been subjected to FGM, fears her daughter will be subjected to FGM if she accompanies her mother to the country of removal." *Id.* at 509 n.4.

Naizgi v. Gonzales, 455 F.3d 484 (4th Cir. 2006)
Denied Application: Ethiopian government agents closed company where (Eritrean) alien worked, came to alien's home, arrested his father for deportation, warned alien's stepmother that they would return for her and the rest of the family, and after stepmother fled the country and alien and stepsister went into hiding, agents returned, seized alien's home and sealed the door. "Without question, the Ethiopian government's treatment of Naizgi and his family is both troubling and deplorable. However . . . the past persecution established on this record was not 'the most atrocious abuse.'" *Id.* at 488 (citing *Gonahasa*, 181 F.3d at 544).

Ngarurih v. Ashcroft, 371 F.3d 182 (4th Cir. 2004)
Denied Application: A Kenyan man's "mistreatment—horrible as it was—[did] not compare in severity to the kinds of persecution for which the humanitarian asylum regulation was designed," *id.* at 190, where he was stripped, placed in a cement cell without light, windows, or toilet for one week; prison officials flooded the cell with cold water at irregular intervals, often up to the man's chest; and did not allow him to eat, sleep, or contact others—all of which resulted in hallucinations.

Rusu v. INS, 296 F.3d 316 (4th Cir. 2002)
Denied Application: Petitioner suffered past persecution "not of the scale warranting a grant of [humanitarian] asylum," where the persecution involved interrogation, assault, and torture, and police used pliers and a screwdriver to remove the petitioner's teeth. *Id.* at 325.

Gonahasa v. INS, 181 F.3d 538 (4th Cir. 1999)
Denied Application: The alien's persecution in Uganda, including arrest, two-week detention, and being stripped, beaten, cut on arms by bayonets, and confined in small cell, was not severe enough to warrant asylum based on *severity of persecution* alone.
Standard: Humanitarian asylum is reserved for "the rare case where past persecution is so severe that it would be inhumane to return the alien even in the absence of any risk of future persecution." *Id.* at 544 (quoting *Vaduva v. INS*, 131 F.3d 689, 690 (7th Cir. 1997)). "Eligibility for asylum based on severity of persecution alone is reserved for the *most atrocious abuse*." *Id.* (emphasis added).

FRIVOLOUS APPLICATION

Ndibu v. Lynch, 823 F.3d 229 (4th Cir. 2016)
Frivolous Asylum Application: Although an immigration judge is free to give an applicant additional oral warnings during the hearing, there is no statutory requirement that he do so. Signing the application for asylum immediately below the paragraph providing the warning against filing a frivolous asylum application is sufficient notice.

REINSTATED ORDER OF REMOVAL

Lara-Aguilar v. Sessions, 889 F.3d 134 (4th Cir. 2018)
Asylum Eligibility: An alien subject to a reinstated order of removal is ineligible to apply for asylum, **even if the asylum claim is based on events after the prior order of removal was effected.**

Mejia v. Sessions, 866 F.3d 573 (4th Cir. 2017)
Asylum Eligibility: An alien subject to a reinstated order of removal is ineligible to apply for asylum, but is eligible to apply for withholding of removal under the INA and relief under the Convention Against Torture.

CONVENTION AGAINST TORTURE

Cabrera-Vasquez v. Barr, No. 18-1226, 2019 WL 1271476 (4th Cir. Mar. 20, 2019)
Holding: The BIA failed to fully consider the evidence in support of Respondent's CAT claim. In analyzing CAT claims, courts must meaningfully engage with the live testimony in conjunction with all of the documentary evidence. Here, the BIA failed to consider the petitioner's testimony regarding the Salvadoran police's refusal to help the petitioner on two separate occasions.

Duncan v. Barr, No. 17-2423, 2019 WL 1246310 (4th Cir. Mar. 19, 2019)
Holding: The BIA applied the wrong standard of review. For purposes of relief under the CAT, the IJ's assessment of whether the likely response from public officials qualifies as government acquiescence is a legal question subject to de novo review by the BIA. *Cruz-Quintanilla v. Whitaker*, 914 F.3d 884 (4th Cir. 2019). In determining whether a foreign-born child derived citizenship from his citizen parent, the IJ's determination of whether the parent had "physical custody" over the child is also a legal judgment subject to de novo review by the BIA.

Rodriguez-Arias v. Whitaker, 915 F.3d 968 (4th Cir. 2019)
Holding: The IJ and BIA erred in denying Respondent's application for relief under the CAT because they failed to aggregate the risk of torture that he faced in El Salvador from gangs, police, and vigilante groups as a result of his gang-related tattoos. rejected the determination that Respondent's tattoos would not put him at a substantial risk of torture in El Salvador. The Court held that the IJ and the BIA did not meaningfully address the evidence that Respondent provided about country conditions in El Salvador. The Court cited a number of statistics from the record regarding violence against suspected gang members.

Cruz-Quintanilla v. Whitaker, 914 F.3d 884 (4th Cir. 2019)
Holding: The BIA improperly characterized the IJ's finding regarding government acquiescence as a purely factual determination subject only to clear error review. The "acquiescence prong" of the CAT analysis first requires a factual finding as to how public

officials will likely act in response to the harm the petitioner fears, a determination reviewed by the BIA for clear error. However, the IJ's assessment of whether the likely response from public officials qualifies as acquiescence is a legal question subject to de novo review by the BIA.

Oxygene v. Lynch, 813 F.3d 541 (4th Cir. 2016)
Holding: Upheld BIA decision in *Matter of J-E-*, 23 I&N Dec. 291, 301 (BIA 2002) (en banc), that "specific intent" requires a claimant to show that government officials "are intentionally and deliberately creating and maintaining . . . prison conditions in order to inflict torture." The five-prong test in *Matter of J-E-* specifically defined torture under the CAT as: (1) an act causing severe physical or mental pain or suffering; (2) intentionally inflicted; (3) for a proscribed purpose; (4) by or at the instigation of or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) not arising from lawful sanctions. *Matter of J-E-*, 23 I&N Dec. at 297.

Martinez v. Holder, 740 F.3d 902 (4th Cir. 2014), *as revised* (Jan. 27, 2014)
Holding: The IJ and BIA considered relevant evidence before them in denying CAT protection to an alien who contended that Salvadoran police would acquiesce or turn a blind eye to the threat that he, as former gang member, would be tortured upon return to El Salvador. The IJ recognized the alien's belief that government officials in El Salvador would view him as still belonging to a gang, acknowledged prevalence of gang violence in El Salvador, and noted that country conditions information reflected government attempts to address the problem of gang violence. The BIA similarly noted that El Salvador had attempted to control gang violence, and cited reports that the alien contended had been ignored.

Mulyani v. Holder, 771 F.3d 190 (4th Cir. 2014)
State Department Reports: State Department country reports alone are insufficient to overcome the substantial evidence standard of review on appeal.

Suarez-Valenzuela v. Holder, 714 F.3d 241 (4th Cir. 2013)
Willful Blindness: "[W]illful blindness can satisfy the acquiescence component of 8 C.F.R. § 1208.18(a)(1)." *Id.* at 246. The applicant need not show "willful acceptance," i.e., that government officials had "actual knowledge" of an individual's torture. Government officials "acquiesce to torture when they have actual knowledge of *or* 'turn a blind eye to torture.'" *Id.* at 245 (emphasis added). The BIA properly evaluated whether "rogue" police officer who attacked applicant was likely to repeat his behavior and whether the Peruvian government was likely to turn a blind eye to the applicant's torture in light of its response to the attacker's earlier conduct and current country conditions.

Turkson v. Holder, 667 F.3d 523 (4th Cir. 2012)
Standard: A claim under the CAT is analytically distinct from an asylum claim. Findings concerning the likelihood of a future occurrence and the future conditions a respondent is likely to face are factual findings, and whether future events and conditions satisfy the legal definition of torture is a legal question.

Lizama v. Holder, 629 F.3d 440 (4th Cir. 2011)
Holding: The alien "failed to demonstrate that gangs or other criminal entities in El Salvador have the approval or acquiescence of the government of El Salvador" where gangs are "unfortunately a problem that all socioeconomic levels in El Salvador face." The State Department Issue Paper said the government "does not have a policy or practice of refusing assistance to persons who receive threats or are otherwise victims of gang violence"; and the government is focused on "fostering and providing greater security for the public against gang violence." *Id.* at 449-50.
Judicial Review: Only available if petitioner has previously exhausted all administrative remedies available to him as a matter of right (exhaustion doctrine, i.e., petitioner must raise each claim before the BIA before going to the circuit courts).
Standard of Review: "We review the denial of relief under the CAT for substantial evidence." *See also Dankam v. Gonzales*, 495 F.3d 113, 119, 124 (4th Cir. 2007); *Haoua v. Gonzales*, 472 F.3d 227, 232-33 (4th Cir. 2007).

Jian Tao Lin v. Holder, 611 F.3d 228 (4th Cir. 2010)
Holding: Unlike asylum and withholding of removal claims, which require an applicant's fear of persecution to be based on an enumerated ground, protection under the CAT is available to an applicant who can prove the likelihood of torture regardless of the motivation.

Gomis v. Holder, 571 F.3d 353 (4th Cir. 2009)
FGM: Substantial evidence, including the applicant's age and education, as well as the decreased incidence of FGM in Senegal (and Dakar specifically), supported the BIA's finding that it is not more likely than not that the applicant would be subjected to FGM if returned to Senegal.

Camara v. Ashcroft, 378 F.3d 361 (4th Cir. 2004)
Holding: An adverse credibility determination alone cannot support the legal conclusion that an applicant is ineligible for relief under the CAT. The IJ must consider "all evidence relevant to the possibility of future torture" and cannot rely solely on an adverse credibility determination to deny relief where independent corroborating evidence exists.

BURDENS OF PROOF

Mondragon v. Holder, 706 F.3d 535 (4th Cir. 2013)
Summary: The BIA correctly applied the modified categorical approach to find that the evidence of record was inconclusive as to whether an alien's conviction was for an aggravated felony crime of violence. The alien thus failed to carry his burden of proof to show eligibility for cancellation of removal under NACARA § 203.

Salem v. Holder, 647 F.3d 111 (4th Cir. 2011)
Summary: Presentation of an inconclusive record of conviction as to whether a noncitizen was convicted of an aggravated felony is insufficient to satisfy a noncitizen's burden of proof to show eligibility for cancellation of removal.

CANCELLATION OF REMOVAL FOR NON-PERMANENT RESIDENT ALIENS

Tiscareno-Garcia v. Holder, 780 F.3d 205 (4th Cir. 2015)
Good Moral Character: Confinement for more than 180 days—even when based on a conviction for illegal reentry—is sufficient to bar an alien from establishing good moral character under INA § 101(f)(7).

Hernandez v. Holder, 783 F.3d 189 (4th Cir. 2015)
Criminal Bars to Eligibility: The criminal bars to eligibility for non-LPR cancellation of removal, set forth in INA § 240A(b)(1)(C), disqualify any alien who has been convicted of any offense listed under its three cross-referenced sections—§§ 212(a)(2), 237(a)(2), or 237(a)(3)—regardless of whether that alien has been admitted or not. The Fourth Circuit also held that INA § 237(a)(2) applied to Hernandez's offense and § 237(a)(2) does not contain a petty offense exception; therefore, Hernandez's petit larceny offense under Virginia law was not excepted. *Matter of Cortez Canales*, 25 I&N Dec. 301 (BIA 2010), *followed*.

Urbina v. Holder, 745 F.3d 736 (4th Cir. 2014)
Stop-Time Rule: Although the alien's NTA did not specify her immigration hearing's date and time, the NTA nonetheless was valid under 8 U.S.C. § 1229(a)(1) and triggered the stop-time rule (re: 10-year period of continuous physical presence for cancellation of removal eligibility).

Jaghoori v. Holder, 772 F.3d 764 (4th Cir. 2014)
Stop-Time Rule: Application of the stop-time rule is inappropriate when a conviction triggering the stop-time rule predates the effective date of IIRIRA (and thus, the stop-time rule).

Garcia v. Holder, 732 F.3d 308 (4th Cir. 2013)
Continuous Physical Presence: When an alien voluntarily departs the United States under threat of removal pursuant to a "formal, documented process," even a break in presence of less than 90 days may still render the alien ineligible for cancellation of removal. *Matter of Romalez-Alcaide*, 23 I&N Dec. 423 (BIA 2002), *upheld*.

CITIZENSHIP

Patel v. Napolitano, 706 F.3d 370 (4th Cir. 2013)
Summary: An alien who has applied for citizenship, registered for the selective service, and provided evidence of his oath of allegiance to U.S. government officials does not qualify as a U.S. national under the BIA interpretation of 8 U.S.C. § 1101(a)(22)(B).

Injeti v. USCIS, 737 F.3d 311 (4th Cir. 2013)
"Lawfully admitted for permanent residence": To establish lawful admission for permanent residence, an alien must demonstrate that the grant of such status was in substantive compliance with the immigration laws, even if there is no indication of fraud in the application. An applicant who makes material misrepresentations in her application for lawful permanent residence is not "lawfully admitted for permanent residence."

Johnson v. Whitehead, 647 F.3d 120 (4th Cir. 2011)
Legal Separation: An alien whose parents never married could not qualify for citizenship pursuant to 8 U.S.C. § 1432(a)(3), since the term "legal separation" requires marriage.

Jahed v. Acri, 468 F.3d 230 (4th Cir. 2006)
Legal Separation: An alien cannot acquire derivative citizenship under former 8 U.S.C. § 1432(a) upon his father's naturalization since his parents were not legally separated at the time of his father's naturalization. The Court provided thorough analysis of why Pakistani divorce was not valid for purposes of U.S. immigration law. *Matter of Ma*, 15 I&N Dec. 70 (BIA 1974).

CONTINUANCES

Onyeme v. INS, 146 F.3d 227 (4th Cir. 1998)
Discretion: (1) "Whether to grant a motion to continue deportation proceedings is within the sound discretion of the IJ and is reviewed for abuse of discretion only";
(2) It is within the discretion of an IJ to deny an alien's request for a continuance when the alien has not applied for adjustment of status; the alien is statutorily ineligible for admission to the United States; there is no reason to believe that the Attorney General would grant a request for a waiver of excludability; and the visa petition submitted on behalf of the alien has been denied by the District Director.

CRIMES INVOLVING MORAL TURPITUDE

Prudencio v. Holder, 669 F.3d 472 (4th Cir. 2012)
Standard: To determine whether a respondent's conviction was for a CIMT, the court must apply the categorical approach by examining the statutory elements of

the crime. The court may not consider the facts or conduct of the particular violation at issue. Where the statute is divisible between some offenses that constitute CIMTs and some that do not, the court may apply the modified categorical approach and review the record of conviction to determine what type of offense formed the basis of the respondent's conviction.

No Deference to *Silva-Trevino*: The Fourth Circuit declined to give deference to the third step of the *Silva-Trevino* framework for determining whether a particular conviction constitutes a CIMT.

SINGLE-SCHEME OF CRIMINAL MISCONDUCT

Akindemowo v. INS, 61 F.3d 282 (4th Cir. 1995)
Summary: When an alien is convicted of two separate offenses against different victims, had the opportunity to reflect upon one crime before committing the other, and used two separate checks in two separate instances removed in time, the alien's crimes did not arise from "a single scheme of criminal misconduct," even if the offenses are similar.

DATE OF ADMISSION UNDER INA § 237(a)(2)(A)(i)

Mauricio-Vasquez v. Whitaker, 910 F.3d 134 (4th Cir. 2018)
The DHS bears the burden of proving removability by clear and convincing evidence. In the case of a respondent who has been admitted to the United States, no presumption exists that the respondent's date of admission is the date when he adjusts status. Nor is a respondent required to prove any account of his entry, much less that he entered on a visa.

Sijapati v. Boente, 848 F.3d 210 (4th Cir. 2017)
The Fourth Circuit deferred to Board's definition of "date of admission" in *Matter of Alyazji*, 25 I&N Dec. 397 (BIA 2011).
The **date of admission** refers to the date of admission by virtue of which the alien was present in the United States when he committed his crime. Look first to the date when the charged alien's crime was committed. If on that date, the alien was in the United States pursuant to an admission that occurred within the prior 5-year period, then he is deportable. Conversely, the alien is not deportable if he committed his offense more than 5 years after the date of the admission pursuant to which he was then in the United States.

Aremu v. Dep't of Homeland Sec., 450 F.3d 578 (4th Cir. 2006)
The date of adjustment of status is NOT the date of admission for purposes of CIMT. The date on which an alien adjusted his status to become a lawful permanent resident does not qualify as the "date of admission" for purposes of crimes of moral turpitude within the meaning of INA § 237(a)(2)(A)(i) when the alien had previously been admitted as a nonimmigrant visitor.

SPECIFIC CRIMES CONSIDERED CIMTs

Martinez v. Sessions, 892 F.3d 655 (4th Cir. 2018)
Md. Code Ann., Crim. Law § 7-104: The Maryland theft statute is not divisible because it encompasses a single offense, as the jury is not required to unanimously agree on the manner in which the statute was violated. It is not categorically a CIMT because a defendant may be convicted under § 7-104 for a temporary taking that deprives the owner of *any portion* of the property's value. This standard is lower that the BIA's "substantial-erosion" standard and permits the state to obtain a theft conviction for joyriding. *See Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016) (holding that a theft offense is a CIMT if it involves an intent to deprive the owner of his property either permanently or under circumstances where the owner's property rights are *substantially eroded*). Judge Niemeyer included a strong dissent.

Guevara v. Solorzano, 891 F.3d 125 (4th Cir. 2018)
Tenn. Code § 39-17-417: A conviction in Tennessee for unlawful possession of a controlled substance with intent to manufacture, deliver, or sell, is *not* categorically an aggravated felony because the statute criminalizes conduct characterized as a misdemeanor under the Controlled Substances Act (CSA). Specifically, the Tennessee statute reaches conduct including possession with intent to deliver one-half ounce of marijuana and does not include any reference to remuneration. Nonetheless, the statute is divisible because each subsection provides for a different punishment depending on the quantity and type of drug involved, allowing for application of the modified categorical approach.

Uribe v. Sessions, 855 F.3d 622 (4th Cir. 2017)
Md. Code Ann., Crim. Law § 6-204(a): a conviction for Maryland third degree burglary under Md. Code Ann., Crim. Law § 6-204 constitutes a CIMT. The act of breaking and entering a dwelling, with the intent to commit *any* crime, necessarily involves moral turpitude.

Mohamed v. Holder, 769 F.3d 885 (4th Cir. 2014)
Va. Code Ann. § 18.2-67.4: Sexual battery in violation of Va. Code Ann. § 18.2-67.4 is a CIMT.

Prudencio v. Holder, 669 F.3d 472 (4th Cir. 2012)
Va. Code § 18.2-371: Subsection (ii) of Virginia's delinquency statute, Va. Code § 18.2-371, categorically constitutes a CIMT. Subsection (ii) punishes any person 18 years or older who engages in consensual sexual intercourse with a child 15 or older not his spouse, child, or grandchild.

Yousefi v. INS, 260 F.3d 318 (4th Cir. 2001)
D.C. Code Ann. § 22-502: A conviction for assault with a dangerous weapon in violation of D.C. Code Ann. § 22-502 is a CIMT.

Castle v. INS, 541 F.2d 1064 (4th Cir. 1976)
Former Md. Code, Art. 27, § 464: A conviction for carnal knowledge of a female fifteen years of age (former Md. Code, Art. 27, § 464) is a CIMT.

SPECIFIC CRIMES NOT CONSIDERED CIMTS

Ramirez v. Sessions, 887 F.3d 693 (4th Cir. 2018)
Va. Code Ann. § 18.2-460(A) (obstruction of justice): Va. obstruction of justice is NOT a CIMT because it may be committed without fraud, deception, or any other aggravating element that shocks the public conscience.

Jimenez-Cedillo v. Sessions, 885 F.3d 292 (4th Cir. 2018)
Md. Code Ann., Crim. Law § 3-324 (sexual solicitation of a minor): The BIA's decision in *Matter of Jimenez-Cedillo*, 27 I&N Dec. 1 (BIA 2017) (finding that a conviction under Md. Code Ann., Crim. Law § 3-324(b) is categorically a CIMT), is arbitrary and capricious because the BIA failed to explain its change in position as to whether sexual offenses against children must require knowledge of the victim's age in order to qualify as a CIMT. On remand, the BIA must acknowledge and explain its change in policy, and consider in the first instance whether such new policy may be applied retroactively.

Sotnikau v. Lynch, 846 F.3d 371 (4th Cir. 2017)
Va. Involuntary Manslaughter: Virginia involuntary manslaughter is not a CIMT because a conviction may be predicated on mere criminal negligence.

Mohamed v. Holder, 769 F.3d 885 (4th Cir. 2014), *contra Matter of Tobar-Lobo*, 24 I&N Dec. 143 (BIA 2007)
Va. Code Ann. § 18.2-472.1: Failure to register as a sex offender in violation of Va. Code Ann. § 18.2-472.1 is not a CIMT.

DETENTION

Hosh v. Lucero, 680 F.3d 375 (4th Cir. 2012)
Summary: An alien otherwise subject to INA § 236(c) is not exempt from mandatory detention on the ground that the alien was not immediately taken into federal custody upon his release from other custody.

DUE PROCESS

United States v. Lopez-Collazo, 824 F.3d 453 (4th Cir. 2016)
Summary: Failure to provide respondents with an interpreter is a due process violation. However, the defect may not prejudice the defendant.
Collateral Attack [8 U.S.C. § 1326]: A defendant charged with illegal reentry is permitted to collaterally attack a prior removal order if he demonstrates all of the following: "(1) the

alien exhausted any administrative remedies that may have been available to seek relief against the order; (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and (3) the entry of the order was fundamentally unfair." *See United States v. El Shami*, 434 F.3d 659, 663 (4th Cir. 2005).

Qing Hua Lin v. Holder, 736 F.3d 343 (4th Cir. 2013)
Summary: An alien's due process rights were not violated when the IJ allowed the government to submit supplemental evidence after the alien's merits hearing and then held an additional hearing several months later to allow the evidence to be examined and to give the alien an opportunity to explain her prior statements.

Anim v. Mukasey, 535 F.3d 243 (4th Cir. 2008)
Summary: An alien's due process rights were violated when the IJ relied mainly on a U.S. Department of State letter to deny an applicant's application for asylum and that letter failed to include sufficient information to establish its reliability and trustworthiness.

Rusu v. INS, 296 F.3d 316 (4th Cir. 2002)
Summary: Procedural due process is only violated when a problem in the proceeding causes the proceeding to be unfair and the problem causes prejudice.

Gandarillas-Zambrana v. BIA, 44 F.3d 1251 (4th Cir. 1995)
Summary: An alien's rights to procedural due process are not violated when proceedings are conducted in accordance with statutes and regulations that are not themselves challenged as unconstitutional, even if the hearing is held far from the alien's residence; the IJ examines and cross-examines the alien by eliciting positive and negative information; the IJ does not provide the alien with a Spanish translator (alien confirms several times that he speaks English and his answers to the IJ are intelligible and responsible); and the alien has to appear at his hearing in prison clothes.

FLEUTI DOCTRINE OVERRULED

Othi v. Holder, 734 F.3d 259 (4th Cir. 2013)
Holding: INA § 101(a)(13) superseded the *Fleuti* doctrine, which permitted courts to investigate whether an LPR's re-entry was after an "innocent, casual, and brief" trip abroad that was not "meaningfully disruptive of the alien's permanent residence." *Fleuti*, 374 U.S. at 462. The Fourth Circuit found that "LPRs are generally exempt from the statutory classification of all other 'aliens' for purposes of an 'admission' designation," and that Congress created specific exceptions to that general exemption—one of which includes aliens that have committed offenses identified in INA § 212(a)(2). Therefore, the Fourth Circuit found that the Respondent was "categorically excluded" from the general exemption for LPRs not seeking admission to the United States.

JURISDICTION

Midi v. Holder, 566 F.3d 132, 134 (4th Cir. 2009)
Under the REAL ID Act, the courts of appeals have jurisdiction to review whether the age-out protections of CSPA apply to HRIFA applicants (question of law) and whether denying the respondent CSPA benefits violates her equal protection rights (constitutional question). The REAL ID Act applies because Congress expressly appended HRIFA as a note to 8 U.S.C. § 1255, an immigration statute within the INA.

Saintha v. Mukasey, 516 F.3d 243 (4th Cir. 2008)
The courts of appeals do not have jurisdiction to review, post-REAL ID Act, an aggravated felon's petition challenging a BIA determination regarding government acquiescence to torture for CAT purposes.

Higuit v. Gonzales, 433 F.3d 417 (4th Cir. 2006)
Adjustment of Status: Under the REAL ID Act, the court of appeals did not have the jurisdiction to review a denial of adjustment of status based on a discretionary determination that the persecution carried out by the alien outweighed his good conduct in the United States, since the alien raised no constitutional claim or question of law.

Deloras Jean v. Gonzales, 435 F.3d 475 (4th Cir. 2006)
Motion to Reconsider: The court of appeals lacked jurisdiction to review the BIA's denial of alien's motion to reconsider the IJ's discretionary denial of waiver of inadmissibility.

Obioha v. Gonzales, 431 F.3d 400 (4th Cir. 2005)
Motion to Remand: The gatekeeper provision of 8 U.S.C. § 1252(a)(2)(B)(i) did not strip the court of appeals of the jurisdiction to review BIA denials of motions to remand for the purpose of pursuing cancellation of removal when the IJ and BIA had never considered the alien's request for cancellation of removal.

Argaw v. Ashcroft, 395 F.3d 521 (4th Cir. 2005)
8 U.S.C. § 1252(a)(2)(C): An alien's possible commission of an 8 U.S.C. § 1182(a)(2) offense is a jurisdiction-stripping fact that a court of appeals may consider under 8 U.S.C. § 1252(a)(2)(C).

Ngarurih v. Ashcroft, 371 F.3d 182 (4th Cir. 2004)
Voluntary Departures: The courts of appeals lack authority to reinstate voluntary departure.

Ramtulla v. Ashcroft, 301 F.3d 202 (4th Cir. 2002)
8 U.S.C. § 1252(a)(2)(C): The court of appeals has no jurisdiction to review a final order of removal of an alien removable for having committed an aggravated felony. "Under this provision, we have jurisdiction only to review factual determinations that trigger the jurisdiction-stripping provision, such as whether Ramtulla was an alien and whether she has been convicted of an aggravated felony." *Id.* at 203.

Lewis v. INS., 194 F.3d 539 (4th Cir. 1999)
8 U.S.C. § 1252(a)(2)(C): Despite 8 U.S.C. § 1252(a)(2)(C), the court of appeals had jurisdiction to review whether an alien was deportable based on an aggravated felony conviction that occurred prior to the effective date of the statute that first made an aggravated felony a deportable offense.

Gottesman v. INS, 33 F.3d 383 (4th Cir. 1994)
Holding: (1) The court of appeals did not have jurisdiction to review an INS decision rescinding the alien's status as a lawful permanent resident; (2) the BIA decision not to terminate deportation proceedings while the alien's second motion to reopen rescission proceedings was pending before the INS director was not abuse of discretion; (3) the BIA's refusal to grant the alien relief from deportation and from voluntary departure or suspension from deportation was not abuse of discretion; and (4) the alien failed to satisfy "good moral character" requirement for suspension of deportation.

LOZADA RULINGS / INEFFECTIVE ASSISTANCE OF COUNSEL

Barry v. Gonzales, 445 F.3d 741 (4th Cir. 2006)
Summary: (1) The BIA properly denied an alien's ineffective assistance claim, since the alien satisfied none of *Lozada*'s requirements; (2) "The BIA's denial of a motion to reopen is reviewed with extreme deference, given that motions to reopen 'are disfavored . . . [because] every delay works to the advantage of the deportable alien who wishes merely to remain in the United States.'" *Id.* at 744–45 (quoting *Stewart*, 181 F.3d at 596).

Stewart v. INS, 181 F.3d 587 (4th Cir. 1999)
4th Cir. Adopts *Lozada*: An alien who claims ineffective assistance of counsel must substantially meet the requirements set forth in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). The alien must:

> (1) provide an affidavit that describes her agreement with counsel;
> (2) inform counsel of her allegation and provide counsel with an opportunity to respond; and
> (3) indicate whether she filed a complaint with the appropriate disciplinary authorities and, if she did not file, explain why not. This requirement discourages counsel-client collusion to delay removal.

Figeroa v. INS, 886 F.2d 76 (4th Cir. 1989)
Prejudice Requirement: An alien who moves to reopen based on ineffective assistance of counsel must show that counsel's actions prejudiced him. *Id.* at 78; *Matter of Lozada*, 19 I&N Dec. at 638; *see Rusu v. INS*, 296 F.3d 316, 324 (4th Cir. 2002).

MENTAL COMPETENCY

Diop v. Lynch, 807 F.3d 70 (4th Cir. 2015)
No clear error in the IJ's determination that the respondent was competent to participate in removal proceedings, given that the IJ made a finding of mental competency after the respondent testified he had no prior history of mental health problems and demonstrated his ability to communicate with counsel. A mental competency determination is a finding of fact that does not rely on an exact list of criteria. *Thompson v. Keohane*, 516 U.S. 99, 111 (1995). Instead, a competency hearing involves a credibility determination in which "the IJ must decide whether someone is honestly failing to understand the proceedings or is instead putting on an act."

MOTIONS TO REOPEN / RECONSIDER

Lawrence v. Lynch, 826 F.3d 198 (4th Cir. 2016)
Equitable Tolling: A petitioner seeking equitable tolling must prove that "(1) the Government's wrongful conduct prevented the petitioner from filing a timely motion; or (2) extraordinary circumstances beyond the petitioner's control made it impossible to file within the statutory deadline." *Kuusk v. Holder*, 732 F.3d 302, 305-06 (4th Cir. 2013). A petitioner who relies on "extraordinary circumstances" must also show that he pursued his rights with reasonable diligence. *Holland v. Florida*, 560 U.S. 631, 649 (2010).
Jurisdiction: The Fourth Circuit lacks jurisdiction to review BIA decisions regarding *sua sponte* reopening of proceedings.

LeBlanc v. Holder, 784 F.3d 206 (4th Cir. 2015)
Lack of Jurisdiction: The Fourth Circuit lacked jurisdiction to review the BIA's denial of a U.S. citizen father's motion to reopen where the beneficiary son never had been placed in removal proceedings. Also, the Fourth Circuit lacked jurisdiction to decide the matter as a nationality claim under INA § 245. Further, transfer to a district court would not be in the best interests of justice. Pursuing the denial of the motion to reopen the erroneously filed I-130 proceedings in the district court would be fruitless since an I-130 petition cannot lead to a grant of citizenship directly. The interests of justice best would be served by terminating the litigation so the beneficiary's son could file a Form N-600 on his own behalf.

United States v. Wanrong Lin, 771 F.3d 177 (4th Cir. 2014)
Summary: The BIA did not abuse its discretion in denying an alien's second motion to reopen based on a material change in country conditions when much of the evidence attached to his second motion was unauthenticated, previously available or not new, not relevant to his circumstances in his province in China, and not sufficient to discredit findings in the May 2007 Department of State Profile of Asylum Claims and Country Conditions on China.

Kuusk v. Holder, 732 F.3d 302 (4th Cir. 2013)
Summary: 8 U.S.C. § 1229a(c)(7)(C)(i) sets forth a limitations period that can be equitably tolled. The *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) standard applies to untimely motions to reopen removal proceedings. Equitable tolling is proper only when: (1) the plaintiffs were prevented from asserting their claims by some kind of wrongful conduct on the part of the defendant; or (2) extraordinary circumstances beyond the plaintiffs' control made it impossible to file the claims on time. Accordingly, equitable tolling is to be granted "only sparingly."

Sadhvani v. Holder, 596 F.3d 180 (4th Cir. 2009)
Summary: The BIA had jurisdiction to consider the motion of an alien no longer in the United States. The BIA did not abuse its discretion when it denied the alien's motion to reopen his asylum application on the ground that an alien must be present in the United States to be eligible for asylum.

Hui Zheng v. Holder, 562 F.3d 647 (4th Cir. 2009)
Asylum: An alien filing an asylum-based motion to reopen more than 90 days after the entry of a final removal order must show changed country conditions.

Nibagwire v. Gonzales, 450 F.3d 153 (4th Cir. 2006)
In absentia: When an alien moves to reopen in absentia removal proceedings on the ground that she never received the NTA sent to her via regular mail, the strong presumption of delivery that attaches to notices sent by certified mail and the evidentiary standard for rebutting the presumption set out in *Matter of Grijalva*, 21 I&N Dec. 27 (BIA 1995), do not apply.

Nwolise v. INS, 4 F.3d 306, 307 (4th Cir. 1993)
Summary: A final deportation order renders an alien ineligible for a § 212(c) waiver. The alien's filing of a motion to reopen does not render the BIA's decision non-final.

MOTION TO SUPPRESS

Sanchez v. Sessions, 885 F.3d 782 (4th Cir. 2018)
In removal proceedings, the respondent moved to suppress all evidence of his illegal entry, arguing that the state police officers obtained this information in violation of his Fourth and Fifth Amendment rights.
Holding: In addition to federal officers, the "demanding standard" under the "egregious violation" exclusionary rule also applies in civil removal proceedings to state and local officers. A stop or seizure based solely on an abuse of an officer's legal authority AND without reasonable suspicion will *usually* be egregious, but more may be required in some circumstances. If the conduct is egregious, its fruits will likely be suppressed in civil immigration proceedings.

United States v. Williams, 808 F.3d 238 (4th Cir. 2015)(non-INA)
Holding: A detaining officer may not extend an otherwise completed traffic stop in order to conduct a dog sniff. A *de minimis* extension of a traffic stop to conduct a dog sniff is unconstitutional absent reasonable, articulable suspicion of criminal activity by the detaining officer.

Yanez-Marquez v. Lynch, 789 F.3d 434 (4th Cir. 2015)
Summary: Triggering of the exclusionary rule based on an egregious violation of Fourth Amendment rights requires that must the egregious conduct must both (1) transgress notions of fundamental fairness, and (2) undermine the probative value of the evidence obtained. To determine whether a Fourth Amendment violation is so egregious that it transgresses notions of fundamental fairness requires a "totality of the circumstances approach," taking into account a variety of factors, including: (1) whether the Fourth Amendment violation was intentional; (2) whether the violation was unreasonable in addition to being illegal; (3) whether there were threats, coercion, physical abuse, promises, or an unreasonable show of force by the law enforcement officers; (4) whether there was no articulable suspicion for the search or seizure whatsoever; (5) where, when, and how the search, seizure, or questioning took place; (6) whether the search, seizure, or questioning was particularly lengthy; (7) whether the law enforcement officers procured an arrest or search warrant; (8) any unique characteristics of the alien involved; and (9) whether the violation was based on racial considerations.

MOTION TO TERMINATE

Barnes v. Holder, 625 F.3d 801 (4th Cir. 2010)
Pending Naturalization Application: Removal proceedings may only be terminated pursuant to 8 C.F.R. § 1239.2(f) where DHS has presented an affirmative statement as to the alien's prima facie eligibility for naturalization.

NACARA

Quitanilla v. Holder, 758 F.3d 570 (4th Cir. 2014)
Persecutor Bar: The persecutor bar applies when the alien oversaw the investigation and capture of 20 to 50 civilians and guerrillas and took custody of or transported individuals for the purpose of persecution based on country conditions reports.

De Leon v. Holder, 761 F.3d 336 (4th Cir. 2014)
Official Restraint: The respondent entered free from official restraint because he was not observed by a border agent until he was 17 miles into the United States from the border and, prior to reaching that point, he was unconstrained by government surveillance. Official restraint may take the form of government surveillance. The Fourth Circuit further noted that every circuit to consider the issue has concluded that an alien first observed miles or less beyond the U.S. border entered free from official restraint.

Pastora v. Holder, 737 F.3d 902 (4th Cir. 2013)
Persecutor Bar: Sworn statements by the alien in regard to his participation in El Salvador's civil war and evidence of numerous human rights abuses were sufficient to indicate that the persecutor bar applied. Inconsistencies in the alien's testimony and his varied responses to the inconsistencies were substantial evidence to support the IJ's adverse credibility finding.

Barahona v. Holder, 691 F.3d 349 (4th Cir. 2012)
Material Support: An alien who allows anti-government guerillas of the FMLN to use his kitchen for nearly a year has provided material support to a terrorist organization and is ineligible for NACARA cancellation of removal, even if the support was provided involuntarily or under duress.

Ramos v. Holder, 660 F.3d 200 (4th Cir. 2011)
"Alien smuggling": "[Aliens'] recurring attempts to financially facilitate their children's illegal entry into the United States satisfied both the assistance and knowledge requirements of the 'alien smuggling' provision [INA § 212(a)(6)(E)]." As a result, the aliens lacked good moral character and were not eligible for NACARA cancellation of removal.

Appiah v. INS, 202 F.3d 704 (4th Cir. 2000)
Summary: The stop-time rule of IIRIRA, as amended by NACARA, applies to deportation proceedings that were pending when IIRIRA was enacted and does not violate an alien's due process or equal protection rights because suspension of deportation is discretionary, not a right. The exemption of certain nationalities from the stop-time rule does not violate an alien's equal protection rights.

OTHER CRIMINAL GROUNDS/ISSUES

CRIMES RELATING TO A CONTROLLED SUBSTANCE UNDER INA § 212(a)(2)(A)(i)(II)

Shaw v. Sessions, 898 F.3d 448 (4th Cir. 2018)
The Respondent is inadmissible under INA § 212(a)(2)(A)(i)(II) because the criminal object of the conspiracy to which he pleaded guilty—possession of more than twenty-five pounds of marijuana with the intent to distribute—constitutes a crime relating to a controlled substance. Inchoate crimes are unique because they presuppose a purpose to commit another crime. In applying the categorical approach to inchoate crimes, courts should look beyond the statute and apply the categorical approach to the object of the inchoate offense. In addition, INA § 240(c)(3) does not exclusively define the documents the DHS may use to prove the fact of conviction. The IJ and BIA may consider documents outside of the § 240(c)(3) list, as long as such documents "reasonably indicate[] the existence of a criminal conviction." 8 C.F.R. § 1003.41(d).

CRIMES OF DOMESTIC VIOLENCE UNDER INA § 237(a)(2)(E)

Hernandez-Zavala v. Lynch, 806 F.3d 259 (4th Cir. 2015)
A conviction in North Carolina for assault with a deadly weapon under N.C. Gen. Stat. § 14-33(c)(1) constitutes a crime of domestic violence under INA § 237(a)(2)(E). The circumstance-specific approach is proper in determining whether an alien committed a "crime of domestic violence" under the INA. Under this approach, while the congruence of the elements of the underlying offense and the offense described in the federal statute must be assessed using the categorical approach, courts may consider other evidence to see if the necessary attendant circumstances existed.

MISDEAMENORS WITH TERMS OF IMPRISONMENT OF ONE YEAR OR MORE

Wireko v. Reno, 211 F.3d 833 (4th Cir. 2000)
Virginia misdemeanor conviction with term of imprisonment of one year or more (in this case, Va. Code Ann. § 18.2-67.4, misdemeanor sexual battery) is an aggravated felony, even if state law classifies the offense as a misdemeanor, because under the plain language of INA § 101(a)(43)(F), there is no requirement that the offense actually have been classified as a felony.

MISDEMEANOR CRIME OF DOMESTIC VIOLENCE

United States v. Vinson, 794 F.3d 418; 805 F.3d 120 (4th Cir. 2015).
North Carolina conviction under N.C. Gen. Stat. § 14-33 for misdemeanor assault, assault and battery, and affray does not qualify as a misdemeanor crime of violence because none of forms of the offense requires the level of intent necessary to qualify as a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A).

RETROACTIVITY

Lewis v. INS, 194 F.3d 539 (4th Cir. 1999)
An alien's aggravated felony conviction supports removal under INA § 237(a)(2)(A)(iii), even if the alien was convicted prior to the effective date of the statute making an aggravated felony a deportable offense.

SENTENCING—PUNISHABLE BY MORE THAN ONE YEAR IN PRISON

United States v. Valdovinos, 760 F.3d 322 (4th Cir. 2014) (non-INA)
North Carolina's legislatively mandated sentencing scheme, not a negotiated plea deal between the prosecutor and defendant, determined whether a prior North Carolina conviction was punishable by more than one year in prison. The Fourth Circuit found that *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) and *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) mandated such a result. In this

case, the Fourth Circuit found that the defendant pled guilty to an offense punishable under state law by a maximum term of 16 months in prison, and therefore a felony punishable by more than one year, even though he ultimately agreed to a plea deal of 10 to 12 months in prison.

WHAT CONSTITUTES A CONVICTION

Gonzalez v. Sessions, 894 F.3d 131 (4th Cir. 2018)
A monetary assessment amounts to a "punishment" or "penalty" under INA § 101(a)(48)(A) if it is principally intended to serve a punitive purpose. A punishment or penalty must be imposed as a discretionary judicial act, and must be proportionate to a defendant's wrongdoing. As such, the imposition of costs assessed attendant to a **North Carolina disposition of prayer for judgment continued <u>does not</u>** qualify as a punishment or penalty under INA § 101(a)(48)(A)(i)–(ii).

Jaquez v. Sessions, 859 F.3d 258 (4th Cir. 2017)
A guilty plea constitutes a "sufficient finding of support for a conclusion of guilt" required in order for a deferred adjudication to qualify as a "conviction" under 8 U.S.C. § 1101(a)(48)(A), even if the finding of guilt is subsequently vacated.
Respondent's deferred adjudication under **Virginia Code § 18.2-251**, falls within the unambiguous definition of a conviction in **INA § 101(a)(48)(A).** He entered a guilty plea and was placed on probation (amongst other punishments) and thus met both requirements necessary to fall within the definition of a conviction.

Dung Phan v. Holder, 667 F.3d 448, 452 (4th Cir. 2012)
An adjudication of guilt under the District of Columbia's Youth Rehabilitation Act (DCYRA) was a conviction for purposes of the INA. The rule set forth in *Matter of Pickering* was "persuasive"—where a conviction is vacated based on a defect in the underlying criminal proceedings, the conviction no longer stands for immigration purposes, but where a conviction is vacated for reasons unrelated to the merits of the underlying criminal proceedings, however, the conviction remains for immigration purposes.

Crespo v. Holder, 631 F.3d 130 (4th Cir. 2011)
When neither a judge nor a jury finds an alien guilty after a trial
and the alien did not plead guilty or no contest or admit to any facts, the deferral of adjudication with a sentence of probation, does not constitute a "conviction" under INA § 101(a)(48)(a).

Yanez-Popp v. INS, 998 F.2d 231 (4th Cir. 1993)
"PBJ": A disposition of probation without judgment, or probation before judgment, constitutes a "conviction" for immigration purposes.

Boggala v. Sessions, 866 F.3d 563 (4th Cir. 2017)

Deferred Prosecution Agreement: The Respondent's deferred prosecution agreement (North Carolina) constitutes a conviction under the INA because the Respondent admitted sufficient facts to warrant a finding of guilt.

RIGHT TO APPEAL

Narine v. Holder, 559 F.3d 246 (4th Cir. 2009)
An alien did not knowingly and intelligently waive his right to appeal when the Immigration Judge did not include any discussion of the fact that waiver of appeal was a condition of voluntary departure during the alien's removal hearing and the alien was not represented by counsel during the removal hearing.

STANDARD OF REVIEW

Chen Zhou Chai v. Carroll, 48 F.3d 1331 (4th Cir. 1995)
Executive Order 12,711 instructing Attorney General to exercise statutory authority to provide for enhanced consideration of asylum claims did not create a right enforceable by a private cause of action; so the BIA did not err in applying *Matter of Chang* as precedent to the alien's case.

Huaman-Cornelio v. BIA, 979 F.2d 995 (4th Cir. 1992)
Pursuant to the administrative procedure for asylum cases, the BIA has authority to review de novo immigration judge's decisions in asylum cases, make its own findings even as to matters of credibility, and to assess the legal sufficiency of the evidence.

TEMPORARY PROTECTED STATUS

Cervantes v. Holder, 597 F.3d 229 (4th Cir. 2010)
Terms Defined: "Continuous physical presence" and "continuous residence" for purposes of late initial registration for TPS cannot be imputed and are not proven when the aliens entered the United States in September 2004 and only their parents were in the United States during the initial registration period in 1999. "Most recent designation" refers to the initial state designation of the program, not extension notices.

WAIVERS OF INADMISSIBILITY

212(C) WAIVER

Guevara v. Solorzano, 891 F.3d 125 (4th Cir. 2018)
An alien who pleaded guilty to a conviction that constitutes a CIMT *before* the repeal of INA § 212(c) in 1996, but also pleaded guilty to an additional CIMT *after*

the repeal of § 212(c), may not avoid removal by using a § 212(c) waiver. *See Matter of Balderas*, 20 I&N Dec. 389 (BIA 1991).

Mbea v. Gonzales, 482 F.3d 276 (4th Cir. 2007)
Accord with *Chambers v. Reno* (see below).

Chambers v. Reno, 307 F.3d 284 (4th Cir. 2002)
Repeal of § 212(c) may take retroactive effect as applied to an alien convicted after trial. "[W]hile an alien who pleads guilty does so in the context of a quid pro quo relationship in which he benefits from the guarantee of a reduced sentence-one that would ensure continued eligibility for [§ 212(c)] discretionary relief—an alien who goes to trial does not strike a quid-pro-quo bargain or receive any similar assurance. To the contrary, an individual who goes to trial in a case where the allowable statutory penalty exceeds that permitted by § 212(c) actually ensure[s] that his eligibility for discretionary relief w[ill] remain uncertain." *See also Mbea v. Gonzales*, 482 F.3d at 281-82 (summarizing holding of *Chambers*) (internal quotation marks and citations omitted).

Tasios v. Reno, 204 F.3d 544 (4th Cir. 2000)
1996 enactment of AEDPA § 440(d) amended INA § 212(c) to preclude discretionary relief for aliens who have been convicted of drug trafficking offenses, regardless of the length of sentence. The Fourth Circuit held that § 440(d)'s bar to relief under § 212(c) should not apply to aliens who pled guilty to aggravated felonies, or who conceded deportability, prior to AEDPA's effective date.

Gandarillas-Zambrana v. BIA, 44 F.3d 1251 (4th Cir. 1995)
The IJ properly considered all of the *Marin* factors in determining the alien's eligibility for discretionary § 212(c) waiver. The IJ considered the evidence relevant to the determination regarding rehabilitation and made a reasoned finding; thus, the Fourth Circuit concluded that his decision was not arbitrary or capricious. The IJ's decision to require Gandarillas to show unusual or outstanding equities was not arbitrary or capricious.

212(H) WAIVER

Bracamontes v. Holder, 675 F.3d 380, 385-86 (4th Cir. 2012)
"Admission": An LPR who adjusted status but never left and re-entered the country as an LPR was not barred from applying for a § 212(h) waiver after committing an aggravated felony because the word "admitted" in INA § 212(h)(2) refers to entry into the United States, not adjustment of status.

Leiba v. Holder, 669 F.3d 346 (4th Cir. 2012)
"Admission": The § 212(h) waiver bar does not apply to an alien who has never entered the United States legally.