No. 07-249

In the Supreme Court of the United States

ANDI PALGUNADI, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in denying petitioner's motion to remand based on evidence outside of the administrative record relating to a new claim for relief.

2. Whether the court of appeals erred in holding that substantial evidence supports the agency's determination that petitioner failed to establish eligibility for withholding of removal to Indonesia.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but it is available at 216 Fed. Appx. 304. The decisions of the Board of Immigration Appeals (Supp. Pet. App. 7a-8a) and the Immigration Judge (Supp. Pet. App. 9a-19a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 2007. A petition for rehearing was denied on May 22, 2007 (Pet. App. 3a). The petition for a writ of certiorari was filed on August 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Section 245(i) of the Immigration and Nationality Act (INA), 8 U.S.C. 1255(i), allows certain aliens who are physically present in the United States to seek adjustment of their status to that of an alien lawfully admitted for permanent residence. Section 245(i) provides that the Attorney General "may adjust" the status of an alien who "entered the United States without inspection" if he pays a penalty and meets two other requirements:

> (A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and
>
> (B) an immigrant visa is immediately available to the alien at the time the application is filed.

8 U.S.C. 1255(i)(2). The original sunset date for Section 245(i) was extended several times and expired on April 30, 2001, except for those aliens who were already "grandfathered." 8 U.S.C. 1255(i); 8 C.F.R. 1245.10. As relevant here, a "grandfathered" alien includes an alien who had an application for a labor certification filed on his behalf on or before April 30, 2001, which was approvable when filed. 8 U.S.C. 1255(i)(1)(B)(ii); 8 C.F.R. 1245.10(a)(1)(i)(B).

An alien may seek to adjust his status under Section 1255(i), based on an employer's need for his skills, in a three-step process. *Khan* v. *Attorney General*, 448 F.3d 226, 228 n.2 (3d Cir. 2006). In "the first preliminary step," the potential employer must file a labor certification and establish, *inter alia*, that there is no United States citizen available to fill the job. *Ahmed* v. *Gonzales*, 447 F.3d 433, 438 (5th Cir. 2006). Second, once the

labor certification is approved, the prospective employer must file the approved labor certification along with an employment-based visa petition (Form I-140). See 8 C.F.R. 204.5(a). Finally, if the employment-based visa petition is approved, then the alien's application for adjustment of status may be considered for adjudication. See 8 C.F.R. 1245.2(a)(2). That process may be lengthy, and the ultimate decision regarding whether to permit adjustment of status is entrusted to the discretion of the Attorney General. *Ahmed*, 447 F.3d at 438-439 & n.3.

If an alien is in removal proceedings and wishes to seek adjustment of his status under Section 245(i), he may only do so in those proceedings. 8 C.F.R. 1245.2(a)(1)(i) ("In the case of any alien who has been placed in * * * removal proceedings * * *, the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file."). Subject to certain exceptions, an alien may file a motion to reopen a completed removal proceeding "within 90 days of entry of a final administrative order." 8 U.S.C. 1229a(c)(7)(C)(i) (Supp. V 2005).

b. Section 242(a) of the INA, 8 U.S.C. 1252(a), generally authorizes the courts of appeals to review final orders of removal on petition for review. The reviewing court "shall decide the petition only on the administrative record on which the order of removal is based." 8 U.S.C. 1252(b)(4)(A). The court "may not order the taking of additional evidence under section 2347(c)" of Title 28. 8 U.S.C. 1252(a)(1).[1]

[1] 28 U.S.C. 2347(c) provides that a reviewing court may grant "a party to a proceeding to review" a covered administrative order leave "to adduce additional evidence" if that evidence is "material" and "there were reasonable grounds for failure to adduce the evidence before the

c. The INA defines a "refugee" as an alien who is unwilling or unable to return to his or her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). If the "Secretary of Homeland Security or the Attorney General determines" that an alien is a refugee, he may, in his discretion, grant the alien asylum in the United States. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(a), 119 Stat. 303 (8 U.S.C. 1158(b)(1)(A) (Supp. V 2005)). An application for asylum generally must be filed within one year of an alien's entry into the United States. 8 U.S.C. 1158(a)(2)(B).

In addition to the discretionary relief of asylum, mandatory withholding of removal is available if "the alien's life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). An applicant for withholding of removal must establish that it is more likely than not that he would face persecution on account of a protected ground upon removal to a particular country. 8 C.F.R. 208.16(b)(2). The "more likely than not" standard is a more stringent standard than a well-founded fear of persecution (the asylum standard). *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-432 (1987).

To obtain protection under the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85, an applicant must demonstrate,

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agency." In such circumstances, a court may order that evidence "to be taken by the agency."

inter alia, that it is more likely than not that he would be tortured "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" if removed to a certain country. 8 C.F.R. 1208.18(a)(1); see 8 C.F.R. 1208.16(c)(2).

The applicant bears the burden of establishing that he or she is eligible for asylum, withholding of removal, or CAT protection. 8 C.F.R. 208.13(a), 208.16(b), 1208.16(c)(2).

2. a. Petitioner is a native and citizen of Indonesia and a practicing Muslim. He arrived in the United States in November 1999 as a non-immigrant vocational student and was authorized to stay for one year. Petitioner remained in the United States long after the date permitted, and the Department of Homeland Security initiated removal proceedings. Petitioner conceded removability, but he sought relief from removal in the form of asylum, withholding of removal, and protection under the CAT. In the alternative, petitioner requested voluntary departure. Supp. Pet. App. 9a-10a.

Petitioner claimed that before he left Indonesia, he was threatened by the Islamic extremist group Jemaat Islamiah, an organization designated by the United States as a terrorist group. Petitioner testified that members of the group first began threatening him when he worked as a pilot for the Indonesian government. Petitioner explained that after his contract expired with the government, he went into business for himself, and he was threatened by "individuals who sought to extort monies from his business," who he "believed to be" Islamic extremists. Petitioner also testified regarding an incident in which he was confronted by several individuals he believed to be members of an extremist group

while he was at an automated teller machine. Supp. Pet. App. 11a-12a.

b. The immigration judge (IJ) denied petitioner's applications for asylum, withholding, and CAT protection, but he granted petitioner voluntary departure. First, the IJ denied petitioner's asylum application because petitioner had not filed the application within one year of his entry into the United States, and petitioner did not demonstrate any circumstances that would permit relief from the one-year bar. Supp. Pet. App. 12a, 16a; see 8 U.S.C. 1158(a)(2)(B).

Second, the IJ determined that petitioner had not established his eligibility for withholding of removal because he failed to establish that it was more likely than not that he would be persecuted on account of a protected ground if returned to Indonesia. Supp. Pet. App. 15a-18a. Petitioner claimed that he would be persecuted on two protected grounds, religion and membership in a particular social group (airline pilots who work for the Indonesian government). *Id.* at 17a. The IJ found that petitioner's social group claim failed because petitioner was no longer a member of the claimed group, which meant that he could not show a likelihood of persecution on that basis. *Ibid.*; see *In re Acosta*, 19 I. & N. Dec. 211, 231-233 (B.I.A. 1985), overruled on other grounds by *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). The IJ then found that petitioner had not established that he would be persecuted based on his religion because there was "no evidence" that petitioner had been or would be "singled out to be persecuted for [his] religious affiliation and belief." Supp. Pet. App. 17a. Indeed, the evidence revealed that petitioner was threatened "not because of [his] religion" but "because [he] worked as a pilot for the government" and "because

[he] owned a business." *Ibid.* As a result, the IJ found that there was simply "no nexus between [petitioner's] fear * * * and the protected grounds" in the INA. *Id.* at 17a-18a.

The IJ denied petitioner's claim for relief under the CAT, finding that there was no evidence that petitioner had been or would be tortured by the government, or with the acquiescence of the government, if returned to Indonesia. Supp. Pet. App. 16a-17a. Finally, the IJ granted petitioner voluntary departure in lieu of removal. *Id.* at 18a-19a.

3. The Board of Immigration Appeals (Board) affirmed the IJ's decision, "find[ing] no error in the denial of the relief sought." Supp. Pet. App. 7a. Petitioner had also filed a motion to remand before the Board, arguing that remand was warranted because he had filed an employment-based visa petition. *Id.* at 8a; see *Ahmed*, 447 F.3d at 438 n.3 (filing of employment-based visa petition is second step in seeking to adjust status based on an employer's need for skills). The Board denied petitioner's motion to remand because petitioner's visa petition had not yet been adjudicated, and thus he had not met the prerequisites to seek an adjustment of status. Supp. Pet. App. 8a.; see 8 U.S.C. 1255(i)(2)(B).

In accordance with the IJ's order, the Board provided petitioner 60 days voluntarily to depart the United States. Supp. Pet. App. 8a. Petitioner then requested a stay of removal and a stay of voluntary departure pending review from the court of appeals. The government did not oppose petitioner's motion for a stay of removal, but it did oppose his motion for stay of voluntary departure. The court of appeals granted petitioner a stay of removal only but denied a stay of voluntary departure. See 06-1666 Docket entry (4th Cir. July 26,

2006); see also *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 193-195 (4th Cir. 2004) (holding that the court of appeals lacks the authority to stay voluntary departure). Petitioner has not voluntarily departed the United States.

4. In an unpublished, per curiam opinion, the court of appeals denied petitioner's petition for review. Pet. App. 1a-2a. It first determined that it could not consider petitioner's asylum application because the IJ had determined it was time-barred. *Id.* at 2a; see 8 U.S.C. 1158(a)(3).[2] The court then rejected petitioner's withholding argument, holding that "substantial evidence support[ed] the finding that [petitioner] did not establish eligibility for withholding of removal." Pet. App. 2a.

Petitioner had also filed a motion to remand with the court of appeals. Petitioner argued that the court should remand his case to the Board so that he could file an application for adjustment of status because his work visa (*i.e.*, I-140 petition) had been approved. See Pet. Motion to Remand 1-2 (filed Nov. 30, 2006). The government opposed the motion, explaining that remand was inappropriate because the court of appeals' review was limited to the administrative record on which the petition was based and that petitioner's remedy was to file a motion to reopen with the Board. See Gov't Opp. to Motion to Remand 3-4 (filed Dec. 8, 2006). The court of appeals denied petitioner's motion to remand. Pet. App. 2a.

ARGUMENT

The unpublished decision of the court of appeals is correct and does not conflict with any decision of this

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[2] Petitioner does not challenge the denial of his asylum claim or the denial of his CAT claim before this Court.

Court or any other court of appeals. Further review of petitioner's fact-bound claims is therefore unwarranted.

1. Petitioner contends (Pet. 5-9) that the court of appeals erred by denying his motion to remand to the Board for consideration of his application for adjustment of status based on new evidence of an approved work visa. Petitioner does not contend that there is any disagreement in the circuits on this point, and he has no colorable claim that the decision below conflicts with a decision of this Court or presents an issue of such extraordinary importance that this Court's review is warranted. See Sup. Ct. R. 10. In any event, the decision below is correct.

a. Regulations implementing the INA make clear that an alien who has been placed in removal proceedings may seek adjustment of his status only in those proceedings. 8 C.F.R. 1245.2(a)(1). Petitioner acknowledges that limitation on the availability of Section 245(i) relief. Pet. 7-8. Moreover, the court of appeals' authority to review a final order of removal is limited to the administrative record on which the order of removal was based. 8 U.S.C. 1252(b)(4)(A). Petitioner's motion to remand was based on new evidence that was not part of the administrative record, *i.e.*, approval of petitioner's work visa. Pet. 6. The court of appeals thus correctly determined that remand was inappropriate.

Petitioner contends (Pet. 8) that under those circumstances, the court of appeals could have remanded the case to the Board for further proceedings under 28 U.S.C. 2347(b) or (c). That contention lacks merit. First, 28 U.S.C. 2347(b) is not applicable to this case because petitioner is not seeking review of an agency action taken without a hearing. 28 U.S.C. 2347(b) (authorizing remand when, *inter alia,* "the agency has not

held a hearing before taking the action of which review is sought by the petition"). Indeed, petitioner was provided with a hearing on his claims for relief from removal, which formed the basis of his petition for review. What petitioner is seeking is an additional hearing on a claim that has not been presented or considered by the agency, specifically, whether he should be granted adjustment of status based on his approved visa petition, and that type of claim is not a basis for remand under 28 U.S.C. 2347(b).

Second, remand under 28 U.S.C. 2347(c) is expressly barred by 8 U.S.C. 1252(a), which defines the limits of the courts of appeals' authority to review final orders of removal. See 8 U.S.C. 1252(a)(1) ("[T]he court may not order the taking of additional evidence under section 2347(c)" of Title 28.); see also, *e.g.*, *Lendo* v. *Gonzales*, 493 F.3d 439, 443 n.3 (4th Cir. 2007) (court of appeals is barred under 8 U.S.C. 1252(a)(1) from remanding based on intervening developments); *Gebremaria* v. *Ashcroft*, 378 F.3d 734, 737 (8th Cir. 2004) (statute's "prohibition of remanding for the consideration of additional evidence pertains to non-record evidence that is introduced in the first instance before a reviewing court"); *Al Najjar* v. *Ashcroft*, 257 F.3d 1262, 1281 (11th Cir. 2001) (statute "prohibits [the court of appeals] from ordering the [Board] to consider evidence that is offered for the first time on appeal, even if such material satisfies the rigors of § 1237(c)"); *Altawil* v. *INS*, 179 F.3d 791, 793 (9th Cir. 1999) (denying remand motion because court of appeals "cannot order the taking of additional evidence by the Board under 28 U.S.C. 2347(c)").

Although one circuit court has suggested that it may have "inherent power to remand for additional fact-finding in agency cases that present extraordinary and com-

pelling circumstances," it concluded that "the exercise of such an inherent power is not warranted if * * * [i] the basis for the remand is an instruction to consider documentary evidence that was not in the record before the [Board]; and [ii] the agency regulations set forth procedures to reopen a case before the [Board] for the taking of additional evidence." *Xiao Xing Ni* v. *Gonzales*, 494 F.3d 260, 269 (2d Cir. 2007). That is precisely the situation here. Petitioner sought a remand so that the Board could consider evidence that was not part of the administrative record below, and there are procedures for petitioner to seek reopening before the Board to consider his additional evidence. Specifically, petitioner may file a motion to reopen based on his approved visa petition with the Board. See 8 U.S.C. 1229a(c)(7) (Supp. V 2005); 8 C.F.R. 1003.2(c)(2). Although petitioner's motion may be time-barred, Pet. 7; 8 C.F.R. 1003.2(c)(2), the Board has the authority to reopen his case *sua sponte*, 8 C.F.R. 1003.2(a), and petitioner also could avoid the time bar by obtaining the government's agreement to join his motion to reopen, 8 C.F.R. 1003.2(c)(3)(iii).[3]

b. Petitioner contends (Pet. 7-8) that the court of appeals' refusal to grant his remand motion violates due process, because "the law confers upon [him] the right

[3] Petitioner also argues (Pet. 7) that it would be contrary to Congress's intent in enacting Section 245(i) to "le[ave] [him] without any venue where his adjustment of status could be heard." That claim lacks merit. Petitioner does not point to any language in Section 245(i) where Congress evidenced an intent to allow discretionary applications for adjustment of status to be evaluated at any time, even after a final removal order has been entered, and there is none. Moreover, Congress specifically provided a mechanism for consideration of new evidence before the agency—namely, a motion to reopen. See 8 U.S.C. 1229a(c)(7).

to apply for adjustment, [and] he cannot be deprived thereof without running afoul of the due process clause of the constitution." That claim lacks merit. As petitioner acknowledges (Pet. 8), adjustment of status is wholly within the Attorney General's discretion, see 8 U.S.C. 1255(i), and thus petitioner cannot have a protected liberty or property interest in it. See *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) (to have a protectable property or liberty interest in a benefit, one must have "more than a unilateral expectation of it"; "[h]e must, instead, have a legitimate claim of entitlement to it").

Indeed, the courts of appeals have uniformly held that an alien has no liberty or property interest in discretionary relief, such as adjustment of status. See *Sarr* v. *Gonzales*, 485 F.3d 354, 362 (6th Cir. 2007) (finding no due process denial in failure to remand for consideration of adjustment of status because that relief is entrusted to the Attorney General's discretion); *Dekoladenu* v. *Gonzales*, 459 F.3d 500, 508 (4th Cir. 2006) (alien has "neither a liberty nor a property interest in adjustment of status"); *DaCosta* v. *Gonzales*, 449 F.3d 45, 50 (1st Cir. 2006) ("A due process claim requires that a cognizable liberty or property interest be at stake * * *. Because adjustment of status is a discretionary form of relief, it does not rise to the level of such a protected interest."); *Ahmed* v. *Gonzales*, 447 F.3d 433, 440 (5th Cir. 2006) ("This circuit has repeatedly held that discretionary relief from removal, including an application for an adjustment of status, is not a liberty or property right that requires due process protection."); *Hamdan* v. *Gonzales*, 425 F.3d 1051, 1060-1061 (7th Cir. 2005) ("[A]n alien's right to due process does not extend to proceedings that provide only discretionary relief, and

the denial of such relief does not violate due process."); *Jamieson* v. *Gonzales*, 424 F.3d 765, 768 (8th Cir. 2005) ("Because Jamieson is seeking the discretionary relief of adjustment of status, there is no constitutionally-protected liberty interest at stake."); *United States* v. *Torres*, 383 F.3d 92, 104 (3d Cir. 2004) (Section 212(c) relief implicates no liberty interest because it is "entirely a piece of legislative grace"); *Tovar-Landin* v. *Ashcroft*, 361 F.3d 1164, 1167 (9th Cir. 2004) ("[A]liens have no fundamental right to discretionary relief from removal for purposes of due process and equal protection."); *Tefel* v. *Reno*, 180 F.3d 1286, 1300 (11th Cir. 1999) ("[A] constitutionally protected interest cannot arise from relief that the executive exercises unfettered discretion to award."), cert. denied, 530 U.S. 1228 (2000); *Ahmetovic* v. *INS*, 62 F.3d 48, 53 (2d Cir. 1995) (finding "no statutory entitlement to asylum that would give rise to a due process claim"); *Velasco-Gutierrez* v. *Crossland*, 732 F.2d 792, 798 (10th Cir. 1984) (no liberty interest in discretionary deferred action). Thus, because petitioner has no protected liberty or property interest in the discretionary relief of adjustment of status, he "cannot establish that [he] had a right to due process in the proceedings to obtain this relief." *Garcia-Mateo* v. *Keisler*, No. 06-3647, 2007 WL 2873665, at *3 (8th Cir. Oct. 4, 2007).

Further, not only does petitioner lack any due process-protected right to discretionary adjustment of status, he also lacks any due process right to the process of applying for that relief itself. See *Ohio Adult Parole Auth.* v. *Woodard*, 523 U.S. 272, 280 n.2 (1998) (holding that asserting a mere protected interest in a process itself is not a cognizable claim); *Olim* v. *Wakinekona*, 461 U.S. 238, 250 n.12 (1983) (an "expectation of receiv-

ing process is not, without more, a liberty interest protected by the Due Process Clause"); *Kovats* v. *Rutgers*, 822 F.2d 1303, 1314 (3d Cir. 1987) ("[P]romises of specific procedures do not create interests protected by the Due Process clause."), cert. denied, 489 U.S. 1014 (1989). A contrary rule would make little sense, because "[i]f a right to a hearing is a liberty interest, . . . then one has interpreted [due process] to mean that the state may not deprive a person of a hearing without providing him with a hearing." *Shvartsman* v. *Apfel*, 138 F.3d 1196, 1200 (7th Cir. 1998) (internal quotation marks and citations omitted).

Indeed, the courts of appeals have routinely rejected the argument that an alien seeking discretionary relief has a liberty or property interest in the process itself. See, *e.g.*, *Cevilla* v. *Gonzales*, 446 F.3d 658, 662 (7th Cir. 2006) (finding no liberty interest in cancellation of removal, even if all statutory requirements are satisfied, because "[a] procedural entitlement is not a liberty interest"); *Nguyen* v. *District Director, Bureau of Immigration & Customs Enforcement*, 400 F.3d 255, 259 (5th Cir. 2005) (rejecting argument that an alien has a due process right to a hearing on discretionary relief); *Torres*, 383 F.3d at 104 (no liberty interest in being considered for Section 212(c) relief); *Tefel*, 180 F.3d at 1300-1301 ("[J]ust as [aliens] enjoy no 'liberty or property' interest in their expectancy of receiving suspension of deportation, they enjoy no 'liberty or property' interest in being eligible to be considered for suspension.").[4]

[4] Although petitioner cites several cases providing circumstances in which aliens have a due process right to a hearing (Pet. 7-8), none of them holds that an alien has a protected liberty or property interest in *discretionary* adjustment of status or any procedure for obtaining that relief.

c. Even if petitioner's claim that the court of appeals should have remanded his case had merit, this case would be an inappropriate vehicle for addressing it, because petitioner's failure to voluntarily depart means that he can no longer obtain adjustment of status. Before the administrative agency, petitioner requested and was granted 60 days to voluntarily depart the United States in lieu of removal. Supp. Pet. App. 7a-8a, 10a, 18a-19a. Petitioner was also specifically notified of the consequences of failing to comply with his voluntary departure order. *Id.* at 8a. Nonetheless, petitioner failed to depart within the 60 days allowed by the agency.[5] Therefore, petitioner is statutorily ineligible for adjustment of status. 8 U.S.C. 1229c(d)(1)(B) (Supp. V 2005) ("[i]f an alien is permitted to depart voluntarily * * * and fails voluntarily to depart * * * within the time period specified, the alien," *inter alia*, "shall be ineligible for a period of 10 years" to receive certain forms of discretionary relief, including adjustment of status); see 8 C.F.R. 1240.26(a); *Ngarurih* v. *Ashcroft*, 371 F.3d 182, 194 (4th Cir. 2004) ("Congress provided for certain penalties to attach when an alien overstays his voluntary departure period."). Further review of petitioner's claim is therefore unwarranted.

2. Petitioner contends (Pet. 9-10) that the court of appeals erred in failing to find that he demonstrated past persecution for purposes of establishing entitle-

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[5] Petitioner requested a stay of his voluntary departure period in the court of appeals, but that request was denied. See pp. 7-8, *supra*. There is no evidence that petitioner took steps to extend or otherwise prevent the expiration of his voluntary departure period, and he provides no explanation in his petition for his failure to voluntarily depart. Accordingly, petitioner's voluntary departure period expired on July 14, 2006. See Supp. Pet. App. 8a.

ment to withholding of removal. Petitioner does not assert that the decision below conflicts with any decision of this Court or any other court of appeals on this issue; he simply invokes (Pet. 9) this Court's supervisory power without providing any explanation why exercise of that power would be appropriate to review his claim. See Sup. Ct. R. 10; see also, *e.g.*, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951) ("Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals.").

In any event, the court of appeals' decision is correct. The IJ reviewed the evidence petitioner presented and concluded that he failed to demonstrate that his past experiences in Indonesia were on account of a statutorily protected ground, which is dispositive of his claim for withholding of removal. Supp. Pet. App. 15a-18a; see 8 U.S.C. 1231(b)(3)(A) (persecution must be "because of" a protected ground); see also, *e.g.*, *In re J-B-N- & S-M-*, 24 I. & N. Dec. 208, 211 (B.I.A. 2007) ("[A]n applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was or would be motivated in part by an actual or imputed protected ground."). The Board agreed with the IJ's finding, Supp. Pet. App. 7a, and the court of appeals determined that "substantial evidence support[ed] th[at] finding." Pet. App. 2a. Petitioner does not challenge the court's finding that substantial evidence supported the agency's conclusion that he failed to demonstrate a nexus between the alleged persecution and a protected group, nor could he. Supp. Pet. App. 17a. Petitioner therefore did not establish eligibility for withholding of removal.

Petitioner contends (Pet. 9) that the IJ refused to consider his evidence of past persecution for purposes of withholding of removal because the IJ found that his asylum claim was time-barred. Petitioner is mistaken. The IJ's decision makes clear that, independent of his asylum holding, the IJ carefully reviewed petitioner's evidence and determined that he had not established a nexus between any persecution and a protected ground. See Supp. Pet. App. 17a-18a (finding "no nexus between [petitioner's] fear * * * and the protected grounds under our law"). As a result, the IJ was not required to consider whether what had happened to petitioner rose to the level of "persecution." The court of appeals thus correctly held that petitioner is not eligible for withholding of removal, and no further review of that claim is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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