02-4363-ag(L)

To Be Argued By:
EDWARD T. KANG

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 02-4363-ag(L)
02-4361-ag (CON)

EUGENE KOVALYK AND ULIANA KOVALYK,
Petitioners,

-vs-

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,
Respondent

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

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BRIEF FOR ALBERTO R. GONZALES ATTORNEY GENERAL OF THE UNITED STATES

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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

EDWARD T. KANG
Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

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STATEMENT OF JURISDICTION

Although repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Section 106 of the Act, 8 U.S.C. § 1105a (1994), as modified by certain "transitional changes in judicial review," governs judicial review of deportation orders, like petitioner's, that were issued on or after October 31, 1996. *See* Pub. L. No. 104-208, Div. C, Title III-A, § 309(c)(1)(B) & (4), 110 Stat. 3009-546, 3009-625 to -626 (Sept. 30, 1996); *Henderson v. INS*, 157 F.3d 106, 117 (2d Cir. 1998) (IIRIRA transitional provisions "control deportation proceedings started prior to April 1, 1997, in which the deportation order became administratively final after October 30, 1996").

ISSUE PRESENTED FOR REVIEW

1. Whether a reasonable factfinder would be compelled to reverse the Immigration Judge's decision that petitioners failed to demonstrate a well-founded fear of persecution if they were to return to Ukraine, where internal relocation within the country was a viable alternative, where there were changed political and religious conditions in Ukraine since petitioners had left, and where petitioners failed to show that petitioner Eugene Kovalyk would be the target of criminal organized groups in Ukraine that the government would be unwilling or unable to control.

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Preliminary Statement

Eugene Kovalyk and Uliana Kovalyk, natives and citizens of Ukraine, petition this Court for review of July 8, 2002, decisions of the Board of Immigration Appeals ("BIA") (Joint Appendix ("JA") 1-4). The BIA summarily affirmed the January 15, 1999, decision of an Immigration Judge ("IJ") denying petitioners' applications for asylum

and withholding of deportation under the Immigration and Nationality Act of 1952, as amended ("INA"), and ordering them removed from the United States. (JA 21-22 (IJ's decision and order)).

Petitioners applied for asylum and withholding of deportation on grounds that they had a well-founded fear of persecution if they were returned to their native Ukraine. They claim that between 1989 and 1991, during which time petitioner Eugene Kovalyk served as a mayor of a Ukrainian town called Zovalu, they were harassed and threatened by members of the Communist party, specifically, the KGB. Petitioners allege that the Communists made those threats to ensure that petitioner Eugene Kovalyk would take actions as mayor that were favorable to the then-Soviet regime. Petitioner Eugene Kovalyk also indicated his fear of religious persecution if he returned to his native Ukraine, given his membership in the Greek Orthodox Church.

Substantial evidence supports the IJ's denial of petitioners' applications for asylum and withholding of deportation. Any claim by petitioners that they fear future persecution is rebutted by the fact (1) that they can successfully relocate within Ukraine, and (2) that Ukraine has undergone significant political and religious changes since 1993 and 1994, when petitioners left. In addition, substantial evidence supports the IJ's rejection of petitioners' claimed fear of persecution at the hands of organized crime. There was no evidence in the record to suggest that even if Mr. Kovalyk were targeted by organized crime, the Ukranian government would be unwilling or unable to protect him from such gangs.

Statement of the Case

On November 28, 1993, Eugene Kovalyk entered the United States on a tourist visa, authorized to remain until May 2, 1994. (JA 187). On June 5, 1994, Uliana Kovalyk entered on a tourist visa and was authorized to remain until December 4, 1994. (JA 182). Both remained beyond the authorized time without permission.

On June 13, 1994, Eugene Kovalyk submitted an application for political asylum (JA 187-91), and on June 17, 1994, Uliana Kovalyk submitted an application for political asylum (JA 182-86).

Both applications were subsequently referred to the Office of the Immigration Judge with issuance of Orders to Show Cause ("OSC") on May 6, 1996, and May 15, 1996. (JA 224-33). The OSC's charged that petitioners were subject to deportation pursuant to § 241(a)(1)(B) of the INA, in that after admission as non-immigrants, both petitioners remained in the United States longer than permitted. (JA 226, 231).

On December 12, 1996 and February 27, 1997, Eugene Kovalyk and Uliana Kovalyk, respectively, through counsel, admitted the allegations contained in the OSC and conceded the charge of deportability pursuant to Section 241(a)(1)(B). (JA 57). Petitioners filed applications for political asylum, withholding of deportation, and voluntary departure. (JA 58).

On January 15, 1999, the IJ conducted a hearing on the applications. (JA 60-97). On that same day, the IJ issued an oral decision and order denying petitioners' applications for asylum and withholding of deportation, but granted petitioners' request to voluntarily depart no later than July 15, 1999. (JA 23-37).

On January 22, 1999, petitioners filed a notice of appeal of the IJ's decision to the BIA. (JA 17-18). On July 8, 2002, the BIA, in separate per curiam orders, summarily affirmed the IJ's decision. (JA 2, 4). Petitioners filed petitions for review before this Court on August 6, 2002.[1]

Statement of Facts

A. Petitioners' Entry Into The United States And Political Asylum And Withholding Of Deportation Applications.

Eugene and Uliana Kovalyk were born in the former Soviet Union (now Ukraine) and are citizens of Ukraine. They are married. Petitioners' applications for asylum

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[1] Petitioners filed a joint notice of appeal to the BIA (JA 17-19) on January 22, 1999, and one joint brief in support of their appeal on August 5, 1999 (JA 6-8). The BIA, however, issued two separate summary affirmance orders for Mr. and Ms. Kovalyk on July 8, 2002. (JA 1-4). Petitioners filed separate petitions for review in this Court (Nos. 02-4361-ag, 02-4363-ag), but those petitions have been consolidated for review.

indicate that both have Ukrainian passports. (JA 185, 190).

On November 28, 1993, Eugene Kovalyk entered the United States in New York, New York as a non-immigrant visitor with authorization to remain in the United States for a temporary period not to extend beyond May 2, 1994. (JA 187). Instead of leaving the United States as required by the terms of his visa, Mr. Kovalyk remained in the United States without authorization and on June 13, 1994, he affirmatively made an Application for Asylum. (JA 187-91). In his application, Mr. Kovalyk indicated that from 1989 to 1990, he served as the elected mayor of his town in Ukraine. (JA 188). He stated that he felt "constant pressure from the local Communists" and that he feared that there would "be bodily harm done to me." (JA 188). Mr. Kovalyk alleged that he fears persecution by the Communists because of his "belief in the democratization of Ukraine." (JA 189).

Uliana Kovalyk entered the United States in New York, New York on June 5, 1994 as a non-immigrant visitor with authorization to remain in the United States for a temporary period not to extend beyond December 4, 1994. (JA 182). Instead of leaving the United States as required by the terms of her visa, Ms. Kovalyk remained in the United States without authorization and on June 17, 1994, she affirmatively made an Application for Asylum. (JA 182-86). In her application, Ms. Kovalyk indicated that "in the past few years, [she] campaigned against the Communists and the KGB," and that as a result, she "was threatened by the KGB of physical harm." (JA 183). Ms. Kovalyk alleged that if she were to return to Ukraine, she

was "afraid that the same threats against [her] life will again continue" and that she was "doubtful that Ukraine will be a democratic country in the near future." (JA 183).

B. Petitioners' Deportation Proceedings.

On September 21, 1996, Eugene Kovalyk appeared *pro se* before an IJ. During that proceeding, petitioner acknowledged that he had received a copy of the OSC dated May 6, 1996. (JA 42). The IJ explained that the OSC placed him in deportation proceedings, and that petitioner had a right to be represented by an attorney. (JA 42). Eugene Kovalyk requested an attorney, and the IJ adjourned the proceedings so that petitioner could obtain counsel. (JA 42).

On December 12, 1996, Eugene Kovalyk appeared before the IJ with his attorney. Petitioner, through his attorney, admitted service of the OSC. (JA 51). Eugene Kovalyk waived a formal reading of the OSC, admitted the factual allegations, and conceded deportability as a visitor who remained beyond the authorized time without permission. (JA 51-52). As relief from deportation, Eugene Kovalyk applied for political asylum, withholding of deportation, and, alternatively, voluntary departure. (JA 52). Ukraine was designated as the country for deportation. (JA 52). The IJ acknowledged that Eugene Kovalyk's asylum application was filed on June 13, 1994. (JA 52). The IJ also acknowledged petitioner's request to consolidate his case with his wife's case. (JA 53).

On February 27, 1997, Eugene Kovalyk and Uliana Kovalyk appeared, with counsel, before the IJ. Uliana

Kovalyk admitted service of the OSC, waived a formal reading of the OSC, admitted the factual allegations, and conceded deportability as a visitor who remained beyond the authorized time without permission. (JA 57). As relief from deportation, Uliana Kovalyk claimed political asylum, withholding of deportation, and, alternatively, voluntary departure. (JA 58). Ukraine was designated as the country for deportation. (JA 58). The IJ acknowledged that petitioner's request for asylum was affirmatively filed on June 13, 1994. (JA 58). The hearing was continued until January 15, 1999.

On January 15, 1999, Eugene Kovalyk and Uliana Kovalyk appeared before the IJ with their attorney and a Ukrainian interpreter present. The IJ described the procedural history of the case and reviewed documentary evidence. Eugene Kovalyk and Uliana Kovalyk both testified during the proceeding.

1. Documentary Submissions

Several documents were admitted into evidence and considered by the IJ. Exhibit 1 were the Orders to Show Cause, for both petitioners. Exhibit 2 were the applications for asylum and withholding of deportation for both petitioners. Exhibit 3-A was a Profile from the Bureau of Democracy for Human Rights and Labor on Ukraine, dated June 1997, that was provided by counsel for the former Immigration and Naturalization Service ("INS").[2] Exhibit 3-B were copies of the Department of

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[2] The INS was abolished effective March 1, 2003, and its (continued...)

State Country Reports on Human Rights Practices for Ukraine for the years 1996 and 1997, that were provided by counsel for petitioners. Exhibit 4 was an acknowledgment that petitioner Eugene Kovalyk was a mayor of a city in Ukraine. Exhibit 5 was a statement from a church committee in Ukraine discussing some of the work that Eugene Kovalyk had been involved with while he was mayor.

2. Eugene Kovalyk's Testimony

Eugene Kovalyk testified that he was born in Ukraine and lived there until 1993, when he came to the United States. (JA 65). He stated that he was elected mayor of the town of Zavolu in Ukraine in 1988, and remained in that position until 1991. (JA 66). The IJ admitted into evidence a document alleging that the petitioner was the mayor of a city in Ukraine. (JA 68). Eugene Kovalyk testified that he was the first non-Communist mayor elected in his town. (JA 68). He testified that he was a member of a Ukrainian independence movement, that had started in approximately 1986, the purpose of which was to bring democracy to Ukraine. (JA 68).

Mr. Kovalyk then testified that in approximately 1989, while he was mayor, members of the KGB interrogated him. (JA 68). He testified that at first it started out as a

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[2] (...continued)
functions transferred to the Department of Homeland Security ("DHS"). For convenience, this brief will refer throughout to the INS.

pleasant interview, but later on, they became more intimidating and he was genuinely afraid at the conclusion of the interview. (JA 68). He stated that the KGB members attempted to pressure him to take actions that were favorable to the Soviet government. (JA 68-69).

Mr. Kovalyk further admitted that he was not physically beaten while he was being interrogated. (JA 81-83). He testified that the KGB visited him weekly. According to Mr. Kovalyk, starting in approximately 1990, the KGB began to send him threatening letters. (JA 69). He testified that one morning, he found that a window at his home had been shot by a bullet. (JA 69). He also testified that in approximately 1989, a member of the Communist party, a large man, threatened to "break [the petitioner's] head." (JA 69).

Mr. Kovalyk acknowledged that the Communists were no longer in power in Ukraine. (JA 70). Nevertheless, he stated that he was afraid to go back to Ukraine because he believed that the Communists had simply changed their name and were still present in that country. (JA 70). He testified that his parents have warned him not to return because the Communists are waiting for him to return to Ukraine, and plan to cause problems for petitioner upon his return. (JA 70). He also believes that his wife and children would be harmed if he were to return to Ukraine. (JA 70). Mr. Kovalyk has two daughters -- a now seven-year old who was born in the United States and a now fifteen-year old, born in Ukraine, who currently lives in Ukraine with her grandparents. (JA 71).

Mr. Kovalyk testified that he came to the United States with a tourist visa in 1993. (JA 72). He stated that he obtained his tourist visa by going to the American Embassy and stating that he wished to visit his aunt in the United States. (JA 72-73).

Petitioner stated that he came to the United States by himself, leaving his wife and older daughter in Ukraine. (JA 75). He stated that he came to the United States alone because he did not believe that all three would have received tourist visas. (JA 75). He testified that his wife joined him in the United States approximately six months later, and that she arrived also on a tourist visa. (JA 75).

Eugene Kovalyk stated that if he were to return, that the Communists would steal his daughter. (JA 76). Petitioner testified that in addition to his occupation as mayor, he worked as a veterinarian in Ukraine. (JA 78). He stated that he was not regularly employed between 1991 and 1993, but attempted to work as a self-employed veterinarian during that time. (JA 79-80). During those two years, he moved to a different region within Ukraine, to the hometown of his wife's mother, which was approximately 20 kilometers away from Zovalu. (JA 85). According to Eugene Kovalyk, he did not receive any threats or other forms of intimidation during those two years, although a few times he saw people watching his house from cars parked on the road. (JA 85).

Petitioner testified that he has been working in the United States as a woodworker. (JA 89). He stated that he is paying taxes and has authorization to work, and that he has not received welfare or other government assistance

while in the United States. (JA 88). Petitioner stated that if the IJ granted leave of voluntary departure, he would agree to leave and to pay his own ticket. (JA 87).

In response to questions from the IJ, Mr. Kovalyk stated that he was a member of the Greek Orthodox Church while in Ukraine. (JA 86). Mr. Kovalyk stated that members of the Greek Orthodox Church had been persecuted in Ukraine in the past. (JA 86).

3. Uliana Kovalyk's Testimony

Uliana Kovalyk testified that she married petitioner Eugene Kovalyk in Ukraine in 1989. (JA 91). She testified that her husband was a veterinarian and a mayor for approximately two years in Ukraine. (JA 92). She stated that he stepped down as mayor because their family received many threats, including a letter threatening that their house might be burned. (JA 92). She testified that those threats occurred at the end of 1989 and in 1990. (JA 92). According to Uliana Kovalyk, between 1991 and 1993, both she and Eugene Kovalyk lived at her mother's home. During that time period, Ms. Kovalyk testified that their family was not persecuted. (JA 97).

Uliana Kovalyk stated that she came to the United States on June 5, 1994, on a tourist visa. (JA 93). She testified that she obtained the visa in Kiev. She testified that she was a member of a nationalist organization called Rourke. (JA 94). As a member of Rourke, she testified that she had demonstrations and public meetings and as a result of those activities, she was threatened and persecuted. (JA 94). She testified that she has never been

arrested and that neither she nor her family has ever accepted any form of welfare or government assistance while in the United States. (JA 96). She stated that between 1991 and 1993, after her husband stepped down as mayor, their family did not receive any threats or other forms of intimidation from the KGB or the Communists. (JA 97).

On cross-examination, Ms. Kovalyk stated that between 1991 and 1993, her husband did not work as a veterinarian. (JA 95).

C. The Immigration Judge's Decision

At the conclusion of the January 15, 1999 hearing, the IJ rendered an oral decision denying petitioners' applications for political asylum and withholding of deportation, but granting petitioners' application to voluntarily depart the United States no later than July 15, 1999. The IJ summarized the relevant portions of both petitioners' testimonies and set forth the relevant legal standards.

The IJ explained that sometimes, the only available evidence of subjective fear is the testimony of the petitioners. He stated that such testimony can be sufficient to establish the subjective component when the testimony is believable, consistent and sufficiently detailed to provide a plausible and coherent account of the basis for the fear. (JA 29).

The IJ stated that petitioners "submitted some documentary forms of evidence, but not a great deal." (JA

31). He stated that he had read from the Profile from the Bureau of Democracy, Human Rights and Labor, and noted that the report concluded that "[t]he post independence period has seen the emergence of multi-party system reflecting a broad range of political view points . . . [there is] no indication that government entities repressed individuals or political parties because of their views." (JA 31-32).

The IJ also addressed Eugene Kovalyk's concerns with regards to his religious activities. In response to that concern, the IJ noted that the Profile from the Bureau of Democracy for Human Rights and Labor on Ukraine stated, with respect to the issue of religion in Ukraine, that "[t]he situation has changed dramatically . . . Disputes over the division of church property was severe and occasionally resulted in violence in some villages of western Ukraine. These incidents virtually ceased by 1994. Both Greek Catholic and Orthodox churches have seminaries in Ukraine." (JA 32-33).

The IJ found that both petitioners were "very forthright." (JA 33). However, the IJ noted that neither petitioner had been back to Ukraine for several years, and that since they left, "the situation [in Ukraine] has profoundly changed." (JA 34). He stated that the background materials supported a finding that there is a multi-party system in Ukraine, and that if there are indeed individual Communists on the political scene, that the Communist party was no longer a significant factor. The IJ concluded that Communists in Ukraine do not "present a danger to individuals" like petitioners. (JA 34).

The IJ noted that the KGB is no longer in existence. He stated that Ukraine does indeed have security agencies that have succeeded the KGB, but he concluded that there is no evidence that individuals such as the petitioners "would have any need to fear interrogation, intimidation, or any form of harm by such security agencies in Ukraine." (JA 34).

Moreover, the IJ stated that Eugene Kovalyk had testified that during the time that he lived away from his town in his mother-in-law's village, between 1991 and 1993, neither he nor his family suffered any form of persecution or even any threats. Therefore, the IJ concluded that "relocation would have been a viable alternative for [petitioners] if indeed they did have apprehension for their safety or the safety of their family." (JA 35).

The IJ concluded that "the political situation has changed greatly from the time that [Eugene Kovalyk] was mayor between 1988 and 1991, [and] the religious situation has also opened up." (JA 35). According to the IJ, "[t]here is no indication of any type of systematic persecution to Greek Catholics" in Ukraine. (JA 35).

The IJ noted that petitioners' counsel argued that politicians and politically connected individuals have been targets of criminal organized crime. The IJ concluded that that argument "is certainly a concern, but there is no evidence of, again, any sort of systematic persecution to those individuals." (JA 35). The IJ also found that there was not "enough evidence to identify [Mr. Kovalyk] in a particular social group and there is no indication that the

government of Ukraine, any way supports [organized crime] or would be in a position where they are unable or unwilling to protect [Mr. Kovalyk] if he indeed would be the target of criminal gangs." (JA 35).

Based on those findings, the IJ concluded that the testimony of petitioners was insufficient "to support both the objective as well as the subjective component of the claim . . . the documents in the record of proceedings do not support a finding of persecution or well-founded fear of future persecution." (JA 35). Thus, the IJ held that "the evidence does not support that [petitioners have] a fear of persecution upon return to Ukraine." (JA 36).

The IJ ordered that petitioners' application for political asylum and withholding of deportation be denied. (JA 37). He ordered that petitioners' application for voluntary departure be granted until July 15, 1999, or any extension that may be granted by the BIA or the INS. (JA 37).

D. The BIA's Decisions

On July 8, 2002, in separate orders, the BIA summarily affirmed the IJ's decision and adopted it as the "final agency determination" under 8 C.F.R. § 3.1(e)(4) (2002).[3] (JA 1-4). These petitions for review followed.

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[3] That section has since been redesignated as 8 C.F.R. § 1003.1(e)(4). *See* 68 Fed. Reg. 9824, 9830 (Feb. 28, 2003).

SUMMARY OF ARGUMENT

The IJ properly denied petitioners' applications for asylum and withholding of deportation. Substantial evidence supports the IJ's conclusion that even if petitioners had suffered past persecution, evidence in the record rebutted any presumption of future persecution if petitioners were to return to Ukraine. The IJ properly held that internal relocation was a viable alternative, given that petitioners had relocated to a different area of Ukraine for two years before entering the United States and had not suffered persecution during that time. In addition, the IJ properly relied upon State Department reports submitted by petitioners and the INS and correctly determined that changed political and religious conditions in Ukraine precluded any claim that petitioners would be persecuted on political or religious grounds. Moreover, given petitioners' failure to adequately show that petitioner Eugene Kovalyk would be the target of criminal organized groups in Ukraine, or that the government would be unwilling or unable to protect him if he were the target of such groups, substantial evidence supports the IJ's conclusion that petitioners do not have a well-founded fear of persecution by such criminal groups.

ARGUMENT

I. THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT PETITIONERS FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM AND WITHHOLDING OF DEPORTATION BECAUSE PETITIONERS FAILED TO DEMONSTRATE A WELL-FOUNDED FEAR OF PERSECUTION IF THEY WERE TO RETURN TO UKRAINE.

A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts above.

B. Governing Law and Standard of Review

Two forms of relief are potentially available to aliens claiming that they will be persecuted if removed from this country: asylum and withholding of removal (or, as previously known, withholding of deportation).[4] *See* 8 U.S.C. §§ 1158(a), 1231(b)(3) (2004); *Zhang v. Slattery*,

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[4] Under current law, "removal" is the collective term for proceedings that previously were referred to, depending on whether the alien had effected an "entry" into the United States, as "deportation" or "exclusion" proceedings. Because withholding of removal is relief that is identical to the former relief known as withholding of deportation or return, *compare* 8 U.S.C. § 1253(h)(1) (1994) *with id.* § 1231(b)(3)(A) (2004), cases relating to "withholding of removal" are applicable precedent for this case involving "withholding of deportation."

55 F.3d 732, 737 (2d Cir. 1995).[5] Although these types of relief are "'closely related and appear to overlap,'" *Carranza-Hernandez v. INS*, 12 F.3d 4, 7 (2d Cir. 1993) (quoting *Carvajal-Munoz v. INS*, 743 F.2d 562, 564 (7th Cir. 1984)), the standards for granting asylum and withholding of removal differ, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-32 (1987); *Osorio v. INS*, 18 F.3d 1017, 1021 (2d Cir. 1994).

1. Asylum

An asylum applicant must, as a threshold matter, establish that he is a "refugee" within the meaning of 8 U.S.C. § 1101(a)(42) (2004). *See* 8 U.S.C. § 1158(a) (2004); *Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 66 (2d Cir. 2002). A refugee is a person who is unable or unwilling to return to his native country because of past "persecution or a well-founded fear of persecution on account of" one of five enumerated grounds: "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42) (2004); *Liao*, 293 F.3d at 66.

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[5] On May 11, 2005, the President signed into law the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005," Pub. L. No. 109-13, 199 Stat. 231. Division B of the Act is referred to as "REAL ID Act" ("RIDA"). Section 101(a)(3) of RIDA amends portions of the INA that impact applications for relief or protection made on or after RIDA's enactment date (May 11, 2005), and thus will not affect this case. However, Section 101(e) of RIDA amends Section 242(b)(4)(D) of the INA, 8 U.S.C. § 1252(b)(4)(D), as discussed, *infra*. This amendment takes effect immediately.

Although there is no statutory definition of "persecution," courts have described it as "'punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate.'" *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995) (quoting *De Souza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993)); *see also Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (stating that persecution is an "extreme concept"). While the conduct complained of need not be life-threatening, it nonetheless "must rise above unpleasantness, harassment, and even basic suffering." *Nelson v. INS*, 232 F.3d 258, 263 (1st Cir. 2000). Upon a demonstration of past persecution, a rebuttable presumption arises that the alien has a well-founded fear of future persecution. *See Melgar de Torres v. Reno*, 191 F.3d 307, 315 (2d Cir. 1999); 8 C.F.R. § 208.13(b)(1)(i) (2004).

Where an applicant is unable to prove past persecution, the applicant nonetheless becomes eligible for asylum upon demonstrating a well-founded fear of future persecution. *See Zhang v. Slattery*, 55 F.3d at 737-38; 8 C.F.R. § 208.13(b)(2) (2004). A well-founded fear of persecution "consists of both a subjective and objective component." *Gomez v. INS*, 947 F.2d 660, 663 (2d Cir. 1991). Accordingly, the alien must actually fear persecution, and this fear must be reasonable. *See id.* at 663-64.

"An alien may satisfy the subjective prong by showing that events in the country to which he. . . . will be deported have personally or directly affected him." *Id.* at 663.

With respect to the objective component, the applicant must prove that a reasonable person in his circumstances would fear persecution if returned to his native country. *See* 8 C.F.R. § 208.13(b)(2) (2004); *see also Zhang v. Slattery*, 55 F.3d at 752 (noting that when seeking reversal of a BIA factual determination, the petitioner must show "'that the evidence he presented was so compelling that no reasonable factfinder could fail'" to agree with the findings (quoting *INS v. Elias-Zacarias*, 502 U.S 478, 483-84 (1992)); *Melgar de Torres*, 191 F.3d at 311.

The asylum applicant bears the burden of demonstrating eligibility for asylum by establishing either that he was persecuted or that he "has a well-founded fear of future persecution on account of, *inter alia*, his political opinion." *Wu Biao Chen v. INS*, 344 F.3d 272, 275 (2d Cir. 2003); *Osorio*, 18 F.3d at 1027. *See* 8 C.F.R. § 208.13(a)-(b) (2004). The applicant's testimony and evidence must be credible, specific, and detailed in order to establish eligibility for asylum. *See* 8 C.F.R. § 208.13(a)(2004); *Abankwah v. INS*, 185 F.3d 18, 22 (2d Cir. 1999); *Melendez v. U.S. Dep't of Justice*, 926 F.2d 211, 215 (2d Cir. 1991) (stating that applicant must provide "credible, persuasive and . . . . specific facts" (internal quotation marks omitted)); *Matter of Mogharrabi*, Interim Dec. 3028, 19 I. & N. Dec. 439, 445, 1987 WL 108943 (BIA June 12, 1987), *abrogated on other grounds by Pitcherskaia v. INS*, 118 F.3d 641, 647-48 (9th Cir. 1997) (applicant must provide testimony that is "believable, consistent, and sufficiently detailed to provide a plausible and coherent account").

Because the applicant bears the burden of proof, he must provide supporting evidence, unless it cannot be reasonably obtained. *Zhang v. INS*, 386 F.3d 66, 71 (2d Cir. 2004) ("[W]here the circumstances indicate that an applicant has, or with reasonable effort could gain, access to relevant corroborating evidence, his failure to produce such evidence in support of his claim is a factor that may be weighed in considering whether he has satisfied the burden of proof."). Section 101(e) of REAL ID Act, Pub. L. No. 109-13, 199 Stat. 231, amends § 242(b)(4)(D) of the INA, 8 U.S.C. § 1252(b)(4)(D), by providing that a reviewing court may not reverse an agency finding with respect to the availability of corroborating evidence unless the court determines that a reasonable factfinder would be compelled to conclude that such corroborating evidence is unavailable. *See also* RIDA § 101(h)(3) (§ 101(e) takes effect immediately and applies "to all cases in which the final administrative removal order is or was issued before, on, or after" the date of enactment).

Finally, even if the alien establishes that he is a "refugee" within the meaning of the INA, the decision whether ultimately to grant asylum rests in the Secretary of Homeland Security's or the Attorney General's discretion. *See Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004); *Zhang v. Slattery*, 55 F.3d at 738.

2. Withholding of Deportation

Unlike the discretionary grant of asylum, withholding of deportation is mandatory if the alien proves that his "life or freedom would be threatened in [his native] country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2000); *Zhang v. Slattery*, 55 F.3d at 738. To obtain such relief, the alien bears the burden of proving by a "clear probability," *i.e.*, that it is "more likely than not," that he would suffer persecution on return. *See* 8 C.F.R. § 208.16(b)(2)(ii) (2004); *INS v. Stevic*, 467 U.S. 407, 429-30 (1984); *Melgar de Torres*, 191 F.3d at 311. Because this standard is higher than that governing eligibility for asylum, an alien who has failed to establish a well-founded fear of persecution for asylum purposes is necessarily ineligible for withholding of removal. *See Zhang v. INS*, 386 F.3d at 71; *Wu Biao Chen*, 344 F.3d at 275; *Zhang v. Slattery*, 55 F.3d at 738.

3. Standard of Review

This Court reviews the determination of whether an applicant for asylum or withholding of deportation has established past persecution or a well-founded fear of persecution under the substantial evidence test. *Zhang v. INS*, 386 F.3d at 73; *Wu Biao Chen*, 344 F.3d at 275 (factual findings regarding asylum eligibility must be upheld if supported by "reasonable, substantive and probative evidence in the record when considered as a whole") (internal quotation marks omitted); *see Secaida-Rosales v. INS*, 331 F.3d 297, 306-07 (2d Cir. 2003);

Melgar de Torres, 191 F.3d at 312-13 (factual findings regarding both asylum eligibility and withholding of removal must be upheld if supported by substantial evidence). "Under this standard, a finding will stand if it is supported by 'reasonable, substantial, and probative' evidence in the record when considered as a whole." *Secaida-Rosales*, 331 F.3d at 307 (quoting *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000)).

Where an appeal turns on the sufficiency of the factual findings underlying the IJ's determination[6] that an alien has failed to satisfy his burden of proof, Congress has directed that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (2004). *Zhang v. INS*, 386 F.3d at 73. This Court "will reverse the immigration court's ruling only if 'no reasonable fact-finder could have failed to find . . . past persecution or fear of future persecution." *Wu Biao Chen*, 344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287).

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 71; *Wu*

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[6] Although judicial review ordinarily is confined to the BIA's order, *see, e.g.*, *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001), this Court properly reviews an IJ's decision where, as here, the BIA adopts that decision. *See* 8 C.F.R. § 1003.1(a)(7) (2004); *Secaida-Rosales*, 331 F.3d at 305; *Arango-Aradondo v. INS*, 13 F.3d 610, 613 (2d Cir. 1994). Accordingly, this brief treats the IJ's decision as the relevant administrative decision.

Biao Chen, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. *See also Zhang v. INS*, 386 F.3d at 74 ("Precisely because a reviewing court cannot glean from a hearing record the insights necessary to duplicate the fact-finder's assessment of credibility what we 'begin' is not a *de novo* review of credibility but an 'exceedingly narrow inquiry' . . . to ensure that the IJ's conclusions were not reached arbitrarily or capriciously") (citations omitted). Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938)). The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992).

Indeed, the IJ's and BIA's eligibility determination "can be reversed only if the evidence presented by [the asylum applicant] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *Elias-Zacarias*, 502 U.S. at 481. In other words, to reverse the BIA's decision, the Court "must find that the evidence not only *supports* th[e] conclusion [that the applicant is eligible for asylum], but *compels* it." *Id.* at 481 n.1 (emphasis in original).

C. Discussion

Substantial evidence supports the IJ's determination that the Kovalyks failed to establish eligibility for asylum and withholding of deportation. *First*, as the IJ correctly concluded, even if petitioners had established past persecution at the hands of the Communists and the KGB, any presumption of a likelihood of future persecution was rebutted because petitioners could and did relocate successfully within Ukraine and because of changed political and religious conditions in the country. (JA 35). *Second*, petitioners failed to prove that petitioner Eugene Kovalyk would be targeted by organized crime as a member of a particular social group or that the government would not protect him if he were so targeted.

For these reasons, as discussed in detail below, petitioners have not demonstrated, as they must, that a reasonable factfinder would be compelled to conclude that they are entitled to asylum or withholding of deportation.

1. Any Presumption Of Persecution Was Rebutted.

If an applicant establishes that he or she suffered past persecution, a presumption arises that he or she has a well-founded fear of future persecution and the government bears the burden of rebutting the presumption by a preponderance of the evidence. *See* 8 C.F.R. § 1208.13(b)(1)(i) (2003). In this case, even if petitioners

suffered past persecution, any presumption of future persecution was successfully rebutted in this case.[7]

a. The Viability Of Internal Relocation.

Pursuant to 8 C.F.R. § 208.16(b)(1)(i)(B), the government can rebut any presumption of persecution by demonstrating, by a preponderance of the evidence, that "the applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so."

To satisfy this internal relocation regulation, the government must demonstrate: (1) that relocation would be successful, and (2) that relocation would be reasonable. *Id.*; *see, e.g., Gambashidze v. Ashcroft,* 381 F.3d 187,

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[7] Petitioners argue that the IJ, by stating in his decision that "I am not satisfied that the [petitioners'] testimony is credible as to the objective component of the claim" (JA 36), improperly divided credibility into "subjective components of credibility and objective components of credibility." Pet. Br. at 16. Petitioners misread the IJ's oral decision. The IJ properly stated the standards for granting asylum and withholding of deportation (JA 28-29), and reviewed all of the evidence relating to both the objective and subjective components of those standards. The IJ ultimately concluded that petitioners' testimony, when weighed against official country reports, was insufficient to meet the burden of proof for establishing that a reasonable person would fear persecution. (JA 36). Petitioners' arguments notwithstanding, the IJ did not divide credibility into subjective and objective components.

192 (3d Cir. 2004). Here, there is ample evidence to support both of those requirements.

First, as the IJ found, internal relocation would be successful. The evidence presented in this case supports the finding that the Kovalyks could return to the village of Uliana Kovalyk's mother and live there without fear of persecution. The IJ noted that petitioners testified that between 1991 and 1993, they lived in Ms. Kovalyk's mother's village, which is located twenty kilometers from the town where Mr. Kovalyk had served as mayor. (JA 34-35). During those two years, both petitioners testified that neither they nor their family had suffered any physical harm, threats, or other form of persecution. (JA 34-35; *see also* JA 85, 97). Moreover, petitioners did not put forth any evidence that circumstances in the village of Ms. Kovalyk's mother have changed such that they would suffer persecution if they were to return to Ukraine. Consequently, the evidence indicates that petitioners could return to the village of Ms. Kovalyk's mother safely without fear of persecution. (JA 30, *see also* JA 85, 97); *cf. Knezevic v. Ashcroft*, 367 F.3d 1206, 1214 (9th Cir. 2004).

Second, internal relocation would be reasonable. The following factors are to be considered in the totality of the circumstances in assessing the reasonableness of internal relocation: "whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health, and social and familial ties." 8 C.F.R. § 208.16(b)(3). Relocation would clearly satisfy that inquiry with respect

to petitioners. As petitioners acknowledged, they had already lived voluntarily in the place of relocation for two years prior to their entry into the United States. Ms. Kovalyk's mother lives there, so petitioners have family members who live in the place of relocation. Moreover, the place of relocation is in close proximity -- only twenty kilometers -- from the town where Mr. Kovalyk served as mayor. For these reasons, petitioners' relocation to the village of Ms. Kovalyk's mother would be reasonable. *See Gambashidze*, 381 F.3d at 192-93 (finding relocation to be reasonable where place of relocation "is not a great distance" from the petitioner's original location and where petitioner did in fact move to place of relocation for period of eight months).

Because internal relocation to the village of Ms. Kovalyk's mother would be both successful and reasonable for the Kovalyks, any presumption of a likelihood of future persecution is rebutted.

In their opening brief, petitioners state that "the Petitioner also testified that even when he was living there [the village of Uliana Kovalyk's mother], when drivers who were like Communists saw him and after that gook [sic] looking cars which were rare in that area, stopped in front of his house a few times and people inside the care [sic] were looking/watching the house" as somehow supporting the conclusion that petitioners were persecuted while they lived in the village of Ms. Kovalyk's mother. Pet. Br. at 11.

As an initial matter, petitioners failed to challenge the IJ's conclusion on internal relocation in their appeal to the

BIA, (JA 6-8), and thus may not raise that issue before this Court. Section 1252(d)(1) of the INA expressly requires that a federal court may review a final order of removal only if "the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1). In light of that express statutory directive, federal courts lack jurisdiction to review issues when an alien fails to exhaust his administrative remedies -- *i.e.*, when an alien fails to raise an issue in his appeal to the BIA. *See Mejia-Ruiz v. INS*, 51 F.3d 358, 364 (2d Cir. 1995) (stating that court loses jurisdiction to review final order of deportation when alien fails to exhaust administrative remedies). Petitioners' failure to argue internal relocation in their appeal to the BIA means that they did not exhaust their administrative remedies on that issue. This Court thus lacks jurisdiction over that issue in this petition.

In any event, petitioners' claims regarding internal relocation fail on the merits. Even if the Court accepted as true the claim that people were staring at the Kovalyks' residence, petitioners do not, and indeed cannot, explain how such behavior rises "above unpleasantness, harassment, and even basic suffering," which is legally required to show that petitioners suffered "persecution." *Nelson*, 232 F.3d at 263.

b. Changed Circumstances In Ukraine.

A second way in which the government may rebut the presumption of future persecution is to establish that "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution . . . on account of race, religion, nationality,

membership in a particular social group, or political opinion." 8 C.F.R. § 1208.13(b)(1)(i)(A). In this case, the IJ correctly denied petitioners' application based on findings that there were changed political and religious circumstances in Ukraine.

(1) Political persecution.

Substantial evidence supports the IJ's denial of petitioners' applications based on the finding that changed country conditions in Ukraine, including the fall of the Communist government and the KGB, represented a fundamental change in circumstances such that the Kovalyks no longer had a well-founded fear of persecution.

The IJ's conclusion is supported by the documentary evidence submitted by petitioners. The 1996 and 1997 State Department's Country Reports for Ukraine,[8] for example, state that "[t]he law provides for the right of assembly; and the Government generally respects this right in practice." (JA 113, 128). Although the Ukrainian government occasionally attempts to control the press, "[t]he Constitution and a 1991 law provide for freedom of speech and press." (JA 112, 126).

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[8] Courts have recognized that the State Department's Country Reports "ha[ve] been described as 'the most appropriate and perhaps the best resource' for 'information on political situations in foreign nations.'" *Kazlauskas v. INS*, 46 F.3d 902, 906 (9th Cir. 1995) (quoting *Rojas v. INS*, 937 F.2d 186, 190 n.1 (5th Cir. 1991)).

Likewise, documents submitted by the Government support the IJ's conclusion regarding the changed conditions in Ukraine. For example, the 1997 Bureau of Democracy, Human Rights and Labor Profile of Asylum Claims and Country Conditions for Ukraine[9] states that "[t]he post-independence period has seen the emergence of a multi-party system reflecting a broad range of political viewpoints." (JA 176). Additionally, that Profile concludes that there is "no indication that governmental entities repressed individuals or political parties because of their views." (JA 176). Moreover, although the Profile acknowledges that "[p]oliticians continued to be the victims . . . of organized criminal groups," that Profile notes that "mistreatment by criminal elements of officials and political figures usually has little to do with the political opinion of the targets." (JA 177). "It is, rather, the target's access to control over material resources that attracts the attention of the criminals." (JA 177).

Based on similar evidence, several recent federal court decisions have denied applications for asylum and withholding of deportation on grounds that changed circumstances in Ukraine preclude any arguments that applicants have a well-founded fear of persecution if returned to Ukraine.

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[9] Courts have also held the Bureau of Democracy, Human Rights and Labor Profiles of Asylum Claims and Country Conditions to constitute persuasive authority with respect to country conditions. *See, e.g., Belayneh v. INS*, 213 F.3d 488, 491 (9th Cir. 2000).

For example, in *Koliada v. INS*, 259 F.3d 482 (6th Cir. 2001), the Sixth Circuit denied a petition for review of an order denying the petitioner's application for asylum. *Id.* at 489. The immigration judge found that the Government "had carried its burden of establishing that conditions in Ukraine had changed enough that Koliada's return would cause him no well-founded fear of persecution." *Id.* at 487. The court noted that the immigration judge's conclusion was supported by the State Department's 1996 Ukraine Profile of Asylum Claims and Country Conditions, which "noted that Ukraine has 'seen the emergence of a multi-party system reflecting a broad range of political viewpoints' in the post-independence period." *Id.* at 488 (quoting the State Department's 1996 Ukraine Profile of Asylum Claims and Country Conditions).

A similar conclusion was reached by the Seventh Circuit in *Kharkhan v. Ashcroft*, 336 F.3d 601 (7th Cir. 2003). In that case, the court also denied a petition for review and affirmed a BIA decision, holding that "[t]he fundamental political changes that occurred in Ukraine between [the petitioner's] arrival in 1991 and the September 1998 hearing leave Kharkan with no reasonable basis for fear of persecution." *Id.* at 605.

The IJ also properly denied petitioners' applications based on their purported fear of persecution of the KGB. The IJ's determination is supported by the 1997 Bureau of Democracy, Human Rights and Labor Profile of Asylum Claims and Country Conditions for Ukraine. That profile notes that "[a]pplicants basing their claim on political grounds often express fear of the KGB, now nationalized and renamed the Security Service of Ukraine (SBU), and

other law enforcement organizations." (JA 177). The profile states that "[w]hile it would not be surprising to find individual personnel who are intolerant of dissent, the security services are effectively subordinated to the Ukrainian authorities, and there is little likelihood that they would now mistreat individuals because of their support for Ukrainian independence at some time in the past." (JA 177). Finally, the profile finds that "human rights organizations have not reported any complaints of violations of human rights by the SBU." (JA 178); *see also Bereza v. INS*, 115 F.3d 468, 474 (7th Cir. 1997).

Given this substantial evidence, a reasonable fact finder would not be compelled to reverse the IJ's conclusion that the government rebutted any presumption that the Kovalyks had a well-founded fear of future persecution by the Communist regime in Ukraine or by the KGB.

(2) Religious persecution.

Eugene Kovalyk indicated during his testimony that he is a member of the Greek Orthodox Church and that he had concerns regarding religious persecution if he were to return to his native Ukraine. (JA 86-87). The IJ denied that claim. (JA 32-33). Any attempt by petitioners to contest the IJ's determination regarding religious persecution must be rejected.

First, petitioners failed to raise the issue of religious persecution in their appeal to the BIA, and are thus procedurally barred from raising this issue in this petition. (JA 6-8). As discussed earlier, § 1252(d)(1) of the INA

expressly requires that a federal court may review a final order of removal only if "the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1). Thus, because petitioners did not challenge the IJ's finding on the potential for religious persecution to the BIA, this Court lacks jurisdiction to review that claim here. *See Mejia-Ruiz*, 51 F.3d at 364.

Second, there is substantial evidence to support the IJ's finding that petitioner Eugene Kovalyk failed to demonstrate a well-founded fear of religious persecution upon return to Ukraine. (JA 32-35).

The IJ's conclusion is supported by the documentary evidence submitted by the parties. The 1996 and 1997 State Department's Country Reports for Ukraine, submitted by petitioners, indicate that "[t]he new Constitution and the 1991 Law on Freedom of Conscience and Religion provide for separation of church and state and permit religious organizations to establish places of worship and to train clergy." (JA 114, 129). Moreover, according to those same reports, the Ukrainian government has taken affirmative measures to ensure religious freedom in the post-independence era. For example, "[t]he Government moved to reduce church utility fees and rental payments to exempt churches from the land tax, and to expedite the return of religious buildings to their former owners." (JA 114, 129).

Moreover, the 1997 Bureau of Democracy, Human Rights and Labor Profile of Asylum Claims and Country Conditions for Ukraine states that numerous church denominations "now enjoy unfettered freedom of worship"

in Ukraine. (JA 175). That profile also notes that "[b]oth Greek Catholic and Orthodox churches have seminaries in Ukraine. . . . Independent observers credit Governmental authorities with seeking to maintain neutrality among the various religious organizations." (JA 175).

Given that evidence, a reasonable fact finder would not be compelled to reverse the IJ's conclusion that the Government rebutted any presumption that Eugene Kovalyk had a well-founded fear of future religious persecution upon return to his native Ukraine.

c. Petitioners' Claim That The IJ Failed To Conduct A Meaningful Inquiry Into Fear Of Persecution Is Not Supported By The Record.

Petitioners argue that the IJ's "finding that circumstances have changed [in Ukraine] is not supported by substantial evidence." Pet. Br. 6. To that end, petitioners also claim that the IJ failed to conduct a meaningful inquiry into petitioners' fear if they were to return to Ukraine. Pet. Br. at 8-9.

Where, as here, a petitioner challenges the sufficiency of the factual findings underlying the IJ's determination that an alien has failed to satisfy his burden of proof, Congress has directed that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B); *Zhang v. INS*, 386 F.3d at 73. Therefore, this Court "will reverse the immigration court's ruling only if 'no reasonable fact-finder could have failed

to find . . . past persecution or fear of future persecution." *Wu Biao Chen*, 344 F.3d at 275 (omission in original) (quoting *Diallo*, 232 F.3d at 287).

The scope of this Court's review under that test is "exceedingly narrow." *Zhang v. INS*, 386 F.3d at 71; *Wu Biao Chen*, 344 F.3d at 275; *Melgar de Torres*, 191 F.3d at 313. *See also Zhang v. INS*, 386 F.3d at 74. Substantial evidence entails only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Richardson*, 402 U.S. at 401. The mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo*, 383 U.S. at 620; *Arkansas v. Oklahoma*, 503 U.S. at 113.

Petitioners' argument, which challenges the factual findings underlying the IJ's determinations, fails to satisfy the stringent standard of review described above. The documentary evidence submitted to the IJ both by petitioners and by the INS overwhelmingly supports the IJ's conclusion that there have been significant changes in political and religious conditions in Ukraine. As discussed earlier, those reports confirm that the Communists and KGB are no longer in power in Ukraine and indicate that the post-independence period in Ukraine has seen an emergence of political viewpoints, as well as freedom of speech and press. (JA 112, 126, 176).

Moreover, the IJ engaged in a meaningful inquiry into petitioners' fear of persecution. The IJ asked questions to both petitioners during the hearing. During the course of

the hearing and through the IJ's inquiry, it was revealed that neither petitioner had returned to Ukraine since at least 1994. Petitioners also explained that during the last two years that they were in Ukraine, from 1991 to 1993, they lived without being persecuted.

Mr. Kovalyk testified that if he were to return to Ukraine, he feared that his older daughter living in Ukraine would be stolen. (JA 76). However, the record indicates that his older daughter has continued to live in Ukraine with her grandparents, and there is no indication that she has been threatened with harm. (JA 71, 74-76). Moreover, Mr. Kovalyk has provided no support for this claim, nor has he provided any support for his testimony that his parents do not want him to come back to Ukraine because they fear for his life if he were to come back. (JA 84). Finally, Mr. Kovalyk testified that while the Communists had changed their name, they were still present in Ukraine, again with no support for this statement. (JA 70).

In addition to this questioning, the IJ acknowledged Mr. Kovalyk's concerns in his oral decision (JA 34, 35), but ultimately rejected his general statements as insufficient to overcome the evidence of changed country conditions in Ukraine. (JA 34) (acknowledging Mr. Kovalyk's concern that Communists remain in Ukraine); (JA 35) (noting that Mr. Kovalyk had provided no details about his parents' concern for his return).

Thus, contrary to petitioners' assertions, the IJ did conduct an individualized inquiry before concluding that conditions in Ukraine had changed sufficiently to rebut

any presumption of future persecution for petitioners. The fact that petitioners can point to generalized and uncorroborated evidence in the record to support a different conclusion does not undermine the IJ's decision. Substantial evidence in the record supports that decision, and petitioners have not identified evidence sufficient to compel the contrary conclusion that they would suffer persecution if returned to Ukraine.

2. The IJ Correctly Rejected Petitioners' Claim Of Well-Founded Fear Of Persecution As Targets Of Organized Crime.

The IJ acknowledged, and the documentary evidence submitted by petitioners and the INS indicates, that politicians and politically connected individuals in Ukraine have been targets of organized crime. (JA 35, 108-09, 122-23, 177). However, it appears that those criminal groups have targeted politicians who are involved in commercial enterprises, and more specifically, those politicians who are managers of state-owned enterprises. (JA 109, 122, 177).

For example, the 1996 and 1997 State Department's Country Report for Ukraine, cited by petitioners, state that "[p]oliticians were also targeted because of their influence over state-owned enterprises." (JA 109, 122). Moreover, the Profile from the Bureau of Democracy, Human Rights and Labor indicates that "mistreatment by criminal elements of officials and political figures usually has little to do with the political opinion of the targets. It is, rather

the target's access to control over material resources that attracts the attention of the criminals." (JA 177).

As the IJ found, petitioners made no showing that Mr. Kovalyk falls into a social group that would be subject to attack from organized crime (JA 35), and petitioners have identified no evidence that would compel a contrary conclusion.

Moreover, even if petitioners were somehow able to demonstrate that Mr. Kovalyk would be the target of organized criminal groups, that showing, without more, could not establish a well-founded fear of persecution. "[O]rdinary criminal activity does not rise to the level of persecution necessary to establish eligibility for asylum." *Abdille v. Ashcroft*, 242 F.3d 477, 494 (3d Cir. 2001); *see also Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998). "The possible persecution to be established by an alien in order for him to be eligible for asylum may come from a non-government agency which the government is unable or unwilling to control." *Bartesaghi-Lay v. INS*, 9 F.3d 819, 822 (10th Cir. 1993) (citing *Rosa v. INS*, 440 F.2d 100, 102 (1st Cir. 1971)); *see also Sotelo-Aquije v. Slattery*, 17 F.3d 33, 37 (2d Cir. 1994).

Here, as the IJ found, there was no evidence that the government of Ukraine supports the criminal gangs or would be unable or unwilling to protect Mr. Kovalyk if he were targeted by such a gang. (JA 35). With no such evidence in the record, the IJ properly rejected petitioners'

claimed fear of persecution at the hands of organized crime.[10]

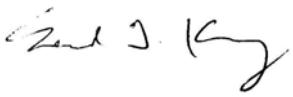
CONCLUSION

For each of the foregoing reasons, the petitions for review should be denied.

Dated: July 5, 2005

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



EDWARD T. KANG
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

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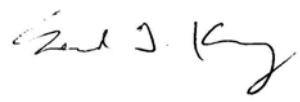
[10] The Government submits that because petitioners did not suffer any "persecution" for purposes of refugee status, petitioners' argument that the IJ failed to consider the non-systematic persecution analysis is moot. Pet. Br. at 12-13.

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,626 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



EDWARD T. KANG
ASSISTANT U.S. ATTORNEY

Addendum

8 U.S.C. § 1101(a)(42)

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country 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, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion. For purposes of determinations under this chapter, a person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted on account of political opinion, and a person who has a well founded fear that he or she will be forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well

founded fear of persecution on account of political opinion.

8 C.F.R.§ 208.16(b)(1)(i)(B)

(b) Eligibility for withholding of removal under section 241(b)(3) of the Act; burden of proof. The burden of proof is on the applicant for withholding of removal under section 241(b)(3) of the Act to establish that his or her life or freedom would be threatened in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) Past threat to life or freedom.

(i) If the applicant is determined to have suffered past persecution in the proposed country of removal on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that the applicant's life or freedom would be threatened in the future in the country of removal on the basis of the original claim. This presumption may be rebutted if an asylum officer or immigration judge finds by a preponderance of the evidence:

(B) The applicant could avoid a future threat to his or her life or freedom by relocating to another part of the proposed country of removal and, under all the circumstances, it would be reasonable to expect the applicant to do so.

8 C.F.R. § 1208.13(b)(1)(i)(A)

(b) Eligibility. The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution.

(1) Past persecution. An applicant shall be found to be a refugee on the basis of past persecution if the applicant can establish that he or she has suffered persecution in the past in the applicant's country of nationality or, if stateless, in his or her country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion, and is unable or unwilling to return to, or avail himself or herself of the protection of, that country owing to such persecution. An applicant who has been found to have established such past persecution shall also be presumed to have a well-founded fear of persecution on the basis of the original claim. That presumption may be rebutted if an asylum officer or immigration judge makes one of the findings described in paragraph (b)(1)(i) of this section. If the applicant's fear of future persecution is unrelated to the past persecution, the applicant bears the burden of establishing that the fear is well-founded.

(i) Discretionary referral or denial. Except as provided in paragraph (b)(1)(iii) of this section, an asylum officer shall, in the exercise of his or her discretion, refer or deny, or an immigration judge, in the exercise of his or her discretion, shall deny the asylum application of an alien found to be a refugee on the basis of past persecution if any of the following is found by a preponderance of the evidence:

(A) There has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution in the applicant's country of nationality or, if stateless, in the applicant's country of last habitual residence, on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1252(d)(1)

(d) Review of final order.

A court may review a final order of removal only if--

(1) the alien has exhausted all administrative remedies available to the alien as of right.