05-4048-ag *To Be*
Argued By:
CHRISTINE SCIARRINO

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FOR THE SECOND CIRCUIT

United States Court of Appeals

Docket No. 05-4048-ag

ZULBER KADRIOVSKI,
Petitioner,

-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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

This Court has jurisdiction under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b) (2005), to review the petitioner's challenge to the BIA's final order dated June 24, 2005 denying him both asylum and withholding of deportation. The petition was filed on July 22, 2005, and is therefore timely. *See* 8 U.S.C. § 1252(b)(1) (requiring petition to be filed within 30 days of date of final order of removal).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1.Whether the Board of Immigration Appeals erred in denying the petitioner's motion to terminate proceedings for "repapering" where the Attorney General has sole discretion to terminate removal proceedings.

2. Whether a reasonable factfinder would be compelled to reverse the Board of Immigration Appeals' adverse credibility determination, where the petitioner's statements and evidentiary submissions were either implausible or internally inconsistent on material elements of his claim, and where the petitioner failed to adequately explain the inconsistencies.

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BRIEF FOR ALBERTO R. GONZALES
Attorney General of the United States

Preliminary Statement

Zulber Kadriovski, a native of the former Republic of Yugoslavia and citizen of Macedonia, petitions this Court for review of a decision of the Board of Immigration Appeals ("BIA") dated June 24, 2005 (Joint Appendix ("JA") 2). The BIA affirmed the decision of an Immigration Judge ("IJ") (JA 58-78) dated September 24, 2003, denying the petitioner's applications for asylum and

withholding of deportation under the Immigration and Nationality Act of 1952, as amended ("INA"), and ordering him removed from the United States. (JA 2-4 (BIA's decision), JA 58-78 (IJ's decision and order)). In addition, the BIA denied the petitioner's motion to terminate proceedings and "repaper" them under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").

The petitioner claims that his motion to terminate should have been granted so that his exclusion proceeding could have been "repapered" as a removal proceeding under the procedure set forth in IIRIRA § 309(c)(3). That section vests full discretion in the Attorney General to determine whether, and when, to repaper proceedings, and the petitioner offers no legal or constitutional basis to disturb the BIA's decision in this case.

The petitioner also claims that he is entitled to political asylum due to alleged past persecution of himself and his family based on their religious beliefs, and due to his alleged fear of future persecution for his illegal departure from Macedonia and his failure to serve in the military. Substantial evidence supports the BIA's determination that the petitioner failed to provide credible testimony and evidence in support of his claim for asylum and withholding of deportation. The agency denied the petitioner's claims for asylum and withholding of deportation after identifying specific inconsistencies between the petitioner's multiple applications for asylum and withholding of deportation, the various applications of his family members who were in the consolidated

proceedings with him, his affidavit, and his testimony. The petition for review should be denied.

Statement of the Case

In December 1991, Zulber Kadriovski entered the United States at John F. Kennedy International Airport.[1]

On September 1, 1993, Kadriovski executed an asylum application with the Immigration and Naturalization Service ("INS") (JA 119-123), which was then filed on September 7, 1993. (JA 61).[2]

A Notice to Applicant for Admission Deferred for Hearing before Immigration Judge, dated May 15, 1996 was served on the petitioner, charging him with being excludable on the following grounds: (1) procuring a visa and other documentation or admission into the United States by fraud or willful misrepresentation of a material

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[1] Several documents indicate that Kadriovski entered the United States on various dates in December, 1991. For example, December 9, 1991 is referenced as the date an affidavit was executed by Kadriovski at John F. Kennedy Airport (JA 79), as well as referenced in his brief to this Court, at page 5. December 10, 1991 is used in Kadriovski's second application for asylum. (JA 81). December 18, 1991 is referenced in the IJ's decision, Kadriovski's initial asylum application, and the INS charge form I-110. (JA 61, 119, 204).

[2] The IJ's decision recites that the initial asylum application was filed with INS on September 7, 1993, however the petitioner notes at page 6, footnote 5 of his brief to this Court that the date received stamp is illegible. (JA 119).

fact; (2) being not in possession of a valid, unexpired immigrant visa and not exempt from presentation of same; and (3) being not in possession of a valid, unexpired non-immigrant visa and not exempt from presentation of same. Kadriovski was ordered to appear on September 20, 1996. (JA 203).

Kadriovski appeared *pro se* at an exclusion hearing on September 20, 1996. The hearing was then continued to October 18, 1996 to allow Kadriovski to retain counsel. (JA 225-227).

On October 18, 1996, counsel appeared for Kadriovski before IJ Williams and denied the charge of fraud relating to his visa. A merits hearing was then scheduled for September 30, 1997. (JA 228-237).

Kadriovski appeared at the September 30, 1997 hearing before IJ Defonzo in New York, however his counsel had filed a request to withdraw her appearance, which was granted. Kadriovski reported that he had retained new counsel, who was not present at the hearing, and the hearing was then continued. (JA 238-248)

On April 8, 1999, Kadriovski and counsel appeared at a hearing before IJ Defonzo, which was then rescheduled to January 28, 2000. (JA 249-254).

On January 28, 2000, Kadriovski appeared with counsel before IJ Defonzo. The hearing was continued to February 4, 2000, at which time Kadriovski's matter would be consolidated with other matters pending before the Immigration Court involving other Kadriovski family

members. The consolidation was requested by Kadriovski's counsel. (JA 255-263).

On February 4, 2000, Kadriovski's case was transferred to IJ Elizabeth Lamb's docket, and the hearing was continued. (JA 397-399).

On August 17, 2000, certain deadlines were set by IJ Lamb at a hearing, and the hearing was then continued. (JA 400-404).

Kadriovski filed a second application for asylum dated August 31, 2000, claiming religious persecution. (JA 81-90).

On February 22, 2001, Kadriovski's consolidated exclusion hearing proceeded before IJ Lamb. Counsel for the Kadriovskis requested a continuance, which was granted. (JA 405-412).

The next hearing was scheduled on November 15, 2001, but was again continued. (JA 413-434).

On January 17, 2003, IJ Lamb reviewed each consolidated case *seriatim* and continued the matters one final time. (JA 264-286).

On August 4, 2003, a hearing on the merits of all the consolidated matters was held before IJ Lamb in New York, New York, during which the petitioner and his mother, Ulvije Kadriovski, testified. (JA 287-362).

At the August 4, 2003 hearing, INS withdrew the fraud charges against Kadriovski because he was a minor when he entered the United States. (JA 346, 351). At the close of the hearing, the proceedings were continued for purposes of IJ Lamb rendering a decision. (JA 361).

On September 24, 2003, IJ Lamb rendered a written decision, denying Kadriovski's requests for asylum and withholding of deportation under the INA. (JA 76).

On October 20, 2003, Kadriovski filed a timely notice of appeal to the BIA. (JA 7). On December 27, 2004 he filed a brief with the BIA (JA 8-22), and a motion to terminate for repapering. (JA 23-25).

On June 24, 2005, the BIA issued an order denying Kadriovski's motion to terminate and dismissing his appeal. (JA 1-4).

On July 22, 2005, the petitioner filed a timely petition for review with this Court.

Statement of Facts

A. Zulber Kadriovski's Entry into the United States and Asylum and Withholding of Deportation Application

In December 1991, the petitioner entered the United States at the age of 17, with his brother. (JA 295). Twenty-one months later, in September, 1993, the petitioner filed his initial application for asylum, Form I-589 ("Original Application"). (JA 119-123).

Then, on May 28, 1996, the INS commenced exclusion proceedings against the petitioner, charging him with being an excludable alien because he procured his visa or other documentation for admission into the United States by fraud, and because he was not in possession of a valid visa. (JA 203-204).

The fraud charges were subsequently withdrawn by the INS because Kadriovski was a minor at the time of his entry into the United States. (JA 346).

Kadriovski, however, conceded through counsel that he was not in possession of a valid visa, and was therefore excludable. (JA 230).

Kadriovski filed a second Form I-589 ("Amended Application") for asylum on August 31, 2000. (JA 81-89).

B. Zulber Kadriovski's Exclusion Proceedings

On August 4, 2003, after numerous appearances, the IJ held an exclusion hearing in New York, New York at which the petitioner was represented by counsel, and an interpreter was present and available, although the petitioner chose to speak in English. (JA 294).

1. Documentary Submissions

Kadriovski's Original Application, dated September 1, 1993[3] states that he left Macedonia and entered the United

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[3] The IJ marked several documents into evidence, (continued...)

States at John F. Kennedy Airport, New York, New York, on December 18, 1991. (JA 119). Kadriovski stated that he was seeking asylum because religion was disallowed and that he wanted to "get a job." (JA 120, 123). Kadriovski further stated that if he returned to Macedonia, he would be killed because of his religious beliefs and beliefs in democracy. (JA 120).

Seven years after filing his Original Application, Kadriovski filed his Amended Application, dated August 31, 2000. (JA 81-90). Kadriovski stated in an attachment to the Amended Application that he and his family were harassed by both Macedonian police and ethnic Albanians because of their religious beliefs, and that he wanted to "live my life in peace, away from the ethnic battle going on in Macedonia." (JA 90).

2. Zulber Kadriovski's Testimony

On August 4, 2003, the IJ held a hearing at which Kadriovski appeared, represented by counsel. (JA 294). An interpreter was available to Kadriovski, however Kadriovski indicated that he preferred to address the court in English. (JA 294).

Kadriovski testified that his religion was not acceptable to either the Macedonian government or Albanians, an ethnic sect in Macedonia, and that, as a result "we always had a problem getting a job." (JA 296). On cross examination, however, Kadriovski admitted that he had

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[3] (...continued)
including Kadriovski's Original and Amended Applications.

never applied for a job in Macedonia before he left the country. (JA 308-309).

Kadriovski testified that there were "problems with the schooling." (JA 297). When asked to explain those problems, he stated that Muslims were not allowed to fast during Ramadan in school, and that they were not allowed to use the Turkish language. (JA 305-306, 323-324). In addition, Kadriovski testified that he was harassed by the police on the way to school. (JA 318). Kadriovski also testified that he advised his mother in 1990 through telephone conversations of problems he was encountering in high school on the basis of his religion.[4] (JA 310). Under cross-examination, Kadriovski admitted that he was able to obtain a high school education prior to leaving Macedonia, and that he did not continue his education

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[4] At the time, Kadriovski used the telephone to communicate with his parents since they had left Macedonia, having previously entered the United States in 1985. (JA 615). Kadriovski's mother, Ulvije Kadriovski, provided a written statement to INS, dated December 10, 1991, provided in conjunction with the petitioner's entry into the United States. (JA 440-444). The petitioner's parents also filed their application for political asylum, on July 15, 1993, (seven years after the father's initial entry into the United States). (JA 615-623). The parents' application was later amended, by application dated August 31, 2000. (JA 603-614). In neither the mother's statement nor the applications for asylum are there any references that the petitioner had reported problems at school due to his religion.

because he left Macedonia after graduating from high school. (JA 307-308).

Kadriovski also stated that if he returns to Macedonia "there will be a lot of charges against me" because he left Macedonia illegally and avoided serving in the military. (JA 300). He explained that he left Macedonia to avoid a military draft, although he had never received a draft notice. (JA 314-316). Later, he testified that his uncle had received a draft notice for him, but that the notice was "back at home." (JA 316).

Kadriovski testified that the police came to his house to search his house in 1989, (JA 324-325), and that the police ran after demonstrators in the streets (JA 326). He testified, however, that he was never arrested. (JA 326).

Kadriovski was asked about the portion of his Amended Application in which he stated that he had witnessed his father being "dragged out of bed" several times by Macedonian police. (JA 90). Kadriovski could not remember many details about these incidents involving his father or even when the incidents occurred. (JA 327-328). Kadriovski agreed however, that his father had left for the United States in 1985, when the petitioner was 10 or 11, and that for the preceding 10 years (around the time of the petitioner's birth), his father worked in Italy and did not reside with the petitioner. (JA 327-330). Furthermore, although the petitioner testified that his father had lived with him when he was 10 to about 14 years of age, he could not reconcile this statement with the fact that his father had left for the United States when he was 10 or 11 years old. (JA 329-330).

Kadriovski reported that he has followed events in Macedonia, and described the current situation at the time of the hearing as "[n]othing changed." (JA 304-305). Nevertheless, upon questioning, he admitted that he did not know who the President of Macedonia was at the time of the hearing. (JA 304, 331).

At the conclusion of the hearing, the petitioner's counsel conceded that Kadriovski's testimony "was a little vague." (JA 360).

C. The IJ's Decision

On September 24, 2003, the IJ issued a written decision denying both asylum and withholding of deportation. (JA 58-78). The IJ found that the petitioner and his family are Muslim, but that the majority of Macedonians are Christian. Of the Macedonians who are Muslim, according to the petitioner, most are ethnic Albanians and speak Albanian. The IJ considered the petitioner's testimony that Christian Macedonians did not approve of his religion and Muslim ethnic Albanians treated the petitioner and his family badly because they did not speak Albanian. (JA 66).

The IJ noted the petitioner's testimony that he and his family experienced a variety of problems due to their religion and ethnicity, such as not continuing his education because "of problems in school," and that while attending school, he experienced problems practicing his religion freely, and learning to speak different languages. (JA 66). Kadriovski testified that he believed that he was of

Turkish descent, but that the government prevented him from learning the Turkish language, as the only language allowed in school was Macedonian. (JA 67).

The IJ also found that Kadriovski testified that there are not many Muslim Macedonians in high government positions and that it is very difficult to find a job if you are Muslim. (JA 66).

The IJ confirmed that Kadriovski left Macedonia illegally and that at the time, he testified that many people were dying in civil war. The IJ noted Kadriovski's testimony that he did not want to serve in the army "because [he] didn't believe in it," but that the government "didn't want anybody to leave." (JA 66). Kadriovski stated that "there was a lot of pressure" on him to serve and thus left the country quickly. Kadriovski testified before the IJ that he believes that if he returns "there will be a lot of charges against [him]."

The IJ considered the petitioner's testimony that the situation in Macedonia is getting "worse and worse" and that his children "would have a very bad life if they returned" to Macedonia. He estimated that only five percent of the population are comprised of Muslims who speak Macedonian and that he would not be welcomed by ethnic Albanians since he does not speak Albanian, nor would he be welcomed by Christian Macedonians because of his Muslim beliefs. (JA 67).

Lastly, the IJ noted that Kadriovski is married with three children, all born in the United States; that he has worked as a plumber for three years and that he stated that

he has paid taxes for eight years. Kadriovski stated that he stays current on the political situation in Macedonia by listening to the news and speaking with people from his hometown. (JA 67).

The IJ then analyzed the credibility of Kadriovski, initially noting that the signed statement portion of his Amended Application "is nearly identical to the other signed statements submitted by the other respondents," and then finding that the generality of Kadriovski's application constituted a negative factor when determining his credibility. (JA 74).

The IJ found that Kadriovski's two applications did not provide a "coherent explanation" of why he left Macedonia. The IJ pointed to his Original Application which first stated that those who were not members of the Serbian Orthodox religion "are killed," but just a few lines later stated that the Communist regime disallowed all religions and that only atheism was acceptable. (JA 75). The IJ noted that inconsistencies within an application may lead to a finding of negative credibility.

The IJ then compared Kadriovski's Original Application to his Amended Application. The Original Application referenced Kadriovski's service in the Yugoslavian army and that he was forced to attend a "Political Information" class. Kadriovski however, provided no explanation concerning the course, nor did he include the experience in his Amended Application.

In Kadriovski's Original Application, he claimed that his "hometown is occupied by [the] Yugoslav army," but

in his Amended Application, no occupation is even mentioned. Thus, the IJ found that there were serious omissions, and that those omissions were also a significant factor in determining credibility. (JA 75).

The IJ flatly found that Kadriovski's testimony was not credible. Kadriovski testified that his refusal to serve in the army was the impetus that led him to flee the country and that he had only one week to leave before he was to be drafted and sent to war. Yet, in his Original Application, Kadriovski stated that he had already served in the army, but then testified that he never received notice from the army requesting enlistment. Then, he testified that his uncle had received notice, and in any case, he was unable to produce a notice from the army indicating that he had been drafted. The IJ held that "[s]uch contradictions undermine the respondent's credibility." (JA 75).

Further, the IJ found that the petitioner's testimony was vague and unconvincing. There were admissions that he had never been arrested in Macedonia, nor taken to a police station or beaten. He stated that he did not come to the United States for economic reasons, but specifically stated in his Original Application that he was seeking asylum so that he could get a job. (JA 75). The IJ also noted that while Kadriovski claimed to be keeping abreast of current events in Macedonia, he did not know who was the current president of Macedonia.

Ultimately, the IJ found that the conditions in Macedonia do not support Kadriovski's claim and that after a close examination of the record, he had failed to establish a credible claim for asylum.

Accordingly, the IJ denied asylum and found that Kadriovski did not meet the even higher burden of establishing eligibility for withholding of deportation. The IJ ordered Kadriovski removed from the United States to Macedonia. (JA 76).

D. The BIA's Decision

On June 24, 2005, the BIA issued a *per curiam* opinion that affirmed the IJ's decision as to the denial of asylum and withholding of deportation. (JA 2). As relevant here, the BIA denied Kadriovski's motion to terminate his proceedings for "repapering" under IIRIRA. The BIA noted that Kadriovski relied on a March 14, 2000 memorandum from the then-Vice Chair of the BIA outlining a procedure for cases to be repapered under IIRIRA § 309(c). Under this procedure, the BIA was to close cases when an applicant is otherwise eligible for suspension of deportation, but for the operation of the stop-time provision of 8 U.S.C. § 1229b(a)(1), so that the alien could be placed in removal proceedings under IIRIRA and apply for cancellation of removal. Kadriovski was ineligible to invoke this procedure, however, because he was in *exclusion* proceedings and thus ineligible for suspension of deportation. Therefore, the BIA denied his motion to terminate proceedings for repapering.

With respect to Kadriovski's asylum and withholding of deportation claims, the BIA agreed with the IJ's adverse credibility finding, noting that the IJ had identified "specific inconsistencies" between Kadriovski's applications, the various applications of his family members, his affidavit, and his testimony. (JA 3).

Furthermore, these identified inconsistencies, which were central to the claims underlying his asylum claim "were specific and cogent enough to conclude that the applicant was not credible." (JA 3). As examples, the BIA pointed to various internal inconsistencies in Kadriovski's Original Application, and between his 1993 and 2000 asylum applications. (JA 4).

The BIA specifically found that the inconsistencies and omissions found by the IJ were "substantial and central" to the asylum claim "because they bring into question whether the applicant or anyone in his family was actually harmed or has a well-founded fear of harm on account of a protected ground." (JA 4). In addition, the BIA rejected Kadriovski's argument that the IJ should not have considered his Original Application, noting that the IJ "was entitled to consider, in her assessment of the applicant's credibility, assertions made in prior applications for asylum, especially if those various claims were inconsistent." (JA 4). In sum, the BIA upheld the IJ's adverse credibility determination "based on the significant discrepancies and omissions in the applicant's applications that go to the heart of his claim." (JA 4).

This petition for review followed.

SUMMARY OF ARGUMENT

I. The IJ properly denied Kadriovski's motion to terminate for repapering. Under IIRIRA § 309(c)(3), the Attorney General may terminate exclusion or deportation proceedings and "repaper" them as removal proceedings under IIRIRA to allow an alien to apply for certain forms

of relief available under IIRIRA. The Attorney General has complete discretion under this section however, and the Attorney General, as relevant to this case, has limited the availability of "repapering" to those aliens who were otherwise eligible for suspension of deportation prior to IIRIRA. Because Kadriovski was in exclusion proceedings, he was not eligible for suspension of deportation and thus the BIA properly denied his motion to terminate for repapering. Kadriovski's challenge to the Attorney General's decision is meritless. The statute does not require the Attorney General to allow repapering for aliens in exclusion proceedings and it does not require the Attorney General to issue regulations implementing this section.

II. Substantial evidence supports the IJ's determination that Kadrivoski's account of alleged persecution suffered in Macedonia was not believable due to inconsistencies between the first written application for asylum, the second written application for asylum and Kadriovski's testimony. Kadriovski's conflicted accounts of the reasons he fled Macedonia, whether or not he was drafted into the Yugoslav army, and alleged mistreatment of him and his family were implausible and not credible, and the IJ's decision properly reflects specific, cogent reasons for the adverse credibility determination which bear a legitimate nexus to that finding. Because a reasonable factfinder would not be compelled to find that Kadriovski had suffered persecution in Macedonia prior to his 1991 departure, the instant petition for review should be denied.

ARGUMENT

I. THE BIA PROPERLY DENIED KADRIOVSKI'S MOTION TO TERMINATE FOR REPAPERING

A. Relevant Facts

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

B. Governing Law and Standard of Review

When Congress substantially revised the immigration laws in IIRIRA, it authorized the Attorney General to "repaper" pending immigration proceedings so that they could proceed under the new provisions. Specifically, Section 309(c)(3) of IIRIRA authorizes the Attorney General to terminate deportation or exclusion proceedings that were pending on IIRIRA's enactment date and initiate removal proceedings, thereby allowing aliens to apply for cancellation of removal under INA § 240A. *See Rodriguez-Munoz v. Gonzales*, 429 F.3d 245, 247 n.4 (3rd Cir. 2005).

IIRIRA § 309(c)(3) provides as follows:

> (3) ATTORNEY GENERAL OPTION TO TERMINATE AND REINITIATE PROCEEDINGS. - In the case described in paragraph (1) [deportation or exclusion cases pending on the IIRIRA's enactment date], the Attorney General *may* elect to terminate proceedings in which there has not been a final

> administrative decision and to reinitiate proceedings under [the IIRIRA]. Any determination in the terminated proceeding shall not be binding in the reinitiated proceeding.

IIRIRA § 309(c)(3) (emphasis added), 110 Stat. at 3009-626 (codified at 8 U.S.C. § 1101 note). This Court has interpreted this language as conferring "complete discretion on the Attorney General regarding whether to repaper a particular case." *Rojas-Reyes v. INS*, 235 F.3d 115, 125 (2d Cir. 2000).

Ordinarily, this Court lacks jurisdiction to review discretionary decisions of the Attorney General. Specifically, Section 242(a)(2)(B)(ii) of the INA provides that "no court shall have jurisdiction to review any . . . decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security . . . ." 8 U.S.C. § 1252(a)(2)(B)(ii); *see also* 8 U.S.C. § 1252(g) ("no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter").

The REAL ID Act of 2005, however, provided that notwithstanding these limitations on judicial review, this Court retains jurisdiction to review a limited class of issues. Section 106 of the REAL ID Act specifies that "[n]othing in [8 U.S.C. § 1252(a)(2)(B)] or (c), or in any other provision of [the INA] (other than this section)

which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition of review filed with an appropriate court of appeals in accordance with this section." 8 U.S.C. § 1252(a)(2)(D).

Interpreting § 1252(a)(2)(D) in *Xiao Ji Chen v. United States Dep't of Justice*, 471 F.3d 315 (2d Cir. 2006), this Court explained that the term "questions of law" was ambiguous, *id.* at 324, and proceeded to construe it as encompassing "the same types of issues that courts traditionally exercised in habeas review over Executive detentions," *id.* at 326-27. As this Court noted, according to the Supreme Court, habeas jurisdiction "traditionally had 'encompassed detentions based on *errors of law*, including the erroneous *application or interpretation* of statutes,' . . . as well as challenges to 'Executive interpretations of immigration laws,' . . . and determinations regarding an alien's 'statutory eligibility for discretionary relief.'" *Id.* at 327 (quoting *INS v. St. Cyr*, 533 U.S. 289, 302, 307, 314 n.38 (2001)) (emphasis in *Xiao Ji Chen*).

The *Xiao Ji Chen* Court ultimately concluded that it "need not determine the precise outer limits of the term 'questions of law' under the REAL ID Act, nor . . . define the full extent of those issues that were historically reviewable on habeas, or what the Suspension Clause itself requires on direct, non-habeas review of a removal order." *Id.* at 328-29 (internal quotation marks and citations omitted). Rather, on the facts of that case, it was enough "to hold simply that, although the REAL ID Act restores our jurisdiction to review 'constitutional claims or

questions of law,' . . . we remain deprived of jurisdiction to review decisions under the INA when the petition for review essentially disputes the correctness of an IJ's factfinding or the wisdom of his exercise of discretion." *Id.* at 329 (citation omitted).

C. Discussion

The BIA denied Kadriovski's motion to terminate for repapering, concluding that under its procedures for repapering, he was ineligible for that relief. Specifically, the BIA noted that under a 2000 memorandum prepared by Lori Scialabba, the then-Vice Chair of the BIA (the "Scialabba Memorandum"), an applicant can have his file repapered if he is otherwise eligible for suspension of deportation, but for the operation of the stop-time provision of § 240A(d)(1). (JA 3). Kadriovski, however, was not otherwise eligible for suspension of deportation because he was in exclusion proceedings, not deportation proceedings. (JA 3). Thus, the BIA denied his motion to terminate for repapering.

The BIA's decision properly implemented the agency's procedures for repapering, and Kadriovski's arguments to the contrary are unavailing.

1. Under the BIA's procedures, Kadriovski was ineligible for repapering because, as an alien in exclusion proceedings, he was not eligible for suspension of deportation

As described above, Section 309(c)(3) authorizes the Attorney General – as an exercise of discretion – to terminate exclusion or deportation proceedings and reinitiate those proceedings as removal proceedings under IIRIRA. In 2000, the Attorney General issued proposed regulations to allow aliens to apply for "repapering" under § 309(c)(3). *See* 65 Fed. Reg. 71273 (Nov. 30, 2000). In the comments to those regulations, the Attorney General explained that she intended "to exercise the discretion granted to her in section 309(c)(3) of IIRIRA in individual cases on behalf of" certain aliens who were otherwise eligible for certain forms of relief under prior law but who were disadvantaged by recent changes in the law. *Id.* at 71274. As relevant here, and consistent with this stated purpose, the proposed regulations would allow aliens who were otherwise eligible for a form of relief known as "suspension of deportation" – but for the operation of a new "stop-time rule" that prevented them from accruing the necessary years of physical presence in the United States required for this form of relief – to apply for repapering if they would be eligible for the new form of relief called "cancellation of removal." *Id.* *See also Alcaraz v. INS*, 384 F.3d 1150, 1153-56 (9th Cir. 2004) (describing statutory scheme governing suspension of deportation, changes in law that disadvantaged some aliens, and proposed regulations). Under the proposed regulation, an alien is only eligible for repapering if he

was "[s]tatutorily eligible for suspension of deportation" but for the application of the stop-time rule. *See* 65 Fed. Reg. at 71274, 71276.

Although the Attorney General has not finalized the proposed regulations, the agency has effectively implemented the standards announced in those proposed regulations through a series of directives to the BIA, including the Scialabba Memorandum. *See Alcaraz*, 384 F.3d at 1154-56; *Rojas-Reyes*, 235 F.3d at 125 (noting that Scialabba Memorandum announces standards "in accordance with [the] expected regulations" for administrative closure of cases for aliens who appear eligible for repapering); JA 35 (Scialabba Memorandum). Thus, as in the proposed regulations, the Scialabba Memorandum limits the availability of "repapering" relief to those aliens who were "otherwise eligible for suspension of deportation . . . but for the application of the stop-time rule." (JA 36).

Under long-standing and well-established law, suspension of deportation is not available to aliens in exclusion proceedings. *See, e.g., Leng May Ma v. Barber*, 357 U.S. 185 at 189-90 (1958) (holding that suspension is unavailable to excludable aliens); *Skelly v. INS*, 168 F.3d 88, 90 (2d Cir. 1999); *Patel v. McElroy*, 143 F.3d 56, 59-61 (2d Cir. 1998); *In re Torres*, 19 I. & N. Dec. 371, 373 (BIA 1986) ("an alien properly in exclusion proceedings is not entitled to apply for suspension of deportation, despite being present in the United States on parole for an extensive period of time."); *In re E-*, 3 I. & N. Dec. 541 (BIA 1949).

Thus, because Kadriovski was in exclusion proceedings, he was not eligible for suspension of deportation and accordingly not eligible for repapering. The BIA properly denied his motion to terminate for repapering.

2. Kadriovski's challenges to the Scialabba Memorandum are without merit

Confronted with the denial of his motion to terminate on the basis of the standards set forth in the Scialabba Memorandum, Kadriovski argues that that Memorandum is contrary to the INA and a violation of the Administrative Procedure Act ("APA"). These arguments are without merit.

As a preliminary matter, Kadriovski should not be heard to complain about the Scialabba Memorandum because he asked the BIA to rely on that Memorandum when he asked for repapering. Specifically, in his motion to terminate, he argued that the BIA should apply the Scialabba Memorandum and that he met the criteria for repapering as announced there. (JA 24-25). By asking the BIA to rely on that Memorandum, he has waived any argument that it was error for the BIA to do so. *See United States v. Giovanelli*, 464 F.3d 346, 351 (2d Cir. 2006) (defendant who requested a specific change in jury instructions has waived any challenge to those instructions on appeal when the district court made the change requested). Moreover, in light of his arguments to the BIA that that Board should apply the Scialabba Memorandum, he has failed to exhaust his arguments presented here that it was error for the BIA to rely on the Memorandum. *See*

8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if the alien has exhausted all administrative remedies available to the alien as of right."); *Lin Zhong v. United States Dep't of Justice*, 480 F.3d 104, 123 (2d Cir. 2007) (noting that this Court requires aliens to present their specific issues to the agency before presenting them to this Court).

In any event, Kadriovski's arguments on the Scialabba Memorandum are unavailing. Kadriovski argues first that the limitation of repapering relief to deportation cases violates § 309(c)(3) because that section authorizes repapering of pending cases without distinguishing between exclusion and deportation cases.[5] Petitioner's Br. at 16. There is no inconsistency, however. While the statute does not distinguish between exclusion and deportation cases, it also does not *require* the Attorney General to allow repapering in any cases, whether

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[5] Kadriovski couches this argument as a legal claim, i.e., that the decision is inconsistent with the statute, but properly understood, it is a challenge to the Attorney General's exercise of discretion. The proposed regulations and the Scialabba Memorandum make clear that the decision to allow repapering for certain classes of aliens (e.g., those eligible for suspension of deportation but for operation of the stop-time rule) was made as an exercise of discretion. Kadriovski's challenge to that judgment is a challenge to the Attorney General's discretionary judgment, a challenge that is barred by 8 U.S.C. § 1252(a)(2)(B)(ii). *See also Xiao Ji Chen*, 471 F.3d at 329 (under REAL ID Act, court "remain[s] deprived of jurisdiction to review decisions under the INA when the petition for review essentially disputes the . . . wisdom of [the agency's] exercise of discretion").

exclusion or deportation cases. In other words, because the statute does not require the Attorney General to exercise his discretion in any particular case or class of cases, the exercise of discretion announced in the Scialabba Memorandum does not violate the statute.

Second, Kadriovski argues that the Scialabba Memorandum violates the APA because it announces a "rule" without complying with the requirements for notice-and-comment rulemaking. *See* 5 U.S.C. § 553(b). In other words, Kadriovksi contends that the Attorney General had to implement § 309(c)(3) through notice-and-comment rulemaking. As a matter of administrative law, Kadriovski is just wrong. Agencies enjoy broad latitude in choosing how to act, whether through formal rulemaking or adjudications, or through the announcement of policies through less formal interpretive rulings. *See SEC v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947) (choice of procedures lies with agency). In addition, "[f]or reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Reno v. Flores*, 507 U.S. 292, 305-306 (1993), *quoting Mathews v. Diaz*, 426 U.S. 67, 81, 96 S.Ct. 1883, 1892, 48 L.Ed.2d 478 (1976). " '[O]ver no conceivable subject is the legislative power of Congress more complete.' " *Reno v. Flores, supra, qutoing Fiallo v. Bell*, 430 U.S. 787, 792, 97 S.Ct. 1473, 1478, 52 L.Ed.2d 50 (1977) (citations omitted). And this Court has already rejected the argument that IIRIRA or § 309(c)(3) required the Attorney General to promulgate regulations. In *Rojas-Reyes*, this Court held that the "statute simply does not mandate repapering regulations,

but rather vests the decision whether to convert pending suspension of deportation cases into cancellation of removal cases in the Attorney General alone . . . ." 235 F.3d at 125-26. Thus, the Attorney General's decision to announce standards for implementation of § 309(c)(3) through directives to the BIA was not improper.

In sum, Kadriovski's belated challenge to the Scialabba Memorandum must fail. The standards announced in that Memorandum are consistent with the statute and the APA.

II. THE IMMIGRATION JUDGE PROPERLY DETERMINED THAT KADRIOVSKI FAILED TO ESTABLISH ELIGIBILITY FOR ASYLUM OR WITHHOLDING OF DEPORTATION BECAUSE HE DID NOT ESTABLISH PAST PERSECUTION OR A WELL-FOUNDED FEAR OF FUTURE PERSECUTION

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.[6] *See* 8

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[6] "Removal" is the collective term for proceedings that previously were referred to, depending on whether the alien (continued...)

U.S.C. §§ 1158(a), 1231(b)(3) (2005); *Zhang v. Slattery*, 55 F.3d 732, 737 (2d Cir. 1995). 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, *see 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) (2005). *See* 8 U.S.C. § 1158(a) (2005); *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) (2005); *Liao*, 293 F.3d at 66.

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[6] (...continued)
had effected an "entry" into the United States, as "deportation" or "exclusion" proceedings. In Kadriovski's case, which arose under prior law, the relevant term was "withholding of deportation." 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) (2005), cases relating to both forms of relief are cited interchangeably.

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) (2005).

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*, 55 F.3d at 737-38; 8 C.F.R. § 208.13(b)(2) (2005). A well-founded fear of persecution "consists of both a subjective and an 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) (2005); *see also Zhang*, 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 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) (2005). 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) (2005); *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*, 19 I. & N. Dec. 439, 445 (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 should provide supporting evidence when available, or

explain its unavailability. *See 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."); *see also Diallo v. INS*, 232 F.3d 279, 285-86 (2d Cir. 2000); *In re S-M-J-*, 21 I. & N. Dec. 722, 723-26 (BIA 1997).

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 Attorney General's discretion. *See* 8 U.S.C. § 1158(b)(1) (2005); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004); *Zhang*, 55 F.3d at 738.

2. Withholding of Removal

Unlike the discretionary grant of asylum, withholding of removal is mandatory if the alien proves that his "life or freedom would be threatened in [his native] country on account of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A) (2005); *Zhang*, 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) (2005); *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 66, 71 (2d Cir. 2004); *Wu Biao Chen*, 344 F.3d at 275; *Zhang*, 55 F.3d at 738.

3. Standard of Review

This Court reviews the determination of whether an applicant for asylum or withholding of removal 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*, 232 F.3d at 287).[5]

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[5] This Court has noted that in 1996, Congress replaced the "substantial evidence" rule drawn from general administrative law with a new standard set forth in 8 U.S.C. § 1252(b)(4)(B), that "the administrative findings of fact are *conclusive* unless any reasonable adjudicator would be *compelled* to conclude to the contrary." (Emphasis added). Despite the fact that this new standard appeared to be even (continued...)

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, n.7. 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). An IJ's factual findings are entitled to "no lesser deference" than those of a district judge, whose determinations are generally reviewed only for "clear error." *Siewe v. Gonzales*, 480 F.3d 160, 168 (2d Cir. 2007).

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

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[5] (...continued)
more deferential, the Court was compelled by precedent to continue to characterize its review in terms of "substantial evidence." *Xiao Ji Chen*, 471 F.3d at 334 n.13.

[6] "When the BIA agrees with an IJ's ultimate credibility determination but emphasizes particular aspects of the IJ's reasoning, the Court reviews both the BIA's and the IJ's opinions, including those portions of the IJ's decision that the BIA did not explicitly discuss. *Gao v. BIA,* — F.3d —, No. 04-4020-ag, 2007 WL 914633, at *3 (2d Cir. Mar. 28, 2007) (*referencing Yun-Zui Guan v. Gonzales*, 432 F.3d 391, 394 (2d Cir. 2005)).

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." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). 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.

This Court gives "particular deference to the credibility determinations of the IJ." *Wu Biao Chen*, 344 F.3d at 275 (quoting *Montero v. INS*, 124 F.3d 381, 386 (2d Cir. 1997)); *see also Qiu v. Ashcroft*, 329 F.3d 140, 146 n.2 (2d Cir. 2003) (the Court "generally defer[s] to an IJ's factual

findings regarding witness credibility"). This Court has recognized that "the law must entrust some official with responsibility to hear an applicant's asylum claim, and the IJ has the unique advantage among all officials involved in the process of having heard directly from the applicant." *Zhang v. INS*, 386 F.3d at 73.

Because the IJ is in the "best position to discern, often at a glance, whether a question that may appear poorly worded on a printed page was, in fact, confusing or well understood by those who heard it," this Court's review of the fact-finder's determination is exceedingly narrow. *Zhang v. INS*, 386 F.3d at 74; *see also id.* ("'[A] witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression.'") (quoting *Arnstein v. Porter*, 154 F.2d 464, 470 (2d Cir. 1946) (citation omitted); *Sarvia-Quintanilla v. United States INS*, 767 F.2d 1387, 1395 (9th Cir. 1985) (noting that IJ "alone is in a position to observe an alien's tone and demeanor . . . [and is] uniquely qualified to decide whether an alien's testimony has about it the ring of truth"); *Kokkinis v. District Dir. of INS*, 429 F.2d 938, 941-42 (2d Cir. 1970) (court "must accord great weight" to the IJ's credibility findings). The "exceedingly narrow" inquiry "is meant to ensure that credibility findings are based upon neither a misstatement of the facts in the record nor bald speculation or caprice." *Zhang v. INS*, 386 F.3d at 74. "Demeanor is virtually always evaluated subjectively and intuitively, and an IJ therefore is accorded great deference on this score – no less deference than that accorded other fact-finders." *Tu Lin v. Gonzales*, 446 F.3d 395, 400 (2d Cir. 2006) (per curiam).

An IJ may rely on an inconsistency concerning a single incident in an asylum applicant's account to find that applicant not credible, "provided the inconsistency affords 'substantial evidence' in support of the adverse credibility finding." *Majidi v. Gonzales*, 430 F.3d 77, 81 (2d Cir. 2005) (upholding adverse credibility finding based on discrepancies between applicant's written application and oral testimony). Where an IJ's adverse credibility finding is based on specific examples in the record of inconsistent statements made by an asylum applicant about matters material to the asylum claim, "a reviewing court will . . . not be able to conclude that a reasonable adjudicator was compelled to *find* otherwise." *Lin v. U.S. Dep't. of Justice*, 413 F.3d 188, 191 (2d Cir. 2005) (emphasis in original) (holding that petitioner's inability to remember basic personal information, such as whether she was married in the spring or fall, supported adverse credibility determination). "[E]ven where an IJ relies on discrepancies or lacunae that, if taken separately, concern matters collateral or ancillary to the claim, the cumulative effect may nevertheless be deemed consequential by the fact-finder." *Tu Lin,* 446 F.3d at 402 (internal quotation marks and citations omitted); *Liang Chen v. U.S. Attorney General*, 454 F.3d 103, 106-107 (2d Cir. 2006) (per curiam). Where inconsistencies among a petitioner's statements are "self-evident" – for example, where a petitioner makes no reference to alleged incidents of persecution in a written asylum application, but relies on such incidents during hearing testimony – neither the IJ nor the BIA is required to solicit from the petitioner an explanation for the inconsistency before basing an adverse credibility finding on those inconsistencies. *Xian Tuan Ye*

v. DHS, 446 F.3d 289, 295-96 (2d Cir. 2006) (per curiam); *Majidi*, 430 F.3d at 80.

In reviewing credibility findings, courts "look to see if the IJ has provided 'specific, cogent' reasons for the adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding." *Id.* (quoting *Secaida-Rosales*, 331 F.3d at 307). Credibility inferences must be upheld unless they are "irrational" or "hopelessly incredible." *See, e.g.*, *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002) ("we defer to the fact finder's determination of . . . the credibility of the witnesses, and to the fact finder's choice of competing inferences that can be drawn from the evidence") (internal marks omitted); *NLRB v. Columbia Univ.*, 541 F.2d 922, 928 (2d Cir. 1976) (credibility determination reviewed to determine if it is "irrational" or "hopelessly incredible"). Although this Court will not uphold inferences based on "bald speculation," "[t]he speculation that inheres in inference is not "bald" if the inference is made available to the factfinder by record facts, or even a single fact, viewed in the light of common sense and ordinary experience. So long as an inferential leap is tethered to the evidentiary record, we will accord deference to the finding." *Siewe*, 480 F.3d at 168.

C. Discussion

Substantial evidence supports the BIA's and IJ's determination that Zulber Kadriovski failed to provide credible evidence in support of his application for asylum and withholding of deportation, and thus failed to establish eligibility for relief.

The BIA's decision referenced just a few examples of the numerous factors that the IJ relied upon in her decision to find adverse credibility. Specifically, the BIA referenced: (1) inconsistencies in Kadriovski's statements as to whether non-members of the Serbian Orthodox religion would be killed, or whether the Communist regime disallowed religion, but did not kill non-Serbian Orthodox; (2) Kadriovski's failure to include in his Amended Application previous statements from his Original Application that he was forced to attend a "Political Information" class; and (3) Kadriovski's similar failure to mention in his Amended Application his statement from his Original Application that his hometown was occupied by the Yugoslav army.

The IJ's decision (JA 58-78) identified several inconsistencies, contradictions and omissions in Kadriovski's testimony and documents that called into question Kadriovski's credibility. The IJ's findings in this regard are summarized as follows:

- Kadriovski's signed statement attached to his Amended Application, which was nearly identical to other family members' statements, was too general and lacking in specifics to support a claim for asylum and withholding of deportation. (JA 74).

- Kadriovski's applications presented no coherent explanation as to why he fled Macedonia in the first place. For example, his Original Application stated that Serbian Orthodox non-members would be killed, but then a few lines later stated that the

regime disallows religion and only permitted atheism. (JA 75).

- Similarly, Kadriovski's Original Application stated that his hometown was occupied by the Yugoslav army, but his Amended Application made no mention of an occupation. (JA 75).

- Kadriovski's Original Application indicated that he was required to attend a "Political Information" course (though no explanation as to the significance of this course was provided), and his Amended Application made no mention that any such required course. (JA 120).

- Kadriovski claimed in his testimony that his refusal to serve in the military was the reason that led him to flee Macedonia, yet his Original Application stated that he had served in the military. Furthermore, Kadriovski initially testified that he never received a draft notice, but knew one would be forthcoming because of observing his friends' experiences. Then he testified that his uncle had received Kadriovski's draft notice, but no notice was submitted into evidence. (JA 300, 316-17).

- Kadriovski admitted that he had never been arrested in Macedonia or beaten, but stated that he did not come to the United States for economic

reasons. Yet, Kadriovski's Original Application requested asylum "so [he] can get a job."[7] (JA 123).

- Kadriovski claimed to be staying abreast of current events in Macedonia, but could not name its current President. (JA 304).

- There were several discrepancies in the testimony surrounding the alleged mistreatment of Kadriovski's father by the Macedonian police. Kadriovski testified that he remembered his father being dragged from his bed, but later admitted that he did not remember the event because he was so young. Moreover, Kadriovski's mother failed to mention this incident in her statement to the Immigration Officer in 1991. (JA 68, 440-443).

Taken together, the IJ properly found that these inconsistencies, omissions, and contradictions – all of which go directly to the heart of his claims for asylum and withholding of deportation – undermined Kadriovski's credibility. The IJ correctly relied upon the "cumulative impact of such inconsistencies" and was entitled to conduct an "overall evaluation of testimony in light of its rationality or internal consistency and the manner it hangs together with other evidence." *Liang Chen v. United States Attorney General*, 454 F.3d 103, 107 (2d Cir. 2006),

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[7] Kadriovski's statement that he was seeking asylum to get a job implied that he had difficulty in obtaining employment while in Macedonia; yet he testified that he had never even applied for employment in Macedonia prior to leaving the country. (JA 308-09).

(quoting *Xiao Ji Chen*, 434 F.3d at 160 n.15). "Although we have stated that an IJ must base an adverse credibility finding on "specific, cogent" reasons that bear a "legitimate nexus" to the finding, an IJ need not consider the centrality *vel non* of each individual discrepancy or omission before using it as the basis for an adverse credibility determination. *Id.* at 106-107 (quoting *Xiao Ji Chen*, 434 F.3d at 160 n.15).

Kadriovski, on the other hand, attempts to ignore the totality of the evidence before the IJ, arguing initially that any inconsistent statements and omissions contained in his Original Application should be entirely disregarded, simply because the Application was later amended. He cites no authority for this proposition. Indeed, the IJ properly considered Kadriovski's Original Application, and the statements within it, especially to the extent that those statements were inconsistent with later statements and testimony. *Secaida-Rosales*, 331 F.3d at 308 ("Like outright inconsistencies, the impact of omissions must be measured against the whole record before they may justify an adverse credibility determination.").

Kadriovski then addresses some of his inconsistent statements and omissions separately.[8] Putting aside for the

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[8] Kadriovski's brief does not even attempt to address all of the inconsistencies and contradictions identified by the IJ. For example, he does not address the fact that his 2000 application failed to mention the occupation of his hometown by the Yugoslav army or the fact that there were several discrepancies in the evidence surrounding the harassment of his (continued...)

moment that the IJ correctly considered the cumulative effect of all of his inconsistent statements and omissions, Kadriovski's arguments on individual statements and omissions are meritless. For example, Kadriovski argues that his statements and his brothers' statements in support of their applications for asylum were merely "similar" and "should not be a strike against [him]". (Petitioner's Br. at 20). This argument ignores the IJ's conclusion that she discounted the statement not just because it was identical to his brothers' statements, but also because it was too general and lacking in specifics to present a credible claim for asylum. (JA 74).

Next, Kadriovski simply concludes without argument that the IJ's finding that he failed to provide a coherent explanation in his Original and Amended Applications is error. (Petitioner's Br. at 20). Kadriovski simply fails to address the multiple inconsistencies in his Applications identified by the IJ and summarized above.

In similar summary fashion, Kadriovski claims that there were no contradictions in his statements and testimony concerning his service in the military. "[T]here appears to be no contradictions in this explanation of circumstances." Petitioner's Br. at 21. This argument is belied by the record. In his Original Application, Kadriovski stated "Every morning while in the Army I had a course called, Political Information," (JA 120), but there was no reference to his military service or attendance at a "Political Information" class in his Amended Application

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[8] (...continued)
father by the police.

(JA 81-90). His testimony revealed even more contradictions. He first testified that he fled the country to avoid serving in the army and that he knew he was supposed to serve because other people his same age were going into the army. (JA 300). Later, he testified that he never received a draft notice, and that "I wasn't drafted..." (JA 316). Still later, however, he testified that he left the country because he did not appear for the draft and that his uncle had received a draft notice for him. (JA 316). He was unable to produce this draft card, however.

In any event, even if Kadriovski could construct an interpretation of his testimony and applications that did not contain contradictions and inconsistencies about his service in the military, this effort reflects a misunderstanding of the standard of review. The substantial evidence standard requires Kadriovski to offer more than a plausible alternative theory to the adverse credibility findings reached by the IJ. As the Supreme Court has held, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 523 (1981) (internal quotation marks omitted). *Accord Mar Oil, S.A. v. Morrissey*, 982 F.2d 830, 837-38 (2d Cir. 1993). It is not the role of the reviewing court to re-weigh the inconsistencies "to see if we would reach the same credibility conclusions as the IJ." *Zhang*, 386 F.3d at 77. Accordingly, the only relevant question here is whether substantial evidence exists to support the conclusion that the IJ reached in light of Kadriovski's testimony and other documentary evidence. *See Elias-Zacarias*, 502 U.S. at

481 n.1. Thus, even if Kadriovski had offered a plausible interpretation of his testimony that could explain his conflicting statements, the record as a whole does not compel such a reading. *See id.*

Kadriovski argues finally that the IJ was wrong to conclude that his testimony was "vague and unconvincing." Petitioner's Br. at 21. *But see* JA 360 (statement by Kadriovski's counsel: "First of all regarding Zulber's testimony I think was he a little vague, yes, he was a little vague . . ."). He argues for example that his general testimony should be considered credible testimony. But the IJ properly rejected Kadriovski's general claims as unconvincing and insufficient to support his claim for asylum. *See* 8 C.F.R. § 208.13(a) (applicant's evidence must be credible, specific, and detailed to establish eligibility for asylum); *Melendez*, 926 F.2d at 215 (applicant must provide "credible, persuasive and . . . specific facts"). In the same vein, he argues that his inability to name the current President of Macedonia does not reflect on his credibility but rather reflects that he has lived in the United States for a long time. The IJ disagreed, however, and pointed to the petitioner's own testimony that he stayed informed of current affairs in Macedonia. (JA 75). Again, the mere existence of alternative inferences from the evidence does not establish that the record compels adoption of those inferences.

Thus, substantial evidence supports the IJ's decision, *see, e.g.*, *Qiu*, 329 F.3d at 152 n. 6 ("incredibility arises from 'inconsistent statements, contradictory evidence, and inherently improbable testimony'" (quoting *Diallo*, 232 F.3d at 287-88)), and therefore Kadriovski has not met his

burden of showing that a reasonable factfinder would be compelled to conclude he is entitled to relief. . "[W]e will reject a deduction made by an IJ only when there is a complete absence of probative facts to support it- that is, when the speculation is "bald." *Siewe*, 480 F.3d at 168 (*citing Zhang v. INS*, 386 F.3d at 74). As long as an "inferential leap is tethered to the evidentiary record, [this Court] will accord deference to the finding." *Id.*

In short, even if the various factors cited by the IJ in the written decision did not "unambiguously militate in favor of an adverse credibility determination, they also do not strongly suggest, much less 'compel,' a contrary conclusion." *Liang Chen*, 454 F.3d at 106.

CONCLUSION

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

Dated: May 4, 2007

Respectfully submitted,
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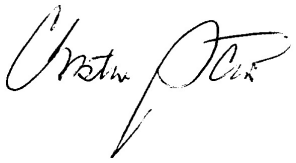

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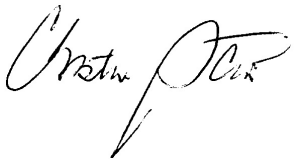
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

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 10,847 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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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 U.S.C. §1252

(a) Applicable provisions

(2) Matters not subject to judicial review

. . .

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review--

. . .

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

. . .

(d) Review of final orders

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, and
(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

IIRIRA § 309(c)(3)

(3) ATTORNEY GENERAL OPTION TO TERMINATE AND REINITIATE PROCEEDINGS. - In the case described in paragraph (1) [deportation or exclusion cases pending on the IIRIRA's enactment date], the Attorney General may elect to terminate proceedings in which there has not been a final administrative decision and to reinitiate proceedings under [the IIRIRA]. Any determination in the terminated proceeding shall not be binding in the reinitiated proceeding.