05-0685-ag

To Be Argued By:
VICTORIA S. SHIN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-0685-ag

FATON LATIFI,

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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STATEMENT OF JURISDICTION

This Court has jurisdiction under § 242(b) of the Immigration and Nationality Act, 8 U.S.C. § 1252(b), to review the petitioner's challenge to the Board of Immigration Appeals' ("BIA") final order dated January 14, 2005, denying him asylum, withholding of removal, and CAT relief, and denying his motion to remand. On February 11, 2005, he filed a timely petition for review of the BIA's decision.

ISSUES PRESENTED FOR REVIEW

1a. Whether Petitioner failed to administratively exhaust his challenge to the Immigration Judge's finding that conditions had fundamentally changed in Kosovo, and that Petitioner was ineligible for withholding of removal under the INA and CAT relief.

1b. Whether substantial evidence supports the Immigration Judge's denial of asylum, withholding of removal, and CAT relief, based on his finding that changed country conditions leave Petitioner, a member of the ethnic Albanian majority in Kosovo, without a well-founded fear of future persecution, or compelling reasons relating to his past persecution to grant him asylum.

2. Whether the BIA abused its discretion in denying Petitioner's motion to remand based on its determination that Petitioner's newly submitted evidence about recent events in Kosovo failed to show that Petitioner is eligible for refugee status.[1]

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[1] Latifi partitions this second issue into three issues, letters A, C and D. *See* Petitioner's Brief ("Pet. Br.") at 4-5. For purposes of this response, the Government combines Latifi's issues A, C, and D in the interest of clarity and efficiency. Nonetheless, the Government will address all points raised by Latifi under Issues A, C, and D of his brief.

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PRELIMINARY STATEMENT

Faton Latifi ("Latifi," or "Petitioner"), a native and citizen of Yugoslavia, petitions this Court for review of a decision of the Board of Immigration Appeals ("BIA") dated January 14, 2005. Joint Appendix ("JA") 2. The BIA adopted and affirmed the decision of Immigration Judge ("IJ") Michael J. Straus dated October 2, 2003,

denying Petitioner's application for asylum and withholding of removal under the Immigration and Nationality Act of 1952, as amended ("INA"), and withholding of removal under Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, and ordering him removed from the United States. JA 2. The BIA also dismissed Latifi's motion to remand to the IJ based on changed country conditions. JA 2.

Latifi did not challenge before the BIA either the IJ's finding that fundamental changes in Kosovo rendered unfounded his fear of persecution were he to return to Yugoslavia, or the IJ's conclusion that Latifi failed to demonstrate eligibility for withholding of removal under the INA or CAT relief. Because Petitioner did not administratively exhaust these issues, he cannot now raise them before this Court. Even assuming *arguendo* that the Court could reach these unexhausted issues, they are meritless. Substantial evidence supports the IJ's determination that Latifi is ineligible for asylum or withholding of removal because he does not have a well-founded fear of future persecution. While the IJ found that there was sufficient evidence in the record to establish past persecution, the IJ also properly determined that the record showed a fundamental change in conditions in Kosovo such that Latifi – an ethnic Albanian who would return to a Kosovo now composed of a 90% ethnic Albanian population and administered under NATO auspices – lacks

a well-founded fear of persecution at the hands of the Serbs based on his ethnicity.

Additionally, substantial evidence supports the IJ's determination that Latifi is ineligible for refugee status because he did not proffer evidence either (1) of past persecution so severe and compelling to warrant asylum despite a fundamental change in circumstances; or (2) that there is a reasonable possibility that he may suffer other serious harm were he removed to Kosovo. JA 75-76.

Finally, the BIA properly exercised its discretion in dismissing Petitioner's motion to remand because the accompanying documentary submissions did not demonstrate that Latifi was eligible for asylum. JA 2. For the foregoing reasons, the petition for review should be denied.

STATEMENT OF THE CASE

Latifi, a native and citizen of Yugoslavia, entered the United States on June 30, 2000, without having been admitted or paroled. JA 82, 95, 383. He filed a request for asylum and withholding of removal, which was received by the Immigration and Naturalization Service ("INS")[2] on

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[2] The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in various sections of the U.S.C.), eliminated the INS and reassigned its functions to subdivisions of the newly created Department of Homeland Security. *See Spina v. Dep't of Homeland Security*, 430 F.3d (continued...)

February 9, 2001. JA 321. On June 6, 2001, the INS commenced removal proceedings against Latifi by filing with the immigration court a Notice to Appear ("NTA"). JA 383.

On September 25, 2001, Latifi was not present at his scheduled removal hearing before IJ Michael W. Straus in Hartford, Connecticut. JA 342. Therefore, the IJ ordered Latifi deported *in absentia* to Yugoslavia. JA 342. However, due to the ineffective assistance of counsel that accounted for Latifi's failure to appear at the September 25, 2001, hearing, the parties jointly moved to reopen removal proceedings on July 10, 2002. JA 351-71. The IJ granted the motion on February 3, 2003. JA 345.

On March 11, 2003, Latifi and his counsel appeared before IJ Straus for a removal hearing. JA 84. Latifi admitted all the allegations in the NTA, JA 85, and conceded the charge that he was removable pursuant to INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without having been admitted or paroled. JA 85-86. However, Latifi informed the IJ that he was seeking asylum and withholding of removal. JA 86. The IJ scheduled a hearing on Latifi's request for relief to be held on October 2, 2003. JA 7-8.

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[2] (...continued)
116, 119 n.1 (2d Cir. 2006). However, because the proceedings in this case were commenced by the INS, the brief will uniformly refer to the pertinent agency as the INS.

The removal hearing resumed on October 2, 2003, JA 93, at the end of which the IJ issued an oral decision denying Latifi's application for asylum, withholding of removal under both the INA and the CAT, and voluntary departure, JA 77. Accordingly, the IJ ordered Latifi removed from the United States to Yugoslavia. JA 67-78.

Latifi appealed the IJ's decision to the BIA on October 24, 2003. JA 53-55. While that appeal was pending before the BIA, on August 6, 2004, Latifi filed a motion with the BIA to remand to the IJ based on alleged changed circumstances in Kosovo. JA 3-22. On January 14, 2005, the BIA summarily affirmed the IJ's decision and dismissed Latifi's motion to remand. JA 2. Latifi filed a petition for review of the BIA's decision with this Court on February 11, 2005.

STATEMENT OF FACTS

A. Petitioner's Illegal Entry into the United States

Latifi is a native and citizen of Yugoslavia, JA 129, who entered the United States on or about June 30, 2000, at John F. Kennedy International Airport without being admitted or paroled. JA 141, 383. He had departed on foot on June 20, 2000, from Kosovo to Albania, where he then flew to Italy. JA 129, 141. From Rome, he flew to the United States using a fraudulent passport and visa procured by his brother who was living in Switzerland. JA 106, 129. The men who helped his brother procure the documents took them back from Latifi upon his arrival in the United States. JA 106.

On February 9, 2001, Latifi submitted an initial application for asylum. JA 321-29. In that application, he requested asylum based on his past persecution in Kosovo at the hands of the Serbs because of his status as an ethnic Albanian, and a fear of future persecution by the Serbs on the same basis. JA 324.

B. Petitioner's Removal Proceedings

The INS initiated removal proceedings against Latifi by filing an NTA with the immigration court on June 6, 2001. JA 383-84. The INS charged that Latifi was removable under INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i), for having entered the United States without being admitted or paroled after inspection. JA 383.

Latifi was not present at his September 25, 2001, hearing. JA 80-82, 342. Consequently, the IJ marked exhibits and ordered Latifi removed *in abstentia*. JA 82, 342. Subsequently, however, on or about June 27, 2002, Latifi and the Government jointly moved to reopen removal proceedings on the basis of ineffective assistance counsel to Latifi. JA 351-71. The IJ granted the motion on February 3, 2003. JA 345.

On March 11, 2003, Latifi appeared with counsel by telephone before IJ Straus. JA 83-84. However, the hearing was adjourned until October 2, 2003, to allow Latifi to submit a complete application for asylum and withholding of removal. JA 85, 88-89.

At the hearing on October 2, 2003, Latifi appeared with counsel and was assisted by an Albanian interpreter. JA 92-93. Latifi conceded the allegations in the NTA and admitted that he was removable as charged. JA 95.

1. Documents Entered Into Evidence

At the September 25, 2001, removal hearing, the following documentary exhibits were submitted:

Exhibit 1: Notice to Appear. JA 383.

Exhibit 2: Notice to EOIR: Alien Address (I-830). JA 335.

Exhibit 3: Notice of Hearing in Removal Proceedings. JA 333.

Exhibit 4: Notice of Hearing in Removal Proceedings. JA 331.

Exhibit 5: Record Deportable/Inadmissable Alien (I-213). JA 330.

At the October 2, 2003, removal hearing, the following documentary exhibits were submitted:

Exhibit 6: Application for Asylum and Withholding of Removal (I-589). JA 321-29.

Exhibit 7: Amended Application for Asylum and Withholding of Removal (I-589), affidavit, List of

Exhibits and Witnesses, and related pleadings. JA 113-320.

Exhibit 8: Affidavit of Faton Latifi re: Application for Asylum, Memorandum of Law in support of Application for Asylum, and related family materials. JA 98.

2. Petitioner's Testimony

At the hearing on October 2, 2003, without objection by the Government, JA 98, Latifi presented the grounds for his request for asylum and withholding of removal chiefly by affidavit and accompanying documents. JA 98-102. Prior to the hearing the IJ had carefully reviewed Latifi's documentary submissions. At the hearing, the IJ asked Latifi several questions about, *inter alia*, his prior experiences in Yugoslavia and his fears were he to return there. JA 98-109.

In his affidavit and at the hearing, Latifi stated that before the war he witnessed and experienced a gradual progression in the persecution of Albanians by the growing Serbian population in his home town of Vushtrri in Kosovo. JA 139-40. At one point, his father was illegally detained by the Serbs for having a gun in his house. JA 139. He stated that during the war his house and all the houses in his town were burned down by Serbs. JA 103, 140. His family was forced to flee their village, and were taunted and harassed by Serbs as they fled. JA 140. At one point, Latifi was separated from his family, staying in safe houses as he searched for his family. JA 140-41.

During the course of his search, Latifi came across an elderly neighbor who had been shot by snipers, and who eventually passed away as a result. JA 141. He spent about a month living without shelter by a mountain called Shale e Bajgores and with very little food. JA 141. Eventually, Latifi stayed with his uncle in a town called Dervare about eight kilometers from his town until June of 2000. JA 104, 141. Latifi provided documentary reports of general human rights conditions in Yugoslavia and Kosovo, including accounts of his hometown of Vushtrri during the war to support his claim of persecution. JA 245-271.

After the war ended in June 1999, Latifi was still at his uncle's home in Dervare. JA 103-04, 141. What few Serbs were in the town during the war departed, and the remaining population was uniformly Albanian. JA 104. Latifi learned through his brother in Switzerland that the rest of his family had escaped to America and obtained refugee status. JA 141. His brother procured for him false travel documents, which he used to go from Dervare to Albania to Rome, and finally to New York in June 2000. JA 141.

Latifi testified that he came to America because "[n]ot only was my family here but the situation in Kosovo was unstable." JA 105-06. He said that if he were to go back to Kosovo, he thought that "[the Serbs] would mistreat [him] the same way they did before the war." JA 107-08. Upon examination by the IJ, he conceded that the Serbs are restricted to various areas of Kosovo, but that "mostly they go, they start coming back in the same place where they

used to live before." JA 108. He also stated that "[the Serbs] stay in their own home, but they still have a conflict with us." JA 108. He included in his documentary submissions a letter from his aunt discussing some of the safety concerns and violence in Kosovo that continues after the war. JA 293-95.

C. The Immigration Judge's Decision

At the conclusion of the removal hearing, the IJ issued an oral decision denying Latifi's applications for asylum, withholding of removal, and CAT relief, and ordering him removed to Yugoslavia. JA 110, 67-79. He preliminarily noted that Latifi had admitted the allegations in the NTA and conceded he is subject to removal as charged. JA 67.

The IJ then recounted Latifi's testimonial and evidentiary proffers. JA 68-72. The IJ stated that Latifi was an ethnic Albanian, born in the town of Vushtrii in the Kosovo province of Yugoslavia. JA 68. The IJ noted that Latifi testified that in Yugoslavia he and his family were subjected to harassment by Serbian police. JA 68. This harassment included the forcible removal of the family from their home as well as the burning of the home by the Serbian police on March 28, 1999. JA 68. The IJ further noted Latifi's testimony that the Serbs burned down all the homes in the neighborhood, spat upon Latifi and other Albanians, and that during the events he was separated from his family. JA 68. Latifi fled to a "safe house" and while searching for his family he witnessed the suffering and killings of his neighbors. JA 69. He eventually took refuge in a Kosovo Liberation Army stronghold, JA 69,

then went to his uncle's home in a village about eight kilometers from Vushtrri, JA 69. The IJ observed that Latifi indicated the Serbs in his uncle's village did not return after the war ended in June of 1999, when the Serbian military departed from Kosovo. JA 69. Latifi remained with his uncle until June 20, 2000, when Latifi left Kosovo. JA 69. By then his parents and some of his siblings were in the United States, where they had received refugee status. JA 69.

The IJ also surveyed the background materials Latifi submitted on the conditions in Yugoslavia in general and Kosovo in particular. JA 69-72. The IJ noted that, according to the documentary submissions, the Federal Republic of Yugoslavia is a constitutional republic consisting of Serbia and Montenegro. JA 70. The IJ further observed that

> [i]n September of 2000, a peaceful resolution forced President Milosevic from power. There have subsequently been elections held in Serbia. The report states that the Serbian government generally respected the human rights of its citizens but that there were problems with police beating detainees, harassing citizens.

JA 70. The IJ next turned to the State Department report on Kosovo. JA 70. The report indicated that

> Kosovo is administered under the civil authority of the U.N. administrative mission in Kosovo following the NATO military campaign that forced

the withdrawal of the Serbian military in June of 1999, and their U.N. authorized NATO peacekeeping force that maintains internal security in Kosovo. The report states that there is high unemployment ranging between 40% to 60% in Kosovo. It states that religious tension and violence persisted but at significantly diminished levels. It states that in Kosovo the great majority of the population are ethnic Albanians.

The report estimated that there were approximately 68 killings of citizens in Kosovo, including 60 Kosovo Albanians. Most killing of Kosovo citizens and other minorities were ethnically motivated. Retaliatory violence against Kosovo Albanians continued some. It also appears that the Serbian population in Kosovo is concentrated in certain areas. It states that in the city of Mitrovica, Kosovo Serbs in one part of the city, illegally occupying Albanian property while Kosovo Albanians in the other part of the city refuse Kosovo Serbs as to their property. It states that in Mitrovica there are restrictions on freedom of movement due to ethnically based harassment. There were several instances of Serb violence against Albanians. There are also instances of violence against Serbs by Albanians. The report also summarizes that in early 1999, large numbers of Kosovo Albanians had to flee their home, fleeing Serbian forces.

The background materials also discuss in detail the attacks against ethnic Albanians by the Serbian forces particularly beginning in the winter 1999. Specifically it states that the town of Vushtrri, that before the war had a population of about 85% ethnic Albanians. The report describes the harassment and attacks against ethnic Albanians before the war ended in June of 1999.

A *Human Rights Watch* report[] states that the divided town of Mitrovica remained a flash point for inter-ethnic conflict. It notes that there have been a few ethnic killings of both Serbs and Albanians. However, it states that much of the violence against Albanians occurred at the hands of other Albanians. There have been killings attributed to organized crime rivalries as well as some political violence.

[Latifi] provided a letter from a person called Dedria Dija. This person indicated that she worked at a police station which was attached and that one police officer from the U.N. mission was murdered. The author of this letter states that there is no safety and no peace and that a lot of people don't have jobs. This author also writes that it's not safe to travel after dark.

There appear to be ongoing discussions as to how to permanently resolve the issue of Kosovo and whether Kosovo should remain part of Serbia or Yugoslavia. It states that ethnic Albanians make

> up about 90% of the population of Kosovo and that as many as 240,000 Serbs left the province after the war ended. It states that about 100,000 Serbs remain in Kosovo.

JA 70-72.

The IJ stated that to qualify for asylum an alien must establish that he is a refugee within the meaning of INA § 101(a)(42). Such a showing requires that the alien demonstrate that he has either suffered past persecution or has a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. JA 72. The IJ indicated that he would be guided by 8 C.F.R. § 208.13(b)(1), and that

> [s]ince the well-founded fear standard required for asylum is more generous than the clear probability standard for withholding of removal, the court will apply the more liberal well-founded fear standard when reviewing the respondent's claims, because if he fails to meet the well-founded fear standard, it follows that he fails to meet the clear probability standard for withholding of removal.

JA 72-73.

The IJ first considered whether, as necessary to determine eligibility for asylum, Latifi established past persecution under 8 C.F.R. § 208.13(b)(1), which created a presumption that he had a well-founded fear of future

persecution. JA 73. The IJ found that there was sufficient evidence of actions by Serbian military, directed at Latifi and his family on account of their Albanian ethnicity, to constitute past persecution for purposes of asylum. JA 73. Specifically, the ejection of Latifi and his family from their home and the burning of that home evidenced that they had been targeted because of their ethnicity. JA 73.

The IJ then determined that the Government had rebutted the presumption created by the past persecution, and established by a preponderance of the evidence that there has been a fundamental change of circumstances in Kosovo such that Latifi no longer has a well-founded fear of future persecution. JA 74. Particularly, the end of the war and NATO occupation forced the Serbian military out of Kosovo. JA 74. The IJ also noted that Slobodan Milosevic was no longer in power and was facing war crimes charges at the Hague. JA 74. The IJ further added that there was "no evidence that merely being an ethnic Albanian which is the majority ethnic group in Kosovo would result in any sort of persecution," that only "a few Serbs of the total number of 100,000 Serbs are left in Kosovo" and that Latifi stated the Serbs had even left the village where his uncle lived. JA 74. The IJ commented that while there may be a few isolated instances of ethnic conflict, there was no evidence that Latifi would be in danger because he is an ethnic Albanian. JA 75.

The IJ recognized that conditions in Kosovo are not easy in light of problems with the economy and a very high unemployment rate, not to mention crime and violence. JA 75. Nevertheless, the IJ explained that "there is no

evidence that [Latifi] would be singled out for harm by the Serbs." JA 75. Consequently, the IJ found "that there has been a fundamental change in circumstances that [Latifi] no longer has a well-founded fear of persecution on account of one of the five enumerated grounds." JA 75.

Upon such finding of a fundamental change of circumstances in Kosovo, the IJ addressed whether despite this change, Latifi had compelling reasons arising out of the severity of his past persecution for being unwilling to return to Kosovo which, under governing regulations, would render Latifi eligible for asylum notwithstanding his lack of a well-founded fear of future persecution. JA 75. The IJ determined he had not made such a showing. JA 75. The IJ explained that

> [w]hile the court understands that [Latifi's] family is in the United States, the court simply does not see compelling reasons that are related to the severity of the past persecution. There is no evidence that [Latifi] was physically harmed in Kosovo. He appears to have other relatives, although more distant relatives[,] in Kosovo. Nor has he established a reasonable possibility of suffering other harm if he had to return to Kosovo or Yugoslavia.

JA 75-76. Consequently, the IJ concluded that Latifi was ineligible for asylum based on past persecution. JA 76.

Next, the IJ examined Latifi's claim for asylum based on a fear of future persecution under 8 C.F.R.

§ 208.13(b)(2). JA 76. This analysis, noted the IJ, looks to whether Latifi has a well-founded fear of persecution under one of the five enumerated grounds. JA 76. The IJ stated:

> [Latifi] only testified that he fears returning to Kosovo because he may be harmed by the Serbs. The court does not find that merely being an ethnic Albanian in Kosovo would render him subject to a well-founded fear of future persecution on account of his ethnicity. The court would note that ethnic Albanians now comprise over 90% of the population of Kosovo. The court would acknowledge that there are instances of ethnic violence. But they rise [nowhere] close to a reasonable fear of persecution.

JA 76.

Because Latifi did not meet the "well-founded fear" standard for asylum purposes, the IJ determined that he would not meet the stricter "clear probability" standard for withholding of removal under INA § 241(b)(3). JA 76-77. Furthermore, the IJ determined that there was insufficient evidence to support finding that Latifi was entitled to withholding of removal under the CAT. JA 77. The IJ found that Latifi had failed to meet his burden to show that it is more likely than not that he would be tortured by authorities if he were removed to Yugoslavia. JA 77.

Finally, since Latifi lacked a current valid travel document, he was ineligible for voluntary departure. JA 77.

On account of Latifi's failure to present sufficient evidence to support a claim for relief for asylum and withholding of removal under the INA, and withholding of removal under the CAT, the IJ ordered Latifi removed from the United States. JA 77-78.

D. The Board of Immigration Appeals' Decision

On October 24, 2003, Latifi filed with the BIA a notice of appeal, JA 181, and on March 13, 2004, filed a supporting brief. JA 31-35. In that brief, he argued only (1) that he had proffered "compelling reasons" warranting the grant of asylum notwithstanding the evidence of changed country conditions; and (2) that the IJ improperly focused on the fact that Latifi had not suffered physical harm. He did not challenge the IJ's finding that conditions in Kosovo had fundamentally changed, such that the Government had rebutted the presumption that latifi had a well-founded fear of persecution based on his past persecution.

On January 14, 2005, the BIA in a per curiam decision adopted and affirmed the IJ's decision finding Latifi removable as charged and denying his applications for relief from removal. JA 2. The BIA also dismissed Latifi's motion to remand based on alleged worsening conditions in Kosovo. JA 2. On this point the BIA observed that Latifi submitted documentation reporting

two incidents of violence in Kosovo between Albanian and Serb communities, and that one of the incidents occurred in a bordering community. JA 2. The BIA was unpersuaded that the reports warranted a remand, stating

> [W]e find [that Latifi] has failed to establish that he will be specifically targeted in Kosovo. The documents submitted by [Latifi] regarding general conditions of unrest do not, either together or when viewed within the evidence of record as a whole, support a finding that [Latifi] met or would be likely to meet his burden of establishing eligibility for relief.

JA 2. Accordingly, the BIA denied Latifi's motion to remand. JA 2.

On February 11, 2005, Latifi timely petitioned this Court for review of the BIA's decision.

SUMMARY OF ARGUMENT

1. a. Petitioner did not administratively exhaust several of his claims before this Court as required by 8 U.S.C. § 1252(d)(1). In his appeal to the BIA, Latifi failed to challenge the IJ's determination that Latifi lacked a well-founded fear of future persecution on account of a protected ground based on the IJ's finding of a fundamental change in circumstances in Kasovo. He also failed to challenge the IJ's determination that he is ineligible for withholding of removal or CAT relief. Therefore, Latifi cannot raise these arguments before this Court.

b. Assuming *arguendo* that the Court could reach these unexhausted issues, there is substantial evidence in the record to support the IJ's determination that Latifi failed to show a well-founded fear of persecution due to a fundamental change in circumstances in Kosovo. Most significantly, the NATO military campaign forced the withdrawal of the Serbian military and the removal of Slobodan Milosevic from power in June of 1999, and the subsequent exodus of Serbs leaves a Kosovo with a population that is over 90% ethnically Albanian. Substantial evidence also supports the IJ's ruling that Latifi failed to establish that he had offered "compelling reasons" related to his past persecution as to warrant asylum under 8 C.F.R. § 208.13(b)(1)(iii)(A). To be sure, the burning of Latifi's village and his subsequent separation from his family were tragic events which should not be diminished. However, they do not rise to the level of past persecution so "atrocious" – comparable to the

experiences of the German Jews during the Holocaust or the Chinese during the Cultural Revolution – necessary to be eligible for relief despite lacking a well-founded fear of future persecution. Furthermore, substantial evidence supports the IJ's determination that Latifi does not qualify for asylum under 8 C.F.R. § 208.13(b)(1)(iii)(B), based on his determination that the evidence did not show a likelihood that Latifi would otherwise suffer "serious harm" if thereto removed.

2. The BIA properly exercised its broad discretion in denying Latifi's request to remand based on newly submitted documentary evidence of allegedly worsening conditions in Kosovo. Petitioner's proffered evidence documents just one episode of ethnic violence where people "t[ook] the situation into their own hands,"and actually catalogues the efforts of the government to combat the violence and establish democratic institutions. JA 17-20. As the BIA reasonably explained, the evidence did not show that he would be specifically targeted in Kosovo or that, taken with the record as a whole, he would be eligible for asylum.

ARGUMENT

I. THE IJ PROPERLY DETERMINED THAT PETITIONER IS NOT ELIGIBLE FOR ASYLUM

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 under the INA. *See* 8 U.S.C. § 1158(a); *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). This Court recently explained that:

> [a] petitioner's burden to establish eligibility is lighter in the context of an asylum claim, but the power to grant such relief lies in the discretion of the Attorney General. *See Jin Shui Qiu v. Ashcroft*, 329 F.3d 140, 148 (2d Cir. 2003). Withholding of removal, under either the INA or the CAT, requires

> a greater quantum of proof, though relief is mandatory once an applicant establishes eligibility. *Id.*

Lin Zhong v. United States Dep't of Justice, 480 F.3d 104, 115 (2d Cir. 2007). The petitioner bears the burden of establishing eligibility for either asylum or withholding of removal. *Secaida-Rosales v. INS*, 331 F.3d 297, 306 (2d Cir. 2003).

1. Asylum

An asylum applicant must as a threshold matter establish that he is a "refugee" within the meaning of the INA. 8 U.S.C. § 1158(b)(1); 8 U.S.C. § 1101(a)(42). 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. § 1158(b)(1); 8 U.S.C. § 1101(a)(42).

Although there is no statutory definition of "persecution," this Court has described it as "the infliction of suffering or harm upon those who differ on the basis of a protected statutory ground" and must rise above "mere harassment." *Ivanishvili v. United States Dep't of Justice*, 433 F.3d 332, 341(2d Cir. 2006); *see also Ai Feng Yuan v. United States Dep't of Justice*, 416 F.3d 192, 198 (2d Cir. 2005) (stating that the alleged harm must be "severe") (*overruled on other grounds by Shi Liang Lin v. United States Dep't of Justice*, Nos. 02-4611AG, 02-4629AG, 03-

40837AG, 2007 WL 2032066 (2d Cir. July 16, 2007)); *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995) (stating that persecution is an "extreme concept that does not include every sort of treatment our society regards as offensive"). 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).

Inherent in the meaning of "persecution" is the requirement that the past harm experienced or feared must be inflicted by the government or by persons or groups the government is unable or unwilling to control. *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997); *Matter of H-*, 21 I. & N. Dec. 337 (BIA 1996); *Miranda v. U.S. INS*, 139 F.3d 624, 626 (8th Cir. 1988). To show persecution by a non-governmental actor, the alien must show that the government "condone[s] [the conduct] or at least demonstrate[s] a complete helplessness to protect the victims." *Roman v. INS*, 233 F.3d 1027, 1034 (7th Cir. 2000); *see also Valioukevitch v. INS*, 251 F.3d 747, 748 (8th Cir. 2001) (denying eligibility for asylum where conduct did not occur "with the imprimatur" of the government). Conduct that "the government does not sponsor and in which it is not complicit" does not support asylum. *Rodas-Mendoza v. INS*, 246 F.3d 1237, 1240 (9th Cir. 2001).

A showing of past persecution is only "the first of two hurdles than an alien must meet in order to merit a favorable exercise of discretion." *Islami v. Gonzales*, 412 F.3d 391, 396 n.3 (2d Cir. 2005) (internal quotation marks

omitted). A demonstration of past persecution triggers a rebuttable presumption of future persecution. *Zhong v. United States Dep't of Justice*, 480 F.3d 104, 116 (2d Cir. 2007); 8 C.F.R. § 208.13(b)(1). This presumption may be rebutted by, *inter alia*, showing by a preponderance of the evidence that "[t]here has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution" based on one of the five enumerated grounds. 8 C.F.R. § 208.13(b)(1)(ii); *see also Islami*, 412 F.3d at 396 n.3 (stating that the presumption is "defeated if the Government demonstrates that conditions in the country of origin have changed sufficiently, so that the danger no longer exists" (citing *Matter of Chen*, 20 I. & N. Dec. 16, 19 (BIA 1989)); *see also Tian-Yong Chen v. INS*, 359 F.3d 121, 126-27 (2d Cir. 2004) (noting that a presumed well-founded fear of future persecution may be rebutted by a showing of changed country conditions).

Even 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 Islami*, 412 F.3d at 394 n.3 (noting that "a showing of past persecution under 8 U.S.C. § 1101(a)(42) need not be a necessary condition for asylum eligibility to be established"); *see also Zhong*, 480 F.3d at 116 ("[W]here a well-founded fear of persecution is demonstrated, an applicant for asylum need not additionally establish the existence of past persecution in order to be eligible for relief."); 8 C.F.R. § 208.13(b)(2) (2007).

A well-founded fear of persecution consists of both a subjective and objective component. *Cao He Lin v. United States Dep't of Justice*, 428 F.3d 391, 399 (2d Cir. 2005); *Ramsameachire v. Ashcroft*, 357 F.3d 169, 178 (2d Cir. 2004). Accordingly, the alien must actually fear persecution, and this fear must be reasonable. *Cao He Lin*, 428 F.3d at 399. The subjective component can usually be satisfied with the alien's credible testimony asserting his fear. *Id.* 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).

Even if an alien is unable to demonstrate a well-founded fear of future persecution, he may nevertheless be eligible for asylum if:

> (A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or
>
> (B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

8 C.F.R. §§ 208.13(b)(1)(iii)(A)&(B); *see* 8 U.S.C. § 1101(a)(42) ("The term 'refugee' means (A) any person who is outside any country of such person's nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself of the protection of that

country because of persecution . . . on account of race, religion, nationality, membership in a particular social group, or political opinion . . . ."); *see also Islami*, 412 F.3d at 394 n.3. This Court has observed that this basis for asylum is reserved for "circumstances rising to 'atrocious forms of [past] persecution.'" *Id.* at 394 n.3 (quoting *Matter of Chen*, 20 I. & N. Dec. at 19). Courts have construed this basis for asylum as appropriate only where the past persecution is "particularly severe, as was the case of the German Jews, the victims of the Chinese Cultural Revolution, survivors of the Cambodian genocide, and a few other such extreme cases." *Shehu v. Gonzales*, 443 F.3d 435, 440 (5th Cir. 2006) (citing *Bucur v. INS*, 109 F.3d 399, 405 (7th Cir. 1997)); *see also Gonahasa v. INS*, 181 F.3d 538, 544 (4th Cir. 2004) ("Eligibility for asylum based on severity of persecution alone is reserved for the most atrocious abuse.").

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)(A) ("The Secretary of Homeland Security or the Attorney General *may* grant asylum to an alien who has applied for asylum . . . if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title."); *Ramsameachire*, 357 F.3d at 178; *Zhang*, 55 F.3d at 738.

2. Withholding of Removal

Unlike the discretionary grant of asylum, withholding of removal under the INA 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), 1231(b)(3); 8 C.F.R. § 208.16(b); *Yang v. Gonzales*, 478 F.3d 133, 141 (2d Cir. 2007) ("Once the showing is made, withholding of removal is mandatory, whereas asylum may be refused to an eligible petitioner in the discretion of the Attorney General."). To obtain such relief, the alien bears the burden of showing asylum eligibility *and* proving by a "clear probability," i.e., that it is "more likely than not," that he would suffer such persecution on return to the subject country. *See* 8 C.F.R. § 208.16(b)(2)(ii); *Islami*, 412 F.3d at 395 n.4 ("The 'stricter test' . . . incorporates the requirement that likely future persecution rather than just past persecution be demonstrated."); *see also INS v. Stevic*, 467 U.S. 407, 429-30 (1984). 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 v. INS*, 344 F.3d 272, 275 (2d Cir. 2003); *Zhang*, 55 F.3d at 738.

3. CAT Relief

Determining eligibility for relief under the United Nations Convention Against Torture and Other Cruel,

Inhuman or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, entails an examination different from that for asylum and withholding of removal under the INA. Relief under the CAT is a mandatory form of relief that hinges on "risk within the country to which the Government is seeking expulsion." *Yang*, 478 F.3d at 151 (citing 8 C.F.R. § 208.16(c)). This Court has explained that "[i]nstead of focusing on persecution and nexus to protected grounds, CAT relief requires the applicant to show that he or she would more likely than not be tortured, and it does not require a nexus to any ground." *Id.* (citing *Khouzam v. Ashcroft*, 361 F.3d 161, 168 (2d Cir. 2004)). "More likely than not" means that "there is greater than a fifty percent chance" of torture upon repatriation. *Mu-Xing Wang v. Ashcroft*, 320 F.3d 130, 144 n.20 (2d Cir. 2003) (internal quotation marks omitted). "Torture" is defined as "an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." 8 C.F.R. § 208.18(a)(2); *Yang*, 478 F.3d at 141. Additionally, "torture" is defined for purposes of CAT relief as "'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person' by persons acting in an official capacity." *Zhong*, 480 F.3d at 116 (quoting 8 C.F.R. § 208.18(a)(1)).

In determining the likelihood of future torture, all relevant evidence including the following shall be considered:

> (i) Evidence of past torture inflicted upon the applicant;
> (ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
> (iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
> (iv) Other relevant information regarding the conditions in the country of removal.

C.F.R. § 208.16(c)(3); *Islami*, 412 F.3d at 395 (same).

4. Standard of Review

This Court reviews the IJ's factual findings under the substantial evidence standard – the 'findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.'" *Siewe v. Gonzales*, 480 F.3d 160, 166 (2d Cir. 2007) (quoting 8 U.S.C. § 1252(b)(4)(B)); *see Secaida-Rosales*, 331 F.3d at 307 ("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.") (quoting *Diallo v. INS,* 232 F.3d 279, 287 (2d. Cir. 2000).

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); *see also Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992). Indeed, the IJ's and

BIA's eligibility determinations "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) (emphasis added); *Kanacevic v. INS*, 448 F.3d 129, 135 (2d Cir. 2006) ("We may reverse an administrative finding of fact only if any reasonable adjudicator would be compelled to conclude to the contrary of such finding.").

Where, as here, the BIA summarily affirms the IJ's decision pursuant to its streamlining provisions, 8 C.F.R. § 1003.1(e)(4)(I), the Court reviews the factual and legal findings in the decision of the IJ. *See Zhong*, 480 F.3d at 116 (citing *Dhoumo v. BIA*, 416 F.3d 172, 174 (2d Cir. 2005) (per curiam)).

C. Discussion

1. Petitioner Failed to Administratively Exhaust His Challenges to the IJ's Finding That Conditions Had Fundamentally Changed in Kosovo and to the IJ's Denial of Withholding of Removal and CAT Relief.

Latifi did not raise before the BIA either his challenge to the IJ's finding of a fundamental change of conditions in Yugoslavia, or the IJ's conclusion that Latifi was ineligible for withholding of removal under the INA or CAT. *See* JA 2, 31-35. This failure to exhaust the issues, as required by 8 U.S.C. § 1252(d)(1) ("[a] court may review a final order of removal only if [] [t]he alien has

exhausted all administrative remedies available to the alien as of right . . ."), precludes judicial review of those issues.

This Court recently addressed the exhaustion principle in *Lin Zhong v. United States Dep't of Justice*, 480 F.3d 104 (2d Cir. 2007). This Court explained that while not jurisdictional, issue exhaustion is a mandatory requirement that precludes the Court from considering issues that have not been exhausted. *Id.* at 107 & n.1. While the Government can waive this requirement by, *inter alia*, simply failing to point out to the Court a failure to exhaust an issue, "[i]f the government points out to the appeals court that an issue relied on before that court by a petitioner was not properly raised below, the court must decline to consider that issue . . . ." *Lin Zhong,* 480 F.3d at 107 n.1; *see Gill v. INS*, 420 F.3d 82, 86 (2d Cir. 2005) (finding that 8 U.S.C. § 1252(d)(1) "bars the consideration of bases for relief that were not raised below, and of general issues that were not raised below, but not of specific, subsidiary legal arguments, or arguments by extension that were not made below").

The first issue Latifi presents to this Court, challenging the IJ's determination that the Government proved there has been a "fundamental change in circumstances" in Kosovo such that Latifi no longer has a well-founded fear of persecution there, was not raised below to the BIA. Pet. Br. 4; JA 31-34. In fact, in his eight-page brief to the BIA Petitioner *assumed* this finding for the sake of making his first argument. *See* JA 32 ("Still, even where the government shows that these disqualifying conditions exist, the asylum application may still be granted . . . .").

It is evident that in his BIA appeal Latifi did not challenge the IJ's finding that changed conditions in Kosovo rebutted a presumption of a well-founded fear of persecution. Latifi thereby failed to administratively exhaust this issue and he is consequently barred from raising it for the first time before this Court. *See* 8 U.S.C. § 1252(d)(1); *Lin Zhong* 480 F.3d at 107 & n.1.

Similarly, Latifi failed to raise before the BIA his claim that substantial evidence does not support the IJ's denial of withholding of removal under both the INA and the CAT. Pet. Br. at 21; JA 2, 31-35. In his "relief requested" section of the BIA appeal, and in that section only, Latifi asks that the BIA "reverse the [IJ decisions] denying Respondent's applications for asylum, withholding and relief under the [CAT]," JA 35, without any discussion of why such relief is due. This is insufficient to amount to exhaustion of the issues relating to withholding of removal under the INA and CAT relief. *See Karaj v. Gonzales*, 462 F.3d 113, 119 (2d Cir. 2006) (finding that mere mention in prayer for relief that the BIA reverse the IJ's denial of withholding of removal was insufficient, and that failure to offer argument relevant to that claim deprived the Court of jurisdiction because the claim was not properly exhausted within the meaning of 8 U.S.C. § 1252(d)(1)).

Some argument to the BIA on the issue of withholding of removal under the INA was essential because this relief requires a higher standard of proof than proving eligibility for asylum. *See Zhong*, 480 F.3d at 116 (explaining that, with respect to withholding under the INA, "to obtain this non-discretionary form of relief, an applicant must clear

the higher hurdle of showing that it is more likely than not, were he or she deported, his life or freedom would be threatened on account of the characteristic rendering him or her a refugee.") (citing 8 U.S.C. § 1231(b)(3)(A)).

Likewise, Latifi failed to offer any argument to the BIA on the issue of why it was improper for the IJ to deny him withholding of removal under the CAT. *See* JA 35. To qualify for withholding of removal under the CAT, the applicant must establish that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal," *Islami*, 412 F.3d at 395 (quoting *Ramsameachire*, 357 F.3d at 184 (internal quotation marks omitted)). Latifi did not at all explain how the IJ erred in finding that Latifi proffered no evidence to show that it would be more likely than not that he would be tortured if removed to Yugoslavia. JA 35, 77.

Finally, and in any event, Latifi's failure to provide in his brief to this Court substantive argument regarding withholding of removal under the INA or CAT relief, *see* Pet. Br. at 21 (citing these two issues only in prayer for relief), constitutes waiver of those issues. *Yan Fanz Zhang v. Gonzales*, 452 F.3d 167, 169 n.3 (2d Cir. 2006); *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal.").

2. Substantial Evidence Supports the IJ's Finding of a Fundamental Change of Conditions in Kosovo, as Well as His Conclusion That Petitioner Is Ineligible for Withholding of Removal Under Either the INA or CAT Relief.

Even if this Court could consider Latifi's unexhausted claims, they should still be denied because substantial evidence supports the IJ's findings that (1) there had been a fundamental change of conditions in Kosovo to render unfounded any fear by Latifi that he would be persecuted if removed there, and (2) accordingly, Latifi did not qualify for withholding of removal under either the INA or the CAT.

a. Fundamental Change in Circumstances

Substantial evidence supports the IJ's finding of a fundamental change in circumstances in Yugoslavia such that Latifi does not objectively have a well-founded fear of persecution. If this Court reaches this issue, "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); *Rizal v. Gonzales*, 442 F.3d 84, 89 (2d Cir. 2006). Here the record would not compel a reasonable adjudicator to determine that, contrary to the IJ's conclusion, Latifi had a well-founded fear of persecution.

In his opinion, the IJ outlined some of the sources in the record which described the conditions in Kosovo during and after the war. JA 68-71. One of these sources

was the 2002 State Department report on Kosovo provided by Petitioner, JA 151-210. Courts have relied on State Department country reports with corroborating evidence in finding a fundamental change in circumstances that rebuts the presumption of future persecution. *See, e.g.*, *Shehu*, 443 F.3d at 439; *Xiao Ji Chen v. U.S. Dept. of Justice*, 471 F.3d 315, 341 (2d Cir. 2006) ("A report from the State Department is 'usually the best available source of information' on country conditions.") (quoting *Zamora v. INS*, 534 F.2d 1055, 1062 (2d Cir.1976)); *Tambadou v. Gonzales*, 446 F.3d 298, 302 (2d Cir. 2006) ("State Department reports are usually the result of estimable expertise and earnestness of purpose, and they often provide a useful and informative overview of conditions in the applicant's home country."); *see also Melgar de Torres v. Reno,* 191 F.3d 307, 310 & 313 (2d Cir. 1999) (relying on State Department Profile as "substantial evidence . . . of the changed country conditions in El Salvador"). *But see Tambadou*, 446 F.3d at 303 (noticing "the widely held view that the State Department's reports are sometimes skewed toward the governing administration's foreign-policy goals and concerns"). Additionally, the IJ may generally use its discretion in determining how much weight to afford such reports. *Xiao Ji Chen*, 471 F.3d at 342 ("Although we have cautioned that "the immigration court should be careful not to place *excessive* reliance on published reports of the Department of State, the weight to afford to such evidence lie[s] largely within the discretion of the IJ.") (citing *Asociacion de Compositores y Editores de Musica LatinoAmericana v. Copyright Royalty Tribunal*, 854 F.2d 10, 13 (2d Cir.1988) (internal quotation marks and citation omitted, alteration in original). As the IJ noted, the State

Department report detailed the withdrawal of the Serbian military and influx of NATO forces in 1999, as well as continued tension and violence between the various ethnic and religious groups. JA 70.

Other evidence the IJ noted in deciding that conditions in Kosovo had changed included a Human Rights Watch report on the town of Mitrovica, the letter from Petitioner's aunt, and the testimony of Latifi. JA 68-72. The Human Rights Report noted that "much of the violence against Albanians occurred at the hands of other Albanians." JA 71, 275. Furthermore, the IJ noted Latifi's testimony that the Serbs who had occupied the village where his uncle lived had departed. JA 74, 104.

In his brief to this Court, Latifi argues that the Government did not meet its burden because it failed to submit evidence of its own to buttress its position. Pet. Br. at 14. However, Latifi provides no legal authority for the proposition that the Government must present its own evidence of changed conditions. The IJ relied on the documentary evidence before him introduced by Latifi in making his determination. JA 68-75. And according to the regulations, a presumed well-founded fear of future persecution based on past persecution "may be rebutted if an . . . immigration judge makes" a finding that "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 . . . ." 8 C.F.R. §§ 208.13(b)(1) & (b)(1)(i)(A). Moreover, this Court has repeatedly explained that under review for substantial evidence, "we will revers[e] only if no reasonable fact-finder could have failed to find' petitioner eligible for

relief." *Kyaw Zwar Tun v. INS*, 445 F.3d 554, 562 (2d Cir. 2006) (quoting *Ramsameachire*, 357 F.3d at 178) (alteration in *Kyaw Zwar Tun*). Latifi does not point to evidence in the record that would compel a reasonable finder of fact to conclude that there has not been a fundamental change in circumstances, and that Latifi has a well-founded fear of persecution sufficient to warrant asylum.

Finally, this Court previously was presented with the question of whether there has been a fundamental change in circumstances in Kosovo for purposes of asylum. In *Islami v. Gonzales*, *supra*, this Court denied a petition for review after an IJ had denied asylum to an ethnic Albanian Kosovar who fled to avoid military service in the Serb-dominated national army. *Islami*, 412 F.3d 391. While the Court recognized the rule that asylum may be granted when an alien flees his country to "avoid punishment for refusing to join a military force condemned by the international community" and found that Islami's "fear of retribution . . . clearly rose to the level of past persecution," this Court nevertheless concluded that he did not have a well-founded fear of future persecution. *Islami*, 412 F.3d at 396-98 (internal quotation marks omitted). This Court noted that "Islami's prospective fears . . . center[ed] on alleged scattered incidents of continued harassment and abuse of ethnic Albanians," *id*., and that since "the nationalistic Serb domination of Kosovo has ended," Islami's asylum and withholding claims must fail. *Id*. *Islami* is thus instructive in this case with respect to the issue of whether, in light of the end of Serb domination of Kosovo, there has been a fundamental change of circumstances such that, in the absence of compelling

evidence otherwise, there is no longer a well-founded fear of persecution of Albanians on account of their status as ethnic Albanians.

In short, with the persecuting Serbian military dismantled and old regime toppled, no reasonable adjudicator would be compelled to conclude that there was not a fundamental change in circumstances such that Latifi still had a well-founded fear of persecution.

b. Withholding of Removal Under the INA and CAT Relief

As substantial evidence supports the IJ's determination that Latifi does not qualify for asylum, *a fortiori* it supports the conclusion that he does not qualify for withholding of removal under the INA. *Yang*, 478 F.3d at 141 ("Because the burden attendant upon the showing necessary to establish withholding of removal is heavier than that required to establish asylum, a petitioner who cannot sustain the burden of the latter cannot ipso facto sustain the burden of the former.").

The standard of review for CAT relief is separate from the asylum standard; the petitioner must show that it is more likely than not that he will be tortured if he returns to his home country. *Zhong*, 480 F.3d at 116. The IJ determined that "[t]here is no evidence that the authorities in [Kosovo or Yugoslavia] would have any reason to either detain or torture [Latifi]." JA 77. *See Zhong*, 480 F.3d at 116 ("'Torture' is defined, for purposes of a CAT withholding claim, as 'any act by which severe pain or suffering, whether physical or mental, is intentionally

inflicted on a person' by persons acting in an official capacity.") (citing 8 C.F.R. § 208.18(a)(1) and *Ramsameachire*, 357 F.3d at 184). In the absence of such evidence in the record, a reasonable adjudicator would not be compelled to conclude that Latifi would probably be tortured if removed to Yugoslavia.

3. Substantial Evidence Supports the IJ's Finding That Petitioner Did Not Show "Compelling Reasons" Related to His Past Persecution to Be Eligible for Asylum Despite the Absence of a Well-Founded Fear of Persecution.

Latifi presented to the BIA, and thereby administratively exhausted, his claim that the IJ erroneously concluded that Latifi failed to present "compelling reasons" related to his past persecution to be eligible for asylum despite the absence of a well-founded fear of future persecution. JA 31-34. In his brief to this Court, Latifi claims that "the IJ failed to meaningfully evaluate and consider whether the Petitioner offered 'compelling reasons' . . . ." Pet. Br. at 16. He also claims that the IJ's evaluation was "cursory" because the IJ's oral decision directed at Latifi's "compelling reasons" claim was brief. *Id.* at 16-17. These arguments, however, are without merit because substantial evidence supports the IJ's reasoned determination that Latifi did not present "compelling reasons" related to his past persecution to warrant a grant of asylum.

The standard for granting asylum based on past persecution alone, as provided in 8 C.F.R.

§ 208.12(b)(1)(iii)(A), remains that the past persecution must be so severe that it would be inhumane to return him to his home country. For this to be invoked, the past persecution must be "particularly severe, as was the case of the German Jews, the victims of the Chinese Cultural Revolution, survivors of the Cambodian genocide, and a few other such extreme cases." *Shehu*, 443 F.3d at 440 (citing *Bucur*, 109 F.3d at 405); *Gonahasa*, 181 F.3d at 544) ("Eligibility for asylum based on severity of persecution alone is reserved for the most atrocious abuse."); *Matter of Chen*, 20 I. & N. Dec. at 19-20 (finding humanitarian asylum justified for victim of Chinese Cultural Revolution whose father was tortured for eight years and killed, and who was interrogated, imprisoned, tortured, and starved for nine years, beginning when he was a child, leaving him physically debilitated).

With respect to Latifi's argument that the IJ should have considered, but did not, the presence of his family in the United States in determining whether he is entitled to asylum even in the absence of a well-founded fear of persecution, JA 18-21, the IJ stated

> While this court understands that [Latifi's] family is in the United States, the court simply does not see compelling reasons that are related to the severity of the past persecution. There is no evidence that [Mr. Latifi] was physically harmed in Kosovo. He appears to have other relatives, although more distant relatives in Kosovo.

JA 75-76. Indeed, Mr. Latifi appears to overlook the crux of the inquiry for asylum in the absence of a well-founded

fear of persecution – whether the petitioner establishes "circumstances rising to atrocious forms of [past] persecution." *Islami*, 412 F.3d at 395 n.3.

Petitioner failed to proffer evidence to the IJ, or even to this Court, that the level of persecution he experienced was atrocious. In his affidavits, appeals and briefs to the BIA and this Court, Latifi describes his past persecution as consisting of, *inter alia*, the burning of his house and village, the fleeing of his family, his separation from them, his witnessing the shooting of his neighbors, and his hiding in the mountains without shelter for about one month. JA 29-30, 67-69, 102-06, 115-19, 139-42. Without diminishing the misfortune Latifi has suffered, the level of his past persecution does not rise to the level of severe or atrocious. *See Bucur* 109 F.3d at 405 ("Mild persecution may be something of an oxymoron, but the regulation makes clear that a refugee . . . must indeed prove that his past persecution was a severe rather than a mild . . . form of persecution."). The IJ was certainly concise when dispensing of this claim. But when viewed in context of the applicable law, and the paucity of pertinent evidence, it cannot be said that a reasonable adjudicator would be compelled to find that the level of persecution experienced by Latifi amounted to "the most atrocious abuse." *Gonahasa*, 181 F.3d at 544.

Finally, a reasonable finder of fact would not be compelled to conclude that Mr. Latifi has established that there is a reasonable possibility that he may suffer "other serious harm upon removal" to Kosovo." 8 C.F.R. § 208.13(b)(1)(iii)(B); JA 75-76. Mr. Latifi provided no evidence of such potential. Contrary evidence, however,

is in the record. For example, with respect to Kosovo specifically, the IJ noted that "ethnic Albanians now comprise over 90% of the population of Kosovo." JA 76.

Accordingly, this Court should find that the IJ's denial of asylum to Mr. Latifi under both 8 C.F.R. § 208.13(b)(1)(iii)(A) and 8 C.F.R. § 208.13(b)(1)(iii)(B) is supported by substantial evidence.

II. THE BIA CORRECTLY DENIED PETITIONER'S MOTION TO REMAND BASED ON ITS DETERMINATION THAT HE DID NOT SHOW HE WOULD BE SPECIFICALLY TARGETED IN KOSOVO.

A. Relevant Facts

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

B. Governing Law and Standard of Review

This Court has explained that "[t]he BIA's authority to remand a case to the IJ for further proceedings is not addressed in the INA, and regulations do not contain detailed criteria for evaluation of 'motions to remand.'" *Sanusi v. Gonzales*, 445 F.3d193, 200 (2d Cir. 2006). The Court noted that the BIA "has stated in cases how it adjudicates motions expressly requesting remand, and it considers such motions differently depending on the asserted grounds," and "[w]hen remand is requested so that an IJ may examine newly available evidence . . . the BIA treats the motion as a 'motion to reopen.'" *Id.* at 200-

01 (citing *Matter of Coelho*, 20 I. & N. Dec. 464, 471 (BIA 1992)); *see also Li Yong Cao v. United States Dep't of Justice*, 421 F.3d 149, 156 (2d Cir. 2005) ("A motion to remand that does not simply articulate the remedy sought on appeal will be held to the substantive standards applicable either to a motion to reconsider or to reopen.").

Motions to reopen will not be granted unless "it appears to the [BIA] that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(c); *see Maghradze v. Gonzales*, 462 F.3d 150, 155 (2d Cir. 2006); *Norani v. Gonzales*, 451 F.3d 292, 293 (2d Cir. 2006) (per curiam); *Ni v. United States Dep't of Justice*, 424 F.3d 172, 175 (2d Cir. 2005) (per curiam). Motions to reopen are "disfavored" because "[t]here is a strong interest in bringing litigation to a close . . . ." *Maghradze*, 462 F.3d at 154 (citing *INS v. Abudu*, 485 U.S. 94, 107 (1988)); *see Ali v. Gonzales*, 448 F.3d 515, 517 (2d Cir. 2006) ("[M]otions to reopen 'are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence.'") (quoting *INS v. Doherty*, 502 U.S. 314, 322-23 (1992)).

Because the petitioner bears this heavy burden, the BIA may properly deny motions to reopen when the petitioner fails to "establish a prima facie case for the underlying substantive relief sought. *Alam v. Gonzales*, 438 F.3d 184, 187 (2d Cir. 2006); *see Abudu*, 485 U.S. at 104-05. The BIA can also properly deny such a motion if the alien is eligible for asylum but not entitled to a discretionary grant of relief. *Abudu*, 485 U.S. 94 at 105.

This Court reviews the BIA's denial of a motion to reopen for abuse of discretion. *See Paul v. Gonzales*, 444 F.3d 148, 153 (2d Cir. 2006); *Kaur v. BIA,* 413 F.3d 232, 233 (2d Cir. 2005); *Khouzam v. Ashcroft*, 361 F.3d 161, 165 (2d Cir. 2004). Abuse of discretion is when the BIA

> provides no rational explanation, inexplicably departs from established policies, is devoid of any reasoning, or contains only summary or conclusory statements; that is to say, where the Board has acted in an arbitrary or capricious manner.

Kaur, 413 F.3d at 233-34 (quotation marks and citation omitted); *see Song Jin Wu v. INS*, 436 F.3d 157, 161 (2d Cir. 2006) (same).

The BIA has a duty to consider the record as a whole. Thus, the BIA also abuses its discretion if it "fails completely to address evidence of changed country conditions offered by a petitioner." *Wang v. BIA*, 437 F.3d 270, 275 (2d Cir. 2006) (citing *Poradisova v. Gonzales*, 420 F.3d 70, 81 (2d Cir. 2005) ("IJs and the BIA have a duty to explicitly consider any country conditions evidence submitted by an applicant that materially bears on his claim. A similar, if not greater, duty arises in the context of motions to reopen based on changed country conditions.")); *see* 8 C.F.R. § 1003.2(c)(1). That is, the BIA should, in its opinion, state more than "cursory, summary, or conclusory statements" to assist appellate courts in discerning its reasons for denying an alien's petition for relief. *Anderson v. McElroy*, 953 F.2d 803, 806 (2d Cir. 1992). This duty exists because the reviewing

court can only affirm the BIA because of the "basis articulated in the decision"; it cannot "assume that the BIA considered factors that it failed to mention in its decision." *Wang*, 437 F.3d 275-76 (quoting *Anderson*, 953 F.2d at 806). However, the BIA does not have the duty or burden to "expressly parse or refute on the record each individual argument" offered by the alien. *Id.* (internal quotation marks omitted).

C. Discussion

1. The BIA Did Not Abuse Its Discretion in Denying Petitioner's Motion to Reopen.

Latifi argues that he is entitled to asylum and withholding of removal based on the new evidence about changed country conditions submitted with his motion to reopen. Pet. Br. at 15. This argument is without merit. Denying a motion to reopen is within the BIA's discretion even if the petitioner "establish[es] a prima facie case for the underlying substantive relief sought. *Alam*, 438 F.3d at 187; *see* 8 C.F.R. § 1003.2(a); *Abudu*, 485 U.S. at 104-05. Latifi clearly failed to meet this burden. The documents submitted by Latifi describe "general conditions of unrest" – an increase in ethnic violence in nearby and neighboring Kosovo provinces. JA 2. In its ruling on the motion to reopen, the BIA stated

> [Latifi] claims that the situation in Kosovo has worsened and submitted documentation reflecting two incidents of violence in Kosovo between Albanian and Serb communities. The respondent

> states that one of these incidents occurred in a bordering community. However, we find the respondent has failed to establish that he will be specifically targeted in Kosovo. The documents submitted by the respondent regarding general conditions of unrest do not, either together or when viewed within the evidence of record as a whole, support a finding that the respondent met or would be likely to meet his burden of establishing eligibility to relief.

JA 2.

As the BIA determined in its discretion, the evidence presented by Latifi in support of his claim of eligibility for asylum "do[es] not, either together or when viewed within the evidence of record as a whole, support a finding that the respondent met or would be likely to meet his burden of establishing eligibility for relief." JA 2. The BIA considered the "record as a whole" and rightly determined that the evidence of "general conditions of unrest" would not suffice to carry the Petitioner's burden. JA 2. Far from being "arbitrary or capricious" or lacking any "rational explanation," *see Maghradze*, 462 F.3d at 152-53, the BIA outlined its reasons for determining that the evidence submitted was insufficient to justify reopening Latifi's immigration hearing. As such, the BIA did not abuse its discretion.

CONCLUSION

For the foregoing reasons, the petition for review should be dismissed to the extent it raises unexhausted claims of well-founded fear of future persecution, withholding of removal and CAT relief, and denied to the extent it challenges the IJ finding of no compelling reasons to warrant asylum and the BIA's denial of the motion to remand.

Dated: August 6, 2007

Respectfully submitted,
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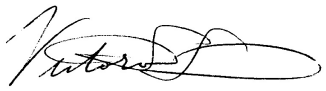
CERTIFICATION PER FED. R. APP. P. 32(a)(7)(C)

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 11,587 words exclusive of the Table of Contents, Table of Authorities this Certification, and the Addendum of Statutes and Rules.



VICTORIA S. SHIN
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Addendum

8 U.S.C. § 1101(a)(42) (2007). Definitions.

(a) As used in this chapter –

(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. . . .

8 U.S.C. § 1158(a)(1), (b)(1) (2007). Asylum.

(a) Authority to apply for asylum

(1) In general

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

. . . .

(b) Conditions for granting asylum

(1) In general

The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

8 U.S.C. § 1182(a)(6)(A)(i) (2007). Inadmissible aliens.

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

. . . . .

(6) Illegal entrants and immigration violators

(A) Aliens present without admission or parole

(i) In general

An alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible.

8 U.S.C. § 1231(b)(3)(A) (2007). Detention and removal of aliens ordered removed.

(A) In general

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1252 (2007). Judicial review of orders of removal.

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(4) Scope and standard for review

Except as provided in paragraph (5)(B)--

(A) the court of appeals shall decide the petition only on the administrative record on which the

order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

(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 aliens as of right . . . .

8 C.F.R. § 208.13 (2007). Establishing asylum eligibility.

(a) Burden of proof. The burden of proof is on the applicant for asylum to establish that he or she is a refugee as defined in section 101(a)(42) of the Act. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration. The fact that the applicant previously established a credible fear of persecution for purposes of section 235(b)(1)(B) of the Act does not relieve the alien of the additional burden of establishing eligibility for asylum.

(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; or

(B) The applicant could avoid

future persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, and under all the circumstances, it would be reasonable to expect the applicant to do so.

(ii) Burden of proof. In cases in which an applicant has demonstrated past persecution under paragraph (b)(1) of this section, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.

(iii) Grant in the absence of well-founded fear of persecution. An applicant described in paragraph (b)(1)(i) of this section who is not barred from a grant of asylum under paragraph (c) of this section, may be granted asylum, in the exercise of the decision-maker's discretion, if:

(A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution; or

(B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country.

(2) Well-founded fear of persecution.

(i) An applicant has a well-founded fear of persecution if:

(A) The applicant has a fear of persecution in his or her 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;

(B) There is a reasonable possibility of suffering such persecution if he or she were to return to that country; and

(C) He or she is unable or unwilling to return to, or avail himself or herself of the protection of, that country because of such fear.

(ii) An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant's country of nationality or, if stateless, another part of the applicant's country of last habitual residence, if under all the circumstances it would be reasonable to expect the applicant to do so.

(iii) In evaluating whether the applicant has sustained the burden of proving that he or she has a well-founded fear of persecution, the asylum officer or immigration judge shall not require the applicant to provide evidence that there is a reasonable possibility he or she would be singled out individually for persecution if:

> (A) The applicant establishes that there is a pattern or practice in his or her country of nationality or, if stateless, in his or her country of last habitual residence, of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(B) The applicant establishes his or her own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable.

8 C.F.R. § 208.16 (2007). Withholding of removal under section 241(b)(3)(B) of the Act and withholding of removal under the Convention Against Torture.

(a) Consideration of application for withholding of removal. An asylum officer shall not decide whether the exclusion, deportation, or removal of an alien to a country where the alien's life or freedom would be threatened must be withheld, except in the case of an alien who is otherwise eligible for asylum but is precluded from being granted such status due solely to section 207(a)(5) of the Act. In exclusion, deportation, or removal proceedings, an immigration judge may adjudicate both an asylum claim and a request for withholding of removal whether or not asylum is granted.

(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:

(A) There has been a fundamental change in circumstances such that the applicant's life or freedom would not be threatened on account of any of the five grounds mentioned in this paragraph upon the applicant's removal to that country; or

(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.

(ii) In cases in which the applicant has established past persecution, the Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (b)(1)(i)(B) of this section.

(iii) If the applicant's fear of future threat to life or freedom is unrelated to the past persecution, the applicant bears the burden of establishing that it is more likely than not that he or she would suffer such harm.

(2) Future threat to life or freedom. An applicant who has not suffered past persecution may demonstrate that his or her life or freedom would be threatened in the future in a country if he or she can establish that it is more likely than not that he or she would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion upon removal to that country. Such an applicant cannot demonstrate that his or her life or freedom would be threatened if the asylum officer or immigration judge finds 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. In evaluating whether it is more likely than not that the applicant's life or freedom would be threatened in a particular country on account of race,

religion, nationality, membership in a particular social group, or political opinion, the asylum officer or immigration judge shall not require the applicant to provide evidence that he or she would be singled out individually for such persecution if:

> (i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and
>
> (ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that his or her life or freedom would be threatened upon return to that country.

. . . .

(c) Eligibility for withholding of removal under the Convention Against Torture.

> (1) For purposes of regulations under Title II of the Act, "Convention Against Torture" shall refer to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention, as implemented by section 2242 of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub.L. 105-277, 112 Stat. 2681, 2681-821). The

definition of torture contained in § 208.18(a) of this part shall govern all decisions made under regulations under Title II of the Act about the applicability of Article 3 of the Convention Against Torture.

(2) The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

(3) In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) Evidence of past torture inflicted upon the applicant;

(ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;

(iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and

(iv) Other relevant information regarding conditions in the country of removal.

(4) In considering an application for withholding of removal under the Convention Against Torture, the immigration judge shall first determine whether the alien is more likely than not to be tortured in the country of removal. If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is entitled to protection under the Convention Against Torture. Protection under the Convention Against Torture will be granted either in the form of withholding of removal or in the form of deferral of removal. An alien entitled to such protection shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section. If an alien entitled to such protection is subject to mandatory denial of withholding of removal under paragraphs (d)(2) or (d)(3) of this section, the alien's removal shall be deferred under § 208.17(a).

(d) Approval or denial of application--

(1) General. Subject to paragraphs (d)(2) and (d)(3) of this section, an application for withholding of deportation or removal to a country of proposed removal shall be granted if the applicant's eligibility for withholding is established pursuant to paragraphs (b) or (c) of this section.

8 C.F.R. § 208.18 (2007). Implementation of the Convention Against Torture.

(a) Definitions. The definitions in this subsection incorporate the definition of torture contained in Article 1 of the Convention Against Torture, subject to the reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention.

(1) Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include

judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:

(i) The intentional infliction or threatened infliction of severe physical pain or suffering;

(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(iii) The threat of imminent death; or

(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or

mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture an act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(8) Noncompliance with applicable legal procedural standards does not per se constitute torture.

(b) Applicability of §§ 208.16(c) and 208.17(a) –

(1) Aliens in proceedings on or after March 22, 1999. An alien who is in exclusion, deportation, or removal proceedings on or after March 22, 1999 may apply for withholding of removal under § 208.16(c), and, if applicable, may be considered for deferral of removal under § 208.17(a).

8 C.F.R. § 1003.1(e)(4) (2007). Affirmance without opinion.

(i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or

(B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: "The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. See 8 CFR 1003.1(e)(4)." An order affirming without opinion, issued under authority of this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial.

8 C.F.R. § 1003.2 (2007). Reopening or reconsideration before the Board of Immigration Appeals.

(a) General. The Board may at any time reopen or reconsider on its own motion any case in which it has rendered a decision. A request to reopen or reconsider any case in which a decision has been made by the Board, which request is made by the Service, or by the party affected by the decision, must be in the form of a written motion to the Board. The decision to grant or deny a motion to reopen, or reconsider is within the discretion of the Board, subject to the restrictions of this section. The Board has discretion to deny a motion to reopen even if the party moving has made out a prima facie case for relief.

(c) Motion to reopen.

> (1) A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material. . . . A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of

circumstances that have arisen subsequent to the hearing. . . . .

. . . .

(3)(ii) To apply or reapply for asylum or withholding of deportation based on changed circumstances arising in the country of nationality or the country to which deportation has been ordered, if such evidence is material and was not available and could not have been discovered or presented at the previous hearing.

ANTI-VIRUS CERTIFICATION

Case Name: Latifi v. Gonzales

Docket Number: 05-0685-ag

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 8/6/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: August 6, 2007