



No. 00-3221

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

TATYANA VLADIMROVNA MIROMOVA

Petitioner-Appellant,

v.

INS

Respondents-Appellees.

**BRIEF FOR RESPONDENT;
ORAL ARGUMENT NOT REQUESTED**

BRIEF FOR APPELLEES

DAVID W. OGDEN
Assistant Attorney General
Civil Division

MARK C. WALTERS
ASSISTANT DIRECTOR

JULIA K. DOIG
Attorney
Office of Immigration Litigation
Civil Division, U.S. Department of Justice
P.O. Box 878 Ben Franklin Station
Washington, DC 20044
202-616-4893

Dated: December 20, 2000 Attorneys for Respondent

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**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

TATYANA VLADIMIROVNA MIRONOVA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

**BRIEF FOR RESPONDENT;
ORAL ARGUMENT NOT REQUESTED**

STATEMENT OF JURISDICTION

This is a petition for review filed by the Mironov family (mother Tatyana Vladimirovna Mironova, father Genadiy L. Mironov, minor daughter Anna Genadievna Mironova, and minor son Anton Gennakyevita Mironov (“Petitioners”) seeking review of a final order of deportation issued by the Board of Immigration Appeals (“Board”) on August 18, 2000. A.R. 1-6.¹ The petition raises the issue of whether the Board properly denied their applications² for

¹ The abbreviation “A.R.” refers to the Certified Administrative Record on file with this Court. The abbreviation “Pet. Br.” refers to the petitioners’ brief.

² Although the caption for this case lists only Tatayana Vladimirovna Mironova as Petitioner, the petition seeks review of the claims of the entire family. As used throughout this brief, Tatayana will be referred to as the female Petitioner and

asylum and withholding of deportation for failure to meet their burden of proving past persecution or a well-founded fear of future persecution on account of religion or imputed political opinion. A.R. 1-6.

This petition is subject to the transitional rules of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub.L. No. 104-208, 11 Stat. 3009. See section 309(c)(4) of IIRIRA and Kratchmarov v. Heston, 172 F.3d 551 (8th Cir. 1999). The IIRIRA repealed and renumbered portions of the Immigration and Nationality Act (“INA”), including the judicial review provisions in section 106. Except for the transitional rules, IIRIRA's amendments do not apply to proceedings, such as these, which began before the April 1, 1997, effective date of the amendments. See IIRIRA §§ 309(a) and (c).

Section 309(c)(4)(C) of IIRIRA provides that "the petition for judicial review must be filed not later than 30 days after the date of the final order of exclusion or deportation." In this case, the petition for review was filed on September 8, 2000, within the 30-day filing period required by the transitional rules of judicial review. IIRIRA § 309(c)(4)(C). Therefore, this Court has jurisdiction under 8 U.S.C. §1105(a).

Genadiy as the male Petitioner. The applications of the minor children are entirely dependent on their parents' claims.

STATEMENT OF THE ISSUES

A. Whether the Board correctly determined that the Petitioners failed to prove their statutory eligibility for asylum based on past persecution on account of religion or imputed political opinion.

INS v. Elias-Zacarias, 502 U.S. 478 (1992);

Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998);

Rucu-Roberti v. INS, 177 F.3d 669 (8th Cir. 1999);

Sofinet v. INS, 196 F.3d 742 (7th Cir. 1999);

8 U.S.C. §§ 1101(a)(42)(A) and 1158.

B. Whether the Board correctly determined that the Petitioners failed to prove their statutory eligibility for asylum based on a well-founded fear of future persecution on account of religion or imputed political opinion.

Cordero-Trejo v. INS, 40 F.3d 482, 488 (1st Cir. 1994);

Matter of A-E-M-, Interim Decision 3338 (BIA 1998);

Manivong v. DD, INS, 164 F.3d 432 (8th Cir. 1999);

8 U.S.C. §§ 1101(a)(42)(A) and 1158.

STATEMENT OF THE CASE

The male Petitioner entered the United States on July 19, 1995, as a visitor for pleasure with permission to remain until January 18, 1996. A.R. 3; 482-488. The female and minor Petitioners entered the United States on November 16, 1995, as visitors for pleasure with permission to remain until May 16, 1996. A.R. 3; 468-481; 489-495. All Petitioners are natives and citizens of Ukraine. A.R. 94. The Petitioners did not depart at the end of the authorized periods. A.R. 3. Instead, they applied for asylum with INS which did not grant the applications. A.R. 95.

The INS commenced deportation proceedings against the Petitioners on July 29, 1996. A.R. 468-495. On that date, INS issued an Order to Show Cause against each Petitioner, alleging that each was deportable for being present in the United States in violation of law pursuant to 8 U.S.C. § 1251(a)(1)(B) since each had overstayed his or her authorized period. A.R. 468-495.

Following several hearings before an Immigration Judge, the Judge found the Petitioners deportable as charged, denied asylum and withholding of deportation, and granted a six month voluntary departure period. A.R. 94-117. The Petitioners appealed the decision of the immigration judge to the Board. A.R. 87-88. The Board reviewed the record *de novo*, again denied the applications for asylum and withholding of deportation, and granted a thirty-day period of voluntary departure. A.R. 1-6.

This petition for review followed.

STATEMENT OF THE FACTS

A. Proceedings Before the Immigration Judge

Following several preliminary hearings, on January 7, 1998, the Immigration Court heard the merits of the Petitioners' applications for asylum and withholding of deportation. A.R. 134-254. The Petitioners' claim is based on a history of mistreatment and brief detentions of the female Petitioner and two attacks by unknown assailants on the male Petitioner, including a stabbing and assault, all of which the Petitioners attribute to their religion. A.R. 311-345; 370-432. The Court heard testimony from both the female and the male Petitioner and admitted nine exhibits relevant to the asylum applications. A.R. 134-254. On behalf of each Petitioner, their counsel admitted the factual allegations contained in the Orders to Show Cause and conceded deportability. A.R. 136-138.

1. Testimony of Tatyana Vladimirovna Mironova

The first witness to testify was the female Petitioner. A.R. 142-218. On direct examination, she testified that she married the male Petitioner on July 6, 1986, in Ukraine and that they were the parents of two children, Anton and Ana. A.R. 144. She said that her children accompanied her to the United States, but that her husband had preceded them as soon as he could walk without crutches since they did not have enough money to travel together. A.R. 144-145. The female Petitioner's mother had visited her in the United States in April 1996 and July 1997.

A.R. 145. The two visits also included attendance at church conferences. A.R. 146.

The female Petitioner and her mother are members of the Seventh Day Adventists religion, her mother having joined the church in 1980 and the female Petitioner in 1983. A.R. 146-147. The male Petitioner and the minor children are also Seventh Day Adventists. A.R. 148. The Petitioners have continued to practice their religion in the United States. A.R. 148. In the 1980s, the female Petitioner attended church gatherings in private homes since public worship was not permitted. A.R. 149. The Government imprisoned people for practicing their religion. A.R. 150.

The female Petitioner testified that she was arrested along with her mother and her sister in 1982 when they went to the American consulate in Moscow. A.R. 151, 210. The women were questioned and briefly detained by the KGB. A.R. 162-164; 210. She said the arrest resulted both from the fact that they went to the American consulate and because of their religion. A.R. 152. Also in 1982, the female Petitioners' mother attempted to renounce her Soviet citizenship because she did opposed the government. A.R. 156. The female Petitioner also said that her mother was fired from her job as a scientist at the Institute of Auto Transport Institute in 1979 after she criticized her bosses and was thereafter subject to KGB surveillance. A.R. 158-159; 162. She admitted that the firing of her mother was unrelated to her religion. A.R. 163.

At some point after 1982, the female Petitioner's mother was involuntarily admitted to a psychiatric hospital in Moscow for three months. A.R. 163-167. The mother was never diagnosed with any mental disorder and was eventually released. A.R. 166-167. The mother continued to practice her religion following her release and was arrested an indeterminate number of times between 1987 and 1990. A.R. 167. Her house was also searched for religious materials. A.R. 169. The Petitioners' mother was briefly detained for one to three days without charge, which the Petitioner attributes to her religion. A.R. 170-171. Other church members were arrested. A.R. 171.

The female Petitioner attended a public school, but had problems because she refused to take tests on Saturday, the Seventh Day Adventist sabbath. A.R. 172. She was permitted to take her tests on other days. A.R. 173. She graduated from high school and received the equivalent of a university degree. A.R. 174.

The female Petitioner's mother also had problems relating to her attempt to denounce USSR citizenship in 1992. A.R. 175-177. Her passport was taken away at that time, but she subsequently received a Ukrainian passport which she used to travel to the United States. A.R. 178.

The Petitioner family, along with the female Petitioner's mother and sister, applied for refugee status in the United States in order to practice their religion freely and so the children could be well, but the female Petitioner was unaware of any decision on that application. A.R. 178-180.

In 1993, the female Petitioner's mother helped to organize the opening of a religious school in Kiev. A.R. 180-181. The mother experienced trouble getting the licenses to open the school and was accused of being a KGB collaborator by a government official. A.R. 182. The school taught grades one through three since permission could not be obtained to teach other grades. A.R. 183. The school was subject to acts of vandalism which the Petitioner attributes to people who did not approve of a religious school. A.R. 184, 208. The school was closed in September or on November 27, 1995.³ A.R. 184, 208. The female Petitioner protested the closing of the school and was arrested and detained for three days. A.R. 185, 210. She said that she was arrested because the Seventh Day Adventist religion was prohibited by the government. A.R. 185-186. The Petitioner's mother was able to reopen the school and it operated as the Early Dawn School. A.R. 186. The school is now closed after its license was denied. A.R. 187, 191. The Petitioner's mother now teaches the Bible at the Seventh Day Adventist Church in Kiev. A.R. 191, 209.

When asked why she sought asylum in the United States, the female Petitioner answered that it was an independent country. A.R. 193, 215. She fears that her husband would be killed by the persons who stabbed him if the family returned to Ukraine. A.R. 193. She believes the attackers were KGB. A.R. 194.

³Contrary to the statement in Petitioners' brief, the record does not support their assertion as fact that the school was closed on the order of Ukrainian President Kravchuk. Pet. Br. at 9.

She said that her mother was questioned about her whereabouts after she left. A.R. 196.

On cross examination, the female Petitioner testified that her sister Natalia is in the United States and is also an asylum applicant. A.R. 198. The female Petitioner graduated from the university as a programmer in 1989. A.R. 199; 202. She entered the United States on a Ukrainian passport. A.R. 2000. The only other foreign country she had previously visited was Poland in 1993 or 1994. A.R. 201-202. The Petitioner was unable to get a job when she graduated from the university and was asked to pay 12,000 rubles. A.R. 202. Her first job was at the Christian school in April 1995. A.R. 202. Before that time, she was home with her children who did attend the Seventh Day Adventist School. A.R. 203-204. There is only one such school in Kiev, but there were two churches that hold services. A.R. 204. There are also services in private homes. A.R. 205. The churches are registered and remain open. A.R. 205. The female Petitioner testified that Seventh Day Adventists are compared to Jews because they both worship on Saturday. A.R. 205. The Petitioner's children would be permitted to attend public school in Ukraine, but she contended that they would be "persecuted" because of their religion by the state and government which are not open to religions other than Orthodox. A.R. 206. No religion can be practiced in the public schools. A.R. 207.

In response to questions from the Court, the female Petitioner testified that she was not arrested or detained prior to 1982. A.R. 210. She also testified to a 1993 detention lasting one night for questioning following the attack on her husband. A.R. 212-213. She was also arrested or questioned numerous times. A.R. 213. The female Petitioner has never been charged with a crime in Ukraine. A.R. 214. She testified to a 1994 arrest and one day detention where everyone at a church service was arrested. A.R. 215.

The female Petitioner explained that the reason she cited the Chernobyl accident on her first asylum application was to show that the government did not pay attention to its citizens. A.R. 215. She fears only the government, and not criminal or mafia groups. A.R. 217. Her children were subject to verbal abuse and some children could not form friendships with them. A.R. 218.

2. Testimony of Genadiy L. Mironov

On direct examination, the male Petitioner testified that he came to the United States because of threats against him and his family. A.R. 221. On May 29, 1988, he was stabbed with a knife in his abdomen A.R. 221. The stabbing occurred on his way home from work when three drunk men approached him and asked him to light or give them a cigarette. A.R. 221-222. He suspects that the men were from the government police, but he had never seen them before. A.R. 223. The men verbally abused him, swore at him, threatened him, called him a subbotnik, and also asked him to wash their feet. A.R. 224-226. They pushed him, beat him, and then

stabbed him once. A.R. 225; 227. The entire incident took about three minutes. A.R. 226.

The male Petitioner suffered internal injuries, including a collapsed lung and internal bleeding, and underwent an operation to repair a liver injury. A.R. 227. He now has two scars on his abdomen. A.R. 227. After two weeks in the hospital, he was released, but did not return to work for three months. A.R. 228. By the time he was recovered, he had lost his job and did not receive any disability pay. A.R. 229. He later found a job as a salesman. A.R. 229. He had received training at a technical school in sales and before the stabbing was the vice manager of a store and in line to be the head of the store. A.R. 229, 230.

The male Petitioner became a Seventh Day Adventist when he married his wife in 1986 and still follows the religion. A.R. 230-231. He said that his mother in law was warned by a local policeman in 1993 that she would have big problems if she opened the church school. A.R. 231. He participated in religious activities at his mother in law's home and distributed religious literature. A.R. 231; 237.

On January 13, 1993, while driving from one of the Kiev suburbs, the male Petitioner was signaled to stop by another car. A.R. 232. When he stopped, he was forcibly removed from the car by one of three men he had never seen before and thrown to the side of the road, on top of sharp stones. A.R. 232-233. The men said that he was warned about the church, then beat him for about five minutes. He suffered a concussion, broken teeth, and other injuries and was

knocked unconscious. A.R. 232; 234. He testified that he could not prove whether the men were from the government. A.R. 233. Although he reported the incident to the police, no action was taken against anyone in connection with the attack. A.R. 233. The Petitioner testified that he was hospitalized for one month, largely because of a pelvic bone dislocation and he did receive disability payments for this injury. A.R. 234. He continued his church activities. A.R. 235.

The male Petitioner also testified that he was accosted by two men near a rehabilitation clinic and that the men broke his crutches and ran away. A.R. 235. He stopped going to rehabilitation after that incident. A.R. 235. Unlike others similarly situated, he was unable to receive his disabilities payments at home, but had to travel to a distant post office to collect the payment. A.R. 235-236.

If he returns to Ukraine, the male Petitioner believes that he will be killed and that his family may not be safe. A.R. 236. He believes that the prior attacks were attempts to kill him and that these will continue after his time in the United States. A.R. 236. He also reported several arrests lasting about four hours for his participation in religious activities. A.R. 236.

On cross examination, the male Petitioner testified that the three men who stabbed him did not identify themselves as police, were not wearing uniforms, and did not steal anything from him, but did have information that only the police or KGB would have. A.R. 237-238. No one was charged in connection with the attack. A.R. 238. With regard to the 1993 incident in the car, the male Petitioner

said that the attackers did not identify themselves and were not wearing uniforms. A.R. 238. He said that only the local police give warnings. A.R. 238. He admitted that there is a mafia in Ukraine and that it is everywhere. A.R. 238. He claimed no contact with the mafia, but did say the mafia and the government are closely linked. A.R. 239.

Prior to coming to the United States, the male Petitioner had visited friends in Germany in 1992 and had also gone to Poland ten or twelve times on business. A.R. 239-240. He exported goods from Poland for sale in Ukraine. A.R. 240. He told the American consul that he wanted to come to the United States as a tourist, but he really came here to join up with the president of the Seventh Day Adventist Church. A.R. 241-242. He did not attend major church meetings. A.R. 242.

The male Petitioner's parents are retired and live in Ukraine. A.R. 243. They do not belong to the Seventh Day Adventist Church. A.R. 243. His only sister, who is a Baptist, came to the United States six months after he did. A.R. 244. He did not move after the 1988 stabbing or 1993 incident because it is not easy to move and he did not request to be moved. A.R. 244-245. He liked Kiev and thought his pursuers would find him wherever he moved. A.R. 245.

In response to questions from the Immigration Judge, the male Petitioner said that neither he nor his wife held leadership positions in the Seventh Day Adventist Church. A.R. 246. They did distribute church flyers and try to encourage people to join the church. A.R. 246. He fears the government in Ukraine. A.R. 246.

On re-direct, the male Petitioner said that religious freedom exists only on paper in Ukraine, that the reality is that persons who do not follow the Orthodox religion are persecuted. A.R. 247.

B. Decision Of The Immigration Judge

The Immigration Judge denied the Petitioners' requests for asylum and withholding of deportation and granted a six month period of voluntary departure in a decision dated January 7, 1998. A.R. 94-117. The Immigration Judge noted that deportability was not an issue since the Petitioners admitted the factual allegations in the Orders to Show Cause and conceded deportability as charged. A.R. 95.

Turning to the applications for asylum and withholding of deportation, the Judge reviewed the testimony of the female and male Petitioners and the documentary evidence. A.R. 96-111. The Judge noted that the basis of the asylum claim was persecution on account of the Petitioners' membership in the Seventh Day Adventist religion. A.R. 112. The Judge characterized the claims of the female Petitioner as harassment or discrimination and noted that significant changes have occurred in Ukraine since the first incidents. A.R. 112-113. The Judge found that some of the arrests of the female Petitioner's mother were a result of her political activities, rather than her religion. A.R. 112. The Judge also noted that the fact that the Petitioner's mother travelled to the United States twice undercut her claim that Seventh Day Adventists are subject to persecution. A.R. 113.

The Judge acknowledge the two serious physical injuries to the male Petitioner, but found that the record did not prove that the attacks were carried out

because of his religion. A.R. 113-114. The Court was also skeptical because the first asylum application attributed the attacks to mafia groups, while the second claimed religious reasons. A.R. 114. Given the male Petitioner's involvement in an import/export business, the Court found that the attacks were more likely based on his work than his religion and specifically mentioned that the Petitioner's business activities continued after the 1993 attack. A.R. 114. The Court also discounted the Petitioners' testimony that there has been no change in religious freedom in Ukraine since the fall of communism, an assertion that is completely contradicted by the State Department report. A.R. 114. The documentary evidence of record shows that Seventh Day Adventists in Ukraine are able to publish their own literature and to participate in worldwide Church activities. A.R. 115. Moreover, the record does not contain any evidence that Seventh Day Adventists are mistreated in Ukraine. A.R. 115.

C. The Decision of the Board

On August 18, 2000, the Board denied the Petitioners' request for asylum and withholding of deportation, but granted them a period of thirty days to voluntarily depart the United States. The Board's decision was based on its finding that the Petitioners had failed to prove their statutory eligibility for asylum. Although the Board's decision does not specifically mention the request for withholding of

deportation, having failed to meet the lower standard for asylum, the Petitioners were not eligible for withholding.⁴

In its decision, the Board initially addressed the issue of whether the Petitioners were credible. Noting that the Immigration Judge did not make an explicit credibility finding, the Board found nonetheless that the Immigration Judge had implicitly made an adverse credibility finding. Under the applicable Board precedent, testimonial inconsistencies can form the basis for an adverse credibility finding. See Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998). The Board then reviewed the two asylum applications and concluded that the inconsistencies noted by the Immigration Judge were present, that they provide specific and cogent reasons to make an adverse credibility finding, and that the Petitioners failed to explain them. A.R. 4-5. The failure of the Petitioners to provide credible testimony in support of their application resulted in its denial. A.R. 5.

Alternatively, the Board noted that, even if it had found the Petitioners credible, it would deny asylum based on country conditions. A.R. 5. Citing the

⁴The last paragraph of the Board's decision addresses the Petitioners' request for protection under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted and opened for signature* Dec. 10, 1984, G.A. res. 39/46, annex. 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987; for the United States April 18, 1988). Although the Board decision incorrectly states that the Petitioners did not request protection under the Convention Against Torture before the Immigration Judge, the Petitioners have failed to raise this issue on appeal and thus have abandoned it. Fed.R.App.P. 28(a)(5); United States v. Eldeeb, 20 F.3d 841, 843 (8th Cir. 1994), quoting Jasperson v. Purolator Courier Corp., 765 F.2d 736, 740 (8th Cir. 1985).

Department of State Profile on Ukraine, the Board observed that Evangelicals, such as Seventh Day Adventists, are permitted to practice their religion, significantly lessening, if not eliminating, the basis for the Petitioners' fear of persecution. A.R. 6.

SUMMARY OF ARGUMENT

The Petitioners have not shown that the evidence compels the conclusion that they were persecuted in the past or have a well-founded fear of future persecution in Ukraine on account of religion or imputed political opinion. The Board's adverse credibility finding is supported by the administrative record. The Board relied on specific and cogent discrepancies between the asylum application filed with the INS and the asylum application filed with the Immigration Court. The Petitioners have not rebutted or explained the discrepancies. The Petitioners failed to introduce any evidence demonstrating the motivation underlying any of the alleged incidents of persecution, thus failing to prove that the alleged persecutors were motivated by one of the five statutory grounds enumerated in the INA.

In addition, the documentary evidence in the record supports the Board's conclusion that the Petitioners do not have a well-founded fear of future persecution in Ukraine. The State Department reports that Seventh Day Adventists and other evangelical religious groups do not suffer persecution in Ukraine. Finally, the Petitioner's mother, who is also a Seventh Day Adventist, remained in Ukraine after she left, apparently without incident. The Petitioner's mother has been able to

obtain a Ukrainian passport and travel to the United States on two occasions to visit the Petitioner and her family here. Thus, it cannot be claimed that the only reasonable conclusion that could be drawn from the evidence is that the Petitioner has a well-founded fear of future persecution in Ukraine. This Court should therefore uphold the Board's decision and dismiss this petition for review.

ARGUMENT

A. The Board Of Immigration Appeals Correctly Determined That The Petitioners Had Failed to Prove Past Persecution In Ukraine On Account Of Religion Or Imputed Political Opinion⁵

1. Standard of Review

The Court reviews the factual findings of the Board under the substantial evidence standard. Kratchmanov v. Heston, 172 F.3d 551, 553 (8th Cir. 1999), citing Hajiani-Niroumand v. INS, 26 F.3d 832, 838 (8th Cir. 1994); Feleke v. INS, 118 F.3d 594, 597-8 (8th Cir. 1997). The Court “must determine whether, based on the record considered as a whole, the BIA’s decision was supported by reasonable, substantial, and probative evidence. . . . Reversal of the [Board’s] decision is warranted only if the petitioner shows that the evidence was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution.” Id. What this language makes plain is that the crucial question that a

⁵The Petitioners’ argument based on imputed political opinion is entirely dependent on their religion and is not developed in the record or in their brief. Consequently, the two arguments are interdependent and the Respondent’s argument on the religion claim is equally applicable to the imputed political opinion claim and will not be separately addressed.

petition for review brings before a court is whether establishment of the ultimate fact of the "requisite fear of persecution" is compelled by the evidence.

The Supreme Court's decisions in INS v. Elias-Zacarias, 502 U.S. 478 (1992) and INS v. Aguirre-Aguirre, 526 U.S. 415 (1999), reflect the principle that judicial review of administrative asylum determinations is sharply limited. Aguirre provides general legal principles applicable to the immigration context and, in particular, to asylum decisions. The Court stressed that the INA makes the Attorney General's determinations of law controlling and "in express terms" makes an applicant's asylum and withholding entitlement "turn on [her] 'determin[ation]'" whether the statutory conditions for [relief] have been met." See 526 U.S. at 424-425.

2. **Burden of Proof**

Section 208(a) of the INA authorizes the Attorney General, in her discretion, to grant asylum to an alien who is a "refugee" as defined by the INA.⁶ 8 U.S.C. § 1158(a). A "refugee" is defined as an alien who is unwilling or unable to return to his or her country because of past persecution or a well-founded fear of future persecution "on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A); INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987). Proof of a well-founded fear of future persecution requires proof that the fear is both objectively reasonable and subjectively genuine. Ghasemimehr v. INS, 7 F.3d 1389, 1390 (9th Cir. 1993). The "on account of" language in the INA requires an applicant to prove that his alleged persecutor was or will be motivated by one of the five statutorily enumerated grounds. See 8 U.S.C. § 1101(a)(42)(A); see also INS v. Elias-Zacarias, 502 U.S. at 483.

An alien bears the burden of establishing statutory eligibility for asylum. Matter of Acosta, 19 I&N Dec. 211, 223 (BIA 1995), modified on other grounds; Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). See also 8 C.F.R. § 208.13(a). An alien may meet his burden of proof by presenting his credible

⁶Petitioners have cited no authority for the bold assertion in their brief that Congress intended for "lenient consideration of asylum claims." Pet. Br. at 16. 20. Congress, in fact, established statutory requirements that must be met in order to qualify for a grant of asylum. See 8 U.S.C. § 1101(a)(42)(A).

testimony without corroboration. 8 C.F.R. § 208.13(a). This regulation sets a threshold showing that an applicant must make to be found eligible. The INA makes clear that the agency may require such a threshold to be met, including terms of testing and determining the credibility of applicants. See 8 U.S.C. §§ 1158 (b)(1) & (2)(C), (d)(1) & (5)(B). If the Board does not credit the testimony and it is the crux of the case, the applicant has failed to present "sufficient" evidence under the regulation to sustain his burden of proof. This requirement functions in the typical nature of a burden of proof rule by sifting out claims that do not meet a certain quantum of evidence. The Court will defer to an adverse credibility finding when there are "specific, cogent reason[s], or a legitimate, articulable basis for the finding." Hajiani-Niroumand, 26 F.3d at 838.

3. The Board correctly determined that the Petitioners did not present a credible claim.

The evidence shows sufficient inconsistencies between the asylum application filed with the INS and the asylum application filed with the Immigration Court to result in an adverse credibility finding. Although the Immigration Judge did not make an explicit credibility finding, this Court reviews the Board's decision, not that of the Immigration Judge. Lim v. INS, 224 F.3d 929, 933 (9th Cir. 1999). The Board assessed *de novo* the credibility of the Petitioners in light of its precedent decision in Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998).

Although the Petitioners mention their religion in the original asylum application, the application is focused on their desire to leave a country of

“lawlessness” and go to the United States, “the most rightful free country in the world.” A.R. 373; 370-378. The application also stated several other claims, including concern about the health consequences of the Chernobyl accident and coercion of the male Petitioner by “muffia” [sic] groups. A.R. 373. Petitioners’ most most significant complaint related to religion was the fact that the church school was closed and their children might have problems in public school. A.R. 373, 374.

In contrast, the second asylum application is clearly focused on the claim of religious persecution. A.R. 311-320. The Petitioners claim that this new focus is attributable to having obtained counsel⁷ familiar with United States asylum law for proceedings before the Immigration Court. Pet. Br. at ii-iii, 16, 17, 23. However, the Board relied on the specific and cogent reasons, including the lack of any reasonable explanation for the differences between the applications, to make its adverse credibility finding. A.R. 4-5.

The inconsistencies between the applications serve to place the credibility of Petitioners’ story enough into question to require that their assertions be supported by corroborative evidence. Rucu-Roberti v. INS, 177 F.3d 669 (8th Cir. 1999).

⁷Although Petitioners claim in their brief that they have a Sixth Amendment right to counsel, there is no Sixth Amendment right to counsel in deportation proceedings. Pet. Br. at 17; Castro-Nuno v. INS, 577 F.2d 577, 578 (9th Cir. 1978). The right to obtain counsel at no expense to the government in deportation proceedings arises from the Fifth Amendment due process clause. Dearinger v. Reno, 2000 WL 1701452 at 2 (9th Cir. 2000); Ramirez-Durazo v. INS, 794 F.2d 491, 500 (9th Cir. 1986).

The inconsistencies are not peripheral to the Petitioners' claims, but central to the claimed fear of persecution and the Petitioners' reason for leaving Ukraine. Such corroborating evidence should have been available if their claim was really credible.

It is, for example, inconceivable that they would not have been able to produce any documentary evidence showing that Seventh Day Adventists and other Evangelical Christians are persecuted in Ukraine. This failure of proof is even more striking in light of the 1995 and 1996 Department of State Country Reports on Ukraine and the 1997 Department of State Country Profile on Ukraine that show the absence of any such persecution. See A.R. 360-369; 347-349; 263-280. The Immigration Judge even inquired of Petitioners' counsel whether the record contained any evidence showing mistreatment of Seventh Day Adventists in Ukraine and counsel conceded that there was none. A.R. 248-250. Reliance on the State Department reports is appropriate, notwithstanding Petitioners' arguments to the contrary.⁸ Pet. Br. at 18. See Yacoub v. INS, 999 F.2d 1296, 1297 (8th Cir. 1993).

Although the Respondent acknowledges that some asylum applicants may find it difficult to collect corroborating evidence while fleeing persecution, such is

⁸In Zamora v. INS, 534 F.2d 1055 (2nd Cir. 1976), the Court found admissible a State Department opinion specific to an applicant's asylum claim. In Okoroha v. INS, 715 F.2d 380, 383 (8th Cir. 1983), this Court observed that some Circuits had disapproved of such specific State Department opinions. In the instant case, the State Department evidence consists of a profile and country reports and are not specific to the Petitioners.

not the case here. See Pet. Br. 54 at fn 16. Interestingly, the female Petitioner was able to gather some documentary evidence, including certifications from the Seventh Day Adventist Development and Relief Agency of the children's enrollment and the Petitioner's employment as a teacher, in the days prior to her departure from Ukraine. A.R. 338-343. The Petitioners' failure to produce evidence to contradict the State Department reports or explain their failure to do so therefore permits a reasonable conclusion to be drawn that they failed to carry their burden of meeting the statutory and regulatory requirements for asylum.

The Board identified specific and cogent reasons for its adverse credibility determination and this Court should defer to the Board's finding. Hajjani-Niroumand, 26 F.3d at 838; Hamzehi v. INS, 64 F.3d 1240, 1241 (8th Cir. 1995); Daiga v. INS, 183 F.3d 797, 798 (8th Cir. 1999); Ghasemimehr, 7 F.3d at 1391.

4. Even if the Petitioners did present a credible claim, the Board correctly determined that the evidence does not show that they were subject to past persecution in Ukraine on account of religion or imputed political opinion.

The Board found that the Petitioners were not persecuted in Ukraine.⁹ A.R. 5-6. To reverse the Board's decision, this Court must find that they have shown that the evidence presented was so compelling that no reasonable factfinder

⁹Contrary to their assertion in their brief, the burden to prove changed country conditions never shifted to INS in this case because the Petitioners did not prove past persecution. Pet. Br. at 50-51.

could fail to find persecution on account of one of the statutory grounds enumerated in the INA. None of the events alleged by the Petitioners, either individually or collectively, rises to the level of persecution because there is no clear nexus between the occurrence and the motivation of the perpetrator. The "on account of" language of the INA requires an asylum applicant to prove that his alleged persecutor was motivated by one of the five statutorily enumerated grounds. See INA section 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); see also Elias-Zacarias, 502 U.S. at 483. The evidence presented in this case does not compel the finding that the Petitioners were persecuted on account of religion. The male Petitioner could not identify his attackers, either in terms of their identity or their affiliation with the police or other governmental agency. A.R. 223; 226; 232-233; 237-238. Such attacks appear to be random acts of violence for which the male Petitioner was an unfortunate target. Though the male Petitioner testified that the 1988 attackers verbally abused him and used religiously offensive language, he did not prove that the attack was undertaken on account of his religion or that the attackers even knew what his religion was. Similarly, there is no proof that the 1993 incident involving the male Petitioner was undertaken for religious reasons, or that those attackers knew what his religion was.¹⁰ Even his own characterization of the attacks calls into question the motivation underlying them. With regard to the 1993

¹⁰The second attack is initially described in the male Petitioner's attachment to the second asylum application as a car accident. A.R. 319.

stabbing, the brief states that the male Petitioner “strongly feels was not unconnected with his religious belief and their establishment of a church run school.” Pet. Br. at 5, citing A.R. 311-19; 370-78.

The arrests and brief detentions of the female Petitioner also do not amount to persecution under the INA. Brief arrests and detentions are not necessarily persecutory and may well be related to legitimate law enforcement reasons. Safaie v. INS, 25 F.3d 636, 640 (8th Cir. 1994). The 1983 arrest was likely related to her visit to the American consulate and not her religious beliefs. Her 1993 and 1994 arrests appear to have been for legitimate law enforcement questioning and she was released without charge and without having suffered any abuse.

In a case involving an asylum claim by a Seventh Day Adventist from Romania, the Seventh Circuit found that he had not shown past persecution or a well-founded fear of future persecution. Sofinet v. INS, 196 F.3d 742 (7th Cir. 1999). As in the present case, the Court found that Sofinet had not shown a nexus between the alleged persecution and his religion. 196 F.3d at 747, 748. In addition, as in this case, the Court observed that “Sofinet makes no claim that he has been hindered in any way from freely practicing his religious beliefs.” 196 F.3d at 747. Despite Sofinet’s claim that he was subject to reprimands at his workplace and was detained five times for brief periods, the Court affirmed the denial of asylum. 196 F.3d at 744, 748. As in Sofinet, the Petitioners have not shown the nexus between

unfortunate events and their religion. In addition, like Sofinet, they were not hindered from practicing their religion.

Petitioners' claims that the Board pre-judged their case and issued a boilerplate decision are unsubstantiated and expressly repudiated by the decision and the record supporting it.¹¹ Pet. Br. at 14-15; 19. The Board did address the Petitioners' evidence and found that they had not met their burden of proof. The Board is not required to specifically address every piece of documentary evidence submitted in support of an asylum claim. See Martinez v. INS, 970 F.2d 973, 976 (1st Cir. 1992). See also Ghaly v. INS, 58 F.3d 1425, 1430 (9th Cir. 1995); Casalena v. INS, 984 F.2d 105, 107 (4th Cir. 1993). Even on appeal, the Petitioners have not pointed to any evidence in the record establishing that Seventh Day Adventists or other Evangelical Christians have been persecuted in Ukraine. Neither served as a leader in the church. A.R. 246. Moreover, the legal and factual analysis in the Board's decision is sufficient to explain the basis for its denial. The Board is not required to write a long and drawn-out decision denying an asylum application. INS v. Aguirre-Aguirre, 526 U.S. at 432. Essentially, the Petitioners' chief complaint about the Board decision is not the Board's analysis (the standard or the weight accorded to certain evidence), but its final decision (denial of asylum). Pet. Br. at 38.

¹¹Petitioners' citation of an unreported BIA decision from 1985 fails to comply with this Court's rules regarding briefs and should be disregarded. 8th Cir. R. 28A(i).

It is notable that, notwithstanding their claims of persecution, the Petitioners had a good life in Ukraine.¹² The female Petitioner, whose claim dates back to 1982, was able to receive permission to take some tests on days other than her sabbath (Saturday) and graduated with a university degree. A.R. 199-200; 409. She was able to attend the university even though “religious” people could not attend. A.R. 199.¹³ The male Petitioner was able to start his own export business and travel numerous times to Poland. A.R. 240-241 Both Petitioners were able to obtain passports and exit visas to visit not only the United States, but also Poland and Germany. A.R. 198; 201-202; 239-240. Such factors undercut the Petitioners’ asylum claims. Safaie v. INS, 25 F.3d at 640-641.

In summary, it cannot be claimed that the only reasonable conclusion that could be drawn from the evidence is that the Petitioners suffered past persecution in Ukraine. Instead, there is a legally sufficient evidentiary basis for the Board's determination that they failed to establish past persecution which this Court must uphold.

The Board Of Immigration Appeals Correctly Determined That The Petitioners Had Failed To Prove A Well-Founded Fear Of Future Persecution In Ukraine On Account Of Religion Or Imputed Political Opinion

¹²The male Petitioner testified that “Kiev was not too bad, and not too bad city to live there in the Ukraine.” A.R. 245.

¹³This testimony conflicts with the female Petitioner’s claim that she was a practicing Seventh Day Adventist since 1983 and had been arrested or detained at least once after that because of her religion. A.R. 146-147; 152; 211.

1. Standard of Review

As stated above, the Court reviews the factual findings of the Board under the substantial evidence standard. Kratchmanov v. Heston, 172 F.3d at 553, citing Hajiani-Niroumand v. INS, 26 F.3d at 838; Feleke v. INS, 118 F.3d at 597-8. The Court “must determine whether, based on the record considered as a whole, the BIA’s decision was supported by reasonable, substantial, and probative evidence. . . . Reversal of the [Board’s] decision is warranted only if the petitioner shows that the evidence was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution.” Id.

2. The Board correctly determined that the Petitioners did not prove a well-founded fear of future persecution in Ukraine on account of their religion.

The documentary evidence in the record supports the Board’s conclusion that the Petitioners do not have a well-founded fear of persecution in Ukraine. The State Department’s June 1997 Profile of Asylum Claims and Country Conditions in Ukraine completely and specifically contradicts the Petitioners’ claims of religious persecution.¹⁴ A.R. 263-280. The State Department does acknowledge that registration of foreign religious groups has been delayed by local officials, but such delay is not persecution. A.R. 270. The Petitioners have introduced no evidence, other than their own incredible testimony, that refutes the State Department Profile.

¹⁴Contrary to the Petitioners’ claim in their brief that the Board ignored country conditions, it expressly considered them. Pet. Br. at 43; A.R. 5-6.

Despite claims that the Petitioners would be harmed if they returned to Ukraine, her mother, also a Seventh Day Adventist, remained there after the Petitioners left without apparent harm or incident.¹⁵ A.R. 191; 196. While harm to relatives left behind is not a prerequisite for asylum, the fact that close relatives remain in the native country unharmed is relevant to the strength of the asylum claim. Cordero-Trejo v. INS, 40 F.3d 482, 488 (1st Cir. 1994). There is therefore a legally sufficient basis for the determination that the Petitioners have failed to show a well-founded fear of future persecution. See Matter of A-E-M, Interim Decision 3338 (BIA 1998); Manivong v. DD, INS, 164 F.3d 432 (8th Cir. 1999).

In summary, it cannot be claimed that the only reasonable conclusion that could be drawn from the evidence is that the Petitioners have a well-founded fear of persecution in Ukraine. Instead, there is legally sufficient evidentiary basis for the Board's determination that they failed to establish a well-founded fear of persecution in Ukraine which this Court must uphold.¹⁶

CONCLUSION

¹⁵This record does not clearly explain why the female Petitioner's mother is described in a letter from the Minnesota Conference of Seventh Day Adventist as an "official with the education department of the city of Kiev." A.R. 405. See also 208. The letter was used to help her get a visa to visit the United States.

¹⁶ Withholding of deportation requires a showing that it is more likely than not that the alien will be persecuted upon deportation. Cardoza-Fonseca, 480 U.S. at 430. Failure to satisfy the lesser standard of proof required to establish eligibility for asylum necessarily results in a failure to demonstrate eligibility for withholding of deportation. See Ghaly, 58 F.3d at 1429. Because the Petitioner's asylum claim was properly denied, the denial of her claim for withholding was also proper, and should be upheld.

For the reasons discussed above, this Court should affirm the Board's decision and deny this petition for review.

Respectfully submitted,

DAVID W. OGDEN
Assistant Attorney General
United States Department of Justice
Civil Division

MARK C. WALTERS
Assistant Director

JULIA K. DOIG, Attorney
Office of Immigration Litigation
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
202-616-4893
Attorneys for the Respondent

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BRIEF FORMAT CERTIFICATION
PURSUANT TO EIGHTH CIRCUIT RULE 28A(c)

Pursuant to Federal Rule of Appellate Procedure 32 and Eighth Circuit Rule 28A(c), I certify that the "Brief For Respondent" is proportionally spaced, has a typeface of 14 points, and contains 7,737 words. The brief was prepared on Word Perfect 9.0. The diskette containing the brief has been scanned for viruses and is virus-free.

Julia K. Doig, Attorney
Office of Immigration Litigation

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2000, I served two copies and a 3 ½ inch diskette containing the Respondent's Brief on the petitioner by placing them in the Department of Justice mail room for same day mailing, First Class postage prepaid, addressed to:

Herbert A. Igbanugo
Blackwell Igbanugo Engen & Safford PA
3601 West 76th Street
Suite 250
Minneapolis MN 55435

Julia K. Doig, Attorney
Office of Immigration Litigation