

**ASYLUM/WITHHOLDING OF REMOVAL/CONVENTION
AGAINST TORTURE/ECONOMIC PERSECUTION/
PERCEPTION OF PERSECUTOR RELATED TO PROTECTED
GROUND/IMPROPER FACT-FINDING BY THE BIA**

In *Boraj v. Holder*, 2014 WL 1012947 (2d Cir. 2014),²⁰ the U.S. Court of Appeals for the Second Circuit partially granted a petition for review filed by an Albanian citizen whose claims for asylum, withholding of removal, and CAT protection were denied by the BIA, which had reversed a decision by an IJ granting asylum relief based on a finding of economic persecution and also granting CAT protection. The circuit court determined that the BIA correctly concluded that the petitioner, Mr. Boraj, had not established that his termination from the police department constituted severe economic disadvantage amounting to persecution, but concluded that a remand was in order, inasmuch as the IJ had not addressed Boraj's separate theory based on his fear of persecution by criminal gangs in Albania. It found that the BIA engaged in inappropriate fact-finding in determining that the Albanian authorities were not unwilling or unable to control the gang members that Boraj feared, and that the petitioner was targeted by the gangs as criminal retaliation for his actions against them as a police officer, rather than on account of his membership in a particular social group.

The court faulted the BIA for ignoring several of the IJ's conclusions, including that (1) Boraj's alleged persecutor, Adrian Malasi, successfully bribed a prosecutor and secured release even though he had been arrested for threatening Boraj's life at gunpoint, (2) four of the six police officers in the petitioner's unit had been murdered in Albania, and (3) Boraj credibly testified that another gang leader had also sought to recruit Boraj into his criminal organization. The Second Circuit observed that those facts might support a conclusion that the two gang members targeted Boraj for his perceived membership in a political or social group. Accordingly, it concluded that the BIA erred by not allowing the IJ to conduct this contextual analysis in the first instance. The court held that the independent fact-finding by the BIA violated 8 CFR § 1003.1(d)(3)(iv), which provides that, except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board shall not engage in fact-finding in the course of deciding appeals. The court explained that, under § 1003.1(d)(3)(i), "the BIA may only review the IJ's factual findings to determine whether they are clearly erroneous."

In upholding the Board's legal conclusion that Boraj did not establish a claim of economic persecution, the court cited to its prior authority, including *Guan Shan Liao v. U.S. Dept. of Justice*, 293 F.3d 61 (2d Cir. 2002),²¹ and determined that Boraj failed to present any testimony or evidence bearing on his personal financial circumstances or his subsequent private sector employment from which to assess the economic impact of his termination from the police department. Thus, it concluded that his evidentiary proffer was insufficient to sustain the IJ's findings of severe economic harm.

In regard to the BIA's conclusion that the IJ erred in granting CAT relief, the court held that the BIA's treatment of the record was predicated on an improper de novo review

of the IJ's factual findings, similar to its erroneous review of Boraj's asylum claim. The court noted that the IJ had concluded that the petitioner established governmental acquiescence, as required for CAT relief, because Malasi successfully bribed the prosecutor's office to release him, and the U.S. Department of State's Country Reports indicated that "police corruption and impunity persisted in Albania." The court expressed its disapproval with the BIA for substituting its own view of the country conditions evidence without regard to Boraj's credible testimony concerning the bribery by his persecutor and the murder of his police colleagues. The court cited to *Delgado v. Mukasey*, 508 F.3d 702 (2d Cir. 2007),²² for the proposition that the BIA commits error when it deals with a claim of fear of future persecution entirely in the abstract. The court further indicated that, inasmuch as substantial time has elapsed since the 2010 merits hearing before the IJ, the parties should be afforded the opportunity to supplement the record with recent evidence of country conditions on remand, citing to *Secaida-Rosales v. I.N.S.*, 331 F.3d 297 (2d Cir. 2003). The court clarified that it was expressing no view regarding the ultimate merits of the petitioner's claims.

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**ASYLUM/WITHHOLDING OF REMOVAL/CONVENTION
AGAINST TORTURE/JURISDICTION TO ADDRESS BELATED
ASYLUM APPLICATION/IMPLAUSIBILITY FINDING**

In *Minghai Tian v. Holder*, 2014 WL 961531 (7th Cir. 2014), the U.S. Court of Appeals for the Seventh Circuit, addressing a petition for review filed by a citizen of China whose claims for asylum, withholding of removal, and protection under the CAT were denied by the IJ and the BIA, held that it did not have jurisdiction to review any aspect of the petitioner's untimely application for asylum, and that the petitioner failed to demonstrate that he met his burden of proof for establishing his eligibility for withholding of removal, and did not exhaust his administrative remedies with regard to his CAT claim. Accordingly, the court dismissed in part and denied in part the petition for review.

The petitioner, Mr. Tian, was admitted to the U.S. in 2001 on a nonimmigrant visa, as a participant in an international culinary exchange program. After he overstayed his temporary authorization, he came to the attention of DHS in 2007 as a result of his arrest during an investigation of human trafficking. This arrest resulted in no criminal charges, but it precipitated a removal proceeding against him. In 2009, while the removal case was pending, Tian pled guilty in Nevada to drawing and passing a check without sufficient funds with intent to defraud. He was ordered to pay over \$100,000 in restitution, though his sentence was suspended, and he was placed on probation for up to five years. In 2008, Tian filed his applications for asylum, withholding of removal and CAT protection. He provided the following narrative. In 1989, he took part in demonstrations in Tianjin, China. Because city officials did not want students demonstrating in that location, Tian and his fellow demonstrators were provided free transportation to Beijing, where they