

AUG 18 2008

*Cadiena v. Mukasey*, No. 06-73289

O'SCANLAIN, Circuit Judge, concurring in part and dissenting in part:

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

While I concur in the court's conclusion that substantial evidence supports the denial of Cadiena's application for withholding of removal, and agree that her *res judicata* claim should be rejected, I respectfully suggest that, in addressing her asylum claim, the court fails properly to consider evidence that Cadiena does not have a well-founded fear of future persecution in the Philippines.

In its terse opinion, the Board of Immigration Appeals ("BIA") "agree[d]" with the Immigration Judge ("IJ") "that there is insufficient evidence in the record to indicate that [Cadiena] has an objectively reasonable well-founded fear of persecution." The IJ's conclusion on such issue, in turn, was predicated in part on the availability of safe relocation within the Philippines. Thus, both by concluding that Cadiena lacked a well-founded fear of persecution, and by noting its agreement with the IJ, the BIA implicitly relied on evidence showing that Cadiena could safely relocate upon returning there. *See Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir. 2003) ("The ability of an applicant to relocate to a place of safety within his country of origin may . . . be considered by the IJ in determining whether an applicant's fear is 'well-founded.'"); *Shah v. INS*, 220 F.3d 1062, 1067 (9th Cir. 2000) ("[O]ur review is limited to the BIA's decision, except to the extent that the IJ's opinion is expressly adopted.").

The evidence of the availability of a safe relocation is more than adequate under the deferential standard of review that we must apply. *See Kaiser v. Ashcroft*, 390 F.3d 653, 657 (9th Cir. 2004). As the BIA noted in its opinion, Cadiena left the Philippines as a teenager, and she since has lived in the United States for more than 14 years. At Cadiena’s immigration hearing, her father acknowledged that he “realistically” did not believe that agents of the Philippine government would recognize her. Although her father testified that the government might recognize the name “Cadiena,” he conceded that “there are a lot of Cadienas” in the northern areas of the Philippines.<sup>1</sup>

Nor would I hold that the IJ violated due process by failing to allow Cadiena to present additional evidence related to whether she suffered past persecution. The IJ properly concluded that she did not have a well-founded fear of future persecution due to her ability to relocate within the Philippines. Accordingly, even assuming that the IJ violated due process, Cadiena has failed to render the requisite showing of prejudice. *See Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1058 (9th

---

<sup>1</sup>I also disagree with the court’s conclusion that the record does not sufficiently establish that an internal relocation would be reasonable. I fail to see any evidence indicating that such a relocation would be unreasonable. Moreover, because Cadiena did not claim to have suffered persecution at the hands of the government, she is not entitled to a presumption of unreasonableness. *See* 8 C.F.R. § 1208.13(b)(3)(ii).

Cir. 2005) (“For us to grant the petition for review on due process grounds, Petitioner must show prejudice, which means that the outcome of the proceeding may have been affected by the alleged violation.”) (internal quotation marks omitted).

For the foregoing reasons, I would deny Cadiena’s petition for review in its entirety, and I therefore respectfully dissent in part from the majority’s disposition.