

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2006

4 (Argued: December 19, 2006 Decided: October 2, 2007)

5 Docket No. 05-3915-ag
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9 BRYAN NOBLE,

10 Petitioner,

11 - v -

12 PETER D. KEISLER,

13 Respondent.*
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15 Before: POOLER, SACK, and WESLEY, Circuit Judges.

16 Petition for review of a decision of the Board of
17 Immigration Appeals vacating an immigration judge's decision
18 granting the petitioner's application for a waiver of
19 inadmissibility under section 212(c) of the Immigration and
20 Nationality Act (now repealed).

21 Petition dismissed.

22 RUCHI THAKER, Bretz & Coven, LLP
23 (Matthew L. Guadagno, Kerry W. Bretz,
24 and Jules E. Coven, on the brief), New
York, NY for Petitioner.

* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Acting Attorney General Peter D. Keisler is automatically substituted for former Attorney General Alberto R. Gonzales as the respondent in this case.

1 MELISSA A. SWAUGER, Assistant United
2 States Attorney in the Middle District
3 of Pennsylvania (Thomas A. Marino,
4 United States Attorney, on the brief),
5 Harrisburg, PA for Respondent.

6 SACK, Circuit Judge:

7 Bryan Noble, a citizen of Jamaica, petitions for review
8 of a decision by the Board of Immigration Appeals ("BIA") denying
9 his application for a waiver of inadmissibility under section
10 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c)
11 ("INA").¹ In re Bryan Noble, No. A 41 651 242 (B.I.A. June 30,
12 2005) ("BIA Opinion"). The BIA sustained the government's appeal
13 and vacated the decision of Immigration Judge ("IJ") Margaret
14 McManus granting Noble's application. In re Bryan Noble, No. A
15 41 651 242 (Immig. Ct. N.Y. City Jan. 15, 2004) ("IJ Decision").

16 Noble now petitions for review, arguing that the BIA
17 applied an incorrect legal standard, as established by agency
18 regulations, to its review of the IJ's determination that Noble
19 had been rehabilitated subsequent to his extensive history of
20 criminal behavior. Because we conclude that the BIA did not
21 reject a finding of fact by the IJ that Noble was rehabilitated,
22 but instead evaluated the nature and extent of his rehabilitation
23 as one equity among many in exercising its discretion, we
24 conclude that the petitioner is, in substance, asking us to

¹ Although section 212(c) has been repealed, it nevertheless applies to Noble because he pleaded guilty to his crimes prior to the repeal of this section. Khan v. Gonzales, 495 F.3d 31, 33 n.1 (2d Cir. 2007) (citing INS v. St. Cyr, 533 U.S. 289, 326 (2001)).

1 review an exercise of discretion by the BIA. We do not have
2 jurisdiction to do so, and we therefore dismiss the petition.

3 **BACKGROUND**

4 Noble entered the United States on a visitor's visa in
5 1982, at the age of twelve. He became a lawful permanent
6 resident on March 10, 1988. Soon thereafter, he was arrested for
7 the first time. He was subsequently arrested on six other
8 occasions. Most of his arrests were drug-related; all led to
9 criminal proceedings in New York state courts.

10 The petitioner's legal troubles prompted the initiation
11 of his immigration proceedings and two delays thereof. Nearly
12 fifteen years after they began, Noble now petitions this Court to
13 review the BIA's denial of discretionary relief from removal.

14 Noble's Criminal Convictions and Sentences

15 Noble's first arrest occurred some seven months after
16 he obtained lawful permanent resident status. He pleaded guilty
17 in 1989 to criminal possession of a controlled substance. He was
18 sentenced as a youthful offender to five years' probation.

19 On April 26, 1990, shortly after his probationary
20 sentence was imposed, Noble was again arrested, this time for
21 criminal impersonation. He pleaded guilty to disorderly conduct
22 for which he was sentenced to pay a fine.

23 Seven months later, Noble was arrested following a
24 police drug-raid. At the time of his arrest, he had twenty-one
25 bags of cocaine base ("crack"), individually packaged for sale,
26 at his feet. On October 30, 1991, before the possession-of-crack

1 prosecution had been resolved, Noble was arrested in the course
2 of another police drug raid for possession of crack with the
3 intent to sell. At the time of this arrest, Noble also had in
4 his possession a loaded semi-automatic pistol with a defaced
5 serial number. On February 25, 1992, while these two cases were
6 pending, Noble was arrested yet again for possession of crack.

7 On November 4, 1992, Noble pleaded guilty to the
8 criminal charges arising from his third and fourth arrests and
9 was sentenced, for each crime, to three-and-one-half to ten-and-
10 one-half years' imprisonment, to run concurrently. Noble served
11 twenty-two months' imprisonment for these offenses.

12 Noble's Removal Proceedings

13 On August 13, 1993, the INS issued an order to show
14 cause to Noble based on his previous convictions for drug-
15 trafficking crimes.² In it, the INS charged Noble with
16 removability under section 241(a)(2)(B)(i) of the INA, 8 U.S.C.
17 § 1251(a)(2)(A)(i) (1994) (current version at 8 U.S.C. § 1227),
18 as an alien convicted of a controlled substance violation, and
19 section 241(a)(2)(A)(iii) of the INA, 8 U.S.C.
20 § 1251(a)(2)(A)(iii) (1994) (current version at 8 U.S.C. § 1227),

² On March 1, 2003, the Immigration and Naturalization Service was reconstituted as the Bureau of Immigration and Customs Enforcement ("ICE") and the Bureau of U.S. Citizenship and Immigration Services, both within the Department of Homeland Security. See Monter v. Gonzales, 430 F.3d 546, 548 n.1 (2d Cir. 2005). Because Noble's removal proceedings began before this date, we refer to it as the INS in this opinion where appropriate.

1 as an alien convicted of an aggravated felony. Noble has never
2 disputed his deportability or removability on these bases.

3 On January 10, 1995, Noble filed an application for
4 relief under section 212(c). While Noble's section 212(c)
5 hearing was pending, he was arrested a sixth time, this time for
6 selling crack. His deportation proceedings were administratively
7 closed pending a resolution of charges in connection with that
8 arrest. He later pleaded guilty to criminal possession of a
9 controlled substance and was sentenced to a conditional
10 discharge.

11 Noble's removal hearings were reopened but suspended
12 again after he was arrested a seventh time on February 21, 2000.
13 Noble pleaded guilty to charges of disorderly conduct arising out
14 of a shoplifting incident, was sentenced to a conditional
15 discharge, and was asked, and agreed, to participate in a drug
16 recovery program.

17 The IJ's Decision

18 On March 28, 2002, almost a decade after deportation
19 proceedings against him had begun, Noble received a hearing
20 before an IJ to address his section 212(c) application. He and
21 his wife both testified.

22 Noble recounted his extensive criminal record and
23 admitted to having committed additional drug offenses for which
24 he had not been arrested and, therefore, of which the INS had not
25 been aware. He expressed his regret about that phase of his life
26 and asserted that he had since turned his life around.

1 Noble's wife testified to Noble's importance to their
2 family as a father, stepfather, caretaker, and breadwinner. She
3 said that, were Noble removed from the United States, the family
4 would no longer be able to afford to pay the mortgage on their
5 home and would therefore be forced to leave it.

6 Noble also submitted several documents in support of
7 his relief application relating to his marriage and extensive
8 family ties in the United States, his employment record and
9 financial stability, his post-parole record, and his positive
10 influence on his children.

11 The IJ issued a written decision on January 15, 2004.
12 After balancing the equities in accordance with Matter of Marin,
13 16 I. & N. Dec. 581 (BIA 1978), she granted Noble a waiver of
14 removal under section 212(c). See IJ Decision at 6-9. She found
15 Noble's testimony to be credible -- his "level of honesty
16 convince[d] [her] that he [had] been forthright in all of his
17 testimony." Id. at 2. The IJ identified several "unusual and
18 outstanding equities" that offset Noble's extensive criminal
19 history, including his family connections to the United States,
20 his positive family relationships, the financial and emotional
21 support he provided to his family, and his steady employment.
22 Id. at 6-9. Addressing the issue of rehabilitation, the IJ noted
23 that Noble had "expressed profound remorse for his criminal
24 convictions and regrets his criminal involvement." Id. at 7.
25 The IJ further found that Noble had "demonstrated a willingness
26 to continue his progress toward a drug-free and crime-free

1 lifestyle." Id. at 8. The IJ said: "In light of the
2 for[e]going analysis and [Noble's] remorse for his past actions,
3 the Court concludes that [Noble] has finally demonstrated good
4 efforts at rehabilitation." Id. The IJ concluded that Noble's
5 positive equities outweighed the negative ones and granted
6 Noble's request for a waiver of inadmissibility pursuant to
7 section 212(c). See id. at 9.

8 The BIA's Opinion

9 The government appealed the IJ's decision to the BIA.
10 According to the BIA, the "sole question on appeal [was] whether
11 the respondent merit[ed] section 212(c) relief in the exercise of
12 discretion, a matter [the] Board reviews de novo." BIA Opinion
13 at 1. The BIA considered a variety of factors: the seriousness
14 of the criminal charges against Noble; the number of them
15 (including those which he admitted committing but for which he
16 had not been convicted); that "the circumstances under which some
17 of these crimes were committed suggest the possibility that he
18 was willing and able to advance his criminal enterprise by means
19 of violence"; and the fact that the criminal behavior continued
20 after his deportation proceedings began. Id. at 2.

21 In light of these "significant negative factors," the
22 BIA opined, Noble would be entitled to relief only if he "[came]
23 forward with evidence of unusual or outstanding equities,
24 including proof of genuine rehabilitation." Id. The BIA first
25 acknowledged that some of Noble's positive factors did rise to
26 the level of "unusual or outstanding equities." Id. at 3. The

1 BIA further noted that Noble had "expressed sincere remorse for
2 his past conduct and . . . testified honestly about that conduct
3 in open court," thereby adhering to the IJ's credibility
4 determination. Id.

5 On the issue of rehabilitation, however, the BIA
6 observed:

7 [R]emorsefulness is not the same as
8 rehabilitation. The fact that the respondent
9 has continued to commit crimes after the
10 commencement of these proceedings and after
11 receiving explicit warnings from the [IJ]
12 about the potential consequences of such
13 conduct frankly leaves us with very serious
14 doubts as to the authenticity of [Noble's]
15 rehabilitation.

16 Id. After "balancing the various factors in [Noble's] case,"
17 including "unusual or outstanding" equities in his favor,
18 "against the adverse factor of his very serious criminal history
19 and [the agency's] reservations as to his rehabilitation," the
20 BIA concluded that it was "constrained to find that a favorable
21 exercise of discretion would not be in the best interests of the
22 United States." Id. The BIA therefore vacated the IJ's decision
23 in relevant part and denied the section 212(c) waiver.

24 Noble petitions for review.

25 **DISCUSSION**

26 I. Jurisdiction

27 At least in the absence of constitutional or legal
28 issues, we do not have jurisdiction to review final orders of
29 removal against aliens deemed by the BIA to be removable because
30 they were convicted of a specified criminal offense, including,

1 inter alia, an aggravated felony or controlled substance
2 violation. See 8 U.S.C. § 1252(a)(2)(C) (precluding jurisdiction
3 where alien is removed after violating 8 U.S.C.
4 § 1227(a)(2)(A)(iii) (aggravated felony) or § 1227(a)(2)(B)
5 (controlled substance offense)). We also lack jurisdiction to
6 review purely discretionary decisions. See 8 U.S.C.
7 § 1252(a)(2)(B)(ii). Section 106 of the REAL ID Act of 2005,
8 however, restored our jurisdiction over "constitutional claims or
9 questions of law." 18 U.S.C. § 1252(a)(2)(D); see Xiao Ji Chen
10 v. Dep't of Justice, 471 F.3d 315, 324 (2d Cir. 2006).

11 II. The BIA's Review of the IJ's Decision

12 The government seeks dismissal of the petition because,
13 it contends, we do not have jurisdiction to review the BIA's
14 discretionary decision denying a section 212(c) waiver of
15 inadmissibility. The petitioner does not assert that we have
16 jurisdiction to review the BIA's ultimate conclusion to deny his
17 application, nor could he successfully do so. See
18 Avendano-Espejo v. Dep't of Homeland Security, 448 F.3d 503, 504
19 (2d Cir. 2006) (per curiam). Instead, he contends that the BIA
20 erred on the narrow ground that it improperly applied de novo
21 review to the IJ's rehabilitation determination, contrary to
22 agency regulations that require clear error review for findings
23 of fact. See 8 C.F.R. § 1003.1(d)(3)(i).

24 As a Court of Appeals, we operate under the familiar
25 rule that when a district court makes a finding of fact or
26 exercises discretion conferred upon it, we must routinely defer

1 to the district court in these matters on appeal. We will
2 overturn a district court's finding of fact only if it is
3 "clearly erroneous" and its exercise of discretion only if the
4 discretion has been "abused." See, e.g., United States v.
5 Agudelo, 414 F.3d 345, 348 (2d Cir. 2005) (findings of fact);
6 United States v. Rigas, 490 F.3d 208, 238 (2d Cir. 2007)
7 (exercise of discretion). By contrast, while the scope of the
8 BIA's review of findings of fact on appeal from a ruling of an IJ
9 is similar to ours when reviewing factual findings of a district
10 judge, the BIA's standard of review of discretionary decisions by
11 an IJ is quite different from ours:

12 (i) . . . Facts determined by the immigration
13 judge including findings as to credibility of
14 testimony, shall be reviewed only to determine
15 whether the findings of the immigration judge are
16 clearly erroneous.

17 (ii) The Board may review questions of law,
18 discretion, and judgment and all other issues in
19 appeals from decisions of immigration judges de
20 novo.

21 8 C.F.R. §§ 1003.1(d) (3) (i)&(ii) (emphasis added). The
22 discretionary portion of an IJ's decision is thus reviewed by the
23 BIA as though it were deciding the issue in the first instance.

24 Noble argues that the BIA erred as a matter of law by
25 applying de novo review under subsection (ii) to overturn the
26 IJ's finding of fact that Noble had been rehabilitated. Because
27 it was a finding of fact, Noble contends, the BIA could do so
28 properly therefore only under subsection (i) and only if it
29 concluded that the finding was clearly erroneous. Noble frames
30 his argument as a constitutional claim of a violation of his due

1 process rights. Pet. Br. at 15. To determine whether we have
2 jurisdiction, however, we must "study the arguments
3 asserted . . . [and] determine, regardless of the rhetoric
4 employed in the petition, whether it merely quarrels over the
5 correctness of the factual findings or justification for the
6 discretionary choices" made by the BIA. Xiao Ji Chen, 471 F.3d
7 at 329. Although the question of the BIA's proper standard of
8 review does not raise a constitutional issue, Noble's argument is
9 best interpreted to assert that we have jurisdiction because he
10 raises a question of law -- the application by the BIA of a
11 legally erroneous standard of review. See Khan v. Gonzales, 495
12 F.3d 31, 35 (2d Cir. 2007) ("[E]ven when the petitioner fails to
13 invoke the rhetoric of 'a constitutional claim' or 'question of
14 law,' our analysis of a petitioner's arguments may reveal that
15 they do in fact raise reviewable issues."). Although in some
16 circumstances we do have jurisdiction to review such claims, see
17 Barco-Sandoval v. Gonzales, 496 F.3d 132, 135 n.5 (2d Cir. 2007);
18 Khan, 495 F.3d at 34, here, no matter how it is framed, Noble's
19 argument mischaracterizes the nature of the agency's decision.
20 The BIA's conclusion regarding Noble's section 212(c) application
21 was discretionary and, therefore, beyond our jurisdiction.

22 The IJ, in her decision, referred to "evidence of
23 rehabilitation," IJ Decision at 9, and commented on Noble's
24 "willingness to continue his progress toward a drug-free and
25 crime-free lifestyle." Id. at 8. The IJ concluded that [Noble]
26 ha[d] finally demonstrated good efforts at rehabilitation." Id.

1 The role of the BIA was to consider Noble's
2 rehabilitation, which the IJ had examined, and weigh it with and
3 against other relevant factors³ in order to render an informed
4 discretionary decision as to whether Noble should be permitted to
5 stay. See Restrepo v. McElroy, 369 F.3d 627, 634 (2d Cir. 2004)
6 ("In evaluating a section 212(c) application, an immigration
7 judge must balance the adverse factors evidencing an alien's
8 undesirability as a permanent resident with the social and humane
9 considerations presented in his behalf.") (internal quotation
10 marks and citation omitted). It did just that. It concluded,
11 "[W]hen we weigh the[] [favorable] equities against the adverse
12 factor of his very serious criminal history and our reservations
13 as to his rehabilitation we are constrained to find that a
14 favorable exercise of discretion would not be in the best
15 interests of the United States." BIA Opinion at 3. To be sure,

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Favorable considerations have been found to include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives).

Matter of Marin, 16 I. & N. Dec. 581, 584-585 (BIA 1978).

1 the BIA also expressed its view that "[t]he fact that the
2 respondent has continued to commit crimes after the commencement
3 of these proceedings and after receiving explicit warnings from
4 the Immigration Judge about the potential consequences of such
5 conduct frankly leaves us with very serious doubts as to the
6 authenticity of the respondent's rehabilitation." Id. But the
7 BIA made this observation while addressing "the sole question on
8 appeal" -- "whether [Noble] merits section 212(c) relief in the
9 exercise of discretion" Id. at 1. It was thus
10 exercising its discretion by balancing the equities, including
11 rehabilitation, which, at least in this case, we do not have the
12 power to review.

13 In Wallace v. Gonzales, 463 F.3d 135 (2d Cir. 2006)
14 (per curiam), we addressed an argument similar to that which
15 Noble makes here. There, the IJ had granted the applicant's
16 petition under 8 U.S.C. § 1255, which allows the status of aliens
17 meeting certain criteria to "be adjusted by the Attorney General,
18 in his discretion and under such regulations as he may prescribe,
19 to that of an alien lawfully admitted for permanent residence."
20 Id. § 1255(a). After balancing the equities, the BIA overturned
21 the IJ's decision that the waiver should be granted. Wallace,
22 463 F.3d at 137. The Board concluded that the IJ "erred in
23 finding adequate evidence of rehabilitation which would outweigh
24 the negative criminal history," id., because "although 'the
25 evidence does suggest that [Wallace] has attempted to
26 rehabilitate himself while incarcerated, we cannot find that this

1 outweighs the seriousness of his conviction for robbery and other
2 indications of criminal activity.'" Id. at 137-38 (quoting the
3 BIA's opinion in Wallace). Wallace argued on appeal "that the
4 BIA exceeded its authority under federal regulations when it
5 rejected the IJ's finding that Wallace had demonstrated
6 rehabilitation." Id. at 138.

7 We declined to consider Wallace's "argu[ment] that the
8 BIA violated 8 C.F.R. § 1003.1(d)(3)[(i)] when it reversed the
9 IJ's conclusion that Wallace merited an adjustment of status
10 because the factual findings of an IJ may be reversed only when
11 the Board deems them 'clearly erroneous.'" Id. at 140. "The BIA
12 did not reject any factual determination of the IJ with respect
13 to Wallace's 'rehabilitation.'" Id. at 141. Instead, we
14 concluded, the BIA had merely "recounted the IJ's findings and
15 concluded that the IJ incorrectly exercised his discretion in
16 granting Wallace an adjustment of status." Id. In doing so, we
17 noted that "[a]lthough any reversal by the BIA of an IJ's
18 discretionary determination must involve consideration of the
19 underlying facts, a review of the factual record by the BIA does
20 not convert its discretionary determination as to whether a
21 petitioner warrants an adjustment of status into improper
22 factfinding." Id.

23 We do not discount the possibility, of course, that in
24 another case, the BIA's declining properly to defer to factual
25 findings by the IJ regarding rehabilitation as required by
26 section 1003.1(d)(3)(i) will amount to an error of law. But

1 here, we think, as in Wallace, the BIA was engaging in a
2 recalculation of the equities in declining to grant a
3 discretionary waiver of removal despite the IJ's conclusion to
4 the contrary. In the course of explaining its exercise of that
5 discretion, it noted the nature and extent of Noble's
6 rehabilitation and recorded its view that it had "reservations,"
7 i.e., "very serious doubts" about it. BIA Decision at 3. It
8 would have made our review easier had the BIA said that it had
9 "reservations as to the extent of his rehabilitation" rather than
10 "reservations as to his rehabilitation," id., and to have
11 observed, "frankly," that it was left "with very serious doubts
12 as to the degree of [Noble's] rehabilitation" rather than as to
13 its "authenticity." Read in the context of the rest of the BIA's
14 opinion, however, it becomes clear that these comments were part
15 of the process by which the BIA made a judgment as to whether, in
16 light of Noble's rehabilitation, among other things, the Attorney
17 General's discretion ought to be exercised in his favor.

18 In its analysis, the BIA agreed with the IJ that Noble
19 had demonstrated unusual or outstanding equities, and further
20 adhered to the IJ's credibility determination, particularly as it
21 pertained to Noble's expression of remorse. But unlike the IJ,
22 the BIA did not think that Noble's positive equities, in
23 conjunction with any "evidence of rehabilitation," IJ Decision at
24 9, sufficiently outweighed the seriousness of his criminal
25 history to warrant the exercise of its favorable discretion. We
26 have no authority to review that discretionary determination.

1

CONCLUSION

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For the foregoing reasons, the petition is dismissed.