

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2006

4 (Argued: March 21, 2007 Decided: September 11, 2007
5 Errata Filed: September 27, 2007)
6 Docket No. 05-6055-ag

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8 MOHAMMAD HOMAYUN MAIWAND,

9 Petitioner,

10 - v -

11 ALBERTO R. GONZALES, Attorney General,

12 Respondent.

13 -----
14 Before: SACK, B.D. PARKER, and HALL, Circuit Judges.

15 Petition for review of a decision of the Board of
16 Immigration Appeals denying the petitioner's motion to terminate
17 removal proceedings based on his refugee status and denying his
18 applications for a waiver of inadmissibility and relief under the
19 Convention Against Torture.

20 Petition denied in part and dismissed in part.

21 MICHAEL P. DIRAIMONDO, DiRaimondo &
22 Masi, LLP (Marialaina L. Masi, Mary
23 Elizabeth Delli-Pizzi, Stacy A. Huber,
24 of counsel), Melville, NY for
25 Petitioner.

26 PAPU SANDHU, Office of Immigration
27 Litigation, Department of Justice (Peter
28 D. Keisler, Assistant Attorney General,
29 of counsel), Washington, DC for
30 Respondent.

1 SACK, Circuit Judge:

2 Mohammad Homayun Maiwand, a native and citizen of
3 Afghanistan, petitions for review of a decision by the Board of
4 Immigration Appeals ("BIA") denying 1) his application for a
5 waiver of inadmissibility under section 212(c) of the Immigration
6 and Nationality Act ("INA"), 8 U.S.C. § 1182(c); 2) his request
7 for relief pursuant to regulations implementing the United
8 Nations Convention Against Torture and Other Cruel, Inhuman or
9 Degrading Treatment or Punishment, adopted Dec. 10, 1984, S.
10 Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85 ("CAT"); and 3)
11 his motion to terminate the removal proceedings against him. In
12 re Mohammad Homayan Maiwand, No. A 28 906 603 (B.I.A. Jan. 29,
13 2004), aff'g No. A 28 906 603 (Immig. Ct. N.Y. City July 22,
14 2002).

15 Maiwand contests the BIA's denial of section 212(c)
16 relief, but his arguments raise no constitutional claim or
17 question of law. We are therefore without jurisdiction to review
18 the BIA's decision in that regard. To that extent, we dismiss
19 the petition. We also dismiss the petition insofar as it asks us
20 to review the correctness of the IJ's fact-finding regarding
21 Maiwand's CAT claim. To the extent Maiwand argues that the IJ
22 erred in assessing what evidence could satisfy his burden of
23 proof under the CAT regulations, we find the argument to be
24 without merit.

25 Maiwand's challenge to the third part of the BIA's
26 decision is based on his argument that because he entered the

1 country as a refugee, the BIA is statutorily prohibited from
2 ordering his removal without first cancelling that status.
3 Although this is a question of law that we have jurisdiction to
4 review, we conclude that the BIA's interpretation of the relevant
5 statutes and regulations are reasonable. To that extent, we deny
6 the petition.

7 **BACKGROUND**

8 According to Maiwand's testimony before Immigration
9 Judge ("IJ") Alan A. Vomacka, Maiwand is a member of the Mohummed
10 Ziy monarchy, which ruled Afghanistan for about two hundred years
11 prior to the 1980s. In 1988, after the Ziy family was overthrown
12 by the Soviet Union, Maiwand escaped with his wife Fazila to the
13 United States. He was accorded refugee status in 1990. In 1992,
14 the INS¹ granted his application for adjustment of status and,
15 retroactive to 1991, made Maiwand a legal permanent resident
16 ("LPR"). Fazila became a United States citizen in 1997. Maiwand
17 and Fazila have three children born in the United States in 1990,
18 1992, and 1994, respectively. They are United States citizens.

19 In 1993, Maiwand, in exchange for \$5,000, introduced an
20 Afghani friend, who said he wanted to purchase heroin, to another
21 friend who Maiwand knew was selling heroin. Maiwand was charged
22 by the State of New York with, and pled guilty to, second degree

¹ 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. Because the rulings at issue in this case were made when the agency was still the INS, we refer to it as the INS in this opinion.

1 criminal sale of a controlled substance. Maiwand's conviction
2 subjected him to deportation because it "relat[ed] to a
3 controlled substance." 8 U.S.C. § 1251(a)(2)(B)(i) (1994)
4 (current version at 8 U.S.C. § 1227). The INS issued an order to
5 show cause in 1994. Maiwand appeared before an IJ, conceded
6 removability, attempted to secure refugee status through his
7 first asylum application, and applied for relief under INA §
8 212(c). The IJ found Maiwand ineligible for both forms of
9 relief. Maiwand's case then began a convoluted journey through
10 the immigration agency and the federal courts, recounted at
11 length in In re Mohammad Homayan Maiwand, No. A 28 906 603
12 (B.I.A. June 23, 2000). As relevant to this petition, the BIA
13 remanded Maiwand's case to the IJ in 2000 to allow the IJ to
14 reconsider Maiwand's application for section 212(c) relief and
15 any other relief that might have been available as a result of
16 the amount of time that had passed since the IJ had last
17 considered Maiwand's applications. See id.

18 On remand, the IJ denied Maiwand's application for a
19 waiver of inadmissibility pursuant to section 212(c), in large
20 part because new testimony by Maiwand before the IJ convinced the
21 IJ that Maiwand's earlier testimony falsely minimized his
22 involvement in the heroin transaction that led to his 1993
23 conviction. In light of the new information and the IJ's
24 corresponding doubts about Maiwand's credibility, the IJ decided
25 not to exercise the Attorney General's discretion delegated to
26 the IJ to grant Maiwand a section 212(c) waiver.

1 We apply the principles of Chevron U.S.A., Inc. v.
2 Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), to agency
3 interpretations of statutes when Congress has delegated law-
4 making authority to the agency and the interpretation was
5 promulgated pursuant to that authority. Ucelo-Gomez v. Gonzales,
6 464 F.3d 163, 168 (2d Cir. 2006) (citing United States v. Mead
7 Corp., 533 U.S. 218, 226-27 (2001)). Precedential BIA decisions
8 are eligible for Chevron deference insofar as they represent the
9 agency's authoritative interpretations of statutes. See id. at
10 170.

11 II. Jurisdiction

12 Because Maiwand was ordered removed pursuant to 8
13 U.S.C. § 1227(a)(2)(B),² we have jurisdiction to review only
14 "constitutional claims or questions of law raised [in his]
15 petition for review." 8 U.S.C. § 1252(a)(2)(D); see also
16 § 1252(a)(2)(C) (providing that its jurisdictional limitations
17 apply when an alien "is removable by reason of having committed a
18 criminal offense covered" in, inter alia, section 1227(a)(2)(B)).
19 "[T]he term 'constitutional claims' clearly relates to claims

² Section 1227(a)(2)(B) makes deportable "[a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21)." 8 U.S.C. § 1227(a)(2)(B). Maiwand's conviction for the heroin deal falls within this provision. See 21 U.S.C. § 802 (defining a "controlled substance" as any substance listed in a schedule in 21 U.S.C. § 812); 21 U.S.C. § 812 (listing heroin as a schedule I substance).

1 brought pursuant to provisions of the Constitution of the United
2 States." Xiao Ji Chen v. Gonzales, 471 F.3d 315, 324 (2d Cir.
3 2006). The phrase "questions of law" encompasses "the same types
4 of issues [over which] courts traditionally exercised
5 [jurisdiction] in habeas review over Executive detentions," id.
6 at 326-27, which the Supreme Court has noted is "broader than
7 habeas review over other types of detentions resulting from
8 judicial determinations," St. Cyr, 533 U.S. at 301. In
9 determining whether we have jurisdiction, we must "study the
10 arguments asserted . . . [and] determine, regardless of the
11 rhetoric employed in the petition, whether it merely quarrels
12 over the correctness of the factual findings or justification for
13 the discretionary choices." Xiao Ji Chen, 471 F.3d at 329. If
14 so, we do not have jurisdiction to review it. See id. We have
15 observed, generally, that we have jurisdiction to review "the
16 application of law to fact, including what evidence may satisfy a
17 party's burden of proof." Gui Yin Lin v. INS, 475 F.3d 135, 137
18 (2d Cir. 2007) (per curiam) (citations omitted).

19 A. Section 212(c) Relief

20 Former INA section 212(c) granted the Attorney General
21 discretion to waive deportation orders issued to LPRs who have
22 lived in the United States for at least seven consecutive years.
23 See INS v. St. Cyr, 533 U.S. 289, 294-95 (2001). This provision
24 was repealed by the Illegal Immigration Reform and Immigrant

1 Responsibility Act of 1996 ("IIRIRA"). Section 212(c)'s waiver
2 of inadmissibility relief nonetheless remains available to aliens
3 who pled guilty to crimes prior to the month of April 1997, in
4 which IIRIRA became effective, and who, "notwithstanding those
5 convictions, would have been eligible for § 212(c) relief at the
6 time of their plea under the law then in effect." St. Cyr, 533
7 U.S. at 326.

8 Maiwand first disputes the IJ's and BIA's conclusions
9 that his testimony about the heroin transaction in his hearings
10 before the IJ was inconsistent. He asserts that the apparent
11 inconsistency resulted from superficial questioning of him about
12 his role in the offense at his first hearing. Because this
13 attack "essentially disputes the correctness of an IJ's
14 fact-finding," Xiao Ji Chen, 471 F.3d at 329, we are without
15 jurisdiction to review it.

16 Maiwand next argues that his strong family ties to
17 United States citizens, along with other favorable factors,
18 warrant a waiver of inadmissibility under section 212(c)
19 notwithstanding the negative weight that attaches to his drug
20 conviction. This argument amounts to a challenge to the "wisdom
21 of [the IJ's] exercise of discretion," id., and we therefore have
22 no jurisdiction to review it.

23 Maiwand also asserts that the BIA ignored a
24 psychiatrist's report that provided evidence of his
25 rehabilitation and the hardships his family would endure if he
26 was removed. He contends that the BIA thereby abused its

1 discretion and violated his right to due process. But while an
2 "IJ's unambiguous mischaracterization of the record raises a
3 question of law," Gui Yin Liu, 475 F.3d at 138, an argument that
4 "merely quibbles with the IJ's description of the facts," Khan v.
5 Gonzales, 495 F.3d 31, 36 (2d Cir. 2007), does not. Here, the
6 BIA explicitly referenced the report in its opinion.
7 Accordingly, we conclude that Maiwand's complaint regarding the
8 extent of the agency's reliance on the report amounts to nothing
9 more than a "quarrel[] over the . . . justification for the
10 discretionary choices" made, a decision we cannot review. Xiao
11 Ji Chen, 471 F.3d at 329.

12 B. CAT Relief

13 Regulations implementing CAT provide that "once an
14 alien establishes that 'it is more likely than not that he or she
15 would be tortured if removed to the proposed country of removal,'
16 the United States may not remove him or her to that country."
17 Ramsameachire v. Ashcroft, 357 F.3d 169, 184 (2d Cir. 2004)
18 (quoting 8 C.F.R. § 208.16(c)(2)). Maiwand contends that the BIA
19 "failed to cite any basis for its decision" that he had failed to
20 meet his burden of proof and that the decision was "clearly in
21 error, unsupported by the record, and without any basis in fact."
22 Maiwand Br. at 51, 52. Because the latter argument "essentially
23 disputes the correctness of an IJ's fact-finding," Xiao Ji Chen,
24 471 F.3d at 329, we are without jurisdiction to review it, id.
25 To the extent that Maiwand challenges the IJ's application of

1 facts to the standard of proof required under the CAT
2 regulations, we find the challenge to be without merit.

3 C. Motion to Terminate

4 Maiwand also contends that his motion to terminate the
5 removal proceedings should have been granted because he is
6 statutorily ineligible for removal on the ground that his refugee
7 status was never revoked in accordance with 8 U.S.C.
8 § 1157(c) (4). This is a question of law that we do have
9 jurisdiction to review. See Romanishyn v. Attorney Gen. of the
10 United States, 455 F.3d 175, 180 (3d Cir. 2006) ("Whether an
11 alien who entered the country as a refugee and subsequently
12 acquired LPR status may be placed in removal proceedings even
13 though his refugee status was never terminated under 8 U.S.C.
14 § 1157(c) (4), is a question of law.").

15 III. Motion to Terminate: The Merits

16 The INA provides that a refugee is a person outside the
17 country of his nationality who "is unable or unwilling to return
18 to, and is unable or unwilling to avail himself or herself of the
19 protection of, that country because of persecution or a
20 well-founded fear of persecution on account of race, religion,
21 nationality, membership in a particular social group, or
22 political opinion." 8 U.S.C. § 1101(a) (42). A refugee may be
23 admitted to the United States notwithstanding 1) the likelihood
24 that he will become a public charge; 2) the absence of a labor
25 certification; and 3) the lack of a valid visa or other entry

1 document. See 8 U.S.C. § 1157(c)(1), (3) (granting the Attorney
2 General discretion, within numerical limits provided in other
3 subsections, to admit refugees). Unless the alien is
4 inadmissible because of, inter alia, his or her involvement in
5 drug trafficking, 8 U.S.C. § 1182(a)(2)(C), the Attorney General
6 may also waive most other grounds for inadmissibility, see 8
7 U.S.C. § 1157(c)(3) (allowing the Attorney General to waive any
8 ground of inadmissibility except for subsections 1182(a)(2)(C),
9 (3)(A)-(C), (3)(E)).

10 Refugee status may be terminated only if the Attorney
11 General finds that the alien did not qualify as a refugee at the
12 time of entry. See 8 U.S.C. § 1157(c)(4) (providing for
13 termination of refugee status "if the Attorney General determines
14 that the alien was not in fact a refugee within the meaning of
15 section 1101(a)(42) . . . at the time of the alien's admission").

16 Maiwand argues that unless his refugee status has been
17 terminated, he may not be removed. But the BIA has recently held
18 otherwise. In re Smriko, 23 I. & N. Dec. 836, 842 (B.I.A. 2005)
19 (finding "no merit to the respondent's assertion that he is
20 immune from removal on the basis of his convictions for crimes
21 involving moral turpitude because his refugee status has not been
22 terminated" under section 1157(c)(4)). The agency noted that the
23 statutes providing for removal refer simply to "any alien" or
24 "the alien" -- they do not distinguish aliens who arrived as
25 refugees from other aliens. See id. at 838 (citing 8 U.S.C.
26 §§ 1227(a), 1229). Moreover, refugees must apply for adjustment

1 to LPR status within a year of their arrival and, upon such
2 application, may be charged with "any applicable ground of
3 inadmissibility . . . or deportability." See id. at 839 (citing
4 8 U.S.C. §§ 1159, 1229a; 8 C.F.R. § 209.1). The BIA reasoned
5 that "[i]f conditional admission as a refugee does not immunize
6 an alien from the general grounds of admissibility, it follows
7 that a refugee admitted as a lawful permanent resident . . . is
8 not immunized from the grounds for removal that are applicable to
9 all other aliens." Id. at 840. It also considered it "difficult
10 to imagine that Congress intended" the result urged by the
11 petitioner -- viz., a statutory framework that allowed refugees
12 to "commit crimes with impunity, or even engage in terrorist
13 activity and remain exempt from removal" as long as they were in
14 fact refugees at the time of entry. Id. at 841.

15 The statute is silent as to whether refugee status must
16 be terminated prior to commencement of removal proceedings. See
17 8 U.S.C. § 1229a (setting forth how removal proceedings are to be
18 conducted without reference to refugee status). We must
19 therefore defer to the agency's interpretation if it is
20 reasonable. See Chevron, 467 U.S. at 843 ("[I]f the statute is
21 silent or ambiguous with respect to the specific issue, the
22 question for the court is whether the agency's answer is based on
23 a permissible construction of the statute.").

24 Although we have not yet addressed whether the BIA's
25 interpretation of the relevant statutes in Smriko is reasonable,
26 the Third and Ninth Circuits have done so and both have concluded

1 that it is. See Kaganovich v. Gonzales, 470 F.3d 894, 897-98
2 (9th Cir. 2006) (citing Romanishyn, 455 F.3d at 185). We agree.

3 As those circuits recognized, refugee status does not
4 afford complete immunity from removal. See Romanishyn, 455 F.3d
5 at 185 (recognizing that "a refugee may under some circumstances
6 be removed even if his refugee status has not been terminated");
7 Kaganovich, 470 F.3d at 898 (upholding the BIA's interpretation
8 in light of "statutory text allowing removal of any alien"
9 (emphasis in original)). The fact that Maiwand's adjustment to
10 LPR status did not terminate his refugee status is irrelevant.
11 Even if he retained his refugee status, he would have remained
12 subject to removal for committing a drug trafficking offense.
13 See 8 U.S.C. § 1159 (requiring refugees to "return or be returned
14 to the custody of the Department of Homeland Security [within a
15 year of their entry] for inspection and examination for admission
16 to the United States as an immigrant in accordance with the
17 provisions of," inter alia, 8 U.S.C. § 1229a; 8 U.S.C. § 1229a
18 (providing that "[a]n alien placed in [removal] proceedings . . .
19 may be charged with any applicable ground of
20 inadmissibility . . . or any applicable ground of
21 deportability"); 8 U.S.C. § 1227(a)(2)(B)(i) (making deportable
22 "[a]ny alien who at any time after admission has been convicted
23 of a violation of (or a conspiracy or attempt to violate) any law
24 or regulation of a State . . . relating to a controlled
25 substance").

26 **CONCLUSION**

1 We have carefully considered the remainder of Maiwand's
2 arguments and find them to be without merit. At the heart of
3 Maiwand's petition are his assertions that the dangers he is
4 likely to face if returned to Afghanistan, his demonstrated
5 rehabilitation, and the hardship his family is likely to suffer
6 upon his removal outweigh the fact of his conviction for a
7 controlled substances offense over a decade ago. While we have
8 no reason to doubt the factual basis for those assertions, for
9 the foregoing reasons, we do not have jurisdiction to address
10 them. The petition for review therefore is dismissed in part,
11 and otherwise denied.