

1 UNITED STATES COURT OF APPEALS

2  
3 FOR THE SECOND CIRCUIT

4  
5 August Term, 2010

6  
7  
8 (Argued: September 1, 2010 Decided: December 6, 2010)

9  
10 Docket No. 09-3877-ag

11  
12 - - - - -x

13  
14 JOSEFA ROSARIO,

15  
16 Petitioner,

17  
18 - v.-

09-3877-ag

19  
20 ERIC H. HOLDER, JR., in his capacity as  
21 United States Attorney General,

22  
23 Respondent.\*

24  
25 - - - - -x

26  
27 Before: DENNIS JACOBS, Chief Judge,  
28 REENA RAGGI, Circuit Judge,  
29 JED S. RAKOFF,\*\* District Judge.  
30

31 Petitioner, a citizen of the Dominican Republic, seeks  
32 cancellation of removal as an abused spouse under the

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\* The Clerk of Court is respectfully instructed to amend the official case caption as shown above.

\*\*The Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

1 amended Immigration and Naturalization Act. 8 U.S.C. §  
2 1229b(b)(2). An Immigration Judge concluded that Rosario  
3 was not "battered or subjected to extreme cruelty" as  
4 defined by the statute and therefore did not warrant  
5 discretionary cancellation of removal, and the Board of  
6 Immigration Appeals affirmed. We dismiss the petition for  
7 lack of subject matter jurisdiction because the BIA's  
8 decision raises no constitutional claims or questions of  
9 law.

10

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26  
27 DENNIS JACOBS, Chief Judge:

28  
29 The Petitioner, Josefa Rosario, is a citizen of the  
30 Dominican Republic who seeks cancellation of removal as an  
31 abused spouse under the amended Immigration and  
32 Naturalization Act. 8 U.S.C. § 1229b(b)(2). An Immigration  
33 Judge ("IJ") found that Rosario was not "battered or

1 subjected to extreme cruelty" within the meaning of the  
2 statute and therefore did not warrant discretionary  
3 cancellation of removal. The Board of Immigration Appeals  
4 ("BIA") affirmed. We dismiss Rosario's petition for lack of  
5 subject matter jurisdiction because the BIA's decision  
6 raises no constitutional claims or questions of law.

7  
8 **BACKGROUND**

9 Rosario was found credible by the IJ; we therefore  
10 adduce the facts to which she testified.

11 Rosario entered the United States on a one-month non-  
12 immigrant tourist visa in 1994. After overstaying by  
13 approximately two years, she married Pedro Martinez, a U.S.  
14 citizen, and petitioned to adjust her status to Legal  
15 Permanent Resident in 1996.

16 The marriage soured soon after the petition was filed,  
17 and Martinez became aggressive and insulting. There were  
18 approximately five incidents of physical abuse or  
19 intimidation in the three-month period between June 1997 and  
20 September 1997, when Martinez was jailed (for offenses  
21 unrelated to Rosario). There are no allegations of abuse  
22 after his release from prison in 2000.

23 During the incidents of abuse, Martinez (variously)  
24 grabbed Rosario by the arms and shoulders, shook her,

1 verbally insulted her, and threw her on the bed. Martinez  
2 also demanded money from her and threatened to withdraw her  
3 application for a Green Card. Rosario did not report these  
4 incidents to the police or seek medical attention.

5 During this time, Rosario's Green Card application  
6 languished, and, in 2000, it was denied as abandoned. In  
7 2002, the Department of Homeland Security served Rosario  
8 with a Notice to Appear and charged her with removal.

9 At her Notice to Appear hearing, Rosario admitted she  
10 was in the U.S. illegally and conceded removability. Soon  
11 afterward, she filed a petition for Special Rule  
12 Cancellation of Removal under 8 U.S.C. § 1229b(b)(2)(A),  
13 which gives the Attorney General discretion to cancel the  
14 removal of an otherwise deportable alien who has been  
15 "battered or subjected to extreme cruelty" by her U.S.  
16 citizen spouse.

17 In 2008, an IJ denied Rosario's petition, concluding  
18 that she had not been "battered or subjected to extreme  
19 cruelty." Rosario appealed this decision to the BIA, which  
20 affirmed. Rosario now seeks review in this Court.

## 21 22 **DISCUSSION**

### 23 **I.**

1           As part of the 1994 Violence Against Women Act,  
2 Congress granted the Attorney General discretion to cancel  
3 the removal of otherwise deportable aliens who were found to  
4 have been "battered or subjected to extreme cruelty" by  
5 their U.S. citizen spouses. Pub. L. No. 103-322, § 40703,  
6 108 Stat. 1796, 1955 (1994) (codified at 8 U.S.C. §  
7 1229b(b)(2)(A)). The five requisites for this relief are:

- 8           (1) "the alien has been battered or subjected to  
9           extreme cruelty by a spouse" who is a U.S. citizen  
10           or permanent resident;  
11  
12           (2) "the alien has been physically present in the  
13           United States for a continuous period of not less  
14           than 3 years";  
15  
16           (3) "the alien has been a person of good moral  
17           character during such period";  
18  
19           (4) "the alien...has not been convicted of an  
20           aggravated felony"; and  
21  
22           (5) "the removal would result in extreme hardship to  
23           the alien, the alien's child, or the alien's  
24           parent."

25  
26 8 U.S.C. § 1229b(b)(2)(A)(i)-(v).

27           The determination as to whether an alien should be  
28 given this discretionary cancellation of removal is made by  
29 an IJ subject to appeal to the BIA. In 1996, Congress  
30 stripped the federal courts of jurisdiction to review these  
31 discretionary rulings. Illegal Immigration Reform and  
32 Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §

1 306, 110 Stat. 3009, 3009-607 (codified at 8 U.S.C. §  
2 1252(a)(2)(B)(i)).

3 Concerned that a complete ban on judicial review of BIA  
4 determinations might violate the Suspension Clause, the  
5 Supreme Court in 2001 construed the jurisdictional ban to  
6 allow for limited federal court review of BIA decisions.  
7 INS v. St. Cyr, 533 U.S. 289, 307 (2001). Specifically, the  
8 Court held that even where the Attorney General had  
9 discretion over whether to grant cancellation of removal,  
10 the alien was nevertheless entitled to a determination of  
11 whether she was *eligible* for discretionary cancellation, and  
12 that this determination of eligibility was reviewable in the  
13 U.S. Circuit Courts when it was "governed by specific  
14 statutory standards." Id. Thus, while the federal courts  
15 retained jurisdiction to review the legal question of  
16 statutory eligibility, the Attorney General's exercise of  
17 discretion could not be second-guessed.

18 The REAL ID Act of 2005 amended the Illegal Immigration  
19 Reform and Immigrant Responsibility Act ("IIRIRA") to  
20 obviate the Supreme Court's Suspension Clause concerns.  
21 Pub. L. No. 109-13, § 106, 119 Stat. 231, 310 (codified in  
22 at 8 U.S.C. § 1252(a)(2)(D)); see also Xiao Ji Chen v.  
23 Gonzales, 471 F.3d 315, 326 (2d Cir. 2006) (describing

1 legislative history of REAL ID Act). The REAL ID Act  
2 prescribed an exception to the general ban on judicial  
3 review of BIA decisions for Circuit Court review of  
4 "constitutional claims or questions of law." 8 U.S.C. §  
5 1252(a)(2)(D).

6 In the wake of St. Cyr and the REAL ID Act, this Court  
7 described the scope of its jurisdiction to review BIA  
8 determinations in two ways. First, based on St. Cyr, we  
9 stated that we could review those "nondiscretionary  
10 decisions" by the BIA that underlie its exercise of  
11 discretion in granting or denying cancellation of removal.  
12 See, e.g., Rodriguez v. Gonzales, 451 F.3d 60, 62 (2d Cir.  
13 2006) (describing scope of review as over nondiscretionary  
14 determinations underlying discretionary relief); Sepulveda  
15 v. Gonzales, 407 F.3d 59, 62-63 (2d Cir. 2005). Later,  
16 based on the REAL ID Act, we stated that we could review  
17 "all constitutional claims or questions of law" raised by  
18 the BIA's exercise of its discretion. See, e.g., Argueta v.  
19 Holder, 617 F.3d 109, 112 (2d Cir. 2010) (describing scope  
20 of review as over constitutional and legal questions).  
21 These two characterizations, which may appear to be two  
22 separate avenues of jurisdiction, are congruent: BIA  
23 statutory interpretation pursuant to an eligibility

1 determination is nondiscretionary and therefore reviewable  
2 precisely because it presents a legal question. In  
3 contrast, the BIA's factfinding, factor-balancing, and  
4 exercise of discretion normally do not involve legal or  
5 constitutional questions, so we lack jurisdiction to review  
6 them.

7

8 **II.**

9 When the BIA's decision explicitly rests on a legal  
10 prescription or statutory interpretation, we unambiguously  
11 have jurisdiction to review it. See Sepulveda, 407 F.3d at  
12 63 (holding that court has jurisdiction to review BIA  
13 determination that alien is ineligible for discretionary  
14 relief as a matter of law). Similarly, when the BIA  
15 explicitly finds an alien to be eligible for discretionary  
16 relief but then refuses to grant relief as an exercise of  
17 its discretion, such a decision is not reviewable.

18 Determining whether we have jurisdiction to review is more  
19 difficult when the BIA is engaged in the application of law  
20 to facts.

21 We determine our jurisdiction by looking at the  
22 *underlying nature* of the BIA's determination rather than any  
23 gloss offered by the parties. Argueta, 617 F.3d at 112 ("We



1 do not rely solely on a petitioner's description of his  
2 claims, but scrutinize a petitioner's arguments to determine  
3 whether they raise reviewable questions." (internal  
4 quotation marks omitted)); Barco-Sandoval v. Gonzales, 516  
5 F.3d 35, 39 (2d Cir. 2008) ("[A] petitioner cannot us[e] the  
6 rhetoric of a constitutional claim or question of law to  
7 disguise what is essentially a quarrel about fact-finding or  
8 the exercise of discretion." (internal quotation marks  
9 omitted)). We ask whether the BIA is expressing legal  
10 doctrine or whether it is engaged in the factfinding and  
11 factor-balancing that are at the core of its discretion.

12 Although, in some sense, every BIA decision involves  
13 the application of law to fact, not every such decision is  
14 reviewable. See Xiao Ji Chen, 471 F.3d at 331 ("The mere  
15 use of the term 'erroneous application' of a statute will  
16 not, however, convert a quarrel over an exercise of  
17 discretion into a question of law."). The mixed questions  
18 of law and fact in BIA decisions are reviewable in three  
19 situations:

- 20 (1) Where the BIA applies the wrong statute,  
21 misinterprets the correct statute, or uses an  
22 erroneous legal standard;  
23
- 24 (2) Where the BIA's underlying factual determination is  
25 "flawed by an error of law"; and  
26
- 27 (3) Where the BIA's conclusion is "without rational  
28 justification," meaning it is located so far

1 outside the range of reasonable options that it is  
2 erroneous as a matter of law.

3  
4 See Mendez v. Holder, 566 F.3d 316, 322 (2d Cir. 2009)  
5 (articulating three situations); Barco-Sandoval, 516 F.3d at  
6 39 (same); Xiao Ji Chen, 471 F.3d at 329 (same). Except in  
7 these scenarios, the BIA's application of law to fact  
8 amounts to the exercise of its discretion and does not raise  
9 the legal or constitutional question required for our  
10 jurisdiction.

11  
12 **III.**

13 Every new petition to review a BIA decision requires us  
14 to make a jurisdictional inquiry: first asking whether the  
15 BIA's decision involves a clear legal prescription; second,  
16 where the decision only involves the application of clearly  
17 established law to a set of facts, asking whether the BIA's  
18 determination comes within any of the three specific  
19 scenarios that justify review.

20 This Circuit has already considered our jurisdiction to  
21 review BIA rulings on certain other aspects of abuse-based  
22 cancellation of removal. In Rodriguez v. Gonzales, 451 F.3d  
23 60 (2d Cir. 2006), we held that whether an alien has been  
24 convicted of an aggravated felony always presents a legal  
25 question and is therefore nondiscretionary and reviewable.  
26 Id. at 62-63. Similarly, in Sepulveda v. Gonzales, 407 F.3d

1 59 (2d. Cir. 2005), we suggested, but did not hold, that  
2 whether an alien satisfies the continuous physical presence  
3 requirement also presents a legal question and its therefore  
4 reviewable. Id. at 63. In Sepulveda, we also reviewed a  
5 BIA ruling that criminal convictions legally preclude  
6 finding that the alien is of "good moral character." Id. at  
7 63-64. Although the fact-specific nature of a moral  
8 character assessment ordinarily suggests that it would  
9 constitute an exercise of discretion not a legal  
10 determination, we held in Sepulveda that the BIA's ruling on  
11 moral character presented a legal question in that  
12 particular case because it was explicitly premised on the  
13 criminal convictions *as a matter of law*. Id.

14 In contrast, in Barco-Sandoval v. Gonzales, 516 F.3d 35  
15 (2d Cir. 2008), and Mendez v. Holder, 566 F.3d 316 (2d Cir.  
16 2009), we held that whether an alien would suffer "extreme  
17 hardship" if deported ordinarily does not require statutory  
18 interpretation but instead involves the application of the  
19 law to particular facts. Thus, we lack jurisdiction to  
20 review such determinations unless they fall into one of the  
21 three categories described in Part II.

#### 22 23 **IV.**

1           Now, we must decide whether we have jurisdiction to  
2 review BIA determinations as to whether a spouse has been  
3 "battered or subjected to extreme cruelty." Like "extreme  
4 hardship"--and unlike criminal conviction or continuous  
5 physical presence--whether an alien has been "battered or  
6 subjected to extreme cruelty" under the statute generally  
7 entails a factual judgment, not a legal prescription.

8           This conclusion finds support in the fact that Congress  
9 did not provide a specific statutory definition for the  
10 terms, and in the fact that the regulatory gloss on the  
11 terms, while requiring more than the unwanted touching of  
12 common law battery, contemplates the exercise of  
13 considerable discretion in assessing the totality of the  
14 circumstances. See 8 C.F.R. § 204.2(c)(1)(vi).<sup>1</sup>

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<sup>1</sup> 8 C.F.R. § 204.2(c)(1)(vi) permits an abused spouse of a United States citizen or lawful permanent resident to self-petition for an adjustment of status. The regulation states that the phrase "was battered by or was the subject of extreme cruelty" includes, but is not limited to:

being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury. Psychological or sexual abuse or exploitation, including rape, molestation, incest (if the victim is a minor), or forced prostitution shall be considered acts of violence. Other abusive actions may also be acts of violence under certain circumstances, including acts that, in and of themselves, may not initially appear violent but that are a part of an overall pattern of violence.



1 Therefore, the BIA's decision in this case involves the  
2 application of law to fact: a determination of whether  
3 Rosario's situation rendered her "battered or subjected to  
4 extreme cruelty" under the statute. Rosario's petition  
5 therefore does not automatically raise a legal or  
6 constitutional issue; it only does so where the BIA applied  
7 the wrong law or misapplied the appropriate law or legal  
8 standard, based its decision on a factual finding premised  
9 on a legal error, or reached a conclusion so far outside the  
10 range of reasonable options as to be without rational  
11 justification.

12 Here, the BIA applied the correct law, 8 U.S.C. §  
13 1229b(b)(2)(A)(i), and the correct legal standard, 8 C.F.R.  
14 § 204.2(e)(1)(vi), to Rosario's case. There were no legal  
15 errors underlying any of the factual findings the BIA used  
16 to reach its decision. And given the level of abuse Rosario  
17 claims to have suffered, it cannot be said that the BIA's  
18 conclusion was without rational justification. Thus, the  
19 BIA's decision does not fall within any of the three  
20 scenarios where we retain jurisdiction to review.

21 Ultimately, the question whether the abuse Rosario  
22 suffered qualifies her for cancellation of removal is not  
23 answered by legal analysis but entails a weighing of facts  
24 and circumstances, the sort of value judgment that lies at

1 the core of the BIA's exercise of discretion. The BIA's  
2 reasoning can be described as an application of law to fact,  
3 but that characterization cannot convert a factual  
4 determination into a legal question. Because the BIA's  
5 decision raised no question of law, we may not second-guess  
6 its discretionary factual judgment that Rosario is not  
7 eligible for cancellation of removal. Therefore, we lack  
8 jurisdiction to hear Rosario's petition.

9  
10 **CONCLUSION**

11 For the foregoing reasons, we dismiss Rosario's  
12 petition for review from an order of the Board of  
13 Immigration Appeals for lack of jurisdiction.