

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Yan Qing Cao v. Holder

342 F. App'x 671 (2d Cir. 2009) · Decided August 18, 2009

SUMMARY

The Second Circuit denied Yan Qing Cao’s petition for review of the BIA’s denial of her untimely and number-barred motion to reopen. The court held that Cao did not establish materially changed country conditions, that the BIA was not required to consider evidence from another case that Cao had not submitted, and that remand for consideration of extra-record evidence was unwarranted.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	Jacobs; Leval; Newman
JURISDICTION	Federal
DECIDED	August 18, 2009
DISPOSITION	writ_denied
PROCEDURAL POSTURE	Petition for review of the Board of Immigration Appeals' denial of Yan Qing Cao's motion to reopen removal proceedings.
STANDARD OF REVIEW	The denial of a motion to reopen is reviewed for abuse of discretion. When the agency considers relevant country-conditions evidence, factual findings are reviewed under the substantial-evidence standard.
PRECEDENTIAL VALUE	Nonprecedential summary order
PARTIES	Yan Qing Cao v. Eric H. Holder, Jr.

TOPICS

- removal proceedings
- judicial review of agency action
- immigration
- appellate procedure
- standard of review

PRACTICE AREAS

- Immigration
- Appellate procedure
- Administrative law

QUESTIONS PRESENTED

1. Whether the BIA abused its discretion by denying Cao's untimely and number-barred motion to reopen for failure to establish materially changed country conditions.
2. Whether the BIA was required to consider evidence that was not submitted in Cao's case but appeared in the record of a different case.
3. Whether the Second Circuit should remand for the agency to consider extra-record evidence.

HOLDINGS

1. The BIA did not abuse its discretion in denying Cao's untimely and number-barred motion to reopen because Cao failed to demonstrate materially changed country conditions sufficient to excuse the time and numerical limitations.
2. The BIA did not abuse its discretion by declining to consider evidence that Cao had not submitted in support of her motion merely because the evidence appeared in the record of another case.
3. The court would not remand for the agency to consider evidence outside the record.

KEY QUOTATIONS

“We do not ourselves attempt to resolve conflicts in record evidence, a task largely within the discretion of the agency” (672)

“it may do so in summary fashion without a reviewing court presuming that it has abused its discretion” (672)

“the regulations set forth procedures to reopen a case before the BIA for the taking of additional evidence” (672)

FACTUAL BACKGROUND

Yan Qing Cao, a native and citizen of the People's Republic of China, sought reopening of her immigration proceedings. Her motion was untimely and number-barred, and she argued that materially changed country conditions excused those limitations. She also argued that the BIA should have considered evidence appearing in the record of another case, including the so-called Guo documents, although she did not submit those documents with her motion.

PROCEDURAL HISTORY

The BIA denied Cao's untimely and number-barred motion to reopen on September 28, 2007. Cao petitioned the Second Circuit for review, arguing that changed country conditions excused the filing limitations and that the BIA should have considered evidence from other proceedings. The Second Circuit denied the petition for review, vacated any previously granted stay of removal, dismissed any pending stay motion as moot, and denied oral argument.

DISPOSITION

writ_denied

CASES CITED

- Ali v. Gonzales, 448 F.3d 515, 517 (2d Cir. 2006)
- Jian Hui Shao v. Mukasey, 546 F.3d 138, 169-72 (2d Cir. 2008)
- Wei Guang Wang v. BIA, 437 F.3d 270, 275 (2d Cir. 2006)
- Xiao Xing Ni v. Gonzales, 494 F.3d 260, 262, 269-70 (2d Cir. 2007)

OPINION

PER CURIAM.

SUMMARY ORDER Petitioner Yan Qing Cao, a native and citizen of the People's Republic of China, seeks review of the September 28, 2007 order of the BIA, denying her motion to reopen. In re Yan Qing Cao, No. A074 854 953 (B.I.A. Sep. 28, 2007).

We assume *672the parties' familiarity with the underlying facts and procedural history in this case. We review the agency's denial of a motion to reopen for abuse of discretion. Ali v. Gonzales, 448 F.3d 515, 517 (2d Cir.2006). Where the agency considers relevant evidence of country conditions in evaluating a motion to reopen, we review the agency's factual findings under the substantial evidence standard.

See Jian Hui Shao v. Mukasey, 546 F.3d 138, 169 (2d Cir.2008). We find that the agency did not err in denying Cao's untimely and number-barred motion to reopen. Cao argues that the BIA erred in concluding that she failed to demonstrate material changed country conditions sufficient to excuse the time and numerical limitation for filing her motion to reopen.

However, this argument fails where we have previously reviewed the BIA's consideration of similar evidence in the context of an untimely motion to reopen and have found no error in its conclusion that such evidence was insufficient to establish material changed country conditions. See *id.* at 169-72 (noting that "[w]e do not ourselves attempt to resolve conflicts in record evidence, a task largely within the discretion of the agency"); see also Wei Guang Wang v. BIA, 437 F.3d 270, 275 (2d Cir.2006) (noting that while the BIA must consider evidence such as "the oft-cited Aird affidavit, which [it] is asked to consider time and again[,],... it may do so in summary fashion without a reviewing court presuming that it has abused its discretion").

Further, we reject Cao's argument that the BIA abuses its discretion when it declines to consider evidence that is not in the record merely because it was in the record of a different case. Indeed, it was Cao's burden to present evidence to support her motion. See 8 U.S.C. § 1229a(c)(7)(B); 8 C.F.R. § 1003.2(c)(1). Nor will this Court remand for the agency to consider extra-record evidence.

Xiao Xing Ni v. Gonzales, 494 F.3d 260, 269-70 (2d Cir.2007); see also *id.* at 262 (noting that the "regulations set forth procedures to reopen a case before the BIA for the taking of additional

evidence”). Cao filed her motion to reopen in April 2007, after this Court decided *Shou Yung Guo*, but she did not submit the so-called Guo documents with her motion to reopen.

Accordingly, we cannot conclude that the BIA abused its discretion in declining to consider the Guo documents. See *id.* at 262. For the foregoing reasons, the petition for review is DENIED. As we have completed our review, any stay of removal that the Court previously granted in this petition is VACATED, and any pending motion for a stay of removal in this petition is DISMISSED as moot.

Any pending request for oral argument in this petition is DENIED in accordance with Federal Rule of Appellate Procedure 34(a)(2), and Second Circuit Local Rule 34(b).