

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Xian Cheng v. Robert M. Wilkinson

No. 19-4005, United States Court of Appeals for the Second Circuit (February 12, 2021)

SUMMARY

****Cheng v. Wilkinson, 2d Cir. 2021 (unpublished)**** – Immigration; waiver of inadmissibility under 8 U.S.C. § 1182(h); discretionary denial of adjustment of status. The Second Circuit dismissed the petition for review, holding that it lacked jurisdiction under 8 U.S.C. § 1252(a)(2)(B)(i) and (a)(2)(D) because the petitioner’s challenges to the agency’s balancing of positive and negative factors—including the weight given to his criminal history and hardship evidence—raised only factual disputes, not colorable constitutional claims or questions of law. The court also noted that the agency may consider a prior conviction as a negative factor in its discretionary analysis even if the conviction is not itself a ground of inadmissibility.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	John M. Walker, Jr.; Robert A. Katzmann; Raymond J. Lohier, Jr.
JURISDICTION	Federal
DECIDED	February 12, 2021
DOCKET	19-4005
DISPOSITION	dismissed
PROCEDURAL POSTURE	Petition for review of BIA decision affirming IJ denial of waiver of inadmissibility under 8 U.S.C. § 1182(h).
STANDARD OF REVIEW	Limited to constitutional claims and questions of law; no review of discretionary weighing of factors.
PRECEDENTIAL VALUE	Unpublished
PARTIES	Xian Cheng v. Robert M. Wilkinson

TOPICS

[removal proceedings](#) [asylum](#) [appellate jurisdiction](#) [administrative law](#)

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the agency erred in denying the waiver by failing to consider positive factors (e.g., grant of asylum, long residence, family ties).
2. Whether the agency mischaracterized the hardship to Cheng's wife and daughter.
3. Whether the agency mischaracterized the nature and seriousness of his convictions.
4. Whether the agency failed to consider Cheng's remorse.

HOLDINGS

1. The court lacks jurisdiction to review the discretionary denial of a waiver of inadmissibility because Cheng's arguments do not raise a colorable constitutional claim or question of law; they are disputes over the weighing of evidence and factors.

KEY QUOTATIONS

“Our jurisdiction to review a discretionary denial of a waiver of inadmissibility is limited to constitutional claims and questions of law.”

“Cheng has not identified any facts or arguments that the agency overlooked or mischaracterized, and his contentions on appeal amount to disagreements over the balancing of factors and the weight the agency gave to his convictions, which we lack jurisdiction to review.”

FACTUAL BACKGROUND

Xian Cheng, a native and citizen of China, was granted asylum in 1991. He had a 1993 Florida battery conviction (not a crime involving moral turpitude) and a 1998 New York assault conviction (a crime involving moral turpitude). He applied for adjustment of status and a waiver of inadmissibility under 8 U.S.C. § 1182(h), which the IJ denied, and the BIA affirmed.

PROCEDURAL HISTORY

The BIA affirmed the IJ's decision denying Cheng's application for a waiver of inadmissibility. The IJ had denied the waiver on March 14, 2018, and the BIA affirmed on November 6, 2019.

DISPOSITION

dismissed

CASES CITED

- Bugayong v. INS, 442 F.3d 67 (2d Cir. 2006)
- In re Mendez-Moralez, 21 I. & N. Dec. 296 (B.I.A. 1996)
- Mendez v. Holder, 566 F.3d 316 (2d Cir. 2009)

- *Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315 (2d Cir. 2006)
- *Wallace v. Gonzales*, 463 F.3d 135 (2d Cir. 2006)
- *Guyadin v. Gonzales*, 449 F.3d 465 (2d Cir. 2006)

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