

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4
5
6 August Term, 2004

7 (Argued December 7, 2004 Decided January 24, 2006)

8
9
10 Docket No. 99-4148

11
12
13
14 SONG JIN WU,

15 Petitioner,

16
17 v.

18 IMMIGRATION AND NATURALIZATION SERVICE,

19
20
21 Respondent.

22
23
24
25
26 Before:

27 CARDAMONE, JACOBS, and CABRANES,
28 Circuit Judges.

29
30
31
32 Petitioner Song Jin Wu petitions for review of the decision
33 of the Board of Immigration Appeals, dated August 31, 1999, which
34 denied petitioner's appeal of the immigration court's September
35 2, 1998 denial of petitioner's motion to reopen his deportation
36 proceedings.

37
38 Petition granted and case remanded to the Board of
39 Immigration Appeals.

40
41
42
43 THEODORE N. COX, New York, New York (Joshua E. Bardavid, Law
44 Office of Theodore N. Cox, New York, New York, of counsel),
45 for Petitioner.

46
47 PATRICIA BUCHANAN, Assistant United States Attorney, New York,
48 New York (David N. Kelley, United States Attorney, Megan L.
49 Brackney, Sara L. Shudofsky, Assistant United States
50 Attorneys, Southern District of New York, New York, New
51 York, of counsel), for Respondent.

1 CARDAMONE, Circuit Judge:

2 This case comes to us on a petition for review of a decision
3 of the Board of Immigration Appeals (BIA or Board) dismissing
4 petitioner Song Jin Wu's (Wu or petitioner) appeal from an
5 immigration judge's (IJ) decision denying Wu's motion to reopen
6 an in absentia order of deportation. The BIA refused to reopen
7 Wu's case without mentioning his contention that the law had
8 changed rendering him eligible for asylum. That was an abuse of
9 the Board's discretion, and we therefore grant Wu's petition and
10 remand to allow him an opportunity to present his claims.

11 FACTS

12 A. Background

13 Petitioner is a 43-year-old male from Fujian province in the
14 People's Republic of China. According to Wu, he and his wife
15 married in 1981. Wu contends that after the birth of the
16 couple's second child, the Chinese government forced his wife to
17 have an Intrauterine Device implanted, which his wife later had
18 removed with the assistance of a private doctor. Wu's wife gave
19 birth to a third child in 1989. Petitioner asserts that upon
20 learning of the birth of the couple's third child, Chinese
21 officials became "very angry," required his wife to undergo
22 forced sterilization, and fined the family 8,000 yuan.
23 Petitioner maintains that he spoke out against China's family
24 planning policies at a village meeting in early 1994 and left
25 China soon after, purportedly because he was afraid Chinese
26 officials would punish him for his conduct.

1 B. Wu's Entry into the United States and
2 Immigration Court Proceedings
3

4 Wu entered the United States illegally through Puerto Rico
5 on January 26, 1994. On his original arrival-departure record,
6 he indicated his U.S. address was 5485 8th Avenue, Brooklyn, New
7 York. Petitioner applied for asylum on February 8, 1994 and his
8 attorney filed a bond reduction request that listed Wu's address
9 as 5405 8th Avenue, Brooklyn, New York. An IJ granted the
10 request and petitioner was released from custody in March 1994.
11 Wu's attorney listed the 5405 address on a subsequent motion for
12 a change of venue to New York City, which an IJ granted on March
13 21, 1995.

14 On August 7, 1995 the immigration court in New York City
15 sent notice by certified mail to Wu's attorney of record, Renrong
16 Pan, that a master calendar hearing in Wu's case was scheduled
17 for October 20, 1995. A person in Pan's office acknowledged
18 receipt of the certified mailing on August 9, 1995. The court
19 also sent notice by certified mail to Wu at 5405 8th Avenue,
20 Brooklyn, New York, but that mailing was returned as unclaimed,
21 apparently because Wu's actual address was 5485 8th Avenue.
22 Petitioner asserts his attorney did not notify him of the pending
23 hearing. On October 20, 1995 Wu failed to appear at his asylum
24 hearing and the IJ, Judge Videla, ordered Wu deported in
25 absentia.

26 Petitioner asserts that at the time he did not know of these
27 developments. Rather, he contends, after hearing nothing from

1 his attorneys regarding his asylum application, he obtained new
2 counsel and submitted a second asylum application to the INS on
3 April 14, 1994. An INS hearing officer referred Wu's case to the
4 immigration court on October 31, 1995, and a hearing on the
5 merits was scheduled for August 28, 1997 before Immigration Judge
6 Lamb. On that date, Judge Lamb learned that Wu was subject to
7 the outstanding order of deportation issued by Judge Videla and
8 terminated this second proceeding.

9 Wu filed a motion to reopen on June 22, 1998 stating he was
10 not aware he had been ordered deported by Judge Videla. He
11 indicated his asylum claim was based upon persecution by family
12 planning officials in China and urged that the deportation order
13 be rescinded. This motion, though addressed to Judge Lamb, was
14 redirected by court administrators to Judge Videla's docket.

15 On September 2, 1998 Judge Videla denied Wu's motion on the
16 basis of Immigration and Nationality Act (INA) § 242B(c)(3), 8
17 U.S.C. § 1252b(c)(3) (1994) (repealed, effective 1997, and
18 recodified, as amended, without material change, at 8 U.S.C.
19 § 1229a(b)(5)(C) (2005)). This section of the INA states that in
20 absentia orders of deportation may only be rescinded if the alien
21 files a motion to reopen within 180 days of the order of
22 deportation and exceptional circumstances explain his failure to
23 appear, or if the alien did not receive proper notice of the
24 deportation hearing. Judge Videla concluded that Wu received
25 proper notice because notice was sent to Wu's attorney of record
26 by certified mail. He also found that Wu did not file the motion

1 within 180 days of the in absentia order of deportation, and was
2 therefore barred from asserting exceptional circumstances
3 justifying his failure to appear. Wu appealed Judge Videla's
4 order to the BIA.

5 C. Board of Immigration Appeals Decisions

6 On appeal to the BIA, petitioner argued that the Board
7 should overturn Judge Videla's denial of his motion to reopen
8 because petitioner did not receive notice of the final
9 deportation order. Wu also maintained that he and his family
10 suffered past persecution in China due to that country's
11 restrictive family planning policies and, more specifically, that
12 "[a]n alien whose spouse was forced to undergo an abortion or
13 sterilization procedure can establish past persecution on account
14 of political opinion and qualifies as a refugee within the
15 definition of section 101(a)(42) of the [Immigration and
16 Nationality] Act, 8 U.S.C. § 1101(a)(42) (1994), as amended by
17 section 601(a)" of the Illegal Immigration Reform and Immigrant
18 Responsibility Act of 1996 (IIRIRA). The BIA initially dismissed
19 Wu's appeal as untimely, but subsequently reinstated the appeal
20 by granting a motion, based on petitioner's attorney's inability
21 to timely obtain the records of Wu's prior immigration
22 proceedings, to reopen and reconsider. In connection with that
23 motion Wu argued that his case was "founded upon the change in
24 law relating to past persecution of the spouse of a respondent
25 who violated birth control policies in the People's Republic of
26 China."

1 On August 31, 1999 the BIA dismissed Wu's appeal. It agreed
2 with Judge Videla that petitioner was properly served with notice
3 of the October 20, 1995 hearing and that Wu's motion to reopen
4 was untimely. The Board did not mention, let alone address, Wu's
5 change-of-law argument.

6 On September 23, 1999 petitioner's counsel filed with the
7 BIA a motion to reconsider. Petitioner argued his case should be
8 reopened because of the above described change in law, the fact
9 that he would be tortured if returned to China, and the purported
10 ineffectiveness of his prior attorney. The BIA denied Wu's
11 motion on March 9, 2000 finding Wu failed to present additional
12 arguments, a change in law, or an aspect of the case that was
13 overlooked. The BIA also noted that, under the circumstances,
14 Wu's motion to reconsider could be deemed a successive motion to
15 reopen that was number-barred under a regulation that prohibits
16 filing more than one motion to reopen with the Board of
17 Immigration Appeals, 8 C.F.R. § 3.2(c)(2) (2000) (now codified at
18 8 C.F.R. § 1003.2(c)(2) (Feb. 28, 2003)).¹ The Board also
19 refused to consider Wu's Convention Against Torture (CAT) claim
20 because the motion was not filed by the administrative deadline

¹ A motion to reopen for purposes of rescinding an in absentia deportation order is distinguished from a motion to reopen for purposes of addressing a change in law because the former seeks to restart proceedings as if the previous proceedings never occurred. See In re M-S-, 22 I & N Dec. 349, 352-54 (BIA 1998). Different requirements pertain to each type of motion to reopen, and thus, although both are technically motions to reopen, for purposes of clarity we shall refer to the former as a "motion to rescind" and the latter as a "motion to reopen."

1 of June 21, 1999, see 8 C.F.R. § 208.18(b)(2) (2000), and because
2 petitioner failed to make a prima facie showing of entitlement
3 for relief under the CAT, see 8 C.F.R. § 208.16(c) (2000).

4 According to petitioner's notice of appeal, he seeks review
5 only of the Board's August 31, 1999 decision, not its later March
6 9, 2000 decision. Although petitioner had made his change-in-law
7 argument in the earlier appeal to the BIA, the Board did not at
8 that time address this argument. The Board did not, however,
9 deem the change-in-law argument waived for it considered the
10 argument in its March 9, 2000 decision.

11 DISCUSSION

12 I Petitioner's Asylum Claim

13 A. Standard of Review

14 We review the decision of the BIA to deny a motion to reopen
15 for abuse of discretion. See Guan v. Bd. of Immigration Appeals,
16 345 F.3d 47, 48 (2d Cir. 2003). "An abuse will be found only in
17 those limited circumstances where the BIA's decision (1) provides
18 no rational explanation, (2) inexplicably departs from
19 established policies, (3) is devoid of any reasoning, or (4)
20 contains only summary or conclusory statements." Zhao v. U.S.
21 Dep't of Justice, 265 F.3d 83, 93 (2d Cir. 2001).

22 B. Government's Objection to Our Review

23 The government, citing 8 U.S.C. § 1105a(c) (1994) (repealed,
24 effective 1997), asserts petitioner did not properly raise his
25 change-in-law argument before the IJ and BIA, and therefore did
26 not exhaust his administrative remedies and preserve the issue

1 for our review. To the contrary, we note that Wu raised his
2 change-in-law argument before both the BIA and IJ. In his brief
3 in support of his appeal to the BIA of the denial of his motion
4 to reopen, Wu expressly stated that after the IJ's decision
5 ordering him deported in absentia, the law had been amended to
6 allow an alien whose spouse was forcibly sterilized or compelled
7 to have an abortion to establish persecution on that basis and
8 therefore qualify for asylum. Petitioner repeated this argument
9 in his motion to reopen and reconsider the BIA's initial
10 dismissal of his appeal for untimeliness, and he repeated it
11 again in his September 23, 1999 motion to reconsider. We
12 therefore conclude that Wu exhausted his administrative remedies.

13 C. Motion to Rescind

14 The requirements of former 8 U.S.C. § 1252b (1994)
15 (repealed, effective 1997) govern Wu's motion to rescind Judge
16 Videla's deportation order. Proper notice under that statute
17 includes "written notice . . . given in person to the alien (or,
18 if personal service is not practicable, written notice . . .
19 given by certified mail to the alien or to the alien's counsel of
20 record, if any)." § 1252b(a)(2)(A) (repealed, effective 1997).
21 Personal notice may not be practicable when an alien does not
22 appear physically before an IJ, see In re Grijalva, 21 I & N Dec.
23 27, 35 (BIA 1995), and therefore service by certified mail was a
24 proper method of notice in this case. Mailing notice to a
25 petitioner's last known address satisfies the § 1252b(a)(2)(A)
26 notice requirement, even if the notice is returned as unclaimed,

1 see Fuentes-Argueta v. INS, 101 F.3d 867, 871-72 (2d Cir. 1996),
2 as does mailing the notice to the applicant's counsel of record,
3 § 1252b(a) (2) (A); Scorteanu v. INS, 339 F.3d 407, 412 (6th Cir.
4 2003).

5 The immigration court sent notice of Wu's October 20, 1995
6 hearing to his last known address by certified mail, which was
7 returned because Wu's attorney provided an incorrect address for
8 petitioner. There is no evidence that delivery was improper or
9 that nondelivery was not due to Wu's failure to provide his
10 correct address. See Fuentes-Argueta, 101 F.3d at 871. Thus, Wu
11 failed to rebut the presumption of proper notice. Id. Moreover,
12 Wu's attorney of record received notice of the hearing by
13 certified mail. In such a circumstance, an applicant is entitled
14 to rescission of the order only if he files a motion to rescind
15 within 180 days of the order of deportation and shows that his
16 failure to appear was the result of exceptional circumstances.
17 § 1252b(c) (3) (A) (repealed, effective 1997). Wu filed his motion
18 to rescind more than two-and-a-half years after he was ordered
19 deported in absentia. The motion was thus time-barred and the
20 immigration court was without power to consider petitioner's
21 assertion of exceptional circumstances. The BIA did not,
22 therefore, abuse its discretion in affirming Judge Videla's
23 decision to deny Wu's motion to rescind.

24 II Substance of Wu's Change-in-Law Argument

25 Although Wu is not entitled to rescission of the in absentia
26 deportation order, he may nonetheless be entitled to have his

1 case reopened due to an intervening change in law. When the BIA
2 reviews an IJ's denial of a motion to reopen, it must "address
3 all the factors relevant to petitioner's claim." Zhao, 265 F.3d
4 at 97. It must also apply its own standards and precedent
5 consistently when faced with similar facts. Id. at 95. Failure
6 to do either constitutes an abuse of discretion. Id. at 95, 97.

7 In its August 31, 1999 decision denying Wu's appeal of Judge
8 Videla's September 2, 1998 denial of Wu's motion to reopen, the
9 BIA did not mention Wu's change-in-law argument. Moreover, in
10 its March 9, 2000 decision denying Wu's motion to reconsider, the
11 Board erroneously stated that Wu failed to raise a change in law
12 at all.

13 However, in order for Wu's change-in-law argument to be
14 relevant, it must be based on an actual change in the law that
15 favorably affects his asylum claim. At the time Wu was ordered
16 deported in absentia, coercive family planning policies,
17 including forced abortion and sterilization, were not per se
18 persecutive, and therefore aliens alleging they had been
19 subjected to such policies could not, on that fact alone, qualify
20 for asylum. See In re Chang, 20 I & N Dec. 38, 44 (BIA 1989).
21 Instead, an alien had to prove that the policy was selectively
22 applied to persecute members of a group based on race, religion,
23 nationality, or political opinion. See id. at 44, 47.

24 In 1996 Congress expressly rejected this rule, stating in
25 the IIRIRA that persecution or a well-founded fear of persecution
26 on the basis of political opinion encompasses the application of

1 forced abortion or sterilization and resistance to such coercive
2 family planning policies. IIRIRA, Pub. L. No. 104-208, Div. C,
3 § 601(a)(1), 110 Stat. at 3009-689 (codified at 8 U.S.C.
4 § 1101(a)(42)). The BIA held that § 601(a) of IIRIRA
5 retroactively superseded its holding in In re Chang, and
6 therefore an applicant who has suffered forced sterilization
7 qualifies as a refugee because she has, as a matter of law,
8 suffered past persecution on account of her political opinion.
9 See In re X-P-T-, 21 I & N Dec. 634, 636 (BIA 1996). The BIA
10 subsequently held that § 601(a) protected not only the person
11 forced to undergo the harmful coercive family planning action,
12 but also that person's spouse. In re C-Y-Z-, 21 I & N Dec. 915,
13 918-19 (BIA 1997). This change in law is relevant to Wu's asylum
14 claim because it potentially affords grounds for discretionary
15 relief that were not available at the time he was ordered
16 deported in absentia.

17 In In re M-S-, 22 I & N Dec. 349, 352-56 (BIA 1998) (en
18 banc) the BIA explained that an in absentia deportation order
19 need not always be rescinded before it can be reopened. Thus,
20 "the requirements for rescission of an in absentia order are
21 inapplicable to a motion to reopen that does not seek rescission
22 of that order." Id. at 355. Instead, in cases in which an alien
23 seeks reopening without challenging the IJ's deportability
24 finding, the Board found that INA § 242B(e)(1), 8 U.S.C.
25 § 1252b(e)(1) (repealed, effective 1997) governs; § 242B(e)(1)
26 states that relief is not precluded unless an alien received an

1 oral warning, in a language he understands, regarding the
2 consequences of a failure to appear. In re M-S-, 22 I & N Dec.
3 at 355. If no oral warning is given, or the type of relief
4 sought is not enumerated in INA § 242B(e)(5), 8 U.S.C.
5 § 1252b(e)(5) (repealed, effective 1997) (itemizing various forms
6 of relief but not listing asylum),

7 where the alien is seeking previously
8 unavailable relief and has not had an
9 opportunity to present her application before
10 the Immigration Judge, the Board will look to
11 whether the alien has proffered sufficient
12 evidence to indicate that there is a
13 reasonable likelihood of success on the
14 merits so as to make it worthwhile to develop
15 the issues further at a full evidentiary
16 hearing.

17
18 In re M-S-, 22 I & N Dec. at 357.

19 The BIA did not mention In re M-S- in its August 31, 1999
20 decision dismissing Wu's appeal, and it did not address the fact
21 that Wu raised a change-in-law argument. Rather, the Board
22 dismissed the appeal solely on the ground that Wu failed to
23 establish a sufficient basis for rescinding Judge Videla's in
24 absentia deportation order. The Board compounded this error by
25 then relying on In re M-S- in its March 9, 2000 decision to
26 construe Wu's subsequent motion to reconsider as a successive
27 motion to reopen that was number-barred under 8 C.F.R.

28 § 3.2(c)(2) (1998) ("Except as [otherwise] provided . . . a party
29 may file only one motion to reopen deportation or exclusion
30 proceedings.") (now codified at 8 C.F.R. § 1003.2(c)(2) (Feb. 28,
31 2003)). This was double error because a motion to reconsider is

1 proper when a petitioner alleges that the Board committed a legal
2 or factual error in its previous disposition of his case based on
3 the record as it existed at the time of the first decision. See
4 Zhao, 265 F.3d at 90, 91 (citing In re Cerna, 20 I & N Dec. 399,
5 402 (BIA 1991)). Since Wu's motion to reconsider asked the Board
6 to reevaluate its August 31 ruling in light of its failure to
7 address his properly presented change-in-law argument, that
8 motion should not have been construed as a motion to reopen.

9 In this case, there is no evidence petitioner received the
10 requisite oral warning before he was ordered deported in absentia
11 and, in any event, the relief he seeks -- asylum -- is not one of
12 the enumerated forms of relief subject to the five-year bar under
13 INA § 242B(e)(5). Thus, because Wu did raise a change-in-law
14 argument relevant to his claim -- and the Board would have had to
15 apply its own standards inconsistently to ignore that argument --
16 we conclude that the Board abused its discretion. Although the
17 Board correctly held that Wu was not entitled to rescission of
18 his in absentia deportation order, it should have addressed his
19 alternative change-in-law argument in determining whether to
20 grant his motion to reopen and to hold an evidentiary hearing.
21 See In re M-S-, 22 I & N Dec. at 353-54.

22 It is not the function of a reviewing court in an
23 immigration case to scour the record to find reasons why a BIA
24 decision should be affirmed. Rather, we take the Board's
25 decision as we find it, and if the reasoning it advances for
26 denying a petitioner's claim cannot support the result, we will

1 vacate the decision. As a consequence, we vacate the BIA's
2 August 31, 1999 decision insofar as it affirmed the IJ's denial
3 of petitioner's motion to reopen on the basis of newly available
4 relief and remand to allow the Board to conduct the inquiry
5 required by In re M-S-.

6 III Petitioner's Claim for Relief Under the CAT

7 Petitioner further declares that the BIA erred in rejecting
8 his claim that he will be tortured if returned to China as time-
9 barred under 8 C.F.R. § 208.18(b)(2). He maintains that U.S.
10 obligations under the CAT override the regulatory requirements
11 governing motions to reopen, when an alien might suffer torture
12 upon return to his country of origin. However petitioner did not
13 raise his CAT claim until he filed his motion to reconsider with
14 the BIA on September 23, 1999, and the Board therefore only
15 addressed the argument in its March 9, 2000 decision. Petitioner
16 has not petitioned for review of that decision. We cannot
17 consider Wu's CAT claim therefore because, although we may
18 discuss the BIA's reasoning in its March 9 decision insofar as
19 such is relevant to our direct review of the August 31 decision
20 (as we did with respect to Wu's change-in-law argument), the
21 March 9 decision is not properly presented for our direct review.

22 Moreover, even assuming the issue was properly presented,
23 petitioner has offered no evidence that he has been or risks
24 being tortured in China. Instead, petitioner relies solely on
25 the bald assertion in his motion to reconsider that he is subject
26 to torture if returned to China. Petitioner has therefore failed

1 to make out a prima facie case for relief under the CAT as
2 required by 8 C.F.R. § 208.16(c) (2000), and were we to review
3 this claim directly, we would likely find that the BIA properly
4 denied his claim.

5 CONCLUSION

6 Although the procedural history of this case is complex, we
7 hold that the Board committed a straightforward legal error: it
8 failed to consider petitioner's properly presented change-in-law
9 argument despite the fact that its prior precedent required it to
10 do so. We therefore grant Wu's petition for review and remand to
11 the BIA for further proceedings consistent with this opinion.
12 Having considered petitioner's other arguments, we find them all
13 to be without merit.