

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT



3
4 **SUMMARY ORDER**

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6 **THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL**
7 **REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS**
8 **OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS**
9 **OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A**
10 **RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL**
11 **OR RES JUDICATA.**

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13 At a stated term of the United States Court of Appeals for the Second Circuit, held at the
14 Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the
15 29th day of October, two thousand and three.

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17 PRESENT:

18
19 HON. GUIDO CALABRESI,
20 HON. ROBERT A. KATZMANN,

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22 *Circuit Judges, and*

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24 HON. MILTON POLLACK,*

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26 *District Judge.*

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29 * The Honorable Milton Pollack, Senior United States District Judge for the Southern District of
30 New York, sitting by designation.

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34 WEN SHIN LIN,

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36 *Petitioner,*

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38 v.

No. 01-4113

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40 IMMIGRATION AND NATURALIZATION SERVICE,

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42 *Respondent.*
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2 For Petitioner: JOSHUA BARDAVID, New York, NY (Theodore
3 N. Cox, *on the brief*).

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5 For Respondent: MICHAEL C. JAMES, Assistant U.S. Attorney, *for*
6 James B. Comey, U.S. Attorney for the Southern
7 District of New York (Kathy S. Marks, Meredith E.
8 Kotler, *on the brief*), New York, NY.
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11 On petition for review from the Board of Immigration Appeals.
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16 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
17 **DECREED** that the BIA's denial of Petitioner's motion to reopen deportation proceedings be
18 and it hereby is **REVERSED and REMANDED**, and that the petition for direct review of the
19 BIA's decision be and it hereby is **DENIED**.
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23 Petitioner Wen Shin Lin, a citizen of the People's Republic of China, entered the United
24 States without inspection in 1993. He applied for asylum and withholding of removal, claiming
25 past persecution and a fear of future persecution under China's family planning policy. Finding
26 incredible Lin's claims that his wife was forcibly sterilized and that he feared imprisonment and
27 heavy fines if he returned to China, an immigration judge denied his petition for asylum and
28 ordered his removal. The Board of Immigration Appeals (BIA) (a) dismissed his appeal and (b)
29 denied his subsequent Motion to Reopen deportation proceedings. Because petitioner did not
30 timely file a Notice of Appeal of the BIA's affirmance of the IJ's decision, we cannot review that
31 ruling. We, however, can consider the BIA's denial of petitioner's motion to reopen, and, finding
32 an abuse of discretion, we reverse that denial and remand the case for further proceedings.

33 I.

1 We review the BIA’s denial of a motion to reopen for abuse of discretion. *See Zhao v.*
2 *United States Dep’t of Justice*, 265 F.3d 83, 93 (2d Cir. 2001). “A motion to reopen proceedings
3 shall not be granted unless it appears to the [BIA] that evidence sought to be offered is material
4 and was not available and could not have been discovered or presented at the former hearing . . .
5 .” 8 C.F.R. § 3.2(c)(1) (2001). Here, petitioner’s proffered new evidence consisted of a new
6 translation of the same sterilization certificate presented at his deportation hearing, and a 2000
7 affidavit from immigration expert John Aird (“2000 Aird Affidavit”), with exhibits attached,
8 describing China’s family planning policies and refuting recent State Department reports on the
9 subject. The BIA found that Lin had “already had an opportunity to present a claim for asylum
10 upon which his motion to reopen is based,” and that he alleged no change in circumstances,
11 either in his home country or in his personal situation, that would justify revisiting his claim.

12 At oral argument, Lin’s counsel drew our attention to a recent BIA decision concerning
13 another Chinese asylum-seeker. In that case, *Matter of Weng*, A75 990 618, the petitioner
14 claimed a fear of future persecution under China’s family planning policy, due to the birth of her
15 child in the United States. After various proceedings before an IJ and the BIA, the petitioner
16 introduced a 2002 affidavit from Aird (“2002 Aird Affidavit”) detailing, *inter alia*, China’s
17 policies with respect to children born abroad to Chinese citizens. The BIA construed her
18 submission of the 2002 Aird affidavit as a motion to reopen and granted that motion.

19 The *Weng* and *Lin* cases do not present identical factual circumstances, nor do the two
20 Aird affidavits contain exactly the same information. However, just as the 2002 Aird Affidavit
21 presented new intelligence regarding China’s treatment of children born abroad to Chinese
22 citizens, the 2000 Aird Affidavit also contains new, previously unavailable evidence. Among

1 other things, the 2000 Affidavit provides extensive evidence undermining earlier State
2 Department reports that had suggested a recent relaxation of China's coercive family planning
3 policies, posited negligible consequences for returned unsuccessful asylum-seekers, and
4 expressed doubts about the pervasiveness of enforcement in rural provinces, including Fujian,
5 Lin's home. This evidence is material in that it bears upon the credibility both Lin's claims of
6 past persecution and his fear of future persecution should he be forced to return to China.

7 In opposing Lin's motion to reopen, the government relies in part on the IJ's conclusion
8 that Lin's claims of past persecution were incredible, but in *In re Ming Jua Weng*, the BIA
9 granted the petitioner's motion to reopen despite an IJ's finding that her testimony about her past
10 treatment at the hands of family planning officials lacked credibility. Although the BIA has
11 considerable discretion to deny motions to reopen, a modicum of consistency is required. *See*
12 *Zhao*, 265 F.3d at 93. Finding such consistency lacking here, we reverse the BIA's denial of
13 Lin's motion to reopen and remand for further proceedings.

14 II.

15 Lin also asserts that we have jurisdiction to review the BIA's dismissal of his appeal of
16 the deportation order. Because Lin's deportation proceedings were pending before April 1, 1997,
17 and his final deportation order was entered after October 30, 1996, judicial review of the
18 deportation order is governed by the Illegal Immigration Reform and Immigrant Responsibility
19 Act (IIRIRA)'s transitional rules. Under these rules, a petition for review of a final deportation
20 order must be filed within 30 days. IIRIRA § 309(c)(4)(C), Pub. L. No. 104-208, 110 Stat. 3009,
21 3009-626 (1996). Lin never filed such an appeal; he merely filed a motion to reopen the
22 deportation proceeding. A petition for review of a final deportation order and a petition for

1 review of a denial of a motion to reopen involve “two separate petitions filed to review two
2 separate final orders,” *Zhao*, 265 F.3d at 89 (quoting *Stone v. INS*, 514 U.S. 386, 405 (1995)).
3 We have before us Lin’s appeal from a denial of his motion to reopen. To consider the
4 underlying merits of Lin’s deportation order in this appeal would be to allow Lin to attack the
5 deportation order collaterally. This we cannot do.

6 Although we cannot directly review the decisions of the IJ and the BIA in Lin’s case, we
7 do find that the Board abused its discretion in denying the petitioner’s motion to reopen. We
8 therefore REVERSE that denial and REMAND the case to the Board for further proceedings
9 consistent with this order.

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12 For the Court,
13 ROSEANN B. MACKECHNIE,
14 Clerk of the Court

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16 by: _____