

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-12786
Non-Argument Calendar

Agency No. A205-765-618

JOSE ROBERTO PADILLA,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

(December 3, 2019)

Before WILLIAM PRYOR, GRANT, and ANDERSON, Circuit Judges.

PER CURIAM:

Jose Roberto Padilla seeks review of the final order of the Board of Immigration Appeals (“BIA”) affirming the Immigration Judge’s (“IJ”) denial of his application for deferral of removal under the Convention Against Torture (“CAT”).¹ On appeal, he argues that substantial evidence does not support the BIA’s denial of CAT relief based on an adverse credibility finding and its determination that he did not produce sufficient corroborating evidence to either rehabilitate his testimony or independently establish his eligibility for CAT relief. Particularly, Padilla argues that the BIA mischaracterized the report and testimony of a counselor who had diagnosed him with post-traumatic stress disorder (“PTSD”). He also argues that substantial evidence does not support the BIA’s alternative denial of CAT relief based its determination that the Honduran government would not acquiesce in any torture. Finally, he argues that the IJ violated his due process rights by engaging in extensive questioning during the hearings. Because Padilla filed his petition after the BIA reissued its decision to allow him to file a timely appeal, we issued a jurisdictional question asking whether the timeliness of his petition should be measured from the date of the reissued decision or of the original decision. The parties responded that we should

¹ Although Padilla also sought asylum and withholding of removal in the proceedings below, he does not challenge the denial of such relief in his initial brief. Accordingly, we deem those issues abandoned. *See Ruga v. U.S. Att’y. Gen.*, 757 F.3d 1193, 1196 (11th Cir. 2014).

measure from the reissued decision. We carried the question with the case, and because timeliness is jurisdictional, we address that issue first.

I.

We review questions about subject matter jurisdiction *de novo*. *Resendiz-Alcaraz v. U.S. Att’y Gen.*, 383 F.3d 1262, 1266 (11th Cir. 2004). Before proceeding to the merits of a petition for review, we must first consider whether we have jurisdiction to hear the petition. *Id.*

To challenge a final order of removal by the BIA, a petitioner must file a petition for review within 30 days of the date of the BIA’s decision. INA § 242(b)(1), 8 U.S.C. § 1252(b)(1); Fed. R. App. P. 15(a)(1). The statutory time limit for filing a petition for review in an immigration proceeding “is mandatory and jurisdictional and not subject to equitable tolling.” *Chao Lin v. U.S. Att’y Gen.*, 677 F.3d 1043, 1045 (11th Cir. 2012) (quotation marks omitted).

The BIA can, at any time, reopen or reconsider on its own motion a case in which it has rendered a decision. 8 C.F.R. § 1003.2(a). There is no express statutory grant of authority to reopen cases *sua sponte*. *Lenis v. U.S. Att’y Gen.*, 525 F.3d 1291, 1293 (11th Cir. 2008). Rather, the authority derives from a statute granting general authority to the Attorney General over immigration matters. *Id.* We have noted that the BIA’s decision to deny or grant a motion to reopen is “quite broad.” *Anin v. Reno*, 188 F.3d 1273, 1276 (11th Cir. 1999) (*per curiam*)

(quotation marks omitted), *abrogated on other grounds by Avila-Santoyo v. U.S. Att’y Gen.*, 713 F.3d 1357, 1359 (11th Cir. 2013) (*en banc*) (*per curiam*).

Here, we conclude that, like with the authority to *sua sponte* reopen proceedings, the general grant of discretionary authority permits the BIA to reissue decisions to allow petitioners to timely appeal. Accordingly, we conclude that the timeliness of Padilla’s petition is measured from the date of the reissued decision and, because it was filed within 30 days of that reissued decision, the instant petition was timely filed.

II.

We next address whether substantial evidence supports the denial of CAT relief based on the adverse credibility finding and lack of corroborating evidence.

We review only the decision of the BIA, except to the extent that the BIA expressly adopts the IJ’s decision. *Al Najjar v. Ashcroft*, 257 F.3d 1262, 1284 (11th Cir. 2001). Where the BIA agrees with the IJ’s reasoning, we will also review the IJ’s decision to that extent. *Ayala v. U.S. Att’y Gen.*, 605 F.3d 941, 948 (11th Cir. 2010).

On appeal from the BIA’s decision, we review legal questions *de novo*. *Zhou Hua Zhu v. U.S. Att’y Gen.*, 703 F.3d 1303, 1307 (11th Cir. 2013). Factual determinations are reviewed under the substantial-evidence test, which requires us to view the record in the light most favorable to the agency’s decision and draw all

reasonable inferences in its favor. *Adefemi v. Ashcroft*, 386 F.3d 1022, 1026-27 (11th Cir. 2004) (*en banc*). We will affirm the BIA's decision if, considering the record as a whole, it is supported by reasonable, substantial, and probative evidence. *Id.* at 1027. In order to reverse administrative factual findings, we must determine that the record "compels" reversal, not merely that it supports a different conclusion. *Id.*

A credibility determination is a factual finding that we review under the substantial evidence test. *Ruiz v. U.S. Att'y Gen.*, 440 F.3d 1247, 1255 (11th Cir. 2006) (*per curiam*). "The trier of fact must determine credibility, and this [C]ourt may not substitute its judgment for that of the BIA with respect to credibility findings." *D-Muhumed v. U.S. Att'y Gen.*, 388 F.3d 814, 818 (11th Cir. 2004). We will reverse the BIA's credibility findings "only if the evidence compels a reasonable fact finder to find otherwise." *Wei Chen v. U.S. Att'y Gen.*, 463 F.3d 1228, 1231 (11th Cir. 2006); *see also* INA § 242(b)(4)(D), 8 U.S.C. § 1252(b)(4)(D).

The BIA must support an adverse credibility determination with "specific, cogent reasons" for that determination. *Kueviakoe v. U.S. Att'y Gen.*, 567 F.3d 1301, 1305 (11th Cir. 2009) (*per curiam*). "The burden then shifts to the alien to show that the credibility decision was not supported by 'specific, cogent reasons' or was not based on substantial evidence." *Id.*

Substantial evidence supports an adverse credibility finding where omissions in an alien's application are revealed during the alien's testimony at his merits hearing. *See Forgue v. U.S. Att'y Gen.*, 401 F.3d 1282, 1287-88 (11th Cir. 2005) (holding that substantial evidence supported the IJ's adverse credibility finding where the petitioner omitted relevant political activity from his asylum application); *see also Carrizo v. U.S. Att'y Gen.*, 652 F.3d 1326, 1332 (11th Cir. 2011) (*per curiam*) (holding that substantial evidence supported an adverse credibility finding where the petitioner's asylum application omitted alleged detentions to which he testified); *Yu Xia v. U.S. Att'y Gen.*, 608 F.3d 1233, 1240 (11th Cir. 2010) (holding that an adverse-credibility determination was supported where the applicant's testimony included one internal inconsistency and one omission). The BIA and IJ may consider inaccuracies, inconsistencies, and falsehoods contained in an applicant's evidence without regard to whether they go to the heart of his claim. *Wei Chen*, 463 F.3d at 1233; *see also* INA § 208(b)(1)(B)(iii), 8 U.S.C. § 1158(b)(1)(B)(iii).

Where a petitioner does not raise an issue in his initial brief, that issue is deemed abandoned. *Ruga v. U.S. Att'y Gen.*, 757 F.3d 1193, 1196 (11th Cir. 2014).

Here, substantial evidence supports the BIA's adverse credibility finding. The BIA identified as specific and cogent reasons the fact that the basis for Padilla's claim changed each time he testified. In his application, Padilla claimed that he was being persecuted by gangs because he refused to participate in their activities. Next, in an affidavit, Padilla claimed that he was being persecuted by those gangs because his father had started a gang war. Then, at the first hearing, Padilla claimed that his father had threatened him. At the second hearing, Padilla claimed that the police and military targeted him because of his father and because of his refusal to participate in their activities. Although he argues that the emergence of new details does not mean that his testimony was false and that the IJ failed to consider his emotional demeanor at the hearing, the fact that Padilla added significant and relevant details to his claim each time he told it is substantial evidence in support of the adverse credibility finding. *See Forgue*, 401 F.3d at 1287-88.

As to the BIA's finding that Padilla did not proffer sufficient corroborating documents to either rehabilitate him or independently support his claim, the only part of that analysis that Padilla argues about in his initial brief is the treatment of Payne's report and testimony. Accordingly, he has abandoned any claim that the BIA erred in its treatment of the other corroborating documents.

Ruga, 757 F.3d at 1196. Although he argues in his reply brief that the IJ also failed to consider Olson's report, his argument in his initial brief was that the report rebutted the finding that Honduras had taken steps to ameliorate the issue rather than that the report corroborated Padilla's claims, so his claim that Olson's report constituted corroborating evidence is abandoned. *See id.* Even if not abandoned, Olson's report on the general country conditions in Honduras do not corroborate the historical facts of Padilla's claim. Similarly, Payne's report and testimony do not corroborate Padilla's claims. Even crediting Payne's PTSD diagnosis, such a diagnosis only shows that Padilla suffered some form of trauma. It does not, however, demonstrate whether that trauma occurred as a result of torture, who caused the trauma, or whether the trauma occurred with the acquiescence of the Honduran government. Any testimony Payne might have offered as to Padilla's trauma would have been merely to recount what he told her in their 60-minute interview rather than anything that Payne had personal knowledge of. Accordingly, the record does not compel the conclusion that Payne's testimony corroborated the historical facts underlying Padilla's claim.

Because the basis of Padilla's claim changed each time that he told it, substantial evidence supports the BIA's adverse credibility finding, and he has pointed to no evidence that would have corroborated the historical facts of his claims. Accordingly, substantial evidence supports the BIA's decision to deny CAT relief on this basis. Because this is sufficient to uphold the denial of CAT relief, we do not address the BIA's alternative ground for denying his application.²

III.

We review due process claims *de novo*. *Lapaix v. U.S. Att'y Gen.*, 605 F.3d 1138, 1143 (11th Cir. 2010). Petitioners in removal proceedings are entitled to due process of the law, including having the opportunity to be heard. *Id.* To establish a due process violation, a petitioner must show that he was deprived of liberty without due process of law and that the purported error caused him substantial prejudice. *Id.* Substantial prejudice requires the applicant to demonstrate that, in the absence of the alleged error, the outcome of the proceeding would have been different. *Id.*

Here, Padilla did not address in his initial brief how the IJ's questioning prejudiced him in presenting his case, so he abandoned that argument and, therefore, failed to establish a due process claim.

² Thus, we do not address Padilla's arguments relating to the BIA's alternate grounds for denying CAT relief, including his argument that the BIA erroneously applied the acquiescence standard and the willful blindness standard.

PETITION DENIED.