

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 22 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

ANU MITTAL; RITU MITTAL,

No. 16-73106

Petitioners,

Agency Nos. A200-963-582

v.

A200-963-583

MERRICK B. GARLAND, Attorney  
General,

MEMORANDUM\*

Respondent.

On Petition for Review of an Order of the  
Board of Immigration Appeals

Submitted September 14, 2022\*\*

Before: O'SCANNLAIN, RAWLINSON, and OWENS, Circuit Judges.

Anu Mittal and Ritu Mittal, natives and citizens of India, petition pro se for review of the Board of Immigration Appeals' ("BIA") order dismissing their appeal from an immigration judge's ("IJ") decision denying their motion to continue removal proceedings and denying their applications for asylum,

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

withholding of removal, and protection under the Convention Against Torture (“CAT”). Our jurisdiction is governed by 8 U.S.C. § 1252. We review for abuse of discretion the denial of a continuance. *Arrey v. Barr*, 916 F.3d 1149, 1158 (9th Cir. 2019). We review de novo claims of due process violations in immigration proceedings. *Simeonov v. Ashcroft*, 371 F.3d 532, 535 (9th Cir. 2004). We review for substantial evidence the agency’s factual findings, applying the standards governing adverse credibility determinations under the REAL ID Act. *Shrestha v. Holder*, 590 F.3d 1034, 1039-40 (9th Cir. 2010). We deny in part and dismiss in part the petition for review.

The agency did not abuse its discretion in denying petitioners’ request for a continuance where they did not demonstrate good cause. *See* 8 C.F.R. § 1003.29; *Ahmed v. Holder*, 569 F.3d 1009, 1012 (9th Cir. 2009) (non-exhaustive list of relevant factors). Petitioners’ contentions that the BIA failed to apply the correct legal standard, violated their right to due process, or otherwise erred in this determination fail. *See Lata v. INS*, 204 F.3d 1241, 1246 (9th Cir. 2000) (error required to prevail on a due process claim). We lack jurisdiction to review petitioners’ contention that the IJ violated due process in denying a continuance because they did not exhaust it before the agency. *See Barron v. Ashcroft*, 358 F.3d 674, 677-78 (9th Cir. 2004) (court lacks jurisdiction to reach the merits of a legal claim not presented in the proceedings below).

Substantial evidence supports the agency's adverse credibility determinations based on petitioners' voluntary returns to India and lack of corroborating evidence, as well as inconsistencies in petitioner Ritu's testimony and petitioner Anu's nonresponsive testimony. *See Shrestha*, 590 F.3d at 1048 (adverse credibility determination reasonable under "the totality of circumstances"); *Loho v. Mukasey*, 531 F.3d 1016, 1018-19 (9th Cir. 2008) (voluntary returns to home country supported adverse credibility determination). Petitioners' explanations do not compel a contrary conclusion. *See Lata*, 204 F.3d at 1245. Thus, in the absence of credible testimony, in this case, petitioners' asylum and withholding of removal claims fail. *See Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003).

Substantial evidence also supports the agency's denial of petitioners' CAT claims because they were based on the same testimony found not credible, and the record does not otherwise compel the conclusion that it is more likely than not they would be tortured by or with the consent or acquiescence of the government if returned to India. *See id.* at 1157.

To the extent petitioners raise in their opening brief a claim of ineffective assistance of counsel, we lack jurisdiction to review it because petitioners did not raise this in the underlying appeal to the BIA. *See Barron*, 358 F.3d at 678 (court lacks jurisdiction to reach the merits of a legal claim not presented in the

proceedings below).

We do not consider the materials petitioners attached to their opening brief that are not part of the administrative record. *See Fisher v. INS*, 79 F.3d 955, 963-64 (9th Cir. 1996) (en banc).

The temporary stay of removal remains in place until the mandate issues.

**PETITION FOR REVIEW DENIED in part; DISMISSED in part.**