

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 29 2023

FOR THE NINTH CIRCUIT

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

Jagan Babu Giri,

Petitioner,

v.

Merrick B. Garland, U.S. Attorney
General,

Respondent.

No. 21-999

Agency No. A206-183-568

MEMORANDUM*

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

Submitted March 27, 2023**
San Francisco, California

Before: BOGGS, *** M. SMITH, OWENS, Circuit Judges.

Jagan Babu Giri (“Giri”), a native and citizen of Nepal, petitions for review of the Board of Immigration Appeals’ (“BIA”) dismissal of his appeal of the immigration judge’s (“IJ”) denial of his applications for asylum, withholding of removal, and protection under the Convention Against Torture

* 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).

*** The Honorable Danny J. Boggs, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

(“CAT”). As the parties are familiar with the facts, we do not recount them here. We have jurisdiction under 8 U.S.C. § 1252 and deny the petition.

Where, as here, the BIA summarily affirms the IJ, we review the IJ’s decision. *Alvarado v. Holder*, 759 F.3d 1121, 1126 (9th Cir. 2014) (citation omitted). We review adverse credibility determinations and denials of CAT protection for substantial evidence. *Wang v. Sessions*, 861 F.3d 1003, 1007 (9th Cir. 2017) (citation omitted). “Under this standard, we must uphold the agency determination unless the evidence compels a contrary conclusion.” *Duran-Rodriguez v. Barr*, 918 F.3d 1025, 1028 (9th Cir. 2019) (citation omitted).

1. Under the totality of the circumstances, substantial evidence supports the IJ’s adverse credibility determination. *See Alam v. Garland*, 11 F.4th 1133, 1135 (9th Cir. 2021) (en banc). In two separate asylum applications and during his direct examination, Giri alleged that he left Nepal for India on September 10, 2009, and remained there for three years before returning to Nepal. When the government asked on cross examination whether Giri had traveled to Iraq sometime between 2009 and 2012, he denied having done so. Only after further questioning did Giri admit that he worked in Iraq in 2011 for “maybe two years,” although he could not recall the exact timeframe. When asked to explain the discrepancy, Giri stated that he had forgotten about his time in Iraq. Shortly thereafter, Giri changed his story again and testified he worked in India for three years before returning to Nepal in 2012.

While the agency relied solely on this ground in making its adverse credibility determination, Giri's inconsistent testimony about his travel to and work in Iraq is significant because it goes to the "heart of the claim." *Shrestha v. Holder*, 590 F.3d 1034, 1046-47 (9th Cir. 2010); *see also Alam*, 11 F.4th at 1137 ("There is no bright-line rule under which some number of inconsistencies requires sustaining or rejecting an adverse credibility determination."). Giri's inconsistent testimony suggests that he either (1) left Nepal before 2009, which conflicts with his claim that he was persecuted by Maoists in Nepal in 2009, (2) was not working in India between 2009 and 2012, which undermines his claim that he was mistreated as a migrant worker in India during that time, or (3) was not in Nepal between 2012 and 2013, which contradicts his claim that he was persecuted by Maoists before coming to the United States. *See Shrestha*, 590 F.3d at 1047 (holding that the petitioner's "inability to consistently describe the underlying events that gave rise to his fear was an important factor that could be relied upon by the IJ in making an adverse credibility determination"). The IJ also considered Giri's explanation for the inconsistency and rejected it. *See Li v. Garland*, 13 F.4th 954, 961 (9th Cir. 2021) (citation omitted). Because the record does not compel a contrary conclusion, we uphold the adverse credibility determination and deny the petition as to the asylum and withholding claims.¹

¹ We need not reach Giri's merits-based challenge to the IJ's denial of asylum and withholding of removal because the IJ's holding, which the BIA summarily adopted, was based solely on the issue of credibility. *See Garcia v. Wilkinson*,

2. Although “[a]n adverse credibility determination is not necessarily a death knell to CAT protection,” substantial evidence supports the agency’s denial of CAT relief here. *Shrestha*, 590 F.3d at 1048. Without credible testimony, the remainder of the evidence does not compel the conclusion that Giri is more likely than not to be tortured if returned to Nepal. *See Dhital v. Mukasey*, 532 F.3d 1044, 1051-52 (9th Cir. 2008) (holding that country reports describing “an ongoing struggle between the Nepalese government and the Maoists” do not indicate that a petitioner faced a particularized threat of torture). Accordingly, we deny the petition as to the CAT claim.²

3. Finally, Giri argues that the BIA abused its discretion by failing to consider his second application for asylum, withholding of removal, and CAT protection based on harm suffered as a Nepali migrant worker in India. The BIA abuses its discretion when its decision is “arbitrary, irrational, or contrary to law.” *Cui v. Garland*, 13 F.4th 991, 995-96 (citation omitted). “As a general rule, the BIA errs if it ignores material issues or arguments raised on appeal, or fails to make a finding on an essential issue.” *Zamorano v. Garland*, 2 F.4th

988 F.3d 1136, 1142 (9th Cir. 2021) (“In reviewing the BIA’s decisions, we consider only the grounds relied upon by that agency.”).

² In his brief, Giri challenges the IJ’s denial of CAT protection based on his fear of torture in Nepal as raised in his first asylum application but does not challenge the denial of CAT protection based on his fear of torture in India as raised in his second asylum application. He therefore waived any objection to the agency’s denial of CAT on the latter ground. *See Cui v. Holder*, 712 F.3d 1332, 1338 n.3 (9th Cir. 2013).

1213, 1228 (9th Cir. 2021). But here, the BIA did not err. It summarily affirmed the IJ's decision, which explicitly denied Giri's second application because he provided contradictory testimony that disrupted his timeline of events in India and failed to show that he is more likely than not to be tortured if removed to India. Accordingly, the BIA did not abuse its discretion.

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

PETITION DENIED.